IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1641/7/7/24 & 1644/7/7/24

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 11th November 2024 – Wednesday 13th November 2024

Before:

The Honourable Mr Justice Roth
Keith Derbyshire
Charles Bankes

(Sitting as a Tribunal in England and Wales)

BETWEEN:
BIRA Trading Limited

Proposed Class Representative

-and-

Professor Andreas Stephan

Proposed Class Representative

v

Amazon.com, Inc. and Others

Proposed Defendant

A P P E A R AN C E S

Sarah Ford KC and Nikolaus Grubeck On behalf of BIRA Trading Limited (Instructed by Willkie Farr & Gallagher (UK) LLP)

Mark Brealey KC, Daniel Carall-Green and Christopher Monaghan On behalf Professor Andreas Stephan (Instructed by Geradin Partners)

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Monday, 11th November 2024

(10.30 am)

MR JUSTICE ROTH: Good morning. I start, as always, with a warning. These proceedings, like all proceedings before this Tribunal, are live streamed. It is strictly forbidden for anyone to make any image of the proceedings. An official transcript is being made and no unofficial recording should be made. To do so is a contempt of court and punishable as such. The transcribers are working remotely, but we shall be taking a short break mid-morning and mid-afternoon for the benefit of the transcribers. We will also, as it is Armistice Day, be observing the two minute silence at 11.00 am. Can I also ask -- this relates to the Stephan case, so Mr Brealey, if we look at bundle D10, if you are working off hard bundles, which is an exhibit to Professor Stephan's witness statement. A number of documents there, so if one goes to page 15 within the bundle, are marked "Privileged and Confidential". I think that's the whole of the LFA, the budget and so on. Are they confidential for the purpose of this hearing, because I imagine people will want to make reference to parts of them?

MR BREALEY: Can I take instructions? We will do that but I can do that immediately. I can't see they would be. Obviously commercial terms would be, but --

MR JUSTICE ROTH: I would hope that matters that are confidential have been redacted.

MR BREALEY: Correct. The answer is I don't see a problem, but I will double check. That's sorted already. There is no problem.

MR JUSTICE ROTH: We have seen a note on the running order that you have agreed. We are grateful for that. I think that means that, Mr Brealey, you start for Professor Stephan. Is that right?

MR BREALEY: I do. Just so that you know, sir, the way it is going to happen today is it says "AM: Professor Stephan". I will introduce the case on abuse 1 and 2 and

abuse 3 and I will finish around about the coffee break. Then Mr Carall-Green will get up with your permission and he will address you on the conflict point.

MR JUSTICE ROTH: Yes. Thank you. Abuse 5 is not really a conflict point so much.

MR BREALEY: It is not really a conflict point. It is in the written submissions. If we need to make oral submissions on it, we will, but we will see how Ms Ford responds to that.

MR JUSTICE ROTH: We might have a question about abuse 5. I don't know if that goes to you or --

MR BREALEY: It probably goes to me. Clearly it is not the same conflict of interest in 5 as they say there is in 3 and 4 and indeed in their skeleton they don't really address 5.

MR JUSTICE ROTH: Yes. It is not really a conflicts point we have got.

Submissions on abuse on behalf of Professor Stephan

MR BREALEY: I am short of time. I don't know if the Tribunal are going through the electronic or hard copy bundle, but I would like to begin on Abuses 1 and 2 and start with the CMA Commitments Decision. That is in bundle B. It starts at B, 6420. That's in my old volume 8 at tab 11. I am just going to refer to the CMA's Commitments Decision, 3rd November 2023.

MR JUSTICE ROTH: Yes.

MR BREALEY: I appreciate, sir, that the Tribunal will have read a lot of this, but it is important that I just go through some of it and emphasise some of the paragraphs which are key.

MR JUSTICE ROTH: Yes. I can tell you that I have not read the Commitments Decision. So there we are.

MR BREALEY: Okay. This is the Commitments Decision. Clearly all parties have

been relying on various regulatory decisions, the EU Commission, the Federal Trade Commission, the Italian authority, but I would like to focus on the CMA Commitments Decision.

If we go to 6423, this is the "Introduction and summary":

"In this decision made under section 31A ... the CMA accepts the Commitments ..." essentially offered by Amazon.

This is a good place to start, because at paragraph 1.2 it sets out the competition concerns and then at paragraph 1.3 it sets out the Commitments. So paragraph 1.2:

"The Commitments were offered by Amazon to address the competition concerns identified by the CMA, namely at least from January 2021 Amazon has engaged in conduct that may have abused or continues to abuse its dominant position in the market for the supply of e-commerce marketplace services to third party sellers to reach customers in the UK."

So that's the dominant position. Then in brief, the CMA's competition concerns, which are set out in more detail in chapter 4, which we will have a look at are that (a) is essentially abuse 1 and (b) is essentially abuse 2:

"(a) Amazon uses data relating to or derived from the commercial activities of third party sellers to inform business decisions" -- and I would ask the Tribunal to note the plural, because every time I come in this document I will be referring to decisions, plural -- "by its retail arm ('Amazon Retail') when competing against those sellers on UK Amazon Marketplace."

So that is the competition concern, abuse 1. That's the data abuse, the data abuse.

"(b) Amazon sets out and applies the conditions and criteria for selecting the 'Featured Offer' on product pages in a discriminatory manner, such that Amazon retailers and sellers that use Amazon's fulfilment services" -- so here we get the fulfilment services, the delivery logistics -- "are unfairly advantaged over other sellers."

So that's (a) and (b). (a) is abuse 1 and (b) is abuse 2, but there is an element of the fulfilment services in it, which we will come to.

Paragraph 1.3:

"The Commitments will ensure that:

Amazon will not use non-public data provided by third party sellers to Amazon or derived through their use of Amazon's marketplace services ... for the purposes of its own retail operations that are in competition with third party sellers. Specifically Amazon must not use data to inform decisions", plural, "to identify and add Amazon Retail offers; identify vendors or negotiate prices and terms; make decisions to stop and start purchasing products; inform inventory planning for products; or inform pricing decisions."

So there are various decisions there that are identified in abuse 1.

Then abuse 2, the Buy Box Commitments:

"Amazon will apply objectively verifiable, non-discriminatory conditions and criteria to determine which offer (either from Amazon Retail or third party sellers) will become the Featured Offer and will not use Prime eligibility or Prime labelling as relevant criteria for selecting the Featured Offer."

They are the Buy Box Commitments. Now in section 4 if we go to section 4 at page 6434, this is where the CMA -- this is section 4. This is where the CMA expands a little on its competition concerns. The first section is essentially abuse 1. This is the data abuse. "Amazon's use of non-public seller data to compete against third party sellers."

4.2, 4.3, again it is repeating the point that Amazon Retail is able to access and use data derived from the commercial activities of third parties.

I would ask in particular the Tribunal to note 4.5, 4.6 and 4.7.

"4.5. The CMA is concerned that Amazon Retail ..."

MR JUSTICE ROTH: Would you like us to read it to ourselves?

MR BREALEY: Yes. I think that is probably better.

MR JUSTICE ROTH: 4.5 to 4.7?

MR BREALEY: Yes, please. (Pause.)

MR JUSTICE ROTH: Yes.

MR BREALEY: If I could just make a few little points. To emphasise what the CMA is saying at 4.5 I ask the Tribunal to note again decisions, plural, decisions relating to adding Amazon Retail offers, starting and stopping inventory, decisions about setting product prices.

Then at 4.6 we see again what these decisions, the effects they may have. (a) is:

"Monitor the success of products introduced by third party sellers ..."

Now this is in a nutshell the data entry decision, as we shall see. This is the gateway for the BIRA claim. 4.6 (a):

"Monitor the success of products ..."

This is the data entry decision. The CMA also goes on to say there are other effects of the decisions:

"(b) identify and approach the suppliers of third party sellers ...

Negotiate more effectively [to get] discounts from suppliers ..."

So, in other words they are competing. Amazon sees that a third party seller is selling more cheaply and Amazon will go after the supplier and get a better discount because that's the sort of commercial data it has access to. Then we see the effects of the competition concerns at 4.7.

Then quickly if we go to the Commitments at 6437.

MR JUSTICE ROTH: Just pause a moment. This non-public data, they will know what the third party seller pays to its suppliers it says. I am just trying to work out how they would know that from the data they get.

MR BREALEY: We will come back to this. This is one of the competition concerns. They did have access to this non-public data, which is a buzz word for commercial data really, which allowed them to identify and approach the suppliers of the third parties selling high product goods. Well, they will know that the third party seller, has a successful product. They will negotiate more effectively with and demand discounts from suppliers.

MR JUSTICE ROTH: Yes. I see they know the suppliers. (Overtalking). I supposed they would know the price, but it says they do.

MR BREALEY: Just very quickly on 6437. This is paragraph 5.2. These are "The Seller Data Commitments". They:

"... committed not to use non-public data provided by third party sellers or derived through third party sellers ... for decisions", plural, "and decisional processes relating to retail operations by Amazon ..."

Lastly on abuse 1 at paragraph 6.16 at 6443:

"The Commitments will ensure that Amazon Retail does not use non-public seller data when it makes business decisions in competition with third party sellers. This restriction applies to the use of such data by Amazon Retail employees as well as by any systems, algorithms or tools that make automated decisions ..."

So that is abuse 1. It is self-contained. My bright line point is to note that there are various decisions that the CMA is objecting to. It is not simply a data entry decision. There are ongoing pricing decisions, inventory decisions.

So let's go and have a look at the Buy Box abuse. If we go back to section 4, 6435, just to see how the CMA looked at this, paragraph 4.8, this concerns abuse 2, prices in the Featured Offer selection process:

"The CMA is concerned that", and here we have essentially two algorithms, "the FME and FMA processes (the 'Featured Offer Selection Process') may include or involve

biases or discrimination that unfairly favour Amazon Retail compared to sellers ..."

The FME is the Featured Merchant Eligibility Algorithm and the FMA is the Featured Merchant Algorithm. The first one essentially selects the offers and the second one, as I understand it, ranks them. These are the two main algorithms in the Buy Box selection process. That is why we say it makes sense, as the competition authorities have seen sense, to try to re-run the algorithms and strip out the abuses.

So that's 4.8. The algorithms select and then rank offers.

We see at 4.9 the Buy Box bias is important in practice, because when the CMA and other authorities looked at who appeared in the Buy Box, Amazon Retail was selected to be the Featured Offer in more than 80% of the cases. So it means something.

MR JUSTICE ROTH: Yes.

MR BREALEY: Then just for completeness at 6437 we get the Buy Box Commitments. This is paragraph 5.4:

"Amazon has committed that it:

Will apply objectively verifiable, non-discriminatory conditions ... for the purposes of ... selection ... [and it] will include all applicable parameters and weightings ..."

So there can't be any discrimination about selection and weightings.

So those are the CMA Commitments. This is the start. Obviously we have the EU Commitments, but it is important to see that these competition concerns, they are serious, because Amazon can commit them.

Next, now I would like to see how Dr Houpis analyses abuses 1 and 2. For this I would like to go to his main report. That is bundle B, 7721. So that is my old volume 9, tab 12, so my old volume 9, tab 12. Houpis 1. We don't have time to go through all of the points. I just need to identify some of the paragraphs.

Section 8 on B, 7810, is his chapter or section 8 on the first potentially abusive conduct, self-preferencing of Amazon Retail through Amazon's use of non-public seller

data. At section 8.1 we get the nature of the abusive conduct which we see. Maybe if the Tribunal just wants to read paragraphs 234 and 235, then that flags what the abuse is. Then I want to go to paragraph 240.

I was not going to go to this, but just you will see, sir, at paragraphs 234, 7, 8 and 9 the type of data we are talking about. So he sets out the type of data that the competition authorities are concerned with.

At 240, so going over the page at B, 7812, Dr Houpis picks up on what the CMA and the EU have been concerned with and we will see there are different decisions. So there are pricing decisions. There are inventory management planning decisions and decisions to start or end the sale of a product.

Now Professor Stephan's claim takes all three whereas BIRA we say takes simply (c), because their theory of harm is concerned with essentially the early start of launching a product. They refer to pricing decisions and inventory decisions, but the key, their whole focus really, their theory of harm, as we shall see, is on the data entry abuse.

In any event we go to paragraph 243. He sets out the pricing decisions. At paragraph 246 he sets out the inventory decisions and at 249 he sets out essentially the entry abuse. This is at page 7814, 249.

At paragraph 252 he acknowledges that there will be an effect of an entry data abuse, but he says it is probably less material, more modest. Why? Because not every entry of an Amazon product results because of a data entry abuse. That's something I will just pick up a bit later on. That is a sticking point between him and the BIRA claim. It is not going to be in all cases that an Amazon entry is because of a data abuse. It may already be an established product. There may be public information throughout that they rely on. So the entry is not because of this misuse of commercial information. So that is his reason why he doesn't believe that starting and ending the sale of a product is the key.

I beg your pardon, sir.

MR JUSTICE ROTH: We have another minute.

MR BREALEY: Okay. Sorry. So on that if we go to --

MR JUSTICE ROTH: I think our minute is up.

MR BREALEY: I was going to take -- okay.

(Two minutes' silence)

MR BREALEY: Can I go to abuse 2, which is at section 9 of his report, which is at B, 7823? In paragraph 274 he sets out what the potential abuse is. If we go over, we have Amazon selection, the outcome of the Buy Box. I just want to go to 7831, section 913, which is his "Preliminary conclusion". At 301:

"The findings of competition authorities and my analysis suggest there is a *prima facie* evidence that is consistent with Amazon unfairly favouring its own retail offers over those of third party sellers in the selection and display of the Featured Offer in the Buy Box."

At 9.2 at 303 he talks about the likely effects. It is an important paragraph. Over the page 306 and 307, where he gives an idea of the likely effects. This is 306:

"... I have undertaken a statistical analysis to assess the extent of self-preferencing of Amazon Retail in the Buy Box. This analysis controls for a number of important factors that determine the likelihood of winning the Buy Box -- retail price, seller rating and availability of the product ... Using statistical techniques, it is possible to arrive at an indicative estimate of the impact of this conduct on the proposed class's sales. I estimate that absent this potentially abusive conduct, 16% of Amazon Retail's sales would have been diverted to third party sellers based on my analysis of live offers on 14th October 2023."

Again obviously this is all preliminary, but he is giving a steer there as to the sort of likely diversionary effects because of abuse 2.

I will not go to it because of the time, but we know from Dr Houpis' table, which is in his summary, which has caused a lot of pain and anguish apparently, in abuse 1 he has estimated the data pricing inventory decisions at £267 million, the data market entry at £100 million. Abuse 2 is considerable. In his table at A, 149 the data pricing and data inventory are taken together at 267. The data entry is less than £100 million. The Buy Box abuse, abuse 2, is considerable at 872.

Can I quickly -- I will give the references to Professor Stephan's claim form, if I can, because I want to go to BIRA's claim. Professor Stephan's claim form deals with abuse 1 and 2 separately. Abuse 1 is pleaded at paragraph 136 at page 6337 and we see there the three main data decisions being referred to. Abuse 2 is pleaded at paragraph 143 at page 6339 and at page 6356 the claim is for lost sales as a result of abuse 1 and abuse 2 and this tracks the figures in Houpis.

So Professor Stephan's claim, as we have seen in Houpis, is looking at abuse 1, looking at at least three pricing decisions in abuse 1, that's entry pricing and inventory, and then claiming damages for lost sales for abuse 1 and abuse 2.

What I would like to do -- in my submission that is a perfectly sensible and logical way of pleading two separate abuses that have caused the CMA a competition concern. It is perfectly logical, and it is perfectly logical to claim damages flowing from those two separate abuses.

How does BIRA's claim deal with this? We need to go to bundle B, volume 1. So the collective proceedings claim form starts at B7, page 7.

Some of the key paragraphs which highlight the narrowness of the BIRA claim are 14, 15 and 16. So that's B, 11 to B, 12. If the Tribunal just wants to read 14, 15, 16 and maybe 18, this gives the real flavour of the BIRA claim. I ask the Tribunal to note the definition of infringement, which is -- essentially infringement is an unlawful product entry strategy. That is the infringement: an unlawful product entry strategy. (Pause.)

In a nutshell can I make two points about this? The first, as I have just flagged, is the infringement that they rely on to claim damages is the unlawful product entry strategy. That is the data entry abuse. So that's one of the decisions that we saw in the CMA Commitments and in Houpis. So it is geared to entry.

The second point is when it comes to abuse 2, that is defined as in 15:

"The Other Anti-Competitive Behaviour."

So on abuse 1 we only have one key decision, the entry decision. Abuse 2 is relegated to Other Anti-Competitive Behaviour. You see that in the first three lines of 15.

When we go, for example, to the causation and loss, so if one goes --

MR JUSTICE ROTH: Mr Brealey, this is a summary, isn't it? This is the section in outline. That's how it is headed.

MR BREALEY: Yes.

MR JUSTICE ROTH: What is said in 14 is addressed -- indeed the concluding words of 14 say at paragraph 59. If we go to paragraph 59 on page 25, which has various sub-paragraphs, and 59.3 -- 59.1 and 59.2 are really setting the scene. 59.3 you have 59.3.2, which is the entry, 59.3.3, which is pricing decisions, 59.3.4, which is inventory management and planning decisions, 59.3.5, negotiation with suppliers and 59.3.6, vendor selection. So is it right to say that it is only about entry, because this is -- you emphasised decisions, plural, and indeed 59.3 is setting out decisions, plural, of various kinds.

MR BREALEY: The key response to that is that yes, they do refer to pricing, but it is all concerned with the product that has been launched early. So the key difference is that if BIRA goes to trial, it will first identify the product which has been identified earlier and then launched earlier. Once that product is identified, then it says it will look at pricing decisions, etc. That's why I say --

MR JUSTICE ROTH: Is that the basis for saying that it is only products launched

early. I thought it is all products that Amazon starts to sell on its platform after 2016 or whatever.

MR BREALEY: That is not its theory of harm. Let me have a look at Nitsche then to develop that point.

MR JUSTICE ROTH: Yes.

MR BREALEY: The other decisions and indeed abuse 2 is making the earlier entry more successful. For example, if one looks at paragraph 94 at B, 40, it is there pleaded in paragraph 94.

MR JUSTICE ROTH: Just a moment. Paragraph 94?

MR BREALEY: Yes. 94.

MR JUSTICE ROTH: Yes.

MR BREALEY: Abuse 2, the Buy Box abuse, makes Amazon Retail entry more successful, increases the likelihood of successful entry. The likelihood of successful entry due to Other Anti-Competitive Behaviour factored into Amazon Retail's entry decisions.

So we see this from Nitsche, so if we can go to Nitsche. That is in core A, 124 and go to page 128 these paragraphs 7 to 14 are quite critical in identifying where BIRA are coming from in their claim.

At 7:

"The methodology that I have prepared is based upon the allegations that BIRA is making in its proposed collective proceedings."

So the methodology is taking the allegations in the Particulars of Claim.

"The BIRA claim concerns Amazon's use of non-public information about products sold by third parties on Amazon's marketplace to inform Amazon's Retail product entry strategy relating to its decisions on which products it brings to market to sell (the “Data Abuse”)."

So it is about the retail product entry strategy:

"The Data Abuse concerns of the Commission were addressed through Commitments. The Commission explained its view that the informational advantage enjoyed by Amazon's retail arm ("Amazon Retail") could distort several competitive parameters, including most importantly, Amazon Retail's decision to start listing products already sold by Third Parties on Amazon's UK Online Marketplace."

Then at 8 Dr Nitsche refers to Other Anti-Competitive Behaviour. At 9 -- is essentially the answer to the question you put to me, sir -- this is the theory of harm that is identified:

"To illustrate the theory it is helpful to consider the information advantage that Amazon had relative to Third Parties."

So Amazon Retail had access to timely and high quality indicators of the success of products being sold by third parties, which he calls "Superior Indicators". In the last sentence of this we see:

"The Superior Indicators" ie the access to information "allowed Amazon Retail to maximise the likelihood of its success by studying the relationship between early movements in the Superior Indicators and actual success."

Then 10:

"I refer to this informational advantage" and this is important:

"So the Data Delta enabled Amazon Retail to include successful products introduced by Third Parties."

So it is looking at an incumbent third party, looking at the success of that third party and entering early. So the third party is already there. The Superior Indicators see that it is a success. Amazon looks at that information and then moves early to the disadvantage of the incumbent and to the following third parties.

11:

"I consider that the key anti-competitive effect resulting from the Data Abuse is earlier and more successful entry by Amazon Retail."

He looks at same product entry, similar product entry. Then he looks at various channels. I ask you, sir, to note paragraph 12 over the page because that is the paragraph we saw in the pleading where abuse 2 interacted with the data abuse making it more successful entry and increased likelihood of entry.

So again abuse 2 is being relegated to making entry more successful.

Then 13 and 14 again clarifies this:

"13. When quantifying the damage, I strip out all unlawful conduct. I do this by comparing the factual outcome with the outcome in a counterfactual world without any abusive conduct including Other Anti-Competitive Behaviour. The effects of the Other Anti-Competitive Behaviour", abuse 2, "will not have been confined to products that experienced unlawful entry … but these additional effects are not part of my analysis, as they do not form part of BIRA's claim."

That's why I say the whole of BIRA's claim, it does skirt around the edges with the pricing decisions. It does skirt around the edges with the abuse 2, the so-called Other Anti-Competitive Behaviour, but it is not looking at the effects save to the unlawful product entry.

It goes on:

"To the extent the Other Anti-Competitive behaviour operated in combination with the Data Abuse in relation to self-preferencing of Amazon Retail that made product entry more successful", again more successful, "this will be captured … This means that what Houpis 1 refers to as Abuse 2 is also considered in BIRA's Claim" and these are the important words, "to the extent it applied to products that Amazon Retail started selling and for which the entry decision may therefore have been affected by the Data Abuse."

So that's why I say the key response, our response to your question, sir, is BIRA will have to identify the products which are subject to the unlawful data entry. Any other effects, as Dr Nitsche confesses at 13, will not form part of the BIRA claim.

So why does that -- we see that to a certain -- I do not have time, but I ask the Tribunal to note 16 and 17. Rather than doing an algorithm methodology, it adopts a broad brush approach, but one sees here again the theory of harm, which is that it is all about successful entry. The incumbent has lost the first mover advantage and the following third parties are also harmed.

So why is this important for the scope of the claim? We see there's a significant risk in putting all the eggs into the market entry abuse basket. I am going to give three examples.

First, there will be no data entry where Amazon was the incumbent seller. So if Amazon was already on the market, it was the incumbent seller, Amazon will not enter second and that is the whole BIRA theory of harm: Amazon entering second earlier than it would.

So for those products where Amazon was the incumbent seller, BIRA's claim will exclude abuse 1 data pricing decisions and it will exclude abuse 2 for those products where Amazon was already on the market.

Another example, the second example, there may well be no data entry decision where the existing product -- so there is an incumbent third party seller -- where the existing product did not have the requisite success at the time of Amazon's entry. So although Amazon was second to enter, it did not make a data abuse market entry decision. Amazon was not using the so-called Superior Indicators to make an entry decision. The success of the product may have come after Amazon's entry. Yet even on this scenario BIRA's claim will exclude abuse 1 data pricing decisions and abuse 2.

So the second example is where they are competing but Amazon simply has not used

its Superior Indicators. A third would be, as Dr Houpis says, there would be no data entry decision where the business case to enter second was based on public information. It may all be well-established. It is already out there. So they haven't made use of a data pricing decision. It is not sufficient just to say that there are algorithms -- it will always be the case.

There is no plan B if Amazon with all its armoury come along and say "You have put all your eggs into the market entry decision basket and you are wrong. There is no data entry abuse in this scenario, this scenario, this scenario", then the products are going to be severely limited and you are excluding the abuse 1 data pricing decisions and you are excluding abuse 2.

You could well have a nightmare scenario where Amazon succeed on abuse 1. The Tribunal finds actually abuse 1 is not made out and then they haven't got abuse 2, because abuse 2, the Other Anti-Competitive Behaviour, is piggy-backing on abuse 1. That's all I would like at the moment to say about abuse 1 and 2. Can I just quickly go to abuse 3 and set the scene there and then my learned friend will take over and expand on the conflict point.

Could I put the Nitsche summary away and go back to Houpis? This is at bundle B, my volume 9, B, 7834. I will not read it, but paragraph 312 is essentially identifying the common issue. What is the common issue? It is self-preferencing of FBA offers over FBM offers in the Featured Offer selection process. Essentially the common issue is Amazon was leveraging its power in the Buy Box to gain a higher share in its delivery service. In a nutshell that is what it is. Amazon leveraged its power in the Buy Box to gain a higher share in its delivery service stripping it all to a (inaudible).

At 7838, Dr Houpis sets out the effects at 10.2.1, the effects on the provision of marketplace fulfilment services. So we are talking here about the fulfilment market, the delivery market logistics. He sets out in these paragraphs the demand side, supply

side effects of how a third party who also provides fulfilment delivery services will have been restricted foreclosed.

MR JUSTICE ROTH: Can I ask was it only fulfilment by FBA or is it fulfilment by approved delivery logistic services because I think I saw somewhere Royal Mail had been approved.

MR BREALEY: Yes.

MR JUSTICE ROTH: Is Royal Mail treated like FBA? Was it in an intermediate position or is it like FBM? Perhaps I should ask that question to Mr Carall-Green.

MR BREALEY: Certainly Royal Mail was approved but it meant that others were restricted.

MR JUSTICE ROTH: I see that. What I was not quite clear, because I don't think Dr Houpis refers to Royal Mail, does he, here?

MR BREALEY: The point I would really like the Tribunal to have in mind --

MR JUSTICE ROTH: So the question will be answered later.

MR BREALEY: It will. I think the answer was Royal Mail was approved. Yes, there are nuances because it is dealing with FBM and FBA and the conflict point.

On 353, 7845, this is essentially a key part of the theory of harm in this abuse 3:

"I have considered the evolution of FBA prices over time … My analysis shows the trend, the growth of average FBA prices … was very different after Amazon became dominant -- before it became dominant."

This figure 15 I think really does show what I was talking about earlier on, which is that Amazon was leveraging its market power in Buy Box to gain essentially market power, if not a monopoly, in fulfilment services.

We see here when it started to become dominant, the prices of the fulfilment services rising, rising by approximately 70%. So at 354:

"Average FBA prices have risen by approximately 70% between 2016 and 2023."

He goes on say there that there is no other explanation for that bar that you have got now substantial market power in the fulfilment market.

MR JUSTICE ROTH: I am taking it they become dominant in about 2016?

MR BREALEY: Yes. That 70% figure -- so prices have risen by approximately 70%. If we go to page 7913 -- again I don't want to tread on my learned friend's toes, but 7913, at paragraphs 584 and 585:

The "FBA fulfilment that would have been paid in the counterfactual."

"584. FBA prices have risen by approximately 70% between ['16] and ['23]."

So the quantum, as one would well understand, is being based on this 70% hike in delivery prices. So prices are higher than they would otherwise have been. So that's the first point I would ask the Tribunal to note, that there is this 70% hike. That has been to the disadvantage of sellers as a class.

Then at 585 it is important for a point I am going to just flag quickly. Some of this overcharge, so this is an overcharge. Sellers have been overcharged for fulfilment services. Some of this overcharge might have been passed on by third party sellers to customers and adopting a pass on rate of 50%. So that's just an illustration, but he is accepting that an overcharge may have been passed on to the sellers' customers.

Now the reason I flag that, and we can put this away, because the conflict and the distinction between FBA and FBM will be developed -- the reason I flag the overcharge is that there is a symmetry between the way that Professor Stephan brings abuse 3, advances abuse 3, and the Hunter Hammond case, which I just want to flag now. So we can put Houpis away for a moment.

Then if one goes to Bundle F, and this is showing the symmetry between Professor Stephan's case on abuse 3 and why it is a sustainable theory of harm and what was claimed in the consumer cases. So in Bundle F we have the Hunter claim and we have the Hammond claim. I will just go to the Hunter claim, because that is

the claim, as you will have picked up, that was funded by LCM. So the funders for BIRA are LCM and the funders for Hunter were LCM. BIRA at the end of their skeleton explain why there is no conflict there. We will come back to that.

Bundle F is the claim form. If one goes to page 53 at paragraphs 123 and 124, this is the Hunter claim for damages on behalf of the consumer class. We see here in 123 and 124 the claim being made essentially for abuse 3, because it says at the end of 124:

"Third-Party Retailers face higher fulfilment costs than they would have absent the abusive self-preferencing and buyers will, accordingly, pay higher landed prices."

So there is a clear claim in the Hunter and the Hammond for higher fulfilment delivery costs. We see this at page 59, which is paragraph 135(c):

"... the Proposed Class Members have suffered loss as a result of the dampening of price competition between sellers which arises from Amazon's abusive self-preferencing. That self-preferencing disincentivises sellers ..."

There is no distinction between FBA sellers and FBM sellers here. Sellers is a class in Hunter.

"... sellers from using logistics and delivery options that are priced lower than FBA … In these cases, all else equal, sellers" as a class "face higher fulfilment costs than they would have absent the abusive self-preferencing ..."

Here you have a case where the consumers are saying third party sellers as a class paid a higher delivery cost than they would otherwise have done and that got passed on to them.

One only has to read Houpis and to see this claim and to read the competition authorities to realise that there is a sustainable, logical theory of harm relating to abuse 3. There is a 70% hike in delivery charges using Amazon and BIRA does not advance the claim. It acknowledges it does not advance claim 3 -- abuse 3, 4 or 5, but 3.

Before we finish for the coffee, I just want to make a point on this, because we are now faced with a conflict point. In their skeleton they say at paragraph 14:

"The three alleged abuses identified by Professor Stephan which BIRA does not pursue" -- this is paragraph 14 at A, 8 -- "are those concerned with Amazon's logistics services: abuse 3" and then 4 or 5.

Then in the penultimate sentence it says:

"BIRA does not seek to pursue these matters because they give rise to a conflict between class members and/or are not suitable."

Well, that would tend to suggest that BIRA has addressed its mind to it and said "Hey, look, there's a very serious claim here for an overcharge for a 70% hike in delivery costs, a very serious claim here. Indeed, Hunter is raising it, we have addressed our mind to it. We are not pursuing it".

I make the forensic point that nowhere in its application has BIRA identified why it is not bringing what on the face of it is such an important claim.

MR JUSTICE ROTH: The explanation, given the sentiment, is the reason that's given.

MR BREALEY: It is, and I make the forensic point that to us it looks a bit of an afterthought, because it was not made -- it was not explained in the application. So, for example, in Mr Goodacre's witness statement at paragraph 20 it just refers to the market entry.

Then I will finish on this and then we can have the coffee. If one goes to the witness statement of Mr Bronfentrinker, so this is at tab B, 6265.

MR JUSTICE ROTH: That's in B7, isn't it, at tab 6?

MR BREALEY: Yes. Tab 6. Paragraph 11. This is in the application to bring the proceedings. At 10 he says:

"I am aware of two prior applications."

That's Hunter and Hammond. At 11 he says:

"I do not consider either of these claims to be substantively similar to the proposed collective proceedings", ie the unlawful product entry. "This is because both proceedings focus on the position of consumers and the alleged harm caused to them by Amazon favouring products or a merchant who purchases Amazon's delivery and logistics services."

So there was clearly a recognition that there was a significant hike in delivery costs, but they are saying they are not pursuing it. It is not overlapping. There is no explanation given here, "It is a significant claim, but we are not bringing it because of a conflict of interest". In my respectful submission that's quite telling.

With that, sir, I have done my allotted time. Maybe we can have a short adjournment and then Mr Carall-Green will take over.

MR JUSTICE ROTH: Thank you very much. We will come back just before 12 o'clock.

(Short break)

MR JUSTICE ROTH: Yes, Mr Carall-Green.

MR CARALL-GREEN: Sir, before I begin, to answer your question about Royal Mail, there are two points of clarification here. The first is that Royal Mail offers a delivery service which is distinct from logistics. So when we talk about FBA and FBM, we are talking about the provision of services that include things like warehousing and the organisation of stock but that's different from what Royal Mail provide.

The second point of clarification, sir, is where you see Royal Mail come up in the documents is that some sellers use Royal Mail as part of the FBM option in order to fit within the seller fulfilled Prime programme, SFP. So in doing so what they are attempting to do is to take the benefit of Prime without having to use FBA. So that's relevant to abuse 4.

MR JUSTICE ROTH: Not abuse 3?

MR CARALL-GREEN: That's right, sir.

Sir, I have been asked to address you on the detail of the supposed conflict that arises in relation to abuse 3 and possibly also to some of the other abuses, although I will come on to that. The weight of the submissions that are made on the part of BIRA are about abuse 3, so I will be using that as my focus.

I am going to address you using the structure that's in our skeleton argument starting at paragraph 27 and that's at bundle A, tab 2, page 27. You may want to have a thumb in that page, because I will use it as my road map.

MR JUSTICE ROTH: Yes. I have the skeleton loose. Within the skeleton itself.

MR CARALL-GREEN: Page 9 of the skeleton, bottom of the page, starting at paragraph 27.

MR JUSTICE ROTH: "The supposed conflict".

MR CARALL-GREEN: So for the first point if we could go, please, to the authorities bundle, as I say, keeping a thumb in the skeleton, to page 625 --

MR JUSTICE ROTH: This is the Trucks claim.

MR CARALL-GREEN: It is the Trucks case, yes.

MR JUSTICE ROTH: We go into the judgment at page 625. Just one moment.

MR CARALL-GREEN: I don't need this very much, only for wording of the relevant rule and confirmation that it applies. It is not in dispute.

MR JUSTICE ROTH: Yes.

MR CARALL-GREEN: The rule that applies is 78.2(c), which provides that:

"The Tribunal shall consider if there is more than one applicant seeking approval to act as the class representative in respect of the same claims whether that person would be the most suitable."

That is the rule that the Tribunal is applying at this carriage hearing.

So the first thing to notice about the conflict, sir, is that it is raised in respect of abuse 3.

MR JUSTICE ROTH: Do you want any more from Trucks?

MR CARALL-GREEN: No, sir.

MR JUSTICE ROTH: It was just to get the wording.

MR CARALL-GREEN: Yes, it was just so you have the wording and, if needed, judicial confirmation it is the right rule.

MR JUSTICE ROTH: Yes, we have the rules separately, but that's fine. Thank you.

MR CARALL-GREEN: The simple point, sir, is that BIRA is not seeking approval in respect of the same claims. Professor Stephan seeks to combine claims relating to abuse 3 and the other abuses 4 and 5 and in respect of losses attributable to overcharges, but there are no such claims advanced on the other side by BIRA. Mr Brealey has taken you to the European Commission and CMA decisions except in Commitments in respect of abuses 3 and 4.

MR JUSTICE ROTH: What is the point you just made. Are you saying we, the Tribunal, can approve both?

MR CARALL-GREEN: Sir, I am saying it is not clear on how BIRA has any standing to challenge Professor Stephan's approach to abuse 3, because --

MR JUSTICE ROTH: Are you saying we can approve both applications in the round?

MR CARALL-GREEN: Sir, if you were to approve both applications as they currently stand, then you would be approving an application brought in respect of certain conduct relating to data and another claim in respect of that conduct as well. So that would not be permissible under the rule. The Tribunal needs to make sure that there are not overlapping cases in respect of the same claims. So I accept, of course, that there is standing here for BIRA to challenge in respect of the claims where there is an overlap.

MR JUSTICE ROTH: Are you prepared, therefore, if we chose BIRA -- you are content to proceed just on abuses 3 to 5?

MR CARALL-GREEN: No, sir, I wouldn't be content on that basis because part of the problem is that that would cause a great deal of confusion, not least because some of the abuses 3, 4 and 5 have effectively feedback effect into abuses 1 and 2.

MR JUSTICE ROTH: You do have to choose.

MR CARALL-GREEN: The simple point I make is on what basis does BIRA advance a challenge? It is not available to it under this rule. The way that they try to shoehorn a challenge to abuse 3 into the rule is to say --

MR JUSTICE ROTH: I don't think BIRA is advancing the challenge. You are advancing the challenge. This hearing has been listed on the basis that it is not possible, as you have just accepted, for the Tribunal to approve both applications as they stand. Therefore, we have to make a choice. Therefore, that's where the mutual challenge arises. The fact that the two cases are not identical, I mean, you have just taken the Tribunal to Trucks. Well, in Trucks one of the applications included used trucks. The other didn't. That was not the basis for say "Therefore we don't have to choose, because the used trucks is a separate claim which could go ahead, in theory it could go ahead" but they were so mixed up together, just as your abuses are, that it just wasn't practicable. So we are in the end having to make a choice.

MR CARALL-GREEN: You do have to choose, but the way that the rule focuses attention is on which of the two class representatives would be more suitable. So what BIRA has to say to the Tribunal is Professor Stephan has taken a case which he ought never to have taken and that makes him unsuitable.

MR JUSTICE ROTH: I am not sure they do. They just have to say their application looked at in the round is more suitable for all sorts of reasons they may put forward than yours may be, because they are a better class representative, for example. You equally can make the case saying that yours is much more suitable because, as Mr Brealey has been pointing out, you cover rather more of the loss that he has been

submitting the class members have suffered and the BIRA one leaves a fair bit out. So we are choosing suitability. I am not sure you get very far I have to say on the rule.

MR CARALL-GREEN: Let me end with that then, sir.

On the question of suitability we say, as Mr Brealey has already submitted to you, that it cuts the other way, because if there is an arguable case to be made on these additional -- abuses in respect of additional losses, it is to Professor Stephan's credit that he does advance those claims.

MR JUSTICE ROTH: Yes, we understand that.

MR CARALL-GREEN: That then is all I want to say about my first point in the skeleton argument.

Going back to paragraph 28 of my skeleton, this is our second point. BIRA sets up the supposed conflict in relation to abuse 3 as a conflict between what it calls FBA sellers and FBM sellers. Now we say that that distinction is illusory, and we have quoted from Amazon itself to the effect that there is no neat division between these two categories of seller. The supposed FBA seller and the supposed FBM seller can actually be the same person.

MR JUSTICE ROTH: Is that the same as in Trucks? It was recognised that there is a conflict. Indeed, the Court of Appeal in its judgment said because of the conflict the Tribunal had not gone far enough to create a distinction. It was exactly the same. Many hauliers buy new and used trucks.

MR CARALL-GREEN: Because there will be some people who have done both.

MR JUSTICE ROTH: Yes, many people have done both.

MR CARALL-GREEN: There is a distinction between a direct purchaser and an indirect purchaser. In a case where there is direct purchaser and an indirect purchaser and there are some people who do both contemporaneously --

MR JUSTICE ROTH: That happened in Trucks.

MR CARALL-GREEN: Yes, that happened in Trucks. In this instance there is a further complication which makes it non-analogous to the direct and indirect purchaser situation, because Professor Stephan's case is that Amazon's abuse nudges commerce towards FBA. If that's right, then one would expect to find, for example, new sellers setting up shop in the factual and using FBA, whereas in the counterfactual they would have used FBM.

This means that in many cases a so-called FBA seller, so somebody who is identified in the factual as being an FBA seller, would in the counterfactual have been an FBM seller. So there is no stealing from one person to the other.

The reason that this is significant is because BIRA wants to say, and this will happen in a direct and indirect purchaser scenario, that somebody who is a direct purchaser or an indirect purchaser and suffered a disadvantage in the factual can be assumed to be a direct purchaser or an indirect purchaser in the counter-factual. So they want to say that if you look at an FBA seller now, they gained an advantage and in the counterfactual they wouldn't have had that advantage because they are an FBA seller.

It is not quite that simple, because in the counterfactual they would have been an FBM seller. I am using this language loosely, because, as I say, it is not entirely clear that there is such a thing as an FBA or an FBM seller.

So the concept of an FBA seller in the factual loses a lot of its meaning when one attempts to apply it to the counter-factual. In fact, what we think probably happened is that over time --

MR JUSTICE ROTH: Are they saying they would have been an FBM seller or are they saying -- that they might still have been an FBA seller for all sorts of possible reasons, but they wouldn't have been in the Buy Box? The FBM seller would have been more likely to be in the Buy Box.

MR CARALL-GREEN: Exactly. If we identify person X who has supposedly reaped

a gain or an advantage from the tort, who is currently using FBA -- right -- the point that is taken against us is that person X doesn't want this claim to be advanced because it would strip them of that benefit vis-a-vis the counterfactual.

MR JUSTICE ROTH: Yes.

MR CARALL-GREEN: The point I make is it is not really that straightforward, because in the counterfactual the nudging towards the usage of FBA would not have occurred. So person X might have actually been on the other side of the fence in the FBM camp and in the counterfactual FBM would have reaped the advantage, because we say that the algorithm would have treated FBM fairly.

MR JUSTICE ROTH: Well, they would be competing with all the other FBMs to be included in the Buy Box. They still might have been in the Buy Box but ...

MR CARALL-GREEN: So the supposed advantage that accrues --

MR JUSTICE ROTH: Yes.

MR CARALL-GREEN: The supposed gain or the supposed benefit that the seller reaps as a result of the tort on BIRA's argument, assumes that the FBA seller would have been an FBA seller in the counterfactual. All I am saying is that that is not a safe assumption. I make that point to illustrate our second submission, which is that it is in the vast majority of instances, it will be very difficult and possibly even meaningless to divide sellers between FBA sellers and FBM sellers.

MR JUSTICE ROTH: It is not difficult in the factual.

MR CARALL-GREEN: Well, it may be difficult in the factual, sir.

MR JUSTICE ROTH: There will be some who are both, probably some who are only one and there will be some who are only the other, and the ones who are both will be either predominantly FBA or predominantly FBM. So we can do it in the factual. You are saying one does not know what might happen -- how that distribution would have been in the counterfactual, might be quite different.

MR CARALL-GREEN: That's right. In a direct and indirect purchaser scenario that complexity does not rise, because in that scenario one can normally safely assume that a consumer would have been a consumer in the counterfactual and that a retailer would have been a retailer, not that a retailer would have become a consumer or a consumer would have become a retailer.

MR JUSTICE ROTH: Yes, of course.

MR CARALL-GREEN: Sir, let us put that to one aside and assume for these purposes that we can arrive at a rock solid understanding of an FBA seller or an FBM seller, as you suggest.

That takes me to the third submission that we make in our skeleton argument, which is at paragraph 20. BIRA defines the conflict as follows, and I think we all have this in mind, but just to make sure that we do. FBM sellers have an interest in pursuing a claim against Amazon in respect of abuse 3. FBA sellers have an interest in resisting or defeating abuse 3 because they were the beneficiaries of that abuse.

The simple point we make is that that is wrong, because FBA sellers, assuming that we can come to a view on who is an FBA seller, want to pursue abuse 3, because the evidence shows that abuse 3 caused them a net loss through the increased logistics and e-commerce fees.

So for a tabular summary of the effect of abuses can I please draw your attention to bundle B, tab 11, page 7889? This is part of the Houpis 1 report.

MR JUSTICE ROTH: B1, tab 12. Page?

MR CARALL-GREEN: The page of the bundle, sir, is 7889, but if you wanted the page of the report --

MR JUSTICE ROTH: 7889. Just a moment. Yes.

MR CARALL-GREEN: Sir, this figure 20 that you see in the middle of the page is a helpful summary of the various effects that on Professor Stephan's case and

Dr Houpis' analysis eventuate from the various abuses. The abuses are listed down the left-hand column and the various effects listed as one moves across the way from left to right.

MR JUSTICE ROTH: Yes.

MR CARALL-GREEN: If we look at the row headed "Third potentially abusive conduct self-preferencing of FBA" and read across, we see that four effects are floated. Now I will come back to the first effect, but the second, third and fourth effects are effects on FBA fees, FBM fees and e-commerce platform fees. The first of those two are both about logistics and then the last one about e-commerce platforms.

First, on high logistics fees, Mr Brealey has already showed you that there is a case to be made on the basis of the authorities decisions that there was an overcharge on the logistics fees.

MR JUSTICE ROTH: Yes.

MR CARALL-GREEN: The way it works, it is set out in Houpis 1. I don't think we need to turn it up, because it is fairly intuitive. In the end by artificially driving commerce towards FBA, one stimulates demand for FBA.

MR JUSTICE ROTH: I think we have that.

MR CARALL-GREEN: Similarly for the e-commerce, if Amazon creates complexity and cost associated with using other logistics services, that has a knock-on effect on the costs and complexity of using other e-commerce platforms and so traps sellers in its ecosystem. The result of that is that it dampens competition in the e-commerce platform market.

Once we see abuse 3 had these effects, it becomes clear that there are good reasons for the FBA seller to pursue a claim for abuse 3. Dr Houpis has confirmed that the FBA seller, whoever that may be, has suffered a net loss as a result of abuse 3. The easiest place to see that is in Dr Houpis' summary at paragraph 24 and footnote 25.

That is the A bundle, tab 8, page 157.

MR DERBYSHIRE: Could you give me that reference again?

MR CARALL-GREEN: It is the A bundle, tab 8, page 157.

MR JUSTICE ROTH: 157.

MR CARALL-GREEN: We see at paragraph 24 that Dr Houpis says, penultimate line: "I estimate that the net loss in respect of FBA offers" -- and Dr Houpis is here using the language of offers rather than sellers because he is conscious of the difficulty of identifying what an FBA seller is -- "an FBA offer under abuse 3 was [around] £200 million."

MR JUSTICE ROTH: So he is using the word "sellers" because?

MR CARALL-GREEN: He is using the term "FBA offers".

MR JUSTICE ROTH: He is saying FBA sellers have suffered a net loss.

MR CARALL-GREEN: Sorry, sir. I am on paragraph (Overtalking).

MR JUSTICE ROTH: 24.

"My analysis shows that sellers who have used FBA have suffered a net loss from abuse 3."

MR CARALL-GREEN: Yes, sir.

MR JUSTICE ROTH: He is looking at the loss suffered by FBA sellers. Yes.

MR CARALL-GREEN: Sir, before I get there, that in a sense is a complete answer to the question.

MR JUSTICE ROTH: We need to understand how he gets to this, because he gives an example, paragraph 26.

MR CARALL-GREEN: Sir, that is an illustration of the approach. It doesn't explain his calculation.

MR JUSTICE ROTH: He is making assumptions about how much higher the logistics charge for FBA is than in the counterfactual and an assumption about how much

benefit they got from being in the Buy Box as opposed to the counterfactual, isn't he?

MR CARALL-GREEN: Paragraph 26 is not the calculation. That's an illustration using assumed numbers to explain --

MR JUSTICE ROTH: No, but in paragraph 24, his estimate can only -- of a net loss is presumably netting the overcharge as against the benefit of higher sales which they would lose.

MR CARALL-GREEN: That's right. Just to be clear, sir, that's not him making assumptions. That's his work estimate.

MR JUSTICE ROTH: Yes, but the estimate, all I am saying is at this point quite understandably, because we are at an early stage, and he has not had all the points that Dr Houpis and both experts make, and all of this will need a lot of further work and refinement and so on, is he has to come up with an estimate of the increased -- the overcharge for logistics compared to the counterfactual and an estimate of the profit on higher sales through being in the Buy Box compared to the counterfactual.

MR CARALL-GREEN: Yes, that's right.

MR DERBYSHIRE: I think a key question is what turns on the word net? What has been netted off? Nothing else has been netted off.

MR CARALL-GREEN: This estimate only nets off the logistics overcharge -- sorry -- it nets off the gained sales from the logistics overcharge. It actually doesn't take into account the e-commerce overcharge. So the net loss, if that were included, might, in fact, be higher.

MR JUSTICE ROTH: If his estimate is wrong on the overcharge and/or his estimate is wrong on the benefit, the result might be different.

MR CARALL-GREEN: Of course.

MR JUSTICE ROTH: And it might not be a net loss.

MR CARALL-GREEN: Of course. We shall see whether Dr Houpis' analysis will

prevail at trial, but the point that's taken against me is it is not in the interests of the FBA seller to argue for that. That can't be right. We say that there is good reason to believe -- the authorities think this is right.

MR JUSTICE ROTH: Sorry. The authorities have not done the netting exercise, have they?

MR CARALL-GREEN: No, sir. I don't say they have. We say there is a good reason to believe there is an overcharge. Dr Houpis has looked at whether or not the gained sales would wipe out that loss and thinks that the answer is no. In those circumstances Professor Stephan says it is in the best interests of the class to advance that claim, because there is a good case that they have suffered a net loss.

MR DERBYSHIRE: That would be the case for the average -- if the net figure is correct then the average FBA trader would be better off if the claim was advanced (inaudible) but that's the average person. It is not the entire class, is it?

MR CARALL-GREEN: It is modelling the effect of the class in aggregate.

MR DERBYSHIRE: Individual traders may be different. They may be net losers.

MR CARALL-GREEN: Sir, they can never be a net loser, and I will come to this. Let's say there is an overcharge. Sir, it may help if I illustrate this with a diagram I have prepared. If I could hand that up, it might help us to focus on the discussion. (Handed).

To answer your question, I think it would be helpful to look at the second diagram.

MR JUSTICE ROTH: That's the one headed "BIRA's hypothetical check".

MR CARALL-GREEN: Yes. I think what you are positing is something a bit like what's going on in the black bar on the right-hand side of the page which is what BIRA posits in its submissions. So it says 60 of overcharge but then 100 of gain. So it nets off to a figure of minus 40 in principle. The response to that is this is a claim advanced by sellers against Amazon. There is no legal basis on which that seller if, contrary to

Professor Stephan's case, they were a net winner from the tort, they would then have to hand money over to Amazon. There is no concept of negative damages.

So the worst case scenario for an individual seller in that circumstance is that their claim is reduced to nil, but we say that is obviously not our starting point. What we want to do for that seller, what Professor Stephan seeks to do for that seller, is to say a loss has been suffered. Maybe Amazon will try to reduce it, but the primary interest for that seller is to claim the damages.

Sir, I will say as a footnote, as it were, that it might be doubted -- we don't know -- it might be doubted whether Amazon will even raise this in defence, because if one goes back to the black bar and says there is an overcharge of 60 for gained sales of 100, what that involves is Amazon arguing for a very large diversionary effect. Query whether Amazon would really argue for that, because that would suggest a very great bias in the algorithm as opposed to what we imagine it will say, which is none or very little.

So whether this scenario would emerge is doubtful on the actual case against Amazon, but to return to the position of your hypothetical class member, it is not only in the interests of that class member to advance the case as a whole, but, in fact, it is necessary for that class member to argue for the diversionary effect, because the overcharges are driven by the diversion.

So the theory of harm here, what we say has happened, is that commerce is steered towards FBA and that has caused the overcharge because it has stimulated the demand for FBA. Even let's call them the purest FBA die hard seller that would never -- there is such great brand loyalty that they would never have used any other service, that seller still has to argue, or should want to argue -- will rationally wish to argue that it has received this diversion effect because rationally, if we take a broad view, if we take an economically literal view, the stimulus of demand for FBA drives

the price up, which causes the loss.

Really what this illustrates, this entire discussion -- forgive me if I am giving a long answer to a short question -- what that does illustrate is that BIRA can only make the argument it makes because it looks at the case purely from the perspective of the retail sales. So it confines its view to what's going on in the red arrows, but once one makes the very simple step of logic to say; if I stimulate use of FBA or drive up the price of FBA, one immediately sees that there is more to the picture.

Sir, I was talking about Dr Houpis' estimate and how he arrived at the view that abuse 3 causes a net loss. In its skeleton argument BIRA says it is not clear how Dr Houpis has reached that conclusion, because it says that if 28% or more of FBA sales would have been lost to FBM, the diversionary effect would have been big enough to wipe out the overcharge.

Now I have an answer to that, but before I give it, I am just conscious that this may be descending to a level of detail which the Tribunal considers is too much at this interim stage of the proceedings. The fact is that Dr Houpis has given his expert view and BIRA may doubt it, but the Tribunal is not necessarily going to be assisted by delving into the details of why Dr Houpis reached the view he does.

However, I do have an answer. I intend to give it unless the Tribunal indicates that this is a waste of its time and it would prefer to stay at a high level.

MR JUSTICE ROTH: I think it would be helpful.

MR CARALL-GREEN: All right. The point that BIRA makes is at paragraph 22 of its skeleton argument. Sir, if you are in loose leaf, that starts at page 7 of their document. Just overleaf the crucial sentence is that BIRA has calculated on the back of a napkin, as it were, that if 28% of FBA sales would have been lost to FBM merchants, then that will put us into this scenario on the right-hand side of my diagram. The simple answer is -- I don't accept that this is the right way of going about the calculation, but I want to

balance detail against time. The simple answer is that a 28% swing, if I can call it that, is considerably larger than Dr Houpis is currently considering.

If I could take you to -- to make good that point -- if I could take you back to Dr Houpis' report, which is the B bundle at tab 12 at page 7902, starting at paragraph 540. Dr Houpis is talking about his econometric analysis and he says at 540, starting at the beginning:

"My analysis shows that the share of products that would have been won by FBM … [is around] 40%."

However he then says that there is a problem with this analysis. He is not able to control for potential differences in delivery speed between Amazon Retail offers and FBM. I should say here he is talking about Amazon Retail versus FBM whereas we are talking about FBA versus FBM but the principle is the same. Therefore at paragraph 541 he goes on to say, "Therefore, I think that the FBM win rate is an over-estimate and actually FBM would have only taken 10% of Amazon Retail offers".

The point is that the large swing, the 40%-ish swing, does not control for the fact that FBA may have had legitimate advantages. So Dr Houpis' damages estimate from the very beginning has been based on much smaller swings.

MR DERBYSHIRE: Based on the 40% and then downgrade it to 10% because it doesn't take account of other factors.

MR CARALL-GREEN: Yes. So it is an estimate in Mr Houpis' experience as an expert. Dr Houpis thinks that we will have a swing in the region of 10%.

MR JUSTICE ROTH: Well, it is a pure -- he says "Analysis shows 40%. He says that doesn't take account of delivery speed, so I will knock it right down". There is no basis for the 10% other than some sort of hunch that it is going to be much less than 40%. It could be 15%. It could be 20%.

MR CARALL-GREEN: It could and there is a net loss and this is important as well, if that case fails it, fails, but that doesn't leave the sellers worse off.

Will you excuse me if I turn my back just for a moment? I may have misrepresented something Dr Houpis intended and I don't wish to do that. (Pause.) I beg your pardon, sirs.

MR JUSTICE ROTH: That's all right.

MR CARALL-GREEN: I am going to move on to the fourth point we make in the skeleton argument unless there are further questions.

MR JUSTICE ROTH: Suppose there was a claim just being brought by FBM sellers, a class claim. They say "We lose out because we don't use fulfilment by Amazon. We don't get any chance of being in the Buy Box and, true, using fulfilment by Amazon might have cost us a bit more in terms of logistics payment, but that's not a reason for excluding us from the Buy Box. It should be on a transparent, non-discriminatory basis". There would be a good claim on the basis of the Competition Authority's reports or seen -- I know there are commitment decisions and so on -- but let's assume that there is an infringement as you allege, and they bring that claim. They wouldn't then have to give credit for any lost sales because they are by definition not in the Buy Box.

MR CARALL-GREEN: Yes.

MR JUSTICE ROTH: So they would then be in a better position than they are being in your claim, are they not?

MR CARALL-GREEN: No, sir. If I can answer that by reference to the first page of my diagram.

MR JUSTICE ROTH: Yes.

MR CARALL-GREEN: The FBM seller in this scenario has a claim for 50, overcharges plus lost sales.

MR JUSTICE ROTH: That's because your case is that the third party logistics prices have also gone up.

MR CARALL-GREEN: That is right, yes.

MR JUSTICE ROTH: Overcharges, yes.

MR CARALL-GREEN: So there is a feedback effect between those two elements of the claim. The diversionary effect also feeds the FBM overcharge as well as feeding the FBA overcharge.

MR JUSTICE ROTH: It increases demand for FBA. Therefore Amazon can charge more.

MR CARALL-GREEN: Yes.

MR JUSTICE ROTH: And it reduces demand for FBM and therefore FBM is more expensive.

MR CARALL-GREEN: Yes, because the FBM networks have been kept very small. So the theory of harm is that by preventing FBM from achieving scale, those competitors have been deprived of economies of scale. So the FBM providers are not --

MR JUSTICE ROTH: Yes.

MR CARALL-GREEN: So all the logistics charges have been affected, increased.

MR JUSTICE ROTH: This is all based on the assumption that the ratio is 40:10.

MR CARALL-GREEN: Sir, it actually doesn't matter what the ratios are. Let's suppose that the 40 is just X. The FBM overcharge is X. You can write X there if you like, and the FBA overcharge is Y., and this 10 is Z.

MR JUSTICE ROTH: Yes.

MR CARALL-GREEN: The total damages that the FBM seller and FBA seller are claiming will always be X, which is the 40, plus Z, which is the 10, plus Y, which is the 60 minus the Z, which is the 10 again in dotted line. So you will always have a plus Z,

minus Z, which will always be zero. So the total damages on an aggregate basis are always going to be X plus Y, 40 plus 60, 100.

Now if the point is what about the fact that the FBM seller suffered a bit more than the FBA seller, the answer is the aggregate damages are always going to be the same, so, the FBM seller, if thought appropriate, can be compensated at the distribution stage.

MR JUSTICE ROTH: At the distribution stage there will be -- if the extent of the plus sales, gained sales is 10 or more than 10, then how do you allocate the distribution between FBM sellers and FBA sellers?

MR CARALL-GREEN: It may or it may not, sir. The Tribunal will know at distribution the mechanism does not have to be based on compensatory principles. It only has to be just. So it is, of course -- if we arrived at distribution and it was 100 and the FBM seller said "It looks like I am owed 40, because that's in the grey box, but actually you have got to remember that I am owed an extra 10 because of the red line, so I am owed a bit more", that can, if thought appropriate, be reflected at the distribution stage. It is an open question whether or not the Tribunal which has to supervise distribution would wish that to be done bearing in mind the complexities associated with making the calculation, but the point is that for the purpose of aggregate damages, which is what --

MR JUSTICE ROTH: May I just interrupt you. You say plus 10. That would mean the FBA members are minus 10. So the FBA members might say "No, it is not plus 10. It should be plus 5", and the FBM sellers would say "No, it is plus 10".

MR CARALL-GREEN: Exactly right, sir. That is important, because that's a dispute that emerges at the distribution stage. We know from Ennis, and I can take you to the relevant passage if it would be helpful, sir, fiduciary obligations at the distribution stage do not involve maximising the claim of every class member. That must be true,

because at the point of distribution the amount of damages has been fixed. So in a sense everybody has a conflict against everybody else at distribution, because everybody will want more to the exclusion of the others.

The fiduciary class representative at that stage is no more affected by a conflict of interest than a trustee in a discretionary trust is. That's exactly the analogy that's used in Ennis, because a trustee of, let's say, three siblings in a discretionary trust, is at liberty to pay money to the first daughter for university education. That's always arguably to the detriment of the second and third daughters. That's not a conflict of interest. The class representative's responsibility is to secure the maximum pot of aggregate damages on behalf of the class and again we know that from Ennis. When it comes to distribution yes, there will be, and again this was put to the Tribunal previously in that case, all of the class members will be like beaks in the nest waiting to receive the grubs or the children with the party plates waiting to receive their slice of cake and that will be a zero sum game, but that's not a conflict of interest.

Sir, that might be -- I am mindful of the time and I wish to finish by 1 o'clock. It might be a good moment to turn to Ennis, if that would be helpful, but if the Tribunal is familiar with Ennis and the points I have just made, we don't need to look at that.

MR JUSTICE ROTH: No. If you want us to look at it, let's do that now before the adjournment.

MR CARALL-GREEN: Sir, it is at the authorities bundle tab 20.

MR JUSTICE ROTH: Yes.

MR CARALL-GREEN: The best place to start is paragraph 20 thereof, which is at page 1035 of the bundle.

MR JUSTICE ROTH: Would you like us to read paragraph 20?

MR CARALL-GREEN: Yes, sir.

(Pause.)

MR JUSTICE ROTH: Yes.

MR CARALL-GREEN: Sir, in Ennis Apple's point was some class members might want the case to be put in a different way. A price was being charged in respect of 16% of apps and not being charged in respect of 84% of them, and one of the arguments made to the effect that that was unfair was the fact that there was no objective difference between those two categories. Apple said, "Well, this would be very upsetting for the 84%", because the corollary of this might be that Apple then goes away and imposes charges on the 84%. The 84% are going to be against this claim.

The Tribunal's answer to that is at paragraph 30, sir, which is at page 1039.

"In the Tribunal's view this argument is misconceived. Whether or not the PCR is in a position of conflict of interest between members of the proposed class should be determined by reference to the claims advanced by the PCR in the Claim Form and not by reference to an alternative claim postulated by Apple."

Then the Tribunal goes on to explain what Apple's proposition hinges on, Apple's counterfactual.

So the first thing to notice, sir, is that whether or not there is a conflict of interest has to be assessed by reference to the claim that the PCR is actually advancing. Of course I accept, as I have done in response to a question, that Amazon might say that the diversion effect is very large and it wipes out the overcharge. I have spoken about how that might be doubtful, but let's suppose that in some world Amazon did want to argue that. If that has happened, then the FBA seller's claim in respect of abuse 3 has already been reduced to zero, ie, we have already lost the case. Whether or not Professor Stephan is in a position of conflict cannot be assessed by reference to a position where he already lost. He's advancing a case which is in the best interests of all of the class members and, yes, of course he might lose, but that doesn't tell you

whether or not he is advancing a case which is contrary to any of the interests of the class members.

One more passage from Ennis, sir, just to make good the point I made earlier, is at paragraph 37, which is at page 1041. I am going to start at the fourth line after the full stop:

"At the distribution stage, with or without a settlement, there may well be competing claims by members. That does not put the PCR in a position of conflict of interest any more than a trustee distributing assets of a discretionary trust to rival beneficiaries is in a position of conflict."

I referred to that earlier. So the point I make is this. The duty of the class rep is to maximise aggregate damages in the interests of all the class as a whole and in that regard all the class members' interests are aligned. Then when we get to distribution, we can see whether it is appropriate to weight the distribution in favour of certain class members according to particular characteristics of those class members, bearing in mind, sir, that there may be a scenario where the diversionary effect is actually very small and it is disproportionate to reflect that in distribution. I am not saying it will be, but there is a scenario where that will happen, so it is an open question.

It also doesn't take into account the fact that the level of distribution, if we have re-run the algorithm -- and we will be coming on to the algorithm tomorrow -- but if we are right that we can establish with a degree of certainty, perhaps not complete certainty but with a degree of certainty, how the algorithm would have operated and where the sales would have been diverted to, the actual scope for debate on how big the diversionary effect is may be minimal. It will simply be a fact. We will have determined how the algorithm operated or the Tribunal will. So the scale of the 10 in my diagram will simply have been established. So there is not going to be an argument about it. It will simply be a fact.

MR JUSTICE ROTH: To establish what happens in the counterfactual with that degree of certainty would be wonderful, but surprising.

MR CARALL-GREEN: I am saying the scope for debate may be quite low.

So, sir, just to finish -- because I appreciate I have now overrun, but I ask for a small indulgence. I won't have covered everything in my skeleton argument, but I hope that by answering your questions I have actually helped more than just running through what you already have on the paper.

The last thing I want to say is just to respond to the hypothetical that BIRA gives when it says that there is a scenario in which Dr Houpis' approach would result in the class not getting everything that it is owed. This is page 2 of my diagram. This is really what the diagram was intended to address.

These are BIRA's numbers. So BIRA says "Let's imagine a scenario where the FBM overcharge is 40, the FBA overcharge is 60" -- those are the grey and black boxes -- "and then the diversion effect, if you like, is 100".

Now in this scenario the correct answer -- we agree with BIRA on this in a sense. The correct answer is that the FBA claims, the claim on the right, has been reduced to zero. We don't say -- the correct answer is not that the FBA seller has to make a payment to Amazon of 40, which is what I have marked as negative damages. That's not -- there is no legal basis for that. That can't happen. So the correct answer is that the FBM claim, ie, the claim on the left, is worth 140. It sits alongside a zero claim, so the total is 140.

BIRA says Dr Houpis' netting approach creates a problem, because it results in you actually deducting 40 from the 140 and it brings you back to 100. All I want to say on that is we agree that the correct answer is 140 and that is what Dr Houpis' methodology will achieve and he has said that in his summary.

To be clear, if contrary to our case --

MR JUSTICE ROTH: (Inaudible) in this scenario instead of -- the recovery will be 100.

MR CARALL-GREEN: That's what they say will happen, but we say --

MR JUSTICE ROTH: It will just be the overcharge recovery and the claim for lost sales would be excluded by the gained sales.

MR CARALL-GREEN: That's what they say would happen. We say that's wrong both legally and on our methodology. Legally we say that that's wrong because what that involves is taking the FBM sellers' claim for 100 of lost sales and causing them to effectively reduce that because of negative damages being paid by FBA sellers. It makes no sense. We say it is meaningless.

MR JUSTICE ROTH: Because it is an aggregate damages claim for everyone, they say the total class is not negative damages. It is just saying in the total class there has been a causally cheap benefit that has to be netted off.

MR CARALL-GREEN: We say the answer to that is that the person on the left has suffered 140 and the person on the right has suffered zero, so the total is 140.

MR JUSTICE ROTH: I appreciate you say that. I think their argument is that is the reality. What would happen is they would only get 100 instead of 140.

MR CARALL-GREEN: They are saying that. The question is do they say that there is some point of legal principle that requires that or are they saying that's just what Dr Houpis' methodology would entail?

MR JUSTICE ROTH: As I understood it, they are saying that as a matter of legal principle, because if you are looking at the total loss of the class, you look at the total benefit for the class that causally results, and therefore you net it off. I see Ms Ford is nodding. That's how I understood their point as well.

If it was just a class of FBM sellers, then, of course, you wouldn't be netting off anything. They would just have a claim for lost sales and a claim for overcharges and they get 140. If you had a separate class action from FBA sellers, they would just get

nothing, but it is because they are all together.

MR CARALL-GREEN: Exactly, yes.

MR JUSTICE ROTH: That's how I think they put it.

MR CARALL-GREEN: If they say that that is a legal principle that means that the FBA sellers' net gain, shall we say, has to be netted off against the FBM sellers' claim, we say it is wrong. We say that's wrong, because we say that 47C(2), which is the provision that enables the Tribunal to assess the damages without undertaking an individual assessment of loss, that's not a requirement -- it doesn't require the Tribunal to adopt any particular method to assess the loss. It doesn't require the Tribunal, for example -- it does not say the Tribunal must assess the loss to the class as a whole. It does not say that. It says it may assess damages without undertaking an individual assessment of loss.

In fact, that rather speaks to the point. If we don't have to look at an individual assessment of loss, then we don't have to look at whether there was an individual assessment of supposed negative loss or gain. Indeed we do say that if the principle that a credit to be given to the FBA seller -- sorry -- given by the FBA seller has to be foisted upon the FBM seller, then we say that would be wrong. That would be an injustice, because it would not properly calculate the loss to the class, and even if I am wrong about that, even if I am wrong about that, there will be ways of managing that in the proceedings.

So we say at the moment that this scenario does not arise, because we say that every seller has an interest in pursuing a claim for a net loss, but if it were the case that at the very end of the proceedings it were established that certain sellers actually had nil claims, effectively their claims were subject to a complete defence of set-off, then the Tribunal can make an order that they are not to receive distribution or can even exclude them from the class, if the Tribunal wished to go that far, but what we are

doing here is we are aggregating claims. We are not aggregating set-off.

Sir, I have overrun terribly.

MR JUSTICE ROTH: I was asking you questions. That's fine. We will come back at 2.10.

(1.09 pm)

(Lunch break)

(2.10 pm)

Reply on behalf of BIRA

MR JUSTICE ROTH: Just a moment. Yes, Ms Ford.

MS FORD: Sir, members of the Tribunal, I am going to start with the authorities on the approach the Tribunal should take when it is comparing the scopes of competing proposed collective proceedings. The binding authority within this jurisdiction is the Court of Appeal in Evans. That's in authorities bundle, tab 14 at page 890 to 891. I am looking in particular at paragraph 148.

MR JUSTICE ROTH: Just a moment. What page?

MS FORD: 891.

MR JUSTICE ROTH: Yes.

MS FORD: The paragraph is 148 and it is headed "The broader scope of the O'Higgins claim". The passage that we rely on is actually over the page, glancing at the top, where the Court of Appeal says:

"The mere fact that one putative class representative crafts a broader claim is not an indication that the claim is preferable. Were it otherwise all class representatives would be falsely incentivised to draft claims as widely as possible to obviate the risk that in a carriage competition having a narrower claim might tell against them. There may be many good reasons why a better articulated and thought-through claim will be

narrower and not wider. There might be sensible trade-offs to be made between pursuing the more questionable outer limits of a claim (which might significantly add to costs) and focusing upon a narrower and stronger core claim (which might be more efficient to litigate)."

Two points we emphasise about this passage. The first is the Court of Appeal has made it very clear that bigger is not better. What the Tribunal should be seeking to do in our submission is to identify the claimant that is better articulated and thought through and that's not necessarily or presumptively the wider claim. As the Court of Appeal says, it might well be preferable to focus on a narrower and stronger core claim.

Secondly, the Court of Appeal is rightly identifying in our submission that there is an important policy consideration which underpins this. That's if a broader claim is automatically deemed to be a preferable claim then it falsely incentivises a proposed representative to draft claims as widely as possible in case they find themselves in a carriage dispute. We say that would be a perverse incentive and it is one that in our submission the Tribunal should be astute to avoid.

The Tribunal has also drawn our attention to a Canadian case which bears on this. That is the case of Kennedy v Akumin. It is the Ontario Superior Court. That's in authorities bundle tab 26, starting at page 1515. Professor Stephan in his skeleton appeared to have interpreted the ratio of this case as being bigger is better, but in our submission there is considerably more nuance to it than that. We start with paragraph 2 on page 1517. There's a summary of what the case is finding. It says:

"For the reasons that follow, I conclude that the Longair action will best advance the goals of access to justice and behaviour modification and overall will advance the claims of the class members in an efficient and cost-effective manner."

That's the basis on which he ultimately grants carriage to the Longair action.

It is evident from what follows in paragraph 3 that the court here is applying a specific test which is set out in the applicable Canadian statute and, just to make the obvious point, worded the same as the Competition Act.

In paragraph 7 over the page the approach that he derived from the statute is that:

"... 'what is precisely necessary for access to justice to the class members and their particular circumstances ...'"

Sorry. This is:

"[The statute] directs the court to the consider 'what is precisely necessary for access to justice to the class members and their particular circumstances and to discourage case theories or the parts of case theories that may be a waste of resources or that may be a drag on the proceeding or are not worth the trouble or effort needed to achieve access to justice."

He goes on at paragraph 8 to say he agrees that:

"... demands a case-by-case analysis of efficiency, productivity and proportionality and the needs of Class Members as distinct from the wants of class counsel."

Paragraph 17 over the page we can see on the facts of the particular case that was before the Canadian court they took the view that the controlling factors were the respective plaintiffs' case theories. They say that other factors like class counsel's expertise and such like and other such factors and funding are not driving factors in the context of this particular case. So they are focusing solely on scope because in the facts of this case the other factors did not weigh one way or the other.

Paragraph 46, that is the context in which the court says:

"In my view it cannot be said that the additional aspects of the Longair claim against Akumin and the individual defendants, or the Longair theory of correction, are based on a flawed or toxic theory, nor that the advancing that theory would unduly delay or complicate the proceeding. Rather, the broader theory advanced in Longair is more

consistent with the goals of access to justice by capturing more viable claims. Moreover, because the Longair action subsumes the Kennedy action, it is likely to be at least as successful as the Kennedy action."

That's the passage that Professor Stephan's skeleton alighted on. If we go over to the conclusion on page 58:

"... I conclude that the Longair action better advances the goals of the CPA, and in particular behaviour modification, by its inclusion of more defendants, and access to justice by its … proposed class period, enabling it to capture claims that would be left out of the Kennedy action."

"59. … I conclude that the risk that the claim against E&Y will disproportionately complicate the litigation is outweighed by the risk that viable and proportionate claims held by class members would not be raised in the Kennedy action."

In our submission this case is not establishing any sort of generally applicable rule or presumption that a broader case which generally seeks to maximise recoveries on behalf of the class will generally be preferable. That's the phrase that comes from Professor Stephan's skeleton argument at paragraph 2.

We say there is no such generally applicable rule to that effect. What the case is saying is that the breadth of the case theory needs to be weighed up against other factors, and the other factors are things like efficiency, productivity, proportionality, delay and complexity, and the conclusions that were reached on the particular facts of this case were driven by the fact that the broader case theory was really the only distinguishing factor between them.

So with that introduction to the applicable test, I am turning to the scope of the BIRA claim. My submission will be that the BIRA claim is clearly the better articulated and thought through claim to adopt the terminology of the Court of Appeal. We say that for broadly three reasons.

Firstly, it rests on the theory of harm which is focused and intuitive. It is not sprawling, dispirit and complex.

Secondly, it avoids the elephant trap that we say Professor Stephan has fallen into of attempting to combine claims where the interests of his proposed class conflict and so are not suitable to be combined in collective proceedings.

Thirdly, we say that the BIRA claim is properly grounded in the regulatory decisions. So it has quite rightly identified and pursued the narrower and stronger core claim, as identified in those decisions.

Can I ask the Tribunal, please, to turn up our collective proceedings claim form, bundle B, tab 1, page 11? This is the passage about claim for that Mr Brealey has already shown the Tribunal. It is the one which summarises the way in which we frame this case, and we say that Amazon pursued an unlawful product entry strategy. We say that the unlawful product entry strategy --

MR JUSTICE ROTH: Sorry. Paragraph?

MS FORD: Sorry, sir. It is paragraph 14.

MR JUSTICE ROTH: 14, yes.

MS FORD: So we say that the unlawful product entry strategy had two elements. The first element is the one summarised in paragraph 14 starting at line 3 and it is that:

"Amazon used the data provided by third-party merchants or derived from those third party merchants' use of Amazon marketplace services to inform, including by use of one or more unique data-driven algorithms, Amazon's product entry strategy, including which products Amazon Retail should sell, when to start or end the sale of products, including private label products; whether and on what terms to negotiate with suppliers and vendors for the sale of products on Amazon's UK Online Marketplace; and other pricing, inventory management and planning matters."

That's the first stage and that's what we define as the “Data Abuse Conduct”.

The Tribunal has already noted that we do here plead matters such as pricing, inventory management, planning matters. We have further pleaded those in paragraph 59. So those are part of the pleaded case. It is not right to suggest that we don't pursue damages in respect of them, which was the suggestion that was made by Professor Stephan in his submissions.

When we come to deal with the methodology that Dr Nitsche applies, I will show you that there as well we take into account these factors.

The second element of the unlawful product entry strategy is the one summarised in paragraph 15 and that's the proposition that Amazon self-preferenced those Amazon Retail products via the Buy Box feature and the consequence that we say arises from that conduct is then spelled out in paragraph 16.

"... Amazon was able to identify products that could be sold by Amazon Retail that would either not otherwise have been sold by Amazon Retail or were sold by Amazon Retail at an earlier point in time than would [otherwise] have been the case."

Then we say:

"Where Amazon Retail did sell products as a result of the infringement, it was more successful in its sales than would have been the case."

MR JUSTICE ROTH: Just on paragraph 60, just as paragraph 14 has a sort of cross-reference to paragraph 59, I think I understood you to say paragraph 15 effectively has an implied cross-reference to paragraph 60. Is that right?

MS FORD: Sir, yes, that's right. The behaviour (inaudible) in paragraph 60. These elements are all footnoted to the relevant regulatory decisions.

MR JUSTICE ROTH: Yes.

MS FORD: The losses by third party merchants are pleaded in paragraph 17. We identify four channels by which we say the losses arose. The first is what is termed the "business stealing channel". So that is essentially loss of revenues and profits on

lost sales.

There is then the "price channel", which is lower margins across the retail market.

There is the "innovation channel", which is that Amazon's conduct caused a reduction in innovation, and it is another suggestion that has been levelled against us in Professor Stephan's submissions that we don't take into account what he defines as the dynamic deterrents effect so that the conduct might have caused third party retailers not to compete at all. We say that is a factor we take into account. It is pleaded at this point as the "innovation channel" and again when I come on to show the Tribunal the methodology we have adopted, it is taken into account in the methodology as well.

Then the final channel is the "capacity channel" and that is the proposition that third party merchants made fewer sales and achieved lower efficiencies.

So that equates to Professor Stephan's abuse 1, the data abuse, and Professor Stephan's abuse 2, self-preferencing of Amazon Retail over third party sellers where it applies to products sold by Amazon Retail for which entry was facilitated by the data abuse.

MR JUSTICE ROTH: Can we focus on those last words, "Amazon products for which entry was facilitated", because we are struggling a little bit, I have to say, with the actual class definition which sort of brings this into focus before one gets to the actual abuse, in other words, who is in your class.

You say at paragraph 6:

"The members of the Proposed Class are third-party merchants" -- that's clear -- "who are actual or potential competitors of Amazon for sales of products on Amazon's UK Online Marketplace, who sold new goods on that platform between ..." and then the class period.

Then you come back later on in paragraph I think it is something like 109 on page 38

where you actually define the class not surprisingly in the same terms:

"Third-Party Merchants who during the Relevant Period sold new products on the Amazon UK Online Marketplace."

Then in the following paragraphs you define what's meant by Third-Party Merchant at 112.1. You define what's meant by the Amazon UK Online Marketplace at 112.2, but we don't see that you actually define what's meant by new products -- maybe I missed it -- in the claim form. It is not clear to us quite what that is. I mentioned this at the case management conference.

MS FORD: Yes.

MR JUSTICE ROTH: Can you be clear about that?

MS FORD: It is a point that has been raised in correspondence. The answer we have given is that new means not second-hand. It was suggested in Professor Stephan's submissions that actually new might mean products which are newly sold on the Amazon UK marketplace. We have confirmed that's not what is meant by new. One of the illustrations of the fact that that's not what's meant by new is that when Dr Nitsche comes to quantifying the losses, he includes not only products which are newly introduced on to the marketplace but the possibility that one might have what he describes as sudden success products. So they are products that have been on the marketplace for some time but suddenly exhibit a rise in sales and that prompts Amazon to say "I am entering with either the same or a similar product".

MR JUSTICE ROTH: Does it include then products where Amazon Retail had a product and then a third party subsequently comes on with their competing product?

MS FORD: I am going to come on to address that. That's one of the three examples Mr Brealey gave as to why he says we don't --

MR JUSTICE ROTH: Does it include it or not? It is a simple question.

MS FORD: Insofar as Amazon is essentially being a market leader and is being

a pioneer in terms of introducing a completely new product it doesn't cover that, because that is not something that will be driven by the data abuse and is (inaudible) with its own new products.

MR JUSTICE ROTH: Well, it might.

MS FORD: What we do say in our submission is that our methodology covers both Amazon's entry with new products and Amazon's entry with similar products -- sorry. I should have contrasted Amazon's entry with the same products and Amazon's entry with similar products.

MR BANKES: (Inaudible) what we are interested in is defining the class, irrespective of how you then go on with your methodology to define the loss. I think you are telling us -- I am trying to think of a product that has been on the market for many years, but if it was a product that was first sold in 1970s nevertheless each sale of a freshly manufactured iteration of that product is a new product for the purposes of your definition?

MS FORD: The merchant would be selling a new product. We would say that -- obviously we are only going back a certain period of time. We are only claiming in respect to the period where Amazon was dominant. And so insofar as you have a product which was first introduced back in the 1970s, that would not be covered by --

MR JUSTICE ROTH: But I am a third party merchant. I sell on (inaudible). I don't sell second-hand goods. I just want to know am I in the class and am I in the class for all my products?

MS FORD: Sir, the answer is yes, you are in the class if you sell new goods on the Amazon marketplace.

MR JUSTICE ROTH: Irrespective of whether Amazon sold them before I started my business or started selling these products at all?

MS FORD: We have recognised that there may be within that class definition,

because, of course, one seeks to define the class in a way which is clear and can be operated by those seeking to opt in or opt out, there potentially is a class of no loss merchants within that definition. The scope of those no loss merchants depends in particular on the exercise of defining similar products, because insofar as those merchants have sold a product on the market that is either the same or similar to one that Amazon enters with, then they will have suffered loss. I don't have the actual references to hand, but we have specifically dealt with the possibility that there might be no loss merchants within the class and how we propose to address that.

MR BANKES: Could I put it another way? Your class definition is clear. Your class may be so broad as to include those who have no course of action.

MS FORD: It may in due course. I am just trying to find the relevant passage where we have dealt with that. Yes. So paragraph 131. “It is accepted the Proposed Class as defined may prior to disclosure include merchants who have not suffered loss, i.e. those who do not sell the same or similar product to one offered by Amazon Retail or not otherwise impacted by the Infringement. In the event that it is possible to narrow the definition post disclosure and evidence, the Proposed Class Representative will apply to do so.

[But] at this stage [we] invit[e] the Tribunal to find that the Proposed Class satisfies the identifiable class criterion."

So it is essentially a trade-off between defining a class which is workable for the purposes of those trying to opt in or opt out of the class and the workability of actually defining it down to the point of can we identify every single individual merchant who has actually suffered loss. In our submission the right trade-off is struck at this stage by defining it as new products.

MR JUSTICE ROTH: So there would be no problem about amending 112 to add 112.3:

"New products means all products that are not second-hand".

MS FORD: We would certainly have no objection to amending to that effect.

MR JUSTICE ROTH: Because that's what you mean.

MS FORD: At 131 (inaudible) but we do make the submission that because we are at this stage where it is not possible to winnow out those members of the class who definitively did or didn't suffer loss prior to disclosure, the prudent approach in terms of class definition is to define it in the way that we have subject to making that change in respect of the definition of "new".

MR JUSTICE ROTH: One can see that on the basis of the abuses that you took us to in paragraphs 14 and 15 they will suffer loss where their product is competing in some way with the product that is on Amazon Retail.

MS FORD: Yes. That's exactly it. That then --

MR JUSTICE ROTH: It won't matter if it went in first or which one has a sudden success. All of that seems a bit irrelevant if it has the breadth that you say it has. It is just competing products.

MS FORD: Exactly. This interrelates with one of the other points that has been raised in our methodology, because Dr Nitsche has identified the way in which he proposes to identify those similar products. It essentially draws on established principles in merger regulations. It is with the standard methodology that one looks at the products that actually compete. He envisages applying that methodology to identify those similar products in the context of which merchants selling new products on the Amazon marketplace will be competing with Amazon.

In particular, the innovation channel, which is about Amazon's conduct chilling, the incentives of merchants is capable of applying to some merchants potentially even if they didn't sell the same or similar products. At least it would be similar products.

MR JUSTICE ROTH: The Other Anti-Competitive Behaviour as explained in

paragraph 60 is about the Buy Box, isn't it, selection for the Buy Box?

MS FORD: Sir, yes.

MR JUSTICE ROTH: And selection of Amazon Retail, from a discriminating or self-preferencing Amazon Retail product for the Buy Box, one can see harms third party sellers of competing products, but what is puzzling me then, is if one looks at paragraph 94, where you are talking about, and this is the other competitive behaviour, and I think that's the only bit about causation through the other competitive behaviour, it says it makes Amazon Retail entry more successful and increases the likelihood of successful entry, but if the abuse is, as you have explained it now, it is not just about entry. It's just about sales, isn't it, because people, as we all know, and as the Competition Authorities have found, are more likely to buy products that are featured in the Buy Box?

MS FORD: It is absolutely right that a criticism that is levelled against us is that we do not pursue a standalone allegation of self-preferencing absent the data abuse. The reason we don't is because in the context of the theory of harm we say it doesn't make any sense, because Amazon had access to third party sellers' data and in a scenario where there is abusive conduct, it would -- we say why would it enter with the products without utilising the superior data insights that it had access to. So we say that in practice the scenario where Amazon entered absent the data abuse, so the scenario where no data abuse exists and one is simply looking at Buy Box abuse, is likely to be of minimal relevance.

Just to elaborate on that a bit, the key information that Amazon has that others don't, because that's what this data abuse is about, it's got to be something that Amazon has access to that others don't have access to, is the quantities of products that are selling that enable it to tell which products are being sold successfully. It's not about pricing information, because third parties can obtain pricing information by looking at the rate

at which products are sold and it is not about inventory, because they can observe the effects on their own inventory, the governing effects of inventory matters are essentially how you manage your own stock.

What Amazon sees that others can't see is which products are successful and the benefit of that information is that it enables Amazon to choose the products in respect of which it is going to enter. We say that in the context of that theory of harm to address Mr Brealey's three examples, he gave the Tribunal three examples of where one might see a Buy Box type abuse in the absence of a data abuse.

The first one was where Amazon is the incumbent seller. That was his first point. This is why I say this only applies in a very limited scenario. Our methodology covers not only situations where a third party seller is selling the same product already, but also where Amazon enters with a similar product. What we mean by similar product could be an Amazon own branded version of the same product, or it could be the same product in a different colour. It is a product that relates to -- it competes with, to use that terminology, competes with the product being sold by an existing third party seller.

MR JUSTICE ROTH: And the other way round. A third party enters with its product and Amazon was already there, wasn't it?

MS FORD: No. In our scenario it applies where Amazon has utilised its data in order to determine whether it is going to enter with a related product. Now the only situation where that doesn't apply is if Amazon is the pioneer of a product that simply isn't on the site and isn't competing at the time Amazon enters. That's the only scenario where actually it doesn't utilise the effect of the data that's available to it.

MR JUSTICE ROTH: (Inaudible) many products showing that Amazon used data, but nonetheless Amazon sells a lot more of them, because it puts them in the Buy Box and because it limits the Buy Box to its own products. That, as I understand it, the Competition Authority suggested is an abuse, because it is self-preferencing

irrespective of data.

MS FORD: In our submission that scenario realistically is only going to arise if we are -- essentially if there is no data abuse as a matter of law. Obviously I cannot exclude that possibility, but the data abuse is the one that has been taken furthest in terms of regulatory proceedings. It was the one that was the subject of the Statement of Objections from the European Commission.

MR JUSTICE ROTH: Why are you limited in that way?

MS FORD: In our submission that's the way the theory of harm works because the information that Amazon has that others don't is the information to enable it to identify these products that are competing well but others can't see these successful products in the same way. It has more precise earlier information and it conditions its own entry by reference to that information.

MR JUSTICE ROTH: I understand that on entry, but self-preferencing in the Buy Box is simple, easy to identify and I think all the Competition Authorities found that 80% or something of people's purchases are products featured in the Buy Box. That therefore might found a claim on -- and it is always nice to have a simple claim -- absent showing how the data advantages at Amazon worked out. I am just puzzled as to why you aren't advancing that.

MS FORD: We say as a matter of practicality the scenarios where Amazon would not have drawn on the data that's available to it and so the data abuse becomes not relevant to Amazon's conduct are in practice going to be incredibly narrow. And I was going to address the three scenarios that Mr Brealey gave you. The first one was this one about Amazon being the incumbent seller, but the Tribunal has the point. It is only really ever going to arise when Amazon introduces a product which is neither the same nor similar to anything that already exists on its own platform. That we say is going to be a narrow scenario.

The second scenario he came up with was products that were not successful, products that were not successful using the Superior Indicators that prompt Amazon's entry. In that scenario why would Amazon enter at all if it is not actually a successful product?

MR JUSTICE ROTH: It might enter because it is a successful product -- one can see that -- without using the -- I can't remember the words -- the confidential data.

MS FORD: Superior Indicators.

MR JUSTICE ROTH: Superior Indicators. This is a popular, good selling product, so we will start selling it. What's more, once we start selling it, we will put it in the Buy Box.

MS FORD: They certainly do. That is our proposition that once they start selling it, they put it in the Buy Box.

MR JUSTICE ROTH: They might have in the counter-factual without having the superior information, it still would have entered.

MS FORD: That's really the issue, because knowing that Amazon does have superior information which tells it with greater accuracy and earlier that there are successful products that it would be worth its while to enter, it is in our submission not likely that Amazon would enter without taking into account the information that it has available. It is not likely that it would -- its entry decision would be driven by the inferior information that's available only to third parties when it has the benefit of all this superior information. It's just --

MR JUSTICE ROTH: I understand that. I was putting to you something slightly different. In the counterfactual where it doesn't have that information you have to say what would it have done? The answer may be it still would have entered because this was well-known to be a successful selling product. So that abuse in itself doesn't here establish any loss, but loss does result from the fact that in the counterfactual that product would not have been in the Buy Box.

MS FORD: That is absolutely our pleaded case in the counterfactual.

"Amazon was able to identify products that should be sold by Amazon Retail that either would not otherwise have been sold by Amazon Retail or were sold by Amazon Retail at an earlier point in time than would have been the case."

I am sorry. I am reading from paragraph 16 of our pleaded case. It is entirely possible that in the counterfactual Amazon would have entered anyway, but our pleaded case is that it would have done so later, if it would have come in at all, because it would necessarily have relied on the information which was available to third parties, which was not available so early and so precise as the information on which it relied in the factual.

I think one is also mindful that this does link into the conflict issue in some way. We do consider the conflict issue to be a fairly fundamental problem. So what we have done is pleaded a claim that avoids getting anywhere close to matters where the situation may differ as between FBA and FBM.

MR JUSTICE ROTH: Yes. I think that's a different point. That goes to the logistics claim and the use of FBA, but I am just thinking of the more basic claim of self-preferencing in the Buy Box and nothing to do with delivery.

MS FORD: I am looking, sir, at paragraph 4.8 of the CMA's case -- the CMA's Commitments Decision. It is authorities bundle, page 788. It says:

"The CMA is concerned that the FME and FMA processes (the 'Featured Offer Selection Process') may include or involve biases or discrimination that unfairly favour Amazon Retail and/or FBA sellers compared to sellers that do not use FBA services."

The broader one expresses the self-preferencing case the closer one gets to issues which then drag in the relative positions of FBA and FBM.

Now our pleaded case is driven by matters that concern Amazon's privileged access to information that wasn't available to others and we do say that on that theory of harm

the circumstances that one is able in theory to identify where there might have been self-preferencing absent data abuse are in practice incredibly narrow. They are a scenario where Amazon entered first with a product which was not in any way competing with anything else that was already there. They are the products which on the Superior Indicators actually weren't successful anyway and so why would Amazon enter into that scenario, and if they are not successful, of course, then there is no loss. One is not losing sales in relation to an unsuccessful product.

Then the third one that Mr Brealey identified was that there was a business case to enter based on the publicly available information and that's essentially the point that you, sir, just put to me.

Our submission is that the information that was available to Amazon is more precise and is available earlier to it than the business case to enter that might emerge from the publicly available information, and that's why our counterfactual is -- why our pleaded case is Amazon enters earlier than it otherwise would have done. It is not just an assertion I should emphasise, because when we come to look at the methodology, in particular both the broad brush and the econometric modelling, but particularly on the econometric modelling what Dr Nitsche proposes to do is to model the extent of the data delta, what he defines as the data delta, so the difference between the information that's available to Amazon and the information that's available to others, and the extent to which those two can inform or can predict or can relate to the sales performance of any particular product. So he is going to go investigate empirically the extent to which Amazon's entry is causally related to the access it has to the Superior Indicators, superior information.

On our theory of harm, although one can come up with theoretical scenarios where Professor Stephan's abuse 2 applies, but abuse 1 doesn't, we say in practice those are going to be narrow.

MR DERBYSHIRE: You made the point that (inaudible) articulated claim can be superior to a broader claim and now we are saying that the areas that you will exclude will be incredibly narrow in terms of Amazon enters and competes. You include that. Amazon is already there and identifies sudden success products and moves in. How very narrow is very narrow? Do you have any idea how much of the kind of Amazon marketplace you would exclude with your narrow, well articulated methodology?

MS FORD: It is fair to say I can't put a figure on it. We are reasoning from the theory of harm and we are reasoning from a case based on the regulatory decisions that says that Amazon did, in fact, have access to this superior information and in our submission in those circumstances it is highly unlikely that it would have made entry decisions which would not have drawn on and benefitted from that information. So --

MR DERBYSHIRE: But if Amazon doesn't move, it doesn't enter. If it doesn't do something different, then it is not within your scope.

MS FORD: If it doesn't move, then there is no damage as a consequence of the data abuse. The only scenario where it doesn't enter is one where essentially it was already there. That is one where we say is narrow, because insofar as they were either the same products or similar products already on the Amazon marketplace, then there is information in relation to the success of those products and we say that is likely to have informed Amazon's decision to come in. So it really has to be a product where Amazon is already there. It is the pioneer. It's brought that product and it cannot have drawn on the information it's derived from third party sellers of similar products in order to define its entry decisions. We say that just as a matter of logic that is going to be narrow.

MR DERBYSHIRE: As a matter of logic. Okay. So if Amazon does compete in an area, that obviously by definition is excluded.

MS FORD: That's absolutely right.

MR DERBYSHIRE: If Amazon enters with a new product that is not an identical product, but is a similar product, subject to what similar means, that will be an abuse.

MS FORD: That is clear, yes. The only thing that can fall outside is where Amazon was there already. We say given the breadth of this material that's on the site already and the nature of similar products and what competes, that simply is not going to be a materially relevant scenario.

MR BANKES: Okay. One of the examples you have given is where a pre-existing product suddenly gains in popularity.

MS FORD: Yes.

MR BANKES: Are you saying if Amazon has a product that's been on the market for a while bubbling along at very low sales, and then suddenly gains in popularity, that's excluded or included, because that's already on the market? That's already entered, not very successfully and then later on it picks up this huge popularity. Is that --

MS FORD: The focus of the analysis is on third party products. So it is not relevant to look at whether Amazon had something that was bubbling along and suddenly took off.

MR BANKES: I thought we were focusing on Amazon entry.

MS FORD: We are focusing on Amazon entry prompted by the information it has about third party products. That scenario is that a third party product has been on the site for some time. It's been essentially unsuccessful. It doesn't attract Amazon entry. Then it suddenly takes off. Amazon's Superior Indicators means that Amazon can see before third party sellers that there is this opportunity here that has suddenly emerged. Suddenly face masks in COVID, for example, just pulling something out of the air, have become very popular and Amazon sees that earlier than a competing third party seller, because it knows what are the volumes that are moving on Amazon's site.

MR BANKES: My scenario was different. There had been very low volume sales.

A third party enters and does rather well. Amazon then chooses to switch its product into the Buy Box using the data that the third party entry had succeeded, that's excluded because Amazon has already entered, isn't it?

MS FORD: If I am --

MR BANKES: They have been on there for a long time. So they have entered 2014.

MS FORD: They, Amazon.

MR BANKES: They, Amazon. They have very, very low sales. Then a third party comes along with a substitutable product and spends a lot of money marketing it and suddenly that substitutable product becomes very popular and so you see an increase in demand for both products and Amazon switches its product into the Buy Box. By virtue of the fact it entered first and before the period, it is excluded from your claim.

MS FORD: Sir, I think the assumption there is that Amazon's product would not already have been in the Buy Box. All the indicators on the regulatory material is insofar as they are there they would have been in the Buy Box.

MR BANKES: Absolutely but nonetheless if my assumption is right, it is excluded. I am just trying to understand.

MS FORD: Yes. I think probably my submission will be the same. It is right that we haven't factored in a scenario whereby Amazon was marketing but not winning the Buy Box. In my submission all the regulatory material suggests that that's an unlikely scenario because of Amazon's self-preferencing, but because we haven't identified this unlikely scenario, we have not identified a situation where Amazon was not previously in the Buy Box and then switched it such that it gets the benefit of the Buy Box.

MR JUSTICE ROTH: (Inaudible) a hypothetical example. Take headphones. Headphones have been in the market for a long time. Amazon retails headphones. Its headphones are in the Buy Box. A developer comes along and develops a new

headphone which is better at insulating exterior surround sound and they have a distribution network selling this new headphone. The distributor, of course, wants to sell it for a tremendous amount, but it is selling it, not Amazon, but it finds because there is an Amazon headphone in the Buy Box, it has no chance of being in the Buy Box, because it is not being sold by Amazon. So it is suffering. Its new product is not competing on a level playing field, but it is nothing to do with Amazon's superior data, it is just Amazon's policy of favouring is own retail offering.

MS FORD: Certainly we have accepted that to the extent that there are products which were introduced prior to 1st October 2015, those were not being encompassed because at that point there could be no data abuse because Amazon was not dominant.

MR JUSTICE ROTH: Yes.

MS FORD: What we have said in relation to that is -- and this is a matter covered in the ECA court -- there's reason to believe that the vast majority of turnover on Amazon's marketplace is in respect of products introduced post 2015. So what that suggests is if these are new products being introduced, and this probably does come up in the context of earphones, one would not normally expect the same model of earphones has been sitting on the website since 2014, because these things evolve. So insofar as Amazon says "Aha, I see there is a new model of earphone that cancels out the sound better. I think we ought to move into that", at that point it will be drawing on the information that it's got to identify that opportunity.

The essential answer to the point about the standalone Buy Box abuse is that in our submission although it is possible to articulate theoretical scenarios of where it might apply, in reality, given that we know that Amazon has access to third party sellers' data the reality is that it would utilise that data when deciding when to enter with either the same product or similar products. So we say in practice the scenario whereby one

has a Buy Box abuse divorced from the data abuse is likely to be of minimal relevance. We have identified two aspects of the case where our claim is actually the broader claim. It used a longer Claim Period on the basis that Amazon's abuse was deliberately concealed and it allows for opt ins in circumstances where merchants established outside --

MR JUSTICE ROTH: Claim Period. Perhaps we can go back to your claim form.

MS FORD: Paragraph 84 of our claim form is the one that pleads deliberate concealment.

MR JUSTICE ROTH: Yes.

MS FORD: We plead that the use of non-public data has been hidden.

MR JUSTICE ROTH: Yes, but they have to be dominant in October 2015 to have a claim at all.

MS FORD: That's absolutely right. In fact, you asked the question to Mr Carall-Green this morning about from what point was he -- he was showing a chart and you said from what point do you assume the dominance kicks in. I think I am right in saying his answer was from 2015.

MR JUSTICE ROTH: I think 2016.

MS FORD: 2016. I may be out by a year. I think 2017 is the relevant period if one looks at Dr Nitsche's analysis. He has indicated that he considers it plausible that Amazon was dominant during the earlier period to enable us to go back more than six years. So in our submission that's a perfectly viable claim and a broader claim.

MR JUSTICE ROTH: Yes.

MS FORD: So it is one aspect in which we have actually pursued a broader claim.

MR JUSTICE ROTH: This is on deliberate -- was it you or Professor Stephan reserved the right to go back earlier depending on the outcome of the appeal on the -- relying on the Court of Justice in Eureka. Perhaps it is you.

MS FORD: I think that's us. Page 3, footnote 2.

MR JUSTICE ROTH: It is you then. Yes, it is you, yes. Yes, but you will still have to establish dominance in the early period.

MS FORD: Yes. Dr Nitsche has addressed that in his report, the basis on which he says it is plausible that it may go back earlier. The point he makes is that Amazon was larger than eBay from the beginning of 2015 and then over time gained market share from eBay. He says that's consistent with Amazon being dominant already in 2015. He fully recognises that a full dominance assessment has to be undertaken in any event. So in our submission it makes no sense to pre-emptively exclude the relevant period when he can analyse it and investigate the matter. He has certainly come to the view that dominance in the earlier period is plausible.

The other aspect in which we are broader is that our class definition permits opt-ins insofar as they are established outside the UK but sold on the UK platform. Again, that seems a perfectly intuitive inclusion in our submission. There is no sensible exclusion on that basis.

MR JUSTICE ROTH: That would involve potential proper law questions, wouldn't it, if the loss is suffered elsewhere, if the merchant suffered a loss abroad?

MS FORD: I think in our claim, and of course this is going back in respect of the UK market.

MR JUSTICE ROTH: I am not saying what the answer would be, but one can see that there might be issues arising.

MS FORD: I am trying to find what we have said about it. I am fairly sure we have addressed the point. I am told at paragraph 65 we have pleaded applicable law.

MR JUSTICE ROTH: I don't think this is a major point, Ms Ford. It is something that can be looked at on certification.

MS FORD: Sir, indeed. It doesn't all go one way in terms of breadth.

MR JUSTICE ROTH: It is not a major point. That's just the opt-in element. I don't think that particularly relevant.

MS FORD: What we don't seek to pursue, as the Tribunal will appreciate, is Professor Stephan's defined abuses 3, 4 and 5, and those are the ones where we consider that Professor Stephan has put himself in the position where the interests of the class conflict and has formulated his claims in a way that are not suitable to be combined in collective proceedings. We also say that those are the claims which have much weaker regulatory support and so the consequence of including them is that they are significantly broadening the scope of the complexity of the claims, the duration and the legal risk involved with trying them, but we say they are not the centre of gravity of the regulatory material.

So I will start with the conflict suitability point and then address the regulatory underpinnings. Two authorities to show the Tribunal on conflicts. The first is --

MR JUSTICE ROTH: Just pause a moment. (Pause). Before we leave that, on claim form, paragraph 114 on page 46 of the -- B46, Bundle B1, talking about the definition of the class again. You say:

"... easily identify whether they are a member of the Proposed Class. All factors [to] determine whether the person falls within the [class] are matters that would be known by that individual, or would be easily ascertainable by it through consultation of its business records."

Then at 1, status as a merchant on Amazon marketplace.

2. Nature of those sales.

It says:

"Nature of the goods sold."

It is simply, as I understand it, whether they are selling other than selling new goods.

MS FORD: Sir, that's absolutely right. That's the question whether it is new goods or

second-hand goods.

MR JUSTICE ROTH: Yes.

MS FORD: I was moving on to address two authorities on the question of the conflict.

MR JUSTICE ROTH: I am sorry. Please continue.

MS FORD: The first one was going to be the Ennis case that Mr Carall-Green has already referred to, which is in the authorities bundle at tab 20. We would draw the Tribunal's attention to the summary of the legal principles at paragraph 18, which begins at bundle 1032, which we say is a useful encapsulation of the applicable principles.

Sub-paragraph (1):

"A class representative is a fiduciary with respect to the class. A fiduciary is under a duty not to place himself in a position where there is a conflict between the interests of the principals for whom he acts. This is because, by acting for both principals, the fiduciary puts himself in a position where his duty to one principal may conflict with the duty owed to the other."

(2) is the point that:

"A potential conflict is one where there is 'a real sensible possibility of conflict as distinct from some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person'."

Then:

"Where there is an actual conflict, even fully informed consent does not resolve the problem; the fiduciary is barred from acting for at least one and preferably both."

Sub-paragraph (3) makes the point that:

"The existence of differences between the claims of individual members of the class does not mean that there are conflicts of interest between them."

Then sub-paragraph (4) is a continuation of that point. They say:

"In the context of prospective collective proceedings, it is important to avoid confusing differences between class members (which are to be expected) with conflicts of interest."

Then paragraph 19 below is cross-referring to the Trucks case as an example where there was a conflict of interest, and over the page part way down that paragraph they cite:

"The Chancellor said at [97] that 'where there is an identifiable conflict of interest on a major issue in the case, I do not consider that a class representative is entitled to prefer the interests of some members to the detriment of others'."

You have been shown I think starting with paragraph 20 the context of this particular case. There it was Apple, the proposed defendant, who was seeking to allege that there was a conflict of interest, and you were shown paragraph 30 where that contention was rejected. It was rejected because, as the Tribunal rightly pointed out:

"Whether or not the PCR is in a position of conflict of interest between the members of the proposed class should be determined by reference to the claims advanced by the PCR in the Claim Form, not by reference to an alternative claim postulated by Apple."

So the reason why it was rejected in that case was that Apple was alleging a conflict that didn't arise on the face of the pleaded case. The Tribunal will anticipate my submission that the position here is different. A conflict does arise on the face of Professor Stephan's pleaded case, and I intend to come on to show the Tribunal the relevant parts of the pleading.

Mr Carall-Green did also draw your attention to paragraph 37 and that was to suggest that reflecting differences between class members at the distribution stage does not give rise to a conflict of interest. Now that was, of course, the case in Ennis, because the Tribunal was satisfied that there was no conflict of interest on the face of the

pleadings in Ennis, but in our submission the converse is not true. So if there is a conflict of interest on the face of the pleadings, then one cannot simply purport to sort it all out in distribution.

MR JUSTICE ROTH: I have to say that in Trucks (inaudible).

MS FORD: Sir, yes. I can see the point. It may be that the Tribunal here was trying to get to the point that it was a conflict postulated on a case advanced by Apple, not a case being advanced by the PCR, whereas in Trucks at the very least it was on the case as being advanced by direct purchases and indirect purchases, but we do say that in any event the conflict is on the face of the pleading in this case.

Just before I come to that I would like to show the Tribunal Fulton Shipping. It is in authorities bundle, tab 3, starting at page 68. The reason we rely on this is because we say this is the legal principle that requires set-off. This is the Supreme Court authority for the circumstances in which a claimant that receives a benefit from unlawful conduct has to give credit for it in their claim for damages.

We start please to see what the claim was about in paragraph [1], which is page 74. It was a claim for assessment of damages arising out of repudiation of a charterparty. If we go to the bottom of paragraph 3 on that page just below J, the Tribunal will see that:

"The owners treated the charterers as in anticipatory repudiatory breach and ... accepted the breach as terminating the [contract]".

So the vessel was redelivered to them earlier than it otherwise would have been had there been no breach.

If the Tribunal goes over the page to paragraph [4], we can see now that the vessel was worth much more when it was sold earlier because of the breach than she would have been had she been sold later had there been no breach. This is just opposite B.

So, as is recorded in paragraph [6], the question in this case was whether when they

are claiming damages for breach, the owners had to take into account and give credit for the fact that they had sold the vessel for more than they would otherwise have done.

The answer to that is given at paragraph 30. 29 and 30 are setting out the circumstances in which one is obliged to give credit for a benefit. The Supreme Court start by saying:

"Viewed as a question of principle, most damages issues arise from the default rules which the law devises to give effect to the principle of compensation, while recognising that there may be special facts which show that the default rules will not have that effect in particular cases. On the facts here the fall in value of the vessel was in my opinion irrelevant because the owners' interest in the capital value of the vessel had nothing to do with the interest injured by the charterers' repudiation of the charterparty."

So just pausing there, the answer was you don't have to give credit in this case for the fact that you managed to sell your vessel at a greater value by reason of the breach.

The test is:

"This was not because the benefit must be of the same kind as the loss caused by the wrongdoer."

He says:

"I agree ... with ... the judge ... As I see it, difference in kind is too vague and potentially too arbitrary a test. The essential question is whether there is a sufficiently close link between the two and not whether they are similar in nature. The relevant link is causation. The benefit to be brought into account must have been caused either by the breach of the charterparty or by a successful act of mitigation."

So the test is causation and again --

MR JUSTICE ROTH: Paragraph 33 (inaudible).

MS FORD: The converse. The absence of a relative causal link is the reason why they could not have claimed the difference in the market value of the vessel if the market value would have risen between the time of the sale in 2007 and the time the charterparty would have terminated in November 2009.

So, if you receive a benefit which is caused by the wrong that you are complaining about, then you have to give credit for it in your claim for damages. We say that that's an important factor which then feeds into the proposed class members' interests and incentives in relation to Professor Stephan's pleaded abuses.

Again, the Tribunal will anticipate my submission. I say that where FBA merchants have received a benefit in the form of increased sales by reason of Amazon's abuse of conduct, that is a benefit which is directly caused by the abuse and so they have to give credit for those sales as against any losses that they claim to have suffered from the same abusive conduct.

So I am about to turn to Professor Stephan's pleaded case. I don't know if that would be a convenient moment.

MR JUSTICE ROTH: Yes.

(Short break)

MR JUSTICE ROTH: Yes.

MS FORD: I was turning to look at the Stephan claim form, which is in bundle B, tab 8.

MR JUSTICE ROTH: Just a second. B, 8.

MS FORD: Starting at paragraph 149, which is on page 6341, abuse 3 is pleaded. 149 is:

"Amazon uses its dominant position in the Relevant Market to favour Sellers' offers that use FBA over Sellers' offers that use FBM when it comes to selection of the Featured Offer (i.e., the offer selected to be in the Buy Box) ..."

Then if we go over the page to paragraph 150, the plea is:

"The result is that offers using FBA are selected as Featured Offers for reasons that do not reflect competition on the merits."

There is then a plea as to the effects of abuse 3, which is at paragraph 170.3, page 6349. It is stated that abuse 3 first of all:

"Makes sellers less likely to win the Buy Box insofar as they use FBM services."

It is also pleaded to feed into the level of FBA fees. That is 170.3.1. It is pleaded to feed into the level of FBM fees, 170.3.3. It is pleaded to feed into rival e-commerce platforms. That's 170.3.4.

There is then a plea as to the relevant counterfactual, which is at paragraph 178. There it is said that:

"Absent Abuse 3:

Amazon would have operated the Algorithm in such a way as not to confer any advantages on an offer made using FBA that would not be conferred on an otherwise materially identical offer using FBM."

Then at 178.2 it is pleaded:

"The effects set out at paragraph 170.3 above, insofar as attributable to Abuse 3, would not have occurred."

In our submission on this pleaded case there is a clear conflict of interest between sellers that use FBA and sellers that use FBM, because sellers who use FBA are the beneficiaries of the pleaded abuse, and sellers who use FBM are the victims of the alleged abuse. We say that the conflict arises specifically in relation to the issue of the proportion of sales that would have been made by FBM merchants in the counterfactual. We say it is in FBM merchants' interests to maximise the proportion of sales by FBM in the counterfactual. It is in FBA merchants' interests to minimise that proportion.

We say that issue, the question of the proportion of FBM sales versus the proportion

of FBA sales in the counterfactual is expressly put in issue in Professor Stephan's pleadings, because it is pleaded at 178 in the counterfactual, Amazon would not confer any advantages on FBA and the adverse effects pleaded at 170.3.1, including that FBM sellers are less likely to win the Buy Box, would not have occurred.

That conflict then feeds into Dr Houpis' methodology.

MR JUSTICE ROTH: Just before you go on to the methodology, going back to 170.3, there is 170.3.1, which you have highlighted; 170.3.2, increase in FBA fees; and 170.3.3, increase in FBM fees. That's not in conflict, is it? That's saying both categories suffered an increase in delivery fees.

MS FORD: It does in my submission give rise to a conflict because of the methodology that Dr Houpis proposed to use to come up with the quantum of the increase in the FBM fees, and that was the point I was about to show the Tribunal, because the question of the proportion of sales that would be achieved by FBM merchants in the counterfactual feeds into the question of FBM fees. I can show the Tribunal where we get that from.

It is easiest to take it from his summary rather than the report. If we look at the summary, A, 8 at page 156, the Tribunal will see there is a heading "My methodology to assess the impact on FBA fees" and then there is a heading "In relation to FBM fulfilment fees". I am first of all looking at the second one, paragraph 22. If the Tribunal looks about halfway down, line 6, he says:

"I will estimate the level of FBM fees in the counterfactual by assessing the extent to which larger FBM volumes", so higher sales to FBM in the counterfactual, "would have led to lower variable costs for FBM fulfilment providers and how much of this difference in costs might have been passed on to third-party sellers in the form of higher fulfilment prices in the factual."

So the question on which there is a conflict, the question of what would be the

proportion of FBM sales in the counterfactual, feeds into Dr Houpis' methodology for estimating FBM fulfilment fees. It will be in FBM merchants' interests to push for higher FBM sales in the counterfactual, because that would mean lower variable costs and lower FBM fees in the counterfactual.

Now oddly Dr Houpis proposes an inconsistent methodology when it comes to estimating the level of FBA fees in the counterfactual. We can see that if we look at paragraph 21 above. There he says he is going to take a different approach. He is going to use an econometrics-based approach to conduct a before and after regression analysis to estimate the relationship between the prices of FBA offers and the underlying drivers, for example, costs, demand, etc, before the infringement period, and then assess how prices evolved during that period.

Now there is another obvious problem with that approach, which is that the period before is not a clean period in any true sense, because Amazon would have been engaging in the same conduct. It's just that it was not dominant during the earlier period. So, comparing a before and during regression in that way is questionable for other reasons, but that's not the key point for these purposes. The important point is this methodology is not driven by the increase in counterfactual FBM sales in the same way as the methodology he's proposed in relation to FBM fulfilment fees. He's come up with a different way of doing it.

What that means is that FBA merchants are not aligned with FBM merchants in arguing for higher FBM volumes in the counterfactuals to assist them with their logistics claims. What dominates FBA merchants' interests in our submission is that the more they benefitted from the abuse by achieving higher sales in the factual, the more credit they have to give to Amazon off their own claims.

So in our submission their interests are in direct conflict with FBM merchants' interests. It is in their interest to argue for lower FBM volumes in the counterfactual.

Now one answer that Professor Stephan has tried to give to this, and we have heard it this morning, is to say that the conflict between FBA sellers and FBM sellers is illusory, because Amazon tells us there is no neat division between FBA and FBM.

If we have a look at what Amazon actually says, it is in bundle F, tab 3, starting at page 137. Wrong reference. Starting at page 115. Sorry. I will sort it out. Tab 3 -- no, it is 137, paragraph 48.1. To identify the document we are in, we are in Amazon's response to an application for a CPO by Mr Hammond. What Amazon says, and this is the passage that Professor Stephan relies on, is 48(1):

"There is no neat division between 'FBA sellers' and 'non-FBA sellers'. On the contrary, the position is very mixed."

It goes on to give more detail. It says:

"Since FBA is offered on a product-by-product basis, many third-party sellers choose to use the FBA service for some (but not all) of the time, or for certain products (and not others). Other sellers choose not to use FBA at all."

So there is a cohort of sellers who do not use FBA. Amazon gives further information at paragraph 69 in this document. That's on page 145 -- wrong reference again. Sorry. Paragraph 60 in this document, page 141. It is the end of this paragraph. Amazon says:

"In particular: … there is no general division between FBA sellers and non-FBA sellers, as the PCR and Dr Pike believe; … there is no 'coercion' to use FBA, as evidenced by the very high number of third-party sellers who choose non-FBA options in many instances, or who choose SFP."

So what Amazon is saying is that there is a definite cohort of sellers who do not use FBA. One simply cannot proceed on the basis that any merchant is an FBA merchant on one day and an FBM merchant on another day and there is no particular difference between them. There is a distinct cohort who are differently positioned, and they are

the victim of the abuse.

Even in relation to those sellers who do use both FBA and FBM, they will almost inevitably use one more than another and their interests will fall accordingly. Either those sellers using both, each seller will either be advantaged or disadvantaged if the proportion of FBM sales in the counterfactual is actually maximum.

So we say it is no answer to say that FBA and FBM should all be treated together for these purposes.

The next way in which it appears to us that there's been an attempt to get around the conflict is to treat the sales that have been lost by FBM as equating to a sale gained by FBA, and so concluding that the class as a whole has not suffered any loss. That is pleaded at paragraph 190 of the claim form.

MR JUSTICE ROTH: Can we put away the Amazon response?

MS FORD: For present purposes, yes. Paragraph 190.1 pleads:

"By Abuse 3, Amazon confers an unfair advantage on Sellers using FBA over Sellers using FBM. However, this does not affect the calculation of damages due to the class as a whole, because it simply reflects the fact that, as a result of Amazon's infringement, some sales were diverted from offers using one logistics channel (using FBM) towards those using another (using FBA)."

But it is then stated differences between FBA merchants and FBM merchants can be accommodated in distribution. That's the point that has been made fairly repeatedly in Professor Stephan's submissions, in his skeleton and it was made orally this morning.

In our submission that cannot resolve the conflict because it is still in FBM sellers' interests to push for a higher proportion of FBM sales in the counterfactual for two reasons.

Firstly, because it will lead to a *prima facie* greater share to them in distribution and,

secondly, because it feeds into their recovery for inflated FBM fees where, as I have shown the Tribunal, the methodology is premised on changes in volume between FBA and FBM. It is still in FBA sellers' interests to push for a lower proportion of FBM sales. That's again for two reasons. It will lead to a *prima facie* greater share to them in distribution and because, applying the approach in Fulton Shipping, they need to minimise the extent to which they will have to give credit to Amazon for the benefits that they have incurred as a consequence of the abusive conduct.

It is no answer to say, in our submission, that it is all a matter of judgment for the class representative on distribution and so it doesn't give rise to a conflict. That was permissible in Ennis, because the Tribunal were satisfied that there was no conflict in Ennis. Here, in our submission, there is a conflict of interest on the face of the pleadings and that infects the approach to distribution, as it infects every other part of the claim.

Where there is an established conflict it doesn't solve that conflict to say that the class rep will sort it all out on distribution. To give an illustration of that, Mr Carall-Green made a submission this morning that the diversion of sales might turn out to be small and if that were the case, then the class rep might decide not to reflect the differences between FBA and FBM at distribution. That absolutely crystallises the conflict of interest between FBA and FBM, because the question of the extent of the diversion of sales will feed into the decision as to the extent to which they are compensated at the distribution stage. Absolutely crystallises, in my submission, the problem of the conflict.

So in our submission Professor Stephan has placed himself in a position where there is a fundamental conflict of interest within his class, but what he has also done, and this in our submission is a cumulative and additional reason why these claims are not suitable to be combined in collective proceeding, it is to formulate this claim in a way

that is not in the interests of either group. It is not formulated in a way which is in the interests of FBA merchants and it is not formulated in the interests of the FBM merchants to be combined together in this way.

Now dealing with FBM merchants first, on the basis of abuse 3 as it is pleaded they have a claim against Amazon for lost sales and for compound interest on those sales. The reason I say compound interest is because Professor Stephan has claimed compound interest on behalf of the class. The Tribunal can see that by just looking very quickly at 195.2 to the claim for compound interest by way of damages and then 196 which gives further particulars of the claim for compound interest.

So that is the claim that FBM merchants have an interest in pursuing and on Dr Houpis' own figures the potential loss of sales between FBM merchants and FBA merchants is substantial.

Can I ask the Tribunal to turn up bundle B, tab 12? This is Dr Houpis' report. Page 7957.

MR JUSTICE ROTH: Give me the page again, please?

MS FORD: 7957. What we are looking at is paragraph F30 and also table 14, which is over the page. F30 is explaining what we see in table 14. It says:

"[It] reports the counterfactual outcomes for products in which sellers using FBA and FBM compete with each other, but there are no competing Amazon Retail offers. In the baseline, my analysis indicates that sellers using FBA won the Buy Box for approximately 85% of such products, while sellers using FBM won in only 6%. In the counterfactual, my analysis indicates that sellers using FBA would have won only 36% of [the] products (i.e. they would have only won the Buy Box in relation to 42% of the products which they won in the factual). [So those] using FBM would have won in the case of 55% of the products."

Now these are the figures which are subject to the caveat that Mr Carall-Green

mentioned that he has not taken into account delivery speed. That these are the figures subject to that caveat, and there was an exchange with the Tribunal. The position is when one takes that caveat into account we don't know subject to -- we can only make assumptions.

So we are saying that 49% of sales that went to FBA would have gone to FBM absent the abuse, and expressed as a percentage of factual sales, FBA merchants lose 58% of their factual sales in the counterfactual.

Now if FBM merchants' claims had not been combined with FBA merchants' claims, then the damages for these lost sales would have been claimed back from Amazon. Because their claims have been combined with FBA claims, they are netted off against FBA gains and they are treated as giving rise to no aggregate loss to the class as a whole.

Equally if FBM merchants' claims had not been combined with FBA merchants' claims, then they could claim compound interest from Amazon on their lost sales, but because their claims are combined with FBA claims and netted off, they recover no compound interest. If FBM merchants' claims had not been combined with FBA merchants' claims, then what would be available to distribute to them would be the entirety of the lost revenue from the lost sales together with the compound interest on those sales, but because their claims are combined with FBA claims, the pot of damages that's available to distribute to them to compensate them for the loss that they have suffered is reduced by the amounts that FBA merchants have to give credit to Amazon for the sales that they have gained.

So in our submission, FBM merchants find themselves worse off by reason of their claims being combined with the claims of FBA merchants, but at the same time the decision to include these claims in Professor Stephan's proposed collective proceedings means when those proceedings are resolved or settled, that will

extinguish these merchants' rights to claim further in respect of Amazon's abuse.

So while Professor Stephan maintains that he is vindicating FBM merchants' claims and ensuring their access to justice, these claims are not, in fact, being vindicated in any meaningful way. What is being combined is in every respect a sub-standard claim on behalf of these FBM merchants, but at the same time the consequence of choosing to do so, the consequence of combining their claims is that they are extinguished and they can't be pursued further on their behalf. So they are shut out from getting a proper vindication of their rights in respect of the sales that they lost to FBA merchants as a result of Amazon's abusive conduct.

So in our submission that shows that FBM merchants' claims are not suitable within the meaning of section 47B(6) to be combined with the claims of FBA merchants.

That's where FBM merchants are left as a consequence of the way this claim is formulated. Turning to look at --

MR JUSTICE ROTH: If there was a class just of FBM merchants pursuing a claim, there would be no problem presumably, because it would just be FBM merchants. They could argue for a high level of diversion plus additional statistics fee.

MS FORD: Yes, if they were a separate claim. One could not do it as a sub-class because then one runs into all the Trucks-related problems and the difficulty of the PCR acting for conflicting sub-classes.

MR JUSTICE ROTH: If there was a claim for FBA merchants separately, again there would be no problem.

MS FORD: There would be no problem, but I will come on to say that it is by no means clear that it is even in the interest of FBA merchants to make such a claim.

MR JUSTICE ROTH: It would depend. If, as Dr Houpis has estimated, the increase in logistics fee is much greater than any diversion, then it would be.

MS FORD: That is what one would have to be satisfied of to conclude that it is in their

interest to pursue this claim, and I am going to come on to suggest that actually one really can't be satisfied with any degree of certainty that that actually is the case, and given that one cannot be satisfied, the risk that one is running is that these claims are actually devaluing the FBM claims with which they are combined.

So we have discussed the fact that these FBA merchants have to give credit to Amazon for the benefits that they have derived. Professor Stephan says that worst case the FBA seller might turn out to have no claim at all in respect of abuse 3. In our submission that is not the worst case because we say the obligation to give credit applies against the entirety of FBA merchants' claims against Amazon. It is not confined to abuse 3. You don't just get to zero on abuse 3 and that's the end of the matter. The reason for that is on Professor Stephan's own pleaded case these abuses are all interconnected and they constitute a single infringement.

Let me show the Tribunal where that's pleaded. We can go back to the collective proceedings claim form, B8, 6347, paragraph 165:

"Five abuses set out above are inter-connected and, taken together, constitute a single and continuous infringement."

Then 166:

"The PCR contends that it is appropriate to consider these various abuses on a collective (as well as individual) basis, as they constitute a single and continuous infringement."

In our submission the consequence of that is that it is not just the FBA merchants might receive nothing under abuse 3. They could potentially find their overall recovery reduced by reason of the decision to combine claims that include the allegation of abuse 3 by which they actually benefited.

Now as we have already canvassed, the assumption appears to be that that will not happen, because FBA merchants have made a net loss by reason of abuse 3. It is

assumed that increased fulfilment fees outweigh any benefit they might have derived. We struggle to see how that conclusion has been reached. We have drawn attention to the 28% figure in our skeleton. If 28% or more of FBA sales would have been lost to FBM in the counterfactual, then the benefit from increased sales outweighs the estimated loss in terms of any inflated fulfilment fees.

When Mr Carall-Green addressed that figure, he didn't take issue with the mathematics of it. His answer was a 28% swing is larger than Dr Houpis is considering. He did not suggest that it is not right that if there was a 28% swing, that would eclipse the estimated recovery from increased fulfilment fees. In fact, we know based on the figures I have shown the Tribunal, Dr Houpis' own figures that he estimates that the upper bound of the sales FBA merchants might have lost is 49% in the counterfactual. So in our submission it is eminently possible that the credit that FBA merchants might have to give might outweigh their losses.

That is on the basis that we assume it is correct that their claimed losses in higher fulfilment fees amount to £1.041 million. That's the estimated figure for the losses fulfilment fees for the FBA -- sorry, billion that should be. I think that has missed off a number of noughts. £1.041 billion.

MR JUSTICE ROTH: Million. £1.041 million. It is £187.2.1. £1.04 billion.

MS FORD: £1.04 billion. It is certainly a billion figure rather than a million. That's the figure we are looking at. That's the figure that would be eclipsed if there was a swing of 28% or more, but the point I am going to come on to make --

MR JUSTICE ROTH: You say that would be eclipsed if the swing is over 28%.

MS FORD: Is 28% or more, yes. The maths is in footnote 32 of our skeleton argument, if that assists.

MR JUSTICE ROTH: Yes, retail margin of 15% which you say is Dr Houpis' margin, is it?

MS FORD: It is a margin which is Dr Houpis' table 7. So table 7 is at B12, 7904.

PRESIDENT: Which footnote?

MS FORD: In our skeleton it is footnote 32.

MR JUSTICE ROTH: Page 8 of the skeleton.

MS FORD: Yes. So we have taken figures from two tables. The first is 7904.

MR JUSTICE ROTH: Just a moment.

MS FORD: We have taken two figures from table 7 while we are in it. We have taken the --

MR JUSTICE ROTH: Retail margin you say of 15%. On page 7905, second line down.

MS FORD: I am grateful. That's the first point, that we take the assumption of the retail margin of 15%. We also from this take Buy Box sales as a proportion of total sales being 75%, which is at the top of that. A figure in table 8 that we have taken as well.

MR JUSTICE ROTH: The 28% which we have seen before, that is in --

MS FORD: That is the product of our calculation which looks at the total value of third party sales by domestic merchants on Amazon UK. That's a figure that comes out of table 8. That's the £33.322 million. It takes 75% of that, because Buy Box sales is a proportion of total sales as taken from table 7 which gives you 75%. So we end up with £24.992 million. Then a loss of 28% of those sales at a retail margin of 15% equates to gains of £1.049 billion, which is --

MR JUSTICE ROTH: 28%. Sorry. I am being a bit slow. That comes from where?

MS FORD: That is the amount of sales that you would have to transfer in order to lose a margin which eclipses Dr Houpis' figure of £1.041 billion. So the 28% figure is the calculation we have performed. That figure does not come from the tables. The figures we have taken from the tables are the value of the total third party sales.

MR JUSTICE ROTH: That's a derived figure, you say. If it were at least 28%, then it would be eclipsed.

MS FORD: Then it would exceed the calculated loss in terms of inflated fulfilment fees. The point I was going to come on to address was that we say that assumption that Dr Houpis makes is the estimated value of the higher fulfilment fees, that is also questionable. So there's a yet further uncertainty in the exercise. I am in the Tribunal's hands as to whether you would like me to address that point now or start with it first thing tomorrow morning.

MR JUSTICE ROTH: I think tomorrow morning. It will give us a chance to look at it. Thank you. 10.30. Thank you.

(4.20 pm)

(Court adjourned until 10.30 am

on Tuesday, 12th November 2024)