IN THE COMPETITION APPEAL TRIBUNAL

CaseNo: 1601/7/7/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 16th September

Before:

Andrew Lenon KC
Tim Frazer
Anthony Neuberger

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Proposed Class Representative

Dr Sean Ennis

v

Defendants

Apple Inc and Others

A P P E A R AN C E S

Paul Stanley KC, Daniel Carall-Green and Victoria Green on behalf of Dr Sean Ennis (Instructed by Geridin Partners)

Marie Demetriou KC, Daniel Piccinin KC and Hugo Leith on behalf of Apple Inc & Others (Instructed by Gibson Dunn)

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Monday, 16 September 2024

(10.30 am)

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

Thank you. (Pause). We just have a slight technical issue.

(Pause).

Yes.

Submissions by MR STANLEY

MR STANLEY: Thank you, judge. As you know, I appear with my learned friends Mr Carall-Green and Ms Green for the proposed class representative. My learned friends Ms Demetriou, Mr Piccinin and Mr Leith appear for the proposed defendants, who I will call Apple.

The main battleground at this hearing concerns Apple's suggestion that the proposed class contains unavoidable conflicts between its members of a sort that would prevent, as I understand it, anyone from safely acting as a class representative, whether on an opt-in

or an opt-out basis. In a nutshell, our response to that is that what had been identified as conflicts are not conflicts, they are ordinary and harmless differences between members of the proposed class of the sort which would be expected in many classes hyperbolically dressed up as conflicts.

The second main area of debate is whether, if certificated, the class should be certified as an opt-out class. Again, in a nutshell, our response to that is it is plain that it is appropriately certified as an opt-out class because an opt-in class would not be as practical. In other words, carrying out the right balancing exercise, that is the conclusion one reaches.

Finally there is now a very small argument about the terms of the Funding Agreement. We addressed, for obvious reasons, authorisation first in our skeleton argument, I propose to leave to the end and in fact I propose to ask Mr Carall-Green to deal with that if that is convenient to you.

My plan is I'm going to first address the basic principles starting with the pleadings and bearing in mind that above all it's my burden effectively to satisfy the Tribunal that this is an appropriate case for a collective proceedings order. And although that is largely common ground, subject to the conflicts

point, I obviously have to deal with it. I will at that point include some discussion about the suitability of aggregate damages, which I think is one issue which has an effect on the conflicts issues, because it's not possible to keep the discussion of the points entirely watertight but I will start, in other words, with

(inaudible). I am then going to turn specifically to the conflicts that have been identified, or the alleged conflicts, the approach we invite the Tribunal to take to those, and in that obviously a pretty heavy focus on Trucks inevitably as perhaps the one authority, along with Merricks, which is critical to the analysis.

I will then turn to opt-in versus opt-out. At that point there will be some confidential material that we may need to look at. Up to that point I think there won't be any confidential material that we all need to look at. Then I will hand over, if I may, to Mr Carall-Green to deal with the funding point.

THE CHAIR: Very good. I don't wish to rush the parties but the issues seem to the Tribunal to be relatively limited and the arguments are quite fully set out in the skeleton arguments, so it does seem to us that we should at least at this stage be aiming to conclude the hearing today.

MR STANLEY: Very good. That is music, I suspect, to everyone's ears.

THE CHAIR: Okay.

MR STANLEY: In the light of that, if you feel that I'm spinning wheels just tell me to move on, I don't want to waste time when the Tribunal has the essential points. I want to spend a little bit of time on the pleadings just so that you can see where the particular aspect which raises the alleged conflict fits into the case as a whole but I will try and take that pretty quickly.

So if we start with the proposed class definition, we can find that in two places. But perhaps if I take it from the pleading then we don't have to keep changing documents. At page 8, paragraph 2 sets out the basic essence of the claim. And paragraph 18 sets out the proposed class definition. That is at page 11. And it's noting that definition: all UK domiciled third-party app developers who during the relevant period made one or more relevant sales. The only point of that definition which one should identify is in particular the relevant sale, which is defined in paragraph 20 at page 13, and means:

"Any sale of a Third-Party App via the App Store; and any sale to an iOS Device user within a Third-Party app, on which the commission is charged ..."

So the class is the class of those who made relevant sales on which commission was charged.

Now, if one then turns to the essence of the case, that begins really at page 43 where paragraphs 80 to 85, which begin at that page, set out various essentially factual points about the way in which devices work, none of which we need to take up now, all of them obviously common to any of the claims which are being made.

That then turns specifically to Apple's system beginning at paragraph 86 at page 44 setting out how the App Store operates, and relevantly one point that I think Apple make at page 46, at paragraph 96: the claimant acknowledges, as is of course the case, that different developers have different models for the ways that they generate income from their apps.

Paragraph 97 and following then turns to the DPLA and the terms and conditions, various points being made, all of those inevitably raising common issues. In the technical sense, they will either be the same or similar issues for everybody in the class.

At page 59, after a long discussion of those points at paragraph 112 and following, is set out the way in which the commission structure is based. And 112 sets out the basic commission of 30%. Then 113 sets out certain cases in which there are exceptions which may

take commissions to lower rates. But although there are differences there, as it were categorical differences between some app developers, there is no suggestion and it's obviously not the case where there's, for example, individual negotiation of commission rates in particular cases. This is a case in which there was for obvious reasons Apple has a predefined scheme on which the commissions are based, predominantly 30%.

So all of that material sets out the essential factual canvas. And all of that material raises, in our submission, questions which are common issues for the relevant purposes.

Paragraphs 115 to 120 then deal with market definition. And that is in fact if one goes back to page 20, one could see that that is the first of what are identified in paragraph 41 as common issues, ie issues which are the same, similar or related, the definition of the relevant market. And that, as I understand it, is not in dispute.

Go back to the pleading, or to the body of the pleading at page 64, paragraphs 121 to 128 then deal with dominance, that is the second, I won't take you back to it but if one goes back to 41.2 that is the second of the issues identified as a common issue and again not, as I understand, in dispute.

Paragraphs 129 to 134, which begin at page 66, then set out effectively propositions of law regarding unfair pricing and they are the building blocks for what is the third set of common issues, which relate to whether pricing is unfair. And the essential points which are made there is very familiar material, that as part of a single inquiry into the fairness of the pricing, one can look at excessiveness compared to cost, and one can also look at whether prices are unfair either in themselves or compared to competing products. So there are three different strands, as it were, that may make up that rope.

In terms of the way the pleading then proceeds, it turns first to the excessive limb, that it picks up at paragraph 136, which begins at page 69, and analyses the prima facie case in relation to that. And that again is obviously one of the common issues, paragraph 41.3 deals with that. That is not, as I understand it, in dispute.

Paragraph 140 then turns, that's at page 73, to the unfair limb and introduces a number of factors that are said to be relevant potentially to unfairness. We can pass through 1, 2, 3, 4, 5, 6, 7 and 8, that is up to page 75, all of those raise what are, as I understand it, accepted to be common issues in relation to which there is no conflict.

We then come to 140.9, on which we should spend a little bit more time. That then notes that a third party app developer can avoid the obligation to pay commission if it allows users to buy physical goods or services as opposed to digital goods or services to be consumed within the app. In other words, if that is its business model, it will not end up paying commission.

It then pleads in 140.9.2 that the distinction between physical goods and services and digital goods and services is arbitrary or illusive. And then it gives an example that while Apple deems romantic matchmaking services to be digital, it deems commercial matchmaking services provided by ride-hailing apps to be physical, in other words what you are doing makes a difference.

The distinction is then said to lead to inconsistent and unfair results and the example given is that most dating apps use the ASPPS and pay the commissions but Facebook, which has been providing a third-party dating service via a third-party app doesn't because it doesn't charge a fee for the dating service but it generates the revenue by other means.

That then builds up to 140.9.4, which is that as a result commission is charged in relation to approximately 16% of the apps distributed through the

App Store while the other 84% are free from commission entirely and the only additional service it provides in relation to the 16% is use of the ASPPS and then it suggests that there is an excessive price for that.

It is then pleaded in 140.9.5.1 that that is an additional reason alongside those which have been set out in 1 to 8 why the commission is overall unfair, and that is then set out in 140.9.5.(2) and (3) by saying that the small minority of the third party app developers, ie those who pay commission, are effectively required to subsidise all of the others. That is an allegation which is being made of course principally to draw a distinction between those who pay commission and those who do not and one bears in mind of course that those who do not pay commission at all will fall entirely outside the class.

It is of course Apple who, alighting on that paragraph, say: well, there will be some people, and I think there are two examples given in the evidence, who do pay commission on some apps but don't pay commission on everything that they earn because they made other non-commission earning sales and they identify that as a conflict because they say those people might be better off under a system where the cross-subsidy exists than in one in which it doesn't

exist. There isn't, I think, before the Tribunal any evidence to identify how many such people there are or what the effect of that would actually be in any kind of concrete terms. It is an abstract proposition.

I simply observe for the moment that the allegation which is being made is firstly being made as part of an allegation about unfair pricing. In other words it's simply one part of the allegation about unfair pricing, are the prices unfair or not, and it's a pretty simple point, which is that it is unfair for the commission-paying entities as a category, in other words the members of class, to subsidise those who don't pay commission as a category. And it's an allegation which is being made, as I have pointed out, as a final subsidiary part of showing that the commission is unfair.

Now, pausing there, just focusing on the pleaded issues, supposing Apple were right in their contention that some members of the class also received a benefit from the cross-subsidy as well as paying commission, where would that actually take anybody? All that could be said perhaps is that the extent of the unfairness for some members of the class was less than for all of them. If they were very numerous, I suppose there might come a point at which 140.9 did not strike the Tribunal

determining liability as making a particularly good point. But no members of the class lose anything by advancing a proposition which is intended to determine that the prices were unfair. The most that could be said in terms of unfairness is that the system would not operate unfairly or as unfairly for all of the members of the class. That weakens the point, but it doesn't eliminate it and it doesn't pose any conflict. In other words, it's never a point that a developer would not want to see made if it would assist in showing that the price which is being charged is excessive and unfair.

So in its terms there is no conflict. I'm getting ahead of myself in a sense but looking at the unfairness issue, the conflict simply doesn't arise.

Carrying on with the pleading we then get to paragraph 144 at page 78 which turns to comparators, so that is the second limb of the unfairness limb of the price allegations, and those again raise issues which are not in dispute but they are common issues and not in dispute or it's not suggested that they raise in themselves any conflict.

So taking all of those together, excessive pricing and the two limbs of unfair pricing are raising common issues, one aspect of which is said, in my submission, in its own terms wrongly, to raise some question of

a conflict.

The pleading then turns to the effect on trade, that's paragraphs 148 to 149 at page 80, that is relevant for the fourth common issue, which is whether there was liability. And it then turns to damages and at page 80 at paragraph 150 it sets out the case on damages, which is that absent the abuse Apple would have charged a price that was not excessive or unfair. And then at paragraph 151 it goes on to say that that would have effectively meant a reduction in commission of between 12% to 15%, I think Mr Perkins might be thinking further about that but it doesn't matter for present purposes, and they would not have paid any commission at all if they used an alternative payment system.

152 then turns to the passing-on question, and points out that the legal burden lies on Apple and asserts, as Apple itself asserts in Kent, that there is no pass-on, but that is no doubt a matter that will have to be explored.

So collectively those damages questions raise further common issues, that's paragraphs 41.5, 6 and 7.

And the pleading then turns to particular aspects of why individual defendants are liable, those will also raise common issues. And then finally, paragraph 164 at page 87, sets out the relief sought, which is

financial relief and financial relief only, there's no claim for any kind of order requiring Apple to impose any particular charging system, and seeks damages on an aggregate basis and with compound interest.

So it's a financial order looking to the past for an assessment of aggregate damages.

All, I emphasise, within the context of what is essentially and from (inaudible) quite clearly an excessive pricing claim. That's the way the damages are assessed. It is not a discrimination claim. There is one aspect of the unfairness which raises a point about cross-subsidy but even that is not a discrimination allegation, it's a different point.

With that in mind, we come to the question of whether the claim is a claim which is suitable for collective proceedings. And obviously you will have in mind, I won't take you to it now, paragraph 9, among other things, of Trucks, in which the Court of Appeal has said: well, this is an issue for a specialist tribunal, which involves effectively the balancing of a number of different factors in the particular case and not one which is or ought to become massively complicated if it can be avoided.

In my submission, in this case it's pretty obvious that it isn't massively complicated, subject only to the

conflicts point, which is itself not a massive complication itself, a minor point.

If one turns in the authorities bundle to tab 2 page 21 to rule 79(2), if we start with 79(1): brought on behalf of an identifiable class of person, not in dispute at all. Raising common issues, quite clear. Suitable to being brought in collective proceedings. That of course is ultimately a test in which one takes into account all relevant factors but 79(2) then sets out various factors. Are they an appropriate means for the fair and efficient resolution of common issues? Plainly yes.

Costs and benefits of continuing collective proceedings, we will come back to this to some extent when we look at opt-out but it's quite clear that collective proceedings, given the number of common issues, represent a very sensible way of deciding these disputes.

Whether separate proceedings making claims of the same or similar nature have already been commenced by members of the class, I don't think it's suggested that that's a factor which cuts one way or another in this case. The size and nature of the class, again we will come to that later on when we look at opt-in and opt-out but it's clear that it's a large number of people, in

the thousands.

Whether it is possible to determine irrespective of any person whether that person is or is not a member of the class. The answer is yes, simple.

Whether the claim is suitable for an award of aggregated damages, I will come back to.

And the availability of any alternative dispute resolution or other means of resolving the dispute, it is not suggested that that is a factor which tells against collective proceedings in this case.

So subject to the aggregate damages point which I will now address, it is quite clear that all of these factors point, may point pretty clearly, in favour of collective proceedings. And it's not really surprising when one thinks that this Tribunal already has Kent in front of it and Kent effectively raises all of the same issues, it raises them from a slightly different perspective but it raises all of the same issues.

Now, as far as the authorisation condition is concerned I will pass over that quickly, I'm not going to say anything about it, because apart from the points made about funding which Mr Carall-Green is going the deal with, I don't think there is any suggestion that Dr Ennis is not a perfectly appropriate person to represent the class.

There might be an argument as to whether the arguments about conflict should be looked at in terms of authorisation or suitability. In Trucks they were looked at in terms of the suitability of the representative. But there were probably particular reasons why that was done. In this case, what is being said is a bit of a broader attack because I think what is being said is that the fundamental underlying factual position is such that no one could be an appropriate representative for the whole of the class. And that argument, if correct, is one which really must go to the suitability for collective proceedings rather than to authorisation.

If I turn then to aggregate damages and suitability for aggregate damages, it is important in this context to bear in mind all that the Supreme Court said in Merricks about aggregate damages and to understand both why they were regarded as needed, what purpose they serve, and how they serve that purpose and the radical changes that the Supreme Court said in Merricks that they make.

We can take the why from all of the reasons why collective proceedings are justifiable, in a sense. As was said in paragraph 17 in the Trucks case, it's perhaps worth turning that one up, it's in the

authorities bundle at tab 31, we will be coming back to it obviously on conflicts but for present purposes just reminding you at paragraph 17 of what this Tribunal had said, which the Court of Appeal said was correct, about collective proceedings generally, which was that the potential damages recovery on an individual basis for such claimants is dwarfed by the cost of such damages proceedings and it is unrealistic to expect small businesses to take the risk of litigation of this nature against major and well-resourced defendants.

All of that in familiar terms, the access to justice rationale for collective proceedings.

If that's the why, the what consists of a separation that aggregate damages permit them to make between two separate concerns. That is what the defendant pays to the class as a whole and what each claimant receives from the amount which is paid either as a result of an award of damages or pursuant to a settlement. In other words, it effects a separation between the calculation of the damages which the defendant should pay to the class and the distribution of those damages between the members of the class.

That is clear if we go to Merricks. If we could go to tab 16 of the authorities bundle, we can start at 1048. This is where Lord Briggs for the majority in

that case is addressing specifically the question of the circumstances in which an award will be suitable for an award of aggregate damages. And at paragraph 57 he says that:

"The same analysis leads to the same conclusion about the meaning of 'suitable for ... aggregate ... damages' under r 79(2)(f). The pursuit of a multitude of individually assessed claims for damages, which is all that is possible in individual claims under the ordinary civil procedure, is both burdensome for the court and usually disproportionate for the parties. Individually assessed damages may also be pursued in collective proceedings, but the alternative aggregate basis radically dissolves those disadvantages, both for the court and for all the parties. In general, although there may be exceptions, defendants are only interested in the quantification of their overall (ie aggregate) liability. For the claimants the choice between individual or aggregate assessment will usually be a question of proportionality."

And then at 58:

"Another basic feature of the law and procedure for the determination of civil claims for damages is of course the compensatory principle, as the CAT recognised. It is another important element of the

background against which the statutory scheme for collective proceedings and aggregate awards of damages has to be understood. But in sharp contrast with the principle that justice requires the court do what it can with the evidence when quantifying damages, which is unaffected by the new structure, the compensatory principle is expressly, and radially, modified. Where aggregate damages are to be awarded, s 47C of the Act removes the ordinary requirement for the separate assessment of each claimant's loss in the plainest terms [it does so of course expressly]. Nothing in the provisions of the Act or the Rules in relation to the distribution of a collective award among the class puts it back again. The only requirement, implied because distribution is judicially supervised, is that it should be just, in the sense of being fair and reasonable."

Now, two key points emerge from that. The first is, as I said, that the rationale for aggregate damages in the cases in which they are suitable are to deal with the difficulty of assessment in individual cases. In other words, it's part and parcel of, albeit leading to a different procedural conclusion, than the rationale for the collective regime generally. And the second is that the assessment of aggregate damages is not simply the aggregation of a succession of assessments of

damages in individual claims, it is not collecting the individual stalks of wheat, binding them into a sheaf and calling that the aggregate damages award. It involves a different method of assessment which radically separates an assessment of the amount that the defendant should be paying, inevitably in a sense on a class basis, to the class, and then the allocation of the amount which is so assessed between members of the class. So it separates award and distribution.

Now, one feature of that separation is that because you are concerned with the assessment of the loss suffered by the class, it is not an objection if that does not result or involve the precise assessment of the damages which has been suffered by each individual within the class, and that's not a bug, it's a feature. It is absolutely common and understood that the individuals will have been in slightly different circumstances and as individuals will have suffered slightly different losses. But the broader Act's principle continues to apply. And that applies also in relation to such matters as the assessment of pass-on and so forth. One is entitled to look at the matter on an aggregate basis. Not only entitled, encouraged and required by the legislation to look at it on an aggregate basis.

So dealing just with that in Merricks at paragraphs 72 and 73, which begin at page 1051, Lord Briggs says:

"I regard the CAT's failure to give effect to this basic principle of civil procedure as the most serious of the errors of law discernible in its judgment. I start by acknowledging the expertise of the CAT's factual review of the difficulties. At the risk of over-simplification it may be summarised in this way. Mr Merricks' expert team proposed to deal with the merchant pass-on issue by deriving a weighted average pass-on percentage from a review of each relevant market sector during the whole of the Infringement Period."

So, in other words, recognising that there would be differences, nevertheless arriving at a weighted average is a statistical way of reflecting those differences fairly to the defendant.

"For that purpose they proposed to divide the retail market into some 11 sectors. But the CAT reviewed a report from RBB Economics entitled 'Cost pass-through: theory, measurement, and potential policy implications' prepared for the Office of Fair Trading in 2014, which concluded that, although in some sectors there was reliable data, in many others the data was 'incomplete and difficult to interpret'. Further, although it might

be that litigation between retailers and Mastercard might yield further data by way of disclosure in these proceedings, that would be unlikely to cover the earlier part of the Infringement Period and would involve a 'very burdensome and hugely expensive exercise'. But the CAT's assessment fell well short of suggesting that Mr Merricks would be unable at trial to deploy data sufficient to have a reasonable prospect of showing that the represented class had suffered any significant loss."

That's the question, has the representative class suffered a significant loss?

Then at 73:

"The fact that data is likely to turn out to be incomplete and difficult to interpret, and that its assembly may involve burdensome and expensive processes of disclosure are not good reasons for a court or tribunal refusing a trial to an individual or to a large class who have a reasonable prospect of showing they have suffered some loss from an already established breach of statutory duty. In the context of suitability for collective proceedings or aggregate damages, it is no answer to say that members of the class can bring individual claims. They would face the same forensic difficulties in establishing merchant pass-on, and

insuperable funding obstacles on their own, litigating for small sums for which the cost of recovery would be disproportionately large."

So the emphasis which is made is that the same principle applies. It is perfectly reasonable to look at a class, even though individual members will have suffered in different ways and to arrive at statistical methods which use the available data to arrive at a fair outcome.

Now, there is no reason to think, in our submission, that that is not the case here; that there are not statistical and economic techniques which will take data which reflects a range of real-world positions to produce a reliable assessment of the overall position for the class as a whole and I think in fairness Apple don't suggest that that is the case.

That will of course ignore, as aggregate damages always do, individual features. That is because in an aggregate situation the individual features are not what is important, it's arriving at the correct aggregate which is important. It is the very reason, in other words, not an error but the very reason why aggregate damages exist.

And in one sense that is why we say it must be right that if Kent is a viable class claim, given that it

necessarily involves both of those same issues, a determination of the amount of the overcharge and a determination of the extent to which the overcharge has been passed on, then this claim is too. And suitable, therefore, for an award of aggregate damages.

Now, I'd just add this: the burden of course will lie on Apple to establish pass-on and our case is that there is no pass-on. Apple has not suggested that it is proposing to advocate a methodology which would not be viable on a class basis. The most that it has done in its skeleton argument is to refer to a position taken by an expert being relied on by Dr Kent, which is an approach that Apple itself says is deeply flawed, and then to suggest that Dr Ennis is going to have to choose how to respond to that analysis. And it's quite unclear why Apple says that Dr Ennis will have choose how to respond to an analysis which Apple is plainly not going to be advancing since it considers it to be deeply flawed, but one imagines that he would, if required to respond, respond without difficulty by saying it's a deeply flawed analysis, with which Apple would agree.

But in any event, that example doesn't show that a class approach is not possible or that there is any inherent conflict of interest, it just shows, as we always know, that faced with evidence a class

representative is going to have to decide how to respond to it.

Now, this is all at the stage of establishing liability and the damages award. At the stage of distribution it is necessary for damages to be parcelled up, obviously. But it is not the case that at the distribution stage they are to be parcelled up by reopening the question of what the particular individual losses were. And the majority of the Supreme Court made that absolutely clear in Merricks at paragraph 76, if we go to 1053. Under the heading "Compensatory principle not essential in distribution of aggregate damages", Lord Briggs says:

"I have already noted that s 47C of the Act radically alters the established common law compensatory principle by removing the requirement to assess individual loss in an aggregate damages case, and that nothing in the Act or the Rules puts it back again, for the purposes of distribution. The CAT took the opposite view. At para [79] it said that in a case where the quantification of aggregate damages takes no account of individual loss, then the process of distribution must, in some way, put it back. Speaking of aggregate damages determined in that way, the CAT said:

'Such an approach can only be permissible, in our

view, if there is then a reasonable and practicable means of getting back to the calculation of individual compensation."

Then there is a longer quotation which I need not read.

"For reasons already given, I consider that this approach discloses a clear error in law. A central purpose of the power to award aggregate damages in collective proceedings is to avoid the need for individual assessment of loss. While there may be many cases in which some approximation towards individual loss may be achieved by a proposed distribution method, there will be some where the mechanics will be likely to be so difficult and disproportionate, eg because of the modest amounts likely to be recovered by individuals in a large class, that some other method may be more reasonable, fair and therefore more just. For that purpose the statutory scheme provides scope for members within the class to be heard about the proposed distribution method. In many cases the selection of the fairest method will best be left until the size of the class and the amount of the aggregate damages are known."

THE CHAIR: So do you say if the Tribunal found that the cross-subsidy approach was unfair, that would make no

difference at the distribution stage?

MR STANLEY: Well, it might or might not make a difference at the distribution stage but it's an entirely different question to the distribution stage. And the establishment of liability wouldn't make a difference to the distribution stage; it's an attempt to go back to an individualised assessment of damages. I mean, it might do. In just the same way that if the Tribunal finds that the fair commission rate is let's say 14%, at the distribution stage you might look to see what commission rates people have actually paid in order to determine how the money should be divided up. All of those factors may be relevant at the distribution stage. But what one doesn't do is conduct the aggregate damages assessment on the assumption that it is also the conducting of the distribution stage and that is a big difference from conventional litigation and it makes a difference to how one looks at conflicts. Because to come from where I'm going to end up, because at the assessment of damages stage one is interested in the interests of the class and those interests are aligned, the maximum award of damages is what the class wants. When one comes to the distribution stage it's slightly different because conflicts at the distribution stage are inevitable, there are bound to be conflicts at the

distribution stage. That can't be an objection and it's something which is not handled by treating the class representative, at that stage, as a fiduciary in the sense that he must maximise the recovery to each individual member, it would be impossible. That's where I'm going.

So still, in a sense, on the suitability of aggregate damages, it is important to understand that the radical change is part and parcel of something which is quite fundamental in the way that the collective proceedings can work. And in this case one is dealing with a large number of relatively small claims, and of course relatively small has to be understood here in the context of the costs which would be involved in individualised assessment of those claims, so that it is necessary to obtain the results that the legislation seeks to achieve in terms of access to justice and the collective proceedings serve to approach damages on an aggregate basis. And in those cases the preferable or the suitable approach is to separate the determination of the amount suffered by the class, which is ascertained using statistical and economic methods applicable to the data about the class from those for an individual assessment of loss in individual cases and to separate, therefore, distribution from that process.

Distribution is then dictated, again, not by

individual loss or the compensatory principle but by what is fair and just in the circumstances. That being a question normally and properly left until after you know what it is you are dividing up, for obvious reasons.

Now, in that context it is plainly not an objection that the individual members will not obtain at the end of that process the very same sum that they would have obtained if they had made an individual claim. And that is the very point that the Supreme Court is making in paragraph 76. It's simply not how the matter is to be approached.

That, in a sense, is, we say, the fallacy in paragraphs such as 27 and 28 of Apple's skeleton argument, which are effectively insisting, contrary to Kent and contrary to Merricks, that the damages here need to be assessed by carrying out a succession of individual assessments and then distribution according to those individual assessments but that is simply not how aggregate damages operate. They exist in recognition of the fact that that is not a viable approach to claims such as this and that one has to have two stages, one stage at which the class members share the interest in maximising the total award and then an interest at which those are distributed.

So that's why we say this is a case which is suitable for aggregate damages and why that then has an impact and an effect on conflicts.

So to wrap up on eligibility generally, subject to the specific conflicts point we have a case here with numerous, thousands of claims, vanishingly few of them of a size which would even approach viability in terms of individual claims, if any of them would given the costs of proceedings such as these. And I will show you the evidence about that later when we are looking at it. There's a mass of common issues to be determined. There is another case proceeding which is essentially -- a collective case which is proceeding essentially on the determination of those very common issues, and aggregate damages are plainly suitable. And in those circumstances, subject to the conflicts point, in our respectful submission plainly a case suitable to be brought as a collective action.

So coming then to conflicts and back, in a sense, to the fundamental change, the radical change which is effected by aggregate damages and how that affects the way one looks at conflicts. I said before, distribution is always going to involve conflicts between class members because by definition distribution to one class member of a larger amount is going to involve

distribution to other class members of the smaller amount. So that conflict cannot sensibly be an objection to representation or it would be an objection which could be taken in absolutely every case.

Nor, as Merricks has pointed out, and I've shown you the paragraph, should anyone assume that distribution will or should consist of an assessment of the individual loss which would have been suffered by class members. I think I have accepted, judge, that that could be a factor which is relevant in the just distribution.

All of that means that it does not follow that decisions about how best to represent the case for the class as a whole should be regarded as having an effect at the distribution stage or as presenting an insuperable conflict.

There must of necessity be a different approach taken to conflicts at the representation stage, at the liability establishment stage, if I can put it that way, at which the representative in his capacity as class representative is advancing claims on behalf of the class to produce an award of damages with whatever role the representative has at the distribution stage, whether that is in the context of a distribution ordered

by this tribunal following an award, or whether the distribution stage happens as part and parcel of the approval by this Tribunal of the settlement.

Because at that stage the class members are birds in the same nest with their beaks open for whatever grubs are available, they are diners around their table with their eyes on the tasty pie and the representative's role at that stage necessarily resembles, insofar as it is fiduciary at all, which it may well be, but it resembles much more the trustee who was deciding how to distribute assets between beneficiaries of a discretionary trust where the essence of the statutory scheme is to ensure fairness, not the sort of role that a barrister or a solicitor represents in advancing their client's interest of single-mindedly advancing the interests of one particular member of a class, it has to be a different role at that stage.

And the safeguards at that stage lie in the role which is given to the Tribunal, either to approve distribution or to approve settlement. And obviously procedurally also to the rights therefore that individual members of the class may have at that stage to make their own representations about how that should be done.

So what must matter for certification purposes

therefore is whether there are significant conflicts at the stage where liability and damages are being determined. That is the point at which one is interested.

Now, a relevant conflict which might cast doubt on the ability of the class to be a class could in principle occur at that stage if there was an indissolvable interest or an irreconcilable interest between different subclasses, if I can put it that way, and their interests could not be simultaneously properly represented, that could be a problem. But that is the issue that one is looking to identify.

And one is looking to identify that in the knowledge that there is no necessary connection between the conclusions reached at the liability stage and what will follow at the distribution stage.

The interests of the class members at the liability stage which the representative needs to be in a position to pursue are to maximise the total recovery for the class, always of course within the limits of evidence and judgment. It's never a scorched earth policy, the representative always has to make informed decisions, which is the one reason why one is looking for a representative who is qualified to make those sort of informed decisions about how the case should be

presented. And in a case where what is sought are aggregate damages, the class members share an interest in maximising the amount of those aggregate damages, the most grubs back to nest, the largest pie in the middle of the table, and the arguments and decisions that are made at that stage don't directly affect the way in which that pie is then divided.

So, in other words, especially in an opt-out case and especially in a case where aggregate damages are suitable and sought, the different individual interests that the class members might have had if their claims were being individually decided fade into the background, and that's deliberate. And they are subsumed in the common interest that the class has in maximising the recovery in which they will prospectively share, and that is a feature of aggregate damages.

Now, with that in mind, can I turn back to Trucks and draw your attention to certain features of that case. First it's at tab 31 at paragraph 5. The RHA is a trade association that promotes the interest of the road haulage industry. It had issued collective proceedings seeking an award of non-aggregate damages, so not an aggregate damages case, on an opt-in basis.

And that was the nature of the class in that case. So this was a case in which there was going to be --

there was no separation of award and distribution of the award, what needed to be done was to prove the damages for each individual because they were not seeking an award of aggregate damages. And the question then becomes whether the RHA can represent everybody in that endeavour.

Now, in that context, if one turns to page 1817 at paragraph 59 -- I have chosen this paragraph from what is a lengthy summary of the parties' submissions because it seemed to me to best summarise the particular conflict that was being identified:

"Accordingly, he submitted that in relation to ..."

I think this is the Chancellor:

" ... in relation to the issue of resale pass-on mitigation, since the interests of the two subclasses of new truck purchasers and used truck purchasers were opposed, on that issue there needed to be separate class representatives, separate legal teams, separate experts and separate funders for the two subclasses."

So there was an actual opposition in a sense that in establishing damages for the used class members versus the new class members the pie was being divided at the same time that the damages were being awarded, effectively. It was akin to the idea that we might have a class in this case which consisted both of the class

in Kent and the class here. In one sense you could say the case in Kent clearly has interest in maximising the amount of pass-on which is involved, and the class of developers has an interest in minimising the pass-on that is involved. Each of those activities maximises, even on an aggregate basis, there. That was the equivalent kind of conflict.

Nevertheless, if one goes to paragraph 88, which you will find at page 1823, you can see the Chancellor there says that he is:

" ... firmly of the view that the conflict between new truck purchasers and used truck purchasers over resale pass-on which the RHA faces can be addressed by the erection of a Chinese wall within the RHA organisation ..."

So that was a case in which there was a conflict, it was a conflict which had to be addressed and it was in fact addressed by the erection of a Chinese wall so that on either side of the wall people could argue that case, as it were, in its full glory.

In that context, it's probably worth also looking at paragraph 97:

"In my judgment, the conflict can only be avoided, not just by an appropriately worded notice but by putting in place now of a Chinese wall and separate

representation by a different team, as described in [paragraph 88] so that the best interests of both the new truck purchaser class members and the used truck purchaser class members are fully protected. Only through putting that in place now will the RHA comply with its duty to act in the best interests of all class members."

So that's the test:

"In that respect I would reject Mr Flynn KC's submission (referred to at [paragraph 85]) that in some way RHA's position as class representative meant that it did not have to act in the best interests of all the class members. Whilst there may be situations in which, on minor or peripheral issues, a class representative may be entitled to act in the best interests of the majority of the class provided that it does not significantly harm the minority, where there is an identifiable conflict of interest on a major issue in the case, I do not consider that a class representative is entitled to prefer the interests of some members to the detriment of others."

So Trucks was a case in which, as the Chancellor saw it, as the Court of Appeal saw it, there was a major conflict of interest -- an identifiable conflict of interest, I am sorry, on a major issue in the case. But

there's an element of realism in that paragraph.

Now, coming then to the alleged conflicts here and starting with the cross-subsidy point, I have already shown you that as pleaded it is simply an argument on the part of Dr Ennis that because those who pay commission, that is all the members of the class, subsidise those who do not pay commission, that is those who are not members of the class, principally, that is one of a number of reasons why the commission is unfair.

Now, can I make two points: if that is fact, the fact that commission is paid only on commissionable activities is just a fact, it is not in Dr Ennis' gift either to call that fact into being or to will it away. Secondly, if the fact is a fact which supports the argument of unfairness, it is clearly in the interests of the class as a whole to deploy it, because it supports the overall case that the commissions were unfair, because it supports liability which the class must establish. It's not a claim for discrimination but part of the unfair pricing claim.

So, so far no conflict.

But then Apple say: well, the conflict creeps in not at that stage but when you think of what we, Apple, might do with this fact that some people in the class derive income from non-commissionable activities,

because, if that is right, we might at the damages stage try to turn that against some members of the class, those who have received the benefit described as a cross-subsidy, and at that point there is a conflict, say Apple.

I would note that that argument has absolutely nothing to do with whether Dr Ennis does or does not mention the factual point at paragraph 140.9 of his Particulars of Claim. So the talk in the skeleton argument about Dr Ennis not having resiled from the paragraph is entirely irrelevant actually to the issue that you have to decide. It's a fact and a fact is a fact is a fact. If it's a good point or it seems a good point to those who advise Apple, they will make it; and if it's a bad point, they won't.

But it's not a good point, as it happens.

So the first question is: is it a realistic likelihood that this argument is actually going to surface? Apple's case would have to be anchored in some credible hypothetical fact, it would have to be that if competitive rates of commission had been charged they could and would have found some way of imposing charges not just on the commission-paying developers, members of the class who derive their unexploited income, but presumably on the 84% of apps which do so and have done

so for years without commission and they would have to show that they could do so lawfully, that is without the new pricing mechanism itself falling foul of competition law and extracting excessive prices from that class. Both of those things seem, with respect, highly speculative, if they are not a stretch. If one makes full allowance for the stringent requirements of fiduciary regulation, one does not come to a point, in my submission, that one has entered a realm of speculation which identifies an identifiable conflict in relation to a major issue in the case on any view.

But, secondly, in any event, with what consequence if that argument was made? Apple's skeleton includes a reference to a concept that they have invented called negative loss, which means a payment due to them. Now, that raises, and the skeleton seems to suggest, the spectre that if there was a success on liability in which this argument featured, members of the class might in fact have to pay Apple. But that is legal nonsense, that simply cannot be so. There is no legal route, everyone can see that there is no legal route, by which Apple can turn a counterfactual used in the assessment of damages into a cross-claim against developers who have not been charged commission fees for past commission, it just can't happen. So that simply is not

a possibility and there is no prospective relief that this court could or would or is being asked to give which would result in that conclusion.

So talk about payments due from members of the subclass as if anyone was going to having to put their hands in their pockets and pay Apple some money is obviously rubbish.

What might happen is that Apple might say: well, since we are looking at damages on a class basis, the benefits to some members of the class which accrued in real life have to be set off against the position as it would have been in if the counterfactual had been the case, in other words we will bring these into account in assessing damages. They couldn't result in damages being negative, there would never be circumstances in which the class or any member of the class could pay Apple a thing, but it could go to reduce, Apple would say, the total amount of damages which the class would pay. And just like any other argument that is aimed at reducing damages, that would have to be confronted. It's an argument which has some pretty obvious legal and factual difficulties, I have referred to the factual difficulties already. There might well be legal difficulties with the notion that anyone's negative loss could ever actually go to reduce damages, but let's

assume it's one Dr Ennis would have to consider and respond to.

One asks in that case, what are the interests of the respective class members? Well, the interests of those who arguably receive this hypothetical benefit are clear. They will want to resist the argument. They will want to undermine that argument factually and they will want to argue that legally it is irrelevant and of limited significance and they would want to do that whether you had an individual damage claim and they would still want to do that in a collective situation, an aggregate situation.

And then what are the interests of those who didn't receive the benefit? Well, the answer is they are exactly the same. The interests of those who didn't receive this hypothetical benefit are equally clear and just the same, they want to undermine the argument factually and to attack the argument legally because they share with all the members of the class the same interest in maximising the total amount of the damages award. It's an issue which is only arising because it's an aggregate damages claim and the interest of the class in relation to that are aligned.

So there is at that point no conflict in terms of the response to that argument and the conflict that my

learned friends have identified is not a conflict between subclasses of representative claimants, they have identified what is a potential strategic decision to take about two different parts of the claimants' case, but the interests are clear in each of them. Pushing hard on the importance and prominence of the cross-subsidy might serve all of the claimants well when it comes to showing that Apple abused its dominant position. No conflict between them. It might serve all of the claimants well.

But pushing hard on that might be less useful to all of the claimants when it comes to maximising damages. In other words, what they have identified is a double-edged point but not a double-edged point in which the interests of different members of the class diverge, it is simply a double-edged point in which the interests of the members of the class, all of them, are clear in each case. And one has a very, very common situation in litigation, there is a point which one can see, well, that might go in our favour but it might hurt us in some other part of the case and we're going to have to make an informed decision about how it's handled. That is not a conflict of interest, it is just the ordinary everyday work of litigation. The interests of all the members of the class are aligned from beginning to

end.

So that's that conflict.

The second conflict that's been identified arises from the fact that it's said different developers have different business models, which they do. And they then suffer different losses. Well, that's just a variation on the same theme. It's absolutely commonplace in any case which is heading towards aggregate damages and probably in every case that proceeds to individual damages that different people will have suffered different losses. If that were a legitimate objection to collective proceedings then one could just wave goodbye to collective proceedings, that will happen in almost every case, so that's not a conflict. Aggregate damages look to the aggregate damages and that is one of the benefits that they have. It's true that there might be situations in which the precise way in which losses have been suffered might or might not be relevant at the distribution stage but for the reasons I have given, the right thing to do is to wait for the distribution stage to handle those problems, because there will be many cases in which those conflicts or differences exist and might be relevant to distribution and simply have never needed to be addressed in the course of determining damages.

And the same is true about pass through, which is really just another aspect of the same point.

The class as a whole has a united interest in minimising the extent to which Apple is able to prove any pass through and thereby maximising the amount of the damages awarded. And if Apple, or for that matter anyone else, Dr Kent for example, advocates a method of assessing pass through that distinguishes between different classes of developer, the interest does not change, the interest is and remains the total amount of aggregate damages which is proved and the effect that any such model may or may not have on distribution is an entirely different question, and it needs to be. So it's not a conflict.

Now, Trucks of course was fundamentally different, pass through is in Trucks but it's fundamentally different if you are not looking at an aggregate damages claim for exactly the reason I have identified. If I was here trying to represent both developers who want to say minimum pass through and app users who want to say maximum pass through, if I'm in that kind of zero sum game I can see that there is something which would fall within the category that the Chancellor described as an identifiable conflict in relation to a major point. But as between the developers it simply

does not arise and it's not a conflict.

And the last of the conflicts which has been identified, although I think probably now largely abandoned, is the applicable law question. That's very odd because it's plainly in the interests of absolutely everyone to maximise the number of people who are covered by English law or EU law because otherwise that's the limit of this Tribunal's jurisdiction. It's not an issue which is ever going to need to be addressed at the stage of liability, as long as some of the claims are governed by English law, it might be relevant to the total amount of damages. I think Apple accept that if there were an award it could be dealt with by the Tribunal as far as necessary at the distribution stage. But they say, well, what about settlement? And the answer is it's just the same. If these issues need to be addressed, if issues of fairness and distribution need to be addressed, the rules contain quite sufficient safeguards to ensure that the Tribunal will be able to assess them in deciding whether a settlement should be approved. It could not be otherwise. So that point again is really just not a point of conflict.

That's why I come back to the nutshell point that I made at the beginning: the bottom line is these are not conflicts, they are actual or potential differences

between members of the class, which you would expect, which are not uncommon at all. They leave in place very large swathes of common issues. The fact that not everyone in the class is in an identical position or has an identical claim is not required and not a reasonable requirement to impose. And because one can separate and should separate out the questions is the defendant liable and for how much? Which focuses on the defendants' liability in making sure that they pay only a fair amount to the class as a whole with the question of how that is then divided up. There is no reason to regard those as conflicts.

In those circumstances, if that is right, the only conceivable objection to collective proceedings falls away, and the Tribunal should make that order.

I'm about to move on to --

THE CHAIR: Should we have a break now?

MR STANLEY: Would that be a convenient moment?

THE CHAIR: A five-minute break. Thank you.

(11.40 am)

(A short break)

(11.48 am)

MR STANLEY: So, judge, can I come to opt-in versus opt-out? There's nothing between us, at least in formal terms there is nothing between us on the principles.

Le Patourel, which is in the authorities bundle at tab 25 at page 1560, makes the obvious point, not in dispute, that:

"Section 47B ... recognises that collective proceedings can be opt-in or opt-out but does not indicate any preference for either solution. Rule 79 makes clear that the exercise of a discretion is open textured. The duty upon the CAT is to take into account all the circumstances. In relation to opt-out or opt-in the Tribunal 'may take into account all matters it thinks fit, including ...' [and then a non-exhaustive list of questions]."

And then I can pass --

THE CHAIR: Where are you reading from?

MR STANLEY: 62. Just between B and C. It then refers to the list and says it's not exclusive. And then at 63:

"The legislature could, had it wished, have introduced a presumption. It could, for instance, have said that collective proceedings will be opt-in (or opt-out) save insofar as the CAT considers that there is good reason to order otherwise; or it could have specified that certain considerations were to carry enhanced weight; or it could have said that there was a rebuttable presumption in favour of opt-in (or opt-out) proceedings. There are numerous drafting

techniques that could have been used had the legislature intended to create such a presumption or preference; but it did not use any such technique. In our judgment the legislature intended to leave the choice of opt-in or opt-out to the CAT based upon the facts of each individual case and it did not intend to create any starting presumption or preference either way."

And then again at 68, after a discussion:

"In summary, the power to order opt-in or opt-out proceedings is one for the Tribunal to make upon the basis of all the circumstances of the case. There is no prior legislative predisposition one way or another. Whether, over time and in the light of experience, the Tribunal and the courts identify considerations which will typically attract greater or lesser weight in the scales is quite a different matter. The CAT did not therefore err in failing to take as its starting point, or otherwise factor into its thinking, that there was a legal or policy presumption or preference in favour of opt-in proceedings."

So one starts with the balance level.

Now, Apple, as I understood it, don't challenge that, for obvious reasons, as a proposition, but if one follows the actual logic of the submissions that they then make, they do all actually assume that there is

effectively a preference for opt-in proceedings and that opt-out proceedings will only be acceptable if opt-in proceedings are not practical, in other words practical is a binary question and to say your question is whether opt-in proceedings are practical, there should be opt-in proceedings.

Now, that, for example, one sees in paragraph -- you need not turn it up unless you want to -- paragraph 40, which summarises the submission in my learned friend's skeleton that the evidence indicates that opt-in proceedings would certainly be practicable, in the sense used in the case law.

But practicability doesn't mean -- and, again, if we have Le Patourel still open, this is a point that's made at paragraph 83 -- doesn't simply mean doability, and in the context of a balance which starts off evenly between opt-in and opt-out it's really a question of which one of them is more likely to achieve the desired aim of collective proceedings, not whether opt-in could conceivably achieve something. So what one should really be looking for is what realistically the shape of an opt-in case versus the shape of an opt-out case would be, assuming that the Tribunal has of course already decided that collective proceedings are the appropriate proceedings for dealing with these kinds of issues.

As far as one can see, the shape of the case that Apple suggest is a case which would feature on a relatively small number of developers. I have to be careful about confidentiality but you will have seen the number that's mentioned in my learned friend's skeleton argument. And it's suggested that that sort of number would be a possible way to proceed in building a book and that then one could have a case which at least captured most of the financial consequences of what Apple have ex hypothesi wrongfully done.

Now, the difficulty with that is that on any view, or one of the obvious difficulties with that is, firstly, would that in fact be viable? Even if one were to focus on that relatively small number of claimants, potential claimants, is that actually viable? Apple turn against us the fact they say: well, you've not tried. But, again, it can't be part of the test to say you always have to try. That would, again, be putting opt-in as effectively a first priority. There may well be circumstances in which one can say given the numbers involved one can see that this is not an achievable option, and at any rate even if tried it is going to achieve no more than a fraction in numerical terms of those who have been affected by this.

One can see, and I'm going to ask you to turn it up,

but I won't read out the numbers because that will avoid us from having to sit in private, if we can look in the hearing bundle at page 11390. You can see at paragraph 4.8 that -- and I emphasise this -- there's some uncertainty in some of the data, but this is, as I think was said in O'Higgins, a broad picture is what one is looking for at this kind of stage.

At paragraph 4.8, Mr Perkins sets out some numbers. And you can see that they are set out from the lowest losses in subparagraph (1) to the higher losses in subparagraph (6) and (7) and very broadly somewhere between (6) and (7) covers the sort of large losses on the figures that Apple are suggesting in their skeleton argument one would be looking at as the core of an opt-in class. But you can see there are some pretty substantial losses in numerical terms in categories 5, and 4, and you might think even for relatively small businesses in category 3. And one asks the question, well, what are collective proceedings designed to achieve? It may be capturing the tip of the iceberg. These icebergs don't work in quite the same way, they are sort of upside down icebergs. So the tip contains the large losses. But if one is not reaching into categories 4 and 5 and down to category 3, where one is dealing plainly with the sort of claims for which collective

proceedings are most obviously intended, one is not achieving anything which remotely resembles a real access to justice for people who have suffered more than de minimis losses. We're not looking at a situation where you can say, well, take 10 or 15 people, we've got everyone who suffered a loss of more than £10, you might then say, well, okay, the rest of them don't matter very much. But we're looking here at real substantial losses, which the very purpose of collective proceedings is to be able to capture.

It is not realistic to suppose that an opt-in approach would begin to get to anything like that level. It is not, in our submission, likely that it would manage to achieve very much even in the higher levels, there would be difficulties there, including difficulties with producing a viable book of claimants, practical difficulties in actually contacting people, bearing in mind the difficulties with data. And quite possibly difficulties with funding as well. You know that we have funding on an opt-out basis. I don't think the evidence says it would be necessarily impossible to obtain funding on an opt-in basis, that would presumably depend on how successful the no doubt expensive and time-consuming process of trying to build a viable book would be.

So the opt-in approach one can predict -- and really Apple to their credit don't suggest that it wouldn't be -- would after an expensive and time-consuming process of canvassing produce a subset of some of the relatively valuable claims but leaving large numbers of far from insignificant claims, including claims far from insignificant for the people concerned, lying on the table.

And to make a virtue out of that by saying: well, we've captured most of the real money here, effectively, in the early parts of the claims, is, with great respect, looking at it from a very defendant-centric point of view and to some extent with the arrogance of size. The amount of money, if we look at those figures, which may still be open, which is left lying in the 5% or so that Apple thinks just wouldn't be caught, is a lot of money. If one goes to the overall estimates of the claim, which you will find at the previous page, 11389, and you look at what 5% of either of those figures would be, it's a lot.

Now, maybe 5% of those sorts of figures mean nothing at all in Cupertino but it does count for something in Leeds or in Cambridge.

MR FRAZER: Mr Stanley, can I just ask just so I understand your submission, you are saying an opt-in proceedings

would leave uncompensated the class members in 1, 2 and 3 and possibly 4 because of the practical difficulties of recruiting them into an opt-in?

MR STANLEY: Yes.

MR FRAZER: Aren't those difficulties going to arise in any event when you come to the distribution stage?

MR STANLEY: No, not necessarily. Because there are other ways in which one could approach the distribution. And besides which, at the distribution stage one is far down the line and one is actually offering people, not the chance to participate in difficult litigation, but one is offering them the chance to participate in a distribution on terms which they know. You are right, obviously there comes a point at which one has to reach individuals and has to find a way of doing that, that's unavoidable. But in terms of asking the question, would opt-in enable one to actually build -- the pattern here is looking very like the O'Higgins pattern, it is not a case where one can say, as one could in Trucks for example, well, we have an established body, it has established connections with members, it's easy to contact them, it can identify the people it needs to contact, it was a follow-on claim in fact so of course it had much less uncertainty about it. That's a different case from this one. All Apple are

suggesting could be done in practical terms in terms of building an opt-in class would be to focus on the very largest claims and to hope that one could pick those up. That's Apple's suggestion. And what I'm saying is that if that is a suggestion which is followed then if it achieves anything at all it inevitably leaves very large numbers of claims entirely unsatisfied in any way at all, unpaid by Apple, uncompensatable to the individuals concerned.

MR FRAZER: Thank you.

MR STANLEY: And, you know, the practical reality is that defendants will favour opt-in claims in particular in cases where the opt-in claims are not really viable. And if one looks at the purposes for which collective proceedings are intended and one looks at this pattern of losses, the Tribunal should be concerned about those, in particular categories 3, 4 and 5. And nobody suggests that there is any opt-in method which is realistically likely to achieve anything very much in those kinds of categories. And if that's right, the opt-out -- one's looking at relative balance, balance between opt-in and opt-out, one is not looking to say it has to be opt-in unless it must be opt-out. The difference between collective proceedings which do have the possibly of dealing with everything and collective

proceedings which don't have the possibility of dealing with everything, and that is the choice that one is making, the choice in this case at least points decisively, we say, in favour of opt-out.

That deals, I think, with the points that I was going to deal with, it's now for Mr Carall-Green to deal with the funding point.

Submissions by MR CARALL-GREEN

MR CARALL-GREEN: Can I check, sir, that you and the transcriber can hear me.

THE CHAIR: Yes, but do speak up.

MR CARALL-GREEN: Sir, I'm going to speak about funding issues or really the funding issue. Bearing in mind your indication that you would like to finish today, I am not going take you through all of the funding arrangements and the insurance arrangements. Of course I can if you wish, but instead I was proposing to skip straight to the contested area.

There's only one aspect of the PCR's funding arrangements that Apple continues to challenge and it can be found in the hearing bundle at page 2445. We see there two tables: option A and option B. Option B applies because of the Supreme Court's decision in PACCAR. That is explained further down the page overleaf. So B is what applies at the moment. Apple's

complaint is that the funder's return steps up from three times to four times on the first day of trial.

Notably, and this is a point we have made in our skeleton argument, exactly the same arrangement applied in Le Patourel, which has already gone to trial, and the near identical page of the funding arrangement in that case is on page 4711 of the bundle. I don't ask you to turn it up, unless you wish to verify that it is in fact the same. The point is that nobody appears to have questioned the suitability of that arrangement in that case.

Nonetheless, Apple questions it here on the basis that it creates a distorted incentive on the funder to resist settlement until after the trial has begun. So I want to make a preliminary point about that and then three points focused on the question of the funder's return.

The preliminary point is that the decision to settle or not always belongs to the PCR or the class representative after the CPO is made. It's not the funder's decision. And that point doesn't appear to be disputed. I think it's accepted in Apple's skeleton argument. If any confirmation of that is needed then it can be seen on page 2448 of the funding agreement -- sorry, that's the page number of the bundle. This is

a page from the Funding Agreement. Clause 8.3.3 deals with the situation in which the class representative has received a settlement offer and the funder has escalated the question of whether or not the settlement should be accepted to a "settlement assessment". Clause 8.3.3 makes clear that even in that case, ie even when the funder is concerned, the claimant is free to determine whether to implement any recommendation in his sole discretion, so that's Dr Ennis, it's his sole discretion.

So the result is that any supposed incentives on the funder aren't going to be determinative and that is a point that we also make in our skeleton argument. And of course that's to say nothing of the incentives on the other parties involved, which is the third of the points we make in our skeleton argument, that is to say that one has to look at the incentives as a whole when deciding whether or not any distorted incentives have arisen. So that is my preliminary point.

And then just focusing on the criticism of the funder's return, this steps up from three times to four times.

First, there is in fact no distortion. It seems to be common ground that a funder's return has to increase as the proceedings go on. And that the return will increase in steps that are prescribed in the Funding

Agreement. And the point is that the increase in risk makes the investment unattractive. And so the increase in the return has to make the investment correspondingly attractive. And in a properly calibrated funding arrangement one will roughly balance the other.

Now, that's where Neill v Sony, which is the case on which my learned friend relies, almost went wrong. So let's have a look at that in the authorities bundle at page 2032.

At paragraph 167 the Tribunal says that it does not have any concerns about the funder's return that it wants to deal with now. And then if I could just invite the Tribunal to read paragraphs 168 and 169 which deal with this issue of the step increase. (Pause).

THE CHAIR: Yes.

MR CARALL-GREEN: So, in my submission, the real problem there was that the Tribunal thought that the return was going to double. So the increase was described in the anti-penultimate line of paragraph 169 as arbitrary and steep. So, in other words, it's disconnected from the risk profile. Now, it's true that the PCR offered to smooth out the increase, but the crucial part of the PCR's solution is simply to point out that the increase was from 3.75 times to 4.75 times and then to 5.75 times and so on and so forth. So it was nowhere near the doubling

that the Tribunal was worried about. The Tribunal looked at the relevant clause and thought that the return would go from 3.75 to 7.5 to 15 to 30, and so one can well understand why the Tribunal was concerned about run-away and disproportionate incentives in that case.

In the present case though we simply don't have that problem. We have an increase in the funding from three times to four times, so relatively modest in the context, at the beginning of trial. And it's quite natural to say there is a step change in risk once trial begins. And if that's right, then the funding arrangement is reasonable because it balances risk and return, meaning that the incentives are properly in balance.

Now, Apple says that the funding should increase in a larger number of smaller steps. But it's not clear why that's actually any better. One could in theory do it that way, but that would link the return more to time than to risk and it's not obvious that that's better.

In fact, and this is my second point, Apple's suggestion on its own logic is worse before trial. At the moment under the current funding arrangement the funder is on a three-times return and will be until trial and then four times. Very simple.

On Apple's multitude of smaller steps the return to

the funder would have to increase from three times to four times over a period of time before trial.

Now, timetabling is an issue for one day if we get there but we are now contemplating a trial in case next year and the claim was issued over a year ago, so we are well on the way, and so if we had done as Apple said we should have done then presumably we would already be on the way up the hill. So on Apple's logic, settlement would already be more expensive. If Apple is really worried about settling then it should favour the current arrangements and just make an offer.

The third and final point is that this is tinkering at the margins anyway. The Tribunal will know that funders' returns are always subject to its approval, so debates about whether the funder should get three times or four times or three and a half times are always going to be abstract at this stage and changing it now isn't going to be determinative in practice. Indeed that point is made in Sony, you should still have the page on your screens, the last sentence of paragraph 167 makes that point. As does paragraph 171 overleaf.

And you will see in paragraph 171 the Tribunal says:

" ... we agree with the PCR that this is not the time to determine the reasonableness of those outcomes."

That is the funding outcomes:

"The proper time for that will be if and when the PCR obtains any recovery from the proceedings and the Tribunal is required to make a determination of the costs, fees or disbursements properly payable to the class representative under Rule 93(4) ..."

So the point the Tribunal is making is that the return to the funder is always really a question for the end of the proceedings when the Tribunal is exercising its supervisory jurisdiction in relation to costs and disbursement.

That is all I wanted to say on the matter.

THE CHAIR: Thank you.

Submissions by MS DEMETRIOU

THE CHAIR: Yes.

MS DEMETRIOU: May it please the Tribunal, as the Tribunal has seen, Apple advances four objections to the PCR's application. We contend first that these proceedings shouldn't be certified, at least as presently constituted, because there are significant conflicts of interest between members of the potential class.

The second objection is that these proceedings are not suitable for an aggregate award of damages.

The third objection is that even apart from these two points, opt-in proceedings would be practicable and so this application for an opt-out CPO should be

rejected because looking at all relevant factors, opt-in proceedings are more appropriate.

The final objection relates to the PCR's proposed funding arrangements.

Before developing our submissions I would like to start by seeking to encapsulate the essential points that we make. And of course, one of the innovative and unusual features of collective proceedings is that the class representative and not the class is a party to the litigation and so the class representative is the person who takes all the decisions, the strategic decisions in the litigation. It's the class representative's choices, strategic choices which ultimately lead to a judgment or a settlement that binds all class members. And this means that the class representative owes fiduciary duties to the class and it's therefore essential that there is no possibility of a conflict between the interests of different members of the class, of the proposed class, or different subgroups in the proposed class. And if there is a possibility of a conflict, the class representative cannot act without informed consent, and if there's an actual conflict then the class representative cannot act at all for the proposed class and we say that these are well-established principles of

fiduciary relationships because a fiduciary cannot allow himself or herself to be in a position of divided loyalty where performing his or her duty in the best interests of one class member goes against the best interests of another class member.

Now, my learned friend at one point in his submissions appeared to be arguing for a watered down version of a fiduciary duty in the context of collective proceedings. And we say that that's wrong. Not only is it not supported by the authorities, so there's nothing to suggest in the authorities, including in the Court of Appeal's judgment in Trucks, that that is the correct approach, it's also wrong as a matter of principle because I think the point made by my learned friend was to say, well, class representatives are in a different position to, say, a solicitor advising a client. Well, they are, but the difference militates in the opposite direction because of course a solicitor advising a client provides advice, but in collective proceedings a class representative takes action which binds the class member as to how the litigation is pursued.

Now, we have seen from the Court of Appeal's judgment in Trucks that this is the case, that the fiduciary duties arise in all collective proceedings.

So even in opt-in proceedings, a class representative cannot act if there's actual conflict between members of the class. But it is, we say, particularly important for the Tribunal to scrutinise the risk of conflict very carefully in opt-out proceedings because otherwise a class member might unwittingly be bound into a claim that doesn't serve its interests or indeed that is inconsistent with its best interests. The whole point of opt-out proceedings is that class members are swept into them without having to give detailed consideration as to whether it's in their best interests to bring a claim.

I'm going to develop the various respects in which possible conflicts arise in this case, indeed actual conflicts are present. But let me at the outset get to the heart of perhaps the most significant issue, which is the cross-subsidy issue. You will have seen that by developing and investing in the App Store and the iPhone more generally, Apple has enabled developers to achieve very significant revenues and Apple doesn't charge end-users for using the App Store. Instead, its business model is to charge a commission on paid transactions and to charge nothing more than that to developers. So, for example, as you've seen, Apple does not charge commission on advertising revenue achieved by

developers via their apps even though that may be very significant indeed and it doesn't charge revenue on the sale of physical goods.

So a developer which makes their app available for free but earns vast sums from advertising or the sale of physical goods or services therefore pays nothing to Apple. And one of the PCR's allegations in these proposed proceedings is that this business model unfairly discriminates against those developers who achieve their revenue through paid transactions which attract commission as compared with those who only achieve their revenues through advertising, for example, which doesn't attract commission. And it's an allegation, as you've seen, that the former category of developers is under Apple's commission arrangements cross-subsidising the latter.

Now, if that point is right, then it must, as we have said, logically apply to developers who only earn small amounts of their revenue through paid transactions and large sums through advertising. Every developer will have a net position. And we say that this gives rise to an obvious conflict between the interests of those different kinds of developer. So take a developer which pays very little commission to Apple, who is within the group because they have made a relevant sale within

the meaning of the definition of the class that Mr Stanley took you to but pays very little commission because its business model is to achieve most of its revenue through advertising, it would be contrary to that developer's interest to run the discrimination argument at all.

Conversely, it's very much in the interests of developers who pay significant commission on paid transactions to advance this allegation. Now, that's an obvious and serious conflict and the broad response of the PCR to this is to say, well, this is an excessive pricing claim. If that claim succeeds it will be in every developer's interest for Apple to be required to charge less, and if there are disparities between developers those can be taken into account, although don't necessarily have to be taken into account, at the end of the proceedings. But we say that that's an attempt to sweep the problem under the carpet. And it's incorrect. It would be true of a classic cartel damages claim where even though class members may have suffered different amounts of loss they all have a shared interest in proving that the cartel has led to an overcharge which they've had to pay, and they may all be in slightly different positions but they all have a shared interest in advancing the same

argument, so no conflict arises.

But it's not the case here, and we say that you only need to think about how the claim is framed in order to appreciate this. So the claim seeks an aggregate award of damages to the class, but a developer which considers that it's cross-subsidising others has a clear incentive not to seek an aggregate award of damages but damages for its own loss instead. So, contrary to Mr Stanley's position, there is no shared interest in seeking an aggregate award of damages to the class.

The same developer also has a clear incentive in this litigation to persuade the Tribunal to make findings about the lawful counterfactual that will improve its position going forwards. So, for example, to find that Apple is engaging in unlawful discrimination between the subgroups of developer and that the counterfactual would be a charging structure which reduces commission on paid transactions to a larger extent with Apple making up some of the difference by charging commission on advertising revenues or sale of physical goods or both.

But of course such an argument would conflict with the interests of developers who do realise the majority of their revenue through advertising. And perhaps the clearest way of looking at this is to take an aspect of

the claim that Mr Stanley highlighted at the beginning of his submissions, when he took you to the claim form, he said: look, here is the relief, we are only seeking damages, we are not seeking any order going forwards. So this potential class representative has chosen not to seek an injunction requiring Apple not to follow a particular business practice going forwards, that's a strategic choice that this PCR has made already in the litigation. But if you put yourself in the position of one of the subsidisers, so those developers which are achieving most of their revenue through paid transactions and therefore paying proportionately a higher amount of commission, and you are just acting for one of those then it would be evidently in that developer's interest to seek injunctive relief going forwards to put an end to this discrimination.

Let me be clear about this, of course Apple says that any such claim would be completely misconceived. But we are not here debating the merits at this stage, we are looking at things from the perspective of potential class members and what would be in their interest to argue, and we say the very fact that Dr Ennis has restricted this claim to a damages claim without seeking to regulate things going forward is a choice which reflects a compromise between

the different interests of the class members and it's a choice which on its face is contrary to the interests of the subsidisers.

Now, the cross-subsidisation argument is an argument that has to be solved one way or the other and what we see from the claim is that the PCR has so far chosen to go halfway down the road and stop. He says that Apple is discriminating but he hasn't put forward any counterfactual which would resolve the issue going forwards and we say that that illustrates and encapsulates one of the vices here, it shows that the claim as presently formulated doesn't work, the PCR is not able to avoid acting in the interests of some class members and against the interests of others.

The other important point is that there is no need to bring opt-out proceedings in circumstances where opt-in proceedings would plainly be practicable. Now, this a point that Mr Piccinin is going to cover so I'm not going to say anything more about it by way of introduction, suffice to say that the bulk of the claim is very highly concentrated and that's a point that Mr Piccinin will develop.

So with those introductory remarks I propose to develop -- I think I've encapsulated the very key vice that we have identified but I'm going to develop the

submission in a little more detail, though I don't expect to be very long, along the following lines. I'm going to, first of all, very briefly go back to Trucks and also very briefly remind the Tribunal of the case law and the duties of fiduciaries where there's an actual or potential conflict. And then, secondly, I'm going to go back briefly to the pleaded claim. Thirdly, I'm going to develop and in doing so by reference to the pleaded claim I'll develop these points about the existence in the case of actual conflicts we say, but if not actual then at the very least potential. Then I'm going to deal with the aggregate award of damages point which is a point which is very closely related to the point we make about conflicts and then I'm going to hand over to Mr Piccinin who will develop our submissions on the practicability of opt-in proceedings and then deal with the separate issue of the funding arrangements. So that's how I propose to approach it.

THE CHAIR: Okay. Before you carry on, Rob, I have a technical issue with my screen, I'm afraid it's gone dead.

MR FRAZER: I'm the same.

MS DEMETRIOU: Shall I pause?

THE CHAIR: Would you mind?

MS DEMETRIOU: Of course. (Pause).

THE CHAIR: Thank you.

MS DEMETRIOU: Thank you. So dealing briefly with the law, could I ask the Tribunal to turn up FHR European Ventures, authorities bundle tab 51 page 3159. I just want to show you paragraph 5. Could I just ask you to read paragraph 5 to yourselves, thank you. (Pause).

Then can I also show you please behind the immediately preceding tab, so tab 50, Bristol & West Building Society, and if we go to page 3138 in the bundle, then we see at the bottom of the page that

a "fiduciary must take care not to find himself in a position where there is an actual conflict of duty so that he cannot fulfil his obligations to one principal without failing in his obligations to the other. If he does he may have no alternative but to cease to act for at least one and preferably both. The fact that he cannot fulfil his obligations to one principal without being in breach of his obligations to the other will not absolve him from liability." I shall call this the actual conflict rule.

So we can see there that where there's an actual conflict even fully informed consent is insufficient, so the fiduciary cannot act if there's an actual conflict.

Then if we can turn up Trucks again please, so this is behind tab 31, 1799 of the bundle. And of course

the Tribunal will know that the case concerned a conflict between purchasers of new trucks and purchasers of used trucks in a cartel damages claim relating to the pass-on rate for used trucks. And the Tribunal's view had been that the conflict could be resolved by the consent that class members give when opting in and I'm not going to ask you to turn it up separately but just so that you have the reference, it's in the Tribunal's remittal judgment, which is behind tab 54 at pages 3307 to 3308, you'll see that from paragraph 32 of the Tribunal's ruling, but the Court of Appeal disagreed with that. And to take you to the key reasoning in the Court of Appeal's judgment you see at 1803 paragraph 1 the issue of law, so top of the page, in broad terms is whether a single class representative can represent a class in relation to a common issue in circumstances where there's an actual or potential conflict of interest between two groups of class members. So the same issue that we say arises in the present case.

Then if you can go to page 1809 please, paragraphs 30 to 31, at the bottom of the page you see that

the CAT said "it had reached the clear view that the RHA opt-in proceedings are preferable to

the UKTC opt-out proceedings or even to the UKTC proceedings on an opt-in basis. That determination was however based on the RHA action comprising both new and used trucks and the CAT turned to consider that issue, which is central to this appeal."

You then see the CAT's reasoning. So:

"The CAT noted ... the OEMs' argument that the RHA application was unsustainable because the inclusion of claimants for both new and used trucks gave rise to an irreconcilable conflict of interest on the part of the RHA. The CAT said ... that it was in the interest of those claiming for new trucks to argue that there was no or little pass-on whereas the interest of those claiming for used trucks was precisely the reverse. On that basis it was submitted that the RHA cannot fairly represent both interests ..."

Then the CAT referred to Canadian jurisprudence, you can see that at paragraph 32, and that jurisprudence included the Alberta case in which the court there held that:

"Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting

interests ..."

As I am going to come on to develop, we say that that test is not met in the present case because success on some issues for some class members will not mean success for all, quite the opposite.

Then:

" ... the CAT considered that there were two important and related and distinguishing features of the RHA action ..."

And the distinguishing features were that here this was an opt-in claim, and we see that from paragraph 34, and also paragraph 37, that there was overlap between potential class members who acquired new trucks and those who acquired used trucks, because some did both.

Then if we go on please to page 1823 of the bundle, under the heading "Discussion" you see at paragraph 88:

"I am firmly of the view that the conflict between new truck purchasers and used truck purchasers over resale pass-on which the RHA faces can be addressed by the erection of a Chinese wall within the RHA organisation for the purposes of dealing with that issue. This will need to involve a separate team within the RHA acting for each of the two sub-classes, instructing different firms of solicitors and counsel and a different expert or experts. I also consider that

a different funder will need to be involved for one of those sub-classes, given that the conflict potentially extends to funding."

So that's where the court ended up. And if we go over the page please to paragraph 92, you can see that the reason that the Court of Appeal didn't disturb the CAT's decision that there should only be one class representative was dependent on the complete separation of the teams. And then we see at paragraph 94, could I just ask the Tribunal, could you read paragraph 94 to yourselves rather than me reading it out. (Pause).

So the Court of Appeal rejected the idea that this was only a potential conflict and held that it was an actual conflict that required action to be taken at the very outset. And then you see at paragraph 96, over the page, that this problem of divided loyalty could not be resolved by informed consent or by a promise to abide by the opinion of an independent expert. And we emphasise the words in the second part of that paragraph, so:

"Since there is no single, objectively ascertainable, 'right' answer to the overcharge pass-on issue, and the decision of how to advance an argument on this issue in the proceedings will inevitably involve some strategic considerations, it cannot be sufficient

for the divided loyalty which the RHA owes to the two groups of PCMs to be resolved by a vague promise that the RHA will decide how to act on the basis of advice from Dr Davis."

So the reason I emphasise those words is because when you are considering whether or not there is an actual conflict, one is asking yourselves what are the strategic decisions that will need to be taken in the litigation? So what are the strategic decisions and how do they impact upon one or other group?

Then we see at 97, if I could just ask you to read 97 again to yourselves. Again the court here is emphasising that this conflict can only be avoided by the complete separation of the teams. (Pause).

And again we emphasise the words towards the end of the paragraph, so the Court of Appeal found:

"Whilst there may be situations in which, on minor or peripheral issues, a class representative may be entitled to act in the best interests of the majority of the class provided that it does not significantly harm the minority, where there is an identifiable conflict of interest on a major issue in the case, I do not consider that a class representative is entitled to prefer the interests of some members to the detriment of others."

And we say that's effectively the position that

Dr Ennis is in in this case.

If I could ask you to now take up the claim form, so that's in the hearing bundle, and if we pick it up at page 7 please. So it's tab 2, page 7, that's the start of it. Perhaps we could pick it up at page 66 of the bundle.

PROFESSOR NEUBERGER: Could you give me the reference again, sorry, I missed it.

MS DEMETRIOU: Yes, of course. It's the claim form and it starts in the hearing bundle at page 7 but I'm taking it part of the way through, two-thirds of the way through at page 66. So it's tab 2 at page 66. The first point to note at paragraph 130 of the claim is that it's common ground, and it is common ground between the parties, that in order to prove an abuse it's necessary to show both that the price charged is excessive and that it's unfair. So there are two limbs to the inquiry. And we have seen and Mr Stanley has shown you that the excessive limb, the PCR's case under the excessive limb is that Apple earned excessive profits and they do that by reference to a cost plus analysis.

Then if we go to page 73 of the bundle, we see --

THE CHAIR: On that there wouldn't be any conflict of interest on that part of the argument.

MS DEMETRIOU: Correct, that's right, yes. The conflict arises under the unfair limb of the test. And we can see the unfair limb starts on page 73, and we have the pleaded case starting at paragraph 140. And the key part for us is paragraph 140.9, which Mr Stanley has shown you, it starts on page 75 at the bottom of the page. And the allegation, as you've seen, is that it is unfair that a small minority of developers were effectively required to cross-subsidise other developers. So that's the nub of the allegation. And Mr Stanley says, well, the class comprises developers who made any sales and so excluded from the class are those who paid no commission at all. That's correct. But the argument bites in exactly the same way in relation to developers in the class who are net cross-subsidisers or net cross-subsidisees, if that's a word. So if you are a developer who makes a tiny amount of revenue, for example, on the basis of paid transactions but an overwhelming amount of revenue on the basis of sale of physical goods or advertising revenue then you will be paying proportionately far less commission than a developer who has the opposite business model.

And if the allegation at this paragraph is well-founded then it must inevitably follow that those

developers in the class which achieve most of their revenue through commissionable transactions, paid transactions, will have cross-subsidised the latter if this allegation is upheld. And we've all referred to it as the "cross-subsidisation argument", so I will refer to it as the "cross-subsidisation argument".

We have in our response -- I think you are all working from electronic bundles so it doesn't arise, I was going to ask you to keep that open, but if I just take you to our response, so if we just pause so I can take you to our responses. It's in the hearing bundle behind tab 69. This is the unredacted version of our response. If you go to page 7484 please, and if I could just remind you of -- we've explained the point by reference to examples at paragraphs 28 through to 36, and if I could just ask the Tribunal, I'm sure you have read that, but just to remind yourselves of what we say there. (Pause).

MR FRAZER: These examples differ from Trucks, do they not, in the sense that it's not a binary concern between the new and the used trucks, but there was some sort of sliding scale? You've provided some examples here of the most extreme. But what about where there's a significantly lower proportion, as it were, of commissionable activity or a proportion of the revenue which is on

the basis of commissionable activity, is there a conflict there in the middle as well or not?

MS DEMETRIOU: Yes. And we say that every developer will have a net position. There may be some developers that have equal amounts and so it doesn't really affect them. But it just stands to reason that most developers are unlikely to be in a position where they are in an entirely neutral position on the argument. And so it is a conflict, depending on the net position of the developer and the conflict may matter a bit less if they are further along in the spectrum, if I can put it that way. So we have given the more extreme examples, you are right, but the conflict still remains if you are a bit less extreme but still a net subsidiser or a subsidisee, but it may matter less.

PROFESSOR NEUBERGER: I'm not very clear about the exact Trucks situation. But what was the position then of people who were both buyers of new trucks and also buyers of second-hand trucks? How were their interests handled?

MS DEMETRIOU: That's a very good question. Can I come back to it so I make sure I'm giving you an accurate answer, because that point was, as we have seen, considered in the judgment. I will come back to that and answer it a little bit later.

PROFESSOR NEUBERGER: Thank you very much.

MS DEMETRIOU: Now, Mr Stanley in his submissions said that this cross-subsidisation point was a rather abstract proposition. But it's really not an abstract proposition, we can see from the examples we have given, but it stands to reason, given the distinction, given the way that Apple's business model works, and it's just common sense that it's going to affect different businesses in different ways depending on their own business model.

Now, I'm going to go back to the claim, if that's okay. If we go back to the hearing bundle at page 80 -- in fact before we do that if we go to page 78 you see that another part of the unfair limb is the use of comparators. And what's being alleged here -- so one of the points put forward is that the commission is unfair when compared to comparable products, you see that at the beginning of paragraph 144. And then you see examples given later on at, say, for example, subparagraph 6, 144.6:

"Commission charged in the Epic Games Store and the Microsoft Store ... [is in the region of] 12% to 15%."

So the allegation that is being made here is that to the extent that the commission charged by Apple to a developer exceeds what comparators are charging then

it's unfair. So that is another aspect or another way in which the unfairness limb is -- the allegations are made.

Then if we can go on to page 80, under the heading "Counterfactual", you see at paragraph 151:

"Mr Perkins has considered what price third-party app developers would have paid in the counterfactual. His preliminary analysis indicates that absent the abuse, third-party app developers would have paid a commission of between 12% to 15% to have their apps distributed on the iOS platform via an App Store if they used the payment system provided by the App Store and would not have paid any commission at all if they used an alternative payment system."

So that's the lawful counterfactual that's put forward by the PCR.

And there are two things that I would just like to pause and note about the PCR's case in that respect. The first is that its case on the counterfactual is that whatever is found to be the lawful commission, so they say at the moment between 12% and 15% but it may be different depending on -- we are not saying they can't pursue a different figure at trial but whatever is found to be the lawful commission is paid on sales. So, in other words, it doesn't follow through on its

cross-subsidisation argument that we've seen at paragraph 140.9 so as to share the burden between different types of developer.

So it's not saying here, well, the lawful counterfactual is a lower commission which is payable on all sources of revenue such as to eliminate the discrimination we've identified at paragraph 140.9. That's the first point we make.

And to foreshadow what I'm going to say about that, we say that that choice is a strategic choice which is in the interests of some members of the group but not others.

The second point that we make is that it appears to be saying that the counterfactual is a flat commission rate, whatever it might be, 12%/15%, or whatever they end up arguing for at trial, whereas in the factual world Apple charges a lower commission, 15% rather than 30%, for various categories of developers. And can I just show the Tribunal, please, where in our response we address this. If we go back, please, to tab 69, so page 7486 of the hearing bundle, this is our response. At 7486 do you have paragraph 37? So that's under the heading "Variable commission rates". And you can see that Apple charges different commission rates to different developers on different transactions. So it

charges a rate of 15% on auto-renewable subscriptions after the first year, this is since 2016. It also offered a 15% rate for members of its VPP relating to app developers that stream premium TV content which they integrate into Apple TV. Then there is the Small Business Program whose members also pay 15% and that is open to developers who earn less than $1 million in total proceeds from the App Store in a given year. Then over the page, again since 2021, Apple's offered a 15% rate for subscription use publications that provide their content to Apple News in Apple News format.

So at the moment you can see that there are defined categories of apps which attract a much lower 15% commission. And we say that it's clear that the strategic choices that the PCR has already made in formulating the claim in this way, in the way that he has, have required him to take decisions which are contrary to the interests of certain members of the class, certain subgroups in the class. And we make three points. So, first, the cross-subsidisation allegation is not in the interests of that section of the class which comprises developers which earn a substantial proportion of their revenue through sales which are not subject to commission; in other words, which developers on the PCR's case are being subsidised. Why would

a developer, we ask, which pays very little commission but which earns vast revenue through its app, via, say, advertising, want to run this argument at all? It wouldn't. It would run counter to its interests to run it.

So when Mr Stanley says that this is not a point that any member of the class would not want to see in the claim, that's wrong. We say it's wrong. It runs completely counter to the interests of certain developers to run that argument. And it follows that the way that the claim has been pleaded by advancing this cross-subsidisation point already reflects a strategic choice made by the PCR in favour of one category of PCMs over another.

The second point that we make is let's take those developers which do have an interest in making the cross-subsidisation allegation, and that's because they make most of their revenue through sales which are subject to commission; so in other words, the net subsidisers, we say that the PCR has compromised on this group's interests too. And the way that the PCR has done that is by pulling its punches and not following through properly on the cross-subsidisation allegation, because if the allegation is well-founded then the lawful counterfactual would be one in which there is no

distinction drawn between sales which currently attract commission and other forms of revenues derived by developers from their apps. And yet that's not the counterfactual that's being advanced by the PCR, no doubt because they are trying to steer a middle course.

Let's say that the Tribunal concludes that, I don't know, X aggregate revenue for Apple is lawful, for example because it's in
a fair proportion to the aggregate amount of economic value that Apple provides to developers, the effect of the cross-subsidisation argument, if you are following it through, ought to be that all developers contribute towards paying that revenue and so the burden is more evenly split. But the PCR, as I have said, doesn't advance such a counterfactual. Instead, its counterfactual, as we have seen, is a lower commission rate that only applies to the sales that currently attract commission. And as I said at the outset, one sees this in the relief that they've sought because if the cross-subsidisation argument is well-founded, of course we say it's not, but if it were, it's an issue which has been pleaded, then the interests of the subsidisers would be to stop this happening in the future. If it's unfair and abusive, why are they stopping at damages for past conduct?

So the fact that the PCR hasn't advanced such a case, hasn't sought such relief, and hasn't put forward that counterfactual represents a strategic choice because it's steering this middle course; it's trying to compromise and reconcile or --, it can't reconcile their interests, it's steering a middle course and in doing so it's acting against the interests of certain class members; it's a classic conflicts situation. And we say it's on all fours with the conflict in Trucks. That is because there is in both cases an issue on which the PCR has to make a choice as to how he will argue the case. And if he makes one choice, that will result in more damages for one group and less for another and vice versa.

So in Trucks, the purchasers of used trucks had an incentive to argue for higher rates of pass-on and success on that argument would lead to that group achieving a higher level of damages. The position was the opposite for purchasers of new trucks. And similarly here developers who obtain most of their revenue through paid transactions will achieve a higher recovery of damages if they advance the price discrimination allegation. And the point could be tested in this way: if the Tribunal were to find that the level -- that the overall revenues -- let's say

the Tribunal were to find that the overall revenues achieved by Apple were not unfair, in terms of their quantum, because of the very substantial economic value Apple confers on developers, then the cross-subsidising category of developers could still in principle achieve damages through running the cross-subsidisation arguments because they have borne more of the burden of that overall fair amount. And that's why they are in conflict with their opposite number.

And it was no answer in Trucks to say, well, that doesn't matter because it can all be sorted out when it comes to distribution or it doesn't matter, it will all come out in the wash because the Tribunal will reach an answer. In the same way as there was a conflict in Trucks, so in the same way as in Trucks it could not have been an answer to say: let's seek an aggregate award of damages for the whole class, and that somehow gets rid of the conflict, that would not have been an answer in Trucks, it can't be an answer here either.

So that's the second point.

I can see that I'm going over 1.00 pm. Shall I save my third point for after the short adjournment?

THE CHAIR: Yes. 2.00 pm.

(1.02 pm)

(The short adjournment)

(2.00 pm)

THE CHAIR: Yes.

MS DEMETRIOU: I was moving on to my third point but before I do that, may I respond to Professor Neuberger's question about what happened in Trucks with claimants who had both used and new trucks? So what happened was that there was a class with used truck owners, a class with new truck owners and if you had both then for each aspect of each portion of your claims your interests in relation to used trucks were being looked after by one team and new trucks by the other team.

PROFESSOR NEUBERGER: Thank you.

MS DEMETRIOU: Not at all. The third point that I was going to make in relation to the choices that the PCR has already made in relation to this litigation, which is evidence of conflict, is this: so, as you've seen, Apple currently discounts its commission for certain categories of developer and transaction. I took you to the categories in our response. And the fact that Apple does that in the real world raises an unavoidable dilemma for the PCR, because one approach would be for it just to argue that all that matters is how much revenue Apple earns in total and the excess, if there is an excess, should be returned as damages to the class in

proportion to the commissions class members have paid. But another approach would be to look at the comparators that Dr Ennis' expert is considering and say, for example, that any commission above 15% or 12% or whatever figure they alight on is unlawful and any commission below that level is unlawful. And you can see that that does appear to be an approach that they are canvassing under the unfair limb, and I took you to the part of the pleading that alleges a case in relation to comparators. It's not entirely clear which approach the PCR favours at the moment but either way benefits some at the expense of the other.

So if you are a developer which pays 30% commission, then you would rather argue, and establish, that there is a single level of commission above which any commission is unlawful, so you point to a comparator and say, well, this comparator charges 15% and so 15% is the only permissible level. We pay 30% and so the 15% above the 15% lawful level is loss. But if you fall within the group that pay the lower commission, so if you are already paying 15% commission, then you would much rather argue and establish that Apple's commissions, whatever they are, should be reduced. And again there's no way to avoid making that decision. And the PCR has a conflict in making that decision, in deciding about

the best way to run the case.

And these are, we say, actual conflicts on the face of the case that we have pointed to and we are in that respect on all fours with the Trucks case.

The PCR says in its skeleton argument, paragraph 31.2.2, that a conflict arises where success on an issue for one means failure for another and doesn't arise if the resolution of an issue is merely neutral or less important for others. But here, that test is met. Because resolution of these issues is not merely neutral, resolution of these issues in a particular way could mean lack of success for one part of the group. And the decisions, we say, that have already been made are inconsistent with the interests of some members of the group.

Now, what does the PCR say in response to this? There were two key arguments that my learned friend advanced really in anticipated response to our submissions. He said that the conflicts that we point to don't arise from the pleaded case but from Apple's own arguments. So he said one of his points was to say that these conflicts only arise if Apple puts forward a certain counterfactual, or the way they put it in their skeleton is to say that they are somehow dependent on Apple saying it could achieve the same

revenues in a different way. But that's not how we put our argument. The way I have put it I hope is clear, that we say these conflicts arise on the face of the claim as pleaded.

The second key point that my learned friend made is to say that it's in everybody's interest to argue that the aggregate award of damages is as large as possible and so long as that's in everyone's interests then these points don't comprise conflicts, they don't constitute conflicts. But we say that that's wrong too because the arguments are run on liability -- so you will recall that my learned friend said, well, it's in everyone's interest to argue the cross-subsidisation point on liability, because that helps demonstrate that these are unfair prices and that there's an abuse. And my learned friend's point seems to be that as long as it's in everyone's interest to argue the point on liability, then somehow it doesn't matter what happens next because distribution is a separate stage that can just be disregarded and carved off. And we say that that's wrong because the arguments which are run on liability will have consequences for distribution.

If you are a developer which is a cross-subsidiser then you will want to establish that it's unfair to charge commission on paid transactions and not charge

commission on other forms of revenue, not only in order to establish liability but precisely in order to establish at the distribution stage that you are entitled to more of the pot. That will be in the cross-subsidiser's interests to do. Conversely, the subsidisee would be against arguing that the subsidy is unlawful because of the cross-subsidisation argument, because although it might help on liability, that's an unduly blinkered approach. Obviously the Tribunal's findings on liability are going to be important at the distribution stage too and if the Tribunal has found that it's abusive for Apple to have a business model which cross-subsidises then when it comes to the distribution stage then those who are subsidised, their interests are not going to advanced at that stage by their argument having been run.

So, really, the key point to make here is that it's artificial to separate out liability and distribution in that way. Now, it's true that in some cases, , like in Merricks, it may be so difficult to achieve distribution in a way which reflects the loss of individual claimants that that's not required. The Supreme Court said that. We don't dispute that. But that isn't the rule for every case. So what distribution requires in every case will depend on the

circumstances of the case. And, really, the way to test this, the key question to ask is: if you are a developer which at the moment is subsidising, on this argument, other developers, what would you want to argue at the distribution stage? Well, you would obviously want to argue that you are entitled to more of the pot. And if you are somebody advising or representing such a developer, that's the argument you would want to press, and that is completely contrary to the interest of developers with the opposite business model.

The same point applies not only in relation to distribution and how much of the damages the various subclasses are going to achieve, but it also applies to what happens going forward, because, again, if you are a developer that has an argument that you are unlawfully cross-subsidising other developers, then it's going to be very much in your interest to secure that, going forwards, that business practice changes. And so, if you are not in a class and you are being represented and you can run the litigation how you want, you are going to want to be saying, well, this is unlawful, this is discriminatory and the lawful counterfactual entails no discrimination and we want to prevent this happening in the future.

THE CHAIR: Does the class representative have to concern himself with that? I mean, is his case not about

recovering damages from Apple? I mean, why should he go further than that and why should he be concerned about future business practices?

MS DEMETRIOU: Well, sir, in relation to that we say that the choice to make it just about damages and not future business practices is a choice which already reflects the interests of some class members and not others because a collective action doesn't have to be just about damages, the Tribunal obviously has the power to grant relief going forwards but it's not even a question of, well, should the class representative seek injunctive relief in the interests of some parties? These conflicting interests affect how the argument's being put. Because if you are a cross-subsidiser then your interests will be to stop this type of discrimination, if it's unlawful, carrying on in the future and the way to achieve that might be through seeking an injunction but it might well be to persuade the Tribunal that it's unlawful, to run the argument very hard and persuade the Tribunal to find that the only lawful counterfactual is one where the burden of the revenue is spread evenly or in some other way to the way it's currently spread; whereas if you are a developer which is on this argument being subsidised, so if you are obtaining most of your revenue from

advertising, then the last thing you want to do is persuade the Tribunal that the lawful counterfactual is one where the revenue burden, whatever the lawful revenues are, is evenly spread between different forms of revenue-gaining activity.

So it's not even just a question of, well, does the class representative have to choose what the relief is, whether to apply for injunctive relief, it goes to the very heart of how to run the case, what is the lawful counterfactual they are putting forward? And you can see that the counterfactual that this class representative has put forward does not involve redistributing the burden of the revenues between different types of developer. And that choice that's already been made is a choice which is against the interests, that's not how a subsidiser would run the litigation, it wouldn't be in its interests to run the litigation in that way. So that's why it does matter. It's really a very fundamental point.

So that was the third argument.

In the interests of time, I'm going to deal very briefly with pass-on and applicable law because you have seen our arguments in writing on those points and we have explained why the pass-on issue also creates a conflict between different members of the class -- different

categories of developer. And here we say -- I think the main response that's been put forwards in relation to that -- so what we have said in our written pleading is that when you look at what Dr Kent's expert says, Dr Kent's expert in other proceedings -- so we are unable in these proceedings to refer to their expert evidence in Kent but in other proceedings, Dr Singer, who is the same expert that is acting in Kent, has said that the pass-on rate can vary radically between different developers, depending on what competitive constraints they are subject to in their relevant market, so depending on their market share.

And of course Dr Ennis will have to choose how to respond to that argument.

Now, my learned friend's main point was to say, well, Apple's not arguing that, and of course we are not. But it is, with respect, unreal to say that these arguments won't have to be addressed by the Tribunal in a way which is consistent as between the two sets of proceedings. And that's a point which Dr Ennis has himself made in submissions to the Tribunal about joint case management. So that's what we say about pass-on.

THE CHAIR: I don't really -- what follows from that?

I mean, why does that matter?

MS DEMETRIOU: Why that matters is that there will be

a choice that Dr Ennis will have to exercise as to how to respond to the argument, for example, that the market share of a developer makes a fundamental difference to how much pass-on there is. Because different developers within the class will be in different positions as far as that is concerned and so depending on the answer, their claims could be eradicated. So that's why we say a potential conflict arises there.

Then in relation to applicable law, the Tribunal is aware of the importance of the applicable law and territorial scope arguments in this case. And what we say about that is that -- well, perhaps I can take it from Apple's response. So if we go please to hearing bundle page 7490, if you could have a look please at paragraph 49 on that page. The point that we make here is that -- so the Tribunal, as you know, has noted in its judgment from earlier in the year the real difficulties that faced the PCR's attempt to claim for commission charged on transactions on storefronts outside the UK and the point we make here is that those difficulties affect different PCMs to a different extent and so we give two examples which I won't read out but if you can just read to yourselves. Again there's a very different impact depending on whether those documents are upheld by the Tribunal or not.

The point here is that if there's a settlement in this case without that point being decided by the Tribunal, the PCR is then faced with a difficult dilemma as to how to structure the settlement and carry out distribution because placing a lot of weight on this defence would mean a much smaller share of any settlement for a PCM with most of its commerce on non-UK storefronts and conversely placing less weight on the risk of Apple being right on these points would mean that distribution would be more in proportion to the PCMs' global commerce. So again, there is a point which puts the PCR, we say, in a position of possible conflict if it comes to a settlement.

THE CHAIR: It seems more like difference rather than conflict though.

MS DEMETRIOU: Well, there could be a conflict because in approaching a settlement -- I understand that it's a difference if the Tribunal's decided the point. So the point's argued, if the Tribunal's decided it, well, then, that's the end of the matter. But if the Tribunal hasn't decided it and the PCR is having to work out what's the appropriate level to settle at and how to distribute proceeds of a settlement, the PCR will have to take a view as to whether a developer who, if the argument's right, would get next to no damages falls to

be treated, and so will have to reach a view on the weight to be given to that argument or not. And again on that point, depending on the view, the view taken will affect positively and negatively in different ways different members of the class. That's really the point.

So that's what I wanted to say about conflict. I'm going to turn before handing over to Mr Piccinin to the question of aggregate award of damages, which is a related point. Essentially we say that this is not an appropriate case for an aggregate award of damages and that is because the differences between class members are acute and important in the context of quantum and in the context of assessing loss.

And the mistake we say that the PCR makes in response to our argument is to say that effectively the statutory power to bring a claim for an aggregate award exists, and therefore it's permissible for a PCR to ignore individual differences between class members. But we say that it's a question of degree and that's the important point. So what the legislation doesn't provide is that because there is the power to bring a claim for an aggregate award of damages it is always permissible to do so and to ignore differences between the positions of class members. So an assessment has to be made in each case as to whether those differences are

sufficiently important as to render a claim for an aggregate award inappropriate and we say we are clearly on that side of the line.

The fact that the Tribunal is specifically required under rule 79(2)(f) to consider whether the claims are suitable for an aggregate award of damages we say does require it to assess whether in seeking an aggregate award the claim goes too far or further than it needs to do in equalising the diverging claims of the class members, that's really the key point. And we say here the divergencies in the claims of different class members are very marked and so that points away from suitability.

Now, the PCR says, well, against that it would be impossible to calculate individual damages for thousands of individual claimants. But of course, we are not saying that that's how the Tribunal would have to go about things. And you only need to look at the interchange fee litigation in order to see that there are very many thousands of individual claims which are being assessed for damages but not in that individual way. So the Tribunal is perfectly capable of using broad techniques to assess claims without making the task unmanageable.

But the key point, we say, is that broadbrush

methods can be used but they need to distinguish between these different categories of class members. And here what we have are categories of developer with claims of very different strength and value depending on how the case is argued. So where it's not necessary to do so we say it's wrong in principle to aggregate those claims and therefore average out their value because aggregation involves taking something away which belongs to one person and giving it to someone else.

That's really the short point when it comes to aggregate award of damages. And one can think of it this way, if this weren't a class representative claim and one was acting for a developer which obtains most of its revenue from paid transactions and so is a cross-subsidiser, how would you argue the claim? Well, you would be pushing the cross-subsidisation allegation and you would be seeking an end to that practice. That's how you would be arguing it. And if it came to the trial and if at the trial it became clear, for example, that Apple was successfully persuading the Tribunal that the cost plus way of looking at things is inappropriate in this context because in fact Apple has conferred through all of its investment huge value on developers which they themselves are recouping by charging other people and

gaining other revenues and if that argument was finding favour with the Tribunal then the cross-subsidiser would think no doubt, well, all right, well, let's soft pedal that argument or abandon that argument and let's really go for this discrimination argument because even if the Tribunal rejects the idea that the cost plus way of looking at things is the right way of looking at things, we have this very good point here that it is unfair because of cross-subsidies, and that just would not be in the interests of a developer that's earning most of its revenue through advertising and is proportionately paying very little commission.

So in those circumstances we say not only is there a conflict, that's really a key point, but it is wrong to even out the claims at the outset by seeking an aggregate award where there are these very stark differences.

So that's what I wanted to say about conflicts and aggregate awards and Mr Piccinin is now going to address you on practicability and then funding.

Thank you very much.

Submissions by MR PICCININ

MR PICCININ: Hopefully that works and you can hear me, sir.

As Ms Demetriou says, the first topic that I will be addressing you on this afternoon is practicability in

proceedings and also the implications of that for the certification of this CPO application, which has obviously been made only on an opt-out basis.

In a nutshell, what we say is that this case is one in which if class members believe that the claim has merit and if there is a way to resolve the conflicts that Ms Demetriou has just addressed you on then looking at the objective features of the proceedings, opt-in proceedings should be very much practicable; indeed they are more practicable, they score higher on practicability than the class members in the opt-in Trucks proceedings.

So that's the first point. And then the second point, we say, is that in the exercise of the Tribunal's discretion, if the opt-in proceedings are practicable then this is a case in which they are also preferable and so the PCR, if these proceedings are going to go forward, should have to go through an opt-in process. Just so you know where we are going, just in summary, there are essentially two main reasons why we say that. The first is that an opt-in process or a process of book building is the best way to make the PCR confront the issue of the choices that he is purporting to make on behalf of the class. Those are the conflict points that Ms Demetriou has already addressed you on. And by

confronting those choices with class members we'll find out what the class members think of them.

If the claim is to proceed, the PCR would have to build a class and a claim for which there are no actual conflicts and for which class members have given consent to any potential conflicts and that wouldn't necessarily look the same as the proceedings that are being put before you today. So that would be one positive effect of requiring opt-in.

The second point is a more general one, which is that it is desirable, we say, if practicable, for proceedings to have the buy-in of the class in whose name they are being pursued. Because what that means is that they are a real party, real persons who we know say that they have been aggrieved by the conduct that is the subject of the claim.

As I say, that is a good point in general in any case to some extent but it has particular force in a case like this one where the claim is actually about the experiences of class members. So this is a claim in which the PCR says that class members have received something from Apple that is not worth what they are paying for it. That's what an unfair pricing claim means in essence.

Then they also want to say that if class members had

paid less in the counterfactual, then they, the class members, the developers, would have kept at least the overwhelming majority of the proceeds as greater profits.

Now, I'm not going to get into the merits of those arguments today. And of course if developers do want to make that pair of claims, that pair of propositions together, then they can do so and we will answer them. But if developers do not positively want to run those arguments, if they don't want to sign up to them, then we do say there is no good reason why the PCRs should be authorised to waste our time and resources and, even more importantly, the Tribunal's time and resources in making those arguments in the abstract in developers' names, in the names of people who don't positively want to advance them.

So that's our answer to the question of why it's preferable to have opt-in, if it's practicable, of course only if it's practicable.

Before I get on to facts of practicability, I just want to touch on a few propositions of law about the exercise of your discretion. I hope these aren't controversial but I do just need to develop them at a little bit of length.

The first proposition is that the question of

whether proceedings should be opt-in or opt out is a question that the Tribunal needs to answer for itself. It's not just a question of what the PCR would prefer, because PCRs will almost always prefer opt-out. And it's worth looking at what the Court of Appeal said about this in FX. So this is at tab 33 of the authorities bundle, and it's page 1940, which is one paragraph, 83 on this point. What Lord Justice Green said was that:

"The CAT unanimously held that it had the jurisdiction to choose as between opt-in or opt-out even where the applicants applied only for an opt-out CPO."

Lord Justice Green says:

"It was plainly correct in this. Nothing in the ... Act ... compels the CAT to accept the choice made by class representatives. Its discretion, in public law terms, cannot be so fettered. Were it otherwise, class representatives would invariably select opt-out thereby making the statutory choice illusory."

So that's the first proposition.

The second proposition is a corollary of the first. If there is a statutory choice for the Tribunal to make about whether proceedings should be opt-in or opt-out, that must logically be because in at least some circumstances opt-in would be more appropriate even

though the PCR has only applied for certification on an opt-out basis. And that is important, in my submission, because it tells us that the mere fact that opt-out proceedings would lead to more class members being included cannot be enough on its own to justify an opt-out class in all cases. That's because it will always be true that opt-out will lead to more class members being included.

So my second proposition, just to encapsulate it, is that at least in some cases the fact that opt-in proceedings would give class members a choice, which would mean that they have to positively decide to participate, would be a good thing. And it would be a good thing compared with an opt-out claim in which those class members would simply be swept in by virtue of not having made any choice one way or the other. And we say that that point has particular force in a case like this where we have seen the class members are in materially different positions to one another and where it's obvious that they would have different interests and different incentives in relation to the litigation, both in terms of the strategic choices to be made and also as to whether to participate at all.

So that then leads me to my third proposition, which concerns the question of how the Tribunal should decide

in a particular case whether providing class members with that choice is a good thing or a bad thing. And in my submission, that comes down to a proper -- or it largely comes down to a proper understanding of what is meant by practicability under the Act. On this I just want to show you briefly what Lord Justice Green said about that again in the FOREX case but also what he endorsed in what Mr Lomas said about that, sitting in this Tribunal at first instance in that case. So, beginning with Lord Justice Green, if we skip forward to page 1953, just picking it up at paragraph 123, you can see:

"With respect to the CAT, it is now clear from case law that where there would be no proceedings save on opt-out terms, that is a powerful factor in favour of a claim being certified as opt-out. Access to justice is not just about the size and sophistication of the class members, but encompasses also the size of the claim and whether it would be proportionate or practicable for the class members (whatever their size and degree of sophistication) to commence proceedings to recover that loss. In the present case even for the largest [in FOREX] class members the sums at stake are relatively modest and on an opt-in basis could be dwarfed by the costs."

As Lord Justice Green went on to say, and really what he was saying there chimed with what he had earlier said in the BT case, Le Patourel, and you can see that he quotes from paragraph 73 of that judgment at the bottom of the page here. He says:

"In our judgment, and in line with the observations expressed in Lloyd and in Merricks, the CAT was entitled to conclude that if an opt-in was ordered the take-up could be very limited. Indeed, this seems to us to be a more or less obvious conclusion to arrive at on the facts. Both judgments demonstrate that the practicalities of collectively organised litigation might favour an opt-out solution where there are large numbers of potentially affected parties and relatively small sums at stake which might otherwise deter the take up of opt-in proceedings."

He goes on he says:

"The ability of a claimant to convert identifiable contacts into litigants is hence an important factor which goes well beyond issues of identifiability and contactability. The Tribunal examined relevant factors such as size of class ... [and so on]. These might be sufficient, by themselves, to justify an opt-out decision. The CAT also considered the more subjective characteristics of the class [Le Patourel was a consumer

class] ... These are case specific factors which can serve to reinforce an opt-out decision."

Then he said it should be left to the Tribunal.

Then in paragraph 125 he has the quote then from his nice encapsulation of those principles in Le Patourel and just looking at the second half of paragraph 83 that he's quoting there, he says:

"Practicability includes being 'doable' but goes further; it requires the court to ask whether it is not only 'doable' but also reasonable, proportionate, expedient, sensible, cost effective, efficient etc, to do it. There are many things that might be doable but where to do them would amount to a poor exercise of judgment."

So that is really the core of Lord Justice Green's statement as to how to approach these issues. But as I said before, I also want to look at what he said about Mr Lomas' reasoning. If we could skip forward to page 1957, you can see here towards the bottom of the page that what he says in paragraph 135 is that Mr Lomas' reasoning largely chimed with his own reasoning and focused on how to evaluate the evidence.

So to put that another way, as we will see, what Mr Lomas provided in this paragraph that we are about to look at was something like a manual for how to answer

the practicability question, so it's quite helpful.

Just looking at that quote, what he said is that:

"In creating an opt-in class, it would be necessary to establish a critical mass of core claimants to make such a claim viable as an action. The (formidable) costs of bringing this action are not materially dependent on the size of the class. However, the total size of the damages claim is critical because it supports the funding to pursue the claim. That is a function of the number of class members and the size of their claims. In essence, that total likely damages claim has to be large enough for the economics of bringing the claim ... to be rational."

And then he says:

"Once sufficient (presumably larger) claimants opt in so that point is reached, and a claim is viable and proceeds, there is then a separate issue of the extent to which it is possible to contact other [class members] to give them a fair opportunity to join the class [those are the critical words]. In this sense, practicability has two elements: (i) would a claim happen at all [that's the viability question]; and (ii) if it did, would it be practicable to bring the claim to the attention of the remaining PCMs to give them a fair opportunity to consider whether they should opt-in."

So what Mr Lomas is doing there is breaking down the question quite usefully into two parts. The first part is the viability question and the second part is contactability and fair opportunity to consider whether they should opt in. Just to note as well, I am not going to read it all out, in the next paragraph, Mr Lomas goes on to make the point that practicability is not binary. There is a continuum of practicability. And then where you are along that practicability continuum is obviously going to have implications for the overall exercise of discretion that the Tribunal makes.

So that is my third proposition, which again to summarise it, is just that we need to be looking at whether it is realistic, not just doable in theory, but a sensible thing to do in practice to gather first a big enough claim to be viable and then also to give the rest of the class a fair opportunity to consider whether they should opt in.

Finally there is my fourth proposition, which is just an acknowledgement that when considering whether it is realistic to gather a big enough claim, and to give people a fair opportunity to consider what they want to do, it's not just a matter of looking at the size of the claim, or the distribution of the commerce within the class, it's also a matter of asking whether there are

other practical obstacles to participation like irrational fear of retribution from the defendant. That is a point that Mr Stanley made in writing, but he hasn't pursued orally so I don't want to make too much more of it.

But I will just refer you to some paragraphs of this judgment, we don't need to turn them up, but on page 1951 at the bottom -- actually, sorry, let's go to that because it's relevant for another point as well. If we just go to 1951, you can see at the bottom in paragraph 120 that Lord Justice Green is quoting from a lawyer who was acting for one of the PCRs in that case, it was Mr Evans, who has described the processes that they had undertaken, actually before they decided to bring a claim on an opt-out basis. You can see that they contacted approximately 321 potential class members and from that they received instructions from just 14 of them. And over the page you can see that the claim wasn't viable at that size if all you had was 14.

Then under the bold heading the lawyer explains why such a small number of class members were interested. And you can see at (a) that a key concern that had actually been expressed by many of these class members was that they did not want to embark on litigation with the bank, with the major banks because of the impact

that that would have on their business.

So that was a witness statement from a solicitor at Hausfeld to the effect giving hearsay evidence that they had been told that that's what class members actually said.

Then at the bottom of the page you can see that Mr Evans wasn't stopping there, he actually got a witness statement from a managing director of a high volume FX trader, who I take it would have been a class member, elaborating on that point. Some of that evidence is then set out over the page. Again, you can see that his evidence was specific, specifically concerned with fears about the potential consequences of participating in litigation against the bank. So that's the kind of evidence that you would be looking for, for a point like that.

Those are the principles that I wanted to set out at the start. Now I want to look at the facts.

In our skeleton argument we show how many developers make up various proportions of the claim. If I can just show that to you. It's in the confidential version of the skeleton argument. We have it in a few different places. The first place is paragraph 43. You can see there we tell you -- it's right at the end, it's highlighted in yellow -- we tell you the number of class

members who cumulatively add up to half of the claim. And I don't want to say numbers because they are --

MR FRAZER: What page are you on?

MR PICCININ: Page 14 of the skeleton argument, which is ... 1151. Perhaps if you could just make a note so I don't have the keep coming back to it. That's the number that add up to half of the claim. If you go back, just back one page, you can see in paragraph 41 we give you the number that makes up 95% of the claim. And then if you go on to -- sorry, Professor --

If we then go on to paragraph 44, you can see the highlighting at the end. We talk about a particular number of PCMs who we say account for less than 1% of the claim value in aggregate, which probably gives you some idea of what the number would be that adds up to 99%, but if you want to know the actual number, I hope you have copies of the spreadsheets that were behind tab 71 of the bundle. Or have them in hard copy. If not, then it may be that the easiest thing for me to do is just to send you those numbers after the hearing so that you have them.

They were filed separately in hard copy and in both Excel and pdf.

(Pause).

In any event, my submission about it is that it's

not a large number of class members.

Sorry, sir, do you have them or not? If not, we can provide them separately and I can direct you to the particular cells. I will just make -- sorry, sir.

MR FRAZER: There is a table which is on page -- I'm just currently on page 7644, which I think is the one you are referring to. It goes back as well, I'm just -- 7641 et cetera.

MR PICCININ: Yes, I don't know what it looks like on your one.

MR FRAZER: I see.

MR PICCININ: Whether you have a number on the left-hand side which tells you which number class member it is. If not, then I think I will need to send it to you afterwards. I will just give you the numbers.

I can make the submissions without looking at the numbers and then I can show you what they actually are afterwards. The point that I want to make just in a little bit more detail about those figures is that if you go to the class member who is the smallest in the group, that takes you to half of the claim. So if we order them all from largest to smallest, this is what the spreadsheet does, and you get to the point where you have half of the claim value covered with the largest developer, that developer has a very large claim indeed

on Dr Ennis' case. It's the kind of claim that is much much much larger than many claims that are brought on an individual basis with just a single claimant on a claim form.

So that is true of all of the developers who add up to half of the claim. And so we say that if there is any merit to the claim at all, it's not unreasonable to expect that group of class members to spend some time, some proper time talking to the PCR about the claim and considering whether to opt in. It really ought to be possible for the PCR to spend some proper time with each of those class members in a very very very short period of time, it must be one of the easiest book builds anyone has ever tried to do, subject to the merits of the claim.

Frankly, once you've reached that point and so you have half of the claim value or you have spoken to the class members who collectively account for half of the claim value, then you are going to know the answer to Mr Lomas' first question, you are going to know whether the claim is viable or not. Because if all of them say "we are interested", then you have a big enough claim. And if all of them say they are not interested, then it doesn't really matter what happens after that, you are not going to have a big enough claim.

Then as you go down this spreadsheet, beyond the top 50%, you really don't have to go very far to bolster that up to the 95% figure that I gave earlier that you saw from our skeleton argument.

So we say that that really does give the answer to Mr Lomas' first question of whether you could feasibly do a book-building exercise that gets you to a viable claim. The answer to that is yes. And actually hearing Mr Stanley this morning I'm not sure that is in dispute anymore, it seemed to be in dispute before but I'm not sure it's in dispute now. In any event, when you look at the numbers, there's just no basis on which it could be said that, you know, that's not something that it's sensible to do or practicable to do or efficient to do.

The High Court's lists and indeed this Tribunal's lists are full of claims where solicitors have built books of hundreds or even thousands of claimants and that is for individual proceedings where the task of the book-building exercise is to get people to sign claim forms so that they actually become parties to the litigation and have to give instruction on everything that happens in it, right through to CMCs and preparation for trial.

That's not what we are talking about here. All we are asking them to do here is make a decision about

whether or not they want Dr Ennis to pursue the claims on their behalf and to do all the CMCs and to do all of the preparation for trial. That is all they are being asked to do, to make a decision one way or another as to whether they want him to represent them or not.

So that is Mr Lomas' first question. But our argument on practicability goes much further than that. Because even once you get to, as I say, 95% of the claim value, you are still talking about a very small number of class members. Far far less than what was at stake in Trucks. And, again, the kind of numbers that you ought to be able to target individually rather than just rely on media or more general methods. You will remember from the passage that we've just seen in FX that Hausfeld in FX actually did contact 321 potential class members individually.

But, in reality, we say Geradin Partners, Dr Ennis, didn't even need to do that, because certainly he doesn't need to get to 95% of a claim of this size to make that viable.

So turning to Mr Lomas' second question, which is giving the rest of the class members, the long tail, if I can put it that way, a fair opportunity to decide whether or not to join. On that question we have two points. The first point is that, unusually for

collective proceedings, we actually have a complete list of who they are. And every company on this list, and certainly almost all companies, has an address on Companies House. So there is a means of contacting anyone that Dr Ennis wants to contact. That's the first point as to whether we can contact them and identify them.

The second point is about what happens after that. And again, we say that this is a claim that is well and truly in the news. It shouldn't be hard to bring a claim of this type to the attention, not just to know where they are but to bring it to the attention of that long tail of class members either and then they can decide for themselves whether they want to sign up. And on that step, the deciding for themselves whether they want to sign up, again that question for them should be much easier than it is for potential class members in most cases, for example in Trucks. Because, as I say, unlike in Trucks where the question was about something as esoteric and abstract as the impact of a very long-running, complex cartel on the price of trucks, that's something that's really unknowable by people who have bought trucks. In this case, as I said before, the claim is about the class members. It's about whether they are receiving fair value for what they pay and

whether in their business the commission is the cost that is passed on. So it really shouldn't be difficult for these businesses to form a view on whether they want to sign up to a claim that alleges that they have suffered loss at Apple's hands. And again, as I say, that's all they are being asked to do, just to sign up.

I also just want to look at these numbers from the perspective that Mr Stanley did by reference to the expert report of Mr Perkins. If we just turn that up, it's at page 11390. You recall that Mr Stanley addressed the Tribunal on these various categories. And I think what he said was that he was really concerned about the class members in categories 3, 4, 5, 6 and 7 because those are the ones where he was characterising them as having claims that are of a significant size or a size that might be considered to be significant for those businesses; or meaningful, I think was the way he put it.

The point that I want to make about that is that just looking at the numbers there, those are actually very manageable numbers, even from category 3 going down, it doesn't add up to anything like the numbers that were put together in the Trucks opt-in litigation. I mean numbers of class members. And then again, if those sums are meaningful to those class members all

they are being asked to do is opt-in. No good reason has been given as to why they should be unable to make that decision.

Another point that I just wanted to make though is just to piece this together with the data that we were looking at before from our skeleton argument, because the claim value, essentially all of the claim value, resides in groups 5, 6 and 7; and 95% of it, thereabouts, is in 6 and 7; and 99% of it, thereabouts, is in 5, 6 and 7 combined. So anything above that is not making any difference to the overall size of the aggregate damages that are being claimed. And that really was my second point -- that was going to be my second point about what is unusual about this case, and I don't think I have ever seen it before in the facts of any of the class actions that I have been involved in, which is, once you get past the very small number of class members it just isn't going to make any difference to the aggregate award of damages; ie, the only relief that is actually sought by the PCR, whether the rest of the class members after that choose to opt-in or opt-out or some go one way and the other go the other way. That is important because if this claim does result in an aggregate award of damages, the calculation of the aggregate award is inevitably going to involve an

estimation of the various parameters of, you know: what is fair value? What is a fair commission? What are the pass-on rates? And so the idea that you could get within 1% or even within 5% of any kind of objective truth is just for the birds. And I don't mean any disrespect when I say it is, but in that sense the long tail is just going to be a rounding error on what the aggregate award of damages actually is.

But Mr Stanley characterised that as a very defendant-type perspective. That's not fair actually because that is the relief that he's seeking, only an aggregate award of damages. Even if you do want to look at it from the perspective just of the individual class members who Mr Stanley says might not sign up. There's one other point I want to make about these categories which is that above category 7, so all of categories 1 to 6, are highly likely to be in the situation where they are eligible for Apple's Small Business Program for which the commission is 15%. That's because unless your commission is more than $1 million then you are eligible for a 15% rate. And so in circumstances where just looking at paragraph 4.8 there, you can see the counterfactual commission rates that Mr Perkins is working with there, you know where those come from because Ms Demetriou showed you the

comparators for them. Well, actually on those metrics those class members really haven't suffered any loss at all. What they would have paid if they had signed up to the SBP would be within that range of counterfactual commissions in any event. So that's something that they could choose for themselves if they wanted to.

So we say all of that is really very different from other cases where the long tail might be small individually but adds up to a very substantial chunk of the overall aggregate damages and can change the outcome and make a real difference to the outcome of the case for everyone.

Pulling the threads together, what exactly is it that we say would have been practicable? What is it that we say the PCR should have done? The first point is that the PCR or its representatives should have started by talking to the top handful, if I put it that way, of class members. That really is a trivial exercise and would have answered one way or the other the question of viability. And then beyond that we know from FX that a diligent PCR can easily contact hundreds of class members and if the PCR is in a position to say that it already has enough class members to make the claim viable before it embarks upon that exercise then it ought to have a following wind in contacting those

remaining class members. And that exercise is already enough essentially to cover the whole of the claim and for the remainder they too are given a fair opportunity to participate because it's straightforward to bring it to their attention and they can understand what the issues are in the case and what they think about them and therefore whether they want to proceed.

So it's not my submission, of course, that literally every single one of the potential class members would sit down and make an informed decision about whether they want to opt-in or opt-out. That is never the position, certainly wouldn't have been the position in Trucks. But that can't be the test or else the statutory choice, as I said at the outset, becomes meaningless. The question is not whether they do form an informed view, the question is whether they are given a fair opportunity to do so.

I keep referring to Trucks, so I do just want to give you a little bit of data on that claim which went forward on an opt-in basis as I've said.

At the time of the certification hearing the PCR had already signed up more than 15,000 class members which is more or -- or at least similar to the overall size of this class. Of course that 15,000 class members must have been a small fraction, or at least a fraction of

the total members of that class but that wasn't regarded as an obstacle to certificating an opt-in claim. It's much, much larger than what you would need to put together a viable claim in this case.

I have heard that Mr Stanley says that Trucks is different because the PCR in that case was an industry association. But on that I just note, and I will just give you the reference without turning it up, it's in the authorities bundle at page 1699, paragraph 220, the RHA which was the industry association, only accounted for approximately half of the trucks on the road in the UK. And looking at the thousands of class members that had been signed up before the claim was even filed, so long before certification, about 45% of those who had signed up in that time were not members of the industry association. And even that is more than 1500 class members. And again, if you look at the data that I have been taking you to, we say that would be plenty in this case.

So why does the PCR say that he should not have to do all of this work? As I've said, one answer that he gives, although it hasn't developed orally, is that it would be pointless because developers would be too scared of the opt-in. But there is absolutely no evidence of that. As we've said in our skeleton argument, there

is simply nothing in the material that the PCR has put forward to point to any specific concerns on the part of developers, that participating in opt-in proceedings would lead to any kind of retaliation from Apple, which is obviously a suggestion that my clients reject. Other developers have sued Apple around the world and that has not led to any kind of retaliation. So this is nothing like the situation in FX where the PCR had gathered specific evidence from the horse's mouth that that really was a concern that was operating on the minds of class members about litigating with major banks.

Beyond that point, the evidence from the PCR is frankly risible. If we could just turn up Gallagher 2, which is in tab 21 of the hearing bundle at page 2749, you can see under the heading towards the bottom that he addresses the challenges that they say the PCR would have faced in identifying PCMs -- sorry, that point is at 8.1. And we say that there is absolutely nothing in that. I mean you can find out who the class members are and that material is available in the public domain. In any event, this tribunal might remember that we gave them a number of examples in the jurisdiction challenge which was now quite some time ago, and if they had wanted any more and they really couldn't find the information in the public domain they could have asked

and if we said no they could have sought an order requiring us to give them that information. So we say there's nothing in that point.

Paragraph 8.2, contact details. Again, as I've already said, there are contact details freely available in the public domain on Companies House. And as I've also already said you only really need to contact the larger class members directly and that really is a trivial task.

At 8.3 he says that it's not clear that they could have obtained funding for an opt-in claim. And again, we say that is risible. It's conclusory. It's not at all clear to me why it would be that external funding is required to do the small initial bit of work that is involved in finding out whether the claim is viable. It should be possible to do that on the basis of the firm's internal funding, and Geradin Partners stand to make many millions of pounds from this litigation, whether it succeeds or fails. I mean, of course they would prefer to do that -- to earn that money without having to do the work of the initial book-building exercise but that's not a good reason why they should be excused from doing so.

Then in similar vein, if we go on to page 2785 we have a statement from the Funder, Mr Way. We can see

what he says at paragraph 8. He says:

"It is highly unlikely that the PCR would have been able to obtain funding for the claim."

And that Mr Way would not have supported the case for funding on that basis, on the material that he had at the time.

But again, this part of Mr Way's statement is also entirely conclusory and unsurprising, given the Funder's interest in going ahead on an opt-out basis. It's also not clear what he means by the material that he had at the time. He doesn't tell us what that was. And presumably that material would have included a statement from Mr Geradin and Dr Ennis to the effect that neither of them had made any efforts at all to try talking to any class members and without the information that you have seen about the fact that virtually the entirety of the commerce is concentrated in a very small number of class members indeed. Mr Way says nothing at all about why a claim with the actual features of this case that Dr Ennis knows very well should be unfundable on an opt-in basis. So we say there is just nothing here at all for the Tribunal to place any weight on.

On that basis we also say that there's no reason why this case needs to go forward on an opt-out basis. If it's got any merit it will be entirely practicable on an

opt-in basis, and I made my submissions at the outset as to what the important reasons are as to why that would be preferable. It confronts the conflicts of interest and creates an opportunity for the PCR to put a claim together that isn't riven with them. And also, it ensures that this tribunal has in front of it a claim that is not just abstract but actually represents something that class members want to see pursued in their names.

So that's why we say because of the practicability of opt-in proceedings this application should be refused.

So unless you have any questions those are my submissions on that topic.

THE CHAIR: Just on that last point, I mean, it would resolve the conflict of interest issue, would it not, if members were asked to consent to whichever strategic decisions the representative was minded to make?

MR PICCININ: Sir, that's why I hesitated slightly on the point. As Ms Demetriou submitted to you earlier, the case law draws the distinction between actual conflicts and potential conflicts. In the realm of potential conflicts the position is, as you have just said, sir, that informed consent would do the trick. But as the PCR in Trucks found out in the case of an actual

conflict, actually that won't do. And so it's still possible that an opt-in class could be put together but it would have to be put together in a way that it consists of people who don't have an actual conflict of interest. That would have to be done either by assembling a class that didn't have the problem or by changing the way the claim is put so that it doesn't create the problem. Obviously it's not for us to solve their problems. But that's why I hesitated slightly over whether opt-in would or wouldn't solve the problem.

THE CHAIR: Yes, okay, thank you.

MR PICCININ: That leaves me with our final point on certification which concerns a specific aspect of the PCR's funding arrangements. As you have already heard, the funding arrangement provides for the Funder to receive a multiple of its investment. So it's a multiple of what the Funder actually spends. And the point that we are concerned about is that the multiple increases by 1 on the first day of any liability trial, and what that means in practice is that the amount that the Funder is due increases by the entirety of what it has spent, so could be up to £15 million on the first day of the trial; so that the Funder's profit increases by that much from one day to the next.

And our concern is that that structure in the run-up

to trial will give rise to perverse incentives whereby the Funder would have a very strong interest in seeing the settlements delayed so that it receives a higher multiple. And I hear what my learned friend says about whose decision it is as to whether to settle or not but it is the PCR's decision at the end of the day. That's not to say that the Funder's incentives are irrelevant. This tribunal has already shown in Sony that it is alive to the risk that the Funder's incentives will infect the decisions that are made by the PCR and also the Funder, as you've seen in, I think it's clause 8.3 of the agreement, actually has the power to call for a separate assessment of the merits of the settlement which itself could cause a delay. That's something that is within the power of the funder.

Just to see the way this concern arises, if we could just go back to the Sony decision that my learned friend showed you earlier. That is authorities tab 34, page 1971. The specific point we are interested in -- sorry, is on page 2032, and it's paragraph 168. The context for paragraph 168 is the tribunal has just finished saying in the preceding paragraph that in general terms it was willing to leave the question of the Funder's returns as to whether it was proportionate or not until after judgment or settlement so that

everything could be considered in the round. And that's a point that the PCR prays in aid.

But the Tribunal says that that conclusion, that it's okay just to leave it until later, was subject to the point that it had raised about the increase in the multiple that was provided for in the agreements of that case. And the reason why you couldn't deal with the concern about the increase in the multiples at the end, the reason why it was important to grapple with that at the front, is because it's about incentives. And if you have a problem with incentives you can't wait until settlement, you can't wait until judgment to find out whether you are right or wrong about that because at that stage there's nothing you can do about the impact of the Funding Agreement and incentives. It's already had its effect, one way or the other. And so that is why it was important the Tribunal recognised in paragraph 168 to deal with that issue right at the start.

You have already seen and heard what the issue was in that case and there was a confusion as to the extent of the sharp increase in the multiple in Sony. But the point wasn't just about the extent of the increase as whether it was a doubling or an increasing by 1. Because you can see in paragraph 169 the way that the

PCR resolved the problem was also to make it more gradual with monthly increments in that case. It says 0.833 recurring each month, I think it must have been 0.083 recurring in each month in order for it to add up but I assume that's a typo that's not in the original agreement.

We don't need to worry about Sony's response to that but just over the page you can see that it was the combined effect of the clarification and the changes that led the Tribunal to conclude that there wasn't a problem in that case. The Tribunal begins paragraph 171 by saying "Taking these developments into account", as in all of these developments.

So we don't say in any way that the particular decision that was made on the different Funding Agreement in that case somehow dictates the answer in this case. All we are relying on Sony for is the proposition that this concern about the impact of a steep increase in incentives is a relevant concern for the Tribunal to consider at the certification stage. As I've said, that really follows logically from the nature of the concern.

The PCR says it's not actually a problem because in this case the increase in reward is commensurate with the increase in risk that is associated with starting

the trial. So far as I understand the point it seems to be that the Funder will therefore be neutral as between settling on the day before trial and settling on the first day of the trial because if he settles the day before he receives less but if he settles on the first day of the trial it's possible that the whole thing will collapse as soon as leading counsel starts making opening submissions. So because it's just an even trade-off and there is nothing to worry about there is no incentive problem.

But while that might make sense in the context of a trial that was a one-day trial, or a two-day trial, even, where all of the uncertainty in the case gets resolved and unravelled very quickly, it really doesn't make sense in the context of litigation on this scale which is, you know, inevitably going to be large, multi-week litigation, the Kent claim is currently listed for seven weeks of tribunal time. In a trial like that, on Day 1 of the trial you are really just getting warmed up. All you have is the initial opening submissions. It's only slowly over time with the passage of weeks as witnesses start getting cross-examined, experts start getting cross-examined, that gradually that risk unravels and you find out whether the case is going well or badly, if at all.

So we say that if the PCR really wants to provide for an uplift to account for trial risk, it's actually in the same position as the different type of uplift that we saw in Sony, which is that it's just not true that there is a factor of 1, or £15 million difference between the risk the day before trial and the day of trial. If anything, what should happen is that there should be an increase gradually over time as that uncertainty unravels through the trial. So on Day 1 of the trial the multiple should still be 3, and on the last day of the trial, if the tribunal considers the multiple of 4 appropriate you could arrive at the multiple of 4 and you could increase by 1 over N each week, where N is the number of weeks; and that would be a way of meeting precisely the concern that my learned friend has advanced without having that kind of steep uplift that was ultimately removed in Sony.

So that's what we say about the merits of the point.

My learned friend has another point about this which is that exactly the same structure was used by the same Funder in Le Patourel earlier without any criticism being made of it. But Le Patourel was certified in 2021, several years ago now, before these kind of issues on the detail of the structures of Funding Agreements received the degree of the scrutiny that they do now,

certainly before the decision in Sony, where the Tribunal told us what it thinks about those issues. As far as I can tell the point was not even raised in Le Patourel and so the judgment in that case certifying those proceedings on the basis of that Funding Agreement just isn't in any authority at all on this topic and doesn't help anyone one way or the other so I'm afraid that means the tribunal needs to grapple with it on its merits and on that you've heard my submissions.

The only thing I would like to add to that is that it's really not clear to us why the PCR is so adverse to making what is, in the PCR's own submission, only a small adjustment to render the approach more reasonable following best practice in other cases that we've seen.

Unless the Tribunal has any questions for me, those are our submissions.

THE CHAIR: Thank you very much.

MR STANLEY: I have been asked to my left whether we could give an estimate of time. I think probably about 20 to 25 minutes. And I dare say what, about two minutes, perhaps, Mr Carall-Green?

THE CHAIR: Should we take a break now then for five minutes.

(3.15 pm)

(A short break)

(3.30 pm)

Submissions in reply by MR STANLEY

MR STANLEY: Judge, I'm going to deal with the points in the same order they were raised more or less, except that having said that I will just start with suitability of aggregate damages, really only to make the obvious point that apart from effectively a re-run of the conflicts point nothing was really said which suggests that aggregate damages would not be suitable. In fact the submission seems to be that there were occasions in which you weren't formally awarding aggregate damages when you could in practice do so. But the idea that the loss needs to be assessed on a class basis will not run individual-by-individual is, in my respectful submission, obvious as a starting point. I'm going to focus on the conflicts point.

In my submission, the right place for the Tribunal to start would be probably with what the Chancellor says in paragraph 97 of Trucks where he talks about the problem occurring if there is an identifiable conflict in relation to a major part of the case. And I accept, of course, that that includes canvassing the potential conflict because that's necessarily done at the stage where the Tribunal is asking: are these proceedings -- do they at the moment appear to be suitable for a

collective proceedings order? Well of course recognising the fact that that always has -- things can change and there is a possibility of change but one would not want to authorise collective proceedings in a situation where one could see the truck rolling down the road towards one, anymore than one would want not to do so because there was something wholly fanciful which conceivably might turn up in some almost unforeseeable circumstances.

That then takes me to my second point which is that although -- I accept, of course, that potential conflicts matter, we are not interested in conflict between claimants in the entire abstract. It needs to be related to the claim that the PCR is proposing to present; it needs to be a conflict which would present itself in that claim; and it needs to be sufficiently anchored in reality to give rise to real concerns. So obviously, for example, developers have all sorts of conflicting interests in various ways: they may be each other's competitors. That's not the question. It's not whether their interests are always aligned. The question is whether there are conflicting interests in relation to the claim and specifically in relation to decisions which are actually going to need to be taken about the claim. That's what one's interested in.

And in that context one should be concerned with the realistic and not the entirely fanciful. And one should be careful about overspeculating. I won't take you back to them but the comments about one or two developers who have been found who do sit in this middle position where they have undoubtedly, to put it neutrally, benefited from the fact that they do not pay commission on some activities but paid commission on other activities, there will be some people who fall into that category. It shouldn't necessarily be assumed that that's likely to be a very major difficulty. And one might ask whether a lawyer looking at that would normally think that alarm bells are ringing and I can't act for these people as well as other people.

Let me look then at the specific conflicts which have been identified. The first one I think it was said well obviously anyone who benefits from the non-commissioned activities would be worse off if Apple were able to charge commission on those activities which are currently not commissioned. And it is therefore said they will be worse off if this case results in that happening. But as you know, there is no claim made for any order that will require Apple to do that. And my learned friend then says, well that just shows the conflict, that demonstrates the very conflict. Why is

there not such a claim? But the answer is there is no claim for any sort of prospective relief at all. There's no claim for commissions to be changed in the future; it is a damages claim and simply a damages claim. And there is a very obvious reason why that is so. It is not likely to be in the interests -- I don't say this tribunal would not have jurisdiction to consider the possibility of a claim for future conduct, but the notion that this tribunal would entertain a claim which would require Apple to charge 84% of developers, including those who are entirely unrepresented in this claim, positively charged commissions on currently non-commissioned activities in the future, that would be an absolutely fanciful claim to bring in these proceedings.

THE CHAIR: I think the way it was put was that it wouldn't need to go as far as that. If the Tribunal was invited to find that the cross-subsidy was unfair, it would be necessary to get an order requiring Apple to conduct its business in a particular way in the future, but nevertheless that might well have a bearing on the financial interests of those members who currently benefit from the cross-subsidy arrangement and that would be something that would give rise to a conflict of interest.

MR STANLEY: But that would be true, with respect, whether or not that was the submission that was made. So if Apple is told in these proceedings: the commission that you currently charge in the way that you currently charge it is too high, one of the things Apple will no doubt do is consider well, how does that affect our charging practice in the future? And there are all manner of impossible to guess ways in which that might happen and that is not a conflict of interest. The particular idea that what is likely to happen, is that Apple is going to embark on the scheme to charge the currently 84% that they charge nothing to, to suddenly start charging money which will more than cancel out -- more than cancel out, because that is what it has to need to do -- any benefit from the reduction in commission is very questionable. But my main answer is to say we are now in a realm of speculation which goes beyond anything which one could realistically describe as a conflict of interest.

And certainly to say that the conflict is not only current, potential, for the future, which I think is the point that you just put to me, but it's actual and current and you can see it on the face of the pleading because: look, there is no claim for relief, makes no sense at all. Of course there is no claim for relief in

the future. There is no claim for relief in relation to the commissions in the future. And nobody would spend two and a half seconds thinking about whether such a claim should be included. On that, there is no conflict in any real sense.

In terms of the second example which was put within the damages claim, my learned friend said: why not push the point when it comes to completion? Why not say: actually, not only should you be reducing your current commissions to a level which reflects a reasonable return on the services that you provide for those commissions, but you should be pushing them even lower to reflect surely the fact that you have been cross-subsidising other people and you can earn money in other ways; in other words, you have two things going on.

Again, there were two answers to that. The first and practical answer is that everyone will say: well that's a very odd claim to make, actually; that is just not the way that one would assess an excessive pricing claim; it would take one into a realm of massive speculation for no obvious advantage. But secondly, it actually wouldn't be a case where there would be a conflict of interest. That's the one thing that would not be presented by that way of putting the case.

Because if that way of putting the case would increase the damages which are paid, then it would be in everybody's interests to do it that way. So whatever the reasons for the decision being taken, it can't be a decision to prefer the interests of one member of the class over another member of the class, it's in every member of the class's interests to have the damages assessed as high as they can be.

And beyond that I think it would just take me to the point that you, sir, just made to me that: well, ultimately if that kind of finding is made might it not have some knock-on effect commercially down the road? And that is not what the law means by conflict of interest. And that happens in all sorts of cases. You argue one point -- one contractual point of construction in one case where it happens to be in your client's interests, may turn out to be to another of your clients' disadvantages in the future that you have won that point, maybe, maybe not, we don't regard that as a conflict of interest and we are right not to do that.

And the third example I think that my learned friend gave was she said -- and I'm afraid it's an example that, no doubt my fault, I didn't entirely understand -- she said that there were some people for whom it might be useful to alight on a single level of commission,

perhaps 15%, and say anything above that is unacceptable, and other people who might want some different and lower rate of commission, and that there was some conflict there. With great respect it's very difficult to see how that is a conflict.

In any case where people have paid in any different -- prices which are to an extent different, any level of commission for which you argue will leave some people above and some people below the rate at which it turns out they have suffered a loss. The class's interests are always to push that rate as low as you realistically can, but bearing in mind the fact that you have obligations to your other clients and to the Tribunal and in any event you have experts that you need to call and expert evidence you need to get home. So there's no conflict there. There are differences; it's not a case of conflict.

Actually, although one can see that in very broad terms the idea that you can divide the world into those who have at least partially benefited from this commission, even if they have also suffered, and those who haven't benefited at all, shows differences in treatment but doesn't on analysis produce anything, in my respectful submission, which amounts to a conflict, and much less a conflict of the sort that the Chancellor

mentioned.

I suppose I should finally say that also applies to pass-on. If there's a conflict on pass-on here, there is always a conflict on pass-on. You could always say that there is some way you could argue the case which might theoretically benefit one group over another group if that mattered. Almost impossible to imagine a case where that might happen. And the solution to it is that the distribution is kept separate for very good reasons.

So that's conflicts, and unless you have any questions I was proposing to say no more about that.

On opt-in, opt-out -- it might be helpful if I start with what my learned friend said were propositions of law that he thought we would all accept and to tell you that with one possible exception, that that was only because I didn't quite understand the proposition, I think I did accept all of them, that it's the Tribunal's discretion, not ours, absolutely. If there is a statutory choice in some circumstances one must assume that opt-in would be more appropriate. I suppose that must be right as a matter of logic but it really takes one no further in any concrete case.

We need to be looking at whether it is realistic, I think he said, but also whether it's sensible in

practice. And ultimately, I think that came down to a quotation that Lord Justice Green gave to I think something that he may have said in Le Patourel, practicability, including reasonable, proportional, expedient, sensible, it doesn't just mean: can you do it?, it means something broader than that, certainly.

And when considering whether that is realistic, you are not just looking at the size of the claim but at other practical obstacles to participation. Again, that's unobjectionable. I'm not sure how far it takes one.

So, so far no point of principle in disagreement.

At one point my learned friend said the question was whether it was more practicable than in Trucks. That is obviously not the question. You don't decide the exercise for discretion in one case by looking at other cases in which the discretion has been exercised, least of all Trucks. The question is really about the reference between opt-in and opt-out in this case, and you will get not very far, in my respectful submission, by looking at the exercise of discretion in other cases, so long as you understand the principles which are to be applied.

My learned friend then summarised his submissions by first of all saying that -- the first question he said

was whether the opt-in process was the best way to confront the issues of the choices that are made on behalf of the class. I'm not sure if that's necessarily clear. But in my respectful submission it was ultimately -- my learned friend was right to say that the opt-in and opt-out questions are separate from the conflicts questions.

THE CHAIR: Separate from?

MR STANLEY: Are separate from the conflicts questions.

THE CHAIR: Yes.

MR STANLEY: I can imagine that there might be cases in which there was a potential conflict but one which could be resolved by actual, informed consent. One would still have to ask the question whether an opt-in class gives one actually sufficiently informed consent to get to the stage of resolving that. But I don't think it's my learned friend's case that this is one of those cases. His case is that -- or my learned friend Ms Demetriou's case, is that this is a case in which there are actual conflicts which are just irresolvable, which means that it could never be a class solution. So I don't -- ultimately, neither party I think is saying that opt-in turns on the (inaudible) question.

The second thing he said, which with respect I would invite you to reject, is that it was preferable if

practicable for proceedings to have what he called a buy-in. And the reason I invite you to reject that is it would effectively revive and resuscitate the notion that opt-in was always preferable to opt-out, that the positive expression of assent was always better than something which didn't involve the positive impression of assent and that doesn't seem to be the law. One can see how people might have thought that that was a choice that should have been made but we know that it wasn't a choice that the legislature made in this particular case.

As far as the heavy reliance on what Mr Lomas had said at first instance, dissenting in Foreign Exchange which the Court of Appeal approved, one would hesitate to describe that as a manual, useful comments which were obviously thought to be useful but ultimately one view of the cathedral, if I could put it that way, one way of looking at the discretion. But let me for present purposes work within their framework. If question 1 is: is there a viable class, a viable claim -- can a viable claim be created on an opt-in basis?, the answer is one does not know, in this case, because as Mr Piccinin points out, that isn't an exercise which has been attempted. He is quite wrong to suggest that it's an exercise which one is under some kind of obligation

to attempt. The fact that it hasn't been tried is something the Tribunal can take into account but it's not by way of criticism of anyone, it would just be taking it into account.

It is a question which does have two possible answers, it might be that a viable class couldn't be created in that way, going to the first few highest value developers would not end up with enough people involved to have a viable claim. Now, if that was so, that would obviously be an argument in favour of an opt-out class, so that wouldn't help Mr Piccinin, if that were the outcome of that process. If, on the other hand, it produced a viable class at that stage, the second stage is to say: well, can you then build from that to something which is practicable, going elsewhere? And it's at that point that we do say: well even if you got there, you got your first, let's call them ten, not the number which is in any of the secret documents, so one can say I'm telling anyone, you get your first ten and you then say: we have a viable claim as it stands, we can now go and recruit other people. You are still looking to contact many more -- well, you've seen the figures. We are looking not at tens, we are not looking at hundreds, we are looking at many, many people who would need to be contacted. And the prospect that you

would do that in a way which you were able to get to all of them and really give them the opportunity to make their decisions, is really not realistic in this case.

And one knows the efforts which have been made. What things like Foreign Exchange show you is that even when you have large claims which can go to people, it costs a fortune and it takes a very long time to build that kind of structure.

I would remind you, though I'm sure you have it in mind already, that though Mr Piccinin made very light of all this and said well it's all publicly-available information; it's not. It's information which not only is not publicly-available, but it's information that he was keeping confidential by not reading it out to the public. It's information that we gleaned in the course of this hearing, in the course of which you will have seen already from the evidence the numbers have changed over time. And the idea, with respect, that sending letters to people's registered offices extracted from Companies House is a realistic way of being able to persuade people to sign up, quite difficult.

And where that leaves one at the end of the day is that even if one captures -- and Mr Piccinin doesn't shy away from this, he says well it doesn't really matter, they've got 95%, that's good enough, it makes no

practical difference, it's a rounding error as far as damages are concerned to go above that. Well that may be so in terms of the amount that Apple pays but it's not a rounding error for the thousands of people who are not included in the class if it's an opt-in rather than an opt-out class.

And one might say that if you have a case where it's no prejudice to the defendant at all if it's an opt-out class, and none has been suggested, but a benefit, a clear benefit to small- and medium-sized enterprises which have suffered relatively small but significant sums of loss if it is now an opt-out class, that is a pretty powerful reason for an opt-out class. That I think is all I wanted to say about that.

Two other points. The first is one should not lose sight of the fact that an opt-out class remains an opt-out class. It's not a compulsory class. People are still to be contacted in whatever way they can be. The Tribunal is in control of that. They still have the ability to opt-out if they have positive reasons not to think that they want to pursue a particular claim. Whether Mr Piccinin is right to think that having experienced excessive pricing you are in a particularly good position to know whether it has occurred or not I leave it to you to decide. These are developers and not

economists and they may have very little idea about that.

The second point is there was mention of the Small Business Program. You should bear in mind that all that shows is that in fact in many cases developers have not signed up for things which could save them money with Apple. Now we don't know why and it doesn't matter why. It doesn't affect the damages that they are entitled to. If they haven't signed up and they have therefore been overcharged, well, there's still a damages claim. But what it does show you is one of the reasons why perhaps opt-out rather than opt-in is more likely to actually arrive at the right result.

Subject to that, unless you have any questions on that aspect of the case those are my submissions.

THE CHAIR: Thank you very much.

Submissions in reply by MR CARALL-GREEN

MR CARALL-GREEN: Sirs, I can be quite brief. Just to pick up on two points that my learned friend has made. The first was in response to what I think was my final submission. My learned friend says: on the question of funding you can't wait until judgment or settlement to worry about the incentives that are on the funder because by that time the incentive will already have taken effect.

But that of course is not true because we all here know that the funder's return is handled after trial or settlement. We all know that what the funder gets is within the Tribunal's gift. So the incentives now are subject to that knowledge and that's why I said in my third submission that this was all tinkering around at the edges because we all know now, today, that when we get there the Tribunal will still have to scrutinise the funder's return.

That's all I wanted to say about that.

The second submission, the second point that I want to pick up is about risk and return, which was part of my first submission, but my learned friend addressed it later. He sort of accepts that risk increases at the beginning of trial. So the question for the Funding Agreement is just how to calibrate that and reflect it properly in the agreement. And what we have in the increase from three times to four times is a perfectly sensible way of calibrating and reflecting that increase in risk in the agreement. It's the kind of practical, sensible judgment that the market is good at arriving at and has arrived at.

So perhaps I could just ask the Tribunal to ask itself two questions: first, is the kind of drafting that my learned friend suggests with some kind of

increase over time as the cross-examination progresses, is that realistic? And second, should the Tribunal really be interfering at that level of minute detail in a commercial agreement which has been arrived at through ordinary market mechanism?

That's all I have to say about that, sir.

THE CHAIR: There is some force in the point that the risk doesn't really change necessarily very much on the first day of the trial? Is that ...

MR CARALL-GREEN: Is it really the case that adjusting it on a week-on-week basis is any better? The point I make is simply that one has to reflect the risk one way or another, one has to sort of model it; and one has to do so in a way which is agreeable to both sides in what is a commercial negotiation.

So of course I accept what we are dealing with here is an approximation and it's not going to perfectly reflect risk, but neither, indeed, is the kind of drafting that my learned friend suggests. So in those circumstances, is this the kind of situation where the Tribunal should step in to interfere, is there a manifest injustice which the Tribunal really needs to control, or is this just a sensible, commercial agreement that the market has arrived at?

Thank you, sir.

THE CHAIR: Is there anything else?

MR STANLEY: No, nothing else. I was only standing out of politeness.

THE CHAIR: Thank you very much.

The Tribunal is going to reserve its judgment and we anticipate that we will let you know what our decision is on Wednesday. That will be without reasons, it will just be so you know what the outcome of today's hearing is.

MR STANLEY: I'm grateful.

THE CHAIR: Thank you very much.

(4.00 pm)

(The hearing concluded)