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 (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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Wednesday, 13th November 2024

(10.00 am)

Reply on behalf of PROFESSOR STEPHAN

MR JUSTICE ROTH: Yes. Mr Brealey, you I think.

MR BREALEY: I was miles away. Sorry. So I will respond on the algorithms point.

MR JUSTICE ROTH: Yes.

MR BREALEY: Then Mr Carall-Green will respond on the back-up methodology and respond to various of Dr Nitsche's methodology.

So can I start with the algorithms? As you know, sir, BIRA declined to run the algorithms. Dr Houpis wants to re-run Amazon's algorithms to strip out the bias. In my submission that is logical. It is logical to do what he's doing and I want to make three points in support of that approach.

The first, and this concerns, just so you know the three points, the Competition Authorities have already looked at this; the Tribunal in Hammond has already looked at this; and the conflicting evidence between Mr Dorrell/Houpis and Mr Kervizic is not sufficient in my respectful submission to say that Dr Houpis' approach is unworkable, or out to lunch or somehow crazy; in other words, doesn't satisfy the Microsoft test.

I want to make three points. The first is the stripping out of the bias is a key issue in the Commitments. When I was miles away, I was not miles away, I was looking at the Commitments actually.

If we can go to volume 8, the CMA's Decision starts at 6420. The Decision of 3rd November 2023 starts at 6420, but if we go to page 6435, we just remind ourselves at paragraph 4.8 "Biases in the Featured Offer selection process". We saw this on day one. The two algorithms: the Featured Merchant Eligibility Algorithm and the FMA, the Featured Merchant Algorithm. One is selecting; one is ranking. So those

are the algorithms that are key in this.

Then if one goes to paragraph 5.4 at 6437, we saw this on day one, but it is important just to remind ourselves:

"Amazon has committed that it:

(a) will apply objectively verifiable and non-discriminatory conditions and criteria for the purposes of determining the selection of the Featured Offer; these conditions and criteria will include all applicable parameters", a word that Ms Ford used yesterday, "and weightings ..."

So those are the Commitments. Then it is important to see what the CMA says about compliance with the Commitments, which I am not sure we have seen. This is at page 6455. It starts at paragraph 68: "Compliance with the Commitments and their effectiveness would not be difficult to discern."

So there was an issue raised "Well, it is going to be too difficult to do".

"The CMA considers" at 6.68 "that the monitoring and reporting processes and activities will be implemented and undertaken ... mean that Amazon's compliance with the Proposed Commitments and their effectiveness will not be difficult to discern."

One of the reasons for this in 6.69:

"Amazon's compliance with the Commitments will be closely monitored. In particular:

(a) The CMA will ensure that an appropriate monitoring trustee (and technical expert) with the requisite skills, expertise and capacity is appointed to monitor Amazon's compliance with the Commitments and to report to the CMA.

(b) Amazon will be required to provide the monitoring trustee with all cooperation, assistance and information that is necessary to monitor compliance, including access to any of Amazon's IT infrastructure, including algorithms, data bases, servers ..."

I will not read it out, but, sir, you can see there that the CMA is responding to certain respondents who say that it is going to be difficult to do. We see there the CMA will

engage with the monitoring trustee.

At 6.70 reporting obligations of Amazon. At 6.71 that:

"... Amazon [must] ensure that the monitoring trustee ... can fully and properly assess those conditions and criteria ..."

Again at 6.73:

"Several respondents to the consultation raised concerns regarding the difficulties associated with monitoring compliance ..."

We don't know the price details, but one can assume that Mr Kervizic would be in this camp, because:

"Four respondents claimed that it will be difficult or impossible to prove what Amazon has done or is doing with the data in its control."

Then over the page at 6458 at 6.76 and 6.77 the CMA concludes that it would not be difficult to monitor that the biases have been stripped out.

6.77:

"... the CMA considers that the Commitments ensure that the CMA, with the assistance of the monitoring trustees, will have sufficient tools to be able to effectively monitor, test and verify compliance with the Buy Box Commitments. In particular, paragraph 30 of the Commitments provides that Amazon will provide the monitoring trustee with access to all information, systems and personnel that is necessary to monitor Amazon's compliance with its obligations under the Commitments."

So that was an issue, a difficulty before the CMA. So in one sense we have a factual algorithm for the abuse and we have the counterfactual algorithm, the Commitments.

MR JUSTICE ROTH: I see that we now have, assuming Amazon has complied with the monitoring trustees doing their job, and you may well say there is no reason to assume otherwise, we now have the revised algorithm which is no longer biased and therefore no longer abusive. One can take I suppose all the data from the previous

period, put it in the revised algorithm and see what it leads to being -- what's in the Buy Box and so on, and what effect that has.

I think the point that's being made against you is I think Dr Houpis is doing something rather more complicated than that. He is doing something or seeking to do something more complicated than that. That's because even with these changes the algorithm as it is in 2024 is not the algorithm as it was -- the algorithms back in the Claim Period. So what you are left now with the amended algorithm pursuant to the Commitments is not actually the counterfactual that reflects what the situation would have been ten years before.

MR BREALEY: That's the point made. Can I take that in stages? I understand that point. It is a submission and really where is it grounded in the evidence? Can I take that in stages then to respond to that? Can I just see what Mr Dorrell says about the CMA's Commitments and how it is relevant?

So if we go to the core bundle A, which is the report from Mr Dorrell at tab 13 -- tab 11 -- I beg your pardon -- page 193. This is section 3.5. This is Mr Dorrell from Frontier's science team. He refers at section 3.5 to "The findings and Commitments from the CMA" and the Italian authority. He refers at 13 to the CMA and he refers to the monitoring arrangements. He says at 14 and 15:

"The above Commitments suggest that both the FOSP algorithms can be modified to remove self-preferencing and that an external party is able to gain access to sufficient information to effectively monitor the implementation of the modifications and the outcomes of the FOSP to the satisfaction of the CMA.

15. It is also clear from the published report from the AGCM that they successfully developed an in-depth understanding of the FOSP. With appropriate disclosure of the confidential versions of the reports and letters of instruction to the monitoring trustees, Dr Houpis' team will be able to target their investigations more quickly and inform any

disclosure requests made to Amazon and rapidly build up an in-depth understanding of the algorithmic systems."

So he is saying there that what has happened previously with the CMA and the Italian authorities will be extremely helpful to inform the counterfactual analysis that Dr Houpis is undertaking.

I make the point that Mr Kervizic does not mention the CMA Commitments at all. BIRA are coming to this Tribunal saying it is not robust, but they don't tackle what has previously gone on before and how the CMA has said "Well, we have looked at the previous algorithm. We are going to look at the Commitments". So, as I say, the abuse algorithm is the factual. The Commitments is the counterfactual. What Dr Houpis is trying to do is put them together and strip out the bias.

But it is important to note that Frontier, the science team are saying with the information Amazon will provide to the CMA and the Italian authorities, Dr Houpis' team will be able to target their investigations.

One would have expected Mr Kervizic to have responded to this and he says it is difficult but doesn't actually respond to this point.

I don't know if the Tribunal has the transcript from yesterday.

MR JUSTICE ROTH: Yes, we do.

MR BREALEY: It is page 90.

MR JUSTICE ROTH: 9-0?

MR BREALEY: 9-0. Well, that's another -- 9-4 actually. So this is lines 5 to 9 where Ms Ford has made the point that you have, sir, just made to me, but she submitted:

"Section 3.5 seeks to place reliance on the fact that Amazon has, in fact, modified its algorithm and has ceased its infringement conduct and the fact that the CMA is able to monitor Amazon's compliance with its Commitments, but monitoring compliance is in our submission again very different than trying to create a realistic simulation of

what would have occurred in the counterfactual for the purpose of estimating damages."

What I would say to that, that is a submission but you do not get from BIRA's report that that is so. It remains a submission. So when one is weighing up the evidence, you have the evidence of Mr Dorrell, who says that what Competition Authorities will be provided with will be informative as to the factual and counterfactual algorithm.

Just maybe going out of step in response to the point, could I go to Dr Houpis' main report, which is at volume 9, which I think is at 7946? This is annex 4 to the main report.

MR JUSTICE ROTH: 7496?

MR BREALEY: Volume 9, B, 7946.

MR JUSTICE ROTH: Just a moment.

MR BREALEY: Sorry.

MR JUSTICE ROTH: Yes. Annex E.

MR BREALEY: Obviously he refers at E.1 to the Competition Authority decisions and E.2 information from Amazon. The point I want just to make to a certain extent in response to the point you have just put to me that at 7948 at the end where he realises there is an issue in relation to the time period:

"In relation to the time period, I would ideally request to obtain the algorithm used before Amazon became dominant in the relevant market.

In order to re-run the FOSP ... I would ideally receive data on all offers and parameters used in the FSOP for a representative sample of products across time."

So he is acknowledging there is an issue with time, and he says at E.12:

"If there are limitations with the historical data available", and we don't know that, "if there are limitations with the historical data available, my analysis can be carried out with data for a more recent and shorter time period. The advantage of having historical

information is that it would enable me to arrive at a more precise estimation of the quantum related to any established abusive conduct. However, where historical information is unavailable, I expect to be able to simulate how Buy Box outcomes would have differed in the past using live data and detailed information about how the algorithm operated and changed over time (which would come from Amazon and the submissions and unredacted decisions of CMA, EC and [the Italian authority])."

Again we are in a carriage dispute, but he has acknowledged that there are difficulties and he has stated how he would try and address the issue of time. As far as I can see from Mr Kervizic's report he does not respond to that.

The second point I would like to make, please, on why the Professor's approach to algorithms is logical is obviously the Tribunal's judgment in Hammond, because the Tribunal has already accepted that re-running algorithms is a good idea and is not necessarily unworkable. It is surprising that really neither Ms Ford nor Mr Kervizic referred to the Hammond judgment.

The Hammond/Hunter judgment is at volume 2 and we should look at this. It is at tab 16. If we go first to page 938, I just mention paragraphs 16 and 17, because it shows that the Tribunal is concerned with the bias in the Buy Box. So Hunter is alleging that Amazon's selection of the offer set out in the Buy Box is systematically and unjustifiably biased in favour of Amazon's own retail.

Mr Hammond at 17 also alleges that there is bias in the Buy Box. So we are squarely concerned with bias in the Buy Box.

If we then go to page 942 and see what the Tribunal itself decided as to a preferred methodology. It starts at paragraph 32 at page 942:

"Although the abuses alleged by the applicants are sufficiently similar to oblige us to decide the question of carriage, the applicants' respected methodologies in seeking to demonstrate and quantify the alleged abuses are very different. Through Dr Pike

Mr Hammond seeks to re-run the algorithms without the abuses as alleged."

I emphasise the next sentence, because it says:

"The counterfactual in this case is thus closely aligned to the abuse."

The Tribunal regarded that as a positive factor:

"Should the process fail or not work as expected, Dr Pike's fallback is to model the operation of the algorithm without the features said to constitute the abuse."

Again, the Professor has a fallback as well or a complementary model:

"By contrast Mr Harman's approach is to ascertain consumer preferences by other means to define the counterfactual in this way. It will rather be appreciated that the approach does not necessarily align itself with the true counterfactual."

We would say that's the same with the broad brush approach:

"The operation of Amazon's algorithm with the abuse and runs the risk of importing a different way of ascertaining consumer preference, which is at variance with the non-infringing aspects of the operation of the algorithm of Amazon's algorithm."

Then we can see what Dr Pike says. This is the expert algorithm person for Mr Hammond:

"'My model is based on input data, on offers and information on the Buy Box, winners selected by the actual algorithm. So we have got the actual algorithm there. It therefore approximates the function of the actual algorithm. In contrast, Mr Harman's conjoint analysis proposed as a method to determine an idealised, historical 'average' consumer preference ..."

It goes on.

MR JUSTICE ROTH: Yes. I think Mr Harman's method is very different from Dr Nitsche's.

MR BREALEY: It was. That's why I kind of paused. It is important to know that the start is "My model is based on the actual algorithm".

Then at paragraph 35 the Tribunal says:

"If Dr Pike's approach was so unfeasible as to inevitably fail the *Pro-Sys* test, then this would be a reason for preferring Mr Harman's approach as a less satisfactory but more workable proxy. Mr Harman raises a series of concerns culminating in his view: “I am sceptical that the analysis that is central to Dr Pike's proposed methodology of 're-running the algorithm without discriminatory provisions'", and I emphasise this, "'is feasible, robust or able to respond to defences Amazon has already indicated it will raise."

I will park that for a moment.

"On the present evidence and bearing in mind the approach to the resolution of carriage disputes ... Dr Pike's methodology appears to be sufficiently workable either as a 're-run' without the abuse or as a 'proxy' of that 're-run' to merit a more detailed examination in the context of a certification hearing. We are satisfied of this for essentially three related reasons."

I just want to go through these reasons. We will have a look at them first.

"First, Dr Pike has been clear as to his methodology. He has clearly considered the difficulties and considers that they can be overcome. We are reluctant to substitute our own inexpert views for those of an expert."

Then he goes:

"This is our second reason: while Mr Harman certainly expressed scepticism in regard to Dr Pike's proposed methodology, he stopped well short of saying this approach could not be undertaken or was impossible. Thirdly, we are very conscious that proceedings of this sort -- assuming this litigation is pursued beyond certification -- will require particularly careful and likely intrusive case management on the part of the Tribunal. We anticipate that Amazon's experts will be required to cooperate ... in establishing a case to trial.

Accordingly, on the basis of the Tribunal's views on methodology, Mr Hammond is determined most suitable to act as a proposed class representative."

Now just teasing out those reasons, on the first reason given by the Tribunal, we say that Dr Houpis and Mr Dorrell have put forward a clear methodology. They have acknowledged difficulties but consider that the process is workable and difficulties can be overcome. We just saw one of those with the issue of time.

Now on the Tribunal's second reason it was not always clear yesterday what BIRA's complaint was about the Professor because --

MR JUSTICE ROTH: When you say about the Professor --

MR BREALEY: The Professor's methodology.

MR JUSTICE ROTH: The Professor's methodology or Dr Houpis' methodology?

MR BREALEY: Dr Houpis' methodology, yes.

Can I just go back to the transcript, because if one compares what Mr Harman is saying at paragraph 35 of Hunter:

"I am sceptical that it is neither feasible nor robust".

If we go back to what was submitted yesterday, which is essentially the thrust of BIRA's complaint and this is in the transcript at 90, line 2 -- this is at page 90 of the transcript it is submitted:

"The first point I would like to make is he's saying it is impossibly reliably to re-run such algorithms. He refers to the impossibility of doing so with any degree of reliability. The reason I emphasise that is because there is no doubt that something could be done. There is no doubt that Mr Houpis could purport to re-run the algorithm and he could purport to produce a result, but the real question in our submission is whether the Tribunal could proceed on the basis the result he produces is in any way reliable. We say even as a rough approximation very clearly no, it couldn't."

So we are not a million miles away from what is being said there and what the Tribunal

was faced with at paragraph 35, because Mr Harman was saying "You can re-run this, but my concern is it is not going to be robust".

Just to complete this, on the third reason the Tribunal gives, "We are very conscious this is a carriage, but with careful case management we anticipate that Amazon's expert will be required to cooperate", again that would be the case as well.

So my submission -- we pray in aid the same reasons given there, but there is another reason why we rely on Hammond for the purposes of this carriage dispute. That is because it is now clear, pending certification, Mr Hammond and Dr Pike will be allowed to re-run the algorithms. So the process is going ahead anyway in the Tribunal. In my respectful submission it would be far more efficient and just to case manage that process rather than reach an inconsistent decision in this case and shut out Professor Stephan on the basis that his methodology is unsuitable.

That really leads me to my third point and that is essentially the evidence of Mr Dorrell from the Frontier science department. I know, sir, that you will have read this, but if I can just flag some important points. After saying that the Australian Competition Commission in Trivago has looked at algorithms, at section 3 --

MR JUSTICE ROTH: Can I just interrupt you to ask --

MR BREALEY: Yes, of course.

MR JUSTICE ROTH: -- is there a judgment now in ACCC v Trivago. It talks about hearing evidence. Has anyone looked into that?

MR BREALEY: I will find out.

MR JUSTICE ROTH: It may not be helpful but --

MR BREALEY: It says there is case precedent.

MR JUSTICE ROTH: Yes, it might be useful just to have it. If someone can dig it out.

MR BREALEY: I am told there is a judgment. We can provide that.

He then goes on at section 3.2 to emphasise that there is a toolkit of methods available

for auditing algorithms:

"Against this backdrop, regulators, academics, auditors have developed a toolkit of approaches to auditing and evaluating algorithmic systems such as ..."

MR JUSTICE ROTH: I think that's clear from what the competition authorities are doing. It is not about evaluating the existing one.

MR BREALEY: No, but it is clearly relevant that there is a toolkit.

MR JUSTICE ROTH: Yes, I understand that.

MR BREALEY: Then I have already referred to at page 193 the fact that the competition authorities probably with these toolkits have looked at the algorithms, at the actual algorithms and the Commitments, and we say the actual algorithm is the abuse and the Commitments is the counterfactual and it is then for the experts to put those two together and work it out.

MR JUSTICE ROTH: Can I just ask you, paragraph 10, page 192, I think there's possibly a word missing and actually a word that might be useful in line 4, the sentence:

"One of the challenges that can be encountered with any econometric approach, particularly when implemented without first performing a technical audit, is the regression model's inability to ..."

Is it -- I don't want to put words into anyone's mouth. I don't know if Mr Dorrell is here and can help.

MR BREALEY: "... inability to capture ..."

MR JUSTICE ROTH: "Capture". Thank you.

MR BREALEY: So there is a recognition here that the process is not easy, but it can be done.

Then at 3.4, running the technical audit of the system. Then there are at section 4 -- you have obviously read it, sir -- there is a response to Mr Kervizic's report.

So there is clearly a conflict of evidence and we have the headings based on a sound understanding of algorithms and automated tools.

At 4.2:

"The methodology can be adapted to work with the data that is available."

That is his evidence. Dr Houpis' methodology can be adapted to work with the data that's available.

I have noted at paragraph 23 here to a certain extent they blow hot and cold. They originally said that the whole exercise was too unwieldy and involved thousands and thousands of people and data points. Then when it is said Dr Houpis is going to do a proportionate exercise, we are then told it is too limited. So there is kind of an element of blowing hot and cold about the criticism, but the bottom line is that the methodology can be adapted to work with the data that is available, and at 4.4:

"The methodology will not incur disproportionate data and resource requirements."

At 38, we saw this yesterday, this is the last few lines of 38 at 199:

"Based on my experience of developing and auditing algorithmic systems" -- so on his experience of developing and auditing algorithmic systems -- "I consider there is a realistic prospect that Dr Houpis will be able to successfully implement the approaches I set out in section 3.4 to re-run and evaluate one or more of the systems underpinning the abusive conducts that he is investigating."

In my respectful submission he is saying Dr Houpis can perform the methodology he sets out, which will look at the actual algorithm and the counterfactual. I am sure that Dr Houpis will have regard to all sorts of issues that Ms Ford referred to yesterday, for example, clean data, perimeters, relevant inputs, which is bread and butter for these economists, inputs with respect to (inaudible). It is bread and butter, but ultimately one has a conflict of evidence. Mr Dorrell and Dr Houpis says it can be done. We are at a stage where there is no cross-examination of these witnesses so I can't put to

Mr Kervizic; "What about the monitoring trustee, the CMA?"

You might ultimately have the evidence of Dr Pike that you could put to him. So we are looking at this on the papers and really in my respectful submission one cannot say that the attempted re-running the algorithm is illogical or unsuitable at this stage, particularly when the Tribunal in Hammond has said it is a good idea, because it is closely aligned with the abuse and they were not persuaded that it was unworkable. Those are my submissions on the algorithm, sir.

MR JUSTICE ROTH: Just one other thing, Mr Brealey. I think you were going to find just the cross-reference to the statement about -- concerning abuse 5 and the contract. Just while you are on your feet, I think it is something mentioned in Dr Houpis' report as an exhibit to a US document. If you give us the page number. I think it may be there already, isn't it?

MR BREALEY: This was the exhibit.

MR JUSTICE ROTH: It is a footnote, isn't it?

MR BREALEY: It is a footnote, yes. B, 7872 I think.

MR JUSTICE ROTH: That's right. Footnote 518 and this is what it is. Thank you. Just one moment. It could be the downloading.

MR BANKES: It was published on 17th June this year.

MR JUSTICE ROTH: I think that's probably the date Dr Houpis downloaded it.

MR BREALEY: This is a copy of what appears on the website, so we downloaded the copy yesterday.

MR BANKES: You don't know what date this was first published?

MR BREALEY: We will find out, sir. Are you saying how long has this is been in existence?

MR JUSTICE ROTH: Effectively the same as figure 19, the (inaudible) policy.

Yes, Mr Carall-Green.

MR CARALL-GREEN: Thank you, sir. I have been asked to pick up some of the other points around methodologies. I don't intend to summarise Dr Houpis' methodologies. That is because there are very few criticisms levelled at that methodology except in relation to the algorithms, which Mr Brealey has already dealt with. The Tribunal has made clear that it has read the summaries.

So what I would like to do is first of all summarise where I think we are now on Dr Nitsche's methodology, having listened to him yesterday. Then I want to respond to a small number of things that Ms Ford has said on Dr Houpis' approach and then to turn to some other things that have been said by us in criticism of Dr Nitsche's approach.

So to set the scene, sir, and this will be a thematic submission because it feeds through into much of what we say about Dr Nitsche's methodology. I think we are now clear that BIRA's case is, and I am quoting -- I think I have Ms Ford right -- from Monday:

"We are focusing on Amazon entry prompted by the information it has about third party products."

So the criticism that we levelled at, that was where there is no entry or there is no reliance on data, then there is no case.

BIRA has mounted a response on both points. First on the point where Amazon is the first entrant, so there is no entry, BIRA has no case, the response to that arises out of footnote 17 of Dr Nitsche's summary. That's in the A bundle at page 130. You may recall this because it has been discussed at length, so I won't ask you to turn that up unless that would be helpful. I see, sir, you are on your way.

MR JUSTICE ROTH: Just one moment. Yes.

MR CARALL-GREEN: You will recall that Mr Brealey took you to a passage from the Crawford paper that suggested that around half the products -- half of Amazon's

revenue came from Amazon's de novo entry.

Footnote 17 here of Dr Nitsche's report is effectively a response to that, because he says:

"... a substantial share of Amazon Retail revenue may relate to ASINs", which are the standard identification numbers, "that Amazon Retail started selling first."

But, and this is the next sentence:

"This is similar product entry to the extent that such products are similar to products already sold by third parties ..."

So Dr Nitsche's methodology is to try to minimise the effect of excluding cases where there is no entry by saying that even where Amazon appears to be the first entrant, it is actually not. It is actually a follower with a similar product, meaning that Amazon is actually following a third party and so the situation is caught by his analysis. That is his answer.

We say that this is an implausible position to adopt. Amazon is a good contender for the title of the world's most sophisticated retailer but BIRA effectively wants to say that in most products Amazon is not the first entrant. In most instances Amazon was just introducing something that was either the same as or similar to something that went before. So BIRA is saying that in almost every instance Amazon's introduction can be characterised as a similar product.

MR JUSTICE ROTH: Depends what one means by "similar".

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

MR JUSTICE ROTH: If one means -- I think Ms Ford said this -- some ground breaking new invention, it may be that even though Amazon is very sophisticated, that's not what it focuses on. It doesn't want to take those sorts of risks. So there will, as Ms Ford said, in the overwhelming majority of cases there will be other products in the same market. Is that similar and how broad is that concept?

MR CARALL-GREEN: That's right, sir, yes. So you say it depends on what we mean by similar and that's quite right, but we know what they mean by similar, because Dr Nitsche has said that what similar means is similar as in substitutable in a merger analysis. As you say, sir, that means effectively in the same retail product market.

Sir, the simple point that we make is that we know from Mr Kervizic's evidence that Amazon has 70,000 people working in technical roles. I simply make the point that that is an illustration of how sophisticated this retailer is. So if you are being asked to believe that in every case Amazon should be considered the follower in a retail product market, i.e. Amazon will only very rarely be the first to enter a retail product market, we say that's a rather ambitious assumption to make and realistically there are going to be situations where Amazon really was the first entrant. That's the debate, but setting the scene, that is the first limitation of BIRA's case.

The second limitation of BIRA's case is that we say there will be instances where Amazon entered not because of data advantages, and in those circumstances BIRA has no case. Now BIRA wants to say in response to that that in every instance Amazon will have had a data advantage. That we say is actually related to the first point, because if in some instances Amazon is properly characterised as the first mover, then there is no antecedent set of products that give the data advantage or the data advantage is minimal, because the similarity is not sufficient to confer any special knowledge.

Further it is possible, and the Tribunal has this point already, I think, for Amazon entry to be prompted by a range of things including its legitimate advantages as a large and sophisticated organisation. So there will therefore be a number of instances where early entry was not prompted by a data advantage even if that data advantage exists, but it is simply that Amazon would have entered anyway, but got there quickly because of its vast resources.

MR JUSTICE ROTH: Yes.

MR CARALL-GREEN: In fact, sir, we suspect that in some instances the supposed data advantage is actually when it comes to entry, ie when we are trying to assess the success of products, the data advantage in some instance will not be very great. If I can illustrate that by reference to the Houpis 1 report, which is the B bundle, tab 12, page 7757.

MR JUSTICE ROTH: Yes.

MR CARALL-GREEN: I am at footnote 103, which is a footnote with two paragraphs. I am in the second paragraph. That paragraph describes something called the "Amazon best sellers rank", which:

"... is a proprietary metric defined by Amazon that appears on an item's product page and indicates how it is selling in comparison to other items within the same product category in the marketplace. Amazon BSR scores go up and down based on sales ..."

So, sir, this is an example of what I think Dr Nitsche calls the Inferior Indicators. Anyway this is publicly available information about the success of a product.

Sir, the point I make is that this illustrates an example of the kind of data point that anyone would be able to use in order to assess the success of a product that it is not currently selling. So that would be an example of a situation where Amazon, even if it were not relying on the proprietary or non-public data still might have entered, because any third party would be able to get access to this public data about how well products are doing.

MR JUSTICE ROTH: It is information produced by Amazon but published. Is that what you are saying? It comes from Amazon.

MR CARALL-GREEN: Yes, it comes from Amazon, but it is displayed to all.

MR BANKES: That is quite a broad metric, isn't it? It is not the same as market or

similar products.

MR CARALL-GREEN: That's true, sir. We still don't know whether or not the subcategories or the categories will properly map on to market. You asked Dr Nitsche yesterday whether he was satisfied that a product category or sub category was equivalent to a product market and he said that he hadn't reached that conclusion. So we don't know whether on Dr Nitsche's methodology these two things are comparable.

So, sir, if I could take you to the Houpis summary, which is bundle A, tab 8, page 149. I am in Table 1 of the Houpis summary. The way some of these concerns are cached out is that Dr Houpis suspects at this point that the entry/exit effects may well be worth less than £100 million of damages.

Now the manner in which that estimate is derived is not before the Tribunal, so I don't place very much emphasis on it. I just pause there briefly to say that this gives you a sense of the scale we think Dr Nitsche might be missing by narrowly focusing on entry and exit -- not even exit, and I will come on to that.

MR DERBYSHIRE: I don't know if this question is appropriate because, as you have just said, we can't really interrogate where this number comes from but my assumption would be that that is on same products as opposed to similar.

MR CARALL-GREEN: Well, yes.

MR DERBYSHIRE: Okay. Thank you.

MR CARALL-GREEN: I hesitate because the manner in which it has been derived is not properly before the Tribunal, but ...

If that is the answer, then that gives you a sense of the work that needs to be done with the similar product concept.

Sir, I have set the scene in terms of what I think is broadly agreed in terms of the battle lines on the narrowness or the scope of BIRA's case and Dr Nitsche's methodology.

Let me respond to three things Ms Ford said yesterday about Dr Houpis. Ms Ford

took you to Dr Houpis' Table 16 which is at the B bundle, tab 12, page 7972. Now Ms Ford took you to this to justify BIRA's decision not to focus on products that were introduced a long time ago and therefore in relation to which there cannot have been any entry effects.

The argument was that if you look in this table, Dr Houpis found no effects in categories where Amazon is well-known to have been the first to enter early, so DVDs and books, for which Amazon was famous in its early days.

Thus the argument went that entry a long time ago was not associated with any effects. However, that is a misuse of Dr Houpis' analysis, because in this analysis Dr Houpis was attempting to assess the impact of pricing and inventory effects and not any entry effects. That is because -- you will know that Dr Houpis does not actually provide an estimate for the entry effects in Houpis 1. That's why we get a new estimate that appears in the summary that I took you to earlier. So this table just isn't about the entry effects. That is not what he is addressing his mind to.

However, even if there was some read across, so that we could say because there is no effect in terms of pricing, or Dr Houpis has not been able to detect any effect in terms of pricing, we can somehow infer that there is no effect in terms of entry. It is also important that this table is only about abuse 1. This table is only an analysis about abuse 1. Dr Houpis' calculations in respect of abuse 2, that is the biasing of Amazon Retail in the Buy Box, would still include damages in relation to product categories like books and DVDs where he has been unsuccessful at this stage in capturing a data conduct effect on those products, but under his abuse 2 methodology he would still go on to assess whether or not there has been an effect in the Buy Box. On BIRA's case abuse 1 is always the gateway you have to pass through. You have to establish a data conduct effect first before any of the Buy Box effects can be brought into account. Sir, that's the first thing I wanted to address on what Ms Ford had said.

The second thing is about Dr Houpis' econometric analysis. You will recall, sirs, that Dr Houpis has an algorithmic approach. He wants to re-run the algorithm. That's a fallback position. If the algorithm turns out to be unavailable or for whatever reason he is unable to complete his work, there is a fallback econometric analysis.

Now in its skeleton argument at paragraph 28 BIRA says that the econometric analysis cannot be used to forecast what would have happened in the counterfactual because of piling assumptions on assumptions. I understand that argument to be that Amazon in the counterfactual might have changed how the algorithm worked. If, for example, the counterfactual were one in which Amazon did not use Prime as a factor in the Buy Box competition, so we have been successful in relation to abuse 4 and the counterfactual had to strip out Prime from the algorithm, it might -- Amazon might have increased the weight it attaches to some other criterion-like seller ratings. BIRA says that Dr Houpis' analysis fails to account for this, or would involve excessive assumptions.

Now our response to this is as follows, and this is addressed in Dr Houpis' summary in footnote 12, which is A bundle, page 154. Dr Houpis proposes also to run a regression with data post Commitments. So he says:

"Post disclosure when I have a better understanding of Amazon's FOSP, I will also consider estimating this model with data during the infringement and data after the Commitments came into effect. This will enable me to simulate a counterfactual that removes both the discriminatory inputs as described as well as addressing any changes to the weights of these inputs that Amazon may have implemented to comply with the CMA commitments."

So there will be a world available in which Amazon has had to change the algorithm in order to strip out anti-competitive aspects. Whether or not it has done so successfully remains to be determined, but it is a fertile field. So there will be a real

world scenario that Dr Houpis can examine in order to gain information on what changes, if any, Amazon has made to other criteria.

So it is not true that Dr Houpis would merely be speculating or assuming. I am not saying that the post-commitment situation would be entirely clean, because we don't know. We haven't seen what Amazon has done, but there is a factual basis for making some of the changes and assumptions, or there will be a factual basis.

In fact, sir, we say that Dr Nitsche faces the same issue, albeit that he does not accept that. We see that in his first report at paragraph 207, which is in the B bundle, tab 2, page 379.

MR JUSTICE ROTH: Which page is it?

MR CARALL-GREEN: 379, sir. Dr Nitsche says he will calculate the damages by turning off the data delta coefficient essentially, but if Amazon was not able to use the commercially sensitive information in the counterfactual, then it stands to reason that it might have shifted its entry algorithm, its entry decision-making towards using other publicly available indicators. So Dr Nitsche also faces the same question, which is in the counterfactual do you just strip out the anti-competitive factors or do you also operate on the assumption that if Amazon had not been able to use those in its decision-making it, would have changed the way it approached the assessment of other factors? We say that this is not an issue, it is simply something that both experts face and it can be appropriately resolved especially by the inspection of the post Commitments algorithm.

Finally, sir, my third -- the third point that I would like to respond to that Ms Ford made yesterday is that she took you to Dr Houpis' first report at tab 12, page 7897. This I think is related to the point I was just making. So in a sense it is a third point and in another sense it is a continuation of the discussion we have just been having.

Ms Ford took you to this passage to show you the various parameters that Dr Houpis

would consider switching on or off in his model of the fair algorithm. I think the gist of the submission was this is all far too much and there is too much to switch on or off and it involves far too many assumptions and estimates, but we say that the reality is that this has to happen, because anything anti-competitive in the algorithmic system or the decision making system -- just to be clear, we are now in a situation where we are not toying with the algorithm. We are modelling the outcome. Anything anti-competitive in the system that the Tribunal deems anti-competitive has to be deactivated in order to construct a lawful counterfactual model, and conversely anything that is not found to be anti-competitive has to be left on.

We say that this is a strength in Dr Houpis' approach, that he identifies all of the possible factors feeding into the outcome of Amazon's decision-making process and is prepared to construct a model on the basis that some of them might still be in the counterfactual and some of them not. So if the Tribunal finds, for example, that the preferencing of Amazon Retail -- that's abuse 2 -- is permissible, and I don't say that it is, but let us assume that we have lost on that, but that the preferencing of FBA over FBM is not permissible, so we have won on abuse 3, then Dr Houpis will have to go through each element of the decision-making process and strip out the abuse 3 elements and leave in the abuse 2 elements.

Now by contrast we say that Dr Nitsche's approach does not allow him to switch the effects on and off. So hypothetically it would be possible on BIRA's case for the Tribunal to find in favour of the data entry abuse but not the other anti-competitive behaviour. It would be possible -- in principle it would be possible for the Tribunal to find that the latter is not made out either on the facts or that there was some reason of law to the effect that it was permissible conduct.

We say that Dr Nitsche has no proper way of stripping from his damages estimate the impact of the other anti-competitive behaviour with the result that the class would be

over compensated.

Now BIRA's response to this, because this argument has been made in writing, is to point to the Nitsche summary. So if we can go to that at bundle A, tab 7, and I am looking at page 138 and figure 2. So, first of all, we are going to look at the broad brush approach and then we are going to look at the econometrics approach. Here in the broad brush approach and we have figure 2 as an illustration of how BIRA's theory of harm works.

I take it that we have the gold line, which is the factual Amazon entry. Then we have the gold dashed line, which represents when Amazon should have entered into the counterfactual. So it enters later. You see it pushing back along the X axis. Then there is a sort of second stage where the gold dashed line gets pressed down towards the pink line. So Amazon would have performed worse.

Now I take it that what is being suggested is that the Data Entry represents the first part, ie the delay, and the Other Anti-competitive Conduct represents the second part, ie the pushing down of the line. So effectively the regions 2 and 3 represent earliness and then success, but we know that the theory of harm behind the Other Anti-Competitive Behaviour is not only that the entry will be more successful, but also that it will be more likely. So there is no -- we don't understand, we don't see from Dr Nitsche's analysis how to model the fact that absent the anti-competitive -- the Other Anti-Competitive Behaviour, the entry would be less likely.

Now for the econometrics approach we go to paragraph 45 of this summary on page 143. Again we discussed this yesterday. So on the econometrics approach Ms Ford stressed that quantifying the abuse, quantifying Amazon's -- the effects of Amazon's abuse as opposed to establishing the abuse involved modelling on the basis that Amazon would have acted like a large third party and that to the extent that Amazon acted otherwise, that was anti-competitive, but the question that we have is

which bit of the difference is attributable to the data abuse and which bit is attributable to the Buy Box abuse?

So what this illustrates we say is actually a weakness that Dr Nitsche cannot properly accommodate a situation where the Data Abuse is made out and the Other Anti-Competitive Behaviour is not. By contrast Dr Houpis' methodology can.

Sir, I am finished responding to Ms Ford's points. I would like to make some remarks about Dr Nitsche's methodology but would that be a convenient moment?

MR JUSTICE ROTH: Yes. How much. I don't want to push you unduly but I am conscious of time. How much longer do you think you will be?

MR CARALL-GREEN: I will cut my cloth accordingly. Ms Ford certainly deserves time before -- a substantial amount of time before lunch.

MR JUSTICE ROTH: Yes. You think you will be about another?

MR CARALL-GREEN: 30 minutes, sir. Is that acceptable?

MR JUSTICE ROTH: Yes. We will come back in ten minutes.

(Short break)

MR CARALL-GREEN: Sir, I am dealing now with some critiques of Dr Nitsche's methodology. I am going to use as my guide paragraph 26 of BIRA's skeleton argument, which is at bundle A, tab 1, page 13.

MR JUSTICE ROTH: Can you give me the page within the skeleton, please?

MR CARALL-GREEN: 9, sir. Now here BIRA has collected ten of the criticisms that we have made and Ms Ford addressed you on them yesterday. I am going to use that as a structure. I am not going to go through each of the ten in turn. I am going to take some of the points in groups.

So starting at (a), and this covers a similar theme to points (h) and (j), the theme of those three is that we say that Dr Nitsche has not put forward a methodology for properly establishing and quantifying the abuse, and we say that that is because the

methodology will not explain why Amazon entered early.

Now the Tribunal already has this point. I have already spoken about it. It is relatively straightforward. Dr Nitsche says that the early entry will have been exacerbated in the sense of being made more likely and more successful by the Other Anti-Competitive Behaviour, but we say clearly what might have driven earlier entry is a range of legitimate and illegitimate drivers that are not covered by BIRA's case.

So on the illegitimate drivers one can speculate but, for example, abuse 5 may have made Amazon more confident that it would not face competition on other platforms or abuse 4, if, for example, Amazon knew that the competitor was offering an FBM offer and so could not get access to Prime.

Then on the legitimate advantages we have already spoken about the fact that Amazon is a large and sophisticated retailer.

So the point is simply that Dr Nitsche's methodology tracks BIRA's case in that it does not account for the fact that Amazon's advantages could have come from other legitimate sources. The result is that it risks attributing conduct to an abuse when that conduct should properly be attributed to another abuse or indeed to lawful conduct.

So that's what I wanted to say on those paragraphs.

The next few I can take also quite briefly. In relation to paragraphs B and E we say that Dr Nitsche does not properly account for Dr Houpis's deterrents effect.

Now I accept, of course, that Dr Nitsche is now saying that his methodology does account for the deterrents effect, but this just returns to the thematic scene setting point that I made earlier, which is that there can be no -- within BIRA's case there can be no deterrents effect outside entry prompted by data advantages. So one can imagine, for example, if Amazon were the only seller of something or it were a seller with a few competitors and the sales had been bumbling along for many years, no sudden success or anything like that, just a constant demand, the bible, the complete

works of Shakespeare. They have been in demand at a relatively constant rate since forever and no data is needed to inform the question of whether or not a bookstore should stop these items.

A third party might be deterred from entering because it knows that Amazon plays in that space. There's no entry effect. There's no data advantage. There's no causation as a result of the data and so BIRA has no case on deterrents.

Then we go to (c). Our critique here is that BIRA does not deal with pricing or inventory decisions. This is effectively the same submission that I make, which is that Dr Nitsche now says they do deal with that but outside the context of entry, and that is prompted by data advantages, there is no pricing effect. There is no inventory effect. The complete works of Shakespeare are not affected.

Now I come to (d). Even if one ignores all of those disadvantages that I have just given, i.e. that various effects are excluded, and we only look at the effect of the data advantages on entry, our criticism is that BIRA does not look at the overall or the net effect of Amazon's data advantages.

This point is quite simple. Both PCRs say that Amazon has a data advantage. Now BIRA says as a result of that data advantage Amazon would have entered earlier. So far so good, but it should be fairly obvious that Amazon's data advantage could have caused it to do other things. For example, a product might have appeared in public to be doing well but non-public data might have shown indications that that product was doing less well or was likely to do less well in the immediate future. With that kind of insight it stands to reason that Amazon would have withdrawn from certain products earlier as a result of that advantage or chosen not to sell where the average third party might have chosen to sell.

Now it appears that Dr Nitsche has not even considered that, because the only response that we have to that criticism is that such allegations lack any proper basis

and form no part of BIRA's pleaded case.

Well, in terms of proper basis we can go to the EC Decision, which is in the authorities bundle at 1547. Sir, at paragraph 114 and 115 we see the Commission says, first sentence of 114:

"For its decisions to start and end the sale of the product Amazon relies on these redacted tools."

At 115:

"These data", last line, "affected entry and exit decisions in all product categories."

So there's only no basis in the regulatory decisions if one takes a scalpel to those paragraphs and cuts out the word "exit".

Sir, the same can be seen in the CMA Decision at page 776.

MR JUSTICE ROTH: We have the reference. It is in one of the other bundles.

MR CARALL-GREEN: Yes. Let me just add for your note so you don't have to turn it up, there is an infelicity of language in the CMA's Decision because the CMA talks about starting and stopping purchasing products. I just wanted to draw that to the Tribunal's attention for the sake of fairness. It is not clear if the CMA should have said buying products or selling. In any event, if really does mean buying products or purchasing products, the only reason for Amazon Retail to purchase them is to sell them, so it amounts to the same thing.

Sir, we do have basis for this on the face of the regulatory decisions. So what BIRA is left with is the fact that these allegations form no part of BIRA's pleaded case, but that, of course, is the problem. We say it is a weakness of BIRA's case that it simply ignores those effects.

That brings me to (f). Now this is a point that we covered yesterday, sirs. Our criticism here is that BIRA has a large task ahead of it have in identifying which members of its class suffered loss and which did not.

Now we have already discussed the fact that there will be in our submission a significant number of instances where BIRA's theory of harm simply does not apply at all and therefore sellers do not have a claim under BIRA's theory of harm. The reality is that BIRA accepts that and accepts that there will be sellers in its class that are not affected by its case. You will remember that we have discussed the methodology for finding what are called the no loss merchants. In case a reference to that is needed it is in the A bundle in Dr Nitsche's summary at 55, which is page 146 of the bundle. That builds on an analysis that he gives in his first report at paragraphs 178 to 182. He has a methodology for establishing who has not suffered any loss.

MR JUSTICE ROTH: Yes.

MR CARALL-GREEN: BIRA says "We have a methodology to figure out who has not suffered any loss", but that is not an answer to our criticism. Our criticism in this instance is not that BIRA has failed to advance any methodology but that the design of the class is overbroad, sweeping up class members who on BIRA's own case are not affected by the abuse and have suffered no loss.

Now I think this is accepted that we know now, i.e. at this stage, at the beginning of proceedings, that there will be a substantial number of members that have suffered no loss. It is not a case of saying we are going to try to attempt -- we are going to try to establish that they have suffered a loss. It is that we just know now that they haven't. So it's different from the speculative examples point that I made to you yesterday. It is not a speculative example. It is simply that BIRA says that its class includes lots of people who have suffered no loss and have arguably -- I beg your pardon -- have no arguable claim in respect of the entry effects.

The result of that is that the litigation involves a cumbersome extra step whereby the class needs to be whittled down and that obviously creates cost and complexity that

one could very well do without, but it also gives rise, which is worse, to a legal problem. For this, sir, I need to refer you to an authority which is not in the authorities bundle, but which has been shared with my learned friends overnight. If I could hand up a copy of it, please. (Handed.) This is a judgment on a CPO application that was made in a case against Mastercard earlier this year.

If I could draw your attention first of all to page 8 just to walk through how this works. I am on paragraph 9 so in this case the PCRs were putting forward a class definition that they were calling the revised class definition which was:

"All merchants who at any point during the Claim Period had in place a merchant agreement ..."

And so on.

It is obviously about card fees. So anybody who has an agreement in place to be able to take a card payment was proposed to be in the class.

Now we go to page 11, paragraph 18:

"It is common ground that there will be a significant number of merchants who will be eligible for inclusion in the class", because they are within the definition, "but who will not have accepted a commercial card transaction at any time in the Claim Period."

Now paragraph 19:

"It follows that these merchants", those who have not accepted card payments, "do not, in fact, have a claim. They have not been charged a commercial card multi-national interchange fee, have not paid an unlawful overcharge and have therefore suffered no injury."

Okay. So what of that? Page 12, paragraph 22:

"The proposed defendants argue that it is a necessary condition of inclusion in the collective proceedings regime that a claim exists as defined in section 47(a)(2) namely one in which a person has suffered loss and damage."

So the proposed defendants are saying that these no loss merchants simply can't be included in the class.

MR JUSTICE ROTH: No, we understand.

MR CARALL-GREEN: The Tribunal's judgment on what point is at page 24, paragraph 61. This answers an objection. One objection to the proposed defendants' argument might be "You can't know whether you have a claim at the beginning because that's what you are asking the Tribunal to determine" but the Tribunal says at paragraph 61:

"There is a clear distinction between a class definition which might inadvertently produce the result that a class member turns out not to have a claim", i.e. where a claim is advanced but it turns out that the claim fails. That's fine, "And the deliberate inclusion in the class of a large number of class members in respect of which it is known that they have no claim. The former", i.e. making a sensible attempt to establish a loss "is a necessary function of the title proceedings".

MR JUSTICE ROTH: Shall we just read 61 to 63?

MR CARALL-GREEN: Please.

MR JUSTICE ROTH: And 64.

MR CARALL-GREEN: Yes, sir. 64 is the secondary --

MR JUSTICE ROTH: We understand.

MR CARALL-GREEN: You understand the point. There's little for me to add by way of explanation. I say the result the Tribunal reached is sensible. If it were otherwise, it would give rise to some potentially difficult ramifications.

MR JUSTICE ROTH: Please do say that.

MR CARALL-GREEN: If it were otherwise, then class members --

MR JUSTICE ROTH: We understand the point. You can move on. Time is precious.

MR CARALL-GREEN: Professor Stephan's case does not suffer from that difficulty

because his case is about self-preferencing across the board.

MR JUSTICE ROTH: We can see that.

MR CARALL-GREEN: So we say that this is another disadvantage of the way the BIRA claim is set up and the methodology that is advanced.

So that takes me to sub-paragraph (g). Sir, this is the point we have already partially canvassed which is the importance of similar product entry.

MR JUSTICE ROTH: Yes.

MR CARALL-GREEN: We know BIRA has to identify what products were similar. We heard from Dr Nitsche yesterday he plans to use techniques from merger control to perform that task. The starting point will be what are called the Amazon subcategories, of which there are 25,000. As I said in response to a question from Mr Bankes, the Tribunal asked Dr Nitsche whether he had examined the subcategories and was satisfied that they were markets for the purposes of merger control analysis and he said he had not. So we have no confidence that the subcategory gives us any reliable guidance. In any event one would have to do the analysis.

So what Dr Nitsche is proposing to do is to run a merger control analysis 25,000 times. So 25,000 SSNIP tests, 25,000 GUPPI tests, whatever it happens to be. The Tribunal properly asked him yesterday how he had any confidence that that would be feasible in the context of collective proceedings. In my submission the answer was not convincing. The answer was simply to say "We are used to dealing with lots of data" but so are competition authorities and so are large law firms in merger situations and I dread to think what any of those would say if they were told they were going to conduct 25,000 SNIP tests.

So it is a simple point here. It is about simplicity, triability, feasibility. This is another area where the BIRA case involves additional complexity but no additional advantage. The extra work here is not producing an advantage. What's happening is it has to be

done because of the narrowness of the case.

Sir, that brings me to the last point, which is (i). Now our criticism here is that BIRA is wrong to model Amazon's behaviour on that of third parties. Now we have seen as regard the broad brush methodology and figure 2 that I took you to earlier, that Dr Nitsche is proposing to adopt the assumption that Amazon would have acted in the same way as a third party did act in the factual. That's what those lines show. If you remember, the line was pressed down. It was moved to the right and then it was pressed down to match the behaviour of a large third party.

MR JUSTICE ROTH: I think we have got this.

MR CARALL-GREEN: Got this point.

MR JUSTICE ROTH: I think you need to wrap up, Mr Carall-Green.

MR CARALL-GREEN: I do need to wrap up before 12.05 I believe, sir.

MR JUSTICE ROTH: Yes, you have five minutes.

MR CARALL-GREEN: The Tribunal has made both points in relation to this. The first is that Amazon is clearly a more sophisticated and better resourced business than any other third party, so the notion that its behaviour should be modelled on the basis of a third party is flawed.

The second point is the one that Mr Justice Roth observed, which is that the factual behaviour of third parties is a poor benchmark because third parties might have been deterred from entering after Amazon, meaning that the earlier entry is actually the right benchmark. So once again BIRA's case and Dr Nitsche's methodology are flawed.

I have five minutes to spare, sir.

MR JUSTICE ROTH: Thank you.

I think, Ms Ford, you can reply on the Dr Nitsche points and then go back to (inaudible) reply to what you said about Dr Houpis.

Reply on behalf of BIRA

MS FORD: Perhaps if I overstep where the Tribunal thinks is a reply, then do let me know. I was going to respond to some of the points Mr Brealey made first thing this morning as well. I can take it extremely rapidly. It is the algorithms.

MR JUSTICE ROTH: Yes. We can't have replies to replies and go on forever.

MS FORD: No, absolutely but this is our reply to their position on the methodology. So I think it is accepted that we are entitled to reply on those points.

MR JUSTICE ROTH: Mr Brealey was replying to your criticisms on the algorithm approach.

MS FORD: Yes. We opened. He responded, and we have a reply.

MR JUSTICE ROTH: We will see how we go but primarily it is about Dr Nitsche's methodology. I think you have a right to respond.

MS FORD: Perhaps I can spend one minute on Mr Brealey and then move on.

MR JUSTICE ROTH: Go ahead.

MS FORD: He made three points. The first was the Competition Authority has already looked at this. In relation to that the Tribunal has our points that discerning compliance and monitoring compliance is not the same thing.

Mr Brealey also took you to the point where the CMA is relying on Amazon being required to provide all cooperation, assistance and compliance, which, of course, is not an obligation that it is under in adversarial proceedings. So one can't proceed on the basis that Amazon is obliged to assist in the exercise that they are hoping to carry out.

The response to all of that was to say well, where is this grounded in the evidence, because Mr Dorrell had referred to the findings and Commitments of the CMA and Mr Kervizic did not mention the Commitments.

In response to that first of all a purely procedural point, which is that Mr Kervizic went

first and Mr Dorrell responded. So Mr Kervizic did not have the opportunity to respond to the points on the CMA, but more fundamentally that doesn't actually go to the point Mr Kervizic was making. The CMA is not re-running an algorithm. It is simply monitoring and investigating it. So it doesn't answer the point that Mr Kervizic quite properly makes about the inability to actually re-run the algorithm. That was Mr Brealey's first point.

His second point was saying they did this in Hammond or they are proposing to do this in Hammond. On that, of course, the Tribunal in Hammond did not have the benefit of evidence from an algorithmic expert dealing with the viability or otherwise of this methodology, so we say simply the Tribunal has to proceed on the basis of the evidence that's before it.

In that context Mr Brealey read out the submission that I made and said that we are not a million miles away from what was said by Mr Harman on behalf of Hunter but, of course, Mr Harman was not there able to draw on specialist algorithmic evidence. So we say we are in a very different position here.

It is also important to emphasise that Hammond, of course, may still not be certified. It is certainly not a binding authority about how one should go about doing this exercise. Of course, in the context of funding Professor Stephan relies on the fact that Hammond may not be certified to suggest that our funder, LCM, may find itself funding two claims. So one cannot proceed on the basis that what is done in Hammond is somehow binding.

The third point was to say that in Mr Brealey's submission the evidence suggests that this methodology does not fail the *Pro-Sys* test. In that context, he put particular emphasis on paragraph 38 of Mr Dorrell's report behind tab 11 in the A bundle. It is just worth seeing exactly what it is that Mr Dorrell says by way of conclusion, because this is what's relied on as the evidence to suggest that this is viable. He says:

"Based on my experience of developing and auditing algorithmic systems", and this is the passage that Mr Brealey emphasised "I consider that there is a realistic prospect that Dr Houpis would be able to successfully implement the approaches I set out in sections 3.4."

Pausing there, the Tribunal will recall that the approaches were all about looking at the algorithm and seeing what it does. The approaches he identified did not in 3.4 include re-running an algorithm.

MR DERBYSHIRE: Where are you reading from?

MS FORD: Sorry. I am reading from A, 199. This is the passage that Mr Brealey has emphasised as being the evidence before this Tribunal about the viability of this methodology. So he is saying:

"There is a realistic prospect that he will be able to implement the approaches I set out in 3.4" which are all about the factual and understanding how the algorithm works, not the counterfactual. Then:

"To re-run and evaluate one or more of the systems underpinning the abusive conducts that he is investigating."

This is not in my submission a resounding endorsement of the possibility that Dr Houpis can actually use the algorithm to recreate a counterfactual for the purposes of a damages methodology.

MR BANKES: That was paragraph 35?

MS FORD: I am dealing with the submission that Mr Brealey made which emphasised paragraph 38.

MR JUSTICE ROTH: We have the point. We never read one paragraph in isolation from either side, so don't worry about that.

MS FORD: Sir, that's the extent of the points I make in response to Mr Brealey.

Mr Carall-Green opened with two of what he described as scene- setting points. The

first was to say that where Amazon enters first, BIRA has no case. The Tribunal will recall that Professor Stephan's case on this point has previously relied on the Crawford article's 49% figure, which we have explained is only looking at Amazon's ASIN numbers. It doesn't include the analysis of similar products.

I understand from Mr Carall-Green's submissions that it is accepted, therefore, that the 49% figure doesn't provide one an insight into whether or not Amazon was or was not a first mover in any particular scenario and the likelihood that that might occur.

The reason I say that is because that submission -- that assertion continues to be made, but the basis of that assertion now seems to be matters such as Amazon is sophisticated and Amazon has lots of employees.

In our submission there is no evidential basis to suggest that this occurs in any materially significant number of circumstances.

The second headline point was where Amazon entered for reasons that was not a data advantage, Amazon might have entered anyway because of its vast resources and public data might have prompted entry and none- of those apparently are covered on the basis of our case.

In our submission that dynamic is very much picked up and modelled in Dr Nitsche's econometric model, because he models the extent to which the data advantage drives product entry. The methodology does pick up that if everybody -- if all third parties are in a position to enter based on the available public data then the data advantage will not drive entry in the model. So we say that is a factor that is properly reflected in our methodology.

In relation to Dr Houpis' fallback methodology based on the econometric analysis, so assuming the algorithm fails, he will attempt to model it. The point was made that he will have available to him the benefit of a real-world scenario, namely the post-Commitments algorithm to gain an insight into what changes Amazon made to their

criteria in order to render their algorithm compliant.

On that point in our submission the changes that have been made in 2024 cannot be assumed necessarily to be the changes that would have been made to render the algorithm compliant many years previously and that's for all the reasons we have already canvassed. This algorithm has been growing, changing and evolving over a period of time. These are fast moving dynamic markets. One cannot assume the position in 2024 is necessarily informative of the position some time previously.

It was then suggested to the extent that that isn't an answer Dr Nitsche's methodology faces the same challenges. That is not right, because, as I emphasised yesterday, Dr Nitsche doesn't model the algorithm for the purposes of estimating loss. He models the algorithm solely for the purposes of establishing the existence of an abuse.

We were taken back to Dr Houpis' list of all the parameters that he would envisage changing if he were to attempt to model the algorithm and the submission, as I understood it, was that we have to change all these parameters because we have to switch off whatever is deemed by the Tribunal in due course to be unlawful. So we have essentially got no choice in taking that as a methodological approach, to which in my submission the answer is the choice is to use a more robust quantum methodology. That is what Dr Nitsche has done instead. That's the choice available.

There were some criticisms made of Dr Nitsche's methodology based first of all on Figure 2 in his summary and then on the econometrics. On Figure 2 it was said that this diagram reflects the fact that entry -- that absent the other competitive behaviour entry might be earlier, but it doesn't reflect the fact that absent the other -- sorry -- entry might have been later but it doesn't reflect the fact that absent the Other Anti-Competitive Behaviour, entry would be less likely. So it is a criticism of the broad brush approach.

In our submission, this really does illustrate the benefit of the way in which Dr Nitsche

has approached it. He has two complementary methodologies, so insofar as the broad brush approach is looking at the likelihood that entry would be accelerated, that is complemented by an econometric approach that then models the extent to which in greater detail things would have changed in the counterfactual, and it is the econometrics that can tell you well, in that circumstance Amazon might well, for example, not have entered at all.

In relation to the econometrics it was said we struggle to discern which bit is attributable to the data abuse and which bit is to the Buy Box abuse. That in my submission is not in any way a valid criticism of the econometric approach, because of course the very first step in the econometric approach is to define the Data Delta and to seek to ascertain the extent to which it is or is not driving entry. Then it goes on to model further stages, such as the counterfactual third party entry and counterfactual Amazon entry. So it is not right to say that one cannot split these matters out.

Mr Carall-Green then worked through our submissions on page 9 of our skeleton, where we had sought to pick up all the criticisms that had been made and respond to them. In the vast majority of the cases the Tribunal has our submissions on that and so I don't propose to reiterate them.

There are a few short points that I think it is fair to say have arisen or have not been canvassed before the Tribunal previously.

The first was an example which was given in the context of books and so an example was given; assume you have a sale of the complete works of Shakespeare. It was said that is an example where you would have no relevant entry data. This is unlikely to be a situation where Amazon is using data in order to inform its entry. You could still in that scenario, it was suggested, have a third party that might be deterred from entering by reason of Amazon's conduct, and the suggestion was that our

methodology does not pick up that possibility.

That is precisely the possibility that is modelled by the innovation channel in Dr Nitsche's methodology. So he has recognised the possibility that other merchants might be discouraged in their innovation. He has indicated a methodology for doing that. He is going to look for what he described as a robust indicator of methodology on the Amazon platform and he is going to perform a different analysis in order to ascertain whether Amazon's presence in the market has a chilling effect on innovation or not. So in our submission this --

MR JUSTICE ROTH: I thought the innovation channel was a bit narrower. It's a chilling effect on the innovation, but on the simple example of say the works of Shakespeare, if the Amazon offering from Amazon Retail is in the Buy Box and a third party selling the works of Shakespeare is not, that could influence the degree of purchasing from Amazon Retail because it is in the Buy Box as opposed from the third party, but it has nothing to do with entry and it has nothing to do with data. I thought that was the example.

MS FORD: I had understood the example --

MR JUSTICE ROTH: The point is that is not -- we don't have to worry about similar products. The same product won't be caught by your claim.

MS FORD: I had understood the example to be making a slightly different point, which is that the model is not capable of modelling the extent to which a third party might be deferred from entering, essentially discouraged from competing absent a data effect.

MR JUSTICE ROTH: I thought he was making the point that there are forms of anti-competitive effect which have nothing to do with entry. That was because your focus is on entry and I see Mr Carall-Green is nodding. I mean, take the example of Shakespeare. It has nothing to do with data; that's constant demand, the point Mr Carall-Green made. It is just that Amazon is preferencing its own channel of selling

the same product as opposed to the third party, because it puts it in the Buy Box.

MS FORD: Yes.

MR JUSTICE ROTH: Is that in your claim or not?

MS FORD: It is common ground that where there is no data entry effect but an isolated Buy Box effect, that doesn't fall within our claim, but that's subject to certain -- two points really. The first is that that's exactly the scenario that Dr Houpis measured in the analysis that Mr Carall-Green took you back to about books and DVDs. He measured -- this was in the context of his data abuse analysis. He measured the extent to which there was a Buy Box effect in the scenario of books where Amazon is well-established on the platform and he found that there was no such Buy Box effect.

MR JUSTICE ROTH: Data but not on the other -- not on simply what they call abuse 2 I think, namely just preferencing in the Buy Box.

MS FORD: Well, it is absolutely right that the analysis was conducted in the context of data abuse, but the explanation that Dr Houpis gave is he doesn't think the data abuse would have been operative in relation to those categories because this is the example of sort of a long lived product on the platform. So it equates to a situation where on his own explanation the data abuse isn't operative. He then says "What is the effect on the Buy Box?" and he finds no effect. So it is quite right that he has conducted this analysis in the context of a data abuse and they say "Oh, well, maybe if we conducted it in the context of the Buy Box, you might get a different answer". His explanation for the outcome he gets is to say "Well these are the sort of products where the data abuse wouldn't make any difference", but his analysis says in that scenario there is no effect on the Buy Box.

So in our submission that really is a good example of where the impression that's sought to be given is that there's all this potential missing damages out there that we are not picking up, but actually if you look at it in a scenario where Dr Houpis says

really data is unlikely to be driving this sort of example because it is books or DVDs and Amazon is already in, he has looked at it and has found no effect on the Buy Box.

MR JUSTICE ROTH: It seems to me there is clearly an effect on the retailer selling Shakespeare who is not -- when Amazon is selling Shakespeare.

MS FORD: That is the second caveat. I am grateful to the Tribunal for prompting me not to forget it. That is a question of looking at; whether Amazon's conduct generally has a chilling effect on the approach taken by other merchants. That is what in my submission Dr Nitsche is looking at in his innovation channel. Now it is quite right that his innovation channel is examined in the context of entry. The methodology he uses is to identify a measure of innovation and compare whether Amazon's presence in the relevant market essentially has a chilling effect on the conduct of other merchants. If the answer is yes, then that is picking up this sort of effect whereby a merchant might observe Amazon engaging in the anti-competitive conduct and say "Do you know what? I am not going to bother".

MR JUSTICE ROTH: I can see if an independent retailer says "I am not going to sell Shakespeare at all because Amazon is selling it and it is in the Buy Box and therefore I am not going to bother to retail it", but if they say "Well, we will retail it on the Amazon platform, because we might make some sales" but they just make rather less sales because they are not in the Buy Box, then it is not affecting their conduct. It is just affecting their revenue and profit.

MS FORD: That is exactly the effect that Dr Houpis has said he didn't find when he looked at it, but insofar as it causes that merchant to say "I am not going to bother", that is covered by Dr Nitsche's examination.

MR JUSTICE ROTH: Yes. (Inaudible).

MS FORD: The next point that's come up that hasn't been debated to a great extent thus far is the possibility that Amazon's conduct might have had -- might have

impacted its negative decision-making and so it might, for example, choose not to enter where it otherwise would or it might choose to withdraw earlier. In that context emphasis was placed on the word "end" in some of the regulatory decisions. That was essentially the point that was being made, "exit" or "end", yes.

Now the Tribunal will recall in Ennis the problem with the argument Apple was running was that it was trying to run an argument that was not actually the PCR's pleaded case. We say this argument has exactly the same flaw, because our pleaded case, our theory of harm as elaborated on by Dr Nitsche yesterday, is that absent the data abuse, absent having these Superior Indicators, Amazon would either have entered where it would not otherwise have entered or it would have entered earlier. That is our theory of harm and what we discern to be the immediate consequence of the data abuse.

It is based on what Dr Nitsche explains. The data that Amazon has, the key data that gives it an advantage that other people can't use and they don't have the benefit of, is that they can see the successful products taking off and they can see that earlier than other parties and they can see it with more accuracy than is available to other parties, who only have the availability of public information.

So what they do is they pick the winners. That is the theory of harm we have pleaded and that is what Dr Nitsche has measured in his methodology. Of course, once Amazon has done that, once it is in, it doesn't need data in order to decide whether it wants to continue selling or not to sell. It knows whether it is making a profit; it knows what its costs are. It knows what competitive dynamics it is facing. It can make its decision whether to end the product perfectly on its own. This is all driven by what is the concrete information that this abuse gives Amazon that advantages it over its competitors. It is that information about what are these winning products that I can get in on earlier than everybody else.

So we say it is no part of our theory of harm to look at it in a negative sense and we say that with the exception of the reference to the words "exit" or "end", that's not the centre of gravity of the theory of harm that the regulatory materials identify either.

The final point to respond to is the point about no loss merchants. In that context we have been provided with the Commercial and Interregional Card claims case. As you have been shown from paragraph 18 the concern in that case was that when you have a claim about multilateral interchange fees on commercial card transactions, you can't have a class which includes a number of merchants who have never accepted a commercial card transaction at any time in the Claim Period. That was the problem that the Tribunal was rightly identifying.

In my submission the equivalent in these proceedings would be to have a class that included merchants who had never sold products on the Amazon UK marketplace. That's the equivalent scenario. You are complaining about commercial cards. These people have never accepted MIFs on commercial cards. You are complaining about victims of Amazon's abusive conduct but you have never sold on the marketplace. Clearly that's not the class definition we are advancing.

If we look, please --

MR JUSTICE ROTH: If a merchant sells a product which Amazon never sells, the merchant sells on the Amazon platform but Amazon Retail never has directly sold that product. Is that merchant in your claim?

MS FORD: Even then, as Dr Nitsche explained yesterday, one has to look at the possibility of the innovation channel impacting on that merchant, because if it is a product that Amazon never sold but observing Amazon's abusive conduct has essentially persuaded that merchant not to come in and sell it when otherwise it might have done.

MR JUSTICE ROTH: No, I am saying a merchant who has entered, who is selling the

product on Amazon but Amazon does not sell that product.

MS FORD: Right.

MR JUSTICE ROTH: Is that merchant in your case?

MS FORD: Yes. That merchant could still have been impacted by the chilling effect of the innovation. That's one answer. I wonder if I can elaborate on this case, because it may become clearer?

If we look at paragraph 52, the Tribunal is drawing a distinction. That is starting at 51: "We don't accept the suggestion that the statute permits the deliberate inclusion of class members who have never been exposed to a wrongful act and as a consequence no possibility of having suffered a loss."

Never having been exposed to a wrongful act.

At 52 we see there are two issues. There is the possibility that a member of the class might turn out not to have suffered a loss and then there is the fact that a proposed member might have no claim because they have never been exposed to the wrongful act complained of. That is the distinction which is driving the conclusions the Tribunal has been shown at 61 to 63. It may be that they might in due course turn out not to have suffered a loss, but what you must not do is include knowingly within your class a member that has never been exposed to the wrongful act complained of.

Now I have shown the Tribunal the way we plead our case on this particular point. It is at B, tab 1, page 53, paragraph 131. Now our submission is each of the members of our defined class has been exposed to the wrongful act we are complaining of. They have been exposed to potential abuse by Amazon, so they have traded on the Amazon marketplace. They have done so in circumstances where they are either actual or potential competitors with Amazon and they have done so in circumstances where Amazon has abused its dominant position by both utilising its superior access to data and by self-preferencing its own products.

So in our submission we are not in a Commercial Cards type scenario where these potential class members haven't even been exposed to the abuse we are complaining of. What we do fairly accept in paragraph 131 is that the proposed class as defined may prior to disclosure include merchants who have not suffered loss.

Now that's the scenario that the Tribunal is saying is potentially possible and potentially permissible, not least because in many cases it's not possible to avoid it.

Now in particular in our case it turns on in large part whether or not it transpires following disclosure that these merchants did or didn't sell either the same or a similar product to one sold by Amazon or -- and I emphasise that this is the wording of 131: "Either they did not sell the same or similar product to one offered by Amazon Retail or are not otherwise impacted by the infringement."

Dealing firstly with the question of whether they did or did not sell a product which is either the same or similar to Amazon Retail, that is a question which can only be determined based on disclosure and based on factual or expert evidence in these proceedings, and so we cannot and so we have not defined our class by reference to that question, because the guide tells us, at 6.37, it is not appropriate for us to define our class by reference to merits-based criteria. So we cannot legitimately at this stage engage in some attempt to winnow out merchants who may not ultimately prove to have suffered loss, and in my submission the judgment of the Tribunal in the Commercial Cards case recognises that that's an entirely legitimate approach to take. It says if it transpires that a class member in due course has not suffered loss, that is not a faulty class definition.

The other point -- the reference in the transcript to what Dr Nitsche said is Day 2, page 79, lines 18 to 21. He explained that even if the merchants in due course haven't sold the same or a similar product to Amazon, it may transpire that they have been impacted in another way by the infringement. In particular, they might have suffered

the chilling effect on innovation by virtue of Amazon's conduct, which means, for example, that they choose not to enter a particular product market at all.

So that's what's contemplated by the way in which they might otherwise be impacted by the infringement.

MR JUSTICE ROTH: I can see what Dr Nitsche calls the innovation channel is where a third party decides not to enter at all, not to develop a new product or not to sell the new product on Amazon, that's how he explains it, but not a case where the merchant is selling the product on Amazon and Amazon just isn't there. It isn't selling directly. That's not what he describes as the innovation channel. It is that you don't introduce -- you are deterred from introducing the product.

MS FORD: Well, if it transpired that that merchant is only selling products where Amazon is not competing, once we have done the analysis of what is the same product and what are similar products, that is an example where, following the evidence and the disclosure, one might conclude that that merchant has not suffered any loss.

What we have proposed is that at the appropriate point that merchant will not be entitled to receive a payment on distribution and that's the point we make at paragraph 141. So we say:

"At the point of distribution it is anticipated that no loss merchants will have been identified and capable of exclusion from participation in the distribution, as considered in paragraph 13.1.3 above."

MR JUSTICE ROTH: There are lots of products Amazon doesn't sell. We all know that, as indeed is part of your case, it picks the winners. There are lots of products it doesn't sell directly. It doesn't think it is worth doing or it won't get the volume. You say that will come out when you go into the evidence. Now the merchants will know -- every merchant of any competence will know "In putting my product on Amazon, am I competing with Amazon?"

MS FORD: No, sir, because whether they are competing with Amazon or not depends in part on how one defines similar products. So this is why a class definition that's driven by that concept is going to end up being merits-based and get tangled with the merits of the proceedings. Whether they are actually -- even leaving aside the innovation channel, whether they are actually competing with Amazon in the proper competitive sense is something that's going to be driven by disclosure and factual and expert evidence. In our submission it is simply not going to be possible to define a class definition now which can sensibly identify those merchants that might have suffered loss. It is a loss question. In my submission we are absolutely not in the same scenario as they were in Commercial Cards case where we are including people who were not exposed to the abusive conduct at all. This is in no way a parallel to that. At most there are merchants in there who may in due course transpire not to have suffered loss, but we say that is a situation which the case law fully recognises is potentially unavoidable because we need an objective class definition.

Mr Grubeck has just reminded me that there is a line which goes to the relevance of the innovation channel in Dr Nitsche's summary. It is bundle A, tab 7, page 131.

MR JUSTICE ROTH: Yes. That's exactly the bit I was looking for.

MS FORD: So it is the last line in sub-paragraph (iii) where he says:

"Harm resulting from the innovation channel may have extended beyond the products and product categories where Amazon Retail entered."

MR JUSTICE ROTH: No. I accept that. I am saying if you decide not to enter at all because of that. Anyway I think we have covered that.

MS FORD: Sir, yes. Those were our points in reply. So unless the Tribunal has any further questions on methodology, I would propose to make a start on the identity of the class rep.

MR JUSTICE ROTH: Give us a moment to reorganise the bundles, because we are

moving on to something quite different.

Submissions on identity of class rep on behalf of BIRA

MR JUSTICE ROTH: Yes.

MS FORD: For this purpose can I ask the Tribunal to turn up Mr Goodacre's statement, which is behind tab 4 in bundle B, please? Mr Goodacre is the chief executive and director of BIRA Trading Limited, which will trade as the British Independent Retail Association. As the Tribunal will have read, BIRA is a longstanding trade association which has acted as a representative body for independent UK retail businesses for over 25 years.

I ask the Tribunal please, to look at paragraph 8 of the statement to start with, where he explains that:

"BIRA and its predecessor organisations have been promoting and representing the interests of retailers across the UK for more than a century. Some retailers have been members for nearly the entire 120 years."

He says:

"Today BIRA is a leading voice in the retail sector representing independent retailers of all sizes and in all sectors."

I should have said 120 years rather than 25 years. I correct myself.

BIRA has a large and diverse membership. That means in my submission that it has insight into and understanding of the issues that affect retailers and how to act in their best interests. It has established channels of communication with them and to has long-term accountability to its members.

BIRA's membership is explained in paragraph 15 of the statement. Mr Goodacre explains:

"BIRA's membership comprises a diverse range of businesses who operate in a wide

range of sectors including electrical goods, clothing, cookware, gifts, lifestyle shops, furniture, carpets, DIY tools ..."

MR JUSTICE ROTH: We have read it.

MS FORD: The particular passage that I would emphasise is what he says at (iii). BIRA members:

"... have brick and mortar shops and/or sell online ..."

The Tribunal will appreciate why I emphasise that point, including on Amazon's UK marketplace, because there was an attempt made on behalf of Professor Stephan to suggest that BIRA only acts for brick and mortar retailers rather than for online retailers. That for the Tribunal's reference is Mr Gallagher's second statement, paragraph 9. We say that that is a false dichotomy and we say that that betrays Professor Stephan's lack of connection with the sector that he is seeking to represent, because brick and mortar retailers are increasingly selling online as well, and indeed one of BIRA's own initiatives was to seek to promote just that.

Perhaps I can show the Tribunal that. It is at bundle A, 13 and an exhibit to Mr Gallagher's witness statement at page 423.

MR JUSTICE ROTH: Give me the page number again. Sorry.

MS FORD: 423. This is an article which has been exhibited by Mr Gallagher and it's headed "BIRA offers further support for High Street with launch of online trading platform Neartoo."

This platform is explained if we look over the page at 424, third paragraph down:

"This platform, Neartoo.co.uk, will complement the shops physical store and help indies move to a 'hybrid' model of retailing. It also maximises consumers' growing thirst to shop locally and independently, guaranteeing that money spent within a community remains there."

So this is an initiative that BIRA has taken to facilitate online retailing by those whom

it represents.

If we turn over the page again to page 425, there is an explanation, the last paragraph of this article:

"'BIRA wants to help independent retailers achieve their ambitions and be able to trade up against other multinational online trading stores such as Amazon. There is such a huge gap between indies not having an online presence and we believe they have been left behind for far too long with big tech companies taking over. This is the answer for thousands of indie stores across the UK to still maintain a bricks and mortar presence on the High Street while also allowing them to sell online but at a lower cost."

So contrary to the attempt that has been made to give the impression that BIRA doesn't act for online retailers, BIRA is actively seeking to facilitate and promote online retailing on behalf of its members and it is already challenging Amazon.

MR JUSTICE ROTH: This is I think dated 1st January of this year. Is that right?

MS FORD: That appears from the index that's attached to --

MR JUSTICE ROTH: The date looks wrong on the --

MS FORD: Sir, yes. I have gone through exactly the same process.

MR JUSTICE ROTH: Do your clients know?

MS FORD: Is it 1st January? The Neartoo initiative was 2022/2023.

MR JUSTICE ROTH: The date is presumably 1st January, this press release, press statement.

MS FORD: The date appears to be 1st January. Would that be 2022? I am told that would be 2022.

MR JUSTICE ROTH: The index is wrong. Yes.

MS FORD: We also rely on BIRA's proven track record of representing the interests of UK businesses, which it has done for 125 years, as we have seen in paragraph 8.

If we look, please, to paragraph 17, Mr Goodacre sets out the work that BIRA does.

He explains that it is focused on assisting retailers with the various issues they face. He explains it is split into two categories: advocacy for the retail sector as a whole, including non-members -- that's what he defines as the "general workstream" -- and then particular services that are offered to BIRA's members.

If we look at the summary of the general workstream, so this is work that BIRA undertakes for the sector as a whole, not just its members. There is then a summary of its advocacy work and its campaigning work and the events it organises and the know-how content that it publishes.

The Tribunal will note in particular towards the end sub-paragraph (d) on page 5829 it also sets out a wider network of trade associations and organisations that BIRA works with, which is obviously invaluable in terms of established means of communications with the proposed class.

It mentions the Independent Retailers Confederation, which independently represents over 100,000 independent retailers, and the British Retail Consortium. All of that is in the general workstream and then it goes on to set out the particular services that are focused on BIRA's members.

MR JUSTICE ROTH: BRC (inaudible) because it includes Amazon, doesn't it?

MS FORD: I see, yes.

MR JUSTICE ROTH: BRC I suspect would be scrupulously neutral.

MS FORD: Absolutely. The point I will make is there is an established means of communication.

MR JUSTICE ROTH: We have got the point.

MS FORD: By way of summary, I rely on what is said in paragraph 18 of Mr Goodacre's statement:

"I see BIRA's strength as seeking to advance the interests of retailers through a range of different means including advocacy, policy analysis, commercial negotiations and

operations. The diversity of skills within the organisation allows BIRA to channel its efforts where it considers it can have the most impact on the interest of retailers, both members and non-members. As I set out below, I consider that the proposed collective proceeding fits within BIRA's work programme because both it promotes the collective interests of retailers on an issue that BIRA knows will be of real concern to its members and many small and medium sized retailers more generally."

In our submission BIRA is exceptionally well placed to take on the role of proposed class representative in these proposed collective proceedings, and we say that with the greatest respect to Professor Stephan, he does not bring the same qualities to the table. Unlike BIRA, he has no prior interest in or experience of the retail sector or of online platforms and unlike BIRA, which sees this role as an extension of its existing industry representative functions, Professor Stephan is proposing to assume this role in a paid capacity. Unlike BIRA, he doesn't have the existing contacts with and the existing understanding of British retailers.

In our submission that point comes through particularly clearly from a point that Professor Stephan makes in his witness statement. It is B, tab 16 and within that paragraph 30. At page B, 8104. At paragraph 30 Professor Stephan expresses:

"I also intend to engage with any UK trade or retail associations which may have some members falling within the proposed class in order to take their views into account and potentially in order to benefit from any assistance those associations might be able to offer. A particularly relevant association appears to be the Responsible Online Commerce Coalition, an organisation established by some members of my legal team in January 2023, which acts as a body providing a policy voice for those businesses that rely on Amazon in the US, UK and EU. This network may provide a useful way of communicating with some members of the proposed class."

So given the reliance that was placed on the ROCC in Professor Stephan's witness

statement, we raised questions in correspondence about this entry.

Can I ask the Tribunal to take up the E bundle? My E bundle has helpfully (inaudible).

In E, tab 24 at page 45, this is a letter that was sent to ask some questions about the Responsible Online Commerce Coalition, ROCC, in light of the reliance that was placed on it in Professor Stephan's witness statements.

You will see we refer in the second paragraph to what is said in paragraph 30 about the ROCC, and in the following paragraph I draw attention to what is said on the website about the ROCC. It is a trade association for a broad coalition of businesses. Statements about the sorts of members it has:

"Our members include small businesses as well as some of the world's largest household brands."

It makes the point that it doesn't list the number or identity of any members, but identifies the category of membership available.

The enquiry we made is over the page. We said:

"From his statement that the ROCC 'may provide a useful additional way of communicating with some members of the proposed class', it appears that Professor Stephan has obtained information regarding the membership of the ROCC in order for him to satisfy himself that he could properly make that statement in his witness statement. In order that BIRA can consider Professor Stephan's suitability to represent the proposed class representatives and more specifically his understanding of the issues faced by class members and his proposals as to how to make contact with class members, please explain how many ROCC members there were in total as at 1 June 2024",

breaking them down by reference to the four categories identified on the website.

There is a further enquiry in the penultimate paragraph:

"As to the ROCC, while we note Professor Stephan's explanation that it was

'established by some members of my legal team ...', it is unclear to what extent it is, in fact, separate and independent from Geradin Partners."

So those were the enquiries that we raised. We then get an answer at E, 28, page 54. The response to the enquiry is in paragraph 3:

"ROCC has only a small number of members. However, the current size of ROCC's membership is not especially significant. Professor Stephan merely says that ROCC 'may provide a useful additional way of communicating with some members of the proposed class'."

So we are told simply that ROCC has only a small number of members.

We pursued the enquiry further in particular in relation to the extent to which ROCC was independent from Geradin Partners. The answer we got back on that is behind tab 33. The letter starts at E/71. We are looking at paragraph 6 over the page, E/72. It is paragraph 6 where they say:

"Your letter ... notes that 'we and the Tribunal are entitled to understand the extent to which there is any practical distinction between the ROCC and Geradin Partners'. However, we have not said, either in Stephan 1 or in our letter of 26th September, that the two are independent and, furthermore, we do not positively assert that there is independence."

So in our submission as an effort to demonstrate that Professor Stephan has the means available to communicate and consult with the proposed class, ROCC has fallen flat. It has only a small number of members and it is not independent of Professor Stephan's legal team. In our submission this is a fairly stark illustration of why BIRA as an established body with its own diverse membership is materially better placed to perform the representative function.

MR JUSTICE ROTH: Would that be a good moment?

MS FORD: It would, yes.

MR JUSTICE ROTH: In terms of timing I imagine -- have you come to the end of the class rep point?

MS FORD: I have. I am about to deal with funding.

MR JUSTICE ROTH: I think we are all right on time. If necessary we can sit to 5.00, but I don't think we will need to. It should be fairly short. There are some points on funding.

All right. 2 o'clock.

(12.59 pm)

(Lunch break)

(2.00 pm)

MR JUSTICE ROTH: Yes, Ms Ford.

MS FORD: Sir, just to clear up the mystery of the date of the article about the Neartoo platform. We checked what was on the BIRA website and it appears that the error in the index may have been because there is an incorrect date on the BIRA website to be fair to Mr Gallagher. So what we have done is dug out a contemporaneous article dealing with this material which does have a correct date on.

MR JUSTICE ROTH: That's fine. We just need to know the date.

MS FORD: It is 10th January 2022.

MR JUSTICE ROTH: 10th.

MS FORD: 10th January, 2022.

MR JUSTICE ROTH: Not 1st.

MS FORD: That is the date of this article we have also dug out which is contemporaneous. I understand Mr Brealey would like me to point out that this is an initiative which is not operating any more, but, of course, the point I am making is not whether it was operating or not operating. It is an example of BIRA acting in the interests of online retail efforts.

MR JUSTICE ROTH: Yes. I mean, it must be the case that many BIRA members will be selling online and no doubt on Amazon but equally there will be many BIRA members who are not selling online. One thinks of maybe butchers and so on who might be members of BIRA. Equally the class as defined encompasses many people who are not BIRA members.

MS FORD: Absolutely, yes.

MR JUSTICE ROTH: We take all the points that you made.

MS FORD: Moving on to funding.

MR JUSTICE ROTH: Before you do that there is one thing we wanted to ask you, although it links to funding. In the budget, your costs budget, which we have at B, 6017, which is in bundle B7 at tab 5, 6017 and it is the document we had asked for in larger copy, because it microscopic in the bundle.

MS FORD: Yes.

MR JUSTICE ROTH: We did see that in the disbursements -- have you got a copy you can read?

MS FORD: I have been handed a larger copy.

MR JUSTICE ROTH: In disbursements going down the left you have solicitors, counsel, disbursements. You see that. The first of the expert economists. The second line is industry experts, £350,000.

MS FORD: Yes.

MR JUSTICE ROTH: Can you just explain that a bit, because you made the point that BIRA has lots of expertise. It understands how retailers operate. It can talk to its retailer. It has channels of communication, but what is it in terms of industry expertise that it is going to spend all this money on?

MS FORD: I wonder if I can take instructions on that particular point?

MR JUSTICE ROTH: Yes, sure.

MS FORD: I am told it is in case Amazon puts in what is factual evidence for Amazon about the way in which they go about operating their online marketplace, because that would be factual evidence for Amazon, but it would entail us getting in an expert in order to address the point, because we would not have that factual information available. So it is anticipating that possibility.

MR JUSTICE ROTH: You say the way it operates the online platform.

MS FORD: Yes.

MR JUSTICE ROTH: Are you talking about data science expertise?

MS FORD: Technical matters, yes, exactly.

MR JUSTICE ROTH: Not retail industry, more data science.

MS FORD: Algorithms and the like.

MR JUSTICE ROTH: Yes. Like Mr -- the gentleman whose name begins with K.

MS FORD: Indeed. Mr Kervizic, that discipline potentially.

MR JUSTICE ROTH: Yes, I see. Thank you. Right. So litigation funding.

Submissions re litigation funding on behalf of BIRA

MS FORD: There are a number of authorities to draw to the Tribunal's attention. What I am proposing do is address them thematically. The first is the circumstances where it might be necessary to have separate funders. That was addressed by the Court of Appeal in Trucks. I am conscious that this is a matter that the acting President is familiar with. It is authorities bundle, tab 12, page --

MR JUSTICE ROTH: That's on conflicts, isn't it?

MS FORD: On conflicts. It is anticipating dealing with the only point that's raised as against our litigating funding, which is it is suggested that if Hunter were to revive, our funder LCM would be placed in a position of conflict because they are funding Hunter. So I am anticipating dealing with that point.

So it is authorities bundle, tab 12, page 767. This is paragraph 88, which is where the Court of Appeal is setting out what is necessary insofar as there is a conflict. We are particularly interested in what is said about what's necessary in relation to funders. So part way down paragraph 88 largely opposite E:

"I also consider that a different funder will need to be involved for one of those subclasses given that the conflict potentially extends to funding. As Green LJ pointed out during the course of Mr Flynn, KC's submissions, the RHA will have to be able to satisfy the CAT that the funding arrangements put in place do not interfere unreasonably with ordinary independent decision-making in the litigation including as to settlement. In my judgment the safest way of ensuring that will be to have separate funders for the two subclasses, thereby avoiding the risk of a funder siding with the members of one of the subclasses."

So the touchstone for the Court of Appeal is that the funder should not be able to interfere with ordinary independent decision making in the litigation, including as to settlement.

Now the Tribunal in Trucks has proceeded to apply the guidance given by the Court of Appeal. That judgment is in authorities bundle tab 21. It is page 1057, paragraph 10. As the acting President will be aware, the Tribunal has authorised the same funder for two subclasses in Trucks on the basis that it was satisfied that there was to realistic ability for the funder to interfere in the independent decision-making of the class representative.

So paragraph 10, the Tribunal cites what was said by the Chancellor in the Court of Appeal that I have just shown you, the fact that the:

"The RHA will have to be able to satisfy the CAT that the funding arrangements put in place do not interfere unreasonably with ordinary independent decision-making including as to settlement."

There was obviously evidence adduced in relation to that particular issue. The Tribunal's conclusion is at the bottom of the paragraph:

"Having regard to the further evidence received from Therium, the Tribunal was satisfied that the fundamentally revised funding arrangements will not realistically interfere with the independent decision-making of RHA or the conduct of the claims of members of either subclass. We consider that this is a matter of assessment by the Tribunal and does not raise a point of law."

So that is the authorities on the issue of the extent to which a funder can act for two different --

MR JUSTICE ROTH: I fully recognise that this is a somewhat speculative point taken against you, because at the moment Hunter is not the one that's going forward. So it is really only in the event that.

MS FORD: Yes.

MR JUSTICE ROTH: But if that is so, I don't think this paragraph 10 I have to say is the relevant point to look at. This is simply a ruling on refusing permission to appeal. The substantive ruling on how funding was dealt with is the substantive judgment, which is at tab 15 of this bundle starting at page 900. That's where the Tribunal actually addressed how one deals with funding, and it was rather more complicated. It starts at page 917. Indeed the subclass representative was established. That's not relevant here because you have a separate class representative but to actually seek independent funding and when they couldn't get independent funding for reasons explained, the funder went to great lengths to actually set out -- there were separate companies within the group. It is not simply that we were satisfied that a single funder is not going to interfere. It was because of everything, including undertakings by the people in the groups. It is everything that is at paragraphs really 54 through to 67 or thereabouts or 68. A situation where it is simply the same funder funding both would

not have been satisfactory.

MS FORD: Sir, that's absolutely understood. I apologise at my attempt to cut through some of the factual detail in that case. What I was trying to identify was that the factual question that the Tribunal has to satisfy itself as to. I hope that has been correctly identified. It has to satisfy itself that the funder is not in a position to interfere with the ordinary independent decision-making, including settlement, and I will come on to make our submissions about the terms of our funding agreement, which we say is capable of satisfying that.

Of course, if the issue came up and the Tribunal were not fully satisfied on the terms of the agreement, no doubt that could be addressed further when it arose.

MR JUSTICE ROTH: Yes. I think it would be very difficult just to have the same funding entity. That does seem to me contrary to what the appeal required. That's where we started. The Tribunal initially (inaudible). The Court of Appeal said no. Then the funder there went to all the lengths that are described in the substantive judgment on the remitted question, which is the one which starts at page 900 and it would be then for your funder to -- I mean, that was in circumstances where it wasn't possible to obtain separate funding. So it is more of a significant question, if it should be that your case goes ahead and Hunter revives and I should say, as you may know, although in the ruling you have just referred to this Tribunal refused permission to appeal, that is, in fact, seeking permission to appeal from the Court of Appeal. So they say even that wasn't good enough.

MS FORD: Yes, absolutely. Really what I was trying to encapsulate was the way in which the Tribunal has articulated the question that it was deciding in that paragraph 10, but I am grateful to the Tribunal for pointing out a great deal of detail, factual detail, in that case that I am reminded.

MR JUSTICE ROTH: I think the real question is if it were to be the case that Hunter

revived, would your client, which is BIRA, then seek alternative funding or seek to approach its funder to see if they can create separate funding vehicles so as to get through this hoop?

MS FORD: I think that's essentially what is being said behind me. Of course, if in the hypothetical event that Hunter does revive, of course, that can then be appropriately explored.

MR JUSTICE ROTH: The starting point is to seek completely separate funding. That's what one expected BIRA to do in the first place.

MS FORD: Presumably one of the claims would seek separate funding.

MR JUSTICE ROTH: Yes.

MS FORD: That has all been heard, but, of course the Tribunal has well in mind that we are very much in that hypothetical situation at the moment. That's not an issue which arises immediately or indeed may ever.

MR JUSTICE ROTH: Yes. Well, you can't give any assurance for Hunter, but you can tell us, and you have, that your client in those circumstances will seek separate funding. That's what I understand.

MS FORD: I don't understand that I have made that indication. I have certainly said that in the event that the situation were to arise, then I presume that they would investigate what it is that they could do. I can take instructions as to what undertaking I can offer.

MR JUSTICE ROTH: Yes. There would be great difficulty (inaudible) just the same funder. It is the same pass through issue. The difference here is your case obviously is capable of self-standing funding. You have got it, so if you have got it from one funder, you can get it from another funder. The used Trucks claim was so small as an element, there were great difficulties getting funding just for that.

MS FORD: Sir, there is another relevant distinction, which is that we do not have

a pass-on problem in the same way, because the nature of the claims that we have brought are claims essentially for lost sales rather than overcharge on a particular fee that then could be passed on to the consumer class.

MR JUSTICE ROTH: Yes.

MS FORD: So we do not have that more immediate collision with the potential consumer claims.

MR JUSTICE ROTH: Yes, I see. Indeed Mr Brealey suggested that's the reason you are not bringing it.

MS FORD: I would point out there is no basis whatsoever for that submission to be made.

MR JUSTICE ROTH: And therefore you don't have a conflict, yes. That might be the short answer, that on your claim the problem doesn't arise. Yes.

MS FORD: The second issue is the extent to which the funder may have involvement in settlement and termination of the funding agreement. That is a matter which was addressed right early on in the regime in Merricks. Authorities bundle tab 6, page 196. The relevant paragraphs are paragraphs 24 and 25. What the Tribunal points out there at the end of 24 is that:

"There are two particular aspects where there is a potential for a conflict of interest between the funder and the class members."

It identifies those as being:

"Settlement of proceedings and termination of the funding agreement."

Our submission will be that both of those arise as issues in relation to Professor Stephan's funding arrangements.

In paragraph 25 it deals with the particular clause in the Merricks LFA which provided for a dispute resolution mechanism in relation to the settlement of the claims, but the important point that the Tribunal drew out of the dispute resolution mechanism in

Merricks was that it was not binding. We can see that from the second half of the paragraph:

"The QC's decision on the matter will not be binding and the decision as to whether to accept or reject a proposed settlement will ultimately be solely for [Mr Merricks] to determine. We consider that this provision satisfactorily protects Mr Merrick's rights to act in the best interests of the class."

So the key point the Tribunal there in my submission is making is that a non-binding dispute resolution mechanism preserves Mr Merrick's right to act in the best interests of the class.

A further development then comes in the case of the Le Patourel. In Le Patourel there was a binding dispute resolution provision proposed. We can see the terms of that in bundle G, tab 5, page 865.

MR JUSTICE ROTH: G is referred to as confidential.

MS FORD: It says "Confidential information redacted" at the top. I can perhaps just point the Tribunal to the relevant term if it exists. My understanding, what I am told, is that the confidential information has been redacted. That's the commercial terms of it and the rest of it can be referred to, but out of the abundance of caution I will perhaps just draw the Tribunal's attention to the relevant provision. It is 8.3, page G/92. The Tribunal will see the relevant mechanism that's envisaged in paragraph 8.3.1. The key point to notice is what's said in 8.3.3.

MR JUSTICE ROTH: Is assessor defined or is it just an assessor? I think that's right. All confidential terms have been redacted. One sees the losses. Are the definitions? Definitions, schedule 1.

MS FORD: There is no definition.

MR JUSTICE ROTH: Schedule 1, definitions. Yes. It is on page G/98. We see that says:

"... any QC or other expert as agreed ..."

MS FORD: Yes. So the Tribunal may have seen there has been a correction to my learned friend's skeleton in relation to this particular point. Perhaps I can show you --

MR BREALEY: Can I just confirm is it the case that Le Patourel was certified on the basis of the text in bundle G?

MS FORD: No, because the position has changed. I propose to show the letter that has been sent just to set out what we are now told is the position.

So it is bundle D, tab 45.

MR JUSTICE ROTH: What page?

MS FORD: 115.

MR JUSTICE ROTH: I haven't got 115. Mine ends at page 113 at tab 43.

MS FORD: It sounds like your bundle has not been updated. If I could hand it up.

MR JUSTICE ROTH: Let me try it electronically. I have it now. The letter of 8th November, is that it?

MS FORD: Yes.

MR JUSTICE ROTH: I have got it on electronic. Thank you.

MS FORD: The Tribunal will see there is a reference there to footnote 59 of the skeleton of Professor Stephan, which refers to the funding agreement in Le Patourel, 8.3, which is the document we have just been looking at.

They state:

"Since filing the skeleton it has come to our attention that after the certification hearing in Le Patourel the version of the funding agreement cited in the skeleton was amended on certification (following an order from the Tribunal). The amendment is not public, but the provisions around disputes in relation to settlement have changed to bring them in line with the position in Merricks."

So where that leaves us is this is essentially a second Tribunal decision confirming

that a binding dispute resolution clause is not acceptable.

Also relevant on this point is the case of Ennis. There, there was an issue as to whether the terms of the funder's return might get in the way of settlement. If we look, please, in bundle F, tab 9 at page 490.

MR JUSTICE ROTH: 490?

MS FORD: 490, yes. The document we are looking at is the proposed class representative's skeleton argument for the CPO in Ennis v Apple. What they record at paragraph 17.1 is:

"Apple suggests that the investment agreement, by providing for an increase in the funder's return (from a multiple of 3 to a multiple of 4) at the start of the trial, creates an unacceptable incentive on the funder not to settle until after the trial has started."

So that's the argument they are addressing.

MR JUSTICE ROTH: You are in paragraph?

MS FORD: That was in paragraph 17.1.

MR JUSTICE ROTH: Yes.

MS FORD: The submission that's made on behalf of the PCR -- the proposed class representative in this case was represented by Geradin Partners, who are also acting for Professor Stephan. The submission that was then made is at paragraph 19. The response to Apple's submission is the second line:

"The decision to settle is the PCR's alone, and so the funder's incentives are of secondary importance."

So what was prayed in aid by the PCR in that case to justify its funding arrangements was that the funder could not interfere in settlement. It was that submission which was then endorsed by the Tribunal in its judgment.

The judgment is authorities bundle tab 20 and it is page 1050. It is paragraph 61:

"The Tribunal does not consider that there is a valid basis of objection to the uplift in

the funder's return at the start of the trial in the present case. A similar funding arrangement was approved in Le Patourel. Whilst a gradual increase in return during the trial would have been a possible alternative arrangement, the Tribunal considers that Apple overstates the risk of the increase in return at the start of a trial being an obstacle to a pre-trial settlement. The decision to settle is the PCR's alone and is subject to the approval of the Tribunal."

So there is the third authority where we have a Tribunal emphasising the importance and relevance of the PCR being the one to decide whether to settle.

Professor Stephan's skeleton has asserted the provisions in his funding agreement, which we will come on to look at, the equivalent provisions in Gormsen, which is also funded by the same funder, by Innsworth, and was certified in February 2024, but it is not suggested that the Tribunal there gave any express consideration to this particular point about the extent to which the funder is permitted to be involved in settlement.

So in our submission it doesn't override the approach that we say has consistently been adopted since Merricks that the funder should not be in a position to exercise control over settlement.

On the issue of the level of returns to the funder, Gormsen did have a fair amount to say. We can turn it up. It is authorities bundle tab 17, page 969.

MR JUSTICE ROTH: The funder in Merricks is also Innsworth Capital, isn't it? You showed us that a moment ago.

MS FORD: I am told that's right, yes.

MR JUSTICE ROTH: That was the agreement that you showed us.

MS FORD: Yes, that's right.

MR JUSTICE ROTH: Not the agreement. Sorry. That was the extract from the Merricks judgment.

MS FORD: Yes. It appears there's been something of an evolution in the sense that

what was before the Tribunal in Merricks was a non-binding dispute resolution clause and what you will come on to see is now being proposed is a binding dispute resolution clause.

MR BANKES: You say in Gormsen it was a binding dispute resolution clause which wasn't challenged.

MS FORD: Well, this is a point that Professor Stephan relies on in response to our reliance on authority which says that this is not acceptable. They say this was in the context of the funding agreement in Gormsen and that was approved. What they have not pointed to is any particular reasoning of the Tribunal or any particular focus on the point.

I was coming on to look at Gormsen for a separate point, which is what it says about the level of returns to the funder.

So we are in tab 17 of the bundle starting at paragraph 35. It is actually towards the very bottom of the page, the passage. They are expressing agreement with the point that was made by Mr Bacon, KC, for the PCR, and they say:

"... and in substance we agree with it: the return to the funder, and questions of costs generally, are controlled by the Tribunal on settlement or judgment and the Tribunal will be astute to ensure that a system intended to further access to justice does exactly that, and does not become a 'cash cow' either for lawyers or for funders."

Then it goes on at 36 to say:

"That being said, there do come points where funding arrangements contain provisions that are sufficiently extreme to warrant calling out or in extremis a blanket refusal to certify."

They go on to say in the context of this particular case at 37:

"This was a case which required calling out."

They give a fair degree of explanation as to what their concerns were.

Perhaps we can just for a flavour look at paragraph 39(4), which is over the page, 971, where they say:

"Given an exposure of £90 million, a return of £350 million represents a return of 3.8 times that exposure, which is defensible. What is not on the face of it defensible is the return 21 months later of 8.3 times that exposure."

So that just gives a flavour of the sort of concerns that they were looking at and expressing. It is right to say that the Tribunal did proceed to certify in that case, but what it says at 41(2) is:

"We would not want there to be any suggestion in the Tribunal's certification of these collective proceedings that we are in any way approving or endorsing or expressing any kind of approval of the terms on which these proceedings are funded. It is simply that of the two choices we have -- to certify or not to certify -- we consider the option of certification to be the right course in this case."

Of course, my submission will be that the Tribunal does have a choice in the circumstances of these proceedings and this carriage dispute and my submission will be that BIRA's funding terms are materially more attractive both from the outset and that they remain so and that's an important differentiator in the interests of the class.

The approach to funding generally in Gormsen has then been endorsed by the Tribunal in Gutmann or the approach -- the observations I have just shown the Tribunal.

So if we look, please, at tab 31 -- I am hoping your bundle has been updated with that as well.

MR JUSTICE ROTH: No.

MS FORD: Can we hand that up, please?

MR JUSTICE ROTH: What is the page number? I can look at it. That's just the blinds coming down. 1768. So this is Gutmann.

MS FORD: It is an authority my learned friend asked to be added into the bundle.

MR JUSTICE ROTH: Gutmann v Apple. There are several Gutmann cases.

MS FORD: Yes.

MR JUSTICE ROTH: You are at paragraph 8, is it?

MS FORD: Paragraph 10. This is simply the Tribunal saying:

"We respectfully endorse the comments of the Tribunal in Meta that the Tribunal should be slow to venture into the detailed negotiations that have given rise to a litigation funding agreement save where provisions are sufficiently extreme to warrant calling out."

That's, of course, the point that the Tribunal in Meta was making.

The final authority to refer to is one the Tribunal identified. It's the Australian High Court case in Wigmans. That's behind tab 24. That authority also indicates that the relative attractiveness of a proposed class representative's respective funding proposals is a relevant consideration in considering which of the proposed proceedings is preferable and the majority there, paragraph 111, so it is 1259 -- part way down paragraph 111 they say:

"Part 10 recognises that litigation funding arrangements are a distinct feature of representative proceedings and evidently there will be cases where the difference between litigation funding arrangements is so stark that to exclude it from consideration in determining whether to exercise the stay power would not be consistent with the court seeking to act in accordance with the dictates of justice under section 58."

MR JUSTICE ROTH: Yes.

MS FORD: So those in our submission are the relevant applicable principles.

MR JUSTICE ROTH: Thank you. Very helpful.

MS FORD: I am grateful. Turning to BIRA's LFA, B/5, 6176 is the page number.

MR JUSTICE ROTH: Can we put away the authorities now?

MS FORD: Yes.

MR JUSTICE ROTH: Just a moment. B7. Is it 6177 that you are at?

MS FORD: Yes. The beginning is 6177.

MR JUSTICE ROTH: We have bundles with tabs. It is bundle B7, tab 5.

MS FORD: I am looking in tab 5. I think you are looking at the same thing.

MR JUSTICE ROTH: We have it. Yes. Then you want to go to page?

MS FORD: Well, the only criticism that Professor Stephan has been able to muster in respect of this is this contingent possibility that they suggest a conflict might arise because LCM is funding the consumer claim in Hunter. We have to a certain extent --

MR JUSTICE ROTH: I don't actually think he did -- when I thought through what you are saying, as I understood it, they are not saying that. They are saying if you had extended your claim to cover the logistics claim, which you are not covering -- they are abuses 4 and 5 -- then there would have been a conflict. I think that's the point that's made. There is no conflict now. Then they made the forensic point, "Ah, that's the reason that you are not doing it", but they are not suggesting on your claim as it stands there is any conflict.

MS FORD: Well, it may be then we are talking about contingencies on contingencies --

MR JUSTICE ROTH: I think that's the position.

MS FORD: -- which is a happy situation. Just to address it, in our submission there is absolutely no basis whatsoever to make a submission the scope of our claim has been driven by funding matters.

MR JUSTICE ROTH: You don't have to worry.

MS FORD: So we do make the submission that our funding provisions are materially more favourable. In particular, it is clear that on the basis of BIRA's funding arrangement, the funder will not be involving itself in settlement matters. So the only

obligation to the funder in respect of settlement is clause 7.6, which is on page 335, and that is an obligation to:

"Immediately inform the funder and the solicitors of any offer of settlement or compromise received or proposed to be made in relation to the claim and/or action."

Then clause 9 on page 336 provides that:

"The PCR shall have complete control of the action, albeit that the PCR will have regard to and ensure compliance with its obligations as provided for by this agreement in pursuing the action.

Nothing in this agreement will permit the funder to override any advice given by the solicitors and/or counsel or to require the PCR to conduct the claim otherwise than in accordance with that advice."

So there are very clear safeguards to maintain the --

MR JUSTICE ROTH: PCR has to follow the advice on settlement. It is 9.4 -- 9.5. 9.5: "The PCR shall not discontinue ... including by entering into a settlement unless that is the advice given pursuant to clause 9.4."

MS FORD: Yes, and clause 9.4 --

MR JUSTICE ROTH: Is that you have to take the advice -- a written opinion. So you can only settle --

MS FORD: Of solicitors, yes. (Overtalking).

MR JUSTICE ROTH: And supported by written legal advice.

MS FORD: "... shall instruct solicitors to prepare and obtain a written opinion in respect of ..."

So that is entirely consistent with 9.2:

"Nothing in this agreement will permit the funder to override advice given by solicitors and/or counsel."

MR JUSTICE ROTH: Yes.

MS FORD: Then in terms of funder's return the multipliers are over the page at clause 10.5 on page 337.

The term "capital deployed" is defined in clause 1.1 (sic), which is at page 6179. Clause 1.12. It essentially means the costs of the proceedings.

Then if we go back to page 337, the multipliers range from a multiplier of 3 times, so capital deployed plus 3 times capital deployed up to a potential maximum of 5.5 times capital deployed.

MR JUSTICE ROTH: Yes.

MS FORD: Unless the Tribunal has any questions about the terms of that LFA, I was proposing to move on to Professor Stephan's LFA.

MR JUSTICE ROTH: Yes. Can you help me with clause 17.1 on page 6195:

"If the funder reasonably considers that the merits of any claim are no longer satisfactory or that any claim is no longer economically viable, the funder may give the PCR no less than 40 business days written notice of its intention to terminate ... subject to the right of the PCR to seek expert determination of the funder's determination under clause 15."

I don't know what the funder's determination is. Does it mean its intention to terminate or does it mean something else?

MS FORD: I can take instructions. My immediate reaction is that it must mean the basis on which the funder reasonably believes the merits of the claim are no longer satisfactory.

MR JUSTICE ROTH: That may be just an infelicity in drafting.

MS FORD: I can certainly take instructions.

MR JUSTICE ROTH: Can you just check on that?

MS FORD: I am instructed what is meant is that the funder's determination that it is no longer economically viable.

MR JUSTICE ROTH: The funder's determination under this clause?

MS FORD: Under clause 17.1 that the claim is no longer economically viable.

MR BANKES: In what circumstances would it be unsatisfactory but remain economically viable? They are the alternatives.

MR JUSTICE ROTH: Alternatives.

MS FORD: Again it is a matter on which I will have to take instructions as to whether there is a material distinction between those two.

While that's being discussed a further point to highlight is clause 15.1 itself, which is the expert determination.

MR JUSTICE ROTH: Yes. We are going to come on to that, but let's first clarify on what occasion the funder can terminate, because it is one thing to say the funder can't force a settlement. If the funder pulls the plug, BIRA is left high and dry unless it can find someone else. So termination is absolutely fundamental.

MS FORD: Yes. (Overtalking).

MR JUSTICE ROTH: So we do want to understand what "satisfactory" means. It is a very vague word, isn't it?

MS FORD: I am told that we can't presently identify a scenario where the claim -- the merits of the claim will be no longer satisfactory but where it would remain no longer economically viable. I appreciate that submission doesn't explain the word "or", but the position is that I am told we can't presently identify a scenario where that would be the case.

MR BREALEY: I mean there is a similar provision in the Innsworth agreement and it is a pretty standard clause.

MR JUSTICE ROTH: Yes. We have it in the Merricks case. It is subject to a safeguard.

MR BREALEY: Basically an example would be, for example, in Evans the Tribunal

says, "I am going to certify this, but it just about passes the strike-out case. I think the merits are pretty dodgy", and that puts everybody on notice that going forward the merits are not that strong. Economically viable is to do with the finances. Let's assume 50% -- in Merricks a huge percentage of the claim goes. You still have the same funding and so it may not be economically viable. I think that's the distinction, costs.

MR JUSTICE ROTH: You still have the claim but the costs of the claim may mean the likely return is so low that the costs don't make sense.

MR BREALEY: I think that's the distinction.

MR JUSTICE ROTH: That's helpful. If each subject -- you took us, Ms Ford, to the Merricks case, where the funding arrangement -- if one has that open, which is authorities at tab 6, page 196, one sees, as Mr Brealey says, exactly the satisfactory point is there as well as an alternative. As Mr Brealey says, that's not in itself unusual, but it is a question about what then are the safeguards, and what is said here is there is then a right to seek determination under clause 15. Well, clause 15 means if there's a dispute about this, then there can be a dispute notice and it goes to the expert, and the appointed expert will be -- it is defined somewhere -- an independent KC or whatever. The expert will determine the dispute notice and the expert's decision is binding, but correct me if I am wrong. That appears to mean that therefore if the funder is terminated in reliance on 17.1 and the expert says, "No, the funder's view that it's -- the claim -- the merits are not satisfactory is wrong" and disagrees with that, that's then a breach of contract and you have a damages claim. It doesn't mean that the funder can't terminate.

That's the big distinction with most of the other funding agreements where if there's a dispute, it goes to -- on such a clause, it goes to the expert, and if the expert decides against the funder and in favour of the class representative, then the termination is withdrawn, ceases to have effect.

That is not said in this agreement and that's the concern that exercises me, because it's no good for BIRA to have a damages claim against its funder for wrongful termination. It is a question of --

MS FORD: Again this is a point on which I need to take instructions. We haven't particularly focused on this.

Sir, I am told that the intention is if the expert determines that the funder is wrong on their view of the merits, then it is not intended that they should then be in a position to terminate and the only remedy will be in damages. Now, of course, so far as that is not completely clear from the clause, I understand they will be willing to amend it to make that clear.

MR JUSTICE ROTH: You have clear instructions that's the intention?

MS FORD: Sir, I do.

MR JUSTICE ROTH: And the clause can be amended accordingly?

MS FORD: Yes.

MR JUSTICE ROTH: Because obviously the funder is not separately represented here, but it may be someone present.

MS FORD: We do, yes.

MR JUSTICE ROTH: It looked to me as though that is what was intended, but it is not very well drafted for reasons you readily understood.

MS FORD: Sir, my instructions are that is absolutely the intention and we will be prepared to change that.

MR JUSTICE ROTH: Thank you. Yes.

MS FORD: I was proposing then to move on to Professor Stephan's terms. They are at bundle B, tab 17 starting at page 8129. These are the terms as originally presented. The Tribunal will be aware that there have been some updates, but we will start with the original document.

Our submission will be that these terms raise three serious concerns. The first is the fact that the funder does have involvement in settlement; the second is the circumstances in which the funder may terminate the LFA; and the third is the level of returns to the funder.

MR JUSTICE ROTH: Yes.

MS FORD: Dealing firstly with the funder's involvement with settlement, can we turn, please, to 8145? Clause 7.1 provides:

"The claimant shall not enter into any agreement to settle the claim and/or the proceedings without the prior written consent of the funder (not to be unreasonably withheld or delayed)."

Then clause 7.3:

"The claimant shall not, nor cause the lawyers to, communicate or make any settlement offers or proposals to the defendant(s) without the prior written consent of the funder (not to be unreasonably withheld or delayed)."

Then clause 7.5:

"In the event of any dispute between the claimant and the funder in respect of a proposed settlement, the matter shall be determined in accordance with clause 18.4."

If we then turn on to clause 18.4, which is on page 8152, this is setting out the dispute resolution process by, as has been referred to, King's Counsel for determination. The passage, that is problematic is sub-paragraph (d):

"The opinion of King's Counsel will be final and binding on both the claimant and the funder."

Our submission in relation to this is by agreeing this mechanism Professor Stephan has materially compromised his ability to act in the best interests of the class. He can be precluded from making a settlement offer if his funder doesn't agree. He can be

precluded from accepting a settlement offer if his funder doesn't agree, and he can be bound by the King's Counsel's dispute resolution process to take a course of action which he considers not to be in the best interests of the class.

Now Professor Stephan's skeleton has argued that Innsworth can only block a settlement if the independent KC agrees and they say that can't be objectionable. In our submission it can be objectionable, because what Professor Stephan has done is to fetter his authority to make that decision on behalf of his proposed class. So he has potentially abdicated the responsibility for making that assessment and that judgment, and in doing so in our submission he has put himself in a situation where he could be compelled to act in such a way that he as the class representative considers to be contrary to the interests of the class. We say that is in our submission unsatisfactory.

Professor Stephan has cited in his skeleton argument at paragraph 36.2 what is said by Professor Mulheron in her article "A review of litigation funding in England and Wales. A legal literature and empirical study". Perhaps we can turn that up. It is in bundle A, tab 13 at page 363. The relevant passage to which attention is drawn in Professor Stephan's skeleton is in this green box on page 363, the final bullet point, where it says:

"The dispute resolution process governing disputes about settlement has the added benefit in practice of drawing to the funded client's attention the cost benefit analysis of the settlement from an independent legal expert."

Now if we look at the context in which Professor Mulheron is expressing that opinion and if you go on to page 365, there is a heading "Safeguards re conflicts of interest". She says:

"It is widely acknowledged by law reform commissions, by law makers and by scholars that settlement provides one of the key tension points between the funder and the

funded client, thereby conflicts of interest could well emerge. The funder may wish to settle and take 'the bird in the hand' whilst costs have not subsumed the success fee largely or entirely, whereas the funded client may wish to press on, hoping for a good outcome regardless of the costs incurred (or irrespective of the risk of adverse costs that may loom large). The funded client may be driven by motivations such as a wish for vindication or to settle past scores vis-à-vis the defendant, which diverge from the commercial motivations which generally underpin the funder's involvement in the funded claim. The funded client's assessment of the substantive merits of the case, the benefits or damage which has arisen from disclosure, and the cogency of the (particularly) expert witness evidence may all be markedly more positive than the funder's. The potential for conflict undoubtedly exists; and the salient question is what can be done about it. Tangible measures are required - and several have been implemented in English law to date."

Now the first such tangible measure that she then goes on to identify as a safeguard to address that circumstance is the binding resolution procedure in the ALF Code of Conduct, but in our submissions these sorts of considerations she has identified, specifically a funded lay client making decisions essentially driven by non-financial considerations, by emotional considerations, don't arise in the same way in collective proceedings. The class representative is approved by the Tribunal to act in that role. They are usually not a class member and they are not making decisions on the basis of extraneous or emotional considerations. They have a duty to act in the best interests of the class.

Indeed, Professor Mulheron goes on in her article to recognise that proceedings in the CAT are different. So the second tangible measure that Professor Mulheron identifies as having been implemented in English law to date, and so she is identifying this as a different and distinctive safeguard from the KC process, is the supervisory

jurisdiction of the CAT. So she says, bottom of page 366:

"Secondly, for any settlement proposed in respect of a collective proceedings action under the CAT regime judicial approval of that settlement is mandated before it can be rendered binding and enforceable. The CAT must be satisfied that the terms of the proposed settlement are 'just and reasonable' pursuant to a so-called 'fairness hearing' for which various criteria are set. This serves as considerable protection, not just for the absent class members, but for the avoidance (or resolution) of any scenario whereby the class representative and the litigation funder may be divergent in their views as to the merits of particular aspects of the proposed settlement."

So in our submission it is clear that the reasons Professor Mulheron is identifying the binding KC process to have merits simply don't arise in the same way in collective proceedings. On the contrary, there is an important countervailing consideration. It is the one that has been consistently identified in the authorities of the Tribunal, which is that the class representative has a duty to act in the best interests of the class and it should not fetter -- he should not fetter their ability to do so.

The final point Professor Stephan makes in his skeleton on this issue is that his approach is consistent with the ALF Code of Conduct. We say in circumstances where two Tribunals have taken the view that that form of clause is unacceptable in collective proceedings, the fact that it might be endorsed in the ALF Code of Conduct is simply neither here nor there.

Now we know that those advising Professor Stephan prayed in aid to the fact that settlement was for the funder alone in Ennis and in our submission the fact that Professor Stephan has seen fit to accede to this term, which cedes control to the funder in these proceedings, is not to his credit.

Moving on to deal with the circumstances in which the funder is entitled to terminate, and going back to Professor Stephan's LFA, the relevant clause is clause 12 and the

two clauses to which we drew attention as being problematic. Clause 12.1(b) we see that:

"Upon giving not less than 21 days' written notice to the claimant if the funder reasonably believes that the claims (or relevant part of the claims) and/or the proceedings are no longer commercially variable for the funder to fund because the funder is unlikely to obtain at least a sum equivalent to the anticipated project costs for the proceedings (as set out in the approved budget) multiplied by five ..."

That is a scenario in which the funder is entitled to terminate.

Then (d):

"The class certified ..." --

MR JUSTICE ROTH: (d) has gone.

MS FORD: It has. That's right. We say the fact it has gone is essentially an acknowledgment it shouldn't have been there. I was proposing to draw attention just to the nature of it:

"The class certified under a CPO by the CAT is substantially narrower than the class for which the CPO is sought such that the claims and/or the proceedings are no longer commercially viable as provided for in subparagraph (b) above, and/or the CAT otherwise disapproves, or provides any negative commentary regarding the claims (or relevant part of the claims) and/or transactions contemplated by this agreement or the terms thereof."

So in our submission these are the sorts of terms which place the funder squarely in conflict with the class. They are extraordinarily permissible rights to terminate. The five times multiplier that is in sub-paragraph (b) lets the funder walk away if it will receive less than what is essentially LCM's maximum recovery. We saw 5.5 was the maximum multiplier under the LCM funding. Five times multiplier. Anything lower than that and that entitles the funder to walk away under these terms.

Then the possibility of terminating in the event of negative commentary, which comes in under sub-paragraph (d). It is broad. It is vague. It is unpredictable. It would entitle the funder to walk away, for example, if there were criticism of the funding terms in the terms the Tribunal made in Gormsen. So we say that these are exactly the sort of terms that put the funder in conflict with the class.

On the level of return to the funder if we go, please, to page 8146, the relevant clause is clause 8.4. This is setting out the priority order. Sub-paragraph (a):

"To the funder an amount equal to the project costs ...

(b) Secondly, to:

The funder the commission limited to four times project costs."

"Commission" is defined in clause 1.1 at page 8133. It is defined as:

"The amount calculated in accordance with schedule 3",

which we will just go to shortly.

Just to come back to clause 8.4, under (b) it was:

"... the commission limited to four times project costs.

"(c) Thirdly, to:

The funder, the remaining balance of commission ..."

So commission is defined in schedule 3, page 8163. It is:

"Project costs ..." and

"An amount equal to the total commitment multiplied by the applicable factor below."

"Total commitment" is a defined term. It is clause 1.1, page 8138.

MR JUSTICE ROTH: It is £32.9 million, isn't it?

MS FORD: It is, sir, yes. The point we took on this is that it is not Innsworth's actual expenditure. It is the defined committed amounts. That's then multiplied by the various potential multipliers depending on the date of trial and settlement. The Tribunal will see it starts with three times where the date of the judgment or settlement

is on or after the commencement date. That's prior to substantive disclosure. You get eight times following factual witness evidence; 12 times following commencement of trial. What we say is a really quite extraordinary 14 times total commitment:

"Where the date of judgment or settlement occurs at any time from 31st December 2028."

As to the likelihood of that happening, Professor Stephan's litigation timetable suggests a trial happening in late 2027, but in our submission that is completely unrealistic. Joint case management with Hammond and/or any appeal mean that a more realistic date for final judgment is likely to be in 2029. We say that in the event of a contested trial that means that Innsworth is likely to claim a fee of up to £460.6 million, so a 1400% return on its investment.

MR JUSTICE ROTH: Yes. We see that. Just if we can take it a bit more quickly, please, Ms Ford. We can see this was then replaced about a week --

MS FORD: D/38, 101.

MR JUSTICE ROTH: It was replaced five days later, wasn't it? That's my understanding. This agreement you have just shown us is dated 7th June, isn't it?

MS FORD: Yes.

MR JUSTICE ROTH: 8129.

MS FORD: You are referring to the 12th June letter.

MR JUSTICE ROTH: Yes. So it was amended five days later.

MS FORD: It was subject to that being conditional, as I understand it. If you look at B, 8191:

"This letter records our agreement that the amendment to the LFA attached to this letter as exhibit A ... is conditional upon and will only come into effect upon written notice to you by ICL in the form set out in exhibit B attached following legislation coming into force which has the effect of reversing PACCAR ..."

MR JUSTICE ROTH: Oh, I see. So it was dependent on the PACCAR amendment?

MS FORD: Yes. There has been a relevant recent amendment and that's an amendment that has been prompted by the carriage dispute.

MR JUSTICE ROTH: That was presumably because the percentage rate of commission couldn't work consistently with the PACCAR judgment in 8189 where it is percentage of damages. That must be.

MS FORD: I infer that's probably what's going on there.

MR JUSTICE ROTH: That must be right.

MS FORD: So the amendment is in bundle D, tab 38 --

MR JUSTICE ROTH: Yes.

MS FORD: -- page 101. So the changes are the commission is now a multiplier of project costs rather than the total commitment. The maximum multiplier is now nine times. We make the obvious point that's still much higher than the maximum multiplier in BIRA's LFA.

"The threshold in clause 121(b) of the LFA" -- so this is the clause that entitles termination based on viability -- "is now amended to a sum equal to project costs, plus project costs times three."

So still a right to terminate if the returns are less than 300%.

Then clause 12.1(d) of the LFA is deleted.

So we make three points about these changes. We say, firstly, the fact that Professor Stephan has been prompted to amend his funding agreement in our submission amounts to a concession that the terms that he originally agreed were unacceptable and we say that is something he should have recognised at the time.

Secondly, the fact that he's now been able to secure materially better terms just begs the question why he didn't negotiate materially better terms from the outset. We do say that this is a point which goes to Professor Stephan's suitability as a class

representative. It took BIRA raising these concerns in the context of a carriage dispute to prompt him to get a better deal for the class. That is in our submission hardly a proper purpose of a carriage dispute and we say he should have negotiated a better deal for the class without being prompted to do so.

Thirdly, even after the amendment in our submission BIRA's terms are still clearly preferable. BIRA's LFA does not cede involvement in settlement to the funder. BIRA's LFA still contains less permissive termination provisions and BIRA's LFA still offers much lower returns to the funder and so in our submission a better deal for the class.

Now the way that Professor Stephan has sought to justify his returns to the funder in the skeleton is to argue that, because his estimated quantum is higher, so Innsworth's return is proportionately lower.

In our submission that is a dangerous approach to take, because if it transpires that that quantum assessment is overly optimistic or certain aspects of his more broadly framed claim do not succeed, then the funder's return will turn out to eat up a much greater proportion of the returns to the class than he's presently assuming. So we say one cannot assess the funder's return as a proportion of the claim value that might turn out to be misconceived.

In our submission it would give rise to perverse incentives, because it raises the spectre that PCRs could bring claims that are formulated in a way which is bloated and overblown in order to justify excessive returns to their funder. In our submission that simply cannot be right.

So for all those reasons in our submission these factors point strongly in favour of BIRA being the most suitable proposed class representative.

MR BANKES: I understand the last point you make, but we are talking only about unallocated damages, aren't we? Neither funding agreement requires the application to the Tribunal for a payment before distribution has taken place. So to that extent

that doesn't that answer your last point, because the reality is what will limit what the funder gets is what's left and at that stage it is just between the funder and the charity.

MS FORD: That is true in the sense the Tribunal can exercise its supervisory jurisdiction to ensure that a funder doesn't essentially suck up the available return to the class, yes. If it only comes out of uncollected damages, that risk would not arise.

MR BANKES: Your point would be part of the (inaudible) of an obligation to make an application.

MS FORD: There is a safeguard in that respect. However, in my submission it is still an incorrect approach as a matter of principle, because when one comes to comparing funding agreements, when one is trying to justify the funding that one has agreed with the funder, it shouldn't mean that one has to essentially inflate a claim in order to justify the level of funding that you have agreed.

MR BANKES: Okay. Got it. Thank you.

MR JUSTICE ROTH: But it won't prejudice the class as such. This return you're saying, you made the point it is an extraordinary return.

MR BANKES: The nature of the termination provision.

MR JUSTICE ROTH: That's because of the termination provision, but subject to that -- yes.

MS FORD: Mr Grubeck makes the point in the circumstances of settlement although the Tribunal would still exercise oversight in the settlement, it wouldn't automatically go to the charity. It wouldn't be the charity in that scenario.

MR JUSTICE ROTH: Yes. Well, we have to approve the settlement.

MS FORD: I think there may be one point somebody is checking before I indicate I have concluded my submissions. I think we will check the point over the brief break, if that assists.

MR JUSTICE ROTH: Yes. We will take our short break.

One question, Mr Brealey, in case you need to take instructions. You'll recall I asked Ms Ford what is BIRA's estimate of length of trial excluding any consideration of the complication of Hammond being tried with it. I have exactly the same question to your side. You can answer that after the break. We will take ten minutes.

(Short break)

Reply on behalf of PROFESSOR STEPHAN

MR BREALEY: Sir, as in all walks of life, it is not quite so straightforward. On the length of the trial if I can just give you a few facts. For BIRA they have estimated 12 weeks starting January to March 2027, and they have a trial estimate -- and this is not unimportant -- they have a trial estimate budget of £6.8 million. So 12 weeks January to March 2027, £6.8 million.

We have at the moment no time estimate, but we have discussed it and we believe it is similar. Why do we believe it is similar? It is because our budget is £5.1 million, so that's £1.7 million below BIRA's. So that would give an indication that our length is not dissimilar to BIRA's estimated 12 weeks.

In our plan we have estimated that the trial would start in October 2027. Now it could be earlier, but October 2027 built in time for this carriage dispute. We don't believe BIRA's did. So when they say Jan to March 2027 --

MR JUSTICE ROTH: We are not so concerned about when the trial might be. It is more the length of trial.

MR BREALEY: 12 weeks.

MR JUSTICE ROTH: In making your cost budget wouldn't there have been some consideration?

MR BREALEY: That's right. That's why we've referred to the budget. All I am saying is 12 weeks seems about right to us, but I can't point to a line that says "12 weeks".

MR JUSTICE ROTH: I am not suggesting there's a line in the document, but when you said, "We infer from BIRA saying 12 weeks", I thought you don't need to infer from BIRA. Your side independently must have thought about it.

MR BREALEY: We believe it is round about 12 weeks. We don't have an entry on that, but all I would say in support of that 12 weeks, our budget is £1.7 million below BIRA's, so that would indicate objectively that we are in the same ball-park.

MR JUSTICE ROTH: Thank you.

MR BREALEY: BIRA makes obviously three criticisms about our funding.

MR JUSTICE ROTH: Are you going to funding first or class representative?

MR BREALEY: I was going to end with class rep.

MR JUSTICE ROTH: So we know where we are going.

MR BREALEY: Funding first. Sorry.

Settlement, termination and the return.

Can I start first with settlement? Now what it appears to be is that BIRA says that Professor Stephan is acting improperly because he has agreed a binding dispute resolution mechanism. So there seems to be a complaint about there being a binding dispute resolution mechanism.

Just so that we remind ourselves -- I am not going to go through this because of the time -- our funding agreement, that is at B, page 1829.

MR JUSTICE ROTH: Sorry. Your funding agreement is B, 8129.

MR BREALEY: Sorry. 8129 at volume 10.

MR JUSTICE ROTH: Yes.

MR BREALEY: At 8145 --

MR JUSTICE ROTH: Is clause 7.

MR BREALEY: -- is clause 7. I will not go there because you have seen it already.

MR JUSTICE ROTH: We have been through it.

MR BREALEY: We have been through it. It is 7.1 and 7.5. Then obviously we have clause 18.4 on page 8152.

It is important just to emphasise in 18.4 there can be a dispute between the claimant and the funder, but that dispute goes for determination to an independent person, King's Counsel, and if it cannot be agreed, the chairman of the Bar Council will appoint the King's Counsel. That opinion of King's Counsel will be final and binding on both the claimant and the funder.

We object most strongly to the submission that was made that somehow the claimant has ceded control -- I wrote down the submission -- ceded control to the funder. It is obviously incorrect. If there is a dispute, it goes to an independent King's Counsel.

Now we say that a binding determination by an independent King's Counsel with no financial interest in the claim is a reasonable safeguard for all parties. If that is so, the Professor has not acted unreasonably.

I submit that for four reasons. Ms Ford has touched on them, but with great respect sometimes scooted over them. I want just to set out four reasons why it is reasonable to adopt this approach.

The first is consistent with the Association of Litigators' Funders' Code of Conduct. We can't just airbrush that away as it being some sort of unreasonable provision when it is in the funder's Code of Conduct, and that is at B, 8124. "Code of Conduct for litigation funders, January 2018".

Just pause there. I am not sure that when we see the Merricks case and the other cases that the Tribunal has actually been referred to the Code of Conduct or to the (inaudible) report but this is the Code of Conduct litigation.

The relevant provisions are at 8127 at clause 11:

"The agreement shall state whether ... the funder or funder's subsidiary ... may:

Provide input to the funder party's decisions in relation to settlements."

Then 11.2, he refers to termination. We see those two words:

"Reasonably ceases to be satisfied about the merits of the dispute.

Reasonably believes that the dispute is no longer commercially viable."

So these words have been picked up in funding agreements since 2018 at least.

Clause 13 advises:

"If the LFA does give the funder or funder's subsidiary or associated entity any of the rights described in clause 11 ..."

So the funder is having a say in settlement, and in brackets in my respectful submission it is plain as a pikestaff that the funder should have had a say in the settlement, because it is incurring significant costs.

At 13.2:

"If there is a dispute between the funder ... and the funded party about settlement or about termination of the LFA, a binding opinion shall be obtained from a Queen's Counsel", King's Counsel, "who shall be instructed jointly or nominated by the chairman of the Bar Council."

Now that is in the Code. I am not sure that this Code has ever been referred to by any parties in the cases, but clearly it is difficult to see how the Professor could be so heavily criticised by BIRA, as he has just been, if he has agreed a settlement provision that is consistent with the funder's Code of Conduct. The Tribunal may strip it out, but to say he's been unreasonable, he is not suitable is way off the mark. So that's the first: consistent with the code of practice.

The second reason is it's consistent with the Mulheron report which we have seen, but I think we should just go back to that, because it is an important document. That's in the core bundle at tab 13. It starts at page 210. I am not sure this document has been referred before to the Tribunal. At 210 we see this is a fairly lengthy document, "A review of litigation funding in England and Wales. A legal literature and empirical

study". It is a report by Professor Mulheron, KC, Department of Law, Queen Mary University. It is a report submitted to the Legal Services Board. This is at page 210. You can see it is quite a detailed and thorough document.

I would like to draw the Tribunal's attention to page 216 where we see the acknowledgments. The third paragraph is important:

"The participants in this project were wide and varied -- ALF funder members, non-ALF funders, ATE insurers, litigation funding brokers or advisors, law firms ..."

One only has to read this to see that the recommendation is based on a thorough review of the rights and interests and obligations of the stakeholders in this collective action process. So it is an industry-wide consultation essentially.

As Ms Ford said, the settlement provision is at page 363. It is important to go through this.

"The main points:

Input to settlement discussions is permitted by English law ..."

So it is permitted that funders have an input. Again it is common sense that they should. To say that they can't have a say I think is divorced from reality, but the extent of that input by which funders negotiate their agreements tends to be more conservative than the extent of input which English law appears to have endorsed. So actually the process under the class actions is more conservative.

Then we have the bullet point:

"The dispute resolution process governing disputes about settlement has the added benefit, in practice, of drawing to the funded client's attention the cost-benefit analysis of the settlement from an independent legal expert."

I ask rhetorically what on earth is wrong about that?

One goes over to 364. We see she sets out "The 'real-life' clauses in modern agreements":

"Given the sensitivity and importance of this point", and it is a sensitive and important point, "... funders were asked to describe the extent to which their agreements provide that input could be provided re the client's decisions regarding settlement."

So the whole focus here is upon what input can the funder have in this important area.

She goes on over the page in the second bullet in the brown:

"A right to refer any disagreement between funder and funded client as to the reasonableness of a settlement to a third party (a pre-agreed KC) for a binding adjudication assessment as to whether or not the settlement is fair and reasonable."

We miss some of the context of the safeguards because -- regarding the conflict of interest.

"It is widely acknowledged by law reform commissions, by law-makers and by scholars that settlement provides one of the key tension points between the funder and the funded client, whereby conflicts of interest could well emerge."

That is an important statement. Again to say that the funder should have no say whatsoever in any settlement is divorced from reality.

"The funder may wish to settle and take 'the bird in the hand' whilst costs have not consumed the success fee largely or entirely, whereas the funded client may wish to press on, hoping for a good outcome regardless of the costs incurred."

Now Ms Ford emphasised the funded client may be driven by motivations. I would emphasise:

"The funded client's assessment of the substantive merits of the case, the benefits or damage which has arisen from disclosure, and the cogency of the expert witness evidence may all be markedly more positive than the funder's."

So it is possible that the parties are taking completely different views as to the merits:

"The potential for conflict undoubtedly exists, and the salient question is what can be done about it."

She does not row back. Procedure in the Code of Conduct:

"Disputes about settlement are to be referred to a KC whose opinion will be binding upon the funder and funded client. In other words, if the KC considers the settlement to be reasonable and fair, then the funded client has to accept it. It has" -- and this is on the basis of her industry-wide consultation -- "proven to be a useful 'backstop' in practice, both directly and indirectly."

It is not appropriate in my respectful submission --

MR JUSTICE ROTH: Just a moment. I don't think we need hear any more on settlement.

MR BREALEY: Can I just make one more point on settlement? This is not on our agreement now. I would like to make a point on LCM's settlement, because that goes in our submission beyond the Code of Conduct.

MR JUSTICE ROTH: You mean the BIRA settlement?

MR BREALEY: The BIRA funding agreement. Can we just go to that? The agreement starts at 6177. We were taken by Ms Ford to 6187, clause 7.6, which says the PCR must:

"Immediately inform the funders and solicitors of any offer of settlement ..."

We were told that's the only provision on settlement in the LCM funding agreement, which was a great surprise, with great respect, because, as you said, sir, have a look at clause 9 and see where we go with clause 9 as regards settlement.

Now clause 9.1 says:

"The PCR shall have complete control of the action, albeit that the PCR will have regard to and ensure compliance with its obligations as provided for by this agreement in pursuing the action."

9.3:

"The PCR shall not abandon, withdraw, or discontinue the action otherwise than in

accordance with this clause 9.

9.4 and 9.5 are very important:

"In the event that a decision is required as to whether to abandon, withdraw or discontinue any action (including any part of any action or by entering into a settlement or compromise agreement) the PCR shall instruct the Solicitors", capital S, "to prepare or obtain a written opinion in respect of whether the action should be abandoned, withdrawn or discontinued and provide a copy of such an opinion to the funder at least ten business days before making a decision to abandon, withdraw or discontinue ..."

9.5 then says:

"The PCR shall not abandon, withdraw or discontinue any action (including any part of any action or by entering into a settlement or compromise agreement) unless that is the advice given pursuant to clause 9.4."

So there is an element of the pot calling the kettle black here, because here is a provision that the PCR, to use Ms Ford's words, has fettered its discretion, because the PCR cannot settle unless that is the advice given pursuant to clause 9.4.

Now I asked the Tribunal to note the word "Solicitors", with a capital S, because "Solicitors" is not, as in the termination provision in this agreement, an independent solicitor. It is the instructing solicitors.

We see that from page 6182:

"'Solicitors' mean Willkie Farr & Gallagher ..."

So you do -- this agreement does -- I am surprised no-one has taken the Tribunal to this. This agreement in principle provides that Willkie Farr & Gallagher can provide an opinion as to whether there should be a settlement or not which binds BIRA. If BIRA says "Don't settle", you can't settle. I appreciate it also refers to solicitors.

MR JUSTICE ROTH: "If BIRA says don't settle". You mean the solicitors?

MR BREALEY: Sorry. If Willkie Farr & Gallagher says "Do not settle", you can't settle.

MR JUSTICE ROTH: I have to say I find this all a bit artificial. You can't settle these cases without a settlement being approved by a Tribunal. A Tribunal is not going approve a settlement unless it sees -- it seems to me it is inconceivable it would approve a settlement -- leading counsel's opinion expressing the view such terms are reasonable. To say -- I would be surprised -- I can't obviously legislate -- if the Tribunal would simply approve a settlement on the basis of the party's solicitors, given that they will have had counsel acting in the case, expressing their own view.

MR BEARLEY: I understand that, but if Willkie Farr & Gallagher say "You cannot settle", then BIRA can't settle and it has to continue.

There is a stick in 17.6 at page 6196 which says if essentially BIRA:

"... contravenes clause 9.5, then the PCR acknowledges and agrees that:

Such ..." --

MR JUSTICE ROTH: Sorry. You're on?

MR BEARLEY: I'm on page 6196, clause 17.6. So if Solicitors, capital S, say "Do not settle" and BIRA contravenes that because it is acting outside the advice, that then constitutes a material breach of the funding agreement and that allows the funder to terminate the agreement with immediate effect. So that is a stick to ensure that BIRA comply with the advice of Willkie Farr & Gallagher.

Now it may well be --

MR JUSTICE ROTH: BIRA must then -- is that right -- repay --

MR BEALEY: Well, then (overtalking).

MR JUSTICE ROTH: -- all other payments? 17.6.3.

MR BEARLEY: 17.6.4, yes.

"The funder's right ... to be paid the funder's fee ..."

MR JUSTICE ROTH: Yes.

MR BREALEY: So there are consequences. So the notion that we are somehow

criticised as not being suitable because we have inserted our settlement provision is, I say, wide of the mark.

On termination --

MR JUSTICE ROTH: Yes. Can we put away the BIRA funding agreement?

MR BREALEY: No, because I would just like to -- you have seen it and I apologise. Clause 17.1 refers to the right to terminate and we have the two considerations, the merits and the economic viability that we saw in the Code of Conduct, and we also see, going back a page at 6193 clause 15, which says if there is any dispute about this, it will go to an independent solicitor. This is clause 15.2, or King's Counsel. So here we have the degree of independence.

MR JUSTICE ROTH: Yes.

MR BREALEY: Somehow this is so much better than our termination in our agreement and it is not. So our termination agreement starts at page 8149 and it has -- 8149.

MR JUSTICE ROTH: Yes.

MR BREALEY: Again we have seen this. We have in 12.1(a) merits but it has to be reached on the basis of independent legal and expert advice and commercial viability. Again it is always subject to independent legal and expert advice.

MR JUSTICE ROTH: For the funder.

MR BREALEY: For the funder. That is the difference, but it is independent.

MR JUSTICE ROTH: Yes, but there is no -- what is extraordinary about this agreement, Mr Brealey, is while you have provision for a dispute to be referred to an independent KC in clause 18.4 for settlement and you have been placing a lot of emphasis on that, as meaning that the settlement provision is fine and kosher, as it were, that does not apply to the termination provision. If the class representative says "That's your view, funder. You have got your own advice from someone outside.

I think, and indeed talking to my solicitors, that I don't agree with that", but it doesn't go -- they can't invoke clause 18.4. 18.4 is restricted only -- I think it is the only circumstance in the whole agreement, unless I missed something, to which it applies is clause 7.5.

My question to you is, how is that consistent with the Code of Conduct? If we look back at the Code of Conduct to which you have referred and on which you place emphasis. On page 8127, 11.2, termination provision.

Then 13:

"If the LFA does give the funder ... any of the rights described in clause 11", which includes therefore termination, "the LFA shall provide that:

13.2. If there is a dispute ... about settlement or termination ... a binding opinion shall be obtained ... who shall be instructed jointly ..."

Does Professor Stephan's termination provision comply with that?

MR BREALEY: Just as I would say that the LCM provision does not comply on settlement, because it doesn't necessarily go to an independent KC or an independent solicitor, here we have a provision -- it is not dissimilar to that.

MR JUSTICE ROTH: I am not asking about LCM. I am asking about your agreement. Does it comply?

MR BREALEY: My only response to the question you are putting to me is that there has to be independent legal advice.

MR JUSTICE ROTH: To the funder.

MR BREALEY: To the funder.

MR JUSTICE ROTH: Well, if Professor Stephan's solicitors say to Professor Stephan, "We think the merits of this claim are strong" it is of no use to Professor Stephan because the funder says "Well, we have got our own advice. Goodbye" and the case collapses.

I have to say speaking for myself -- I can't speak for my colleagues although we have discussed this -- I find that very concerning. I think the situation of a class representative wanting to settle and a funder saying "No, you shouldn't" is theoretically possible but unlikely. It is more likely the other way round, so the settlement provision is of less concern it seems to me, but this is a very plausible scenario for a funder wanting to go, particularly on something as subjective as to whether the -- what is the likely recovery where clearly you can have different views.

MR BREALEY: It may well be just as Ms Ford was asked about clause 17 of the LCM "What does that mean? Can you give some clarification", it may well be that we would have to amend the termination provision to include -- so that clause 18.4 embraces it.

MR JUSTICE ROTH: Well, that is rather different, because the point I put to Ms Ford was the way I thought the agreement was meant to work. It just wasn't very well drafted. This is clearly not the way this agreement is designed, and your client has had already one amendment and here we are with a long and expensive carriage dispute assessing it now. If you are able to tell us that this agreement will be amended so as to apply the 18.4 mechanism and conform to the Code of Conduct, that's one thing, but to be told "We might go away and have a look at it" is very unsatisfactory. I will let you take instructions.

MR BREALEY: Can I just go to page 8152? This clause 18.3. I can take away the 18.4 point, but I am told that clause 12.1 and the independent funding advice would be subject to 18.3.

MR JUSTICE ROTH: I am sure it would, because it talks about termination, but that's a damages claim and it goes to arbitration and that takes --

MR BREALEY: Any dispute --

MR JUSTICE ROTH: It can go to an LCIA arbitration but that is not going to solve -- as I say, that will give Professor Stephan damages for breach but it is not going to stop

the termination. That's the whole point of having 18.4. As I say, it is striking that 18.4 bites on settlement, but it doesn't bite on termination. You have the point.

MR BREALEY: I have to accept what the agreement says.

MR JUSTICE ROTH: Yes.

MR BREALEY: I do emphasise the fact it is independent, which you say to me it is independent to the funder.

MR JUSTICE ROTH: I see that.

MR BREALEY: So we would need to take --

MR JUSTICE ROTH: I mean --

MR BREALEY: Lightening quick I have got instructions that it would be modified to comply so that clause 12 would be subject to clause 18.4.

MR BANKES: (Inaudible).

MR BREALEY: Market forces and judicial forces.

MR JUSTICE ROTH: Well, there's a Code of Conduct, which should guide the drafting in the first place.

MR BREALEY: I accept that. I accept that. I think you were taken to this, which is that what is economically viable was amended on 28th.

MR JUSTICE ROTH: Yes.

MR BREALEY: So that's termination.

The funder's return. I am conscious of the time.

So this is the last point I want to address on the funding. It is said that essentially the multiples are too high. I would like to make three points in response to this.

The first is, as Mr Bankes has said, that the return is paid out of undistributed damages. We see that in D, 101, which is the 18th October '24 amendment letter:

"With regard to your obligations we agree that any entitlement to project costs, commission, deferred base fees, success fees, ATE will be payable out of

undistributed damages."

This is always subject, of course, to the Tribunal.

I don't want to score points too much but again compare this to BIRA's funding. I will not go to the agreement. Just go to Mr Goodacre's statement, which is at B, 5848. This is Mr Goodacre of BIRA's witness statement. It is volume 7, tab 4, 5848. This is BIRA's CPO. We know damages in our case are paid out of undistributed damages.

I refer the Tribunal to paragraph 63 of Mr Goodacre's statement. He says:

"In consideration for making a substantial budget available to BIRA to pursue the proposed collective proceedings, the LFA provides for certain payments to be made to LCM from the recovery", the recovery of the damages, "if the claim is successful. The return ... is based on a multiple ..."

I don't know what the certain payments are, but I can only read what I read and that is what is Mr Goodacre has told the Tribunal in his witness statement, that the certain payments will be made to the funder from the damages.

Therefore that is, if correct, a difference between the two. That's certainly his perception at least of the agreement that he has concluded.

That was the first point and really that is a key point.

The second point I want to make is that the nature of the funding was similar to that which was certified in Gormsen. Mr Goodacre himself says the terms that have been certified in the past may be considerably reasonable and Professor Stephan would agree with that, and in this respect may I just refer to the Innsworth letter of 1st November, and that is bundle E, one of the last few documents I will go to, bundle E, page 405 because Innsworth the funders wrote two letters. They wrote one letter essentially amending schedule 3 and clarifying the terms and it wrote a longer letter on 1st November 2024 which starts at E, 405, essentially in answer to BIRA's criticism of its funding arrangements because we know that Innsworth Capital is very

experienced in this matter. It has some previous agreements that have been certified and the point I want to make is at E/407. This is Innsworth's response to the submission. 407:

"Subject to the approval ...

Innsworth Capital acknowledges, consistent with the Stephan LFA, that the level of commission will be subject to the CAT's approval, at its discretion, of an award of costs, when the relevant circumstances are known."

Then it goes on:

"Pricing model reflected pricing used in the (now certified) Gormsen case.

The funding" -- this is the original funding -- "made available in the 7th June 2024 Stephan LFA, including the commission levels and multiples, reflects the commercial terms agreed in the now certified Gormsen case."

If you take Mr Goodacre at his word, something that has been certified before is not necessarily unreasonable and inappropriate.

The next paragraph essentially leads into my last point on the commission rate. You can see what Innsworth say there, but in my submission the Tribunal should be slow to delve into the commercial bargain struck between the representatives and the funder, because if the Tribunal really wish to get involved in the commercial bargain, it would need to have access to far more commercially sensitive information than it tends to have and indeed in this case.

For example, here in this larger paragraph you will see that Innsworth say that they fund complex large scale group actions. They have a portfolio and they have expertise, having funded many claims worldwide. They have committed £30 million towards the Professor's costs of litigation and have guaranteed £25 million in respect of adverse costs, £25 million compared to £15 million from LCM, and we see that its funding Commitments are secured by a guarantee by Elliott Associates, which is one of the

oldest and most experienced funders with billions of dollars behind it.

Now we do not have details of how long the LCM fund is. We don't have any details of the guarantee the fund has. We don't know what risk profiles LCM has attached to the claim. We don't know the extent to which LCM may have hedged its bets by agreeing to fund both claims, the consumer claim and the seller's claim. In principle these risk assessments are highly confidential to the funder and the qualitative assessment is pretty confidential to the class representative.

Now of course you can call-out certain commercial terms, but I won't repeat, but we have set out the comparison between the amended terms and LCM's terms at paragraph 40 of our skeleton. We say that they compare pretty favourably, but my short point is on the commercial terms that the Tribunal should not be overly concerned with the risk assessments and the business models of the funder when the return is not directly affecting the class. That's the important point. There is a lot going on here. As I say indemnities, exposure, risks, portfolios, all feed into a risk assessment and a qualitative assessment. It is artificial just to say "You are 9 and I am 5.5". The Tribunal will need to know a lot more of what goes behind the 5.5 and the 9.

The short point is we don't have to go behind it unless there is something crazy, because it is all coming out of undistributed damages and the Tribunal always has the ultimate say in it.

Very quickly and lastly on proposed class representative unless there is --

MR JUSTICE ROTH: There is the point that links with what you have been saying, because the other point brought by Ms Ford is we see this very significant reduction in the multiples made on 28th October in the new schedule 3 compared to the original, the rates of commission and the deletion of 12.1(d) and the reduction of the threshold for termination.

If that can be agreed with the funder, how much control or indeed concern was the

class representative expressing at the outset when he was asked to sign up to the original agreement?

MR BREALEY: Sir, two responses to that. The first is -- that's why I wanted to go to the 1st November letter --

MR JUSTICE ROTH: Yes.

MR BREALEY: -- is that the terms in the original funding agreement were similar to the amended terms that were passed in Gormsen.

MR BANKES: The original terms or the amended terms?

MR BREALEY: The original terms. Depends which one you are talking about. The amended did -- let's just go --

MR BANKES: Gormsen ultimately certified at 8.5 times committed funds, not 14 times notional committed funds.

MR BREALEY: The 14 -- can I just go to the 1st November letter, because there is obviously two amendments? This is E/407. I referred to E, 407:

"The [original] funding made available [on] 7th June" -- so that's the unamended Professor Stephan agreement -- "including the commission levels and multiples, reflects the commercial terms agreed in the now certified amended Gormsen case."

That is quite important to recognise. So when one is saying to Professor Stephan "How could you do that? How could you agree these terms on 7th June 2024? The answer would be they were certified in the Gormsen case.

So that is my first response to you, sir, that he was acting reasonably by concluding terms that had been certified. That's the first point.

Then the second point is it is a market. BIRA comes along. As a result of I think your direction, sir, people saw the different funding agreements and it was and the Professor said potentially the different terms and what happened was market forces brought Innsworth down. It is to the Professor's credit -- not a vice -- it is to his credit

that he said "I want better terms" and BIRA say they are materially better terms. So those are my two responses.

MR JUSTICE ROTH: There is also really the last paragraph of the Innsworth letter on page 408.

MR BREALEY: That is an important point. So it is acknowledged that the Professor obtained independent advice from the named QC -- KC, both ahead of the inception of the original LFA and also ongoing.

MR JUSTICE ROTH: Is Mr Marven cost counsel? I imagine he possibly is.

MR BANKES: I am sorry to keep nagging at you when time is limited. I have Gormsen open at page -- second bundle of authorities, page 971 and I can't see the times 14 number that you say is equivalent. I see the 8.3 number. I am just trying to understand the submission you make. I have your second point about having taken advice.

MR BREALEY: G, 154. G, 154, schedule 3 is the 14 times:

"The commission shall be an amount equal to the sum of ..."

MR BANKES: What is this document?

MR BREALEY: This is the Gormsen -- tab 6, G.

MR JUSTICE ROTH: G. I haven't got G.

MR BREALEY: G, 154.

MR BANKES: This is a document that we looked at earlier. My question is why is there reference on the Tribunal's decision to 8.3? How does that reconcile with the assertion that -- I don't know that this copy of the agreement was the one that was certified. Is there a straightforward answer?

MR CARALL-GREEN: It is a multiple of what the President has called exposure, which is different from costs. So 8.3 is a multiple of exposure which is a total of £90 million there, which is different from project costs and different from commitment as well.

MR BANKES: Then the Gormsen terms were different. It was a multiple of exposure, not a multiple of something else.

MR CARALL-GREEN: No, no. The President has -- the Gormsen terms are the ones you have been taken to in G, in bundle G.

MR BANKES: Yes.

MR CARALL-GREEN: At page 154. So the Gormsen terms do provide commitment times 14. Then what has happened in that passage in the judgment of Gormsen that you are looking at is that the President has taken it upon himself to evaluate the return using a different mechanism, so not looking at the return on commitment, which is what the contract provides for, but to look at the return on exposure, which includes the ...

MR BANKES: Thank you. Sorry. One final question. The original agreement signed up to by Professor Stephan is also an exposure multiple, not a (overtalking).

MR CARALL-GREEN: No, it is commitment. So the original terms signed up to by Professor Stephan are the same as the Gormsen ones at G 154. There are three concepts: so a commitment exposure and costs are three different things. Cost is what is paid in cash terms outlay. Commitment is what could be paid out in outlay terms and exposure includes possible downside by way of adverse costs.

MR BANKES: Okay. So does Gormsen include an ATE?

MR CARALL-GREEN: Yes, the £90 million figure that's being talked about in Gormsen is the total exposure, i.e. in the worst case scenario all commitment paid plus all adverse costs paid out as well.

MR BANKES: Okay. So the comparable is not visible on the face of the judgment. You have to --

MR BREALEY: If we just go to 971.

MR JUSTICE ROTH: 971 of?

MR BREALEY: This is the authorities bundle.

MR JUSTICE ROTH: Authorities.

MR BREALEY: Volume 2.

MR JUSTICE ROTH: This is the Gormsen judgment.

MR BREALEY: This is the Gormsen judgment. 971:

"Expressed in tabular form, the position is as follows"

and you get the multipliers.

You see the 14 there in that table. Then you get at sub-paragraph (4), as Mr Carall-Green has explained, the Tribunal then went on to express a slightly different approach concerning exposure. We pick up on this in paragraph 40.3.5 of our skeleton, where we say that:

"Innsworth's maximum return on exposure, a metric that the Tribunal used in Gormsen, is only 5.1, whereas in Gormsen it was 8.3."

Our skeleton refers to exposure and makes the point that it is 5.1.

So this 3.8 and 8 times 3 is a metric that the Tribunal itself used relating to exposure.

MR JUSTICE ROTH: The multiple of costs is 14.

MR BREALEY: Yes. Essentially the criticism is made of Professor Stephan when he agreed on the original terms, (a) he took independent legal advice and (b) he could see that similar terms had been certified in Gormsen. So it is not unreasonable for him to have accepted those. Then what happens is you get the carriage dispute and as a result of basically market forces the terms got amended, and it is to the Professor's credit that he achieved in the words that BIRA say a materially better outcome.

We do at paragraph 40 of our skeleton -- that's where we do compare the commercial terms with LCM. So now Professor Stephan's terms are in BIRA's words materially better. Innsworth's maximum entitlement is now a mere 11.9 of Professor Stephan's

estimated maximum damages. Innsworth's return after certification but before disclosure is 3.5 times, which is not likely to be very different from LCM's return, 3.5. Innsworth's return immediately before trial is only six times, which is not very different from LCM's return of 5.5. Innsworth's return from the beginning of trial, 9, is higher than LCM, but only to the extent commensurate with the higher value associated with the Professor's case.

Again I make the point that Innsworth is guaranteeing £25 million of adverse costs whereas LCM is 15. No criticism, because the original terms looked reasonably (a) because of the independent legal advice, (b) because of Gormsen and then to criticise him for trying to get them amended, it should go to his credit. He is acting for the benefit of the class rather than to his detriment.

MR JUSTICE ROTH: I may have missed it, Mr Brealey. Did you say that -- you gave a figure for the Innsworth return under the original litigation funding agreement by reference to exposure, did you? You said it is the same as in Gormsen.

MR BREALEY: I gave the figure now.

MR JUSTICE ROTH: Which is in 40.3.5. Is that right?

MR BREALEY: Yes.

MR JUSTICE ROTH: That's the 5.1, which you were comparing to the 8.3. Yes.

MR BREALEY: Sir, is it okay if Mr Houpis leaves?

MR JUSTICE ROTH: Yes. We never expected Mr Houpis to stay beyond -- the idea was the two experts should be here yesterday and were not required for today. Just one moment.

I understood the terms were the same as effectively in Gormsen as when originally agreed, albeit that the Tribunal in Gormsen did indicate that they thought the funding agreement seemed to give an excessive return. Is that right?

MR BREALEY: No. Again I go back to E, 407, which is Innsworth's letter:

"The funding made available in the 7th June 2020 Stephan LFA", that's the original terms, "including the commission levels and multiples, reflects the commercial terms agreed", in the amended Gormsen, if you can put it that way, "in the now certified Gormsen case".

MR JUSTICE ROTH: Those are terms we have in the judgment. Is that right?

MR BREALEY: The judgment which certifies them.

MR JUSTICE ROTH: Yes.

MR BREALEY: Yes.

MR JUSTICE ROTH: We just -- I think our problem is we are just -- but those were terms, although certified, which the Tribunal criticised. If we look at page 971, which is the authorities bundle, tab 17, where at page -- we have the multipliers on project costs in tabular form. One can see that they go up to times 14. That was indeed what the original LFA schedule 3 did. So I can understand that it reflects those terms, but the Tribunal did criticise that. They criticised that it seems not on the basis of the multiplier of project costs, but on the basis of return on exposure, which Mr Carall-Green pointed out is a different measure, but what I am not clear is whether these original terms then were equivalent on exposure to the Gormsen terms which the Tribunal criticised or whether they were materially better. I can see that as amended they are significantly better and that's your point in the skeleton. It is not 8.3 times exposure. It is I think 5.1 times exposure. We can see that Innsworth say that. We are just trying to understand it. If they are just saying it is the same and reflect those terms, maybe it does, but those are the terms that the Tribunal had serious misgivings about.

MR BREALEY: In the terms of 7th June 2024 they were, as I understand it, amended to amend the dates that we see in that second column. So the Tribunal said:

"What is not on the face of it ... a return 21 months later of 8 times 3 exposure."

So there was an objection to the return 21 months later.

MR JUSTICE ROTH: Have you been following this judgment? In the Innsworth Capital letter of 1st November they say:

"... reflects the commercial terms agreed in the now certified Gormsen case."

Are they referring to the terms as set out in the judgment or are they referring to something else?

MR BREALEY: They are referring to -- if one goes to schedule 3 at page 8163, the original, those multiples have been -- the dates when these multiples kick in were changed. The multiples when these dates kick in were changed and this schedule 3 was passed in Gormsen, this schedule 3.

MR JUSTICE ROTH: Sorry. 8163.

MR BREALEY: 8163 has times --

MR JUSTICE ROTH: This is the Stephan schedule 3, isn't it?

MR BREALEY: Yes.

MR JUSTICE ROTH: That doesn't correspond to ...

MR BREALEY: I am going to let Mr Carall-Green, because I understand he is more knowledgeable on this.

MR CARALL-GREEN: Sir, if I can have a go?

MR JUSTICE ROTH: Yes.

MR CARALL-GREEN: I am looking at the Gormsen judgment.

MR JUSTICE ROTH: Yes.

MR CARALL-GREEN: At paragraph 39.3. So we have some terms there and they are criticised. Then the Tribunal says at paragraph 40 those terms underwent significant change. The question is what were they changed to. The answer is they were changed to what you see at G, 154.

MR JUSTICE ROTH: I see. So when they say in 40, paragraph 2:

"The operation of the ratchet was materially softened in a manner we do not consider it necessary to articulate, but which affected time frames and trigger points",

it means that the table above was actually not the final.

MR CARALL-GREEN: Exactly so. If you want to see the difference, you can just look at the dates in that table and then you can look at the G document.

MR JUSTICE ROTH: Which is you say the final one?

MR CARALL-GREEN: Yes. So that then has different dates, and you can compare those. So where we end up after Gormsen is that the table at sub (3) is not approved. The terms at G, 154 are approved and then when Professor Stephan agrees his funding agreement, it is based on G, 154 or it is not based on G, 154 but it is consistent with G, 154.

MR BANKES: That I now understand. Fantastic. I wasn't previously. I see that in both documents we have the times 14. You assure me that by some sleight of financial magic times 14 actually equals times 8.3.

MR CARALL-GREEN: Exactly, because times 14 of the smaller number, which is the commitment, is only times 8.3 of the bigger number, which is total exposure in Gormsen, that is, not in Stephan.

MR JUSTICE ROTH: It does appear that in that table there may be some confusion between project costs in the third column and total commitment in the fourth column, because the times 14 seems to be -- and times 6 and you can trace it, seems to be applied to project costs.

MR CARALL-GREEN: One would imagine the heading project costs actually ought to be commitment.

MR JUSTICE ROTH: It all ought to be consistent anyway.

MR CARALL-GREEN: One way or the other. It ought not to be costs one imagines, because costs would not be consistent throughout the life of the litigation. The

commitment would be, but the costs would go up as time goes by.

MR JUSTICE ROTH: Yes. Thank you. I think that's cleared it up.

MR BREALEY: E, 154 and B, 8163 are the ... So that's my response to the criticism. He did take legal advice. Terms did appear reasonable, because they have been passed and then he shouldn't be criticised for trying to obtain materially better terms and he did.

I am conscious of the time. Maybe just on the class representative we just need to go to two documents. The first is the Professor's own witness statement, which is at B, 8094. So it starts at 8087. I am not going to deal with suitability of the claim. I am just going to deal with the suitability of the Professor as a class representative.

The first point is there is no reason why he has to be a trade association to be a class representative.

MR JUSTICE ROTH: Yes. Well, you can take that as read.

MR BREALEY: That's read. So he sets out at paragraph 25 what has motivated him. I would cross refer that to Mr Gallagher's witness statement which for the Tribunal's note is A, 201 where he sets out how many academics have actually been class representatives.

MR JUSTICE ROTH: We have that point. We know you don't need to be clearly by association.

MR BREALEY: The second point I would make is his advisory consultative panel, which in my respectful submission is impressive. This I would pick up at 8102. He has:

"... a consultative panel made up of prominent individuals ..."

8102, paragraph 28. He has three members of his consultative committee: Lord Neuberger, Sue Prevezer, KC, and I emphasise Mr. Stephen Robertson because it is said that the Professor lacks experience in bricks and mortar or retail, whereas

Mr. Robertson is a former Director General of the British Retail Consortium. He is currently acting as Chairman of Retail Economics. Non-executive Director of Timpson. So we do have on the consultative panel someone with considerable experience of retail.

MR JUSTICE ROTH: Yes.

MR BREALEY: I can basically finish by saying this is a gentleman who has brought a well-crafted claim. On the face of it, it does not exclude various products and various sellers. He is acting in the best interests of the class. Abuse 2 is being advanced as a standalone claim and he is taking -- at least he is trying to bring a claim based on abuse 3 whereas BIRA is said to act in the best interests of all sellers, which hasn't even really advanced the case on abuse 2, save in combination with abuse 1 and has not even advanced a case on abuse 3. Yet it is said against us that BIRA is far better equipped to act on behalf of sellers. We would say there is a serious risk BIRA will under-compensate sellers as a class.

I make one last point on the algorithms.

MR JUSTICE ROTH: I think we have covered the algorithms.

MR BREALEY: It is just that when one asks why are BIRA not -- they don't want any algorithms, it is because they have such a narrow claim. They are not seeking damages for abuse 2, for example.

MR JUSTICE ROTH: I think we have covered all that. Before you sit down one question also on your litigation budget which is at B, 8165. That is just about legible. Do you have that? Can you see that?

MR BREALEY: I am looking at a screen.

MR JUSTICE ROTH: The class representative Professor Stephan, he is clearly being remunerated. There is 318,000 if it goes through trial. Are you able to tell us anything about the rate of remuneration? Is it an hourly rate or a day rate? Obviously there will

be people in court who know.

MR BREALEY: I mean, the answer, and I am just trying to find it in the witness statement, it is his ordinary consulting rate of £250 an hour.

PRESIDENT: Is it in the witness statement?

MR BREALEY: Under paragraph 33, 8105:

"Under no circumstances will I stand to receive any part of any damages which may be awarded in the proceedings. Instead the funder has allocated a part of his overall budget to allow it to pay me hourly rate, currently £250, for the time I spend on the case, which I will properly document."

MR JUSTICE ROTH: Yes. Thank you. Yes. No further questions other than the undertaking that, if selected, Professor Stephan and Innsworth Capital will amend the litigation funding agreement to make I think was it clause 12.4 or at any rate to make the termination provision subject to the dispute mechanism. Could that be set in writing?

MR BREALEY: Set out in writing and we will send it to the Tribunal tomorrow.

MR JUSTICE ROTH: Yes, please. Yes, Ms Ford.

Reply on behalf of BIRA

MS FORD: I am very mindful of the time. I have four very brief points.

MR JUSTICE ROTH: That's fine. Thank you.

MS FORD: First is a response to the submission that was made in relation to the witness statement, the BIRA witness statement, paragraph 63. So this is B, tab 3, page 5848. Mr Goodacre's witness statement. Attention was drawn to paragraph 63 where it says:

"In consideration for making a substantial budget available to BIRA to pursue the proposed collective proceedings, the LFA provides for certain payments to be made

to LCM from the 'recovery' as defined in clause 1.38 if the claim is successful. The return from the 'recovery' is based on a multiples of the costs LCM has incurred (the 'capital deployed') with the multiple increasing depending on how long the proposed collective proceedings last, as set out in clause 10.5 ..."

I just wanted to show the Tribunal the relevant provisions because it was insinuated that this in some way involved an understanding about payment of undistributed damages.

Clause 1.38 is at page B, 6181.

MR JUSTICE ROTH: Clause 1 point?

MS FORD: 38. So this is the clause.

MR JUSTICE ROTH: Recovery.

MS FORD: Recovery that has been referred to in paragraph 63. It essentially means any amounts received by or on behalf of the PCR, etc, etc. The Tribunal can just run its eyes over the definition. Then there are provisions in the LFA about how the recovery is to be received and distributed. They are clause 10, which is at B, 6188.

"Receipt and distribution of any recovery."

Probably the most relevant provision is 10.2:

"Subject to any order of the Tribunal, the PCR shall hold the recovery on trust firstly for the class members and then the funder and, to the extent their charges have not been paid, solicitors, counsel and the ATE insurance providers."

Then the other clause he refers to is clause 10.5, which is the multipliers that I have already shown the Tribunal. So insofar as it was being intimated there was something somehow objectionable about all that, we would say clearly not.

That's the first point. The second point is the reliance that's now been placed on Innsworth's letter of 1st November. When that was sent we made the point in correspondence it was essentially cherry-picking, because we see a letter that the

funder has composed in order to essentially make submissions, and we wrote back and said "Can we please see all the relevant correspondence that relates to all the amendments that have now been made to the LFA", and we were told "No, we are not prepared to provide any of the correspondence". That essentially means that we are provided solely a single letter that Innsworth has chosen to make for public consumption and a lot of reliance has been placed on that for the purposes of making submissions this afternoon and we have not seen any of the other relevant correspondence. So we do say that raises a real cherry-picking concern.

MR JUSTICE ROTH: Well, I think the only, it seems to me, relevant reliance is to say among the things that were said, (a) the original terms are the same as the terms in Gormsen.

MS FORD: That is certainly one of the matters for which it is being relied on.

MR JUSTICE ROTH: Whether that was the intention or not, but just as a matter of fact and we have been shown the terms in Gormsen. Secondly, that Professor Stephan had independent advice from costs counsel. You will not see the advice.

MS FORD: Innsworth said they have no objection to it being provided. That's what they said in the letter.

MR BANKES: (Inaudible) about whether you should sign the contract.

MS FORD: I think they say they have not seen it.

MR JUSTICE ROTH: It is all very well for them to say they object but one would not expect to see the advice. It is the fact that Professor Stephan took or arranged to have independent advice and that's not a submission. That's a fact. I am sure that is not a bald statement.

MS FORD: I wasn't suggesting that.

MR JUSTICE ROTH: Those are the two relevant facts that for my part I take out of

that letter.

MS FORD: Sir, yes. A simple point we make is it is to provide one element of correspondence which has gone worth back and forth which is considered to be of assistance for whatever reason and not the rest is cherry-picking. We don't know what else in this agreement was asked to be amended and the answer was "No, we are not prepared to amend it".

The third point does actually relate to Gormsen and the submission was made that Professor Stephan took comfort in entering into these terms because these are the ones endorsed by the Tribunal in Gormsen.

We struggle to understand that as a submission, because Gormsen is the very case where the Tribunal says "Ordinarily we would agree that one doesn't enquire into the terms of funding but in some cases things are so extreme that they require calling out. This case" says the Tribunal "requires calling out". Then when they go on to certify, they do so on terms, paragraph 41(2) they are absolutely at pains to explain that they are not in any way endorsing the terms of the funding. They say:

"We would not want there to be any suggestion in the Tribunal's certification of these collective proceedings that we are in any way approving or endorsing or expressing any kind of approval of the terms on which these proceedings are funded. We are just left with no choice."

So insofar as it has been submitted that this is the basis on which Professor Stephan took comfort that what he was agreeing was reasonable terms for the class, in our submission we cannot see how he could possibly have derived comfort from what the Tribunal says in this judgment.

MR JUSTICE ROTH: Yes.

MS FORD: The final point, the terms of settlement. The point that was made there at some length was that the ALF Code of Conduct was not before the Tribunal in

Merricks. The implication is that had the Tribunal realised that there was this Code of Conduct which said that binding settlement according to funders was a good plan, then it would have decided differently.

Now the Code of Conduct is, of course, an industry agreed code. In our submission it simply does not go in any way to the principle that the Tribunal has indicated in Merricks that a class representative, who is supposed to be acting in the best interests of the class, shouldn't be putting himself in a position where he can be bound by the funder. It simply doesn't go to that point of principle that this fiduciary relationship should not be compromised by putting yourself in a position that you are bound by the funder.

So in our submission the Tribunal should be slow to depart from the principles that have been outlined in Merricks that were essentially confirmed by what the Tribunal required in the Le Patourel and which were also the submissions that were made and endorsed on behalf of the class representative in Ennis, that settlement must be for the PCR alone.

Sir, those are my submissions.

Further reply on behalf of PROFESSOR STEPHAN

MR BREALEY: I am terribly sorry. Can I just make one point? You did stop me doing the settlement provision. I just wanted to emphasise that Merricks and Ennis are not the last word. Obviously there is the decision in Trucks, which is in the bundle. If I can just give you the reference, it is Trucks and it is volume 2 at 900. It is not an unimportant point and I was going to make it and then I didn't. It is paragraph 80 at 926 in Trucks where on 2nd August 2024 the Tribunal referred to a settlement provision where there was a binding provision from a QC. Paragraph 80 at 926. I needed to respond to that.

MR JUSTICE ROTH: I may say I am sure the Code has been before the Tribunal before, but don't ask me which case.

MR BREALEY: If you don't know, no-one does.

MR JUSTICE ROTH: Whether on this point that I don't remember. Well, thank you all, both senior and junior counsel and your teams for all the hard work. It has been a very concentrated three days and obviously you have left us with a lot to reflect upon. You will be informed in due course when a judgment is ready. Thank you.

(5.13 pm)

(Hearing concluded)