Neutral citation [2026] CAT 41

Case No: 1689/7/7/24

IN THE COMPETITION APPEAL TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

6 May 2026

Before:

THE HONOURABLE MR JUSTICE WAKSMAN
(Chair)
MICHAEL CUTTING
PROFESSOR ALASDAIR SMITH

Sitting as a Tribunal in England and Wales

BETWEEN:

CONSUMERS' ASSOCIATION ("WHICH?")

Applicant/Proposed Class Representative

- v -

(1) APPLE INC.
(2) APPLE DISTRIBUTION INTERNATIONAL LTD
(3) APPLE EUROPE LIMITED
(4) APPLE RETAIL UK LIMITED

Respondents/Proposed Defendants

Heard at Salisbury Square House on 19 and 20 November 2025, and 6 March 2026

JUDGMENT (STRIKE-OUT)

APPEARANCES

Philip Woolfe KC and Jack Williams (instructed by Willkie Farr & Gallagher (UK) LLP) appeared on behalf of the Applicant/Proposed Class Representative.

Marie Demetriou KC, Max Schaefer and Michael Quayle (instructed by Covington & Burling LLP) appeared on behalf of the Respondents/Proposed Defendants.

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Michael Cutting and Professor Alasdair Smith:

A. INTRODUCTION

1. This judgment sets out the decision of the majority of the Tribunal in respect of the Strike-Out Application. Save where specified, the defined terms used in this judgment are the same as those set out in the unanimous judgment of the Tribunal in respect of Which?'s CPO Application ([2026] CAT 29), which should be read alongside this judgment.

2. At the hearing on 19 and 20 November 2025, we had one day of argument on the issues covered in the judgment on the CPO Application and a day of hearing on the substance of the parties' arguments on the Strike-Out Application. After the initial two days of hearings, the Tribunal asked the parties to expand on their arguments in relation to pecuniary loss and put to them a paper with some questions and some scenarios designed to understand their arguments more fully. This led to the submission of further skeleton arguments and a further one-day hearing on 6 March 2026.

B. THE NATURE OF WHICH?'S CLAIMS FOR DAMAGES

3. Which? frames its claims for damages consequential upon the alleged abuse in its draft Amended Claim Form thus:

> "**D(4) Causation, loss and damage**
>
> 133. Apple's breach of statutory duty, arising out of the Preferential Treatment Abuse, has caused loss and damage to the Class Members during the Claim Period as further set out below.
>
> 134. But for the Preferential Treatment Abuse:
>
> > 134.1 Apple could not and would not, through its design and/or operation of iOS, be able to discriminate against third-party cloud storage solutions to the advantage of Apple and the detriment of third-party cloud storage service providers. All cloud storage service providers would be treated alike by Apple, including with respect to being able to store and/or backup Restricted Files and/or being presented and made available in the same way in the design and/or functionality of iOS;
> >
> > 134.2 iCloud would have faced competition in the market for FSCSi (or what would, in the absence of the conduct have been a single

market for cloud services on iOS). Class Members would have had the option of using competing cloud services, as well as iCloud, to host and backup all file types on an iOS Device and therefore to backup, synchronise or restore all data held on an iOS Device;

134.3 iCloud would have faced greater competition in the market for OCSi (or what would, in the absence of the conduct have been a single market for cloud services on iOS). If Apple had treated competing cloud storage services equivalently to iCloud, competing cloud storage providers would have been able to offer services which were equivalent to (or superior to) iCloud;

134.4 users would not have been artificially steered towards the use of iCloud and/or away from third-party cloud storage services;

134.5 greater competition between iCloud and third-party cloud storage services (whether by existing market participants or new entrants) in the iOS Cloud Solutions Markets would have occurred on the parameters of (a) price, (b) storage capacity and/or (c) quality, such as security, speed and functionality;

134.6 Class Members would have been able to use competing cloud storage services, which in the factual they purchased or had the right to use in any event, but which, by reason of the Preferential Treatment Abuse, they did not in fact use to backup or store files (or certain files) on their iOS Devices; and/or

134.7 Apple would likely have reduced the prices charged for iCloud to meet competition and/or increased the amount of free storage it offered.

135. In the premises, but for the Preferential Treatment Abuse, Class Members who in fact paid for iCloud in some part of the Claim Period would, in respect of that part of the Claim Period, either:

135.1 have purchased iCloud Services (or a competing cloud storage service) for a lower price than they in fact paid for iCloud; or

135.2 not have paid to purchase iCloud or a competing cloud storage service but instead made use of a greater quantity of free storage offered in the counterfactual by iCloud or a competing cloud storage service if sufficient to meet their needs.

136. Class Members have therefore suffered loss and damage to the extent that the amounts they paid for iCloud exceeded the amounts (if any) that they would have paid for iCloud (or an alternative service) in the counterfactual.

137. Further, in the premises, but for the Preferential Treatment Abuse Class Members who did not in fact pay for iCloud in some part of the Claim Period would, in respect of that part of the Claim Period:

137.1 if the Class Member's valuation of cloud storage services equivalent to iCloud was higher than the competitive price in the counterfactual, have purchased iCloud at the counterfactual price, or have purchased services equivalent to iCloud from an alternative provider of cloud storage at the counterfactual price; and/or

> 137.2 have made use of a greater quantity of free storage offered in the counterfactual by iCloud or alternative cloud storage providers, if sufficient to meet their needs.
>
> 138. Class Members have therefore suffered loss and damage:
>
> 138.1 to the extent that their valuation of FSCSi was higher than the price for such services that would have prevailed in the counterfactual; and/or
>
> 138.2 in respect of the loss of the opportunity to make use of free cloud storage services equivalent to iCloud in the counterfactual.
>
> 139. The loss and damage particularised at §§133 to 141 above will be the subject of quantification in expert evidence in due course. This loss and damage is likely to be an underestimate since it does not directly compensate for the loss of innovation and reduction in user-experience and/or quality of iCloud Services and/or third-party providers suffered by the Class Members as a result of the Preferential Treatment Abuse. The CR invites the Tribunal to take this into account when assessing and/or calculating the loss and damage claimed using the above methodology and further for the purposes of considering the CR's claim for injunctive relief.
>
> 140. As to the estimate of the amount claimed in damages, aggregate damages are currently estimated, as at 31 December 2024, as follows:
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> 140.1 in respect of damage suffered by Class Members who paid for iCloud Services at between £1,187 million and £1,671 million (excluding interest) and at between £1,462 million and £2,043 million (including simple interest at the Bank of England base rate + 5%); and
>
> 140.2 in respect of damage suffered by Class Members who never paid at between £162 million (excluding interest), and £202 million (including simple interest at the Bank of England base rate + 5%)."

4. There is thus a distinction drawn between: (a) losses allegedly suffered by Apple customers who did in fact pay for iCloud in the claim period (the Purchasing Customers) (see §§135–136); and (b) those customers who did not pay for iCloud in the claim period (the Non-Purchasing Customers**)** (see §§137–138).

5. Apple's Strike-Out Application is made in respect of the entirety of claims advanced on behalf of the Non-Purchasing Customers (see §§137–138), which represent about 13% of the total sums claimed.

6. The ways in which the sums claimed on behalf of both the Purchasing and Non-Purchasing Customers have been calculated are set out in detail in sections 5 and 6 of the expert report of Mr Mat Hughes dated 8 November 2024 (the **Hughes report**). Mr Hughes summarised his approach at section 1.5.

7. For Purchasing Customers, as described in §135.1 of the draft Amended Claim Form, the losses are calculated on a conventional "overcharge" basis, in other words the difference between the price actually paid and the lower price which would have been paid in the counterfactual (i.e. the position absent the alleged abuse, where prices charged by Apple would have been lower and/or a greater amount of free storage would have been provided by Apple). We refer to the putative lower price as the **competitive price**. Mr Hughes presently arrives at that price by calculating it on a "cost plus" or comparator basis.

8. Although §135.2 of the draft Amended Claim Form makes reference to what on its face is a separate element of the claim for Purchasing Customers, based on the expectation that they would have gained more free storage in the counterfactual, there is no separate monetary claim made here. Instead, the availability of a greater amount of free storage is already factored into the overcharge claim.

9. If we suppose that the actual price (i.e. that paid by the Purchasing Customers) is £14 per year and the competitive price is £5 (broadly reflecting the weighted average prices included for some years in table 1.2 of the Hughes report), then the annual loss is calculated as the simple difference between the two, i.e. £9.

10. For the Non-Purchasing Customers, the calculation of loss is described in §1.5.6 of the Hughes report as:

> "The harm to Non-Paying Subscribers will vary depending on their requirements. My preliminary methodology for estimating the Aggregate Damages to Non-Paying Subscribers is as follows. First, I start with the number of unique iCloud users in the UK, and then apply the proportion of iCloud users who do not pay for iCloud (starting at 70% in 2015, reducing to 30% by 2024). Second, I reduce the number of Non-Paying Subscribers because a proportion of Non-Paying Subscribers are not harmed by Apple's Conduct as their willingness to pay for Cloud Services on iOS is less than the competitive prices that would have prevailed absent Apple's Conduct. In absence of available data, I assume this group is 50% of the Non-Paying Subscribers. Third, I assume the average willingness to pay is approximately 50% of the iCloud price. Taking the difference between this price and the competitive benchmark (IDrive) derives the consumer surplus / overcharge for Non-Paying Subscribers…"

11. Thus, once the number of such proposed class members is calculated, it is reduced by 50% to allow for those who in the counterfactual would not have

paid even £5 because for them, this was still too expensive, so they have suffered no loss.

12. As for the other 50%, Mr Hughes's assumption is that they would have purchased at somewhere between £5 and £14 per year, and he describes this as their willingness to pay (**WTP**). The maximum any of this group would have paid is just below £14 – we know that they would not have paid £14 because in fact they did not do so. The value here differs between purchasers. Mr Hughes recognises that there is no present evidence to identify what that value for each of them might have been, and so instead, he takes an average of the price which they would have been willing to pay and he calculates this as the mid-point between the actual price and the competitive price, in our illustrative numbers, £9.50 (his words in the paragraph quoted above "approximately 50% of the iCloud price" do not correspond with his calculations in table 1.2). So, using this average, the service is worth £9.50 to them but they would have only paid £5 in the counterfactual. Thus, the average consumer in this part of the class has lost the opportunity (because of the actual price entailed by the abuse) to buy for £5 a service for which their WTP was £9.50. This £4.50 is what Mr Hughes, in standard economics terminology, calls "consumer surplus". This is elaborated upon in §138.1 of the draft Amended Claim Form.

13. Mr Hughes says that the eventual methodology for calculating the losses suffered by the Non-Purchasing Customers will be by reference to data and consumer research from Apple, but he does not have this information at this stage – hence the somewhat basic averaging methodology described in his §1.5.6 quoted above.

14. As for §137.2, and as with Purchasing Customers, there is no separate monetary claim made in respect of the Non-Purchasing Customers who made use of a greater quantity of free storage. We were told that this is already factored into the claim and we focus therefore on the claim in §137.1.

15. When §§137 and 138 of the draft Amended Claim Form are read in the full context of the claim, the Which? claimed that it is arguing that:

(1) all iCloud users were affected by Apple's abusive behaviour to the extent that this restricted competition in the supply of cloud storage services to iOS customers; here there was a deprivation of a service that would have been supplied but for the abusive behaviour;

(2) that the group or collection of Non-Purchasing Customers whose WTP is between the counterfactual market price and the abusive price suffered "loss and damage" (i.e. more than nominal damages) as a result of Apple's abusive behaviour; and

(3) that the quantification of that loss will be calculated in due course but will equal the summation of the collective excess of WTP over the counterfactual market price.

16. Apple argued that the alleged loss was contingent on each Non-Purchasing Customer's own, subjective valuation.

C. THE BASIS OF THE STRIKE-OUT APPLICATION

17. Apple notes that the claim in respect of the Non-Purchasing Customers, as formulated, amounts to a claim in respect of forgone consumer surplus (**FCS**). It contends that there is no basis in law for such a claim in this context because it depends fundamentally, but impermissibly, upon WTP, a subjective valuation by individual customers. According to Apple, FCS is not a pecuniary loss which can be claimed as damages, nor can it be claimed as a non-pecuniary loss.

18. Moreover, since no such claim could be made by an individual claimant, there is then no basis for claims of this nature being made on an aggregated basis either, according to Apple.

19. Further, Apple says that the issue over these claims raises a pure question of law. It therefore submits that there is no reason why we should not "grasp the nettle" now in respect of the legal basis (or not) for the relevant claims. In reality, there are no further facts which need to be decided at a trial before the claims are analysed as a matter of law.

20. As against that, Which? contends that FCS losses are recoverable in law either as pecuniary loss or as non-pecuniary loss, by reason of certain authorities.

21. Further, to the extent that this is a novel claim, Which? says it should await determination at trial when all the relevant facts have been decided.

22. Which? also refers to the EU principle of full compensation, as expressed in Directive 2014/104 of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law (the **Damages Directive**). Article 3 reads:

> "Right to full compensation
>
> 1. Member States shall ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm.
>
> 2. Full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest.
>
> 3. Full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages."

23. Finally, to quote Which? in the Reply (§35.4):

> "... significantly, the claim seeks an aggregate award of damages under section 47C Competition Act 1998, representing loss to the class as a whole, by way of a top-down methodology based on willingness to pay. The PCR is not seeking to advance a bottom-up individualised assessment of loss nor one based on a purely subjective measure."

24. There are a number of important areas of common ground between the parties. They agreed that the Damages Directive neither requires nor forbids compensation for FCS. Which? agreed with Apple that if an individual claim is not valid in law, its position is not improved by being aggregated with other claims for the purposes of these proposed collective proceedings.

25. It was also common ground that the test applicable to an application for strike-out/reverse summary judgment made at the certification stage is the same as that which applies on an application for strike-out in the High Court, namely whether the relevant head of claim has a realistic prospect of success: *BSV v Bittylicious*

[2024] CAT 48 at §§35–38. Which? argued that we should bear in mind the following propositions established by the authorities (and recorded in *BSV*):

(1) The factual allegations on which the claim is based may be rejected if, on examination, they have no real substance. However, regard should be had to the evidence that can reasonably be expected to be available at trial, and the Tribunal should not conduct a mini-trial. Even where a short point of law or construction is raised, the Tribunal should be satisfied that it "has before it all the evidence necessary for the proper determination of the question": *Easyair v Opal* [2009] EWHC 339 (Ch), [2009] 3 WLUK 2 at §15(iii)–(vii). If the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. That is because if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be.

(2) It is not generally appropriate to strike out a claim on assumed facts in an area of developing jurisprudence. Decisions as to novel points of law should instead be based on findings of fact: *BSV* at §38, citing *Begum v Maran* [2021] EWCA Civ 326, [2022] 1 All ER (Comm) 940 at §23 and *Sel-Imperial v BSI* [2010] EWHC 854 (Ch), [2010] 4 WLUK 394 at §16.

26. Which? argued that this last principle should on its own be fatal to the Strike-Out Application. Which? argued that the loss of "consumer surplus" is the essential harm caused by anti-competitive conduct which raises price or restricts supply, referred to by Marcus Smith J as the "gist" of the damage (*BritNed v ABB* [2018] EWHC 2616 (Ch), [2019] Bus LR 718, at §422 onwards). It was Which?'s case that the authorities clearly establish that this loss is recoverable and in any event that it should be recoverable either as pecuniary loss or as non-pecuniary loss and that there was no authority to the effect that it was not. Which? argued that this is not an appropriate point for strike-out or summary judgment, without the Tribunal benefitting from the facts as they are ascertained

during the course of these proceedings, including hearing relevant expert evidence as to the nature of that loss.

27. Apple described this head of claim as "entirely novel": see the Response at §10. Nevertheless, Apple also argued that the loss was not recoverable as a matter of law and that the case fell squarely within the principle at §25(1) above, i.e. that the claim had no real substance as a matter of law and that we should grasp the nettle now.

28. We take the view that Which?'s claim, at the very least, raises novel points of law and does so in an area of developing jurisprudence. Consequently, it falls into the category of case in which it is "not generally appropriate" to strike out. But before coming to a decision on this, we need to carefully consider the arguments about whether the Which?'s case is "bad in law".

D. AUTHORITIES

29. A number of authorities were cited by the parties. In the following paragraphs we describe a number of those. Neither party could cite a case directly on the question of the treatment of FCS. Since collective proceedings seeking damages for harm arising from breaches of competition law are a recent innovation, we do not find that surprising.

(1) Damages

30. Which? cited a number of cases as authority for the propositions that:

(1) Apple is wrong to suggest there can be no claim for pecuniary loss where a claimant has not expended money (*Liffen v Watson* [1940] 1 KB 556; *The Mediana* [1900] AC 118);

(2) a pecuniary loss is one that is inherently susceptible to valuation in monetary terms or is one that money is capable of remedying (*H West & Son v Shepherd* [1964] AC 326);

(3) where the loss consists of the non-receipt of a service or loss of asset, the loss arises irrespective of whether the claimant is put to expense, and the service of which a claimant had been tortiously deprived could be treated as an asset if the law required a change in asset position as suggested by Apple (*Liffen*);

(4) in the alternative, if consumer surplus falls to be characterised as non-pecuniary, it is well-arguable that it is recoverable in an action for breach of statutory duty (*BritNed*; *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344).

(a) Liffen

31. In *Liffen*, a domestic servant was unable to continue in her employment for which she received wages and board and lodging, as a result of sustaining personal injuries in an accident at work. After the accident, she went to live with her father to whom she made no payment for board and lodging. The Court of Appeal held that her damages should include the loss of board and lodging (valued at 25 shillings per week) on the same footing as the loss in cash of wages. Notwithstanding that she lived with her father without charge, she was entitled to say that the loss of board and lodging previously supplied was as much a loss to her as if she had lost an actual sum in money. Thus, it was concluded that there should be an award for that loss and a new trial was ordered.

32. Which? submitted that this case is of assistance because it shows that there can be compensation in damages in pecuniary terms for the loss of a service (i.e. board and lodging) even though it was not paid for by the claimant. Apple argued that the loss was of a contractual entitlement (and therefore an "asset") and was valued on an objective basis.

(b) The Mediana

33. In *The Mediana*, a lightship belonging to the claimant was damaged in a collision, due to the negligence of the defendant. While the lightship was being

repaired, its place was taken by another lightship owned by the claimant and maintained at an annual expense for the purpose of being deployed in emergencies. The House of Lords held that the claimant was entitled, not only to the direct expenses caused by the collision, but also to substantial damages for the loss to it of the services of the damaged lightship, even though those services were performed during the repair period by the substitute lightship. Lord Halsbury stated that the latter damages were claimable because the claimant had been deprived of the use of the damaged lightship, and it was not for the defendant to dictate whether it would have been used in any event (i.e. because of the use of the substitute lightship). He gave the example of a claim for the loss of use of a chair belonging to a claimant which had been removed by a defendant; it would not be open to the defendant to diminish or extinguish the damages claimed for loss of use of chair by saying that the claimant did not usually sit in it, or that other chairs were available anyway.

34. Which? claimed that *The Mediana* established that where the defendant's tortious conduct deprived the claimant of the use of an asset, pecuniary damages would be awarded for the deprivation of the asset, whether the claimant is put to expense in replacing that asset or not. Apple argued that it did not support the use of any subjective valuation of loss and was clearly a case involving a loss of or to the claimant's assets.

(c) H West

35. Which? referred us to the speech of Lord Morris in *H West* where he said:

> "A money award can be calculated so as to make good a financial loss. Money may be awarded so that something tangible may be procured to replace something of like nature which has been destroyed or lost."

36. Apple said that this was accepted but missed the point which was that the valuation was to be determined objectively.

(d) BritNed

37. *BritNed* was a cartel case. The claimant alleged that as a result of the unlawful conduct of the defendant cartel, it had been overcharged, because the price paid

for the relevant goods was more than their putative competitive price. The defendants denied that the claimant had suffered any loss because there was in truth no overcharge. This was because, notwithstanding the existence of the cartel, the defendants were unaware of it, and in fact the actual price agreed had been the subject of considerable negotiation between the parties and could not be shown to be more than a putative competitive price. It followed that there was no loss on the overcharge basis.

38. Marcus Smith J agreed that there was no loss on that basis. However, he considered that this did not mean that the claimant had suffered no loss at all. It was in this context that he stated as follows (at §422 onwards):

> "I. My assessment of the overcharge
>
> (1) The 'gist' damage: accrual of a cause of action
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> 422. The first question that I must consider is what constitutes the 'gist' or actionable damage to complete the cause of action of breach of statutory duty. Such 'gist' or actionable damage must be shown to exist on the balance of probabilities.
>
> 423. This is, I understand, the first claim for damages arising out of a restriction of competition contrary to Article 101 TFEU/Article 53 EEA on which judgment has been given in an English court. The question is, therefore and to an extent an open one. There is, however, a great deal of law regarding other, analogous, tortious, causes of action.
>
> 424. Although it is possible that, in order to make good the cause of action and show actionable damage, a claimant must have to show that he, she or it has sustained some monetary harm by reason of the defendant's breach of statutory duty, it seems to me most unlikely that that should be the case for this cause of action. In other torts, it may not be necessary to show damage of this sort before the cause of action arises…Thus, in *Forster v. Outred & Co.* [1982] 1 WLR 86…actionable damage occurred on execution because, although there was no actual monetary loss at that time (and there might actually be no financial loss at all, if the security was not called upon), the encumbering of her property in this gratuitous fashion was sufficient harm…
>
> […]
>
> 426. Article 101 TFEU prohibits 'all agreements between undertakings, decisions by associations of undertakings and concerted practices…which have as their object or effect the prevention, restriction or distortion of competition…'. The provision is aimed at preserving or protecting competition and maintaining the consumer benefit of having a competitive market.
>
> 427. When seeking to articulate what constitutes actionable harm, it is necessary to have regard to the object and scope of the statutory duty imposed. In this case, the object and scope of the provision is the preservation and

protection of competition from collusive efforts to undermine it. This purpose must inform the 'gist' or actual damage that a claimant must show when bringing a private action for damages. More specifically:

> (1) Cartel cases do not, by definition, involve a single actor. Cartel cases involve two or more actors, by agreement or concerted practice, acting with the object or effect of preventing, restricting or distorting competition. It is not possible, in cartel cases, to identify the act of a single person that can be tested as being the cause of a claimant's harm. It is the collective failure to compete that is the wrong at which Article 101 TFEU is aimed.
>
> (2) In this, Article 101 TFEU is different even from abuse of a dominant position under Article 102 TFEU, which is directed towards the unilateral conduct of dominant firms which act in an abusive manner. In such a case, assuming the abuse has been identified and proved, it is possible – applying the approach of Stuart-Smith LJ in *Allied Maples Group Ltd v. Simmons & Simmons* [1995] 1 WLR 1602 at 1609-1610 – to ascertain what loss the abuse has caused.
>
> (3) What the collusive misconduct of cartelists does is prevent, restrict or distort competition. To require a claimant to show monetary harm in order to found a cause of action is to ignore the purpose of Article 101 TFEU and to impose too great a burden on the claimant. Rather, what the claimant must show, as the "gist" damage, is that the unlawful conduct of the defendant has, on the balance of probabilities, in some way restricted or reduced the level of the claimant's consumer benefit. In other words, that the claimant has suffered as a result of the prevention, restriction or distortion of competition created by the cartel. Such a restriction or reduction of consumer benefit might take the form of an increased price payable, but equally it might take the form of a reduction in the number of suppliers properly participating in a tender process. I regard consumer benefit as a broad concept, and there will be many ways in which conduct infringing Article 101 TFEU will adversely affect it.

428. This Cartel had its origins in a desire to substitute for competition a form of allocation amongst the cartelists, determined by the cartelists. In order to maintain a semblance of competition, rival bids might be put in, but these would be unattractive in terms of price and/or technical specification and/or non-compliance in terms of the tender. In this way, the customer's hand could be forced and a particular tenderer foisted upon it. This is exactly what happened here:

> (1) BritNed entered into a contract with ABB for the supply of the Interconnector.
>
> (2) That transaction was entered into, in the form that it was, by reason of the Cartel. But for the Cartel, BritNed would (as I find on the balance of probabilities) have been presented with a different commercial environment, with different tenderers tendering on different terms.

429. Those facts are sufficient for me to hold that the cause of action is made out. Of course, this says nothing about the quantum of BritNed's loss. The process of quantification may show substantial damages (as BritNed contends)

> or it may show nominal damages (as ABB contends). It is to this process of quantification that I now turn."

39. The key passages in the judgment of Marcus Smith J relied upon by Which? are §426, and those parts of §427, which state:

> "the object and scope of the provision is the preservation and protection of competition from collusive efforts to undermine it…
>
> […]
>
> …the claimant has suffered as a result of the prevention, restriction or distortion of competition created by the cartel. Such a restriction or reduction of consumer benefit might take the form of an increased price payable, but equally it might take the form of a reduction in the number of suppliers properly participating in a tender process. I regard consumer benefit as a broad concept, and there will be many ways in which conduct infringing Article 101 TFEU will adversely affect it."

40. These references are relied upon by Which? to support the notion of FCS as a foundation for the disputed claim here. In particular, Which? argued that the case is authority for the proposition that the "loss of consumer benefit" constituted "actionable" damage in respect of competition law torts.

41. Apple argued that nothing in *BritNed* is concerned with assessing a loss by reference to the claimant's WTP. Apple argued that it was not enough for Which? simply to alight on a reference by Marcus Smith J to consumer benefit and say that this is the same as the particular lost consumer surplus claimed here, such that it vindicates Which?'s approach.

(e) UBAF

42. Although *UBAF Ltd v European American Banking Corporation* [1984] QB 713 is not directly on point, Apple referred to a paragraph in the judgment of Lord Ackner in which he said:

> "The mere fact that the innocent but negligent misrepresentations caused the plaintiffs to enter into a contract which they otherwise would not have entered into, does not inevitably mean that they had suffered damage by merely entering into the contract. To take and somewhat modify an example canvassed during the course of argument: A tells B that he wishes to sell his vintage Bentley which he innocently but negligently represents is a blue label long chassis. It is, in fact, a red label short chassis. If A had known, he would not have agreed to buy the Bentley, because he only collects blue label long chassis Bentleys. Assume, however, that the red label short chassis Bentleys were at

> all material times significantly the more valuable cars so that he was able to re-sell at a profit. He has then no cause of action."

43. Apple argues that this is persuasive for the point that English law does not recognise a claim based on the subjective valuation of the claimant and is thus a demonstration of the invalidity of Which?'s claim.

(2) Collective proceedings

44. Before the second hearing, the Tribunal sent a note to the parties with matters and questions on which we invited further, written representations. That note included a number of potentially relevant recent cases on the collective proceedings regime created by the Consumer Rights Act 2015 (and now under the Act).

45. In *Merricks v Mastercard* [2020] UKSC 51, [2021] 3 All ER 285, Lord Briggs speaking for the majority at §§46–47 stated:

> "46. … In this follow-on claim Mr Merricks and the class he seeks to represent already have a finding of breach of statutory duty in their favour. All they would need as individual claimants to establish a cause of action would be to prove that the breach caused them some more than purely nominal loss. In order to be entitled to a trial of that claim they would (again individually) need only to be able to pass the strike-out and (if necessary) summary judgment test: ie to show that the claim as pleaded raises a triable issue that they have suffered some loss from the breach of duty.
>
> 47. Where in ordinary civil proceedings a claimant establishes an entitlement to trial in that sense, the court does not then deprive the claimant of a trial merely because of forensic difficulties in quantifying damages, once there is a sufficient basis to demonstrate a triable issue whether some more than nominal loss has been suffered. Once that hurdle is passed, the claimant is entitled to have the court quantify their loss, almost *ex debito justitiae*. There are cases where the court has to do the best it can upon the basis of exiguous evidence. There are cases, such as general damages for pain and suffering in personal injury claims, where quantification defies scientific analysis…"

46. In the same judgment, Lord Sales and Lord Leggatt said that s. 47C(2) of the Act covered liability (as well as quantum). At §95-97, Lord Sales explained:

> "95. A provision for aggregate damages may, however, go further and serve an additional purpose. It may also permit liability to be established on a class-wide basis without the need for individual members of the class to prove that they have suffered loss, even though this would otherwise be an essential element of their claim. As Professor Mulheron notes, the nature of a claim for a breach of competition law is that it constitutes a claim in tort for a breach of

statutory duty. Under the general law such a claim is not actionable without proof of loss. In other words, a defendant commits no wrong and incurs no liability towards a claimant unless its anti-competitive behaviour causes that claimant to suffer financial harm. An aggregate damages provision may dispense with this requirement by permitting liability towards all the members of a class to be established by proof that the class as a whole has suffered loss without the need to show that any individual member of the class has done so.

96. The Canadian legislation referred to by Lord Briggs has not been interpreted as allowing liability, as well as the quantum of loss, to be established on a class-wide basis. The British Columbia Class Proceedings Act 1996, s 29(1), provides that a court may make 'an aggregate monetary award' if (amongst other requirements) 'no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined …'. In *Pro-Sys Consultants Ltd v Microsoft Corp* 2013 SCC 57, [2013] 3 SCR 477 ('*Microsoft*'), paras 128–134, the Supreme Court of Canada held that this provision could not be used to establish proof of loss where this is an essential element of proving liability. Rothstein J said (at para 133):

> 'The [British Columbia legislation] was not intended to allow a group to prove a claim that no individual could. Rather, an important objective of the [legislation] is to allow individuals who have provable individual claims to band together to make it more feasible to pursue their claims.'

97. The UK legislation is not limited in this way. Section 47C(2) of the [1998] Act contains no wording comparable to that of s 29(1)(b) of the British Columbia Class Proceedings Act, quoted above. Section 47C(2) is phrased in broad terms and is properly read as dispensing with the requirement to undertake 'an assessment of the amount of damages recoverable in respect of the claim of each represented person' for all purposes antecedent to an award of damages, including proof of liability as well as the quantification of loss. Such an interpretation better accords both with the language used and with the statutory objective of facilitating the recovery of loss caused to consumers by anti-competitive behaviour."

47. Marcus Smith J said in *FX* [2022] CAT 16 at §§174–175:

"174. …rules of causation and quantification are as applicable (and not more strictly applicable) in collective proceedings as they are in individual claims. There is one important qualification to this that we should highlight now. Whereas, in an individual claim, the individual claimant must allege and at trial prove the loss he or she has suffered, that is not a requirement in a collective action: [footnote: *Merricks* at [58]; *Lloyd v. Google LLC*, [2021] UKSC 50 (**Lloyd**) at [32].]

> '… in sharp contrast with the principle that justice requires the court to do what it can with the evidence when quantifying damages, which is unaffected by the new structure, the compensatory principle is expressly, and radically, modified. Where aggregate damages are to be awarded, section 47C of the [1998] Act removes the ordinary requirement for the separate assessment of each claimant's loss in the plainest terms. Nothing in the provisions of the Act or the Rules in relation to the distribution of a collective award among the class puts it back again. The only requirement, implied because distribution is

> judicially supervised, is that it should be just, in the sense of being fair and reasonable.'
>
> 175. It is unnecessary to consider quantification of loss in this Judgment, only the causative link between infringement and actionable damage. We should make clear that when considering the question of actionable damage, we approach that question by reference to classes as a whole, without particular consideration of the position of individual claimants within that class. Although speaking for the minority, we consider that Lord Sales' and Lord Leggatt's statement at [94] and [95] of *Merricks* provides a clear statement of the law in this regard".

48. In *Gutmann v London & South Eastern Railway Limited and others* [2022] EWCA Civ 1077, [2022] ECC 26, the Court of Appeal held that liability issues do not have to be proven by reference to the position of individual claimants: see §§29–43. In considering the fact that some members of the class may have suffered greater losses than others and that some may only have suffered nominal or *de minimis* loss, the Court of Appeal said in *Gutmann* at §38 that:

> "38… It is common ground that quantum should be calculated so that an award of damages does not overcompensate. Section 47C(2) does not rewrite the constituents of the tort to remove liability issues; it merely permits those ingredients to be established deploying different - top down - evidence. In determining quantum, the CAT therefore necessarily ensures that it excludes from the calculation those who fail at the liability stage and the methodology must, at some point, include a device for winnowing out no-loss members of the class. When this methodology is applied it necessarily traverses the boundary between recoverability and non-recoverability. These are two sides of the same coin. We therefore have difficulty in understanding how an aggregate quantum exercise does not involve the CAT simultaneously determining liability for the simple reason that in fixing the outer-parameters of quantum it is also drawing the line between liability and non-liability. The language of section 47C(2) is consistent with this. It creates a power for the CAT in determining what is "recoverable" to apply an aggregate approach. The converse of recoverable is irrecoverable; the exercise of determining aggregate recoverability necessarily entails excluding categories of consumer who should recover nothing."

49. In *McLaren v MOL (Europe Africa) Ltd and other*s [2022] EWCA Civ 1701, [2023] Bus LR 318 the Court of Appeal observed at §35:

> "..The Supreme Court in *Merricks*…and in *Lloyd v Google LLC* [2021] UKSC 50…and the Court of Appeal in *Le Patourel*…made clear that the CAT was not bound by traditional principles of compensation. When both quantifying and distributing aggregate damages the CAT might, wielding its broad axe, work with new techniques and principles to achieve practical justice. In *Lloyd* …the Supreme Court accepted for example that the CAT could apply a 'broad brush' approach to distribution of damages leading to an equal division amongst all class members and a person or category of persons might therefore acquire an entitlement to compensation even if there was no proof of loss..."

50. In *Evans v Barclays Bank Plc and others* [2025] UKSC 48, [2026] Bus LR 328, the Supreme Court (Lord Sales, Lord Leggatt, and Lady Rose) opened its unanimous judgment with:

> "Amendments made to the Competition Act 1998…in 2015 introduced a new and important procedure in cases where breaches of competition law are alleged. Under section 47B of the 1998 Act, collective proceedings, a form of class action, may be brought in the Competition Appeal Tribunal...Anticompetitive behaviour can affect large numbers of people but the loss suffered by any one individual may be too small or hard to establish to justify bringing a separate claim. The new procedure allows proceedings to be brought on behalf of a class of persons who are affected and allows damages to be awarded for the aggregate loss suffered by the class as a whole, without the need to show what loss each individual member of the class has suffered."

(3) Other authorities

51. As we shall see below, Apple made extensive reference to *McGregor on Damages* (22nd ed, 2025, Sweet & Maxwell) (***McGregor***) as the key authority on damages. On the criteria for an award of pecuniary damages, both Apple and Which? cited the opinion of Advocate General Capotorti in Case 238/78 *Ireks-Arkady GmbH v Commission* [1979] ECR 2955 EU:C:1979:203 at §9 (***Arkady***). There he said at §9:

> "It is well known that the legal concept of 'damage' covers both a material loss stricto senso, that is to say, a reduction in a person's assets, and also the loss of an increase in those assets, which would have occurred if the harmful act had not taken place (these two alternatives are known respectively as *damnum emergens* and *lucrum cessans)*...The object of compensation is to restore the assets of the victim to the condition in which they would have been apart from the unlawful act, or at least to the condition closest to that which would have been produced if the unlawful act had not taken place; the hypothetical nature of that restoration often entails a certain degree of approximation."

52. Apple said this supported its argument that a claim for compensation required an actual loss or loss of profit (being a loss of the right to an increase in assets). Where an unlawful act had not impacted a claimant's "overall asset position", it fell within neither category referred to by the AG. Which? argued that the passage indicated that the term "lucrum cessans" does not necessarily equate to the term loss of profits in English law and that the concepts of *damnum emergens* and *lucrum cessans* should be understood in the context of the aim of fully compensating for the specific unlawful act.

53. Against that background, we turn to the central issue of whether FCS can give rise to a claim for pecuniary damages.

E. PECUNIARY LOSS

54. The starting point for discussions of FCS at the hearings was the EU Commission's Staff Working Document: practical guide to quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the EU (**TFEU**) (the **SWD**). This had been cited at §19 of Apple's skeleton argument for the first hearing and its footnote 22. §§1 and 2 of the SWD state as follows:

> "I. LEGAL CONTEXT
>
> A. The right to compensation
>
> 1. Everyone who has suffered harm because of an infringement of Article 101 or 102 of the Treaty on the Functioning of the European Union (TFEU) has a right to be compensated for that harm. The Court of Justice of the EU held that this right is guaranteed by primary EU law. Compensation means placing the injured party in the position it would have been in had there been no infringement. Therefore, compensation includes reparation not only for actual loss suffered (damnum emergens), but also for loss of profit (lucrum cessans) and the payment of interest. Actual loss means a reduction in a person's assets; loss of profit means that an increase in those assets, which would have occurred without the infringement, did not happen.
>
> 2. Civil actions for compensation are generally adjudicated by national courts. In so far as there are no EU rules governing the matter, it is for the domestic legal system of each Member State to lay down detailed rules on the exercise of the right to compensation guaranteed by EU law. Such rules, however, must not render excessively difficult or practically impossible the exercise of rights conferred on individuals by EU law (principle of effectiveness), and must not be less favourable than those governing damages actions for breaches of similar rights conferred by domestic law (principle of equivalence)." (footnotes omitted)

55. These paragraphs reflect the Damages Directive referred to above at §22.

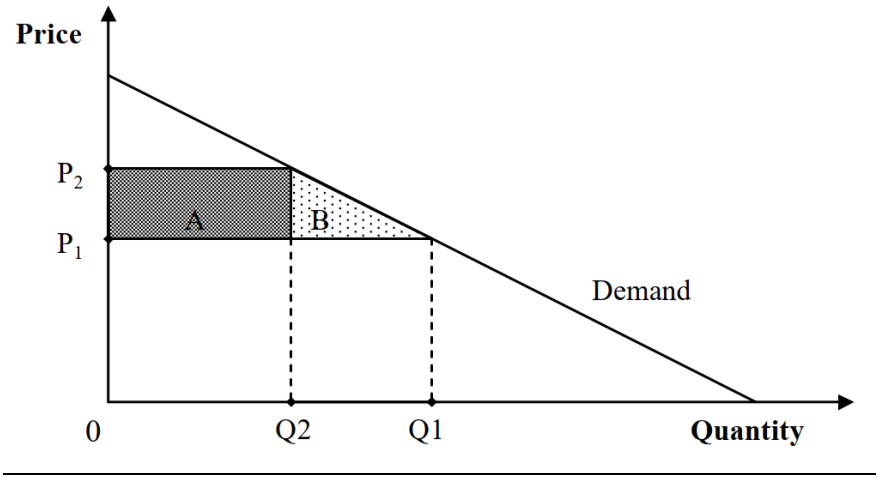
56. Apple placed emphasis on the references in §1 of the SWD as to compensation including that for actual loss suffered by a reduction of a person's assets or loss of profit (including interest). Apple says that the claim under §137.1 of the draft Amended Claim Form does not fall into either category.

57. §128 of the SWD then provides as follows:

"128. In so far as infringements lead to a rise in prices for the products concerned, two main kinds of harm caused by such infringement can be distinguished:

> (a) the harm resulting from the fact that direct and indirect customers of the infringing undertakings have to pay more for each product they purchase than without the infringement (the 'overcharge'). This type of harm is further discussed in Section II; and
>
> (b) the harm resulting from the so-called 'volume effect', which is caused by the fact that fewer of the products in question are bought due to the rise in prices. This type of harm is further discussed in Section III.

The following figure represents in a stylised way these two main effects:



58. The sloping line in the figure is the demand curve and we refer to the figure as the **Demand Curve Diagram**. It is explained in §129–133 of the SWD, which need to be set out in full, for context:

> "129. P1 is the price charged if no infringement of Article 101 or 102 TFEU affects the market. In a perfectly competitive market, this price will equal the supplier's cost of producing one more unit ('the marginal cost'). Many markets are in fact not perfectly competitive and non-infringement prices on these markets will be above the level of marginal costs. At price P1, Q1 is the quantity of the product bought by customers.
>
> 130. P2 is the higher price resulting from an infringement having an effect on price. This in turn leads to lower demand (Q2) because some customers will consider that the higher price they have to pay exceeds the value of owning the product or of benefiting from the service. This effect is referred to as the 'volume effect' or the 'quantity effect'. The degree to which a rise in prices affects demand depends on demand elasticity: Demand elasticity measures by what percentage the quantity sold of a product in a given market varies in response to a one percent price change for a particular demand level, and provides a useful indication of the magnitude of the volume effect for small price changes.

> 131. Rectangle A represents the value transferred from the customers to the infringers due to the infringement: the customers who buy at the higher price P2 have to transfer more money to the infringing undertaking(s) in order to obtain the product. They can demand compensation for having had to pay more and Section II below will explain how to quantify this harm.
>
> 132. Triangle B represents the volume effect and thus the value foregone by those who would have bought the product for price P1, but refrain from doing so when the price rises to P2.
>
> 133. Some customers use the product in question for their own commercial activities – for example to sell it on or to manufacture other goods. When they do not buy at price P2 (or buy less), they forego the profit they would have made had they been able to purchase at price P1. They can claim reparation for this loss of profit and Section III below will illustrate how to quantify this harm. Other customers are end-consumers. If these do not purchase at price P2 this means that they fail to enjoy the utility of these products or services, for which they would have been prepared to pay price P1. Applicable legal rules may provide that some or all of such harm should be compensated for such failure to enjoy the usefulness of the product. At a minimum, end-consumers who have to bear higher costs (for example for the purchase of a substitute good) and who therefore have suffered an actual loss must be able to obtain compensation."

59. Apple relies on §133 above to emphasise its point that, whether there can be compensation for an end user's loss of enjoyment of products or services which they did not purchase, but would have purchased in the counterfactual, is a matter for applicable legal rules, i.e. the domestic law of the Member State where the matter is litigated. In other words, the SWD, or perhaps more accurately, EU law as understood by the authors of the SWD (which is at best an advisory document), does not compel such a remedy. What is required as a minimum remedy, according to the last sentence of §133, is compensation to the end user who did pay the higher costs and therefore suffered an actual loss. The Purchasing Customers would thereby fall into that category.

60. Accordingly, Apple argued in its skeleton argument that there is no positive support for the claim under §137.1 in EU law. Which? did not refer to the SWD in its skeleton argument.

61. Linking the description in the Hughes report of the claim for FCS in §10 above with the Demand Curve Diagram, the price P2 corresponds to the actual price of £14, P1 to the counterfactual price of £5 (noting that this does some violence to the scaling in the diagram), the sales level Q2 corresponds to the purchases by Purchasing Consumers, and the increases in sales to Q1 correspond to the

purchases by those Non-Purchasing Consumers who would have purchased iCloud services at the lower price. The rectangle A measures the overcharge claim in §135.1, while **Triangle B** corresponds to the FCS claim in §138.1.

62. Ms Demetriou KC for Apple based her case on legal principles and argues that a claim based on FCS is contrary to the established English law of damages. In answer to questions from Professor Smith about the Demand Curve Diagram, Ms Demetriou did not deny the existence of the economic concept of FCS but argued that this does not translate into a valid legal remedy in damages under English law because it depends on the subjective valuation of each customer.

63. She quoted *McGregor* (§2-002):

> "'The heads or elements of damage recognised as such by the law are divisible into two main groups: pecuniary and non-pecuniary loss. The former comprises all financial and material loss incurred, such as loss of business profits or expenses of medical treatment.'
>
> So underline those words: 'all financial and material loss incurred, such as loss of business profits'. So … volume effects are a loss of business profits. They fall squarely under pecuniary loss.
>
> 'The latter [non-pecuniary loss] comprises all losses which do not represent an inroad upon a person's financial or material assets, such as physical pain or injury to feelings. The former, being a money loss, is capable of being arithmetically calculated in money, even though the calculation must sometimes be a rough one where there are difficulties of proof. The latter, however, is not so calculable. Money is not awarded as a replacement for other money, but as a substitute for that which is generally more important than money: it is the best that a court can do.'
>
> So that's how the law organises claims for damages."

64. As we shall see below, the term "volume effect" is normally used in respect of a firm which is adversely affected by a price increase in an input. If that firm is selling in a market in which it has no influence on the market price, the volume effect arises if the rise in its input costs induces it to reduce its sales. If it has some market power and can raise its consumer price, the volume effect reflects the reduction in sales induced by the rise in the consumer price. In both cases, the volume effect will be associated with a loss of business profits.

65. The volume effect in a market for an intermediate good, purchased to be an input into a business, represents a loss of profit to that business. In the market

for a final consumer good it represents a loss of consumer surplus. Ms Demetriou's justification for treating these differently was:

> "[W]e're not saying that there's a distinction between direct purchasers [business customers] and end consumers. We're saying in both cases the law requires damages only to be recovered on an objective basis. So we're not drawing a distinction … here.
>
> What this stylised example -- I mean, you can see at the beginning, some customers use the product in question for their own commercial activities, so a direct purchaser. Well, not necessarily, for example, to sell it on or to manufacture other goods. And so where they don't buy at price P2 or buy at less, they forego the profit they would have made, so that's all conventional loss.
>
> … They can claim reparation for this loss of profit. And a consumer would be able to do that too. So, if a consumer has paid too much for a product, they can claim too much in the sense that the price they paid is lower than it is higher than it would have been in the counterfactual, or they can claim lost profits if they would have put that to some use and made a profit further down the line.
>
> But the point here is and it applies both to direct and indirect purchases that if the claim is based on forgone consumer surplus, which is connected with the subjective valuation of the purchaser, be they direct or indirect, that's not recovery which is mandated, and so legal rules may, and we emphasise the word 'may', provide for that, but do not have to. And we say it's anathema to English law. And so English law does not provide for recovery of such damages."

66. We understand that when Ms Demetriou stated that business purchasers and end-consumers are treated in the same way, she means that both overpayment for actual purchases and other business losses are actionable but consumer surplus is not. When the Demand Curve Diagram is read as a description of the market for a business input, Triangle B is a loss of profit to the business purchaser and is actionable, while when the Diagram is read as a description of a final consumer good, Triangle B is a loss of consumer surplus and is not actionable.

67. Which?'s response to the Strike-Out Application starts by reference to the same Demand Curve. Mr Woolfe KC for Which? stated:

> "First of all, we say, this does show that the dispute, as Professor Smith rightly observed, is about area B on that diagram. And, we say, it does show that the loss is real. That area of that diagram shows services not being provided to people, services which they would otherwise value and wish to purchase. And, we say, that fits with and I'll get to the case of *Liffen* that non-receipt of the relevant good or service is the nature is the very nature of that loss. You

> obviously have to take account of anything that's paid for that good or service in the counterfactual.
>
> Second point is to say this diagram shows that this really is about valuation in money terms. Area B is inherently a monetary valuation because it's multiplying a price by a quantity.
>
> Third point to note is that this is a classic formulation of the harm caused by monopoly pricing and market power. It's absolutely standard in many economics textbooks, nothing novel about it or unusually peculiar to the European Commission. And the control of the harm caused by monopoly and market power is precisely what competition law seeks to prevent."

68. It should be noted that *McGregor*'s wording of "such as a loss of business profits" indicates that loss of business profits is *an example* of a financial or material loss. Ms Demetriou's reference to "volume effects [being] a loss of business profits" (at §63 above) is not an answer to the question of whether a volume effect can arise in the market for a consumer good and give rise to a financial or material loss to the consumers of the good.

69. Ms Demetriou appealed to *McGregor*'s description of the appropriate damages for a breach of contract or damage to an asset in support of her proposition that damages had to be based on objective data. However, she agreed that in the calculation of damages for a breach of competition law, it was often necessary to compare the factual outcome in the market with a counterfactual description of a market outcome absent the alleged breach of the law:

> "I entirely accept that in some cases -- and competition cases are a very good example -- it will be difficult to establish the price that would have been charged in the counterfactual absent the abuse. I accept that.
>
> When I talk about a market price, I'm using that as a shorthand for objective price. So when you're constructing the counterfactual, you're quite right to say that that will often depend on quite complex economic and factual evidence, because, by necessity, it's a hypothetical construct, the counterfactual, and it may be difficult to ascertain what the price would have been absent the abuse.
>
> The court may have to wield a broad axe as it often describes the process. But what it's trying to do in that exercise is still to determine the objective counterfactual price. What it's not doing is taking account of the individual valuations or individual views of different consumers, and that's really the fundamental distinction here.
>
> So [I] completely agree that the exercise may be difficult, may be a broad-brush exercise, may require economic evidence, may require use of the broad axe. But it's still trying to figure out what the true -- I'm going to say market price -- what the objective counterfactual price is doesn't depend on the valuations of individuals. That's the key distinction."

70. We now turn to the Demand Curve Diagram and the relevant paragraphs of the SWD, already set out at §§57 and 58 above.

71. Ms Demetriou correctly noted that §133 of the SWD supports in its last sentence the distinction made between the two classes of consumer loss in §§135.1 and 137.1 of the draft Amended Claim Form, illustrated respectively by rectangle A and Triangle B in the Demand Curve. But whereas she argues that the consumer loss represented by rectangle A is in principle actionable in damages while that represented by Triangle B (the FCS loss) is not actionable in damages, we interpret the quoted paragraph as indicating that "[at] a minimum" the loss represented by rectangle A should be actionable, while "[applicable] legal rules *may* provide that … *all* of such harm should be compensated" (our *emphasis*). The SWD, like the earlier quotations from *McGregor* (see §§63, 68 and 69 above), does not provide definitive support for Ms Demetriou's argument. The quotation indicates that compensating for FCS is neither mandated nor ruled out by EU law and is left to national law, which does not imply that it is ruled out by English law.

72. In relation to §63 above, we see here that there can indeed be a "volume effect" in a consumer market, and the parties agreed in their submissions at the second hearing that the central question at issue here is whether a volume effect which concerns FCS – rather than a loss of profit to firms – and so therefore not a financial loss, is nevertheless a material loss which is actionable in damages in English law as a pecuniary loss.

73. Apple's skeleton argument for the second hearing focused on that issue by arguing that "pecuniary loss comprises financial and material loss" (§20(1)); "… FCS is not recoverable in law because it is not pecuniary loss: it does not involve any change in a person's asset position" (§21); "… it is not an objective matter that sounds in the law of damages" (§24). Furthermore, "Apple does not accept that a demand curve of consumers' willingness to pay is 'objectively derived' in any relevant sense … the demand curve still ultimately reflects the underlying willingness to pay of individual consumers. Such willingness to pay will … differ from person to person depending on their individual preferences" (§29(1)).

74. Which?'s claim is made on an opt-out basis in collective proceedings. Since it is agreed by the parties that a valid claim brought in collective proceedings must be based on valid individual claims, we start by considering Apple's asset test for pecuniary loss in the context of *individual* claims for pecuniary loss.

(1) Apple's apricots

75. We have noted already that both parties have cited Advocate General Capotorti in *Arkady* (§51 above) as an appropriate description of an asset test for damages in terms of pecuniary loss.[1]

76. Apple's interpretation of this asset test is helpfully explained by simple examples in its skeleton argument for the second hearing. In an excessive pricing example, a cartel is supposed to fix the price of apricots at £1, compared with a counterfactual competitive price of 50p. An individual called Carla has a WTP of more than £1, whereas Adam and Becky have WTPs of 60p and 90p respectively.

77. Apple says "Carla spent £1 on an apricot objectively worth 50p. Objectively, she lost 50p as a result of that purchase – however subjectively happy it made her" (§16(2)). Further, "Carla has also suffered a pecuniary loss because of the cartel. Although in the counterfactual her net change in assets would have been zero, she would still have been 50p better off than she was in fact – by avoiding the 50p that she sustained when she spent £1 on an apricot worth 50p. Her pecuniary loss is therefore 50p" (§17(4)).

78. The language of asset valuation does not sit entirely comfortably with the analysis of the purchase of a single perishable consumer good, but that is not the problem with Apple's approach. When Carla willingly buys an apricot for £1, she is treated as having suffered a loss of assets because the asset is only "worth" the 50p it would have cost in a hypothetical competitive market.

[1] Although both parties considered *Liffen* supported their position on the asset test, we do not consider that in the context of a collective proceedings claim that much weight can be placed on a personal injury case in which employment law and the Truck Acts appear to have been influential.

79. Mr Woolfe in the second hearing cast doubt on whether the counterfactual competitive price was an appropriate measure of the true worth of the apricot:

> "The loss to [the Non-Purchasing Customers] doesn't arise from non-delivery of goods under a contract. It arises from the fact that Apple has raised the price of iCloud above the level that would have pertained in the absence of the anti-competitive conduct, so that the price for iCloud is more expensive than the non-paying class members are willing to pay.
>
> The consequence of that is that [the Non-Purchasing Customers] don't purchase and they lose out on those services. Unlike in Apple's contract example, non-paying customers or class members cannot mitigate that loss by purchasing an iCloud in some available market. There is no available market for iCloud other than at the price it is provided.
>
> […]
>
> Apple doesn't offer iCloud at a price which enables the non-paying customers to mitigate this head of loss. So in a sense there is a fundamental difference between their breach of contract example and ours which is the availability of that option to mitigate and that is actually what drives the quantification of loss, not that an apricot somehow has an objective value of 50p."

80. A more natural approach to asset valuation than Apple's approach described in §77 is to respect the consumer's decision to buy the admittedly overpriced apricot as a willing exchange of £1 for an asset that she values as worth at least £1 to her. She is not a trader or investor, and there is no counterfactual market in "pre-loved" apricots in which she could realise the true "worth" of the asset and regret a poor investment. She is a consumer, and the best measure of the worth of the good to her is the price she is willing to pay for it. She will not regard her assets as having been depleted by the willing transaction, and why should the law override her own assessment of the value of her personal consumption decisions? The loss to her is in the comparison with the counterfactual perfect market, where she would have bought for 50p an asset worth at least £1 to her and made a gain of at least 50p.

81. It is therefore incorrect to say that the purchase of an overpriced apricot has reduced the value of Carla's assets: it is the overpricing of apricots that has impaired the real value of her assets. In everyday terms, a price increase has increased her cost of living and reduced her real income. In the counterfactual, she could buy for 50p an apricot for which she would have been willing to pay

£1; in the actual she pays £1 so she ends up with an apricot and 50p less in her pocket.

82. Putting this miniature exercise in the valuation of consumer assets into the language of Advocate General Capotorti in *Arkady* (see §51 above), we can regard the increase in the price of apricots as having reduced the value of Carla's assets by 50p (Advocate General Capotorti's first alternative) or having deprived her of the opportunity to increase her assets by 50p (the second alternative). But either way, we get the same answer: a pecuniary loss which sounds in damages for 50p. And this is Apple's answer too.

83. So why worry about the wording of Apple's asset test, which mistakenly locates the asset reduction in Carla's voluntary purchase of the £1 apricot? Because it matters when we turn to the cases of Adam and Becky.

84. In the actual, neither Adam nor Becky buy an overpriced apricot and, according to Apple, "Adam and Becky's net asset position in the counterfactual would have been the same as it was in fact. They have suffered no pecuniary loss." (§17(5)). Apple tells us that Becky's WTP is 90p, so the excessive price of £1 has deprived her of the opportunity to buy for 50p an asset for which she would have been willing to pay 90p, so her FCS is 40p. Apple says this loss of consumer surplus is not a loss of assets, and therefore does not sound in damages as a pecuniary loss. It is clear on the facts as stated in Apple's example that the cartel has done more harm to Becky than to Adam, but on Apple's reckoning both are due no damages.

85. But it is simply not correct that their net asset position is the same in the counterfactual as in fact. The price of apricots is higher than in the counterfactual and the real value of the monetary assets in their respective pockets has diminished.

86. A brief diversion in time and place to the port of Liverpool in 1898 may underline this point. As described earlier at section D(1)(b), *The Mediana* concerns the appropriate level of compensation for the damage of one of the lightships belonging to the port authority. It was agreed that the owners of The

Mediana, the tortfeasor, had to pay the repair costs of the damaged lightship, so restoring the nominal value of the two lightships. The House of Lords agreed that this was insufficient, because during the period that the damaged lightship was being repaired, the port did not have a spare lightship. In the second hearing, in an exchange with the Chair, counsel for Which? stated:

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

87. We understand Mr Woolfe's point to be that it is not enough to look at the balance sheet value of the lightships (with the repair costs included); the value to the harbour board of the ships was reduced while the damaged vessel was being repaired. This points to the error in Apple's position that Adam and Becky suffered no loss since the nominal value of the money in their pockets was unchanged by the unaffordability of apricots.

88. Ms Demetriou was reluctant to recognise that price rises make consumers worse off:

> "PROFESSOR SMITH: No, they're worse off if the price is £10 than if the price is £9 and with respect, that's not a matter of economics or law but of common sense. If …nothing else has changed except a price has gone up then a consumer is worse off.
>
> MS DEMETRIOU: No, we don't accept that because if the price had been £10 then the person would not have spent any money. … If it's £9, then they would have spent money and they would have been £4 worse off. But they didn't spend any money and so they're not worse off. So in fact if the price is £10 the person is not worse off."

89. The wording "they didn't spend any money and so they're not worse off" displays the error in Apple's asset test. Adam and Becky did not spend any money on excessively priced apricots because the excessive price reduced the purchasing power of the assets in their pockets. Of course, not spending money does not make Adam and Becky worse off, but that is not the question. The

proper question is whether the excessive price has reduced the value of the pound in their pockets and the answer to that question is that it has.

90. Suppose now that the apricot cartelists have a defector: one seller who becomes anxious about being left at the end of the day with a pile of unsold fruit and quietly reduces his price to 90p. Now Becky can buy an apricot. Since by the definition of WTP, 90p is the maximum she would pay, the exchange of 90p for an apricot does not make her better off or worse off than she was before, so her own valuation of her assets is unchanged, but on Apple's reckoning (as confirmed in the above exchange) she is now due damages of 40p.

91. The erroneous nature of Apple's accounting becomes particularly clear at this point. When Becky meets the defecting merchant and buys a cartel-busting apricot, Apple correctly says she now is 40p worse off than she would be in the counterfactual and has a valid claim for damages. She is better off than when the cartel price held at the unaffordable (to Becky) £1, but Apple claims that at the £1 price she suffered no loss of assets compared with the counterfactual, and does not have a valid claim for damages, as confirmed at the second hearing (in discussion of an example where the relevant numbers were 10 times larger):

> "PROFESSOR SMITH: And you're not troubled by the notion that consumers are entitled to compensation when the price is £9 but not entitled to compensation when the price … goes up?
>
> MS DEMETRIOU: Sir, no, I'm not troubled by that at all because the law of damages as I have said proceeded for centuries on an objective basis and I would be troubled by a situation in which Consumer A comes along to the Tribunal and says my valuation was £9 and so I'm entitled to £4 and the next consumer comes along and says my valuation happens to be £5, which is the price I've paid, so I'm not entitled to anything and the third consumer comes along and says my valuation happened to be £6 and so I'm entitled to -- that would trouble me much more. And that's not the way in which the English law of damages proceeds."

92. The troubling issue raised here is that Apple's asset test produces a paradoxical result that a person harmed by a cartel has a claim for damages so long as the excessive price is not prohibitive, but the claim evaporates if the price rises to a prohibitive level. The paradox exposes an error not in centuries of the English law of damages, but in Apple's asset test.

93. Returning to Advocate General Capotorti's formulation of the asset test, we see that Adam, Becky and Carla all suffer a reduction in the purchasing power of their assets; or, on the alternative version of his test, they are all deprived of the opportunity of increasing their assets by buying at the counterfactual price of 50p an apricot for which they would have been willing to pay respectively 10p, 40p and at least 50p more.

94. Apple's asset test does not capture the fact that a prohibitively excessive price harms Adam and Becky because of Apple's *assumption* that the excessively priced apricots should be valued at their hypothetical competitive price. This assumption implies that the lost opportunity to buy at the competitive price a good for which Adam and Becky would have been willing to pay more is necessarily an opportunity with zero value. FCS fails Apple's asset test because of *petitio principii* – the conclusion is in the assumption, in this case a mistaken assumption.

95. On the facts set out in Apple's skeleton argument for the second hearing, in our view, Adam, Becky and Carla all have good claims in principle for 10p, 40p, and 50p respectively.

96. However, Adam and Becky's claims are fatally marred by the absence of objective evidence they could bring to court. We agree with Ms Demetriou that consumers cannot come to court with unevidenced statements about their WTP.

97. The difference between Adam and Becky on the one hand and Carla on the other is not about subjectivity of tastes. Apple has told us what their respective WTPs are, i.e. the amount of money each would be willing to exchange for an apricot. Carla's choice is driven by her individual preferences in the same ways as Adam's and Becky's choices are. The difference is about evidencing their losses. Faced with a price of £1, Carla's purchase provides objective evidence that her WTP is at least £1, and that the excessive price deprives her of the opportunity to increase her assets by buying for 50p an asset (the apricot) for which she would have willingly paid £1. She can evidence that loss because she bought at the price of £1. But Adam and Becky cannot evidence their losses of

opportunity to increase their assets by 10p and 40p respectively by purchase at 50p of an asset they value more highly than 50p.

98. That is where it becomes relevant, crucial indeed, that Which?'s claim "seeks an aggregate award of damages under section 47C [of the Act], representing loss to the class as a whole, by way of a top-down methodology based on willingness to pay." Which? is "not seeking to advance a bottom-up individualised assessment of loss nor one based on a purely subjective measure" (see above at §23).

99. The individual claimants are not coming to trial with unevidenced statements of individual preferences, but with an evidence-based market demand curve like the one in the SWD. Evidence from modelling of the operation of the market, including of the relationship between demand and price, will have been required in any event in the determination of the counterfactual price which plays a central role in Apple's asset test; indeed in any evaluation of the harm caused by breaches of competition law.

100. We pick up this thread after considering Apple's differential treatment of producer and consumer losses, another illustration of paradoxical conclusions from Apple's asset test.

(2) Differential treatment of producers and consumers

101. The SWD notes that the Demand Curve Diagram could represent the demand by firms for an intermediate good. Then the Triangle B can be seen to represent lost profits: a firm will be willing to pay a price for additional supplies of a business input that will correspond to the profit it can make using the additional inputs. Just as the FCS for final consumers was represented by adding up all the area in Triangle B, so for business purchasers, Triangle B measures the loss of profit associated with the volume effect on producer demand.

102. The two cases seem exactly parallel, but Apple takes a different view: while lost profits are objectively determined and give rise to actionable damage, FCS is subjective and does not sound in damages. For the reasons given above, we do

not accept that in collective proceedings FCS calculated from a market demand curve is subjective.

103. The consequences of Apple's distinction were explored in the second hearing in a hypothetical example of an examination board which supplies essential teaching material to private tutors who prepare students for an examination which awards a well-established certification to successful students. The examination board decides to exploit its dominant position by setting high prices for the essential teaching material. The tutors cannot absorb the increased cost and pass at least some of it on to their students as higher fees. Some students can pay the higher fee; others drop out.

104. Ms Demetriou readily agreed that there are three groups who would suffer harm from the excessive price: (1) the tutors who lose income as their market shrinks; (2) the students who pay higher fees; and (3) the students who can no longer afford to study for the examination. She agreed that Apple's view is that the losses to the first two groups sound in damages, but not the harm to the third group:

> "PROFESSOR SMITH: ... The pupils who can pay the higher price, they can claim. But the third class, the people driven out of the market can't claim.
>
> MS DEMETRIOU: They haven't suffered any pecuniary loss.
>
> PROFESSOR SMITH: That is the position, and that's a position that the law of damages should be happy with.
>
> MS DEMETRIOU: Well, that's the position the law of damages takes, which is all I need to show you. ... I don't need to persuade you that you think it's a good idea. I just need to persuade you that that's what the law of damages says."

105. The fact that the students who have dropped out constitute a third group who have been harmed by the excessive price was not denied by Ms Demetriou, but because they "haven't suffered any pecuniary loss", i.e. they have not spent any money, they have no actionable loss. Moreover, "that's the position the law of damages takes, which is all I need to show you." As we have shown earlier, Apple's position that the excluded students should be denied compensation demonstrates not a failing of the law of damages but a fatal flaw in their asset test.

106. Ms Demetriou argued in the first hearing that the inadmissibility of FCS as a claim for damages reflected:

> "a fundamental, very fundamental principle of English law, because objectivity ensures consistency and equal treatment before the law, rejecting individual subjective valuations of interests means that claimants in like situations will be treated alike. So just because one claimant values an asset more highly than another, the law does not give that claimant more compensation. This objective approach also enhances legal certainty. Liability is not dependent on unknowable individual preferences, but is reasonably measurable. And, as I say, it's a fundamental point running through English law."

107. The outcome of the distinction in this example would be inconsistency and unequal treatment before the law: tutors and one group of students entitled to compensation, another group of students not. Apple's interpretation of objectivity does not meet its stated objective.

108. We noted earlier Apple's expressed concern about the "unconscionable" possibility of better-off consumers getting a higher recovery in damages as compared with the less well-off. Now an outcome in which better-off students are entitled to damages for the overcharge, while less well-off students get no compensation for their very real loss gets the response: "Well, that's the position the law of damages takes, which is all I need to show you."

109. Furthermore, the basis for the distinction is a misplaced concern about subjectivity. In a collective action by tutors against the examination board, the key evidence of the quantum of harm would be provided by the demand curve for the tutors' services, which would be a reflection of the declining number of students. The objective evidence of the loss of income to the tutors would be essentially the same objective evidence of the loss of opportunities to the excluded students. The effects on tutors' incomes would depend on the individual choices tutors made (for example about their hours of work) in response to the increase in their costs. The objective evidence of the choices of tutors and pupils is available in their respective demand curves.

(3) FCS in collective proceedings – aggregating liability

110. We concluded above that the barrier facing a claim in damages based on FCS is not the subjectivity of individual choices, but the fact that individual claims for FCS cannot be objectively evidenced.

111. An estimated demand curve anchored in the actual price and sales data plays a central role in collective proceedings seeking consumer damages. How the demand curve would be estimated would depend on the facts of the individual cases. The key parameter required to provide a usable description of the counterfactual is the elasticity of demand – the standard measure of how the level of sales might respond to a reduction in price. The estimation of a demand curve for a consumer good does not typically depend on individual valuations or individual views of different consumers.

112. Now, instead of named individual consumers with WTPs which cannot be evidenced, we have an objective relationship between consumer demand and price which represents the number, but not the identity, of consumers with different WTPs.

113. There are now two slightly different routes to deriving a measure of aggregate pecuniary liability in a collective action.

(a) Aggregating anonymous individual claims

114. Our preferred route is the simpler one of aggregating valid but anonymous claims. Triangle B in the Demand Curve Diagram refers to those consumers who would purchase the good at the price P1 but not at the higher price P2. Some like Becky in Apple's apricot example have a WTP close to P2, others like Adam have WTP closer to P1. The WTPs of all the Non-Purchasing Customers who would have purchased at the price P1 are represented by the part of the demand curve that is the upper border of Triangle B. There are of course some Non-Purchasing Customers who would not purchase at P1, and

they have no claim to damages.[2] The distance between Q1 and Q2 on the horizontal axis (equal to the base of Triangle B) represents the additional quantity of the good which would be sold if the price were reduced from P2 to P1.

115. The demand curve does not tell us the identity of consumers at its different points. The consumers are anonymous points on the demand curve. But each anonymous consumer has a valid claim to damages on the *Arkady* asset test properly applied, for the reason that Adam and Becky had valid claims to damages in the apricots example. The price increase from P1 to P2 has reduced the real value of their monetary assets; or, in the *Arkady* alternative, has deprived them of the opportunity to increase their assets by buying at a price below their WTP. For each unit of the good which the anonymous consumer would have bought, the gap between the demand curve and the line corresponding to P1 is the harm caused by the excessive price, and the FCS liability for that individual consumer is measured by that gap multiplied by the number of units they would have bought at the lower price. The difference between these claims and those of Adam and Becky in the apricots example is that the anonymous claims are individually evidenced by the demand curve.

116. Now these individual liabilities can be added up across all the units Q1–Q2 which would have been sold at the lower price to give the total liability for the class: it is an aggregation of anonymous individual claims where the liability has been established individually. Picking up the wording of Lord Sales in *Merricks*, "liability [has been] established on a class-wide basis without the need for individual members of the class to prove that they have suffered loss" by aggregating the valid individual claims of anonymous class members.

[2] For completeness, we would note that these customers are comparable to "A" in the comments of Ackner LJ in *UBAF*. The difference is that in that case the prices of red and blue Bentleys are assumed to reflect a competitive market. In that context, the valuation of "A" is not determinative. No one is suggesting that "A" would have a claim for damages in this case. The difference from the alleged position in the current case is therefore material.

(b) The alternative "gist"-based route to class-wide liability

117. The alternative route first establishes "gist" for a collective cause of action in the way set out in *BritNed*.

118. Which? quoted (the Reply, §§29–30) Marcus Smith J in *BritNed* at §427(3):

> "What the collusive misconduct of cartelists does is prevent, restrict or distort competition. To require a claimant to show monetary harm in order to found a cause of action is to ignore the purpose of Article 101 TFEU and to impose too great a burden on the claimant. Rather, what the claimant must show, as the "gist" damage, is that the unlawful conduct of the defendant has, on the balance of probabilities, in some way restricted or reduced the level of the claimant's consumer benefit. In other words, that the claimant has suffered as a result of the prevention, restriction or distortion of competition created by the cartel. Such a restriction or reduction of consumer benefit might take the form of an increased price payable, but equally it might take the form of a reduction in the number of suppliers properly participating in a tender process. I regard consumer benefit as a broad concept, and there will be many ways in which conduct infringing Article 101 TFEU will adversely affect it."

119. "Consumer benefit" is not synonymous with "consumer surplus": Marcus Smith J's words could apply to purchasers who continue to buy the good whose price has been increased by a cartel rather than those priced out of the market.

120. In the present case, we are considering an allegedly abusive price set by an allegedly dominant firm which causes some consumers to be priced out of the market, and the claim contested in the current action is the claim for FCS for these excluded consumers. It is apparently not contested by Apple that consumers excluded from a market by an excessive price suffer harm, though Apple maintains this is not pecuniary loss recognised by law.

121. *BritNed* at §10 reads:

> "In English law, competition law infringements are vindicated as statutory torts. To establish a claim, two things must be shown: (i) an infringement of competition law; and (ii) actionable harm or damage, caused by that infringement. As has been stated in the context of the tort of negligence – but the point holds good for breach of statutory duty – '[i]t is a truism that a fundamental requirement for a claim in negligence is that the plaintiff has suffered some past "damage". A breach of duty by the defendant is not enough. The cause of action will not accrue until actionable damage occurs. The damage is said to form the gist of the action. Recovery is not limited to this threshold "gist damage", but without it there is no cause of action."…Proving

> actionable damage inevitably involves demonstrating a causal link between the infringement and the damage, generally using the 'but for' test of causation."

122. The excluded consumers have a loss which is more than nominal, and therefore on Marcus Smith J's reasoning, they have established the "gist" of a cause of action, the first step in establishing whether their loss sounds in damages in law.

123. They cannot make individual claims, because quite apart from the usual practical and financial barriers to litigating individual claims under competition law, individuals cannot evidence the quantification of their loss as we have discussed above.

124. However, now that we can identify claims for at least more than nominal damages (the hurdle in §47 in the judgment of Lord Briggs in *Merricks* quoted at §45 above) albeit subject to the process of quantification, they can go forward in a representative action so that liability and quantum are determined on an aggregate basis at class level, consistent with the judgments of Lords Sales and Leggatt in *Merricks* as summarised by Marcus Smith J in *FX*, and by the Supreme Court in *Evans*.

125. In the Demand Curve Diagram, a point above P2 corresponds to an anonymous consumer who buys the goods at the higher price and is entitled to claim for the overcharge. The rectangle A sums up the overcharge damage claims of all the Purchasing Customers. A point between P2 and P1 corresponds to an anonymous Non-Purchasing Customer who does not buy at the higher price, but would buy at the lower price P1. The gap between the demand curve and the line P1 is the FCS for that consumer, and the Triangle B sums up the FCS claims of all these Non-Purchasing Customers. Below P1 on the Demand Curve are the Non-Purchasing Customers who would not buy at the counterfactual price and who have no claim for damages from the overcharge. The Triangle B of FCS thus adds up the value of all the lost opportunities of consumers with WTP more than P1 and less than P2 to increase the value of their assets by buying for P1 a good that is worth more than that to them. The calculation uses only the objective data in the demand curve to give an evidence-based pecuniary value to the aggregate loss suffered by the Non-Purchasing Customers, a pecuniary loss represented by Triangle B in the Demand Curve Diagram. In the same way

as when we aggregated anonymous individual claims, Triangle B provides an objectively evidenced aggregate measure of the class-wide liability. The two routes have arrived at the same conclusion: in a collective claim for FCS, the Triangle B calculation provides a valid measure of the aggregate liability arising from the pecuniary loss.

F. ASSERTION OF LOSS ON THE BASIS OF *RUXLEY* OR NON-PECUNIARY LOSS

126. If, for the moment, we accept that Apple is right that the claim could not be for pecuniary loss, and that we are wrong in our conclusions in section E, the question which then arises is whether Which? has a realistic prospect of success for remedy for non-pecuniary loss.

127. Which? claimed that if FCS does not give rise to pecuniary loss, it was well-arguable that it could give rise to recoverable non-pecuniary loss. Which?'s claim in this respect was built on the following points:

(1) that in *BritNed*, Marcus Smith J had said (albeit in relation to claims under Article 101 TFEU) that actionable damage could be shown without monetary harm;

(2) that it was necessary in the competition law context to take account of the principle of full compensation;

(3) that Lord Mustill's speech in *Ruxley* showed that there was no policy of the common law which excludes claims for FCS and that it was persuasive authority for the proposition that FCS is a recoverable form of loss in a contract claim, and that the case for this in a competition law claim was stronger since FCS was a central part of the competitive harm; and

(4) that Apple had identified no authority for the proposition that the loss was not recoverable (other than general summaries in *McGregor*).

128. Apple argued that:

(1) Which?'s reference to *BritNed* was misconceived and related to "gist" damage in a cartel case rather than to more than nominal, actual damages in an abuse of dominance case;

(2) the principle of full compensation was not triggered because FCS was a matter for which compensation was not required;

(3) reliance on Lord Mustill's speech in *Ruxley* was misconceived because it did not open the door to damages based on and equal to FCS and the claimant's valuation, but only to "modest" sums;

(4) such awards were only for a specific category of contractual claims, where the object, or an important part, of the contract was to give pleasure or peace of mind or to provide amenity, which were not pleaded for and in any event were inapplicable here;

(5) in *Ruxley*-based contract cases, a claimant's case is that they had not got all of the bargain that they had paid and contracted for, and in this case Non-Purchasing Customers could not say they had not got the bargain they had paid for because they had paid nothing; and

(6) applying these principles in tort would be "revolutionary".

129. We have discussed *BritNed* extensively at sections D(1)(d) and E(3)(b) above. In the context of the claim on the basis of non-pecuniary loss, Which?'s argument is that §427(3) of *BritNed* means that some claimant class members must show that Apple's infringing conduct has reduced the level of the claimant Non-Purchasing Customers' consumer benefit to an amount sounding in more than nominal damages.

130. Whilst "consumer benefit" and FCS are not synonymous, the Non-Purchasing Customers who are priced out of the market suffer harm. In section E above we have described that harm in financial terms, noting also the common-sense

interpretation that a class of existing customers who face price rises that price them out of the market have suffered loss. Using the language of §133 of the SWD, the harm could also or alternatively be characterised as the loss of the enjoyment of the services that would have been supplied in the counterfactual. That may be a more appropriate characterisation of the loss if, contrary to our analysis in section E, it is not to be treated as pecuniary loss. A further question is whether that loss would sound in more than nominal damages and we return to that at §132 below.

131. First though, we deal briefly with the question of aggregation. As noted above in §23, Which? put its case on a top-down basis based on the approach set out in *Merricks* to permit the aggregation of the determination of liability and quantum of individually valid claims. We discussed *Merricks* at §§45–46, §116 and §124, and we note here that for the reasons set out in section E(3) above, the problems confronting an individual claimant evidencing the quantification of their loss can be addressed differently in collective proceedings, provided the loss would sound in more than nominal damages. That analysis is no different in relation to the treatment of Which?'s case as non-pecuniary loss from that relating to pecuniary loss.

132. We turn now to the question of whether the "loss" or harm identified in §133 of the SWD is actionable for more than nominal damages. The starting point here is *Ruxley*. In this case, one of the plaintiffs contracted to build for the defendant a swimming pool in his garden with a diving area seven feet and six inches deep. On completion, the pool was suitable for diving but the diving area was only six feet deep. There was no adverse effect on the value of the property. The estimated cost of rebuilding the pool to the specified depth was £21,560. The trial judge held that awarding damages on the basis of the cost of reinstatement was unreasonable and instead awarded the defendant £2,500 for loss of amenity. The House of Lords agreed with that approach.

133. Which? claimed that *Ruxley* was authority for the proposition that "the loss of consumer surplus constituted a compensatory loss", and for the proposition that there was no policy at common law which excludes a claim based on FCS. In argument there was some discussion whether the judgment of Lord Mustill

should be regarded as the *ratio* of the case. We note that Lord Bridge specifically agreed with Lord Mustill's reasoning and judgment and that Lord Keith agreed with his judgment (as well as those of Lords Jauncey and Lloyd whose reasoning was differently expressed). We draw attention to two parts of Lord Mustill's speech here:

> "…and in particular…where the contract is designed to fulfil a purely commercial purpose, the loss will very often consist only of the monetary detriment brought about by the breach of contract. But these remedies are not exhaustive, for the law must cater for those occasions where the value of the promise to the promisee exceeds the financial enhancement of his position which full performance will secure. This excess, often referred to in the literature as the 'consumer surplus' (see for example the valuable discussion by Harris, Ogus and Philips (1979) 95 L.Q.R. 581) is usually incapable of precise valuation in terms of money, exactly because it represents a personal, subjective and non-monetary gain. Nevertheless where it exists the law should recognise it and compensate the promisee if the misperformance takes it away.
>
> …
>
> To say that in order to escape unscathed the builder has only to show that to the mind of the average onlooker, or the average potential buyer, the results which he has produced seem just as good as those which he had promised would make a part of the promise illusory, and unbalance the bargain… If the plaintiff's argument leads to the conclusion that in all cases like the present the employer is entitled to no more than nominal damages, the average householder would say that there must be something wrong with the law."

134. We note that in the subsequent case of *Farley v Skinner* [2001] UKHL 49, [2002] 2 AC 732, which was also cited to us, Lord Steyn said at §21: "I do not therefore set much store by the description 'consumer surplus'." However, he went on to say that the "controlling principles stated by Lord Mustill and Lord Bridge are important."

135. Lord Scott said (at §§79–80 and 86):

> "79. *Ruxley*'s case establishes, in my opinion, that if a party's contractual performance has failed to provide to the other contracting party something to which that other was, under the contract, entitled, and which, if provided, would have been of value to that party, then, if there is no other way of compensating the injured party, the injured party should be compensated in damages to the extent of that value. Quantification of that value will in many cases be difficult and may often seem arbitrary. In Ruxley's case the value placed on the amenity value of which the pool owner had been deprived was £2,500. By that award, the pool owner was placed, so far as money could do it, in the position he would have been in if the diving area of the pool had been constructed to the specified depth.

> 80. In *Ruxley*'s case the breach of contract by the builders had not caused any consequential loss to the pool owner. He had simply been deprived of the benefit of a pool built to the depth specified in the contract. It was not a case where the recovery of damages for consequential loss consisting of vexation, anxiety or other species of mental distress had to be considered.
>
> …
>
> 86. In summary, the principle expressed in [*Ruxley*] should be used to provide damages for deprivation of a contractual benefit where it is apparent that the injured party has been deprived of something of value but the ordinary means of measuring the recoverable damages are inapplicable."

136. Lord Hutton said at §48 that:

> "…the speeches of Lord Mustill and Lord Lloyd of Berwick (with which Lord Keith of Kinkel and Lord Bridge of Harwich agreed) in [*Ruxley*] established that in some cases the plaintiff, notwithstanding that he suffers no financial loss, should be compensated where the defendant is in breach of a contractual obligation."

And at §50:

> "Whilst [*Ruxley*] was concerned with the proper measure of damages for breach of a construction contract, I consider that the principle stated in it can be of more general application and that, as Lord Mustill stated, at p 360, there are some occasions 'where the value of the promise to the promisee exceeds the financial enhancement of his position which full performance will secure' and for which the law must provide a remedy."

137. Apple argued these principles have been confined by authority and *McGregor* to a series of narrowly confined cases, none of which apply here. In particular Apple referred us to:

(1) The comment of Lord Steyn in *Farley* at §24 that for the principles to apply "...it is sufficient if a major or important part of the contract is to give pleasure, relaxation or peace of mind".

(2) The speech of Lord Millett in *Johnson v Unisys Ltd* [2001] UKHL 13, [2002] 1 AC 518 at §70. There he referred to contractual situations that "are not purely commercial but which may have as their object the provision of enjoyment, comfort, peace of mind or other non-pecuniary personal or family benefits". However:

(i) *Ruxley* was not cited in that case (and *Farley* post-dates it); and

(ii) that paragraph is specifically concerned with claims related to mental wellbeing. Moreover, the case arose in an employment context where the operation of the common law was affected by statute.

(3) The speech of Lord Millett in *Freeman v Niroomand* (1996) 52 Con LR 116. There, Apple said in its skeleton argument, he said *Ruxley* damages compensate "personal and intangible loss which arises from the fact that [the plaintiff] has not obtained what he wanted and what he expressly contracted for, the so-called 'consumer surplus'". However, that was a decision of the Court of Appeal in which no claim or discussion of *Ruxley*-based damages had been made or even considered in the case below – it was a building contract case in which *Ruxley* was applied by the Court of Appeal. The case was not therefore concerned with the potential limits or expansion of *Ruxley*. Again, we note that *Farley* post-dates this case.

138. Moreover, we note that Lord Hutton in *Farley* (at §52) expressed concern at too much concentration on the concept of the provision of pleasure in argument at the expense of the general approach of Lord Mustill in *Ruxley*. Consequently, we are dealing with a series of differing statements from other cases, all different from the one before us, which both parties accept is novel.

139. We do not say that *Ruxley* is a precedent directly on point. It is a contract case and we are here concerned with the tort of breach of statutory duty. But Lord Mustill's speech is to some extent authority for the recognition of consumer surplus as a head or measure of loss. It is also authority for the proposition that there are circumstances where the absence of a reduction in a claimant's "net assets" as measured by market values should not bar all recovery where a claimant places a higher value on a supply than the market price.

140. What we conclude for the purposes of the Strike-Out Application is that it is more than arguable that:

(1) The principles set out by Lord Mustill in *Ruxley* and endorsed by Lord Hutton in *Farley* are capable of wider application in recognition of FCS and compensation where "the ordinary means of measuring the recoverable damages are inapplicable".

(2) At trial, if Which? were successful in showing that Apple abused a dominant position in the manner alleged, then the parallels in terms of breach of obligation are notable: claimants here would have expected to receive, but would have been deprived of, more services for free or on better terms and thus have "been deprived of something of value" (to use the language of Lord Scott in *Farley*). That is consistent with the language and intent of §133 of the SWD as compensation for the loss of an opportunity to enjoy a service that, but for the breach of statutory obligation, would have been provided. That is also an answer to the challenge that in the context of a contractual claim the issue is that the claimant did not get "all" that he or she had paid for, but that in this case the claimant has not paid anything. It is a consequence of applying the principle to a breach of statutory duty tort such as this where the infringement has led to the supply not being made.

(3) Apple's argument that the claimants suffered no change in assets would be akin to the argument in *Ruxley* that there was no loss by reference to the value of the property and captured by Lord Mustill's reference to catering for the situation where the value of the obligation to the customer "exceeds the financial enhancement of his position which full performance will secure", and to his comment that if the defendant could avoid liability on the basis that there was no change in asset value "the average householder would say that there must be something wrong with the law".

(4) It is true, as Apple argued, that *Ruxley* did not lead to an award reflecting the claimant's subjective valuation but "awarded some modest sum". This would still suggest a claim for more than nominal damages and therefore meet the threshold for aggregation and quantification at class

level: that seems consistent with *Merricks* (see the discussion at §§45–46, §116 and §124 above).

141. Furthermore, we note that in *Ruxley*, Lord Mustill had said the consumer surplus was "...normally incapable of precise valuation in terms of money". However, the nature and potential use of Triangle B in claims in collective proceedings such as the present case raises the question of what approach might apply in a case where the surplus could be given "a more precise valuation in money terms". That is a reason why this novel point of law ought to be allowed to go to trial so that it can be considered in the light of the evidence. Consequently, it is also well-arguable that claims based on WTP would be valid. The process of aggregating liability and quantum will lead to the determination of the Triangle B for the claims in issue and will mean that only the claims of those claimants whose WTP is greater than the competitive price will result in damages. Again (see section E(3) above) the Triangle B calculation will be objectively evidenced and provide a valid measure of the aggregate liability. The way such an aggregated approach would draw the line between successful and unsuccessful "individual" claims was endorsed in *Gutmann* (see §48 above).

142. The process of quantification and distribution would also, if Which? is successful, result in a total sum that would then be the subject of further analysis as to distribution. While that would be some time in the future, it seems reasonable to assume at this stage of the proceedings that, were it to be treated as a measure of recoverable loss, it would be shared with class members whose WTP were less than others', and would result in amounts by way of compensation that were generally less than individual claimants' WTP. By equalising payouts among all, or some qualifying subset of the class, the concerns raised by Apple of differential claims and payouts of more than "some modest sum" would also be avoided: aggregation therefore would deal with at least some of Apple's concerns.

143. Consequently, we do not accept Apple's arguments that, if the case for pecuniary loss cannot be made out, a claim based on non-pecuniary loss based on *Ruxley* must fail as a matter of law.

G. CONCLUSION

(1) Apple's concerns for distributional effects

144. Apple expressed concerns that compensation for FCS might have adverse distributional consequences. In §29(2) of Apple's skeleton argument for the second hearing, it argued:

> "… if damages were awarded based on such a subjective measure, then, were the individual class members' claims accurately assessed, those consumers who were willing to pay a price closer to – but still less than – the inflated price (P2 in the diagram) would recover more than those consumers (generally, less well-off than the former group) whose willingness to pay was closer to the market price (P1) despite the forgone good or service being identical."

And in §34:

> "a claim for physical/psychological harm on the basis of FCS…would be an unconscionable response to the posited facts."

145. We consider that Apple's concerns are misplaced in the context of collective proceedings, leaving aside the contested word "subjective". Yes, the anonymous consumers with higher WTP account for a higher proportion of Triangle B than those with lower WTP, but recovery of damage is to the class as a whole. That is how the law operates in collective proceedings, as made explicit in the case law cited above at section D(2). In spite of Apple's misplaced concern for distributive justice it proposes that the law should award no damages to all claimants who cannot afford to pay an excessive price, while awarding damages to those who can.

(2) The purposes of the collective proceedings regime

146. Ms Demetriou in the second hearing drew our attention to passages in *Evans* including the statements in §115 that: "[t]he regime provides additional opportunities for claims to be brought and vindicated, but it does not guarantee that this will be possible in every situation where there has been a breach of competition law"; in §137 that "… there are competing policy aims, which also underpin the regime, of protecting businesses from the burden of defending unmeritorious or inflated claims. The Tribunal is required to strike a balance in

the way we have described between these interests"; and in §141 that "[t]he sophistication of the collective proceedings regime shows that it was not intended simply to provide a stick with which anyone who claims, however implausibly, to have suffered loss can beat infringing undertakings into paying them substantial damages."

147. We do not consider, on what we have seen so far of Which?'s case, that it is an obviously unmeritorious claim which aims to put unfair pressure on an allegedly infringing undertaking; and we have made our decision on the Strike-Out Application on the arguments presented to us, without any need to engage with the competing policy aims articulated in *Evans*.

148. We also note that Lord Briggs at §37 of *Merricks* quoted with approval the words of description by McLachlin CJ of "the beneficial purposes of class action procedure" in relation to the Canadian Ontario Class Proceedings Act 1992:

> "The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool … class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public. In proposing that Ontario adopt class action legislation, the Ontario Law Reform Commission identified each of these advantages … In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters."

149. Apple apparently accepts that FCS represents harm to the affected consumers, but regards it as a harm which does not sound in damages in English law. The effect of Apple's interpretation of the law would therefore damage the third objective quoted by Lord Briggs in that it would insulate actual and potential wrongdoers from a part of the harm they cause, or might cause, to the public. This consideration too has not however influenced our decision-making, except to the extent that any argument which seems to shield wrongdoers from the need

to take full account of the harm they might cause is an argument that merits the most careful scrutiny.

150. Waksman J says in his dissent that our approach would open the floodgates to actions and would not benefit the regime under the Act. We have referred to the Supreme Court's endorsement of the role of compensation claims in the achievement of the aims of competition law at §148 above. We have explained why we think they are applicable here. So far as concerns the "floodgates risk": first, we note, that in the collective proceedings regime, the Tribunal has an important role at the stage of certification that can address this risk. Over time, the scope for such actions will become clearer as a result of future precedents. We note that the current case relates to a defined class of existing customers of the Defendant corporate group, and so represents a limited test case for the application of these principles.

(3) Conclusion

151. The issue we are dealing with in this judgment is not an easy one. There is no statute addressing the question at issue. As we have already noted, a claim for FCS can realistically arise only in a collective claim by final consumers. Although this is not the first collective claim by final consumers which has come to the Tribunal, it is the first claim for FCS, so there is not a body of existing case law which addresses the issue directly. We are also aware of the fact that we are coming to a different conclusion from a very experienced and respected High Court Judge, and we do not do so lightly.

152. For the reasons given in sections E and F above, we conclude that Apple has not made out its case that the contested claim is simply bad in law and should be struck out forthwith. We must therefore consider whether the claim, which undoubtedly raises a novel point of law, is best assessed in trial in the light of evidence of the effects on customers of the alleged conduct.

153. Which? expects that Apple has a large body of information on its customers which will be useful evidence in trial. For example, Which? believes that information about customers who switched between being Non-Purchasing

Customers and Purchasing Customers may provide information helpful in establishing liability.

154. It seems likely that a significant proportion of Non-Purchasing Customers would have remained Non-Purchasing Customers even if the price had been at the counterfactual competitive level – customers who had little need for cloud storage or those for whom an increased level of free storage in the counterfactual would have been sufficient. The Tribunal will have to make its assessment of what proportion of the Non-Purchasing Customer population is likely to have been in those categories, indeed this is how it will mitigate the "floodgates risk" referred to in §150 above.

155. The Tribunal will then, for the remaining Non-Purchasing Customers, those who did not pay the alleged excessive prices but would have paid the counterfactual prices, have to make the difficult judgment of how much damage is due. The Purchasing Customers, it is agreed, would be credited with the full overcharge between P2 and P1. To give the same compensation to those Non-Purchasing Customers who were excluded by the alleged excessive price would clearly be too much – if they had valued paid storage as highly as P2, they would have paid. At the other end of the spectrum, the Non-Purchasing Customers who were deterred by the alleged excessive price have suffered some loss. Which? says that the Tribunal will be able to make an evidence-based assessment of where to strike a balance between these two ends of the spectrum. Apple says that any attempt to assess non-zero damages for Non-Purchasing Customers will be hopelessly subjective. The Tribunal will be much better placed to decide which party is right, and to address the "floodgates" risk, after it has grappled with real evidence as well as abstract argument. This is all part of the careful scrutiny to which we referred in §149 above.

156. We have therefore decided that the contested claim for FCS should not be struck out but should be allowed to proceed to trial.

The Honourable Mr Justice Waksman:

H. DISSENTING JUDGMENT

(1) Introduction

157. I gratefully adopt the background set out at §§1–27 above. There is some disagreement between us on the nuances of that section but where they are material, I will refer to them below.

(2) FCS as pecuniary loss

158. I consider the position first, by reference to the case law relied upon by Which?

(a) Case law relied upon by Which?

Liffen

159. The facts have already been set out at §31 above. I fail to see how this case assists Which?. There is no dispute that the court can award damages in respect of the loss of a benefit-in-kind. Further, in this case, there was a clear loss of an asset to the plaintiff, namely the particular board and lodging to which she was entitled.

160. The issue on the Strike-Out Application is, however, whether it is permissible in law to assess the value of any such benefit by reference to the subjective WTP of the party suffering the loss. There is no suggestion in *Liffen* that the Court of Appeal was permitting such an approach or even considering it. I should add that Mr Woolfe suggested that board and lodging should not, for the purposes of damages, be regarded as an asset because it is used up over time, as opposed to some tangible asset. That cannot be right, because otherwise, the loss of any fungible, or other time-limited asset or one which would depreciate in value over time to which a party was entitled under a contract could not sound in damages, and that is plainly not the law.

161. Which? submitted that this case is of assistance because it shows that there can be compensation for the loss of a service (i.e. board and lodging) even though it was not paid for by the claimant. Again, that is not the issue since, of course, in *Liffen* the plaintiff was entitled to the board and lodging because of her domestic work. That has nothing to do with the type of claim being made on behalf of the Non-Purchasing Customers here. Indeed, in answer to a question from Professor Smith, Mr Woolfe accepted that the board and lodging which the plaintiff was deprived of receiving from the defendant in that case was valued at something that looked like a market price. That indeed would have been how it was valued on any redetermination of her claim. It would not have been valued according to her subjective valuation of it.

162. In one sense, *Liffen* can be viewed as an example of the application by the court of the principle of *res inter alios acta*: in other words, the plaintiff was entitled to compensation for the loss of board and lodging, even though she was then able to live with her father for free. Indeed, in argument, Mr Woolfe agreed that it was such a case.

163. In my judgment, *Liffen* does not assist Which?. I note that the majority agrees (see footnote 1 at §75 above).

The Mediana

164. Again, the facts have been set out at §33 above. I would add that this decision also can be seen as an application of the principle of *res inter alios acta.*

165. I fail to see how this says anything about the entitlement of Which? to value its claim by reference to subjective WTP. In addition, Mr Woolfe (as with *Liffen*) argued that the loss of use of the lightship did not constitute a loss of an asset or a change in the asset position of the plaintiff and yet the plaintiff still recovered damages (and here, see the passage quoted at §86 above). However, in my view, it clearly did. In the counterfactual, the damaged lightship would have been available for use by the plaintiff as well as the spare lightship, just as, in Lord Halsbury's example about the loss of the use of a chair, in the counterfactual, the plaintiff would have had one extra chair. So first, there is compliance here

with the change in assets test, and on any view, the damages awarded were not to be assessed by the plaintiff's own valuation of the services of the damaged lightship of which it had been deprived.

BritNed

166. *BritNed* was a cartel case. The claim is summarised at §37 above.

167. Marcus Smith J agreed that there was no loss on the overcharge basis. However, he considered that this did not mean that the claimant had suffered no loss at all. It was in this context that he stated as set out at §§38 and 39 above.

168. In the event, although the claim for losses due to an overcharge was not made out, he held that the claimant was entitled to damages on two bases:

(1) for loss suffered indirectly because the defendant's product was, as a result of the cartel, less efficient than it otherwise would have been, and the cost of that inefficiency had been passed on to the claimant;

(2) for cartel savings which the defendants had made as a result of not having to compete with their co-cartelists to win projects.

169. At §450, Marcus Smith J explained the first form of loss by referring to "baked-in" inefficiencies in the way in which the defendant made its product as a result of the cartel. He then proceeded to quantify that overcharge to the claimant. He did so by assessing the cost of the use of inefficient cable thickness which, in the counterfactual, would have been absorbed by the defendant so as to keep its bid competitive; he quantified then assessed this as a 15% cost saving in relation to copper content. This translated into a reduced margin which would have been available to the defendant in the counterfactual – on the assumption that in the counterfactual, the price would have reflected this lower margin. He then arrived at an overall loss figure of £7.5 million.

170. On appeal, the Court of Appeal rejected the award of damages on the second basis. This was because costs savings by the cartel did not, without more,

translate into any loss suffered by the victim, i.e. the claimants. However, the Court of Appeal upheld the first form of damages.

171. The key passages in the judgment of Marcus Smith J relied upon by Which? have already been referred to at §39 above.

172. Which? relies upon them to support the notion of FCS as a foundation for the disputed claim here.

173. However, I do not consider that *BritNed* assists Which?'s argument here for the following reasons:

(1) First, the question of lost consumer benefit had to be ascertained: for this head of loss, it was identified as the impact on the putative bid price, had the defendant been obliged to absorb itself the "baked-in" cost inefficiency which had arisen (and which had in fact been passed on to the claimant) because of the cartel; a consideration of the extent of those cost inefficiencies wrongly passed on, as it were, then led to an award of damages based on a difference of margin. That difference, although not straightforward to assess, and calculated on a somewhat broad-brush basis, was nonetheless objective. None of it depended on what either the defendant, or, more importantly, the claimant, would have calculated as the extent of the inefficiency, or how it was passed on to the claimant.

(2) Second, Marcus Smith J was assessing the question of lost consumer benefit expressly in the context of a cartel claim under Article 101 TFEU, where it was the first case in an English court where damages were awarded; he was not considering a claim made under Article 102 TFEU for damages as a result of abuse of dominant position, as here; in fact, he drew a distinction between the two types of claim in §427(2).

(3) Third, even ignoring the cartel context, that there could be a head of loss for a diminished consumer benefit in some way in the abstract (which was Marcus Smith J's starting point on his Article 101 TFEU analysis) does not avoid the problem of how Which? has approached the

calculation, in principle, of such a consumer disbenefit here; in reality, Marcus Smith J was simply accepting that the loss of a benefit other than money can in principle be recovered if quantified in a permissible way. The question remains what that permissible way is, in the context of this case.

174. I agree with Ms Demetriou that nothing in *BritNed* is concerned with assessing a loss by reference to a claimant's WTP. It is not enough for Which? simply to alight on a reference by Marcus Smith J to consumer benefit and say that this is the same as the particular lost consumer surplus claimed for here, such that it vindicates Which?'s approach.

175. Ultimately, what Which? submitted was that it was important to take account of the object and scope of Article 102 TFEU which, like Article 101 TFEU, is all about remedies for the misuse of market power. While I obviously see that, this does not in my judgment entitle Which? to say, without more, that the subjective WTP approach to calculating loss is itself permissible. That point simply never arose in *BritNed*, and the assessment of the two heads of loss which were permitted by Marcus Smith J proceeded on familiar, objective principles.

176. I should note that in its original skeleton argument, Which? focused on *BritNed* in the context of its submission that the disputed claim here constituted a claim for non-pecuniary loss, if it did not constitute a claim for pecuniary loss. In oral argument, *BritNed* was relied upon in a rather more general fashion. However, this makes no difference in my judgment. Either way, it provides no real support for the disputed claim.

177. The majority at §121 quotes §10 of the judgment of Marcus Smith J in *BritNed*; §122 then says that the consumers here have suffered a loss which is more than nominal, and they have established the "gist" of a cause of action. I disagree. At §10 of his judgment, Marcus Smith J explains that "gist" is about proving actionable harm or damage. But whether the damage claimed here (FCS) is actionable at all is the very question we have to decide. Moreover, for the reasons already explained at §173–174 above, *BritNed* does not assist on the actual issue before us, anyway.

Gutmann

178. Which? also relied in this context on what Green LJ said in *Gutmann* as follows at §93:

> "The law relating to abuse is concerned with consumer unfairness because when an undertaking is dominant it is, by definition, freed from the competitive shackles which otherwise incentivise and discipline it to maximise consumer welfare and benefit. This is why most laws worldwide which prohibit abuse of dominance include within the prohibition the imposition of some form of 'unfair' terms and prices. These are often described as 'exploitative' abuses. There is no single definition of unfairness set out in case law. One leading commentary (O'Donoghue and Padilla, 'The Law and Economics of Article 102 TFEU', 3rd Edition, 2020), provides a useful summary of the case law (ibid pages [1031] – [1045]) and observes (page [1037]) that the test includes asking whether the disputed term is 'reasonable' bearing in mind the legitimate interests of the dominant undertaking, its trading parties and consumers. It is commented that the reasonableness test seems vague but that a more developed definition from case law is one which involves two stages and entails an analysis of (i) whether the disputed term serves a legitimate purpose and if so (ii) whether it is proportionate relative to that purpose."

179. Again, however, I do not see how that assists with the issue before us.

Bunge

180. Which? further referred to the decision of the Supreme Court in *Bunge SA v Nidera* [2015] UKSC 43, [2015] 3 All ER 1082. This case was about claims for damages where there was a grain contract on GAFTA terms. It involved a consideration of the compensatory principle in relation to a contract for the sale of a single cargo where there had been a repudiatory breach so that there was non-delivery.

181. At §78 of the judgment, Lord Toulson observed that where a contract was discharged by the breach of one party, and that party's performance obligation was of a kind for which there existed an available market in which the innocent party could obtain a substitute contract, the innocent party's loss would ordinarily be measured by the extent to which his financial position was worse off. At §79, he continued that the rationale here was that this measure represented the loss which could fairly and reasonably be considered as arising naturally. The availability of a substitute market enabled a market valuation to be made of what the innocent party has lost.

182. He saw the entry into the available market to purchase the goods by the innocent party as an example of mitigation of loss which is part and parcel of the question of causation. He then said this at §82:

> "There are three important things to note about measurement of damages by reference to an available market. First it presupposes the existence of an available market in which to obtain a substitute contract. Secondly, it presupposes that the substitute contract is a true substitute. The claimant is not entitled to charge the defendant with the cost of obtaining superior benefits to those which the defendant contracted to provide. Thirdly (and in the present case most importantly), the purpose of the exercise is to measure the extent to which the claimant is (or would be) financially worse off under the substitute contract than under the original contract."

183. Mr Woolfe submitted that the case before us is not a contract case where market price was relevant because there was no available market for the Non-Purchasing Customers as a result of the excessive pricing, so they could not mitigate their loss. I see that, but in my judgment, that has nothing to do with whether the claim for FCS made here is a valid claim in law.

184. I would also agree with what Ms Demetriou said in this context, which was that it was possible to discover what the "alternative" price was, because this would be the notional competitive price in the market in the counterfactual of, say £5. This also presented its value on an objective basis. The alternative price or value was not whatever value was attributed to it by any given individual. Accordingly, for those consumers who would have purchased at £5, but did not in fact purchase in the actual market, their loss is zero. I will deal further with this question below.

Conclusions on the case law

185. The reality is that none of the cases cited assists Which?. It is in fact notable that Which? has not cited a single competition case from any jurisdiction where a claim along the lines of the disputed claim has succeeded or even been admitted as arguable. It would no doubt have done so had there been any such case because, even if not binding, it would obviously have been of interest. The fact that Apple has not been able to prove the opposite, i.e. that there is a particular case (or statute) which positively outlaws an FCS claim, is not to the point.

Indeed, on this analysis, that is not surprising, because all it means is that no party has ever advanced it to the stage where it was determined by a court.

(b) Some further points

186. Which? submitted in the course of oral argument that WTP itself, although it may arise from a consumer's subjective desires, is not in itself a subjective desire. It is a willingness to hand over cash up to a certain amount to fulfil that desire and, while a market-wide demand curve reflects consumers' underlying subjective desires, that does not mean that it is somehow an objective measure of demand. I do not understand the distinction sought to be drawn. Reliance on a subjective WTP of course does not mean that money is not involved, or that it is impossible to understand a calculation like that done by Mr Hughes for Non-Purchasing Customers described at §§10–12 above. However, this does not mean that the basis of the calculation is not rooted in an individual's subjective assessment of value by reference to their own particular WTP. That is why, as Mr Hughes agrees, one consumer may be willing to pay £6, another £7, and others all the way up to £13. All of those figures are entirely dependent on the WTP of each consumer. The fact that there is ultimately a calculation proffered to the Tribunal so as to put a figure on this head of loss does not alter that. And as Which? accepts, its case on this formulation of loss has to be determined by reference to whether it would in principle be recoverable in the case of an individual claimant.

187. Which? also relies upon the fact that all claims for damages are made by reference to a particular "subject", i.e. the claimant in question, rather than anyone else. I agree – but this says nothing about the process of the assessment of such damages and in particular whether it involves reliance upon a subjective valuation of loss by the claimant.

188. Which? also referred to the EU principle of full compensation, as expressed in the Damages Directive, and in particular Article 3 thereof which is quoted at §22 above.

189. However, Which? accepts that this does not mandate that consumer surplus damages of the kind claimed here must be made available.

(c) Apple's argument from objectivity

190. Apple's position is not merely that the disputed claim has no support in case law. It is that it is positively precluded because the law of damages entails that they be assessed objectively, which itself follows from the need of a claimant seeking damages for a pecuniary loss to show some net change of assets, be that money, or an expected benefit which can be valued in money terms. If that is correct, it is a further argument against Which?'s position.

191. First, Apple points out that §5-002 of *McGregor* states that when a contracting party is deprived of a benefit, its presumed basic loss is the market value of that benefit. That statement is repeated in the context of tortious losses at §5-051, where reference is made to the market value of destroyed or appropriated goods or benefits. In addition, *McGregor* makes reference to the reasonable cost of repair. As statements of general principle, these can hardly be doubted, and Which? did not attempt to do so.

192. In this context, "market value" and "reasonable" costs are plainly designed to enable, and indeed require, the court to apply objective measures of assessment. The fact that different courts might assess what is a reasonable amount differently, or that there may be arguments as to what the relevant market value is, perhaps assisted by expert evidence, does not detract from this. The point is that the objective measure is a way of introducing relative certainty into the assessment of damages, which is regarded as necessary in order to achieve consistency, predictability and equal treatment before the law.

193. Determining the amount of damages by reference to the value placed upon the lost benefit by the claimant, means that it would be impossible to predict what the likely measure of loss might be. Moreover, it would be inherently unfair because a contract-breaker or tortfeasor would be entirely at the mercy of the claimant's whim.

194. In addition, and as Apple has pointed out, other aspects of the law of damages emphasise the need for objectivity; for example, the credit for any benefit received by a claimant which is to be objectively assessed – see *McGregor* at §50-031, or the principles of remoteness which are based on reasonable foreseeability of harm. Again, see *McGregor* at §§9-066 and 9-067. I would also refer to how Ms Demetriou put it in argument, which is quoted at §63 above.

195. This approach is reflected in the observations of Ackner LJ in *UBAF*, at §§725E–H:

> "To establish a cause of action [the claimant] must establish not only a breach of duty, but that that breach of duty occasioned them damage. This is axiomatic
>
> […]
>
> To take and somewhat modify an example canvassed during the course of argument: A tells B that he wishes to sell his vintage Bentley which he innocently but negligently represents is a blue label long chassis. It is, in fact, a red label short chassis. If A had known, he would not have agreed to buy the Bentley, because he only collects blue label long chassis Bentleys. Assume, however, that the red label short chassis Bentleys were at all material times significantly the more valuable cars so that he was able to re-sell at a profit. He has then no cause of action."

196. Thus, at least as far as the law of contract and tort is concerned, and when it comes to pecuniary loss, the court does indeed apply an objective measure, and one based on the need to show a change in the claimant's asset position. The two requirements are linked, because it is impossible to discern a change of net assets if that change can only be determined by reference to the valuation of the party making the claim. In other words, what has to be measured is something external to that party's own view. I shall return to this point when dealing with some of the further arguments addressed below.

(d) The Further Argument

The Demand Curve Diagram

197. It is now necessary to deal with a further argument said to be in favour of the validity of the disputed claim. I describe its nature and effect below. Before

doing so, however, I should explain its derivation. It was essentially not a point developed by Which?, either in its original skeleton argument or in its response to the Strike-Out Application which is contained in its Reply.

198. Instead, it arose in its initial incarnation from an exchange which took place at an early stage in the oral submissions at the first hearing made by Ms Demetriou for Apple. The starting point was the SWD, cited at §19 of Apple's skeleton argument and its footnote 22. §§1 and 2 of the SWD are quoted at §54 above.

199. As previously noted, this, of course, reflects the Damages Directive referred to above at §§22 and 188 above.

200. Apple placed emphasis on the references to awardable compensation being for actual loss suffered by a reduction of a person's assets or loss of profit, including interest. Apple says that the disputed claim here does not fall into either category.

201. §128 of the SWD is set out at §57 above, which also includes the Demand Curve Diagram. §58 then sets out the explanation given at §§129–133 of the SWD.

202. Apple's argument in this respect has already been set out at §§59–60 above.

203. In answer to questions from Professor Smith about the Demand Curve Diagram at the first hearing, Ms Demetriou did not deny the existence of the economic concept of lost consumer surplus. Her key point was that this does not translate into a valid legal remedy in damages under English law. As developed at the second hearing, she said that this was because it did not represent any change in the assets of the relevant consumers because they had not reduced any of their assets. The fact that each customer is said to have placed a subjective value on the product which they did not purchase, in excess of its counterfactual price, makes no difference. While it is true that EU law will stipulate that there should be compensation for loss of profits due to the relevant unlawfulness (see Recital (12) and Article 3 of the Damages Directive) it does not go further and stipulate damages for lost consumer surplus. Later on in oral argument, Mr Woolfe was asked some questions about the Demand Curve Diagram.

204. All of this was addressed in considerably more detail by the parties at the second hearing, following the submission of our questions to them.

205. In taking a different view to the majority here, I begin by observing that there appears to me to be a real extent to which the majority is saying that, because there is a compelling economic case for compensation for lost consumer surplus, this is something which UK competition law should recognise as a recoverable head of loss. However, that is not the test. What we have to decide is whether, as a matter of English law, such losses, in the way that they have been claimed – i.e. not by reference to any change in their asset position of the claimants and dependent on their individual subjective view of each of them – are recoverable. If they are not, this Tribunal cannot decide that they are. In my judgment, this is precisely why the Commission recognised in the SWD that claims for lost consumer surplus, which are to be differentiated from claims for actual loss based on overcharge, reduction in assets or lost profits, are not considered essential to the EU principle of full compensation (already conceded by Which? – see §189 above), stating rather that this was a matter for national courts.

206. At §24 of its skeleton argument for the second hearing, Which? argued that EU authority has required that financial compensation must enable loss and damage sustained "to be made good in full" to secure the full effectiveness of the relevant provisions of EU law. Refusing to compensate foregone consumer benefits would weaken the working of competition law, enabling dominant undertakings to reduce or eliminate such benefits without consequence. However, as we have already seen, neither the Damages Directive nor the SWD mandates that compensation for such losses is required by the principle of full compensation in the context of competition law. It is all a matter of national law. Nor can it be assumed that a failure to recognise this head of loss would weaken the working of competition law. If such a recognition led to a multiplicity of such heads of loss being sought in, for example, every claim alleging abuse of dominant position (or presumably anti-competitive behaviour by a cartel), such claims may be very difficult to manage because of the inherent difficulty of proving or investigating them. It is hard to see why this would inure

to the benefit of competition law generally. The fact that (as far as I am aware) such claims have never yet been made, supports that view.

207. Then, at §25 of its skeleton argument, Which? refers to the Commission's Explanatory Memorandum to the proposal for a Damages Directive entitled "Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union". This states, among other things, that:

> "Article 2 [now Article 3]…recalls the *acquis communautaire*…on the definition of damage to be compensated. The notion of actual loss referred to in this provision is taken from the case-law of the Court of Justice, and does not exclude any type of damage (material or immaterial) that might have been caused by an infringement of the competition rules."

208. However, again, the actual Damages Directive does not require this head of loss to be made available by Member States and the principle of actual loss, as enunciated in the case law of the Court of Justice, does not mandate it either.

209. Finally, at §26 of its skeleton argument, Which? states that there is no relevant CJEU or General Court authority which considers whether the consumer surplus can be characterised as "actual loss" or "gain deprived", nor how it should be characterised in terms of the phrases commonly used in the EU jurisprudence, namely *damnum emergens* and *lucrum cessans*. Quite so, but that is because such a claim has never been made.

210. Here, Which? refers to *Arkady*, and paragraph §9 of the Opinion of Advocate General Capotorti, set out at §51 above.

211. I fail to see how this assists Which?. If anything, it supports Apple's case that there needs to be shown a reduction in assets or the loss of an increase in assets, and then the restoration of the victim's assets. Indeed, the Advocate General later in the same paragraph refers to the need to restore the parties to the financial position in which they would have been placed, so as to compensate them in accordance with the principles of damage he previously outlined.

212. Subject to that observation, I note that a substantive point made by the majority is that the creation of anything like the Demand Curve Diagram in respect of any given product in any given market will involve an assessment of economic data. That is obviously correct, although one would be starting from what might be described as an economic truism that (save for exceptional cases where demand is wholly inelastic for some reason) raising prices is likely to reduce demand to a greater or lesser extent and vice versa. I would also accept that such economic data can involve consideration of the preferences of relevant customers, whether they are intermediate trade purchasers or end-consumers. This could include survey evidence, and it might also rely upon historic data as to the movements in demand when the relevant prices have actually moved up or down.

213. However, this does not assist Which? for a number of reasons.

214. First, it remains the case that, however measured, the foundation for Which?'s claim remains each individual consumer's assessment of the value to her of the product. It is based on nothing else. The fact that a collection of different values attributed to the product by different consumers can be assembled, or that there is a range of values to be attributed to different consumers, or that one can assess what the average might be, or that the prices charged, and the amount of sales at any given point, are "facts" is irrelevant. While it is true that in an individual case, if the only evidence which the consumer had of the value to be attributed to the product was her own say-so, which would be effectively impossible to challenge, it is not about proof. Thus, suppose we know that, in the past, when prices were lower, a particular consumer had indeed bought at up to the price he now says is his subjective value of the product, so there is some evidence of how he gave effect to his WTP, it does not alter the fact that it is still about his own WTP and nothing else. The distinction is not between "hard" sales data as opposed to economic modelling. The (impermissible) foundation for both is the same. It is also why Triangle B, which represents the varying WTP of different consumers, does not help.

215. Thus I do not agree that the Demand Curve Diagram in some way invalidates the subjective/objective distinction employed in the law of damages when it

comes to the assessment of particular losses. This can be illustrated by considering the differences between a claim for lost profit and one for lost consumer surplus. It also needs to be borne in mind that both of these only apply in a situation where there is no actual overcharge claim (i.e. where the relevant customer had in fact purchased the product at an excessive price).

216. For the customer claiming loss of profit which it said it would have made, had it been able to purchase the product (or more of the products) in question, which it would have done had the price been lower, the claim is that by purchasing at a particular price, it would have made a particular profit: it has been denied the opportunity to make that profit by the anti-competitive conduct in question. Here, it will not do for the claimant to assert that, in its opinion, in the counterfactual, the profit would have been X. Rather, any court or tribunal would wish to see: (a) whether there would have been a profit at all; and (b) how much it would have been, by reference to the trading history of the claimant in the context of the market in which it operated, its actual profit margins, and the opportunity it would have had to make deals at a profit at the purchase price had it been lower. Such matters can be objectively analysed and tested in a way that the trader's own assessment of the putative profit, shorn of anything else, cannot be. This is what the law means by having an objective analysis. It is of course the case that for traders, as with consumers, they have their own WTP. However, this is not what their claims are based on; rather it is the ascertainable profit which they had lost the opportunity of earning.

217. Moreover, in the context at least of the law of contract, there will operate principles of remoteness in the context of what was or should reasonably have been in the contemplation of the parties, which act as further objective factors. It seems highly unlikely to me that in competition law such factors would be entirely absent.

218. Indeed, it is to be noted that the so-called defence of "pass-on" in classic overcharge cases is treated as an example of the familiar concept of mitigation of loss which can be deployed to reduce the amount for damages otherwise recoverable in tort or contract; see here the observations of the majority of the Tribunal when rejecting that defence in *Royal Mail Limited v DAF Trucks*

Limited [2023] CAT 6 ("*Trucks*"). §691 of that judgment is a good example of the Tribunal distinguishing between an economic concept and how that may (or may not) translate into a valid legal argument:

> "As we have said above, it is important to distinguish between the economic concept of pass-on and the legal test for causation in relation to mitigation of loss. The former is likely to be much broader than the latter which requires there to be demonstrated a proximate causal connection between the Overcharge and an increase in downstream prices. Mere recovery of costs is insufficient proof of such a connection. Something more is required and we are satisfied that DAF has not in the end provided us with anything more than that the increase in truck costs represented by the Overcharge was taken into account in the price setting process, whether by the respective regulators or the Claimants themselves. A number of other factors were also taken into account as well as costs and these were overlain with regulatory, public interest and commercial judgments being made. It is not possible to say that an increase in truck costs, however small, was likely to have led to an increase in prices. And if that is the case, there can be no SPO defence of mitigation."

219. The approach of the majority here was upheld on appeal (see *Royal Mail Limited v DAF Trucks Limited* [2024] EWCA Civ 181, [2024] 2 WLUK 413 ("*Trucks CA*") at §§149–156).

220. While dealing with *Trucks*, it is also worth noting that the Tribunal made various observations about the volume effect. It considered (at §740) that this was something that should be taken into account if there was otherwise a valid pass-on defence:

> "The argument on loss of volume is that if any part of the Overcharge had been passed on in higher downstream prices for Royal Mail's postal services, this higher price would have resulted in lower sales volumes in the downstream market. This in turn would mean that Royal Mail would suffer a loss of profit on those discouraged sales volumes that should be offset against any mitigation that is granted in respect of SPO. The argument is therefore a '*mitigation on a mitigation*'. This loss of volume effect, and its possible offsetting impact, is a standard feature of most pass-on mitigation scenarios."

221. As it happens, the majority does not cite any case law to show volume effect as a primary measure of loss (as opposed to its subsidiary role in respect of a pass-on defence). I suspect this is because the normal measure of loss for an intermediate trader is the extent of the overcharge, regardless of how it might or might have affected profits. That does not mean that such a claim could not be made. However, none of that supports the further argument.

222. Returning, then, to the trader's claim for loss of profit where the product (or more of it) was not purchased, and what can be examined by a court or tribunal, one can compare that situation where the claim is based on no more than the claimant's own valuation of the benefit it has lost. Under the further argument, that valuation would prevail regardless of whether it was reasonable or commonly held among other consumer claimants. The reason why end-consumers are in a different position, in law, from intermediate traders, is precisely because there are no materials which a court or tribunal can ultimately assess other than their own subjective valuations, however well they are demonstrated.

223. All of this reflects a more fundamental point, in my judgment. The Demand Curve Diagram assumes that purchasers subjectively decide whether or not to buy the product depending on its prices. That is obviously correct and, moreover at that level, such subjective decision-making would apply to both intermediate traders and end-consumers. However, in the context of the disputed claims here, it is not the issue of subjectivity which causes the problem. It is the fact that an individual seeking to claim lost consumers surplus is permitted to value it herself.

224. The majority also says that the subjective/objective distinction drawn by Apple would lead to inconsistency and unequal treatment before the law. Why, it is asked rhetorically, should a trader be entitled to claim loss of profits while a consumer cannot recover for lost consumer surplus? However, what this does is to pre-suppose the answer, namely that end-consumers should be entitled to compensation if traders are. The reason why their positions are in fact different, according to English law, is precisely because the assessment of one claim can be undertaken objectively whereas the other depends solely on the subjective view of any given claimant. The former does not give rise to problems of uncertainty and unfairness whereas the latter does. To my mind, all of this is simply a reflection of what the Court observed in *UBAF* and why it refused to order the reinstatement costs in *Ruxley* (a case which I discuss in detail below at section H(3)(a)).

225. That is why Apple says that it does not suggest that damages cannot be awarded for the loss of a particular benefit (rather than cash). Courts do this all the time. The point is that when they do so, they quantify the money value of the lost benefit in objective terms, frequently by resorting to concepts such as market value. They do not do so by reference to some subjective value given to the lost benefit by the claimant to have lost it. The reason for this is obvious. Suppose the claimant has been deprived of a week's stay in a particular hotel, together with a host of individual amenities. The court will assess the value of that lost benefit by reference to hotel pricing, pricing of amenities and so on. Suppose the value calculated in this way is £100. The claimant cannot then come along and say: "yes but for me, to stay in that hotel but with those amenities would have been worth £500 because I particularly cherish them." Were it otherwise, any claimant could dictate, subjectively, what his award of damages would be. If Apple is correct, then there can be no award of damages for those who did not pay for the service here. This is because, in the counterfactual and for those who would then have paid, they would have received a service for £5 (i.e. the objectively ascertained competitive price). But they would have had to pay £5 to get it – hence no loss. The only way that loss can be shown here is by attributing to the service a value of more than the competitive price and the only way that can be done is by bringing in the subjective consumer surplus.

226. For the same reasons, the fact that market data and analysis include the use of comparators or, for example, historical or reasonable profit margins in order to determine what the putative competitive price is in the counterfactual, tells one nothing about the legitimacy or otherwise of the disputed claims here. To be clear, the objection is not that market data of all kinds cannot be deployed as part of the analysis which ultimately may lead to an award of damages. It is that the foundation for the claims here is based on a valuation of the loss which is entirely personal to each consumer affected.

227. A further, broader point was put by Professor Smith to Ms Demetriou in oral argument at the second hearing. The question postulated the example of a consumer affected by monopoly pricing at £10, when the competitive price would have been £5. At £10, that consumer was unable or unwilling to pay and therefore never bought the product. In other words, such a consumer would fall

within the category of a Non-Purchasing Customer. On Apple's case, such a consumer would have no claim. On the other hand, an example of a pharmaceutical cartel canvassed at the second hearing showed that this consumer would have paid £9, and so if the monopoly price had been £9, that price would have been paid, in which case the consumer would be a Purchasing Customer and would be entitled to damages on the usual "overcharge" basis of £4. Ms Demetriou was asked whether a consumer in the original position was "worse off" than when the price was £9. She said that the consumer might have been worse off in the economic sense because he was deprived of the consumer surplus, but in law he was not worse off, because there had been no change in his assets, since he had never spent any money in the first place. Nor did it follow, as a matter of common sense, that the consumer who did not buy at £10 was worse off. I agree with Ms Demetriou that the key point is what the law of damages here permits, and other considerations do not really assist.

228. At section E(1) above, the majority gives consideration to the apricots scenario set out by Apple in its skeleton argument for the second hearing. I shall refer to Adam, Becky and Carla as A, B, and C. This is summarised at §§76–77 of the majority judgment. It is necessary to add simply that, because A and B had WTPs of less than £1, namely 60p and 90p, they did not in fact buy any apricots, although they would have done if the price was equal to or less than their WTPs. On Apple's case, they suffered no loss because their net asset position had not changed, whereas it had for C.

229. Before considering the majority's view of this scenario, it is worth recounting some fundamentals of the law of damages in both contract and tort which apply just as much to the law of competition. The core objective of our law of damages is to place the claimant in the position it would have been in had the (tortious or contractual) wrong not been committed. That inevitably involves comparing the claimant's actual position with their putative position had the wrong not been committed. It is in this latter context that the determination of a counterfactual and its consequences arises.

230. Accordingly, when one asks what damages should be awarded to C for having paid too much for the apricots by reason of the cartel's wrong, one compares

her actual position – the spending of £1 – with the counterfactual position, the spending of 50p. Since she would have spent 50p less in the counterfactual for the same good, her damages are 50p. This would put her in the position she would have been in, absent the wrong. There is a change in her asset position, because she spent 50p which she should not have done, thereby losing 50p. Her own subjective valuation of the apricots is irrelevant. We know that, because it follows from this scenario that C's WTP for the apricot was £1 since that is what she was prepared in fact to pay and did pay. However, in its defence, the cartel would not be able to argue, under English law, that she should not be compensated at all because in her case, she spent £1 for something which she valued at £1 and therefore suffered no loss.

231. The change in assets test relied upon by Apple (and effectively supported, in my view by what was said in *Arkady* referred to at §§51 and 210 above) is in my view a correct understanding of English law. What it means here is that the wrongful conduct has deprived C of 50p. Of course, in some cases, the change in assets may be so obvious it hardly needs to be stated. If X steals £500 from Y, committing the tort of conversion, there is an immediate and clear deprivation of £500 for Y. But this does not mean that the change in assets test does not operate in our context as well.

232. At §81 above, the majority suggests that the true change in assets for C was not due to her purchase of the overpriced apricot. It was the overpricing itself because, without more, the pound in her pocket had now been devalued so far as the purchase of apricots was concerned. This recharacterisation of the change in assets test is important not, as the majority recognise, because it would make a difference to the outcome in C's case; rather it is because of its implications for the position of A and B.

233. As a matter of principle, I disagree with this recharacterisation for the following reasons. First, if correct, it would follow that in every case of abusive overpricing, every consumer in the relevant market would have suffered an immediate loss of 50p by reason of the reduction in buying power of the pound in their pocket which could only have purchased one, and not two, apricots. It does not matter whether they bought, or would have bought, apricots, because

their buying power has been reduced in any event. They would all therefore have a claim, in which case the floodgates would truly be open.

234. Moreover, that ability to claim would in fact exist regardless of any particular consumer's own subjective WTP. Rather, on this basis, A and B would each have suffered a 50p loss, just like C. In other words, at this point, we have left the individual WTPs behind. If a claim based on the reduction in the buying power of the pound in the pocket was viable in law, it must follow a defendant could not protest that A and B each valued the apricot at more than 50p so that their claims should be discounted. That does not even reflect Which?'s own case, which is that the differential values attributed to the product by different consumers must be taken into account.

235. Accordingly, there is simply no legal basis for this highly abstracted recharacterisation of the change in assets test.

236. In respect of §90 of the majority judgment, it is not clear to me if there is still meant to be a cartel with a counterfactual market price of 50p given that there is a defector. However, in any event, if, somehow, the 90p is still adjudged to be an overcharge, as a consequence of the cartel, because the defector is more or less hanging onto the coat-tails of the actual cartel, and so the defector is still liable for a wrong, it must follow that if the consumer did buy at 90p where the counterfactual competitive price was 50p, there would clearly be the usual overcharge remedy.

237. Nor do I accept the existence of the paradox referred to in §92 above. Of course, on the basis of the net asset test, there is no FCS claim for the Non-Purchasing Customers. That is simply where English law draws the line. It may not be perfect, in the sense that there are other claims which might be regarded as worthy. As recognised by Apple, the issue is not whether there is an economic concept of FCS: the question is simply whether it can found a claim for damages. That is precisely what the SWD concludes, hence making precisely that distinction and saying that it is a matter for national courts.

238. Nor is the problem for the putative claims by A and B the absence of evidence. In line with what I observed earlier, suppose a court accepts that A really did value the apricots at 60p (because his track record of purchase when, and only when, the price of apricots did not exceed 60p shows this), the objection in principle is not about the lack of proof, objective or otherwise, of what is a perhaps genuinely held subjective view on the part of the consumer – it is that the subjective view is not relevant. That is why the system of aggregated damages available in collective proceedings (addressed in detail below) does not help. The demand curve may well be an objectively assessed collection of various data points – but the nature of the data which is collected is still referable to each individual consumer's subjective WTP.

(e) The concept of aggregated losses

239. A further matter which attracted much more emphasis at the second hearing related to the impact (if any) on the FCS claim of the aggregate damages regime made available in collective proceedings. Given that it was accepted (inevitably, in my view) that if an individual claim is unsustainable in law, it cannot be "saved", as it were, if combined with many other individual unsustainable claims.

240. Here, it is necessary to refer to s. 47C(2) of the Act which provides as follows:

> "The Tribunal may make an award of damages in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person."

241. There has, of course, been much by way of judicial comment on this provision. In *Merricks*, Lord Sales explained thus (at §§94–95):

> "94. As pointed out by Professor Rachel Mulheron in an illuminating discussion of the present proceedings, there are two functions which a provision allowing damages to be awarded on an aggregate basis may in principle fulfil: see R Mulheron, 'Revisiting the Class Action Certification Matrix in Merricks v Mastercard Inc' (2019) 30 King's LJ 396, 412-417. The first concerns the quantification of loss. Where the liability of the defendant to the members of a class has been established, such a provision enables damages to be assessed by quantifying the loss suffered by the class as a whole, without the need to determine what loss each individual member of the class has suffered. This involves a departure from the normal 'compensatory principle', whereby the object of an award of damages for a civil wrong is to put the

> claimant (as an individual) in the same financial position as if the wrong had not occurred. It is clear that section 47C(2) is intended to serve this purpose.
>
> 95. A provision for aggregate damages may, however, go further and serve an additional purpose. It may also permit liability to be established on a class-wide basis without the need for individual members of the class to prove that they have suffered loss, even though this would otherwise be an essential element of their claim. As Professor Mulheron notes, the nature of a claim for a breach of competition law is that it constitutes a claim in tort for a breach of statutory duty. Under the general law such a claim is not actionable without proof of loss. In other words, a defendant commits no wrong and incurs no liability towards a claimant unless its anti-competitive behaviour causes that claimant to suffer financial harm. An aggregate damages provision may dispense with this requirement by permitting liability towards all the members of a class to be established by proof that the class as a whole has suffered loss without the need to show that any individual member of the class has done so."

242. In *McLaren*, the Court of Appeal observed at §35 that set out in §49 above.

243. In *Evans*, the Supreme Court opened its unanimous judgment with the statement at §1 cited at §50 above.

244. What all of this is about is to enable collective proceedings to lead to an award of damages, assuming that there has been an unlawful abuse of dominant position, cartel, etc., which has affected a class of consumers, without the need for each and every individual member to prove what particular loss, if any, they have suffered. Rather, the position is looked at on an aggregate basis with regard to the class as a whole. However, all that is concerned essentially with quantification. There is no suggestion either in s. 47C(2) of the Act or any of the judicial pronouncements thereon that if a claim made on an individual basis (and indeed by any individual in the class) would fail because the head of loss was irrecoverable in law, it can somehow surmount this obstacle because there is a large class of claimants in this respect. In my judgment, that is the beginning and end of the point on aggregation.

245. While accepting the principle that if an individual claim for damages is bad in law, the concept of aggregation cannot save it, Mr Woolfe pointed to the fact that at §95 of *Merricks*, Lord Sales said that a second function of s. 47C(2) of the Act was that it was not necessary to prove that any loss had been suffered in order to establish liability in collective proceedings. This is in contradistinction to the usual rule for claims in tort, where proof of loss is an essential element of

the cause of action. However, that particular function of s. 47C(2) of the Act is not in issue here. Apple is not saying that there is no cause of action in the sense of showing liability, and hence it does not challenge, on a summary basis, the allegation of abuse made here. Instead, it simply submits that the particular head of loss with which we are concerned here has no legal foundation. What Lord Sales said in §95 does not affect this question.

246. Mr Woolfe then referred to the decision of the Court of Appeal in *Merricks v MasterCard* [2024] EWCA Civ 759, [2025] 2 All ER 1048. This was an appeal from the Tribunal in relation to preliminary issues, one of which was the applicable law. In that context, Sir Julian Flaux C stated at §148 that:

> "I agree with Ms Demetriou KC that it is wrong to describe the collective proceedings regime as a 'wrapper' for a whole series of individual claims, each of which needs to be considered separately for the purpose of this issue. As the passages from the *Merricks* judgments in the Supreme Court referred to at [90] and [91] above make clear, the collective proceedings regime has effected a radical change in the law under which the claimants are not identified other than in the definition of the class and any damages will be assessed on an aggregate basis."

247. I see that, but I do not accept that this was saying anything different from what had been observed in the earlier cases to which I have just referred, nor does it assist on the issue before us.

248. In fact, Mr Woolfe accepted that if the true question for pecuniary loss is whether there has been a change in net assets (a proposition contested by Which?), then the concept of aggregated damages cannot assist. However, if the true question was based on the subjective/objective distinction, then that concept <u>can</u> assist because it is dealing with quantification which is where the subjective/objective distinction comes in. In the end, this nuanced position in relation to the effect of the aggregated damages concept does not take the matter any further. This is because the net assets and subjective/objective tests are intimately connected and, for the reasons already given above, the subjective/objective distinction here is not simply about a quantification exercise which is to be conducted at trial. It goes to the heart of whether the particular head of loss claimed here can be advanced at all.

(f) Conclusion on FCS as pecuniary loss

249. Accordingly, I do not accept that there is any viable claim for FCS as pecuniary loss.

(3) The claim for non-pecuniary loss

250. I therefore turn to Which?'s alternative argument that the disputed claim constitutes a valid non-pecuniary loss.

251. It is common ground that damages can be awarded for non-pecuniary as well as pecuniary loss. Examples of such losses include general damages awarded for pain and suffering and loss of amenity in the context of personal injury claims, or loss of amenity in the context of, for example, "spoilt holiday" claims. The identifying feature of such claims is that the court does not even purport to assess those losses by some form of calculation. Rather, it awards a figure, usually a round figure, by reference to what it considers the loss to be worth: see also *McGregor* at §2-002. As case law in this area developed, the amounts awarded by courts in these commonly occurring cases took clear account of the size of awards in previous cases and the circumstances pertaining to those cases.

252. However, that, without more, does not, in my view, assist on the question of the validity or otherwise of the disputed claim here. To the extent that Which? relies upon *BritNed* in this context, I have already dealt with it above, in particular at §176.

(a) Ruxley

253. However, Which? also relies upon the well-known decision of the House of Lords in *Ruxley*. The key facts are set out at §132 above. The House of Lords agreed with the approach of the trial judge. They held unanimously that where the expenditure being claimed by way of damages was out of all proportion to the benefit to be obtained, the appropriate measure of damages was not the cost of reinstatement but the diminution in value of the work occasioned by the breach even if that would result in nominal damages. However, there was also

the award of general damages and there was no dispute as to the amount awarded here. Therefore, the judgment of the trial judge was restored (the Court of Appeal having reversed it).

254. At pages 360–361 Lord Mustill, agreeing with Lord Jauncey and Lord Lloyd, made these further observations:

> "In some cases the loss cannot be fairly measured except by reference to the full cost of repairing the deficiency in performance. In others, and in particular those where the contract is designed to fulfil a purely commercial purpose, the loss will very often consist only of the monetary detriment brought about by the breach of contract. But these remedies are not exhaustive, for the law must cater for those occasions where the value of the promise to the promisee exceeds the financial enhancement of his position which full performance will secure. This excess, often referred to in the literature as the 'consumer surplus' (see for example the valuable discussion by Harris, Ogus and Philips (1979) 95 L.Q.R. 581) is usually incapable of precise valuation in terms of money, exactly because it represents a personal, subjective and non-monetary gain. Nevertheless where it exists the law should recognise it and compensate the promisee if the misperformance takes it away. The lurid bathroom tiles, or the grotesque folly instanced in argument by my noble and learned friend, Lord Keith of Kinkel, may be so discordant with general taste that in purely economic terms the builder may be said to do the employer a favour by failing to install them. But this is too narrow and materialistic a view of the transaction. Neither the contractor nor the court has the right to substitute for the employer's individual expectation of performance a criterion derived from what ordinary people would regard as sensible. As my Lords have shown, the test of reasonableness plays a central part in determining the basis of recovery, and will indeed be decisive in a case such as the present when the cost of reinstatement would be wholly disproportionate to the non-monetary loss suffered by the employer. But it would be equally unreasonable to deny all recovery for such a loss. The amount may be small, and since it cannot be quantified directly there may be room for difference of opinion about what it should be. But in several fields the judges are well accustomed to putting figures to intangibles, and I see no reason why the imprecision of the exercise should be a barrier, if that is what fairness demands.
>
> My Lords, once this is recognised the puzzling and paradoxical feature of this case, that it seems to involve a contest of absurdities, simply falls away. There is no need to remedy the injustice of awarding too little, by unjustly awarding far too much. The judgment of the trial judge acknowledges that the employer has suffered a true loss and expresses it in terms of money. Since there is no longer any issue about the amount of the award, as distinct from the principle, I would simply restore his judgment by allowing the appeal."

255. Other judges expressed the position in slightly different ways.

256. In oral argument, Mr Woolfe accepted that trying to distil a single *ratio* out of *Ruxley* was difficult. Their individual Lordships had agreed on the outcome, but gave slightly different reasons. Accordingly, he did not place any real reliance

on the reference by Lord Mustill to "consumer surplus" as if this was a mantra which, without more, supported the disputed claim. Had he done so, it would not have assisted because the context of Lord Mustill's observations were all about where there can be losses of a non-pecuniary nature which should be compensated. Again, that itself is not in dispute. However, what Mr Woolfe did submit was that the general thrust of the individual judgments in *Ruxley* was that the law of damages can respond flexibly to achieve justice and is not strictly limited to those measures of damage that are commonly used in commercial cases. In that sense, Which? invokes *Ruxley* as supportive of its position.

257. In my judgment, and taken out of the particular context of rejecting the claim for reinstatement costs but affirming instead the loss of amenity award, Mr Woolfe's "takeaway" from *Ruxley*, as it were, is far too broad. The law of damages (in any particular context) has not reached the stage where a court is entitled to award whatever it thinks appropriate in order to do justice. There are still principles which have to be applied in order to establish and prove any particular claimed head of loss and its quantification.

258. Thus, in *Ruxley*, because: (a) reinstatement cost was unreasonable and disproportionate as a measure of damages, itself an objective assessment; and (b) there was no material diminution in value; therefore (c) the House of Lords accepted that a conventional loss of amenity general damages award of £2,500 could not be objected to in principle in circumstances where there was no argument over its quantum. This was a non-pecuniary head of loss no different from other loss of amenity claims. Of course, in one sense, it was subjective, because it arose out of a particular claimant's desire to have a construction with special features, even if that would amount to a "folly" because those special features had no intrinsic functional value. However, the key point is surely that the assessment of that particular amenity was still undertaken objectively, by the Court, rather than by reference to what value the claimant might have put on the "folly". The fact that the assessment is broad (which is why, typically, such assessments are in round figures) makes no difference. Accordingly, *Ruxley* is no support for the disputed claim here.

259. I note that the majority does not suggest that *Ruxley* is directly on point, and I obviously concur with that. However, I do not agree with the majority's further suggestion that Lord Mustill's judgment is to some extent authority for the recognition of FCS. Nor is it authority for the proposition that where there is no reduction in the claimant's net assets there could be recovery where the claimant places a higher value on a supply than the market price. To reiterate, that is not what happened in *Ruxley*. The Court paid no attention to the claimant's own value of the lost benefit which was the cost of reconstructing the pool to provide it. Instead, it was the Court's own (objective) assessment of what the loss of amenity should be.

(b) Three further cases

260. Which? also relies upon *H West*. One of the issues here was whether the trial judge had awarded too much by way of general damages for pain and injury and loss of amenity. Which? Relies upon the reference by Lord Morris of Borth-y-Gest at page 346 to the fact that:

> "Money may be awarded so that something tangible may be procured to replace something else of like nature which has been destroyed or lost. But money cannot renew a physical frame that has been battered and shattered. All that judges and courts do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common assent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional."

261. However, that passage says nothing about whether the relevant assessment is made by reference to the subjective valuation of the claimant. In fact, what this passage shows is that it is to be an objective assessment, hence the reference to "reasonable".

262. Which? then relies upon the well-known case of *Forster v Outred* [1982] 1 WLR 86. That case is authority for the proposition that there can be actionable damage occurring at a time when there is an encumbrance on a property by way of a legal charge which may in the future give rise to a liability, even though at the time of execution, no such liability had crystallised. This was all about

contingent loss in the context of limitation. It has nothing to do with the recovery of a subjectively assessed loss of benefit.

263. Which? also refers to the case of *Arkady* in this context. I do not see how this assists, for the reasons given in §§210–211 above.

(c) Conclusion

264. Accordingly, in my view, there is no viable claim as a matter of law for non-pecuniary loss either.

(4) Should the FCS claim in any event be left to trial?

265. In my judgment, there is no reason to do this. I agree with Apple that we should "grasp the nettle" now, in respect of this point of law. I do not see that there is any advantage to leaving it to trial on the basis that it is arguable. As I have explained above, its success or failure does not turn on the resolution of any disputed facts or the presentation of evidence (including expert evidence) which will only be available at trial, and if in truth, the claim is hopeless from a legal point of view, the sooner it is disposed of the better. Doing so avoids the inevitable expenditure on time and costs (including those relating to expert evidence) which will be incurred by the parties if it is left to trial. Indeed, Which?'s position was essentially that the disputed claim is indeed already viable in law. There was little emphasis placed by it on the need for a trial in order to decide matters of fact based on evidence then adduced, to work out whether the claim had legal merit.

266. I do not accept that merely because in some respects, competition law may be a developing area of the law, it follows that all disputed points of law must inevitably be deferred to trial.

(5) Conclusion

267. For all of the reasons given in this dissenting judgment, I am, unfortunately, not in a position to agree with the majority, and for myself, I would have acceded to the Strike-Out Application.

The Tribunal:

I. DISPOSITION

268. In the event, of course, and in accordance with the decision of the majority, the Strike-Out Application must be dismissed. We are all most grateful to Counsel for their assistance to the Tribunal and for their very helpful submissions.

The Honourable Mr Justice Waksman
Chair

Michael Cutting

Professor Alasdair Smith

Charles Dhanowa CBE, KC (*Hon*)
Registrar

Date: 6 May 2026