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4 record.

5 **IN THE COMPETITION**

Case No: 1722/5/7/25

6 **APPEAL**

7 **TRIBUNAL**

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

12 Wednesday 14th May 2025

13
14 Before:

15
16 The Honourable Mr Justice Morris
17 Professor Pinar Akman
18 Paula Riedel

19
20 (Sitting as a Tribunal in England and Wales)

21
22 BETWEEN:

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26 **Perse Technology Limited**

27 **Applicant**

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29 **V**

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32 **ElectraLink Limited**

33 **Respondent**

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

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39 Tristan Jones KC and Femi Adekoya (Instructed by Macfarlanes) On Behalf of Perse
40 Technology Limited

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42 Kassie Smith KC and Jen Coyne (Instructed by Pinsent Masons LLP) On Behalf of
43 ElectraLink Limited

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(10.30 am)

(Proceedings delayed)

(10.35 am)

MR JUSTICE MORRIS: I will just read the standard notification. Some of you are joining us via live stream on our website, so I must start, therefore, with the customary warning.

An official recording is being made and unauthorised transcript will be produced. It is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings. Breach of that provision is punishable as contempt of court.

Thank you very much. Good morning, everybody. Good morning, Ms Smith.

MS SMITH: Good morning, my Lord.

My Lord, just to confirm, we received a copy of the case of Dahabshil from the tribunal last night and I will address that case or points arising from that case during the course of my submissions.

MR JUSTICE MORRIS: Of course.

MS SMITH: Thank you for that.

Submissions by MS SMITH

MS SMITH: My Lord, members of the tribunal, since we were last before you, there have been exchanges of correspondence in a without prejudice meeting between the parties. The correspondence, I hope, has been inserted in your hearing bundle at tabs 145 to 154. If not, we've got hard copies.

MR JUSTICE MORRIS: Yes, we have those.

MS SMITH: You have those?

MR JUSTICE MORRIS: Anyway, take us to it as and when.

1 MS SMITH: I will.

2 Just by way of summary, in that correspondence, my clients have made detailed and
3 extensive offers to the applicant as regards giving details of its aggregated data
4 product for landlords; the availability of a new bilateral agreement after August;
5 provision of draft, trilateral and reseller agreements; detailed proposals as to ring
6 fencing of custom information; and proposals for the restarting of supplies of data
7 under the existing bilateral agreement, subject to the applicant giving appropriate
8 undertakings to the court.

9 I will come to the detail of that correspondence and those offers in the course of my
10 submissions. But the point to be made upfront is that despite the offers made by my
11 client, and my client's request on the back of those that the applicant withdraw its
12 application so that discussions can continue, the applicant has nevertheless chosen
13 to pursue its application and continue with its application before the court.

14 We oppose the application for the reasons I'll explain and we'll seek our costs against
15 the applicant in that regard.

16 Today, what I propose to do is outline our case briefly by way of introduction, and then
17 I will address the various sequential tests under American Cyanamid, which this
18 tribunal must apply in considering the application.

19 By way of introduction, as I've said, Perse applies for an interim injunction compelling
20 ElectraLink to resume supplies of data under the DTSA or bilateral agreement
21 between ElectraLink and Perse dated 6 March 2024 for supply to electricity
22 consumers with their consent -- that's what's described by Perse as the first permitted
23 purpose -- and also for supply to landlords with the landlord's consent, not the consent
24 of a tenant, the consumers of the electricity, but the landlord's consent. That's the
25 second permitted purpose.

26 Now, I understand that a new draft order with a small number of amendments was

1 sent to the tribunal yesterday evening.

2 MR JUSTICE MORRIS: I have it.

3 MS SMITH: I don't propose to comment on the detail of the draft order at this stage.
4 I'll come back to it if that's necessary.

5 MR JUSTICE MORRIS: So I understand it, first permitted purpose is what I call
6 service A and service B; second permitted purposes is service C?

7 MS SMITH: That's right, my Lord.

8 MR JUSTICE MORRIS: Yes.

9 MS SMITH: So, it's our case that ElectraLink, we, my client, cannot supply its data
10 under the existing bilateral agreement, the 2024 bilateral agreement, for onward
11 supply by Perse to landlords without tenant consent. That is as a result of the
12 obligations imposed on my client by the DTSA -- that's the data transfer services
13 agreement with the DTS users -- by data protection legislation and by the bilateral
14 agreement itself.

15 It was for these reasons, and also as a result of finding out about Perse's supply of
16 ElectraLink data to third-party broker intermediaries, that ElectraLink suspended
17 supplies to Perse under the bilateral agreement on 1 April of this year.

18 In this regard, it's important for the tribunal to note that when Perse makes calls upon
19 ElectraLink's API for data for commercial MPANs -- that's meter processing
20 administration numbers, commercial meters -- ElectraLink cannot tell whether the data
21 it provides in response to such calls is then used by Perse to supply its
22 services -- Perse's services, that is -- to commercial end users directly or to third-party
23 broker intermediaries, or to landlords.

24 However, since April and most recently again in correspondence this week,
25 ElectraLink has indicated to Perse that it is prepared to resume supplies of data under
26 the bilateral agreement for supplies to end consumers A and B, and as regards to

1 supplies to landlords, C, ElectraLink is willing to supply individualised MPAN-specific
2 data to Perse under trilateral arrangements with the end consumer tenant's consent.
3 That's individualised data.

4 MR JUSTICE MORRIS: Can you say that again please, and I'd like to take it down.

5 MS SMITH: Yes.

6 MR JUSTICE MORRIS: As regards C --

7 MS SMITH: As regards supplies of the data --

8 MR JUSTICE MORRIS: Can you say it a bit more slowly so I can make a note.

9 MS SMITH: -- (overspeaking) to landlords. First, ElectraLink is willing to supply
10 individual meter-specific, premises-specific data to Perse under trilateral
11 arrangements between ElectraLink, Perse and the landlord with end consumer tenant
12 consent. That's individual data.

13 MR JUSTICE MORRIS: Okay. Right, so that's a trilateral which is ElectraLink, Perse,
14 landlord.

15 MS SMITH: Yes.

16 MR JUSTICE MORRIS: And if the landlord's got 20 tenants, there has to be 20 tenant
17 consents?

18 MS SMITH: Yes.

19 MR JUSTICE MORRIS: But if there's 100 --

20 MS SMITH: For individual meter-specific data.

21 MR JUSTICE MORRIS: Yes, yes. Okay, that's -- yes.

22 MS SMITH: Alternatively, of course, ElectraLink is willing, and has detailed to Perse
23 the product that it can supply, to supply Perse with its aggregated data product where
24 there is not meter-specific data but it's per property.

25 MR JUSTICE MORRIS: Right.

26 MS SMITH: That aggregated data product does not need tenant consent because it

1 | doesn't identify individual meters or individual premises, data relating to individual
2 | meters, and it doesn't require a trilateral agreement.

3 | MR JUSTICE MORRIS: It doesn't?

4 | MS SMITH: No, because it can be supplied under a new order.

5 | MR JUSTICE MORRIS: Because I had thought prior to today, that even aggregated,
6 | you still wish to have a trilateral.

7 | MS SMITH: I will explain why.

8 | MR JUSTICE MORRIS: No, it's all right --

9 | MS SMITH: It's been made clear in the correspondence and (overspeaking) --

10 | MR JUSTICE MORRIS: It doesn't require trilateral. You added something else, then?

11 | MS SMITH: Yes. It can be supplied under the existing bilateral under a new order.
12 | The tribunal will recall there are currently four orders --

13 | MR JUSTICE MORRIS: Okay.

14 | MS SMITH: -- attached to the existing bilateral. There's QuoteRight, QuoteBusiness,
15 | meter reading -- various orders. So, this aggregated data product can be supplied
16 | under a new order.

17 | MR JUSTICE MORRIS: New order, but existing bilateral?

18 | MS SMITH: Yes. Or a new bilateral after August. That leads me then to the question
19 | of supply after August 2025.

20 | MR JUSTICE MORRIS: Oh, sorry, this is --

21 | MS SMITH: This is --

22 | MR JUSTICE MORRIS: I hadn't realised, this is up until August?

23 | MS SMITH: Yes. You'll recall one of my learned friend's complaints is that not only
24 | do we suspend supply on 1 April --

25 | MR JUSTICE MORRIS: Yes, you terminated --

26 | MS SMITH: -- but on 26 February, we terminated for convenience at six months'

1 notice to terminate in August 2025. There was some complaint about lack of clarity
2 as to what was going to happen after August 2025. And --

3 MR JUSTICE MORRIS: Right, so -- okay.

4 MS SMITH: We say it is clear and has always been clear -- I'll take you to the relevant
5 documents in due course, but just by way of introduction, you might recall when we
6 were last in front of the tribunal, Professor Akman asked my learned friend -- this is
7 transcript page 13 -- whether there were negotiations started for another bilateral for
8 Perse's supply chains A and B after August 2025. Perse's counsel said, and I quote:
9 "ElectraLink will not enter into another bilateral."

10 That's transcript page 13, line 19. That is not correct. In its evidence, which of course
11 was lodged before last week's hearing, paragraph 77 of Mr Linnane's witness
12 statement. I'll take you back to that in due course. In its evidence, paragraph 77 of
13 Linnane 1, in correspondence before last week's hearing, which is paragraph 7 of
14 Pinsent's letter of Friday 2 May --

15 MR JUSTICE MORRIS: You're giving me these references; are you actually going to
16 take me to them in due course?

17 MS SMITH: I will, yes.

18 MR JUSTICE MORRIS: Okay, right. Because, as I said earlier, references alone --

19 MS SMITH: Yes.

20 MR JUSTICE MORRIS: Yes, carry on.

21 MS SMITH: Again, in correspondence since that hearing, ElectraLink has made its
22 position perfectly clear: that it is willing to enter into a revised bilateral agreement with
23 Perse after August on updated terms.

24 But given the history of this matter so far, of which, my Lord, you and the tribunal are
25 fully aware, ElectraLink considers it is necessary to clarify the terms of the agreement.

26 It is willing, therefore, to enter into a clarified bilateral agreement after

1 August 2025 -- clarified and amended not just for the agreement to be entered into
2 with Perse, but all subsequent agreements with its customers will reflect that clarified
3 and amended wording.

4 MS RIEDEL: (Inaudible) clarifications relate to the tripartite agreements?

5 MS SMITH: Questions of consent, tripartite agreements, questions of landlords,
6 supply to landlords, so basically the matters that have come up and which Perse have
7 said that there has been dispute between the parties as to what the terms mean. It is
8 the intention, certainly of my clients, to seek to ensure that the terms are clarified to
9 deal with the sort of confusion that they say appears to have arisen between the parties
10 insofar as that is necessary. But we certainly have never said that we're not going to
11 enter into another bilateral agreement with them after August.

12 PROFESSOR AKMAN: May I ask, before you move on, if you could please clarify the
13 difference between aggregated data, which you said is per property but not
14 meter-specific and then specific data, I guess?

15 MS SMITH: So, as I understand it -- again, it's quite detailed, technical, and it's set
16 out in the correspondence; I can take you to it if necessary -- it is a request for
17 anonymised data which is then aggregated at various meter numbers which are
18 provided on an anonymised basis or identified -- I'll get this wrong, but if I do, I'm sure
19 those behind me will pick me up -- which is then aggregated and provided by
20 ElectraLink to Perse. It's that data flow that is of concern to ElectraLink, the data flow
21 from ElectraLink to Perse.

22 And, as I understand it, Perse will identify properties -- because carbon reporting is
23 done on the basis of properties -- so Perse will identify property for which -- or it may
24 be a number of properties: for example, I think they mentioned last week a landlord or
25 one of their clients or potential clients is the Grosvenor estate, so they have a number
26 of properties and they have carbon reporting obligations.

1 So, the data for each of the properties will be provided -- in each of those properties,
2 there'll be a number of flats or a number of businesses or whatever, and for each of
3 those flats there will be separate meters. It is the identification of each individual meter
4 and data as regards each individual meter where the data protection problems arise.
5 The product that we are offering is one that provides aggregated anonymised data for
6 each property rather than by reference to individual MPANs, the technical industry
7 jargon, but individual meters.
8 And I'll show you why, if I may, providing property on an individualised meter basis
9 gives rise to privacy and data protection issues. I'll show you that, it's absolutely clear.
10 PROFESSOR AKMAN: Okay, but just to clarify, if there is only, let's say, one flat in
11 this property, aggregated data is also, by definition, personalised data?
12 MS SMITH: It is. And in that situation we would say that it's perfectly reasonable to
13 obtain the consent of that one tenant.
14 PROFESSOR AKMAN: So, there will be some situations where the provision of
15 aggregated data will still be in dispute? Because --
16 MS SMITH: Well, I suppose in that case it wouldn't be aggregated data so there would
17 be no need for the product. If there's only one meter in a property, then ... no, you
18 would need tenant consent because if you're only calling the ...
19 If you recall, and I can take you back to this, under the bilateral agreement for each
20 order, you've seen on the order the data that is called and the data points that are
21 called. Those data points are called for each individual meter; there is an MPAN
22 number on each of those orders. It is the identification of that MPAN number plus the
23 address plus the supplier plus the individual or sole trader or whoever who owns that,
24 pays for that meter, that gives rise to the privacy problems and the data protection
25 problems. I'll bring you back to that, show you that.
26 PROFESSOR AKMAN: Thank you.

1 MS SMITH: So, the point I'm making by way of introduction is that we are willing to
2 supply data to Perse. We always have been, and we have made it absolutely clear
3 that we continue to be and will be in the future willing to supply it. We cannot supply
4 that data where it breaches our data protection obligations as a data processor; we
5 cannot supply that data where it breaches the obligations under which we have access
6 to the data under the DTSA, because it is not our data. It is the data of the users of
7 the data transfer network who allow us access to their messages from which the data
8 is obtained.

9 So, it's against that background we say that the tribunal must consider Perse's claim
10 against ElectraLink and its current application for an interim injunction. We are
11 prepared to supply the data to Perse; Perse does not like the terms it is being offered.
12 Perse's case is that because they say ElectraLink is dominant in the market for the
13 supply of electricity consumption data in the UK, which solely -- and I stress solely for
14 the purposes of today's application -- we accept Perse must supply its data on fair
15 terms. Perse has identified just three ways, three limited ways, in which it says the
16 terms offered by ElectraLink are abusive and therefore in breach of section 18 of the
17 Competition Act.

18 I stress that the sole basis of Perse's claim against ElectraLink is breach of competition
19 law, specifically abuse of dominance. As I will show you, Perse's claim that these
20 three terms are abusive and that they restrict or foreclose competition on the relevant
21 downstream markets is unarguable.

22 As I've already said, we offer Perse our data on the basis of these impugned terms
23 because we say, and I will say correctly, we're required to do so by our obligations
24 under the DTSA and the data protection legislation. But what is central for the
25 purposes of this application is whether or not it's arguable the impugned terms are
26 abusive, whether they restrict competition. The tribunal can reach the --

1 MR JUSTICE MORRIS: Go a bit more slowly please.

2 MS SMITH: Sorry, my Lord.

3 MR JUSTICE MORRIS: Yes, okay.

4 MS SMITH: What is central is the question of whether or not these impugned terms
5 arguably restrict competition, arguably foreclose competition on the downstream
6 markets. If the tribunal reaches the conclusion that they are not arguably restrictive of
7 competition, you don't in fact need to come to a conclusion on the accuracy of
8 ElectraLink's understanding of its obligations under the DTSA and the data protection
9 legislation, because effectively those just provide an objective justification for the
10 terms. If they have no anti-competitive effect or arguably anti-competitive effect in the
11 first place, you don't need to go on to objective justification.

12 We say the allegedly abusive terms can't conceivably be said to restrict competition in
13 the downstream market, so there is no serious issue to be tried. That's the first of the
14 American Cyanamid tests.

15 But what is then also of crucial importance, because, of course, my Lord and members
16 of the tribunal, you're facing an application for an interim injunction. We are not trying
17 to strike a case out by way of summary judgment. It is whether you are required to
18 hold the ring until this case comes to trial by way of compelling ElectraLink to turn back
19 on supplies. That is the question for the tribunal on this application.

20 So, the important issue is that we say that even if Perse has an arguable case on
21 abuse, its application for this interim injunction fails because it is unable to say that
22 damages would be an inadequate remedy for any loss that it would sustain as a result
23 of ElectraLink's requirements.

24 And in that regard, the question of adequacy of damages, the question of whether you
25 need to hold the ring or whether we leave it to trial subsequently and damages and
26 liability be assessed subsequently at trial, whether you need to order an interim

1 injunction in that regard, Perse's change of case between that set out in its application
2 and its evidence to that set out in its skeleton argument which was served the day
3 before the hearing last week is of crucial importance. I say that because the tribunal
4 will be aware that up until it served its skeleton on the last working day before the
5 hearing, Perse was making its application on the basis that it was entitled under the
6 bilateral agreement to supply products containing ElectraLink's data to all third parties,
7 including third-party broker intermediaries and third-party landlords. Our evidence for
8 this application, and in fact our skeleton argument, were all prepared to meet that case.
9 However, in its skeleton argument, without any previous indication that it was going to
10 do this, Perse drew back from that position and indicated that it would not be pursuing
11 its application for an interim injunction as regards its supply of products containing
12 ElectraLink's data to third-party intermediaries, brokers.

13 MR JUSTICE MORRIS: Service D.

14 MS SMITH: This is paragraph 11(d) of the skeleton, service D.

15 MR JUSTICE MORRIS: I've called them service A, B, C and D.

16 MS SMITH: Yes.

17 MR JUSTICE MORRIS: In my book they are capital As rather than As in brackets, but
18 that's a stylistic thing.

19 MS SMITH: Fair enough. I think they're that in the transcript as well.

20 So the situation we're now facing is Perse says, "Right. We reserve our right to argue
21 at trial that your requirements for tripartite arrangements in the case of D, or third-party
22 broker intermediaries, is in breach of the chapter 2 prohibition, and we'll seek damages
23 against you for that. But we're not pursuing our application for an interim injunction on
24 that basis."

25 Effectively, therefore, they are saying damages would be an adequate remedy for
26 those breaches. Any breaches that arise as a result of their supply chain D.

1 MS RIEDEL: (Inaudible) or explain why you say that?

2 MS SMITH: They are saying, "We think that your terms, insofar as you apply your
3 three terms to our service chains, our supply chains C and our supply chains D, they
4 are an abuse of dominance and we will seek damages against you for the impact of
5 you applying those terms to our supply chain C and our supply chain D.

6 MR JUSTICE MORRIS: Is it C? I would have thought it was just D.

7 MS SMITH: And landlords as well. They're saying -- their basic case is that.
8 But then they are saying, "We want an interim injunction to hold the ring until we can
9 get damages, but we only want that interim injunction -- we're only applying for that
10 interim injunction -- on the basis of supply chain D, landlords. We're not applying for
11 an interim injunction," they say in terms, and this is the puzzling aspect of it.
12 Paragraph 11(d) of their skeleton. Perhaps we could go to that to see how it's put. It's
13 in hearing bundle F, tab 140, unless you've got it separately.

14 MS RIEDEL: Could you repeat the number?

15 MS SMITH: It's in volume F, tab 140. It starts on page 1801.

16 MR JUSTICE MORRIS: Yes, yes.

17 MS SMITH: And at the bottom of page 1801, paragraph 11 starts, "The four supply
18 chains are ..."

19 MR JUSTICE MORRIS: Yes.

20 MS SMITH: Then over the page they set out the four supply chains: A, B, C and D.

21 MR JUSTICE MORRIS: Sorry, Ms Smith, can you just bear with me one moment. I'm
22 sorry.

23 MS SMITH: I'm sorry, my Lord. I didn't --

24 MR JUSTICE MORRIS: No, it's all right. Yes.

25 MS SMITH: If you have the skeleton separately --

26 MR JUSTICE MORRIS: I've got the skeleton.

1 MS SMITH: -- it's internal page 3, turning over to page 4 or bundle page 1801, 1802.

2 MR JUSTICE MORRIS: Yes. I mean, it's very clear here. There are four categories.

3 MS SMITH: So we have A and B: "Supply to human consumers"; "Supply to corporate
4 consumers". Then we have C: "Supply to landlords".

5 The supply is described, and then it's said:

6 "Perse's position is that this is permitted by the existing contractual arrangements.
7 Perse seeks an order that the supply of ElectraLink Data be restored to facilitate these
8 services."

9 But then, and this is what I emphasise:

10 "Supply to intermediaries", which is D: supply the services described.

11 "Perse's position is also that this is permitted by the existing contractual arrangements.
12 However, in order to narrow the issues of the hearing, Perse does not pursue this
13 category within this Application. Perse therefore accepts for the purposes of this
14 Application that if it were to provide any service which involves supplying data or
15 derivatives to an intermediary entity, (ie an entity which is not the electricity consumer
16 or a landlord) then it would need to enter into tripartite arrangements with ElectraLink."

17 Obviously, we don't in this case have a draft particulars of claim. But as I understand
18 it, what they're saying is not that, "We are not going to pursue you in due course for
19 damages resulting from you disrupting, because of your abusive terms, our supply not
20 only to landlords but also to broker intermediaries," but "we are only asking for an
21 interim injunction insofar as it applies to the supply of data to facilitate the services we
22 supply to landlords. We're only seeking an order to that limited extent."

23 My submission to you is that by implication they are therefore saying that insofar as
24 we are talking about supply to broker third-party intermediaries, they are implicitly
25 accepting that damages would be an adequate remedy for any loss they suffer as
26 a result of our allegedly abusive terms disrupting that supply chain.

1 MS RIEDEL: I -- sorry.

2 MR JUSTICE MORRIS: Go ahead.

3 MS RIEDEL: I'm just struggling a little bit. It's almost -- you're saying by omitting that
4 from the order they are seeking, they are making a positive case that damages are
5 sufficient for them in that regard. But I guess my logic is always -- once it's outside
6 the order, why do you say that that implies a statement or a position as to damages?
7 It's just outside the order, isn't it? Therefore one reads nothing into it other than that
8 it's outside the order.

9 MS SMITH: Well, I suppose the point is -- and this is the point I make on what is
10 crucial here -- whether they need an interim injunction or whether damages are
11 adequate. This is the second stage of American Cyanamid.

12 What I say is lacking from Perse's case, through the tribunal (inaudible) submissions
13 to the tribunal, is any explanation as to why or how there is any difference between
14 the situation relating to their supply to thirdparty- intermediaries -- that's their supply
15 chain D - and that relating to their supply to -thirdparty- landlords, their supply chain
16 C.

17 What difference is there between those two supply chains that means they need an
18 injunction as regards the former situation - sorry. They need an injunction as regards
19 the latter -situation - that's- supply chain C - but they don't need, or they don't pursue,
20 an injunction as regards the former situation. That's- supply chain D.

21 I simply make the point that it's puzzling to us why they insist on continuing to pursue
22 their application for an interim injunction as regards landlords, when they are not
23 pursuing the application for an interim injunction as regards intermediary brokers.

24 MR JUSTICE MORRIS: Just to clarify in my mind, I'm envisaging what is ultimately
25 being sought at the final trial is not just damages, but final injunctions.

26 MS SMITH: Well, my Lord, we don't know. This is the problem.

1 MR JUSTICE MORRIS: But that's the whole basis of American Cyanamid. It's
2 whether there is a serious issue to be tried as to whether you would get the injunction
3 at trial.

4 MR JONES: I hesitate to interrupt, but would it help just to clarify Perse's position?
5 No.

6 MR JUSTICE MORRIS: No, I think we're all right. I'm just pointing that out.
7 I think the point you're making is not about damages down the line. I think your point
8 is that any interim period between granting the injunction and the final trial, any loss
9 that -- it's inherent in Perse's case that they still maintain that the refusal to supply for
10 the purpose of service D is a breach of competition law. You're saying that they don't
11 seem to be worried about any loss they've suffered in relation to that damage for the
12 interim period.

13 I think that's your point. Damages would be an adequate remedy for any loss caused
14 between now and trial in relation to service D, so why wouldn't it be adequate for
15 service C?

16 MS SMITH: Yes, there's no explanation as to (overspeaking) --

17 MR JUSTICE MORRIS: I think that's the point. But I don't think you can assume that
18 all that's being sought at trial is damages.

19 MS SMITH: Well, my Lord, we can't assume anything, because contrary to what
20 I understand to be best practice in these sorts of applications --

21 MR JUSTICE MORRIS: Yes.

22 MS SMITH: -- there is no draft particulars of claim. In fact, we don't even know the
23 basis on which the claims are made against us, the precise basis. Perhaps more
24 importantly, my Lord, the tribunal doesn't know the precise basis on which it's being
25 asked to hold the ring until trial.

26 Anyway, my Lord, what's also of supreme importance as regards the second, third and

1 fourth tests under American Cyanamid, that this is not a case in any event where on
2 any proper reading of the evidence -- and I'll show you this -- the applicant would go
3 out of business without the protection of an interim injunction pending trial. There's no
4 existential threat to Perse's business, as its counsel sought to argue last week. This
5 is particularly the case whereas here we are offering them an anonymised, aggregated
6 data product, which would provide them with the data they need to offer their carbon
7 reporting service to their landlord customers.

8 On their own evidence -- Mr Sachdeva's second witness statement, paragraph 13,
9 and I will take you back to this -- this aggregated data product is described as, and
10 I quote, "a viable alternative for carbon reporting."

11 As I said, even leaving that to one side, this is not a case where the applicant is going
12 to go out of business pending trial. This is an applicant that is strongly backed by its
13 shareholders, including in particular its major shareholder, Stark Software Holdings.
14 The position of shareholders has been, and I will show you, a matter of supreme
15 importance in interim injunction case law. I'll take you back to that.

16 I will also show you in due course numerous emails and calls made by a Mr Joel Stark,
17 who is the owner of Stark Software Holdings and also, you should note, one of five
18 directors of Perse.

19 I will show you the numerous emails and calls that he has made to ElectraLink's CEO,
20 its chair, its DNO -- distribution network owner, operator owners -- and its
21 non-executive directors, making -- I don't think I put this too highly, I'll show you the
22 documents -- threats that if this is not settled, Stark will also be seeking damages
23 against ElectraLink, and putting pressure on my client to restart supplies.

24 This is not a disinterested shareholder who's not going to invest in the survival of one
25 of their investee companies. What these documents show instead is that this
26 application is a tactical move designed to put pressure on my client, which has caused

1 my client to incur substantial costs, particularly in light of Perse's various last minute
2 concessions and changes of approach, and it shouldn't be entertained by this tribunal.
3 So then I'll turn to address in a little more detail the tests set out under the American
4 Cyanamid principles.

5 MR JUSTICE MORRIS: Step 1, serious issue to be tried.

6 MS SMITH: Step 1, whether there is a serious issue to be tried.

7 MR JUSTICE MORRIS: Okay.

8 MS SMITH: We accept, of course, that the tribunal will not be conducting a mini-trial
9 at this hearing and should not do so. But we do say that on the basis of Perse's own
10 evidence and Perse's own arguments, the tribunal is in a position to determine that
11 Perse's proposed claim is fanciful.

12 I've said that Perse objects to the fact that before ElectraLink will supply it with
13 individualised data -- that's data for individual meetings at individual premises' flats, as
14 I've explained -- before ElectraLink supplies Perse that data for use in its carbon
15 reporting service to be supplied to landlords, ElectraLink requires Perse to enter into
16 tripartite agreement arrangements and where the premises are tenanted, that tenant
17 must give consent as the end user for the data -- must give consent for the data
18 relating to its meter to be processed.

19 Last week, Perse's counsel made various submissions to the tribunal about refusal to
20 supply and indispensability, you'll recall, by reference to the Court of Justice judgment
21 in Alphabet and about refusal to supply an existing customer by reference to the CAT's
22 and Court of Appeal's judgment in Sports Direct.

23 Our submission is that these points are at best of peripheral relevance. Perse does
24 not argue -- insofar as we can discern what its case is in the absence of a draft claim
25 form -- I'll take this from application paragraph 87.1, and I'll take you back to that if
26 I need to.

1 Perse argues it is not necessary for Perse to prove that ElectraLink is under an
2 obligation to supply its data. ElectraLink does supply its data and it must therefore do
3 so on fair terms. That's application paragraph 87.1.

4 MR JUSTICE MORRIS: Are you going to take us to that or not?

5 MS SMITH: I can --

6 MR JUSTICE MORRIS: My understanding at the moment is that the case on abuse
7 is put in two ways. First, that there is an outright refusal to supply effectively, and
8 secondly, there is supply on unfair terms.

9 MS SMITH: This, my Lord, is one of the problems you face in trying to determine this
10 without a draft. I'll take you to paragraph 87.1, which is here in bundle A --

11 MR JUSTICE MORRIS: Okay. Let's find it.

12 MS SMITH: -- tab 1, right in the very beginning. Here in bundle A, tab 1, page 32,
13 under the heading "Legal framework: abusive conduct involving unfair trading
14 conditions."

15 We have section 18.2(a), which refers to unfair trading terms, Pinsent's letter, and then
16 87.1, which is what I was referring to:

17 "The position is that ElectraLink does offer its data to third parties. That being so, the
18 question of whether or not it could in theory choose not to make its data available at
19 all does not arise. So this is not a question of refusal to supply. If it makes data
20 available, then it must do so on fair terms."

21 That's its primary case.

22 MR JUSTICE MORRIS: That's the way it's put here.

23 MS SMITH: Yes. And then, my Lord --

24 MR JUSTICE MORRIS: In the argument it is put the other way around.

25 MS RIEDEL: But also, 87.1 is responding to a letter sent on behalf of ElectraLink. So
26 it seemed to me it's just responding to the apparent statement in that letter that

1 | ElectraLink has no obligation to offer supply at all.

2 | MS SMITH: You are in as difficult a position as we are as to discerning exactly what
3 | the pleaded case will be in due course. If you then go on to look --

4 | MS RIEDEL: Sorry, you're saying that that statement effectively amounts to
5 | a concession?

6 | MS SMITH: Well, they make various passing, glancing references to the refusal to
7 | supply case law in this document. But then when they are setting out what they say
8 | are the problems in this case, they come under headings D on page 34, which is the
9 | insistence on tripartite agreements, which they say is problematic because it involves
10 | the provision of customer lists, commercially confidential information. I have identified
11 | that as unfair term 1.

12 | Then they say under heading E on page 36, "the requirement to only supply
13 | information to end consumers."

14 | That is the point that we cannot supply the information to landlords without tenant
15 | consent, which I have identified -- well, actually, I've identified it as a third point
16 | because it doesn't arise out of the requirement for tripartite agreements. It's separate.

17 | Then we have on page 37, under heading "Unfair pricing terms," the pricing point,
18 | which is unfair term C.

19 | MR JUSTICE MORRIS: There's no doubt --

20 | MS SMITH: And that's it.

21 | MR JUSTICE MORRIS: -- cutting through it, there's no doubt that the consistent
22 | position in relation to unfair terms is that there have been three aspects to that. 1,
23 | tripartite.

24 | MS SMITH: Yes.

25 | MR JUSTICE MORRIS: 2, tenant consent; and 3, pricing. In the course of oral
26 | argument last week, Mr Jones placed least emphasis on pricing and sort of said --

1 MS SMITH: Well, barely any submissions were made on pricing.

2 MR JUSTICE MORRIS: So those were the three sub-identification of the unfair terms.

3 MS SMITH: Yes.

4 MR JUSTICE MORRIS: I don't disagree with you that it would help if there was
5 a pleaded case, because I'm not sure that this amounts to a pleaded case, and the
6 skeleton may have a different nuance, and the oral argument may.

7 Even leaving that to one side, my impression has been that there has been a separate
8 strand, and I can't quite remember whether that was put first, of essential refusal to
9 supply or terminating an existing supplier based on Alphabet. That has been put as
10 a different case.

11 MS SMITH: Well, my Lord --

12 MR JUSTICE MORRIS: That's as I understand it. But I agree with you. It would help
13 if it was clarified.

14 MS SMITH: I would perhaps cut through this, because --

15 MR JUSTICE MORRIS: Yes.

16 MS SMITH: -- in my submission, it is not clear what case we will ultimately face. It is
17 clear that there are three terms that are complained about as being unfair and abusive,
18 and I will address each of those in turn.

19 MR JUSTICE MORRIS: Yes.

20 MS SMITH: As regards the question as to whether there might, at some point in the
21 future, also be a case of refusal to supply, that is, we do not know. But my Lord, the
22 point is, there is no refusal to supply as a matter of fact, and that is the point I made in
23 opening.

24 We are perfectly willing to supply them on terms that we have set out, and that we
25 consider we are obliged to apply. The terms as to the tripartite agreements, which
26 give rise to the problems, they say, of commercially confidential information being

1 shared and pricing -- we say they don't -- and the requirement for tenant consent. So
2 we are not refusing to supply. It is just that they do not like the terms upon which we
3 are offering the supply.

4 MR JUSTICE MORRIS: Is there a conceptual difference between --

5 MS SMITH: Well, that's a --

6 MR JUSTICE MORRIS: -- outright refusals to supply and offering to supply on terms
7 which are unfair/anti-competitive.

8 MS SMITH: An interesting point, my Lord. I'm not sure, sadly, that we have time to
9 enter into that debate today.

10 MR JUSTICE MORRIS: I mean, you take it as you wish to, but you're obviously going
11 to address the three elements of the unfair terms. But, anyway.

12 MS SMITH: And I think that's the important point to address, the three elements of
13 the unfair terms. Because we say that what -- Perse say our conduct is abusive as it
14 involves the imposition of unfair trading conditions, and that's their skeleton,
15 paragraph 53. Well, you may still have it open.

16 MR JUSTICE MORRIS: I start with paragraph ...?

17 MS SMITH: 53. Page 21 of the hearing bundle. Sorry, no, I've got an incorrect
18 reference. It's their skeleton, not their application notice. Hearing bundle 140.

19 MR JUSTICE MORRIS: Sorry, you've lost me. Are you making reference to the
20 skeleton?

21 MS SMITH: Yes. Making reference to the skeleton. Sorry. Hearing bundle F,
22 tab 140.

23 MR JUSTICE MORRIS: Paragraph 53. Yes.

24 MS SMITH: The obligation to supply on fair terms.

25 MR JUSTICE MORRIS: Yes. And there it is. Put first.

26 MS SMITH: It is put first. Yes.

1 MR JUSTICE MORRIS: Yes.

2 MS SMITH: They refer in paragraph 53 to section 18(2)(a) of the Competition Act.

3 MR JUSTICE MORRIS: Yes.

4 MS SMITH: With which you're well familiar. They then rely on the Court of Appeal
5 judgment in Gutmann.

6 The only point I would make in that regard -- I don't think I need to take you to the
7 case. The relevant paragraph is set out there, paragraph 93 of the judgment of the
8 Court of Appeal in Gutmann. But the tribunal will recall that Gutmann concerned an
9 allegation of exploitative abuse, specifically the imposition of unfair and excessive
10 charges for boundary fares.

11 That was the context in which the Court of Appeal was considering the meaning of
12 "unfair", which is explicitly recognised by the Court of Appeal's reference in
13 paragraph 93 of its judgment to exploitative abuses. I'm not sure whether it is in the
14 quotation in paragraph 54, but it's certainly in paragraph 93 of the Court of Appeal's
15 judgment, that it's about exploitative abuses.

16 MR JUSTICE MORRIS: Well, it the passage refers to exploitative abuses.

17 MS SMITH: But we say, in this case, the three allegedly abusive terms -- the sharing
18 of customer information, the pricing terms and the requirement for tenant
19 consent -- are not, nor could they conceivably be argued by Perse to be, exploitative
20 abuses.

21 As regards pricing, Perse explicitly states in paragraph 78.3 of its application that it's
22 not pursuing a case of excessive pricing, but reserves the right to do so at trial. It's
23 not an excessive pricing case. It's not an exploitative abuse case.

24 MR JUSTICE MORRIS: So that's in the application?

25 MS SMITH: 78.3 of the application.

26 So Perse will have to establish at trial that these three terms are capable of having

1 exclusionary or foreclosure effects in the downstream markets. That's standard. Are
2 they capable of having an anti-competitive-competitive effect? Are they capable of
3 having exclusionary foreclosure effects in the downstream markets? And we say they
4 clearly are not so capable.

5 In this regard, I propose to show you first, on the basis of Perse's own evidence, that
6 it is clear that we, my client, ElectraLink, does not compete with Perse in the relevant
7 downstream markets. Then I will address each of the three allegedly abusive terms.

8 As regards competition on the relevant downstream markets, can I ask you first to turn
9 to my skeleton argument, which, unless you have it separately, is in hearing Bundle F,
10 tab 141.

11 Can ask you to start at paragraph 21 on page 1826. At the bottom of that page,
12 paragraph 21 under the heading "Product Services Offered by Perse and ElectraLink".

13 I make the point there -- I'm not going to read it out, I promise, not all of it anyway:

14 "ElectraLink does not compete with Perse in the downstream market. ElectraLink
15 provides data sets in the form of DAS reports to Perse and other customers. Perse
16 [and I interpose ElectraLink's] other customers then [use] data extracted from [those]
17 reports in products which it supplies downstream [and I address Perse's switching
18 service]."

19 You'll recall there are five products that Mr Sachdeva describes in his evidence as
20 being supplied by Perse, and I address each of those five products.

21 First, Perse's switching service in paragraphs 22 to 26. Then I go on to address its
22 carbon reporting service at 27 to 28, its recommendations service and its meter
23 readings conversion products in paragraph 29, and its demand flexibility product in
24 paragraph 30.

25 Addressing each of those starting with Perse's switching service: it is uncontroversial
26 that Perse, as I understand it, does not supply its switching service to landlords. It

1 supplies its switching service via price comparison websites to end
2 consumers -- domestic end consumers, but it could also be commercial end
3 consumers. But it also supplies it via brokers to commercial end consumers.
4 That -- and I probably can take you to it, because we're going to keep coming back to
5 it -- Mr Sachdeva's first witness statement, which is hearing Bundle A, tab 4. If I could
6 ask you to look at paragraph --

7 MR JUSTICE MORRIS: B, actually.

8 MS SMITH: Sorry, B, I apologise. There were so many of these bundles,
9 I consolidated all of mine and trying to remember which was A, B, C, D, E, or F.

10 MR JUSTICE MORRIS: Okay. Just give me a moment. I'm struggling for space at
11 the moment a bit.

12 MS SMITH: I probably only need to have open my skeleton Mr Sachdeva's witness
13 evidence on that for now.

14 MR JUSTICE MORRIS: Yes.

15 MS SMITH: So Mr Sachdeva's first witness statement is at hearing Bundle B, tab 4.
16 If I could ask you to turn in that to paragraph 36, which is on page 58.

17 Just to put this in context, if you go back to page 56, you'll see that he, in paragraph 27
18 onwards, says "Perse has five products which take the form of different services".

19 He then goes on to describe each of those five products, switching service first in
20 paragraph 28 onwards. And I'm just addressing the point as to whom does Perse
21 provide that service, and I made the point it provides does not provide it to landlords.

22 That is found in paragraph 36 of Mr Sachdeva's first statement, which explains the
23 proportion of the revenue that Perse obtains from this product.

24 "The switching product is provided by Perse via Compare The Market, the price
25 comparison website, or its Labrador website directly to customers, to Perse's
26 customers."

1 Or, it then says at the bottom of paragraph 36:
2 "The majority of Perse's switches to commercial customers is provided through
3 brokers."
4 But it's a different product, the switching service, to the carbon reporting service. It's
5 not provided to landlords, it's provided to end consumers and to consumers via brokers
6 or intermediaries.
7 MR JUSTICE MORRIS: Okay. I'm a bit baffled by the reference to "provided through
8 brokers".
9 MS SMITH: I understand that to be: if you are a large commercial customer with
10 a large office --
11 MR JUSTICE MORRIS: In terms of service A, B, C and D, which is it?
12 MS SMITH: It's B, but it is done via an intermediary. It's via a broker.
13 MR JUSTICE MORRIS: Okay. But it's not the same as D?
14 MS SMITH: So if you were a large company who has a big office with the meter, and
15 you say, "How much would it cost me? Could I get a better deal from switching my
16 supplier to this office?" You can go to a broker and ask them to look around the market
17 for you, and try to find you a better deal to switch to. And as I understand it, that is
18 what the supply, the switching services to commercial customers via a broker, is.
19 That's what it comprises.
20 MR JONES: That's correct, but just for clarity, we would call that D. So that would be
21 outside of --
22 MR JUSTICE MORRIS: We would call that D. That's the point.
23 MR JONES: We would call it D.
24 MS SMITH: Because, yes, it's the one when it is agreed, at least for the purposes of
25 this application by Perse, that they require a tripartite agreement, arrangements for
26 those.

1 MR JUSTICE MORRIS: That's why I was confused. It's D.

2 MS SMITH: But it's not C. This is the point.

3 MR JUSTICE MORRIS: That's why my initial remark was, "I'm confused by the
4 reference to brokers". My confusion has been removed.

5 MS SMITH: As regards switching services, therefore, that product: you may recall
6 that, in his submissions last week, Perse's counsel accepted -- and the reference for
7 this is transcript page 81, lines 10 to 13:
8 "ElectraLink does not currently supply switching services direct to end consumers."
9 So in that particular type of service, they, ElectraLink, would be, at most, a potential
10 competitor of Perse. So they accept we don't supply switching services.

11 MR JUSTICE MORRIS: Was that the point where I got confused about certain
12 paragraphs about QuoteRight and whether that was supplied. Anyway.

13 MS SMITH: But, my Lord, I wasn't proposing in light of that submission by Perse's
14 council last week to go into detail as to why we say as regards switching services, the
15 downstream market for switching services, we, ElectraLink, clearly do not compete
16 with Perse in the downstream market for switching services.

17 Insofar as you need me to make detailed submissions on that point, they are
18 summarised at paragraphs 22 to 26 of my skeleton argument, and I can develop those
19 if you require me to do so. But they are not relevant and the point you've already
20 made, my Lord, they are not relevant to supply chain C, because switching services
21 is not supply chain C, not the supply to landlords.

22 MS RIEDEL: I would find it helpful for your explanation, as to -- obviously, ElectraLink
23 has a relationship with certain price comparison websites and supplies the data to, for
24 example, MoneySuperMarket or Uswitch. So it would be helpful, I think, for the
25 tribunal to hear how you articulate why that relationship is not on a par, on the same
26 level of the market, as the relationship that Perse has with, Compare the Market.

1 MS SMITH: Yes. So in that regard then, my Lady -- madam.

2 MR JUSTICE MORRIS: I'm sure "my Lady" will do, your Ladyship. Yes, I think.

3 MS SMITH: In that regard, then, if I can perhaps take you through the points that
4 I make in my skeleton. It's starting with what the switching service is, and what role
5 ElectraLink plays in the switching service. That is set out in Mr Sachdeva's first
6 witness statement, paragraph 29. So if you could just ask you to read paragraph 29
7 to yourself, rather I read it out for you, you'll see the role that Perse's data plays in the
8 service, the product, offered by Perse to its customers. (Pause)

9 You see there that the electricity consumption data that Perse obtains from ElectraLink
10 is just one of the ingredients in the switching service. First of all, Perse uses its own
11 proprietary algorithm it has developed, which it operates, and it applies that to the
12 consumption data provided by ElectraLink. It then adds other data that it obtains from
13 other sources -- pricing data, which it says, Mr Sachdeva's says, they have obtained
14 from a number of commercial providers who aggregate the tariffs and provide that data
15 set. So there's another data set.

16 There's the algorithm ingredient, there's our electricity consumption data ingredient,
17 there's the pricing data ingredient. Then there is the software that carries out the
18 comparison, and obviously, in fact, the website page face, the consumer-facing
19 software of the website. Then the customer can use the information to make a choice
20 and can switch, and the switch also can be actioned via Perse's platform. So Perse's
21 platform is adding that ingredient as well: the ability, the software, whatever, to enable
22 the switch to take place.

23 So as I put it, Perse's electronics data is just one ingredient in this product, this overall
24 product. And a price comparison website -- Perse operates its own price comparison
25 website, where it takes the ingredient, our input, and it puts it together with all the other
26 ingredients. That's Labrador, and that's consumer facing.

1 Perse also effectively provides it via Compare the Market. Because it's a white-label
2 product. It's a brand effectively for a product that's service that's provided by Perse,
3 and the contracts the consumer enters into on that website are with Perse.
4 But also, Perse sells that product that it has made from all those ingredients, including
5 our data input, but many other ingredients as well, to other price comparison websites
6 who can then provide that product comprising all the various data inputs and the
7 software and the algorithms via their websites.
8 MR JUSTICE MORRIS: Just pause there for a moment. Which websites are those?
9 MS SMITH: I'm not sure whether it actually already does that, but it can offer them.
10 MS RIEDEL: I think we heard of two names: Compare the Market and Free ...
11 MS SMITH: Yes, that's right, Free Price Compare.
12 MR JUSTICE MORRIS: Can we put Compare the Market to one side, because it's
13 not truly, in this connection, a separate price compare PCW.
14 MS SMITH: Yes.
15 MR JUSTICE MORRIS: But you're saying that as well as supplying its switching
16 service to, effectively, let's call them end consumers, either through Labrador or
17 through Compare the Market, it does provide something to an intermediary price
18 comparison website.
19 MS SMITH: That's what we understand. Before these proceedings, my instructions
20 are we were not aware of Free Price Compare buying the switching service product
21 from Perse, but we understand that now to be the case.
22 Of course, there are other price comparison websites on the market such as Uswitch,
23 Go Compare and MoneySuperMarket. What we understand they do -- and this I'll take
24 you to Mr Linnane's evidence in that regard -- is that they, like Perse, take the various
25 elements of a price comparison website -- electricity consumption data, pricing data,
26 software, algorithms, the web page, the consumer-facing web page -- and they put

1 together the product themselves.

2 So unlike Free Price Compare, they don't buy the switching service product from
3 Perse. They put it together themselves, they make it themselves by buying all the
4 various ingredients.

5 Two of those price comparison websites, Uswitch and MoneySuperMarket, obtain the
6 electricity data ingredient from ElectraLink. One of those does not. Go Compare does
7 not the electricity consumption data ingredient from ElectraLink. It uses -- well, I'll
8 come back to this if I may, as regards adequacy of damages -- but it uses,
9 I understand, average data and/or also asks consumers to enter in their own
10 consumption data, which they can obtain from their bills. But, if I may, I'll come to that
11 and show you that.

12 So what we say is that Perse is competing here. It provides a product, of which
13 ElectraLink simply provides an ingredient. Other price comparison
14 websites -- Uswitch, MoneySuperMarket, Free Price Compare -- none of those can go
15 and obtain a switching service product from ElectraLink. We don't provide that
16 product. We provide one of the ingredients.

17 MR JUSTICE MORRIS: Okay.

18 MS SMITH: I make the point in paragraph 25 of my skeleton.

19 MR JUSTICE MORRIS: Okay.

20 MS SMITH: "Mr Sachdeva is correct when he says that ElectraLink sells its data
21 directly to price comparison websites such as Uswitch and MoneySuperMarket.
22 However, Mr Sachdeva is not correct when he says that ElectraLink's data or its DAS
23 reports are, and I quote, 'an alternative to Perse's product, or that ElectraLink is a key
24 competitor of Perse' on the basis that I've explained to you."

25 PROFESSOR AKMAN: Has ElectraLink ever considered entering this market?

26 MS SMITH: Not that I'm aware of.

1 PROFESSOR AKMAN: Thank you.

2 MS SMITH: Well, there's certainly no evidence to that effect.

3 MS RIEDEL: I think Perse also submitted that, by virtue of ElectraLink providing the
4 data to MoneySuperMarket and Uswitch, that provides an alternative to those potential
5 customers of Perse. How would you respond to that comment?

6 MS SMITH: It provides an alternative only insofar as it enables them to put the product
7 together themselves. So it's the point I've already made, and that they can buy --

8 MS RIEDEL: Would you agree that they are potential customers of Perse?

9 MS SMITH: They may very well be, yes.

10 MS RIEDEL: Okay.

11 MS SMITH: Well, their potential customers. They may decide not to put the product
12 together themselves. They may decide to buy it off the shelf, but they're not going to
13 be buying that from ElectraLink.

14 MR JUSTICE MORRIS: So can I just clarify who is the "they" here? Can we clarify.
15 Are you talking about the end consumer?

16 MS RIEDEL: No, the price comparison (overspeaking).

17 MR JUSTICE MORRIS: That's the point. Which who are we talking about. Are we
18 talking about the price comparison website or are we talking about the end consumer?

19 MS RIEDEL: My question was about the customer of Perse. Yes, you're right. If you
20 think about Compare the Market being in partnership with Perse, so could
21 MoneySuperMarket and Uswitch have similar relationships with Perse, in theory, as
22 Perse does with Compare the Market? You're right, I wasn't (overspeaking).

23 MS SMITH: If I may, perhaps a better example is Free Price Compare, which is a true
24 intermediary. So yes, they could, but they can't obtain that product from ElectraLink.

25 MS RIEDEL: Yes. I see.

26 MR JUSTICE MORRIS: So this -- I can't remember the name of this other PCW.

1 MS SMITH: Free Price Compare.

2 MR JUSTICE MORRIS: Free Price Compare. They are not just getting the data,
3 they're getting a switching service.

4 MS SMITH: Yes.

5 MR JUSTICE MORRIS: So what does Free Price Compare to add to it all? Nothing.

6 MS SMITH: Not very much, but I think their legal relationship is they buy the product.
7 I don't know. I'm speculating here because this was not something that my clients
8 were aware of before the evidence.

9 MR JUSTICE MORRIS: No, I understand that.

10 MS SMITH: But I think the distinction is that when an end consumer customer, when
11 you go on a price comparison website to find out about switching, if you go on the
12 Go Compare website -- and I'll find you the reference for this, this is in Mr Linnane's
13 evidence -- the terms and conditions on the Compare the Market website say to the
14 end consumer. "You are entering into a contract with Perse".

15 MR JUSTICE MORRIS: Yes. So --

16 MS SMITH: So with Free Price Compare -- I do not know, I haven't checked
17 this -- I assume that there are two contracts: a contract between -- again this is
18 speculation, I should make that absolutely clear -- a contract between Perse and
19 Free Price Compare, and then a contract between Free Price Compare and the end
20 consumer. I don't --

21 MR JUSTICE MORRIS: If we are trying to compare Free Price Compare with
22 MoneySuperMarket, the others --

23 MS SMITH: Yes. It's different. My understanding of it is it's different, because in the
24 former case, Free Price Compare are effectively just distributing Perse's product,
25 ie not putting it together, whereas, MoneySuperMarket -- and I can't keep the names
26 in my head -- they are making the product.

1 MS RIEDEL: Yes.

2 MR JUSTICE MORRIS: So --

3 MS RIEDEL: Yes. So if we look at VS exhibit 1, paragraph 31.

4 MR JUSTICE MORRIS: So we're looking at Mr Sachdeva's statement at
5 paragraph 31.

6 MS SMITH: So what document is that?

7 MR JUSTICE MORRIS: Paragraph 31 of Mr Sachdeva's first statement, page 57 of
8 the bundle.

9 MS RIEDEL: I had understood you had talked earlier about Compare the Market, that
10 there's a white labelling arrangement between Perse and Compare the Market.

11 MS SMITH: Yes.

12 MS RIEDEL: My understanding, looking at footnote 9, is that Perse is also offering
13 a white-label product to Free Price Compare.

14 MS SMITH: As I've already said, my Lady, my clients were not aware of this.

15 MS RIEDEL: Yes. I'm not trying to pin you down. I'm just trying to make sure that the
16 court understands the point I was trying to get to, which is regardless of quite what the
17 contractual relationship is that Perse has with a price comparison website, my
18 understanding from its evidence was that it believed that it could potentially enter into
19 contractual arrangements with MoneySuperMarket and Uswitch, but for the fact that
20 ElectraLink already has contractual arrangements in place with them, so that those
21 were potential partners, or customers of, Perse. I had asked you what your reaction
22 was to that, and your reaction was they might be potential customers of Perse, but
23 ElectraLink could not supply the same service that Perse could, in theory, supply.
24 That's just to clarify.

25 MR JUSTICE MORRIS: Yes, that's very helpful. Thank you very much.

26 MS SMITH: That's right, madam. I understand that the transcriber is doing this

1 remotely, but they do need a break. And I see --

2 MR JUSTICE MORRIS: Within the next ten minutes.

3 MS SMITH: Within the next ten minutes.

4 Given this -- these are slightly tricky -- I was about to go on to deal with the

5 downstream market for carbon reporting services.

6 MR JUSTICE MORRIS: Yes.

7 MS SMITH: It might be that we take the break now, and we do that after a short break.

8 MR JUSTICE MORRIS: All right. Thank you very much. Thank you. Very helpful.

9 (11.45 am)

10 (A short break)

11 (12.02 pm)

12 MS SMITH: My Lord, members of the tribunal, I said I was going to turn then to the

13 market for carbon reporting services.

14 MR JUSTICE MORRIS: Yes.

15 MS SMITH: I address that downstream market, if I could ask you to turn to my

16 skeleton argument, hearing bundle F, tab 141, page 1828. I address Perse's carbon

17 reporting service in paragraphs 27 and 28 of my skeleton.

18 MR JUSTICE MORRIS: Yes.

19 MS SMITH: I do need to develop some of those points orally given Perse's counsel's

20 assertion last week that ElectraLink is, and I quote, "an actual competitor to Perse in

21 that downstream market". That's transcript page 81, line 18.

22 First, in this regard, it's important for the tribunal to understand exactly what product is

23 offered by Perse. Mr Sachdeva describes Perse's carbon reporting product in his first

24 witness statement, which you may still have open: hearing bundle B, tab 4. And if

25 I could ask you to turn to page 59.

26 MR JUSTICE MORRIS: Yes, you can. Again, if you'll just give me a moment, I'm

1 | trying to make some space.

2 | MS SMITH: Page 59. Can we start with paragraph 38.

3 | MR JUSTICE MORRIS: Yes.

4 | MS SMITH: If I could just very quickly ask you to read that. Mr Sachdeva describes
5 | the carbon reporting service.

6 | Then, paragraph 39 is very important. In this paragraph, Mr Sachdeva explains what
7 | the carbon reporting service, this product, is actually made up of. So, can I ask you to
8 | perhaps read -- I'm not going to read it out, easier just to read that to yourself. But this
9 | is, in my submission, a very important paragraph for the tribunal to understand.

10 | (Pause)

11 | MR JUSTICE MORRIS: Yes. 39, yes.

12 | MS SMITH: So as you can see from paragraph 39, ElectraLink's electricity
13 | consumption data are just one of a number of data inputs that Perse uses in its carbon
14 | reporting product. It also uses gas consumption data that it obtains from RECCo, and
15 | data that it has regarding relevant energy suppliers and the particular mix of fuels used
16 | by those suppliers.

17 | Perse then applies its own algorithms to that various data to calculate historical energy
18 | usage and to produce the carbon value for the amount of energy used by the customer.

19 | Moreover, Mr Sachdeva explains that if the customer chooses to pay more for Perse's
20 | advanced option, it receives what it described, perhaps a little enigmatically, as
21 | "additional insights". So, those are the various ingredients, perhaps, as we're into the
22 | carbon reporting product that Perse offers on the downstream market.

23 | You'll see from paragraph 40, if you glance at that, Perse's customers for its product
24 | are landlords or property managers responsible for reporting on the carbon emissions
25 | of the buildings. Then, in paragraph 41 of Mr Sachdeva's first witness statement, he
26 | explains that Perse's carbon reporting service uses five ElectraLink data points. Those

1 are set out in footnote 11 on page 59. Each of those five data points are lines
2 extracted from the DAS reports supplied to Perse by ElectraLink under the bilateral
3 agreement.

4 So, you can see that, my Lord, if you keep your finger on page 59 of tab 4 and compare
5 what's in footnote 11 with the first order attached to the bilateral agreement, which is
6 in hearing bundle C, tab 18, page 377.

7 MR JUSTICE MORRIS: It's in my C1.

8 MS SMITH: You'll see at 377 --

9 MR JUSTICE MORRIS: Yes.

10 MS SMITH: -- the DAS report format for the QuoteRight data product that ElectraLink
11 supplies to Perse. And you'll see the line under paragraph 1.1: input parameters and
12 export parameters, field type and description. We have the MPAN as the first data
13 line, which is the first item of data in footnote 1 to paragraph 41 of Davis's witness
14 statement; the MP ID of the current supplier, about few lines down; the date the current
15 supplier gained the MPAN, and the estimated annual consumption of the MPAN, and
16 the meter port. Those effectively are the data lines that Perse uses as described in
17 footnote 11 of Mr Sachdeva's first witness statement.

18 MR JUSTICE MORRIS: Okay. Thank you.

19 MS SMITH: So, that is all.

20 MR JUSTICE MORRIS: Can I put that file away?

21 MS SMITH: Yes. C, yes. So, those data points are extracted from that DAS report;
22 it's sold by ElectraLink to Perse and also to other competitors of Perse. You have
23 seen that that data is combined with the other data from various other sources, that
24 Perse obtains its own algorithms and its software, et cetera, that it puts into producing
25 its carbon reporting product.

26 ElectraLink does not provide carbon reporting services or products to customers. It

1 only provides these DAS reports under equivalent bilateral agreements to that entered
2 into with Perse. In that regard, if I could ask you to turn to Mr Linnane's first witness
3 statement, which is in hearing bundle B, tab 5, turn to page 115. Could I ask you to
4 read paragraphs 141 to 143. (Pause)

5 And perhaps as regards --

6 MR JUSTICE MORRIS: Sorry, just let me digest that. (Pause)

7 The words, "You can use it to calculate their own carbon reporting requirements" in
8 143 ...

9 MS SMITH: It is a similar point to that that I've already made as regards switching
10 services. It would be in principle open to an entity to obtain the data from ElectraLink,
11 to also obtain gas consumption data from RECCo, et cetera, et cetera.

12 MR JUSTICE MORRIS: Sorry, I'm just -- slow down a bit. Just trying to understand
13 that sentence.

14 "ElectraLink supplies data to customers such as Perse ..."

15 So that's just the ingredient (a).?

16 MS SMITH: Yes.

17 MR JUSTICE MORRIS: Right.

18 "... who offer carbon reporting services, namely Perse or other customers, to other
19 customers or businesses, ie landlords ..."

20 Right?

21 MS SMITH: Yes.

22 MR JUSTICE MORRIS: "...~who can use it to calculate their own carbon reporting
23 requirements."

24 Who is doing the calculation? According to that sentence, who's calculating carbon
25 reporting requirements? Is it the landlord? Or I thought -- if you go back --

26 MS SMITH: Yes, I think it is. I think, yes, Perse offer their carbon reporting services

1 and then the businesses can use it to fulfil their --

2 MR JUSTICE MORRIS: Is that right?

3 MS SMITH: -- regulatory requirements.

4 MR JUSTICE MORRIS: Sorry, is that consistent with what we've just been looking at

5 in 39 of Sachdeva?

6 MS SMITH: Yes, I think it is. If you look at paragraph 38 of Sachdeva, I think it

7 explains the distinction.

8 MR JUSTICE MORRIS: "Helped companies do this reporting" --

9 MS SMITH: By calculating their carbon emissions for them --

10 MR JUSTICE MORRIS: Calculating it for them --

11 MS SMITH: -- so they get the carbon emissions, and then obviously the company

12 have to do the carbon reporting and fill in the reporting.

13 MR JUSTICE MORRIS: I'm not sure that -- it's maybe a point of detail, but I'm not

14 sure the two are consistent because --

15 MS SMITH: No, I think --

16 MR JUSTICE MORRIS: Sorry, let me finish.

17 MS SMITH: Yes.

18 MR JUSTICE MORRIS: Paragraph 38 suggests that the calculation is done by Perse.

19 MS SMITH: Yes.

20 MR JUSTICE MORRIS: Paragraph 143 suggests that the calculation is done by the

21 landlord.

22 MS SMITH: I'm sorry. It's the use of the verb "calculation". What is calculated in

23 paragraph 143 of Mr Linnane's witness statement is carbon reporting requirements.

24 What is calculated in paragraph 38 of Mr Sachdeva's witness statement is calculating

25 carbon emissions when the companies then use that calculation of carbon emissions

26 to put into or calculate their carbon reporting requirements.

1 MR JUSTICE MORRIS: All right.

2 MS SMITH: I think it's the ... a slight --

3 MR JUSTICE MORRIS: It may matter.

4 MS SMITH: Well, my Lord, I hesitate to --

5 MR JUSTICE MORRIS: Because when it says -- that last bit of 143 suggests that the
6 landlord themselves do something. And --

7 MS SMITH: The landlords do do something. They have to -- I mean, you have to find
8 out what the carbon emissions were for your portfolio of properties. Perse do that,
9 because carbon emissions don't just come from electricity; they come from gas,
10 et cetera.

11 MR JUSTICE MORRIS: Yes, I understand that.

12 MS SMITH: So, Perse do that and they work out overall what your carbon emissions
13 were. You then -- and I don't know the detail on this; we're not at trial, unfortunately,
14 we're at an interim injunction stage -- then the companies have to take the fact that for
15 this property, it has the following carbon emissions, and we fill in a report. They can
16 be various reports: regulatory reports, reports they attach to their accounts to show
17 that they are complying with the various ESG requirements, et cetera, et cetera.
18 Those reports might want the carbon emissions calculation to be used in various
19 different ways, I don't know.

20 So, it's the carbon emissions calculation that is provided by Perse. And Perse provide
21 it, as described in paragraph 39, for a particular property. The address and post code
22 is provided by the customer and they then take all the relevant data as to electricity
23 consumption, gas consumption, mix of fuels to calculate the amount of carbon to
24 produce the carbon value.

25 MR JUSTICE MORRIS: Pause a moment. To calculate the amount of carbon emitted
26 by the supplier?

1 MS SMITH: By the particular address.

2 MR JUSTICE MORRIS: And that's the carbon emitted?

3 MS SMITH: Yes.

4 MR JUSTICE MORRIS: But then it says, "in order to produce the carbon value for the
5 amount of energy". Right? At this stage, able to use basic blah, blah, blah.
6 Now, who is producing the carbon value, and is that the same as the carbon reporting
7 requirements?

8 MS SMITH: No. I don't think the carbon value is the same as the carbon reporting
9 requirements.

10 MR JUSTICE MORRIS: I have to say, the wording "calculating your carbon reporting
11 requirements" in 143 is not altogether clear.

12 MS SMITH: I think --

13 MR JUSTICE MORRIS: You can comply with your carbon reporting requirement, but
14 who is actually doing the calculating?

15 MS RIEDEL: I must say, I had read that as businesses who are effectively
16 self-supplying their carbon reporting, so they're doing the calculation themselves. So,
17 I had read it that ElectraLink provides data, either to customers such as Perse who
18 offer carbon reporting services --

19 MR JUSTICE MORRIS: Ah, yes.

20 MS RIEDEL: -- or to businesses who then input the data to calculate their own
21 emissions, effectively, or carbon value.

22 MR JUSTICE MORRIS: Yes.

23 MS SMITH: I think they do that because, of course, the only data that ElectraLink can
24 supply is the electricity consumption data, but in order to calculate -- do both steps of
25 the requirements, a landlord has to work out what the carbon emissions were for that
26 particular block of flats, which will require not just the electricity consumption data, it

1 requires gas consumption data and data on the mix of fuels.

2 MR JUSTICE MORRIS: I think --

3 MS SMITH: So, all that ElectraLink --

4 MR JUSTICE MORRIS: So, cutting this short, I think if you put the word "to" between
5 "or" and "businesses", that is how that Ms Reidel is construing that paragraph --

6 MS RIEDEL: Yes.

7 MR JUSTICE MORRIS: -- and that does make sense.

8 MS SMITH: Fine. Yes, that makes sense my Lord.

9 MR JUSTICE MORRIS: Thank you.

10 MS SMITH: So, the important point is again that there are only these five data points
11 on electricity consumption data that ElectraLink provide on the market. They are just
12 one of a number of ingredients that go into Perse's carbon reporting service.

13 MS RIEDEL: Could I ask you, while we are there, are you going to address
14 paragraph 144?

15 MS SMITH: That's what I'm coming to, yes, which is the carbon track product, which
16 was -- because Perse's counsel specifically relied upon that last week and that is
17 addressed in paragraph 144.

18 I think the point I make is it's simple. Carbon Track is a brand, as you see in
19 paragraph 144:

20 "ElectraLink introduced the branding Carbon Track in 2024. It is functionally an
21 identical product to that offered by under QuoteRight, and identical to the data
22 obtained by Perse. The only slight difference is that we also offer Carbon Track
23 consumption data for industrial and commercial customers where QuoteRight only
24 maps consumption by individuals and SMEs."

25 And you can see that if you turn back to the DAS report that I was showing you -- sorry,
26 I did say you won't need to turn back, but you do -- in bundle C at tab 18, page 377.

1 MR JUSTICE MORRIS: 377 again?

2 MS SMITH: Yes. So you'll see at the top, this order is the QuoteRight product.

3 MR JUSTICE MORRIS: Yes.

4 MS SMITH: And you'll see that the QuoteRight product is limited to, in the brackets,
5 "domestic and SME APIs". And Mr Linnane is making the point that the new branding,
6 Carbon Track, is functionally an identical product, so the same data points are
7 provided, as under QuoteRight and identical to the data obtained by Perse. But
8 Carbon Track consumption data is also provided, not just for individuals and SMEs,
9 but also for industrial and commercial customers. So, it's the same data points, but
10 not just for the residential, also for industrial.

11 MS RIEDEL: That QuoteBusiness, is it combining QuoteRight and QuoteBusiness?
12 Yes.

13 I do have one slight quibble on paragraph 144, or question. It says, Carbon Track,
14 that the different terminology and different branding is aimed at different customers
15 from QuoteRight and that's the reason for the different branding. But Perse is already
16 obtaining this data, so Perse is not a different customer. So, I don't really understand
17 what different customers you're talking about, I suppose?

18 MS SMITH: It's because the QuoteRight product is ... if as a customer you only buy
19 the QuoteRight product, you only get the domestic and SME data. However, if as
20 a customer you buy the Carbon Track, you get under one name, under one brand, not
21 only the QuoteRight data for the individual and SME customers, but also the data for
22 the industrial and commercial customers.

23 So, we're not talking here customers -- this is different customers. It may be that Perse
24 has obtained two products from us, QuoteRight and QuoteBusiness which it has in the
25 two orders. But Carbon Track is like one product, one order, that is aimed at different
26 customers from those who just buy QuoteRight.

1 MR JUSTICE MORRIS: Perse don't buy Carbon Track at all?

2 MS SMITH: No, because it's been --

3 MS RIEDEL: It's a combined product that --

4 MS SMITH: -- I think was introduced after the bilateral agreement was entered into
5 with Perse. It's a combined product. You'll see in Mr Linnane's witness statement,
6 paragraph 44:
7 "We introduced the branding Carbon Track in 2024."
8 So, it's after the bilateral agreement. So it's a product under which you can get just
9 the one product, one order, one DDQ, one DPIA, but you get not only QuoteRight, you
10 also get QuoteBusiness.

11 MS RIEDEL: So, it's specifically aimed at customers who are not looking for switching
12 data but are looking for carbon reporting data?

13 MS SMITH: Yes.

14 MS RIEDEL: Okay.

15 MS SMITH: Because you can run a business with just consumer switching data and,
16 you know, domestic.

17 PROFESSOR AKMAN: So what does it mean when it says it's identical to the data
18 obtained by Perse?

19 MS SMITH: Functionally identical product, sorry, and identical to the data obtained.

20 PROFESSOR AKMAN: 144?

21 MS SMITH: I don't want to read too much into these; you've got to remember these
22 are witness statements that were produced over the course of two sleepless days in
23 response to an interim injunction application. But I ... it's the same data points.

24 PROFESSOR AKMAN: So, if Perse has only one of these, it can offer both the
25 switching service and the carbon reporting anyway, if the data is identical; is that
26 correct?

1 MS SMITH: The carbon reporting is likely to be -- well, the carbon reporting service,
2 it wants to be able to have that data for both domestic, SME and industrial and
3 commercial customers. So Perse can't offer the carbon reporting service solely with
4 QuoteRight; it can offer it with the various orders that it has obtained for QuoteRight,
5 QuoteBusiness, et cetera.

6 MR JUSTICE MORRIS: So, it's not an identical product (overspeaking) QuoteRight?

7 PROFESSOR AKMAN: It's not identical, no.

8 MS SMITH: Well, I'm sorry, identical to the products maybe, or to the data. It's
9 identical to the data. It's a functionally identical product in that it is the same data; it's
10 just relating to different types of consumers.

11 MR JUSTICE MORRIS: Right.

12 MS SMITH: I really do need to stress that this evidence at the moment is being subject
13 to the sort of analysis that one would expect evidence at trial. This is not a mini-trial;
14 this is evidence that was produced in response to an interim injunction application in
15 two days.

16 MR JUSTICE MORRIS: It's not a criticism at all, but it does slightly make the point the
17 other way, doesn't it?

18 MS SMITH: Well, my Lord, maybe it does or maybe it doesn't, because the points
19 I make are: you asked me to describe what competition was going on in the
20 downstream market, and I'm describing you that.

21 It can be put in one line: we provide the data that they use as one of only many inputs
22 into products which they produce, Perse. We do not provide those products on the
23 downstream markets. You might remember that last week, Perse's counsel
24 suggested, with regard to specifically the example of Perse's carbon reporting service
25 and our Carbon Track, that these products were, quote, "substitutes and in close
26 competitive tension with each other". That's transcript page 84, lines 2 to 3. To

1 illustrate that, he gave what he described as a "really silly example", you might
2 remember. He said, and I quote:

3 "If someone who sells sugar in big bags, then they sell it to cafes, but also to people
4 who put the sugar into little sachets to sell on to cafes, that cafe owner has a choice
5 between buying the sugar in the big bag or buying sachets. And the big bag sugar
6 company is in competition with its own customer."

7 We say that just illustrates the point I'm making. That situation of the big bags of sugar
8 and the little bags of sugar is a world away from the situation as regards the product
9 that Perse offers, such as its carbon reporting product and the data that we offer, such
10 as our Carbon Track data.

11 Saying that Perse's carbon reporting service and ElectraLink's data are substitutes in
12 close competitive tension with each other is about as realistic in my submission as
13 saying that bags of sugar are substitutes for the chocolate brownies that are made
14 with that sugar.

15 Perse's counsel also relied upon my client's supply ElectraLink's supply of data to
16 arbnco. That's all lowercase: a, r, b, n, c, o.

17 MR JUSTICE MORRIS: Yes.

18 MS SMITH: As a further example of ElectraLink being in competition with Perse, this
19 is transcript page 87, line 25.

20 We say that's a mischaracterisation of the facts. ElectraLink simply supplies the DAS
21 reports to arbnco and arbnco then uses data lines from those reports as an input into
22 its carbon calculation service, which it then supplies to its customers in competition
23 with Perse. Arbnco is competing with Perse. If I can take you to Mr Linnane's first
24 witness statement, paragraphs 147 to 152, and ask you to read that, that sets
25 out -- well, it's quite long, but it's the arbnco relationship.

26 MR JUSTICE MORRIS: Sorry, paragraph --

1 MS SMITH: 147 to 152, page 116 of tab 5 of hearing bundle B.

2 MR JUSTICE MORRIS: I'm just trying to -- (pause)

3 You say this evidence is that Perse and arbnco are at the same level of supply, namely

4 carbon reporting services, and each of them gets the data from you.

5 MS SMITH: Yes, that's right. The point to ask you to underline is a point at

6 paragraph 151 that arbnco used to take a service from Perse, but when they got new

7 funding towards the end of last year, they decided to take the services they were

8 receiving from Perse in-house and design their own. So they're putting together their

9 own product now instead of just obtaining the product from Perse and selling it on.

10 MR JUSTICE MORRIS: So according to that, the previous position was that there

11 was an extra layer in the chain. It was ElectraLink data to Perse; Perse, I don't know,

12 carbon reporting service --

13 MS SMITH: Put together that product.

14 MR JUSTICE MORRIS: -- to arbnco.

15 MS SMITH: Yes.

16 MR JUSTICE MORRIS: Arbnco then distributed Perse --

17 MS SMITH: Arbnco sell it then to customers such as landlords, yes.

18 MR JUSTICE MORRIS: Yes, okay.

19 MS SMITH: Now arbnco say, "Right, we're going to cut out the middleman. We'll do

20 it ourselves."

21 MS RIEDEL: While we're on this, I had one question on the press release, which

22 is -- I'm on the electronic bundle, so I've lost it now.

23 MS SMITH: Yes. It's in the hearing bundle. It's tab 95, which I think is in hearing

24 bundle D it's.

25 MS RIEDEL: Page 139.

26 MR JUSTICE MORRIS: Yes, it's D2 of mine.

1 MS SMITH: That's helpful. You've got yet another division of the folders.

2 MR JUSTICE MORRIS: Yes. Just what I need, another bundle on my desk. Yes.

3 Press release. I've got it.

4 MS RIEDEL: Does everybody have it?

5 PROFESSOR AKMAN: Yes.

6 MS RIEDEL: So the first sentence says, "Arbnco is pleased to announce the extension

7 of its partnership with ElectraLink."

8 In the submissions I didn't find anything, I think, which explained what the prior

9 relationship with arbnco was. I did see obviously in Mr Linnane's statement that he

10 had said that he'd had discussions over several years with arbnco, which does imply

11 there was a relationship. But I was a little bit perplexed, because Perse's submission

12 is that they were supplying arbnco and effectively ElectraLink has supplanted them.

13 You've explained how you see that distinction. But this seems to imply that at some

14 point, on the one hand, arbnco had a relationship with Perse and on the other hand it

15 had a relationship also with ElectraLink.

16 MS SMITH: Well, I am not sure of that. I can take instructions on it if necessary, but

17 as regards the carbon reporting service -- I'm not sure exactly the extent of all the

18 products that arbnco offers on the market -- I know they were offering carbon reporting

19 service, buying it off the shelf, in effect, from Perse. Now they're buying the data and

20 making it in-house and then selling it on. That is the evidence that Mr Linnane gives.

21 As to their -- I can take instructions on that. I don't know what --

22 MS RIEDEL: It would be helpful to have a little bit of a fuller picture in relation to

23 arbnco as they've been specifically highlighted by Perse.

24 PROFESSOR AKMAN: Can I ask if there is a tripartite agreement then with arbnco?

25 MS SMITH: I will take instructions on that. I don't want to start making up evidence.

26 I've addressed the switching service, downstream market for switching service and

1 the downstream market for carbon reporting service. There are other products offered
2 by Perse. Mr Sachdeva describes Perse's recommendation service and its meter
3 reading service, but they are effectively, as he describes them, an add-on or part of
4 Perse's carbon reporting service. Again, the same point I make is that ElectraLink
5 simply inputs the data which is used by Perse along with other data, software,
6 algorithms, et cetera to produce these products.

7 In the time, I think it is important I move on, but I make the point that Perse does not
8 compete with ElectraLink in the relevant downstream markets. Even if -- which we
9 say there isn't -- there's an arguable case that they are potential competitors, there is
10 no case on ElectraLink's evidence that the allegedly abusive terms have the ability to
11 restrict competition or have foreclosure effects in the relevant downstream markets.

12 MR JUSTICE MORRIS: Okay, so this is a different point.

13 MS SMITH: Yes. So if I could ask you in that regard to turn to paragraphs 45 onwards
14 in my skeleton argument.

15 MS RIEDEL: You just said, "Even if there is an arguable case that ElectraLink are
16 potential competitors," is that correct?

17 So are you conceding there is an arguable case?

18 MS SMITH: I'm saying no. No, there isn't.

19 MS RIEDEL: Even if there were an argument -- (overspeaking).

20 MS SMITH: Cannot see that there is -- sorry, I should have used -- I'm terrible at
21 grammar. Subjunctive?

22 MR JUSTICE MORRIS: Sorry. Subjunctive.

23 MS SMITH: Subjunctive.

24 MR JUSTICE MORRIS: Yes. Very important.

25 Right. This is an alternative argument.

26 MS SMITH: Well, no. This is the next step, effectively, and the argument is saying

1 these are not abusive. Let's look at the terms.

2 MR JUSTICE MORRIS: It is an alternative argument. Your argument is --

3 MS SMITH: Sorry.

4 MR JUSTICE MORRIS: -- number 1, there's no potential competition downstream
5 market. And 2 --

6 MS SMITH: Yes.

7 MR JUSTICE MORRIS: -- even if there are potential competitors, there's no relevant
8 restriction of competition.

9 MS SMITH: Yes. So if I can turn you in that regard to paragraph 45 and onwards of
10 my skeleton argument, which is in hearing bundle F, tab 141, page 1833.

11 I address there the alleged sharing of commercially sensitive information at
12 paragraphs 45 to 46, the objection to obtaining tenant's consent at paragraph 47 to
13 48, and the proposed pricing structure, paragraphs 49 to 51. I'd like to address them,
14 if I may, in a slightly different order.

15 I address first, the alleged commercially confidential information that the customer
16 lists; second, the pricing structure, because both of those arise from the requirement
17 for tripartite agreements; and then third, the requirement for tenant's consent, because
18 that's a separate requirement.

19 I should also emphasise that it's only a requirement for tenant consent when
20 ElectraLink is asked to provide individual MPAN-specific data to Perse.

21 First, the sharing of the allegedly commercially confidential and competitively sensitive
22 customer information. I've already made the point that, in our submission, Perse and
23 ElectraLink don't compete in the downstream market for carbon reporting services, but
24 in any event, ElectraLink's customer list has not been provided to any individuals at
25 ElectraLink involved in sales.

26 If I could ask you in that regard to turn to Mr Linnane's witness statement,

1 paragraphs 154 to 155, hearing bundle B, tab 5, page 117. If I could ask you to read
2 paragraphs 154 to 155.

3 So the customer lists have not been circulated to any individuals involved in sales in
4 ElectraLink, and as indicated in paragraph 155, ElectraLink is working to put in place
5 ring-fencing arrangements so that they will not be in future. ElectraLink had already
6 indicated to Perse that this was the case in its letter of 17 April of this year, which
7 predated the issuing of the application. If I could take the tribunal to that, it's in hearing
8 bundle C, tab 51. It's a letter, in fact, from ElectraLink's solicitors, Pinsent Masons.

9 MR JUSTICE MORRIS: Can you give me the page number.

10 MS SMITH: 660.

11 MR JUSTICE MORRIS: Yes.

12 MS SMITH: It's a letter of 17 April from ElectraLink's solicitors, Pinsent Masons.

13 MR JUSTICE MORRIS: Something went wrong with the tablet. So it's tab 51. Okay.

14 MS SMITH: It's on page 663, addressing the issue of competitively sensitive
15 information. If I could ask you to read paragraph 11.2. 11.2.1 and 11.2.2, bearing in
16 mind that this letter was sent before the application was issued.

17 MR JUSTICE MORRIS: Yes.

18 MS SMITH: Five days before.

19 MR JUSTICE MORRIS: (Pause) Okay.

20 MS SMITH: So Perse's counsel now says this reassurance was not good enough, as
21 it only proposed ring-fencing until after tripartite agreements had been signed by all
22 parties. But instead of responding to the explicit invitation in paragraph 11.2.2 of that
23 letter to indicate whether or not the proposal as it was currently offered at that stage
24 would address your client's concerns, and making the point he now makes, that it's
25 not good enough because it only proposes ring-fencing for a limited time, Perse didn't
26 come back and say, "No, it doesn't address our concerns, you've got to put it in place

1 | ad infinitum". They issued their application for an injunction.
2 | Even then, in any event, in ElectraLink's evidence, it has been made clear to Perse
3 | and to the tribunal that the confidentiality arrangements would not be limited in time.
4 | I've shown you Mr Linnane's evidence in that regard, paragraph 155. Ms Ogborne
5 | makes the same point at paragraph 22 of her witness statement, which is hearing
6 | bundle --
7 | MR JUSTICE MORRIS: Does 155 say that it's not time-limited?
8 | MS SMITH: It does.
9 | MR JUSTICE MORRIS: 155 just says, "We're exploring options". Sorry.
10 | MS SMITH: For ring-fencing.
11 | MR JUSTICE MORRIS: Yes.
12 | MS SMITH: Okay. Yes. And Ms Ogborne's witness statement is at tab 6 of the
13 | hearing bundle B, page 137, paragraph 22. She explains how documents that may
14 | include customer information --
15 | MR JUSTICE MORRIS: "Is considering". Last sentence.
16 | MS SMITH: Yes.
17 | "How to ringfence the process internally to protect the customer's own customer lists."
18 | No suggestion that those will be protected only for a period of time, until after
19 | agreements were signed.
20 | I think the point is this, and I make the point that you might recall at last week's hearing,
21 | Ms Riedel asked Perse's counsel whether his client Perse's position was that if, and
22 | I quote, "there were suitable information barriers in place that [they] felt were
23 | sufficiently robust, then [they] think that would be an answer to the question of breach
24 | of competition law".
25 | That was transcript page 96, lines 7 to 9. His answer at line 10 was to wonder
26 | "whether I can dodge that question," quote. But he did then go on to say that it was

1 something that could (several inaudible words).

2 MR JUSTICE MORRIS: Yes.

3 MS SMITH: And it has been. My client has made further extremely detailed proposals
4 in this regard in its letter of 12 May, which has been added at the very end of the --

5 MR JUSTICE MORRIS: Yes.

6 MS SMITH: -- trial bundle, the hearing bundle at tab 153. It's hearing bundle G.

7 MR JUSTICE MORRIS: Just give me a moment.

8 MS SMITH: Tab 153. It starts at page 1914, and the relevant part of the letter is at
9 1916 to 1917.

10 MR JUSTICE MORRIS: ElectraLink (inaudible). Right.

11 MS SMITH: The point, my Lord, is this: the question for the tribunal today on this
12 application is whether you think there is an arguable case that the tripartite
13 arrangements have the potential to distort competition resulting from sharing of
14 customer information. We say there is no arguable case to that effect. The customer
15 information has not been shared with individuals at ElectraLink who are involved in
16 sales. So there's no competitively sensitive sharing of information and ElectraLink
17 have made it absolutely obvious that they do not propose to share that information. In
18 fact, they are trying to put in place ring-guarding, ring-fencing arrangements. It is not
19 for this tribunal to start setting out the detail of what the ring-fencing arrangements are.
20 The position is clear that my client will not share that data internally with its
21 salespeople, unless and until it has entered into an agreement that meets the
22 requirements and satisfies both itself and Perse.

23 What I am saying is that it was clear -- those discussions were taking place before this
24 application was issued. Instead of engaging in those discussions, Perse issued this
25 application.

26 MR JUSTICE MORRIS: Can I just read it?

1 MS SMITH: I make that point because Perse might say in reply, "Well, look at our
2 letter of 13 May. We have made proposals" or "We don't think those are good enough.
3 We have made various proposals as to changes to the proposals you make".
4 These, in my submission, are tweaks to the arrangements. It is not for this tribunal to
5 do the tweaking. It is for the parties to do the tweaking. The intention is quite clearly
6 that there will not be sharing of commercially sensitive or competitively sensitive
7 information, and this application should not have been issued in that regard. The
8 parties should have sought to bash out the details between themselves rather than
9 bothering the tribunal.

10 My Lord, I can deal very quickly with the second of the three terms that I say Perse
11 argues are abusive. That's the proposed pricing structure.

12 It's addressed "For your note," and this is for your note, because at paragraph 49 to
13 51 of my skeleton -- because Perse's counsel didn't really touch on this point, you've
14 already said, in his oral submissions last week. We say that's not surprising, because
15 the argument is fundamentally misconceived. All of ElectraLink's customers are
16 subject to the same pricing structure and pay the same prices to ElectraLink under the
17 tripartite reseller arrangements. Therefore it cannot be conceivably said that this
18 pricing structure is in some way discriminatory, or that it has the potential to distort
19 competition on relevant downstream markets.

20 Again -- and this is really very much for your note -- that is a fact that all of ElectraLink's
21 customers are subject to the same pricing structure and pay the same prices under
22 the tripartite arrangements. Mr Linnane's witness statement, paragraph 64 to 65.

23 PROFESSOR AKMAN: Perse seems to be arguing that it's discriminatory because
24 the new structure puts larger customers at a competitive advantage in comparison to
25 smaller customers.

26 MS SMITH: Yes, and that's what I say is a misconception. It's in footnote 11 of my

1 skeleton argument, which is in tab 141, page 1834. It's their reliance on Portugal
2 v Commission.

3 MR JUSTICE MORRIS: It's in the skeleton. It's bundle --

4 MS SMITH: My skeleton, sorry. Bundle F, tab 141, page 1834. It's footnote 11, which
5 you'll find in -- yes.

6 I say:

7 "Perse's reliance on the [Court of Justice's] judgment in Portugal v Commission ... [is]
8 a misunderstanding between of the difference between the prices charged to
9 a dominant undertaking's customers, which must not be discriminatory, and the prices
10 that Perse ... charges to its customers. Perse's complaint is that its 'large landlord'
11 customers might be able to benefit from volume discounts, but its 'smaller landlords'
12 will not."

13 But that is the same for Perse and all of its competitors. We, as the allegedly dominant
14 undertaking, charge the same price to Perse and all of its competitors, and so all Perse
15 and all of its competitors will have the same problem -- if it is a problem, which we
16 don't accept -- that the prices that it is able to charge its large landlord customers might
17 be able to benefit from volume discounts, but the smaller landlords will not. The only
18 way that Perse benefits currently from being able to give its large landlords volume
19 discounts is by breaching the bilateral agreement. It's by supplying them under the
20 bilateral agreements so that their orders --

21 MR JUSTICE MORRIS: Which they say they're entitled to.

22 MS SMITH: -- are simply added on to the number of orders processed through the
23 bilateral, and therefore they take advantage of the volume discounts because they are
24 being processed under the bilateral agreement rather than the trilateral agreement.

25 MS RIEDEL: Under the tripartite agreement, are the payment flows purely still going
26 from Perse to ElectraLink and not the third party to ElectraLink?

1 MS SMITH: The first one. And the payment terms are not set out in the tripartite
2 agreement, so that the Perse's customer does not see them. They're in the reseller
3 agreement.

4 MS RIEDEL: Yes.

5 MR JUSTICE MORRIS: But you said the only reason that they could get the
6 volume -- because you just asserted that they were supplying to landlords in breach.

7 MS SMITH: Well, that's our position --

8 MR JUSTICE MORRIS: That's your case. But that's ...

9 MS SMITH: Okay, to put it more neutrally, the only reason they got the volume
10 discount is because they were supplying the landlords under the bilateral --

11 MR JUSTICE MORRIS: Yes.

12 MS SMITH: -- so they could add the all the (overspeaking) --

13 MR JUSTICE MORRIS: All customers?

14 MS SMITH: Yes, all customers, under the bilateral, so they get volume discounts more
15 quickly.

16 MR JUSTICE MORRIS: Fine.

17 MS SMITH: So finally -- and it is worth, I think, spending ten minutes before we break
18 on this point: Perse objects to having obtain tenants' consent for the sharing of their
19 individual data, rather than being allowed to rely upon the consent of, or the legitimate
20 interest of a landlord or a multi-tenanted property.

21 MR JUSTICE MORRIS: Can you just pause again, Ms Smith? Sorry, I just want to
22 make a note. Thank you. (Pause)

23 Yes, thank you, Mr Smith.

24 MS SMITH: So we say that requirement can't be said to have the potential to
25 (inaudible) all of ElectraLink, use ElectraLink's data in the downstream are subject to
26 the same requirement to obtain tenant consent, where the tenant is the end consumer

1 of the electricity and the bill payer.

2 There is no discriminatory treatment or potential foreclosure effect in the downstream
3 market. Further, we make the point that if Perse don't want to go to the trouble of
4 obtaining that consent, they can either use other electricity consumption data, not
5 ElectraLink's consumption data in their carbon service -- and I'll make this point by
6 reference to the evidence -- or they can obtain the aggregated data product. If I could
7 ask you to turn back to Mr Sachdeva's first witness statement, which is in hearing
8 bundle B, tab 4, page 59.

9 Page 59 is where we see the carbon reporting service, and you turn over the page to
10 page 60, paragraph 42, which is where Mr Sachdeva's says his product is sold to
11 commercial customers and a large proportion of institutional landlords. Then he sets
12 out who his competitors are in that market, paragraph 43.

13 Then, crucially, and this is what I ask you to highlight the first sentence of
14 paragraph 44:

15 "To my knowledge, apart from arbnco, our competitors for this product do not generally
16 use ElectraLink data."

17 Then he goes on to explain what other data they use in providing carbon reporting
18 services to landlords. He does say, in his view, their products are therefore not as
19 good as those offered by Perse. But the crucial point is those companies are
20 competing with Perse in the downstream market for carbon reporting without access
21 to ElectraLink's data.

22 The one company, the one competitor of Perse's that does use ElectraLink data is
23 arbnco, and arbnco obtain individual tenant end-user consent. They do not rely on
24 landlord consent.

25 If I could take you to Mr Linnane's first witness statement -- actually, I'm going to take
26 you straight to the exhibit, which is in hearing bundle D, tab 94.

1 It's exhibited to Mr Linnane's witness statement, and it is described in paragraph 152
2 of his witness statement, which is on page 117, tab 5 of hearing bundle B as an extract
3 from the arbnco website, which shows that arbnco obtain tenant consent in order to
4 use individualised meter data.

5 You'll see there level 2 consent management. They are advising their customers,
6 landlords et cetera, how to get tenant consent. So although arbnco recognises on its
7 website that getting tenant consent may be a challenge, it does not suggest that it can
8 simply rely on landlord consent or legitimate interest. It offers solutions to that
9 challenge in order to enable its customers' landlords to get tenant consent.

10 MR JUSTICE MORRIS: There's no evidence to suggest any internal reasoning why
11 they need to?

12 MS SMITH: Well, no, my Lord, we don't have access to internal reasoning on the part
13 of arbnco.

14 MR JUSTICE MORRIS: You've got access to this. I mean, I don't know --

15 MS SMITH: This is its website, my Lord. This is arbnco's website, in which it's offering
16 its product to landlords and says --

17 MR JUSTICE MORRIS: No, I understand that. I just --

18 MS SMITH: -- "This is what you need to do, landlords, in order to get consent". We
19 say this is because such consent, end-consumer tenant consent is required as
20 a matter of data protection law and best practice in this industry.

21 MR JUSTICE MORRIS: Okay. Pause a minute, please. Can I put that away?

22 MS SMITH: Yes.

23 MR JUSTICE MORRIS: Just so you're aware, if you wish to finish this section on
24 tenant consent before we break. You're not? No, fine. Okay, you're not going to.

25 MS SMITH: Well, what I am going to make before we break (overspeaking) --

26 MR JUSTICE MORRIS: Okay. Your point. Just repeat what you said.

1 MS SMITH: I've said that it's getting tenant consent is required.

2 MR JUSTICE MORRIS: Yes, as a matter of data --

3 MS SMITH: Data protection law and best practice. And I'll explain why. But I make
4 the first introductory point before I get to the detail, which I will have to do after lunch.
5 But before I get to the detail, I will make the point that this argument, that the consent
6 is required as a matter of data protection law, is relevant, of course, only to the
7 arguments of objective justification, which we say the tribunal doesn't even need to
8 get to if it's able to reject Perse's competition cases unarguable on the point I've
9 already made that it doesn't have the potential to distort competition. There's no
10 (overspeaking).

11 MR JUSTICE MORRIS: All right.

12 MS SMITH: I do need to address the point in some detail -- I'll seek to do so as
13 concisely as I can, but I should make the tribunal and my learned friend aware -- that
14 I am, at best, halfway through the submissions I want to make because -- I'm not
15 blaming anyone, this is detailed stuff.

16 MR JUSTICE MORRIS: Other than us!

17 MS SMITH: Other than you, my Lord, yes!

18 MR JUSTICE MORRIS: Me, in particular!

19 MS SMITH: Of course not. But, yes, I hope I will be able to take -- I will do my very
20 best --

21 MR JUSTICE MORRIS: I understand, don't spend time -- but we get the point, you're
22 concerned about time.

23 MS SMITH: Yes.

24 MR JUSTICE MORRIS: Fine.

25 MR JONES: (inaudible) on timing. Far be it from me to criticise Ms Smith for taking
26 the time that she's taking, and I won't do that. Clearly, my reply can, if necessary, be

1 squeezed. I see that. What we would very much be against would be any suggestion
2 that we should go to another day. I know that hasn't yet been raised, but as far as --
3 MR JUSTICE MORRIS: Can you keep your voice up a little bit, sorry.
4 MR JONES: Any suggestion that we should go into a third day would be extremely
5 unwelcome from my client, and I'm sure from everyone in the room. But that would
6 be, I think, the point at which I would want to make some forceful submissions on
7 timing. I'm not criticising Ms Smith --
8 MR JUSTICE MORRIS: It's hard, isn't it? Because you did have a very good go last
9 time.
10 MR JONES: Yes.
11 MS SMITH: My Lord, yes. And --
12 MR JUSTICE MORRIS: All right, let's see where we get to. We'll have to --
13 MS SMITH: If I may just raise a tentative suggestion, or question, whether the tribunal
14 could sit half an hour later tonight or something?
15 MR JUSTICE MORRIS: Obviously, that's crossed my mind. I'll give that some
16 thought. That may well be possible, I don't know.
17 MS SMITH: I'll leave that with you to discuss it.
18 MR JUSTICE MORRIS: Fine. I think we should break there. Before we do, can
19 I just ... (Pause)
20 I just want to raise one thing which we've touched upon. Somewhat unusually in an
21 interim injunction case we don't have a pleaded case from the claimant or the
22 applicant. That is entirely understandable when something is done literally at very
23 short notice. We're now two weeks down the line since the application at least. I am
24 also conscious that a pleading in this tribunal is somewhat different from a pleading in
25 the High Court.
26 Nonetheless, I think we would find it helpful, Mr Jones, if you would provide us with

1 your formulated case on abuse, preferably in writing, or certainly a clear case of how
2 you will plead it. I'm not asking for a full pleading over the adjournment, but I would,
3 in the light of the various ways this has been put in the application and in the skeleton
4 and in orally, it would help, I think, everybody, if we could see a formulated, almost
5 sort of pleaded in an old-fashioned way case of how you put your case on abuse.
6 Dominance, for the moment, we're clear about in terms of the purposes of this
7 application, and I think it would assist us if you could do that.

8 MR JONES: Sir, we will --

9 MR JUSTICE MORRIS: I'm not asking for a full claim form or particulars of claim.

10 MR JONES: No, no, I fully understand. The timetable, sir, that you're asking me to
11 produce that in is ...?

12 MR JUSTICE MORRIS: Well, if you could start thinking about it over lunchtime about
13 how you put it and --

14 MR JONES: Yes.

15 MR JUSTICE MORRIS: -- see where we get to. But, I mean, I'm only talking about
16 kind of two or three pages, aren't I?

17 MR JONES: I understand we will do that.

18 MR JUSTICE MORRIS: If you could do it over lunch, so much the better if you can't --

19 MR JONES: No, I understand. Sir, could I make a similar suggestion which is
20 intended to save time? I don't mean to respond to that by giving you homework as
21 well, but it's just been suggested to me that my own submissions in reply might be
22 a lot shorter if the tribunal did have time to read. It's the final letter in volume G, which
23 was sent, I think, yesterday.

24 MR JUSTICE MORRIS: We have read it once. We'll read it again.

25 MR JONES: Very well. I'm grateful, sir.

26 MR JUSTICE MORRIS: We will do that. I think one of the difficulties in this case is

1 it's a moving feast. The extent to which what each party has offered moves the
2 goalposts in terms of what we have to decide is, at the moment, something that I'm
3 thinking about, I haven't got any answer to.

4 MR JONES: Yes.

5 MR JUSTICE MORRIS: But you may be both able to express that more clearly than
6 I have. We will say 2.00, if that's all right. Thank you very much.

7 (1.06 pm)

8 (The short adjournment)

9 (2.07 pm)

10 MR JUSTICE MORRIS: Can I just start by observing that we are will be able to sit
11 beyond 4.30. How long, I don't know, but certainly till 5:00. Possibly a bit later. That's
12 not to encourage --

13 Over the adjournment, we have some short questions which if you'd like to just -- the
14 first three really are for ElectraLink, one of which has already been asked by,
15 Professor Akman, which is, we'd like to know whether there is a tripartite agreement
16 with arbnco.

17 Secondly -- and this is, I think, probably my own personal lack of understanding
18 is -- we would like to understand more precisely why ElectraLink says that a tripartite
19 agreement is necessary. When I say a tripartite agreement, I mean that the three
20 agreements, the arrangements, is necessary in the case of service C and service D,
21 landlords and intermediaries.

22 And a related question, which I think was asked last time, which is, if in relation to
23 landlords and service C aggregated data is provided, why is a tripartite agreement
24 needed?

25 So those are the sort of related questions (audio distortion) it's not needed if there's
26 aggregated data.

1 MR JONES: Okay.

2 MR JUSTICE MORRIS: The final question was really for Perse, which is -- and it's
3 linked into this request to see a pleaded case on abuse -- does Perse contend that
4 even if ElectraLink is not, or were not, an actual or potential competitor in downstream
5 markets, the refusal to supply/constructive refusal to supply is an abuse of a dominant
6 position? That might involve considerations of potentially exploitative abuse and/or
7 a restriction of competition in some other way.

8 Thank you.

9 MS SMITH: I'll come back, if I may, at the end of my submissions --

10 MR JUSTICE MORRIS: Yes.

11 MS SMITH: -- with points just to clear up, in case I haven't addressed them
12 (overspeaking).

13 MR JUSTICE MORRIS: Of course. And, you know, I'm conscious that when we throw
14 things out at you, I don't --

15 MS SMITH: But it may be that they're covered in the course of what I'm proposing to
16 say anyway, but I'll come back to them if not.

17 I was addressing the tribunal on why tenant and consumer consent is required as
18 a matter of data protection law and best practice. In this regard, can I ask you first to
19 turn to Perse's skeleton argument at hearing bundle F, tab 140, page 1808.

20 MR JUSTICE MORRIS: Yes.

21 MS SMITH: It's necessary, I think, to start by clearing up some confusion that may
22 have been caused by that paragraph. In that paragraph, Perse talks about the carbon
23 reporting service that it provides to landlords using estimated consumption figures
24 from estimated annual consumption data, and Perse takes the precaution of
25 aggregating the data which relates to residential properties, before supplying the
26 service to the landlord.

1 So, that is the aggregation of data that Perse does in its supply of its carbon-reporting
2 service to landlords. What ElectraLink is concerned about is the different and prior
3 data flow, whereby ElectraLink supplies its data to Perse.

4 MR JUSTICE MORRIS: Yes.

5 MS SMITH: And when ElectraLink is supplying its data to Perse, and when Perse
6 specifically calls ElectraLink's API's for such data, when it does so on an individualised
7 MPAN specific basis for, for example, different flats in a multi-tenanted building, we
8 say it needs the consent of the tenant bill payers for the various flats in that building
9 for individualised MPAN specific data.

10 We say we cannot accept the landlord's consent or the landlord's legitimate interest
11 as a legitimate basis for providing our data as regards those individual tenanted
12 premises to Perse. I will explain why, if I may, by reference to Ms Ogborne's witness
13 statement. It's hearing bundle B, tab 6.

14 I think the most efficient way of doing this, if I may, is make the point and then, if
15 necessary, refer you to the relevant paragraph of her witness statement, because the
16 points follow.

17 Okay.

18 So if you have Ms Ogborne's witness statement open tab 6. The first point is this.
19 Electricity consumption data discloses highly personal information about an individual
20 which, if accessed, can provide sensitive data about that person's or that individual's
21 personal routine.

22 That can be illustrated if you turn to page 139 of the bundle at paragraph 34, bottom
23 of that page, Ms Ogborne inserts an image of a bar chart produced from ElectraLink
24 systems, which shows energy consumption for an anonymised meter point reference
25 number over a two-year period. That is the bar chart that's on the following page. As
26 she says:

1 "This is highly personal information about that individual, which if accessed, potentially
2 facilitates a form of surveillance as to personal routine and lifestyle pattern."
3 So you can see particular months where there is no electricity consumption, and one
4 can read from that, well, the person was not present in their property in those months.
5 So this is highly personal data.
6 Which leads to my second point, which is that the ICO, the Information Commissioner's
7 Office, recognises the potential risks to privacy presented by access to data about
8 electricity consumption. If you go back to paragraph 32 of Ms Ogborne's witness
9 statement on page 139, she cites from the relevant ICO guidance.
10 If I could just ask you to read that about the potential risks to privacy presented by
11 access to data on energy consumption. It's in the context of smart meters, but the
12 same general principles apply here.
13 MR JUSTICE MORRIS: You say that, but that paragraph is specifically addressed to
14 the problems caused by smart meters.
15 MS SMITH: My Lord, it's about the --
16 MR JUSTICE MORRIS: "With the advent of smart meters, the process --"
17 MS SMITH: Yes, because -- well, the advent of smart meters, suppliers in this
18 instance can get access to the sort of data that you see in paragraph 34, which is the
19 data that is supplied by ElectraLink --
20 MR JUSTICE MORRIS: Okay.
21 MS SMITH: -- which shows you, gives suppliers -- this is the point I make -- with
22 insights into personal routines, and that is why this is important data for the purposes
23 of privacy.
24 MR JUSTICE MORRIS: Right.
25 MS SMITH: Moreover, my third point:
26 "Where such data is linked to the meter, the MPAN of a domestic property or

1 a commercial property where the business owner is a sole trader, it is likely to be
2 'personal data' which is protected by the UK GDPR and the Data Protection Act 2018."
3 That is paragraph 35 of Ms Ogborne's first witness statement. It makes the point
4 specifically. (Pause)

5 MR JUSTICE MORRIS: Okay.

6 MS SMITH: This is my fourth point:
7 "However, even where the data relates to a commercial premises where the business
8 owner is not a sole trader and therefore is not personal data for the purposes of UK
9 GDPR, it is still confidential information which ElectraLink is required to protect as
10 confidential under the provisions of the DTSA."
11 That's the agreement under which ElectraLink is granted access to the data by the
12 DTS users. And that is if you turn back to Ms Ogborne witness statement,
13 paragraph 15 on page 136, footnote 5. (Pause)

14 MR JUSTICE MORRIS: Just remind me, briefly, 17.4.4 defines what confidential
15 information is?

16 MS SMITH: Yes.

17 MR JUSTICE MORRIS: What are the obligations?

18 MS SMITH: They're contained in clause 17 of the DTSA, not to disclose confidential
19 information. It's set out in Mr Linnane's witness statement, but I can come back to you
20 with a specific clause.

21 MR JUSTICE MORRIS: Right, so that's an obligation on ...?

22 MS SMITH: On ElectraLink (overspeaking) imposed by the DTSA.

23 MR JUSTICE MORRIS: Not to disclose without?

24 MS SMITH: Entering into a DAS contract with the individual to whom data is -- Sorry,
25 that is an obligation that is imposed by the DTS users on ElectraLink under the DTSA.

26 MR JUSTICE MORRIS: Sorry, let's just bottom this out. Not to disclose confidential

1 information, dot dot dot?

2 MS SMITH: Sorry, just so I get the words completely right.

3 MR JUSTICE MORRIS: Does it say, "not to disclose without a tripartite agreement"?

4 It doesn't say that, presumably?

5 MS SMITH: "Except for the purposes of [this is clause 17(1) of the DTSA] ElectraLink

6 will not use or disclose confidential information except for the purpose of performing

7 its obligations under the DTSA or as required by law."

8 MR JUSTICE MORRIS: Right. Well, hold on. Where does that take us?

9 MS SMITH: Clause 17(3) sets out:

10 "... the limited circumstances in which the parties may disclose such confidential

11 information, including in relation to DAS customers, as defined in relation to data

12 analysis services provided in accordance with schedule 9."

13 So only to DAS customers who have been approved under the processes in

14 schedule 9 of the DTSA. That is the only basis that (overspeaking).

15 MR JUSTICE MORRIS: Under a bilateral.

16 MS SMITH: Yes. And that is so, under a bilateral, ElectraLink --

17 MR JUSTICE MORRIS: It would help me to actually understand very precisely what

18 these -- you'll come to data protection law, but what exactly these contractual

19 obligations are.

20 MS SMITH: Yes.

21 MR JUSTICE MORRIS: There's plainly not a bar on disclosing it full stop, or else none

22 of this would ever happen at all.

23 MS SMITH: No. The bar is --

24 MR JUSTICE MORRIS: Can you take me to the relevant clause, please? Where is

25 clause 17?

26 MS SMITH: I can also take you.

1 MR JUSTICE MORRIS: Well, take me anywhere.

2 MS SMITH: Let me start there.

3 MR JUSTICE MORRIS: Actually, Ms Smith, sorry. Actually, rather than going to the
4 clause, just explain to me in stages the starting obligations. Clause 17 of the DTSA:
5 "ElectraLink is not to disclose confidential information except ..."

6 MS SMITH: Yes, it's Mr Linnane's witness statement.

7 MR JUSTICE MORRIS: Yes, at?

8 MS SMITH: At paragraph -- sorry, I'm just reading from it -- 17 on page 86, tab 5 of
9 hearing bundle B.

10 MR JUSTICE MORRIS: Yes. Thank you.

11 MS SMITH: And 17 sets out the confidentiality provisions.

12 MR JUSTICE MORRIS: Okay. So:
13 "17.3 ... limited circumstances ... may disclose such ... including 'to DAS Customers in
14 relation to [DAS] provided in accordance with schedule 99."
15 And schedule 9 of the DTSA sets out the DAS contracts?

16 MS SMITH: Yes.

17 MR JUSTICE MORRIS: Right. And what does that say about who they can disclose
18 it to?

19 MS SMITH: What it says is -- this is paragraph 17.1.5 of Mr Linnane's witness
20 statement which is on page 87 over.

21 MR JUSTICE MORRIS: Yes, thank you.

22 MS SMITH: And it says that:
23 "The relationship between ElectraLink and those parties to whom it provides the Data
24 Analysis Services 'shall be governed by a separate agreement' ..."
25 That is the DAS contract.

26 MR JUSTICE MORRIS: Yes.

1 MS SMITH: And that the DAS contract has to comply with the requirements in 4.1
2 which contains various obligations on the DAS customer, including obligations as to
3 confidentiality, et cetera, data protection, data processing.

4 MR JUSTICE MORRIS: Yes.

5 MS SMITH: I will be coming back to this, if I may. I'm trying to do it step by step.
6 "Requires that services are provided in ... one or more of the permitted purposes set
7 out in paragraph 4.2 ..."

8 And importantly --

9 MR JUSTICE MORRIS: (Overspeaking).

10 MS SMITH: Sorry, importantly, subparagraph 3(c) on page 88:
11 "Paragraph 3.8 of schedule 99 provides that ElectraLink shall not enter into a DAS
12 Contract for the provision of [its] Data Analysis Services to a third-party customer
13 unless and until the DTS User Group approval process under Annex A ... has been
14 completed. Such a process involves the approval by the DTS User Group of the
15 particular customer to which the [DAS] is to be supplied."

16 MR JUSTICE MORRIS: Yes.

17 MS SMITH: So, this is -- and then in the footnote:
18 "See the reference to full legal name, company number, registered address ..."

19 So, the point we make here is that information, confidential information, but all the
20 information, the DAS services entirely, the data, cannot be supplied by ElectraLink to
21 any DAS customer unless that particular customer has been approved by the DTS
22 user group under annex A of schedule 99.

23 MR JUSTICE MORRIS: That's happened?

24 MS SMITH: And that -- yes. And then --

25 MR JUSTICE MORRIS: Go on.

26 MS SMITH: And so that happens in the case of a bilateral agreement.

1 MR JUSTICE MORRIS: Yes.

2 MS SMITH: In the case of the onward supply of the ElectraLink data to intermediaries,
3 they also have to be subject to the annex A, schedule 9.

4 MR JUSTICE MORRIS: Who is "they"?

5 MS SMITH: The intermediary, third party.

6 MR JUSTICE MORRIS: Where do you get that from?

7 MS SMITH: You get that from a combination of the DTSA and the bilateral agreement
8 itself. If I can show you the bilateral agreement itself --

9 MR JUSTICE MORRIS: Okay, just running back a moment. So we have, this is
10 non-personal data. It is plainly confidential and it can't be disclosed by Perse other
11 than in accordance with the terms of a bilateral which complies with schedule 99.
12 Yes? But what I don't get is where the further restrictions --

13 MS SMITH: And that's the point I was making about it's a combination of the bilateral
14 agreement and the DTSA. And the bilateral agreement, in clause 7.1 and 8.2.

15 MR JUSTICE MORRIS: Okay.

16 MS SMITH: Let me take you to those. They're set out simply in Mr Linnane's witness
17 evidence.

18 MR JUSTICE MORRIS: Yes, page 89?

19 MS SMITH: Page 103, paragraph 97. This is about -- let me just make this point
20 before, if I can, because it is necessary to put the point in context, my Lord. It was my
21 next and fifth point in the points I was seeking to make: that ElectraLink has no means
22 of identifying whether a premises consumption data relates to an individual,
23 a domestic, or a sole trader, and therefore it's personal data, or whether it relates to
24 a commercial business.

25 MR JUSTICE MORRIS: I understand that.

26 MS SMITH: So, that is relevant to the data protection rules and the data protection

1 requirements. As to the tripartite agreements, that's addressed --

2 MR JUSTICE MORRIS: Hold on --

3 MS SMITH: The requirement for tripartite agreements, which is a separate question.
4 We're here dealing with tenant consent. But as you've asked me to address the
5 question of the requirement for tripartite agreements, which does not go to the
6 question of tenant consent --

7 MR JUSTICE MORRIS: Not the same point as --

8 MS SMITH: -- because the tenant -- as I said, there are three terms to which Perse
9 objects --

10 MR JUSTICE MORRIS: Yes, I know.

11 MS SMITH: -- those that relate to the tripartite agreement or the requirement to enter
12 into a tripartite agreement for intermediaries and landlords, the only terms that come
13 out of that requirement that they object to are that they say there's customer
14 information -- list sharing and pricing, discriminatory pricing, they say.

15 The requirement for tenant consent is a separate issue. It does not arise from having
16 to enter into tripartite arrangements. It is separate from having to enter into tripartite
17 arrangements. So, I am addressing -- I have been addressing you --

18 MR JUSTICE MORRIS: I was slightly just dealing with a different point, which you
19 didn't --

20 MS SMITH: Which was the point you asked me, in your first three questions, I was --

21 MR JUSTICE MORRIS: No, no, we weren't on -- I know they interlink. I was just
22 getting the contractual structure and you sort of stopped before we got to -- the answer
23 may have been somewhere in --

24 MS SMITH: Because -- yes, it's there in the evidence, my Lord. It's paragraph 97,
25 page 103 of tab 5, Mr Linnane's first witness statement, where he says the basis upon
26 which, in our submission, Perse providing the Switching Service to intermediaries or

1 brokers is in breach of the bilateral agreement because they're not providing it under
2 tripartite arrangements.

3 MR JUSTICE MORRIS: Okay.

4 MS SMITH: Because of clause 7.4 and 7.5.

5 MS RIEDEL: Should you not be drawing our attention to 8.2 now?

6 MR JUSTICE MORRIS: That's what I was trying to get to.

7 MS SMITH: Yes, we're getting there, if we might. It's 97.1.2 on page 105 of
8 Mr Linnane's witness statement, which is clause 8.2 of the agreement, that:

9 "Perse shall not make the DAS Reports available to any other person [or] onward sell
10 or exploit the benefit of the Data Analysis Service ... with any third party except where
11 permitted under the PIA."

12 I will show you that supply to landlords is not permitted under the PIA, and I'm going
13 to come to that.

14 "[Or] save that Perse shall be entitled to use data contained in the DAS Reports to
15 directly provide services to End Consumers to whom such data relates."

16 So, there are two -- there's one exception and one saving in paragraph 8.2. Perse
17 cannot basically pass our data on or use our data in its supplies to any third party
18 unless it's permitted under the PIA or they are directly providing services to end
19 consumers. And I will, if I may, in the order I was intending to do so, show you why
20 they are not permitted under the PIA to use our data in making supplies to landlords.

21 That reflects the requirements of the DTS user group that they don't want the data to
22 be used unless they have been able to approve the users of the data and the
23 data -- I think it's called a DAS case -- for the use of the data, and that's set out in
24 schedule 9 of the DTSA.

25 MS RIEDEL: Is that limitation imposed by the user group or the parties to that
26 agreement to the DTSA? Is that driven by data protection concerns? Is that the

1 underlying motivation, primarily?

2 MS SMITH: Yes, driven by data protection concerns. I believe it is, and they do
3 not -- again, I cannot speak for their thinking and why they entered into this agreement,
4 the DTS users, but my understanding is -- and I've shown you the concerns about the
5 use of personal data when it relates to MPANs, or the use of personal data when it
6 relates to MPANs -- the fact that we cannot tell whether a premises consumption data
7 is an individual or a company that's a sole trader, a business address that's a sole
8 trader, which would be personal data, or it's a commercial business.

9 So, as I understand it, the DTS user group put those -- again, I can't speak for what
10 they were thinking when they instructed Herbert Smith to draft the contract -- but the
11 DTS user group, I believe, was inspired by concerns about data protection.

12 MS RIEDEL: Well, yes, I presume ElectraLink would have some insights as it signed
13 up to the agreement.

14 MS SMITH: Yes, yes.

15 MS RIEDEL: But, and forgive me if I'm asking you to go outside your area of expertise,
16 under data protection legislation, is there an obligation on the controller, which are
17 obviously the suppliers of the data, to trace through data at each lower level of use to
18 keep control over it, or is the obligation merely to put in place the contractual
19 arrangements that they can, as best as possible, safeguard the onward use of that
20 data?

21 MS SMITH: I can't answer off the top of my head what the obligations are on the data
22 controllers; that is the DTS users in this case. However, what I can say and a point
23 I was about to come to, is that the data processor, Perse, can only rely on --

24 MS RIEDEL: Perse is the controller, sorry, you mean ElectraLink?

25 MS SMITH: Sorry, ElectraLink. I'm very sorry, yes. The data processor ElectraLink
26 can only rely on the originating data controllers lawful basis. So, in a way, there's that

1 flow through of the obligations. And I'll come to that; this is now I think my seventh
2 point.

3 MS RIEDEL: Because Perse then becomes the data controller under the agreement
4 between ElectraLink, so then Perse presumably is subject to that same legal obligation
5 as a data controller.

6 MS SMITH: So, I was making a number of points and I think I was on my fifth point.

7 MR JUSTICE MORRIS: Yes, we did divert you, Ms Smith.

8 MS SMITH: No, that's fine.

9 MR JUSTICE MORRIS: Go back to your points.

10 MS SMITH: Yes. No, I think I was on my --

11 MR JUSTICE MORRIS: Fourth or fifth.

12 MS SMITH: -- fifth point. I've also been given a note that under article 4.8 of the UK
13 GDPR, the processor processes data on behalf of the controller. So, ElectraLink is
14 processing the data on behalf of the data users, which is why the ...

15 I was on my fifth point, which I think I've already made, that ElectraLink has no means
16 of identifying whether a premises consumption data relates to an individual or a sole
17 trader and is therefore personal data for the purposes of the legislation or whether it
18 relates to a commercial business. That's paragraph 16 of Ms Ogborne's first witness
19 statement. If we go back to that paragraph, Ms Ogborne's witness statement, tab 6.

20 MR JUSTICE MORRIS: Paragraph 16.

21 MS SMITH: Paragraph 16 on page 136.

22 MR JUSTICE MORRIS: Yes.

23 MS SMITH: Therefore, as she says in paragraph 17, in order to ensure that
24 ElectraLink protects the personal data as it's required to do so under the data
25 protection legislation, it applies UK GDPR standards "to all of the data which it receives
26 and processes as part of its Data Analysis Service".

1 That then leads to the point I've already made, which is my seventh point: as a data
2 processor, ElectraLink does not have a lawful basis for processing the data itself, but
3 instead must rely on the originating data controller's lawful basis. The data controllers
4 are the DTS users represented by the DTS user group.

5 That's paragraph 14 of Ms Ogborne's witness statement on page 135. That's the
6 introductory paragraph to paragraph 14.

7 MR JUSTICE MORRIS: So, the data controllers are the DTS users; is that what you
8 said?

9 MS SMITH: Yes, represented by the DTS user group.

10 That then leads to my eighth point, which is that the DTS user group's preferred
11 approach to processing data is to rely upon the consent of the data subject: that is,
12 the electricity consumer themselves. That is the lawful basis for processing data under
13 the UK data protection legislation that the DTS user group prefer. If you turn in
14 Ms Ogborne's witness statement to paragraphs 37 to 39, she explains her
15 understanding of that. Paragraph 37 to 39 on page 141.

16 MR JUSTICE MORRIS: Prefer, not require?

17 MS SMITH: Preferred. I'll go on to the next point, if I may, my Lord, in turn. But
18 paragraphs 37 to 39 make this point that I'm making at this stage, which is their
19 preferred approach.

20 MR JUSTICE MORRIS: Yes.

21 MS SMITH: The approach they have actually approved for each particular case, I will
22 come on to. But their preferred approach, generally, when considering whether to
23 approve a DAS customer, is to require consent. That is the consent of the electricity
24 consumer themselves.

25 MR JUSTICE MORRIS: Okay.

26 MS SMITH: That leads me to my next point, which is that this preferred approach,

1 that is requiring the data subject's consent, is consistent with the approach taken by
2 other data controllers in the energy industry, such as energy suppliers and other
3 companies supplying data in the industry, including the data and communications
4 company, the DCC, who operate the smart energy code and RECCo, the retail energy
5 code company. That is Ms Ogborne's first witness statement, paragraphs 40 to 41.

6 MR JUSTICE MORRIS: Okay.

7 MS SMITH: That is their preferred approach. But my next point -- and I'm rather losing
8 track of the numbering here, but I think this is my tenth point -- is that importantly, end
9 user consumer consent is the basis and the sole basis upon which the DTS user group
10 granted approval to ElectraLink under schedule 9 of the DTSA for ElectraLink to
11 provide the data analysis to Perse.

12 MR JUSTICE MORRIS: To Perse, or to anybody?

13 MS SMITH: To Perse. Whenever Perse receives data from ElectraLink, they have to
14 have done so with the consent of the end user to whom that personal data relates.
15 This is paragraph 49 of Ms Ogborne's witness statement on page 143. (Pause)

16 That was the use case for the lawful basis upon which the DTS user group approved
17 ElectraLink providing the data to Perse. And --

18 MR JUSTICE MORRIS: Through the DPIA, or --

19 MS SMITH: Well, no. The process, which I think was explained to you, is that Perse
20 draft up a DPIA or what's now called a data -- a DDQ as to how they're going to
21 propose to use the data, which is then used by ElectraLink to prepare its DPIA for
22 submission to the DTS user group --

23 MR JUSTICE MORRIS: Yes.

24 MS SMITH: -- on the basis of which the DTS user group then approves ElectraLink's
25 provision of the data analysis services to the particular customer, in this case, Perse.

26 MR JUSTICE MORRIS: Yes.

1 MS SMITH: So, there has to be a use case for the use of the data or a lawful basis
2 for the use of the data approved by the DTS user group. In this case, it was end
3 consumer consent.

4 If I can ask you to turn to the covering emails referred to by Ms Ogborne in
5 paragraph 49 of her witness statement, that's hearing bundle E, tab 108. Sorry,
6 bundle F.

7 MR JUSTICE MORRIS: (Overspeaking) My understanding was that what the DTS
8 user group approved was effectively what was contained in the DPIA. Is that right?

9 MS SMITH: I'm going to start, if I may, with the basis upon which the request was
10 made by ElectraLink to the DTS user group. And that's hearing bundle F, not E,
11 tab 108.

12 MS RIEDEL: What's the page number?

13 MS SMITH: 1442.

14 MR JUSTICE MORRIS: Tab 108? That is in bundle E.

15 MS SMITH: Oh, is it? Yes, I think --

16 MR JUSTICE MORRIS: The bundles are not necessarily all quite consistent.

17 MS SMITH: No. So, you'll see there, this is from ElectraLink.

18 MR JUSTICE MORRIS: Yes.

19 MS SMITH: It's exhibited in Ms Ogborne's statement and she explains that it's sent to
20 the DTS user group.

21 MR JUSTICE MORRIS: Yes.

22 MS SMITH: And you'll see there:

23 "Dear colleague, ElectraLink is seeking re-approval from the DTS User Group to
24 provide a Data Analysis Service for the provision of a subset of Copied Message Data
25 relating to end consumers MPANs to Perse ..."

26 And then in the third paragraph:

1 "Under the terms of the DTSA, end consumers are entitled to contract for DAS
2 Services relating to their own Copied Message Data. As detailed in the attached
3 DPIAs, the End Consumers are providing their consent for Perse Technology to
4 access their Copied Message Data on their behalf."

5 And then in the sixth paragraph, that refers specifically to Perse's carbon reporting
6 service --

7 MR JUSTICE MORRIS: Can you identify the paragraph by what it starts with?

8 MS SMITH: It starts with, "Furthermore, Perse intends to offer analytics".

9 MR JUSTICE MORRIS: Yes.

10 MS SMITH: You'll see the description there is effectively the carbon reporting service.
11 Penultimate line:

12 "Perse will also be able to provide information on carbon intensity of energy usage and
13 recommendations to reduce carbon. Each use case will be subject to a valid consent
14 from the end customer."

15 So, that is the basis upon which ElectraLink asked for -- and the DPIA which I'll take
16 you to -- consent from the DTS user group, and that was the basis upon which the
17 DTS user group --

18 MR JUSTICE MORRIS: Pause for a moment. The word "end customer" there, insofar
19 as it relates to carbon reporting, is the tenant; is it?

20 MS SMITH: Yes.

21 MR JUSTICE MORRIS: Okay. Can you just -- there's already been a DPIA? No,
22 no --

23 MS SMITH: No, the DPIA was attached to the email.

24 MR JUSTICE MORRIS: The DPIA was attached to it. Yes, okay.

25 MS SMITH: Now, Perse as you will understand, seeks to argue that its DPIA allowed
26 it to rely on the consent of a landlord.

1 MR JUSTICE MORRIS: Okay, pause there for a moment, Ms Smith, just so that I'm
2 clear. Where that document says, "As detailed in the attached DPIAs", that is what
3 Mr Jones took us to last week; is that right? I was looking at page 1442.

4 MS SMITH: Yes. Yes, they are the DPIAs --

5 MR JUSTICE MORRIS: There's three of them, he said.

6 MS SMITH: -- submitted to the user group, yes.

7 MR JUSTICE MORRIS: The document he took us to is one of those?

8 MS SMITH: Yes.

9 MR JUSTICE MORRIS: Right. Okay.

10 MS SMITH: I'm not sure which one.

11 MR JUSTICE MORRIS: So, the words "each would be subject to valid content from
12 the end customer", okay?

13 MS SMITH: Actually, no, he -- well, I'll come to that. There's a slight wrinkle on that
14 because of course there are the DPIA questionnaires submitted by Perse to
15 ElectraLink and the DPIs submitted by ElectraLink to the DTS user group, and I think
16 it's the first of those that Mr Jones relies upon.

17 MR JUSTICE MORRIS: No, he didn't. No, no. I thought he took us to the document
18 that ElectraLink had submitted to the DTS users and explained that that document had
19 incorporated what his client had supplied to your client in the meantime, and I think he
20 said section 4 of that document was the DPIA.

21 MS SMITH: Okay, well, in that case, I might need to take you to both of them. If I can
22 take you to the DPIAs that were attached to the email.

23 MR JUSTICE MORRIS: Yes.

24 MS SMITH: Those are at tab 109 to -- well, there are three of them. We're fine to just
25 look at one.

26 MR JUSTICE MORRIS: Go to the first one.

1 MS SMITH: Tab 109 in the same bundle.

2 MR JUSTICE MORRIS: In fact, it's the next tab. This is the one we went to.

3 MS SMITH: Well, we did go to this --

4 MR JUSTICE MORRIS: In some detail.

5 MS SMITH: Yes, we did go to this, but you may recall, just to outline the point,
6 my Lord, Mr Jones's argument was that because there was a specific reference to
7 leaseholders of assets and legal owners of assets, that includes landlord, the
8 references to leaseholders of assets and legal owners of assets do not appear in this
9 document at 109. They appear in the prior DPIA that was produced by Perse and
10 submitted to ElectraLink. They do not appear in the DPIAs that were produced by
11 ElectraLink and submitted to the DTS user group.

12 PROFESSOR AKMAN: Sorry, (inaudible) 1462?

13 MR JUSTICE MORRIS: What about page 1462?

14 MS SMITH: Oh, is it? It's at the end.

15 PROFESSOR AKMAN: End consumer is the entity responsible for paying energy bills,
16 legal owner of assets, leaseholder of assets.

17 MR JUSTICE MORRIS: Yes.

18 MS SMITH: Oh, okay.

19 MR JUSTICE MORRIS: You're ahead of me.

20 MS SMITH: Okay, sorry. I understood they were referring to the ... the DPIA.

21 MR JUSTICE MORRIS: One minute. I thought ... Actually, no, you carry on because
22 I'm just wasting time by making an observation.

23 MS SMITH: Okay. In their skeleton, I understand, or in their application -- anyway, it
24 doesn't matter --

25 MR JUSTICE MORRIS: I got the impression that when Mr Jones took us to the
26 document at 109, he took us to page 1445.

1 MS SMITH: Yes.

2 MR JUSTICE MORRIS: And he went through the contents list and he said section 4
3 is actually the DPIA itself. And that's, he said, I've got a note, based on what Perse
4 had given to ElectraLink.

5 MS SMITH: Yes. That's right.

6 MR JUSTICE MORRIS: But nonetheless it was incorporated in this document.

7 MS SMITH: That's right. And if I could take you to what Perse had submitted to
8 ElectraLink, that's at hearing bundle C, tab 19.

9 MR JUSTICE MORRIS: C19.

10 MS SMITH: Yes. That's on page 410.

11 MR JUSTICE MORRIS: Yes.

12 MS SMITH: And at the top of page 411, we have a table.

13 MR JUSTICE MORRIS: Yes.

14 MS SMITH: Definitions which include:
15 "End consumer: Building occupant; EV driver; Entity responsible for paying energy
16 bills; legal owner of asset; leaseholder of asset."
17 My understanding is that Perse argues that the reference here to various end
18 consumers, including legal owner of asset and leaseholder of asset, means that
19 landlord consent is sufficient even where it is a tenant and not the landlord who pays
20 the electricity bill for the premises. Of course, as I have explained --

21 MR JUSTICE MORRIS: Sorry, can I just -- I'm sorry. Those words are exactly the
22 same as the words we've just looked at.

23 MS SMITH: Yes, my Lord, I take that point.

24 MR JUSTICE MORRIS: All right.

25 MS SMITH: But my understanding perhaps, and this is the important point, this is the
26 crux of it: Perse argues the reference here to legal owner of asset and leaseholder of

1 asset means that landlord consent is sufficient even where it is the tenant and not the
2 landlord who is in effect the end consumer because they are the ones who pay the
3 electricity bill.

4 Of course, as I have explained, there are situations where a landlord can be the bill
5 payer and thus the end consumer. For example, in the case of vacant properties, or
6 for communal areas with a separate meter in a building, the landlord there is the bill
7 payer and therefore the end consumer.

8 But in my submission, this reference to legal owner of asset and leaseholder assets
9 as one of the entities that can be an end consumer does not mean that the landlord
10 can give consent for the processing of the actual end consumer's data where they are
11 not the end consumer themselves. This definition says yes, they can also be end
12 consumers, but it does not override the fact that they have to be end consumers and
13 they cannot provide consent for the processing of the actual end consumer's personal
14 data when they are not such an end consumer themselves.

15 That interpretation, in my submission, would not make sense in the context of
16 a document which has been drafted so as to ensure compliance with data protection
17 legislation. Because if Perse's interpretation were correct, it doesn't matter if the end
18 consumer is a domestic individual, a company, a sole trader. On Perse's reading of
19 this definition, the landlord can give consent in any of those situations. We say it
20 cannot and that would be the wrong interpretation in the light of data protection
21 legislation, which I have taken you through.

22 So, that is landlord consent and Perse's reliance on landlord consent. They also, as
23 part of this application, have sought to rely on the legitimate interest, a different lawful
24 basis for processing, of the landlords, or possibly, which was hinted at in Perse's
25 counsel's oral submissions, the legitimate interest of Perse itself.

26 Again, we say this argument of legitimate interest on the landlord or Perse does not

1 work. First, and perhaps most importantly, it is not the ground on which the data
2 processing was approved by the DTS user group. The use case, as I've shown you,
3 was approved on the basis of end consumer consent.

4 This then leads to my second point: under the DTSA and the bilateral agreement,
5 ElectraLink can only supply MPAN meter-specific outputs to Perse on the basis of
6 a legitimate ground under the data protection legislation. The important words I think
7 were highlighted by Ms Reidel last week: where the DAS customer has been approved
8 by the DTS user group on this basis.

9 So, if I can take you to the DTSA in this regard --

10 MR JUSTICE MORRIS: Sorry, can you take me to that wording before you --

11 MS SMITH: That's what I'm doing. It's taken from the DTSA itself, which is where I'm
12 now taking you. Hearing bundle D, tab 59. The DTSA starts on page 815; schedule 9
13 starts on page 917. And the relevant paragraph is 922.

14 MR JUSTICE MORRIS: Yes.

15 MS SMITH: It is paragraph 4.1.1(B)(i). And it's at the bottom of that paragraph, (i) on
16 top of 923:

17 All DAS contracts have to include confirmation from the DAS customer that, to the
18 extent they request from ElectraLink's data analysis service with meter-specific
19 outputs, the meter numbers in respect of which they request such services are meter
20 numbers for which the DAS customer has the right to receive copied message data,
21 either by law, by contract or on the basis of a legitimate ground under data protection,
22 where the DAS customer is approved as the recipient of such data analysis services
23 on this basis.

24 MR JUSTICE MORRIS: Okay, can I pause there so I understand it. You say there's
25 an additional on the -- not you say. Under that provision, not only does there have to
26 be a legitimate ground, but also the DAS customer has to be approved as the recipient,

1 et cetera, et cetera, et cetera.

2 MS SMITH: On that ground. On this basis.

3 MR JUSTICE MORRIS: On this -- sorry, it's approved as the recipient on this basis.

4 MS RIEDEL: On which basis, sorry?

5 MS SMITH: Well, ignore what's in the brackets.

6 MS RIEDEL: Yes?

7 MR JUSTICE MORRIS: Yes.

8 MS SMITH: So, if we begin at the bottom of 922, the very top of 4.1.1: the service
9 controller, ElectraLink, has to ensure that all DAS contracts include confirmation from
10 the DAS customer, Perse, that, to the extent that Perse requests meter-specific
11 outputs, those meter specific outputs, it has the right to receive data:
12 "(either by law, by contract, or on the basis of a legitimate ground under [the
13 legislation])."
14 Ignore what's in the following brackets.
15 "... where [that] customer [Perse] is approved as the recipient of such Data Analysis
16 Service [the supply of the data from ElectraLink to Perse] on this basis."
17 That basis, I say, is on the basis of a legitimate ground. That is the basis upon which
18 they have to be approved.

19 MS RIEDEL: "Either by law, by contract, or on the basis of a legitimate ground under
20 the [DP] legislation ... where the DAS Customer is approved --"

21 MS SMITH: On this basis.

22 MS RIEDEL: "-- as the recipient of such Data Analysis Service on this basis."

23 MR JUSTICE MORRIS: Well, "this basis" is ambiguous, isn't it?

24 PROFESSOR AKMAN: Which basis?

25 MS RIEDEL: It's all in brackets.

26 MR JUSTICE MORRIS: Because it could either mean the basis referring back to the

1 basis of legitimate ground narrowly, or it could mean the "by law, by contract or on the
2 basis of a legitimate ground", doesn't it?

3 MS RIEDEL: True.

4 MS SMITH: Well, even so, I say that --

5 MR JUSTICE MORRIS: Can you just clarify, "pursuant to Annex A of this Schedule 9"
6 is pursuant to the approval under the whole process that we've just looked at?

7 MS SMITH: Yes. It has to be -- but if that is right, I had read it as being -- the "on this
8 basis" is either, it has to be approved; the DTS user group has to have approved that
9 customer as being allowed to receive the data on the basis of either law, contract or
10 a legitimate ground. And the only basis upon which the user group has approved the
11 provision of data to Perse is on the basis of end user consent, that ground. It has not
12 said, "Yes, you can have it by law or by contract or another legitimate ground"; it has
13 said the use case is the legitimate ground of end user consumer consent.

14 PROFESSOR AKMAN: On that note, could I take you to the DPIA? And I asked
15 Mr Jones last week as well: the DPIA says that the lawful basis for processing is the
16 performance of a contract, not end user consent, and it says it in every one of them --

17 MS SMITH: Performance of the contract, the DPIA?

18 PROFESSOR AKMAN: Performance of the contract.

19 MS SMITH: Yes, sorry, the bilateral agreement, then. Can I take you to the bilateral
20 agreement?

21 MR JUSTICE MORRIS: Sorry? No.

22 PROFESSOR AKMAN: It's the DPIA and I asked Mr Jones last week as well.

23 MR JUSTICE MORRIS: Can you give us the reference, please?

24 PROFESSOR AKMAN: This is bundle E, page 1458.

25 MS SMITH: Tab 8, sorry, the DPIA 1458.

26 PROFESSOR AKMAN: Tab 109. The document we were looking at a minute ago.

1 MR JUSTICE MORRIS: I remember you asking the question.

2 PROFESSOR AKMAN: He said that that's incorrect because their submission is that
3 the basis for processing is legitimate interest.

4 MS SMITH: Yes.

5 PROFESSOR AKMAN: You have been emphasising that the basis for processing is
6 consent.

7 MR JUSTICE MORRIS: Now we have --

8 PROFESSOR AKMAN: And the document itself only says performance of a contract.

9 MR JUSTICE MORRIS: Performance of a contract. A contract.

10 PROFESSOR AKMAN: A contract.

11 MS RIEDEL: Which paragraph?

12 MR JUSTICE MORRIS: 1458, it's the middle of the page. It's under the heading
13 "Assess necessity and proportionality: What is your lawful basis for processing?"

14 MS SMITH: Yes, sorry. Trying to find the references.

15 MR JUSTICE MORRIS: So, if that was right, would that be --

16 PROFESSOR AKMAN: The contract between ElectraLink and Perse?

17 MR JUSTICE MORRIS: Yes, but would that amount to approval on the basis of
18 contract? Is that the same thing?

19 MS RIEDEL: But this is repeating -- this is the information which Perse supplied to
20 ElectraLink.

21 PROFESSOR AKMAN: This is from ElectraLink.

22 MS RIEDEL: Yes. But this is ElectraLink is -- well, I believe ElectraLink is just
23 rehearsing the --

24 MR JUSTICE MORRIS: Yes, it is, but if the DPIA ...

25 MS RIEDEL: -- information that Perse ...

26 PROFESSOR AKMAN: Where do we find the fact that the legitimate basis for

1 processing is consent rather than performance of the contract?

2 MR JUSTICE MORRIS: Right, yes, and my further question is if it's performance of
3 contract, is that the same as approval on the basis of contract? Do you see what
4 I mean, looking back here?

5 PROFESSOR AKMAN: Under provision.

6 MR JUSTICE MORRIS: Because it's either by law, by contract or legitimate ground.
7 Ms Smith's just said "on this basis" means one of those three.

8 PROFESSOR AKMAN: How would this contract be the same then, sufficient?

9 MR JUSTICE MORRIS: Would that be performance? I don't know.

10 MS SMITH: Give me a moment, as I had understood, yes, as you say, that Perse's
11 cases, they had either landlord consent was -- tenant was enough for end user
12 consent and consumer consent or it was the legitimate interest of the landlord. I didn't
13 understand them to rely on a separate basis, which was not ...

14 PROFESSOR AKMAN: I'm just only interested in why the DPIA mentions
15 performance of the contract as a lawful basis for processing rather than consent?

16 MS SMITH: Yes. If you give me a moment, I just want to look at the bilateral
17 agreement as well, which is -- I'm trying to find where they all are in these bundles.
18 (Pause)

19 Yes. Sorry. The confusion is caused, I think -- although of course, I'm now not
20 meeting an argument made by Perse and I'm thinking on my feet -- but I think the
21 answer is to be found in the bilateral agreement, which is where I was going to take
22 you, which is clause 7.2(c)(iii), which is tab 18, bundle C. And recall, this is what the
23 DPIA is attached to, the bilateral agreement.

24 MR JUSTICE MORRIS: A bit slower, Ms Smith, please. Let's just try and --

25 MS SMITH: Tab 18, page 362.

26 MR JUSTICE MORRIS: Thank you very much.

1 MS SMITH: So this is the bilateral agreement. It is the agreement under which
2 supplies are made by ElectraLink to Perse.

3 MR JUSTICE MORRIS: Yes.

4 MS SMITH: And 7.2(c) -- 7.2, first.

5 "The Customer acknowledges and agrees [the customer being Perse] that ...

6 "(c) the information disclosed to a Customer [disclosed by ElectraLink to Perse] does
7 not include information which explicitly references or identifies an End Consumer [so
8 that's the end consumer], unless the Customer has a right to receive such information,
9 whether:

10 "(i) at law;

11 "(ii) pursuant to a contract between:

12 "(a) the relevant Customer and the relevant End Consumer or that End Consumer's
13 electricity Supplier ..."

14 Or a contract between the relevant customer and the relevant consumer, or that gas
15 supplier, or on the basis:

16 "(iii) on the basis of a legitimate ground under Data Protection Legislation ... which is
17 documented in the relevant PIA, and the Customer is approved as the recipient of
18 such ... Services on [that] basis."

19 MR JUSTICE MORRIS: On this basis.

20 MS SMITH: So the contracts here in the bilateral agreement are contracts between
21 the customer -- that's Perse -- and the relevant end consumer or electricity supplier,
22 not contracts between Perse and the landlords.

23 MR JUSTICE MORRIS: Because --

24 MS SMITH: Because they are not end consumers --

25 MR JUSTICE MORRIS: No, because the definition of end consumer --

26 MS SMITH: -- or electricity suppliers. The definition of "end consumer" in the

1 | bilateral --

2 | MR JUSTICE MORRIS: In the bilateral, it doesn't include the landlord.

3 | MS SMITH: Yes. Nor do we say, for the points I've just made, is it in the DPIA that

4 | the end consumer (overspeaking) unless they are also end consumers.

5 | MR JUSTICE MORRIS: Well, that's your -- no, no. We've got your argument about

6 | the meaning of the DPIA.

7 | MS SMITH: Yes.

8 | MR JUSTICE MORRIS: But there's no doubt, I don't think, that as far as the bilateral

9 | is concerned, end consumer excludes the landlord.

10 | MS SMITH: That's right.

11 | MR JUSTICE MORRIS: How 7.2(c) relates to what we've just been looking at, I am

12 | afraid at the moment ...

13 | MS SMITH: Yes. But this is the contractual arrangements under which the data is

14 | provided by ElectraLink to Perse. So Perse cannot rely on the legitimate interests of

15 | the landlord is a lawful basis for processing that data on the basis of contract, where

16 | under the bilateral agreement, it's only these types of contracts.

17 | MR JUSTICE MORRIS: Interestingly, the words "on this basis" on page 363 --

18 | MS SMITH: Yes.

19 | MR JUSTICE MORRIS: -- might mean something different from "on this basis" on

20 | page 923.

21 | MS SMITH: It is more specific. Yes. It's definitely more specific in 363.

22 | MR JUSTICE MORRIS: It's got to be documented in the relevant PIA there. Okay.

23 | MS SMITH: So -- sorry for that. Yes. Thank you, Professor Akman, for that. I hope

24 | that clarifies the point.

25 | There's a further point on legitimate interests ground under article 6, which is that if

26 | they are going to rely on the legitimate --

1 MR JUSTICE MORRIS: Sorry, can we just row back a second, Ms Smith? Can you
2 just summarise in one line, where we are so far is -- you say it has to be consent. Is
3 that right?

4 MS SMITH: Yes. I say that under the DTSA and more specifically -- now having
5 looked at the clauses -- under the bilateral agreement as well, ElectraLink can only
6 supply meter-specific outputs to Perse on the basis of end consumer consent.
7 ElectraLink cannot supply meter-specific outputs to Perse on the basis of a contract
8 between Perse and a landlord, or on the basis of the legitimate interests of the landlord
9 or the consent of the landlord.

10 MR JUSTICE MORRIS: Sorry, you've lost me now.

11 MS SMITH: Perse are saying --

12 MR JUSTICE MORRIS: Sorry, I --

13 MS SMITH: Perhaps I put it around the other way.

14 MR JUSTICE MORRIS: I got the impression that your first submission was that
15 legitimate ground, legitimate interest is not available, full stop. Let me finish. It has to
16 be based on tenant consent, because of what's said in that email, and you seem to
17 say that it's supported by the bilateral. But the bilateral plainly allows legitimate ground
18 as an alternative.

19 MS SMITH: Only the legitimate ground that has been approved by the DTS user
20 group, and the only legitimate ground that has been approved by the DTS user group
21 is that of end consumer consent. It is not the legitimate interests - sorry, the word
22 "legitimate" are used in two (-inaudible) - it's not the legitimate interests of the
23 landlord. -That is not a legitimate ground for processing the data there.

24 MR JUSTICE MORRIS: Are you saying that in fact 7.2(c)(iii) is meaningless?

25 MS SMITH: No.

26 MR JUSTICE MORRIS: Because --

1 MS SMITH: No, I'm saying --

2 MR JUSTICE MORRIS: No, because it's not been approved on that basis.

3 MS SMITH: No, it has been approved on the basis of one of the various -- there are

4 a number of legitimate grounds or perhaps more properly put, lawful grounds.

5 MR JUSTICE MORRIS: No, no. Hold on a minute.

6 MS SMITH: No, I need to explain this point. There are a number of legitimate grounds

7 under article 6 of the UK GDPR, and I can show this to you --

8 MR JUSTICE MORRIS: Ah, yes. Okay.

9 MS SMITH: -- upon which data can be processed. They include --

10 MR JUSTICE MORRIS: Got you. Consent and --

11 MS SMITH: Consent or the legitimate interest --

12 MR JUSTICE MORRIS: Okay.

13 MS SMITH: Not a legitimate ground, the legitimate interest of the landlord. The only

14 legitimate ground for the purposes of article 6 of the UK GDPR that has been approved

15 by the DTS user group is the --

16 MR JUSTICE MORRIS: Consent.

17 MS SMITH: -- tenant consent, end user consent.

18 MS RIEDEL: And that approval process was as between ElectraLink and the DTS

19 user group.

20 MS SMITH: Yes.

21 MS RIEDEL: Correct. And was that then communicated back to Perse? I see a nod.

22 MS SMITH: There's evidence specifically on that point. Let me check. But it's always

23 been my client's understanding that the only basis for processing is consent, and we

24 say that's reflected in what was said in the DPIA produced by Perse and submitted to

25 my client. It's also the basis upon which my client supplies it to everyone else. You

26 have seen the arbnco also seek tenant and user consent.

1 MS RIEDEL: But there could have been a misunderstanding if that was not conveyed
2 back.

3 MS SMITH: It was only in December that we discovered that Perse was supplying this
4 data to landlords without having obtained tenant consent. It was when we did that,
5 and it was part of the -- I think it was December -- it's all tied up with, at the same time
6 we also found out about brokers, which is a different issue, but we say it's also in
7 breach of the agreement. And it was on finding out about that we suspended services.
8 Since then this debate has raged between my client and Perse as to whether or not
9 that's allowed.

10 PROFESSOR AKMAN: I'm sorry to hold you up, but neither 72 nor the DPIA actually
11 mentions consent. And consent is, of course, a different lawful ground to contract and
12 legitimate interests under data protection. So this one seems to mention contract and
13 not consent, but you said that the user group requires the basis under data protection
14 to be consent. Neither does the DPIA mention consent - (-inaudible)

15 MR JUSTICE MORRIS: I think that's the email, isn't it?

16 MS SMITH: Yes, and that's the way in which they generally --

17 MR JUSTICE MORRIS: Just the covering email? Is that the only reference to
18 consent?

19 PROFESSOR AKMAN: But the agreement doesn't require consent. It mentions
20 contract, which is a different lawful ground under data protection.

21 MS SMITH: And throughout the DPIAs, there is reference made on numerous
22 occasions, both -- well, in the DPIA that was submitted by Perse to my client and then
23 reflected in what was submitted to the DTS user group. It's all about consent.

24 If you look at tab 19, which is what was actually drafted -- tab 19 in bundle C -- what
25 was actually drafted by Perse. It starts on page 410, but it then goes on to page 411.
26 In response to the second question, under "Non Half Hourly Consumption":

1 "How will you be processing the data, can you explain how you will be sharing the data
2 with End consumers and intermediaries".

3 The answer from Perse is they talk about their web app, and then they say in the
4 second paragraph:

5 "Perse may process the data ... but all analysis will take place in [their] database. Data
6 will only be shared and transferred out of Perse's database at the End consumer's
7 request and only to the End consumer ..."

8 And then again, on the next page, last sentence:

9 "ElectraLink data, and data derived from ElectraLink data, will not be shared with ...
10 third parties.

11 "The request to share the data ... may be made by the End Consumer ..."

12 And then down the page, on page 412:

13 "What is the source of the data?

14 "End consumer provision ... Other sources include from End consumer interaction with
15 platforms [et cetera] ... where consent is provided by the customer to do so via the
16 web [app]."

17 So the presumption throughout this DPIA is that the customer, the end consumer, will
18 be providing consent. This is Perse's customer, the end consumer.

19 PROFESSOR AKMAN: But the question "What is your lawful basis for processing?"
20 is clearly aimed at answering that question about processing under data protection
21 legislation. It says "performance of a contract", whereas consent and legitimate
22 interest are two alternatives to performance of a contract. So the choice has been
23 made to insert "performance of a contract" here, rather than "consent". And if consent
24 was key, then why does this say consent as the basis of processing?

25 MS SMITH: You've heard my submissions on the bilateral agreement and what that
26 says about contracts. It doesn't cover contracts with landlords. Contract is not the

1 basis upon which (inaudible) Perse seek to justify their use of the data.

2 I would also stress that the covering email to the DTS user groups -- together, I would
3 say, with the content of the rest of the DPIA -- make it clear that the basis upon which
4 ElectraLink was seeking approval from the DTS user group, and the basis upon which
5 that use case was approved by the DTS user group, was the basis of tenant consent.

6 I can take you back to the emails. I think it's pretty clear.

7 I mean, the point has already been made, but there is absolutely no evidence from
8 Mr Sachdeva to the effect that he says they thought contract was the basis on which
9 they were processing the data.

10 I'll just make one final point before we break for the transcriber, which is -- again, I'm
11 addressing the landlord's legitimate interest as being the ground under which Perse
12 say they can process the data, and I make this submission in that regard. It's not the
13 basis upon which the user group approved processing of the data. But in any event,
14 in order to rely on that particular ground under article 6 of the UK GDPR, a data
15 controller -- that is, Perse -- must have carried out a three-stage balancing exercise,
16 which was not carried out by Perse. That's explained in the ICO guidance, which
17 reflects the case law of the Court of Justice in this regard.

18 If we can go back to where we were in Ms Ogborne's statement, which is hearing
19 bundle B, tab 6, page 132, paragraph 11(e). In paragraph 11(d) she set out the
20 various --

21 MR JUSTICE MORRIS: Yes. Article 6 is set out. Yes.

22 MS SMITH: It's article 6, yes, actually. And that last one is the legitimate
23 interest -- processing is necessary for the purposes of (f). You've seen it before.

24 She says in (e):

25 "As is obvious in the phrasing of the legitimate interest ground, there's a balancing
26 exercise required [which] will always be fact-specific ..."

1 And the ICO provides guidance. That ICO guidance, that three stages to the balancing
2 exercise -- the ICO guidance is at hearing bundle E, tab 105.

3 MR JUSTICE MORRIS: We've been there before.

4 MS SMITH: Yes. So you see on page 1430:

5 "There are three elements [to the test] ... a three-part test ...

6 "Identify the legitimate interest;

7 "show ... processing is necessary to achieve it; and

8 "balance it against the individual's interests ...";

9 Then the penultimate bullet point, before we have the checklist:

10 "Keep a record of your legitimate interests assessment [your three-stage assessment]
11 to help you demonstrate compliance if required."

12 Turn over the page to 1432. At the bottom of page 1432:

13 "How can we apply legitimate interests in practice?

14 "If you want to rely on legitimate interests, you can use the three-part test to assess
15 whether it applies. We refer to this as a legitimate interest assessment ... and you
16 should do it before you start the processing."

17 MR JUSTICE MORRIS: I've lost this. I'm sorry.

18 MS SMITH: 1432. Bottom of the page.

19 MR JUSTICE MORRIS: I've got it now. I was on the wrong page.

20 MS SMITH: Under the heading, "How can we apply legitimate interests in practice?"

21 The point is that if you are going to rely on the three-stage balancing test, you have to
22 have carried it out before you start the processing.

23 MR JUSTICE MORRIS: Okay.

24 MS SMITH: And 1433, on the next page, four paragraphs from the bottom:

25 "Keep a record of your [legitimate interest assessment] and the outcome. There is no
26 standard format for this, but it's important to record your thinking to help show you

1 have proper decision-making processes in place and to justify the outcome."

2 So it's absolutely made clear by the ICO that you have to have carried out the
3 three-stage balancing test before you start processing the data. You have to keep
4 a record of it.

5 There is absolutely no indication or evidence from Perse to the effect that it carried out
6 a legitimate interest assessment before it started processing the data. With the
7 greatest respect, I do make the submission that the legitimate interests arguments
8 appear instead to have been an ex post facto justification for Perse's actions made in
9 legal submissions.

10 We have also made the point that even if we get to this stage, the balancing test could
11 not have been fulfilled even had it been carried out, because we do say that Perse
12 would be unable to show the processing was necessary. This is the point Mr Jones
13 addressed. We say that Perse can achieve the same result -- that is, get the data
14 necessary for its carbon reporting service -- in another, less intrusive way. This is the
15 anonymised aggregated data service.

16 In his oral submissions, Perse's counsel emphasised the word "achieve the same
17 result", you'll recall, and sought to argue that Perse couldn't do this because it couldn't
18 offer a carbon reporting service of the same quality without individualised data. In my
19 submission, that is not the evidence that has been given by his client. Quite the
20 contrary.

21 If you see Mr Sachdeva's second witness statement, which is in hearing bundle B,
22 tab 8. If I can ask you to turn to page 163 and paragraph 36, and read the whole of
23 paragraph 36 --

24 MR JUSTICE MORRIS: You've read it before, but I'll read it again.

25 MS SMITH: -- to yourself and I'll make a submission on it.

26 MR JUSTICE MORRIS: Yes.

1 MS SMITH: There is nothing in that paragraph that says the aggregated project would
2 be in some way inferior to individual meter-specific data. Nor does Mr Sachdeva
3 suggest that it would be less appropriate for Perse's carbon reporting services for
4 some types of property, but not others. That's residential versus commercial. He in
5 fact says, on the contrary, it would be "a viable alternative for carbon reporting" but we
6 haven't previously been given it. We have been given data once for our collaboration
7 with NatWest, but we haven't offered it to Perse as something it could provide on an
8 ongoing basis. Then he says he did it manually but didn't provide it through an API.
9 There's no suggestion that it is in some way inferior to individual data.

10 I make the submission it's difficult to see how it could be, given that carbon reporting
11 services are provided to landlords or property managers to enable them to report on
12 the carbon emission of buildings, not the carbon emission of separate properties within
13 those buildings.

14 MR JUSTICE MORRIS: Doesn't Perse segregate it anyway? Is it -- have I lost --

15 MS SMITH: For residential customers? It does.

16 MR JUSTICE MORRIS: Okay.

17 MS SMITH: On his feet, Perse's counsel also referred to the example of a shopping
18 centre and said -- I assume in his opinion -- for shopping centres it would, and I quote,
19 be:

20 "really useful to have the data individually because then they [his client Perse] can
21 provide individualised recommendations for carbon reduction services."

22 That's transcript page 28, lines 1317. That submission is not supported by any
23 evidence from his client. There's no evidence from his client that they might require
24 individualised data -- be able to provide individualised recommendations for shopping
25 centres.

26 MR JUSTICE MORRIS: This would be a shopping centre, a single landlord, multiple

1 shops --

2 MS SMITH: Yes.

3 MR JUSTICE MORRIS: -- where the carbon reporting service would be provided to
4 the landlord. The suggestion that nonetheless it would assist the landlord if the data
5 for each shop was provided -- that's the suggestion. I'm not -- I'm just getting in my
6 own mind clear --

7 MS SMITH: I mean, I understand that's the suggestion, but it is no more than that. It's
8 a submission made by counsel. It's no evidence of that.

9 MR JUSTICE MORRIS: I'm not disputing that. I'm just --

10 MS SMITH: In any event, I make the point that if that really is the case, then it's difficult
11 to see why the landlord could not obtain the consent of the various business shops,
12 the premises in that shopping centre, and then ElectraLink would be able to provide
13 the individualised data to Perse. Perhaps that might be a point at which to stop.

14 MR JUSTICE MORRIS: I am concerned about time.

15 MS SMITH: I am too.

16 MR JUSTICE MORRIS: I might need to give that some thought. Right. I think for the
17 time being that we'll break till, I think, 3.35.

18 Thank you very much.

19 (3.24 pm)

20 (A short break)

21 (3.43 pm)

22 MR JUSTICE MORRIS: Ms Smith and Mr Jones, we have concerns about time.
23 I suppose in the first place, Mr Jones, I'm asking you how long you think you would
24 want to be in reply? And second place, or the other way around, Ms Smith, how long
25 you think you're still going to be?

26 MR JONES: Yes. Ms Smith and I have had a brief word on this as well. I've already

1 indicated, I accept that my reply is going to need to be squeezed.

2 MR JUSTICE MORRIS: Again, I couldn't hear.

3 MR JONES: I do apologise, I must speak louder.

4 As I indicated earlier, I accept my reply is going to have to be short. I fully accept that.

5 I do, however, need at least 30 minutes and, I think -- Well, I'll hand over to Ms Smith,
6 but we had a word about this a moment ago.

7 My Lord, I had indicated to Mr Jones that I'd hoped to finish by 4.30 on the assumption
8 that we were restarting at 4.35. I now see it's 4.45, but I do need at least another hour.

9 MR JUSTICE MORRIS: Okay. Well, that -- at least another hour?

10 MS SMITH: Yes, at least another hour.

11 MR JUSTICE MORRIS: I suspect we could, we could sit till 5.30. I'm looking at
12 my -- so I'm also looking at the court staff and the usual -- but I think if that's right, then
13 we should be able to do it.

14 Thank you very much.

15 MS SMITH: I'm moving on then to adequacy of damages, the second test to be applied
16 under American Cyanamid.

17 If I can ask you to turn to authorities bundle 1, tab 5, which is the American Cyanamid
18 case. Page 346 of the bundle.

19 MR JUSTICE MORRIS: If you'll give me a little while just to have a bit of a tidy up.

20 (Pause)

21 MS SMITH: It's American Cyanamid itself, tab 5. I want to take you to page 346,
22 B to C. More like B to D. But where you where the House of Lords is addressing the
23 question of adequacy of damages.

24 The paragraph starts:

25 "As to that, the governing principle is that the court should first consider whether, if the
26 plaintiff were to succeed at the trial in establishing his right to a permanent injunction,

1 he would be adequately compensated by an award of damages for the loss he would
2 have sustained [and I emphasise the following words] as a result of the defendant's
3 continuing to do what was sought to be enjoined between the time of the application
4 and the time of the trial."

5 So you can put that to one side. But what Perse seeks to enjoin by way of this interim
6 injunction application is for ElectraLink to be compelled to supply its data under the
7 bilateral agreement, not only so as to enable Perse to supply its products directly to
8 end consumers, supply chains A and B, but also so as to enable Perse to supply its
9 carbon-reporting product to landlords, its supply chain C.

10 Perse is not seeking by way of the interim application injunction to enjoin ElectraLink
11 to supply it under the bilateral agreement for the purposes of supply chain D, and that
12 is broker intermediary. So what we're concerned with for the adequacy of damages
13 test is simply supply chains A, B and C.

14 We say any loss that Perse might sustain if an injunction were not ordered, compelling
15 us to supply the data for those purposes between now and trial, can be adequately
16 compensated in damages. I make three arguments in support of that submission,
17 which I will identify and then briefly develop. These are in addition to the points I've
18 made in my skeleton, but I'll emphasise these.

19 First, we say Perse would be able to continue to offer all of the five products which it
20 currently offers without an injunction in the terms sought.

21 Second, Perse has not provided adequate or transparent financial data to support its
22 assertion that, without an injunction, it will be forced out of business in around
23 June 2025.

24 And third, and importantly, there would be no total loss of Perse's business were an
25 injunction not granted.

26 MR JUSTICE MORRIS: No total loss?

1 MS SMITH: It would not be forced out of business. It would be adequately
2 compensated in damages. So "total loss" are, I think, the words from various
3 authorities. But it would not be forced out of business.

4 If an injunction would not be granted, it is more likely instead that Perse's shareholders
5 in particular stock would step in to meet any short term cash-flow issues and to support
6 Perse so that it could survive to trial -- a trial that it says it will win -- rather than to let
7 it go out of business.

8 So briefly, addressing each of those three points in turn: first, we say Perse would be
9 able to continue to offer all of its five products without an injunction, without access to
10 ElectraLink's data, under the bilateral agreement. The fact that Perse might prefer to
11 use ElectraLink's data for its products does not mean that it cannot continue to offer
12 those products and thus continue in business without ElectraLink's data. That point is
13 the relevant point for the purposes of determining whether damages would be an
14 adequate remedy for Perse.

15 Each of the products I'll address first of all Perse's carbon reporting service. I have
16 already explained, and I'm not going to take you back to the evidence, but I've already
17 shown you the evidence that none of Perse's competitors for those services, except
18 arbnco, use ElectraLink data to provide carbon reporting services.

19 As regards Perse's recommendations, service and meter readings conversion
20 products, which are offered as an add on to, or as part of, its carbon reporting service,
21 Mr Sachdeva's evidence is that sum of Perse's competitors for these products use
22 ElectraLink's electricity consumption data and others do not. So again, those services
23 can also be provided without access to ElectraLink's data.

24 I am going to give this, if I dare to, for your note: paragraphs 51 and 57 of
25 Mr Sachdeva's first witness statement. They relate to the recommendation service,
26 paragraph 51, the meter readings conversion product.

1 Mr Sachdeva's evidence -- so we're going just on Perse's evidence -- is that some of
2 Perse's competitors for each of those products use ElectraLink data in their products
3 and others do not. My point is, therefore, that Perse can similarly provide those
4 services without access to ElectraLink's data, even though they would prefer to use
5 ElectraLink's data, but that's not the relevant point.

6 So I make the point that for these three carbon-reporting products, the
7 carbon-reporting service, the recommendation service, and the meter readings
8 conversion service, they together account for about 56 per cent of Perse's revenue,
9 on Mr Sachdeva's evidence. That I have taken from paragraphs 45, 52 and 57 of his
10 first witness statement. So the products that can be supplied by Perse, these three
11 products without access to ElectraLink's data, account for about 56 per cent of its
12 revenue.

13 As regards Perse's switching service: insofar as that is to be provided by Perse via an
14 intermediary broker, Perse accepts that, for the purposes of this application, it will have
15 to enter into tripartite arrangements with ElectraLink to obtain the data to provide those
16 services via intermediaries, so it doesn't seek, under the terms of the injunction sought
17 by it, supply under the bilateral agreement in order to provide services via intermediary
18 brokers. Those switching services provided via intermediary brokers account for
19 a further 30 per cent of Perse's overall revenue. That's Sachdeva one, paragraph 36.

20 As regards sales of the switching service to Perse's customers directly, supply
21 chains A and B, that apprises about 14 per cent of Perse's revenue. But, in any event,
22 there are numerous alternative sources of consumption data available to Perse for all
23 of its products.

24 To take just one example for the switching service, one of the examples of alternative
25 sources of consumption data, every customer, residential and commercial in the
26 United Kingdom, receives an energy bill which includes a QR code that the customer

1 can scan directly into a price comparison website and thereby provide the price
2 comparison website with an accurate and up-to-date figure for that consumer's
3 electricity consumption. I will take you to an example of that which is in hearing
4 bundle D, tab 83. D for -- something rude I can't think of anything clean!

5 This is a gas bill, a -- bizarrely -- electricity bill produced by British Gas exhibited to
6 Mr Linnane's first witness statement, paragraph 135.

7 If you turn to page 1235, at the end of that bill you'll see a QR code, and you'll see the
8 instruction:
9 "Scan this QR code on a price comparison app to compare your tariff with others on
10 the market."
11 You've got that on page 1235.

12 MR JUSTICE MORRIS: Right. So assuming Perse provides their service through
13 Compare the Market --

14 MS SMITH: The 14 per cent of their revenues that are accounted for by providing their
15 services through Labrador and Compare the Market supply chain A and B --

16 MR JUSTICE MORRIS: Sorry, I'm just trying to understand.

17 MS SMITH: Yes, they can be provided By --

18 MR JUSTICE MORRIS: Ms Smith, I know you've got time concerns. Could you just
19 let me finish my question, please?
20 You're saying that they can still have their service up and running and the consumer
21 can go to the website and hold this, take a photo of this, and scan and get into the
22 Compare the Market website and get an answer. Is that how it works?

23 MS SMITH: They go on the Compare the Market website. They put in their address
24 details. They can then put in their electricity consumption details, and they can do that
25 by either scanning the QR code or putting in the figures from the bill.

26 I'll show you how that works, which is one of Perse's largest competitors, you'll recall,

1 in the switching-service market, the direct switching-service market, supply
2 chains A and B. Go Compare does not use ElectraLink's data. Instead, it asks
3 customers to input their own consumption data. And I'll show you how that works.
4 That's hearing bundle D, tab 77.

5 MR JUSTICE MORRIS: Yes.

6 MS SMITH: This is a snapshot, a page, from Go Compare's price comparison
7 website. It is exhibited to Mr Linnane's first witness statement, paragraph 138.
8 You'll see there Go Compare are saying to the customers who go on to their price
9 comparison website, "What details do I need to check energy market rates?"
10 And there's five steps:
11 "You'll need to tell us about:
12 "1. Where you currently live.
13 "Pop your postcode and house number in ...
14 "2. Your current supplier ...
15 "3. How you're billed.
16 "Online or through the post ...
17 "4. Your estimated usage.
18 "Either in kWh or by monthly cost. You can find this information on your latest bill."
19 So that's what Go Compare do. They ask consumers to put in their electricity
20 consumption, their usage. From their bill.
21 So that is 99 per cent of Perse's overall revenue.

22 MS RIEDEL: Apologies, I have two questions. The more important one, maybe I'll
23 just ask one then.
24 How long do you estimate it would take Perse to adapt its business in order to provide
25 these orders to carry on via these alternative routes in relation to landlords and the
26 switching service?

1 MS SMITH: I understand that currently, as regards switching, the Compare the Market
2 website is still operating asking consumers to enter average data. I will come on to
3 the question about whether, as a result, Perse is going to lose customers. I'll address
4 that in a moment, if I may. I think Mr Linnane gave evidence of how easy it would be
5 to -- yes, let me have a look at that. How easy it would be to (overspeaking) write the
6 few sentences of code that would ensure that you could put that on a price comparison
7 website.

8 MS RIEDEL: So I understand that what you're saying is that you think for
9 Compare the Market, they're already operating something, so there's no time delay
10 there.

11 So then in relation to the landlords, is there a material time delay or not?

12 MS SMITH: On the landlords, there's obviously the aggregated data which we have,
13 as I will show you. I was going to come to our offers on that.

14 MR JUSTICE MORRIS: So that's why you've been talking about switching services.
15 Yes.

16 That's right. And effectively supply service A and B. Is that right?

17 MS RIEDEL: Because we talked about carbon reporting at the beginning.

18 PROFESSOR AKMAN: I think (overspeaking).

19 MR JUSTICE MORRIS: I'm getting confused now, I'm afraid.

20 MS SMITH: Carbon reporting is to landlords that supply chain D.

21 MR JUSTICE MORRIS: No, sorry (overspeaking). Just tell me, thus far, the points
22 you have been making, have they been confined to the switching services?

23 MS SMITH: I started by referring to carbon-reporting service.

24 MR JUSTICE MORRIS: No, you --

25 MS SMITH: I said of the five products --

26 MR JUSTICE MORRIS: Yes.

1 MS SMITH: -- they could supply all.

2 MR JUSTICE MORRIS: Yes, okay.

3 MS SMITH: I said that as regards Perse's carbon-reporting service, I've already
4 explained that none of Perse's competitors --

5 MR JUSTICE MORRIS: Yes, that's right.

6 MS SMITH: -- except arbnco use ElectraLink's data.

7 MR JUSTICE MORRIS: Yes. And I think that that is where Ms Riedel's question
8 comes in: how quickly could they switch to that model?

9 MS RIEDEL: Yes, that's right. (Pause)

10 MS SMITH: Yes. We don't have evidence on the data that other -- how quickly one
11 Perse could switch to using the type of data that their competitors use. I don't have
12 evidence on that. What I do have, however, is -- (Pause)

13 Sorry, we don't have evidence on how quickly Perse could access the data that other
14 carbon-reporting service providers access for the purposes of providing
15 carbon-reporting services. I'm going back to Sachdeva, just to see if I could get
16 a description from him. I'll see if he knows as to what that is. (Pause)

17 Yes, it's paragraph 44 of Mr Sachdeva's first witness statement, page 60 of tab 4.

18 He says there:

19 "To my knowledge, apart from arbnco, our competitors for this product do not generally
20 use ElectraLink data. Where they do not, they instead use energy bills (i.e. the
21 customer needs to get the usage data themselves from their bill), EPC data (i.e.
22 estimates based on information in the Energy Performance Certificate), or industry
23 default standards ... to generate reports."

24 Remember here we're talking about the carbon-reporting service. We're not talking
25 about a website that has to be changed. We're talking about individual landlords
26 coming to Perse and saying, "Please give me my carbon report for these properties".

1 So Perse has an individual direct relationship with the landlord.

2 At the moment Perse says, "Fine, we'll do that and we'll use EL data", they could
3 equally usually, and immediately I would suggest, ask the customer to get the energy
4 usage themselves from their bill, as per paragraph 44 of Mr Sachdeva's evidence, and
5 use energy bills. That's not going to take any time.

6 MR JUSTICE MORRIS: Which? Whose bills?

7 MS SMITH: The customer. The landlord.

8 MR JUSTICE MORRIS: Will the landlord have all the energy bills? Or the tenants?

9 MS SMITH: Well, again, this very much depends on the nature of the landlord, the
10 nature of the properties they have. There are options here. Instead, use energy bills
11 or EPC data estimates based on information in the energy performance certificate, or
12 industry default standards. So those are alternatives, each of which, depending on
13 the size of the landlord, the size of their property portfolio et cetera, might be more
14 appropriate for one landlord than another. But they're all alternative sources of the
15 data used by Perse's competitors that are also immediately available, in my
16 submission, to Perse. (Pause)

17 MR JUSTICE MORRIS: And obviously, I know what you said in paragraph 44 that he
18 says it's not --

19 MS SMITH: He said it's not as good, and that's the point I made at first, which is that
20 is not the point for the purposes of assessing adequacy of damages. If it's not as
21 good, it may be that this can subsequently be compensated in damages. The question
22 is whether they cannot supply these services and therefore whether or not they will.
23 They need the injunction between now and trial, and without it they would go out of
24 business, they being Perse. That's the first point I make in that regard. They can
25 provide these products in other ways.

26 A further point Perse asserts is they say the suspension at 1 April -- and this was

1 repeated by Mr Jones last week came at a critical point for them, because new
2 markets are opening up for the "demand flexibility" service, and:

3 "Perse is on the cusp of concluding contracts with large businesses for its
4 recommendation service."

5 That's Mr Sachdeva's first witness statement. Hearing bundle B, tab 4. Page 79,
6 paragraph 108.4.

7 MR JUSTICE MORRIS: Yes, I've read it. Thank you.

8 MS SMITH: My submissions on that point are as follows.

9 This evidence is speculative, and the tribunal should not place any real weight on it.

10 There is no detail given of what these apparent new contracts with large businesses
11 are, or the identity of the alleged counterparties to those contracts.

12 If there's concern on Perse's part about confidentiality, as the tribunal is well aware, it
13 has well-established processes to manage confidential material. So we say Perse is
14 evidence in this regard, such as it is, should be rejected by the tribunal.

15 Perse also makes various arguments about damage to its reputation. Of course, loss
16 of reputation on its own is not a relevant loss, because a company doesn't have
17 feelings that a court can compensate. The relevant question is whether loss of
18 reputation leads to any financial loss that can't be compensated in damages.

19 The highest point that -- Perse are able to put this point in their evidence -- is
20 paragraph 15 of Mr Sachdeva second witness statement, which is in hearing bundle
21 tab 8 at page 158, paragraph 15.

22 MR JUSTICE MORRIS: Yes, nearly there.

23 MS SMITH: Again, no evidence given of who these customers might be, the
24 customers asking for discounts and refunds; nor are, as one might have expected, the
25 alleged requests for discounts et cetera exhibited to Mr Sachdeva's evidence. You
26 would expect to see them to support this assertion; they're not given.

1 Furthermore, no basis is given by Perse for the assertion that its customers will -- they
2 anticipate the customers will complain, or they anticipate that the customers will pay
3 invoices. Again, we say this is mere speculation and should be rejected by the tribunal
4 on that basis.

5 In his submissions to the tribunal last week, counsel for Perse argued that even if
6 Perse manages to survive until judgment -- and I'll address the question of whether
7 Perse will be able to survive shortly, even if it does -- he said Perse could suffer
8 irreparable harm because it might lose customers it never gets back.

9 Well, leaving to one side that they have put in no evidence of customers
10 complaining -- we don't see any complaints; we don't see any evidence of customers
11 refusing to pay their invoices, let alone do we see any evidence of customers going
12 elsewhere -- even had we that such evidence, the tribunal will recall that Perse's
13 counsel relied by analogy on the case of Sports Direct; that was at pages 98 to 100 of
14 the transcript.

15 MR JUSTICE MORRIS: Yes.

16 MS SMITH: We say the analogy that Perse's counsel seeks to draw between the
17 present situation and the situation in Sports Direct is entirely inapt. The tribunal will
18 be aware in Sports Direct, the products at issue were replica kit, Newcastle United kit,
19 a pretty commoditised product which Newcastle United supporters were as likely to
20 buy in JD Sports as they were in Sports Direct, but they couldn't find them in
21 Sports Direct.

22 By contrast, what we have in this case is a carbon reporting product supplied by Perse
23 to large commercial customers, landlords, who are buying bespoke value added
24 products from Perse, including the -- I can't remember how Mr Sachdeva explained
25 it -- additional products. But more importantly, perhaps, they are products which Perse
26 can supply to those customers, either using ElectraLink's aggregated data product or

1 by obtaining tenant consent, as does arbnco, or by not using ElectraLink's data at all
2 by using the alternative sources of data that its competitors use. It's not the same
3 case as where if Sports Direct could not supply the Newcastle kit, that was the end of
4 the matter and the customers had to go elsewhere.

5 MR JUSTICE MORRIS: Did you just say they could get it using the ElectraLink's data?

6 Sorry --

7 MS SMITH: No, I said they could either use ElectraLink's aggregated data --

8 MR JUSTICE MORRIS: Aggregated, okay.

9 MS SMITH: -- or they could obtain tenant consent for the individualised data, or they
10 could not use ElectraLink's data at all, as do their competitors.

11 MR JUSTICE MORRIS: Can you just pause for a moment? (Pause)

12 Sorry.

13 MS RIEDEL: So, I had raised earlier internally, I had noted, I think it's around
14 exhibit 66 of Mr Linnane's supporting evidence. Let me just find it. It's either 64, 65
15 or 66. This is evidence that you, your client submitted. Let me see if I can find it for
16 you.

17 MS SMITH: This is not that helpful that the exhibit numbers have been lost when --

18 MR JUSTICE MORRIS: I think the bundle page number would probably be --

19 MS SMITH: Yes, I have different tab numbers to the exhibit numbers, unfortunately.

20 MS RIEDEL: Yes. It's 1117. It is volume D, tab 72.

21 MS SMITH: Yes, it's tab 72.

22 MS RIEDEL: So, just to summarise how I had read this, this seemed to be
23 a conversation between your legal team, the legal team of ElectraLink and
24 a disgruntled customer of Perse. And so, to the extent that there you say there isn't
25 evidence, would we be wrong to take this as evidence of there being a customer who
26 is disgruntled because it seems to be unable to obtain data from Perse at the

1 moment?

2 MS SMITH: I'm sorry, I don't want to make submissions on my feet without having
3 looked at that.

4 MS RIEDEL: No, I appreciate that. That's why I'm trying to --

5 MR JUSTICE MORRIS: Do you want to just highlight which particular paragraphs in
6 particular? To help us --

7 MS RIEDEL: Yes. If we run through it, it says, "We use Perse at the moment." And
8 then if we go on:

9 "Perse switched us off about three weeks ago in discussions with you about changes
10 we had ... This is the story I've been given from Perse. ... They're getting us to sign
11 an additional LOA."

12 Moving down the page:

13 "Point I make is, the LOA is going to take us months. ... We're in danger of losing
14 customers over this. ... Perse is telling us something has changed between us and
15 them. At this time of year, it's extremely problematic and we are in danger of losing
16 customers over this. ... I'll go back to Perse and question why we've been asked to
17 sign an additional LOA. Don't understand why this additional requirement has come
18 from. ... Let's get it done directly."

19 MS SMITH: Yes.

20 MR JUSTICE MORRIS: So, it goes on to competition, doesn't it?

21 MS RIEDEL: Yes.

22 MS SMITH: I understand, and I'm going to get you the reference of Mr Linnane's
23 witness statement paragraph that refers to this exhibit, that this is a broker
24 intermediary. So, it's a supply chain D; it's not relevant for the purposes of adequacy
25 of damages. It's not the type of supply for which the injunction is being sought.

26 MS RIEDEL: I see, so we should read this as not indicative of complaints from

1 customers generally?

2 MS SMITH: Yes. I'll give you the reference in a moment. Sorry, I don't have the
3 paragraph to cross-reference.

4 MR JUSTICE MORRIS: Yes. Carry on, Ms Smith. Anyway, we just wanted to raise
5 that with you because we have been looking at it.

6 MS SMITH: Yes, I understand it is an intermediary broker.

7 Now, I move on to my second point that Perse has not provided adequate or
8 transparent financial data to support its argument that it will go out of business by June
9 next month. This is a very significant point, in my submission, because Perse is asking
10 the tribunal to exercise its powers in its favour at the expense of ElectraLink as well
11 as third parties and I will explain that under the third test.

12 It's incumbent, we say, on an applicant in Perse's position, to be completely frank with
13 the tribunal in this regard. Instead, we've had the opposite of that. Perse's initial
14 evidence failed to disclose that it had additional bank accounts to those that it
15 mentioned in its first witness statement: there's a third bank account that it now admits
16 it has.

17 It also failed to disclose any shareholder involvement in the company, even though we
18 now know that there is a shareholder who has recently invested 4.9 million in the
19 company. That was not disclosed in ElectraLink's first witness statement. Those
20 matters only came to the tribunal's attention as a result of being uncovered by my
21 client.

22 If I can take you to Mr Linnane's evidence, first witness statement of Mr Linnane,
23 paragraph 161. It's in hearing bundle tab 5, page 118. I would ask you to read
24 paragraph 161 to yourself and also paragraph 164. (Pause)

25 While we're there, perhaps 165 through to -- 165 onwards, unless you have already
26 read that to yourself.

1 MR JUSTICE MORRIS: 165 until where?

2 MS SMITH: Well, from 165 onwards --

3 MR JUSTICE MORRIS: Yes, well, I don't think we've got time --

4 MS SMITH: -- is all the financial material -- no, well, it is extremely important material

5 my Lord. Because what it shows is that we have found Perse's last 2024 accounts on

6 Companies House which were not exhibited to their previous statement. They record

7 share capital for Perse of just under £2 million.

8 MR JUSTICE MORRIS: When you make these points, can I just highlight --

9 MS SMITH: So, 2024 accounts, paragraph 166.

10 MR JUSTICE MORRIS: Yes.

11 MS SMITH: The 2024 accounts were not exhibited to Mr Sachdeva's first witness

12 statement; we have found them on Companies House.

13 MR JUSTICE MORRIS: Yes.

14 MS SMITH: There is no profit and loss statement, they haven't been audited, but they

15 do record share capital for Perse of £1,995,099. That's paragraph 167.

16 MR JUSTICE MORRIS: Yes.

17 MS SMITH: That was not disclosed by Perse. Also there is a subsequent investment

18 by Stark which Mr Linnane refers to below.

19 Then in paragraph 168, he talks about the fact that:

20 "In early September 2024, Stark Software International Limited invested in Perse by

21 buying out the investment of Deepbridge Capital [we assume that that is the previous

22 two million shareholding] and enabling that investor to exit profitably [and this we found

23 from searches on the web]. Stark's website described its recent relationship with

24 Perse as a 'strategic investment and partnership' and its CEO, Alex Warren, stated [as

25 follows]. [Then Mr Linnane says:] I understand from a conversation with

26 Dan Hopkinson, the CEO of ElectraLink, that he spoke with Mr Stark and Mr Stark

1 indicated his investment in Perse was in the region of £7 million. [I'm sorry, it's 6.9,
2 not 4.9 million.] I am not clear where this would show on Perse's accounts."
3 None of this was disclosed in Mr Sachdeva's first witness evidence.
4 Then the Companies House documents that we have uncovered, which are in
5 paragraph 169, the current directors of Perse, there are five of them.
6 MR JUSTICE MORRIS: Yes.
7 MS SMITH: Mr Lingulta; Ms Lucy, who we have referred to in the statement;
8 Mr Sachdeva, who gave evidence; Mr Stark, the founder, executive chairman and one
9 of the two directors of Stark; and Mr Warren, who is the CEO and other director of
10 Stark.
11 So, Stark are not just shareholders; they are also two of the five directors of Perse.
12 This again, was not disclosed.
13 MR JUSTICE MORRIS: Yes.
14 MS SMITH: Paragraph 170, over the page:
15 "Based on data from Orbis [which we found online], it appears that Perse is owned [in
16 the following shareholdings]."
17 MR JUSTICE MORRIS: Yes, okay.
18 MS SMITH: I emphasised Stark owns 40 per cent of Perse.
19 MR JUSTICE MORRIS: Okay.
20 MS SMITH: So, paragraph 171:
21 "It appears that Stark and its Directors have direct financial interests in and are deeply
22 embedded in the ownership and management of Perse."
23 And then paragraph 173, Stark's 2024 accounts show a net current asset position of
24 8.95 million. They owed £30 million to creditors, but they had £19 million debtors
25 balance, £5 million of stocks and £15 million of cash in the bank.
26 And in paragraph 174:

1 "In January [of this year] (after its investment in Perse) Stark took new and additional
2 investment, respectively, from Macquarie Capital and growth capital investor BGF
3 [which is] said to be for 'long-term' by Mr Stark. The purpose of the investments was
4 stated to be to help Stark's growth and acquisition ambitions, meaning that it is likely
5 Stark will be protecting its existing investments as well as making further investments."
6 Then I'll come back, if I may, to paragraph 175, which is "Stark has already been active
7 in seeking to protect its investment" in the context of this application.
8 So, we make the point that Perse has been minimal in the amount of information it's
9 provided to the tribunal. We say that even on the basis of the material it provided in
10 its initial -- in its evidence to the tribunal, Mr Sachdeva's first witness statement, its
11 latest profit and loss statement shows that it could make cost savings.
12 If I can ask you to turn to hearing bundle C, tab 39, this is the sole financial
13 document -- financial I say in quotation marks; it's a two-page document, doesn't say
14 who prepared it, for what purposes. This is Perse's profit and loss account statement
15 for the year end of 2025.
16 You'll see there under -- I'm making the point here about potential cost savings -- we
17 have directors' remuneration of £468,000-odd, by the lower of the two hole punches;
18 that's about a third of its total costs. About another third over the page, subcontractors'
19 costs of £490,368; no breakdown of these sorts of payments have been provided by
20 Perse. In fact, it's unclear to whom the director salaries go, whether they go to the
21 chairman or CEO of Stark, who have two director seats. No reason is given either by
22 Perse as to why it could not reduce these sorts of costs, such as directors' drawings.
23 In our submission, it would be common sense for a company seeking to avoid to go
24 into administration to make such cost savings.
25 This is the point I now come back to: Perse would not go out of business if an injunction
26 were not granted in the terms sought, because instead Perse's shareholders, in

1 particular, Stark, would be likely to step in to meet any short term cash flow issues to
2 protect their investment in Stark.

3 All we have from Perse by way of evidence in response to that point is paragraph 17
4 of Mr Sachdeva's second witness statement. This is his sole response to that point
5 and all the evidence we put in about Stark's investments.

6 MR JUSTICE MORRIS: Can I get the reference?

7 MS SMITH: Sachdeva 2, paragraph 17, hearing bundle B, tab 8, page 159. He says
8 in paragraph 17 that Mr Linnane suggests Stark would step in. That is incorrect. Our
9 understanding, based on discussions with Stark, is that Stark is not willing to step in
10 to provide additional funding. Well, if that were the case, one might have expected to
11 see evidence from Stark saying that.

12 Stark own 40 per cent of Perse. Stark directors, the CEO Mr Stark and Mr Warren
13 themselves are two of the five directors of Perse. Stark recently made a substantial
14 \$7.9 million investment in Perse. It's puzzling why we have no evidence from Mr Stark
15 given, as you'll see shortly, he is not backward in coming forward in this application.

16 But even if the tribunal takes Mr Sachdeva's evidence in this regard at face value that
17 Stark would not step in, is not willing to step in, the tribunal can and we say on this
18 evidence should find that actually Stark would be more likely than not to step in. In
19 analogous cases, the court has found that it would be rational for shareholders to step
20 in and support a business, even when those shareholders have given evidence to the
21 court saying it would not be rational for them to do so. We don't even have that here;
22 we don't have evidence from the shareholders. But even where the shareholders have
23 said, "No, it would not be rational for us to step in, we're not going to step in", the court
24 has said, "Well, I'm sorry, I think it would be".

25 So, if I can take you in that regard to authorities bundle 2, tab 24. This is an interim
26 injunction application in the High Court before Mrs Justice Jefford.

1 MR JUSTICE MORRIS: Tab 24, did you say?

2 PROFESSOR AKMAN: Yes.

3 MS SMITH: I'm sorry, my learned junior, who was in fact acting for the defendant in
4 that case, informs me that this was a procurement injunction where an automatic
5 injunction applies.

6 MR JUSTICE MORRIS: I'm sorry, where is it in the bundle?

7 MS SMITH: Authorities bundle 2, tab 24.

8 MR JUSTICE MORRIS: My tab 24 is in my authorities bundle 6.

9 MS SMITH: Oh, for goodness' sake.

10 MR JUSTICE MORRIS: It's all right.

11 MS SMITH: This is One Medicare, is the case.

12 MR JUSTICE MORRIS: Yes. Thank you.

13 MS SMITH: It's a judgment of Mrs Justice Jefford of 17 January 2025. It's
14 a procurement case, so there's an automatic injunction that kicks in under the
15 procurement legislation, and it's an application to set aside that automatic injunction
16 which proceeds on the same basis as the American Cyanamid principles.

17 If you turn to paragraphs 32 to 33, if I could just ask you to read paragraph 32 to 33 in
18 that regard, in particular, what's said about shareholders. (Pause)

19 MR JUSTICE MORRIS: Slightly baffled by the first sentence, the evidence there is
20 not that they cannot or will not support.

21 MS SMITH: But that he says it's not rational.

22 MR JUSTICE MORRIS: He says not rational.

23 MS SMITH: (Several inaudible words) Obviously each case turns on its facts, but
24 what I would emphasise is the last sentence of paragraph 33.

25 MR JUSTICE MORRIS: Yes.

26 MS SMITH: "In those circumstances, despite the protests of OPC, in my view, there

1 is every reason to consider it rational for the shareholders to support OPC."
2 We say you should reach a similar conclusion in this case, that it would be entirely
3 rational for Stark to step in to protect its financial interests, particularly where, if it did
4 not do so, it would potentially lose its investment in Perse, it's more likely to support it
5 to take the case to trial, which it says it's going to win and get damages.

6 And I've already made the point, but I'm now going to make it by reference to the
7 evidence: Mr Stark has already been active in seeking to protect his investment in
8 Perse, even going so far as to say in correspondence very shortly before this hearing,
9 a week or so before the first hearing last week, that Stark would also pursue
10 ElectraLink for damages if they weren't going to come to some sort of negotiated
11 settlement.

12 MR JUSTICE MORRIS: This is still the second or the third of your three arguments,
13 isn't it?

14 MS SMITH: We're still on number 3, yes. Could I take you to -- I don't think I need to
15 take you to the underlying documents unless you'd like me to -- where Mr Linnane
16 refers to each of those documents, which is Mr Linnane's first witness statement,
17 paragraph 175, hearing bundle B, tab 5, page 120. Mr Linnane says:

18 "Stark has its investment in Perse to protect, both on its own terms and part of its wider
19 business strategy. Stark has ... been active in seeking to protect this investment."

20 If I could refer you in particular to paragraphs 175.2 through to 175.3.

21 MR JUSTICE MORRIS: Can I just read those.

22 MS SMITH: Can I ask you to read those, and I can give you the hearing bundle
23 references for the exhibits. (Pause)

24 MR JUSTICE MORRIS: Read to the end of 175.

25 MS SMITH: If you want to write on that document, the emails that are referred to in
26 paragraph 175.2 are hearing bundle tab 102 and tab 103. The letter of 26 April 2025,

1 referred to in 175.3(a), is at hearing bundle tab 85 and the email from the chief financial
2 officer of Stark referred to in subparagraph (b) is at hearing bundle tab 86.

3 We make the point that this is not an investor that is likely to sit back and let its
4 investment fail and so this is not a case where the applicant will cease to exist by the
5 time of trial if the tribunal does not grant the injunction. Damages will be an adequate
6 remedy for Perse.

7 That then takes me to the third point.

8 MR JUSTICE MORRIS: Yes. Just pause a minute while I just ...
9 Yes. Step three.

10 MS SMITH: So, damages are ...

11 MR JUSTICE MORRIS: Not adequate for you.

12 MS SMITH: Damages are not an adequate remedy for ElectraLink and this is the
13 point. Here, one is having to assess risk. This is the test of the tribunal. What are the
14 risks, here, to ElectraLink and to third parties? Obviously, we cannot establish at this
15 stage that X will definitely happen or Y will definitely happen. We do say, however,
16 that here, there are real risks of damage to ElectraLink which could not be remedied
17 in damages.

18 First, there is a real risk that the DTS users would stop allowing ElectraLink to provide
19 the data analysis service under the DTSA on a commercial basis. If this were to
20 happen, ElectraLink would revert to its core function of providing the data transfer
21 service to DTS users on a cost recovery basis only. That is the initial --

22 MR JUSTICE MORRIS: Say it again, providing --

23 MS SMITH: That is the core of ElectraLink's business. It's not a profitable part of
24 ElectraLink's business, but it's the core. You will recall that ElectraLink was first set
25 up to provide --

26 MR JUSTICE MORRIS: Yes, in two.

1 MS SMITH: -- the telephone exchange for all the DTS users and to operate the data
2 transfer network that enabled DTS users to send messages across that network to
3 enable them to fulfil their licence conditions to encourage switching and competition
4 within the market.

5 MR JUSTICE MORRIS: Sorry, Ms --

6 MS SMITH: Add on to that point is the data analysis service, which ElectraLink
7 provides on a commercial basis to customers such as Perse.

8 MR JUSTICE MORRIS: Yes. Sorry, just pause there for a moment. The risk is that
9 they will stop supplying. Are you saying they'd stop supplying full stop?

10 MS SMITH: No, we're saying --

11 MR JUSTICE MORRIS: No, sorry, let me finish. Stop supplying full stop for the
12 purposes of third-party supply, or stop supplying only insofar as supply was to Perse?
13 I understand the internal supply thing, but are you saying that because of the data
14 breaches, the user group would say, "I'm sorry, the whole of schedule 9 is off"?
15 Maybe that's the other point.

16 MS SMITH: I think the point is -- our point is that --

17 MR JUSTICE MORRIS: What is going to be cut off?

18 MS SMITH: What is going to be cut off is they would stop allowing us to provide the
19 data analysis service which is provided under clause 5.3 and schedule 9 of the DTSA
20 because we have provided or we would be compelled to provide the data in our breach
21 of our obligations to them and in breach of the data protection legislation.

22 MR JUSTICE MORRIS: Even though you write back and said, "Awfully sorry, we've
23 had to do this because we're compelled under an order, please don't" --

24 MS SMITH: The DTS user group are not compelled to allow us to provide their data
25 to us.

26 MR JUSTICE MORRIS: No. Are you saying they'd say you can't have it at all for

1 anybody?

2 MS SMITH: I think we would say that there is a risk that they would say the easiest
3 thing is just to stop doing that, because it would allow us, it would require us to carry
4 on providing the data transfer service over the network, which is all they need to do
5 under their licences. There's a risk that, if we were required under the injunction to
6 breach the various terms of the DTSA and the data protection rules, we say, and this
7 is our evidence, that they are risk averse and would likely just switch off the --

8 MR JUSTICE MORRIS: Just remind me the paragraph of Mr Linnane that says that.
9 I'm assuming that that's Mr Linnane?

10 MS SMITH: Sorry, yes, I was trying to summarise them because they're obviously all
11 set out in my skeleton and then by cross reference to Mr Linnane. I'm just trying to
12 follow it through.

13 MR JUSTICE MORRIS: Somewhere from 193 onwards?

14 MS SMITH: Yes.

15 MR JUSTICE MORRIS: Yes, he does say "would suspend right of access and
16 commercialise the DSA reports"; that means to everybody.

17 MS SMITH: Yes.

18 PROFESSOR AKMAN: Which paragraph?

19 MR JUSTICE MORRIS: 194, I'm looking at. There's no evidence from the DTS user
20 group that they'd do that. Okay?

21 MS SMITH: There is evidence from ElectraLink who deals with the DTS user group
22 every day, but yes.

23 Mr Linnane then makes a point in paragraph 195 as to the potential financial loss that
24 that could cause to ElectraLink if that data analysis service was not allowed.

25 MR JUSTICE MORRIS: Yes.

26 MS SMITH: Yes. Also in that regard, I should -- because I take on board what

1 your Lordship said about wanting to be taken to all the relevant
2 evidence -- Ms Ogborne, who is the data officer and head of compliance and data
3 privacy at ElectraLink, her evidence in paragraphs 68 to 69 of her witness statement
4 is also relevant. That's in hearing bundle B, tab 6, page 146, where she sets out the
5 two options available to the data controllers. That's to the DTS users.

6 MR JUSTICE MORRIS: Option one --

7 MS SMITH: Allowing the processing data without any consumer consent for either
8 Perse alone, an unfair advantage over all of its competitors. I think that's the important
9 point, and I should have made that point myself. If they just said, "Right, Perse can
10 have the data and use it in this way, which we consider to be in breach of our data
11 protection obligations, but we can just end, we can say you can't use the data for
12 Perse", which would give it an unfair advantage over all its competitors -- I've explained
13 to you why that's the case -- or for all ElectraLink customers. They could allow that to
14 happen or they could stop providing data altogether to ElectraLink under schedule 9
15 of the DTSA. Although ElectraLink may be forced by an injunction to breach the
16 DTSA -- that's ElectraLink's case -- the DTSA is the contract through which the users
17 currently provide the data. If they're not satisfied with how ElectraLink.

18 MR JUSTICE MORRIS: Sorry, I know you're under time pressure but I'm not following
19 you.

20 MS SMITH: Sorry, I'm reading out.

21 MR JUSTICE MORRIS: I know you are, but can you point out where you're reading
22 from?

23 MS SMITH: Paragraph 68 where she sets out two options available:

24 "(a) Allowing the processing of data without consent, or (b) stop providing data to
25 ElectraLink.

26 MR JUSTICE MORRIS: Yes, and you were reading --

1 MS SMITH: -- altogether under schedule 9 of the DTSA. Although ElectraLink may
2 be forced by an injunction to breach the DTSA, the DTSA is the contract through which
3 the users/data controllers currently provide the data. If they are not satisfied with how
4 ElectraLink (even if required to do so by the tribunal) processes the data, they do not
5 have to acquiesce by continuing to provide it to ElectraLink. This option of total
6 termination seems significantly more likely (and indeed likely) to me. Energy industry
7 participants are in general very risk averse and unlikely to risk creating the conditions
8 for liability under Article 5(1) and/or Article 32(1) and pursuant to Article 82 of the UK
9 GDPR. [Those are the provisions under which data subjects can sue for breach of
10 their data rights and sue for damages.] There are potentially millions of data subjects
11 whose data is supplied in DAS Reports (I note that the ONS figures indicate
12 approximately five million private renters ...)"

13 So the renters, the tenants whose data is potentially being provided by ElectraLink to
14 Perse in which in fact they are asking for an injunction for their data, those renters',
15 tenants' data to be provided by ElectraLink to Perse, we say in breach of data
16 protection legislation to landlords.

17 "There are five million private renters [in the UK]. Such data subjects could bring
18 individual claims or (more likely under the recent trends in data protection law where
19 there is liability arising in relation to a common event for a large group of potential
20 claimants) group litigation against Users".

21 MR JUSTICE MORRIS: All right. I still don't understand why they'd terminate other
22 than in respect of Perse.

23 MS SMITH: Because, my Lord, if they terminated other in respect of Perse and said,
24 "Okay, well, we're not going to --" yes. Yes, we would still hold the data because we
25 would be required -- we would be given ... Let me see. Let me just work out how this
26 works. ElectraLink have access to the data transfer network.

1 MR JUSTICE MORRIS: Yes.

2 MS SMITH: And we hold that data, which is the DTS users, the data controllers' data;
3 we would be obliged under the injunction to provide it and process it in a certain way.
4 I do not see how or I don't think -- again, this is not a point that's been addressed -- we
5 could be granted access to that, we could be allowed to carry out the data analysis
6 services for certain customers, but not others without breaching the injunction.

7 MS RIEDEL: But you have the data anyway, because you have the data for the
8 purposes of the primary initial purpose.

9 MS SMITH: Yes, exactly. So, we'd have the data anyway. We'd be required by the
10 injunction to supply it to Perse, so we would be required to breach. Yes, that's it.

11 MR JUSTICE MORRIS: Required to?

12 MS SMITH: To breach -- in the DTS users' view, we would be required to breach data
13 protection legislation to process their data in breach of data protection legislation.

14 MS RIEDEL: But that -- never mind.

15 MR JUSTICE MORRIS: Let's leave it for the moment.

16 MS SMITH: So, this is the question: is there a real risk? We said there is a real risk.
17 There's a real risk that the data the DTS users would stop running the data analysis
18 service. There's also a real risk that users themselves could face potentially significant
19 claims for damages, which we would be required to indemnify.

20 MR JUSTICE MORRIS: Okay, so let's just take it as -- So, first of all, the DTS users
21 would terminate because of their fear of being sued themselves?

22 MS SMITH: Yes. Or they don't terminate.

23 MR JUSTICE MORRIS: Or they don't terminate, and they are sued -- the DTS users
24 are sued. Is that right? And you have to indemnify them?

25 MS SMITH: Yes. And they would be sued by the data subjects; the DTS users would
26 have no defence because they are not subject to the injunction. They could be sued

1 by data subjects -- so they've not been made parties to the injunction, which they could
2 have been. But the DTS users are not subject to the injunction; they don't have
3 a defence to claims for damages from data subjects, and we would have to indemnify
4 them.

5 MR JUSTICE MORRIS: Okay. Are you also saying that you would be subject to
6 claims?

7 MS SMITH: There is a risk as well that we would be subject to claims, however the
8 risk is not quite so -- well. There is a risk we would be subject to claims. Whether we
9 have a defence --

10 MS RIEDEL: Sorry. Would not a defence arise for ElectraLink on the basis that, under
11 the GDPR on the basis that it had to process data --?

12 MS SMITH: Well, this is what I'm saying: we may face claims, but we may have
13 a defence under the GDPR that we're required by the injunction to provide the data.

14 MS RIEDEL: Right.

15 MS SMITH: The DTS users would not have that defence, but we would have to
16 indemnify them.

17 We say the risk of litigation is real. I've made the point about there being five million
18 renters in the UK, and we say that third-party funded group litigation is also a real
19 possibility. Even after the Supreme Court judgment in Lloyd and Google that drew
20 back, you might recall, the ability to make group litigation orders for data claims,
21 third-party funders are dreaming up ever more imaginative ways of bringing class
22 actions for data breaches including the current ongoing Gormsen class action
23 proceedings in the CAT, in the tribunal. So, there are real risks.

24 We're also now told for the first time, and this is in paragraph 76.1 of Perse's
25 skeleton -- it doesn't appear to be in their evidence, I don't think -- hearing bundle F,
26 tab 140, page 187, paragraph 76.1. For those who are using the bundle, it's

1 | page 1817. It says there, about halfway through this paragraph, 76.1:
2 | "In any event, Perse has been using ElectraLink's data to provide services to
3 | intermediaries, brokers and property landlords since May 2020."
4 | Now, before we saw that in the skeleton, we had no idea that they have apparently
5 | been providing it for five years in breach of our agreements. We found out about it in
6 | December and we did not know that the time period since which they've been using
7 | our data to provide these services goes back to 2020. It is a far longer period than we
8 | previously thought. It means that any claims brought by data subjects for breach of
9 | their data rights could be really substantial. They could date back much longer than
10 | we originally thought.
11 | Quite apart from private actions for damages, there is also a real risk, we say, of the
12 | DTS users being subject to investigations and fines by the ICO. Those also could be
13 | substantial. This is addressed in Ms Ogborne's evidence, I think. I probably need to
14 | take you back to that before I take you to the ICO.
15 | MR JUSTICE MORRIS: Just that paragraph 76.1, it cuts different ways, doesn't it?
16 | You don't accept that you knew that. It may be late in the day, but would not that
17 | suggest that if consumers were going to complain, they could have complained over
18 | the last five years?
19 | MS SMITH: Perhaps I can address that point before I go back to ICO fines.
20 | MR JUSTICE MORRIS: Nobody's ...
21 | MS SMITH: We didn't know that this was the data was being used in this way.
22 | MR JUSTICE MORRIS: No, well, that is a conflict --
23 | MS SMITH: There is no reason why tenants would know that their data was being
24 | used in this way. The services that Perse is providing are to landlords using tenant
25 | data without tenant consent. The tenants are not being asked for their consent. There
26 | is no reason why they should know that their data is being used in this way.

1 They are, however, now likely to become aware that their data is being used in this
2 way, particularly when this judgment is handed down. So, although it's unsurprising
3 in these circumstances that no complaints have yet been received by tenants, because
4 how could they know that Perse was using their data in this way? Landlords may
5 know this is what they're doing, but tenants aren't being asked about it because their
6 consent is not being sought. So, how would they know that their data is being used in
7 this way? They will now, however, know.

8 MR JUSTICE MORRIS: Because they will all read our judgment?

9 MS SMITH: Maybe we're a little. But it would then be in the public domain. But in
10 any event, lawyers will. Third-party funders will. Litigation lawyers will.

11 PROFESSOR AKMAN: But in that case, it wouldn't matter which way we rule; that
12 information will be in the public domain whether we grant or refuse to grant the
13 injunction.

14 MS SMITH: But the damages -- whether damages are an inadequate remedy for us
15 relate to the period relating to the period that the injunction was in force. So if we're --

16 MR JUSTICE MORRIS: So, our judgment either way might cause lots of claims to be
17 made for the last five years?

18 MS SMITH: It might. But then, yes. Anyway, the question I was going to address,
19 which I think is ICO --

20 MR JUSTICE MORRIS: Yes. Do you need to take us to that in detail? Are you just
21 saying there's a risk of fines, substantial fines?

22 MS SMITH: Yes. And I do actually just want to take you to this to give you some idea
23 of the significance of fines, which is Ms Ogborne's witness statement,
24 paragraph 17(d). It's hearing bundle tab 6, page 148. And it's subparagraph (d):

25 "The data controllers would each be likely to consider the extent to which they are
26 required to, self-report to the ICO. Regardless, the ICO may open an investigation

1 into the data controllers and ElectraLink, and monetary fines in penalty notices are
2 also possible. Under section 157 DPA, a fine can go up to '£8,700,000 or 2% of the
3 undertaking's total annual worldwide turnover ..."

4 MR JUSTICE MORRIS: So you're suggesting that the ICO would impose a fine on
5 you of --

6 MS SMITH: Again, this goes --

7 MR JUSTICE MORRIS: -- this enormous amount because you disobeyed a court?

8 MS SMITH: This goes to a number of questions. This goes to "Well, they might do,
9 and then we might have to indemnify the DTS users for it". It also goes to the
10 judgements that the DTS users will make as to when they decide what they will do, as
11 to whether or not they continue to allow ElectraLink to supply data or not.

12 Not only will they be thinking, "We may face claims from third-parties' data subjects
13 for damages, but we may also face an investigation by the ICO and potential of
14 monetary fines if we allow this to continue, having now found out about it". (Pause)

15 In oral submissions last week, Perse's counsel said that if the DTS user group did stop
16 ElectraLink supplying its data to Perse, it would seek an injunction against the DTS
17 user group. That's transcript, page 104, line 3. Well, they have not sought an
18 injunction against the DTS user group up until now that they could have done, and for
19 the purposes of this application, the tribunal cannot and should not assume either that
20 such an application would be made, let alone that it would be successful.

21 Nor can the tribunal assume that the vague threat of an injunction made on his feet by
22 Perse's counsel would prevent the DTS user group from cutting off the supply of its
23 data to ElectraLink when weighed by them against the risk of data subject claims and
24 ICO fines. (Pause)

25 I think I've made the point that the data controllers, the DTS users, would not have
26 a lawful ground. They're not subject to the injunction, so they do not -- cannot -- rely

1 on article 61(c) of the UK GDPR. I think I don't need to take that point again.

2 So the authorities have made it clear that a sufficient cross-undertaking in damages is
3 the price an applicant has to pay for an interim injunction. In the present case, the
4 cross-undertaking offered by Perse is of £435,000, assuming a ten-month timetable
5 of trial. It's not adequate and it's unlikely to cover the potential losses to ElectraLink if
6 an injunction were to be ordered.

7 You have the witness statement of Ms Bret, which makes it clear that ten months is
8 likely to be a significant underestimate of the time it would take to trial, or at least
9 a judgment, more importantly. It will take at least 12 to 18 months until judgment,
10 longer if either party appealed. That's how long you are being asked to hold the ring.

11 Mr Sachdeva argued that any loss suffered by ElectraLink would factor in the tripartite
12 agreements. Of course, that evidence was first given before they did not pursue the
13 injunction against intermediaries. Then Perse's counsel made the argument to the
14 effect that there's actually no loss because there is a cost to ElectraLink of entering
15 into the tripartite. Well, we say no, that's all irrelevant.

16 The correct counterfactual is what position would ElectraLink be in if the injunction is
17 not granted? If the injunction is not granted to hold the ring until trial, there is no risk
18 of ElectraLink supplying the data to Perse in breach of the data protection rules. There
19 is therefore no risk of the data analysis service being suspended by the DTS users,
20 and there's no risk of claims by data subjects which would have to be indemnified by
21 ElectraLink.

22 If the injunction, however, is granted, these risks do eventuate. And if they do
23 eventuate -- and we say they are real risks -- the potential loss involved if one or more
24 of these risks do eventuate clearly cannot be covered by a cross-undertaking of
25 £435,000 by Perse.

26 But in any event, the tribunal cannot have any confidence that Perse would be able to

1 cover across undertaking even in this sum. And I make this point on the following
2 basis --

3 MR JUSTICE MORRIS: Sorry, they can't even --

4 MS SMITH: But they can't even --

5 MR JUSTICE MORRIS: -- meet the £435,000.

6 MS SMITH: -- meet the £435,000. And we say that on this basis: Sachdeva 1,
7 paragraph 114 is where the cross-undertaking is offered, here in bundle tab 4,
8 page 81. We say the cross-undertaking is inadequate in any event, and we say it's
9 not clear they could meet even that figure by way of cross-undertaking:

10 "As of today's date, Perse has a total of [£420,000-odd] in its two bank accounts ..."

11 They also then refer to various accounts receivable et cetera, and various other
12 income which they say is likely to be coming in. However, what he does not give any
13 evidence on is what upcoming costs Perse might have to cover. Nor does he give any
14 evidence on how much money might remain available to Perse once those upcoming
15 costs have to be recovered, and which would be available for cross-undertaking as
16 a result.

17 You have heard my submissions on the fact that Perse's financial data is unreliable in
18 any event. That's particularly the case when you look at paragraph 115 of
19 Mr Sachdeva's first statement, which is his second argument to say we can cover
20 across undertaking in damages of £435,000. He says, "We've got this money", we
21 say, "But you don't know what costs are coming up". And then he says in
22 paragraph 115:

23 "Furthermore, for the past financial year ending 28 February 2025, we have offered
24 with a profit after interest and tax of [£353,000], which approximated to an EBITDA of
25 about £42,000 a month ..."

26 Now that is a document that I already took you to. It's at hearing bundle tab 39.

1 MR JUSTICE MORRIS: The two-page document?

2 MS SMITH: Yes. Well, it's not clear, as I said then, who prepared this or on what
3 basis or for what purpose. The actual accounts available for Perse on
4 Companies House, are they unaudited abridged financial statements? They are at
5 hearing bundle tab 80.

6 MR JUSTICE MORRIS: Watching the clock at the moment, Ms Smith.

7 MS SMITH: Yes, I have one page left of my submissions. Okay. Tab hearing bundle,
8 tab 80. This is (d).

9 Yes.

10 Which is the accounts.

11 MR JUSTICE MORRIS: Yes.

12 MS SMITH: The unaudited, unabridged accounts for the year ended 29 Feb 2024.
13 They are, as it says there, unaudited. They haven't been audited by an independent
14 third party, and they don't contain any profit-or-loss statement at all, in fact.

15 MR JUSTICE MORRIS: Right.

16 MS SMITH: So all we have is a profit-and-loss statement for the year ending
17 29 February 2024, which in fact was dug out by my client.

18 MR JUSTICE MORRIS: That's the first document you referred us to.

19 MS SMITH: No, that's this document.

20 MR JUSTICE MORRIS: I though you said there was no profit-and-loss?

21 MS SMITH: It is. Sorry. It's called "Unabridged Accounts".

22 MR JUSTICE MORRIS: Yes, so this is profit-and-loss?

23 MS SMITH: Sorry, this is the accounts.

24 MR JUSTICE MORRIS: This is "Balance Sheet". So you just said "profit-and-loss" --

25 MS SMITH: Yes, we have two documents. We have this document which are the
26 accounts submitted by Perse.

1 MR JUSTICE MORRIS: Yes.

2 MS SMITH: To Companies House.

3 MR JUSTICE MORRIS: Yes.

4 MS SMITH: But it does not contain a profit-and-loss statement.

5 MR JUSTICE MORRIS: Yes, exactly.

6 MS SMITH: We have a document at HB39.

7 MR JUSTICE MORRIS: Yes, unless you want to take us there?

8 MS SMITH: It might be worth it because there's some confusion about what the two

9 documents you have purport to show on Perse's ability to pay this cross-undertaking

10 in damages. That official --

11 MR JUSTICE MORRIS: Ms Smith, just wait a minute. I know you're really rushing,

12 but 39 is in a different file.

13 MS SMITH: It is.

14 MR JUSTICE MORRIS: Let's just all slow down a moment. C?

15 MS SMITH: 39, tab 39.

16 MR JUSTICE MORRIS: I don't know which file it's in.

17 PROFESSOR AKMAN: Which volume? C?

18 MR JUSTICE MORRIS: C2, I think.

19 MS SMITH: It's tab 39.

20 MR JUSTICE MORRIS: Right. I've got that. Yes.

21 MS SMITH: This is a profit-and-loss document that was attached to Mr Sachdeva's

22 first witness statement in support of the statement that it was able to pay this

23 cross-undertaking in damages, but we really don't know what this document is. It's

24 not a document that was put in, as far as we can see, by Perse, with its accounts for

25 Companies House.

26 MR JUSTICE MORRIS: It's a different year, for a start.

1 MS SMITH: It is, and there's no explanation as to who prepared it, whether it was
2 prepared by an independent third party, whether it has been audited in any way
3 whatsoever.

4 MR JUSTICE MORRIS: Okay.

5 MS SMITH: It's really very -- and I've made the point, the financial data is inadequate.

6 MR JUSTICE MORRIS: Yes. So I've got to open at the moment -- I've got unaudited
7 accounts for the year ended 24, which is just a balance sheet by the looks of it, and
8 no profit-and-loss. Yep. And I've got a profit-and-loss, ended February 2025.

9 MS SMITH: Yes. Which we don't know --

10 MR JUSTICE MORRIS: Yes.

11 MS SMITH: That's all we have.

12 MR JUSTICE MORRIS: Right.

13 MS SMITH: So we say that there is no adequate support for this offer of
14 a cross-undertaking, even though a cross-undertaking is the price that applicants have
15 to pay for an interim injunction under the case law. And that is made absolutely clear.
16 I can take you to that case, or I can give you the reference. It's whether you need me
17 to give you a reference for that statement.

18 MR JUSTICE MORRIS: Which case do you rely on? Is it in your skeleton?

19 MS SMITH: Yes, it is. It's in authorities bundle 12. Tab 12. RBG (Resources) Plc v
20 Rastogi. Judgment of Mr Justice Laddie.

21 MR JUSTICE MORRIS: Just take us to the paragraph.

22 MS SMITH: Paragraphs 22 and 24 on page 531.

23 MR JUSTICE MORRIS: I mean, quite often in cases you have supported by bank
24 guarantees and things like that.

25 All right. I'm not going to read it. I've just marked it.

26 MS SMITH: It makes it clear that, as you expect, that's the price you have to pay and

1 they really have not given either an adequate sum itself or, even for that sum, they
2 haven't given an adequate basis for that.

3 MR JUSTICE MORRIS: One minute please. (Pause)

4 We're on your last page, are we?

5 MS SMITH: Last five minutes, I hope, on balance of convenience.

6 MR JUSTICE MORRIS: Yes.

7 MS SMITH: At last week's hearing, your Lordship asked Perse's counsel about the
8 approach taken by the Court of Appeal to the balance of convenience in its judgment
9 in Sports Direct. What I understood your Lordship to be referring to there is what is
10 said in paragraph 30 of that judgment, but, in my submission, I can take you back to
11 paragraph 30. That does not change the approach that should be taken under
12 American Cyanamid and Factortame in that one only goes to consider the balance of
13 convenience if there is doubt as to the adequacy of either or both of the respective
14 remedies and damages.

15 MR JUSTICE MORRIS: I should say for my part, subject to persuading otherwise,
16 that I prefer to go down the orthodox American Cyanamid route. You don't get the
17 balance of convenience, unless.

18 MS SMITH: Exactly. But I'm not sure that, even in Sports Direct, the Court of Appeal
19 was saying that in paragraph 30. As I read paragraph 30 -- or certainly it could be
20 read -- in looking at balance of convenience, if you get to that stage, you should
21 consider all of the circumstances of the case, including, of course, matters that may
22 also have been relevant at the stage of considering adequacy of (overspeaking).

23 MR JUSTICE MORRIS: He sort of says that - seems to suggest you don't get
24 to -stages - 2-, 3 and 4 are all one. But anyway.

25 MS SMITH: So my submissions on balance --

26 MR JUSTICE MORRIS: There's no doubt that when you get to stage 4, the fact is that

1 2 and 3 can come back in.

2 MS SMITH: Yes. As can the first stage as well.

3 MR JUSTICE MORRIS: Yes.

4 MS SMITH: So my submissions on balance of convenience are set out in my skeleton,
5 I'm not going to repeat them, but I would emphasise the following.
6 First, even if the tribunal is not with us on our case that Perse's competition case is
7 unarguable --

8 MR JUSTICE MORRIS: Yes.

9 MS SMITH: -- it is, on any view, weak for the reasons that we have explained, and
10 that weighs in the balance of convenience. And I do want to take you to Sports Direct
11 in that regard, because the point is you apply a different test to the merits of the claim
12 at the balance of convenience stage. And that is in Sports Direct Court of Appeal
13 judgment, tab 22 of the authorities bundle.

14 MR JUSTICE MORRIS: Yes, I have read Sports Direct in some detail.

15 MS SMITH: It's paragraph 41 of the judgment in Sports Direct, tab 22, the authorities
16 bundle.

17 MR JUSTICE MORRIS: Yes. Got it.

18 MS SMITH: Paragraph 41.

19 MR JUSTICE MORRIS: Page 1196.

20 MS SMITH: Yes.

21 "... the tribunal was, at this stage of its inquiry [that's the balance of convenience stage]
22 entitled to take into account its view of the strength of Sports Direct's overall case.
23 Even if there were (as I have found) a serious case to be tried, the Tribunal was
24 entitled to judge that it was a weak case for the reasons it effectively gave."
25 So you can say, "Right, well, it's gone over the threshold for stage 1, but we think it's
26 not gone that far over the threshold, so we take it into account when applying the

1 balance of convenience stage 4".

2 So we say this is a weak case for the reasons I've given. It doesn't have exclusionary
3 effects in the downstream markets, any of the three, allegedly abusive terms.

4 We also do maintain that this is effectively an application for mandatory injunction,
5 because the status quo was when the application was made that we were not
6 supplying data to Perse under the bilateral agreement, and the injunction seeks to
7 change that status quo.

8 However, we do have in mind the comments of Lord Hoffmann in National Commercial
9 Bank Jamaica Limited that was cited in the judgment you sent to us last night,
10 Dahabshiil that:

11 "Arguments over whether the injunction should be classified as prohibitive or
12 mandatory may ultimately be barren. What matters are the practical consequences of
13 the actual injunction." Paragraph 49.

14 While I'm there on Dahabshiil, very briefly, I would stress that, of course, every
15 application for an interim injunction has to be considered on its own facts. In that case,
16 it may have been assessed by the court that damages were not an adequate remedy.
17 The facts on our case are very different. Sorry, the damages were not an adequate
18 remedy for the applicant, Dahabshiil. We say in our case, it's very different. They are
19 an adequate remedy for Perse.

20 MR JUSTICE MORRIS: If you're right on that, that's the end of it.

21 MS SMITH: If we're right on that, that's the end of stage 2, but even if we're not right
22 on that, they are not inadequate. We go on to stages 3 and 4. And that's because, to
23 be weighed against the weak case, we say that Perse has under competition law,
24 there is a substantial risk of loss and damage not only to ElectraLink, but also to the
25 DTS user group and other third parties, such as data subjects and other users of
26 ElectraLink data analysis service if the data analysis service is switched off.

1 Perse is unable to offer a cross-undertaking that could compensate for such loss. It's
2 not just the loss that may that ElectraLink might have to indemnify the DTS user group
3 against, but in the balance of convenience, in my submission, you also have to take
4 into account the loss that could be suffered by millions, potentially five million
5 data-subject tenants, as a result of breach of their data rights.

6 So even if that might not eventually lead to any -- we, my client might not be able to
7 have to identify those data subjects, that is a risk of harm that in my two third parties
8 that, in my submission, you also need to weigh in the balance when looking at the
9 question of balance, of convenience. It's not just harm to Perse versus harm to
10 ElectraLink. When you're looking at the balance of convenience, it's potential harm to
11 Perse versus potential harm to ElectraLink and all the other third parties affected
12 potentially by the imposition of the injunction. And on that basis, we say the injunction
13 should not be granted.

14 Thank you.

15 MR JUSTICE MORRIS: Yes. Thank you.

16 The questions we raised at lunchtime included a question of, first of all, whether there's
17 a tripartite with arbnco.

18 And did I ask a question about the justification in general for a tripartite agreement,
19 why a tripartite agreement was required?

20 MS SMITH: Yes. The second question I hope I've given you the answer by taking
21 you through the relevant provisions of the DTSA and the bilateral agreement,
22 particularly clause 8(2) and the DTS requirements --

23 MR JUSTICE MORRIS: It's required because of 8(2), and it's all to do with ...?

24 MS SMITH: And it's required. We cannot supply Perse under the bilateral agreement
25 for onward supply to third parties such as landlords and brokers because of
26 clause 8(2) and the other clauses that are referred to in Linnane's witness statement.

1 MR JUSTICE MORRIS: Because you need consent?

2 MS SMITH: Because we need either -- we can't supply two third parties under
3 paragraph 8(2), we can't allow ElectraLink to supply to third parties under
4 paragraph 8(2), unless it is as set out in the DPIA, or it's at the direct request of an end
5 user. You'll recall if you go back to paragraph 8(2), that's what the clause says.

6 MR JUSTICE MORRIS: So clause 8(2) of the bilateral.

7 MS SMITH: Yes. So that is why we can't allow them to provide to third parties under
8 the bilateral agreement, why we then require a tripartite arrangement with ElectraLink,
9 Perse, and let's say intermediary broker or landlord --

10 MR JUSTICE MORRIS: Landlord or broker.

11 MS SMITH: -- is because under schedule 9 of the DTSA, every DAS customer to
12 which the ElectraLink data is eventually supplied, including those who get it down the
13 line, have to have been approved by the DTS user group under annex A of schedule 9,
14 and have to have entered into a separate DAS contract as set out in schedule 9.

15 MR JUSTICE MORRIS: That can't be right, can it? There's not a requirement for a
16 DAS contract between you and the landlord.

17 MS SMITH: What has to be approved -- and this is set out in Mr Linnane's
18 statement -- what has to be approved by the DTS user group is the identity of the DAS
19 customer and the DAS use case. So every potential entity, to use a neutral term, to
20 which our data flows -- they have to be approved and the use to which they are
21 proposing to put that data also has to be approved by the DTS user group, and that
22 has to be reflected, that approval, that that individual entity is approved, and that the
23 use case for which they're going to use that data is approved -- the DTS user group
24 have to give consent. That also has to be reflected in the terms of a DAS contract
25 between my client ElectraLink and any entity to which their data flows.

26 MR JUSTICE MORRIS: My understanding to date has been a DAS contract and

1 a DAS customer is somebody to whom there is a direct supply by ElectraLink.

2 MS SMITH: Well, if you look at schedule 9 -- I'm not going to take you back to it. It's
3 set out in Mr Linnane's witness statement. That's not our understanding of schedule 9.
4 The position as regards arbnco is that I do not understand there is currently a tripartite
5 agreement with arbnco, but there will have to be one.

6 MR JUSTICE MORRIS: Is there any evidence that you've been negotiating with them
7 about it or that you're insisting on it?

8 MS SMITH: I'm not sure I can give evidence, but I can certainly take instructions.

9 MR JUSTICE MORRIS: Yes.

10 MS RIEDEL: But you have entered -- so there is a current contract and there is
11 a supply of data to arbnco without a tripartite agreement being --

12 MS SMITH: Without a tripartite agreement but with tenant consent. I showed you
13 arbnco's website, you will recall, that they had to get tenant consent.

14 MS RIEDEL: Yes.

15 PROFESSOR AKMAN: The website is a bit ambiguous, though, that they require
16 tenant consent.

17 MS RIEDEL: But even beyond that, I thought that you were saying that under the
18 terms of your agreement with the user group, that (overspeaking).

19 MS SMITH: I am, and I'm saying that will have to be entered into with arbnco. It is
20 not in force at the moment, though there is a supply of data. That is something that
21 has been highlighted by these proceedings and that although they do provide tenant
22 consent, it's not under (inaudible).

23 MR JUSTICE MORRIS: How long have you been supplying this data to -- April 2024?
24 No, 2025?

25 MS RIEDEL: No, it's recent.

26 MR JUSTICE MORRIS: Recent. Okay.

1 MS RIEDEL: But didn't Mr Linnane say that everybody has to have a tripartite
2 agreement?

3 MS SMITH: So that's the position (several inaudible words).

4 MS RIEDEL: How many -- I think --

5 MR JUSTICE MORRIS: How many other tripartites do you have?

6 MS SMITH: I think I made submissions on that regard. I can't remember the name of
7 the blooming tripartite. It's in Mr Linnane's evidence.

8 MS RIEDEL: Yes. I think I remember there being one mentioned.

9 MS SMITH: There is one. I think that's paragraph 63 and 54 of --

10 MS RIEDEL: MyUtilityGenius.

11 MS SMITH: Can I just have a look at that? Because it's not slightly -- there are two
12 paragraphs that you need to look at in that regard. It's 53 and 64, or 54 and 63. Let
13 me just have a look at Mr Linnane's first witness statement.

14 Yes. Paragraph 54, page 96 of the hearing bundle, tab 5, is he says he:
15 "Raised the possibility with our customers of a reseller model. It became clear that
16 ElectraLink had a number of customers including Perse (including for example,
17 DecisionTech, Power and MyUtilityGenius) interested in a reseller model that would
18 enable them to offer data services to third party intermediaries based on DAS
19 Reports ..."

20 So those are the people with whom -- as well as Perse, there are four in
21 total -- customers with whom ElectraLink has been discussing reseller arrangements.
22 Paragraph 63 -- obviously, we have not concluded any reseller or tripartite
23 arrangements with Perse, but we have -- paragraph 63, page 97 on
24 29 March 2024 -- finalised an agreement with MyUtilityGenius.

25 MR JUSTICE MORRIS: Thank you. Five minute break for the transcript. We're going
26 to have to have a break for the (inaudible). So we can go on till 6.00, did you say?

1 | I mean, obviously we want to give you sufficient time.

2 | MR JONES: Sir, thank you, and I do appreciate that. I will be as short as I can.

3 | MR JUSTICE MORRIS: I know you will, but I think what I'm being told by (inaudible)

4 | is that we can go beyond 5.30.

5 | MR JONES: I'm very grateful.

6 | MR JUSTICE MORRIS: I don't want you to be squeezed into that.

7 | MR JONES: I understand. I'm grateful, sir.

8 | MR JUSTICE MORRIS: Fine. I think we need a five-minute break. I've just got some

9 | questions. I think from my part -- just so that you are aware, apart from one question

10 | I asked you, was in relation to stage 2, I'd like to know the distinction between the

11 | claim that Perse will go out of business within two months, and --

12 | MR JONES: I'm sorry --

13 | MR JUSTICE MORRIS: Sorry. Step 2, damages and adequate remedy for you.

14 | MR JONES: Yes.

15 | MR JUSTICE MORRIS: You put it on two bases, certainly in your skeleton. 1 is your

16 | submissions in response to the suggestion that you won't go out of business.

17 | MR JONES: Yes.

18 | MR JUSTICE MORRIS: And 2 is, assuming you don't go out of business, the so-called

19 | reputational and quantifiable loss.

20 | We'd also be interested to hear what you say about the adequacy of the

21 | cross-undertaking at stage 3. In particular, we raised the question of whether there

22 | would be any backing from that undertaking from, for example, Mr Stark.

23 | The other question I also would like to hear you on was in response to Ms Smith's

24 | suggestion that whilst you might have a defence under article 6 in relation to a claim

25 | for breach of the data protection legislation, relying on the fact there's an injunction,

26 | her suggestion that the DTS users would not have such a defence. I think you've

1 touched upon that last week, but I'd like to revisit those, just in case you haven't got
2 enough to think about.

3 MR JONES: Thank you very much.

4 MR JUSTICE MORRIS: We'll start at half past -- eight minutes. Okay. Thank you
5 very much.

6 (5.22 pm)

7 (A short break)

8 (5.33 pm)

9 MR JUSTICE MORRIS: Yes. Mr Jones, when you're ready.

10

11 Reply submissions by MR JONES

12 MR JONES: Sir, can I start with the question: why are we here? I don't mean that to
13 sound overly existential, but there are moments in --

14 MR JUSTICE MORRIS: Well, I have to say, I'm beginning to wonder. But there we
15 are.

16 MR JONES: I said early on in my submissions last week that whenever ElectraLink
17 say we are willing to provide certain types of data, one always needs to test it and say:
18 until when, and on what terms, and what are the conditions, and so on. I reiterate that
19 now.

20 Sir, you asked an open question, to what extent it's going to be necessary for you -- the
21 tribunal -- to go through all of the correspondence and the offers. It's a good question,
22 and it's true to say that there's been back and forth and there's been movement on
23 both sides and they've tried to reach satisfactory conclusions and not been able to.

24 The point, which is important for my purposes, is that the offers which have been made
25 have never been sufficient to overcome the objections, based on competition law,
26 which Perse has repeatedly raised. That is critical. And it's critical because Ms Smith,

1 of course, tried to persuade you that ElectraLink is willing to provide the data. I think,
2 as she put it, there was a need -- I've lost the exact quote, but essentially there was
3 a need, my learned friend said, to allow the parties to hammer out the details. Those
4 were not her words, but words to that effect.

5 MR JUSTICE MORRIS: Yes. Not a matter for the tribunal.

6 MR JONES: Not a matter for the tribunal. Of course, to an extent one can understand
7 that. But the problem is: if, as I say the position is, there has been tough negotiation
8 and Perse has pushed and pushed and not been given something which it says is
9 competition law compliant, then there does come a point when they need to issue an
10 application as they've done here.

11 I will, because of that, just spend a bit of time. I appreciate that this is background, but
12 it's just a little bit of time on the correspondence, just to come back on a few points
13 which are relevant to this.

14 The 17 April 2025 letter from Pinsent Masons was the one sent a few days before the
15 application was issued. You've seen it and it's been referred to on several occasions.

16 I will just take you back to it, please. It's in volume C at tab 51.

17 I'm just going to pick up on three points.

18 MR JUSTICE MORRIS: Yes. Just give me a moment, please. Sorry. Yes.

19 MR JONES: The first is about landlords. You'll see at the bottom of page 663, there's
20 a paragraph 14.

21 MR JUSTICE MORRIS: Yes.

22 MR JONES: What is being said in 14.1 is that it is a breach of the agreement to
23 provide data not to end consumers, which as you know -- what they mean there is as
24 defined in the bilateral agreement. So what is being emphasised here is: to supply
25 landlords, you need to be in a tripartite agreement. That was one of the points that
26 was being emphasised in this letter. They did not say in this letter that an aggregated

1 data solution is available, and that that would not require landlords to enter into
2 tripartite agreements.

3 That proposition, that they don't need to enter into tripartite if it's aggregated, is also
4 frankly hard to square with what they say in paragraph 14 because they're relying on
5 clause 8.2, which I'll come back to. I'll come back to that in a moment. But the key
6 point for this purpose is to say they don't mention here "aggregated".

7 The second point is: in relation to supply chains A and B, down the page at 17.3, they
8 say they're not going to withdraw the termination notice. They did not say that they
9 would negotiate a different arrangement for A and B, and that wasn't said until the
10 witness statement. And in page 663, you'll see at paragraph 11, where they were
11 talking about confidentiality arrangements -- you've seen this already, but
12 11.2.2 -- what the proposal was was to keep the identities away from sales managers
13 until after the agreements have been signed by all parties.

14 Now, what happened after this on the 22 April -- could I take you please to volume G,
15 tab 142, page 1841. This was a letter sent on the day.

16 MR JUSTICE MORRIS: Okay.

17 MR JONES: This is the date of the application. The letter was sent shortly before the
18 application, but it was the date.

19 MR JUSTICE MORRIS: I've got the wrong document here. What page number?

20 MR JONES: 1841.

21 MR JUSTICE MORRIS: My 1841 is your letter of 29 April. How weird. Are you looking
22 at the 22 April letter?

23 MR JONES: That is very weird.

24 MR JUSTICE MORRIS: Mine is 1839. How strange. Sorry. Okay. Yes, I have it.
25 Sorry. 22 April from you.

26 MR JONES: That's right. On the next page, you'll see --

1 MR JUSTICE MORRIS: Yes.

2 MR JONES: -- that Perse does come back at paragraph 6 and paragraph 7 to discuss
3 ring-fencing and to raise its concerns with what has been suggested on ring-fencing.
4 I show you that because my learned friend said there was no attempt to discuss
5 ring-fencing before the application was issued. But what in fact was happening was
6 Perse was, yes, moving swiftly to issue an application because there had been already
7 a long period of discussion. But they did pick up the point about ring-fencing, in this
8 letter on the same day. There is also -- it's a tab 144 for me, but it's the letter of 3 May.

9 MR JUSTICE MORRIS: 3 May, from Macfarlanes.

10 MR JONES: Yes. Mine has also --

11 MR JUSTICE MORRIS: Mine, interestingly, hasn't got a pagination at all. So, 3 May,
12 beginning paragraph 1, "The position which Perse has taken".

13 MR JONES: So I'm going to skip this point. I can't see the page. My pagination has
14 also gone a little bit haywire.

15 MR JUSTICE MORRIS: I've got it in twice, actually.

16 MS RIEDEL: 1849.

17 MR JONES: It's the letter which was sent shortly after exchange of skeleton
18 arguments, which among other things said "please inform us urgently", to ElectraLink,
19 "if you're willing to turn supply chains A and B back on".

20 MR JUSTICE MORRIS: Yes.

21 MR JONES: So there was a long series of exchanges in which Perse was pushing for
22 more information. Most recently, what it culminates in is the correspondence which
23 was added to your bundles, which has taken place since last week's hearing.

24 MR JUSTICE MORRIS: Yes.

25 MR JONES: I asked you to read, and I think you had already read, the final letter in
26 that list.

1 MR JUSTICE MORRIS: From you, 13 May.

2 MR JONES: Yes. If one just picks that up briefly, please. In my bundle, it's tab 154,
3 page 1919.

4 MR JUSTICE MORRIS: Yes.

5 MR JONES: Going through the various issues -- just an overview -- you will see at
6 1.2, in relation to supply chain A, ElectraLink had in their letter come back and said,
7 "We need further undertakings".

8 MR JUSTICE MORRIS: Yes.

9 MR JONES: Over the page at paragraph 2.1, in relation to supply chain B, ElectraLink
10 had shifted position again and said that they actually need reseller and tripartite now.

11 MR JUSTICE MORRIS: Right.

12 MR JONES: For supply chain B.

13 MS SMITH: No, they don't say that they need reseller and tripartite arrangements for
14 supply chain B. They say, "We cannot put back on supply chain B unless you have
15 entered into reseller and tripartite arrangements for supply chain D, because we
16 cannot distinguish between the two supply chains. And I'm afraid we cannot trust you."
17 Not (overspeaking).

18 MR JUSTICE MORRIS: Just tell me where in your letter you said --

19 MS SMITH: That is --

20 PROFESSOR AKMAN: 3.2.

21 MR JUSTICE MORRIS: 3.2 of which, sorry?

22 MS SMITH: Tab 151.

23 MR JUSTICE MORRIS: 1915, 3.2, yes?

24 MS SMITH: Yes.

25 MR JUSTICE MORRIS: Okay.

26 MR JONES: I see there's an ambiguity. I take that point. You'll read that paragraph

1 and see why we'd misinterpreted it. But there it is.

2 Back on page 1920, 2.4. They had said that they would need to be "significant
3 amendments" to the tripartites. So they're not, as it were, good to go.

4 MR JUSTICE MORRIS: Yes.

5 MR JONES: In relation to aggregated data, if you turn forwards to page 1922 --

6 MR JUSTICE MORRIS: Yes.

7 MR JONES: -- paragraph 3.9, you will see a summary of the reasons why Perse has
8 not, in the weeks since the last hearing, been able to agree with the aggregated data
9 solution. These are not plucked out of thin air here for the first time. These have been
10 trailed in the previous correspondence, so it's simply summarising what has gone
11 before, in relation to which ElectraLink hasn't been able to give an answer.

12 Over the page on 4.2, you will see that the revised bilateral agreement, which it is now
13 said will be offered, also is not final. So this is what apparently will be offered from
14 August 2024. But there's no detail about that.

15 MR JUSTICE MORRIS: That would be a precondition to the supply A and B.

16 MR JONES: Yes.

17 MR JUSTICE MORRIS: Okay. Yes.

18 MR JONES: Then over the page at 5.3, picking up on the confidentiality safeguards,
19 the key point here is that if they are competitors or potential competitors, confidentiality
20 safeguards need to ensure that those individuals within ElectraLink who are
21 responsible, yes, for sales -- also for other commercial decisions, but principally
22 sales -- do not have access to the data.

23 That's what hasn't been offered. What has been offered is different sorts of
24 undertakings. And of course, part of the difficulty here is that there is just
25 a fundamental difference between these parties as to whether they are in actual or
26 potential competition. Because if ElectraLink agreed with Perse that they are, it would

1 be offering far more than it is here, because any competition lawyer would be saying
2 to them, "You need really rigid Chinese walls," and these are really difficult, not sort of
3 contractual undertakings of the sorts which have been offered.

4 Sir, can I move on from that because I'm now taking too much time on that
5 correspondence. That broadly tells you why we are here as well as, I hope, picking
6 up on some other points relevant to other heads of the claim.

7 I'll deal very briefly with competition on downstream markets because it comes down
8 to essentially the question which Ms Riedel posed a couple of times to Ms Smith,
9 which is whether or not Ms Smith accepts that Perse's clients have a choice to make
10 between taking the product from Perse or taking the product from ElectraLink, in which
11 case they would have to do more themselves or get other add-on benefits. Ms Smith
12 said she did accept that, and that is essentially the whole of my case: that is sufficient
13 for them to be in competition, because the point is that customers are choosing
14 between them.

15 Hot off the press, I have the three pages that you asked for, sir. Can I hand these up?

16 MR JUSTICE MORRIS: Yes. I have a copy.

17 MR JONES: Oh, you already have it? (Handed)

18 MR JUSTICE MORRIS: Yes.

19 MR JONES: I will walk you through this and, I hope, answer some of your questions
20 as I go through. I should say this, in certain respects, is a much briefer outline than is
21 in the application because, in some of these respects, the application is fuller. But
22 what we've tried to do in the gaps which apprehended, sir, you wanted us to fill, were
23 addressing things like the effect on competition and which markets were being referred
24 to. So, that's what we've tried to do. It was put together at pace over lunch. We can
25 provide something for you if that would help. But that's what it's intending to do.

26 It does put the obligation to supply and the unfair terms arguments around in the other

1 order to how they appear in the application, as I did in my opening submissions to you.
2 Because as I said in my opening submissions, these are overlapping concepts
3 because an argument that fair terms are not being offered is quite hard to distinguish
4 from an argument of constructive refusal to supply.

5 MR JUSTICE MORRIS: Isn't it the same thing?

6 MR JONES: It's essentially the same.

7 MR JUSTICE MORRIS: I mean, constructive refusal.

8 MR JONES: Yes, essentially, and here it's --

9 MR JUSTICE MORRIS: If you offer to supply on terms which are unfair for whatever
10 reason, primarily because they have an effect on competition, then that's
11 a constructive refusal to supply, isn't it?

12 MR JONES: Yes. So, we've set out for that reason the obligation to supply,
13 alternatively, we say an obligation supply on fair terms, a paragraph 2. Then over the
14 page, the arguments have been shuffled under those two headings, a refusal to
15 supply, and then there's the unfair terms arguments which are set out.

16 So, that is the way in which it is put. Back on page 1, the obligation to supply, we say,
17 derives from those four different features of this case. Those are the four which
18 I identified in my opening submissions last week.

19 At paragraph 3, Perse relies on the format as set out above, individually or in
20 combination. The reason that we've put it that way is that case law does recognise
21 a degree of flexibility. It isn't the case, I say, that there is a, as it were, fixed checklist
22 of features that one needs to identify in order to trigger the obligation to supply. The
23 reason I'm framing it like that now, sir, is in answer to one of your questions, which is
24 do we say that it is necessary for all of these arguments that ElectraLink is a potential
25 competitor? And the answer to that is no.

26 MR JUSTICE MORRIS: Right. Look at paragraph 2, you put square brackets around

1 2.4. Okay? And you say, even omitting 2.4, there is still an abuse?

2 MR JONES: I would say that. I would say that. But we're not -- I should emphasise
3 we're not, as it were, weak on 2.4 --

4 MR JUSTICE MORRIS: No, no, I absolutely understand that.

5 MR JONES: But I would say that, yes. Because these are, factors that can be looked
6 at --

7 MR JUSTICE MORRIS: Okay, and my question for you is, if you look at proposition
8 one, which is your general statement about what an abuse is, if ElectraLink are not
9 downstream competitors, how would the conduct impair genuine undistorted
10 competition in the relevant market?

11 MR JONES: One would have to look at the other factors, by which I mean, if you have
12 a situation which we say we have here, where the dominant company is established
13 to provide the service, so it's providing the service to our competitors, but it cuts us off,
14 even if ElectraLink isn't one of our competitors, all of our other competitors have the
15 data.

16 MR JUSTICE MORRIS: So, that argument is that you're saying in that circumstances
17 you're relying on a distortion of competition in downstream market between you and
18 your existing competitors because you're going to be cut off?

19 MR JONES: That's right.

20 MR JUSTICE MORRIS: Okay.

21 MR JONES: That's what it would be.

22 MR JUSTICE MORRIS: All right.

23 MR JONES: So, it is -- I should just complete that particular point. The
24 unfair -- I apologise. The fact that they are actual potential competitors is relevant and
25 is a necessary part of -- over the page, under the unfair terms heading -- the criticisms
26 that we make of tripartite agreements. Because, of course, that depends on saying

1 sharing our customer list with ElectraLink would be a breach of chapter one. So, it is
2 a part of that particular argument.

3 MR JUSTICE MORRIS: That's (inaudible) in relation to that.

4 MS RIEDEL: I don't want to hold you up, but your point about you would be cut off,
5 whereas other of your competitors would not be, but of course, our -- based on the
6 submissions, they would be subjecting themselves to the same terms which
7 you -- you're not accepting those terms, but they would have accepted those terms.
8 So, in a sense you are just refusing to do something that they agree to do? So, is
9 that ...

10 MR JONES: Madam, that is a fair point if those definitely are the facts. The reason
11 I say that is we of course have the complexity here of not actually being able to get
12 supply even for A and B, and we're being told that there will be a new future bilateral
13 agreement, but it hasn't been drafted yet and so on. But yes, I accept, apart from that,
14 if it really were the case that A and B could be switched on tomorrow and that
15 ElectraLink were going to do that, then I'd accept that point, yes.

16 So, I was going to move on from this note.

17 MR JUSTICE MORRIS: Yes, you have the note.

18 MR JONES: In relation to the data, could I just make one point of clarification, which
19 is that Ms Smith showed you paragraph 34 of Ms Ogborne's statement, which was
20 where they had the graph showing monthly usage.

21 MR JUSTICE MORRIS: Yes.

22 MR JONES: I just want to emphasise this. As I understand it, Ms Smith took you to
23 that to explain why ElectraLink takes confidentiality so seriously. That was an
24 illustration of that. I don't dispute that; that makes sense that that would be a concern
25 of theirs if they have access to that sort of data.

26 I do, however, emphasise that that is not the data that Perse gets from ElectraLink.

1 | Perse gets, in relation to domestic premises, as I emphasised in my own opening,
2 | estimated future annual consumption data.

3 | MR JUSTICE MORRIS: Okay.

4 | MR JONES: In relation to the contracts ...

5 | Before I go to the contracts, I will just circle back to the arguments on abuse, just to
6 | make this point. In relation to consent, we have been told and you have been told that
7 | arbnco are relying on consent as a ground to access tenant data. Now, that --

8 | MR JUSTICE MORRIS: We're being told that there's a website saying that they get
9 | consent; is that what you mean?

10 | MR JONES: That's right. And you were shown -- there's actually two versions of that
11 | website in the bundle and you were shown one which only has half of the text. Can
12 | I show you the one with the full text, which is in volume C, tab 32.

13 | MR JUSTICE MORRIS: Am I right in thinking this shows what they say they do?

14 | MR JONES: Yes.

15 | MR JUSTICE MORRIS: Is there any evidence to suggest that (a) they've actually they
16 | actually obtained it, and (b) that it's something which ElectraLink required that they
17 | do? I don't know.

18 | MR JONES: There's no evidence.

19 | MR JUSTICE MORRIS: No.

20 | MR JONES: Well, my learned friend is saying it's in a witness statement, so I shan't
21 | answer that because --

22 | MR JUSTICE MORRIS: Go to the bit you want, I'm sorry. Carry on.

23 | MR JONES: Page 596.

24 | MR JUSTICE MORRIS: Yes.

25 | MR JONES: What you were shown previously was at the level two bit. But you'll see
26 | here, level one, which has also broken out, says:

1 "Solution: Get access to energy consumption data for your commercial real estate
2 portfolio without the need for initial tenant engagement."

3 The short point here is we just don't know what arbnco are doing. And I want to
4 emphasise that whereas it is said by ElectraLink that they are getting tenant consent,
5 Perse does not know that, and I can't accept that for today's purposes because this
6 website is opaque; Perse does not itself consider it would be practical to obtain tenant
7 consent for large portfolios of properties; and the whole arrangement with arbnco has
8 caused a lot of suspicion in these proceedings. Because, sir, it won't have escaped
9 your notice that the so-called partnership, as arbnco calls it, was announced on the
10 day that Perse was suspended. You asked three times whether arbnco has a tripartite
11 agreement, and it is pretty extraordinary that that was not answered until it was asked
12 again following my learned friend's submissions in a context where she had been
13 criticising, just 20 minutes earlier, my clients for, she says, not mentioning things in
14 their witness evidence.

15 Arbnco, if they are obtaining this on the basis of consent, as is alleged according to
16 ElectraLink, could only do that with a tripartite. Because what they're now saying to
17 us is you can have aggregated data with a bilateral, but for anything else, you need
18 a tripartite.

19 This isn't something which has just fallen through the cracks; the day they suspended
20 my client for, they say, breaching all the arrangements, supplying data to landlords,
21 et cetera, et cetera, this new arrangement is announced.

22 MR JUSTICE MORRIS: Can I just understand that sentence that you just referred me
23 to? This is on their website. This is them explaining the challenges.

24 MR JONES: Yes.

25 MR JUSTICE MORRIS: The challenges accessing the data from your -- this is them
26 advertising to the landlord, isn't it?

1 MR JONES: Yes. Yes.

2 MR JUSTICE MORRIS: And they say, the answer to that is, "We can get access to
3 the energy consumption data for your [landlord's] real estate without the need for initial
4 tenant engagement".

5 MR JONES: That's what it says.

6 MR JUSTICE MORRIS: Right, so that suggests they can get the data before they get
7 consent. That's what -- on its face, I mean, who knows.

8 MR JONES: I should say -- I don't want to be casting aspersions on them; all I'm
9 saying is we can't accept what is being said. One answer to that might be they use
10 aggregated data until they've got consent. That would be a theoretical answer to that
11 particular point. So, I'm not saying this shows you that they are not getting -- they're
12 not following the process that --

13 MR JUSTICE MORRIS: You're just saying it's all very opaque.

14 MR JONES: It's all very opaque.

15 MR JUSTICE MORRIS: And we don't know. Okay.

16 MR JONES: So, I won't go back to the DPIA unless that would assist, given the time --

17 MR JUSTICE MORRIS: No.

18 MR JONES: -- so I'll move on from that.

19 I will, though, just make this point about all of those arrangements, which is that
20 Ms Smith, in her final remarks before she sat down, said that a DAS customer is not
21 just Perse, but everyone down the line from Perse.

22 MR JUSTICE MORRIS: Yes.

23 MR JONES: That is not something that's been said before and it's also just clearly
24 wrong. And I'll just show you D.

25 MR JUSTICE MORRIS: Well, I picked that up -- I was surprised when I heard that.

26 MR JONES: Volume D, tab 59 is the DTSA. DAS customer is defined in schedule 9.

1 MR JUSTICE MORRIS: Yes, got it. Page, sorry?

2 MR JONES: Page 918, which is in schedule 9 here. It has this horrible
3 cross-reference to "DAS Data Transfer Catalogue Customer".

4 MR JUSTICE MORRIS: Yes.

5 MR JONES: So you see that on the next page, "DAS Data Transfer Catalogue
6 Customer [is] a potential DAS Data Transfer Catalogue Customer who has entered
7 into a DAS Contract with the Service Controller ... for Data Analysis Services."
8 That's who the DAS customer --

9 MR JUSTICE MORRIS: So the service controller is ElectraLink?

10 MR JONES: ElectraLink.

11 MR JUSTICE MORRIS: Yes, that's what I thought.

12 MR JONES: So is Perse.

13 MR JUSTICE MORRIS: Or anybody else.

14 MR JONES: Well, or anybody else. But it's not Perse's customers.

15 MR JUSTICE MORRIS: No. It's not the landlord.

16 MR JONES: No.

17 MR JUSTICE MORRIS: No.

18 MR JONES: Just before I come to adequacy of damages, I do need to respond to
19 a point which was made about the balancing exercise where Ms Smith said the
20 reliance on legitimate interests by Perse appeared to her to be something which had
21 been put forward for the first time in litigation, so something, essentially, which we
22 dreamt up for litigation. Clearly, that is a serious accusation. It's not something which
23 has been said before, but it's not something which is an issue.

24 I can tell you, sir -- and if it would help, I can provide this -- that after Ms Smith said
25 that, I was shown an eight-page legitimate interests assessment prepared in
26 February 2024 on the ICO template by my client, which goes through that. So, there

1 it is. That's the response.

2 Adequacy of damages.

3 MR JUSTICE MORRIS: Yes, just ... Yes, I think if possible, it would be helpful to see
4 that document.

5 MR JONES: Yes.

6 MR JUSTICE MORRIS: The eight-page, and obviously helpful for ElectraLink to see
7 it.

8 MR JONES: Of course.

9 Adequacy of damages. In my respectful submission, Ms Smith mixed up two different
10 issues in her submissions on this. There's a question of whether the services can be
11 provided at all, including by Perse's competitors on the one hand versus on the other
12 hand, the impact on Perse if it is unable to access ElectraLink data. The reason that
13 that is an important distinction is, in a nutshell, that Perse's business is built on its
14 ability to access the data from ElectraLink.

15 MR JUSTICE MORRIS: Two questions. One is, could they use alternative sources?

16 MR JONES: Yes.

17 MR JUSTICE MORRIS: And two is that, even if they could, how would it affect their
18 business? Is that it?

19 MR JONES: Yes, that's right, that's right.

20 Mr Sachdeva, in his first witness statement, which I'll just show you, it's in B, tab 4,
21 page 76.

22 MR JUSTICE MORRIS: Just bear with me. I'm struggling with bundles at the moment.

23 (Pause)

24 Yes.

25 MR JONES: From paragraph 93, over several pages describes what the impact would
26 be on Perse of the suspension. So, these are the paragraphs that are addressing that

1 particular point.

2 MR JUSTICE MORRIS: Yes.

3 MR JONES: Ms Smith took you then to Mr Linnane's witness statement -- and, much
4 as I'm doing now, just gave you paragraph references due to timing -- but in which
5 Mr Linnane had criticised various aspects of Mr Sachdeva's witness statement.

6 I just want to take you to the answer to those points. So that is Mr Sachdeva second,
7 tab 8, page 157. From paragraph 10, he addresses all of those points that you were
8 taken through, including at paragraph 11, the criticism which you were asked to read
9 by Ms Smith that he had been selective in providing just two purchase orders. He
10 says, well, there are only two.

11 In paragraph 12, the criticism that you were asked to read about a share transfer,
12 which explains the inferences which are being drawn about that are wrong. He goes
13 on over the page to address the points about whether Perse could make adjustments
14 to its costs; that's paragraph 14. Looks at that in some detail. He explains it's a small
15 company:

16 "Me and my fellow directors' livelihoods depend on earning our salaries and we have
17 dependents who we support."

18 The point about the £9 million injection is addressed at paragraph 16, and at
19 paragraph 17, there is the evidence that Stark would not be able or would not, rather,
20 step in to support the company. And on that basis, the evidence is that it would go out
21 of business.

22 MR JUSTICE MORRIS: Yes.

23 MR JONES: Now, sir, I take the point that you can take into account whether
24 a shareholder could and rationally would step in. I don't dispute that; as a point of law,
25 as a point of principle, I take that point. But I made two points about that in my
26 opening, and I'll just reiterate them.

1 The first is when you ask yourself whether it would be rational for someone like Stark
2 to step in, you're entitled to take into account the adequacy of damages to compensate
3 for the harm that's been done. So, the points overlap. What I mean by that is, if you
4 accept the submission which I made that even if Perse is able to stumble on until trial,
5 it will have suffered damage which is essentially impossible to do anything other than
6 estimate in compensating Perse, and for that reason, damages are not adequate, if
7 you accept the logic of that, then in a sense that rolls over to Stark, because the
8 argument that, "Well, Stark should just put their money where their mouth is and
9 support the company and then get damages" falls apart if damages are not actually
10 going to compensate them for the losses. So, the points overlap.

11 The second point which I emphasise, and I do emphasise again, is that I do not have
12 to persuade you that the company would go out of business.

13 MR JUSTICE MORRIS: No. Well, I mean, that's why I asked. Because you very
14 much last week didn't emphasise the going out of business point in your evidence, and
15 your starting point was we've got two months left, et cetera. But what I came away
16 with at the end of last week was that you were placing the case not primarily or
17 necessarily on that basis, but that there was other unquantifiable or uncompensatable
18 damage, even if they stayed in business.

19 MR JONES: That's right. That's what I emphasised last week. And, of course, as
20 I said, in any event, we do say that they would go out of business, but absolutely right,
21 it's not necessary for the case to be put that high.

22 MR JUSTICE MORRIS: Yes. And the case made against you is that the
23 unquantifiable reputational damage, the high watermark of it is paragraph 15 and
24 that's all speculative. I think that's what's been said.

25 MR JONES: Well, sir, and I've shown you it's not -- it's said that the high watermark
26 is paragraph 15. Mr Sachdeva's witness statement goes through all of the services.

1 His first one, the paragraph that I took you to and following, goes through all of the
2 services and explains why Perse wouldn't be able to provide them. The point I'm
3 making is even if they could provide them, you know, a bit or find some sort of
4 substitute for some of them, the points he makes are still valid. It's just that you might
5 conclude, "Well, they won't go out of business, they just will lose a lot of customers
6 and their reputation will be harmed, and so on and so forth".

7 And that is where I say it's not adequate compensation in damages if what we are
8 having to do to obtain damages is speculate on things like: which customers would
9 have remained, which customers would have expanded their purchases from Perse.
10 How you look forwards and say, well, now that Perse has taken this hit to its
11 business -- remember not just reputation, but customer base, goodwill, staff -- and how
12 you would ask, how long is it now going to take for Perse to rebuild its business in
13 future, it's finger in the air territory.

14 MR JUSTICE MORRIS: Okay. All right.

15 MR JONES: Damages to ElectraLink. So, I said in opening and I stand by it, that
16 these are fanciful. Not just speculative, because on the question of speculation,
17 there's no evidence from any of these user group members, for example, that they
18 would terminate the arrangement.

19 MR JUSTICE MORRIS: Some of these user group members are, in fact the
20 shareholders in ElectraLink.

21 MR JONES: I don't know if that is right. They're users --

22 MR JUSTICE MORRIS: So, the users include the DNOs and other energy -- any
23 market participants; is that right?

24 MR JONES: Whether it includes the DNOs, I don't want to --

25 MR JUSTICE MORRIS: All right.

26 MR JONES: It certainly includes other market participants. As a matter of fact, there

1 are six members, and Mr Stark is one of them, of the user group, but that is not
2 currently in evidence. But it's a small group of people we are talking about, and they
3 are representative of the users, as I understand it from ElectraLink.

4 Now, the hypothesis that has been put to you is that that user group would stop
5 providing DAS services. That was how it was put. So, the DAS --

6 MR JUSTICE MORRIS: Full stop.

7 MR JONES: Full stop. But actually the logic has to go even further, because when
8 you asked, "Well, why wouldn't they just stop providing it in order to be onward
9 supplied to Perse?" The answer was because ElectraLink will have access to the data
10 and therefore, if it were under a court order to provide the data to Perse, it would have
11 to do it.

12 Ms Smith took that to say they would therefore need to cut off all DAS services.
13 Actually, the same logic, though, goes a step further because ElectraLink would have
14 access to the data even if it stopped providing DAS services because it would still be
15 providing the fundamental services that it was set up to provide between all the users.
16 So, actually, for this to work, they'd have to just pull the whole thing down. And it is,
17 in my submission, just not plausible that they would do that because the circumstance
18 would be you would have imposed a court order until trial. Presumably, part of the
19 reasoning in your judgment would be, when we look at the DPIA, which has been
20 approved by the user group, it looks as though they had landlords in their sights
21 because that was what they signed off on. So, the idea that the user group is going
22 to look at that and feel that they've somehow been so badly treated by ElectraLink that
23 they're going to pull the whole edifice down, I do say that that is fanciful, sir.

24 The DPIA claims. Small point of detail, but you were shown my skeleton
25 argument -- I think it was paragraph 68 -- but you were shown a sentence which said
26 that the services were provided by Perse since mid-2020 and Ms Smith said they

1 hadn't known that until the skeleton. Just to be absolutely clear, that is in the evidence
2 and it's in a paragraph of the evidence which I took you to in which Mr Sachdeva says,
3 essentially, "We, Perse and ElectraLink, were hand in hand developing this", and
4 they --

5 MR JUSTICE MORRIS: This is your disputed issue of fact.

6 MR JONES: That's precisely what it is.

7 MR JUSTICE MORRIS: Mr Sachdeva's says they've known since 2020 and
8 Mr Linnane says, no, we didn't.

9 MR JONES: Yes.

10 MR JUSTICE MORRIS: And it's your argument, your point, based on Sports Direct
11 about conflicts of evidence.

12 MR JONES: Yes.

13 One of your questions to me was what would be the defence of DTS users to a DPIA
14 claim? My answer to that has two parts. The first part is, just realistically, again, I said,
15 it's somewhat fanciful, that people are going to look at a court order and say, let's get
16 together a group claim to try and get damages for users on the basis of a court order.
17 But in terms of the precise question, what I said in opening was that the defence would
18 be under article 6 GDPR, subparagraph F, which is the legitimate interest defence.
19 That was where I was saying that they would be able to say, we're --

20 MR JUSTICE MORRIS: They being the DTS users?

21 MR JONES: They being the DTS users, they would say legitimate interests, that
22 needs to be either their legitimate interest or a third party's legitimate interest. In this
23 context, the third party would be ElectraLink because you would have injuncted them
24 to carry on providing the data.

25 MR JUSTICE MORRIS: Okay.

26 MR JONES: And so the answer would be legitimate interests under F for that reason.

1 MR JUSTICE MORRIS: A third party.

2 MR JONES: What I was emphasising was, you see that under the shadow of C, I think
3 is how I put it, because C was essentially if you're required to provide data as a matter
4 of law. And I did accept that DTS users couldn't be said to --

5 MR JUSTICE MORRIS: C would not apply strictly to the users; it would apply to
6 ElectraLink.

7 MR JONES: That's right.

8 MR JUSTICE MORRIS: Yes.

9 MR JONES: I think the only outstanding point was you asked whether Stark would
10 stand behind a cross-undertaking in damages. I see that that is a separate issue to
11 whether they would come in with funding. We have put in a call to Mr Stark. As soon
12 as I have an answer, we will write in to the tribunal and let you know.

13 PROFESSOR AKMAN: If I can just --

14 MR JUSTICE MORRIS: One minute. Your question? Go ahead.

15 PROFESSOR AKMAN: Can I take you back to your draft claim on abuse of
16 dominance? And I'll be very quick. Could you be a little more specific on which
17 downstream markets, Perse and ElectraLink, may be in actual potential competition in
18 terms of the services you already identified as the services Perse supplies?

19 MR JONES: Yes, although whether I can do that comprehensively on my feet, I'm not
20 sure.

21 PROFESSOR AKMAN: What would be your best example of them being, let's say,
22 the closest potential competitor -- on which market is competition being distorted,
23 potentially, is what I'm trying to get at?

24 MR JONES: The best example is the supply to landlords for carbon reporting. You
25 looked at that in some detail, but perhaps I'll just take you back to one paragraph that
26 you were sort of coming very close to reading, but maybe didn't quite read, which is,

1 I think, Mr Linnane, which is tab 5. If you go to page 116.

2 MR JUSTICE MORRIS: Yes, we're getting to one.

3 MR JONES: You'd spent some time looking over the prior page from around
4 paragraph 143 and discussing what that meant, and I think you maybe got as far as
5 144.

6 MR JUSTICE MORRIS: Yes.

7 MR JONES: But the real kicker is 146 on this page:

8 "CarbonTrack is an input into Perse's Carbon Reporting Service in exactly the same
9 way as QuoteRight is an input into Perse's switching services. Customers can obtain
10 the data directly from ElectraLink and use it to calculate their own carbon reporting, or
11 they can seek services from third parties such as Perse to use their own data for
12 carbon reporting."

13 So, it's the big bags versus small bags of sugar. That is the clearest example, madam,
14 but you can make similar kinds of points and I have made similar points in relation to
15 other markets. So, for example, switching, it is true to say and I did say in opening,
16 they are not in actual competition in relation to end consumer facing switching
17 services. So, they do not have a service like Labrador for example, which is in direct
18 competition with Perse. But if you look at the supply chains which exist in that market,
19 you can see that in different ways, these two companies are in competition because,
20 for example, someone like Compare the Market or MoneySuperMarket could go to
21 Perse and obtain a white-label product, or they could go to ElectraLink and obtain data
22 direct and then add their own additional sources to that data. It's the same point.

23 PROFESSOR AKMAN: Is there any evidence that ElectraLink has ever considered
24 doing more than just providing the data, and providing the carbon-reporting service
25 that could be in competition with Perse's carbon report? Obviously the data is being
26 combined with other things to provide a carbon-reporting service.

1 MR JONES: Madam, I'm trying to separate in my mind things that I have been told
2 versus your question, which is what is in the evidence and I don't want to just give you
3 evidence, so let me just see whether there's anything in the evidence.
4 Madam, I think the direct answer to that is no, there is not anything in the evidence
5 which shows them producing, as it were, a carbon-reporting service which is directly
6 equivalent to Perse's. But of course, Perse's position is that does not matter, because
7 they are, as Mr Linnane explains in 146, in any event, alternatives. So customers
8 could choose to have the value-added product from Perse, or they could choose to
9 obtain data from ElectraLink.

10 MR JUSTICE MORRIS: Okay, thank you.

11 MR JONES: Unless I can assist --

12 MR JUSTICE MORRIS: I thought Ms Smith wanted to pop up. Maybe Ms Smith
13 doesn't.

14 MS SMITH: It's only, my Lord, that the situation that we face of not knowing what the
15 answer is one way or the other as to the cross-undertaking and damages and Mr Stark
16 is relatively -- is quite --

17 MR JUSTICE MORRIS: Could you keep your voice up a bit?

18 MS SMITH: We don't know what the position is as to the question you asked whether
19 Mr Stark would be willing to underwrite the cross-undertaking as to damages.
20 Mr Jones slipped into the transcript that if he does, that's quite different from whether
21 they'd step in at stage 2, adequacy of damages. It's not, in my submission. If Stark
22 are willing to underwrite a cross-undertaking for damages, Mr Sachdeva's evidence
23 that they would not step in to support the business just can't stand.
24 So, I need to be able to make those sort of submissions when and if I know that
25 Mr Stark is going to be able to provide a guarantee effectively for the
26 cross-undertaking in damages. But we don't know that.

1 MR JUSTICE MORRIS: Well ...

2 MR JONES: Well, so you have the submission and whether Ms Smith would want to
3 say anything more, I don't know.

4 MR JUSTICE MORRIS: We'll wait to see what you say if you tell us.

5 I suspect we are not in a position to give you a decision today, now, and I'm not sure
6 when we will be. One of the questions we will consider is whether or not we will be
7 sufficiently confident to give a decision before our written reasons or not. It depends
8 on the degree of urgency.

9 At one level, one got the impression that this was very urgent; on the other level, we've
10 gone on for another week and you haven't gone out of business. So, I don't know
11 whether either whether you have any observations to make about how quickly you
12 need a decision. A full judgment is likely to take a little bit of time.

13 MR JONES: Sir, the answer is very quickly, and that is for the reasons which are
14 explained in Mr Sachdeva's evidence. Just to bring that to life a little bit, things like
15 carbon reporting happen on regular dates. When that can't be done, Perse starts to
16 lose customers because they just don't get what they've signed up for. The same sort
17 of point applies to other services that they are offering: if they can't offer it, their
18 customers will start to go elsewhere.

19 MR JUSTICE MORRIS: You are offering switching services at the moment, even
20 though on a less good basis, you say?

21 MR JONES: That's right. So, the Compare the Market service -- which is a fraction
22 of overall revenues, I think it may be 11 per cent; we've got the data in one of the
23 witness statements -- that's right, that at the moment is still being offered, but that is
24 all. That is the only thing which is being offered.

25 In terms of the urgency of this application, it is true that it was listed a bit later than we
26 had hoped and then of course, it's gone on for another week. We have understood

1 why that has been the case, and we've understood that there was a need to give time
2 before the hearing and to give time before today, but I would certainly not want the
3 tribunal to read into that that this is not urgent. It is, and Perse would say they left it
4 as late as they possibly could before issuing the application.

5 MR JUSTICE MORRIS: I'd say I'm pretty sure we're not going to give you a decision
6 today. We will take that on board and give it due consideration.

7 I'm assuming from both of you that that concludes the hearing?

8 MR JONES: Yes.

9 MR JUSTICE MORRIS: Thank you both, everybody, very much. Can I thank your
10 solicitors for having redone my bundles and generally for the presentation of the
11 evidence, which was very clearly done, for which we are grateful. You'll be hearing
12 from us. Thank you very much.

13 (6.29 pm)

14 (The court adjourned)

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