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5
6 **IN THE COMPETITION**
7 **APPEAL TRIBUNAL**

Case No: 1601/7/7/23

8
9 Salisbury Square House
10 8 Salisbury Square
11 London EC4Y 8AP

12 Wednesday 22nd April 2026

13
14 Before:

15
16 James Wolffe KC
17 Tim Frazer
18 Anthony Neuberger

19
20 (Sitting as a Tribunal in England and Wales)

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22
23 BETWEEN:

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26 **Dr Sean Ennis**

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28 **Class Representative**

29
30 v

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32 **Apple Inc and Others.**

33 **Defendants**

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

38
39 Robert O'Donoghue KC and Daniel Carall-Green on behalf of Dr Sean Ennis (Instructed by
40 Scott + Scott UK LLP)

41
42 Marie Demetriou KC and Crawford Jamieson on behalf of Apple Inc & Others (Instructed by
43 Gibson Dunn & Crutcher UK LLP)

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(10.30 am)

(Audio lost)

(10.35 am)

Submissions by MS DEMETRIOU

MS DEMETRIOU: -- It is wrong in principle to allow a long, thin tail of class members with very small claims to be determinative of the question of practicability when the majority -- in our case, the vast majority -- of the value of the claim lies with large class members. But that is precisely what the tribunal did in this case, unsurprisingly, perhaps, because it's what the Court of Appeal in Evans had said was the right approach.

Now, the Supreme Court establishes that what the tribunal needs to do is consider whether proceedings by different groups within the proposed class would be practicable on an opt-in basis and then, having done that, stand back and make a holistic assessment. We say that, applying the principles laid down by the Supreme Court, it's clear that this is a case where opt-in proceedings would be practicable. Indeed, the position is even more clear cut on the facts than in Evans itself, because the concentration of the commerce in these proceedings is higher. What Evans tells us is that, in certain circumstances -- we say circumstances such as this case -- opt-in proceedings are so practicable, so obviously practicable, that opt-out proceedings are inappropriate.

I propose to structure my submissions in the following way. I'm going to, first of all, briefly show the tribunal the relevant legislation.

Secondly, I'm going to take the tribunal to the relevant part of this tribunal's judgment, certifying these proceedings, to show you the basis for the tribunal's conclusion.

1 Thirdly, I'm going to take the tribunal to the Supreme Court in Evans and I'll also briefly
2 address the Microsoft judgment, which the tribunal handed down yesterday.

3 Fourthly, I will make Apple's submissions in support of its application. Some of them
4 I may have made along the way and, in doing so, I'll address the key arguments made
5 by the class representative.

6 So starting with the legislation, authorities bundle 1, tab 3, page 10. Are you all
7 working electronically or ...? I think, happily, the pagination is the same. So page 10,
8 tab 3. You have rule 79.3 and you can see that that requires the tribunal to decide
9 whether proceedings should be opt out or opt in. It may take into account all matters
10 it thinks fit, but two particular matters are specified at (a) and (b), the strength of the
11 claims and whether it's practicable for the proceedings to be brought as opt-in
12 proceedings, having regard to all the circumstances, and --

13 JUDGE WOLFFE: Would it be fair to say that, while those are the two matters
14 mentioned in 3, 3 also enjoins us to take into account the matters set out in
15 paragraph 2.

16 MS DEMETRIOU: The matters in paragraph 2 are matters which are -- so the tribunal
17 has two things to consider. First of all, whether claims are suitable to be brought in
18 collective proceedings at all, and that's really paragraph 2. So, for example, 2(a):

19 "Whether collective proceedings in general [that's not, at that point, distinguishing
20 between opt in or opt out] are an appropriate means." [as read]

21 So those factors are really directed to whether or not there should be collective
22 proceedings at all, and then 3 is concerned specifically with the question of opt in or
23 opt out.

24 JUDGE WOLFFE: Yes, it's simply that 3 also contains the phrase:

25 "... including the following matters additional to those set out in paragraph 2." [as read]

26 MS DEMETRIOU: Sir, it does. We don't demur from the fact that the tribunal should

1 have regard to all relevant circumstances. So, the circumstances in paragraph 2 may
2 be relevant in any particular case. The factors specified in 3, so strength of the claims
3 and practicability, are the two factors that are specifically set out by the legislature as
4 being relevant to opt in, opt out. So, when we come to the Supreme Court, they say,
5 well, they're specifically mentioned for a reason. That's because they're especially
6 relevant, or may be especially relevant, on the facts.

7 Now, rule 85, if you could just briefly look at that on page 13. So you see at 85.1:

8 "The tribunal may, at any time, either of its own initiative or on the application of the
9 class representative, a representative person or a defendant, make an order for the
10 variation or revocation of the collective proceedings order or for the stay or assist of
11 collective proceedings and, in deciding whether to vary or revoke a collective
12 proceedings order, the tribunal should take account of all the relevant circumstances,
13 including in particular ..." [as read]

14 You see, for example at (a), whether the criteria for certification set out in rule 79 still
15 apply or apply in the same way as when the order was made. So you'll have seen that
16 we say in our skeleton argument that it's clear from the legislation that the tribunal's
17 gatekeeper function is a continuing one and various authorities point out the ongoing
18 role of the tribunal in supervising continued certification of collective proceedings.
19 We've referred, in our skeleton argument as an example, to the Court of Appeal's
20 judgment in the McLaren proceedings.

21 I can briefly show you that. It's in the same volume behind tab 18. If we go to
22 page 647. I just ask you to read paragraph 45 which emphasises the continuing
23 nature of the tribunal's role and in satisfying itself that the criteria for certification
24 continue to be met, which is clear on the face of the legislation but has also been
25 underlined here by the Court of Appeal.

26 Now, I want to turn now to the tribunal's certification judgment and that's in the core

1 bundle behind tab 5.

2 JUDGE WOLFFE: Just before you do that, Ms Demetriou, do you say there is any
3 threshold or trigger point which applies or which the tribunal should be applying in
4 terms of deciding whether or not and, if so, when, to exercise the reviewing power.

5 MS DEMETRIOU: So you'll have seen the dispute between the parties. So my
6 learned friend's case is that the tribunal should adopt the very strict approach that
7 applies in cases where final orders have been made, including on case management
8 decisions, where there's a strict requirement that you show that there's been a material
9 change of circumstance.

10 Now, we say that that case law is inapposite, because it's directed to final orders
11 whereas, in this case, there is, in the legislation, a continuing obligation on the tribunal.
12 However, having said that, of course, I wouldn't have very good prospects of success
13 if I were to turn up to the tribunal, if nothing had changed, and say to the tribunal, well,
14 we didn't like your decision last time round, please now de-certify the proceedings.
15 So, in practice, in order, successfully, to ask the tribunal to revisit the question of
16 certification, a defendant will inevitably have to show that something's changed. But
17 we say that it's sufficient and, indeed, this is common ground and this, in a sense, is
18 why the dispute about the threshold question of whether you've got power to look at
19 this is rather an arid one. Because the class representative accepts that a material
20 change of circumstance can comprise a change in the law.

21 Now, they repeatedly announce, in their skeleton argument, they say, "Apple's
22 arguments are the same, nothing's changed in Apple's arguments". Of course, that's
23 correct. In a sense, we did make the same arguments before the tribunal. The thing
24 that's changed is that the tribunal rejected our arguments on the basis of the Court of
25 Appeal's judgment in FX, and the Supreme Court has said that's wrong. So that's
26 what's changed and that's why the tribunal, again, needs to satisfy itself that the criteria

1 for certification, including that these proceedings should be opt out, continue to be met
2 in light of the law as set down by the Supreme Court.

3 Now, turning to the tribunal's certification judgment. It starts at page 155 behind tab 5
4 but if we could pick it up, please, at page 162.

5 You can see at paragraph 16, under the heading "Apple's opposition to the CPO", the
6 third subparagraph is that the proceedings are not suitable to be brought on an opt-out
7 basis. Then if we skip forward, please, to page 174. We then see where the part of
8 the tribunal's judgment on this issue begins. Let's take it from paragraph 47 at the top
9 of 175. This is under the heading "Legal Principles" and the tribunal says that:

10 "The fact that the proposed class comprises a group of several thousand members of
11 which the large majority suffered small losses is, in this case as in others, a strong
12 indicator that opt-in proceedings would not be practicable and that the proceedings
13 should therefore be on an opt-out basis." [as read]

14 You can see that Lord Justice Green's judgment in La Patourel is cited and that, again,
15 refers to large numbers of potentially affected parties and relatively small sums at
16 stake which might otherwise deter the take up of opt-in proceedings.

17 So you can see that here, the tribunal in paragraph 47 is looking at practicability by
18 reference to the overall number of claimants and finds that the existence of a large
19 number of class members with small losses is a strong indicator, it says, that opt-in
20 proceedings are not practicable. I'll come on to show you that that is inconsistent with
21 the principles laid down by the Supreme Court in Evans.

22 Now, paragraph 48, can I just ask the tribunal to read that to yourselves, rather than
23 me reading it aloud?

24 JUDGE WOLFFE: One second.

25 MS DEMETRIOU: So you can see, similarly in this paragraph, that the tribunal is
26 focusing on maximising take up by potentially affected parties, saying that this is

1 conducive to the underlying purpose -- purpose singular -- of the collective action
2 regime; namely, facilitating access to justice. As we'll come on to see, the Supreme
3 Court in Evans found that the Court of Appeal in that case was wrong to focus on
4 access to justice, to the exclusion of the other purpose of the regime. The
5 Supreme Court held that, in fact, the regime seeks to strike a balance between access
6 to justice for potential class members and the rights of defendants not to be exposed
7 unnecessarily to the procedural advantages conferred on claimants by the opt-out
8 regime.

9 Now, moving on, paragraph 49. The tribunal here is first referring to the tribunal's
10 judgment in Evans. In that judgment, the tribunal in Evans, of course, found that there
11 were large and sophisticated class member entities that could afford to bring
12 proceedings. It was therefore practicable for them to join opt-in proceedings. But then
13 the tribunal in this case, explains that the Court of Appeal disagreed with that. If we
14 read the last two sentences over the page:

15 "The Court of Appeal disagreed. Relative to costs, the scale of typical claims was
16 modest and the size of the typical claimant was not large. Furthermore, the principle
17 that the collective action regime was intended to facilitate the vindication of rights and
18 the principle that unlawful anti-competitive conduct should be restrained also pointed
19 in favour of opt-out proceedings." [as read]

20 Then, if you could keep that open but also look, please, at paragraph 13.5 of the class
21 representative's skeleton argument, which is behind tab 15 and it's on page 445. I just
22 note there that they say, in the last sentence of 13.5:

23 "There's no trace in the original certification judgment in this case of the tribunal
24 deciding between opt in and opt out on policy grounds or of adopting anything other
25 than a neutral starting point." [as read]

26 That just simply isn't correct factually, because you've seen that the tribunal does, in

1 fact, place weight on the one part of the policy aim, which is facilitating access to
2 justice.

3 Now, back to the tribunal's judgment.

4 If we can go back to page 176, paragraph 51, could I just ask you to read that? That's
5 a summary of Apple's argument. (Pause)

6 And then if we go to paragraph 53, this summarises the PCR's argument, Dr Ennis's
7 argument, and you can see there, first two sentences:

8 "The PCR, for his part, drew to the tribunal's attention Mr Lomas's observation that
9 practicability must include some assessment of how widely opt-in proceedings would
10 meet the interests of the PCMs as a whole, rather than, say, just a core element.
11 Whilst it might well be possible to contact a sufficient number of the PCMs with large
12 claims and persuade them to opt in, and thereby attract the funding needed to pursue
13 the claim [so they're saying, well, that might be right, you might have practicable opt
14 in proceedings], this would not resolve the practical difficulties of identifying, contacting
15 and persuading the large tail of claimants with their modest claims to opt in." [as read]

16 Now that's precisely what the Court of Appeal says; it's understandable why the PCR
17 was making that submission, but it's exactly what the Supreme Court has said is not
18 the correct approach, as we'll come on to see.

19 And then if we look at paragraph 56 over the page, we have the tribunal's conclusions
20 on all of this. So the tribunal says that:

21 In its judgment, "the fact that the proceedings might be financially viable on an opt-in
22 basis, because of the number of large PCMs with substantial claims, [. . .] would not
23 overcome the impracticability of opt-in proceedings vis a vis the majority of the PCMs,
24 with relatively modest claims." [as read]

25 Now pausing there, it's saying, as was submitted to the tribunal by Dr Ennis, well, it's
26 correct that opt-in proceedings are practicable for the few developers with very large

1 claims, but that doesn't answer the question, because you're not then catering for the
2 majority that have very small claims. And that's really the nub of the error, it's what
3 the Supreme Court has said is not the correct approach.

4 And they explain why they say that. They say:

5 "The process of identifying and contacting many thousands of app developers would
6 be costly and time consuming. Opt-in rates would probably be very low, because of
7 the small sums involved in the majority of the claims. An opt-in basis would not be in
8 the interest of the PCMs as a whole." [as read]

9 And so they are very clearly here, we say, allowing the tail to wag the dog. And it's
10 interesting to focus on those words: "Opt-in rates would be very low because of the
11 small sums involved in the majority of the claims." Now, if they're not going to opt in
12 because their claims are worth a tenner, they're probably not going to collect that
13 money either, and we'll see later in the Supreme Court judgment that the
14 Supreme Court says very clearly that if you have large class members with large
15 claims for whom it would be practicable to bring opt-in proceedings, it would not be
16 appropriate for the tribunal to bundle them up with small claims, simply because that
17 might raise the overall quantum received in circumstances where the small claimants
18 may never even recover -- seek to recover any money.

19 Now you can see here, in this paragraph, that the tribunal is expressly, in the last
20 sentence, relying on the principles set out in Evans in the Court of Appeal, the
21 principles in Evans and Le Patourel that it set out earlier in its judgment. And they
22 include, of course, the principle that a point in favour of opt-out proceedings is that the
23 collective action regime was intended to facilitate justice and vindication of rights, and
24 that's really what's lying behind the tribunal's finding that it doesn't matter that
25 proceedings on an opt-in basis would be practicable, because you've got this long,
26 thin tail of people with small claims; it wouldn't be swept up in it.

1 So that's the tribunal's judgment, and I'm now going to take you to the Supreme Court
2 in FX. That's in the third volume of authorities behind tab 33, and it starts at
3 page 1795. Now, before taking you to the key parts of the judgment, it is of
4 course -- just a few preliminary remarks. It's common ground in this case that the
5 question whether proceeding should be certified as opt-in or opt-out is a matter for the
6 evaluative judgment of the tribunal; that's common ground. In its judgment, the
7 Supreme Court found that the Court of Appeal had wrongly substituted its own
8 evaluation of the issues for that of the tribunal, in circumstances where the tribunal's
9 judgment -- evaluation -- displayed no legal error.

10 But what the Supreme Court has done in this judgment, as we'll come on to see in
11 a moment, is lay down principles that must be applied by the tribunal when making
12 that evaluative judgment. And it's, of course, axiomatic that the tribunal must consider
13 cases in a structured manner and in a way that treats like cases alike. There will be
14 cases in which one or more particular factors are sufficient by themselves to render
15 opt-out proceedings inappropriate.

16 In Evans on the facts, there were two factors -- merits and practicability -- that each
17 individually pointed strongly against opt-out proceedings. And the
18 Supreme Court -- as we'll see in a moment -- made clear statements of principle in
19 relation to each of them separately, to the effect that opt-out proceedings were unlikely
20 to be appropriate in particular circumstances. And although it's the tribunal's task to
21 analyse the facts and to reach an overall evaluative judgment, where the tribunal finds
22 a fact pattern that falls within any of the clear statements of principle identified in the
23 Supreme Court judgment, it's almost a truism to say that the only lawful answer that
24 the tribunal can give is the one that's consistent with the principle laid down by the
25 Supreme Court.

26 Now, I think if we take the judgment, if we start at page 1801, please. I just want to

1 show you -- by way of background -- paragraphs 9 and 10. You can see there -- we
2 don't need to read them out -- see that the claims were follow-on claims and that two
3 commission settlement decisions had established the breach of Article 101.

4 And then if we turn to page 1804, and paragraphs 26 and 27 at the bottom of the page,
5 this is where the Supreme Court sets out the dual policy objectives, and you can see
6 that they say, that:

7 "There was a need for measures [I'm reading from the second part of paragraph 26]
8 to facilitate the bringing of actions for damages, but at the same time that such
9 changes should not lead to a situation in which undertakings engaging in lawful
10 economic behaviour are placed at undue risk of having to pay unjustified claims or
11 change their behaviour in order to avoid costly litigation. The tension between these
12 objectives and the need to strike a balance between them all is at the heart of the
13 issues arising on this appeal and, of course, underlies the legislation." [as read]

14 And the Supreme Court then turned to look at the legislative context and then went on
15 to look at the proceedings below, and I think if we pick it up again from page 1812 of
16 the bundle, paragraphs 59 to 60, this is in the section where the Supreme Court
17 summarises the tribunal's findings in that case:

18 The tribunal found that the claim should not be certified on an opt-out basis, and both
19 the merits and the practicability factors in that case pointed clearly and strongly away
20 from this. The tribunal accepted that that meant that the proceedings would not go
21 ahead on an opt-in basis.

22 Now pausing here, there is, of course, no such finding by the tribunal in the present
23 case. In fact, on the contrary, you've seen the tribunal's conclusion that opt-in
24 proceedings would be practicable by the majority by value of the claim, the claimants
25 that have -- the large class members -- in which the vast majority of the value of the
26 claim resides.

1 Now, Dr Ennis's --

2 JUDGE WOLFFE: Sorry, Ms Demetriou, it's in paragraph 56, where the tribunal uses
3 the phrase "might be financially viable on an opt-in basis". You read that as reflecting
4 a positive finding, for that?

5 MS DEMETRIOU: I agree it's a little ambiguous. When you see the argument of
6 Dr Ennis in the paragraph I took you to a little bit just before that, Dr Ennis's argument
7 was put on the basis that, well, proceedings by the small number of large class
8 members may well be practicable, and I think that's what the tribunal is finding.

9 Now, I think to be completely accurate, no argument was made by Dr Ennis that opt-in
10 proceedings would not be practicable; their submissions proceeded on the basis that
11 they would be, and that's what the tribunal's picking up in its concluding paragraph.

12 And so we do say that where Dr Ennis's skeleton argument repeatedly says that if the
13 tribunal found for Apple on this application, the proceedings would come to an end,
14 that is a submission that's made in terrorem, and it's a submission made with no basis,
15 and we say it's not open to the tribunal to accept that submission, because there is no
16 evidence that Dr Ennis or anybody else has even attempted to put together opt-in
17 proceedings. And more importantly, there is nothing in the objective characteristics of
18 the proceedings to suggest that's true; quite the opposite.

19 Now, if we could go on, please, in the judgment, to page 1813. Without reading it out,
20 let me just summarise paragraphs 64 to 68 -- refer here to two further decisions of the
21 European Commission, called "Sterling Lads". So two further decisions, and they
22 were published after the tribunal's judgment but before the Court of Appeal's judgment.
23 And one of them was a fuller infringement decision, rather than a settlement decision.
24 I'm going to come back to those on the Hollington v Hewthorn point.

25 Now, if we then look at paragraph 69, you can see -- this is under the heading "Court
26 of Appeal's judgment" -- the Court of Appeal disagreed with the tribunal's approach to

1 both merits and to practicability.

2 And you see over the page, on practicability, it said that:

3 "In relation to practicability, the statistical evidence, which in broad sweep is
4 unchallenged, explains why opt-in is impracticable." [as read]

5 And the reason for that was the long, thin tail.

6 Now, moving on in the Supreme Court's judgment, if we stay on page 1814, we see
7 the heading "Issues in the Appeal". There were four issues that were raised by the
8 appeal.

9 Now, in the present case, you've seen that the tribunal determined the opt-in/opt-out
10 issue by reference to practicability. It didn't place any weight on, or indeed make any
11 comments as to, the merits. And indeed pre-Kent, that didn't form part of the PCR's
12 argument. So the PCR wasn't saying to the tribunal, "this is a very strong case", it was
13 all about practicability. And so issue 2 is of particular importance.

14 But on the basis that we're right to say that the tribunal should revisit the question of
15 certification, Dr Ennis, as you've seen, now seeks to rely on the merits of the claim as
16 being a factor in favour of opt-out proceedings. And in advancing that argument,
17 Dr Ennis relies very heavily on the tribunal's decision in Kent. And our position -- you'll
18 have seen from our skeleton argument -- is that it's not open to this tribunal to place
19 any weight on that judgment for those purposes. It's inadmissible.

20 So I'll take the tribunal also to what the Supreme Court said about the merits factor,
21 given that it's an issue now, and also what it said about admissibility, the
22 Hollington v Hewthorn point.

23 JUDGE WOLFFE: Just putting to one side the point about Kent --

24 MS DEMETRIOU: Yes.

25 JUDGE WOLFFE: -- would you take issue with the general proposition that if this
26 tribunal is revisiting the question of certification, that it would be entitled to look at

1 merits, assuming it had material before it, which enabled it to assess the strength or
2 weakness of the case?

3 MS DEMETRIOU: Sir, I agree, and what we say about that is that the best case
4 scenario for my learned friend is that merits is a neutral factor in this case, and I'm
5 going to come on to that in more detail, but the two key points are that they can't place
6 reliance on the outcome in Kent, that's just simply not a factor that would be legally
7 permissible for this tribunal to take account of; and then what you're left with is a claim
8 where a very significant portion of the quantum is -- at the moment -- under a very
9 large shadow, because of the applicable law points.

10 So we say that the picture is mixed and that at most it's a neutral factor. But you are
11 legally entitled to take account of merits.

12 JUDGE WOLFFE: Yes. The way you put it a moment ago, that the class
13 representative can't place reliance on the outcome in Kent --

14 MS DEMETRIOU: Correct.

15 JUDGE WOLFFE: Now, as I understand it, the point being taken is that, if we can't
16 look at the outcome, one can still look at Kent for an assessment of the evidence that
17 might be available in this case in due course. So do you take issue with that
18 proposition?

19 MS DEMETRIOU: I take issue with it to this extent that -- I'm going to come to that in
20 more detail. Let me just tell you in a nutshell what we say about that. So in their
21 skeleton argument, they say even if they're wrong on admissibility as to outcome they
22 can take account of the evidence before the tribunal. They then set out in their
23 skeleton a number of points. But, as I'm going to show you, all of those points are
24 about the conclusions that the tribunal reached, and they're also all inadmissible. But
25 I'll do that in more detail when I come to that part of my submission.

26 JUDGE WOLFFE: Yes.

1 MS DEMETRIOU: Now, paragraph 76, page 1815 explains that the Court of Appeal
2 placed weight on the Sterling Lads decision as regards the merits of the claim. The
3 Court of Appeal held that it was admissible and of significant probative value, and that
4 it indicated that disclosure was likely to generate relevant material. So a similar
5 argument to what you're hearing Dr Ennis make in response to this application.
6 Then at 77 you see the conclusion of the Supreme Court that the Court of Appeal had
7 no basis for interfering with the judgment of the tribunal on opt in, opt out. The
8 Supreme Court then goes on to set out principles relevant to both of the factors that
9 are identified by the legislation, merits and practicability.
10 Starting with merit, let me just show you what it says. So if we skip forward to
11 page 1817. Bottom of the page, paragraphs 88 and 89, can I just ask the tribunal to
12 read those paragraphs to yourselves? (Pause)
13 And 91:
14 "If the merits of a claim are very weak, as the Tribunal assessed them to be in this
15 case, it is unlikely that the Tribunal will be justified in conferring on the proposed class
16 of claimants the significant leveraging advantage associated with opt-out
17 proceedings ... [That would be unfair] as between claimants and defendants ..."
18 So just pausing here. This is one of the statements of general principle that
19 I mentioned earlier we'd see in the judgment, that the Supreme Court is saying, as
20 a matter of general principle, that if the merits of a claim are very weak, it's unlikely
21 that the tribunal could be justified in certifying opt out proceedings. So, in other words,
22 a tribunal who found a claim to be very weak and then certified opt out proceedings
23 anyway would in all likelihood have erred in law, unless there was some completely
24 compelling factor going in the other direction.
25 That would be true even in a consumer claim with millions of consumers, for the
26 reasons that the court is giving here and in the next two paragraphs. So even if you've

1 got millions of consumers, even if there's an access to justice issue, if the claims are
2 very weak, as a matter of principle, they generally won't be appropriate for opt out
3 proceedings.

4 Then if we go to page 1819 and look at paragraphs 94 to 96, perhaps you could just
5 read them to yourselves first. (Pause)

6 So this summarises the proper approach in principle to the merits factor. Once you
7 move away from the extreme scenario of a very weak case, you have a sliding scale
8 and it's a factor that goes into the mix one way or the other.

9 If we look at paragraph 99 to 101, there's no general legislative presumption as
10 regards opt in and opt out. The tribunal has a wide discretion, but the legislation
11 singles out two factors, and it wouldn't have done that if those were simply neutral
12 considerations. That's what the Supreme Court says.

13 They then say, paragraph 100, that there may be cases in which it's not possible to
14 form a view on the merits. Then at 101, "but equally there may be cases in which it is
15 possible such that weight can be attached to it." [as read]

16 Then if we skip forward, please, to page 1823. You can see at the top of that page,
17 paragraphs 110 to 111, the court's conclusion on this issue. Again, can I just ask the
18 tribunal if you could read that to yourselves. (Pause)

19 The Supreme Court then went on to consider the question of practicability, which was
20 issue 2 in the appeal. Looking at paragraph 112:

21 "The implication of rule 79(3)(b) is that, if it is practicable for the proceedings to be
22 brought as opt-in proceedings, then generally speaking they should be." [as read]

23 I pause there. That's again an expression of a general principle by the
24 Supreme Court. So if it's practicable for the proceedings to be brought as opt in
25 proceedings, then the general position is that they should be. They shouldn't be
26 opt out proceedings.

1 MR NEUBERGER: Can I just interrupt one moment about merit, because I didn't quite
2 understand? You were saying that you start off from a neutral position between opt in
3 and opt out. You said there was a sliding scale on merits. You said that if the merits
4 were weak, that would point in favour of opt in. What I wasn't clear is whether you
5 were saying that if the merits were strong, that would be a factor in favour of opt out
6 or whether you were saying it then became neutral.

7 MS DEMETRIOU: So the court says that if the merits are strong, then that's a factor
8 that is relevant to take into account that may support opt out proceedings. So we
9 accept that. But just to cut to the chase of what our submission is, and focusing on
10 these opening words of paragraph 112, we do say that in a case which is at the
11 obviously practicable end of the spectrum, where -- as we'll see from this paragraph
12 and in the next few paragraphs of what the Supreme Court says in relation to
13 practicability -- if you're at the clearly practicable end, then we say that means there
14 shouldn't be opt out proceedings, even if the merits are strong. So even if the merits
15 are strong, that can't outweigh a case which is clearly practicable as opt in
16 proceedings.

17 Now if it's a more nuanced picture -- so if the tribunal says, "Well, it may be that these
18 are practicable, but there are disadvantages", if it's a more mixed picture, then strong
19 merits may come in to tip the balance. That does come down to the evaluative
20 judgment of the tribunal. But we're not in that case. We're at the very practicable end
21 of the spectrum. So that's in summary how we put our case.

22 JUDGE WOLFFE: Thank you very much.

23 MS DEMETRIOU: So again, paragraph 112, you can see the tribunal then go on to
24 say:

25 "The principle is clear: if it is practicable for claimants to bring opt-in proceedings, it is
26 unlikely to be proportionate to confer upon them the additional advantages associated

1 with the opt-out procedure and unlikely to be reasonable to expect the defendants to
2 have to face the additional commercial pressures to settle [regardless of the merits of
3 the claim that opt out proceedings would involve] ... As with the strength of the claim,
4 this is only one factor (though clearly, since it is singled out in the rule, potentially an
5 important one) which feeds into the overall evaluation which the Tribunal has to make.
6 Its weight may vary from case to case, depending on just how difficult it might be for
7 the claimants to bring their claims on an opt-in basis."

8 That's why I said, sir, in response to your question, if you've got a more nuanced
9 picture as to practicability, that it may be quite difficult for claimants to bring on an
10 opt in basis, then you're into an evaluative exercise that looks at merits and weighs
11 everything in the balance. But where, as in this case -- and we say this is a paradigm,
12 this case, of clear practicability as opt in proceedings -- then you apply the principle in
13 the first two sentences of 112, that it just will not be right to allow proceedings on behalf
14 of large commercial entities to enjoy the procedural advantages of opt out
15 proceedings.

16 Now, skipping down the page to 114, you see the heading, "the nature of the tribunal's
17 assessment". As the heading suggests, this lays down principles indicating how the
18 tribunal should go about examining practicability and applying any conclusions
19 reached in relation to it. If we look at paragraph 115, can I just ask you to read 115 to
20 yourselves? (Pause)

21 We'll come on to see in a moment what the tribunal mean by that, when they say that
22 the regime is not intended to immunise class members completely from the usual
23 background commercial considerations, which have a role in determining when
24 proceedings are thought to be sufficiently viable to be worthwhile.

25 We can see, if we read on to 116 and 117, here again you have statements of principle
26 as to how the tribunal should approach cases at either end of the spectrum. So you

1 see, 116, the Supreme Court says that:

2 "The regime is designed to accommodate a wide spectrum of cases ... to allow classes
3 of claimants a reasonable opportunity to litigate, but not an absolute or specially
4 privileged right to do so. At one end of the spectrum, there may be a large class of
5 ordinary consumers affected by a breach of competition law ... involving small sums
6 for each individual which would make each individual case economically unviable
7 given the costs involved."

8 They put forward Merricks as being the paradigm type of case in which opt out
9 proceedings are likely to be justified. That's because the large numbers of claimants
10 and the small sums involved are likely to make opt out procedure the only basis on
11 which it is practicable to bring proceedings. So you've got that at one end of the
12 spectrum.

13 Then paragraph 117:

14 "At the other end of the spectrum, the claimants who allegedly suffered loss as a result
15 of breaches of competition law may be large commercial organisations, well capable
16 of looking after their own interests, and the sums involved may be large enough to
17 make it financially viable to contemplate bringing proceedings to seek recovery. That
18 may be done by clubbing together with other similar organisations with similar claims
19 to bring a single set of proceedings with multiple claimants, or a number of separate
20 proceedings that are case managed together, rather than trying to bring a collective
21 action with a class representative. In such circumstances it may not be appropriate
22 for collective proceedings to be brought at all; and if collective proceedings are
23 considered appropriate, it is likely to be only on an opt-in basis."

24 So again, the Supreme Court there is laying down a principle that applies in all cases.
25 If you're at that end of the spectrum, it doesn't matter if the merits are strong. It would
26 not be appropriate to allow opt out proceedings.

1 Then at 118:

2 "The present case falls between these two poles. It also demonstrates the way in
3 which background commercial considerations continue to operate regarding decisions
4 whether to litigate, albeit through the prism of the collective proceedings regime ..."

5 Now, pausing here, this case also falls between the two ends of the spectrum identified
6 in paragraphs 116 and 117, but it is in fact very close to the paragraph 117 end of the
7 spectrum, and in fact much closer than Evans to that end of the spectrum. That's
8 because a higher proportion of the value resides in the hands of fewer class members
9 who are large commercial organisations.

10 Can I just take you slightly out of course? We're going to come back to the
11 Supreme Court. But can I just remind you, please, what we've said in our skeleton
12 argument about that comparison. So we're in the core bundle, tab 16. That's where
13 our skeleton argument is. It's paragraph 49, which starts at the bottom of page 472.

14 So we say:

15 "The Ennis proceedings show extreme differences between different class members
16 and are a paradigm example of a heterogeneous class."

17 Now, (a):

18 "As set out at paragraph 9 above, [which was the paragraph I took you to at the outset]
19 the vast majority of the claim value is concentrated in a small number of larger
20 developers. The concentration is even more pronounced than in the FX proceedings.
21 The Court of Appeal's decision records, at annex B, that some 48% of the alleged
22 claim value rested with some 342 class members."

23 Then can I just ask you to read to yourselves the final sentence? So you can see that
24 the concentration in this case is much greater, in fact, than it was in the Evans
25 proceedings. That's why we say, going back to the judgment in the authorities bundle
26 at page 1824, that we are very close to the paragraph 117 end of the spectrum and

1 closer to that end of the spectrum than the Evans case itself was.

2 Then, paragraph 119, just moving on in the judgment, what this says is that it's critical
3 that the tribunal, when assessing practicability, carries out an objective assessment.
4 That's an important point in this case too. So it shouldn't depend on evidence about
5 the subjective state of mind and legal advice received by individual potential claimants.
6 If we look at the final sentence, the inference to be drawn is that rule 79(3)(b) requires
7 the tribunal to stand back and make an objective determination by reference to the
8 inherent likelihood of how a reasonable person in the position of a potential claimant
9 would assess the situation. That's important because the tribunal will have seen that
10 Dr Ennis seeks to argue that various developers might feel reluctant to bring
11 proceedings against Apple because of their commercial relationship, and relies on
12 hearsay evidence about subjective views of some class members. We say that that
13 is impermissible for the reasons that you can see in paragraph 119.

14 Then moving on to 120, and this is a really critical paragraph because, again, it's
15 another clear direction as to how the tribunal should approach the issue of
16 practicability. The Supreme Court says:

17 "This does not require the Tribunal to assume that the position of all potential claimants
18 is the same. It is relevant to consider the composition of the proposed class and
19 whether it is relatively homogeneous or comprises potential claimants of different
20 types and with different sizes of potential claim. The identification of distinct groups of
21 claimants is a matter for evaluative assessment by the Tribunal depending on the
22 particular facts, and is one in relation to which it again has a wide discretion. In our
23 view, where the Tribunal identifies groups of claimants with distinct profiles relevant to
24 the assessment to be made, it should consider the practicability of bringing an opt-in
25 claim for each group separately; and if this yields a different conclusion for each group,
26 it should then stand back and make an overall assessment of the balance of justice

1 having regard to those underlying assessments."

2 It says that's, in substance, what the majority of the tribunal in Evans did. Again,
3 pausing here, the evidence before this tribunal, and indeed before the tribunal at the
4 certification stage, was uncontested in terms of the differences between size of class
5 members and the concentration of value of the claim. So this isn't a question where
6 the tribunal is having to engage in an evaluative judgment interpreting the data,
7 because there's common ground as to what the data shows. What the tribunal, in
8 these proceedings, did not do is precisely what the Supreme Court said is necessary,
9 which is to stand back and carry out that two-stage exercise.

10 You've seen that Apple's case was, and remains, that the class is not homogeneous
11 as the vast majority of the value of the claim is accounted for by large developers with
12 large claims and there's then a long tail of small claims. But, while the tribunal didn't
13 demur from Apple's analysis of the facts, it considered that the claim as a whole -- so
14 it went straight to a single assessment -- couldn't be practicably brought on an opt-in
15 basis because of the long, thin tail. So it didn't go through that two-stage analysis or,
16 rather, it did, in a sense, because it said the large developers with large claims may
17 well be practicable for them to bring opt-in proceedings. But then it completely
18 discounted the relevance of that because of the existence of the long, thin tail and it
19 held that, because of the long, thin tail, opt-in proceedings would ipso facto be
20 impracticable for the claim as a whole. That analysis is flawed in law because it's
21 inconsistent with the structured approach laid down by the Supreme Court here.

22 Now, one of Dr Ennis's arguments in response to this application is that the class is
23 highly homogeneous. They say, "Well, there's no good way of distinguishing between
24 class members" and they say, "Well, they're all seeking the same relief, they've all got
25 the same interests". But you can see from this part of the Supreme Court's judgment
26 that differences in size and differences in value of claim are precisely the type of

1 difference that the Supreme Court had in mind. Of course, Dr Ennis is right that there's
2 always an element of arbitrariness in exactly where you draw the line, that's right. But
3 he's wrong to say that the solution is to ignore the issue or to decide the case by
4 reference only to the smallest class members, as the tribunal did in our case. We say
5 that argument is not a good one.

6 Then, moving back to the judgment, paragraph 121. You see there that it's incumbent
7 on the tribunal to have regard to differences in class composition. So we emphasise
8 that. That's in the middle of the paragraph. So, again, it's a principle that the tribunal
9 needs to comply with.

10 Then, if we could move on to page 1826, there's a summary of the tribunal's
11 assessment in this case. Given the time, I'm not going to read it out, but I assume that
12 the tribunal may have had the opportunity to read this part of the judgment already.

13 Then, starting at paragraph 124, you see the Supreme Court's own analysis. So:

14 "It's difficult [the Supreme Court says] to see why the financial institutions and large
15 entities with substantial claims should be allowed to proceed by way of opt-out
16 collective proceedings. The additional leverage this would give them can't be justified,
17 having regard to their particular circumstances."

18 Again, that's a point of principle which is applicable a fortiori in the present case. It's
19 not tethered to the merits factor. So the Supreme Court is not saying large entities
20 with substantial claims shouldn't be allowed to proceed by way of opt out if the merits
21 are weak. The court is here concentrating on practicability and saying, per se, large
22 commercial entities shouldn't be entitled to proceed by way of opt out if opt-in
23 proceedings are practicable. It's obvious why this is so because, if large entities with
24 substantial claims don't believe in the litigation or don't care enough about the issues
25 to sign an opt-in agreement, then it's right that the litigation shouldn't be pursued,
26 because it's better to have litigation where there is buy in from the people who are the

1 subject of the claim and who are affected by it.

2 Now, paragraphs 125 and 126 are important. Can I just ask the tribunal to read those
3 paragraphs to yourselves and then I'll make some short submissions on them.

4 JUDGE WOLFFE: Before you do that, Ms Demetriou, I'd just like to ask one question
5 in relation to 124.

6 MS DEMETRIOU: Yes.

7 JUDGE WOLFFE: You've explained why, you say, regardless of the merits, the first
8 sentence of 124 is a principle that should apply.

9 MS DEMETRIOU: Yes.

10 JUDGE WOLFFE: The particular point the Supreme Court makes is under reference
11 to the additional leverage that that would give in such a case. One might read that as
12 a reference back to the discussion of leverage at an earlier point in the judgment. I'd
13 be interested in your submission on what, if anything, we should take from the way the
14 Supreme Court explains its position at 124.

15 MS DEMETRIOU: Yes. So, if we focus on -- it's a very good question, if I may
16 respectfully say so -- if we look at paragraph 124. Let me put it this way, opt-out
17 proceedings, as a matter of fact, give class members more leverage than opt-in
18 proceedings. That's a factual point that the Supreme Court has commented on at
19 various places in its judgment. Earlier in its judgment, in relation to merits, it says that
20 that leverage is important in the merits context because, if the merits are very weak
21 then why should class members have that additional leverage? It would be unfair to
22 defendants. So leverage is important there. But it's also separately important in
23 relation to practicability. We can see why the Supreme Court says that in
24 paragraph 124. So they're not linking, here, the leverage question to merits. You can
25 see there that the tribunal was entitled to conclude that they shouldn't be permitted to
26 bolster their position by bundling themselves together with claimants who were not

1 able to bring their claims. Then they say:

2 "It would certainly not be appropriate for the Tribunal to order opt-out proceedings
3 simply to give the large commercial operators the advantage arising from the
4 expectation that the smaller entities for whose benefit the opt-out proceedings are
5 supposedly being brought will increase the overall award of damages but will not
6 ultimately come forward at the end of the day to claim their share of the award."

7 Now, that's not a point that is linked to merit. That's a procedural point. What the
8 Supreme Court is saying is that, where you've got large commercial operators that
9 make up the vast proportion of the claim, and then you've got a bunch -- maybe very
10 many -- small operators that have claims that are really minuscule. What you shouldn't
11 be doing is bundling them all together to create leverage, to give the funders more
12 incentives, to raise the aggregate amount sought, in circumstances where the reality
13 is that those small entities will probably never come forward to claim their £10.

14 Now, moving on to paragraph 125. I was going to ask -- if I've answered your
15 question, sir -- if you could read those two paragraphs and I'll make some short
16 submissions on paragraphs 125 and 126.

17 JUDGE WOLFFE: Yes, thank you. (Pause)

18 MS DEMETRIOU: So the focus here really is on the value of the claim. That's what
19 the Supreme Court's looking at. In paragraph 125, it's explaining that it would be
20 legitimate in principle to take a hybrid approach with individual proceedings or opt-in
21 proceedings for the large class members, and opt-out proceedings for the smaller
22 ones, and that has been taken, for example, in the commercial card interchange fee
23 proceedings. But the court is saying that that won't work in every case because, in
24 some cases, the long tail is just not worth enough.

25 But the important point here is that, where the long tail is not worth enough on its own,
26 it's not legitimate to bundle up the claims in order to make them work. In those cases,

1 the right answer in principle is either no collective proceedings or opt-in proceedings.
2 If the consequence of that is that smaller firms and individuals miss out -- well, that's
3 what the Supreme Court's getting at when it says that the regime isn't there to protect
4 everyone against all of the normal risks of litigation.

5 Now, paragraph 126, the court is dealing with the reverse situation from that which we
6 have in this case. So what they're dealing with is a hypothesis where you have a mass
7 of small claims that are cumulatively very valuable and make up most of the value of
8 the claim, but also a small rump of larger claims. So the court's saying it may be
9 legitimate in those circumstances to bundle the few larger claims, which make a small
10 proportion of the overall quantum, together with the smaller claims. There's no fixed
11 rule requiring the tribunal to excise large claims in every case. But what this is saying
12 is that the tribunal must look at those claims, which form the core of value of the action,
13 to reach an overall assessment of practicability. So the answer in every case on
14 practicability depends on the distribution of commerce.

15 Of course, the present case is the opposite of the hypothetical in paragraph 126,
16 because the overwhelming majority of the value lies in the hands of a very small
17 number of large developers, for whom it's crystal clear that it would be practicable to
18 claims or to opt in.

19 Now, having laid down these principles, that the Supreme Court found that the tribunal
20 had not overstepped the ambit of the evaluative judgment open to it, and you've seen
21 it goes on to criticise the Court of Appeal for exercising too intrusive a review of that
22 evaluative judgment.

23 Now, of course, I think I've made the point already that, of course, we accept it's an
24 evaluative judgment, but that has to be made in accordance with the principles laid
25 down by the Supreme Court, and that we are at the extreme end of the practicability,
26 or near the extreme end of the practicability spectrum.

1 Now, I want to turn briefly now to the Hollington v Hewthorn issue. Might I just cover
2 that, and then I'll have covered the judgment, and then we take our short break. Thank
3 you.

4 So we can pick that up at page 1831, bottom of the page, under the heading
5 "Admissibility". And you can see from paragraph 142 that similarly to Dr Ennis,
6 Mr Evans sought to rely on the Sterling Lads infringement decision of the commission
7 as lending strong support to the merits of his claim. And of course, the Supreme Court
8 found -- the punchline is that the Supreme Court found that the commission was
9 inadmissible for that purpose. And let me show you the reasoning. So we start with
10 paragraph 144, which sets out the ruling in Hollington v Hewthorn; can I just ask the
11 tribunal quickly to remind itself of that paragraph.

12 And then I think we can move on to the bottom of page 1833, paragraph 152, where
13 the court found that the rule in Hollington v Hewthorn does apply to the tribunal.

14 And then if we move on to page 1836, paragraph 158, Mr Evans argued that the rule
15 in Hollington v Hewthorn is not applicable at an interlocutory stage. Now, that's the
16 same argument that Dr Ennis seeks to run before this tribunal. And we say that
17 Dr Ennis has misunderstood the Supreme Court's response.

18 Can I show you briefly, so I don't need to come back to it, what Dr Ennis says about
19 this in his skeleton? So if we go back to the core bundle, tab 15, page 446, at
20 paragraph 19. So Dr Ennis says:

21 "In its application, Apple said that the tribunal's reasoning and conclusions in the Kent
22 proceedings rest on factual findings that are inadmissible in the Ennis proceedings.
23 That was clearly wrong. In Evans, Mr Evans submitted the ruling in
24 Hollington v Hewthorn does not preclude reliance on findings made by another
25 decision maker for the purpose of defeating a strikeout or summary judgment
26 application, or otherwise demonstrating the strength of the claims at an interlocutory

1 stage." [as read]

2 So, citing Tulip and so on.

3 "The Supreme Court said, 'we endorse this analysis'." [as read]

4 And so what they're saying is that you can rely on the findings made by another
5 decision maker at this stage and for this purpose; that's what they're saying. And that's
6 plainly wrong. If we go back to Evans at paragraph 158, you can see that the
7 Supreme Court there cites a passage from a judgment of Mr Justice Mellor in
8 Tulip Trading, which says that a decision that would otherwise be inadmissible can be
9 used to help identify the evidence that might be available at trial.

10 And then paragraph 159 is important:

11 "The Supreme Court says that it endorses Mr Justice Mellor's analysis, but the
12 Supreme Court explains that this is not to be understood as an exception at all. It's
13 permissible under Hollington v Hewthorn to rely on prior judgments and reports insofar
14 as they record evidence of relevant facts." [as read]

15 Now, that's always been permissible. But what's impermissible is reliance on the
16 conclusions of the court or other decision maker, because those conclusions contain
17 opinions on matters of fact. And you can see that from the conclusion, at
18 paragraph 167 on page 1838, "Reliance placed by the Court of Appeal on the
19 Sterling Lads decision was misconceived" [as read], the findings made by the tribunal
20 in that decision are inadmissible and irrelevant, to the question of the merits of
21 Mr Evans's claim.

22 Now here, Dr Ennis seeks to rely on the outcome of the Kent trial in order to make his
23 submissions that the merits of these proceedings are strong. Indeed, that's the key
24 submission running through my learned friend's skeleton argument. You can see
25 it -- I'm not going to go back to it, but paragraphs 4, 5.16, they're all relying on the
26 outcome. No doubt, because Dr Ennis has problems on practicability, he's pivoting to

1 the merits factor. But the key argument -- his key argument -- is that the strength of
2 the claim is demonstrated by the outcome in Kent. That's not a permissible
3 submission that he's entitled to make. And to be clear, even if I was wrong about that,
4 you have my submission that this is such a clear cut case on practicability that opt-out
5 proceedings would not be appropriate on any view of the merits of the claim, if you
6 apply the Supreme Court's judgment in Evans, the principles that are laid down.

7 Now, so I was going to turn to the Microsoft judgment. This might be a convenient
8 moment, if it suits the tribunal, to take the short break.

9 JUDGE WOLFFE: That would be helpful. Does it make any difference that you're
10 a party to -- as I understand it, I assume you represent a party to the proceedings?

11 MS DEMETRIOU: No, and what the Supreme Court does, and we can see this from
12 paragraph -- they talk about the strong version of the principle and the weaker version
13 of the principle. I don't think they call it weaker, but the strong version of the principle
14 is where a party was not party to the previous proceedings. But then what they say is
15 that the only difference is that if you were party to the earlier proceedings -- you can
16 see this, it's paragraph 145 on page 1832 -- it may be that a party is bound by
17 proceedings where they give rise to an issue estoppel, or it's an abuse of process. So
18 the only difference between the two positions that the Supreme Court draws is: you've
19 got the general rule in Hollington v Hewthorn, but where you were party, there may be
20 additional principles of law that come in. So is there an issue estoppel, or is it an
21 abuse of process? Plainly, none of them apply here.

22 So it makes no difference that Apple was party to those proceedings, and of course
23 you know that Apple is appealing the Kent judgment and that there's a three to five
24 day rolled up hearing that's being listed for the end of the year or early next year.

25 So shall we break now?

26 JUDGE WOLFFE: Let's break now. 15 minutes. Thank you very much.

1 (11.46 am)

2 (a short break)

3 (12.02 pm)

4 MS DEMETRIOU: Take the tribunal now to the Microsoft judgment that was handed
5 down by the tribunal yesterday, which I think has made its way into your authorities
6 bundle, behind tab 41, starting at page 1949. Can I just check that you do have that?
7 This was a CPO application by Ms Stasi for a proposed opt-out against three Microsoft
8 entities, and the claim alleges a breach of the chapter two prohibition in relation to
9 certain licensing practices for the Windows server operating system. And one of
10 Microsoft's arguments was that the claim should be certified as a hybrid opt-out/opt-in.
11 In fact, I think more precisely, their submission ended up being -- by the time of the
12 hearing -- that there should be a three-way bifurcation. So some should not be able
13 to bring collective proceedings at all, some should be opt-in and the rest should be
14 opt-out. And the tribunal decided that in the circumstances of that case, it was
15 appropriate to certify the whole proceedings as opt-out proceedings.

16 Now, I'm anticipating, because of the flurry of correspondence last night, that my
17 learned friend has got quite excited about this case, but the position is that, unlike the
18 present case, which is, as I've said, is a fortiori, Evans on practicability. The case in
19 Microsoft did not fall within the same fact pattern, and we make two points in particular.
20 The first is that there were limitations on the data that meant that the tribunal was
21 unable to make any safe distinctions between different members of the class. That's
22 the first point; I'll show you the relevant bits of the judgment in a minute.

23 And the second point is that what data there was did not suggest anything like the
24 concentration of value of the claim in such a small number of class members.

25 So turning to the judgment, if we could pick it up, please, from paragraphs 102 to 103,
26 starting on page 1981, and this is the three-way bifurcation, so we don't need to read

1 | it, but it's just where you find that, 102 to 103.

2 | And then if we skip forward to paragraph 114, the tribunal says that:

3 | "The Supreme Court made it clear in Evans that the question of opt-in is an exercise
4 | of evaluation." [as read]

5 | We agree; I made that point already.

6 | And then the discussion begins, paragraph 126, a discussion on practicability begins
7 | at 126. Essentially, merits was taken to be a neutral factor in the circumstances of
8 | that case.

9 | And if we look, please, first at 129. So we would start by agreeing with the PCR
10 | submission that the limited data available in this case makes it difficult to have
11 | confidence that a reliable distinction can be drawn between claimant subgroups
12 | having different profiles.

13 | And then, 130, the limitations in the available data are accepted on both sides; that
14 | was common ground.

15 | And then if we turn to 133, Microsoft's arguments in summary are preceded by the
16 | following steps. And what you see there is that Microsoft said that a material
17 | proportion of the expenditure is concentrated in the hands of customers who spend
18 | over \$100,000 per annum; that's the spend, it's not the value of the claim. And I just
19 | pause here to make two points.

20 | First of all, as I've said, \$100,000 is the spend, not the value of the claim. So you
21 | would expect the value of the claim to be much smaller than that, a fraction of it.

22 | And secondly, material proportion, which is Microsoft's submission -- and you would
23 | anticipate they put their best case forward -- doesn't tell you very much, and that's
24 | a complete contrast to our case, where you have the precise data showing that a very
25 | high proportion of the claim is in the hands of a very few class members. And you've
26 | got the points we've made at paragraphs 49A and 49B of our skeleton. I don't know if

1 I took you back, in fact, to 49B; can we just have a look at that, in case I didn't? So
2 that's tab 16 of the core bundle, and you'll find it on page 473. I think I showed you
3 49A, but can I just ask you to have a look at 49B, and that's about the tail being very
4 long and very thin, and you can see at subpoint 1 that many claims are tiny, so less
5 than £10 of loss, and then you've got a large number, which are small, between £10
6 and £100, and then another set of, again, large number, that suffered loss of between
7 £100 to £1,000, far fewer claims further up the scale. Can I just ask you to read (ii)
8 and (iii) to yourselves? (Pause)

9 So going back to Microsoft, the picture in our case is very different to the argument put
10 forward by Microsoft at 133.

11 And then you see at 134:

12 "We don't accept these submissions. They proceed on the false premise that the
13 position of claimants spending over 100,000 per annum is sufficiently different from
14 those spending less, that the resultant subgroups can safely be separated out for the
15 purpose of determining practicability." [as read]

16 We don't agree. If there's a line to be drawn at all, it's not clear to us why it should be
17 drawn by reference to a figure for customer spend of only £100,000. Again,
18 I emphasise that the value of the claim is likely, obviously, to be a fraction of that
19 spend.

20 And then we see that at 136; can I just ask the tribunal to read paragraph 136 to
21 yourselves, please? (Pause)

22 So you can see there that the tribunal found -- understandably I would submit -- that
23 it's difficult to see why businesses spending more than £100,000 on the services would
24 be in a better position as regards practicability than those spending below that figure.
25 It seemed quite arbitrary to the tribunal, and the tribunal goes on to say that
26 practicability would depend on a range of other factors, in particular claim size. That's

1 | what they're focusing on, and that's precisely, of course, the information that we have
2 | in the present case, is the claim size.

3 | The latter point, claim size, is an important one. You can see that the PCR estimates
4 | an average claim value of around £29,000. So not large claims, on average.

5 | Then at 137:

6 | "Even if a cut off point could be identified at some higher level of expenditure that
7 | wouldn't be the end of the matter. The question then would not be about dividing up
8 | the proposed class into possible alternative classes. Instead, it would involve -- see
9 | Evans -- standing back and making an overall assessment of the balance of justice,
10 | having regard to those underlying assessments [ie, having regard to the fact that there
11 | are distinct groups standing in a different position as regards the practicability of their
12 | claiming on an opt in basis]". [as read]

13 | We agree with what the tribunal said in paragraph 137. Looking there at the data
14 | challenges and really at the absence of data enabling the tribunal to make any safe
15 | conclusions about the concentration of value of the claim, still less draw any sort of
16 | line so as to consider the position of different categories of class members, we say
17 | that it's clear that Microsoft is not a case that fits within the fact pattern on practicability
18 | identified in Evans.

19 | But by contrast the present case does. As I've said before, it's a stronger case than
20 | Evans on the facts. The tribunal does have undisputed data enabling it to carry out
21 | the two-stage exercise laid down by the Supreme Court in Evans on practicability.

22 | So that's what we say about Microsoft. It may be that I come back to it and reply,
23 | depending on what my learned friend makes of it. Now to draw together Apple's
24 | submissions --

25 | JUDGE WOLFFE: If I could just ask you a question, looking at paragraph 49 of your
26 | skeleton. I understand the submission on concentration. Where do you say the line

1 would fall to be drawn between different groups?

2 MS DEMETRIOU: I don't think I have to identify a precise, line. I don't think the
3 tribunal does either. I think that you can look at this and you can reach a view as to
4 the value of claim that it would be practicable to bring proceedings forward. I mean,
5 there are plenty of claims that are brought on an individual basis for £100,000, if you
6 take that as being a starting point. If you look at the concentration -- look at the number
7 of members that have claims above that. Or you could say, "Well actually, we think
8 these are complicated proceedings, perhaps £100,000 wouldn't cut the mustard".
9 Although we're not talking about individual claims here. We are talking about opt in
10 proceedings which bring with them procedural benefits. So we're not making the same
11 point as they did in Microsoft.

12 But we say whichever way you dice it, whether you draw the line at £100,000 or even
13 a little higher, you can see the concentration is so pronounced in this case. So going
14 back to paragraph 49(a) and looking at those figures there. So even if you drew the
15 line -- I'm not going to read out the number, but looking at the last line of
16 paragraph 49(a), you see there that that's a very high proportion of the claim made up
17 by relatively few number of developers. So one could draw the line there, in principle,
18 and say, "Well, would that, would that claim be practical?" Plainly, yes. That's almost
19 all the claim. The rest of it is footling in terms of the overall value.

20 JUDGE WOLFFE: Thank you.

21 MS DEMETRIOU: Now to draw together our submissions, I think probably I've made
22 the submissions I want to make about the threshold jurisdictional question, in response
23 to the question the tribunal put to me at the outset. I think you have our submission,
24 that we say in a sense it's an arid debate.

25 There is a material change of circumstance. Dr Ennis accepts that a change in the
26 law is a material change of circumstance.

1 We say it's clear, for the reasons I've given, that the tribunal in this case proceeded on
2 a flawed basis, by applying the principles laid down by the Court of Appeal in Evans
3 and by finding that ipso facto the impracticability of bringing opt in proceedings for the
4 long, thin tail was determinative of the question of practicability. That's an approach
5 which is wrong in law, and for that reason this tribunal does have jurisdiction, and we
6 say, indeed, has a duty to reconsider the question of opt in, opt out.

7 So that's what we say about the threshold question. Unless you have any particular
8 questions about that, we've covered it pretty thoroughly in our submissions.

9 JUDGE WOLFFE: So I still don't understand about it. Is the arguments you put are
10 that the claims should be not opt out, but opt in. So why is the application for
11 de-certification, rather than certifying as opt in?

12 MS DEMETRIOU: Because the proceedings have been certified as collective
13 proceedings on an opt out basis, we say that the criteria for opt out are not met,
14 because it's practicable for them to be brought as opt in.

15 The consequences of de-certification are a matter for Dr Ennis and for the class, and
16 so we accept that Dr Ennis may well be able -- if you accede to our application and
17 de-certify the proceedings. Of course, Dr Ennis is perfectly entitled to apply again for
18 certification on an opt in basis. They could have come to these proceedings saying,
19 "Well, if we fail, this is what we propose to do". They haven't done that. They've
20 chosen to go for an all or nothing approach, saying, "Well, this will be the end, the
21 interim submission". But we say that what happens afterwards is a matter for
22 Dr Ennis. If Dr Ennis wants to come forward with opt in proceedings, that's a matter
23 for Dr Ennis.

24 JUDGE WOLFFE: I suppose in the Evans case what the tribunal did was to give the
25 class representative an opportunity to come back with an application to amend.

26 MS DEMETRIOU: Yes, that was a slightly different point, because of course in that

1 case in Evans it was accepted that if they weren't opt out they wouldn't be viable on
2 an opt in basis. I've already made my submission that it's not really open to the tribunal
3 to make that finding, given that there is no evidence before you of that, and given that
4 it's an objective question which turns on the objective characteristics of the class
5 members.

6 JUDGE WOLFFE: Yes. But I suppose the only point is that if we were with you there
7 might simply be a practical question of allowing time for the class representative in this
8 case to come back with an application.

9 MS DEMETRIOU: Absolutely. So you could find these are not properly certified on
10 an opt out basis, but we want to give Dr Ennis the opportunity to come back with an
11 opt in. I accept that.

12 Now, moving beyond the threshold question and turning to the assessment of
13 practicability, and trying not to repeat myself, because I've made many of my
14 submissions in the course of showing you the Supreme Court judgment. We say, in
15 a nutshell, that the practicability criterion weighs decisively against opt out
16 proceedings in this case, that the merits of the claim don't counteract the practicability
17 factor, and thirdly that there's no other factor that outweighs or is even capable of
18 outweighing the practicability factor in this case.

19 As to that, although Dr Ennis makes much of the fact that the proceedings were
20 certified 18 months ago, the reality is that we're only at the close of pleadings. There's
21 been no disclosure, other than the material that was disclosed in Kent, and we're
22 a long way from filing factual and expert evidence.

23 So the first point, which is practicability weighs decisively in favour of opt in, you've
24 seen the figures that I've shown you in our skeleton argument about the concentration
25 of the claim. Of course, the first stage of the analysis is to determine whether there
26 are distinct groups of claimants within the class and consider them separately. Here

1 you have my submission that there are and that we are in a stronger position on the
2 facts than FX, because there's a far greater concentration of the value of the claim
3 even than in FX. I've shown you the comparison at paragraph 49(a) of our skeleton
4 argument.

5 Let me just take you back to our application where we summarised the evidence of
6 the class representative's own expert, Mr Perkins. We go to the core bundle, please,
7 at tab 1, page 16. This is very similar, I think, to the figures that we've extracted in our
8 skeleton, but can I just show you? This is Mr Perkins, who's the class representative's
9 expert, setting out the data here. So again, we are, with respect, a very long way away
10 from Microsoft, where there was no proper data before the tribunal or no clear data.

11 The position is even more pronounced in view of the fact that many of the developers
12 with large claims are part of very substantial global enterprises. Can I just show you,
13 in the same document, paragraph 39 of our application, and just ask you to read
14 paragraph 39, which is on page 15. (Pause)

15 Mr Watson, in his third witness statement, which you'll find in the supplemental
16 bundle --

17 JUDGE WOLFFE: Sorry, before you do that. I may not have read this fully. Do these
18 relate to the five who have the largest claims, or do we not know that?

19 MS DEMETRIOU: I don't immediately know the answer. Can I just revert to you on
20 that point?

21 JUDGE WOLFFE: Yes. Because in a sense that would go nowhere if these are
22 amongst long tail. It may be unlikely.

23 MS DEMETRIOU: The point is, of course, that this is an excessive pricing case where
24 what's being claimed is that the commission paid by the developers on transactions
25 was too high. So the volume of commerce that the developers have with Apple is
26 obviously key to the question of what the size of their claim was. It will be large

1 developers that have a large volume of commerce with Apple. So broadly, there's
2 obviously a correlation.

3 The precise question that you've asked me I just need to come back to you on, if that's
4 okay. I was going to show you briefly Mr Watson's third witness statement, which is
5 in the supplemental bundle, behind tab 8, page 326.

6 So looking at paragraph 6, this helps a little, I think, because he says that he identifies
7 the following examples of such corporate groups amongst the -- and then you've got
8 the largest X developers in the developer analysis. So these are examples of
9 undertakings which fall within the top.

10 JUDGE WOLFFE: That's helpful. Thank you.

11 MS DEMETRIOU: Now, of course, Apple in this case has identified all of the
12 developers for Dr Ennis by name. So it would be straightforward, we say, for Dr Ennis
13 to contact them using publicly available information. It's not a question of scrabbling
14 around trying to work out who unknown members of the class are. Apple knows
15 exactly who they are, because they're the developers it works with. So, objectively
16 viewed, we say that it's obvious that it would be practicable for the developers with the
17 largest claims to opt in to collective proceedings should they wish to do so.

18 Just going back to our skeleton argument, please. Core bundle, tab 16, page 474.

19 This really takes us back to a question that you asked me earlier, which is where do
20 you draw the line. Can I just ask you to read paragraphs 50 and 51 to yourself? It's
21 really a slightly more complete answer to the question that you put to me earlier.

22 Now, the second stage of the analysis is to reach an --

23 JUDGE WOLFFE: Before you go there, Ms Demetriou, I'd just like to clarify one point.

24 You made a point that, although these proceedings were certified 18 months ago, that
25 we're only at the close of the pleading stage, do I take it from that that you accept that
26 the fact that proceedings have been commenced and work has been done and that

1 the procedure has reached a certain stage is a factor or do you not accept that.
2 Because I took it from the way you put it that, if we were further down the line in terms
3 of the filing of evidence, the position might be different.

4 MS DEMETRIOU: Yes. I think there are two questions. One is: is the tribunal
5 permitted in law to have regard to that factor? Answer: yes. We don't say that it's not
6 a permissible factor for you to take into account.

7 JUDGE WOLFFE: Yes.

8 MS DEMETRIOU: But we say, in the circumstances of this case, it's a factor which
9 should be given very little weight and, certainly, it is not capable of outweighing the
10 very strong steer given by the practicability factor, in light of what the Supreme Court
11 has said in Evans. I make a couple of points. One of them is the point I've already
12 made, that this is actually an early stage of proceedings. So, if the tribunal is not willing
13 to review certification at this stage, ie before anything has actually happened, then
14 when? And we know that the tribunal has an ongoing function. So it's not a weighty
15 point.

16 Secondly, Dr Ennis says, "Well, we've spent a lot of money on these proceedings
17 already". They say they've spent £7.4 million. Now, just pausing here, we say that
18 that is, with respect, an extraordinary sum for the class representative to have incurred
19 at this early stage of proceedings where not much has been done. The size of that
20 total figure suggests that it includes costs which could never be recoverable. We say
21 that, if anything, the fact that the class representative has spent so much to achieve
22 so little is a reason why it might be thought to be more desirable to have engagement
23 by class members -- as you would have in an opt-in procedure -- to keep the class
24 representative's expenditure within reasonable limits.

25 Now, on that -- and I make this point by way of parenthesis -- we have the recent
26 judgment of the tribunal in the salmon proceedings, it was handed down the other day.

1 One of the points there -- and this tribunal will know that the tribunal did not certify the
2 salmon proceedings but gave them another opportunity to come back. One of the
3 reasons for this was that the tribunal did not consider that the PCR met the conditions
4 for authorisation. Let me just show you, briefly, one of the reasons for that. If we go
5 to the authorities bundle, tab 37.1. I want to take you to 1935.25. If you look at
6 paragraph 54, one of the tribunal's difficulties with authorising that class
7 representative, we can see from paragraph 54, was that she was charging £300 an
8 hour for her services. The tribunal found that that was excessive and unexplained in
9 the evidence.

10 Now, in these proceedings, Dr Ennis is charging £400 per hour. That has also not
11 been explained properly. If that is part of the reason underlying the massive costs that
12 have been incurred so far then, obviously, that's a point which counts against Dr Ennis
13 rather than in Dr Ennis's favour.

14 But, again, the other point we make is, standing back -- and this comes back to the
15 point put to me by Professor Neuberger and also by you, sir -- if you're with me on our
16 application then, of course, it's open to Dr Ennis to come back with a properly formed
17 opt-in claim and all of the work that's been done so far won't be wasted in those
18 circumstances. So it doesn't really avail Dr Ennis to say, "Oh, well, I've spent all of
19 this money and it will all go to waste", in circumstances where, objectively, opt-in
20 proceedings are practicable. So that's what we say about that factor. Sorry, that was
21 a rather long answer to your question.

22 JUDGE WOLFFE: Not at all. I was just keen to be clear as to whether you agreed or
23 didn't agree that the procedural stage was a factor that could be taken into account.
24 You've made your position very clear --

25 MS DEMETRIOU: Yes, and I agree with that. We say in this case it should not be
26 given any material weight.

1 Moving back to practicability, the second stage of the analysis mandated by the
2 Supreme Court is to step back and reach an overall conclusion about practicability in
3 order to determine where the balance of justice lies. As to this, there is a small
4 subclass of developers with large claims for whom opt-in proceedings would clearly
5 be practicable. Those claims form the vast majority of the aggregate claim value.
6 There is another subclass: the large majority, by number, of developers whose claims
7 are a tiny proportion of the aggregate value. Regardless of whether opt-in
8 proceedings would be practicable for those claimants, the existence of those claims
9 should not change the overall assessment because their value is a small proportion of
10 the aggregate value of the claim. Indeed, whether those developers opted in or opted
11 out would make little or no difference to the aggregate award of damages, which is
12 quite a good way of testing the point.

13 The Supreme Court was very clear that in circumstances such as this, the tail should
14 not be permitted to wag the dog. It was very clear that the collective action regime is
15 not designed to alleviate all class members from the entirety of the risks that they
16 would otherwise encounter in litigation. So we say, standing back, this case is
17 a paradigm of what the Supreme Court had in mind the tribunal must do when
18 examining classes with clear differences between members with large claims and
19 members with small claims. As I've said, it's an even stronger case on its facts than
20 Evans. If you ask yourself, "What would the tribunal first time round have done if the
21 Supreme Court had given its judgment in Evans just before the certification hearing?"
22 Well, we say it obviously would have said that opt-in proceedings are practicable,
23 applying the principles laid down by the Supreme Court, and that these proceedings
24 should not be certified on an opt-out basis. Any other outcome would have involved
25 the tribunal, disregarding the principles that the Supreme Court had laid down. We
26 say precisely the same is true now. Applying the principles laid down by the

1 Supreme Court, it's hard to think of a case which is more obviously practicable on an
2 opt-out basis.

3 Now, the arguments made by Dr Ennis in response are themselves inconsistent with
4 the Supreme Court's ruling. Can I just ask you to pick up Dr Ennis's skeleton argument
5 behind tab 15 of the core bundle, taking it from page 441. We see the summary, at
6 paragraph 5.2, of the submissions on practicability. If we look at the first two factors,
7 "The class is numerous and the vast majority of the claims are small" [as read]. Their
8 reliance on those factors is flatly inconsistent with the principles laid down by the
9 Supreme Court and completely ignores the two-stage process. It's focusing solely on
10 the large number of small developers with very small claims.

11 Now, the third point, cost and delay, I've addressed you on in response to the chair's
12 question.

13 The fourth factor is an allegation that opt-in proceedings would be impracticable
14 because developers fear retaliation. Now, that's a statement of their subjective state
15 of mind; not permissible. The Supreme Court has confirmed that subjective factors
16 have no place in the tribunal's assessment of the practicability of opt-in proceedings.

17 Now, the class representative says, if we look at paragraph 42 of the skeleton
18 argument, the evidence is not subjective. He says:

19 "Much of the evidence is of public statements that express a fear of Apple. This
20 evidence gives a general, objective picture of how participants in the market tend to
21 behave." [as read]

22 But the evidence relied on is not objective in any proper sense. It is concerned with
23 the views of particular developers, vis a vis Apple. You can see that in the immediately
24 next paragraph, which refers to the witness statement of Mr Newman, describing
25 a deep-seated fear of retaliation from Apple if any of his association's members raised
26 concerns, et cetera. This is all about the subjective state of mind of the members of

1 his association.

2 But the second point is that the evidence put forward by Dr Ennis is incredibly thin and
3 unspecific. It certainly can't be relied on to substantiate an argument that the large
4 developers that make up the vast majority of the claim would be intimidated by Apple
5 into not joining opt-in proceedings.

6 Now, you've seen from these paragraphs of Dr Ennis's skeleton, that he relies also on
7 evidence from Mr Geradin and Mr Mansfield. You see that in the footnotes. I don't
8 know if the tribunal's had the opportunity to read those statements at all, but the
9 evidence is hearsay evidence which is unspecific in nature. I'll just show you an
10 example. Mr Geradin's statement, if we go to the supplementary bundle at tab 1,
11 page 10:

12 "App developers of various sizes have given accounts of Apple retaliating." [as read]
13 So that's hearsay evidence about their subjective state of mind, cherry picked. But
14 then, if we go to 34.3, just by way of example, you can see that one developer named
15 by Mr Geradin is Spotify. I don't have time to take you to it but Mr Watson's third
16 statement -- I'll give you the reference which is supplemental bundle 1, tab 8,
17 page 328 -- explains that Spotify is, in fact, just one example of developers who have
18 bought proceedings against Apple or made complaints to regulators. So, really, the
19 difficulty in drawing any conclusions at all from this sort of generalised hearsay
20 evidence put forward by the class representative is precisely why the Supreme Court
21 found that the subjective views of class members should not be taken into account
22 when determining whether proceedings should be certified as opt out as opposed to
23 opt in. Because the tribunal simply can't be confident that it has an accurate picture
24 of the subjective states of minds of the class members, let alone the large class
25 members who make up the bulk of the claim. So it's not appropriate for the tribunal to
26 take account of such matters for the purposes of assessing practicability.

1 Now, I'm going to turn, finally, to the strength of the claim on which Dr Ennis has placed
2 much reliance. If we could go back, please, to Dr Ennis's skeleton argument, behind
3 tab 15. You can see, first of all, if we look at paragraph 4, for example. It's just an
4 example of where the skeleton argument is replete with reliance on the outcome in
5 Kent. You see that very clearly from paragraph 4. The claims are strong, there's
6 a direct vindication of Dr Ennis's case in the tribunal's Kent judgment, and this goes
7 all the way through the skeleton argument. So, 6:
8 "Tribunal's ruling in Kent underscores the considerable strength of the present claim."
9 [as read]
10 7:
11 "Clear in the light of Kent, Apple has no meaningful defence to Dr Ennis's claim." [as
12 read]
13 All of this is inadmissible and these are submissions on which the tribunal is precluded
14 from placing any weight as a matter of law.
15 Now, let's see what Dr Ennis's alternative submission is, and we can see that from
16 paragraph 23. In fact, let's take it from paragraph 22:
17 "Common ground that Hollington doesn't stop this tribunal from reading the judgment
18 in Kent for evidence of underlying facts. The Supreme Court said that where, as here
19 a defendant was a party, [. . .] [it] may be prevented from contesting those findings via
20 the doctrines of issue estoppel or abuse of process.'" [as read]
21 Now, if that is a point, that's not a serious point because, obviously, Apple is permitted
22 to raise whatever defence it wants in the Ennis proceedings. It's not bound by the
23 Kent judgment in any respect. I think we know it's not a serious point because it's just
24 not developed. It's thrown out there. Then:
25 "Hollington is about facts, not law." [as read]
26 Correct. Then 23, let's see where this goes:

1 "In light of the above, the following can be given as examples of the many and various
2 conclusions that the tribunal can, at this stage, draw from Kent." [as read]

3 Now let's have a look at them. The first is:

4 "Market definition and dominance. The Kent tribunal accepted that Apple held
5 a monopoly position in the stated market." [as read]

6 Now, pausing here, that's the tribunal's conclusion.

7 We had a whole trial on market definition and dominance on the basis of evidence
8 submitted by both sides. These are the tribunal's conclusions on market definition and
9 dominance. They're not facts. In the same way that the commission's conclusions on
10 the market and the effects of the exchanges in FX weren't admissible, the tribunal's
11 conclusions on market definition and dominance are not admissible. 23.2,
12 excessiveness:

13 "The Kent tribunal found that Apple's return on revenue was over 74%." [as read]

14 Again, that was a contested point. There was evidence on both sides. My learned
15 friend is completely misunderstanding the import of the Supreme Court's judgment on
16 admissibility if he thinks that relying on a conclusion is permissible. It's just not
17 admissible for that purpose. 23.3:

18 "The Kent tribunal said the high profits themselves indicate unfairness." [as read]

19 Again, a hotly contested question. Apple's argument, amongst many arguments, was
20 that they weren't unfair because of all exceptional value that Apple provides to
21 developers and that the commission is in return for that.

22 Now, it lost that argument in Kent, subject to appeal, but this is the tribunal's conclusion
23 they're relying on. 23.4, "unfairness judged by reference to comparators". Exactly the
24 same point again applies.

25 23.5, the point about value provided by Apple. Again, this was a conclusion reached
26 by the tribunal following the evidence and submissions on each side.

1 23.6, the same.

2 23.7, the same.

3 Every single one of these examples is an example of an inadmissible conclusion. And
4 there is actually, on analysis, nothing that's been put forward in my learned friend's
5 skeleton in relation to Kent that's anything other than an invitation for this tribunal to
6 act in a legally flawed way by accepting the conclusions of the tribunal in the Kent
7 proceedings.

8 Now, we say, and in fact just on the Salmon case, we see a recent example of the
9 tribunal getting that right. If we just pick that up again, it's in the authorities bundle at
10 37.1 and it's at the beginning of the judgment. So -- sorry, I've got -- bear with me
11 a second, the wrong -- here we are. So 37.1 of the authorities. 1935.6 is the page
12 number, and it's paragraph 4. You can see:

13 "PCR makes reference to various commission views, the recent observations of the
14 Supreme Court in Evans make clear that it's not open to this tribunal to attach weight
15 to the evaluative decisions of another decision maker." [as read]

16 Obviously, that applies to the evaluative conclusions of the tribunal itself in another
17 case.

18 Now, in any event, we say there are problems with Dr Ennis's case that didn't arise in
19 Kent, and let me take -- in view of the time -- let me make this point good by reference
20 to our skeleton argument, which sets it out reasonably fully. And it's, again, tab 16,
21 page 479. These are the points about applicable law and so on. And it's
22 paragraph 64. Can I just ask the tribunal just to remind yourselves, just to read
23 paragraph 64 to yourself, and I'll make a couple of short submissions. (Pause)

24 Now, as to the point at paragraph 64C, Dr Ennis says in his response to the application
25 that even if he's wrong about the applicable law points, a very significant claim would
26 remain. However, such a claim would still be a small proportion of the total commerce.

1 And can I just give the tribunal an idea of numbers? If we go back to the supplemental
2 bundle, please, volume 1, tab 10, and these are the calculations of Dr Ennis's own
3 expert. So supplemental bundle, tab 10. It's in the second supplemental report of
4 Mr Perkins. And if we go to page 496, please. (Pause)

5 Do you see the table, table 3.1? And you can see that in the bottom row of that table,
6 Mr Perkins estimates the total commission that's paid by UK developers. And you can
7 see that the total sum on the basis of worldwide transaction data is significantly higher
8 than the total commission paid on the UK transaction data, and that's despite the fact
9 that the period for worldwide transaction data is much shorter than the period for UK
10 transaction data, and in any event, Dr Ennis's own case only claims for a portion of
11 these figures. And so we say that the applicable law issues thus affect the vast
12 majority of the commerce. It follows that if Dr Ennis is wrong about applicable law,
13 then the class members claims viewed as a whole are significantly smaller and these
14 challenges faced by Dr Ennis have been recognised by the tribunal, albeit it hasn't
15 struck the claims out. But it's -- if I can put it this way -- a significant shadow hanging
16 over the claims.

17 And so we say that the merits factor is not a factor that weighs in favour of opt-out
18 proceedings in this case, and we say that taking account and applying the principles
19 laid down by the Supreme Court and focusing on practicability and how close to the
20 end of the spectrum on very obviously practicable we are, there would be no
21 reasonable basis, we say, for the tribunal to conclude that merits counteract the clear
22 consequences of the practicability factor.

23 Now, I've already made my points about -- I think the only other point made by
24 Dr Ennis, in terms of factors that are relevant, is the stage of the proceedings, and you
25 have my submissions on that.

26 I think there's just one point -- you asked me, sir, about the data on the very large size

1 of some of these developers and you asked me to what extent it correlated with the
2 breakdown of the developers that had the largest claim and I said in a general sense,
3 it does, obviously so, because large developers are always -- a lot of their commerce
4 is going to be on Apple. I showed you Mr Watson's statement. The figures are
5 confidential, but I can tell you that the very large entities that we pointed to in our
6 skeleton argument, so including Bumble and Match and Universal, the ones that you
7 were asking me about, I'm not going to give you their ranking, but they do fall in the
8 small number of large developers with very large claims. It's confidential; if the precise
9 detail matters, we can clear the court.

10 JUDGE WOLFFE: It may not. It may not.

11 MS DEMETRIOU: Unless you have any further questions for me, those are Apple's
12 submissions.

13 JUDGE WOLFFE: Thank you very much. I just have one question. You make a point
14 about the jurisdiction and applicable law argument, and I'm just asking this as
15 a hypothesis; you shouldn't read anything into it. But as with the practicability
16 question, on the merits side, if the tribunal were to take the view that a part of the claim
17 has strong merits and part of the claim is weak or less meritorious or neutral or
18 whatever, you know, would there be scope for the tribunal in the evaluative judgment
19 to take that into account?

20 MS DEMETRIOU: Sir, absolutely, and we say not only scope, but you should do that.
21 If your view is that merits is a factor that is relevant in this case, it's always -- of
22 course -- permissible to look at merits, but if your view is that there are factors relating
23 to merits that should be weighed in the balance, then absolutely it's critical that you
24 take an overall view and that does require you to look at the very long shadow that's
25 cast over these proceedings by the applicable law and jurisdictional issues.

26 JUDGE WOLFFE: Yes, right. I suppose just as you've distinguished on practicability,

1 you've said there's a small group with large claims and a long tail with very small
2 claims. Equally, could the tribunal in the overall weighing say, well, there's a smaller
3 part of the overall claim, but nevertheless still a very large claim, where the
4 tribunal -- let's say for the sake of argument, considers the merits are strong, but
5 there's also the residue, where the tribunal considers the merits are weak. Again, the
6 tribunal would weigh that as part of its overall evaluative judgment, assuming, as you
7 say, merits are, in principle, going to be of relevance in this case.

8 MS DEMETRIOU: Yes, in principle, but of course the claim as formulated as an
9 opt-out claim, is a claim which does rely on a claim being made in respect of the
10 contested jurisdictions, if I can put it that way. So the claim as formulated includes
11 parts which we say are weak. And so I don't think, with respect, it's open to the tribunal
12 to say, "Well, we're going to hive off this part of the claim", because you're looking at
13 a claim that's been formulated by the class representative.

14 And so I don't think it would be permissible at this stage for the tribunal to say, "Well,
15 we're going to treat part of the claim as being hived off", because that's not the claim
16 that you've been presented with, or that the previous tribunal was presented with, for
17 certification purposes. It may be that no funder would have been interested in such
18 a claim.

19 So that's what we say to that, and of course you have -- I'm not going to repeat my
20 overall submission, which is that really on analysis, all of the points made by my
21 learned friend in his skeleton argument about the merits being strong are points which
22 depend on the tribunal's conclusion and so they're not admissible points.

23 JUDGE WOLFFE: We've got that point.

24 Thank you very much, Ms Demetriou. Mr O'Donoghue, do you want to make a start
25 at 2.00?

26 MR O'DONOGHUE: If we start at 2.00, then limber up now for a couple of minutes.

1 JUDGE WOLFFE: Yes. No, that that's fine. If we make a start at 2.00, are you
2 reasonably confident that we'll conclude today?

3 MR O'DONOGHUE: Yes. I spoke with Ms Demetriou, she says she needs 15 to
4 20 minutes to reply on the basis that (inaudible).

5 JUDGE WOLFFE: Excellent. Thanks very much.

6 (12.56 pm)

7 (The short adjournment)

8 (2.02 pm)

9 JUDGE WOLFFE: Mr O'Donoghue.

10

11 Submissions by MR O'DONOGHUE

12 MR O'DONOGHUE: Sir, in my respectful submission, this application has shades of
13 surrealism that would make Rene Magritte blush. At the time it certified these
14 proceedings in 2024, Apple essentially made one argument on the debate on opt-out
15 versus opt-in, that a large proportion of the value of the claim was accounted for by
16 a relatively small proportion of developers and that it was reasonable to expect such
17 claims would be book built via opt-in proceedings.

18 That argument was fully considered and dismissed on no less than three occasions:
19 first in the certification ruling and then twice in permission to appeal rulings by the
20 tribunal and Court of Appeal. So the contrary was not even considered arguable for
21 appeal purposes.

22 Apple now wants a fourth bite at the cherry. It does not suggest any new and material
23 facts have emerged. One of the most striking features of Ms Demetriou's submissions
24 is that she is "reheating", essentially, the same factual material as was before the
25 tribunal in 2024 and the Court of Appeal in permission to appeal following on from that.
26 Her argument essentially hinges on a contention that the Supreme Court in Evans has

1 applied a new legal framework; the tribunal has somehow misapplied the legal
2 principles concerning that framework. But as I will show the tribunal that the
3 Supreme Court judgment in Evans does not establish a new principle of law that
4 impinges on the tribunal's original assessment of opt-out. It was concerned with a well
5 established principle that an appellate court should not interfere with a multifactorial
6 discretionary assessment by a first instance court, particularly as here, where that first
7 instance is a specialist tribunal. But this is not new law that bears on this application.
8 Indeed, the criticism in Evans was that the Court of Appeal recognised this established
9 principle, but did not adhere to it.

10 Now, in my submission, there's been an important concession by Ms Demetriou, which
11 is for this application to get off the ground, Apple needs to identify something new and
12 material that was not before the tribunal in 2024, and for the reasons I will develop,
13 there is no such material in this case.

14 MS DEMETRIOU: Sorry, I haven't conceded that there has to be something -- just so
15 that my learned friend doesn't go off on the wrong tangent, I fully accept that our
16 arguments are the same as before the tribunal, so I certainly haven't conceded there
17 has to be something new that wasn't before the tribunal.

18 MR O'DONOGHUE: Well, that's helpful. In that case, I will develop for the tribunal
19 why Ms Demetriou is wrong to withdraw that concession and not to make it in the first
20 place. So that's the first point in outline.

21 The second point is that if, contrary to my first point, it is appropriate to revisit the entire
22 question of opt-out certification, the first mandatory criterion in rule 79.3, "claim
23 strength", now points overwhelmingly to the continued suitability of opt-out. The claims
24 were always strong, as set out in our claim form and expert report, so much so that
25 Apple did not even argue claim strength when it came to opt-out at the certification
26 stage.

1 But the claims are now undeniably strong following Apple's overwhelming defeat in
2 Kent, where the entire predicate of £1.5 billion of damages suffered by consumers was
3 that it was the developers who were ripped off for many years by Apple through unfairly
4 high commission charges. This application therefore stands for an extraordinarily
5 stark vista, that an overwhelmingly strong case where about 13,000 developers who
6 have strong and certainly valid claims should now come to a complete halt. The case
7 should be de-certified.

8 Come back to Ms Demetriou's suggestion on the hoof. We could try a little bit of hybrid
9 and see how that goes, but we would suggest that the complete de-certification of
10 these proceedings in these circumstances cannot be consistent with the proper
11 administration of justice. Apple's only response to Kent is a hopeless attempt to
12 airbrush Kent from existence or, in a bizarre feat of denialism, to suggest that strength
13 is no more than a neutral factor. As I will show the tribunal, Ms Demetriou is simply
14 wrong in law to make those submissions in the context of this application.

15 The third point is that if it is appropriate to revisit the entire question of opt out,
16 consideration of the second mandatory criterion, practicability, now points even more
17 strongly to opt out. The class is very numerous indeed, the overwhelming majority of
18 claims are small, and there is new evidence on developer fear of retaliation from Apple
19 that could adversely affect the scope for opt in.

20 The penultimate point is that Apple is wrong to say that in the light of Evans in the
21 Supreme Court the tribunal has misapplied the test or framework for practicability.

22 This is Ms Demetriou's two-stage point. The tribunal did consider at paragraph 56 the
23 possibility of distinct class member cohorts, and then made an overall evaluative
24 assessment that opt out would not work for the class or the proceedings. In my
25 submission, Evans is not only not inconsistent with that approach, but it fully supports
26 that approach as a matter of analysis. In my submission, this is an application where

1 Apple doesn't seem to want to take yes for an answer.

2 The final point is -- as the chair picked up at the outset -- rule 79.3, in addition to the
3 two mandatory factors, allows the tribunal to take account of all matters it thinks fit,
4 including, but not limited to, the considerations in 79.2. In this context, we rely on five
5 factors.

6 First, the claims are well advanced, having been set down to trial with the full set of
7 directions and a whole series of interlocutory applications and case management
8 conferences, with a further case management conference scheduled in a couple of
9 weeks. The class representative and the tribunal have invested considerable time,
10 effort and expense in these proceedings, which were issued almost three years ago.
11 De-certification would mean that all of this time and a substantial seven-figure sum
12 invested in these proceedings by Dr Ennis and his insurers and funders is essentially
13 wasted.

14 We say this in part because there is uncontested evidence that funding is likely only
15 to be available on opt out terms. That's the second factor.

16 The third factor is there is a strong public interest in consistency across the treatment
17 of developer claims and a real risk of competitive distortions between developers in
18 the event of fragmentation or inconsistency. In our submission, opt out remains the
19 best, indeed, we say only, way to secure this important consistency objective.

20 Fourth, the homogeneous nature of the class, all are UK-domiciled app developers
21 with a common interest in paying lower lawful commissions.

22 Finally, de-certification of the opt out claim would likely mean that over 98 per cent of
23 developers are deprived of an ability to claim, just because it is said 2 per cent of the
24 class have bigger claims. We said that would be profoundly unjust to the bulk of the
25 developer market who would be left, we say, remediless. And this is simply not in the
26 public interest.

1 So starting with my first point, there is no basis for revisiting the tribunal's original
2 assessment. If I can invite you, sir, to turn up the Tibbles case in tab 8, the first
3 authorities volume. Sir, if we can start on page 50. Just to give a context. Tab 8, sir.
4 So this is Lord Justice Rix in the Court of Appeal.
5 You'll see, sir, from paragraph 1, about the powers to "vary or revoke" an order, and it
6 is said to raise an important point of principle.
7 Then at paragraph 6, over the page, you will see the relevant CPR rule. Like the rules
8 in this case, it is expressed without any apparent limitation.
9 Then, I won't read it out but I invite you, sirs, to look at paragraphs 2 to 4. You will see
10 the contours of the dispute. Essentially a first instance judge thought he could vary or
11 revoke the order, and the first layer of appeal judge considered he could not, and
12 Lord Justice Rix had to determine who was correct.
13 Then, sir, on the questions of principle, if you turn then to page 54 at 27 to 38,
14 Lord Justice Rix goes through quite a large number of cases, and then on page 59 he
15 distils the case law into a series of propositions or principles. So, sir, page 59, then
16 (i), he says:
17 "The rule is apparently broad and unfettered, with considerations of finality, the
18 undesirability of allowing litigants to have two bites of the cherry, and the need to avoid
19 undermining the concept of appeal, all pushed towards a principled curtailment of an
20 otherwise apparently open discretion." [as read]
21 Then in (ii), the second part:
22 "The primary circumstances in which the discretion may as, a matter of principle, be
23 appropriately exercised [. . .]: a) where there's been a material change in
24 circumstances the order was made, or b) where the facts which the original decision
25 was made were innocently or otherwise misstated." [as read]
26 Then (vii) at the bottom of the page:

1 "The case as considered above suggested successful invocation of the rule is rare.
2 Exceptional is a dangerous, a sometimes misleading word, however, such is the
3 interest of justice in the finality of a court's orders that it ought normally to take
4 something out of the ordinary to lead to variation or revocation of an order, especially
5 in the absence of a change in circumstances in an interlocutory situation." [as read]

6 Then over the page, he says:

7 "It may well be there is room within CPR 3. 1(7) for prompt recourse back to a court
8 dealing with the matter, which ought to have been dealt with, but which generally was
9 overlooked." [as read]

10 That is essentially a slip of pen point. Then 42 is very important:

11 "I emphasised, however, the word 'prompt', the court would be unlikely to be prepared
12 to assist an applicant once much time has gone by. With the passing of time, there is
13 likely to come prejudice for a respondent who is entitled to go forward in reliance on
14 the order that the court has made." [as read]

15 This, sir, picks up on a point the chair made, "Well, is the delay or the effluxion of time
16 in the raising of the application a relevant factor? We say, emphatically, yes, it is an
17 important factor. Ms Demetriou -- it may be a function of absence in this case for the
18 last couple of years -- but she suggested at one point, "Well, we're not very far down
19 the track. Pleadings have just closed".

20 That is flat wrong. Factual evidence in these proceedings is due on 5 October of this
21 year. We have a full set of directions to trial. Last September, we received 1.7 million
22 disclosure documents, which we are actively reviewing. So the suggestion this case
23 is in the foothills is simply wrong. It is very, very substantially advanced, with a further
24 CMC to come in two weeks' time. That, in my submission, is a very significant factor
25 in the context of this application.

26 I'll come on to the point, sir, but you will have seen in Evans that there was four years

1 of book building for potential opt in proceedings. You'll have seen references in our
2 skeleton to the CICC case, which suggests a period of around nine months of potential
3 book building, again for opt in proceedings. With a trial date in early 2028, anything
4 other than the continuation of the existing directions to trial would lead to the
5 adjournment of the trial and substantial delay. In reality -- and we suggest this is
6 Apple's true objective -- we are looking at best at a trial many, many years into the
7 future. It may become an actuarial question as to how many of us indeed get that far.
8 So this is a transparent attempt to kick this into the longest possible grass, and I want
9 to make that very, very clear from the outset.

10 Now, there was an unworthy attempt, in my submission, to criticise the costs we've
11 incurred to date. For perspective -- Mr Frazer may remember this -- the (inaudible)
12 costs in Kent, I think, were just under £25 million. We are about a third of that today
13 and we suggest, with all directions to trial set down, we are well on track to come within
14 that sort of order of magnitude. So we do not accept in any shape or form the unworthy
15 criticisms made by Ms Demetriou of the money spent, or indeed there's anything out
16 of the ordinary about that.

17 Again, there was an equally unworthy attempt to criticise the class representative's
18 hourly rate. Again, we say it is in Dr Ennis's credit that he is conscientiously taking an
19 interest in these proceedings in the interest of the class as a whole.

20 So we say, as a starting point, it is incumbent on Ms Demetriou to identify a new and
21 material change in circumstances since the original certification decision. We also
22 say, secondly, that the effluxion of time, the delay in bringing this application when we
23 are proximate to trial and all steps have been laid down and substantial sums incurred,
24 is a prejudice to the class representative and the class members in terms of the timing
25 of this application. That is a factor, we say in the tribunal's multifactorial assessment.

26 Now, I will come on, as I said, sir, as part of my fourth section, to deal with

1 Mr Demetriou's point that there has been a change in the framework for the
2 assessment of practicability as a result of Evans. We say that is simply wrong. But
3 subject to that point, which I will deal with, the tribunal, in my submission, is entitled to
4 ask itself, "Well, given that this is a fourth bite of the cherry, what has changed in the
5 intervening period?"

6 Certainly it is not any new factual material. It is recycling of the same arguments
7 rejected on multiple occasions already. The only basis which is put forward is the
8 Supreme Court's judgment in Evans. But we say that the story of evidence in the
9 Supreme Court is a remarkably straightforward one, and it was concerned with a --

10 JUDGE WOLFFE: Before you go there, do you accept that in principle
11 a -- I understand your headline point on Evans that you're about to come and elaborate
12 on, but let's suppose in a different case. There was a Supreme Court case which on
13 any view, as it were, changed the legal framework within which the tribunal had to
14 operate. There's a debate between you as to whether that's the position in here. But
15 let's suppose that that was the position. In principle, could that be a material change
16 of circumstance?

17 MR O'DONOGHUE: So to take an easy example, if there was a hard-edged point of
18 law where there had indeed been a sea change in the position as understood then,
19 yes, I accept that. But we're a million miles away from that. This is about evaluation
20 and discretion.

21 In a nutshell, we say the story of Evans is a straightforward one. It was concerned
22 with a familiar principle that an appellate court should not interfere with a multifactorial
23 discretionary assessment by first instance tribunal, absent an error of law. It said that
24 the Court of Appeal was wrong to second guess the tribunal's findings on strength,
25 practicability and other aspects as to why it rejected opt out.

26 We can see this very, very readily from the judgment itself. If we start at paragraph 77,

1 please, it's in tab 33 of the authorities bundle. The Supreme Court says:
2 "The Court of Appeal had no proper basis for interfering with the tribunal's assessment
3 of strength of the claim, or with the weight that the tribunal gave to that assessment
4 choosing opt out and opt in." [as read]
5 Then 128, it says:
6 "The essential error made by the Court of Appeal that it failed to follow the sound
7 guidance given in its earlier judgment in Le Patourel about the approach the Court of
8 Appeal should adopt when considering evaluative judgments and instead made its
9 own assessment." [as read] Now pausing there, that is a clear illustration as to why
10 there is no sea change in Evans, because the Supreme Court was saying, "Well, look,
11 hang on. In your own judgment in Evans, you cite your own judgment Le Patourel and
12 the principle of concurrent deference of restraint. Then you fail to adhere to that
13 principle when you made your assessment".
14 So there's nothing new in this. It is a failure to apply a well-established principle.
15 Now we don't need to turn it up, but when this tribunal refused permission to appeal
16 against opt out, one of the cases referred to -- well, perhaps it is useful to turn it up
17 briefly. It's in core bundle, tab 8 at page 289. So it starts, "there is no real prospect"
18 and it's the second part. So they cite La Patourel, which we've been discussing, and
19 they cite a case in 2013, Re TG, and the principle is:
20 "... will not interfere with such an assessment unless it's persuaded the judge urged
21 principle [and so on] ... generous ambit of the discretion entrusted to the judge." [as
22 read]
23 So this is a very, very old principle indeed. It was, in fact, the principle applied by this
24 tribunal in refusing permission to appeal on the question of opt out. So there really is
25 nothing by way of sea change or novelty in that principle, established or reiterated by
26 the Supreme Court in Evans.

1 So we looked at 128 in Evans. Just a couple of more references, if I may. 133, the
2 last sentence:

3 "... it [the Court of Appeal] should have followed its earlier guidance given in
4 Le Patourel and refrained from interfering with the conclusion of the specialist tribunal
5 which, under the collective proceedings regime, has been tasked with making the
6 relevant evaluation, unless there was an error of law in the Tribunal's approach."

7 Then 109, a few pages back:

8 "The Court of Appeal should have left the evaluation of the strength of claim to the
9 specialist body entrusted with that task."

10 So we say, as a starting point, there is no new law, in this respect, in Evans. It is about
11 facts, discretion and noninterference. We say, therefore, that Apple's application
12 doesn't even get off the ground. Stripped of its rhetoric, Apple is saying it would like
13 a fourth bite of the cherry just for its own sake and that is simply not a proper basis for
14 reopening the whole issue of opt out. Indeed, if Apple were right, we'd be open to any
15 party in any case before the tribunal to revisit any order at any time, even if the party
16 in question had not bothered to appeal or had attempted to do so and failed. We say
17 that cannot be right. It is a recipe for chaos. The tribunal's docket is already
18 overwhelming, not just for collective proceedings. Apple's freewheeling and
19 unprincipled approach would decimate the docket by allowing any party to reopen any
20 order, apparently at any time, merely because there had been appellate litigation in
21 other cases and they would like to relitigate an issue.

22 JUDGE WOLFFE: Is that really correct? I think the rule that we're appointed to is
23 rule 85, which is concerned with the power, at any time, to vary or revoke the collective
24 proceedings order. So we're not talking about any ordinance the tribunal may make.
25 We're looking at a specific power, and I think that's reflected in the primary legislation,
26 if I'm not mistaken, where there's also provision of power to vary or revoke, at any

1 time, the collective proceedings order.

2 MR O'DONOGHUE: Well, that's true as far as 85 goes. Of course, the whole point of
3 Tibbles was that where there is a generalised and apparently unfettered power, it is
4 still subject to the threshold question as to whether there is a material change in
5 circumstances. So, in my submission, that would apply more generally, not merely to
6 rule 85.

7 MR FRAZER: But in Tibbles, the CPR 3.1(7), that was a general statement, wasn't it,
8 that a power to make an order includes the power to vary or revoke it? Whereas here,
9 we've got a very specific process under which the tribunal, even of its own initiative,
10 can keep under review a matter. Is it your submission that that is also subject to the
11 Tibbles rule, if I can put it like that, that it can only be own initiative or on application
12 when there's been a material change in circumstances?

13 MR O'DONOGHUE: Well, yes. Otherwise there was no (inaudible). This comes up
14 for grabs, seemingly, at any moment in time. There has to be some filter or threshold
15 for engagement because otherwise it is chaos.

16 MR FRAZER: But isn't that what rule 85.1 actually says? That there isn't a finality in
17 the sense that it's a continuing power. The tribunal may review or revoke
18 (overspeaking).

19 MR O'DONOGHUE: Well, there's obviously that possibility. My point is there has to
20 be a trigger. One cannot be trigger happy.

21 MR FRAZER: It's not at large, you're saying?

22 MR O'DONOGHUE: Indeed.

23 MR FRAZER: Okay, thank you.

24 MR O'DONOGHUE: So let me move to my second point on claim strength. Again,
25 just to anchor this at the level of principle within the rules and the tribunal's guidance.
26 We can start with Evans in the tribunal, which is tab 15 of the first authorities bundle.

1 It starts at paragraph 103. You'll see a reference to the tribunal's guide to
2 proceedings, 6.39:

3 "... the Tribunal will usually expect the strength of the claims to be more immediately
4 perceptible in an opt out than an opt in case ..."

5 And then the tribunal goes on to say:

6 "What the guidance is suggesting, rightly, is when assessing the significance of the
7 strength factor, the stronger the claim, the easier it is to justify an opt-out basis.

8 [Although it adds] It is quite possible, if other factors point in that direction, even for
9 a weak claim to be certified on an opt-out basis." [as read]

10 So we see from the tribunal that claim strength is critical to the issue of whether
11 a defendant might be disadvantaged by opt-out proceedings through being pressured
12 to settle weak claims. In my submission, what Evans does is it underscores this point
13 even further.

14 If we then jump forward to tab 33, paragraph 91. It says:

15 "If the merits of the claim are very weak, as the Tribunal assessed them to be in this
16 case, it is unlikely that the Tribunal will be justified in conferring on the proposed class
17 of claimants the significant leveraging advantage associated with opt-out proceedings.

18 To allow such a claim to go forward on that basis would be unlikely to be fair, as
19 between claimants and defendants, and would tend to be contrary to the obligation ...
20 under rule 4(1) to deal with the case 'justly' ..."

21 Then, just to give you the other reference quickly, 92, it speaks of extract value from
22 unmeritorious claims. It says:

23 "... the need to secure access to justice for claimants to vindicate meritorious claims.

24 [Then further on] ... if the claims are unmeritorious then ultimately no money is properly
25 or substantially in issue and the case is not important. [And the last sentence] ... did
26 not reflect meritorious claims. [And then it says] ... But if it appears that the claims do

1 not have merit, the proceedings will not contribute to the just resolution of the dispute
2 or to the genuine vindication of rights, and the cost involved will tend to be
3 disproportionate to those aims. Similarly, if the claims are of little or questionable
4 merit, the advantages for claimants associated with opt-out proceedings, and the
5 concomitant risk that this tactical advantage will result in the defendant settling the
6 case on terms which do not reflect the true rights of the parties, will be out of proportion
7 to those aims.

8 "94. To sum up, if the claim is very weak it is likely to be more difficult to justify resort
9 to the opt-out procedure ... It is also likely to be difficult to justify resort to opt-out
10 procedure as a proportionate way of providing access to Tribunal for the vindication of
11 such a claim [and] ... it is indeed appropriate, in our view, to view the strength of the
12 claim in terms of a sliding scale."

13 Then 96, that's the point we just saw. It says:

14 "The Tribunal analysed the pleaded causes of action with care, in the light of Mr Evans'
15 proposed economic theory of harm ... was both intrinsically weak and that it lacked the
16 necessary particularity ... On the basis that the pleaded claims suffered from such
17 fundamental weakness, we consider the Tribunal majority were right to regard this as
18 'a powerful reason against certifying on an opt-out basis' ..."

19 If we can go forward to 101:

20 "If the Tribunal is able to form the view not only that the claim has a realistic prospect
21 of success but that it appears to be a strong case, that will provide support for
22 a decision to make the proceedings opt-out."

23 Then 141, a few pages on:

24 "If clearly unmeritorious claims are allowed to proceed on an opt-out basis which
25 involves unjustified leverage advantage for claimants of the kind we have described,
26 the result will not be due enforcement of competition rules but over-enforcement,

1 | contrary to the public interest."

2 | Now, just to unpack this, we say this is crucial. The impetus for the collective
3 | proceedings regime was that the preexisting regime of individual claims or
4 | representative actions or group litigation orders did not serve the public interest in
5 | competition law cases. If we go back to the very first paragraph of Evans, the
6 | Supreme Court, tab 33, it says:

7 | "Anti-competitive behaviour can affect large numbers of people but the loss suffered
8 | by any one individual may be too small or hard to establish to justify bringing
9 | a separate claim."

10 | Now, in addition to the creation of an aggregate damages awards procedure, the
11 | collective proceedings regime created scope to have opt-out claims in a group
12 | litigation order. For example, the individual claimants still had to be identified and,
13 | again, there was a public interest in competition law cases and having such a new
14 | type of procedure of this kind. If we look at paragraph 3 of Evans:

15 | "Opt out collective proceedings are an especially powerful vehicle for seeking redress
16 | from alleged wrongdoers [and so forth] ... But [you see] they also carry the risk that
17 | defendants may be driven to settle unmeritorious claims by their sheer size and the
18 | heavy costs of defending them."

19 | By contrast, if the claim is strong, not only do these leveraging concerns via opt-out
20 | proceedings fall away but there is, in fact, a benefit in that it increases the likelihood
21 | that meritorious claims will be prosecuted which is in the public interest because it
22 | compensates victims and increases the deterrence for wrongdoers.

23 | If we quickly go back to Evans in the tribunal at paragraph 88(3), it says:

24 | "The benefits of class action regimes have been clearly articulated ... One
25 | consequence of class action regimes is that potential defendants become exposed to
26 | claims that might not otherwise be brought. That is a benefit, not a disbenefit."

1 It goes on to address some of the potential risks, citing Merricks's concern about
2 speculative actions. Then it says at the end:
3 "Recognising the concerns raised that this could lead to frivolous or unmeritorious
4 litigation, the Government is introducing a set of strong safeguards ... only meritorious
5 cases are taken forward ..."
6 Then finally, to wrap up on this at the level of principle, the Stasi judgment from
7 yesterday, Microsoft, tab 41. We would respectfully suggest that the judgment as
8 a whole merits reading in full. It is the first example, to our knowledge, applying Evans
9 in the tribunal. I'll come back to Microsoft on some other issues but, just on the
10 leveraging point, if we look at 115, it says Evans was:
11 "... principally the incentive to settle even weak claims for more than merely nuisance
12 value."
13 Then 138, the tribunal says the mischief in Evans was:
14 "... the involuntary grouping together of claims which were inherently weak on the
15 merits ..."
16 In other words, the chief lesson of Evans is the need to avoid blackmail litigation by
17 weak or frivolous claims. In my submission, this case is at the precise opposite end
18 of that. So the concern about opt out, about an unjustified leverage advantage,
19 evaporates or substantially fades into the background where the claim is not weak or
20 frivolous or speculative but is of a strong variety.
21 Now, just to round off on the issue in Evans, this would be --
22 JUDGE WOLFFE: Before you leave that --
23 MR O'DONOGHUE: Yes.
24 JUDGE WOLFFE: -- do we see the same point being made at 139? Rather explicitly.
25 This is the Stasi judgment:
26 "To begin with, we do not consider the Claim to be a weak one. Although we shy away

1 from characterising it as strong [for the reasons they explain. And they then go on to
2 say] We therefore do not regard the present as a case where the leveraging effect of
3 an opt-out certification would generate an unfair degree of pressure to settle a weak
4 claim."

5 That's really the point that you're making.

6 MR O'DONOGHUE: Sir, that's right. It's important because the point is an asymmetric
7 one. So if a claim is weak, then the concern is a blackmail litigation, or unjustified
8 leveraging is present. If the claim is viable, even if one cannot say with certainty it's
9 a surefire winner, the leveraging of blackmail concerns, they either evaporate or they
10 fade into the background. So we say that Evans in that sense functions
11 asymmetrically. The filter is a very weak claim. If there is such a weak claim, these
12 leveraging concerns arise. If we're not in that territory, that point either ceases to have
13 force or has considerably less force in the context of claims that are viable or strong
14 or very strong. (Pause)

15 Just to wrap up on Evans, Professor Neuberger will remember this, perhaps not with
16 relish, but there were some pretty fundamental gaping holes in Evans and O'Higgins.
17 And just to give you a flavour of what a very weak claim looks like, if we go back to
18 Evans and CAT at tab 15. So 375:

19 "Present case claims it's so weak, they're liable to be struck out as a powerful reason
20 against certifying on an opt-out basis." [as read]

21 So that's my asymmetric point.

22 Then 147, subparagraph 4:

23 "We consider a sufficiently exceptional case to warrant our raising considering the
24 question of strike outs of our own initiative." [as read]

25 So this was so concerning to the tribunal, after many, many days of argument,
26 cross-examination and expert reports, that they raised the question of weakness by

1 causation of its own motion.

2 And then 3851:

3 "Claims, as presently framed, are so weak that they are deserving of strike out." [as
4 read]

5 And then just to wrap up on what the particular issue was, if we then go forward to the
6 Supreme Court in tab 33, it's at paragraph 81. So it was essentially all about
7 causation. And there were two problems.

8 The first problem was, we see at 81:

9 "The pleaded case did not explain how it was alleged that transactions that were not
10 the subject of an unlawful information exchange were affected." [as read]

11 So that was the first problem.

12 Then at 82, we see the second problem:

13 "There was a further theory of harm of a market-wide umbrella effect, and the tribunal
14 said in causation terms, we simply don't understand by what mechanism it is said
15 people who were not involved in collusion or information exchange had transactions
16 that were affected." [as read]

17 So these were the particular difficulties.

18 And just, finally then, jump forward to Stasi 117, the Microsoft case. (Pause)

19 We see in the middle of 117, which tribunal said:

20 "In Evans the claim was a weak one, because it suffered from fundamental causation
21 problems." [as read]

22 Now sir, moving to the strength in the present case, taking a step back, we said the
23 strength of the claim in the present case is -- before one gets to Kent -- obvious. Apple
24 is unique in that it operates what is called a "closed ecosystem". From the outset,
25 apps run on devices using its iOS operating system could only be distributed via the
26 App Store, and payments in relation to those apps could only be made using Apple's

1 App Store payment system. Apple has therefore excluded all competition since the
2 introduction of the App Store in the UK in 2008, and this complete monopoly has
3 allowed it to extract a monopoly rent in the form of an unfair price.

4 In our amended claim form, we explain Apple's profitability is off the charts, well over
5 100 per cent on standard metrics such as return on capital employed and other
6 metrics. Its prices are therefore excessive in legal terms.

7 On the unfairness limb of the assessment, Apple's commission has been set under
8 conditions of total monopoly for almost two decades and is by definition not reflective
9 of the commission set under conditions of workable competition. It is the very
10 antithesis of total monopoly.

11 There are also strong comparators from PC App Store distribution, which suggest
12 a commission rate of ten to 15 per cent is a competitive rate, whereas Apple charges
13 two or three times these rates.

14 And finally, we also say that the commission should be even lower in the present case,
15 because Apple's commission takes no -- or certainly insufficient -- account of the value
16 the developers bring to the App Store. Apple is quick to champion its innovation, but
17 the stark fact is that it is responsible for 0.01 per cent of apps on the App Store;
18 99.99 per cent of apps on the App Store are developed by third parties. It is
19 developers who are the innovators and that should be reflected in the commission
20 charged, rather than developers being ripped off by Apple for many, many years. So
21 that's at a high level.

22 Then of course, sir, we have Kent. I will deal head on with Ms Demetriou's Hollington
23 submissions shortly; there is nothing to them. Just to give a flavour of where Kent we
24 say takes us, we go to paragraphs 18 to 23 of our skeleton, we go through the building
25 blocks for the elements of the analysis of where we say Kent takes us. And I'm not
26 going to go through each one, but Ms Demetriou I think has touched on some of them.

1 But so what we've tried to do in relation to the elements of market definition,
2 dominance, excessiveness, unfairness, objective justification and so on, is give some
3 indication of where Kent we say takes us. (Pause)

4 Now, Ms Demetriou has said more than once -- including in her skeleton -- that the
5 claim strength is no more than a neutral factor. We say that is clearly wrong, both at
6 the level of principle and at the level of practicality in this case. At the level of principle,
7 if we quickly look at Evans and tab 33 of the Supreme Court judgment. (Pause)

8 We go to the end at 168(i). It says:

9 "The weakness of the claim was properly regarded as a factor weighing strongly
10 against opt-out proceedings. The merits of the claim are not a neutral factor." [as
11 read]

12 And then we see the leveraging point again being made -- again and again -- in context
13 of the weakness of the claim.

14 Now, turning to Ms Demetriou's Hollington point. As a starting point, it is quite
15 extraordinary that in circumstances where not that long ago it was being suggested by
16 Apple, and indeed by Dr Ennis, that because the court issues in Kent and Ennis were
17 essentially the same, that the cases should be heard together. So we've gone from
18 that to a volte face whereby it is now said the outcome of the trial in Kent and the
19 judgment is something to which this tribunal can have no regard whatsoever and that
20 really is an extraordinary submission, and unsurprisingly it is wrong.

21 And it is a very upside down submission for another reason: the only disclosure we've
22 had to date in these proceedings is the same disclosure that was given by Apple in
23 the Kent proceedings. So the evidence by way of disclosure to date in the Ennis case
24 is exactly the same as the contemporaneous documents disclosed by Apple in the
25 Kent proceedings. So the suggestion again that Kent tells us not a single thing about
26 the merits of this case is a very, very surprising one indeed.

1 Now, if we go back to Evans on the question of Hollington v Hewthorn, just to --

2 JUDGE WOLFFE: Just on your point about the application or the discussion about
3 the cases being heard together, as I read that -- but I then have to confess I've only
4 read it relatively quickly -- the tribunal accepted that there was a risk of inconsistent
5 outcomes if the cases were not heard together.

6 MR O'DONOGHUE: Yes.

7 JUDGE WOLFFE: It took the view that -- there are reasons to seek to avoid that, but
8 that in the particular circumstances of this case, those were overwhelmed -- as it
9 were -- by the delay that would be imposed on the Kent proceedings. So it seems to
10 be inherent in the decision of the tribunal at that stage that there was at least a risk of
11 inconsistent outcomes as a result of the proceedings being dealt with by a separate
12 tribunal.

13 MR O'DONOGHUE: In a sense, once they were uncoupled, that is a possibility, but
14 I don't think it's being suggested this was nonetheless desirable in a sense. But
15 I think -- I mean, if we turn to the Hollington points, maybe that would make the point
16 more concrete for my purposes. If we start at 168(iv) at the end of this (inaudible).

17 (Pause)

18 So again this is wrapping up on the key findings, the conclusions. So the finding in
19 Evans was that a decision of the commission containing findings of infringement
20 against a third party is not admissible, and so on. So the issue in Evans was a decision
21 addressed to a third party, not to the defendants in that case. So that's the first point.

22 Then, sir, if we can turn back to 145, which picks up on a point the chair put to
23 Ms Demetriou, which she rather skirted over. (Pause)

24 So there the Supreme Court says:

25 The unfairness concerns does not apply to someone who was a party to the earlier
26 proceedings and that obviously includes Apple in Kent.

1 The third point is: the rule is about findings in the other decision. So the rule, if it
2 applies, means that you cannot rely on the findings of the other decision maker. But
3 if the rule does not apply, which we say does not in this case, for reasons I will come
4 to, then you are at the very least entitled to rely on the findings made by the other
5 decision maker.

6 If we then go forward to 158 --

7 JUDGE WOLFFE: Do you say that generally, or are we speaking -- are we thinking
8 specifically of interlocutory proceedings?

9 MR O'DONOGHUE: Interlocutory -- so that's my next point and this really is the critical
10 one. 158:

11 It is permissible to refer to the earlier ruling when considering the strength of claims at
12 the interlocutory stage.

13 And as we see in the rest of 158, you see the quote from Mr Justice Mellor. It says:
14 "In identifying the evidence which can reasonably be expected to be available at trial,
15 to which the court is entitled to regard the interlocutory stage." [as read]

16 So, in my submission, in considering the strength of the claim at the interlocutory stage
17 which is plainly permissible, that also includes the evidence that underpinned the
18 findings made in that case for two reasons: one, because it indicates the evidence that
19 may well be available at trial; two, because in most cases, the findings which are
20 relevant to strength cannot be logically understood without having had regard to the
21 evidence that underpins them. So they go hand in glove.

22 Then, fifthly, there are other exceptions to the rule, or other instances in which does
23 not apply, including: one, demonstrating the evidence that can reasonably be expected
24 to be available at trial; two, for purposes of recording evidence of relevant facts. And
25 again, the last sentence of 159 is important. It says:

26 You see *Rogers v Hoyle* insofar as they record evidence of relevant facts, "it is only

1 insofar as such material contains opinions on matters of fact, as opposed to recording
2 evidence, that the material is inadmissible unless it qualifies as expert evidence." [as
3 read]

4 So there are at least three further exceptions: reliance for purposes of demonstrating
5 evidence that can be expected to be available at trial; evidence of relevant facts; and
6 thirdly, expert evidence.

7 JUDGE WOLFFE: So can I just understand the point you're making about 158. I'm
8 thinking about it in the context of what you say at paragraph 19 of your skeleton. Do
9 you say that we read down to the end of the list of cases and find in there the
10 proposition that a party may rely on findings of another court for the purpose of
11 demonstrating there's a serious issue to be tried.

12 MR O'DONOGHUE: Yes.

13 JUDGE WOLFFE: Then there's the quotation from Mr Justice Mellor, which talks
14 about a limited exception to the rule, which is about identifying the evidence which can
15 be expected to be available at trial. You say that's a separate proposition from the
16 one that we find in the first sentence of the paragraph.

17 MR O'DONOGHUE: Yes, we do, sir.

18 JUDGE WOLFFE: So you say that we read the first part as a narrative of cases which
19 hold that a party could rely on findings of another court on the question of issue to be
20 tried --

21 MR O'DONOGHUE: Yes.

22 JUDGE WOLFFE: -- and then we ought to read the quotation from Mr Justice Mellor
23 as a separate issue, which is about identifying evidence as opposed to findings.

24 MR O'DONOGHUE: Yes, exactly so, sir.

25 JUDGE WOLFFE: You say that findings in the first sentence includes or does not
26 include the kinds of opinions that are mentioned in paragraph 159. Sorry, I was giving

1 | you two alternatives. I'd welcome just absolute clarity about what your submission is.

2 | MR O'DONOGHUE: The most effective way for me to demonstrate this is if we can

3 | quickly look at the Microsoft case. It's a very concrete illustration of why there are

4 | these two points.

5 | JUDGE WOLFFE: Yes. But before you do that, perhaps I could just crystallise. When

6 | you talk about findings in that first sentence, do you include within that, in effect, the

7 | ultimate conclusion, the conclusions that the previous tribunal drew on from the

8 | evidence.

9 | MR O'DONOGHUE: Yes, otherwise it isn't findings.

10 | JUDGE WOLFFE: So it's not simply findings of fact, but also judgments and

11 | conclusions. You read that as a very broad --

12 | MR O'DONOGHUE: Yes. So Mr Carall-Green reminds me, the quote

13 | Mr Justice Mellor, the bit in brackets, inadmissible at trial, it is important.

14 | JUDGE WOLFFE: Yes.

15 | MR O'DONOGHUE: At the interlocutory stage, you can rely on the findings, even if it

16 | would be inadmissible at trial to make the argument at a later stage. That's the

17 | difference.

18 | JUDGE WOLFFE: Yes, but you say that the first part is --

19 | MR O'DONOGHUE: Free standing.

20 | JUDGE WOLFFE: -- is reliant on findings even which goes beyond identifying the

21 | evidence, which can reasonably be expected to be available.

22 | MR O'DONOGHUE: (inaudible)

23 | JUDGE WOLFFE: Yes, yes. Were you proposing to show us whether any of the

24 | cases referred to support that broader reading of what's said?

25 | MR O'DONOGHUE: We have some non-competition data in our skeleton and the

26 | Stasi case, the Microsoft case, as an example.

1 JUDGE WOLFFE: Okay.

2 MR O'DONOGHUE: I'll get the skeleton references in a second. If we can go back to
3 Microsoft and tab 40. So in a nutshell, sir, it confirms the tribunal can have regard to
4 the decision maker's findings when assessing strength of the claims at the
5 interlocutory stage. It also separately makes the point about evidence that may be
6 available at trial. So it is both.

7 Sir, on the non-competition cases, it is paragraph 21 of our skeletons and we refer to
8 a case called Sabbagh and a Tulip Trading (inaudible).

9 JUDGE WOLFFE: Yes. Those are cases that are amongst the list in paragraph 158.

10 MR O'DONOGHUE: So Stasi, if we then turn to paragraph 11. So the prior decision
11 was a CMA final report on the market investigation. That's at paragraph 11. And then
12 you will see at 99 the proposed class representative, she relied on the CMA market
13 investigation. She said "regulatory investigations demonstrate that the proposed claim
14 is strong enough to justify certification on an opt out basis". [as read]

15 Then if we go back to 73, the tribunal, chaired by Mr Justice Adam Johnson, so he
16 recognises the Evans and Hollington point. But if we then look at 75 to 82, he says
17 the PCR was correct to emphasise the significance in this context of the conclusions
18 expressed by the CMA in its final report, and he said:

19 "We consider the CMA's conclusions tell us something about the likelihood of the
20 evidence available at trial to substantiate the claim there has been abuse of a dominant
21 position [and so on]." [as read]

22 Now we say if that is true of a CMA market investigation decision, which is something
23 in some ways quite far removed from ex-post abuse of dominance legislation, the point
24 in relation to the Kent judgment in these proceedings -- where the predicate of the
25 overcharge to consumers was an overcharge suffered in the first instance by the
26 developers -- that is an overwhelming case relative to what we see in Microsoft.

1 Sir, as you adverted to earlier, this was in a context we see at 119 where the tribunal
2 did not feel able to agree with the proposed class representative submission that the
3 claims were strong and instead they said they had a reasonable prospect of success
4 at 125, an apparently viable claim with a good prospect of success, and 139, tangible
5 value promising but not without difficulty. Then 120 is important. It expressly based
6 those conclusions on the findings made by the CMA.

7 Then just to round off on Microsoft. So in the context of this, in some ways relatively
8 muted endorsement of the strength of the claim, we then look at 139. It's in the middle.
9 So in the context of a claim that wasn't overwhelmingly strong but was at least viable,
10 the tribunal decided that the leveraging effect of an opt out certification was not enough
11 to generate an unfair degree of pressure to settle a weak claim, and the tribunal
12 therefore decided to certify the case on an opt out basis.

13 We submit that if that case was strong enough for opt out, facing those uncertainties
14 and challenges, that a fortiori present case, which enjoys a comprehensive and
15 full-throated support in the form of Kent, must also be.

16 Then finally, on the question of leveraging, just to wrap this up before I move to my
17 third point. At 139, (inaudible) says:

18 "One would expect a company like Microsoft to have a high degree of resilience and
19 to be unlikely to be pressured into agreeing terms which it did not itself regard as fair."

20 Much the same could be said of Apple, with a \$4 trillion market capitalisation. We're
21 not dealing with a poor grandmother or litigant in person. Tribunal will have seen from
22 the application that it's signed by three king's counsel, including one from Hong Kong,
23 three juniors. It reminds me of something said of the general counsel of IBM in the
24 1980s in litigation, that he has an unlimited budget and he frequently overspends it.

25 So the idea that Apple gets shoved around by Dr Ennis, with respect, is for the birds.

26 So I'm moving to my third point. Would that be a convenient moment or?

1 JUDGE WOLFFE: Yes. Let's take 15 minutes.

2 (3.04 pm)

3 (A short break)

4 (3.22 pm)

5 JUDGE WOLFFE: Mr O'Donoghue, before we start, can I just remind you to give page
6 numbers for the references so that those of us who are using electronic bundles can
7 find them? Thank you.

8 MR O'DONOGHUE: So before I move on to, practicability, topic 3, can I just say
9 a couple of words on the applicable law. Now the antecedents of this point are that
10 we've already had two days of strike out before the tribunal on this. We've had one
11 day of a preliminary issue application followed by further written submissions. The
12 upshot of the preliminary issue application, which was rejected, was that the issues of
13 principle on applicable law and territoriality cannot, in fairness, be decoupled from the
14 issues at trial.

15 So I therefore make a modest submission at this stage, which is that it would be
16 prejudicial, in my submission, to say much beyond what has already been said on
17 applicable law, because it is all wrapped up in the issues at trial. Now, I don't need to
18 convince you today that this is an aspect of the case that is bound to succeed. It is
19 sufficient for my purposes to put this in Microsoft terms that, at the very least, there is
20 a viable case on the regression of applicable law and territoriality, if nothing else,
21 because it has been the subject of debate for many days and no-one has really said
22 otherwise. So that's the high level point.

23 We would urge some caution on the part of the tribunal, respectfully, about saying
24 "Well, applicable law, that has already been said."

25 The second point is, if the tribunal can look at paragraph 27 of our skeleton.

26 JUDGE WOLFFE: So just picking up your point about putting it in Microsoft terms.

1 I appreciate your point that one shouldn't be glossing what the tribunal, on what's
2 clearly a pretty technical issue, has already said. But would you invite this composition
3 of the tribunal to take the view that what was said by the tribunal falls within the
4 sentence? We see this as a more routine situation in which a claim is being advanced,
5 which, although promising, is still in its early stages and is not without difficulty. Or
6 would you say it although promising, is perhaps pushing it, given what the tribunal said
7 previously.

8 MR O'DONOGHUE: Well, I don't want to get too hung up on semantics. One
9 difference is we've had three days of debate on applicable law, and we're still heading
10 to trial on these issues. I think from my perspective, it is at least a novel point, that we
11 say is at least viable. I would take some persuasion to bid myself down any further
12 from that.

13 But on the skeleton, in any event, if you see the figures at the end of paragraph 27,
14 even if one stripped out those particular members of the class, it is still an enormous
15 claim. Now, it may be to a 4 trillion market cap company, hundreds of millions of
16 pounds is chicken feed, but not to the class members.

17 Finally, if indeed Ms Demetriou is correct, that we can put all this in the bin and assume
18 she wins hands down, then if value is shaved off of the total claim, that makes the
19 case for opt out even more compelling, because the average claim value will thereby
20 be reduced. So, in my submission, it actually works against Mr Demetriou.

21 JUDGE WOLFFE: Sorry, you'll just have to unpack that for me.

22 MR O'DONOGHUE: Well, the practical upshot of -- let's assume I'm wrong in
23 applicable on territoriality -- is that certain sales will fall outside the scope of damages
24 at trial. Now that will, on the face of it, reduce the total claim value and reduce certain
25 claimants from the scope of the class. That will drag down the average value of the
26 claims themselves. So that's a reason why opt out is more appropriate, not less.

1 Let's move to my third point, practicality. Again, just to anchor ourselves on some
2 important points of principle. We go back to Evans in the tribunal, at tab 15 of the
3 authorities. The paragraph is 121.

4 JUDGE WOLFFE: Page?

5 MR O'DONOGHUE: 409, halfway down. (Pause)

6 But as we've said in the context of strength, that is only one factor amongst multiple
7 whose weight will vary according to circumstances. We do not consider that these
8 words oblige the tribunal whenever opt in proceedings are practicable to resolve opt in
9 versus opt out issue in this way.

10 That is so for two reasons. One, the wording only provides the factor we take into
11 account. That's a discretion, not a requirement. Secondly, opt in proceedings may be
12 practicable, nevertheless extremely onerous when compared to the opt out
13 alternatives.

14 The next point picks up on what practicability means. It says:

15 We do not consider that the test of practicability can or should be reduced to a test of
16 what is theoretically possible. That is not what practicability means. It means
17 practicable from the standpoint of the members of the class concerned. That
18 assessment requires consideration of the practical bars to opting in.

19 And says at the end:

20 "The tribunal is obliged to consider from the totality of evidence before it, however
21 produced." [as read]

22 Then finally, at 377, page 504:

23 "Our (inaudible) test does not involve asking how else could proceedings be brought,
24 rather requires consideration of why the more obvious route to access to justice (opt
25 in proceedings) has not been taken, that it has not been taken as opt in proceedings
26 themselves constitute a barrier to access to justice, then that is a clear indicator in

1 | favour of opt out certification." [as read]

2 | The Supreme Court in tab 33, 114, page 1824. (Pause)

3 | So talks of the tribunal:

4 | "... has a wide case management power of evaluation and discretion." [as read]

5 | Mellor's decision. Then:

6 | "Tribunal is well placed to understand and balance out the risks of unjust outcomes

7 | associated with this sort of complex litigation to make the required overall assessment

8 | of how the interests of justice are to be served." [as read]

9 | Now, in Evans itself, the particular reasons why opt in proceedings in that case were

10 | considered practicable, they are important and they are a complete answer to

11 | Ms Demetriou's core submission.

12 | If we go back to the tribunal's original ruling, it's at 381, subparagraph 8, and page 506.

13 | (Pause)

14 | The bottom third of the paragraph:

15 | "Putative class members in case these applications will, on the whole, be sophisticated

16 | potential litigants capable of looking out for themselves, certainly where the claims are

17 | of value." [as read]

18 | Here, of course, the tribunal is referring to banks, institutional investors and hedge

19 | funds. Then subparagraph 9:

20 | "... it may be that those sufficiently interested have joined the Allianz proceedings;"

21 | Now, pausing there, there was a separate claim in the High Court involving, I think, in

22 | excess of 100, if not hundreds, of individual claimants that had been brought by FX

23 | providers before Evans and O'Higgins. So, in a way, one didn't need to speculate in

24 | Evans as to whether other forms of proceedings were possible. They were extant

25 | proceedings in the High Court by involving Allianz. So that's the first important point.

26 | Then:

1 "... or it may be that the class members are so apprehensive about joining the
2 proceedings because of the potential reaction of the Respondents that they are
3 deterred from doing so; or it may be that decision-makers simply cannot be bothered
4 to consider whether it is in their firm's interests to opt in or not. We have no material
5 on which to base so specific a conclusion. [And the next part is the important bit] ...
6 we can see no reason why it is not practicable for the putative class to join on an opt-in
7 basis, given all the circumstances and in particular given the general sophistication of
8 the putative class, the class knowledge, and the potential size of claim. The inference
9 (and we consider it a strong one) is that potential class members are not opting in
10 because they do not want to, and not because opt-in proceedings are not practicable."
11 So it was a fact-specific inferential finding in Evans that the sophisticated potential
12 litigants, including in the light of the Allianz proceedings, did not want to opt in to the
13 proceedings, not that opt-in proceedings were not practical. So there's a specific,
14 perhaps even unique, factual finding, inferential finding in Evans itself.
15 Now, back to the present case. If we go back to the certification ruling in tab 5 of the
16 core bundle. Just to tee up the point that was being made, and it's essentially a carbon
17 copy of the arguments being made today:
18 "Transaction data shows that a few hundred of the largest PCMs would comprise the
19 great majority of the commission charged, a substantial size and could reasonably
20 expect to take an informed decision as to whether to opt in to opt-in proceedings. If
21 opt-in proceedings were practicable with the support of a relatively small number of
22 large PCMs and were certified, and the long tail could participate if it wished to once
23 the claim is publicised [and so on]." [as read]
24 So that is, essentially, the argument being advanced again today. Then at 56, we've
25 seen this paragraph before, on page 178. So the tribunal said:
26 "The fact that the proceedings might be financially viable on an opt-in basis because

1 of the number of large PCMs substantial claims, as Apple contends ..."

2 So, pausing there, the tribunal accepted that there was a possibility, "might" not

3 "would", that some large claims could be financially viable, at least:

4 "... would not overcome the impracticability of opt-in proceedings vis a vis the majority

5 of the PCMs with relatively modest claims. The process of identifying contact between

6 thousands of app developers would be costly and time consuming. To contact and

7 identify the opt-in rate would probably be very low because of the small sums involved.

8 The majority of claims on an opt-in basis would not be in the interests of the proposed

9 class members as a whole and opt-out basis is therefore to be preferred." [as read]

10 Now, sir, a point you picked up Ms Demetriou on, the word "might" is important. Just

11 to give you the reference, sir, our skeleton argument for the certification hearing is in

12 the supplementary bundle. Just to show you the submission we had made, because

13 it puts the word "might", we say, in its correct context.

14 JUDGE WOLFFE: It's fair to say it's an ambiguous sentence. I mean, in fairness to

15 Ms Demetriou, it could certainly be read in the way that she invites the tribunal to read

16 it.

17 MR O'DONOGHUE: Going for the jackpot, yes.

18 JUDGE WOLFFE: The sentence structure certainly leaves it unclear, I think.

19 MR O'DONOGHUE: Yes. That's why the context of what we said is quite important.

20 In the first supplemental bundle on page 126. (Inaudible). The point we make to the

21 tribunal is that it's unlikely opt-in proceedings (inaudible). You can see the reasons

22 we gave. They include matters of retaliation, relationship, funding, class size and so

23 on. So there was a reasoned basis for why we said it was unlikely that opt in would

24 be practical. So it is quite wrong for Ms Demetriou, with respect, to say that there was

25 a concession on our part that opt in would be practicable.

26 Now, we say the tribunal's two-stage assessment of recognising that there might be

1 some people for whom opt in was financially viable, but that was not an answer to the
2 issues with the substantial and lengthy tail. We say that is unimpeachable then and
3 today. The tribunal recognised potential differences between the different class
4 constituents and informed an evaluative judgment as to whether, for the class as
5 a whole, opt in would be practicable.

6 If we can quickly look at what the Court of Appeal said about this when Apple
7 appealed, it's at core bundle, tab nine, page 290. It's at paragraphs 4 and 5. They
8 said:

9 "That is a question of valuation, which is quintessentially one for the CAT as an expert
10 tribunal with whose decision on such matters this court will not interfere. As this court
11 has repeatedly said [this is a reference to Le Patourel] ..."

12 Then five is important. It wasn't just this was something to which the tribunal was
13 entitled to deference. It says:

14 "Apple seeks to argue that the factual situation of the present case, that almost all of
15 the value of the claim is confined to a small number of class members, has not arisen
16 previously and that this is a compelling reason to be heard. However, as the class
17 representative points out correctly in his statement, this factual situation clearly favours
18 opt out, given the large number of class members with small claims."

19 Then it refers to paragraph 56 and then over the page:

20 "Quite apart from the fact that this assessment was one for the CAT with which this
21 court will not interfere, the reasoning was entirely correct."

22 In a sense --

23 JUDGE WOLFFE: How does that sit with the analysis in the Supreme Court in Evans?

24 I mean, I understand your headline point that the ratio, you would say, of evidence
25 was simply appellate deference to the specialist tribunal. But it is fair to say that, in
26 getting there, the Supreme Court goes through a very considered analysis of the

1 approach to practicability.

2 MR O'DONOGHUE: Yes.

3 JUDGE WOLFFE: Do you have a submission on what the Court of Appeal said in that
4 the permission decision stands with what the Supreme Court said?

5 MR O'DONOGHUE: So we did. First of all, we say that what the chancellor said in
6 the permission to appeal ruling, that is essentially a carbon copy of what the
7 Supreme Court in Evans criticised the Court of Appeal for doing in Evans itself. So he
8 recognised the hands-off, noninterference principle, first of all.

9 Second of all, he said the evaluative judgment of the CAT as a factual matter was
10 unimpeachable.

11 Thirdly -- and this, sir, I think, is your question -- in our submission -- well, if we can
12 quickly look at what Evans says. The paragraph Ms Demetriou took you to. It's at 120
13 of the Supreme Court judgment. If I can ask you, sir, to quickly read that. So the
14 submission, in a nutshell, is very straightforward. We say, insofar as there is
15 a suggestion here that you should look at possible differences between the class
16 members, they did that. Then the last bit is important. It should then stand back and
17 make an overall assessment of the balance of justice, having regard to those
18 underlying assessments. In substance, this is the approach the tribunal majority adopt
19 in this case. We say that in substance, in paragraph 56, that is the approach the
20 tribunal took in the present case.

21 It had regard to:

22 "... a number of large PCMs with substantial claims, and that, for them, proceedings
23 might be financially viable on an opt-in basis. It then had regard in stage 2 to the
24 majority of PCMs with relatively modest claims, for whom it said opt-in proceedings
25 would not be practicable. Having identified these two potential cohorts, and
26 I emphasise 'potential', decided the viability of opt-in claims for the former would not

1 overcome the impracticability of the opt-in claims for the latter and, in other words, the
2 tribunal recognise that, for some developers, opt in might potentially work but found
3 that for most it would not and then it stood back and made an overall, evaluative
4 assessment.

5 We say that Apple's arguments elevate form over function. Functionally, what Evans
6 requires is that, where the answer to the opt in, opt out question is that some might be
7 able to opt in, others could not, the resolution is that the tribunal needs to look at the
8 bigger picture. Taking account of the nature of the class and the case as a whole and,
9 of course, the other factors such as strength and other matters we referred to. We say
10 that is exactly what the tribunal has done in the present case.

11 So just to give a couple of further references to make good this composite or overall
12 assessment, if we go back to Evans in the CAT at 381, subparagraph 7. You see
13 a reference to --

14 JUDGE WOLFFE: Page number, please.

15 MR O'DONOGHUE: 506.

16 So it talks about where the individual claims of the whole class or substantially the
17 whole class are so small. Then if we go back to 122, subparagraph 6, page 410, it
18 says:

19 "Moreover, in some claims, the class may be diverse with claims of very different sizes
20 or members with varying degrees of knowledge and experience so that, for some
21 members, the practical bar to opting in may be much higher than for others. The
22 question arises in these circumstances as to how the test of practicability is to be
23 applied. It seems to us it is incumbent on the tribunal in considering practicability to
24 have regard to differences in class composition and not to allow the fact that there are
25 some members who are clearly able to decide for themselves about opting in to
26 override the interests of other members for whom opting in is not practicable. This,

1 we consider, is a very fact-sensitive question [and so on]." [as read]

2 In my submission, this exposes the flaw in Ms Demetriou's submission. The key
3 message from Evans is that these are highly evaluative, multifactorial in fact, sensitive
4 questions. Ms Demetriou, I think, grudgingly accepts that. But what she wants to
5 superimpose on that is to say, well, when it comes to one of the criteria, practicability,
6 there is essentially a cookie-cutter-type assessment that must be applied, to the
7 disregard of other evaluated factors. We say that is simply a wrong approach. We
8 say, in our case, it's actually quite straightforward. The overwhelming majority of the
9 class, which is very large in size, have relatively small claims, that there is no hope in
10 the real world of them being pursued on anything other than an opt-out basis.
11 Ms Demetriou's only answer to that, first is to caricature our case. To say, "Okay, well,
12 it's for a tenner. Nobody would bother to collect tenner". First of all, it is not for
13 a tenner, these are still substantial claims. But, second of all, these are cases where
14 there is a direct contractual relationship by the DPLA between Apple and each and
15 every one of the developers.

16 We say that if Apple can overcharge the developers for many, many years, there is no
17 difficulty whatsoever in refunding that overcharge to the same developers by some
18 form of payment. It is fundamentally different to a case such as the Waterside case,
19 where none of us can remember whether we may or may not have purchased smoked
20 salmon in 2015. There is a suite of transaction data via direct contractual relationship
21 and the distribution of the present case will be entirely straightforward for that reason.

22 Now, the other string to Ms Demetriou's bow is she tries to cut and paste, from what
23 I recall, the facts and figures of class membership in one case, and says, "Well, that's
24 a sort of template or cookie cutter for another case". In my submission, that is
25 a completely sterile exercise. When one is in the realms of an evaluated, multifactorial
26 judgment that is fact sensitive, to cherry pick certain facts from case A and say, "Well,

1 I can cut and paste them into case B," is a pointless exercise; each case is different.
2 One has to look at the totality of factors in the individual case. So in my submission,
3 saying, "Well, our case is closer to Evans and less close to Microsoft or a fortiori
4 Microsoft", that is a pointless exercise in my submission. (Pause)
5 Before I move, sir, to my final topic, can I just pick up the point on retaliation, which is
6 a very, very substantial concern in these proceedings? There is ample public record
7 evidence that developers fear retaliation and that Apple is prone to taking aggressive,
8 punitive, capricious, and retaliatory measures against developers. Now, just to show
9 you the evidence on this, Ms Demetriou again skirted over this. I think she showed
10 you the sum total of one paragraph. If we start in the first supplemental bundle, tab 1.
11 (Pause)
12 Mr Geradin's statement, we start at paragraph 25, you see that the CMA found that
13 developers had negative experience with Apple's --
14 JUDGE WOLFFE: Page 7?
15 MR O'DONOGHUE: Sir, yes, forgive me, page 7. Forgive me.
16 "Developers have variously described the process as obscure, arbitrary, capricious
17 and Kafkaesque." [as read]
18 At 25 subparagraph 3: "Apple is judge, jury and executioner".
19 Over the page, 27: "submission to the CMA coercive pressure".
20 And at 34.1 on page 10:
21 The Coalition for App Fairness, 60 developers, said Apple often uses App Store
22 reviews to retaliate against developers. The public voices its opposition to
23 monopolistic conduct." [as read]
24 34.2: "CMA punitive measures". [as read]
25 34.4: "Pretextual reasons". [as read]
26 35.1: "They sound like hostages, otherwise Apple could hurt their business". [as read]

1 Bottom of the page: "We live in constant fear". [as read]
2 35.4: "Completely petrified to say anything". [as read]
3 35.4: "There is a fear you should stay quiet". [as read]
4 36.1: "Parties that provided information to us indicated that they wish to remain
5 anonymous for fear of repercussions in the market." [as read]
6 36.2.1:
7 "Retaliate against them. Even potentially risking retaliation causes alarm. Others
8 have previously seen a platform retaliate against someone for raising public concerns
9 about their business practices. Wanted to avoid the same fate." [as read]
10 Next paragraph:
11 "Unaccountable, arbitrary power, economic retaliation, fear of retaliation by Apple, and
12 so on." [as read]
13 So that is the starting point.
14 This was available at the time of the original certification hearing -- we have two further
15 statements which supplement this evidence in a significant way.
16 The first is the statement of Mr Simon Newman, who is a representative for an
17 association of developers in the dating app space. That's in tab 5 of this bundle at
18 page -- tab 6, forgive me. (Pause)
19 If we can look, for example, at 184:
20 "Members of the heavily asymmetric relationship with Apple drive a significant portion
21 of their revenues, rules and terms presented on take it or leave it basis." [as read]
22 Then over the page at the top: "the dynamic is entirely one-sided." [as read]
23 16:
24 "Economic dependence that members have on Apple app-based services. The
25 App Store is not only one channel among many, it is an essential gateway for reaching
26 users, and in practice there are very few, if any, viable alternatives for reaching users

1 of iOS devices. Any disruption to App Store presence would have an immediate
2 material impact on their business." [as read]
3 17:
4 "On the commission, no realistic option other than to accept." [as read]
5 18, the last sentence:
6 "ODA members cannot realistically forego the App Store without inflicting severe
7 damage on their business models." [as read]
8 And then 19:
9 This is not just a function of dating app developers, fears of retaliation, and I quote the
10 issues I describe above the developers face their relationship with and reliance on
11 Apple seem to be broadly shared by developers outside of the dating app sector.
12 And then --
13 JUDGE WOLFFE: You would presumably say that at least the structural features that
14 that witness statement refers to are objective features of the market. I'm thinking of
15 Ms Demetriou's point about the extent to which this is a subjective question.
16 MR O'DONOGHUE: Sir, in my respectful submission, the semantic debate of
17 objective versus subjective: it completely misses the point. There is a huge public
18 record evidence, witness evidence from responsive associations that, in fact, their
19 members are in a situation of extreme economic dependence on Apple. In fact there
20 has been retaliation and there is a genuine and well-held fear of future retaliation if
21 you put your head above the parapet. And that's not subjective; that is evidence, plain
22 and simple. Nothing in evidence remotely says the tribunal cannot have regard to this
23 evidence.
24 Now, sir, 20 to 27: they are important, I'm not going to go through them in detail, but
25 you will recall I showed you the passage in the tribunal's judgment in evidence, which
26 says that opt-in has to not merely be theoretically possible, but has to be practically

1 | achievable. And you will see, for example, at 20, there are some basic awareness of
2 | legal and regulatory actions. At the end:
3 | "Members know these exist, none of them indicated to me that they're considering
4 | bringing their own proceedings against Apple." [as read]
5 | 21:
6 | "A deep-seated fear of retaliation. The perception of this risk is widespread and firmly
7 | held. I consider these concerns to be unsurprising in circumstances where developers
8 | rely so heavily on Apple." [as read]
9 | Then 23, an important point:
10 | "It is felt across the membership, but it is particularly acute for small developers." [as
11 | read]
12 | The next sentence:
13 | "Even larger developers who are better resourced are often highly risk averse when it
14 | comes to public confrontation with Apple." [as read]
15 | 24:
16 | "They're generally unwilling to participate openly in legal regulatory processes that
17 | might help address these issues solely because they fear potential consequences
18 | from Apple." [as read]
19 | And 26:
20 | "Specifically in context of litigation, members also worry about potential disruption
21 | costs associated with litigation. Most developers are small businesses without
22 | in-house legal support and they would not have the time or resources to engage in
23 | such a prolonged legal process. Even for larger members, the nature of their
24 | relationship with Apple is likely to push them towards a more risk averse approach.
25 | Taken together, these factors mean that although members are privately critical of
26 | Apple's conduct, they are very reluctant to be publicly associated with any litigation

1 against Apple or to take active steps to participate in such litigation." [as read]

2 And again, he says: "This is consistent with the views of the broader developer
3 community, what I've heard from participants in other sectors".

4 So in my submission, there is really quite overwhelming evidence of the practical
5 challenges, and I emphasise the word "practical", not theoretical, challenges that face
6 developers when it comes to consideration of opt-in.

7 JUDGE WOLFFE: Part of Ms Demetriou's submission on this issue was that -- if
8 I understood it correctly -- one is thinking about the practicability of opt-in, in particular
9 for those with larger claims, because on her submission, that's, in effect, a discrete
10 group within the class. And I think on this issue, she further pointed out that at least
11 some of those are, on the face of it, themselves, very substantial organisations.

12 MR O'DONOGHUE: I think she mentioned two, yes.

13 JUDGE WOLFFE: Well, I think she had a paragraph in her skeleton with four, and
14 I didn't read the four or five, I think. But anyway, our basic point was for that group,
15 without accepting the rest of your submission, I think, for that group, at least could be
16 said that they're not likely to face the same pressures.

17 MR O'DONOGHUE: Yes.

18 JUDGE WOLFFE: Do you have a submission on that part of her case?

19 MR O'DONOGHUE: Yes. So, sir, in my submission, the start and end point is: the
20 tribunal has to consider all of the relevant factors cumulatively. So claim strength, the
21 evidence I've just shown you, the long tail, the size of claims, and so on. So all these
22 factors need to be triangulated, for want of a better phrase.

23 Now, the possibility -- I don't put it any higher than that -- that some of the larger claims
24 might be financially viable in their own right, that is a factor, but it is not either
25 a decisive factor or something that means that the other factors fall to be disregarded.

26 So in my submission, the answer is: that is "a" consideration. We say "seen in

1 context", in view of the matters I've shown you, strength of the claim, phase of
2 retaliation, long tail, ease of distribution and so on. It is not actually a very weighty
3 factor at all in this case, and indeed in most cases where the market is not monopolistic
4 or oligopolistic, you will have a distribution of companies of different shapes and sizes
5 that is inherent in the exercise and in my submission one needs to be quite careful in
6 not attaching excessive importance to the question of claim value.

7 It is simply a data point; there are other data and non-data points that feed into the
8 analysis and it certainly should not be some sort of erga omnes point in the context of
9 the evaluative assessment as a whole.

10 Now, before I wrap up, it may be useful to quickly run through Microsoft on this very
11 point, because it's a neat illustration of how these factors play out in the real world.

12 (Pause)

13 So just to make sure I've understood your question correctly on the larger developers,
14 was your question also that, well, they have nothing to fear in terms of retaliation?

15 JUDGE WOLFFE: Well, that was part of Ms Demetriou's answer on --

16 MR O'DONOGHUE: Two responses. One; according to Mr Newman, they are equally
17 concerned. Two; we have quite a lengthy section in Mr Manfield's statement. It starts
18 at paragraph 84, supplemental bundle 1, page 178.

19 The only developer, really, who has put his head above the parapet in relation to Apple
20 is Epic. That led to essentially an existential crisis for that developer with many,
21 many years of litigation all over the world that threatened to decimate its entire
22 business and business model. This is, I think, a 5 billion revenue company that was
23 almost cut off at the knees by Apple. So again, the only evidence before this tribunal
24 is that the only large developer put his head above the parapet, almost decimated the
25 company. There is no evidence coming back in the other direction of any of that.

26 Now, just to wrap up on Stasi and then I'll quickly list the other factors we say the

1 tribunal, respectfully, should take into account. If we go back to Microsoft and tab 41.
2 So we see at paragraph 22 -- it's on internal page 10 -- there were 59,000 proposed
3 class members, and the average claim size was in the tens of thousands of pounds,
4 and this was opt out certification. Then, as Ms Demetriou showed you earlier,
5 Microsoft's position was that this could be a partial opt out, but with some larger
6 customers with an annual spend of between \$100,000 and \$5 million, they should
7 have to opt in and then some very large customers, more than \$5 million, should not
8 be allowed in the class at all. So that's 102 and 103.
9 Then 114 -- it's on internal page 37 -- it says the Supreme Court has made clear in
10 evidence that the question of opt in versus opt out is an exercise of evaluation. So
11 that echoes the point I made more than once, which is one cannot say that any single
12 factor is a trump card. It's an overall evaluative assessment.
13 Then the tribunal made a range of observations that may be true in a range of direct
14 purchaser claims generally, but they're certainly true in the present case. Now, just to
15 tee this up quickly, 127, 128, it says:
16 "Not even Microsoft argues that it's practicable. The claim is constituted comprising
17 all members of the proposed class proceed on an opt in basis." [as read]
18 It commented that Evans did not involve fragmenting the intended class, but requires
19 an overall assessment. Again, it is not seriously being suggested in this case that the
20 vast majority of the class members could proceed on an opt in basis. The
21 fragmentation point is important. In response to a question from Professor Neuberger,
22 this is a de-certification application only. On the hoof, Ms Demetriou said, "Well, we
23 could try a bit of opt in and sort of see how it goes".
24 MS DEMETRIOU: That wasn't my submission. I hope you understood. It was in
25 response to the tribunal's question. I wasn't suggesting a bifurcation. I was just --
26 MR O'DONOGHUE: Ah. Well, that is helpful because --

1 JUDGE WOLFFE: I understood for you to be saying, she's here seeking
2 de-certification.

3 MR O'DONOGHUE: Yes.

4 JUDGE WOLFFE: If we were with her, it would be matter for you to come forward with
5 any alternative proposal.

6 MR O'DONOGHUE: That helps. Because what we also get from 127, 128 is that
7 fragmentation is not the answer to the choice between opt out, opt in.

8 Then at 129, tribunal says:

9 "We would start by agreeing with the submission that the limited data available in this
10 case makes it difficult to have confidence that a reliable distinction can be drawn
11 between claimants, subgroups having different profiles."

12 The same, we say, is true here. There is no evidential basis on which the tribunal
13 could distinguish between claimant types. All that you're being told is that -- we say
14 by some arbitrary measure -- some claims are big and some claims are small, and
15 some claims are in between. That is simply a single data point.

16 The other point, sirs, you may have picked up Ms Demetriou's skeleton at 9(b), the
17 transaction data to date goes up as far as 2022. So they're already four years out of
18 date for today's purposes and maybe eight years out of date by the time we get to trial.

19 So one certainly cannot assume that an averaging of claim size until 2022 would be
20 representative of the position of the same developers going forward from 2022 to
21 2028.

22 This is above my pay grade, but, for example, many of these games apps, they tend
23 to be very, very fashionable at one moment in time. Then the youth of today move on
24 to something bigger and better or different. So success for developers in a past period
25 is not a reliable indicator of success in the future.

26 One of the things we get loud and clear from the Microsoft case is that the reliance on

1 a single data point is actually quite dangerous. In effect, the claim value is a single
2 data point that we say is already stable. What, of course, it doesn't do is have any
3 regard to any of the other characteristics of the class members that would be relevant
4 for the opt out, opt in assessment.

5 At 133, 134 we see the point about using spend as a differentiator. So it's a false
6 premise that (inaudible) claim to spending over £100,000 is sufficiently different from
7 those spending less, and the resultant subgroups can safely be separated out for
8 purposes of determining practicability. If there's any line to be drawn at all, it is not
9 clear to us why it should be drawn by reference to a figure for customer spend of
10 £100,000.

11 And we say exactly the same is true here. Any line drawn on the basis of claim size,
12 quite apart from my point about shifting lines, would be entirely arbitrary. I was
13 discussing with my junior how one would put this. I grew up in a family of five siblings.
14 When we were young, we had one car, we didn't all fit. My mother would say to us,
15 "well, the big boys can go to town today or the good boys can go to town today". Of
16 course, we would instantly put our hands. "We're all big and we're all good and we
17 should go."

18 But the claim value is a completely arbitrary thing. Why is it 350? In what way would
19 one draw the line? It would be completely arbitrary, of course. For the developers
20 who fall on the wrong side of the line for purposes of opt out versus opt in, it would be
21 devastating. So the arbitrariness is particularly unfair to them in particular.

22 Then at 136, you see the point:

23 "A single data point is an unreliable approach." [as read]

24 This is my point. Practicability will depend on a range of other factors, including stage
25 of development, the overall profitability, their available financial reserves, as well as
26 claim size and so on. Again, there is no evidence placed before the tribunal today

1 from Apple on any of these matters. The best they have done is said, "Well, we reckon
2 300 developers could opt in", but that's just speculation on their part and the number
3 could just as easily be 200, 125, whatever. It's all completely arbitrary.

4 And 141 is important. I quote:

5 "If we refuse certification on an opt out basis, the present funding arrangements put
6 forward on behalf of the proposed class would need to be revised. Depending on how
7 the proposed class would be constituted, (inaudible) carry the risk of the funding
8 arrangements collapsing entirely." [as read]

9 It says:

10 In these circumstances, many thousands of claims with apparently valid claims will be
11 denied the opportunity of seeking redress.

12 Just to give you, sir, the evidence in this case. You have the evidence of Mr Way,
13 paragraph 8. It's in supplemental bundle 1, tab 41.44 he says:

14 "It is highly unlikely PCR would have been able to obtain funding for the claim. I would
15 not have chosen to support the case for funding if it had been proposed on an opt in
16 basis, based on material available to me at the time we decided to fund this claim.

17 Then Mr Mansfield in tab 5 of the same bundle:

18 "It is my expectation that they [being the funder] would cease funding the proceedings
19 if they cease to be opt out, should the proceedings cease to be opt out, [. . .] and
20 should the (Funder seek to terminate the LFA, that would likely, in practice, spell the
21 end of the proceedings." [as read]

22 Again, there is no evidence whatsoever in the other direction.

23 Now, just to wrap up on Microsoft. 143, on internal page 45, Microsoft argued that the
24 opt in procedure would confer benefits in terms of obtaining disclosure for members
25 on an opt in, as opposed to opt out class. You see the tribunal attached little weight
26 to those arguments.

1 In the present case, it's important. First of all, it's not clear that any disclosure is
2 required from the class given the nature of the claim. Secondly, Apple, at least at this
3 stage, has not in fact applied for any disclosure.

4 Then at 144, we see essentially the same book building argument that Apple has
5 made. Microsoft made the criticism:

6 "The PCR could have helped herself by conducting a more aggressive book building
7 exercise."

8 Tribunal says:

9 "We see little in this criticism. It would have been highly impractical and
10 disproportionately costly at this stage to identify and approach potential class
11 members in order to book build. There is no trade association or other body to act as
12 an obvious point of contact [and so on]." [as read]

13 This essentially echoes the tribunal's findings of paragraph 56 of the certification
14 judgment on the difficulties of building a book of claims for the long tail.

15 So the tribunal in Microsoft, in our submission, has effectively rejected all of the
16 arguments that Apple is now making. The tribunal, of course, will have to form its own
17 views of this case. But Microsoft, in my submission, supports the overarching
18 submission we make. Far from being some sea change in the landscape, Evans is
19 entirely consistent with having an opt out class containing a range of larger, smaller
20 and medium-sized businesses.

21 So before I sit down, can I just give you, in quick fire fashion, the other factors we rely
22 on as part of the cumulative assessment. The tribunal already has my points
23 concerning claim strength that opt in claims for the 13,000 or so developers would be
24 impracticable, and the retaliation points. In addition, we rely on five further factors.

25 First, case management considerations. All the time and money spent in the
26 proceedings, a substantial seven-figure sum would be completely or substantially

1 wasted. We have a trial date. We have the directions on evidence from 5 October.
2 We have disclosure on a substantial scale. These proceedings are well, well down
3 the track. The idea that would be upended at this stage would, we say, be quite wrong.
4 Second, we say the claims are all of a like nature brought by claimants that are all app
5 developers who supply iOS apps via the app store. The only difference, frankly,
6 between the developers is the size of claim. That is likely to be true in any market. By
7 contrast, in Evans, the class was made up of diverse interests: FX customers, banks,
8 institutional investors, hedge funds, and possibly even individuals.
9 Third, I've shown you the evidence that the funding side of things means that if this
10 case is de-certified, it is the end of the road. That is uncontested.
11 Fourth, even on Apple's argument, only around 2 per cent of the class could opt in or
12 otherwise act alone, and therefore de-certifying the proceedings is liable to lead to
13 huge unfairness, because the vast majority of UK domiciled developers, the
14 98 per cent whose claims the regime was intended to facilitate, would be left without
15 recourse, for no reason other than a handful of larger developers might -- and
16 I emphasise might -- have claims that are financially viable. We say, on the
17 98 per cent, that would be profoundly unjust and not consistent with access to justice.
18 Then finally, we say in the same way as the tribunal has achieved a market-wide
19 binding outcome for consumers in Kent, the same consistency on a market-wide basis
20 should be afforded to developers via opt out proceedings. The commission is a very
21 significant cost item for developers, 30 per cent of sales value. This case is not merely
22 about the recovery of unfair overcharges for the past, which is already nine years and
23 counting, but it is also about setting a proper lawful rate for the future. So there is an
24 important prospective aspect to these proceedings for developers that was not present
25 in evidence.
26 So in conclusion, we say, stripped of its essentials, this is an application by Apple to

1 kill off what on its face appears to be a strong -- we say unanswerable -- case that all
2 UK-domiciled app developers were ripped off for many years by unlawfully high Apple
3 commission payments. The immediate consequence of the application is that the
4 proceedings would be de-certified. Game over.

5 Apple sees the extreme and unattractive vista that this creates, since it tries to palliate
6 the point by arguing for the fourth time now that there might be some opt in by larger
7 developers, and that might in turn gee up the smaller developers to bring proceedings
8 as well.

9 The only evidence before the tribunal is that the current funding would come to an end.
10 Future funding on anything other than opt out would be challenging. The rate of opt in
11 for the overwhelming bulk of the 13,000 class members is likely to be very low, and
12 developers fear, genuinely, retaliation that putting their heads above the parapet on
13 an individuated manner would cause.

14 Even if some opt in proceedings did miraculously emerge, the evidence from
15 Mr Mansfield is that there would be a lengthy delay, even just to get something up and
16 running, to the point the tribunal could be presented with a further proposal.

17 Mr Mansfield has given evidence -- and we see this in Evans -- that the book building
18 exercise in that case took four years, 6,000 hours. He has also given evidence on the
19 CICC case that a period of nine months was considered the minimum to consider
20 questions of opt in.

21 Delay on this scale would take us well beyond the evidential deadlines for October of
22 this year, which have been set down by the tribunal, and would therefore lead to the
23 vacation of the current trial date. Indeed, we say the overwhelming likelihood is that
24 Apple will, as it has done in this and countless other cases, bring application after
25 application and hopeless appeal after hopeless appeal to delay the proceedings,
26 because every day it can continue to charge its unfair commissions is a win for Apple.

1 So we say this application will kill off an overwhelmingly strong case, or at least ensure
2 that, at best, a carcass of a case is mired in Dickensian delay and expense for many,
3 many years to come.

4 JUDGE WOLFFE: Thank you. I think, Ms Demetriou, before you stand up, I have
5 a question, if I may, for Mr O'Donoghue. I'm conscious of the time, but there is
6 a matter I'd like to ask him. Also, I welcome your thoughts on the question I'm going
7 to put to him.

8 Mr O'Donoghue, the way you presented the threshold jurisdictional question for this
9 tribunal was: we have to find a material change of circumstances, and if we don't then
10 we don't go any further. If we do, then we have to reconsider the case.

11 MR O'DONOGHUE: Yes.

12 JUDGE WOLFFE: Something that's been occurring to the members of the tribunal as
13 we've been thinking about this, is if you put the ongoing gatekeeping role of the tribunal
14 in the context of the competing policy considerations and why it is that we're given
15 a responsibility and a power to vary and revoke a certification or certification of the
16 class.

17 One answer might be, because of the potential unfairness, that opt-out proceedings
18 can impose on a defendant, and that might suggest that, rather than a general "any
19 material change of circumstance" question, the real question for a tribunal is, has
20 something happened which means that the continuation of opt-out proceedings is
21 unfair to the defendants? If yes, then the tribunal has to do something about it. If no,
22 then, in a sense there isn't a reason to revisit the certification. That would at least
23 accommodate -- or might be thought to accommodate in a way that is overall fair -- the
24 fact that any such application may come at any stage in the proceedings.

25 MR O'DONOGHUE: Yes.

26 JUDGE WOLFFE: On the view that if, taking account of all the circumstances as they

1 present the tribunal at a particular point in time, it now appears that to continue the
2 proceedings would be unfair to the defendant then, obviously, the tribunal has to do
3 something about that in a sense, regardless of what stage the proceedings are at. I'd
4 certainly welcome any reaction that you have to that proposition and, equally, any
5 reaction that Ms Demetriou might have.

6 I don't think it actually -- I may be wrong, you will form your own view -- I'm not sure
7 that it affects the argument between you on the circumstance of this case, because
8 Ms Demetriou would say it's unfair to these defendants for opt-out proceedings to
9 proceed for the reasons that she's advanced. And you would say it's not unfair but,
10 as a way of thinking about that threshold question, I would be interested in any
11 observations you might have.

12 MR O'DONOGHUE: I can react quickly on a few points. First of all, as I submitted to
13 you, the principal driver of the unfairness to the defendants is the weakness of the
14 case. That's my sort of asymmetric point. If the case is not weak then the substantial
15 part, we say, indeed, practically all of the potential unfairness to the defendants falls
16 by the wayside. You remember the quotation I showed you from Evans at the tribunal
17 where they said that the prospect that, in the context of claim that is not weak, more
18 claims might come forward. That is a benefit and not a disbenefit. So I think the
19 weakness is fundamental in addressing that criterion.

20 Secondly, we do say it is important that if there is no new information or reason to think
21 that there is suddenly unfairness to the defendant, then it's very hard to think of
22 a principal reason why the question of fairness should be revisited merely for its own
23 sake. We do emphasise in this context that, given that Apple is essentially recycling
24 exactly the same point on: there are big developers with potentially financially viable
25 claims, there is nothing new to see here in terms of that argument. We've had that
26 debate on a number of occasions in the past and I'm not sure that repeating it really is

1 either principled as a basis for looking at this again or, indeed, useful given that nothing
2 has changed.

3 Third, and this maybe in some ways is the most important point that Ms Demetriou,
4 I think, needs to address. Apple has never explained what is the unfairness it suffers
5 in these proceedings by virtue of them proceeding by way of opt out. As far as we can
6 tell, it has not been suggested that there is a disclosure problem. They haven't even
7 applied for any disclosure and, therefore, one is compelled, in my submission, to say
8 that what this is really about is ensuring that lots of people cannot bring claims at all
9 and that is not an unfairness, that is a benefit.

10 JUDGE WOLFFE: Thank you, Mr O'Donoghue.

11 Ms Demetriou.

12 MS DEMETRIOU: Sir, can I just check what the cut-off point is for the tribunal?

13 JUDGE WOLFFE: The members of the tribunal have no cut-off point.

14 MS DEMETRIOU: Oh, that's a very dangerous thing to say.

15 JUDGE WOLFFE: We would rather, perhaps, get away around 5.00 because I'm
16 conscious there are other members of staff and the transcriber, of course, to take
17 account of.

18 MS DEMETRIOU: I'll certainly finish by 5.00, hopefully before that.

19 JUDGE WOLFFE: Yes.

20 MS DEMETRIOU: Thank you very much. I'm very grateful.

21

22 Reply submissions by MS DEMETRIOU

23 Just on the last question, I think the legislation is clear that the ongoing gatekeeper
24 function is an ongoing duty on the tribunal to satisfy itself that the conditions for
25 certification continue to be met. I think it's perhaps not correct to say that there's a sort
26 of super-added criterion of unfairness to the defendant.

1 JUDGE WOLFFE: So, yes. So your answer -- or an answer -- is the statute tells us
2 that, actually, that gatekeeping condition is about being satisfied the conditions
3 continue to be met.

4 MS DEMETRIOU: Exactly.

5 JUDGE WOLFFE: And, therefore, even if, you know, something happened that
6 rendered the proceedings unfair from the point of view of the defendant, that would be
7 a pretty powerful reason. It wouldn't be exhaustive of the reasons, you would say.

8 MS DEMETRIOU: Exactly. In the circumstances of this case, of course, we are saying
9 they don't continue to be met because these should not be opt-out proceedings. We
10 say that does cause unfairness to Apple but we don't need to give specific evidence
11 of unfairness. It's there in the Supreme Court's judgment. The Supreme Court said,
12 and it's a truism, that collective proceedings have procedural advantages which favour
13 claimants. One obvious advantage is that you're lumping together lots of claims and
14 increasing the aggregate value in circumstances where there may be no take up by
15 smaller members of the class of that quantum. Then another counter advantage of
16 opt-in proceedings, of course, is that there is much greater engagement by members
17 of the class. So that has benefits in terms of the way the proceedings are run. So
18 they're being run by the people who are affected by the claim and not by a funder and
19 a firm of solicitors. So that's what I say in response to the question.

20 In terms of my reply, and just standing back. Now, Mr O'Donoghue, what was notable
21 in his submissions was that he shied away from the question of value of the claims
22 and where the value of the claims resides. He went so far as to say it's just one data
23 point amongst others.

24 Now, looking at the Supreme Court judgment, the Supreme Court's analysis on
25 practicability is all about where the value of the claim resides and so it simply is not
26 correct, as a matter of law, to say that this is not an important factor. The reason why

1 Mr O'Donoghue shied away from the point is because he has no answer to it. The
2 vast majority of this claim resides in the hands of a few large developers which are
3 sophisticated undertakings. There's no dispute about the breakdown of the class and
4 there is no objective reason why these large undertakings with high value claims could
5 not opt in to proceedings. We're not even talking about bringing self-standing claims.
6 We're talking about signing an opt in. There's no objective reason why they couldn't
7 do that.

8 Now, my learned friend took you to the tribunal's judgment in FX. I'm not going to go
9 back to it, but paragraph 506 of the tribunal's judgment. The tribunal in that case made
10 the same finding on the facts. It said these are large, sophisticated class members
11 with high value claims. There is no objective reason why they can't opt in. The fact
12 that efforts have been made to get them interested and they haven't signed up doesn't
13 tell you that there's an objective reason why they can't, that it's impracticable to opt in.
14 What it tells you is that they're not interested. Here, we say this is a stronger claim for
15 the reasons I've given because the concentration of the value is even more
16 pronounced. So opting in to proceedings is clearly practicable in respect of the vast
17 majority of this claim. The question, then, is whether the existence of a large number
18 of smaller claims, some of them very small indeed, should lead the tribunal to
19 a different result. That's step 2 of the Supreme Court's analysis and the answer is no,
20 because that would fly in the face of what the Supreme Court has held at
21 paragraph 112 and at paragraphs 124 to 126, where it effectively said that a long, thin
22 tail should not wag the dog.

23 Now, my learned friend says that what the tribunal did in this case was compliant with
24 the Supreme Court's judgment. It obviously wasn't. The tribunal's judgment in this
25 case, its analysis, its conclusion at paragraph 156, was expressly based on the Court
26 of Appeal's judgment, which said in terms that the impracticality of the long, thin tail

1 | opting in was what made opt-in proceedings impracticable. That was the point that
2 | was overturned by the Supreme Court.

3 | Now, my learned friend also said the fact that the vast majority of the claim here, by
4 | value, rests in the hands of large developers for whom it might be practicable to opt in,
5 | he said that that's not a decisive factor because it's just one factor in the mix. But that
6 | is to misconstrue, in our respectful submission, the Supreme Court's judgment which
7 | says that when you're at that end of the spectrum it is a decisive factor. See
8 | paragraph 112.

9 | Now, going back to the threshold point, Mr O'Donoghue accepted that a change in the
10 | law engages the tribunal's jurisdiction. Now, we don't agree that Tibbles applies
11 | because we say that that is a very different context. But, in a sense, as I said, that's
12 | an arid dispute because he agrees that a change in the law engages the tribunal's
13 | jurisdiction. So the question is, did the Supreme Court change the law? And
14 | Mr O'Donoghue says no, because he says all the Supreme Court decided is that the
15 | Court of Appeal should not interfere in the evaluative judgment of the tribunal. Yes, it
16 | did find that, but to say that it only found that is significantly and critically to undersell
17 | what the Supreme Court did. Because the Supreme Court laid down principles to
18 | guide that evaluative exercise.

19 | I'm not going to go back to the judgment. I made all of those submissions in opening
20 | but one thing I will do is, perhaps, take you to the Court of Appeal's refusal of
21 | submission because, in the many times Mr O'Donoghue said that Apple is "trying to
22 | have a fourth bite of the cherry", one of his bites, he says, is the Court of Appeal's
23 | refusal of permission. Now, we see that in the core bundle, tab 9 at page 290. Let's
24 | see what the Court of Appeal said and bear in mind, of course, that this was after the
25 | Court of Appeal in FX but before the Supreme Court. If we go down to paragraph 5:
26 | "Apple seeks to argue that the factual situation in the present case, that almost all the

1 value of the claim is confined to a small number of class members, hasn't arisen
2 previously and this is a compelling reason for the appeal to be heard. However, as
3 the class representative points out correctly in his statement, this factual situation
4 clearly favours opt out, given the large number of class members with small claims ..."

5 [as read]

6 Then it repeats paragraph 56 of the CAT's judgment. Now, that's consistent with the
7 Court of Appeal in FX but completely contrary to the principles laid down by the
8 Supreme Court. So we're not having a fourth bite at the cherry, we're simply inviting
9 the tribunal to exercise its gatekeeper responsibility and assess whether, in light of
10 what the Supreme Court has said, these proceedings are properly certified as opt out
11 proceedings, and we say that they are plainly not.

12 Now, the only real point that my learned friend made on practicability, aside from the
13 points he made about how to construe the Supreme Court's judgment -- which I'm not
14 going to address because I've given you my submissions on the Supreme Court's
15 judgment in opening -- was in respect of retaliation. He said, "We've got evidence to
16 show that some developers, or that the market generally, worries about retaliation from
17 Apple and these developers are in business with Apple". Now, that submission
18 somewhat diminished by the end in response to the tribunal's question. But, in any
19 event, what do you have? What does the tribunal have? I should say this was
20 a submission, of course, made in FX that the Court of Appeal relied on. We see that
21 at paragraph 121 of the Court of Appeal's judgment in FX. So the Court of Appeal
22 placed weight on intimidation of class members not wanting to sue their banks. That
23 wasn't a factor at all picked up by the Supreme Court, no doubt because of the
24 Supreme Court's admonition that it's objective features that you're looking at.

25 Now, my learned friend then said, "Oh, well, this hearsay evidence, which is hearsay
26 evidence relating to some developers, is objective evidence of the features of the

1 market". We say in response that the tribunal cannot possibly find -- the key question,
2 as the chairman identified, is not whether there are some developers in this class of
3 hundreds that might feel that they don't want to sue Apple. The question is whether
4 the large developers, in which the vast proportion of the value of the claim resides,
5 would find it impracticable to opt in -- opt in, not bring self-standing proceedings, but
6 opt in -- because they feel intimidated by Apple. We say that the evidence put forward
7 by the class representative doesn't come close to enabling the tribunal to make that
8 finding, which would be a troubling finding. Apple does not agree that that is how
9 developers feel and there are countless examples of developers complaining to
10 regulators openly and bringing proceedings against Apple, as Mr Watson has
11 explained in his evidence.

12 So the key question is, the large businesses -- which you've seen, many of them are
13 very large indeed -- would they find it impracticable to opt in? We say not. There's no
14 objective evidence establishing that that's the case.

15 Now, my learned friend said, in a typically overstated fashion, that Epic has been
16 decimated. That was his word, "decimated". Now, I don't know where he gets that
17 from at all. It's completely unevidenced and it's an exaggerated submission and it's
18 unhelpful, frankly, to give evidence like that from the bar. It's unhelpful to the tribunal.
19 That is something which you should take no account of.

20 Now, moving on to merits. So that's practicability. We say one end of the spectrum,
21 clearly practicable and it would take something -- what the Supreme Court says is that
22 really is conclusive of opt in, opt out. Now, Dr Ennis says, "Oh, no, we've got very
23 strong merits". Now, Mr O'Donoghue, again, in his oral submissions, placed the
24 outcome of Kent front and centre of his submissions. And you heard reel off a number
25 of points about the supposed strength of the case. So he said, for example, Apple's
26 commission has been set in conditions of total monopoly. Now, that is obviously hotly

1 | contested, as it was in Kent. In Kent, Apple argued that the market was wider and it
2 | wasn't dominant, and it evidenced that. Now, the tribunal disagreed with Apple, but
3 | those are arguments and it can induce evidence again before the tribunal in Ennis to
4 | the same effect. So it's simply not open to Mr O'Donoghue to say, "Well, that's a fact
5 | that the tribunal is entitled to take account of. That shows our claim is strong". It's
6 | disputed.

7 | Now, probably where the error comes from, in terms of Mr O'Donoghue's submissions,
8 | is an error in interpreting the Supreme Court's decision in Evans on the import of
9 | Hollington v Hewthorn and so I do need to grapple with that. Let me take you back,
10 | please, to the Supreme Court, third volume of authorities, tab 33, and I want to go to
11 | paragraphs 158 to 159. Let me give you the page number. They are on page 1836.
12 | Before I take you to the text, Mr O'Donoghue said that our submission, that the
13 | judgment is inadmissible for the purposes for which he uses it, is an extraordinary
14 | submission. Well, we say it's what the Supreme Court found. He also said that it's
15 | extraordinary in view of the fact that disclosure is the same in both cases but, with
16 | respect, that betrays his misunderstanding of the Supreme Court's judgment.
17 | Because the underlying evidence may well be similar and it is open to my learned
18 | friend to point to evidence that might be available. He can even point to the Kent
19 | judgment to show what evidence might be available. But what he can't do is place
20 | reliance on the findings of the tribunal. That's the critical distinction.

21 | Thinking about it, pointing to what evidence might be available at trial, doesn't take
22 | him very far which is why he wants to go further to rely on the findings in Kent.
23 | Because what you've got, if you look at the judgment in Kent, is a rehearsal of
24 | evidence on both sides. So it takes you to an essentially neutral point. There's
25 | evidence available on both sides that go to these issues in dispute and we can expect
26 | that, in the Ennis trial, there will similarly be evidence on both sides that's available.

1 What that shows us is that the claim is a viable claim, yes, but it doesn't show us that
2 it's a very strong case on the merits, which is what Mr O'Donoghue is asking the
3 tribunal to find. For that, he does need to rely on the tribunal's findings in Kent and
4 that is what is impermissible.

5 It was telling, in my submission, that he said in his submissions that evidence and
6 findings go hand in glove. That was his expression. But that is to fail to grapple with
7 the very distinction that the Supreme Court made. The Supreme Court carefully
8 distinguished between evidence and findings. That's the whole premise for its
9 judgment.

10 If we go now to paragraphs 158 and 159. You see at 158, the argument that counsel
11 for Mr Evans put on admissibility, that the rule in *Hollington v Hewthorn* doesn't apply
12 at the interlocutory stage. That's the argument. Then you see these words halfway
13 through the paragraph:

14 "In support of this argument, reliance was placed on cases" [as read]

15 And then there's a list of cases. This was the point put by the chairman to my learned
16 friend. This is all in the context of the argument that was put. Then the Supreme Court
17 says:

18 "In the last of these cases [so now we've moved on from the argument, we're looking
19 at what the Supreme Court found] Mr Justice Mellor concluded from the earlier
20 authorities that there's a limited exception to the rule in *Hollington v Hewthorn* which
21 is applicable in situations where the case is at a preparatory stage. Yet the court has
22 to consider what evidence at trial there might be. Material inadmissible at trial can
23 assist in identifying the evidence which can reasonably be expected to be available at
24 trial to which a court is entitled to have regard at the interlocutory stage." [as read]

25 Now, pausing here. He is saying normally a judgment or decision would be
26 inadmissible at trial, but what you can do at an interlocutory stage is produce it, but

1 you're producing it for a particular purpose. That purpose is to show what evidence
2 might be available at trial. It's not relying on the findings and that's crystal clear from
3 the next paragraph, 159:

4 "We endorse this analysis, save only to observe that reliance on findings of another
5 decision maker for the purpose of identifying evidence, which can reasonably be
6 expected to be available at trial, is not inconsistent with the ruling in Hollington. It is
7 therefore not strictly an exception to it. Likewise, it's not inconsistent with the principle
8 underlying that case to rely on prior judgments insofar as they record evidence of
9 relevant facts. [. . .] It is only insofar as such material contains opinions on matters of
10 fact [. . .] that the material is inadmissible." [as read]

11 So that is the distinction, and what my learned friend -- sorry, sir, you're about to ask
12 me something.

13 JUDGE WOLFFE: Yes. And you would draw a distinction -- I mean, the word
14 "findings" perhaps could cover a variety of different kinds of findings. But do you read
15 that as -- you know, so you could have a tribunal that makes findings of fact based on
16 the evidence, but you would say, would you, that the findings are admissible in this
17 context only so far as they disclose evidence, rather than themselves having any
18 probative value even in the context of an interlocutory hearing.

19 MS DEMETRIOU: Sir, yes, I say that is what I say, and I say that's clearly what the
20 Supreme Court is saying. And that really undercuts all of my learned friend's
21 submissions on Kent, because if you go back to his skeleton argument, every single
22 subparagraph at paragraph 23 is relying on a finding which was made following
23 a dispute on the evidence. What he would be entitled to do is say, "Well, look at this
24 paragraph here, there was a witness statement that told us that the market was this,
25 we could produce something similar at trial". That's the exercise that's permissible,
26 not permissible to say the tribunal found that Apple was dominant in this market.

1 That's the distinction.

2 Now, insofar as the tribunal in Microsoft, in the recent decision of yesterday in Stasi,
3 went further than that, which Mr O'Donoghue relied on. Insofar as the tribunal did that,
4 we say for the reasons I've given, it was wrong, and if it did do that, then that finding
5 is vulnerable, if there's an appeal. So we say that the Supreme Court is clear, and
6 Microsoft doesn't help my learned friend.

7 My learned friend also relied on Microsoft -- and I'll just pick up this point here -- in
8 relation to leveraging. So essentially, he said the concern about leveraging the
9 procedural advantages of an opt-out procedure only applies where a case is weak.
10 That was his submission, and he sought to rely on paragraphs 138, I think, and 139 of
11 Microsoft. Now, we don't read those paragraphs as saying that; we read those
12 paragraphs as simply explaining factually what the factual position was in Evans,
13 where the case was indeed very weak.

14 If the tribunal was going further and making the point Mr O'Donoghue made, which is
15 that the procedural advantages of opt-out proceedings only matter if the claim is weak,
16 we say that is wrong in law -- his submission is wrong in law -- and it's completely
17 contrary to what the Supreme Court found. Again, see paragraphs 112 and 124 and
18 I made those points in opening that the findings there of the Supreme Court, that
19 generally, if a claim is practicable on an opt-in basis, the claimant shouldn't have the
20 procedural advantages associated with opt-out. Those findings were not linked to the
21 merits of the claim at all and if you think about it for a few moments, my learned friend's
22 argument proves far too much, because if he were right, it would mean that if a claim
23 is not weak -- so for any viable claim -- then you discount the procedural advantages
24 point. And yet that's obviously not what the Supreme Court said. Again, I pray in aid,
25 paragraphs 112, and then 124 to 126. (Pause)

26 One small point of clarification -- or perhaps correction -- on the applicable law

1 jurisdiction point. You've got my submissions on that, but I think my learned friend
2 said that you could somehow carve out some of the class members, and I don't think
3 that's right, because I think that many or most of the class members would be making
4 sales across different jurisdictions and so the issue, I think, would affect pretty much
5 everybody in the class. I just make that as a point of factual clarification.

6 Finally, and I'm coming to the end, so I'm going to finish on time well in advance, the
7 additional factors relied on by my learned friend, and we say that none of them have
8 much weight at all, but certainly they don't have enough weight to counteract very
9 strong, we say decisive steer, given by practicability. These proceedings are not well
10 advanced, because we haven't got -- there's still a long way to go. Now, my learned
11 friend says, "Oh, we've, we've spent £7 million", but that's from a total budget of
12 £25 million, and our point is, if we're right, that these proceedings are not properly
13 certified as opt-out proceedings, now is the time to grasp the nettle, before all of that
14 money is spent on proceedings that are improperly certified.

15 In any event, it's an in terrorem submission, because if the tribunal accedes to our
16 application and de-certifies these proceedings, it is, as I've said, open to Dr Ennis to
17 seek to come back with opt-in proceedings, and none of that work would have been
18 wasted.

19 Funding, Mr O'Donoghue has overstated his case. He said that there's uncontested
20 evidence that funding is only available on an opt-out basis, and that's
21 a mischaracterisation, I'm afraid, of the evidence that they've put forward. Mr Way's
22 evidence that he took you to simply says that Harbour would not have funded on the
23 same terms, so that's a different point; it's a much more muted point.

24 And then if we see -- he also relied, I think, on -- let's just take it out, so supplemental
25 bundle 1, page 172. (Pause)

26 So this is Mr Mansfield's statement. He also relied on Mr Mansfield's statement. Let

1 me just show you what he says, at paragraph 64. He says:
2 "Lastly, even leaving aside what set out above concerning Harbour specifically ..." [as
3 read]
4 So you have the point that Mr Way's evidence only concerns Harbour, and of course
5 there are other funders out there, and it also only relates to the terms that were agreed.
6 But here, Mr Mansfield says:
7 "It certainly should not be assumed that funding for an opt-in case could be obtained."
8 [as read]
9 That's quite careful language.
10 "It's possible that larger developers will decide not to opt-in, in the hope or expectation
11 they could free ride on top of an opt-in case, brought on behalf of smaller developers."
12 [as read]
13 Now just pausing there, that makes no sense at all. How would they free ride on
14 a case if they're not -- they wouldn't recover anything if they hadn't opted in, so that
15 just doesn't make any sense.
16 But in any event, let's say he's right. Let's say that larger developers choose not to
17 opt-in. Well, that tells us something meaningful about the case. If the very developers
18 that have got most at stake decide that they're not interested enough in the litigation
19 to opt-in, then these are proceedings that shouldn't be brought. (Pause)
20 Unless you have any further questions for me, those are our submissions in reply.
21 JUDGE WOLFFE: Thank you very much. No further questions, thank you.
22 Well, can I just thank counsel for their submissions. Thank all the work -- thank all
23 those who've been involved in preparing the written material, the skeletons, and the
24 bundles. We will take time to consider our judgment. Thank you.
25 (4.54 pm)
26 (The court adjourned)

Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?