IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1601/7/7/23 & 1403/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 23rd September 2024

Before:
Andrew Lenon KC
Ben Tidswell

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Dr Rachel Kent

Class Representative

Dr Sean Ennis

Proposed Class Representative

v

Apple Inc. and Others

Defendants / Proposed Defendants

A P P E A R AN C E S

Tim Ward KC and Michael Armitage on behalf of Dr Rachel Kent (Instructed by Hausfeld & Co.)
Paul Stanley KC, Daniel Carall-Green and Victoria Green on behalf of Dr Sean Ennis (Instructed by Geradin 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, 23 September 2024

(10.00 am)

Case Management Conference

MR LENON KC: The case is on a livestream 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. Breach of that provision is punishable as contempt of court. Thank you. So who is going to start?

MR STANLEY: We have not discussed who is going to start. We are very much in your hands.

Can I just tell you where we stand, having considered the skeleton arguments?

MR LENON KC: Yes.

MR STANLEY: Which is that reluctantly it doesn't seem likely to us that any of the intermediate positions are going to work. So it is between effectively separate trials and consolidated trials. When I make submissions I will put the intermediate positions in their place, because ultimately it is a matter for the tribunal, not the parties. But I think that probably means that, in how we line up, the likelihood is that you will find that we and Apple line up in terms of what we are advocating for is a single joint trial, and that Mr Ward is the one who is suggesting that there should be two separate trials. And that may help you to decide what order you want to hear us in, in relation to the issues.

We are very much in your hands.

I think as between me and Ms Demetriou, I think it probably doesn't matter much. But it might make more sense for Apple, since they are effectively on both sides of this particular fence, to go before me. But I am not asking you to do that. I am just saying

that that is an option.

MR LENON KC: Yes.

We are still potentially interested in the intermediate position.

MR STANLEY: That's why I was going to deal with them more comprehensively, yes.

MS DEMETRIOU: Would it be helpful for me to summarise our position having reflected on our submissions? That may help you decide who you want to go first, as we have not discussed it.

We have similarly come to the view that the most appropriate way forward is a joint adjourned trial, and we haven't come to that view lightly. But in short summary, our reasons are as follows.

We say, first of all, the position that Dr Kent puts forward in her skeleton argument, mainly having two separate trials, is the worst of all worlds because it would result in huge inefficiency, particularly for Apple but also for the tribunal. Apple would have to call all of its witnesses twice, probably within the course of a few months. But secondly, it would result in a very serious risk of inconsistent judgments.

This case raises much more serious inconsistency risks than in Interchange, because it's not just pass-on. There is the very issue of liability, which is a serious issue which affects Apple's business practice going forwards. So we say that really there must be a solution, given that these two sets of proceedings are before the tribunal, to manage this in a way that doesn't result in any risk of inconsistency.

We reluctantly think that the interim solutions -- the halfway house solutions -- won't work. I can elaborate on that in my submissions, and I will do.

Thirdly, we say that although it may not seem at first blush very attractive to adjourn the January and February trial, actually the downsides of doing so compared with the other alternatives are reasonably limited, because we say that if the January trial were to go ahead without binding Dr Ennis, then the idea that any swifter resolution in terms

of money going to the class if Dr Kent succeeds is going to happen we say is illusory, because the reality would be that there would then be a separate Ennis trial and any issues would have to be dealt with in a joint appeal. There would very probably be an appeal, given the seriousness of the issues in these proceedings.

In terms of costs, we say it is difficult to see that there are any serious costing implications of adjourning the trial because all of the work that has been done in terms of getting the expert reports ready and so on will be reused. Dr Kent hasn't put forward any costs which she says wouldn't be recoverable or wouldn't be reused. And that -- if there were any costs which were occasioned by an adjournment, those would be outweighed very significantly by the duplication of costs that would arise if there were two separate trials.

So that, in a nutshell, is our position. I just wanted to put it out there first so that you know where we are heading. But of course I am very happy and prepared to elaborate on these various points.

MR TIDSWELL: Can I just check with you. I think you are saying that you are making an application to adjourn the trial. Obviously Dr Kent needs to respond to that, if that is the position on that basis. I just want to be clear what is actually happening here. It is a slightly unusual construct where we have two different proceedings and we are sitting in their way. But if what we ended up doing was accepting your view, I think it would amount to an application to adjourn, wouldn't it?

MS DEMETRIOU: Well, I am not sure technically we would need an application, in the sense that everyone knows that this is about how best to case manage the trials.

MR TIDSWELL: I am not making a procedural point. I think we would be perfectly happy -- I don't think anyone would suggest that your letters don't amount to a fair warning of it.

MS DEMETRIOU: Yes.

MR TIDSWELL: That's not the point I am making. The point I am making is that we should be looking at this through the lens of an application to adjourn so far as the impact on Kent goes.

MS DEMETRIOU: Yes.

MR TIDSWELL: Albeit that we are also looking at it in a broader context because we are trying to manage the two proceedings together.

MS DEMETRIOU: Yes, of course, sir. You will want to hear from Mr Ward as to what Kent says about that and the impact on Kent. But we say very much that needs to be compared to the alternatives. In a sense we say that an adjourned single trial, binding everyone, is the most appropriate or the least bad of the alternatives that the tribunal is faced with. And we say it is the most appropriate and that the downsides, as I say, are not significant. There are very significant upsides.

MR TIDSWELL: Can I also ask you -- I think this is something you may say you don't necessarily know the answer to because it depends a bit on Dr Ennis. But if you are saying the trial should be adjourned, the question is, of course, when to?

MS DEMETRIOU: Yes.

MR TIDSWELL: And that could have a number of different possibilities. It could be when the Ennis proceedings are ready, which of course as we know could take several years. Or it could be on a less aggressive timetable than the adjournment, than the trial in January, but still one that was quite aggressive for the Ennis proceedings. Maybe you are not in a position to express a view on that until you hear more about the Ennis position, but do you have a view at the moment?

MS DEMETRIOU: I think we would be looking for a trial -- a joint trial -- as soon as reasonably practicable. I think that Dr Ennis would have to do what he could to cut his cloth to join a trial that is not too far in distant future, given that we are up and ready for the Kent trial now. So I don't think this should be left at large. We do think that the

trial should be adjourned and relisted but also that Dr Ennis has to be realistic in terms of working to a more expedited timetable than might otherwise be the case. Aside from that, I can't be more precise at the moment.

MR TIDSWELL: I understand. Obviously at the moment Dr Ennis has been saying that he thought he could get there for January. I think it is probably apparent from the skeleton that it is not really thought to be a particularly realistic option. I am sure we will hear more about that. I think it is entirely fair for you to say you don't know the answer.

The question then becomes, if not January, when would be a realistic time to expect Dr Ennis to be ready to participate in a trial that was configured in the way in which the proceedings are now?

MS DEMETRIOU: Precisely so. We would say as well, if that is the course the tribunal is taking, we very much say -- and I anticipate that both my learned friends -- famous last words -- would be in agreement on this -- a single trial dealing with liability and pass-on, rather than then hiving off pass-on yet further.

In fact, that is in itself a good reason for not rushing to a partial trial in January, because the liability and pass-on points, as you have seen from our skeleton, are overlapped substantively. Having two trials at all leads to some inefficiency.

So I agree with you that we would need to hear from Dr Ennis in terms of what timetable is realistic. We would be urging them to work to a more expedited timetable and one in which they are prepared to address pass-on as well as liability.

MR TIDSWELL: Just to be clear, I am not expressing any preference in my questions on that. And I think it's not a situation where either of us want to give you any provisional view, which has sometimes been the case in this tribunal. We're not doing that. It is obviously quite a difficult question.

One other point, just really for all parties. I do think we want to explore the intermediate

positions to understand, but particularly we would like to understand better in due course the issues that are said to arise with separating pass-on.

MS DEMETRIOU: Yes.

MR TIDSWELL: Which have been set out clearly and obviously identified in the skeletons. I think we would like to work through those and make sure we really understand what the practical implications would be on both viability and the remaining quantum issues, if one were to attempt to do that, and how it would impact the Kent trial, for example, if we were to try to do that. To understand that in more detail would be really helpful.

MS DEMETRIOU: Sir, of course. I am summarising our position now rather than developing any submissions. But just to summarise where we are on that, we say that hiving off pass-on would be difficult because of a substantive overlap, which I will develop. But we also say if that were to happen, a joint trial on liability in January/February would not be practical or fair in the short time that's available.

So we make both of those points.

MR TIDSWELL: Yes.

MS DEMETRIOU: I am very happy to develop them in due course.

MR WARD: Sir, may I just outline the position on behalf of Dr Kent.

You will have seen from our skeleton that we do respectfully submit that whatever merit these applications and the effect they might have had at an earlier stage, it is now far too late. But we do advance an intermediate position as Mr Tidswell suggests, because what the case law shows -- and I will take you through this later -- is that the CAT does not take an absolute view about the question of overlap. It takes a pragmatic, case-management-driven approach that aims of course to be fair and proportionate.

There is no getting away from the fact that Dr Kent's claim was started in 2021 and

was set down for this trial before Dr Ennis's claim was even issued. And that is just a sort of stark fact about the chronology. And here we are, just a few weeks away from trial on all issues, facing now an application to adjourn from Apple, that has come off the fence this morning. Dr Ennis would like to engage in this trial. And we can see why from his point of view it is attractive for him to do that.

My clients and solicitors have done an awful lot of work to bring the case this far. What we have suggested, with reluctance, is a middle way, which allows Dr Ennis a limited role in the trial but without undermining its integrity. And that involves the opportunity to make limiting submissions. He says, after all, he's supporting Dr Kent on the liability issues and plainly he's more aligned with Apple on issues of pass-on, at least against Dr Kent. He can then prepare in an orderly manner for the trial of the issues in this case.

The issues are very wide, very complex. Apple has joined issue with Dr Kent on more or less every conceivable point. This is a very, very substantial undertaking. And what the CAT's practice shows consistently is that it will have regard to issues of overlap, but it's not going to derail the case management of a case that is on its way to trial in a way that would cause prejudice. And I will take you through this later.

This morning, Ms Demetriou has made some extreme submissions. She's said the downside of an adjournment is not significant, just a few weeks from trial where things are almost prepared. She said it would lead to a swifter resolution. Well, there are members of the class represented by Dr Kent whose claims go back to October 2015. It will be ten years before there is a judgment even under the current trial timetable. She says there will be no cost consequences. With the greatest respect, that is simply unreal at this late stage of preparation.

As to this question of whether the issue of pass-on could be severed, we think it can be done in an entirely straightforward way. We don't want that to happen. We think

the appropriate course is for the listed trial to proceed, for Dr Ennis to take a role in it that is not disruptive, that wouldn't undermine its fair resolution but would allow him to have some influence on it. The outcome would be a judgment which, under the law as stated in Evans in the Court of Appeal, would not be binding, it would be informative. And yes, we face up to the reality that there might be some overlap there if both cases really go all the way through to final judgment. But the CAT has grappled with that repeatedly in all kinds of arenas, whether it is Interchange or Trucks or other matters. If we were sitting here two years ago, this whole debate would be different.

So that's our position. As I said, with great reluctance we do offer an intermediate way, which is pragmatic. As you have seen, Dr Ennis is quite intransigent in resisting this. He doesn't want joint chairs. He says that wouldn't be enough. He even says he shouldn't pay the costs. But with the greatest respect the other two parties also ought to be more pragmatic in their approach, given where we are, just weeks away from trial.

So that's our position in a nutshell.

MR LENON KC: Thank you.

MR STANLEY: If we are setting our stalls out, who do you want to hear from first? I am very happy to go first.

MR LENON KC: Yes.

Submissions by MR STANLEY

MR STANLEY: In that case, can I hand up to you -- you may have it already. It is deliberately blank because it is not particularly helpful, probably, for you to have my views so much, though I am going to develop them.

What I am trying to do is to look at this from a number of different dimensions, because the problem that you really face, apart from the fact that everyone is offering you problems and no one is offering you solutions, in a sense, is that it is very clear what

the issues of each individual party are, and one can well understand why they are there, but there are things to be said for and against each of the possible ways of proceeding.

Ultimately, what the tribunal has to do is to hold the balance between the position as it affects one party and the position as it affects another party.

So, there is no dispute about what -- obviously no dispute -- about what the basic parameters of the rules are, the factors that you will be considering. There's not much help to be got from looking at other decisions in other cases, and much less from other transcripts of other hearings in other cases, to decide that. It is really about trying to form a considered view where there are trade-offs on all sides.

The second general point is that there is also a certain amount of uncertainty about some of these things depending on what will happen in the future. There is a certain amount of uncertainty about that, and to some extent people are flying blind. For example, we haven't seen Dr Kent's expert evidence. I think we saw some of the Apple evidence late last week, but we haven't yet seen Dr Kent's expert evidence.

All of us will be speculating to some extent about what might happen about decisions and appeals and that sort of thing. So all of those are there. But what I wanted to do was to try to look systematically at how one might rank the various options, if I can put it that way, on a number of different dimensions.

The first one that I have put on the boxes is speed. In other words, how quickly is either case likely to get to a decided outcome. At some point one might need to consider also what it does for settlement, but that is probably pretty much a secondary consideration.

The way I have ranked them is in numbers, from minus 3 to plus 3, but I am not suggesting that there is any magic in that, however one ranks them; it is just useful to think systematically about what each of the options does.

In terms of speed, starting from the bottom and moving to the top, in fairness to Dr Kent, probably it seems right that a single trial prepared on a timetable which would be an ordinary timetable for Dr Ennis is the one that one would anticipate at the moment is likely to be the slowest for Dr Kent. So that's a disadvantage, particularly since, as Mr Wood points out, Dr Kent started the case some time ago. That's a disadvantage of that.

Picking up the question of how quickly, if one were to go for a single trial, how quickly would one expect Dr Ennis to prepare for that? The answer must be that one would want to put one's foot on the gas at least a bit, but on the other hand the purpose of having a single trial as opposed to something intermediate is partly to enable that trial to be fully prepared, which I will come to in due course.

We suggest that it would probably be realistic to think that a timetable which would get the Ennis case fully ready for trial in January 2026, a year from the Kent trial, would be realistic. And that would involve some pressure -- in other words more than just the most leisurely of progress -- but not the same sort of pressure as one would put on oneself if one was trying to do an expedited trial or something of that sort.

So that's why we put single trial -- you might put single trial at the bottom of the list, so far as speed is concerned.

MR LENON KC: Why do you say as long as a year? I mean, in one scenario Ennis could be in some sort of readiness by the time of the joint trial at the beginning of next year?

MR STANLEY: Some issues could be, but that proposal assumed that you put pass-on back, which is not a problem if you are doing -- the problems with pass-on, if you haven't decided liability, are where the problems come. There's no problem putting pass-on back. So it's not a full trial if you do the joint trial at the beginning of the year. It also seems that other issues, although they do look as if they are mostly

legal issues, wouldn't be being dealt with in that trial.

So you might say, well, we will put you under pressure to be a bit faster than January, but I think the message I was getting was that one could be confident that one could have Ennis ready for trial in January 2026.

MR TIDSWELL: Do you accept that if you would be getting, if you like, the benefit of an adjournment, you might have to work on a more expedited basis?

MR STANLEY: Yes.

MR TIDSWELL: And I suppose, just to push a little bit further on that, you say you could do it faster. But how fast could it be done? And for the whole piece? It does seem to me that pass-on and the non-ambulating bits are unlikely to be really what takes the time for preparation, or indeed the time for trial.

Most of this is going to be about the complexity of the excessive pricing case and we know there will be an awful lot of information and evidence that needs to be dealt with on that.

So pushing you as to what would be the expedited timetable that you could do, what would that look like?

MR STANLEY: I am waiting to be told what --

MR TIDSWELL: Yes, I appreciate --

MR STANLEY: I would want to take time to talk to people about that rather than give you an answer --

MR LENON KC:I understand. In a way I can see why that is an unhelpful question, because you don't really know the answer. I know you don't.

MR STANLEY: Logically, sir, I think if we said we could be ready for a common issues trial in February and a pass-on issue in October, we must be capable of being ready for pass-on and common issues by October. That must follow logically.

MR TIDSWELL: Yes.

MR STANLEY: So I feel confident in saying that, because those have been thought through.

Before committing myself to that, not just because I am being forensically difficult, I would want to talk to people who are actually going to have to do the work, in case I am missing something important.

Can we come back to the relative merits of the separate trial and single trial position. Obviously for Dr Kent -- separate trials are likely to be slower for Dr Ennis, quite possibly slower than they otherwise would have been.

This is where one of the uncertainties exists, which is, what would happen about appeals in the Kent case? If one is being realistic, one should consider appeals as at least a realistic prospect. It is a big case with a lot of money, some difficult issues. The Court of Appeal is generally speaking quite interested in these kinds of cases and an appeal is not unlikely.

One of two things can happen with an appeal, or three things, I suppose. The Court of Appeal might be able to hear it very quickly so it didn't slow anything down. The Court of Appeal might take time, and one would then have to decide what does one do with the Ennis case whilst one is waiting for the outcome of the appeal in Kent. Or the Court of Appeal might decide, no, we wait until we see the Ennis case before we deal with Kent and we are going to deal with them together. That will slightly depend on what timetable Ennis is on.

All of those affect the extent to which one will actually get a real answer in the Kent case any earlier. One possibility is that one might not, and one possibility is that actually, it might slow Ennis down quite considerably.

Now, when one puts those together -- though I accept that the single trial has disadvantages in terms of speed compared to the separate trials proposal -- they are not possibly quite as large, when one takes all parties into account, as they at first

sight appear.

MR TIDSWELL: Is that the right thing for us to do? If we are looking at this as an adjournment application, effectively, by Apple in the Kent proceedings, does the interest of Dr Kent or the class have the same weight as -- sorry, Dr Ennis and the class have the same weight as Dr Kent's interests and class? Because it seems to me what you are asking is whether the balance of what's effectively a policy consideration as to consistency should override the interests of Dr Kent and her class with the fixture they already have.

Now, if you are effectively a third party to those, you are not involved in them. What weight do we give the convenience for Dr Ennis in that analysis?

MR STANLEY: At the moment I am simply looking at speed. I accept that when it comes to weighting the factors there are differences. But when one is considering case management the interests of other court users and litigants are also relevant. It is never just a question --

MR TIDSWELL: That's fair, but it is a slightly different point, isn't it, in that it is a more policy type -- maybe policy is the wrong word, but I think you are saying, quite fairly, and I am not pushing back on this, that there is a world in which Kent going ahead to trial may actually result in Ennis being a longer case than would otherwise be.

One way of looking at that is to say, well, that is just tough because that's how it has turned out. The other way would be that that has some weighting in the decision as to -- against the impact it has on Kent.

MR STANLEY: I would say it does have weighting.

MR TIDSWELL: Yes.

MR STANLEY: I understand you might say we want to give some special weight to the fact that Dr Kent started three years ago and is ready for trial. That's a factor which affects weighting. But it doesn't mean that looking at the position for other parties with

similar cases is not relevant. One doesn't principally look at each one, as it were, entirely in a vacuum.

I am sorry I can't give a more concrete answer.

MR TIDSWELL: No, no, that is helpful.

MR STANLEY: It is somehow inherent in the discretion that there are different balances to strike.

MR TIDSWELL: Thank you.

MR STANLEY: Then in terms of the other possible ways of looking at it, the proposal for separate trials with what I call minimal participation, which is the first of the halfway house proposals -- in other words you have separate trials but Dr Ennis can turn up and make some submissions perhaps on points of law or something of that sort -- it's a little bit unclear. That's really no different from the separate trials proposal in terms of how it is likely to play out in terms of speed. It doesn't have any speed advantages or disadvantages.

And the common issues approach -- well, if one took a common issues approach, or a delayed pass-on approach, conceivably they might be a little bit better than either of the alternatives in terms of speed, because you would be likely in either of those cases to get answers to some of the critical questions in both Ennis and Kent together and earlier than one might get them if one had entirely separate trials or a single trial.

Probably in terms of speed, the intermediate positions get one closer to an answer sooner. But there is not much to choose between them.

MR LENON KC: I am not sure what you mean by common issues there.

MR STANLEY: For example, once the tribunal has decided -- for example, suppose the tribunal decided there is no liability. Well, in a full common issues trial you would have an answer. If you got to pass-on, and you could do pass-on -- I am assuming these are all practical to do -- once you have an answer about what the extent of the

pass-on was, and you coupled that with the provisional conclusions which have been made in Kent, you would have an actual answer in Kent and you would be quite a long way down the road towards an answer in Ennis as well.

So both of those probably have some advantages in terms of getting the whole shooting match decided sooner rather than later.

But all of the speed points are actually quite subtle -- if one starts thinking them through, if one is looking at it from all the parties' perspectives, the differences between them are not great. They are real but they are not great.

That was speed. The second point I put on the list is decision-making efficiency and accuracy. By that I mean I am looking at it from the tribunal's point of view, really, and I am asking the question, what is the most efficient way for the tribunal, with all of the relevant evidence and arguments before it, to reach conclusions in relation to common issues.

I will look at consistency separately. But there is obviously an overlap. In terms of that, the tribunal not having to effectively do all the work twice with different material, if one asks what is the worst of the options it's pretty clearly a separate trials option. That's the likely one that's going to give the tribunal, effectively, conceivably, the need to re-decide the same issue twice on different evidence.

Now, of course that might be mitigated, I accept, by an ability to read across, to the extent that one fairly could do so. I will come to the fairness of that later. If it was a legal issue it may be an easier point. It might be less likely that you will have to decide the whole thing all over again. But where one is dealing with factual issues which have been based on expert evidence, it is quite difficult to see that it is better to decide those twice separately rather than once together.

So that's the worst as far as those are concerned. Then, the next, and not much better, we suggest, are delayed pass-on and minimal participation.

Now, minimal participation, it is quite clear why that is so, because minimal participation is not going to involve and nobody suggests it should involve cross-examination of experts by Dr Ennis. Nor is it going to involve any evidence about Dr Ennis. The consequence of that is likely to be that there will be different evidence in the Ennis trial, and that it is going to be very difficult to make any read-cross.

Even accepting the point that the tribunal is not, as it were, bound by Hollington v Hewthorn so as to make its previous decisions inadmissible, there are still fairness concerns.

I mean, in a quite different case in front of the Upper Tribunal -- nothing to do with this -- we recently had a case where the tribunal was looking again at something it had decided before and said, in terms, it would not be fair to the person in this case to take any notice of the decision we made in the previous case because we haven't heard the same evidence, and therefore under these circumstances it is not a reasonable thing to do.

Now, that's all down the line, but it is not going to make much odds. So minimal participation in this context does not really solve the problem.

Delayed pass-on is more difficult because it looks like a win at first, because it looks like a situation where if you could decide the pass-on in Dr Ennis's case and Dr Kent's case at the same time, you would have a big part of the puzzle, as it were, solved.

The reason that we have concluded that that doesn't work is that it seems to us quite likely that the conclusions that one reaches about pass-on will depend on the conclusions that one has reached about the amount of the overcharge. And therefore, since that will be effectively necessarily an input into whatever conclusion one is reaching in Dr Kent's case, because it will have been decided, the risk is that one then finds that when one comes to look at that issue again in Dr Ennis's case, one either

has to say, "You are now stuck, Dr Ennis, with this conclusion that we reached in the Kent case", which is difficult, or you have to say, "Well, we are now going to have to revisit the conclusion we reached about pass-on".

MR LENON KC: And does it work the other way round? Does the amount of the overcharge depend on the amount of pass-on?

MR STANLEY: Some would say yes, some would say no.

MS DEMETRIOU: We say it does, on Dr Kent's case. And I will come back to that.

MR STANLEY: I don't know the answer. I would have thought the answer is probably no. But always someone will probably say it is not no. It is easier, I think, to see how the amount of the pass-on -- it's easy just as a matter of common sense to see how the amount of the overcharge can affect the amount of the pass-on.

MR TIDSWELL: Would you mind unpacking that? It does appear to be right, but I think it would be helpful to understand precisely why you say that.

MR STANLEY: The easiest thing is to imagine two very different overcharges. If one is very small, it might be very likely that that is a cost which would be absorbed by the person who first paid it, because there would be really no point in trying to pass it on, for the disadvantages that would cause.

MR TIDSWELL: So then -- I am not quite sure what the numbers are now, but if you reached the conclusion that, instead of the amount of X per cent that you say amounts to the overcharge, the tribunal were to determine excessive pricing and there was Y per cent, you would say that the level of that – let's say it's a half the amount -- you would say the response of developers to that is likely to be different.

MR STANLEY: It is certainly conceivable that it would be, yes.

MR TIDSWELL: Yes.

MR STANLEY: Readily conceivable that it would be. It's not an independent variable, effectively, and therefore it is difficult to pull it out to decide it in a vacuum. That's the

point.

MR TIDSWELL: And that is presumably consistent with most of the literature on this, isn't it? I think part of the problem for me on this is uncovered by my experience in MIFS where the starting premise is that nobody knows what it is because it is so small. But of course we are not necessarily talking about that here, are we? It could be a significant proportion of the developer's work, that I am conscious of.

MR STANLEY: I am sure there would be arguments about it. But if one starts thinking of that, one starts thinking about what looks at first a very attractive way of resolving what is obviously an important point and one which is commercially important in the sense that if one has half an eye on the possibility of things settling, one might think, well, isn't pass-on rather important here? And is the issue where Dr Ennis's and Dr Kent's interests are most diametrically, potentially opposed -- it looks like a very attractive option, but the more one thinks about it the less attractive it becomes in terms of decision-making efficiency.

And then in terms of decision-making efficiency, doing things only once, obviously there are the common issues with evidence, and that would be a plus -- and I will explain later; that it is not under this heading -- and one could have the common issues trial in January and that would be an efficient way of dealing with it because one would be dealing with all of the common issues and then be in a position to deal with pass-on later, knowing what the amount of the overcharge was. That would work smoothly and well.

And a single trial is obviously the most efficient way of dealing with common issues. And it will always be.

So that's the order there. Then consistency and participation fairness. And this is really looking at the same point in a sense, but from the position of the parties and looking at it in terms of fairness rather than just the efficiency of having all the material

in front of you. They are slightly different points.

The tribunal may well make a better decision if it has all of the expert evidence and it has had everybody turning over every stone. It will not necessarily be more difficult to make. That's the decision-making efficiency.

But quite separately from that, people have a fairness interest in having their day in court, as it were, and the opportunity for them to consider the evidence that they want to adduce in relation to each of the issues and to cross-examine other people's evidence.

The reason I put this with consistency is that the two things are slightly a trade-off. You can always have consistency by saying, well, too bad that you were not in that trial, but we are going to stick to the same answer. And you can always have fairness by saying, "We don't mind what answer we gave in the past; we are going to look at it again". What you often can't do is have actually both of them at the same time.

Fairness, also, is not just about having your day in court. I accept that. It is also about having the time to prepare and all of those things. Nor am I suggesting that fairness doesn't come into things like speed and cost. They are aspects of fairness. But in this case I am looking quite specifically at participatory fairness: have you had a fair chance to participate?

Of those, separate trials is clearly the hardest to manage that. The ones in which one is most likely to face a choice between being consistent with what has been decided in another trial on different evidence and being true to the evidence which has been heard in that trial and the arguments which have been made about it. So that's probably at the bottom of the list as far as that is concerned. And no surprises that as far as my client is concerned that's probably the principal concern that we have about separate trials.

Delayed pass-on. So far as there is an overlap with anything which has been decided

in the Kent trial, it's the same problem. If there weren't an overlap, it wouldn't be a problem, because obviously Dr Kent and Dr Ennis would both be participating fully in that trial. But because there may be a feed-in from the amount of the overcharge into the pass-on, there are fairness problems with that as well. Not perhaps quite as acute as if you had entirely separate trials in which both of the issues were decided.

Moving up, minimal participation. The sort of thing that Dr Kent is suggesting we would have helps a bit, because it does at least mean that on legal issues, for example, there might have been submissions. But for reasons I have already given, it doesn't help very much if it doesn't include things like cross-examination. It's very hard to see how that is really going to do very much to move the dial in terms of fairness. Nobody could say that the fact that somebody had been allowed to turn up to make some submissions at the end of the trial on a point of law, faced with all of the evidence which they had had no input into and no cross-examination on is going to solve those problems. And at that point, read-across to obtain consistency is starting to push on the boundaries of fair participation as it would normally be understood.

MR TIDSWELL: Can I ask you, I don't think anybody has suggested that there is any consensus on a read-across style approach. Is it clear that that is something that could not be done consensually? Because obviously Mr Ward read out that -- that was the essence of it -- all the parties agreed to it. If parties are not going to agree to it, it does rather seem to take it off the table. Is it the case that there is any prospect of the parties all agreeing to it?

MR STANLEY: I think the answer to that is no. The problem is also "read across", what does it mean? It can mean a number of different things. That's not really a criticism of it; it's just a reflection of the reality.

When one is dealing with something which is a pure point of law, it's not very difficult to see that there is likely to be read-across. That's likely to follow from the fact that,

although there is not a binding effect of a previous decision at first instance, it is going to have very strong persuasive weight.

In other ways there are likely to be -- in practical terms there are likely to be elements of read-across, in the sense that there will always be some issues which are sufficiently clear cut one way or another that in the light of a reasoned decision people will say: no point in trying to re-invent the wheel on that one.

But when you come to really hotly contested issues, particularly issues which turn on any significant amount of fact or expert opinion, it's very difficult to know what the read-across is, and very unlikely that anyone would be prepared to agree to read-across unless they said: well, we have seen the expert evidence that is going to be deployed. We are very comfortable that that expert evidence is expert evidence we agree with. We have understood, for example, on a common interest basis, the arguments which are going to be made. We are very comfortable they are going to be made well. We are prepared to agree that we are going to sit on your coattails. We are certainly not in a position and don't even begin to be in a position to say that at the moment.

MR TIDSWELL: Because it is not entirely clear what does happen at the other end, is it? Of course, we don't know, because it settled.

MR STANLEY: It's not --

MR TIDSWELL: It is set up but, as you say, it's not explained how one would deal with the bits that really matter, which are the hard bits.

MR STANLEY: And it may just be, because in practical terms sometimes people are willing to tolerate a degree of uncertainty. Sometimes people will say, "Well, this is a test case". And you say, "Well, what do you mean by that?" Which is a similar thing to read-across. And the answer is that sometimes it's not really a test case at all. It's what the Americans would call a bellwether case. No one is agreeing to be bound by

it, but everyone really knows, given the issues, that the chance you are going to get a court to reach a different conclusion in another case is very small. So in practical terms, once you have a reasoned judgment it is quite unlikely that anything is going to change.

At the far extreme, people may actually agree that they are going to be bound. And that is obviously a very straightforward read-across perhaps because they agree that the cases are identical. The same legal teams are running two or three cases at the same time.

So it is not a bad expression but it is very difficult to actually tie it down to know exactly what it means. What I think we can say is that at the moment, if participation is limited effectively to making submissions on points of law, that really doesn't move the dial significantly from a separate trials position.

Sticking with consistency, the common issues with evidence would have been a pretty significant improvement in terms of consistency and participation. But the problem is -- which is the reason why on reflection it is difficult to maintain them -- that really, a bit like the read-across which depends on people being prepared to do it, so does this. It would put other people under a lot of pressure to do it.

Realistically, if Apple say, "We don't think we can be ready; we don't think we will have time to assimilate what Dr Ennis's evidence is saying and prepare our evidence for the trial", that is itself a fairness problem. And it's not an unrealistic or unreasonable position to take. And the same, I suppose, applies to Dr Kent, who might have all sorts of things to say about what we say about pass-on and would need to have time to deal with that. Although admittedly there would be a bit longer for that because we would be going to October.

So that's how we see the options lining up under the consistency heading. It seems pretty clear that a single trial is the best and separate trials are the worst, and the

others line up somewhere in between.

The fourth one is overall cost. I accept Judge Tidswell's point that you have to consider how far you are really interested in looking at everyone's costs, but you have Apple sitting in the middle on this one and they will turn out to be the most important. I am trying to look at the overall cost to the parties and to the tribunal.

And that one, there may be room for disagreement about it -- well, there is probably room for disagreement about all of these things, which is why I left the sheet blank so that you can think about it. The worst seems likely to be separate trials, overall. In my submission, one can actually probably be pretty sure about that. I say that, even accepting that there is some efficiency for Dr Ennis, which I will come to when I look at the single trial.

But the big and obvious point is that the costs for Apple, who sit in both of those trials, are going to be effectively doubled. There is no avoiding that. In two trials there may be some economy of scale from having fought one once before and done evidence and so forth once before, but it is going to be massively more expensive than dealing with one trial, bearing in mind that trial is always the most expensive thing that one has to do.

It is also going to have higher costs probably for the tribunal, because of the decision making inefficiency of it. You have to sit through the case twice, effectively, which is a relevant factor in case management, the efficient use of the tribunal's resources. It is probably neutral so far as- Dr Ennis is concerned. It's not going to make much difference for Dr Ennis whether he's preparing for one trial - he's going to be preparing for one trial anyway. It is best for Dr Kent. It doesn't increase Dr Kent's costs if there is a separate trial for Dr Ennis. So it is really Apple and the tribunal whose position means that one can say, I think unequivocally, that overall it's- not good.

The minimal participation by Dr Ennis, again, so far as costs are concerned is no better

than separate trials. It is probably a little bit worse because Dr Ennis has to (inaudible) up for the first trial, but not materially.

Delayed pass on is probably the next worst. Or the next best, if you see it that way. I tried to think through, and one has to be quite speculative about it. A little bit of an increased cost for Dr Kent, because they are currently expecting to deal with pass on in the course of their existing trial. But probably not very material. Probably some saving for Apple because they at least don't have to deal with pass on twice, and they may indeed be able to slightly sit out a pass on trial and watch Dr Ennis and Dr Kent fight it out. And probably neutral so far as Dr Ennis is concerned. It shouldn't make a difference when that is decided, if it can be decided. So, in pure costs terms it's not really a very unattractive option.

Common issues with evidence would be in a sense still more attractive, for all the same reasons. But it has the disadvantage that we all know that preparing for an expedited trial is more expensive than preparing for a regular trial. Although against that you don't have so long for the clock to be ticking.

Then probably the best or the cheapest option would be to have a single trial, in terms of the overall costs to the parties. That would, we accept, mean some waste of costs for Dr Kent. We don't know what they are, but it is not unreasonable to suppose -- nothing has been wasted so far. It is all preparation that needs to be done for the trial. But insofar as there are tranches of brief fees which have been incurred and are not rescheduled, which often happens, then those would be sunk costs which would not be recoverable. And that's a relevant factor. We don't know how much that is.

MR TIDSWELL: Presumably there is a period of time in which no doubt some activity would fill the space, and also the trial would be longer too, wouldn't it? The single trial presumably would be longer than the estimate for the --

MR STANLEY: The trial might be a bit longer.

MR TIDSWELL: I suppose it depends a little bit on the position that Dr Ennis took on the liability issues, because there is a world in which you might say, well, actually we think that Dr Kent's experts are excellent and we don't need to call anybody separately.

MR STANLEY: Yes.

MR LENON KC: I suspect that's probably not --

MR STANLEY: You have to assume the trial will be a bit longer. It will obviously be shorter than two separate trials. That is clear. But it might be a bit longer than a single trial. So yes. But both of those factors, both whatever are the currently earned tranches of brief fees which will not be repaid and whatever is the additional cost of -- there won't have been much reading in done yet, but whatever are the additional costs which will occur when the trial is re-fixed and possibly allowing for a little bit of a longer trial, if that happens, those go to reduce the advantages of a single trial, but they don't stop the fact that the single trial is pretty clearly, in overall cost terms, likely to be the most efficient.

And if one were looking at this without the fact that there was currently a trial listed, one would be quite clear that a single trial was likely to be the most cost-effective way of dealing with this.

The other thing in terms of overall higher costs, the other things that -- there will be in a single trial some parts of the trial which really are only of concern to one party or another, and one can obviously try to organise a trial in such a way that that time is used efficiently.

So that's the fourth of my columns. Then the fifth I have described as case management, simplicity or risk. Which is basically a way of saying, how likely is it to go badly wrong or to require a lot of case management intervention from the tribunal to keep it on track?

It is obviously difficult to put precise figures on these things. For those, there doesn't seem to be probably much to choose between separate trials and a single trial, in terms of case management simplicity. For separate trials you are managing two cases. That's a little bit more work for the tribunal, but on the other hand managing three parties is always a little bit more work for the tribunal.

But so long as neither of those is on a sort of Stakhanovite route, it will be pretty clear what one is deciding in each of those cases and there is no reason to think that the case management of those trials wouldn't be reasonably smooth. Parties know pretty well how to get ready for a trial, two trials.

I have already said, we agree that if one was looking at a single trial one would sensibly adopt a timetable which was -- it might be tighter than it would be if one was simply listing Ennis separately, in other words putting Ennis under some pressure -- but one would not aim and I would respectfully say should not be aiming for a timetable that was so challenging that it was likely to be difficult to manage.

The estimates that I gave you, so far as they are estimates, were on that basis: tight but comfortable, if I can put it that way.

I think it follows from that that the next easiest to manage would probably be minimal participation from Dr Ennis. That wouldn't be very hard. A little bit more because you would have to work out what that exception was actually going to consist of in concrete terms, but nobody would imagine that that would be difficult to do.

Managing delayed pass-on would probably not be very hard either. That seems like a reasonable timetable and, in terms of the case management aspects of it, it doesn't look like it is particularly tough. It's going to be a little bit tougher because it's going to be quite hard to prepare pass-on until we actually have answers in relation to liability and so forth, and therefore it does put the tribunal under a bit of pressure to provide a judgment in the Kent case in time to enable the party to prepare for the pass-on.

That might mean that you ended up telescoping quite a lot of the case management for the pass-on to quite a confined area, if you are going to have it done on time. And that seems to me to be the case management risk with pass-on. So it is a bit riskier than having separate trials but it doesn't look too difficult.

And common issues with evidence, in other words the option 3A that we propose, looks like the hardest of all. And one would say that is a high risk situation in terms of case management. I suspect your own experience would be that managing towards an expedited trial is always difficult and sometimes rocky(?), and it will really only work -- and I think we said this in our skeleton -- if everyone is at least starting with the proposition that that is what they really want to do.

And that is not the position, and it is largely for that reason that we think that that is probably an option which reluctantly we have to abandon.

I hope that provides you with submissions across each of those ways of looking at things. You also have to think about not only whether you agree or disagree with the advantages and disadvantages that I have suggested but also how you do weight these different factors, because they are all factors which deserve different weighting.

The upshot, I think, is that the joint trial is a winner and probably a clear winner in terms of the most likely best option in three categories. That is decision-making, efficiency, consistency -- and I accept that those two are in a sense related, so it is not a numbers game, this one -- and overall cost.

The separate trial is, by the same token, not just not the winner but it is the worst, probably, in each of those three categories. It may be ahead by a nose in terms of speed for Dr Ennis.

They are both pretty much the same in terms of case management simplicity. All of the remaining intermediate positions sit in between, which makes them, not surprisingly, on the face of it quite attractive. But the biggest difficulty with them is that

on pass-on there really looked to be some quite difficult issues that might arise in relation to consistency. One might find that one has almost made the consistency position worse, that it was more difficult for the tribunal to reach a decision which was both right and consistent and fair.

And the common issues is regrettably to be discounted because it is simply not achievable without everyone wanting to do it. And two people do not want to do it. That's not a criticism of them. They have their own reasons for it. They may be very sensible.

The minimal participation by Dr Ennis really is a separate trial with no material advantage or disadvantage.

So that's where we get to on what I hope is a reasonably fair assessment or reasonably objective assessment of a number of different factors, trying to separate them and keep them separate. You can see, I think, as a result of that, why it is that we suggest that a joint trial is the right thing to do.

Of course, against that, it will be said, well, of course that's in our interests. It's just a feature of this case that it is very obviously -- what is in the interests of each of the parties individually doesn't really tell you anything very useful about what is in the interests of everyone generally. It is a classic case, I am afraid, for needing a tribunal to be able to balance those factors one against another.

So as I say, I am sorry I bring you problems rather than solutions, but that's our analysis and the reasons why we reach the conclusions we do.

MR LENON KC: Thank you very much.

We would like to hear next from Ms Demetriou.

Submissions by MS DEMETRIOU

MS DEMETRIOU: Thank you.

I start by saying that Mr Ward said that Dr Kent offers a middle ground, but we need

to be clear about what that middle ground or compromise solution is said to be.

Dr Kent says that in January there should be a liability trial in Kent, or the full Kent trial, whichever way one goes, with minimal participation by Dr Ennis -- limited participation by Dr Ennis, not involving any additional evidence from Dr Ennis, but that the upshot of that, that Dr Kent realistically recognises is that Dr Ennis will have to be allowed to argue liability all over again at a separate trial.

So we say that that's not in any meaningful sense of the word a middle ground or a compromise solution. That's just back to two trials.

We say that two trials in this case is the worst of all possible worlds. One just needs to think it through. It would entail the tribunal holding a seven-week trial in January/February in Kent, and giving judgment on the issues of market definition, dominance, unfair pricing and pass-on. And that judgment would of course be following the appraisal of the factual and expert evidence in submissions in Kent. And then some months later -- perhaps a year later -- a differently constituted tribunal would have another presumably seven-week trial to determine the very same issues on the basis of the evidence filed and submissions made in Ennis. And we say that that scenario should be avoided, for two reasons:

First, because it gives rise to a clear risk of inconsistent judgments. Dr Kent seeks to downplay the overlap and risk of inconsistency, we say wrongly, and I am going to say why in a minute to develop that.

But secondly because it is grossly inefficient in terms of time and cost, two trials covering the same ground instead of one, inevitably more expensive in monetary terms, but critically will require Apple having to appear before the tribunal twice in a short period of time with the same factual witnesses and the same experts in relation to the very same issues. And it will of course consume much more of the tribunal's time in terms of the trials.

So I want to develop my submissions as follows. I want to deal first of all with the inconsistency point and develop my submissions a little. Then I want to deal with costs and the overall efficiencies. And then I want to go back to the possible middle ground and say why, after reflecting very carefully about it, we don't think it works.

So to start with inconsistency, may I just remind the tribunal of the Interchange judgment relating to pass-on. That's in the authorities bundle, tab 11. If we could pick it up from page 303 of the bundle, please.

MR LENON KC: Hold on. I haven't found it.

MS DEMETRIOU: The authorities bundle, page 303.

MR TIDSWELL: I think the number is the same.

MS DEMETRIOU: Thank you. I am looking at paragraph 12 at the bottom of the page --

MR LENON KC: "... perils of bilateral ..."

MS DEMETRIOU: Exactly. So here of course the issue was inconsistency in relation to pass-on, because the question was whether to have a single pass-on trial, so just dealing with pass-on. Liability was not an issue. You can see the tribunal saying that the theoretical risks of over- or under-compensation of B or C, which is the flip side of the same coin, the theoretical risks of underpayment by A are clear where damages in respect of the same overcharge are claimed by B and C.

Then if we go over the page, you can see at (i) and (ii) the tribunal talking about the clear risk of over- or under-compensation when one is looking at the same pie and deciding which stage of the retail chain has borne the loss.

Then if we go on to paragraph 15 at the bottom of page 304, some of the parties before the tribunal recognised those concerns but made the point that in that case there was no risk of either over- or under-compensation because the overcharges being claimed did not overlap. And that's because there was a temporal disconnect between the

cases, so it wasn't actually the same pot of money.

But the tribunal held that, even so, the policy reasons in favour of avoiding inconsistency still applied, and gave two reasons for that. Could I just ask the tribunal just to remind yourselves, without my reading it out, of what the two reasons are, at subparagraphs (i) and (ii). And at paragraph 16, the tribunal found:

"For those reasons, and notwithstanding [the] simplified assumptions, we consider that it is necessary to regard the claims against A in the round, and to try to articulate the law so that – to the extent practically possible – consistency of outcome is achieved in the broadest sense.

Of course, as the tribunal knows and as we have explained in our skeleton argument, to give effect to those principles the tribunal issued practice direction 2 of 2022 which expanded the tribunal's extensive case-management powers that already exist, such as consolidation, by providing for the making of an umbrella proceedings order, pursuant to which common issues can be decided together. And of course, in Interchange the tribunal has used that power extensively to sweep together thousands of individual claims into a single UPO.

Pausing here, I would like to emphasise three points. The first is that the overlap and risk of inconsistency in the present case is much more serious than the inconsistency that the tribunal was discussing in the judgment that we have just looked at. That is because in the present case there is not only a risk of inconsistency when it comes to pass-on but a much more serious and acute problem: a risk of inconsistency on the fundamental issue of infringement. The same issues of market definition, dominance and the unfair pricing abuse arise in both sets of proceedings.

Inconsistent decisions on whether Apple's commissions are lawful, or on what other commission would have been lawful in the counterfactual, would be highly undesirable, because it would leave both Apple and consumers in a position of very

serious uncertainty as to the application of competition law to Apple's business practice. And that's a situation, we say, to be avoided at almost any cost. It would be corrosive to public confidence in the work of the courts if the tribunal were to say, for example, well, in one trial, having heard the evidence, there is no unfair pricing, perhaps because the tribunal accepts Apple's argument on economic value, and then at the other the tribunal takes the opposite view.

Or even if they both were to find that there is some unfair pricing but on a different basis and to a different degree, all of those possibilities and permutations are to be avoided, we say, if at all possible.

The second point we make is that unlike in Interchange, and even if one is just focusing on inconsistency in relation to the pass-on issue, there is significant overlap in the commerce between the two claims in this case. As opposed to the tribunal's hypothesis in Interchange that there was no overlap between Merricks and the merchants in that case, there is a significant overlap here because transactions between UK developers and UK consumers form part of both proceedings. And then either the commission was passed on or it wasn't. And double or under-recovery would be all but inevitable if pass-on were not determined jointly in the two cases. So again we say, even if one is just looking at pass-on -- which you have my point, that's not even the most serious overlap here -- but even if one is just focusing on that, we do have actual significant overlap. Not complete overlap, but actual overlap which would result in over- or under-compensation if there were different conclusions.

MR LENON KC: Can I just stop you there.

On the first point, on risk of inconsistency in relation to infringement --

MS DEMETRIOU: Yes.

MR LENON KC: -- might it not be said that, looking at this realistically, Ennis and Kent are going to be adopting pretty much the same position, so the risk of

inconsistency in a relative sense is much less significant than in relation to pass-on where they have different issues?

The other point is, what is the extent of the overlap? Surely it only relates, in terms of commerce, to sales made through the UK storefront --

MS DEMETRIOU: Yes.

MR LENON KC: -- to UK, by UK domiciled app developers to UK consumers.

MS DEMETRIOU: That's the overlap, yes.

MR LENON KC: But it is only a relatively small part -- certainly a small part of the overall --

MS DEMETRIOU: I am not sure how small. It is obviously a subcategory of the entire claim. But the point I make is not so much about how big it is but that all of the considerations that the tribunal was emphasising in Interchange apply even if one is just looking at pass-on alone with more force, because there is actual overlap rather than in Interchange where the tribunal assumed that there wasn't.

But we also make another point about that. I am going to come back to your first question in a moment, sir.

MR LENON KC: Yes.

MS DEMETRIOU: But there is actually a much more hard-edged conflict here potentially. That's because it is probable that some members of the Ennis class are also members of the Kent class. So we say it is likely that material numbers of the Ennis developer class are likely to have made purchases of digital content for iOS devices using the UK storefront, which would bring them within the Kent consumer class.

And what you would have, if there were two separate trials, of course, is that the members of each class are bound as against Apple by the result in any judgment that's given, because they would be res judicata.

So findings in a first judgment would be binding as between Apple and those overlapping class members in the second proceedings but not as between Apple and non-overlapping class members in the second proceedings. So there is very likely to be a res judicata issue where members of the Ennis class, if there are inconsistent judgments, would be treated differently because they would be bound by the judgment and the finding in the first Kent proceedings --

MR LENON KC: How are we supposed to deal with that? We don't know, do we? It is just speculation.

MS DEMETRIOU: Well, at the moment we don't know. But we say it is likely to be the case that some members of the Ennis class would have downloaded and made purchases which would just bring them within the Kent class because of the wide definition of the Kent class.

Now, the other point that we make, going back to your first issue about liability, is of course -- I think there are two points to make in response to the point you put to me, sir.

The first is that the evidence may well be different. Indeed, there wouldn't be much point in Dr Ennis putting in evidence on liability if it weren't going to be different or supplementary to the evidence in Kent. So we have to be working on the basis that that evidence might be different.

I am going to come on in a minute to say why the evidence base as a whole in Ennis might be different. That's because in a nutshell one of the reasons for that is that of course one important plank of Apple's defence to the unfair pricing allegation is that one doesn't look at this on a cost plus basis. One has to take account of the vast economic value that Apple's investment has conferred on developers. Of course, those developers, including some very large developers, are members of the class in Ennis.

So when it comes to the argument in Ennis, it will be open to Apple to seek disclosure under the tribunal's rules in relation to the economic value that's been conferred on those class members, or some of them. So the evidence may well be different, not just from Dr Ennis but the arguments and the expert evidence, and that may have implications for Apple's own evidence in those proceedings.

So that's one answer. But the second answer is that of course even if the evidence were very similar, where you have two separate tribunals looking at that evidence and appraising it and hearing cross-examination and submissions, they may well reach different conclusions on the basis of the same evidence.

That's not an unlikely course of events, because different judges looking at the same evidence may well have a different view and reach different conclusions. There is no black-and-white answer to all of this. These are very difficult points.

One only has to think back to the Interchange litigation when it came to the liability question, whether there was a restriction of competition, to remember that one judge in the High Court found that there was no restriction of competition and another judge found that there was a restriction of competition, really based on materially identical facts.

One follows through to what happened with that. You have judgments -- the first and the last judgment were some 19 months apart -- but they all had to go to the Court of Appeal in a joint appeal for the Court of Appeal to consider everything in the round.

So we say it's not really an answer -- if Dr Kent were to say, well, our interests are aligned, the outcome is likely to be the same on liability in any event, and we say that that certainly can't be taken for granted. Indeed, we say the opposite. We say different tribunals where the issues are so difficult and so complicated and not capable of black-and-white and precise outcomes are highly unlikely to take exactly the same view of the evidence. So there is a serious risk of conflict here.

On efficiency and cost, I have really highlighted the point that it would be two trials dealing with the same issues and Apple having to defend the same points twice. And its factual witnesses include, of course, some of the most senior individuals in the company. So Mr Federighi, who is senior vice president of software engineering, Mr Schiller, an Apple Fellow, and Mr Parekh, to become Apple's CFO from January 2025, are all members of Apple's senior leadership team.

Some of these individuals, Mr Federighi and Mr Schiller have both already been called upon to give evidence in similar trials in the US and Australia, and we say that unless there is no way round it really the tribunal should, with respect, strive to avoid a situation where the same factual witnesses and experts are coming back within the space of perhaps a year to give evidence on exactly the same points again. It is also, as I have said, wasteful of the tribunal's resources.

Now, as against that, Mr Ward said, well, of course there are going to be costs that are wasted, because we are just a few weeks away from trial. But with respect, Dr Kent has not explained what those costs might be or the extent of them. Just thinking about it as a matter of logic, it is difficult to see what those costs would be, because certainly the costs of preparing the evidence and of disclosure, which have been the major costs so far, none of that will have to be repeated if the trial is pushed back.

So those costs aren't additional costs that would arise if there are two trials rather than one. And logically, at most, all that one is looking at, we would respectfully submit, is any portion of counsel's brief fees that has already been incurred. So any portion that has already been incurred that can't be rolled over, that aren't subject to renegotiation. But we have had no information about that at all from Dr Kent's team despite having been asked that question.

But in any event, even if there are some costs that would be irrecoverable, we say that

those necessarily pale next to the additional costs and duplication of costs that would arise from having two trials looking at exactly the same matters.

So that's why we say the worst of all worlds here is to have two separate trials dealing with the same issues.

Then over to the question of a third way or a middle ground. I want to make some submissions about that. So of course I have made the submission that the middle ground suggested by Dr Kent isn't a middle ground at all. It is very like participation by Dr Ennis but in a way in which Dr Kent herself accepts would not result in Dr Ennis being bound. So you are back to the two trials.

We have given very careful thought to whether or not it would be possible to have a joint trial in January/February, so keeping the trial date, in a way which bound Dr Ennis. Of course that would meet, in principle, the very serious issues that we have identified in relation to risk of inconsistency and also the cost duplication and inefficiency. So if that were possible, then that would be a viable way forward.

But we say, having considered this very carefully and heard what the other party have to say, we couldn't, regrettably, think that that is going to be practicable.

Really the basis that Dr Ennis says that he's willing to proceed we say is unworkable. If we pick it up from his skeleton argument at paragraph 15, please.

MR LENON KC: I think that more or less has been conceded, hasn't it?

MS DEMETRIOU: I think it has been conceded.

Can I just make a couple of points about this. I think everybody agrees that the issues in the case are very complicated. The market definition and dominance issues and the unfair pricing issues are all very complicated issues that have given rise to extensive expert evidence in the Kent proceedings already. We don't know what non-duplicative evidence Dr Kent might serve, but what we do know, having reflected, is that we would not fairly be able to respond to new evidence in the current timetable,

in circumstances where the experts are meeting by 4 October and there will be a joint statement shortly after that. I don't think anybody is saying that that's practicable.

So once that's accepted, then one is back to, is it a joint trial that's adjourned, say to next October, or is it two separate trials looking at the same issues? We say that as between those alternatives there really is no contest, and the two separate trials looking at the same issues, for the reason I have given, is really the worst of all worlds and should be avoided.

Unless there is anything further I can assist with -- let me just see if I have missed anything.

Yes, very good, overlap. The overlap with pass-on. There is a big topic that I have missed. That's true.

So the question here would be, can pass-on be hived off? Now, the first issue with that is that that wouldn't deal with the issue on liability, which we say needs to be decided in a consistent way. That's the first problem. It doesn't actually serve the objective of avoiding inconsistency.

But we say, in any event, there are two distinct parts. I was surprised to hear Mr Ward say that there is not a substantive overlap, because the substantive overlap arises from the way that his experts -- Dr Kent's experts -- have put the case. And there are two distinct parts of Dr Kent's claim.

Dr Kent contends that Apple has engaged in abusive and exclusive dealing by requiring that all native iOS apps should be downloaded only through the App Store and by requiring that all in-app transactions under those apps should be processed through Apple's commerce engine. And Dr Kent relies on the expert evidence of Dr Singer to prove that part of her case.

He addresses -- I am slightly hampered. We do have copies of Dr Singer's report but can I just make the point and then if you feel we need to look at it -- because Dr Kent

did object to our putting the expert evidence in. So I will just explain the point and then if you want me to give you copies of it to show you, then I can do that.

What Dr Singer has done is that -- he's attempted -- so Dr Kent needs to show, amongst other things, that Apple's rules have anti-competitive effects. In other words, that there would be appreciably more competition in the counterfactual without Apple's rules. Dr Singer has attempted to show that by modelling how he says competition would work in that counterfactual, both in relation to downloading apps and for in-app transactions. And that forms part of his analysis of why Apple's conduct is abusive. It's also one of the ways in which he quantifies the effects of Apple's conduct on the commissions paid by developers. So, in other words the overcharge resulting from the inclusive dealing abuses.

What his model does is it uses the pass-on rate as an input. So he has a simulation model with various inputs and one of those inputs is the pass-on rate. And he has a number of different possibilities, ranges. And which of those pass-on rates applies affects what the model spits out at the other end, and therefore affects overcharge. So that's Dr Singer's own analysis.

MR LENON KC: I think --

MR TIDSWELL: I think we are both interested to know a bit more about it. I don't think we want to cause any difficulty --

MR WARD: For what it is worth, so far I agree with what Ms Demetriou says. So with respect, if we may just hear her submissions and see what disagreement there is.

MR TIDSWELL: Well, I think it is the --

MS DEMETRIOU: I will do it quite quickly --

MR TIDSWELL: As I indicated earlier, we do want to make sure we completely understand the connection, because if we were to reach the conclusion it can't be done, we want to be absolutely sure it can't be done, if I can put it that way.

I am not sure, Mr Ward -- you are going to tell us it can be done either from the sound of things.

MR WARD: If it helps, I can just explain what our position is.

MR TIDSWELL: I think it is better to let Ms Demetriou finish up and then we can come back. Even if you all didn't think it could be done, we want to satisfy ourselves it can't be, is perhaps the best way of putting it. So I think we would want to make sure that we have fully understood the point.

It's not in the bundle, then?

MS DEMETRIOU: No. We wanted to put all the expert evidence in, but Dr Kent objected. **(Handed)**.

So you only have the Apple expert evidence, which is why we have this separately.

MR LENON KC: Is it the passages that you referred to in your skeleton that we should look at?

MS DEMETRIOU: Can I just take it a little bit more slowly. If we go to paragraph 125 of Dr Singer's report. There is no internal pagination. So feeling the thickness it is probably a third of the way through.

Sir, I just want to show you where this is located. So this is the beginning of the section "Exclusionary abuses and anti-competitive effects."

MR LENON KC: Yes.

MS DEMETRIOU: Then if you go on, please, to paragraph 156, the second sentence in that paragraph:

"I have been asked to opine on what the commission would have been absent the [two] Restrictions."

Which they say are abusive. So that's what he's doing.

Then 157, if you go over the page -- sorry, start from the bottom of the page. He says that economists often try to use regression analysis to answer questions like this, but

that doesn't work in this case.

At 158 he says that there are two alternative tools. So benchmarking against comparable markets and simulation. And he purports to use both. Then he picks up the simulation approach at paragraph 199. So if you could turn to 199, please.

At paragraph 199 he says because he can't use the regression analysis he uses a two-sided platform model to simulate what Apple's counterfactual commission would have been instead. Then at paragraph 200 he says that the model is based on one that was developed by economists Roche and Tirole, and he says it works by observing actual world variables. So you see in brackets "eg prices, quantities, the commission in the UK transactional data, market share" and then solving for certain unobserved variables.

Then he takes a counterfactual market share as an input -- "The model can take a counterfactual market share as an input and solve for the counterfactual commission rate".

Then in paragraph 201 he explains that the majority of the data for the model comes from Apple's actual world data via the UK transactional data. But it also needs three other inputs that don't come from the transactional data. So one, Apple's counterfactual market share; two, Apple's marginal cost per transaction, and three, the incidence rate.

And you will see that incidence is the word that Dr Kent uses for pass-on. That's common ground. I don't think there is any dispute about that. As he says in the second sentence:

"As these inputs change, the resulting counterfactual commission rate changes."

So he gives results for a number of different possible combinations but obviously the answer is different if the inputs are different.

Now, for today's purposes we don't need to get into the detail of how the model actually

works. Obviously, Apple's position will be that this is an inappropriate model when it comes to -- but that's not a question for today. But what I do need to show you is where Dr Singer gets the incidence figure from.

If we go to paragraph 214, please, bottom of the page, and you have the heading "Inputs to the model". Do you have that?

MR TIDSWELL: Yes.

MS DEMETRIOU: Over the page, at the end of the main paragraph before the bullets, he says he's about to tell us his sources and methods for obtaining the monopoly scenario inputs.

Then if we look at the bottom bullet on that page where he introduces the variable gamma, which stands for the incidence rate, and the change in the app price charged to consumers in response to a change in developer's costs, which he says includes the commission.

In the second sentence he says that this is an external input "which I calculate later in part I." He uses the most conservative, he says, incidence -- oh, this is confidential, sorry.

He uses the most conservative incidence rate of -- and the figure is confidential but -- is it blanked out --

MR LENON KC: We only have the non-confidential.

MS DEMETRIOU: He then explains what the consequence of that rate would be in terms of the price of apps. So you can see that that's exactly the pass-on issue. At the end of the bullet -- this is going to be confidential again, I think -- he also shows results for a different pass-on rate, a higher pass-on rate.

Below the bullets you can see that he goes on to explain how he calculates the counterfactual side of the model. Of, in order, what price Apple would charge if it faced competition. As he says -- if you are looking under the bullets, between the bullets,

he says:

"I hold the marginal cost C and incidence rate γfixed between the monopoly and counterfactual scenarios as I have no basis to believe that either of these would change in the presence of competition."

So in other words he uses the two rates that he's posited, which are confidential, for the counterfactual as well. You can see where this comes back to feed into Dr Singer's calculation of quantum, if you can go forward in the report to paragraph 314.

From here we have a series of tables where he's using the same models to calculate damages. Of course, there would be an internal contradiction in using an overcharge calculated on the basis of one pass-on in combination with another pass-on rate for damages purposes or vice versa.

These figures also feed back into Dr Singer's analysis of market definition and dominance. You can see that if you go to paragraph 78. If we go right back to paragraph 78.

You can see the heading there. He's using a hypothetical monopolist test to demonstrate that what we call the iOS app distribution market is indeed limited to iOS app distribution only and doesn't include other platforms. And as you know, an HMT is a test that starts with a focal product and asks whether a monopolist of that product could profitably increase prices and, if he can, then that's a market.

Then if you go down to paragraph 79 he tells us about the Cellophane fallacy. And he concludes that paragraph by saying that you need to model the monopolist price increase, called a snip, above competitive levels, not above Apple's actual levels.

Then at paragraph 81 he uses two counterfactual commission rates. One is from the benchmarking exercise, but the other comes from the two-sided platform model that we were looking at earlier. So the same pass-on input comes back into his analysis on market definition and dominance.

So that's why we say that it is not possible on Dr Kent's own case just to say, well, right, we are going to deal with reliability first and then hive off pass-on to afterwards, because the two things are linked.

There is another point that we make as well that arises from Mr Holt's report. I don't think we need to hand it up. Can I just explain the point because it is a shorter point to explain.

One of the points, of course, that we have canvassed already is that a very important argument for Apple on the unfair pricing is the economic value point. So one of the things that Apple says -- Apple's experts in Kent, just rowing back a little, have explained the many and extensive sources of economic value that Apple provides to developers that go far beyond mere distribution of apps or processing of payments. Apple provides the technology that developers actually use to create theirs apps, as well as the technology with which their apps actually work on an iOS device. And we say that these technologies are an important part of what developers are actually paying for when they pay the commission.

One of the ways that Apple puts its case on this point is that an app is essentially a joint work product between Apple and the developer. So it is the combination of the effort and the ingenuity of the developer with the effort and ingenuity of Apple. And because an app is a digital product there is in general no limit to the number of times it can be downloaded and used. So if it is a very successful app it can earn revenues that bear no relation to the costs that the developer incurred in making the app.

One of the points Apple makes is that that is essentially the reason why the App Store generates significant revenues and why those revenues have grown so significantly over time. Apple's revenues have grown not because it has increased its prices but because developers have earned ever greater revenues from their apps. And developers are earning those great revenues in part because of Apple's contribution.

And that's one way of looking at the value that Apple provides to developers. And it is one reason why commission is a fair way of charging for the technology that Apple provides. And we say that Apple's charge is proportionate to the value that its technology generates.

That leads to the conclusion that if you want to ask whether Apple's commission is fair, the real question that the tribunal is addressing is really about whether Apple's share of the revenues produced is commensurate with the contribution that its technology makes to the success of the app. In other words, it's a question about the division of revenues between developers and Apple.

I want to show you how, in a nutshell, the issue of pass-on affects this point, because Dr Kent seeks to establish her case on excessive pricing by relying on a cost plus analysis prepared by Mr Holt. But Mr Holt's cost plus analysis sheds no light on the issue I was just addressing you on, which is about the division of revenues between developers and Apple. We say the total revenues produced by an app are not determined by either the developers' costs or Apple's costs. They are determined by how many users pay for the app. So we say that there is no good reason why Apple's share should be limited to what Mr Holt says is a reasonable return to Apple's costs. That just shifts profit from Apple to developers, for reasons that have nothing to do with their relative contributions.

Now, Professor Hitt, who is one of Apple's economic experts, discussed this in his main report. Let me just briefly show you that, please. I think you have the Apple expert evidence. I have it in something called bundle -- you have it electronically. It was filed on Friday.

It is a bundle of "Kent proceedings evidence materials". Do you have that?

MR LENON KC: Yes, we do.

MS DEMETRIOU: It is the second expert report of Professor Hitt. It is paragraphs

395 to 398. It is internal page 219 of the second expert report. Do you have that?

MR LENON KC: His report starts at 283 of the bundle? The first page is at 283. So which page did you say?

MS DEMETRIOU: I don't have a paginated copy. I am just going to ask Mr Piccinin to find -- page 502.

MR TIDSWELL: I was trying to do the maths.

MS DEMETRIOU: If you go to page 502. Do you have paragraph 395?

MR TIDSWELL: Yes.

MS DEMETRIOU: Sorry, 501. Could you just read for yourselves 395 to 398, so you see the gist of what Professor Hitt is saying, which is partly what I have been attempting to summarise.

MR TIDSWELL: I think I can see where you are going, but you are yet to get to the pass-on point.

MS DEMETRIOU: I am. I am going to tell you the pass-on point now.

MR TIDSWELL: Yes.

MS DEMETRIOU: The pass-on point arises because of Mr Holt's response to this argument, which is in his reply report which we don't have before you. I am going to read you paragraph 50 because I can't see on any view that that would be confidential. So he says:

"In Professor Hitt's view, a lower commission would 'simply shift more of the profits from Apple to the developers'. However, in my opinion, a lower commission rate entails a lower per-unit cost for iOS app developers. To the extent that their iOS apps are competing with other iOS apps, developers would have an incentive to lower prices for their paid iOS apps or for in-app purchases to attract more customers or a greater sales volume. That is, a lower commission rate could also lead to a price reduction and shift surplus from Apple to consumers."

MR TIDSWELL: So he's saying the money doesn't get stuck at the developers.

MS DEMETRIOU: Exactly. That's his response. Now, we say his response is wrong. But that's not for today. But it's another way in which the pass-on issue will need to be considered at a trial of the infringement issues.

And then we make one further point about the risks of decoupling pass-on from liability. And that's of course that this is not how things have proceeded in this trial. So the expert reports have already been prepared on the basis that the same trial was going to resolve all of the issues. We say that in this case obviously the battle of the experts is going to be significant. The tribunal is going to have to reach a view as to which expert evidence it prefers. And in deciding which expert's analysis it prefers, the tribunal obviously -- as it does in every case -- is going to have to form a view of their credibility. And we say that it is important that it does that having regard to the entirety of the evidence given by a particular expert.

That's not a theoretical point here because we can say that, having considered Dr Singer's analysis of pass-on, Apple is of the view that it falls so far short of acceptable standards that a submission we will want to make is that the tribunal should be wary of accepting any of his evidence. We say his pass-on analysis is so poor that we want to make submissions more generally as to his credibility.

Of course, that's something which in a single trial we would be entitled to do, and will do, but of course if pass-on is split off that's not an argument that can be entertained because pass-on won't be considered.

So we say that there are very good reasons, substantive and procedural, for not hiving off pass-on. As I said at the outset, it simply wouldn't resolve one of the major problems here, which is the risk of inconsistency on liability and the inefficiency of having two liability trials.

Unless I can assist any further, those are the submissions that we wish to make.

MR TIDSWELL: Can I say, there is a timing point here, isn't there? Obviously there is a timing point, but the time at which we have now come to decide what to do with the Ennis proceedings in the context of the Kent proceedings has been dictated rather by the certification hearing.

One could actually -- thinking out loud -- say that was not a particularly helpful way of doing it. Actually one could have had this conversation, this application, some time earlier. Now, I am not advancing this as a criticism, because there may be very good reasons why it was required to wait for certification before -- I think you showed your hand before it, but close to that time. But these proceedings have been running for quite a long time and actually, if these points had been made eight or twelve months ago it might have been easier to deal with the consequences of them.

Conversely, of course, the certification has happened and we now understand the outcome rather than necessarily the reasons. But of course, if that had been delayed for some reason and had happened just before the trial started, I am not sure whether you would have been able to stand up and make the submissions you are making now because they would have been so close to trial it would actually almost be (inaudible). I suppose the point I am making is that I think there must be some weight to be attached to where one fits in that continuum and why. I am not intending to pass any judgment on it, but there must come a point at which it really doesn't become realistic to suggest any alternative other than fairly pressing ahead. You are clearly saying we have not reached that point yet.

MS DEMETRIOU: Yes, as a matter of principle, of course, I agree with your latter point, which is that you will have to look at the stage that proceedings are at. And it may well be that we were mid-trial and Dr Ennis only just issued --

MR TIDSWELL: Yes.

MS DEMETRIOU: In that case, it would be impossible to do anything about it. So

one is looking at, well, what stage are we at? What would it mean in terms of prejudice to the Kent proceedings? I have made my point that we say that prejudice is limited. So what's the downside of the various options?

We say that weighing all of those things in the round you do now have two sets of proceedings in front of you. It will require -- having a single adjourned trial will no doubt entail some inconvenience to Dr Kent, but of course would be much more efficient overall, including for Apple, which would otherwise have to go through two separate trials. But one then has to ask, well, what is the nature of this inconvenience?

So really it comes down to costs. What are the costs that we are talking about that Dr Kent would be incurring that would be thrown away, as it were, by the adjournment? And weighing that against the imperatives, we say, which militate in favour, given that you do have two sets of proceedings in front of you now, of trying them jointly together.

MR TIDSWELL: I suppose it is not entirely clear that it is just costs. I mean, you have made a perfectly good argument about how the Court of Appeal might look at this, but there is a world in which the tribunal might decide the Kent case and, just on this hypothetical, against Apple, and there might be quite a quick appeal if there were matters of law which the Court of Appeal were willing to hear quickly. But actually the legal issues in Kent are actually relevant to other matters before the tribunal as well.

MS DEMETRIOU: Yes.

MR TIDSWELL: So for example, I think we have Coll starting in October, and of course a lot of the themes, the legal issues at least, will be common to a number of these cases. So one can see a different world in which actually it is possible -- I am not saying how one -- it is impossible to say how likely, I think, partly because it depends on the outcome of the case, but one can see a world in which Dr Kent may have succeeded, may actually have a judgment and been to the Court of Appeal and would know the answer to that before the end of next year.

MS DEMETRIOU: Sir, I think that of course in principle that's something which theoretically might happen. Then I think one has to ask -- so on that hypothesis you have a Kent trial with a relatively quick judgment.

You then have to ask yourself, well, is it likely that the Court of Appeal would be attracted to hearing an appeal in isolation knowing that the tribunal in October is deciding very similar things in Coll, and potentially very soon afterwards in the Ennis trial involving Apple too.

And the experience of Interchange is that the Court of Appeal isn't really interested in deciding these serious points in isolation. And it does join cases. So the Interchange timings, I said to you, was 19 months between one trial and the other, and they were both joined for the purposes of the Court of Appeal.

So one is looking at, well, what's more likely? In circumstances where -- I think one can put the boot on the other foot. So in circumstances where Apple would be -- on the two-trial scenario, let's say you are right. Let's say hypothetically Kent succeeds in the first trial. Apple is then fighting the second trial with Ennis. Apple goes to the Court of Appeal and will say to the Court of Appeal, well, we are running all of these arguments in Ennis. And the likelihood, we say, is that the Court of Appeal would want to wait to hear everything in the round, potentially with any appeal from Coll.

MR TIDSWELL: Even if Ennis was not going to go to trial until, say, 2027 --

MS DEMETRIOU: It would depend on timing. But what we are saying here is that you have a route in front of you which involves actually a modest adjournment of the trial for a few months -- let's say six to eight months, something like that -- without the need to have all of these difficult issues in the future as to the interaction between the two sets of proceedings.

On your first point about certification and should this point have been taken sooner, of course Dr Ennis did take this point several months ago and Dr Kent has resisted

steadfastly the idea of any joint case management. I think what happened in the end was that everybody proceeded on the basis that we should grapple with this once certification had been decided, when the issue would become concrete. So we are where we are.

The real question now for the tribunal is, given the timing now, so given where we are, what's the best way forward?

MR TIDSWELL: Yes, thank you.

MR LENON KC: Thank you.

Submissions by MR WARD

MR WARD: What I would like to do is start by showing you some precedents from the tribunal's case law, because of course there is nothing unique about this situation. It is a common problem the tribunal faces, even where cartelists give rise to multiple claims or in the technology arena where there are very similar themes even where they are stand-alone.

What this case law shows very clearly is that there is a pragmatic approach taken to the question of overlap. There is no inviolable rule that it has to be arranged for the convenience of the defendant. It is not essential, to use Ms Demetriou's word. It is just a factor in case management.

But what the tribunal has stressed is the importance of avoiding prejudice to the existing parties such as Dr Kent, the 20 million people she represents and claims now going back a decade. It is just an immutable fact that this has all arisen very late indeed in the day on the eve of trial.

The extent to which it is the fault of Dr Ennis or Apple or whoever, no one could possibly suggest it is the fault of Dr Kent, until Ms Demetriou just now suggesting that Dr Kent is at fault for being unhappy about this proposal when it was raised in the last few months. And what I want to show you is how the tribunal has dealt with this issue

in a number of cases, including Interchange which you have already been shown.

I will start with Coll, which of course as you know is about alleged abuse of dominance in the Google Play Store. It was issued in 2021. But also a claim was issued by Epic Games, a developer with a similar subject matter, in the same year.

Now, in 2024 the tribunal considered an application by Epic to formally consolidate the claims so they could be heard in the trial window that had been set down for Coll. And actually what happened was, just like today, the president who was chairing Epic Games heard the application together with Ms Lucas KC who was chairing Coll. And the Tribunal ordered a sort of hybrid hearing where there would be a joint trial on questions of fact, in effect. But I would like to show you some of the transcript, which we did quote in our skeleton argument because it really does, in our respectful submission, point the way powerfully for today.

Could I ask you please to turn this up. In the hard copy it is volume 2, tab 28. If you are electronic, it is CMB490. Page 4 of the transcript.

MR LENON KC: Yes.

MR WARD: Thank you. This is the president. There was quite a multifaceted debate going on that day. One of the concerns of Ms Coll's representatives then was costs.

You see at 20, the president says:

"… can I begin with my thanks to Epic for raising this point. It is, of course, precisely the sort of case management that does need to be drawn to the Tribunal's attention, but, I do think we need to be careful about placing too much weight on the existence of common issues. The fact is, apart from Interchange Fee and Trucks in the Tribunal's overall list, the list is actually quite technology heavy and there are more cases than merely Epic and Coll raising similar issues which are certainly not right for the UPO but which could quite easily be decided inconsistently and the tribunal will, of course, take steps to avoid inconsistency, but it can't, with the best will in the world,

consolidate everything. So it does seem to us we need to find a way of maximising the synergies between the two claims while ensuring that the Coll Proceedings are not prejudiced by any leveraging of such synergies."

We will see that that is a theme in the tribunal's reasoning.

Over the page, Mr Justice Marcus Smith touches on the issue of costs, because of course Ms Coll's claim was supported by funders, just as Dr Kent's is.

If you see at the bottom of page 492 electronic or page 6 in the hard copy, he says at the bottom of the page:

"I will put it as high as this: it would be irresponsible to derail the very intense process of certification where we know the tribunal looks at funding with a degree of intensity which does not arise in other proceedings. And the idea that we are going to cause difficulties in funding arrangements which are inevitably high risk and well and carefully thought through in manners kept away from the tribunal, the idea we are going to prejudice this is, I think, at the forefront of our consideration."

The forefront of ours, but not much of a consideration for either of my learned friends' clients.

It is very important to appreciate that at this stage the Coll trial was 19 months off. So even though the proceedings had been afoot for a long time, it was still 19 months away. And the concern that's being expressed here even so is about funding issues. Here, just as in the case of Coll, of course, Dr Kent's claim is both funded and budgeted by funders for a complete trial in January.

And of course, if we end up in a joint trial of the kind that I think both my learned friends are effectively arguing for, those costs will hugely increase. The case is ready for trial. There are a few more steps. Experts are meeting I think next week. Obviously there are unincurred costs of the trial itself. But if this case is put off and we have a joint trial, there is going to be a great deal more work that has to be done.

Obviously Dr Kent is going to face two enemies instead of one, at least on the issue of pass-on. And with the best will in the world, one's co-claimants are not always quite in the category of friends so much as frenemies. But on any view, there is going to be a lot more work and a lot more time. I am going to come back to how much shortly.

It is notable that a lot is being said about, well, how much cost would be wasted by the adjournment. But it is also just the cost of a trial that is ready to go in fact being put off, in our submission, quite a long time into the future.

What is really important here is the stage where we are. May I ask you now to turn on to page 499. This is again the president making observations. He says at line 3:

"This is nobody's fault -- and I want to stress that – this is an application that is relatively late in the day. Mr West's clients [who I think was Epic] are quite rightly wanting to take advantage of the fact that the gap between Epic and Coll has narrowed [in terms of listing] and that is why we welcome this application, but it is pretty late in the day to be dealing with it."

That was 19 months from trial. So it is very important to see how significant this timing issue was.

Then we see a submission about costs from Google from my friend Mr Holmes' case. He was acting for Google. You see it on page 500, the next page, picking up at line 18. He makes the point, well, the funders will pay for it; what is the problem? He says:

"There is no evidence at this stage that the Class Representatives' commercial funders would not foot some additional cost. Quite rightly, the Class Representative has yet to ask the question, taking the view, as we see it responsibly, that it’s for the Tribunal to decide what is the appropriate approach to case management and to give the funder a veto on the appropriate approach to case management would be an example of the tail wagging the dog."

That submission did not find favour on this particular occasion, which we can see on

page 501, where Mr Justice Marcus Smith said, line 14:

"I think the area where I want to push back – and it's not really a point for Google it's much more a point as between Epic and Coll -- is this: that we hear what you say about the funding tail wagging the consolidation dog, but we don't think that is actually a proper way to articulate the somewhat interesting combination of case management questions ...(Reading to the words)... The fact is that we have a perfectly happy set of parties in Coll. The matters are being nicely case managed, there's no problem..."

That is certainly not the case in this case:

"…and the reason I am attaching such weight to the Class Representative's concerns is because I do not wish to upset a very stable apple cart by obliging the Class Representative to go to the funder and saying: 'look, the goalposts have now shifted, you've undertaken a very significant risk in funding the action so far and undertaking to fund it for the future, we are now throwing in this additional material variant and we'd like you to reconsider your funding obligations in that light.' Of course, the funders are likely to do so because they've invested as sunk costs, a significant amount of money. My point, I think, is that they shouldn't be obliged to do so precisely for that reason. Of course, if we shift the goalposts the chances are that the funders will, in a degree of unhappiness, say: 'well, if that's what the Tribunal is directing, that's what we'll do. The point is, the Tribunal is not presently minded/willing to direct that. What we are willing to do is we are willing to disrupt the process of Coll, but not the funding basis, and that means that the savings that Google anticipates ..."

Et cetera. It basically decides effectively that Epic has to pay the costs. You can see that at 11 and 12, Epic being prepared to minimise/eliminate funding issues that arise out of Coll. Here it is fair to say that Dr Ennis is adamant he should not pay any costs of any of the variants he is seeking to impose on Dr Kent.

You can see here the tribunal is very sensitive to the fact that the litigation is

long-advanced, there is big investment, it is funder-backed and the case management decisions it is being asked to consider would have major implications for the funders.

I am almost finished with this, but if I may, just a couple more points. If we can move on to page 511 electronic or page 25 paper: talking here about what all the possible consequences might be of settlement, the context is slightly different. Settlement by, I think, Epic, but at lines 3 to 4, it says:

"It seems to me very important that consolidation ensures that the integrity of the Coll process is unimpaired."

And he uses the same expression at 12, that Coll should proceed unimpaired.

Then finally, before we put this document away, Ms Lucas KC made the same point at page 514, page 28 of the transcript. She says at lines 2 to 3:

"Obviously critical is maintaining integrity for Coll."

Which we respectfully submit applies here.

So there is no fixed rule of elimination of the risk of inconsistency, because in a situation where the tribunal finds itself with 50-something class actions in particular with overlapping subject matter, it's not practicably possible.

But what the tribunal was astute here to do was to preserve the interests of the existing class claimant, just as we have here. What it did in the end was something far short of consolidation: essentially factual issues would be jointly determined in the Coll trial, and the price of this was Epic paying the costs of and occasioned by that subject to a cap. If we need it, that order is at CMB/454.

But that's not the only case which makes good this point. Indeed, if we can go to the Interchange authority that Ms Demetriou opened, this also is powerful on this, in my submission. This is in the authorities bundle 11. The relevant part is on page 304 electronic, or page 7 of the hard copy.

You will recall that Ms Demetriou showed you paragraphs 12 and 15 of this ruling, but

what she didn't show you was paragraph 13, which in my respectful submission is right on point. Because the tribunal talked about the risks of over and under compensation just as Ms Demetriou took you through. Then at 13:

"Such are the perils of bilateral dispute resolution where B's claim and C's claim in respect of the same loss are progressed in separate proceedings. Of course, the courts are alive to this risk, and will seek to avoid inconsistency of outcome by consolidating related proceedings or hearing them together. But that may not always be possible: B may commence proceedings in one jurisdiction, and C in another."

Going down four lines, because that's not the issue here:

"Equally, it may be that B's claim and C's claim are commenced in the same jurisdiction, but so far apart in time it is not practically possible to hear both claims together."

In our respectful submission, that is the case here, save by imposing quite significant prejudice on Dr Kent and the class that she represents.

But I would like to follow the story a little bit further in Interchange, please, because Ms Demetriou alluded to this as well, what happened next. For this we go to tab 17 of the authorities bundle, which is the ruling in which the tribunal allowed a Merricks class representative to participate in the trial of pass-on that concerned the retailers.

So it is prayed in aid by my friends as a beneficial precedent, but I would like to take you, please, to page 511 or page 12 hard copy where the relevant part of the ruling begins. It is just useful to know that this ruling is dated May 2024. Of course, these proceedings had been going on for a very long time; I don't remember when they started, but a long time ago.

At paragraph 19, the tribunal says:

"By an application dated as long ago as 25 October 2022, the Merricks Class Representative applied to vary the Umbrella Proceedings Order to designate the

Merricks Collective Proceedings as an additional host case ..." for the purpose of pass-on.

So that application by this point was more than 18 months on. Then the tribunal explains, if you look down about three lines:

"At that stage, the application was stayed on the basis that it was premature in circumstances where there was a need to understand how the evidence on all issues, particularly pass-on, would be framed ..."

Then at 20:

"However, the Merricks Class Representative was permitted to participate in the expert led process to the provision of pass-on data ..."

So Merricks became embedded to some extent in the umbrella proceedings, the lead proceedings. Then at 21:

"Now that the pass-on data collection process has substantially run its course, such that the evidential shape of Trial 2 is much clearer, it is now appropriate to decide the application ..."

Then in March 2024, the application was renewed, asking to participate. Then at 22, the tribunal says:

"Clearly, no criticism can be made (and none was made) of lateness: the application has been heard at the earliest point appropriate in the trial process, given the very considerable difficulties in regard to data collection that we have described."

Well, in our case, of course, Dr Ennis' application was, I believe, started in 2023. A lot of time was spent on an unsuccessful point taken by Apple about conflict of laws, but the issue that we are grappling with only arose very recently obviously at the 11th hour. I am just going to check, if you give me a moment: yes, then decided in favour of allowing Merricks to participate.

If we turn, please, to page 513, it says at the top of the page, second line:

"We accept that there are other ways of attempting to avoid inconsistency -- namely to hear the Merricks pass-on issues on the same evidence but later -- but it seems to us that the most natural case management solution is to grant the application ...

We also note that the application ... has been flagged for a long time, and that the Merricks Class Representative has been quasi-incorporated into the Trial 2 process for a number of months."

Then skimming to the end of that numbered bullet, last three lines: “We … see no insuperable obstacles to the application…”

Then at (3):

"We consider this to be a safe conclusion because the incorporation of the Merricks pass-on issues will not involve the inclusion of sufficient additional evidence to create unfairness or to jeopardise Trial 2 preparations or the trial timetable."

Then there are a series of further bullet points. I will just draw your attention to two of them on the next page, bullet (iii) and bullet (iv):

Bullet (iii): "The Mastercard Defendants have retained an additional expert (Ms Webster) to deal with the issues, which are being raised by Mr Merricks ..."

At (iv): "Visa's expert, Mr Holt, is conducting a very similar exercise to that proposed by Mr Merrick's expert, suggesting that to some extent Mastercard will have to deal with the 'economy wide' calculation of pass-on in any event, we can see no particular prejudice to Mastercard."

Over the page, please, 515, (5):

"We are therefore confident that the inclusion of the Merricks Collective Proceedings in Trial 2 as a fully participating party is unlikely to cause any party material prejudice …"

Well, it simply could not be more different from this case.

If I may --

MR LENON KC: Are there any cases where the tribunal has said: well, the case management considerations are such that we are going to go ahead and give rise to a situation where there is a risk of inconsistent judgments, but that's just life?

MR WARD: I can't show you a ruling that is precisely to that effect. In the Trucks litigation, of course, that was the consequence of what was contemplated.

You will recall that there were a series of cases that were initially case managed together: BT, Royal Mail, Rider, Dawsongroup, and then a group called VSW. Then after being case managed in parallel for a long time, the tribunal offered BT, Royal Mail against DAF to be heard as a lead case. It didn't have any particular status, I should say, I didn't mean that in capital letters, but to come on for trial first, to be followed by a trial the following year with Dawsongroup and Rider against DAF and other manufacturers, to be followed up by another year by VSW against a range of manufacturers. Now, as I am sure you know, of course, there is a so-called second wave of Trucks claims that are proceeding.

So the logical consequence of that conscientious case management was that there could indeed have been different figures for UK overcharge for, say, Daimler, given in two different judgments but this was a pragmatic approach to a very large number of actual and potential claimants. Indeed, of course, there is a class claim afoot as well which also involves DAF.

Of course, one of the potential outcomes of allowing a first claim to go ahead is that it can lead to a wave of settlement. Indeed, Rider, Dawsongroup and VSW -- I believe in its entirety -- all settled. Someone will correct me from behind me as my solicitors acted for VSW. Certain claims are still proceeding.

Of course, one thing very much missing from my learned friends' submissions is any pragmatic recognition that a judgment in Kent would be a powerful force for settlement in Ennis. Of course one doesn't know, but there has been a lot of

speculation this morning about how the Court of Appeal might case manage appeals from two different cases, neither of which has even been heard, still less there is any error in the tribunal's legal reasoning being identified.

But it is obviously not far-fetched to say that if you decide a case which has powerful overlap with another, it may lead to settlement. Commercial funders are probably more interested in getting their money than fighting cases for points of principle.

So that is the answer. Obviously, the short answer is no, there is no such case; but also this is a very, very extraordinary application to be made now. Two years ago, not an extraordinary application, without prejudice to what my client might have said on that occasion if it had happened, obviously in the run of things. We are here though on the eve of trial.

I was going to show you just two other judgments, Sportradar, which you have already referred to, but it is again useful to see it for context because a pragmatic approach was taken. This is authorities bundle, tab 9, AB250. You can see the date of the ruling is February 2022, and the issue there was there were a group of claims that were going for trial in October of that year, called the "October Actions" and then there was something else called the "SCM" action, which I think had started in the commercial court.

You will see, if we turn, please, to page 253, paragraph 5: “The SCM action is somewhat behind the October Actions …. The October Actions, self-evidently from the name … will be tried in a long trial beginning in October 2022. The SCM Action is the relative foothills of preparation…”

That's where we are today. Almost nothing has actually happened in Dr Ennis' case. There has been a claim form; there has been a ruling by the tribunal that there will be certification, but of course we don't have the reasons because the hearing was only last week. There is no defence, there is no reply, almost nothing has happened.

Foothills would be a good way of putting it.

Then if we turn to page 256, please, page 7, the tribunal says, talking about various options:

"Consolidation is also a non-starter for altogether more prosaic reasons. If there were to be consolidation of the Competition Issues [which is where the potential overlap arose] so that parts of the SCM Action would be heard with the October Actions, then a number of steps would have to be taken between now and the end of the Summer term this year. First of all, the issues ... would have to be identified ..." and so forth.

Over the page, please, paragraph 19:

"There is simply not time to take all these steps."

So what the tribunal did instead is adopt a pragmatic third way, paragraph 20, which is the so-called "read across" option. Their president says:

"I want to absolutely stress ..." this is not binding.

But it obviously required consent. And Dr Ennis' representatives have been very quick to slam down the suggestion that anything so pragmatic could happen here.

Then finally, I won't take time with this, but McLaren is also in the bundle. That's AB/14. Again, there was an attempt to deal with this in an orderly way -- actually, sorry, I do want to turn it up briefly for one point. The same kind of issue in McLaren about people in the supply chain in respect of the same cartel.

Let me show you two things very briefly. AB/365, which is paragraph 13(7), the tribunal is talking about the possibility there might need to be an Umbrella Proceedings Order but it's not making one yet. Then it says:

"... their cases are at an early stage of formulation, and their experts have a great deal of work to do."

But even at that early stage, it didn't say, "Let's have a giant trial". What it did instead, if you look over the page at 366 at 15(2), what it did was the tribunal said:

"... we propose to earmark the whole of that term for the determination of issues arising out of McLaren and Volkswagen proceedings, although we are not ... committing to hearing any Volkswagen Issues during this period. If, however, the progress of the Volkswagen Proceedings enables Volkswagen Issues to be heard in this period, then we will certainly be minded to do so."

So even though it was at this very early stage, he didn't say, as Ms Demetriou does, it is just essential (inaudible) we have it on trial. It must be ordered. It is pragmatic that in the case managing from an early stage, the tribunal was able to say: look, we want at least to make that possible and that's something we will have to look at when the case is developed.

I see the time, but I just want to make one final point if I may before 1 o'clock. With your permission, I will need another 10 or 15 minutes after the short adjournment.

What is the state of readiness of Dr Ennis? It is an important question. The answer is "not remotely ready". The most important point in this regard can be seen if we go, please, to volume 2. This is what we have called the "Ennis application", which is the letter setting out Dr Ennis' thinking. It is under tab 45 and the letter starts at page 917, but the paragraph I wanted to draw your attention to is 11.3, where he explains -- this is on the question of pass-on -- the critical issue where he is obviously not ad idem at all with Dr Kent:

"… since Apple has not pleaded a case on pass-on in Ennis, his expert has not considered or addressed that issue in any detail."

Then he said, well, that's because Apple bears the burden of proof.

But here he is before you trying to interpolate himself -- I think that is now abandoned -- to disrupt the trial in Kent in order to take what he assumes will be an antithetical position to Dr Kent's experts, in other words arguing the money stuck with him and never made it to the class insofar as there is overlap, but he's not really even

worked up a case on it. So we are not really in the foothills, we are in the molehills. We know, in terms of the scale of the task, Apple has disclosed around 1.7 million documents. We also see that Dr Ennis says he might want more. That's also in his letter. Let me see if I can quickly show you. Yes, we can see that on page 925, where he says, at 21.3:

"Dr Ennis will need disclosure at least of all the documents disclosed in Kent as soon as possible. He should also be permitted to seek a limited amount of further disclosure, to the extent necessary."

So that 1.7 million might not be enough. Ms Demetriou is explaining she might well be seeking disclosure against class members as well. We know that in this case, in Kent, there are about three thousand pages of expert reports. There is a very large amount of factual material. It's taken more than three years to get to trial. That's not a criticism, everyone has worked extremely hard. We have had five case management conferences; we have had the benefit of very active case management from the tribunal. But the idea that Dr Ennis' claim can go from a position where his expert has not considered the key issue to considering 1.7 million documents and being in a trial in a year's time is just fanciful in our respectful submission. It just does not reflect the realities of litigation of this level of complexity.

It is just on 1 o'clock. I can finish and it might take ten or 15 minutes or we can come back and I will trouble you no longer.

MR LENON KC: We will break now.

MR WARD: Okay, thank you very much.

(1.02 pm)

(The short adjournment)

(2.00 pm)

MR WARD: (Missing text due to Livestream audio not being switched on) ...

intermediate option, leaving you with a very stark choice whether to grant a last minute adjournment essentially precipitated by a non-party, even if today backed by Apple.

We do respectfully submit that there is a third way to mitigate but not resolve the problems, which is allowing Dr Ennis to participate in the trial in a limited capacity in the way that we proposed in our skeleton argument. We don't like it: we are concerned that it will involve some compromise on our side; the trial timetable is already congested; it is seven weeks plus one reading week, but it is pragmatic. The submissions this morning have been in a sense designed to close that down and leave you only with the choice of adjournment.

But I wanted to show you one more authority about the approach to last minute adjournments. That is in the authorities bundle, tab 3. It is Mr Justice Coulson, as he then was, in the Fitzroy Robinson case. It is page 29, paragraph 8.

If we can take it from "Relevant principles":

"What are the relevant principles governing an application of this kind? It seems to me that the starting point is the overriding objective ... [and] the notes in the White Book ... Thus, the court must ensure that the parties are on an equal footing; that the case -- in particular, here, the quantum trial -- is dealt with proportionately, expeditiously and fairly; and that an appropriate share of the court's resources is allotted, taking into account the need to allot resources to other cases."

Pausing there, there is no (inaudible) in that case. This is an adjournment which is precipitated by an entirely third party, not the orthodox situation where one party comes before court and says we are just not ready for trial, or our key witnesses have become sick or something of that kind.

The parties themselves are ready for trial, or will be. It is no part of Apple's application that it can't meet the timetable. But more particularly, Mr Coulson says:

"More particularly, as it seems to me, a court when considering a contested application

at the 11th hour to adjourn the trial, should have specific regard to:

(a) The parties' conduct and the reason for the delays."

Now here, obviously, there is no serious basis on which Dr Kent's conduct can be criticised, nor do we seek to criticise Apple's conduct in this matter, that is something we are not party to. Of course, we do make the basic point that by the time Dr Ennis had even issued his application, this trial had already been set down. It was set down in 2022 and it was issued in 2023.

The extent to which the consequence of the delays can be overcome before the trial is very hard to apply here because there is nothing in these proceedings that is running amok.

The extent to which a fair treatment may have been jeopardised by these delays. Again, nothing that Dr Ennis wants to do or say risks jeopardising the fairness of the Kent proceedings.

Specific matters such as illness of a witness are not applicable. Then the consequences of an adjournment to the claimant, the defendant and the court.

If I may deal with the last one first, which is the court -- or in this case of course the tribunal -- it is no secret that the tribunal's diary is full and we are privileged to have a slot in the calendar ready to go with a complex tribunal that can hear this case in that window, and, of course, counsel who are committed and available in order to do that and to make that hearing, we hope, as efficacious as it can be. So there is a consequence for the court of adjourning that, of losing that capacity in the interests of what would inevitably be a much longer trial a lot later.

That's what I just want to come back to now, even though I touched briefly on it earlier. What is the prejudice to Dr Kent? Because my friends seem to think there would not be any. When I say Dr Kent, of course I mean Dr Kent, the funders, and most importantly of all the class members which she represents.

The first point of course is delay. I made the submissions this morning that it is just unrealistic to imagine, as seemed to be suggested, that a joint trial could take place in a year's time in which the issues could be determined in an orderly manner without very substantial extra work and a great deal more work on the side of Dr Kent, because we are fighting a three-cornered trial at that point. We are aligned but different to Dr Ennis on some issues, but of course at loggerheads on another, assuming in due course his own expert backs his case when he starts to think about it.

So there is a very, very substantial prejudice here that when one thinks also about diaries, obviously finding a date in the tribunal for a trial -- if the current trial is seven weeks, if it becomes a three-way trial, ten weeks, twelve weeks, I don't know. Of course, I wouldn't presume to make submissions that will eventually be made in a year's time at some case management conference about how long is needed for the trial window.

Then dates have to be found that are convenient for the tribunal and sufficiently convenient for the parties. It is no secret that the Competition Bar is very busy and a lot of challenges are being found, just because of the sheer weight of cases before the tribunal. Indeed, quite a number of the barristers involved with Dr Kent are also in the Coll matter, and that, I understand, is listed for twelve weeks in October. That is just an illustration.

So it is not going to be quick or simple to get this trial on, nor is it going to be cheap. As I said, we had five CMCs in Kent and that's unsurprising given the complexity of the matter.

Then there is the matter of costs, because various, quite extreme submissions have been made this morning about how it need not cost any money. But it is not just the question of "Are there some sunk costs in terms of brief fees?", which in fact there are. That's not really the issue. You will have seen my solicitors wrote last week to explain

what the cost position was. I would like to just show you that letter just to remind you. I think it is under tab 50, if I recall correctly, to just explain how much has been spent. If I can just invite you to read paragraph 5, if you have that, it says the total figure -- it is in bold -- is £7.6 million-odd for pre-trial and trial phases of the Kent trial and a significant proportion of brief fees have been incurred. Then my solicitors are criticised for what they say at paragraph 7 -- this is contemplating option 3 which was the option previously advanced by Dr Ennis where we would have "incidence" as a separate trial -- it would go into the "millions of pounds", it says here. It was criticised because it is not specific, but with respect of course, it is a very complex question exactly how much it is going to cost. It is self-evident that if we have two trials instead of one, it is going to cost a lot more money. I have shown you that the impact of this on funding is a very important consideration for the tribunal.

Now, of course, Apple makes the submission that this is all going to be terrible for Apple because it is going to be duplicative if this trial goes ahead and then later there is an Ennis trial if there is no settlement. Of course one of the points, though, is this is a bit of a double-edged point for them, because if, as they say, these cases are heavily overlapping, then no doubt the material itself is overlapping, the disclosure will be overlapping, Ms Demetriou has made the point about the witnesses having given evidence already in other jurisdictions and they may have to do so again -- and we know that the conduct of Apple and its App Store is under scrutiny in a number of jurisdictions so that may well be true. I don't try to set any of this at nought. I don't. It is all about the balancing exercise and what goes into the balance.

Again, I don't seek to argue there is no overlap here. Of course not. There is. There is. But equally I do make the point that was put this morning in argument that the overlap is very far from being back-to-back.

These cases are in some ways mirror images. Dr Kent's claim is for purchases by UK

consumers who used the UK version of the App Store in respect of apps which could be developed anywhere in the world, whether it be Google or Facebook or games. I am told, just to be clear, that three non-UK consumers have opted into the claim, for what it is worth. But Dr Ennis' claim is it is a mirror image: it is UK domiciled app developers on sales that could be anywhere in the world. So the overlap is very imprecise indeed.

Then of course you have seen from the skeleton argument that there is another reason why it's not simply a straightforward question of: would there be two inconsistent answers? Dr Ennis is proposing a form of top-down modelling. I would like to just show you what is said about this. What we know about this we learned from Apple's skeleton argument in the certification argument which we were finally provided with.

Can I just turn this up? I might be among the least informed people in the room on this, but I would like to show you anyway. It is in tab 28, page CMB/523(xxi), page 9 of the skeleton. There is some discussion essentially about the fact that Dr Ennis is using a top-down approach even though he has a class of only 1500. As we understand the argument, one of Apple's points is there is going to be a relatively small number of large people in that class, but he's nevertheless using a top-down model.

So the PCR argues that pass-on should be on an average or probabilistic basis and Apple criticises that but obviously we don't take any position on that. But the point is you have a top-down model on behalf of a particular class which does not match the class that is at issue in Kent. Kent has a different top-down model. Ms Demetriou has already made clear there will be some negative submissions about the model: fine, that's all for another day. But you could have two different models that lead to somewhat different answers on behalf of different classes. But there is nothing, in our respectful submission, that is really radical, surprising or inimical to the interests of justice in that possibility.

MR LENON KC: Well, that might be said to be a reason for having a joint trial if you have these different approaches.

MR WARD: All other things being equal, one can see that. But what I am respectfully suggesting is that the point about duplication, I am not seeking to say there is no point here at all or it is all utterly misconceived, but when you are weighing this in the balance my point is that there are limits to the potency of this point and it need not be the overriding consideration in the way that Apple at least is contending for.

Then on the related point about incidence. No one is actually arguing for severing of incidence. As I understand it now -- Mr Stanley will, of course, speak for himself -- but what I heard this morning suggested there was no appetite for that, realistically, on the part of Dr Ennis.

But ultimately, in the quantum model of Dr Singer on behalf of Kent, as you saw, incidence is just one input into the modelling of overcharge. Undoubtedly one can't come up with a figure for overcharge until that is determined, but in our respectful submission that could be dealt with sensibly if that was the course that you wished.

It is also fair to say, as Ms Demetriou pointed out, that the incidence model is one of many factors that are considered by Dr Singer in his market definition exercise. It is, but it is very much a multi-factorial exercise on his part so that would have to be managed.

The position in regard to Mr Holt was, in my respectful submission, not quite right the way it was prepared. Mr Holt has concluded that Apple's charges are excessive and unfair based on a comparison to its profitability. It's not a costs plus model as was suggested. But the crucial thing is that that comparison is not itself concerned with the level of incidence as to where that charge lies as between consumers and developers.

It is also not true that one of Apple's central points is that in the world of its products

the economic value is so great that that justifies the charges, and they do have a point that they wish to make that really all this is about is who takes in the profits from their innovation. But Mr Holt's analysis doesn't depend on this question of exactly what incidence lies where. But no party is advancing that proposition in any event.

Now the final thing I wanted to address very briefly is just the question of costs here. Because, with respect to my friends, Dr Kent is in a sense caught here because of a claim brought by Dr Ennis against Apple to which Dr Kent is a stranger. The hearing today is initiated by Dr Ennis and Apple has now weighed in on the side of an adjournment, but it is, in my respectful submission, plain that Dr Ennis ought to be in fact offering to pay the costs of and occasioned by this rather than contesting it. Dr Kent faces a great deal of disruption and expense. Costs are always discretionary, but ordinarily a party seeking a last-minute adjournment would expect to pay. And here the adjournment application has been prompted by an entity that is not even a party.

I will just finally show you the order that was made in Coll, which shows how that was dealt with, even though that was part of orderly case management as opposed to last minute intervention. That's under tab 19, please, at page 455. You will recall when we were looking at the transcript from this hearing, the tribunal was talking about the need -- I think it even used the words "hold harmless", that Epic should hold Coll harmless, although the order it made was of course more nuanced than that.

If we turn to page 454, you will see at paragraph 4 there is the order that allows for the joint determination of the factual issues. At 4b:

"This factual evidence excludes all expert evidence."

Then at paragraph 5:

"Epic shall, subject to paragraphs 6 to 8 below, pay the additional costs of and occasioned by the work done by the Class Representative [albeit up] to an overall cap

of £1 million."

And with a caveat in paragraph 8 that reserved the tribunal's residual discretion to revisit this.

The reason I raise this is not because I am, as it were, just saying, "Well, I want my costs if this happens", but I do say this really underlines the essentially unreasonable basis on which Dr Ennis has approached this application today: he's walked away from the intermediate options; he's expressed an absolute unwillingness to accept any form of read across form of compromise; he's not even willing to pay the costs; but the strategy of my friends has been to seek to paint the tribunal into a corner, but in my respectful submission their submissions simply don't reflect the impact on Dr Kent, her class, the funders.

Unless I can assist, those are the submissions for Dr Kent.

MR TIDSWELL: Could I just ask you a bit -- just coming to this question of costs and the prejudice to Dr Kent. So I just want to understand a little bit about what you say those costs might be.

MR WARD: Yes.

MR TIDSWELL: So effectively the wasted costs of the adjournment.

MR WARD: There are two different types of costs at stake here. If the trial now is adjourned for, let's just try to as it were split the difference between myself and Mr Stanley and say 18 months -- we think it will be longer, he thinks it will be shorter -- obviously there will be sunk costs involved in this trial which are going to be thrown away.

MR TIDSWELL: Like brief fees and trial bundle operation, that sort of thing.

MR WARD: All sorts of things, as you know. But then the costs we really pray in aid more strongly than that are the additional costs that will be incurred that are not budgeted from in fact having to fight a three-way trial that faces another couple

of years in the trenches in order to get there.

Of course, you are here week after week case managing large and complex competition trials, you don't need me to tell you what that would involve. It's not because of incompetence or inefficiency on any part; these cases are fiercely contested and every last advantage is sought and every strategic point is taken. In reality there will be a great deal more cost going with the delay, because I think you made a point, sir -- these were not your words -- to the effect of when there is time, work will be done, because parties will aim to make their case as good as it reasonably can be.

MR TIDSWELL: Also it might be quite difficult to work out what costs were, if you like, attributable -- everything will be attributable to the adjournment but it would be quite difficult to work out what were specifically attributable to Dr Ennis' participation, because presumably as things evolve there are going to be more issues that arise between Dr Kent and Apple that have not arisen because of lack of time or whatever. All of this is very uncertain, isn't it. It is very difficult to work out what any of it is.

MR WARD: What we know is that we will be in a three-way fight with one party at least that is exceptionally well-resourced, and also funder-backed litigation that I am sure will be taken with the seriousness it deserves by Dr Ennis, and we already know that Dr Ennis puts his claim somewhat differently even on the issues that he's at least aligned directionally with Dr Kent, but also his assumed position is antithetical to Dr Kent on incidence. He wants to serve expert evidence from Mr Perkins and maybe other experts as well and directions are given. All of that applies more engagement, more time by experts, more disclosure. Ms Demetriou makes clear that Apple will seek disclosure and if it goes to incidence, it is going to be relevant to Dr Kent too.

Of course, when Dr Ennis gets away from the molehills and into the foothills, then as he's made clear, he might want more disclosure. That's why this litigation takes

several years to come to trial. In my experience, invariably; the tribunal will know better than I. So all of that will take time and resource in terms of lawyer resource but also ultimately as well funding resource.

MR TIDSWELL: Thank you.

MR LENON KC: Thank you.

Reply submissions by MS DEMETRIOU

MS DEMETRIOU: Mr Stanley and I thought it might make more sense for me to go first by way of reply, if that is acceptable.

I will be short. My learned friend's submissions were, with respect, characterised by quite a lot of forensic outrage but very little tethering in the facts of the case. For example, in relation to the overcharge and pass-on point and Dr Singer's model, he accepted our point but said, "Well, this can be managed", but didn't explain how it could be managed if pass-on were hived off. We say that there is no good way of managing it and it is a compelling reason why pass-on shouldn't be heard separately. There is no evidence before you from the funder, by contradistinction with the Coll case, to say this is going to jeopardise the ongoing arrangements if there were to be a single, adjourned trial. So no evidence like that at all. There is no evidence of what brief fees have been incurred and would be wasted. To be fair to Mr Ward, he's not placing much emphasis on that point anymore.

Mr Ward didn't deal in any detail with the overlap point. He touched upon overlap on pass-on -- I have made my points about that, I don't think I need to reply -- but he didn't deal at all with overlap on liability, which is a hugely significant issue, given that whatever the tribunal finds in relation to the counterfactual will have implications for Apple's entire business model going forwards.

MR TIDSWELL: Ms Demetriou, I think you say there is no evidence for the funder here but there was in Coll. Was there? I thought in Coll they had not asked the funder,

was that not the import of the transcript?

MS DEMETRIOU: Maybe I have made a mistake.

MR TIDSWELL: I'm not sure I know the answer but I thought I saw in the transcript --

MS DEMETRIOU: No, I am going to just ask. I may have misspoken, let me just ask --

MR TIDSWELL: Well, maybe it doesn't matter terribly. Obviously we don't know here which is --

MS DEMETRIOU: We will get to the bottom of that. Apologies if I have misremembered.

MR TIDSWELL: Yes.

MS DEMETRIOU: Mr Ward, before the lunchtime adjournment, sought to suggest that if there were separate trials and the tribunal gives judgment in Kent, then that might lead to efficiencies in that the tribunal in Ennis might follow the judgment in Kent or it might promote settlement.

We say that that's not a realistic scenario. One just thinks back to Interchange, which I rather undersold as a point when I made my opening submissions. Thinking back to how it panned out, there was the Sainsbury's v Mastercard trial in this tribunal; then a few months later there was the ASDA v Mastercard trial in the High Court. They were months apart and the defendant's experts were exactly the same experts, yet the court and tribunal reached completely inconsistent decisions.

Then we had ASDA v Visa in the High Court, where again there was a very different decision. In a sense, that's as it should be, because one would hope that the tribunal in each case would be looking at the evidence before it as it comes out and the submissions before it and reaching its own view. Otherwise, if it were the case that by way of osmosis, as it were, the second tribunal in Ennis would decide the case in the same way so as to avoid inconsistency, that would mean in effect that it was

pointless to have the second trial at all and it would mean very pronounced unfairness to both parties in the second trial.

Standing back and thinking about the practicalities of this, let's say the Kent trial were to go ahead and Apple were to lose, then one simply can't say that it is likely that Apple would then roll over in relation to Dr Ennis' case and say, "Well, all right then, we accept that that's the answer, we are no longer going to fight this anymore." That doesn't seem like a likely scenario. Obviously I can't say now what Apple would or wouldn't do, but it seems unlikely that Apple would do that.

One sees it from the other perspective. If Apple were to win, then would Dr Ennis just roll over and say, "Well, that's it for my claim", particularly in circumstances where Dr Kent may have appeals before the Court of Appeal?

One sees what has happened in other jurisdictions. So Apple has won in the United States on the exclusionary abuses, yet Dr Kent is still running those arguments here. That's because there may be different evidence, it is a different court who looks at matters in their own way.

So we say that the overlap and the risk of inconsistency is very pronounced and is really the prime factor that we say should be motivating the tribunal in what we accept is a balancing exercise.

Just coming back, sir, to your point about Coll. I think I didn't misremember: there was evidence of extra costs in Coll and the bundle reference is page 507, lines 10 to 21.

MR TIDSWELL: I thought we were talking about the funders' view rather than the extra costs.

MS DEMETRIOU: No. That's right.

MR TIDSWELL: Yes.

MS DEMETRIOU: But there was evidence of the additional cost.

MR TIDSWELL: Yes.

MS DEMETRIOU: In this case, the tribunal asked Mr Ward what would be the additional costs and Mr Ward indicated that there would be some sunk costs in this trial.

Now, (A) we don't have evidence of that so we don't have evidence of what are the elements of the brief fee that has been incurred that wouldn't be recovered, or indeed whether or not they could be rolled over. We don't have any evidence of that. (B), we say those costs are unlikely to be large, given the stage that we are at. In circumstances where this is a claim for over £1 billion, the idea that perhaps a few hundred thousand pounds of brief fee incurred that's not recoverable -- if in fact that's the case -- should be driving this, we say would be very much putting the cart before the horse.

Mr Ward focused more on the additional costs that would follow from having a trial involving Dr Ennis. He called that a three-way trial. Of course, the point on which Dr Kent and Dr Ennis will diverge will be pass-on. Mr Tidswell will have seen the evidence in the Kent proceedings: the pass-on evidence is a tiny fraction of the evidence in the case. So in terms of how much time is pass-on going to take up, it's going to take up much less time than the trial on liability on which Dr Kent and Dr Ennis should be aligned.

In any event, costs can be managed by the tribunal. So Mr Ward posits a trial which is more than 18 months away which is running out of control in terms of everyone being allowed to run whatever additional arguments they want. But of course the tribunal will be able to (A) case manage tightly the proceedings so as to keep any additional costs under control, and (B), always retains a discretion.

So if the tribunal thinks at any stage of the proceedings that Dr Kent has adduced evidence to say that these additional costs are throwing the funding of this into doubt, or that it would be unfair for Dr Kent to bear these additional costs, the tribunal always

retains a discretion to address that. So again, we say it's not a point that should be driving the correct thing, the correct course in these proceedings.

As to the question of delay, again, we say that Mr Ward's submissions were overblown. We do say that a trial in October of next year is feasible. Can I just run through how we think that could work?

So we, Apple, could provide the disclosure to Dr Ennis that it has already provided in Kent very quickly. Apple could then serve a defence in the Ennis claim by, say, the end of October. There would then, as Dr Ennis says in his skeleton argument, assuming that the opt-out process finishes at some point in December, then there could be a deadline for either side to make any additional disclosure applications or any disclosure applications by the end of term. Then there could be a CMC listed in January to determine any disclosure applications insofar as they are contested. Then disclosure provided by the end of February.

I ought to say that, of course, everyone -- and Apple certainly -- would be cognisant of the fact that this would be running to an abbreviated timetable and would have to cut its cloth according to the timetable. But then if disclosure were provided by, say, the end of February, Dr Ennis could serve evidence both factual and expert by the end of April; Apple could reply by mid-June; Ennis' response by mid-July, and then a meeting of all the experts by the end of the summer term, leaving everyone to prepare for a trial starting in October. We do think that that is feasible, so the idea that this is going to be punted off for more than 18 months, we say is not correct.

Also, a further point on delay. One has to bear in mind here that it is a damages claim and it is damages to a class. Of course it's important: if Apple has abused any dominant position, which of course we say it hasn't, but if there has been an infringement then, of course, the tribunal will want to ensure that the class is compensated. That goes without saying.

But one is not in a position here where one has a single litigant who is claiming an amount of money which might make a very real difference -- so, for example, whether it could carry on business, have a very real impact -- and is being kept out of pocket for a large sum of money for an unreasonable amount of time. Realistically, any recovery, if there is recovery by class members, will be a small proportion of their ongoing expenses. So of course, it's important for things to be decided expeditiously by the tribunal, but this is not a case where class members will suffer real prejudice by a delay of some months in the trial.

Then just two very small points. Trucks: we say that that is not an apposite analogy because there was no infringement issue in that case. It was a follow-on claim, so there was no infringement issue before the courts, before the tribunal. And there was in fact no overlap on pass-on. So no actual overlap on pass-on.

Then once the claims had happened, the second wave that Mr Ward mentioned comprises lots of claims all being case-managed together, so rather makes our point.

Finally, the judgment of Mr Justice Coulson, as he then was. My learned friend pointed to the dicta in that judgment where the judge talked about adjournments at the 11th hour. But the application there was two weeks before trial, and none of these very compelling features that we have in this case about risk of inconsistency and the huge inefficiency that would result from having two trials were characteristics of that case. It really was a case between two parties in which it was being argued that the parties were not ready for a trial which had been listed and that argument was made two weeks before the trial was about to begin. So it is a very different type of case and one simply can't lift dicta from that case and try to make them apposite here. They are simply not.

Unless there is anything from the tribunal, those are the points I wanted to make in reply.

MR LENON KC: Thank you very much.

Reply submissions by MR STANLEY

MR STANLEY: At one point in his submissions my learned friend or frenemy, Mr Ward said all other things being equal, this would be a joint trial. That is blindingly obvious. It is only the timing factor which means anything isn't obviously equal.

Nobody would doubt for a second that these cases should be managed and heard together if it weren't for the timing factor, and it is relevant to bear in mind that that would include the fact that it would involve a slightly longer trial which would no doubt cost Dr Ennis a bit more than if his trial was alone, and Dr Kent more than if her trial was alone, which would clearly be in everyone's best interests given the advantages for consistency and fairness and the overall costs of the entire proceedings, because one slightly more expensive three-way trial is still a lot cheaper than two two-way trials. That's quite important when one is considering whether those additional costs of having a consolidated trial actually stand in the way of consolidation. One would brush those aside in a second if it were not for the timing issues in this case, which tells one in a sense what they are worth.

In terms of timing, I have taken instructions over the short adjournment as well. We also are confident that we can be ready for a trial beginning in October, which I thought we should be logically, because the only issues which are additional issues are really legal issues about the territorial principle. If we could have been ready for a trial in two stages up to October, we should be able to be ready and we think we can be.

We accept, of course, that that is a tighter than normal timetable, but it is a tighter than normal timetable bearing in mind the circumstances of the case. It's not put forward as one which is, as it were, totally unreasonably tight. It's not a full scale expedition to get the case ready to be heard in February, much as we would like to have been able to do that.

Then in terms of principles -- if I can turn to principles and then I will turn, I am afraid, to some facts -- in my respectful submission, you will find very little assistance in looking at transcripts of other hearings dealing with other similar or related issues.

We are constantly being told by the Court of Appeal that we should not even cite judgments in cases which have been making case management decisions. You look to the principles and you apply the principles to the circumstance of the individual case. Much less is it helpful, I suggest, to read through what has been said in the course of argument to guess which way the tribunal's mind was moving in one case or another case. You confront the case that you have.

So far as Mr Justice Coulson's judgment in Fitzroy Robinson is concerned, my learned friend Ms Demetriou is right: that and Interchange are really the two judgments which set out anything by way of principle. That judgment no doubt contains principles which are sometimes useful when you are looking at an adjournment two weeks before a trial because the parties haven't got their experts to meet according to their schedule. We are quite a long way away from those kind of cases.

I am not sure if we are parting company, but we are inviting you to take a slightly different approach in a sense from either of the other parties. Apple emphasise consistency, and they say look how important the tribunal says consistency is in Interchange. Of course consistency is important, but consistency is not a trump card. As Mr Ward rightly points out, there are cases in which one must tolerate inconsistency because there are other factors.

For his part, Mr Ward has his own trump card which is prejudice: there must be no prejudice to the claimants. Well, again, prejudice is always important but prejudice to one party is not a trump card: you have to consider the prejudice to other people and the overall shape and case management of the case. So neither of those things will in and of itself decide the case for you. You are balancing those factors up.

As far as consistency is concerned, it is in our submission quite clear where the risks of inconsistency lie and they are obvious.

As far as prejudice is concerned, you will have to ask yourself what is the real prejudice? Not only the prejudice to my learned friend but the prejudice potentially arising to Apple from additional costs, because rich as they no doubt are, they are still entitled to have that considered; to Dr Ennis from the risk of inconsistent judgments or unfairness; and of the prejudice to Dr Kent's class.

In concrete terms, what is the prejudice? If one sets aside the additional costs of the consolidation -- which as I have already said one really should because that's a prejudice plainly justified by the merits of consolidation -- it comes down to a modest additional cost, whatever is the additional cost of the brief fees, which for your note -- I won't take you to the correspondence, you don't need to look at it -- but tab 51 is the letter.

In response to the letter that you were shown which referred to these significant costs, we wrote a letter which for once was a nice short letter and it just said "What are those costs?" and there has been no answer. That is relevant when you are being asked to consider there is this prejudice. They are genuine prejudice but you are entitled to assume, both in absolute terms and certainly relative to the size of this case, not likely to be significant.

The other possible prejudice is delay. That's real prejudice. But again you look at that prejudice in the context of the length of delay there is going to be; the possible delay there will be to Dr Ennis if one does not consolidate; and actually the overall possibility that at the end of the day a trial a bit later of all of the issues, which are then proceeding together and can move together to the Court of Appeal if that's where they head, will be likely to produce a quicker overall answer for everybody than a trial in January.

So those are the key points so far as the discretion is concerned. One other point

I think I should address before I sit down is there came a point -- or there came various points -- at which it looked as if Dr Ennis was very much in Dr Kent's sights.

At one point, I think it was said that we had approached this in an essentially unreasonable way, and that the delay in bringing this to the tribunal now is effectively our fault. I do want to suggest that that's not a fair point. I am not sure at the end of the day it takes anyone anywhere --

MR TIDSWELL: I think the word "unreasonable" was used in relation to your approach to costs rather than delay.

MR STANLEY: Perhaps it was only --

MR TIDSWELL: It may be Mr Ward doesn't think so, but that's certainly what I had heard.

MR STANLEY: It's not unreasonable in relation to costs when we have asked what the costs are that it is said that we should be covering and we have not had an answer. That is not unreasonable. It is eminently reasonable. It is not unreasonable when although it is said that the attitude of funders is of critical importance, there is not a whisper from any of the funders as to what the attitude actually is, or any suggestion that if there was a consolidated hearing that would cause any funding difficulty at all. So if that is the extent of the allegation of unreasonableness, I don't accept that. If it goes further, can I ask you to look at three short letters? The first is at tab 29. I think it is page 524 of the bundle in hard copy; 571, I think it is, if you are working with electronic numbering.

This is a letter that my instructing solicitors wrote to the Registry on 24 November 2023, so right at the outset of the case, pointing out that there were substantial overlaps between the Ennis proceedings and the Kent proceedings, and saying, given the overlaps, Dr Ennis considers that if the tribunal is to determine both the Ennis and the Kent proceedings it ought to do so at the same time or at least in such a way as to

avoid inconsistent outcomes, and suggesting that it would be beneficial if one of his legal advisers was present at the Kent CMC in December in order to at least be up to speed on that and in order to know what was happening. So raising very early on -- indeed my recollection is it was raised even before then -- that there was this degree of overlap.

The next letter in the bundle, so that is tab 30, is a letter of 15 May 2024 to Gibson Dunn, who represent Apple, of course. One of the topics that it addressed was in paragraph 2(a), asking that the tribunal should give directions to address the efficient resolution of issues raised in both Ennis and the proceedings in Kent v Apple, see paragraphs 5 to 9 below.

Paragraphs 5 to 9 then set out the overlap. At paragraph 8, they say that it is plain that the parties in Ennis and Kent and the tribunal will need to give urgent and careful consideration to the interactions between the sets of the proceedings, and identifies three basic possibilities which remain the basic possibilities, and invited Apple to comment on which of those options they regarded as preferable.

Now, there was then a case management conference at which some of those issues were ventilated and which led, I think, ultimately to the decision to have the hearing which is taking place now.

Then the last letter I would ask you to look at is at tab 36, which is at page 822 of the bundle.

This is after that CMC, from Hausfeld, so that is Dr Kent's sort of representatives, asking for this to be placed before both of you judges, and referring to the case management conference which took place in June. Dr Kent was invited to attend the CMC on 8 May by Dr Ennis' representatives. So that's by us. But she was not subsequently informed of the agenda, nor that Dr Ennis intended to make proposals regarding the Kent proceedings. Well, that is certainly not because we have not told

Apple about it.

Conscious of the costs, she declined to formally appear, but did instruct a member of her legal team to attend that. And Dr Kent understands that the proposed hearing will take place on 23 September before the chairs of the panels of both Kent and Ennis to discuss the role of Dr Ennis in the Kent proceedings.

So you can see that what essentially is being said at that stage is that it was being said that it was still premature and that this should be put off until after the proceedings were certified in 4A.

In the end, we have got here on this date even before the proceedings were certified. Now, this is not a case that you are going to sensibly decide by deciding who has behaved reasonably or unreasonably. It is not about reasonable or unreasonable behaviour. And it cannot be said that Dr Ennis has not raised at a very early stage the fact that this needs to be considered. He can't be regarded as having behaved unreasonably in doing that.

So far as one can detect any element of tactics in what is going on, it is Dr Kent saying, well, I will not come to the CMC; I am not going to formally appear; I think this is premature. It is to be kicked off and kicked off and kicked off until you are then told it is too late.

We are not on the eve of trial, we are at the moment months before the trial is actually going to be begin, months before the written submissions are even due to be put in. It is much later than one would want to be addressing this in an ideal world. But if the only real additional prejudice which occurs from that stage -- the additional prejudice which occurs is as a result of whatever is going to be lost in relation to costs of brief fees and so forth. And those, in my submission, are not material.

I am sorry if that is a slightly hostile way to end the submissions, but it is not fair, in my respectful submission, to accuse Dr Ennis of having behaved unreasonably.

Unless I can help you further.

MR LENON KC: Thank you very much.

Reply submissions by MR WARD

MR WARD: May I just correct something I said.

I said several members of the counsel team for Dr Kent were also involved in the Coll trial, which is indeed the case, and I think I said it was 12 weeks. In fact, it is nine weeks in October, not 12, which is the window that my friends are arguing for.

Just finally, the letter you have just been shown on page 82 -- if you think it is helpful, please, we would ask you to read it all. And I don't make any submissions on it.

MR LENON KC: The tribunal is going to withdraw for ten minutes and we will let you know what our decision is.

(2.50 pm)

(A short break)

(3.05 pm)

RULING

MR LENON KC: The tribunal thanks the parties for their submissions. The tribunal has decided that it is not going to alter the existing timetable for the trial of the Kent proceedings, and it is not going to further case-manage the Kent and Ennis proceedings jointly. A case-management conference will have to be arranged in the Ennis proceedings. The tribunal will provide a written ruling with its reasons for this decision in due course.

MR WARD: Sir, we would ask for our costs of today, please. We were all here essentially at the behest of other parties and we have been broadly successful in our submissions.

MS DEMETRIOU: We say it would be inappropriate to give Dr Kent costs of these

proceedings. Everybody agrees that the issue of joint case management is a serious issue that must be addressed by the tribunal.

MR STANLEY: So far as I am concerned, yes, I agree with that. So far as the Ennis proceedings are concerned, it is a case management decision in the course of the Ennis proceedings and (inaudible) costs in the case. Effectively it will be an application for third party costs, I think.

MR LENON KC: On the subject of costs, this case management conference was arranged at the suggestion of the tribunal and we consider that it is appropriate for each party to bear their own costs.

MR STANLEY: Thank you, sir.

MR LENON KC: Thank you.

(3.06 pm)

(The hearing concluded)