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IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1433/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 31st January 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 A N 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.

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1 **Tuesday, 31 January 2023**

2 **(9.30 am)**

3 **MR JUSTICE SMITH:** Ms Kreisberger, good morning.

4 **MS KREISBERGER:** Good morning.

5 **Submissions by MS KREISBERGER (continued)**

6 **MS KREISBERGER:** Thank you, again, for the early start.

7 **MR JUSTICE SMITH:** Not at all.

8 **MS KREISBERGER:** I wanted to begin by coming back to some of the questions that
9 were posed yesterday, particularly on the excess profits, commercial valuation
10 approach. What I will do is address the following three questions:
11 The first is why is commercial valuation, excess profits, a useful metric for
12 compensatory harm.
13 The second is does Mr Harvey need to account for some hypothetical overcharge on
14 the advertiser side of the market.
15 Thirdly, how does the excess profits analysis fit together with the user valuation model.
16 So those are the three questions I will address.
17 First, why is the excess profits measure a useful metric, a useful measure for
18 compensation, compensatory harm? In order to explain why that's the case, I need to
19 go back to the objective of the exercise; what will be the exercise at trial in
20 compensating the class?
21 The objective in compensating the class is to put the claimants who have suffered loss
22 as a result of the competition law infringement, in the position they would have been
23 but for the infringement. That's the overall, well-known approach.
24 Now, there is a useful summary of the relevant principles in the Achilles judgment.
25 I have a copy here and we can hand copies up. I'm sorry it hasn't been added into the
26 bundle in time, I'm afraid. It's paragraph 5, so I will take you -- we have copies ...

1 **(Handed)**.

2 If I could ask you to turn to page 5 of the judgment. So this is the Tribunal's judgment

3 in Achilles and the Tribunal there, beginning on page 5, sets out a very helpful

4 summary of the legal principles which apply to the damages assessment. And you

5 see at subparagraph 2 on page 6 at the top:

6 "Proving a causal link between the infringement and the damage involves application

7 of the [I think it should say] 'but for' test. The measure of loss is the amount of

8 damages that will put the claimant in the situation it would have been in, had the tort

9 not been committed."

10 And there you see the quote from Enron.

11 And then if I could show you subparagraph 4 which refers to the broad axe:

12 "... demands only as much certainty and particularity in proving damages as

13 reasonable ... having regard to all the circumstances ... the fact that it's not possible

14 for a claimant to prove the exact sum of its loss ... it's not a bar to recovery. The

15 assessment of damages will involve some element of estimation, assumption, sound

16 imagination, a broad axe or a broad-brush."

17 Very familiar with that. So the need for estimations and assumptions at trial.

18 Paragraph 5 sets out that the need to make assumptions and estimates is particularly

19 acute in the context of the assessment of losses resulting from competition law

20 infringements. And they refer to the president's observations in BritNed:

21 "Quantification of loss, it's not a question of mathematical calculation. Turns on

22 developing a robust understanding of what would have happened in the counterfactual

23 case."

24 Subparagraph 6:

25 "The assumptions on which the counterfactual hypothesis is based must be realistic."

26 And then paragraph 7, and this gets to the nub of the exercise:

"The counterfactual world is purged of the competition law infringement in question and its consequences and any other unlawful conduct."

Now, I will come back to the application of that requirement as regards the counterfactual in a moment.

MR JUSTICE SMITH: Yes.

MS KREISBERGER: I should just first emphasise that that, of course, is the approach that's taken at trial to the methodology. Obviously, at certification, a lower threshold applies. One is not determining those questions to which the economic model will apply. It's a less intensive review. All that the Tribunal can do now is ask itself if there is a plausible methodology which can be used at trial and, of course, the Court of Appeal emphasises the need for practicable justiciability. In other words, you need a workable methodology, but now is not the time to think about each and every eventuality or possible rabbit hole that one might go down.

The question for you now is, are there glaring defects? If not, the methodology will appropriately be tested at trial.

Now, before I turn to the application of the principles to the present case, my final point on the overarching approach is, again, claimants who have suffered more than nominal loss are entitled to have the court quantify their loss, notwithstanding forensic difficulty. So if one is too demanding of the methodology at this stage, one risks contravening that principle.

Now, applying those principles to the present case, the existing evidence that we have today in the public domain shows that users value their data. I showed you some of that evidence yesterday. The sources of that evidence include the CMA market study, and I took you to the relevant passages, and also the ATT natural experiment which shows that when given a choice, the majority of users prefer not to share their data. I also showed you passages in the Klein judgment which make the same point.

1 That evidence which we have today is more than sufficient to surpass the more than
2 nominal loss or, rather, no more than nominal loss threshold. Users value their data
3 and they've given it up.
4 Now, that means that, notwithstanding the forensic difficulties, the challenges in this
5 case, the class is entitled, as of right, to have this Tribunal quantify their losses. We
6 get that from Merricks.
7 With that, I turn to Mr Harvey's methodology. The task which Mr Harvey grapples with
8 is to work out the loss sustained in the actual world by reference to the counterfactual,
9 and as captured in Achilles, the counterfactual is a world stripped of the abuse. That
10 is the damages counterfactual. So at this point, the Tribunal is not concerned with
11 other competitive scenarios; it is the actual world stripped of the abuse.
12 The world stripped of the abuse, purged of the abuse here, is a world in which
13 Facebook does not operate on the basis of the unfair terms and conditions. Now, that
14 means that the quantum trial, the analysis will involve postulating a plausible
15 counterfactual in which Facebook is not abusing its dominant position and users retain
16 greater control over their data.
17 Now, if users retain greater control over their data in that non-abusive world, given the
18 evidence I have taken you to which shows you that users place a value on their data,
19 in the non-abusive counterfactual, Facebook would have needed, during the claim
20 period, to incentivise users to part with their data.
21 I will just go over that again: in the non-abusive counterfactual, where users retain
22 greater control of their data, Facebook would have to incentivise them to grant access
23 to their data, to share it with Facebook.
24 **MR JUSTICE SMITH:** Well, possibly.
25 **MS KREISBERGER:** That's a plausible counterfactual.
26 **MR JUSTICE SMITH:** What Facebook do in the counterfactual is going to be informed

by, no doubt, Facebook's best interests, but they could provide the service without asking for the data at all. I don't know.

MS KREISBERGER: We're not postulating --

MR JUSTICE SMITH: You're postulating data being lawfully provided that is necessary for the provision of the social media website. You're postulating that data which goes to the advertising side, if I can categorise it that way, is not permissibly accessed by Facebook from the users.

MS KREISBERGER: If I might, sir, the problem with your alternative suggestion is it's not within the scope of the counterfactual exercise. So one is postulating a plausible counterfactual which involves merely stripping out the abuse.

MR JUSTICE SMITH: Yes, the counterfactual is that the data which you say is unlawfully used is not unlawfully used.

MS KREISBERGER: But the unlawfulness is in the unfair terms and conditions, so what we're postulating and, remember, I don't need, today, to postulate every possible outcome, but I put before you a plausible counterfactual for the basis of the damages assessment. A plausible counterfactual for the basis of the damages assessment is that the world stays as it is, except for the unfair terms.

In that world, Facebook has an incentive to continue running the business model which involves a social network on one side and targeted advertising on the other side. I'm not proposing something more extreme, so we take the world as it is. We take out the unfairness. The unfairness lies in users giving up control, the bad bargain, giving up their data without adequate recompense. We just delete that. Once you delete that, you're remaining in other respects with the hallmarks of the actual world. There is an incentive for Facebook to incentivise users to give access to their data and the world carries on as is.

And, remember, on that basis, when we're looking at excess profits, we're talking

1 about profits made above Facebook's reasonable rate of return. So standard
2 economic theory. In a non-abusive counterfactual, Facebook would be willing to pay
3 users amounts up to the excess profits which it earned from the use of that data,
4 leaving Facebook with its reasonable rate of return.
5 That is why excess profits is a useful and relevant metric. That's Facebook's
6 willingness to pay measure.
7 I am reminded, I am going to come on to the question of whether users retain the data
8 in the counterfactual, but I will come back to that.
9 Turning, then, to the President's question about whether those excess profits would
10 be lower in the counterfactual, whether that assumption should be made because
11 there is some sort of overcharge to advertisers. I think your particular question was
12 should the model assume that advertisers are being unfairly overcharged for showing
13 their targeted ads to Facebook users? And the short answer is no. There's no need
14 for the model to reflect that.
15 There are two principal reasons for that. The first is the non-abusive counterfactual
16 purged of the abuse does not involve postulating some completely different theoretical
17 market with competing platforms or -- that's not the exercise. That is as a matter of
18 law. One simply takes the actual world, removes the abusive conduct, the unfair
19 terms. Ultimately, it's a trading terms case. You take the abusive terms out of the
20 equation.
21 Since there is no change, then, in Facebook's market position, there is simply no
22 reason to postulate the change on the advertising side of the market.
23 **MR JUSTICE SMITH:** Well, you're not just taking out the abusive terms, are you?
24 You're inserting new terms.
25 **MS KREISBERGER:** Well, what you're saying is --
26 **MR JUSTICE SMITH:** The abuse is the unlawful use of data. The way of creating

1 a lawful counterfactual is to say that you may not use that data. That's --

2 **MS KREISBERGER:** That's not quite right because the abuse is the unfair terms

3 which facilitated the data extraction.

4 **MR JUSTICE SMITH:** Yes, but that's putting -- that's repackaging the point. You're

5 saying --

6 **MS KREISBERGER:** No --

7 **MR JUSTICE SMITH:** -- in some way there is an unlawful appropriation of data.

8 **MS KREISBERGER:** Absolutely.

9 **MR JUSTICE SMITH:** And I'm not quite sure that any court is in the business of going

10 beyond the absolute minimum to ensure compliance with the law and the minimum,

11 as it seems to me, is you say what you are doing which is unlawful, you cannot do.

12 End.

13 **MS KREISBERGER:** That is the end of the analysis and then one asks: well,

14 what -- so what one is deleting, as it were, is the unfair bargain. The unfair bargain is

15 social network, data given up for free which is then monetised. That's the unfair

16 bargain.

17 **MR JUSTICE SMITH:** One is eliminating the abuse.

18 **MS KREISBERGER:** Yes, the unfair terms. So if one is looking in an excessive

19 pricing case, you eliminate the excessive price and you must ask for the damages.

20 **MR JUSTICE SMITH:** This isn't an excessive pricing case.

21 **MS KREISBERGER:** Of course, but it is a helpful analogy.

22 **MR JUSTICE SMITH:** Right.

23 **MS KREISBERGER:** So one eliminates the abuse, that is the unlawful overcharging,

24 and then necessarily in the counterfactual, one asks: well what would be the lawful

25 counterfactual price, and that gives you the difference is the overcharge. And I will

26 show you that by reference to another case in a minute,

1 but all one is saying is, if Facebook can no longer take the data under its existing terms
2 for free, a different bargain will take its place. The incentives on Facebook are to pay
3 for the data up to the amount of excessive profits. That's the cap and that's simply
4 what would happen in the absence of the abuse, the abusive terms and that's
5 a plausible counterfactual.
6 **MR JUSTICE SMITH:** You see, Ms Kreisberger, going back to the method of framing
7 the counterfactual that I put to you yesterday. Let's suppose one goes back in time to
8 2016, at the inception of your claim, and one asks what would the claimant class have
9 sought by way of an injunction to stop the abuse. How would that injunction have been
10 framed?
11 **MS KREISBERGER:** Again, it would be the striking of the unfair terms. So the
12 challenge is to the terms.
13 **MR JUSTICE SMITH:** Yes, it would have been to say: this data which you are using
14 unlawfully, you may not use.
15 **MS KREISBERGER:** Well, that, no. It would be, you can't apply your terms of trading
16 in order to get access to our data.
17 **MR JUSTICE SMITH:** Yes, you can't get access to the data, but are you saying that,
18 in an injunction case, a court would say, do you know, we're going to work out what
19 the price that should be paid by Facebook to its subscribing class should be? Do you
20 think a court would do that?'
21 **MS KREISBERGER:** In an injunction case, a court would simply red pencil the
22 abusive terms.
23 **MR JUSTICE SMITH:** Yes, so the entitlement to the data would go.
24 **MS KREISBERGER:** And then it would be for the parties to reach a new bargain that
25 is not abusive.
26 **MR JUSTICE SMITH:** Yes.

1 **MS KREISBERGER:** Which is exactly what I am postulating here.
2 **MR JUSTICE SMITH:** But the court would not be involved in defining those terms.
3 **MS KREISBERGER:** No, but unfortunately, for the counterfactual exercise, one has
4 to engage. This is intrinsic to the exercise. There's no way round it.
5 **MR JUSTICE SMITH:** Okay.
6 **MS KREISBERGER:** The job is to hypothesise how the world would work if you simply
7 remove the abuse. The abuse here is contained in Facebook's terms and conditions.
8 You take the abuse out of the equation, what would happen? This is the plausible
9 counterfactual: a new bargain is reached and there is a cap on what Facebook will be
10 prepared to pay, up to the excess profits level.
11 **MR RIDYARD:** (Audio distortion) your excess pricing case, the actual return on sales
12 was 100 per cent. We decide that 20 per cent is reasonable, is lawful, but anything
13 above 20 per cent isn't, so you take that away and then there is a direct transfer of
14 money from the dominant firm to the consumer and that's all straightforward. Here it's
15 more complicated because you're saying you're taking away the unlawful act and then
16 you're making a prediction or a guess about what the response will be to that.
17 So there is an extra step in --
18 **MS KREISBERGER:** Absolutely.
19 **MR RIDYARD:** You're saying that. I was thinking as you were saying it, I was
20 thinking, well, how did Facebook respond when this thing happened with the Apple
21 business. You know, they lost their $10 million and they didn't run around, as far as
22 we know, offering £5 to every user to get them to sign up to the Apple thing. But
23 I guess you will say, well, that was the facts of that thing and your facts might be more
24 complicated and so forth and you'd want to argue them out at trial.
25 **MS KREISBERGER:** Exactly, precisely and, actually, Mr Ridyard is ahead of me in
26 some ways. I'm going to come back to the specific question as to how you might

1 approach the quantification exercise, triangulating between the two approaches. It is
2 more complicated than a vanilla excessive pricing case. I will come back to that.
3 **MR JUSTICE SMITH:** Ms Kreisberger, you're using, I think, the contractual measure
4 of damages, not the tortious one. The tortious measure is to hold the claimant
5 harmless against the wrong committed by the defendant, as you said. So the reason
6 I see the injunction case as powerful is because what you do is you work out what
7 a court would do in terms of the injunction. So you say, as you've accepted: you can't
8 use the data.
9 You then have, because we can't go back in time, you have to compute over the
10 three years of your claim, 2016 to 2019, you have to compute what the cost of that
11 harm was to the claimant class and the question is not what would Google [sic] have
12 paid to get the data. The test is what harm did the class suffer through the unlawful
13 appropriation of their data.
14 **MS KREISBERGER:** (Inaudible).
15 **MR JUSTICE SMITH:** But the harm is not what Google [sic] would have paid to get
16 the data in the first place. That's a matter for contractual negotiation separately. The
17 harm is Facebook have obtained data and have used it in a manner that they shouldn't
18 have done. What damage has that done to the claimant class, for which they can be
19 compensated?
20 Now, I accept all you say about difficulty of quantification not being a bar to assessing
21 it, but the trouble is, we're talking about completely different types of loss. You're
22 saying what would the market have reached by way of a consensual outcome between
23 a willing buyer and a willing seller of data, in terms of value? And, frankly, that's the
24 sort of thing that a court is going to step many miles away from assessing because it's
25 not something courts do.
26 What we are talking about is the harm resultant from the wrong that you are alleging

1 and we're more than happy to assume the law and we're more than happy to accept
2 that the quantification of the harm is very, very difficult and is going to require a lot of
3 data in the future. What we're arguing about is what exactly it is that you are measuring
4 and --
5 **MS KREISBERGER:** Can I --
6 **MR JUSTICE SMITH:** What I am putting to you is you're looking at one side of the
7 fence and I'm looking at the other side of the fence.
8 **MS KREISBERGER:** I think we ought to be on the same side of the fence on this one,
9 sir, if I might. Let me run through it again: the exercise, the quantification exercise,
10 involves taking the actual world. In the actual world, as you quite rightly say, users
11 shared their data. They suffered a loss. We know that's more than nominal. It's
12 sufficient for me to show you users value their data.
13 **MR JUSTICE SMITH:** Yes, you said they suffered a loss but that's the thing you have
14 to help us on. What exactly is that loss?
15 **MS KREISBERGER:** Well, I have shown you evidence. We can go back to it again.
16 **MR JUSTICE SMITH:** No, no.
17 **MS KREISBERGER:** Users value their data, so that is sufficient. If I give away
18 something of value, I have suffered a loss. Users value their data and they
19 value -- now, whether you're with me or not --
20 **MR JUSTICE SMITH:** Yes.
21 **MS KREISBERGER:** -- on this, it's -- you know, the fundamental premise of the case
22 is that data has a value, as the Supreme Court held in Lloyd v Google, and they have
23 given it up for free. So users have given up -- in the actual world they, have given
24 access up to their data and they haven't been paid for it and they only have access to
25 a social network in return. That's the actual world. How do you quantify the loss? You
26 must, necessarily, postulate a plausible counterfactual.

1 Now, sir, when you say courts stay away from this kind of thing, this is the exercise
2 that the Tribunal must perform. There's no way round it. What does the counterfactual
3 look like when you strip out the abuse? The abuse is not some action in handling the
4 data. The abuse is as pleaded: the unfair terms and the unfair price. That needs to be
5 eliminated.
6 You must ask yourself and there is no shying away from it, what would the market look
7 like without the abuse? What would Facebook do? And the plausible counterfactual
8 I am advancing is that users value their data. They would, therefore, need to be
9 incentivised in the ordinary way by a payment to share their data. We mustn't be
10 tricked -- the cognitive trick is that data has never been paid for because this is how
11 Facebook has been operating.
12 If Apple is distributing music for free, it doesn't mean that artists' work has no value.
13 This happens in digital markets. So the job, then, is to look at the data that they gave
14 up in the actual world and then ask yourself: well, what would happen in the
15 counterfactual world when the unfairness element is taken away? What I'm saying to
16 you as the plausible counterfactual is Facebook would need to incentivise users to
17 give up their data so that Facebook can carry on conducting the business that it
18 conducts. It's not a very extreme proposition, simply that things carry on.
19 In order to be incentivised to give up their data, Facebook will need to make
20 a monetary payment. Facebook will not pay more than the level of its excessive
21 profits. That's the cap. So I hope that, sir, answers your question which you put to
22 me, which is well, there is a disconnect between harm and profits and this answers
23 that question. There is no disconnect. One naturally follows from the next. This is
24 the harm in the actual, what would we see happen in a non-abusive counterfactual.
25 That's simply the proposition.
26 So just to come back to the flow, and I should say I am conscious that Ms Demetriou

has made a plea not to be too pressed on timing, so I will do my best to get through.
Just to pick up the thread again. Your question was whether advertisers are being overcharged, and my first answer was no because there is no change in dynamics, so one doesn't need to worry about what happens on the advertising market. Advertisers' willingness to pay Facebook for access to the data is unchanged in this non-abusive counterfactual.

Also, it is right to say that there's no allegation of any abuse before you in relation to advertisers, and Mr Harvey has explained that the advertising, the way in which the actual world works, the current business model, is good for advertisers because advertisers are data hungry. More data means better targeted adverts. So they benefit from the actual. So there's no suggestion of a problem in the advertising market.

Now, that takes me to the third question, which is how do the user valuation method and the excessive profits method sit together? And I am conscious I haven't yet addressed you on user valuation. I will come on to do that.

Mr Harvey explains in his reports that his approach will be to triangulate the two methods. Now, this is because, if I just take you through this, user valuation sets a floor on what users will accept for their data, so users won't give up their data for less than the value they place on it.

Excess profits sets a cap on what Facebook will pay. They're obviously not going to pay more, so in that case there are two possible scenarios. The first is that user valuation is lower than the excess profits cap. If that's the case, there is a bargain to be done and users will enter into the transaction. They will enter into the bargain with Facebook to share their data for a monetary payment and the payment will be no lower than user valuation and no higher than the excess profits cap. It sits somewhere in that delta.

1 Using the two approaches in combination will help you get to a sensible estimate for
2 value. That's the value which users should have been paid in the actual world, when
3 they were paid nothing but they gave up their data. So that's scenario number 1.
4 Scenario number 2, user valuation is higher than the excess profits cap. In that case,
5 no bargain is struck because it means in the counterfactual world, users prefer to retain
6 their data, so that's a point I said I will come back to.
7 If users retain their data, they prefer to hold on to it than to give it up, then the task
8 with which the Tribunal must engage is to quantify the value of the data which they did
9 give up but would not have given up in the counterfactual world, where -- so let me put
10 it this way: the user valuation in that case, the case where the users haven't given up
11 their data, provides the upper bound of the harm suffered. That's the value they would
12 have demanded in order to share their data. But bearing in mind user valuation relies
13 on primary research techniques, necessarily, one can see it may be eminently sensible
14 to use the lower excess profits amount as a cross-check, sensitivity check, given that
15 represents the maximum amount which Facebook would pay.
16 Now, the ultimate valuation that you get to might be the product of some sort of
17 triangulation between the two approaches, and that's exactly what the broad axe
18 requires. That's what it's there for. Now, I said I would refer to an excessive pricing
19 case by analogy. Can I hand round, this is the Albion Water judgment, the damages
20 judgment, sir, I think you might be well familiar with it. And this is in Vivien Rose's time
21 as chair in the Tribunal.
22 **(Handed)**.
23 **MR JUSTICE SMITH:** Thank you, yes.
24 **MS KREISBERGER:** Now, if I could ask you to turn to page 23 of this judgment,
25 paragraph 67.
26 **MR JUSTICE SMITH:** Yes.

1 **MS KREISBERGER:** Now, if I could take you to the bottom of that page. So this is
2 a case about an excess price, an overcharge and I will pick it up here, towards the
3 bottom of the page:
4 "As the unfair pricing judgment makes clear, an abusive price is a price which is not
5 only excessive but is too high in comparison with cost but also unfair in terms of the
6 economic value of the product or service in the eyes of the would be purchaser."
7 Then they go on to address Welsh Water's submissions which were, essentially, that,
8 in working out what the price should be in the damages counterfactual, it should be,
9 essentially, the highest price that could lawfully be charged. That was the submission
10 before the Tribunal, and you see that at 67.
11 If I could take you down to paragraph 69:
12 "We reject Dwr Cymru's submissions on this point as wrong in principle, as well as
13 entirely impracticable. It will be very rare that an infringement decision, whether
14 adopted by a domestic competition authority or the Commission or indeed on appeal,
15 will determine the precise borderline between lawful and unlawful conduct. If Dwr
16 Cymru is right that the claimant in a follow-on damages claim will have to show
17 precisely where that line should be drawn, that will often involve the court in re-doing
18 much of the work done in the earlier infringement decision. Further, it is a task that is
19 almost impossible to accomplish, as demonstrated in this case."
20 And then they give some numbers and they say: well, you know, where do you draw
21 the line?:
22 "We don't see how a claimant could prove that one, rather than the other, is the tipping
23 point between lawful and unlawful conduct."
24 If you could then turn the page and go to paragraph 70:
25 "Albion helpfully referred us to the case of Banque Bruxelles v Eagle Star. In that
26 case, the House of Lords considered the issue of counterfactuals in respect of

1 a negligent valuation. Their Lordships held that if the figure put forward by the valuer
2 is found to be wrong, the correct figure for the purposes of calculating the loss caused
3 is the average one which a non-negligent valuation would have produced."
4 Then if I could ask you to read Lord Hoffmann's dictum here. So Lord Hoffmann said
5 one goes for the mean figure rather than the -- either extreme end and the Tribunal
6 said: well, the same principle applies, by analogy, in this case. There is a range of
7 lawful access prices which Dwr Cymru could have offered and we should take the
8 figure in the middle of that range.
9 **MR JUSTICE SMITH:** This is just in manifestation of the pragmatic approach that
10 a court takes to a range of outcomes, starting with Chaplin v Hicks, where you have
11 the beauty contest prize, but you don't assume that the beauty contestant would have
12 won. Nor do you assume that the beauty contestant would not have won and what you
13 take is the chance of winning as the assessment of loss which, in that case, was
14 perhaps the right measure.
15 **MS KREISBERGER:** So what the Tribunal is saying specifically on price here is: look,
16 there is a range and one has to take a pragmatic approach and we go for the mean.
17 **MR JUSTICE SMITH:** The average may be the right approach, but, then again, it may
18 not be.
19 **MS KREISBERGER:** The reason I am advancing this before you today is Mr Harvey
20 is relying on two approaches and I am showing you how they potentially triangulate.
21 They are each valuable. There's a place for both of them in the methodology and one
22 certainly wouldn't want to exclude one or other, given they both play a role and it may
23 be that the Tribunal would be looking at values generated by the models and coming
24 to some estimate informed by each of them. That's really the only point. It's well worn.
25 Now, sir, you might say to me: well, this is a very -- coming back to my explanation of
26 the upper and lower bounds, you may say: well, look, this is a very stylised approach,

1 and my answer to that is, of course, it is but that's intrinsic to the nature of this exercise.
2 The abuse ultimately comes down to user being at the wrong end of a very bad
3 bargain. It's not the mere fact that you posit in the injunction example that Facebook
4 has monetised the data. That's not the complete abuse. It's that Facebook extracted
5 data without giving adequate value in return. Therein lies the abuse. In that case,
6 a means must be found to ascribe a value to the data. If I win on abuse, a means
7 must be found to value the harm.
8 Now, the Supreme Court lay down in Merricks the class must not be deprived of a trial
9 merely because of forensic difficulties.
10 **MR JUSTICE SMITH:** You don't need to press us on that (inaudible).
11 **MS KREISBERGER:** You're well used to that, but he also notes the particular
12 importance of informed guesswork, where one is proceeding by reference to
13 a counterfactual. To the extent these models rely on assumption, that's intrinsic to the
14 exercise.
15 **MR JUSTICE SMITH:** Yes, I mean, we have done all this many times and there's no
16 intention in the courts to defeat a claim out of a spurious quest for certainty. We will
17 do what we can with the data there is.
18 **MS KREISBERGER:** I'm grateful, sir, and I wasn't suggesting otherwise.
19 **MR JUSTICE SMITH:** No.
20 **MS KREISBERGER:** Simply that I am addressing the point, well, how far does one
21 have to go on the counterfactual and so on. I hope I have addressed you on that.
22 **MR JUSTICE SMITH:** I think the issue that we are debating is not how far do you
23 need to go, but how far do you need to identify the right questions which are then
24 elucidated over the course of the trial process. And if you start with the wrong
25 questions, then the process results in more heat than light being generated, a waste
26 in costs and a wasting of a good trial date. So you need to make sure you have the

1 right questions asked at this stage and that, going back to our debate of yesterday, for
2 my money, is what the process is all about.
3 **MS KREISBERGER:** I'm grateful, sir. With that, that addresses the questions.
4 I would now really like to just pick up the thread as I left it yesterday and we were in
5 the section of my submissions on Meta's criticisms of Mr Harvey's excess profits
6 analysis.
7 And I pick it up -- you will recall that the -- we're in the first flaw which is the multisided
8 platform issue. Now, Meta's third point raised under that heading is to say that
9 "Mr Harvey's expectation that Meta will have internal analyses of the financial effects
10 of possible changes to its data practices."
11 So this is the internal forecast. Meta says: well, that is pure speculation, to think that
12 we have these analyses. That's at Meta's skeleton, paragraph 31. If I might, this is
13 not a meritorious argument. I would invite the Tribunal to reject this. I have three short
14 points in response.
15 The first is I have shown you that Meta has modelled and widely publicised and decried
16 the effects of ATT. That's one high profile example of an event study which -- that one
17 allows Mr Harvey to value data directly, but it's reasonable to assume that Meta has
18 other event studies, perhaps of less well publicised changes.
19 As far as A/B testing is concerned which Meta says is purely speculative, can I show
20 you CMA market study again. This is authorities bundle volume 4, tab 38, page 2372.
21 **MR JUSTICE SMITH:** Yes.
22 **MS KREISBERGER:** And that's at paragraph 4.222 at the bottom of the page:
23 "Further CMA requests for information and discussions with platforms have indicated
24 that some do carry out more research than the initial evidence provided to us. Various
25 parties have now submitted evidence of the use of different types of user research,
26 including moderated usability testing, contextual research and A/B testing."

1 And you find the same reference at paragraph 8.145, for your note. That's at
2 page 2557.
3 **MS DEMETRIOU:** I'm so sorry to interrupt, but just so I don't have to go back. Just
4 while you're on it, can you read the paragraph above that?
5 **MR JUSTICE SMITH:** Yes, of course.
6 **MS DEMETRIOU:** Thank you.
7 **MR RIDYARD:** On to the next page.
8 **MS KREISBERGER:** 2372. So the CMA said: we were surprised there wasn't much
9 and then we looked again and found this evidence does exist.
10 **MR JUSTICE SMITH:** Yes.
11 **MS KREISBERGER:** And shall we go to 2557 in that case and you can see there,
12 another reference to platforms using AB testing. That's paragraph 8.145.
13 So it doesn't seem all that speculative.
14 It's also taking a common sense approach. It's a little hard to believe that a corporate
15 giant like Meta hasn't analysed various scenarios, hasn't war gamed them, looked at
16 the impacts on its business.
17 Finally, it doesn't lie in Meta's mouth to say: your assumption about our documents is
18 speculation. Meta knows what internal documents it has but they have chosen not to
19 share the information with us. It's striking that Meta doesn't say they don't exist. They
20 say: you're speculating. I leave the point there.
21 **MR JUSTICE SMITH:** Well, let me just articulate this, more for Ms Demetriou's benefit
22 than yours. Let's suppose one has a coherent articulation of a methodology for
23 assessing loss in relation to an arguable cause of action, and having stated both the
24 arguable cause of action and the methodology, the expert says: well, I'm going to
25 achieve a granular calculation in accordance with my methodology, by reference to
26 disclosure from the other side, and the other side come back and say: terribly sorry,

1 we just don't have this data.

2 It seems to me that that simply means that the claimant has to pivot to something else,
3 but it doesn't undermine the process situation. So I'm provisionally agreeing with you,
4 but no doubt Ms Demetriou can assist on the answer to that, but that is assuming, to
5 be clear, a coherent methodological approach. It's not enough to say: we don't have
6 a methodological approach, we're going to answer this question in the abstract by
7 reference to disclosure from the other side. That's where Pro-Sys is engaged
8 because you have no idea what material you're seeking disclosure of in the course of
9 the disclosure process. At that point, you get stayed and you're told: go away, tell us
10 what you will be asking the court to order by way of disclosure or whatever else, in the
11 future.

12 **MS KREISBERGER:** Now, this is very far from that example because we have ATT
13 and this is simply saying: well, given ATT and that's empirical data that exists, we
14 expect there is more. It's really all it's saying.

15 Meta has a fourth point. I think I can deal with this briefly. Mr Harvey suggests that
16 there may be some comparators out there in the market that are helpful. This really
17 raises the same point that you have just ventilated, sir. Frankly, the attack is
18 overblown.

19 Mr Harvey says in terms -- I can just give you the reference. It's at Harvey 2,
20 paragraph 3.37, which is core bundle, tab 6, page 364. He says this:

21 "While I've not yet reached a view on the extent to which these other services are
22 suitable comparators, for present purposes I consider that they're worthy of further
23 investigation."

24 His methodology doesn't rely on a comparator analysis, that if there is useful data to
25 be mined, he will mine it.

26 Mr Harvey is fully entitled to preserve that possibility, you know, within the context of

his methodology.

I should say, sir, the same point was made in the Kent CPO judgment. That's at authorities bundle 2, tab 25, page 1274. This was a strike-out application at the certification stage.

MR JUSTICE SMITH: Yes.

MS KREISBERGER: At the top of that page, that's subparagraph 91.3, the Tribunal said there:

"As to the dispute about comparators, it is plainly not appropriate for us to seek to determine that at this stage. Complex disputes between experts regarding data and methodology are not likely to be suitable for disposal by way of summary judgment."

The same point applies to certification.

It's a small aspect of the methodology. It may be available, it may prove valuable. We can't say at this stage.

With that, I move on to the second flaw which Meta alleges, and that is the argument that Mr Harvey's methodology has no way of identifying that part of Meta's overall excess profit which is attributable to the abuse. Well, we have covered the question of excess profit now, in quite some detail, so I want to dispense with that argument, to say it really is another misdirected attack on the ROCE-WACC analysis. I have explained to you now, very carefully, how that measures up to the harm and we go through the stages of abuse, causation and quantum. If it's right that there is a portion of data to which the abuse relates, that is the portion which will be valued. But there is no disconnect between abuse and quantum, because the methodology fails in some way to isolate profits attributable to the abuse.

Now, I just need to deal with the specific points which Meta makes under this heading. It criticises ATT as very different to the pleaded loss and not analogous to the pleaded abuse of unfair prices and trading conditions, and this is the first time Meta engages

1 with ATT in their skeleton.
2 Again, they fall back on cries of pure speculation regarding these other studies, so
3 I can deal with these points briskly. I'm not entirely sure what's meant by not
4 consistent with the pleaded loss. It's not explained, no references are given.
5 The loss is pleaded at claim form paragraph 148 which is page 56, behind the first tab
6 of the core bundle. I have taken you to that and it refers to the absence of adequate
7 compensation for the commercial value of personal data. So the measure of loss is
8 the commercial value for which they were not adequately compensated.
9 ATT measures precisely that. I have explained in some detail already, how it will do
10 that. So there is no question of difference.
11 I have already addressed the speculation criticism. I don't think I need to say more
12 about that.
13 That takes me to Meta's third and final criticism of excess profits and this is where
14 Meta argues that Mr Harvey has failed to take into account the value of Facebook.
15 Now, this is another misdirected argument which, once again, has ROCE-WACC in
16 the cross hairs only. It ignores ATT and the other aspects of the analysis. The stages
17 of the argument which is set out in Meta's skeleton at paragraphs 41 to 42, are this:
18 excess profits is a cost plus method. Cost plus ignores demand side economic value.
19 You must account for demand side value.
20 Fourth, in order to do so, you must measure the value of the Facebook service to users
21 and discount that value from the sum of excess profits. The methodology must
22 therefore grapple with the economic value of Facebook.
23 Now, I am hoping it will be clear from everything I have said that one is not having to
24 value Facebook. Excess profits values the data, the value of the data to Meta.
25 **MR RIDYARD:** Paragraph 151 of your claim does say "discounting the value of
26 access to the social network", so that implies that you do need to value.

1 **MS KREISBERGER:** Now, what's being referred to there is any changes in value. If
2 there were a change in value to the social network, then one might need to account
3 for that.
4 **MR RIDYARD:** That's not what it says, is it? It says "discounting the value of access
5 to the social network."
6 **MS KREISBERGER:** Yes, so that's for -- sir, I'm just going to check that I don't
7 misspeak.
8 **(Pause)**.
9 This is referring in broad terms to the economic value that users actually received, but
10 if it's the same in actual and counterfactual, then it's neutral. One doesn't take any
11 account of that. So if we come back to my counterfactual world. In the actual world,
12 free data, Facebook service. In the counterfactual world, payment for the data, minus
13 any additional benefit that might arise.
14 **MR RIDYARD:** I understand that argument.
15 **MS KREISBERGER:** Yes.
16 **MR RIDYARD:** Okay, that's not -- obviously -- that's not the most natural interpretation
17 of what you say in 151 but -- okay, but I understand what you're saying.
18 **MS KREISBERGER:** And I should say, if it's helpful, that's --
19 This is a part of the pleading that goes to certification, as it were. It's explaining the
20 economic evidence. It doesn't roll over post-certification because, of course, the
21 evidence falls away. But that is the position which Mr Harvey is advancing in his
22 evidence. So you will remember I took you to Facebook's argument at paragraph 28
23 of their skeleton, where they posit that Meta, in a world of lower ad revenues, would
24 result in less investment in the platform and a degradation of the Facebook service to
25 users or, putting it another way, what Facebook is saying is users experience some
26 sort of offsetting benefits in terms of the service supplied to them, as a result of the

1 unlawful monetisation of the data.
2 Now to that extent, it is right as a matter of principle, in measuring overall harm caused
3 to users, any benefits flowing from the unlawful practices would need to be offset. So
4 that is what that is intended to get at and, just to show you Mr Harvey's report, where
5 he deals with this -- that's his second report. That's core bundle 6, page 365,
6 paragraph 3.43. He says this:
7 "First, I believe that Mr Parker is confusing the analysis that needs to be done for the
8 assessment of aggregate damages following a finding of abuse, with the assessment
9 of whether Facebook's practices, including in relation to personal user data, were
10 abusive. I would only be employing my proposed quantum methodology on the basis
11 that abuse had already been established. In that case, the goal will be to quantify the
12 value which users received from Facebook in the factual world, compared to the value
13 which they would have received from Facebook in the counterfactual scenario, in the
14 absence of the abusive practices. If I were to identify any benefits to users in relation
15 to the services supplied by Facebook in the factual world, compared to the services
16 supplied in the non-abusive counterfactual scenario, I will deduct that value from my
17 estimation of damages."
18 So it's simply offsetting benefits.
19 **MR RIDYARD:** I know Mr Harvey says that, but I think one of the points that Meta
20 makes is that doesn't seem to be consistent with what you say in the claim form, but
21 now you're saying that's what you meant to say in the claim form. Are you intending
22 that to mean?
23 **MS KREISBERGER:** The language in the claim form simply reflects that, if there is
24 a difference between actual and counterfactual, that's what one is measuring. So it's
25 baked into that, really.
26 Now, in any event, Mr Harvey might identify no such benefits and, if we just think about

1 how might this point arise, Meta's position, foreshadowed by paragraph 28 of the
2 skeleton, is that it appears to be that there are many and varied benefits to users from
3 the unlawful data extraction, in terms of investment in the platform. If Meta want to
4 advance that case, they're free to advance that case at trial. They will need to make
5 that defence -- it's a defence to quantum. They need to make it good.
6 So in practice, this is more likely to be a point which Mr Harvey engages with in his
7 reply evidence, responding to Meta. Arguments about likely degradations in the
8 service. But none of this is pointing to any deficiency in Mr Harvey's approach.
9 So I hope I can leave that point there, but I should say because this is the attack that
10 appears to be made by Meta, it's not right to say that ROCE-WACC obviously takes
11 no account of demand side considerations. That will be a matter for trial, to the extent
12 that -- what the reasonable rate of return is to assess excess profits against, but these
13 are questions for trial. We're not accepting the contention that you need to do
14 something else to reflect demand side value of the service.
15 But as I have said, it's only offsetting benefits that will need to be taken account of in
16 the equation.
17 **MR RIDYARD:** ROCE-WACC, are you saying that does take into account, demand
18 side value considerations?
19 **MS KREISBERGER:** Well, I'm not making that positive submission.
20 **MR RIDYARD:** No.
21 **MS KREISBERGER:** We're just not accepting -- we don't know what it is that
22 Meta -- what argument Meta is looking to advance here about demand side.
23 **MR RIDYARD:** No, but you do know what ROCE-WACC is.
24 **MS KREISBERGER:** Yes, and there is a reference to this issue in the Kent judgment
25 which I can -- I do not have to hand where they say: well ROCE-WACC doesn't fully
26 answer demand side but one can't say -- perhaps I will find you the --

1 **MR RIDYARD:** It doesn't address it at all, though, does it? I mean it's just a cost -- it's
2 a price cost thing, isn't it?
3 **MS KREISBERGER:** With a reasonable rate of return --
4 **MR RIDYARD:** Yes, of course.
5 **MS KREISBERGER:** -- which reflects the value of the service.
6 **MR RIDYARD:** Doesn't it just measure how much excess revenue you make over
7 your costs?
8 **MS KREISBERGER:** Yes.
9 **MR RIDYARD:** Obviously in a complicated and glorified way, but it doesn't bring in
10 any consideration of whether some of that may be justified by these so-called value
11 arguments.
12 **MS KREISBERGER:** Yes, but I'm not saying that it's the end of the analysis on
13 demand side value. Can I just take you to Kent and show you how it was addressed
14 there? It's in the bundle at volume 2, tab 25, page 1274.
15 **MR JUSTICE SMITH:** Yes.
16 **MS KREISBERGER:** I think that's a wrong reference.
17 **(Pause)**.
18 Yes, here we are:
19 "Mr Holt doesn't employ a cost plus method to determine what he finds to be the
20 excessive nature of the commission. The ROCE-WACC comparison --"
21 **MR JUSTICE SMITH:** Where are you reading from, Ms Kreisberger?
22 **MS KREISBERGER:** I'm so sorry, it's page 1272. So that's the language I was
23 looking for, where ROCE-WACC, the Tribunal says:
24 " ... does not purport to identify or measure demand side factors, although it can serve
25 as a reference point for consideration of such matters."
26 Which is what we understand Mr Holt to do when he considers the outcome of the

1 comparison with factors such as the alleged monopoly power of Apple.
2 So it's a reference point, but in any event, I think we're being drawn into a rabbit hole
3 because there is no need to engage in a valuation of the service as a whole. The
4 question which arises when applying the compensatory measure is to take account of
5 any offsetting benefits to the unlawful harm. So to the extent that there are benefits in
6 the actual world which aren't seen in the counterfactual world, those would need to be
7 taken into account.
8 Now, Meta is going to be best placed to make arguments about the service in the
9 counterfactual -- or the degradations in the service that would result, but, really, having
10 this debate before we have seen disclosure is -- it's speculative. One needs to see
11 what there is on this. It's an argument that will be made in relation to quantum down
12 the line, is the short point.
13 That brings me to user valuation. Is now a good time for a transcriber break? I see
14 nodding.
15 **MR JUSTICE SMITH:** Yes, indeed.
16 Do you have an estimated time for conclusion, Ms Kreisberger? Because I am --
17 **MS KREISBERGER:** Yes, I think I need no more than an hour.
18 **MR JUSTICE SMITH:** Okay. That coincides nicely, I felt, that in order to allow
19 Ms Demetriou a reasonable shot at replying, midday would be a good time for you to
20 start. Is that a not unreasonable --
21 **MS DEMETRIOU:** I think that would be fine and then that gives me the best part of
22 tomorrow morning, in so far as I need it, leaving some time for Ms Kreisberger to reply
23 and then we should be able to finish by lunchtime.
24 **MR JUSTICE SMITH:** I'm grateful. We will rise for 10 minutes.
25 **(10.41 am)**
26 **(A short break)**

1 **(10.54 am)**

2 **MR JUSTICE SMITH:** Ms Kreisberger.

3 **MS KREISBERGER:** Thank you. That brings me to user valuation, so Mr Harvey's

4 second methodology which involves primary research techniques to identify the value

5 of the data to users. So this is a direct measurement of user valuation.

6 I will structure my submissions as follows, in four parts: surveys are a familiar method

7 in competition law. They were recently considered by the Tribunal in the

8 Court of Appeal in Gutmann, and so I will start with the approach laid down there.

9 Then I will turn to what Mr Harvey says about his method.

10 Then I will address the Tribunal's question 5 in the letter, about how Mr Harvey intends

11 to control for the state of users' knowledge of the data they give up and then I will

12 address Meta's three criticisms.

13 So if we could begin by turning up Gutmann which is authorities bundle, volume 2,

14 tab 27. And it begins at page 1314.

15 **MR JUSTICE SMITH:** Yes.

16 **MS KREISBERGER:** Sorry, sir, my laptop has decided to give up the ghost. There

17 we go.

18 If we pick it up at paragraph 48, the criticism being made in that case was that

19 the Tribunal -- so this is the Court of Appeal judgment -- that:

20 "The Tribunal was wrong to accept that the class could meet the Microsoft test by

21 reference to a survey that the class intended to carry out in the future but had not, as

22 of certification, conducted and/or that the description of the survey that was to be

23 performed was so vague and imprecise that even if the CAT was entitled to defer it

24 until later, it was still wrong to do so on such an insubstantial and flimsy basis."

25 That criticism is then addressed at paragraph 64 on page 1319.

26 **MR JUSTICE SMITH:** Yes.

1 **MS KREISBERGER:** And at paragraph 66, the Court of Appeal said this:

2 "Secondly, the nature of the burden confronting a claimant is important under the

3 Microsoft test. The issue relating to surveys concerns an estimate of travel card

4 holdings. It is clear from the first expert report of Mr Holt that he addressed this, relying

5 on a variety of different data sources. However, he suggested that the data could be

6 improved by use of a survey. This came under sustained criticism from the

7 defendants, who argued that the sources relied upon would not properly capture

8 historical travel card holding patterns or the overlap between holdings and the

9 purchase price of the ticket. Mr Holt addressed these concerns in the second report.

10 He set out how the survey would be carried out, described the methodology, and set

11 out some possible adjustments."

12 At paragraph 162 and 163:

13 "The CAT emphatically and, in our judgment, correctly rejected the criticism, making

14 the point that, at the certification stage, what was required was for the expert to explain

15 the methodology proposed and indicate the available sources of data to which it will

16 be applied, but not provide detailed elaboration of the way the analysis or the analyses

17 will be conducted. Demands from TOCs that the methodology should go further were

18 disproportionate and wholly misconceived."

19 If I could ask you to just read down the quote at 162 and 163.

20 **MR JUSTICE SMITH:** Yes, of course.

21 **MS KREISBERGER:** And then the Court of Appeal concludes with:

22 "The use of surveys in competition cases is unremarkable."

23 I would just like to show you the Tribunal's further judgment in the same proceedings.

24 That's in tab 2 -- it's a supplementary authorities bundle, that's why I am confused.

25 So it's tab 2 of the supplementary authorities bundle.

26 **MR JUSTICE SMITH:** Yes.

1 **MS KREISBERGER:** If I could ask you to turn to page 66, paragraph 25 to 27,
2 the Tribunal say this -- actually, sir, perhaps it might be more efficient to just read it to
3 yourselves, if I could ask you, 25 down to 27.
4 **MR JUSTICE SMITH:** 27, yes, of course.
5 **MS KREISBERGER:** Given the time.
6 **(Pause)**
7 **MR JUSTICE SMITH:** Yes.
8 **MS KREISBERGER:** So, ultimately, the approach of the Tribunal there is that the
9 survey method should be tested at trial, not least because it's yet to be designed at
10 the CPO stage, so it wouldn't be a sensible use of resources to do that but the survey
11 will prove its metal at trial or fail. If the latter, it simply won't provide a basis for
12 recovery. So that's an approach that I would recommend to the Tribunal here.
13 Now, Mr Harvey describes his proposed method in his first report at paragraph 3.31.
14 That's core bundle, tab 4, page 286. If I might ask you to read paragraph 3.31 to 3.34
15 on page 286.
16 **(Pause)**.
17 **MR JUSTICE SMITH:** Yes.
18 **MS KREISBERGER:** So this is a direct measure of user harm and since the real
19 world, the data was shared with Facebook for free, that value can only be measured
20 through the use of primary research methods.
21 Now, it is right to say there will be a host of practical challenges which must be met in
22 using these methods and Mr Harvey sets some of those out at table 5. That's at
23 page 303 of the report. He sets out there in the column "Key issues to address", some
24 of the challenges he will face but, of course, as you have said, sir, difficulty is not
25 a reason to shy away from a methodology that is useful.
26 Now, primary research methods are well recognised in the literature, contrary to what

Meta would have you believe. Mr Harvey addresses them at paragraph 3.74, so that's going back to page 300. He gives six examples of academic studies in which primary research was used to value user data. He also says at table 5 -- let me turn back. Table 5 on page 303, second bullet point under "Summary of method", in the first row: "I will review and draw on existing primary research studies, including those that have quantified the value of Facebook social networking platforms and personal data."

Now, I want to turn to what Mr Harvey says about how he intends to design the survey. From his description, he says there are two key issues foremost in his mind. First of all, to find the right technique for primary research and the second is a design which ensures that respondents understand what they're being asked to value and that was the question you raised, sir.

So if you turn the page --

MR JUSTICE SMITH: Pausing there, on a slightly higher level of abstraction, we were discussing what the Pro-Sys test was intended to achieve and I gave you the example of the Pro-Sys test not being intended to prevent -- an articulation of a methodology being thwarted by certain data not being available.

But let's look at a situation where, as here in this bullet point, Mr Harvey is referring to existing primary research studies. In other words, data that is already in place. To what extent does the Pro-Sys test oblige the claimant to say: look, here is what we have and here is what we need to do going further?' In other words, to get a degree of clarity about how the quantum exercise is to be carried out, such that if you are saying "I'm going to rely upon existing work", there is actually an obligation to particularise it, rather than say "The research is somewhere out there." I'm going to say no more than that.

MS KREISBERGER: I'm going to address that point more concretely in a moment because where -- one of the points which comes out of that literature which is valuable,

1 is the guidance given on the privacy paradox which is one of the points Meta makes.
2 So I want to ensure I don't misquote Mr Harvey, but he's not suggesting that the work
3 has been done and he can rely on that. He is going to run these surveys, but there is
4 useful guidance as to points to take account of in terms of the framing of the questions,
5 but it's not his one on the shelf ready, to go.
6 **MR JUSTICE SMITH:** No. My point is though, to the extent that there is data that is
7 there, that then informs the future work -- I'm not saying every case, I'm sure there
8 would be vanishingly few would have everything on the shelf ready to go, but to the
9 extent that there is material that you are relying upon, to what extent is it acceptable
10 under the Pro-Sys test simply to say, it's out there, that's it?' Does one have to go
11 further and say: it's not complete, but this is my starting point and then I would do the
12 following work in addition, in order to meet my --
13 **MS KREISBERGER:** Yes, I'm grateful. So that approach would be apt in relation to,
14 for example, ATT, where Mr Harvey has said: look, there is this data, this is what we
15 know and this is how I would propose to use it, this is what I expect to get from Meta,
16 and that's absolutely apt. In this particular context, what Mr Harvey does is you see
17 at 3.74 on page 300, he does list the studies.
18 **MR JUSTICE SMITH:** Yes, but I think here he's just making the point that research
19 has been done into this question. I don't think he's going so far as to say I would rely
20 on this research, he's just saying 'It's something that has been traversed before but
21 I would do it, myself, differently.
22 **MS KREISBERGER:** I think it's more in the spirit of -- subject to the privacy paradox
23 point which I will address you on specifically. This is the reading list, it's useful
24 background research.
25 Now, I was just taking you to some of the nuts and bolts because I think I need to show
26 you what it is that Mr Harvey is proposing and that's at paragraph 3.80, page 306. As

1 I said, you see at that paragraph, his concern to make sure that he's using the right
2 research technique and Mr Harvey suggests some approaches: stated preference
3 surveys, conjoint studies and price sensitivity meter. It may well be he uses
4 a combination of approaches.
5 Ultimately, these questions, the specifics, will be informed by the expert primary
6 research provider. So at this stage, Mr Harvey is simply setting out possible
7 approaches and he will explore them with the primary research provider.
8 Just worth mentioning conjoint studies which I imagine Mr Ridyard is very familiar with,
9 those are studies which don't involve asking a hypothetical question along the lines of:
10 how much do you value Facebook? And so that might have a particular role here, in
11 addressing the problem that you raise in your question, sir.
12 But the point I make, just to show you, is at 3.82 on page 307. Mr Harvey says:
13 "I would need to formulate the precise research design. For this purpose, I will need
14 to work with expert providers."
15 And then he sets out some issues which they would need to work on together.
16 **MR RIDYARD:** Sorry to interrupt. Why are we doing this? We get the idea that
17 surveys could be useful and would be done as well as possible and there would be
18 argument about it but I'm sorry, I am just lost as to why we're doing this here.
19 **MS KREISBERGER:** So to show you -- I have to show you under the Microsoft
20 standard that Mr Harvey has not just said: oh, and I will conduct a survey.
21 **MR RIDYARD:** Okay.
22 **MS KREISBERGER:** Because then it would be put to me that's inadequate. So
23 I'm just showing you the proposal.
24 Now, I also just want to draw out in table 5, Mr Harvey says --
25 **MR JUSTICE SMITH:** The reason you're doing it is to establish the lower bound of
26 your range.

1 **MS KREISBERGER:** The reason for the methodology is the user valuation boundary.
2 Just to mention, he makes the point specifically that there are benefits and drawbacks
3 to different techniques, he will use a variety of them. Now, he also makes the
4 point -- and the reason I raise this is because of the question you ask, sir, in the letter.
5 He says the design has to ensure that respondents understand what they're being
6 asked to value, .and the same point is made in the table at page 305. That's row 4,
7 third column:
8 "I will assess whether the piloted research design provides robust results. I will do this
9 based on various factors, including whether the results are plausible and whether
10 respondents appear to have properly understood the questions being asked of them."
11 So with that, I turn to the question you asked: to what extent has Mr Harvey taken into
12 account that users will know or be able to know what data they are giving up? And
13 that's clearly going to be an important consideration. He will need to explore that with
14 the specialist who runs the survey. The Microsoft test, at the moment we flag issues,
15 not answers. Particularly in the context of a survey that's yet to be designed. So
16 Mr Ridyard's perplexed response is fitting, because there is something somewhat
17 contrived about having this debate now. There is a call for the surveys.
18 But Mr Harvey has set out what he has in mind as to the nuts and bolts, including
19 dealing with the question of knowledge of the data.
20 **MR JUSTICE SMITH:** But you don't say that it's necessary to go one step further and
21 work out how you're going to isolate the people who are going to be asked these
22 questions, because, of course, you have a pool that's going to be a pretty large pool
23 of Facebook subscribers. Presumably, you're going to want that pool to be
24 representative in some way. Representative of what is begging a lot of questions but
25 these are questions you say could come further down the line.
26 **MS KREISBERGER:** Yes, although Mr Harvey does say that the usual approach

1 which he would intend to use here is to conduct a pilot at the outset, see if the results
2 are meaningful. If the pilot produces robust results, then they go on and that's one
3 means of checking these sorts of issues. There are well-established techniques.
4 **MR JUSTICE SMITH:** Well, indeed, but where you're drawing the line -- no one is
5 arguing that you need to produce the outcome and, therefore, no one is arguing that
6 you need to actually do the survey, but you are drawing the line before even the
7 specification of the survey and you're saying: it's enough to say we will do a survey,
8 no real idea what it's going to look like because I'm going to discuss that with the
9 survey provider, and that, you say, is the appropriate line to draw, in order to satisfy
10 the Microsoft/Pro-Sys test.
11 **MS KREISBERGER:** I think that's not an entirely fair characterisation of what
12 Mr Harvey has done which is why --
13 **MR JUSTICE SMITH:** Well, no, but the first question is, what exactly is the line that
14 is needed to be drawn and the second question is what has Mr Harvey done. It may
15 be that he has way overshot matters, it may be that he has way undershot matters.
16 The first question is just what level of granularity as to process is required, it being
17 a given that you don't have to produce the end result because that would be fast
18 forwarding to trial.
19 **MS KREISBERGER:** Yes, so Mr Harvey has engaged with that question and that is
20 why I was keen to show you his table 57, which I'm just turning up, where he hasn't
21 simply said: well, a survey will be done. He has set out the stages. So there will be
22 an initial research design. He sets out the summary of his method and the key issues
23 he will need to address.
24 Sir, I am conscious of timing. I think given the time, it might be best for me to draw
25 your attention to the table.
26 **MR JUSTICE SMITH:** All I would say by way of comment, and we will look at this, is

1 that this could be translated into any process of quantification of any harm that required
2 survey evidence. It's quite generic.
3 **MS KREISBERGER:** And that's where Gutmann draws the line. That's precisely
4 where Gutmann -- one does what one can. Mr Harvey has directed his mind to the
5 value of the exercise, what would be the value of the exercise and what are the issues
6 in his mind. Anything further is not practicable and we're in a world of practicable
7 justiciability.
8 **MR JUSTICE SMITH:** But the answer to my question is Mr Harvey has drawn the
9 line --
10 **MS KREISBERGER:** In the appropriate place.
11 **MR JUSTICE SMITH:** That is required --
12 **MS KREISBERGER:** But he has given it, as you will see when you read the report,
13 careful thought.
14 Now, I did just want to give a further response to the Tribunal question 5 about the
15 state of knowledge. How will users know or be able to know what data they're giving
16 up, was the question put. Again, it will be a matter for the survey design but there are
17 intuitive common sense techniques that could be used, within the context of a survey,
18 to ensure that the respondent does understand. So just to give you an example. You
19 might show the respondent to the survey a typical user journey on Facebook, viewing
20 a photo, posting a comment, and so on, or you might even ask the respondent to use
21 Facebook in front of you, as they typically would.
22 You can then show the respondent the data trail they have created. Another
23 permutation of that would be to first ask them: well, what data do you think Facebook
24 collects?' And then show them what Facebook collects. So there are methods that
25 will address the state of knowledge and I raise that purely because the Tribunal asked
26 the question.

1 The question also asks, question 5 in your letter -- it raises a separate question: will
2 respondents react accordingly by not using Facebook at all or by going elsewhere?
3 But I want to clarify that user reactions are unlikely to be the direct subject matter of
4 the survey questions, because whether users understood what they were sharing with
5 Facebook and for what purpose, well, that will be a central question on abuse and you
6 have my case on that; it's part of the abuse. But user knowledge has no centrality to
7 the question of loss. It's quite an important practical point, I think, and it relates to the
8 stages of the analysis with the upper bound and lower bound I took you through.
9 But users who would have stuck with Facebook, even though they did understand the
10 cost to them, they did understand the data that was being taken, they still suffered
11 loss, notwithstanding they had the knowledge. But our case is they didn't have
12 anywhere to go. They had no other alternatives. They were faced with a take it or
13 leave it deal on the table, so they paid the price of the data, so their knowledge isn't
14 really in the frame on this question.
15 Now, it's worth saying -- one could take a drug example, again, drug pricing. You
16 wouldn't say that a patient or a health service didn't suffer any loss if they paid
17 an extortionate price for a lifesaving drug because they understood how high the price
18 was. They paid the price because they had to pay the price. They had no alternative
19 and the loss is the unlawful overcharge.
20 So the same analysis applies here, to users who had no choice.
21 Now, I raise this because Meta advance this argument in their skeleton. That's at
22 paragraph 53, and they say:
23 "Mr Harvey will have to ascertain the extent to which users knew how much data they
24 were sharing."
25 That's wrong, he won't, not for quantum.
26 **MR RIDYARD:** If I know how much data I am sharing and I don't like it, it's painful to

1 me to share it but I'm still choosing to do Facebook, then that must indicate that I value
2 the service, doesn't it?
3 **MS KREISBERGER:** That's --
4 **MR RIDYARD:** Pretty highly, probably.
5 **MS KREISBERGER:** That's willingness to pay fallacy.
6 **MR RIDYARD:** That's what value is.
7 **MS KREISBERGER:** But that would be a licence for excessive pricing by any
8 dominant undertaking.
9 **MR RIDYARD:** I fully understand that you can't get out of an abuse, you know, claim
10 by reference to willingness to pay but, nevertheless, what value is, is willingness to
11 pay and that's what we're trying to ascertain here, isn't it, what is the value.
12 **MS KREISBERGER:** There is case law that says that's not correct. So Flynn says in
13 terms, economic value is not willingness to pay because in a situation --
14 **MR RIDYARD:** Okay, I don't think Flynn does say that.
15 **MS KREISBERGER:** I can --
16 **MR JUSTICE SMITH:** I don't --
17 **MS KREISBERGER:** If I may come back to you, I can give you the passage in reply
18 , but it says the price cannot be whatever -- I think the words Lord Justice Green uses,
19 the price cannot be whatever a dominant undertaking can get away with.
20 **MR RIDYARD:** Yes, of course it says that. Yes.
21 **MS KREISBERGER:** So value is not the same as the high price which is charged. In
22 a situation of market power, the user has nowhere else to go. It must deal with
23 Facebook. It knows that it's giving something up of value. He or she knows they're
24 giving something up of value but they have to give it up because there are no
25 alternatives. There's nowhere else to go. You have to pay the price for the lifesaving
26 drug. You've suffered a loss. You know you're overpaying, but you've suffered a loss.

1 So whilst many users won't have known, won't have understood, those that do
2 understand still suffer loss and in that sense, it's a direct analogy to an overcharged
3 good with a monetary price.
4 So I turn to the flaws that Meta alleges in relation to user valuation. There are three.
5 The first of them, flaw 4, is the claim that subjective user valuation is irrelevant to
6 pleaded loss. It seems quite a strange argument to engage with, after we have had
7 rather long debates about commercial valuation. User valuation is the direct measure,
8 but I need to respond to the point being made against me.
9 I come back here to the Supreme Court's articulation in Merricks of the unavoidable
10 requirement for quantification, notwithstanding forensic difficulty: the need to ensure
11 full compensation to victims of wrongdoing. So while excess profits uses that cap as
12 a measure of harm, this measure is the more direct one.
13 Now, I have taken you through the point on under-recovery. In other words, if you
14 don't have user valuation, there's a risk of under-recovery. That's where, coming back
15 to my example, users place more value on their data than Meta's commercial
16 valuation, so no bargain is reached in the counterfactual. Meta doesn't monetise the
17 data, so you can't fall back on commercial valuation. The direct measure of loss is the
18 user valuation, where no bargain is struck.
19 That's all I was going to say in relation to that flaw.
20 The fifth flaw alleged by Meta is the irrationality argument. Now, Mr Parker's argument
21 is that users only suffer loss if they value their data more highly than they value using
22 Facebook, but if they value their data more than the platform, it would be irrational for
23 them to hand over the data for something less valuable. We say that argument is
24 wrong as a matter of principle, for three reasons. It's the same point that I just made
25 to Mr Ridyard.
26 Users in the actual world have nowhere else to go. It's precisely because Facebook

1 has market power that it's able to extract the unfair bargain from the user. So, again,
2 that takes me into my point, this is a species, it's the fallacious willingness to pay
3 argument which was rejected in Flynn. In other words, a non-abusive price is not
4 anything that the dominant firm can get away with. That's a charter for excessive
5 pricing. It's not irrational to overpay for the lifesaving drug: it's because there is no
6 other option. So the bad bargain is a reflection of the dominant firm's market power.
7 Here, Facebook.
8 The second problem is it ignores, the allegation of irrationality ignores the fact that the
9 pleaded case extends to the allegation that Meta has gone out of its way to make sure
10 users don't understand what they're doing and what bargain they're striking and how
11 much data they're sharing. So irrationality has no place in a case that alleges that
12 users are kept in the dark.
13 What Mr Parker is really saying is that there can't be any loss in this case because
14 users are winning. They experience a net gain. That can't be treated too seriously,
15 after an abuse has been found.
16 Now, the sixth point is the privacy paradox. Meta's argument comes down to saying
17 that stated preferences in surveys are unreliable because people don't say as they do
18 when it comes to privacy.
19 Now, Meta's position is an extreme one. They say that the discussion in this academic
20 literature about the privacy paradox demonstrates that you can never conduct
21 a meaningful user survey and that's categorically put in the skeleton at paragraph 57,
22 for your note.
23 Now, there are three principal reasons to refute this extreme position. Again, the
24 privacy paradox is irrelevant in a world where users have no real choice or no
25 substitutes because what they do is no indication of what they would do if they had
26 options. It's the same point again, they're tied in.

1 Secondly, Meta has mischaracterised the literature. In fact, the position is the opposite
2 and I showed you that Mr Harvey actually says in his first report, and the President
3 questioned me about this. The academic studies provide useful guidance on how to
4 design primary research to avoid potential pitfalls and biases and he fully intends to
5 build on that learning. That's his reading list.
6 Now, I am certain no one is going to thank me if I go to the academic papers at this
7 stage of the hearing, but, for your note, it's set out in Mr Harvey's second report,
8 paragraph 4.29. Mr Parker, Meta's expert, himself recognises that one of the possible
9 explanations for the disconnect in the literature is that what people say is the
10 meaningful aspect, that's the true data point, and what people do, is unreliable or
11 distorted and it relates to my point about lack of substitutes, alternatives, but
12 particularly in this context, it relates to the part played by choice architecture.
13 Default settings which drive users to behave in particular ways which benefit the
14 platform, and I flag the CMA's paper on this.
15 So to say that -- and I should say that there are papers, it's in the bundle, there is
16 a paper by Dr Padilla and others which acknowledge the possible existence of the
17 paradox, but adopt choice modelling methodologies which they say closely resemble
18 decision-making in the real world. So it's just not right to suggest the literature says:
19 there is an insurmountable problem and everyone should stop now. On the contrary.
20 **MR JUSTICE SMITH:** But just so I understand the nature of the exercise, the root
21 data which drives the outcomes of the survey will be, am I right, questions put --
22 **MS KREISBERGER:** Yes.
23 **MR JUSTICE SMITH:** -- to a sample --
24 **MS KREISBERGER:** Yes.
25 **MR JUSTICE SMITH:** -- of the group?
26 **MS KREISBERGER:** That's correct, and in putting those questions, and this is my

1 fourth point, Mr Harvey is going to work with the designers to control for behavioural
2 biases and that is the expertise they bring forward.
3 Now, ultimately, how effective these methods are will be tested at trial, but the survey
4 is yet to be designed. But I've explained, just to sum up on user valuation, it's
5 an important part of the tool kit because in a certain situation, it avoids under-recovery.
6 It's also right that the Gutmann approach suggests that one should take this forward
7 to trial, rather than prejudge the issue.
8 I want to make one final point on user valuation. Sir, you've posed to me a number of
9 questions about the value of the data to users and I've shown you the evidence that
10 we have in the public domain. I have shown you the evidence that the CMA refers to,
11 the statement in Lloyd v Google that data is a valuable commodity and the literature
12 to which Mr Harvey refers, which also suggests that data is a valuable commodity, but,
13 ultimately, this will give us the answer. So if users were to respond to the survey and
14 say: no value whatsoever, our recovery, even though there's been an abuse, would
15 be zero in that hypothetical situation, but this is the means of finding out how users
16 value their data, in addition to public domain evidence we have so far.
17 **MR JUSTICE SMITH:** (Audio distortion).
18 **MS KREISBERGER:** I'm sorry, sir.
19 **MR JUSTICE SMITH:** I said that postulates that there is only one way of carrying out
20 the survey, whereas these are, intrinsically, very subjective things. I mean, you can
21 skew results by asking questions in a different way.
22 **MS KREISBERGER:** The reason why one has experts in this field is to -- and, of
23 course, the experts owe a duty to the Tribunal, so I would hope there's no suggestion
24 that they're doing anything but trying to get to the true answer.
25 **MR JUSTICE SMITH:** No, I think my point is that there are a range of true answers.
26 **MS KREISBERGER:** Well, that's why, ultimately, Mr Harvey has two methodologies:

1 the commercial valuation, that's the market price, and the user valuation, survey
2 based.
3 **MR RIDYARD:** If I'm a user and I just don't care about my privacy or data being taken
4 up, on your analysis I would still be liable to get -- for compensation because
5 it's -- even though I have had no value for it, it's still valuable to Meta and, therefore,
6 I thought it was part of your case that Meta would, therefore -- in the counterfactual,
7 would be throwing £10 notes at me to get me to reveal my data, even though I don't
8 happen to value the loss of it.
9 **MS KREISBERGER:** That is right, but I gave you the different scenarios. So if users
10 overwhelmingly value their data at a very low -- let's say a low level, then the delta at
11 which the value of the data sits is between that lower bound, user valuation, and the
12 upper bound, commercial value, and the bargain which would be struck would be
13 somewhere in that delta.
14 So if, overwhelmingly, users are coming up with a low value, you're going to be looking
15 at that as the Tribunal saying: well, I see that Meta could pay up to these great profits
16 but they'd probably get away with striking a bargain at a much lower level. That gives
17 you the answer. So this will come out in the wash. These are the inputs that get you
18 there.
19 Now, finally, I have the entirely separate topic of suitability which is also challenged by
20 Meta, so if I might turn to that and address that, I hope quite crisply. I will go straight
21 to Meta's objections.
22 **MR JUSTICE SMITH:** Yes.
23 **MS KREISBERGER:** Meta raises four points on suitability and, in fact, most of them
24 I can deal with very briefly because they rehash the quantum arguments, or they
25 rehash arguments which have already been rejected in other CPOs.
26 The first point they make is that the methodology is implausible. I don't need to run

1 through that one again.

2 The second point is Meta's claim that the damages estimate is inflated and that it's
3 impossible to decide whether the costs of the proceedings outweigh the benefits. We
4 only have a provisional estimate. I'm in your hands as to how much you want me to
5 grapple with this point because it doesn't seem to me a good point. We have a good
6 methodology.

7 At the moment there is an estimate which is given based on commercial valuation only
8 because the surveys haven't been conducted. The estimate may go up or down once
9 we have disclosure and evidence, triangulation of techniques, the surveys. It's
10 contrived to fixate on the figure given purely for illustrative purposes at this stage of
11 the game.

12 The fact that an exact estimate is infeasible in these circumstances cannot possibly
13 be a bar to certification, but it's right that quantum is likely to be significant and I have
14 given you the figures on profitability and so on. 2.75 billion in the UK in 2019 alone.
15 I think I can leave that point there.

16 It's right that the costs anticipated in the budget amount to 2 per cent of the current
17 estimate as well, so in terms of proportionality, you can see there is no issue.

18 Just for your note, I mention that the Tribunal in Qualcomm found that costs amounting
19 to 5 per cent of the total estimated claim value were proportionate, but perhaps, more
20 importantly, the President's judgment in FX held there that the cost benefit assessment
21 for the Tribunal is a wider one. And perhaps I could just read the quote, in the interest
22 of time. For your note, it's authorities tab 21, page 883, volume 2, paragraph 288.2,
23 which I imagine the President remembers well:

24 "We consider that in a very broad-brush way, we must consider whether there are
25 adverse effects, costs in allowing these proceedings to continue. In short, costs does
26 not refer to the financial costs being incurred by the funders and by their contingently

instructed lawyers; it refers to disbenefits in an altogether broader framework. We can, in this case, identify no such disbenefits."

We say the same reasoning applies here, there are no disbenefits.

The third point is that the PCR's proposals for distribution are complicated and expensive. In Gutmann, the Court of Appeal rejected the very same argument. They said that's (inaudible) tested premise and unduly pessimistic.

The PCR considers there is every reason to expect a significant take-up by consumers if the claim is successful. Notably in Qualcomm, damages, which equated to around £16 to £17 per consumer, were treated as material for these purposes, particularly in the current climate and cost of living challenges. The estimated award here is several times bigger than that.

There has also been significant media attention about this case already, so it's a good indicator of a high take-up to be expected. In any event, you will know well that matters of distribution are in the Tribunal's hands and the Tribunal will ensure that it's appropriately addressed. And that point is made in the Gutmann judgment at paragraph 87. I don't think I need take you there.

Meta's fourth point, finally, is that the litigation funders' return is said to be too high. That's also been considered in other CPOs. It's been rejected where it's been raised. The Court of Appeal in Gutmann emphasised the essential role of litigation funders in bringing these cases and that it's perfectly legitimate for funders to seek a return on their investment. That's paragraph 83 of the Gutmann Court of Appeal judgment and it's cited at paragraph 90 of our skeleton.

The point is also wrong. The funder's returns come out of undistributed damages. That's after the class members have claimed compensation due to them.

Now, that point is addressed in McLaren at paragraph 150. Again, I don't think we need to go there, with an eye on the time.

1 Now, Meta suggests that the funder might walk away if it can't achieve its targeted
2 returns. That can't be right either, because if that were to happen, well, Meta would
3 have its costs covered. There's adequate cover for that.
4 Secondly, the amount of undistributed damages is only known at the end of the
5 procedure, at which point it's, frankly, too late for the funder to walk away. So none of
6 these objections amount to very much at all.
7 Stepping back, any suitability assessment needs to take into account the overall
8 picture in this claim, which would be an arguable case on the merits, a class size of
9 45 million consumers. That's a factor that has been taken into account in other CPOs,
10 Coll and Kent, for example.
11 If the abuse is established, each member of the class will receive a material amount
12 of damages, not an amount that comes anywhere near individual litigation; impossible.
13 These proceedings are the only realistic possibility to vindicate the rights of this class
14 of 45 million affected users, so to that extent, the cost benefit analysis falls very clearly
15 on the side of benefits.
16 Sir, that was all I was going to say on that topic. I can hand over to Ms Demetriou, if
17 there is nothing else.
18 **MR JUSTICE SMITH:** Thank you very much, Ms Kreisberger. Very grateful. I think
19 the shorthand writer asked for two breaks rather than one which is understandable.
20 Should we take a break now?
21 **MS DEMETRIOU:** I think that's probably better, rather than me starting for
22 ten minutes.
23 **MR JUSTICE SMITH:** That's what we thought. Very good. Well we will resume at 5
24 to midday. Thank you.
25 **(11.44 am)**
26 **(A short break)**

1 **(11.59 am)**

2 **Submissions by MS DEMETRIOU**

3 **MR JUSTICE SMITH:** Ms Demetriou.

4 **MS DEMETRIOU:** May it please the Tribunal. Meta's essential concern here is this
5 is a very large and complex piece of proposed litigation seeking an aggregate award
6 of damages for a large class of some 45 million people and it is, at present, unclear
7 how it is to be tried.

8 Now, we obviously understand that some of the challenges that arise in this litigation,
9 as with any litigation, will be for trial and not for resolution now, but it is incumbent on
10 the PCR at the certification stage to put forward a methodology which will serve as
11 a blueprint for the trial and which will identify the right questions that need to be
12 grappled with at the trial, and set out a plausible methodology for addressing those
13 questions. That is what Pro-Sys requires, and the PCR has not done that in this case.
14 Its methodology does not meet the Pro-Sys test and the consequence of that is that
15 the Tribunal should refuse the certification application. The Tribunal should not certify
16 something where the Tribunal doesn't know what it is it will be trying when it comes to
17 a trial.

18 **MR JUSTICE SMITH:** Refuse or give them a second bite of the cherry?

19 **MS DEMETRIOU:** We say refuse. I will come back to that point, but we say refuse
20 and essentially, sir, the reason why we say that is the flaws which we have pointed to
21 which are fundamental which I'm going to elaborate on and develop, those flaws have
22 been apparent because we made them apparent to the PCR in our response to the
23 CPO application a long time ago now and they responded, they replied and we had
24 another report from Mr Harvey and they still haven't been cured. And there comes
25 a point where you say: well they have had their opportunity, they haven't changed their
26 claim, they have stuck to their guns and the mistakes are still there, and this is

1 an onerous piece of litigation and there should be finality for the Defendants. So we
2 do say you should refuse the certification.
3 **MR JUSTICE SMITH:** Just so I can calibrate the strictness of your response. In
4 a strike-out case, one would almost always give the party liable to be struck out
5 a chance to replead.
6 **MS DEMETRIOU:** Yes.
7 **MR JUSTICE SMITH:** Even if, it's always subjective but even if there had been debate
8 before the hearing of the strike-out, that the case was untenable. I'm sure there are
9 very extreme cases where you say: look, you have been given your chance and even
10 though this is the first hearing of the strike-out, I am striking you out. You say that's
11 this case, rather than a situation where the PCR is only now waking up and smelling
12 the coffee, assuming you're right and because they should have known the problems,
13 they shouldn't get a second chance.
14 **MS DEMETRIOU:** Sir, yes, and may I just briefly explain why. In my experience, in
15 a strike-out application, then it's often the case that the respondent to a strike-out
16 application will take on board the criticisms that are made and will come with a draft
17 amended pleading to the hearing and then very often the debate at the hearing will be
18 about that draft amendment. And so you're right, sir, that there is -- and normally, the
19 court will take account of the draft amended pleading.
20 But we have, in a sense, had that in this case because the points were made in our
21 response and in Mr Parker's report and they did come back, so they have had every
22 opportunity to respond. Now, I don't want to adopt too black and white an approach
23 because it does, obviously, come down to fairness and the circumstances of any
24 particular case and so if it were the case that a Tribunal on a CPO application were to
25 think of a new point that hadn't been canvassed, then I can see in such a case, there
26 wouldn't have been an opportunity to deal with it and so it may be fair to give the PCR

1 an opportunity to do so, but if in a certification hearing, the Tribunal agrees with one
2 or more of the points made by the respondents and those have been grappled with or
3 the PCR has had every opportunity to grapple with them, then we say in those
4 circumstances, fairness doesn't require any further opportunity. Indeed, giving them
5 a further bite of the cherry may be unfair to the defendant. So that's how we say
6 the Tribunal should approach it.
7 **MR JUSTICE SMITH:** How does that fit with the approach taken on pleadability in
8 Merricks? Let's suppose for the sake of argument one has a claim that has been
9 properly articulated, in the sense it can't be struck out, but where the mechanics of
10 assessment of loss are woeful.
11 **MS DEMETRIOU:** I'm so sorry, I didn't hear that last part. The mechanics?
12 **MR JUSTICE SMITH:** The mechanics for the assessment of loss are woeful.
13 **MS DEMETRIOU:** Yes.
14 **MR JUSTICE SMITH:** And let's further assume that that woefulness has been
15 articulated many times in the conversations before the certification hearing. What
16 you're really doing is you are equating the inability or the failure to particularise the
17 quantum methodology with, actually, the strike-out jurisdiction, aren't you? You're
18 effectively saying that in order for certification to take place, you have to have, one,
19 an arguable case, but you have to have something which passes the Pro-Sys test.
20 **MS DEMETRIOU:** Yes.
21 **MR JUSTICE SMITH:** And unless you hit both, you don't just get a second bite of the
22 cherry. You don't get that: you have your application refused.
23 **MS DEMETRIOU:** Sir, I would look at it this way, if I may: so, yes, we say that you
24 have to have both, so you have to have an arguable case that isn't strikable and you
25 have to meet the eligibility and suitability and common issues requirement which
26 requires a methodology which meets the Pro-Sys criteria.

1 And if you don't have the latter, then the claim won't be certified.
2 Now, I'm not saying, of course, that the Tribunal doesn't have a discretion --
3 **MR JUSTICE SMITH:** No, no.
4 **MS DEMETRIOU:** -- as to when it refuses certification.
5 **MR JUSTICE SMITH:** I'm trying to calibrate where that discretion fits.
6 **MS DEMETRIOU:** Yes.
7 **MR JUSTICE SMITH:** I know you're not taking a black and white approach. You're
8 taking a more nuanced approach but I'm trying to unpack the nuance.
9 **MS DEMETRIOU:** So if I can assist on that, then we say that the Rules require, if
10 Pro-Sys isn't met, that certification is refused, but we recognise that there will be
11 a question for the Tribunal as to when it does that. So does it give another bite of the
12 cherry or not? That question isn't answered by the Rules. That will come down to
13 the Tribunal's view of the proper case management of the proceedings and the
14 requirements of fairness.
15 And that's why I said earlier that the answer as to whether or not the PCR should be
16 given another bite of the cherry will depend on the factual circumstances and where
17 it's a case where they have had every opportunity to meet the objection already and
18 that's the objection that the Tribunal decides is fatal to meeting the Pro-Sys test, then
19 there is no good reason of fairness to give them another bite of the cherry. So that's
20 how we say it fits together.
21 **MR JUSTICE SMITH:** And I raised this with Ms Kreisberger, so I will raise it with you:
22 does the Court of Appeal's decision in McLaren teach us anything about the Pro-Sys
23 jurisdiction? And let me explain why I am particularly focused on McLaren, because
24 there, the Tribunal took a view about the Pro-Sys test, took the view that it was
25 satisfied and obviously took a view about arguability and so certified the matter.
26 The Court of Appeal says: well, this is a matter for the Tribunal, the Tribunal acts as

1 the gatekeeper, but we don't like the assessment of the Tribunal, so we're going to
2 send it back, but we're actually not going to vary the certification order, which seems
3 to me to be riding two horses in a rather curious way, in that if you're saying (inaudible)
4 the breadth of discretion the Tribunal has in terms of its gatekeeper function. That the
5 Tribunal has erred and needs to reconsider, then one would expect the certification to
6 be set aside, so that the whole thing can be considered again in the way we're
7 discussing, but that's not what happened.
8 **MS DEMETRIOU:** No, sir, and I do agree with you, with respect, that the
9 Court of Appeal's judgment in McLaren is a slightly curious beast, so I do agree with
10 that. I want to take McLaren slowly. I'm going to come to it, but may I just foreshadow
11 what I am going to say about it. So in that case, the Court of Appeal found that both
12 the arguability strike-out standard was met by the class representative and the Pro-Sys
13 test was satisfied, so there was no jurisdiction to -- so on that basis, the
14 Court of Appeal didn't overturn the certification or the decision not to strike-out the
15 claim, but you're quite right to say that it was, nonetheless, troubled by aspects of the
16 methodology and I think one curious aspect of the judgment but something which
17 I think rather helps explain the gatekeeper role. So I think what they were saying is
18 that the gatekeeper role means even if you think this meets the Pro-Sys test and
19 arguability, the Tribunal, at certification, has to do a bit more than say: oh, well, this is
20 all for trial, if there are, nonetheless, some problems with the methodology. That's
21 how I square the circle but I will go back to the judgment in due course.
22 **MR JUSTICE SMITH:** That will be very helpful, but the difficulty I have and need your
23 help on because I think the Tribunal needs to understand what we're all doing on these
24 sort of applications which are not infrequent applications before the Tribunal --
25 **MS DEMETRIOU:** Yes.
26 **MR JUSTICE SMITH:** -- is to have at least a clear understanding of what the parties

1 are supposed to deliver up. And the problem with McLaren is I'm not sure that anyone
2 knows what the further scrutiny which is implied by remission is intended to achieve.
3 Either one has a situation where the articulation of the quantification process is
4 deficient and needs correcting and, in that case, because it looks like it's a minor, albeit
5 material deficiency, you would think: set aside certification, stay, reconsider, or it is
6 a general question of case management, in which case you really have to make
7 a pretty major error, as the Tribunal at first instance, before one is going to intervene,
8 because we all know case management questions are hugely judgmental in terms of
9 the exercise of judgment and when something like that is remitted, you've not just
10 made a call that a different Tribunal would call differently. You've made an error which
11 no properly instructed Tribunal would make and it's that --
12 **MS DEMETRIOU:** Sir, I agree with how you've put it and you're right to say that the
13 Court of Appeal didn't characterise it as a failure of case management. They said in
14 terms it was an error of law that the Competition Appeal Tribunal committed.
15 I think if you can just bear with me a moment.
16 **MR JUSTICE SMITH:** Of course. I have laid out my concern and I will leave it to you
17 when you raise it.
18 **MS DEMETRIOU:** Thank you very much because I understand the concern and I'd
19 like to address it. It won't take me very long, much longer, but I would like to address
20 it when I get to that part --
21 **MR JUSTICE SMITH:** That's absolutely fine and, to be clear, it seems to me important
22 to understand McLaren, for us to understand what we are obliging the parties to do
23 here.
24 **MS DEMETRIOU:** I agree.
25 **MR JUSTICE SMITH:** I'm grateful.
26 **MS DEMETRIOU:** Thank you, sir.

1 So I have made the introductory submission that the PCR, in our submission, has not
2 met the Pro-Sys test and there are a number of flaws which we have explained in the
3 methodology on which the PCR relies and I will address these.
4 But I just want to emphasise the following things at the outset. The Tribunal has seen
5 the nature of the abuses that are alleged and the PCR alleges those abuses caused
6 the class to suffer loss and its pleaded case, we will come back to this in a moment,
7 its pleaded case on loss at paragraph 148 of the claim is that the loss is the commercial
8 value of the class members' data monetised by Facebook. So that's the pleaded
9 measure of loss and that's the basis on which, of course, we have approached the
10 plausibility of the proposed methodologies; are they appropriate to measure that
11 pleaded loss which is the commercial value of the class members' data?
12 Now, obviously, there is an anterior point which the Tribunal raised yesterday which is
13 whether that measure of loss is appropriate at all because it doesn't look like
14 compensatory loss and particularly when it comes to the damage the class suffered
15 as a result of the unfair terms, and so we respectfully agree with the way the Tribunal
16 has put it there. One can approach it from either direction. I will come back to that.
17 Now, the excess profits methodology purports to measure the pleaded loss, so the
18 commercial value of the data, but we say is not a plausible way of doing so in the
19 present case and there are two fundamental problems. The first is that it doesn't meet
20 the test for unfair pricing because it assumes that anything above a reasonable return
21 on costs is abusive and it fails to investigate the question of economic value, and as
22 you, sir, as the Tribunal noted yesterday, United Brands is a rather more sophisticated
23 assessment than simply saying profits above the WACC are unfair.
24 I will come back, obviously, and elaborate on that point.
25 The second problem is that it ignores the implications of Facebook operating in
26 a multisided market and what the PCR does instead is proceed on an assumption that

1 the sides of the platform other than users don't matter, they don't need to be taken into
2 account in the methodology, but what happens to all sides of the Facebook platform,
3 in the absence of the alleged abuses, is plainly an issue which we can say now will
4 need to be investigated at trial because it affects the quantum of users' loss, if any
5 loss, of course, and the PCR, we say, ought to explain now how she proposes to do
6 it. So the issues need to be identified and a methodology needs to be put forward for
7 dealing with them.
8 Now, turning to the user valuation methodology and I'm just now, at this point,
9 summarising, foreshadowing the submissions I'm going to return to, that this doesn't
10 measure the pleaded loss at all because the pleaded loss is all about the commercial
11 valuation of the data. Instead, it purports to measure the subjective value that users
12 place on their data. Now, I understand that the Tribunal might think: well, that looks
13 more compensatory, but the problem is it's not what's pleaded. So there's a mismatch
14 between the pleaded loss and the user valuation survey which looks to calculate
15 something different.
16 We say that's a problem for the PCR. Methodology simply doesn't address the
17 pleaded loss and so that methodology doesn't meet the Pro-Sys test and needs to be
18 discounted.
19 **MR JUSTICE SMITH:** This is, you say, much closer to my granular articulation of
20 a form of quantification that bears no relation to the pleaded loss, the starlings flying
21 around Africa?
22 **MS DEMETRIOU:** We absolutely do.
23 **MR JUSTICE SMITH:** So you're taking two points. You're taking that point but you're
24 also saying: even if that's wrong, it's not sufficiently unpacked?'
25 **MS DEMETRIOU:** We do. We say it's not sufficiently unpacked and it suffers from
26 the privacy paradox and I will come back to those points too.

1 We say that, further, despite my learned friend's best efforts today, the PCR has still
2 not properly articulated the relationship between the two approaches, so how they fit
3 together. So they talk about triangulation, but we don't really understand how that's
4 supposed to take place and, indeed, in an answer to a question from Mr Ridyard to
5 my learned friend just now, Ms Kreisberger appeared to suggest that a user who
6 values their data at zero would nonetheless recover loss if the ROCE-WACC valuation
7 leads to something higher, and we say, well, how can that be because, in those
8 circumstances, that user has suffered no loss? If they value their data at zero, how
9 can it be said they valued loss? So these really quite fundamental questions have not
10 been addressed --
11 **MR JUSTICE SMITH:** I think what Ms Kreisberger is saying is you need to, as part of
12 your counterfactual, imagine a market at which everyone has a valuable commodity,
13 even if they don't themselves value it and, therefore, the rational subscriber to
14 Facebook will pitch for as much as they can get, even if they don't value it very much
15 and that's why I think the Facebook side of the equation, the earnings that Facebook
16 make in excess of their costs, becomes relevant.
17 **MS DEMETRIOU:** I think that is what Ms Kreisberger is saying, but one just needs to
18 stop and think for a moment. If they say that the user valuation methodology is
19 relevant because it's important to see what subjective value users place on their data
20 and then you have someone who says: well, I just don't care, I don't care about my
21 data and what I am receiving from Facebook is something very valuable, so I really
22 don't care and had I known what all the terms and conditions were and had
23 Ms Kreisberger sat down and explained it all to me very carefully, I still would have
24 handed over exactly the same data, well how can it be said in those circumstances,
25 that that person has suffered loss by reference to profits Facebook has made? It just
26 doesn't stack up and that really, in a sense, illuminates the difficulty we're facing in this

1 case.

2 **MR JUSTICE SMITH:** And also, one has to be very careful about language here. You
3 said a moment ago "handed over". Now, that implies that the data we're talking about
4 can only be used once. Now, of course that's not the case. The data that Facebook
5 are interested in, no doubt if you are buying from Amazon or using Google, that data
6 is going to be -- being extracted, depending on the terms and conditions many, many
7 times and there's no reason why that can't happen.

8 This isn't a case where Facebook are saying: you are providing us with data and, by
9 the way, you're providing it to us exclusively. Now, if that were the case, you would
10 be looking at the opportunity cost of being deprived of being able to sell your data
11 elsewhere, but you're not. You can use it many, many times because the data is not,
12 in that sense, a scarce property.

13 **MS DEMETRIOU:** Sir, that is a very important point in this case and since you've
14 made it, can I just take you to our response at core bundle, tab 2, page 119.

15 If you look at paragraph 36, please, because there has been lots of blithe talk about
16 data being handed over and we do respectfully agree with the point you've just made,
17 sir. So this explains that there are three categories, broadly, of user data collected by
18 Facebook. So the first is user provided data. So when you give your name or contact
19 details or age and so on.

20 The second is onsite data generated as a result of a user's activity on Facebook. So
21 if you like someone else's post, et cetera, then that's data which directly results from
22 a user's interaction with the platform. But then you have, and this is what you're
23 referring to I think, sir, offsite data, so data Facebook receives not from the users but
24 from third parties. So advertisers, shops, retailers, regarding how users interact with
25 third party websites, including purchases, ads seen, interacted with.

26 So that's data which is included in the claim. I think it must be the most significant part

1 of the claim. That's their key complaint but it's not data which users are handing over
2 to Facebook in any sense, in any exclusive sense or even any direct sense. It's their
3 interaction with third party retailers, who then choose to share it with Facebook and,
4 yes, the user has to consent to that, but it's certainly not exclusive data that's being
5 handed to Facebook.
6 **MR JUSTICE SMITH:** Doesn't it even go further than that? I take your point about
7 36(c) but looking at 36(a), the user provided data. There's no reason why I, as
8 a hypothetical subscriber to Facebook, can't provide exactly the same data to any
9 other social media service that I choose to subscribe to. I'm not precluded from doing
10 that.
11 **MS DEMETRIOU:** Sir, that's exactly right and we make those points, so if you look at
12 paragraph 38 over the page, that's exactly the point we make at 38(a) and then we
13 make similar points in respect of the other two categories of data. So this is all data
14 which can and I'm sure generally is shared with other providers and so the data in
15 respect of category (c) is, by definition, shared with other providers.
16 **MR JUSTICE SMITH:** In the case of (a), it is in the subscriber's control whether they
17 do or not.
18 **MS DEMETRIOU:** Yes.
19 **MR JUSTICE SMITH:** They have the choice, but that choice is not constrained by
20 Facebook.
21 **MS DEMETRIOU:** No, exactly.
22 Now, what we're left with, for the reasons I have summarised and I'm going to come
23 to in more detail, is a methodology that doesn't meet the Pro-Sys standard, because
24 it doesn't provide any sort of blueprint for trial. The Tribunal is simply not in a position
25 today, having heard everything the PCR said, not in a position to know what it needs
26 to put in place in order to organise a trial of this matter.

1 So that's why we say that the Pro-Sys test is not met.
2 Now, a large part of the answer that the PCR gives in response is to say: well, don't
3 worry, this is all a matter for trial, there will be a broad axe at trial, and, of course, we
4 accept that there is a broad axe when there are difficulties with data or difficulties with
5 calculating damages. Of course we accept that. We're not seeking to resile from any
6 part of the Supreme Court's judgment in Merricks, but the broad axe can't be the
7 answer to everything, otherwise you wouldn't have a Pro-Sys test. The standard would
8 be toothless, which we know it's not, and what we do say is that, yes, the Tribunal will
9 wield a broad axe at trial, but it needs to know now what it's going to be doing. So what
10 is the methodology, what are the issues that we need to be grappling with? And that
11 really is the problem.
12 **MR JUSTICE SMITH:** There's a risk of pushing the analogy of the matter too far but
13 one needs to identify the tree or the vegetation (inaudible) which the broad axe is going
14 to be applied, so that when at trial, you're hacking away and severing limbs and things
15 like that, you know, what particular thing you are wielding your axe at.
16 **MS DEMETRIOU:** Sir, that's exactly right. That's the distinction. So broad axe is all
17 right once you know what you're doing, once you know what the questions are that
18 are going to be addressed, but if you don't, then the broad axe won't save you. That's
19 really the point.
20 Take the unfair price abuse and the reason that we have -- and I'm going to focus
21 mostly on the unfair price abuse is because it's actually the easiest case for the PCR,
22 because the other cases, so the lack of transparency and unfair data, have very little
23 connection with the methodologies, and what I want to do is meet the hardest case
24 against us. So the unfair price case, it looks like it might have something to do with
25 the methodologies and so that's what I am going to address but take that.
26 The PCR says: well, abuse is all a matter for trial, you don't need to worry about abuse,

1 our methodology is only concerned with quantum, but when you have an unfair price
2 allegation, an excessive pricing allegation, then the questions of abuse, whether the
3 price is excessive and quantum, are inextricably linked. You can't say: well the
4 methodology doesn't look at abuse, we're just worried about quantum because you
5 only get to quantum once you have the benchmark of the competitive price.
6 So that's why it simply doesn't work to say: well, abuse is for trial, don't worry about it
7 now in the methodology.
8 Now, could we just turn up the claim form, please, so we're in core bundle, tab 1 and
9 go to page 49. So these are the particulars of the unfair price abuse and let's look at
10 how it's put in paragraph 127. So:
11 "By making access to its platform contingent on users giving up access to their
12 valuable personal data, Facebook demanded an unfairly high price or payment in kind
13 for the provision of social networking services."
14 So that's how it's put primarily. Now, of course the price for the social networking
15 service is zero, but what they're saying is that's not, in itself, an answer to an excessive
16 pricing allegation because what they're saying is: well, it should have been a negative
17 number, you should have paid us, and then they say:
18 "Conversely, by taking that valuable personal data without paying for it and offering
19 only social networking services in return, Facebook offered an unfairly low purchase
20 price for users' valuable personal data."
21 So they're looking, if I can put it this way at this stage, at both sides of what the Tribunal
22 has called the barter and they accept there that you need to look at both sides. So
23 you need to look at the value of the data, but also the value of the social networking
24 service.
25 Indeed, the primary way it's put there is "demanding an unfairly high price for the
26 provision of social networking service."

1 Now, it follows that the value of that service obviously needs to be ascertained,
2 otherwise you just don't get off the ground in terms of working out an unfair price for
3 it. How can you work out whether the price of the social networking service is unfair if
4 you don't look at it? And that's the problem here. So they do not look at it. They do
5 not put forward any means of examining the value of the social networking service,
6 and we see if we go down, paragraph 127, we see that having set it up as being
7 something which is relevant which it plainly is, they then downplay its relevance. So
8 you then see at (a):
9 "The incremental cost to Facebook of offering the personal social network is very low."
10 So in one fell swoop they say: well you don't need to worry about the value of the
11 service.
12 Then the focus returns solely to the question of data, so you see that at (b):
13 "The revenues generated by Facebook indicate that the value of the data is high."
14 So that's what they say at (b), and then:
15 "By virtue of commercialising the data, Facebook earned the substantial excess
16 profits."
17 So these are all of the particulars of the unfair price, and then they say:
18 "There is no reasonable or proportionate relationship between the economic value of
19 users' personal data and the economic value of the personal social network."
20 So they do there at least accept that you need to be looking at both things.
21 Just to foreshadow my submission which you have seen already in our written
22 submissions, but they don't then, in a methodology, have any way of analysing or
23 addressing the value of the social network. They just don't address it because they
24 take in the excess profits methodology. They say anything above the WACC is
25 excess. That's what they say and they just don't factor in the economic value of the
26 service.

1 Now, we then go to paragraph 128(a) and you see there:

2 "In a competitive market, users would have received recompense for giving up their

3 personal data in amounts which were proportionate to the commercial value of that

4 data."

5 So of that data. So they're drawing here a link between the damages, the loss, and

6 the commercial value to Facebook of the data, but, again, they're not factoring in here

7 what the users are actually receiving which is a social networking service, and then if

8 we go to the pleaded loss at paragraph 148. I have made this point but just to show

9 you it at page 56. You see here under the head "Loss and damage":

10 "Facebook's breaches of statutory duty have caused loss and damage. The proposed

11 class members were not adequately compensated for the commercial value of their

12 personal data monetised by Facebook."

13 So you can see, you saw it in the particulars of the unfair price and you can see it here,

14 that the measure of loss is said to be the commercial value to Facebook of the data,

15 the commercial value of the data monetised by Facebook.

16 Then, if we go to paragraph 151 which Mr Ridyard referred to, we see there that, again,

17 there is a recognition that the value of access to the social network -- well it's asserted

18 to be minimal but it's at least recognised that it needs to be taken into account in the

19 claim, and that's consistent with what was said in paragraph 127 and you have my

20 point that the methodology just doesn't do that and I will come on to explain why.

21 Then you have at paragraph 153, two approaches in order to estimate this pleaded

22 loss. The first approach is the excess profits approach, so the economic profit that

23 Facebook generated in excess of what a firm would be expected to generate in

24 a competitive market. So that's the measure of loss. That's the methodology. That's

25 what Mr Harvey is supposed to be doing.

26 Then you see at (b):

1 "The value of the data to the proposed class members, i.e. the price at which users
2 would be willing to give away their data in a competitive market for user data," and as
3 I said, the first of these methodologies assumes a coincidence, or at least a direct link
4 between the commercial value to Meta of users' data and loss suffered by users, and
5 we say that that link can't be assumed. It would break down in fact because it fails to
6 account for the value in the service provided by Facebook to users, and just pausing
7 there, Ms Kreisberger kept saying: well, users value their data, therefore they have
8 suffered a loss and she said that repeatedly. Well, that simply doesn't make sense
9 because it all depends -- let's say they do value their data, so we're not looking at the
10 survey respondent who says: well, I don't value my data at all. Let's say someone
11 does value their data.
12 The question of whether they have suffered loss depends on the inter-relationship
13 between the value they place on that data and the value of the service they're getting
14 from Facebook. If they still think they're getting a higher value service from Facebook,
15 then there is no loss and so to say: well, users value their data, therefore they have
16 suffered a loss, really encapsulates one of the problems in this case.
17 **MR RIDYARD:** I'm not sure about that because isn't that just saying in that situation,
18 you're saying you value the product more than it costs you, more than the price you're
19 paying? But that's going to be true of anyone who buys any product any time, isn't it?
20 **MS DEMETRIOU:** Well, sir, let me try and explain why I said it and then you can -- so
21 here you have Facebook providing a social networking product service to users and
22 they provide it for free, in the sense of no monetary amount and what's said is: well,
23 it's not really for free because users are giving their data, and so we do say that if the
24 value -- in a multisided market -- and we will come on to this, but I know that it's bread
25 and butter for you, sir, but the price set, whether it's a zero price or anything else, will
26 be carefully thought through, depending on the interdependencies of the different

1 sides of the market.

2 Now if, in fact, the case is that the service provided by Facebook to users far exceeds

3 the value of the data which they're getting returned, then we do say that there's no

4 loss.

5 **MR RIDYARD:** Far exceeds the cost to them of giving the data up?

6 **MS DEMETRIOU:** No, the value, if you're looking at it from the perspective of whether

7 the consumer, the user has lost anything.

8 **MR RIDYARD:** Yes.

9 **MS DEMETRIOU:** So if the user is receiving a service which they value at 10 or

10 something and the data giving a value at 8, we say they have suffered no loss.

11 **MR RIDYARD:** But that's just saying that no product which is purchased by anyone

12 can ever be an abusively high price, is it? Isn't that exactly the fallacy that is

13 highlighted in the Flynn case?

14 **MS DEMETRIOU:** No, I don't think it is. So one does have to -- we will come back to

15 Flynn but you do have to ask -- so one is looking at -- sir, I think the Flynn fallacy is

16 you look at the real world and you ignore market power and so you say: well, just

17 because consumers are prepared to pay something for that product doesn't mean that

18 that is the fair price.

19 **MR RIDYARD:** Yes.

20 **MR JUSTICE SMITH:** In a dominant market.

21 **MS DEMETRIOU:** In a dominant market.

22 **MR JUSTICE SMITH:** If you define value by reference to consumer surplus, in other

23 words, if you look at what a consumer would be prepared to pay, then by definition

24 they will pay that price if they are obliged to do so.

25 The virtue of a competitive market is that there are other constraints viz the

26 competition between suppliers which means that the price is pushed down --

1 **MS DEMETRIOU:** Yes.

2 **MR JUSTICE SMITH:** -- not by reference to consumer value, but by reference to the
3 competition. When you have a monopoly or a dominant player in the market, that
4 competition which restrains price goes. The price, therefore, depending on all the
5 circumstances, can go up to the level of the consumer surplus, the value the consumer
6 places on it and that is obviously undesirable because what you're doing is you are
7 ensuring that producer surplus is maximised and consumer surplus is minimised which
8 is precisely the wrong way round.

9 The market is supposed to ensure that consumer surplus is maximised and producer
10 surplus is minimised. The way the minimisation occurs is through competition and
11 that's why it's a fallacy in a dominant market because you've lost that control on price
12 which exists on the supply side but not on the demand side.

13 **MS DEMETRIOU:** But if in a competitive market -- so if in a competitive market the
14 value that the consumer is receiving from the Facebook service exceeds the value of
15 the data, then they won't have suffered loss.

16 **MR RIDYARD:** If the market is competitive, no, but the proposition is this.

17 You might not like this characterisation, but we have to describe it for the purposes of
18 here that Facebook is dominant because it has this power over -- it's the only show in
19 town when it comes to social media products, therefore, it is able strike a deal with the
20 consumer which is unfairly in Facebook's favour, and so you can't then say just
21 because the consumer is prepared to pay that price, that it must be fair because it's
22 unfair because the consumer doesn't have a choice.

23 **MS DEMETRIOU:** Sir, but neither can you say, and I think this is really the point I am
24 making, neither can you say that because the data is valued at 10 or something, that
25 they have suffered £10 worth of loss, in circumstances where they're receiving
26 something in return.

1 **MR RIDYARD:** Maybe.
2 **MS DEMETRIOU:** So in the same way that at paragraph 127 and 151, the class
3 representative is accepting that you have to net off the two things, we say that that is
4 right, otherwise you're ignoring the fact that they're receiving something in return for
5 their data.
6 **MR RIDYARD:** I fully understand the point about you can't just take the return on
7 capital, you know, you can't say everything in excess of the WACC is unlawful.
8 **MS DEMETRIOU:** Yes.
9 **MR RIDYARD:** I understand that argument, but when I interrupted you, I thought you
10 had gone further, to say that any consumer who chooses to consume Facebook must
11 be valuing it for more than the cost which is obviously true --
12 **MS DEMETRIOU:** Ah, no.
13 **MR RIDYARD:** -- and, therefore, that's okay.
14 **MS DEMETRIOU:** No, and if that's what I seem to be saying which I'm sure it was,
15 that's not what I meant to say. So I meant to be making the point which is that you
16 can't assume -- you can't take out of the equation the value of the service you're
17 receiving because that's an essential part of the bargain.
18 So that's really the point I am making.
19 **MR JUSTICE SMITH:** Indeed, just following that on, there's a great danger in
20 regarding the value that is attached by the consumer class to the product, here social
21 media, as being uniform.
22 **MS DEMETRIOU:** Yes.
23 **MR JUSTICE SMITH:** It's likely to vary, in that even for the dominant undertaking, you
24 are going to attract more purchasers of your service, typically the lower your price
25 goes. So even in a dominant market, the demand curve slopes downwards, left to
26 right.

1 What's peculiar about the dominant supply side is that you don't have to worry too
2 much, as the supplier, about the relationship of price to cost, because the absence of
3 competition makes that less relevant, but you're still going to be looking to see how
4 many punters you can attract if you price at a certain level. That's why you have the
5 hypothetical monopolist test because you ask yourself to what extent will persons
6 move away if you change price. You're not changing price in order to compete with
7 other suppliers. You're changing price to drag more people in.
8 So the distorted element that you get in a dominant market is that you may result in
9 a price that is attracting as many people in as you can, subject to a maximising of
10 revenue. In other words, you, the dominant entity, won't care if you could sell more at
11 a lower price, if the higher price maximises your revenue, even at the expense of
12 buyers.
13 So the problem one has is the absence of a control on that element in, critically
14 speaking, a single sided market or single market, but when you have a two sided
15 market, you have an additional point that even the dominant undertaking is going to
16 be interested in attracting as many eyeballs or purchasers of the social network as
17 possible, not because it's revenue maximising in the social media market, but because
18 the data of the many is much more valuable than the data of the few. Not because
19 you're gratuitously giving social media to the market but because you're flogging it for
20 much more in the other advertiser market, and so what you have is a constraint that
21 arises directly out of the profit maximising desires of the entity that is sitting as a seller
22 in two markets, selling advertising services and selling social media services, and
23 that's why you have to look at the two when deciding what you're saying.
24 **MS DEMETRIOU:** Yes.
25 **MR JUSTICE SMITH:** You have to look at the two because I'm not pricing at zero
26 because I care -- I'm sure you do -- because I care about the subscribers. I'm pricing

1 at zero because that, viewing the two markets together, is the best way I can maximise
2 my profits, and so one has a constraint on pricing in one market that is nothing to do
3 with competition, but everything to do with the revenue elsewhere which is why we
4 were giving Ms Kreisberger such a hard time about the revenue above the WACC.
5 **MS DEMETRIOU:** Yes. Sir, we completely agree with that and that's really one of the
6 difficulties, that the methodology that's put forward doesn't grapple with that essential
7 feature of this two sided market.
8 Just picking up on a couple of the points that you made, sir. So you're right to say that
9 the value -- so one of the reasons why the ROCE-WACC measure is not apt or not
10 appropriate, not plausible in this case, is because Facebook adds value to the data.
11 So one person's data is of really no value whatsoever. So the value comes from
12 Facebook aggregating the data and also offering all of the eyeballs to the advertisers.
13 So it's that interaction, as you say, that adds value, but why should that value flow, as
14 Ms Kreisberger kept saying, to the user because it's nothing to do with -- that added
15 value of the aggregation and providing the social networking service which gives you
16 the eyeballs, that isn't something that the user has contributed to. It doesn't represent
17 loss to the user, so that's why, to say profits above the WACC are profits which all flow
18 to the user, doesn't make sense.
19 **MR JUSTICE SMITH:** You have thrown in aggregation and we certainly raised it with
20 Ms Kreisberger yesterday and I agree that aggregation is a cost to Facebook that
21 enables it to leverage its advertising services, but how that's treated is perhaps a
22 slightly different question. Even if you didn't have to aggregate, the fact is that there
23 are reasons why Facebook doesn't sell its social media services for, say,
24 a subscription of 50p a year. It's not because it doesn't want to get 50p a year, it's
25 because that price deters so many people from coming in, assuming that's how the
26 demand curve works.

1 **MS DEMETRIOU:** Yes.

2 **MR JUSTICE SMITH:** Let's assume that. It deters so many people that it's worth
3 taking a hit on the 50ps that you would receive because some people would value it
4 above 50p, you're taking such a hit on eyeballs that, irrespective of aggregation, you
5 are receiving less because you have less data from the advertisers and that's a sort
6 of restraint that I am trying to articulate.

7 **MS DEMETRIOU:** Sir, we agree with that and that comes back to the importance
8 of -- so when you've just said Facebook takes a hit because it could have
9 a subscription model but that wouldn't maximise its -- that wouldn't be conducive to its
10 business model for the reason that you give, but if (audio distortion) it takes a hit
11 because it's foregoing a charge that it could make to consumers for the valuable
12 service it provides and that's why it's important to look at and to factor in the value of
13 the service, because -- and really coming back to the point, what the PCR is proposing
14 to do is just say: well, let's just look at the profits that Facebook make, and we say:
15 well, no, that's not the right metric, it's not plausible here because what they're
16 providing in return for your data is a valuable service and you're just cutting that out of
17 account and you have to look at the barter, as it were.

18 For the reason you give, sir, the upshot might be that, actually, they're taking a hit.
19 There isn't any excessive price at all. They're giving consumers a benefit here, for the
20 reason you give.

21 **MR JUSTICE SMITH:** What you're saying, I think, is that the zero price is, even in
22 a dominant market, an equilibrium price because that is the price at which you are
23 looking at the two markets, maximising your revenue.

24 If it were disproportionately to increase your revenue on the advertiser side to pay
25 subscribers to the social service to provide even more intrusive data, then no doubt
26 that is a model that Facebook would consider. So if -- take 10 million subscribers.

1 **MS DEMETRIOU:** Yes.

2 **MR JUSTICE SMITH:** Paying them £1 a year, outlay of £10 million gets you 20 million
3 in additional advertising revenue, then one would anticipate that that is what a rational
4 social media provider would do, not because it's rational for a social media provider to
5 do it, but because it's rational for someone who is both a social media provider and
6 a seller of advertising services to get their overall pot bigger.

7 **MS DEMETRIOU:** Yes, exactly.

8 **MR JUSTICE SMITH:** And that is true, I think, and I'm sure Mr Ridyard will correct me
9 if I am wrong, but it's true I think, even if Facebook is dominant in both markets.

10 **MS DEMETRIOU:** It is, because it's taking the rationally -- the commercially rational
11 course, so, yes, and that really gets, if I may respectfully say so, gets to the heart of
12 our two sided or multisided market point and we say that the methodology needs to
13 really grapple with that and it just doesn't, it leaves it out of account. So it's common
14 ground, of course it is, that it is a multisided market, but the methodologies that are
15 put forward simply don't grapple with these sorts of implications.

16 Sir, what I was proposing to do now is develop my submissions as follows. So I was
17 going to start with the law and, in a way, circle back to the first debate that we had
18 when I stood up and look at the relationship between the strike-out standard and the
19 Pro-Sys test and I do want to go back to a couple of the authorities that Ms Kreisberger
20 took you to.

21 Then I'm going to address the excess profits methodology and explain why that doesn't
22 meet the Pro-Sys test, and then I will turn to the user valuation methodology and then,
23 finally, I will make submissions on cost benefit.

24 So legal principles. There are really two points that I want to address on the applicable
25 legal principles. The first is the nature of the Pro-Sys test and I'm going to wrap up in
26 that the McLaren Court of Appeal judgment. As I said at the outset, a PCR needs to

1 put forward a methodology that acts as a blueprint for trial and which identifies the
2 questions that are going to arise and puts forward a plausible means of addressing
3 those questions, and it's not correct -- so another submission my learned friend made
4 a number of times is that she said: if we establish abuse, there is an entitlement to
5 damages. She said that's what Merricks said, that once you have abuse, there is
6 an entitlement, everything else is about the broad axe.
7 We say that's obviously not right because, otherwise, Pro-Sys would be meaningless.
8 There wouldn't be a Pro-Sys test. If you could show that you have a plausible case
9 on liabilities, you have an arguable case and then, after that, you say: well, I have
10 an entitlement to have a trial and to have damages assessed, well then Pro-Sys
11 wouldn't exist. So we say that that submission goes much too far.
12 **MR JUSTICE SMITH:** Well, yes. Given that this is a tort where you have to establish
13 actionable loss.
14 **MS DEMETRIOU:** Yes.
15 **MR JUSTICE SMITH:** You can't say, if you're conceding arguability, that there is no
16 actionable damage arguable as a consequence of the tort that is alleged and I don't
17 understand you to be saying that.
18 So, yes, Pro-Sys obviously is saying you've established, arguably, that you're going to
19 get something that is above the de minimis. How are you going to go about
20 establishing what that amount is? And, to be clear, I don't think the court is particularly
21 bothered, subject to very broad proportionality lines, particularly bothered about what
22 the outcome will be.
23 **MS DEMETRIOU:** No, of course.
24 **MR JUSTICE SMITH:** What we're concerned with is, as you've already said, the
25 geometry of what one needs to do, so that when one comes to the first day of the
26 substantive trial, we're not all sitting there thinking: crikey, what are we here to do?'

1 We know what we're doing and we go about doing it.
2 **MS DEMETRIOU:** Sir, we entirely accept the way that you put that, so that accords
3 with how we characterise the position.
4 Now, my learned friend started yesterday with the Supreme Court in Merricks and
5 relied on parts of the judgment which refer to the broad axe, et cetera and, again,
6 I have made my point about that, so we don't say the broad axe can't be wielded, but
7 it really comes back to your analogy, sir, that you have to identify the tree or the thing
8 that you're wielding the broad axe at.
9 Just a point of distinction between this case and Merricks. So in Merricks, there was
10 no dispute at that stage about the methodology itself, the methodology for loss. I say
11 "at that stage", because there is a further Merricks judgment on compound interest.
12 but there was no dispute about the methodology to establish loss being plausible, so
13 that wasn't disputed by Mastercard, so the methodology itself and the Tribunal held
14 that the methodology was sound. I don't want to take you to it but it's paragraph 77 of
15 the CAT's judgment,
16 and the issue in Merricks was the shortcomings in the likely availability of data to apply
17 the methodology and that was the basis on which the Tribunal refused to certify the
18 case. Essentially, it held that there was no prospect of the PCR of Mr Merricks,
19 obtaining sufficient data across all areas of the UK economy for the 16-year period of
20 the claim because that was a very ambitious task and it was in that context that the
21 Supreme Court held that courts don't generally refuse relief because quantification is
22 difficult and that they can use a broad axe to do the best they can on the evidence
23 available, and so we say that the issue in the present case is rather different because
24 it's the methodology itself which we say doesn't stack up. So we're not complaining
25 about lack of data or where they're going to get the data from and we say that the
26 broad axe is less obviously relevant when you're looking at the plausibility of the

1 methodology itself.

2 Now, we're not saying it can't be tweaked when it comes to trial; of course it can, but

3 it needs to be plausible at the outset in terms of identifying the issues that need to be

4 grappled with. That's really what we say.

5 **MR JUSTICE SMITH:** I just want to check one aspect of my understanding of

6 Merricks.

7 **MS DEMETRIOU:** Yes.

8 **MR JUSTICE SMITH:** And do please put me right if I have it wrong, but one of the

9 points that I think emerges from the Supreme Court's decision is that there is a benefit,

10 an advantage in the claimant class, in the fact that you are assessing damages

11 collectively and not individually, and one of the reasons I think the Tribunal was

12 overruled in Merricks was because the Tribunal, entirely rightly, had a concern about

13 being able to allocate an adequate share on a rational, legal basis to the members of

14 the class, so you could work out the pool of damages that was awarded, assuming

15 success, which bit would go to which claimant, and I think the Supreme Court said, in

16 addition to saying it's a broad-brush: you don't actually have to worry about that,

17 necessarily, because all we're concerned with is the quantification of the damages for

18 the class. The class mustn't be overcompensated. Provided you have that right, you

19 can --

20 **MS DEMETRIOU:** You have that right.

21 **MR JUSTICE SMITH:** -- distribute it administratively.

22 **MS DEMETRIOU:** Yes.

23 **MR JUSTICE SMITH:** And there, different criteria apply, obviously subject to judicial

24 control, but you're not necessarily applying the rules of quantification, as you would if

25 there was an individual claimant saying: I overpaid in this case, through the MIF.

26 **MS DEMETRIOU:** Sir, that's exactly right and so there were two bases in Merricks for

1 the CAT to not certify. One was the methodology to show pass-on of the interchange
2 fee down to the consumer class, that there was not sufficient evidence of data or
3 evidence of sufficient data being available to apply the methodology and so that was
4 one point and that's the point we have been focusing on because it's the one that's
5 most pertinent to the issues that you have to look at.
6 The other point was a discrete point about distribution. So the CAT found that the
7 distribution, the proposed distribution method which was essentially not much more
8 sophisticated than a sort of per capita divvying up of the award, depending on how
9 long they had been in the class, that that was not compliant with the compensatory
10 principle and that was also found to be wrong. That particular discrete issue doesn't
11 arise, is not so pertinent for the present case.
12 **MR JUSTICE SMITH:** The reason I raised it is because if one, for instance, looks at
13 the class of Facebook subscriber and one assumes that they are -- they, the
14 subscribers, value their data differently, for example --
15 **MS DEMETRIOU:** Yes.
16 **MR JUSTICE SMITH:** -- which is very likely to be the case, that isn't a deal breaker
17 so far as certification is concerned, because, at the end of the day, what we are
18 assessing is the damage to the class. We mustn't overcompensate, in the sense that
19 aggregating each individual's claim, you mustn't be awarding more to the class than
20 that, but you don't need to worry how you would be dividing up that aggregate sum of
21 money, assuming success, amongst the members and that, to a limited extent at least,
22 makes the PCR's job a little bit easier.
23 **MS DEMETRIOU:** So I think one needs to separate out two issues in what you have
24 just said, if I may respectfully say so. The first is that I absolutely agree with you that
25 you don't need to work out everybody's loss and total it up because they've sought
26 an aggregate award of damages, so they can seek damages to the class. I agree with

1 that and that does make the PCR's job a little bit easier, but the second point is that,
2 where you have a situation where not everyone will have suffered the same loss, then
3 you do need in your methodology to explain how you're going to deal with that and we
4 say that they haven't adequately done that.
5 So where you have a situation where everybody -- people will value access, both their
6 data and access to the social media network, social network service differently, then
7 you need to explain in your methodology, well, that's an issue and how we're going to
8 deal with that, and we don't think they've adequately dealt with that.
9 So I think one has to separate out that that's a Pro-Sys issue rather than a distribution
10 issue, but we completely accept that they can seek an aggregate award of damages
11 and that they're not shut out by that threshold point.
12 **MR JUSTICE SMITH:** Let's take interchange fees as a nice neutral example, rather
13 than this case.
14 **MS DEMETRIOU:** Yes.
15 **MR JUSTICE SMITH:** If you are saying we have established that there is
16 an overcharge in the sense of a percentage amount per transaction, you've somehow
17 got to get a grip on the number of transactions and their value.
18 Now, you could do that by saying: let's tot up the purchases of each individual person
19 in the relevant retailer area and reach an aggregate that way. That's unlikely to be
20 a very efficient way of doing it, because --
21 **MS DEMETRIOU:** Exactly.
22 **MR JUSTICE SMITH:** -- you won't have the data and it's pretty hard even if you do.
23 So what you will do is you will look probably at the sales figures of the retailers in
24 question and work out the overcharge that way, which gives rise to the problem of
25 distribution which we solve in the way we have discussed.
26 **MS DEMETRIOU:** Exactly.

1 **MR JUSTICE SMITH:** What you're saying is of course you need to have a rational
2 method --
3 **MS DEMETRIOU:** Of doing that.
4 **MR JUSTICE SMITH:** -- of assessing the collective sum.
5 **MS DEMETRIOU:** Exactly, so in Interchange and in Merricks you're absolutely right,
6 that what they're doing is they're looking at sales data, they're taking a top down
7 approach, but it's not obvious how you do that, so you can see how you do that when
8 people are paying for things in the economy and you can take the sales data and say:
9 well, this represents the spend by the class, which is effectively -- the class is almost
10 the whole of the UK; it is the whole of the UK adult population during that 16-year
11 period who were buying goods and services in the UK, so one can take the sales data
12 and one says that's the starting point for the loss. You then have to factor in the
13 overcharge and pass-on and the rest of it, but here where people value both the data
14 and access to the social network differently you don't have the aggregate sales data
15 to work down from and so you do need to explain plausibly how you're going to get at
16 that aggregate figure. That's the point we're making.
17 Now, I have just seen the time. Is that a convenient moment to stop?
18 **MR JUSTICE SMITH:** Is it for you, Ms Demetriou?
19 **MS DEMETRIOU:** It is for me.
20 **MR JUSTICE SMITH:** Very well, we will resume at -- we have been interrupting, as
21 we do in this case, too much. It's not a problem timing-wise. We will try and --
22 **MS DEMETRIOU:** I think I am fine timing-wise. At the end of the day, can I let you
23 know if I think we need to start a little earlier, if that might be possible, tomorrow?
24 I may not need to.
25 **MR JUSTICE SMITH:** I think you can take it that we will run until 5 o'clock tonight.
26 **MS DEMETRIOU:** Okay.

1 **MR JUSTICE SMITH:** And presumptively start at 9.30 tomorrow. If you tell us that
2 that's not needed --
3 **MS DEMETRIOU:** That's very helpful, sir. I will let you know towards the end of the
4 day whether I think it's needed. Thank you very much.
5 **MR JUSTICE SMITH:** Obviously you will liaise with Ms Kreisberger, because we need
6 to get her reply.
7 **MS DEMETRIOU:** Of course.
8 **MR JUSTICE SMITH:** Very grateful. In that case we will say 2 o'clock.
9 **(1.04 pm)**
10 **(The luncheon adjournment)**
11 **(2.00 pm)**
12 **MR JUSTICE SMITH:** Yes, Ms Demetriou.
13 **MS DEMETRIOU:** Good afternoon. I was about to make some submissions on the
14 nature of the Pro-Sys test and I would like to start with Gutmann in the Court of Appeal
15 which I can take quite briskly because Ms Kreisberger took you to it, but could you
16 please take up authorities bundle 2, tab 27 and start with page 1306?
17 **MR JUSTICE SMITH:** Yes.
18 **MS DEMETRIOU:** So at paragraph 23 you see the point that in determining suitability,
19 the CAT doesn't consider the merits of the claim, but the defendants do have the right
20 to seek to have the claim struck out.
21 Then at 24:
22 "To enable the CAT to form a judgment on commonality and suitability, the class
23 representative is required to put forward a methodology setting out how the issues
24 they have identified will be determined or answered at trial. It's counterfactual,
25 hypothetical in nature, but it constitutes a critical document that can be examined when
26 determining commonality and suitability. The test to be applied is the Pro-Sys test."

1 And then moving on to paragraph 44 at the bottom of page 1313. You see here that:
2 "The methodology is to act as a broad blueprint, identifying the issues for trial and how
3 they're to be resolved and provides important material from which the CAT can
4 determine whether the issues are common and suitable for certification. It will
5 therefore be relevant to a range of issues, including breach of duty, causation, proof
6 of loss and quantum."
7 And so we say that this really chimes with the point which you, sir, put to me before
8 lunch which is the analogy, again, not to push it too far, with the axe and the tree, that
9 you need to identify what the trees are that are going to be examined.
10 Then moving on to paragraph 53 at the bottom of page 1315, under the heading
11 "Observations on the Microsoft test". So not a statute, a common sense approach that
12 any court should be able to apply, and there is a broad discretion to approve of the
13 methodology to be used at trial.
14 So the CAT is making a value judgment in a common sense way and then, 54, you've
15 looked at this already. The test is counterfactual and so will use assumptions,
16 et cetera, so it's not, therefore, a fair criticism to say that it's hypothetical.
17 And then at 55, you don't have disclosure at this point and so it might well be that the
18 methodology is refined later and further work is carried out after disclosure,
19 but then, 56 and this is an important paragraph, in our respectful submission:
20 "The methodology must identify the issues, not the answers."
21 And nothing in what we say seeks answers, so we are really just asking for the issues
22 to be identified and to be grappled with, or, rather, a methodology to be put forward,
23 indicating how they're going to be grappled with, and the CAT will wish to assess
24 whether, if the defendants do win on some issues, the methodology is capable of being
25 adjusted. So it needs to be a methodology which can be used at trial and which
26 identifies the issues at trial, albeit that it can be adjusted, and then we see at 58 -- you

1 have the reference to the broad axe and the point I was making about the facts of the
2 Merricks case. You can see at the end of that paragraph, so claim by, say, indirect
3 consumers in a pass-on case, the amount of available hard data might be far less at
4 the certification stage and the CAT might, therefore, be less demanding.
5 Well, that was the point in Merricks.
6 And then 60, page 1317:
7 "The test is about practical justiciability."
8 And, again, we emphasise those words: practical justiciability. Does the methodology
9 advance the resolution of the issues at trial and enable the court to determine the
10 issue?
11 And that's really where we say applying that standard, this methodology falls down.
12 Then 61, the test is not toothless and that's because -- otherwise, if it were toothless,
13 if it were just enough to say: once we have established an arguable case, that's
14 sufficient, then there would be no purpose or point in the test, and the Court of Appeal
15 here explains that the aggregate damages regime represents a paradigm shift in the
16 dynamics of tortious recovery and this contrasts with the previous position and:
17 "The CAT [over the page] therefore plays an important gatekeeper role in certifying
18 claims and will always vigilantly perform that function, striking a balance between the
19 right of the class to seek vindication and the right of defendants not to be subject to
20 a top down claim unless it's a proper one to proceed."
21 So that's what the Court of Appeal said in Gutmann.
22 Could we pick up, please, now the Merricks remittal judgment? So that's in authorities
23 bundle 1, behind tab 15. Page 454. That's the beginning of the judgment.
24 Before I take you to the paragraphs that I want to rely on, the context is that -- so this
25 was the remittal after the Supreme Court and MasterCard didn't oppose following the
26 Supreme Court, unsurprisingly, certification of the main claim for loss, but it did oppose

1 certification of the compound interest claim. So MasterCard challenged the compound
2 interest claim on the basis that the methodology that the class representative
3 advanced for establishing compound interest did not meet the Pro-Sys standard and
4 the Tribunal agreed with that. It held that it was right that the methodology did not
5 meet the Pro-Sys standard and refused to certify that part of the claim.
6 If we go to page 482 in the bundle, paragraph 82, that explains the compound interest
7 claim and so:
8 "The claims in these proceedings are for sums equivalent to the multilateral
9 interchange fees paid on transactions using MasterCards that were passed through
10 by an increase in the prices paid for goods and services."
11 So that's the main claim:
12 "As noted above, the claim form alleges that all class members will either have
13 incurred borrowings or financing costs to fund the overcharge or have lost interest they
14 would have otherwise earned through deposit or investment of the overcharge or some
15 combination of the two."
16 So that encapsulates the compound interest claim, and then you see at paragraph 83,
17 the argument that we made. So:
18 "Difficult to imagine that there will be any member of the class who didn't, at least at
19 some point during the 16 year period, borrow money or have savings and if they did
20 either of those things, then they would have been caused some loss."
21 And so the starting point is that the inclusion of a claim for compound interest is much
22 more likely to be reflective of the true loss to the class than the exclusion of such
23 a claim, and then we see at 84, the Tribunal:
24 "I accepted that it's not sufficient for a claim to compound interest to show that
25 an individual had borrowing and/or savings. It is necessary to show on the balance of
26 probabilities how they funded the additional expense or what they would have done

1 with the additional money."
2 And then we see at paragraph 91, so if we can move forward to page 485, this explains
3 the methodology that Mr Merricks put forward for the compound interest claim and
4 there were two approaches that were put forward. I'm not going to read it out, but can
5 I just ask the Tribunal to scan down so you get an idea of the methodologies that were
6 put forward?
7 **MR JUSTICE SMITH:** Yes.
8 **MS DEMETRIOU:** And so then we have at 92, the Tribunal finding that the problem
9 with both approaches is not any limitation on the data that might be available. So this
10 is in contra-distinction to the point that it found first time round in relation to the main
11 claim:
12 "As the Supreme Court judgment made clear, that's not a basis for denying
13 certification. The Tribunal has to do its best with the data that is available but the first
14 approach is based on the assumption that anyone who was a saver or a borrower
15 would have used the small amount by which each of their purchases would have been
16 cheaper, to reduce their borrowings or add to their savings. The second approach
17 rests on the same assumption, limited only to borrowers. However, the relevant
18 question is, if the class members hadn't suffered the overcharge, what would they
19 have done with the additional money that they would have received. Both the above
20 approaches assume the answer to this question and fail to take account of the need
21 to show, as a matter of probability, that the money wouldn't have been used simply for
22 a little extra expenditure. Indeed, if either approach was valid, it would mean that most
23 claims for monetary loss by individuals in the courts would result in an award of
24 compound interest but that's manifestly not the position."
25 And then:
26 "It is true that Mr Merricks' submissions proceed to state that it may be the case that

1 alternative approaches are available."

2 But that wasn't good enough, the Tribunal says over the page:

3 "Since the Tribunal is being asked to include this issue in the collective proceedings

4 and given that the Microsoft test has now been recognised in the context of the UK

5 regime, we expect a plausible or credible methodology to be put forward at this stage,

6 even if it may need refinement later."

7 Now, just pausing there, we say that the reasoning in these two paragraphs of

8 the Tribunal is of application in the present case because what the Tribunal is saying

9 here is: yes, but hang on, your methodology rests on assumptions which are issues in

10 the case that need to be decided, so similarly in the present case, we say the PCR's

11 methodology rests on assumptions which are issues that need to be decided.

12 Assumptions such as their assumption that the service provided by Facebook is of

13 minimal value. That's an assumption on which their methodology rests. That's why

14 they don't explore it, but we say that that's an issue that needs to be decided, needs

15 to be grappled with in this case and, similarly, their methodology rests on

16 an assumption that the implications of the two sided nature of the market don't matter,

17 but, again, that's one of the issues that needs to be grappled with in this case.

18 So we say we are in an analogous position to the position the Tribunal was in in

19 Merricks in relation to the compound interest claim and you see the Tribunal's

20 conclusion at paragraph 97. So they say that they:

21 " ... accept that the claim for the principal loss is suitable for collective proceedings but

22 unlike the claim for the overcharge, we consider that the claim here for loss by way of

23 compound interest cannot fairly be resolved in these collective proceedings.

24 Accordingly, we find it is not suitable for collective proceedings and should be

25 excluded. The class members will, of course, remain entitled to seek simple interest

26 under the statute."

1 So that's a judgment which we say is analogous to the position in the present case.
2 I am now going to go to McLaren, so that's in authorities bundle 3 behind tab 30,
3 starting at 1563. Just by way of context, so the challenge that was made to the
4 proceedings at first instance before the Tribunal was based both on the way the claim
5 was pleaded, there was a strike-out challenge and on the methodology relied on. So
6 both strike-out and Pro-Sys were in play.
7 The key point, just by way of context, was this: so the claim advanced was based on
8 a Commission decision finding a cartel between shipping companies in relation to
9 deep sea carriage of motor vehicles and the class representative claimed that the
10 overcharge was passed on down the chain, as it were, to the car manufacturers and
11 then to national sales companies and to car dealerships and then through to
12 consumers who purchased vehicles.
13 Now, the majority of -- and the class was anyone who had purchased a vehicle in the
14 UK within a particular claim period, in circumstances where some of the brands, there
15 were some excluded brands that had never been subject to deep sea shipping, but
16 the claim -- so the majority of cars purchased in the UK have not been shipped from
17 outside the EEA but, nonetheless, the claim extended to those cars and the class
18 representative's evidence was that the delivery costs of deep sea shipping were
19 spread across all of a particular manufacturer's cars and its claim was then that the
20 delivery charge is passed on to consumers and it advanced a methodology seeking to
21 demonstrate such pass-on.
22 Now, the defendants' argument was that class members haven't suffered a loss unless
23 they have paid more for their cars than they would have done, absent the cartel, and
24 so the defendants argued that the class representative needed to advance
25 a methodology which examined whether car prices were higher in the real world, as
26 opposed to -- yes, in the real world as opposed to the counterfactual world, and the

1 Court of Appeal held that the class representative's case which focused only on the
2 delivery charge which was a notional amount because most of the cars hadn't been
3 subject to deep sea delivery, was based -- the Court of Appeal held that the class
4 representative's case was based on a theory of what the Court of Appeal called "silo
5 pricing". In other words, that it's legitimate to extract the delivery charge and look at it
6 separately, and the Court of Appeal found that the class representative had
7 established that there was silo pricing or at least an arguable case and we can see
8 that if we go to page 1581, paragraph 36. So MNW's argument ignores the facts found
9 by the CAT which were that:
10 "The class representative had established that there were, in effect, two pricing silos
11 and that these didn't affect each other. The CAT recorded that there was a plausible
12 case that delivery charges weren't simply wrapped up in or considered as part of a
13 single, undifferentiated price."
14 So that's the kind of factual finding that sort of underpinned the Court of Appeal's
15 judgment. On that basis, the Court of Appeal found that the CAT had been correct to
16 certify the claim.
17 Now, you can see at paragraph 37 how the argument was put on behalf of the
18 defendants. So one of the things that we said was that if the silo pricing theory of the
19 class representative failed at trial, then there was no fallback because they weren't
20 proposing to look at prices of cars at all.
21 Now, pausing there, the present case is different. So we say that there's a distinction
22 to be drawn between McLaren and the present case, in this sense, because, in this
23 case, the analogy would be if the PCR said in relation, for example, to multisided
24 markets: well, we can show now, definitively, we can show that no benefits would
25 accrue to advertisers in the counterfactual.
26 What they say is something less than that. Mr Harvey says there's reason to suppose

1 that, but they're not saying: that is not something which can conceivably happen, so
2 we don't need to address it. They do recognise it might be the case, but they're still
3 not stressing it.
4 Then if we go to paragraph 40 on page 1583, we see that there, the Court of Appeal
5 say that there's no strike-out, so they reject the submission that the claim should be
6 struck out, and then moving forward to paragraph 44, you see a heading "Case
7 management issues," and this is the part of the judgment which I apprehend is quite
8 tricky to interpret and if we just have a look at it a bit more closely. So paragraph 44,
9 so even though the Court of Appeal didn't overturn certification, they did find that the
10 CAT had made an error of law in the way in which the CAT understood
11 and approached the principles governing its gatekeeper and case management
12 responsibilities, and then you see at 45:
13 "The CAT needs to ensure from the certification stage that the case proceeds
14 efficiently to trial."
15 And then you see at 46, a reference to:
16 " ... a strong public interest in the CAT performing an active elucidatory role which
17 includes ensuring that large scale litigation is run efficiently, ensuring that defendants
18 are not confronted with baseless claims and ensuring that potentially sprawling cases
19 don't absorb an unfair amount of judicial resource."
20 Then at 47:
21 "In such cases, the methodology advanced by the class representative at the
22 certification stage will be an important feature of the process. The level of detail of the
23 methodology required by the CAT will always be fact and content sensitive and will
24 turn upon such matters as the availability of evidence. However, underlying the
25 Microsoft test is the proposition that if a claim is certified, then the methodology offered
26 by the class representative will provide an initial blueprint for the parties and the CAT

1 of the way ahead to trial. That is, of course, not to say that it's set in stone. It can be
2 challenged by the defendants and rule 85 of the CAT rules contains wide powers for
3 the CAT to stay, vary or revoke a CPO. In short, the CAT has power at any point to
4 revisit the methodology."
5 And then you see at 48:
6 "In the instant case, there were clear battle lines that were drawn."
7 And the court says that:
8 "Both sides advanced a relatively rigid position."
9 And then at paragraph 50, over the page:
10 "In its judgment, the CAT identified the battle lines but said the battle along those lines
11 was for trial. In our judgment, this was an error in approach. Once it had decided to
12 grant certification, the CAT should have gone on to address the ramifications of the
13 challenges to the class representative's methodology. At the CPO stage, it was clear
14 that this represented the pivotal dispute in the case."
15 And then at 52, they remitted the issue now to the CAT, before additional significant
16 steps are taken by way of preparation for trial. So having gone through it, what do we
17 take from this judgment? Well, I think what we take is this: so we know in this judgment
18 that the CAT found that both the Pro-Sys test and the -- so the strike-out standards,
19 the arguability standard and the Pro-Sys test were both met by the PCR and it certified
20 the claim and refused to strike it out. We know that the Court of Appeal agreed with
21 that, so it found that the Pro-Sys test was met and that the case shouldn't be struck
22 out, but it nonetheless found that the Tribunal had made an error of law in exercising
23 its gatekeeper function.
24 I think what we take from this is that, when significant difficulties are identified in
25 relation to a PCR's methodology in terms of its suitability to form a blueprint for trial,
26 it's quite plainly not sufficient for the PCR to say: well, don't worry, that's all a matter

1 for trial. That the Court of Appeal is saying very clearly, so you can't say as the PCR:
2 well, don't worry about these difficulties, it's all a matter for trial, we will sort it out then.
3 What the Court of Appeal is saying is that would be a dereliction of the PCR's
4 obligation to put forward something sensible and it would prevent the Tribunal from
5 exercising its essential gatekeeper role because fundamental matters need to be
6 addressed at the certification stage.
7 There is then a question as to whether the flaws identified should lead to refusal of
8 certification, or whether the Tribunal should so, as the Court of Appeal is requiring
9 here, to -- whether the Tribunal should certify the claim but, nonetheless, exercise
10 case management powers very, very early on, to try and direct the proceedings.
11 In our submission, that turns, the question of which the Tribunal should do, which of
12 those things the Tribunal should do, turns on whether the flaws are such that the
13 methodology fails to meet the Pro-Sys test. That's really the acid question. So in this
14 case it met the Pro-Sys test, but there were still some problems which were not
15 sufficient so as to mean the test wasn't met, but were, nonetheless, sufficient as to
16 raise questions as to next steps.
17 We say that there's a distinction between -- so that's really the question the Tribunal
18 is confronted with in this case, and we say that we're in a position here, where the
19 Pro-Sys test just isn't met and, really, the distinction between this case and the
20 McLaren case, the reason why the McLaren case fell the other side of the line, was
21 that there's a distinction between a situation where a PCR puts forward a methodology
22 which is appropriate to meet its pleaded case and that was the position in McLaren.
23 So in McLaren they said: well, we have this theory of silo pricing and the CAT had
24 found that was arguable and the Court of Appeal agreed, and its methodology was
25 plausible to meet that theory of silo pricing. So if they ended up being right about that,
26 then the methodology would be okay, would be plausible.

The difficulty was they might be wrong about that and so what happens next, there's nothing to fall back on and that was the point which -- at that point the Court of Appeal said: well, the Tribunal needs to grapple with that possibility very early on and it was an error of law not to do, and so we say that we're not in the same position here. We're in a position here where no plausible methodology has been put forward to meet the case that's pleaded, so it's not a question of: well, they have some case that may or may not transpire to be right at trial and if they're right, their methodology works. The position here is that even on their own terms, so even just taking their case at its highest, the methodology in this case does not meet the Pro-Sys test. It does not provide a blueprint for the parties and for the Tribunal of the way ahead to trial, and so it's not a case where there are rough edges in the methodology that can be smoothed by the Tribunal making adjustments and it's not a case where the methodology will be fit for purpose if they're right on their case. We're just not in that situation.

Of course, the Tribunal will bear in mind that McLaren was a follow-on case and so liability was already established and so in a sense, the task there is an easier task, but here, the case is much more amorphous and much more ambitious and so there is all the more need for clarity and precision as to what will have to be done at trial.

Going back to what the Court of Appeal said, they say: well, it's clearly the case that the application of Pro-Sys is fact and context specific, and we say, where you have an amorphous case, where it's really difficult to see the link between the abuses and the loss that's caused, then you really do need to have a blueprint that lets everyone, including the Tribunal, know what needs to be done going on to trial.

So I hope that has gone some way to addressing the question that you put to me.

I want to return, now, to the distinction between the Pro-Sys test and the strike-out test because the Tribunal has seen that, as a matter of principle, they target different things. The strike-out standard is concerned with the merits of the claim and the

1 Pro-Sys test is concerned with the suitability of the claims to be joined in collective
2 proceedings and, in particular, the plausibility of the methodology put forward.
3 So even if a proposed claim does have a realistic prospect of success and is more
4 than merely arguable, that doesn't mean that the Pro-Sys test is met. They're just
5 looking at different things. Indeed, Lord Briggs and Leggatt made exactly this point in
6 a passage that Ms Kreisberger took you to yesterday. If we can just pull that up quickly.
7 So that's in authorities bundle 1, behind tab 14, page 449.
8 So it's the final sentence of paragraph 158:
9 "We therefore think it is clear that the CAT asked itself and answered the correct
10 question and the CAT was right to say that the applicant had to do more than simply
11 show that he has an arguable case on the pleadings, as if, for example, he was facing
12 an application to strike out."
13 Now, of course, they're in the minority but they're correct in saying that the two things
14 are different and the fact that you meet the strike-out standard doesn't mean that you
15 satisfy the Pro-Sys test, and you can see at paragraph 154 on page 448, part of their
16 reasoning. Now, I'm not placing too much weight on this because they are, of course,
17 in the minority, but because Ms Kreisberger took you to that paragraph, I am taking
18 you back to it to show you what they say about that point.
19 Now, having said that they look at different things which is undoubtedly the case, there
20 are certain flaws that could be approached on either the basis of Pro-Sys or in terms
21 of strike-out. We see that from McLaren itself because the same point was put in both
22 ways, and we say that this is true, in principle, of some of the issues in the present
23 case.
24 Now, of course, we haven't made a strike-out application in this case. We have
25 approached the matter on the basis of Pro-Sys and we have said, for example, that
26 the excess profits methodology is not plausible because, for example, it ignores the

1 economic value of the Facebook service to users, but the same issue could have been
2 presented as a flaw in the claim as pleaded in ignoring -- so in other words, in ignoring
3 economic value, the PCR has not pleaded a case that can fulfil the requirements of
4 the case law, namely United Brands.
5 Then take also the issue of the pleaded loss being the commercial value of the data.
6 Again, we have approached the matter through the Pro-Sys lens because we have
7 said: well, you have this pleaded loss which is the commercial value of the data and
8 your user valuation methodology is in the starlings category because it doesn't address
9 the pleaded loss, but it's also possible to come at the same issue from the direction
10 of a strike-out and say, as the Tribunal was canvassing yesterday, that the pleading
11 simply doesn't advance a claim for compensatory damages. You can look at it from
12 either direction.
13 So we say that although the tests are different, it would be wrong to think that they're
14 not capable of overlapping, depending on the issue, and, ultimately, what my clients
15 are concerned to ensure is that this claim before us doesn't proceed because it isn't
16 sufficiently clear, and we have approached the matter by focusing on the
17 methodologies and the Pro-Sys test. but, of course, it's always open to the Tribunal, if
18 it thinks the matter is better approached through the process of a strike-out, to strike
19 the claim out under rule 41 of the Tribunal Rules, as indeed it canvassed in the FX
20 case.
21 So that's what we say about the overlap between the two points.
22 Now, that's what I wanted to say by way of the law on the standard and I was going to
23 turn now to consider the excess profits methodology and I want to start with what we
24 have called flaws 2 and 3 in our response and skeleton argument which tie in to
25 the Tribunal's question 4, and 2 and 3 are that what the PCR hasn't done in this
26 case -- so their approach is to focus -- is to say that any profits above the WACC are

1 excess and unfair and we say that that doesn't account for the fact that in a competitive
2 market, Facebook might well be earning profits well above the WACC, including
3 because of the economic value of the service, and so I want to -- I'm going to -- the
4 two points are very intimately linked and I want to consider them both together. I don't
5 think there is any purpose, really, in separating them out.
6 So just summarising our submission, really, on flaws 2 and 3 first. The PCR, and I'm
7 going to focus on the unfair pricing abuse because as I say, that's the easiest part.
8 That's the easiest claim for the PCR to make because the unfair pricing abuse, at
9 least, has some superficial link with their methodologies.
10 We say that the PCR does need to establish that the United Brands test is met and
11 we say that the distinction that Ms Kreisberger seeks to draw between United Brands
12 , on the one hand, and DSD and Deutsche Post, on the other, that's a distinction
13 without a difference and I will show you why we say that, and we say moreover, sir,
14 we agree with the point that you put to Ms Kreisberger yesterday which is that one
15 shouldn't be able to get materially different outcomes by pointing to different cases.
16 That really isn't how the law in this area works.
17 We say that this is an area involving an intangible and innovative product, where Meta
18 would realistically be expected, in a competitive market, to achieve profits well above
19 the WACC. So consistently with United Brands and with the President's example
20 yesterday of Nike, for example, that issue needs to be explored. Yet Mr Harvey's
21 excess profits methodology doesn't explore it because it assumes that in the
22 counterfactual, all economic profits above WACC would accrue to users and so
23 represent loss to the class. That's the very premise of his methodology.
24 So the methodology fails entirely to grapple with the fact that the loss suffered by the
25 class may not be the same as Meta's profits at all, or may not be linked to Meta's
26 profits and in any event, these are profits which Meta could well have earned in

1 a competitive market.
2 I go back to what I said at the beginning. There are two things in play in the present
3 case because of the barter that the Tribunal has referred to, and the Tribunal will need
4 to assess both the economic value -- I mean the Tribunal at trial, if this is
5 certified -- both the economic value of the Facebook service to users which Mr Harvey
6 ignores and also focusing on the data, what economic value Facebook adds by
7 aggregating the data and attracting lots of people to view the advertisements,
8 because, again, that's something which Facebook adds to the data, value Facebook
9 adds, which has no link with loss suffered by the consumer.
10 What we have here, therefore, is a methodology which simply assumes that there is
11 a link between Facebook's profits and the value to the consumer of their data but the
12 only way that they can make that link is by ignoring these questions of economic value.
13 And we say that that is inconsistent with the case law and for those reasons, the
14 methodology doesn't provide the blueprint that Pro-Sys requires.
15 I want to look first at the legal principles, so look at a couple of the cases, and then
16 I will go to the methodology. So if we turn up, first, the Court of Appeal's judgment in
17 Flynn and Phenytoin. So, that's at A, bundle 1, tab 13/315.
18 Just as we're looking at this, if you can bear in mind, please, my learned friend's
19 submission of yesterday which is that the United Brands test is different to DSD and
20 Deutsche Post because we say it's not, because we say that, essentially, to put the
21 point in a nutshell, she says the test in DSD and Deutsche Post asks whether a price
22 is disproportionate to the economic value of the product. She says: well, that's
23 different to the United Brands test, but our response, in short, is to say it's not different
24 to the United Brands test because you see that very test in United Brands and no
25 doubt the reason why the courts in DSD and Deutsche Post were able to establish
26 unfair pricing very quickly and intuitively is because both cases were cases where

1 dominant undertakings were charging for things they didn't provide. So you will
2 remember DSD charged fees not only for the packaging it had collected, but it stuck
3 labels -- every time it collected packaging from a manufacturer, it stuck its label on and
4 it charged even for packaging collected by the manufacturer itself, so it wasn't very
5 difficult to work out that that was unfair and disproportionate, but the test is the same,
6 it's the United Brands test, and if we turn up this judgment at page 330 of the bundle,
7 paragraph 56 sets out the relevant passages from United Brands and you can see the
8 words that Ms Kreisberger likes in DSD at paragraph 250:
9 "In this case, charging a price which is excessive because it has no reasonable relation
10 to the economic value of the product, would be an abuse."
11 That's exactly the test in DSD and Deutsche Post. So to say that they're different
12 really doesn't get off the ground.
13 Then you see the Court of Appeal discuss the test in United Brands. So if you look at
14 paragraph 60 to 61 on page 331 at the bottom of the page. They say at 60:
15 "The basic test is fairness."
16 And then you see two central features of unfairness, that:
17 "The undertaking has reaped trading benefits which it could not have obtained in
18 normal and sufficiently competitive conditions."
19 And, 2, that:
20 "A selling price that's excessive, in that it bears no reasonable relation to the economic
21 value of the product or service in question, is an example of abuse."
22 These paragraphs are connected:
23 "Charging a price with no reasonable nexus to its economic value and which is,
24 therefore, excessive, is such an abuse. It is an example of an abuse. I address below
25 more fully, the concept of economic value."
26 And then you get how the court moves on to consider in evidential and methodological

1 terms how that can be established and one way, but only one way, and it won't always
2 be appropriate, is a cost plus method. Then it says that you then need to see -- so the
3 first stage or limb, this is paragraph 62:
4 " ... entails comparing the price charged with the cost of production to see whether it's
5 excessive."
6 So that being one way of approaching the matter and the second stage involves
7 determining whether, if it is excessive, it is also unfair in itself or by reference to
8 competing products.
9 Then paragraph 253 is important because it acknowledges there are other economic
10 ways of devising rules for determining whether a price is unfair.
11 Then if we move forward, please, in the judgment to page 336 of the bundle -- sorry,
12 that's the wrong reference. So I want paragraph 97. So we're on 342. You then have
13 conclusions flowing from the case law. Now, the Tribunal saw this passage yesterday
14 and here the Court of Appeal is distilling the case law, including, notably, United
15 Brands and you see at (ii), the same passage. So:
16 "A price which is excessive because it bears no reasonable relation to the economic
17 value of the good or service, is an example of such an unfair price."
18 So the court there is using exactly the same language that my learned friend said
19 yesterday was not the test in United Brands, but is the test in DSD and we say, well,
20 it's just not a different test.
21 You can see that from DSD. I'm not going to ask to you turn it up but for your note,
22 it's at paragraphs 141 and 142 and I will just read you what it says. So it says:
23 "In the same paragraph of the judgment under appeal, the Court of First Instance noted
24 the settled case law according to which an undertaking abuses its dominant position,
25 where its charges for its service fees are disproportionate to the economic value of the
26 service provided."

1 So it's exactly the same language as in United Brands, and you then have -- I think
2 you have read already paragraph 97, so I don't need to go over it but you will see that
3 one method is cost plus, but that's not the only method and you still have to go on to
4 look at the economic value of the product.
5 Then if we go to page 360 of the bundle and paragraph 154 at the bottom of the page:
6 "The concept of economic value is not defined. In broad terms, the economic value of
7 a good or service is what a consumer is willing to pay for it."
8 And this is the point I think Mr Ridyard was putting to me:
9 "But this can't serve as an adequate definition in an abuse case, since otherwise, true
10 value would be defined as anything that an exploitative and abusive dominant
11 undertaking could get away with. It would equate proper value with an unfair price."
12 It says:
13 "This is a well-known conundrum in competition law."
14 Then you see at 155:
15 "The simple fact that a consumer will or must pay the price that a dominant
16 undertaking demands, is not therefore, an indication it reflects a reasonable
17 relationship with economic value."
18 So we agree with that. We're not seeking to demur from that, but a proxy might be
19 what consumers are prepared to pay for the good or service in an, effectively,
20 competitive market, hence the relationship between the two descriptions of abuse in
21 paragraphs 249 and 250, and the fact that the economic value description is said to
22 be an example of the broader descriptions of an abuse in paragraph 249.
23 So really the position is that you do need to look at economic values and that is
24 an essential part of the United Brands test, but you can't just say consumers are
25 prepared to pay £10 for something, therefore, that shows what the economic value is,
26 because you're, therefore -- if you have a dominant undertaking, they might be

1 extracting higher prices than is reasonable than properly represents the economic
2 value, but the Court of Appeal says a proxy is what might the consumer be prepared
3 to pay in a competitive market. So that's the point that needs to be investigated.
4 **MR RIDYARD:** It may be just helpful if I ask -- the way I sort of read this is that you
5 have economic value which is willingness to pay and that's what is stated here in the
6 Court of Appeal judgment in paragraph 154. In broad terms, the economic value of
7 a good is what a customer is willing to pay.
8 Then the Court of Appeal says: you can't use that notion of value because it becomes
9 circular and defines excessive pricing out of existence. Therefore, we have to use
10 a different standard which is whether -- which has this word "reasonable" in there. So
11 there's one concept which is the economic value which is willingness to pay which
12 can't be used, for the reasons we just describe but a different concept, the different
13 benchmark is whether there's a reasonable relationship to economic value.
14 So it's that reasonable relationship to economic value which is the test of legality, as it
15 were, under the second tier.
16 **MS DEMETRIOU:** Sir, are you taking "reasonable" from paragraph 155?
17 **MR RIDYARD:** It's in 154 and 155, yes.
18 **MS DEMETRIOU:** Yes, so there needs to be, we agree with that, there needs to be
19 a reasonable relationship between price and economic value. We agree with that, but
20 you need to investigate economic value. So to go back to the president's example
21 yesterday, the fact that a branded product, so Nike, might charge £50 for a T-shirt, the
22 fact that that's well above cost, that isn't conclusive of whether or not that's
23 an excessive price because you need to be investigating the value, the economic
24 value to the consumer.
25 However, if Nike were in a dominant position, you couldn't just say: well £50 is what
26 the consumer is willing to pay. That's, therefore, fair because it becomes circular, as

1 you say.

2 **MR RIDYARD:** Yes. So the key to this is to understand what this reasonable

3 economic value is, which is different from what economic value is. It must be lower,

4 mustn't it? If the cost of something is £20 and the price is £100, then clearly consumers

5 value this thing at least £100 because they wouldn't buy it if not.

6 **MS DEMETRIOU:** Yes.

7 **MR RIDYARD:** But it could still be abusive because the reasonable relationship to

8 value might be £70.

9 **MS DEMETRIOU:** Yes.

10 **MR RIDYARD:** But the sort of magic formula here is to understand what it is to say

11 that something bears a reasonable relationship to economic value. That's not the

12 same as economic value.

13 **MS DEMETRIOU:** Well, I think, if I could just unpick that a little. So I agree with

14 everything but I may just try and tweak --

15 **MR RIDYARD:** Feel free to, yes.

16 **MS DEMETRIOU:** So the last -- I think the reasonableness, so the test is you have

17 price and economic value. We will come back to what that is, and there needs to be

18 a reasonable relationship between the two and if there's not a reasonable relationship,

19 then it fails that part of the United Brands test, but that then begs the question: well,

20 what is this magic economic value number? And I completely agree with you, sir, that

21 you don't take -- for a dominant undertaking, you can't just say: well, the user is willing

22 to pay X because it becomes circular, and so that's why they say at 155 that a proxy

23 might be what consumers are prepared to pay for it in a competitive world and so you

24 might investigate that by using comparators, for example.

25 **MR RIDYARD:** You have to do something like that.

26 **MS DEMETRIOU:** Have to do something like that.

1 **MR RIDYARD:** Because you can't get to it by looking at economic value in itself
2 because we know that that gives you an answer which is too lenient on the dominant
3 firm.
4 **MS DEMETRIOU:** Exactly. So I agree with -- I think we have ended up in exactly the
5 same place. I agree with all of that, but our key point is that you need to take it into
6 account and that's what they don't do, and so, for example, take -- so what they do is
7 they take -- they say everything above the WACC, and I know my learned friend has
8 sought to downplay this part of the methodology, but it is the methodology. When you
9 go back to Mr Harvey's report, that's what he's saying. He's saying: everything above
10 the WACC can be taken to flow to consumers. That's their excess profit methodology.
11 **MR RIDYARD:** He might say that in his first report, but I thought in his second report
12 he does acknowledge that there could be some middle ground?
13 **MS DEMETRIOU:** So I think I'm going to come to that separately but, in short, our
14 answer to that is he says: oh well, yes, I recognise that the counterfactual is the world,
15 absent the abuse, but the difficulty with that is when you have an excessive pricing
16 case, then it's one and the same thing. Really, when you're establishing what price is
17 excessive, then your counterfactual is a competitive world which is what he says in
18 Harvey 1, and when you're then computing the damage that results from charging
19 a price above that, you need that first step as the benchmark, and so I don't think it
20 really helps him, but I will come to unpick that in a bit more detail later, but, really, our
21 essential point is you can't just say: oh well, abuse is for trial, because when it's
22 an excessive pricing claim, the abuse is really bound up with the calculation of
23 damages because what you're looking at is to what extent is this price excessive, and
24 we do say that --
25 **MR JUSTICE SMITH:** So are you saying that, as part of the Pro-Sys test, you have
26 to articulate, in this case at least, how you would derive the excessive unfair price that

1 is the abuse?

2 **MS DEMETRIOU:** Yes.

3 **MR JUSTICE SMITH:** It's not enough to say it's an excessive price and so an abuse
4 because of the dominant position. You have to explain how you are going to unpack
5 or prove the way in which price is excessive without anticipating -- you may be right,
6 you may be wrong -- but you have to say: this is how we're going to do it, and that's
7 not because of any strike-out jurisdiction, the claim is properly pleaded, it's because
8 you need that unpacking in order to work out what it is needs to be delivered, in order
9 to have a case that will run through properly to trial.

10 **MS DEMETRIOU:** That's exactly right. So in order to work out -- in an excessive
11 pricing case, and we saw this from Albion Water -- I won't go back to it, but in Albion
12 Water, the Tribunal worked out that the price was excessive and then when it came to
13 look at damages, it took that as the benchmark -- it took the competitive price as the
14 benchmark for damages. So the exercises are just inextricably linked. It's
15 meaningless in an excessive pricing case to say: oh well, while that's being
16 established at trial, here's my methodology, and you can see that in the way that Mr
17 Harvey's methodology's evolved, because the initial methodology in Harvey 1 used
18 the competitive world as a counterfactual. So he was, effectively, just doing everything
19 in one go. He was saying: this is why it's abusive because it's everything above the
20 WACC and those are the damages, and what he said in Harvey 2 is, ah well, yes,
21 I recognise that the counterfactual is a world without the abuse, but if you just think
22 that through, what's a world without this abuse? It's a world without an excessive
23 price. So you need to work out what the excessive price is before you can calculate
24 the damages. The two things are just linked together.

25 Of course, that's why I took you to paragraph 127 of the claim form because that's
26 what's recognised by the PCR herself in her claim.

1 Now, what we do say is that, when you are approaching excessive pricing in a case
2 like this that involves an innovative and intangible product, it simply doesn't get off the
3 ground to say: oh well, everything above the WACC is an excessive profit. As bit like
4 your Nike example, sir, and it's a bit like -- take something less tangible. So when
5 Josh Wardle, who invented the Wordle game, the British software engineer, he would
6 have incurred very little cost at all. I think he did it as a gift for his girlfriend and yet he
7 sold it, I think, for a seven figure sum to the New York Times. Well he's not in
8 a dominant position and charging an excessive price, that's because it had value. It
9 had value that can't be measured by reference to a reasonable return on costs.
10 This principle is reflected in the case law and I want to take you, please, to first of all,
11 the Victor Chandler case.
12 **MR JUSTICE SMITH:** I think one needs to be quite careful here because I wonder if
13 there isn't a question of dominance loitering there, just as there is in the Nike example,
14 because we're moving into the realms of intellectual property which creates
15 a monopoly in respect of a limited thing which bears no necessary relationship to the
16 cost of evolving that thing, whether it be the brand or an invention or whatever, but you
17 do get a monopoly to the extent of the intellectual property rights, and the reason the
18 Nike case and, indeed, the Wordle example might be said to be within the realms of
19 dominance is because you have a protection for the idea, which means that if it is seen
20 as valuable, and it may not be, in which case the question doesn't arise, but if it is seen
21 as valuable, then you can extract a price which is not related to cost and which can go
22 up to the consumer value which we say isn't and that is the problem because you have
23 this right which is distortive of the market, because you can't compete. There can't be
24 two Nike Swooshes.
25 **MR RIDYARD:** I think you might want to -- and that was (inaudible) property rights,
26 but you might want to look to see whether there are other property rights which

1 compete with that one. So there is Adidas and there is Slazenger and there is lesser
2 brands and so forth, so the consumer can choose how much brand to buy with their
3 T-shirt, I suppose.
4 **MR JUSTICE SMITH:** That is absolutely right and I am quite happy to be tentative
5 about the question of dominance and it may be that if you have differently intellectually
6 propertised product, the problem vanishes. It may be that Wordle is in competition
7 with other forms of games and each has their intellectual property protection, but it
8 isn't as valuable. Well, that's fine, but my example is where you have to work out in
9 a situation where people are paying up to the consumer value for the brand when take
10 away the brand, the product is worth a fraction of what it is and this is the problem that
11 United Brands is dealing with.
12 It's saying: look, we know that we want to have a competitive price. We would like to
13 work out what the market would produce by way of a price if there wasn't this
14 dominance viz the Nike brand but, unfortunately, because courts can't hypothesise
15 how markets will behave, we have to have some other test completely divorced from
16 the market which draws on other material that we do have, so we can work out whether
17 it is or isn't fair, and that's why we have this fundamental vagueness in United Brands
18 because sometimes you will say cost is relevant. Sometimes you look at comparators.
19 You will try and get some form of stopping point short of consumer value which is the
20 "fair price", but what it's trying to do is proxy. What the competitive market will achieve,
21 if there was a competitive market.
22 **MS DEMETRIOU:** Sir, yes, and I agree that what we're trying to do is proxy, what the
23 competitive market would achieve and I agree with you that if you have a position -- if
24 Nike were dominant, I doubt they are, really, because of the point that Mr Ridyard
25 made, but if they were dominant, just running with that hypothesis, then I would agree
26 with you that you can't just look at the £50 and say that's what consumers are going

1 to pay. That was really the answer I gave to Mr Ridyard, it comes back to the same
2 point. So you're looking at a proxy, you're finding other ways of trying to work out how
3 consumers -- what the demand side value attached to this product would be in
4 a competitive market.
5 Really, I accept that. So with a dominant firm, you can't just say: well, consumers pay
6 it, that represents the economic value, you have to go further and strip out the
7 dominance, but I do make the point, the reason I gave you the Wordle example and
8 there are countless examples. Take perfumes, branded perfumes. It's difficult to
9 believe that any particular perfume company is in a dominant position. When you go
10 into Selfridges, you get overwhelmed by all the different brands that there are there.
11 Yet they can charge -- lots of them can charge a premium well above their costs
12 because it's a value to the consumer because they're able to position themselves as
13 high end products because of their branding.
14 Now all I'm saying is -- now, of course, if they were in a dominant position, you couldn't
15 just take their price as representing the economic value of the product but the fact that
16 lots of non-dominant firms, in particular (inaudible) are able to charge -- they're not
17 dominant, so they're in competitive markets -- are able to charge prices which are
18 more than just their WACC or a reasonable return on their costs, shows that economic
19 value is something important that needs to be grappled with, and it really is, in this
20 kind of market, something important. So I don't want to overpitch my submission. I am
21 certainly not saying that if Facebook is dominant, which is the hypothesis we're
22 working on for present purposes, that you can just take what consumers pay and leave
23 it at that. I fully accept Mr Ridyard's point, but we do say it's an important matter and,
24 if we could turn up the Victor Chandler case which is a decision of Mr Justice Laddie,
25 so that's in authorities 1, tab 8, starting at page 88, and the question here was whether
26 the British Horseracing Board was abusing a dominant position by charging an unfairly

1 high price for the database that it had compiled and if you look at paragraph 2 on
2 page 89, you see there what the database -- you see the nature of it, 2 and 4. It's
3 paragraphs 2 and 4. So it's:
4 "Collection of information accumulated over many years by way of registration of
5 information supplied by owners ..." et cetera.
6 So it was a useful database and then you see, if you can go to page 102 of the bundle,
7 you see the argument that was put by Mr Turner. So Mr Turner confirms that the
8 allegation is that BHB has breached its alleged dominant position by imposing unfair
9 prices.
10 Then he says:
11 "All that is said is that the rates are fixed at 10 per cent of the bookmaker's gross profits
12 or 1.5 per cent of the bookmaker's turnover, that the cost of preparing the pre-race
13 data is approximately 4 million a year and that BHB's total income ...(reading to the
14 words)... in 2002 to amount to 600 million over five years. That is about 120 million
15 each year. Even if these figures are correct and tell the whole story, they don't begin
16 to set out the basis for asserting that the charges are unfair, as opposed to high."
17 That's Mr Justice Laddie saying that bit. So Mr Turner is pointing to the fact that the
18 revenues vastly exceed the costs, and then Mr Bailey reminds me that the data is not
19 protected by IP, but, of course, we know that the BHB was in a dominant position in
20 this case, and then if we go to paragraph 47, page 103. So you see the argument
21 there advanced by Mr Turner against the BHB. He argued that:
22 "There's, in effect, a per se rule. Where a dominant undertaking charges prices greatly
23 in excess of the cost of production, this is, in principle, an abuse of its dominant
24 position."
25 He says that:
26 "The price charged by an undertaking enjoying a dominant position must be compared

with the price he would have been able to charge, had there been competition."

And then he says:

"In a market where there is full competition, the price a trader can charge will move towards that figure which will allow him to recoup his cost, together with the cost to him of the capital he has used."

So you can see there the argument that was put bears a striking resemblance to the methodology that's being put forward here.

Then at 48, that argument was rejected. So:

"Even before one considers the case law, this approach is based on a number of doubtful propositions. It assumes that in a competitive market, prices end up covering only the cost of production plus the cost of capital. I am not convinced this is so. Sometimes the price may be pushed much lower than this, so that all traders are making a very small, if any, margin. Sometimes the desire of a customer for the product or service is so pressing, that all suppliers, even if competing with one another, can charge prices which give them a much more handsome margin. In other words, even where there is competition, some markets are buyers' markets, some are sellers'. I don't see there's any necessary correlation between the cost of production or cost of capital and the price which can be achieved in the marketplace. Furthermore, the question is not whether the prices are large or small compared to some stable reference point but whether they are fair."

And then at 49, just looking at the second part of that paragraph:

"If Mr Turner's proposition were correct, it would mean that for most fashion products [coming back to Nike, sir] clothes, cars, perfumes, cosmetics, electronics [and so on], the prices charged would be deemed to be unfair. Indeed, it must follow that if the price of a product differs significantly in a single market or between markets in different locations, one must assume that, at best, one set of customers is getting a fair price

1 and all the ones being charged more are being charged an unfair price. That will be
2 so even though no trader occupies a dominant position."
3 And then at 51, the court rejects the proposition that the claimant's argument followed
4 from United Brands and then if we go to page 106, paragraph 56:
5 "It seems to me that Mr Vaughan is right [he was for the BHB]. The message of these
6 passages [so this is looking at the case law, the European case law at the time] is that
7 we still live in a free market economy, where traders are allowed to run their
8 businesses without undue interference. What article 82 and section 18 of the Act are
9 concerned with is unfair prices, not high prices. In determining whether a price is
10 unfair, it is necessary to consider the impact on the end-user and all of the market
11 conditions. In a case where unfair pricing is alleged, assessment of the value of the
12 asset, both to the vendor and the purchaser, must be a crucial part of the assessment
13 ... approach did not take into account value at all, it simply relates prices to the cost of
14 acquisition or creation," and we say exactly the same is true in this case in relation to
15 the PCR:
16 "Here, were one to consider value, there are numerous factors which would suggest
17 that the allegation of unfair pricing is unjustified," and then they explain what the factors
18 were in that case and, of course, they're specific to that particular case.
19 Then if we go to paragraph 58, again there's a consideration of factors that go to
20 economic value in that case and then at 59:
21 "All of this expenditure, to a greater or lesser extent, benefits bookmakers as well as
22 others. It is the sort of matter which would have to be taken into account if the court
23 were to consider whether or not the charges for the pre-race data were unfair. What
24 is clear is that VCI's approach ignores all of this. It does so because it ignores the
25 necessity of proving that price are unfair and considers only whether they are high,"
26 and, again, we say that really, we make exactly the same criticism of the PCR's

1 methodology in this case. It is really just looking at the benchmark, the WACC
2 benchmark and it's not looking properly at the question of unfairness which does
3 require an examination of the economic value of the product.
4 **MR JUSTICE SMITH:** Yes, the problem, I think, is what, actually, does value mean?
5 Looking back at paragraph 56 here, what Mr Justice Laddie is doing is he's saying in
6 unfair pricing, you need to assess the value of the asset to both the vendor and
7 purchaser.
8 **MS DEMETRIOU:** Yes.
9 **MR JUSTICE SMITH:** Now, we have a very clear idea of what value means to the
10 purchaser; it's what they're prepared to pay to get the product. The value to the vendor
11 is something I'd venture to say is completely different.
12 **MS DEMETRIOU:** Yes, so in relation to the vendor -- so I think the point that's being
13 made here in relation to the vendor and purchaser is that in relation to the vendor,
14 they're looking at -- the only thing that was being put forward was what's the cost of
15 producing this and you get a reasonable return on your costs, and they're saying: well,
16 you can't stop there because you have to look at the value to the purchaser too.
17 **MR JUSTICE SMITH:** Well, indeed. And I'm sure Mr Ridyard is going to correct me
18 very rapidly if I misspeak, but if you were to move to an area of perfect competition,
19 you would have a situation where, actually, the price that the vendor operates at is
20 cost plus a return for staying in the market, and it will be impossible to have anything
21 higher than an excessive form of producer surplus because parameters of perfect
22 competition are such that you can enter and leave without let or hindrance, such that
23 the competition between market players is inevitably focusing the more on cost and
24 you, therefore, have to trend towards the most efficient producer.
25 In the real world, there are a number of things which make that not the case, things
26 like past investment that you have to recover, future investment that you have to make

1 in order to stay in the market and these, I would suggest, are the sort of factors that
2 influence the competitive vendor in considering what their price should be.
3 You're not going to look at the marginal cost of producing X, particularly if you're
4 Facebook, because you're going to be regarding the marginal provision of a service
5 as so close to zero as makes no difference.
6 The way you're going to be thinking about your pricing, even leaving on one side the
7 complexity of two sided markets, is you're going to be trying to work out how you
8 recover the costs of a network that has been years in the development, and will no
9 doubt need to be evolved years in the future, in order to remain in the business and
10 that is the sort of a nuance that perfect competition misses, but to equate that, in fact
11 I think to call it value, is wrong. It is simply a more sophisticated way of working out
12 how you can cover your costs and make a turn in what is not a straightforward market,
13 but that's, I think -- there are complex factors on either side of the equation which,
14 when they interact in a free market, result in a price and that's why courts don't like
15 fixing prices because it is so complicated, but those are the sort of things we need to
16 be thinking about --
17 **MS DEMETRIOU:** Yes, exactly.
18 **MR JUSTICE SMITH:** -- when we're looking at what a fair price is.
19 **MS DEMETRIOU:** Exactly, we would agree with that and we say none of them are
20 really grappled with by the methodology here which takes a very simplistic approach
21 and which doesn't account for any of the factors that you have just referred to, but also
22 doesn't account for the demand side factors.
23 Of course, United Brands was talking about not perfect competition, but workable
24 competition and what we do know from cases like Victor Chandler -- I'm going to take
25 you to Attheraces in a moment which I'm sure you will be familiar with, but what we
26 know is that, even leaving aside cases of dominance, but in a case of workable

1 competition where no firm is dominant, we just know from our own experience that
2 customers might value a product and place high value on it. Even where there are
3 lots of competitors and pay something -- pay a price which vastly exceeds the costs
4 because it's branded, because it is has cachet, because it's innovative and these are
5 all things that need to be grappled with and they're just not. So looking at both the
6 vendor and the purchaser side, we would respectfully agree with what you have said.
7 Sir, Attheraces is supplementary bundle, tab 1. This, again, concerned the BHB's
8 database. It's the Court of Appeal and we see from paragraph 34 on page 14 that
9 ATR -- so ATR, Attheraces, was a broadcaster and you can see from paragraph 48
10 on page 17, what the cost of collating the data was. So it cost the BHB about 5 million
11 a year. Do you see that in the middle of the paragraph? To collate relevant information
12 to compile the database and to distribute it to persons authorised by BHB, and then
13 note that the BHB needed the database itself, you can see that from the end of the
14 paragraph, because it would be unable to develop the fixture list and race programme
15 for which it's responsible. So it did actually need it, but then it was commercially
16 exploiting it too.
17 Then if we go to paragraph 107 at the bottom of page 25, you can see there that it's
18 accepted that BHB had a dominant position and then if we move forward to the next
19 page, under the heading, bottom of the page, 114, "Excessive unfair pricing and
20 economic value", and you see here, the start of the analysis of unfair pricing and
21 economic value and the reference to United Brands, and then moving to 117,
22 paragraph 117:
23 "The central concept in abuse of dominant position by excessive and unfair pricing is
24 not identified as the cost of producing the product or the profit made in selling it but as
25 the economic value of the product supplied. The selling price of a product is excessive
26 and an abuse if it has no reasonable relation to its economic value."

1 So coming back to the same test. Then 118:

2 "The court did not say that the economic value of a product is always ascertained by

3 reference to the cost of producing it, plus a reasonable profit, cost plus, or that a higher

4 price than cost plus is necessarily an excessive price and an abuse of a dominant

5 position. The court was indicating that one possible way inter alia of objectively

6 determining whether the price is excessive and an abuse, is to determine, if the

7 calculation were possible, the profit margin by reference to the selling price and the

8 cost of production."

9 Then 119:

10 "It has to be borne in mind that the law on abuse of dominant position is about distortion

11 of competition and safeguarding the interests of consumers, not a law against

12 suppliers making excessive profits by selling their products to other producers at prices

13 yielding more than a reasonable return on the cost of production, i.e., at more than

14 what the judge described as the competitive price level. Still less is it a law under

15 which the courts can regulate prices by fixing the fair price for a product on the

16 application of the purchaser who claims he is being overcharged for an essential

17 facility by the sole supplier of it," and then you see 121 to 122 explains the approach

18 of the trial judge. So Mr Justice Etherton as he then was, and what he did was he

19 established what he called the competitive price as being the price which enabled BHB

20 to recoup its costs, plus a reasonable return on those costs which we say is analogous

21 to the PCR's approach in this case, and you see at 124 the conclusion of the trial judge

22 and then at 134 on page 29, the appeal. So, according to BHB:

23 "The judge failed to consider the correct price for determining the key issue of alleged

24 excessive and unfair pricing. He applied the test of cost plus, whereas in determining

25 the economic value of the pre-race data, account should also be taken of its value to

26 ATR and how much ATR could make out of the data as a source of income. The

1 economic value of a product is not the same as what it cost to produce. The product
2 is a revenue earning opportunity for ATR, with profitable billing opportunities for
3 bookmakers. The judge's approach was that ATR could keep all its earnings from the
4 pre-race data," and then you see at 186, if we go on to page 36, BHB's appeal. So
5 Mr Roth, who was arguing this for BHB, he said that -- so his second main criticism of
6 the judgment was that:
7 "The judge's conclusion equating economic value with cost plus did not involve any
8 separate analysis of economic value. The judge gave no meaning to economic value,
9 other than the competitive price defined in terms of the supply side. Economic value
10 looks to the demand side rather than the supply side. It means the value to the
11 customer, not the cost to the seller," and then 189, Mr Roth there drew a comparison
12 with -- he talked about media rights, so not appropriate to assess the value, economic
13 value of media rights by reference to their costs.
14 Then 203 on page 39:
15 "In our judgment, although the judge reached the right conclusions on important issues
16 raised by the claim for abuse of dominant position, he erred in holding that the charges
17 proposed by BHB were excessive and unfair. We are in broad agreement with
18 Mr Roth's submissions, criticising the judge's approach to the issue of excessive and
19 unfair pricing of the pre-race data."
20 204:
21 "The judge correctly stated the law as laid down in United Brands, that a fair price is
22 one which represents or reflects the economic value of the product supplied. A price
23 which significantly exceeds that will be prima facie excessive and unfair but the
24 formulation begs a fundamental question: what constitutes economic value?"
25 And then the point that's made in Flynn that economic value can't simply be what price
26 it will fetch because of the circularity that Mr Ridyard spoke about because the supplier

is in a dominant position but then at 206:

"Neither is it right to say that whatever price a dominant supplier charges is abusive, so how is the critical judgment of the economic value to be made? That has to be determined before deciding whether BHB is seeking to charge ATR a price which abuses its dominant position by trying to obtain substantially more than the economic value of the pre-race data. There is nothing in the article or its jurisprudence to suggest that the index of abuse is the extent of departure from a cost plus criterion. It seems to us that in general cost plus has two other roles. One is as a baseline below which no price can ordinarily be regarded as abusive. The other is a default calculation, where market abuse makes the existing price untenable," and then 208 cites Mr Justice Laddie's judgment in Victor Chandler which we just looked at with approval and then if you look at 209, second half of the paragraph:

"Exceeding cost plus is a necessary but in no way a sufficient test of abuse of a dominant position. None of the authorities cited suggest otherwise," and then 212, examples of sporting events being good examples of products, the economic value for which can't be measured in relation to cost plus methodology.

Then 213, the Commission's decision in Scandlines supports the view that you don't just look at cost plus and then you see at 215, there is some moral force in ATR's position. This might be thought to be unfair but it doesn't make it abusive, and then you see the conclusion at 218 on page 42:

"For all the above reasons, we conclude that in holding that the economic value of the pre-race data was the cost of compilation plus a reasonable return, the judge took too narrow a view of economic value in article 82. In particular, he was wrong to reject BHB's contention on the relevance of the value of the pre-race data to ATR, in determining the economic value of the pre-race data and whether the charges were excessive and unfair."

1 So, again, another case making clear that United Brands simply doesn't permit you to
2 stop at cost plus and then conclude that that's an abuse and represents damage due
3 to the purchaser.
4 I have one more case to take you to which is Kent v Apple. I don't know when you
5 want to take a break. I don't mind.
6 **MR JUSTICE SMITH:** Should we rise now and then resume for the last case? Very
7 good. Ten minutes.
8 **(3.19 pm)**
9 **(A short break)**
10 **(3.31 pm)**
11 **MR JUSTICE SMITH:** Ms Demetriou.
12 **MS DEMETRIOU:** I want to take you to Kent v Apple, so that's at authorities bundle 2,
13 tab 25. You looked at this briefly, Ms Kreisberger took you to it briefly, starting on
14 page 1241, and if we turn to 1243, you can see at paragraphs 2 and 3 the context of
15 the claim and so the PCR alleges that -- so this concerns the app store, Apple's app
16 store and the PCR was alleging that Apple had abused its dominant position, including
17 by charging excess and unfair prices in the form of commission charged on
18 transactions.
19 Now, the challenge made by Apple in this case was a strike-out only, so it didn't frame
20 the challenge as a Pro-Sys challenge, and if we turn to page 1265, paragraph 68, you
21 see Apple's argument summarised, and so they were criticising Mr Holt, the expert
22 economist's methodology for not grappling with economic value and they say that his
23 methodology, his ROCE-WACC comparison, is just cost plus, et cetera, et cetera, and
24 so you see the arguments that are made there, and then paragraph 69, you see the
25 PCR's argument summarised in response and if I could just point out subparagraph 7
26 on 1267. So in other cases -- so 6:

1 "Cost plus can, in appropriate cases, satisfy United Brands.

2 "In other cases [this is 7] there are a variety of methods which can be chosen to
3 encompass all aspects of economic value, including demand side factors. This can
4 be done, for example, through assessing the prices charged by relevant comparators
5 which can demonstrate what value a customer attaches to a similar product."

6 And then at 9:

7 "In any event, Mr Holt has undertaken a number of exercises which do take account
8 of the demand side [and those include his assessment of relevant comparators."]."

9 So you see what they say he had done, .and then if we go to paragraph 75 on
10 page 1269, you see that the Tribunal is saying at 76 that:

11 "To the extent they exist, it is necessary for demand side benefits to be taken into
12 account in the United Brands analysis which means the tools employed to make the
13 assessment have to be capable of identifying and measuring that demand side
14 benefit," and then, 77:

15 "Cost plus is a conventional starting point. The question is whether, standing back, it
16 sufficiently takes account of the factors relevant to economic value, including any
17 demand side factors or whether further steps or analysis are required to do that. That
18 will depend on the facts, including the nature of the product or service and the
19 competitive conditions."

20 78:

21 "Not necessary to quantify a demand side benefit with precision," and it says -- they
22 say that:

23 "Demand side factors need to be taken into account but there are a number of ways
24 in which this can be done. No established rule for assessing demand side factors.
25 Each case needs to be carefully assessed on its merits by reference to the product or
26 service in question and the economic and other evidence," and then you see at

1 paragraph 84, the PCR rejects the strike-out application that Apple made and you see
2 that they say -- you see at 84.3 that:
3 "PCR has pleaded facts which could found a methodology that takes into account
4 demand side factors, in particular the pleaded case on comparators. The PCR also
5 advances an argument about the lack of competitive conditions which is relevant to
6 the assessment of demand side factors."
7 And just pausing there, of course in the present case, Mr Harvey has rejected the use
8 of comparators, so can I just show you that. If we keep this open. It may be harder
9 for those who are looking at electronic bundles to get both but in the core bundle at
10 tab 4, page 282.
11 Mr Harvey considered a comparator approach and then rejected it, so you see that at
12 3.19 and 3.20:
13 "I consider it's unlikely that a comparator approach will be suitable in this case."
14 So that's an important point of distinction between this case and the Apple case,
15 and then going back to the Apple judgment, 1272, they consider the reverse summary
16 judgment application because it was, as is quite usual, put both in terms of a strike-out
17 and reverse summary judgment, and they look at the evidence from Mr Holt and they
18 say at -- 88, you looked at because that's the paragraph that Ms Kreisberger took you
19 to and what they're saying in the final sentence is that:
20 "The ROCE-WACC methodology does not purport to identify or measure demand side
21 factors," and we agree with that, and then at 89, they are a bit troubled that Mr Holt is
22 somewhat abrupt in his explanation of his assessment of demand side factors but
23 remember, here, they're not looking at the methodology under Pro-Sys, they're
24 considering reverse summary judgment.
25 But then at paragraph 90, they say that they:
26 " ... understand that Mr Holt has, in fact, considered demand side factors in a number

1 of ways, including [at 1] by attempting to identify suitable comparators which is
2 an exercise designed to identify a price which would prevail in conditions of workable
3 competition and which would therefore reflect demand side characteristics," and then
4 at 91, as a consequence, they reject the reverse summary judgment application
5 because they say:
6 "It is not correct that Mr Holt has ignored demand side factors. The exercise of
7 reviewing comparators, if nothing else, demonstrates that."
8 So what we take from this judgment is that the Tribunal has here accepted our position
9 on the law that it is necessary to take account of demand side factors and has also
10 accepted that the ROCE-WACC methodology doesn't do that, but has found on the
11 facts that the pleading did look at demand side factors because of the
12 comparators -- because they said they were going to investigate the position of
13 comparators and, as I have said, that's not the position in the present case. In the
14 present case, there is no means of investigating economic value.
15 **MR RIDYARD:** Can I just try and unpick that a bit because clearly Mr Harvey looked
16 at this, but he didn't find any good comparators, but that's not to say that he didn't
17 consider it. So it's not as though Mr Harvey has said: I'm just going to go with WACC
18 and nothing else. At least as I have read it, he understood the criticism from Mr Parker
19 and has taken it on board to some extent and said: I should look for these demand
20 side factors but then didn't find a good comparator.
21 **MS KREISBERGER:** Sir, I think that the rejection of comparators is in Harvey 1, so
22 that's not in response to Mr Parker, so he's just looking with a blank slate at: how might
23 I go about identifying an excess price -- excessive price. So he's not particularly
24 meeting that point, but if he had been, so if he had been saying: well, that's not a very
25 good way of isolating and identifying the economic value because there aren't any
26 good comparators, he should have put something else forward, but the problem that

1 we have is that he just doesn't grapple with it at all and that's why we say it's not
2 a blueprint for trial. It doesn't identify the issues, looking ahead.
3 **MR RIDYARD:** Your proposition is that the PCR hasn't considered anything other
4 than cost factors.
5 **MS DEMETRIOU:** In this excess price -- exactly, yes, it doesn't grapple with this point
6 at all.
7 Perhaps we could go back to Mr Harvey's first report. So let's pick that up. So that's
8 in core bundle, tab 4 and if we take it from page 278 of the bundle.
9 So he says at 3.2, so he says that his excess profits approach -- he says:
10 "This is the economic profit that Facebook generated in excess of what a firm would
11 be expected to generate in a competitive market."
12 So pausing there, that's based on -- what he then goes on to say is that that's
13 everything above the WACC and so what he's excluding there is, well, in a competitive
14 market, where you have an innovative product, it's not true that you can only expect
15 to make something that's just above the WACC -- confined to the WACC. So then:
16 "In such a counterfactual competitive market, Facebook would not be expected to
17 make these excess profits and this value would have been expected to be shared with
18 the users instead, in the form of compensation for user data and/or better services."
19 So he's saying there that the excess profits which he then goes on to explain what
20 those are, everything above the WACC, those are equivalent to the aggregate loss to
21 the class because as Ms Kreisberger kept saying, they could be expected to flow
22 through to consumers, and then if we go to page 283, paragraph 3.22, so that says:
23 "In a competitive market, Facebook would be expected to earn profit to cover the
24 return that its shareholders would require to continue investing in the business. This
25 is because any profit in excess of this would have been competed away between
26 Facebook and other players in the market. In other words, Facebook and other players

1 in the market would have competed up to the point that they made only enough profit
2 to cover the return that its shareholders would require to continue investing in the
3 business."
4 Again, we say, well, that's the wrong approach because that ignores all of the points
5 in Attheraces and Victor Chandler and ignores the very realistic possibility that in this
6 area, in a competitive market, innovators would be able to charge more than that.
7 **MR RIDYARD:** In Harvey 2, doesn't he move from that position and say: oh yes, the
8 cost is just the starting point and there could be concessions to it?'
9 **MS DEMETRIOU:** Sir, can I deal with that? So I think that is what the PCR says, but
10 would you mind if I address that by going through the reports one after the other?
11 **MR RIDYARD:** Sorry, yes, of course. Sorry.
12 **MS DEMETRIOU:** I think I may just give you a more useful answer that way.
13 **MR RIDYARD:** Yes.
14 **MS DEMETRIOU:** Thank you. So then 323. So in fact, 324 -- 323:
15 "Facebook's excess profits are a measure of the aggregate harm to class members."
16 So you can see what he's saying here and then you say that's because they flow
17 through to users. Then 324:
18 "To see why excess profits are a measure of the aggregate harm to class members,
19 consider that in the competitive counterfactual, Facebook paid users for their data. All
20 else equal, Facebook would be willing to pay users for their data up to an amount
21 equal to its excess profits."
22 So that's how he explains it and, of course -- just two points, pausing there.
23 First of all, this is a point I'm going to come to when I consider multisided markets but,
24 of course, all else isn't equal, so that's something he's not taking into account. So you
25 can't say "all else equal" because here it isn't equal because you have the multisided
26 nature of the market, but also it's just wrong in United Brands' terms to say that

Facebook would be willing to pay users for the data up to an amount equal to its excess profits, those profits being defined by reference to the WACC, and then what you have is at paragraph 340 on page 288, you have the methodology set out and it's, essentially, excess profits are the difference between Facebook's actual return on capital employed and the weighted average cost of capital. So the WACC that Facebook would have expected to make in a competitive market. So that's said to be the methodology.

There then follows an explanation of how the return on capital employed and the WACC will be determined, but the methodology doesn't mention, still less address, this question of economic value or demand side factors. It doesn't seek to investigate it. It simply assumes that it doesn't matter.

Now, one point before I get to the second report which I am coming to very shortly, one point that Ms Kreisberger made was that she referred to 3.46 saying: oh look, here, Mr Harvey uses the word "starting point", so this is just supposed to be a starting point, but you really need to look at what follows. So he says:

"Therefore, as a starting point, I consider that the loss suffered by class members effectively equates to the excess profits that Facebook generated," and then he says what he needs to do to investigate this further to move on from the starting point but none of it is about economic value. It's all about things like the period over which Facebook generated the data, identifying the operating costs, the value in Facebook's assets. So none of it is -- starting point is not used in the sense of: well, we're now going to go on and look at economic value.

Mr Parker, of course, made these points in his report which was served along with Meta's response to the CPO application and Mr Harvey then served his second report. So if we turn up the second report. So that's behind tab 6 of the core bundle and if we look at page 354.

1 So he sets out Mr Parker's criticisms at 3.1 of the excess profits approach and at the
2 moment, what we're concerned with -- I'm going to come back to B which is multisided
3 market but it's A and C that I am considering in combination -- and he then says -- if
4 we go over the page to 3.4 to 3.6, here Mr Harvey says that he recognised in his first
5 report that it would be necessary to identify the excess profits that were due to the
6 alleged abuses. So he says that at 3.4 to 3.6, but, of course, what he was doing in his
7 first report was purporting to answer that question by identifying the difference
8 between ROCE and WACC. That's what he was doing, and so then if we go to 3.6, he
9 again uses the word "starting point", and he says there that he accommodates the
10 possibility that Facebook may have earned economic profits above its WACC in the
11 relevant counterfactual scenario, but then you ask yourself: well, where does he
12 accommodate it because he certainly doesn't accommodate it in Harvey 1?' That
13 wasn't there at all. So what does he say. So he says at 3.7 that he uses several
14 empirical techniques. So one has to ask: what are these empirical techniques?'
15 because we say it's not good enough to refer in vague terms, in general terms, to
16 empirical techniques. What is needed at the certification stage is a plausible
17 methodology that must offer a realistic prospect of getting to trial.
18 Now, he places most emphasis on the ATT update and, of course, that's the point that
19 Ms Kreisberger placed most weight on both yesterday and today.
20 What's said is that Facebook placed a value on the impact of ATT on tracking data of
21 iOS users. We see that from Harvey 2, paragraph 3.11 on page 357 and this could be
22 used by Mr Harvey. So you remember the $12 billion-odd of lost revenue, so this is
23 really the point that's mostly being put forward to assist on this gap in the methodology,
24 but we say, as Mr Sawyer put to my learned friend yesterday, that's $12 billion less
25 revenue, but consumers are no better off. So Facebook has lost advertising revenue
26 and advertisers unhappy with less data, but none of this means that consumers are

1 better off. It's hard to see how it helps and, in fact, what we say is that the ATT example
2 suffers from all the same flaws that we have identified because what it's to do is to
3 equate the commercial value derived by Facebook from users' data with loss to the
4 class. So it's back to the same old story. We look at the value to Facebook and that
5 equates to loss to the class, but the two things are different and the ATT example
6 doesn't assist in bridging the gap between the two because this example, as well,
7 ignores the economic value of the service provided by Facebook to users. It just
8 doesn't provide a means of assessing it.
9 **MR JUSTICE SMITH:** To be fair to Mr Harvey, he's not saying that this is a new
10 technique; what he's saying is it is another way of getting what he is initially assessing
11 by way of the WACC through what he calls empirical techniques. So reading his
12 paragraph 3.7, he's not saying: I'm doing anything new by way of technique. I've got
13 the WACC but I've got two other ways of getting to exactly the same end point.
14 **MS DEMETRIOU:** Sir, yes, I think that is fair. I think that is fair. but I think what we
15 then say in response is that that doesn't grapple with the fundamental problem that we
16 have identified.
17 **MR JUSTICE SMITH:** Yes, I think that is right. The way it was presented was
18 Mr Harvey is somehow moving on --
19 **MS DEMETRIOU:** Yes.
20 **MR JUSTICE SMITH:** -- from his initial starting point and what I am, I think, agreeing
21 with you is that he's not doing that, or at least he's not doing that in paragraph 3.7 and
22 the paragraphs that follow under this section.
23 **MS DEMETRIOU:** Exactly.
24 **MR JUSTICE SMITH:** It may be a better way of doing what he was doing in his first
25 report, but it's not addressing the point that you have been making which is what he's
26 doing in his first report isn't enough.

1 **MS DEMETRIOU:** Sir, that's exactly the point so I don't need to press it any further.
2 That really is the point, that it's more of the same but he's not addressing the flaw that
3 we have identified, the gap, as it were, in the United Brands test and then if we move
4 on. So that's ATT.
5 Then if we look at -- and this is the paragraph my learned friend referred to -- 3.43 on
6 page 365, so.
7 "I disagree with Mr Parker's argument on ... demand side value," and at 3.43, he
8 says -- and this is the paragraph that Ms Kreisberger emphasised, that he said:
9 "I believe Mr Parker is confusing the analysis that needs to be done for the
10 assessment of aggregate damages following a finding of abuse, with the question of
11 whether Facebook's practices were abusive. I would only be employing my proposed
12 quantum methodology on the basis that abuse had already been established. In that
13 case, the goal would be to quantify the value which users received from Facebook in
14 the factual world, compared to the value which they would have received from
15 Facebook in the counterfactual scenario, i.e. in the absence of the abusive practices.
16 If I were to identify any benefits to users in relation to the services supplied by
17 Facebook in the factual world, compared to the services supplied in the non-abusive
18 counterfactual, I will deduct that value."
19 So that's the point I think that you, sir, Mr Ridyard, were putting to me and we say
20 a couple of things about that. So we say that here he is, for the first time, addressing
21 the idea of needing to look at demand side economic value, but he's saying that he's
22 only going to be doing that once the abuse is established. So he says: I'm all about
23 quantum and I just take the abuse that's found, but the first thing we say is that that
24 doesn't make any sense because, of course, one of the abuses is unfair pricing and
25 so it might make sense if you're looking at transparency and you say: well, we have
26 the transparency abuse and somehow I have to take that and find some way of turning

1 it into a figure, but where one of the alleged abuses is unfair pricing, then there
2 obviously needs to be a methodology to establish whether or not that abuse has taken
3 place and that methodology is inextricably linked with the loss flowing from an abuse
4 of excessive pricing because what you need is the application of the basic test for
5 an unfair price abuse which is the test in United Brands which includes an assessment
6 of economic value, and you then work from that to work out what loss has happened.
7 So you can't, in a vacuum, decide what the loss is that flows from an excessive price
8 without working out whether the price is excessive in the first place. The two things
9 are just linked together. If Mr Harvey is not going to do that, then who is? And how
10 can he be purporting to quantify the abuse without determining whether or not there is
11 an excessive price?
12 So we say that that doesn't really work but also my learned friend said that the upshot
13 of paragraph 3.43 is that economic value, this was her submission, is only relevant if
14 there is a degradation of the Facebook value in the counterfactual. So it's only if
15 there's a change that it becomes relevant to take it into account and she said:
16 otherwise, you don't need to look at it. That's their case, but that doesn't make sense
17 because if one takes a stylised hypothetical example -- so let's say in the real world,
18 the excess profits according to the ROCE-WACC methodology are 100 and let's say
19 that economic value -- let's say that's calculated as being 80 and so the excessive
20 element is then 20. So leaving aside all the other points we have about multisided
21 markets, but you have 20 which is the excessive value.
22 Then let's say in the counterfactual that the excess profits above the WACC are 0,
23 then if you -- let's assume that there's no degradation in the value of the offering in the
24 counterfactual. Well then you have a position where the excessive element in the
25 counterfactual is 50, but that ignores the economic value of the product which we have
26 ascertained already as 80. So it doesn't make sense.

1 You can't say -- it doesn't make sense to say that you only look at economic value if
2 there's a change between the factual and the counterfactual. You need to look at it to
3 establish whether or not the price charged in the real world is excessive. That's what
4 you need to do as a first step and so that's why this doesn't work, this moving on from
5 the methodology doesn't work.
6 **MR RIDYARD:** (Audio distortion) what is being said here, another way of saying this,
7 in terms of the United Brands limb 1 and limb 2 test, that in Harvey 1, all that was done
8 was looking at limb 1 and not taking account of limb 2 which gives the dominant
9 company a bit of extra wiggle room which you would like to take advantage of,
10 obviously, and then Harvey 2, he's not doing anything. In fact, nothing that the PCR
11 was saying was actually taking account of limb 2 which is this extra discretion that the
12 dominant company has.
13 **MS DEMETRIOU:** Exactly, so he's just not factoring it in at any point and he's not
14 offering any means of doing it. So he's said comparators don't work and fair enough,
15 he hasn't found a comparator. I don't want him to invent one, but what you do need is
16 some method, some acknowledgement that this needs to be taken into account and
17 how is he proposing to go about doing it?
18 Now, the last thing he says and this is at 3.45, is that:
19 "To the extent it is necessary to consider demand side value, I will be able to do so
20 using the user valuation approach, as I explain below in section 4B."
21 So that's what he says.
22 Now, if we look at section 4B, so that starts on page 369, this is mostly about the value
23 that consumers place on their own data which is obviously not a -- it's not relevant to
24 the Facebook service. So I think he must be referring to 4.21 and at 4.21 at the bottom
25 of page 370, he says:
26 "Whether adjustments to this sum are required to arrive at a value of harm, depends

1 on whether there's a difference in the value that users would have placed on the
2 services they receive from Facebook or others in the counterfactual scenario,
3 compared to the real world," and so that paragraph -- again, we're back to the same
4 problem -- merely says that an adjustment might need to be made if there's a
5 difference between the real world and the counterfactual world, but he doesn't focus
6 on how he's going to seek to ascertain the economic value of the Facebook service
7 received by users during the real world in the claim period which we need to know.
8 So again, that doesn't work. Now, it's perhaps not surprising that he doesn't address
9 this issue because there are a number of studies which he has referred to which
10 Ms Kreisberger took you to the list which have sought to ascertain the value placed by
11 users on the Facebook service, including during the claim period, and what those
12 studies show is that users placed a very high value on the Facebook service and what
13 Mr Harvey fails to do is engage with those studies. So he doesn't engage with them
14 and still less does he put forward any methodology which explains how he might take
15 a different approach or why those studies are wrong or why he needs to do anything
16 different.
17 So if we just turn up, please, Meta's response to the CPO application at 1C -- sorry,
18 page 139 of the core bundle and it's paragraphs 94 to 95 and that says -- for example,
19 3.74 of Harvey 1 cites the following papers that used primary research. Now, that's
20 the list that Ms Kreisberger took you to.
21 These were initially referred to by Mr Harvey in Harvey 1 without reservation and these
22 studies, they don't address the value of user data, so they're not subject to the privacy
23 paradox and they all indicate that users receive significant benefits from using
24 Facebook and value their use of Facebook highly and they also show that the benefits
25 to median or average users of using Facebook are many times higher than the alleged
26 £48 of damage per user across the three and a half year claim period.

1 Let me just give you an example. If we turn up the supplementary bundle. So this is
2 not the supplemental authority, but the supplemental bundle behind tab 8, page 87.
3 So this is a study by Corrigan and others and what the authors found is that the
4 average user would require -- we have changed the figures into pounds, but would
5 require between £854 and £1,441 to deactivate their Facebook account for a year,
6 across the different samples of respondents considered.
7 Now, if that's scaled up across the estimated class size, it amounts to a value of
8 between 38.5 and 64 billion which obviously obliterates the estimated damages
9 claimed.
10 The same is true of the paper behind tab 9. So starting on page 98 of the
11 supplemental bundle. So these authors estimate that a user would need to be paid in
12 the region of £430 in 2016; £352 in 2017, to forego using Facebook for a year. So
13 scaled up across the class, that amounts to 19.4 billion.
14 Then behind tab 10, the Sunstein paper, the user valuation is £431, scaled up to the
15 class size. That's £30.4 billion of user value for the class.
16 So Mr Harvey acknowledges these studies when setting out his proposed survey
17 approach, but fails to consider the implications of them, of the substantial economic
18 value that they find, when -- for his own estimation of damages, and we say, really,
19 that's precisely why -- precisely one of the reasons why it's important for a PCR to put
20 forward the blueprint at the certification stage because, had it put forward a blueprint
21 here, dealing with economic value, well the Tribunal could approach, they could have
22 said: well, how is your methodology different to these studies that have taken place?
23 Are you doing anything different?' and returning to a point that the president put to my
24 learned friend, we do say that a certain amount of clarification in that nature needs to
25 be done.
26 You can't just say: well, here are previous studies that I'm vaguely referring to, you

1 need to say: well, what else am I doing? Am I placing weight on them and if not, why
2 not and what else am I going to do?' but by ducking the issue of economic value,
3 we're simply not in a position to interrogate that at all.
4 So, members of the Tribunal, that's what I wanted to say about flaws 2 and 3. I was
5 going to turn to flaw 1 which is the multisided market now because we say that the
6 PCR has used a similar avoidant strategy in respect of the implications of this being
7 a multisided market. Can I, with apologies to the president because you're very
8 familiar with it, but can I go to the Tribunal's judgment in BGL, and it's at authorities
9 tab 28 so that's authorities volume 2, tab 28, starting at page 1337. This case
10 concerned the platform operated by Compare The Market and the market in question
11 was a two sided market. On one side were home insurance providers and on the other
12 side were consumers, and if we could turn, please, to page 1406, the Tribunal here
13 considered the nature of two sided markets and you see there the Tribunal say that
14 they present an additional complexity and the Tribunal considers the nature of those
15 markets without reference to the question of market definition which was the particular
16 context in which it arose and that they arose in that case.
17 If we look at 116, that refers to a Support Study. Can I just ask you to read 116,
18 please?
19 **(Pause)**.
20 Then moving on to 117:
21 "The essence of a two sided market is the interaction between agents through the
22 intermediating platform. As the Support Study notes, at the heart of the
23 interdependence between the various market sides are direct and indirect network
24 effects," and then the Tribunal goes on to explain what are meant by direct network
25 effects:
26 " ... being when the value of a product or service received by a user fluctuates with the

1 variation of the number of the services users," and the Support Study gives this
2 example:
3 "Concretely, a telephone service or a social network: Facebook, Twitter, Instagram, is
4 all the more valuable for the individual user, the more users make use of this service,"
5 and then you have indirect network effects:
6 " ... when a platform or service depends on the interaction of two or more user groups,
7 such as producers and consumers or buyers and sellers or users and developers.
8 That will be the case, for example, where, if more people from one group join the
9 platform, the other group receives a greater value amount."
10 So you can immediately see that this is a context which is characterised by both direct
11 and indirect network effects.
12 Then if we go on to paragraph 118, the Tribunal points out there that pricing strategies
13 are very important in such markets and again quotes from the Commission Support
14 Study and this comes back to the exchange I was having with the president a little
15 earlier. The fundamental aspect of the business model being the optimal pricing
16 structure which must be set so that the division of revenues brings both parties on
17 board, and the product may not exist at all if the business doesn't get the pricing
18 structure right.
19 Then it says that:
20 "To optimise usage of the platform ... so in two sided platforms, the price structure is
21 usually asymmetrical, with prices on one side substantially above those on the other
22 side, Facebook charges users zero, while it charges advertisers," and then:
23 "The network effects frequently imply that in order to attract a group of users, the
24 platform needs to subsidise the other group of users totally or in part. One end of the
25 spectrum, one platform side is charged lower or zero prices, the other side pays. This
26 cross-subsidisation is an optimal strategy from the viewpoint of the multisided

1 platforms."

2 This is really getting back to some of the points you, sir, were making earlier to me,
3 and then the Tribunal found that whilst the CMA had recognised that this was a two
4 sided market, it had not sufficiently taken into account the implications of that when it
5 defined the market and it had consequently defined the market incorrectly, and you
6 can see that for example -- on page 1411 at (6). You can see the Tribunal's conclusion
7 reflected in part in that paragraph, and so we respectfully endorse all of those
8 observations in BGL about the complexities of multisided markets and the passage
9 about pricing strategy that was cited by the Tribunal from the Support Study is very
10 important in the present case because the Tribunal will immediately see that if, for
11 example, in a competitive counterfactual, users provided less data to Facebook -- this
12 is the counterfactual, really, that's put forward by the PCR, that Mr Harvey puts
13 forward -- so in the counterfactual, users would know more about what they're giving
14 up and they would provide less data.

15 If that happens, you can immediately see that this would make Facebook less
16 attractive to advertisers because there would be less data to help advertisers to
17 personalise the advertisements. Advertisers would pay Facebook less for its ad
18 services and Facebook's revenues and profits would fall, which would, in turn, and this
19 is the critical part, would in turn, reduce the funds that it uses to maintain and improve
20 its social network service that it provides to users, and that's simply -- that last piece
21 of the jigsaw is one factor that the PCR simply does not take into account.

22 Could we turn up Mr Parker's report, please? So this is in core bundle, tab 5 and if we
23 go to page 325. If we start with paragraph 2.12, this explains in broad terms the
24 demands of the different groups and how they're interdependent. So if I just ask you
25 to read 2.12.

26 **(Pause)**.

1 Then if we go to page 326, please, and look at paragraph 2.16. So there, Mr Parker
2 is saying that the nature of the price setting process is different for firms in two or
3 multisided markets, compared to the standard case of firms in one sided markets
4 which is the point the Tribunal was making in Compare The Market and then you have
5 the easy case of one sided markets explained in 2.17.
6 Then at 2.18:
7 "A firm in a two sided market faces a more complex price setting challenge, due to the
8 existence of interdependencies of demand. Increasing the price charged to one side,
9 the firm needs to take account of the fact that it won't only reduce demand on the side
10 of the market directly impacted by the price change but may also reduce demand on
11 the second side of the market and vice versa," and then at 2.19, that refers to the same
12 Support Study that the Tribunal cited in BGL and then 2.20, we have the asymmetric
13 point which, again, the Tribunal noted and then 2.21:
14 "Where the market is multisided rather than two sided, it is, if anything, more complex,"
15 and then 2.22:
16 "The identification of the competitive price and so the competitive counterfactual on
17 each side of the market in a two sided or multisided market, needs to take account of
18 these interdependencies of demand."
19 So that's the point that's made and then Mr Parker goes on to explain why Mr Harvey's
20 excess profits methodology doesn't do that and I'm going to take you back to
21 Mr Harvey's methodology in a moment but before I do that, let me just show you
22 Mr Parker's conclusion. So if we go to page 330.
23 Perhaps if you just read the conclusion, those three paragraphs, please.
24 **(Pause)**.
25 **MR JUSTICE SMITH:** Yes, thank you.
26 **MS DEMETRIOU:** Thank you. Then if we could turn up Harvey 1. So if we could go

1 to core bundle 4, page 280 and I just want, for the purposes of this part of our
2 argument, to leave aside for the moment the criticisms I have already made about the
3 excess profits methodology. So let's assume, for the sake of argument, that the PCR's
4 correct to say that everything above the WACC represents profits that are caused by
5 the alleged abuses.
6 Crucially, we say the excess profits methodology put forward in Mr Harvey's first report
7 allocates all of those excess profits to the members of the proposed class and we see
8 that at paragraph 3.46 which I have shown you already. So in other words, the
9 assumption underlying the methodology is that in a competitive market, Facebook
10 would pay all of those excess profits to users, in return for access to their data, and if
11 we have a look at page 283. So I have already shown you this paragraph, but he
12 explains here why they all go to users and I have already emphasised the words "all
13 else equal", being the key qualification, and we say that this assumption that all of
14 the -- it was a point that Ms Kreisberger repeatedly made -- all of these excess profits
15 would flow to the user side. That assumption simply ignores, doesn't grapple with the
16 interdependencies between the different sides of the market.
17 So his approach, Mr Harvey's approach of assuming that the correct counterfactual is
18 one where all benefits flow to users, might make sense if the market were one sided,
19 but he himself acknowledges that it's multisided, with advertisers and other business
20 users facing their own prices.
21 Now, when Mr Parker pointed this out in his own report, Mr Harvey responded -- I'm
22 going to turn up Harvey 2 in a moment, but can we first look at the relevant part,
23 please, of the PCR's skeleton argument. I have that separately, I'm not sure -- I think
24 it's in the core bundle as well.
25 **MR JUSTICE SMITH:** Tab 14.
26 **MS DEMETRIOU:** Thank you, tab 14, starting at page 689.

1 So paragraph 56. So it is said that the objection that's made is wrong and it is said
2 that the contention that Mr Harvey's methodology is incapable of being adjusted to
3 account for the implications of the multisided market is wrong.
4 Then the PCR says: well, we will need to see what the counterfactual is. So you see
5 that at 57, but we don't know what the counterfactual is and if it turns out to be
6 a counterfactual in which other participants would have benefitted, then there will need
7 to be an apportionment, and they say: well that's all a matter for trial because
8 Mr Harvey can't say what the appropriate counterfactual is. So that's what they say
9 and they say that our criticism falls foul of the Court of Appeal's admonition that the
10 provisional methodology should identify the issues, not the answers.
11 Now, our answer to that point is that it doesn't. We're not asking for an answer, we're
12 not seeking now, of course we are not, to find out how all of this works. What we're
13 looking for is a blueprint to trial, some way of mapping out how that is going to be
14 determined and that's what we don't have.
15 Now, what Ms Kreisberger said today in oral submissions was a bit different. So she
16 said: well, you have to strip out the abuse in order to determine the counterfactual and
17 you strip out the abuse so there are no unfair terms. She said she was focusing on
18 the unfair terms abuse.
19 Then she says: well, it would follow from that that Facebook would pay users for their
20 data, but she said in the same breath: well, you can't go on and look at the position
21 of advertisers because that's doing more than stripping out the abuse. So she says
22 all you can do is purge for the counterfactual, at this stage is purge the abuse. So you
23 can't go on and look at the position of advertisers, but her own approach in
24 submissions today involved doing more than purging the abuse because it involved
25 positing a positive action on behalf of Facebook, namely, that they would choose to
26 incentivise users to provide the data by paying them.

1 So you can't say in one breath: well, we can't go any further than purging the
2 counterfactual, we can't think about what that counterfactual world would look like for
3 the purposes of advertisers but we are going to do it for the purposes of working out
4 that Facebook would pay users. We say that just wouldn't work.
5 What you do have to do in a multisided market is have a means, a blueprint of a
6 methodology for grappling with the complex issues that arise, otherwise you're on
7 a hiding to nothing. You're pretending it's not there and nobody knows how this is
8 going to be addressed, what disclosure is required and so on and so forth.
9 Now, I want to turn to Mr Harvey's second report. So this is behind tab 6 and if we
10 take it from page 361. So at 3.24, you see there, Mr Harvey says it will be necessary
11 at trial for the Tribunal to identify the correct counterfactual.
12 Then he says, he explains why, in his view, there are good reasons, you see that in
13 the heading, to believe that users, rather than others, would benefit in the relevant
14 counterfactual scenario.
15 Then 3.27 is important because he looks here at the perspective of users. So he says
16 that in the counterfactual scenario, Facebook would have obtained less personal data
17 from them, with the corollary that other apps and advertisers connected with Facebook
18 would have received more limited services based on personal user data, but users
19 would have still received the Facebook service.
20 So just pausing there, he is positing a counterfactual, as he must do, because,
21 obviously, any damages, any methodology for estimating loss has to compare the real
22 and the but for world. So his counterfactual is a counterfactual where Facebook would
23 have obtained less personal data from users. That's his counterfactual and what he
24 says is, in that counterfactual, users would have still received the Facebook service
25 which is the service they actually did receive in the real world. That's a defined term
26 in his report. So he's saying they would have received the same Facebook service in

1 the counterfactual, having given less data, as they received in the real world, but that
2 is the very assumption that we say you simply cannot make, where you have
3 a multisided market and that's for the reasons that I have already given, that
4 the Tribunal traversed in the BGL case.
5 The provision of less data will make Facebook less attractive to advertisers wishing to
6 tailor and target their ads. That will mean that Facebook generates less advertising
7 revenue and it certainly can't be assumed -- it's a question that needs to be
8 investigated -- it can't be assumed that Meta would be able to maintain and innovate
9 the Facebook platform in the way it does currently because, put bluntly, it would have
10 less money to reinvest, to invest in the service in the counterfactual.
11 So that really goes to the heart of why there's a problem here because, even if you
12 take Mr Harvey's counterfactual, the one that he wants to put forward which is users
13 provide less data, he's ignoring the implications of the multisided market. He says you
14 just hold the service -- they just get the same service and that's just simply something
15 you can't assume. He needs to put forward a way of investigating that point.
16 **MR RIDYARD:** Just as an aside, it might be argued that Facebook generates quite
17 a bit of cash, so losing some might not have a big effect, but I don't expect you to
18 agree or disagree with that.
19 The point I was going to make was is this counterfactual that's described in 3.27, is it
20 also inconsistent with the one that we were taken to this morning? Because this
21 morning, the mechanism whereby the compensation is paid -- or the -- Facebook
22 can't, anymore, impose the requirements to extract this data from consumers and then
23 it's prepared to use its profits to pay for it.
24 **MS DEMETRIOU:** Yes.
25 **MR RIDYARD:** So in that scenario, consumers would end up giving up the data
26 but -- not giving it up but selling it, instead of giving it up.

1 **MS DEMETRIOU:** I don't think it is consistent. One of the problems in this case and
2 one of the problems we have confronted is that there is no consistency about
3 counterfactuals. I think you have that point which is that the counterfactual Mr Harvey
4 is referring to here is different to the counterfactual my learned friend said is the
5 counterfactual she was relying on in her oral submissions.
6 Then you have Mr Harvey changing tack in Harvey 2 compared to Harvey 1 and so
7 there is a moving feast and what they really need to do is say: well, look, this is our
8 case, so our case is that this is the counterfactual. There are lots of ways they could
9 do it. If they had done this, then it would all be much easier to understand. 'This is
10 the counterfactual we're relying on. These are the implications of that counterfactual.
11 So take Mr Harvey's counterfactual, less personal data. He then says -- he would then
12 have to say: well, Facebook would have received less data, advertisers would have
13 received less data. What's my way of working out the knock-on effects of that?'
14 What he can't do is just say: well, I have put my counterfactual forward and I can
15 assume that the service remains the same. which is really a critical point.
16 He's just ignoring the fact that because this is a multisided market, the service and the
17 ability to invest and innovate -- ability and incentive to invest and innovate in the
18 service is dependent on the revenues received from advertisers. So if you say: well,
19 those revenues are going down, then it doesn't follow, necessarily, that the service will
20 remain the same which is the assumption that's being made.
21 **MS KREISBERGER:** Sir, I hesitate to interrupt. I just want to draw your attention in
22 response to your question, Mr Ridyard. If you read the rest of 3.27, particularly the
23 second parenthesis, you will see that's perfectly consistent with the point put this
24 morning about less data or people being compensated.
25 **MR RIDYARD:** Thank you.
26 **MR JUSTICE SMITH:** It may be just a question of how one formulates it, but on one

1 sense, the counterfactual is actually very clear. You have an allegation that personal
2 data is being improperly used. Counterfactual is you can't use it in the way you are.
3 So what's going to happen.
4 Now, the problem, I think, is actually articulating what would be the consequences of
5 that and that's a matter for trial. The issue that we have at the moment is how do you
6 work out how to answer that question?
7 Now, it seems to me that if you said to Facebook: look, you can't, any longer, use this
8 data for nothing. You could have any number of cases. It may be that Facebook is
9 willing to take the hit on advertiser revenue loss and continue offering a service
10 absolutely (inaudible).
11 It may be that Facebook so values the advertiser revenue that it chooses to pay for
12 the data, which is what Ms Kreisberger says will happen.
13 It may be that they say: no, we will get the advertiser revenue, taking the hit of
14 providing less data but we will charge users for the service which previously we
15 provided for free because they're not giving us our data. Well, we're going to charge
16 for the social network.
17 None of these are given. We don't know what the position is. What we need to have
18 in place is a means where both sides can explain how they're going to prove that they
19 are right or wrong, and it's that question that is, going back to Microsoft, what Microsoft
20 is requiring the Tribunal to consider, as intermediated by the various decisions on what
21 that Microsoft/Pro-Sys decision actually means.
22 I'm not sure how far we're in disagreement, but it's not, I think, framing the
23 counterfactual. I think it is unpacking how you work out what the quantum implications
24 of that are.
25 **MS DEMETRIOU:** Sir, yes, I entirely agree with that and what we have here is
26 a methodology which doesn't set out that blueprint because it doesn't grapple with the

1 fact that this is a multisided market and benefits might not all flow to users, they might
2 flow to other sides of the market in the counterfactual. It doesn't grapple with the fact
3 that, even on the counterfactual they put forward which is users provide less data, the
4 implications of the multisided market are such that you can't assume that the Facebook
5 service would remain the same.
6 So these are all points which we completely agree with you, are not for determination
7 now. They're obviously matters for trial, but what you need now is a way forward,
8 a blueprint: these are the questions that will arise, how do we propose to grapple with
9 them? Not the answer but the issues, as the court says.
10 Really one can draw an analogy, just sticking with Mr Harvey's counterfactual and the
11 fact that he doesn't -- he assumes what he needs to prove, in a sense, so he assumes
12 that the Facebook service would not be degraded in the counterfactual, despite the
13 impact on Facebook's revenues. That's similar to the point in Merricks' remittal on
14 compound interest, where a methodology was put forward but it assumes what it had
15 to answer which was what proportions of the class were borrowers or investors and
16 so on.
17 What the Tribunal there said was: well no, hang on, these are the questions we need
18 to determine: how are we going to do it?' and it's really the same point that arises
19 here. I don't want to overpitch our point. We're not saying they need to now identify
20 what the counterfactual is, they need to have a methodology in place or a blueprint for
21 determining it. They need to identify the issues which arise and they just haven't done
22 that, when it comes to the multisided market.
23 So one point that Mr Harvey makes, if you look at paragraph 3.29, he says -- well, he
24 says that -- he assumes that advertisers -- he goes on at 3.28 to 3.29 to look at the
25 position of advertisers and he explains why he thinks advertisers wouldn't receive any
26 benefits in the counterfactual, but he's there really just making that assumption

1 because if there's less good data in the counterfactual, that means that advertisers
2 would pay less money and so that's just not something he's grappling with at all, and
3 so that's why the impact on advertisers needs to be explored in some way and he's
4 just not offering any way of doing it. He's not even confronting the point that it needs
5 to be explored, let alone setting out a blueprint for doing it and that's because the
6 premise of his methodology, as you heard my learned friend say a number of times
7 yesterday, is that all of Facebook's profits above the WACC flow through to the
8 consumer side in the counterfactual.
9 Again, we say as per the Tribunal's judgment in Merricks, that can't be assumed. It
10 certainly can't be assumed in a two sided market because otherwise, there is a real
11 risk of overcompensation.
12 Sir, I am looking at the time. I am doing quite well on time, so I don't think we will need
13 to start at 9.30. I'm quite happy to stop now. I think I have about -- I mean no more
14 than an hour and so I think that's going to leave us plenty of time. Even -- I think it will
15 be no more than an hour.
16 **MR JUSTICE SMITH:** Ms Kreisberger, what do you have by way of reply?
17 **MS KREISBERGER:** I do need to correct some points that have been eloquently
18 made that mischaracterise the case, so I will need some time to take you back to the
19 PCR's case.
20 **MR JUSTICE SMITH:** We have been remarkably intrusive to both teams and that's
21 something that I think we need to take the hit on.
22 I think unless you prefer to stop now, we will carry on until 5 o'clock.
23 **MS DEMETRIOU:** Okay.
24 **MR JUSTICE SMITH:** And then we will take a view about when we start. I don't want
25 either you or, indeed, Ms Kreisberger, to feel that we're guillotining you, unless you
26 really want to apply the guillotine.

1 **MS DEMETRIOU:** No, I'm very happy to carry on, if that's what you would prefer.
2 I don't mind either way.
3 **MR JUSTICE SMITH:** We're very grateful, Ms Demetriou, I appreciate it's a long day.
4 **MS KREISBERGER:** Sir, I apologise for rising, could I just -- just so I'm clear, what
5 time is our end point tomorrow; is it lunchtime?
6 **MR JUSTICE SMITH:** If we say 1 o'clock, that gives ample time. As I say, we're more
7 than happy to consider 9.30 if that is necessary. That's what I said.
8 **MS KREISBERGER:** I'm grateful.
9 **MR JUSTICE SMITH:** We only want an intentional guillotine to apply. We don't want
10 to run out of road accidentally.
11 **MS DEMETRIOU:** Thank you, sir. Both Mr Harvey and my learned friend yesterday
12 rely on the CMA's market study as a basis for saying that all profits would flow back to
13 the consumer in the counterfactual, and you see that -- I don't think we need to turn it
14 up but we see that in Mr Harvey's first report in paragraph 3.10. He says that the CMA
15 market study says -- he's quoting from it:
16 "Although many online services are currently provided free of charge, in a well-
17 functioning market, consumers might be offered a reward for their engagement online
18 or offered a choice over the amount of data they provide or adverts they receive."
19 So that's relied on as being evidence that all -- you can safely assume that all benefits
20 would flow to the consumer side of the market.
21 The short answer to that is that the CMA's market study was not concerned with the
22 counterfactual for assessing any loss caused by an alleged abuse of a dominant
23 position. It was concerned with how well the markets (inaudible) search social media
24 and digital advertising are working and the role of Google and Facebook within them.
25 So it wasn't looking at the question that the Tribunal would need to address in this
26 case.

1 In any event, the passage relied on by Mr Harvey and my learned friend doesn't say
2 that consumers would or would even be likely to be offered a payment for their
3 engagement offline. It says they might be offered a reward or choice, nothing about
4 likelihood, nothing about the size of the reward, nothing about benefits flowing or not
5 flowing (audio distortion) of the market, so it simply doesn't really help.
6 Now, back to Harvey 2, if we could take that up at tab 6, page 363. Mr Harvey
7 says -- so this is paragraph 3.33 to 3.39. He says here that if the relevant
8 counterfactual scenario is one in which profits are shared between the different sides
9 of the Facebook platform, there are various ways of apportioning the loss, and I will
10 come back to the three things he puts forward but it doesn't really deal with the prior
11 point that I have made. So, namely, that he's not explaining how you work that out in
12 the first place, and nor is he dealing with the point that if one takes his counterfactual
13 that we saw a moment ago, his proposed methodology is still not prospective because
14 it doesn't grapple with the implications of the two sided market. So it's not really
15 dealing with the elephant in the room which is he's not setting out an approach for
16 addressing these points, for deciding whether or not they arise, but in any event,
17 turning to the methods of apportionment put forward by Mr Harvey, we say that it's
18 impossible to say that they constitute a plausible methodology for exploring the
19 implications of the multisided market. So if we look at 3.33, he says that you rely on
20 Facebook's own analysis. I mean, again, that's speculative. I think that the point that
21 Ms Kreisberger made -- again, she took us back to the ATT example, but that just
22 doesn't help. So that's not a methodology, that's a: let's hope something turns up, and
23 then the second point which is about use of comparators, we say that that's odd, given
24 that he said in his first report that there were no suitably close comparators and I took
25 you to the part of his first report that says that, and then, finally, Mr Harvey seeks to
26 rely on the user valuation method. We see that over the page on 365, but he quite

1 rightly here, so that's paragraph 3.3, [sic], he quite rightly here, doesn't suggest that
2 this provides a means of exploring the implications of the multisided market. Instead,
3 he says it could provide a cross-check, but for a cross-check to be useful, you need
4 a methodology in the first place and so it's not something which assists.
5 Drawing these threads together, we say that the PCR's methodology ignores the
6 implications of the two sided market or to put the point another way, it makes
7 assumptions that those implications don't matter, but clearly, for all the reasons
8 the Tribunal gave in BGL and we have seen from the Support Study, this is a critical
9 part of the context and it's one of the very issues that's going to need to be investigated
10 and addressed and determined at trial and that there is no -- nothing is put forward,
11 no blueprint at all for taking this issue forward. Instead, there is just an assumption
12 that everything will flow to the user side, but no means of investigating whether that
13 assumption is right or wrong. It simply doesn't recognise the methodology -- these as
14 issues and doesn't lay out a roadmap for grappling with them.
15 So for these reasons too, we say that the excess profits methodology fails the Pro-Sys
16 test, for that reason too. That's what I wanted to say about two sided market. I was
17 going to turn now to consider the user valuation approach.
18 **MR JUSTICE SMITH:** Thank you. Could I just throw in something that we're not sure
19 either side has focused on, which is something, were we trying the case, I would be
20 asking questions about and, therefore, it's probably appropriate to see how it fits into
21 the mechanics of bringing that material before the court.
22 Facebook clearly didn't develop into the market fully formed, making enormous profits.
23 It developed over time and what I feel at the moment we're getting is very much a static
24 view of what Facebook is at the moment, but oughtn't we to be, in terms of trying
25 an excessive price, looking at a more dynamic situation. So, for instance, let's suppose
26 Facebook had a ten year run up before it turned any kind of profit. I have no idea what

1 Facebook's history is, I'm hypothesising. Ten years, where enormous losses were
2 made in order to establish the market.
3 So it may have been that one offers the service, as now, for nothing to subscribers,
4 but the service to advertisers at a tiny discount -- a tiny price compared to now
5 because the service is being monetised, in the process of being monetised. So how
6 would one, for instance, take into account, in what is alleged to be an excessive price
7 now, those costs in the previous ten years?
8 Equally, and it's not in the bundle but I'm sure we all know the second limb of the Napp
9 test, namely limb 1, is there an excessive price?
10 Second question, to what extent is that excessive price liable to be competed away by
11 new entrants into the market? In other words, if you could only maintain the excessive
12 price for a short period, query how long short is, then that is something which suggests,
13 according to the director, the Office of Fair Trading, formulation of the received
14 endorsement, but according to that framing, you don't really need to worry about the
15 excess price, provided it is temporarily limited and is going to act as an attracter to
16 other people in the market, who will then compete that price away.
17 Now, at the moment, I feel we are talking just about Facebook as it is now and there's
18 no consideration of either side of that high point, and, first question, does it matter?
19 Second question, if it does matter, how is that to be fed into the Microsoft/Pro-Sys
20 questions that we are in the process of trying to articulate?
21 **MS DEMETRIOU:** Sir, yes. So I think my answer is that yes, it does matter because
22 it's really another flaw in the methodology because, if you go back to paragraph 127
23 of the claim form, what they say is that you look at, insofar as you take into account
24 the network, the personal and social network, you look at the incremental cost to
25 Facebook of supplying it to each user and they say: well, we can dismiss that because
26 it's very low, and we say, including for the reasons that you have just given, that that

1 isn't the right approach because this is the product of years of innovation and
2 investment and so that's something which would need to be addressed by any
3 excessive pricing methodology and it isn't currently.
4 So for that reason, it's another, as it were, nail in the coffin in terms of the Pro-Sys test.
5 **MR JUSTICE SMITH:** But you say for your part, you don't need to go any further
6 because it's not for you to frame the Pro-Sys question?
7 **MS DEMETRIOU:** We say it's not for to us frame the Pro-Sys -- it's not for us to frame
8 the methodology, it's for the PCR to frame the methodology and it's done that and we
9 have looked at it and we think it's deficient and we have explained why.
10 We have explained why it's deficient, so it's not for us to say: well, here is
11 a methodology you could use, but we have engaged and we have explained why it's
12 deficient and what they could have done is come back and address deficiencies, but
13 they haven't. Sir, that's the answer that I think I would give to that question.
14 On limb 2 of Napp, can I perhaps take that away and think about it? I think that it's
15 slightly more difficult to fit that into the Pro-Sys -- I wonder if -- let me take it away;
16 I don't want to give a half-baked answer. Can I come back on that tomorrow?
17 **MR JUSTICE SMITH:** It might be helpful if we actually had limb 2 in front of us
18 because I think quoting from memory --
19 **MS DEMETRIOU:** Okay.
20 **MR JUSTICE SMITH:** -- but the point there is simply having profits which are way
21 above cost is not likely to be abusive, if that excess acts as an incentive to bring other
22 people into the market and brings -- it's part of the abuse case but, equally, if there is
23 a dynamic market going on with people thinking: well, Facebook are making an awful
24 lot of money, we would like to have a part of that and come in, then isn't something
25 that Facebook is going to be doing is looking to the future to ensure that the service
26 it's providing to both sides of the market is ever better, so that it maintains its

1 competitive advantage?' and that's rather half baked, the thought that I had.

2 **MS DEMETRIOU:** Sir, thank you. If I can take that away and discuss it with those

3 behind me, that would be helpful and I will come back on that point tomorrow morning,

4 but you have my answer to the first part of your question.

5 So I wanted to -- unless there is anything else for now, I was going to turn to user

6 valuation. We say that there are very good reasons to believe that this type of survey

7 evidence that's envisaged is inappropriate in this context and I will come back to why

8 we say that is, but the first and fundamental point that we make is that it's an

9 inappropriate, this is the starlings point, an inappropriate means of measuring the

10 pleaded loss and you have seen the pleaded loss is the commercial value of users'

11 personal data monetised by Facebook.

12 Indeed, Ms Kreisberger was emphasising that that's the pleaded loss when she was

13 relying on the ATT example, if you remember. She says: well, the ATT example

14 measures exactly that. Well, we dispute that because of the economic value point,

15 but she's relying on the way she pleads the case in order to lend weight to the ATT

16 example, but by parity of reasoning, the user valuation method obviously does not

17 value, it's not apt to value the commercial value of users' data because it envisages

18 asking users about their own subjective valuation of their data, and the two things are

19 completely different because it's impossible to see how the fact that a user might say,

20 well, I think my data are worth £20 per year, has any bearing on the commercial value

21 of that data to Facebook. There's just a complete disconnect between the two things

22 because the commercial value of users' data to Meta is an assessment of data as one

23 of several inputs to Meta's online advertising services, as well as the Facebook service

24 and that's something that users have no insight into.

25 Can we just pick up Mr Parker's report to show where he explains this point. So this

26 is at core bundle, tab 5. If we go to page 335 and it's paragraphs 4.9 to 4.11. So he

1 says at 4.9:

2 "The concepts of value to the user and value to Meta are entirely separate. There is
3 no reason from economic theory to think they are related. A user's valuation of their
4 own data is a subjective and individual assessment that determines whether they will
5 use Facebook, where the value of using Facebook for that user must exceed the
6 valuation of their own data. In contrast, the commercial value of users' data is
7 determined by, amongst other things, the ability of Meta to use data to optimise the
8 ranking and delivery of ads, advertisers' willingness to pay for advertising services
9 from Facebook and Meta's costs of operating the Facebook platform. There's no
10 relationship between the two. Mr Harvey's proposed ...(reading to the words)...
11 valuation survey, therefore cannot provide any insight on the commercial value of
12 an individual's data to Meta by asking individuals about their valuations of their
13 personal data," and then, second:

14 "Users don't have any insight into the commercial value of their data to Meta and it's
15 not possible to use a survey of users to explore this issue. As outlined in section 2,
16 Meta operates within a multisided market and monetises the Facebook service by
17 providing advertising services. User data is employed for purposes which include
18 personalising the Facebook service and optimising the ranking and delivery of ads,
19 therefore improving the effectiveness and value of Meta's advertising services for
20 advertisers and users. As described above, the commercial value of users' data is
21 determined by a range of factors, such as advertisers' willingness to pay, Meta's costs
22 of operating the Facebook platform. There is no reason to expect users to know about
23 these factors. No adjustment to the survey approach could conceivably solve this
24 problem."

25 So that's the point that we put and then let's look at Mr Harvey's second report to see
26 his response. So this is behind tab 6. So if we go to page 368, please, it's important

1 to see what he says because he agrees at paragraph 4.7. He says:
2 "Mr Parker is right to say that there's a distinction between the commercial value of
3 personal user data to Facebook and the value which users place on their personal
4 data."
5 So he's accepting that the two things are separate and distinct.
6 Then he says:
7 "That does not, in my view, mean that the user valuation approach which measures
8 the latter is not a useful approach for quantifying the harm to users."
9 Which, of course, is what -- the pleaded harm is the former.
10 So he says: well, it's not the same thing but it's still useful and then he goes on to
11 explain why he says that's so, but we say that that explanation just doesn't stack up
12 and I just want to take you through it.
13 So at 4.9, he illustrates the user valuation approach with a simply numerical example,
14 so he says:
15 "Suppose in the factual world, users placed a value of £20 on the personal data they
16 gave up to use Facebook and in the counterfactual world, they could have given up
17 less personal data and would value that data at £15."
18 And then he says:
19 "In this situation, I would calculate the harm per user at £5 because that's the extra
20 value that users gave to Facebook in the factual world that they could have, instead,
21 retained in the counterfactual scenario."
22 So that's focusing on the users' perspective and he says:
23 "That is consistent with the following user behaviour in the counterfactual scenario."
24 So they don't give it up and they retain the £5 in value or they give it up in return for
25 a £5 payment from Facebook.
26 So that's the user perspective but then he says at 4.12:

1 "This simple numerical example also shows that there is a relationship between the
2 value of the personal data to users and the value of the personal user data to
3 Facebook."
4 Which is, of course, what their pleaded loss is. He says:
5 "If Facebook derive less than £5 of value from that extra personal data, it would be
6 commercially irrational for it to transfer £5 of benefit value to the user in return," and
7 then at 4.13:
8 "That is while there is a conceptual difference ..."
9 So, again, he is accepting the difference:
10 " ... between the value of personal user data to Facebook and the value of their
11 personal data to users, there's, nevertheless, a relationship between them."
12 So he's not disputing that they're different but he says there is a relationship between
13 them:
14 "This is because [he says] in the counterfactual scenario the value of the personal user
15 data to Facebook would need to be at least as large as the value of the personal data
16 to users, otherwise it wouldn't be in Facebook's commercial interest to obtain it and
17 compensate users for it. It follows that as well as measuring the minimum amount by
18 which users would need to be compensated by Facebook for obtaining the relevant
19 personal user data in the counterfactual scenario, it also measures the minimum
20 commercial value that Facebook would need to derive from the use of it."
21 So just pausing there, what he's saying there is that there is a relationship between
22 users' valuation and commercial value, because in the counterfactual scenario, he
23 says, the value of the personal data to Facebook would need to be at least as large
24 as the value to the user, otherwise it wouldn't be in Facebook's interests to pay
25 consumers for the data in the counterfactual, .but that doesn't work, in our respectful
26 submission, because if you take Mr Harvey's example of users giving up less personal

1 data in the counterfactual and valuing that at £15, which is his simple numerical
2 example, the question is whether in the counterfactual Facebook would pay users for
3 the missing data and, if so, what they would pay, but that's completely disconnected
4 to the users' subjective valuation of £5. It's just not connected to it because it depends
5 on an array of commercial factors, as Mr Parker explained, including the value of the
6 missing data to advertisers and the number of users interacting with the platform.
7 So if a user valued the missing data at £5 and it was established that Facebook would
8 not pay for that data in the counterfactual then the commercial value of the data will
9 be at some level less than £5.
10 If, on the other hand it could be shown that Facebook would pay for it in the
11 counterfactual then the commercial value would be higher than £5, maybe a lot higher,
12 but either way the £5 tells you absolutely nothing about the commercial value. There's
13 just no relationship, no relationship at all, and so it's measuring the wrong thing.
14 Mr Harvey accepts it's different and it's not measuring the pleaded loss, and it doesn't
15 tell you anything about what the value of the pleaded loss is. It just simply doesn't,
16 and that's why we say it really simply should be discarded; it's within the starlings
17 migration patterns category.
18 **MR JUSTICE SMITH:** Just to be sure that I have your point, can I articulate it back
19 and you can tell me if I have got it wrong.
20 **MS DEMETRIOU:** Yes please, sir.
21 **MR JUSTICE SMITH:** We had, in the course of the PCR submissions, the suggestion
22 that there was a lower limit to the damages claim.
23 **MS DEMETRIOU:** Yes.
24 **MR JUSTICE SMITH:** The upper limit being the excess profits to Facebook
25 calculated, let us say, above the WACC but there are a variety of ways of doing that,
26 but that was the upper limit, and then there was a lower limit which was based upon

1 individual subjective value of the subscribers themselves, and your first point is that
2 that is not a range that is pleaded in terms of the articulation of how the loss
3 methodologically is to be calculated. So you taking a pleading point, you're basically
4 saying that range is not open without some kind of further articulation to the PCR to
5 take.
6 **MS DEMETRIOU:** Yes.
7 **MR JUSTICE SMITH:** So right so far. Then you say if and to the extent it is said that
8 the two different values are said to equate then they don't.
9 **MS DEMETRIOU:** That is right.
10 **MR JUSTICE SMITH:** And that's because the actuators of value or harm, if there is
11 an unlawful use of the data, are completely different and perhaps, because it might
12 help to give some examples, I mean, two examples spring to mind as to why that might
13 be the case.
14 So take a recent decision of the Investigative Powers Tribunal about improper use by
15 the security services of our personal data, and let us suppose that one has
16 a data-gatherer that is using our data unlawfully, extracting it unlawfully, but not using
17 it for profit; using it for some other purpose that doesn't actually have any monetary
18 value.
19 Now, at that point you can certainly say that if the data has been extracted improperly
20 from the user base there is or ought to be a loss that should be quantifiable in
21 damages, but it will inevitably be higher than the WACC plus base loss because there
22 is no WACC plus based profit at all, so there is a disconnect that way.
23 Converse case, take the free newspaper that one picks up at the station. Now, that is
24 a two sided market rather similar to this one, if somewhat antiquated. Now, there you
25 have the advertiser market because you are monetising the content of the newspaper
26 by putting advertising space in it. The way in which you monetise it is through the

1 eyeballs of the readers but there is no provisional data by the reader to anyone. All
2 they're doing is reading the newspaper and hopefully being influenced by the
3 advertisements.
4 So those are two instances that I put to you just to illustrate the disconnect at that you
5 articulate.
6 **MS DEMETRIOU:** Yes.
7 **MR JUSTICE SMITH:** Obviously I am articulating this so that Ms Kreisberger can
8 come back on them.
9 **MS DEMETRIOU:** Yes.
10 **MR JUSTICE SMITH:** Do those examples work for you or have I got something
11 wrong?
12 **MS DEMETRIOU:** No, they work. They work for us and we would also say that it's
13 very telling that Mr Harvey accepts that they're different so he's not saying: well,
14 actually they're the same thing. He accepts that they're different, but what he's trying
15 to do is say that there is a relationship between the two and we say there is just simply
16 no -- there's no correlation, there's no relationship between the two and that's
17 fundamentally why this methodology fails the Pro-Sys test; it's just not measuring the
18 pleaded loss.
19 **MR JUSTICE SMITH:** And just to be clear about the point you're not making, in case
20 you are making it and I am missing it, you're not making the points that survey
21 evidence is valueless or pointless. If there was an articulated case saying: well, we
22 have one way of calculating our loss, it's WACC plus, but the other way is to focus on
23 the value of the data to the subscriber market or the harm that they suffer in unlawfully
24 being obliged to give it up and how we're going to articulate that is by way of a survey
25 data, you might have a particular problem with that if it was articulated that way, but
26 you're not at the moment saying there is anything wrong with that because that's not

1 the case that your clients are facing at the moment.

2 **MS DEMETRIOU:** So we also make that point. That's the point we make about the
3 privacy paradox and that in this asking users about the value they subjectively place
4 on their data is, it is well-established in the literature, is not a robust thing to do. So
5 that's a separate point we make, but we say that before you even get on to that this
6 really fails at a first and very fundamental hurdle.

7 **MR JUSTICE SMITH:** I suppose my question is do we need to get into the privacy
8 paradox, because aren't we there really getting into a debate about what we will be
9 trying to determine at trial, if this case comes to trial, in that you would say the outcome
10 of a survey would be rather more in favour of Facebook than is being suggested at the
11 moment, but that's surely a question of what a survey would show rather than saying
12 that a survey is intrinsically a methodologically wrong way of going about valuing that.

13 **MS DEMETRIOU:** Sir, obviously if we're right on this threshold point we don't have to
14 get on to the --

15 **MR JUSTICE SMITH:** That's what I'm exploring.

16 **MS DEMETRIOU:** If we're right on this, that's just a knockout blow to this
17 methodology, so you then don't go on to privacy paradox. You get on to privacy
18 paradox if we're wrong on this threshold point, and if we're wrong on the threshold
19 point we do say that privacy paradox isn't -- I'm going to have to develop submissions
20 on that tomorrow -- but we do say that it's not a matter for trial because it's not
21 a question of -- it's actually a really fundamental problem with surveys in this field, and
22 so if that's being relied on then we say it's not adequate. If survey evidence is being
23 relied on we say it's not adequate because of the privacy paradox, but can I develop
24 those submissions tomorrow, but we do, in answer to your question, if we're right, our
25 first and fundamental threshold point is this just doesn't measure the loss that's
26 claimed, and if we're right on that you need go no further.

1 **MR JUSTICE SMITH:** Okay, that's helpful.

2 If I can just put down a marker on the contingent point as it were, that if you're wrong

3 on the first point --

4 **MS DEMETRIOU:** Yes.

5 **MR JUSTICE SMITH:** -- I think, speaking entirely for myself, I would have some

6 difficulty in your saying that a proposal to survey subscriber value or the data they're

7 giving up is so intrinsically flawed, because it's very difficult, that it can't be articulated

8 as a methodological way of getting an answer to trial and I say that not because I'm

9 suggesting that you're wrong about the difficulties; you may very well be right.

10 The reason I am putting it that way to you is because it seems to me that if a claimant

11 chooses to serve up something that is methodologically understood but hopeless then

12 that is something for a trial and not for pre-trial vetting.

13 In other words, what I am saying is it doesn't seem to me, assuming your pleading

14 point is wrong, it doesn't seem to me that the methodology of the survey is evaluating

15 starlings over Africa. It's trying to get to something which you say isn't articulated.

16 **MS DEMETRIOU:** No, I think that you're right to say that it's not a starlings point, the

17 privacy paradox point, but I think -- and I will come back to this tomorrow and I will

18 reflect on what you have just put to me, sir -- but I think we say it's a plausibility point

19 because if actually -- what we say is it's so well-established in the literature that you

20 can't place any weight on questions that you ask users about the value they place on

21 data. That's so well-established that there is a threshold plausibility point, which is if

22 this is going to be the methodology are we really going forward to an expensive trial

23 based on something which lots of economists have said consistently can't be -- you

24 can't place weight on it.

25 So it's not just any old point about surveys being, you know, you could design it this

26 way or that; it's actually a very fundamental point that goes to plausibility, but if I could

1 return to it tomorrow.

2 **MR JUSTICE SMITH:** I don't want an answer from you this evening. My reason for

3 raising it now is to enable you to --

4 **MS DEMETRIOU:** Thank you.

5 **MR JUSTICE SMITH:** -- focus on the concerns we have about the point. I think the

6 response I have to that is that you're coming quite close to saying that an arguable

7 cause of action fails because the court can't assess the loss.

8 **MS DEMETRIOU:** Let me reflect on that, sir. That's very helpful to understand those

9 points.

10 **MR JUSTICE SMITH:** Thank you very much, Ms Demetriou.

11 I am reminded -- as if reminding was necessary -- that we have a train strike tomorrow

12 which does cause some issues in terms of ensuring the Tribunal is up to speed, and

13 I'm sure issues in terms of people coming here.

14 Let me just check with those in front of me whether 9.30 is an absolute no-go on that

15 front or whether that's possible.

16 **MS DEMETRIOU:** I don't think it should be necessary. I haven't got much longer at

17 all. It's a reply, so even if Ms Kreisberger needs some time I don't think she is going

18 to take hours over a reply.

19 **MS KREISBERGER:** On the basis that Ms Demetriou, I am assuming, has about half

20 an hour.

21 **MS DEMETRIOU:** Half an hour. Assuming questions from the Tribunal, the absolute

22 maximum is an hour, but I am anticipating it's going to be less than that.

23 **MR JUSTICE SMITH:** What we will do is we will start at 10.00. Subject to the Tribunal

24 having an unreasonable amount to say we will guillotine you at 11.00, Ms Demetriou.

25 And then you will have two hours to conclude your reply.

26 Thank you all very much. I apologise for keeping you so late. 10 o'clock tomorrow

1 morning.

2 **(5.09 pm)**

3 **(The hearing adjourned until 10.00 am on Wednesday, 1 February 2023)**

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