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IN THE COMPETITION APPEAL TRIBUNAL Case No: 1759/7/7/25

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 1st July 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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Wednesday, 1 July 2026

(10.00 am)
(Proceedings delayed)
(10.03 am)

Housekeeping

THE PRESIDENT: Yes. Good morning, Mr de la Mare.

MR DE LA MARE: My Lady, you gave us all some homework overnight. It's produced various hand-ins.

THE PRESIDENT: I've only had one, which is the one from the proposed defendants.

MR DE LA MARE: Yes. There's one in electronic version from us in relation to professional trustees and the rates of remuneration from professional trustees. I'd understood that that had been emailed, but warm hard copies are coming over as soon as possible, and we'll give those to you as soon as we can.

THE PRESIDENT: All right.

MR DE LA MARE: There's also a further handout that I'll let my learned friend, Mr Went, explain in relation to some of the costs information that you asked.

MR WENT: If I can hand this up, please. (Handed)

This provides the breakdown of the stakeholder entitlements following judgment, January 2030. It ties in with scenario B in Campbell 2. Definitions are the same. You see all the various stakeholders, and then there are three sets of calculations. One includes all the Riefa-related costs, including the adverse costs due to the insurers. The second one excludes, if you like, the wasted costs in Riefa and also excludes the adverse costs to insurers -- yes. The wasted costs and the adverse costs. Then the third one excludes everything from Riefa. You can see the various comparisons there.

THE PRESIDENT: When we were discussing yesterday, we saw that there was a figure of 19 million, and I said, how do you get from there up to the 120-something?

Is that the first column, effectively?
MR WENT: That's the first column. The 19 million is the outlay, the budget, in effect, the overall budget. Then you can see the success fee for the funder on that, and then the success fees for the other stakeholders.
THE PRESIDENT: All right. In relation to the ATE insurers, how does that work?
MR WENT: The ATE insurers is simply whether they are repaid the adverse costs on the Riefa proceedings at 3.8 million.
THE PRESIDENT: I see.
MR WENT: Under the existing policy that's continued -- and I explained why the PCR took the view to maintain that policy, because it was cheaper -- part of that arrangement is that they would be repaid any adverse costs paid during proceedings, and so that's the 3.8 million.
THE PRESIDENT: Yes. Very helpful.
MR WENT: That's the difference between the first and second columns.
I was going to say just very briefly: we've obviously already set out why the existing funding agreement is the best available to the PCR, even when the funder's prior funding and returns to which that gives rise are fully taken into account, and that remains our position. We invite the Tribunal to make a CPO on that basis.
THE PRESIDENT: Yes.
MR WENT: I do, though, have something more substantive to say in respect of solicitors and counsel fees incurred in the Riefa proceedings.
THE PRESIDENT: Yes.
MR WENT: So the PCR's primary position is as I've set out yesterday.
THE PRESIDENT: Yes, of course.
MR WENT: However, the PCR has had the opportunity to consider this overnight, the issues raised by the Tribunal yesterday, and to discuss it with the legal team. I do

therefore have authority from solicitors and counsel to say this.

THE PRESIDENT: Yes.

MR WENT: In the event the Tribunal considers that their Riefa fees ought to be permanently disallowed at this stage, then the Tribunal is invited so to rule, and I can confirm that solicitors and counsel then simply write off those fees other than the discounted fees already paid by the funder. The PCR's application ought then to be regarded as an application made on that amended basis, and this ought not, though, then be a basis for the Tribunal to dismiss the application for a CPO.

You'll be able to see, obviously, the note handed up with the breakdown scenarios, the difference between the CFA elements, depending on whether or not all Riefa costs are disallowed, or only the wasted cost element.

THE PRESIDENT: So that just deals with the rows here for Hausfeld and counsel.

MR WENT: Yes.

THE PRESIDENT: What about the rest? There are three remaining rows: Asertis's drawdown repayment, Asertis's success fee, and the insurers.

MR WENT: Well, as I say, our submission remains that the deals that the PCR reached were the cheapest available both on funding and insurance. There wasn't anything else available in the market that would have been cheaper, and so it was perfectly rational for the PCR to enter into those arrangements. The alternative would have been more expensive. That was the cost of the cheapest funding available, if you like.

THE PRESIDENT: Right. So you're not putting forward any alternative application for certification on a basis that strips out those costs. Is your submission that if we conclude that we're not willing to authorise the proceedings to continue on the basis that the funder and insurers will recover in respect of the Riefa costs or some portion of the Riefa costs, is your submission in that event that we would then have to refuse

certification, or is there any other alternative available to us?
MR WENT: Well, as I've said, I think the position is we would go back to the funder and insurers if you were going to refuse certification on that basis. As I said, the primary submission is that these are the cheapest deals available. Anything else would be more (overspeaking).
THE PRESIDENT: You've made that submission.
MR WENT: (Overspeaking) I understand that, yes.
THE PRESIDENT: Yes.
MR WENT: Yes. I'm not in a position to take that any further at the moment. We don't have anything further from the funder or insurers at this stage.
THE PRESIDENT: The answer is, then, if that is our view, then we would have to hand down a judgment refusing certification on that basis. Is that correct?
MR WENT: Well, I think I've made that point. I think the only point that we're making is that if you were going to refuse certification on that basis, we would take that, if there's an opportunity, we would take that to the funder and insurers and take their position on it.
THE PRESIDENT: But what does that mean? I mean, we've got submissions today. We were then going to go and write our judgment. Are you saying that you would want us to give some kind of non-judgmental indication that you would then take away, because how do we do that? Everyone is here to make their submissions on the basis of the case advanced. You're not advancing an alternative case that we strip that out, which you are in relation to your (inaudible).
MR WENT: That's, I think, the position, my Lady.
THE PRESIDENT: So we would have to just give a judgment saying that we would refuse certification, and then you would have to then reapply on an alternative basis if you have one.

MR WENT: Yes.
THE PRESIDENT: All right. Thank you.
MR BANKES: Can I just very quickly understand the top line in this table? The Asertis drawdown repayment. First line is 19 million. Does that 19 million include all of the drawdown that took place during the Riefa proceedings?
MR WENT: Yes. So includes the 4.5 million that we were looking at.
MR BANKES: The 14 million is the actual budget for this set of proceedings, the JLP proceedings?
MR WENT: Yes, if you look at it like that. We obviously say a lot has been reused in these proceedings, including the insurance policy making up 2 million of those costs.
MR BANKES: I understand. But the new drawdown is 14 million?
MR WENT: Yes. That's correct.
MR BANKES: Okay.
MR WENT: All of this is subject to the Tribunal's control, obviously, at the end of the day as (overspeaking).
THE PRESIDENT: You've made that submission. Yes.
MR WENT: Indeed. I'm grateful.
The only thing I was going to say is that the Tribunal yesterday obviously raised whether it had ruled already on whether the PCR cannot recover inter partes costs, which I've called reusable costs. My submission is that while it's ruled on what the defendants were entitled to recover in light of dismissal of the Riefa proceedings, it hasn't ruled that the PCR cannot subsequently claim costs for work which has been reused. If the Tribunal rules that all of the Riefa legal costs are disallowed, there wouldn't be any opportunity for the PCR to seek on an inter partes basis all base costs for the (inaudible) work in these proceedings. So principally you could decide now just to exclude the uplifts, but we appreciate you may just want to take a view on everything

now.

Then just following up very briefly on the second --

THE PRESIDENT: I'm sorry. This is a moment for housekeeping. We don't really want further submissions, because you'll get reply submissions later on. You've explained this, and I don't think you need to say anything more now.

MR WENT: I'm grateful.

THE PRESIDENT: Thank you.

MR WENT: Thank you.

THE PRESIDENT: Ms Abram, how are you doing on time? Because we are conscious that there are a lot of issues, including some new points. You, I think, all very diligently prepared a timetable on the basis of two days. We don't want to put you all under undue time pressure, and we're mindful that some in this room might want to leave the court before 5.00 today. I should say that was pointed out to me by other of my panel members. It didn't even occur to me that anyone might not mind sitting late today, but anyway.

All right. How are you doing on time? Do you think that you can finish today, or would you like us to work on the basis that we'll have to come back tomorrow?

MS ABRAM: We are behind where we'd hoped to be. On the other hand, certainly from my perspective, I think quite a generous amount of time was allowed in the provisional timetable for our kind of (inaudible) reply, and I doubt that that time is really going to be needed.

THE PRESIDENT: All right.

MS ABRAM: I would be really hopeful that we could finish by 4.45 today.

THE PRESIDENT: 4.45. All right. Yes.

MS ABRAM: If that's going to be -- 5:00 pm isn't such a pressing deadline for me.

THE PRESIDENT: You and me, Ms Abram. However, I think we ought to aim to finish by 4.45, if that means that we shave a little bit of time off at lunchtime. I really don't want to bring everyone else back with the expense of doing that tomorrow, if we can avoid it. All right.

MS ABRAM: I'm really grateful.

THE PRESIDENT: Thank you very much.

Opening submissions by MS ABRAM (continued)

MS ABRAM: To pick up from where I was at the end of yesterday, I had just finished summarising the PCR's case on Amazon sales, and I was about to start on the evidence showing that Amazon is, in relative terms, a minnow in the sales of Apple products.

Before I turn to the actual facts and figures, the first thing I want to say is to underline that until yesterday, there was no criticism at all from the PCR of the evidence that had been put forward by the proposed defendants in support of the strike-out application. For example, there has never been any suggestion that that evidence needs to be tested at trial or that it's unsatisfactory in some way, and such that it's not an acceptable basis, a solid basis, on which to determine the strike-out application.

Yesterday on his feet, for the first time my learned friend did put forward a couple of criticisms of that evidence, and they go nowhere. The first point made about the evidence was that it only covered the issues that are relevant to the strike-out application. It didn't cover the other issues in the case. Well, yes, that's correct so far as it goes, but it goes nowhere in showing that the evidence isn't relevant and sufficient to determine the strike-out application.

Second, there was some suggestion that Amazon should have had the data necessary to underlie the strike-out application before the application was made at an earlier stage. This is a case in which many, many questions have been (inaudible) doubtless understandably raised by the PCR in correspondence, and that had never been mentioned until yesterday. It's too late to raise it at that point. One doesn't see, frankly, why it's relevant at all in any event, in circumstances where it's not suggested that there's any problem with the data. Doubtless that's been crawled all over by both sides, and it (inaudible) deficiency that means that it's not a proper basis for the strike-out application.

THE PRESIDENT: I think the point was taken against you that you could have made that point in the Riefa proceedings if it was a good one, because you did have the data then. You know, we'll have to take that as far as it goes, but that's the way I understood it to be put.

MS ABRAM: Two years ago at the certification hearing in Riefa, you, Madam President, and I had an exchange about what we were going to do about the off-Amazon sales. You said, "Are you planning to make any application about them?" And I said, "Look, there is a jigsaw puzzle to be done of putting together two sets of data. We're looking at it, but we're not in a position to bring forward that application now". And that remained the case. Of course, the certification was denied and the case went away for some time. But when it came back, that was revised and it was done as quickly as it could be and in proper time for these proceedings.

So turning to the figures themselves, as you know, and as set out in the one page summary that you asked for, the figures that are relied on by each side, the bottom line is that before the GTA, about 1.2 per cent of Apple products that were sold in the UK were sold through Amazon. That includes both sales through Amazon Retail and sales through third-party resellers. So just to anchor that back in the claim, as we were talking about yesterday, the PCR's argument is, and has to be, that that 1.2 per cent of sales is the strongest source of intra-brand competition for Apple's own RRPs, and that it was pulling prices down for the other nearly 99 per cent of sales of

Apple products in the UK.

We say that's clearly not credible on its own terms, but it's also important to put that figure in context by remembering that it only takes into account certain elements of the calculation with the consequence that the figure is likely to be conservative in the PCR's favour.

So just to give an example of that, it only takes into account intra-brand competition. So it's a figure that gives the share of sales of Apple products without taking into account constraints from inter-brand competition from competing manufacturers of whichever Apple products one happens to be looking at. So in itself it's a very conservative figure in the PCR's favour.

Now --

THE PRESIDENT: Well, it's not that it's a conservative figure. The figure is what it is. You're not saying that it actually might be a lower figure. All you're saying is that in assessing the weight to be given to that, one also needs to take into account inter-brand competition.

MS ABRAM: That's right. That's exactly it. Of course Mr de la Mare at times yesterday was at great pains to emphasise the importance of inter-brand competition. So one of the points that was made was about the advertising restriction elements of the GTA which are complained of in relation to the on-Amazon claims. That was said by Mr de la Mare to have an effect on inter-brand competition on Amazon. So it is a part of the picture.

Now, you've seen that there is a dispute between the parties about whether the relevant temporal reference points for analysis is Amazon's share of sales before or after the GTA came into force. We say it's clearly the before period, because the premise of the claim is that it was the resellers before the GTA. So that share of the 1.2 figure that reflected the resellers. Again, it's not even the whole of the 1.2. The share of the 1.2 that were the resellers were pulling prices down across the whole rest of the market. So we say the before period is the relevant reference point.

But actually, just pragmatically, even if you look at the period after the GTA came into force, sales through Amazon account for about 3.7 per cent of UK Apple product sales since the GTA. Again, that figure is in the one pager for your reference. It's no more plausible that 3.7 per cent of sales would have pulled prices down across the rest of the UK market than 1.2.

MR DERBYSHIRE: Isn't the key thing the change in the share and the actual prices that were going on in Amazon. Because earlier on, when you were talking about the 1.2 per cent, and I understand the point, that must have had an impact on prices for the kind of change to the non-Amazon Retail sellers and the resulting increase in prices to actually have in effect. So it's the delta between the two that's important. You said the assumption is the 1.2 per cent must be the strongest influence on prices overall. I don't think it needs to be the strongest influence; it needs to be an influence. Then something's changed and that influence has changed and everything else has stayed more or less the same.

MS ABRAM: It needs to be a net influence.

MR DERBYSHIRE: It needs to be a net influence.

MS ABRAM: So the way that it's put by the PCR is "the strongest influence", and one sees why one puts it that way. But it's got to be that whatever the level of competition in the 98.8 per cent that's above is constraining prices down to a certain level. But then there's a net pull down by the on-Amazon pricing. So whether you call it the strongest or a net, which I respectfully agree is a more appropriate way of terming the effect, that's the idea that it exerts an incremental effect.

MR DERBYSHIRE: Okay. Thank you.

THE PRESIDENT: So is the theory of harm that although the share rose from 1.2 to

3.7, so if you were looking at just those abstract numbers you might say actually the gravitational pull was even greater -- is the point that the 1.2 was made up of lots of resellers, whereas the 3.7 is concentrated among fewer resellers and then Amazon Retail? Therefore, because the 3.7 internally doesn't have as much competition, although one might think that the gravitational pull was stronger, actually it resulted in a muting of the discounting. Is that the point?

MS ABRAM: That would be the way the point was put against me. But in relation to that delta from the 1.2 to 3.7, we say that's not at all informative until you look at why sales may have increased before and after the GTA. This is really more a question for Mr Harris than for me. But we would say that that there are two main drivers that are kind of obvious and explain that. The first is that the reason the GTA was entered into was to combat counterfeiting.

Of course, once consumers could have more confidence that the products that they might think of buying through Amazon were less likely to be counterfeit, because they were more likely to come from Amazon and bona fide third-party resellers -- possible to have more confidence, therefore possible to buy at least some items, perhaps the lower value items, through Amazon.

The second point is that -- and Amazon are at pains to emphasise -- until the GTA was entered into, they only had certain products available to them from Apple, and the GTA enabled us to regularise our relationship so they were able to gain access to the newest iPhones, to the whole range of Apple products. Of course that wider availability to Amazon itself as a seller of Apple products enabled it to sell more and therefore increased the volumes. So that delta between 1.2 and 3.7 has got nothing to do with the strike-out application, but the way that you determine what's identified as the gravitational pull of Amazon prices across the market is the way that that's put.

Just to bring that back to a couple of additional points on those figures, whether the

1.2 or 3.7, you have the point where we say "It doesn't matter much whether the rest of the market was 99 per cent or 96 per cent, or 97 per cent". The case isn't plausible on off-Amazon sales on either basis.

It might just be helpful at this point to put forward a potential litmus test of the PCR's case on plausibility; so whether the theory of harm is plausible. Just ask oneself: "Hang on. If Amazon was the lowest price reseller, and if it was so attractive, if it had such market power in the way the PCR has put it, why on earth was its share of sales of Apple products so low either before the GTA or after the GTA?" Because if Amazon really did have all this power, was such an attractive reseller, did exercise its gravitational pull on the rest of the market --

MR DERBYSHIRE: Can I just agree with you that I was shocked by the size of the Amazon share of the market, but didn't you say just a few minutes earlier that there was some kind of limited availability of supply to Amazon before the agreements?

MS ABRAM: So it's true that not all products were available to Amazon, but if I may say so that's not relevant to the logical analysis here, because the point that's being made is that whatever products were available to Amazon -- just taking that as the starting point, as ground zero -- Amazon was in that factual world exercising this downward pull. So this isn't a case that complains about limited availability of products to Amazon before the GTA. It's a case that says: in that world, given the limited availability, look how powerful Amazon still were; and we say that they weren't.

What's striking we say about that is not that Dr Pike wrote Pike 1 on the basis of a different anticipation as to how the market would interact as to this idea that Amazon is a behemoth, in your words. But it's that when he saw the strike-out application, when he saw the 1.2 figure and the 3.7 figure, he doesn't seem to have asked himself those questions. There's no evidence of him saying, "Hang on, if Amazon was such an attractive sales channel" as he doubtless genuinely believed when he wrote Pike 1, "why weren't more people buying products there, and do my expectations as to Amazon having all this market power actually stack up against the data as it's been revealed?"

Now, I want to show you just a couple of examples of Dr Pike's reaction to changes in the evidential picture -- developments in his understanding -- and show you the way that he dealt with them. The first example I want to take you to is in Pike 3. So that's A, tab 18 and it's page 565. Can I just ask you to remind yourselves of paragraph 42 and 43 and footnote 61? (Pause)

THE PRESIDENT: Yes. He says "Surprisingly low".

MS ABRAM: That's it. So, to give the context, Dr Pike had calculated or estimated, based on publicly available data, the range of on-Amazon sales up to £22-odd billion. That figure isn't confidential because it's based on public data. He's then confronted with information showing that it is a tiny fraction -- the real figure is confidential -- of the figure that he believed. He says -- footnote 61 -- "Surprisingly low", but there's no discernible reaction beyond that. There's no analysis of whether that matters to his report.

Now, of course what might have been said by Dr Pike is "Actually the absolute sales numbers don't matter so much. What really matters is the relative value of Amazon's sales as a proportion of the market"; the point you made yesterday, a point that we rely on. But no, quite the contrary. The PCR continues to rely on the absolute sales value without even acknowledging that it is such a small fraction of what it was believed to be as a predicate for this claim when it was first issued. That's the first example I wanted to take you to.

The second example relates to Amazon UK's share of Apple product sales. As you know, there's been a great deal of focus in Dr Pike's recent evidence on disputing whether the 1.2 and 3.7 per cent figures are the right reference point. He does that by excluding offline sales and bundled sales. I'm going to come on to those points. But just to step back from that, you know that in Pike 3, Dr Pike believed that once those sales had been excluded from the denominator, the relevant figure showing Amazon UK's share of Apple product sales was 18.5 per cent and that was a key foundation stone in the analysis in Pike 3. So you can see that in Pike 3 on page 552. So this is the section summarising Dr Pike's conclusions and you can see seven lines up from the bottom of the page, so in (ii):

"Once that calculation is made using the actual sales data provided by the PDs ... UK Amazon Marketplace accounts for 18.5% of unbundled Apple Products sold online ..."

So this is one of the key conclusions that Dr Pike draws in Pike 3.

Now, what then happens is that Apple's team couldn't reproduce Dr Pike's calculation, so we sent a letter to say, "Can you explain how you got to that number?" And he realised, following that letter, that he made a mistake in the calculation and he'd removed too many sales from the denominator. Correct figures should have been 11.4 per cent and you know that there was an addendum then produced for Pike 3 that explains that.

Now, 11.4 per cent; it's about 40 per cent lower than the previous incorrect figure, but according to Dr Pike, that 40 per cent difference in the figure that was trumpeted in Pike 3 makes not a difference to the analysis. I want to show you that in the addendum to Pike 3, so that's tab 22 of the same bundle at page 640. There are three paragraphs dealing with this: it's 14 to 16. If I could ask you to read those. (Pause)

THE PRESIDENT: Is some of the 16 confidential?

MS ABRAM: Of 16?

THE PRESIDENT: Because I thought the word at the end of the second line of 16 --

MS ABRAM: That's right; that is confidential. Yes, that's right. (Pause)

But that's the only point that is in the body, certainly of 14 to 16.

THE PRESIDENT: And just remind me: while he says, "UK Amazon Marketplace remains a clear pricing reference point for UK retailers", the words, "clear pricing reference point", does that come from the point about John Lewis and Currys? Is it just that, or is there something else?

MS ABRAM: Our understanding is that that's just John Lewis and Currys; it's the price promises and I will come to those price promises.

The point that I wanted to look at these for now -- these paragraphs for now -- is to say that that substantial change, that 40 per cent reduction, is effectively just brushed aside by Dr Pike in this addendum. And look, we all make mistakes; we are absolutely not criticising Dr Pike for having got the number wrong in Pike 3. We are not criticising him either for having produced Pike 1 on the basis of what turned out to be a misunderstanding of Amazon's share of sales of Apple products; none of that is something that we criticise Dr Pike for.

But it is a real cause for concern, we say, that I've shown you two really significant developments -- absolute volume of sales and share of sales -- in what are identified as key buttresses for the off-Amazon claim. Neither of them individually -- and especially both in combination -- seem to have caused Dr Pike to step back and reconsider the off-Amazon claim, that analysis underlying the off-Amazon claim and we say that a genuinely independent expert would have been prompted by these significant developments to undertake a detailed review of whether his earlier opinion remained good, whether it needed to be qualified, or whether it no longer stood up at all in the light of the facts as they'd emerged.

MR DERBYSHIRE: To be fair to Dr Pike, he didn't have much time to do any further analysis, certainly not look at this in detail, and my understanding of what Mr de la Mare said yesterday was that he did reconsider how the effect might work with a smaller market share and worked through the logic of Amazon having this multiplier effect that no matter what the share, it would have an influence on prices. So that was my understanding of why Dr Pike then said, "it doesn't really matter".

MS ABRAM: So there were two points bound up in that question: the first is these qualitative challenges that go beyond market share and I will come to them, if I may, what we say about them; and the second is -- with respect -- the evidence that was given about the thought process that Dr Pike may have followed and I'm afraid in my submission it's not good enough for counsel from the Bar to give that kind of information to the Tribunal on his feet without any foreshadowing in circumstances where, frankly, the PCR has known for weeks and weeks that we've got these concerns and in circumstances where none of this is explained in Dr Pike's work. What you've got before you is the evidence that's properly before you according to the normal rules of evidence and that isn't properly before you.

So let me turn then to the sales that Dr Pike has removed from the denominator in order to produce that 11.4 per cent figure. There are really two types of sales that he removes: the first is offline sales and the second is bundled sales.

Now, I'm just going to say a few words about each. As you know, Dr Pike considers that the relevant proportion for Amazon is the share of online sales rather than offline sales. Now, starting point: that is very odd, because offline sales are part of the claim. So the idea is that, so far as the claim is concerned, offline sales were constrained by online pricing sufficiently to be the subject matter of the claim, but then they're removed from the denominator where the consequence of that is to bump up the percentage share of Amazon UK's sales and the way that Dr Pike tries to square the circle is saying, "Well, okay, online prices constrain offline prices, but it doesn't work vice versa, it's an asymmetric effect, so that makes it legitimate to cut offline sales out for the purpose of calculating the relevant share". I'll show you where that comes from, it's Pike 3, paragraph 16, so that's at tab 18, page 558. Can I ask you just to read the whole of that paragraph? It's really 16(b) for this point, but I'm going to come back to (a).

THE PRESIDENT: Pike 3, paragraph 16.

MS ABRAM: Yes, page 558. (Pause)

THE PRESIDENT: Yes.

MS ABRAM: Yes. So you'll see 16(b) is the one that deals with this point. So it says:

"... necessary to exclude online [sic] sales because they are likely to provide little competitive constraint on online sales ..."

And then footnote 25 cross-refers to Pike 1, 134 to 136. So that's the basis for this; let's have a little look at that, that's in tab 7 of the same bundle at 205. (Pause)

Mr de la Mare showed you this passage yesterday, so you've already seen it. The fundamental point that is being made -- and you see it particularly in 135 -- is that offline sales aren't likely to be a constraint on online prices because of the wider range of products that are offered on Amazon. So this "endless aisle" is the basis for this asymmetric competition.

You'll see that 134 to 136 are not actually based on any analysis; it's just an assertion about how the interaction between online and offline pricing works based on this observation that Amazon can offer a wider range of products and not only is it just an assertion, but Dr Pike doesn't seem to have asked himself whether it holds good for sophisticated, relatively high value products, in relation to which consumers might value customer support and technical support, like Apple products, for example.

So, even if in general there was an asymmetric effect on competition between offline and online – there's no basis for that here, but just imagine that there is -- Dr Pike hasn't asked himself whether that's right for Apple products, as well as for the generality of product.

Another odd interaction that's just not identified anywhere here in this passage -- these three paragraphs are the only basis for this bit of the case -- is that Dr Pike has said -- I'll just give you the reference, I don't need to take you there, it's Pike 1, footnote 48.

Dr Pike has also said that Apple sets a single RRP for online and offline prices. Now, prima facie, that tends to suggest that there is a competitive interaction between online and offline pricing, but that's not even referred to, if we just dismiss it.

THE PRESIDENT: Why is that? Does that follow?

MS ABRAM: Well, if the prices are the same, if Apple's RRPs are the same and Apple is selling products at the same price online and offline, that suggests that competitive conditions are such that consumers are choosing between where to pay, where to buy the same product, whether to buy it online or offline.

THE PRESIDENT: Such that you can't price differentiate.

MS ABRAM: Yes, exactly.

So that seems to undermine the suggestion of asymmetric competition, but really the point I'm going to bat for is just to say at least that deserved raising the question, deserved asking the question and thinking about what the answer to it might be.

MR DERBYSHIRE: Just on the point that you can't price differentiate: I understand that the RRP is the same, but the prices can be different.

MS ABRAM: Yes, although what we know about these particular products is that Apple itself -- on its online and offline channels -- is very significant in the sale of our own products.

MR DERBYSHIRE: Yes.

MS ABRAM: So that's offline sales. We say no reason -- no good reason -- that's been explained or evidenced to exclude them from the denominator.

Then we've got mobile contract sales. Now, you've seen in our skeleton that this frankly makes less difference to the percentage share of Amazon UK sales of Apple products. I've given the numbers at paragraph 18.3 on page 7, but let me just give you the punchline.

THE PRESIDENT: Sorry, 18.3 on page 7 of your skeleton?

MS ABRAM: So it's A, tab 3, page 36. (Pause)

So these are the only percentages in the case that are confidential and you'll see in the final line of 18.3 what they are. (Pause)

THE PRESIDENT: Yes.

MS ABRAM: And the point I'm making there is that they're not very different from the 1.2 and 3.7 reference points, so actually this isn't a very significant factor. I'm not proposing to spend very long on it, because it doesn't really move the percentage share of sales, but it is just worth observing a couple of things.

The first is that the claim includes products bought on financing. Now, products bought on financing and bundled products are prima facie, one would think, relatively similar, because they both involve long-term contracts, effectively, where a monthly payment is made and this is another of the areas where Dr Pike doesn't seem to have challenged his assessment of either what should be in the claim or specifically this percentage figure that I'm focusing on now, because there's nowhere in his evidence that says, "Oh, hang on, if finance products are relevant for the purpose of the calculation, why are bundled products not also relevant for exactly the same reason?"

So it's just another of those little details that adds up to form part of the picture and there's a similar sort of oddity that emerges from Pike 1 on this point. So if you go to Pike 1, which is A, tab 7, page 274. (Pause)

So you see the heading above 338, we're looking at:

"Estimating damages to buyers of Apple Products from other UK online and offline stores."

So we're off-Amazon here.

Second half of 339, Dr Pike says:

"To the extent Apple sets the same RRP for mobile network operators to base their bundled prices upon, and to the extent that these are followed or prices are set relative to RRP, purchasers in ... MNO stores might also be potentially affected."

What Dr Pike is saying there is that there may be a competitive constraint between bundled and unbundled products, because Apple sets the same RRP for the two. But then I showed you paragraph 16 of Pike 3 a moment ago, and we can go back to that if helpful.

Just to remind you of the relevant line at paragraph 16 of Pike 3, page 558 of the same bundle, in tab 18. Sorry, 16(a) for this.

The end of 16(a) says:

"... bundled products sold by mobile service providers provide little if any competitive constraint on unbundled Apple Products ..."

Until yesterday, that was a mystery to us. We didn't understand why Dr Pike seems to be saying in Pike 1, well, it's possible that there's a competitive constraint between the two; and then suddenly in Pike 3, there's no competitive constraint from bundled products onto unbundled products. Mr de la Mare explained that to us yesterday. It's another of these, if I may say so, conveniently asymmetric competitive effects, because the idea is that unbundled prices might affect bundled prices, with the consequence that maybe they might like to add them to the claim at some point. On the other hand, bundled prices apparently don't affect unbundled prices, so the bundled prices can be removed from the denominator when you're working out the share of sales. Again, it's another of these points that on its own, I doubt I'd be whinging about on my feet, but it really does build up a picture of the sort of evidence that we're dealing with.

Just to step back on offline bundled products, because I'm conscious that that is quite a granular set of submissions I've made about that, we don't agree that there's any principled basis to exclude them from the denominator. We don't agree with Dr Pike's 11.4 per cent figure. But actually, put the claim in perspective. We say that the rest of the market is 99 per cent, so 1.2 per cent, 100 less 1.2. Dr Pike says the rest of the market is about 89 per cent. Whichever is the right reference point, we say that Amazon UK isn't credibly exercising this net incremental pull on the rest of the prices in the market.

While we're stepping back and thinking about how the picture fits together, it might just be helpful to kind of build up the picture of the combination of views that Dr Pike has had to express about how competition works in this market in order to get him to this point in relation to the off-Amazon claim.

He says prices of Apple products through any channel aren't materially constrained by inter-brand competition. So you take inter-brand competition out of account, step 1. Then you say: on-Amazon pricing is constraining Apple's pricing, so Apple's RRP, but not to a material extent the other way round. It's having a net effect from Amazon to Apple.

THE PRESIDENT: So on-Amazon constrains --

MS ABRAM: Apple's RRP.

THE PRESIDENT: Yes.

MS ABRAM: Net constraint on Apple's RRP, so asymmetric.

THE PRESIDENT: Yes, but not the other way around.

MS ABRAM: Not the other way around.

On-Amazon pricing, third step. On-Amazon pricing constrains third-party retailers, but not materially the other way around. You've got the same net point.

Fourth point: on-Amazon pricing constrains online and offline pricing, hence offline being part of the claim. But actually, offline prices don't constrain online prices. Then final step: on-Amazon prices might constrain bundled prices of mobile phones offered by the MNOs, but not the other way around; so bundled prices not materially affecting unbundled prices. They can also come out of the denominator.

At this point, we are standing on our head with one eye closed and squinting a bit, in order to build up this picture of how competition is said to work in the market. We say that the position on market share is totally clear.

The challenge that's put to me that Mr Derbyshire very fairly also put a few moments ago is it's not all about market share. There's also these qualitative points. Let me run through the five qualitative challenges that are made about why it's more than market share.

The first point that's made against me is, well, look, Amazon is in absolute terms a significant sales channel. You've seen the correct revenue data now. Although it's so much lower than it was believed to be, it's still significant. On that we say, quite simply: well, it's not absolute values that one is interested in for the purposes of competition analysis. One is interested in relative share of relevant sales. Amazon could have as many billion sales as it wanted, but if it's only one per cent of relevant sales, that's what would matter.

That's the short point.

THE PRESIDENT: Why is it relative sales? Because the point that's being made against you is that the other retailers don't know what the relative sales are. So how are they constrained, other than by seeing that a lot of products are, in general and absolute terms, sold by Amazon? They don't know actually the value of those or the relative value of those.

MS ABRAM: This is another point on which it is quite surprising to hear factual evidence without any support for it. That is based on a sheer assertion by Dr Pike as to what retailers know and don't know. I would respectfully suggest that if one was going to take a view about what retailers are likely to know, it is that they are highly expert on the markets in which they operate and on the extent to which each competitive force is significant in the market; and to the extent that other retailers are interested in Amazon, to the extent for a particular product set, then they will absolutely have a good idea. Certainly, this Tribunal can't proceed on the basis that they don't.

I think, if I may say so, the point was put much better than I just have by Mr Derbyshire yesterday, in that the other retailers may not know exactly what the percentages are, how the market divides up, (inaudible) have a keen interest. But what they will know is what happens to volumes when their prices move. They will know, they'll be able to see, if a price goes down on a particular star product in Amazon. Is that relevant to John Lewis? They will know; they will absolutely be able to track that. We've got no insight on any of that from the PCR. That deals with absolute volumes.

Second point: alleged market power. The PCR says, well, both Amazon and Apple have got a great deal of market power. It's perhaps helpful just to remind ourselves that, as I showed you yesterday, the way in which the point on market power is put is by reference to Amazon's market power in the consumer electronics world; so in a generic sense, in this field, as opposed to for Apple products specifically.

We say that's nothing to the purpose. It's shooting at the wrong target, because the question isn't: do lots of people buy things from Amazon in general in the UK? It's whether lots of people buy Apple products from Amazon in the UK. It's helpful, perhaps, to get down beneath the -- if I may say -- relatively vague and rhetorical references to market power, to actually think about what the PCR would need to establish in order to show there was relevant market power.

To show that there was relevant market power of Amazon, it had to show two things. Step 1: that it had market power for the sale of Apple products. Step 2: that any market power it might have for the sale of Apple products plausibly means that price rises on-Amazon will be echoed by price rises off-Amazon.

I want to show you the closest that Dr Pike gets to this in his expert report, which is nowhere near where they need to be. You saw this yesterday, so I can take it quickly, but I do want to remind you of these reference points.

We start at Pike 1, paragraph 166, which is A, tab 7, page 216. You see in the first two sentences of 166, Dr Pike is concluding that, "... Amazon Retail has market power as a retailer of Apple Products". We disagree, but Dr Pike says:

"This suggests that it is weakly constrained by other sales channels and that it has the power to raise the price of Apple Products sold on ... Amazon Marketplace above their but-for level."

We're not applying to strike out that bit of the claim. Take that as the starting place. But even Dr Pike doesn't take the extra step to say that shows Amazon has enough market power to raise prices for Apple products off-Amazon. The highest he puts it -- and you've shown this yesterday as well -- is at paragraph 155 of the same report, which is on page 213. He's talking about market power here, and line 4 of 155, he says:

"In this section I next consider the market power of Amazon Retail. This is relevant because a comparison of the market power of Amazon Retail and the market power of the Buy Box winner ... determines whether [on-Amazon price rises are credible]."

Point 1. But the sentence we're interested in is the final sentence, "It is also relevant to the scope for the 2018 Agreements to have an umbrella effect driven by Amazon Retail ..."

So the highest that Dr Pike puts it anywhere in his report is that market power of Amazon UK is relevant to whether or not the GTA could have led to raised prices off-Amazon.

Somehow, that has transmogrified in the PCR's pleaded case to an allegation that the alleged market power on-Amazon is a direct demonstration of ability to raise prices off-Amazon. Your note for that is paragraph 27(4) of the reply. That's where that direct demonstration terminology --

THE PRESIDENT: He says in Pike 1, it's relevant.

MS ABRAM: Relevant.

THE PRESIDENT: Then in Pike 3 --

MS ABRAM: No, in the reply. The point I'm making is that the pleading is unsupported by the evidence. So in the reply, tab 17, paragraph 27(4), which is on page 523. You see, second sentence of 27(4):

"The preliminary analysis conducted by Dr Pike shows that the Restrictive Agreements led to an increase in the price ... on Amazon ... [and then] That provides a direct demonstration that Amazon ... and Amazon Retail have market power, and that the Restrictive Agreements are capable of affecting prices for Apple Products more broadly, both on-Amazon and off-Amazon."

I say, where does that come from?

MR DERBYSHIRE: Did it not come from section 13.4.1?

MS ABRAM: Well, if one looks at 13.4.1, that's the proposed methodology, the empirical methodology. Of course, that hasn't happened yet. It hasn't been done. So there's no basis for this.

That's Amazon's market power. The point is also made against us, well, Apple's got market power of its own. It's not just Amazon. We say that this argument about Apple's market power really epitomises and underlines the lack of logical coherence of the off-Amazon claim. It's a real example of trying to have your cake and eat it, because if one thinks about what the PCR needs to do in order to make the off-Amazon claim, it's got to say Apple's got market power in the sale of Apple products, because it needs to reduce the apparent impact of inter-brand competition. So it needs to put Apple in a kind of league of its own, in order to get the off-Amazon claim going.

But at the same time, in order to maintain the off-Amazon claim, the PCR has to say: well, Amazon, despite its tiny, tiny share of sales and Apple's much, much greater share of sales through its online and offline sales channels, has more market power for the sale of Apple products than Apple itself. That just doesn't stack up. Either Apple has got market power as alleged, in which case this 1.2 per cent of share of sales point the wrong way. This 1.2 per cent share of sales doesn't make the difference, doesn't move the market in the way that it said that it does; or Apple doesn't have market power, in which case, hello inter-brand competition.

MR DERBYSHIRE: Market power is of course not binary.

MS ABRAM: Of course, of course. I totally accept that. I'm putting the point by focusing on the two extremes. But that's the way that it's got to be done, really, by the PCR, because you've got to say, well, it's faced with the reality that 1.2 per cent share of sales, much bigger sales by Apple through its own channels. It's got to be saying, look, it's exercising this net impact on the market. Market power, we say, just doesn't come up to proof in the way that it needs to.

Third point that's made -- and this is important because a great deal of emphasis was placed on this yesterday -- is the idea that Amazon UK is the second largest individual vendor of Apple products after Apple itself. I need to show you the basis for this claim, and it's to be found in the addendum to Pike 3. A, tab 22, page 636. Paragraph 6. Dr Pike explained:

"To estimate the share of Apple Product sales accounted for by Argos and John Lewis [which is effectively a proxy for saying Amazon is number 2 after Apple itself], I note that according to [the survey] from 2024, 13% of respondents [bought] phones from Amazon ... 7% from Argos and 3% from John Lewis."

The whole basis of this argument that Amazon is the second biggest sales channel in the UK of Apple products is a customer survey from 2024. That's all there is. Not only is it just one customer survey from 2024, it doesn't look at iPhones specifically. So Dr Pike doesn't, for example, seem to have asked himself whether: well, is it possible that consumers would be more likely to buy a phone, including a dumbphone, from Amazon, than it's likely to buy an (inaudible) expensive, high-value, technically sophisticated product? Are those figures representative? And the survey doesn't look at other Apple products at all.

So this survey is valueless to extrapolate the idea that Amazon is the second biggest sales channel for Apple products in the UK. It's frankly a spurious basis for that.

In their reply, in their skeleton argument --

THE PRESIDENT: You must have figures on that.

MS ABRAM: This is the point that I was just going to come to. They say, "Well, look, it's our fault, Apple and Amazon's fault, because we haven't told you how big the sales channels are". They haven't asked. The PCR's asked so many questions in this case, and they have not asked that question. Instead what they've done -- it's a deliberate choice to base that assertion that Amazon's the second biggest channel on this spurious reference point -- 2024 survey about something else -- rather than asking.

THE PRESIDENT: But you could have put in your evidence -- you could have simply said this is what Pike -- I think Pike 1 made the same point. So it was there in Pike 1?

MS ABRAM: Yes, I think that is right. Yes, I think that is right. I will check.

MR DE LA MARE: (Inaudible) the basis of the assumption that the iPhone discounting is a proper proxy on the basis that the 61 per cent of iPhone users will carry over onto Amazon.

THE PRESIDENT: Yes. I was just asking whether this was in Pike 1.

MR DE LA MARE: That's the analysis in Pike 1.

THE PRESIDENT: Right, so this point about a "second largest" is in Pike 1.

MR DE LA MARE: No, the "second largest" point is not, but the prevalence of the iPhone in the Amazon product mix is.

THE PRESIDENT: All right. Okay. All right, so there's some data about the extent to which iPhones are sold in the Amazon product mix. So you could have put in data saying that that's not right.

MS ABRAM: The point emerged in the reply though. So in the PCR's reply to our strike-out application -- in circumstances where I can assure you there have been lots of letters in this case which we don't need to trouble the Tribunal with -- they've asked lots of questions about things they wanted to know the answers to. They wanted to know the answer. They've been able to ask the question; we didn't have the right to put in any further evidence at that point, and neither is it for us to do that. It's for the PCR to establish a valid basis for its claim. So all I need to do is say, "Well, this 2024 survey about something else is not a valid basis for the claim".

THE PRESIDENT: But for the strike-out test we need to be pretty sure that this is a meaningless or inaccurate figure because we can't conduct a mini trial as to whether it's right or not. So we've got that. We don't have anything from you to say that that's wrong. All you can say is it might be wrong. I mean, it might be correct, but we don't know that.

MS ABRAM: I say that the evidential basis that they've put forward for the claim is spurious. Of course you're right that you don't have any affirmative data from us, the point was raised so late. But what we can't do, and we know that from Easyair, is just let a case go on to trial on the basis that something might turn up if there's disclosure.

THE PRESIDENT: We know that they will be able to get a figure on that. There's nothing to suggest that this is obviously implausible. If one looks at the strike-out cases, I mean, yes, the figure might be dodgy; we don't know. We know you will be able to get the figure because you're not saying that you haven't got the data. The evidence will be out there so that they will be able to test whether it's the second largest or the third or the fourth largest.

MS ABRAM: I don't know the answer to the question myself, but what I can say is that when one thinks about whether it's obviously implausible, one has to put it in the context that Amazon's got 1 per cent of sales. So even if it were the second largest that would suggest a highly, highly fragmented market with no one having particular market power. But actually -- and I don't know the answer, I don't know what the relative fragmentation between the different retailers is -- that market share figure is not suggestive of a significant force.

Of course, it's also important to underline that "second largest" is by reference to Dr Pike's view of the world, which excludes offline sales and excludes bundled sales. So, for example for John Lewis, which is obviously a very, very significant high street retailer, you're taking out its high street presence for the purpose of that statistic. So for all sorts of reasons we just say it's spurious.

The fourth point that's put against me, and this is the one that was presented yesterday as really critical for the upgrade of the third-party retailer price effect from plausible to highly plausible, is the price promise. So the idea that the third-party retailers price match Amazon as a competing retailer. The evidence in support of that is at tab 18, page 556. Can I ask you to read paragraph 10 and footnote 18? We did look at them yesterday, but just to remind yourselves. (Pause)

THE PRESIDENT: Yes.

MS ABRAM: I particularly draw your attention to the wording of footnote 18. So Dr Pike acknowledges that:

"... the John Lewis and Currys promises [the only two we're talking about here] do not include third-party sellers on UK Amazon Marketplace, they cover almost all sales of

Apple products on UK Amazon Marketplace given Amazon Retail's share of these sales since the 2018 Agreements."

So that is evidence from Dr Pike that the John Lewis and Currys price promises cover almost all sales on UK Amazon Marketplace. Mr de la Mare showed you the current version of the John Lewis price promise yesterday. It might just be helpful to remind ourselves of what it said. It's in B2 and tab 24, page 978.

Perhaps if we pick it up on page 979. You'll recollect that the critical bit of this current price promise is halfway down the page, between the page and hole punches, and John Lewis saying:

"When price matching Apple products, we will only match those sold by Apple directly. We will also price match Apple products sold by one of our named competitors if they offer a minimum 2 year guarantee as standard at no additional cost [and no one else does so]."

Now, you measure that against the words of footnote 18 to Pike 3, which says that the John Lewis promise covers almost all sales of Apple products on UK Amazon Marketplace since 2018. That is wrong. That evidence is wrong by reference to the current version of the John Lewis price promise, because the John Lewis price promise says that it doesn't price match Apple products, except to one of the list of competitors who offer a two-year guarantee as standard for no additional cost, and no one does so.

MR BANKES: But aren't the online sales by Apple directly just through the marketplace? It doesn't change the identity of the vendor. The vendor is Apple.

MS ABRAM: So the vendor is Amazon, I think you might mean.

MR BANKES: No, no, the vendor is Apple. Amazon is the marketplace; it's the shop front. It's not the vendor.

MS ABRAM: No. Amazon sells products on its own --

MR BANKES: Yes, okay. Sorry, you're right.
THE PRESIDENT: That's Amazon Retail.
MS ABRAM: That's Amazon Retail.
MR BANKES: Amazon Retail. Yes.
MS ABRAM: The point that I'm seeking to tee up here is that when it said "This promise covers almost all sales of Apple products"; that is wrong. That is factually wrong by reference to the current version of the price promise.
Now, Mr de la Mare said, "Look, the words of the price promise change over time", he showed you another version that had been in force at some other time which did seem to capture sales via Amazon itself. But it gives rise to two concerns. The first is about how this footnote came to be included in the terms that it has been -- it hasn't been corrected -- when it was realised by the PCR. Doubtless it was included inadvertently. Doubtless the price promise was misunderstood and so on. But how it was included in these terms and hasn't been corrected in circumstances where this has been identified as the factor -- the John Lewis price promise -- the factor that raises this claim from being plausible to being highly plausible. Question one.
And question two: is it enough to form the basis for a claim? Because the way that Mr de la Mare was driven to put it yesterday was that an absence of evidence that John Lewis is not benchmarking against -- sorry. I'm sorry, I'm quoting the wrong bit. Mr de la Mare said that this does support his case because it doesn't show that there was no benchmarking by John Lewis to Amazon.
Now look, an absence of evidence that there wasn't benchmarking is not the same as a plausible basis for a case that there was in fact benchmarking. To put it bluntly, it's not good enough. So that's the fourth point that's relied on in support of the off-Amazon claim -- the fourth qualitative point.
Then the final point on this is --

THE PRESIDENT: But we still have Currys. Is there anything particularly wrong with the Currys price promise.

MS ABRAM: So the Currys price promise isn't in evidence and I don't have a point to make about it now, save to say that -- well, save to make a couple of points about it since you invite me to. The first is that Currys sells --

THE PRESIDENT: Isn't it sort of in evidence indirectly? We've got that in footnote 7. So he's referred to it and he's given evidence about Currys price promise matching any UK retailers' prices, online or in-store. So that is the evidence and the fact that he hasn't exhibited it is neither here nor there; he's given a reference to a URL.

MS ABRAM: So you've got much to look forward to from Mr Harris in relation to Currys. But what I would say is that if this case boils down to an assertion that it is plausible that there is an off-Amazon pricing effect because there is a Currys price promise from one retailer in the UK, that is not good enough to get over the fact that 1 per cent of sales are sold through Amazon. But if that's the only foundation stone for this bit of the case because the John Lewis one has fallen away, then that is not good enough.

Of course, this is never going to get better. So this is actually even worse than one of these cases where you say something might turn up at trial because Dr Pike has expressly said "I don't need evidence from third-party retailers". Mr de la Mare said yesterday on his feet for the first time "Well, perhaps there'll be expert evidence from retailers" but that's not part of the plan for the case. That was new yesterday. So, this is the best it's ever going to be so far as the materials before the court are concerned.

Then the final point just on these qualitative issues is that -- it's been said only in the skeleton and orally -- so we haven't dealt with this in writing before -- that the subjective intent of the GTA must have been to increase prices for Apple products across all channels. That must have been the aim of the parties in entering into the

GTA. We said that's both wrong and irrelevant: it's wrong, because the purpose of the GTA was to combat counterfeiting, as we've consistently said; but it's also irrelevant, in the sense that it's a bootstraps argument, it assumes what it seeks to prove.

Our argument is that it's not credible that prices on Amazon could constrain the whole rest of the market. That's not made any more credible by an argument that the parties' subjective intention must have been to achieve an effect that couldn't plausibly have been achieved to begin with.

MR BANKES: We're in chapter 1 territory, aren't we? So it could be an object infringement.

MS ABRAM: It could in principle be an object infringement, but what the PCR is seeking to claim here is damages. So it's seeking to evidence an effect on competition on Amazon. So none of the qualitative points go anywhere.

I'm conscious of the time; I need to deal with cost benefit as well. But let me just pull together the threads of what I've said about the off-Amazon claim before I go briefly onto cost benefit.

So Dr Pike's evidence is that he considers that the off-Amazon bit of the claim is plausible. That's the highest that he put it until Pike 3 and there's a helpful summary in Pike 2, which is the summary that the Tribunal instructed guide of Pike 1, and I'll just give you the reference: it's A, tab 11, page 402, paragraph 13 of the internal numbering and it's paragraphs (e) to (g), where he says the off-Amazon claim is plausible.

So that's what you've got before you and you've also then got this upgrade to the off-Amazon claim being highly plausible in relation to the effect on third-party retailer prices and I'll give you the reference also for that, that comes out in Pike 3, paragraph 4, (i), A, tab 18, page 551.

So you don't have any empirical analysis on the off-Amazon claim; you've got nothing on the Spanish and the Italian regulatory decisions; you've got an expert saying that he thinks that the claim is plausible or highly plausible and the question is then: is that enough by itself to form reasonable grounds for the claim? And I hope that by dissecting the basis for what Dr Pike has said in his evidence, I've shown why we say that there is no reasonable basis for the claim and the fact that Dr Pike has the opinion that the claim is plausible does not, in fact, connote that's it plausible, given the evidence that we've put forward on the strike-out application and the analysis of his evidence.

And so then the question is: what does the Tribunal do about that? So we say that the starting point, in relation to the off-Amazon claim, is that that claim has got no sustainable basis. It's got no real prospect of success, so it should be struck out at this stage and we say that should happen regardless of what you think about Dr Pike more generally, regardless of what you do about the cost benefit issue -- which I'll come on to say something about -- and one of the reasons why we say that is that Dr Pike's error has quite clearly been to strain too hard to support the off-Amazon bit of the claim.

So, even based on Dr Pike's evidence, it has no realistic prospect of success. This is not an issue that would be remedied by replacing Dr Pike with an independent -- a genuinely independent -- expert, because not only has he done his level best, he's done much more; he's gone much further than he should have done in order to support the off-Amazon claim and this bit of the claim is distinct. So striking out -- or summarily determining -- the off-Amazon bit of the claim, regardless of what you do about the rest, would materially narrow the issues, would narrow the disclosure, would narrow in particular the issues for economic evidence, it would shorten the trial. They're separate points and we say that the off-Amazon claim should be struck out regardless of what you do about the kind of rump of.

Questions from THE TRIBUNAL

MR BANKES: Can I ask you one question? I think Mr Harris is going to address this on Pro-Sys. What do you see that -- you're asking us to do both, or at least you're giving us submissions in the alternative -- what's the difference? Why do we need the strike-out if we've got the Pro-Sys point, which will lead, I think, to more or less the same place? What's different about strike out?

MS ABRAM: The Pro-Sys point would take you to more or less the same place in terms of actual outcome of the case, but of course the tests are slightly different. So the strike-out looks at whether the whole claim -- taking into account the law and the facts and so on -- has a reasonable prospect of success, whereas the Pro-Sys is a particular technical requirement as to the methodology that must be put forward by PCR and although the outcome of this hearing would be the same whether you went for strike-out or Pro-Sys, the arguments are related but different and so the grounds are different and you could go for either or both.

THE PRESIDENT: But does it have an effect on whether it could be brought back? So if we were to strike out, then we're saying there's no plausible basis whatever -- this is what you just said -- your evidence, whoever your expert is. You couldn't come back and have another go, because it's completely pointless, it's bound to fail.
Whereas Pro-Sys says, you haven't done enough in this application and it doesn't necessarily preclude someone coming back with a different expert and different evidence with a better blueprint to trial. Is that correct?

MS ABRAM: In principle, that is correct and there have been examples where the Tribunal hasn't closed the door, has found the process wasn't satisfied and hasn't closed the door to a PCR coming back with a revised methodology. So Gormsen v Meta is, I think, the first example of that happening.

THE PRESIDENT: Well, Gormsen was a case where the Tribunal didn't deliver a sort of final -- it's not a "no" judgment, but said, "It's a no from what we've seen, but you can have another go". That's, I think, what we were effectively invited to do the first time round and we refused that and we said "it's a no".

But I think my question is: even if one said "it's a no" and didn't invite the parties to come back, if that "no" was on a Pro-Sys basis, rather than on a strike-out basis, could they nevertheless come back? Or are you saying that they would still be precluded from coming back? If so, why?

MS ABRAM: So in those circumstances, you'd be in the world of abuse of process and the Tribunal would need to consider whether there was an abuse of process, if they sought to come back.

THE PRESIDENT: I see.

MS ABRAM: Just to tie up the loose ends on the --

THE PRESIDENT: So that would be a sort of Henderson v Henderson-type case. All right.

MS ABRAM: On the on-Amazon bit of the claim: of course, you know, we say certification should be denied because of Dr Pike's independence and alternatively because of cost benefit, which I'll say something about. But just on independence, just to tie up -- to join up dots with the Tribunal's practice direction on expert evidence, the Tribunal identifies, of course, circumstances where an expert may have been involved in instigating a case as a possibility in cases before the Tribunal, but that is identified as a particular circumstance where it's important to be really clear what has happened and therefore it's a circumstance where it's particularly important for the Tribunal to be on alert as to whether the expert is not only independent, but also whether they've shown themselves to be independent and the key part of the practice direction for this purpose is paragraph 3, where the Tribunal identifies the need for

experts to adopt a balanced approach and to be willing to stand back and to engage constructively and sensibly -- I'm paraphrasing -- in challenges to their expert opinion.
(Pause)
They're not advocates for a party; they're not there seeking to defend a position. Even as advocates, we've got an obligation to put forward a case fairly to the Tribunal and to identify points against us and all the more so an expert who's meant to be independent has to engage in a fair and balanced way and we say -- and I've shown you lots and lots of examples -- but Dr Pike just has not met that requirement in Pike 3 and in the addendum to Pike 3 and it's worth just flagging that I have focused today on the points that are on the critical path to the strike-out application. They are not all; there are many other points that I could have drawn to the Tribunal's attention.
Just to give you one example that I haven't had to show you: in Pike 1, Dr Pike says, "I can't give an estimate of the value of the off-Amazon claim; I don't have the available data". Fair enough. In Pike 3, as to the value of the on-Amazon claim has gone down, suddenly Dr Pike has found himself able to give an estimate of the value of the off-Amazon claim and again, no explanation of what's changed to enable him to give that information that he wasn't previously able to give.
So examples of this kind of conduct are just abound and we say it's not good enough and the Tribunal's expected --
THE PRESIDENT: That's the estimate based on an overcharge of 1 per cent.
MS ABRAM: That's it, exactly.
So we say no part of the proceedings can be certified without a genuinely independent expert report that satisfies the Pro-Sys tests. Of course, what one doesn't know is whether another expert would stand behind any part of Dr Pike's methodology and I'm not just talking now about the off-Amazon claim, but also the on-Amazon claim.
THE PRESIDENT: Well, does that part of your case struggle with the fact that you

haven't identified anything that's really wrong with the on-Amazon methodology? I mean, I could follow that if you said there are all these problems with the on-Amazon methodology. You are reliant on Dr Pike's evidence and nothing else and because there are problems with it, if you follow his methodology, you need to be confident that it's an objective one and you don't have that confidence. I mean, that's effectively what you're saying about the off-Amazon part of the case.

But in relation to on-Amazon, there's nothing that you have identified as being in any way -- leaving aside the independence point -- a matter that would call for strike out of that claim.

MS ABRAM: In order to reach that view -- that kind of permutation of findings though -- the Tribunal would have to, ex hypothesi, have had to find Dr Pike is not independent, he's not a sufficiently independent expert to be doing this case, we don't have confidence in the off-Amazon bit of the claim for whatever reason, so that's off the books. But yet despite the fact that the expert is not independent, we find that the claim is certifiable, based on his expert report, an expert --

THE PRESIDENT: But let's take realistically the evidence of a witness. Let's say that the witness goes into the witness box and on all of the disputed issues the witness is found to have told a pack of lies, the Tribunal would say, "On the disputed issues, we don't place any value on the evidence of Mr Y". Right? But the witness may have given evidence on some completely uncontroversial, not disputed issues on which the Tribunal said, "On those, the witness wasn't challenged and his evidence wasn't disputed and we therefore can rely on that as evidence, because that wasn't a disputed point". Are you not in a similar territory -- not saying it's exactly the same -- but similar territory? You've got Pike on the on-Amazon section and there is no dispute taken, anything in his evidence. It's just not said at all that there's anything wrong with that as a methodology. Why does the fact that you might take issue with some of the rest and say that we can't rely on it mean that that taints the on-Amazon methodology?

MS ABRAM: So we say it's different and that's because of the principles that Mr Harris is going to, to expand in relation to the appearance of independence. So it's not just a question, like, whether the witness is or isn't telling the truth about one bit of the case, even though he's lying about the rest, it's not just a question of whether Dr Pike can be relied upon for one bit of the case, but he can't be relied upon for the rest. It's a question of whether Dr Pike has the requisite appearance of independence to satisfy the requirement.

THE PRESIDENT: But why is that needed for a part of the case where there is no dispute that regression analyses of a fairly vanilla method that he's putting forward pre-and-post, and difference-in-differences? No objection is taken to those. It's not said that this is in any way a novel or unusual analysis. Why do we have to reach the view that he's putting that forward on an independent basis? I could understand it if you were saying, this is a very suspect analysis and all you have to rely on for this very suspect and novel analysis is him. But no one is saying that there's anything wrong with this. You're not saying it's unusual. You're not saying it's unorthodox, or that it is based on implausible assumptions.

MS ABRAM: Let me just give one example that may be helpful. In the Pinochet case, no one was saying that Lord Hoffmann's judgment had actually been affected or would actually be affected. But nonetheless, the connection of his wife, I think, to one of the parties was sufficient to give rise to it being inappropriate. That's the logic.

THE PRESIDENT: What if you hadn't even put forward Pike? I mean, there's nothing that says you've got to rely on an expert. What if you just said, "What is proposed to do by an economist is to do a regression analysis that compares this and this. I mean, look, everyone in the courtroom knows what a regression analysis is and how it's conducted. There are two ways of doing it. Here's a before and after. Here's a difference-in-differences. This is the data set that we propose to use, and we will instruct (inaudible) economist to do it. Would it even have been needed to have an expert report for that?

MS ABRAM: Well, perhaps that's an argument for another case. It's very likely that, that an expert would be needed, but in any event, an expert was put forward, and we say that he doesn't have the requisite appearance.

THE PRESIDENT: Okay.

MS ABRAM: Just on cost-benefit. I recognise that Mr Harris will be champing at the bit.

Oh, of course, the shorthand break. Should I just finish on cost-benefit first? I'm conscious we've been sitting for a while, but I --

THE PRESIDENT: We're going to be sitting for three hours this morning, so would now be a good point to just take a five-minute break? Then you can look and see what you need to say on cost-benefit.

All right.

(11.32 am)

(A short break)

(11.45 am)

THE PRESIDENT: Just before you carry on, Ms Abram, so that everyone has as much notice as possible of a request that we are making.

We have looked at the material that has been handed up to us this morning on funding. We are very grateful for the work that's been done overnight. The table that Mr Went very helpfully took us through, the proposed defendant's work on comparators; also the PCR's work on comparators. We haven't got that in hard copy yet, but we're going to be getting it.

Can I just pick up again on the point that I raised with Mr Went as to what happens -- as before, I'm trying to explore the different outcomes we could reach and what routes we can go down; the decision tree, if you like.

I wonder if we can just say this to try and get greater clarity at an earlier stage as to what the position would be if we are with the proposed defendants on either or both of a) the Riefa costs point, and b) the hourly rates point, because both of those are squarely in issue, and we are going to have to reach a decision on those one way or the other.

Rather than being driven to a conclusion that we can't certify on one or both of those bases, and then everyone having to go away and think what to do, and then potentiality of having arguments about abuse of process and so on, which seemed to us a bit unsatisfactory, especially given the history of these proceedings, what we think that we would like is for the PCR by the end of next week, 4.00 pm on Friday next week, to provide us with a statement as to whether, if we reach the conclusion that the Riefa costs must be excluded in their entirety -- in other words, if we reach a conclusion that we could only properly certify on the basis of the right-hand column of this table -- number 1; and b) if we were to reach a conclusion that the PCR should not properly get an hourly rate of more than, say, £100 an hour, which is the upper limit of what the proposed defendants have submitted to us; would the funder and ATE insurer take the same (inaudible) as Hausfeld and counsel would do, and would Mr Le Patourel also accept a lower hourly rate on that basis?

If we were going to accept the proposed defendants' submissions on those, forcing us to say in a binary way now that we will not certify and then this case comes back, potentially, we want to know right now whether you would be able to proceed on an amended basis.

MR WENT: That's understood, my Lady.

THE PRESIDENT: Given the fact that you've produced these figures -- and also, to be honest on the funding Riefa point, Mr Le Patourel has said quite candidly, and you said, the Tribunal can control this at the end of the day. So everyone bears in mind the risk that at the end of the day the Tribunal says no.
MR WENT: That's understood.
THE PRESIDENT: That must have been factored in. I wouldn't believe that the funder hasn't thought about it. Ditto the ATE insurer. That's why we're asking you to set this out quite clearly by the end of next week.
MR WENT: Yes.
THE PRESIDENT: Thank you very much.
MR WENT: Friday the 10th.
THE PRESIDENT: Yes. Next Friday by 4.00 pm. Thank you.
MS ABRAM: Costs and benefits.
THE PRESIDENT: Yes.
MS ABRAM: I know you're aware that in effect this has three elements. The benefits of a claim, in the sense of its alleged claim value; the costs of the claim; and then distribution, to look at the real-world benefit of the claim.
On the benefits of the claim in the sense of claim value, you've heard now from Mr de la Mare that the figure focused on now is £289 million. You've also seen, we don't agree with that figure. We think it's put forward on some remarkably favourable assumptions.
THE PRESIDENT: Remarkably --
MS ABRAM: Favourable assumptions from the PCR's perspective. We've set some of them, just some examples of those out at paragraph 36.2 of our skeleton. But I'm happy just to use it as a reference point for today's purposes.
What I'm not happy with is to accept that, as the PCR contends, the proposed addition

of the injunction has incremental value that should be seen to take the claim value above the £289 million. Of course, there's an application for permission to amend. Just to clear that point away, Apple's position is obviously that permission to amend doesn't arise because certification should be refused. If the proceedings were to be certified, we wouldn't oppose the amendment. That's our position there. It's the same as Amazon's.

But the injunction, if added to the case, wouldn't add any further separate benefit in terms of claim value beyond the monetary claim. This is a claim for alleged consumer loss. So the alleged damages, the monetary damages, are the measure of the value of the claim, and the injunction doesn't add any separate benefit. That's what I say about value of the claim.

Costs is straightforward. Again, content to use the PCR's figure. The focal figure is about £130 million, and content just to use that as a rough guide to what the costs might be.

What that means just in very ballpark terms is that in order for the class to do better than the lawyers and funders, for them not to be the key beneficiaries of the proceedings, the PCR is going to need to achieve on the on-Amazon claim take-up of above 50 per cent, just in very ballpark terms.

THE PRESIDENT: So in order for the class to do better than the lawyers, take-up has to be more than 50 per cent, just because that figure is a little shy of 50 per cent.

MS ABRAM: Exactly. Just in really ballpark terms, just to give you an idea of what we're looking at.

The PCR's position is really built on three prongs --

THE PRESIDENT: Although that figure would fall if one were to strip out the Riefa-related costs.

MS ABRAM: It would fall to some extent, and the 50 per cent figure would also fall slightly. But, I mean, we're talking about the ballpark here. It just gives you an idea of where one's up to.

The PCR's position on distribution, which then becomes critical, really has three elements to it. First, you could have a direct credit methodology here; second, the per capita claim value is sufficient to incentivise take-up; and third, they use that 75 per cent reference point from the FCA and motor finance redress scheme.

On the direct credit mechanism: the PCR's proposals were only set out in the Epiq report that was served together with the reply, and that was about three weeks ago. It's based on all sorts of factual assertions about what data Apple and Amazon have about the proposed class. We haven't had the time since then to get to the bottom of whether those factual assertions are right, but it is clear that they are remarkably simplistic. For example, it's suggested that having an Apple account would enable a direct credit, but you don't need to put in your payment details in order to open an Apple account. So merely having an Apple account can't be good enough. Of course, it's also possible that any payment details that were given might have expired. It's also possible that the holder of Apple accounts may not be the class member; for example, if an iPhone has been bought for an overly lucky and doubtless ungrateful teenager, the Apple account may be in the wrong name.

So although this is presented as a case where direct credit would be possible -- in fact, it's presented as easy -- one just doesn't have the data to assess that. It's also important just to highlight that although this is identified as direct credit methodology, that's not quite accurate, because one of the steps in the proposed process is that class members should have to elect between receiving a money sum and confirm their payment details, if they want to receive a money sum or receive a credit in the form of a credit to their Apple or Amazon account. Just setting aside whether any of that is technically feasible, that is a step that requires proactive, direct engagement by class members. It can be expected to reduce participation. One saw in Gutmann, for example, one of the factors that was identified as depressing participation in that case was that class members were concerned about inputting their bank details. So confirming payment details is a real issue for class members.

THE PRESIDENT: But if actually all that is required is you to confirm whether or not you want the direct credit, that won't for most class members require them to put in any extra bank details, so the sort of psychological obstacle of having to input details to a new platform won't arise in that case. It's just a tick box: "Do you want this credited to your Apple or Amazon account?"

MS ABRAM: That assumes, of course, that the Apple and Amazon account has payment details and that those payment details are current.

THE PRESIDENT: But in the case of on-Amazon claims, presumably it would be a credit to your Amazon account because that's where the purchase would have been made for and that would have had payment details.

MS ABRAM: That is the proposal.

THE PRESIDENT: So it's a lot easier for the on-Amazon because you know that there will be record and you know that there will be payment details.

MS ABRAM: I'm not able to make any submissions about that.

The second prong of this distribution methodology is this idea about whether the per capita value of the claims will be enough to drive take up through an online claims process. So the bit where you don't have direct credit, for whatever reason, will the per capita claim value be enough for people to be bothered to sign up?

Now, you've seen in our skeleton that we have calculated the per capita claim value for the on-Amazon claim at £14.36. That's based on Dr Pike's methodology. So we divide his figure up to 2025 by the number of all Amazon class members -- that we know is 7.8 million -- gives you £14.36 a head on average. It's an average figure.

Dr Pike has produced a different figure of £37 to £39 a head. It's another Dr Pike figure, I regret to say, in a sense that what he's done to produce it is to divide his calculation of the claim value up to the end of 2028 by the number of on-Amazon claimants up to the end of 2025. So again it's another of these points where the numerator and the denominator just don't match up because he's got a longer claim value than the number of class members that it relates to. So it's another specious reference point.

But whether the per capita claim value is about £15, as we say, or £30-odd as Dr Pike says, it actually compares very closely to the amount that was available in the Gutmann distribution just certifying the number of journeys that you've taken in the claim period. So in order to get up to £30 in the rail fares distribution -- the only one that we've done so far -- class members just had to enter the number of journeys they've taken -- didn't have to give any details, didn't have to give any contemporaneous documents. I'll give you the reference to where that is because that's hidden in a judgment -- authorities 4, tab 4, page 220, paragraph 21.5, final two sentences is where that is. (Pause)

THE PRESIDENT: Yes. But realistically again for on-Amazon you're really going to be looking at direct credit, aren't you, because everyone will have bought on Amazon with payment details? It's difficult to see why there should be any substantial number of non-direct credit cases.

MS ABRAM: I can't make any assumptions about Amazon (inaudible).

THE PRESIDENT: So it's for off-Amazon. For off-Amazon then one can divide between sales from Apple directly in which there may be a direct credit possibility, and then sales via other retailers.

MS ABRAM: That's the way that it's put in the (inaudible), yes.

THE PRESIDENT: All right. Yes. So the real problem is most likely to arise for the sales that are made neither on Amazon nor directly from Apple; it's the rump of the other resellers.

MS ABRAM: So the concerns are particularly acute in relation to those third-party retailers. But we say where you need to make a claim -- where you need to make an online application in order to lodge a claim -- the best reference point -- the only reference point that we've got -- is the rail fares distribution. So less than 1 per cent take up, and as I've said that was in a case where you could get £30 -- twice the amount we say you can get here -- just by giving details of the number of journeys, not even the journeys or any evidence.

Then the final point that's relied on here is the FCA's expectation in the motor finance redress scheme, which is 75 per cent. That is a totally different context. There's an estimated per capita average sum available of £830. So, over 20 times even of Dr Pike's estimates of the amount available here. It's a scheme that has involved a complex legislative scheme that's designed to ensure its effectiveness.

The point that was made yesterday by Mr de la Mare is, well, it's actually much easier to do distribution here because Apple and Amazon will have much more information about class members in this case than the financial firms will in that case. That is not a credible submission because the financial firms that will have to give redress in the motor finance context have entered into financing arrangements with the people who are entitled to claim redress. They're regulated financial firms who will have obligations to retain data for (inaudible) periods of time and to make sure that they have particular bits of reference points about their customers. I mean, if there's going to be any guessing about which is likely to have more data, it's going to be the financial or the regulated financial entities rather than Apple and Amazon.

MR BANKES: But it is the case that Apple has, since the start of these proceedings, retained all the relevant data, isn't it? I know you can't speak for Amazon, but Apple

retail has retained the data of these purchases.
THE PRESIDENT: For Apple direct purchases?
MR BANKES: Yes.
MS ABRAM: I don't know what the document holds are that are in place, but -- I'm not aware of what document holds are in place.
THE PRESIDENT: But given that we're talking about -- actually the crunch point is likely to be non-Amazon non-Apple direct purchases, the question is: what data is available for the rump of the third-party resellers?
MS ABRAM: That would be the most acute issue. What I'm saying about the FCA is that that 75 per cent reference point, whether or not it's right for the FCA scheme, it's not a good reference point --
THE PRESIDENT: Yes. I mean, your best point on that is the money is just much, much greater to incentivise people to make claims.
MS ABRAM: Yes.
MR DERBYSHIRE: And the acute point you're talking about is all off-Amazon, because on-Amazon it's just Amazon? The data is held by Amazon and what they sold to people; Apple products.
MS ABRAM: I'm not able to say anything about what data is held by Amazon. That's all I wanted to say about distribution.
THE PRESIDENT: Thank you very much. Is that the end of your submissions, Ms Abram?
MS ABRAM: Yes, it is.
THE PRESIDENT: Thank you very much.
Mr Harris.

Submissions by MR HARRIS

MR HARRIS: Madam president, members of the Tribunal, I'm principally going to address you on two matters. They are authorisation problems that we contend arise both as regards Dr Pike and as regards Mr Le Patourel. I'm going to begin there.

I am in the course of making those submissions to address you on Waterside and also on the Currys price promise.

THE PRESIDENT: Yes. So is Waterside your second point?

MR HARRIS: Well, you can put it down as a second point, yes.

THE PRESIDENT: Okay. So authorisation problems and Waterside.

MR HARRIS: Correct. Then I'm going to address you on Pro-Sys; the two difficulties that we say arise there. I'm happy to answer any questions about how it differs from the test for strike-out in this or any other case.

If necessary, I'm going to make after those three sets of submissions a very short point about Evans and opt-out. Then if I can, and if the Tribunal wishes me to, I can address a small, discrete point that arises about the Amazon distribution in the US case that has featured in the written submissions. But that may not be necessary.

THE PRESIDENT: No. And when are you going to sit down?

MR HARRIS: Well, we're now running --

THE PRESIDENT: Sorry, that's very rude. But just so that we can set our expectations.

MR HARRIS: Absolutely. I understand, no problem.

THE PRESIDENT: How long are you going to enlighten us, Mr Harris?

MR HARRIS: I'm keen that we do not go beyond 4.45 and I would therefore anticipate at the very latest 2.45 to 3.00 so as to give Mr Mallalieu time to address the funding issues and time in order to reply.

THE PRESIDENT: Well, hang on.

MR HARRIS: 2.30.

THE PRESIDENT: No, no. So, all right. Your side was supposed to have --
MR DE LA MARE: Four hours.
THE PRESIDENT: Four hours. Assuming the four hours started at 10.15, when does that take you to? 3.15. Around 3.15?
MR HARRIS: Yes.
THE PRESIDENT: So you were going to sit down at around 2.45 and then Mr Mallalieu is then going to address funding until how long?
MR HARRIS: Well, no later than 3.15.
THE PRESIDENT: 3.15, I see.
MR HARRIS: With any luck we will be shorter than that.
THE PRESIDENT: All right. Then what?
MR HARRIS: 3.15 allows an hour to 4.15 for my learned friend, Mr de la Mare, which is what had been agreed; an hour. Then that would allow half an hour for any further reply from our side and any further matters that the Tribunal wishes to raise.
THE PRESIDENT: Right. Mr de la Mare, is there any objection taken to that?
MR DE LA MARE: I appreciate we went late yesterday, but we did start on Ms Abram's submissions at about 4.15 yesterday, and we sat till 4.45. So there was half an hour yesterday. There's three hours this morning, and we've all had to deal with questions and shorthand breaks so --
THE PRESIDENT: All right. Hang on. But you had a lot more than your allotted time and you had --
MR DE LA MARE: We had half an hour.
THE PRESIDENT: No, no. No, no you didn't. You had three quarters of an hour more than your allotted time yesterday and then there was another 15 minutes this morning from Mr Went.
MR DE LA MARE: We had half an hour more than our extra time, my Lady, because

15 minutes of it at the beginning was in relation to confidentiality issues. That was what was allotted. So it was 15 minutes for confidentiality. Four hours -- we ran over by half an hour and there was half an hour of a submission. So I totally accept my learned friend should have four and a half if that's what's required.

THE PRESIDENT: Well, that takes us to 3.15 then.

MR DE LA MARE: Yes, exactly.

MR HARRIS: Unless we spend time arguing about time.

THE PRESIDENT: So 3.15. So you need to finish by 3.15 and then Mr de la Mare will have an hour, and then you will have half an hour. And it's you that won't be able to get to whatever you might want to go to if you don't finish by 4.45.

MR HARRIS: I understand. Well, let me -- without further ado then -- deal with what we contend are the authorisation problems, first as regards Dr Pike and then as regards Mr Le Patourel.

This first submission proceeds in four layers. I'm going to say that there are four layers of problems associated with Dr Pike's involvement in this case.

The first layer is that the whole case, in my respectful submission, has started back to front. The economist and his firm have generated the idea for the case to begin with. They wanted to commercialise the idea and now we don't criticise them for that per se, but what we do criticise is that having come up with the idea with a view to commercialising the idea, they have then allowed themselves to be chosen as supposedly the independent testifying expert to this Tribunal, notwithstanding that such a role necessarily requires a fiercely independent mindset and a rigorous scrutiny at all times of all aspects of the methodology continuously and all that time having forever in mind it's the economist's independent duties to this Tribunal to present a scrupulously fair case.

So the back to front start at layer one is a problem and it's not limited to that, because as the expert practice direction makes clear in paragraph 2 -- and I'm quoting -- the expert should be, "Seen to be the independent product of the expert and influenced by the pressures of the proceedings". So it not only has to be in fact, but it has to be seen to be and the clear danger, in my respectful submission, is that if you start in this back to front way with generating the idea and seeking to commercialise it, then you fall into the clear danger zone of suffering from confirmation bias.

Now, I'm going to show you a case in a moment that sets out a judicial definition of confirmation bias and I will give you my own overlay, if you like, so I'll come to that in a moment. But just to summarise so far, in trying to sell the idea of the case in the first place in order to make money, in my submission, it's not in the interests of the economist to identify weaknesses in the case -- let alone rigorously -- since if you identify weaknesses in the case that you're trying to sell, you're less likely to sell it. (Pause)

Two additional adjuncts is if you come up with the idea in the first place and you then try to sell it, the tendency will be that you have a certain degree of proprietorial instinct towards that idea. It's your idea, you don't want to be exposed as having had a bad idea. That leads to the allied point, that it gives rise to a risk to your reputation -- particularly as a professional person -- if having come up with the idea it turns out later on it wasn't a very good idea, indeed an idea that can't be sustained.

So if I could summarise so far: once you've had the idea, it's difficult to back away from it and going back to where I was a moment ago about being seen to be independent, the test that we'll see in the case law in a moment -- I say by analogy -- is the fair-minded and independent observer, that's the person who assesses apparent bias and confirmation bias; you'll see this in a minute in the case law.

But it's not just that you actually find it harder to back away from your own idea that you're trying to commercialise, but the fair minded and independent observer would certainly think, "Whoa, hang on a minute, that gives rise to these risks". So in other words, from the outside looking in, it would always appear to be more difficult to back away, more difficult to identify weaknesses, let alone then to expose them and certainly not to take them to the point where it undermines your own idea.

Now, what do I mean by "confirmation bias"? I'll show you the passage from Pfizer in just a moment. But what I mean is -- I say it's a well known phenomenon that you come up with an idea and then you become wedded to it, so that everything else that arises after the initial inception of the idea is made to fit that idea, to support that idea. It's not -- if you suffer from confirmation bias -- to go out rigorously to test the idea. Sometimes -- if the confirmation bias is sufficient -- then actually you will be prepared to -- I'm going to, in a minute, submit that this was subconscious and I'll make that good by reference to the case law, but you subconsciously are prepared even to manipulate materials that you do receive in order to fit the idea, because you're wedded to the idea.

Another way in which it can go wrong is you discard evidence that actually is adverse but you think, "Well, it doesn't fit my idea, there must be something wrong with it". That's the confirmation: it must be flawed or it must be -- in certain extreme cases I've seen -- it can't be right, it must be forged or it must be false, so I disregard it.

More typically, what happens is the person suffering from the confirmation bias says, "It's not relevant", and then there are various spurious ways in which the alleged irrelevance is made out, because it doesn't fit the original idea and allied to that, what one gets is: you don't go off looking, because you're not sufficiently unbiased -- as a matter of confirmation bias -- you don't go off looking for what might undermine your idea.

So, I said I'd take you to Pfizer, where there's a judicial -- a definition of this is set out and this is in the fourth volume of authorities, which is tab 3 at the back, I think it's the very final authority and it's at page 170 of authorities bundle 4, the case of Pfizer; the facts don't matter in the slightest, it's just a reflection of what it says about confirmation bias. Could I invite the Tribunal just to read to itself paragraph 175, beginning, "The concept of confirmation bias assumes"? (Pause)

THE PRESIDENT: Yes. Well, I think we read that when you sent us the authority.

MR HARRIS: Thank you.

And that ties in with how I've -- in my respectful submission -- described confirmation bias about being wedded to an idea and not looking to challenge it.

And then if one turns to the previous paragraph, it's 174 and this is the test for bias from Magill v Porter. If I could just invite the Tribunal to remind itself of that paragraph. (Pause)

THE PRESIDENT: Yes.

MR HARRIS: And then if we could go in the same bundle of authorities to the case of BAA -- which is tab 1 of bundle 4 -- and this time turn to paragraph 108, which again was on the pre-reading or marked-up version. Again, the facts of this case don't matter --

THE PRESIDENT: Sorry, page number?

MR HARRIS: It's page 44 of AB4. Again, the facts don't matter, save that in the background this was an allegation of apparent bias on the part of a professional economist, albeit not one who was presenting to the Tribunal, but nevertheless, Professor Mosier was a professional economist.

And at 108, what it says is that, "apparent bias is to be distinguished from actual bias". Item number (2):

"... in relation to apparent bias, not only are outward appearances and public perceptions important, but it is also to be borne in mind that a person who in good faith believes that he or she is impartial or is capable of acting impartially, may nevertheless be subconsciously affected by bias."

And I do rely upon a subconscious.

In fact, number (3):

" ...the test to be applied is an objective one: whether the fair-minded and informed observer [so that's what I was talking about before], having considered the facts, would conclude that there's a real possibility that the decision-maker was biased."

I don't particularly need points (4) and (5).

THE PRESIDENT: It's mainly (2) and (3).

MR HARRIS: Precisely.

And then over the page at 113, this is particularly apposite to our case. If you turn over to page 46 of the bundle at paragraph 113, what it says is:

"However, it follows from the underlying assumption that bias may be subconscious as well as conscious that protestations by the decision-maker [just pausing there, which we've seen in this case] that he is not biased are, in the words of Lord Hope in Porter v Magill 'unlikely to be helpful' from the point of view of the FMIO. Indeed, Lord Hope approved Lord Justice Schiemann's approach, in the Court of Appeal ... of treating such assertions as self-serving and of no weight. In similar vein, in Locabail ...

"Nor will the reviewing court pay attention to any statement by the judge concerning the impact of the knowledge on his mind or his decision; the insidious nature of bias makes such a statement of little value."

Now, I'm going to be reminding you in due course that that's what we have in our case.

When Dr Pike was invited to explain to this Tribunal in turn, pursuant to paragraph 9(a) of the practice direction, how he could demonstrate that he was not tainted even by layer one, let alone the other three layers that I'm going to develop in a moment.

Essentially, all he says is, "Well, I'm really careful, I'm really responsible, I know what it says in the practice direction and I've thought about it afresh".

It is a self-serving -- with respect to him -- protestation of precisely the variety that these cases have said don't work, where it's a decision maker suffering from apparent bias and my submission is confirmation bias is just a species of apparent bias.

Now, I don't need you to turn that up; if you wanted to see what I've just called the self-serving protestations, it's at bundle C, tab 49. When you re-read them, you will see there is no concrete step. It amounts to nothing other than, "No, I'm very careful, I knew about the practice direction, I've considered matters afresh", but with respect, that obviously can't work, because if the insidiousness is subconscious, merely saying, "Well, actually, I'm not suffering from it", it doesn't work, precisely because it's subconscious.

Now, in our case, the facts are worse. What I've said is that there are -- if you like -- reputational or confirmation bias reasons why Dr Pike might not want to resile from his idea, but it's not limited. The imperatives and -- if you like -- the forces acting on him are not limited to his own reputation and his own ability to commercial ideas, not just this one, but future ideas, if he wants to sell them to other people. But if he backs away from this idea, it also affects two other sets of people adversely, which could be expected -- and certainly from the perspective of the FMIO, fair minded independent observer -- to again contribute to his reticence from backing away.

The first other person is the solicitors, who are acting in the case. As it happened in this case, it's Hausfeld. But they invest time, energy and resource into working up the idea to see if it will be able to move forward and then if it does look like it might move forward, then they expend further time and resource in moving it forward. We've seen that in this case.

Of course, if then Dr Pike, if he were truly independent -- and to take some of the examples that my learned friend Ms Abram gave -- if he suddenly said, "Well, the market shares have fallen dramatically", or, "The volume of commerce has fallen dramatically", or, "I've made some significant 40 per cent error in my calculations, that means I can't carry on any longer", who else is going to suffer? Hausfeld. But who is the person -- it's not just Hausfeld, but people in the position of Hausfeld; happens to be Hausfeld in this case.

But that affects the people to whom Dr Pike would sell future ideas. If they lose faith in his ability to maintain the idea that he essentially sold to them in the first place -- and again, it's not limited to Hausfeld or solicitors of the claimant type such as Hausfeld -- when Dr Pike came on board in this case and initially interested Hausfeld with the idea, there was no funder. The funder subsequently had to be brought on board.

You will find -- I'm not going to turn it up, but just so that you know -- the letter of engagement which proves this point, is at B, tab 21, page 956. This was one of the documents that this Tribunal asked Dr Pike to disclose that he hadn't previously and you will recall from that document that no funder was in situ at the time that Hausfeld instructed Dr Pike to work up the idea to the next level and indeed it says, essentially, that Fideres and Dr Pike will get this retainer of £250,000 if a funder subsequently comes on board.

So my point is exactly the same one: in the same way that Hausfeld or claimant's solicitors would be let down if it turns out that Dr Pike is forced to back away from the original idea that he sold, the exact same thing will happen for the funders. They will say, "Whoa, hang on a minute, I've been let down. I've contributed all this funding, I've actually spent a load of money and what you're now telling me is months or years down the track your idea was no good to begin with". That is -- at least subconsciously -- a reason not to back away, but instead to reinforce your confirmation bias and so -- the other thing that you will note --

MR BANKES: Mr Harris, can I just ask you: isn't it inevitable that any firm of solicitors is going to need some sort of expert report in order to persuade funders to fund? Isn't there a chicken and egg problem?

MR HARRIS: Yes, but the difference here is that the idea came from the economist to the lawyer.

MR BANKES: I get that, but any economist is going to see a future work stream if the case is funded --

MR HARRIS: To a degree.

MR BANKES: -- and is going to have the same issue that you're raising when they write their pre-funding report.

MR HARRIS: Not the same issue, because you don't have this confirmation bias of having come up with the idea in the first place and having staked your reputation and your commercialisation on you, having come up with the idea, that it's harder to back away from. The imperatives are significantly less.

Let's say, for example, Hausfeld or whoever, a claimant firm -- let's just use Hausfeld as an example -- they come to a truly independent professional economist with an idea and they say, "Oh, I'd quite like to know whether this idea is any good". Actually, at that point, because it's got nothing to do with the economist, the economist could well say, "No, it's absolutely rubbish, go off and think of another idea."

Instead, if the economist has gone to the lawyer in the first place, the dynamics are completely reversed. So I accept --

MR BANKES: I'm not sure I completely accept --

MR HARRIS: All right, take out the word "completely", but for my purposes, at layer one -- and bear in mind there are three more layers -- that is a problem from the inception and let me move on then to -- well, let me develop that last point.

When did the funder come on board? We know that at the time that the original memo advice from Dr Pike and Fideres was written in January 2022 -- again, you don't need to turn this up, if you want the reference, it's bundle B, tab 20, page 955 and in particular paragraph 7. The reason we don't need to turn it up is because it does not say that there's even any idea of an off-Amazon claim.

THE PRESIDENT: The date is, sorry?

MR HARRIS: The date is January 2022.

Dr Pike and Fideres, his original conception of the case had nothing to do with off-Amazon claims at all. It doesn't mention them. That was pre-funder, but at some point after the funder came on board, although we can't say exactly when on the materials we have, suddenly the case gets a lot bigger. What I say here is that, again, should raise an alarm bell in the minds of this Tribunal as to the reliability of this expert in this case, for two reasons. Firstly, you're more likely to get a funder if the claim gets bigger. Secondly, Dr Pike and Fideres, although they're not claiming success fees, and properly so, obviously they're going to earn more regular fees if the case is bigger. The more bells and whistles, the more money they're going to earn. Lo and behold, in this case, the case did get very materially bigger. The budget went up and they stand to gain more.

Again, at this first point, I say that structurally, right from the beginning, at layer 1, the back-to-front nature of the inception of this case gives rise to risks, and particularly gives rise to risks in the eyes of the FMIO, fair minded and independent observer. You should therefore, even at layer 1, be extremely cautious about placing any weight on it at all. At all. And that, my Lady, addresses layer 1 across the board. That's on-Amazon and off-Amazon.

But layer 2: this one is very short. You should be even more concerned and even more worried if the theories that are being propounded in this report, that's been generated at its inception by the economist, are unorthodox, extreme, and implausible. I, of course, don't repeat, but I adopt Ms Abram's submissions in all of those regards.

Where they are unorthodox, extreme, implausible, not backed up by actual data -- and I'll develop that in a moment, including by reference to the Currys price promise, but not limited to that -- you should again be thinking, "Whoa, layer 2; even more reason for me to be not placing any weight upon that". That's my principal submission. Even before we reach layer 3 and layer 4, you, in my respectful submission, should not be placing any weight upon this expert economist's evidence, fundamentally because it's not reliable for you. You can't place weight upon it because of the way in which it's been generated, and because of its extreme nature.

But it's not limited to layers 1 and 2. There's a third layer. This has three subparts.

THE PRESIDENT: Layer 2 is: you should be all the more cautious where the evidence is prima facie implausible.

MR HARRIS: Precisely. Short point.

Layer 3 has three subpoints. These are three particular features of the context of this case, or this type of case, that should make you even more wary.

The first one is the practice direction. This Tribunal, in my respectful submission, properly has concerns about independence based upon experience. That's why it wrote the practice direction. That's why it's been promulgated. People need to comply with the practice direction. In my submission, context point 1, it is open to you to find that this expert has not complied with the practice direction in this case, because he is not sufficiently independent and not capable of being seen as sufficiently independent. So context point number 1 -- and he's acted as an advocate, and I'll develop that point in a bit more substantive detail in a moment. Context point number 1, even more caution beyond layers 1 and 2, because it would be open to you to find that he breached the practice direction.

Context point number 2: in all cases before the Tribunal, the economic evidence is important, but in this case, par excellence. This is a case; a collective opt-out --

Everybody knows, and this case makes this point in spades, it is critically important to have the economic evidence. Without it, you're going nowhere. Therefore, in these sorts of cases, collective opt-outs, the CAT in my submission ought to be especially astute to ensure that the expert evidence that underpins the entirety of the case is scrupulously independent and seen to be such.

Context point number 2 is: an awful lot rides upon the credibility and the actual and perceived independence of an economist in these cases, including this case. Since you ought, in my submission, to have doubts about that, that would be another reason why you could reject placing any weight on it.

Then the last point is a more minor one, which you haven't heard before. It's an Evans-type point about opt-out. Where there's an opt-out case, what it means is that there are no actual lay clients for any person on my learned friend to my left, the claimant's team, to take any instructions from. They have no access to underlying class members. They don't call any of them. They don't speak to any of them. Most of them have no idea they're even in the case. That's the whole point of opt-out. Why is that meaningful? It's meaningful because unlike either an opt-in or a regular piece of litigation, there is absolutely nobody at any point in time on the claimant's side to say, "Oh, hang on a minute, what you're doing is off the rails. What you're doing isn't consistent with how I operate. What you're doing isn't how I look at the market. What you're doing isn't what my data shows". None of the lay victims' -- if there are any victims in this case -- data is ever going to make its way to the claimant PCR, or CR, if it becomes a CR.

What I'm saying is, again, in these sorts of circumstances, the Tribunal ought to be even more concerned and cautious.

THE PRESIDENT: What would the lay claimants be saying? They've just purchased an iPhone. They probably don't give any thought to how the market works.

MR HARRIS: They may or may not. They may or may not. My point is that in these sorts of cases, you don't have any reality check by reference to anybody who is actually participating on the market. That's my point.

THE PRESIDENT: Well, the force of that might be stronger if there was evidence that you might expect somebody to be giving. I just asked what evidence you would expect somebody to be giving that might check that of the economist.

MR HARRIS: Well, for example, there are all kinds of assertions made by this economist about how consumers are, if you like, stuck. It's sticky to be on Amazon Marketplace, including because of Amazon Prime. One could very well expect an actual consumer member of the proposed class to have a perspective on whether or not he or she feels stuck in Amazon, as compared to going to some other platform, because he or she also pays an Amazon Prime subscription. That's an example, but it may not be limited to that.

My point is that there's no reality check. So at layer 3, for these three further contextual reasons, that's all the more reason for this Tribunal to be cautious.

But then it doesn't finish even with layer 3, because on the facts of this particular case, and I say because of layers 1 to 3, it has manifested itself, I say, as confirmation bias. Just to be clear, I'm not making an allegation of actual bias. I'm making an allegation of subconscious confirmation bias, because of the inception and because of the context. But it's not limited to that, because at layer 4 there are multiple specific manifestations of this confirmation bias. My learned friend Ms Abram has already mentioned --

THE PRESIDENT: Hang on. You just said you're not saying actual bias, but you're saying subconscious. So you are saying actual, just not conscious. Or are you saying apparent bias?

MR HARRIS: Yes. Well, I'm saying confirmation bias, which is a species of apparent bias which requires only subconscious.

THE PRESIDENT: Okay. So you're saying that there is an appearance of subconscious bias.

MR HARRIS: That's right. Exactly. The label I prefer to use is confirmation bias, which is a species of apparent bias, for the reasons that I've already given.

I have, I think, four or five, maybe six specific examples, but I'm delighted to say I don't need to develop any of them, because Ms Abram has already done it. I just want to identify them for you, because at layer 4, I'm relying upon specific examples of where things have gone wrong from the perspective of presenting an independent report to the Tribunal, or at least --

THE PRESIDENT: Yes.

MR HARRIS: The first one Ms Abram has mentioned, I think toward the end of her submissions, the new umbrella damages estimate in Pike number 3.

THE PRESIDENT: Yes, that's the 1 per cent figure.

MR HARRIS: Precisely. But it gets worse than it being just a new one. To remind you, he was not able, in his expert opinion, to put forward any figure for off-Amazon in Pike 1. That was his expert opinion, because he didn't have the data. But even though he still didn't have the data in Pike 3.

THE PRESIDENT: Can you just give us the estimate for the "not able" quote?

MR HARRIS: Yes.

THE PRESIDENT: Sorry. Yes, just the paragraph reference.

MR HARRIS: Yes. It is Pike 1, paragraphs 258, 333, 344. That's to be found at A/7/247, and those references are all given in our skeleton, that's to say Amazon's skeleton, at paragraph 62.

THE PRESIDENT: Okay. Thank you. So, Pike 1, not able to put forward an estimate, and you've given us the paragraphs.

MR HARRIS: Yes. That's right. But nevertheless, suddenly in Pike 3 -- which by the way then increases significantly in the addendum to Pike 3 -- suddenly there's a so-called illustrative figure, and that's to be found at A, tab 18, page 566, paragraph 46.

MR DERBYSHIRE: And the word "illustrative" is very important.

MR HARRIS: Well --

MR DERBYSHIRE: He says you can't make an estimate in Pike 1. In Pike 3, he says, "I can make an illustrative number".

MR HARRIS: Yes.

MR DERBYSHIRE: He's not really making an estimate.

MR HARRIS: Well --

MR DERBYSHIRE: He's putting two bits of arithmetic together and coming up with a number.

MR HARRIS: Well, I'm not sure, with great respect, Mr Derbyshire, I agree, because what then happened is that the PCR still puts forward the illustrative figure as having been put forward in an expert report. If we look at the skeleton argument from the PCR, I'm not sure of the bundle reference to that, because I --

THE PRESIDENT: No, that's all right. Just give us the paragraph reference.

MR HARRIS: Paragraph 4.

THE PRESIDENT: Yes.

MR BANKES: Page 6, my Lady. (Pause)

MR HARRIS: Second sentence, "Illustrative damages for the same period [are such and such]". Footnote 8, see addendum to Pike 3, and the previous footnote is Pike 3. In other words --

THE PRESIDENT: But the skeleton also uses the word as "illustrative".

MR HARRIS: It does use the word "illustrative", but what it doesn't say is, "I feel duty bound to point out to this Tribunal that this illustrative figure is completely meaningless, because it was made without access to any of the data that my expert said was necessary in order to come up with a real estimate. Oh, and on top of that, the 1 per cent that I've used in order to generate this illustrative figure is completely made up. It's a guess".

THE PRESIDENT: But we're not stupid, Mr Harris.

MR HARRIS: Well --

THE PRESIDENT: Of course we understand what's meant by "illustrative".

MR HARRIS: Well, that's my submission. What I say is it's surprising that it should be put forward -- if it were purely illustrative for advocacy terms then it should have been put forward by the advocate and said as such. But instead it's put forward by the expert who said he couldn't do it and then it's cross referred to an expert report. The problem is that Dr Pike, in my submission, has allowed himself to be used as the vehicle for the advocacy. That's the problem on this set of submissions.

THE PRESIDENT: Yes. Are you saying that the counsel could have simply done the maths?

MR HARRIS: Absolutely. Then it would have been naked advocacy. But instead it's advocacy dressed up in the form of an expert report. Yesterday at 14.50 my learned friend said, and I quote, "It's just a sensitivity analysis", but nowhere does that appear in Dr Pike's report or in his skeleton argument or anything. That was a new point. Last but not least on this is that the 1 per cent, as I said, is completely made up. They could have easily put forward a so-called sensitivity analysis at 0.1 per cent. That obviously proves the exact opposite of what my learned friend wanted to do by way of this piece of advocacy. Yet Dr Pike has allowed himself to put forward in his report: 1 per cent.

THE PRESIDENT: Yes, I understand that point.

MR HARRIS: Thank you. The falling market shares is item 2. Ms Abram dealt with that, so he hasn't taken a step back and reflected. So that's the second manifestation. I'm not going to develop that, save only to say this: that one is left wondering after the fall in market shares in the error in the calculation -- one is left wondering whether there's any percentage of share of supply that is too low for Dr Pike. It seems not. It seems not because we were told yesterday in oral advocacy that even on our figures of 1.2 pre-GTA and 3.7 post-GTA it doesn't make a difference. That's still my case. It's perfectly plausible or highly plausible. Whoa.

Number 3. Generally the number of assertions made without evidence, so for example all the ones that Abraham identified about asymmetries -- another example is about price setting causation. I'm going to come back to that because I want to make some submissions under Pro-Sys about the inability of this methodology properly to address causation. I want to show you Kone, the case. So that's number 3.

Number 4. Again I'm going to come back to. It's not dealing properly with market definition. That's my other Pro-Sys point.

Number 5 is the one Ms Abram raised which is excluding shares of supply that can't be consistent with his own case, most notably excluding offline supplies. So for those four layered reasons what we say, and what we invite you to do, is to give no weight to Dr Pike's evidence at all. In that sense, you reject it. I'm not suggesting that you rule it inadmissible.

Moving on, though, in light of the time -- so that's what I have to say about Dr Pike. But I also have some issues on authorisation as regards Mr Le Patourel; why he shouldn't be authorised above and beyond the difficulty that arises for Mr Le Patourel from having persisted with Dr Pike, notwithstanding the problems that relate to Dr Pike. So I also level that accusation and that criticism of Mr Le Patourel for having persisted with him when he shouldn't have done.

But moving on, the principal difficulty with Mr Le Patourel -- it's now completely clear that we've got two witness statements from Mr Le Patourel, JLP 1 and JLP 2 -- and it is this: that he's completely candid now, once he was pressed on the topic, that he did not get any independent legal advice about the future composition of either the legal team or the expert team. He admits that. What he says basically now is that, "No, I didn't get any independent legal advice because I'm sufficiently independent and expert myself to make this decision personally".

MR DERBYSHIRE: So what lawyer advises on which lawyer to use?

MR HARRIS: Another lawyer from outside the bubble. This has happened in a case in which I was involved only a few months ago, so this is very realistic. What Mr Le Patourel is duty bound to do in my respectful submission, for reasons that will become very clear in a moment, is he has to ask himself: what is in the best interest in the class? That includes, shall I carry on with the same economist? Shall I carry on with the same lawyers?

Now, when it came to the funders and the brokers he did go off and get independent advice, including independent legal advice. He went to another firm, for example, as well on whether he should retain the corporate vehicle or do it in some other manner. But when it came to asking himself the question "Should I retain the economist or the lawyers?" he candidly admits, "I did not obtain any independent legal advice. I am sufficiently experienced and knowledgeable to do this by myself". But as we're about to see, he's not. He's got it wrong.

But before I just develop that point, it is entirely possible that although he didn't get any independent legal advice as to the future composition of the team, expert and solicitors or for that matter counsel, it's quite possible, indeed it seems likely, that he got non-independent advice about that question. Non-independent advice; from whom? From Hausfeld. So let me show you that in bundle A, in tab 8, at page 334.

This is JLP 1. What he says is revealing, at paragraph 28, particularly, (d) and (e). So this is under the heading "Choosing the appropriate team to pursue the claims":

"28. I then considered [what was] in the best interest ...

"(d) To the extent that I felt any new direction or fresh perspective in the solicitor team was required, I believed this could be achieved by a different Partner at Hausfeld leading the case ..."

Well, that's interesting actually because we know that the two previous partners left. But be that as it may, the even more revealing point is (e): "I met" -- so this is under the heading "Choosing the appropriate team to pursue the claims". So this is my exact topic. Quote:

"(e) I met other Hausfeld team members and was reassured by their explanations of what had gone wrong during the Riefa proceedings, and the learnings taken from this."

But with respect that can't possibly be adequate. The most non-independent people in the entire universe to advise about whether the future composition of the team should include the people who had just failed in Riefa are Hausfeld, and it's obviously not satisfactory in my respectful submission for Mr Le Patourel to be reassured by the very people who had a huge financial vested interest in continuing to be retained and who had just lost the Riefa case. So in my submission it's not only clear that he didn't get independent legal advice, but it is tolerably clear that the express topic came up with Hausfeld, he got advice from them, and then he relied upon it, which is plainly not an acceptable way to go ahead.

What's most worrying is he doesn't even identify anywhere in JLP 1 or JLP 2 that this is a concern. He simply says, "Oh, well, I've done this before. I'm really clever". I don't mean that to be an unkind remark. I'm paraphrasing. "I'm experienced, I know my way around". So the problem that he's got, therefore, is that if Hausfeld did give any advice, and it looks as though they did, then they plainly had a conflict of interest; they plainly weren't independent and Mr Le Patourel took no steps to overcome that conflict of interest and that lack of independence.

But if he got no advice on the topic at all -- so let's assume in his favour for a moment that Hausfeld didn't advise him on future composition, notwithstanding what he says in paragraph 28 (d) and (e), then personally he has to explain to this Tribunal that -- notwithstanding that he didn't get any advice from anybody; he personally has the abilities to conduct this exercise himself -- so he would have had to explain to the Tribunal, which he doesn't, that he recognised that Hausfeld and the economist, for that matter counsel too, had clear financial vested interest in continuing to be retained. Doesn't mention it. Even more so that they had a clear financial vested interest in getting Riefa payments for the part of the case that they had already lost.

Even worse, success fees on top of that. He doesn't say anywhere, "Oh, I recognise these are clear financial (inaudible). I couldn't trust what they had to say about these topics". But of course, who wouldn't suffer from any one of those difficulties? Answer: a fresh replacement team from a different firm of solicitors and/or a different firm of economists.

The problem that he's got is he never identifies it. Therefore, he never balances up whether it would have been better with a separate and independent replacement team. He's oblivious to it. So the problem there is that when he says to you, "Oh, I'm personally sufficiently expert and experienced to have done all this" he manifestly wasn't. That is another problem for him, because what it shows to you is you can't trust his judgment. He said to you, "I've got the ability to perform this judgment", but you can see on the materials that he hasn't.

Then going on, it's not as though that's the only problem, because he was put on notice of all of these points about his failure properly to conduct this assessment by us in our response. He put in a second witness statement and he doesn't deal with it.

Again, it doesn't end there because what he says -- and this is his second witness statement at paragraph 70 -- that he identified some "cost savings" from -- and this is important -- retaining Hausfeld. So what he has addressed you on is: I thought there were cost savings from retaining Hausfeld. But he doesn't identify what the alleged cost savings are.

Then a point that came up yesterday: he then doesn't quantify or even attempt to quantify, even in ballpark terms, what these alleged cost savings are. So then because he didn't look into it he then also doesn't identify any cost savings that might have been obtained by replacing Hausfeld. I'm going to identify two or three, maybe four, heads of such cost savings in just a moment, but just to finish this point.

So having not quantified the cost savings from retaining, then not even asking what the cost savings are from going somewhere else, and therefore not quantifying them, he can't balance them. Yet it's the net cost saving that counts in the interests of the class members. But he can't perform the exercise because he hasn't done the work again. He says he can, but he can't. So again, that's poor judgment. This is the person who's asking you to certify him, albeit qua director of a corporate vehicle, as being able to act in the best interests of the class. But there's two respects in which he's proven that he can't do it.

Then what are these cost savings that would have arisen from replacing that he should have (a) identified, (b) be sought to quantify, and then (c) sought to balance with the supposed cost savings of keeping Hausfeld and Dr Pike. They are as follows: a replacement -- but this is obvious stuff -- a replacement for them could well have been cheaper. We don't know because he didn't go and try to find out.

For example, another one on the same heading, they might not have charged any success fee. We don't know because he didn't bother to find out. So that's item 1: replacement firm may have been cheaper.

Item 2 is an absolute nailed on dead cert for me, which is: no other replacement firm could possibly have sought to recover Riefa payments, let alone Riefa success payments -- that thing speaks for itself. They weren't involved in Riefa.

There's a third one which is a possible one. Well, I tell you what. I'm just going to leave that one. That third one is that there would have been further cost savings potentially arising of the same type from replacing Dr Pike in Fideres. They might have been cheaper but we just don't know. Of course they wouldn't have been charging for anything -- any time or money -- they spent in Riefa.

So now I accept that the cost savings and expenses have to be weighed up. But what I'm respectfully submitting is that Mr Le Patourel has not put himself in a position to do it -- so he's not done it -- that's bad enough. But he's not even recognised that he should have been doing it. That's the poor judgment. It's flawed in principle.

Now, what he does say is that -- this is in his witness statement -- he says that he considered "replacing the existing legal team", albeit without mentioning the cost savings; that's the point I just made. But what he doesn't also do -- another failure -- is he doesn't recognise that replacement might not have been a binary outcome for Hausfeld. As this Tribunal knows, Hausfeld regularly act with other, and with respect to them, cheaper solicitors in collective proceedings. The examples are all over the Tribunal's website.

For example, in none other than the South West trains case -- the Gutmann case that my learned friend Ms Abram was talking about -- they acted together with Charles Lyndon. In the Adtech case, they were acting together with two other firms. In a case that was, I believe, just issued yesterday, Housebuilders, they're acting with a firm called Geradin Partners.

Now, my point is that it's not even a binary consideration. Mr Le Patourel could have said, "Oh, well, I'm not happy with these fees". In particular, he's already admitted that he wasn't happy with what he calls the "suboptimal attempt" to claim the Riefa, but it's not as though he would have had to fire all of Hausfeld. He could have said, "Well, let's get another firm on board that's a lot cheaper, some of which happen to be more regional firms where the rates are lower, and we'll proceed on that basis".

But the point is: he never even asked himself the question and what's more, it looks as from the absence of evidence that he was never even told that that was a possibility. One could very well imagine why a firm like Hausfeld wouldn't have told him that that was a possibility; it doesn't do them any favours, but that's my point. That's exactly my point. Somebody else from the outside could well have said, "Well, not only am I cheaper and I won't charge success fees and I don't want anything to do with Riefa, but actually even if you don't go with me, you can get somebody who's a lot cheaper than Hausfeld", none of it happened; none of it at all.

Now, he says at JLP 2, paragraph 70, that he "had regard to the quality of alternative solicitors and Counsel available". But we established yesterday that he didn't actually go and ask anybody. He didn't have any interviews or meetings with any other law firm, any other counsel, any other economist. Mr de la Mare was forced to concede that yesterday: it just didn't happen.

He then says later on in that same paragraph that he, "relied on information available to me", about the "costs and uncertainty of replacing the existing team". But again, he doesn't tell the Tribunal what it was, this information that was available to him. He doesn't say what the cost and uncertainty replacing the existing team were. In fact, this Tribunal can't assess -- all it can assess is that he didn't actually go and ask anybody. He didn't actually get any other rates and I said to Mr Bankes that I'd come back to this point, but in the case of Boyle -- which was another one of the main cases where Mr Boyle, sadly was the CR who died, he therefore had to be replaced -- and in that case, what happened was, Mr Merricks -- this was all on the public record, there was a hearing all about this -- Mr Merricks put himself forward, Mr Merricks of Merricks v MasterCard put himself forward and one of the first things he did was he said that the firm on the record there was a firm called Maitland Walker -- a much cheaper firm I might add -- out in the provinces.

First thing he did was he said, "Oh, well you're not, you're not the solicitors I want to retain", and he went to a different firm, bigger American firm, called Willkie Farr and Gallagher and they were the ones who tried to get into the case on his behalf, acting in the interests of the class. So he did; not only did he actually ask the question and actually go and find some other people, but they actually then stepped in. So it goes to prove that it is perfectly realistic. And it seems to me --

MR BANKES: So in that case are Quinn now on the record as acting for the PCR?

MR HARRIS: No, it was Willkie, Farr and Gallagher and in fact what happened was just at the moment when it came to actually trying to get into the case, Mr Merricks and Willkie Farr and Gallagher backed out.

MR BANKES: And it didn't end well for him did it?

MR HARRIS: So in the end they didn't prosecute an application to formalise his attempt to be the substitute --

MR BANKES: And it didn't end well for Mr Merrick.

MR HARRIS: It didn't end well for Mr Merricks, no.

MR BANKES: Which Mr Le Patourel may well have been aware of.

MR HARRIS: Well, yes, but the reason it didn't end well was because of the mess that had -- with respect -- been made. I mean, I did that case on the other side and the details are in the public judgment, but they had caused a lot of wasted costs to be incurred and which is why they were made to pay costs orders. Had it been done properly, as I conceded in open court, there would inevitably be a degree of expense to the defendants from having to face a potential application for a substitute in unfortunate circumstances, namely death of a CR -- we wouldn't have even sought those costs. The costs that we sought were generated by the fact that they made a mess of it and the Tribunal agreed with me, which is why we got the cost orders.

THE PRESIDENT: But that is a bit of a different situation, because in that case it was replacement of a PCR in an existing case, whereas in this case Riefa is dead -- that case is gone -- and it was about bringing, effectively, a new case, but relying on some of the existing work.

MR HARRIS: Quite right, Madam President, but let's not forget that in paragraph 121 of the Tribunal's judgment in Riefa, the Tribunal said, and I quote:

"Our view that this is the correct approach, i.e., not challenging eligibility of the methodology in this case, having considered Dr Pike's evidence and submissions of the CRO's defendants on the substance of the claim. However, in light of our decision on the authorisation condition, it's not necessary for us to ..." [as read]

So the point is that looking from the outside in, what was seen to have happened was a methodology that prima facie looked good and being semi-endorsed -- I don't obviously put it higher than that by the Tribunal -- publicly and all of this material is available and was said to be very straightforward and all that had gone wrong was -- with respect to Professor Riefa -- she hadn't quite managed to overcome the hurdle. In those circumstances, I appreciate I can't give evidence from the Bar, but my respectful submission is it is inconceivable that there wouldn't have been a lot of other solicitors interested and certainly enough to give at least some initial free advice about the things that Mr Le Patourel should have been considering, but he didn't even do that.

Just to finish off before the short adjournment and this will take me on to the Waterside submission -- and I'm pleased to say that I've then essentially finished the authorisation points -- is that: can I show you what Mr Le Patourel said in his first witness statement, which is at A8, paragraph 29, page 335? So he's talking here about various reasons -- some of which I've already read out -- these are the reasons why I didn't get a different team. But there's a single reason that appears in 29. It says, "In addition to the points made above ... no guarantee", and then the final sentence on that page, he's talking about looking around for other people:

"This would in any event have been a significant undertaking that I would have had to take on at considerable financial risk to myself in the form of unpaid work if the case ultimately did not proceed ..."

Now, you'll have seen that in our response document we criticised that as not consistent with the other protestations about how he's acting in an altruistic manner in the interests of the class, because they're all supposed victims. In fact, what it betrays is a very personal and direct financial interest in this claim and the first point I make is that reason, which appeared in Pike 1 before the response, wherein we focus upon Mr Le Patourel's unsatisfactory nature under the authorisation condition, that reason then doesn't reappear in Pike 2, even though Pike 2 is, in many respects, a simple repetition of Pike 1; that reason suddenly seems to have disappeared, but in my respectful submission, it's a very important reason.

Why is it important? This takes me on to Waterside, and perhaps I just take a couple of minutes on that. What Waterside says -- I don't propose to turn it up, you're familiar with this, it's A2 -- in the authorities bundle that is -- page 831, at paragraph 53, I think that's volume -- if people in hard copy, that's volume 2, tab 7 -- and what it says is -- what's to be deprecated about the notion of having an hourly rate that is too high -- is, and I quote:

"... it gives the appearance of a motivation beyond pursuing the interests of the class ... it may be seen as aligning the PCR's interests with those of the legal advisers who also charge commercial hourly rates."

And so I'm about to make the point that that's the problem with Mr Le Patourel's hourly rate as well. But the exact same conceptual problems arise from Mr Le Patourel having said in paragraph 29 of his first witness statement that actually, "Well, you know what? All those things that I didn't do that I've been submitting to this Tribunal", he definitely should have done. "At least one of the reasons why I didn't do it is because I personally would have lost out" and that aggravates the situation very significantly. My last point then on Waterside -- I'm delighted to say that that will complete the points that I have to make about authorisation of Mr Le Patourel and Dr Pike -- is: I don't propose to address you on this table that we've handed in; my submission is it speaks for itself. But you can see both annual salaries worked into implied -- this is the table that we handed in this morning, my Lady.

THE PRESIDENT: Yes.

MR HARRIS: You can see both, if you like, part 1 of the table, table 1 is "annual salaries into implied hourly rates". It's just maths.

THE PRESIDENT: It's very helpful.

MR HARRIS: And then one can see in table 2, we took some examples of, if you like, daily rates for different types of people and you can see why, therefore, we submit that the range should be between 50 and 100.

THE PRESIDENT: What we don't have from either side is whether there is evidence that at a rate of between 50 and 100, there would be a ready pool of people that could do that job and I have an assertion from Mr de la Mare that there wouldn't be. You're probably going to assert that there would be and I don't know whether you can think about whether there is any indication that we can get from anything else as to whether there would be such a pool of people.

MR HARRIS: Well, I have two responses immediately. First of all, in the Which? case -- I think that you, Madam President, sat on, Consumers Association v

Qualcomm -- certainly my instructions -- I'm happy to look into this in more detail -- are that the PCR didn't charge anything at all.

Secondly: what about all these other public servants? They're all working in important public service jobs at hourly rates, very significantly less than what Mr Le Patourel has awarded himself in this case and yet there's a ready pool of those people.

THE PRESIDENT: Am I right in thinking that, so far, there are no PCRs that have charged that rate?

MR HARRIS: I'd have to check that. I know there's a GCR "survey" of rates. I think some of them are low, but I will have to look at that over the short adjournment.

THE PRESIDENT: I'm not aware, but I haven't done a comprehensive review.

MR HARRIS: There are certainly some lower than 200.

THE PRESIDENT: Yes.

MR HARRIS: The very final point is just to reiterate a point that the Tribunal made yesterday on the question of work already undertaken. Another failure of Mr Le Patourel is that whilst he said, "Oh, well, I can rely upon the work already undertaken from the existing legal team as opposed to a replacement team", but this was pointed out to him yesterday in argument, by Mr de la Mare. There's nothing to prevent the corporate entity that owned all that work from continuing to take advantage of it, albeit with a different legal team or economic team.

And the very final point is, again, that's not binary; you could have achieved cost savings by replacing one or the other -- or bits of one or the other. It's not an all or nothing question, but he hasn't even considered it.

So unless I can assist further, those are the submissions on the authorisation difficulties.

THE PRESIDENT: Just let me check --

MR BANKES: Just one question on the table you handed up overnight.

MR HARRIS: Yes.
MR BANKES: Do the values you've given for remuneration include pension contributions?
MR HARRIS: I don't believe so. I will check that, but I don't believe so in.
MR DE LA MARE: In relation to that, sir, my understanding is they don't and I also understand from Mr Le Patourel, who worked in the public sector, some of these numbers would appear to be wrong. In any event, based on base salaries, he was paid something like 13 years ago, but there we go. That's the evidence base we have. My Lady, can I ask -- and it's a very cheeky request and you can say "go get lost", because it may speed my limited hour -- if you had any time -- and I appreciate that's a big "if", it's going to shorten my submissions replying to Mr Harris, if -- you were able to look at the last two authorities in bundle D in the passages that have been side barred. They are the Factortame case, the side bar starting at page 279, 66 and following, and they are the Morgan v Hinton Organics case in the next tab, the side bar passage starting at page 306, paragraph 67.
THE PRESIDENT: Yes, all right, we'll do that. I think it's very much in everyone's interest that you have the time to say what you say and we were able to finish on time.
MR DE LA MARE: I'm most grateful.
THE PRESIDENT: Thank you. All right, 2.00 then.
(1.02 pm)
(The short adjournment)
(2.02 pm)
THE PRESIDENT: Yes, Mr Harris, let's crack on.
MR HARRIS: You'll be delighted to hear, my Lady, that we'll be sitting down at 2.45.
THE PRESIDENT: Brilliant.
MR HARRIS: Four quick things.

Why does it matter for the on-Amazon part of the case that Dr Pike's evidence and approach in my submission was unreliable and suffers from confirmation bias? The answer to your question about the on-Amazon is it matters for this reason: going forward, even for the on-Amazon part of the case, you -- the members of the Tribunal -- will have to continue to rely upon the independent expertise of Dr Pike and with my submissions before lunch --

THE PRESIDENT: We don't have to continue to rely.

MR HARRIS: Well, you will in a sense and let me give you a concrete example: he has said he's going to employ a regression; you mentioned that before lunch.

THE PRESIDENT: It doesn't have to be him. We could certify on Amazon but say he couldn't act going forward.

MR HARRIS: I see, yes, I accept that, but --

THE PRESIDENT: So just address us on what we can do at this hearing and we'll address what we can do in future --

MR HARRIS: In that case, I'll move on.

There's a reference -- I mentioned a GCR article with rates from other PCRs or CRs. That's to be found -- you don't need to turn it up -- at B11, 107. (Pause)

What that shows is on a short non-scientific survey of CR rates, written pre-Waterside -- i.e., related to data pre -- 707 not 107 -- at least three CRs were at £150 an hour pre the Waterside judgment.

The last updated point is: in the table that we handed in on Waterside rates, I said I'd give you the reference to this, it's already written down, at footnote 2, the Which? v Qualcomm case, in which Which? did not charge anything. There's the reference at footnote 2, the cap reference.

Last but not least, Mr de la Mare invited you to have a look at a couple of cases, which in my submission are irrelevant, because they're the ones that essentially say you can't exclude as inadmissible evidence that is suffering from apparent bias. But I'm not inviting you to exclude as inadmissible; what I'm inviting you to do is reject as being completely unreliable. In other words, when it comes to exercise your judgment, you should disregard it completely, because it's totally unreliable.

So that then takes me on to the second and last of my principle submissions. What I've dealt with so far are the authorisation problems for Dr Pike and Mr Le Patourel, including the Waterside issues.

The next major submission is the two Pro-Sys problems, and I'm going to -- although there are two, I'm going to focus most of my time on the causation and foreseeability problem and that's because the other problem -- which is the simultaneous existence of two mutually inconsistent implied market definitions -- I will address that, but much more briefly, because that sets out rather fully in writing and to some extent was ventilated yesterday when your Ladyship in particular was asking questions about where's the market definition? Why isn't there one? Why couldn't he put one in? So that one will come, but it'll be a lot shorter.

And then my final point just before 2.45 would be a short submission about evidence and the opt-out.

So with no further ado, causation and foreseeability: we say that there is a fatal flaw in the methodology, i.e., the methodology I've presented to you today is not credible, not coherent, not plausible, not based or grounded on the facts of this case and does not show any evidence of the availability of the necessary facts or data. All of those five propositions are to be found in paragraph 118 of Microsoft v Pro-Sys, which is the test for assessing whether or not a methodology should be certified.

Why is it not credible? Why is it not coherent? It's because it is common ground between me and my learned friend, Mr de la Mare, that the PCR today has to show -- or at trial will have to show -- and I'm quoting here his reply at paragraph 31(2), which you don't need to turn up, but which is at A17, 530. So it's common ground, he says, it needs to be shown, "as a matter of fact to be caused by", so the off-Amazon prices has to be shown, as a matter of fact, to be caused by the on-Amazon prices. And the other way he puts it in the same paragraph is, "what must be shown is factual causation". We agree: that is the law. That comes from the CJEU case of Kone that I'll be taking you to in a minute.

But although that part is common ground and is correct, it's incomplete, because, as I shall show you in a moment, Kone also says that when you're talking about umbrella damages, there has to be a recognition that these rather remote damages -- after all, they're said to be caused by somebody who's not even an infringer -- they have to be foreseeable to the infringers. That part of the case is completely ignored by the PCR. Total silence.

In any event, why does there need to be a very careful scrutiny of causation as regards things that are bought from suppliers that aren't even in the cartel or aren't even infringers? That's because they are obviously more remote from the offensive action. One might ask: why would a non-cartelist have higher prices caused by the cartel if, by definition, the non-cartelist isn't in the cartel? And the answer that the CJEU gave in Kone -- which I'm going to show you in just a moment -- is that it all depends very closely on the particular facts of the given case: facts, facts, facts. That's the byword for umbrella damages and in particular it depends upon there being what is coined as "an umbrella". There has to be a pervasive ambiance of much higher prices in the market, such that the non-infringers, the non-cartelists, can look at those and say, "Well, you know what? I can now set my prices for my small share of the market, even though I'm not an infringer, by reference to -- as a result of those higher prices that are put up by the bulk of the market -- I can shelter beneath that umbrella and the reason I can shelter beneath it is because people can't then abandon me and go somewhere else, they can't divert their demand to somewhere else, because most of the demand is already taken up by the cartelists, who occupy most of the market".

The umbrella, in other words, is a proper umbrella that shrouds everything that goes on. It's not a handkerchief. It's not some tiny little thing, it's a proper rain umbrella and in those circumstances one can see the plausibility of a non-cartelist or a non-infringer looking to these other cartelists' high prices or infringing high prices and say, "Oh, I can get away with setting my prices higher than I otherwise would, i.e., causation, but it's because I'm caused to do that by these other umbrella high prices", and that's why you have to look at the facts, because although it is conceivable that a non-cartelist, a non-infringer, would look at the infringing prices -- might not know that they're infringing -- but would look at them and see how pervasive they are in the market, it's conceivable that the non-cartelist would then say, "Oh, okay, I'm now going to put my prices up because of those".

THE PRESIDENT: But for the off-Amazon case, we're not just talking about the umbrella part of it, because you've got the Apple bit, which isn't an umbrella claim.

MR HARRIS: I accept that.

THE PRESIDENT: Maybe it's helpful if, when you make your submissions, you should break down the off-Amazon claim into its constituent parts and just explain what your case is for each of those.

MR HARRIS: Yes. I am not addressing, under this causation part -- unlike my failure to define markets part -- not addressing the Apple direct sales, because you quite rightly say that they are not umbrella sellers.

THE PRESIDENT: So can you just explain what's your breakdown of the off-Amazon claim? It's Apple sales and that's an RRP effect.

MR HARRIS: Yes, you're quite right my Lady, so pick me up on this point. When I am now addressing umbrella sales, which are a part of off-Amazon --

THE PRESIDENT: List me the part --
MR HARRIS: The third parties are the non-Apple other retailers.
THE PRESIDENT: Give me a list breakdown now. So off-Amazon divides up into what? What categories do you divide it into?
MR HARRIS: I break -- strictly speaking -- off-Amazon is anything not on-Amazon, so that includes Apple as one category, but it includes everybody else who's not Apple, such as John Lewis, Currys, Argos, et cetera.
THE PRESIDENT: That's too broad. Break down the way in which the theory of harm works for each of those. So start off with Apple. Is that RRP?
MR HARRIS: That's it, but I'm not addressing that.
THE PRESIDENT: No, just give me the list of what your categorisation of the theory of harms for each of those, so I can see where your point about umbrella fits in.
MR HARRIS: So I understand my learned friend's case, what he's saying, as regards Apple prices -- which I'm not addressing, so the RRP -- is that Apple is caused to have a higher RRP than it would otherwise do because of what he contends is a higher on-Amazon price by Amazon.
THE PRESIDENT: Okay.
MR HARRIS: So that's his theory of harm and I'm not addressing that.
THE PRESIDENT: I understand; that's Apple.
MR HARRIS: Off-Amazon: what he's saying -- I beg your pardon -- third-party umbrella off-Amazon part, of which there's obviously a lot of suppliers, what he's saying is that there is those third-party non-Amazon sellers are also caused to increase their prices for these third-party off-Amazon sales by reference to the price that is to be seen on on-Amazon when sold by Amazon.
THE PRESIDENT: Right, but is there also not -- so you've got Apple and you've got third-party resellers. Third-party resellers: there's an umbrella price increase and

that's all that you're addressing right now. What about the diversionary effect?
MR HARRIS: I'm going to come on to the diversion --
THE PRESIDENT: And is that another category that applies to both Apple and third-party resellers? Is that another --
MR HARRIS: No, we say it's a complete red herring and I'll develop this -- if you'll allow me, I'll do that in just a moment. The diversion ratio has got nothing to do with causation, so I'm going to deal with that.
THE PRESIDENT: Right, but before you get to that, just tell me how that actually links into your categorisation of the losses that are suffered. Diversionary: are you regarding that as applying to both the Apple and the third-party resellers or only the third-party resellers?
MR HARRIS: Well, my understanding of the way my learned friend puts that part of his case is that there would be a diversion to anybody who's not on-Amazon, but that's really for him to develop.
THE PRESIDENT: Okay, so the third part of the loss is a diversionary effect for both diverting Amazon sales to either or both of Apple and third-party resellers.
MR HARRIS: My Lady, what I say is that it's been put forward in Pike 3 that there are three bases upon which causation is supposedly going to be established. The third one is said to be diversion --
THE PRESIDENT: Yes.
MR HARRIS: -- but that one is a complete red herring in a manner that I will --
THE PRESIDENT: I'm not asking you to develop your submissions. To frame your submissions, I'm just trying to work out how you understand the losses breaking down. So there are three categories of loss: Apple from the RRP mechanism; secondly, the third-party resellers umbrella price increase, that's where your current submissions slot in; and thirdly, the diversionary effect and that operates for both Apple and

third-party resellers and you say it's a red herring.
MR HARRIS: Yes.
THE PRESIDENT: That's fine, all right. Thank you.
MR HARRIS: That's, if you like, the matrix.
THE PRESIDENT: Yes.
MR HARRIS: But what I would like to show you is my point about how causation of umbrella -- so from third-party non-Amazon people -- is highly fact-specific, and why it matters; because a third-party non-Amazon seller might not, even if there are higher prices caused by on-Amazon higher sales -- which of course we don't accept -- but if there were, they might adopt, say, cost-plus price setting. That's got nothing to do with on-Amazon sales, right? But you don't know unless you look. They might be told by, say, I don't know, their Japanese head office, "We've got a global strategy for pricing and we want to penetrate a new market, or we've got a particular product, so we've got to have rock bottom pricing in order to expand market share". Or there might be particular local conditions which mean that the competition for this particular --
THE PRESIDENT: Yes.
MR HARRIS: All of these other things might be going on. You don't know unless you go and look. This point is made out, if you look at authorities bundle 2 --
THE PRESIDENT: And your point is that Dr Pike doesn't say he's going to go and ask them for data.
MR HARRIS: He doesn't. He doesn't. More importantly, given that we're at the certification stage, he has absolutely no credible, plausible method, founded on the facts of this case, ever to get close to the necessary legal causation question.
THE PRESIDENT: All right, but your Pro-Sys argument applies to all of these kinds of loss, so you're going to have to address us also on the Apple RRP point and also on the diversion effect. At the moment you seem to be putting everything on the

umbrella part of the loss.

MR HARRIS: No, no. Just to be quite clear, my Pro-Sys point regarding causation applies to the third party off-Amazon sales.

THE PRESIDENT: Do you have a Pro-Sys argument in relation to the diversionary effect and/or the Apple sales for which there is said to be an RRP effect?

MR HARRIS: Not based on causation or foreseeability. But I do on my other Pro-Sys challenge, which is about mutually inconsistent implied market definitions.

THE PRESIDENT: So your causation argument only applies to the umbrella element of the third-party case.

MR HARRIS: That's right. Yes, that's absolutely right. If you'd like me to, I can turn it up. Otherwise, I can just read to you and give you the reference to the attorney general's opinion in Kone, which is authorities bundle 2, tab 13, paragraph 84, page 1084, wherein she says -- (Pause)

If you see in the second sentence of 84, it says:

"Rather, it will always be necessary to carry out a comprehensive assessment of all the relevant circumstances in order to determine whether the cartel in the case in question has given rise to umbrella pricing.

"85. Shifting the umbrella pricing issue from the level of pure theory to that of the production of evidence seems to me the best way of contributing to the effective enforcement ..."

The point I'm simply making here is that it always is necessary to do a deep dive, comprehensive factual analysis. Therefore, if you're going to mount a case of umbrella damages, which is what the PCR does in this case, including for third-party off-Amazon sales, then your theory, your methodology, has to be able to cater for the law. It has to be able to cover this first part, which is just factual analysis. But my learned friend's doesn't. It doesn't have a theory, a methodology, that's even capable of addressing this. In a minute, I shall explain to you that there's another part, which is foreseeability. He doesn't even mention that.

What I say -- your Ladyship has essentially foreseen my submission -- is the only way to do that in an umbrella case like ours for third-party off-Amazon sales is to ask the third parties, because there are all of these other possibilities, cost-plus pricing, et cetera, et cetera, et cetera. And yet, the methodology specifically eschews going and asking third parties. They say, in terms, they are not going to do it, and Mr de la Mare on his feet yesterday gave the two reasons. He said it is a "cost centre".

THE PRESIDENT: Yes. I mean, we know they're not going to do it. You're going to need to speed up, because I really need you to address all the parts of the case and not just focus on one bit of it.

MR HARRIS: Right. Okay. Well, I will speed up, then.

What they do, if we could turn to Pike 1, 13.4.1, which is A 7, page 275. This is where he says he's going to quantify his umbrella damages. (Pause)

I think this was mentioned in our evidence earlier on. What he says is three things. In 341, he says he is going to do a correlation; in 342, he says he is not going to ask for third-party disclosure; and in 343, he says that my standard correlation might have some control factors.

My simple submissions are: first, correlation doesn't amount to causation. That's trite; end of that. Even a controlled correlation doesn't amount to causation. It might be able to contribute towards quantification. Even a regression, even the most fancy, all singing, all dancing regression in the world doesn't amount to causation, but he doesn't even mention regression here in this critical heading, "Estimating damages from an umbrella effect". He does mention regression in a different part, which is page 271, which is relating to Apple products being bought from Apple, but I'm not addressing that. Those are the problems with it, and at the last --

THE PRESIDENT: You're saying he's not doing a regression analysis?

MR HARRIS: No. You will not find the word "regression", or any reference to it, in 13.4.1, which is umbrella effect from third parties. The reference that you find to regression is several pages earlier, and by the way, it's just a mention of the word "regression". It's at 271. It's actually on 272, paragraph 330. Just before the top hole punch in 330, do you see, "Alternatively, a longer period can be used for a regression analysis ..."

MR DERBYSHIRE: That's on the RRP effect?

MR HARRIS: That's on the RRP one.

MR DERBYSHIRE: Yes.

MR HARRIS: Yes. But by the way -- (Pause)

My submission, for what it's worth, is: just using the phrase "a regression analysis", which is all he does, that's not sufficient.

Those are my points on the third-party umbrella sales.

What we heard in the reply and the oral submissions was, "Oh, no, no, but look, I've got some great factual evidence. It's the price promises". Of course, they don't amount to anything. Ms Abram largely addressed you on this, but just in summary, there are three fatal problems with the John Lewis one, and then I'll take you to the Currys one, which we weren't able to show you earlier.

The first problem is: the price promise from John Lewis doesn't relate exclusively to Amazon, but for this case theory to work, the price matching of Amazon by the third parties has to be caused by Amazon, not by somebody else. When John Lewis refers to 25 main competitors, well, if it's the other 24, the case doesn't work. Fatal flaw number 1.

Fatal flaw number 2 is: he says, "Oh, well, the price promises talk about matching the lowest price, and that gets me home". But of course, that only works if Amazon is always, in every single instance, without fail, the lowest price. But even Dr Pike doesn't say that. He says in his evidence at Pike 3, paragraph 25, that Amazon is often -- only often -- the lowest price. In any event, that's not enough.

Then thirdly, what we saw when we looked at the John Lewis price promise, is that it doesn't actually show that the prices, even for John Lewis, are set, caused to be set at a level, by Amazon. What it says is: if you come along after the event and you bought something at a higher price, or if you found it the day before and you were about to buy it, and in fact, it's at a different price -- not the same price -- we'll give you a refund. Only on certain conditions. Okay. That's the opposite of prices in John Lewis being set by, caused by -- put it this way, if they were always caused to be the same as Amazon, and Amazon was always the lowest price, there would be no need for a price promise. It would never be operating.

Currys, Mr de la Mare said on his feet -- if we could just hand in the printout from the footnotes in Dr Pike's expert report. (Handed)

What Mr de la Mare said at 14.17 yesterday was, "Oh, well, don't worry about Currys. It's in the footnote, and you don't have to look at the Ts and Cs'". That's what he said at 14.17 yesterday.

But in actual fact, far from it. Here is the printout of that footnote, and if you look in the box at the bottom, what it says is "Price match terms and conditions". There are at least three relevant ones, the third, fourth, and fifth bullet point. The third one, "The lower price item must be offered on identical terms". Fourth bullet point, second sentence: "This does not include", and then there's a whole load of exclusions. Fifth bullet point: "those [inaudible] must have the product in stock and ready for delivery".

My submission there is: the devil is in the detail. You do have to look at the terms and conditions, because it's critical that for a price match promise to fit the umbrella theory, you have to be comparing the like price with the like price. But all of these bullet points in the Ts and Cs suggest that there might be many instances where prima facie it looks as though it's the same thing, but actually, when you dig into the Ts and Cs, it might well not be the same thing. It's not the same colour. It's not the same specification. It doesn't include a warranty. It might have been provided by means of a loyalty scheme, et cetera. You get the point.

So that's of no use, and I adopt Ms Abram's submission, which is, they are -- that's the high point of my learned friend's supposed fact evidence, which the AG has said, you need to have a deep dive into this.

My last point on this part of the Pro-Sys submissions is foreseeability. What the law is is that in addition to having this deep dive into factual causation, precisely because on its face it's a bit odd to be claiming umbrella damages when it's not even an infringer that has sold you the overpriced good, and so what the law says is that there has to be a foreseeability, that the infringers have to foresee that this type of remote loss is something that is caused by their behaviour.

In many instances, this is not a difficult hurdle. Take the facts of Kone itself. They had 80 per cent of the elevator and escalator market. It's not that difficult to think that actually, to get their own cartel to work, they rather wanted the other 20 per cent to put up their prices as a result of the cartel. Far harder to see how that's even remotely plausible where the relevant market share is 1.2 or 3.7. So you're screaming out for evidence of foreseeability. In the advocate general's opinion, there's an entire section of her opinion on the need for foreseeability. That's authorities bundle 2, at tab 13 again. The Court of Justice, which is authorities bundle 2, tab 12, at paragraph 34, says as a requirement of the law, that a requirement is that those circumstances and specific aspects -- i.e., the non-cartel is putting up the price -- " ...those circumstances and specific aspects could not be ignored by the members of that cartel".

THE PRESIDENT: Page number for the CJEU reference? (Pause)

MR HARRIS: Paragraph 34. CJEU, A2/12, page 1068. (Pause)
That's ignored, and that's fatal for Pro-Sys purposes, because there is therefore no methodology that even attempts to get at this. In any event, you could only get it by some sort of evidence, but it's not even identified. The reason it's fatal at this stage is that I respectfully contend that it's gone wrong, because until we pointed out what the law was on umbrella causation, the other side hadn't thought of it. Little wonder that their methodology doesn't address it. Mr de la Mare virtually said that yesterday. I noted down when he was being asked about the price promises and why they weren't put forward before, et cetera. These are the high points of his factual material. He said, "We haven't thought about it". Well, there we go. It's not my fault; not my problem. Anyway. There we go.
What that means, my Lady, in the time available left -- so just to be quite clear, that only addresses third-party off-Amazon sales, and I don't pretend it goes any further.
But my other point, which is much shorter, is still a Pro-Sys point, and it applies across the board to the entire methodology, all aspects: Apple, third parties and on Amazon. It is this. I won't develop it at length because it's set out in writing, I hope, rather clearly. But what it comes down to is that Dr Pike's methodology necessarily implies at one and the same time that there is both a narrow market upon which Amazon has high market power. Mr de la Mare very fairly yesterday started by addressing why Amazon has high market power. That's because it is the sine qua non of his entire expert case theory. But to get a high market power, my simple submission is you have to have a decent, if not very high, market share of sales. You can only get that on the facts of this case if you have a narrow market namely just on-Amazon.
But at the same time that his expert implicitly needs a narrow market to get high market share so that he can say that Amazon is powerful --at the very same time that he implicitly needs that he is also implicitly saying that the market is wider so as to include

all off-Amazon sales, because unless those off-Amazon sales are in the same market there's no coherent basis upon which the prices in the on-Amazon platform can exert a price influence upon the wider set of sales. By definition, if they're in a different market, not the narrow one, then there's no price impact. That's the whole point of being different markets.

Yet, he says, indeed, it's essential for all effects in this wider part of the market that the price on-Amazon does translate into cause, in fact -- not just translate -- but actually cause in a foreseeable way, higher prices off-Amazon. The way that that would have to work as a matter of economic dynamics is -- it could in theory cause higher prices somewhere else, but only the people who were going to buy on Amazon see the higher prices on Amazon, and then they shift their demand to somewhere else which provides the leg room or the latitude for the non-Amazon sellers to put up their price. There's no extra demand. They can't meaningfully or -- it's not coherent to say economically that they can put up their price. But of course, the very point here is: if they do shift their demand from the on-Amazon to the off-Amazon, thus allowing the latitude for the off-Amazon people to put up their prices as well, that means they're in the same market because that's the hypothetical monopolist test. If you put up the prices in market A, do people substitute into some other products? If they do, those other products are in the same market. Therein lies the rub.

What Dr Pike cannot escape from -- and so it's worse, my Lady, than just "he hasn't when he should have done" identified the market. It's much worse than that. It's that at one and the same time he has refused to do that which we expressly said you need to do and that he says he can do. He has incoherently and inexplicably not done it, and yet necessarily implicitly relies on two inconsistent markets at the same time. That is an incoherent methodology and that applies across the board.

MR DERBYSHIRE: Are there two inconsistent markets, or are there two subcomponents of the same market; one being the Amazon segment of the market and the other being the off-Amazon segment of the market, and one influences the other?

MR HARRIS: Well, we don't know Mr Derbyshire, do we, because the expert who should have been addressing this has deliberately ducked the question, even though he says he can do it. We don't know. But it's for him -- it's for him to come and address you as to why he in fact has a coherent market definition that he says he can do; and he hasn't. He can't pretend, oh, this is somehow a surprise or something weird. We said in terms in our response: "You've got two mutually inconsistent, necessarily implicit market definitions. That's incoherent. You fail Pro-Sys". So what he should have done in Pike 3 is "Oh no, no", and in speedy reply "No, no, no. What are you talking about? That's nonsense. Here's the market definition". But he hasn't. So he hasn't come up with yours or anything resembling it, and that's his problem, not mine. And that's fatal.

Let me point out the last point just before I move on to my short evidence point about opt-out. It's not as though now, if you were to say the off-Amazon umbrellas theory or anything off-Amazon is incoherent and can't be allowed -- it suffers from the strike out. It's not that Dr Pike, in those circumstances, would be able to come back to you and say, "Oh, don't worry, I've listened to that. That's all struck out. I'm now plumping for the narrower market definition, namely on-Amazon. That's all that matters". It's not that because he can't now ever credibly say that to you, even if you do strike out, because we know from these reports that it's necessarily implicit in his approach that actually he believes in a wider market, hence his claim for off-Amazon umbrella effects. So to put that another way, if you strike that out, he's stuck. That's fatal.

THE PRESIDENT: That argument relies on saying that he absolutely cannot get home on a wider market definition. So if that's the case, I mean, it looks very much like the strike out argument. I find it difficult to see that there's much between you. In order to make this case, you have to say he must be relying on a wider market and that wider market is, on any basis, unsustainable. It's not a question of him not setting out how he's going to get the data. You must be saying it cannot sit alongside the case that he's advancing.

MR HARRIS: I agree.

THE PRESIDENT: So yes, so on that point --

MR HARRIS: I adopt the submissions of Ms Abram as to why that's not plausible, but I completely agree with your conceptual approach.

THE PRESIDENT: So really the Pro-Sys argument comes down to the causation point because you say he hasn't outlined a way of getting the data that would be needed. You don't say it's impossible conceptually ever to get that. You say you would need a full picture and he hasn't shown a route map to getting it. But on this part of the argument, which is why I really wanted you to kind of explain the layers of your argument and how it affected the different parts of the off-Amazon case on the rest of the off-Amazon case, that is not turning on the third-party resellers umbrella point. So in the RRP argument for Apple and the diversionary effect, your only argument is market definition. On that, the point is exactly the same as Ms Abram advances.

MR HARRIS: I would nuance it in this way, and the reason we put it as Pro-Sys is, I say that in the paragraph 118, for the Microsoft v Pro-Sys test you need a coherent, plausible methodology and you cannot have a coherent, plausible methodology where it's a necessary part of your case that you're simultaneously running two inconsistent market definitions. So I do make that as a distinction. But I also agree with your further point that as regards the wider market, that's implausible for the reasons that Ms Abram gave. So I do say that there is a separate point.

Then in the three minutes remaining, I'm delighted to say I will easily be able to do this. So the Evans point that we run is not the one that was raised yesterday. It is not any part of my case that I'm trying to persuade you that there should be an opt-in instead of the opt-out. That's not part of the case at all. I'm not even saying that the opt-in is -- whatever. I have no suspicions about whether it's reasonable or not reasonable or practical, not practical. That's not the point at all. All I'm very simply saying is in the Supreme Court in Evans, what it said is that it is the duty of this Tribunal to make sure that cases are only allowed to go forward where it's just in the interests of both sets of the parties, both by reference to allocation of resources, the initial time and all of the usual things, costs, et cetera. What it says in Evans, and we don't need to turn this up, is that -- it's all over the place -- but including paragraph 3, paragraph 88, paragraph 89, all it's saying is that where an unmeritorious opt-out claim is given permission to proceed, that gives rise to an "enormous leveraging effect" and that is unfair. So I'm not saying anything about opt-in. All I'm saying is the only proposal before you today is opt-out.

What we're saying to you is that the opt-out is the unmeritorious -- for all the reasons that Ms Abram has given that I give -- and in those circumstances you shouldn't allow the opt-out claim to proceed, because it's not just within the meaning of Evans. That's it.

But since there's nothing else put forward, if you agree with that submission that it's not just to allow the opt-out to go ahead, that's the end of the case. It's not as though Mr de la Mare has come here to you and said, "Oh, well, okay, in the alternative let's run an opt-in". But that was a matter for him. That's not my concern. So that's it. So unless I can assist further, those are the submissions.

THE PRESIDENT: All right. Do you have any questions? Thank you very much.

Submissions by MR MALLALIEU

MR MALLALIEU: My Lady president, members of the Tribunal, finally we get to the exciting part; funding. I very much hope I will stick to the timetable, as Mr Harris has done, and will be sitting down in half an hour. I might take the extra minute Mr Harris has given me, if I may. But there we go.

May I start just by reference to the direction that you gave before the luncheon adjournment. So this is the opportunity for the class representative, within the space of just over a week, to put in evidence to deal with the point as to what would happen if this Tribunal were to rule that what I will for shorthand term "the Riefa costs" are to be irrecoverable.

THE PRESIDENT: No, that's not what I asked them. I just asked them to say if they would proceed to fund and if the ATE insurer would accept an arrangement that would strip out the costs, and also whether Mr Le Patourel would agree to proceed on a lower rate if necessary.

MR MALLALIEU: Apologies, I wasn't suggesting anything other than that that was what they were being asked to do. So in other words, to respond to the question of whether essentially the funding arrangements -- the funder and the ATE insurer -- would continue in those circumstances. Obviously, if they respond to that then we would like an opportunity to reply to whatever they say. But just to come to the immediate relevance of that --

THE PRESIDENT: Well, if they say they would, why do you need a reply?

MR MALLALIEU: Well, my Lady, it may depend on what they say. I mean, if they simply say they would and there's no more to that we may not need to, but we need to see what they say. It's a short point. But the more immediate relevance is -- just to be clear as to what our case is in relation to these issues -- we say that it's plain that the Riefa costs should be excluded. So that's a starting point. But we also say that that is not the end point because the important question that we say the Tribunal must consider is how we got here and what that says about the suitability of this class representative to be authorised for the purpose of these proceedings. In support of that, what I'm going to do in the time available --

THE PRESIDENT: Is this an argument about us excluding the Riefa costs, or is it an argument about suitability of Mr Le Patourel?

MR MALLALIEU: It's an argument about suitability and authorisation.

THE PRESIDENT: All right.

MR MALLALIEU: So that is the core of our case as we've put it in the skeleton --

THE PRESIDENT: Are you saying that the only basis on which the Tribunal can exclude the Riefa costs is by saying that Mr Le Patourel couldn't have properly agreed them and nevertheless remain as the class rep?

MR MALLALIEU: No, that's not what I'm saying. I'm saying that the Tribunal should exclude those costs because those costs are not costs which it would be just and reasonable for the class rep to incur.

THE PRESIDENT: In terms of the legal framework, which of the conditions are you saying that would attach to?

MR MALLALIEU: My Lady, we are saying that the Tribunal has power at this stage to say that those costs are costs --

THE PRESIDENT: Which part of the legal framework? Take us to the test and tell me exactly where you say that that would come under.

MR MALLALIEU: Well, my Lady, as there was the discussion yesterday with Mr Went, there's no specific rule which says that the Tribunal knows or doesn't --

THE PRESIDENT: No, take me to the legal test for certification and show me the particular rule which you say that we would be applying if we were to say we won't agree to certify the costs.

MR MALLALIEU: Well, what we say is that -- as I say, there's no specific rule which

says you can or cannot now say --
THE PRESIDENT: Authorisation or -- no, take me to the legal test and then show me what's the hook that you rely on.
MR MALLALIEU: Well, what we rely on is rule 78, (2) and (3), in relation to saying that Mr Le Patourel, through his SPV --
THE PRESIDENT: That's Mr Le Patourel, but you just said that your argument was not limited to Mr Le Patourel. Take me to the legal rule and show me which of the provisions that you rely on, if you're not talking about the suitability of Mr Le Patourel.
MR MALLALIEU: My Lady, we say that the Tribunal has a general discretion now to say that these are costs which should not be recoverable.
THE PRESIDENT: Under which part of the test? Just take me to the test and tell me which part you rely on.
MR MALLALIEU: Well, my Lady, there's no specific rule that we are saying. It is part of this Tribunal's ability on certification to say that the class representative is anticipating seeking costs, which this Tribunal thinks should not be recoverable from the class. So what will be recoverable from potentially from damages distributed or undistributed in due course will depend on the terms of the conclusion of these proceedings, whether it's a settlement or a judgment, whether it's CPR, whether it's section 47C of the Competition Act that's being applied or what the precise terms are. But at that point, the Tribunal undoubtedly will be able to control any claim for costs from distributable or undistributable damages, including any question of the funder's return, any question of success fees --
THE PRESIDENT: But that's because the Tribunal has a power to approve, for example, a settlement. We're talking about certification, and certification is governed by the framework and it's governed by the statutory framework. Can you not point to anything in the statutory framework that we would be relying on? I'm not saying that

there's a particular rule there, but what bit of it would we be addressing if we say that we won't certify the Riefa costs?

MR MALLALIEU: Well, it's not a question of -- the certification is of the claim and of the class representative as being a suitable person to bring that claim. As part of that power that the Tribunal has to determine whether or not this claim should be certified and whether or not the class representative is a suitable person to bring that claim, it is within this Tribunal's discretion to say you anticipate, on successful pursuit of this claim, recovering certain aspects of costs. We do not think those are costs that should be properly recoverable. (Pause)

So, my Lady, I referred the Tribunal to Rule 78, (2) and (3). And so it is --

THE PRESIDENT: Hang on, (2) is whether it's just and reasonable for the applicant to act as the class rep. You're making a different point. You are making a point about Mr Le Patourel, but I asked you just a minute ago: is that the only point that you're making? If we decided that it was just and reasonable for Mr Le Patourel to act as the class representative, my understanding was you would still be saying that the Tribunal should exclude the Riefa costs. So 78 is not the right provision, in that case.

MR MALLALIEU: My Lady, we say it is within the scope of this Tribunal's powers on certification to say that as part of that certification, the class representative has said that if the claim succeeds, he anticipates seeking to recover specific aspects of cost and it is open to the Tribunal to say those are costs that it does not consider -- if the claim succeeds -- would properly be recoverable. It's effectively the Tribunal -- as part of its judgment -- declaring that it is considered aspects of the funding which it thinks would not properly be recoverable. There's no specific power which says you can or indeed cannot do that --

THE PRESIDENT: No, I'm not asking for a specific power, I'm just asking: what part of the test that we are applying does this argument fall under?

MR MALLALIEU: My Lady, it's part of your consideration of authorisation. So it's part of your determination as to whether or not to authorise. So, for example, as part of that determination, you will consider those costs. You can say -- and we invite you to say -- that by virtue of the inclusion of those costs, you do not think that this is a claim that should be certified and we invite you to say that this is a class representative who is not suitable to be authorised.

But in our submission, it is open to the Tribunal to say that even if the class representative is able to persuade you that they should proceed through authorisation, that nevertheless the Tribunal considers that there are aspects of the costs that the class representative seeks to recover that will not be recoverable in due course. (Pause)

THE PRESIDENT: Right.

MR MALLALIEU: But our primary position -- which was the basis on which I sought to introduce this -- is that we say that the Tribunal's conclusion should be that this claim should not be certified and that is -- the point I was endeavouring to make -- not simply curable on the basis, should it happen, of the class representative coming back to the Tribunal and saying, "Well, we've now -- didn't do it before -- gone away and negotiated with the funder and with the ATE insurer and if this were to happen they have now agreed not to pursue the Riefa costs", and therefore there's no problem with certification, because we say the question of how we got to this position in the first place goes to the question of Mr Le Patourel's suitability.

So, even if that position is cured, in that they come back and say, "We're not now going to seek to recover those costs", we say it doesn't answer the question as to suitability for authorisation. (Pause)

And so, my Lady, in respect of that, can I just invite the Tribunal to come to the one-page document that was handed up this morning -- the breakdown -- and I'm going to come to various points to various aspects of these figures. But we know in broad terms what the Riefa costs are, if I can use that expression. They are -- as has been identified -- in that top table, the difference between the first column and the third column, which is £36 million -- or thereabouts -- and if we can just understand what the class --

MR BANKES: Hang on, the difference is £4.5 million. The difference on recovery is £32 million. Difference in the costs is £4.5 million.

MR MALLALIEU: No, the difference in the total cost that the stakeholders will seek to recover and the class representative has indicated he will see --

MR BANKES: Is the bottom line.

MR MALLALIEU: Is the bottom figure. So the difference in the budget is the first row, £19 million versus the £14.6 million. So that's the £4.5 million-odd extra drawdown, extra funding -- the Riefa funding -- but then we have elements of the success fee that Asertis will be seeking, because it will seek 5.75 multiple, on the basis of the Campbell 2 scenarios on that extra drawdown. So that Riefa extra drawdown gets multiplied by 5.75.

The insurers: we can see the additional cost.

Hausfeld: so again, you can take the 3.6 million away from the 5 million, which tells you broadly that the Hausfeld deferred and success fees relating to Riefa are about £1.4 million.

Counsel, you can do the same: take the 1.97 million --

THE PRESIDENT: We can do the maths.

MR MALLALIEU: And so you end up with a total of about £36 million.

Then if we just come down to the second table, which hasn't particularly attracted much focus, just to understand what the -- this is the class representative’s table, what the class representative’s present intentions and indications are.

So this identifies on the class representative's assumptions -- and I'm not going to go into the issues of distribution -- the anticipated damages pot based on just the on-Amazon claim and then if we come down to the next two lines, you'll see 75 per cent distribution to class, to 100 per cent payout and then 75 per cent distribution at 75 per cent payout. And so what this table anticipates is those members of the class that the class rep says will come forward only receiving 75 per cent of their entitlement and the reason to do that, in short, is that figure in the third row is then taken away from the top figure, the damages pot, to leave the balance, which is the next row, the £126 million.

THE PRESIDENT: Yes and then there would be a shortfall --

MR MALLALIEU: There'd be a shortfall, which is made up in part by the anticipated £10 million cost recovery.

And so what is going on here, in short terms, is the class representative is anticipating that in order to be able to pay the stakeholders, any class members who come forward on their 75 per cent analysis will only recover 75 per cent of their entitlement and that is almost entirely made up, that deduction, by ensuring there's a sufficient amount in the pot for the stakeholders to be paid in full, including the Riefa costs, because if you were to take the Riefa costs --

THE PRESIDENT: This is just an illustrative set of calculations. They're not saying that this is what they think will happen; all this is saying is: we would be able to get the full amount of the 128 if there is a 75 per cent payout, a 75 per cent take up, 75 per cent of that 75 per cent plus £10 million recoverable costs.

MR MALLALIEU: It is -- my Lady -- illustrative of the approach that's been taken by the class representative, which is to enter into an agreement -- or into a set of agreements -- which anticipate priority being given to the various stakeholders over the class members.

THE PRESIDENT: Well, no, because they're claiming more than that. They're just saying that even on the -- only on the on-Amazon claim, if that was all that was certified and even if our costs were as much as this, we would be able to get it back if we got that claim plus 10 million and we can just take that for what it's worth. All they're saying is: this would be how it would fall out in that scenario. They're not saying that that's what they think, or that's what they've advised the funders that they will get.

MR MALLALIEU: No, my Lady, but as I say, this illustration illustrates that where that scenario -- which is the scenario that's been given as the illustration to occur -- the way that the square would be circled is by anticipating a reduction in the class members' entitlement to ensure sufficient funds were available and the main delta between the two matters is in fact made up in its majority by the Riefa costs.

But perhaps I can come to each of the three aspects of that.

So, the Tribunal is aware of the figures. So the first element of that, of the Riefa costs, is the £1.7 million broadly, which is made up of the deferred and success fees in relation to the solicitors and the deferred and success fees in relation to counsel. So that's the contingent element of their costs, where they entered into the risk-based agreements in relation to Riefa, Riefa was unsuccessful, those entitlements have been lost to them, save for the fact that as part of the funding arrangements agreed for these proceedings, they've been resurrected, if I can put it that way.

So that, as I say, that's £1.7 million, and our concerns in relation to that, they're expressed in a skeleton argument, but just to identify them.

Firstly, we say that there is a lack of any attempt to adequately investigate the options that were available to the class representative at the time of seeking to reconstruct the same legal team.

Secondly, there is a lack of any advice being taken as to either the suitability of that course or as to the appropriate terms on which to agree to instruct that legal team were they to be re-instructed.

The third is that we say, of particular concern, is the lack of any evidence in negotiation with the legal team, if they were to be instructed, as to the basis of their fees.

And the fourth concern is the lack of any adequate explanation as to why those decisions were therefore taken.

If I can just run through each of those quickly.

So firstly, in terms of the lack of investigation of options: well, it's quite clear we don't need to spend too much time on it. There was no --

THE PRESIDENT: Do we need to spend time on any of these? I mean, we've got the points and we've been over, in some detail, what information was sought and what Mr Le Patourel did and in other submissions I think we have the point as to what he did and didn't do.

MR MALLALIEU: Well, my Lady, in that case I'll move on. Our short point in relation to it is that this is an example, because we will say in the other points -- the ATE and the funder, which I'll come to in a moment -- that what is missing here is a balanced and informed assessment conducted by the class representative of the options available, and in particular, an adequate consideration of whether the decisions that are being made were in the interests of the class, taking into account all of the relevant circumstances.

May I just touch on two short further points in relation to that before moving on. In terms of the explanation that's been given, you've been taken to the first part. It was addressed in exchanges with Mr de la Mare yesterday, where part of the explanation that's been given in relation to this by Mr Le Patourel was a concern that the work product from Riefa would be lost.

That is dealt with in a number of places. It's in Mr Le Patourel's second witness statement, paragraph 78, which is bundle A, 596. It's also in his first witness statement, paragraph 64(b), which is bundle A, 349. I'm not inviting you to turn them up, because you've been taken them to them already, but that's the point that we simply don't understand.

The position as at the end of the Riefa proceedings was that insofar as there were any costs payable for that work product, they had been paid. They had been paid by the funder. The various bargains that had been entered into, the conditional bargains that had been entered into, had come to an end. That work product belonged to the class representative. The director was a different person, but ultimately it ended up being the same SPV.

But in any event, there's no obvious reason why the previous class representative would not have wanted a new class representative to have the benefit of that. And as a matter of fact and law, prima facie, it's the property of this class representative in any event. So we don't understand why that concern would have informed, let alone explained or justified, a decision to re-incur the Riefa costs.

The second explanation that appears to be advanced, and the reference in this regard can be seen in Mr Le Patourel's second witness statement of paragraph 76, which is page 564, and paragraph 78, which is page 594 and 596, is a repeated reference to agreeing a whole package of funding; that each of these decisions, as to each aspect of the funding, was made as part of a consideration of the arrangements as a whole and accepting an overall package.

We don't understand why that had to be the case. Indeed, it seems to us that that was a fundamental flaw, and it's a fundamental flaw the class representative has only really started to address at this hearing with, for the first time, for example, this morning, indicating that a separate approach was now being taken by counsel and solicitors from the funder and the after-the-event insurance. We don't understand why it had to be, "Take the CFA with all of the liabilities, and take the ATE with all of the liabilities, and take the funding agreement with of the liabilities", and why each could not be, if any merit was attached to each, considered in turn.

We say those are fundamental flaws which reflect a failure to properly consider the relevant circumstances and to apply adequate, independent, robust scrutiny to these issues.

Can I then just turn briefly to the ATE policy. In terms of the ATE policy, we know the headline position in relation to this again, which is that by virtue of agreeing to reuse the ATE policy, the class representative has agreed on success in this case to repay, out of any funds available, subject to the Tribunal's discretion, the sums that the insurer paid out by way of adverse costs in the Riefa proceedings; £3.82 million, as it presently stands.

The question then is: on what basis could the class representative reasonably reach that decision and conclude that it was in the interests of the class? As at the end of the Riefa proceedings, the position was that the first deposit premium for that policy had been paid by the funder. There was no recourse by the funder as against the class representative for that. The funder had no claims against the class representative. Essentially, the class representative at that point, if the policy was to be continued, had that first deposit premium free; but also at that time, the class representative had no liability to the insurer. It was an insurance bargain. The insurers provided the insurance, and he had no liability, or it had no liability to the insurer.

What the class representative then did was three things it agreed the continued use of that policy, and the first part that came with that was agreeing to repay the £3.8 million. Secondly, because £3.8 million pounds of the policy had been used and it was the same policy that was going to come forward, £3.8 million came off the level of indemnity that this insurer was going to provide. If they'd gone to a new insurer, that wouldn't have happened, but by staying with the same insurer, the insurer discounted the Riefa costs from the (inaudible) indemnity.

The net effect of that was that the class representative needed more additional insurance than he would otherwise have needed, and this is explained in the policy. £28 million of total insurance was taken out, an £8 million excess policy, whereas with a different insurer, because the full amount of adverse costs cover that was thought to be needed for this case was only £24 million, you wouldn't have needed that extra £4 million of excess insurance. That, of course, comes at a cost. Just for your reference, the premia for the excess contingent policy are set out at page 888 of bundle B. I won't go through the figures, but they are substantial figures. (Pause)

I won't go through the figures, but they're substantial figures in terms of deposit and contingent premium for that excess policy, and a substantial part of that would not have been needed, but for rolling over the policy with the same insurer.

But the central point in relation to this, just to make, is that this is presented on the basis that, well, it must have been cheaper, because essentially the first deposit premium was free; and therefore, if you'd gone to a new insurer, you would have had to pay a new first deposit premium. Well, the first deposit premium was free up until the point when the class representative, as part of this overall package, decided to agree with the funder that it would repay to the funder its drawn funds in a multiple of them, because those drawn funds include the first deposit premium of just over £2 million.

So by agreeing as part of this overall package that funding arrangement, the first deposit premium is no longer free. In fact, because we know the figures -- it's just over £2 million pounds -- we know that on either of scenarios B or C, there will be a multiple payable on that of 5.75 X, because it is Riefa funding; and therefore, as Mr Bankes pointed out in an exchange yesterday, it runs from the earlier date, and therefore it's the higher multiple.

In fact, within these figures that you have in that one-page spreadsheet handed up, the cost of the first deposit premium -- 5.75 plus the deposit premium itself is just short of £14 million.

We say that is relevant, because it goes to the point that there has not been an adequate overall consideration of these issues. The only evidence that you have is the evidence that you've been taken to. I won't take you to it again.

MR BANKES: Can I just go back on the numbers you've just given me. Are you saying that the £2 million, because of the operation of the LFA, will cost £14 million to repay?

MR MALLALIEU: Correct.

MR BANKES: That's the relationship: 2 to 14?

MR MALLALIEU: Essentially, 6.75 times the £2.072 million, because it's 5.75 X, plus the payment of the premium itself. That forms part of those figures that you have in that table. It forms part of the £36 million.

It's not a free premium. This comparison in Astill 1, this comparison in Mr Le Patourel, that if we'd had to go to the market we would have been comparing the cost of the policy we already had with its free first deposit premium as against a new policy with a new deposit premium, is a false comparison. Then you have to add into that that going out to the market to a new insurer wouldn't have cost you the £3.8 million that you're going to repay in adverse costs. Going out to the market with a new insurer wouldn't have cost you the extra whatever it is -- deposit premium or contingent premium -- for the extra £4 million of excess insurance that you need. All of those things wouldn't have been a part of that. Therefore what you need -- and again, come back to the point I made before -- is a balanced consideration of all of those factors weighed against each other to determine what the proper approach is, what decision to make. That's what is completely missing.

That's where you get to what the evidence is in this regard, which is essentially the evidence from Mr Le Patourel, is he didn't consider it proportionate to conduct any proper market review, to ask any insurer what they would charge. No single insurer was asked what they would charge in relation to this. No market review was done. There was simply an initial brief discussion with Exton, which appears to have taken place before the decision to enter into the new funding agreement with Asertis. Before then, an initial consideration, which was on the basis of: it was unlikely that any other insurer would be any cheaper, they were probably going to be more expensive, and you would have to pay a new first deposit premium.

Well, once the decision was made to take this as an overall package, the class rep is paying that deposit premium and getting the worst of all worlds: paying for the deposit premium, paying the multiples, repaying adverse costs, and paying for the extra excess insurance. We say that that is not the proper approach, and it's a failure to properly consider the relevant considerations.

Can I then just come briefly to the funder, in the last couple of minutes. We know what the funder's additional cost is, and we can see it from the table. In broad terms, the cost of rolling over the Riefa funding -- if we exclude solicitors and counsel -- we know what the additional repayment is, and we know what the additional success fee is. It's the two tables, two lines, at the top of the table.

There's a lot of evidence from Mr Le Patourel and indeed from Mr Astill, on the basis of "we went out to the market", and it may seem surprising. There were nine funders who were originally contacted. Only one was interested. Ultimately, that one that was interested turned out to be more expensive.

I have a degree of scepticism about the basis, the maths that underpins that, but I don't have time to go into that. But can I just flag what we say are fundamental concerns about the process that has been followed, which arise from questions that we asked and the answers that were given.

The first is that it appears from Mr Le Patourel's evidence that one of the reasons, or at least one of the factors, why the other funder who did come forward was more expensive, was because it wanted an adverse costs indemnity. We don't understand why it wanted an adverse costs indemnity if there was the potential available to continue the existing insurance, or at least we don't understand whether or not that potential was discussed with that funder. So we asked the questions in relation to it.

The response we got -- and for the Tribunal's reference, it's in the CPO reply, which is bundle A, page 545, and it's paragraph 47(4)(d). -- the response we got from the class representative is, I quote, "Mr Le Patourel is unable to speak to the competing funder's commercial reasons for proposing its own adverse costs package".

What we take from that is that when they did, Mr Le Patourel did not go back to them and say: why are you doing that, these are other options that might be available? It begs the whole question of whether any consideration was given to looking at this, other than as an overall package -- we take all of it or we leave all of it -- and whether proper consideration was given to discussing with funders: what the actual position was at the end of Riefa, what potential options were available in terms of legal costs going forwards, ATE insurance, and therefore whether this market review that was conducted was conducted on a proper basis.

There's a second fundamental concern that goes to that, which is the one that's set out in our skeleton argument at paragraph 67, core bundle, page 51. This relates to the question of what the alternative funders knew and were told when they were asked to consider whether they would become involved in these continued proceedings. The short answer to that -- again, we ask the question, and it's responded to in two places. It's in core bundle 361, which is Mr Le Patourel's evidence, paragraph 100. And it's in Mr Astill's evidence at page 389. What we take from that, and I quote first from

Mr Le Patourel: the key terms of the funding were in the public domain and he considered a competing funder would be aware of them. Mr Astill says, "I expected prospective funders would be aware of the key commercial terms from Riefa".

So in other words, the funders were simply left to read the Riefa judgment, divine from that what they could understand as to the existing funding terms, and it would appear no information was provided to alternative funders as to what the existing funding terms were, as to what options might exist for continuing any or all part of them, or as to any of the information one might think that competing funders would want to consider in order to be able to consider pitching for funding in this case. In those circumstances it's perhaps entirely unsurprising that there was such limited funding interest in this case.

We say again that's all an aspect of a failure to ask the right questions, a failure to properly scrutinise the options available, and a failure, frankly, to act in the best interests of the class when considering the funding arrangements that were going to be proposed for these proceedings. I have gone over time, and I apologise. Can I just add one final point to it? I won't repeat any of the points about the class representative budget which have been made.

THE PRESIDENT: Well, extremely quickly, please.

MR MALLALIEU: My Lady, it's just this final point. I rely beyond that on the contents of our skeleton argument. The final point is the lack of independent cost scrutiny. As this Tribunal will know, it has been established in case after case after case: Bulk Mail, Shotbolt, Hammond. Indeed, in Hammond it was said it should be "standard", was the term used, that a class rep should have independent scrutiny by a third party of the cost it anticipates incurring. That has been expressly declined by the class representative in this case, who considers he doesn't need it. He can do it himself. We say that is all of a pattern with the approach to these funding arrangements, all of which go to say that this class representative has failed to put before this Tribunal the adequate evidence to satisfy it, that it is capable of exercising the necessary robust and independent scrutiny to be authorised.

THE PRESIDENT: Thank you. We'll take five minutes.

(3.16 pm)

(A short break)

(3.24 pm)

THE PRESIDENT: (Audio interrupted) tomorrow evening at 4.00. What we would like is a one page answer to the question that I put to you at the beginning of your submissions as to our jurisdiction not to certify on grounds that we don't think the Riefa funding costs should be included, leaving aside your argument that that goes to whether Mr Le Patourel has done a good enough job. So you said that you didn't rely solely on the question of whether Mr Le Patourel was suitable in himself to be authorised as the class rep, but you are making a wider point about the Tribunal's jurisdiction. One pager from you as to exactly where that jurisdiction is founded, please, by Friday 4.00 pm. Any response limited to one page. Again, this is only about jurisdiction. We have, of course, your point that we shouldn't exercise that jurisdiction anyway. We understand that, but it's a question as to whether the tribunal can do this at all.

MR MALLALIEU: It's the narrow jurisdiction. Understood.

THE PRESIDENT: It's a jurisdictional point, yes. That must be founded, if you say that jurisdiction exists, in the statutory framework, or if it is not -- if you say it's some inherent part of the Tribunal's jurisdiction, Mr Mallalieu -- where does that come from? All right. Thank you.

Reply submissions by MR DE LA MARE

MR DE LA MARE: My Lady, can I start with the topic of class reps and hourly rates for this reason. What has become apparent with the discussion, from instructions I'm receiving behind me, is that what has been said has created really quite substantial perturbations in the class representative market. You ask the question: what impact is this going to have on the supply of class representatives? I think it's only right that in due course, in line with the timeline that you've given for Mr Le Patourel to put forward his position, that the similar time is afforded for others to explain what their position will be, in the sense that what I understand is that several class representatives, acting either in anticipated claims in which they're seeking to recover rates higher than £100 or in claims awaiting certification, take the attitude that if that is the threshold, they will no longer act. I think before --

THE PRESIDENT: It's rather in terrorem, isn't it?

MR DE LA MARE: It's not in terrorem, my Lady. It's precisely the type of evidence that we say would be obtained by a consultation. It goes to my point -- I know my Lady doesn't like it, but this is setting a rate for the market, and in the cost context, when that's done, as we indicated, the green book rates, et cetera, for costs in the High Court which have been carried over, following consultation.

So whatever information -- if my Lady remembers before in Riefa, we had the information from the class representative network. If we could put information of that ilk before you in good order you can at least see what the implications are of the rates in question. We'll put in whatever points we have about the adequacy or inaccuracy of my learned friend's schedule. Of course we think there are a number of things are wrong. A number of things were omitted from it; not just pension contributions, but holiday pay, implications of full time job security, other work benefits, et cetera. We'll put that in paper. You don't need that now.

THE PRESIDENT: All of you on your side of the table, does anyone have any submissions on that? I think what's envisaged is that by the same time scale we will accept further evidence.

MR HARRIS: I think our position, my Lady, is if you're minded to allow that, notwithstanding that this was squarely on the table before this hearing, and provided we have a reasonable opportunity to consider it and potentially reply.

THE PRESIDENT: Yes.

MR HARRIS: Of course, the downside for the Tribunal is even though it was squarely on the table, it means the hearing's not over. We're carrying on and on and on.

THE PRESIDENT: Okay. Well, it's a fairly circumscribed carrying on. Let me just ask my colleagues. (Pause)

Yes. All right. So, I think that that's entirely reasonable that you should have a right to reply and Mr de la Mare's not saying you shouldn't. So by the same time frame, next week you're going to arrange for any submissions to be put in, or evidence. Then there's a right of reply. Let's just look at the timing of all of this. I said 4.00 pm on the 10th, so I think that that would need to take us to any reply on by say 4.00 pm on the 17th, and that will be the end of the matter.

MR DE LA MARE: That seems entirely reasonable, my Lady, I'm most grateful.

So the second point is: yesterday -- seems a long time ago now -- my learned friend said we don't need to worry about Hollington v Hewthorn and Evans problems with the AGCM decision, because there was nothing in those of relevance to on-Amazon claim.

There's two problems with that submission. The first problem is that there is material that's relevant to the on-Amazon claim in the AGCM decision.

The second problem is that there's material --

MS ABRAM: I hesitate to rise, but the submission relates to the off-Amazon claim, not the on-Amazon.

MR DE LA MARE: I meant there is material relevant to the off-Amazon claim. My tardiness is showing. The second point is that there is material that relates to some of the points made about the on-Amazon claim. The simple point there -- I'll make it straight away -- is that the methodology used by the AGCM is identical in some respects to the methodology on-Amazon used by Dr Pike.

And insofar as one gets into the question, it having been disclaimed that the case was a fundamental inadmissibility argument -- it's an argument about weight -- this is an area where his approach -- his discounting -- is not only not challenged, it's corroborated directly by the same method, having been used on better data in relation to Italy. So we say that that is relevant to the answer to that problem and answers my Lady's question as to whether or not Dr Pike's material should be accepted for the purposes of the on-Amazon claim.

Now, in terms of the off-Amazon claim, the starting point is to look at what's said at 386. That's authorities bundle 3, tab 2, page 159.

MR BANKES: Sorry, the authorities bundle?

MR DE LA MARE: Yes, the AGCM decision is in the authorities bundle. It has been exhibited. It is in evidence. It shouldn't be in the authorities bundle, but that's where you'll find it, sir. It's page 159.

THE PRESIDENT: Sorry, give me that all again. Which bundle?

MR DE LA MARE: It's authorities bundle 3. It's part 1 of that. It's tab 2 of that, and it's at page 159.

THE PRESIDENT: Thank you.

MR DE LA MARE: The critical thing about the passage at 386 is that what is being investigated is the impact of Amazon's prices before and after. Then at the end, almost at the foot of the page, it's concluded that the change in price observed is also an effect that affects Apple.it. Why: because it's a direct competitive constraint on the sales of Amazon.it that was being reduced by the reduction of prices on the

Amazon Italia Marketplace.

That finding of a reduction of a constraint on Apple.it, i.e., the Italian Apple online store, was then the basis at 481 for the value of commerce used for the fine. You see that at 481:

"As far as Apple is concerned, we do not accept the party's arguments regarding the circumstance that the sales turnover on the Apple.it website should not be taken as a reference."

In other words, that's because it was considered more appropriate to use that sales value, both because of the relevant markets affected by the conduct, in particular from the consumer's point of view the market for the sale of consumer electronic products on the internet, i.e., the wider market, and because of the circumstances the restrictions under examination appear to have led to a reduction in the discount between the price proposed on Apple.it and the price of third-party retailers.

In other words, the basis of fining is on the basis of a reduction of constraint on the Apple Italia online store. That accords entirely with the AGCM's primary approach to the discounting that they looked at. The primary focus for their discounting analysis was the difference in price between Amazon Italia and Apple Italia -- not within Amazon Italia -- between Apple Italia and Amazon Italia. That was the primary focus of their discounting investigation. You see that from the passage at 404, page 165 onwards.

It was in response to the criticisms of that approach, that primary discounting approach, that the AGCM also developed their analysis of discounting on Amazon Italia. You see that from 406 and following, and that culminates in the tables at 413 and following, that look at the levels of discounting that are forgone on Amazon Italia. So the tables at 413, page 168 to 169, are the tables that Dr Pike makes comparison to for the purposes of his on-Amazon discounting analysis. It's a second tier of

discounting analysis.
What that tells you is that this regulator does think that the lower Amazon Italia prices are acting as a material constraint, vis a vis Apple, and they have exactly the same analysis of the potential for harm, or theory for harm, to the extent even that in the teeth of objections from Apple they decide to use the Apple Italia commerce as the basis for the fine.
The next thing, of course, that tells you is that Apple are well aware of the different levels of commerce being achieved on the Amazon Italia and the Apple Italia platforms, because they're trying to move the fine by reference to the 1.2 per cent market share, et cetera, that we've been arguing.
MR BANKES: And can I just check? I understand this decision has been --
MR DE LA MARE: Yes, I was going to deal with that, because my learned friend, I don't think entirely fairly described the position to you. The decision has been annulled on procedural grounds, on the basis that the investigation took too long. What next happened was that the commission, I think, brought infraction proceedings against Italy for the fact that such a rule requiring a competition investigation to be concluded in a very short time window was an impediment to effective competition enforcement. Those infraction proceedings were won by the commission and the matter is back for re-decision before the AGCM.
So there's absolutely nothing wrong with this decision as a matter of substance. It was annulled and the question is now what to do about the fact that it was annulled pursuant to this, unjustified as a matter of EU law procedural rule. I hope that answers your question.
MR BANKES: Yes, thank you.
MR DE LA MARE: The second thing that this decision shows is the clearly bogus -- and I put it that high -- nature of the IP arguments that are being advanced in

this case and you can see that -- clear as day -- from the passage at 438 to 442. The position is as stark as this: it's basically a cutthroat between Apple and Amazon, because Amazon doesn't think that the IP issues are the real solution to -- or indeed perhaps justification for -- these measures. Why? Because Amazon was always pushing Apple to join its brand registry, which was its own way of addressing counterfeiting and it thought -- and there are extensive internal emails quoting from what they thought at the time -- that it was this act that led to whatever limited counterfeiting problem there was being satisfactorily addressed.

So if you look at the passage at 438, page 175, over the page to 176, you'll see that. You'll also see at 444 that the authority criticised Apple for the quality of its materials. It's not at all granular; the materials that they use are about counterfeiting in general, problems in general, nothing to do with the problem on Amazon. All of this is completely confected.

THE PRESIDENT: But that's not for us.

MR DE LA MARE: Well, it is, because when one comes to ask yourself what the real object of this agreement was, if the real object was, as I'm going to show you, to market partition in order to prevent grey imports between different markets and to reinforce Apple's price as I've shown you, by reducing the competitive constraint, then that is a basis on which you can infer that that is the effect that it had.

Now, as for parallel imports, look please at recitals 112 to 115, page 77 to 78 and it's in particular at the end of 115 you'll see that there were internal emails that show that the real purpose was to identify companies that are non-compliant, non-legitimate or likely to export and what this agreement was -- I fear all of us in the room this portion forwards are old enough to remember Comet and full market partitioning -- this was a full market partitioning arrangement designed to segment into different national markets and that's one of the things that the AGCM found: it found market partitioning an intention to stop export. And again, if you're concerned with the effect of Amazon's marketplaces as a whole, as a generator of parallel imports, that too is going to show the type of competitive constraint it will offer if open to grey market goods and suppliers of that kind.

So we say it is important to ask what the real -- as opposed to bogus -- explanation is. The only real explanation is -- and the only explanation as to how Apple was making money out of this, because Amazon was going to make a lot of money by giving access to the wider suite of goods, which it would sell at considerable profit and as it has and as is recorded in the AGCM decision -- what Apple got out of this arrangement, we say, is obvious. It got removal of the most effective engine of price competition, which was competition on the Buy Box.

So that's the second thing that's important from this decision.

The third point of importance is what happened during COVID. COVID is, if you like, a perfect experience of what happens when offline is closed down. (Pause)

And what happened, in the recitals -- you'll see it at 104 to 106, page 73 to 74 -- is that there was a clamour for people -- no doubt the smaller high street shops who had stock that they couldn't sell -- to be able to list it on Amazon so that they could clear their stocks and make business and all of those requests for access were refused and note in particular the conclusion of the AGCM at 391, page 161. (Pause)

And what they conclude is that at this time, effectively access to Amazon intel was indispensable; that's what they say:

"The effects under examination were presumably accentuated as a result of the COVID-19 health emergency, where online sales have become an indispensable selling mode in this context."

Now remind yourself -- go back and have a look please -- of the Apple and Amazon data for 2019 and then compare it with 2020, 2021 and COVID. What happens is a massive change as between the online and offline data sales in Apple. I won't go into the numbers, you can look at them for yourself. You see a massive increase in the amount of sales on Amazon, which is of course online only, and then a readjustment afterwards as offline sales come back online, if that's not a (inaudible) way of putting it, as when COVID restrictions lift and what that is a perfect demonstration of, combined with the clamour to be admitted, is exactly how this type of agreement will impact upon those third-party resellers.

And that's why, at 486, page 186, one of the aggravating factors for the (inaudible) is the suggestion that the agreement had particular effects during COVID, when offline stores were generally foreclosed.

And then the last point is this -- and this makes the point I made by reference to Mr Dongre's witness statement -- the last point is that if you go to paragraph 426 in the volume, page 173 of the decision, you will see that there was a sophisticated monitoring process for monitoring compliance with the agreement. Apple monitored Amazon's implementation of the agreement and it was a feature of that monitoring that the better the performance was, the higher or deeper the extent of the discount that Amazon got and I say again, it is inconceivable -- if that is the process that is being operated by both Apple and Amazon -- that they didn't know in advance which products were being caught, who was being kicked off the platform for trying to list and matters of that kind.

I say that not because I say that there's anything wrong in the BRG review of the data; that's never been my case. My case is that it was second sourced, by which I mean it's a way of presenting the data without showing the fact that you could also just present the data by looking at the internal monitoring and the internal policing and saying this is how the agreement functioned. Of course, if they'd done that, we'd have had a number of consequential questions about the reports, et cetera. It would have been a valuable trove of obviously undisclosed information, which would have been relevant for Easyair principles in showing that there was an issue here to go to trial and of course all of those passages I've shown you are based upon disclosure given to the Italian authorities that we haven't been given and this is an absolutely clear illustration of the danger that this case presents to you. You're effectively being asked to do a mini-trial, without access to the information available, even to the Italian authorities. You're being asked to strike out the case where the Tribunal will face the prospect that when you get disclosure -- and much of this disclosure will be relevant to questions of liability in any event, whatever you say about quantum -- you'll find that the disclosure shows a mass of internal material supporting the theory of harm that we advance, that you have ruled incapable of being advanced to trial.

That's why my answer to the question my Lady puts, that if you have to put this in any box at all, the difference between strike-out and Pro-Sys is a profound one, because strike-out does lead to finality: unless appealed, it leads to issue estoppel within the litigation. Pro-Sys does not: it leads to a Johnson v Gore Wood -- rather than Henderson v Henderson -- and a party will have to show good cause as to why it wasn't raised beforehand and if the reason that it wasn't raised beforehand is that the defendant in possession of the disclosure sat on the disclosure and didn't put it before the court, that would be a good reason to allow the claim to be added to the claim.

So we certainly don't accept the AGCM decision is not highly central; it is. They plainly took a wider approach to all of these issues than the defendants care to admit, and it's also an approach plainly predicated on exactly the same market power analysis that Dr Pike advances.

So, that leads to my next point from yesterday: there was an exchange between Ms Abram and my Lady about where market share appears in Dr Pike's first report and it was an illuminating exchange, because my learned friend was forced to concede that the only place that market share was used was at recital 267 and that was in relation to the calculation of quantum. It doesn't feature anywhere in his theory of harm and that's because, as I said yesterday, his primary and only analysis in Pike 1 is on the basis of market power analysis. (Pause)

He has, responsibly, responded to Apple's attempt to say that the relevant optic is some form of market share analysis and his response to them saying it's all market products is, well, I don't think that's the first and proper way to look at it, it's market power and reference pricing, point one; but point two, if you are going to look at market shares, look at the market shares that I say are meaningful and what's meaningful is market share assessed in accordance with the methodology used in my original report, which unbundled phones only are relevant -- that's consistent, as I showed you yesterday with everything I've done -- and in which offline is not relevant, not because offline can't be effected, which was the straw man my learned friend sought to set up against me, Mr Harris in particular, but because offline prices follow online prices, they're follow-up prices, as I described them. There's no problem in causation if that's the position.

Next, my learned friend sought to deal with the question about the absence of expert evidence and her answer was, "Well, if it's so bleeding obvious, you don't need an expert", and the answer to that is: if it's so bleeding obvious that you don't need an expert, if you've already paid about £1 million for experts, even before the end of the Riefa proceedings, surely you can find an expert who says this is so bleeding obvious it shouldn't be allowed to go forward. It's actually a point against herself and again, I say the fact, particularly after the AGCM analysis, when Amazon and Apple will have spent millions of pounds in defending these proceedings, they can't identify a single expert to come forward and to say the thesis of Dr Pike -- which corresponds with the thesis of the AGCM about constraints on Apple -- is unarguable. That is a telling point against any attempt to strike this out.

Next, we have the 1 per cent number. The 1 per cent number -- is it the 1 per cent number or the 3 per cent number -- raises a question about what the relevant counterfactual is. The relevant counterfactual is the world without the restrictions that are challenged by the particular piece of litigation, and that's not a world without the GTA. It's a world with the GTA, without the restrictions it contains. So Amazon and Apple can't defend themselves by saying, "Well, it was only in consequence of the GTA that we got access to the increased stock and were able to sell across a full product range and all those other desirable things", because the counterfactual requires you to look at what would have happened if Apple had given Amazon access to that additional stock, but not gated resellers; resellers, which, by the way, the AGCM says for the large part -- I can give you the recital that says that, but it's not immediately to hand -- for the large part, they're already authorised resellers.

THE PRESIDENT: Hang on. I thought that Dr Pike's counterfactual was the world without the GTA, because it doesn't have before and after analysis.

MR DE LA MARE: No. His before and after analysis is about what's going to be the effect of continued discounting from resellers on the Buy Box. He uses the only period he can get, discounting detail about resellers on the Buy Box, which is the pre-GTA period, at which point they are excluded. But the relevant counterfactual is what's going to happen if that level of discounting continues, they continue to receive supply and can ask for more supply because they can sell profitably on Amazon, and Amazon itself stocks a wider range of product.

THE PRESIDENT: Why would you make up a world that never existed as your counterfactual? I mean, you're saying that the counterfactual isn't the world that exists without the agreements that you impugn, but you're going to say the counterfactual was some different world with entirely different agreements that nobody's ever entered into.

MR DE LA MARE: It's a perfectly proper counterfactual. As I say, the counterfactual is the world in which Amazon, which wanted to sell these products on a more wide basis, is given wider access to them. There were all kinds of commercial reasons as to why Apple and Amazon would have been interested in Amazon so selling them.

THE PRESIDENT: Then you'd have to make a completely different case. You'd have to say that this is something that they would have entered into. There's no explanation as to what evidence you'd need for that. I mean, this is something that they never did, no one agreed. You're saying that they would have entered into this completely different agreement, for which we have nothing in Dr Pike to say that must be the assumption.

MR DE LA MARE: That's a legitimate area of investigation, in my submission.

THE PRESIDENT: But he hasn't said that he's going to investigate it. There's no --

MR DE LA MARE: It may not be for him to investigate. It may be for cross-examination.

Then we come on to --

THE PRESIDENT: I'm sorry. Where in your claim form is there the statement that the relevant counterfactual by which we should assess all of this is the world with the GTA, but with those restrictions excised?

MR DE LA MARE: Can I dig that up in due course, my Lady?

THE PRESIDENT: Yes. All right.

MR DE LA MARE: I'm sorry. You've asked a very good question, which I don't have an immediate answer to. I'm doing my level best to rattle through all the points I have.

THE PRESIDENT: No, that's fine.

MR DE LA MARE: Then we come on to the criticisms made by Ms Abram, adopted by Mr Harris, about how Dr Pike responded to the errors in his report about market share, in his third report in his addendum. What my learned friend did was took you to the explanations and said: well, what he hasn't done is explained how the change from 15 per cent or 17 per cent or whatever it is -- I can't remember what it is -- down to 11.4 per cent, how that isn't in itself a cause for concern. But what that argument depends upon is reading that passage in isolation from the sentences next to the particular passages that says it is the second largest online store after Apple, with the fraction that I'm not allowed to say of the size of Apple.

The submission is incapable of being sustained in those circumstances, because what Dr Pike is effectively saying is there's a substantial market share nonetheless, and it's still the second largest online store in the market and the largest third-party reseller, and therefore is likely to have an effect on third-party reseller pricing. In other words, if you raise the prices in the Amazon store, that's going to have a dampening effect on price competition vis a vis the other third-party retailers. So you can't read what is said about market share without looking at what he's saying about the market share in the position of the market, the question of how fragmented the market is, what the size, the other players are.

Ms Abram attempted to attack Dr Pike's basis for saying it was the second largest and got short shrift from my Lady in relation to that. We say the methodology he used is perfectly sound, given that the retailers in question -- Currys, Argos, et cetera -- are likely to have the same sort of product mix as Amazon. The question is not whether or not they have the same sort of product mix as Apple. It's whether or not they are broad spectrum retailers selling consumer electronic goods.

The next point was that the attack on offline prices -- and this was said to be odd as a basis on which to proceed -- that this asymmetry was odd. Nowhere did my learned friend address my point, which is that there is nothing odd about this. This is the whole predicate of online RPM. The fact that stores are forced to follow the prices online is a feature of the market, or a perfectly plausible analysis.

She accepted that the analysis came from Pike 134 to 136, and she said that wasn't based on analysis. Effectively, Dr Pike was holding forth, and he hadn't done a separate analysis in relation to branded goods, as to whether or not that type of analysis was appropriate in relation to things that were branded goods and supported by stores.

My answer to that is that that's the type of extremely finicky point that is a point for trial. It's not some kind of major forensic body blow, and that's what you need in order to have a strike-out. There is actually no basis at all to suggest that they won't be (inaudible) prices, and again, the COVID natural experiment is rather likely to be proof thereof.

As to the unbundled versus bundled debate, my learned friend accepted that that wasn't quite so material in any event, but she sought to argue that because some products were bought on finance, that means that the whole basis of distinction was somehow unsound. There's a fundamental problem with that argument that is again in the realms of the bleeding obvious -- or at least bleedingly obviously sufficient to meet the plausibility test for strike-out -- and that's that when you buy a phone with minutes bundled in it, you get a monthly payment. You don't get any kind of indicator of what the headline price is for the device you're paying; whereas if you choose to finance a phone you've bought without minutes, or a computer that you have bought, you have a straightforward choice of paying for the thing that has a ticket price out cash, or paying for it on the finance; and you can see the incremental cost of the finance by reference to the product that you're seeking to buy. That's a fundamental difference between the two scenarios, and it's what makes for difficulties of price comparison as between the two different situations.

Of course, there will be many situations where a party will not want a mobile phone with bundles. Take one that's an alarmingly regular one in my household. Your child has lost a phone. You already have minutes. You can get a replacement SIM. You just need a new handset, and they always want an Apple handset. That much I am prepared to concede, at least in my household. So that's a bad point.

Then we have the attack on 11.4 per cent, and this really revealed the fact that whatever number arose, Apple and Amazon were going to say that it was insufficient. But if the number is genuinely 11.4 per cent; and the market is one in which the big dog in terms of online sales is the Apple store; and the next biggest dog is Amazon; and everyone else is at least half the size of Amazon in terms of online operation; and the market is highly fragmented; how is it in any way implausible, unforeseeable, et cetera, that if you dampen price competition in relation to the largest third-party retailer, the other third-party retailers that see themselves in competition respond to the lifting of that restraint? It's not in any way implausible.

What this argument then came down to was that retailers would know, and this was a bizarre submission. We spent the first 15 minutes of yesterday arguing about the tier 2 confidentiality status of this information, and yet when it suits my learned friend, she moves from a position of saying significant harm would be caused by the revealing of the information, to saying everyone in the market can work it out anyway. Now, it can't be both. It's obvious that the information isn't more widely known. That much is obvious.

THE PRESIDENT: What information are we talking about?

MR DE LA MARE: We're talking about the size or volumes of trading that occur on Amazon UK. The answer to Mr Derbyshire's question is that what matters, from the perspective of the retailers -- the third-party retailers, the Currys, the John Lewis, et cetera -- is the relative position as between them and Amazon. And if Amazon is twice their size and selling twice their volume, that is going to be enough to generate competitive effects in the retailer cascade between the high-value Apple premium tax-extracting Apple store -- which is not in the business of competing away discounts unless it really has to -- and the cascade of prices down from that, where retailers decide how much of their discount against RRP to give away in order to get market. The idea that the second largest store -- the largest third-party retailer -- can't move the market, in and of itself is implausible, I would suggest. It's implausible when you start hearing the sorts of technical arguments that were directed at the John Lewis and Currys material. I didn't introduce this material to suggest that what was required in order for an effect to occur was a price match, and unless you had a price match, there would be no effect on prices. I introduced it, as did Dr Pike, as material that shows that retailers perceive Amazon as a competitor, that they set their prices by reference to Amazon. Whether they're the same or not, whether or not it's extreme enough to be a price match, they have identified Amazon as one of their main competitors; and once you identify someone as a main competitor, you benchmark your prices by reference to them in order to ensure -- even if your prices are slightly higher -- that you remain competitive. Let's say you're John Lewis, and you think you've got the strength of a brand, and people like shopping at John Lewis; they like the customer service. I might decide to price a little bit above Amazon's price to reflect the fact that some people will still choose to shop at John Lewis relative to Amazon. I don't have to price match in order to have set my prices by reference to what's happening on Amazon. That's the central point. This material makes plain that this is a highly competitive retail market in which retailers are keeping a very, very close eye on the prices of Amazon, because they perceive Amazon, the behemoth, to be their principal competitor in the sale of consumer retail electronics.

Now, the fact that it is the market for consumer electronics is the answer to my learned friend Mr Harris's convoluted arguments about different sizes and asymmetries.

There's no inconsistency in Dr Pike's analysis. His analysis is: Amazon has market power. My Lady held my feet to the fire. What market? I said it was plain, even if it wasn't stated. You criticised Dr Pike for not stating it; but it's in relation to consumer electronics. The effects that are being argued that generate causative effects in the market are effects upon other retailers who operate in the same market for consumer electronics. That's why Currys, John Lewis, et cetera, set their prices across electricals -- remember the word from the promise -- they set them across electricals, because that's the space in which they think that they need to have a competitive basket of offering.

That then leads to the answer to the charge from my learned friend that our market power argument was, and I quote, "shooting at the wrong target". Dr Pike was shooting it exactly the same target as the AGCM, and it is a fallacy to suggest, as she did, that what we had to do was to establish market power for the sale of Apple products, and then say that that market power was misused in such a way that led to plausible causative effects. That's a complete misdirection. It's enough if there is market power in relation to consumer electronic goods, and because of the responses of other retailers, they change their pricing in relation to this particular good as one of the goods in that market. That's enough to produce retail pricing ripples in the consumer electronic goods market.

THE PRESIDENT: In relation to the categorisation of those ripples I had an exchange with Mr Harris and he, I think, accepted what I thought was a tripartite classification. The RRP ripple, the umbrella ripple and the diversionary effect ripple. Do you agree with that categorisation?

MR DE LA MARE: Yes.

THE PRESIDENT: They're all separate ripples.

MR DE LA MARE: But they're all interrelated because when you relieve the pricing pressure on retailers who are looking to Amazon -- so in other words, when you lift the competitive price, you reduce the amount of RRP discount and others follow suit. That in turn lifts the pressure on Apple to change its RRP because it's not having to potentially compete against its own retailers to get market share.

THE PRESIDENT: Does it also work in other ways?

MR DE LA MARE: Of course -- sorry, forgive me, my Lady. Then what that means is as that gap narrows, more and more people will be willing to pay the Apple premium to simply just go to the Apple Store and buy there. By the way, in the AGCM decision they found that after the agreement more people were borrowing on the Apple store. So they're all interrelated. One ripple produces another ripple.

What then happens if you lift the RRP, for instance an old phone, let's say an older model can be sustained at a higher price for longer. That's then going to have the causative effects in other parts of the market that don't work on competition by reference to consumer retail electronics -- they're not in that space -- they're just pricing discounts by reference to RRP. That's why we say the bundled phones are different.

THE PRESIDENT: Is there a different interaction that you also rely on, which is that if the on-Amazon has a muting effect on the Apple RRP, then the Apple RRP would then have a muting effect on the discounting because they'd be discounting from a different basis.

MR DE LA MARE: It means that they're going to have more profit to play with, and therefore are likely to want to keep as much of that as they can. And, yes, that will in turn lift overcharge.

THE PRESIDENT: So you are saying that all of the different ripples interact with each other.

MR DE LA MARE: Yes, they do.

THE PRESIDENT: Right. But there are three basic mechanisms.

MR DE LA MARE: Absolutely. Now, it was said somehow that by referring to Apple market power our position was incoherent. I was interested to hear that because what I didn't hear was any response to the very careful explanation I gave to you yesterday from Dr Pike's report as to how he used the fact of Apple market power to explain Apple's price discrimination model. In other words, how it can charge a premium in its own store and have intra-brands that effectively hoover up those with a lower tolerance to pay the Apple tax. Do you remember I went through that? There was no attempt to answer any of that. Yet that provides both a mechanic for understanding the effect of lifting the Amazon prices in terms of how it will impact that cascade down to the lower price, so it explains all the points we've just been through now. It also answers my learned friend Mr Harris's points in relation to foreseeability.

The idea that in a carefully constructed regime of price discrimination, that you won't appreciate that if you take out the strongest source -- or a material source -- of competitive pressure, and thereby dampen price competition, it won't predictably and foreseeably produce those ripple effects. That's for the birds, I suggest. This is not a case like a cartel with the interaction of different operators and potential arguments about substitutability of umbrella products, which is what Kone is in part directed at and concerned with.

This is all about intra-brand restraints, where if you restrain competition on an intra-brand level that is likely to have entirely predictable and foreseeable effects upon prices charged in the rest of the intra-spectrum. So we don't see that that foreseeability argument has any substance at all.

I suppose I should address what my learned friend said about Currys. I really don't know where to begin with that. I mean, it's just a simple promise. The conditions that he referred to as being some kind of fundamental answer to it -- I don't think it's a fundamental answer that the products have to price match, because my position is not that it's all about matching in any event, and the fact that the price promise only applies to things that are the same colour, or what have you, is -- it has absolutely nothing to do with the price of fish, nor does the fact that it doesn't apply to someone who gets NHS discounts. I mean, really, if that's the best you can offer, you really haven't answered the point of substance which is that Currys shows that it considers a demand of its marketplace -- is that it has to compete with online prices.

So, what the defendants want to do is to turn the reference pricing issue into strict price matching. That's not our case. Our case is that the fact that there is price matching gives you a flavour of the quality of the closeness with which prices are being followed by competitors and it tells you who the third-party retailers think are their competitors.

Then lastly, my learned friend, Ms Abram, suggested that subjective intent wasn't of any relevance and you have my submission in relation to that; that's not right. If you find that the agreement has the object of stopping parallel imports, or has the object of reducing price competition generated by resellers competing for the Buy Box, as the AGCM and the CNMC expressly concluded, then that leads to the inference that that object infringement will produce certain necessary effects.

Then my Lady asked the "what to do" question; Pro-Sys or strike out, and you have my answer in relation to that. There is a material difference between which weapon you choose, if you're inclined to pick any weapon -- and I encourage you to put them back in the locker because we're not in that space -- but if you do, the --

THE PRESIDENT: I think it wasn't a question about which to choose, but what is the difference in outcomes and also I was asking what was the difference in the arguments on the two.

MR DE LA MARE: Yes. But I do say it's highly material that if you say that this is a Pro-Sys issue, the consequence is that if the disclosure does reveal all kinds of nastiness, then the Tribunal is able to deal with this. That better reflects, I would suggest, the justice of the situation --

THE PRESIDENT: I didn't understand it. If I say it's Pro-Sys --

MR DE LA MARE: If you say it's Pro-Sys, there is no issue estoppel. If you strike out and the strike-out is final, there is and that's the end of it. So even if disclosure turns up and it's Apple disclosure saying, "Well, we're going to ramp up all our prices by taking out this", there would be no comeback if there hadn't been an appeal in relation to that. The only option would be to sue for the new year in relation to which the issue estoppel wouldn't apply.

THE PRESIDENT: So are you saying that if this is a Pro-Sys case and if we were to refuse to certify on a Pro-Sys basis, and then you were to get disclosure and then that indicated that you had a good case for off-Amazon, if that was the basis, then you would come back and say, "Can we now certify off-Amazon as well?"

MR DE LA MARE: If the material was strong enough and there was no issue estoppel, we would be entirely at liberty to do so. If there was an issue with estoppel, all that would be possible would be to come back for the new years, which wouldn't be caught by any such ruling, and to say, well, in relation to the new years, we now have the disclosure that shows this wider loss has been suffered. That sort of difference should turn upon the choice suggested to me in a case where on any metric you've had only the most minuscule amount of the vast amount of disclosure, and where the AGCM decisions show the quality of pretty damning material that has been unearthed by the regulators, that you should exercise caution in how you exercise procedural controls. So, lastly then, in terms of Ms Abram's submissions, cost benefit, she basically accepted the 289 figure. What she didn't say anything about was the £44 million that was attributable to 2030, and I say that goes into the mix in any event, and a run off period, let's say at the least six months, plausibly a year, could be another £20 million or so.

THE PRESIDENT: Just unpicking that, the 289 figure predicates a trial when?

MR DE LA MARE: The 289 figure predicates claim value having been added up to November 2028 with a trial, which is the date used for the costs and the multipliers in 2030. My point was there's a gap between 2028 and 2030.

THE PRESIDENT: Trial in 2030?

MR DE LA MARE: A judgment in 2030.

THE PRESIDENT: Trial in when?

MR DE LA MARE: 2029. Judgment in 2030. That's the basis on which we've all --

THE PRESIDENT: This is a trial in front of me.

MR DE LA MARE: Well, my Lady, dare I say --

THE PRESIDENT: When did I take a year to deliver a judgment?

MR DE LA MARE: It's a bit late to be making that point, with respect, my Lady. We've all been arguing by reference to the multiplier effects by reference to a trial in 2030. That's how the entire --

THE PRESIDENT: Trial in 2030?

MR DE LA MARE: Judgment in 2030.

THE PRESIDENT: All right. Okay, so I just realised this point. So you are predicating, sorry, a trial in 2029 and a judgment a year later?

MR DE LA MARE: Well, if the PTR is in November 2028, that's a trial sometime let's say in the first or beginning of the second quarter of 2029.

THE PRESIDENT: And a judgment --

MR DE LA MARE: And a judgment in January 2030. I think that's the projection. There we go. That's the basis on which the numbers are assembled.

My point was a simple one which is you've got to take into account that bit of claim value that can't be added into the catch up at the PTR. It's another £44 million. That wasn't answered. Instead, what Ms Abram did was swiftly move on to the topic of distribution and there were a series of, with respect, pretty finicky points.

I was surprised that she did want to go into the whole topic of gifts. It's not a very attractive subject, frankly. The Tribunal has ample power in its decision as to how to award compensation to the receiver of the gift, rather than the payee. That will only be necessary if the payee can't be identified from credit card information and on-Amazon there will be the credit card information enabling the purchaser -- the poor old parent -- to be identified.

And this was the point my Lady put, even in the case of third-party resellers there was no answer to my point that with two data sets -- two sets of credit card information and payment information, and information about the registration of devices on Apple -- that you may, in any event, be able to identify someone who's bought from a third-party reseller who has either Apple or Amazon payment details. In other words, you can triangulate a bit like the GCHQ do on a regular basis upon who the actual person is and where they have current up to date payment mechanisms.

As for the idea that there's going to be a huge number of people with Amazon accounts without payment details -- again, how many children don't have access to an app store even on a controlled basis? How many adults don't occasionally buy films or music, et cetera, amongst Apple users; it's just unreal. The fact that Amazon is driven to taking that sort of point is, in my submission, indicative. Of course the claim value is lower than the SCA case, but here the data is very much richer.

Bear in mind, in the motor vehicle context, the relevant commission arrangements we're talking about ended I think in 2017, something like that, 2017, 2018. Some of them date back to the noughties or the tens, whereas this is a continuing infringement in relation to people -- I think we're all agreed -- who love Apple devices, loyal Apple purchasers carrying on buying details. There won't be the problem of stale details that the FCA distribution is going to present.

Now let me move very, very quickly to Mr Harris's point. There really wasn't much in any of them.

First of all, his bias case: it was constructed from entirely flawed premises, which is that somehow when assessing experts, you apply by analogy either the medicaments test or some test of subconscious bias in order to decide what weight to be given to the evidence.

Now, medicaments and all of that case law, Porter v Magill, is about a disqualifying Bar for a decision maker -- either a court or a body like the CAA or something of that kind -- and it includes an expert, when the expert is part of the decision-making body. It has no application, as Factortame 3 says, to the decision as to whether or not to admit -- or how to assess the weight of -- expert evidence.

Amazon had it completely right the first time round, when we were here in Riefa and the reference to the submissions that my Lady won't let me take you to because you said it was a jury point, but it's not a jury point. Amazon had it completely right at B6, page 598, when they said that what was in play here was a general issue of weight and that is the correct approach and it is unfortunately -- in all kinds of circumstances -- a commonplace that some experts in some areas will -- in any event -- have all kinds of connections to parties in any event and are still the only testifying expert available. That's why the court has to exercise its judgment on how to apply it. We had this in the Diesel trial, where all the experts had various connections on the defendant's side, had various connections to the motor vehicle industry, had regularly worked for it. Some of them had designed -- or alleged to have designed -- some of the defeat devices for some of the other manufacturers. So it's a question of weight.

So that's the whole legal predicate out the window. Of course, the fact that you're involved in identifying a commercial opportunity is a relevant feature in deciding how much weight to give; that's why the practice direction says as much. But I invite you to go back and look -- and I won't have time to take you to it -- at the Fideres presentation at B20, 952, from which this whole exaggerated argument has been constructed. It consists of nothing more than a recitation of the contents of the regulatory decisions, along with -- at page 955 -- a very, very tentative indicator of what the potential value of the claim might be in the UK using -- and here's the kicker -- a very rough methodology, which isn't the methodology that Dr Pike then used when instructed.

So we're not in a Royal Mail situation where an expert has committed far too early to a particular theory of harm. What happens -- and what you will see as you work through the sequence -- is that when Dr Pike is instructed, receives his formal instructions, he goes off and thinks about it and he adopts a different approach to the one in the memorandum: he adopts everything from the ground up, he does draw from the reasoning in the AGCM approach, and why not? It seems perfectly coherent as a theory of harm.

The second layer, as my learned friend put it, was entirely circular. It was the point about plausibility, meaning he must lack implausibility, meaning he lacks independence.

The third layer, his three context points. Well, the fact that the Tribunal has made a practice direction reflects no more than the perceived problem after Royal Mail, of experts having problems with independence and needing to tell the Tribunal about that and that's precisely what Dr Pike did in his second report, by the track changes version in particular that was filed and I commend to you in the track changes version that identified the differences between the two reports -- paragraph 366 (iii), page 523, and paragraph 18, page 421. 18 was amended in consequence of the insertion of 366 (iii), and 366 (iii) then provides the account of how effectively matters have unfolded.

There was compliance; my Lady asked for fuller information, it's been given. Nothing to be hidden, the letters of instruction you've seen, there is nothing unusual, there's nothing unusual about experts doing work at risk at certain stages in relation to this, many of the people on the claimant's side do matters at work at risk. That is not a basis for saying someone lacks independence.

There's no special rule for CPOs; that was my learned friend's 3.2 problem. Of course expert evidence is just as central in CPOs as it is in many circumstances, but that doesn't raise some heightened test of independence and the evidence point, again, doesn't take matters any further, it's simply an observation about the dangers of leveraging claims.

And then his layer four points --

THE PRESIDENT: How much more time do you need? Because you're very much in injury time at the moment.

MR DE LA MARE: I'm down to about three pages, my Lady, so I'm probably more than two minutes, then Mr Went has got a few --

THE PRESIDENT: How long do you need? The three of you.

MS ABRAM: Each of Mr Harris and I, as matters stand, have got one point. So between us we'll be five to ten minutes, nothing like the 45 minutes that we're budgeted.

THE PRESIDENT: All right, so I'll give you another you and Mr Went between you another five minutes.

MR DE LA MARE: Right. Well, Mr Harris's five points. I've dealt with one per cent point, I've dealt with the falling market share point.

The number of asymmetries: that's another circular argument, that's just recycling the same arguments about the implausibility of asymmetries, which has been answered by reference to plausible analysis.

The market definition point is answered squarely by Dr Pike saying, "Well, there's market power in play effectively on the plane of consumer electronics and that's all that needs to be investigated at this stage".

And then his fifth point was effectively some kind of inconsistency between us saying offline was not relevant for the purposes of working out the price moving effect, but the claim, including offline price changes. Well, that's no more than a reflection of the fact that if it is a follower price, as we say -- offline prices follow online prices -- they'll have a causative impact on offline prices. There's no incoherence there.

I've dealt with the foreseeability and causation issues in my submission.

The Kone point is answered by the obvious nature of this type of effect in a carefully designed intra-brand distribution network and as my Lady put to my learned friend, really the rest of his Pro-Sys arguments really didn't add anything to the strike-out; that's what we've been saying all along, it's the same point recycled.

So on that note, I'll hand over to my learned friend.

THE PRESIDENT: Thank you very much.

Mr Went.

Reply submissions by MR WENT

MR WENT: Just very briefly, in terms of Mr Harris's points first, just picking up on two. The notion of a lack of independent legal advice; just to make clear, Mr Scannell KC wasn't in the Riefa proceedings, he's instructed on this case and settled the claim form and the package materials to start the claim, so there was independent oversight relative to the lawyers involved in the Riefa proceedings. That's dealt with the one at Le Patourel 1 at paragraph 28(f) at A8, 334, and we've already pointed out that

Mr Le Patourel will also have made use of independent costs counsel. That's paragraph 97 of Le Patourel 1.

It was also suggested that Mr Le Patourel hadn't taken independent advice on retaining Fideres. Mr Le Patourel did actively consider whether it was of interest to the class for Dr Pike to be instructed. At paragraph 28(g) of Le Patourel 1 at A8, 334, he explains, without waiving privilege, that his due diligence on the expert included obtaining a second opinion from another expert economist on the basis of which he was satisfied that it was in the best interests of the class of Dr Pike to be instructed and that's -- of course -- in the context of where, when considering matters at the outset, Mr Le Patourel took matters as he found them, as they were at the end of the Riefa proceedings, from what the Tribunal had said at paragraph 119 to 121 of the Riefa CPO judgment about eligibility before the criticisms now being raised.

And then just on Mr Mallalieu's point: I do want to be absolutely clear about the funding process, that what resulted from that detailed process, it was done very carefully, was the cheapest deal on the table was with the funder -- the existing funder -- whose terms included the Riefa costs. That was the cheapest deal on the table. That was the commercial basis on which the existing funder was offering terms. There wasn't any other basis -- that was the basis. If Mr Le Patourel hadn't taken those terms, the alternative was a competing funder whose terms were more expensive and we can see how much more expensive in the evidence that it was 11 to 37 per cent, I think were the figures, more expensive and you can apply those types of figures to the funder's success fees that you can see -- you've got the evidence on that -- to see what sort of ballpark we're looking at.

So that was clearly more expensive and those terms -- the commercial terms of the existing funder -- including the Riefa costs, included about 80 per cent -- we said it's about 80 per cent cost being recycled in these proceedings, but importantly including

the cost of the first deposit premium on the existing ATE policy.
So, the idea that you don't then take advantage of that, in the face of the evidence being that a new policy would have been more expensive, it's certainly another initial premium with the likes of £2 million and then a fund of multiple applied to that: it just doesn't make any sense. What he did was undoubtedly in the class' interest, in securing the best deals possible from a funding and from an ATE perspective and as I pointed out yesterday, that makes up 95 per cent of the stakeholders costs on success if we get there.
Just very briefly then on the tender process, I think, Mr Bankes, you said there was no evidence that the broker went back to the competing funder about their approach to adverse costs cover. However, the evidence is that Mr Le Patourel did direct the broker to do so and the evidence of Mr Astill is that he did do so. So that's paragraph 104 of Le Patourel 1, A8, 364, and then paragraph 39 of Astill 1, A10, 393.
And then I think just very briefly in terms of the criticism levelled against the PCR in terms of the tender process for funding: the idea is that the Tribunal doesn't have enough information on the present evidence about the basis on which the funding, search or presentation to alternatives funders were made and we say the PCR has, in fact, provided ample evidence to show it has taken proper efforts to secure favourable and appropriate funding terms, as per Hammond and Stephan, at paragraph 671, that's AB1, 26, 1350. And I'd say ultimately Apple seems to be suggesting the Tribunal should be examining in detail the basis on which the PCR conducts competitive tenders with prospective funders. But where would you draw the line if you were going to adopt that sort of micromanagement? And it's also in the context of case law which says the Tribunal should exercise caution in intervening in what are confidential commercial negotiations. That's Gormsen, paragraph 35, AB1, 15, 621.
I think those are the only points I was going to make. I was going to touch on the

independent third-party costs scrutiny, but I don't know whether you want to hear anything on that. I mean in essence Mr Le Patourel has set out his points on that at paragraphs 67-68 of Le Patourel 1, and then also paragraphs 49 to 56 of his second statement.

Ultimately, he thinks that regular checks as an additional layer of cost could be avoided, but he says, of course, he's open to sensible controls on the review of funding notices if the Tribunal considers that appropriate. So that's his position.

THE PRESIDENT: Thank you very much, Mr Went.

MR WENT: I'm grateful.

Reply submissions by MS ABRAM

MS ABRAM: Just one point from me in relation to the Italian and Spanish decisions. You recall that Mr de la Mare said that the Italian and Spanish decisions were, in fact, did provide some kind of support for an off-Amazon pricing effect. The Spanish decision, which is the one that hasn't been annulled, wasn't actually then mentioned. So it seems like we're actually on the same page, that that doesn't provide any support for an off-Amazon pricing effect. What you did hear was a little bit about that annulled Italian decision and if it were to have any legal effect, which obviously it doesn't, I'm afraid it would undermine rather than support in that part of Mr de la Mare's case and if I can show you the paragraph that just makes that good, so it's in authorities bundle 3, volume 1 if you're on hard copy, page 193.

MR BANKES: Are we in Italian decision?

MS ABRAM: We're in the Italian decision, yes we are. And the point that I'm going to make is that the Italian decision contains no analysis of off-Amazon pricing effects, so there's nothing about pricing effects on Apple and in fact, I'll just show you now but just to explain the punchline, the Italian decision, the regulatory authority, uses the on-Apple price, the RRP, as the clean price to determine what the difference was in the level of discounting on Amazon, so it's directly inconsistent with the idea that there was an effect on the RRP.

THE PRESIDENT: Which paragraph?

MS ABRAM: So it's 507 on page 193 and this is just -- you see it's in an appendix which is identifying the analysis of discount trends sold on Amazon by third-party sellers and the key sentence is the last one of 507:

"The discount is calculated as the difference between the price charged by third-party sellers on Amazon and the price charged by Apple on its online shop Apple.it."

So implicitly what's happening there is that the RRP, the price being charged by Apple, is being used as the clean price. If it was being suggested that the RRP had been creeping up post the GTAs as well, of course, that would make this analysis completely null and void, because you'd have the RRPs creeping up at the same time as allegedly, in this case, the discounts were reducing, so they'd be creeping up to. It would cancel itself out potentially.

So far from supporting the argument that there are off-Amazon pricing effects established by the Italian decision, actually the analytical approach is consistent with the opposite.

THE PRESIDENT: Thank you very much.

Reply submissions by MR HARRIS

MR HARRIS: Madame President, members of the Tribunal, two short points.

My learned friend Mr Went referred to the instruction of David Scannell KC as indicating I don't know what. It certainly doesn't indicate that the PCR took independent legal advice as to the composition going forward of the legal and expert team. He referred to core bundle, tab 8, page 334 to paragraph 28(f) where

Mr Scannell's name is mentioned but it doesn't even say that he gave independent legal advice as to whether or not Hausfeld should be retained or somebody else should be looked at and how to go about doing it, nor to Dr Pike, so that's a red herring.

The next paragraph he also referred to, he says, "Look at paragraph 28(g) of JLP 1". Well, Dr Pike, he was considered as to whether to retain him and indeed there was a second opinion. Three very short points.

Nowhere in 28(g) does it address the point that I actually made, which was no separate consideration at any stage was given to whether or not to retain Dr Pike on grounds of cost, whether there could have been a cheaper expert; it doesn't say that.

My second point was that nowhere did Mr Le Patourel consider that Dr Pike had the vested interests in his idea being confirmed and pursued so that he could (a) earn future fees and (b) start to write off some of the sunk costs from the proceedings. That's not addressed in 28(g) either and they were my two points. So the reference to 28(g) is a total red herring.

And then I don't understand how Mr Went can seek to place any form of reliance upon the "second opinion" obtained from another expert economist in circumstances in which you haven't been provided with it; and privilege is not waived. It's totally meaningless. One can only infer from the fact that if no privilege had been waived and you haven't been provided with it, that at the very least it doesn't address the two points that I've raised, namely dispensing with Dr Pike might have been a cheaper alternative and, in any event, he had confirmation bias. So you'd have no basis upon which to discard those submissions of mine. In any event, it's impossible to see why a second economist would have addressed those matters. The fact is: it was never considered on the part of the PCR by anybody.

The last point is: if I've understood it, I found that submission extremely difficult to follow, but if I've understood my learned friend Mr de la Mare's reply, what he was saying was, "Oh, no, don't worry, I'm not really placing any reliance on the John Lewis price promise or the Currys price promise", and in particular why was Mr Harris referring to the terms of it? If I've understood the submission, it's, "No, no, no, all I'm referring to them for is because it shows that some retailers look at some other retailers when it comes to setting their prices". Well, that is not how the case is being presented by Dr Pike. Can I show you, and then I'll sit down?

Tab 18 of bundle A, so it's core bundle, page 556. These price promises are the only basis upon which there is even an attempt to address the Kone causation point, and Dr Pike does not say what my learned friend said in reply. What he says is, in paragraph 9, there is a price reference, "by reference to their larger rival Amazon", and then in particular he goes on. 10:

"Indeed, based on available public statements, I am aware that other retailers price match with Amazon and other online retailers."

My learned friend disavowed that and said, "No, no, I'm not talking about price matches, I'm just talking about the fact that they look at each other".

But here's his expert saying something completely different, which is, "I am relying upon him for the purposes of retailing price matches".

And then at 11, he actually then goes on intensive -- refers to both Lewis and Currys, which is obviously why I then referred to them.

And then he says in 11, rather gives the game away:

"Such online price matching supports my view that is highly [et cetera] ..."

So he expressly relies upon them for the purpose to which I criticise them and not for the purpose that was given in reply.

Unless I can assist further, those are my short reply submissions.

THE PRESIDENT: Thank you very much everyone. Thank you to everyone who's prepared for submissions today, including those who have not spoken. We've given you some homework, we've got a timetable for that, so some initial homework on the side of the proposed defendants in particular, Mr Mallalieu tomorrow, with a response on Friday and then some submissions or evidence, from the PCR next Friday, with the response the following Friday. I suggest 4.00 pm for all of those.

Is there anything else that I need to deal with by way of housekeeping?

MR DE LA MARE: Other than, I think, thanks from across the court to you and the court staff in particular for sitting late and putting up with us.

THE PRESIDENT: All right. Thank you and enjoy the evening.

(4.38 pm)

(The hearing concluded)

Key to punctuation used in transcript

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