IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1759/7/7/25

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 30th June 2026

Before:

The Honourable Mrs Justice Bacon
Charles Bankes
Keith Derbyshire

(Sitting as a Tribunal in England and Wales)

BETWEEN:

JLP A&A Class Representative Limited

Proposed Class Representative

v

Apple Inc. and Others

Proposed Defendants

A P P E A R AN C E S

Tom de la Mare KC and David Went (instructed by Hausfeld & Co LLP) on behalf of JLP A&A Class Representative Limited

Roger Mallalieu KC, Sarah Abram KC and Michael Quayle (instructed by Freshfields LLP) on behalf of Apple Inc

Paul Harris KC and Daisy Mackersie (instructed by Cleary Gottlieb Steen & Hamilton LLP) on behalf of Amazon

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Tuesday, 30 June 2026

(10.30 am)

(Proceedings delayed)

(10.36 am)

Housekeeping

THE PRESIDENT: Good morning, everyone. I can see we've got a very packed courtroom here.

Thank you very much for your submissions, your skeleton arguments, which we've all got. We're just going to take a little bit of time for everyone to sort out their papers and bundles.

Mr de la Mare, just to tell you what we're working from. I'm working mostly electronically. My two wing members, Mr Bankes and Mr Derbyshire, are working from hard copy bundles, so you might just need to allow a little bit more time for them to find things like authorities. I will need references to the PDFs for everything except the core bundle, and I've got the core bundle in hard copy. Thank you very much.

MR DE LA MARE: I'm grateful, my Lady. I too have tried to prepare electronically, but with the updated references and some of the to-ing and fro-ing on confidentiality, it's been a little bit hard keeping the updated bundles as marked up, so I might hover between the two.

In terms of appearances, my Lady, you know who I appear for, with Mr Went. Mr Marven is also here, if a recondite point of costs arises, which we hope it won't. For Apple, it's Mr Mallalieu, Ms Abram and Mr Quayle; and for Amazon, it's Mr Harris and Ms Mackersie.

You have had the pre-reading. I hope, for once, as a glorious exception, the estimate was relatively reasonable, and you've chosen the Amazon agenda. I'm going to be addressing you on the first issue, confidentiality, and on the ground 1 issues, which broadly consist in a debate over whether the claim or all of it is sufficiently arguable and cost-effective to be certified.

THE PRESIDENT: Yes. Can you just tell me which bundles you are likely to be referring to, so I can make sure that I have those bundles ready to hand electronically.

MR DE LA MARE: I think it's likely to be principally bundle A and bundle B.

THE PRESIDENT: Right. I've got "B" up.

MR DE LA MARE: We will need to on occasion go to bundle C and bundle D as well.

THE PRESIDENT: All right. That will help the others, if you have bundle A and bundle B. All right.

MR DE LA MARE: I'm dealing with the ground 1 issues, and I'm also going to deal with what I'm going to call the Waterside rates issue. Mr Went is going to address most of the ground 2 authorisation condition issues, and we're going to split our time, about three hours and one hour between us.

THE PRESIDENT: Yes. Is everyone aligned in terms of the time estimate? We have got 15 minutes for anything preliminary, and just before you start your submissions, I just want to check if anyone else has any housekeeping matters they want to address. Then you've got four hours for your opening submissions, and then four hours for the Apple and Amazon submissions between them. Then you've got an hour and then 45 minutes respectively each in replies, and that will take us to the end of tomorrow. Is everyone agreed on that timetable?

MR DE LA MARE: As I understand it, my Lady.

THE PRESIDENT: All right. Thank you.

Just to explain, the reason why we went for this was to avoid having a lot of people bobbing up and down all the time on different chunks of the case, and we just thought this would be more streamlined. It doesn't indicate any view as to the merits, of course.

MR DE LA MARE: Understood, my Lady.

Confidentiality, I'm afraid, is where we're going to have to start, unless there are any other housekeeping points.

THE PRESIDENT: No. Are there any other housekeeping points?

MS ABRAM: May I just hand up a note on confidentiality, in fact, just before Mr de la Mare starts. We, Apple, have received instructions this morning to agree to the de-designation of some of the figures over which until now we've claimed confidentiality.

THE PRESIDENT: All right. Thank you very much.

MS ABRAM: I don't know if some additional copies would be helpful for the reference there. (Handed)

THE PRESIDENT: Yes. If there are any other hand-ups during the course of the hearing, I think we would appreciate having at least five copies.

Opening submissions by MR DE LA MARE

MR DE LA MARE: Noted, my Lady. Thank you.

The position we are in, in relation to confidentiality, is that there remains, I think, a gap between all of the parties in relation to what is and is not properly to be treated as confidential. The starting point, of course, is that any claims for confidence have to be properly substantiated; and what the CRO requires -- the CRO is at bundle B, tab 12, page 713 -- is that it requires the material to be confidential; see the standard definition at 1.1.1, page 7.14. (Pause)

It's the confidentiality ring order, sir.

THE PRESIDENT: Just before you go there, are you requiring us to decide anything on confidentiality immediately, or are we able to proceed pro tem on the basis of the confidentiality rings? Is there anything that is going to arise that we need to grapple with in this hearing?

MR DE LA MARE: Well, my Lady, there are going to be certain facts and figures in relation to which I'm going to have to make certain, if you like, adjectival submissions, which we say should be open and Apple principally say should not be. That is going to impede the public accessibility of the hearing, and we don't think it's justified. That's the position we're in.

Now, obviously matters have been assisted by the change in position at 9.41 this morning, the timing of which is not helpful, the contents of which do narrow the gap. But basically what we're arguing about is aggregate sales figures, and in particular historic aggregate sales figures, because the position is that we've made reasoned de-designation requests, the most recent of which was to be found at C 32, page 118. The relevant passage is from paragraph 7, page 119 onwards.

Amazon has responded, we think, broadly reasonably, and they've accepted that historic aggregate data; so data over five years old and aggregated data shouldn't be treated confidentially, subject to the agreement of Apple. Of course, there's an overlap between the data, because the Apple data on volumes data is the same as or a corollary of the Amazon data. But Apple does not agree.

THE PRESIDENT: Yes. All right. What I think we'll need, if we're going to decide this either during the course of this hearing or for future reference, is just to have -- I don't think we've had any submissions on this in writing, apart from the note that Apple has handed up, and that really just addresses what is being de-designated.

MR DE LA MARE: Yes.

THE PRESIDENT: I think I'd rather not take up time now dealing with confidentiality, if you are able to refer to the figures adjectivally.

MR DE LA MARE: Understood.

THE PRESIDENT: Going forward, there's obviously a case for saying we will need to grapple with it, insofar as this case goes forward. Then I think the question is whether you want us to deal with it at this hearing, or whether we can for this hearing deal with it as it is, if we're not going to have to go yo-yoing in and out of closed session during the hearing and you are simply able to say, "Can you look at this figure on this paragraph".

MR DE LA MARE: Of course. I've got that conventional method.

THE PRESIDENT: If that is possible during this hearing. Then if the case goes forward, I think we will then have to deal with it, and I would suggest that it comes back for addressing at the first CMC after certification, if we decide (inaudible).

MR DE LA MARE: Entirely understood, my Lady.

THE PRESIDENT: Yes.

MR DE LA MARE: I think what we need to just establish, then, is the ground rules, because I don't want to cross any particular threshold. It's probably best illustrated by reference to the one, in fact two-page document that you requested, which is in bundle A, tab 5.

THE PRESIDENT: Yes.

MR DE LA MARE: The relevant figures on page 78.

Where we're at, as I understand it -- and I'll be corrected by Ms Abram if I'm wrong -- is that the percentage figures here, they can be referred to --

THE PRESIDENT: So the yellow and black can be referred to, but I've got some figures that are yellow and red, and that's within the inner confidentiality ring.

MR DE LA MARE: It's the percentage figures. For instance, on line 2, the 1.2 and the 3.7 figure, they can be referred to, as can the rival calculations from Mr Pike, as I understand it. But what can't be referred to is the AMUK sales revenue figures -- in brackets there in highlight but not in red -- nor the total Apple billings, which is, as you say, in a further inner ring. Those are the red figures.

Then likewise, if you go down to the PCR's figures, we can refer to the percentage numbers; but again, not the aggregate sales revenue figures. That's, as I understand it, the line Apple is insisting on.

THE PRESIDENT: Okay. Well, it makes it more easy, because during the course of this hearing I imagine that there will be quite a lot of reference to the percentages, and that facilitates discussion of that.

MR DE LA MARE: That's certainly helpful. The ground rules I think then I should establish are that I'm entitled to make adjectival submissions by reference to the billings data. For instance, when comparing one to the other, I'm allowed to say things like "small" or "tiny" or "nugatory" or "notional", things like that.

THE PRESIDENT: All right.

MR DE LA MARE: You'll see there's going to be an occasion where one needs to gist something. For instance, you may not be able to name a particular reseller, but you might be able to say "a range of resellers, including well-known high street brands", or something of that kind. That's the type of issue we're dealing with. As long as I can do that within the confines of this, and I think the rest I can do by reference to inviting you to read figures.

THE PRESIDENT: Yes.

MR DE LA MARE: And moving on. I hope that's a sensible way to proceed.

THE PRESIDENT: Yes. Is anyone unhappy with that? No.

MS ABRAM: No, no. Thank you.

MR DE LA MARE: I do say however, my Lady, that you may have to grapple with some of these issues in your judgment, because at the end of the day, there is still the Scott v Scott issue; and if your reasoning turns upon any of these particular issues, you're going to have to reach a judgment based upon the sorts of factors we've set out in our de-designation letter, and maybe that's a matter for consequential argument, if we get there.

That's confidentiality. Can I then move to round 1?

Can I give you a roadmap as to how I am going to proceed? Firstly, I'm going to contextualise the agreements about which this case is all about: who made them; what their market position was; what the broad market context and effects were going to be; the strengths of the putative justifications for the restrictions that the agreements contain.

Then I am secondly going to look at the on-Amazon claims first and their cost benefit. Why am I going to deal with those first? Well, because this part of the case -- which is not attacked on grounds other than cost benefit and likely distribution -- has some wider features and arguments that demonstrate, we suggest, the fundamental soundness of Dr Pike's analysis, analytical methods, et cetera; and that's a useful place to start, given that both of the defendants appear intent on a wholesale attack on Dr Pike's independence, seemingly -- from the authority sent through by Amazon on Friday -- on the basis of the application of some kind of medicaments or judicial bias test.

They sent through various authorities on the test for judicial or decision-making bias. There is clear authority that that has no application at all in relation to expert witnesses -- the case of Factortame number 3 -- and if we get into that, so be it. But clearly that is going to be a central thrust of the attack, and it's unsurprising that it's going to be a central thrust of the attack, because of the nature of the evidence that the defendants have chosen to put in. It is very liminal, factual evidence about sales. There is no countervailing expert evidence, so effectively they're trying to say you should put no reliance at all on Dr Pike's evidence.

THE PRESIDENT: Is it in this context that you're going to deal with the attack on Dr Pike and his credibility?

MR DE LA MARE: No, let's deal with that in the context of when we get to the off-Amazon claims, but I'm going to show you the on-Amazon claims to show you how reasonable Dr Pike's approach has been and how it actually is more conservative than the approach that's been adopted by the two regulators that have looked at these agreements.

Now, we're inevitably going to have a dispute about Evans and the passage in Evans about interlocutory use of regulatory materials. The case contains an exception, as the panel will well know, for interlocutory proceedings that is adverted to explicitly as strike out and summary judgment applications. We say, to the extent that Dr Pike has referred to those regulatory decisions as confirming his analysis, that's a perfectly proper thing to do at the stage of preliminary certification and completely consistent with the approach in Evans.

When you then get to analysing the cost benefit on an apples and apples comparison basis -- and an apples and apples comparison basis is claim value as at trial or judgment compared with costs at trial or judgment, and since most of the value that we're going to be able to get before the court based on Kent and Apple is likely to be the value up to the PTR at the end of November 2028, that figure -- now, here's a figure I'm not sure I am allowed to refer to or not. What is permissible to refer to is the 112 million figure that Apple referred to. But the figure that we calculate; is that something I'm allowed to refer to in opening? I don't know.

MS ABRAM: Well, since the PCR hasn't claimed confidentiality over it, then I think that is okay.

MR DE LA MARE: Well, it's derived from Apple numbers, it's just with the additional numbers. But that's very helpful. So the 289 million figure on an 8 per cent calculation, that is more than sufficient to show the cost benefits of this litigation. Not least since it's before the 44 million figure that relates to the year of 2029, which won't be encompassed in the claim, but will be relevant in a judgment in 2030. Nor does it encompass any run-off figures for an infringement that will continue until curtailed.

THE PRESIDENT: Yes. On that, sorry, did you say that Mr Went was going to deal with the funding issues?

MR DE LA MARE: He's dealing with the funding issues; I'm dealing with cost benefit.

THE PRESIDENT: Yes. So I should just flag at this point that, related to the point that you've just made, you say 289 is more than sufficient for the cost benefit of this litigation.

MR DE LA MARE: Yes.

THE PRESIDENT: But we will want to know if the on-Amazon case is the only one that is certified to go forward. I should say this: I'm not expressing any view, preliminary or otherwise, as to the merits, but we need to explore what the outcomes are on the range of arguments that have been put to us.

So, to avoid having a lot of further submissions after this hearing, if the strike out were to succeed so that we're left with only the on-Amazon, you're making submissions about cost benefit, but we will also want to know: does the funding permit for the case to go forward on that basis, or is it currently tied to certification of the claim form? Now, Mr Went can answer that, but I just wanted to say, since you're talking about cost benefit, that that's the other part of the argument on the 289.

MR DE LA MARE: Thank you. We'll answer that when we get to it. So, we say that 289 figure with an expected rate of distribution of the kind identified in the Epiq report -- a high rate of distribution, something akin to the FCA 75 per cent -- is going to mean that almost every single claimant to whom distribution is made is going to be getting about at least 75 per cent, and quite possibly substantially more, of the sums that they're entitled to. That's assuming the Tribunal allows the funders to deduct from the recovered sums prior to distribution. That would lead to a situation where in reality most of the funding is paid for out of the unallocated sums, which is exactly the model that the act envisages.

THE PRESIDENT: Yes. Are your submissions then predicated also on an expected rate of distribution of around 75 per cent?

MR DE LA MARE: Yes. That's a high rate of distribution.

THE PRESIDENT: No case is so far achieved.

MR DE LA MARE: No. But what no cases so far have entailed is cases against claimants with such data rich resources about the relevant attributes of the customers in question.

THE PRESIDENT: Will you be dealing with the distribution in due course?

MR DE LA MARE: Yes.

THE PRESIDENT: All right. So you are dealing with on-Amazon and then are you going to get to off-Amazon?

MR DE LA MARE: Yes. That's going to be my third topic. Broadly speaking, our argument here is threefold. Our answer is that this is a case based upon the nature of Amazon's market power in relation to consumer electronics. That's what the restraints in question are collectively addressed at.

Our first answer to all of these arguments is that it's Amazon's market power in that space that makes it plausible -- and that's the relevant test for striking out -- that any increase in Amazon pricing, consequent upon the restrictions, is going to lift the ceiling for pricing off-Amazon. That's an analysis that applies, with respect, whatever the market share that Amazon has in relation to any particular product in that consumer electronics space -- a market share that's going to be unknown to other retailers.

What's central is that other retailers perceive Amazon as their competitor and they price by reference to the price on Amazon. It doesn't have to be the same price. It can be benchmarked. It could be as extreme as a price match -- the famous John Lewis promise. But any form of reference across to Amazon as an essential competitor with whom you have to remain competitive is enough to establish a chain of causation, and that's sufficient to generate umbrella effects.

MR DERBYSHIRE: So I would characterise that as "Amazon is a behemoth in most things; it's a behemoth in everything".

MR DE LA MARE: All it needs to be is a behemoth in consumer electronics, as it plainly is. That reality leads to other retailers in the consumer electronics space pricing by reference to Amazon in order to avoid a kind of virtual "showrooming" phenomenon for people looking at a price and saying "Oh, is it available cheaper on Amazon?" In the context of the on-Amazon effect we'll go through all the particular unique network effects that really underpin all of this. That's our first answer.

Our second answer is that the metric the defendants have chosen, which is to look at overall Apple sales and the portion or share of them that's attributable to Amazon UK -- that's not a metric Mr Pike has used. Mr Pike's response to that is to say, "That is not a useful way to look at Amazon's ability to affect the prices of its competitors". Why? For two reasons.

First, because I've always said that unbundled phones are the focus. Bundled phones are not a strong constraint. As we'll see, that underlies the claim definition itself. Bundled phones have always been excluded from the claim.

Secondly, he says, given the strength of the online effects, the reality is: effectively offline prices follow online prices, or don't act as a sufficient constraint -- so called asymmetric constraint -- and therefore, if you want to assess Amazon's ability to move prices, you need to look at its relevant share, if we're looking at this at all, by reference to unbundled phones in online marketplaces.

Once you do that -- and I am allowed to refer to this -- you will see that Amazon is the second largest online retailer for these products in the UK. The largest is Apple itself. So of all the independent resellers, Amazon is the largest of the independent resellers.

The idea that that largest third-party reseller can't move the prices of other third-party retailers and thereby effectively lift the ceiling for their prices, lower the pressure to discount against RRP, and thereby entrench RRP -- the notion that is implausible is simply not arguable. It's obviously a perfectly plausible, arguable thesis deserving to go to trial. That's particularly so given that there is absolutely no expert evidence deployed before the court to suggest that anything Dr Pike has said is somehow unsustainable as a matter of economics.

Now, we put the figures in our skeleton argument, but these are defendants that even in the Riefa proceedings have spent hundreds of thousands of pounds on experts. Frontier and BRG, we know, are sitting behind the defendants, and yet no expert has gone on paper and said that Dr Pike's theory of harm, his proposed methodology, et cetera, is untenable, or that it’s laughable, no serious economist would stand behind it, et cetera. That's the obvious reason, as we'll get to, that no economist would be willing to say that.

So we say once you control for bundled phones and offline sales, and once you look at the market shares and the market position accordingly, this strike-out becomes hopeless. Look back at the tab 5 numbers and look at the sorts of aggregate sales achieved halfway down in the PCR figures, the number of distinct customers, which I can't refer you to in opening, I think; is that right? I can? 7.8 million customers on Amazon over a seven and a half year period, with the volume of sales that you'll see on page 78, from the second largest online retailer, the largest independent online retailer, the idea that that is -- and this is the strapline -- a minor retail channel; that is an untenable argument.

THE PRESIDENT: Well, they're not saying it's a minor retail channel full stop, end of story. They are saying it's a minor retail channel for these products.

MR DE LA MARE: For the purposes of moving prices in relation to these products, absolutely. I totally accept that. But the idea that the second largest online store with sales that large and with that number of discrete customers is incapable of moving prices, even for other third-party retailers; that is untenable.

MR DERBYSHIRE: Well, we're not mixing currencies here. We've got absolute volumes. It's the second largest. We've got the total number of people buying from that particular site and we've got a relative size; the percentage. Which is important: is it the absolute numbers or is it the relative size, which I think earlier you said isn't that important?

MR DE LA MARE: Well, our primary case is it's the absolute numbers -- it's the wider market position because of the effect that has on other retailers and their perceived need to price against Amazon. That's our primary case.

But we say even if the focus were upon Apple products and Apple products alone, which bear in mind is not a market definition. It's not a market definition. The defendants themselves -- look at, for instance, I think it's paragraph 7 of my learned friend's skeleton -- one of the things they say is outlandish about the case is, they're saying -- we're saying this minor retail channel will constrain prices in circumstances where even Samsung, Dell, et cetera, John Lewis, Currys, can't constrain prices. That is an argument by reference to a wider consumer electronics market, which is exactly the focus Dr Pike has always said is the appropriate focus. So we don't accept the forensic utility of drilling down in relation to Apple products. But if you do, you should exclude bundled phones and you should exclude offline sales as best you can. That's our case.

So can I then next move to claim definition and make some fairly elementary points early doors.

THE PRESIDENT: So, your roadmap: (1) nature of agreements; (2) on-Amazon and cost benefit analysis; (3) off-Amazon. Is that, then --

MR DE LA MARE: Off-Amazon; I will deal with Pro-Sys at that point and then lastly I will deal -- very briefly -- with the Waterside charging issue.

So topic one, the sort of context for all of this: can I start with the claim definition and the claim form? The PCR has always been clear that it proposes to add to the initial claim period. You can see that, if nothing else, from A6, page 90 and as my Lady may recall, this reflected some arguments in the Riefa proceedings about the certainty of class definition and the compromise that was reached in that case was, "We'll fix the class for now, but periodically we reserve the right to come back". And that's precisely, effectively, what's happened in Kent v Apple, where the claim was updated to the date of the PTR and that is, we say, the relevant optic. So there's nothing new about --

THE PRESIDENT: Sorry, what page of the core bundle?

MR DE LA MARE: It's bundle A, tab 6, page 90. (Pause)

Why there's a reference to initial claim periods. All of these terms are defined when you get on to page 131. These are the operative class definitions. You'll see the wide definition of Apple products and it is -- if you like -- high end big ticket expensive items like iPhones, iPads, iMacs, MacBooks, Apple TV, et cetera, and then accessories at the other end of the pricing spectrum, like HomePods, perhaps iPods if you subscribe to the lower end of that and then adapters, cables, et cetera.

And then the initial claim period is defined at 132 and then crucially, "relevant purchase": can I invite your attention to the last sentence of the definition of "relevant purchase":

"It excludes Apple products sold as part of mobile network operator or mobile virtual network operator contracts." [as read]

So the class has always been defined to exclude bundled deals and the reasons for that have always been clear: they're contained in Dr Pike's first report, at section 9.3.3, paragraph 204, A7, 229. (Pause)

His preliminary view -- and he does say in this passage it's his preliminary view and he's going to keep it under review -- is that such bundled sales are unlikely to impose a strong constraint on the price of Apple products, but that is going to be kept under review is clear from paragraph 237, page 329. And that exclusion of bundled products has thus always been part of his proposed methodology; if you look at paragraph 262-263, page 248, part of his methodology for estimating class numbers. If you look at 267, page 250: it's part of his methodology for estimating Amazon's share of online unbundled phones.

Now, it's important to put that marker down, because one of the things that Apple says -- and it's an unfortunate, I think, unjustified, pejorative term -- is that Dr Pike has manipulated -- that's the word repeatedly used in the skeleton, "manipulated" -- the Apple data by excluding bundled phones. Well, that's quite unfair in circumstances where it's always been part of the claim definition and his methodology that such phones need to be excluded from the scope of the claim, because, in fact, they're in a separate market.

So that's the claim. Can I then next remind the Tribunal what happened in the recent proceedings on the topics of eligibility and experts and so forth? Because it is important to have a bit of a reality check. The proposed defendants are pretty late to commit to this strike-out and Pro-Sys objection and the all-out attack on Dr Pike. They're going to seek to portray that as somehow prompted by the Supreme Court decision in Evans and I suppose insofar as Dr Pike is concerned, the supposedly new information that has been provided in answers to questions since.

Now, we pointed out in our reply, paragraph 11, A17, page 514, that when the Riefa proceedings were before the Tribunal last time and Dr Pike's evidence was in substantially the same form, Mr Campbell has exhibited a track changes version of the two reports -- which I'll take you to momentarily -- to show the differences as part and parcel of filing in this case. When that substantially the same evidence was before the Tribunal previously, the Tribunal indicated that the defendants were right not to resist certification based upon the eligibility condition. That's the passage in your judgment, at 119-121 at bundle B, tab 3, page 54.

THE PRESIDENT: Judgment at paragraph ...?

MR DE LA MARE: 119 to 121.

THE PRESIDENT: Bundle B, page ...?

MR DE LA MARE: Bundle B, tab 354. It's 53 to 54. (Pause)

They had the totality of the Pike report, they had access to their own internal data -- the data that they'd now belatedly placed before the Tribunal -- and they knew about Dr Pike or Fideres's role in approaching Hausfeld in relation to this litigation -- I'm going to show you that in a second.

THE PRESIDENT: Although that was before the expert evidence practice direction.

MR DE LA MARE: Absolutely: it was before the expert evidence practice direction and what happened was that when the report was refiled after the practice direction, a fuller account to comply with the practice direction was provided. But the point I'm going to make is that nothing material changes with the information that was provided, because they knew all that they needed to know to make the objections that they did make and you can see that from what Amazon said in the Riefa proceedings. That's bundle B, tab 6, page 598. (Pause)

THE PRESIDENT: I'm just wondering if it's useful really to be taking up time on what is essentially jury points: matters have moved on; we've had the Evans judgment of the Supreme Court; we've had the expert evidence practice direction -- which I should say was very widely consulted upon before we produced it -- and the Tribunal's jurisprudence involves, Apple and Amazon are taking the submissions that they feel appropriate to take now, based on what they now know, including the submission of

Pike 3, which I think is a focal point for their criticism and in light of the development of the Tribunal's practice. I don't think it's very useful to take up a lot of time with an archaeology of what might have been said before.

MR DE LA MARE: I was simply going to make the point that they well knew that Fideres was involved in putting -- if you like -- the litigation opportunity --

THE PRESIDENT: Yes, we all knew that.

MR DE LA MARE: Yes, absolutely. And what they said was that goes to the weight of the evidence and it's a matter that we'll raise at trial. That's all I need to say and what they said was they were cognisant of the dangers of creating mini trials contrary to the Tribunal's guidance in Boyle v Govia. We suggest nothing is in fact changed by the additional information that has been provided since, because all it confirms -- and you've seen the memorandum and no doubt defendants will take you through it -- the memorandum simply summarises the two regulatory decisions in question, their essential reasoning and contents and says the same agreements were implemented in the UK, or appear to be operative in the UK. It doesn't commit to any form of theory of harm, doesn't commit to any form of proposed quantification or analysis or data analysis, it simply says: this is what regulators have decided elsewhere and it seems to be the same agreement in the UK.

So, let's move to what are the central topics in the certification debate about which this change in position -- prompted or not by the changes in case law and practice -- are. They are really topics of causation and quantum. Could a price rise or overcharge on Amazon, accepted for these certification purposes to have occurred at an average of 4 per cent -- because that's Dr Pike's discounting analysis -- could that have plausibly also produced pricing effects off-Amazon? And in assessing that question, as well as the on-Amazon effects, you need to look at the nature of the agreements themselves. They're restrictive agreements between the largest consumer electronics brand in the

UK -- that's Apple -- and Amazon. And the restrictions pertain not to Amazon's sale of the product it buys, in the way that a classic vertical agreement like an exclusive distribution agreement would do so, but rather they pertain to the operation of Amazon's online marketplace and it's because the restrictions operate by reference to the marketplace -- the inter-mediation market -- the two EU regulators have rejected any application of the VABR; they've said it's not an acceptable agreement under that regime and that we say is obviously right, because what Apple and Amazon are doing is changing the rules of the marketplace, not settling the terms of supply of goods to be sold in the marketplace as it is. (Pause)

And beyond that feature -- the feature of targeting the inter-mediation market -- there is another notable feature: the agreements are between two undertakings in relation to which we say there is a plausible case of substantial market power. Of the four so-called GAFAs, this is the "two As": Apple and Amazon. It's not an ordinary agreement -- it's not a Marks and Spencer agreement -- it's a GAFA agreement, and in many ways, that feature, the fact that we're looking at an agreement between two huge companies with market power and in consequence the production of publicly observable and -- we say -- inflated prices, that generates a reference price. That feature is the beginning and the end of the comparison with the very different facts of evidence. The strike-out thesis is built upon the idea that off-Amazon commerce is a small tail wagging a very big dog -- that's the way that the case is put against us -- and we would suggest that the dog analogy is helpful, but not in the way that the defendants seek or think.

So, if you have a group of dogs -- I don't know if any of you are dog owners -- you'll have noticed that dogs copy each other's behaviour. If a dog starts barking, the other dogs start barking. If a dog wags its tail more frequently, the other dogs start wagging their tail more frequently. It's called allelomimetic behaviour. Now, dogs do it to build social cohesion. In Competition Law, we call it "price competition", because in order to win custom, you look at the behaviour of your competitors and you seek to price in a fashion that is competitive with them and the reality is that the big dog in this retail space is Amazon and small retailers relative to Amazon -- like John Lewis and Currys -- look to the Amazon tail wagging -- the amount of discounting and pricing on Amazon -- to decide how to conduct their discounting. They price by benchmarks to, even by matching of, Amazon prices.

So, if we're going to do dog analogies, we think that the relevant one is: whose behaviour is likely to be leading market pricing trends and we say it's the biggest player in the consumer electronics market.

Now, once you understand that that is the factual context, the analogy with evidence breaks down, because Evans was a follow-on claim, where transient and nontransparent prices relating to just a couple of chatrooms and currency pairs, trading in tiny volumes of currency with no wider transparency, were being said to move very wide financial markets. Footnote 97 of our reply, A17, 531, points out some of the cardinal factual differences. And we say, like all analogies, if the facts aren't the same, the analogy is useless. It can't be correct to compare the effects produced by an agreement between Apple and Amazon, two GAFAs, two entities with market power and one being the largest and the self-professed cheapest retailer in the country, to the effects produced by a handful of chatrooms.

So that means Dr Pike's market power analysis is pretty important and let's look very briefly to see what he says about market power and let's start with Amazon: it is by some distance the largest online intermediated marketplace. Dr Pike's view is that Amazon has market power in relation to such intermediation services; that is set out in section 7 of Pike 1, 87 to 93, A7, 188 to 189. The reasoning shows, amongst other things, that it accounts for something like 64 per cent market value of all such markets, with the nearest rival being eBay (one third of its size) and everything else being in single digits under 3 per cent. See paragraph 98 and he says its likely share in consumer electronics intermediation is even higher.

THE PRESIDENT: So just I wanted to get the phrase you used. He considers Amazon to have market power in intermediation. Well, he uses the phrase "intermediation and online shopping services". I think you said something slightly different. Is that the right phrase to use? "Intermediation and online shopping services"? That's 89.

MR DE LA MARE: Yes, that is the right phrase.

THE PRESIDENT: Okay.

MR DE LA MARE: What he points out at 99, page 193, is that that share has been growing despite growing commission rates.

THE PRESIDENT: What does he mean by intermediation?

MR DE LA MARE: Providing a marketplace to sell products, providing the advertising provenance, sales services, payment services, et cetera required to effectively create an online store for someone that doesn't have or wishes to use their online store.

THE PRESIDENT: Is that just another word for online marketplace services?

MR DE LA MARE: Yes, it's a synonym for that entirely. It's making the point that it's not selling (inaudible) --

THE PRESIDENT: It's a platform.

MR DE LA MARE: It's a platform. It's a marketplace. It's an online bazaar, where the bazaar owner is taking payment and doing many other things to facilitate sales within the (inaudible).

The point he makes at 99 is that they've been able to increase their commission rates, sometimes with notable incremental hikes, at the same time as increasing market share. What has been generated -- see 100 to 101 -- is an unrivalled pool for both buyers and sellers. In 2019, nine out of ten buyers used a service, with some 65 per cent -- Prime subscribers -- in effect looking nowhere else. What you have in sales terms, if you like, is locked-in sales eyeballs. A habit of shopping on Amazon as a default practice. That self-evident reach -- see 102, page 195 -- is part of Amazon's USP to sellers.

Then section 7.1.2 to 3, A7, 195, describes the network effects that that generates and the barriers to entry. Section 7.1.4 describes the fact that many sellers cannot replicate Amazon's marketplace with a direct sales channel. They can't incur the cost of building their own online sales channel in a way that can compete; see 117, A 7, page 200.

Then he explains at 119 to 122, page 202, that they can't access the direct sales channels of others, like other retailers. The conclusion, at 123, is that for some sellers, there are few effective alternatives, or at least for those not able to set up their own direct sales channels; page 202.

But all of that notwithstanding, the network effects are also driving competitive pricing; see 132, 204. That's driven by the competition for the Buy Box between the multiple vendors on the platform, when you allow multiple vendors onto the platform. If you have lots of people selling the same goods, that is going to generate a competitive price and improve the shopping experience; 133.

As Dr Pike notes in his third report, this enables Amazon, notwithstanding its high commission, to advertise itself as the lowest priced online retailer in the UK. The footnote reference 10, at page 555, if one goes to that very briefly, is to an Amazon publication that draws attention to the fact that Amazon is, and I quote -- and we don't have the relevant article in the bundle, but we can provide it; I don't think there's any dispute that this is what it says -- Amazon is the lowest priced online UK retailer for the sixth year in a row, according to a Profitero -- if that's how you pronounce it -- study.

Dr Pike, if you go back to his first report, explains that the perception of Amazon as a marketplace generating cheap prices is undoubtedly part of its success, and we would say it's an obvious part of the reason why other retailers consider that they have to benchmark their prices by reference to Amazon prices.

Dr Pike explains at 134 to 136, page 205, that these network effects mean that there's little or no constraint on Amazon pricing from other bricks and mortar stores, but the same obviously doesn't follow in reverse. Given the network effects and the customers locked in, a price on Amazon is likely to operate as a ceiling for other retailers; because if the price on Amazon is competitive, as produced by the Buy Box, and it is ubiquitous and widely used by shoppers, other retailers are going to have to match it. That's the cornerstone of Dr Pike's conclusion as to asymmetric restraints in Pike 1 at, say, section 9.3.2, page 228, returned to Pike 3.

MR BANKES: Mr de la Mare, how does it work if Amazon is proud of being the cheapest --

MR DE LA MARE: Yes.

MR BANKES: -- and yet you say it sets a maximum? Those two propositions are in contention.

MR DE LA MARE: It sets a floor. It sets the lowest price.

MR BANKES: Okay. I thought you said "maximum", but --

MR DE LA MARE: If I did, I apologise. What I'm trying to convey is that the price that Amazon is setting is likely -- notwithstanding its high commission rates, because of the competitive effect of the Buy Box -- to be the lowest or amongst the lowest on the market. That sets a floor for other prices. So other third-party retailers, considering how much of their discount from RRP to effectively give away by their pricing in order to win market share, will look to the Amazon price to decide where to set their price.

Dr Pike deals with the buyback prevalence at 137 to 138, 206. He deals with the Prime lock-in network effects at 139, 206. Then he deals with the direct evidence on market power at 208, section 73.1 onwards, and suggests that the market power of Amazon is shown by its ability to sustain higher commission rates than eBay, and paragraph 148, page 210, to introduce an across-the-board 2 per cent commission rise in 2020.

If you put all that together for the on-Amazon claim, what that means is that for small retailers, if that marketplace or bazaar is shut to them, there may be nowhere else to go, no other marketplace in which they can sell their wares as effectively and as cheaply, because they can't access the scale and network effects of the Amazon platform. That might mean either exiting the market altogether, or exiting it on Amazon and only appearing with higher prices elsewhere.

Dr Pike then goes on in section 8 of his report to address the market power of Amazon retail, page 213 following, after his conclusions in relation to section 7. I invite you to read paragraph 155 at 213.

As he explains, the market power of Amazon retail is relevant to both on-Amazon effects and umbrella effects, and he cross-refers to his proposed methodology for investigating that in paragraph 13.4.1, at page 274. His conclusion at 166 is that Amazon retail -- post the GTA, an exclusion of resellers from its platform -- has market power as a retailer of Apple products and can raise the price of the Apple products sold on its marketplace above the "but for" price.

THE PRESIDENT: Sorry. Which paragraph are you looking at?

MR DE LA MARE: 166, my Lady.

MR DERBYSHIRE: That's the on-Amazon effect?

MR DE LA MARE: That's the on-Amazon effect. It's able, because of all of its network effects -- its locked-in customers, et cetera -- to raise prices, and intra-brand and inter-brand competition won't prevent it from so doing, because of all of the advantages of convenience, locked-in subscriber, prepaid delivery charges, et cetera.

THE PRESIDENT: What market definition generates the conclusion that Amazon retail has got market power, as a retailer of Apple products?

MR DE LA MARE: Well, Dr Pike hasn't engaged in formal market definition, but this passage is plainly directed at an analysis of consumer electronics retail. That's the focus of all of this analysis here.

Turn then to Apple market power.

THE PRESIDENT: So the conclusion is it has market power as a retailer of consumer electronics, and therefore of Apple products.

MR DE LA MARE: Market power as a consumer of electronic products, and through that it has the ability to raise prices for Apple products if it removes resellers from its platform. Because once you have removed the competition from the Buy Box and the Buy Box element, the thing that generates competitive prices, you can raise prices, and prices have risen; and we're going to see the discounting analysis that supports that.

THE PRESIDENT: Where does Dr Pike address the interface between the consumer electronics market and the Apple market, and explain why he picks the consumer electronic market as the focus of his market power analysis, rather than looking separately at the Apple market?

MR DE LA MARE: I'm not sure he undertakes that exercise, my Lady. I think he looks at market power in relation to both, and then he looks at how market power supports his analysis in relation to on-Amazon effects, and then he looks at how it supports his analysis in relation to off-Amazon effects.

I go back to the point I made at the beginning. He doesn't look at the matter through the lens of the market share of Apple products in the UK. That's not part of his analysis. It doesn't drill down to particular products as part of his analysis, or a product class, or a cluster.

MR BANKES: But your proposition is it's conceptually possible to say that someone or something has market power without saying what the market is on which it has the power.

MR DE LA MARE: Well, it has the market power. He's plainly saying it's got market power in relation to the sale of consumer electronics.

MR BANKES: But he's not saying that's the market, because you're saying he hasn't defined market.

MR DE LA MARE: I'm not saying he's saying it's not a market. I'm saying what he said he hasn't done is done an investigation or market definition of every single product market that may be relevant in the case.

THE PRESIDENT: Or any product market.

MR DE LA MARE: No.

THE PRESIDENT: He hasn't defined any product market.

MR DE LA MARE: No.

THE PRESIDENT: So he not only is saying that there is market power on an entirely undefined market, but he's also not responding to the concerns expressed by Amazon, in particular, about what the definition of market would do to the case in this and the fear of harm in this case.

MR DE LA MARE: Well, he's obviously not responding to it in his first report, because --

THE PRESIDENT: No, no. But I was asking a general question, including in Pike 3. I mean, is there something in Pike 3 that --

MR DE LA MARE: He does respond in Pike 3 and says he hasn't done a full market definition.

THE PRESIDENT: Or any.

MR DE LA MARE: No, or any market definition. Absolutely. The next port of call is Apple market now.

THE PRESIDENT: What's your submission representing the PCR on whether it's conceptually meaningful for conclusions to be drawn about market power without identifying the market on which there is said to be market power?

MR DE LA MARE: My submission is that plainly the market power that Dr Pike is investigating is market power by reference to the consumer electronics market.

THE PRESIDENT: What --

MR DE LA MARE: That's the sale of the cluster of products that are consumer electronics that retailers will identify themselves as consumer electronics retail.

THE PRESIDENT: A consumer electronics retail market. But if that's the case, why didn't he just say, "This is my market definition"? I mean, that's your submission.

MR DE LA MARE: Well, that's my submission as to what the substance of the analysis is, my Lady. Yes.

THE PRESIDENT: If it's that easy, why didn't he define that market and say, "That's the relevant market"? You're saying that there is a market definition running through this which is unstated. My question to you is, in circumstances where he expressly eschews any market definition -- I'm not even talking about a full market definition, but any whatsoever -- how is it conceptually possible for a meaningful conclusion to be made as to the market power on an entirely undefined market?

MR DE LA MARE: The point that Dr Pike makes is that there is plainly market power sufficient to abstract increased overcharges, or increased prices through reduced discounting, through the removal of the (inaudible).

THE PRESIDENT: No, I know what he says. Maybe Mr Derbyshire wants to ask you.

MR DERBYSHIRE: Yes. My understanding of Pike 1 is that it's largely theoretical, and largely focused on the on-Amazon effect.

MR DE LA MARE: That's right.

MR DERBYSHIRE: He has many, many pages devoted to market power of the Amazon Marketplace, Amazon Retail within the Marketplace, and Apple. What he says explicitly in Pike 1 is he doesn't need a market definition to get to a position of calculating preliminary estimates of damages of the agreement.

MR DE LA MARE: Yes. He says, basically, you can see that market power in some form is in play, because absent market power, there would be no basis to explain how they have been able to raise their prices as they have once the resellers have been excluded.

MR DERBYSHIRE: That's based on a series of assumptions or theories that within Amazon, if you don't have a lot of competitors, and if Amazon retail wants to go in there and kind of take over that particular segment, it will do so.

MR DE LA MARE: Yes, yes. What's key is that there is actually no argument with Dr Pike's discounting analysis. The one area he is able to do some quantitative analysis is in relation to discounting. He's able to do that because there's available information about who has won the Buy Box and at what price before and after the agreement. He uses that to infer a reduction in the frequency of discounting, and a reduction in the level of discounting when it occurs, that produces an average reduction in discount of 4 per cent across the before and after analysis. That is, we suggest, proof positive that market power must be in play, because if Amazon were otherwise constrained by inter and intra-brand competition in the sale of these products, it wouldn't be able to do that.

MR DERBYSHIRE: What he does not go on to do is look at how that particular segment of the wider market for Apple products might impact on other segments of the Apple market, except to say that Amazon is very powerful in consumer electronics, and therefore it's very powerful on Apple products.

MR DE LA MARE: Absolutely. He doesn't have the material to do a wider quantitative analysis; he says as much. That's why his quantitative analysis begins and stops with the discounting analysis, which is an analysis that resembles that undertaken by the two regulators.

So, Apple market power. Apple market power is also relevant. Apple is an incredibly strong brand; I don't need to tell this Tribunal that. It is the largest consumer electronics brand in the UK. Dr Pike addresses its market power in section 9 of his report starting at paragraph 167, page 216, and it's a function of: its walled garden, its interoperable devices, its market share in devices with operating systems -- in the case of Apple -- its strong branding and product differentiation, et cetera. All of that means it's only weakly exposed to inter-brand competition.

Dr Pike describes in section 8 how that weak inter-brand competition allows Apple to charge a premium for its products; the so-called Apple tax. The brand loyalty and perception of trust in the Apple branding allows Dr Pike, as he explains in some detail -- see paragraph 40, page 169; 50 at 176; 192 to 196 at page 226 to 227 -- it enables Apple to operate a price discrimination model in which Apple's own brand stores, online and physical, cater to customers with higher willingness to pay greater trust or value in the Apple brand, while those who are more price sensitive tend to move to the discounted third-party retailer offers, and their lower willingness to pay is met by discounting that's encountered there. So effectively you have a pricing spectrum with RRP pricing in the Apple store picking up those with the highest willingness to pay, and those with lower willingness to pay being picked up by whatever discounted prices are produced by the third-party resellers.

It's here that Dr Pike identifies the key asymmetry, about which we are going to be arguing, that Apple Retail has market power as a reseller of Apple products, with resellers excluded, and it's only weakly constrained by other online and offline channels in relation to high value brand loyalty customers. So if you're going to go to the Apple store, you're always going to go to the Apple store. Your choices in that respect aren't going to be constraining Amazon.

But the other online and offline third-party channels are constrained by Amazon prices -- see 198 to 200, page 228 -- and that leads to the key preliminary conclusions of off-Amazon sales at 201 to 203. Can we have a look at those? He says:

"201. Amongst the resellers of Apple Products, the resellers on UK Amazon Marketplace are likely to pose a particularly important constraint upon Apple's online store given the size of network effects that the marketplace enjoys, its speed and convenience, and its loyal and broad customer base. I therefore expect ... Apple's online store and hence Apple's RRP may be constrained both by the Buy Box price of the same model, and potentially by the Buy Box price of older models. As a result, the weakening of this competitive constraint that resellers on UK Amazon ... impose (via reduced competition for the Buy Box) would be expected to allow Apple to set higher prices than it could absent the 2018 Agreements.

"202. Similarly, I also expect that other online and offline retailers are, like Apple, likely to be constrained by the Buy Box price for the same reasons ... This again suggests that when the 2018 Agreements reduced the discounts available ... they likely weakened the competitive constraints that it imposes upon other online and offline resellers.

"203. Ultimately however, the strength of the constraints that resellers on UK Amazon Marketplace impose upon Apple and others in the post-2018 Agreements period will be illustrated by the responsiveness of Apple's price (and the price of other resellers) to the reduced discounts on UK Amazon Marketplace that occurred after the exclusion of the non-whitelisted resellers ... (see Sections 13.3 and 13.4 below)."

Which are his methodologies for investigating those Apple and umbrella effects. So that's the market power analysis.

What about the agreements themselves. The agreements, the PCR says, did two things, and we plead two things -- see paragraph 21, subparagraph 1 and 2, page 86.

(Pause)

The first thing that we plead is the exclusion of the resellers; 21(1), page 86. The second thing that we plead are the advertising restrictions, at 21(2). Although Dr Pike also looks at both things in his theory of harm -- see Pike 1, 241, A 7, 240, as an example -- the defendants actually only want to talk about the first of those restraints. Indeed, if you look at Apple's skeleton argument, they say that it's the first one, and only the first one, that's the core constraint. Well, there's no basis for saying that. They're both informative about what this agreement is really about.

The first restraint effectively leads to a complaint of shutting the marketplace -- shutting the intermediation services -- to small resellers. Those resellers are denied access to the pre-eminent shop window that they require to sell their goods and to offer the discounted prices they offered beforehand. Exactly as Dr Pike says at paragraph 91 of his first report, A 7, 190, the resellers are removed. That's our pleaded case: paragraph 76 of the claim form, A 6, 106, and the facts now disclosed by the defendants fully bear it out.

What has happened is that resellers that formerly included Apple Authorised Resellers, Apple premium resellers -- those are the resellers who get greater discounts for providing effectively brand support in store -- Apple retailers and third-party retailers – i.e., those buying it from a wholesale source -- they are all excluded from the store unless they have been whitelisted.

Now, we don't know -- and not least because Apple hasn't provided data of sufficient granularity of what's happened, say, in relation to the small Apple authorised or premium resellers -- we don't know what's happened to them off-Amazon. But what we do know is that they have left the marketplace on Amazon, and it's plausible that they've left the market altogether, for the reasons Dr Pike gives.

Now, what justification is given for this restriction? There are two justifications that have been given consistently to the two regulators who've looked at this. The first is that this is required to combat IP infringement or piracy. The second is that it ensures an improved purchasing experience for those seeking genuine Apple products on the Amazon UK store. That is the explanation that has been papered since they were investigated first by the AGCM in 2021.

So if you look at the resellers list at D 1, tab 3, and this is a confidential document. It's quite a good illustration of the excesses of confidentiality as well. Page 3 of this document, the entirety of which is designated as confidential, does no more than set out what is now the defence or justification advanced for the list that follows. It's very difficult to understand how this email can in any way be confidential. Forget the table.

THE PRESIDENT: Are we looking at the same document? So we're looking at tab 3, page --

MR DE LA MARE: Bundle D, tab 1, page 3.

THE PRESIDENT: Tab 1, page 3.

MR DE LA MARE: This is where these two justifications are set out after the investigation has started.

Now, it's notable that both the defendants say very little about the justification and want to move on from it pretty swiftly. Neither of the regulators have accepted these justifications, having seen more material than was available to you. Both explanations -- both on the manufacturer's own case and our case as to what we say the true justification is -- gainsay this idea that Amazon is a minor sales channel unable to move prices.

Start with IP infringement. If Amazon is such a minor channel, how is exclusion of these resellers just from Amazon -- with no like effect that we know in relation to eBay or elsewhere, or no like initiative -- how is exclusion from Amazon going to advance their IP infringement objectives?

MR DERBYSHIRE: Because Amazon is the largest marketplace.

MR DE LA MARE: It's the largest marketplace; there must be sufficient volumes of sales to make this worthwhile doing, that it's material. Because otherwise the concerns wouldn't be sufficient to justify a measure targeted only at the Amazon marketplace.

The other way that you would ordinarily respond is that when you find a dodgy reseller you would terminate the agreement to supply the reseller for mixing in counterfeits with the legitimate goods, or so forth. So, IP infringement doesn't make any sense unless there is something very material happening in terms of the level of sales occurring on Amazon.

That's all the more obviously so in relation to stability of supply arguments. Because if the real concern is to ensure that there's a sufficient level of stock available on Amazon so that customers don't order things and then find that the small reseller can't in fact deliver it, or something of that kind, why doesn't that stability of supply argument militate continuing to supply to the small retailers, but supplying them more, as well as supplying Amazon? Why does it begin to justify the exclusion of the resellers or the curtailment effectively of their opportunities to sell? It just doesn't make any sense. It particularly doesn't make any sense if Apple thinks that Amazon is a minor sales channel.

Now, these areas are areas where disclosure, as to the real objects and intentions, are likely to be extremely relevant. Of course, qualitative evidence of that kind will be relevant to the assessment of the effects of the agreement.

In relation to the second restriction, advertising restrictions, we have a flavour of what that qualitative disclosure may entail.

Now, it's notable -- in relation to the advertising restrictions -- they are plainly targeted at inter-brand competition, because what the advertising restrictions do is stop Amazon advertising competitor products, as it usually does, against a product search for Apple. So, if you search for an Apple iPhone, you won't get a Galaxy phone put up as an alternative. If you search for AirPods, you won't get Amazon's own Echo Buds products pulled up, or you wouldn't have done until they discontinued them. If you search for a HomePod speaker -- the speaker that you do "hey Siri" to -- you won't be offered the Amazon rival speaker.

So, they are plainly restrictions targeted at inter-brand competition, and again the question arises: why would you be doing inter-brand competition restrictions if you thought this was a minor sales channel? It makes no sense at all. The only reason you would be seeking to restrict inter-brand competition on Amazon is if Amazon was a major focal point for potential inter-brand competition, and the effects of that are going to ripple through into prices more generally. And the material -- and here you can refer to it as effectively facts -- from the CNMC investigation shows the quality of disclosure and what it reveals. So if you go to authorities 3.1, (several inaudible words).

THE PRESIDENT: Authorities bundle 3 --

MR DE LA MARE: Tab 3. (Pause)

THE PRESIDENT: That's the Spanish decision.

MR DE LA MARE: This is the Spanish decision and this deals -- paragraph (899), 501 -- deals with the disclosure about the reasons for the advertising restriction.

THE PRESIDENT: Which page of the PDF bundle?

MR DE LA MARE: 501, my Lady.

MR BANKES: Which authorities bundle?

MR DE LA MARE: It's authorities bundle 3.1.

MR BANKES: Yes.

MR DE LA MARE: Tab 3, page 501. (Pause)

Does my Lady have that?

THE PRESIDENT: Yes.

MR DE LA MARE: Paragraph 899 under "The objective", you can see that one of the documents disclosed -- and it's only that I rely upon this one, not the conclusions of fact, though the conclusions of fact are perfectly proper to consider for interlocutory purposes in any event -- the document referred to, which we haven't seen, is one that states that the purpose of the clause, the inter-brand restriction, is to avoid approaching customers by encouraging them to switch to a non-Apple product.

So, the whole purpose of this was to stop or hinder inter-brand competition and that rather reinforces our point, that the object of these agreements is very much on the plane of inter-brand as well as intra-brand and the relevant focus is therefore on consumer electronics more broadly. What they're trying to do is impede switching, say, between an expensive Apple Watch and an Amazfit Watch, or one speaker and another, or one form of headphones and another, one form of tablets and another, and bear in mind -- as we plead in the claim form -- Amazon itself is a manufacturer of competitor products. Now, its Fire Tablet may be a considerably cheaper proposition than the iPad, but its speakers are often similarly priced. There are all forms of products and accessories that have either interlocking functionality, or offer a reduced functionality but at a greatly reduced price, and those are all forms of inter-brand competition.

But what that does is give the lie to the idea that this agreement is about IP restrictions, or this agreement is about certainty of supply; it's all obviously about trying to curtail intra and inter-brand competition and if that is the inference that you draw from the justifications and their weaknesses, which we invite you to draw and say it's plausibly to be drawn, then that feeds through to the analysis of the agreements altogether. Now, I don't know, my Lady -- are we having a shorthand break? Is this an appropriate moment?

THE PRESIDENT: Yes, it is. All right, we'll take five minutes. Just to check: on your timing, are you and Mr Went between you sitting down at around 3.45?

MR DE LA MARE: Exactly, that's what we planned.

THE PRESIDENT: And what time are you envisaging that we finish today?

MR DE LA MARE: I presumed it was 4.30; if I'm wrong to presume so, forgive me.

THE PRESIDENT: All right. Well, if you think that we're going to need more time, either at the end of today or at the start of tomorrow, can someone let us know?

MR DE LA MARE: I'm grateful, my Lady.

THE PRESIDENT: Thank you.

(11.55 am)

(A short break)

(12.06 pm)

MR DE LA MARE: Can we next please move to the evidence -- the data -- on the forms of harm on Amazon? And it's here that Dr Pike was able to do a discounting analysis. (Pause)

And that discounting analysis was undertaken by reference to the iPhone alone as a proxy for the entire class, on the basis that, given it accounts for somewhere in the region of 60 plus per cent of the overall sales, that's likely to give a reasonable proxy for the overall claim value and that is, we say, a perfectly reasonable assumption that's been substantiated by the detailed product split data supplied (inaudible) covered with Matthews's statement, B8, 640 onwards, where you can see references to the numbers -- the relevant prominence of Apple iPhones in the overall mix of products on a quarterly basis.

When looking at those data and other Apple data, I do ask you to bear in mind that some of the numbers are retail, some of the numbers are wholesale. All of the Apple numbers are generated in US dollars; they require conversion into pounds and if you aggregate by year and you only have quarterly conversion numbers, that becomes practically impossible.

But in his discounting analysis, Dr Pike arrived at levels of discounts that aligned with, but were less than, the findings of the CNMC and the AGCM and the way he reached his discounts was by using four years of Buy Box data to pre-infringement and to post taken from Amazon itself. You see that at page 245.

MR BANKES: Of bundle B?

MR DE LA MARE: Bundle A. So 241, paragraph 245. (Pause)

And there is, if you like -- as he goes on to describe -- something of a control in relation to Samsung and what this passage shows is that where resellers remain, as with Samsung, the discounting pattern is unchanged. Where the resellers were removed, the number of discounted offers that were winning the Buy Box after the GTA dropped by 40 per cent, from 91 per cent of the offers being discounted to just 51 per cent.

THE PRESIDENT: Where are those figures? (Pause)

MR DE LA MARE: 246.

THE PRESIDENT: I've got 256.

MR DE LA MARE: I'm sorry, page 246 I'm looking at -- yes, it's 256, but I'm looking at the table on 246. So sorry. The text is at 256 at page 245. The table is at 246. (Pause)

And not only does the discount change in its frequency, the amount of discount also changes. So the pre-2018 discounts were typically 6.5 and post they're down to

5 per cent and you have the control of Samsung set out below and what Samsung shows is that actually, after the GTA, other factors in those two years were leading to increased discounts. (Pause)

So, it's this discounting analysis that leads to the average 4 per cent that Dr Pike identifies. That is then applied to the value of commerce. Now, that is applied to the value of commerce, which is where his estimates in the original Pike 1 report go wrong. He had access to no data about the actual levels of commerce and he reached an estimate based upon a series of assumptions that have turned out to be cumulatively unsafe. The actual data shows the value of commerce is very substantially smaller; there's no hiding from that, Dr Pike doesn't seek to do so. What I do note is that no one has suggested that there was any other better available, publicly available, data set that Dr Pike should have used, or that his methodology for estimating -- given the total absence of the data -- is somehow unsatisfactory.

THE PRESIDENT: No, I don't think the criticism is with the original dataset as such, but as what he's done with the information that he's now received.

MR DE LA MARE: Yes. So what he's done is, with the information he's now received, he's applied the same discounting analysis -- which has not been suggested to be unsafe -- to the volume of commerce shown by the data in question to calculate a new on-Amazon number and that's the 112 million figure at the date of issue and you have our case that that then has to be carried forward to 2029 in order to do the cost benefit comparison. (Pause)

And we're not going to have an argument about interest rates; we say in due course there will be a proper case to be made that it should be more than 8% per cent, but given that 8 per cent is what the Tribunal awarded in Apple v Kent, we're quite content to proceed on that basis and that means the carried forward figure to November 2028 is 289 million and there is a further 44 million for the year 2029, which won't be captured by an amendment, but will still be payable by reference to the claim if we succeed. About half of that is attributable to interest and the other half is the additional year of infringement.

MR BANKES: Mr de la Mare, if we give you leave to amend the claim form --

MR DE LA MARE: Yes.

MR BANKES: -- and you get the relief you seek in an earlier CMC, what effect does that have on these numbers?

MR DE LA MARE: What effect does it have on the numbers?

MR BANKES: It must bring them down.

MR DE LA MARE: It will bring it down, if it curtails the infringement earlier, but the benefit of that earlier curtailed infringement still in use to the benefit of the class and this is a pretty important -- it is a novel -- in the sense it hasn't arisen before -- but obvious point of principle, which is that if the consequence of the litigation is to bring to end a continuing infringement that is effectively taking money out of the pockets of the affected consumers every time they purchase those goods, the fact that the private litigation has brought about that cessation, with the saving of 20 odd million a year to the class, that is a benefit that this Tribunal could and should take into account when undertaking the cost benefit analysis.

The point hasn't arisen before, because most of the certified proceedings to date have been in relation to follow-on claims where the infringement has terminated -- cartels -- or cases like Apple v Kent, where albeit that the infringement is continuing, the numbers are so large that it hasn't been the sort of branding -- that cost benefit analysis -- we're having in this case.

But we say there's nothing surprising, in principle, for us saying that there is a benefit in the cessation of the infringement. You can test it in this way: when the court decides whether or not to grant an injunction in relation to a threatened future infringement, there are three things that you can do: it can grant the injunction; it can grant damages in lieu under section 50 of the Senior Courts Act, the modern equivalent of Lord Cairn's Act; or it can refuse an injunction and say, "Come back to court and sue for your damage each time it occurs". Those are the three options.

Now, damages in lieu is obviously not a proper remedy in a case like this, because of the public interest in enforcement of the competition rules, but it's a remedy that monetises all future wrongdoing -- that's the whole effect of damages in lieu of the injunction -- and it shows quite clearly that there is future benefit obtained by bringing conduct that is causing current loss to an end.

So, we say that what's on the table in terms of the cost benefit analysis is the carried forwards 289 million, the 44 million --

THE PRESIDENT: The 44 -- you said it will not be captured by the amendment but still payable. Did you say?

MR DE LA MARE: That's 2029.

THE PRESIDENT: 2029 is not captured by which amendment?

MR DE LA MARE: Because what is being proposed is, as in Kent v Apple --

THE PRESIDENT: They'll catch up?

MR DE LA MARE: It'll catch up to the date of the PTR, which is on the timetable November 2028.

THE PRESIDENT: Right.

MR DE LA MARE: Judgment is on the timetable 2030.

THE PRESIDENT: And this is just interest, mainly?

MR DE LA MARE: It's interest and the additional infringement sum for 2029.

THE PRESIDENT: Okay.

MR DE LA MARE: Because the costs for which scenario B is calculated are the costs up until judgment in January 2030.

So what's missing even on the 289 million November 2028 analysis, is the further year of infringement that will occur after the PTR and before judgment and any run-off effects if the agreement is enjoined and comes to an end at that stage and what is also not included are the future benefits of curtailing the behaviour.

MR BANKES: Yes, and these numbers are very important for that cost benefit analysis.

MR DE LA MARE: Yes.

MR BANKES: I just wanted to ask two methodological questions very quickly --

MR DE LA MARE: Of course, sir.

MR DERBYSHIRE: -- which you may go away and answer, and apologies if they are in the report, but I don't think they are.

You said that the period was two years before and two years after the infringement. Do you know what those two years were? You also said that it was the Buy Box, obviously, because that's the publicly available data. I just wanted to know if Dr Pike had done any analysis about how representative the Buy Box was on prices and discounts of actual commerce.

MR DE LA MARE: I think you can see the answer to that question from the data about who wins the sales before and after. I'll take you to that in a second.

Sir, I think that's your second question. Forgive me. What was the first question?

MR DERBYSHIRE: The first question was: you said it was two years before and two years after?

MR DE LA MARE: I think -- and I'll check over lunch -- I think the cut-off point was the date that the resellers were filing --

MR DERBYSHIRE: The two years before, and the two years (overspeaking).

MR DE LA MARE: They were removed from the platform in January 2019, so it's the two years after that. Dr Pike does very fairly say that before that date, there may be effects as people start running down their stock in anticipation of the restrictions coming into effect. But I think the two years before and after is January 2019. I'll double check on that.

THE PRESIDENT: All right. So your point is that this is not a complicated analysis that he's done on a preliminary basis. He's done a very rough and ready, looking at iPhones; because iPhones make up, you say, more than 60 per cent of the sales. He's done it before and after on the percentage of offers, discounts and the average discounts, and he's used that to calculate the 4 per cent, which he applies to VoC.

MR DE LA MARE: Yes, but it's an analysis that --

THE PRESIDENT: I'm not criticising.

MR DE LA MARE: No, I know you're not.

THE PRESIDENT: I'm saying, have I accurately summarised your question?

MR DE LA MARE: That's, as ever, a crisp and accurate summary. The point I was going to make was that this analysis is entirely of a piece with the analysis of the AGCM and CNMC. You'll see at various points -- for instance, paragraph 257, page 247, just after the table we have been looking at -- Dr Pike draws attention to what those regulators were able to find. (Pause)

They had access to all the material they got in the course of the regulatory investigations, and they found price increases of between 5 and 10 per cent for iPhones and iPads, and between 10 to 20 per cent for AirPods.

Of course, we accept that as and when one gets access to more granular data -- and this is part of the reason why no full market definition has been done -- there may be different stories to tell in relation to different products, because phones are bundled and make up a very large proportion of the commerce; but sitting below phones, there are all kinds of different products with different competitors and different degrees of inter-brand competition. The inter-brand competition in relation to a high-end laptop may be one thing; the inter-brand competition in relation to a more moderately priced speaker may be another thing, and all of those points of detail will have to be investigated with data. It's one of the reasons --

THE PRESIDENT: Does the VoC which he ultimately used include bundled phones?

MR DE LA MARE: No.

THE PRESIDENT: Because he's excluded those on the basis initially set out.

MR DE LA MARE: Well, they're excluded from the VoC because Amazon doesn't sell bundled phones.

THE PRESIDENT: Right.

MR BANKES: Sorry. Just one other question. The 289: that's with interest?

MR DE LA MARE: That's with interest.

MR BANKES: That's simple or compound?

MR DE LA MARE: Simple.

So you can see the findings of the regulators, finding with more information larger overcharges. I'd suggest that what that shows is that Dr Pike has done his own analysis. Yes, the UK is a different market to Italy, but it is in fact the most highly penetrated e-commerce market in Europe, and therefore the effects of anything you would expect to be greater in the UK than in Italy, and his results are plausible, conservative and sensible by reference to the regulatory investigations.

THE PRESIDENT: That's on Amazon?

MR DE LA MARE: That's on Amazon, and we say it's perfectly permissible and consistent with Hollington v Hewthorn, which I seem to spend my life arguing about, and Evans, to look at the regulatory decisions for confirmation at this stage of the plausibility of analysis, the plausibility of the head of loss. That's entirely consistent with the approach of the Supreme Court at paragraphs 158 to 159, authorities 1.1, page 161.

What is actually notable -- and here I know the Tribunal will pick this point (inaudible) -- is that the regulators actually took the relatively unusual step of actually quantifying the overcharge. Most of the time, when one sees cartel decisions or decisions like this, the regulator doesn't actually quantify the amount of overcharge.

THE PRESIDENT: Yes, but do you even really need the other regulators as comparison? Do you say, look, here's a vanilla pre-and-post analysis. It's obviously only a preliminary.

MR DE LA MARE: I point to them as fortifying the merits of the analysis and the strengths of the conclusions, and your entitlement to be satisfied in relation to the strength of this claim. It's obviously a strong claim. All these arguments have been tried twice in extenso with the regulators and failed.

The other thing I would point out is that when you look at --

THE PRESIDENT: What arguments? I mean, not the arguments that are advanced today, because the arguments advanced today in relation to Pike are not the ones, presumably, that (overspeaking).

MR DE LA MARE: The arguments that we're not getting into on liability, and those matters.

THE PRESIDENT: Yes.

MR DE LA MARE: The other thing I would point out is if you look at the data, the on-Amazon data at C, tab 21, page 86.

These data show that something very strange is --

THE PRESIDENT: C what?

MR DE LA MARE: C, tab 21, page 86.

THE PRESIDENT: Okay.

MR DE LA MARE: If you draw a line between 2018 and 2019 -- that's the GTA cut-off date -- in the left-hand column, you'll see how after the cut-off date, Amazon sales

increase, and we've said in the skeleton, the percentage -- and I think I can say it --
THE PRESIDENT: Yes.
MR DE LA MARE: -- exponentially. Conversely, look on the other side, third-party resellers: you can see the collapse in third-party resellers down to the numbers for 2024 and 2025, which I won't read out, but these are a pretty blindingly obvious conclusion as to what's happened.
In Star Wars terms, this is a major disturbance in the Force. These are not normal market perturbations. This is a wholesale restructuring of the operation of the Amazon marketplace in consequence of this agreement. There is no other way to look at this.
THE PRESIDENT: Full marks for pandering to me, Mr de la Mare.
MR DE LA MARE: I always listen to what my Lady says very carefully, and I happen to be a big Star Wars fan, which will surprise no one --
THE PRESIDENT: But look --
MR DE LA MARE: -- given my notorious geekery.
THE PRESIDENT: I think you need to move on, off-Amazon. I mean, you've done almost on-Amazon.
MR DE LA MARE: Yes.
THE PRESIDENT: You've said that the attack on the off-Amazon analysis isn't an attack on the analysis itself. It's an attack on Dr Pike.
MR DE LA MARE: Well, I'm going to pick up, if I may the subject of distribution, which I think I do have to deal with.
THE PRESIDENT: Yes.
MR DE LA MARE: And opt-out versus opt-in, and then I will move on, (inaudible) my Lady says.
Cost benefit: you've got my basic submission in relation to that. There is more than enough even in relation to the on-Amazon to make this a cost-effective claim. You

would generate, if there is a 75 per cent distribution, sums approximately 75 per cent of what a party would recover. That's very important for the Waterside analysis, because that looks a lot like conventional litigation. Conventional litigation to recover 75 per cent of your debt, after you've had to pay for your lawyers and funders or what-have-you, is a pretty decent level of recovery. It's not only commercial litigation.

THE PRESIDENT: That's assuming that 75 per cent --

MR DE LA MARE: Yes.

THE PRESIDENT: -- of consumers (overspeaking).

MR DE LA MARE: And of course, if it goes down from 75 per cent to 50 per cent, the corollary of that is that the proportion of compensation paid to the parties to whom distribution will be affected necessarily goes up.

MR BANKES: How are you getting to the 75 per cent? 75 per cent of what?

MR DE LA MARE: 75 per cent of the class.

MR BANKES: Will get something back. Why will the other 25 per cent not?

MR DE LA MARE: Well, Amazon and Apple's case is that you're not even going to get to 75 per cent.

THE PRESIDENT: Yes. I mean, you're going to come and address us on distribution and how you get to the 75 per cent.

MR DE LA MARE: Yes, and our case in relation to that is that the combination of a direct payment method and options to notify, which is effectively the more modern form of distribution that's being pioneered in the States by the FTC, for a data-rich business is going to achieve high levels of distribution. If you could remove the friction from claims by either paying parties directly without a claim even having to be made, or by reducing the amount of friction in relation to a claim, then you will achieve higher levels of distribution.

THE PRESIDENT: Yes.

MR DE LA MARE: The critical thing to understand here is that there is not one data set but two data sets. So, if Amazon doesn't have up-to-date payment details, for instance, it may well be that the same customer can be identified on Apple with up-to-date payment details, and vice versa. Equally, if a credit card can be identified as having been used for a third-party retailer, and you can identify that credit card from the information available to Apple or Amazon, you may be able to identify who the account holder is and to make a direct payment to that party.

The arguments that Apple make in relation to this are, I think, very much at the margins in relation to the argument that high levels of distribution won't be achieved. Their arguments are about gifts, and I would say that's a deeply unmeritorious argument. In the perhaps quite rare circumstance where the payee is different from the relevant account holder to which the Apple device is registered -- and bear in mind, most of them will be --

THE PRESIDENT: But do you want to kind of go back to the beginning on your distribution argument? I mean, you're sort of foreshadowing it. Are you going to deal with distribution now?

MR DE LA MARE: Well, that's what I am dealing with.

THE PRESIDENT: Okay. You're not just sort of highlighting it and then going to go to --

MR DE LA MARE: No.

THE PRESIDENT: Okay. Where do you get the 75 per cent from? Is this really a finger in the air from Epiq?

MR DE LA MARE: It's Epiq's high levels of distribution, and an analogy with what the FCA say that they will be able to obtain in the motor vehicle scheme.

THE PRESIDENT: That's a really different scheme for a very different amount of money.

MR DE LA MARE: It's a very different amount of money, but it's a situation where the finance holders don't hold anything like the same amount of information about those that they're dealing with that is held by these two companies. They are massively data-rich about their customers, compared to the finance companies.

So yes, it is. There's a smaller incentive to make a claim, because the sum of money is smaller, but there's far more data with which to be satisfied that a claim can be made. Bear in mind, Apple's submissions here are really quite cutthroat, because first of all, anything that reduces the percentage increases the likely effective payout to the class that recovers. That's point 1. But point 2, in Waterside itself, the Tribunal emphasised that the minute you start using data-rich sources like supermarket loyalty schemes, et cetera, the Tribunal would expect substantially higher levels of recovery to be achieved. That was the basis on which Waterside was effectively sent off to try again.

THE PRESIDENT: Can you unpack your point that if there is a lower take-up, then the claiming class gets more? Because if you are doing a direct distribution, as in you just credit somebody's Amazon account, that's not going to change unless you redo the exercise later on. So how is it going to work that a lower claiming class gets more?

MR DE LA MARE: If, through the data sets you can only identify 75 per cent of the people who've made the payments or benefited from the particular items to whom you're going to make the direct credits; if you could only reach 75 per cent of people with the combination of direct credits and the claims notification, there is going to be a pot of 25 per cent of undistributed funds available to pay off against funding.

THE PRESIDENT: But how? I mean, if you're doing a direct credit, as in the US you often get, I mean, you're not envisaging that people are going to get multiple credits on their Amazon accounts. So how is an extra amount going to be distributed? I just don't understand how the sequence of events works that gets extra money into the consumer claimants' pocket.

MR DE LA MARE: Because you identify the class of people to whom you can distribute, through the direct payments.

THE PRESIDENT: Right.

MR DE LA MARE: You distribute to them. You identify those to whom you can distribute through the notification; you distribute to them.

THE PRESIDENT: But that's not you identifying, that's them self-identifying.

MR DE LA MARE: Yes. Absolutely.

THE PRESIDENT: Right.

MR DE LA MARE: Yes. But that's a further pot of claim if you like.

THE PRESIDENT: Right.

MR DE LA MARE: If there is at that stage any surplus left over that hasn't been used for funding, then there could be a further distribution to both such parties -- both such classes of claimants. Why can't there be two claimants?

THE PRESIDENT: Is that set out in your distribution plan that there could be a cap top?

MR DE LA MARE: I don't believe it is, but it seems to be --

THE PRESIDENT: Are you just making that submission without evidence?

MR DE LA MARE: Well, I'm making that submission as a matter of logic, with respect, my Lady.

THE PRESIDENT: It's not about logic, it's about practicality and how the distribution is going to work. So if you are --

MR DE LA MARE: If you've established the payment mechanisms to make a payment of, let's say, £50 and it's been established either through a direct credit system or through details having been provided of the purchases and bank accounts into which payments can be made for distribution, with the greatest of respect, I don't see why a second payment using exactly the same details can't be made.

THE PRESIDENT: All right.

MR DE LA MARE: What Epiq deals with are the practicalities of identifying people with as little friction as possible so that claims are made. The claimants will do everything they can to identify and pay with as little friction as possible. We don't see any substance in the Amazon objections of comparison to the FTC proceedings. The fact that the third-party payments -- the direct payments -- were made through Venmo and PayPal doesn't detract from the fact that, as they were described by the FTC and as they were described by the relevant class website, they were automatic payments made without request for payment.

There was then a second phase of those who hadn't benefited from automatic payments in the form of PayPal, Venmo and cheques being sent out to them automatically. A second phase of payment for people who had notified claims who hadn't received such payments. It's that basic structure that the distribution plan, proposed by Epiq, replicates.

So, we don't see any reason in a case such as this, precisely as the Tribunal anticipated in Waterside, why with two data rich sources of information about customers and payment details and payment mechanisms and platforms built into those platforms, a high rate of distribution can't occur. Of course -- I'm sorry, my Lady.

THE PRESIDENT: Can you just give us the reference to where the calculation is set out as to the waterfall from the on-Amazon claim? So, with your 289 million, your additional 44 million; how does that then break down, assuming a 75 per cent take up into the distribution and the payment of the funders and lawyers?

MR DE LA MARE: There's no such calculation in our skeleton argument but I can provide one if that's helpful.

THE PRESIDENT: Well, yes, because I think the total funders and lawyers -- I'm assuming that this figure is not confidential.

MR DE LA MARE: No.

THE PRESIDENT: So, in the region of 120 million?

MR DE LA MARE: Yes.

THE PRESIDENT: So, if you assume an initial pot of something in the region of -- over 300 million.

MR DE LA MARE: Yes.

THE PRESIDENT: -- 75 per cent of that -- 225 -- that doesn't quite leave your 120-odd the funders and lawyers, but you say it gets close to it.

MR DE LA MARE: And that's what generates the 75 per cent to 80 per cent level of your overall entitlement being satisfied, if the Tribunal gives permission, for the funding to be taken from the pot first.

THE PRESIDENT: I see. So, your point --

MR DE LA MARE: It's just math, my Lady.

THE PRESIDENT: You say 75 per cent of 75 per cent then gives enough surplus.

MR DE LA MARE: Yes.

THE PRESIDENT: Okay.

MR BANKES: So, you're saying you'll find 75 per cent of the potential class and you'll pay them 75 per cent of what they're entitled to?

MR DE LA MARE: If you take my Lady's example: 300 million times 75 per cent is 225, you've got funding of 120 million, so you've got a shortfall of approximately 50 to 60 million. So that leads to distribution rates of somewhere in the region of 75 to 80 per cent. If you then add in the 44 million, which isn't even taken into account, and you add in any run off, let's say another 5, 10, 15 million that would (inaudible) it yet further.

THE PRESIDENT: Okay, so you say "If you have 75 per cent take up, and if you took off all of the funder’s and lawyers’ fees, that gives you about 75 per cent going to the class that claim".

MR DE LA MARE: Yes. And if the number goes down to 50 per cent take up, the payout will be complete.

THE PRESIDENT: All right.

MR DE LA MARE: That's my point. We can provide some illustrative calculations. Now, all of this is obviously predicated on the funding costs being recoverable out of the undistributed damages and being recoverable altogether.

THE PRESIDENT: No, I understand. I understand.

MR DE LA MARE: I'm grateful, my Lady. So, we don't think that there's anything in the objections to distribution. If anything, this is an illustration of the system working exactly as it should and with a pot of undistributed money being used to fund costs for claims that wouldn't otherwise be brought.

That leads to my last point on this, which is Amazon's case that this shouldn't be an opt-out claim, and I note the Tribunal's reaction. This is, with respect, a ridiculous argument. These are consumer claims which there would be no prospect at all of being brought but for opt-outs of certification. The proposal of opt-in is just a wrecking proposal and nothing more.

It is not a leveraging claim like Evans. In Evans there were no consumers. There were banks leveraging claims worth hundreds of millions of pounds on an opt-out basis. It's quite understandable why the Supreme Court thought that that was applying an entirely improper form of commercial pressure.

THE PRESIDENT: I don't think in opening you need to say anything more about that.

MR DE LA MARE: I agree, my Lady. So let me then move on to the topic of the off-Amazon claim. Can I start with the law. I appreciate this is the terrain of motherhood and Apple pie. We cite in our reply at 23, my Lady's decision in the

Bittylicious case that shows that the test is the same in the CAT as in the High Court -- I don't think we need to turn that up -- but the test that my Lady applied for strike-out is that in Begum v Maran. That probably is worth turning up very briefly. Authorities 1.1, tab 5. It starts at page 182. The relevant passage, paragraph 22, is at page 187. The adjectival juxtaposition at 22(a) is "realistic" as opposed to "fanciful", a claim that carries some degree of conviction shouldn't be carried too far. In essence, the court is determining -- and I think this is a very useful test -- whether the claim, and here the head of loss is, "bound to fail".

Then there is a stricture at (b) against conducting a mini-trial: although you won't automatically accept what has been said at face value, and I haven't detected any of that, it's nevertheless necessary to accept the claim unless the factual assertions are demonstrably unsupportable. That is a very high bar in our submission. It's a test which makes allowance for the fact that further facts may well appear at trial.

Then the test on strike-out or summary judgment is, of course, that of Mr Justice Lewison, as was in the Easyair case. That's the case that's been cited by everyone in the Tribunal. That's in authorities bundle 2.2 at tab 9. The famous passage of criteria is at 15, page 891. Points (i), (ii), (iii) and (iv) resemble what we've seen already, and the tests are very similar indeed. (v) emphasises:

"... in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial ..."

There is likely to be a great deal of qualitative material available to both the defendants as to the purpose and effect of these agreements. It's unreal that they haven't monitored or assessed or looked at the effects of the agreements themselves. Even if the purported IP justifications or user experiences were the real reasons, you'd expect there to have been some investigation of the effects. And after the beginning of competition investigations you would have expected there to be investigation of the wider effects. We've seen from 899 of the CNMC decision that there is material of that kind that we don't have access to.

Point (vi):

"Although a case may turn out at trial not to be really complicated [I suspect this is not that case], it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge ..."

Well, that's this case in spades.

Then criterion (vii) doesn't apply here because what is before you is not a short point of law or construction, and so the "grasp the nettle" mandate -- if the law is clear -- doesn't apply.

Now, that authority has been applied by the court numerous times. It's helpful we suggest to look in the same bundle at what was said about it in the Gutmann case. In fact, it's bundle 2.1 rather than 2.2, tab 4.

MR BANKES: Again, I need your help on page number.

MR DE LA MARE: Of course. Starting at page 583 of bundle 2.

THE PRESIDENT: Have you got your bundle 2 divided into several volumes?

MR DE LA MARE: I do, yes.

THE PRESIDENT: PDFs come in one volume, so I'll just need the PDF number. As for Mr Bankes, I suspect if you're using just one PDF --

MR BANKES: I'm on page 583 of bundle 2, which is Gutmann v Vodafone.

MR DE LA MARE: Yes, that's correct. I'm not sure if the pagination carries over as between the two bundles. Let me just double check.

THE PRESIDENT: That's what I just wanted to check. Okay, that's fine.

MR DE LA MARE: I don't know -- I have -- yes, it does.

THE PRESIDENT: It does? Okay. (Pause)

MR DE LA MARE: So, the relevant passages on the legal test are at 140, page 69 and following. There's a citation of the passage I've just taken to you in Easyair, then a discussion of that at 142 through to the top of 632 and I would suggest that paragraph 144 and 145 -- applying those tests in the context of this type of dispute -- are particularly helpful.

And then the last authority is that of Mrs Justice Cockerill as she then was, Lady Justice Cockerill as she now is, in the Lombard case in authorities bundle 2.2, tab 10, report starts at 900. The relevant --

THE PRESIDENT: The Lombard case, authorities bundle --

MR DE LA MARE: Volume 2.

THE PRESIDENT: Yes.

MR DE LA MARE: Page 900 is where it starts. It's paragraph 33-36 at 906. (Pause)

And it's in particular paragraph 36 that I draw your attention to, because Mrs Justice Cockrell identifies it in a summary in a strike-out test on the facts. There are cases that pitch the test somewhat higher. There's Harris v Bolt Burden, in which Lord Justice Sedley said the case had to be "absolutely unwinnable". There's the case of Richards v Hughes, where Lord Justice Gibson said the correct approach is that:

"... the court must be certain that the claim is bound to fail. Unless it is certain, [and I think that's original emphasis] the case is inappropriate for striking out."

And then there's Oysterware v Intentor, which says the "remedy is only for 'plain and obvious cases'".

Now that, cumulatively, is an extremely high bar. And the case that's made is one of relative simplicity. It is simply that the share that Amazon UK has of the entire product mix of Apple products in the UK is so small that nothing that happens on Amazon UK can affect the prices offered by third-party retailers off-Amazon -- that's the umbrella claim -- say high street and online retailers like Currys, Argos, John Lewis Partnership, or Apple itself, in terms of whether Apple has sustained -- and for how long -- it's RRP. Now, the RRP points is one that Dr Pike points out -- goes not just to the price obtainable by Apple in its stores, it also feeds into what the benchmark against which discounting occurs is, because if -- we don't know -- the material shows that prices are discounted against RRP, as is common, as is a reasonable assumption, if RRP is buttressed and in a but for world, it would have been lower. That's going to have cascade effects, first of all, in relation to the third-party resellers, whatever prices they otherwise impose, but secondly, in all other areas where RRP is used and that's one of the reasons why bundled phones are being kept under review, not because they are in price competition, but because if there is an impact on RRP and RRP is buttressed and held up in the factual and would be lower in the counterfactual, then it may be -- depending upon the discounting arrangements arranged with the MNOs, that their prices have also been affected. We don't make a claim in relation to that presently, we've just put down a marker. That's said to be inconsistent, but in my submission there's no inconsistency at all.

Now, let's look at the evidence in support of this and the evidence is very unusual. The evidence in support of this consists of three extremely skeletal witness statements, whose only role is to present, effectively, exhibit the data sets in question to perform the denominator and numerator calculation. The witnesses in question have no involvement, so far as we can see, in the Amazon UK store. We've got a witness from Seattle, Mr Dongre; we've got a witness from somewhere else stateside, Ms Matthews. They say absolutely nothing about the agreements, about why they were adopted, how they were adopted, what the purposes of adopting them were. They say nothing at all other than to explain how the data has been put together. There's no explanation of how the black and white list was monitored, how listings were excluded or barred or anything of that kind and that in itself is quite notable when you come to look at the Amazon evidence from Mr Dongre, because what you're presented with is an explanation through that witness statement -- combined with the BRG letter of 8 May -- that describes a process in which all of the ASINs -- the unique product codes -- to which the whitelisting/blacklisting arrangements applied, were identified starting in March 2026, when the data set was provided to BRG. They were effectively started from scratch and the obvious forensic point that that raises is: isn't that second sourcing? Isn't that the creation, again, of data that you must already have? Because how can you operate a blacklist in relation to all of these products if you don't know which products are not permitted to be listed other than by someone who is on the list? How are you going to stop --

THE PRESIDENT: Mr de la Mare, you've lost me, because I don't think this witness statement was on your pre-reading list. So if you want us to understand something from it, you'd better take us to it --

MR DE LA MARE: I'm so sorry.

THE PRESIDENT: -- and tell us what you want us to have read.

MR DE LA MARE: Of course. So Mr Dongre's witness statement is at A15. (Pause)
And what this describes in combination with the BRG letter at B7, 630 is how, effectively, Amazon have identified the Amazon UK numerator, to which the Apple denominator will then be applied. (Pause)
And what you can see from the BRG letter at B7, 632.

THE PRESIDENT: i.e., the Apple sales on Amazon.

MR DE LA MARE: Exactly, my Lady, exactly. Paragraph 1, you can see this exercise didn't start in BRG until 20 March 2026.

THE PRESIDENT: So which do you want us to read, his witness statement or the BRG?

MR DE LA MARE: I think the BRG letter is actually probably in some ways clearer. What BRG are basically being asked to do is to go into this dataset and identify all of the unique product codes -- the ASINs -- that relate to products affected by this agreement and my simple forensic point is: why is this needed if they've been operating to exclude all of these products being listed on their site from anyone other than a whitelisted seller? They must have some kind of list or mechanism to identify when a reseller comes along, who's not on the whitelist, who tries to list an Apple iPhone, new AirPods, whatever it may be, obtained from whatever source they've obtained. There must be a mechanism where they identify that's happened and removed the sale and bar the seller, and that's not described at all.

And it's -- of course -- something that would have prompted all kinds of questions if it had been described, like: how often has this happened? Who are the people that it's happened in relation to? And so forth.

So, it's quite odd, this evidence, because it is basically, seemingly, re-inventing something that must already exist.

But in any event, you've got three witness statements that only deal with the calculation of the numerator and the denominator. What there isn't is any evidence -- particularly expert economist evidence -- saying that this approach is -- and is the only plausible way -- to assess whether or not Amazon UK sales will have any potential effect upon retail prices by third-party resellers, or upon Apple and that absence of economist evidence in a debate about asymmetries of effects, effects of market power, is a fundamental omission and it's particularly striking when we know -- as we set out in the skeleton argument from the Riefa proceedings and the costs that we had to pay in the Riefa proceedings -- that hundreds of thousands of pounds have already been paid, even at the date of the Riefa proceedings, to Frontier and BRG to experts for their assistance in the claim.

This choice -- not to put in expert evidence -- is plainly deliberate and it leads to the obvious inference that no expert economist would make a statement of the required categorical nature to support the strike-out. We all know what economists are like. Economists say, "Well, I'm going to need some data to look at this". The idea that an aggregated dataset of this kind in markets this complicated is going to be sufficient for any economist to arrive at the kind of conclusions that Apple and Amazon require them to reach is for the birds and we can see the proof of the positive of that in the absence of any such statement. Any economist worth their salt is going to say, "Well, we want to understand properly the place of this Amazon Marketplace in the wider dynamics of the markets". In all respects, they're going to want to look at bundled and unbundled phones; there's plainly an issue about the constraining effect of bundled and unbundled phones. No economist without sight of data is going to reach some kind of categoric conclusion that Dr Pike is wrong to say bundled phones are in a different space because of the minutes bundled up with them.

They're going to want to look at the relative size of all of the channels. They're going to want to look at the relative size of Apple in both its online and its physical store, compared to the other third-party resellers and they're going to want to look at where Amazon is in that hierarchy of size and the evidence we have is clear and undisputed in terms of online sales. It is the second largest online seller in the marketplace. In terms of third-party online sellers, it is the largest.

No economist, I would suggest, is going to reach a conclusion that the largest online marketplace that is approximately -- and I can't say the number, so I'll have to go back to A5 as the way to do it -- you will see the fractional size is, in relation to Apple's own

store -- A, tab 5, page 78, mid-page, red inner ring confidentiality. No economist is going to say the second largest online store that has the scale relative to Apple online store -- says out there -- is inherently incapable of moving online prices and no economist is going to say that in a highly integrated e-commerce marketplace, it's implausible to suggest that online prices lead offline prices, not least because there is evidence -- and Dr Pike provides it and it's everywhere -- that stores equalise their online and offline prices. Customers feel ripped off if they don't; that's just ubiquitous, stores promise to sell and charge you the same amount in store or online. (Pause)
No economist is going to say that that doesn't mean that e-commerce isn't really the legitimate or a proper focus for the capacity of these prices to move the market and no economist is going to say that if you have qualitative material, like the price promises that retailers make -- and I'll show you after lunch very briefly some stuff from John Lewis and Currys -- if you have price promises of that kind, no economist is going to say that a process of price formation isn't by reference to your most substantial competitors and if you have John Lewis saying, "Our 25 competitors against which we set our prices starts with Amazon", then the causative plausibility is established, even only in relation to John Lewis, at which point the claim goes forward and that's the exercise that has to be done and that is in our submission one -- it's plainly impossible against a strict test I've set out -- to say can't go to trial.
MR DERBYSHIRE: And no economist is going to say that the second largest online platform would affect or would not affect the remainder of the online market without wanting to know just how big it was in percentage terms.
MR DE LA MARE: Well, indeed, how highly fragmented the other retailers were relative to Apple and to Amazon.
MR DERBYSHIRE: How fragmented the other retailers were, but also how large the retailer in question was compared to the rest of the market.

MR DE LA MARE: Indeed, how large it was as a retailer.

MR DERBYSHIRE: And we have that figure now, but we can't refer to it, but we all know what it is and previously in Pike 1, Dr Pike estimated it as a much larger figure.

MR DE LA MARE: The VoC, yes, that's right.

Is that a convenient moment, my Lady?

THE PRESIDENT: Yes, all right. We'll return -- I think that's maybe a few minutes fast -- at 2.00. Thank you very much.

(1.00 pm)

(The short adjournment)

(2.01 pm)

MR DE LA MARE: My Lady, before lunch I was making the point that there was no economist willing to back any of these particular points in relation to what the correct approach is to the data and what the data tells you about Amazon UK's ability to move the market. We say in the absence of that economist data, a strike-out, faced with an economist willing to say -- for perfectly plausible reasons that I'll come to -- that this is not the right way to look at matters, is obviously hopeless.

What is the answer Dr Pike gives? Well, as I've already foreshadowed, it comes in two parts. The first part is: you are looking at the wrong big dog. The big dog is not who is the biggest seller of Apple products, or which dogs are selling Apple products and how much. That's the wrong focus. The real big dog is Amazon and its market power in the consumer electronics retail space, which is so extensive that its competitors, those selling consumer electronics through their own stores -- offering their own array or suite or basket of products drawn from different retailers, an inter-brand basket -- those retailers look to Amazon to check that their prices are competitive, so that if Amazon softens its discounting, that creates the headroom for those retailers to soften their discount. It relieves the competitive pressure, which allows them to charge more, and that in turn softens the pressure on RRP. With respect, that is the terrain that Basil Fawlty calls "the bleeding obvious". If Amazon itself proudly proclaims itself to be the lowest-priced online retailer six years in a row, then anyone interested in competing for that intra-brand market share is going to have to look at the prices Amazon sells at, because otherwise Amazon is going to be selling the stock, and the other party is going to be left with their stock sitting on their shelves. Think of the price discrimination model I took you through this morning, that Dr Pike describes, and look at the various points along the price discrimination model. You've got Apple at one end, which because of its market power can charge the high-tolerance-to-pay-Apple, tax-intolerant Apple fanboys, if you like, who will go to the store for their devices. Then you have a chain down of the third-party resellers deciding how much of their discount from RRP to compete away in order to get market share.

Those third parties, well, they don't have the market power that allows Apple to sell at full RRP, and they don't have the scale, the network effects, that allows Amazon to sell and distribute these goods as cheaply as it can. They have to compete against Amazon's huge economies of scale, where the commission that Amazon would ordinarily charge a third party has been internalised, effectively, for the benefit of the sales.

THE PRESIDENT: I mean, we understand the way that his argument goes. Are you, going to address the criticisms of his independence?

MR DE LA MARE: The criticisms of his independence?

THE PRESIDENT: Yes.

MR DE LA MARE: Yes, I am, but if my Lady says you understand that argument, let me just make a couple of further points in relation to it. It is not only an intuitive and logical and plausible question or analysis, as a matter of economic analysis; it's also consistent with the qualitative evidence. That's what price match promises and things like that, as exhibited in his third statement, are, with respect. These are statements by retailers about how they set their prices. Look, for instance, at the John Lewis price match promise, at B/24, page 978.

A document like this is not unlike, in a "pass on" context, a document explaining how a party composes its price for onward sale of a good containing cartelised products; in other words, how we build our price. It's the sort of qualitative evidence that's looked at, with a similar question of causation and quantum, in a "pass on" context, for the assessment of the same types of questions of causation and quantum.

So, there's no doubt that qualitative evidence of this kind is important. What does it tell you? It tells you three things. Firstly, that in certain circumstances they're promising to match prices, so it tells you about price formation. Secondly, it tells you who they identify as their competitors in relation to whom they see effectively the need to compete on terms of price to be particularly acute. Thirdly, it tells you whether or not they're going so far as to offer a full price match; and just because they don't offer a full price match, it does not follow that prices are not, even if different, otherwise benchmarked against competitive prices.

Then look at the top of page 978, "We regularly check our prices against our 25 main competitors". Everyone listed in the list is decided by John Lewis to be a main competitor:

"How it works

"1.

"We run regular checks and automatically change our price if a competitor sells the same item at a better price."

There seems to be some element of automated or algorithmic price setting by reference to this. Amazon's own algorithms as to how they do the opposite and equal exercise will be an important part of the equation, along with their market intelligence about how their competitors set price.

Then, over the page, "Retailers we match with". You'll note immediately, Amazon UK is at 1, "Electricals only", and that's the consumer electronic space there. All the items identified are the sorts of items Dr Pike has been talking about. Apple --

THE PRESIDENT: Is it only at 1 because it starts with an A?

MR BANKES: Yes.

MR DE LA MARE: Yes.

THE PRESIDENT: It's not --

MR DE LA MARE: It's in alphabetical. I'm not suggesting otherwise. They are all alphabetical. But if you look through the 25, a good number of these retailers don't even sell electrical items. You can put a line through the likes of Dunelm or Furniture Village, because they (inaudible). They don't have an offering in this space. What it is actually telling you is much more than who the 25 are. It's who we think the ones are in the electrical space that are our main competitor.

Then look above, and what's said in relation to when price matching Apple products. This version of the price promise says, "... we will only match with those sold by Apple directly". Why? It's apparent from the rest of the paragraph why, because it's only Apple that at the time of this price guarantee is offering the same accompanying guarantee as John Lewis offers, a two-year guarantee as standard at no additional cost; and, "... at the time of going to print, no competitors currently [offer that]", but they will price match if they do. So --

THE PRESIDENT: Isn't this suggesting that they don't benchmark against Amazon UK? Because it's saying at the time of going to print, no competitors currently do.

MR DE LA MARE: It is suggesting that in relation to those products with a minimum two-year guarantee attached to it, they won't price match against them, and on the version of this policy, yes, it is saying they're not going to price match. But you have my point, that it doesn't follow that there is not some wider benchmarking of price by reference to the difference in product attributable to the guaranteed price. But in any event, in the --

THE PRESIDENT: I don't understand it, because this is a sort of "retailers we match with", and this whole thing is talking about the competitors. So this is the list, both for the purpose of the benchmarking, which is number 1 on 978 --

MR DE LA MARE: Yes.

THE PRESIDENT: -- and for the price matching, which is number 2 and 3. So at the moment it seems to be saying that they only do any comparison and price matching with Apple directly.

MR DE LA MARE: No. It's saying: we regularly check our prices against our competitors, and we're promising to match prices if the conditions are set out below. But it doesn't follow that they don't otherwise benchmark their prices for price competitive purposes against someone they're not promising to match against. What it tells you is that they think Amazon is one of their key competitors. That's the critical insight, and they're closely following Amazon prices, and if the guarantees correspond, they will match them.

MR DERBYSHIRE: What I can't accept intuitively or economically is that regardless of the size of each particular segment of electrical goods, that price matching will be the same. So maybe Amazon Retail sells 80 per cent of Dyson vacuum cleaners, and we know it sells a much smaller proportion of Apple iPhones. Because this process is dynamic, we run regular checks against our competitors. Eventually, John Lewis will realise that if it kind of overprices against Amazon on iPhones, it might not suffer such a big hit as it would if it overpriced against Dyson on Amazon retail. Do you get the point that the size of the share must, especially in the dynamic market, have some impact on the level of price match? It can't be the same for everything, and it can't be the same over time.

MR DE LA MARE: With respect, Mr Derbyshire, I don't accept that, because that's not what they're saying they're going to do. What they're trying to do is win custom so that they don't have that situation where a customer is saying, "Is this product cheaper on Amazon?" and diverts to Amazon instead of completing the sale at John Lewis?

MR DERBYSHIRE: But the frequency that that will happen will vary depending on the share of the particular product sold on Amazon Retail.

MR DE LA MARE: Yes. Well, I suppose that feeds into the second point I was going to make, which is: the frequency with which that's going to happen is going to be a function of the relative size of John Lewis and Amazon as online stores. If John Lewis is a smaller online store than Amazon, that process is not going to be displaced. That must be the logic.

It's not our case that these are immutable. John Lewis withdrew its price promise altogether for a substantial period. There's a different form of price promise, which was the one referenced in Dr Pike's report. That's in bundle E, tab 4, page 45. It has a similar format. It starts with the "regularly check against our 25 competitors", but if you go to the "retailers we match with" part -- (Pause)

MR BANKES: Which of these is more recent?

MR DE LA MARE: The one you've just been looking at. That's the current one, as I understand it. This one, as you can see from the top of page 45, is produced by the Wayback Machine, and it's from 2025, so last year. You can see here there is no carve out for Apple sales, only directly. Before that, they weren't saying what they were saying about guarantees and not matching Apple prices unless they're Apple direct sales. Different approach: they were matching Apple sales guarantees and no guarantees.

Then in Amazon, they say "Electricals only", et cetera. But then if you go on -- I've lost the point where it appears. There's an indicator -- yes, here it is on 47, "We don't match with 3rd party sellers or marketplaces on their websites". That wording is different.

So only Amazon UK direct sales – i.e., of stuff they themselves are selling as opposed to a third-party reseller -- will be price matched. But that, rather than helping the defendants, seems to say, well, that helps the claimants, because it's saying, effectively, "The only price match which we will enforce is if Amazon is itself selling the product in question". So it's a direct causative effect of the agreement that it will trigger a promise like that.

There's also a price match promise from Currys as well, given as an example. Footnote 17, page 556. It's far less hedged around than the John Lewis partnership promise. It simply promises to match any other UK retailer online or in store. You don't have to be one of the 25. You don't have to read the Ts and Cs. That's it.

MR BANKES: And where is the Currys one?

MR DE LA MARE: We don't have it in the bundle. We can supply it, if it would help.

THE PRESIDENT: Its URL is at footnote 17 on page 556, (inaudible).

MR DE LA MARE: That's the reference for the footnote to the link. But you can, if you have it electronically, just click through; it's hyperlinked in Dr Pike's report.

So the primary answer is, as Dr Pike explains at section 2.2, 557, following of his report, is that because of this phenomenon of reference pricing, if you dampen the price competition for the Amazon price that is used as the reference price, it means that the third-party retailers can lift their prices closer to RRP. That in turn decreases the gap between the third-party resellers -- Amazon included -- and Apple, and increases the likelihood that a party may simply choose to pay the Apple tax for the product on Apple's store, thus diverting business from third-party resellers to Apple, and in turn increasing Apple's profits and reinforcing RRP. So that's the first answer. The second answer is: if you're going to do some kind of market share analysis of the Apple products, it's got to be of some form of market share or analysis of product mix that is meaningful for the purposes of the ability of that "placing the market to move the market" price.

Dr Pike makes two points. He says, "Don't include bundled and don't include offline sales because they follow online sales". You have my points that his position in relation to bundling hasn't changed; it's the basis of the entire structure of the claim. It's the basis for the exclusion of bundled phones from relevant purchases, as I showed you this morning, on the basis that such phones offer no form of strong constraint.

In relation to online, he's explained this in Pike 3 at A 18, 556, citing his earlier report. It really comes down to this: if retailers equalise their own prices in-store and online, as they do, the relevant question is which form of sales, online or offline, are likely to drive price competition? Dr Pike's thesis is really no more than that the driver of price competition is online prices; in effect that offline prices are follow-up prices.

The defendants have no evidence of intra-brand competition being led by lower in-store sales prices and in relation to a product which the pleaded claim suggests has to be supported for those willing to provide brand support by displaying the product in stores -- having assistants conversant in Apple, et cetera -- it has to be supported by deeper discounts. That is only obviously consistent with a world in which otherwise those stores are carrying higher costs to sell their offline in-store costs and won't be able to compete with online prices. That intuition is what lies behind all of the CMA's decisional practice in relation to online RPM.

You know how the online RPM story goes. The story goes, "Well, we need to maintain the margin of bricks and mortar stores. They're the ones providing the display for our pianos or our fender guitars or our light fittings. They're the showroom that people go in, play the instrument and then buy it on the internet. We need to find a way to support the costs of running that kind of brand support".

Online RPM sought to do that by stopping discounting online to protect the margin of the in-store sales, and that can only be because otherwise the stores would be forced to match the price online, otherwise they'd lose customers. It's a so-called phenomenon, it's even got a Wikipedia definition, called showrooming. You go to the showroom, you try the thing out, you think you like it, and then you go and buy it cheaper on the internet.

So Apple's response to that is not online RPM, it's to provide deeper discounts for those who are providing brand support. But we say this agreement is plainly in effect, and we will say if the disclosure so says by design, it's a form of softer online RPM designed to remove price competition of the kind that would otherwise lead to discounts being offered.

It's important to analyse here the nature of Apple and Amazon's argument. Their answer to this claim doesn't turn upon the nature of the restraint we're arguing about. So let's imagine the GTA contained online RPM conditions. Their answer would be "Amazon can't move the market in relation to an online RPM condition, it's simply incapable of having that effect. Therefore there's nothing problematic in such an arrangement. Why? because nothing that we can do can move the reseller prices, because our market share is so tiny". If that argument is good at all, as a matter of market mechanics, it's good in relation to all forms of restraint. You only have to put that argument in that way to see the inherent implausibility that an operation of the scale of Amazon, even in relation to Apple products -- particularly when you've controlled the bundled and offline stores -- that Amazon couldn't move the market in those circumstances.

Now, given that that's where the debate on the expert evidence and analysis --

THE PRESIDENT: Do you say that that's true? I mean, from your last sentence, irrespective of the control for bundled ...

MR DE LA MARE: Irrespective of the --

THE PRESIDENT: Control for bundled products. Do you say that's true, even if you put in the denominator, bundled products and offline? So is your last sentence conditional on (inaudible) --

MR DE LA MARE: It's not conditional. It's true even if you were to include it against Dr Pike's analysis. Why? Go back to the John Lewis Partnership on the (inaudible). They're not price controlling against Vodafone or against O2, they're controlling against other retailers.

THE PRESIDENT: Right. So you say that the pull of Amazon is such that even if you did get down to the percentage which the proposed defendants rely on, the proposition of the on-to-off Amazon influence is still true?

MR DE LA MARE: It is, because when you're asking about whether or not it's moved prices for third-party resellers, which is the head of loss along with the RRP on Apple that we're looking at, the question is: what effect does Amazon's retail business have upon the pricing of the retailers? If the retailers don't look at MNO pricing or don't treat that as a constraint, and you've got evidence, they're not interested in that at all. They're not in there. They're looking at retail propositions. It's pretty obvious why, because a bundled phone with minutes and 12 or 24 or 36-month finance is a very different proposition to an unbundled phone.

THE PRESIDENT: That wasn't my question. My question was that if you assumed that you were wrong about that and the denominator, does your point still hold good?

MR DE LA MARE: Yes, it does, because even if that's part of the overall market, still the relevant point of inquiry is what do retailers do.

THE PRESIDENT: Right. Now, in this section of your submissions, are you addressing us both in a sort of strike-out context and in a Pro-Sys context?

MR DE LA MARE: Yes, because our position in relation to Pro-Sys is that if we pass strike-out/summary judgment it's going to be extremely hard to recycle the same arguments as a Pro-Sys objection. That's the obvious insight. Why, for two reasons, it's obviously ambitious to say that a case that has got a plausible theory of harm, a plausible case as to causation, and answers the concerns about asymmetry of market function, et cetera, which are a number of the criticisms made, will nevertheless fail on a Pro-Sys basis. That's the first problem.

The second problem with the Pro-Sys arguments is that they too are advanced without any support from an expert that says the methodological basis of Dr Pike is unsound.

THE PRESIDENT: What do you see as the theoretical difference in this context between a strike out case and a Pro-Sys case? What's the difference in the legal tests? What are they -- I mean, because you say it's difficult to see how if you fail strike-out then you wouldn't also fail their Pro-Sys argument. But what's the difference that you see between the two?

MR DE LA MARE: Well, in a fact-based strike out, which is what this is, I would submit it's very little. Not all strike-outs are fact-based. So go to the Gutmann and Vodafone -- I think it is -- example. There, the legal argument which was the subject of strike out and the disagreement -- it wasn't Gutman and Vodafone, I'm getting mixed up. It's the foregone consumer surplus dispute in which two of the Tribunal said it shouldn't be struck out.

THE PRESIDENT: Yes.

MR DE LA MARE: Mr Justice Waksman disagreed.

That type of argument about whether or not foregone consumer surplus is recoverable is the type of "grasp the nettle" argument that is the last Easyair criterion, and that may well present a different optic, because you may well have a methodology that's correct for grasping and identifying foregone consumer surplus, but there equally may be an argument to say it's not recoverable as a matter of law; strike it out.

THE PRESIDENT: Yes. But is the difference in this context this: to survive strike out you have to show that there is a non-fanciful case, a plausible case.

MR DE LA MARE: Yes.

THE PRESIDENT: You say you can't show it's bound to fail on any basis, then you survive strike out. But do you also then have to get over a further hurdle, which is that there is in principle a non-fanciful case, but have you, for the purpose of authorisation, advanced a credible blueprint to trial that allows the Tribunal to authorise this collective action. So it's a separate hurdle.

MR DE LA MARE: I totally accept that that's a separate hurdle. That's what section 13 of Dr Pike's report does. The bit we're focusing on is section 13.4, which is the blueprint in particular for the third-party reseller umbrella effect. Insofar as there are truly distinct arguments made in relation to that, they need to be addressed. But we've answered them.

So for instance, it's argued -- and this is the only Pro-Sys argument that Apple make. The Pro-Sys arguments otherwise are exclusively made by Amazon. The one that's common to Apple and Amazon is the argument about correlation and the assumption of correlation, and the dangers of that. It's been answered by Dr Pike. He said his methodology always proposed to control for problems of assuming correlation equals causation by conducting both common and asymmetric cost analysis to see what the outcome was. That's the first control.

The second control is qualitative evidence because qualitative evidence, just like the John Lewis partnership or Currys material that we've been looking at, can establish that correlation equals causation, because it says "I am intending to match prices".

THE PRESIDENT: Can you just take us to that section of Pike, in which he discusses the way that he will --

MR DE LA MARE: Well, it's section 5 of Pike 3, A 18, page 564.

THE PRESIDENT: So, methodology for establishing causation umbrella effects. (Pause)

So he says he could rule out common supply shocks.

MR DE LA MARE: As I understand --

THE PRESIDENT: Is that sufficient? All he's doing there is saying, well, he might be able to get some information that would enable him to rule out some common factor which is causing the same direction of travel. But what he's not saying is that there is anything specific which will enable him to establish -- or are you saying it's asymmetric shocks, and what does that mean?

MR DE LA MARE: Well, what he's looking at is to see whether or not there are differences in response, depending on whether or not they are common shocks or asymmetric cost shocks. If there's an asymmetric cost shock, one party alone suffers increased costs, but they nevertheless have to continue matching prices; that rather suggests that they are required to follow the prices, even though their costs have gone up. In other words, that the Amazon costs are exerting, some form of ceiling upon the price that can be charged.

THE PRESIDENT: If there is that. I mean --

MR DE LA MARE: That's the data he proposes to investigate and that's a perfectly respectable method when combined with qualitative data to investigate, just like the John Lewis Partnership material, how retailers set their prices.

MR DERBYSHIRE: But Kelyn's point was: there must be a certain number of those asymmetric shocks for that to work.

MR DE LA MARE: We have eight years of the operation of this agreement for the (inaudible) and I don't know how many years pre-operation data, but if one looks at the Amazon data I showed you earlier, it went back to 2014, 2015, it must go back beyond that as well. There is likely to be a very great deal of data to enable that exercise --

MR DERBYSHIRE: A long time series of what happened; we can observe what happened. What we need to see is a lot of variability in what would drive those prices between those different products.

MR DE LA MARE: I appreciate that, but as a basic methodology, to answer The Chair's question, it's perfectly comprehensible, perfectly defensible and it wasn't objected to -- I come back to this point unashamedly, my Lady said it's a jury point, I think it's more than that -- it wasn't objected to as some form of fundamental methodological objection, back in Riefa. Dr Pike's approach hasn't changed. All that Amazon said back in 20 -- whenever it was -- was that they also favoured the potential use of additional regression.

So we submit there is no problem -- insuperable methodological problem -- in relation to correlation. Qualitative data and materials will be important --

THE PRESIDENT: Is he saying he's going to be asking for anything from other retailers?

MR DE LA MARE: No third-party disclosure -- obviously that's a cost centre and a source of delay, but it doesn't follow from that that one's not going to be looking at, say, factual evidence or other materials, factual materials, insofar as they can be obtained. All of that will be of use.

THE PRESIDENT: So, in a way, he's looking at almost exclusively statistical means of testing for causation. He's not looking at any qualitative information from third parties.

MR DE LA MARE: This is his proposal. We, of course, are in the dark entirely as to the quality of data that Apple and Amazon possess and it may well be we don't know that they possess data that would enable some form of regression in relation to third-party resellers.

THE PRESIDENT: No, I'm not suggesting a regression, I'm just saying that you accept that he's not proposing in any way going after third parties to find out what influences their price setting.

MR DE LA MARE: He's not proposing to seek data, pricing data, from John Lewis Partnership.

THE PRESIDENT: More than that: any disclosure at all from third parties.

MR DE LA MARE: But it doesn't follow that no evidence will be led on that topic and equally -- and this may be a down the line dispute -- it doesn't follow that that's not a topic in relation to which the Tribunal may choose to hear expert evidence from the retail sector. Practices in retail and retail price setting --

THE PRESIDENT: This is not for us to say how you might make your claim, it's for you to say how you're going to make it. I'm just wanting to establish that he's saying that he doesn't think that he needs third-party disclosure.

MR DE LA MARE: Third-party cost disclosure.

THE PRESIDENT: And does he explain why, apart from in this section, does he anywhere in Pike 3 grapple with the relevance or necessity for getting third-party disclosure?

MR DE LA MARE: I don't have in my notes immediately the passages in Pike 1, in 13.4, where he explains --

THE PRESIDENT: Well, it's not about Pike 1, it's his response --

MR DE LA MARE: In his response in Pike 3, no, he doesn't.

So you were asking me to what extent the Pro-Sys arguments are distinct. There are other -- so we answered the correlation point with all the relevant references at paragraph 28.3 of our skeleton, that's A80 and 564. There are distinct arguments made by Amazon, which we address in paragraph 31 to 33 of our skeleton in particular -- in view of the time and I promised to have been finished by 2.45 -- I will address those in my hour of reply, if we get into those.

The simple point we have here, ultimately, is an expert who has answered the charge of implausibility on two planes: the plane of market power and the plane of what is the relevant subset of sales to look at, information as to the likelihood of Amazon's prices moving the market and when you look at what Apple say in response to that -- and I'll listen to what my learned friend says in their skeleton argument -- much of it consists of little more than an assertion unbacked by expert evidence and that assertion then mutates into an argument attacking the integrity of Dr Pike and this was the point The Chair asked me if I'm going to address, which is his independence.

When you read Apple's skeleton in particular, you will see that their argument about lack of independence is entirely circular. It's circular, because they say his evidence is implausible: it's implausible to fixate on market power of Amazon; it's implausible to exclude bundled iPhones; it's implausible to say online leads offline, that offline prices are followers; and because it's implausible, he lacks independence. His report lacks independence because he's reached these implausible conclusions, therefore he's lost all objectivity, therefore his evidence should be rejected in toto.

THE PRESIDENT: No, I think that's an unfair characterisation of what they say and they go back to the start and they talk about the way in which the case was initiated and then they talk about the way in which -- not merely the content of Pike 3 and whether that's plausible, but the manner in which Pike 3 is written, pointing, for example, to the fact that plausible in Pike 1 becomes highly implausible in Pike 3 among other things and the way in which he responds to the criticisms made. So they're not just looking at a circular argument -- as you say -- of whether Pike 3 is plausible, but the way in which -- and the tone in which -- he responds to those criticisms.

MR DE LA MARE: I stand by my submission that there is a substantial element of circularity in relation to the way that the point is put. They do make some additional points to the effect that, first of all, the volume of commerce has changed so significantly that it's astonishing or remarkable or whatever that Dr Pike doesn't fundamentally retreat from his conclusions and that's a non-sequitur with respect, at that point, because if the discounting analysis is still sound, even if the VoC is smaller, the loss that he's identified is still sustained and that's still (inaudible) on Amazon's analysis, and it's difficult to see what he can do, other than to explain what the result of his methodology applied to real VoC figures is.

In relation to the language, in relation to off-Amazon claims, there's no getting away from the fact that off-Amazon was not the focus of Pike 1, it wasn't the object of quantification in Pike 1. The only part of the claim that was quantified in Pike 1 was the on-Amazon claim. All there was, was a methodological section, based upon the wider predicates about market power contained in the balance of the report and what, in view of the change of VoC, Dr Pike has had to do -- and in view of the attacks now ventured for the first time under the process rubric -- is to address in greater detail the methodological concerns identified and the plausibility of his analysis. And what he's done: he's gone back, he's thought about it, he's thought about how retail works in this respect, he's dug up qualitative evidence and said, "This confirms my thesis and now that I think about it further, it's not just plausible, it's highly plausible", and that's a perfectly respectable and sensible approach and I come back to the basic intuitive point, which is that if retailers do match their prices against Amazon because they have to in order to sell their goods -- and there's qualitative evidence substantiating that -- how is that in any way an outlandish or strange or contestable proposition that begins to attract the sorts of adjectival descriptions about Dr Pike's evidence?

THE PRESIDENT: Well, when we're talking about adjectives, what is it that allows a mutation from plausible to highly plausible? Is it simply the fact that there's a John Lewis well known price match promise, and Currys price promise? Is that the only new data that he has, and how is that new? He must have known about both of them.

MR DE LA MARE: Well, I come back to my point, my Lady: there's no getting away from the fact that a different degree of focus and concentration on this part of the claim has occurred as a result of the objections taken. But if the consequence of that is you reconsider your position and you reconsider further evidence that you hadn't dug up at the time -- you think about pricing mechanics in a further fashion -- and your conclusion is: "Well, I would expect prices in this case to be set by reference to Amazon, because Amazon is the self-proclaimed largest and cheapest online retailer", and these retailers have to win business against Amazon, at that point a change in adjectival qualification seems entirely reasonable to me.

MR DERBYSHIRE: So the process was that Dr Pike's response to the new data, showing it was a fairly small market share, was to look again at the mechanism by which Amazon might affect prices outside of Amazon? Having looked at that information, he concludes that regardless of the market share almost entirely, the Amazon effect is there present for all to see and he can now move from implausible to very implausible, that there is --

MR DE LA MARE: No, plausible to highly plausible.

MR DERBYSHIRE: Yes.

MR DE LA MARE: Yes, exactly so, and it comes back to the point -- if you think about it in these terms, think about the John Lewis price promise, they don't know how much Amazon is selling -- let's take a widget and they price match against that widget, even if Amazon's volumes are very small, the price of that widget on Amazon will affect the

price on John Lewis.
MR DERBYSHIRE: So Amazon is a behemoth in everything and it sets prices for all consumer electrical goods?
MR DE LA MARE: Yes.
MR DERBYSHIRE: Regardless of the proportion of a specific electrical good sold on Amazon by Amazon retail?
MR DE LA MARE: Yes and that's because electrical retailing undertaken by third-party retailers like John Lewis, et cetera, is a basket of goods operation. They don't set their prices -- they don't construct their price match promises by reference to particular products; they could set it by reference to who their competitors are for the basket of goods and that's why you see in the latest version of the John Lewis price promise, you see them denoting the category of Amazon goods they're willing to price match against, which is electrical goods.
MR DERBYSHIRE: Well, why do you think John Lewis, for example, might change its price match promise? What is it trying to find out?
MR DE LA MARE: Periodically -- and this was certainly, as I understand it, the reason they withdrew it altogether -- it becomes too expensive to maintain.
MR DERBYSHIRE: I suppose my point is: this is a very dynamic market and people are following each other's prices all the time.
MR DE LA MARE: Yes.
MR DERBYSHIRE: What they want to uncover is who their biggest competitors are, where they would lose business to.
MR DE LA MARE: Yes.
MR DERBYSHIRE: And I would say to you: the size of that competitor affects that potential loss.
MR DE LA MARE: But it's not transparent; that's the whole point. They don't

know -- we've been through this entire, very detailed, exercise of shielding the amount of volume that is actually traded, on the basis that it's commercially confidential. That whole argument of commercial confidentiality is entirely inconsistent with the idea that these volumes can't move the market. If Amazon is such a minor sales channel, with knowledge about the volumes, how could they move the market or produce the kind of significant harm the CRO requires?

The key point is it's like a prisoner's dilemma. The key point is the retailers don't know what volume Amazon is doing. They simply see that Amazon is their main competitor in certain market segments in which they're willing to price match and that's effectively what's happening.

MR DERBYSHIRE: Okay. Dr Pike became more aware of that phenomenon as a result of reinvestigating.

MR DE LA MARE: I can't speak to Dr Pike's awareness. All I can say is that he's obviously focused more attention upon that, in the reply report in Pike 3, in consequence of these criticisms or issues having been raised; and he's reconsidered the matter and reached the opinions he set out in that report. I mean, whether Dr Pike knew about the John Lewis promise before, I suspect he probably did. Most of the country know about it.

THE PRESIDENT: Oh, yes. That was my point.

MR DE LA MARE: No, I know that.

THE PRESIDENT: I think Mr Bankes has a question.

MR BANKES: A brief (inaudible).

I hear what you say about the strength of the arguments that Dr Pike puts forward. What I find nowhere in Pike 3, or the amendment to Pike 3, is what a truly independent expert might be expected to do, which is to stand back and say, "In discharging my duty to the Tribunal, I recognise this is a strong point, and this is a slightly weaker point". Everything he says is heavily on one side of the scales, and we are increasingly concerned to ensure that experts understand their duty to the Tribunal and are fully transparent about the things that cause them doubt, as well as the things that operate most strongly in favour of the party who first instructed them. And what I struggle with on Pike 3 is I see no evidence of that balancing and that impartiality.

MR DE LA MARE: Well, I understand the point you make, sir, but I would say that the language in Pike 1, in fact, is caveated. It's not expressed in categorical terms. This is what he proposes to investigate and he thinks is plausible. He recognises that certain of these assumptions -- I mentioned one of them, the role of bundled phones -- needs to be revised in the light of data as it emerges. What has happened is in relation to the off-Amazon sales, is that he has reconsidered, and in that area he has firmed up his opinions. I don't accept that there's some kind of universal, strong language used by Dr Pike in relation to how he's put his conclusions. Indeed, at other junctures, the defendants criticise him for the tentative nature of his language, or the caveated nature, or the conditional nature of his language. They can't have it both ways.

THE PRESIDENT: There's not very much that's caveated or conditional or tentative in Dr Pike's comments on off-Amazon, which is the main stay of the defendants' criticisms here. I have the same problem as Mr Bankes. I am concerned there really is very much not any evidence of objectivity in Pike 3, and it is Pike 3 that was served after the experts' practice direction.

MR DE LA MARE: Well, with respect, my Lady, I don't accept that, because what he's saying in Pike 3 -- read fairly, in my submission -- is that there is a highly plausible case here worthy of investigation. He's not committing himself to any particular number in the way that he has in relation to on-Amazon. The one per cent number given is just a sensitivity analysis. It's no more than that. It's saying that if some form of causation is established in this very large value of commerce sitting outside Amazon, the numbers will be very large indeed, and that's obviously relevant to --

THE PRESIDENT: But that's not the real issue here. The real issue is his methodology, not what the numbers might turn out on one assumption; and whether he's really grappled with the criticisms of the defendants in particular, whether he would need retailer data or information disclosure of some kind, and whether the assumptions that he makes are strong enough, and whether he would need to conduct a market definition analysis, and if so, what that would lead to. All he says, just taking the last one as an example, "Well, no, I don't do market definition analysis at this stage because there are lots of potentially related markets". Why is he reluctant to say? Surely he's looked at it. He must have considered the question of market definition. Why does he say nothing at all about what the most important potential markets here would be?

MR DE LA MARE: Because his analysis is that there is market power in play in relation to some variant of upstream market from the Apple sales, and that's all that's frankly required in the circumstances. A full market definition in a case like this, without access to the kind of data and materials that you need to undertake, would be fraught with difficulty. There are plainly many interlocking markets in play here, and working out which of the particular markets is the one triggered, and then affected by the triggering of an upstream market, is a very involved exercise. I mean, just look at the range of products that are in what he calls the cluster of Apple products. There will be potential for each of those requiring some form of market definition to assess the effects of intra-brand competition, et cetera, in those particular markets to assess whether or not there are differential prices of the Italian regulators and Spanish regulators found. It's not a simple exercise.

THE PRESIDENT: No. Are you really saying that in four years, he's not reached any, even provisional conclusions as to the markets that one might define?

MR DE LA MARE: I'm not sure "in four years" is a fair way of putting a claim that's been through a stop-start process of the kind this claim has. But what he has said in his report is that when he comes to look at the matter in full, with the benefit of the materials that will be available to him when he comes to write his report, he will do such market definition as he thinks, as an expert, is appropriate to be done by reference to the facts of the case. To be honest, to embark upon a market definition exercise without data, which is then only going to expose him to criticism for having looked at the wrong things, et cetera, doesn't strike me as being an unreasonable exercise (overspeaking).

THE PRESIDENT: No. There's no expectation that he would actually carry it out, but he doesn't even say what he would be looking for. He just says, in very vague terms, "I will be able to undertake a formal market definition exercise". But for what? To look for which markets, in what context? If he accepts that he would do it, and it's not wildly improbable that this would be required, why doesn't he even set out how he would go about doing that and what he would be seeking to do in that regard?

MR DE LA MARE: Because as he explains at 562, paragraph 31, he's reached a view, and I can't really take it any further than this. He's reached the view that in circumstances where he's reached clear conclusions about the forms of market power that are held by both Apple and Amazon, at this juncture, going on to do a full-blown market definition exercise in a preliminary assessment, in circumstances where the quantitative data available to him is limited only to the on-Amazon claim, is not required. That's why he says at 33:

"... I would note that this case involves many potentially related markets, not least as some retailers operate on a narrow product offering basis while others operate across [a much wider range]."

There's going to be complications on what the relevant retail market is and how, for instance, a pure Apple store outside the Apple ecosystem, an Apple specialist, interacts with the market definition. There's lots of complications. What he's saying, quite reasonably, is it's an extremely complex exercise, and I can pull back and just look at the existence of market power, because that's a clean optic with which to see the capacity of these agreements to create this form of harm. In my submission, that's a perfectly reasonable approach to adopt.

I'm conscious of the time, my Lady. I don't know if you have any further questions in relation to my submissions on that.

THE PRESIDENT: All right. Thank you.

MR DE LA MARE: I think that then that leaves the last topic. I'm going to pick up anything additional said about Pro-Sys challenges by Amazon in reply.

The last topic I was going to address before handing over to Mr Went is the class representative payments rate issue.

I don't need to tell you that Waterside is this Tribunal suggesting for the first time – it's authority is 2.2.

THE PRESIDENT: I'm aware of the judgment.

MR DE LA MARE: Suggesting that class representative rates should be set by reference to the levels of remuneration received for public sector work. I think the position between the parties is that Apple takes the view that the hourly rates in play here may be unobjectionable. It's the accumulation of hours, or the budget, that is the proper focus of inquiry. Amazon, at section 67 of their skeleton, page 76 of bundle A, seems to take a harder line.

THE PRESIDENT: Yes. Let's suppose that our starting point is, well, that's what the Tribunal has said in Waterside, and we need to consider whether we should apply that in this case, irrespective of what the parties argue, but at least Amazon is putting that in issue. So what's your response? Because what the Tribunal in that case is saying, well, we're not strictly bound by other decisions of the Tribunal. We need to take careful account of them, and if one were applying the standard comity rules, we would need to be persuaded that that was wrong in order to depart from it.

MR DE LA MARE: Ex parte (inaudible).

THE PRESIDENT: So is that wrong.

MR DE LA MARE: Yes.

THE PRESIDENT: All right. Would you like to make good that submission?

MR DE LA MARE: Yes. The skill set required of a PCR is a very demanding and ever-growing one, with respect. They must be skilled in conducting litigation and using professionals at all stages, including professionals to control costs. In an appropriate case, they're going to be required to have some degree of sector knowledge. They're going to need to have understanding of competition law and competition (overspeaking).

THE PRESIDENT: Well, let's put this bluntly. If you take the PCR's hourly rate, the PCR is paid considerably more than I am.

MR DE LA MARE: Yes.

THE PRESIDENT: Are you saying that the skill set of the PCR is so demanding that they should be paid more than a High Court judge?

MR DE LA MARE: Yes. I have no problem in saying that. I have no problem in saying that a comparison between someone who's chosen, for all kinds of admirable reasons, to undertake public service at the end of a successful private practice is not in a comparable position to someone conducting ongoing litigation with all the opportunity costs that has for their other professional activities for all.

THE PRESIDENT: Why not? Why not? Because this is effectively a public service. They're doing it on behalf of the class, and they're doing it on behalf of the class, most of whom will not be as well remunerated as they are, and they are taking away from the recovery to the class. Also, I should say, in some jurisdictions it is that there is no remuneration, aside from a fairly nominal honorarium for the class representative. We don't have that requirement here. But why are you saying that in order to attract the skills of somebody like Mr Le Patourel, it's necessary to pay them more than a High Court judge.

MR DE LA MARE: Because the relevant benchmark is not a price in the public sector. It's a price for an equivalent functional skill set in the private sector. The proper comparator, in my submission, is not a High Court judge, and that is a fairly loaded comparison in any event. The proper comparison is with someone like a professional trustee. A PCR is a species of professional trustee designed to represent the interests of the beneficiaries, the members of the class; and that type of job, particularly at a senior skill set, attracts the sorts of prices that PCRs have been charging. The list of things that PCRs are required to do, and particularly after Riefa and the knowledge of the funding market that's expected of ATE products, the expectation to have time available to allocate to a case as and when issues develop, set aside time in diary to fluctuate between working part time and effectively full time on issues as the case hits various milestones or key points, and the willingness after Merricks v MasterCard to potentially accept the risks and the insurance consequences that may entail of the job.

THE PRESIDENT: What risks if you were acting through a company in this case?

MR DE LA MARE: Disputes with insurers, my Lady, that's the --

THE PRESIDENT: What personal risk is Mr Le Patourel on? He's acting through an SPV.

MR DE LA MARE: He is. That doesn't necessarily insure him against all forms of allegation in negligence or of that kind. One only has to look at the Merricks litigation to see how things can go badly wrong. Then you have the problem that the pool of people actually qualified to do the job is small, and they are inevitably in the private sector.

THE PRESIDENT: But what do you mean that they're in the private sector? The same kind of person that may do that job may also do a public sector job, like a (inaudible) or a (inaudible) body.

MR DE LA MARE: I suspect, much like members of the panel and indeed much like Dr Pike and Mr Le Patourel, they may well have worked in the private sector and the public sector before arriving at a private sector role.

THE PRESIDENT: But this point about they are in the private sector; that's meaningless. They are somebody who has a skill set that could be used both in the private sector and the public sector, and if they were in the public sector doing any equivalent job, they wouldn't earn anything like £200 an hour.

MR DE LA MARE: Yes, but with respect, they're not in the public sector.

The second point that I'm going to make is that if a rule like this is going to be set up and applied both retrospectively and prospectively, then the Tribunal is in effect in some forms legislating. A rule of this kind should be made by practice direction or rule after appropriate consultation so that the Tribunal, before reaching a judgment like this, has all relevant evidence before it from all of the relevant interested parties.

To make effectively a hard-edged rule of thumb of the kind that has been set up by Waterside, and as my Lady is putting to me by way of decisional practice, is in my submission not the correct way to go about addressing this type of issue. If the intention is to leave the market, then there should be notice and opportunity to be heard in relation to (inaudible).

THE PRESIDENT: That could be said for anything in the Tribunal's decisional practice in this area. I mean, we have to obviously operate within the framework of the legislative regime, the Tribunal's Rules and the practice direction. But a lot of this, a lot of what we decide in every case, isn't governed by the rules and the practice direction; we have to make a decision as to the Tribunal's policy.

MR DE LA MARE: I understand that, but the basis for singling out class representatives when there is no such rule in relation to funders, to ATE insurers, and the profits that they may or may not make, to lawyers on the defence side and on the claimants side, in my submission --

THE PRESIDENT: Well, as you all know, in relation to cost recovery the Tribunal has said in various judgments that it will base the cost recovery from lawyers using the benchmark of the guideline hourly rates uplifted as appropriate. So we have addressed the question of lawyers' fees. We're looking at this, the fact that there isn't a similar statement in relation to funders is by the by -- that's different. That's a company offering effectively an investment service. Why is the Tribunal insulated from looking at the remuneration of class representatives when it is able to comment on the remuneration of the legal teams, and does so every time we issue a cost ruling, really?

MR DE LA MARE: My submission is: in a decision of this ilk, which is going to have an effect upon the pipeline of people willing and able to conduct this extremely complex job, the proper approach is consultation and rulemaking. That's my submission.

MR DERBYSHIRE: Can I just go back a moment to the end of your first point which is about: this is a private sector job, highly skilled, limited pool of people can do it, and therefore you have to pay the market rate or you don't get the people. On what basis do you say it's a private sector job?

MR DE LA MARE: I'm saying that the skill set that is required and the increasingly complex set of skills that you require, is increasingly likely to mean that the people willing to do that job are going to be from the private sector, and they're only going to be willing to do it if they're remunerated at a level that at least reflects a portion of their opportunity costs. The guideline rates that my Lady mentions, they were set after consultation, and that rather makes my point. It's just a basic feature of rule-making of this kind that there's consultation and notice, and an opportunity to cut your cloth according to the rules as you know them to be before you accept the job. So we do say with respect, and I appreciate it's not a popular view, there is no basis, no proper basis at this juncture, effectively after the event -- Mr Le Patourel having decided to agree upon the terms negotiated -- which --

THE PRESIDENT: It's not after the event, because we haven't certified yet. He's coming to the Tribunal and asking for certification. It's not after the event at all. I can see that you might be aggrieved if, having certified, the Tribunal were then to say, "Well, we're only going to allow this to continue". But in this case we are at the certification stage, same as in Waterside.

Can I just unpick your last response, because Mr Derbyshire was trying to unpick your comment about "this is a private sector job". Your response is not that this is inherently a private service, but rather, you said, that the skill set required means that you will only attract somebody at private sector rates. Has there been any exploration of whether, despite the fact that there are lots of people who are willing to accept lower rates, whether in judicial or quasi judicial roles, or in jobs like NEDs and serving on other public bodies, have you explored whether there is any possibility of attracting that kind of skill set, which in many cases is a very, very highly skilled job?

MR DE LA MARE: This is, with respect, why it is after the event, because when Mr Le Patourel gave his evidence in Le Patourel 1, as to why he took the job and the approach and the decisions he went through in deciding it, it was before Waterside. And he's explained after Waterside, in his second statement, why it is that he thinks that the rate he's asking for, which is considerably less than he's paid for his consultancy work, is a reasonable rate given the demands of the job and the opportunity cost of his lost consultancy earnings from doing this work.

THE PRESIDENT: But he's effectively making a decision to pay himself. Who is the person who is scrutinising whether that's an appropriate rate and seeing whether there might be somebody who could do it at a lower rate, with a skill set that would be comparable to many of the skill sets required for senior public sector appointments?

MR DE LA MARE: The rates that Mr Le Patourel charges, or is proposing to charge, is in the lower end of the band of charges that have been charged to date. The GCR survey and the average rates are accurate. The £243 average is substantially in excess of the £200 an hour index linked, up from £190.

THE PRESIDENT: That just tells us that historically, before anyone looked at this, people have been paid a lot. That doesn't answer my question, first of all, as to who is scrutinising that, because Mr Le Patourel is effectively the class rep, he's deciding to pay himself this.

Secondly, who has done the exercise of seeing whether it would be possible to get somebody with a skill set equivalent to any of those that you're appearing in front of today, at a rate that is considerably lower than you're paying Mr Le Patourel.

MR DE LA MARE: Ultimately, that is a matter that the Tribunal can regulate through setting rules. But in my submission, if you're going to be setting rates in that way, in such a firm and unequivocal fashion, you need to do so with the full evidence as to the availability of people from the public sector, the private sector, the willingness to act, et cetera, otherwise --

THE PRESIDENT: What is there in the Tribunal Rules that prevents us from doing this?

MR DE LA MARE: There's nothing in the Tribunal Rules --

THE PRESIDENT: So it's not there at the moment. So as in many cases where we don't have anything in the Rules, we have to decide what is right in the case before us, and that may influence the Rules going forward. But unless you're pointing to something in the Rules that prevents us from doing so, we have to decide in this case whether that's an appropriate amount. Otherwise you're saying we have to just accept what is presented to us and can't in any way regulate that.

MR DE LA MARE: I'm not saying that you have to accept whatever is presented to you. I'm suggesting that the position is analogous to the approach that the Tribunal takes in relation to funding agreements, which is to only interfere in relation to funding and funding multiples when the facts are so stark as to call out for such intervention.

In other respects, if the rates don't strike one as out of the ordinary for the rates that are otherwise charged by people providing those services, which is the relevant rule against which the rates should be tested, in our submission it's not right to intervene unless the expectations of the market have been entirely reset by the Tribunal effectively legislating to say you shall not be paid more than "x". That's our submission, and I detect my Lady doesn't like it, but that's my submission.

THE PRESIDENT: All right.

MR DE LA MARE: (Inaudible) hand it over to Mr Went at this point.

THE PRESIDENT: Yes. Can I just --

MR DE LA MARE: Should we take the shorthand break and --

THE PRESIDENT: Yes. Let me just make one point before we do. So I said first thing this morning we would like to know whether the outcome of the strike-out affects the funding position.

Also in relation to funding and a question for everyone, what do you say that we should do in terms of the outcome in this case if we consider that it's not appropriate for anyone, and that means anyone -- the funder, the ATE insurer or the lawyers -- to recover anything in relation to the Riefa case. We obviously ourselves can't rewrite the contractual arrangements between the parties but if that were our conclusion, and we are being invited to draw that conclusion by the proposed defendants so it's one conclusion that we might reach, what do you say are our options. That's probably a question for Mr Went, so I wanted to just raise that now.

MR DE LA MARE: I'm grateful my Lady. Is now a convenient moment for the short break?

THE PRESIDENT: Yes, it is. Thank you.

(3.11 pm)

(A short break)

(3.25 pm)

THE PRESIDENT: Just before you start, Mr Went, just to say in light of the discussion that we've just had, I think it would be helpful if tomorrow Apple and Amazon would each be able to just give us a hand-up setting up very briefly what they think the comparable rates or range of rates, or where we should be looking to find the relevant rates for this kind of work would be. Because on one hand we have Mr de la Mare just saying private sector rates. We've seen what they are, but if you are saying between you that Waterside is correct, then we need to know what are the comparables and what rates do those comparables generate, or what range of rates should we be looking at. All right. Thank you.

Mr Went, sorry.

Discussion re timetable

MR WENT: Good afternoon.

I just -- from a housekeeping perspective to start with, just in terms of timing, I think we're running a bit late. I suspect that I will need something like 35 to 45 minutes for my submissions, which takes us through to 4.15. So it's just in terms of then how we make up time, whether we do actually sit late this evening to try and make up that time.

THE PRESIDENT: All right. (Pause)

Just let me check with the CAT. Is everyone okay to sit a bit late? (Pause)

I'm proposing this: if we sit until 4.45, will that cause inconvenience to anyone in court?

MS ABRAM: I doubt that it will cause inconvenience to anyone, but it won't quite enable us to make up the time that would be missed and we'd have to sit until 5.00 today to make up that additional half hour, because that would involve Mr Went taking an additional half hour if he went to court.

THE PRESIDENT: I think not, because I think he was due to finish at 3.45.

MS ABRAM: That's right.

THE PRESIDENT: And he's going to go until just after 4.00.

MS ABRAM: If that's the case, then 4.45 would --

THE PRESIDENT: But if he goes an extra half an hour, then we'll need to make up half an hour, so I was wondering in that case we could sit until 4.45 today and then we could maybe start at 10.15 tomorrow, if that's the case. Would that be acceptable to everyone?

MR WENT: Yes, my Lady.

THE PRESIDENT: All right, let's do that then. We'll sit until 4.45 today and we'll start at 10.15 tomorrow.

Opening submissions by MR WENT

MR WENT: I'm grateful. So it falls to me to deal with the balance of the authorisation condition. We deal with authorisation in the claim form, at paragraphs 130 to 133, that's at A6, 135. That has cross-references to the first statement of Mr Le Patourel as well as the litigation plan and the notice and administration plan exhibited to his first statement.

We then deal with authorisation at paragraph 21 of our skeleton, which has references to both the first and second written statements of Mr Le Patourel. That's at 8 to 12. Also, just for reference at this stage, we set out the relevant legal principles at paragraphs 41 to 42 of our reply.

THE PRESIDENT: In a nutshell, what issues are you dealing with? Is it just funding?

MR WENT: It's, in essence, dealing with the various issues that have been raised by the defendants. So it mainly touches on funding issues.

THE PRESIDENT: So that's the Riefa point, as in whether you recover --

MR WENT: That's the main point that I'm going to be dealing with, exactly.

THE PRESIDENT: Is there any other issue that you're going to be dealing with?

MR WENT: I was going to touch on a couple of further points that we made, in terms of the consultative committee. There's the third-party cost scrutiny point. We --

MR BANKES: (inaudible) a determination by funder point?

MR WENT: I can deal with that. I was potentially going to deal with that in reply tomorrow.

THE PRESIDENT: So on your shopping list today, you've got recovery of Riefa costs, consultative committee, third-party costs, scrutiny. Is there anything else?

MR WENT: I was going to touch on the overall budget for the PCR; I don't know whether you want to go further on that, but I was planning to touch on that. I obviously also then have the couple of points that you've raised, both this morning and this afternoon.

THE PRESIDENT: Yes, those are both about funding.

MR WENT: Yes, exactly.

So I was going to first set out in broad overview the basis on which Mr Le Patourel approached the decisions he needed to take when deciding at the outset whether and how these proceedings should be brought and then delve a bit more deeply into those decisions and that's to do, as I said, with complaints raised by the proposed defendants against Mr Le Patourel from an authorisation perspective.

Just briefly, in terms of the overview -- so, Mr Le Patourel, his background in telecoms, broadcasts and internet regulation with a focus on competition and consumer protection issues, is very passionate about the collective proceedings regime and seeking to obtain redress for consumers harmed by the Competition Law breaches, included in this case. Paragraphs 43 to 48 of his first statement deal with that. That's A8, 339.

THE PRESIDENT: Does that passion extend -- okay, you might at some point address us on whether that extends to accepting a lower fee or whether he's just saying he will only do it at the fee that he's charging.

MR WENT: Yes. As is often the case, he was approached by the law firm about being class representative and as he notes at paragraph 19 of his first statement, he immediately appreciated the unique circumstances in which he found himself. That's at A8, 330.

He also noted the Tribunal's comment at paragraph 6 of the Riefa PTA order, that any newly constituted PCR would need to take a fresh decision as to whether to bring these proceedings and Mr Le Patourel therefore set out taking that fresh, independent decision and ensuring that the various arrangements in place for the proposed proceedings -- individually and collectively -- were in the best interests of the proposed class.

As he explains at paragraphs 24 to 27 of Le Patourel 1 -- that's at A8, 331 -- he initially satisfied himself as to the merits of the claim and that the level of distribution at the back end would make it worthwhile to bring proceedings. Distribution has already been touched on.

Then at paragraphs 28 to 29 of Le Patourel 1 -- that's at A8, 333 -- he next needed to decide on whether he should continue with the same legal team and expert. As he mentions at paragraph 69 to 70 of his second statement -- that's A19, 592 -- he did his own due diligence on that and reached the view that it was in the best interests of the class to continue with the same legal team and expert and in reaching that view, he took into account in terms of the lawyers, the work product built up over several years and the significant institutional knowledge -- that's at paragraph 28 of Le Patourel 1 -- he reasonably formed the view that it would result in significant delay and additional cost in seeking to proceed with a new legal team or indeed seeking to build a new claim, even if that was possible and that's mentioned both at paragraphs 28-29 of Le Patourel 1 and paragraph 70 and then 80 of Le Patourel 2 -- that's at A19, 592 and 595 -- but I will come back to that element in a moment.

And then at paragraph 89 to 111 of Le Patourel 1 -- that's A8, 358 onwards -- Mr Le Patourel explains in great detail the competitive tender for funding organised by the specialist broker firm Extern and overseen by him and he believes that he secured favourable terms -- the most favourable terms -- for the class in that regard.

The tender process is also described in detail at paragraphs 20 to 44 of Astill 1 -- that's the independent broker of Exton -- that's at A10, 388 onwards -- and just to note that I'll return to this, you already have the point, I think, that the most favourable funding deal available was with the existing funder and that was despite the fact that the funder insisted on being paid its outlay in the Riefa proceedings and a return on that outlay and we've referred to that outlay as the Riefa drawn funds in our submissions and our written submissions; I'll do the same now.

The overall budget agreed for these proceedings is just over £19 million -- that's paragraph 22 of Le Patourel 1 at A8, 359 -- and you can also see that in the amended

LFA at point 8 at B14,781 and no concerns have been raised as to the adequacy of that amount.

THE PRESIDENT: Is there some easy place where we get from the overall budget for these proceedings to the figure of -- I think somewhere like 120, which you think is that going to be the total costs and disbursements?

MR WENT: That's in Campbell 2. So in Campbell 2 there is set out various scenarios. So I can give you the reference.

THE PRESIDENT: All I want is -- is there a place where we've just got it on one page that just does the maths?

MR WENT: Yes. So it is at --

THE PRESIDENT: I've got Campbell 2.

MR WENT: Page 626.

THE PRESIDENT: Page 626. Yes, okay, that just gives the figure. Is there anywhere that shows the breakdown of the 128?

MR WENT: We haven't broken it out as between -- if you're asking about the break out between funders, insurers and lawyers, it's not broken down in that basis; we don't have that in the bundle.

THE PRESIDENT: Okay. Maybe you could just give us a hand-up tomorrow which just shows the breakdown, as in how we get from the 19 up to the 128 or higher figure.

MR WENT: Yes, we can provide that.

MR BANKES: So could I ask a separate question? 19 strikes me as a fairly full number for a claim of this type, yet you tell us there are synergies from using the same team and everything else as Riefa. Can I see a number anywhere which quantifies the savings that have been made by virtue of recycling the Riefa product, which would otherwise be in addition to the 19 million?

MR WENT: I think I was going to go through the breakdown of the Riefa drawn funds;

you can see how those are made up. That will of course show what was spent in the Riefa proceedings from a legal perspective, but from other perspectives as well.

I think all I can say is that Mr Le Patourel in forming his view is retaining the same legal team. He formed the view that it would be likely more expensive to start with a new team and I was going to take you to that evidence, but I can't show you any specific --

THE PRESIDENT: You haven't done a calculation of how much you think -- well, he hasn't done a calculation of how much he thinks he'll save?

MR WENT: Well, if I may, I will come to that in a moment. I will explain the rationale behind the thinking on that; hopefully that may become a bit clearer.

THE PRESIDENT: But just to answer Mr Bankes's question, there's not a figure put on it as to how much will be saved.

MR WENT: No, there isn't, but there is more explanation that I'll come to -- when I come to that -- if I may. (Pause)

So we have the overall budget.

Then Mr Le Patourel also considered it was in the best interests of the class to continue with the existing ATE insurance policy of £20 million, but it would be prudent to take out an excess policy as well; that was on top of the existing cover, so the top up takes up to £28 million, but bearing in mind that £3.8 million has been paid out under the policy for adverse costs and the Riefa proceedings. So in terms of the existing cover, it's just over £24 million. That's dealt with at Le Patourel 1 at paragraph 77 to 88 -- that's at A8, 353 -- and then also in the second statement at paragraphs 65 to 67.

THE PRESIDENT: Yes, I think in the handout that you gave us which breaks it down, I think you need to separate how much is for these proceedings and how much is attributable to the Riefa proceedings.

MR WENT: Yes, you'll have a sense already from that and the numbers I come to in a moment in Campbell 2, but we'll certainly provide that in the handout.

Just in terms of the broad overview, I was just going to also say throughout the negotiations which took place in the first half of last year, Mr Le Patourel had recourse to advice from Hausfeld on independent costs, counsel and his consultative panel. That's at paragraph 97 of his first statement, A8, 361. He also took advice from the law firm Fox Williams on the capacity in which it would be most appropriate for him to act as PCR and that's at paragraph 34 to 35 of his first statement at A8, 336.

So the main challenge raised as to the authorisation under rule 78.1 is that Mr Le Patourel has not been sufficiently robust and independent because the PCR has agreed to take on cost liabilities in respect to the Riefa proceedings. That's another -- that part of the challenge.

I want to look first at precisely what the costs were from the Riefa proceedings and then I'll show you how they came to be dealt with in the funding agreement before moving on to the ATE policy and then finally the arrangements with the legal team.

So first looking at precisely -- the costs were from the Riefa proceedings. If we can turn up Campbell 2 at A 21, 620. (Pause)

So 14(a), you can see the overall amounts of funds drawn in the Riefa proceedings were just over 4.5 million.

It's then noted at point (b), however -- just going on to the next page as well -- the PCR derives continuing benefit in these proceedings from those drawn funds.

And then you can see at point (c) that just over 2 million of those funds represents the first deposit premium for the primary ATE policy, which has been transferred to these proceedings. So the PCR has a continuing benefit of that policy, paid for as part of the Riefa proceedings.

And then at paragraph (d), you can see it said that a large proportion of the balance of the 4.5 million -- just under 2.5 million -- relates to work that's been re-used in these

proceedings. That includes the first expert report of Dr Pike, the claim form and the service out application.
And then moving down to subparagraph --
THE PRESIDENT: Well, just before you move on from that, are you saying that that wouldn't have been available if Mr Le Patourel had instructed a different legal team, for example? Because he's chosen to keep the same SPV, but just rename it. So that's work product that was done for the Riefa SPV, which is the same SPV in this case. Could he not simply have used that?
MR WENT: At the moment, the only point I'm making is that there is work product that was deployed in the Riefa proceedings that is being reused in these proceedings. I'll come on, if I may, in a moment to Mr Le Patourel's considerations about the extent to which there might have been cost implications in moving to a new (inaudible) notwithstanding the existence of that work product. I will come on to that, if I may.
Then over the page, still in point (e) though, you can see that just over 1.5 million of costs relate to work that's been redeployed from these proceedings. That was the point I was making.
MR BANKES: One of the appendixes to Le Patourel 1 was a budget. Where is that in the bundles?
MR WENT: The budget is at B 790.
MR BANKES: Thank you. (Pause)
MR WENT: So you can see in the top line of that -- it's rather small, I'm afraid -- but you can see in the top line of that the total Riefa budget drawn down, and then you've got the various costs. If you look right at the end on the right-hand side, you see the figure we've just been talking about of just over 4.5 million.
MR BANKES: You've just quoted Campbell 2, that the economists costs were £612,000. Yet on this piece of paper, in the economists' column, which is six or seven

from the right, it's only £510,000.
MR WENT: Yes. Certainly, that's without VAT.
MR BANKES: Is that the difference?
MR WENT: That, I think, would be the difference.
MR BANKES: Yes.
MR WENT: I was just going to mention, just for reference, there's actually a mistake in the skeleton about the amount of redeployed costs, our skeleton at paragraph 35(1), that's at A 2, 24. The correct figure is the one in Campbell 2, and rather than that representing 25 per cent of the (inaudible) as stated in our skeleton, it represents 34 per cent, just to make that correction.
But we say it's artificial simply to view the Riefa proceedings as entirely separate and unrelated to these proceedings, which of course are brought by the same PCR reconstituted and on behalf of the same class. In fact, if you look overall, including the initial deposit, insurance deposit, 3.6 million or 80 per cent of the 4.5 million in costs relate to insurance or work redeployed in these proceedings.
I'd like next to show you how these costs were dealt with when assessing what was the most favourable funding deal. We can turn back to bundle A, 8/359. This is Le Patourel 1, in paragraph 92. Well, that actually just repeats the funding budget we've seen. You can also see the Riefa drawn funds mentioned there as well, about halfway down. But if we go on to paragraph 96 on page 360, Mr Le Patourel notes in the second and third sentences there that from 4 March 2025, until the conclusion of the funding and insurance litigations, that he led all the negotiations, providing instructions to Exton and Hausfeld. He spent 195 hours on the funding and tendering process, insurance matters and subsequent negotiations. Mr Warner, who's also on the consultative panel, provided a good deal of input and assistance to him as well.
Then over the page, paragraph 97, as I've mentioned already, explains that throughout

the negotiation process, as well as receiving advice from Hausfeld, he had input from Exton, independent costs counsel, and his consultative panel.

Just pausing there, at the time, his consultative panel included David Greene, a senior commercial litigation law firm partner, and Leslie Perrin, who has 35 years of experience in litigation, both as a solicitor and as a litigation funder. As a solicitor, he was head of litigation for a City law firm. You can see those details in the statement at paragraph 53, at A 8/344.

Mr Le Patourel also mentions at paragraph 37 of his statement that he confirmed early on that he'd be able to take advice from Mr Perrin, given his experience on funding in particular. That's at A 8/336.

Then just continuing for the moment, paragraph 98 notes that there were nine funders during the tender initially, in addition to the original funder, but only one of those funders ultimately expressed interest and provided indicative terms.

Then paragraph 100, (inaudible) down, makes clear in the first couple of sentences that Mr Le Patourel was focused on securing the best funding terms available without any bias in any direction.

Then if we can look at the main disadvantage of the indicative terms provided by the competing funder, that's at paragraph 102(b).

THE PRESIDENT: Yes. Slightly more expensive and significant extra fees, including a proposed adverse costs indemnity, which was more expensive than you had already incurred in relation to the primary policy.

MR WENT: Yes. In terms of the funders' terms, for the competing funder, it was mainly a function of the fact that the competing funder multiple is calculated on the total litigation budget rather than by reference to deployed capital drawn funds.

THE PRESIDENT: And (e).

MR WENT: Exactly.

THE PRESIDENT: Requirement for reduced rates of the solicitors and counsel team, which weren't acceptable. So he would have had to look for a new solicitor and counsel team.
MR WENT: Yes, yes. So you have the points, and you've already talked about the insurance being more expensive with the competing funder.
THE PRESIDENT: I note that the competing funder then withdrew its offer anyway, when Exton went back to it.
MR WENT: Yes. So at paragraph 106, as you say, the competing funder hadn't improved its offer, despite attempts obviously by the broker to get the funder to improve their offer on a number of occasions, and withdrew the offer.
Then if we can look at paragraph 108, if I can just ask you to take a look at that.
THE PRESIDENT: So he stopped with the (inaudible).
MR WENT: Yes, exactly, as the most competitive, offering the most favourable terms. I also just want to pick this up briefly in Mr Astill's evidence as well, (inaudible) through that. It's at A 10/388, from paragraph 20 onwards. This deals with how the broker dealt with the tender process, and actually, over the page at paragraph 24, Mr Astill explains, he was initially engaged by Mr Warner and then a list of nine funders were put forward to approach, in addition to the searches. Then paragraph 25 explains that it was an atypical starting point, inasmuch as the key commercial terms of the Riefa LFA were made public during the Riefa proceedings, and the funding community would have been aware of that.
Paragraph 26 says the two funders immediately declined, and the remaining seven were provided with further information on the claim.
Paragraph 27 deals with Mr Le Patourel being added to the engagement letter for the broker. Then 28 notes that only one of these funders (inaudible) to be offered the terms, as we've seen.

Then paragraph 29 to 31 explained the negotiations with the (inaudible) and the fact that it was seeking to earn a return on the Riefa (inaudible) fund, as we know.
Paragraphs 33 to 34 deal with the fact that the competing funders' terms were more expensive, as we've just seen. Then paragraph 36 notes, the competing funder's offer was also unfavourable because of the adverse costs covers, as we've seen.
Paragraph 37 explains, the competing funder's terms (inaudible) period of exclusivity as well and the broker provides what were the perceived difficulties around that.
Paragraph 39 then notes that in the months that followed Exton, they engaged with the competing funder across a number of issues, and that included the multiple on the committed capital rather than drawn funds and the proposed arrangements for adverse costs cover.
Paragraph 41 notes that Exton pointed out to both funders areas of improvement required in order to be competitive, and 42 shows that negotiations with the competing funder didn't result in any material improvements, and as we know, the funder eventually withdrew.
Then if you just look at paragraph 44 of his statement, Asertis was offering in (inaudible) the best terms available in the market.
So we say, ultimately the evidence is clear that the tender was run and the PCR considered with advice from various advisers that it had achieved what it thought was the most favourable deal for class members. The broker's evidence also says the most favourable deal available was secured, and we say that should be the end of the matter.
MR BANKES: Here's what troubles me: two of the three of us were named on the costs judgment in Riefa -- you may be going to address this on this -- in which we said it's difficult to see how it could possibly be right for the costs which have been incurred in Riefa to be transferred to a future claim. So it's all very well negotiating a generous

LFA, but if that LFA faces a substantial obstacle to certification, it's not really the best offer in the market, is it, because it must require a significant caveat on its use, on its effectiveness. And there's no evidence in any of the statements I've seen in which Mr Le Patourel tells us, "Well, I'm aware there was this additional obstacle related only to this funding agreement, and I calculated as follows".

MR WENT: Well, I think Mr Le Patourel's evidence is that the broker went out and did a competitive tender. The cheapest terms available from any funder available were on the basis that that funder, at least contractually, would be entitled to its outlay in the Riefa proceedings and a return on that. That was simply the cheapest deal that was available, even taking into account that the funder was insisting on those terms. That was the cheapest deal. It wouldn't have been rational for Mr Le Patourel to go with the more expensive funder, notwithstanding that point. We obviously accept what you say about what was decided in the cost judgment. We certainly, in terms of, if you like, the wasted costs in relation to the Riefa proceedings -- are certainly not suggesting there's any argument there -- but we do at least suggest there may be an argument, sort of recoverability, as to any material work product that's been reused, redeployed, in these -- sort of service or use in these proceedings.

THE PRESIDENT: You just said that you weren't suggesting that there was any argument in relation to the wasted costs in the Riefa proceedings, but those are wrapped up, as I understand it, in what you are seeking us to certify.

MR WENT: Well, at the end of the day, all of this is subject to the Tribunal's control, its settlement and final judgment.

THE PRESIDENT: But, hang on. You're coming to the court as the advocate for the PCR, and you just said, in relation to wasted costs, you don't think that there's an argument there. So why are they included in what you're asking us to certify?

MR WENT: Well, as I said, in terms of the funding deal, this was the cheapest deal on the table. The funder was insisting on being entitled to have its outlay from the Riefa proceedings being repaid, and an outlay on that. That was what was insisted upon, and that was the cheapest deal that was available to Mr Le Patourel. I'm just making --

MR BANKES: And you say we should override our distaste and what we wrote in a previous judgment, and simply certify because it's the cheapest?

MR WENT: Well, I don't see why -- it would have been irrational for Mr Le Patourel to go for the more expensive funding deal just because of this issue, particularly when at the end of the day, these costs are controllable and will be controlled by the Tribunal on settlement or at trial.

THE PRESIDENT: But why can't we control them now? I mean, if you accept that there's not really any argument for transposing over the wasted costs, why can't we grasp the nettle and say now that we don't think that it's appropriate, and if we do so, what is the outcome? We obviously can't certify, because that's not the package that's being put to us. So what can we do?

MR WENT: Well, just to be clear about what waste -- there's obviously I said the wasted cost. I pointed out that it's around 80 per cent of the cost in terms of the Riefa outlay related to work that's been redeployed, and of course the insurance premium is making up a big part of that amount and that policy is being reused in these proceedings. So that that was paid for on the Riefa proceedings but that policy carries over into these proceedings.

MR DERBYSHIRE: But as I understand it, they also are going to recover the 3.8 million -- under the funding package that you've got in place, were you to succeed, you would apply to us to repay them the 3.8 that they paid out in Riefa?

MR WENT: Yes. There's --

MR BANKES: So it's not just the LFA that was on favourable terms, there was a separate negotiation for the ATE insurer, and that also reached the same --

MR WENT: Well, I was going to come on to the ATE insurance at the moment because it is important to break this down properly and see what the implications are in relation to those drawn funds.

MR BANKES: Will you also talk to us about the (inaudible) negotiations with the lawyers?

MR WENT: I'll take you to the evidence on that, yes, indeed. So let me move to the ATE insurance. So the proposed defendants criticised the PCR for having taken on the liability to repay the insurance, the adverse costs of 3.8 million paid out in the Riefa proceedings. That's in Apple's skeleton at paragraphs 60 to 63. That, of course, was a function of the set of maintaining the existing ATE policy. I think there's also a suggestion there should have been a tender exercise conducted in relation to the insurance.

Now, the evidence is that even assuming it might have been possible to obtain brand new insurance, it would have been more expensive. That's the evidence from the independent broker at paragraph 46 of his statement at A 10, 395, and it's the reason given by Mr Le Patourel maintaining the existing policy at paragraph 88 of his first statement. That's A 8, 358, and paragraphs 83 to 84 of Le Patourel (2). If we can turn that up just very briefly, it's at A 19, 596. If I can just ask you to read, starting five lines into it where it says "I considered that".

THE PRESIDENT: Yes.

MR WENT: So he took into account the fact the existing policy would require repayment to the insurers of the adverse costs paid in the Riefa proceedings, including that it was still the better course for the class to maintain that existing policy, because the new policy would have been more expensive, and because it would have involved paying a fresh deposit premium. Then at the end of that paragraph he says the fresh

deposit premium would also have attracted additional funding returns.
If we just look very briefly as to how the policy is priced. That's at B15, 830. (Pause) So you can see the various premiums there. There's the first deposit premium, which we were talking about, that's without the tax. You can see the second deposit premium payable on certification if that occurs. Then the table showing the contingent fees, you can see those levels. We will provide overnight the proper breakdown of all these elements. Then there's also the excess policy which is structured in much the same way.
So to replace the existing policy already providing cover would have meant in effect writing off that 2 million initial deposit premium despite the fact that had already been paid, and despite the fact that the cheapest funding offer on the table covered that payment. With a new policy there would then have been more expensive initial deposit premium needing to be paid and importantly, as we've seen from Mr Le Patourel, and he appreciated this, the funder’s multiple on that new deposit, as well as more expensive second deposit premium and a funded multiple on that would be payable as well. (Overspeaking)
MR BANKES: Only from the date of drawdown, not from the date of Le Patourel drawdown.
MR WENT: Well, yes, but let's just assume that we're taking out a new policy with a new initial deposit premium costing another £2 million -- I think the evidence is it may be more expensive than that -- that would then have attracted the funder multiple. Let's just assume we're looking at five times, for example. I can show you where the actual multiples are as well, if that's helpful. But that of course would mean that there would have been £10 million to repay. As I said, the evidence is the new insurance would actually be more expensive. So, not just the initial premium, but also the contingent premiums as well. So we say it becomes very clear very quickly that

maintaining the existing policy with initial deposit premium already paid, despite having a liability to repay the £3.8 million, was by far the cheapest option, so in the best interests of the class --

MR BANKES: I just want to test -- forgive me for interrupting you again. The £2 million premium that was paid on the Riefa policy was part of the drawdown costs of 4 million, so the repayments to the funder on that 2 million accumulates from the date of the Riefa drawdown. And as we go through time the multiple increases.

MR WENT: Yes, that's right.

MR BANKES: So are you telling me that it was more expensive to get a new policy drawing down fresh funds on which the lower rate would have applied initially, although it would have ratcheted up, than to continue to repay that 2 million with all the additional repayment premium that accumulated on.

MR WENT: Yes. Yes, I mean --

MR BANKES: Where do I find that it's worked through?

MR WENT: You won't find that laid out. What I'm saying is that if there was a new deposit premium paid, the funded multiple on that would very quickly draw what it is costing to reuse the existing policy. I'm just saying that that just stands to reason as a matter of logic. Yes.

We can certainly provide some notional calculations if that would be helpful. I've already made the point about the supervisory jurisdiction of the Tribunal at the end of proceedings. There's also -- I'll come back to that if I have time.

Just very quickly on Apple’s skeleton at paragraph 60 to 61, if you can just turn to that actually very briefly, it's at A 3, 49. I just want to make sure that there's no misunderstanding on this. So it says that the evidence was that there were early indications that if other insurers were to offer policies, (a) higher premium percentages would be required, and (b) a new deposit would need to be paid.

Then paragraph 61 over the page says that these indications are not based on any testing of the market and appear divorced from the decision-making process by Mr Le Patourel.

If we can just turn to what the position was briefly at paragraph 46 of Astill 1, that's at A 10, 395. So paragraph 46, Mr Astill's evidence is that there are early discussions that the new policy would involve higher premiums. Then separately, in a new sentence, he says that if new policy was required, additional deposit premium would have been due on inception, which would have been a significant sum. So in Mr Astill's mind, there was nothing provisional about that second element. As I said, we've seen the significant impact of that element.

Also, it's not correct that these two elements were divorced from Mr Le Patourel's decision making. I think Apple in their skeleton cite paragraph 77 to 80 of Mr Le Patourel's first statement. However, the relevant paragraph for this aspect is paragraph 88 of his first statement. That's A 8, 358. Then also paragraphs 83 to 84 of the second statement at A 19, 596. So, Mr Le Patourel says he was aware that it was likely to be cheaper to stick with the existing policy for these two very reasons.

So we say that Mr Le Patourel has secured the cheapest funding terms and also cheapest ATE costs that were available. Those are by far the two largest liabilities for the class -- the potential liabilities. The funds return and insurance contingent premiums account for almost 95 per cent of the overall potential success for us. As I said, we'll provide some calculations on that overnight.

In terms of the lawyers CFAs, so the analysis applied to the ATE insurance applies analogously as to whether it was reasonable for Mr Le Patourel to retain the same legal team. The starting point again is that the funding deal, obviously with the existing funder, was the cheapest one available. It includes money already spent that's been reused in these proceedings.

As to whether to use existing legal team or switch to a different one, I think it's helpful just to look at the passages from his two statements. So if we turn first to, Le Patourel (1), paragraphs 28 to 29, that's at A 8, 333.

THE PRESIDENT: So, can you help us? So am I right in thinking that the partner from the Hausfeld legal team or partners have changed?

MR WENT: Yes, that's correct.

THE PRESIDENT: So how many partners were there to start off with for Riefa?

MR WENT: There was one that I was aware of. There were two --

THE PRESIDENT: Two partners.

MR WENT: Yes.

THE PRESIDENT: Okay, who were they? Because I remember Mr Kadri, I think.

MR WENT: So it's Ms Jazrawi and Mr Kadri.

THE PRESIDENT: Right. So those were the original partners?

MR WENT: That's right, and it's now Mr Campbell.

THE PRESIDENT: Right. So you haven't retained the original partners. So in terms of what's in the head of the original partners, that's gone. The associates working on the case are the same?

MR WENT: Yes.

THE PRESIDENT: All right. Did Mr Le Patourel explore the additional costs that would be required, or wasted costs if you like, if he were to take the work product, which of course the SPV should have been able to retain, and some of it was in the public domain anyway, and go to a new law firm.

MR WENT: I'll just make sure I've got the paragraph correct. I'll just take you briefly through that. So in his second statement, paragraph 78 at A 19, 595, so here it explains it's sub-optimal that the legal team could receive deferred fees contingent on the list for work that couldn't be redeployed in these proceedings. He says --

THE PRESIDENT: So what was the work that couldn't be redeployed, because any of the substantive work product was owned surely by the SPV?

MR WENT: No, I -- what we're talking about there is the work that, in terms of from the reply to the defendant's responses and then the two hearings that occurred and then the consequentials after two hearings -- so that's work that isn't being redeployed.

THE PRESIDENT: Oh, I see, so he's saying that there are some wasted costs.

MR WENT: Yes, exactly.

THE PRESIDENT: Then the benefits of preserving the existing work product; what does that mean, because he could have just taken the work product, taken the relevant witness statements, taken the skeleton arguments, taken any of the economic reports and gone to a new legal team?

MR WENT: So I think what he says at paragraph 80 is that he thought that replacing the legal team would have created a material cost and execution risk with no assurance an alternative team would be able to use existing work product as efficiently, reduce the overall burden of action contingent costs on any --

THE PRESIDENT: I know what he says, but I don't understand --

MR WENT: That was his reason.

THE PRESIDENT: Yes, but I'm asking you to explain that. I mean, why couldn't he have taken all of the existing documents in the bundle and gone to a new set of solicitors and counsel, given that in any event, the two partners who were running the case at Hausfeld aren't continuing? They've gone elsewhere, I think, haven't they?

MR WENT: He's not saying here that the new law firm -- if that's what Mr Le Patourel decided to do -- could not use any of that work product. He's saying it couldn't be used -- in his mind, it couldn't be used as efficiently.

THE PRESIDENT: Why?

MR WENT: Well, in terms of the institutional knowledge, the work that --

THE PRESIDENT: The institutional knowledge on the partners has gone.

MR WENT: The partners, but the associates are --

THE PRESIDENT: Are they all identical? And in terms of the work product for this certification --

MR WENT: It is the same, I'm told.

THE PRESIDENT: But what's the institutional knowledge that was required? I mean, you've put in the claim form, which is almost identical; you've put in witness statement from Mr Le Patourel -- well that had to be new anyway; you've got economic evidence, almost identical; skeleton argument. They are being drafted by Hausfeld.

MR WENT: Yes. I think the simple answer to that is that Mr Le Patourel said -- in terms of the evidence -- that he took the view that any additional cost with the new law firm, it didn't just involve -- well, all I was going to say is it didn't just involve the potential new cost of the law firm, but then to extend there were additional costs then any multiple on that as well --

THE PRESIDENT: No, but I'm just looking at paragraph 80. I don't understand paragraph 80. I don't understand what it was that couldn't be done as efficiently by taking the existing work product and moving to -- let's just concentrate on Hausfeld for the time being: what was it that was a cost saving by staying with Hausfeld, given that the essential documents were the same? (Pause)

MR WENT: So --

THE PRESIDENT: Sorry, and given that the partners were gone anyway? (Pause)

MR WENT: So -- because in terms of reading into the --

THE PRESIDENT: Okay, a bit of course of reading in.

MR WENT: And getting comfortable with the sense of the claim as well.

THE PRESIDENT: All right. But they would have to -- he would have -- if he was going to move this to a new legal team, they would have had to agree to take on the claim, so they would have had to get comfortable with it anyway. Did he go to any other legal team, or did he just take Hausfeld as presented and decided it was best to stick with them?

MR WENT: His evidence is that he considered these issues.

THE PRESIDENT: That's not the answer to my question. Did he put out to tender to any other legal team? Did he speak to any other lawyers?

MR WENT: No, there's no evidence of any tender and there's no evidence of him speaking to other lawyers.

THE PRESIDENT: So he didn't get -- for example -- quotes from another firm of solicitors for taking over the case?

MR WENT: No, there's no evidence of that.

MR BANKES: And there's also no evidence that he attempted to negotiate with Hausfeld, rates which did not include paying Hausfeld the foregone conditional fees on Riefa, is there? So Hausfeld is going to pick up -- if this action is successful -- the monies that they would have got had Riefa been successful and there's no evidence that I can see that he negotiated that point; he simply agreed with Hausfeld that they would be rewarded for failure.

MR WENT: Yes, but there's no evidence on that. What he says is that he thought it was suboptimal, and --

MR BANKES: He said it was suboptimal? He didn't say that it was suboptimal that they should get the money, he said it was suboptimal --

MR WENT: He says that it's suboptimal given that some of that work could not be substantially redeployed in these proceedings.

MR BANKES: So if he saw it as suboptimal, what did he try and do about it?

MR WENT: Well, so in terms of evidence, he thought it suboptimal. He thought, in his mind, it was likely to be -- there was likely to be some cost associated with moving to a new legal team; that was his thinking.

THE PRESIDENT: He didn't ask any other legal team to give him a quote for those costs.

MR WENT: No.

THE PRESIDENT: So what was the basis of his thinking that it was going to be a greater cost if he didn't actually ask anyone else for a quote?

MR WENT: Well, what he says is: it was an inference. What he inferred from the circumstances -- that a new law firm wouldn't necessarily choose existing work product as efficiently -- that's his evidence and then he thought it was suboptimal.

But in addition to that, he took the view that any additional costs that he thought might become payable with a new legal team, there would then be a fund of multiple on those costs. So it doesn't take much costs -- when you start applying the five times multiple, for example -- for it not to be any cheaper to have moved to a new legal fund, but bearing in mind that from a funding perspective as well, all these costs have already been paid for. He took the view that this could be controlled for a settlement and final judgment, but by the Tribunal.

He accepts that the Tribunal may decide that none of these costs should be repaid; he accepts that and that's in his evidence. So he thought this could be controlled.

So in a sense, if he's taking the view that the Tribunal may decide at the end of proceedings to write off all these costs, in a sense, Mr Le Patourel is getting these costs -- sorry, the work that's already being used has been redeployed in these proceedings and obviously there was a significant amount of work that was done in those proceedings that's been redeployed; we've seen the figures.

In effect, if all of that is not allowed at the end of the day, then, in effect, he is getting that for free; he doesn't have to go to a new law firm, who may then incur additional costs to which the multiple would apply. In effect, that the Tribunal's control over these costs at the end of the day may mean that they're written off, in any event.

THE PRESIDENT: Okay. Well, look, we're at 4.20. I think you need to tell us what is the outcome if we say we're not having that right now and we're not going to leave it to the end of the proceedings.

MR WENT: I think I'll need to take instructions if I may, maybe overnight, and --

THE PRESIDENT: All right, okay. I mean, I'd hope that you would be able to address this now, but if you don't have instructions on that, I think you'll need to come back.

MR BANKES: There was a related question this morning, which I did understand you were going to answer, which is if we certify only on the on-platform claim, what impact would that have on the funding?

MR WENT: Yes, indeed. I was going to deal with that.

THE PRESIDENT: Could you just answer that very quickly, so that we could move on to the submissions of the proposed defendants?

MR WENT: Yes, of course. (Pause)

So in terms of the question, if Amazon claim was certified, in terms of contractual commitment, the position is that clause 12.4 of the amended LFA -- that's at page 774. (Pause)

THE PRESIDENT: Which clause do you want us to look at?

MR WENT: Yes, apologies, I'm trying to work efficiently. So 12.4, that includes the situation, 12.4.2. So:

"Where the amounts reasonably expected to be recovered have deteriorated materially since the amendment date such that the formula will no longer earn a commercially viable return under this." [as read]

So that's the provision, the relevant provision.

THE PRESIDENT: But Mr De La Mare's submission was that you didn't need off-Amazon in order for the fund --

MR WENT: Absolutely, so let me just come to that. I was just going to give you for reference as well, in funding condition 2 -- we don't need to turn to it -- that deals with ongoing provision of paid funding as well. That's at B783, but the mechanism essentially is the same as what we're looking at, at clause 7.3.

So we say there's nothing to suggest that the funder would have any right to terminate under these circumstances.

So two points.

First: we've seen the cost benefit discussion, but in principle -- based on the current numbers -- there should be enough for the fund to receive its full return if the Tribunal permitted that. I'd also just add because this wasn't discussed earlier, that when thinking about the amount to be returned to stakeholders, one can also take into account the costs to be paid out of those costs, to be paid by the defendants on success and that may mean around another £15 million coming off the overall fees return, to be paid to the various stakeholders. So that's another element.

I was also then just going to make -- I think hopefully the fairly obvious point -- that the cost of bringing the claim would reduce materially and so the outlay would reduce accordingly and of course that impacts on the funder's return based on its multiple.

So, for example, in terms of cost reduction, the trial length at the moment is estimated to be seven weeks; that would be page 790 and we say that could come down considerably. So that would all have an impact on the overall amounts to be repaid to the stakeholders.

MR BANKES: And one criticism that I raised at the beginning -- which we deal with later -- of clause 12, is that at the moment there's no reasonableness qualification; there's no subject to assessment by KC if there's a dispute qualification to that termination provision, is it the absolute decision of the funder and that's a criticism made in other cases, that the Tribunal has required that additional caveats be added to that.

MR WENT: There is a case in dispute, but not -- what has changed is that, originally, the funder could reach a reasonable view on these matters and that would be subject to either independent legal advice or where appropriate independent expert advice. As a result of the Tribunal's decision in Carolyn Roberts v Thames Water, the reasonableness test was taken out, because if that is taken -- any decision by the funder is taken -- to the review process, the Tribunal in that case thought that it should be based on an objective view rather than what was in the reasonable view of the funder. So that's why that clause has changed.

MR BANKES: But that doesn't go to the appeal, the dispute point. (Pause)

THE PRESIDENT: So this just -- it doesn't say where the funder reasonably takes a view; that was your point. It just says if at any time the amounts reasonably expected to be recovered have deteriorated materially -- so who makes that decision and what control is that subject to under this? Because it's no longer the funder's reasonable view; it's just where the amounts have deteriorated materially. What's the decision-making --

MR MALLALIEU: My Lady, can I assist briefly? Because it's my dispute, effectively, and it might just cut to the chase.

THE PRESIDENT: Right, okay, well you can address it then.

MR MALLALIEU: My Lady, the short point is: if we come over the page to 12.9, you will see -- on page 775 -- there's provision for "Termination Dispute". So termination dispute is subject -- I won't take you to it -- but to a QC determination provision and that applies to 12.4.

So 12.4 is subject to a KC determination in the event of a dispute. Our issue is that when that was amended to introduce that, they took out the provision that the decision to terminate in the first place had to be on the basis of independent expert or legal advice and that's how --

THE PRESIDENT: I see, it doesn't get any more. All right. (Pause)

Well, maybe you can just consider that, Mr Went, if you weren't going to do submissions on that. Were you going to respond to that point, or do you want to come back to it?

MR WENT: All I was going to say is that in Carolyn Roberts, what the Tribunal didn't like was that the decision by the funder on termination was subject to its reasonable view and then the dispute resolution process would then have to examine whether the reasonableness of the funder's view in taking that decision. So the Tribunal thought that should be on an objective basis, so that was the reason that the reasonableness view came out when the funder was taking its decision, so that when it goes to dispute, it's on an objective basis. That was the reason for that change. (Pause)

THE PRESIDENT: All right. I think that we really do need --

MR WENT: Those are my submissions, unless there's anything further.

THE PRESIDENT: Thank you very much. (Pause)

We're now 45 minutes late, so what we were proposing is we will sit until 4.45 today; would everyone be happy to come back at 10.00 tomorrow, rather than 10.15?

MR WENT: Yes.

THE PRESIDENT: All right.

Opening submissions by MS ABRAM

MS ABRAM: Let me start then, if I may, by giving you a sense of the plan as between the defendants. I'm going to kick off by dealing with the defendant's strike-out application -- in relation to the off-Amazon claim -- and then I'll deal with the cost benefit point and distribution aspect of that.

Then Mr Harris will add anything further he's got to say on the strike-out, he'll deal with process and he'll deal with the suitability aspects, before Mr Mallalieu finally deals with all of the funding points. (Pause)

THE PRESIDENT: Who's going to deal with the Waterside point?

MS ABRAM: Mr Harris will deal with Waterside.

THE PRESIDENT: So Mr Harris will deal with any residual points on strike-out process and Waterside.

MS ABRAM: Yes, suitability in the sense of the non-technical funding aspects of suitability.

THE PRESIDENT: And then Mr Mallalieu will deal with all the rest of the funding issues.

MS ABRAM: Funding issues, that's it.

THE PRESIDENT: Yes, all right. Okay, thank you.

MS ABRAM: So to start with the summary determination application: I'll divide what I say on that topic into four main sections:

First, I'll show you the PCR's case as to how this effect on Amazon prices is said to interact with off-Amazon prices; second, focus on the very small size of Amazon as a sales channel for Apple products; third, then measure the evidence against Dr Pike's conclusions and put that in the context of the test for summary determination; and then fourth, I'll tie up the ends and set out what we say the Tribunal should do, given the strike-out application and the concerns around Dr Pike's independence and then I'll come on separately to cost benefit; that's a separate point.

Now, I don't propose to spend any material time on the underlying legal principles, because, frankly, I'm conscious that you know them better than I do. You've seen that we apply for both strike-out and reverse summary judgment and no one suggested that there's any relevant difference between those two for the purpose of today.

Mr de la Mare took you to a couple of authorities on summary determination -- including Easyair -- and the point that we take from Easyair and from Evans in the Supreme Court is that it's not enough for someone resisting a summary determination application just to say, "Well, something might turn up that might have a bearing on the relevant question by the time of trial", and that's paragraph 15.7 of Easyair, and in Evans it's paragraph 108. (Pause)

And that's the bit of the test that we really rely on, because we say that there's a strong flavour of that in the evidence and in the claim of Amazon sales.

So then turning to that first point about how it's said that the challenged provisions caused prices of Apple products to rise across all of the UK sales channels. Now, of course, the starting point is that we don't accept -- inside the court -- that the Global Tenets Agreement -- the GTA -- had any impact on prices on Amazon either, but I'm not focusing on that today; I've got to put that marker down.

So just focusing on off-Amazon sales and just reiterating the heart of it: the foundation of the claim has got to be that before the GTA, the third-party Amazon resellers were pulling prices down on Amazon and then Amazon was in turn pulling prices down across the rest of the market and then after the GTA, by contrast, the combined effect of all of the other competitive constraints wasn't enough to prevent price rises and that includes competition from competing brands and the competing brands obviously differ, depending on which Apple product you're talking about, but Samsung and Huawei for mobile phones, or HP or Lenovo for laptops, so it includes inter-brand competition and also intra-brand competition, so competition from other sellers of Apple products and it's important to retain that focus on those two types of competition because when we look at the share of sales figures, we tend to look at share of sales across Apple products, which is an intra-brand only measure, but there's also inter-brand competition to be taken into account.

The PCR's case is summarised at paragraph 28.1(b) of their skeleton, so that's page 13 of their skeleton, or A tab 2, page 17, if you're looking at it in the bundle. If you pick that up on the fourth line of subparagraph (b) there, you'll see that the PCR says:

"The correct way of characterising what Dr Pike in fact observes (and does not merely assume) is that the strongest source of intra-brand competition on Apple's RRP is on-Amazon pricing, while Apple's RRP is otherwise insufficiently constrained by inter-brand competition."

THE PRESIDENT: And what's the observation based on?

MS ABRAM: So that observation is based on Dr Pike's analysis and I'll come to show you Dr Pike's analysis and how that is said to stack up with that observation. The reason I'm showing you that sentence now is to anchor the submissions I want to make, which is to say we agree with the PCR that this has to be their case. This is how high they've got to be able to put their case. In order to have a credible claim of an off-Amazon pricing effect, they have to be saying that that tiny share of Amazon sales is somehow the strongest competitive force, because it's pulling down the prices across the whole rest of the market. It's the only way that that claim works.

THE PRESIDENT: So you have to say that that is bound to fail?

MS ABRAM: I have to say that it's not plausible, that there are no reasonable grounds for it, that it has no realistic prospect of success and that's right.

Just to put the problem in a nutshell: we say that the origin of the issue to which the strike-out application gives rise is that when Pike 1 -- which is obviously the basis of the claim -- was produced, Dr Pike was working on the basis that Amazon sold almost half of relevant Apple products and I'll take you to the paragraphs of Dr Pike that showed that that was his reference point, some of whom 46 and 48 per cent was his expectation. So that's the basis for this "big dog" theory.

But since Dr Pike produced that original report, Apple and Amazon have disclosed those materials in the context of the strike-out application and it shows that Amazon's relevant share of sales is less.

THE PRESIDENT: Are we not allowed to say the figure?

MS ABRAM: We are allowed to say the percentage figures -- that was on that one-page document that I handed up this morning. So the percentage figures can be --

THE PRESIDENT: Oh yes, I'm sorry. Yes.

MS ABRAM: It was a late change.

THE PRESIDENT: So sorry.

MS ABRAM: So I will be saying the percentages, because it's quite handy to have them as kind of reference points.

So we now know that Amazon's relevant share of sales was as low as about one per cent; it's not so much a big dog as a tiny puppy, in the context of the sale of Apple products.

So we say that the theory of harm that Dr Pike initially set out -- on the basis of how he anticipated that this market would work -- just isn't credible in the light of the fact that they've emerged and I want to show you where Dr Pike's theory of harm came from and the context in which he set it out. So let me show you the section of Dr Pike that sets out the theory of harm. So that's A, tab 7, page 229, is the place to pick this up. Mr de la Mare showed you these paragraphs this morning, but perhaps I could just ask you to remind yourselves of 201 to 203. (Pause)

THE PRESIDENT: Yes, they don't have the almost half figure.

MS ABRAM: No, I'll show you that in a moment. But just to tee up what I want to say about this passage before I take you to that paragraph, so 201 obviously starts by exploring the impact of Amazon pricing on Apple's pricing and the whole premise of the logic is in the first sentence. So:

"Amongst the resellers ... the resellers on UK Amazon Marketplace are likely to pose a particularly important constraint upon Apple's online store [and then this is the reason, this is the basis, of the report] given the size of the network effects that the marketplace enjoys, it's speed and convenience, and its loyal and broad customer base."

So this is Dr Pike's articulation of what Mr Derbyshire this morning called the "behemoth point", the idea that Amazon is massive and therefore must be exerting a gravitational pull on the market.

And you can see, from the start of the next sentence, that this is identified as the basis for the theory of harm, because Dr Pike goes on:

"I therefore expect [given Amazon's size] that Apple's online store and ... RRP may be constrained both by the Buy Box price [and so on] ..."

And that's the theory in relation to Apple pricing as a result of on-Amazon sales.

And then paragraph 202, the next one, looks at other third-party resellers and you see that starts similarly, "I also expect", so it's the same logic that leads to the conclusion on other third-party resellers.

And 203 makes the really fair point that the "strength of the constraints" are going to need to be tested by reference to the empirical analyses that Dr Pike proposes to, but hasn't yet carried out.

So we know that he hasn't carried out any empirical analysis of prices for off-Amazon sales. He has done some analysis -- and Mr de la Mare showed you it -- of prices -- or discounts more precisely -- of on-Amazon sales, but there's no equivalent in his report for off-Amazon sales. He's explained what he proposed to do if the claim was certified and Mr Harris will set out the criticisms that we have of that methodology. But the point that I'm making for present purposes is that the off-Amazon claim is based just on a theory of harm; it's not even based on any preliminary testing of the empirical evidence.

Now, Mr de la Mare said this morning -- rather forebodingly -- that he was sure we'd need to have a big row about Hollington v Hewthorn. Happily, in relation to the off-Amazon sales, we don't need to have a row about Hollington v Hewthorn, and therefore at all for my purposes today, because there is nothing in the Italian and Spanish decisions that support the off-Amazon claim at all. So Mr de la Mare showed you those documents -- the Italian decision has been annulled, but there we are -- in relation to the on-Amazon claim, but there's nothing in them on the off-Amazon claim.

MR DERBYSHIRE: No mention of a theoretical effect?

MS ABRAM: No mention of a theoretical effect, no finding as to the effect of the GTA on the off-Amazon on off-Amazon pricing and to be fair, Dr Pike doesn't suggest the contrary; I'm just making it clear that there's nothing in there. So all we've got in support of the off-Amazon bit of the claim: no empirical analysis, nothing from other regulatory decisions, all we've got is this theory of harm.

To make good on my promise to show you the context in which the theory of harm was developed, the share of sales reference point is at 267 of Pike 1, page 250 of the bundle.

You see, to estimate the number of Apple products sold on Amazon Marketplace, he uses Amazon Marketplace's share of UK online consumer electronics -- which goes back to Mr Derbyshire's point earlier -- approximately 48 per cent, but there's another reference point that's 46 per cent. So either way, when Dr Pike produced Pike 1, he's working on the basis for Amazon accounts for almost 50 per cent of relevant sales of Apple products.

Of course, I'm not criticising Dr Pike for the fact that that was clearly his understanding at the time that he produced Pike 1. But the evidence in the case has now shown that his expectation about what Amazon's share of sales would be is very wide off the mark indeed, and what we do complain about is that instead of stepping back and asking himself, "Hang on, should my analysis change in the light of this new information, my new understanding of Amazon's share of Apple products?", Dr Pike has just doubled down. I'll show you several examples tomorrow. Every time the factual picture has changed -- whether the change relates to Amazon's share of sales of Apple products, whether it relates to the value of sales of Apple products through Amazon in absolute terms, in pound terms -- every time there's a change in Dr Pike's understanding, instead of saying, "Oh, hang on, this is relevant; I had better have a think about whether the theory of harm still stacks up", he just doubles down, in some cases strengthens, his earlier view.

THE PRESIDENT: He's used that simply to estimate the number of Apple products sold, so it's a kind of a volume of commerce estimate. Where in Pike 1 does that figure factor in his analysis of the theory of harm?

MS ABRAM: It isn't expressly mentioned in the context of the founder building blocks of the theory of harm. That's the section I showed you at 201 to 203. That's a narrative or qualitative, I suppose, assessment of Amazon as a behemoth. But the reason I'm showing you those 46 and 48 per cent figures is just to show you the only reference point that Dr Pike did have when he started thinking about share of sales, and then we can compare that to the figures that he's seen in the case, the ones that he's derived later on.

THE PRESIDENT: But even if you go back to the narrative, his narrative theory of harm, it's not based on saying that part of the pull derives from the share of UK consumer electronics. He just says, it's based on Amazon as a behemoth. It's purely the behemoth, the network effects, its speed and convenience, loyal and broad customer base. So even just looking at the narrative and assuming that that sets out his theory of harm, that doesn't indicate that the percentage has anything to do with his, his overall assessment of the likelihood of there being these pull effects.

MS ABRAM: It doesn't suggest that he's using the percentage as a necessary stepping stone to reach those conclusions, but it does suggest that he's referring to the size and the market reach of Amazon as an indicator of the likelihood that it exercises market power. I just used the percentages as a kind of reference point to give you a guide to the ballpark in which he thought that that market power is likely to be situated, and not because he identifies it as a stepping stone here. Indeed, that might be one of our criticisms, that there isn't a percentage reference point here, and Mr Harris will have more to say about that from the perspective of market definition tomorrow. But that's not one of the critical building blocks in the strike-out application. I'm conscious of the time, but I've just got one more point before I finish this section, which is this kind of faint attempt to say, in the skeleton and in oral submissions, look, these have got to be questions for the trial and particularly for expert evidence, and there's a complaint that we haven't relied on expert evidence in support of our application, but we say, so what? Because we say you don't need to be an economist to see that the basic premises underlying Dr Pike's evidence and his theory of harm aren't sustainable, or to observe that Dr Pike regrettably hasn't engaged with the arguments on the strike-out in a way that could enable the Tribunal to have confidence in his independence.

It's true that money has been spent on expert economists, and you've seen some of the work product of that in the form of the BRG letter that Mr de la Mare took you to. Of course, expert economists have been crunching the data behind the scenes, and you'll have seen we've got a clean sheet on the data crunching from the PCR, who has found not a criticism of our data crunching exercise, so they've done doubtless, very useful work. But in terms of whether we needed an expert report in order to make the arguments that I'm putting forward on this strike out application, I say that's not necessary.

THE PRESIDENT: All right. So if I've taken it down correctly, you say that you don't need to be an economist to say that the basic premises underlying the theory of harm aren't sustainable. So you're going to make that argument in a way that doesn't rely on this figure 48 or 46 being one of the premises, because you've accepted that that wasn't the premises. So if you're saying that figure has gone down, and he hasn't engaged with it, you'll need to explain where that takes us, given that you're fairly not saying that that was one of the building blocks of his theory of harm.

MS ABRAM: Yes. Just to give you the answer to that in a nutshell, so it's not to keep you in suspense overnight, I don't take any particular point on the 48 per cent. I do take a point on the percentage figures that we rely on, and indeed even on Dr Pike's version of the percentage figures, now as to what we now know to be Amazon's share of sales. We do say that if you look at that chain of logic, for example in 201 to 203, it does not stack up in the light of those percentages as we now know them to be. That's the critical point.

THE PRESIDENT: Yes. All right. That's very helpful. Thank you very much. So we'll return then tomorrow at 10.00. I'm aware I've given you all homework during the night. Thank you very much.

(4.47 pm)

(The court adjourned until 10.00 am on Wednesday, 1 July 2026)

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?