**IN THE COMPETITION APPEAL TRIBUNAL**

Case No: 1601/7/7/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 14th April 2025

Before:
Andrew Lenon KC

(Sitting as a Tribunal in England and Wales)

BETWEEN:

# Dr Sean Ennis

**Class Representative**

v

# Apple Inc. and Others.

**Defendants**

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## A P P E A R AN C E S

Robert O'Donoghue KC, Daniel Carall-Green and Victoria Green on behalf of Dr Sean Ennis
(Instructed by Geradin Partners)

Daniel Piccinin KC, Tim Parker and Grant Kynaston on behalf of Apple Inc. & Others
(Instructed by Gibson, Dunn & Crutcher UK LLP)

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**Monday, 14 April 2025**

**(10.30 am)**

**Opening remarks**

**MR LENON:** Let's start with the customary warning: some of you are joining us via livestream on our website. An official recording is being made and an authorised transcript will be produced, but is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings, and breach of that provision is punishable as contempt of court. Thank you.

**MR PICCININ:** Good morning, sir.

**MR LENON:** Good morning.

**Submissions by MR PICCININ**

**MR PICCININ:** I appear for Apple, together with Mr Parker and Mr Kynaston; and for Dr Ennis we have my learned friends, Mr O'Donoghue KC, Mr Carall-Green and Ms Green.

Before we get started on the agenda items, sir, there is just one other order of business that I wanted to raise -- which is really just by way of information -- which is that unfortunately, very recently indeed, my clients discovered a serious conflict issue has arisen with Geradin Partners, in light of which in our view is that Geradin Partners cannot continue to act for Dr Ennis in these proceedings. The issue relates to a new employee at Geradin Partners who has previously acted for Apple in relation to another matter. I don't want to get into the detail of any of the issues because the protection of Apple's confidential information is, as you will appreciate, a matter for the High Court rather than for this Tribunal. But just so you know, the latest development is that my clients sent a letter before action on Saturday requiring Geradin Partners to cease to act and informing them that we are in the process of finalising papers to commence proceedings in the High Court seeking an injunction to that effect.

Now it is obviously very unsatisfactory that this issue should only have come to light so shortly before this CMC. We didn't want to cause disruption to the CMC or inconvenience to the Tribunal, which is why we are all here, but given that we are here to debate directions to a trial, it just seemed to us right that we should bring that to your attention so that it doesn't come as a surprise to you if in a short period of time Geradin Partners come off the case.

**MR LENON:** Thank you for drawing it to my attention. But from my perspective, it's not going to affect this hearing.

**MR PICCININ:** It's not going to affect this hearing, that's right.

So on the agenda, as you will have seen, sir, what the parties have agreed is that there are only two issues: one is whether there should be a preliminary issue trial, and the other is directions to the main trial. Because the PI trial application is my application, Mr O'Donoghue and I have agreed that I should kick off. On that, I just want to start with the contextual point, which is about the second issue, the timetable to trial, just so you can see where our application for a preliminary issue trial fits in.

So, as you will have seen, sir -- subject to your own views, of course -- there is actually substantial agreement between the parties on the directions to the main trial. My learned friends have proposed a trial starting in November 2027 and we agree with that. There are two principal advantages to that timetable that we perceive. One is that it allows enough time to pass between now and the first exchange of expert reports in these proceedings for the parties to take account of any judgment from the Tribunal and potentially, we hope, also any appeal from any judgment of the Tribunal in the Kent proceedings. Obviously, we don't know when that is going to come, we don't have Mr Fraser here to tell us, but subject to the inevitable uncertainties of life, it does seem to us that it will probably be possible to resolve any appeal from Kent, if there is one, before expert evidence is served in 2027 in these proceedings. Indeed, it will

probably be possible to know whether the Supreme Court has granted permission to appeal further well before the Ennis trial if we adopt this approach.

That is obviously desirable for everyone. From the Tribunal's perspective, it makes it more likely that the evidence that the parties submit will be aimed at the right target, and will therefore be of assistance to you ultimately. So that's one of the reasons why we have taken that approach.

The other reason why we commend Dr Ennis' proposal on that to you is that both Dr Ennis and Apple, you will have seen, contemplate seeking evidence in these proceedings in one form or another from non-parties, if I can put it that way. So, you may have seen that Dr Ennis has in mind surveys of class members and disclosure from third parties, and I will come back to that when we get to the second issue; and that on our side of the courtroom, we have in mind some focused and targeted disclosure in due course from a selection of class members.

Those are obviously matters that the parties and the Tribunal will want to consider carefully so that they are kept within reasonable and proportionate bounds. Inevitably, that sort of process will take time, and the timetable that Dr Ennis proposes -- with which we broadly agree, there are very minor wrinkles -- will give us the time, we think, for that to take place in an orderly fashion.

That's why I think we all agree on the parties' side of this room that whatever you decide on our application for a preliminary issue trial, it makes sense to set a timetable to the main trial that is roughly along the lines that is proposed by my learned friends.

The reason I wanted to begin with that is just that, as it then happens, our application for a preliminary issue trial on applicable law and territoriality slots in neatly into the timetable that my learned friends have proposed for the main trial. We have explained how that works in our skeleton argument at paragraph 29, which is in the hearing bundle at page 35.

We will return to that later if we need to run through the practicalities. But the point I want to make at the outset is that my learned friends are quite wrong to characterise this, or any other application that we make, as an attempt to delay or derail the resolution of this claim. That's self-evidently not true, because my learned friends have themselves proposed a trial in November 2027 and we had put forward a timetable for the preliminary issue that has everything resolved on that front in good time to arrive at the same destination. The only difference that our preliminary issue trial would make is that when we get to that main trial in November 2027, we know what the case is actually about, and we say that would be a good thing.

So that's really the spirit in which this application is made. The Tribunal's Guide itself, as you know, highlights the possibility of preliminary issues as a matter to be considered at first CMCs. And in cases where the Tribunal sends a draft agenda to the parties that routinely includes that question on it, we consider that in this case the preliminary issue trial on these matters would be useful, for the reasons that I will come to shortly, and can be achieved at minimal cost and with no delay to the main trial. That's why we have floated this issue for the Tribunal's consideration and that's what we are here to discuss.

So, what I want to do now is start by showing you the relevant principles for a preliminary issue trial application. I can take this quite quickly, because I don't think there is actually any material dispute between the parties and I know you are familiar with it anyway, sir.

Then I will show you the nature of the issues that we want to try as preliminary issues. I will take this mostly from your judgment on our jurisdiction challenge, but then I will also show you the latest word on the pleadings, just to reassure you there is nothing very interesting or at least nothing material to this application has come up since the jurisdiction judgment.

Then I want to explain why we say that a preliminary issue trial is workable in that there is a clean split. Then I will explain why it is desirable in all the circumstances, and there I will deal with the objections that my learned friends have raised.

So, on that first topic, sir: the principles for an application of this kind. Those principles have been stated and applied in a number of cases in this jurisdiction. We have taken them in our skeleton argument from the judgment of Mr Justice Zacaroli, as you will have seen in *Churchill Gowns*. That's in the authorities bundle at tab 16, page 368.

If we could just pick it up from page 370. Just looking at paragraph 6, what he tells us is that the overall test to be applied is to ensure that proceedings are dealt with justly and at proportionate cost. He says in the next sentence that this involves a pragmatic balancing exercise taking into account numerous factors. Those numerous factors include the factors that were summarised by Mr Justice Hildyard in *EWRG*, and we can see those over the page. But on page 371, paragraph 8 is also important. Ultimately what he says is that there is limited utility in comparing the application of the overall test and the particular factors in other cases because every case is highly fact-sensitive. The factors identified by Mr Justice Hildyard, while they are helpful, are both overlapping and non-exhaustive.

So, in my submissions today, rather than running through each of those factors one by one and attempting some sort of totting up exercise, I am just going to focus on the particular points that we and Dr Ennis have made, and explain why we say that the appropriate approach is to have the preliminary issue trial having regard to the overall test. I think that is actually broadly consistent with the way that Dr Ennis' team approaches this issue as well, in that they also caution against some kind of pros and cons list where we just count up the number of factors.

So, in a nutshell, the main issue here on this application is really whether there is a clean split. We say that there is. The restriction of competition in this case that is

alleged -- and when I say "restriction of competition", I am picking up there the language of Article 6(3)(a) which we will see in due course. That restriction is just the charging of an excessive commission on transactions. That's the only allegation that's made in these proceedings.

The Article 6(3)(a) question for applicable law is whether, when Apple charges that commission on a transaction between a UK-domiciled developer and, say, a US consumer buying something from the US storefront of the App Store, the question is whether that commission affects the market in the UK or the US. That's the question we are answering.

The territorial scope question is similar. It's a different legal issue, as I will come on to, but the question that the Tribunal would be grappling with is similar, in that it is whether to characterise the effects of the allegedly excessive commission as effects in the UK where the developer is domiciled or as effects in the US where the transaction is taking place. Or both, of course, that's a possibility. But that's the question. It's one of characterisation of those effects.

We say that neither of those questions arises in the main trial on infringement or causation or loss. My learned friend's main objection that I am going to come on to look at in the pleadings is that when we, in our defence, have come on to explain why our commission is actually a fair commission, we point out that what developers are really paying for is not just some narrow distribution service, but also for the provision of the technology and the tools with which the apps are made.

But just to summarise at this stage in a nutshell just so you know where we are going: we say that makes no difference to the applicable law or territoriality analysis because the allegedly excessive commission is a charge that is applied to transactions taking place through our storefronts, and that's where they take effect.

Conversely, the other side obviously say no, that's not right: it's a charge to

a developer who is domiciled in the UK. That's the same debate that we are going to have whether we are right in our substantive defence or not. Ultimately it is a question of characterisation as to where the commission charge is having its effect.

So, we say that is a clean question that you only need to answer once. And on that basis, if we are right about that, we say there are powerful case management reasons to have the issues decided, and no material downsides to doing them on a preliminary basis. In particular, as I have already said, delay is not a factor in this case whereas it often is in preliminary issue applications.

As you know, sir, preliminary issue trials are a case management technique that this Tribunal often uses. Indeed, in *Westover*, which was, you will probably remember, one of the Interchange Fee cases, the Tribunal used it specifically in relation to applicable law.

Indeed, in most of the true preliminary issue trials that this Tribunal conducts -- and when I say "true preliminary issue", I am distinguishing a discrete trial of something like applicable law or causation from a split trial between liability and quantum -- so for the true preliminary issue trials, it's usually the case that it's clear from the outset that the proceedings are going to be continuing, whatever the outcome of the preliminary issue.

The reason why the Tribunal conducts the preliminary issue trial varies from case to case; but the general idea is that some discrete point has been identified that will provide the parties and with the Tribunal with useful clarity before you get to the main trial.

So, in *Westover*, just to give you an example, the reason that the applicable law mattered was limitation. Not limitation in the sense of the whole claim being chucked out; but the question was whether the limitation period was six years in English law or I think it was five in Italian law. So, there was one year of limitation at stake and the

Tribunal held a preliminary issue trial.

In this case, as I will come on to explain, the benefits of having the preliminary issue determined are far greater than that. The preliminary issue trial will clarify whether this is a case that is about Apple's conduct on all storefronts everywhere in the world, as Dr Ennis contends, or whether it is only about Apple's conduct on the UK storefront, and for the period prior to IP completion day, EU storefronts.

If we are right, the consequence of that is that the overwhelming majority of the claim will fall away, and that's common ground. I will show you that later. We say that is obviously a very useful thing for the parties to know well before the main trial. We say that's true even if you accept Dr Ennis' view that the main trial will go ahead even if we win the preliminary issue trial. That does seem unlikely to us, but even if it is true, it is still going to be useful to know where we stand.

So, with that introduction out of the way, I want to take a look at what the issues that we want to try here actually are. As I said, I would like to start by doing that by reference to your judgment in the jurisdiction challenge. So that's at authorities bundle, tab 23, page 505 is where it starts. If we can pick it up from page 533. So, in paragraph 65 -- sorry, I should say, just to set the scene, if you go to the previous page, you will see this is your conclusions that you reached on the applicable law issue.

You are talking about Article 6(3)(a). In paragraph 65, the Tribunal points out:

"There is no clear guidance ... as to what is meant by an 'affected' market [in Article 6(3)(a)] or how the location of an affected market is to be ascertained. The PCR relies on the market definition exercise carried out by Mr Perkins in his reports."

That's Dr Ennis' expert. "But that exercise", as we say, was:

"... concerned with market definition for the purposes of competition law, not as a means of identifying or locating the affected market for the purposes of [applicable

law]."

The purpose of market definition in competition law is to "identify the main competitive constraints faced by the supplier" and the reason why you are doing that is as a first step to assess supplier's market power. The purpose of defining the market in an applicable law context is “to identify the country or the countries with a sufficient connection to the dispute in order to determine the applicable law.”

Then in paragraphs 66 to 68, the Tribunal's judgment continues on that theme, referring to some academic writings and decisions in the jurisdiction, the Brussels regulation context.

If we go on to paragraph 69, you can see that the Tribunal concluded that the PCR's approach, Dr Ennis' approach, is open to a number of objections:

"The PCR's case that the affected market is located in the UK relies on a market definition developed for the purposes of competition law. As a matter of impression, however ..."

And that's picking up what the academic writers have said is the right approach on applicable law:

"... the market for app distribution services in relation to transactions effected via foreign Storefronts is located in the foreign country concerned, not in the UK. The PCR's market definition treats the location of the various national Storefronts as irrelevant even though the location of the Storefronts may be considered to be the place where Apple's marketing of app services takes place. It was submitted on behalf of the PCR ..."

And they maintain this in their pleading, we will see:

"... that the foreign Storefronts are no more than a metaphor but [the Tribunal says] there is a real locational dimension to the Storefronts in that each Storefront is accessible from a particular country or region and is selected by app developers under

the terms of the DPLA. It is difficult for a device owner located in a given country to switch ... So, for example, an app delivered to a French device owner will almost certainly be purchased through the French Storefront. That is why the Kent proceedings brought on behalf of UK device owners can conveniently be limited to sales via the UK Storefront."

Which indeed it was:

"The distribution services associated with a given Storefront are necessarily associated with that Storefront and may be seen as taking place in that country."

Then in paragraph 70, you go to say:

"Apple's distribution services themselves do not exist in isolation. They exist only to ensure that a product or service is made available to a downstream user. An app is not developed for its own sake but in order to expose it to sale. Distribution services are sought and provided in order to enable the developer to expose its products for sale to the device owner. The services are not fully provided ..."

This is important:

"... are not fully provided until the app reaches the Storefront and is thereby exposed for sale. On this basis, the services are provided at the place of the Storefront."

And the reason why I highlighted that, sir, just to foreshadow it, is that the same is true if you add into it all of the prior steps and services that Apple is providing, like permission to create the app using Apple's tools and technology for distribution in a particular storefront in a particular country.

Sir, perhaps if you could just read, just to save my voice, 71 to 73. Then at 74 to 76 -- I don't think you need to go through them -- you give the reasons why summary judgment was not being granted in that case.

At 77, what is said is that: "The issue may well have been suitable for determination as a preliminary issue as in [the *Westover* interchange fee litigation]." But the Tribunal

wasn't satisfied that it should be dismissed as hopeless at this stage before we had responded to Mr Perkins's evidence on market definition. So, if I can just try and summarise where we think we ended up on Article 6(3)(a). The main reason why the Tribunal decided not to grant summary judgment on this issue is that there were novel issues of law and novel issues of how to apply that law or how to characterise the primary fact pattern that we had before you on that application, and that we still have before you in this case. What the Tribunal were saying in these paragraphs, 74 to 76, was that it was not appropriate to decide novel and difficult issues of that kind on a summary basis. And in addition, insofar as expert economic evidence on market definition is relevant -- and you've seen the doubts that you expressed about whether the competition law market definition issue really is relevant -- insofar as it is, it would be more appropriate to have our answer to Mr Perkins's evidence in the form of expert evidence from Apple's appointed experts before reaching a conclusion. That's the way we understand where we...

**MR LENON:** What additional evidence do you see as being necessary to decide that?

**MR PICCININ:** You might have thought we didn't need any evidence other than the documents, but in view of the comments that you made in this judgment in this passage that I've just shown you, we thought the Tribunal would probably want to see expert economic evidence on market definition on the geographic scope of the market. And so we've made provision for that in our timetable in our draft directions. We've also made provision for fact evidence, just because at his stage we don't want to exclude the possibility that someone might want to put one in. I didn't want to put in a timetable that was too short and truncated for that to happen.

The way we see it is the documents, the DPLA, tells you everything you need to know about the way the system works, what the primary facts are. Then it's really a question of how you characterise those facts looking through the lens of applicable law or

looking through the lens of territorial scope. If I put it this way: I don't envisage your judgment at the end of the preliminary issues trial spending very much time talking about the expert economic reports or about any other evidence beyond the documents.

**MR LENON:** Or an issue of law.

**MR PICCININ:** Yes, law or legal characterisation. Law including legal characterisation of the facts, yes. That's the way we see it. I should also just show you what you concluded on Article 6(3)(b), so that's paragraph 88 at page 540. I show you that just because, as we will see, my learned friends are going to invite you to decide that you were wrong about that what you say in that paragraph. That will also have to be within the scope of the preliminary issue trial. That's obviously a pure issue of law, so it doesn't really matter one way or the other. That's applicable law.

Territorial scope is a different issue. Territorial scope is not about what system of law governs a private law claim. It's about the extent to which the substantive law of one country, here the competition law of the UK, can be applied to conduct overseas. And the tests that have been derived to delimit that territorial scope actually come from the public international law sphere and reflect basic principles of comity between states. Those are the same tests that apply to the question of whether the CMA, for example, or the European Commission has jurisdiction in determining whether commissions charged on foreign storefronts are excessive. The Tribunal acknowledge that difference between applicable law and territorial scope in paragraph 90, which is on the page that we've currently got open, where it explains that territorial scope is a separate issue from applicable law. And, as we will see, my learned friends also want to have another go at persuading you that is not quite right either and you can infer one from the other. That obviously too is a pure question of law and so doesn't really go one way or the other on this application.

Over the page, on 541 at paragraph 92, you set out the two tests that everybody agrees apply to the question of territorial scope, so the implementation and qualified effects test. If we go on to page 546, it's useful to see how Dr Ennis puts his case. In paragraph 105 what's said is there's a single course of conduct here, a single contract between Apple and a UK developer is the way they characterised it. At paragraph 106 they say that implementation is in the UK because the commission is charged under a contract that's entered into the UK. And for the same reasons, they say that qualified effects are made out. I highlight subparagraph 3 in particular. They say that immediacy follows because we're charging a price to these UK-based businesses.

If we go over the page to 547 you can see the way we put our case. In paragraph 109 you noted that we were relying on Roth J's decision in *Unlockd*, which is true. Over the page, paragraph 110, our argument was that purchasing services outside the UK is outside the scope of the Competition Act. Paragraph 112 we said, and this is really the nub of it, that the fact that the UK domiciled developer received less money in its bank account, even if that bank account was in the UK, does not constitute an immediate effect in the UK. We made the point that if that was good enough, if all you have to show is basically loss suffered in the UK, then you could say the same for any provision of services to UK domiciled consumers, like a real estate agent's commission on the sale of land in Australia was the example we gave.

I show you that not to re litigate the issue but to illustrate the nature of the argument. In these proceedings we all know who does what. There's no dispute about how app developers interact with Apple under the DPLA and the system that is set out in that contract. Even if there was, that would just be a matter of reading the contracts to see what it says. The debate really is about how you characterise those primary facts for the purposes of these tests.

Over the page we have the Tribunal's reaction to these arguments. In paragraph 114

you agreed with us that the mere fact that Apple's commission forms part of a global policy would not give rise to even an arguable case of territoriality being made out in respect of the foreign commerce. But you said that the overall question of whether the tests are satisfied is the question of fact and that is a question that was not answered in *Unlockd*. That's why I hovered a little bit, sir, when you asked me before whether I was saying it was a pure question of law. Well, it's a question of applying the law to the facts but it's not a question of primary fact.

**MR LENON:** So, the facts wouldn't be disputed?

**MR PICCININ:** The primary facts wouldn't be disputed. Sometimes you call the question of characterisation of those facts, is it here or is it there, a factual issue and I think that's really what you're saying there, sir, in that paragraph.

**MR O'DONOGHUE:** Just to disabuse Mr Piccinin, the facts will be disputed, and I will explain why.

**MR PICCININ:** I look forward to that in due course. I will go through what has been said in the skeleton argument. That is what we say sir. It's really a question of characterisation of the primary facts rather than a debate about who does what or where they do it.

To drive that point home, I would like to look at the way things have been put in Dr Ennis's reply. That's over in the hearing bundle, sir, at tab 10 and starts at page 197. I would like to pick it up from page 231. There's a heading on that page of "Applicable law."

I'm not going to go through every paragraph but if we focus on 38.1, which is really the core statement here. They start by saying that applicable law is the law of the place where the market is or is likely to be affected. That much we can agree on because that's what the regulation says. Then they say: "The competition to provide (global) distribution services [to developers in the UK] takes place (or, but for Apple's monopoly

would take place) in the UK." Stopping there for a moment, this is really sir the same debate that I've just summarised for you about how to characterise the primary facts. It's the same debate that we had at the jurisdiction challenge stage. The primary facts are that we know the developer is domiciled in the UK, the developer who is a class member in this claim. We know that if the developer wants to distribute an app for iOS users anywhere in the world, then it needs Apple's permission to do that in each country in which it chooses to do that. It needs Apple's permission because the developer is using Apple's propriety technology and its tools to create and publish the app.

We also know that in order to distribute the app the developer needs to appoint one or more Apple entities – you probably remember seeing the list in schedule 2 to the DPLA – to act as agents or commissionaires to market the developer's app separately on the different storefronts in different countries around the world to consumers in the countries of those storefronts. It's the developer's choice as you saw in the judgment as to which country it asks Apple to market the app in. In each storefront, that UK domiciled developer's app is going be presented to consumers alongside apps from other developers of all kinds and all flavours domiciled in all countries around the world without any distinction at all as to where they are domiciled. And so that's something that we all know, that's a primary fact.

We also know the developer has to agree that Apple will deduct the commission at source and remit the difference to a bank account nominated by the developer. Those are the primary facts. The question is just how you characterise them. Dr Ennis characterises them as Apple providing a service that is aimed at and delivered to developers who were domiciled in the UK, so they say that's something that happening in the UK, whereas we characterise the same facts, I would say more naturally – naturally I would say that – as Apple providing services that culminate in the

distribution of an app to consumers to the storefront selected by developer. Granting permission for and marketing apps on the US Storefront is different from granting permission for and marketing apps on the UK Storefront. In both cases, as I've said, there's no distinction between drawn between where the developer is domiciled. So, there's no discernible dispute we say of primary facts, at least in that sentence. We are going to come on to the rest of it.

Now, the next sentence sir is, I have to confess, slightly puzzling to me, the next one says that “if it were not for Apple's restrictive practices, alternative providers of distribution services would compete, in the UK, for the business of Class Members.” The reason I find that slightly puzzling is because the claim in Ennis, unlike the claim in Kent, is purely a claim for excessive pricing. There is no allegation that Apple's requirements in relation to distribution, the requirement to use the App Store, or in relation to payments, are illegal. So, the counterfactual just consists of Apple, at least in the usual sense of that word, charging lower commissions -- now they go so far as to say zero commission -- and that's it. It's not entirely clear to me what my learned friends have in mind here. Whatever they have in mind, the one thing that is clear to me is that again there is really no point of primary fact at stake here that is relevant to the applicable law issue. Because even if, for some reason, you want to imagine the counterfactual with competing App Stores at some point in the exercise, you still just come back to the basic point, that there's no different field of competition, this is our case, for developers who happen to be domiciled in the UK. In each case what is being offered is distribution and associated services on the storefronts aimed at consumers in particular parts of the world. That's true, or at least that's our side of the argument and theirs is the opposite, whichever way you want to look at it. That's 38.1, which is really the meat of it.

38.2 I don't need to go through in detail because it's essentially just legal submission.

And the same is true, just flicking through slowly, in 38.3. 38.4 is more significant for today's debate because this is one that they make some fuss out of in their skeleton argument. In 38.4.1 they refer to our defence that the commission is not unfair because it is remunerating not only Apple's distribution function but also a wider array of services including the tools and technologies with which apps are consumed and created. They say that those services are delivered to class members in the UK. Now, structurally, this is a slightly odd paragraph, paragraph 38.4, because they seem to be starting with our case rather than with their case. But we can put that one side. Because the key point for today's purposes is that there's just nothing in this for the context of applicable law or territorial scope. The contracts, the DPLA, just says what it does about who is doing what for whom. There is no dispute about what services Apple actually provides.

Just to give you a reference if you want to flick back to it in 7.2 of the reply, Dr Ennis accepts that developers need access to Apple's propriety tools, that Apple grants under the DPLA, in order to create and distribute apps anywhere in the world.

So, that's what I mean by the primary factual position being common ground. That's on page 202 of the hearing bundle. That's why, because the primary facts just are what they are, and there's no dispute about them. I say what we're faced with is just the same question of characterisation again. Whatever the reasons why Apple charges the commission it does may be, and whatever the reasons why those commissions may be fair or unfair, whatever the sources of value that Apple provides for developers, the claimed restriction of competition in this case at the end of the day just consists in the charging of the allegedly excessive commission on transactions, or as they would put it on distribution services. It's the same thing. At the end of the day, the question is just where that alleged conduct has its effects. Where the commission charged on transactions with US consumers on the US Storefront, is the effect on the

market on the US or the UK? That's it.

Then over the page sir at 38.4.2, they plead, and this is the oddity that I was referring to before, the opening words "[e]ven if" make it sound like this is some alternative case. This is their primary case. It's actually the only case that's pleaded in their claim form. Even if this case is actually about what we say it is about, distribution, still they say they're right on applicable law, so again when you read it, it's just the same question of characterisation that I keep saying over and over again. I won't say again now. It's the same point about where the event takes place.

To be fair, they do also, in the second sentence, throw in one small factual issue, namely the question of whether support services are provided by Apple through account managers that are based in the UK. I do struggle to see where that goes in terms of the applicable law analysis. But, it's hardly a big factual dispute and I'm not sure it is a dispute. If they want to ask us any questions about it, of course they can. But in any event, sir, what we're trying to figure out here is whether there's a clean split or not. And the one thing I can tell for you sure about that proposition is that issue is one that is relevant, if at all, only to the preliminary issues and not to the substantive issues of infringement in the main trial.

So, this isn't a point -- a factual issue -- that gives rise to any overlap with the main trial. I can tell you, sir, giving evidence from the Bar, that a grand total of zero seconds were taken up on that issue in the seven-week trial in the Kent proceedings. That is 38.4.2. 38.5 is another legal argument. The same is true of 38.6. It is just more submission. 38.7 this is the one I flagged before, they want to re-run the Article 6(3)(b) point. This is pure law or the same characterisation debate we've been having all along. Then, at 38.8 this is another point I flagged before. This is just another legal argument. This I think is the opposite of what you addressed in the judgment. This is the argument that applicable law actually follows from territorial scope. We say that's

nonsense. The important point for today is just that it's legal nonsense. There are no facts in dispute there. So, sir, that's applicable law. We say there's virtually nothing in dispute from a primary factual perspective and any facts that they do want to investigate, such as those concerning the extent of work done by Apple's UK-based account managers, do not have any overlap with infringement issues in the case. So, we have a clean split on applicable law.

Over the page they launch on to territorial scope, paragraph 39. 39.1 they say that because there's no pass-on, it follows that the qualified effects can only be in the UK. The reason they say that, sir, is because they are equating effects with impact on bank balances. So that is just the legal characterisation debate that we had already canvassed in the jurisdiction judgment, as I showed you before.

39.2 is just the other side of the coin. There are no primary facts in dispute here. 39.3 is just the same point again and then repeated at slightly greater length at 39.4. But I should highlight in 39.4.3 that they do add a small issue of primary facts concerning the role of the 7th and 8th defendants. And here my answer is the same as the answer I gave in relation to the UK account managers. Insofar as this is relevant at all, and I'm not sure why it is, it is certainly not a point that has any bearing on the infringement issues. There's no issue about that on the actual substance of market definition, dominance or excessive pricing or anything else. So that would be one for the preliminary issue trial. 39.5 is more legal submission and so is 39.6.

So, we say there's a clean split on that as well. I should just pick up their skeleton argument too. That's at the start of the bundle, tab 1. If we can go to paragraph 14.2 on page 10 and 14.3, we can see where we say they go wrong in their argument to the effect the clean split isn't possible. What we say about these paragraphs is that they're just over-elaborate sir. As I have already said, the restriction of competition here is alleged is just a commission being charged on transactions between

developers and end users at a level that Dr Ennis says is too high. That's just it. Article 6(3)(a) tells us that the law applicable to such a claim is the law of the country where the market is affected by that allegedly excessive commission. And so that's why we say they're wrong to say that it matters whether, for the purposes of the infringement analysis, you think that we need to take into account all of the economic value that Apple provides through its tools and technologies or not. That is a very important issue on the question of whether the commission is fair. It's not an issue that goes to the question of where the effects of the commission are felt, or on what market you should characterise them as being felt. At the end of the day, as I keep saying, it really is that simple; it's just that question of characterisation.

The same goes for territorial scope. The issue is just whether the charging of that commission on a transaction between a UK domiciled developer and a US consumer on a US Storefront is to be characterised as having an immediate effect in the UK or not. We can test this in another way, sir, by going to paragraph 15 of their skeleton and just running through the points that they identify there about market definition that they say overlap with the main trial.

My submission here is very simple; which is that for each one of these it's very easy to say whether it belongs in the PI trial or the main trial and we don't get anywhere if it belongs in both. So, starting with the first one which is the extent to which alternative channels for distribution provide a meaningful substitute for developers to distribution via the App Store. That is an important issue in the final trial sir, they're right about that, because it goes to product market definition and dominance. For example, we say that a developer in their class can avoid Apple's commission by transacting with consumers directly on their website. We say that constrains Apple's ability to charge commissions that are above the competitive level. You can see how that goes to market definition, product market definition and dominance. But it makes no difference

at all to the applicable law or territorial scope issue.

The place where Apple's commissions take effect for applicable law purposes can't depend on how many developers would switch to using their websites if Apple charged commissions that were super competitive. It's notable, sir, that Dr Ennis doesn't even attempt to explain in this paragraph how that makes a difference to the applicable law analysis. I have just shown you in the pleadings that there's nothing there to explain it either. It just doesn't come up.

15.2 is a more subtle point. There they say that there's a dispute about whether the App Store operates on two separate markets, one for developers and another for consumers -- that's Dr Ennis's case -- or whether there is a single market for transactions. Again, it is just impossible to understand what difference that makes for the applicable law of territoriality debate. Everybody agrees, at least everybody in this courtroom agrees, that the App Store is a two-sided platform in the economic sense of that term. Whether you want to define a single two-sided anti-trust market or two separate anti-trust markets just makes no difference to the applicable law analysis. Whichever way you do it, you're going to come back to the same question of characterisation that I keep repeating, which is: is the commission that's charged on these transactions an effect on a market in the US or in the UK? That's an issue for the infringement trial as well, not for the preliminary issue trial.

Then we have 15.3, which is whether you need to analyse the product markets separately by genre, or whether you can just lump all different types of apps together into a single market. Again, that is important, or at least potentially important, for the infringement issues because it is possible that a developer of one type of app will have different substitution possibilities from a developer of another type of app. Different ways to avoid paying Apple's commission, if that's what they want to do. Again, it is just impossible to understand how that makes any difference to the applicable law or

territorial scope issue that I keep coming back to. That one is also clearly for the infringement trial, not for the PI trial.

Then, finally, we have paragraph 15.4 which is geographic scope. If you were going to decide any economic issues in the PI trial at all, this would be the one that you would be deciding. But this is one that just makes no difference at all to the infringement analysis sir. Mr Perkins has said that himself, just to give you the reference paragraph 3.21 which is tab 16 paragraph 609. So, if you need to decide this issue in the preliminary issue trial at all, which you expressed doubt on in the jurisdiction judgment, and we say you were right to express those doubts, if you need to decide it, that's going to be the only time you need to decide it. And again, it may provide some reassurance to the Tribunal to know that there was no debate about this issue at all in the Kent proceedings. It just didn't feed into the analysis.

Then paragraph 16 of their skeleton takes matters no further. They're building on the conclusion that they failed to establish in paragraph 15. Paragraph 17 I do need to deal with because it concerns pass-on. This is the point I showed you earlier in their reply. Dr Ennis is right to say at the outset that we have not yet pleaded a pass-on defence, but even if we do plead a pass-on defence in due course, we say that can't make any difference to the applicable law or territorial scope issues. I hope you already have my point by now that applicable law and territorial scope are not about where someone's bank balance is affected. It's not about who suffers loss and to what extent do they suffer loss. To make that more concrete: Suppose there were two developers both domiciled in the UK. One of them passed on an excessive price on a transaction in the US to the tune of 90%, and there was another one hypothetically that absorbed the whole of the excessive price, it cannot be right that UK law and UK competition law would apply to one of those UK domiciled developers claims but not the other. That just doesn't make any sense.

Even if I'm wrong about that, then Dr Ennis only has a claim to the extent that UK developers did suffer loss. So, we don't need to worry about a scenario in which pass-on is so high that the Ennis class suffered no material loss because that's a scenario in which there's no claim to be adjudicated on in the second trial. So, for those reasons, the points made at paragraph 18 of the skeleton just don't arise and there's nothing that you need to decide in trial one that actually matters in trial two. And for the same reasons, my learned friends are wrong to characterise in paragraph 19 what we say is involving any sleights of hand.

The one point here that I do want to call out specifically is in paragraph 19.2 where they say in parenthesis on the third line we incorrectly reduced their case to being a question about domicile. Now, sir, it's not entirely clear to me what they mean by that. I appreciate that they do rely, or plead reliance on, the various other factors that are listed here, but at the end of the day, the submission that they need to be making to the Tribunal, what they need to persuade the Tribunal of is that the Competition Act applies to all of the claims brought on behalf of the class. They do need applicable law and territorial scope to line up, if I can put it that way, with domicile. It can't depend on facts that are specific to specific class members because if that was the position, if they had pleaded that position in their claim form, which they hadn't, then those claims wouldn't be suitable for determination on a common basis. That would have been a certification issue that we would have raised. So, again, just to summarise, there's no sleight of hand in our argument that all of this can be done with a clean split.

So, if we're right about that, then we say that the case for preliminary issue here is very strong. As I have said, the Tribunal has more than once conducted preliminary issues trials on issues of this kind, specifically on applicable law at *Westover* even when there's much less at stake. Here, if we're right about applicable law or if we're right about territoriality, then Dr Ennis is not entitled to pursue claims in this forum in

relation to the foreign storefronts at all. For forensic rhetorical purposes Dr Ennis characterises that outcome as a matter that only affects volume of commerce. I should say "only" because volume of commerce is a big deal. It's very important. That's actually not the right way of characterising the outcome. It's not just that the volume of commerce is reduced. It's that Dr Ennis can't be heard to allege in this courtroom that Apple's commission in the US or Japan, or anywhere else, is excessive at all. It actually goes to liability in relation to those claims. Indeed, further than liability, it goes to this Tribunal's jurisdiction in relation to those claims.

I accept I should clarify that, with the possible exception of pass-on, we have not at this stage identified any great respects in which the evidence would be reduced in scope at a final trial depending on the outcome of the preliminary issue trial.

In actual fact though Dr Ennis suggests that there needs to be more disclosure if he is right about applicable law. For your reference that's paragraph 33.4 of his skeleton. We don't accept that. But at the end of the day, that isn't really the point. That's not why I'm here asking you to order a preliminary issue trial. But the point is it's beneficial to all concerned to know what the trial is about, to know what is at stake before it commences, if, indeed, it commences at all.

As I said the volume of commerce is obviously very important too. If the vast majority of the claims is ruled out that has to make is less likely that the final trial is going to happen. That is a matter of common sense. There are a lots of ways that the proceedings might come to an end in those circumstances. But in any event if it does go ahead, the parties will be going ahead with it and preparing for a trial in a way that is proportionate to the issues at stake. So, the particular numbers --

**MR LENON:** That is important information. Supposing I did consider that in view of the preliminary issue, the trial wouldn't go ahead, why is that a factor in favour of the pursuit?

**MR PICCININ:** Because if that turns out to be the case then, sir, it would save enormous costs of not having a second trial if that's how it goes. Really my main point --

**MR LENON:** -- it would leave issues unresolved wouldn't it? It wouldn't lead to a satisfactory conclusion to the case in a sense.

**MR PICCININ:** I suppose it depends how -- I don't want to go through all of the possibilities. The main point, as in *Westover*, if there's a discrete issue like this which will determine something about the scope of the final trial, then it would be a good idea to go ahead and decide it if we can. This isn't a case where I'm saying that's the only way to organise these proceedings, or the only efficient way to do it, but we say it is the most efficient way to do and it's helpful to do it that way. That's the burden of my submission.

I don't know, sir, if you would find it helpful if you've already seen the numbers on how much difference it makes to the volume of commerce. If you just want to have a quick look at that in volume 4 to take the way my learned friends put it, that's in the hearing bundle at tab 18 in something called the third supplemental report. And if we go to page 650 and look at the parenthesis in paragraph 3.4 we have a percentage I won't read out because it's confidential. You can see there what they say the impact on the claim is. Then over the page in table 3.1 we have the series of absolute numbers in millions of pounds which again I won't read out. These are on different hypothesis. Again, all I want to say about these numbers is that they are highly exaggerated numbers in the sense that I know they're only based on a preliminary analysis by Mr Perkins so I don't want to be too harsh. He may see reason as the case progresses. For context Dr Kent's expert on excessive pricing, Mr Derek Holt, accepted in the Kent's proceedings that commissions up to 20% could be fair and obviously that doesn't bind Dr Ennis. I just note it's a little bit surprising that Mr Perkins hasn't gone

as far as the class representative in the Kent proceedings went when illustrating to you what the impact of the outcome of the preliminary issues might be. As I say, the numbers don't particularly matter. The point is, on any view, the proceedings would be greatly reduced in scope. The vast majority of it would be ruled out if we succeeded and it would be helpful to everyone to know that's what we're dealing with at the trial.

The only real point that Dr Ennis has against a preliminary issue trial, if we're right about the clean split point, is costs. They deal with that at paragraph 27 of their skeleton which is on page 18. We say that is a very weak point. I am not sure if it's really been pursued on an independent basis if they're wrong about clean split. Dr Ennis has chosen not to give any evidence at all on the extent to which a preliminary issue trial would give rise to greater costs. That's perhaps not surprising because there's really no reason to think it would give rise to any materially greater costs because the preliminary issue trial is itself a fairly small venture. We've suggested conservatively, to allow for the possibility of cross-examination of experts if we really get there, we've suggested a period of a week. But even if that's right and if there was no preliminary issue trial which is Dr Ennis's preferred outcome, all of that is still going to have to happen in the main trial. So, all of the work of preparing the evidence and the argument and presenting it to the Tribunal is going to have to happen. So, it would only be whatever small incremental costs there are from doing it at a separate time.

Paragraph 27.2 Dr Ennis says that there's likely to be an appeal. Well, that may be so sir, since it, as we say, a pure point of law rather than one of facts. It's possible there will be an appeal. But if that's true at the preliminary issue stage, it's also true at the final trial stage that there's likely to be an appeal on this issue. And the appeal itself would be of a very modest scope indeed because it could only be, as is true of all appeals from this Tribunal, on points of law.

It's difficult to see what that really adds to their submissions on costs. I think the main

reason they wanted to mention appeals was for the point that they make at paragraph 27.3 where they say that, if there was an appeal, then the Tribunal would face a dilemma as to whether the main trial should be delayed or the remaining issues should be determined in the knowledge that the Court of Appeal might reverse the outcome. As to that sir, it's always true that a preliminary issue judgment could be appealed, and that the Court of Appeal could overturn the result. If that mere possibility was enough to render a preliminary issue trial inappropriate, it would never have them. Looking through the CAT's website at the various judgments that are issued from time to time we can see that's not the position. In this case, this is a particularly weak argument because if you look at the timetable that we propose there's plenty of time for the Court of Appeal to rule on this as well before the main trial takes place. Again, if you just go to page 35 of the hearing bundle to see what we've proposed by way of a timetable, we've got fact evidence in September. I'll just wait for you to get there.

**MR LENON:** Which page?

**MR PICCININ:** Page 35 of the hearing bundle. Page 12 of our skeleton if you've got that sir. At the top of the page paragraph 29, we've got the timetable that we propose. Fact evidence in September, if any, expert evidence at the end of October. We've even made provision for reply expert evidence just in case 5 December and then a trial in a convenient date in January 2026. So, even if allowing a considerable period of time for the Tribunal then to consider that and issue a judgment in due course, there should be plenty of time for an appeal to the Court of Appeal to take place long before November 2027, which is when the parties are agreed the main trial should take place. As for the case management dilemma, as to whether to order the parties to continue preparing on the basis that it's global or to proceed on the basis that it's only local, that is something that the Tribunal can form a view on at the time. But if my learned friends

are right that this issue makes no difference to the evidence that needs to be deployed in the main trial, then it's hard to see how there would be real dilemma as to that. So, that's a point that just goes nowhere.

Then finally, in paragraph 28 of their skeleton, they say that a preliminary issue trial is likely to delay the ultimate resolution of the proceedings. There is just no basis for that submission at all. As I said at the outset, if you look at the directions that we have proposed, they lead to the main trial taking place exactly when my learned friend have suggested it should take place. The only difference in our proposed directions arises from the preliminary issue trial that we're proposing is the one set out in paragraph 31 of our skeleton argument on page 35 of the hearing bundle. This a very small point. My learned friends have suggested witness statements for the main trial to be exchanged on April Fools' Day next year, which is not an auspicious date. We suggest that instead this should take place on 1 June 2026 which would give a little bit more time for the Tribunal to produce a judgment on the preliminary issue trial and the parties to take that into account to the extent of matters in their witness evidence. It's not a big point. But that seems preferable to us if it can be accommodated. It certainly can be accommodated because my learned friend's proposal is that the expert evidence be exchanged in late February 2027. We agree with them for the reasons I have already canvassed and so our proposal would still allow nine months between the date for the fact evidence and the date for the expert evidence.

So, sir, those are my submissions on the preliminary issue and the trial application unless you have any questions. At this point it might make sense to hand over to Mr O'Donoghue.

**MR LENON:** We will deal with a few points on trial directions --

**MR PICCININ:** -- I'm happy to deal with them now if you would like me sir?

**MR O'DONOGHUE:** On directions?

**MR PICCININ:** Yes.

**MR O'DONOGHUE:** It is obviously a matter for the Tribunal. I think we thought this would be dealt with sequentially, but it is entirely up to you sir.

**MR PICCININ:** I don't have very much to say about them, so I can run through them.

**MR LENON:** Do you have anything to add to what's in your skeleton?

**MR PICCININ:** A little bit sir. There are very few points where we disagree with Dr Ennis's proposal. The first of them, I think there are only two actually that arise for decision, the first of them is the date of the inspection from the Kent proceedings. On that Dr Ennis proposes 22 April, which is just four business days on from today. Obviously, sir we've not been sitting on our hands in relation to this. We've already begun work on it. We just can't do it that quickly. We propose 14 May which is 16 business days later. The reason we need the extra time, I will set this out, and I hope it helps Mr O'Donoghue, the reason we need that extra time is because of the scale of the task. We're talking about 1.7 million documents running to 8.2 million pages. In Kent those were provided in over 60 productions over the course of nearly two years. We've already spoken with our e-disclosure provider who has already started work on this. They need until the end of April to get the productions on to a hard drive. That hard drive would then be physically located in the US. So, we would need to get it shipped to London. Then we need to check it here and make a copy for good order. You'll already know sir, there are three public holidays, bank holidays, between now and then. So, assuming it arrives on 5 May and allowing a week for the steps to take place in London, that's how we get to the 14th. So hopefully that point won't be controversial. It's impossible to see how it causes any prejudice to anyone.

The second point is slightly more substantial: Dr Ennis is asking us to produce a new disclosure report and EDQ, specifically in relation to the Ennis proceedings. That disclosure report and EDQs are not standard in competition cases in this forum. We

have already done that exercise for Kent. We say it is disproportionate and that instead what should happen is that Dr Ennis should start by looking at the literally millions of documents we're about to give them before coming back with any specific requests that we can then talk about what we have, if anything.

The reason that Dr Ennis gives for wanting to skip ahead and make us do the work of producing a specific Ennis EDQ now is that he says that his claim is different from the Kent claim. If we can just look at their skeleton argument at paragraph 33, we can see that Dr Ennis actually just hasn't realised yet how much of what he is saying has already been said before and is already covered by the disclosure that has been given. Running through those sub-paragraphs, at 33.1, Dr Ennis says that his case is that developers contribute value to Apple through the apps that they bring. That was a major theme of the Kent trial.

**MR O'DONOGHUE:** Where is this in evidence? It is inappropriate for Mr Piccinin to give evidence.

**MR PICCININ:** I am responding to what has been said in the skeleton argument. There hasn't been time to produce evidence. All of this happened in open court. I am not talking about anything that is secret. My learned friend will find, when they receive the documents, that there are lots of documents about that issue. Indeed, it should be clear from our defence that this is something that is already in issue because of course a key premise of our case on market definition is that Apple is constrained in what it does on the App Store front by the need to keep developers happy and keep them making apps for our devices. That's a key part of our defence in Kent which was played out in open court in front of everyone. I'm sure Dr Ennis was following. That's why they will find, when they look at the documents, there's plenty of material on this and indeed there's no dispute on it.

In paragraph 33.2, his next point is about where and by whom Apple provides services

to developers. It's not clear to me what they want from us by way of disclosure on this. I don't really know how I would go about putting together an EDQ on this. To a large extent, it can just be seen from the contracts themselves. For example, as I said earlier, you can read the DPLA to see exactly which entities are doing what. If there's something specific they want to know that's not covered in the disclosure, then they can ask us. It really doesn't seem to be proportionate for us to start with a blank page and produce a whole EDQ on that.

Then we have paragraph 33.3 which relates to the DMA. Again, there was material on this in Kent. But more fundamentally than that, it's just not clear to me why they say this is relevant to the issues in this case at all. Because, as I said earlier, unlike in Kent, the counterfactual here does not involve any relaxation of Apple's rules about distribution or payments. It's entirely unclear to me why information on the take up of those options in the EU is relevant to Dr Ennis's claim which is just about the level of the commission that Apple charges on the App Store not through alternative distribution.

So, this is a point that I would suggest really needs to be thought through further on the Dr Ennis side and discussed in correspondence as part of the post disclosure process that they provided for they in their draft directions.

Then, finally, at 33.4 we have their point that this is a claim about all storefronts, not just about the UK. As I said earlier, sir, this is in tension with Dr Ennis's position that resolving the preliminary issues would make no difference to the liability issues at trial at all. Here they seem to be saying "Oh no, we need lots of additional disclosure." In any event, just to reassure them it's obviously not the case that all of the documents that we're disclosed in Kent, or anything like that, related specifically to the UK storefront. There were lots of documents discussed in open court at trial about developers' interactions with Apple on lots of issues of global significance as you would

expect given the issues in that case. Again, we say what Dr Ennis really needs to do is to take a look at what we're giving him from Kent and then consider specifically what he says is missing. Then we can take it further in the way that he has proposed in the directions from that point.

So those are really the only points that are in dispute at this CMC arising from a decision. Beyond that you'll have seen, as I said at the outset, that both sides have laid down some markers about what might be coming down the line. It is probably not helpful for me to pre-argue any of that, but you've heard what I said at the outset about what those issues were. So, unless there's anything else, no, that's me. Thank you.

**MR O'DONOGHUE:** In the interest of a clean split, would now be a convenient time to take a short adjournment?

**(11.48 am)**

**(A short break)**

**(11.55 am)**

**Submissions by MR O'DONOGHUE**

**MR O'DONOGHUE:** I will deal with the preliminary issues application and my learned friend, Mr Carall-Green will deal with directions. I am anxious to give him some air time, in line with the Chief Justice's indication a couple of years ago.

Can I just give you the headline points in terms of what I am going to say. First the burden is on Apple to show that a preliminary issue has clear benefits over and above those of a unitary trial. The test is not a whether PI wouldn't be a bad idea, or we give a lash, or we suck it and see. There needs to be a positive demonstration that a preliminary issue trial has clear benefits. In our respectful submission, Apple is a million miles away from being able to demonstrate this. Not only are there no clear benefits to a preliminary issue trial, but it is obvious, we say, that a PI would generate unique disbenefits.

The problems with the proposed preliminary issue application we say are: first a clear split is not possible since, as I will show you, the preliminary issue issues overlap with market definition, dominance, abuse, causation and quantum. Indeed, we say if one takes a step back it is actually obvious. Applicable law and territoriality are about understanding whether there is an effect on the competition in the UK or, for the pre-Brexit period, in the EU. Contrary to what Apple submits one cannot seal these issues from the other issues in the case. In practice they bleed into each other, which, of course, pointedly, was the very reason why in the Kent proceedings the Tribunal refused Apple's preliminary issue application in that case, on that occasion with market definition and dominance coming first. As we will see from the case law, the lack of a clean split is itself a reason to refuse a preliminary issue, so we could stop there.

Secondly, it is common ground that a preliminary issue will not dispose of the claim. It is common ground the Tribunal has jurisdiction over sales affected via the EU versions of the App Store, including the UK version, in the pre-Brexit period and via the UK version of the App Store from IP independence day. As Mr Piccinin showed you, sir, we put in an expert report setting out how substantial this aspect of the claim, over which you have jurisdiction, is. The figures are not public, but they are of the order of hundreds of millions of pounds. With respect to Mr Piccinin, he doesn't have an answer to the point, other than a rather hubristic submission that, well ultimately the class representative won't succeed and therefore you can discount that completely. Now I do note, parenthetically, that in classics defeat follows hubris. But the concrete point for today is that the Tribunal is in no position to say well, these hundreds of millions of pounds of claims over which you have jurisdiction, as is common ground, we can put those to one side and pretend they don't exist. Indeed, even at the jurisdiction challenge stage, Apple did not think to question the merits of the main case of abuse. It accepted it was at least arguable.

We say again, as a second factor, the fact there would need to be a substantial trial in any event is itself a compelling reason to reject the application. The preliminary issue, in such a context, has nothing to commend it. Thirdly, we say there are no real benefits to a preliminary issue and indeed substantial disbenefits. If there's a preliminary issues trial and Dr Ennis wins, it would be utterly pointless since the main trial needs to then take place from scratch. This will just add cost and cause delay. We will come back to this. But there are realistic scenarios in which, were the PI were to intervene, there would be no main trial until possibly 2028 or 2029.

If there is a preliminary issue and Dr Ennis loses, then as I indicated, we need to try a substantial claim in any event that they accept the Tribunal has jurisdiction over. There was an important concession from Mr Piccinin that a preliminary issue would not really cut down, in any material sense, the scope of the second trial. We say that concession is entirely correct. Apple applies a global commission policy and associated practices. They're not differentiated by territory, and it is notable there is no analysis of any individual country in Apple's defence. We say that the second trial would basically be the same even if the preliminary issue succeeds save, perhaps, for some minor data points when it comes to quantum. It is clear from Kent that trial would be a very substantial one, in its own right, since a UK-only trial in Kent took, I think, something in the order of eight weeks.

As I will show the Tribunal in a moment, the case law speaks in disapproving terms of preliminary issues being a siren song and a treacherous short cut. We say that in this case, the song may superficially sound sweet and beguiling, but, like its classical illusions, it will end in shipwreck.

In terms of the structure of what I'm going to say, hopefully before lunch, I want to look quickly at the legal principles. Whilst this is of course a case management issue, it does not arise in a vacuum from the perspective of legal principle. I then want to

develop the main reasons why the preliminary issue should be rejected and, whilst covering those topics, I will then deal with Mr Piccinin's main points by way of response.

So, starting, sir, with the question of the principles, obviously the CAT rules provide for the possibility of a preliminary issue, but there are some key principles that in our submission Apple has rather glossed over. We have addressed this in skeleton, but I want to very quickly list what we say are the key points.

Can we first go to the case called *Jinxin*. It is in the authorities bundle, tab 21. Sir, it is on page 473. If we start at paragraph 23 at the top: "The fact remains that the decision to split what would otherwise be a single trial into more than one trial each dealing with defined issues is a step out of the norm, where most cases there will be a single trial determining all of the issues arising in the action. Accordingly, there must be a real and substantial advantage if a split were ordered to take place."

Again, a small but not unimportant point. The norm in adversarial civil litigation is a unitary trial, not a preliminary issue or split trial. And the norm, like most norms, is there for a good reason. A unitary trial, at least in general, best serves the need of justice, fairness and efficiency.

Second, as I alluded to in my earlier remarks, the courts, and particularly the Appellate Courts have been critical of the false economy that a preliminary issue creates. If we look sir at the *Rosetti* case in tab 10, Lord Neuberger stated on page 131, that this: "represents yet another cautionary tale about the dangers of preliminary issues. In particular, it demonstrates that … while often attractive prospectively, the siren song of agreeing or ordering preliminary issues should normally be resisted, … if there are nonetheless to be preliminary issues, it is vital that the issues themselves, and the agreed facts or assumptions on which they are based, are simply, clearly and precisely formulated and… once formulated, the issues should be answered in a clear and

precise way."

We will come back to this. But one point we make at this stage is you have nothing from Apple whatsoever in its application as to what factual assumptions that would be applied by the Tribunal on the preliminary issues. We say that is, itself, a defect and is in itself a concern. I will come back to that.

Then we have an equally famous dictum from Lord Scarman in the *Bindel* case - it is at tab 18, 411. This reproduces Lord Scarman's quote. Let's look at tab 18. Page 411. Paragraph 30 at the bottom of the page, Lord Scarman observes: "Preliminary points of law are too often treacherous short cuts. That was a warning about points of law; a fortiori preliminary issues that involve substantial disputes of fact."

Now I will come back to the last sentence, since one of the many objections to the preliminary issues application is that -- as I will show the Tribunal -- a whole host of disputes of fact arise, so preliminary issues are inappropriate for that reason as well.

Third, we say, in part because of the first two point I mentioned, that there is an asymmetric and high burden on Apple, as the applicant. If we go back to *Jinxin* in tab 21, please, paragraph 26 on page 473: "Unless a split trial can be justified as a means of resolving the disputed issues... with clear benefits over and above those seen at a single trial, the peril exists that a split trial will add considerably to the parties' costs burden, will delay the conclusion of the action (with an unappealing draining the court's resources) and/or will lead to unanticipated difficulties."

I will come to this in my submissions. We say that Apple has failed to discharge what we say is a high burden to establish the clear benefits of the preliminary issue and, indeed, the disbenefits we say are obvious.

Fourth, one factor which is dispositive is what I call the cleanliness of split and if there are difficulties in identifying a clean split, that is itself a reason why the Tribunal can

indeed and should stop there and refuse a preliminary issue. We can pick this up at 20.1 --

**MR LENON:** Which page is it?

**MR O'DONOGHUE:** Page 583, tab 25. At the bottom of page, paragraph 19:

"There are dangers and unintended consequences, where an apparently bright line separating particular issues turns out to be not so bright or perhaps a little bit fuzzy. This is likely to be particularly acute when considering a split trial. There is an inherent risk of satellite disputes which would undermine the intended benefits of a split trial. If the split turns out to be in the wrong place or not clean there is the risk that the trial one judge cannot determine properly or at all those issues which the parties intended to have determined at trial one. If there is a grey area or some fuzziness there may be missing evidence and disclosure at trial one or overlap, creep or seepage between the evidence and the issues to be determined at the two trials and/or worse that some issues might end up falling down between a gap between the two. The starting point and often the end point is therefore whether there is a sufficiently clear bright line between the issues to be determined at each stage such that in principle a split trial is possible."

Again, sir, for your pen in tab 20 -- the *Euronet* 360 case -- paragraph 10, I quote: "If there are difficulties in defining an appropriate split or a clean split is not possible, that is likely to count significantly against there being a split trial."

So that's what I want to say by way of principles.

On the substance we say there are five core objections. One is the lack of a clean split. Two is the point I alluded to earlier, that the preliminary issue would not be dispositive -- a substantial claim would remain in any event. Third, there is no clear advantage in a split, and indeed serious disadvantage to a split. Fourth, significant delay is likely. And fifth, the preliminary issue application is defective on its face for

reasons I will develop.

Before I move to these five reasons, sir, one point I can deal with while finishing up on principles -- it is striking that the only example Mr Piccinin has put forward of where either the High Court or indeed this Tribunal has dealt with applicable law on a preliminary issue basis is the *Westover* case. We say that absence of precedent is, itself, conspicuous and significant. Of course, sir, as Mr Piccinin fairly conceded, comparisons between case management decisions are odious, so we don't think there's a lot to be gained by comparing and contrasting this case and that case in terms of the case management.

But the fundamental point, that Mr Piccinin glossed over, is that in that case the parties were agreed that a preliminary issue was the way forward. In this case we're very much not agreed. *Westover*, with respect, doesn't take Mr Piccinin anywhere.

Starting with the question of the cleanliness of the split we have a handful of points to make: first of all, we say there is a lack of a clean split in terms of the preliminary issue of territoriality. As the Tribunal is aware, under territoriality, there are two tests; conduct implemented in the jurisdiction of the EU, or alternatively conduct that has a qualified effects in the EU or UK. On qualified effects, on the second territoriality test, it is clear we say from authority that that issue is very much bound up in the question of the effect of the conduct on the market. Now we can pick this up from the *Martinair* case which is in tab 20.1 of the bundle. This is one of the many air freight cargo decisions. The case was about a global air freight cartel and the issue on territoriality was whether an overcharge applied to air freight services concerning in-bound cargo into the EU gave rise to qualified effects as a matter of territoriality. That's the basic context. If we then look at paragraph 125 on page 465.33, the court says: "The purpose of applying the qualified effects test is precisely to prevent conduct which, while not adopted with the EEA, has anti-competitive effects liable to have an impact

in the internal market and within the EEA", citing *Intel*.

Then, at paragraph 126, it says that the test doesn't need to be based on actual effects on competition. It says "[i]t is sufficient to take account of the probable effects of that conduct on competition." At the bottom of the page, sir, the court notes that for an object infringement, there's no need in any event to show an actual concrete effect on the market, but a potential effect may suffice. So that's by way of backdrop. Then the court deals with each of these sub-criteria for qualified effects test. I want to focus on foreseeability so we can pick this on page 465.36. If I can invite you to read 145 to 149 and then I will make my submission, and also 150, please.

First, sir, we say the analogy between a cartel overcharge and an unfair pricing overcharge is a fair one. Then 150 is important because there you see that, in the context of territoriality, you have economic evidence being submitted from experts on the effect that the overcharge has on the market down the supply chain. You see an economic argument of a waterbed effect -- if the surcharges go up, the rates down, and the waterbed evens out. That's at 150. The point I'm making is you see this very clearly that when it comes to territoriality and foreseeability, the effect of the conduct on the market is relevant and cannot be sensibly decoupled from the issues of infringement and indeed causation. Of course, what's very striking about this territoriality analysis is that the Commission is not concerned with private law damages, it is concerned with the question of liability, but even at the stage of liability, the effect of the infringement on the market and whether it caused damage knocking on down the chain is part and parcel of the territoriality assessment. That's why we say one cannot hermetically seal these issues. They fall to be assessed on a holistic basis. This point comes out loud and clear from both the Court of Appeal and indeed from the Court of Justice in *Iiyama*. If we can start with the *Iiyama* case in tab 12.1, paragraph 95 -- this was a challenge, as it happens, by Mr Piccinin and I to territoriality

and applicable law. In rejecting that challenge the Court of Appeal says at 95: "Whether or not the test [which here is territoriality] is satisfied will depend on a full examination of the intended and actual operation of the cartel as a whole. Such an examination can only take place in the light of the full facts as they emerge and are assessed at trial. The exercise is not one suitable for summary determination on the basis of the assumed facts", which is important.

I ask you to underline the quotation where it says "As a whole" because Mr Piccinin's skeleton, at paragraph 19, says: "It must be shown that the charging of those commissions on transactions on those foreign Storefronts, specifically, gives rise to an immediate and substantial effect here." That is wrong. One looks at the conduct as a whole. One does not itemise it by storefront.

You see that from *Iiyama*, the court did not consider on a fragmented basis whether each sale, or indeed groups of sales into each country, were liable to affect competition in the UK, it assessed whether the overall cartel or infringement had a foreseeable, immediate and substantial impact on prices. Now the same point emerges loud and clear from Intel at tab 12 please.

**MR LENON:** That is talking about a worldwide cartel. It's not quite the same, is it?

**MR O'DONOGHUE:** In substance, yes. We're talking about a global overcharge commission. Indeed, the analogy between an overcharge caused by cartel and an overcharge caused by unilateral power in the context of a global commission is close if not exact. The *Intel* case, tab 12, page 275: "It was appropriate to take into consideration the conduct of the undertaking viewed as a whole in order to assess the substantial nature of its effects on the market of the EU and of the EEA." It is at the same point as we see in *Iiyama*, one has to look at the infringement and the impact on the market as a whole and, in my submission, that takes one very firmly into the territory of considering issues of liability and, indeed, causation.

That is the first lack of clean split we rely upon. The second lack of clean split we rely on is there is not a clean split between the consideration of the impact on the market for the purposes of applicable law and territoriality, one on side, and the issues of market definition, on the other side. Now, it is common ground that to resolve issues as to applicable law the Tribunal must consider where the market is or is likely to be effected by the restriction of competition alleged and on territoriality, as I indicated, the Tribunal will need to consider whether the conduct is implemented or it had a qualified effect on the competition in the UK or the EU.

So, the effect on the market and competition is key to the analysis in both cases. Now, sir, you'll recall from the jurisdiction challenge that there was an interesting debate on whether and to what extent there was overlap between consideration of the market, and the impact on the market and competition, under applicable law and territoriality on the one hand, and the question of the impact to the market when it comes to issues of market definition and indeed liability on the other.

Just to show you, sir, in the judgment where that is anchored, it's in tab 23, paragraph 66. There you may recall you set out a quotation from Dicey. You say Dicey says that “Article 6(3) requires courts to undertake a process of the market definition in order to determine the applicable law and that the most obvious starting point for that exercise would be the principles developed in the context of Articles 101 and 102…"

You go on to say, some people think well that's quite complicated and the analysis might be something which operates at a slightly more aggregated level.

You'll recall, sir, that in the jurisdiction challenge we put in expert economic evidence from Mr Perkins going to questions of jurisdiction. Now to be clear sir, I'm not going back down the rabbit hole as to how complete are the Venn diagram overlaps between market definition, on the one hand, and the impact on the market under applicable law,

on the other. I am making two different points. First there is, as we see at 66, an unresolved issue as to whether and to what extent there is overlap in the assessment of the market under applicable law and territoriality and the relevant product and geographic market when it comes to market definition. Now I'm not suggesting that we resolve that issue today, but what I am saying is that it at least means -- to put it no higher -- that there would be real risks in decoupling the issue of market definition from the consideration of the market in the issues underpinning applicable law and territoriality. So, to put it another way sir, because it is unresolved as to what extent market definition (in terms of product and geographic market) overlaps with the reference to the market in Article 6(3), we say as a starting point, there are inherent dangers in decoupling these two issues in the context of the preliminary issues. That's my first point.

The second point is really not about that rather abstruse legal issue. It is a pragmatic point. The pragmatic point, and effectively Mr Piccinin conceded this, is that when we're considering the product and the geography in the context of applicable law and territoriality, that will inevitably be reasonably likely involve some consideration of questions of expert evidence and indeed factual evidence. We say for that reason alone it is difficult, if not impossible, to have a clean separation as to which expert and factual evidence will go into which bucket. I will unpack this, sir, a bit more for you now. The problem I envisage -- and it is a serious one -- is what I call the mouse hole problem, which is that we would be in trial one discussing questions of expert evidence and factual evidence on the market, and there would be satellite disputes about well is that really for trial one or for trial two? Conversely, we would be in trial two saying we've done that in the PI.

We are now on to the product and geographic market in the main case and again, there will be satellite disputes saying well, we've had that debate. That's the mouse

hole over there. That is why the inability to decouple these in a way that is clear is a fundamentally important starting point in terms of the cleanliness of the split. In a sense, I could rest my case on what you set out from Dicey which is that it is unclear to what extent the overlap between market definition in terms of the expert issues is complete relative to the overlap with applicable law and territoriality. In a sense, if that is unclear, it logically follows that saying today we can clearly and cleanly split these two issues and no satellite dispute of any description could conceivably arise, in my submission, is ambitious beyond belief. I go back to where I started, which is there is an asymmetric burden. The way I put this, and I will unpack the overlap, the way I put this is as follows: because Apple needs to show the Tribunal that there are clear benefits from a preliminary issue, if you, sir, have nagging doubts as to the cleanliness of the split, that would itself be sufficient reason to dismiss the preliminary issue application. In my submission, based on the Appellate case law, the warning of the siren song and treacherous short cut, one doesn't take risks with satellite disputes and other difficulties in inefficiencies if you perceive there is a realistic prospect, I put it no higher, of complications and inefficiencies arising on that basis today, that is a sufficient basis to dismiss the preliminary issue.

To quote Jonny Cochran: "if the glove doesn't fit, you must acquit." That's what we say. If you have some doubts as to the viability of this split, that would itself be a reason to dismiss the split to begin with.

Now, just to give you a flavour, sir, of the overlaps and in a sense, as I indicated, Mr Piccinin has, we say, conceded the substance of this point because he said in his submissions "Well, we accept that there may be expert and factual evidence on what is the product, the geographic scope and so on". Now, if one takes that concession at face value, the idea that we have an expert module in trial one that is completely hermetically sealed from an expert module in trial two is completely unrealistic. So,

he has cut the legs from underneath his own submission, we say, by that important concession.

Indeed, if one takes a step back, the idea that we have two rounds of expert evidence on issues that are either fungible or closely related, as a matter of case management efficiency that itself is nothing to commend it.

Now just to unpack what we say are some of the overlaps here. One dispute between the parties is whether alternative channels provide a meaningful substitute in terms of distribution. Apple says there are various methods for the distribution of digital content which, it says, are effective substitutes for services offered by Apple and imposed competitive restraints on Apple.

Just to show you their defence on that, it's in the first hearing bundle at tab 9 paragraph 32 and over the page at 32.1. They say: "Users of iOS Devices have at all times been able to access web apps on iOS devices… Developers are free to distribute their digital content (including apps) to iOS Device users than otherwise through the App Store and without entering into the DPLA ,including through… websites and/or web apps… apps that operate on other operating systems on other devices iOS Device users also own."

If you go to the next tab, the reply at paragraph 15.3, it's on page 214, sir, if you can read 15.3 and 15.4, but essentially as you will see Dr Ennis denies that any of these provide meaningful alternatives. So, this is a keenly contested issue about the scope of the product market.

We would suggest it is obvious that one must form a view on whether certain alternative distribution channels provide a meaningful substitute to developers to the services provided by Apple in order to form a view on the boundaries of product market. Further, it is only when one has formed a view on this that one can then properly start to form a view as to where the competition to provide those services

does, or would absent Apple's conduct and monopoly position, take place. To take an analogy, until you determine whether a train ticket from Manchester to London St. Pancras is a substitute for a train ticket from Sheffield to London Euston, you can't properly conceptualise the relevant market and you can't begin to consider where competition in that market takes place or would take place -- Manchester, the north or somewhere else. So, this is a relevant issue for the purposes of determining applicable law. We say it plainly also has ramifications for the issues which are likely to be heard in a second trial. In particular, it is critical to the interlinked issues of market definition and dominance, with Apple inevitably relying on its wider definition of the market to disclaim dominance, as indeed as it does at paragraphs 83.2 and 83.3 of its defence. But it also has implications, we say, for abuse. Apple relies on its position as to the alleged substitutability of different modes of distribution to counter Dr Ennis's case that the commission is, in part, unfair because it is inescapable. Their riposte to our case that the commission is inescapable is, well, there were other means of distribution. I will give you the quotation, at paragraph 97.1, Apple argues commission can be avoided by developers distributing "Substantially the same or at least highly substitutable digital goods and services via other channels."

So there, in our submission, you have a direct read across from the issue of what distribution options developers have under market definition to abuse, which is also relevant to understanding the impact on the market and competition when it comes to applicable law, territoriality. And, furthermore, Apple goes on to suggest that the alleged substitutability demonstrates the level of commission was set under circumstances of "competitive pressure" and reflects the "market's quantification of [the value Apple provides] at a competitive rate." That's at 97.2 of their defence.

Now we obviously deny that. What it does show, in my submission, is how pervasive arguments as to substitutability are across the different issues and in practical terms,

sir, there is likely to be an array of evidence on this including disclosure, potential factual witness evidence from developers on the extent to which other channels offer meaningful substitutes and also potentially from experts to the mobile industry and/or in software. And all such evidence is therefore potentially relevant both to the preliminary issues and to the remaining issues to be heard in trial two. It manifestly overlaps and again the suggestion that we can hermetically seal the evidence in trial one from trial two is fanciful, I suggest. That's the question of distribution.

There is also substantial dispute between the parties on the significance of different genres on apps. This is another issue which we say the cleanliness of the split is challenging. The point is quite a short one: if Apple is right that there are different markets based on different genres of app, then the logical conclusion would it be that the Tribunal would have properly to analyse where each of these is affected for the purposes of applicable law and where Apple's conduct in respect to that market would have qualified effects for the purposes of territoriality.

It cannot be right that we can effectively argue the Tribunal should decline jurisdiction on an assumption that there is a single unified market for distribution services, tools and technologies at a preliminary issue trial, and then proceed to argue in a second trial that actually there's an array of different markets, some of which may have different boundaries and competitors at a later trial, without this raising a fundamental question of the utility and fairness of the first trial compared to the second.

That's the point we made in our skeleton, there is a rather Janus-faced approach by Apple. It argues for one market in the context of applicable law and then when it comes to the liability issues it says "Well, we will have a second bite."

The issues straddle market definition and abuse and the preliminary issues and are highly significant, we say, for the application. They give rise to a fundamental concern of the viability and certainly the wisdom of a preliminary issue. And the reason why I

showed you the case law is again the lack of a clean split is itself, a dispositive reason against a preliminary issue application. Now we've set out in our skeleton, sir, at paragraph 18 if you're with me, sir, that if there is at least a risk of an overlap that is not trivial, the question then becomes well, how can that be resolved. We say in paragraph 18 that in theory there are two options, neither of which is terribly attractive. If we look at 18, 18.1, you could decide that any determination made in the first trial on overlapping issues would be binding in the second trial. We say if that's the approach, then you effectively have to have the full corpus of evidence on overlapping issues at trial one, otherwise it's unfair. Therefore, the preliminary issue has nothing to commend it.

Looking at 18.2, alternatively, the Tribunal can proceed on a set of assumed facts for the purposes of the first trial, leaving open the possibility open for reaching different conclusions at the second trial. And again the problems that creates are rather obvious we say.

In my submission, one doesn't even get this far. If one is in the realms of speculating -- well, should we do everything in trial one that is overlapping and have all the disclosure and the expert evidence, or should we have an assumption as to facts for trial one which may then come back to bite us in trial two -- that is already, in my submission, a reason why the preliminary issue is inappropriate to begin with. Again, we go back to the case law, the lack of a clean split is itself a reason why the split should not be made in the first place. One does not get into the realms of creative troublesome solutions to the overlapping issues. It's the overlap which is the gravamen.

**MR LENON:** Can you just go back to 15 of your skeleton, Mr O'Donoghue.

**MR O'DONOGHUE:** Yes.

**MR LENON:** If I understood Mr Piccinin's point on this paragraph is I think the first

three sub-paragraphs deal with matters that would need to be addressed at the final trial but not preliminary issue, whereas four was dealing with a preliminary issue matter but not a final trial matter. Is that right? Did you want to comment on that?

**MR O'DONOGHUE:** Yes. Sir, I have taken you to 15.1. That's my point on alternative distribution and I have taken you to 15.3.

**MR LENON:** You've taken me to it, but I don't immediately see why that needs to be addressed at preliminary issue stage.

**MR O'DONOGHUE:** Well, sir, the question is what are the services which are provided to the developers and as I will show you in Apple's defence we now understand there is a very wide array of services across the whole range of different planes. In respect of each of those services, you'll need to understand what is the product scope of the service, then where geographically is it provided. You then have our point which is you need to also consider, but for Apple's monopoly, where might these alternative distribution services and other services be provided. We say all of that directly overlaps with the questions on market definition and indeed on abuse as I will come to. We say there is clear overlap between those issues and the market definition issues at a subsequent stage. Indeed, we say that Mr Piccinin, at least in substance, has conceded that the product and geographic market issues in trial one would overlap to some extent with the market definition and other issues in trial two. In a sense, once that concession has been made, we say, that's the end of it.

**MR LENON:** What about the other one?

**MR O'DONOGHUE:** I have covered three. On four, again we say Mr Piccinin is wrong. Of course, when one is considering the impact on the market and the issue of qualified effects and territoriality, one necessarily has to geo-locate the services in question. Again, that is a direct overlap with the question of geographic market in a second trial. Mr Piccinin is making a different point. He says well, it maybe when we

come to the second trial that issue of geographic market definition, whether it's UK, EU, or something else, is not dispositive. With respect that is not the question for today. The question for today is when one is considering the geo-location of these services in the context of preliminary issues trial, will that issue overlap in terms of expert evidence, factual evidence, and submissions with the geographic market definition issues in trial two and the answer to that is yes. It is not a response to that, with respect, to say well, in the end, that is not decisive or maybe in the end the parties can have some agreement on the geographic market. The issue for today on that question is that there is a disputed issue in trial two that, we say, plainly overlaps with the preliminary issue in trial one. Again, there's two basic questions; what service is being provided and where is that service being provided from and to. Those issues will equally reappear in the context of market definition in both its product dimensions and its geographic dimensions. Again, the fact there would be expert evidence in trial one is, we say, a salutary warning that replicating at least some of this in trial two is nothing to commend.

**MR LENON:** Why should the expert on what service is provided or where it is provided?

**MR O'DONOGHUE:** That is the first stage, sir. The second stage is where does competition take place in respect of the provision of those services. The reason I took you to the distribution point is that, once one gets outside the Apple eco-system as they call it, they say there's all these non-Apple alternatives. One then has to investigate other service providers, other distribution possibilities, and understand where the competition for those alternatives takes place.

Their defence introduced these points. Mr Piccinin has rather sought to air brush them when it comes to the preliminary issues, but that won't work. They rely on these alternative distribution possibilities. They're not, at least for the most part, Apple

alternatives. We will need to investigate where is the competition for those taking place. That is in part a factual question, it is in part an economic question, and it is in part, of course, a question of submission. It is not, as Mr Piccinin submitted, simply a question of looking at a contract figuring out who are the contracting parties. There may be all kind of taxation and other reasons why the contracting party is one entity verses another. Again, Mr Piccinin took you to this, although he rather glossed over it -- we have pleaded that the 7th and 8th defendant who were UK domiciled offer a range of services to UK-based developers, they have not pleaded back to that in any shape or form. There will be a whole series of factual, expert and other issues for dispute and as you recall sir even in the context of the strike out, in the jurisdiction challenge, there was expert evidence. Now I understand from your judgment that on that occasion you didn't find it terribly helpful. But it is a distortion of our case to say "Well, you rely simply on domicile." That is not how we put our case We put our case in terms of distribution services, and there is an economic question, in part, as to: where the competition for those distribution services does take place; what the non-Apple alternatives are; and, on our pleaded case, also a counterfactual question which I will come to that these services, in the absence of a closed eco-system, could well be provided by alternative providers.

Now Mr Piccinin expressed some bemusement at this point. He didn't know show any authority to suggest that it was not open to us, in the context of considering the impact on the market under applicable law or territoriality, to have regard to where competition could have taken place but for the monopolisation conduct in question. Again, to date sir, the suggestion you have resolved that definitively against Dr Ennis, we suggest, is a step too far.

Sir, coming then to a further overlap. There is an overlap between the issue of abuse on the one hand and applicable law and territoriality on the other. I want to show you

what we say is a volte-face by Apple what is now claimed the commission is for. I then want to explain why this is about-turn affects both the issues of applicable law territoriality, such that there is a lack of clean split for that reason as well.

Can I first show you what Apple has now pleaded. It's at paragraph 74 of their defence. It's in tab 9, page 177, it starts at 74 and they say "The Commission is not only consideration for the distribution of the digital goods and services." Pausing there, sir, again on their own pleading, we have now left the realms of the issue of distribution. They say there are non-distribution components that justify the commission. So that's already a shift away from their previous position and indeed that of Dr Ennis. They say: "It is also consideration for the wide array of services which enable or facilitate Relevant Sales and for the access which Apple confers on [developers] to use Apple's propriety services, tools and technologies through which digital goods or services are created and consumed."

So, I will ask you to underline the wide array of services.

Then, if we go back to 149, you'll see a shopping list at paragraph 16.2 of the services they say are provided as part of this wide array.

This extends over many, many pages. It's page 6, 7 and 8. So you've got a long list of all these services they claim now underpin the commission.

We then go to our reply, in the next tab, page 232, and if we go back to paragraph 38.4.1, we say: "Apple's case is that the Commission is consideration for a wide array of services" and so on. We say that at least a very substantial part of these services are provided to Class Members in the UK. Then, over the page, we say: "Even if the focus is placed purely on the act of distribution, this, in practice, involves distribution from the [UK] to iOS Device users all over the world" and that the support services provided by Apple to UK developers globally are provided to the UK, and the UK alone, and generally by Apple account managers based in the UK.

If we then jump forward to 40.3, we make the point this is a shift in Apple's position because they were telling the US Supreme Court "Well it's all about distribution on the other side of the market" whereas now it's about the wide array of services, not just distribution.

Now, why does this matter for the purposes of the preliminary issue? We say on Apple's own pleaded case the commission is now about services provided to developers, the API's and so on, not really or, at least, not in major part about the final delivery of digital goods to device and users. We submit that it is obvious that one must know what services are provided in order to understand the scope of the market in which competition to provide those services takes place and, consequentially, where that competition itself takes place in terms of the locus on the market.

We go back to 38.1. I can take it relatively briskly: "…the applicable law is the law of the place where the market is, or is likely to be, affected. The competition to provide (global) distribution services…. to [developers] in the UK takes place (or, but for Apple's monopoly, would take place) in the UK. In particular, if it were not for Apple's restrictive practices, alternative providers of distribution services would compete, in the UK, for the business of Class Members..."

Then over the page at 38.3: "The affected market is not situated where the provision of the relevant services take place. The affected market is situated where competition takes place (or would take place but for Apple's restriction of competition). A fortiori the affected market cannot be situated (exclusively) where only part of the provision of the relevant services takes place, as implied by Apple's references to the place of the services that trigger the obligation to pay the Commission..."

So, sir, to answer your question it's not simply a clerical question about what is the service and where, in fact, is it provided. The question is: where does competition to provide that service take place or where would it have taken place but for Apple's

monopoly position? Both of those components we say are plainly matters of expert and other evidence, which is why these issues straddle both trial one and trial two and why it's even not possible or at least extremely troublesome to achieve a clean split.

Indeed, if we are wrong on how one locates the market, and Apple is right to suggest that the place in which the services are provided is determinative of the location of the market, one still needs to know what services are provided in order to identify where they are provided. In that case we say it is plain, for example, that the provision of access to propriety technology to UK developers takes place in the UK, or at least part of the services to which Apple provides directly in relation to distribution appear to be provided in the UK. To put it another way, understanding the service that is provided is therefore critical to identifying the place of the market which is affected and where, for example, qualified effects are liable to be felt.

Apple's case on the scope of the services which it provides in exchange for the commission is the central pillar of its defence to abuse. As I showed you, they say the commission is not simply for an act of distribution, it is effectively a tax for the wide array of services you saw at 16.2 they say they provide. So, there you have a very direct overlap between the question of abuse -- why the array is said to justify the commission. Then on applicable law and territoriality, we will need to understand the wide array of services, what they are, where they are geo-located, where competition actually took place and where competition would have taken place but for Apple's monopoly. That is the very direct overlap we say between the abuse questions, on the one hand, and the applicable law and territoriality issues, on the other.

Dr Ennis, as I think is common ground, will be entitled to seek disclosure on this question. Apple, as I think Mr Piccinin conceded, will inevitably need to call witnesses both factual and expert to support his position. We will be entitled to cross-examine those witnesses to test Apple's position on this issue. We say once one understands

that all these pre-ambulatory events take place in the context of trial one, they inevitably bleed into trial two. That is my point on the lack of cleanliness of the split. So, we say even on their pleaded case a clean split is difficult, we say, actually, impossible. The process identified we say is plainly inapt to be conducted once at a preliminary issue trial and then again at a second trial as, quite apart from the question of the burden on the witnesses who would have to give evidence twice, we say there's also a question of fairness as to whether one or other party should be allowed to improve its case in the second trial.

In a sense, Mr Piccinin, I think, sees the issue with their defence on the wide array of services because he argues in his skeleton, and he said it again today, well even if the commission is actually charged for a wide array of services, basically his pleaded case, the question of applicable law should be resolved by reference not to his case, but to Dr Ennis's case. We say that is obviously wrong. First of all, it shows the problem with the preliminary issue. If there was a unitary trial, then the Tribunal would assess the applicable law and territoriality issues by reference to what it has determined the commission is actually for. But Apple says, in a preliminary issue context, the Tribunal can, indeed should, assume that Apple is wrong on the issue for wide array of services. But what then happens if it turns out in a second trial that the commission is for a wide array of services, but it is unfair? Does the Tribunal then re-open its conclusions on applicable law and territoriality? Alternatively, if, as Apple suggests, the Tribunal applies an assumption, then the PI would be essentially useless because the assumptions may turn out in the second trial to be completely false. This isn't a case, we submit, where one can say that, if the Tribunal assumes everything in Dr Ennis's favour, a decision that the defendants are right will then dispose of the case. If the Tribunal assumes the commission is just for distribution and says on that basis the governing law is always foreign, Apple will still want to raise its point on the wide

array of services at the second trial.

We say that, anyway one looks at this, there is a real risk the Tribunal has to revisit the question of the wide array of services in a second trial, making a first trial either a waste of time or at the very least highly inefficient.

**MR LENON:** Why does it have to investigate it at first trial?

**MR O'DONOGHUE:** Well, sir, again, Apple's defence now is the commission isn't just distribution. It's for the wide array of services you've seen in 16.2. It's the point I made to you repeatedly sir: We need to understand what are the nature of those products and services, where they are geo-located, where did that competition take place, where could the competition have taken place but for Apple's monopolisation. All those issues will be in the frame for the preliminary issue trial. And then we will come back to those head on the question of abuse in a second trial. One can see the scope for chaos and disorder. I go back to my mouse hole point; we end up in satellite disputes about well, that's for trial one or trial two. We've done that or we haven't done that, and we've done a slightly different version of this. In a sense the debate before you today is a window into, or a microcosm of, some of the issues we say inevitably will arise if these two things are split. If we need the guts of a day to figure out, at a high level of aggregation, are these splits indeed clean, one can imagine over the course of multi-week trials, the satellite disputes that will inevitably arise. That goes back to my point about nagging doubt; unless there is a high degree of certainty today as to the cleanliness of the split we don't go there. I see the time. I have a bit more to do but I am making good progress.

**(1.00 pm)**

(Lunch adjournment)

**(2.00 pm)**

**MR O'DONOGHUE:** Just to quickly take stock, to make sure you have the point I have

been making. The starting point we say, sir, is that on applicable law in the Rome Convention article 6.3, there is an explicit reference to the market. We have seen from Dicey and other publications that in that context one is considering the impact on the market and competition on the market and where does that take place and so on.

Then when it comes to territoriality, under qualified effects, one is trying to understand is there a foreseeable, immediate and substantial impact on the market in the UK or the EU and indeed on competition in the UK.

So, what we have is essentially a sui generis provision in the Rome Convention which says that, in contradistinction to contractual obligations and other legal categories, one focuses on the market and competition when determining applicable law in a competition law case. That's why we say Mr Piccinin is quite wrong to say you essentially look at a contract, ascertain what is the sort of characteristic performance of the service, where is that takes place -- and that this is either not a factual issue or not much of a factual issue. That is just wrong. That may well be analysis for a contractual provision, but the analysis under applicable law and territoriality is about the market, competition on the market, where does competition in respect of the relevant goods take place, both in product terms and geographic terms. We say that hardwired into the applicable law and territoriality is all things market and competition. That is why I make the point that -- and it isn't simply to overload a case with experts for the sake of it -- when one is considering the market, competition on the market, the products, the geolocation, the impact of practices on the market, that inevitably has a substantial economic component.

Now the air cargo case is actually a very good example. There, sir, you had two categories of services. You had air freight services from the EEA-outbound, so the freight-forwarders would have negotiated with the air cargo airlines in the EU for goods

to be exported outside the EU. Now the Commission found, as we saw in *Martinair*, they absolutely had jurisdiction over EEA-outbound services, and essentially the reason for that was that the competition on the market to provide those services took place in the EU.

Now the fact that, physically, the goods end up outside the EU, in Australia -- to quote Mr Piccinin's favourite example, for parochial and other reasons -- is by-the-by, because the impact on the market, the competition on the market, takes place at least sufficiently within the EU and the place of final delivery is not a critical part of the assessment.

That's EEA-outbound. Of course, the EEA-inbound is equally interesting for the same proposition, because for the EEA-inbound services you have an air cargo carrier located in, say, Japan, dealing with a freight-forwarder in Japan; and the goods being transported into Europe, then onwards sold to customers in Europe.

Now in that situation, as we saw in *Martinair*, what the General Court said is, well, the fact that these airlines and freight forwarders are physically located outside the EU, and that at least a part of the competition in relation to those services took place outside the EU, that doesn't matter. What matters is that we can apprehend an effect on the market in the EU, because the price of those services has a knock-on impact on the price of goods in this jurisdiction.

So, that is another illustration that one is not simply looking at contracts and characteristic performance; one is not simply looking at what happens to be the final destination of the goods; it is a different sort of assessment which is: where is the market, where is it located, where does competition take place, where does the restriction manifest? And that may be in multiple locations.

Now to take a hypothetical example, if the University of Oxford organises an expedition to the Antarctic and for that purpose procures, in the UK, equipment for the expedition

from UK suppliers, one wouldn't say, well, the fact the expedition equipment ends up in the Antarctic means that the affected market is the Antarctic. One is looking at where does competition take place, what are the alternatives, and so on.

That's why, sir, I took you to Apple's own defence, which is, well, there are alternative modes of distribution -- they say, we don't agree -- they say you need to look at all these different genres of apps. We say that is a microcosm of the issues that you will need to consider in the context of applicable law and territoriality, and they will absolutely overlap -- we say in a very substantial way -- with the questions of market definition and dominance, and indeed, on the wide array of services point, with questions of abuse.

Sir, I hope that is helpful in terms of triangulating between Mr Piccinin and the Tribunal and what we are saying. That is the crux of our submission. That is where the experts fit.

We say it is a rather prosaic point. You are trying to understand the market and competition on the market, where it takes place, where it might have taken place but for the practices, then that inevitably that has an economic component that inevitably overlaps the issues of market definition at a subsequent stage.

In a sense the quote from Dicey is helpful from that perspective, because it certainly says if one could identify a relevant competition law market that may be relevant to applicable law, so it may be sufficient even if it is not necessary.

And there is a practical point. Sitting here today we cannot divine at this stage what will be the outturn of all these interesting debates on market definition. The suggestion that we interpose a preliminary issue trial with all those issues looming large, and we graft at least some of them onto a preliminary issue trial, we say is indeed a treacherous shortcut.

So, sir, two final points on the question of the cleanliness of the split, and then I will

move on to more briefly deal with the question of benefits and disbenefits. So, the fourth overlap, we say, or the lack of cleanliness and split, we say is on the question of pass-on of the overcharged commission. Now as Mr Piccinin indicated, Apple has not pleaded a pass-on defence in the Ennis case. Rather curiously, it says in Kent that there was no pass-on to the device users and therefore in effect, as of today, its case is that there was no pass-on by the developers to the device users. So as a starting point on Mr Piccinin's own case on pass-on, there is no impact on the device users in any jurisdiction, not just the United Kingdom or indeed the EU, and that is his effective position as of today.

But, be that as it may, the point I want to make, sir, is a slightly different one. It is as follows. I will show you this in *Martinair*. It is crystal clear from *Martinair* -- and indeed other cases -- that the question of whether the commission had impacts along the value chain is highly material, certainly at least to territoriality.

Let me just show you *Martinair* first. You will see where I am going on this. So if, as *Martinair* makes clear, the issue of pass-on is relevant to territoriality, the suggestion that we break up the two trials and deal with territoriality first and pass-on in a second trial, that raises an obvious issue to do with the cleanliness of the split, and indeed we say it's a recipe for chaos and disorder.

Just to give you point in *Martinair*, it's in tab 20.1, it starts at paragraph 164 -- this is territoriality, sir -- page 465.38, sir -- again, I am sorry for the laborious numbering. You will see, sir, this time we are considering the substantiality criteria in the context of territoriality. So, the General Court says:

"The assessment of whether effects produced by the conduct at issue are substantial must be carried out in the light of all the relevant circumstances of the case. Those circumstances include, inter alia, the duration, nature and scope of the infringement."

Now pausing there, sir, they say first you need to consider all the relevant

circumstances of the case. On any view, splitting these trials would not be doing that. Second, and in any event, they say those circumstances include the duration, nature and scope of the infringement. I would underline those words. We do say, sir, how in a preliminary issue trial in the context of territoriality, where you are required to consider the duration, nature and scope of the infringement, are you to make that determination? That is Trial 2 territory. It simply doesn't work. It is completely backwards. What it is saying by implication, by corollary, is that you would be conducting an assessment of territoriality without considering all the relevant circumstances of the case, without having any clear sense as to the duration, nature and scope of the infringement. So that is already deeply problematic.

Again, as I said in other contexts, if the Tribunal made assumptions as to duration, nature and scope of the infringement, what happens if in Trial 2 they turn out to be wrong? Are we then back to square one on preliminary issue? At the very least it is inelegant. We say that it is, actually, deeply problematic.

That's the first point at 164. Then, sir, at 165 to 169, if I can ask you, sir, to read that. But just to give you the punchline, what the Court is considering there is the question of pass-on. The increase in the price for the services, the air freight services, lead to some knock-on impact on the price of goods coming into Europe; and what they conduct at 165 to 169 is essentially an analysis of the propensity for pass-on.

So again, there you have in black and white, in the context of territoriality, a consideration of questions of pass-on which in our trial would be questions of causation arising at a later stage in Mr Piccinin's application.

Again, it is completely backwards. How is the Tribunal supposed to factor in the question of pass-on to territoriality, when all things pass-on only intervene in the context of Trial 2? It is confused and gets it backwards.

Sir, that's all I want to say on pass-on. Then one final point before I move to two much

shorter topics. The final area of overlap, we say, is between the issues in the preliminary issue application and the question of the abuse and the counterfactual to the abuse, which is a Trial 2 issue. I have shown you, sir, at 38.1 our pleaded case on applicable law and territoriality. 38.1 of the reply relies on how counterfactual competition would have evolved. So, we say on our pleaded case, which isn't being gainsaid or hasn't been gainsaid today, the question of the counterfactual competition is relevant to applicable law on territoriality. Yet, on Apple's case, we don't get to counterfactual competition until the second trial.

So if we can quickly look again, sir, at 38.1. It is in the hearing bundle, tab 10.

**MR LENON:** Page 231.

**MR O'DONOGHUE:** 38.1: "applicable law is the law of the place where the market is, or is likely to be, affected." That's the point I put to you earlier. Then competition takes place, in brackets:

"...(or, but for Apple's monopoly would take place) in the UK. In particular, if it were not for Apple's restrictive practices, alternative providers of distribution services would compete, in the UK, for the business of Class Members. Therefore, UK law applies."

So, what we are saying is one of the many impacts on the market is that Apple's conduct has prevented alternative distribution options from materialising. That is one of the impacts on the market we rely on in the context of applicable law and territoriality.

Now, you will see the phrase, sir, "restrictive practices", and Mr Piccinin makes the point, well, all you complained about was the high level of commission, there is nothing else, and therefore the restrictive practices you should essentially ignore, or limit it to the question of the level of commission.

Now, that is not a fair depiction of our pleading. Just to give you the pleading references to what we mean by "restrictive practices", we can start, for example, at

paragraph 22 of the reply on page 222: the first restrictive practice, indeed the principal one, is that Apple does not allow alternative App Stores on its iOS operating system. Or, at least until the intervention of the Digital Markets Act did not do so, hence the reference to 22.1. So that's the first restriction.

The second restriction is the prohibition on the distribution of iOS apps created using software tools licenced under the DPLA by any other means, which prevents the direct download of apps by what is called "sideloading", by which native apps may be downloaded from websites, installed on an iOS device by means other than the App Store. Can I just give you the reference for that: this time the claim form at paragraph 101.2 and tab 8, page 101.

We identify the various restrictions on sideloading and so on. It is 101.2, 101.4, 101.8 and 101.9. Then importantly 116.1 to page 114.

We say sideloading would have been part, in effect, of the same market. Again, that is an issue on which the economists will obviously have to include as part of their evidence.

Then finally, at 22.4 of the reply, on page 223, we expressly pleaded that we will seek disclosure of Apple’s monitoring data on the emerging alternative App Stores and alternative distribution methods under the Digital Markets Act.

So, that may provide a concrete example of disclosure which would go to resolving the dispute, which would be relevant both to the trial of preliminary issues and to any second trial on the logic that how competition would have developed also has implications for where it would have developed.

So that is just a smattering, sir. There are other restrictions we rely on. Again, we say is it clear, in the context of the preliminary issue in understanding the impact on the market and the impact on competition, that these counterfactual questions as to how competition would have evolved are highly relevant. I have given you some examples

of that.

So, sir, that's why we say there are multiple overlaps. The split between the various issues -- I have shown you -- is anything but clean and, certainly, there is more than ample material to suggest today that the Tribunal should have certain nagging doubts -- we say very substantial doubts -- as to whether a split is indeed realistically possible.

So that's the first core submission. Now, very, very quickly, our second point, we say that a preliminary issue is not in any event dispositive. A substantial trial would remain in any event. You have seen the data in Perkins 4, we are talking about claims of hundreds of millions of pounds that it is accepted the Tribunal would have jurisdiction over.

Mr Piccinin, with respect, doesn't really give an answer to that. He suggests, well, it is ambitious, or it assumes no pass-on or, you know, you will not get there. But, at this stage, in my submission, the Tribunal can and indeed should take the case as it is stated.

You have my point on pass-on that it doesn't help Mr Piccinin to say, "Well, your figures don't take account of pass-on", because Mr Piccinin doesn't have a case on pass-on, so that doesn't get him anywhere.

In a sense, the figures in Perkins 4 are stark, because what you are being asked to do today is to say: well, we shall have a preliminary issue trial, which will give rise to incremental costs and, as I will come on to, incremental delay in circumstances where it is a racing certainty that we will have a second trial in any event, which, as I will come on to, will not be reduced in any material way by the incidence of the preliminary issue.

We say, when one looks at it in those stark terms -- not only is it not dispositive, but they implicitly, but clearly, accept there will be a substantial second trial -- the case

for preliminary issue really goes out the window. It has nothing to commend it. In a lot of these cases one is speculating: well, if we have a split trial or preliminary issue, there is a realistic prospect that the second trial becomes moot. In this case, it is clear there will be a second trial of a very substantial nature, in any event.

One is bound to ask why, in that context, the preliminary issue has anything to commend it. That's the second point.

The third point on the benefits and disbenefits. We say Apple is keen to talk up the supposed benefits, but completely ignores the disbenefits. On the disbenefits, there are two basic scenarios.

The first is, if a preliminary issue is ordered Dr Ennis prevails, then we have to do the whole trial -- the whole main trial as originally pleaded. In that context, a PI will do nothing other than massively increase costs and delay. I will come back to delay that moment.

If a preliminary issue is ordered and Dr Ennis does not prevail, then there would, as I just submitted, be a substantial claim that would need to be tried in any event, which, again, would be made more costly and delayed because of the preliminary issue.

Now, Apple says in its skeleton -- but notably Mr Piccinin didn't go to this today -- that it would not, if the preliminary issues succeeds, be necessary to consider pass-on issues via several storefronts. So, one of the points Mr Piccinin has made is that on pass-on and other issues, the stripping out of certain jurisdictions will lead to a saving in terms of the second trial.

Now, on his feet this morning, Mr Piccinin seemed to have done an about turn and seems to suggest the second trial would actually be more or less the same as a trial in which the preliminary issue had intervened. Just to give you a few references, sir, for example, on the question of pass-on, Apple has said on multiple occasions to date: the question of pass-on does not really depend on whether we are looking at one

jurisdiction or lots of jurisdictions.

If we go, first, to the hearing bundle, tab 19, page 655 -- it is about two-thirds of the way down – they say:

"Dr Kent offers no basis for the suggestion that the rates of pass-on might differ based on the location of the end-user."

Then, tab 34 in the same bundle, paragraph 23, this is a skeleton argument from the last CMC. They say in the first line:

"No party [including, therefore, presumably Apple] has identified any reason why pass-on for the non-overlapping commerce, (i.e. for commission on transactions that are part of one set of proceedings but not the other )..."

In other words, via different storefronts. Paragraph 23, sir, first three lines:

"... would be expected to differ."

Then, of course, in the Kent trial Apple approached the question of pass-on, on essentially an aggregate basis. What it put forward was a series of natural experiments, straddling multiple jurisdictions and dealing with the question of pass-on.

So, based on Apple's own consistent submissions, there is no reason to think that, if we hive off certain jurisdictions from a second trial, that there would be any material saving in terms of the tribunal's workload in that second trial.

Indeed, I don't know if Mr Piccinin maintains this view, but we say the suggestion that the trial in this case would be in any material sense affected by a microscopic store-by-store analysis across 170 plus jurisdictions, there is really no basis for it. This is a global commission policy, the tools, the inputs are essentially common across different jurisdictions and different storefronts. So there really is no saving, we say, whatsoever in terms of hiving off certain jurisdictions from a second trial.

Essentially, we say, sir, that all the substantive enquiry throughout market definition, dominance, unfairness, causation and quantum will remain whether we are dealing

with 28 jurisdictions in the EU or 170 jurisdictions across the globe. The basic scope of factual and expert evidence will not change depending on those permutations.

Of course, strikingly there is nothing in Mr Piccinin's defence setting out any material difference between any jurisdiction of the 170 that they rely on. Indeed, on the contrary, Apple is now keen to position the commission as essentially a form of tax for access to its global so-called ecosystem. So, what Apple says to you in terms of the savings on a storefront basis, in terms of their excision from the second trial, is not even consistent with its own pleaded case.

Indeed, just to give you one reference to our skeleton, which is quite an important point, it's at 24.41, in the bundle, page 17, is:

"There no reason to believe the questions of liability will vary by storefront, Apple's rate of commission and restrictive practices are… global in nature. Further, suggestion that a Storefront-by-Storefront analysis might be necessary flies in the face of Apple's pleaded position that it is impossible to allocate costs even to the Apple Store as a whole (let alone each Storefront) in a non-arbitrary and economically meaningful way."

So, there is not a hint of a suggestion in Mr Piccinin's pleading, or indeed anything else, that a storefront-by-storefront analysis has any bearing on the scope of trial. The only thing that could conceivably be affected in a second trial, if the PI succeeds, is essentially a volume of commerce calculation in terms of the quantum analysis. In simple terms, revenues in certain jurisdictions, if Mr Piccinin succeeds, would be excised. That really is a minor mechanical point. It has no impact whatsoever on the question of market definition, dominance, unfairness and causation, and indeed the main contours of quantum.

So, we actually say, when one looks at this preliminary issue, it has virtually no positive benefit in terms of the scope of a second trial and encounters all the downsides that

I mentioned to you.

On the question of delay, I make two points.

First of all, on the question of costs, we say it is clear there would be enormous incremental costs generated by the fact that either the preliminary issue will not resolve anything or, at the very least, will leave a substantial claim in the second trial that will in effect the start from scratch.

It is an iron law of litigation that two trials cost more than one -- two sets of brief fees, the costs of re-reading into a case for the second time, and so on. This is aggravated, in my respectful submission, by the racing certainty in this case that the expert and factual evidence in the first trial would, if a preliminary issue is ordered, be substantially reheard in a second trial.

Now, Apple may say: well, the burden from that perspective falls more on Apple than on the class representative and it is prepared to suck that up.

But, as the Tribunal saw on the jurisdiction challenge, it is, we would say, certain that the class representative would be leading expert evidence on applicable law and territoriality. Factual evidence is a real responsibility, although I should note there is the issue the developers are scared to speak out against Apple due to fears of reprisals.

But, in any event, the class representative would incur substantial costs in dealing with Apple's factual and expert case.

We do say the Tribunal needs to be sensitive to the fixed nature of the class representative's budget, which was the basis on which it was certified, and the risk that a collateral purpose, certainly a collateral effect of a preliminary issue, will be to run that budget down, and place pressure on the class representative.

Ultimately, this is public interest litigation that has been approved at the highest level by the Supreme Court in *Merricks* and the effects on the last representative's budget

of this satellite litigation is a factor, in our submission, to be taken into account.

Now, Mr Piccinin valiantly said: well, the PI would not cause any delay. It can slot into the overall timetable.

Now, we say that isn't correct.

First of all, we have proposed a two-and-a-half-year timetable to trial which Mr Piccinin has said is sensible, and Apple has said disclosure will, I think, be given in mid-may. But, from our perspective, that disclosure is a starting point and not a terminus. Mr Piccinin this morning, I think, candidly conceded that it would be at least open to the class representative to come back and seek further disclosure based on gaps in the Kent disclosure.

Now, I do emphasise in this context we are not running an identical case to Kent. Our case is that because of the enormous contribution of the app developers to the Apple so-called ecosystem, the effective rate of commission should be zero or something close to zero. And that seam of the case, to do with the developer contribution to Apple's products, was not explored at all, certainly not in any significant way, in Kent. We have a different case, which will lead to disclosure that has not been given in the Kent proceedings.

So, we say, if we get the first tranche of disclosure in May of this year, there will then have to be a second and possibly a third round of disclosure, which then pushes us late into 2025 at the very earliest. So, the suggestion that there could be a preliminary issue in January of next year is, we say, completely not realistic and indeed is self-serving.

If there is a preliminary issue, from our perspective, it is a trial which in a very substantial matter will overlap with the main trial, particularly in terms of disclosure. We will, therefore, want to have for a preliminary issue trial, a proper corpus of disclosure that will not be done in May, or indeed quickly after May. All the signs in

this litigation are that this would be an attritional issue. We do not see how we can resolve disclosure even this year.

If we are then looking at the vista even based on Mr Piccinin's directions of a preliminary issue trial in the middle of next year, followed by at least one appeal, then it is impossible to see how preliminary issue could be done and dusted for a trial proposed in Michaelmas 2027.

Of course, Mr Piccinin did mention -- therefore I am entitled to mention -- the possibility that an appeal might not end at the Court of Appeal level and may indeed go further, and then all bets are off.

We say, in fact, on a very basic analysis, this preliminary issue does not dovetail with the timetable to trial. Of course, there are significant issues for the class representative as to whether, in parallel with fighting a preliminary issue trial, he needs to prepare fully for the main trial to follow. And that will have enormous budgetary implications for the class representative and, effectively, we would be fighting on two fronts.

So, there is the additional cost, there is the delay and in any event none of this, we say, properly dovetails.

Then, finally, sir, my last point before I hand over to Mr Carrall-Green. Can we quickly go to the *McLoughlin* case, which is in tab 8 of the authorities bundle?

It is page 124:

"In my judgment the right approach is as follows. (a) Only issues which are decisive or potentially decisive should be identified. (b) The questions should usually be questions of law. (c) They should be decided on the basis of a schedule of agreed or assumed facts. (d) They should be triable without significant delay, making full allowance for the implications of a possible appeal. (e) Any order should be made by the court following a [CMC]."

Now, we say the application in this case fails at each and every limb. It would not be

decisive. There would be a substantial trial in any event, as is common ground. Contrary to what Mr Piccinin submitted, it is not a pure question of law. There are very significant issues of fact and expert evidence. It cannot be tried without significant delay, because, we say, a preliminary issue trial would need to contend with a host of factual and expert issues and indeed attendant disclosure.

Now, as I indicated at the outset, one striking omission in the application is: what facts are we to assume for purposes of a preliminary issue trial?

Now, I apprehend Apple saying: we should assume no facts and we should have a full factual debate trial.

But they haven't put in schedule of assumed facts, which you would think they ought to do if they were to proceed on that basis.

But it is very difficult, given the extent of the disagreement between the parties on even the most fundamental questions -- what is the commission for, for example -- to think that the parties would be able to agree on assumed facts or, at the very least, to do so without this in and of itself leading to significant time and expense being incurred. And in *Steele v Steele*, paragraph 11, that is, itself, another factor against a preliminary issue.

If one quickly looks at Apple's preliminary issue application, at tab 4 of the first hearing bundle, page 46, there is paragraph 3 at the top of page. They say:

"Insofar as these claims relate to the charging of Commissions on transactions taking place through non-UK storefronts ..."

But this formulation ignores -- certainly downplays and obscures -- the point that on its own case, in defence, the transactions in respect of which the commission is charged include a wide array of services, including the supply of intellectual property, software and support services from Apple to developers located in the UK. Therefore, the formulation of the preliminary issue is not even consistent with Apple's own pleaded

case in the defence.

One final point, sir, I can take extremely quickly, there was point made in Mr Piccinin's skeleton -- but, again, not repeated on his feet -- that because a preliminary issue in this case is what he calls a jurisdiction question, it makes sense to determine that on a preliminary basis. We have three responses to that.

First, it is actually wrong, because a substantial part of the claim will need to be tried in any event, as is common ground.

Second, it is, with respect, a straw man. The issue is whether the PI application meets the conditions for preliminary issue. If it does not, then calling it a jurisdictional issue adds nothing. If it does, it does so on its merits not because of the label one affixes to it.

But the basic logic is flawed. If that logic was correct, it would mean that in every case in which a party brings an unsuccessful challenge to jurisdiction, but maintains its position on jurisdiction, jurisdiction would then need to be determined at a preliminary issue trial. We say that is clearly not the practice at all and there is not a single precedent mentioned by Apple here, which we say is telling. And you have my point on the Westover case and why it doesn't take Mr Piccinin anywhere.

Sir, for those reasons we say the application should be objected.

**MR LENON:** Do you have any other points on the definition of the issues in paragraph 3 of the volume you have just taken me to?

I take your point about the scope of the services. But do you have any other points?

**MR O'DONOGHUE:** Yes, sir, it is essentially hopeless. All it does, at the highest possible level of aggregation, is try to identify the broad contours of the issue. We can all see what the Rome II convention says. We all know what "territoriality" means. These questions are essentially meaningless and what they obscure is what is holed beneath the waterline. If this were to be a serious application, you would expect Apple

to come along and say, "Here is the factual evidence we will advance. Here is what we say are the expert issues". Mr Piccinin mentioned all this orally this morning. This should have been in the application. Then we could have responded.

This doesn't even begin to touch the edges of the issues. If they were serious about this, there would have been a suggestion put forward: here are the factual assumptions or factual issues in dispute that they propose. Likewise for expert evidence.

That is what the case law requires them to do. This is really a wing and a prayer point, which is: well, in this case, there is an issue under applicable law and territoriality concerned with non-UK storefronts. That doesn't begin to get to grips with the issues. That's why I say it is defective on its face. It is essentially a series of throwaway questions that take one nowhere. You will have seen from the debate, even over a few hours this morning, this is quite complicated. Clarity and precision on the issues, the factual issues, the expert issues, is required. What you have here is something at the highest possible levels of abstraction. It is defective for that reason as well.

**Submissions by MR CARALL-GREEN**

**MR CARALL-GREEN:** Sir, I have been asked to address you on the outstanding case management issues. I can divide these into three, sir. The first is the scope of disclosure. That goes to the question of the disclosure report because my learned friend has said that our case is not sufficiently different from Kent to warrant a new disclosure report.

Second and relatedly, I will take you to the disclosure report in Kent itself to examine whether or not it is sufficient for present purposes.

The final point is about timetabling to trial.

So, first, on the scope of disclosure.

Sir, Apple has said that it is content to provide the Kent disclosure by to us by 14 May.

We are happy with that date. Mr O'Donoghue has already made the point that is a starting point and not a terminus. That's because Dr Ennis does not accept that the Kent disclosure covers all the issues in his case. We say that for the reasons that are given at paragraph 33 of our skeleton. Mr Piccinin took you there earlier, but if we could go back to that paragraph which is on page 22 of the bundle.

So, here, we list the examples of what we say are non-overlapping areas.

Now, the first area is one on which Mr O'Donoghue touched just a few moments ago, which is the point that Dr Ennis's case is that developers contribute value to Apple, beyond the payment of money, which offsets any economic value provided by Apple. So, the point here is that the commission is said by Apple to be justified in light of economic value provided to developers and the reply is that if one is looking at economic value one has to have regard to the other direction, i.e., the value provided by developers to Apple.

Now, Dr Ennis is not aware that this was in focus in the Kent proceedings. My learned friend says that Dr Ennis doesn't realise that the documents about this issue are somewhere in the Kent disclosure. Of course, one response to that is: he doesn't realise that because Apple has not explained that and the disclosure report is a valuable exercise by which Apple can explain what disclosure it has given in various sets of proceedings hitherto, and we will go to the disclosure report. I will show you that's what Apple did in the Kent proceedings.

The other answer is that my learned friend said that the reason that this issue had been covered in Kent was because Kent concerned the constraints that were imposed by app developers on Apple. But that's, as far as we are concerned, not fully analogous to the case that we put in these proceedings. If I could take you to page 250 of the bundle, sir, you will be able to see some of the ways that we put this. This page starts at paragraph 53.3.4.1. I am just going to take those three full paragraphs on the

page there by way of example.

In that first paragraph, we make the point that one of the things that app developers do is contribute value by allowing Apple ad revenue associated with the commerce going on on the App Store. Then we have the second paragraph, where we make the point that app developers contribute value to Apple by driving demand for the devices themselves.

Then, in the third paragraph, we make the point that Apple derives value from app developers through a process which is known as Sherlocking, whereby Apple using, effectively, its panopticon, where it can see everything, all the commerce going on through the App Store, it can detect what apps are considered to be valuable to consumers and can then seek to develop its own response, either by way of a competing app or by integrating the functionality into iOS itself.

So, sir, we are not aware that these issues were sufficiently canvassed in the Kent proceedings. To the extent they were, or there are documents lying in unused bundle somewhere that we have not seen, then the obvious solution is that Apple should tell us that they are there in a fresh disclosure report.

**MR LENON:** I seem to recall one of Apple's answers to this part of your case was that you will have things to be getting on with in terms of the disclosure that was given in the Kent proceedings and you should have a look at that first, before you come back and ask anything else.

**MR CARALL-GREEN:** We will certainly do that, sir. But if we know at this stage that the existing disclosure covers the issues in Kent, and we know at this stage that there are issues in our case that aren't in Kent; why should one wait?

Sir, I wanted to return to paragraph 33 of my skeleton argument. I don't ask you to turn it up. Going back to the non-overlapping issues, a second non-overlapping issue is, as has been discussed at length earlier in this hearing, there is a lively debate

between the parties about what the commission is paid for, and if it is paid for a variety of services, where the services are provided and -- which maybe different -- where competition takes place.

Again, Dr Ennis is not aware that was in focus in the Kent proceedings. But it is quite conceivable that Apple has documents discussing that issue of which Dr Ennis would want to seek disclosure.

The third non-overlapping issue, to which I wanted to draw your attention, is the fact that the Tribunal will note that Apple's disclosure report in Kent is dated 6 March 2023, and the Kent trial was, of course, at the beginning of this year. Things have continued to happen since then that have a bearing on the case.

We mention in our skeleton argument -- this is the specific example that we pick up -- the fact that Apple introduced, on 25 January last year, a new set of terms and conditions called the "AEUTA" or the Alternative EU terms addendum. My learned friend says this is irrelevant; it's not clear why this is this a non-overlapping issue.

The answer is that Apple has, by means of the AEUTA, lowered the headline commission rate to 17 per cent in response to regulatory intervention from the EU. So, developments of this kind are likely to generate documents that are relevant to Dr Ennis's pleaded case. For example, we apprehend that Apple may well have documents considering the effect of lowering the commission on its margins. You would expect a sophisticated business to take a view on whether it should lower the commission to 15 per cent, 16 per cent, or 17 per cent or what have you. That may all be helpful for the purposes of assessing the excessiveness of Apple's pricing, which is clearly a pleaded issue in this case.

Now, we give another example in our skeleton argument where we make the point that the AEUTA now allows alternative methods of distribution for app developers outside our class because it applies to EU app developers, and we may want

documents going to, for example, the uptake of alternative distribution methods because that sheds light, perhaps, on a variety of things, such as how much app developers really value Apple's offering as opposed to anybody else's.

Indeed, sir, that would be relevant for the preliminary issue as well, I add as a side bar.

So, my learned friend's suggestion is that our disclosure requests will need had to be thought through further and then we need to write to Apple with suggestions. But, of course, that is actually the purpose of the disclosure report in the first place.

If I can take you to the one in Kent, if we go to page 681 of the bundle, you see there, sir, at paragraph 2, the document actually set outs its purpose, which is that Apple is to file the disclosure report and then the parties are going to seek to agree in correspondence the categories of documents to be disclosed and so on and so forth.

So, the right way round is the way round that it was handled in Kent, which is to say that the disclosure report should give an indication of what documents Apple has, where, what kind of issues they are likely to cover, and then Dr Ennis will be in a position to start making some informed suggestions about how a disclosure should be taken forward.

So, you will have seen, sir, from our draft direction that we have proposed a CMC in October of this year to resolve any disagreements arising out of that.

**MR LENON:** But you have already had the disclosure report in Kent, haven't you?

**MR CARALL-GREEN:** That's what we are looking at, sir.

**MR LENON:** Yes, that's what we are looking at. So, what more is there?

**MR CARALL-GREEN:** Let's look through it. We can start at paragraph 3, where we see the way the report is organised is by reference to these so-called repositories. If I may, sir, the way that this report has been used is the report was given, Dr Kent will have made her request, and then some disclosure will have eventuated. Now, that disclosure is going to be handed over to Dr Ennis. That's common ground. So, in

a sense, the report has served its purpose, as it were. The documents that are relevant -- at least to the Kent proceedings, not necessarily the Ennis proceedings -- that were flushed out by means of this report have been delivered.

Where did they come from? There are five so-called repositories and the first one is -- well, they are all documents from certain other proceedings elsewhere. So, the US proceedings, or certain US proceedings, from certain Australian proceedings, from a CMA investigation and market study, and from a European Commission investigation.

But, sir, if I can draw your attention to the dates of these, just taking the first as an example, the US proceedings. Paragraph 9B, which is on page 684 of the bundle, shows us that the documents were collected in October 2019 and December 2020. So, this document is now, in my submission, rather stale. Then if one scrolls down, or turns the page, to paragraph 11, we see that Apple lists the issues -- paragraphs 11(a) to 11(h) -- that it says arise in Kent, but are covered by the documents being provided in the US proceedings.

You will see, sir, from that list that it does not include the kind of material that I have referred to earlier as being part of the non-overlapping case.

Now, sir, very similar points can be made about each of the five so-called repositories that are identified in the report. The documents from the Australian proceedings are from 2022; from the CMA proceedings, 2021, and from the European Commission investigation the date is not given. But the investigations in question were opened in 2020. So, sir, in each case the issues that are stated to be relevant either don't cover the non-overlapping grounds or indeed there are no issues stated. So, if I could take you, by way of example, to the CMA investigation, paragraph 28 of this document and the relevant part is on page 693, here we are looking at document production notices dated June 2021 at the latest. So, getting on for four years ago.

At paragraph 28, we see that Apple will review the documents produced as part of the CMA investigation for responsiveness. So, it's not even clearly stated what issues are being reviewed for.

So, sir, that is the thrust of my submission on all of the five repositories, i.e., that the data collection date is now rather stale. I have already made the point to you that events continued to happen, investigations into Apple's conduct continue to take place, decisions continued to be made, litigation continued to be brought. There is no reason why the litigation and proceedings that are set out in this document from a couple of years ago should be assumed to represent the most up to date position. That's the first point.

The second point is the document has clearly been produced, rightly, in the context of the Kent proceedings, where the issues are, yes, overlapping, but not precisely coextensive.

Sir, a couple more examples for you. Moving on past the part of the document that deals with repositories and into the part of the document that deals with data. You will see from paragraph 45 that obviously the data in question is transaction data for the UK storefront. I needn't labour the point that that is only part of the Ennis case.

Then, paragraph 49, my last example, sir, the question of financial data. This is on page 699 of the bundle. Here Apple reports about documents relating to financial information relevant to the App Store. So, if I could draw your attention to our reply which concerns the kind of financial information that we will seek, on page 217 of the bundle. You may or may not need to turn it up, because this point has been somewhat ventilated already. I would ask you to bear in mind our paragraph 16.4.

In summary, sir, the debate between the parties is this: Apple says its commission is fair because it is paid in return for access to an ecosystem that is very valuable. In reply, Dr Ennis says that Apple monetises that ecosystem in a number of other ways,

meaning that, among other things, its margins have to be assessed by reference to all the profits that it generates from that ecosystem. So insofar as Apple is preparing a disclosure report that tells us that we will be able to access information about the profitability of the App Store, that is not enough. Because the financial data that we will be seeking relates to Apple's profitability more broadly.

So, sir, just standing back from the detail, I say that it isn't right for Apple to say that we can make do with the disclosure report in Kent. Quite apart from anything else, this Tribunal has taken the active decision that this case and Kent should proceed separately. That is to say nothing of the fact of the points that I have already made, i.e., the staleness of the document and the fact that it doesn't cover issues that are squarely pleaded in this case.

Sir, the question of the electronic documents questionnaire goes hand in hand with the report. The Tribunal will know from the High Court procedure that the questionnaire is an eight-page form that deals with such questions as date ranges, custodians, forms of electronic document, file formats, databases and that sort of thing, under the Tribunal Rules, the Tribunal uses the same form. So, we say the two go hand in hand.

I stress that we have no difficulty with Apple using its pre-existing work in Kent -- which is no doubt of some utility -- as a basis on which to do further work in this case. But the fact that Apple can use its work on Kent as a base makes its position more unreasonable. If some or much of the work has already been done and all it needs to do is update this document, then why is it such an imposition?

Or the alternative is that it is quite an imposition because it involves a lot more work, in which case that only reinforces my point that the Kent disclosure report is not suitable.

Sir, that's all I wanted to say about the disclosure report. If I can just wrap up with

a few minor points on timetabling to trial?

The draft timetable is at page 51 of the bundle, sir. We have already dealt with the fact that the proposed disclosure date by Apple is acceptable. Apple has only one further variation, I think, to this timetable, which my learned friend drew your attention to, which is Apple would prefer to have witness statements -- which are currently dealt with in paragraphs 8 and 9 -- by 1 June 2026, rather than 1 April. We assume that would put the responsive witness statements back by a commensurate time. So, we would suggest end of July for the responsive witness statements, if that's all acceptable, sir.

I just did want to clarify something about the timetable, because you will see that it has some quiet periods. Now, there is no harm in having some slack in the timetable, especially when matters like disclosure are likely to become contentious. But, sir, it doesn't mean that nothing is intended to happen during those periods. They aren't really slack. The two periods are the front end of 2026 and the back end. The reason that they are quiet periods is because they are both designed to accommodate parts of the procedure that may happen; that have been floated in correspondence, but that won't necessarily happen. So, the first is third party disclosure. My learned friend drew your attention to that, as well, this morning.

The proposal would be that the quieter period in the beginning of 2026 would be used for the third party disclosure. There is some back and forth in the skeleton arguments about whether or not that's needed, but we don't need to get into that now. To the extent necessary, the proposals can be debated at the Michaelmas CMC.

Then the second quieter period, sir, is the back end of 2026, where you will see that, even on the slightly pushed back witness statement timetable, Michaelmas 2026 looks quiet. Of course, there will be lots of drafting on our expert evidence going on, but that period will also accommodate the possibility of survey evidence, which is something

that's been floated in the correspondence and skeleton argument.

So, sir, I do commend that timetable to you as being sensible. I think there is broad agreement on that. But I do stress that it applies only to the extent that you don't order a preliminary issue. If that is where the Tribunal is minded to go, then we would want to come back to you on the timetable, essentially on the lines that Mr O'Donoghue has outlined a few minutes ago.

**MR LENON:** Thank you.

**Reply Submissions by MR PICCININ**

**MR PICCININ:** My learned friend, Mr O'Donoghue, has been throwing up quite a lot of smoke in his submissions and trying to give nagging doubts, as he put it, that I am some kind of hyper-attractive mythical being that is seductively singing you to shipwreck, sir. That's very flattering, I have to say. I am grateful to my learned friend. But I am afraid today's application is much less interesting than that.

When you strip away all the metaphors and look at this analytically and coldly it is actually very simple. Whichever way you skin it, the singular focus for the applicable law and territorial scope issues in this case has to be on the place where the rate of commission is characterised as having its effect. That's all.

That's not because we say that applicable law and territoriality issues always turn on that kind of characterisation of simple primary facts that you can just take from the face of the contracts. That's not our submission. It's not some characteristic performance-type of argument.

The reason it is as simple as all that in this case is because of restriction of competition alleged in this case is such a simple one. It is charging too much commission on transactions. Again, that's all.

Although my learned friend today referred to various different restrictive practices, as he calls it, that pop up here and there in their pleadings by way of context, none of

those so-called restrictive practices are alleged in these proceedings to be abuses of a dominant position. The only allegation of abuse in this case is excessive pricing.

My overarching submission to you on the issue of clean split -- which is really the key one -- is that there is just no overlap between the singular focus that is called for in this case on applicable law and territoriality and the issues in the main trial.

There are just five specific points that Mr O'Donoghue raised on clean split that I want to respond to that won't take long. The first point only related to territoriality. My learned friend showed you two particular cases in which somewhat intricate and factual issues had arisen on the topic of territoriality. One was *Martinair*, that's air cargo; the other was *Iiyama*, that's the LCD cartel.

My submission on those, sir, is that obviously I accept that the tests for territorial scope of EU law can engage intricate factual issues. In *Iiyama*, for example, there was a worldwide cartel as you noted, sir, concerning LCD panels. That cartel was implemented in the first place -- it was formed and implemented -- in East Asia. Then the issue was that the LCD panels then filtered their way through multiple steps in the supply chains through multiple transformations of products from a panel into a monitor into a completed computer package that might then have been sold in the EU. So, the question under territoriality -- or a question -- was whether there were foreseeable effects in the EU at all.

So, there was a key primary factual issue about whether any such impacts would have been foreseen which would require you, as the court said, as the Commission said, to look at the intentions of the cartelists in those cases. So, the Court of Appeal was saying there that there were, in that case, real issues of primary fact to grapple with.

The same goes for *Martinair*. There was an issue that arose from the Commission trying to establish territoriality by reference to alleged effects of a cartel on a knock-on downstream market. That's why pass-on mattered for territoriality in that case.

The point here, sir, is that there are no primary factual issues of that kind that arise in this case. Because there is not, and there could not be, any debate about whether Apple is charging commissions to UK-domiciled developers. If that's all my learned friend has to show as a matter of law, he's going to win, because of course we are. The question is: what conclusion do you draw from that fact on the wider fact pattern in this case? That's the issue.

So, this is not a case where I'm asking you to ignore the edicts from the courts that you should decide territoriality on the basis of all the relevant facts. The point is just that there are no primary factual issues about the alleged infringement that are actually in dispute in this case and are relevant to the territoriality issue in this case.

**MR LENON:** Supposing I am with you on the principle of issue: how do we get to the position of identifying the facts?

I mean, Mr O'Donoghue says that it is a defect in your application that you don't put forward any assumed facts. I mean, there would have to be some sort of definition, wouldn't there, if the preliminary issues were going to be dealt with?

**MR PICCININ:** Yes, that was going to be the last point I was going to come on to, sir, but I can answer it now.

There isn't a defect here in that insofar as there are any minor factual points that do need to be decided, we have made provision for them to be decided on the evidence in the preliminary issue trial. The point is that none of those issues will actually overlap with anything in the main trial.

But, sir, I can see the practical point that you are putting to me, which is that there is an awful lot here that I have said is common ground and is obviously common ground, because it just arises from what the documents are. So, as a case management technique, it might be useful, if we are going to have a preliminary issue trial, for us to try to produce -- or for us to produce an agreed statement of facts: the facts that are

agreed and those that are not. That's something that the parties could, of course, be ordered to produce. There is plenty of time between now and January for us to do that, and that might be useful.

**MR LENON:** Do you envisage that the Tribunal would say today that -- I mean, I am going to actually reserve judgment -- but, if I were to decide it now and I was in your favour, I would say that these issues are the issues as per your application --

**MR PICCININ:** Yes.

**MR LENON:** -- and the parties should go away and agree --

**MR PICCININ:** Produce a list of the facts that are agreed as common ground for the purposes of that trial. Then you can consider them and ask us to try again if you are not happy with it.

But it's not a question of assumed facts, sir. Because the whole point I have been making to you today is that those primary facts, about who is appointed to do what under the DPLA, are not in dispute at all. The question of characterisation about, you know, whether you say that is something that's happening to the market in the US or to the UK, that's never going to be agreed and I am certainly not asking you to assume that.

So, it's not a case of assumed facts, sir. It's just a matter that it's likely that most of this is going to be agreed.

**MR O'DONOGHUE:** We don't share that optimism.

**MR LENON:** No.

**MR PICCININ:** The other point, sir, still on territoriality: my learned friend made a point that was specifically arising out of *Iiyama*, Court of Appeal, paragraph 95, which for your reference is page 286.44 of the authorities bundle. You will remember that was the one that he said shows that in every case you need to look at the effects of the infringement as a whole, the words that he underlined, rather than specifically looking

at the transactions that are on the US storefront than on the UK storefront.

So that's just their legal argument; that because this is a global policy, a global commission, as long as there are some effects in the UK you can look at all of it. Sir, that's the legal argument you rejected in your jurisdiction judgment at paragraph 114 -- I showed you that when I opened -- because Mr Justice Roth had rejected the same legal argument in *Unlockd*.

But, in any event, that's a legal point. Because there is no dispute about the fact that there are obviously effects in the UK when we charge the commission on transactions on the UK storefront. There is no dispute about that.

So those are the first two points which related just to territoriality. The next one is on market definition --

**MR LENON:** Sorry, before you leave that, I could direct today that you were to prepare a list of facts that you say are --

**MR PICCININ:** Yes.

**MR LENON:** -- not disputed and not capable of serious dispute.

**MR PICCININ:** Yes.

**MR LENON:** I could direct that the class representative responds to that, and I can just make of that as I may in due course.

**MR PICCININ:** Sorry?

**MR LENON:** I could then see what the parties' positions were in relation to those primary facts and I could draw whatever conclusions I wanted as to whether they were actually facts that couldn't really be disputed or weren't relevant insofar as they were disputed.

**MR PICCININ:** That's true, sir. In fact, that may be, if I may say so, a better suggestion than my one about the parties just going off and agreeing something. You may then decide that we don't need all of the evidential steps that we have set out in our skeleton

argument being conservative about what's required. So that's true.

It may be that you don't need to hear everything I say about clean split then?

I will carry on, okay.

So, on market definition, my learned friend said that I had conceded that there was an overlap between Trial 1 and Trial 2 issues in relation to market definition. That's not correct, sir.

The position is, as you put to my learned friend in argument, by reference to paragraph 15 of his skeleton argument, you will remember, essentially I can put it this way: the product market definition issue, which is about whether developers can respond to a super-competitive commission by switching to other means of transacting with their customers, that's an issue for Trial 2, and it's not an issue for Trial 1.

The geographic scope of the market -- I will come on to show you exactly what I mean by that -- is an issue for Trial 1 and it's not an issue for Trial 2. So, there is a perfectly clean split.

The one thing I should have shown you earlier from your judgment that I didn't is in the authorities bundle at page 528. It is paragraph 62.1.

This is where you are summarising the PCR's case on applicable law. If you just look at the second sentence of that subparagraph as to why Mr Perkins says that the market is limited geographically to the UK, it's because UK app developers would be unlikely to switch domiciles in the event of a hypothetical monopolist charging a super-competitive price in the UK. So that's an issue that, you know, I disagree that it is relevant, but you can kind of see why they say it's relevant to applicable law. But that's the issue that he also says -- I gave you the reference earlier -- isn't relevant to any of the dominance or infringement analysis in Trial 2.

So that's why we say there is a clean split on market definition.

The next point was my alleged volte-face on what the commission is for. Sir, it has

always been our case that the commission is for not just the narrow service of distribution, but also all of the other economic value that Apple provides to developers. I mean, that ought to have been clear to my learned friends for many years now. We have been arguing it in Kent in public for many years, going right back to the strike out judgment.

In any case, to be clear, I'm not suggesting at all that you should assume against us that the commission is only for distribution. It's not a case of assumed facts at all. What we are saying is that this question just makes no difference to the applicable law analysis. It is not something you need to decide in Trial 1. It doesn't matter why we charged the commission at the level that we do; it doesn't matter what economic value justifies the level of commission that Apple charges; all that matters is where the commission is characterised as having its effect. That's the same question of characterisation that I just keep coming back to very unattractively over and over again today.

So, the last point on clean split actually I don't need to deal with. Because that was the one that you raised with me, sir, which is that we have failed to identify which facts should be assumed, and that's because, as I say, there are no assumed facts. But we can certainly produce the document that you have in mind.

On practicalities in terms of the steps leading up to the trial and any delay that it might cause, I think all my learned friend was really trying to say is they might need more disclosure in order to prepare for a trial on the preliminary issue, and that would make it difficult to do it by January 2026.

Well, sir, at the moment, I am struggling to see what disclosure they really need. But even if there is something that they need, I find it even more difficult to understand how there could not be sufficient time between now and January for us to sort that out. If you were worried about it, then you could put the preliminary issue trial later than

January. It doesn't have to be in January 2026 in order to wrap everything up in time for a principal trial in November 2027.

The joy of this issue, sir -- the reason we are here, the reason this should be such an easy preliminary application to make, if I weren't making such a meal of it -- is that these issues are narrow, they are discrete and they are important. That's why we say there should be a preliminary issue trial and that's why we say it should be easy to slot it in sometime between now and November 2027.

So, that's all I have to say on the preliminary issue trial. On case management, I think the only issue that there really is to argue about is the disclosure report and EDQ. What my learned friend seems to say is that they need to understand what disclosure there is in order to satisfy themselves that the additional points -- the points that they say are additional -- are going to be adequately covered.

We say that's just got it backwards. Because we are not just proposing to give them the disclosure and, you know, we have already given them, as you have seen, the disclosure report from Kent: they have also asked for and we've agreed to give them a list of everything from the disclosure that was in the trial bundle of Kent. In addition, sir, they already have, as I understand it, the written closing submissions from Kent.

Now it is just hard for me to imagine, sir, what an easier start to life in a case could possibly be than having a full set of submissions from a trial of the very issue that you have pleaded, together with a list of what was in the trial bundle, together with the full set of disclosure that includes all of those documents. That is much more useful than anything that you are ever going to find in a disclosure report or an EDQ.

As you have seen, sir, just flicking through the amended Kent disclosure report, all it is is an explanation at a high level of the repositories of the documents that we have pulled together. We don't really have anything much more useful to say than that in the abstract.

I should say as well, it's not correct that the disclosure is somehow stale, because we made lots of productions -- I said before I think 60 of them -- leading up to the latest one in November 2024.

So our practical solution, which is actually very similar to what they say they want to do with this information, is that they should go away, they should take a look at the written closing submissions, they should take a look at the list of what's in the trial bundle, they should use that to go and cross-reference it against the actual documents that we give them -- they can, of course, do wider searches so they are not restricted to what anyone in Kent thought should go in the trial bundle -- they should look across the rest of it, and then they should come back and tell us, in more than just a couple of sentences like they have given us in their skeleton, what categories of documents over what date ranges they really think they are missing and why they are relevant and necessary for us to give them further disclosure for the purposes of this case.

Because, as I said to you before, when we run through the list that they have given us in the skeleton argument, I just don't know what to do with that. I mean, most of those are points that they are going to see are covered in the Kent material, and the ones that aren't, I frankly do not understand from what has been said today how they are relevant to the issues in this case or what exactly it is that they want us to go away and produce.

The one exception to that might be the specific bits of financial data that they say they want. Again, what they have said today doesn't really give us what we need. But a disclosure report or an EDQ is really not the way to go about having that sort of discussion. If they really need something more than what was given in Kent, which they are going to have shortly, then they can come back and have a separate offline discussion with us which is tailored to what it is they say they are missing and we can explain what it is we have.

That's actually the way it was done in Kent, sir, as well. It is true that we started with the disclosure report because no one had the benefit of the kind of material, you know, from an earlier case that my learned friends have here. But when we came to deal with financial data, there was a whole separate process. You know, with quite a lot of specific discussion that led to the production of what was produced.

So that, sir, is what we say should happen. It is just pointless to send us off to create a document which is basically the same as the Kent disclosure one but tries to cross-reference to the pleadings in this case rather than that case. I just don't see what that is going to achieve other than create pointless costs.

Unless, sir, there is anything else I can help you with, I think those are the only points in dispute.

**MR LENON:** With the proviso I said I am going to direct Apple should produce a list of primary facts that it contends the (inaudible).

**MR PICCININ:** Just bearing in mind the aforementioned bank holidays that are coming up, if we could have a month to do that.

**MR LENON:** How long?

**MR PICCININ:** A month to do that.

**MR LENON:** I don't see there is any particular urgency. You won't get the judgment until you have provided that information.

**MR PICCININ:** Understood.

**MR LENON:** How long would you like to respond?

**MR O'DONOGHUE:** A month.

**MR LENON:** You would like a month too? Let's leave it like that then.

I reserve judgment. Thank you very much for your submissions.

**(3.30 pm)**

**(The hearing concluded)**