IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1403/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 27th May 2026

Before:
Ben Tidswell
William Bishop
Tim Frazer

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Dr. Rachael Kent

Claimant

v

Apple Inc. and Apple Distribution International Ltd

Defendant

A P P E A R AN C E S

Tim Ward KC (Instructed by Hausfeld) On behalf of Dr. Rachael Kent

Brian Kennelly KC & Hugo Leith (Instructed by Gibson, Dunn & Crutcher UK LLP) On behalf of Apple Inc. and Apple Distribution International Ltd

Digital Transcription by Epiq Europe Ltd
Lower Ground, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400
Email: ukclient@epiqglobal.co.uk

Wednesday, 27 May 2026

(1.58 pm)

THE CHAIR: Good afternoon, Mr Ward. I'm going to just do the live stream warning, if you'll forgive me.

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

Afternoon.

Application by MR WARD

MR WARD: Good afternoon. As the Tribunal knows, the issue before you today is whether to grant Dr Kent's application to amend her claim form. The sole function of the amendment is to extend the claim period for existing class members up to the date of judgment, namely 23 October last year. The effect, therefore, is to bring additional App Store purchases for those class members for that 11-month period into the claim. It's a question for the Tribunal, in the exercise of its discretion, whether to grant the application.

As you've seen, our case is this is a matter of obvious practical justice. It serves the objectives of the class action regime and the Tribunal's governing principles. Apple's objection based on fairness is a matter of form rather than substance.

What I propose to do is to deal with four short points: finality in judgments; fresh causes of action; re-litigation, which is your second question; and then discretion. But to frame those submissions, I want to say something about Apple's case first, and what the real implications of it seem to be.

As you've seen, Apple says it would be fundamentally unjust to Apple to allow the application. What it says is that if Dr Kent wants to bring a claim for that period up to the judgment, she must bring a fresh claim. Then Apple says there would be a trial, so it would have what it calls, "the opportunity to defend itself". That's paragraph 11 of its skeleton.

Now, it doesn't say "defend itself on discrete issues", say. It says, again, to quote the skeleton at paragraph 16:

It “would be entitled to raise whatever matters it wished by way of defence." [as read]

So, it seems that what Apple envisages is a full re-trial -- what we could call "Kent 2" -- and Apple would have the opportunity, as it says, to patch up the holes in the case that the Tribunal identified. We might have another 1.7 million documents. We might have another 3,751 pages of expert evidence, and of course, another year of the Tribunal's time; probably, you would say, more than a year.

But what they haven't said really is why any of this matters. The supposed injustice is that Apple says the circumstances might -- might -- be different for that period. That's to say, the period up to the judgment.

As you've seen, we've repeatedly challenged Apple to say in what way those circumstances actually changed. We have to keep in mind that we're now talking about a past period, November 2024 to October 2025. So, it started well over a year ago, and it ended six months ago. So, Apple has had ample time and resource to investigate whether, in fact, in that period, there was a material change. I'm so sorry, but despite having had that opportunity, it is reduced to pure Micawberism, saying something may turn up. But Apple is not Mr Micawber. It's one of the world's largest corporations, and despite its best efforts, it's come up with nothing. I will show you later what it did say.

So, against that background, if I may, I'm going to turn to my short points. The first

one is about finality in judgments. Now, just to remind you, of course, that in your ruling of January, you held that you did have jurisdiction to grant the amendment Dr Kent was then seeking, but you declined as a matter of discretion. There's been no appeal against that ruling, but here we are today, with an alternative application. You observed on that occasion that finality in judgments is a powerful factor that would need to be displaced. That, just for the transcript, is paragraph 54 of your January ruling at authorities bundle 26.

Now, we, of course, accept that. But finality cuts both ways in this case. It is, of course, Apple that is seeking the opportunity to re-litigate the issues in your judgment. But I also want to focus for a moment on the very limited nature of any incursion into the principle of finality arising from Dr Kent's application and to compare this with the authorities that Apple relies on.

Could we turn, please, to the authorities bundle, tab 19? It's volume 1 in any hard copy. This is the case that Apple cites, AIC in the Supreme Court. It's probably familiar, but just to remind you from the headnote, please, on page 466. This was about an application to enforce an arbitration award which had been obtained in Nigeria. If you skim down about seven lines of the headnote, the judge made an order giving the claimant leave to enforce the award. However, on the same day before it was sealed, something happened with the bank guarantee. Then the judge granted the defendant's application to set aside her order, finding that to allow the claimant to have the benefit of the guarantee and leave to enforce would give a windfall. So, on the same day, the order was reversed, if you like, 180 degrees.

Then if we turn on, please, in the report, there's a helpful summary of another lead Supreme Court authority in this area, 474. This is the case of Re L. You'll see at paragraph 23, L concerned care proceedings brought by a local authority in respect of two children, after one of them had been found to have non-accidental injury. Then

four lines down, each parent accused the other of being the sole perpetrator. The judge gave an oral judgment which concluded that the father was the perpetrator, and an order was drawn up to state that conclusion.

However, before it was sealed, the judge issued a second judgment in which she said that upon reconsideration, she was unable to find to the requisite standard which of the parents was the perpetrator. So again, you have, if I may put it colloquially, a 180-degree change of mind by the judge, which required the judgment to be reopened.

Then before we close this judgment, I just want to put something, if you like, at the back of your mind. If we turn to 476, where the court is discussing principle of finality and the correctness of what has happened. You will see at 476(F) a citation from the Sainsbury Supermarket case talking about the rule in Henderson v Henderson, which we'll be talking about more. So, it's important to see that one of the things that is preoccupying the court here is a principle of finality.

Now, I show you that authority because it's heavily relied upon by Apple.

THE CHAIR: Yes, just before you do move on, just while we're in it. I mean, as I understand, what the Supreme Court's doing here, it's trying to bring all this together, isn't it? It goes back --

MR WARD: Yes.

THE CHAIR: -- and puts Re L into particular context and says that that's a feature of the rules of the family division. Then it says these are the relevant principles and sets them out in detail.

I mean, it does make it plain, as I understand it, at 35, that -- well, just in this section really, I suppose 33, 34, 35, the point that's being made, as I understand it, is that finality is a significant factor in its own right, and it's the starting point, if you like, one assumes that there's a significant weight to be given to the principle of finality.

MR WARD: Yes.

THE CHAIR: I mean, I understand the submission you're making, which is that that weight may depend, for example, on what it is that's seeking to be undone.

MR WARD: Yes.

THE CHAIR: That's the point you're making. But it also does say, in 35:

"Finality is likely to be at its highest importance in relation to orders made at the end of a full trial." [as read]

MR WARD: Absolutely. I do, in fact, make exactly the submission that -- it's presumptuous of me to say it's a submission -- but what's said in 35:

"The weight to be given to the finality principle will inevitably vary depending on the nature of the order, the type of hearing, and the type of proceedings." [as read]

Absolutely, that must be right. This was a trial, but we are not asking you to vary the content of your reasoning. We're not saying to you -- actually, I mean, obviously, we would never say to you that we want your findings reversed. We're simply saying the same reasoning extends to this additional period.

I fully accept that it involves reopening the order. I'm not here to say that it doesn't. I've just drawn attention to the fact and the context in which these remarks were made, because we are so far from that context.

THE CHAIR: Well, can we just explore that a little bit? Because let's say, for example, we were having this discussion during the trial and said, "Put aside the question of why we're doing it now", and no doubt we're going to come back and talk about that -- but let's just say that -- and you say we couldn't have done that -- but if we were having that conversation then, then you would be saying to us, not as in these cases, "Oh, a fact has come to light, which is very different from the facts which we thought applied and therefore makes us realise the judgment is wrong, hence the 180-degree turn".

You were saying something different. You're going to be saying to us, "We don't know how long your judgment is going to be, but let's assume it could be six months; it could be a year. We say the conditions in relation to the cause of action that's going to accrue every time someone makes an app purchase or an in-app payment is the conditions that would lead to liability are going to remain the same from now through to judgment."

That's the exercise you're really asking us to do, isn't it?

MR WARD: Paradoxically, that would be more difficult. Because, of course, if I had made that submission, say, at the PTR or something like this --

THE CHAIR: Yes.

MR WARD: -- then we might anticipate that Apple would have stood up and said, "Well, hang on a minute. We don't know what will prevail in the world in the period between the hearing and the judgment." It was obviously a very substantial trial. Obviously, the judgment would be reserved for some months, as indeed was the case. And they might well have said, "Well, who knows what will happen?" Because to take an example that Mr Kennelly points to: “the comparator app stores”, their position might change, say; or Apple itself might change its terms and conditions or its commission.

So, in that sense, my position is advantageous as compared to what it was then, because we know we are now talking about a factual period that has expired. Since when there has been a generous buffer in time for such a well-resourced litigant to discover whether there is a material change of circumstances? Not “no change”, but “material”. So that's why, in my respectful submission, the fact that we make the application now is in fact of assistance.

THE CHAIR: Well, I know that we'll come back to that.

MR WARD: Of course.

THE CHAIR: I mean, I suppose the point I was making was that there is just necessarily a degree of speculation involved in the application of the infringement of Chapter 2 to that period of time.

Now, you say your answer to that is, "Well, they haven't displaced, if you like, the presumption of" --

I understand that point, but just generally speaking, that does make it quite a different case -- I mean, you say it's a different case anyway, but I'm wondering whether -- you know, there was something to be said for the 180-degree being very obvious and clear because the facts that the order was based on are obviously wrong. In some ways, I wonder if that might be an easier case.

MR WARD: Well, perhaps the facts are pointing in different directions. I mean, I'm making a relatively limited point, which is we are not trying to do violence to the judgment. We are simply trying to extend its reasoning. As you say, sir, that involves applying it to an additional period. But this is why -- I'm probably going to have said this rather often this afternoon; I'll try and rein myself in -- but you have the parties before the court. The defendant has not been able to identify something that actually has changed.

That's why, in my respectful submission, it wouldn't be "speculative", I think was the word you used a moment ago. It would be speculative to do it in the absence of any opportunity for the defendant. But the opportunity has been abundant.

THE CHAIR: But you do -- but you are saying, I think, that in order to work out what sort of finality principle we have, we need to think about the particular circumstances.

MR WARD: Absolutely.

THE CHAIR: Yes. That's the essence of the point, isn't it?

MR WARD: That is, and it's my submission that the circumstances are favourable for me as compared to situations where a judge has simply changed their mind, albeit on

additional -- in the case of AIC, there seemed to be additional facts. In the case of Re L, judging only on the basis of the summary which is in here, it appeared to be just a change of heart reflecting on the evidence. I haven't actually read the judgment, so I hope that's not unfair.

THE CHAIR: Just to be clear about how we -- I mean, in my mind -- I'll just test this with you -- I think what we're doing here, as being instructed to do by the Supreme Court, is to start with the finality principle, and it has significant weight. I mean, on any view, no matter what sort of finality --

MR WARD: We don't (overspeaking) that.

THE CHAIR: We start with that, and then we say what are the other factors that might indicate, notwithstanding that significant weight, we should re-open the order, and at the same time, what are the factors that might indicate that beyond the finality principle, we should indicate that don't.

In other words, we sort of put in the mix everything else, but we're still left with a sort of quite big road hump of the finality -- whatever it is, the finality principle is a road hump you've got to overcome somewhere.

MR WARD: If I may put that in my own words.

THE CHAIR: Yes.

MR WARD: Yes, the principle carries weight. It's my submission it's less weight in the context of this case. Absolutely, it carries weight. You are carrying out an exercise of your discretion. That means you are bound to balance various factors that may not all be pointing in the same direction.

If I may, I'll move on now to my second head of submissions about the nature of the pleaded claim. As you've seen, it's our submission that it was not open to Dr Kent to plead these losses up to the date of judgment by any means other than the amendment.

The reason is, in short, because every time a class member buys an app or makes an in-app payment, a new cause of action arises and is perfected in the jargon by the loss. Under the collective action regime, those claims could not be adjudicated until they had crystallised.

Can I turn to Phonographic Performance, which is the authority we cite for this proposition. It's at tab 13 of the authorities bundle. Again, if I may, I'll start with a headnote. This is probably familiar territory.

This was an application by the licensing body, which was suing on the basis that English copyright law, if you pick it up at about eight lines down:

"... permitted the playing of sound recordings in circumstances which would otherwise constitute an infringement of copyright law." [as read]

They argue that was contrary to a directive that should have been implemented. The issue, which was at one point a bit of a chestnut in the courts, was “did time start to run from when the directive should have been implemented in 1994, or did they have six years going back from when this litigation arose in the early 2000s?”

The answer given by Sir Andrew Morritt, the vice chancellor, was that they had six years going backwards.

Just to try and deal with this quickly. Turn to page 244, please. You'll see at paragraph 13 the judge says:

"There is no dispute the claim is one founded on tort." [as read]

Section 2 prescribes a limitation period.

Then picking up the submission of the PPL, half a dozen lines down, it submits that the breach of duty imposed by article 82 -- in other words, the breach of the directive duty -- is a continuing one, and not being actionable per se gives rise to a fresh cause of action on each occasion when PPL suffers consequential damage, i.e. a loss of royalties. On that basis, PPL claims to be entitled to recover damage within six years.

That's the submission that succeeded.

THE CHAIR: Yes, and I don't think there's much dispute about this. I mean, I think all this is fairly straightforward. It's actually what it means when you start to look at it through the lens of Battishill and what that means and so on.

So, I think continuing cause of action, breach of statutory duty, which obviously we're dealing with, I think Mr Kennelly is nodding, so ...

MR WARD: Good. Good, good, good. Well, that obviously saves time. So, what that means, then, is each time a purchaser purchases an app, there was a fresh cause of action. This is very different from a case like, for example, a personal injury claim where someone suffers loss of earnings as a result of an accident, and the loss of earnings goes on into the future, but the court will assess it on a discounted basis on the day of the trial, even if they're actually projecting lifetime earnings.

Our short point is that under the class action regime, as Neill shows us, future and contingent claims cannot be included. The easiest place to see this is, in fact, your judgment of January. If we could turn to authorities bundle tab 26, please. I'm sorry, I don't have the page, but I'll give it to you. It's 1145.

This is just a quotation from Neill. We see, 1145, for example -- I'm not going to read the whole thing out, but just hopefully hit some salient parts -- 64:

"Sony's argument is that the purpose of the collective proceedings regime is to combine claims which must be extant at the date of the claim form." [as read]

Then at 67 is quoted the passage from Merricks 3, which is essentially endorsed in Neill, paragraph 26:

"The bringing of collective proceedings by the proposed class representative combines actual claims by the proposed class members, and a CPO is required for them to continue. Accordingly, the individual claims are not contingent claims or potential claims, which can start to crystallise only if and when a CPO is granted. It is

therefore fundamental to the CPO application all the potential class members have existing claims." [as read]

Now, those words obviously open up a crack of daylight as to whether it's enough to have an existing claim, but what I respectfully submit on the basis of Phonographic Performance is evidently the claims within the class have to be crystallised claims.

THE CHAIR: Well, I mean, that's a more startling proposition, isn't it? So, are you suggesting that this is different because it's a collective proceeding rather than any other 47A claim?

MR WARD: What I am saying --

THE CHAIR: Sorry, in other words, just to make it clear -- sorry to interrupt you, but just to make it clear what the question is, are you saying this arises because of features of collective proceedings and the application of 47B, or are you saying that any private action for damages is subject to the same point?

MR WARD: As ever, one tries to make no more an ambitious submission than one needs to. So, I'm actually confining my submissions entirely to the collective regime, where I say if you add these two elements together, you reach the conclusion that an existing class member cannot properly claim for future torts that have not yet arisen.

Now, obviously, there's been a discussion in the pleadings before you about what is or isn't the position in the High Court. There is this interesting but rather non-dispositive section of McGregor talking about Battishill, an 1852 nuisance case, and this mysterious case of the missing CPR rule. One of the things McGregor says is, forgive me for paraphrasing, "Probably, people are quite pragmatic about this in practice." I confess that resonated with me.

But that's a different question, though, from whether formally it is permissible under the rules that apply to this particular kind of claim.

THE CHAIR: Well, yes, okay. Well, I'm not sure that it is. I mean, firstly in relation

to -- is it "Battis-hill" or "Batti-shill", do you think?

MR WARD: Oh, I'm afraid I don't know. It's a long time ago.

THE CHAIR: I've been calling it "Battis-hill", so unless you've (overspeaking) --

MR WARD: Well, I'll go with that too, sir.

THE CHAIR: Well, I'll keep doing that, but you can call it what you like.

But it seems to me that in relation to 47B and the Neill v Sony judgment -- so the context of that is that it's about the class definition, isn't it?

MR WARD: Yes.

THE CHAIR: Isn't really all it's saying that you have to have a claim to be a class member and you can't therefore be included in the class definition unless you've suffered a claim? That's all that's about, isn't it?

MR WARD: Well, sir, when I reflected on how we got to where we are today, it occurred to me that one of the features of this debate has been that you have the advantage over us to some extent over the Neill v Sony case. Obviously, when Mr Hoskins was standing where I was, he was essentially making the case that a view had been taken about what it meant, in terms of the way that the Kent amendment was first put forward.

I don't want to try and reventilate any of that. What I've tried to do is suggest that the logic of these provisions is such that, in fact, if a claim has not crystallised, it cannot be in the class claim until it has.

THE CHAIR: Well, I think that's just a bit unsatisfactory, isn't it? Because it just leaves you in the position that you could be, as a class member, worse off. If what you're saying is that 47B and the application of Neill v Sony is, if you like, the problem, then it leaves you in the situation that you'd be worse off as a class member than you would as just a private litigant. That can't be right, can it?

MR WARD: I'm not sure that is right. I think that the position of a private litigant really

depends on the debate in McGregor. What's said in McGregor is that people are usually pragmatic about this.

THE CHAIR: We'll come to that in a minute. But just on this point, I can't -- so the logic, if we're just dealing with whether you can be a class member because there is no claim at all, then that's actually perfectly consistent with the 47A analysis, because you can't bring a claim if you haven't suffered a cause of action as well.

But everybody knows that -- subject to the Battishill point, which we'll come to -- if you've suffered a competition law infringement at least once, you can bring your claim. The fact that it occurs every day thereafter up to the trial and indeed potentially after it, depending on how you read Battishill, means that you've got to -- it doesn't stop you having a 47A claim in the first place.

So, I don't really understand why those claims can't be bundled in exactly the same way under 47B. I don't think Neill v Sony stops that. I don't think it says anything about that.

MR WARD: Obviously you would know better than I, sir, but anecdotally the position in this Tribunal is people taking the kind of course that Dr Kent took in this case, which is regularly updating applications, just as has happened here. The question is, was all that just unnecessary in respect of the existing claimants? Of course, the risk is you turn around and you face something rather like we have in this case, of the defendant saying, "Well, absolutely these claims can't be included."

THE CHAIR: Well, I'm not sure. I mean, I think in our previous ruling on the previous amendment, we've dealt with this and we've made it plain what we thought Neill v Sony was about. I think it is clear -- and this is no criticism of you or those behind you at all, Mr Ward -- but the simple fact is that because of the way that the, if you like, overlap between the class definition and the claim period, it had that consequence. So that wasn't the consequence that Neill v Sony was seeking to

address. It was only seeking to address the question of the class definition.
If we just put aside whether, you know, that's anybody's fault -- we are here now and we have to deal with this. Put that aside for one minute and just try and work out whether as a result there was any special rule for collective proceedings that doesn't apply to private actions. I don't think it has any bearing. It seems to me that it's just beside the point.
MR WARD: It may be, but as I said, I'm trying to exercise a certain amount of submission economy.
THE CHAIR: Yes.
MR WARD: We say that certainly in the case of class proceedings, statutes make clear that the claims have to be extant. The point of British Phonographic is to show that individual purchases are individual claims; that when one talks about continuing breach, it may be true that Apple is in continuing breach of duty, but it's giving rise to individual torts each time a purchase is made at an excessive price, in effect, we say, or at a higher than counterfactual price, because of the exclusionary abuses.
That's why we say it's just difficult to see why that is permitted under the regime, if the regime is for collecting claims together that already exist.
THE CHAIR: Well, because the claim does exist.
MR WARD: Well, a claim exists.
THE CHAIR: Well, yes, a claim exists, and the whole point of the class definition is to make sure that the people who are in the class have a claim, and that's really all Neil v Sony does.
You're then back -- sorry. I just don't think you're going to get there on 47B, and so in order to succeed with this, you're going to have to, I think, establish that somehow as a consequence of the wording of 47A or the application of Battishill, there was some inability to bring this claim; and that seems to me to be completely inconsistent with,

as you say, the general practice of everybody. I mean, I had a bit of a fish around and found several cases, including some I think in which you have been counsel, where people have made claims for damages up until judgment, and no one's better than either, as far as I can tell. One of them, I think, being Gutmann, which -- there was some discussion, I think, at a CMC, but it's quite plain when you read the judgment that that's not where it ended up; at least no one took the point.

I suspect the reason that no one takes the point is that, like both of you, that's not a very attractive place to go to try and work out what the answer to Battishill and why it is now more or less disregarded, as far as I can see, because it's all rather complicated and there is some attraction in avoiding it, but I don't think it gets you -- I think you still have to grapple with this point as to, if it's not 47B that causes you the problem, what is it?

MR WARD: I mean, I can't really improve, I fear, on the submission I've already made, which is that the class regime exists to aggregate existing claims; and of course, those are claims that exist at the time when the claim is certified. A fresh claim -- if you imagine a person who purchased one app in 2019 and another one in October 2025, these are just completely discrete tools. One is in at the time of the certification. The other is a new tort that has arisen later. In my respectful submission, the fact it's the same claimant means they're already in the class, but it doesn't mean the actual claim is in. That's the submission.

THE CHAIR: Are you saying that in all these collective proceedings, the only course open to the class representative is to wait until judgment and then apply to bring the damages up to the date of judgment?

MR WARD: If they want damages up to the date of judgment and it is opposed, then that is what would be needed. Obviously, what happened in Kent -- and as I say, anecdotally, I'm aware it's happening in other cases -- is there's been an updating

process, but not so frequently as to infuriate the tribunal. Obviously, the period of embargo is of necessity uncertain, and of necessity, typically, parties don't find out until fairly late in the day where the judgment is going to be handed down. As McGregor says, there is scope for people to be pragmatic about that and to accept that in order to avoid precisely the kind of issues we're arguing about today, that the parties will just agree to pay up to the date of judgment. That's not where we are here.

THE CHAIR: But you're conflating the class definition point and the damages point again, aren't you? Well, I think you are, because I think the only reason for the updating is because the class is expanding. That's the only reason that's happening, and the fact that your definition of the class is the same for the claim period is the only reason that's had to happen.

MR WARD: We've accepted, of course, your ruling already, that we can't update the scope of the class. So, we are only talking about updating the definition in order to include claims within a certain date.

THE CHAIR: No, no. What you're doing in the current amendment is you're detaching the claim period from the relevant period.

MR WARD: Yes.

THE CHAIR: Which you could have done at the time of issue.

MR WARD: We could have done at the time of issue, but --

THE CHAIR: So, if you had done that, then you wouldn't have been updating along the way. I mean, if you had issued a claim form that said the claim period was from now until trial, for example, there could have been no argument about that, could there?

MR WARD: I'm not sure that's right, sir. If we could have certified way back in whenever it was -- let's say it was 2021; forgive me, I can't remember the date; it was in fact before my time -- but if it was certified in 2021, to try to have the claim certified

to include claims even for the existing class up until the date of judgment, I think would have been met with a firestorm of objection.

THE CHAIR: Well, I said date of trial, which I think --

MR WARD: Date of trial, sorry.

THE CHAIR: No. Well, I think in a way that's less controversial.

MR WARD: Yes, that is less controversial. So, it's really the additional period that we're talking about.

THE CHAIR: But I think the point I'm making is the updating is neither here nor there when it comes to this question. If you had separated the claim period -- I'm not saying it was the something that you should have done or you're wrong not to have done it -- but if you had in the way you're now doing, then there's no question of updating it all, is there? There's no reason to do that.

MR WARD: The question would have been different, which would have been a challenge at certification as to whether this was permissible. If I had said at certification, "We will crystallise the class today", so we deal with the point that you ruled on in January, "but for those class members, we will want to include any purchase up to the date of judgment", I anticipate would have been met with exactly the same objection we have today, which is to say, imagining the trial was set down at certification -- I know the story was more complicated -- Apple would have said in 2021, well, hang on a minute. We're going to have a trial in, when was it, I forget, January 2024; and then there's going to be a long period. Mr Ward is saying he wants all those claims in now from January 2024 to October 2025, when the judgment is going to come out.

Well, that can't be right. Circumstances might change, which is the submission they're making today, albeit after the fact rather than before the fact. That submission, if I may say, would have been more attractive before the fact, for Apple to say, well, how can

we know today -- let's call it 2023 -- what will or won't happen between January 2024 and October 2024, when the judgment might come out.

THE CHAIR: But that illustrates, doesn't it -- it may be you're right when you say, "well, we now know or could know the answer to all those things", but we're still left -- if we're trying to produce something which explains how people should do this, which is of course, something -- well, you certainly don't want to explain something which is the wrong way to do it, if I can put it that way.

So, we're trying to get this right in terms of the right way to do it. I'm not sure I'm at all clear what the right way to do this is, because you're either faced with the difficulty that every collective proceeding, on your argument, you have to wait till judgment and then have another hearing to amend to bring it up; and then, if you like, you certainly at that stage, I think, are pushing the onus very firmly back on the defendant; or you need to have this big argument at trial as to how reliable -- and we're talking about an Article 102 case here, because it might be quite different in a follow-on case. But there's a big argument about how reliable the evidence is and whether it could be trusted to last another 6 months or 12 months without going awry.

MR WARD: It's easy to see why defendants would make that submission in advance, ex ante, to say, "Well, this post-trial period, none of us know what will happen in this". You know, Google might go bust. I mean, who knows, in that period. Anything could happen. You can see the attraction of that submission.

So, part of the way this discussion is gently pushing me towards is an even more economical submission, which is that this is obviously difficult; and of course, what I'm really asking you to do today is exercise your discretion, and you're exercising the discretion against the background that it is true. Dr Kent did not make that kind of submission at certification. She didn't originally formulate the class in the way you said. I've suggested, respectfully, that had we done so, Mr Kennelly and

Ms Demetriou might have had something to say about it. At this point, I claim the advantage of the fact that we in fact do have the facts, and we do know that there isn't a distinguishing feature that Apple can identify for the period that we're talking about.

THE CHAIR: In that case, I'm going to stop bothering you, because I know you've got a lot to get through --

MR WARD: No, no. This is very helpful.

THE CHAIR: This is very helpful. It's a very helpful discussion. But I suppose that goes to two points, doesn't it? The submission you have just made goes to two points. One is: you're dealing with a criticism of you, effectively, that you haven't done this soon enough, and that is said to go into the mix alongside everything else. You're saying, well, “actually it shouldn't because this is the first time we've done it.” But at the same time, you're also saying that when you get to the question of unfairness to Apple, which is another point to put in the mix, then it's not as bad as it seems, because they have had the opportunity to tell us whether there was anything that has changed, and they haven't.

MR WARD: It's not so much "not as bad as it seems"; it's not bad at all.

THE CHAIR: Yes.

MR WARD: Yes. I mean, when we're in the area of your discretion, these are all factors.

THE CHAIR: Yes.

MR WARD: I can see, sir, that you may take this opportunity to make a ruling, rather like you did in January, that sets out views about what the best way to do this is, and I'm sure it will be devoured by the class action litigation community, as it's probably fair to say that people have been struggling with this, as the various transcripts show, and Neill, and so on and so forth.

It may not be necessary to reach a kind of bright-line view about exactly what the law

it really requires in this area, and if authors as eminent as the authors of McGregor are really not sure what the answer is, who am I to try and answer the question for them. But it becomes then a more pragmatic question when one focuses on the narrowness of the aim of our amendment, just to capture that additional period, which we respectfully submit: even if not on jurisdictional grounds, it would have been unrealistic to try and do it in advance for precisely the kind of reasons that are being now advanced. But those reasons, one might say, would have more cogency when we're talking about a future period which remains inherently uncertain.

THE CHAIR: Yes.

MR WARD: May I move on, please, to the next factor, which was what at least we put under the heading of "Re-litigation", which is your second question to us in your very helpful letter.

The issue here, of course, is whether Apple is right to resist the amendment on the basis it should be free to relitigate this short additional period, the period from November 2024 to October 2025. Our answer to your question is, in short: yes, there is a problem with seeking to do so absent a material change of circumstances or some other special factor.

Now, I am not here today to invite you to rule what would or wouldn't be an abuse of process on a claim that might be brought under defence that might be raised. That's obviously all far too far down the pipe and hypothetical. But focusing on this question, in our submission, does expose the flaw in Apple's argument that it has been, or would be, some kind of victim of injustice, if you were to make the order that we seek.

What I'll do, if I may, is just talk a little bit about the law and then focus on what Apple has actually said about the facts. The first thing is that you will have observed the skeletons to some extents are ships passing in the night, as Apple has focused on cause of action estoppel and issue estoppel, and we have focused on abuse of

process. We accept and we've observed in our skeleton argument that those types of estoppel require the cause of action or the issue, as the case may be, to be the same. As Apple rightly says, there is case law which casts doubt on that situation where we're dealing with a different time period.

But what we say in that context is that what we deal with there is the broader doctrine of abuse of process. We can see this from two sources in the bundle.

Firstly, I'd like to show you a passage of Johnson v Gore Wood, which is in the authorities bundle at tab 12. This is actually a quotation, but with observations upon it. It's at page 198, tab 12 of the authorities bundle. It's a quotation from the Court of Appeal, Lord Justice Auld in a case called Bradford and Bingley. The facts, I think, don't need to detain us.

If we look at the bottom of the page, Lord Justice Auld said:

"In my judgment, it is important to distinguish clearly between res judicata and abuse of process not qualifying as res judicata, a distinction delayed by the blurring of the two in the court's subsequent application of the ... dictum [from Henderson v Henderson]. The former, in its cause of action estoppel form, is an absolute bar to re-litigation, and its issue estoppel form also, save in 'special cases' ... The latter, which may arise where there is no cause of action or issue estoppel, is not subject to the same test, the task of the court being to draw the balance between competing claims ... to put his case before the court and of the other not to be unjustly hounded ...

"Thus, abuse of process may arise where there has been no earlier decision capable of amounting to res judicata, either or both because the parties or the issues are different, for example, where liability between new parties ... or determination of new issues should have been resolved in earlier proceedings, [it may also arise] where there is such an inconsistency between the two that it would be unjust to permit [one]

to continue."

So, what we take from this is simply the point that abuse of process may apply more broadly in a fact-sensitive way, even where there is no issue estoppel. In discussing this passage, Lord Bingham, if we look to page 200 says, just talking about Henderson v Henderson, in this very famous passage, the underlying principle:

" ... Henderson v Henderson abuse of process, although separate and distinct from cause of action ... and issue estoppel, has much in common ... The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if ... at all."

Of course, we're not dealing with that particular species of abuse of process here; it's a separate question. But I'm going to carry on developing these submissions. It's just worth noting, Lord Bingham also says:

"I would not accept it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party."

So, I draw your attention to that because, of course, it is a leading authority on abuse of process, but also because of what is said about the doctrine applying in a more broad-based way than the narrow doctrines of cause of action and issue estoppel.

The point is also helpfully made in an extract from Spencer, Bower that Apple relies

on. So now, turn that up, please. That's authorities bundle tab 37. This is quoted in Apple's skeleton argument. (Pause)

THE CHAIR: Sorry, tell me that reference again.

MR WARD: Sorry, it's tab 37. I'd like to go to page 1413.

THE CHAIR: Yes.

MR WARD: This is part of what Apple quotes:

"Changing situation", 17.30.

THE CHAIR: Yes.

MR WARD: "There can be no effective res judicata in a changing situation. A decision on “greater hardship” under the Rent Act was “not res judicata, because facts may alter [and so forth]." [as read]

Then over the page, though, revealingly, it discusses and disapproves of a ruling of the Employment Appeal Tribunal. This is in the middle of page 1414. The Employment Appeal Tribunal has held that:

"Potential for change is not enough, and dismissal of a claim to equal pay created an issue estoppel against a later claim where the facts had not changed." [as read]

Then you'll see a very disapproving footnote:

"The decision is contrary to principle, because the facts had to be found at both dates to determine whether it was an issue estoppel."

I'm not here to advance the proposition that that case should be followed, and that this is an issue estoppel. But the revealing thing is the next sentence in the main text:

"Such cases are better dealt with for abuse of process." [as read]

That is indeed precisely the approach that we are arguing for.

THE CHAIR: That does it make a lot of difference here, as a matter of practicality, because I mean, I think, on any view -- I mean, I know you're going to come on to this, but on any view, obviously abuse of process is going to depend on, I think, what's

been described as "a close merit-based analysis of the facts".

MR WARD: Yes.

THE CHAIR: So, we would ordinarily have to do that. I think, anticipating your submission, it's going to be, "Well, we haven't been given any arguments to examine and we should therefore make a presumption. That's basically where we get to".

MR WARD: Well, I'm actually taking another step further.

THE CHAIR: Yes.

MR WARD: Because I'm saying, again, all you're deciding today is whether to grant the application as a matter of discretion. If you are faced with a claim by Dr Kent and a defence by Apple seeking to fully contest the litigation, as if Kent number 1 had never taken place, there'd be a full-blown argument about abuse of process.

That isn't the application before you today, because all of those things are yet to happen. Hopefully they never will, but they're yet to happen.

So again, what I'm pointing to, though, is what the real weakness is in Apple's claim about unfairness to its procedural rights. Because what we see, though, is an attempt to re-litigate, absent the kind of circumstances that would, if you like, make it non-abusive. It's not a reason for you to withhold consent to the application. Sorry, that was a very complicated sentence.

THE CHAIR: No. I think I get that, but I think, I mean, I suppose just to think about some facts, let's just say, you know, speculatively, that, Epic had suddenly decided to increase its commission to 30 per cent for everything. Then there would be a real question, wouldn't there, as to whether -- the significance of that on the judgment --

MR WARD: Absolutely.

THE CHAIR: -- and therefore the infringement. You know, we would have to do our close merits-based analysis of those facts and try to work out whether it was an abuse of process. That would be the argument, wouldn't it?

MR WARD: You might end up in a situation where you'd say, "Well, this piece of the case does need to be re-examined". Of course, those comparators were important to market definition as well as quantum.

THE CHAIR: Yes.

MR WARD: So, I can see it's a good example because it's quite an important piece of the case.

THE CHAIR: Yes.

MR WARD: It's not something more peripheral. But equally, it doesn't necessarily follow you could re-litigate the entire case. But all of that would be absolutely for another day if we ever get there.

What I'm doing at the moment is really showing you the abuse cases that show how improbable Apple's case is, that really there is a gross unfairness to it in not being allowed to re-litigate.

THE CHAIR: Yes.

MR WARD: I've already said that this isn't really a Johnson v Gore Wood type of case. It is about re-litigation but in a different way. You've seen in our skeleton that we relied on the famous dicta of Lord Diplock in Hunter.

Although I know you must be well familiar with it, may we turn it up, please? It's in the authorities bundle under tab 8 at page 98. So, it's internal 536. (Pause)

THE CHAIR: Yes.

MR WARD: The beginning of Lord Diplock's speech:

"My Lords, his is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among

right-thinking people. The circumstances in which abuse of process can arise are very varied ..."

Then it goes on to observe the memorable facts of that case.

Of course, what's important to keep in mind is that this kind of Hunter abuse has been identified in cases where the parties are not even identical. You'll recall the Trucks' binding recitals judgment is an example. Should you wish to look at it, it's in the authorities bundle under tab 17, and it's at paragraph 101 of page 424, and then at 141, I think, where the principles are looked at.

But here, of course, we are dealing with identical parties. We've cited some authority on our skeleton. You've already observed to me, sir, the need for close consideration of the facts, but also that this kind of abuse is not limited to fixed categories.

What we have here, of course, is an application -- a submission by Apple that it should be allowed to re-litigate all issues. It's conspicuously silent on the question of whether it would regard your judgment in Kent as even admissible, were it to do so.

But our submission is that if this amendment were brought as a freestanding claim, and if there were no material change of circumstances or other special facts, it would be manifestly unfair to Dr Kent and members of the class and indeed the funders to allow re-litigation, and to run Kent 2 in this Tribunal for a couple of years would indeed bring the administration of justice into disrepute for the Tribunal to have to entertain that entire trial.

When I talk about special facts, the other factor that's identified in the case law is whether there is evidence not reasonably available at the time. Of course, that doesn't extend to getting an improved expert report. It means a material fact that have been uncovered that were not reasonably available at the time.

Against that background, I do want to turn to the facts and what the various pleadings and submissions say about the facts.

Could we start, please, in the core bundle with the class representative's first submission, which is under tab 3, which is the original application. If we turn, please, to page 36.

This is where the paper trail begins. You'll see at 16, Mr Hoskins and Mr Armitage observed on that occasion:

"... Apple's arrangements in respect of the App Store in the UK, including in relation to the Commission, have remained the same during the Further Period, and Apple, in spite of having had the opportunity to do so, has not suggested otherwise. To the contrary, during the trial, Apple pointed to evidence from the Further Period in support of its own case ..."

So that was what was said. In Apple's response to that, it didn't, in fact, identify any such evidence. Instead, it said something else. If we look at paragraph -- sorry, this is now at tab 7, page 111, paragraph 11.

THE CHAIR: Yes.

MR WARD: "The injustice in such a course of action would be compounded by the fact that, in finding for Dr Kent in the Judgment, the Tribunal has on significant points found that Apple had not evidenced important parts of its defence."

You'll remember the various things where there were gaps, like, for example, failing to provide evidence on the value of its intellectual property, despite calling Professor Hitt who said he was an expert in it.

So, all they're really saying here is they have buyer's remorse about that strategy and there are gaps they would like to fill. But that is precisely the kind of thing that Johnson v Gore Wood cautions against.

So, moving on in the pleadings, if we could, please, to tab 8. The class representative again makes the same point. If you look at page 116, please. Paragraph 4:

"... in spite of having several opportunities to do so, Apple has not suggested that there

was any material change in the Further Period which would render the findings in the Judgment inappropriate ..."

That's where the pleadings lay until the skeleton arguments for today. There, I want to show you what Apple said this time. So, this is core bundle, tab 2, page 20. There are two paragraphs we need to look at.

The first one, which may be indeed what you were thinking of, sir, when we were just talking about game stores. It points to the fact that there are third-party activities. It says in paragraph 13: the PC games market, prices were treated as a “useful indicator.”

But of course, it doesn't say that those prices have actually changed. It says, ‘well, that's third-party information that's relevant.’

Then it adverts again to this issue at paragraph 44 on page 29. It says:

"The trial was expressly limited ... to the Claim Period ... The Judgment reaches findings on key issues based on [the] evidence ... [including, for example]:

"... Apple's costs, and ... revenues ...”

"Market conditions and competitive constraints [et cetera] ..."

But again, it's careful not to say any of those have actually materially changed. Apple might or might not be slightly more profitable or slightly less profitable. It's not actually telling you that in this past period that we are concerned with, there is something new to say.

And (d), "Apple's average commission rate", well, it must know what that is.

Then at 45, it goes on. It makes the same point you've seen already: “There are various other points on which the Tribunal found it had not evidenced its case.” So again, it's saying, ‘Well, we'd quite like to patch up those gaps’

Then at the end there in the last three lines, it talks about regulatory action in Japan and the EU. But it hasn't told you what was new in that period or why it matters. So,

in my respectful submission, what you're left with is really nothing. Really nothing. Despite all of the resources available to Apple, it's asking for the opportunity to re-litigate without really having a clear reason as to why there is any material prospect of a different judgment, other than merely by having a second bite at the cherry.

Again, I say, I don't ask you to decide now whether or not that actually would be an abuse of process. That would be no doubt harmful. But the key point is there is just no basis on the evidence before you for Apple's assertion it would be a gross injustice to grant this application.

Then that takes me finally to discretion. I'm intending to deal with this very briefly, subject of course to any concerns you have. I've emphasised already and accepted, indeed, in argument that this is a matter of weighing the factors, starting indeed from finality. I don't intend to read out the factors in our skeleton, which I know you will have read, but I just re-iterate that our application serves the objectives of the class action regime by allowing access to justice and vindicating the rights of members.

It serves the governing principles for the Tribunal of deciding matters at proportionate cost. It allocates an appropriate amount of the Tribunal's resources, unlike litigating Kent 2. It avoids the extreme consequence that Apple would like to foist upon you of a retrial and accompanying waste of time and expense. It avoids the risk of inconsistent outcomes for that period, and indeed, the inherently unfair prospect of Apple getting a second bite at the cherry. Apple's objections based on fairness, are, in truth, all form and no substance.

Unless I can assist further, those are our submissions.

THE CHAIR: Yes. Just a couple of things. I mean, really, what you've just said about discretion, you might say about any situation where you were avoiding having a new trial, if I can put it that way. I mean, clearly there is the policy setting, if you like, in the policy context of the regime and the benefit that that brings to an awful lot of class

members. I mean, all of those things really boil down to a single thing, which is saying that if we avoid having a second trial, then that's a good thing.

In a sense, that's sort of the inevitable consequence of the application, isn't it? I suppose I'm just asking you whether if one starts with this idea you've got a finality -- I put it as a finality road hump, which you didn't like very much -- but you've got to get at least past some point of finality and show that you've got something that overrides that. I think what I'm really putting to you is, is there really anything particularly special about the points you've just given us?

MR WARD: Well, I think what's special about them, if anything, is that you had in front of you the most intensely fought trial and the most rigorous examination of all of the issues. What we're now talking about is a really small extension of time on the back of that, where Apple, through these rounds of pleadings that I've possibly wearied you by showing you, just hasn't been able to come up with a real reason why that period cannot be extended. So, in that sense, it's just fact-sensitive.

THE CHAIR: Yes, well I suppose that's the point, isn't it? Because I think -- what I'm saying to you is, I don't think it's good enough for you to say all other things being equal, as long as it's not unfair to Apple, then we should go ahead, because we're stuck with the finality point, aren't we? So if one starts with the finality point and thinks, "Okay, this is a serious factor to put into the weighting no matter how you look at it", then put aside any unfairness to Apple which is only going to add to that, you've still got to get past that point. I'm saying to you, you know, why are you telling us you've got past that point just simply because you're saving some resources?

MR WARD: I'm afraid I think it does go further than that. I hope my submissions did go further than that. I mean, there is a positive case here, which is not, as it were, just resources, but we have a very large number of people in the class. We're talking about a very large number of purchasers. Practical justice has been achieved up to a certain

period within the class definition. What we're saying is that the aims of the regime favour encompassing those additional purchases. That's precisely what the regime is here for.

So, there's a public interest as well as a private interest. It's not merely about saving the funder's money, saving the Tribunal's time on all of those, I think, good, healthy, pragmatic concerns, but it really is at the absolute heart of what the regime is for. So, the positive case is indeed the fact of recovery for those purchases in a period where Apple's practices apparently remained unchanged. If the application is refused, we don't know what will happen in terms of the vindication of those rights. Apple has made clear its intention, which is to make that very difficult.

THE CHAIR: Obviously, there's an appeal underway. So, I'm not making any predictions about where that will end up; I'm the last person who should be doing that. But if it were not to be successful, the appeal, then there is a very, very large amount of money which would be available to distribute. We haven't got anywhere near distribution plans or anything like that, for obvious reasons. But is it of any relevance as to whether adding another 200 million to the pot is going to make any difference to your average class member? I mean, is that something you think we can take into account?

MR WARD: I don't know what the numbers are, but it's inherent to the scheme that it exists for the benefit of consumers who may recover relatively small sums in some cases, and the purpose of the recovery is nevertheless compensation. So, if people have made these purchases, the very object of the scheme is to compensate them.

THE CHAIR: I suppose I'm making a slightly different point, which -- I mean, I absolutely accept that I'm making a slightly different point, which is: who knows how we're going to distribute this money? But no doubt if we ever get to that point, and obviously subject to appeal rights and so on, it would be perhaps a pleasing, certainly

a somewhat surprising result to disperse whatever was left after 1.5 billion had the legal fees and funding costs deducted. I mean, that would be a very significant outcome, wouldn't it?

In other words, are we actually going to be able to disperse what we've got, let alone another 200 million? That's the question I'm asking you.

Well, rather I'm not asking you the answer to that question, I'm asking you whether it's something we should be properly taking into account.

MR WARD: I think in a way, the answer is in the question to the extent that, as you say, because of the appeal, we're not actually here discussing exactly how all this distribution would occur. Had there not been an appeal, all of that would have probably taken place by now.

In a sense, there is, forgive me, a sort of trite answer to the question, which is if there is more in the pot, there is more to compensate class members. You've adverted to it: all of the complicating factors that go into distribution, which take this very far away from an ordinary breach of contract claim.

I'm perhaps at risk of re-iterating what I've already said, but recovering that money on behalf of class members is precisely why we're here.

THE CHAIR: Yes. Thank you.

Just one other thing from me. There may be other things, but just coming back to Battishill, with apologies.

MR KENNELLY: Yes.

THE CHAIR: But actually, hopefully it'll make it easier. I mean, I think what I understand from the skeletons is that nobody is encouraging us to get into the question of what happened in 1836 or whenever it was, and --

MR KENNELLY: I'm certainly not.

THE CHAIR: No. I mean, I think whatever the current practice is, it does seem to be

to accept that at least, putting aside your point about section 47A and 47B, as a matter of general practice, people do plead continuing causes of actions and competition cases up to the day of the judgment. That is something which happens, I think, and I'm just making sure you're not taking a point about: that we need to decide about whether or not that is permissible.

MR WARD: Definitely don't need to decide, sir. I made a submission about what the law provides, but again, I say again, we're really in the question of whether you should, as a matter of discretion, allow this application.

THE CHAIR: Yes, but I think we there are a number of ways in which we could reach that conclusion. I think rule 4 is one and rule 115(1) would be another. So, I'm talking about, if you like, replicating what was in the RSC; it was order 58, or whatever it was. But you're not taking any point about that. I mean, you're just assuming if we needed to do that, we could get there.

MR WARD: Yes.

THE CHAIR: Yes.

MR WARD: You've obviously decided the jurisdiction point in the January application.

THE CHAIR: That's a different jurisdiction point, isn't it? I mean, that's a jurisdiction point as to whether under rule 115(2) we are entitled to re-open orders.

MR WARD: Yes.

THE CHAIR: But that wouldn't deal with an underlying substantive problem or procedural problem.

MR WARD: Oh, I see. You're quite right, sir.

THE CHAIR: Yes.

MR WARD: But no point about that has been taken against me, in that sense.

THE CHAIR: And you're not taking it.

MR WARD: No.

THE CHAIR: No. Okay. Thank you.

Thank you very much. Very helpful. Thank you.

MR WARD: Thank you.

THE CHAIR: Mr Kennelly.

Submissions by MR KENNELLY

MR KENNELLY: Thank you.

If I begin with what is common ground. It's important to be clear about what's common ground between the parties. There is no dispute that the Tribunal's findings in the judgment determined issues in respect of the period 1 October 2015 and 15 November 2024 only. That is the claim period referred to in your judgment. There was no trial of any issues from any other period.

Dr Kent accepts that no cause of action or issue estoppel arises, because the causes of action and the issues determined in the trial concerned the claim period only. Dr Kent accepts, therefore, that in respect of the period from 16 November 2024 to your judgment on 23 October 2025, her causes of action are new. The issues are new.

In principle, Dr Kent must accept that the starting point is that she would have to plead a claim in respect of these new causes of action, and Apple will be entitled to a defence and a trial to determine these new causes of action and issues. But Dr Kent argues that instead, the Tribunal can decide now that there will be no point in allowing Apple a defence or having that trial, because whatever defence Apple might raise, whatever evidence Apple might adduce, would be an abuse of process.

The skeleton argument from Dr Kent does positively invite you to find that whatever Apple might put forward would be an abuse of process. That's paragraph 2 of the skeleton. That's necessarily so because if you do not find that our future defences

and evidence would be abusive, then Apple is entitled to its trial.

Dr Kent says that whatever Apple might advance by way of plea or evidence would be an abuse of process, regardless of the different disclosure or evidence that might emerge in respect of that 11-month period. The Tribunal, Dr Kent says, can decide now and in advance, and without seeing that disclosure or evidence, that whatever Apple would say would be an abuse of process; and all this in circumstances where this new 11-month claim period has never been examined at trial.

In the face of the -- what we say -- manifest injustice involved, Dr Kent's main argument is that in the three weeks between the application and our response, Apple should have explained what its defences and evidence would be if a new claim were issued in respect of this new period. Well, that ignores, and what, with respect, Mr Ward has ignored throughout his submissions, is that it is for Dr Kent to show why Apple's defences, pleas and evidence are an abuse of process. The onus is on her. To expect Apple to explain now what disclosure it would seek, what evidence it would produce, what arguments it would raise to defend itself is to reverse the onus. Since this is a new claim, Apple is entitled to an opportunity to lodge a fresh defence, to seek disclosure, to adduce evidence, including, critically, in relation to third parties; and, yes, to have a trial.

At some point in the future, Dr Kent may wish to argue that a particular argument or piece of evidence advanced by Apple is an abuse of process, and the Tribunal can take a view then, based on the actual material, if that is the case.

That's my brief introduction to our submissions. I will, if I may, take you to the authorities and to the question of the Tribunal's discretion, the second of the two questions.

THE CHAIR: Just to put that in context again and to make sure that we're all on the same page: I put to Mr Ward, the sort of conceptual framework here, which is that you

start with the finality principle and you say what might outweigh that or indeed what might add to it, in terms of factors against the application.

MR KENNELLY: Yes.

THE CHAIR: This whole question of injustice to Apple as something which one would stack on top of the finality principle is another reason not to do this.

MR KENNELLY: Yes.

THE CHAIR: So, you're really trying to neutralise the attack on that, if you like. That's where this fits in, isn't it?

MR KENNELLY: Yes, indeed. The starting point is that there is a powerful factor weighing against reopening the judgment in any event, as you discussed with my learned friend earlier.

THE CHAIR: Yes.

MR KENNELLY: This is a further very powerful factor which goes on the same side of the balance.

THE CHAIR: Yes.

MR KENNELLY: On the question of whether the Tribunal has jurisdiction to reopen the judgment at all, as you know, we respectfully disagree, and we rely on our submissions on that issue that we advanced at the consequentials hearing, and we reserve the right to take that further.

THE CHAIR: Yes, of course.

MR KENNELLY: But I'll say no more about it today.

I'll turn, if I may, to the law on abuse of process, and back to Johnson v Gore Wood, in the first volume of authorities, tab 12, and go to page 170, where it begins.

This authority is obviously very familiar to you. Mr Johnson owned a company which had been advised by the defendant's solicitors. The company had issued and settled a claim that the defendant had given negligent advice, and then Mr Johnson

subsequently issued a claim in his own name, to the effect that the firm had also been advising him personally, and he had suffered loss personally because of similar negligent advice given to him in respect of the same transaction.

If you go, please, to page 191, just the heading. This is where we know we are dealing with the analysis of abuse of process. Then turn to page 192. 192B, in the indented passage.

We see the famous passage from Henderson v Henderson, and it's useful, in my submission, to read this again, just to recall precisely what the problem was in Henderson v Henderson and what was relevant for modern abuse of process. Read the indented passage.

The vice-chancellor said, skipping to the second line:

"[w]here a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case ..."

I will ask the Tribunal to focus on a given matter, and the subject of litigation. What was the matter being adjudicated by you in the trial? It was whether Apple abused a dominant position without objective justification during the claim period. The matter being adjudicated was not whether Apple abused its dominant position in 2025. The court in Henderson v Henderson said you can't reopen the same subject of litigation. The subject of litigation in our trial was the claim up to 2024.

Skipping to the end of that passage from the vice-chancellor, the parties are told that they must, sorry, that the court is required to determine the points advanced by the parties, but also every point which properly belonged to the subject of the litigation, which the parties exercising reasonable diligence might have brought forward at the time.

Again, what properly belonged to the subject of litigation in our trial was whether Apple

committed an abuse of a dominant position and lacked justification in the claim period. Whether that was the case in 2025 was not the subject of the litigation.

THE CHAIR: In terms of where this is going, Mr Kennelly, I mean, you're not going to argue, are you, that there's no jurisdiction for abuse of process here? I mean, it could possibly be the case if you were to run up an argument which had already been run and there was no -- I think the authorities talk about changed circumstances in relation to the issue estoppel and cause of action estoppel.

But broadly speaking, I think Mr Ward is accepting that the same point could apply here. I mean, you're not arguing that we don't have jurisdiction to get into that? I mean, I'm just wondering how much difference there is between you and Mr Ward on this.

MR KENNELLY: Well, on the (overspeaking).

THE CHAIR: There's a bit on the emphasis, I know. He's done his bit, and I'm not going to dissuade you from doing yours, but I'm just wondering where we're going with it.

MR KENNELLY: We both agree that abuse of process is the point. If there's a point to be taken here, it's abuse of process.

THE CHAIR: Yes.

MR KENNELLY: It's open to him to say, in principle, that everything that we could possibly adduce in the future would be an abuse of process. That's what he needs to show in order to shut down our right to a trial. But to your point, sir, I'm not saying that it could never be an abuse or that somehow you must find now that it would be impossible for an abuse of process to arise. That will depend. Whether an abuse of process could arise in the future is an intensely fact-sensitive issue, which would have to be assessed by you in a future scenario where, if the claim is brought, and if we raise defences in evidence, at that point you would make that decision.

THE CHAIR: We're back to the onus point, really, aren't we, whether it's your responsibility to tell us what the things are or the class representatives' responsibility to, I suppose -- and I'm not quite sure how they do deal in the context of this application with those issues. I mean, maybe they can't.

MR KENNELLY: The onus is key, and that's why it's stressed, and I'll come to it (overspeaking).

THE CHAIR: No, no, I can see that.

MR KENNELLY: It's vital, because otherwise you end up in a situation of extreme injustice, where the class representative says, "Well, put forward your whole case and explain to us now why you can make those points consistently with your arguments in the trial".

THE CHAIR: Yes.

MR KENNELLY: That is the opposite of the process which the Supreme Court has stipulated. It is for them to make the claim they want to make. It is for us to raise such defences, adduce such evidence, seek just disclosure, and then it's for them to say, "No, that's an abuse of process" and ask the Tribunal to resolve it based on the concrete facts as they arise in the litigation.

THE CHAIR: Is that a convenient point to take a break?

MR KENNELLY: Yes, thank you.

THE CHAIR: Yes. Thank you.

(3.16 pm)

(A short break)

(3.27 pm)

THE CHAIR: Yes, Mr Kennelly.

MR KENNELLY: Just before we broke, you were putting to me what the distinction, if any, is between our approach to abuse of process.

To be clear, I understood my learned friend's case to be that in order for his application to succeed, he would have to show you that it would be an abuse of process for Apple to resist if a new claim were issued in respect to the new period. That's necessarily so because, unless they can show that it would be abusive for Apple to resist the new claims as for the new period, Apple would be entitled to a defence and all of the procedural rights that go with it and a trial.

My learned friend then, in the course of the submissions before you, said, "Well, I think I'd have to say, well, abuse of process could be determined later, or you don't need to make a positive finding about abuse of process today". But of course, if you allow the amendment, there will be no opportunity to have an argument about abuse of process. In any trial, the amendment will be allowed, and the benefit of the judgment will be extended for that period which has not been subject to a trial.

THE CHAIR: I thought he was really just simply saying, "You've had the opportunity to tell us that something has changed. You haven't. So therefore, we can presume it hasn't". I mean, maybe he was saying something more than that I -- but I didn't think so.

Yes, okay.

MR KENNELLY: Well, then if the case is that this court can presume that the onus is on us positively to show --

THE CHAIR: Yes.

MR KENNELLY: -- that what we would say in the future would not be abusive, then I will go back to Johnson v Gore Wood and take you back.

THE CHAIR: Yes, we're back to the onus point, I think.

MR KENNELLY: Exactly. It's not just that the onus point is critical, but also the reason why the onus is so important is that this is such a serious thing to do: to deprive a party of their right to a trial, that the onus applies always in a fact-sensitive context where

the tribunal or court looks carefully at the evidence before it to decide if, in fact, it is abusive for the party to take the point which they're seeking to take.

THE CHAIR: I don't think, just to be clear, he's taking a point about an onus. If you had -- if he had issued fresh proceedings and you started raising the same points again, I think he would accept he has the onus in that context.

I think he's saying, in the present context, because you've had the opportunity to indicate that there might be points where circumstances have changed, just to use that shorthand --

MR KENNELLY: Yes.

THE CHAIR: -- and you haven't done so, then if you like, his onus, any onus he has is discharged.

MR KENNELLY: I understand. His onus is discharged because we have not advanced --

THE CHAIR: Yes.

MR KENNELLY: -- what our defence, disclosure -- for example, and evidence would be in any future case relating to the period.

THE CHAIR: Well, I think he wouldn't -- sorry to interrupt you -- I think he wouldn't even put it that high. I think he would say, "You haven't come along with even one point which you've indicated might be different, as a matter of fact". If given some areas where there might be difference, but you haven't actually advanced, as a positive point, anything that is different. That's the point he's making.

MR KENNELLY: Before I go back to Johnson v Gore Wood, to make a short response to that, which is that the onus lies on the party making the allegation to show an abuse of process.

THE CHAIR: Sorry, I'm just -- but I mean, in a way that's just simply saying, isn't it -- I'm just trying to -- and this onus point is sort of somewhat unhelpful, and no

criticism of either of you, but somewhat unhelpful in a way, because really all it does is just go to the question of discretion here, doesn't it? Isn't it just simply a point about whether it's a good idea for us to allow something to happen, which might be unfair to you in circumstances where you have had the opportunity or haven't had a fair opportunity, whatever it is. I mean, that's really what it boils down to, isn't it?

MR KENNELLY: I would actually disagree. You have a discretion broadly as to whether you must reopen the judgment or not. That's -- in taking that discretionary decision, one of the issues before you is whether it would be an abuse of process for Apple to raise a defence to the new claim.

THE CHAIR: Well, so to unpack it slightly, whether it would be unfair for us to exercise the discretion, and it would only be unfair if it would not be an abuse of process for you to raise a new claim.

MR KENNELLY: Yes. But that still involves you making a positive finding about whether it would be an abuse of process or not for Apple to resist the new claim.

THE CHAIR: Yes. I think, and he says, "Well, you don't need to worry about that", because if there was a point, they could and would have raised it --

MR KENNELLY: Yes.

THE CHAIR: -- and therefore, there was no unfairness.

MR KENNELLY: Indeed.

THE CHAIR: That's what unfolds, yes.

MR KENNELLY: That argument reverses the onus. The argument that he says, which is that it's for us to explain positively why it would not be abusive for us to resist, is to reverse the onus.

THE CHAIR: Yes, I understand --

MR KENNELLY: Yes.

THE CHAIR: Yes, I understand it now.

MR KENNELLY: That's my sole point.

THE CHAIR: No, I get that. I understand that.

MR KENNELLY: The onus is important because of the nature of the exercise that you are asked to undertake.

THE CHAIR: Yes.

MR KENNELLY: We are a million miles from a viable case of abuse of process here. Hunter v Chief Constable of the West Midlands was the case he placed particular reliance on. As the Tribunal knows, Hunter involves a collateral attack on the determination of issues in an earlier criminal case. The effect of the ruling that was sought in the civil case in Hunter was that the determination in the criminal case was wrong. That was why it was a collateral attack.

Here, there is no collateral attack proposed by Apple. If Dr Kent issues a fresh claim, as she should, and Apple succeeds in its defence, that ruling will concern new causes of action covering a different period. The earlier judgment remains correct and valid, subject to appeal, on the basis of the evidence considered by the Tribunal in that case, and issue estoppel and cause of action estoppel arises between Dr Kent and Apple. There's no question of collateral attack on the findings in the earlier judgment.

We see, if you go to page 200, to which you were taken by my learned friend, he read some of this to you. I'd like to take you to some of the passages he didn't read but also to focus on some of the language he skipped over.

So, we're on page 200 of Johnson, and second full sentence:

"The underlying public interest is the same: that there should be finality in litigation and that [the parties] should not be [vexed twice] in the same matter."

What was the matter determined by the Tribunal in the judgment? The matter was, whether during their claim period, what was the relevant market? Was Apple dominant? Did it abuse its dominant position during the claim period? During that

period, was there any justification?

Skipping down about three lines:

"The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all."

Skipping down to see an important observation by Lord Bingham:

"... there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive."

In my submission, you can't make a finding of abuse of process without undertaking that exercise, which you cannot do unless the material is before you.

Then:

"That is to adopt too dogmatic an approach to ... [what is required is] a broad, merits-based judgment which takes account of the public and private interests and ... all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

Now, if you go to Lord Millett on page 228. Millett on page 228, just above (D), he makes the point -- he obviously agreed in substance with Lord Bingham.

"It is one thing to refuse to allow a party to relitigate a question which has already been decided ... quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. [That is to deny their] right of access to the court conferred by ... Article 6 of the [ECHR]."

The purpose of the abuse of process doctrine is:

"... to protect the process of the Court ... and the defendant from oppression."

It's the level of concern that needs to be demonstrated.

Then skipping to (F):

"... the true basis of the rule in [Henderson] is abuse of process ... it '... ought ... to be applied [only] when the facts are such as to amount to an abuse: otherwise there is a danger for a party being shut out from bringing forward a genuine subject of litigation.'"

Just skipping ahead, in undertaking that careful factual assessment by whether a party is being shut out from bringing forward a genuine new point or new evidence, again, going to the bottom of the page:

"The burden should always rest", over the page, "upon the defendant to establish that it is oppressive or an abuse of process for him to be subjected to the second action."

That would be the claimant in this context, the class representative.

Before I leave Lord Millett and Johnson, if you could go back, please, to page 228(G). Two further points at (G) and (H).

First at (G), the question was:

"... whether it was oppressive or ... an abuse ... for Mr Johnson to bring his own proceedings against the firm when he could have brought them as part of or at the same time as the company's action."

Then down to (H):

"There is ... no doubt that Mr Johnson could have brought his action as part of or at the same time as the company's action ... [it doesn't] follow [at all] that he should have done so or that his failure to do so renders the present action oppressive to the firm or an abuse of the process ..."

Even if, in principle, Apple seeks in the future to produce evidence which it could have produced in the course of the Kent trial, it doesn't follow necessarily that that would be

an abuse of process. That's a matter for you to determine in the future.

But you're being invited now to find that, to the extent that Apple would seek to bring forward evidence dealing with the 2025 period, which it could have produced during the Kent trial, that is necessarily an abuse. That is contrary to what Lord Millett is saying in Johnson: whether it would be an abuse or not is a matter you would have to assess at the time when you look at the material and the context in which it's set to be adduced.

The key point, though, in relation to cases involving alleged allegations of abuse of dominance, is that the relevant facts may well be changing. This is not a case where a single point will be determined in one trial and will be obviously correct for the future, and therefore it would be abusive to seek to re-examine it for a new period.

In a claim involving market definition, the tribunal will always focus on the particular facts in the particular period in question. The competitive conditions will change over time. The tribunal knows that very well. That's precisely what the CMA market definition guidance says; I don't need to take you back to it, and the European Commission guidance is of the same effect. You will always look, in a trial of abuse of dominance, on the competitive conditions prevailing at the time of the conduct that is being assessed, not some earlier period. If a new claim is issued for 2025, you will look at the competitive conditions in 2025.

Now, in relation to this case, Dr Kent's submission is that it's obvious that nothing new will emerge, such that anything that Apple may plead by way of defence will be an abuse of process. That's wrong, obviously wrong, on the face of your judgment, because, on its own terms, the judgment demonstrates how its findings were based on the situation that pertained during the claim period and the particular evidence that was presented in respect of the claim period. That's especially important when the issues arising in Dr Kent's claims don't depend only on Apple's arrangements,

because, as you recall very well, the market context and the activities of third parties were of central importance in the trial, and they would be of central importance if the 2025 period was to be litigated.

Just to give you a sample, because it's true, sir, as you say, we haven't introduced evidence to the effect that, "This is the evidence we would adduce. This is the disclosure we would seek and we'd expect to get". But because of the onus point, it's not for us to do that. It's sufficient for us to resist the abuse of process allegation, to say, "Look at the kinds of issues that would arise in respect of the new claim period for 2025." It's obvious that there is the prospect of new points and new arguments being taken for that new period that you did not examine in the trial.

So, for market definition, you found that the issue was concerned with substitutability with the alleged focal product. That depends on the offerings of third parties and the preferences and behaviour of customers. In the judgment, you do that by looking at the PC games market, a useful indicator of the price that might be reached if rivalry were introduced. If there were to be a trial concerning 2025, we would look at PC games pricing in 2025, and Apple would have the opportunity, the right, to introduce more recent information in relation to that period.

You will recall the benchmarking, the comparators' analyses that you undertook that underpinned Dr Kent's case and market definition, as well as exclusionary abuse and unfair pricing.

Just to show you a quick example. If you go to your judgment, it's in the second authorities bundle, at page 796, paragraph 256. There was the Roblox point, where you found that Roblox wasn't a reliable benchmark, and you had no direct evidence about how it sets its prices and the products to which they apply.

Now, if there were to be a claim in respect of 2025, should Apple be denied the opportunity to obtain for the 2025 period evidence in relation to how Roblox sets its

prices? For the 2025 period, should we be shut out from investigating that question? Similarly, on the question of competitive constraints, again you found we adduced no evidence on whether the whales, the high-value users, take the price of apps into account when choosing devices. There's no need to go back to that reference in the judgment; it's well known to us all. It's all relevant to dominance. But again, if we were to examine the competitive constraints in 2025, Apple would have the right to seek evidence in relation to that.

Mr Ward suggests that it's somehow abusive for us to seek to obtain better evidence for the 2025 period than we might have obtained during the trial before you. On its face, that wouldn't be abusive because we're concerned with a new period. We'd be dealing with the competitive constraints in respect of that new period. But in any event, you can't assume at this stage that an attempt to do so would be an abuse of process. That would be contrary to the need for a fact-sensitive assessment, where the onus would lie on Dr Kent.

THE CHAIR: It might rather depend (inaudible) on whether the new -- well, if the new evidence was available in relation to the pre-2025 period and you hadn't brought that forward, that is likely to give rise to at least a question about abuse of process, isn't it?

MR KENNELLY: One could see the argument that they could make about it, yes. We would have arguments to resist that. We could say, for example, that the Henderson v Henderson concern is really dealing with attempts to revisit findings made in an earlier judgment. Whereas in this context, we would not be seeking to revisit findings in the earlier judgment, we'd be seeking to assess the true situation for a new period by reference to evidence from earlier periods. That is not the same as the concern in Henderson v Henderson.

But I don't need to persuade you today that I'm right or wrong about that. The point is, it's entirely premature for Dr Kent to ask you to find that everything that I might say

in the future would necessarily be abusive, which is what they have to show you if we're to be shut out.

THE CHAIR: Yes. Can I just ask you the same question I asked Mr Ward? If this had been done a different way -- and really, again, I'm just trying to work out how this should work in these types of proceedings. So if the claim had from the beginning, in relation to the existing class -- whatever that was from time to time -- had sought damages up to the date of judgment, one assumes we would have then had a discussion at the trial about the safety, if you like, of making assumptions that evidence as of 1 February 2024 and whatever date we thought we were going to deliver the judgment. I mean, how does one deal with that point in these cases?

MR KENNELLY: We deal with it in the same way we've been dealing with it in the High Court --

THE CHAIR: Which is?

MR KENNELLY: -- for centuries; for 25 years, anyway, speaking for myself, which is that we have that very debate. The claim form seeks damages in respect of loss suffered up to the date of assessment, which is the date of judgment. Then during the trial, since the period after judgment is put in issue, the defendant has the opportunity to argue about the extent to which the evidence before the court -- whether the facts post, depending on the period or the nature of the thing -- the extent to which the circumstances in the period later are material to the assessment that the court or tribunal has to undertake.

That is entirely standard in the High Court.

THE CHAIR: And just --

MR KENNELLY: Sorry, just to be clear --

THE CHAIR: (Inaudible), yes.

MR KENNELLY: -- Mr Ward suggested that it would be somehow difficult or wrong in

principle to have an argument about the robustness of a claim in respect of causes of action which have not yet accrued. That's just simply wrong. In High Court cases where it's well accepted that the damages can be claimed up to the date of judgment, we debate the robustness of the claim, even in respect of causes of action which have not yet accrued.

In this case, Dr Kent originally claimed in respect of loss up to the date of judgment. The claim form in your bundle originally sought damages up to the date of judgment. We did not object to that. They amended that for their own reasons. Mr Ward said, oh, if they'd sought it at the date of judgment, who knows what I might have said. They did do that, and we did not object.

THE CHAIR: Presumably, you'd have -- I don't know if this is your experience -- but you'd have quite a different discussion depending on the nature of the claim. So, if it's a follow-on action, then the number of variables that might change is considerably more limited than a Chapter II based claim, where you do have issues about everything, from market definition through to quantum. So, I don't know if this is your experience, but presumably it rather depends on the case as to what sort of discussion you have at trial about it.

MR KENNELLY: There's more of a predictive exercise in a more fast-changing market, yes. But the courts are well able in cases other than competition cases to deal with those predictive exercises in fast-changing markets, and they have to take a judgment. You were invited to make a finding on the balance of probabilities as to what's going to happen in a period that runs after the trial itself, which one can imagine in an Article 102 case might well be complex, but not barred by law, as my learned friend suggested, and certainly not impossible.

THE CHAIR: I mean, it's all just a bit odd, isn't it, really, that -- and this is no criticism of anyone -- but it's a bit odd that we're having this discussion now and talking about

abuse of process and onus of the burden of proof in relation to that, when actually it probably would have been dealt with in quite a robust way at trial. I mean, you know, maybe Mr Ward's right: you might have taken a particularly aggressive point on what was happening in Europe and the effect that might have had on Apple's business model or whatever it was. But I mean, that all would have been recorded in the evidence, I'd assume.

But I mean, in a way, what you're describing, it's a fairly agricultural way of dealing with this period, which is contrasted a bit with your submissions about all the things that you would be entitled to now do to litigate it afresh.

MR KENNELLY: But what we cannot do is say because they didn't claim up to the date of judgment for their own reasons, and because they simply didn't sue in relation to 2025 -- and that was not before you -- you can say: well, let's just assume it's probably all the same. Had they done it the right way, it would have been in the trial. Maybe you'd have said different things, who knows? But let's just make a decision now, that whatever you would have said would have made no difference, and grant the application.

THE CHAIR: Well, I --

MR KENNELLY: That's really what's been sought.

THE CHAIR: No, that's a useful way to put it. You know, there's probably a fairly high degree of comfort that it probably is more or less the same, and particularly since you haven't told us that it isn't, but that doesn't get away from the point that you're making, which is: is it really fair to make that assumption in these circumstances? That's the point you're making.

MR KENNELLY: In circumstances where it is obvious, and it's recorded in your own judgment, that we're concerned with changing market conditions and competitive constraints. This is not a slip rule. My learned friend said, "Oh, you know, the period,

a few months", it's 11 months and it's worth £236 million with interest. That's what's being sought: judgment to be entered against Apple for £236 million for an 11-month period without a trial, on the assumption that whatever we would say about that period would make no difference.

Just going back to what we are entitled to address, if we, as we ought to, have the opportunity in a new claim, there is the critical question of what Apple would charge developers legitimately in the counterfactual. This is central to the question of the overcharge.

Again, in your judgment, you said that we did not adduce evidence on this, but this is something which, again, has changed. This is an area where there is genuine recorded change in development since the trial.

If there was a new claim in respect of 2025, Apple could, if it chose to, adduce evidence in relation to developments in other jurisdictions post-dating the evidence and the trial in Kent, where Apple has introduced separate charges for its tools and technology, like in Japan following the Mobile Telecoms Competition Act and the separate charging for core technology in the EU under the Digital Markets Act.

So, what does Dr Kent say in her response to this? If you go to her skeleton argument. It's behind tab 1 in the main bundle at page 13, paragraph 25. End of paragraph 25, she says:

"It would be a vast and pointless expense of time and resources for the parties and the Tribunal, the only real purpose of which would be to allow Apple a second bite of the cherry."

Again, that involves an assumption that Apple will definitely be found liable in respect of 2025 without you seeing any defence, disclosure or evidence in respect of that period.

Throughout the skeleton argument, Dr Kent fails to understand that the situation in

2025 was not properly before you in the trial. That's why it's a mistake for her to refer to a "second bite of the cherry". Subject to the appeal, your findings in the judgment are fixed and final as between Dr Kent and Apple. But as regards 2025, there has been no trial for the 2025 issues, not even a first bite at that cherry.

Then paragraph 26 is a reference to the Trucks (Binding Recitals) judgment, and my learned friend referred to that earlier today. Just reading from his skeleton, he says: "In Trucks ... it would be an abuse of process for truck manufacturers to dispute, in follow-on damages claims before the Tribunal, matters that had been the subject of admissions those manufacturers had made during the infringement proceedings before the European Commission ..."

"Matters that had been the subject of admissions", again, which matters?

It's common ground that the admissions covered a particular period. Everyone accepted that the admissions in question were binding in respect of the period in question. Nobody argued the admissions were binding in respect of a different period, or that it was abusive to deny liability in respect of a period other than the period covered by the admissions.

THE CHAIR: All of this depends, doesn't it, on what it is you might seek to advance as a defence. I mean, if you're right and there are things that are very -- let's take, for example, a completely different set of facts, so very clear change in circumstances -- then I don't think Mr Ward could argue this is the second part of the cherry, could he? But he's saying, "Well, there's no indication there is such a thing, and you've not advanced it". So, it just rather depends, doesn't it?

I'm just not sure how much any of this really helps us, other than the fact that it's not clear, what points you might take and what arguments they might have about it. Now, you may say that helps us because it goes to the point of discretion, which I think undoubtedly it does, but I'm not sure we can really take it any further, can we?

MR KENNELLY: What it points to is that you cannot find today that it would be abusive for Apple to resist the allegations in respect of 2025. You can't make a positive finding based on what you have before you, that whatever Apple would say would be abusive. You don't have the material to make that finding, and that is the end of the abusive process allegation. So, in terms of the weighing exercise that you're undertaking in reopening the judgment, the emphasis that my learned friend places on abuse of process falls away.

Since you mentioned the question of reopening judgment, just to recall your statement of the principles of what's involved; the third volume of authorities, tab 26, page 1163, paragraphs 54 and 55.

We're stepping back from the broader abuse of process discussion we've been having and looking at the jurisdiction to reopen the judgment, because now we have to recognise that the claimants did not, as they could have, sued in respect of the period up to judgment. They're seeking to reopen the judgment to have that added in respect of a year that was not before you. It was not put an issue before you. You said in 54 that the jurisdiction must be used carefully and sparingly. Skipping to the end of paragraph 54:

"[t]he general approach is that the interests of finality in judgments is a powerful factor which would need to be displaced before it would be just to reopen a judgment".

And you have the acceptance, the general principle, at the end of 55, that the interests of finality require there to be very good reasons why it would be just to reopen the judgment.

To take you back to AIC, would you go to that, please, at tab 19 in the first volume, page 477. Just to go back to the paragraph, Mr Chairman, that you pointed to earlier today.

Paragraph 32 on page 477:

" ...on receipt of an application [like the one before you] by a party to reconsider a final judgment ... a judge should not start from anything like neutrality or evenly balanced scales. It will often be a useful mental discipline, reflective of the strength of the finality principle, for the judge to ask [himself or] herself whether the application should even be entertained at all before troubling the other party with it or giving directions. … It may be a perfectly appropriate ... response just to refuse [it] in limine after it has been received and read, if there is no real prospect the application could succeed. Judges should not re-open proceedings just to allow debate on the point if it is already clear that the judgement or order should not be re-opened."

To the passages that you refer to, sir, 35 and 36, or 35 alone, the weight to be given to the finality principle varies depending on the particular nature of the order made, the type of hearing, the end of which it was made. But the point you made, sir, which I emphasise, is that finality is likely to be at its highest importance in relation to orders made at the end of a full trial.

My learned friend says, "Well, don't worry about that, because we're not seeking to change anything in the original trial or the original judgment". But that doesn't work. The principle of finality is also opposed to what my learned friend is seeking to do. They could have raised the new period during the trial. They could have put that in issue. Had they put it in issue, we could squarely and fairly have addressed that period, which was not put in issue. They're now saying that the new period can simply be applied to the old findings, in your judgment. That is a change to the implications of the findings that you made. That's a change to what the findings in your judgment were aimed at.

My learned friend said in response to a question from the chair, "What would we have said if the new period had been put in issue?". As I've already shown you in the claim form itself, the new period was originally in issue. We didn't oppose it, but if they've

chosen not to put an issue, they can't then come around after the judgment and say, "Oh, sorry, we should have done it", and you can just assume that it would have made no difference to Apple's disadvantage --

Still on the question of discretion, the next argument that Dr Kent makes is that the amendment would allow full compensation for class members. But of course, that assumes that Apple would lose a trial irrespective of 2025, again, without you seeing any pleadings, disclosure or evidence for that period.

-- then on the question of whether Dr Kent was in fact barred as a matter of law from raising this amendment application until after the judgment was handed down, you have our submission that that's just plain wrong, as a matter of law. We share the Tribunal's indication -- in terms of the discussion you had earlier with my learned friend, it's a clear distinction between what Sony was concerned with, which was the class definition. You can't have class members in the claim if they have no claims at all.

It's quite different where class members have a claim, have an existing claim, and then seek to recover losses in respect of the continuing tort up to the date of judgment. That's why the Battishill principle was overturned by a ruling in the superior courts, and why we submit that the McGregor view is correct, that that express rule in the old RSC must be treated as having been followed in the CPR and the Tribunal Rules. It was perfectly clear what it meant, and it would be extraordinary when the Tribunal Rules were drafted if, as the Chairman said, a class member would be worse off than a private litigant.

The updating to which my learned friend referred, that updating exercise, is needed for new class members. It's not needed to extend the period. The period could have been pleaded as it was originally extending to the date of judgment.

THE CHAIR: The Battishill problem is a problem for, everybody, if it's a problem. So,

I don't think Mr Ward was particularly saying that Battishill affected his analysis of 47B. Assuming he's wrong about that, then if there's a Battishill problem, everybody is stuck with it.

MR KENNELLY: Yes.

THE CHAIR: But you say that -- well, I mean, that's just not what people do, is it?

MR KENNELLY: No, it's not. The Rules should not be construed so as to have that restriction to which my learned friend refers. We say that the CPR and the Tribunal Rules must be read to mean that you can seek damages in respect of loss up to the date of judgment.

THE CHAIR: I mean, it's all quite odd, isn't it, really, because you've got Battishill, which appears to be about making sure someone doesn't get double compensation. (Inaudible) on a different basis and a different action. Then you have it being dealt with by, effectively, procedural means in the RSC, and the case law that accepts that that's valid. I mean, it doesn't really seem to be a substantive rule at all. It's really a procedural point.

MR KENNELLY: Procedural, and it requires express treatment both in the CPR and in the Tribunal Rules. But the point we make is that McGregor is correct, and correct in relation to the Tribunal Rules also. That means that Dr Kent could have addressed this issue and put the 2025 period in issue earlier. The idea that somehow she could only do it once the judgment was handed down is wrong; wrong in principle.

If I'm wrong about that, and if Battishill does apply, as my learned friend said, then of course Battishill says in terms that you should bring a new claim. Because the point that you made, sir, in the previous finding was about jurisdiction. You found that that the Tribunal had jurisdiction to reopen the judgment. That's a different question from whether -- if Battishill applies, then Dr Kent needs to bring a new claim in relation to the period between the trial and judgment.

There's a real contradiction in the heart of Dr Kent's argument about that. If Battishill applies, then on the terms of Battishill, she needs to bring a new claim, and the question of your jurisdiction has got nothing to do with it.

Sir, I see the time. I think those are my submissions. If I can be of any further assistance.

THE CHAIR: Thank you very much, Mr Kennelly.

Mr Ward.

Reply submissions by MR WARD

MR WARD: A very short reply, if I may.

Apple's argument is confirmed as being all of form, and not in the least about substance. It is a theoretical concern about fairness, not in any way grounded in the facts. It serves to impose a massive procedural burden for no concrete reason.

Starting with onus, it is Apple that claims that the amendment would lead to unfairness. It is Apple's arrangements that are at the very centre of this case, and it is Apple that is unable to identify anything to suggest there is any substance to its unfairness. All of that goes to the exercise of your discretion. You do not have to decide today that the doctrine of abuse of process is made out in respect of a hypothetical defence to a hypothetical claim.

We've heard much about Johnson v Gore Wood. It's not an issue of that kind. The problem is Apple wants to re-litigate the whole thing. In that sense, it is a collateral attack, not in the literal and narrow sense of Hunter. But of course, abuse of process is a broad and pragmatic doctrine.

Mr Kennelly said, "Well, Dr Kent says that we have to adduce all our evidence now that we'd have to adduce a trial". We don't say that at all. We just say you need to point to at least one thing that might materially be different.

Then Mr Kennelly said, "Well, look, you could have raised this new period at trial. Then it wouldn't have been a problem". Well, if we just put ourselves back in the shoes that we were wearing at the end of February, I think it was, of last year, at the end of the trial; supposing I had stood up and said to the Tribunal, "Well, of course you'll be aware that our claim extends all the way to the date of judgment, and of course, we're all aware that's bound to be some months off", inevitably, given the complexity of the case, and then consider the formalistic approach you've heard today, is it conceivable that Mr Kennelly, Ms Demetriou and Co would have said, "Oh, well, that's fine, you can just extrapolate forwards"? Would they perhaps have taken the kind of points we're hearing today, which at that point were at least forward-looking, but they might have said, "Well, we don't know what the future will bring", as on 28 February 2024. That was a fair thing to say in the period leading up to your judgment. Standing here today, in May 2026, looking back in time, it's just speculative.

Those were the only submissions I planned to make by way of reply.

THE CHAIR: Thank you.

Well, we will reserve our judgment on this as you might expect. Just in terms of timing, obviously there's no immediate pressure, is there, because I assume not much is happening until the Court of Appeal have done what they're going to do. I mean, I'm not suggesting we'll be very long with it, but it's not --

MR WARD: There's no specific pressure driven by another deadline.

THE CHAIR: No. That's helpful. Good.

All right. Thank you. We will reserve our judgment and get that to you as soon as we can.

Thank you very much for your assistance.

(4.10 pm)

(The hearing concluded)

Key to punctuation used in transcript

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