



Neutral citation: [2021] CAT 4

IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos: 1377/5/7/20
and 1378/5/7/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

22 February 2021

Before:

THE HONOURABLE MR JUSTICE ROTH

(President)

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) EPIC GAMES, INC.
(2) EPIC GAMES INTERNATIONAL S.À.R.L
(3) EPIC GAMES UK LIMITED

Claimants

- v -

(1) APPLE INC.
(2) APPLE (UK) LIMITED

Defendants

and

(1) EPIC GAMES, INC.
(2) EPIC GAMES INTERNATIONAL S.À.R.L

Claimants

- v -

(1) ALPHABET INC.
(2) GOOGLE LLC
(3) GOOGLE IRELAND LIMITED
(4) GOOGLE COMMERCE LIMITED
(5) GOOGLE PAYMENT LIMITED

Defendants

Heard remotely on 21 January 2021

JUDGMENT: SERVICE OUT OF THE JURISDICTION

APPEARANCES

Mr Mark Brealey QC and Ms Daisy Mackersie (instructed by Clifford Chance LLP) appeared on behalf of the Claimants.

A. INTRODUCTION

1. The Claimants in two separate but similar actions seek permission under rule 31 of the Competition Appeal Tribunal Rules 2015 (“the CAT Rules”) for service

out of the jurisdiction on some of the Defendants. One action is against two companies in the Apple group (“the Apple action”); the other is against five companies in the Google/Alphabet group (“the Google action”). Both actions allege breach of EU and UK competition law arising from the requirements imposed regarding software applications (“apps”) on the two main operating systems for mobile devices (i.e. smartphones and tablets).

2. Although such applications are usually determined on the papers (see the Tribunal’s *Guide to Proceedings 2015*, para 5.44), because of the need to explore more fully the factual circumstances of the claims and also because of the importance of some of the legal issues raised, I directed an oral hearing. Since the Claimants in both actions are largely the same, with the same legal representatives, and there is substantial overlap in the issues raised, the two applications were heard together and this judgment deals with both.
3. The applications were heard *ex parte*, without submissions from the Defendants. Therefore, insofar as permission to serve out of the jurisdiction upon them is granted, the relevant Defendants can apply to set aside that decision on the basis that the Tribunal does not have jurisdiction or that such jurisdiction should not be exercised: rule 34 of the CAT Rules. In that regard, the parties should bear in mind the admonition of Lord Neuberger P in *VTB Capital plc v Nutritek International* [2013] UKSC 5, at [82]:

“... hearings concerning the issue of appropriate forum should not involve masses of documents, long witness statements, detailed analysis of the issues, and long argument.”

This was re-emphasised in the recent judgment of the Supreme Court in *Okpabi v Royal Dutch Shell plc* [2021] UKSC 3 at [20].

4. Whilst this judgment has to consider, for the purpose of jurisdiction, whether the claims have a real prospect of success, if I find that threshold satisfied it is axiomatic that this does not constitute a concluded view on the merits of the claims. If the actions proceed, any issues raised, unless admitted, will be argued and determined in the proceedings.

5. The terms “Apple” and “Google” will be used to refer to the two corporate groups, although in many sections of this judgment it is necessary to identify the particular corporate entities involved.

B. MOBILE DEVICES AND APPS

6. The description below is derived from the Claim Forms in the two actions and the witness statements of Ms Morony of the Claimants’ solicitors.
7. All mobile devices, like personal computers (“PCs”) require an operating system (“OS”). This is a piece of software which provides basic functionality to users, including button controls, touch and motion commands and the user interface, which includes icons and other visual elements representing actions which the user can take. A smartphone OS also facilitates the basic operations of a smartphone, such as GPS positioning and the camera. OSs are updated regularly, both to provide upgraded functionality and additional features for users, and to correct technical errors and protect devices from viruses and malware. Mobile devices are supplied with a pre-installed OS and the purchaser cannot replace that with an alternative OS.
8. The OS which is pre-installed on Apple’s Mac PCs, iPhones and iPads is referred to as the “macOS”, “iOS” and “iPadOS” respectively. The last two concerning mobile devices are referred to here for convenience “the iOS”. The iOS software is owned by Apple and it does not license it to any other original equipment manufacturer (“OEM”) for installation on any devices other than the iPhone and iPad. The iPhone and iPad will be referred to as “Apple devices”.
9. The “Android” OS is developed and owned by Google and it is the only OS that is widely available for licence by OEMs. The overwhelming majority of mobile devices made by OEMs use Android their OS. Mobile devices using Android are referred to for convenience as “Android devices”. Over half the Android devices in the UK are manufactured by Samsung.
10. In the UK, approximately 34% of all smartphones and 62% of all tablets sold in 2019 were, respectively, iPhones and iPads. The balance would be Android

smartphones and tablets. It is estimated that approximately 46.5 million consumers in the UK use Android devices and, of course, some consumers have both a smartphone and a tablet.

11. The layout and functions of the iOS are different from Android. These differences include (but are not limited to) button, touch and voice controls, search functions, and the way of configuring settings and organising digital content, such as photos.
12. Some apps are pre-installed on mobile devices but users can download further apps to enhance the functionality of their devices. Apps are available for an enormous range of activities including shopping, social networking, emailing, document creation and editing, reading books and newspapers, streaming videos and playing video games.
13. A user has to pay a charge to download some apps whereas others are free to download. In either case, the user may be offered the opportunity to purchase enhancements or extra features within the app, known as “in-app content”. Such a purchase is referred to as an “in-app purchase” or “IAP”. Most mobile devices come with a pre-installed digital “store”, i.e. a digital distribution platform which enables users to browse and download apps. On Apple devices this is called the “App Store”. Some 90% of Android devices (outside China) are supplied pre-installed with the “Google Play Store” displayed on the home screen.
14. To facilitate the purchase of in-app content, particularly in the context of mobile gaming apps when such content can extend and enhance play, consumers wish to make a payment quickly and without leaving the app. The Claimants say that this is particularly important in the context of mobile gaming, where a consumer may lose the benefit of the purchase if they are required to leave the app and stop playing the game to process their payment. Accordingly, an application programming interface (“API”) (a set of functions used by a computer program to communicate and exchange data with other systems) is integrated into mobile apps to enable in-app purchasing. When an in-app purchase is made, the API sends the user's payment method to a payment processor for approval. The

payment processor processes the transaction and, if approved, indicates through the API that the app can make the purchased content available to the user. Both the App Store and the Google Play Store incorporate a payment processing solution through which users can pay either for apps or for in-app content. This payment system used with the App Store is referred to as the “Apple IAP” and the system used with the Google Play Store is called Google Play Store In-App Billing (“Google IAB”).

15. Apps must be programmed to function on the specific OS on which they will be downloaded and run. Thus, an app developed for iOS will not function on an Android device and similarly an app developed for Android will not function on an Apple device. To develop and test an app, a developer must have access to the OS software on which the app will be used and related development tools (including software development kits (“SDKs”)), as well as various privileges necessary to run and test the software on a device using that OS.
16. Apps are periodically updated, for example to add new functions, address technical issues and to ensure compatibility with an OS that has itself been updated. Sometimes updates require new code and must be downloaded by the user. However, developers often make changes to apps without requiring users to download an update. This process is known as a “hot fix” or “Server Driven Update” (“SDU”).

C. THE CLAIMANTS AND THEIR PRODUCTS

17. The First Claimant, Epic Games Inc (“E1”) is a US company incorporated in Maryland but based in North Carolina. It was founded in 1991 by Mr Tim Sweeney. It is engaged in developing video games and software for games consoles, PCs and mobile devices.
18. E1 has developed a number of successful video games, including in particular “Fortnite”, a game which connects people in a virtual world. In Fortnite, players can create new environments, dance, chat, socialise and attend virtual events. It comprises several gameplay modes, of which the most popular is called “Battle Royale” which evolves over time in that new versions or aspects (referred to as

“seasons”) are released periodically. A season typically lasts around 10 weeks. Most users of Fortnite play with other users, and they can play together using different platforms. Thus one player may use a PC, another a games console and a third a mobile device. However, such cross-platform play is only possible for users who remain on the same version of the game.

19. Fortnite is free to download and E1 generates revenue by offering players the opportunity to purchase in-app content, such as digital avatars, costumes and dance moves. When a user makes such in-app purchases, E1 is for the most part¹ the supplier. If payment is made through the App Store or the Google Play Store, E1 receives that payment net of commission charged, respectively, by Apple or Google.
20. Fortnite was released on iOS in July 2017 and on Android in October 2018. Since then, it has been downloaded approximately 21 million times on Apple devices in the UK, and more than 1.3 million times on Android devices. E1 has received over US\$20 million from sales of in-app content through the Fortnite app in the UK on Apple devices and over US\$3 million from such sales on Android devices.
21. E1 also operates the “Epic Games Store”. This is a digital store through which users can download video games developed by Epic and by third-party developers. It is accessible through any web browser connected to the internet but it is currently only available on PCs (including Apple’s Mac computers) and cannot be downloaded as an app on mobile devices.
22. In addition, E1 has developed the Epic Games App. This enables users to download games developed by Epic (and not by third party developers). Apparently its primary function is to enable users to download and install Fortnite and Battle Breakers. It can be downloaded directly by users of Android devices and is pre-installed by certain OEMs, notably Samsung. It is not available for download on an Apple device.

¹ See further paras 24 and 44 below: however, even if payment is made to E2, E1 may still be the supplier.

23. E1 has also developed a software suite called “Unreal Engine”. This allows third party developers (as well as companies in the Epic group) to create realistic 3-D content for use in a range of contexts, including but not limited to video games. It is free to use for non-commercial purposes, subject to certain limitations, and a 5% royalty is typically charged to developers after they reach US\$ 1 million in sales. In addition to use by developers of video games, Unreal Engine is used in architecture, film and television and the automotive and transport industries. For example, the Royal Horticultural Society and University of Salford used Unreal Engine to create a virtual reality model of a garden for a landscaping project and Network Rail used it to plan track renewal and maintenance.
24. The Second Claimant, Epic Games International S.à.r.l. (“E2”) is a Luxembourg company operating out of its branch in Switzerland. E2 is a wholly owned subsidiary of E1. E2 is the company in the Epic group which grants licences to developers outside the US who want to use Unreal Engine. Since July 2017, about 270,000 individuals based in the UK have used an Unreal Engine account. Further, when in August 2020 a change was made to the Fortnite app supplied to users of Apple and Android devices to enable them to make in-app purchases directly from Epic, as explained below, E2 was the company which sold in-app content in that way to users in the UK.
25. The Third Claimant in the Apple action, Epic Games UK Ltd (“E3”) is, as its name suggests, an English company. It is not a claimant in the Google action. E3 is a wholly owned subsidiary of E2. Its main focus is the development of Unreal Engine. As well as research and development of Unreal Engine, it works closely with Unreal Engine customers in the UK, providing them with local support and help with their projects which use this software suite. It employs about 110 people in the UK.
26. The Epic group recently acquired two other English companies. In March 2020, E2 acquired the company now called Epic Animation UK Ltd, based in Manchester. Its work is closely related to Unreal Engine, especially concerning facial animation. In September 2020, the group acquired SuperAwesome Trading Ltd, based in London, which develops services in respect of online

advertising targeted at children and software solutions for developers to facilitate parental consent processes online. Neither of those companies is a party to either action.

D. THE DEFENDANTS TO THE APPLE ACTION

27. The First Defendant, Apple Inc (“A1”), is a US company incorporated and based in California. It designs, develops and sells consumer electronics and software. Among its other products, A1 designs and markets the well-known and popular Apple iPhones, iPads and Mac PCs, and it owns the OS for those products.
28. The Second Defendant, Apple (UK) Ltd (“A2”), is an English company and a wholly owned subsidiary of A1. According to the strategic report of its directors published with its report and accounts for the year ended 28 September 2019, A2 provides services, including research and development and other technical services, to other companies in the Apple group. In a letter to the Claimants’ solicitors dated 4 December 2020, A1 and A2’s solicitors explained that A2 provides support to UK developers of apps in helping them understand the products, features and options available to them on the App Store, but “does not provide support for technological or systems related issues”.

E. THE DEFENDANTS TO THE GOOGLE ACTION

29. The First Defendant, Alphabet Inc (“G1”), is a US company incorporated in Delaware² and based in California. Since about October 2015, it has been the holding company of the Second Defendant.
30. The Second Defendant, Google LLC (“G2”), is a US company also incorporated in Delaware and based in California. It is a multinational technology company and its products include search technologies (such as the well-known Google Search engine), online advertising technologies (such as “AdMob”), cloud computing, software and hardware. G2 owns and develops the Android OS and

² The claim form and witness statement of Ms Morony state that it is incorporated in California but that is not correct.

owns and licences the Google Play Store. In that regard, it also owns and operates the Google IAB payment system.

31. Both G1 and G2 were addressees of the EU Commission decision of 18 July 2018 in Case AT.40099 *Google Android* (“the *Android Decision*”), finding that they had infringed Art 102 of the Treaty on the Functioning of the European Union (“TFEU”), by abusing their dominant position, inter alia, by tying the Google Search app with the Google Play Store. G1 was there held liable for the acts of G2 on the basis that it exercises decisive influence over G2: recital (1389). The *Android Decision* is on appeal.
32. The Third Defendant, Google Ireland Ltd (“G3”) is, as its name suggests, incorporated in Ireland. As explained below, G3 is the company in the Google group that is the contracting party under relevant agreements made with E1.
33. The Fourth Defendant, Google Commerce Ltd (“G4”) is also incorporated in Ireland, and has a UK establishment registered under the Overseas Companies Regulations 2009, with an address for service in England. It is responsible for the distribution of apps through the Google Play Store in the UK. As explained below, the Claimants say that it was therefore responsible for the removal of the Fortnite app from the Google Play Store.
34. The Fifth Defendant, Google Payment Ltd (“G5”) is an English company. It is responsible for the processing of payments for purchases in the UK of apps through the Google Play Store and of in-app content in apps downloaded through the Google Play Store.
35. G3-G5 are all subsidiaries of G2.

F. THE APPLE ACTION

36. A developer of an app that is to run on Apple devices requires as inputs both for the initial development and then to keep upgrading the app, access to the iOS software and SDKs, as well as various privileges necessary to run and test the app software on the iOS. To obtain access to these inputs, the developer must enter into a standard form Apple Developer Program License Agreement

("DPLA") through which it obtains an Apple Developer account. The DPLA is a lengthy and very detailed contract which also incorporates seven attachments setting out additional terms applicable in specified circumstances, and two schedules which set out further terms and, in turn, have several exhibits. The DPLA is governed by US and California State laws (except for the California conflict of law rules) and has an exclusive jurisdiction clause in favour of the State and Federal Courts of the Northern District of California: cl 14.10.

37. Under the DPLA, a developer must submit an iOS app for review by Apple. Unless Apple selects the app, it cannot be distributed through the App Store: cl 3.2(g). Similarly, any change to an app (including to any functionality) must be resubmitted to Apple: cl 6.1.
38. Companies in the Epic group have entered into a number of DPLA agreements with A1. In particular:
 - (a) E1 holds the Epic 84 Apple Developer Account. This account is used for the Fortnite app and four other apps developed by E1;
 - (b) E2 holds an Apple Developer Account with an identification number ending "3Y". That account is associated with the development of the Unreal Engine.
 - (c) Life on Air Inc, a subsidiary of E1 in the US, holds two Apple Developer Accounts. One is used to submit the popular app, "Houseparty", to the App Store.
 - (d) KA-RA S.A.S. and Pysonix LLC, subsidiaries of E1 incorporated in, respectively, France and Sweden, each hold an Apple Developer Account.
39. Under the DPLA, the developer is prohibited from:
 - (a) distributing iOS apps through any channel other than the App Store: cl 3.2(g);

- (b) permitting an iOS app to download or install executable code which provides “features or functionality that are inconsistent with the intended and advertised purpose of the [app] as submitted to the App Store”: cl 3.2.2;
 - (c) using any payment processing solution for in-app purchases on such apps other than the Apple API: cls 3.3.1- 3.3.2;
40. The Claimants state in their Claim Form, at para 77:
- “Apple imposes non-negotiable terms and conditions through the DPLA which:
- (a) Prevent developers from distributing iOS apps other than through the App Store: and
 - (b) Prevent developers from using any payment processing tool for in-app purchases other than the Apple IAP.
- (together the “Restrictive Terms”).”
41. The Claimants allege that:
- (a) an iOS app which does not comply will not be selected by Apple for distribution via the App Store; alternatively, if it is already on the App Store, it will be removed; and / or
 - (b) the developer of a non-compliant iOS app may not be permitted to access the iOS software and/or any Apple software.
42. Further, the Claimants allege that technical restrictions are built into the iOS which prevent users from downloading apps or app stores direct from developer’s own websites.
43. For any iOS app where a fee is charged to purchase an app or for any purchase of in-app content on such an app, the developer is charged a commission of 30% (save that A1 announced that from 1 January 2021 new developers and developers who earned under US\$ 1 million from app sales and in-app purchases in 2020 can qualify for Apple's Small Business Program and pay a

reduced commission of 15%). E1 receives the proceeds of sale of in-app content on its apps paid for using the Apple API net of this commission.

44. On 13 August 2020, E1 changed the Fortnite iOS app using a SDU,³ to give users the option of paying for in-app purchases through Epic's own payment processing system as an alternative to the Apple IAP. Such sales using "Epic direct payments" achieved a cost saving (by avoiding the Apple commission) which was passed on to the user: the price of in-app content was 20% lower if the user chose to purchase directly. As stated above, payment for such purchases by users in the UK was received by E2.
45. Later that day, the Fortnite app was removed by A1 from the App Store. This means that users can no longer download Fortnite onto their Apple devices, and users who had previously downloaded Fortnite cannot receive updates to Fortnite. And since E1 launched a new "season" of Fortnite on 27 August 2020, players on Apple devices are unable to play the game with players using other platforms who have the latest version.
46. Further, on 14 August 2020, A1 wrote by email to E1 notifying it that its action constituted a breach of several terms of the DPLA and that if those breaches were not cured within 14 days (i.e. by removal of the Epic direct payment option), all rights and licenses under the DPLA would be terminated and "your apps" still available for distribution on the App Store would be removed and "you will lose access" to all Apple software, SDKs, APIs and developer tools.
47. On 28 August 2020, A1 wrote by email to E1 informing it that its Epic 84 Developer Account was being terminated forthwith and that E1 would be unable to reapply to the Apple Developer Program for at least a year.
48. From the evidence of Ms Morony, it is clear that the Claimants apprehend that A1 might terminate the Developer Accounts held by other companies in the Epic group, including the Account held by E2 pursuant to the DPLA related to Unreal Engine: para 38(b) above. If that were to happen, the Claimants state

³ See para 16 above.

that this would have a devastating effect on Unreal Engine, given the prevalence of Apple devices on the market.

49. In their Claim Form, the Claimants contend that the Defendants are in breach both of the Chapter I prohibition on anti-competitive agreements in sect 2 of the Competition Act 1998 (“CA 1998”) and the corresponding Art 101 TFEU, and of the Chapter II prohibition on abuse of a dominant position in sect 18 CA 1998 and the corresponding Art 102 TFEU. The Claimants allege that there were relevant and distinct markets for the distribution of iOS apps, alternatively for the distribution of apps to users of all mobile devices; and for the processing of payments for the purchase of digital content within iOS apps. Their central allegations are set out at para 122 of the Claim Form, as follows:

“By:

(a) Imposing the Restrictive Terms on developers as part of Apple's standard terms and conditions; further or alternatively,

(b) Charging unfair prices for the distribution of apps via the App Store and/or use of the Apple IAP; further or alternatively,

(c) Purportedly enforcing the Restrictive Terms by terminating Epic 84 Apple Developer Account and/or threatening to terminate all of Epic's access to Apple software;

Apple has abused its dominant position in each of the Relevant Markets contrary to section 18 of the Competition Act 1998 and Article 102 TFEU. Further, or alternatively, the Restrictive Terms have the object and/or effect of preventing, restricting and / or distorting competition in each of the Relevant Markets contrary to section 2 of the Competition Act 1998 and Article 101 TFEU.”

50. Although the Claim Form sets out losses which the Claimants allege they will suffer, including losses related in particular to Fortnite, the Epic Games Store and Unreal Engine, there is no claim for damages and the witness statement of Ms Morony makes clear that no such claim is being pursued in this action. The prayer to the Claim Form is as follows:

“AND THE CLAIMANT [sic] CLAIMS

- (a) A declaration that the Restrictive Terms are contrary to section 18 of the Competition Act 1998 and Article 102 TFEU, and/or section 2 of the Competition Act 1998 and Article 101 TFEU and accordingly unlawful;

- (b) A declaration that the removal of the Fortnite app from the App Store in the UK and / or the threatened refusal to grant Epic access to Apple's software was contrary to section 18 of the Competition Act 1998 and Article 102 TFEU, and/or section 2 of the Competition Act 1998 and Article 101 TFEU and accordingly unlawful;
- (c) An order requiring Apple to restore the Fortnite app and the other apps submitted using the Epic 84 Apple Developer Account to the App Store in the UK;
- (d) An order preventing Apple from restricting the download of the Epic Games Store on to any Apple device in the UK;
- (e) An order requiring Apple to remove the restriction on the use of alternative in-app payment processing solutions for apps distributed through the App Store in the UK;
- (f) An order preventing Apple from making access to the iOS software and/or any other Apple software conditional on the use of the App Store and/or the Apple IAP;
- (g) An order requiring Apple to reinstate the Epic 84 Apple Developer Account;
- (h) An order restraining Apple from taking or threatening further action against Epic consequent on the Fortnite SDU; and
- (i) Such further or other relief as the Court may think fit.”

G. THE GOOGLE ACTION

51. There are similarities between the Google Action and the Apple Action but the two are not altogether parallel. That in part results from the fact that most Android devices are manufactured by OEMs independent of the Google group. The source code of Android is made available to OEMs for free via the Android open-source project and under an open-source licence (the “AOSP Licence”). This licence enables OEMs to customise their mobile devices to some extent.
52. E3 is not a claimant in the Google Action and no allegations are made regarding Unreal Engine.
53. The claims in the Google Action are based on:
- (1) the agreements for Android made with OEMs;

- (2) the agreements for Android made with developers;
- (3) technical restrictions incorporated in the Android OS; and
- (4) action taken by some of the Defendants when E1 introduced the Epic direct payment system into the Android app for Fortnite in August 2020.

(1) Agreements with OEMs

54. Following the *Android Decision*, separate licences are now offered to OEMs for the Google Search app and the Google Chrome app. To obtain a licence to pre-install any other Google apps, including Google Play, OEMs must enter into a Mobile Application Distribution Agreement (“MADA”) with G2: see the *Android Decision*, recitals (172)-(173) and (189).⁴
55. Under the terms of the MADA:
- (a) If an OEM decides to pre-install one or more of the relevant proprietary Google apps on its devices, it must pre-install all “mandatory Google apps” listed in the MADA. The *Android Decision* states that what was then (July 2018) the latest MADA listed 30 such mandatory Google apps, including the Google Play Store: recital (182). According to the Claim Form this remains the position.
 - (b) OEMs must place the icon which gives access to the Google Play Store on the device’s default home screen: *ibid*, recital (184). The Claimants refer to this as the “Google Play Pre-Install Requirement”.
56. The Claimants assert that as a result of the Google Play Pre-Install Requirement,
- “the vast majority of users of Android mobile devices will use the Google Play Store rather than any other Android app store. The pre-installation and placement of the Google Play Store mean that it is the first app store that consumers see when they start to use their device. They are accordingly unlikely to look for, download and / or use alternative app stores, and may even believe that there are no alternative app stores available....”

⁴ “Google” there refers to G2: see recital (1).

(2) Agreements with developers

57. A developer who wishes to distribute their apps through the Google Play Store must enter into a Google Play Store Developer Distribution Agreement (“DDA”). Pursuant to the DDA, any app which a developer wants to distribute through the Google Play Store must be submitted for review and approval.
58. Through the DDA, the developer is contracting with different Google entities depending on where the app is being distributed. E1 is party to a DDA which was used to distribute the Fortnite app through the Google Play Store, and G3 is the counterparty in relation to apps made available through the Google Play Store in the UK: DDA cl 2.1 and document entitled “Supported locations for developer & merchant registration”. Companies in the Epic group are parties to a number of other DDAs.
59. The DDA is a relatively short agreement (certainly compared to the Apple DPLA) but by cl 4.1 both the developer and its products are required to adhere to the “Developer Program Policies” which are set out in a separate and much more detailed document. The DDA is expressly governed by the laws of the State of California (excluding California’s conflict of laws provisions) and gives exclusive jurisdiction to the Federal or State courts within the county of Santa Clara, California: cl 16.8.
60. The DDA contains standard terms and conditions, including the following:
- (a) The developer must not use the Google Play Store to distribute or make available any product that “has a purpose that facilitates the distribution of software applications and games for use on Android devices outside of [the Google Play Store]”: cl 4.5;
 - (b) The developer must use the Google IAB for purchases of in-app digital content. The Developer Program Policies prescribes, under the heading “Payments”:

"Apps that employ in-store or in-app purchases must comply with the following guidelines:

...

In-app purchases:

- Developers offering products within a game downloaded on the Google Play Store or providing access to game content must use the Google Play Store In-app Billing as the method of payment.
- Developers offering products within another category of app downloaded on the Google Play Store must use the Google Play Store In-app Billing as the method of payment, except for the following cases:
 - Payment is solely for physical products
 - Payment is for digital content that may be consumed outside of the app itself (e.g. songs that can be played on other music players). ...”

61. The Claimants refer to these provisions as “the Restrictive Terms”. They allege:

- (a) The provision in (a) above means that developers cannot use the Google Play Store to distribute other app stores, such as the Epic Games App. Further, it means that consumers may be under the impression that no alternative app stores to the Google Play Store exist on Android devices, since they cannot be found by searching in the Google Play Store;
- (b) The provision in (b) above means that developers cannot choose to use alternative payment processing tools, which might provide a cheaper and/or higher quality service.

62. Google charges a commission of 30% on sales of Android apps distributed to consumers through the Google Play Store and sales of in-app content to consumers within apps distributed through the Google Play Store, save that the fee reduces to 15% for subscription products where subscribers are retained after 12 paid months: DDA cl 3.4 and document entitled “Service fees”.

(3) Technical restrictions

63. The Claimants contend that:

“In addition to the Google Play Pre-Install Requirement and the Restrictive Terms, Google further restricts the distribution of Android apps by configuring Android OS to make it unreasonably difficult (and, in some cases, impossible)

to download apps directly ..., i.e., to use an app store or a web browser to install app stores which have not been pre-installed on the Android mobile device other than through the Google Play Store or an OEM's own app store.”

64. In summary, in some cases the user must change their default settings and navigate warnings in order successfully to download an app store or an app directly from a website, and in other cases downloading of such apps through the internet browser is prevented altogether. The Claimants refer to these features as “Technical Restrictions.”

(4) Action taken in August 2020

65. Following abortive discussions between E1 and G1, on 13 August 2020 Mr Sweeney emailed Mr Lockheimer at G1 to inform him that Epic would no longer adhere to Google's payment processing restrictions. He told him that Epic direct payments would be launched on Fortnite in the Android app, as also in the iOS app (see para 44 above), and that the version of Fortnite available through the Google Play Store will contain alternative payment options for users, so that they could choose to pay either through Epic direct payments or the Google Play Store IAB system.
66. In response, G1 notified E1 later that day that Fortnite had been removed from the Google Play Store for breach of the payment condition of the Developer Program Policies set out at para 60(b) above. In her witness statement, Ms Morony states that the Claimants understand that the removal of Fortnite from the Google Play Store in the UK was carried out by G3.
67. This had the same effect on users with Android devices, mutatis mutandis, as the removal of Fortnite from the App Store had on users of Apple devices: see para 45 above.
68. As with Fortnite on Apple devices, where the users chose to pay for the purchase of in-app content through the Epic direct payments system, they were offered a 20% reduction on in-app prices, as a result of Epic avoiding the 30% commission charged by Google. As noted above, payments using Epic direct payments made by users in the UK were made to E2, whereas G4 is the company

within the Google group that receives payments for purchases of in-app content made by users in the UK.

69. As in the Apple Action, the Claimants contend in the Google Action that the Defendants are in breach both of the Chapter I prohibition on anti-competitive agreements in sect 2 CA 1998 and Art 101 TFEU, and of the Chapter II prohibition on abuse of a dominant position in sect 18 CA 1998 and Art 102 TFEU. The Claimants' allege that there were relevant and distinct markets for the distribution of Android apps, alternatively for the distribution of apps to users of all mobile devices; and for the processing of payments for the purchase of digital content within Android apps. Their central allegations are set out at para 115 of the Claim Form, as follows:

“The Google Play Store Pre-Install Requirement and / or the Restrictive Terms and / or the Technical Restrictions; further, or alternatively, the steps taken by Google in response to Epic offering lower prices to consumers using the Fortnite app for choosing to pay Epic directly for in-app content described above, which are purportedly justified by reference to the Restrictive Terms; are anti-competitive and unlawful. Specifically, the aforesaid restrictions and / or conduct constitutes:

- a. an abuse of a dominant position contrary to section 18 of the Competition Act 1998 and / or Article 102 TFE; and / or
- b. a breach of section 2 of the Competition Act 1998 and / or Article 101 TFEU as the standard terms and conditions upon which Google relies constitute a significant distortion of competition in the UK and in the EEA.”

70. The Claim Form sets out the losses which it is alleged the Claimants continue to suffer. That includes losses resulting from the restrictions in the MADA on OEMs as regards the installation of alternative app stores to the Google Play Store. Although the Epic Games Store is not currently available in a version for Android devices (unlike PCs using Android), the Claimants assert that if OEMs were able to install an alternative app store in a way that made it attractive to users (e.g. on the home page) then the Claimants would produce the Epic Games Store in a version suitable for Android devices, and charge a lower commission to developers than the 30% charged for supply through the Google Play Store. However, as in the Apple action, the Claimants do not claim damages, and the witness statement of Ms Morony makes clear that no such claim is being put forward.

71. The prayer to the Claim Form is as follows:

“AND THE CLAIMANT [sic] CLAIMS

- (a) A declaration that the Google Play Pre-Install Requirement and / or the Technical Restrictions and / or the Restrictive Terms are contrary to section 18 of the Competition Act 1998 and Article 102 TFEU, and / or section 2 of the Competition Act 1998 and Article 101 TFEU and accordingly unlawful;
- (b) A declaration that the removal of the Fortnite app from the Google Play Store in the UK was contrary to section 18 of the Competition Act 1998 and Article 102 TFEU, and / or section 2 of the Competition Act 1998 and Article 101 TFEU and accordingly unlawful;
- (c) An order requiring Google to restore the Fortnite app to the Google Play Store in the UK;
- (d) An order requiring Google to remove the restriction on the use of alternative in-app payment processing solutions for apps distributed through the Google Play Store in the UK;
- (e) An order requiring Google to cease imposing the Google Play Pre-Install Requirement, or any condition requiring OEMs to give preferential treatment to the Google Play Store as compared to competing app stores, on Android mobile devices in the UK;
- (f) An order requiring Google to cease interfering with OEMs’ ability freely to enter into agreements with Epic in respect of the pre-installation of the Epic Games Store and / or Epic Games App and / or their location on the mobile device for Android mobile devices sold in the UK;
- (g) An order requiring Google to remove, alternatively amend, the Technical Restrictions to ensure that consumers can directly download apps / app stores without obstruction, including ensuring specifically that those apps / apps stores are able to operate in the same way as the Google Play Store with respect to app installation, app updates, and access to operating system features;
- (h) An order requiring Google to remove the restriction on the use of alternative in-app payment processing solutions for apps distributed through the Play Store in the UK; and
- (i) Such further or other relief as the Court may think fit.”

72. The relief sought at paragraph (h) of the prayer appears in substance identical to that sought at paragraph (d).

H. SERVICE ON THE ENGLISH DEFENDANTS

73. No permission is needed to serve defendants in the jurisdiction. Accordingly, an order is not required to enable service on the Defendants that are English companies: A2 in the Apple Action and G5 in the Google Action.⁵
74. I note that service on the English Defendants also comes within the scope of the Brussels Regulation (Recast) (see para 75 below) and so is authorised by the general rule on jurisdiction in Art 4 of that Regulation.

I. SERVICE ON THE IRISH DEFENDANTS

75. The Claim Form in the Apple Action was filed at the Tribunal on 8 December 2020 and the Claim Form in the Google Action was filed on 29 December 2020. Accordingly, both actions were commenced before the end of the implementation period under the Agreement for the UK's withdrawal from the EU ("the Withdrawal Agreement"). The provisions regarding jurisdiction in Regulation (EU) No 1215/2012, the Brussels Regulation (Recast), therefore apply to both these proceedings, pursuant to the Civil Jurisdiction and Judgments (Amendment)(EU Exit) Regulations 2019, reg 93A and Art 67(1)(a) of the Withdrawal Agreement.
76. In the Google Action, the Claimants assert that the Tribunal has jurisdiction over G3 and G4 pursuant to the special jurisdiction concerning tort claims in Art 7(2) of the Brussels Regulation (Recast). This is on the basis that the place where the Claimants suffered damage includes England, or alternatively, that England was a place where the harmful event giving rise to the damage occurred. This judgment does not address that question for the purpose of Art 7(2), since permission to serve G4 and G5, whose domicile is in an EU Member State, is therefore not required.

⁵ The fact that G4 has a registered address for service in England means that it can be served at that address, but as a company domiciled in an EU Member State the jurisdiction requirements of the Brussels Regulation (Recast) still have to be satisfied.

J. SERVICE ON THE US DEFENDANTS

77. Service of the Apple Action on A1 and the Google Action on G1 and G2 requires the permission of the Tribunal: rule 31(2)-(3) of the CAT Rules. The Claimants in both actions contend that the proceedings are to be treated as taking place in England and Wales. Accordingly, the Tribunal approaches service out of the jurisdiction on the same basis as the High Court under the Civil Procedure Rules (“CPR”): *DSG Retail Ltd v Mastercard* [2015] CAT 7 at [17]-[18].

78. The requirements for permission to serve out of the jurisdiction of a claim in the Tribunal on a defendant not domiciled in an EU Member State (where proceedings were issued before 1 January 2021) are therefore as follows:

(a) There is a serious issue to be tried on the merits of the claim: i.e. that there is a real as opposed to fanciful prospect of success on the claim. This is the same test as would be applied if the claimant were resisting a summary judgment application by the defendant: *AK Investment CJSC v Kyrgyz Mobile Tel Ltd* [2011] UKPC 7 at [71].

(b) There is a good arguable case that the claim falls within one or more of the categories of case, generally referred to as “gateways”, set out in CPR Practice Direction 6B at para 3.1. For this requirement, “good arguable case” means that the claimant has the better of the argument on whether the claim comes within the gateway(s) relied upon. Where this depends on an issue of law, the Tribunal would normally decide that issue as opposed to determining whether there is a good arguable case on it: *AK Investment CJSC* at [81]. Insofar as this involves an issue on the facts, the effect of the test is as follows:

“(i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it.”

Per Lord Sumption in *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80 at [7], as approved in *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34 at [9].

- (c) In all the circumstances, England is clearly or distinctly the appropriate forum for the trial of the claim and the Tribunal ought to exercise its discretion to permit service of proceedings out of the jurisdiction. This is reflected in rule 31(3) of the CAT Rules. As regards this requirement, the task of the Tribunal is first, to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice; and then to determine whether England is clearly or distinctly the appropriate forum: *VTB Capital Plc v Nutritek International Corp* [2012] EWCA Civ 808 at [101].

79. The burden is on the claimant to satisfy the Tribunal that all three requirements are satisfied.

(a) Serious issue to be tried

80. For the purpose of this requirement, the Apple and Google actions can be considered together.

81. The jurisdiction of the Tribunal for the purpose of private civil actions is set out in s. 47A of the CA 1998, of which the relevant parts are as follows:

“(1) A person may make a claim to which this section applies in proceedings before the Tribunal, subject to the provisions of this Act and Tribunal rules.

(2) This section applies to a claim of a kind specified in subsection (3) which a person who has suffered loss or damage may make in civil proceedings brought in any part of the United Kingdom in respect of an infringement decision or an alleged infringement of—

(a) the Chapter I prohibition, [*or*]

(b) the Chapter II prohibition,

(c) *the prohibition in Article 101(1), or*

(d) *the prohibition in Article 102.*

(3) The claims are—

- (a) a claim for damages;
- (b) any other claim for a sum of money;
- (c) in proceedings in England and Wales or Northern Ireland, a claim for an injunction.”

82. The italicised paragraphs in s. 47A(2) were removed (and the “or” in paragraph (a) was inserted) by amendment with effect from 1 January 2021, subject to transitional provisions: the Competition (Amendment etc) (EU Exit) Regulations 2019 (“the 2019 Regulations”), reg 16, interpreted pursuant to Sch 5, para 1 of the European Union (Withdrawal Agreement) Act 2020.

83. The transitional provisions in Sch 4 to the 2019 Regulations (as amended by the Competition (Amendment etc) (EU Exit) Regulations 2020, reg 39) include the following:

“13A In this Part of this Schedule –

...

“EU competition infringement” means an infringement or alleged infringement of –

(a) the prohibition in Article 101(1) of the Treaty on the Functioning of the European Union,

(b) the prohibition in Article 102 of that Treaty,...

...

14(2) Where an EU competition infringement occurs before IP completion day, on or after IP completion day a person may –

(a) continue any claim ... in relation to that infringement in proceedings before a court or tribunal in the United Kingdom,....”

84. The Apple and Google actions both include claims for declarations: see paras 50 and 71 above. Such a claim is not included in the specified claims for which the Tribunal is given jurisdiction under s. 47A(1)-(3). Mr Brealey QC on behalf of the Claimants recognised that a claim seeking only a declaration could not be brought in the Tribunal. However, he submitted that the position was different where such a claim was included in an action along with a claim for an injunction. He said that if the Tribunal granted an injunction it was inherent in that remedy that the defendant was acting contrary to one of the prohibitions in

the CA 1998, and therefore the Tribunal was in a position to declare that the relevant conduct was in breach.

85. I find that submission completely unsustainable. It is no doubt correct that when the Tribunal reaches a decision to grant an injunction or, indeed, to award damages, that will be based on findings that the defendant is in certain respects infringing competition law. Such findings will be set out and explained in the Tribunal's judgment. But that is, in my view, very different from the Tribunal issuing a formal declaration that specified conduct constitutes a breach. A declaration by a court or Tribunal carries particular status, which may well be why the Claimants here are seeking two particular declarations rather than being content with asking for injunctive relief. In any event, while it may be unfortunate that declaratory relief is not included as a remedy available in the Tribunal, I consider that the wording of the statute is clear and that the scope of the Tribunal's jurisdiction cannot be enlarged to determine a claim which is not specified in the governing provision by including in the proceedings a claim which is specified.
86. Accordingly, I find that there is no issue to be tried as regards the claims for the two declarations in the Apple and Google actions. That leaves the claims for injunctions. As noted above, they are based on allegations of infringement of both EU and UK competition law. However, the effect of the transitional provisions set out above is that the jurisdiction of the Tribunal for private claims since 1 January 2021 comprises only breaches (or alleged breaches) of domestic competition law, save that a claim in respect of breach (or alleged breach) of EU competition law that occurred before 1 January 2021 may continue. Accordingly, if the Claimants had sought damages, they could do so in respect of breaches of EU competition law alleged to have occurred up to 31 December 2020. But as I have observed, they have expressly stated that they are not seeking damages. The injunctions are therefore forward looking, and indeed the injunction sought at paragraph (h) of the prayer in the Apple Claim Form is expressly directed at threatened future conduct.
87. It follows that the claims restricting or requiring conduct by the Defendants for the future, and therefore after 31 December 2020, cannot be founded on breach

of EU competition law. There is accordingly no serious issue to be tried in respect of the allegations of such breaches. When this was pointed out to Mr Brealey, he did not seek to resist that conclusion and was content for the actions to proceed on the basis of UK competition law alone. The substantive provisions of the UK law relied on are in effect the same as those of EU competition law, save that the requirement is of an effect on trade within the UK rather than as between EU Member States.

88. Considered therefore as based on allegations of breach of the Chapter I and/or Chapter II prohibitions of the CA 1998, I consider that there is a serious issue to be tried in the claims for injunctions against the US defendants. It would be inappropriate in this judgment to go through the analysis in any detail. The potential restrictive effects on competition should be apparent from the description of the impugned conduct set out above. The definitions of the relevant markets which the Claimants put forward are well arguable, and on that basis there is clearly a seriously arguable case that the Apple and Google US defendants are dominant in those markets. Insofar as some of the conduct impugned in the Google action may be carried out by G3, G4 or G5, I think the Claimants have a real prospect of success in contending that those Google companies were implementing with regard to the UK policies determined by G1 and G2 in the US: cp *Unlocked Ltd v Google Ireland Ltd* [2018] EWHC 1363 (Ch). And although the impugned conduct, including the entry into the relevant agreements, in the Apple action may have taken place in the US, and in the Google action it may have taken place partly in the US and partly in Ireland, I consider that it is well arguable that it was foreseeable in each case that it would have an immediate and substantial effect in the UK (among other places). On that basis, the so-called “qualified effects” test of jurisdiction set out in EU competition law would be satisfied: see *Unlocked*. In my view, the same test applies to determine the application of the Chapter II prohibition in UK competition law by reason of s. 60A CA 1998. The position is less clear as regards the Chapter I prohibition by reason of s. 2(3) CA 1998, but I think that there is at least a serious question to be tried as to whether the relevant agreements were “implemented” in the UK. Finally, given the prominence of both Apple and Android devices in the UK, I think it is clear that the alleged

anti-competitive conduct would have an appreciable effect on trade within the UK.

(b) The jurisdictional “gateways”

89. The Claimants rely in both actions on the same three paragraphs, or ‘gateways’ under PD 6B, para 3.1 to found jurisdiction: para (2) concerning injunctions; para (3) concerning a “necessary or proper party” to a claim for which permission to serve is not required; and para (9) concerning claims in tort.
90. It is axiomatic that if one claim in proceedings satisfies a jurisdictional gateway that is not a ground to permit service of other claims which do not. It is therefore necessary to consider each of the claims in the actions, and for this purpose it is necessary to consider the Apple and Google actions separately.

Gateway 2: injunction

91. Para 3.1(2) is as follows:

“A claim is made for an injunction ordering the defendant to do or refrain from doing an act within the jurisdiction.”

92. Mr Brealey submitted that all the claims for injunction concerned acts within the jurisdiction since the relief was directed at the UK.

The Apple action

93. As presently drafted, although the first three claims for an injunction at (c)-(e) of the prayer are expressed to apply only to the UK, the three further claims at (f)-(h) contain no such limitation but would apply worldwide. Mr Brealey appreciated in the hearing that this was problematic: see *Unlocked*, where a similar problem led the court to hold that a worldwide injunction would not satisfy this gateway. Accordingly, Mr Brealey accepted that these three claims could be amended to insert such a limitation. On that basis the injunction claims will read as follows:

“(c) An order requiring Apple to restore the Fortnite app and the other apps submitted using the Epic 84 Apple Developer Account to the App Store in the UK;

(d) An order preventing Apple from restricting the download of the Epic Games Store on to any Apple device in the UK;

(e) An order requiring Apple to remove the restriction on the use of alternative in-app payment processing solutions for apps distributed through the App Store in the UK;

(f) An order preventing Apple from making access in the UK to the iOS software and/or any other Apple software conditional on the use of the App Store and/or the Apple IAP;

(g) An order requiring Apple to reinstate the Epic 84 Apple Developer Account in respect of the UK;

(h) An order restraining Apple from taking or threatening further action against Epic in respect of the UK consequent on the Fortnite SDU;”

94. The Claimants relied on *Unlockd* to support their contention that, when so limited, gateway 2 was satisfied. In *Unlockd*, the claimant group had developed a software product for incorporation in apps for Android devices. Companies in the group, of which the first claimant was the Australian parent company, therefore entered into agreements with suppliers and developers of apps to incorporate their product. The English claimant had a contract on that basis with Tesco Mobile Ltd, whereas two other subsidiaries in Australia and the US had contracts with, respectively, Australian and American suppliers for incorporation of their software in those countries. When the first claimant was informed by Google that all apps containing the Unlockd product would be removed from the Google Play Store and also from Google’s platform assisting in-app advertising (“AdMob”), the claimants started proceedings against three companies in the Google group (who are also defendants to the Google action here) seeking an injunction and damages. The main issue in the case at the permission stage concerned the claimants’ attempt to obtain worldwide relief that would cover also Google’s conduct affecting the apps in Australia and the US. I held that there was no serious question to be tried that the defendants’ conduct regarding the position in Australia or the US breached EU or UK competition law.

95. As regards gateway 2, the judgment states, at [45]:

“As regards the injunction gateway, it is clear that the acts within the jurisdiction do not include the suspension/refusal of access to the Play Store and AdMob as regards the Boost Dealz app in the US or the flybuys app in Australia. Although I have accepted, and it is indeed now conceded, that the Claimants can obtain jurisdiction over [Google LLC] on the basis of access to the Tesco Mobile app in England and Wales, and their claim for an injunction in that regard, that does not mean that [Google LLC] thereby comes within the jurisdiction of this court for a claim for an injunction which also orders the defendant to do an act elsewhere.”

Accordingly, the battleground at the jurisdiction stage concerned relief as regards Australia and the US, and the Google defendants did not in the end contest the application of the injunction gateway to a claim as regards only the Tesco app in the UK.

96. I nonetheless accept that this gives some slender support to the Claimants’ contention that whereas the acts restrained or required might be initiated in the US, those acts are sufficiently carried through in the UK to come within gateway 2. No other authority was cited on the point, but I recognise that the interpretation of “act within the jurisdiction” in the wording of the gateway may not be straightforward in an age of digital transactions. For reasons set out below, it is unnecessary for me to reach a concluded view on the point.

The Google action

97. In this action also, six claims for an injunction are set out in the prayer of the Claim Form, although as I have observed two of them appear identical: see para 72 above. While four of them are confined at least to conduct concerning only the UK, the claim at paragraph (g) of the prayer is framed in world-wide terms. As with the Apple action, Mr Brealey agreed that this claim should be amended to incorporate a UK limitation and that a clarification to similar effect was appropriate to the claim at paragraph (e). As so amended, the claims would read:

- c. An order requiring Google to restore the Fortnite app to the Google Play Store in the UK;
- d. An order requiring Google to remove the restriction on the use of alternative in-app payment processing solutions for apps distributed through the Google Play Store in the UK;

e. An order requiring Google to cease imposing the Google Play Pre-Install Requirement, or any condition requiring OEMs to give preferential treatment to the Google Play Store as compared to competing app stores, on Android mobile devices supplied in the UK;

f. An order requiring Google to cease interfering with OEMs' ability freely to enter into agreements with Epic in respect of the pre-installation of the Epic Games Store and / or Epic Games App and / or their location on the mobile device for Android mobile devices sold in the UK;

g. An order requiring Google to remove, alternatively amend, the Technical Restrictions to ensure that consumers in the UK can directly download apps / app stores without obstruction, including ensuring specifically that those apps / apps stores are able to operate in the same way as the Google Play Store with respect to app installation, app updates, and access to operating system features;

h. An order requiring Google to remove the restriction on the use of alternative in-app payment processing solutions for apps distributed through the Play Store in the UK;

98. On that basis, the issue under gateway 2 appears to be essentially the same as that discussed above in the context of the Apple action. As explained below, albeit for different reasons, it is unnecessary for me to reach a concluded view on the application of the gateway.

Gateway 3: necessary or proper party

99. Para 3.1(3) is as follows:

“A claim is made against a defendant on whom the claim has been or will be served [otherwise than in reliance on para 3.1] and (a) there is, between the claimant and the defendant a real issue which it is reasonable for the court to try; and (b) the claimant wishes to serve the claim form on another party who is a necessary or proper party to that claim.”

100. As the Claimants recognise, it is first necessary to examine the claim against the so-called ‘anchor’ defendant(s) in isolation. If, on analysis, there is no real issue to be tried against the anchor defendant(s) which it is reasonable for the Tribunal to try, this head of jurisdiction is not made out. The test here is again the ‘reverse summary judgment’ test, as in the application of the first condition for service out: *AK Investment CJSC* at [82].

The Apple action

101. The anchor defendant is A2, an English company. However, the evidence is that A2 provides services to other companies in the Apple group and support to developers of apps in the UK: see para 28 above. It is not a party to the DPLA agreements nor is it suggested that it is responsible for deciding which apps may or may not be supplied through the App Store. I find it difficult on this basis to see that A2 can be liable for any of the breaches of competition law alleged.
102. Mr Brealey pointed out that for the purpose of competition law A1 and A2 are part of the same economic entity. That may be so, but that is not a ground for asserting that any subsidiary of A1 (and given the size of the Apple group worldwide, there may well be very many) is thereby liable for a breach of competition law committed by its parent. Mr Brealey also sought to draw support from the filed directors' report and accounts of A2, of which a copy was provided shortly before the hearing, which show that in the year ended 28 September 2019, A2 had operating costs of £262,350 and turnover of £296,552. Mr Brealey may be right in saying that A2 therefore amounts to a "substantial operation in the UK" (although I have some doubt whether figures of this size qualify as "substantial" in terms of the turnover of the Apple group) and that it gives support to app developers wishing to make their apps available through the App Store. However, I do not see that this can begin to make A2 liable for the impugned conduct.
103. Moreover, it is appropriate to consider the specific claims made as set out in the prayer. Although expressed as injunctions against "Apple", without identifying a legal person, Mr Brealey very properly accepted that the acts sought to be restrained or mandated could be ordered only as against A1 and that the terms of the injunctions should be so understood. It follows, that no relief is sought against A2 at all. In my judgment, there cannot be an issue to be tried in respect of a defendant against whom no relief is claimed.
104. Therefore I find there is no serious issue to be tried as against A2, and it follows that the claim against A1 does not satisfy gateway 3.

The Google action

105. In addition to G5, which is an English company, the Google action can be served on the Irish defendants (G3 and G4) without the need for permission. All three therefore constitute anchor defendants. As explained above, G3 is counterparty to the DDA with E1; G4 is said to be responsible for the distribution of apps through the Google Play Store in the UK; and G5 is said to be responsible for the processing of payment transactions in the UK of purchases through the Google Play Store, including purchases of in-app content.
106. It is necessary to consider the specific claims in order to ascertain whether, in respect of each claim, there is an issue to be tried against one or more of the anchor defendants. This process is not helped by the fact that the injunctions claimed are sought as against “Google”, without identifying the specific legal person intended to be enjoined.
107. As explained above, the Google action alleges breach of the Chapter I and/or Chapter II prohibitions in four distinct respects: (1) as regards the MADAs concluded with OEMs for the inclusion of the “Google Play Pre-Install Requirement”; (2) as regards the DDAs concluded with E1 for the imposition of the “Restrictive Terms”; (3) as regards the way that Android is configured by incorporating the “Technical Restrictions”; and (4) as regards the action taken in August 2020 to remove Fortnite from the Google Play Store. The various injunctions sought in the prayer of the Claim Form correspond to these different claims.
108. I consider first claim (2) for which the remedy sought is the injunction set out in (d) and (h). Although the decision as to what is put in the DDA may be dictated by G1 and/or G2, the counterparty to the DDA with the Claimants as regards apps distributed in the UK is G3. It seems to me that the Claimants therefore have a serious issue to be tried as against G3 on that claim and that, since the G3 is designated the counterparty for the UK, it is reasonable for the Tribunal to try that claim.

109. As regards claim (4), G4 is responsible for distribution of apps through the Google Play Store in the UK, and it is alleged that it was therefore also involved in implementing the decision to remove Fortnite from the Google Play Store. On that basis, there is a serious issue to be tried against it on that claim which it is reasonable for the Tribunal to try: see *Media Saturn Holding GmbH v Toshiba Information Systems (UK) Ltd* [2019] EWHC 1095 (Ch) at [155]. I should add, that since the removal of Fortnite from the Google Play Store was based on breach of the terms of the DDA that are the subject of claim (2), I consider that there is a serious issue to be tried against G3 also on claim (4), which is linked to injunction (c).
110. In the light of my findings regarding G3 and G4, it is unnecessary to consider separately the position of G5 as an anchor defendant.
111. Claim (1) is linked to the injunctions sought in (e) and (f), which address restrictions under the MADAs. The counterparty to the MADAs is G2 and there is no basis to assert that any of G3-G5 have anything to do with those agreements. I do not see how there can be a serious issue to be tried as against any of them as regards the alleged breaches of competition law concerning the terms of the MADAs.
112. Finally, claim (3) concerning the “Technical Restrictions” is linked to the injunction sought in (g). On the Claimants’ evidence, it seems to me that configuration of the Android OS similarly has nothing to do with any of G3-G5. It follows that there is no issue to be tried as against any of the anchor defendants on that claim.
113. Are G1 and G2 necessary or proper parties to claims (2) and (4)? In my judgment, they are at least proper parties, and arguably also necessary parties, to those claims. In respectful agreement with Marcus Smith J in *Microsoft Mobile OY v Sony Europe* [2017] EWHC 374 (Ch) at [138], I find helpful the summary of the legal test for “necessary or proper party” set out in Dicey, Morris & Collins, *The Conflict of Laws* (15th edn) at para 11-165:

“Y, who is out of England, must be either a necessary or proper party to the proceedings. If Y is a proper party it is not also a requirement that he be a

necessary party; but if adding Y is likely in practice to achieve no potential advantage for the claimant, it would not ordinarily be a proper case for service out of the jurisdiction. The question whether Y is a proper party to proceedings against X depends on this: supposing both X and Y had been in England, would they both have been proper parties to the proceedings? If they would, and only one of them, X, is in this country, then Y is a proper party and permission may be given to serve him out of the jurisdiction. Y will be a proper party if the claims against X and Y involve one investigation. It is not necessary that the alleged liability of Y be joint and several with that of X.”

114. If, as appears likely, G1 and G2 were responsible for deciding the terms of the DDA, the information as to how those terms came about and their rationale will come from those defendants; and it appears that G1 and/or G2 took the decision to remove Fortnite from the Google Play Store worldwide. In any event, if they were in England, I have no doubt that G1 and G2 could have been properly sued on this claim.
115. I find that gateway 3 is therefore satisfied for the claims based on the DDA and for removal of Fortnite from the Google Play Store, which support the injunctions sought at (c) and (d)/(h), but not for the other claims in this action.

Gateway 9: tort

116. Para 3.1(9) is as follows:
- “A claim is made in tort where –
- (a) damage was sustained, or will be sustained within the jurisdiction; or
 - (b) damage which has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction.”
117. The tort gateway therefore encompasses two alternatives. Both are framed in terms of the damage that has been or will be sustained. It is somewhat unusual to found jurisdiction on that gateway in proceedings where no damages are claimed. However, I do not regard that as an obstacle: although the permissible claims are only for injunctive relief, if those injunctions seek to restrain tortious conduct which causes damage, there is no reason, in my view, why it is not open to the Claimants to rely on the tort gateway.
118. As regards both actions, Mr Brealey bases the Claimants’ case primarily on limb (a), submitting that it is clear that the Claimants will suffer significant damage

in England. He relied on the majority decision of the Court of Appeal in *FS Cairo (Nile Plaza) LLC v Brownlie* [2020] EWCA Civ 996 (“*Brownlie II*”) for the following propositions:

- “(i) The word “damage” should be construed in a common-sense manner.
- (ii) There is no requirement that the damage suffered in this jurisdiction is the only damage suffered. There may be other “significant damage” in another country, and the courts in that country may also have jurisdiction; that is not a problem: on the contrary, it is an inevitable corollary of the global economy.
- (iii) There is no need to import the “legalistic niceties” of direct and indirect damage from the case-law on the application of Article 7(2) of the Brussels Regulation.”

Brownlie II is on appeal to the Supreme Court, whose decision is pending, but at the time of this judgment the decision of the Court of Appeal is binding upon me.

119. Further, as regards the place where the loss is suffered, the Claimants rely on what was said in *Apple Retail UK Ltd v Qualcomm (UK) Ltd* [2018] EWHC 1199 (Pat). Among the claims advanced in those proceedings was an allegation that the second defendant (a US company) had abused its dominant position in breach of the Chapter II prohibition and Art 102 TFEU (see at [16]). The competition claim against the second defendant concerned an alleged overcharge for goods supplied. In addressing the application of gateway 9(a) to this claim, Morgan J said this:

“97. The First Claimant is incorporated in England and Wales. The Second Claimant is incorporated in the Republic of Ireland. If the First Claimant claims as a buyer who has paid an overcharge which it has not passed on, then the First Claimant can say that it has suffered a loss in this jurisdiction. If the First Claimant claims as a seller who has passed on an overcharge but has lost sales in this jurisdiction, then it can say that it has suffered a loss in this jurisdiction. The position of the Second Claimant is to be analysed in the same way but the difference will be that the Second Claimant as a buyer pays an overcharge in the Republic of Ireland but it may wish to say that it passes on the overcharge and loses sales in the market in this jurisdiction.

...

99. As to where any such losses might be made, if the loss is paying an overcharge when buying the goods, the loss would seem to be made where the goods are bought. If the loss comes from reduced sales then the loss would seem to be in the market where the seller suffers the loss of sales.”

The Apple action

120. As regards the factual basis for application of gateway 9(a), the Claimants submit, as set out in counsel’s skeleton argument:

“Significant damage will be suffered by Epic consequent on Apple’s unlawful conduct: (i) in the place(s) where fewer consumers download / use Epic apps on iOS devices than would have been the case but for that conduct; (ii) in the place(s) where fewer consumers purchase digital in-app content within those apps than would have been the case but for that conduct; (iii) in the place(s) where third party developers enter into fewer agreements to license the Unreal Engine than would have been the case but for that conduct; (iv) in the place(s) where, but for that conduct, third party developers would have entered into agreements to distribute their iOS apps through the alternative app store developed by Epic; (v) in the place(s) where consumers make purchases of digital in-app content on which Epic has incurred / continues to incur excessively high fees; (vi) in the place(s) where developers and consumers perceive that Epic is less trustworthy and / or reliable; (vii) in the place(s) where the preceding damage manifests itself in reduced revenue / profit for Epic.

121. As regards (vii) in the above list, the Claimants accept that the revenues or royalties flow to E1 or E2 outside England. As regards (i)-(vi), the Claimants submit that the relevant places include England.
122. Although the quoted passage refers to “Epic” in general terms, it is appropriate to consider which “Epic” Claimant(s) will suffer the loss. Moreover, as explained above, the Apple action alleges breaches of the Chapter I and Chapter II prohibition in several distinct respects. It is therefore necessary to consider which claim(s) cause which damage (although for that purpose the claims under Chapter I and Chapter II can be considered together). In summary, the Claimants allege breaches of competition law as a result of: (1) the restriction under the DPLA which prevents the distribution of iOS apps other than through the App Store; (2) the restriction under the DPLA which prevent the use of any payment processing system for in-app purchases other than the Apple IAP; (3) the action taken in August 2020 to remove Fortnite from the App Store and terminate the Epic 84 Developer Account; and (4) the alleged threat to terminate all Epic Apple Developer Accounts. However, (3)-(4) were the result of the introduction into Fortnite of the Epic direct payment system and therefore were effectively steps taken to enforce the restriction in (2). These different claims are in turn linked to the different injunctions which are sought.

123. The restriction which founds claim (1) prevents the Epic Games Store from being made available on Apple mobile devices. The Epic Games Store is a platform that enables the purchase of games made by other app developers as well as those of E1. I think that the Claimants have a well arguable case that if the Epic Games Store was available on Apple devices, more game developers in the UK would seek to have their games available on this Epic product. The revenue (by way of commission) lost as a result is not lost in the UK, but as those sales are made by E1 is losing part of this market in the UK.
124. The restriction which founds claim (2) means that users of Epic games who purchase in-app content have to use the Apple payment system not the Epic direct payment system. On the Claimants' evidence, if the Epic direct payment system could be used, the prices to purchasers of such in-app content would be cheaper because Epic would pass on the saving in commission it otherwise has to pay to Apple. Again, it is well arguable that if in-app content was cheaper, more users would buy it, and that would also make the Epic games themselves more attractive. It follows that by reason of this restriction, the Epic group loses market share and sales of in-app content in the UK. I think it is not straightforward to determine whether that loss is properly regarded as the loss of E1 or E2 (the company which received payment from users in the UK for such direct sales). In the end, I do not think this matters. There is also, as the Claimants point out, damage to the reputation and therefore goodwill of "Epic" and it seems to me that such loss constitutes damage to E1.
125. The conduct which founds claim (3), while linked to claim (2), is alleged to constitute a distinct abuse of A1's alleged dominant position. I think the removal of Fortnite from the App Store as regards the UK is likely to lead to a loss of sales of in-app content and damage to Epic's reputation in the UK.
126. The position as regards Unreal Engine merits separate consideration. A large part of the work on the Unreal Engine is carried out by E3 in England. Accordingly, the alleged threat to cease supplying access to iOS software necessary for the development of Unreal Engine undoubtedly would cause significant damage to E3 in England. That software is supplied under the DPLA with A1 held by E2. But as Unreal Engine is also developed by E1, the damage

to development work by E3 would harm E1's product which, as I understand it, E1 supplies to app developers in the UK. If indirect damage is sufficient for gateway 9(a), then it seems E3 would suffer damage in England and E1 would suffer damage to its product in England. I think they have a good argument that this constitutes significant damage in England.

127. I should add that the Claimants submitted in the alternative, that some of their claims also satisfy gateway 9(b), on the basis that the damage they suffer or will suffer results from acts committed within the jurisdiction. They say that this is the corollary of their argument under gateway 2, which depended on each of the acts sought to be restrained being "an act within the jurisdiction". As indicated above, I find that argument problematic, and in view of my finding on gateway 9(a) I think it is unnecessary to say more in respect of gateway 9(b).

The Google action

128. The Claimants' argument in this action for the application of gateway 9 mirrors that advanced in the Apple action. The skeleton argument states:

"37. Significant damage will be suffered by Epic consequent on Google's unlawful conduct in the same places as for Apple, save that the Unreal Engine is not a relevant consideration. Further, significant damage will also be suffered (i) in the place(s) where consumers purchase / use Android mobile devices onto which the Google Play Store is pre-installed in a prominent position; and (ii) in the place(s) where consumers use Android mobile devices to which the unlawful technical restrictions apply.

38. Again, save for the place(s) where the other forms of damage manifest in reduced revenue / profit for Epic (which do not include the UK), all of these places include the UK...."

129. Again, the question of where damage is or will be suffered must be considered for each of the different claims and in respect of the different Google Defendants.
130. As regards the claim in respect of the Google Pre-Install Requirements in the MADAs concluded with OEMs, that is alleged to have the effect of restricting the potential attraction of the Epic Games Store to users of Android devices in the UK. It follows that loss of custom of UK developers of games apps for the Epic Games Store will arise in a similar way to the loss alleged in the Apple

action. Although it seems that the revenue loss does not occur to any of the Claimants in the UK, the loss of custom is in the UK which, it seems to me, satisfies the requirement of the gateway: cp para 122 above. As regards the claims in respect of the terms of the DDA and the removal of Fortnite from the Google Play Store, those are equivalent to the restrictions under the DPLA and similar conduct in respect of the App Store impugned in the Apple action. The same reasoning as regards the place of loss therefore applies. Finally as regards the Technical Restrictions, they make it difficult to download the Epic Games App directly onto Android devices which would enable users to circumvent the Google Play Store: in terms of higher prices for in-app content and therefore reduced custom in the UK, the position is the same as for the “Restrictive Terms”.

131. Accordingly, I find on the case as presented on behalf of the Claimants and the evidence before me that the Claimants have shown a good arguable case that their various claims fall within gateway 9(a).

(c) Forum conveniens

132. The governing approach to determination of whether England is clearly the appropriate forum derives from Lord Goff’s classic speech in *The Spiliada* [1987] AC 460. Lord Goff there emphasised that the fundamental consideration is the interests of all the parties and the ends of justice. As numerous judgments have subsequently shown, a range of factors may therefore be taken into account, including (i) the residence or place of business of the parties; (ii) the location of likely witnesses; (iii) the existence of parallel proceedings; (iv) the applicable law (v) the cost and delay; (vi) a legitimate personal or juridical advantage; and (vii) the jurisdictional gateway relied on. See note 6.37.16 in *Civil Procedure 2020 (the “White Book”)*, However, this is not an exhaustive list, and the relevance and importance of any factor will vary significantly from one case to another in the “evaluative or balancing exercise” which the court or tribunal has to carry out: per Lord Neuberger in *VTB Capital* at [97].

The Apple action

133. Since I have concluded that there is no serious issue to be tried as against A2, the effective defendant is A1 which is based in the United States. The main claimant is E1, which is also based in the United States. I recognise that E3 is an English company but its involvement in the dispute is limited to the effect on the Unreal Engine if A1 were to carry out the alleged threat to terminate other Apple developer accounts held by companies in the Epic group, and more specifically the account held by E2. Such conduct would affect a number of Epic subsidiaries in different parts of the world: see para 38 above.
134. The substance of the case is a dispute between two large American companies. Mr Brealey realistically accepted that the factual witnesses would virtually all be in the United States. While some evidence can perhaps be given remotely, for extensive and detailed evidence and cross-examination the witnesses can be expected to attend the hearing once that again becomes possible (as it should be, by the time this action would come to trial). In my view, this factor is less significant as regards A1. If a multinational company trades on a global scale, it can expect to have to bring evidence to defend its conduct in courts around the world: see e.g. the *Unlocked* case; *Streetmap.EU Ltd v Google Inc* [2016] EWHC 253 (Ch). But in the present case, the Claimants' witnesses would also come from the US.⁶ I note that in *VTB Capital* at [62], Lord Mance described the location of witnesses as "at the core of the question of appropriate forum".
135. Pursuant to their obligation of full and frank disclosure, the Claimants rightly drew the Tribunal's attention to the fact that there are antitrust proceedings on foot in which E1 is claiming against A1 in the US District Court for the Northern District of California. Those proceedings were started on 13 August 2020, and include a claim for an injunction ordering the reinstatement of Fortnite to the App Store and restraining A1 from suspending or terminating any Apple developer account associated with an affiliate of E1, including expressly in relation to Unreal Engine. The overlap with the present action is sufficiently demonstrated by the judgment of the US District Court of 9 October 2020 on

⁶ While there might be some evidence from A3 in England regarding the effect on it, I find it hard to imagine that this would be controversial, and it would certainly be peripheral.

Epic’s application for a preliminary (i.e. interim) injunction, in which Judge Gonzalez Rogers stated at the outset that:

“Epic Games has strong arguments regarding Apple’s exclusive distribution through the iOS App Store, and the in-app purchase (“IAP”) system through which Apple takes 30% of certain IAP payments”.

136. In my view, that is a significant factor in favour of the US as the appropriate forum. It is clear from even a cursory reading of the judgment of 9 October 2020, and hardly surprising, that many of the same issues of substance which arise under UK competition law arise under US antitrust law: e.g. what is the definition of the relevant market or market; and to what extent A1’s impugned conduct affects competition or can be justified? Moreover, there appears to be a substantial overlap in the relief being sought. I think it is important to look at the reality of the issues likely to be in dispute and to avoid viewing them purely in the clothing of English statutory provisions: see the observations of the Court of Appeal in *Huawei Technologies Co Ltd v Conversant Wireless Licensing SARL* [2019] EWCA Civ 38 at [32]-[35], referring to its earlier judgment in *Harrods Buenos Aires* [1992] Ch 72. The factual and economic evidence, including expert economic evidence, that would have to be given on such issues in the Apple action under UK competition law therefore substantially overlaps with the evidence that will be given in the US proceedings. The additional cost if this action proceeded in the Tribunal in addition to the US proceedings is accordingly, in my view, very significant even allowing for the cost of presenting expert evidence of English law to the US court.

137. It is of course the case that the Apple action is based on UK competition law. Ms Morony says in her witness statement that she has been told by the Claimants’ US lawyers that for the US court to consider a claim based on the tort of statutory duty under English law would:

“involve significant practical difficulties, including the need for extensive expert evidence on English and EU competition law.”

As explained, the claim under EU competition law is not now available in these proceedings, so if it can be pursued at all in California that indeed gives the Claimants an advantage there. But as regards English law, while no doubt

expert evidence on English competition law would be required, I do not see why this presents a problem. I have no doubt that the US Federal court is well able to receive evidence on foreign law. And since the law here is in the same language, and the US is not only a common law country but has a well-developed jurisprudence in antitrust/competition cases, I do not see why a US Federal judge would have difficulties in understanding and applying UK competition law to A1's conduct as regards the UK.

138. Mr Brealey urged that the particular reason why England was the appropriate forum was that the Apple action could be heard here in this Tribunal, which is specifically tasked to consider allegations of UK competition law. Mr Brealey said in his oral submissions:

“We have a specialist tribunal charged with applying the Competition Act, protecting competition and indirectly protecting UK consumers. If a multinational company does breach laws of this country, which are there for public policy reasons, there is, in my submission, a central focus that the dispute should be heard in this country.”

139. I accept that the nature and objective of UK competition law is a relevant and important factor. The law reflects a public policy to protect the interests of UK consumers and businesses against anti-competitive conduct and arrangements. Nothing that I say in this judgment concerns the right of the UK competition authority to take action with respect to the effects on consumers and the relevant markets within the UK. Although this is a private action, I bear in mind that such private enforcement of the law can complement public enforcement. If it was the Claimants' case that their claims under UK competition law were not justiciable in the US or that the US courts would not grant injunctive relief extending to the UK, that would in my judgment be a powerful factor in favour of holding that this country is clearly or distinctly the appropriate forum. However, the Claimants are advised by a leading US law firm and on Ms Morony's evidence quoted above that is not the position. If it were, there would be no question of adducing expert evidence on EU and UK law in the US court: that court would not entertain a case based on such laws at all.

140. Finally, there is the question of the applicable grounds of jurisdiction. As regards the injunction gateway, while there may be acts in the UK, they flow

directly from acts in the US since in a digital world the territorial location of the “act” is a somewhat anachronistic concept. As regards the tort gateway, I consider that a neutral factor here given the international aspect of A1’s conduct.

141. In short, in balancing these various factors I consider that the US is an appropriate forum for this dispute. And I am far from persuaded that England (or the UK, since the CAT is a UK tribunal) is clearly or distinctly the more appropriate forum. I reach this conclusion without the need to consider the implications of the exclusive jurisdiction clause in the DPLA.

The Google action

142. Many of the considerations as regards forum conveniens as regards the Google action mirror those that apply to the Apple action. As regards factual witnesses, I can see that some might come from G3 and/or G4 in Ireland, but I expect that in this action also the main factual and technical evidence on both sides would come from the US.
143. There are similarly pending proceedings commenced on 13 August 2020 by E1 in the US District Court for the Northern District of California. The defendants to those proceedings include G2, G3 and G4. E1 is seeking injunctive relief which is expressed in broad terms but appears to encompass the relief claimed in the Google action and would cover Google’s conduct internationally (excluding China). The defendants have filed a motion to dismiss the complaint. It appears that there has not so far been any judicial ruling in those proceedings.
144. However, there is in my view one notable difference between the Google action and the Apple action. On my findings above, in the Google action the Claimants have a serious issue to be tried as against at least G3 and G4, who are the Irish anchor defendants, as regards several of the claims. Since no permission is required to serve them, the action can proceed against them in this Tribunal. On that basis, I have also found that G1 and G2 are proper parties to those claims.
145. In my judgment, in balancing the various factors this makes a significant difference. Refusing permission to serve the action on G1 and G2 will not mean

that the proceedings here go no further. On the contrary, the result would be that the action as regards those claims for which there is a real issue to be tried against at least G3-G4 (and possibly G5 which is in any event in UK) the action will proceed, but without all the proper parties to that action. And I anticipate that as part of their defence, G3-G5 may in any event need to rely on evidence from the US.

146. However, I determined above that as regards the distinct claims in the action as regards the Google Play Pre-Install Requirement in the MADAs and as regards the Technical Restrictions, there is no serious issue to be tried as against any of G3-G5. It follows, that this factor does not apply in respect of those claims.
147. On the basis of those considerations, I find that England (or the UK) would be clearly or distinctly the appropriate forum for trial of the claims concerning the Restrictive Terms in the DDA and the removal of Fortnite from the Google Play Store as regards the UK. I have considered whether on that basis England should be regarded as the appropriate forum for all the claims in the action. In my view, that would not here be the right conclusion. The claims as regards the MADAs and the Technical Restrictions are wholly distinct and while there may well be some evidence that applies to all the claims, those two claims raise different and substantial issues and will involve significant additional evidence. Taking that into account, I see no good ground for finding that this is clearly or distinctly the appropriate forum for trial of those claims just because they are based on alleged breach of the same statutory prohibitions and are included in the same claim form.
148. What is the effect of the exclusive jurisdiction clause in the DDA? To the extent that the parties had agreed that the dispute should be subject to the court of another jurisdiction, I think that would clearly be very relevant to the question of forum conveniens. Although the Claimants rightly drew my attention to this point, it involves in the first place determination whether, under California law as the proper law of the agreement, the clause applies to these competition law claims. In their skeleton argument, counsel referred to the approach adopted by Hamblen J (as he then was) in *Astra-Zeneca UK Ltd v Albemarle International Corp* [2010]1EWHC 1028 (Comm), having regard to the observations of Rix

LJ in the case of *Konkola Copper Mines plc v Coromin* [2006] EWCA Civ 5.

The judge said, at [39]:

“I respectfully agree with the intuitive approach supported by Rix LJ. Although it is ultimately always for the claimant to show that it is a proper case for service out, where this is disputed by the defendant on a specific ground such as the existence of a jurisdiction agreement which it is alleged obliges the claimant to bring a claim before the courts of another country, it is for him to establish the agreement, its scope, applicability and validity rather than for the claimant to prove a negative. Nor do I consider that a different approach is appropriate depending on whether the case concerns common law jurisdiction or statutory jurisdiction.”

149. Consistent with that approach, I shall not consider in this judgment the applicability of the jurisdiction clause. If G1 and/or G2 apply to set aside permission to serve and seek to rely on the clause, it will be for them establish its scope and application, and for the Tribunal then to determine whether it leads to permission to serve being set aside.

K. CONCLUSION

150. For the reasons set out in this judgment:

- (a) In the Apple action, the application for permission to serve the proceedings on A1 out of the jurisdiction is refused.
- (b) In the Google action, the application for permission to serve the proceedings on G1 and G2 out of the jurisdiction is granted for the claims for breach of the Chapter I and Chapter II prohibitions under the CA 1998 as regards the alleged “Restrictive Terms” in the DDA and the removal of Fortnite from the Google Play Store, and the injunctions claimed at paras (c), (d) and (h) of the prayer to the Claim Form. Permission is refused as regards the other claims made.

The Honourable Mr Justice Roth
President

Charles Dhanowa O.B.E., Q.C. (*Hon*)
Registrar

Date: 22 February 2021