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5 **IN THE COMPETITION**

Case No. : 1595/7/7/23 & 1644/7/7/24

6 **APPEAL**

7 **TRIBUNAL**

8
9 Salisbury Square House
10 8 Salisbury Square
11 London EC4Y 8AP

12 Tuesday 6th May– Thursday 8th May 2025

13
14 Before:
15 The Honourable Mr Justice Roth
16 Keith Derbyshire
17 Charles Bankes
18 (Sitting as a Tribunal in England and Wales)

19
20 **BETWEEN:**

21 **Between**

22 Robert Hammond

Proposed Class Representative

23
24 -and-

25 Amazon Inc and Others.

Proposed Defendants

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27
28
29 **And Between**

30 Professor Andreas Stephan

Proposed Class Representative

31
32 -and-

33 Amazon Inc and Others.

Proposed Defendants

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37 **A P P E A R A N C E S**

38 Philip Moser KC and Ben Rayment (Instructed by Charles Lyndon Limited & Hagens
39 Berman EMEA LLP) on behalf of Robert Hammond.

40 Kieron Beal KC, Laurence Page and Hannah Bernstein (Instructed by Geradin Partners) on
41 behalf of Professor Andreas Stephan.

42 Jon Turner KC and Oscar Schonfeld (Instructed by Herbert Smith Freehills LLP) on behalf of
43 Amazon Inc. & Others in respect of the Hammond application.

44 Daniel Piccinin KC and Kristina Lukacova (Instructed by Covington & Burling LLP) on
45 behalf of Amazon Inc. & Others in respect of the Stephan application.

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(Wednesday, 7th May 2025)

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(10.34)

MR JUSTICE ROTH: Mr Moser, before you resume, Mr Beal, were you able to take instructions on the matter we left with you yesterday?

MR BEAL: I have discussed it with Mr Moser. He also has a suggestion for the Tribunal. I do not know whether it is convenient for him to make the suggestion and I will then follow it. But if you want me to deal with it, I am very happy to do so.

MR JUSTICE ROTH: Yes, I do not mind which order. I am waiting because it hung over from your submissions.

MR BEAL: Yes, the proposal for the Tribunal which I am happy to outline.

MR JUSTICE ROTH: Yes.

MR BEAL: It is just the question about when you want to hear about the proposal. Okay, Mr Moser has given me a change of plan.

MR JUSTICE ROTH: Yes.

MR BEAL: So the proposal that we are suggesting is essentially just, without waiving privilege, those who sit behind me and my instructing solicitors have already taken steps in the light of the suggestion to secure indicative costs and quotations from specialist costs, consultancy services. In particular project cost to us and costs to lawyers, depending on how they categorise the service. We have obtained two quotes and made inquiries more generally in the market. That has been undertaken. Professor Stephan is prepared to engage a firm of cost lawyers without amending the budget or the LFA as a matter of principle, subject to finalising the details. Obviously, that is based on the indicative quotes we have received, where we think he can fit it within the existing budgetary allocations. Budgetary allocation would either be within solicitor's fees or within clerical, administrative support services. The budget is sufficient to cover the indicative fees that we have had cited to us, but we will obviously

1 need to finalise the details. The proposal is that the specialist costs firm carrying out
2 an independent review of solicitor and counsel costs potentially to extend to
3 specialist... The expert economist's fees as well, that is for discussion with the firm,
4 and whichever firm is selected. And the suggested periodic review would be at least
5 once per quarter. We will need to take away the details of how that is put in place,
6 whether any changes need to be made to the LFA or the budget. We do not think they
7 do at the moment, but it depends on the finalising the details. On what we would
8 therefore propose is my having formerly indicated to the Tribunal that this is the route
9 we go down, once we finalise those arrangements, we will of course, notify the Tribunal
10 and the other parties, and confirm what we have done. Now, whilst the terms of that
11 work, that will be privileged for Professor Stephan, what we anticipate is that at the
12 cost stage of these proceedings, that work would be readily available for review in the
13 usual way. But it would show, in a sense, an ongoing monitoring of the cost situation
14 and that material would therefore be available for the cost assessment part of the
15 trial. Now, Professor Stephan will take into account that analysis before agreeing to
16 the payment of legal bills issued to him, and he will reserve the right to seek any credit
17 or discounts if he thinks the solicitors or counsel have overegged the fees. I use that
18 term as a colloquialism. To the extent that he considers it is reasonably necessary to
19 do so. Any discounts are likely to be reflected in costs for the following quarter. So that
20 is the outline of the proposal. Could I make five short points for the record so that the
21 Tribunal understands the ... I will not say it is a caveat because it is not a caveat, but
22 the context in which that proposal is made. Firstly, the PCR and Innsworth already
23 check invoices carefully and raise queries where they have them. That, as it happens,
24 is currently conducted on a monthly basis. And fees and invoice notes are signed off
25 on a monthly basis by Professor Stephan in consultation. But there is a two-step
26 process, each of them looks at the invoices and fees, and forms a view as to whether

1 or not any push back is necessary. Again, colloquial term. My second point is that
2 there is a risk, of course, that these costs may put pressure on the budget. We do not
3 anticipate at the moment, but looking at the fees that have been indicated that it will
4 do so, but that is of course a risk. And the third point, of course, is that this does
5 introduce a new layer of costs into the budget. So, we will have a consultancy firm of
6 lawyers and cost draftsmen to the extent that they are not lawyers, providing services.
7 And there will be interaction if there is a query between the existing solicitor's teams
8 and counsel teams, and that cost specialist to the extent that it's necessary to do so
9 to resolve any queries that the Proposed Class Representative may have. So, there
10 is an additional layer of cost built into this. Of course, one hopes that it will be modest,
11 and one hopes that they may produce benefits in a sense of reduced costs elsewhere.
12 So, I appreciate that is thrown into the mix. But I am simply making the point that this
13 is additional cost as such. And that is relevant because we say fourthly, that we will be
14 suggesting this is a recoverable expense on an inter partes basis in due course. It will
15 inevitably be a project cost for the funder, but we are putting down the marker at this
16 stage please, with respect, that we will view this as a recoverable expense in the same
17 way as other solicitor's costs. Because it is part and parcel of the monitoring
18 process. For purposes of complex, lengthy litigation like this and it has recently been
19 suggested by the Tribunal as part of the iterative process of working about how these
20 arrangements work on the ground. My final point is just to clarify, if I may, on behalf
21 on the funder, that the funder in this case at least, does not take the view that it is to
22 its advantage to have higher costs. And notwithstanding that they are project costs,
23 this funder is very assiduous in trying to keep costs down as far as possible, not least
24 because of the risk of not being successful and it not being added into the recoverable
25 level of return for the funder using the arrangements that you have seen, the
26 Commissioner arrangements that you have seen. So, I simply wanted to put that down

1 on behalf of the funder, unless it be thought that they were somehow going out there
2 and thinking aha we have got large costs that is going to help us. That is not the way
3 they work.

4 MR JUSTICE ROTH: No, that is really helpful. Whether it actually adds, at the end of
5 the day, to cost, or indeed, as a method of keeping costs down so that, as it were,
6 justifies the expense, and whether it has a net effect one obviously does not know. But
7 –

8 MR BEAL: It does at least address the difficulty of tracking fees incurred.

9 MR JUSTICE ROTH: Yes, well that is very helpful and I think on the point you raised
10 that Professor Stephan will contend that this is a recoverable experience. That is not
11 something we need to address now, you have put down your marker. I expect it is not
12 going to be a major item of expense in the total mix anyway, but that is for another day
13 now. No, but that is very helpful. Thank you.

14 MR MOSER: It may be convenient, if you like, if I follow along immediately to say that
15 we have independently come to a rather similar suggestion. We also want to put down
16 a variety of similar markers. I will not repeat everything my learned friend has said.
17 Where we started from, was seeking to avoid any unintended consequences as to
18 both further expense and delay. Because, obviously, it would be a further expense for
19 either the costs draftsman or we will see what the solution is that I am about to suggest.
20 And there is also the issue of cash flow for solicitors getting paid, but every further
21 milestone that is put in the way of that has the tendency to perhaps delay payment.
22 But again –

23 MR JUSTICE ROTH: Well, it does not really. I mean, this is what... If you were a large
24 company and not an individual, your in-house counsel would be looking at the
25 solicitor's bills as they come in and checking them and reviewing them and querying
26 them as appropriate. So, it is simply to introduce what is very common in large

1 commercial litigation, but because it is collective proceedings it is done by a Class
2 Representative who is an individual, something that gives him the, sort of, resource
3 and benefit, and that would normally be there in people bringing multi-million pound
4 accounts. I do not think it is thought to cause delay for solicitors and counsel if they
5 work for a multinational company.

6 MR MOSER: It is inherent in the solution we suggest that we are satisfied that it is not
7 going to cause significant delay. In our case what we suggest is we have on our
8 advisory committee someone called Charmaine Cole, who used to work for Clifford
9 Chance, and who has experience both of competition litigation and of costs. For some
10 reason amidst all the thousands of documents, the consultative group terms of
11 reference are not in the bundle. I wonder whether I might hand them up, please.

12 MR JUSTICE ROTH: Yes. And while that is happening can you confirm, because it
13 was not clear from her CV, she has conducted litigation in the English court, has she,
14 as a solicitor?

15 MR MOSER: Someone will check.

16 MR JUSTICE ROTH: Presumably it is Mr Hammond in court?

17 MR MOSER: Yes, she has been, and indeed is, involved in instructing counsel in the
18 UK.

19 MR JUSTICE ROTH: She is not at Clifford Chance, is she?

20 MR MOSER: She is not.

21 MR JUSTICE ROTH: No, I thought she is now an academic.

22 MR MOSER: She has [inaudible] role and I am told –

23 MR JUSTICE ROTH: Or she is in [inaudible], sorry.

24 MR MOSER: From time-to-time instructed counsel. I gather we are working on an
25 updated CV that is going to make these matters clearer.

26 MR JUSTICE ROTH: Yes.

1 MR MOSER: The proposal is that Ms Cole looks at it in much the way that is
2 suggested, and no less than quarterly, and where necessary we have also looked into
3 and costed a costs draftsman's services. And that a costs draftsman be brought in if it
4 is felt by Ms Cole and by Mr Hammond that it is necessary or would be of assistance
5 from time to time. So that is our suggestion. It has not sprung fully formed between
6 yesterday and today, and indeed my learned friend's suggestion also requires the
7 crossing of t's and the dotting of i's. But that is what we propose. And as I said, we are
8 going to submit the detailing to [inaudible] but I have seen it in draft, but I am afraid I
9 have not had time to [inaudible].

10 MR JUSTICE ROTH: Yes, thank you very much.

11 MR MOSER: And also, by the same marker of course that we would consider this to
12 be a recoverable cost at the end of the day. And also, that our funder does not have a
13 direct interest in driving up costs, despite the fact that when we come to funding later
14 on this morning, we are going to talk about multiples, and how it looks and the table
15 we have produced, our LFA does not actually work on multiples of costs. So that is not
16 actually in the interest of the funders in this case.

17 MR JUSTICE ROTH: Right. Can you say you will write it with the details when worked
18 out?

19 MR MOSER: Yes.

20 MR JUSTICE ROTH: Thank you.

21 MR MOSER: So, where I left off yesterday was Dr Pike's report, which bears those
22 comparisons with Dr Houpis, at least for abuse two and three. And, as I said, Dr Pike's
23 aim is to measure the illegitimate advantage on Amazon FBA offers, which in turn
24 allow them to charge higher prices, where the ability of the FBA sellers and FBA offers
25 charge higher prices is the concern that has been identified by the various competition
26 authorities. And unusually perhaps, we have, of course, also Professor Stephan's

1 [inaudible], who will be giving evidence of the fact that they consider that there was a
2 discriminatory effect. So, this is summed up in Dr. Pike's own summary. And [audio
3 cuts out]... [inaudible] if you can cast your eyes over paragraphs 33 to 34, that is really
4 the summary of everything that Dr Pike is going to do rerunning the algorithm.

5 MR JUSTICE ROTH: Yes. Well, I think I put to you that, that sounds very similar to
6 what Dr Houpis is planning to do. And, I mean, one point made by Amazon in its
7 skeleton is that, and I think it is paragraph 29, at page HB/67. The last sentence of
8 paragraph 29, "It is submitted that the prospect of two PCR experts carrying out
9 parallel exercises in isolation from each other should be regarded as intolerable, even
10 if the Tribunal were to conclude there are certain issues on which the PCRs and the
11 experts have articulated an adequate way forward to trial. There would need to be
12 careful case management to avoid duplication of effort." Well, we hope that is an
13 approach that you endorse.

14 MR MOSER: I do. I said something almost identical yesterday.

15 MR JUSTICE ROTH: And therefore, if we consider that it is plausible and credible
16 that one can proceed in the way that both experts are suggesting, then the appropriate
17 course going forward if both applications are certified, orders are made, is really that
18 one expert should do this, because it is the same exercise for the two cases. We do
19 not want two experts doing almost the same thing. And having then to answer both
20 experts. It should be one because where they are aligned, that is the sensible way in
21 which things should be done.

22 MR MOSER: Yes, they are aligned. There will be certain differences.

23 MR JUSTICE ROTH: Why is there a difference on this, of trying to remove the
24 discriminatory variable in the algorithm? What is the difference?

25 MR MOSER: Well here, I admit it is very hard to see the difference.

26 MR JUSTICE ROTH: It is exactly the same, is it not?

1 MR MOSER: I take your point, sir, but I cannot on my feet, without instructions, suggest
2 that either Dr Pike would be doing it for Professor Stephan or Dr Houpis would be
3 doing it for us.

4 MR JUSTICE ROTH: But in principle, you should be jointly instructing one expert for
5 a common exercise, and Amazon will have one expert that can answer it, not two
6 experts, and one answering the other.

7 MR MOSER: I would submit, certainly that there should be rigid case management to
8 avoid any sort of duplication between the experts.

9 MR JUSTICE ROTH: Yes.

10 MR MOSER: But we would not want to lose certain aspects of our methodology that
11 is not reflected in Dr Houpis' report, and no doubt vice versa. So, I would have thought
12 that this is something that could be agreed between Dr Houpis and Dr Pike, so that in
13 much the same way as my legal submissions are to some extent supplementary to
14 those made by my learned friend, Dr Pike's report would deal with the aspects that we
15 felt were necessary specifically for our class. I know we would be very loathe to lose
16 any input from Dr Pike because our case is, of course based on how he has put his
17 methodology, which is very similar in this regard, but otherwise not identical. And in
18 particular, when we come on to the other parts –

19 MR JUSTICE ROTH: Well, where they are doing different things, we fully appreciate
20 that, we are not saying you lose him as an expert or that Professor Stephan loses Dr
21 Houpis. But what I am basically saying is if we are satisfied, and they explain it slightly
22 differently, but that one or the other has a credible and well thought through way of
23 rerunning the algorithm without discrimination. And it is not a simple task to do, I think
24 everybody agrees that, it is a complex exercise. We do not want two experts spending
25 all the money doing an almost identical thing and then the Tribunal saying, well, this
26 one may seem slightly better than that one. Ones got to take a proportionate view on

1 it.

2 MR MOSER: I completely agree. I simply say I cannot on my feet now, much though
3 I would like to, between you, Sir, and me, just sort out all the details.

4 MR JUSTICE ROTH: No, I am not suggesting you, it is a more general approach that
5 one can take where we have, if both are certified, and then certainly, as it appears
6 today, it would be sensible that they are tried together, that it will be sufficient if we
7 have an expert who has an effective way of carrying out the exercise that they both
8 say needs to be done.

9 MR MOSER: No duplication. We hear you and indeed one could not disagree. In the
10 light of all that, I am uncertain the extent to which the Tribunal wants me to go into the
11 specifics of Dr Pike's modelling at this stage and Amazon's criticism of it, and Mr Holt's
12 criticism of it. It is clear from his reports that at this stage, without having access to
13 the FMA algorithm, during the relevant period, he does not pretend to know all the
14 variables that the FMA has taken into account, or precisely how it weighted the
15 different variables for the purpose of ranking offers for the Buy Box in the UK. He has
16 looked at some limited information in the public domain, as to relevant factors taken
17 into account by the FMA, and he took that into account in his preliminary analysis. So
18 above all, the offer price and also the Seller Performance Rating, the SPR, which
19 certainly the Italian authority AGCM said was inflated. You recall seeing yesterday
20 that what the Italians say is the FBA sellers were all marked up to a perfect score, and
21 that is also in the EC decision at recital 129, at least for 2015-2020. All the FBA sellers
22 are marked up to a perfect score regardless of their actual performance on things like
23 delivery and so on. And there is then also the offers' eligibility for Prime, which Dr Pike
24 actually has not modelled yet at this stage on the limited information available, but he
25 says, and that is his first report at paragraph 382, that he intends to do that, when
26 disclosure has been given. There is a sort of, slight twist for the post 2020 period in

1 relation to what has happened to seller performance ratings. And I would just like to
2 turn briefly to the EC decision, because I think we have not looked at that aspect yet.
3 That is at Authorities Bundle 5, tab 83, page 361, and for the PDF that is 327. Sorry,
4 3627. 3627. It is just worth bearing in mind that what seems to have happened since
5 June 2020, and we see that recital at 130 and following on page 3627 PDF. "In June
6 2020 Amazon replaced the description of seller performance metrics with direct
7 metrics that track performance for all types of offers." But what the Commission
8 preliminarily found at 132 is that what Amazon actually did, I will paraphrase slightly,
9 is they unilaterally adjusted the attributes based on observed anticipated performance
10 of the relevant carrier, and that has resulted in more significant adjustments for FBM
11 offers. "As a result, a negative adjustment of the attribute is likely to have a greater
12 impact on FBM than FBA." So, what has happened here is that since 2020, Amazon
13 says we are looking at the actual performance, but when the self-fulfilling seller says,
14 oh we can deliver on Thursday, Amazon says, yeah, well I do not know, you say that
15 but let us say Wednesday. Sorry, vice versa, we can deliver on Wednesday, you say
16 that, but let us say Thursday. So they adjust it negatively in a way that is not entirely
17 clear. So it may be that some extent of the discrimination has been perpetuated in the
18 new arrangement which is called the Delivery Promise Adjustment. And that remains
19 to be seen. So, from 2020 we may have, well, we certainly have very interesting
20 information on what they did to replace the SPR. We then have the Delivery Promise
21 Adjustment, the DPA. That may itself be discriminatory. If it is, that is also something
22 that would then again have to be taken out to get a fully unbiased algorithm. But that
23 is the sort of thing that has been looked at for now, that will of course be replaced by
24 the actual data once we get it from Amazon. Also at this stage, Dr Pike, we can
25 [inaudible] that bundle. But also, at this stage Dr Pike has looked at proxies, notably
26 the star rating system, for how he would estimate and model the effect of the

1 discrimination in terms of boosting the FBA sellers' probability of winning the Buy Box.
2 There are various criticisms that he has not taken into account this or that specific
3 factor. I will say two things about that. The first is, he did not actually have to go so
4 far as to do any preliminary modelling. All we needed for this stage was the
5 methodology. He has gone the extra step and said well, I am looking at the star
6 ratings, best thing, it is all I can see and had a go. But insofar as he has done that,
7 that is extra. The other point is, quite specifically, it is being said against us again that
8 he is not taking into account delivery speed. Now he has, I submit, not unreasonably
9 assumed that delivery speed, being an important factor, would be part of the star
10 ratings. We are surprised in two ways. First, we are surprised, we are having the
11 debate, because the debate around delivery speed was ... probably the main
12 argument raised by Hunter at the carriage stage saying oh, unlike Mr Harman, Dr Pike
13 has not looked at delivery speed. And I explained, I recall at length, how he has taken
14 into account delivery speed, and Mr Bankes may recall. Because he has taken into
15 account all of the factors which would remain essentially the same factors that Amazon
16 takes into account. It is part of his methodology. And if we look at his report in bundle
17 C1 at tab 12, page 257, paragraph 18, this was the response report for the carriage
18 hearing. So responding to Mr Harman's similar criticism. He talks about his preliminary
19 analysis inevitably being constrained. He has explained. And then halfway through
20 after [inaudible], "With information from disclosure on the various unobservable
21 elements of the algorithm, for instance the delivery speed variable, seller rating
22 variable, which I have thus far been only able to proxy using the star ratings, as well
23 as the methodology for constructing those variables, I will be able to rerun the test and
24 identify clearly for the court whether Amazon's algorithm was discriminatory." And of
25 course, unlike in *Stephan*, Amazon were there at the carriage hearing, so they heard
26 all of this. So the second surprise, the second surprise is that it is now asserted by

1 Amazon that, oh well, the star rating does not include delivery speed. As far as I know,
2 that is the first time that has been said. As I say, it seems unlikely that a high star
3 rating reflects nothing about delivery performance. But be that as it may, obviously in
4 the actual exercise, Dr Pike will not be using the star ratings, he will be using the actual
5 data on the SPR, including delivery speed and everything else. So these criticisms
6 are, in any event, irrelevant at this stage. But they are also, I respectfully submit,
7 unfair, because it is clear from Dr Pike's methodology that he always proposed to take
8 into account whatever the elements are that Amazon takes into account. We see that
9 in his Buy Box formula. If we look in this bundle, C1, tab 15, at page 383, and see his
10 exhibit 5, and it is quite useful to have just a glancing acquaintance with exhibits 5 and
11 6, which are his formulae. They are not as complex as some of these formulae are.
12 And you see at exhibit 5, the first section is the Buy Box win probability, which is the
13 unknowns plus the offer price, plus the seller performance. And it is clear that
14 whatever we do not know yet, and that may include if it is not in seller performance,
15 that may include delivery speed, will be part of the unknowns. And a similar exercise
16 is carried out over the page at 384, in exhibit 6, on the harm resulting from the conduct.
17 If we look at the unbiased algorithm holding sales volume constant at 6.1.2, Buy Box
18 win probability is offer price, seller performance unknown, [inaudible] not publicly
19 known it says under that how offer price and seller performance are computed and so
20 on. But of course, it will be once we are told. And the key point is once he has access
21 to the FMA, his method allows him to identify the discrimination and to remove its
22 impact in the counterfactual. And he says that we need not turn it up, but he says that
23 at paragraphs 319 and following of his first report.

24 MR JUSTICE ROTH: And he says there... He infers that seller performance is a
25 composite index capturing factors such as the speed and quality of a seller's delivery
26 process.

1 MR MOSER: Indeed. Which would be surprising if it were otherwise. So, yes, two
2 points, it does not matter at this stage because we are only modelling. But secondly,
3 it is also wrong to allege that he has not looked at the right factors. And then at the
4 second stage of his methodology, Dr Pike proposes to model the impact of the loss of
5 the discriminatory advantage. We have seen, and we see it again here in exhibit 6.
6 We saw yesterday the two scenarios, the constant price scenario and the constant
7 volume scenario. And we looked at figure 5 in his report. I will come to Amazon's
8 criticism of --

9 MR JUSTICE ROTH: This is the exploitative abuse you are talking --?

10 MR MOSER: This is all still the exploitative abuse. I am addressing you on the
11 exploitative abuse, and then I will have a few more words on pass on and then I will
12 come to exclusionary thereafter. So, Amazon has criticised, sticking first with the
13 constant prices scenario, the constant prices scenario in its response at paragraph 36,
14 that is bundle B, tab 5, page 75. And at paragraph 36 on page 75, they say, "For the
15 PCR to show that class members suffered loss in that way, Dr Pike would need to be
16 able to show 1) A lower priced non-FBA offer was available. 2) The corrected FMA
17 would have selected that offer." Over the page, "3) A certain proportion of purchasers
18 can be expected to have clicked on the featured offer unreflectively." And on that, in
19 relation to one, lower priced offer available. Well, that is correct. But that is not a
20 defect, that is a feature of Dr Pike's methodology. If there was no such offer, then Dr
21 Pike's method would correctly find that there was no incidence of loss on that occasion.
22 It is not suggested there was always loss. And as to 2) the corrected FMA, it is wrongly
23 claimed further on in paragraph 36 on page 76, in four lines down, "It bears emphasis
24 to Dr Pike's constant price scenario, in the form in which it is presented in his report,
25 disregards the offer attributes that matter to consumers apart from price. This, it is
26 said, is a serious omission." Paragraph 37 says, "It is a crucial point." Well, the point

1 is wrong for the reasons just discussed. Not only has Dr Pike sought to take offer
2 attributes into account other than price, even in his preliminary report, but when he
3 reruns or models the algorithm, well, I have made the point, he will use the actuals.
4 And I even respectfully suggest that Amazon knows this because its language quite
5 carefully does not say that this is what Dr Pike intends to do once he has the
6 information. It is a passive criticism. And he also, of course, explains in his report why
7 those other attributes are not of primary interest to him, because he is going to remove
8 the discriminatory assumption of the ranking of 100%, and instead rank it according to
9 the actual criteria. But other legitimate attributes are not going to be adjusted by him.
10 He is going to take those as they are. It does not ignore the other attributes in any
11 event. And then, as I have mentioned, paragraphs 38 and 39 of the response go on
12 to quibble with Dr Pike's assumptions about the star rating system. I have explained
13 why we say Amazon is wrong on that. And in any event, it is a misunderstanding, at
14 the very least, to suggest that Dr Pike's methodology always finds harm where there
15 is a non-FBA offer. That is their assumption, but it is a straw man that they knock
16 down. He does not, as I have explained. And then the third point they make in
17 paragraph 36, the unreflective purchaser. That, with respect, is a bad point too,
18 because we have significant evidence, we saw it yesterday, and Mr Beal went through
19 it, that there is reason to think that many purchasers do not look beyond the Buy Box.
20 The majority. The vast majority. So that is the criticism of the constant prices scenario.
21 There are a couple of other points which Amazon make, which I just want to address
22 briefly, which we say are, with respect, not well founded. There is a point that
23 somehow Dr Pike's methodology does not address that certain sellers are not
24 necessarily FBA or FBM, but that they are both. But again, there is nothing in this
25 point for two reasons. The first is that Dr Pike has been clear that he addresses the
26 effect of the discriminatory abuse at the ASIN level. So at the Amazon identification

1 number. So, we are not talking about the sellers in the abstract, we are talking about
2 the actual offer by offer, Buy Box scenario. What that leaves then is a purely semantic
3 point as to whether we are right to use the shorthand FBA seller. As I said briefly
4 yesterday, we are in good company, and I will show you in the Authorities bundle the
5 Commission decision at tab 83, PDF page 3611,3605 in hard copy. And there we
6 have recital 29. And the Commission says, "Third party sellers that use FBA services,
7 "FBA sellers", do not need to register all of their products for FBA. However, the share
8 of products that FBA sellers register for FBA services has been continuously
9 increasing. In 2020, [redacted] of all FBA sellers' products on average were fulfilled
10 by Amazon." And we have seen elsewhere high percentages for FBA. So we have
11 used the same definition with the same meaning as the Commission. And indeed,
12 Amazon itself in its skeleton, puts it that way when it says, and for instance, I will not
13 turn them up, but paragraphs 103, 104, 109, it talks about, "sellers who 'predominantly
14 or exclusively use FBA.'" So we are happy with that description of FBA sellers. There
15 is another, just in a sweep up of criticisms of the constant prices scenario, there is
16 another criticism. It is the last one I am going to deal with, which is that it said, where
17 two or more FBA sellers offer to win the Buy Box, any discrimination premium would
18 be competed away. That is a premise we do not accept. First, if there is a third
19 cheaper, merchant fulfilled offer, and secondly, if in rerunning the algorithm, an FBA
20 offer wins the Buy Box, as I say, we correctly identify no loss. So not every transaction
21 again. Now it is recognised the CPS is a simplified scenario, but it is a model. He has
22 also modelled a second scenario. We saw it yesterday, the constant volumes
23 scenario. There is, as far as I can see, a little less fire aimed at the constant volume
24 scenario. Of course it is not accepted by Amazon. It is the one where the FBA seller
25 lowers prices in order to maintain the same probability of winning a Buy Box. And for
26 that purpose, Dr Pike has created a model to approximate at this stage Amazon's

1 ranking algorithm. And that allows him to predict the impact of a change in price on
2 an offer's ranking using a non-discriminatory Buy Box. That is at Pike 1, paragraph
3 374 to 378. It is essentially a regression model. And we have seen exhibit 6, which
4 is essentially where it is set out in formulaic form. And we also see in exhibit 6, the
5 estimate that the discriminatory advantage accounts on average for a nearly 3%
6 difference in price. And that is in one of the tables in exhibit 6 at page 386. So that is
7 the preliminary assessment to give an idea of what we are looking at.

8 MR JUSTICE ROTH: And I am sorry, the reference for that is?

9 MR MOSER: Is page 386, 6.2.1.1, Table 6.2.2.

10 MR JUSTICE ROTH: 386 of --

11 MR MOSER: Of C1.

12 MR JUSTICE ROTH: So it is part of exhibit 6?

13 MR MOSER: It is part of exhibit 6, yes.

14 MR JUSTICE ROTH: 6.2. Yes.

15 MR MOSER: Now he considers, of course, he can refine his analysis by determining
16 more precisely the nature and extent of seller responses with information that he
17 expects to be available. That includes research and analysis by Amazon of likely seller
18 behaviour, in the event that a non-discriminatory algorithm was to be used. And of
19 course, it ought to be revealed in response to an actual change, either in 2020 or
20 whenever, according for instance to the AGCM. So this is not, as is being alleged, a
21 fishing exercise. It is an unusually obvious case that this evidence will exist. Because,
22 of course, Amazon has had to adjust its position in reaction to the Commission, in
23 reaction to the CMA, and in reaction to the AGCM in Italy. So there seems to be little
24 doubt in this case that there would be information of this type. Mr Holt's answer to
25 this, as far as I can see, the only answer is he says, ah, yes, but we may have over
26 rectified for any discrimination. Well, at this stage there is nothing, I submit, that the

1 Tribunal can or need to do in order to resolve that conflict. I will leave it there and
2 simply say it seems unlikely. If they have over rectified, then they presumably know in
3 what way or to what extent they have over rectified. Otherwise, how could they say
4 that? There is an oddity I will say in passing around Mr Holt's findings, and I make no
5 criticism of Mr Holt, but it is obvious that Amazon have not in fact provided him with
6 the underlying data. So he is making findings, as it were, on the instructions rather
7 than on the basis of numbers.

8 MR JUSTICE ROTH: Yes.

9 MR MOSER: And as I say, we also have the Stephan claimants. And the fact that
10 they say there was a discriminatory effect as identified by Dr Houpis in his tables.

11 MR JUSTICE ROTH: Yes, Stephan, of course, he is not looking at a price effect.

12 MR MOSER: No.

13 MR JUSTICE ROTH: So the exploitative abuse, to sustain that you need Dr Pike's
14 methodology, do not you?

15 MR MOSER: Yes. But Stephan, he provides another puzzle piece at least. So that is
16 the primary methodology, unless you want to hear more on it... I thought what I might
17 do, unless you tell me it is not necessary, is expand a little bit on my very short answer
18 in the last 30 seconds of yesterday to Mr Derbyshire on pass on. But I may not need
19 to. The answer was, we do not depend on pass on for our primary methodology,
20 although it will arise under the alternative.

21 MR JUSTICE ROTH: I do not think you need to say any more than that.

22 MR MOSER: No, I am grateful. That brings me to exclusionary effects. Exclusionary
23 effects is what Dr Pike has called, as it were, the secondary or additional aspects of
24 his methodology. He says Amazon's conduct may also have had an exclusionary
25 effect on competition from fulfilment rivals to FBA and other rival marketplaces. And
26 he deals with that in his first report at paragraph 317. You might just want to turn it

1 up. It is at page 360. And he deals with it there at paragraph 317. "Having considered
2 the publicly available evidence –"

3 MR JUSTICE ROTH: Just one second.

4 MR MOSER: Yes.

5 MR JUSTICE ROTH: 317?

6 MR MOSER: 317, the introductory bit. He says, "He has considered the publicly
7 available evidence. His preliminary view is that by discriminating..." So we are dealing
8 with the same discrimination, "By discriminating against the sellers that purchase non
9 FBA services, Amazon protected itself from equally efficient logistics competitors and
10 thereby reduced competition in the logistics market. Furthermore, I consider this
11 conduct served to protect Amazon's dominance in the market for intermediation
12 services for online marketplaces. I consider that this discrimination has therefore
13 harmed consumers." Section 9, magnitude is in section 10. And he has a
14 methodology for testing these effects. And that is in section 8.3.2 over the page at
15 361. And he draws an analogy with time. And at 327 he says, "To assess whether
16 the discrimination effectively tied access to the Buy Box to the purchase of FBA, I
17 would assess the size of any discriminatory advantage it provided. This will help me
18 identify how much more efficient a third-party seller would need to be to have the same
19 access to the Buy Box as an FBA purchaser." Drawing on the same methodology
20 conducted. And we have also drawn on communication and advertising and so on.
21 And second, to the extent he finds Amazon is dominant in the tyingmarket, he plans
22 to assess the volume of demands for FBA that Amazon can expect to have created
23 and foreclosed by engaging in the discriminatory conduct. He explains his
24 assessment based on the elasticity of demand for fulfilment services in respect of the
25 price of those services. And he expects Amazon will have conducted analysis from
26 their public statements to understand these elasticities. But he can undertake his own

1 analysis if necessary. And this is further addressed in Pike 2 at paragraphs 40 to 52.
2 Just to see this. That is pages 262 to 265.

3 MR JUSTICE ROTH: Right.

4 MR MOSER: [Inaudible] even to trouble you to reread it now but those are --

5 MR JUSTICE ROTH: Sorry, 262, this was for the carriage hearing, was not it?

6 MR MOSER: It was, yes.

7 MR JUSTICE ROTH: Right.

8 MR MOSER: He has expanded on his first report in his second report for the carriage
9 hearing.

10 MR JUSTICE ROTH: Yes. But we are going back a bit, are not we? But, yes.

11 MR MOSER: Yes, it is to note.

12 MR JUSTICE ROTH: Yes.

13 MR MOSER: So this is an additional aspect to his primary methodology.

14 MR JUSTICE ROTH: Well it is... Yes. And here, I mean, two points. One, this is of
15 course also, is it not, Professor Stephan's abuse, on which Professor Stephan for the
16 merchants claims through the effect on the cost of fulfilment services and the cost of...
17 Or the effect on other marketplaces?

18 MR MOSER: Yes, it is.

19 MR JUSTICE ROTH: And your claim, therefore, for consumers, is going to depend
20 on pass through, is not it?

21 MR MOSER: On this event?

22 MR JUSTICE ROTH: On this one?

23 MR MOSER: Yes. On at least some aspects of this one, yes.

24 MR JUSTICE ROTH: Well, when you say some aspects, would it not all depend on
25 pass through? Because this is increasing costs for merchants. So for your clients to
26 suffer, it is entirely dependent on pass through, is it not?

1 MR MOSER: It is going to be a pass through, yes.

2 MR JUSTICE ROTH: And if there is no pass through, the loss is the merchants not...

3 And I am not sure, does Dr Pike say anything about pass through?

4 MR MOSER: I beg your pardon?

5 MR JUSTICE ROTH: Does Dr Pike say anything about pass through?

6 MR MOSER: Well, yes, he does.

7 MR JUSTICE ROTH: On this.

8 MR MOSER: What he says... I was going to take you to something else first, but I am

9 happy to go there, because when he explains his three potential scenarios, he goes

10 into this. At paragraph 392, so that is page 375 of bundle C1. He explains the

11 secondary category of harm, 392, page 375. "If the conduct has an exclusionary effect

12 and forecloses rival fulfilment/logistics services, there are three potential effects." So

13 either there is no overcharge, at least not yet. I think this is something Amazon have

14 picked up as a great concession. It is just an obvious thing to say in my submission.

15 Or there is an overcharge and that has been not relative to the price of rival fulfilment

16 services, but relative to an even lower price that Amazon might have offered absent

17 the discrimination, in order to build its share of fulfilment and obtain the associated

18 economies of scale. That is the second one. There is an overcharge because Amazon

19 could have been cheaper. Thirdly, they might have been overcharged in the sense

20 that Amazon set prices for FBA that were higher than it would have done but for the

21 conduct, and that are relatively more expensive than rivals' prices. There are two sub

22 reasons given under C.

23 MR JUSTICE ROTH: Yes.

24 MR MOSER: And there is another aspect to additional harm raised at paragraph 398,

25 the opposite page. There is also the potential for additional harm if the foreclosing of

26 fulfilment also restricts competition marketplace.

1 MR JUSTICE ROTH: Yes.

2 MR MOSER: That is separate. So in relation to overcharge and pass on, I have already
3 mentioned that any overcharge on FBA would not, in our scenario, in our methodology,
4 be additional to the harm under the primary methodology. Although there might need
5 to be some netting off, and I will come back to that, it is raised by Mr Holt. Dr Pike has
6 set out a basic approach for overcharge and pass on.

7 (11.29)

8 MR JUSTICE ROTH: Where is the approach for pass on?

9 MR MOSER: There is an approach to pass on at 397, which we see in relation to this
10 because first of all, it is important that it cannot be assumed on the evidence that Dr
11 Pike has so far reviewed that there has not necessarily been an overcharge on FBA
12 services or that any overcharge was passed on. My learned friend Mr Turner rightly
13 points us to 397, which is at page 376 and that is where Dr Pike says, of course, if
14 there is an overcharge analysis then that will be entirely conductible and if there is any
15 overcharge on FBA that will lead to a pass on analysis.

16 MR JUSTICE ROTH: But he does not actually explain how he is going to do the pass
17 on, what is his method for conducting it. It is not straightforward.

18 MR MOSER: Dr Pike does not need, of course, for his primary methodology FBA plus
19 pass on to show how loss to the class eventuates because he has his primary
20 methodology. And Dr Pike says the evidence he has reviewed has indicated that there
21 is either no overcharge or it would not be large. As the caselaw says, if there is a solid
22 methodology for the main part, you do not have to fully develop a methodology for
23 every alternative.

24 MR JUSTICE ROTH: Are you saying this is a pure alternative, as you are putting it?
25 I thought it is an addition. Conceptually they are quite separate, are they not?

26 MR MOSER: Some of it is alternative. Most of it is potentially additional. But this is

1 on the assumption that there is an overcharge, which at the moment neither Mr Holt
2 nor Dr Pike identify.

3 MR JUSTICE ROTH: Well, I know, obviously, but if there is no overcharge, there is
4 no pass on. But what one is looking at is, is there a methodology to show, to examine
5 and then quantify, an overcharge, a potential overcharge, in the fulfilment services and
6 effect on marketplace commissions. And then if that is established, is there a
7 methodology to show pass on to examine whether there is and to what extent there is
8 pass on to consumers because if you cannot do the second, your class cannot show
9 loss.

10 MR MOSER: My submission on that, with respect, is there can be no doubt that if
11 necessary, Dr Pike can carry out an overcharge and pass on analysis because these
12 are established methodologies that he is well able to do. And, of course, Dr Houpis,
13 for whom this matters more, has demonstrated in greater detail how he would do it in
14 this case. The second point is the point of law that I addressed and the case that I
15 was thinking of is the Ad Tech case, sir, where if I can just turn briefly to the authorities
16 bundle – it is authorities tab 37 at page 2178 in the PDF. That will be 2184. So, 2178.
17 Actually, the paragraph – it is paragraph 35 -- starts on 2183, the previous page. They
18 are talking about the preliminary analysis in that case. If we go to 35.2 over the page:
19 “Given the manner in which Ad Tech’s claim has been pleaded – namely that the
20 abuses are all inter-connected – we consider that it is necessary only for us to assure
21 ourselves that the consequences of a narrower set of abuses could, if necessary, be
22 ascertained. The Tribunal could, at trial, conclude that only some of the abuses were
23 made out and it would be necessary to have a methodology robust enough to deal
24 with the outcome. We are satisfied this had been considered by Ad Tech ... We do
25 not consider that each and every combination of failure or success at trial needs to be
26 stated either in the pleading or the expert report. If that was Google’s contention ...

1 we reject it as contrary to law and oppressive.” And (3) “The expert report necessarily
2 must be formulated at a fairly high degree of generality, because Ad Tech is not
3 currently in possession of the data required to support its claims. To oblige Dr Latham
4 to put forward a methodology that is to a higher standard than that required of a
5 pleading does no more than introduce, by the back door, the sort of merits test
6 repudiated in Merricks.” I have read that out because our footnote 40 in our skeleton
7 argument, which is the reference to this, is the wrong reference. This is the reference
8 that footnote 40 in our skeleton argument at page 17 of bundle A should have given.
9 MR JUSTICE ROTH: Sorry, footnote, just to be correct, 40 should have been a
10 reference to this page, 2178 in hard copy, 2184? paragraph 35(2) and (3)?
11 MR MOSER: Paragraph 35(2) and (3).
12 MR JUSTICE ROTH: Thank you.
13 MR MOSER: In the history of this case, when these reports were first prepared it was
14 Dr Pike and Mr Holt. Dr Pike and Mr Holt both posited that there was no pass on as
15 such. No further, more elaborate methodology for pass on was prepared by Dr Pike.
16 Now Stephan has entered the picture, there is more talk of pass on because they need
17 it. But the reason that Dr Pike has --
18 MR JUSTICE ROTH: Well, they do not need it; they do not want it.
19 MR MOSER: They need to deal with it.
20 MR JUSTICE ROTH: They need to deal with it. They acknowledge – Dr Houpis
21 acknowledges -- that there may well be.
22 MR MOSER: It is pass on as a consequence of overcharge.
23 MR JUSTICE ROTH: Yes.
24 MR MOSER: So, if there is one, so we say we do not need it. There may or may not
25 have been one. And if there is one, Dr Pike says he would, of course, calculate it.
26 However, he has not set it out in detail in his report simply because he has not had to.

1 It is a report that has a different primary methodology. As I say, I respectfully suggest
2 it cannot sensibly be suggested that Dr Pike would not be able to calculate overcharge
3 and pass on if that became necessary. It has also been criticised by Mr Holt in relation
4 to some additional criticism of Dr Pike's methodology that he says Dr Pike will need
5 third party fulfilment services costs. But no, Dr Pike intends to use Amazon's data
6 and/or analyse public data on their prices and Dr Pike will quantify how much additional
7 scale Amazon FBA has and that, he says, will show him the scale denied to others.
8 That is at Pike 4, paragraphs 89 to 90 at page 435 of bundle C1. That is all under
9 "Impact on Commissions". We see that at 89 to 90 and in particular, the last sentence
10 of 90: "The increase in demand for the marketplace that I seek to measure is then the
11 amount of increase caused by a reduction in fulfilment prices due to the additional
12 scale that Amazon has achieved through the anticompetitive discrimination."

13 So we, I think unlike Stephan, are only interested in Amazon's own material which Dr
14 Pike expects to be able to use in his report.

15 MR JUSTICE ROTH: On this overcharge, the exclusionary effect –

16 MR MOSER: Yes?

17 MR JUSTICE ROTH: -- again, Dr Houpis is looking at that and it is a fundamental part
18 of the abuse he alleges and his work on, if his case, Professor Stephan, goes ahead,
19 will then cover this area as well, will it not?

20 MR MOSER: You would expect it, yes.

21 MR JUSTICE ROTH: Yes, well I mean it has to, because that is fundamental to the
22 Stephan abuses and again one would wish to avoid two lots of exercise by experts on
23 asking the same question; namely: is there an overcharge on fulfilment costs as a
24 result.

25 MR MOSER: Absolutely.

26 MR JUSTICE ROTH: If there is a robust method, it can be applied for both cases, can

1 it not?

2 MR MOSER: Yes, and Mr Holt's main criticism -- I can perhaps wrap it up in this way
3 -- of Dr Pike is that there is a lack of detail on these matters. I have explained why Dr
4 Pike did not need to go into more detail in his preliminary report on such matters. Dr
5 Houpis has, and there will not be a need to duplicate it.

6 MR JUSTICE ROTH: Yes.

7 MR MOSER: That is probably all I want to say about Dr Pike. I realise I am slightly
8 behind.

9 MR JUSTICE ROTH: Well, I have been asking you questions but that is an area in
10 which, as you know, your application is particularly challenged. Should we take then
11 just a short break at this point?

12 MR MOSER: We have the funder's return to deal with.

13 MR JUSTICE ROTH: Yes, well, that is an important point.

14 MR MOSER: Yes.

15 MR JUSTICE ROTH: So, if we come back just before 10 to, then -- we will take about
16 seven minutes.

17 (1141 hrs)

18 (Adjourned for a short time)

19 (1152 hrs)

20 MR MOSER: That brings me, Sir, members of the panel, to the question of the LFA.
21 There are some points on the LFA that I propose to treat quite lightly and then address
22 you mainly on the funder's return, which seems to be the main battleground.

23 MR JUSTICE ROTH: Yes, well, a couple of points, I think, but yes. Now, the latest
24 LFA is where?

25 MR MOSER: It is in a couple of places, but it is in bundle D. Well, is this the latest
26 66?

1 MR JUSTICE ROTH: And the thing, you told me, that we have is just the unsigned
2 version but it has been signed?
3 MR MOSER: Yes, correct.
4 MR JUSTICE ROTH: So, we have it in?
5 MR MOSER: Bundle D1, tab 66.
6 MR JUSTICE ROTH: Yes, and that shows the changes, which is helpful.
7 MR MOSER: Yes, that shows us the changes which I thought might be helpful. I am
8 told it is also in bundle C1.
9 MR JUSTICE ROTH: Yes, it is, but this is probably the best place. I agree.
10 MR MOSER: I'd suggest it is.
11 MR JUSTICE ROTH: Now, can we ask, is this LFA now available on the website for
12 the class?
13 MR MOSER: Not yet.
14 MR JUSTICE ROTH: But it will be put on the website?
15 MR MOSER: In the usual way.
16 MR JUSTICE ROTH: Oh.
17 MR MOSER: Well, I think at the moment it is available on request.
18 MR JUSTICE ROTH: Well, there are what, 53 million people to write in seeking
19 copies? If 10 million write in you are going to be sending out 10 million copies or
20 something? Should it not be transparently on the website?
21 MR BANKES: You may also consider the litigation plan, which I think is HB30 at
22 paragraph 47, which says you do not have any resource to deal with individual queries
23 at this stage. So, if you are expecting 53 million individual queries and have no
24 resource allocated, that may be a problem.
25 MR MOSER: To date, no one has requested it.
26 MR BANKES: Well, just because you have not yet offered it, have you?

1 MR MOSER: I believe -- is it already available?

2 MR JUSTICE ROTH: We think it should be. With a class that size, it ought to be on
3 the website with the other documents. You have a dedicated website, as we
4 understand it.

5 MR MOSER: We're not resisting that point.

6 MR JUSTICE ROTH: Yes, so you can agree that that will be done?

7 MR MOSER: Yes.

8 MR JUSTICE ROTH: Thank you.

9 MR MOSER: As I say, there are various points taken in relation to the LFA. I do not
10 propose to deal, unless you want me to, with the question of whether the clauses on
11 the independent KC and other clauses mean that the funder is somehow not
12 sufficiently independent -- sorry, the PCR is not sufficiently independent from the
13 funder to conduct the proceedings in the best interests of the class. I say there is
14 nothing in that. These are standard clauses and indeed follow recent caselaw. I am
15 thinking in particular of clause 9 and dispute resolution clause 23, where you can have
16 an independent KC in much the way that Professor Stephan has. Then my learned
17 friend Mr Beal has already dealt with the powers of the Tribunal itself to ensure fairness
18 between the funder and the class in light of the circumstances at the end of the
19 proceedings, and we have reference in our skeleton argument to the relevant case
20 law Gormsen No. 2, and now, also hot off the press, the Court of Appeal in Gutmann,
21 No. 2. and I believe Mr Beal, KC, has already taken you to that. The appropriate time
22 is to look at the time of distribution. And generally speaking, that is for very good
23 reasons. Assessing the appropriate return to the funder is better left to the end of the
24 proceedings when you know what outcome you are dealing with.

25 MR JUSTICE ROTH: Well, I can see that in terms of finally approving the return or
26 possibly saying that the return is unreasonable, but if it is clear at the outset that it

1 seems an excessive return, is it not right that the Tribunal should raise that? And
2 indeed, I think there was the other case -- maybe it was Gormsen, where the Tribunal
3 said, and I do not think that was disapproved by the Court of Appeal, that if a return is
4 so excessive, then it should be called out.

5 MR MOSER: Indeed, it was, and you, Sir, said that to my learned friend yesterday.
6 We do not disagree. So, I am going to address that by looking for convenience -- can
7 we take what is being said against us from Amazon at hearing bundle B, Tab 6, pages
8 102 to 103, in Amazon's response.

9 MR JUSTICE ROTH: This is the specific funding response.

10 MR MOSER: Funding response, yes, 102 of hearing bundle B. So, it is paragraphs
11 11 to 15 where they describe the various scenarios. They say it will inevitably be
12 extremely large. The funder always recovers its outlay -- this is at 11, 12 -- with the
13 funder's initial return, and they describe the stages, stages A and B. Then, after the
14 end of stage B, they have provided essentially three scenarios because there are three
15 different stages set out in clause 9 of the LFA used to calculate the funder's fee.

16 MR JUSTICE ROTH: Just looking at 9, to get this clear, this is 9.2, is it?

17 MR MOSER: Yes.

18 MR JUSTICE ROTH: On page 246 of bundle D?

19 MR MOSER: Yes.

20 MR JUSTICE ROTH: So, you get your outlay and a further 40 million up to stage A,
21 and Stage A is?

22 MR MOSER: They are defined as 90 days after the CPO. Page 237.

23 MR JUSTICE ROTH: Is it 90 days after the CPO?

24 MR MOSER: Yes, and stage B is the period of time beginning immediately after stage
25 A and ending on the date on which the lists of documents are first ordered to be
26 exchanged. That is stage B's date. The reason for those dates, as we said in the

1 skeleton argument, is because those are the dates commonly used for ATE policies
2 when different levels of premia become due. I am sorry to go to yet a third document,
3 but we have taken those stages for convenience in a table that we have appended to
4 our skeleton argument. That is in bundle A at page 29. I am told we do have an A3
5 version of this table if anyone wants it.

6 MR JUSTICE ROTH: We have had that. Yes.

7 MR MOSER: Oh, you have it. Now you have the three stages: A, B and after the end
8 of B, and in the event of success, the stage at which the proceedings as defined end
9 dictates the elements in clause 9.2 used to calculate the funder's fee. We have seen
10 clause 9.2 a moment ago. Now, of course, estimating the actual level of return
11 requires some assumptions about a number of variables and the debate that we are
12 having turns on the multiple of the funding as the return.

13 I submit that that is overly reductive. The issue of whether the return is excessive
14 cannot simply be reduced to the multiple of the return, but it requires a broader
15 consideration of all the circumstances -- at the end of the proceedings, for instance,
16 any recovery, the size of any success. Plainly, if we're looking at 500 million or a
17 billion, then the funder's return will look different in relative terms. That is not how the
18 LFA calculates it, and it does not calculate it on the basis of a multiple of costs incurred
19 either, but we submit, with great respect, that Amazon have, of course, and you would,
20 would you not, have given us the most extreme scenarios in their three scenarios. I
21 venture to suggest that Amazon does not think for one moment that any of their
22 scenarios are actually a likely outcome. What they do is they look at a possible
23 settlement, always immediately upon the reaching of the threshold date.

24 Now, it would be wholly miraculous, of course, in light of what is being said against us
25 and what is about to be said orally against both of us, if Amazon were about to settle
26 this case with us. I would not mind, but it is not a realistic scenario. It is highly unlikely

1 it would settle just after stage B and what we have tried to do is model a slightly more
2 realistic scenario, and in particular, if I may turn to our table on page 29 and turn to
3 the third scenario first, the period after stage B we think is perhaps a more down-to-
4 earth way of looking at it.

5 If you look at the third scenario, what we see in the first column – I am afraid in the
6 first column the year numbers, at least in my version, have somehow attached
7 themselves to the stage column but that should be 3, 4 and 5 plus in the first column.
8 After stage B, the period after stage B, the green line, following disclosure, five years
9 into the case, assuming the funder has deployed the full amount of the budget on this
10 scenario, you can see there is a figure of 129 million and a return multiple of 7.74 of
11 deployed capital and not 20 as you get in Amazon's example. And by the way, that
12 includes the commitment fee of 12.5 million. So to take a comparator that we mention
13 in our skeleton argument, at 60, and I think, Sir, you mentioned Gormsen No. 2, that
14 was based on committed funds, not deployed funds. In Gormsen No. 2, it was said in
15 passing that a multiple of 8.3 times over 21 months was not, I quote, "on its face",
16 defensible, although they did not have to decide it. This was amended. Here,
17 however, I submit that 7.7 after 5 years with all the funding fully deployed, is, I
18 respectfully submit, defensible, certainly at this stage, although no doubt the Tribunal
19 will always want to look very carefully at the circumstances at the end of the
20 proceedings. Not a basis, I say, in any event, for refusing certification now. That is,
21 of course, the approach that my learned friend read out yesterday in Gutmann v Apple.
22 Moving up to perhaps the less likely second scenario in the beige line after stage A,
23 but before stage B, four years into the case, assuming 5 million of costs deployed, I
24 have said this is, with respect, unrealistic, given Amazon's stance, i.e. substantial
25 settlement before disclosure, but £5 million of deployed costs is probably an
26 underestimate. Nevertheless, we use it, with respect, because of the comparison with

1 Amazon's figures. I say in parentheses, Amazon's figures do not include a number of
2 things, above all the ATE premia, which are confidential, but it is known that they are
3 substantial in these cases.

4 So in this scenario, the beige scenario, the funder's fee would be 95 million after four
5 years of litigation using committed funds, and that includes the commitment fee, and
6 the return multiple is 5.69. In Bulk Mail, I think the return multiple was 5.75. So, we
7 are well in the sort of area where this has been considered reasonable. Amazon says
8 -- this is at paragraph 14 of their response -- that if you base the return on deployed
9 funds at 5 million excluding the commitment fee, then the return to the funder is a
10 multiple of around 16. Well, again, the difficulty with that, in my submission, is the
11 simple fact that the business model of the funder in this case uses committed funds.
12 That is the basis on which this LFA is agreed and a basis on which LFAs have been
13 approved in other cases. An example for that is the Gutmann v Apple case itself. In
14 Gutmann v Apple, if we look at the CAT decision -- we may not need to turn it up, but
15 it is in authorities bundle at tab 35, page 2121. At paragraph 36 of Gutmann it tells us
16 that there too it was on a committed funds basis. So this is a perfectly acceptable way
17 of looking at it.

18 Amazon look at it on money actually spent, not how the LFA does it. On a committed
19 funds basis, we have given you the multiple return of 5.69. The terms here reflect
20 risks that the funder has evaluated in terms not just of whether success would be
21 achieved at all, but also what the level of success achieved will be in terms of the
22 proceeds recovered for the class. And as we have seen in other celebrated
23 settlements, they are not always quite as high as the starting figure.

24 MR JUSTICE ROTH: Where does the level of success come in?

25 MR MOSER: It will come into the funder's calculation. It is a submission I make, not
26 a document.

1 MR JUSTICE ROTH: Yes. It does not come into the way the fees are calculated
2 though?

3 MR MOSER: It does not.

4 MR JUSTICE ROTH: No, it cannot.

5 MR BANKES: Is not the difference, is not the problem you have here that if it is just
6 calculated by reference to committed funds, then at any time we can be certain what
7 the return is, but because you have agreed this step model, where a significant
8 proportion of the return is paid out not by reference to committed funds, but in these
9 very, very large steps, that the actual return will vary on an almost day-to-day basis
10 between what you say is implausible and plausible settlement[?]. But the reality is
11 none of us can foretell today where on that spectrum it will be, because it depends
12 precisely on the timing of the end of the proceedings or the success date and on how
13 much has been paid out at the time. So it is quite difficult to take a decision based on
14 a particular level of return.

15 MR MOSER: Indeed, that is the system that Amazon have exploited in their
16 submissions by always taking it at the moment of the biggest step having just
17 happened, which we say is just an unlikely scenario.

18 MR JUSTICE ROTH: Yes, but I think Mr Bankes' point is you can do it at the other
19 extreme. The problem is inherent in the structure of having these huge sums that
20 come in irrespective of the commitment fee at a particular point, which is a rather
21 unusual model, at least in our experience, of calculating a return because it means
22 there is the potential for unreasonably high returns, but it is possible there will not be
23 because it has become slightly arbitrary. That is the difficulty.

24 MR MOSER: There is, as you say, the potential. My submission is that unless and
25 until the unlikely happens and there is a settlement immediately after the big step day,
26 it is not a problem that is going to eventuate. If it does eventuate, you have all the

1 powers from *Gutmann v Apple* and elsewhere to say, “Well, we’re not having it,” and I
2 am not going to suggest what you do or do not say about that at this stage, but it ought
3 not to hold up certification. There are other scenarios where the funder’s fee would
4 appear, as I say, to be a modest proportion of damages. I know the law set its face
5 against looking at it that way, at least for the moment, but you cannot lose sight of that
6 when in amounts that are routinely paid to funders in cases that involve DBAs, that is
7 perfectly acceptable. So for instance, the Post Office litigation, the sub-postmasters,
8 where the funders were much thanked and celebrated that the award in that case to
9 the sub-postmasters was 58 million. About 14 million or so were costs. About 20
10 million went to the sub-postmasters and most of the rest went to the funders. That is
11 actually a much greater proportion than the sort of sums that we are looking at in our
12 table.

13 MR JUSTICE ROTH: Well, I am not sure that is the best precedent. There were quite
14 a lot of concerns about that, even though need for funding was celebrated. But in any
15 event, I think we have your submission.

16 MR MOSER: Yes.

17 MR JUSTICE ROTH: And you say, “Well, we do not know whether this will be a very
18 high return on committed capital, if that is the right measure, until it happens”?

19 MR MOSER: Yes, and –

20 MR JUSTICE ROTH: And when it happens, the Tribunal is not bound by this and can
21 substitute something that it thinks more reasonable?

22 MR MOSER: Yes, so committed capital: acceptable way of doing it, see *Gutmann v*
23 *Apple*. It is a liberating thought -- it may never happen -- but it is more than that
24 because I do make the submission it is very unlikely to happen for the reasons I have
25 explained. And the third point, if it does happen, you have the power.

26 MR BANKES: Just because this is not binary, it is not either 16 or 7, every day of

1 litigation, every pound spent, will move it along that spectrum. So that 60 may be 50
2 or it may be 8, but we can be very unclear today where we are on that spectrum. You
3 say lower end, they say upper end, but who knows?

4 MR MOSER: Exactly. We can predict that it will taper. There will be the big step and
5 then there is another step until there are no more steps. In the final analysis, and we
6 have made this point in the skeleton argument, do not forget, and this is sometimes
7 the measure for things in other sorts of cases, this is what was available on the open
8 market and at the time that this funding agreement was entered into, there was already
9 a funding agreement and another claimant in place in the form of Hunter. So, to some
10 extent, the market is the king on this. That was what the class representative entered
11 into based on expert advice from his advisors, us, without waiving confidentiality or
12 privilege, and that is another factor. I am not making that as the main factor, but it is
13 a point we have raised in the skeleton argument and just to put into context how this
14 LFA came about.

15 MR BANKES: And we have that point but what you have not explained -- you
16 managed to reopen the LFA; you have not explained how and you say you managed
17 to negotiate better terms, although we can discuss if they are better, but there is no
18 evidence to suggest that when Hunter had left the market, you tried to renegotiate
19 more favourable terms, although you say you managed to reopen it?

20 MR MOSER: We reopened it in relation to the control aspect.

21 MR JUSTICE ROTH: Which aspect, sorry?

22 MR MOSER: This is matters such as how to deal with any dispute.

23 MR JUSTICE ROTH: The KC?

24 MR MOSER: The KC and other matters associated with dispute we see in the red
25 lined parts of tab 66 of D1. So, for instance, at 912 to 914, pages 245 to 246, and
26 certain other aspects, including assignment and other matters. But no, I do not resist

1 the point. That has not been renegotiated, but I cannot possibly waive privilege on
2 what went on behind the scenes. Oh, yes, then there's adjustment of the priority, my
3 learned friend reminds me.

4 MR JUSTICE ROTH: Yes, the adjustment of the priorities, and of clause 9, 9.1.1 in
5 particular, is, I think, seeking to apply for the stakeholder fees to be paid potentially
6 from proceeds before distribution. Is that not right?

7 MR MOSER: Yes, but it gave the PCR greater discretion as to when to make an
8 application and in what amount. I am probably not giving away anything when I say
9 that if one looks at the changes one can trace it to developments in the Tribunal and
10 elsewhere. These are caselaw driven matters.

11 MR JUSTICE ROTH: Yes, but previously the class representative was going to seek
12 payment of the funder's fee and costs out of undistributed damages, and now that has
13 been changed, is that not right? Have I understood that correctly? They can now
14 seek --

15 MR MOSER: I have to confess I am not sure on that point.

16 MR JUSTICE ROTH: Well, indeed, and that is a very recent change. At least
17 something has changed because there is this rather extraordinary, to my mind,
18 document produced by your client which is called a re-re-amended witness statement,
19 not something I have ever encountered as a judge before, if it is indeed permissible
20 but if we look at that which is at C1 tab 1 at page 16, he said in paragraph 49 --
21 previously, he said that was his evidence. "I intend to make an application to the
22 Tribunal to allow an appropriate payment to be made to 4World from any unclaimed
23 damages." That was his evidence. He has not put in a supplementary witness
24 statement but he sought to amend his evidence in a way that I find astonishing and
25 say he is now going to make an application for the Tribunal to make payment to the
26 funder prior to distribution. That is now his intention. Well, which, Mr Moser, is better

1 for the funder: an application only from undistributed damages or before distribution?
2 Which do you think the funder prefers?

3 MR MOSER: I had better get instructions, but I think that it would be wrong to read
4 into this that this is part of the amendment of the funding.

5 MR BANKES: I think you will find it is the new clause 9.1.

6 MR MOSER: I am going to take instructions.

7 MR JUSTICE ROTH: Yes.

8 MR MOSER: (After a pause) There is nothing, sir, I can say about the format of this,
9 which is unsatisfactory. The instructions I have received are that there was a first
10 version of the LFA, which reflected the original version of this. There was then a
11 change after PACCAR, which is reflected in the amended version of this. There is in
12 fact now a different provision in the LFA which is that Mr Hammond has a discretion
13 as to when the payment is to be made prior or after distribution.

14 MR JUSTICE ROTH: When was that changed? That is the new 9.1? 9.1.2, 9 1.3 –

15 MR MOSER: That was agreed on Friday.

16 MR JUSTICE ROTH: No, we have it in this document.

17 MR MOSER: Yes, in draft.

18 MR JUSTICE ROTH: In draft.

19 MR MOSER: So signed on Friday.

20 MR JUSTICE ROTH: Yes.

21 MR MOSER: So that is not actually reflected yet in any witness statement.

22 MR BANKES: So, Mr Moser, my understanding is that the post PACCAR version,
23 which was before us at the carriage dispute, contained no obligation, qualified or
24 unqualified, to make a priority application, and that since the carriage dispute, for
25 reasons I do not understand, the class representative has seen it appropriate to
26 reopen the LFA and agree an obligation, a qualified obligation but nevertheless an

1 obligation which was not previously there to apply to the Tribunal for payment of the
2 funder in priority over the class. And we are just trying to understand why the class
3 representative thought it appropriate, having survived carriage and with no other
4 change in the market, to agree that plan.

5 MR MOSER: Without giving away internal privilege matters, my understanding is that
6 after Riefa there was a concern that it might be thought that the class representative
7 did not have enough control over things, and one aspect of showing more control was
8 to give the class representative the option on this point.

9 MR BANKES: And I recognise from Riefa the criteria that you have included in 9.1,
10 the appropriateness criteria.

11 MR MOSER: Yes.

12 MR BANKES: But my point is that there was no obligation inside 9.1 until you recently
13 amended it. And so Riefa r did not require you to put that amendment in.

14 MR MOSER: No. It was perhaps out of an overabundance of caution.

15 MR JUSTICE ROTH: But it is an amendment that favours the funder, is it not? The
16 funder is better off if the fee is paid in priority to distribution.

17 MR MOSER: Only if Mr Hammond elects to do that.

18 MR JUSTICE ROTH: Yes. But previously the funder had no opportunity for that at all
19 and now there is that possibility and Mr Hammond has said in his amended evidence
20 that that is what he will apply for.

21 MR MOSER: Inevitably, when there is an opportunity to renegotiate because of a
22 development in caselaw, there are two sides to the negotiation.

23 MR JUSTICE ROTH: Yes. So, what has Mr Hammond got for the class in return for
24 making this concession to the funder, because the return of the funder is unchanged.
25 It is just moved up the priorities. We are really quite concerned that we do not
26 understand why Mr Hammond saw fit to agree to this, still less why he says actually

1 that is what he's going to do. There is no, as there should have been, not an
2 amendment, but a further witness statement saying, "I have now agreed to this
3 change," and explaining why such.

4 MR MOSER: Such a witness statement can be adduced. As I say, this has only just
5 been finalised.

6 MR JUSTICE ROTH: But this was done on 4 November because that is what is the
7 date of his initials by paragraph 49 of his witness statement.

8 MR MOSER: The funding agreement will have been reopened because of PACCAR.
9 Then inevitably that gives the opportunity for the funder to, I suppose – I am not
10 suggesting this was on the table, but to leave.

11 MR JUSTICE ROTH: This is all long after PACCAR, is it not?

12 MR MOSER: Yes.

13 MR JUSTICE ROTH: 4 November of last year. I think it had been amended previously
14 because of PACCAR.

15 MR MOSER: I think that is probably the post-Riefa change.

16 MR JUSTICE ROTH: Yes.

17 MR MOSER: But as I say, I am just respectfully disagreeing with the severity of the
18 concern because it gives Mr Hammond a discretion, but unless it is thought that he is
19 somehow the funder's creature, I submit there is no reason to consider that he would
20 exercise his discretion in a way that particularly favoured the funder.

21 MR JUSTICE ROTH: Well, he said he would in his witness statement?

22 MR MOSER: Well --

23 MR JUSTICE ROTH: That is his evidence. It may be, Mr Moser, that the appropriate
24 thing is to direct that your client should put in a further witness statement explaining
25 why he agreed to the change and why he says that he is going to ask for, given that
26 he got an agreement with a funder, to fund it on the basis that the funder would get its

1 return out of undistributed challenges. The funder was content with that, or at least
2 had agreed to that. No doubt the funder would welcome this change, but it does not
3 mean that Mr Hammond, whose concern is the class, not the funder, should have
4 opened up that possibility or, if he was going to do it, not get anything so far as we can
5 see in return, because –

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9 MR MOSER: It may well be -- an explanation has been suggested to me. I am in the
10 difficult position that I do not want to give away matters that might be privileged.

11 MR JUSTICE ROTH: Well, they might be privileged, but I think what is not privileged
12 is for Mr Hammond to explain to the Tribunal why he agreed in the interest of the class
13 to make this change and why he says he is going to make the application that the
14 Tribunal should pay prior to distribution, namely what he says in the amended
15 paragraph 49, and I think we would like a witness statement from him. I think you
16 mentioned Riefa. I think Riefa made clear that the Tribunal would expect the class
17 representative to explain the efforts he makes, or she makes, or it makes, to secure
18 the best funding arrangements in the interests of the class. That is not privileged.

19 MR MOSER: I respectfully agree. Maybe the best answer is to produce a proper new
20 witness statement which explains exactly what the situation is now.

21 MR JUSTICE ROTH: Yes.

22 MR MOSER: I am directed to a letter of 4th November 2024, which may or may not
23 assist, just on the off-chance it does. That is in correspondence bundle D1, tab 53,
24 page 146, which gives some of the history of the changes. I suspect it will not answer
25 your query fully, but this is what I tried to reflect in my original response, which is that
26 this was a change post-PACCAR and it did not fully reflect what was done. So we see

1 at 3.

2 MR JUSTICE ROTH: That is the change.

3 MR JUSTICE ROTH: It is strange that you have got paragraph 3 with - 4.3 you say
4 you amended it post-PACCAR by way of the deed of confirmation dated 1st November
5 2023.

6 MR MOSER: Yes.

7 MR JUSTICE ROTH: That is the version we had before us (inaudible).

8 MR MOSER: Yes.

9 MR JUSTICE ROTH: You then say that, unfortunately, the second variation failed to
10 fully reflect all the necessary changes required to affect amendments of the deed of
11 priorities. No reference to case law, but there is a suggestion there that there were
12 inadequacies in the November 2023 version, which necessitated changes. So that is
13 just neither changes required by case law nor renegotiation, but some sort of
14 necessary updating. So I am afraid I think it causes greater mystery, not greater
15 clarity.

16 MR MOSER: Anyway, I was asked to show you that letter that I have. I respectfully
17 agree with the President that the best route forward is going to be for Mr Hammond to
18 produce a short written statement explaining what has happened and why and what
19 he intends to do.

20 MR JUSTICE ROTH: When can that be produced?

21 MR MOSER: We will aim to have it done by Friday.

22 MR JUSTICE ROTH: Well, could it not be done overnight? I mean, Amazon may
23 wish to say something about it.

24 MR MOSER: We can have a go at it overnight, yes.

25 MR JUSTICE ROTH: I mean, this has been done. Mr Hammond is presumably in
26 court and he can explain what is happening.

1 MR MOSER: Yes, Mr Hammond is in court and has heard everything you have said,
2 Sir. So we will aim to get it to you tomorrow, or overnight, and to Amazon, so that they
3 have a chance to comment on it before the hearing is finished.

4 MR JUSTICE ROTH: Just a moment. We will leave it at that, and we will expect a
5 witness statement for tomorrow morning.

6 MR MOSER: It shall be done. Unless I can assist any further, those are my
7 submissions.

8 MR JUSTICE ROTH: Can we just, before changing to Amazon - thank you, Mr Moser.
9 Mr Beal, on the point we raised with Mr Moser about the LFA, is your client's LFA on
10 the website?

11 MR BEAL: I do not think it is yet.

12 MR JUSTICE ROTH: But can you also please agree to put it on?

13 MR BEAL: That should not be a problem in principle. If there is any confidential
14 information on it, it obviously would not be put into the public domain.

15 MR JUSTICE ROTH: No, but I mean, we have had it in open court here.

16 MR BEAL: You have, and that would suggest that there is no redaction necessary.

17 MR JUSTICE ROTH: And there are a few redactions of bank account and address
18 and so on, obviously those redactions are to be maintained, but in the same form it
19 has been here.

20 MR BEAL: There can sensibly be no objection to that.

21 MR JUSTICE ROTH: Yes, yes, thank you. Yes, Mr Turner.

22 MR TURNER: May it please the Tribunal. Just to pick up on what we were just
23 discussing, may I respectfully suggest it may be appropriate for Mr Hammond to be in
24 court tomorrow, the Tribunal tomorrow also, in case this issue needs to be addressed
25 (inaudible) have questions for Mr Hammond on that occasion.

26 MR JUSTICE ROTH: Yes, we do not encourage that course.

1 MR TURNER: No, I understand.

2 MR JUSTICE ROTH: But we will see what happens.

3 MR TURNER: Sir, I am sharing the submissions on behalf of Amazon with Mr Piccinin.

4 I will deal with the Hammond consumer claim, Mr Piccinin will deal with the Stephan

5 claim. We are aiming for a broadly equal allocation of time. I plan to use the rest of

6 the day and to finish by around 11 o'clock tomorrow morning. Mr Piccinin's

7 submissions will then run until about 3.30 in the afternoon, leaving time for the PCR's

8 replies, which should occupy, it is estimated, up to an hour. By way of roadmap, I will

9 start with some brief opening remarks, then I will address the legal principles

10 applicable to the Tribunal's task at certification, focusing on what the Microsoft test

11 involves at certification because that has been covered. Third, I will turn to the

12 Hammond claim. I will develop our case that there are certain specific critical

13 deficiencies in the outline methodology for establishing loss on the part of consumers,

14 and the size of those losses, as put forward by (Dr Pike). Finally, I will deal with the

15 funding issues in the Hammond claim. So, if I may begin with the preliminary remarks.

16 My first point is this: although much of the opening you heard yesterday from Mr Beal

17 then Mr Moser, was directed to whether there is an arguable, evidential basis for

18 bringing a case on abuse of dominance, it was the wrong target. It is not the gravamen

19 of Amazon's objections to these applications for collective proceedings orders, as Mr

20 Piccinin and I will seek to explain. On the substance, we are raising a number of

21 discrete points focused on the expert methodologies relevant to showing causation of

22 loss and the quantum of loss and on those points, there are a number of serious and

23 difficult issues to grapple with, which we hope to convince you in relation to, that there

24 are some genuine gaps. In this regard, there was a suggestion in the course of

25 yesterday that the expert methodologies in the two cases may run along the same

26 lines in certain respects. It was picked up again today. So if, for example, you are

1 satisfied that the Houpis methodology is workable, to some extent the Pike
2 methodology can be viewed in the same way. With respect, it is not a safe assumption.
3 There is certainly an overlap in their mutual intention to rerun or model the algorithm
4 to see if adjusting it causes any material differences in the outcomes as regards what
5 is shown by Amazon as the featured offer. However, even there, you do have a
6 divergence. We outlined that in our skeleton. If you would please open that and look
7 at paragraph 28, just before the paragraph that the acting president referred to earlier.
8 We pointed out there that each of the experts separately proposes to rerun the
9 algorithm after making adjustments or to undertake a modelling exercise, but Dr Pike's
10 proposal goes further than Dr Houpis in one key respect. Dr Pike intends not only to
11 investigate what the impact would be if a seller using FBM had been selected as a
12 featured offer, holding all aspects of the various offers constant, his constant prices
13 scenario. He has this additional layer of analysis. He says I am going to investigate
14 whether the sellers who are using the FBA logistics would in practice have responded
15 to this different algorithm by competing harder against each other on price with the
16 view to winning the offer, and this is what was called the constant volume scenario.
17 We point out that the logic -- and it translates into the figures that Dr Pike comes up
18 with -- the logic takes you to a lower level of prices for customers. That also implies
19 lower margins and no gains in sales because the volumes are remaining constant for
20 sellers who are using FBA when you come to the unbiased counterfactual. That is
21 why we say this scenario is propounded on the consumer side by Hammond and not
22 by Stephan with sellers in mind.

23 MR JUSTICE ROTH: Yes, but pausing there, the first part, before we get to the
24 additional layer of analysis, is the same, is it not? The objective of what they are
25 seeking to do is the same.

26 MR TURNER: That is correct, yes.

1 MR JUSTICE ROTH: The point I think that we were making was not clear, is that if
2 one of the two experts has explained in more detail how they could do it and have
3 plausibly set out a way of doing it, the fact that the other may not have, given that one
4 is not going to let them both do it, it does not matter because we have got a plausible
5 method of doing this. We now have two cases that could be run together.

6 MR TURNER: Sir, yes, we accept that and of course ---

7 MR JUSTICE ROTH: And it was a point you made, quite rightly.

8 MR TURNER: Yes, in the following paragraph.

9 MR JUSTICE ROTH: And so, to that extent, where they are seeking to do the same
10 thing, if Dr Houpis does not explain it very well, or can be criticised, but Dr Pike does,
11 one would say well that that is fine as far as the Tribunal is concerned because we
12 have got a plausible method of doing it. Who actually then proceeds to do it is a matter
13 they can discuss between them, but it can be effectively done, as far as we can tell at
14 this point, and vice-versa. Dr Houpis has shown a way of dealing with a particular
15 matter, the fact that Dr Pike has not gone into so much detail or explained it so clearly
16 does not matter. That is the point.

17 MR TURNER: So, we understand that. We accept that. Indeed, that was the reason
18 why we made the point we did, that you drew attention to paragraph 29. My purpose
19 is really just to show how far that takes one, because there is then this extra level of
20 analysis that Dr Pike envisages. It is quite true that as the starting point, both of them
21 seem to envisage taking the algorithm, removing, as they see it, the discriminatory
22 elements, and then applying it to the data applicable at the time in the claim period on
23 transactions and offers, to see what that yields and, at that point, they are all saying
24 what Dr Pike refers to as holding prices constant, take that data, see what the outcome
25 is. All I am observing here is that the consumer case then goes this further step and
26 indeed, Dr Pike in his report refers to this as being the more realistic approach than

1 the former and that is where there is a divergence. That is the only point I wanted to
2 make by way of explanation at this early stage. So that is, in short, how it works. I will
3 invite you to look at this distinctive aspect of Dr Pike's methodology in due course
4 because it is one of the points that we are focusing on for this hearing. There are also
5 other differences between what the experts propose to do and when you come to the
6 issue that was canvassed a little earlier on pass-on, you have seen the limited extent
7 to which that is addressed in the report on behalf of Hammond in paragraph 397, Pike
8 1. It was said by Mr Moser, ultimately, whether it was not or this is a methodology, but
9 I wrote down his language, "it cannot be said, by way of assertion, it cannot be said
10 that Dr Pike would not be able to calculate pass-on if that became necessary." So
11 essentially, the submission is we do not have a methodology, but it cannot be said that
12 we cannot get one. Mr Piccinin will draw your attention to the limited way in which Dr
13 Houpis also deals with pass-on, but I shall not be covering that. The point in relation
14 to pass-on that I will make now, by way of opening, is to draw your attention to the fact
15 that, of course, Houpis and Pike represent different stakeholders who have opposed
16 interests when it comes to the issue of pass-on, of overcharges from sellers to
17 consumers in the form of higher prices. That will also need to be thought about, but
18 for the purpose of my address now, I intend to ask you to focus specifically on the Pike
19 report and, in the main, to ask this Tribunal to consider the Pike report on its own
20 merits. So that is the first observation. The second is a point prompted by the detailed
21 review by Mr Beal yesterday, extending over a number of hours, going through the
22 reasoning in support of the commitments that Amazon gave to the Commission and
23 to the CMA and the findings of the Italian Competition Authority. I need to underline a
24 point that was made in our skeleton argument, in view of that development. We do
25 not accept the correctness of the reasoning in those commitments' decisions
26 underpinning the concerns of abuse, obviously. In certain respects, moreover, it has

1 | been drawn to my attention that Amazon not only disagrees with what has been said
2 | by the European Commission, it is genuinely puzzled too as to the underlying basis
3 | for some of those findings. Without the need to go to it, but to give you one example,
4 | one of the recitals that Mr Beal took you to yesterday was a recital 206 in the
5 | Commission decision, which you find authorities PDF 3637. So if you want to turn it
6 | up.

7 | MR JUSTICE ROTH: What was the paragraph?

8 | MR TURNER: So it is 206. This is one that he took you to. So in that, you will see
9 | that the Commission say they found that the FBM offers were disadvantaged as
10 | compared with FBA offers, even when materially equivalent. You see from the
11 | penultimate sentence and the point I wish to make at this point is simply that there,
12 | Amazon does not know what analysis the Commission did to come to that conclusion.
13 | It did not have the opportunity to rebut it. This was not that type of process. In broad
14 | terms, though, we do not think that the Commission had a sufficient understanding of
15 | the algorithm and its inputs to have been able to do an analysis that would have
16 | produced reliable results and I say that only to give you a flavour at this point of
17 | Amazon's position in relation to these documents and to say that if and to the extent
18 | that these claims are certified, this sort of issue will become a material point in dispute.
19 | That is the sort of thing that will be gone into, but it does not matter today.

20 | MR JUSTICE ROTH: Have you checked that you do not - you know, that Amazon can
21 | challenge my reasoning that even the findings, and there are factual findings here as
22 | well, in this case and equally, it will have, as a result of the commitments, changes to
23 | the algorithm. There were reports of monitoring trustees looking at the changes and
24 | what effect they had, and that will all inform this debate.

25 | MR TURNER: Yes, staying with this point, I wanted merely to draw to your attention
26 | that it is not merely the reasoning, but some of the underlying analysis by the

1 Commission was not something on which Amazon at the time had the opportunity to
2 come back and rebut. This was not therefore the result, what you see, as it would be
3 in an infringement decision, of engagement, the exercise of rights of defence, and
4 Amazon's case being taken into account. That explains the puzzlement on Amazon's
5 part, but also I wish to draw to your attention so that you understand the way in which
6 these findings in a commitments decision need to be viewed.

7 MR JUSTICE ROTH: But they did, of course, get a lot of information from Amazon
8 over an enquiry over a couple of years, I think.

9 MR TURNER: They did.

10 MR JUSTICE ROTH: And they sent Amazon various requests for information. There
11 were a lot of footnotes, redacted, referring to things. So they have a lot of information
12 from Amazon, which obviously we do not have and they also, I think, got a lot of
13 information from third parties, which clearly we do not have, so as to inform the findings
14 that they made. So they clearly are findings to which we can have regard but accept
15 it is common ground they are not binding on the Tribunal.

16 MR TURNER: Sir, that is right. My point is that there is a difference between taking
17 into account material initially which raises concerns and separately allowing the
18 company to exercise its rights of defence, get into questions such as how the algorithm
19 works, the weights, the inputs, and so forth, before coming to a conclusion. My point
20 is that in the nature of this process, the matter was drawn to a close before that debate
21 had crystallised and that this is the consequence. Sir, in relation to your other point
22 concerning the information that would come about the changes from the commitments
23 and so forth, that is right. You will have that information. It is my understanding, and
24 I will be corrected if I am wrong, that for your information, that the monitoring trustee
25 is not looking at the effects in the market of these changes. It is supervising whether
26 certain changes that comply with the commitments in behavioural terms have

1 | happened. It is not therefore part of the monitoring trustee's function to look at what
2 | impact this has had.

3 | MR JUSTICE ROTH: Yes. So it is looking to see that the new algorithm or practices
4 | are non-discriminatory, and do not lead to a competitive disadvantage, but how much
5 | that changes what happens in the market, they are not looking at.

6 | MR TURNER: The only qualification, Sir, I note is that they are in fact looking to see
7 | whether the commitments that were entered into, which the Commission said satisfy
8 | it, are being implemented as agreed and that is their (inaudible).

9 | MR JUSTICE ROTH: Yes, but just looking at the commitments, that is worth looking
10 | at for a moment while we are on this. I think they are in the authorities, I think. The
11 | EU commitments.

12 | The authorities, tab 80, I am told it is done. Yes. In accordance with Article 9, it is
13 | page 3583, electronic, Amazon offers the following voluntary commitments, and then
14 | going down to the fifth paragraph, with respect to the first case, the commitments are
15 | intended to ensure Amazon's first party retail activities refrain from using non-publicly
16 | available data, generated or provided by sellers, when making decisions in competition
17 | with those sellers and with respect to the second case, which is the one I was referring
18 | to, the commitments are intended to ensure the conditions and criteria that Amazon
19 | uses for the purpose of selection and display of the offers in the offer display, which I
20 | think means the featured offer, and the selection of merchants and offers eligible to
21 | Prime and the Prime name in the Amazon stores do not, by reason of discriminatory
22 | treatment, lead to a competitive disadvantage for sales. This includes competitive
23 | disadvantage as a result of the application of unequal carrier-related conditions and
24 | criteria. So that, presumably, will be the focus of the monitoring trustee, to ensure that
25 | the changes that are made satisfy those conditions.

26 | MR TURNER: Sir, I will check over a short adjournment if possible, whether what the

1 monitoring trustee is doing goes beyond policing whether what has been agreed to
2 satisfy the concerns that you've read out from the document have been implemented
3 properly, as opposed to having a wider role of looking themselves into questions of
4 discrimination beyond simply policing whether the specifics that have been agreed
5 have been implemented.

6 MR JUSTICE ROTH: Yes.

7 MR TURNER: The other point relates to the one finding where there has been an
8 infringement decision, which is Italy. Amazon firmly considers that the Italian
9 competition authority decision is incorrect. You asked yesterday about the status of
10 Amazon's appeal. I am told that it is this. The stay has been lifted. The merits hearing
11 is currently listed for as soon as 21st May. There is, though, I am told, a prospect that
12 this may not be effective and that there might be a further stay. I am also able to say
13 that it is a full appeal on the merits of the decision, but I am not in a position to give
14 you precise details of the coverage now. So that is by way of ---

15 MR JUSTICE ROTH: That was the hearing - the custom of the Italian courts, it is a
16 fairly short hearing.

17 MR TURNER: Yes.

18 MR JUSTICE ROTH: A matter of days, if that.

19 MR TURNER: I know it is short. I will take instructions on the expected length.

20 MR JUSTICE ROTH: Yes.

21 MR TURNER: The third opening remark, just before we adjourn is not about the expert
22 methodology, it concerns the issue of the litigation funding arrangements on the
23 Hammond side, which I do intend to come to. In a nutshell, we do consider that those
24 arrangements, for the reasons I will develop, are outrageous because they
25 contemplate disproportionate returns to the funder from this litigation project at the
26 expense of the class. Their defining feature, as was canvassed a few moments ago,

1 is large step changes in payments of a huge amount at various intervals. One thing
2 this unusual structure in this context does create is perverse incentives on the funder
3 at each stage to delay any settlement until after a milestone has been reached and
4 the jackpot is achieved. Mr Moser did suggest that it is not something that should
5 trouble the Tribunal because you should focus on the position at the end, after many
6 years of proceedings alone. It is our position that you cannot, and I will get into the
7 rest of it, that you cannot wish away the process that is envisaged for the progress of
8 the proceedings throughout its duration. In the context of the explicit recognition in Mr
9 Moser's skeleton, which is paragraph 59, I think, that any eventual award of damages
10 to consumers in the claim could be, in his words, modest, we consider that these
11 arrangements are manifestly indefensible and that they are inconsistent with the
12 overall beneficial purpose of the collective actions regime, which was described
13 yesterday pithily by Mr Beal, as access to justice for a class. The only explanation
14 that has now been offered is that at the specific time that Mr Hammond was looking
15 for funding, there was already a PCR for the consumer class up and running, Ms
16 Hunter, there were no other alternative funding terms, there was no alternative funder
17 available. As I will explain, or hope to, this is not something that can be pushed off to
18 the final distribution of an aggregate damages award at the end of the case, if indeed
19 the case ever gets that far, because it is clear, here and now, that the funder returns
20 could, on realistic assumptions, substantially erase any damages that consumers
21 would receive, and that is a particular concern in the circumstances that were debated
22 just before I stood up, where the funder intends to be paid in priority to the class and
23 Mr Hammond has recently, November last year, amended his witness statement to
24 emphasise that if there are damages at the end of the case, he will apply to the
25 Tribunal for payment to the funder prior to distribution to the class that he represents.
26 Sir, those are the only points I wanted to make by way of brief preliminary remarks.

1 After the short adjournment, I will get straight into relevant legal principles, focusing
2 on Microsoft, and then these specific points.

3 MR JUSTICE ROTH: Yes, I think on the point on Mr Hammond's skeleton, as I read
4 it, all that was being said is well, one does not know what the ultimate outcome of the
5 proceedings will be and if they fail, as you hope, the funder gets nothing. If the
6 damages are very large, these returns might be reasonable, but if the damages are
7 modest, then the Tribunal might well regard these returns as unreasonable and can
8 control it (inaudible). I do not think he is saying there is a realistic expectation the
9 damages will be modest, he is certainly not going to say that. He is saying well if that
10 were to be the eventuality, then no doubt the Tribunal would then, in that situation,
11 review the returns and not accept these. I think that is the way I understood it.

12 MR TURNER: Sir, I entirely accept that. The only comment that I would make, if it is
13 convenient as you have raised it, relates to what Mr Moser was saying about the failure
14 of his expert in his preliminary estimate of loss, £2 billion or so, depending on the
15 assumptions, to take into account delivery speed when he was weighing up these
16 offers. I am not going to go into the rights and wrongs of it, but the fact is it was not
17 taken into account in those estimates and our point for today is simply that, therefore,
18 the resulting number which you have available to you for certification, when you are
19 thinking about potential benefits, does not include a number that we say is reliable.
20 That is the only point.

21 (13.05)

22 (Luncheon Adjournment)

23 (14.02)

24 MR JUSTICE ROTH: Yes, Mr Turner.

25 MR TURNER: Sir, I turn to relevant legal principles. The single point that I would like
26 to cover is the issue of the requirements of the Microsoft test, which Mr Beal addressed

1 yesterday morning. It is important because the issues of substance which Amazon is
2 raising at this hearing all concern the correct application of that test.

3 MR JUSTICE ROTH: Yes.

4 MR TURNER: And our case is that the following four propositions are established by
5 the authorities. First, it is not the case that if the proposed class representative can
6 show an arguable claim of infringement of the competition rules, here abuse of
7 dominance, they are entitled to a trial of collective proceedings almost ex debito
8 justitiae. Rather, the position is that at certification the Tribunal must be satisfied that
9 the PCR (Proposed Class Representative) has a workable methodology for
10 establishing the elements of causation of loss and quantum for damage. The first
11 proposition. Second, what that entails is that a methodology must be put forward
12 which is not hypothetical or speculative, it must be grounded in the facts of the case
13 and it must be plausible. The Tribunal is entitled to use their intuition and common
14 sense to assess plausibility and credibility. Third, that there must be some evidence
15 of the availability of the data to which an expert intends to apply their methodology
16 and, fourth, that the need for these matters to be shown to the Tribunal's satisfaction
17 stems from the important gatekeeper function performed by the Tribunal in the
18 collective action regime. It is an active, elucidatory role, not passive. It is intended to
19 keep sprawling litigation in proper bounds and ensure that defendants are not
20 confronted with baseless claims. Those are the four points we say should guide your
21 approach to the issues that Amazon is raising today and to make them good I will
22 simply take you at pace to the key passages in the relevant authorities.

23 For the first of these, please return to Merricks in the Supreme Court, which Mr Beal
24 went to, authorities tab 15. He took you to a couple of references. He took you to 47,
25 PDF page 916 on my copy, and 73, PDF page 932, I think. Let us go only to 73
26 because they make the same point, both of these paragraphs, when you read them

1 properly.

2 MR JUSTICE ROTH: That is paragraph 73, is it?

3 MR TURNER: Paragraph 73: "The fact that data is likely --"

4 MR JUSTICE ROTH: Sorry.

5 MR TURNER: I am sorry?

6 MR JUSTICE ROTH: My mistake, please give me a moment. (Pause). This is: "The
7 fact that data".

8 MR TURNER: That is right.

9 MR JUSTICE ROTH: And what is the electronic page?

10 MR TURNER: It is 932. The same point falls to be made about this and the earlier
11 paragraph 47. When you read it, you see the point. This paragraph says:
12 "The fact that data is likely to turn out to be incomplete and difficult to interpret, and
13 that its assembly may involve burdensome and expensive processes of disclosure are
14 not good reasons for a court or Tribunal refusing a trial to an individual or to a large
15 class [and then these words] who have a reasonable prospect of showing they have
16 suffered some loss from an already established breach of statutory duty."
17 The point being made is about the problems that you get with patchy or difficult data
18 that may crop up down the line, once it has been established that the individual or the
19 class has a reasonable prospect of showing that they have suffered some loss, which
20 takes you back to the methodology. It is an essential ingredient at certification that
21 a methodology will have been shown that gives the Tribunal some solid basis for
22 inferring that causation of loss and some element of quantum can be proved. The
23 concern in Merricks was to point out that, once that stage had passed, potential
24 difficulties in precise quantification, grappling with patchiness of the data, should not
25 stand in the way of taking a case to trial. But you still have to show you have
26 a workable outline methodology at certification and that is what the argument today

1 with Amazon is about. That deals with my first proposition.

2 If you would now, please, go to Bulk Mail, which is in authorities at tab 42, and the
3 PDF page reference I have is 2338. Here you have the paragraphs, Sir, that you
4 directed Mr Beal's attention to yesterday. They conveniently do set out, at paragraph
5 14, the statement of approach from the Microsoft case. And to rehearse what those
6 contain, the key elements are (i) credibility or plausibility, (ii) that the methodology is
7 grounded in the facts, it is not merely speculative, (iii) that there must be some
8 evidence given to the Tribunal to show it that the data that will be considered will be
9 available. And then over the page, at paragraph 15.5, the Tribunal records the
10 statement by Green LJ in Gutmann that judges are naturally expected to use their
11 intuition and common sense in resolving those matters. So that addresses the next
12 proposition.

13 And as regards the fourth of my propositions, there is the classic statement of the need
14 for the Tribunal to perform an active elucidatory role and not to be passive in McLaren,
15 Court of Appeal. That is authorities tab 23. The relevant page for the PDF is at 1589
16 and the two relevant paragraphs on that page, 1589, are 46 and 47, to read those in
17 Gutmann, 46:

18 "The Court of Appeal when seeking to pull the threads together from the case law
19 endorsed the proactive gatekeeper role of the CAT."

20 Then moving on:

21 "There are clearly established strong public interest benefits in the CAT performing
22 an active elucidatory role, which includes ensuring large-scale litigation is run
23 efficiently, ensuring defendants are not confronted with baseless claims [and that
24 extends to the causation and loss elements of those claims for damages] and ensuring
25 that potentially sprawling cases do not absorb an unfair amount of judicial resource."

26 And then at 47:

1 “The consequence [reading on a few lines] underlying the Microsoft test is the
2 proposition that if a claim is certified, the methodology offered by the class
3 representative will provide an initial blueprint for the parties and the CAT of the way
4 ahead to trial.”

5 Each of those propositions are going to be in play in my analysis of the methodology
6 put forward by Dr Pike for proving key aspects of the pleaded loss, which is the topic
7 that I now come to.

8 Sir, I now turn directly to the Hammond case and my starting point is to anchor the
9 submissions in the way that the claim has been put in the pleading. If you would,
10 please, look at the pleading itself, it is the re-amended collective proceedings claim
11 form at bundle B, tab 1, beginning at HB4.

12 MR JUSTICE ROTH: Just one moment.

13 MR TURNER: Apologies. (Pause).

14 MR JUSTICE ROTH: Yes.

15 MR TURNER: So, it is at bundle B, tab 1. The part I want to go to is the part headed:
16 “Causation and loss”, which is page 28 of the PDF, internal page 25, so that you can
17 see the structure. Paragraph 82 tells us the infringements are a claim to amount to
18 breaches of the statutory duties that give rise to actionable claims. Then 83:

19 “UK consumers who purchased goods on the marketplace suffered losses in the form
20 of the higher prices caused by the discriminatory nature of the algorithm which enabled
21 Amazon and other FBA sellers to charge higher prices while retaining the higher
22 probability of winning the Buy Box than non-FBA sellers.”

23 So this is the case based on direct losses from self-preferencing which is alleged,
24 overcharges on the part of Amazon and other sellers using the FBA service. Go over
25 the page, 86, paragraph 86, this sets out what it is alleged would have happened in
26 the absence of the alleged self-preferencing and it is one or both pleaded of two

1 scenarios. The first scenario, at subparagraph (a), all sellers would have made the
2 same offers as they actually did, but a non-FBA seller would have won the Buy Box,
3 either with a lower headline price, a lower price, or, they say, better rated, a better
4 rating. Pause there for a moment. It is unclear whether Mr Hammond considers that
5 if you have a competitor put in the Buy Box who is better rated as pleaded, but their
6 offer was higher, higher priced, would that count as a consumer loss or not? Mr Moser
7 may be able to clarify that. But in any case, this first scenario, where all the offers are
8 the same, this is what is labelled the constant price scenario.

9 The second scenario is subparagraph 86(b). It contemplates the FBA sellers who
10 won the Buy Box in the real world would have offered lower prices, sufficiently low to
11 maintain the same probability of winning the Buy Box. That is the schema and one
12 point on methodology that I will come back to but flag now, is that Dr Pike does not
13 take into account, we say, the common sense and intuitive point that a retailer is
14 generally constrained by their costs when setting a price for a product. Sellers do not
15 tend to sell below their costs. But that recognition, as you will see, forms no part of
16 Dr Pike's intended methodology.

17 Paragraph 87 completes the description of the two potential ways in which the class
18 will have suffered the loss. If you go over to paragraph 91 on the facing page --

19 MR JUSTICE ROTH: But I think, if I have understood it rightly, that in paragraph 87,
20 (a) relates to (b) in 86. And (b) in 87 relates to (a).

21 MR TURNER: I understand that.

22 MR JUSTICE ROTH: Is that right?

23 MR TURNER: Yes.

24 MR JUSTICE ROTH: That is right, yes.

25 MR TURNER: Yes, exactly.

26 MR JUSTICE ROTH: You understand it the same way.

1 MR TURNER: We understand it the same. And then if we then go over the page to
2 paragraph 91, you see the last sentence. A rider is entered, notes that Dr Pike
3 considers he will be able to refine his analysis further as to seller behaviour in the
4 counterfactual. So he says that is something that he flags that he will be looking into.
5 It is another point on methodology that I am going to look at. And finally, you have
6 paragraph 92, at the bottom of that page and going over. This sets out three
7 circumstances in which consumers are alleged to have suffered loss.
8 The first two of these, (a) and (b), are the direct losses from the alleged
9 self-preferencing, which Dr Pike and Mr Hammond are calling the exploitative loss.
10 And if you read those, you can see that subparagraph (b) is bringing in the issue of
11 purchases which are made outside the Buy Box of FBA items. The point here in both
12 of these subparagraphs is you are buying from an FBA seller, to use that terminology,
13 and you are overpaying. Turn over the page and look at subparagraph (c).
14 This in the pleading is the only statement of losses resulting from what Mr Hammond
15 calls, and Dr Pike elaborates, the exclusionary abuse. It is extremely brief and you
16 will see that it matches the very brief, and sometimes quite hard to follow, explanation
17 that is given in Dr Pike's expert report of an intended methodology for proving this loss.
18 There are two points to note about it.

19 MR JUSTICE ROTH: Just one moment. (Pause). Yes.

20 MR TURNER: There two points to note about it. The first is just a formality. There is
21 a reference back that has been added to paragraphs above, 73 to 76, which have
22 been added by amendment. You will note that seems to be wrong. It should be 77 to
23 80. We do not need to look into that.

24 But the significant point is this. As you read it, you see that the claim for loss from the
25 exclusionary abuse is expressly confined to charges imposed by Amazon on FBA
26 sellers. Charges that are passed through by those sellers to consumers and the

1 overcharges by Amazon concern two things; excess FBA logistics fees and excess
2 marketplace commissions. So it is limited to overcharges directed at this particular
3 type of seller, or a seller in a particular circumstance, FBA sellers, relating to excess
4 fees for the logistics and excess marketplace commissions. And I say that because,
5 although Dr Pike in his report from July last year said his thinking is that excess
6 marketplace commissions might also be imposed by Amazon on FBM sellers, and
7 then passed through to consumers by them, that is also a loss. That is not this pleaded
8 case. The pleaded case is what you see. That is how they have framed it.
9 So I turn now from this pleaded case and put that away to the methodology in support.
10 I will take you later to Dr Pike in his expert reports. And my aim, if you open up bundle
11 C, and we are going to be going in particular to his first report as updated at C/15. But
12 my aim is to show you that this is a case where the outline methodology in material
13 ways is so scant and so difficult to understand, even incoherent, that it does not meet
14 the necessary standard needed for certification under the Microsoft test because the
15 Tribunal is, we say, prevented from exercising the gatekeeper function to see that this
16 case is in a proper state to go forward and that you do have a satisfactory initial
17 blueprint for trial. And if I may, I will begin with my points on the methodology for
18 proving losses from the so-called exclusionary abuse.

19 I probably ought to make one point in view of what Mr Moser said earlier about the
20 relationship between these different abuses, just to be clear about this. The
21 exclusionary abuse, you restrict competition in a logistics market which enables you
22 to overcharge for logistics fees and then there are knock-on consequences for your
23 marketplace commission fees. That does not simply overlap with the so-called
24 exploitative abuse. And the methodology in support of this exclusionary abuse is
25 therefore not, contrary to what was said earlier, just another way of getting to the same
26 end point. It means that even if the Tribunal, if you end up satisfied with the

1 methodology on the exploitative abuse, discrimination leading to higher prices for
2 consumers, you do still need to attend to this methodology put forward on the
3 exclusionary abuse to see if that is sufficient and plausible and workable.

4 MR JUSTICE ROTH: It is an additional scope for additional loss, is it not?

5 MR TURNER: Yes, exactly. And I just want to be clear about the extent to which it is
6 said that that is scope for extra loss.

7 MR JUSTICE ROTH: And it is not the sole basis but it is a main basis of the Stephan
8 claim.

9 MR TURNER: Yes. Dr Pike's clear position is that this exclusionary abuse creates
10 what he refers to as additive harm on top of the pricing effect in one specific respect.
11 And that respect is loss based on Amazon allegedly overcharging the sellers for the
12 marketplace commission fees, which he then says the sellers pass on in their prices
13 to consumers. That is his case. And you can see that immediately if you go to his
14 expert report at tab 16 of bundle C1, which is a small report replying to Mr Holt on
15 behalf of Amazon. And you go in it to page 434 and look at paragraph 85 where at
16 the end of that paragraph he simply says, this is what I have been saying all along.
17 Four lines up from the bottom of 85 on that page he says:

18 "To restate, I register that neither the harm --"

19 MR JUSTICE ROTH: Sorry, just a minute.

20 MR TURNER: Yes. (Pause).

21 MR JUSTICE ROTH: You are in paragraph 85?

22 MR TURNER: I am, that is right. Sorry, not at the very beginning of it.

23 MR JUSTICE ROTH: I see, the last two sentences.

24 MR TURNER: The last two sentences.

25 MR JUSTICE ROTH: Yes.

26 MR TURNER: So I will need to explain. You will need to have Pike 1 available to you

1 at the same time.

2 MR JUSTICE ROTH: Yes.

3 MR TURNER: And if you have not got a hard copy, you will not be able to flip over
4 easily, but what he is says is:

5 “To restate, I consider that neither the harm in 391, Pike 1, nor the harm in 392, Pike
6 1, is additive.”

7 391 is essentially the harm from the higher prices itself, absolutely identical, it is
8 obviously not additive. 392 is the extra logistics fees which feed through, he says, into
9 the ultimate price, the delivered price or landed price of goods you pay for on Amazon.

10 And he says that is not additive either. But what he does say is, in the final sentence:

11 “The only additive harm is that set out in 398 of Pike 1 where I note that there is scope
12 for additional harm.”

13 And for you, just to be clear about what he means as the scope for the addition, if you
14 go to page 376 in C1, which is in that first report, he says so in terms. So that is in his
15 first report at paragraph 398. He says:

16 “Finally there is also the potential for additional harm if the foreclosing of fulfilment also
17 restricts competition between marketplaces.”

18 And essentially this is his point that there is then, because of that restriction of
19 competition between the online marketplaces, he says there is going to be higher
20 commission charged by Amazon taking advantage of that limited competition. It
21 charges it to the sellers, they pass it through to the consumers, and his approach is
22 that this, according to him, is additional to the exploitative harm. That is his case. That
23 is how he explains it.

24 Now, the exclusionary abuse therefore, to recap, involves these two elements; higher
25 logistics fees and higher marketplace commissions, one of which is said to be additive,
26 one of which is not. How does one approach analysing his methodology? The correct

1 starting point is what he himself says about it and which Mr Moser also trailed in his
2 submissions. If you go to his report last year responding to Mr Holt's criticisms of this
3 very scant methodology, and that is at tab 16 in C1. This is the response to Mr Holt.
4 In it, if you go to page 433.

5 MR JUSTICE ROTH: This is where we just were, yes?

6 MR TURNER: Yes, I am sorry, this is where we just were, to go to the prior page and
7 look at paragraph 82. And he says, gently:

8 "In general, I note that the methodology that I have set out in relation to the direct
9 damages from the exclusion [which is exclusionary abuse] is at a higher level than that
10 which I provided in relation to the damages from the exploitative abuse or the collateral
11 damages from the exclusionary abuse [which as far as we can see is exactly the same
12 thing]. However, I would suggest this is proportionate given the detail provided on the
13 exploitative abuse and the collateral damages from the exclusionary abuse, and the
14 possibility I have acknowledged that Amazon may not yet have taken the opportunity
15 to overcharge, despite having created the capability to do so."

16 So he suggests this is proportionate. What you will now see he has done, because he
17 has done more work on the self-preferencing case and for the reason he candidly
18 acknowledges that Amazon might not have overcharged at all at this stage, that is
19 either on commission fees or on the FBA logistics. In my submission, neither of those
20 amounts to a good reason to not set out a plausible methodology to show losses from
21 the exclusionary abuse, if this is what he intends to call for material on and to work up
22 for a report for the trial. So if I may, I will turn to the substance of this outline
23 methodology to prove losses from the exclusionary abuse.

24 MR JUSTICE ROTH: I am just trying to understand the statement you drew attention
25 to at the end of paragraph 85 about the harm in 391 and 392.

26 MR TURNER: Yes.

1 MR JUSTICE ROTH: At 391 is a higher charge. (Pause). Well, it is really 392, which
2 is a higher charge in fulfilment/logistic services.

3 MR TURNER: Yes.

4 MR JUSTICE ROTH: He says it may or may not have happened. There may not have
5 been such a charge. And he says ... I am just trying to ... (pause).

6 MR TURNER: He deals with it at 394 in saying that it is not additive there, that bit.
7 His point is that even if there has been an overcharge --

8 MR JUSTICE ROTH: That is referring to 391, is it not, and 394?

9 MR TURNER: No, 394, if you read on, he is --

10 MR JUSTICE ROTH: The question of harm.

11 MR TURNER: What he is saying is if you do not accept, essentially, if you do not
12 accept my case on there being harm from the discrimination leading to consumers
13 paying higher prices, the question might arise, and now I am paraphrasing, you
14 continue at the third line:
15 "As to whether there was harm that was directly rather than indirectly caused by
16 foreclosure."
17 So he says put aside my whole first approach, ask yourself whether this harm caused
18 foreclosure of the fulfilment market, squeezing other logistic rivals and meaning that
19 Amazon's costs go down and their costs go up. And he says:
20 "In that case I would want to measure the extent to which any overcharging for FBA,
21 two of the scenarios above, were passed on to consumers."
22 And his final comment is:
23 "To be clear, that harm would be a proportion of the harm described in section 10.4."
24 The one which is his, it is just a page back, two pages back. But that is the harm from
25 the exploitative abuse itself. And he says it would not be additional. Now, I am not
26 seeking to, I should say, I am not seeking to defend this logic. All I am seeking to do

1 is to show you what he says. And it is very clear that what he says is that when you
2 turn to harm from impairing the logistics market you will not get any additional harm
3 for consumers that is not already racked up in the higher prices that you would see
4 that they pay once you have done the work on self-preferencing.

5 But then over the page, the next page, he says the position is different, he says, when
6 you come to the marketplace commission fees. Now, as I say, I am not seeking to
7 understand this and the logic of it myself. I do need you to see what he is saying.

8 MR JUSTICE ROTH: Yes, I think, and I have not read this report in anything like the
9 close attention that all of you have. He may be saying because there is no claim for
10 what we are calling FBM sales at all, so it is competition and fulfilment effect on FBM
11 sellers he does not take into account. So it is just on FBA and therefore it may have
12 increased the price charged to FBA sellers that is reflected in their higher price to
13 consumers. Then if you remove the discrimination in the algorithm, therefore the FBM
14 seller, who is not affected by this, would get the featured offer and the sale and
15 therefore it is wrapped up in exploitative abuse. That is the only way I can understand
16 it.

17 MR TURNER: We are in that position too. We are exactly there. However, there are
18 two ways in which he says with this exclusionary abuse theory the harm is caused.
19 One is Amazon overcharging for the logistics service to the FBA seller, he talked about
20 that. Another is that Amazon overcharges these FBA sellers, he is again restricting
21 the case we have seen just to them, for the marketplace commission. And here he
22 says, we went to it before, this is additive, this is different, and it is something extra
23 that I will be showing, if this case goes forward. It is not for me to go into that
24 reasoning. That is how he sees the case and how it has been explained to him. And
25 what I would propose to do now, having drawn to your attention his logic in the case
26 that he is going to develop, is to turn to points that we consider for certification show

1 that there is a gap in his approach and there is one very large particular point, even if
2 you accept this logic, that we say should cause you to conclude that he has not put
3 forward a proper methodology.

4 So if I may, I will, first of all, show you a little bit more closely all he has got in his report
5 on this exclusionary abuse because there is not much. You begin in his main report
6 at page 361, where there is the heading: "Methodology on exclusionary abuse". You
7 see that, so that is page 361 of the bundle, halfway down, 8.3.2 is the section:
8 "Methodology on exclusionary abuse". And you will see it is followed by six
9 paragraphs, that is it, 326 to 331. And then just to show you the whole scope of it, we
10 will come back to that. If you go to the end of the report beginning at page 374, there
11 is one further bit. At the bottom of page 374 there is a heading, 10.4.2: "Harm from
12 exclusionary abuse". So this is all there is. It is those two together. And that is
13 followed by essentially ten paragraphs, 390 to 399, some of which we were just looking
14 at. So that is the totality, that is all there is on exclusionary abuse. That is all you have
15 to consider.

16 Now, if you go back to page 361, in a nutshell, the suggestion is that self-preferencing
17 by Amazon of the FBA fulfilment service for retailers has led to it taking an excessive
18 amount of business on the Amazon marketplace. And he intends to show that this
19 has damaged competition between fulfilment service providers in the logistics market.
20 So that is the target. It has made Amazon's FBA stronger because it gets economies
21 of scale. It has made other fulfilment providers, Royal Mail or DPD or Evri, weaker
22 because they cannot achieve necessary economies of scale. From that point he then
23 posits two possible harms which you are going to see actually collide their intention
24 with each other. His first proposition is that Amazon takes advantage of the increased
25 market power in logistics it has now got to charge artificially high prices to retailers for
26 the FBA service, then the artificially high prices are passed on to consumers.

1 The second, coming to the marketplace commissions point, is actually on the basis
2 that Amazon does not take advantage of increased market power in logistics to charge
3 higher prices. In fact, in his recent summary document he says he expects Amazon
4 will not charge prices out of line with its costs, its low costs now. Instead, on this part
5 of the case, because Amazon's FBA prices are so much better because of the extra
6 business than those which the rivals can offer, it causes harm to other online
7 marketplaces because all the sellers on those other marketplaces have got to buy in
8 more expensive logistics. And then the suggestion is that that weakening of the other
9 marketplaces materially reduces the constraint on Amazon to set competitive
10 marketplace commission rates. And that is why Amazon's marketplace commissions
11 to the sellers are pushed up. And then in the final step he is going to say that the
12 sellers pass on the higher commissions to consumers.

13 That is the way the theory operates and I would like to show you the relevant outline
14 methodology then in these paragraphs, such as it is, to identify why we say there are
15 manifest gaps and, to be clear, this is not an attack on the merits of what he is
16 proposing. This is not a battle of the experts. I am simply seeking to identify to the
17 members of the Tribunal that it is missing certain elements that as a matter of common
18 sense are needed and the end result is that he does not have a plausible methodology.

19 So if you begin back on page 361 in Pike 1, this is the very compressed section where
20 he explains how he is proposing to show the competition in the logistics market has
21 been harmed by the self-preferencing of the FBA service. The gist is as follows. In
22 paragraph 327 Dr Pike says:

23 "I am going to begin by assessing the size of any discriminatory advantage [at line 2]."

24 What that means is working out how hard the rival sellers who do not use the FBA
25 logistics service have got to work in order to beat the self-preferencing, as I understand
26 it, if I can put it colloquially. Put simply, what is this discriminatory advantage worth if

1 | you think of it in money terms? Then you go down to the bottom paragraph, 328, and
2 | this is where the methodology for today's purposes begins to fray, and I will come on
3 | to the crunch point. Because he says in 328 that he plans to assess the elasticity of
4 | demand for fulfilment services with respect to the price of those services. In other
5 | words, he wants to measure how much extra business in the Amazon store the FBA
6 | service gets, and so takes away from other network providers, because of
7 | self-preferencing. Where will he get this information on elasticity of demand for
8 | fulfilment services from? Where is that data coming from?

9 | He says, you can see, that he expects, on the basis of public statements that Amazon
10 | has made, that Amazon will have done analysis on it, and he refers to the transcript of
11 | an interview with Mr Jeff Bezos, Amazon's executive chairman. Now, it is unlikely that
12 | this Tribunal has looked at that statement by Mr Bezos, but if I may, there is a copy of
13 | it here. I have handed to my learned friends too, so you can see what data he has in
14 | mind when he makes this statement about having this information on elasticity. It is
15 | a very short interview.

16 | MR JUSTICE ROTH: Yes.

17 | MR TURNER: And there is only a very narrow bit that you need to see. It is on the
18 | second page near the bottom, about three boxes up from the bottom, Jeff Bezos. You
19 | will see on the second page:

20 | "When things get complicated, we simplify by saying what's best for the customer?
21 | And then we take it as an article of faith if we do that, it'll work out the long term. So
22 | we can never prove that. In fact [this is the relevant bit, sometimes we've done price
23 | elasticity studies, and the answer is always we should raise prices. And we don't do
24 | that because we believe— and again, we have to take this as an article of faith— we
25 | believe by keeping our prices very, very low, we earn trust with customers over time,
26 | and that actually does maximise free cash flow over the long term."

1 So that is what is being footnoted by Dr Pike. And you can see quite straightforwardly
2 that Mr Bezos is talking about studies on how consumers on the store react to price
3 increases in the end products. He is not talking about studies on how sellers react to
4 price changes in logistics, which is the point where he is footnoting.

5 So what is left by way of the data availability and the intentions? In the last lines of
6 paragraph 328 is an intention on Dr Pike's part to estimate his own elasticities by
7 calling for collection of data --

8 MR JUSTICE ROTH: Did he only talk ... sorry to interrupt you.

9 MR TURNER: No. (Pause).

10 MR JUSTICE ROTH: Is he only talking about prices for something that is sold by
11 Amazon retail? Or is he talking about prices generally? It is not clear, is it?

12 MR TURNER: Well, what he seems to be saying, and as we understand 327 to 328
13 is, I am going to price this discriminatory advantage. How much is it worth in money
14 terms?

15 MR JUSTICE ROTH: Yes.

16 MR TURNER: And then I am going to use an elasticity of demand study, data from
17 that, to work out if the price really was --

18 MR JUSTICE ROTH: No, I understand. I am looking at what Mr Bezos says.

19 MR TURNER: I am sorry. I apologise.

20 MR JUSTICE ROTH: It is so vague, other than saying that Amazon has done
21 a number of price elasticity studies, whether they are only on consumer price elasticity
22 or whether they are on seller price elasticity on the basis that it can feed through to
23 the consumer, it is unclear, is it not?

24 MR TURNER: I understand your point, sir. We have read this. We understand this
25 to mean that he is talking here about price elasticities in terms of the consumer, the
26 end consumer. That is how --

1 MR JUSTICE ROTH: No, it is very clear, but I mean, you can say it is not a very strong
2 basis for assuming that Amazon has done it, but one can, as you pointed out earlier
3 on, the Tribunal can use its common sense, Amazon is a hugely sophisticated, well
4 resourced, well established company and in looking at how it prices for fulfilment, and
5 it obviously charges for FBA for that service, it would be surprising if it never does any
6 sort of assessment of, well, if we increase the price so much what volume will we lose?
7 And it is part of the normal commercial decision making. So to say that I expect, even
8 if there was no such interview, that Amazon will have done some internal studies, and
9 if not he says I will do my own, I do not think that is a surprising statement, is it?

10 MR TURNER: Well, sir, what I was intending to show, I am now coming to the point,
11 the insurmountable problem. What I was doing was taking you through systematically
12 his methodology and the data that he intends to use to get there. So I understand
13 your point. I now come to the issue that Amazon is going to make as to why there is
14 an unsurmountable problem. So we have gone down the path so far to see what he
15 is doing and what data he is using.

16 The insurmountable problem, in our submission, now comes in the next step. It is
17 designed to investigate what impact this loss of the business on the part of others,
18 corresponding to the gain from Amazon's fulfilment network, has on the economics of
19 the rivals. This is the impact on the logistics market. This is the point that was briefly
20 canvassed, Sir, with I think it was Mr Beal yesterday as well. So as an integral part
21 of this methodology he says I am now going to have to consider how much others are
22 harmed by this behaviour, by a certain amount of business that comes to Amazon
23 being taken away from the rivals. So staying on this page, you can skip over 329 at
24 the moment at the top of the next page. That is about whether Amazon pushes up the
25 prices of the FBA logistics in response to the extra volume of work. We will come back
26 to that in a moment.

1 The key paragraph is 330, just below it. Here Dr Pike says he will assess whether the
2 associated smaller scale of the rival fulfilment services in certain categories raises
3 their costs because they cannot achieve the economies. And our submission is this.
4 It is a matter of common sense that in order to assess it you do have to know who are
5 the main competitors you are talking about, you have got to have some details of their
6 business operations and their cost structure. For example, one of these rival fulfilment
7 providers in the UK inevitably is going to be Royal Mail. Another is likely to be Evri.
8 And their business operations could well not be heavily dependent on deliveries to
9 Amazon at all. The impact on them of any reductions in business from Amazon
10 deliveries might not be that significant. It is something that has to be empirically looked
11 into.

12 MR JUSTICE ROTH: Well, Amazon has negotiated with both of those, has it not?

13 MR TURNER: That is another point. I am glad, Sir, you have raised it. Another
14 possibility is that if, like Royal Mail and Evri, you have got businesses to which Amazon
15 sometimes subcontracts its own delivery of FBA items --

16 MR JUSTICE ROTH: No, I am not thinking of subcontracting. They are both SFP
17 providers, Royal Mail and Evri.

18 MR TURNER: And Amazon as well.

19 MR JUSTICE ROTH: And Amazon has negotiated the terms on which they will supply
20 that service to third parties.

21 MR TURNER: Yes.

22 MR JUSTICE ROTH: So Amazon will have some information surrounding those
23 negotiations which no doubt will have considered when they discussed price, what are
24 their costs and how they negotiate on price.

25 MR TURNER: Sir, that is where I --

26 MR JUSTICE ROTH: So there will be something in Amazon on the negotiations of

1 | those standard terms, I think, or mandatory terms that Amazon then imposes on SFP
2 | sellers.

3 | MR TURNER: Sir, we understand that they will have negotiated to that extent and, as
4 | I say, they are also subcontracting the delivery of FBA items as well which --

5 | MR JUSTICE ROTH: Yes, I did not know that.

6 | MR TURNER: However, the point remains, and we say very firmly, that is not going
7 | to be telling you information. It cannot give you the information you need about their
8 | costs or their costs structure for you to form a view on this for the data to be available.
9 | And that is our submission. This is where the gap arises.

10 | MR JUSTICE ROTH: But is that not the sort of thing that can be refined as the method
11 | converts, if he finds it is not enough from Amazon? I mean, there are a limited number
12 | of fulfilment providers of this sort of scale in the UK, by seeking third party disclosure
13 | from one or two of those and to get the necessary information.

14 | MR TURNER: Sir, we are --

15 | MR JUSTICE ROTH: I know he has not said he is going to do that, but I mean, it is
16 | something if he finds that, contrary to his expectation, there is not that information
17 | available from Amazon, then there are plausible other sources. This is not disclosure
18 | from tens of thousands of sellers. This is disclosure from a couple of major suppliers
19 | of fulfilment services. And we all know who they are from just ordering goods from
20 | online retailers themselves. So there is a plausible source of that sort of information.

21 | MR TURNER: Yes. Sir, a couple of points on this. We agree that this information is
22 | needed, or we perhaps go further. We say it is not really a question in doubt because
23 | the notion that Amazon in the negotiations with these providers in these different ways
24 | has got sufficient information about the rivals' costs structures we do not consider to
25 | be plausible. It should be clear today that this information is going to be needed and
26 | that is why we say this is a pinch point because it is very clear from, I will give you

1 a range of references, but you can see in paragraph 330 itself, if we just read the next
2 sentence, and elsewhere. He does not intend to gather this information from third
3 parties. Mr Holt on Amazon's part said that you are going to have to get information
4 about the third parties' costs, which is confidential to them, Amazon is not going to
5 have it, in order to do this work. And his response was to double down and say, "I am
6 not going to." Now, you may say, well, when he discovers that it is insufficient this can
7 simply be raised as an issue. It is a material issue. It is a clear requirement for him to
8 carry out this methodology. It is not something that is provided for in the litigation plan
9 or budget. It is a gap. And so that is therefore, we say, a genuine pinch point where
10 the outline methodology as he has expressed and defended it found us. So that is our
11 first point.

12 MR JUSTICE ROTH: But there is then a point about it is not about the method of
13 using elasticities of demand, either implausible or inappropriate. It is about having the
14 information today effectively.

15 MR TURNER: Yes, it is coming back to Microsoft. It is the availability of data. It is
16 that part of the test.

17 MR JUSTICE ROTH: Although that, I have to say, was exactly the reason why the
18 CAT in Merricks refused to certify under the Microsoft test. What the experts said they
19 were seeking to do was logical and made sense and so that aspect of the test was
20 satisfied. But the Tribunal found that the sources that they said where they get the
21 data to do it, just were most unlikely to supply it. And the Court of Appeal and the
22 Supreme Court of course said that is not a major ground for refusing because then the
23 expert, they did not have to look at the methodology as such because we had said
24 that methodology was fine. But the question of the lack of information or difficulty of
25 getting information to apply it is just something one has to live with and you do the best
26 you can. And that is where the appellate courts overruled the Tribunal.

1 MR TURNER: Sir, if I may, our position is that that aspect of the Microsoft test remains
2 an important point because as a matter of common-sense reality, to perform your
3 gatekeeper role you do need to consider looking ahead for a blueprint for trial. Where
4 is the data going to come from? How is this going to be done? What is the impact on
5 the litigation plan and the budget? It is a factor that one cannot ignore. To that extent
6 it must be still a part of the test that should be heeded by the Tribunal.

7 The second point is that

8 (15.01)

9 the Courts in Merricks when that decision was made were at the very first step in the
10 development of this regime. There has been a considerable amount of learning since
11 that case, which bears out the first proposition that I have made, that this is
12 an important factor relevant to the Tribunal's task. And my third point is that there is
13 learning indeed, if I may say so, from the Merricks case itself and the fate of that case,
14 which as a natural experiment, one may say, perhaps bore out the way that the
15 Tribunal first (inaudible).

16 MR JUSTICE ROTH: Yes. I am not sure that allows us to depart from the Supreme
17 Court.

18 MR TURNER: It may, however, mean that unless it is said that that Microsoft test, this
19 part of it, was expressly disapproved by the Supreme Court, which it was not. So, you
20 refer to it.

21 MR JUSTICE ROTH: No, it was approved, the test.

22 MR TURNER: Lord Briggs refers to it --

23 MR JUSTICE ROTH: The test was approved.

24 MR TURNER: Absolutely and this is a part of it. So I do say therefore that this is
25 something that should not be swept to one side because as a matter of principle and
26 for future cases, this is an important dimension, and it matters here because you have

1 an expert who is saying: this is what I am going to be doing. I want to look into the
2 economics of the rival providers. He is going to need to get essentially confidential
3 information from them to do it. The modalities of it could be discussed further down
4 the line, but it is (a) not part of the methodology proposed and (b) it is something he
5 has repeatedly said: I am not going to do.

6 MR JUSTICE ROTH: Suppose that is all correct, we have Dr Houpis, not for Mr
7 Hammond, but it is another case --

8 MR TURNER: Yes.

9 MR JUSTICE ROTH: -- being tried with it. It also focusing much more and in great
10 detail on an overcharge on fulfilment, both for FBA sellers and for FBM sellers, and as
11 set out in detail in the methodology for doing that.

12 MR TURNER: Yes.

13 MR JUSTICE ROTH: If that methodology passes the Microsoft test, why can that
14 then not be, as it were, adopted in this case on the basis that we are not going to have
15 two experts trying to establish the same thing and that will then deal with the -- as an
16 alternative or supplement the inadequacies that you say are there in Dr Pike's
17 approach.

18 MR TURNER: So, fair question, Sir. The first point is that - and perhaps you are
19 taking this as read - it does assume essentially full joint case management and all the
20 data in the one case being available in the other. It also, secondly, means that in this
21 sort of case, and this would be essentially a novel point, where you have this sort of
22 joint case management and joint management for trial, the defects in one expert's
23 case, and I submit this is a relevant, clear first defect, can be repaired not by that
24 expert but by something else - another case running alongside it. And that raises
25 questions about how, if this case is certified, this methodology by Dr Pike is going to
26 be allowed to go forward.

1 MR JUSTICE ROTH: Well, there might be that question. But the idea that if two cases
2 run alongside each other, the expert evidence for one can stand for both, or it is
3 directed that there will be a single expert, is not entirely novel. I mean, suppose we
4 had not a collective action, but we had just two claimants, two retailers bringing claims
5 against Amazon; one produced one expert and one produced another expert, both
6 trying to carry out the same exercise, alleging an overcharge in fulfilment services.
7 We would say, well, these are going to be tried together, and you will have one expert,
8 and you cannot have two.

9 MR TURNER: Yes.

10 MR JUSTICE ROTH: And no doubt Amazon would be saying the same thing: we do
11 not want to have to meet two experts. And here we have the screening process of
12 having to say: well, has the expert set out a plausible methodology? Well, if one of
13 the two has, is that not good enough? Now, that is of course subject to the point that
14 for Mr Hammond's case he has got to show pass-through because if there is no pass-
15 through to consumers, his class does not benefit from this overcharge - and we have
16 not heard you on that yet, and I know you are coming to it. But on this aspect it would
17 be very strange if you take the alternative position. Say we said: no, this is no good.
18 Mr Hammond cannot claim for this. The two are heard together. We find,
19 notwithstanding the no doubt excellent arguments we will hear from Mr Piccinin that
20 actually Dr Houpis has got a good methodology, so that can be heard. So we find on
21 one of the cases being charged, heard together, there is an overcharge on fulfilment
22 services. We have to ignore it for the other one, even though it may be found that on
23 Professor Stephan's case there is an element of pass-through, to make it even more
24 absurd, a pass-through to the other group of claimants who are in front of the court.
25 So you see where I am coming from.

26 MR TURNER: So I will make only two further short points and then move on. The first

1 is I have been reminded, but Mr Piccinin will develop this, that Dr Houpis does not
2 intend to obtain third party data on costs either. So this may not be something that
3 can be solved in that straightforward way. So we need to look at the whole picture.
4 The second is that this forms a component of a wider string of reasoning in Dr Pike's
5 methodology on the exclusionary abuse. This is part of a development where he also
6 is now going to talk about the marketplace commission fees being raised and so forth
7 and how that is affected. And before you take a final view on allowing the
8 methodological approach on exclusionary abuse here to go forward, I would ask you
9 to wait until we have got to the end of this submission and see what is left.

10 MR JUSTICE ROTH: Yes. We will not take a final view. I can assure you.

11 MR TURNER: So for the following steps in this methodology, it is best to jump forwards
12 to this recent summary which you have at - I have it at tab 17.

13 MR JUSTICE ROTH: Yes.

14 MR TURNER: -- of C1. If you go to page 452, and I want to look at paragraph 61 at
15 the bottom of page 452 and paragraph 62 on the facing page. These are paragraphs
16 that almost replicate the corresponding paragraphs in the main report, which are at
17 398 and 399, but actually on comparing them, they beef up those paragraphs in small
18 ways and so it is sensible for you to look at this up to date account. So. if you pick up
19 at the second sentence of paragraph 41 at the foot of that page - 61, I am sorry. "Dr
20 Pike declares his intention to assess the extent to which discrimination allows Amazon
21 to build the market share of FBA at the expense of the rivals and therefore protect the
22 dominant position of the Amazon marketplace." Dr Pike then goes on in the last part
23 of 61 to say that as a first step he will identify and quantify any supra competitive
24 marketplace commissions charged by Amazon because of its dominance and assess
25 the role played in allowing that level of commission to be charged by logistics and
26 delivery. It is very unclear, but he ends up saying that he may envisage a before and

1 after (last line) “ analysis of commission levels using data on Amazon’s commissions
2 [Marketplace commissions] pre 2006”, which is 20 years ago.

3 MR JUSTICE ROTH: Presumably 2006 because that is when FBA was launched.

4 MR TURNER: That is right, yes. Yes, and he says that. Now our submission is that
5 it is mystifying what Dr Pike considers information about commission rates 20 years
6 ago are going to tell you. And the simple point here is that this is certainly not a
7 plausible methodology for showing the impact that logistics and delivery have on the
8 freedom to set marketplace commission rates by Amazon. And the final port of call is
9 paragraph 62, just below. As you see from the first sentence there, it is declaring an
10 intention to estimate the excess commission that Amazon can charge because of the
11 artificially larger scale of FBA attracting additional users. His line of reasoning is
12 important, particularly looking ahead to what he says about Amazon taking the
13 opportunity to charge inflated FBA fees to FBA sellers. Because here he says his
14 language that he would expect differences in the costs between Amazon FBA, and
15 other networks essentially, to be reflected in full in the differences in end prices; and
16 thus he expects that he can identify the impact on the difference between delivered
17 prices on Amazon relative to its rivals. So just pausing, what he is saying as his
18 reasoning is that Amazon would be expected by him to charge lower FBA prices. And
19 he continues in the next sentence, “The increase in demand for the marketplace that
20 I would measure is then the increase caused by a reduction in fulfilment prices...” - a
21 reduction in fulfilment prices - “... due to the additional scale Amazon has achieved
22 through the anti-competitive discrimination.” Now, the fact that Dr Pike’s entire
23 assumption is that Amazon’s FBA logistics prices will go down, not up, because of the
24 additional business it gets, is made crystal clear if you go to his reply to Mr Holt. So
25 please keep your finger in the page here and just go to tab 16, page 435. You have
26 got on that page paragraph 90. If you just look at the second and third sentences. I

1 will wait for you to get it. That is page 435. The second and third sentences read: "I
2 would expect differences in those costs to be reflected in full in the difference in prices.
3 The increase in demand for the marketplace that I seek to measure is then the amount
4 of increase caused by a reduction in fulfilment prices due to the additional scale
5 Amazon has achieved through the anti-competitive discrimination." Now this
6 assumption is going to be important when you look in a moment at the plausibility of
7 the next aspect of Dr Pike's methodology for showing harm from an exclusionary
8 abuse because as you know, it involves the opposite proposition that Amazon puts its
9 FBA prices up. For present purposes, if you go back in the Pike summary on page
10 453 of the bundle to paragraph 62, you are now at the point in the line of reasoning
11 where Dr Pike is assessing that Amazon's FBA costs and its prices are materially
12 under the cost and prices of rival logistics networks. So now the question arises, how
13 in his methodology will he use this information to show that Amazon has charged
14 inflated marketplace commission fees which have been passed on to consumers. And
15 his first step is what is set out in the sentence halfway down paragraph 62, which
16 begins: "Then using Amazon's estimates of the average cross price elasticity of
17 demand for marketplace consumers, I can calculate the increases in demand for the
18 Amazon marketplace that is achieved." So, what he says he is going to do is he is
19 assuming that Amazon has got studies showing what additional level of business its
20 marketplace gets if the prices on the rival stores change. That is the cross price
21 elasticity of demand. And if I may say so, I heard, Sir, what you said earlier about
22 Amazon being a sophisticated company and so on, but there is no reason for thinking
23 that Amazon has got studies of this cross price elasticity, and nor does he put forward
24 a backup plan if they do not. So that is troubling. But that says the immediate and the
25 unavoidable hole in the methodology becomes clear in his final step for the
26 marketplace commission methodology, because the final step is to translate this

1 | estimated wrongful increase in the volume of traffic in the Amazon store into a
2 | conclusion that that will have led Amazon to increase its commission rates. So, they
3 | have got extra business, so it has led them to increase their commission rates. We
4 | say there is nothing coherent in these documents that Dr Pike says about how he is
5 | going to work this out. It is all concentrated in the penultimate sentence here in
6 | paragraph 62, where he says, "Using estimates of the elasticity of demand with respect
7 | to the commission charged by the marketplace, I can obtain an estimate of the
8 | increased commission that follows from the demand boost that is achieved through
9 | anti-competitive means." So, what is he saying here? Again, he has got no reason to
10 | think that Amazon has got such studies on how much it can increase commission
11 | depending on the volume of traffic in the store. The reference he gives is in footnote
12 | 90 - a reference back to the Jeff Bezos interview, but we say something different. And
13 | moreover, you will recall from that interview that Jeff Bezos told the interviewer that
14 | Amazon does not increase consumer prices just because there are studies saying it
15 | has got scope to do that. And nor indeed does Dr Pike have an independent reason
16 | to think that Amazon even does vary the level of its commission automatically
17 | according to the level of business in the store. If there was a plausible basis for
18 | thinking that is how Amazon works, you would expect Dr Pike to have said so. And
19 | that is why we say that ultimately there is nothing here that gives this Tribunal a
20 | plausible methodology to show how Dr Pike aims to estimate higher marketplace
21 | commission fees caused by self-preferencing behaviour. So, if I may take stock, I
22 | have referred to two things. The absence of a methodology to investigate whether
23 | rival logistics networks would suffer these cost impacts that would cause them to put
24 | up their prices to sellers on other marketplaces; it has got to be thought through. And
25 | then, and critically, the absence of a methodology after that to show how any such
26 | effects translate into higher marketplace commissions charged by Amazon. There is

1 a gap. You have to jump over that. And that is why we say on this second issue of
2 marketplace commissions there is an aspect of the methodology which again is not
3 suitable to be certified. So that is the distinct point there. And if I may, I will continue
4 in view of the time. We come to the other part of the exclusionary methodology - the
5 methodology for showing losses from the weakening of other logistics networks, and
6 this is now the contrary proposition that Amazon does not, as he says he expects, put
7 its prices down; it puts them up to sellers for the FBA service and the sellers then
8 pass that on in their prices. So, this part of it is addressed in Mr Pike's first report,
9 beginning on page 375 and it is discussed in the paragraphs we were looking at a few
10 moments ago, 392 to 397. There are just a couple of points that fall to be made about
11 it. The first is that the methodology for showing this exclusionary conduct which
12 increases the cost of the rival networks and so forth, depends on the need for
13 investigation of the cost structure of those rival networks. Otherwise, you cannot show
14 an exclusionary effect, but we have now covered that. The second point is that the
15 suggestion that Amazon responded to a lowering of its costs for FBA (the extra
16 business) and the corresponding increase in the cost of the rivals by lifting its FBA
17 prices, contradicts the opinion that we have seen Dr Pike also gives. It flatly
18 contradicts it to the effect that Amazon can be expected to have reduced its FBA
19 prices. To remind you, that was the response to Mr Holt, paragraph 90 at C/1435. So
20 these two bits of the methodology are in contradiction. It is not candidly acknowledged
21 by Dr Pike. And the closest he comes to it is what, Sir, you referred to. If you go to
22 392 in the main report, at 392A, and that is where he gives this view that there might
23 well be no overcharge on FBA at all at this juncture. He says that Amazon might be
24 playing a long game, building the network. Now, Mr Moser said when he was
25 addressing you, well, that's just common sense. It is just one possibility. It is more
26 than that. It is in line with the expectation of this expert that he expresses elsewhere.

1 Then he goes on, in the following sub paragraphs (b) and (c), to say there might be an
2 overcharge on the FBA prices. So, my point here is the fact that it runs counter to
3 what the expert says he would expect to happen should lead the Tribunal to scrutinise
4 carefully the methodology he is proposing to test it. And you will see that the only
5 statement of an intended methodology to test for inflated FBA prices is squished into
6 paragraph 396 of Pike 1. That is it. And he says two things in that very short
7 paragraph. The first one is he would compare FBA prices with rivals' prices. Pause
8 there: we say that would tell you nothing about whether Amazon was charging higher
9 FBA prices than it would do otherwise, even after you have adjusted for all of the
10 differences in service levels and quality which are bound to exist between the FBA
11 service and rivals in different ways. The point is that Amazon could perfectly well have
12 charged the prices which you see anyway. The real question is what would Amazon
13 have done differently? And so, you come to his second point. Dr Pike says that you
14 might estimate an overcharge from FBA prices being higher than they would otherwise
15 be. And here is his methodology: "We would deduct the price premium the FBA
16 sellers earn as a result of discriminating to identify a notional counterfactual price for
17 the FBA service." That he says - estimates the price Amazon would have had to
18 charge for FBA to make the same volume of sales were it not for the leg-up it gets
19 from discrimination. But the problem is it is not a real world question. It is a notional
20 construct. That exercise, that theoretical exercise, tells you precisely nothing about
21 what price Amazon would, in the real world, have charged for FBA in the absence of
22 self-preferencing. Even if there was self-preferencing, even if they show that, it could
23 have been felt in, as he says elsewhere, high markups for the goods which are sold.
24 There might not have been a taking of a higher price here at all. So, there is nothing
25 that he has which is going to tell you how this leads to higher FBA prices. Stepping
26 back, for all of those reasons now that I have sought to take you through his chain of

1 reasoning and the data he is going to rely on, it is, in my submission, very plain that
2 Dr Pike has come to this hearing without a plausible methodology for showing loss
3 from the exclusionary abuse. And that is why, and I take, Sir, the point you made
4 about the first issue on the costs. But when you look at these points together, this part
5 of the Hammond claim at a minimum is not fit for certification. If I may, then I will finish
6 on the methodology points by turning to the issue of gaps in the methodology for
7 proving the direct harm.

8 MR JUSTICE ROTH: We had better --

9 MR TURNER: Yes, I am sorry.

10 MR JUSTICE ROTH: Do not forget, someone is taking down every word you say.

11 MR TURNER: Yes.

12 MR JUSTICE ROTH: And they need a break.

13 MR TURNER: It is a convenient moment.

14 MR JUSTICE ROTH: So we will come back at 25 to.

15 (A short break)

16 MR JUSTICE ROTH: Yes, Mr Turner.

17 MR TURNER: Mr Chairman, sir. Two final points to mop up on this and I will then
18 look at the methodological point that arises on the self-preferencing methodology
19 directly. First is just to complete the discussion before that break about Dr Pike
20 potentially taking some of the material from Dr Houpis - it is joint case managed and
21 working on that basis. It is really just to draw out one issue there, which is it is one
22 thing to say that an expert who has not themselves called for primary data may be
23 able to take advantage of another expert in the same case, saying well: I am calling
24 for that data and it is therefore available to be used - and by the way, on this I have
25 made the point that Dr Houpis is not asking for it - but it is another matter beyond that
26 to say that you can have a different form of mix and match where let us say Dr Pike is

1 not merely taking advantage of the availability of some primary data, but he has got to
2 work with some level of analysis of that data, some processing of it, by the other expert
3 and then it feeds into his different and wider approach. So here you have seen the
4 chain of reasoning from Dr Pike and if it becomes that form of integration, that is
5 unsatisfactory because you would have one expert essentially bringing into their
6 analysis a part of analysis by another expert which they would then have to approve
7 and adopt as their own and where they are, as in this case, experts representing
8 different stakeholders in the case.

9 MR JUSTICE ROTH: So I was only... No, I was not quite saying that. What I was
10 saying is if there is a common issue which is a common issue for different classes,
11 and the classes on that issue are not opposed, then they could have a single expert
12 on that issue, not one expert adopting the other. They just have one expert.

13 MR TURNER: I understand that, yes.

14 MR JUSTICE ROTH: And I cannot see a problem about that.

15 MR TURNER: Yes, indeed. If it is limited to essentially a single issue where there is
16 identity of interest seeking to report, yes.

17 MR JUSTICE ROTH: Yes.

18 MR TURNER: That is correct. My point is only if it goes beyond that - if it strays into
19 these wider areas which may happen. The second point is on pass-on. I do not really
20 need to say much more about this. I have submissions on it, but it has essentially
21 been covered sufficiently. Paragraph 397 in Pike¹, that very short paragraph, which
22 is all that you have from this expert on what is a necessary part of the consumer case
23 that loss overcharges were passed on in the prices. And as to that, you heard Mr
24 Moser. There is not a methodology. He said: "It cannot be said that Dr Pike would
25 not be able to calculate pass-on if that became necessary." So it is a clear absence
26 as matters stand. With that, I turn to the issue of gaps in the methodology for proving

1 the direct harm from self-preferencing, which is what Mr Hammond calls “the
2 exploitative abuse”. And here there are two further points that I will make and each of
3 them in my submission is compelling in showing that there is a critical gap in the outline
4 methodology for showing that consumers have suffered harm from self-preferencing.
5 And as an aside, when he stands up, Mr Piccinin will raise a further point about
6 whether the methodologies of either of the PCR’s experts are adequate to show
7 unlawful discrimination in the first place. But I am going to focus solely on what Dr
8 Pike says about how he will go about quantifying loss on this primary basis. And my
9 essential submission will be that Dr Pike’s outline methodology is in one respect clearly
10 inadequate. It would lead to systematic and wrongful over-compensation, and, in a
11 second respect, it is unworkable and not coherent. The first problem arises from what
12 Dr Pike has called “the constant prices scenario” - the plan to rerun the algorithm,
13 assuming that all the seller offers stay the same to see if there is a difference in what
14 is the featured offer. Mr Moser took you to the illustration of this. Perhaps we can turn
15 it up at page 368 in the report at C1, tab 15. We call that a simple pictorial illustration.
16 And in the first box, which is marked “actual” on the left, you have got three offers: two
17 at €12, one at €10. And because of the alleged bias, the Buy Box is won by a €12
18 offer when you have got the FBA delivery. In the third box, the one on the right,
19 “unbiased algorithm holding sales prices constant”, you have got the same set of
20 offers, but now the Buy Box is won by the €10 offer. And in such a case, let us focus
21 on this, Dr Pike’s methodology entails treating the loss to the consumer as €2. It is
22 the headline difference in price. However, our point is this. It is uncontroversial that
23 these seller offers are not just based on price. Each offer is a package of elements.
24 We know that price is a major element. Another major element is the promised
25 delivery speed. A third major element is what is compendiously referred to as “the
26 seller reliability” - a term encompassing a range of matters about performance, like the

1 past history of late shipments or defective goods or order cancellations, chargebacks,
2 things of that nature. And we know that Amazon's algorithm considers all those
3 elements together when assessing these rival seller offers and ranking them. The
4 algorithm takes a view on which one is the offer that consumers would be likely to
5 prefer in the round, and that one is chosen as the featured offer. And what it may
6 mean is that a slightly higher priced item, just looking at the money, is legitimately
7 selected if, for example, it has got a better delivery speed, which is a countervailing
8 consumer benefit; or if you have got a lower priced item which is selected at the
9 featured offer, that may still be a close shave because the delivery speed on this lower
10 price offer is worse - and that is objectively a real tangible consumer detriment. But it
11 still does not prevent the lower priced offer being selected, but it is nonetheless a
12 feature of the offer. And the problem with Dr Pike's methodology associated with this
13 scenario is that it disregards this feature of reality - a point that we made in our
14 skeleton. Wherever, according to what he plans to do, you rerun the algorithm and it
15 throws up a lower priced offer as the featured offer, Dr Pike proposes to treat the
16 headline difference in the price between the actual and the counterfactual, the notional
17 featured offer, as if that is an accurate measurement of the real, the net consumer
18 loss. And he refuses, for example, to countenance using Amazon's legitimate
19 weighting of the different factors with an unambiguously unbiased algorithm, let us
20 say, to adjust the measure of any loss. He just wants to look at the headline numbers
21 and he says: this is my methodology.

22 MR JUSTICE ROTH: I thought he was going to - maybe I misunderstood it - attempt
23 to reconstruct the algorithm, removing the discriminatory elements so it will still take
24 account of delivery speed and consumer satisfaction. And so it will not - and this is a
25 simplified illustration - it will not always mean that the cheapest offer would get into the
26 Buy Box because of these other factors.

1 MR TURNER: That is right.

2 MR JUSTICE ROTH: So, he is not only doing it saying the only thing the algorithm
3 should look at is price. He is accepting that there will be these other elements in the
4 ranking and sometimes it will throw up a featured offer without discriminatory bias that
5 is cheaper, and sometimes it will not.

6 MR TURNER: It might be more expensive.

7 MR JUSTICE ROTH: It might be more expensive, if that is really the way the
8 discriminatory aspect works, in which case that would have to be credited. So is that
9 not right, that that is what he is doing? He is not just saying the only thing that should
10 be considered in the algorithm is price?

11 MR TURNER: No, that is right, Sir. Our point is that you must not conflate the two
12 things and that logic which we say is right - that is the right way to do it - you should
13 take into account, let us say delivery speed, also should follow through into the
14 assessment of the consumer loss. Because his proposition is... let us just work it
15 through. Say for the sake of argument, a higher priced offer, as I said earlier, by
16 reference to their pleading - if the changed algorithm shows that getting in we do not
17 know exactly how that is intended to be dealt with in the overall calculation of the
18 aggregate loss. Mr Moser will tell us in his reply. But assume that you have now got
19 many cases where there is a lower priced offer because that has now made it in there
20 taking into account all these different features --

21 MR JUSTICE ROTH: Yes.

22 MR TURNER: -- that lower priced offer is what is presented to the consumer -- will
23 be, let us say €10 instead of 12, but it might be €10 instead of 12 also parcelled up
24 with a different and worse delivery speed (might be) and a different seller rating, maybe
25 a less reliable seller rating. So when you come now to this point, because you are
26 trying to calculate what is the loss, how much money should be given to the class as

1 a result of this, follow through the logic completely because at this point when you are
2 calculating the amount of the loss, our point is you have got to look at that package
3 that is then offered.

4 MR JUSTICE ROTH: So, you are saying you have got to credit some value for a
5 slower delivery?

6 MR TURNER: Yes.

7 MR JUSTICE ROTH: That makes entire competition damages claims unworkable.
8 You have a cartel that pushes up prices. The counterfactual, the competitive market,
9 and so prices would be lower. Margins therefore of the companies would be lower.
10 They cannot say: oh but then we might have had to make some staff redundant; our
11 installation periods would be later. In fact, there is a detriment that people would suffer.
12 You have got to credit it.

13 MR TURNER: Sir, it is not that there are these knock-on effects, wider externalities
14 that need to be taken into account. Our point here is a simple one; that you have to
15 look at the offer facing the consumer with the change. The offer facing the consumer,
16 it started as -- it is a package; it is not merely a number, a price. What the consumer
17 is faced with is a different quality product.

18 MR JUSTICE ROTH: So, how would you value an extra day of delivery?

19 MR TURNER: Well, as I am for Amazon, Amazon have some ideas about that and
20 perhaps Mr Derbyshire does as well. But one thing that I may say is that although
21 Hammond says that they are going to take - you heard it from Mr Moser this morning
22 - Amazon's weightings entirely as they are when it comes to working out the way that
23 the algorithm, the unbiased algorithm works, it says nothing here about taking into
24 account the weights that Amazon accords to these other dimensions in working out
25 what is the real loss that the consumer who pays for the changed featured offer suffers.
26 And this is a point that our expert Mr Holt made very trenchantly in his report as being

1 a clear flaw in the methodology.

2 MR JUSTICE ROTH: How do you suggest it could ever be done?

3 MR TURNER: How do I suggest --

4 MR JUSTICE ROTH: This has a slightly better customer satisfaction rating than the

5 one that is now in the featured offer. So what value would you put on that that should

6 be credited in pounds?

7 MR TURNER: Well, in the way that the algorithm works --

8 MR JUSTICE ROTH: Yes.

9 MR TURNER: Sir, you will appreciate that these factors are crystallised into a form

10 and that --

11 MR JUSTICE ROTH: Yes, and if it works in a neutral way - sorry to interrupt you - you

12 will get the featured offer that is taking the package the best for the consumer.

13 MR TURNER: Yes.

14 MR JUSTICE ROTH: And that the featured offer that is the best for consumer would

15 be with a non-discriminatory - because we are assuming a discrimination here -

16 algorithm, one that is €2 cheaper. Having regard to all these things, why is not the

17 only effective way of calculating the consumer loss the €2?

18 MR TURNER: Because the offer is not merely an offer of a product, a basket of fruit

19 at one price rather than another; it is saying this basket of fruit will be delivered two

20 days later.

21 MR JUSTICE ROTH: Yes, but this is the best deal for the consumer. That is what

22 your algorithm is working out. This is the best deal and the best deal will be €2 cheaper

23 than what had previously been regarded as the best deal.

24 MR TURNER: Yes.

25 MR JUSTICE ROTH: So why is not the consumer's loss --

26 MR TURNER: Because --

1 MR JUSTICE ROTH: -- otherwise there is no effective way of calculating the loss.

2 MR TURNER: Well, in my submission, there is because you have, let us say, a basket
3 of fruit delivered in two days at a certain price or the basket of fruit coming in four days
4 at a lower price.

5 MR JUSTICE ROTH: Yes.

6 MR TURNER: And let us say that that basket of fruit delivered in four days is what is
7 chosen, what the consumer is faced with on the changed approach is not merely a
8 basket of fruit at a lower price. They are also receiving it with other changes which
9 matter and which everyone agrees matter, and where the proposed class
10 representative says: we are prepared to accept Amazon's weighting. Our observation
11 is that therefore when you are looking at the difference in quality, how much worse off
12 the consumer is made, you cannot ignore --

13 MR JUSTICE ROTH: Well, how do you take it into account?

14 MR TURNER: As I say Amazon - the only observation I would make is that Amazon
15 itself - and it is really a question for them --

16 MR JUSTICE ROTH: No, it is a question for you because there has got to be an effect
17 --

18 MR TURNER: There is clearly a loss.

19 MR JUSTICE ROTH: If there is unfair discrimination and certain products do not get
20 a chance, competing products, and Amazon favours its own products, that is a
21 distortion of competition and therefore there is clearly the potential that products that
22 would have been chosen are not chosen for the Buy Box - and that is considering all
23 these factors. So there has then got to be an effective way in which those who have
24 suffered can calculate and claim damages. You cannot say: it is all too difficult, so
25 we cannot do it, so you get nothing.

26 MR TURNER: Which is not what we are saying for a moment, Sir. Our submission

1 then, in light of that challenge, is that this is not a mere subjective or impenetrable
2 obstacle. Just as they say that they would accept all of Amazon's legitimate weightings
3 for an unbiased algorithm, which enables them to assume the different weights for
4 these different calculations, when they are calculating a net loss that consumers suffer
5 with this different offer, equally those same weightings should at the very least be
6 taken into account.

7 MR JUSTICE ROTH: But those weightings are not financial. Those weightings are
8 terms of customer satisfaction, level of complaints. They can be given a points value
9 when you are choosing what is in the Buy Box, but that does not translate into a figure,
10 does it? (Discussion between the Panel) (After a pause) Mr Derbyshire is pointing
11 out that if your algorithm monetizes the aspects as part of the algorithm, one could
12 take that into account. But this is not saying it is not a workable methodology or saying
13 the methodology needs to be refined, in your view, to bring into account certain
14 weightings in the calculation.

15 MR TURNER: Yes.

16 MR JUSTICE ROTH: That is, I think, what you are saying, and you may say well,
17 when one looks at the algorithm and it is explained to Dr Pike how it works, then he
18 may be able to see how you translate into monetary terms in the algorithm delivery
19 speed; and then you can take that into account that way. That was something that
20 will emerge when the operation of the algorithm is explained. Because if, for example,
21 there are cases where you say the FBA offer is the one for €11 in the counterfactual
22 because of faster delivery speed - sorry, the Buy Box offer is €11, not €10, even though
23 there's a €10 alternative because it has fast delivery speed, you are giving some
24 weighting in monetary terms to the faster delivery speed.

25 MR TURNER: Yes.

26 MR JUSTICE ROTH: And so one could use that weighting in calculating the loss. But

1 | it is a refinement of the calculation --

2 | MR TURNER: Yes.

3 | MR JUSTICE ROTH: -- which Dr Pike really cannot do until he gets into how you do
4 | your weightings.

5 | MR TURNER: Sir, there are two points. The first is that I think we are in alignment on
6 | this, which is that when this ranking is carried out by Amazon, it must be the case that
7 | these different dimensions are at least put on a common footing to enable this to
8 | happen. That must be the case.

9 | MR JUSTICE ROTH: Yes.

10 | MR TURNER: So, it is therefore, secondly, a mistake which will lead to systematic
11 | overcompensation for an expert to say: well, that is not something I am going to look
12 | into or take into account. Now, on this, sir, you say: well, once the case is up and
13 | running, it is something that Dr Pike can look into. He has said, and he has doubled
14 | down on this, it is not something he proposes to do. He is only interested in money
15 | changing hands in this.

16 | MR JUSTICE ROTH: Yes, but you, in your expert report at trial, will say: that is wrong.
17 | It fails to take account of this - and the Tribunal will decide whether it should. Then
18 | the damages will be reduced accordingly. But that is not saying he has not got a
19 | methodology that can be applied. You are saying it will lead to an over-statement of
20 | the damages and it will be challenged by saying it needs adjustments.

21 | MR TURNER: Yes.

22 | MR JUSTICE ROTH: Well, that is something, is it not, for trial? You may be right, and
23 | it is not unusual that a defendant's expert says that the way the claimant's expert has
24 | calculated damages failed to take account of certain things and produces too high a
25 | number.

26 | MR TURNER: At trial, that is absolutely right. The feature of this, and I think we have

1 reached the sharp point of it, is this, that at certification the PCR's expert is saying, in
2 response to us raising this point: I do not intend to do it. It has been raised by our
3 expert - I can give you the references - "I am not interested in; I do not consider it to
4 be something I am going to look into." So you have the expert saying "this is something
5 I will not look into". Our case is it is not a point where you have two arguable points of
6 view and at trial, ultimately the Tribunal decides who is right and who is wrong. My
7 submission is that this is actually a clear point and you have an expert saying "I am
8 not going to do it." And that is the problem that this Tribunal is confronted with today.
9 That is how we put it. If I may, with an eye on the time, I will turn to the second point.
10 And the second point, if we go to tab 16 - these are points developing my - well I do
11 not think I need to take you to this - I was going to show you the debate between Holt
12 and Pike on this point.

13 MR JUSTICE ROTH: Yes.

14 MR TURNER: I think it has been sufficiently covered for today's purposes. So I will
15 come to the final methodological problem with the Hammond case that we say needs
16 to be brought to your attention at this hearing. And this concerns Dr Pike's proposal
17 to depart from the constant prices scenario, that illustrative example we were looking
18 at, which he treats as setting a floor for any estimate of consumer loss. And then he
19 would go on, he says, to assess how sellers would actually have acted in setting offers
20 if the algorithm had been different in the claim period. So, it is going down the path of
21 what he has called his constant volume scenario. And here again our submission is
22 that the outline methodology is inadequate. To see what he proposes, it is most
23 convenient if you would please turn up his summary at tab 17 and go in it to page 447.
24 At the bottom of that page there is a heading 7.2. "The counterfactual algorithm can
25 be used to estimate a counterfactual set of prices". And if you look at paragraph 44
26 underneath that, at the foot of the page, Dr Pike says that he needs to consider, he

1 will need to consider how sellers would have reacted in the absence of the alleged
2 discrimination. He then distinguishes between the non-FBA sellers and the FBA
3 sellers. For the former, the non-FBA sellers, he says, and I quote: "It is difficult to
4 identify exactly how non-FBA sellers would have acted." So in other words, he says,
5 that is difficult. He does not put forward a way of grappling with the issue. But if you
6 follow his footnote, footnote 14, just look at that bottom of the page, what does he say
7 about it? He says his current conservative model does not address these additional
8 impacts, but he would, in his words, "evaluate the feasibility of correcting these biases
9 if the claim is certified". So, when it comes to this question of how these differences
10 in behaviour would play out, it is no methodology at all here. It is a recognition that Dr
11 Pike does not have one and he offers no way of getting into the problem that he himself
12 has identified. Next, if you continue in this same paragraph --

13 MR JUSTICE ROTH: Is he not saying: I will assume that non-FBA sellers would not
14 have changed their price. That is the way I am putting it. That is a conservative way
15 of calculating damages. I might look further at the possibility, whether there is any
16 way of thinking how they would have reacted. But for the purpose of certification, he
17 is assuming they would not have changed.

18 MR TURNER: Yes, I agree. That is what he is saying.

19 MR JUSTICE ROTH: Yes.

20 MR TURNER: My point is only this, that as you see from that, combined with the
21 footnote, he says: it is something that I will think about as the case goes forward as
22 to how to take this into account. My point is that for a blueprint for trial, if this is going
23 to form an aspect of it, it is a potentially material aspect, and he is saying: "I am
24 deferring it." Now, if you continue then to look - shine the light on the position of the
25 FBA sellers, he says he sees the rational options open to the FBA sellers as easy to
26 foresee. Either they put forward the same offers that they actually did - that is (i) at

1 the top of the next page 448. "Whole price is constant", or they would offer lower
2 prices to maintain the same probability of winning the Buy Box. In fact, again, as a
3 matter of common sense, the realistic options are different. To return to a point that I
4 flagged at the outset, as a matter of common sense, retailers will typically set prices
5 to at least cover their costs so they can sell at a profit. And in passing on that, simply
6 for your note, I could not help noticing that the FTC complaint shown to you by Mr Beal
7 made precisely that point. And for your note it is authorities 87 PDF 3853 paragraph
8 309. But the essential point is that the alternative to holding your prices constant in
9 this counterfactual is not that they would be dropped to whatever level is needed to
10 win the Buy Box- the binary choice that is presented without regard to your costs.
11 And that is a point again that was made in Mr Holt's report. I can give you the reference
12 if needed, but it has not deterred Dr Pike. And Dr Pike ignores the point, which was
13 also made by Mr Holt in his report - this was addressed by Mr Moser very briefly - that
14 where you have two or more of these FBA sellers competing against each other to sell
15 the same item, they both share the same discriminatory advantage, allegedly, and it
16 is reasonable to assume, therefore, not that they drop their prices all the way down to
17 the lowest offer necessary to win the Buy Box in different circumstances. What is
18 reasonable to assume, as a matter of common sense, is that they will already be
19 charging prices in the actual world which are aligned to their costs. They will have
20 gone down competing against each other to the competitive level of price viewed
21 against their own costs.

22 MR JUSTICE ROTH: Can you pause a moment? (After a pause) I mean, you say it
23 is common sense that in the actual world aligned to their costs, but if the abuse is
24 made out, they are shielded from competition from the FBM sellers.

25 MR TURNER: Yes.

26 MR JUSTICE ROTH: And if it is not a fully competitive market, it is also common

1 sense that prices in a fully competitive market might be lower because an FBM seller
2 might be lower and it forces them to reduce their margins. So, in a less than fully
3 competitive market, margins are generally higher.

4 MR TURNER: I agree. Sir, may I just replay that point very slightly?

5 MR JUSTICE ROTH: Perhaps I have misunderstood your point.

6 MR TURNER: No, not at all. We agree, following the logic of the case, you have got
7 an allegedly reconfigured algorithm correcting for biases, allowing greater competitive
8 opportunities, maybe that other people win the featured offer - become the featured
9 offer. My point is that when you are considering the position of the FBA sellers
10 specifically they are in that mix. There might be more people now who have got a
11 better chance and would be more likely to be chosen when you remove certain
12 elements or adjust for them. However, when you are considering what the scope is
13 for the FBA sellers to reduce their prices further, which is the second scenario here,
14 then we say it goes - surely it must be the case that these sellers, where they are
15 competing certainly against each other, they will be competing down to their own levels
16 of costs.

17 MR JUSTICE ROTH: Well, it depends on the degree of competition between FBA
18 sellers for any particular product. If there is greater competition, people may have to
19 accept lower margins. They may not have gone down, we do not know, to the lowest
20 margin at which they can profitably make a sale because they know they are only
21 facing competition from one or two others as opposed to six others who are cheaper.
22 So I am not sure that common sense or intuition tells us that there is no scope with
23 greater competition for these people then to be forced to - for the FBA sellers to accept
24 a lower margin.

25 MR TURNER: Let me put it like this. There are these two scenarios that are offered
26 as tools by Dr Pike. On the one hand, he assumes all the prices remain constant from

1 all the existing sellers.

2 MR JUSTICE ROTH: Yes.

3 MR TURNER: A flare goes up and you see where everyone is standing. The second
4 alternative is that instead he says, let us assume that the FBA seller who won the
5 featured offer, they will now reduce their prices to whatever level is needed to maintain
6 the same probability of winning the Buy Box. So, my point here is that at the very
7 least, the friction of what their own costs are is not taken into account in this poll at all.
8 This is by way of - if I may convert the point: where does this go? In his methodology,
9 once you leave aside the constant prices scenario, he is saying what you will want to
10 do, what he will want to do if this case goes forward is he wants to see how different
11 sellers would have behaved.

12 MR JUSTICE ROTH: Yes.

13 MR TURNER: So, that is a crucial feature that he will want to look into and which we
14 need to attend to at this hearing. His methodology on that you see in the summary, if
15 you go to paragraph 47, page 449, that is where it is. And you can see for yourself
16 what he says. He says, on the one hand, I can stay with my constant prices scenario
17 and say, well, that is the most conservative; all the offers are exactly the same, frozen
18 in aspic. His second one, another simple option he says, is I will just take the midpoint
19 between two things, between that and a scenario which, I say, is not a plausible
20 approach, where the FBA sellers will just do whatever it takes in all circumstances to
21 win the Buy Box without the friction of their cost base being accounted for. And then
22 you get what he says is the more complex approach, which really is what we need to
23 focus on. And he says this is to investigate the proportion of sellers that can be
24 expected to set lower prices in the counterfactual and the proportion that would hold
25 their prices constant. And then at (i), (ii) and (iii) you have his way of getting into this,
26 and that is what I am asking you now to look at finally because, in my submission,

1 none of these three withstand scrutiny. At (i) Dr Pike refers pretty vaguely to using
2 survey data from Amazon about sellers or sales and offer data, again from 20 years
3 ago or so before the FBA service was born, before 2006. Now, for one thing, and just
4 so that the Tribunal has this at its fingertips, there is a witness statement from Amazon
5 of Mr Rowan in the file that is at tab 19 of C1. He says very clearly and definitively,
6 and it is not a surprise, that Amazon does not have usable sales and offer data from
7 20 years ago. Nor, in my submission, is there any plausible reason to suppose that
8 Amazon has got surveys of how sellers would behave if the algorithm was different in
9 particular respects, as though it is anticipating this sort of litigation. And nor is there
10 any reason to suppose that offers set by the sellers today, even if they refer to the
11 same products as in the claim period, same basket of fruit, are the product of the same
12 market conditions - because a thousand things could have changed in the market
13 conditions: costs, inflation, many things. So, that we say is not a workable approach
14 to this issue. At (ii) Dr Pike refers to examining a sample of sellers who became FBA
15 sellers and hence who have periods with and without the discriminatory advantage.
16 So leave aside the point that as Mr Moser rightly recognised, there are people who
17 are for a certain period non-FBA sellers and then become FBA sellers. It is far more
18 nuanced than that. One asks where does this get Dr Pike? Assume that there were
19 previous non-FBA offers; those could have been associated, if someone was saying
20 I am now offering this basket of fruit to arrive in four days and that was not an FBA
21 offer at the time, there is no reason to think that this, looking at that comparison, will
22 tell you anything about the scope for an FBA seller to lower its price to maintain the
23 same chance now of winning the Buy Box. And finally, you have (iii) where Dr Pike
24 makes the assumption, and I ask you to read it, that Amazon has in the cupboard
25 analysis of quotes "likely seller behaviour" in anticipation that a non-discriminatory
26 algorithm were to be used. There is no basis for that assumption. In short, stepping

1 back, Dr Pike has not set out for the Tribunal, we say, a plausible methodology for
2 gauging seller behaviour if this algorithm is adjusted. If the Tribunal now asks itself
3 what has he said about how this can be looked into sensibly, you do not, in my
4 submission, have an answer from this.

5 MR JUSTICE ROTH: This is on the -- you are talking of course about the constant
6 volume scenario.

7 MR TURNER: Yes, in this more practical way, once you depart from the idea that
8 everything is frozen and you ask how sellers would behave differently. This is not
9 really a methodology for getting at what in the consumer claim - leave aside Stephan
10 - is actually a very important potential point. All you have is what is in 47(i), (ii) and
11 (iii). So, to sum up, before funding, we say there are four main areas where Mr
12 Hammond's expert has not put forward a workable methodology.

13 MR JUSTICE ROTH: Just pausing before you do that --

14 MR TURNER: Yes.

15 MR JUSTICE ROTH: -- the constant price scenario gives one a measure. You say,
16 well, that needs adjustment. It is not reliable because it does not take into account
17 consumer detriment and these other factors. We have discussed that. But that gives
18 you a measure. The constant volume really increases it, does it not, because it then
19 says: we now look at further pricing potential on the basis that the constant price
20 scenario is too conservative for the class and does not reflect the full loss yet.

21 MR TURNER: Absolutely right. That is how he approaches it, and on this, our point
22 is that ultimately it boils down to some need to get a handle on how these sellers would
23 have behaved. It is an important part of the consumer experts' methodology and I
24 have gone through... My submission is that it is not sufficient. So to step back and to
25 summarise, I have dealt with four issues essentially and canvassed with the Tribunal
26 the position in relation to each. The first is: no basis for showing that rival logistics

1 suppliers would be foreclosed in the logistics market by Amazon's conduct because
2 of the information that is needed, and we went through that before the last break. The
3 second is: no proper methodology to show how any of this foreclosure of rival logistic
4 suppliers would feed through into the increased marketplace commissions charged by
5 Amazon. I went through that, and how on Earth he is going to show that a change in
6 commission is attributable to this factor? It is not explained. The third is the issue of
7 the methodology for showing the true loss to consumers on the constant prices
8 scenario, which, sir, you have just mentioned. And the fourth is this point about
9 changes in seller behaviour. So those are, and I am grateful to the Tribunal for your
10 indulgence and time on this, those are our points on the Hammond case in relation to
11 methodology. I can turn to funding now. Funding was covered quite carefully earlier
12 today, so I hope I can be quicker on this, but I am not going to finish it in the next six
13 minutes.

14 MR JUSTICE ROTH: I think you told us that you are not planning to... Were you
15 planning to finish today?

16 MR TURNER: No.

17 MR JUSTICE ROTH: No, you were not. You said about 11 o'clock, I think, tomorrow.

18 MR TURNER: That is right, yes.

19 MR JUSTICE ROTH: I mean, one possibility, because there is also, of course, on
20 funding, the witness statement which relates to funding - is we could start, if that does
21 not inconvenience anyone, a bit earlier tomorrow.

22 MR TURNER: I would say that is preferable if the Tribunal is --

23 MR JUSTICE ROTH: -- rather than you launching into funding now. If you want to
24 make some headline points in the next sort of 10 minutes on funding, if you would like,
25 we could do that, but I think it is sensible to start at 10 in any event. I leave that up to
26 you. It is your choice if you would like to make some basic points or if you would rather

1 wait and put it together for 10 o'clock tomorrow.

2 MR TURNER: I think maybe to start at 10 o'clock tomorrow.

3 MR JUSTICE ROTH: Very well. Just one moment. I am reminded that someone
4 should produce just a draft order on the confidentiality for the Tribunal to make the
5 Rule 102(5) order about keeping matters confidential. That is just a fairly routine form
6 of order, if someone could draft one and send it to us.

7 MR TURNER: Mr Schonfeld makes the practical point which is that sometimes in this
8 sort of situation, a witness statement arrives 10 minutes before hearing starts and it
9 will not -- it is actually going to lead to more trouble than it is worth and there has to be
10 a short break while we read it and think about it.

11 MR JUSTICE ROTH: Yes.

12 MR TURNER: So, if it were possible to direct that that should come --

13 MR JUSTICE ROTH: Well, I assume it is going to be prepared this afternoon or this
14 evening which is one good reason for stopping now. So, if it can be sent overnight so
15 that the Amazon legal team have it for 9 o'clock in the morning or indeed 8.30, if it can
16 go this evening, that would be of assistance.

17 MR MOSER: It will certainly go so that people have it by no later than 8.30 tomorrow
18 morning. If it can be this evening so much the better. And, of course, the Tribunal may
19 also wish to read it before you sit.

20 MR JUSTICE ROTH: Yes. If we say by 8.30 tomorrow morning, that will assist
21 everyone. Very well. 10 o'clock tomorrow.

22 **(16.27)**

23 **(Adjourned until 10.00 on Thursday 8 May 2025)**

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