IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1433/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 1st February 2023

Before:

The Honorable Mr Justice Smith
Derek Ridyard
Timothy Sawyer CBE

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Proposed Class Representative

Dr Liza Lovdahl Gormsen

v

Proposed Defendants

Meta Platforms, Inc. and Others

A P P E A R AN C E S

Ronit Kreisberger KC, Nikolaus Grubeck, Ben Smiley & Greg Adey (Instructed by Quinn Emanuel Urquhart & Sullivan, UK LLP) on behalf of Dr Liza Lovdahl Gormsen.

Marie Demetriou KC & David Bailey (Instructed by Herbert Smith Freehills LLP) on behalf of Meta Platforms, Inc. and Others.

Digital Transcription by Epiq Europe Ltd
Lower Ground 20 Furnival Street London EC4A 1JS
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Email: ukclient@epiqglobal.co.uk

Wednesday, 1 February 2023

(10.00 am)

MR JUSTICE SMITH: Ms Demetriou, good morning.

Submissions by MS DEMETRIOU (continued)

MS DEMETRIOU: Good morning.

Members of the Tribunal, I had yesterday afternoon just addressed the Tribunal on the first difficulty with the user valuation methodology, namely that it doesn't measure the loss that's pleaded and I showed you that Mr Harvey agrees that the commercial value of the data, which is the loss that's pleaded, and the users' own valuation of the data are separate and distinct things, but he sought to say that there is a relationship between the two and that's why this methodology is still useful.

I explained yesterday, and I'm not go repeat my submissions, why we say that doesn't stack up.

Now, Ms Kreisberger says that -- and to be fair Mr Harvey says, as well, that Mr Harvey proposes to triangulate his two methodologies. Now, Mr Harvey's report doesn't explain what he means by that or how he proposes to do it and the Tribunal will recall that on Monday my learned friend submitted to the Tribunal that the PCR would simply take the higher of the two figures, so that was her submission on Monday.

Then yesterday morning she made a different submission. She said that the two methodologies will provide upper and lower bounds. You may recall that, and she prayed in aid the SAAMCO judgment in the House of Lords, which is referred to in Albion Water, to say that it would be reasonable to take an average of the two.

Our response to that is we say that simply doesn't work in circumstances where, one, the user valuation method is not measuring the pleaded loss at all, so it's simply not a relevant methodology, so you can't say -- so take the starlings migration patterns analogy, you can't say:well, it's very pragmatic to have a methodology that looks at

migration patterns and a methodology that looks at excess profits and one can be a higher and lower bound because we say there is a disconnect between'--

MR JUSTICE SMITH: What you're saying is that whether you're triangulating on or averaging or doing something between the various points, all of the points have to be in the ballpark.

MS DEMETRIOU: Exactly.

MR JUSTICE SMITH: The ballpark being the pleaded case. If they're outside the ballpark then the triangulation all or average is worthless.

MS DEMETRIOU: That's exactly the point, sir. So that was the only additional point I wanted to make in relation to that issue and what I am going to turn to do now is look at the arguments we make about the substance of the survey approach.

Now, as I said to you yesterday, the Tribunal doesn't need to get into these points if you are with me on the first point, and we do completely understand the observation, sir, that you made at the end of yesterday to the effect that, in general terms, criticisms about the detail of how the survey is going to be conducted, or indeed the substantive detail of a methodology, will generally be for trial rather than certification, so we do understand that point.

To be clear, we are absolutely not saying that survey evidence can't be used in competition proceedings or in collective actions. So we're not criticising the user valuation approach on the simple basis that it envisages a survey. So that's not our submission.

However, what we are saying is that what we have here from the PCR is something very generic in terms of a proposal that hasn't been properly thought through. We are not saying that the survey had to be conducted at this stage or we're not saying it had to be designed at this stage. We're not saying those things, but what we are saying that the key issues that it will give rise to had to have been identified and a blueprint

established for grappling with them. So it really is a Pro-Sys point.

Before making the points, can I take the Tribunal back briefly, please, to the Court of Appeal judgment in Gutmann where it considered the survey issue. You saw this yesterday, Ms Kreisberger took you to it, but I just want to revisit it, please, so it's at authorities 2, tab 27, page 1319.

If we can pick it up, please, at paragraph 66 and we see a number of things from these paragraphs. So we see first of all that in that case there was a first expert report which had addressed the question of quantum relying upon a variety of different data sources but then the expert suggested that the data could be improved by use of a survey.

So it's a supplementary method, a refinement of a primary methodology or a sensitivity check or something like that, so it's an additional means of showing loss.

Then we see that that came under criticism from the defendants and, in a second report, Mr Holt addressed these concerns and then you see this:

"He also set out, in detail, how a survey would be carried out. He described the methodology including its target population, the sorts of questions that would be asked, and how the results would be interpreted. He also set out the adjustments that would be made to take account of other variables."

Now, pausing there, that is quite obviously what we don't have in this case and so I am drawing a distinction between what was done there which passed the certification threshold and what we have in the present case which falls very far short of that.

Then you have the Tribunal's conclusion, so the conclusion is that -- sorry, the Court of Appeal's conclusion:

"The CAT emphatically, and in our judgment correctly, rejected the TOCs' criticism making the point that at the certification stage what was required was [and you have the Pro-Sys requirements]."

Then you have an excerpt from the Tribunal's judgment and you see there in the

citation that they rejected the submission:

" ... we do not accept Mr Ward's submission that Mr Holt should have designed, at least on a provisional basis, a survey."

We agree with that, we're not seeking to suggest that that should have been done.

Then if you go over the page, you see at the end of paragraph 66 that the Court of Appeal there is saying that:

"... the conclusion of the CAT as to the level of detail required at the certification stage was one for its legitimate discretion."

We might say judgment, because it will be context and fact dependent.

Then we see at 67:

"Thirdly, the CAT went to pains to satisfy itself during the certification hearing that at trial the methodology could be adapted so as to reflect, for instance, issues upon which the defendants might be successful. For example, Mr Holt was questioned from the witness box by the CAT panel, and in particular by its economist member (Professor Mason), about various aspects of the methodology including whether it would be possible to exclude from aggregate damages certain fares or customers at trial. The exchange focused upon so-called point-to-point tickets. The purpose of the exchange was so that the CAT could satisfy itself that it had understood the methodology and how it could be adjusted at trial. This reinforces our conclusion that the CAT exercised a vigilant gatekeeper role and went to proper lengths to satisfy itself as to the robustness and fitness for purpose of the class representative's methodology."

So here we're talking about the methodology including the survey because that's what the Court of Appeal is looking at.

Then you see:

"Fourthly, the transcript of the questioning of Mr Holt involved him explaining how his

estimates would need to be perfected following disclosure. The CAT accepted that the methodology was based upon data that might be sub-optimal but took into account that at the certification stage disclosure was yet to occur. This was a relevant conclusion which was well within the CAT's margin of judgment to consider."

So what you have here is a high degree -- first of all, it seems from paragraph 66 that Mr Holt, the expert in that case, had set out in quite some detail how the survey would work, including the methodology, the target population, the sorts of questions that would be asked and how the results would be interpreted. So you had a much more granular blueprint for trial in Gutmann than is the case here.

Secondly, the Competition Appeal Tribunal did exercise its gatekeeper role by interrogating how that would work and whether it could be adjusted and so that's the basis on which the Court of Appeal said: well, we're not interfering with the CAT's judgment, and one can well understand.

Really our position in this case is that, by contrast to the position in Gutmann, the approach that's been put forward -- the user valuation approach that's been put forward here is sketchy and generic. It doesn't contain any of the kind of detail that one sees described in the Court of Appeal's judgment and you have seen already, for example, that Mr Harvey in his first report refers to a number of existing studies that have been carried out in this sphere relating to social networks, which he's referred to presumably because they're relevant. Yet, nowhere does he say how they're relevant, what he proposes to do with them, whether he proposes to build on them, whether he will do anything different, really how he proposes to use them at all.

That's the kind of detail one would expect at this point. It's completely within the PCR's gift to provide it and it would assist in providing a blueprint to trial because the Tribunal is then able to interrogate, ‘well, what else do we need, what are you doing that's going to be different and take a view as to whether or not that seems sensible.

Now, if we could turn up, please, Mr Harvey's first report, so if we go to the core bundle behind tab 4 and I want to go to page 278, please.

MR JUSTICE SMITH: Yes.

MS DEMETRIOU: Here in the middle of the page at the second bullet under paragraph 3.2 you see a summary of the user valuation approach and you see that what he is proposing there to do is:

"…quantify the loss through the value that users place on their data net of the value that users place on the Facebook social network. The user value of data captures the price at which users would be willing to give away their data in a competitive market for user data. This approach relies on using primary user research methodology such as surveys."

So that's the summary of the approach.

Then what happened is that Mr Parker pointed out in his report that if this were to lead -- following this methodology were to lead to a figure of loss then it would rest on an assumption that users have been behaving irrationally in the real world because in fact they have been giving permission to Facebook to use their data and we see this point in Mr Parker's report.

So if we go behind tab 5 in the core bundle at page 337 and it's really paragraph 5.1 to 5.3, focusing on 5.2, so:

"For there to be any damages under this approach a user's individual valuation of their data must be greater than the value she derives from using Facebook services. In this case that users would have been better off not using Facebook and thereby foregoing both the costs of data sharing and the benefits of using the service. Therefore the user valuation approach rests on an assumption that in order for there to be any damage consumers must have been behaving irrationally by choosing to use Facebook. If consumers were behaving rationally, Mr Harvey's approach would find

no damage."

Then he says at 5.3:

"In his view any economic analysis that relies on consumers behaving irrationally is unlikely to give sensible answers."

So that's the criticism that's made and then you see the response and --

MR JUSTICE SMITH: Just pausing there, and it may covered in the response, but that's why such emphasis is placed on the misleading terms and the misleading of the state of mind of subscribers, because this is postulating a rational decision where you know what it is you're giving up and you know what it is you're getting, but if you know what it is you're getting, but you don't know what it is you're giving up, then your valuation is going to be skewed and the point made in paragraph 5.2 won't pertain. Would that be fair?

MS DEMETRIOU: Sir, I think that is what the PCR says. I think that Mr Parker's point is a little different, which is that if -- that may be so, so it may be, and we do see that their abuse includes misleading terms and so on, but if you're conducting a survey and you're asking people, so members of the class, ‘so what's the value that you placed on your data and what's the value you placed on the network, and they -- it's a hard question to ask them in circumstances where in fact what they have done by their actions is place much more value on the network, or more value on the network.

So what he's doing is saying -- what Mr Parker is doing is pointing out that -- he's saying: well, any economic analysis that really has to deal with that problem that -- the implications of a finding of loss is that people in the real world were acting irrationally, is problematic in terms of the robustness of the assessment.

What we see then is that Mr Harvey -- Mr Harvey's response implicitly accepts that point, so he doesn't say: well, you're right, I accept that point, but he changes tack in his responsive report, and so we do say that in fact he has implicitly accepted the

points made by Mr Parker because what Mr Harvey puts forward in his second report is a different version of the user valuation approach and we can see this if we go to page 370.

We can see it at paragraph 4.18, so he characteries it as a misunderstanding on Mr Parker's part. We say when you look at the summary that I just showed you in report 1 of what he was proposing to do, it's not a misunderstanding of Mr Parker, but that's rather an arid debate that we don't need to resolve, but anyway what he's now saying in the second report, what he will be doing is seeking to establish from users the additional value.

So if we look at 4.18, he says:

"The loss suffered by users in this claim is the difference between the value that users would have received in the counterfactual scenario and the value that they did receive in the factual world. In other words, the harm suffered by users in this claim is the additional value that users would have received in the relevant counterfactual scenario compared to the factual world."

So that's now what he's saying he's doing. So let's just take it that this is the user valuation methodology, but this gives rise to further problems, in our submission. So I'm not saying that these are problems which the Tribunal needs to resolve one way or the other now, but they are issues that had to be grappled with.

So for this reason, because what he's proposing to do is ask users about the counterfactual. Now, you can see immediately that when you start asking users hypothetical questions about a counterfactual, you have to be very careful what you put to them because you're asking them to hypothesise. It's always difficult to ask people about a counterfactual. And elsewhere, and this is a problem for the PCR, they have been at pains to say that the question of counterfactual is for trial. So Ms Kreisberger has repeatedly said, well, this question of counterfactual is for trial.

We don't want to be drawn on it now. This is all for trial. The Tribunal doesn't need to resolve it now, but if that is right, then how can users be asked what they would have done in the counterfactual if that's all for trial? So it's very difficult to understand what they're proposing to do, and we're not saying, as I say, we're not looking for a solution but we're looking for some recognition that this is a problem and this is what we're going to do to meet the problem.

MR JUSTICE SMITH: The sort of question you might put in, and I raise this so Ms Kreisberger can tell me I am wrong, would be: suppose you have been forced to give data to Facebook that they shouldn't have had, on these terms and conditions. If Facebook were going to pay you £10 a year for this data, what will you do?

Now, I suspect most people would say, if they were subscribing to Facebook, that they would be very happy to have the £10. In a sense, the question is probably better directed at those who are not subscribing to Facebook to see whether the £10 would actually make a difference if they were coming in. But that is in a sense making the point that was made a moment ago in Mr Parker's report, in a different way.

MS DEMETRIOU: Yes, sir, I agree. One might speculate further, so one might think: well, one of the counterfactuals that Ms Kreisberger referred to, or rather Mr Harvey refers to, his counterfactual is a world in which users are not confused about how much data they're giving up and so they give up less data in the counterfactual.

What are they going to be asked then? Are they going to be asked whether they would -- are they going to be asked about the implications of that in terms of the social network service they receive being degraded because that's a feature of the multisided -- the interdependencies of this multisided market, so we're not saying -- we're really not saying, going back to, sir, your point at the end of yesterday, we are not saying these are points that need to be resolved one way or the other now.

Of course not, but they are points that need to be identified and grappled with and it

just seems to us extremely hard to be saying: well, we're going to be conducting a counterfactual exercise, when in the same breath you're saying, well, the counterfactual is for trial, we don't need to say what it is, because one thing is clear, you need to be very, very clear with respondent surveys about what it is you're asking them.

So that's the point that emerges from the debate about irrationality if I can call it that way and I'm going to turn to the further fundamental problem, which is the privacy paradox, and that's in a nutshell it's well-established in the economic literature that surveys that ask users how they value their own data are unreliable.

Again, to be clear, we're not saying that surveys in general are unreliable, we're saying that there is a well-established issue here in relation very specifically to surveys that ask consumers about the value they place on their data. Could we just take this first from Mr Parker's report in the core bundle, tab 5, page 338.

I think we can actually start at 339 and so if we look at -- can I just ask you first of all to read 6.6 and 6.7 to yourselves.

MR JUSTICE SMITH: Of course. (Pause).

Yes.

MS DEMETRIOU: Then at 6.8 Mr Parker summarises the extent of the research and it's very extensive and it includes literature dealing with social networks. Then if we go to 6.9 over the page, Mr Parker explains the theoretical explanations for the privacy paradox and he says there are competing theoretical explanations and broadly these are two-fold, and this is an important point, so he is saying that these consist of theories first of all that users' stated views are unreliable and alternatively that their stated preferences are reliable but these differ from their actual behaviour.

So the paradox is a mismatch between what people say and what they do and he's saying, and it's logical, he is saying there are two explanations for that in the literature.

One is what they're saying is wrong and one is what they're doing is not the right reflection.

We then see at 6.10 on page 341, he says that each of these interpretations implies -- so he first of all goes through -- so he first of all looks at the interpretations which fall in to bucket 1, so the stated views are unreliable, and that's what we see at (a), ,(b), (c) and (d), and then he says:

"Any of those interpretations that fall within bucket 1 implies that in disclosing data through their actual behaviour users are acting on their true preferences and that under these theories surveys are inherently unable to fully capture users' true privacy preferences."

So then he turns to look at version 2, explanation 2, which is that their stated preferences are accurate, but their actual behaviour is not. So he acknowledges that very squarely and fairly as a possibility.

Then what he says at 6.12 on page 342 is that this all remains unresolved. So there is a debate about which type of explanation is correct and it's unresolved in all of the learning that's been carried out on the privacy paradox.

Then if we look down to 6.15 and 6.16, he summarises the two explanations at 6.16, so he says:

"If the first explanation [we see this in the middle of the paragraph], ie that users' stated views are unreliable, survey evidence can't prevent an accurate valuation of users' data."

So he said if one or more of the explanations in the second category apply then survey evidence could potentially provide an indication of uses' valuation of their data, but he says that what you would need to do is work out which explanation is correct before -- so the Tribunal would need to be able to work out which explanation is correct before it could place any weight on the data. So it would have to be satisfied that the

second explanation were correct before it could place any weight on the data.

MR JUSTICE SMITH: But isn't this, Ms Demetriou, a completely common problem with surveys, that people say one thing and do another. It's just that in most cases you know from the other facts that there is this discrepancy?

Take, for example, the survey that was conducted after the assassination of Kennedy into who voted for President Kennedy in his election and the outcome you got was that he won by a landslide because everyone was feeling very sad about the fact that he had been shot. Actually, he won by the tiniest of margins over Nixon. Now, you know it's wrong because you know what the outcome of the election was, but how you discern -- how you make it right is very difficult.

Here, you don't actually know how wrong it is because it's an unknown how these survey participants value their privacy versus other factors, but in a sense isn't this just something that you're going to have to deal with at trial? It's a problem and each side will have their own expert surveyor and these errors will be thrashed out at trial.

MS DEMETRIOU: Sir, I think, with respect, it's a problem that goes beyond the generic in surveys. So of course in lots of contexts, surveys -- there may be those biases in responses that would need to be addressed and one of the things Mr Harvey says in his second report is, ‘oh we can be very careful about how we ask the questions, but what Mr Parker is saying is that this is a very specific problem relating to surveys in the sphere of data privacy. It's a very specific problem that has been very well traversed in the literature and so what one needs to do -- so we're not saying that -- in one sense, of course, one could just say: well, it's a matter for trial,

but because it's such a specific and such a fundamental problem with surveys of this very specific nature then I think what we do expect, what we can expect in terms of Pro-Sys, is for that to be fronted up to at this stage and something put forward for how that's going to be resolved, because otherwise the Tribunal is going to be left with

survey evidence, and experts talking about the privacy paradox and what the explanations are for it, something which hasn't been resolved in all of the academic literature on the subject and the Tribunal is going to be put in a very difficult position in terms of resolving in the trial.

So what we're saying is that yes, of course, sir, to some extent these points are points for trial but they need to be confronted now in terms of identifying the issue and setting out a roadmap for dealing with it. That's really our point.

MR JUSTICE SMITH: Okay, I have your point. It does seem to me that if this is something that is capable of resolution at this stage, whoever solves it is going to make an absolute fortune in the political poling market because we all know that no one predicted that Donald Trump would be winning various elections. Yet behold, he does and the polling was obviously wrong, it's just before the event you didn't know how wrong it was. So it does seem to me that this is a fairly common problem with surveys where you are trying to find something out that is intrinsically unknown, because, what you're saying is, you can't tell how wrong it is by any metric that is available and that's the problem.

MS DEMETRIOU: Sir, we do say that there is a qualitative difference between the problem that usually arises generically in surveys and this very specific, more fundamental problem that arises in respect of users being asked, surveyed about their data, and that's what Mr Parker says.

I will come back to what Mr Harvey says.

Sir, we do say that it does go beyond the sort of problem you would get on election surveys and so on, and that's recognised in the literature.

So just turning your point around, sir, where you say we would all make a fortune if we could resolve it now. Equally this is a problem, what's the real explanation for this, which has been traversed by many, many economists and it would be surprising if

the Tribunal were able to find a magic solution to that conundrum and so that's why we do see that it is a conundrum for the PCR and what we're saying is no, no, of course it doesn't need to be resolved now, but you need to explain how you're going to confront this problem. So it's a more conservative point than saying -- I'm not saying, 'well, the Tribunal now needs to grapple with it at certification, but we are saying that it was incumbent on the PCR to grapple with it and set out at least a blueprint. So it's really that point.

Can I just show you, please, Mr Harvey's response just to complete the point.

MR JUSTICE SMITH: Yes.

MS DEMETRIOU: So this is behind tab 6 and if we go to page 372.

MR JUSTICE SMITH: Yes.

MS DEMETRIOU: So he's not saying there is no such thing as the privacy paradox, first of all, so he accepts that that is something that's well recognised in the literature, but what he says first at paragraphs 4.25 to 4.28 is he doesn't accept that his research will inevitably suffer from the privacy paradox. So the qualification inevitably already tells you something, and what he suggests is that the privacy paradox might only apply when people are asked generalised questions about the value of their data and he says: well, don't worry, I'm going to ask specific questions. But the literature on the privacy paradox includes examples of surveys that ask respondents specific questions, including specific questions about data sharing costs and benefits in the context of social media platforms, and I'm not going to take up the references, but, just for your note, we make this point in our skeleton argument at paragraph 56 and the reference is in footnote 68, but can I just show you one by way of example. So if we go to the supplementary bundle and we look at tab 20 -- sorry, I have the wrong bundle. Bear with me a moment, please. Here we go.

So supplementary bundle, tab 20 and the paper starts on page 317. If we can go to

320 and you can see in the first column there that what's said is that another stream of research was focused on online social networks, the relationship between privacy concerns and information disclosure and it talks about various questionnaires that all ask specific questions in this sphere.

MR JUSTICE SMITH: Yes.

MS DEMETRIOU: So the idea that this paradox only applies to generalised questions about privacy just isn't right.

Then going back to Mr Harvey on page 372, so we then see at paragraph 4.28 that his response, to be fair to him, is put in quite a qualified way, it's not put very forcefully on this point, so his conclusion on this point is that, he says:

"Therefore at face value it is unclear that the privacy paradox is necessarily a concern."

Now, it's hard to think of a more caveated sentence than that. Then at 4.29, Mr Harvey says that:

"One of the possible explanations for the privacy paradox is that users' stated valuations reflect their true valuations and it's their behaviour which doesn't."

Which is of course the point Mr Parker made, but the difficulty with that is that it's only one possible explanation and the other possible explanation is the opposite and none of this, as I have said, our point is none of this has been resolved in the literature and it's something which needs to be confronted for trial. Not decided now, but confronted rather than simply sidestepped, which is what Mr Harvey and the PCR are seeking to do.

MR RIDYARD: What is the difference between confronting it and solving it? Because we're not going to solve this problem.

MS DEMETRIOU: We're not.

MR RIDYARD: And it's possibly an insoluble problem, but then you can think of other insoluble problems like the Cellophane Fallacy problem is basically insoluble, but we

still struggle with it in trials about, you know, interpretation [sic] price information in dominance cases and we haven't fixed it, we probably never will fix it, but there are ways of groping towards some sort of answer. Mr Harvey, he may not be very gracious in accepting Mr Parker's points, but he does refer to the need to consult with behavioural economist and cognitive bias and all these things. So he does pay some attention to the problems that will be confronted if this survey goes ahead. I'm not clear, what's the dividing line where we say this is hopeless as opposed to, you know, this is difficult but someone has to have a go at it?

MS DEMETRIOU: Sir, that's a very good question, if I may say so. I think that the difficulty with what they have done at the moment is they have attempted to sidestep the problem by saying: well, it might be the second explanation and we can ask specific questions and there are some generalised things. We see this at 4.32 on page 374, that can be done in terms of formulating the questions properly and I think that that doesn't give us any confidence because I think what we would like to see is the PCR saying: look, there is actually a problem we have to grapple with, with survey evidence in this sphere. So he refers to -- for example, if I can give you a more concrete example. He says, he refers at 4.29 that one of the explanation is that users' valuations are accurate and their behaviour is not, but it's unclear what he's going to do with that, is he going to show at trial that that explanation is the proper explanation behind the privacy paradox?

If so, tell us and then we know what sort of evidence we're expecting at trial. We will have evidence from someone saying, ‘look at all this literature, we can persuade the Tribunal that it's the first explanation. At the moment, various threads are left hanging and he doesn't actually say what's required for trial in order to make their case. I think that's really the point, just trying to respond to your question, sir.

MR JUSTICE SMITH: Ms Demetriou, I can see some force in the point arising out of

the case law you took us to a few minutes ago, that it is helpful to have some understanding of what exactly you're going to do. In other words, instead of having Mr Harvey saying, 'I'm going to commission a survey from someone expert in the field, you actually get someone expert in the field to say: this is how we do it and we are confident that he we get a result that would work for the claimants, but the idea that you're going to close out this kind of attack at trial just seems to me completely fanciful because the problem is people don't articulate what they do when answering a question about what they do and you get that with: how much do you drink in the week? Do you vote for exit from the European Union or not? Do you vote for Donald Trump? All of these things, you know these surveys are wrong because you have external data telling you that they're wrong. Trump wins the election. We know from supermarket figures that people drink far more than they say they do.

Yes, that's a problem, to be resolved at trial. So all, I think, one can do is achieve a degree of clarity about what one is going to do, but the idea that one is going to solve the problem, I don't see how you can do it.

MS DEMETRIOU: Sir, we're not saying the problem needs to be solved now. We're saying the issues need to be identified. So in the same way as in Gutmann, the Tribunal, you saw from the Court of Appeal's judgment, pressed Mr Holt on, well, what happens if at trial the defendants succeed on this issue? Can it be adjusted and how? That's really what we're not seeing here and in relation to the privacy paradox, what we're - is Mr Harvey saying, well, it might be the first explanation, but he's not saying: oh and what we will get is an expert of X sort saying why the first explanation is right.

So, as I say, there's loose threads which are not -- I'm not asking for them to be resolved but we're asking for the blueprint as to how they're going to be addressed at trial, really, and that's really the point. So, sir, that's what we say about the user

valuation methodology.

I now need finally to deal with cost benefit, which I can certainly deal with within (audio distortion). So we submit that these claims don't meet the suitability condition in the legislation. I have explained why they don't in terms of the methodology in Pro-Sys, but for the further reason that their costs outweigh their potential benefits to class members and of course the Tribunal will know that a consideration of cost benefit of the proceedings is one of the matters that Rule 79.2 specifically says that the Tribunal will have regard to when determining, considering suitability.

We say here really one has to stand back because what the Tribunal has before it is a claim which is ambitious and amorphous at the moment. Now, nothing wrong in itself with being ambitious, but with a claim like this we say it's essential that the Tribunal satisfies itself that the potential benefits to members of the class justify the complexity and the costs of trying the case. Otherwise what one is left with is a juggernaut that eats up valuable Tribunal time, eats up costs and may achieve nothing for members of the class.

Now, the Tribunal is not, of course, at this stage enquiring about prospects of success. So you're not saying, well, how likely is it that there will be recovery? but the Tribunal must, in our respectful submission, look at the likely costs, look at the likely benefits that are estimated to transfer to members of the class, to be accorded to members of the class and take a view as to whether the benefits outweigh the costs and whether these proceedings meet the suitability requirement.

Now, in Gutmann, of course, the Tribunal found that the cost benefit weighed slightly against suitability, but found that this consideration was outweighed by others and so certified the proceedings.

In this case, we say that the PCR hasn't come close to showing that the benefits of proceeding outweigh the costs. First of all, these proceedings will be very costly to

bring. Now, the PCR's estimate is that the collective proceedings will cost 49.6 million, which is a very substantial sum, obviously, but of even greater concern is the fact that the Tribunal simply cannot have any confidence that this figure won't be substantially exceeded. Why do we say that? We say that in part because we heard for the first time this week that the PCR is anticipating a split trial between liability and quantum.

MR JUSTICE SMITH: I think that's putting it a little highly. I think Ms Kreisberger saw the merits in the idea but wasn't committing to it being something she would push for.

MS DEMETRIOU: Sir, it's fair to say that she wasn't committing, she was careful to say that, but she also did say that the question of the proper counterfactual is so complex and there are so many possible permutations that it would be time-consuming and very difficult to have a combined trial, so that's also what she said, and that will obviously have a huge impact on costs.

If there is a split trial, that will be much more costly and it is simply not taken into account, hasn't been thought through in terms of the costs estimate that has been put forward by the PCR.

Turning to the methodology, you have my submissions on the methodology and we say they don't constitute any sort of blueprint for trial and a huge amount of work will be needed to get them off the ground, which is also obviously relevant to costs.

Disclosure, you have seen the stance of the PCR. I think because of the defects in the methodology, what it's proposing, it appears to be proposing, is some kind of scattergun approach to disclosure.

MR JUSTICE SMITH: Can you show us that, what's proposed? I don't think we have seen that in the course of the hearing.

MS DEMETRIOU: I need to find the bundle reference.

MR JUSTICE SMITH: Of course.

MS DEMETRIOU: Can I move on and come back to that while Mr Bailey is helping

me with that?

Now, we can expect that costs will vastly exceed the PCR's estimate or, if I could put the same submission perhaps more conservatively, the Tribunal can't at this stage be satisfied that it won't because so many things are up in the air.

Now, turning to the potential benefits to class members, the PCR's estimate is that the damages per class member will be £48. That's its estimate. Now, this is a low starting point. The overwhelming likelihood, we say, is that it's an overestimate, potentially a very significant overestimate. We say that because the PCR's estimate is based on the methodology it's advanced. So the excess profit methodology, which, for all the reasons we have been given, because it doesn't take account of economic value, because it doesn't take account of the multisided nature of the market, is bound to be an overestimate because its lack of link with consumers' actual loss.

So the actual estimate of damages due to each class member is likely, we say, to be very small indeed because that's bound to be an inflated figure and that then raises the question whether class members will bother taking up a small damages award at all and we say it seems very unlikely that many will and a key point is that, unlike the position, for example, in Le Patourel, class members have no existing financial relationship with Meta, because the service they receive is free. So Meta does not, for example, hold bank details of users. There's no basis on which it could simply give users credits as it doesn't charge them. So it follows that a system will have to be set up and users will have to proactively take the positive step of providing bank details et cetera.

The further point is that the distribution method currently proposed by the PCR is that damages will be distributed according to the time spent by users on Facebook during the claim period and we see that from claim form, paragraph 163, and we say, well, not only is that going to be expensive in the litigation, but it will be time-consuming for

users and so if you're somebody faced with, I don't know, a £20 award, are you going to go through all of those steps or how many people will go through all of those steps to provide their bank details and provide the granular information that will be needed in terms of how much time they spent on Facebook during the claim period?

So we say, standing back, the Tribunal is faced here with a poorly articulated claim for which no blueprint for trial has been provided, in which fundamental issues will arise, which the PCR has failed to identify let alone grapple with, and the potential rewards for the class are very small and in those circumstances we say the Tribunal simply can't have any confidence that the benefits will outweigh the costs and we say that the overwhelming likelihood is that they won't and so that's a further reason why the claim should not be certified.

MR JUSTICE SMITH: Can I just disentangle two aspects of cost benefit. First of all, I would like to extract from your argument, if I may, the rerun of earlier points. In a sense, if we're not going to allow the case to go forward on Pro-Sys grounds, then this cost benefit question just doesn't arise.

MS DEMETRIOU: Or it's an additional reason alongside.

MR JUSTICE SMITH: May be an additional reason. Let's suppose we are satisfied that either the matter has been appropriately framed for Pro-Sys purposes or could be framed in that way, so you get, which is the purpose of Pro-Sys, as good a control over costs and scope of disclosure and so on that you can at this stage of the proceedings so that everybody knows what they have to do in order to get this matter up for trial.

To what extent do you continue to have a point?

Now, it seems to me that the point that you're making about cost versus benefit continues to hold in that case because what you're saying is that whether it's £48, £75 or £100, if there is a complex process for acquiring the fund that is put in place,

assuming success, and there is no take-up, then that's a point which sits in your favour.

So first of all, I just want to see how much of your argument survives the extraction, as it were, of points that you have already made in the Pro-Sys context.

MS DEMETRIOU: Sir, yes, it's a very fair question. I think that I would put it this way: so if you're extracting the Pro-Sys points, I think it depends on where the Tribunal ends up on the substantive points which underlie my Pro-Sys argument if I can put it that way.

So this is a point in any event, so let's take the best scenario for the PCR, which is that the Tribunal thinks that everything is fine and dandy and there is a blueprint for trial and we can just press, then I still press my cost benefit point because the £48 is the estimate based on their overblown methodology and it's still a very expensive claim and we have our points about low take-up. So we still press the point.

I think if we're in a world where -- because the world that you're hypothesising is that I've lost my Pro-Sys argument and that the Tribunal is not going to refuse now to certify, if we're in a world where I have lost my Pro-Sys argument, but the Tribunal thinks: well, actually, no, we're not happy, there are some fundamental difficulties, so we're with Meta on the substance of some of these points but we don't think they reach the Pro-Sys level but we're in a McLaren world where we need to actually send the PCR away to go and do some more work and reframe things. If we're in that sort of world then my submission to you would be that you should not be reaching a view on cost benefit until you see what they come back with because --

MR JUSTICE SMITH: I accept all of that.

MS DEMETRIOU: Yes.

MR JUSTICE SMITH: What I'm saying is that let's suppose our view is £48 is a likely return, 49 million, whatever the spend is going to be, is a sum that is actually a robust,

not-to-be-exceeded line and that there isn't a problem on disclosure in terms of focus and the amount of work the parties have to do, so all of the points that you're making on Pro-Sys fall away.

MS DEMETRIOU: Yes.

MR JUSTICE SMITH: I'm not saying that you're going to lose on those.

MS DEMETRIOU: I understand.

MR JUSTICE SMITH: I'm saying we'll decide them earlier on.

MS DEMETRIOU: Yes.

MR JUSTICE SMITH: But if we do then, frankly, we're not really going to be much bothered about a cost benefit analysis because, if you win on all of these Pro-Sys cases, we're going to be saying go away either permanently or on a stayed basis and do your work again.

MS DEMETRIOU: Yes.

MR JUSTICE SMITH: So what I am really trying to extract is the value that this point adds in terms of additional work the Tribunal needs to do to work out whether there is traction in the point or not.

MS DEMETRIOU: Sir, if we're in a world where you're not with me on any of the criticisms we have made and so you think that this is all fine to proceed to trial, so the worst case in terms of our arguments, then we do continue to press the point, we then say we're in the Gutmann position where we say that it's not marginal in this case because we say for the reasons we have given that these figures are low in terms of gains, there is unlikely to be good take-up and that these are costly and complex proceedings. So we still press the point and we say that the cost benefit analysis weighs against certification and is a matter to be taken into account by the Tribunal. Obviously it's a matter for you whether it's decisive or not, it depends where you come out, but we do of course, and I think this is the reason you're asking me the question,

obviously the point gains more force the more you're with me on the substantive flaws.

MR JUSTICE SMITH: We have that. I am trying to see how much of an independent self-standing point this is and how much it is parasitic on previous arguments and, of course, there is an element of overlap. There is an element of parasiticness but in a sense if it's completely parasitic then our job is very easy on this point. If it's not --

MS DEMETRIOU: I'm not going to accept it's completely parasitic.

MR JUSTICE SMITH: That's what I am exploring with you and I have got where you say it's not and what you're saying is the return combined with the bother of claiming, if there is success, combined with the cost, even assuming it is a robust and not-to-be-exceeded cost of the litigation. Making all those assumptions against you, even so, the cost benefit equation comes out against the PCR and not in favour.

MS DEMETRIOU: That is our submission, yes.

MR JUSTICE SMITH: So next question: how far is the public interest relevant in the benefit? Now, let me be clear, this is something which is significantly unexplored in the case law, but we do know that the CMA have a right to intervene and they are watching this case.

Do we, in looking at the benefit, factor in things like it's a good idea to hold wrongdoers, and we have to assume for the sake of argument that you are a wrongdoer here, to account? Is the abuse of a dominant position, if it is an abuse, a finding to that effect, valuable in terms of controlling through private law actions something in which the public may have an interest? Data is, after all, one of the key concerns that exists today. We see it all over the place. Is that something that we ought to be throwing into the mix? Because, after all, if you look at individual benefit versus collective cost, you're always going to have a mismatch. It's the nature of collective proceedings, that it's going to be very little to the individual claimant versus a comparatively high cost, but if you aggregate the £48 across billions of people, well, you're talking real money.

MS DEMETRIOU: Sir, yes. Let me take that in stages. So on the latter point, of course there are collective proceedings, including Merricks, where the gains per member of the class is estimated in the hundreds of pounds and so one can immediately see that that's in a different category in terms of people's willingness to bother to claim and take up with the class, but on the point about public interest, I think in this case there is obviously an ongoing CMA investigation into Meta in relation to collection and/or use of data and the claim form itself refers to that at paragraph 65. Really, it's the CMA's role to explore those matters. So it's the CMA's role. If it conducts its investigation and finds there is a problem then it will hold Facebook to account and it's fulfilling the public enforcement function.

Now, there are obviously cases where the regulator is not involved and private enforcement serves a useful public interest, as you've identified, sir, but in a case where the regulator is looking at the same thing, we say it's not a factor to take into account. So that's what we say about that.

Just on the point about disclosure, so what we see, if we go to core bundle 7a. -- I have the wrong reference here.

(Pause).

It's core 7a,/420, thank you. So you see here, so this is an exhibit to the PCR Dr Gormsen's witness statement and you see here likely disclosure, degree of disclosure likely to be required, and if you go over the page, what you see is you can see the sorts of things that are being canvassed and really the point we make is that these are very broad and unfocused categories of disclosure.

We think that's really a function of the fact that the claim has been so poorly articulated and the flaws in the methodology, because if you don't have the blueprint you can't then start working out what you need. They say, of course, that even more disclosure might be required on top of these categories and you have the points in Mr Harvey's

report where he canvasses additional types of disclosure from Meta.

MR RIDYARD: Can I just ask a question, jumping back to CMA's position. Clearly the CMA is interested in the (audio distortion) in Meta, but you say the CMA is looking at the same problems, but one feature of this case which is distinctive, I think, is the exploitative abuse that's being alleged. Is the CMA investigating exploitative abuses by Meta as opposed to exclusory ones?

MS DEMETRIOU: I think we can only go off what's said in the public domain, sir, which is set out in the claim form. So what that says is that:

"…in June of 2021 the CMA announced it was opening an investigation into whether Facebook might be abusing a dominant position in the social media or digital advertising markets through its collection and use of advertising data, that the CMA is investigating whether Facebook has unfairly used the data gained from its advertising and single sign-on to benefit its own services, in particular Facebook Marketplace."

So it's a generalised press release --

MR RIDYARD: When I looked at the CMA report, their concern seemed to be about exclusion --

MS DEMETRIOU: I think you're talking about the market study, which is different. This is an investigation under the Competition Act.

MR RIDYARD: I know, okay (audio distortion) don't know.

MS DEMETRIOU: So, so I think the two things are very different. So the market study is looking at the markets generally in this area and the Competition Act is specifically looking at whether there has been an abuse of a dominant position.

MR RIDYARD: I understand that but I wasn't sure whether we knew whether it was exploitative or an exclusionary abuse that they were concerned about.

MS DEMETRIOU: I don't think we can tell. It doesn't specify.

MR RIDYARD: Thanks.

MS DEMETRIOU: It might be both, we just don't know, but normally one would think that if the CMA is looking to see whether it can establish an abuse of a dominant position, if it has reasonable suspicion that there is one and it's investigating an entity, then it will investigate the position, but I can't help you any further on that.

MR JUSTICE SMITH: That's understandable, Ms Demetriou.

I am minded to say that if the CMA want to say something, and I think they want to say something on an asymmetric basis, in other words they can't really be against this because it's a matter for the PCR to go ahead, but if they see a benefit in it going ahead then it might be helpful if they articulated that in communication in the first instance with the parties and then to us. What we make of it, frankly, I have no idea and we would be more than happy to have further brief submissions from that.

MS DEMETRIOU: Sir, if you think that would be helpful --

MR JUSTICE SMITH: I raise it now to see what you say about it in the first instance.

MS DEMETRIOU: I think the CMA hasn't intervened in this hearing, so it could have done, so I would be --

MR JUSTICE SMITH: The CMA have in communications to us and to the parties indicated that they don't need to intervene.

MS DEMETRIOU: Yes.

MR JUSTICE SMITH: They are observing and at any trial I think their position would be that they would want to be present. So there is clearly an interest and, of course, the point of having a right of intervention in the process reflects that fact. All I am doing is I'm not saying what we'd make of it.

MS DEMETRIOU: Yes.

MR JUSTICE SMITH: Because frankly this is a terrain that is largely uncharted, but my general rule is that it's better to know more than less and it would be in that spirit that I would be putting out the invitation, which need not be taken up in that way.

But if you object then I obviously --

MS DEMETRIOU: Can I take instructions because I suppose the thing that's immediately occurring to me -- and, of course, if the Tribunal wants to do that, I don't want to stand in the Tribunal's way if you think it would be helpful. I think what's occurring to me in terms of my immediate reaction is that if the CMA came back saying, 'oh yes, we think it would be very helpful for this to go ahead because of enforcement, I think we would then want to know, well, what is it that the CMA is investigating exactly and what's the interaction? It seems to be opening up a sort of line of investigation that might not fairly stop at just asking the CMA what its reaction is to this point, if you see what I mean.

MR JUSTICE SMITH: Well, I certainly don't want to open up a cottage industry --

MS DEMETRIOU: No, that's what I'm worried about.

MR JUSTICE SMITH: -- in exploring other matters. What we will do is we will leave it to the very end. You can take instructions --

MS DEMETRIOU: Thank you.

MR JUSTICE SMITH: -- and we can see where it goes, but I had in mind no more than an articulation of the level of interest in this outcome by the CMA in the sense that if they're gloriously indifferent then a light touch intervention is probably all they need to know. They need to know what's going on but no more, and the benefit is going to be pretty much purely and simply the relationship cost benefit between the parties before us.

If, on the other hand, there is a statement, without disclosing the details and I would not expect the CMA to be disclosing details, saying, actually, we would quite like this to go to trial, then that does raise a further question of how far that is something to take into account, not as anything decisive but as a material factor in your cost benefit.

The question is then: is cost benefit purely and simply a private matter between the

parties before us --

MS DEMETRIOU: Yes.

MR JUSTICE SMITH: -- or is the public interest something which we ought to take into account, and let me be frank with you, I am laying this out now because it seems to me an unexplored area of collective proceedings --

MS DEMETRIOU: Sir, thank you.

MR JUSTICE SMITH: -- and if we're going to say 'we really don't care what the CMA think, then perhaps we ought to be saying that so that we can avoid this sort of debate in the future.

If on the other hand we're saying, no, there is a public element to these proceedings --

MS DEMETRIOU: Yes.

MR JUSTICE SMITH: -- then certainly for the future we might want to formalise the position of the CMA going forward. The reason I am raising it now is because we don't really know what it is we ought to be looking at.

MS DEMETRIOU: Sir, thank you for elucidating your thinking. That's very helpful. Thank you also for saying that you will come back to it at the end because I think it is a matter on which I would really need to take instructions before making submissions, so thank you very much.

I'm just about to finish --

MS KREISBERGER: I was just going to give a reference, I think it's helpful on this point, and I apologise for leaping up, but it might be helpful over the break. The CMA press release is authorities bundle, tab 44, page 2899. I'm not suggesting we look at it now, but it does suggest a focus on exclusionary abuses and the case page is at A/45/2903. Very happy to come back to this but it does suggest the focus is exclusionary.

MR JUSTICE SMITH: Yes, thank you.

MS DEMETRIOU: I was just about to say unless there is anything further from the Tribunal, those are my submissions on behalf of Meta.

MR SAWYER: Just one question from me. In the papers -- sorry, I have long COVID and occasionally forget things -- you were running an argument about, 'well, it's personal and business mixed up --

MS DEMETRIOU: We do.

MR SAWYER: Is that something you're relying on or not? Because it was something of interest to me. Whether that has gone by the board, that you can't work out business versus personal --

MS DEMETRIOU: No, we are, that relates to the amendment of the claim form and we are very much running that point, but I had thought that where we had left that on the first day, and I think Ms Kreisberger has been working on the same basis, is that the President had said that we will deal with that issue in light of the Tribunal's judgment, but we do very much say that it's a live issue that will need to be grappled with if this claim is certified.

MR JUSTICE SMITH: As we said, we are committing Ms Kreisberger de bene esse, effectively, to put her case at its highest. Depending on what our judgment is, there will be issues about -- there may be issues about amendment or not, but we certainly don't want to, and we haven't, I think, fetter Ms Kreisberger in putting her best foot forward.

MS DEMETRIOU: No, I understood that and that's the basis on which we have been working, but just in response to Mr Sawyer, no, it is still a live point but I think we have all agreed to defer consideration of it for now.

MR JUSTICE SMITH: Thank you very much. We have no further questions beyond those.

MS DEMETRIOU: Thank you.

MR JUSTICE SMITH: Do you want to make a start now, Ms Kreisberger, or do you want --

MS KREISBERGER: It's convenient to take a break now, I'm very happy to start after the break. I will need, I think, the time until 1 o'clock.

MR JUSTICE SMITH: We have only been going an hour and five minutes. Do you want to go for half an hour now?

MS KREISBERGER: I would prefer to break, a short comfort break, as they say.

MR JUSTICE SMITH: We will rise until 11.15 am.

(11.07 am)

(A short break)

(11.17 am)

Reply submissions by MS KREISBERGER

MR JUSTICE SMITH: Ms Kreisberger, thank you.

MS KREISBERGER: Thank you, sir. These are my submissions in reply to Ms Demetriou.

Ms Demetriou's submissions contained a number of very serious mischaracterisations of the PCR's case and the notion that Mr Harvey's methodology doesn't directly grapple with the quantification issues which arise is wrong and I'm going to show you that. Now, what he does is he explains precisely what the quantification task will involve and how he proposes to address it as far as he can at this stage and what else he would need to see. My overriding submission to you is there aren't gaps, there are no lacunae.

What Ms Demetriou has done is to raise a number of factual arguments which Facebook will ultimately want to deploy at trial and dress them up as gaps. So what I want to begin by doing is to unpack Ms Demetriou's main argument into its

constituent parts so that I can then show you where the errors lie and I will then come back to her mischaracterisations of what Mr Harvey has done but first I want to deal with the main case being put against me.

She says, unpacking it, it wasn't made entirely clear, but there are three stages to the analysis that she's advancing in terms of how the assessment should work, the quantification assessment. The first stage is Ms Demetriou rather deliberately and very obviously begins with the unfair price abuse and the unfair price abuse alone. She didn't address you on the other abuses. That's her starting point. So that's the first stage.

Secondly, she says in order to establish unfair pricing, the PCR must apply the two-limb methodology in United Brands. Limb 1, price cost; limb 2, price comparators. She says that is the approach that you have to take to work out whether the bargain is unfair, so that's her case.

She says there is a third stage to the analysis. She says categorically it's necessary to work out the economic value of the social network service and deduct that from the overall figure. So those are her three key submissions on how to approach the task.

Just to show the Tribunal what she said, if I could ask you to turn up page 125 of the transcript.

MR JUSTICE SMITH: It may be tricky.

MS KREISBERGER: If it's helpful, I could read it out.

MR JUSTICE SMITH: You'd probably better.

MS KREISBERGER: I'll do that.

MR JUSTICE SMITH: Day 2 or Day 1?

MS KREISBERGER: Yesterday.

MR JUSTICE SMITH: Day 2/125. I think we have it.

MS KREISBERGER: It's at line 16.

So this is her central submission. She says:

"But where one of the alleged abuses is unfair pricing, then there obviously needs to be a methodology to establish whether or not that abuse has taken place and that methodology is inextricably linked with the loss flowing from an abuse of excessive pricing because what you need is the application of the basic test for an unfair price abuse which is the test in United Brands which includes an assessment of economic value. And you then work from that to work out what loss has happened.

"So you can't, in a vacuum, decide what the loss is that flows from an excessive price without working out whether the price is excessive in the first place. The two things are just linked together. If Mr Harvey is not going to do that, then who is?

So that's her submission.

That's what I am aiming at.

Now, every single stage of her analysis is wrong and I would like to show you that. Step 1, she starts with the abuse and she says quite carefully, "I am only going to look at unfair pricing", she doesn't want to you focus on the other elements of abuse. Now, I'm going to take you back to the correct conceptual approach which I set out on Monday. The correct approach involves the usual three stages of abuse, causation and quantum.

Now, abuse relates to the terms and conditions on offer to users which the PCR says are exploitative and unfair. Those terms include the unfair bargain whereby personal data is taken as a condition of gaining access to the platform and the unfair terms extend to, and this is a point the President raised, the surreptitious way in which the data is extracted, which is an abuse for a dominant firm.

Now, I just want to be clear at this stage as to what the abuse is not, to pick up one of the President's observations. The PCR does not say that it's unlawful for Meta to monetise data. That is not the PCR's case and I think it's quite an important point.

The PCR says it was unlawful not to tell people what you were doing. It was unlawful not to give them a choice and it was unlawful not to give them something in return or one or more of those elements. That's the unlawfulness.

The PCR is not launching a wholesale attack on monetisation and actually this, sir, brings me back to your injunction example. The injunction wouldn't enjoin monetisation. The injunction would enjoin monetisation on unfair terms and the effect of the injunction would be a new, non-abusive, non-exploitative bargain would need to be put in place and the extent of the injunction would depend on the finding of abuse. Is it the lack of transparency, the lack of choice or the bargain, but that would be what's enjoined. Monetisation per se is not in the frame. It's how this has been done by Meta. So I think that's quite an important point.

Now, coming back to how does this play out for the application that you're addressing today. For the purposes of this application, as the President made very clear yesterday during the course of Ms Demetriou's submissions, the Tribunal has to assume a finding of abuse in my favour and that's because an individual claimant wouldn't need to persuade you that there's a triable issue on infringement in the absence of any strike-out application and we know it's impermissible to introduce additional obstacles that don't apply outside the collective regime.

Now, the President yesterday called Ms Demetriou up on this point in relation to quantification and quantum. That's at page 73 of the transcript, lines 2 to 9. The President said this:

"You can't say, if you're conceding arguability, that there is no actionable damage arguable as a consequence of the tort that is alleged and I don't understand you to be saying that.

"So, yes, Pro-Sys obviously is saying you've established, arguably, that you're going to get something that is above the de minimis. How are you going to go about

establishing what that amount is. And, to be clear, I don't think the court is particularly bothered, subject to very broad proportionality lines, particularly bothered about what the outcome will be."

And Ms Demetriou agreed, "No, of course," but actually when one looks at her submissions, this is precisely what she is doing, she is opening up the issue that is supposed to be addressed as having been settled for these purposes.

So the Tribunal is assuming in my favour that the abuse box has been ticked, the causation box has been ticked, there's some element of actionable harm.

Now, what does causation mean in this context? The causative question is confined to identifying the affected data. So when it's said, well, the counterfactual is a very difficult question. Well, the counterfactual is clearly a matter for trial, but that's distinct from the causative question, which isn't complex, hard to understand. In fact, it's very easy to formulate.

The causative question is this: what portion of the data which Meta uses for its targeted ad business was extracted as a result of the abusive trading terms? That's the question.

Now, for these purposes, for today's purposes, it doesn't matter whether they were abusive because the bargain was unfair or because Facebook hid from users what it was doing or because it only dealt with them on these take-it-or-leave-it terms. That doesn't matter. By the time you get to causation the exercise is simply to identify the portion of affected data.

Now, in substance that might come down to saying third party tracked data was the disproportionate element. Through their surreptitious dealings, that's what they got hold of, which they wouldn't have done had they dealt fairly or it might be first party tracked data as well or it may be some other combination, but those are some examples, but you're assuming for the purposes of this application that the unfair terms

did cause Meta to extract data for targeted ads that it wouldn't have otherwise extracted. That's the actionable harm. So those points are established and one moves on to quantum.

Quantum involves measuring the value of the affected data identified under the causation step. So it's also not to say that's a very straightforward exercise but it's not difficult to formulate what the exercise is. It's to value the data. The affected data.

Now, I would like there to turn back to Ms Demetriou's logic. So I have addressed her first stage, which is, look, I'm only going to look at unfair price.

Her second stage is to say: well, having focused on price, I don't want to talk about the other bits of the case. Having focused on price, the only way forward is to apply the United Brands test.

Now, that is wrong in law and it's wrong as a matter of principle and it's Ms Demetriou's approach that sets out a mismatch. Let me explain.

There are two distinct and fundamental errors in her reasoning. The first is the insistence that you must apply the two-step test laid down in United Brands for unfair pricing. That's the first.

The second is the claim, and it's absolutely pivotal to all the points Ms Demetriou makes, that Mr Harvey has to set out his unfair pricing methodology in this quantum report. So given the way Ms Demetriou has put her case, I need to address you on both those points.

My first submission is it is not right to say that there is no other way of assessing Meta's conduct under Chapter II in relation to unfair pricing. I showed you the statutory head; it's the first of the statutory abuses. There is no way to do it unless you apply the United Brands test.

Now, Ms Demetriou accused me of misrepresenting the position when I say that United Brands doesn't apply because she said: well, look at Ms Kreisberger's case,

the principle on which she relies in her pleading is that the dominant firm reaped trading benefits, not reaped in conditions of workable competition. That is my case and I'm sorry if I wasn't absolutely clear about this. I hope I was. So that it is absolutely clear, I'm not disavowing the United Brands judgment. The principles that underlie it and underlie Flynn and underlie the other cases I took you to are of course common.

What I say doesn't work in this case is the two-limbed United Brands test. That's a very specific methodology. It's a specific tool. The reason I say it doesn't work is because it's not tailored to these kinds of facts. They were looking at bananas. Limb 1 of that test compares price and cost. You see immediately we don't have a price in the actual world. It' a zero monetary price.

MR JUSTICE SMITH: You have the data that's been given up.

MS KREISBERGER: But we don't have a monetary price. We have to value that data. United Brands says the price of bananas is --

MR JUSTICE SMITH: It's a barter.

MS KREISBERGER: Quite, so I agree that the underlying principle is good but I can't just look at Meta and say price cost. I have to do some more work, so I need a different toolkit. It's process, it's how do we do the job. It's not the underlying principles that one is comparing economic value.

So I can't just look and say there is a problem here because there is a zero price, what am I comparing? I need to do something a little bit different. It's not different in terms of its underlying -- the underlying purpose of the exercise is precisely the same. It's the toolkit.

Limb 2 relies on price comparators. Well, I have a problem because Facebook has dominated this market, so of course I don't have price comparators. This is the business model. Free service, targeted ads. So that's also a methodological challenge

in these circumstances.

Now, this is precisely the type of forensic issue that's being addressed by what's known as platform antitrust law. These are the challenges being faced.

Now, what competition law doesn't do is it doesn't throw up its hands where it finds digital gatekeeper markets characterised by enormous market power and serious distortion for competition. Competition law rolls up its sleeves, it looks at the purpose of the test in the existing case law and it nimbly adopts a different approach where the old tools for bananas or medicines don't work, and that's why you see, you know, you see the CMA conducting a very detailed lengthy market study into these issues.

Now, I don't only accept, I positively rely on the fact that the purpose of the test is to identify trading benefits which would not have been reaped in conditions of workable competition, but how do I go about that in this case? If I could ask you to turn up the claim form, that's at volume 1, tab 1, page 49.

I have taken you here before. Those are the particulars of the pleaded case on unfair price. Now, you can see there it refers to the low incremental cost of the Facebook service, high ad revenues, high excess profits and, and the fourth one is very important: no proportionality between the economic value of data and the economic value of the Facebook service.

So these are the indicia of the unfair bargain and this is setting out some of the sources of evidence for it.

Now, what Ms Demetriou is urging on you is to take an entirely rigid approach which says United Brands limb 1 and limb 2, that's a single methodology.

MS DEMETRIOU: Sorry, I must interrupt here, I really don't like interrupting people but I am worried that Ms Kreisberger is shooting at the wrong target because of course I wasn't making those points about a rigid approach on United Brands. Our point was the disproportionality to economic value that's not been investigated. I hope

the Tribunal understands that. I was just a bit concerned hearing how Ms Kreisberger is developing, seeking to portray our position.

MS KREISBERGER: Sir, if I could just take you back to transcript, page 125. So the submission that was made was:

"... there obviously needs to be a methodology to establish whether or not that abuse has taken place and that methodology is inextricably linked with the loss flowing from an abuse of excessive pricing because what you need is the application of the basic test for an unfair price abuse which is the test in United Brands which includes an assessment of economic value."

So that was the submission. That's what I was responding to.

Now, to pick up, so urging the United Brands mechanics is not correct in law, but there is a second reason why Ms Demetriou is wrong in any event and this is really her central error. Her argument that Mr Harvey's approach is deficient depends on her being able to persuade you that Mr Harvey should have run the United Brands test in his quantum methodology report. That's what she says there.

She is saying that's the glaring deficiency. Fundamentally that's her submission. He didn't run excessive pricing and who's going to do it if not him is what she said.

Now, Mr Harvey will perform his unfair pricing assessment for the purposes of the infringement trial and, as has been ventilated, that may be before the quantum trial. There may be a split approach, so chronologically it may come first, but he does not run that analysis for the purposes of his quantum methodology. The question before you today is: if abuse is assumed, how is he going to do quantum? We're not allowed to look behind abuse today because that's trespassing into the merits and that's impermissible under Rule 79.

So it would be a very strange and inefficient approach for Mr Harvey to run an analysis which may already have been upheld in terms at the first trial, if there is a split trial,

but certainly this is not what he has been asked to perform for you today. He has been asked to say: okay, you have an abuse finding, we bank that. How are you going to ascribe a value to the harm? and he says, I'm going to value the affected data. So this is a really important point.

Now, Ms Demetriou laboured the point that Mr Harvey's main deficiency is that he doesn't think he needs to put a value on the Facebook service to calculate quantum. Mr Harvey is right about that. He does not need to put a value on the Facebook service for the purposes of quantum and I'm going to come back to that point, if I might just develop this point and I will certainly return to it and I'm grateful for any questions.

It needs to be emphasised, though, first, that the value of Facebook is a matter which arises for determination on the PCR's pleaded case on abuse and I just showed you that in the pleading at paragraph 128. Mr Harvey will absolutely need to value the Facebook service in order to make out the case on abuse because the case on abuse, paragraph 128 subparagraph D, is there's no proportionate relationship. Perhaps we should turn it up; it's helpful to have it to hand.

“No reasonable or proportionate relation between on the one hand the value of the data and on the other hand the value of the service.” That is the case. So there is no sense in which Mr Harvey is going to overlook the value of Facebook or it won't squarely be in issue before the Tribunal. To the extent that's a concern of the Tribunal, that will be an absolutely central part of the fight at trial on abuse. No question, but it doesn't arise at the quantum stage and I'm going to take you through that.

So the critical take-away for these purposes is once we get to the quantum trial --

MR JUSTICE SMITH: It does arise, but you say we don't need to consider it because it is going to be decided at the abuse stage, so what you are --

MS KREISBERGER: No.

MR JUSTICE SMITH: -- doing is a complete siloing of abuse and quantum.

MS KREISBERGER: No, that's not my submission. I'm grateful for the question, so that I can clear that up. If I might just take you through this. I am genuinely grateful because I want to make that clear, that there is no deduction for the value of the Facebook service at quantum. So I first want to allay any concern that you might have 'well, when are we going to look at the value of the Facebook service, it must be factored in somewhere?' Well it's, you know, pivotal to abuse. So that's the first point. I'm going to come on to the netting-off point, if I may, but my point here first, before I come to that, is that once we get to the quantum trial, if it is a split trial or whenever quantum is determined, the Tribunal will have found in the PCR's favour on this point because if unfair pricing is upheld then 127D has been made good. So if I win on unfair pricing, you have held that the service is not proportionate to the data. That's the finding.

So on that basis we need to assume that in my favour today. That's the premise for this certification exercise. Now, Ms Demetriou's submission, with respect, is impermissible. It's wrong. It's also impermissible, because what she's asking the Tribunal to do is step outside of the section 47B jurisdiction and Rule 79, which are both confined to the question of eligibility, eligibility of the collective proceedings.

Now, I know that you have very well in mind, and we don't need to go back there, that merits today are impermissible and I showed you in McLaren that the merits of the methodology as to infringement are for the same reason impermissible. That's not what we're here to assess and review under Microsoft.

What Ms Demetriou's case is doing is she's putting obstacles in the way of a collective claim which don't exist in an individual claim, and that's contrary to the process. So that is the procedural objection to Ms Demetriou's position that Mr Harvey should be running unfair pricing in front of you today in his report. So when she says in the section I have now quoted to you twice the quantum methodology is inextricably linked

with excessive pricing, it's not.

Let me emphasise again: the quantum methodology is not confined to unfair pricing. Ms Demetriou may not like it, but the abuse finding might be: Meta, you should have told users what you were doing and the unfairness was keeping it quiet or misleading the public in certain statement. These are all pleaded elements of the case. That works just as well for this -- this quantum methodology will value the data that was unlawfully exploited, whatever the abuse. I am covering all bases; she only wanted to look at one.

Now, Ms Demetriou also said this at page 100, line 25. She said this:

"So I think I'm going to come to that separately but, in short, our answer to that is he says: oh well, yes, I recognise that the counterfactual is the world, absent the abuse. But the difficulty with that is when you have an excessive pricing case, then it's one and the same thing. Really, when you're establishing what price is excessive, then your counterfactual is a competitive world which is what he says in Harvey 1, and when you're then computing the damage that results from charging a price above that, you need that first step as the benchmark."

So she's saying you have to work out your excessive price within your quantum methodology:

"And so I don't think it really helps him but I will come to unpick that in a bit more detail later. But, really, our essential point is you can't just say: oh well, abuse is for trial ..."

Sir, you then had a debate with Ms Demetriou and she confirms at line 22 on page 101:

"That's exactly right. So in order to work out -- in an excessive pricing case and we saw this from Albion Water -- I won't go back to it but in Albion Water, the Tribunal worked out that the price was excessive and then when it came to look at damages, it took that as the benchmark -- it took the competitive price as the benchmark for

damages. So the exercises are just inextricably linked."

That's not what the Tribunal did in Albion Water and I'm going to show you that.

So if we could turn up Albion Water, that's at -- my trusty reference, it's supplementary authorities and it's at tab 7, page 233. If I could ask you to turn to paragraph 69, which I have shown you before.

MR JUSTICE SMITH: Yes.

MS KREISBERGER: It makes the point in terms, the Tribunal's judgment:

"It will be very rare that an infringement decision, whether adopted by a domestic competition authority or by the ... Commission ... will determine the precise borderline between lawful and unlawful conduct."

So Ms Demetriou said you have to work out where the boundary is, what's excessive, what's not. They said in terms, no, they wouldn't expect to set out the borderline:

"If Dwr Cymru is right that the claimant in a follow-on damages claim will have to show precisely where that line should be drawn, that will often involve the court in redoing much of the work done in the earlier infringement decision."

That's precisely what Ms Demetriou's position is: you have to do all the work again. Further, they say, not only is it repetitious, it's impossible to accomplish. So they say:

" ... it is a task that is almost impossible to accomplish ... If 16.5p per metre squared is not abusive ... what about 16.6 or 16.7 or 16.8? We do not see how a claimant could prove that one rather than the other is the tipping point between lawful and unlawful conduct. Dwr Cymru has recognised the impracticability of the test by making the two tactical concessions ..."

Then at paragraph 70 the Tribunal goes on. So they're saying there you don't identify the lawful/unlawful price boundary. Just picking it up at paragraph 70, they refer to Banque Bruxelles, and they say:

" ... for the purposes of calculating the loss caused is the average one ...," ..."but this

quote that follows from Lord Hoffmann is important:

"I must notice an argument advanced by the defendants concerning the calculation of damages. They say that the damage falling within the scope of the duty should not be the loss which flows from the valuation having been in excess of the true value but should be limited to the excess over the highest valuation which would not have been negligent."

Then, going down, halfway down, this is something I want to draw out for you, sir, because it answers another one of your questions:

"For this purpose the court must form a view as to what a correct valuation would have been. This means the figure which it considers most likely that a reasonable valuer, using the information available at the relevant date, would have put forward as the amount which the property was most likely to fetch if sold upon the open market."

Then he goes on to make the point, well, there may be a range and you take the mean.

At paragraph 71 the Tribunal says:

"That same principle applies by analogy in this case ... The counterfactual must be based on an assumption that Dwr Cymru would have offered a reasonable access price ..."

So that's the counterfactual bargain that you postulate for the purposes of the counterfactual.

So you see what the Tribunal is doing there is it says, 'I'm not interested in what is the excessive price. You found under your test for infringement that the price is unlawful but at this point you say what would the parties have done given that they couldn't enter into the unlawful bargain? What does the lawful bargain look like?' That is what must be postulated.

MR RIDYARD: In a damages case ultimately the damages in a competition law case is going to be the overcharge times how much was bought.

MS KREISBERGER: Correct, yes, sir.

MR RIDYARD: But you're saying you can't infer from that, you can't reverse engineer from that what the dividing line is between lawful and unlawful pricing?

MS KREISBERGER: Precisely. So the job for the court or the Tribunal is to say: we take the figure that was charged in the actual world. That's the abusive price. We know that's unlawful. Then we ask ourselves, 'well, what would have happened if the dominant firm was not allowed to charge the unlawful price, what price would they have agreed and here they pick their mean. Then you take one away from the other. It's the delta. It's the overcharge. So you don't perform an excessive pricing test. You say: we have condemned the price in the actual world, now let's calculate the difference between the actual price and the counterfactual price.

MR RIDYARD: The counterfactual price must be a lawful price.

MS KREISBERGER: Must be lawful.

MR RIDYARD: And the actual price is an unlawful price.

MS KREISBERGER: Yes.

MR RIDYARD: But you're saying that the counterfactual price plus one penny would not necessarily be unlawful?

MS KREISBERGER: You have the point precisely.

MR RIDYARD: I see what you're saying I'm just trying to work out if it makes sense.

MS KREISBERGER: So what they say there is, 'we can't say there's one number that would have been agreed in the counterfactual because that's contrived but we can see there is a reasonable range and Dwr Cymru were arguing for the highest number within the range, and they said, 'well, you know, you're working with a broad axe, that's the job, but the exercise fundamentally is to subtract the counterfactual price from the actual price. It's the delta, the overcharge which is the damages. This comes down to what is compensation.

MR RIDYARD: We understand that but what I am musing over, just thinking aloud, is what that means about -- can you reverse engineer the abuse from the damage? And you're saying you can't.

MS KREISBERGER: I'm saying it's not a necessary part of the analysis. The relevant information is: was the price as charged in the actual world, was that unlawful. So you have a finding, by the time you get here you have a finding that was unlawful, and so the reason why the exercise works is that the Tribunal is required in terms to then postulate the bargain, and we get this from Lord Hoffmann, the bargain that would have happened, in our case where the dominant firm has to, and in that case, has to price lawfully.

So you say, well, what bargain would they have reached when the company was told it can't charge an unlawful price and you look at the evidence that you have available and you say: okay, I can see there are three prices that might have been charged, you know, of this range and I will take out my broad axe and I will award damages in the centre of that range, but precisely the same exercise applies here, so as I stand before you today we must assume that Meta's terms and conditions were abusive and they caused some actionable harm. So you have an unfair bargain, on whatever basis. Doesn't matter if it's price or transparency or whatever.

MR JUSTICE SMITH: Yes, that is the point. You are articulating the test that arises in the case of a cartel that is overcharging, a cartel that is fixing prices and is precisely the approach that I took in BritNed, but whether that is the correct approach in, let us say, an abuse of dominance --

MS KREISBERGER: Sir, can I urge on you that it is the only approach you can take in a compensatory case for breach of statutory duty, because the task inevitably must be to put the claimant, as you well know, in the position but for the tort.

MR JUSTICE SMITH: Right.

MS KREISBERGER: So you strip out the unfair conduct.

MR JUSTICE SMITH: No, you strip out the wrongful conduct.

MS KREISBERGER: Correct, unlawful. It's unlawful because we plead unfair terms. There is no pleaded abuse outside of unfairness, so you strip out the unlawful conduct and then you go through the additional two stages. This is critical. All roads lead to a portion of affected data. So you have unfair terms, what data did Meta extract as a result of the unfair terms that don't exist in the non-abusive world and then you have to value the data.

MR JUSTICE SMITH: No, I don't see that.

MS KREISBERGER: So you have to compensate. Remember, you're assuming harm and you have to compensate the class for the harm suffered.

MR JUSTICE SMITH: Yes.

MS KREISBERGER: So you're assuming --

MR JUSTICE SMITH: Not the benefit gained but the harm suffered.

MS KREISBERGER: Correct.

MR JUSTICE SMITH: Right.

MS KREISBERGER: So you're assuming they have suffered harm. I'm not now engaging in how you do it, user valuation or -- we will come to that.

MR JUSTICE SMITH: Right.

MS KREISBERGER: But you're assuming harm. So let's accept, let's say for argument's sake that user valuation is a very good approach because it depends on -- just for the purposes of this argument. So you say: okay, users, you dealt with Facebook on unfair terms and you gave up all your personal data. You must --

MR JUSTICE SMITH: You didn't give it up; you allowed or were required to allow Facebook to use it. You could have used it in many other ways. It's duplicative.

MS KREISBERGER: Well, there is a factual point there which I'm not sure we have

time to get into.

MR JUSTICE SMITH: Well, you're not precluded from using the data elsewhere.

MS KREISBERGER: I understand the position. Yes, essentially it's proprietary data once you've handed it over to Facebook, is the position.

MR JUSTICE SMITH: Right.

MS KREISBERGER: This is one of the problems in this case. A number of submissions were made that turn on factual points that you're not in a position to determine.

MR JUSTICE SMITH: Ms Kreisberger, are you saying that when I enter my hobbies into Facebook, I can't then do the same on WhatsApp or TikTok or something?

MS KREISBERGER: You can, but it's more complicated than that and I am quite reluctant because I don't think these matters arise now.

MR JUSTICE SMITH: Let me give you an example that I gave to Ms Demetriou and see you deal with that. Let's go to the entity that extracts data unlawfully, per se Facebook in your case.

MS KREISBERGER: Sorry, sir --

MR JUSTICE SMITH: They extract data unlawfully in exactly the way you say. Too much data is wrongfully given over, but it is not used by the defendant to monetise anything. It is simply used in a manner that is unlawful because -- well, it's being used. Is the loss zero in that case?

MS KREISBERGER: Can I reflect on that? I'm going to show you that -- I think we're onto a different debate here, which is does data have value, which I do want to --

MR JUSTICE SMITH: No, no, I'm sure it has value, but I can use data in a manner that is not monetised. I used the example of MI5 to Ms Demetriou and that's what I am throwing at you now.

MS KREISBERGER: That may not --

MR JUSTICE SMITH: So you have a wrong. Let's say it's statutory tort, which actually I think it is. Are you saying that the loss is zero because the defendant does not monetise it even though it has done the wrong?

MS KREISBERGER: No.

MR JUSTICE SMITH: Okay, so how do you assess the loss?

MS KREISBERGER: That would be a different case. I'd probably need to go away and think about it, to be honest.

MR JUSTICE SMITH: Right.

MS KREISBERGER: We're moving onto quantum and at the moment --

MR JUSTICE SMITH: We are moving onto quantum, but my point to you, and it's what you're saying you're going to address so I will give you both barrels because it does worry me: the problem you have is that your measure of loss is not a measure of loss; it is a measure of gain by Facebook. The loss -- and it's very difficult to quantify, I accept -- the loss is what the subscriber has suffered in having their data unlawfully extracted, and there is a mismatch between the Facebook side and the subscriber side. Facebook's gain is not the subscriber's loss.

MS KREISBERGER: Can I develop my submissions in order?

MR JUSTICE SMITH: Of course.

MS KREISBERGER: I'm very grateful for the question. I am for now very keen to draw out a different point, which is what the Tribunal must do in terms of the counterfactual analysis for damages.

MR JUSTICE SMITH: Right.

MS KREISBERGER: So I make the simple point that the damages assessment involves the actual price or, in our case, bargain, the bargain in the counterfactual scenario, and then you deduct one from the other to get the difference. That's what they did in Albion Water.

MR JUSTICE SMITH: I'm willing to accept that for the purpose of the overpricing cartel, but I'm not sure it follows in each and every case, because what you are doing in the tortious measure, not the contractual measure, is working out what the consequences of the wrongful behaviour were, and the consequences are not that Facebook makes billions. The consequences are that your data has been misused. So what is the loss to you?

MS KREISBERGER: I see the problem. One of the pleaded allegations of abuse is the unfair bargain. That's the unfair pricing. So it's not correct to say monetisation. I said the attack is not on monetisation per se, but we come back again, you know, if I pay a million pounds for a drug, one has overpaid. We're saying that there is a problem with the bargain now today.

MR JUSTICE SMITH: Right. This is where we come to the other problem, so I will throw that at you now as well. This was actually all considered by me in BritNed where we had an infringement found by the Commission. We then had, effectively, a follow-on claim and the problem was could I or could I not find that there was actionable damage before the quantification exercise?

And the Gordian knot that I had was that you had to establish actionable loss, which is an amount above the de minimis, on the balance of probabilities when you did the whole quantification exercise on loss of chance basis. Essentially, you evaluate the evidence and reach a view which is detached from balance of probabilities.

So I had to work out whether there was in fact an actionable loss which permitted me to go into the quantification done on a different basis. So what I said was, ‘well, I'm just going to assume it happens and then I will go into the quantification.

Now, that's an assumption that most courts will be prepared to make, but you are using it as a device to park the whole exercise of quantification. How you're going to do the assessment, into the abuse arena, the substantive breach, rather than on the

quantification side, and I'm not sure that that is entirely permissible, because whilst we might well be prepared to say you've passed the actionable loss threshold, to say that that means you are utterly absolved from working out the granular nature of the, let us say, abusive price, if we're talking about abusive price, well I'm not sure that works.

MS KREISBERGER: Sir, happily I'm in the position that there is no strike-out application, so it must be right that there is actionable harm.

MR JUSTICE SMITH: I agree.

MS KREISBERGER: Otherwise we're going into the merits and there is a process problem.

MR JUSTICE SMITH: I'm absolutely prepared to assume there is actionable loss. The point I am making to you is that says nothing about quantum, and I'm not prepared, I do not think, to assume that you're going to get an unquantifiable lump of something simply because we're assuming you're going to succeed to recover an actionable loss --

MS KREISBERGER: Yes.

MR JUSTICE SMITH: -- at trial.

MS KREISBERGER: Thank you for that. What I would urge upon you, sir, is that to say the quantification, the damages assessment -- we're on quantum -- to say it involves something other than comparing the actual bargain with the counterfactual bargain would be a very extreme proposition because it departs from authority.

MR JUSTICE SMITH: Let's go to the concrete. Now, BritNed was not a collective action, so we didn't have this stage at all, but what we did have was a very clear difference between the parties in terms of methodology. We had one party, the claimant, doing a huge regression analysis on a statistical base comprising various forms of overground and undersea cabling and that was their method, and we had a defendant's approach which was based upon the fact that the tender figures for

a sample were all in fact not inflated and it was simply a question of what was topped and tailed to that to work out whether there was an overcharge and the allegation or the defence was there was in fact no overcharge, even though there was a cartel.

Now, all of this was extremely granular quantum argument. To say that none of this should have been disclosed at, let us say, the certification stage simply because I was prepared to assume there was a cause of action that would result in actionable damage being found, well, I wouldn't have awarded.

MS KREISBERGER: Sir, that's not my submission. I do need to make this clear because it's such an important point of principle. My submission is a much more limited one.

MR JUSTICE SMITH: Just to be clear -- okay.

MS KREISBERGER: I'm so sorry, sir, to speak over you.

MR JUSTICE SMITH: No, no, this is an interesting debate, but what I put on the quantum side, therefore, is the manner in which one was working out whether the prices charged in all of these cases pre and post the cessation of the cartel were or were not overcharged prices and that was talking about exactly what you are saying you're not talking about, which is the extent of the overcharge, and what I am putting to you is that, certainly if you look at BritNed, was a quantum question, not a liability question.

MS KREISBERGER: Sir, all I am putting to you is that the conceptual framework for calculating, measuring the harm, before we get into the precise quantification methodologies, whether it be regression or something else, purely the conceptual framework as a tortious measure of harm has to be a comparison of the actual price or actual bargain with the counterfactual. That's all I'm saying. So one necessarily doesn't get into the question of where do you draw the line, what's your excessive price. It doesn't arise. It's purely the conceptual.

MR JUSTICE SMITH: What you're saying is that you don't need for purposes of quantum to articulate the level of the unlawful price.

MS KREISBERGER: You don't need to isolate the boundary.

MR JUSTICE SMITH: Yes.

MS KREISBERGER: That really is the submission.

MR JUSTICE SMITH: Yes.

MS KREISBERGER: So you know the price is abusive. The task is to work out what would happen in the counterfactual, what's the difference, so, in other words, actual price minus counterfactual price equals damages is the equation.

So in a world in which data was extracted abusively under abusive terms, you simply compare it to the bargain in the counterfactual world. Now, this means that Ms Demetriou's analysis, coming back to that, has two further flaws I want to highlight. So one I have dealt with. It's not right that you need to work out the excessive price. For this purpose, you don't.

It's not that you're shying away from it or you're trying to push it into a different part of the trial, it's just not the conceptual exercise.

Secondly, it explains why Ms Demetriou is wrong to say that you have to value Facebook, and I did promise to come back to this point and I appreciate that it's in the forefront of your mind so I must address it.

Now, there is no netting-off of the Facebook service in the usual conceptual approach of working out the difference between actual and counterfactual. Now, I did address you on this on Monday and my submissions stand. It's a simple point, and I think, sir, I had this debate with Mr Ridyard, that the Facebook service is supplied in the actual world and the counterfactual world, so it nets off, it's neutral. So, to be very clear, users get the value of the Facebook service in the actual world. In the counterfactual world they're simply dealing with users non-abusively on non-abusive terms, so

whatever that value might be, we have done hard work, we have certainly engaged in it, but not for damages, it nets off.

MR JUSTICE SMITH: Yes, what you're saying is all of the work is done at the liability stage. Whether you achieve a mismatch between the size of the barter, you say is all for liability. We don't need to worry about it. That's the problem --

MS KREISBERGER: Not quite, sir. Might I just check that I am understood on this point. I'm not saying to you the Tribunal doesn't need to worry about it because we will do it before. That's not my submission. It is correct that to the extent you're worried it's not going to happen I can give you that comfort. It's part of the abuse exercise. No shying away from that, .but it's not being done at the quantum stage because it doesn't need to be done, because 5 take away 5 is zero. If they get £5 of value from Facebook in the actual world and they get £5 of value from Facebook in the counterfactual world, they net off to zero. So whatever answer you get, this is my point, whatever answer you get at the abuse stage doesn't matter. It can be a million, it can be 5. They come to zero subject to the point about offsetting benefits, which Mr Ridyard might be about to put to me. I will come back to that.

MR RIDYARD: (Audio distortion) I was going to put, the way I see the value thing or the reasonable value thing, coming into the assessment, is that charging price above cost is not in itself unlawful. It's perfectly lawful and normal for many imperfect, i.e. real world industries, to charge prices in excess of the WACC.

MS KREISBERGER: Of course.

MR RIDYARD: That's when this value term seems to come into the assessment of whether something is unlawful or not. Whether a price is unlawful or whether a bargain is lawful or not lawful, and that does need to be addressed in deciding, you know, whether the bargain is unlawful in the first place and also does it not need to be assessed when you come to looking at the damage that has been suffered?

MS KREISBERGER: It doesn't, and I wonder whether it might be more efficient for me to address you on this when I come to that part of the analysis, but it's not the PCR's case that everything above WACC is unlawful and that's the pot of damages. That's absolutely not the PCR's case.

MR RIDYARD: In that case you must have to address which bit of the surplus over cost is lawful.

MS KREISBERGER: Yes, and we have the techniques, which are ATT and the other empirical methods, which are a direct measure of the value of the data using the commercial valuation approach, but one is not saying, 'let's take everything above WACC and that's the number and it might need some adjustment, that's not the approach.

MR RIDYARD: I understand that.

MS KREISBERGER: Might I come back to that and please do tell me if I haven't addressed the concern.

MR RIDYARD: I will.

MS KREISBERGER: Because I want to make sure that I have.

So Facebook nets off, you don't need to do that exercise, so I say Ms Demetriou just has that wrong, she has misunderstood the conceptual damages exercise.

Facebook wants to argue, does argue, will argue at trial, no doubt, if we get there, that the Facebook service provided in the fairer counterfactual world will be in some way degraded. So this is Ms Demetriou's argument that a drop in ad revenues would lead to underinvestment.

There are four problems with that argument. So she's saying there is some net off, even though she's saying, you know, Facebook is worth £5 in the actual and only £4 in the counterfactual and so there is £1 worth of difference. My principal submission of my four responses is that that should be taken with a grain of salt, a rather large

grain of salt, as I think Mr Ridyard pointed out yesterday. Meta has billions of dollars of profit to invest in its business and this is a very speculative assertion from Meta.

Secondly, Facebook's incentives lie in investing in the platform to attract users because it's the user base which drives ad revenues. So here I'm really addressing the multisided platform argument. In this market, just raising the term multisided platform is not helpful. In this market, on the basis of what we know from the public domain, network effects point in one direction because the interests of Facebook and the advertisers are aligned. The joint incentive is to attract as many eyeballs as possible. So they both want more data, more users, more granular data.

So that's the second problem.

The third problem is that the model wasn't always based on targeted advertising. So it's not fundamental, it came later, after Meta achieved market power.

Fourthly, if Meta wants to make arguments at trial that there are offsetting benefits, it's perfectly free to do so. Mr Harvey will assess the evidence, but as matters stand today, Mr Harvey doesn't think there will be such offsetting benefits. He's highly sceptical. I don't have time to go there, but he says in terms at Harvey 2, paragraph 3.45:

"To the extent it is necessary I will consider demand side value."

So he's not shutting his mind to anything at this stage, but what I want you to take from this is that this is a theme you see time and again in Ms Demetriou's submission. She hones in on a factual point, a factual question, would Meta underinvest? It's a point they want to deploy in their favour at trial. Mr Harvey says, ‘well, I have considered it, I don't have the data at the moment but I'm actually unimpressed with the point from where I am now. I'm sorry, sir.

MR RIDYARD: This is not the way I understand the way -- I understand the point about the possibility that the product is degraded if Meta gets less data. I think it's

really a separate point. I understand it entirely and Harvey acknowledges it.

MS KREISBERGER: Understood.

MR RIDYARD: But the value thing, the value point is another element completely. Put that to one side. The value point is if it's legitimate for Meta to earn a reward above cost. It's still not the abusive -- doesn't that have to be addressed in the damages assessment?

MS KREISBERGER: But that's what the empirical tools do.

MR RIDYARD: That's what you say but --

MS KREISBERGER: Because the empirical tools simply measure -- it's targeted, so you look at ATT and you can work out and Meta has worked out and --

MR RIDYARD: I can see that Meta is capable of working out the value of extra data.

MS KREISBERGER: Sure.

MR RIDYARD: I understand that.

MS KREISBERGER: So Meta says, okay, so we see, so what does ATT tell us.

MR RIDYARD: Sorry, but I don't think that's addressing the point that a price which is above cost is not per se abusive. So there must be a legitimate margin above cost which is okay and then beyond that there is something which is not okay which is abusive and therefore requires compensation because it's happened.

MS KREISBERGER: So if one is taking a slice of data, as in the ATT example, you can then say, well, these are the profits above the appropriate rate of return.

MR JUSTICE SMITH: What is the appropriate rate of return?

MS KREISBERGER: Meta has done that. So we need to see Meta's disclosure, but what you're doing is you're not using WACC as your benchmark in that case, you're saying, 'well, Meta say this is worth X in profitability to us. So you're saying this is -- and you have to engage with this issue in any case that involves looking at profitability to work out harm, but it is a problem if you're saying, I'm just going to take

all of Facebook's profits. You're not doing that, you're saying what profits has Facebook made out of third party tracked data? And you can identify the excess profits. I accept you have to use some rate of return, but one doesn't throw up one's hands to say it can't be done. So you're not valuing the Facebook service; you have to engage with rate of return, but one would hope to have very useful data on that from Meta.

MR RIDYARD: Okay.

MS KREISBERGER: I want to pick up the thread. I am very conscious of time. I will do my best.

I have set out that Ms Demetriou's argument fails at every stage of the analysis and what her tactic is to collapse abuse into quantum. Now, if she wanted to run these arguments about abuse, you've heard all of her arguments, cost plus, and she took you through the case law in great detail on excessive pricing. If she wanted to run that argument, what she needed to do was to bring a strike-out, but Meta did not bring a strike-out.

Now, she worked hard yesterday to try and convince you that that's a distinction with little relevance. Well, that's an important statutory distinction. I think you're with me on that, sir, and it has a practical difference. Had she applied strike-out then, the PCR would have had an opportunity to put in expert evidence, evidence including on the question of abuse and these points, but it hasn't been done because, quite properly, the PCR has addressed eligibility under Rule 79 in the Microsoft test.

So this is a veiled strike-out and it's gaming the system. It's not permissible under the rules.

So now I turn to Mr Harvey's methodology. What he has done, quite properly, is to set out two approaches for valuing the affected data, and I have explained why that's the correct approach to take and I'm going to have to be crisp in my submissions.

Ms Demetriou's overriding criticism, when you really look at what it is that she's saying, what's the problem, she's not really complaining about assumptions, you can't complain about the use of assumptions because we all know that's there in the test, it's there in Merricks and Gutmann. Assumptions are absolutely necessary to be able to address these hypotheses, but what she's really saying is he fails to ask the right questions. Well, my question is rhetorically what other question should he have asked. The question he addresses is: I have an actual world in which the data was unlawfully extracted. I will know which portion of data I am looking at. I must now value it using real-world empirical evidence and so on. I have to come up with a value because otherwise the class aren't compensated.

Ms Demetriou said repeatedly, repeatedly yesterday the claim is premised on the idea that anything above WACC is abusive. That's not right. Mr Harvey explains that ATT is a targeted empirical method and he will be able to measure profits using whatever proves to be the reasonable rate of return. It's not a WACC assessment.

Now, just to flag, I won't go there, but the President observed yesterday, and it's page 123, line 21 to page 124, line 17. Sir, you said, ‘well, this is just another way of addressing profits above WACC. So I apologise if I haven't got this point across before because it is important. ATT, the empirical methods don't engage WACC. As Mr Ridyard says rightly, one always has to find a reasonable rate of return, but it's not a WACC method, it's a direct measure of the profitability of the data. So when Meta says, ‘we lost two-thirds of iOS uses, they didn't opt in, that wipes 10 billion of revenues, that's a clean data point.

Now, the actual lost profits tell you what the data is worth to Meta. Now, I want make this observation: Mr Sawyer asked why hasn't Meta offered to pay iOS users for their data? Well, with respect, sir, that's not an option on the table when the Meta business is still based on free data, targeted ads, with everyone else in the market, and Meta is

launching a full throttled attack on Apple about this change in policy, so it's not going to change its business practices now. It's not a realistic approach.

What ATT does show you is that advertisers like data. When data goes down, ad revenue goes down, so the benefits of data are on the advertisers' side, the detriments are on the users' side. There is no reason to think that advertisers are detrimentally affected by the abuse. It was said, a little unfairly against me, that the PCR wants the abuse to continue and I do need to correct that. Far from it. She's very passionate about these subjects. She seeks recompense for the data that was unfairly taken because users were duped into a bad bargain. That's essentially the case.

MR JUSTICE SMITH: But, as you said earlier, you're not against monetisation.

MS KREISBERGER: Absolutely not. It's the bargain. I'm grateful, sir.

Now, I just here want to say it was also said against me, well, it can't be a bad bargain if users don't know and don't care about the data.

That's a merits point because obviously the abuse has to engage with that question, but I nonetheless take the opportunity to address you on that point. I'm going to venture a new analogy. We have had a few in the last three days.

If I have a Jackson Pollock, I have no idea it's valuable and I don't like it much, don't give a fig about it. Now, if Mr Grubeck dupes me into giving him my Jackson Pollock painting for free, the fact that I don't know it's value, I don't understand it and I don't give a fig about it, I don't even like it, it doesn't mean I'm not entitled to compensation at its market value. That's all we're saying.

So I turn back to the methodology and I think it's important. Lack of knowledge is not the answer here. I have addressed you on ATT. There's every reason to think that Meta is sitting on a treasure trove of analyses. They haven't denied it, although Ms Demetriou did claim speculation.

I want to go, now, to a number of mischaracterisations of the case and I will try and

take them briskly. Mischaracterisations in relation to the methodology, the quantum methodology. So the first mischaracterisation is that Mr Harvey has not taken account of the multisided nature of the platform. If one turns to Harvey 2, paragraph 3.25, that's at core, tab 6, page 361. You have seen it before. Mr Harvey says in terms that he has not reached any concluded view on the point and he makes the point he will need to see disclosure in evidence, but his provisional view is that advertisers' and Facebook's interests are aligned. The benefits of more and better data fall to Facebook and advertisers. The costs fall to users.

So it's quite important that one is not misled by the label "multisided benefits," but Ms Demetriou says again, her constant refrain, ‘your methodology fails to grapple with the issue, and I ask you what else is Mr Harvey to have done?

Mr Harvey gives his expert view at this stage: this isn't an issue I need to grapple with. I think it's a bad point from Meta, but if Meta has evidence to suggest otherwise, I will look at it, I will assess it. It's a lot of sand being kicked about the failure to grapple, but it's just an argument being made by Meta. Next mischaracterisation. Ms Demetriou said the allegation is not concerned with the abuse. I hope I have explained my position. The matches, the abuse, what's the affected data, value the affected data, and so you have it for your note, paragraph 3.7 of the second Harvey report, core 6/356, that's where he addresses ATT forecast and they measure the value of the affected profits. That's the direct connection with the abuse.

The third mischaracterisation. It's said that it's wrong -- Ms Demetriou says you don't look at commercial value and user value, and that's one of the challenges I am being presented with. Ms Demetriou took you to the Victor Chandler case. Could I ask you to turn up, please, authorities volume 1, tab 8, page 106.

MR JUSTICE SMITH: Yes.

MS KREISBERGER: There's quite a useful statement here. What Mr Justice Laddie

says is, this is two-thirds of the way down, paragraph 56:

"In a case where unfair pricing is alleged, assessment of the value of the asset both to the vendor and the purchaser must be a crucial part of the assessment."

So that's the value to Meta as well as the value to the user. You look at both sides, and that's a case Ms Demetriou relies on very heavily. So that encapsulates very neatly why Mr Harvey is right to use both of his measures.

MR RIDYARD: Is this talking about damage or abuse?

MS KREISBERGER: This is abuse.

MR RIDYARD: Right.

MS KREISBERGER: But the same point arises because he's talking about measuring the unfairness.

Now, the next mischaracterisation, Ms Demetriou said, well, Facebook wouldn't pay users for their data. That's a nonsense counterfactual. Could I ask you to turn up the judgment in Klein in the Northern District of California. It's volume 5 of the authorities bundle, page 3554.

Sir, you did say this is just a preliminary judgment. It's actually essentially a judgment in relation to a strike-out application, so I do invite the Tribunal to read this judgment, but if I take you to line 10 on page 3554, the judge said this:

"Similarly, in the instant case consumers allege that users' information and attention has a cash value which can be approximated by Facebook's reported RPU."

I'm sorry, sir. I am racing ahead, sorry. I'm grateful:

"Additionally, like the plaintiffs in Brown, consumers identify [and this is the point] examples of companies that have been willing to pay users for information and attention. Indeed, Facebook itself paid certain users up to $20 per month in return for access to those users' emails, private messages and social media apps, photos and videos, web browsing and search activity and even location information. Thus,

consumers have adequately alleged that by providing Facebook with their information and attention they lost money or property."

This is an absolutely critical point and I'm sorry it hasn't been adequately brought out before now. More than enough for our certification standard in terms of harm.

MR JUSTICE SMITH: What is he talking about here, is he talking about actionable loss or method of quantification?

MS KREISBERGER: No, he's simply saying that they have surpassed the threshold of harm because Meta paid for data, so to say that data is inherently valueless is not a good argument when Meta has paid for it itself.

MR JUSTICE SMITH: Ms Kreisberger, no one at least on this side of the bench is saying that.

MS KREISBERGER: Well, I'm grateful for that, sir, because it is certainly said against me.

MR JUSTICE SMITH: But I think the borderline between what you have to show by way of quantification method is not subsumed into merely showing that you have actionable loss.

MS KREISBERGER: No.

MR JUSTICE SMITH: So showing you have actionable loss, absolutely fine, big tick on liability but it doesn't help you on methodology for quantification.

MS KREISBERGER: Let me be clear and thank you for that question. That's not my submission at all. I really am grateful for that, sir, because I am not saying to you, and I wouldn't dare make this submission, I get a free pass on quantum because you're assuming actionable harm. I am simply saying we have gone through abuse and causation, but what I do need to, clearly need to satisfy you, is that the methodology is plausible. That simply is. I'm not trying to get a free pass, but it's said against me, 'your counterfactual -- it's a different point -- your counterfactual a nonsense, it's

a fantasy, because data has no value, but Meta paid for the data.

My next mischaracterisation is the high valuation of Facebook in the literature. My first point is Ms Demetriou is making submissions based on primary research techniques. So it's implicit in her submission that she regards them as being of some value.

The second point is that the literature she urges you to take account of in relation to the value of Facebook, I have addressed you on the fact that the value of Facebook nets off anyway so it's not a point for quantum, but I would like to make the argument made against me.

The value of Facebook in the actual world is represented in this literature and it's very high, she says, but of course I think Mr Ridyard has already made the point that's a reflection of market power. That's not a reflection --

MR RIDYARD: I certainly have not made that point.

MS KREISBERGER: I apologise, sir.

MR RIDYARD: It's a measure of willingness to pay.

MS KREISBERGER: Yes, to the extent that the primary research identifies the value which users are saying they get from Facebook, that's the world where there aren't alternatives. That's simply the point.

MR RIDYARD: Simply measuring their willingness to pay, which appears to be very high.

MS KREISBERGER: In the actual world.

MR RIDYARD: In any world.

MS KREISBERGER: Well, I'm not sure one can make the leap from the surveys that say, well, what do you value this existing platform at? I don't push the point too far because this is academic literature. The idea that Mr Harvey won't actually do the work himself is -- he has to do the work.

Now, third point, Ms Demetriou comes back to her theme that you have to value the

network to say there can be no loss, she says, if users value Facebook more highly than the service. That was the specific submission. There can be no loss because they're getting a more valuable service than the data they're giving up. We don't accept that. That's not our case.

I come back to the point that Mr Ridyard has the point and is way ahead of me. The service nets off. The question is the value of the data that was passed. So in the actual world you have Facebook service plus data extracted unlawfully. In the counterfactual world you have Facebook service, comes to zero, but you have, for instance, fair payment for the data or you have users retaining their data.

So it's just wrong in principle. It's a mistake. It doesn't matter.

Now, the next mischaracterisation was that Ms Demetriou said that our methodology rests on an assumption that Facebook is of minimal value. We haven't made that submission and, as I said, we say that there is a disproportionate relation between the economic value on both side of the bargain. I didn't say minimum.

MS DEMETRIOU: It's in the pleading, that's the submission I made. It's in the pleading, paragraph 127.

MS KREISBERGER: I take it back if that's the wording used, but Mr Harvey is not addressing the value of the Facebook network for these purposes nets-off.

Now, the next mischaracterisation is that the counterfactual is shifting. It isn't. It doesn't shift. Now, I explain that the damages counterfactual is by definition, I think we're all agreed, you strip out the abuse. That's the easy bit, if there is an easy bit in this case, but because of the way Ms Demetriou puts the point, I must remind the Tribunal that the counterfactual is a matter for trial. It's not permissible to use the fact that it may be challenging to define it as a reason for withholding certification. Actually the Court of Appeal says it's a reason to be less demanding.

Having said that, the broad counterfactual is clear and I would like to show you

Mr Harvey's second report on this. It's at paragraph 3.27, core bundle, tab 6, page 361. 3.27, Ms Demetriou read out the partial quote, not the full quote:

"In the counterfactual scenario, Facebook would have obtained less personal data with the corollary that other apps, advertisers would have received more limited services but users would have still received the Facebook service or would have provided the same quantity of personal user data that received greater value from Facebook or other competing platforms so therefore one would expect users to benefit in the relevant counterfactual."

So just to sum this point up, Mr Harvey is saying that in the counterfactual, users either retain the affected data or they give it up as part of a fair bargain, including being paid for it, or some combination of the two.

So I think of this as deal or no deal. If users value their data more than Meta values their data, no deal. If Meta values their data more than users value their data, you have a deal, there is a bargain. In that case, the value lies between the commercial value to Meta based on methods like ATT, not just everything above WACC, that's not our case, and commercial value to users.

So, sir, I promised to come back to this point, very important point. Why am I saying commercial value is relevant in the way that Mr Justice Laddie looked at both side? Well, here because it gives you the lower bound. So actually there are risks to Meta if one doesn't have that lower bound, because one is saying the -- what would actually happen, this is the Albion Water, how would you hypothesise the fair bargain in the counterfactual? It has to be between the user value cap and the Meta value floor. So you're left with an incomplete set of tools, an incomplete methodology if you don't have both.

I think Ms Demetriou said I changed my case on this so I do just need to show you Mr Harvey's second report, paragraph 3.39, so that's at page 365. If you could just

cast your eye over it, he makes the same point there.

Now, sir, I don't know how we're doing for timing. Is it a hard 1 pm stop? I fully appreciate if it is and I will adjust my submissions accordingly.

MR JUSTICE SMITH: Well, nothing is ever completely hard.

MS KREISBERGER: You may have had all you can take.

MR JUSTICE SMITH: As I say, I don't want you cut off but I would work to 1 o'clock.

MS KREISBERGER: I'm grateful. I'm going to address you very briefly on the question of the privacy paradox. I am in your hands, but I have the sense that I don't need to go into great detail on this.

MR JUSTICE SMITH: If you're addressing the final stage of Ms Demetriou's assessment on questionnaires --

MS KREISBERGER: I wasn't going to do that.

MR JUSTICE SMITH: I think the privacy paradox is part of that. What I understood Ms Demetriou to be saying was that there was a fundamental problem with survey evidence in this particular area, which was that you got people telling you one thing which might not be the case and there was no way of working out whether it was or was not. Is that the point you're proposing to move on to?

MS KREISBERGER: It is. I will address that point briefly if that's helpful.

Can I ask you to turn up supplemental bundle, tab 11.

MR JUSTICE SMITH: We're just conversing. We don't need to hear anything further on the third point, that the process of obtaining this survey evidence has been insufficient to articulate the privacy paradox difficulty.

MS KREISBERGER: I'm grateful for that.

So I was going to address Ms Demetriou's submission, which I wrote down from this morning, that it is well-established in economic literature that surveys are unreliable in relation to these questions, in relation to data, and that's a submission I was going to

address.

MR JUSTICE SMITH: I don't think you need to.

MS KREISBERGER: I'm grateful. I will leave it there. Perhaps I could just say for your note it's tab 11 of the supplemental bundle. There's a paper from Dr Padilla and others where they acknowledge the paradox and they say: here are some answers. So that was really the point.

I'm not going to address the attack on the questions. I take it that I don't need to address that point.

So I think, sir, with that, I can end my submissions on the methodology. In short, it's not right to say Mr Harvey doesn't even ask the question. That's the way the case against me is put. He doesn't ask the question. He asked the question: how do I value the data? And he sets out a really robust method for doing that, looking at both sides, for all the reasons I have set out.

So with that, I move briskly on to the process question. Now, I don't want to end on a pessimistic note for my case, but I must address you, sir, on the question of what the Tribunal should do, if, contrary to everything else I have said, it considers that the expert methodology doesn't currently satisfy the Microsoft threshold; it's implausible, or it doesn't satisfy that test unconditionally.

Now, what one sees from the McLaren judgment, sir, that you have raised is it's obviously not a purely binary question. It's not yes or no, traffic lights, red light, green light. Whether or not a CPO is made ultimately, the Tribunal has the power to actively case manage the proceedings and ensure that any methodological concerns it has are addressed.

Now, in such a scenario, sir, you've indicated that the question of certification could be stayed to allow the PCR to address the issues that the Tribunal is concerned about and that might involve putting in further evidence or making amendments.

Now, I just wanted to deal with two points. First, what are the Tribunal's powers, and I think this is an important question. Secondly, why you should exercise those powers, in my submission, in this case, if appropriate.

So the relevant case management powers, of course I need not take you there but one starts with the governing principles and subparagraph 4 is the requirement to actively case manage.

Now, under rule 88(1), the Tribunal may at any time give any directions for the appropriate case management. The case management powers in part 4 of the rules expressly apply to collective proceedings. I sense that I am teaching grandma to suck eggs. I am conscious of that and I apologise for that, sir, but I am getting on to perhaps a slightly less obvious point.

So case management powers apply under rule 74(1) to collective proceedings. They include the power to stay or to provide for further evidence or additional information.

Now, what I think it may be helpful to direct you to very briefly, you may be able to recite these provisions, but rule 53, that's at page 41 of authorities 1, tab 6. If I could ask you to cast your eye over 53.1, so can make any direction.

Then if I could just draw your attention to the list of things which the Tribunal may give directions about under subparagraph 2, include (d):

"Requiring clarification of any matter in dispute or additional information in relation to any such matter."

Ok:

"That the whole or part of any proceedings be stayed generally or until a specified date."

And subparagraph 3: very wide powers to put questions, invite parties to make submissions, information, particular documents, et cetera. Very broad case management power.

Just for your note, paragraph 6.66 of the guide says:

"The general provisions dealing with case management in private actions under rules 53 to 57 apply to collective."

So these granular provisions apply to collective proceedings and you can call for further evidence, for instance, or clarification.

You then have the separate provisions under the collective part of the framework. That's rule 88(1):

"Can give any case management directions."

And 85(1) is the power to stay, but what I wanted to show you is that these very granular wide-ranging provisions specifically do apply in the collective context.

Now, as members of the panel will know, the Supreme Court held in Merricks that a CPO is not the beginning or the end; it's a process and the Tribunal is the gatekeeper and must manage the process.

In Merricks, the Supreme Court referred specifically to the wide powers for the CAT to stay collective proceedings under Rule 85 and its wide powers of case management under Rule 88.

Now, you already have the point that collective action shouldn't be held to a higher standard than individual claims unless provided for, Microsoft. So inherent in that statement is the recognition that the Tribunal can and should actively case manage either before or after granting a CPO. It's not that there is a cut-off, you have to wait for the CPO, and that intuitively would be completely wrong.

So there is no question that the Tribunal can't order a stay now if it is so minded.

Now, my submission, my specific submission is that the Tribunal should exercise those case management powers if you're not with us that the case can be certified as it stands today. So respectfully I agree with the President's observation that it would be appropriate to exercise these powers, either to stay the case and allow the PCR to

address any deficiencies that are identified or to make a CPO and set conditions on what further steps need to be taken. I obviously prefer the latter approach but both are available to the Tribunal for sure.

Now, that would give the PCR the opportunity to address any specific concerns that the Tribunal has in relation to quantum, quantum methodology, and, sir, you drew the analogy with the strike-out procedure and in my submission that's entirely apposite. Unless there is a fundamental insurmountable flaw in a pleaded case, a party would usually be given the opportunity to make amendments to their pleadings and address any issues. I have the FX case in mind, for example, and we say the same latitude should be afforded to the PCR here and in fact that applies a fortiori more strongly here because the Tribunal accepts that there's an arguable case on the merits and Meta hasn't challenged it with a strike-out.

So if there are methodological issues and they're surmountable, fairness to the class requires that they be addressed and the class be given an opportunity to advance the claim.

Now, Meta urges on you really a draconian binary approach and that approach would deprive you of what is a valuable case management tool in line with the principles laid down in McLaren. So it wouldn't be consistent. It wouldn't be consistent with Merricks. So we oppose the allegation that you have to give a crude thumbs up or thumbs down approach rather than setting the parameters for the refinement to the methodology, should you consider.

The binary approach doesn't advance the interests of the class.

Now, in McLaren, perhaps if we just turn that up briefly. That's volume 3 of the authorities bundle, tab 30, page 1583.

MR JUSTICE SMITH: Yes.

MS KREISBERGER: Paragraph 41:

"The Supreme Court in Merricks made emphatically clear that once the CAT had concluded that a claim was arguable and was not to be dismissed on the merits there was an entitlement or right on the part of the Class Representative to have the claim tried. Once the strike-out hurdle has been passed the ' ... claimant is entitled to have the court quantify their loss almost ex debito justitiae'. The right to quantification in order to do justice is 'unavoidable' and the CAT cannot deny a class the right to a trial merely because of 'forensic difficulties' in quantification 'however severe' or 'formidable'."

If we go down to paragraph 47, the Court of Appeal emphasised that the methodology is not cast in stone and it says in the last sentence there, it's page 1584:

"In short, the CAT has power at any point to revisit the methodology."

So this appears to envisage giving the class representative the opportunity to deal with deficiencies and in McLaren, of course, the approach was content with the CPO but conditions should be implemented to supplement it.

MR JUSTICE SMITH: Yes, that's what I don't get, because it seems to me that if you're having a process where you need to ensure that the stepping stones for trial are properly in place, well, in many cases you will say the stepping stones should be considered later on and you leave the uncertainty for later development because it's pointless to discuss them right at the beginning; too many unknowns, so you leave them for later, but if you've discovered at the outset of the action that there is a problem that needs addressing by way of further articulation of how one is going to go about trying the case, then it seems to me irresponsible to make a CPO and say: oh well, we will give away a significant case management power, which is we're not going to certify you if you can't satisfy us that this is triable, and the question really arises what does the Tribunal do if the class representative says, well, we're not going to do this. It's not something that is appropriate.

You're then in a cleft stick of seeing, well, you certified it on the one hand and you're not being permitted to let it go further on the other. So from my part it seems to me that the logical consequence of McLaren is to say there was an error; there was an error in certifying it. Granted, you may well certify it again, but you need to revisit the basis on which it is certified so you have the relevant bits and bobs in place to enable the action to go forward.

MS KREISBERGER: I obviously don't want to make submissions on the facts of that case, but it may be that, given your case management powers are so broad, it's the nuance of certification and then ensuring that these conditions are workable, but can I, sir, give you this comfort: this PCR is very enthusiastic about meeting any conditions that the Tribunal would have.

So whether you were attracted to the McLaren approach which was to certify, which sends a signal to the class that this action proceeds, but there are conditions, that would be very welcome to address any concerns that the Tribunal has, but equally, sir, I can see where you're coming from and, if that feels procedurally contradictory, then equally it's fully within your power to grant a stay and the deficiencies can be addressed pre-certification. Of course, the PCR is in your hands.

MR JUSTICE SMITH: But, I mean, there are variants. It may be that, to take a hypothetical case, the pre-conditions are so at variance with how the class representative wants to take the case that the class representative would prefer to have the CPO reject it and take their chance in the Court of Appeal in order to have the matter corrected in that way.

So there may be a situation -- I'm not saying this is that case -- but there may be a situation where the Tribunal's view of what you need to show by way of stepping stones are so onerous and destructive of the case that you say: look, I don't want a CPO on this basis. I'm not going to work towards it because it can't be done or it

can't be done efficiently or whatever you say. I would like you, the Tribunal, to put your money where your mouth is, reject it, because I'm not going to do this, and I will get the Court of Appeal to correct the error.

MS KREISBERGER: So I may need to take instruction but let me just say this: the assumed basis on which the PCR appears before you today is that the Tribunal would not be asking for something so irrational.

MR JUSTICE SMITH: No, that's -- we're trying not to --

MS KREISBERGER: And the PCR is very keen to address any concerns up front, early on and deal with it.

Now, sir, my final point is that in all of this the overriding interest should be to advance the interests of the class which we say have an actionable claim and the most efficient, cost-effective way to do that is to keep these matters open.

Now, sir, again, as I say I see the time and I am in your hands on suitability, which I haven't addressed. So if there are points that I can help you about on suitability I can make some crisp submissions on that point, but I am in your hands.

MR JUSTICE SMITH: Well, you saw the debate that we had with Ms Demetriou.

MS KREISBERGER: I did.

MR JUSTICE SMITH: You can take it that we understand your primary case. If there is anything by reply that you want to say then do say it, but these are reply submissions. It's to add in new material, not revisit the old.

MS KREISBERGER: Let me just make this point then, in that case. Ms Demetriou said, ‘: well, these amounts are probably inflated and there's no reason to think that these amounts matter to individual members of the class, and my submission is that given perhaps the hourly rates in this room, that's not an apt submission.

We don't have a final or conclusive figure for you per member of the class. We haven't run the survey yet, but it is divorced from the realities of life to say that these numbers

are inconsequential. This is why this regime exists, to transfer -- two reasons: transfer compensation to members of the class who would never otherwise see it; and to bring defendants to book, as you said yourself in Merricks.

Now, on the point that the regulator is looking at this, I have given you the reference. I don't think we need to go to the press release --

MR JUSTICE SMITH: We have read it.

MS KREISBERGER: -- but it does not seem to flag exclusionary abuses, so that's the first point.

The second point is it's fair to say that, for corporate giant defendants, the 10 per cent of worldwide turnover penalty is sometimes seen as a tax of doing business. It's private claims that really is a cause for concern and that is why, apart from the fact that the CMA is looking at exclusionary abuses -- it's rather like Michael Winner who said: I've just discovered you can drive in the bus lane for £50. You know, it's a cost of doing business. Actually, having to pay fair compensation is in a rather different order and it's one of the rationales for this regime.

Sir, that's all I am going to say on that point, but I'm of course very happy to answer questions.

MR JUSTICE SMITH: That's very helpful. I think from that I take it that you do see there as being a public element in the cost benefit analysis.

MS KREISBERGER: That's my submission.

MR JUSTICE SMITH: Yes. And before we go back to Ms Demetriou on this point only, what do you have to say about my tentative suggestion that we issue a non-binding and non-obligatory invitation to the CMA to say something in a few lines if they have something to say about that equation?

MS KREISBERGER: We welcome that. Far better to be informed than to be in a position of speculating about the CMA's position, so we fully endorse the approach.

We would invite the Tribunal to take that course.

MR JUSTICE SMITH: Well, thank you very much.

MS KREISBERGER: I'm grateful.

MR JUSTICE SMITH: We have no questions for you, thank you.

Ms Demetriou, on that point.

Further submissions by MS DEMETRIOU

MS DEMETRIOU: On that point alone, sir, so just very briefly, we would observe that the CMA has of course carried out its market study and it will have taken a decision. It could of course have then opened an investigation in relation to these matters, because you can see the ground that was traversed in the market study. So insofar as one is looking for objective evidence of what's in the public interest, the CMA has taken its public interest decision.

The CMA has also asked for and has received the key documents in this case and it has chosen not to intervene at certification, obviously conscious that one possible outcome of certification is that the claim is not certified.

So we say those are the objective factors, really. If the Tribunal wants to take account of this public element in the cost benefit analysis then those are the objective factors to which you should have regard, rather than asking the CMA now for its view.

Now, we're not saying we object to that. I'm not putting forward a formal objection, but we are a little concerned because one is kind of looking forward to what the CMA say, and if they come back with a two-liner saying: yes, we think this would be in the public interest because it enhances public enforcement, then I can see that we may well have questions as to what the CMA itself decided following its market study, and so I am a bit worried that this is going to give rise to the sort of cottage industry that you were concerned about.

So we would, for our part, urge you to look at the public stance that the CMA has taken but, as I say, we don't formally object if you think that that would be a helpful course.

MR JUSTICE SMITH: No, that's very helpful, Ms Demetriou.

What we're going to say is that we are not going to invite the CMA to submit anything. We say that because, in an ideal world, these things really ought to take place before rather than after the hearing and it's something that simply occurred to me during the course of your cost benefit submissions.

That's not to say -- and we will try and say something about this in the judgment -- that public interest questions are necessarily irrelevant. They probably are relevant, but we will think about that.

But for next time, without intervening, I would want to put on the record that the CMA is very welcome to put in its two penny worth. The costs of intervention are not something that should be incurred in order for that to happen, but I think the point that you have made, Ms Demetriou, about inviting what is in effect further material after both sides have sat down is a course that is asking for trouble. Trouble may not result, but one should not ask for it, so we won't, but I hope that has given an indication for the future that, if the CMA has something to say, we would be interested, and I'm sure the parties would be interested, in hearing that.

MS DEMETRIOU: Sir, thank you, and I know the CMA, as you say, are following this and so they will have heard that message. So thank you very much.

May we, on behalf of both of us, thank the Tribunal for sitting longer hours.

MR JUSTICE SMITH: Not at all. For our part, we're very grateful to both parties for their very helpful submissions. We will obviously reserve and we will hand down a judgment as soon as we can, but thank you all very much.

(1.08 pm)

(The hearing concluded)