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5 **IN THE COMPETITION**

Case No. : 1377/5/7/20 & 1378/5/7/20

6 **APPEAL TRIBUNAL**

7
8 Salisbury Square House
9 8 Salisbury Square
10 London EC4Y 8AP
11 (Remote Hearing)

12 Thursday 21 January 2021

13
14 Before:
15 The Honourable Mr Justice Roth
16 (Sitting as a Tribunal in England and Wales)

17
18 **BETWEEN:**

19
20 Epic Games, Inc. and Others
21 **Applicant**

22 v

23
24 Apple Inc. and Another
25 **Respondent**

26
27 _____
28 AND

29
30 Epic Games, Inc. and Another

31
32 V

33
34 Alphabet Inc., Google LLC and Others

35
36 **A P P E A R A N C E S**

37 Mark Brealey QC and Daisy Mackersie (On behalf of Epic)

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40 Digital Transcription by Epiq Europe Ltd
41 Lower Ground 20 Furnival Street London EC4A 1JS
42 Tel No: 020 7404 1400 Fax No: 020 7404 1424
43 Email: ukclient@epiglobal.co.uk

Thursday, 21 January 2021

1
2 (10.30 am)

3 MR JUSTICE ROTH: Good morning, Mr Brealey and others. This is of course a
4 hearing, although conducted remotely, that is as much a tribunal hearing as if
5 it was taking place physically in the court room, where I'm sitting, in Salisbury
6 square house.

7 An authorised transcript will be produced in the usual way of the proceedings, but it
8 is a contempt of court for anyone to make an unauthorised recording, visual or
9 audio, of those proceedings, and punishable as such. So I must issue that
10 warning to everyone participating, either on teams or watching the live stream.

11 We shall take a break in the usual way mid-morning, both for the assistance of the
12 transcribers and indeed for our own benefit.

13 Mr Brealey, I've read both particulars of claim, the two witness statements in the two
14 actions and, of course, counsel's skeleton arguments, which was helpful up to
15 a point. It was unhelpful in that it -- and the pleadings, indeed, don't generally
16 distinguish between the different claimants, or indeed the different
17 defendants. It is very important to be clear which legal entity is being referred
18 to when there are issues of jurisdiction or, indeed, when you are seeking
19 injunctive relief. Just saying Apple and Epic is really not very helpful in that
20 regard.

21 As you know, I sent, in advance, the questions I had arising from that because
22 I know your client's in California and I expected you need to take instructions.
23 I've received a helpful letter this morning, addressed to the Tribunal, from
24 Clifford Chance answering those questions, but it really should have been
25 made clear in the pleadings.

26 So, there we are, and it's over to you.

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Submissions by MR BREALEY

MR BREALEY: Well, sir, I appreciate from the questions you've asked that you've read quite a lot. What I would like to do is follow the skeleton argument. So, if you could have that --

MR JUSTICE ROTH: Yes.

MR BREALEY: I will go through that and emphasise various matters as I go along and try to particularise which claimants and which defendants are relevant as I go along.

So with that introduction, if I could go to the first page of the skeleton. I know you have it in mind, sir, that the claimants have applied for permission to serve outside this jurisdiction on Apple Inc, who is called A1, Alphabet Inc, which we call G1, and Google LLC, G2. These are the US defendants.

MR JUSTICE ROTH: Yes.

MR BREALEY: I know you will also appreciate, if we go into paragraph 2, that the other defendants are domiciled in the EU and no application for permission to serve is required.

MR JUSTICE ROTH: Yes.

MR BREALEY: With claims against Apple UK, A2, and Google Payment Limited, G5, are brought in this jurisdiction as of right and the Tribunal has jurisdiction in relation to Google Ireland Limited, G3, Google Commerce, which will be called "the Irish defendants", under the Brussels Regulation and importantly, in relation to G4, that's Google Commerce Limited, service can also be affected on that company without permission at its registered UK establishment.

MR JUSTICE ROTH: Yes.

1 MR BREALEY: So, although these non-US defendants are relevant to the
2 proceedings, the application relates to the US defendants.

3 MR JUSTICE ROTH: Yes, and G5, of course, as well, being the UK company.

4 MR BREALEY: Of course.

5 I know, sir, have you it in mind, but I just want to emphasise -- this is paragraph 3 the
6 claims which underpin the applications and there are four complaints, four
7 complaints, relating to the breach of the Competition Act and the Articles 101
8 and 102. If I could just highlight the four complaints.

9 First, Apple prevents completely and Google unreasonably restricts the distribution
10 of apps to consumers who use mobile devices, including in the UK,
11 consumers with Apple mobile devices cannot access Epic's games, or any
12 other app, except through Apple's App Store and Google makes it
13 unreasonably hard for those games to be accessed, except through Google's
14 Play Store. UK consumers are thus denied the possibility freely to access
15 alternative channels of distribution, including Epic's own Epic Game Store,
16 which it currently makes available --

17 MR JUSTICE ROTH: Yes, I mean, I've read it, so you don't need to read it out.

18 Can I just ask you to clarify one thing I think I've understood, but just to make sure
19 I've understood. Epic Games Store, one can access that on a mobile device,
20 through the internet.

21 MR BREALEY: No.

22 MR JUSTICE ROTH: I thought you can.

23 MR BREALEY: You can on Apple Macs.

24 MR JUSTICE ROTH: I thought not an Apple Mac, on a mobile device. If I take my
25 iPhone and put in "Epic Games Store", I think -- I haven't tried this, but, as
26 I understood it, you can get to it, but there's a difficulty in downloading games;

1 is that right? Through it. Is that the point?

2 MR BREALEY: I will address that point.

3 MR JUSTICE ROTH: Because I did want to understand exactly what happens
4 because, of course, all mobile devices, you can access the internet.

5 MR BREALEY: That's why I need to take it -- I do appreciate, sir, that you're on top
6 of the -- but it can be quite complex and that's why I just want to take this
7 introduction a little bit slowly.

8 So, if I could just continue -- I do appreciate that you've read it, and I just want to
9 emphasise a few things as I go along.

10 MR JUSTICE ROTH: Yes. Well, you don't need to read it out, which is what you
11 were doing.

12 MR BREALEY: So, the second complaint is that Apple and Google, having
13 effectively forced consumers to use the App Store, the Play Store, then insist
14 the payment is made through their own payment process solutions.

15 MR JUSTICE ROTH: Yes, I understand that.

16 MR BREALEY: But, when consumers purchase digital in-app content. I want to
17 emphasise that no such terms are imposed in respect of physical goods and
18 services, and we will just have a look at one of the documents which
19 highlights that.

20 MR JUSTICE ROTH: Hm-mm.

21 MR BREALEY: So, the first complaint is about distribution.

22 The second complaint is about payment.

23 The third complaint, obviously, is about Fortnite, as you know, sir, when Epic gave
24 consumers the choice of paying for digital content, both Apple and Google
25 immediately retaliated by withdrawing Epic's games from the App Store.

26 Then the fourth complaint is at D. Apple's retaliation went even further, threatening

1 to withdraw all access for the inputs necessary to the continued development
2 of Unreal Engine.

3 MR JUSTICE ROTH: That's the threat which hasn't happened yet?

4 MR BREALEY: Which hasn't happened yet.

5 MR JUSTICE ROTH: That's only Apple, is it, not Google?

6 MR BREALEY: That's only Apple. I think the point I would like to emphasise in
7 relation to Unreal Engine is that this, the threat, if it was carried out, would
8 impact on Epic Games UK Limited, that's the third claimant, as its work force
9 is focused on the continued development and marketing of Unreal in the UK,
10 and you'll have seen from the papers --

11 MR JUSTICE ROTH: Yes, I have seen that.

12 MR BREALEY: You'll see that (audio interference) and Epic Inc have particularly
13 chosen the UK for its expertise in developing this sort of software. You will
14 also know --

15 MR JUSTICE ROTH: These threats -- I mean, Apple's threat, I don't think I've
16 actually seen the threat. I don't know if it was in a letter or an email, but it's
17 not been exhibited. But that came from what you call A1, Apple US?

18 MR BREALEY: Yes, and that led to the US proceedings.

19 MR JUSTICE ROTH: Yes, because it's Apple US, as I understand it, that controls all
20 these things, makes the agreements and so on.

21 MR BREALEY: It effectively controls it, but, yes, is the answer. Yes.

22 MR JUSTICE ROTH: Yes. I mean, it's obviously important because you're seeking
23 injunctive relief.

24 MR BREALEY: We'll come on to Apple UK in a moment, but we -- although Apple
25 UK, we say, is part of the single group and carries on Apple Inc's business in
26 the UK and is effectively an arm of the UK. It appears to be that Apple Inc

1 was the person who decided that --

2 MR JUSTICE ROTH: Yes. There may be lots of subsidiaries of Apple round the
3 world, but you couldn't get an injunction against all of them if the conduct that
4 you want to stop is being carried out by the Apple US.

5 MR BREALEY: Correct, just as in *Unlockd* against Google, we are seeking
6 injunctive relief specifically relating to this jurisdiction.

7 You also know, because you've asked questions about it, but it is important to bear
8 in mind the many millions of people, in 2019 --

9 MR JUSTICE ROTH: I have all that. You can skip over that. I have that. Yes.

10 MR BREALEY: But I think it is important to emphasise that this is a substantial UK
11 customer base.

12 MR JUSTICE ROTH: Oh, yes, but there are a lot of people, of course, in the UK
13 who have mobile devices and, as you point out, mobile devices, either Apple
14 on the iOS system or using the Android system. That's a given.

15 MR BREALEY: It's a given, thank you.

16 I don't need to then, obviously, read out the policy objectives of the
17 Competition Act --

18 MR JUSTICE ROTH: Yes.

19 MR BREALEY: But we do pray-in-aid that the policy objectives of the
20 Competition Act in particular is to protect competition in the UK and thereby
21 protect the interests of consumers.

22 MR JUSTICE ROTH: Yes.

23 MR BREALEY: Can I then just go to the background and then, after that, I will go to
24 the claims. That's paragraph 6.

25 MR JUSTICE ROTH: Yes.

26 MR BREALEY: You will have seen paragraph 6.

1 MR JUSTICE ROTH: Yes.

2 MR BREALEY: What I'll do is just emphasise (v), (vi) and (vii) since I think have you
3 it in mind.

4 MR JUSTICE ROTH: Yes.

5 MR BREALEY: The only App Store available for Apple mobile devices is the
6 App Store owned by Apple and pre-installed on all Apple mobile devices. The
7 App Store used for more than 90 per cent of downloads of Android is the
8 Google Play store.

9 The process of downloading an app directly from a website, this is (vi), rather than
10 through an app store, is referred to as "direct downloading". This is very
11 commonly done by users of personal computers, including Apple Macs. It is
12 rarely done by mobile device users. Apple prohibits direct downloading on its
13 mobile devices.

14 MR JUSTICE ROTH: Well, that's what I was asking about. I mean, I can fully see
15 that it's far less convenient and might deter people from doing it, and people
16 much rather go to the App Store, which is prominent on the menu page,
17 display page and so on. But it's the prohibition.

18 What happens if you access the Epic Games website through the internet on your
19 Apple iPhone and want to download a game?

20 Are you saying it's blocked, or are you saying it's a legal prohibition in the agreement
21 that Apple has with the Epic entities?

22 That's what I wasn't clear about.

23 MR BREALEY: As I understand it --

24 MR JUSTICE ROTH: I should say, I haven't tried to do it. I could, and see what
25 happens, and, no doubt, maybe you or people in your team have tried to do it.
26 But I just wanted to quite understand what the prohibition means.

1 MR BREALEY: As I understand it, and I will ask Clifford Chance and my junior to
2 double check and give me chapter on verse on this, so you know, sir.
3 As far as Apple is concerned, Apple contractually prohibits direct downloading and
4 there are technical restrictions, also.
5 MR JUSTICE ROTH: So, it's prohibited in the agreements, which you've referred to
6 and exhibited, and you say there are technical -- there's a lot of detail about
7 the Google technical restrictions.
8 MR BREALEY: Right.
9 MR JUSTICE ROTH: But what are the Apple technical restrictions?
10 I mean, can you do it? Is it that you have to go through lots of these warnings that
11 put off? Or can you not do it at all because it's blocked?
12 MR BREALEY: I think you may be able to do it in theory, just as Epic introduced its
13 own in-app payment process, but it is difficult, but I will double check that.
14 MR JUSTICE ROTH: Yes, if you could, that would be helpful.
15 MR BREALEY: Apple has a contractual prohibition and a technical restriction.
16 Google uses technical --
17 MR JUSTICE ROTH: Yes, there's evidence about Google.
18 MR BREALEY: -- to dissuade consumers from direct downloads.
19 MR JUSTICE ROTH: Yes, that is covered in the evidence, isn't it?
20 The Epic apps are free and, unlike some, you don't have to pay to get the game, but
21 there is then in-app content, which you are encouraged to purchase, or the
22 people you play with have, and you want to enhance your abilities to do
23 various things and that's where they get their revenue.
24 MR BREALEY: Well, Epic gets the revenue, but Apple and Google take --
25 MR JUSTICE ROTH: Take a commission. Yes, that's right. But what I mean is
26 there are lots of other apps, as we all know, where you have to pay to get the

1 app at all; that's not Epic?

2 MR BREALEY: No, Epic allows consumers to access it for free, and then it will
3 make its money from in-app purchases. That is essentially what we say at
4 (viii).

5 MR JUSTICE ROTH: Yes.

6 MR BREALEY: If I can just -- so those are --

7 MR JUSTICE ROTH: Just so I can understand, I can see Fortnite is of course a
8 game which you download in this way. There are various other products that
9 are referred to. The Epic Games Store is, as it were, a platform, isn't it,
10 through which you can download apps? It's not --

11 MR BREALEY: The Games Store is like a shop.

12 MR JUSTICE ROTH: Yes.

13 MR BREALEY: I mean, I think one has to kind of -- the Epic Games Store is like a
14 shop, and the consumer can access and purchase -- can access Epic's own
15 games and games developed by third parties. If you need certain -- the
16 reference for that, I can get that for you as well.

17 MR JUSTICE ROTH: Yes, but is it something that you would -- it could be
18 pre-installed on a mobile device or you could download it through the internet,
19 or would you -- it's not an app that you could download through someone
20 else's app store?

21 MR BREALEY: There is little doubt, and again, I will get everybody to double check
22 this, that the Epic Games Store could be pre-installed.

23 MR JUSTICE ROTH: Yes.

24 MR BREALEY: And it certainly can be downloaded from the web. So, in other
25 words, I could have my Apple phone and I would be able to press on the app,
26 the Epic Games Store. It's unlikely to be pre-installed by Apple, but it could

1 be.

2 MR JUSTICE ROTH: No.

3 MR BREALEY: But it could be pre-installed by an OEM, as far as Google is
4 concerned.

5 MR JUSTICE ROTH: What you were saying is that, although it can be downloaded
6 from the web, and that's what people can do on a PC --

7 MR BREALEY: Correct.

8 MR JUSTICE ROTH: If you try to do it on a mobile device, well, there are both
9 contractual and technical restrictions from doing that as well.

10 MR BREALEY: Correct.

11 MR JUSTICE ROTH: Yes.

12 MR BREALEY: That is one of the anomalies of these restrictions. There are
13 several. But one is that you can have an Apple Mac on your desk and you
14 can download the Epic Games Store and play the game that you've accessed
15 the Games Store, but if you have the phone to your left, or to your right, you
16 just can't do it.

17 MR JUSTICE ROTH: Yes, and the Epic Games app, which is distinct from the
18 Games Store, that's featured in the Google claims -- the Google claim is not
19 part of the Apple claim, as I understand it.

20 MR BREALEY: As I understand it, I will --

21 MR JUSTICE ROTH: It's not referred to in the Apple claim at all.

22 MR BREALEY: But it's still -- there is no doubt that Epic would like consumers to be
23 able to access the Epic Games app directly on a mobile phone.

24 MR JUSTICE ROTH: But that is -- and the difference between the Epic Games app
25 and the Epic Games Store is what?

26 MR BREALEY: I don't believe there's any real difference between the two claims in

1 that respect.

2 MR JUSTICE ROTH: Right. Well, we need to look at that, because it's referred to
3 as a different product, I think. That's the way it appeared from -- just let me --
4 if you look at the Google claim form, at paragraph 11, it distinguishes between
5 the two.

6 MR BREALEY: There's undoubtedly a distinct between the two.

7 MR JUSTICE ROTH: Yes, well, I'm just trying to understand what is the difference.
8 I mean, Epic Games Store, you can only get Epic Games, it appears, but it doesn't
9 feature in the Apple claim.

10 MR BREALEY: Can I -- just before we get to --

11 MR JUSTICE ROTH: I'm just trying to understand these products before we get into
12 the detail.

13 MR BREALEY: Absolutely. The Epic Games app is an app available on certain
14 Android devices and the Epic Games store is an app store.

15 MR JUSTICE ROTH: It may be that the Epic Games app is purely for Android and,
16 therefore, not relevant to the Apple claim. That may be the explanation.

17 MR BREALEY: Because the -- yes.

18 MR JUSTICE ROTH: Does that sound right to you?

19 MR BREALEY: Because of the OEMs and the way that the OEMs --

20 MR JUSTICE ROTH: Well, it's a different operating system, isn't it?

21 Is that why --

22 MR BREALEY: I don't think it's a different operating system. I think it's because
23 clearly Google --

24 MR JUSTICE ROTH: Well, the Android system is a different operating system from
25 the iOS.

26 MR BREALEY: It is.

1 MR JUSTICE ROTH: And Epic game app, is it designed only for Android, as
2 opposed to the Epic Games Store?

3 MR BREALEY: As I tried to say, it is only -- it's relevant to both cases, in the sense
4 that if Epic had the freedom it wanted, there would be an Epic Games app on
5 an Apple mobile phone.

6 MR JUSTICE ROTH: Well, there's no mention in the relief in Apple --

7 MR BREALEY: No, and there doesn't have to be. As we'll see in a moment, the
8 primary aim is to get an Epic Games Store.

9 But can I just say, the Epic Games app, as you said, sir, is a different thing. It's not
10 an app store. It just launches just two apps, two games. It's currently made
11 available for Android because some OEMs permit it to be pre-installed. So,
12 there is an Epic Games app on Android because some OEMs permit it.

13 MR JUSTICE ROTH: I see.

14 MR BREALEY: They permit it to be pre-installed.

15 MR JUSTICE ROTH: I see. I have it. Yes.

16 MR BREALEY: So, can I just take you to -- you've probably seen them, but the two
17 Tim Sweeney emails which requested. What Epic is really seeking --

18 MR JUSTICE ROTH: No, I haven't seen -- I should tell you, I have not looked
19 beyond the witness statement --

20 MR BREALEY: No, okay.

21 MR JUSTICE ROTH: -- at any correspondence.

22 MR BREALEY: Then, I think it's just for background. If we go to Apple first. This is
23 at Apple 3A, the exhibit, Apple 3A.

24 MR JUSTICE ROTH: Yes.

25 MR BREALEY: At tab 5, page 49. This is the genesis of the dispute and there's a
26 similar one from Google that I'll show you, sir, but this is Apple.

1 So, this is an email from Mr Tim Sweeney, who obviously is the founder of Epic:
2 "Consumer choice and competition."
3 It's dated 30 June 2020.
4 MR JUSTICE ROTH: This is sent to people at Apple US?
5 MR BREALEY: Yes. So:
6 "Because of restrictions imposed by Apple, Epic is unable to provide consumers with
7 certain features in iOS apps. We would like to offer consumers the following
8 features ..."
9 MR JUSTICE ROTH: Yes.
10 MR BREALEY: And the two that you know, sir, but it's just important you see this:
11 "Competing payment process options other than Apple payments, without Apple's
12 fees and Fortnite and other Epic Games software; a competing Epic Games
13 Store app available through the iOS App Store and through direct installation
14 that has equal access to underlying operating system features for software
15 installation and update as the iOS App Store itself has."
16 MR JUSTICE ROTH: So, the Epic Games Store, that's what, as I now understand it
17 from this, it is itself an app that could be available through the Apple -- the
18 App Store.
19 MR BREALEY: Yes, or if Apple said no --
20 MR JUSTICE ROTH: And I was asking, a direct installation which you referred to as
21 direct downloading?
22 MR BREALEY: Correct.
23 MR JUSTICE ROTH: That's what "direct installation" is, is it?
24 MR BREALEY: Yes. Then, as we know, if Epic were allowed to provide these
25 options, consumers would have an opportunity --
26 MR JUSTICE ROTH: Yes, I see.

1 MR BREALEY: Again, I think it's important, the last few lines of that paragraph:
2 " ... which would be as open and competitive as it is on personal computers."
3 MR JUSTICE ROTH: Yes.
4 MR BREALEY: Then he talks about the non-negotiable contracts.
5 MR JUSTICE ROTH: Yes.
6 MR BREALEY: That was the genesis of the dispute.
7 Then the similar one for Google is at Google 3, tab 6. Google 3, tab 6, page 60.
8 Exactly the same wording, really.
9 MR JUSTICE ROTH: And the same day, a little earlier.
10 MR BREALEY: The same day, yes. I'm just doing this for completeness.
11 MR JUSTICE ROTH: Yes.
12 MR BREALEY: Again, we see the two main vices, the competing payment
13 processing option and a competing Epic Games Store available through
14 Google Play and/or through direct installation.
15 MR JUSTICE ROTH: This is to these people, Sundar and so on, and one sees who
16 they are from page 58. Where are they? Are they at G2?
17 MR BREALEY: I don't know whether it's G1 or G2.
18 MR JUSTICE ROTH: But it will be one of the US.
19 MR BREALEY: As I understand it, yes.
20 MR JUSTICE ROTH: Yes. Yes.
21 MR BREALEY: Could I just take you to a couple of the exhibits, to which really we
22 need just to go to by reference to the claims. I'll just put those -- could
23 I start -- so I'm now on the skeleton at essentially paragraph 7 and 8.
24 MR JUSTICE ROTH: Just a second.
25 MR BREALEY: Can I go to the claim in Apple first, which as you know is in Apple 1?
26 Put all the others ...

1 MR JUSTICE ROTH: Yes.

2 MR BREALEY: So, really ...

3 MR JUSTICE ROTH: Yes.

4 MR BREALEY: So just to -- paragraph 8:

5 "In return for the inputs necessary, Apple imposes standard terms and conditions on

6 developers --"

7 MR JUSTICE ROTH: Yes, well, there's the clear term that you can't distribute

8 through any other -- only through the App Store. So, that's the contractual

9 prohibition on direct downloading or -- and then there's the prohibition on

10 payment solutions other than using Apple's IAP.

11 MR BREALEY: I can take you to the relevant provisions of the agreements, if you

12 want, sir.

13 MR JUSTICE ROTH: No, I've seen those, I did look at the contract, yes.

14 MR BREALEY: So --

15 MR JUSTICE ROTH: And those are the contracts -- and it's been clarified by the

16 letter this morning -- which the first and second claimants and a number of

17 other Epic companies have with Apple --

18 MR BREALEY: Yes.

19 MR JUSTICE ROTH: -- (overspeaking) with Apple US. That's where the prohibition

20 arises.

21 MR BREALEY: Yes.

22 MR JUSTICE ROTH: Yes.

23 MR BREALEY: So, I won't go to -- and you've picked up the typo.

24 MR JUSTICE ROTH: Yes. The typo's in the Google claim, I think.

25 MR BREALEY: Can I -- I think the typo is in Apple, because it's --

26 MR JUSTICE ROTH: Is it?

1 MR BREALEY: Because it concerns the Apple App Store review guidelines. I think
2 the question was: where do I get that from? So, if one goes to --

3 MR JUSTICE ROTH: Yes, you're quite right.

4 MR BREALEY: -- if one goes paragraph 78 of the Apple, you can see it should read
5 clause 6, not 1.

6 MR JUSTICE ROTH: Now, can I just ask, you've shown me the letter or emails
7 of June, the termination that's referred to in paragraph 20 --

8 MR BREALEY: Of the claim?

9 MR JUSTICE ROTH: Of the claim, that we are looking at on page 5, on 28 August
10 Apple terminated the developer account used by Epic. Well, that account --
11 well, I haven't seen that letter, or email or whatever it was; is that in the
12 bundle?

13 MR BREALEY: I'll double check. I'm not sure it is. It's obviously referred to in the
14 witness statement of Elizabeth Morony.

15 MR JUSTICE ROTH: Yes, I'm surprised it's not exhibited.

16 MR BREALEY: It may be -- again, I will get my team to get the reference, because it
17 may well be referenced in the US proceedings.

18 MR JUSTICE ROTH: Well, I'm sure it's referenced, but I wanted to see the letter, or
19 the email, because, again, but I assume that will be a termination -- the Apple
20 there referred to is Apple US. It won't be the second defendant, will it?

21 MR BREALEY: No.

22 MR JUSTICE ROTH: No, well, on that basis, I perhaps don't need to see the letter.

23 MR BREALEY: But I will certainly -- if we can get copies of the letter referred to in
24 paragraph 20 --

25 MR JUSTICE ROTH: Yes. Well, it's the US company that's done it, yes. That was
26 the agreement with the first claimant, and it's threatened.

1 Again, I don't know if the threat's in that letter or another letter?

2 I mean, you're relying on the threat quite strongly. Again, I haven't seen it. I'm not

3 doubting that it was made. I fully accept it was made, it's just to see the terms

4 in which it is made would be normal in these circumstances.

5 MR BREALEY: I understand.

6 MR JUSTICE ROTH: But, again, I think it's clear, isn't it, that would be Apple US as

7 well?

8 MR BREALEY: Yes.

9 MR JUSTICE ROTH: Yes.

10 MR BREALEY: But, again, if we can find the --

11 MR JUSTICE ROTH: Yes.

12 MR BREALEY: So if I -- on the actual restrictions, I just -- I think it's informative. If

13 we can just go to the Google claim, but we don't need to go to the pleading,

14 just to see, again, the anomaly about the in-app payment. It's in respect of

15 both companies, but you see this particularly with one of the documents

16 relating to Google. So, if we go to Google -- I won't go to any more of the

17 documents relating to the restrictions, save this one, and this is --

18 MR JUSTICE ROTH: So, you want me to look at the Google claim?

19 MR BREALEY: No. Unnecessary. The Google 1C pleadings. It's a document --

20 MR JUSTICE ROTH: Yes.

21 MR BREALEY: -- which highlights -- so this is the Google 1C pleadings. It is the

22 document that is referred to in paragraph 10B of the skeleton.

23 MR JUSTICE ROTH: Yes.

24 MR BREALEY: And I say I will endeavour to get the documents referred to.

25 MR JUSTICE ROTH: You say -- where do I look?

26 MR BREALEY: So this is 416. This, I think, just helps understand the anomaly

1 about the in-app payment. So 416.

2 MR JUSTICE ROTH: Hm-mm.

3 MR BREALEY: This is in the document, the developer programme policy. So:

4 "Apps that employ in-store or in-app purchases must comply with the following
5 guidelines: in store purchases; developer's charging for apps from
6 Google Play must use Google Play's payment system."

7 So this is at the bottom, "payments".

8 MR JUSTICE ROTH: Yes.

9 MR BREALEY: In-app purchases:

10 "Developers offering products with a game downloaded on Google Play or providing
11 access to game content must use Google Play in-app billing as the method of
12 payment."

13 MR JUSTICE ROTH: Yes.

14 MR BREALEY: Then:

15 "Developers offering products within another category of app downloaded on
16 Google Play must use Google Play in-app billing as a method of payment,
17 except for the following cases ..."

18 Payment is for physical products.

19 MR JUSTICE ROTH: Yes. No, that's what they --

20 MR BREALEY: And it's just helpful, over the page, here are some examples of
21 products supported by Google Play in-app billing, so virtual game products.
22 That's the first one. So, that's essentially Epic.

23 MR JUSTICE ROTH: Yes.

24 MR BREALEY: Then, a bit further down:

25 "Here are some examples of products not supported by Google Play in-app billing."

26 And this is why you have retail merchandise, such as a groceries, clothing,

1 housewares and electronics, service fees, including taxi transportation,
2 cleaning services, food delivery, airfare, event tickets, gym membership,
3 loyalty programmes.

4 So, you have these phones and you can have the various apps, and if you want to
5 buy your groceries through your phone, you're not forced to use the in-app
6 processing.

7 MR JUSTICE ROTH: No. Can I cut you short? This is a jurisdiction application.
8 You're not seeking summary judgment or anything?

9 MR BREALEY: No.

10 MR JUSTICE ROTH: I can see that the various matters that you allege may
11 constitute restrictions on competition and come within the prohibitions on
12 anti-competitive conduct.

13 MR BREALEY: Thank you.

14 MR JUSTICE ROTH: I can see that for the purposes of a serious question to be
15 tried.

16 MR BREALEY: That's what --

17 MR JUSTICE ROTH: What I am concerned about is which party might be liable,
18 where the acts are done, and where the damage is suffered, because that's
19 on the jurisdiction point.

20 Now, those are the issues that concern me and, therefore, it's important to focus on
21 who's doing it and I'm concerned about some of the relief that's sought. So,
22 it's not about showing me that there are restrictions on what Epic can do and
23 that prevents it competing in various ways in which it would like to compete. I
24 think that's clear.

25 MR BREALEY: That's helpful, sir, but, clearly, I have to address you -- I have to be
26 full and frank, and I have to kind of get over a threshold question.

1 MR JUSTICE ROTH: But I'm just telling you, certain aspects, from what I've read,
2 you've got over that on the papers and you don't have to develop them in oral
3 submissions.

4 It's because some of the other aspects are problematic that we're having this oral
5 hearing. As you know, these applications are sometimes dealt with on the
6 papers.

7 MR BREALEY: Well, I will take onboard which party, where the acts are done,
8 where the damage is suffered and the relief.

9 MR JUSTICE ROTH: Yes.

10 MR BREALEY: Can I then turn to the parties?

11 MR JUSTICE ROTH: Yes. I thought we should do them separately because the
12 situation is quite different, it seems to me, between the different claims.

13 MR BREALEY: I will. I'll do the -- so --

14 MR JUSTICE ROTH: Because I think Unreal Engine, for example, doesn't feature in
15 the Google claim, does it? Indeed, Epic Games UK, the third claimant in the
16 Apple claim, is not a party -- is not claiming against Google, so there is that
17 difference to start with.

18 MR BREALEY: Can I start then with Apple?

19 MR JUSTICE ROTH: Yes.

20 MR BREALEY: This is paragraph 12.

21 MR JUSTICE ROTH: Yes.

22 MR BREALEY: I think you've picked this up from paragraph 61 of the pleadings
23 bundle, where we refer to various developer accounts.

24 MR JUSTICE ROTH: Yes.

25 MR BREALEY: It's expanded upon in the letter.

26 MR JUSTICE ROTH: Yes.

1 MR BREALEY: But we have Epic Games Inc, that is the ultimate parent company. I
2 think this is the claimant that is concerned with Fortnite and the Games Store
3 and, clearly, it impacts on all of the group because it is interlinked.

4 But Epic Games Inc, as one will see from paragraph 61 of the claim form and the
5 letter from Clifford Chance this morning, is concerned with the Epic Games
6 Store and Fortnite.

7 MR JUSTICE ROTH: Yes.

8 MR BREALEY: The reason --

9 MR JUSTICE ROTH: And indeed the other perhaps less important games that are
10 part of the DPLA that it has. They're in a footnote to paragraph 20,
11 Battle Breakers and so on.

12 MR BREALEY: Right.

13 MR JUSTICE ROTH: Yes.

14 MR BREALEY: One of the reasons that we have the Epic Games International, the
15 Luxembourg company, and Epic Games UK Limited, is because of
16 Unreal Engine. So, they are concerned in particular -- and clearly
17 Epic Games Inc is concerned by Unreal Engine, as we've seen from the letter
18 this morning. But they are claimants in the Apple proceedings because the
19 Luxembourg company and the English company are focused on
20 Unreal Engine.

21 MR JUSTICE ROTH: The position is, as I've understood it, that the developer
22 account for Unreal Engine is held by Epic Luxembourg.

23 MR BREALEY: Yes.

24 MR JUSTICE ROTH: But much of the work on Unreal Engine is done by Epic UK.

25 MR BREALEY: Well, I think, from the letter, much of the work on Unreal is done by
26 Epic as a group because it has worldwide companies. Clearly it is developing

1 Unreal Engine in the States, but there is a real focus in the UK on improving
2 and developing Unreal.

3 So, the Unreal Engine is developed essentially by Inc and UK.

4 MR JUSTICE ROTH: Yes, and the licences for Unreal Engine to the many people in
5 the UK who -- it's referred to as having an Unreal Engine account.

6 MR BREALEY: Yes.

7 MR JUSTICE ROTH: That account, as confirmed in this morning's letter, is with Epic
8 Luxembourg.

9 MR BREALEY: Yes.

10 MR JUSTICE ROTH: That's right, isn't it?

11 MR BREALEY: Yes. So, the combination of paragraph 12 of the skeleton and 61 of
12 the claim and the letter, is that Luxembourg licences the Unreal Engine
13 software outside the US.

14 MR JUSTICE ROTH: Yes.

15 MR BREALEY: And holds the Apple Developer Account, as is said in paragraph 61.
16 I think it is important, if I can, because you asked, sir -- one of the questions is:
17 where is the damage suffered or potentially to be suffered unless restrained?

18 MR JUSTICE ROTH: Yes.

19 MR BREALEY: Is Epic Games UK. Can I just give you the references, or show you
20 at least, go to Elizabeth Morony's witness statement, which is Apple 2. That's
21 tab 2.

22 MR JUSTICE ROTH: Yes.

23 MR BREALEY: So, just a couple of passages here on Epic Games UK.

24 If we go, first, to page 14, we see there Ms Morony at paragraph 37, 38 to 41 is
25 relevant to Epic Games UK.

26 MR JUSTICE ROTH: Yes.

1 MR BREALEY: So, 37, we know that Epic Inc develops the Unreal Engine. In
2 relation to the use of -- Epic has informed me that -- and then we've seen
3 those individuals.

4 MR JUSTICE ROTH: Yes.

5 MR BREALEY: We then, in 39, refer to various cases where Unreal Engine has
6 been used in the UK.

7 MR JUSTICE ROTH: Yes.

8 MR BREALEY: Paragraph 40, I understand from Epic that its employees at its
9 offices in England and Scotland are predominantly concerned with the
10 development of Unreal Engine. Then, at A, on page 16:
11 "The main focus of Epic UK is the development of the Unreal Engine and working
12 closely with Epic's key customers and partners in the UK. Epic UK's
13 employees work closely with Unreal Engine customers as well as continuing
14 research and development activities in support of the Unreal Engine providing
15 local support to UK customers.

16 MR JUSTICE ROTH: Yes.

17 MR BREALEY: Just lastly, I referred to a work force earlier on.

18 MR JUSTICE ROTH: Yes, and you have a figure here, I think.

19 MR BREALEY: Yes. If you can go back to page 10, paragraph 29, at the bottom.

20 MR JUSTICE ROTH: Yes.

21 MR BREALEY: "Epic's headquarters are in North Carolina. It operates more than
22 40 offices worldwide, London, Manchester."
23 Then you see that's where you get the figure of Epic UK of whom 110 are currently
24 employed by Epic Games UK. That's at the top of page 11.

25 MR JUSTICE ROTH: Yes.

26 MR BREALEY: So, this is --

1 MR JUSTICE ROTH: Yes, I see that.

2 MR BREALEY: I think this is important from the point -- if one goes to paragraph 41,
3 on page 17, before we leave this.

4 MR JUSTICE ROTH: Yes.

5 MR BREALEY: The significance --

6 MR JUSTICE ROTH: So, I can see -- I've read it. I've seen that. Yes.

7 MR BREALEY: But I think it's an important point to bear in mind when one is looking
8 at the UK.

9 MR JUSTICE ROTH: Yes.

10 MR BREALEY: The US company has focused on the UK for development.

11 MR JUSTICE ROTH: Yes.

12 MR BREALEY: Can I move to Google?

13 MR JUSTICE ROTH: You're not going on with the Apple defendants then?

14 MR BREALEY: Sorry, I'll -- you're quite right. The Apple defendants. Apple Inc --
15 so there are two defendants in Apple.

16 MR JUSTICE ROTH: Yes. Well, what I want to know is about the second one.

17 MR BREALEY: Right.

18 MR JUSTICE ROTH: Because I can see that all the things you're complaining about
19 are the responsibility of Apple Inc, but it's the second defendant that I'm
20 concerned about.

21 MR BREALEY: Can I then take you to probably four documents then? We are at
22 paragraph 14(ii).

23 MR JUSTICE ROTH: Yes.

24 MR BREALEY: So, the question is: what flesh can we put on bones?
25 So, the first is then the witness -- well, actually I don't know whether you have the
26 Apple 3C exhibit?

1 Apple 3C exhibit.

2 MR JUSTICE ROTH: Yes.

3 MR BREALEY: It's right at the end, and hopefully it's been put in.

4 MR JUSTICE ROTH: What tab?

5 MR BREALEY: Well, it's page 600, right at the end.

6 MR JUSTICE ROTH: Page ...?

7 MR BREALEY: 600.

8 MR JUSTICE ROTH: No, I don't have a page 600. I stop at 599.

9 MR BREALEY: Right. Then we need to get --

10 MR JUSTICE ROTH: And my index also stops at 599.

11 MR BREALEY: It was referred to in Ms Morony's witness statement.

12 MR JUSTICE ROTH: Well, I have her witness statement.

13 MR BREALEY: But we --

14 MR JUSTICE ROTH: What page is this? What paragraph of the witness statement?

15 MR BREALEY: If one goes to paragraph 64.

16 MR JUSTICE ROTH: Yes.

17 MR BREALEY: But I do need -- I'll check whether it's been sent to the registrar,

18 because I do want to show you the document.

19 MR JUSTICE ROTH: Well, as we made clear, I think, in the letter before this

20 hearing, given the restrictions we're all operating under --

21 MR BREALEY: Yes, I understand.

22 MR JUSTICE ROTH: -- last minute letters, coming at 10.20 on the morning of the

23 hearing --

24 MR BREALEY: No, it didn't come -- it was yesterday.

25 MR JUSTICE ROTH: Yesterday?

26 MR BREALEY: Yes.

1 MR JUSTICE ROTH: Well, we'll look at that. We received the letter this morning
2 from Clifford Chance. Do you want me to -- I mean, we can take -- it's a little
3 early for a break. Would you like me to take the break and we can try and find
4 it.

5 MR BREALEY: Yes, I'll take you to --

6 MR JUSTICE ROTH: Is it referred to -- you said it's referred to in the witness
7 statement?

8 MR BREALEY: Well, it is, but it doesn't set out all the -- so, if one goes to page 26,
9 paragraph 64, there she sets out, based on information available on
10 Companies House website, three subsidiaries.

11 MR JUSTICE ROTH: Yes. Well, I am sure it is a subsidiary and I am sure it has the
12 same directors.

13 MR BREALEY: Yes, the same directors. Then she sets out the correspondence
14 between Apple --

15 MR JUSTICE ROTH: Yes.

16 MR BREALEY: The main point to note for present purposes, from the witness
17 statement, is paragraph 69.

18 MR JUSTICE ROTH: Yes. Yes, I don't think I have that letter either, but she quotes
19 it.

20 MR BREALEY: I've checked and it quotes verbatim, as one would expect. And we
21 can provide that letter to you, if you like.

22 MR JUSTICE ROTH: Well, it's a verbatim quote, I think.

23 MR BREALEY: Yes.

24 MR JUSTICE ROTH: Yes.

25 MR BREALEY: So, Epic asked various questions because, clearly, to a certain
26 extent, claimants are at a disadvantage when it comes to the defendant's

1 corporate structure, and this is why the Tribunal -- we'll come to the cases
2 later on -- has said this is very often a question of fact that can't be
3 determined at this stage.

4 MR JUSTICE ROTH: Yes.

5 MR BREALEY: But in its response, dated 4 December:

6 "Apple maintained the position Epic had no pleadable case against Apple UK. It
7 provided the following information: two of the directors of Apple UK are senior
8 managers at Apple Inc ..."

9 Although they said are not involved in day-to-day operations:

10 "Apple UK --"

11 MR JUSTICE ROTH: Well, I've read it.

12 MR BREALEY: Okay. So, I just --

13 MR JUSTICE ROTH: What I'm trying to understand is on what basis --

14 MR BREALEY: Could I --

15 MR JUSTICE ROTH: You're saying --

16 MR BREALEY: On this paragraph --

17 MR JUSTICE ROTH: Yes.

18 MR BREALEY: I do not want to interrupt. On this paragraph, can I make two
19 points?

20 The first relates to Apple UK, and the second relates to Inc.

21 The important point about Apple UK, from this witness statement, is what is said at
22 (g), on page 29, where it is said --

23 MR JUSTICE ROTH: Page -- yes.

24 MR BREALEY: Page 29. It's the bundle 29.

25 MR JUSTICE ROTH: Yes.

26 MR BREALEY: Clifford Chance asked:

1 "Do you provide technical support and assistance to developers in the UK?"

2 It says:

3 "Apple UK does not provide support for technical or systems related issues ..."

4 But I would ask, sir, you to underline this:

5 "Its employees do however support UK developers in helping them to understand the
6 products, features and options available to them on the App Store."

7 MR JUSTICE ROTH: Yes.

8 MR BREALEY: So, there is a connection between the UK App Store and
9 developers, and this case, these proceedings, are about developers having
10 access to the UK App Store.

11 MR JUSTICE ROTH: Yes. But, according to this, Apple UK is nothing to do with
12 who gets access within the App Store. It's just helping developers understand
13 how the App Store works and, therefore, how they have to design their
14 products. But it doesn't get involved in the actual functionality of the
15 App Store. That's all set by Apple US. It's just giving support to it, as they
16 say.

17 MR BREALEY: Well, that is right and the question is whether, if a subsidiary is
18 giving support to a policy of Inc, whether -- and it is part of the same economic
19 undertaking. We will come on to the submissions about that in a moment --
20 one should be looking at this as a holistic whole or you salami slice the two
21 corporate -- you don't pierce the corporate veil at all.

22 MR JUSTICE ROTH: It's not a corporate veil. There is no question of corporate veil.
23 These are separate companies.

24 MR BREALEY: As one knows, when it comes to competition law, there is one
25 economic unit.

26 MR JUSTICE ROTH: Yes, but it's not a corporate unit. It's not a corporate veil. It's

1 an economic unit. It's not a corporate unit.

2 MR BREALEY: One of the reasons I wanted to emphasise what Apple (UK) Limited
3 says in its directors' report --

4 MR JUSTICE ROTH: That's the missing document, is it?

5 MR BREALEY: Well, that's the missing document. But, just as -- if there is a cartel
6 between parent companies abroad and the subsidiary is quoting the prices to
7 customers in this country, and it is wholly owned subsidiary, there is at least a
8 reasonable argument to say that, if the parent company in that situation is
9 selling products in this country and its subsidiary is quoting the cartelised
10 prices and it's a single economic unit for the purposes of competition law, that
11 essentially the foreign company can be brought into this country by virtue of
12 its subsidiary.

13 Similarly, here, I would submit, that if Apple (UK) Limited is explaining Apple Inc's
14 policy to the millions of customers in this country -- so, for example, if there's
15 complaint saying, "Why can't I get Fortnite on my phone?", and Apple (UK)
16 Limited says, "Well, that is group policy", in my submission -- and Apple UK is
17 a wholly owned subsidiary, one single economic unit, it would be artificial to
18 say Apple UK has nothing to do with the anti-competitive conduct.

19 MR JUSTICE ROTH: Well, that's an interesting -- that's --

20 MR BREALEY: One of the reasons I want --

21 MR JUSTICE ROTH: So, you say explaining the policy. I mean, the subsidiary
22 example of a cartel, it's generally a subsidiary -- although it's not involved in
23 the cartel -- that makes the sale, because companies sell through their local
24 subsidiaries.

25 But, here, that's not the case. Apple UK is not getting the revenue from the games,
26 not taking the commission. It's not setting the policy. It's just helping

1 people -- telling them what the policy is.

2 MR BREALEY: Yes, and --

3 MR JUSTICE ROTH: You say, communicating policy makes you liable for the policy
4 as a matter of competition infringement, just because you're owned?

5 MR BREALEY: Well, you would be jointly and severally liable with your parent
6 because you are one holistic whole.

7 MR JUSTICE ROTH: Well then, not all subsidiaries of Apple around the world are
8 liable, and not if Apple has a subsidiary that rents property in the UK and is
9 responsible for entering leases, you wouldn't say it's therefore liable, would
10 you?

11 MR BREALEY: Well, if Apple UK is essentially the UK arm of Inc --

12 MR JUSTICE ROTH: But it isn't, on the evidence. That's the point, because Inc is
13 selling directly. Inc is the contracting party, and it's Inc that's taking the
14 commission and collecting the money from consumers in the UK who pay for
15 in-app content. It's not Apple UK that's taking the money from the UK
16 consumers; it's going to Apple Inc or perhaps some other Apple body, but
17 certainly not Apple UK.

18 MR BREALEY: Well, I -- I understand that point.

19 MR JUSTICE ROTH: I have the document, so let me put it in. It goes into --

20 MR BREALEY: It will be tab 25 of Apple 3C.

21 MR JUSTICE ROTH: 3C. Well, I do not have tab 25, but I'll put it at the end. Don't
22 worry about that. Page 600. So this is the report -- I don't think this is
23 referred to in Ms Morony's witness statement, is it?

24 MR BREALEY: As I understood it, it was based on -- this is why I said it wasn't -- I
25 think this is the basis upon which the claim was pleaded, and --

26 MR JUSTICE ROTH: No, I'm just asking whether the --

1 MR BREALEY: It's not quite -- what I'm going to --

2 MR JUSTICE ROTH: I thought you said this document is referred to, but --

3 MR BREALEY: No, that's the whole -- it was supposed to be exhibited, but it wasn't.

4 MR JUSTICE ROTH: Yes, okay.

5 MR BREALEY: But if you go to page 602. So, this is --

6 MR JUSTICE ROTH: Yes, principal activities.

7 MR BREALEY: This is a strategic report, directors report and financial statements of

8 Apple (UK) Limited.

9 MR JUSTICE ROTH: Yes.

10 MR BREALEY: So, this is the submission to Companies House and, at 602, the

11 directors of Apple UK present their strategic report for the year ending

12 28 September 2019.

13 "Principal activities and business review. Apple Inc and its wholly owned

14 subsidiaries, the group [I think it's important to emphasise 'the group']

15 supplying, manufacture and market smart phones, tablets, personal

16 computers, accessories. The group's products include ..."

17 "The group's services include digital content, stores and streamlining services."

18 MR JUSTICE ROTH: Yes.

19 MR BREALEY: "The group sells its products and services worldwide through

20 various direct and indirect ... the group customers are primarily the consumer.

21 The company provides [this is Apple UK] services to group affiliates. These

22 services include research and development, technical and other services."

23 We know from the Morony statement that it's not limited to supporting the group

24 affiliates because it supports the UK developers.

25 MR JUSTICE ROTH: Yes.

26 MR BREALEY: I'd then ask you, sir, to note the operating costs. 262 million. A

1 quarter of a billion operating costs. I also asked, below that -- the operating
2 costs increased as it was a change in the functions performed by the
3 company during the prior year, and it makes -- you can see this over the
4 page -- over £26 million profit.

5 Now, my submission is that this actually, if one looks at this, this is a substantial
6 Apple company, in the UK, providing services to group affiliates and to UK
7 developers, who are the claimants in this case essentially, the UK developers,
8 or --

9 MR JUSTICE ROTH: Yes.

10 MR BREALEY: -- they're the persons that could be harmed, the UK developers, with
11 operating costs of a quarter of a billion pounds.

12 Although it may well be that money does flow to Inc, there is clearly a substantial
13 exercise going on in the United Kingdom and it is not as if my clients are
14 simply bringing in A2 as some sort of company that has no shareholding or
15 whatever, and nothing to do with the UK.

16 MR JUSTICE ROTH: No, it's clearly a substantial and effective operating company.
17 The question is: what connection does it have with the anti-competitive
18 conduct that you're alleging?

19 MR BREALEY: Well, this is a service out application. Clearly we're at a slight
20 disadvantage because we haven't had disclosure, or we haven't even had --
21 I mean, all Ms Morony has done is set out what Apple have said in one letter.
22 It's not even signed by a statement of truth.

23 What I am submitting to you, sir, is that Apple UK is a substantial UK company that
24 does support UK developers. It clearly has connections to the UK App Store,
25 and if it is giving effect to the policy which is decided upon by its American
26 parent, in my submission it is a legitimate defendant in this case.

1 MR JUSTICE ROTH: But this is a case where you're seeking no damages. You're
2 seeking injunctive relief, and if one looks at the terms of the injunction, as
3 you're claiming, which are at page 34 of the claim form, we'll see restoring the
4 Fortnite apps and other apps, well, it's Apple US which removed them; it's
5 Apple US which would have to restore them. It's not Apple UK. They have no
6 ability to do that. You can't make an order against a company which is
7 incapable of performing it, then an order preventing Apple from restricting the
8 download.

9 Well, as you explained to me, in answer to my questions, that's a contractual
10 restriction. Well, that's Apple US. Apple UK is not party to the contract, and it
11 may be a technical restriction. Again, that's put in by Apple US, an order
12 requiring -- well, that's the contractual restriction, and so on.

13 (g):

14 "Reinstating the developer account."

15 Well, that's an account with Apple US. Then, (h):

16 "Restraining Apple from taking/threatening further action."

17 Well, the threats are from Apple US. So, the injunctive relief, it seems to me, which
18 is the only substantive relief here, is going to be against Apple US. How can it
19 be against a company which may well be a substantial operating company
20 within the Apple group, but which doesn't do anything of these things? All it
21 does is explain what the situation is and help developers deal with it. That's
22 the problem I have.

23 MR BREALEY: Well, I understand that and, in our submission, the Apple Inc and
24 Apple UK are participating in anti-competitive conduct.

25 Clearly Apple Inc is the primary defendant, but we say that Apple UK is involved in it.

26 The mere fact that we are seeking relief only against Inc should not preclude

1 us from suing Apple UK when it is party to the unlawful conduct and giving
2 effect to it.

3 MR JUSTICE ROTH: So, you accept that the relief there, in (c) to (h), can only be
4 against Apple Inc?

5 MR BREALEY: That's why I said there were two points on Ms Morony's witness
6 statement, which is, if one goes back to paragraph 69 -- you know, we don't
7 actually know for certain, but this is paragraph 69, paragraph 20, page 28. I
8 said there are two points I wanted to make, one about the participation of
9 Apple UK and, secondly, Apple Inc.

10 Where I have to draw your attention to it, because this is a full and frank disclosure:

11 "Apple UK is not responsible for implementing those policies."

12 Well, I question that:

13 "If a UK developer sought to develop an app, the Apple UK personnel would have no
14 involvement in the approval of the app in accordance with the app review
15 process."

16 We would probably accept that:

17 "Even if the app was intended to be sold only on the App Store's UK store front, thus
18 [this is what is said in correspondence] Apple UK have no involvement at all in
19 a decision to remove Fortnite from the UK App Store."

20 Well, that is probably correct:

21 "Or in the implementation of that decision. That decision was taken and
22 implemented by Apple Inc."

23 The reason I wanted to refer to that is that, clearly, at least on Apple's own
24 statement, Apple Inc has implemented the policy in the United Kingdom, and
25 that is relevant to gateway 9, gateway 9(b).

26 So, coming back to one of your questions: where are the acts done?

1 They're saying it's not Apple UK that implemented the removal of the app on the UK
2 store front; that was implemented by Apple Inc. We would say that is an act
3 committed within this jurisdiction.

4 So, that is essentially why the relief is against Apple Inc.

5 I do understand the point that you make to me, which is the relief is against Apple
6 Inc, but that's not to say that Apple UK has had nothing to do with it because,
7 in my submission, it is a question of fact whether it has actually implemented
8 Apple Inc's policies.

9 MR JUSTICE ROTH: I mean, of course, as you will appreciate, this goes to one of
10 the gateways, essentially, although it may go to the third consideration as
11 well. You can bring your case against Apple UK, you can serve them. You
12 don't need anyone's permission, and that's up to you. But, as you recognise
13 in your skeleton, when it comes to the necessary and proper party, I have to
14 consider whether you have a serious case against the anchor defendant.

15 MR BREALEY: Yes, and that's 3 and -- I fully accept that.

16 MR JUSTICE ROTH: Yes, and that's why I'm exploring this.

17 MR BREALEY: You're correct to probe me on it.

18 MR JUSTICE ROTH: Yes.

19 MR BREALEY: So, that is Apple. Do you want, sir, to have a break?

20 MR JUSTICE ROTH: I think that probably is a sensible moment for a break. So, if
21 we reconvene at noon, and that will give everyone time. We'll pick it up then,
22 and we'll turn, presumably, to Google at this point. Yes, well, till 12 o'clock.

23 **(11.53 am)**

24 **(A short break)**

25 **(12.06 am)**

26 MR JUSTICE ROTH: If you can hear me, we are having a technical problem.

1 MR BREALEY: I can hear you now.

2 MR JUSTICE ROTH: We have a technical issue, so just wait a moment, please.

3 Yes, there we are. I'm sorry, Mr Brealey, we've solved the problem.

4 MR BREALEY: Before we leave Apple, I just want to make a point concerning

5 Apple, but equally applicable to Google. It relates to the question that you

6 sent to us yesterday, and it relates to paragraph 86 of the claim in Apple. So,

7 I don't know if one has -- or the letter, the response.

8 MR JUSTICE ROTH: Yes, and the response to 86:

9 "Users in the UK who purchased directly from Epic transacted with Epic

10 Luxembourg."

11 MR BREALEY: Yes, so, in paragraph 86, on paragraph 21, it was averred that, on

12 13 August -- this is on page 21, Apple 1, pleadings.

13 MR JUSTICE ROTH: Yes.

14 MR BREALEY: This is the -- you maybe have seen that.

15 MR JUSTICE ROTH: Yes.

16 MR BREALEY: So, on 13 August, Epic made a change to the Fortnite iOS app

17 using the Fortnite SDU. The effect the of Fortnite SDU was to give players

18 the option of making in-app purchases directly from Epic, as well as through

19 Apple's own in-app purchase function.

20 You asked the question, sir, as to paragraph 8:

21 "If a user in the UK used the Fortnite SDU to purchase directly from Epic, which

22 claimant was the supplier?"

23 Users in the UK who purchased directly from Epic, on an iOS device, transacted with

24 the second claimant through its Swiss branch.

25 MR JUSTICE ROTH: Yes.

26 MR BREALEY: So, that is essentially the counterfactual. So, if -- and this is

1 essentially why the Luxembourg company is a claimant in Google. If Epic
2 were to succeed and get equality and the freedom it wishes, it is likely, as
3 happened before, that UK customers would be transacting with Epic
4 Luxembourg. That's where the money would, first of all, go. So, I just wanted
5 to make that point clear.

6 MR JUSTICE ROTH: Yes.

7 MR BREALEY: So, Google in the skeleton, that is page 7 of the skeleton,
8 paragraph 13, and the Google pleading, obviously, is at Google 1A.

9 The Google claim is brought by claimant 1 and 2, but not C3, so the participation of
10 the Luxembourg company is because of its potential revenue in the
11 counterfactual. But, at the moment, there's no complaint about the
12 Unreal Engine as there is with Apple because Apple went further in its
13 retaliation. That's why we have claimant 1 and 2 in Google.

14 Then, again, as I submitted earlier, it's often difficult to work out what is the corporate
15 structure of the defendants, but we set this out at paragraph 15.

16 MR JUSTICE ROTH: Yes.

17 MR BREALEY: Although you have probably seen it, I don't know if you want to just
18 take out Google 1(b) pleadings?

19 MR JUSTICE ROTH: I'm a bit surprised that it's said the US Google company is
20 incorporated in California, because I'd understood they were incorporated in
21 Delaware. That was certainly -- I've done a couple of cases against Google,
22 so I'm speaking from -- and I checked the judgment. I think one of the
23 judgments is exhibited and, indeed, it was passed to the Google defendant in
24 the usual way for checking. They're based in California, but I don't think
25 they're incorporated in California. I think Ms Morony says so in her witness
26 statement, but I'm not sure that's right.

1 MR BREALEY: I will again double check that, because I'm looking at Google 1
2 pleadings. Sir, if you want to go to Google 1 pleadings, to the Google Play
3 developer distribution agreement.

4 MR JUSTICE ROTH: Yes.

5 MR BREALEY: That's page 374, tab 4, Google 1 pleadings. This is the Google
6 developer distribution agreement.

7 MR JUSTICE ROTH: Yes. It says "a Delaware company".

8 MR BREALEY: Correct.

9 MR JUSTICE ROTH: Well, indeed, you've included in your authorities the judgment
10 at Unlockd, which also says it's at -- that's where my knowledge comes from,
11 that it's a Delaware company and Google, as I say, were --

12 MR BREALEY: Before you put it away, do you want to see the list of the defendants
13 in that agreement or --

14 MR JUSTICE ROTH: No. I see why it's said -- I've looked at that. It's a very
15 different structure from Apple.

16 MR BREALEY: Yes. Yes. So, we have -- I mean, in particular, paragraph 15.4,
17 Google Commerce Limited --

18 MR JUSTICE ROTH: Yes.

19 MR BREALEY: -- is referred to in the agreement. It's the counterparty. It's
20 responsible for distributing apps through the Google Play store in the UK and,
21 as I submitted earlier on, it has a registered UK establishment.

22 MR JUSTICE ROTH: Yes. Is the fact of having a registered UK establishment, how
23 does that relate to jurisdiction?

24 Obviously, you don't need permission to serve the Irish Google defendants anyway,
25 but if you were starting this case after 1 January and therefore Brussels
26 Regulation did not apply, would the fact that G4 has an address for service in

1 the UK mean you don't need permission? Is that the situation?

2 MR BREALEY: As I understand it, you do not need permission to serve them. That
3 doesn't mean to say that the court would have jurisdiction.

4 MR JUSTICE ROTH: I see, so the same jurisdiction requirements apply, but you
5 don't need permission.

6 So, it's not relevant then to this application because you don't need permission
7 anyway because of the Brussels Regulation.

8 MR BREALEY: Brussels Regulation. As a matter of English law, they can be served
9 at the UK place of establishment.

10 MR JUSTICE ROTH: Yes.

11 MR BREALEY: We sent a case yesterday, just belt and braces, which was the
12 Teekay Tankers case.

13 MR JUSTICE ROTH: Well, I think the problem is there was no one here yesterday,
14 and that's the problem that we're facing. We're trying to, I hope, catch up with
15 what came yesterday.

16 MR BREALEY: But, just for your note, it's the Teekay, spelt T-E-E-K-A-Y Tankers.
17 It's at tab 6 of the supplementary authority bundles and, again, for the note --

18 MR JUSTICE ROTH: When you say "supplementary authority bundles", just so we
19 don't get in a mess, I've got authority bundles 1 to 5; is there another one?

20 MR BREALEY: There is a supplemental one. The main reason was -- just to deal
21 with this point -- it's a non-point, but just for the sake of completeness --

22 MR JUSTICE ROTH: Yes.

23 MR BREALEY: -- we thought we'd give you, sir, Teekay Tankers. It's at tab 6, and
24 it's a judgment of Mr Justice Hamblen. The relevant paragraphs are 22 to 23
25 and 48. It just makes the point that if you have a UK establishment, as G4
26 does, it can be served here.

1 MR JUSTICE ROTH: Yes, I see.

2 MR BREALEY: It was just to give you --

3 MR JUSTICE ROTH: No, I know. Okay. Right.

4 MR BREALEY: So, we have, at the moment, the five defendants. We have the two

5 US companies, the two Irish and Google Payment Limited. So, the UK

6 incorporated -- the company incorporated in England, clearly that's not

7 an issue, at the moment anyway. The Irish companies are not, and we're

8 seeking permission to serve on the two US companies.

9 MR JUSTICE ROTH: Yes.

10 MR BREALEY: We would say that clearly Google Commerce Limited is a relevant

11 person for the purposes of the gateways --

12 MR JUSTICE ROTH: Yes --

13 MR BREALEY: -- (overspeaking) are serving.

14 MR JUSTICE ROTH: Yes, can we then look at the allegations because, if we look at

15 the claim form against Google and the Google defendants, they are -- I'm

16 just --

17 MR BREALEY: Paragraph 27 is where -- page 9.

18 MR JUSTICE ROTH: Yes, that's where you also say they're incorporated in

19 California. Yes. I'm just looking at Google's restrictive agreements because

20 there are --

21 MR BREALEY: So, that starts at paragraph 88, page 21.

22 MR JUSTICE ROTH: I'm just looking at -- yes, and there are different ones that

23 you've set out. There's the MADA restrictions.

24 MR BREALEY: Yes, so that -- essentially that is averred because that is how the

25 Google Play Store gets prominence. That's pre-installed.

26 MR JUSTICE ROTH: So, just a minute. So, the MADA is the -- well, it's the --

1 MR BREALEY: It's a requirement --

2 MR JUSTICE ROTH: The pre-installation, but it's also -- and that's one of the
3 practices that you are seeking to restrain, isn't it, or not? Yes. In the relief, at
4 page 39, in (e) of the prayer:

5 "To cease imposing the Google Play pre-install requirement or any condition
6 requiring it to give preferential treatment to Google Play store on Android
7 mobile devices."

8 MR BREALEY: Yes.

9 MR JUSTICE ROTH: That imposition condition is through the MADA.

10 MR BREALEY: Yes.

11 MR JUSTICE ROTH: The MADA, I want to see then which Google defendant is
12 responsible for the MADA as regards that claim, because the MADA's
13 an agreement made with OEM, as I understand it.

14 MR BREALEY: Yes.

15 MR JUSTICE ROTH: The Google defendant that makes that agreement is the
16 second defendant, isn't it?

17 MR BREALEY: I believe so. We get that from -- I think, if one goes to page 54 of
18 tab 2, clearly this was concerned with MADA as we pleaded. Paragraph 8,
19 recital 8, right at the bottom --

20 MR JUSTICE ROTH: Yes.

21 MR BREALEY: "Google converted from an incorporated entity, Google Inc, to a
22 limited liability company. In addition a new holding company ..."

23 MR JUSTICE ROTH: Yes.

24 MR BREALEY: That is a wholly owned subsidiary of Alphabet. So, you're absolutely
25 right that it would appear that it's the second defendant --

26 MR JUSTICE ROTH: Well, we get it more clearly, I think, at page 90, at recital 189.

1 MR BREALEY: Yes.

2 MR JUSTICE ROTH: Google is defined as what is here the second defendant.

3 MR BREALEY: Yes.

4 MR JUSTICE ROTH: So, my question is: as regards that claim -- and I'm focusing
5 only on that claim at the moment -- can any of the third, fourth or fifth
6 defendants be liable or subject to any injunction in that regard?

7 MR BREALEY: I think, to be fair, sir, no.

8 MR JUSTICE ROTH: I think that must be right.

9 MR BREALEY: Yes. But, as far as service out of the jurisdiction is concerned,
10 I understand that Alphabet is at the top with the policy and the second
11 defendant is more of the counterparty from the MADA.

12 MR JUSTICE ROTH: Hm-mm. Well, it may be that D1 and D2 -- and one doesn't
13 know who controls what, but I don't think D3 to 5 have anything to do with
14 that.

15 Then the second thing is the DDA, and that's paragraph 95:

16 "Restrictions on the use of the Play Store through the DDA."

17 That is: the third defendant in the UK is the Google entity that deals with the DDA -- it
18 is the counterparty to the DDA, as I understand it.

19 So, where you are dealing with restrictions that arise from the DDA, one can see that
20 may be a claim against the third defendant.

21 MR BREALEY: I think, to be fair in this respect, the injunction could bite on -- it
22 certainly bites on the Irish companies because they are counterparties to this
23 restricted agreement on our part.

24 MR JUSTICE ROTH: Well, are they all counterparties to the agreement? I thought
25 it's just the third defendant. It may bite -- and I accept, I should say, that if it
26 bites on the third defendant, then it may be that the second defendant may

1 also be liable because it may be controlling the third defendant. But I'm not --
2 what I'm looking at is, particularly, the fifth defendant.

3 MR BREALEY: Okay. If we go to the fifth defendant, can we go back to 374, which
4 is Google 1 pleadings, to the actual agreement, where we looked at
5 Delaware. So, this is --

6 MR JUSTICE ROTH: Yes. Sorry, I may not -- this is the Google Play Developer
7 Distribution Agreement?

8 MR BREALEY: Correct. One needs to read this by reference to their skeleton,
9 paragraph 15.

10 MR JUSTICE ROTH: Yes.

11 MR BREALEY: So, Alphabet, we say, is responsible for setting the global policies,
12 which include, we would imagine, the sort of agreements that are in play here.

13 Then you see Google, that's at 374, and under clause 2.1:

14 "The agreement forms a legally binding contract between the developer and Google
15 as defined."

16 And Google as defined on the first page is the second defendant, the third, and the
17 fourth.

18 MR JUSTICE ROTH: Yes.

19 MR BREALEY: So, all three, G2, G3 and G4, are counterparties to this agreement.

20 MR JUSTICE ROTH: Well, they're -- yes, it's slightly odd, isn't it, because it goes on
21 to say:

22 "You are contracting with the applicable Google entity based on where you have
23 selected to distribute your product as set forth here."

24 As I understand it, the "here" is a hyperlink to the document at tab 5.

25 MR BREALEY: That's primarily Google Commerce Limited.

26 MR JUSTICE ROTH: And that, for the UK, is Google Commerce Limited.

1 MR BREALEY: That, you see --

2 MR JUSTICE ROTH: The contracting party for people in -- as regards distribution in
3 the -- it's not about where you are, it's about where you distribute.

4 MR BREALEY: Yes.

5 MR JUSTICE ROTH: So, if you're distributing in the UK, wherever you're based,
6 you're entering into a DDA with Google Commerce Limited.

7 MR BREALEY: Well, it is extremely odd, but I don't think we can be criticised for
8 having belt and braces, because clause 2.1 clearly says:

9 "This is a legally binding contract between you, the developer, and Google in relation
10 to your use of Google Play to distribute products."

11 And Google, on the first page, as we said, is those three defendants, G2 --

12 MR JUSTICE ROTH: No, I see.

13 MR BREALEY: So, you're absolutely right to pick me up, to say you are contracting
14 with the applicable Google entity, and that, if one goes for page 389, would
15 appear to be Google Commerce Limited, which is the Irish company that has
16 an establishment in the UK.

17 MR JUSTICE ROTH: Yes.

18 MR BREALEY: I think for the purposes of --

19 MR JUSTICE ROTH: Yes, well, I mean, it may not -- that may not very much matter.

20 The real question in my mind is how D5, which is the UK based company,
21 comes into the restrictions on the use of the Google Play store.

22 MR BREALEY: Well, it is there. Again, I don't know whether you have been sent the
23 corporate structure of Google Payment Limited? But, basically, it is a fifth
24 defendant because it is responsible -- as we say at paragraph 15 -- for the
25 process of Google payment transactions in the UK. So, as we understand it,
26 if a consumer makes a payment in the UK, it will go through Google Payment

1 Limited.

2 MR JUSTICE ROTH: Hm-mm.

3 MR BREALEY: Where it goes after that, I would imagine it goes maybe to Ireland
4 and then to the US.

5 MR JUSTICE ROTH: Well, that probably doesn't matter.

6 MR BREALEY: But it is responsible for processing the payments. So, again --

7 MR JUSTICE ROTH: Yes, but I'm again looking at the relief that's sought.

8 MR BREALEY: Yes.

9 MR JUSTICE ROTH: They all result here, the DDA restrictions, from the conduct of
10 D3, maybe D4, for the reasons you've just -- sorry, D4, maybe D3 and maybe
11 D2. But, again, it's hard to see that, just because Google UK gets the
12 payments, any of this injunctive relief would apply to Google UK.

13 MR BREALEY: I totally understand that, sir, and essentially it makes what I was
14 submitting before -- you may not agree, but more persuasive, if I can
15 articulate that.

16 We know that G2, G3 and G4 ...

17 MR JUSTICE ROTH: Yes.

18 MR BREALEY: So, I understand the point, but we know that G2, G3, and G4, who
19 are parties to this Developer Distribution Agreement, there is a requirement to
20 use, essentially, Google Payment. We would submit, clearly one of those
21 companies will be in a position, if they're injuncted, to allow Epic the freedom
22 that it wants.

23 The reason at that Google Payment is there is because these companies, as a
24 group, are executing that restriction in the UK through Google Payment
25 Limited.

26 So, again, the point is that, if you have a company abroad who is implementing an

1 unlawful restrictive policy in this country through a subsidiary, although that
2 subsidiary is not the fountain of the restrictive conduct, but is executing the
3 restrictive conduct, and it is one economic unit, can that subsidiary be brought
4 into the mix? In my submission --

5 MR JUSTICE ROTH: But my problem is I don't at the moment see how it is
6 implementing the policy.

7 The fact that the policy prevents Epic, in its games, having the sale of digital content
8 going otherwise than through the Google API.

9 All that D5 does is, when a payment is made, it gets the money. But it's not
10 implementing the restriction. It's just receiving the payment.

11 MR BREALEY: I understand that --

12 MR JUSTICE ROTH: I mean, even if there was no restriction, suppose that the
13 consumer had a choice. You could pay through an Epic API or a Google API.
14 It would still be the fifth defendant that's getting the money if the payment's
15 made through the Google API.

16 MR BREALEY: Well, I simply come back to the main point, which is: in my
17 submission, on the facts, the fifth defendant, Google Payment Limited, is the
18 process by which the other defendants execute the unlawful restriction, which
19 is the payment restriction.

20 MR JUSTICE ROTH: Yes.

21 MR BREALEY: Now --

22 MR JUSTICE ROTH: Okay. Now --

23 MR BREALEY: It may well be that you cannot claim relief against the fifth defendant
24 because it is not the fountain; it's not the decision-maker. But is that
25 necessarily fatal to ensuring the 5th defendant is before the court?

26 MR JUSTICE ROTH: Well, you wouldn't normally bring before the court a defendant

1 against whom you can't claim relief, on the relief you're claiming.

2 MR BREALEY: Well, I take a step back from that submission. I understand the
3 point, but I take a step back because a lot of these cases, these competition
4 cases, have large foreign parents.

5 MR JUSTICE ROTH: Yes.

6 MR BREALEY: Very often the foreign parents are acting through subsidiaries.
7 Although the subsidiaries have a presence here and are carrying out the will
8 of the parent, it may be futile to claim relief against the anchor defendant, the
9 subsidiary, because the subsidiary, all the subsidiary has done is sold the
10 goods subject, for example, to the cartel.

11 So, the fact that you cannot seek injunctive relief against a subsidiary because that
12 subsidiary has not come up with the decision, does that mean that the
13 subsidiary should not be a defendant in this country?

14 MR JUSTICE ROTH: Well, not if -- it may well be a proper defendant if you're
15 claiming damages. I can see that. But you're not, and you made a great point
16 of this.

17 MR BREALEY: So, the question is --

18 MR JUSTICE ROTH: That's the distinction about this case as opposed to most other
19 competition cases, private actions, where even if there's a claim for injunction,
20 there's usually a claim for damages as well.

21 MR BREALEY: I understand.

22 MR JUSTICE ROTH: So, that's the -- I mean, it's a little less significant in the
23 Google case because of your claims against D3 and 4, for which you don't
24 need permission, so I see that. So, I think it's less important as a point, if I put
25 it that way, than in the Apple case.

26 MR BREALEY: No, I understand.

1 MR JUSTICE ROTH: But I think it's not wholly unimportant.
2 The last one is the technical restrictions, which is based on a configuration of the
3 way Google configures the Android OS. Well, that, it seems to me -- is that a
4 claim against -- from what you say about Google --
5 MR BREALEY: That will be the US companies.
6 MR JUSTICE ROTH: Yes. It could only be the US companies.
7 MR BREALEY: Yes.
8 MR JUSTICE ROTH: Right. Okay. Well, that's very helpful.
9 Then you have the action taken by Google and, again, I haven't seen that
10 correspondence either, from Google. I just rely on what Ms Morony says in
11 her witness statement.
12 MR BREALEY: Yes. Again, I will see over lunch whether we can provide them.
13 MR JUSTICE ROTH: Yes.
14 MR BREALEY: Can I just make one -- I understand that you are concerned, sir, and
15 quite rightly, with the defendant. It may well be there's a difference between
16 Google Payment Limited, G5, and Apple A2, in the UK.
17 MR JUSTICE ROTH: Yes.
18 MR BREALEY: And just to put something in the mix here, and it goes to the
19 Tribunal's jurisdiction, which may be why you were asking me about relief
20 earlier on, which is that clearly this is a claim in the Tribunal under the Act.
21 MR JUSTICE ROTH: Yes.
22 MR BREALEY: Normally you would claim damages. The Tribunal now has
23 jurisdiction to claim injunctive relief.
24 MR JUSTICE ROTH: Yes.
25 MR BREALEY: And the question is whether the Tribunal has jurisdiction to grant a
26 declaration.

1 MR JUSTICE ROTH: Yes.

2 MR BREALEY: And that hasn't necessarily been decided but what I would submit is
3 that, under the Tribunal's rules, it can grant injunctive relief on any terms that
4 it sees fit and when the court grants an injunction very often it would make
5 a decision, a declaration that something is unlawful or wrong, and it is in my
6 view seriously arguable that, if the Tribunal were to injunct, for example,
7 Google Commerce Limited, it could do so on terms by also having a
8 declaration against Google Commerce Limited and a declaration against the
9 5th defendant.

10 MR JUSTICE ROTH: Well, before one gets to the rules, one has to go to the statute,
11 because it's a statutory tribunal and its jurisdiction is by statute.

12 MR BREALEY: Yes.

13 MR JUSTICE ROTH: And I do struggle to understand how under section 47A this
14 tribunal can make a declaration. Certainly it's been the general view, as
15 you know, that the Tribunal can't and --

16 MR BREALEY: Yes, and what I would say to that --

17 MR JUSTICE ROTH: -- indeed many have commented that that's unfortunate and
18 indeed there's suggestion the statute shall be amended. But at the moment --

19 MR BREALEY: What I would say to that, sir, is that, if an application is brought to
20 the Tribunal simply for a declaration, then under the statute the tribunal would
21 have to say no. But if one is coming to the Tribunal for injunctive relief, as
22 part of that relief the court can declare something to be restrictive and on the
23 basis of that injunct the wrongdoer. So it would be -- it's mixed up with the
24 injunctive relief --

25 MR JUSTICE ROTH: I mean, on that basis you wouldn't normally grant a
26 declaration. The reasoning in the judgment --

1 MR BREALEY: Correct.

2 MR JUSTICE ROTH: -- would show but the court would not grant a declaration
3 which is a distinct remedy. It's just the same as a claim for damages. You'd
4 have to find that there was a breach of the relevant prohibition to award
5 damages and it would be clear from the judgment that the court has found a
6 breach. But you wouldn't say therefore we grant a declaration and/or
7 damages in whatever sum it is.

8 MR BREALEY: And that's why I'm raising it with you, because I think you have
9 raised it with me and that's why I'm raising --

10 MR JUSTICE ROTH: Hm-mm.

11 MR BREALEY: But the only way we would get the declaration before the Tribunal is
12 if the Tribunal accepted the point which is that, if one is granting an injunction
13 and the ability to grant an injunction can be on any terms, inherent in that you
14 can declare that something is restrictive contrary to the Act. That would be
15 the only basis --

16 MR JUSTICE ROTH: Yes. So you're not suggesting that it can be any wider than
17 any injunction.

18 MR BREALEY: No. So I am declaring that it is contrary to section 2 and on that
19 basis an injunction will be granted to stop you from doing it or section 18 --

20 MR JUSTICE ROTH: But the actual order that would be drawn up normally would
21 just be the injunction.

22 MR BREALEY: The actual order would the penal consequence, certainly.

23 MR JUSTICE ROTH: Well, not just penal consequences. I mean, I'm not sure, if
24 you put it that way, what the purpose of your seeking that relief is anyway as
25 distinct from the injunctive relief if it's not really freestanding in the way you've
26 described.

1 MR BREALEY: Well, it's simply --

2 MR JUSTICE ROTH: What's the point of it?

3 MR BREALEY: It simply catches the point that I was trying to make, and your
4 answer to me is it's a question of damages, but I'm simply trying to answer a
5 point, which is that a global company can act through subsidiaries in this
6 country and, if one is talking about injunctive relief, one has to go to the
7 decision-maker, but that's not to say that the decision-maker has not acted
8 through its subsidiaries in this country and therefore it is quite an important
9 point when it comes to jurisdiction that, if a global company is abusing its
10 dominant position through its subsidiary, but the focus is always on who made
11 the decision, the anchor defendants very often are just going to fall away and
12 you will be left with having to serve on the global company, because the
13 riposte will be, well, there is no anchor defendant here because you're not
14 seeking any and you can't seek any injunctive relief against the anchor
15 defendant because the anchor defendant is not responsible for the policy --

16 MR JUSTICE ROTH: But, if I may interrupt you, you can seek relief if the anchor
17 defendant is implementing it, then you can, because it's doing something that
18 can be stopped. But if it's just a subsidiary unconnected with the
19 implementation of the policy in a way that it could stop implementing the
20 policy under court order, because it's not actually doing anything, then that's
21 not a basis of jurisdiction. You'll get the basis of jurisdiction then potentially
22 under another basis.

23 MR BREALEY: But you could order the 5th defendant to stop --

24 MR JUSTICE ROTH: Well, what? You're not seeking any such order, but what
25 could you stop it doing?

26 MR BREALEY: Well, processing payments on behalf of Google until such time as

1 Google was to alter its policy and allow --

2 MR JUSTICE ROTH: Well, that's just punishing a subsidiary for a misdeed of a
3 parent. You can't do that. I mean, there's nothing wrong with Google allowing
4 people to use a Google API. You're not saying Google should be prohibited
5 from having a Google API, you just want to have one competing with it and
6 perhaps offering better terms. But you're not saying Google must be stopped
7 from accepting payments.

8 MR BREALEY: I understand the point and all I'm doing is raising, I think, a legitimate
9 point which is at what point do you say an anchor defendant cannot be an
10 anchor defendant --

11 MR JUSTICE ROTH: Yes.

12 MR BREALEY: -- and what does implementing mean and --

13 MR JUSTICE ROTH: Well, I mean, I think you've got a good example in Google
14 because the third defendant, or the fourth defendant, may be the ones that
15 are executing the DDA but no doubt the DDA is drafted in America by the
16 parent and clearly you can injunct the third and fourth defendants and, if they
17 were in England, you could injunct them here, notwithstanding they say we're
18 just carrying out orders from the US. So that is the situation where you can.

19 Anyway, I think we've covered that point. You've declared me on declaration, I see
20 what you say and perhaps we should move on.

21 MR BREALEY: Yes. So I think that takes us then to the jurisdictional rules.

22 MR JUSTICE ROTH: Yes.

23 MR BREALEY: And before lunch maybe we can just --

24 MR JUSTICE ROTH: Yes.

25 MR BREALEY: -- deal with the Brussels regulation.

26 MR JUSTICE ROTH: Well, the Brussels regulation, as you point out, applies to this

1 case, both cases, because they were started before 31 December and that's
2 clear. It follows also that the jurisdiction clauses, even if on their true
3 construction would cover this, they don't block --

4 MR BREALEY: Service.

5 MR JUSTICE ROTH: -- your case for service on the UK or Irish defendants because
6 the jurisdiction clause is not for the court of another member state, it's for a
7 court of a non-member state, I see that, and so --

8 MR BREALEY: Shall I move on to paragraph 27 then of --

9 MR JUSTICE ROTH: Well, before you do that -- sorry, paragraph -- yes.

10 Paragraph 27. Yes.

11 MR BREALEY: And you will, sir, from Unlocked and many other cases be aware --

12 I don't need to take you to DSG. We set out the three governing principles.

13 MR JUSTICE ROTH: Yes.

14 MR BREALEY: And I know that you're fully aware of it.

15 Going on to 28, I think, subject to the points that you will decide on relief and
16 defendants, there is on the substantive issues a serious issue to be tried.

17 MR JUSTICE ROTH: Well, I do have a question on that, because you're claiming
18 not only under UK competition law but also under EU competition law and
19 you're not claiming damages for past infringements, you're claiming
20 injunctions going forward. Now, on what basis can an English court now, post
21 1 January, enforce EU competition law and particularly on what basis can the
22 Tribunal enforce EU competition law given the amendment to section 47A?

23 MR BREALEY: Well --

24 MR JUSTICE ROTH: It may not hugely matter, I don't know if it does, because
25 you've got of course the Competition Act and you may say, fairly, well, it
26 amounts to the same thing. But I have to formally address this and you have

1 claimed in terms under 101 and 102 of the European Treaty and at the
2 moment I don't see how there is a serious question or an arguable case that
3 you can get relief for breach of article 101 or 102 as we are today going
4 forward for --

5 MR BREALEY: And I'm content on that basis that we don't need it. We'll proceed on
6 the basis of the Competition Act.

7 MR JUSTICE ROTH: Yes.

8 MR BREALEY: You do have accrued rights to a certain extent but it may well be --

9 MR JUSTICE ROTH: Well, if one looks at the transitional provisions, it's for past
10 infringement.

11 MR BREALEY: Certainly a past infringement, but it's an ongoing --

12 MR JUSTICE ROTH: Yes. Well, I say, if you claimed damages in respect of up to
13 31 December, that would apply but not going forward.

14 MR BREALEY: Unless the damage was continuing.

15 MR JUSTICE ROTH: Well, anyway, you're not claiming damages so --

16 MR BREALEY: So shall I --

17 MR JUSTICE ROTH: So I think let's go to -- but you accept that you're not seeking
18 to proceed under article 101 and 102 in the circumstances.

19 MR BREALEY: No, on the basis that --

20 MR JUSTICE ROTH: The basis that no longer enforceable or effective in the UK.
21 Yes.

22 So we go on to the gateways.

23 I know it's just before 1 o'clock but would it be sensible -- is that a convenient
24 moment to break and so come back at five to two?

25 MR BREALEY: Of course. Of course.

26 MR JUSTICE ROTH: Thank you.

1 (12.56 pm)

2 (A short break)

3 (1.55 pm)

4 MR JUSTICE ROTH: Yes, Mr Brealey.

5 MR BREALEY: We were just about to deal with the jurisdictional gateways.

6 MR JUSTICE ROTH: Yes.

7 MR BREALEY: So, I'm on paragraph 29 of the skeleton.

8 MR JUSTICE ROTH: Yes.

9 MR BREALEY: You clearly know the terms of gateway 9, damage was sustained or
10 will be sustained within the jurisdiction. Damage which has been or will be
11 sustained as a result of an act committed or likely to be committed within the
12 jurisdiction.

13 So, those are the two limbs of gateway 9.

14 What I'd like to do, is take you to a couple of the witness statements in the United
15 States District Court, because I think they give a flavour of what Apple and, to
16 a certain extent, Google will have done.

17 We will send the Tribunal the letters about the termination of the agreements. But if
18 we go to Apple 3A exhibits, we'll just have a look at two of the statements
19 there.

20 The first one -- so Apple 3A exhibits, tab 3.

21 MR JUSTICE ROTH: Yes.

22 MR BREALEY: This is a statement by a Mr Andrew Grant, as we can see at
23 page 38, who is the technical director of Epic Games Inc. When reference is
24 made to "Apple", it is only referring to Apple Inc.

25 As I say, I just want to refer to several paragraphs, because I think it will give the
26 Tribunal a flavour as to the conduct about which the complaint is made.

1 So, if one goes to page 43, I refer the Tribunal to paragraphs 24 to 27.

2 MR JUSTICE ROTH: Do you want me to read them to myself?

3 MR BREALEY: Yes, rather than me. Yes, please.

4 MR JUSTICE ROTH: Yes.

5 (Pause).

6 Yes.

7 MR BREALEY: So, if I just recap, so 24 is about Epic's in-app purchase. Then you
8 get the response to that and, at 25, you see that Apple just simply removes
9 Fortnite from the App Store.

10 MR JUSTICE ROTH: Yes.

11 MR BREALEY: Then, 26, at the bottom, is a violation of the App Store review
12 guidelines, so that shows a link between the guidelines and that is the reason
13 that the app has been removed from the App Store. That's the top of
14 page 44. So:
15 "You will be in violation of the guidelines and the app has been removed."

16 MR JUSTICE ROTH: Yes.

17 MR BREALEY: Then the last few lines of paragraph 27, on page 44, so this is line
18 10:
19 "Although the notice was posted to the Epic developer account that submitted
20 Fortnite, the notice stated that upon termination of Epic's account Epic will
21 lose access to all Apple software."

22 And that is what gives a particular concern to the Unreal Engine.

23 Just going on, at paragraph 36, on page 46, that you just see -- I think you referred
24 to this earlier on, that other games have been essentially blocked.

25 MR JUSTICE ROTH: Yes.

26 MR BREALEY: Battle Breakers. I think we should also bear in mind that 37 -- this is

1 the extent of the retaliation -- whereas there were no restrictions, essentially,
2 on the Apple Macs, as we know, Apple's action -- this the first line of 37:

3 "... Epic from continuing to offer Fortnite and other games for Mac OS."

4 So, the damage extends not only to the mobile devices, but to the Mac.

5 But then if I could just, on the Unreal Engine, go to Mr Sweeney's statement, which is
6 at tab 7. At page 60, paragraph 28, we won't go through it all, but it's
7 essentially the rest of this statement, that in addition to terminating Epic's
8 developer account for at least a year, and removing Fortnite and Epic's other
9 apps registered under that account from the App Store, Apple is also
10 retaliating against a separate part of Epic's business, Unreal Engine. So, it
11 was quite a wide retaliation against the second part.

12 At 29, he sets out the Unreal Engine.

13 MR JUSTICE ROTH: Yes.

14 MR BREALEY: It goes on. At paragraph 35, at page 62, there is a heading of:

15 "Apple's further retaliation."

16 MR JUSTICE ROTH: Hm-mm.

17 MR BREALEY: We see at paragraph 37, Apple's August 14th notice was not even
18 limited to Epic iOS apps. It's said:

19 "Upon termination from the Apple developer programme, Epic will also lose access
20 to the following programmes, technologies, and capabilities ..."

21 And gave an extensive list. That list mentioned not just tools and capabilities relating
22 to apps for the App Store, but expressly included matters relating to the
23 Unreal Engine, including engineering efforts to improve hardware and
24 software, performance of Unreal Engine on Mac and iOS hardware.

25 So that --

26 MR JUSTICE ROTH: Yes.

1 MR BREALEY: Then, at 39, he basically -- and this is relevant to damage to Epic in
2 the UK and to Epic business in the UK. At paragraph 39, he says:
3 "This would be an existential threat to the Unreal Engine."
4 MR JUSTICE ROTH: Yes.
5 MR BREALEY: He goes on to expand on why that is the case.
6 MR JUSTICE ROTH: Yes.
7 MR BREALEY: So, that just gives a flavour of how the termination occurred, but we
8 will send you the letters.
9 MR JUSTICE ROTH: I mean, it may be they weren't, from these letters, but notices
10 that were posted, and not direct letters as such. That's what he seems to be
11 saying.
12 MR BREALEY: I've been told that there are letters, but it may be they're letters
13 which actually are the notices, but --
14 MR JUSTICE ROTH: I see, yes.
15 MR BREALEY: On gateway 9, I just want to refer to two cases before we go back to
16 the skeleton.
17 MR JUSTICE ROTH: Hm-mm.
18 MR BREALEY: The first is that we refer to at paragraph 31, which is Brownlie II.
19 MR JUSTICE ROTH: Yes.
20 MR BREALEY: That is at authorities bundle 4, tab 17, and there's just a couple of
21 paragraphs that I think are relevant. We refer to them.
22 MR JUSTICE ROTH: Yes.
23 MR BREALEY: So, it's tab 17, page 688. Page 688, and the relevant paragraphs
24 are paragraphs 51 to 54. If I could invite you, sir, just to read those, and then
25 I'll just emphasise, if I may, a couple of important things.
26 MR JUSTICE ROTH: Yes. This is on the point that it's not to be construed by

1 reference to the Brussels Regulation?

2 MR BREALEY: Yes. Essentially, we had Brownlie I. It went up to the Supreme
3 Court, 3-2, there was obiter to say that the gateway under 9 is wider than the
4 Brussels Regulation. Then, in the Court of Appeal, by a majority 2-1,
5 essentially, the obiter was confirmed.

6 MR JUSTICE ROTH: Yes, of course, it's on appeal now, as you know. I think it was
7 argued last week, in fact.

8 MR BREALEY: Was it? I didn't know it was last week.

9 MR JUSTICE ROTH: Yes. So, we don't know what the final result will be.

10 MR BREALEY: I obviously rely on paragraphs 51 to 54, because I think it gives a
11 common sense approach to the damage. I actually don't, in my submission,
12 think it matters whether it's under the Brussels Reg or gateway 9 to identify
13 the damage to Epic in the UK. But, nevertheless, if I could ask you, sir, to
14 read 51 to 54, then I'll emphasise a few points.

15 (Pause).

16 MR JUSTICE ROTH: Yes.

17 MR BREALEY: So, there's just -- I mean, in my submission it all seems quite
18 sensible. I emphasise the last half of paragraph 51, which I think you could
19 transpose to this case by analogy, where he says:

20 "I see nothing frightening in the existence of parallel jurisdiction in the courts of
21 different countries in respect of tortious liabilities. It is simply a corollary of the
22 global economy in and many aspects of life and competition law.

23 "Tested on the facts of this case, nothing remarkable in [we could say] an American
24 arm of a multinational organisation which looks for customers from all over the
25 world being a potential subject of litigation in a country other than that of its
26 incorporation."

1 The second point I would like to emphasise is really at paragraph 54, which is there
2 is undoubtedly, in my submission, an approach which is to adopt the word
3 "damage" in a sensible, common sense manner. That is what is said in the
4 first few lines of paragraph 54. Has damage been suffered in England?

5 We'll come on to that in a moment.

6 MR JUSTICE ROTH: Yes, I mean, they're talking about damage suffered by the
7 claimant, I assume?

8 MR BREALEY: Yes.

9 MR JUSTICE ROTH: Not by a third party?

10 MR BREALEY: No, by the claimant. But, clearly, in competition terms -- I mean, if
11 I was to bring a case on competition law and simply refer to competition and
12 not refer to the consumer at all, I would probably be criticised, and clearly
13 competition is there to protect consumers and where there are higher prices
14 or lack of choice, et cetera, as you know, sir.

15 So, the last few lines of 54:

16 "There is nothing particularly difficult in deciding in a purely financial case whether
17 such significant damage has been sustained in this country, whether
18 exclusively or in addition to damage suffered elsewhere."

19 MR JUSTICE ROTH: Yes. So, it must be significant damage, but it doesn't matter if
20 there's also significant damage somewhere else.

21 MR BREALEY: Correct, and that has to be the case if you are dealing with a
22 multinational --

23 MR JUSTICE ROTH: No, I see that.

24 MR BREALEY: Yes, and if we could then just go -- I said there were two cases. It's
25 the second case -- we referred to this at paragraph 34 of our skeleton. It is
26 the Apple Retail case, which is at -- I think we can put this one away. It's at

1 volume 3, tab 13. It's just one paragraph, but it is quite important.

2 This is the Apple Retail v Qualcomm case, Mr Justice Morgan.

3 MR JUSTICE ROTH: Yes.

4 MR BREALEY: It's page 514, and this is paragraph 97. Paragraph 97, page 514.

5 MR JUSTICE ROTH: Yes.

6 MR BREALEY: Again, I won't read it, but I'll just ask my Lord to.

7 (Pause).

8 I know this is about an overcharge, and there's a reference to the first claimant.

9 MR JUSTICE ROTH: What's the product?

10 MR BREALEY: This was -- one can see from the opening. It's essentially the Apple

11 Group of companies involved in the design, manufacturer, and marketing of

12 mobile communications. Defendants --

13 MR JUSTICE ROTH: Yes, I was just wondering: what was the claim about?

14 I haven't read this judgment, so I don't know. Can you help me?

15 MR BREALEY: Yes, we see that from paragraph 11. I think, essentially, it is the

16 licensing of an intellectual property. This is one of the patent cases,

17 essentially.

18 MR JUSTICE ROTH: Yes.

19 MR BREALEY: As you know, there have been many disputes between the people

20 who are --

21 MR JUSTICE ROTH: Yes.

22 MR BREALEY: -- manufacturing mobile phones and the defendant companies, who

23 own the technology that make these mobile phones work, the hardware. This

24 was one such case where --

25 MR JUSTICE ROTH: Yes, they're seeking --

26 MR BREALEY: You see this from 3 and 4. Essentially, it's like a FRAND case

1 where --

2 MR JUSTICE ROTH: So, for the first defendants, they seek declarations of
3 invalidity, I think, and revocation. Yes, they seek revocation and a declaration
4 that they're not SEPs.

5 MR BREALEY: Essentially, if you're being --

6 MR JUSTICE ROTH: Then, the second defendant rights declared to be exhausted.

7 MR BREALEY: So --

8 MR JUSTICE ROTH: Then there's a Competition Act claim, and they claim
9 damages. At 16:
10 "Abuses ... need permission ... abused its dominant position ..."

11 MR BREALEY: Mobile phone companies need access to certain technology.

12 MR JUSTICE ROTH: Yes.

13 MR BREALEY: As you will have seen, there are several cases concerning FRAND.
14 If companies, like the defendants in this case, Qualcomm, are charging too
15 much for the technology, then the mobile phone companies say that their
16 handsets are too expensive.

17 MR JUSTICE ROTH: Yes. But is that the -- I'm just trying to see what was the
18 abuse being alleged against the second defendant. Where do we find that?

19 MR BREALEY: Well, I think if one looks at, for example -- this is very much an
20 intellectual property case.

21 MR JUSTICE ROTH: Yes, but there's a Competition Act claim as well.

22 MR BREALEY: Yes.

23 MR JUSTICE ROTH: Let me just have a look. The referendar has said it would be
24 helpful to look at 92, paragraph 92.

25 MR BREALEY: The way --

26 MR JUSTICE ROTH: The case is alleged over charge by the second defendant.

1 MR BREALEY: So, it is always alleged in these FRAND patent cases that the
2 patentee either doesn't properly own the patents and/or it is dominant in the
3 supply of that patent, because it is an essential technology.
4 The vice is always either you're not entitled to charge a royalty, or, if you are, it is
5 an unreasonable royalty and I'm being overcharged.
6 MR JUSTICE ROTH: Yes, and the people who were claiming under the tort gateway
7 were the first and second -- only the first and second claimants, not the 6th
8 claimant, Apple Inc, because it was accepted they don't suffer loss in the
9 jurisdiction, as I understand 96. That's right.
10 I just want to see, the first claimant is an English company and the second claimant
11 is an Irish company; yes?
12 MR BREALEY: And you get that from the paragraph that I was alluding to, which is
13 paragraph 97.
14 MR JUSTICE ROTH: Yes, and the others are not -- there's no allegation that the
15 others suffered damage in the UK, although they are the --
16 MR BREALEY: Claimants.
17 MR JUSTICE ROTH: -- parent company, they are claimants, and they're all in the
18 same group.
19 MR BREALEY: Yes.
20 MR JUSTICE ROTH: So, they're not saying that the parent suffered damage in the
21 UK.
22 MR BREALEY: But the important point, from my perspective, is paragraph 97,
23 bringing it back to -- so the first claimant is an English claimant --
24 MR JUSTICE ROTH: Company, which was paying the money.
25 MR BREALEY: Paying the money. If it's an over charge, it can state it suffered loss
26 here. If the first claimant claims there are lost sales in this jurisdiction, then it

1 can say it has suffered loss in this jurisdiction. So, the third claimant, in the
2 Apple case for example, can say it's certainly lost sales -- its business is in
3 Unreal Engine. It has a work force of 110 --

4 MR JUSTICE ROTH: No, I can see that the third claimant is an English company
5 dealing with Unreal Engine, even though it doesn't make any sales and
6 doesn't hold the licence, or doesn't supply the licences.

7 MR BREALEY: Its business.

8 MR JUSTICE ROTH: But it has a business in Unreal Engine. If Unreal Engine
9 suffers, in a common sense way, it suffers damage in the UK. So, I'm with on
10 that.

11 So, on the Unreal Engine point, I can see that is locked in the UK.

12 MR BREALEY: So, the position of the second claimant -- so that's the Irish claimant.

13 MR JUSTICE ROTH: The second claimant, just to be clear, are you talking about
14 Mr --

15 MR BREALEY: -- (overspeaking) I am. So, my paragraph 97, I've an English first
16 claimant, I've an Irish --

17 MR JUSTICE ROTH: Second claimant.

18 MR BREALEY: I might confuse them.

19 MR JUSTICE ROTH: The second claimant pays an overcharge in the Republic of
20 Ireland.

21 MR BREALEY: This is why I think this is important for Epic Inc because it may wish
22 to say that it passes on the overcharge -- that's not my case -- but loses sales
23 in the market in this jurisdiction.

24 In my respectful submission, any common sense approach to the word "damage"
25 must include losing one's customer base in this country.

26 MR JUSTICE ROTH: Well, just thinking about that --

1 MR BREALEY: So, if I --

2 MR JUSTICE ROTH: I mean, suppose -- just a minute.

3 MR BREALEY: Sorry.

4 MR JUSTICE ROTH: I want to write that down. Losing --

5 MR BREALEY: One's customer base in this country. The consumers, the UK
6 consumers, who buy the product, that must, in my respectful submission,
7 mean damage.

8 MR JUSTICE ROTH: So, if -- to take a hypothetical example -- you've a German
9 seller of -- keep it simple -- goods that they sell online, through their website,
10 and something's done by another German company to them, which restricts --
11 which may be anti-competitive, and restricts their ability to sell online, and
12 therefore they don't succeed in selling as much, or maybe at all, to customers
13 in the UK, you say that German online seller suffers a loss in the UK?

14 MR BREALEY: It certainly suffers damage in the UK. It has lost -- its whole
15 customer base has been wiped out. The fact that the money might end up in
16 Berlin --

17 MR JUSTICE ROTH: Well, the sales are made from Germany, it's unable to sell
18 from Germany to the UK. It's not just about where the money goes. It's just
19 unable -- as a German company operating in Germany, it's unable to sell to
20 the UK. You say that means it sustains loss, what, only as regards UK
21 customers? Does it suffer loss in Germany as well, or is it only in the UK, as
22 regards its UK customers?

23 MR BREALEY: It probably suffers a loss of profit in Germany, but it suffers
24 damage -- it suffers damage -- in the UK.

25 So, another example would be if a German company sets up a distribution system in
26 the UK, and another German company wipes out that distribution network,

1 does it matter whether the distribution network is a series of agents or
2 independent distributors?

3 A big company has wiped out that distribution network in the UK.

4 In my submission, adopting what the Court of Appeal said in *Brownlie II*, a common
5 sense approach would be you've suffered damage in this country, you may
6 have suffered damage elsewhere, because you may -- the profits may have
7 gone, as I say, to Berlin, but to say that you haven't suffered any damage in
8 England, when your custom base has been wiped out, I think would be to
9 adopt a too restrictive approach.

10 Also, I think, again, the flip side is we're not talking about the sale of goods in the
11 true sense; I'm talking about sale of goods in the competition law sense. I
12 think this is an important aspect, because it's not just about the sale of goods
13 and where profit goes; it's about competition in this country and whether
14 consumers are paying higher prices than they otherwise should be, and
15 whether they're getting the choice that they're entitled to.

16 MR JUSTICE ROTH: Well, that's damage to the consumers.

17 MR BREALEY: It is, but when one is looking at damage in a competition context,
18 I don't think you can just say, well, I'm going to leave that to some sort of class
19 action for the consumers to bring a case. The developer, Epic, is entitled to
20 say: my customer in the UK is paying too high a price because of the
21 defendant's contact. My customer in the UK is not getting the choice it
22 deserves.

23 MR JUSTICE ROTH: But then he's becoming a sort of private attorney general.

24 MR BREALEY: It's not, because, clearly, I accept that the developer is not acting on
25 behalf of the consumer. He's not an attorney general; he's acting in his own
26 interest.

1 MR JUSTICE ROTH: I mean, Epic is acting in its own interest, but that means --
2 maybe you're right, I don't know -- that one construes the words "damage"
3 sustained within the jurisdiction in a competition case saying it can be damage
4 to consumers, even though it's not damage to the claimant.

5 MR BREALEY: No, I haven't gone that far at all. I've primarily said that it is damage
6 to the claimant because for several years it has been growing a customer
7 base in this country.

8 MR JUSTICE ROTH: Yes. That's the point you made. I have that point. I thought
9 you were making a separate point saying: well, if there's damage to
10 consumers in the UK, then that -- which I can see there would be. They
11 would be suffering the damage because they're English customers paying
12 more or not getting Fortnite, so they are suffering and they could claim, or the
13 competition authority could bring a case -- even if the claimant isn't suffering,
14 itself, damage in the UK, that will satisfy gateway 9A.

15 MR BREALEY: I haven't gone that far, because then there would be no cause of
16 action. But all I was -- I was trying to make an ancillary point here. My first
17 point is --

18 MR JUSTICE ROTH: Just a second. I think something's happened with the feed.

19 MR BREALEY: Yes, I think it keeps on going fuzzy.

20 MR JUSTICE ROTH: No, it's --

21 MR BREALEY: Ah.

22 MR JUSTICE ROTH: Carry on, and we'll see what happens.

23 MR BREALEY: So, my primary point is that a foreign company who sets up a
24 business with office in this country, with customers in this country, and with all
25 sorts of personnel in this country, workers --

26 MR JUSTICE ROTH: Well, the workers are not of Unreal Engine, are they? They're

1 not dealing with the rest of it.

2 MR BREALEY: No.

3 MR JUSTICE ROTH: Aren't they?

4 MR BREALEY: If one goes back to the Morony witness statement.

5 MR JUSTICE ROTH: Then there's some new subsidiaries. It's not clear what
6 they're doing, but --

7 MR BREALEY: But paragraph 29, which is at page 10.

8 MR JUSTICE ROTH: Yes.

9 MR BREALEY: Epic's headquarters at North -- these include offices in London,
10 Manchester, Leamington Spa, Newcastle, Guildford, Edinburgh. Epic has
11 only 300 employees across its offices in the UK, of whom 110 are currently
12 employed by Epic Games UK.

13 So, it does have a business. Overseas companies can have a business, whether it
14 is their offices, like --

15 MR JUSTICE ROTH: It's not clear what they do, the other 200 and -- 190-odd.

16 I think they work for -- they work for SuperAwesome Trading, as I understand that; is
17 that right?

18 They say, historically, the majority were employed by Epic UK as a result of the
19 acquisitions. Therefore, now, the majority are not employed by Epic UK, so
20 they work for SuperAwesome Trading or Epic Games Animation.

21 MR BREALEY: Yes, and if one goes to page 15, paragraph 40, I understand from
22 Epic that its employees at its office in England and Scotland are
23 predominantly concerned with the development of Unreal Engine and other
24 technology for developers through employees of companies recently acquired
25 by the Epic group.

26 MR JUSTICE ROTH: Yes.

1 MR BREALEY: The main focus of Epic UK.

2 MR JUSTICE ROTH: That's what I thought.

3 MR BREALEY: My simple point is: it's obviously a large company. It sets up a
4 business in the UK. It clearly is an America company. Money would go to
5 America, probably; it may go to the Luxembourg company. But the structure
6 of a substantial business is in the UK, and does that fit within one line of
7 gateway 9, which was:

8 "Damage was sustained or will be sustained within the jurisdiction."

9 MR JUSTICE ROTH: Well, I mean, it does as regards Unreal Engine, because that's
10 what they're doing.

11 But the other things that you've outlined over the page, in paragraph 32, where you
12 say damage will be suffered by Epic, and, again, one has to ask, well: which
13 Epic company are we talking about?

14 MR BREALEY: Well, let's take -- I think, which is concerning you, sir -- Epic Inc and
15 Fortnite. Let's assume that you have -- well --

16 MR JUSTICE ROTH: I mean, if I can interrupt you, if you're right on your submission
17 that losing customers in the UK, wherever you are, is damage within the
18 jurisdiction, then the answer is yes. That's what it seems to me to come down
19 to because I think the agreements for Unreal Engine are with Epic
20 Luxembourg. The sales of in-app content are by Epic Inc. It's all explained in
21 this morning's solicitor's letter.

22 So, it really comes down to that point. You may say: well, you don't have to prove it
23 and all you have to show is that you have a good arguable case on that to say
24 that, well, that's damage in the UK, and it's not an entirely straightforward
25 point. There's one line in Mr Justice Morgan's judgment that supports it. You
26 haven't pointed me to anything else in that judgment, so I see that's in your

1 favour.

2 MR BREALEY: Yes.

3 MR JUSTICE ROTH: But that's about it, and I don't know if there's anything else that

4 supports it, but --

5 MR BREALEY: Well, I also refer to Brownlie.

6 MR JUSTICE ROTH: Well, Brownlie is the sort of general construction. It's

7 obviously a very different kind of case. But, no, I see the point you're making,

8 and you say that it's -- if you lose sales in a market from wherever you are

9 selling, and in the digital age it could be from wherever, that counts as

10 suffering loss in the market where the sales would have been made.

11 MR BREALEY: Yes.

12 MR JUSTICE ROTH: That's your point, isn't it?

13 MR BREALEY: That is my point.

14 MR JUSTICE ROTH: I understand that.

15 MR BREALEY: It's suffering damage.

16 MR JUSTICE ROTH: No, I see. If you do, then it's clearly significant. I can see that.

17 MR BREALEY: Yes. Given the amount -- I mean, just on this, on Apple, Fortnite

18 has been downloaded --

19 MR JUSTICE ROTH: No, I've seen all that. It is significant. There's no question

20 about that. And --

21 MR BREALEY: And it is a business and you --

22 MR JUSTICE ROTH: No.

23 MR BREALEY: -- are operating a business in this country.

24 MR JUSTICE ROTH: No, I see that. Yes. So, that's gateway --

25 MR BREALEY: That's gateway 9A.

26 MR JUSTICE ROTH: I don't know if it's perhaps not easier -- I know it's not the way

1 you've done it here, to do the cases separately.

2 MR BREALEY: Well, I think on gateway -- we can do it separately, but I think the
3 same point that you've just put to me applies to Google, that's paragraph 37
4 and 38, which is that, if you've X million customers, or hundreds of thousands,
5 or whatever it is, in the UK, downloading your game and playing your game,
6 you're creating good will in this country and all of a sudden that good will and
7 that customer base gets wiped out -- and it has been, to a certain, extent
8 wiped out -- that is damage.

9 MR JUSTICE ROTH: Yes, well, damage to good will may be something distinct,
10 may it not? Which is not the point that Mr Justice Morgan was thinking about.
11 There might be a distinct form of damage.

12 MR BREALEY: It is. We have mentioned that in paragraph 32. That's one of the
13 last -- it's the penultimate -- where developers and consumers perceive that
14 Epic is less trustworthy and reliable. That is (vi) and Mr Sweeney has
15 testified --

16 MR JUSTICE ROTH: That would come from, just to be clear, the damage to the
17 good will is the removal of Fortnite and the threat to remove the others.

18 MR BREALEY: Yes.

19 MR JUSTICE ROTH: It wouldn't come from, for example, the fact that you can't
20 have the Epic API. That doesn't damage your good will. You lose revenue,
21 but --

22 MR BREALEY: I mean, if, for example, Apple said to one company, "You can have
23 an in-app", and said to Epic, "You can't", then clearly that would be a lesser
24 offering. So, there is an element of -- but the good will we're talking about
25 here is the fact that it's difficult, if not now impossible, to play the Fortnite
26 game.

1 MR JUSTICE ROTH: No, you see that. I understand that. I'm just trying to think
2 about whether it applies to all -- damage to good will to all the claims you
3 make or it's really the removal. The things that you might like to do with
4 a different, as it were, business model from Apple, which you could never do
5 and would increase competition and so on, but the fact that you haven't been
6 able to do them I don't think has damaged your good will.

7 MR BREALEY: I take that point. I take that point.

8 MR JUSTICE ROTH: That's all. Yes, so there's a separate form of damage within
9 the UK. Yes.

10 MR BREALEY: So, I would take those two -- the two groups of defendants together
11 on gateway 9A.

12 On gateway 9(b), I can take that to a certain extent with gateway 2. There's a typo in
13 paragraph 39, just for completeness, penultimate line. I think it should read
14 "gateway 2", not "gateway 3".

15 MR JUSTICE ROTH: Yes.

16 MR BREALEY: But, gateway 9(b), I won't go over old ground, but if one remembers
17 the Morony statement I mentioned this morning about Apple Inc
18 implementing, then if one want to go back to that -- maybe we should -- I was
19 very kindly told that it is in the exhibit, the letter.

20 MR JUSTICE ROTH: Sorry, where am I going? Ms Morony's statement?

21 MR BREALEY: Yes, at page 29.

22 MR JUSTICE ROTH: Yes.

23 MR BREALEY: At the top. The decision to remove Fortnite -- this is at the top, this
24 is at paragraph 69. The decision to remove Fortnite from the UK App Store,
25 the implementation of that decision, that decision was taken and implemented
26 by Apple Inc.

1 Just for your note, sir, the letter, if you ever wanted to go to it, is at 3A, page 100.
2 3A, page 100.

3 That is Gibson Dunn's letter, but it repeats the same thing. It's exactly the same
4 words.

5 MR JUSTICE ROTH: Yes, so this --

6 MR BREALEY: All I'm saying there is --

7 MR JUSTICE ROTH: But the -- yes. I'm not sure that means it's an act in the UK.
8 You can do your act in California by changing what's in the UK App Store,
9 can't you?

10 MR BREALEY: At some point, I think that the jurisdictional rules have to come to
11 terms with the digital age.

12 MR JUSTICE ROTH: Yes, it's not very well adapted, is it, the wording, to a digital --

13 MR BREALEY: That's right. So, you press a button in your room in California that
14 can have devastating effects in the UK by removing something from a UK
15 app store; is one only going to say that is committed in the room in California
16 or can you say, in this digital age -- that it's also committed in England, where
17 the app has been removed from the UK App Store?

18 In my submission, the rules have to come with the times and decide that, if you do
19 press the button and you do remove an app from a UK app store, which is
20 what is said there, that is implemented in this country. It's at least arguable
21 that it is.

22 MR JUSTICE ROTH: Yes. Yes, so that's gateway 9.

23 MR BREALEY: That's gateway 9.

24 Gateway 2, which is at paragraph 40, we have debated it at length and, quite rightly,
25 you've probed us as to who is being injuncted. The point that we're making
26 here is we're essentially relying, by analogy, on *Unlockd v Google* because

1 we are seeking relief limited to this country. I just mention the App Store, and
2 that essentially -- and I don't know if one needs to go back to Google? I know
3 you know it well.

4 MR JUSTICE ROTH: One forgets these things. But looking at your claim form --

5 MR BREALEY: Bundle 3.

6 MR JUSTICE ROTH: Yes, if we look first at the claim form.

7 MR BREALEY: Yes.

8 MR JUSTICE ROTH: In Apple, first of all. You think injunctions are on page 34?

9 MR BREALEY: Yes.

10 MR JUSTICE ROTH: (c) in the UK, (d) in the UK, (e) in the UK, but (f) is worldwide,
11 isn't it? And so is (g) and so is (h).

12 I think Unlockd showed that's precisely what the English court can't do, from
13 memory.

14 MR BREALEY: It couldn't force someone to do something to cure a vice in Australia.
15 But, essentially, if one takes it in -- so C, an order requiring Apple to restore
16 the Fortnite app --

17 MR JUSTICE ROTH: There's the UK App Store, which is different from perhaps the
18 US App Store.

19 MR BREALEY: Yes.

20 MR JUSTICE ROTH: I'm looking at (f). It's a condition on use -- and this is directed
21 at Apple parent, Apple US. This is covering the world. It seems someone in
22 Australia can't access the software, that's the effect of that order.

23 MR BREALEY: Well, can I then, in (f), an order preventing Apple Inc from making
24 access in the UK, so we limit (f) to the UK, because --

25 MR JUSTICE ROTH: Yes, okay, and -- well, (g), again, as in respect of the UK; is
26 that right?

1 MR BREALEY: Yes.

2 MR JUSTICE ROTH: Right. Well, it's not what it says, Mr Brealey.

3 MR BREALEY: No, I do appreciate that, sir.

4 MR JUSTICE ROTH: I can only work off what's been asked for:

5 "Order restraining further action against Epic --"

6 MR BREALEY: "In the UK".

7 MR JUSTICE ROTH: Right, or maybe you want to say "in respect of the UK".

8 MR BREALEY: Yes.

9 MR JUSTICE ROTH: Or "in respect of" -- because they're threatening to remove --

10 yes, "in respect of the UK. "Epic in respect of the UK consequent on"; is that

11 right:

12 "An order restraining Apple taking further action against Epic in respect of the UK."

13 Yes?

14 MR BREALEY: Yes.

15 MR JUSTICE ROTH: Similarly, if we go to the Google pleadings, at page 39, at (e).

16 Well, when you say "on Android devices in the UK", I would have thought it

17 needs to be "devices supplied or sold in the UK", or something like that. If

18 someone from the US travels -- not that anyone can travel anywhere at

19 moment, but, in due course, travels to the UK carrying their mobile, I don't

20 think one could seriously say that's --

21 MR BREALEY: No.

22 MR JUSTICE ROTH: So, is it mobile devices supplied in the UK?

23 MR BREALEY: Yes.

24 MR JUSTICE ROTH: Yes, supplied in the UK. Indeed, you say in the next one "sold

25 in the UK", so one can use the same. You have it in (f).

26 MR BREALEY: Yes.

1 MR JUSTICE ROTH: And then (g):
2 "An order to remove/amendment to ensure that consumers ..."
3 In the UK?
4 MR BREALEY: In the UK. Can directly -- yes.
5 MR JUSTICE ROTH: Yes. Okay. So, we've limited the --
6 MR BREALEY: I'm obliged.
7 MR JUSTICE ROTH: We can amend the orders sought.
8 MR BREALEY: Yes.
9 MR JUSTICE ROTH: To be restricted to UK. Right. Yes.
10 MR BREALEY: So, that would be the gateway 2.
11 MR JUSTICE ROTH: Gateway 2. Just -- but, again, pausing there, looking at these,
12 and let's take the Apple one first, even if it's now limited to the UK in its scope,
13 I mean, restoring at Apple, page 34 -- and it's Apple Inc, first defendant -- to
14 restore the Fortnite app to the App Store, they wouldn't actually be doing
15 anything in the UK, would they? They would be doing something in California
16 that has an effect in the UK.
17 MR BREALEY: Well, I think so that --
18 MR JUSTICE ROTH: They're not carrying anything out, are they, in the UK?
19 All these restrictions -- it's slightly different for damage. Damage may be suffered
20 here by you, but what you're actually asking Apple to do, they wouldn't -- none
21 of these things, would they, be taking any action in the UK? I mean, they're
22 taking global action by what they're doing in California.
23 MR BREALEY: What -- if one goes -- we don't have to go back to it, but I can repeat
24 it.
25 The witness statement and the letter before -- the correspondence refers to Apple
26 Inc removing the Fortnite app from the UK App Store. In my submission, this

1 court can injunct Apple Inc to put back Fortnite in the UK App Store.

2 MR JUSTICE ROTH: Well, they might be able to do that on the damages limb, and
3 I'm with you to this extent: that if you can come through gateway 9, even if
4 you're not claiming damages, you can get an injunction with respect to the
5 same claim. You don't have to come within gateway 2 to get an injunction.
6 It's not the only means you can get an injunction. Otherwise you could suffer
7 damage in the UK by acts abroad.

8 MR BREALEY: Yes.

9 MR JUSTICE ROTH: You could claim your damages, but you can never stop the
10 damage from continuing, and that can't be right, it seems to me. So, in your
11 example, yes, you could, but you do it through gateway 9.

12 MR BREALEY: And that's why I said --

13 MR JUSTICE ROTH: I appreciate that's your primary case, is gateway 9, you've put
14 it first. But, gateway 2 is, as it were, a separate limb, where you're saying:
15 you, defendant, are doing something within this territorial jurisdiction and you
16 must stop it.

17 I'm not sure the relief you're seeking, even though it concerns damage in the UK, but
18 it actually requires Apple to do anything in the UK or to stop doing anything in
19 the UK.

20 MR BREALEY: That is why I said that gateway 9(b) was related to gateway 2,
21 because if one takes the view in the digital world that Apple Inc has indeed
22 implemented something in the UK, then gateway 2 would follow.

23 So, the decision to remove Fortnite from the UK App Store, in the digital world, is
24 that simply an act in America or, because it relates to the UK App Store, is it
25 an act also within the jurisdiction?

26 Because if one takes the view that removing the app from the UK App Store is also

1 an act implemented within the jurisdiction, then it seems to me that gateway 2
2 can bite.

3 MR JUSTICE ROTH: Yes. Yes, I see.

4 MR BREALEY: I'm just putting some bundles away.

5 Gateway 3, as you know, sir, is the anchor defendant.

6 MR JUSTICE ROTH: Well, I think the position on gateway 3 is rather different from
7 between the two claims. In the Apple claim, I accept that if you have a
8 seriously arguable case as against Apple UK, then Apple Inc is a necessary
9 and proper party.

10 MR BREALEY: Yes.

11 MR JUSTICE ROTH: So, it all comes down to whether you have a reasonable case
12 against Apple UK or an arguable case, and we've been over that.

13 MR BREALEY: We have.

14 MR JUSTICE ROTH: I think that's it because, as I say, that if you have a case
15 against Apple UK, then, given the nature of the case, the parent is a
16 necessary and proper party. I don't think there's more to it than that.

17 MR BREALEY: No, I don't need -- I mean, I have it up. All I would ask you to do, sir,
18 is when you have a look at the Media-Saturn case and what
19 Mr Justice Barling said, at paragraph 155 to 157. So, that's volume 3, tab 15.
20 Volume 3, tab 15, and it's page 583. 583.

21 MR JUSTICE ROTH: It's paragraph 155 to 157. Right. I'll do that.

22 MR BREALEY: Yes, and --

23 MR JUSTICE ROTH: Then as regards Google, well, you have a case, you have
24 jurisdiction, at least insofar as you do -- have the wrong bundle -- against the
25 Google Irish defendants under the Brussels regulation.

26 MR BREALEY: Yes, sir.

1 MR JUSTICE ROTH: Insofar as that will stand, and that's not a matter for today --

2 MR BREALEY: No.

3 MR JUSTICE ROTH: -- then I accept that Google US is a necessary and proper
4 party, in just the same way, indeed, that was the Unlockd case.

5 MR BREALEY: Correct.

6 MR JUSTICE ROTH: So, again, it will depend on whether the jurisdiction for Google
7 UK and Google Ireland and so on will stand up. As I don't think, certainly at
8 the moment, there is any, it seems to me, for most of it -- there may be
9 something I'll have to think about on the technical restrictions, but, for some of
10 it, it seems to me clear there is an arguable case against the Irish defendants.

11 MR BREALEY: Who are counterparties to --

12 MR JUSTICE ROTH: Yes, because they are counterparties to the agreement.
13 Then Google parent is a necessary and proper party. So that, it seems to me, is
14 how it's going to fan out.

15 MR BREALEY: Because D2 is counterparty as well. So there's --

16 MR JUSTICE ROTH: Even if it isn't, no doubt they're carrying out -- acting under it --
17 it sets the policy, I've little doubt. If it doesn't, it will no doubt say so in due
18 course. But that certainly was the position in Unlockd, where it was effectively
19 accepted, I think from memory.

20 My memory is not infallible by any means. It may be wrong, but I seem to recall that
21 it was accepted there that the Irish Google defendants were implementing a
22 policy set by Google in the US.

23 MR BREALEY: Yes.

24 MR JUSTICE ROTH: Yes. So that's gateway 3.

25 MR BREALEY: So, that's the end of, essentially, the second condition.

26 MR JUSTICE ROTH: Yes.

1 MR BREALEY: Then the third and last condition is, essentially, the appropriate
2 forum.

3 MR JUSTICE ROTH: Hm-mm.

4 MR BREALEY: In the light of what we've discussed and the indication that you have
5 given me, I can pass over paragraphs 49 to 53 because that is concerned
6 with the exclusive jurisdiction clauses.

7 MR JUSTICE ROTH: Yes.

8 MR BREALEY: Then, lastly, it is the relevant circumstances to be weighed by the
9 Tribunal.

10 MR JUSTICE ROTH: Hm-mm.

11 MR BREALEY: The main point that I wish to make on this is that this is UK
12 competition law.

13 MR JUSTICE ROTH: Hm-mm.

14 MR BREALEY: We have a specialist tribunal charged with applying the
15 Competition Act, protecting competition and indirectly protecting UK
16 consumers.

17 If a multinational company does breach laws of this country, which are there for
18 public policy reasons, there is, in my submission, a central focus that the
19 dispute should be heard in this country.

20 Because this is an ex parte, I do refer you, sir, to the Microsoft Mobile case and the
21 judgment of Mr Justice Marcus Smith. That's at volume 3, tab 11,
22 paragraph 186 and 408.

23 MR JUSTICE ROTH: That was a competition case as well, wasn't it, I think?

24 MR BREALEY: It was. But, in my submission, if one remembers that case, it is
25 wholly distinguishable on the facts there. The claimants could hardly
26 articulate where the damage was being suffered, let alone who was suffering

1 it and by whom.

2 Here, if I'm right on what I've said thus far, there is a substantial risk of serious harm
3 to competition and consumers in this country.

4 MR JUSTICE ROTH: Hm-mm.

5 MR BREALEY: And I do pray-in-aid the sentiments that we set out in paragraph 56A
6 that essentially multiplicity of proceedings and different proceedings in
7 different jurisdictions is to be expected where there are allegations that certain
8 conduct has given rise to breaches of law in multiple jurisdictions and that's
9 Mr Justice Morgan. That's paragraph 56A.

10 MR JUSTICE ROTH: Yes.

11 MR BREALEY: And that essentially is the essence of the case.

12 I go to paragraph 61 of the skeleton, where we set out what was said in Unlocked. In
13 other words, we're not policing the competition laws in Australia or the US but
14 global companies must understand that they will be policed in this country,
15 particularly when there is an allegation that they have breached laws which
16 have been adopted by Parliament to protect competition and consumers in
17 this country. It's a public policy. It's not simply a sale -- what I was trying to
18 say earlier on, it is not simply a sale of good --

19 MR JUSTICE ROTH: I see that point, the sort of public policy point. If we approach
20 it, if you like, in the more traditional way, the argument about what's
21 happened, what might be the justification and so on, the witnesses, the
22 technical experts, they will be almost exclusively from the US, won't they?
23 I mean, your clients will be -- in the Google case, indeed there's no English
24 claimant. In the Apple case, there might be some evidence about the impact
25 on Unreal Engine but you're not claiming damages. So the fact that this
26 conduct that you're attacking has an impact on Unreal Engine it seems to me

1 is likely to be uncontroversial.

2 The real question is does the conduct breach the law, what does it amount to, how
3 does it affect your client, prices and so on.

4 So the evidence is all going to come, with little exception, from the US, other than, as
5 you point out, evidence on the UK law if this were tried in California. Is that
6 right?

7 MR BREALEY: I think clearly there will be US witnesses. I would say that these
8 proceedings would have witnesses which were, even if they're US, were
9 tailored to the UK.

10 MR JUSTICE ROTH: Yes, but they'd be coming from, basically, if we're back to
11 physical movement --

12 MR BREALEY: If we're back to physical movement, yes, I'd have accepted that they
13 would be coming from the US. The expert, maybe not, if there's an expert.
14 The expert can well be a --

15 MR JUSTICE ROTH: Well, experts could be found in the US or they could be found
16 in the UK or anywhere.

17 MR BREALEY: As you know, they come from all over the place.

18 MR JUSTICE ROTH: Yes, other than the point you make that the US court would
19 have to consider evidence on UK competition law.

20 MR BREALEY: Yes.

21 MR JUSTICE ROTH: Yes, which would no doubt come from the UK. Yes.

22 MR BREALEY: But it does -- yes. I accept that.

23 MR JUSTICE ROTH: Yes.

24 MR BREALEY: And essentially what I'm submitting is summarised at paragraph 62
25 of the skeleton.

26 MR JUSTICE ROTH: Yes.

1 MR BREALEY: So those are the submissions, sir.

2 MR JUSTICE ROTH: Well, that's been -- I think having oral submissions has been
3 very helpful and I think you can appreciate why I didn't want to decide this one
4 on the papers.

5 MR BREALEY: No, I understand. No, there's issues to be raised.

6 MR JUSTICE ROTH: Yes. Well, I will consider those submissions and you'll receive
7 a written judgment in due course.

8 Can I just ask, it would assist me, if you could arrange to send or have those
9 instructing you to send the two claim forms and from you the skeleton
10 argument in Word, as I am likely to -- or may wish to quote from them in the
11 judgment.

12 MR BREALEY: Yes. Of course.

13 MR JUSTICE ROTH: Is there anything else that you need to raise at this point?

14 MR BREALEY: I don't think so, sir, but thank you.

15 MR JUSTICE ROTH: Thank you very much. We shall end there.

16 **(3.12 pm)**

17 **(Hearing concluded)**

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