IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1572/7/7/22 & 1582/7/7/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Friday 10th May 2024

Before:

The Honourable Justice Marcus Smith
John Alty
Dr Maria Maher

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Proposed Class Representative

Ad Tech Collective Action LLP

v

Proposed Defendants

Alphabet Inc. and others

A P P E A R AN C E S

Robert O'Donoghue KC, Gerry Facenna KC, Julian Gregory, Nikolaus Grubeck & Greg Adey (Instructed by Humphries Kerstetter LLP & Hausfeld & Co. LLP) On behalf of Ad Tech Collective Action LLP

Meredith Pickford KC, Conall Patton KC, Natasha Simonsen and Warren Fitt (Instructed by Herbert Smith Freehills LLP) On behalf of Alphabet

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Friday, 10th May 2024

(10.30 am)

Submissions on behalf of PROPOSED DEFENDANTS (cont.)

MR JUSTICE MARCUS SMITH: Mr Pickford, good morning.

MR PICKFORD: Good morning. So continuing where we left off yesterday afternoon, we were dealing with the issue of a structural economics of auction data simulation model. I just have a few concluding points on that before moving on to the next model.

MR JUSTICE MARCUS SMITH: Yes.

MR PICKFORD: So the first of those is I made reference to the Umbrella Interchange fee case but I did not actually take the tribunal to it. I think it would be helpful to go to two paragraphs of the case. It is to be found in the authorities bundle volume 6 at tab 138. I am going to go to page 7711, paragraph 45.

DR MAHER: Can you give that reference again?

MR PICKFORD: Yes, of course. The reference is volume 6, tab 138, page 7711. I can see quizzical faces.

DR MAHER: Which tab is it in the bundle?

MR PICKFORD: It is in tab 138.

MR JUSTICE MARCUS SMITH: I think the problem is finding the right bundle. Once you have the right bundle you are ...

DR MAHER: 136?

MR PICKFORD: 138.

DR MAHER: Page?

MR PICKFORD: 7711. If I could ask the tribunal, to read paragraphs 45 and 46 on what is said about the use of simulation models in that case. What we say is those

comments are of single applicability. They are a warning in relation to simulation models that it can be very hard to replicate real world conditions and that the Black Box nature of the model may make it very hard for the tribunal ultimately to make use of it at trial. That is a point we say carries across --

MR JUSTICE MARCUS SMITH: I think you are over-reading what is said there. I quite take the point that simulation models are complex, but I am pretty certain it is clear from the introductory part of the judgment and absolutely clear from the submissions that the simulation models were entirely half baked in the sense that they let us have a simulation model and that was it.

Now when one is laying down directions for a trial that is going ahead, and this was I think our second or possibly even third time of trying to actually manage this case, having a half baked simulation model was really not acceptable, and no-one particularly pushed back on that.

The question now is a rather different one, because we are here at the very outset of the process, and I am just not sure that the Black Box point has traction, given that we can actually work out how the simulation model is controlled and what goes into it and what goes out of it, and the party should be under no illusions that if this case goes ahead and if a simulation model is the methodology that is used -- those are both big ifs -- the tribunal will be rolling up its sleeves and being pretty prescriptive about how that model works and what the tribunal is told about it and what is agreed between the parties.

So I think you should read anything that is said, by us at least, about simulation models with a very clear sense that we will not be allowing the parties a free for all to sculpt whatever model they want. We are an expert tribunal with an economist on the panel precisely so that we can control the process and that is what we will do if this case

were to go ahead.

MR PICKFORD: That's well understood, sir.

If I might just then complete my submissions on this point just by being slightly more concrete about the challenges, because we had yesterday quite a high level abstract discussion about challenges and it might be helpful just to make that slightly more concrete in terms of the particular things that we say are going to be challenges.

MR JUSTICE MARCUS SMITH: Yes.

MR PICKFORD: That may -- whether or not the tribunal certifies the case and allows a simulation model, it will still hopefully be helpful in terms of future case management.

MR JUSTICE MARCUS SMITH: Absolutely.

MR PICKFORD: So if one is to compare auction outcomes, which is what the simulation model is all about -- it is saying let us look at auction outcomes under this version of the world versus this version of the world, and each of those is modelled mathematically -- if you are going to do that, in an ideal world you would know the actual valuations of the people who are bidding, the participants, because that will affect what they bid.

Obviously we don't know that in an ideal world because that's secret information to them. So the first thing we need to do is to back out the participants' valuations by observing the outcomes in an actual auction, and then we will use what we back out from that to try to estimate the outcomes under a different auction structure. That is the essence of what the model is going to seek to do, if it is going to do anything.

We say the first point is that even if we knew the true valuations of participants, that would be a very difficult thing to do, because you need to estimate how participants are going to bid, and that's relatively easy to do in a second price auction because, as we discussed yesterday, you simply assume that they bid their true valuation. It is

much, much harder to do in a first price auction because you have to work out how they're going to approach the issue of anticipating what other people in the auction are going to be doing, because they are not only trying to win it themselves, but they are trying to win it at the lowest possible price that they can. So they don't want to overbid to do so. So that's the first point.

Secondly, since we don't know anyone's true valuations we are going to have to estimate them, as I said, and as Mr Matthew explains, is going to be very complicated and it is going to be data intensive.

The difficulty that arises there is that in terms of the sorts of data that you might think that you would need for that we certainly don't have that data. So Mr Kornacki's witness statement sets out what kind of data Google doesn't have and it gives an explanation of some of the data sets it has provided, for example, to the FCA, etc. He explains that we don't know relevant bidders' bids for the header bidding world because we are not involved in header bidding, and Dr Latham accepts that he is going to need some data on bids made through SSPs other than Google, and because those are SSPs other than Google, we don't have that kind of data. So that's one problem.

MR JUSTICE MARCUS SMITH: Okay. Let's look at this problem and unpack it a little bit and see what its implications are. So it is really neither party has the data, but the data is accepted by both parties to be material, possibly highly material. That is the problem, isn't it?

MR PICKFORD: To the extent that anyone -- yes, yes.

MR JUSTICE MARCUS SMITH: It may be that the solution is you go to a third party, but let's assume that that's not possible either. Let's assume that the data is just not in any sensible way capable of being produced. Now what are the implications of that?

Are you saying that you simply have to say "We can't try this case, because the data isn't there"?

MR PICKFORD: Well, if this --this of course, is not the only methodology on the table.

MR JUSTICE MARCUS SMITH: Okay.

MR PICKFORD: So one of the implications might be, as it was in Umbrella Interchange -- I take the point for different reasons -- but in Umbrella Interchange the order that was made ultimately was “this case is going to go ahead but there are certain approaches that are not going to go ahead and one of them that isn't going to go ahead is simulation modelling”. It will have to be something else. So that is one possibility. That's one way through.

MR JUSTICE MARCUS SMITH: So your response is put a bullet through the simulation model and try something else, but you are not particularly keen on anything else either.

MR PICKFORD: No. On gross price effect that is true. I mean, to be very clear, I haven't come today to expect to say to you on take-rate there is no way that one can grapple with those issues.

Our problem is that the gross price effect is something that -- and the idea that it caused the kind of damage that it said it caused is something that is new to this case and it is very, very hard, we say, to actually grapple with properly, both because of the difficulty in understanding the underlying theory, and I am not going to repeat my submissions on that, and then how that translates through to a workable model.

I mean, my submission is there is a genuine difficulty with this part of the case.

MR JUSTICE MARCUS SMITH: Okay.

MR PICKFORD: The tribunal may or may not accept that, but that's my submission.

MR JUSTICE MARCUS SMITH: It may be that we need to be much clearer about the

inter-relationship between the arguability case and the Microsoft Pro-Sys question. Let me just put out what I think they could so that you can tell me I am wrong, because it is quite important I think for the thrust of your submissions.

If one has got a case which is properly arguable in the sense that it cannot be struck out looking at the pleadings alone, which is what one does, the case ought to go to trial. What then, one asks, is the point of the Microsoft Pro-Sys test? It is not to act as a filter preventing a case going to trial. My understanding, and I am putting this down there so that you can tell me I am wrong, my understanding of Microsoft Pro-Sys is to ensure that come day one of a trial that is going to happen, we don't have a car crash of an untriable case. We have a case that is triable, where everybody knows what they are doing, and where it runs to timetable and to cost.

If I can draw from my own history, many years ago I was junior counsel in the Sphere Drake litigation and I think we could probably have done with a Microsoft Pro-Sys there, because we started with an eight week trial estimation, we bumped it up to 12, then moved to 18. 54 weeks later we finished the trial. Now that was case management which was not present.

Now I don't know, looking back, how we could have got a better idea on the handling of this case, but that's what we are talking about. We are not talking about do we kill the case or not, because that's the arguability question. We are talking about how do we try it?

So the idea that one goes through the various methodologies and puts a bullet through each one and says "Well, there we go. Can't do it", isn't an outcome that is acceptable for the Microsoft Pro-Sys stage, because it is axiomatic that no case that is properly arguable should fail for want of evidence. We don't allow that to happen in any court in this jurisdiction for very good reason, because evidence is elusive and cases have

got to be tried on the basis of evidence that is produced, and if there is a gap then the court copes with it. It may be unsatisfactory. It may result in an outcome that is divergent from the strict truth, given perfect information, but that's what courts do.

All we are doing here is trying to work out the best way to try a case that, because it has passed the arguability test, ought to be tried. I have seen the two stages in that way.

Now if you want to say that Microsoft Pro-Sys is doing something more than that and is acting as a second filter to the elimination of a case so that it doesn't go to trial, I think now is your time because that's a very important difference between how I am putting my understanding and how you may be putting your understanding. I don't know how far there is a divergence, but if there is we obviously need to hear your submissions on that.

MR PICKFORD: That's very helpful, sir. I think there is a very large degree of agreement and a qualification which means there is some degree of divergence.

So for our part we would say that the Microsoft Pro-Sys test, the blueprint approach, has two aspects to it. A very important aspect to it is the point that you have just articulated, sir, which is ensuring that you get to a trial that works. There is, however, the qualification. To that extent almost everything you said I agree with. The qualification is that it is incumbent, we say, on the PCR to articulate a methodology that is going to work.

Now, of course, there will be a very strong desire from the tribunal to ensure that the court can ultimately hear the case, but that doesn't -- what that doesn't mean is that the first go, for example, that any PCR comes to with this tribunal we say "Well, okay. We are going to certify that. It can't be a road block, so we must go on and deal with it through case management".

There may be some cases, and it depends obviously on the case, where the PCR has not given it sufficient thought and where they have not come up with a methodology that looks like it is going to work. In those cases the solution is not to draw stumps and say "We end the case here". It is to send the PCR back to give it some more thought and say "Well, okay. I am afraid those methodologies didn't work. We obviously want to hear your case. You are going to have to give it further thought and come back with one that does."

That is the qualification. In some cases it can act as a pause for getting through the barrier.

MR JUSTICE MARCUS SMITH: That's entirely fair. Mr O'Donoghue I think is the world expert where that happened, because the only time it happened was in Gormsen. We did send it back and it took a year to reframe, but it is quite important to understand the nature of the problems. First time round -- Mr O'Donoghue was not counsel then, so I will make it clear that the problems we had with the first effort was yes, based upon methodology, but it is because of the deficiencies in the way the claim was articulated in that it had a healthy element of "We want a claim and account for profits". At least that's what it seems to us. I am telling you nothing new. It is all in our first judgment as to why we refused to certify.

There we said you can't have a proper methodology to quantify something which is not actually in law recoverable. There was that problem in that the methodology appeared to be directed to the wrong set of goals. So actually we sent the PCR back for second go on both elements of the case, both the bit where the law had been over-egged, if I can put it that way, so that a recovery that was not known in law was being pressed with a methodology which tried to compute that which was not recoverable.

So yes, it was wrong on both barrels, and because it was a sort of combined strike out / Microsoft Pro-Sys issue we gave them a second bite of the cherry.

Had the response been less helpful than it was, if the PCR had said "We have done enough. We are not doing what you say", then we would have refused to certify and the PCR would have taken their chances in the Court of Appeal. As it is we did certify and the Respondents have taken their chance in the Court of Appeal. That is the way these things go, but that's how I think Microsoft Pro-Sys works in that it is absolutely a conversation or a dialogue between the tribunal and the class representative to get something manageable, and clearly you are right it is not for the Respondent to be obliged to assist the class representative in framing their case.

The Respondent can, as you have done, sit back and take shots. Absolutely fine. It results in a stronger process, but we do have to bear in mind that there is a reason we don't try cases on day one. That's because all of the interlocutory steps that we are undertaking between certification and trial are intended to have a purpose, which is to make the case triable, and really I think what Microsoft Pro-Sys is about is can we envision the process by which we with a high degree of confidence get to a case which on trial one is tried to time, to budget and in accordance with both sides' expectations and we don't end up with a Sphere Drake situation where a manageable 12-week trial turns into a nightmare year long monster?

I think we are very closely aligned in how we are describing it. It is just the point at which you say you have not done enough, that's where we are interested.

MR PICKFORD: Yes.

MR JUSTICE MARCUS SMITH: Because you are saying there is real benefit in sending Mr O'Donoghue away to try again, and I think what we are pushing back on is, well, is that right? Have we got in Dr Latham's material enough clarity so that we

can visualise the process going forward so that we do end up with a triable case on day one of the actual trial? I think that's the battle line.

MR PICKFORD: Sir, that's extremely helpful. My response I think is that the essential problem that we identify is that the case as we understand it pleaded by the PCR on the gross effect hinges, as I sought to show you yesterday in terms of Dr Latham's analysis, on an idea of some information and advantage allows a leg up to the participants in the AdX auction. They get an unfair advantage.

The submissions I have been seeking to make yesterday and continue to make through this morning are that none of the methodologies proffered is adequately going to measure that. We went through the bid translation service yesterday and I explained that in our submission it doesn't do the job. It doesn't get to the heart of what the alleged problem is. So it is not going to help the tribunal.

In relation to this aspect of the case, the structural economics of auction data point, it is a different point. It is that this sort of model is going to be too hard and we don't have the data for it, but ultimately all of my points on the methodologies line up to say "Here is the essence of their point. This is what they are trying to prove. These methodologies aren't going to work to do it".

That's why I say there is a correspondence between this case and Gormsen, because obviously it is different facts and the problems are different, but ultimately the thing that the tribunal is going to have to grapple with is the same, that if there is not a methodology that works for the essence of the problem that has been identified, we are going to have a very difficult and possibly wasteful trial process.

MR JUSTICE MARCUS SMITH: That's clear.

MR PICKFORD: So we were just in the middle -- I probably had two minutes left on the structural economics of the auction data point, which is, as I discussed, one of the

things -- some information we didn't have, which was data on bits from other SSPs.

The other thing we don't have, which we understand would be necessary for this kind of model to work is losing bid information from the AdX auction. That's something we don't have from the key period when we ran a second price auction.

Although Dr Latham's response is "You know, I will make do. I will work around with whatever I've got", we say that that's assertion, but it is not a sufficiently firm basis for the tribunal to certify. So that's all I have to say on that methodology.

So we then go on to the methodologies A2 and B2, which are said to be for the purposes of estimating losses suffered by Publishers who did not use header bidding. So far we have been dealing with the losses from the previous header bidders in the real world. Now we are looking at those who didn't use header bidding, and who are also said to have suffered losses.

The most important point here is that these are not alternatives. These are effectively parasitic on one of the first approaches working, because the essence of what Dr Latham says here is for those that didn't use header bidding in the real world the problem is even worse. Not only do they suffer everything that the header bidder suffered, he says -- we will argue about that but that makes sense. That's his case. He says they suffer all that plus some more. A2 and B2 are directed at the plus some more part of the equation. If the PCR is not able to get over the line on the first part, then the plus some more doesn't help them and that is the essential point.

I also have very similar points to make about absence of data. They are set out in our response. I can take you through them, but I am not sure it really matters, because the big point is they are not alternatives.

So those are the methodologies as they stand. We say that there is one big elephant in the room that they don't grapple with and that is the volume effect. It was the volume

effect that led Dr Bagci not to pursue any of this line of argument in the Arthur application, because the essence of the point we say here is that if prices of display advertising rose, which is what the gross price effect is all about, advertisers would naturally buy less of it, and given the nature of advertising they might, in fact, well spend the same amount as they would otherwise spend, because advertising is quite an unusual product. It is not like a normal kind of input as a raw ingredient might be for a product.

This is the volume effect. Dr Latham, his methodologies when he first articulated them did not grapple with the volume effect. He now says "Don't worry. It can be easily incorporated into my methodologies". He says he can do that by assessing the effect of introducing header bidding into the market.

We say there is no fully articulated methodology of how that's going to work and in any event the basic allegation here is not that we have prevented header bidding. Header bidding happened. It was very successful. It is that we gave an advantage to people who took part in the auction in the way -- the AdX auction in the way that they did. So we say the volume point is not going to be sufficiently grappled with by Dr Latham in his methodologies. We don't have enough there on that.

This is a serious point. It is not just us seeking to be difficult, because this is the very reason why this point was not pursued by Dr Bagci in Arthur. Her working assumption was that advertising budgets would remain static and therefore any increase in prices would just be met by buying less online advertising and therefore it would all come out in the wash. So that's all I have to say on that.

Then again briefly we have overhang damages. This is the point that even if the conduct stopped there would still be a substantial continuing effect. I think it is four years -- in fact, it is four years that's in Dr Latham's modelling. We say again there is

no real methodology here. All that's being proposed is a set of assumptions. He has decided it is going to be four years, but he doesn't say how we are going to find out whether it is four years.

MR JUSTICE MARCUS SMITH: How can you? The point about modelling is that you embed in assumptions which the expert economist will be obliged to defend from attack in the witness box. In a sense this is precisely why the specification of the model is so important.

Let's suppose we certify and we go down the route of an aggressive control by the tribunal, that model would have to be robust enough to be able to cater to all the combinations of outcome that the tribunal will reach in the course of its judgment.

So, for instance, we would have to have a model simulation that could scope with the tribunal saying well, the class representative loses on two abuses but succeeds on a third, or wins on all three in a manner that has been reframed in terms of nature by the tribunal, or to take your point about overhang, we were not persuaded by the expert that it was four years, having heard the evidence but, in fact, it is 18 months.

Now all of that needs to be controlled for so that you have the data that is capable of manipulation according to various parameters, but one cannot possibly say that "We are going to embed four years in the model on the basis that that's our case" without it being tested. The testing is not going to be: it is four years or nothing. It is going to be, "Let's try to understand how the overhang works in this particular case. Let's at trial hear the evidence and then we will work out whether there is or is not an overhang and, if so, what its duration might be".

MR PICKFORD: Sir, I think I agree pretty well with everything you said.

MR JUSTICE MARCUS SMITH: Right.

MR PICKFORD: The only difference between us is in relation to its consequence,

because what we say Dr Latham needs to do at this stage is to say "Here is how it is going to work. Here is how I am going to test it". To be clear, I am not committing us to saying it is a regression model, but just for the sake of argument, he could come and say "I am going to test how this effect worked with some regression analysis and that will give me an answer and we will then plug that in and that is how we are going to assess the overhang", but he has not done that. What he said is the overhang "I am working on the basis it is four years, it is linear and it is across all of the bases for damage, including, for instance, the gross price effects".

Just on that, just to illustrate why that can't possibly be right, the gross price effect is about the auction structure and the problem that it immediately causes for the auction outcomes. So if you stop the abuse and you create an auction structure that works according to my learned friends but doesn't have any unfair advantage to AdX, then immediately you should start seeing the results of that realised in better prices.

That's different from a take-rate effect. I accept on a take-rate if you have given yourself an unfair advantage in the market, it might take they might argue a while for that to unwind, but the gross price effect, there is no reason to assume that it would be four years and therefore if there is no methodology at all for testing to say "This is how we are going to get to an answer on how long it lasts empirically", then that is we say an absence of an important part of the methodology and it needs to be grappled with, because it may not just come down to looking at the evidence, the non-economic evidence, if I can put it that way.

Insofar as there is an economic aspect to ascertaining how long any overhang is, if there is one, there should be some articulation of that now.

MR JUSTICE MARCUS SMITH: What you are asking is Dr Latham to produce in advance of any production of data an expert opinion on what is the subject matter for

trial.

MR PICKFORD: Sorry. To be clear I am not seeking to do that. Sir, I am very sorry. I have obviously mis-explained my position.

My position is that he doesn't have to give us the answer now. In some senses telling us that it is four years is both too much and too little. It is too much because we are not asking to know that it is four years. It is too little because what we actually want to see is the method by which he says economically we are going to determine how long that overhang truly is.

So I am not asking him to come with the answer, to be clear. I am asking him to set out, just as he has sought to do, ineffectively we say, for the other parts of the gross price effect in particular, how he is going to answer that question. Hopefully that is clearer as to what I am saying.

MR JUSTICE MARCUS SMITH: Thank you.

MR PICKFORD: So those are the points that we make on methodologies. If I might then just make some very brief concluding submissions.

MR JUSTICE MARCUS SMITH: Of course.

MR PICKFORD: To draw all the strands together.

It is well-established that the Respondents should have a cards on the table approach to certification hearings. It is not appropriate for us to save up significant problems and then deploy them tactically later and that's what we have sought to do here. We have sought to say we think there are these problems and we have sought to be very transparent about that. Obviously ultimately the view on how significant those issues are and how they are best managed, including through potentially case management steps is one for the tribunal.

I put my case that they are sufficiently serious, that there should be a pause now and

the PCR should be required to think again. Obviously that's not the only option, and if the tribunal is not satisfied that that's right, that they are not sufficiently serious, there are obviously other options that we can employ.

As I hope I have made clear, our essential concern is with the gross price effect. That's where we think there are the most serious problems with managing this case and we say it is ultimately not sufficiently clear how but for the impugned conduct it is the case that Publishers would have received much higher bids in auctions in an alternative world, and we say that the PCR either doesn't seek to explain that for most of the conducts that it complains about, or insofar as it does seek to explain it, for instance, in relation to the last look, that explanation does not make sense.

Now we don't rely on any factual assertions to say that. We say it is based on the logic and consistency of the PCR's own case, and in my submission that is suitable for determination now because it is essentially a summary judgment point. Obviously I heard the tribunal's views on that yesterday. I am not asking to you accept any facts. I am simply saying look at what they are saying themselves. It doesn't actually make sense.

Now one of the issues that we debated -- we had a very insightful exchange on yesterday was the level of generality that is necessary for the PCR to articulate its case, in particular, if I can put it this way, the 17 versus the three. Mr President, you gave me an analogy of a road traffic accident. In my submission the helpfulness of the analogy depends on the nature of the case that's being made. We respectfully submit that the analogy works quite well for the take-rate effect, because the whole essence of that is that there is a whole series of ways, it is said, that Google has given itself an unfair leg-up in the market and it has increased its market share allegedly at the expense of its competitors, and all of those allegations point in the same direction.

They all point in the direction of us having too much market share relative to what we should have had potentially, and they will obviously have to establish that even if they are right on the first part, that that led to a price effect in terms of our take-rate.

So in that context we understand and agree with the analogy. Where we say it breaks down is in relation to the gross price effect, because the case on the gross price effect is very, very different. It is saying let's compare the details of two different institutional frameworks for auctions and we are going to discover, says the PCR, that one of them is much better than another from a Publisher's perspective and would have generated much bigger yields for them.

We say that that requires real precision firstly to identify what in concrete terms, not an abstracted level that in general you, DFP, favoured AdX, but in concrete terms what the precise problem is, because that will inform the difference in the auction structures, how that then is said to have fed through into different outcomes and then how that's going to be measured with the methodologies. We say it is in relation to that sequence for the gross price effect where this claim really falls down.

The analogy that I would use in this context -- it is going to be imperfect, because all analogies always are -- what I would suggest is perhaps one that works better in relation to the gross price effect is let's assume that a Space X rocket is sent up and explodes. Then Elon Musk sues his suppliers and says "You are responsible for that explosion" and there is a huge dispute about precisely what each supplier did, what is the particular -- who is responsible, what is the particular clarity of the problem, how those problems ultimately did or didn't lead to an explosion. Suppliers will say "Well, you know, we just dealt with X. It has nothing to do with us". If you were to say "It is in the power systems area", all you need to say is "It is a power system problem". That wouldn't be sufficiently specific. We would say the analogy there is a bit like saying

"Well, there is DFP favouring AdX. You need to tie it down more clearly to really understand how the case works and in our case how it is going to be tried.

Now I don't want to go too far in the analogy, because you have understood my points really hinges on the correspondence between the allegation and the economic method. That's the heart of it, but the key point is that correspondence needs to occur at a sufficiently discrete level of particularity that it matches the case that's being made and it isn't going to be adequate just to have it at the level of DFP allegedly favoured AdX. That's not going to tell us enough. It is going to have to be at the more particular level. For instance, the reason there was a problem was because of an information advantage and we are going to measure the information advantage effect in this way.

Sir, members of the tribunal, those are the submissions that I wanted to make on behalf of Google. Unless I can be of any further assistance. I am just checking behind me that there is nothing else that wants to be said.

MR JUSTICE MARCUS SMITH: We have nothing for you, Mr Pickford. Thank you very much for your submissions. We are most grateful.

Mr Patton.

MR PATTON: I am going to deal with the five points on which Mr Facenna addressed you in the same order. So the first point is whether you should certify an opt-in sub-class for the Publisher Partners alongside the opt-out class for the Publishers.

Mr Facenna took you to the defined terms Publisher and Publisher Partners in the claim form at paragraph 29 and he took you to the basis on which they seek the opt-in sub-class in paragraph 35.

There is one further reference in the claim form I wanted to show you. It is in bundle B for Bravo at page 105.

MR JUSTICE MARCUS SMITH: Yes.

MR PATTON: It is the footnote right at the foot of the page, 279. It says:

"Publisher Partners suffer losses as a result of the losses caused to Publishers because the fees charged by Publisher Partners are related to the level of revenue received by Publishers from the sale of the impressions the Publisher Partners sell on their behalf."

Then it says:

"Dr Latham states that he will identify the ad revenue associated with", over the page, "Publisher Partners and then use information on their fees to apportion the ad revenue appropriately."

That's paragraph 467 of Latham 2, to which I think Mr Facenna took you on Wednesday.

MR JUSTICE MARCUS SMITH: Yes.

MR PATTON: Focusing on the first sentence of the footnote, the point that seems to be made is that Publisher Partners effectively charge a commission to the Publishers for the service they provide in liaising with the relevant entities. That is what one takes from:

"The fees chart are related to the level of revenue received by the Publishers."

So it is effectively a commission arrangement.

In relation to paragraph 467 of Latham 2 -- I think that was shown to you but if you just want to refresh your memory of what it says, it is at page 1778 behind tab 5, paragraph 467:

"As I discussed briefly in section 2 some Publishers will work with resellers and these resellers are included in the class definition and referred to as Publisher Partners. To account for these resellers, I would need to identify the ad revenue associated with these Publisher Partners and then use information on these resellers' fees to apportion

the ad revenue between the Publisher and the Publisher Partner."

Then he says he expects that the share in the value of commerce is limited.

So you have now seen everything of substance that is in the claim form and in the evidence concerning the relationship between the Publishers and the Publisher Partners, and on the basis in particular of the footnote to which I took you, we asserted in our response that the allocation of revenue between the Publishers and the Publisher Partners is a zero sum gain, and that has not been gainsaid by the class representatives. So it seems to be accepted that it is a zero sum game.

In relation to the award of damages, the more of that that is allocated to the Publisher Partners, the less that is going to be allocated to the Publishers and vice versa. That is the implication.

Now until the skeletons the PCR had maintained the position, including in the skeleton, that this was only a matter for distribution and so was a long way off and could be ignored until then, but I think Mr Facenna acknowledged when he addressed you that it is going to arise at an earlier stage and certainly that is our position, that it is going to arise at an earlier stage and it is for this reason.

As Mr Facenna accepted, it is quite likely that not all of the Publisher Partners will opt-in. That is what he said at page 85 on Wednesday at line 15. So it will be necessary for the PCR when it comes to formulate and make its claim for damages, for aggregate damages, to carve out from the aggregate damages the damages that would have accrued to those Publisher Partners who have not opted in. They will not be within either of the sub-classes and so it is accepted that the PCR will need to carve out the fees that they would have earned, the damages represented by their fees, from the aggregate award that it is asking the tribunal to make.

MR JUSTICE MARCUS SMITH: Well, you calculate the aggregate award (inaudible).

MR PATTON: But what that requires is that the PCR will need to take a position on what is the allocation of revenue between the Publishers, who are all in the opt-out class, so they are going to be before the tribunal unless they have opted out, and the Publisher Partners with which they have relationships who have not opted in.

MR JUSTICE MARCUS SMITH: Well, I wonder is that really right? I mean, let's -- so the nature of the conflict that you articulated is quite an attenuated one. It is not that there is any conflict in terms of the claim as against Google (inaudible) which they can properly get. So no conflict there. It is actually a conflict between (inaudible) allocation and aggregate awarded damages. No-one I think is suggesting that we are going to be assessing damages individually by reference to class members. If we were going down that route, then we wouldn't be certifying at all.

So assessment will be by reference to the class and my question to you is how far is this case different to let's say the Merricks litigation, where you have credit card users on an opt-out basis. So they are all in unless they choose not to be. I suspect most won't have heard of it, so they will be out. All of them will be capable as against each other of saying "My losses through the Interchange fee, assuming success, are worthy of a higher slice of the cake".

You may have someone who is extremely wealthy, multiple cards, or just higher spend on more expensive items through credit cards rather than other forms of payment and that might be quite plausible, given the age of the action.

Now that in a sense is precisely the conflict you articulate. You have different members saying that they ought to have a bigger slice of the aggregate cake. No-one is suggesting millions of little sub-classes. What they are saying is it is a distribution question. I am wondering how far, if Mr Facenna was suggesting that some kind of formal articulation of this conflict was needed before distribution, how far he is

necessarily right about that.

MR PATTON: In the example you give, sir, I accept that is a distribution point because all of the consumers are in the opt-out class and, as you say, the chances are that they will not opt out, so everyone is in and so it is purely a question of once the aggregate damages are determined how they are divided up between the members of the class.

MR JUSTICE MARCUS SMITH: Right.

MR PATTON: The issue that arises here is that the opt-out class are the Publishers, but the opt-in classes that ought to be added on to that are the Publisher Partners who take a share of the revenue as their fee and only some of those will be within the overall class.

MR JUSTICE MARCUS SMITH: Sure, but isn't that exactly the same as 10 million credit card users in the class of whom 25 have opted out?

MR PATTON: Well, in the sense that the aggregate damages will have to cater for that.

MR JUSTICE MARCUS SMITH: Yes.

MR PATTON: The difference here is that the Publisher Partners who have opted in, they can be regarded in precisely the same way as the Publishers. They have the same interest in increasing the aggregate award of damages, but there will be Publishers in the opt-out class whose Publisher Partners have not opted in and whose -- and therefore there will be a conflict between the position of the Publishers and the Publisher Partners because the tribunal is inevitably going to have to take a view as to what is the correct division of the damages between the Publishers and Publisher Partners. It will have to do that to make sure that the aggregate award of damages doesn't represent damages that would have been claimed by those who

haven't opted in, by the partners who have not opted in, but in doing that it is by implication going to be taking a position on the allocation of the revenues as between the Publishers and the Publisher Partners who have opted in, because I assume the tribunal is going to approach that on an overall basis.

So the exercise of carving out the damages that is irrecoverable by the class by virtue of some of the Publisher Partners not having opted in, then that's going to necessarily involve a position being taken as to what is the correct division between Publishers who are in the opt-out class and those partners who have opted in.

MR JUSTICE MARCUS SMITH: Just to test the access to justice element here. I am sure Mr Facenna will correct me, but I got the sense that this sub-class is so small if there is any material expense incurred in terms of litigation and cost in the process of litigating this claim prior to distribution, chances are that these claims will just be binned because they are uneconomic for the ongoing litigation, because they are so small.

I mean, if you were talking about a distinction that was 50/50, then one would not have this access to justice question, because it would be inherent in certification, but if one is talking about 98%-2% as a split, which I think is closer to what Mr Facenna was suggesting was the case, well, if you have costs which are, you know, out of proportion to the 2%, then isn't this just going to be jettisoned with the result that certain claims will just never come to trial and surely the tribunal ought to be doing what it can properly and appropriately to ensure inclusion rather than exclusion even on an opt-in basis?

MR PATTON: The difficulty is because if you accept that there is a conflict then the conflict has to be addressed in some way. You are right that the way in which, for example, the Court of Appeal in the Trucks case sought to address the conflict, that would be burdensome in terms of the costs of the litigation.

The Court of Appeal in Trucks, as I am sure you know, required there be separate solicitors acting for the different sub-classes and indeed the various experts. We accept that wouldn't be proportionate in the context of this litigation, because the other alternative is simply not to address the conflict at all and no proposal is made as to how that can be done in some other way.

We do suggest that the right approach, therefore, given that we are talking about relatively small numbers of claimants according to the evidence, is not to certify that opt-in class, but simply to leave it as an opt out class for the Publishers, if you were minded to certify that, and to remove the complication of the additional opt-in class for the Publisher Partners.

That means that that claim it is true would not be pursued in collective proceedings in this litigation, but there is no evidence that the claims of the individual Publisher Partners would be insufficient if they wished to pursue those as individual claims.

MR JUSTICE MARCUS SMITH: What about going to the other extreme and certifying all on an opt-out basis?

MR PATTON: I have not reflected on that. That's not an application that's before you.

MR JUSTICE MARCUS SMITH: Well, I know, but I will be putting it to Mr Facenna. Does that resolve the problem or is it something you can't --

MR PATTON: I suppose that raises its own problems, as I am reminded, because if you go back to the claim form at paragraph 35, which is on page 17, the reason why they haven't been included in the opt-out class is that most of them are -- it is explained they are abroad. It is paragraph 36 over the page.

MR JUSTICE MARCUS SMITH: 36. One moment.

MR PATTON: They would need to opt-in for jurisdictional reasons. That's the reason one has ended up in this situation.

MR JUSTICE MARCUS SMITH: Mr Facenna, correct me if I'm wrong, but that's going to be true of the main class as well. I mean, you can't make an opt-out order in relation to foreign domiciled claimants. You just can't.

MR PATTON: The definition of the Publishers, as you can see at paragraph 29.1, is they are required to be UK domiciled.

MR JUSTICE MARCUS SMITH: Yes, and Publisher Partner doesn't have that restriction, but my question I suppose is why can't you have a general approach -- I entirely accept this is much more for Mr Facenna than for you, but I don't really want to have this as a rejoinder point. So if you don't mind, I will ask the question of you, and if you want to come back again later, we will see, but couldn't you have a definition of Publisher and Publisher Partner that was jurisdiction neutral, as it were, and then simply make clear that any opt-out order could only be made in regard to a UK domiciled person? So you would actually remove the UK domiciled restriction from Publisher, but you would make clear elsewhere -- it would be a trifling amendment -- you would make clear elsewhere that to the extent an opt-out order was being sought and made, it could only apply -- this must follow from the legislation -- to UK domiciled natural and legal persons.

MR PATTON: That would be to effectively create another opt-in sub class of Publisher on a domicile. That would be the effect.

MR JUSTICE MARCUS SMITH: What it is doing is taking the view that the classes are being defined on a jurisdiction neutral basis. So you would embrace the class of 29.1, but yes, you would be allowing those who are outside the jurisdiction, because bear in mind that's a fairly arbitrary distinction, you would be allowing them to come in, but the only reason you are going down an opt-in route is because for reasons of comity we have got legislation which respects the rights of foreign jurisdictions to

regulate the extent to which their domicilaries are impacted by English litigation. I mean, that's why you draw the distinction.

MR PATTON: If the suggestion is the application would be amended so as to cover effectively -- I know it wouldn't be drafted in this way -- but to have an opt-out class of UK domiciled Publishers and an opt-in class for Publishers Partners and an opt-in class for non-UK domiciled Publishers, that is something that we would I think need to reflect on as to whether that made sense. That is not something that the PCR has --

MR JUSTICE MARCUS SMITH: I apologise that it is coming out --

MR PATTON: Not at all. It is simply that I am reluctant to address it on the hoof because it may be there are implications of that if one were to have another opt-in class.

MR JUSTICE MARCUS SMITH: Entirely fair enough. It is helpful to have your hesitant reaction. I meant that in all seriousness. These are complicated things. So I am grateful that it is not a no brainer solution. It is difficult.

MR PATTON: That must be true.

One of the points that has been made is that the Publisher Partners are able to make an informed choice, because they will know of this conflict that we have identified when they decide whether to opt-in, and we have two points about that.

The first is to describe it as an informed choice assumes that there is some explanation as to how this issue is going to be addressed, and we would suggest there is not really any explanation before you.

The second point is that if one is in the realm of informed choice, the informed choice is one that ought to be made not only by the Publisher Partners but by the Publishers but, of course the Publishers are the opt-out class and in practice many of them will not make any choice at all. They will simply be included by default. That's a point we

repeatedly made. Where is the informed choice for the Publishers about this issue? We reiterate that again in our skeleton at paragraph 80. The PCR has simply never addressed that point. What is the answer to that point?

So that is really our submissions as to why we say if you decide to certify the opt-out class, you shouldn't also go on to certify the additional opt-in Publisher Partner class.

The second point is a short one, and it is that we have proposed that the class definition would exclude anyone who has brought or who brings a claim that overlaps with the claims in these proceedings. We don't say that the legislation requires that to be done in every case, but we do say it is a good idea and it is a sensible clarification, and we take inspiration from the tribunal's decision in the Trucks case.

If I can just show you briefly what was said about it, it is in authorities 3, and it is page 2715.

MR JUSTICE MARCUS SMITH: Do you have a tab?

MR PATTON: Tab 63.

MR JUSTICE MARCUS SMITH: I am very grateful. Yes. Do you have a paragraph number?

MR PATTON: 104.

DR MAHER: Paragraph number?

MR PATTON: 104. As one can see, the tribunal here notes in the Trucks case:

There were already a number of significant actions that were pending before the tribunal "brought by claimants, and it is axiomatic that if a person is pursuing an individual claim, they cannot at the same time be part of collective proceedings covering all or part of the same loss."

There is then a reference to Rule 82(4). Then it is said:

"It is possible that if a CPO is made, some of those claimants might discontinue or

seek to stay or sist their individual claims and choose to be part of the collective proceedings instead. However, whether and to what extent that might happen is obviously uncertain." As presently drafted neither the two class definitions make any reference to this. We consider that the class definition requires amendment to give effect to Rule 82(4) and state clearly it excludes those who are claimants in other actions unless they discontinue or stay or sist those claims by a specified date.

Now in the present case the PCR says the tribunal was wrong to say that that is required by the rule and in a sense that doesn't matter whether that's so or not, whether the rule requires that, but we would suggest that it is a very sensible idea that you make clear in the class definition that if anyone has brought a claim that overlaps with the claims that are certified, then they will be out of the class whether or not they go to the trouble of actually opting out. It may be, for example, they are not aware of the class certified claim, but it is clear simply on the face of the class definition such people are not to be treated as part of the class.

In the Trucks case, as I say, the claims had already been issued, but we would say the same logic applies to someone who issues a claim at a later date, that it would be clear on the face of the class definition that they are not part of the class.

MR JUSTICE MARCUS SMITH: Well, I doubt -- we will hear from Mr Facenna again -- that the principle of double recovery is going to be in serious dispute. It is more a question of how best to manage the double recovery question. Now what I will be anxious to avoid is for there to be a more ambulatory enquiry across the course of these proceedings with a view to identifying and sifting out individual claims. That is something I would not want embedded in the process.

So really what one is wanting is a very clear understanding, and if one gets that far and there are a lot of ifs in this, but let us assume you do get that far to a fund that is

distributable, so a successful outcome. You would have to be very clear at that point that to the extent there was an individual claim in the mix, then that money, first of all, could not be distributed.

Secondly, it would have to go back not into the unclaimed pot but back to Google.

MR PATTON: Yes. That is essentially our objective. We suggested that following the example in Trucks simply make it clear on the face of the definition. As you say, the principle can't be in dispute. It is just a question of how one best gives effect to that. They say that in each individual case we shall identify who it is who has brought a claim, get them specifically eliminated from the class. We would suggest that is not going to be a profitable use of anyone's time.

MR JUSTICE MARCUS SMITH: No. It seems to me that it is going to be a necessary use of somebody's time at the end of the process.

MR PATTON: Yes.

MR JUSTICE MARCUS SMITH: It may not be a question of definition, but I think all of us will be singing from the same hymn sheet in terms of it being a necessary control and what is axiomatically to be avoided. That's very helpful.

MR PATTON: Now I don't know when you wanted to take a break or whether I should try to complete my submissions.

MR JUSTICE MARCUS SMITH: Well, tempting though it is, I think we had better give the shorthand writer a ten-minute break now. So we will rise at that point. Thank you.

(Short break)

MR JUSTICE MARCUS SMITH: Mr Patton.

MR PATTON: Sir, I was going to move on to the third point we have raised. This is about the structure of the legal team acting for the PCR. Now we raise this in recognition of the tribunal's important gatekeeping function to protect the interests of

the class members. Just to be clear, this is not a point about the headcount of the lawyers. Mr Facenna said there are 20 lawyers in the confidentiality ring on each side. That figure is not particularly informative, because it often includes trainees and paralegals and those who cycle in and out of the case.

MR JUSTICE MARCUS SMITH: Yes, indeed.

MR PATTON: That's not our point. We have made very clear that we are not casting aspersions on anyone's professional integrity. That's not the nature of the point either. The point is simply this, that the decision has been made to structure the team on the basis that there will be three separate law firms acting jointly in these proceedings. To illustrate the reasons why we consider this is something the tribunal would wish to scrutinise, if I can show you the co-counsel agreement which governs this, it is in bundle B at tab 14. It is right at the back of the hard copy bundle, if you have got it in hard copy. It is page 2265.

DR MAHER: Which tab?

MR PATTON: 14, page 2265. As you can see this is a co-counsel agreement of 29th September last year between the three law firms. It governs their rights and responsibilities. The key provision is on page 2268, clause 2, which sets out the co-counsel relationship. I will just identify the key provisions.

Clause 2.1 says:

"The three firms will be the solicitors jointly on the record acting for PCR."

Then clause 2.3 says that:

"Decisions with regards to the proposed litigation strategy recommended to the PCR shall be taken on a collaborative basis between the Arthur advisers and the Pollack advisers along with input from others."

Then at 2.4:

"The Arthur advisers shall have joint responsibility with the Pollack advisers on an equal basis for proposing courses of action and litigation strategy to the PCR and subsequently acting on instructions to implement the claim."

Then 2.5 is a dispute resolution mechanism. So if the three law firms don't agree on the strategy or conduct, they present senior counsel with the different options and he has the power to advise on the strategy.

2.6:

"The Litigation Team, or part thereof, shall hold meetings, with such frequency as is necessary to agree on the work which needs to be undertaken during the next period; and agree on a proposed course of action prior to seeking the Ad Tech PCR's approval (where appropriate)."

2.7:

"Work allocation shall be applied on the basis of which member of the litigation team is best placed in terms of experience, availability of budget and other relevant factors to carry out the particular task."

Then 2.8:

"The overriding concern is to provide the PCR with the best possible advice in the best interests of the proposed class members and always in priority over the individual or collective interests of the party as the funder or any other party. As a secondary principle, when deciding on the division of work, they also have regard to the anticipated fee split that has been agreed between the different firms."

Now we suggest that in particular the provision for dispute resolution is revealing, because what it simply reflects is the reality that if you have three separate law firms, each of whom is conscientiously discharging their duties, as one would expect them to do, it is inevitable that they may reach different views on what's the best course of

action in complex litigation.

MR JUSTICE MARCUS SMITH: Yes.

MR PATTON: This structure introduces an inherent need for time and costs to be taken up in debating those issues between the law firms and, where necessary, invoking the deadlock procedure, none of which would be necessary in the ordinary course of litigation where a party is represented by a single firm.

(c) is the expectation there could be meetings between the firms for that purpose.

Although there is clause 2.7, which says:

"Work allocation will be decided on the basis of who is best placed",

that obviously does not take away the joint responsibility for everything that has been assumed under clause 2.8. The way one would interpret that I suggest is that someone will prepare a first draft. Each of the law firms, given that they have joint responsibility, will need to review, comment on and approve the document in question. So the structure that has been created has baked into it we would suggest a degree of duplication and delay because each firm will feel duty bound to discharge their duty under clause 2.3 and 2.4.

Now it is a complex and unusual structure and we would suggest that it isn't necessary. When the two separate claims were originally issued, neither party thought that three firms were needed to prosecute the similar proceedings that they were pursuing. It is simply a legacy of the fact that the carriage dispute was resolved on the basis that all of the firms who had been previously acting for either of the --

MR JUSTICE MARCUS SMITH: It is not a legacy. It is the consequence of the carriage dispute being resolved, which we approved, because it ensured that the best representation question was answered not with a degree of trepidation by the tribunal but by consent with the parties.

Now if you are suggesting that we involve ourselves in re-writing this agreement and effectively unwinding the carriage dispute, I just don't think that can happen.

If, on the other hand, you are saying that this, to use your words, excess of advisers is something that, assuming Google go down, they shouldn't be expected to pay for, then that seems to me to be right, but isn't that a question of detailed assessment if one gets to that point? Clearly if Google win, it doesn't arise. Equally if you are not certified, it doesn't arise.

So naturally I will want to hear from Mr Facenna on this but if we were to say that we would be giving a pretty clear direction -- we would be giving a direction to whatever costs judge has to embark upon a detailed assessment, that costs would have to be capped on the basis of the most expensive alternative, ie the two carriage disputes, in other words, you look to extract the costs incurred as a consequence of the carriage dispute and say that is a matter not for Google but for the class, does that meet your concern?

MR PATTON: Sir, we would certainly welcome that sort of reflection or indication and that would reflect the common law generally. If a party chooses to be represented by two firms of solicitors, then that is their decision. The reason we thought it appropriate to put this before you today is that obviously it is not simply Google's interests in if it were the subject of a cost order that are in play here, because there are the interests of the clients.

The budget for the proceedings following the amalgamation has increased by over £6 million. I am not suggesting it is necessarily solely related to this, but that's the headline figure. That's something that we would suggest that you as a tribunal wish to be concerned about in the interests of the class.

MR JUSTICE MARCUS SMITH: Mr Patton, there is no question but that is helpful

that you raised it. I am very grateful to you in doing so. The interesting point is it does seem to me that that matter has in a sense already been decided in our acceptance by the tribunal of the agreement between the parties that they would settle their carriage differences and proceed accordingly.

Now we clearly didn't have at that time complete transparency as to how it was being done, but it was certainly clear at the time of the order approving the withdrawal of one application and the substitution of another and the insertion of Ad Tech as the claimant that there would be involvement of both teams. We knew that, and so we did know about this additional cost.

The reason I think your intervention is helpful is we are seeing at an early stage, and subject, of course, to whatever is said in response, we are seeing the price that will be paid, and you are right it is the price that will be paid by the class, for a resolution of the carriage dispute in a manner that we think is best for the class, but you don't get the benefit without the burden.

So I think that's -- there are two reasons you are on your feet. One is rightly to point out a question that affects the class, but equally and as importantly, to ensure that the defendants' position is protected against if for perfectly good reasons additional cost which a defendant shouldn't be expected to pay for. It is like the inclusion of, you know, three leading counsel in a case where actually it is perfectly sensible to have just one, but it is just something you should pay for rather than the losing party.

MR PATTON: Yes. Understood. Insofar as it is helpful for me to make this submission, I submit that the tribunal has not fettered its discretion to make any decision it would like on certification simply by virtue of having allowed the amalgamation. You were very clear that that wouldn't affect --

MR JUSTICE MARCUS SMITH: That is absolutely right, but it would be to effectively

revisit the carriage question to say I am going to look at one of Hausfeld, Humphries Kerstetter and Geradin Partners and I am going to pick the lucky one. I am not saying we can't do it, but it would be an almost arbitrary exercise of the certification power to say that the careful agreement which we approved on carriage is going to be unmade in circumstances where whoever is not picked would rightly be aggrieved that we had essentially unmade the entire process by which this certification hearing was being heard.

So you are right. There is not a fetter, but I think there is a very clear impetus in terms of the direction of travel. Absolutely right we need to ensure that it is appropriate going forward, because we are not going to be looking at this question again, and absolutely right that we ensure that the consequences of that choice in terms of the sort of protection that Google is, subject to their response, entitled to, is there on the record, so that's why we are very grateful to you for making these two related points.

MR PATTON: I am grateful. Just one last point. We suggested it might be helpful -- certainly we would regard it as helpful without necessarily unscrambling what has been agreed, if there were a firm of solicitors that was on the record in the sense of a firm with which we conduct correspondence. It does simplify matters, administratively to know who you are dealing with, you know who you should be chasing for a response. It does make things more efficient. Provided that it doesn't -- if the tribunal is content with the arrangement, that can be made clear it doesn't involve any departure from these arrangements, but simply as a matter of --

MR JUSTICE MARCUS SMITH: Well, that, I think, is I hesitate to say a no brainer, but that seems to me to be so necessary to conduct efficient litigation that I am quite sure there will not be push back on that but we will see. I mean, you need a single interlocutor.

MR PATTON: Yes.

MR JUSTICE MARCUS SMITH: I mean even in a one firm situation the lines of communication need to be pretty clear and all the more so I anticipate here.

MR PATTON: Yes.

MR JUSTICE MARCUS SMITH: Again that's a good point well made.

MR PATTON: Thank you. Sir, I will move on, if I may, to the last two points, which are the two limitation points. As I made clear, I am not going to launch into substantive submissions on that but to address you on how they should be determined.

If I can take them in turn and start with the simpler point, that is the amalgamation point, the effect of the amalgamation of the two claim forms.

What that issue goes to is what was the date when a claim was brought in respect of the third abuse; in other words, when did the PCR do the thing that is necessary to stop limitation from running? Normally the issue of the claim form, but if it is not the issue of the claim form, when was that subsequent date?

The debate between us is that they now say it was on 30th November 2022 when the Pollack claim form was issued and we say it was on the 29th March 2023 when the Arthur claim form was issued. That is the debate. It may seem like a narrow debate. It is a narrow debate in that sense, it is a difference of four months, but given the enormous sums that are in dispute in this case, it could be that four months has quite a big price tag associated with it.

MR JUSTICE MARCUS SMITH: Yes.

MR PATTON: Now we would suggest at this point, it is essentially unfinished business from the amalgamation hearing, because that is when the PCR was effectively given permission to amend both of the claim forms that they then became identical.

Normally the application to amend is the point at which the court or tribunal would be

seized of this question. Is there a new claim, and if there is, does it arise out of the same or substantially the same facts? That's what's needed to decide the point.

Now it wasn't convenient to deal with this at the amalgamation hearing and that's why it was specifically stood over. I can show you the order but maybe you have it in mind and that the order specifically made clear that was a point for later decision.

MR JUSTICE MARCUS SMITH: I don't think we said how much later, did we?

MR PATTON: No, you didn't. I don't think so:

"... to a later hearing to be fixed ..."

MR JUSTICE MARCUS SMITH: Good.

MR PATTON: At least by implication it sounded like it would be a soon hearing, that it would happen soon. We would suggest that is the appropriate course. It is a very narrow and discrete point. It is essentially an interlocutory point in the sense it is the sort of point normally decided on an amendment application as part and parcel of the amendment application. It is not an intrinsically complex point. It doesn't require any evidence and the legal principles are trite as to how it operates.

As I think my learned friend also acknowledged, all you need to do is to compare the two claim forms and say; is the third abuse there? Is that claim there? We say it is quite obvious when you look at the two it is not there. It was in Arthur but it wasn't in Pollack. That would be the debate on that point, and if we are right about that point that it is a new claim coming into Pollock for the first time, the second issue is does it arise out of the same or substantially the same facts? There is authority that tells you what that means, but it means what it says.

Then one is looking at the facts that are already in Pollack and asking whether those are sufficient to plead the third abuse. We say it is very clear that they are not. Just to give an example of that, there is now an allegation in the claim form part and parcel

of the third abuse that Google is dominant in the DSP market. So an allegation of dominance in that market. We say that allegation was simply never there originally. There was not an allegation of dominance in that market, and there is authority which says that if you make a new allegation of dominance in the market, that is a new fact for limitation purposes. It is not on the same or substantially the same facts. Even though they were alleging dominance in other markets, they were not alleging it in this market. So that's the nature of the points.

MR JUSTICE MARCUS SMITH: Mr Patton, that's very helpful. Let me unpack what I see you are saying. First of all, it is an economically big point. It is not something you can kick-off and say "Well, it is a minor case management thing". This is economically significant. The parties are entitled to a proper resolution. It is not a discretion. It is a hard-edged legal point.

I accept that it is not factual. It is legal. Do it on the papers. I also accept that ordinarily we do it sooner rather than later, because, as you say, it is related to the application. However, we are here looking -- the lens that I am looking at it through is a Microsoft Pro-Sys lens, which is how do we get from (a) a presumptively certified action -- that's a necessary assumption to make -- to (b), the trial as quickly and as cost effectively as possible? It seems to me that unless the resolution of this point can be shown to be beneficial to the efficient management of the case, we ought to kick it off to later.

Now one benefit of resolving it early is that the quantum may be sufficiently significant that it might affect settlement considerations. You might want to know that, but my sense is that four months over a multi-year period is not going to drive a settlement. You may want to come back on that, but that's an impressionistic point.

On the other hand, it is a big point that is pretty technical where the losing party is very likely to ask for permission to appeal and where, unless it resolves itself to something

rather simpler than it appears at the moment, we might be quite likely to give permission.

Now at that point you've got a tail wagging dog in-built delay in the run from (a) through to (b) and that's why my sense is that this point, precisely because of its importance, but not overwhelming importance in terms of shape of case, ought to be dealt with at the end. Indeed, if the case goes one way, it may not have to be dealt with at all, and if Google win, then we can park that into the arena of interesting but irrelevant, but that's not really my point.

My point is it is not going to so affect the shape of the trial that we are all working towards, assuming certification, but rather is going to be introducing a quite potentially serious distraction to no real benefit and that is the question. Is there benefit in dealing with it earlier? My feel is we ought to be doing it later, but you may well want to push back on the benefits of earlier resolution, but you can take it as read that normally my instinct is resolve points when they arise rather than park them for later.

MR PATTON: Yes.

MR JUSTICE MARCUS SMITH: But this is a case where that assessment seems to me to be different, but you may well tell me that's a wrong impression.

MR PATTON: Yes. Can I just focus on the implications of an appeal? Taking a step back, as I say, the law in relation to this is established, the test whether there is a new cause of action, whether it arises out of the same or substantially the same facts. We have dealt with that in each of our skeletons for this hearing on the footing that we might have had to open the point today and there is to dispute of principle between us.

The dispute is simply looking at the two claim forms and making a judgment as to whether it is a new claim or whether the facts are already there. We say it is, in fact,

very clear when you do that but obviously you can't pre-judge that, but it is not obvious that there will be a point of law as distinct from a question of applying settled principles to the two documents you are concerned with.

Now even if that were wrong -- suppose you thought there might be a case for permission to appeal, or suppose the Court of Appeal gave permission, this certainly is not a point that would disrupt the timetable to trial. There is no reason why anything would have to come to a halt if this point went on appeal, because all it's doing, as I identified at the outset, is giving you the date when limitation stopped. It doesn't in itself -- this point doesn't determine whether there is a good limitation defence or not. That's a second point I am going to come to for part of the period and for the rest of the period that would be an issue for trial. All it does is it creates clarity when it comes into the trial.

If the third abuse is the abuse that matters, is the date that we are all working back for limitation purposes, is it the November date or is it the March date? In my submission it would be very valuable to the parties to have clarity on that. It removes it completely as an issue for trial. You are as well placed to decide it now as you would be at trial. Then everyone knows where they stand.

If you decide it one way and it does go on appeal, and it is not obvious it is a case of appeal, but I may be saying something different later, it certainly doesn't look like an obvious case for appeal but even if it did go on appeal --

MR JUSTICE MARCUS SMITH: I think we can take it as read that the winner will not say that there is an issue; the problem is what the loser does.

MR PATTON: I accept that.

MR JUSTICE MARCUS SMITH: There is always a loser.

MR PATTON: There is. My serious point is that question of the date -- the date of

issue effectively of the claim form in respect of the third abuse, that would not stop anything from proceeding to trial, because one can simply continue. This point goes only to that question, and given the timescale between certification, if it happens, and the trial, there is ample time for the appeal to be resolved well before the trial. The Court of Appeal lead dates are not very long these days. So one could expect that could all be accomplished. That would be one issue off the table for trial.

So it has the value that determining any point ahead of trial has, which is that one goes in with clarity and one can focus on the other points that are still live. My expectation is that arguing it at first instance certainly is no more than half a day. I mean, I know we, in fact, had it in the mix for the issues for today on the basis that we would deal with that and some other points well within today. So it really is a very short point, and if it went on appeal, it is impossible to see how it could take any longer than that. It could be a very short appeal if it does go there.

So that's the amalgamation point.

The second limitation point is the more substantive point. That concerns whether claims before October 2015, so claims in respect of damage that were suffered between 1st January 2014 and the start of October 2015, are time-barred.

Then I am sure you have this, but just to identify what the essential point is, it is that the relevant rule for that period, the stub period up to October 2015, is rule 31 of the old 2003 rules. I am happy to take you to them, but since I am not arguing the points --

MR JUSTICE MARCUS SMITH: Yes.

MR PATTON: It is a two year limitation period for stand alone claims. As I understand it, there is no dispute between us. That's the rule and that's what it says. So if that were the end of the story that would be it. We would have a limitation defence that was unanswerable.

The answer that is, in fact, put forward is that by virtue of the EU law principle of effectiveness, limitation cannot run until some further requirements have been satisfied: the knowledge requirement, knowledge on the part of the claimants in respect of the claim, and the cessation requirement, that the infringement has come to an end.

So that's the answer that is put forward, although the rule says two years from the cause of action, that is subject to these principles.

Whether that argument is correct or incorrect is a pure question of law and it would involve looking, first of all, at the EU authorities, and I know the President has done that recently in the context of the Falbo limitation decision.

MR JUSTICE MARCUS SMITH: Yes, but I won't have that as a reason for not hearing it again, tempting though it is.

MR PATTON: And then an even more enjoyable prospect which is looking at the Withdrawal Act and understanding how its provisions put together. One of the points we make is that because these proceedings were issued after IP implementation day, the court no longer has the power in England to disapply a rule of English law by reference to general principles. So that will be a matter of debate between us.

So those are all purely questions of law. Those questions don't call for any evidence whatsoever. If we are right on the question of law, then our limitation defence succeeds and that 21-month period of the claim is eliminated on that basis.

It is only if the PCR is right on the law that it then would be necessary to consider some factual points and they would obviously have to be considered at trial. We are not seeking any preliminary determination of those factual points. If we are wrong on the law, then all of that would be a matter for trial.

The question is do we need to get into any of that? Do we need to get into questions

of what members of the class knew in 2014 and 2015? If we are right, that's irrelevant and you won't need to look at that at the trial, because the claims will be time-barred anyway.

MR JUSTICE MARCUS SMITH: Yes.

MR PATTON: Now the procedural mechanism by which we have sought to raise this point is by making in our response a strike-out application. That's on the basis that it is appropriate on a strike-out application to raise a short point of law that doesn't involve any disputed triable issues of fact.

Now we are not moving that application before you today, but we are not seeking to withdraw the application. Of course, it is a question as to when it should be heard.

MR JUSTICE MARCUS SMITH: Absolutely. Again this is of serious commercial significance. You can't possibly be precluded from dealing with it. It is a traffic light question of when goes with it.

MR PATTON: The fact there is a properly constituted strike-out application which is pending is, I suggest, an important point, but can I park that for the time being and come back to it to explore its significance, because the point I wanted to focus on was in response the points the President has been making so far while we say it is a good idea to determine it early in this case.

Now the first reason we suggest it would be a good idea is that it would affect the class definition, because the class period currently goes back to 1st January 2014, but that's only because that is the period in respect of which loss is claimed. It is said that loss has been suffered going back to 1st January 2014, but if there can be no claim for damage before October 2015, then that part of the class will simply fall away. There will be no claim by that group of people that could continue. So the class period will then become 1st October 2015.

So it is a point which in that sense affects class definition. It affects who is within the class that is going to progress forward and have their claims tried in these proceedings. That is obviously a paradigm issue that one would wish to look at early.

Can I just again remind you of what was said in the Trucks judgment? The point I am going to is simply to highlight the desirability of issues affecting the definition of a class being decided early. It is just a couple of paragraphs. It is in the third authorities bundle at tab -- it is page 2756. I will just find the tab number. I think it is tab 63. 2756. It is paragraph 211 of the judgment.

Just to explain what was going on here, this is in the context of the two carriage -- the carriage dispute between the UKTC and the RHA. There were arguments about what was the run-off period and whether the run-off period should be reflected in the class definition. What the tribunal says in 211 is:

"It is not satisfactory in the case of collective proceedings to leave the duration of the run-off period effectively ‘open’, to be considered as the proceedings unfoldEven in individual cases claimants cannot generally ‘sit on the fence’ but have to assert the run-off period for which they claim. Not only is that essential to determine the boundaries of proportionate disclosure, but the defendants are entitled to know the extent of their potential exposure."

That's a point I wanted to come back to.

"In collective proceedings, the imperative is all the greater. The CPO has to describe the claims certified for inclusion: r. 80(1)(d); and it is necessary for the class of persons covered to be clearly identified, so any class member can decide whether to opt-in or opt-out as the case may be: see rr. 79(1)(a) and 82. Moreover, once the class has crystallised, the proceedings encompass the claims of all represented persons and the class representative would be in a difficult position if after a lengthy disclosure

process it were to seek to narrow the class to exclude a large number of hitherto represented persons on the basis that it had over-defined the period for claims. In our judgment it is necessary to reach a view for the purpose of certification and avoid an over-broad class definition."

Now it is a slightly different context but we say there is a similar point here, which is are the people who suffer damage between January 2014 and October 2015, are they properly included within the class or do they have no claim that can be pursued into those proceedings? That's an important point to decide early.

The reason it is important even from the point of view of the class members is, as you know, our limitation point is one that arises specifically because of the CAT rule. It is not a point that arises -- it wouldn't be the same point if individual class members were pursuing claims, for example, before the High Court, because the two-year limitation period that we rely on is one that is specific to the CAT and it is one that was carried over by the CAT transitional provisions.

So that's one reason why we say it is important to have clarity. Are the members from 2014 to 2015 properly within this class or not? They ought to know where they stand at an early stage.

Second of all, we would suggest that by limiting the claim period there is likely to be an impact on the scope of disclosure and evidence. Now I can't say today what the precise impact is going to be, because we haven't had any of the debates about -- one would have to have that debate in a specific context, but overall if there are 21 months of the claim where there are no damages being claimed, that is surely going to have a bearing on the significance of data from that period. It may not necessarily mean that no data from that period is relevant, but it may affect which types of data from that period are relevant, how significant that data is to the proceedings. If it is not data that

will determine the quantum of damages, it may affect the proportionality of ordering disclosure of that data. Those are the kind of considerations.

Bear in mind that since this data is now more than ten years old, that may be data which it is particularly burdensome to produce.

We would suggest one would wish to know are these claims live when having that debate.

Similarly in relation to evidence, as I have said already, if we are right on the point of law, then the question of knowledge of the claimants is no longer an issue for trial in 2014 and 2015. That would simply fall away, that the claimants wouldn't have to produce evidence and we would not need to test evidence by that point.

Now we do suggest, thirdly, your focus, Mr President, on the trial estimate, it is obviously an important consideration, but we would respectfully suggest that is too narrow a view if one were looking at that only, and I am sure that's not what you are suggesting, as a reason for deciding this early.

It is really the point that Mr Justice Roth made in the passage I read:

"The defendant is entitled to know the extent of the potential exposure." If there is a good limitation point for a period of 21 months, that is plainly something that's very significant.

You mentioned settlement discussions. That is true. Simply in looking at one's exposure coming into trial, if 21 months had been taken off the table then it is something which is plainly desirable for the defendants to know earlier on.

MR JUSTICE MARCUS SMITH: Right. So I think you are saying that, but I repeat it just to be clear, that this is a point that needs to be conclusively resolved before one gets to data exchange.

MR PATTON: We would suggest that would be desirable.

MR JUSTICE MARCUS SMITH: Desirable -- you can take that I have the desirability point well on board. As I said earlier, you decide cases and issues as they arise as a good working presumption, but what you are saying I think is that one shouldn't be proceeding down routes that may be impacted by this 21 month period until it has been resolved. Therefore let's assume certification, we next proceed to deal with this limitation point, if we decide it, we do nothing very much by way of production of data until it's resolved, and presumably that would include any appeal.

MR PATTON: Well, in respect of that period, in respect of the 2014, 2015 period, that doesn't prevent progress being made on parts of the case which are bound to remain live come what may.

MR JUSTICE MARCUS SMITH: I know that, but we are not going to be ordering disclosure. We are going to be ordering data production according to what the experts on either side need, and there it is much more efficient to take an holistic approach to work out what data Google has without having an artificial cut-off point, by which I mean a limitation informed cut-off point, which is at large.

So it does seem to me that if you don't know the scope of your data exercise, you are saying there needs to be a certain brake on progress by virtue of this point. So that's the price I think we would be paying for satisfaction of the desire for earlier resolution.

MR PATTON: I accept that that certainly goes to the second reason that I gave as to why it is worth deciding it early. If you were not minded to pause disclosure because of other considerations in relation to making progress on disclosure, then that point would fall away as a reason for deciding it earlier, but I still say that there are a number of other reasons for deciding it early, even if you think the right course is to decide it early but nevertheless to proceed with disclosure on a more all-encompassing basis. Nevertheless there are advantages.

For instance, the evidence as to knowledge would fall away, and that would be at a much later stage than disclosure. We would know where we stand.

MR JUSTICE MARCUS SMITH: The know where you stand is a very important point. The knowledge point is, my inclination would be if we were not to do it soon would be to do it late and to deal with the legal points at trial and the knowledge point to the extent it mattered after trial when you know exactly what the parameters for dispute are.

As I say, it may not arise at all, depending on how the outcome falls, but to the extent knowledge matters, you could have a trial 1A, which would have this as a coda.

MR PATTON: That would involve the prospect, the one point that is not decided finally at the trial is limitation, which would be an inversion of what one would normally expect in litigation.

MR JUSTICE MARCUS SMITH: It is. I agree.

MR PATTON: And certainly from our point of view a very unsatisfactory outcome if Google were not to know even at the point of a public judgment in relation to the aggregate order of damages that represents the true exposure.

MR JUSTICE MARCUS SMITH: You say that it doesn't matter that we don't get there.

MR PATTON: Well, true. That's for sure.

MR JUSTICE MARCUS SMITH: We may circumvent this problem, depending on where it falls but, you see, once again one has the rather clearer prospect of an appeal, and so really what you are saying is let's achieve certainty on the granular point at the price of losing swift certainty on the far bigger point, which is; is there an abuse that is creative damages at all?

MR PATTON: Recognising that the point I am seeking certainty on is a point of law which involves looking at a handful of authorities and a statute, which is not to say that

the answer is that you are going to find that the answer is completely straightforward, although obviously you will have our submission on that, but that's the reason. It is a day's argument perhaps before the tribunal if it did go on appeal, that or less in the Court of Appeal. It is a short point.

MR JUSTICE MARCUS SMITH: And to what extent ought we to have regard to the fact that quite possibly related points, not the same point, but related points are in at least one case and I think two cases already on their way to the Court of Appeal.

MR PATTON: Then I entirely accept you might decide it is better to wait for guidance from the Court of Appeal.

MR JUSTICE MARCUS SMITH: Yes.

MR PATTON: Then I obviously take no issue with that.

The other aspect of that is that we would suggest that the point we have raised is a point that is bound to be coming before the tribunal again and again in CPO cases, because anyone who claims back before October 2015 is going to be met with precisely the same argument, because if there is a two-year period there is a two-year period. If you don't decide it in these proceedings, there is bound to be someone in my position in another case who will seek an early determination of that. The upshot of that is we wouldn't have the benefit of this tribunal's input on the point and we, the parties, would not have an opportunity to influence that point. If it is decided in another case and goes on appeal then that will be the position and we will not have a chance to address it.

Because it is such an important point it goes to what is the regime, it is bound to be a point in one of the cases someone will think "That does need to be decided quickly". We would very much like to have the opportunity to make submissions on it.

May I just, conscious of the time, make this final point, which I said was a point I was

going to park. So far I have been addressing you effectively as if this were an application for a preliminary issue and one looks at the sort of Steel v Steel factors as to what is the --

MR JUSTICE MARCUS SMITH: It is not. It is a strike-out application.

MR PATTON: That's exactly the point. Sir, we do say, if necessary, although we say for very good reasons why this is an attractive thing to deal with, we do say it is an application that's pending before the tribunal which you ought to rule on in the same way that one rules on applications for strike out of summary judgment in all proceedings before the tribunal or normal proceedings in court.

MR JUSTICE MARCUS SMITH: Mr Patton, of course that's right. I think I have probably said on a couple of occasions that we want strike out points to arise at the same time as certification and the parties have quite properly prepared on that basis, but it is again a question of overall trial management whether it is appropriate to deal with the strike out point at that time or at some later point.

Now I entirely accept the point you are making, that we need some pretty good reasons not to deal with it sooner rather than later. On the other hand, this may be a case where such pretty good reasons exist, and if we frame them then we ought to take those into account in deciding when to schedule the strike-out application.

MR PATTON: The point I wanted to make is if one were to say that a strike-out application can't be heard -- obviously if there is a Court of Appeal decision pending, it may be sensible for it to be heard once judgment is available. That's something that happens all the time on strike out points that raise questions of law.

MR JUSTICE MARCUS SMITH: Yes.

MR PATTON: If one were to say well, the strike out point can't be heard before the trial at all, that's tantamount to saying your dismissal of the application in substance,

because --

MR JUSTICE MARCUS SMITH: No, I don't think that's right. One regularly has strike outs that are heard on day one of a trial.

MR PATTON: No, that I accept. If an application is made shortly before the trial it may be heard at the start of the trial, but obviously that's not the situation we are in.

MR JUSTICE MARCUS SMITH: No. You are making it quite properly at the beginning of the process.

MR PATTON: Yes.

MR JUSTICE MARCUS SMITH: What I am saying is that it is not a rule. It is a discretion when one deals with it. You are well within your rights for saying it is a discretion that usually is exercised so that one hears it sooner rather than later, but that is because a strike-out doesn't delay matters, doesn't complicate the process but indeed narrows and simplifies. I think the unusual thing here is that you are accepting -- you are advocating for as a consequence of this a quite significant interruption in the process to a trial which would ordinarily take place probably a year sooner.

MR PATTON: As I hope I have already made clear, that obviously is one --

MR JUSTICE MARCUS SMITH: It is one factor.

MR PATTON: One factor.

MR JUSTICE MARCUS SMITH: Of course.

MR PATTON: You might decide that that factor should be overridden in relation to disclosure and it is better to proceed with disclosure on the assumption that everything is at large, but nevertheless the other factors are still on point of deciding the question --

MR JUSTICE MARCUS SMITH: It is not binary.

MR PATTON: Exactly.

MR JUSTICE MARCUS SMITH: There is a spectrum. I can see that.

MR PATTON: I think, unless I can assist you further, those are my submissions on Mr Facenna's points.

MR JUSTICE MARCUS SMITH: That's very helpful. Mr Patton, thank you very much. I see the time. Mr O'Donoghue, we will start with you, I think at 2 o'clock.

MR O'DONOGHUE: It will be Mr Facenna. For my part, I don't expect to be more than an hour.

MR JUSTICE MARCUS SMITH: Oh, right. Very good.

We had one point which I think I will try to flag now, which was for you, Mr O'Donoghue. I think it is better coming from our expert economist rather than from me, because I think we ought to frame it right, but it is to do with the methodology in relation to the simultaneous rather than sequential auctions. I don't know, Dr Maher, if you would put the query so that Mr O'Donoghue could think about it over the short adjournment.

DR MAHER: I think this relates back to one of the points I made on the first day which is about the methodology used over the different periods. If my understanding -- let me give a quick summary.

The basic allegation is that Google has self-preferenced. They have an informational advantage in the auction and that has caused harm. An informational advantage arises through primarily the last look, but that approach disappears once you have moved to a simultaneous auction, so unified first price auction.

My understanding, and maybe you can correct me on this, is that the informational advantage still exists, but it takes a different form. It is one in which there is asymmetric information provided to the bidders in the auction. Some bidders have

been provided information, so open bidders, whereas header bidding bidders participating in that auction do not have the information.

So all of the methodologies that Dr Latham has proposed, he has addressed them more in the terms of the sequential advantage in the chain whereas this is slightly a different informational advantage. So I just wanted to get some clarification -- I mean, I have some views on how that might be done, but I would like to maybe see what Dr Latham thinks. Thank you.

MR O'DONOGHUE: Thank you.

MR JUSTICE MARCUS SMITH: Just by way of guidance for you, Mr O'Donoghue, in terms of where we would be assisted on issues (inaudible) exchanges yesterday and today with Mr Pickford in terms of (inaudible) pretty brief. In terms of the Microsoft Pro-Sys question the real question that I think is going to engage us when we are considering our judgment is what I will call the wood and trees point. It is very easy to sink down into a level of granularity which at this stage in the proceedings is entirely inappropriate and it is a point you made. Actually I think it is the first point you made when you stood up two days ago.

Clearly there are a number of points which no self-respecting expert could reach any opinion on because we are so early on in the process, and the idea that the Microsoft Pro-Sys test would derail that sort of enquiry to say I need to wait and see what the data produces and what my discussions with my opposite number expert would produce would be to shut down claims which absolutely should proceed, and no-one is suggesting that that should happen.

The problem is the moment you move away from the granular, you are in grave danger of moving into the unduly specific, because what you get is the expert saying: I can do this. In broad brush terms this is how I am going to do it, but that is all I can say.

That sort of response does not sit very easily with the term blueprint, which is fairly ubiquitous in the Microsoft Pro-Sys test.

So the question is where does one draw the line between the very granular and the unduly general, first point, and, secondly, having drawn that line, does Dr Latham on the material that you have produced cross it properly so that the matter can be certified, but it seems to me that the harder question is not the second one. It is the first one. We obviously have a wealth of detail. We also have a wealth of unarticulated or unanswered questions and that is absolutely not a criticism. If there weren't unanswered questions, well, we would be scheduling in a trial in a fortnight's time and doing it super fast.

The reason one has questions that aren't resolved is because that's why we have trials with interlocutory proceedings beforehand to make them triable. So it is that line on which I think we would be most assisted. It seems to me that we would be most assisted by a -- subject to the point Dr Maher has raised about a specific query, it is that general articulation that we certainly canvassed with Mr Pickford that we would be most interested in.

Really it boils down to the question; not do we certify or do we not certify, but where it's ended up on the Google side, do we certify now or do we send you away saying here is what you need to do, and just to unpack the issue there, going back to Gormsen, it was very clear what our problems with the first application were and we set them out with, I would like to think with great clarity in the judgment, and we said "Look, this is what you have not done, this is what you need to do." And to her very great credit Dr Gormsen went away and did it. It took a year and was done.

Here I am not sure that we are in a position to frame that issue except by saying there is all sorts of uncertainties in whatever methodology has been processed.

Well, I am repackaging the where do we draw the line question, but it does seem to me significant that we can't, at least at this stage say there is a massive problem, and to be fair to Mr Pickford, he wasn't saying the same either. He was saying there are problems with all of the methodologies and he is quite entitled to say that, but he can't say that that is fatal to the application. All he can say is go away and try again, but he wasn't saying "This is the problem with the claim".

He was saying there is a problem with everything and that is helpful, but raises again the same questions. I put the same issue to you really three different ways.

MR O'DONOGHUE: Yes.

MR JUSTICE MARCUS SMITH: But that's what I think is troubling us much more than the specifics about various methodologies.

MR O'DONOGHUE: That's very helpful. Thank you.

MR JUSTICE MARCUS SMITH: Thank you. We will resume at 2 o'clock. Thank you very much.

(1.14 pm)

(Lunch break)

(2.00 pm)

Reply on behalf of PROPOSED CLASS REPRESENTATIVES

MR JUSTICE MARCUS SMITH: Mr Facenna, good afternoon.

MR FACENNA: Good afternoon. I am going to deal with our response to the points that Mr Patton dealt with just before the short adjournment.

The first of those is the Publisher Partners' point, the so-called conflict.

I already indicated -- well, I outlined the other day what the issue was. You have been taken to paragraphs 35 and 36 in the claim form, which set out what Publisher Partners

are and why it is in our view the idea that they be given the opportunity to avail themselves of the proceedings if they wish to do so and the rationale for doing that, and I think you have the point that we are talking about an extremely small number of potential opt-in class members relative to the overall class.

Submissions were made by my learned friend Mr Patton as to the paucity of the detail that has been given as to how the apportionment between Publishers and Publisher Partners will take place. There were actually a couple of other references which I don't think you were shown, which we say do provide the answer as to how this is going to work to the extent there is any uncertainty about it.

At paragraph 66 of Latham 2, which is B1, tab 5, 1671.

MR JUSTICE MARCUS SMITH: Paragraph 66.

MR FACENNA: Paragraph 66.

MR JUSTICE MARCUS SMITH: Latham 2, tab 5, Bundle B1.

MR FACENNA: B1. You will see there, if you have that, that Dr Latham:

"... believes the group to be small such that it doesn't alter his estimation of the class size."

He explains in the main text below how he is going to do that. I think there is a reference there in that last sentence. He explains below how he is going to be able to use data on these partners, average commissions to partition the damages award as between Publishers and Publisher Partners.

Then if we one goes forward to paragraph 91 on page 1679, Dr Latham sets out there his understanding of how ad revenues flow to Publisher Partners and their clients. So they add a layer. Final sentence:

"Ad revenues flow to the reseller who will then pay the Publisher on whatever basis has been agreed between them."

That's the reference to the Publisher Partners. Then the other paragraph I want to take you to is one shown to you a number of times already which is 467, and that's where Dr Latham says that to account for the opt-in class he has identified the ad revenue that has any association with Publisher Partner transactions and then he will use the information on their fees to apportion that part of the ad revenue as between the opt-in and the opt out class members.

In other words, he is going to identify the overall ad revenue that involves Publisher Partners. He will then use information on the average fees, which is what you see in paragraph 66, and that's information which obviously will be available from market data, but more importantly from the opt-in members themselves. So they set out in their contracts what their arrangements are.

He is going to use that average commission rate to apportion part of the relevant advertising revenue to Publisher Partners overall.

So he would then ultimately add into the total value of affected commerce the aggregate affected ad revenue of the Publisher Partners who have opted in and exclude the aggregate affected ad revenue of those Publisher Partners who have not opted-in.

I think, as I said the other day, there is an analogy with the approach which is set out later in Dr Latham's report as to what he will do with any class members who opt out. So there is an explanation there as to how it is going to be done, what the basic data is that is going to be used to do that apportionment. That's why I return to the point I made the other day, which is we don't currently anticipate that there is going to be any meaningful conflict, because the opt-in class and the opt-out class share a clear common interest in relation to all the main issues in the claim.

MR JUSTICE MARCUS SMITH: Yes. I mean, meaningful conflict is slightly

ambiguous in that it can be not meaningful because it is de minimis in terms of value or number of persons impacting. I get that, but it could also be of a second order in the sense that the identity of interests is the claim against Google which everyone wants on the claimants' side maximised.

The only area of dispute or conflict is in terms of how much of the cake should it be delivered is given to different persons, but my point is; isn't that a conflict for the court as such that actually arises in almost every case?

MR FACENNA: Exactly, sir. It is a conflict that does arise in every case because the interests of individual members and sub groups and sub-classes are always going to be such that everyone is going to want a bigger slice of the pie, and that is going to affect everyone else's slice of the pie. The mere risk -- if there really is only a conflict at the resolution stage well, that very obviously cannot be a reason for chucking out the opt-in class at this stage.

MR JUSTICE MARCUS SMITH: I mean, let's take a case of settlement. Let's suppose that one has a deal in a hypothetical case where there is a settlement on the table and what the terms of that are and are referable to the quality of the evidence that persons can bring in order to articulate their probability of success. In other words, one requires say in a Merricks credit card case, one requires as a term of the settlement the production of credit card transactions. We know that some people are rather better at keeping records than others.

So immediately there in the process of negotiating the settlement you have the potentiality of a conflict of interest in that the class representative who is doing the negotiating will be wanting to get the maximum amount of money from the defendant, but they will have to negotiate on what needs to be proved in order to make a pay out. That's the way it is structured.

Now immediately you have a conflict of interest between the well documented and the undocumented class member. The idea that you are at that point going to say "Well, let's multiply the number of class representatives to ensure that there's a fair shake of the dice for everyone", it's outlandish, isn't it?

MR FACENNA: Quite. Indeed, there are -- under the tribunal's existing powers and rules, all of those to the extent they deal with -- they arrive at distribution, there are provisions for dealing with them, and if there is a conflict that arises then, then individual class members can come along under rule 92 and make any submissions they want.

Certainly on our view if the problem is really only a post-distribution problem, that very clearly cannot be a reason for excluding some members of the proposed representative members altogether at this stage, and to the extent that it might be helpful, there is useful authority from the Supreme Court in Canada on that, which is the Infineon case. Perhaps since we are ad idem, maybe I will just give you the reference. It is in authorities bundle 5, tab 100. It is the headnote at page 5429. The relevant reasoning is at paragraph 148 to 154.

That was a class action on behalf of both direct and indirect purchasers of micro chips. It was argued there that the representatives shouldn't be authorised in relation to the indirect purchasers because inevitably there would be a dispute later on as to how it should be divided up and the Supreme Court of Canada said it is certainly not a certification problem now. You don't deal with it at the beginning. They have common interests all the way through and if there is an issue at distribution, we will deal with it later on.

So that is that issue, but what I understand Mr Patton to be pressing is a different point, which is they say that there is a conflict that arises prior to distribution, because

a decision will have to be taken about how to value the commerce which relates to those Publisher Partners who do not opt-in. So to the extent that there is a decision to be made about the division, that might have to happen prior to distribution. That is my understanding of the point.

Now we are not sure that's quite right, but to the extent that it is theoretically possible that a decision will have to be made on that, the answer is the one I have already given you by reference to Dr Latham. There's a methodology which has been set out. It will be based on objective market data about the average commissions that these Publisher Partners charge and it won't -- it is not going to involve any individual assessment of fees or anything that we think is likely to be controversial.

Again in relation to the Publisher Partners who have opted-in there will be a common interests with the opt-out class, because the common interest will be ensuring that the amount of revenue which is outside the aggregate award is as low as possible.

MR JUSTICE MARCUS SMITH: Yes. Even here I confess I have some difficulty in understanding the difficulty. I see the point, but what we are doing here is we are framing a cause of action that is in loss terms as well as in liability terms, but in loss terms calculated at the aggregate level. So we are not, unless the class representative wants to go down that particular route, we are not having to be interested in individuated loss assessment, and if we had to be interested in individuated loss assessment, you wouldn't be being certified anyway.

So we are talking about claims that are capable of being assessed in the aggregate and all we are doing up until judgment is talking about an argument.

MR FACENNA: Yes.

MR JUSTICE MARCUS SMITH: Of course, as we get closer to trial that argument is buttressed by evidence, but at the end of the day we are only really going to resolve

this question of the value of the pot when we have heard all the evidence.

MR FACENNA: Yes, sir. In relation to that question, as I say, it is not clear to us there would be any conflict at all as between Publisher Partners who have opted-in and the opt-out class. So that's the answer to that.

There is a final point which is made, which is that people ought to be given the choice and somehow it is suggested that either the potential opt-in members or the opt-out members don't have an actual choice.

First of all, I would say that Google's approach, which is to remove the Publisher Partners altogether without them having any say at all obviously doesn't give anyone any choice. Insofar as the complaint is made that the opt-out class of Publishers don't have a choice, well, they do. The default position for them is different, which is that they are opted in, but if any Publisher really perceives that there is an issue in terms of their own interests in being represented in these proceedings, they do have the option to opt out of them.

The PCR has put forward a detailed notice and administration plan, which explains how the proceedings will be notified to the class members, how they will be publicised, how they will deal with any enquiries from proposed class members, and Google has made no criticisms whatsoever of that plan. We say as a result of those arrangements it is very clear that both Publishers and the potential opt-in Publisher Partners will be able to access information to enable them to make an informed choice about whether they want to opt out of the proceedings or indeed opt-in to them.

So the conflict is completely theoretical at this point. To the extent that it does arise there is nothing at all to suggest that the PCR would not be in a position to deal with it and fairly in the interests of all class members, or indeed the tribunal wouldn't have the power to deal with it as and when it arises. So that's the conflict point.

The second point then is the class definition and overlapping claims, so the Rule 82 point. I identify two questions that we thought arose. The first was; does the legislative scheme require the class definition to be amended to give effect to Rule 82(4). Helpfully Mr Patton indicated it is not his position that it does.

So the only question then is how pragmatically does one deal with again at this stage the theoretical issue that there will be members of the class who have parallel overlapping claims and who, therefore, would not be capable of being represented members in accordance with Rule 82(4).

Now Google's proposal seems to be based on what happened in Trucks, the class definition itself should somehow be amended. They have not said exactly how. We assume simply copying and pasting across the wording of the rule, and that seems to us to achieve nothing in practice. Its only possible virtue is to publicise the effect of the rule to proposed class members. If that's the concern, then I am instructed we would have no difficulty with putting something in the CPO notice and the opt-out notice drawing it to people's attention, if that's the concern, but it is not a class definition issue, because both the rules and indeed the underlying legislation draw a very clear distinction between class members and then represented persons. This is an issue as to whether someone who is within the class can be a represented person ultimately if they decide that they would rather pursue some parallel claim.

Now an approach was taken in Trucks, because as is noted in the paragraph of the judgment that you were taken to, there were a significant number of overlapping actions which were already pending before the tribunal brought by companies and public authorities that had acquired Trucks and issues of extant claims with a large number of claimants in the courts in Scotland and I think in Northern Ireland.

There was a clear choice facing a large number of UK domiciled claimants that if they

wanted to be part of the collective proceedings, they would have to make up their mind and have to do it quite soon, but one can see why in that case the tribunal thought that it made sense to bring the issue to a head directly and to include it in the class definition, but there are no similar circumstances here.

In this case the question of whether anyone would actually be affected by rule 82 is more difficult and it is far from obvious what the answer would be. The only example that Google has raised is the claim that has been brought by Associated Newspapers Limited in the Southern District of New York, and I think we reasonably infer that if there were others, then Google would probably have mentioned them. So indications seem to be that this is not going to be a widespread issue.

Applying Rule 82(4) to claims in foreign jurisdictions under foreign law is quite a lot different to applying them to a series of parallel Trucks claims which are already in the domestic courts.

Now I don't want to get into the detail of that point. We have addressed it in paragraphs 157 to 158 of our reply and in paragraph 61 of the skeleton argument, but in summary our understanding is that the claim that Associated News has brought against Google in New York may not enable it to recover damages relating to losses suffered in markets other than the United States.

Now if that is the case, there may end up being a tricky question as to the extent of any overlap and how Rule 82 operates. That may not be straightforward.

To be clear, the PCR is not suggesting there should be some case by case process or that we should be coming along as the trial goes along to deal with this sort of issue. Once the claim is certified, it will be publicised. If the claim is certified it will be publicised. The CPO notice, as I say, if necessary can include information on the rule. It will then be a matter for the class members to make the choice which is inherent in

Rule 82. There is a choice as to whether to remain in these proceedings, or if you have something else going on somewhere else, you have to discontinue or stay or sist it.

So far as the PCR is concerned, we take the same view the tribunal has expressed, which is if there end up being issues -- once people know what their rights are and have to make the choice, if there end up being issues of potential double recovery later on down the line, then again those can amply be catered for at the distribution stage.

It is really Google who seems to want to turn this into an issue that has to be dealt with and argued about at some prior stage. Again we infer possibly because they want to try to knock out Associated News from the class. That may or may not be the case, but it is only really in response to Google's complaints about this and them having raised it that the PCR has made a suggestion as to how it can be dealt with.

That proposal you will find in our reply at paragraphs 160 to 162. That's bundle D, tab 1 at pages 66 and 67 in the bundle. You will see there at 160 the proposal is made to meet the concern really that has been raised by Google. I will let you just scan your eyes over those paragraphs, sir.

So, in summary, we can, if necessary, set out the effect of the rule in the CPR order, following the making of a CPO, if Google believes that there are members of the class who are affected and where it wishes to do so, it can identify them, we say, and set out why it alleges that they fall to be excluded from the proceedings on the basis of Rule 82(4).

The PCR has agreed that they will write to that person to highlight the effect of the rule and to invite them to comment on what the position is and let them know what their options are. Following that correspondence, if the parties agree or if Google ends up

making an application to the tribunal that certain Publishers or Publisher Partners should be excluded, then the collective proceeding order can simply be amended pursuant to rule 85.

If that happens, obviously then the PCR will be in a position to adjust its methodology for quantum and so on. That's the reason why we suggest if Google is going to make something of this and wants to start excluding people from the class in reliance on this rule, then we should get on with that and certainly do it well in advance of the exchange of expert reports, because it may ultimately have an effect on quantum.

Just as a matter of practicality Google has suggested in its response that it intends to argue that certain class members should be excluded from being represented persons on the basis of alleged exclusive jurisdiction and/or arbitration clauses. That's Google's response, paragraphs 175 to 181.

So if that is part of the plan, then we would suggest that any application that Google wants to make in relation to the application of Rule 82 could be determined at the same time as any applications on the basis of jurisdiction.

Unless there is anything else on that point, that's what I wanted to say about that point.

That then brings me to the testy complaints about the PCR's team and the three law firms and the suggestion that what we have done is unwieldy and has all kinds of duplication and delay baked in not identified on a genuine need and so on.

The first point is that a submission was made that post amalgamation the budget has increased by £6 million. That is not correct. The tribunal is concerned here with the certification of these proceedings and this budget and any assessment of the appropriateness of the structure of the team and so on has to be done on its own terms. That submission implicitly is referring to the budget in the original Pollack proceedings but, of course, there is a failure to acknowledge or mention that the post

CPO funding available in the present proceedings is, in fact, extremely similar to that which would have been available in the proposed Arthur proceedings.

Moreover, it was expressly suggested or recognised in the litigation plan that was filed by Mr Pollack that his budget might need to be revisited. That is paragraph 51 of the original Pollack litigation plan. I think you may recall, sir, that there was at least an implicit suggestion in some of the evidence that was filed at the time of amalgamation that the Pollack budget may have been too small to start with.

So the submission that we have just as a result of amalgamation added £6 million to the budget is simply not correct. There is a budget. It is pretty much the same budget as there was for the Arthur proceedings. We can all debate whether the original budget for Pollack was too low or not.

The speculation again that there is going to be inefficiency, waste and delay and so on, they ignore the fact that there is a fixed budget, that it is in everyone's interests that that budget is used efficiently, and there is the point you made the other day that there is an obvious distinction between having three law firms and a number of lawyers within the team and them all working at the same time. The fact that you have a larger squad from which you can pick your starting 11 or whichever sporting analogy one wants to choose, will mean that will help you to navigate absences. You can make sure you are allocating your resources efficiently and so on.

But overall there is a fixed budget and that we say will discipline the PCR to ensure, to continue the analogy, that only 11 players are on the pitch at any one time.

Now there are, moreover, benefits to the structure we say, because the complaint seems to be being made not just because of Google's interests, and I will deal with that in a moment -- those are obviously protected by existing provisions on costs -- but it seems to be suggested that it is not in the interests of the PCR itself to have the

arrangement that we now have post amalgamation.

Now we would say on the contrary there are a number of benefits to the proposed class members. Given the volume and intensity of competition litigation in this jurisdiction, first of all, having a pool of representatives available to help at different times helps to avoid availability issues and ensure that there is proper representation of the PCR and the class throughout the course of the proceedings.

It will and has allowed the PCR to access a greater breadth of experienced advisers familiar with this matter and more likely to have availability at any given time and we say that will be a significant benefit not just to the class members but indeed to the tribunal in the context of what is going to be a complex and potentially long-running case such as this one.

The combination of the three law firms allows for a pooling of the knowledge and understanding of the relevant factual and legal issues that those law firms have cumulated previously from working on the Pollack and Arthur claims respectively.

So to that extent the consolidation of the legal teams, the pooling of the resources one has seen as a result of the resolution of the carriage dispute will allow the PCR and class members greater scope to match what are undoubtedly Google's massively greater available resources and significant advantages in these proceedings.

Given the nature of the issues in these proceedings, Google will no doubt be drawing on its vast external legal and economic teams, who are currently working on these very issues in other proceedings and investigations in multiple jurisdictions, all of them relating to its conduct in these ad tech markets. That's understood to include at least ten or more different law firms, multiple economic and other consultants, a vast multi-national legal team.

MR JUSTICE MARCUS SMITH: Fair enough, but it does look a little inefficient to

have three law firms on the record in circumstances where one large law firm might be capable of resolving the undoubted personnel questions that you have got at greater efficiency because you have easier communications within the firm.

Now you may say that's not right and maybe you would be right in saying so, but it does look like a question that in another case we would want to explore. You know, why have three firms when, you know, one usually will do even in a complex and busy piece of litigation.

Now the reason I am not pressing you on that is you have heard the debate I had with Mr Patton earlier on today, which was we can understand the participation of these firms, because it arises out of, as a necessary consequence of the resolution of the Carriage dispute, which this tribunal endorsed.

Now I am certainly not saying that we are fettered in looking at this thing, but it does seem to us that we at least bought into the desirability of a unified claim being brought forward involving a pooling and that that is enough of an explanation for these purposes, provided we are satisfied that it is in the interests of the class.

MR FACENNA: Yes.

MR JUSTICE MARCUS SMITH: And provided we are satisfied that Google's cost exposure in the event of their losing is protected, and the latter is the territory of detailed assessment. The former is arising out of the reason why we acceded to the application to elide two claimants, and clearly we did not do that because it was in the interests of the class representatives. We did it because it was in the interests of the class.

MR FACENNA: Yes.

MR JUSTICE MARCUS SMITH: So I suppose what I am saying is; is your better point that there are certain inefficiencies which might be said to exist -- I am sure you will do

your absolute level best to minimise them or eliminate them altogether, but they are the burden that you, the class, have to pay in order to get the benefit of an elision of two well articulated claims going forward.

MR FACENNA: Can I first of all -- it is one thing for us to be throwing around what might be superficially attractive suggestions that there is inefficiencies baked in and so on. Can I show you the evidence that you have on that, because Mr Starr has addressed it? It is bundle 5, tab 5, page 188 and it is paragraph 18 of Mr Starr's third witness statement.

DR MAHER: What page?

MR FACENNA: 188. I will let you read that, sir.

MR JUSTICE MARCUS SMITH: Yes.

MR FACENNA: I know Mr Patton can stand up and say "It is all terribly inefficient. There are three law firms. We don't know who we are dealing with" and so on. None of that is true. Mr Starr has said there has been no difficulty whatsoever, and indeed the correspondence bundle that you have has months of correspondence going back and forward, some of it under a Hausfeld letterhead, some of it under Humphries Kerstetter letterhead, with no indication of any difficulty on either side. You have seen the provisions of the co-counsel agreement which identify that the overriding principle is to act in the interests of the class and to behave efficiently. Very careful thought has gone into it.

It is not the case that we have taken the three law firms and had all the same lawyers and much smaller teams.

MR JUSTICE MARCUS SMITH: No-one is saying that. Mr Patton's point was that the inefficiency, as he calls it, is patent from the face of the co-counsel agreement itself.

MR FACENNA: It is difficult to understand that submission because the co-counsel agreement says that the overriding concern of all the parties is to act in the best interests of the proposed class members and that the work allocation will be decided on the basis of which part of the team is best placed.

MR JUSTICE MARCUS SMITH: But if there is disagreement, you have to go through a process which will cost money.

MR FACENNA: So the whole thing, the whole complaint turns on the suggestion that because there is a dispute resolution mechanism which has very sensibly been put into this contract, that that must mean that there is ongoing inefficiency and it is all there and that is going to arise.

MR JUSTICE MARCUS SMITH: I don't think Mr Patton nor the tribunal is in any position to say anything of the sort. All he is saying and all I am repeating is that the mere fact that you need that provision, even if it is theoretical and is never used, is indicative of a cost, maybe an implied cost of the process, because looking forward, which wouldn't arise if you weren't eliding these two separate claims into one.

MR FACENNA: Sir, I am not sure I can really accept that. Let's look on the other side. Let's say there is a strategic question that comes up on the Google side and Mr Wisking, a Herbert Smith partner, takes a different view from one of his other partners. No doubt they will arrange a conference with Mr Patton and Mr Pickford and come to a view. The same thing might happen here. It might be that we have a partner at Humphries Kerstetter who takes a different view from a partner at Hausfeld. Call up Mr O'Donoghue's clerks and my clerks and we will resolve what the issue is. Indeed it says expressly that ultimately Mr O'Donoghue is Senior Counsel in this case and he will make the decision.

So I don't accept that simply because you have that process, which is a process which

happens in litigation all the time, simply because you have it set out in black and white and formalised in that way that it can be said that there is inevitably some increased additional cost or complexity or inefficiency in the process. So I do not accept that premise, and, as I say, the evidence that you have from Mr Starr is that there has been no difficulty whatsoever at this stage.

So we don't say it is a problem. In terms of Google's own interests those are amply protected by the normal arrangements on costs. If Google wants to say -- if there is a costs award against Google and Google wants to say ultimately "We shouldn't be liable for these costs because there has been duplication" and so on, again completely orthodox arrangement. That happens in all litigation. We don't need to do anything about that today and you certainly can't pre-judge that I would say without necessarily making unreasonable and unjustified assumptions about how the PCR's legal team is operating.

I will return briefly to the question of proportionality, but the only real practical thing that seems to be being asked for is that there should be one single interlocutor or one solicitor on the record. Now again superficially one thinks "Well, why not?" First of all, the concept of on the record is one which is slightly difficult to understand in this tribunal. Formally all three of the law firms are instructed on behalf of the LLP, on behalf of the PCR. If what is being said is that the tribunal should insist that one firm has to conduct correspondence and deal with e-mails, well, we say that would involve rewriting the co-counsel agreement. It is not clear on what basis the tribunal is going to be asked to decide that.

We say it is just unnecessary trouble making, because there is no example given, no detail or no evidence of any issue arising at all and the complaint seems to be "We have to send e-mails to three e-mail addresses instead of one".

I mean, if that really is what they are complaining about, then it is difficult to understand why the point is being raised at all other than possibly to stir up trouble and cause a headache for us.

By the way, if that were to be necessary, we say that it would, in fact, cause additional trouble and expense, because the work streams have sensibly been divided up between lawyers in different firms. So you would have -- to give an example, let's say you have Humphries Kerstetter who have been corresponding very sensibly with Herbert Smith on a bundling issue, if now all correspondence is to go through Hausfeld, who haven't been engaged on the issue at all, you are going to have the lawyers in one firm then have to brief the lawyers in one other part of the PCR's legal team so that the letter can go out under their letterhead. I mean, it is all just absolutely unnecessary and completely -- it is a completely hollow complaint.

So unless and until there is some issue that Google is able to come to the tribunal and say "We are having real trouble here. We haven't had a response to our letter" or anything along those lines, then this is really not an issue that the tribunal needs to be concerned with at all, and once you start getting into the issue of which bit of the PCR's team should be doing what, then that does involve going behind the co-counsel agreement without any justifiable reason for doing so, and potentially matters of privilege, as my learned friend indicates.

Now just to finish off on this point, to the extent that there is any issue at all about the PCR's legal team which properly arises at certification, we would say the only question would be whether there's a question of overall proportionality of the budget, and again just to give you the reference, this is addressed in Mr Starr's third witness statement at paragraph 23 in particular where he carries out the comparison with the budgets for various other collective proceedings post CPO in this case, the PCR has £13.9 million

of funding available to cover its costs. That is considerably less than 1% of the total estimated claim value even if one takes the lowest end of the £1.9 billion to £13 odd billion estimate. It is we say manifestly proportionate and it certainly compares very favourably with the relevant percentages in other certified proceedings.

Just in terms of the -- whether the tribunal is being invited to say anything today about costs, aside from the fact that you don't need to, because Google's interests are protected by the usual rules, the risks are already in order that the costs of the amalgamation are reserved. So we would say there is no need for any further order or any exercise of discretion. It wouldn't be appropriate to do so or say anything along those lines at this stage.

Sir, again unless there is anything else you want to raise with me, those are my submissions on the PCR team and so on.

That then leaves limitation. The PCR remains strongly in agreement with the concerns that the tribunal has expressed about hiving off limitation points, particularly where it is not clear that ultimately it will save anyone time or trouble at trial or, indeed, on disclosure or evidence and so on, trial preparation. I will come to that in a moment.

We say it is very clear that even if Google were to succeed on these two limitation issues, that will have no effect really whatsoever on the evidence and the issues that will have to be fully investigated and considered at trial in any event and, of course, you then have the additional problem of the potential satellite appeals.

Now until late yesterday we had understood that the tribunal was being asked at this hearing to strike out a portion of the claim on the basis of a series of arguments about the effect of the Withdrawal Act and the EU principle of effectiveness.

Now that application seemingly is not being pressed, despite us preparing on that basis, and the only question that now seems to be being raised is whether a decision,

effectively a case management decision, should be made now that those two limitation issues ought to be listed at some point prior to trial to be determined, if I have understood what's now being asked.

First of all, that is simply not an issue that you need to determine at all today. We would say that that question can simply be parked -- could be parked and could be considered at a case management conference, not a certification issue.

In general we would say that is an approach that the tribunal should take. Limitation points are ultimately matters that have to be raised in a defence. Once those have properly been raised we could plead out our case on concealment and knowledge. At that point Google can decide whether it wants to apply to strike out any part of our case or to say why it should be dealt with as a preliminary issue, and then the claim having been certified and on its way to trial, at that point every one will also have a clearer idea about where we are going on timetable and disclosure and so on and the tribunal can in that context decide whether it is a sensible approach or not.

Overall our position is particularly on the first limitation point, the cessation or knowledge point, if I can call it that, the arguments remain somewhat inchoate. That point depends on difficult points of unsettled law that are before the appellate courts and they are simply not points that the tribunal should be determining at all at the certification stage or even deciding at the certification stage whether you are going to determine them at some other as yet unidentified point in the proceedings.

Now to deal with each point individually and perhaps reflecting Mr Patton's approach, I will deal with the second limitation point first, so that's the four months between the two claims, without going into the detail of it. It is a relatively straightforward question in that one asks is it a new claim and if it is not a new claim, does it arise impressionistically out of essentially the same factual allegations?

We say and will say when the time comes it is perfectly obvious that the third abuse arises out of essentially the same factual allegations as the first and the second abuse, and again I have prepared to come here today and spend time with the two claim forms open and showing you the paragraphs, showing you how dominance in relation to the third abuse rests on exactly the same allegations of dominance in relation to the first and second abuse, showing you the references in the Pollack claim form.

Now we could do all of that. We are obviously not going to do it in this hearing. The suggestion seems to be that we should come back and do it for at least half a day on another occasion. My response to that is what is the point? It will have no material effect on the trial whatsoever. It is not necessarily the case that it is so uncontroversial that it wouldn't give rise to an appeal, because there are issues about how one applies particularly the relation back test and what the relationship has to be between the two claims, and it is not clear to us on what basis it can be said that if there were disputes and a subsequent appeal that it wouldn't materially affect the trial, and if it is being said that it wouldn't materially affect the trial, then a fortiori that's the point of doing it? It might be only half a day, but you don't need me to tell you how much lawyers can spend on preparing for a half day hearing even on what appears to be a relatively discrete limitation point.

The impact on any damages is likely to be very limited. If we prevail on that four month limitation point, well, there's no effect at all on damages. If not, then the difference relates to a period of less than four months and in relation to only one part of the abuse allegations anyway.

So it seems to us it can't sensibly be suggested that resolving that will have any meaningful impact, for example, on settlement discussions, let alone on trial preparation.

As you said, sir, the point might not arise at all, because Google might win, in which case you won't have to get into it. As I said the other day it, also might not arise because it is not yet possible to determine the period for which the claims can be pursued until the separate issues of knowledge and cessation are resolved, and depending on the outcome of those deliberations, the point about the four month difference just might not arise at all.

So at its most extreme, for instance, if the Supreme Court or Court of Appeal were to say there is a cessation requirement post Volvo and Eureka and that we would be able to rely on it, then the limitation period has not even begun to run, because some of the infringements have not stopped, the alleged infringements.

MR JUSTICE MARCUS SMITH: Yes.

MR FACENNA: So there won't be any limitation point at all. So that's our position on the second limitation point, if you like.

The first limitation point then in a sense the answer is obvious, because Mr Patton accepted that if there are controversial and difficult points of EU law or retained EU law which are already before the appellate court, then that would be a good reason not to try to determine them in some summary way, whether by way of a strike-out application or preliminary issue.

The tribunal has engaged with those points in the Merricks and Umbrella Interchange proceedings. The tribunal's own order acknowledges that they are difficult points of wider importance and that they have a realistic prospect of success in the Court of Appeal. They are not just in the Court of Appeal. As I understand it the points are also being argued in the Supreme Court in the Lipton case.

MR JUSTICE MARCUS SMITH: Yes. I think there may be a leapfrog.

MR FACENNA: I have understood that. Someone has indicated that to me as well.

There is useful authority on this point to the extent you need it, sir. It is the Court of Appeal in Begum and Maran, which is authorities bundle 6, tab 157 at 8, and if we can pick it up at page 8386.

MR JUSTICE MARCUS SMITH: Tab 157.

MR FACENNA: 157, yes. It begins on 8386 I think. The relevant paragraphs are 23 and 24, which are on 8394. If you have those, if I could just invite the tribunal to quickly read.

MR JUSTICE MARCUS SMITH: Paragraphs again?

MR FACENNA: 23 and 24 on page 8394.

MR JUSTICE MARCUS SMITH: Yes.

MR FACENNA: It is well established that if you have difficult unsettled points of law then you shouldn't be determining them on a summary basis or on a strike out. Aside from it raising legally difficult and unsettled points, if the position turns out to be that there is scope for the PCR to rely on EU case law relating to knowledge and possibly also to the date of cessation of the infringements, then the limitation point will give rise to a series of detailed factual questions relating to relevant knowledge and questions of concealment and so on.

My learned friend asserted that if the pre-1st October 2015 period were knocked out, then that would have a material effect on disclosure and evidence and the issues at trial. We don't accept that. We say he is wrong to assert that and that is because we have here a single continuous infringement. The alleged abusive conduct overlapped and applied in parallel, and it is not clear today when they started and if and when they ended. More specifically, concealment by Google is an aspect of the alleged abuses. So even if you knock out the pre-2015 period on limitation grounds, evidence and disclosure relating to what was going on at the time, what Google was doing, what it

was or wasn't saying publicly is all going to be relevant to the disputes about the abuse and its effects and justification and so on in the subsequent period.

Just to make that point good if I can give you a couple of references in the claim form. So the claim form is back in Bundle B1, tab 1, paragraph 120, which is on page 47. You will see there it is said in the middle of that paragraph:

"It is not entirely clear when dynamic revenue sharing was introduced. The functionality was not formally launched until the summer of 2016. However, the state AG's Complaint in the United States alleges that Google started opting Publishers into DRS in 2014 and had opted in all Publishers by 2015 without disclosing it.

Then a couple of other examples. 135. I think we say there in the claim form:

"It is difficult to be certain based on publicly available information precisely how different features of DFP have interacted with each other over time but the PCR's present understanding is this."

You will see various references to periods going well before 1st October 2015.

Then in relation to the first abuse paragraph 181 there is another example where we say that:

Even when Google had publicly announced dynamic revenue sharing in 2016, it didn't disclose what it had already been doing in relation to AdX's take-rate.

So there are aspects of the claim, plus moreover there are aspects of Dr Latham's methodologies which expressly rely on a before and after analysis. Without turning them up, the references to those are Latham 2, paragraphs 492, 493 and 537. So both on the economic methodologies and indeed on the plain allegations in the claim we are going to have to get into disclosure and evidence relating to the period before 1st October 2015 irrespective of what the outcome ultimately is on the limitation point.

Moreover, issues of knowledge and concealment -- I think I said this already the other

day -- are going to arise anyway separately from this point, because the PCR relies on concealment under the Limitation Act 1980 in relation to the periods postdating 1st October 2015.

Mr Patton suggested that this would have an effect on who is within the class and that's why one -- one of the reasons why it should be determined. Well, again in theory that might be right if you have class members who have nothing other than some loss for the pre-1st October 2015 period and nothing at all after that date. That seems inherently rather unlikely, or at least at best it is going to be a highly peripheral category of class members, and that can be compared with what's said in Trucks in the paragraphs that you were taken to, paragraph 211, where the tribunal said there that it would exclude a large number of the class members to determine the limitation point.

Then really Mr Patton's other point was that there would be an impact on disclosure and evidence. He fairly said that he could not say exactly what it will be for the reasons I have given you. Our position is there won't be anything at all.

For the moment at least on that as well we would say it is exactly the kind of limitation point that raises difficult questions of law pending before the appellate courts, whose determination will again involve delay, detailed argument at considerable cost without the prospect of any genuinely material saving later on, and which clearly is at least at the moment pending judgments of the appellate courts sufficiently significant and controversial that it undoubtedly would give rise to an appeal either way.

I would finish with this point really. The indications from the tribunal so far, which we heartily endorse, are that we ought to be aiming for an efficient process leading to a single trial with close management of experts and data production and so on so that we can get on with it. We very much endorse that and it seems to us that the proposals which are being made, it was particularly surprising to hear the suggestion made that

we ought to have a whole day or more of argument on this difficult controversial point before we have even got into questions of data production.

That is simply a suggestion that all of that should be delayed so we can spend more time arguing about legal issues that are already before other courts and in relation to which my learned friend was not able to identify any material benefits for the trial or the submissions that he made were for the reasons I have given not accurate having regard to what will ultimately be an issue in any event.

Sir, members of the panel of the tribunal, unless there is anything else, those are the PCR's submissions on those non-methodology points.

MR JUSTICE MARCUS SMITH: Thank you very much. I am very grateful.

MR O'DONOGHUE: Sir, I am content to start. I just wonder did you want me to do a straight run and take a break now or shall I make a bit of a start.

MR JUSTICE MARCUS SMITH: How pressed for time are you going to be or how --

MR O'DONOGHUE: I have a handful of points. It shouldn't take me more than an hour.

MR JUSTICE MARCUS SMITH: In that case we will rise now and allow a break of ten minutes. Thank you.

(Short Break)

MR JUSTICE MARCUS SMITH: Mr O'Donoghue.

MR O'DONOGHUE: Thank you. Sir; I have a handful of points. I hope to finish in an hour or thereabouts. I have, sir, well in mind your helpful indication to go light on arguability and a bit heavier on *Pro-Sys* and methodology and crossing the line. So I will cut my cloth to those measurements and I will come back to Dr Maher's helpful question as well. We have the homework, sir, which you set for us overnight in relation to the table, which I will come to as well.

The first point is a short one but in some ways quite fundamental. Mr Pickford, he commenced his submissions with really a lei motif that permeated the rest of his submissions and he said that a vertically integrated company such as Google necessarily treat themselves differently to other undertakings. That may well be so. The law is extremely clear that self-preferencing by a dominant firm is an abuse assuming there is an effect on the market.

Now the irony, of course, is that the principle of law has been established in a number of cases directly involving Google. Just to show you one, Street Map, Mr Justice Roth. It is in the first authorities bundle, tab 35 and it is at page 954.

MR JUSTICE MARCUS SMITH: Which tab was that?

MR O'DONOGHUE: Authorities 1, tab 35.

MR JUSTICE MARCUS SMITH: Thank you. 35, Dr Maher, internal page 954.

MR O'DONOGHUE: Do you have that?

MR JUSTICE MARCUS SMITH: I am still looking for that bundle, but do go on and I will catch up. Do proceed, Mr O'Donoghue.

MR O'DONOGHUE: "I see no reason as a matter of principle why the preferential promotion by a dominant company, by means of its power on the market where it is dominant, of its separate product on a distinct market where it is not dominant, may not constitute an abuse if that has the effect of strengthening its position on that other market and is not otherwise objectively justified."

Then he gives the example of a supermarket self-preferencing its own brands over third party brands and the same point, of course, was made in the Google shopping case.

So discrimination again, assuming dominance and an effect on the market, is an abuse by a platform of this kind and that is an important starting point.

The second point, and this is the last point I will make on arguability. Mr Pickford focused on what he said were pleading deficiencies and the case he put forward in relation to that is the Forrest Foods case from the tribunal.

Now I just want to briefly hand the tribunal the particulars in that case. I can make a very brief point. You will see on page 2 -- it will not take you long to read -- there was less than a page of particulars of abuse. In 7.1 they said giving advantageous price is an abuse. Then 2. Purchasing products in Ireland and Georgia, an abuse and so on. So this was literally it.

Now Mr Justice Bacon in the judgment which you were shown said in relation to 7.1 claimants' counsel was unable to give any coherent answer in terms of what was the abuse pleaded. 7.2 no intelligible basis for the abuse. In fairness to Mr Pickford, he was not engaged in (inaudible) odious comparisons of our pleading and the pleading in Forrest Foods, but there is a serious point at the heart of this, which is a number of things have been said about our pleading but the suggestion that our pleading descends to a level of mediocrity so as to be strikable, when one sees pleadings like this, with respect if that suggestion were made -- I am not sure it is -- would be completely and utterly unrealistic.

Now the more substantive point, it is not that any suggestion we have driven a clown car into the tribunal and the wheels have fallen off and everybody laughed. It is in my respectful submission Mr Pickford has a fundamentally misconceived starting point in terms of what a pleading must achieve as a matter of demonstrating arguability. That's the error of principle which permeates his approach.

He suggested based on annex A to his skeleton that the PCR needed to say in relation to each of the 15 sub conducts, or perhaps 17, it doesn't matter, that it was incumbent on the PCR to plead how in relation to each conduct Google ought to have behaved

differently and how it should have complied with the law.

In my respectful submission that is a fundamental misunderstanding of principles of pleading in this jurisdiction. A pleading must, of course, set out each necessary element of the cause of action. It must, of course, plead the essential minimum factual averments needed to make good each element of the cause of action and therefore the cause of action overall, including we accept the basis for the gist damage caused by the conduct in question, but if a pleading achieves those objectives, it is simply wrong in our submission to suggest that the pleading is then deficient, because it does not do more than this or because it is not pleaded in the way the defendant would like. The claimant gets to choose how to plead its case. If that choice is an adequately pleaded case, it is a non-point for the defendant to say that it could have been pleaded differently or better. The tribunal needs to satisfy itself that the pleading as presented passes muster. The issue, with respect, is not whether Mr Pickford would have produced a more beautiful pleading.

In my respectful submission examples that Mr Pickford gave really just showed how far removed his points are from a proper pleading complaint. He said yesterday, for example, that Google might have imposed the 10% commission in the context of open bidding as a reflection of its costs of introducing that facility, but that is quintessentially a defensive point for Google to raise. It might be an argument as to why there is no abuse. It might be an argument as to why, if there is no abuse. It might be an argument as to why if there was a prima facie abuse, it is objectively justified as a reasonable reflection of additional costs, but it is not certainly in a pleading for the claimant to pre-empt these defensive matters.

What Mr Pickford effectively has in mind is that within a pleading a claimant must have a sort of proxy defence pre-empting what the defendant might in due course seek to

argue. That is not the claimant's job certainly in a pleading. It may be at trial this is a good point for Google to make as to why there is no abuse or the monetary impact is zero or attenuated, but that is merits and it is for later and not for now.

Now one reason, of course, why this approach is not merely correct as a matter of pleading is one of common sense. The claimant does not have powers of telepathy or omniscience. It does not know what evidence the defendant will lead or what justifications it will put forward. This applies particularly in a case such as the present where the systems architecture, the algorithms and so on of the Ad Tech stack will in many respects be a black box for someone like the Publishers. The Publishers only directly interface with the publisher ad server, the DFP, and even then it is a virtual interface.

Nor do the claimants have to explain certainly in the pleading what the defendants should have done to comply with the law. That is not a pleading issue either or indeed an arguability one.

Now the other reason why we say the submission is misconceived is that it assumes at the certification stage that everything is set in aspic. Google ignores, for example, the fact that the function of a defence and a responsive pleading from the PCR will be to elucidate points of difference, that further information may be sought and that active case management can lead to a recalcitrant party, who refuses to clarify a necessary matter in its pleading, being required to do so.

This applies in particular we submit in a CPO context where the Court of Appeal in this tribunal have strongly emphasised in recent judgments that certification is part of an ongoing process. It's not once and for all, and until yesterday at least Mr Pickford was suggesting that our case should simply be struck out, ignoring all of these case management and other common sense points.

His retreat in my submission should not obscure the fact that his pleading point on arguability is simply a bad one in any event.

So we say on arguability there is no material ambiguity in our pleading and to the extent there is any residual ambiguity, the answer to that issue is case management, pleadings, requests for information, all the usual stuff.

Now, sir, third, coming to the key issues on counterfactual and causation. Then I will move to my penultimate point on *Pro-Sys* and then I want to pick up on some case management matters.

MR JUSTICE MARCUS SMITH: Yes.

MR O'DONOGHUE: Now starting with the counterfactual on causation because, of course, this leads into methodology to some extent and to aspects of *Pro-Sys*. The starting point, as Mr Pickford made yesterday what in our submission is an important and necessary concession. He accepted that one could have a case in which the counterfactual to two or more abuses -- two or more conducts is essentially a common one. This concession we say is important, because that is the PCR's case.

Now parenthetically just to note here, Mr Pickford, he suggested that the single and continuous infringement concept is really about the commission or CMA trying to bundle up various mini infringements into an overall infringement, but we say the concept is something more than that. It reflects the pragmatic reality that anti-competitive conduct will more often than not be cumulative in nature, somewhat different manifestations over time and that the focus should be on commonality rather than the artificial atomisation of the case.

MR JUSTICE MARCUS SMITH: Mr O'Donoghue, I wonder if we could test that point by reference to your pleading, because what we have is essentially three generic abuses articulated nicely under headings first and second abuse. We can see that if

we look at the structure of the pleading. The first abuse begins at paragraph 163, second abuse begins at 211 and then the third abuse, just moving through, is at 237. So those are the abuses and, of course, they are more granularly unpacked in the other paragraphs and that's obviously right. One does not plead by way of headings. When one then comes, however, to the question of causation, paragraph 265, what we have at that paragraph and following is what I read as a plea of causation that is common to all three abuses. In other words, what you are saying is that the counterfactual requires removing the infringing conduct, assessing how the relevant market would likely have operated without it, relying on assumptions and approximations as appropriate.

Of course, that's very general but it is an introduction, but what is clear I am suggesting from 265 is that the pleader is saying that the consequences of the abuses are, as you put it, common or overlapping or duplicative. They may be different in extent and that may depend on the evidence we hear in due course, but their measurement and their essential cause of damage to the market if you establish it is the same sort of thing. It is essentially an improper preference.

MR O'DONOGHUE: They have sufficient commonality.

MR JUSTICE MARCUS SMITH: Indeed. No-one is saying they are exactly the same because then one would have one abuse, not three. They are sufficiently similar for the pleader to have done in this way.

Now given that we are at the level of strike-out and arguability, don't we as a tribunal simply have to take that?

MR O'DONOGHUE: Yes. I mean, the point I made yesterday or rather the day before was two-fold. One, for Mr Pickford's case to get off the ground on this point he would at a minimum need to say the single and continuous infringement is not arguable. He

has not said that. The other thing he would need to do is go to this section, these pages on commonality, and say "These paragraphs are defective as a sufficient commonality pleading for the following reasons".

Again he has not even opened those paragraphs to the tribunal. So we say it doesn't really get off the ground. It really is a dog that barked but never bit.

Sir, again the reason I showed you the particulars of Forrest Foods was not for hilarity or meanness. It is to show the type of clown filled car one is typically talking about when it comes to strike-out territory. One of the many ironies in this case is the loudest complaint in relation to our case has been the level of detail and volume. We have been accused periodically of "Well, there is too much" and there is some truth in that. I entirely accept that, but to suggest that where there is a standalone section in a pleading headed "Causation" where there is a coherent case on commonality linked to the three abuses, that you can put a pen through all of that at this stage, pre-disclosure in a complex case such as the present, and in particular given the regulatory backdrop, is unarguable in my submission.

Sir, that's all I want to say about arguability. In my submission it doesn't get off the ground for obvious reasons and in the end in fairness to Mr Pickford it was all a bit quarter hearted on that.

Now where Mr Pickford focused a lot of his fire, and, sir, coming back to your question on *Pro-Sys* and the dividing line, just to tackle that head on, can we go back to the Court of Appeal in Gutmann just to anchor ourselves in what are the framing principles? This is in the third authorities bundle, tab 66. It starts at 2843 but I want to pick up paragraph 52, which is 2860 Dr Maher, it starts at paragraph 52, which is on page 2860. Again we have seen this once already. I don't want to labour the point. It is critically important in my submission that this is the starting point for *Pro-Sys* and

methodology. Again just to rattle through the really key points, middle of 53:

"Credible or plausible ... some basis in fact ... realistic prospect ... class-wide loss ... not purely theoretical ... ground in the facts of the particular case ... some evidence ..."

You will see the emphasis in Lord Justice Green's own drafting and these words are emphasised for good reason.

"Some ... grounded ... realistic" and so on.

I also ask the tribunal to note at the end of 53 the discretion of the tribunal to make a value judgment.

54. Counterfactual. Everybody agrees with that in spades.

Absence of disclosure. Again it might seem blindingly obvious, but it is worth thinking about this, because one of the mental exercises or issues the tribunal needs to in my submission grapple with is we are pre-disclosure, where the PCR and his or her economists are solely reliant on public information on a complicated and multi-faceted infringement, and likewise when it comes to damage. So the absence of disclosure is an important issue.

Now the really important point is at paragraph 56. In my respectful submission, sir, this is the answer to the question you posed. What the PCR must do at the certification stage in terms of methodology is identify the issues, not the answers. Lord Justice Green goes on to say:

"Methodology is workable at trial when the issues are tested. It might lead to different answers, some in favour of the defendants ... capable of being adjusted ..." and so on.

In 57 "intuition and common sense". Again I don't need to labour that point.

58 is an important point, because it shows the iterative nature of *Pro-Sys* when refracted through the lens of case management. What Lord Justice Green says is, second sentence:

"The axe head is adjustable and can expand and retract to meet the nature of the case."

Now I will come back to what that means in our case. One obvious thing it means is whether and to what extent one needs to adjust the axe head will in the first instance be more or less a complete function of what data is available to be plugged into the model and whether the model with those data actually works. The iterative exercise -- if through that process of case management it transpires through an absence of data or for some other reason the methodology that is put forward in the model simply does not work or not robust enough, then the axe head gets adjusted into another aspect of the methodology.

Now we may be in the realms where, God forbid, there is inadequate data and there is no quantitative model that can be constructed. We may be in the realms of looking at internal Google studies. We may be in the realms of more qualitative assessments and we may well be in the realms of all of the above, and you will recall, sir, from Merricks the Supreme Court -- and it is not often you see this in the Supreme Court judgments -- they use the word "guesswork".

Now again I don't think we will be in that territory, but one possibility in terms of the adjustability of the axe head is in the spectrum of evidential possibilities. The furthest -- one of the ends of the spectrum is guesswork and the Supreme Court have said in Merricks there is nothing in principle wrong with informed guesswork if that is the best evidence available in the case.

Now again I doubt very much that is where we will end up, but it is an important framing principle in understanding what are the demands of *Pro-Sys* at this stage and how does one triangulate the *Pro-Sys* requirements with active case management and the shape of the case to trial.

Now just to map these principles on to our case in terms of the methodology, there is no challenge whatsoever to the umbrella damages component. Mr Pickford, in spite of what was said in his skeleton, has effectively conceded that the take-rate effect methodology at least for certification purposes passes muster. There has been no real complaint about that. That has been effectively conceded.

On overhang damages there was a rather half-hearted suggestion, "Well, we need a methodology for the four years". Sir, as you put clearly and fairly to Mr Pickford, that is a question to be managed going forward. It is in part a question of fact.

Just to give you a reference for that, Dr Latham -- you were not shown this -- has very substantial sections in both of his reports dealing with overhang and pushing back on the idea that "Well, this is all sort of guesswork on your part".

Just to show you one of those, if I may, if we go to Latham 2 in the B bundle, it is at 1802. This is a section on the methodology for computing overhang damages.

MR JUSTICE MARCUS SMITH: Yes.

MR O'DONOGHUE: 1802. He says, for example, at 563:

There is a regulatory backdrop here. There are remedial changes which seem to be afoot and they may tell me something about the unwinding of the infringement.

So that's Latham 2.

Then if we jump forward to Latham 3 in the D bundle, it is at D3, 136. It is at paragraphs 255 and following. If I can ask you, sir, to pick up in particular at 258 and 259 on 136, he says, sir, in the middle of 258 -- do you have that? It is 136 and it's paragraph 258 and it's in the middle. He says:

"My final methodology with regard to overhang damages will necessarily depend on the data and documents to which I hope to gain access through disclosure. Indeed, I have specifically stated ways in which I would like to proceed: for example, by

examining the impact of regulatory intervention", as we saw.

Then 259, important:

"I will be guided by the data and the documents to which I have access, it would be inappropriate of me to wed myself to a particular set of assumptions at this stage as to how Publisher revenues in the actual would evolve after the cessation of Google's alleged abusive conduct. This is the very reason my preliminary estimates were based on a simple and highly conservative set of assumptions" and so on.

In my respectful submission as an independent expert what Dr Latham has done is entirely appropriate and in my submission it would have been inappropriate for him at this stage to say, "Well, to hell with data disclosure. Here is my assumption. It's a rigid one and I am going to close my mind". This is exactly what an independent expert at the pre-certification stage should be doing.

Somewhat ironically, if you see over the page at 263, Google's expert Mr Matthew, he says -- we have seen the quotation:

"It cannot simply be assumed that technologies enabling real-time competition head-to-head amongst SSPs could have come into existence instantaneously."

So Google's own expert is accepting, albeit in the other direction, that it takes time for things to unwind, and what this illustrates is that it is primarily a question of fact as to how long it takes for things to get up and running in a post-abuse period. That will be a question of fact, evidence, data. There may need to be evidence from Publishers. There may be some interplay, as we saw, with the regulatory remedies.

To suggest at this stage you should also put a pen through Dr Latham's overhang analysis due to the apparent absence of an all-singing, all-dancing methodology in my submission shows a complete lack of common sense as to what an expert should be doing on overhang at this stage.

So on umbrella, overhang and take-rate, three of the four principal heads, there is not actually a credible challenge to any of the methodology.

So effectively all the tribunal is left with is an attempt to gainsay at this stage the gross price effect.

Now on that there are a few points. First of all, in my submission it is fundamental to understand what is the benchmark or the hurdle that needs to be vaulted. Now we know from Gormsen and from a recent interchange case called CICC, which I think is the only competition law case in history that is not in the bundle, and they provide us with a very, very clear insight into the level of a gaping hole or fundamental defect that is needed to send a PCR back to the drawing board.

Now on Gormsen, sir, I don't need to remind you at least, but just to unpack the foundational problems in Gormsen 1, first of all, for two of the three abuses there was no economic methodology whatsoever.

Second, in relation to one of the pleaded abuses, essentially a misrepresentation case, the tribunal suggested in pretty clear and strident terms that it was probably not an abuse at all.

Third --

MR JUSTICE MARCUS SMITH: We thought it was an individuated claim, not a class claim.

MR O'DONOGHUE: As well. It was both not an arguable abuse, and if it was, it was individuated.

Thirdly, and in a sense most damningly, the basis on which the damage as a whole appeared to be put was a gains based type of approach that was simply not available in law.

Now one can understand in that context why a PCR might well be sent packing and

back to the drawing board, but these are pretty big issues that the tribunal as gatekeeper can't simply shrug its shoulders and say, "We will case manage that". They are not case manageable is the point.

Then on CICC again very, very serious foundational problems. No methodology whatsoever on pass on, which was an essential component for any loss to arise in the first place. I think the Chair in that was Mr Tidswell. Just to give you the reference, sir, it is [2023] CAT 18, CICC. So no methodology whatsoever on pass on, which was an essential component. For any claim to arise it would pass on to the claimants from up the chain. They had no methodology to make that good.

Then, secondly, and in a way almost worse, there was no basis on which the tribunal could understand who was a member of the class in that case.

So in my submission what one is looking at, we have had two cases so far as I am aware where people have been sent back to the drawing board. One is looking for foundational gaping holes, showstoppers, deal breakers, things of that ilk.

Now we map that on to our case. For three of the four heads of damage there isn't really any challenge. At best Mr Pickford seems to be suggesting on one of the four heads we should be sent packing.

Now I would say parenthetically there, and again, sir, I don't need to remind you, if one is sent packing, in the real world we are looking at about two years of delay. It will be a year, a year and a half to be recertified and then almost certainly an appeal. So if the tribunal is to send a PCR packing, it has to be with the open eyes that you are baking in one to two years of delay into a process in which access to justice and in my submission speedy access to justice are paramount considerations. Again that reinforces the point that there needs to be a deal breaker to justify that draconian step.

Now what is said in this case in relation to the gross price effect? In reality the highest

the case could be put is this is complicated. It is not a *Pro-Sys* point. There may or may not be data. That is a case management point. The model may or may not work. Again active case management point. None of the points Mr Pickford made in relation to gross price effect methodology were foundational in nature.

He attempted to say, sir, for example, in relation to simulation, "Well, there is effectively a per se strong presumption these are not fit for purpose". As you quite rightly said, sir, it is all context dependent and, of course, data dependent. That really was the high watermark of a principled foundational challenge.

Now in my submission -- I want to come on briefly to the questions of data, because what the consideration of the questions of data retention availability show is that Mr Pickford's true complaints are really questions about how do we manage going forward access to data, because, at the risk of stating the obvious, you cannot build a model that functions in the absence of relevant data.

The correct case management way forward is not the tail wagging the dog. It is to start with a speedy, logical and orderly process whereby we can understand rapidly what data are available to be plugged into one or more models, because a sterile and abstract debate about "How good, bad or indifferent is this model?" in the absence of any understanding as to what data are available and their quality is in my submission chasing your tail.

It is important to understand where the battle lines have been drawn on data retention, because what they underscore in my submission is that we are very, very firmly already in the realms of needing active case management on these data issues.

Just to go to Mr Kornacki's witness statement and make a small handful of points. It is at C3, 178. Dr Maher, C3. It starts at 178.

You will see, members of the tribunal, at 1 he is a software engineer. Then over the

page at 5 he says he is advised that:

"... Google is not required at this stage to identify comprehensively which data may be relevant and whether and to what extent that data may be available."

So from the very outset this statement is self-avowedly minimalist and limited in nature and ambition.

Then if we go over the page at 9, where he then unpacks some of the queries, we see, for example, at 9.1 he says:

"Google does not in the ordinary course ..."

Now this, of course, is litigation language. This is not the vernacular of a software engineer. This is all rather carefully curated, but he says:

"Google does not in the ordinary course retain auction level data on losing bids for more than 35 days."

Then over the page again more "ordinary course", but he does say in relation to data on the winning bid in AdX:

"The retention period in these auctions vary between 35 days and five years."

Then 9.3, again more "ordinary course":

"... has some auction level data ..."

Non-specific.

Then at 12 at the bottom of the page:

"Google retains some data on winning bids for longer than 35 days."

Again not very illuminating.

14, you see the heading "Auction data that's not available". He says at the start:

"... even though Google has not carried out such an exercise ..."

Again this is a witness statement that, a bit like statistics, is interesting for what it reveals. What it conceals is vital.

At 19 again more tentative stuff. Second line:

"There may be different systems ...."

Well, he is the software engineer. How does he not know this?

24, he says in the second line -- this is under "Header bidding outcomes":

"Google has developed a method to identify when Publishers are likely to have configured items to utilise header bidding."

Then it starts:

"Since June 2018, Google has been able to make inferences ...", and so on.

Then at 25 you see from the first two sentences again it does look like at least some aggregate data aggregated by Publisher is available.

Then you will see at 28 he deals with CMA data. At 34 he deals with data provided to the French Authority. At 37 he deals with data provided to the Department of Justice.

Now, of course, we have seen none of these data.

Now, as the tribunal will understand, we very quickly sought further information, trying to understand on a more granular level some of the things which were not apparent from Mr Kornacki's carefully worded statement.

Now if we go to the I bundle, which is the correspondence bundle, I just want to show you two letters. The first one is at I, 104, please. Dr Maher, it is tab 104, page 273.

You see at the top we are responding to Kornacki.

Then paragraph 1:

"Your letter does not address a significant number of requests made in our letter regarding the availability of data and documents requested in Appendix F to Latham 2."

Then we attach essentially an annex or appendix, in which we ask Google to respond to a series of specific further data clarifications in Kornacki.

We then see the response two tabs on at 106. At page 290, paragraph 7, Google says:

"It is only where the data limitations are so significant they would impact the viability of the blueprint at trial that information on the availability of data should be canvassed pre-certification."

At 15, the last sentence:

"The appropriate time for consideration of these requests would be after your client's claim is certified when the issues of relevance, proportionality and necessity can be properly considered. Google's position on those matters is reserved."

16. "For those reasons Google considers that it is premature to provide the confirmations sought in your 13th March letter and annex thereto."

So there is effectively a refusal to clarify a number of quite legitimate clarifications in the Kornacki witness statement and, of course, we have not been able to cross-examine Mr Kornacki on many of the interesting things he says.

So in my submission Google, therefore, puts forward an unattractive position. They are saying, "Well, the tribunal should be confident at this stage that, due to data deficiencies, Dr Latham's models will not work". We reasonably and responsibly say, "Well, can you please clarify and provide further information on the data you have?", and we have seen in the statement they do seem to have quite a lot of data. They say, "Well, you can't have it. That's for later, but you should not be certified now".

In my submission what that really exposes is the need for urgent case management on trying to extract the relevant data and see to what extent they can sensibly populate the methodologies that Dr Latham has put forward.

In a nutshell it is in our submission unjust to strongly hint at the possibility that the model will not work because of data absence, but then to be unwilling to come clean

as to what Google actually possesses, or, to put it more neutrally, there is a significant case management issue as to what data are reasonably and proportionately available, and that is the case management issue that will drive the resolution of the methodology. Sir, you have my point that that data driven and case management issue is not *Pro-Sys* territory. That is answers, not issues.

Indeed, we would say that the suggestion of sending us back to some of the drawing board is both pointless and potentially unjust to get our rulers out with Dr Latham's methodologies. Unless and until we can see with fuller visibility what data are available, it is in my submission a sterile exercise trying to mark the homework of Dr Latham at the pre-disclosure stage.

Now a lot of fire was focused on method A1, which has aspects of bid translation, but even in relation to that Dr Latham in my submission has a more than robust methodology at this stage. It is based on something used by the French Authority in a decision that Google settled. It has its origin in a commercial product offered by Google to its customers and therefore manifestly of some practical utility, and to suggest that a method inspired by both of those sources does not pass the *Pro-Sys* test in my submission is an extremely ambitious submission.

The answer to this issue is urgent cooperation between the parties and their experts and strict and prompt supervision from the tribunal. We are willing and able to assist with that exercise. We need Google's coy or we say tactical approach to stop and for grown-up, professional and collegiate discussions to take place instead.

Finally, sir, my last point on case management, on confidentiality we, of course, have no issue of principle with genuinely sensitive materials that may require protection, but it is ultimately a balancing exercise. There are at least three other important principles to be applied in the scales. We need to be able to work in a way that is practical and

fair to our witnesses. That is about access to justice and equality of arms. The trial is in principle supposed to be public, not private, and we shouldn't have multiple hokey-cokeys of individuals in and out of proceedings as we go in and out of private session.

Now Mr Pickford made a helpful suggestion that it may be possible for cross-examination and submissions to be conducted on the basis that confidential documents would be available to the witnesses, but not necessarily read out in public. In my submission that can be useful in certain contexts, but the correct approach in principle is to establish whether such an approach is necessary in the first place and it should not be a panacea for avoiding grappling with the point of principle.

The third principle, of course, is the judgment itself should be fully or at least maximally open to the public to read. That is a canon in this jurisdiction, but it applies with particular force in the CPO context, which after all are about access to justice, and in simple terms seeing justice done in a judgment is part of access to justice.

MR JUSTICE MARCUS SMITH: Well, just to sharpen that point a bit, isn't the thing that renders the judgment at least, if it gets that far, important to be public that otherwise only the representative of the class ever gets to see the reasoning?

MR O'DONOGHUE: Indeed, sir. When the judgment is rendered in some ways from a class perspective it is then the real interest starts. The suggestion that we or the PCR would be ham-strung from the availability to explain what has happened and activate next steps because of confidentiality in relation to events that in many cases started a decade ago, that is a real problem.

My practical point is avoiding those car crashes, inconveniences, that starts on day one following certification.

Now what happens in these cases unfortunately is things get dumped into the mother

of all inner rings. There is then an attritional process of trying to get things out of the ring. In my submission we need -- again, sir, I know I don't need to teach you to suck eggs on this -- to get out of that bad habit and force all parties to address their minds at each and every stage as to what truly should be in the inner ring and in what capacity and at what speed it can be de-restricted.

So the final point on case management: you have my points in spades on the data availability is crucial to get a hand on as soon as possible. We need to get on -- we need to get a process in place for disclosure. The case, in fact, was issued one and a half years ago. We have had a carriage dispute. You have seen the off-the-shelf disclosure from the CMA Commission, DoJ, French Authority. We need Google candidly to unpack properly what it has instead of the tantalising approach we see in Kornacki. They need to tell us comprehensively what types of documents and data these agencies have rather than speaking around the edges or suggesting that it is rather a lot.

We do, of course, sir need at some point a pleading. We have had a number of very interesting defensive points from Mr Pickford in relation to, for example, the open bidding fees being cost justified and other technical points. If Google is going to make these points, given that they are the experts, the architects, they need to be set out so that we can then shape the case going forward.

Sir, I would suggest that if this is certified, that even at the stage of consequential issues we start thinking in a very serious and rapid manner about how to grapple with these things.

Those are my submissions.

There is a couple of -- on the two housekeeping points, through powers of insomnia we have produced the table you asked for, sir.

MR JUSTICE MARCUS SMITH: That is very helpful, Mr O'Donoghue. I think it may have either been buried in submissions or not been answered, but Dr Maher raised a point about methodology.

MR O'DONOGHUE: Yes.

MR JUSTICE MARCUS SMITH: That may be something to -- let's first look at your very helpful table. First of all, can I say thank you to your team for producing it. It was a very late and --

MR O'DONOGHUE: The bad news is it is three pages. We didn't think that the dark arts of formatting would help in trying to shoehorn it into two pages.

MR JUSTICE MARCUS SMITH: I think that would have been compliance with two pages at the expense of readability. I think this is an excellent sized font.

MR O'DONOGHUE: Sir, what we have done in a nutshell, you will see in the first row we say the primary case is the single and continuous infringement commonality. Then we do unpack the three self-preferencing categories. You will see on the left-hand column the abuse in a nutshell with pleading references, in the middle column the counterfactual again with both pleading and Latham references and then how that is triangulated with the methodology in the right-hand column.

MR JUSTICE MARCUS SMITH: That is very helpful and we will take it away and consider it. Thank you very much.

MR PICKFORD: May I ask do you wish to hear from me, because I can address the tribunal on the question that was asked about the test?

MR O'DONOGHUE: Sir --

MR PICKFORD: Oh, sorry.

MR O'DONOGHUE: I had hoped to answer Dr Maher's question.

MR PICKFORD: I beg your pardon. I'm sorry. I was getting ahead of myself.

DR MAHER: My question was actually (inaudible) in the sense that somewhere in the realms of post 2019 we are in a situation where the alleged abuse is not necessarily arising out of the last look advantage, so to speak, informational advantage. In fact, it is my view, and this is something I think is more again for case management, it is a much more simpler thing to be able to test and can be done econometrically. Maybe that's something that can be left.

I just wanted to -- it was not quite clear to me -- econometrics was one of the methodologies that Dr Latham had suggested and by increasing the number of bidders to try to get an estimate again of this bid shading, so to speak.

MR O'DONOGHUE: Yes. That is extremely helpful.

DR MAHER: So it is a little different when we get to the all bidding together, because the number of bidders don't change, but I can see a much simpler way of trying to estimate that once would he get --

MR O'DONOGHUE: I sincerely hope you are right, Dr Maher.

DR MAHER: If we get down that road.

MR O'DONOGHUE: The one thing I would say is Google's position, of course, is that the open bidding and unified pricing auction, they effectively replicate real-time multi-SSP bidding, and therefore are fungible with the true counterfactual.

Now we, of course, don't accept that on various levels, as you will have seen in the pleading, and one footnote on open bidding: as we understand it, the uptake of open bidding is about 5% to 10%. So the idea that even quantitatively there is some mass scale multi-SSP real-time auction under open bidding is --

DR MAHER: I wasn't referring to open bidding.

MR O'DONOGHUE: It was the unified.

DR MAHER: It was even later.

MR O'DONOGHUE: Yes, but I think, Dr Maher, the -- again I come back to the question of data availability. We will in simple terms want to get our hands on as much auction data as are reasonably proportionately available. I suspect that will be easier for more recent history than earlier in the period, and again, at the risk of mangling this, you are trying to back out of the data that are available something which gives you comparison of factual and counterfactual.

So whilst I entirely agree it is a case management issue in the sense that it will in the first instance be dictated by what's reasonably available and can that be used to populate either an existing model or perhaps, as you indicate, something actually more straightforward.

Sir, I had nothing else to add.

MR JUSTICE MARCUS SMITH: Mr Pickford.

MR PICKFORD: Sir, I have two questions and they are, firstly, we have obviously been handed this, but I didn't address this is in any of my submissions. The question is how we go about addressing that. One way we could do it is to provide a similarly -- a similar length response or I can speak to it now, but obviously we have only had it a short time.

The other is, sir, you asked a question about "What is the test and what does the blueprint need?" You may feel that I have given you my answer to that, in which case I am happy to stop with that, or you may want me to give you what my answer is to that as well as him.

MR JUSTICE MARCUS SMITH: I rather thought we had had it, but if you have anything to add, of course, we are not going to shut you out, provided you are brief and you understand that it is a rejoinder in circumstances where you have had at least your fair share of time and quite possibly more than your fair share of time.

In terms of that document, of course we are not going to stop you responding, but it should be in writing rather than orally, but to be clear, we regard this as a document which is doing no more than pulling together what has been pleaded. As I made very clear to Mr O'Donoghue yesterday, we were not expecting the origination of new points.

MR PICKFORD: We have not re-invented any.

MR JUSTICE MARCUS SMITH: I am quite sure you have not and we would not be best pleased if you had. The point of the document is to enable us to navigate some quite voluminous documentation accurately and in line with what the pleaders think. So to that extent I am not sure you have got very much to say, but, as I say, do feel free to respond if you think it is appropriate. We are not going to shut you out.

MR PICKFORD: Thank you. In relation to that that settles the second question. In relation to the first, if the tribunal is content that they feel they have my answer, I am happy to leave it there. It was really a question --

MR JUSTICE MARCUS SMITH: No. If we had questions for you arising out of Mr O'Donoghue's submissions, we would be asking them.

MR PICKFORD: In which case I don't need to trouble the tribunal any further.

MR JUSTICE MARCUS SMITH: In that case can I thank the parties very much for their assistance. We will reserve our judgment but endeavour to hand something down as quickly as we can, but thank you all very much for your very considerable efforts. Much obliged.

(4.12 pm)

(Hearing concluded)