IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1572/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Friday 19th May 2023

Before:

The Honourable Justice Marcus Smith

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Class Representative

Claudio Pollack

v

Defendant

Alphabet Inc. and others

APPEARANCES

Julian Gregory (Instructed by Humphries Kerstetter LLP) On behalf of Claudio Pollack

Meredith Pickford KC and Warren Fitt (Instructed by Herbert Smith Freehills LLP) On behalf of Alphabet

Gerry Facenna KC (Instructed by Hausfeld & Co. LLP) On behalf of Charles Arthur

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Friday, 19 May 2023

(10.30 am)

Housekeeping and procedural matters

MR JUSTICE MARCUS SMITH: Good morning.

MR GREGORY: Good morning.

MR JUSTICE MARCUS SMITH: Before you begin, Mr Gregory, just the usual live-stream notice. As you can see, this is being streamed on our website. An official recording of these proceedings is being made and a transcript will be produced in due course.

It is prohibited for anyone else to transcribe, record, broadcast or photograph or transmit these proceedings, and breach of that would be punishable as a contempt. So please don't do it. I'm sure no one will.

Apart from that, I have read the very helpful written submissions from all concerned. I think we indicated yesterday that we were happy to see Mr Arthur here, Mr Facenna. The way I think we should deal with it, Mr Pickford, if you are happy with that, is that we deal with the Proposed Class Representatives, as it were as a group, and you respond to both of them, rather than have Mr Arthur sort of sweep up the tail, that seems undesirable. So if you are all happy with that, that's how I propose we move on.

With that, Mr Gregory, I'll hand over to you.

Submissions by MR GREGORY

MR GREGORY: As you know I'm here representing Mr Pollack the applicant. Mr Facenna, Mr Grubeck and Ms Berridge are here representing Mr Arthur. And Mr Pickford and Mr Fitt are here representing Google, the respondent.

You should have some bundles. Bundle A is the main CMC bundle with skeletons and written correspondence. Bundle F is the authorities bundle. You should I believe have both of those in hard copy. Bundles B to D contain the Pollack and Arthur application materials, including the Claim Form. My understanding is you have those electronically. I am proposing to give you some references to those during the course of my submissions but I'm not planning to take you to them, I think.

MR JUSTICE MARCUS SMITH: That's very helpful, Mr Gregory.

I mean, as Mr Pickford has flagged in his written submissions there's been -- and it's not a criticism, it's just an observation -- a shift in terms of how one sees the management of this matter going forward. And as I understand it, both you and Mr Facenna are going to try and persuade the tribunal to move towards a bifurcated carriage versus certification hearing.

Mr Pickford, your position is, I think in the first instance, that that shouldn't be heard at all today because it's been sprung on you at the last minute and you feel there ought to be listed a further case management conference.

Now, Mr Gregory, I don't want to take you out of your stride but if that is Google's position then we probably ought to hear that first.

MR GREGORY: That was where I was proposing to start.

Mr Pickford actually suggested that he should go first on that on the basis it was his application I think. As it's my application to do something I was proposing to go first on that, but addressing first the question about whether any timetable should be laid down today, and then before moving on to the other issues.

MR JUSTICE MARCUS SMITH: I must say I'm more inclined to hear than not hear this matter, subject to any question of prejudice to Google. So it does seem to me, Mr Gregory, that actually it's probably right on this point that I hear from Mr Pickford first and that you and Mr Facenna respond, as appropriate, to that point. But I think

we do need to understand exactly where Google are coming from.

So Mr Pickford, if you are happy I'd rather hear from you first.

MR PICKFORD: Thank you Mr President. I am grateful for the indication from the tribunal as to where you are situated on this point but if I may I'd like to make a few short submissions on it.

MR JUSTICE MARCUS SMITH: Yes, of course.

Application by MR PICKFORD

MS PICKFORD: We say that before we get drawn into a detailed discussion about the -- what I might call the somewhat 'hot from the oven' directions that have just been advanced by the Proposed Class Representatives this week in their skeleton argument, there is a prior issue, as we've just heard, about what can fairly and sensibly be achieved at this CMC. And (inaudible) two points.

The first point is that we have now been told, as of skeleton arguments, that we may not be facing two claims vying for carriage at all. What we are now told is that the Proposed Class Representatives may decide to amalgamate their claims and that will be very good for them if they can resolve that issue amicably between themselves, that is obviously a crucial issue for Google and this tribunal to know the answer to, we say, before we start taking large numbers of other significant steps in the litigation, because what the PCRs are asking us to do is to prepare on one basis, which is that there are two separate applications, which they now tell us they may then radically depart from at the last moment.

Now to underscore just how much leeway they want -- I am sure, Mr President, you are aware of a letter that came from Mr Pollack's solicitors last night where they wrote to the tribunal and they suggested, in effect, that the deadline for the PCRs to decide whether they can reach agreement on amalgamation should be the date for the hearing that they propose on carriage, instead of as we suggested, that there should

be a date that they propose now, well in advance of that, where they effectively put up or shut up on this issue so we all know where we stand, and then we prepare accordingly. And they say: no, no, no, we can just go ahead and we should steam ahead towards the proposed hearing that they are suggesting and they should be allowed to swerve at any moment prior to that.

There are two points to make about that. That presupposes, of course, that they are going to be successful in persuading the tribunal that there should be a hearing just on carriage. It's premised on a carriage hearing only, it's not premised on steamrollering towards a so-called joint hearing.

But secondly, even if they are right on that, we say that their proposal simply doesn't address Google's position and fairness to Google. Because what they are proposing is the same last-minute swerve that we seek to avoid and that we may prepare for a hearing on one basis and then that's totally changed at the last. I notice there's no undertaking to pay our costs, for example, in these circumstances.

MR JUSTICE MARCUS SMITH: Mr Pickford, let me say this, and I say it in part to assist Mr Gregory and Mr Facenna to push back if they wish to, but I entirely understand your point if one has a rolled up carriage certification hearing. My question is, assuming, and we're assuming that which has to be decided today, but assuming one does what the PCRs are proposing and split carriage and certification, why do I need to be particularly troubled about Google's position on the question of carriage? To put it another way, what can Google properly say about carriage in contrast to what they absolutely have a right to say on certification?

MR PICKFORD: That's actually quite a difficult question to answer briefly and the reason is it trespasses on the very topic that we may be getting on to, which is whether we should or shouldn't have a so-called rolled-up hearing or, as I would prefer to say, a preliminary issue, where one plucks out from the certification issues a particular

point going to which of the PCRs is better placed. I actually think that that's the correct characterisation in law, it's not that one's a rolled-up hearing; it's in fact one's a certification hearing and the other is a certification hearing later with one preliminary issue plucked out first.

MR JUSTICE MARCUS SMITH: Well that is the analysis I think in FX.

MR PICKFORD: It is indeed, and with respect I fully endorse that analysis.

So that therefore bleeds into what it would be appropriate or legitimate for us to be saying in that so-called carriage hearing because it's not at all clear to us really what the parameters of that carriage hearing would probably be. I don't desperately want to develop that submission fully now because I think in order to really properly develop that submission I'm going to have to get drawn into quite a lot of authority which deals with the point in substance. But that is where I will be going on that.

MR JUSTICE MARCUS SMITH: Well indeed.

MS PICKFORD: And so to re-wind to say: how does that impact this? Even if it is the case that there is a relatively discrete preliminary issue that can somehow be extracted, and I will be making submissions, if we get that far, that there cannot, it may well be one that we are still entitled to make submissions on, for example perhaps there is a conflict of interest in the class and that may well be something on which it would be in our interests to draw to the attention of the tribunal, because there might be, for example, to draw a parallel with Trucks, a certain part of the class whose interest are aligned more with Google's than with the rest of the class. And it would be in fact for us, perhaps ironically, to draw that to the attention of the tribunal because it might be that the class as a whole doesn't really want to develop that issue and that issue may well go to the suitability of the Proposed Class Representative to represent the class.

So there are certainly issues, in my submission, on which it would be appropriate for

us to be making submissions at that hearing. And the difference between what is being proposed by the PCRs and a normal inter partes dispute is that when the hearing goes away at the last minute because the parties have reached an agreement, normally it's in both of their interest. They recognise, though of course they may have expended quite a lot of costs preparing for that, but that doesn't matter because ultimately they managed to find a substantive resolution of the conflict between them. But we have a very important role in this litigation, we are the proposed defendants, the respondents to the application, but we sit outside that. And so the problem for us is that we may well invest lots of resources preparing for a hearing and only discover on the morning of the hearing that all of that was a waste of time. It would be more sensible if they just made their position on that clear earlier so that we all knew where we stood, and then we can proceed that is the point. That's the first -- I had two points.

MR JUSTICE MARCUS SMITH: No, no. The problem I have with your first point is that, bearing in mind you are just addressing on whether we should be addressing this at all today.

MR PICKFORD: Yes.

MR JUSTICE MARCUS SMITH: It does seem to me that the point you've just been making is a very powerful point in favour of at least establishing what it is that we are doing by way of future management of these matters. It does seem to me that I would want to understand what it is that Google can properly say on a pure carriage argument when the application for certification is on that basis not being moved at all. I would want to understand the points that Google would want to make there before saying anything else; in other words, your swerving point and your costs point are intrinsically tied up in the question of whether carriage is a self-standing debate between the PCRs *inter se* only, or whether it is, as you say and as we said in FX, it is a preliminary issue.

Now, kicking that off to another day serves nothing except delay.

MR PICKFORD: Sir, I recognise that. I see that point. If I may I would just like to articulate the second reason.

MR JUSTICE MARCUS SMITH: The second one, of course.

MR PICKFORD: I understand the interrelationships between these points, indeed that is the strong theme that if we get there I'm going to be developing myself.

The second point is a difficult one because obviously it's something that courts and tribunals often have to grapple with. But we do say that whether it's -- I'm not making particular submission on fault, but nonetheless there was a problem that's arisen here in that the question about whether there should be a preliminary issue on carriage has very significant consequences for this CMC and the direction of this particular proceedings and there is an unfairness to Google in the way that it has come about, for three reasons: firstly we say, and I will develop this again, that the precise nature of what is in fact being sought in this preliminary issue is unclear, and if it had been something that had been made properly, either by application notice or in a letter well in advance, we could have sought to tease that out, and we are in something -- we don't really know quite where we stand on that point.

Secondly, the PCRs have had opportunity to develop their submissions fully in writing on this. We were denied that opportunity because we didn't know that it was coming until -- I didn't know this was coming until the very morning of the day when our skeletons were due in at 12.00. I believed, when I woke up that morning, that we had completed our skeleton, it had been signed-off by our client and it was just a question of exchange a couple of hours later. As it turned out I was totally wrong and I spent a short time hastily seeking to redraft to accommodate the latest change. But we didn't have a proper opportunity to development arguments in writing and so we are prejudiced relative to the PCRs who did have and afforded themselves that

opportunity.

Thirdly, I make least of this, but we obviously had limited time, I would say, to prepare for this important issue in what is very serious complex litigation, the amounts being claimed are obviously enormous and this particular point is fundamental to the future direction of the litigation.

So in my submission there is unfairness. The final point on the unfairness is it's well-demonstrated by Mr Arthur's own submissions for this hearing because having adopted a course of action whereby the PCRs denied Google an opportunity properly to address this issue in writing, they then complain in their skeleton argument that we haven't properly engaged with the issue and they say well we haven't given any good reasons to reject their approach.

Now, I give credit where credit's due. What that submission lacks in merit it certainly more than makes up for in umph(?) but it would be readily apparent to the tribunal why we didn't address this point in full in our written submissions, is because we didn't have the opportunity to. We say that is demonstrative of the unfairness in seeking to do that now.

Having said all of that I heard the tribunal's opening remarks. I understand why there is some advantage in at least examining this issue now. What I would say is certainly if the tribunal is with me and rejects the suggestion that we can have a preliminary issue there is no problem at all in deciding it. The tribunal is in a slightly difficult position if it favours the preliminary issue because it's deciding it in circumstances where I said there's been unfairness. Those are my submissions on whether we should proceed or not.

MR JUSTICE MARCUS SMITH: I'm very grateful, Mr Pickford.

Mr Gregory and Mr Facenna, I won't need to hear from you on this. I am going to make a short ruling as to why we are going to proceed today, notwithstanding

Mr Pickford's submissions.

RULING

MR JUSTICE MARCUS SMITH: I have before me a case management conference which is really concerned with the broad-brush future direction of two applications for certification as a class representative in which a carriage dispute clearly has the potential for arising. That is a matter which I am going to say nothing about in terms of substance because I have yet to hear argument - what I am going to address in this ruling is a point made in writing by Google in their written submissions and expanded upon by Mr Pickford, King's Counsel, orally, and it is this:

"*Google's position is that the only fair course that can now be adopted in the light both of the last-minute abandonments of the PCRs' previous positions and the limited time Google has had to consider the Arthur application is that a further CMC be listed fully involving all three parties at which the Tribunal can determine (1) the newly-raised issue of whether carriage and certification should be heard separately or together; and (2) the directions which are accordingly appropriate for the further hearings in these proceedings*."

I accept that the change in position is one that has occurred at a very late stage on the part of the PCRs. However, I do not accept that the only fair course is one of adjournment. I say that for a number of reasons: first of all, even if there were agreement between the PCRs as to how to proceed in terms of the conduct of these matters, at the end of the day how these matters are determined is the province of the Tribunal and not the parties, however close their agreement might be. I remind myself that in the *FX* case where this point was raised, both of the class representatives proposing themselves were in agreement that carriage should be separated from certification and the proposed defendants were neutral on that point. However, for reasons given in its ruling, the Tribunal took the view that a preliminary

issue was inappropriate and a rolled-up carriage and certification hearing was ordered. I am certainly not saying that *FX* is the precedent to follow. We will consider the question of how this matter should be dealt with in light of the submissions and in light of the Tribunal's experience of certification proceedings that have occurred since *FX*. But I would expect - and from Mr Pickford's submissions I think that expectation was justified - all parties to be ready to inform the Tribunal as to what would be the most appropriate way of handling matters going forward and it seems to me that all of the parties are ready to do that.

The second point is that one of the matters which I am going to be pressing all of the parties on today is if -- and it is a big if -- there is a separation of carriage from certification, what that actually means. Is that a split in the shape of a preliminary issue, or is that simply dealing with the prioritisation of two rival applications, one against the other, knocking one on the head and allowing the other to proceed to certification? If that is the analysis then I am going to need some help on the extent to which Google has a role at all in the carriage argument because on that view it is not a preliminary issue, it is simply a question of two applications against essentially the same parties standing head-to-head and being dealt with on that basis.

I say nothing about what is the correct way of analysing things. But that is something which absolutely needs to be resolved today, otherwise we will simply be kicking off this matter for further argument in however many weeks' time to the prejudice of all and the benefit of none.

So for those reasons it seems to me that we must proceed today.

I will say this, however, I am very conscious that Mr Pickford has not been able in his written submissions to say as much as he would like about the configuration of the proceedings that the PCRs will be advocating for before me now. That I think entitles him to a degree of latitude in his oral submissions which I perhaps would not otherwise

give. And I want to put both PCR teams on notice that any suggestion that Mr Pickford could have made points in writing that he has been making orally today will receive singularly short shrift because, for the reasons that he expounded, he has not been able to make those points in writing and he should be entitled to make those points orally.

For those reasons we will proceed with the case management conference and I will not adjourn it.

Mr Gregory.

Application by MR GREGORY

MR GREGORY: I'm grateful.

(Inaudible) from your comments. It is Mr Pollack's position that the carriage dispute would essentially be a knock-out blow to the losing party; and secondly, I was not planning to object to Google making submissions which go beyond the scope of its skeleton. If Mr Pickford said something which I don't feel able to respond to on my feet then perhaps we could take a short break and we can consider the position and take instructions.

MR JUSTICE MARCUS SMITH: Of course.

MR GREGORY: One preliminary sort of contextual point that I just wanted to make before I get into the carriage first issue is that these proceedings, we say, are already behind schedule, at least compared to what's happened in broadly equivalent cases. My instructing solicitors have produced a helpful table just showing the timings in --

MR JUSTICE MARCUS SMITH: I have the timings in mind, I don't need you to take me to that.

MR GREGORY: The first few collective proceedings claims, including FX and Trucks, were obviously held up waiting for the Supreme Court's judgment in Merricks. Of the

more recent claims in terms of the time from filing to receipt of the certification judgments, Gutmann took 16 months; Boyle, 14; Kent and Coll both took 13, and Gormsen, one year, six days.

The reason I raise that is that even on the sort of rough timetable that we proposed in our skeleton, we wouldn't be getting a certification judgment until around 18 months after we filed -- approximately, it varies a bit. If the timetable laid down today is not derailed for some reason, and obviously what I have in mind is if we lay down a timetable for a joint hearing and then that had to be revisited and a new entirely fresh timetable laid down, either because some arrangement had been reached between the PCRs, or in the light of the Court of Appeal's judgment in FX, then there would be very considerable delay even beyond that and we would probably be in a position where we wouldn't get a certification judgment until around two years after our claim was filed, which is effectively double what's happened in Gormsen.

MR JUSTICE MARCUS SMITH: Mr Gregory, let me help you on this. I'm not sure that, as it were, comparative approaches to how other cases have progressed particularly helps. It is the standard practice of this tribunal to try to move things on at a pace which makes all of the parties before it moderately uncomfortable in that their feet are held to the fire but not so uncomfortable as to produce unfairness, and that is precisely the approach that I would be minded to adopt here; in other words, we want to move forward as quickly as we can.

Now it does seem to me, and I flag this so that Mr Pickford can push back on this, that if you are right in your implied submission that carriage is not a preliminary issue but an altogether separate question in terms of prioritising distinct applications, and if I can be colloquial, knocking one on the head to allow the other to proceed, then that has certain time and costs advantages.

So the analysis of the question is one on which I would be grateful if you could assist.

If the proper characterisation is as a preliminary issue, as Mr Pickford is contending, then it does seem to me that it's quite difficult to say that Google should not have a role, because preliminary issues are issues in an application, all one has done is extracted a point that can be dealt with early. So if that is the proper analysis then it seems to me Mr Pickford's point about needing to know where you are coming from so that he can respond, has some traction, and he would be entitled to know sooner rather than later what his clients have to deal with.

If, on the other hand, the proper analysis is that carriage is a matter that is only really as between applicants, in other words to be analogised to, for example, an application for permission to appeal where the proposed appellant appears before the court seeking permission and the proposed respondent may, but doesn't have to appear, and the process is entirely fair even if the respondent doesn't appear, if that is the proper analogy, then the participation of Google in the carriage dispute assumes a rather different colour.

Now if that is the right analysis, and I'm sure you will help me on that, one does have two further questions which is: when would a carriage dispute be brought on? And to my mind if that were the proper analysis, sooner rather than late is emphatically the case and I would be interested to hear whether the two applicants could in fact bring carriage as a self-standing question on before the tribunal this side of the summer rather than the far side of the summer. So that is a point I would be grateful to hear from all of the parties.

Secondly, I would be interested to hear what the parties say about the question of appeal, because if the tribunal's decision on carriage is intended to move things along, the implication is that the tribunal's decision on carriage is not de jure but de facto final, unless the tribunal has gone so badly wrong as to reach a perverse decision; if one as a matter of course has an appeal then one is immediately adding 18 months to the

timetable. And that is something which frankly speaks very strongly against the notion of unpacking carriage and speaks in favour of rolling it up with certification so that one can, if so advised, have an appeal which is just one appeal rather than two.

So I think what both you and Mr Facenna will need to do is address me on, assuming -- and I am sure that it's an assumption you'd only make unwillingly, but assuming your client was the losing party, what would you do?

MR GREGORY: That's noted. I will take instructions on them at some point, perhaps when we take a short break halfway through the morning.

MR JUSTICE MARCUS SMITH: Yes.

MR GREGORY: In terms of whether carriage and certification should be determined together or at separate hearings it's probably helpful to recognise at the outset, as you did in your FX judgments, that there are arguments to be made either way on this: potential cost and timing advantages from dealing with carriage first, and potential costs and timing advantages from dealing with it in a combined hearing with certification. It's not straightforward, and indeed, as you've been made aware, we initially proposed a combined hearing. We changed our mind primarily because we think that it's important that the timetable steps that are laid down now, including in particular the hearing dates, should be capable of surviving possible future developments. So in particular the upcoming Court of Appeal judgment in FX and the possibility, and it's no more than that at the moment, that Mr Pollack and Mr Arthur might reach an agreement, some sort of agreed arrangement, acceptable to the tribunal that would remove the need for a carriage determination.

And it seems to us that there's a greater risk of a timetable leading up to a combined hearing would be derailed by either or both of these developments, than a timetable leading first to a carriage hearing and then subsequently to a certification.

MR JUSTICE MARCUS SMITH: Mr Gregory, let me help you on that. I quite take

your second point that the dynamics between PCRs may well make a difference in terms of how matters are dealt with and that is a reason to accelerate the question of carriage. I don't particularly want to hear about what the Court of Appeal may or may not do or say in FX. The reason I say that is because the FX preliminary issue decision was decided in 2020; it was not appealed. It was a case management decision that was made for the reasons there set out. That issue is not before the Court of Appeal. What is before this tribunal is the proper case management going forward and that is a matter for me to decide on the facts before me today. And if it comes to making clear how I'm going to approach this I think all parties should understand that I'm not regarding myself as in any way bound by the FX position. As that position makes clear, it was the first carriage dispute and it was one that was decided in circumstances where the Merricks Supreme Court decision was awaited and not been made and where we have done a great deal of learning since then. So I think you can take it that the points articulated in FX are matters that I'm alive to but the outcome is one that I regard as appropriate in that case but not as something which, beyond the points that were substantially made in that decision, will inform the outcome here.

MR GREGORY: Well we agree with that, sir, that there's -- well, there is no absolute hard-and-fast rule about how you should deal with this and the decisions have to take into account the different circumstances of each case.

MR JUSTICE MARCUS SMITH: Yes.

MR GREGORY: We also obviously don't know what reasons will be contained in the Court of Appeal's FX judgments when it comes. The significance of it, we say, is that -- if I can take you -- you will have seen in our skeleton one of the things that caused us to change our position was that we saw a report of the Court of Appeal FX hearing, and I don't know if you've seen that report, sir but --

MR JUSTICE MARCUS SMITH: Mr Gregory, I don't think it helps. I mean, if you want

me to adjourn so that we hear what the Court of Appeal says then I will think about that but I anticipate that's not your submission. I'm not going to decide this case about what people are reporting that the Court of Appeal said in the course of argument in a matter that they haven't actually had a valid judgment on.

MR GREGORY: No, I appreciate that, sir. Our position is that based on --

MR JUSTICE MARCUS SMITH: I quite see why you've changed your position.

MR GREGORY: Yes.

MR JUSTICE MARCUS SMITH: You've done that. So what we are really exploring is why the new position that is adopted by the PCRs is one that I ought to direct, going forward. If the Court of Appeal is critical to that argument then we will kick it off and wait to see what the Court of Appeal says. If, on the other hand, as I see it this is simply a difficult case management question for this Tribunal to decide in light of the factual constellation that exists at the moment, well then we can get on with it today.

MR GREGORY: The main reason for taking into account the Court of Appeal FX judgment is it's likely to be handed down some time between now and when the first substantive hearing takes place in these proceedings. If the judgment contains comments suggesting that in general it is preferable to hear carriage disputes first, and subject of course the taking into account the circumstances of each case, then that may cause problems if the tribunal has laid down a timetable leading to a joint hearing.

MR JUSTICE MARCUS SMITH: Yes, but the converse is exactly the same, isn't it? I mean, if the Court of Appeal says: you must have a rolled-up hearing, then what do I do then? I don't see how speculating about what the Court of Appeal is or may say going to help anyone. As I say if this is so important then Mr Pickford is right for different reasons. I mean, do you want me to put things off so that we await the Court of Appeal's decision in FX?

MR GREGORY: Fine. Then I think the next point is that -- the reason for referring to the Court of Appeal judgment is that it is just a practical reality which needs to be taken into account, the judgment may well be -- (inaudible) taken into account.

MR JUSTICE MARCUS SMITH: But you don't want us to await the Court of Appeal's decision -- I mean, if you want me to rise I'm very happy to do so, Mr Gregory, because I appreciate that you may need instructions on this. Would that assist? **(Pause)**. The --

MR FACENNA: Sir, there are a number of points that you raised this morning, and we've made some progress. Speaking for myself, there are already a number of points on which it might be useful to take instructions before I stand up so it may well be sensible to rise for a short --

MR JUSTICE MARCUS SMITH: That's entirely fair enough. Will ten minutes --

MR FACENNA: I'm sure that would suffice, sir.

MR JUSTICE MARCUS SMITH: These things are being transcribed by arrangement between parties. In other words, we need to have a transcriber break anyway, don't we? We will take ten minutes now.

(11.15 am)

(A short break)

(11.30 am)

MR JUSTICE MARCUS SMITH: Yes, Mr Gregory.

MR GREGORY: Sir, I'm grateful for the short break, which has been very helpful. We have taken instructions on some of the points you raised at the outset. I our understanding is that the carriage hearing determination would be a knockout blow. We think the tribunal could essentially order that.

Both the parties, subject to Mr Facenna's confirmation, will be on record as saying that they are going into the hearing on that understanding, and there are points about

whether it's an appeal or a judicial review from a carriage determination, but in those circumstances I would have thought it would be very difficult for someone to appeal, having lost the carriage determination, on the basis that it was not some sort of knockout blow and that they were therefore entitled to proceed towards the certification hearing nonetheless. That's certainly not the basis we are going into it, and we think the tribunal would have power to order otherwise.

On the timing of the carriage hearing, Mr Facenna can address you but I think there's a difference between the PCRs. Mr Pollack thinks that it would be very difficult to have a hearing before the summer but, as you said at the outset, sometimes the tribunal likes to put pressure on the parties to do things somewhat faster than they would like. We think we could make it work. There are real difficulties. It won't be easy for the PCR teams to come to an agreement. There are several different parties involved: the funders and insurers and so on. Decisions will have to be made about the staffing of the amalgamated team if that is what it is. So it's not easy. And simultaneously the teams will have to be preparing for the carriage hearing. We think it could be made to work. Counsel teams will probably be taking lead in preparing for the hearing, and the solicitor teams will probably be taking the lead in engaging in negotiations along with the PCRs themselves. So we would be happy to do that.

Mr Pollack is acutely conscious of his responsibilities towards his class members. I know in the FX judgment you suggested that the PCRs' responsibilities towards the class were more likely to crystallise only once they've been certified. I think all can say is that that is not how Mr Pollack sees things. He feels under responsibility to them now, and that is in fact one of the reasons why he is open to entering into negotiations with Mr Arthur, to see if it's possible to find a way to progress the claims in a way that promotes the interests of the class members, which are, you know, almost exactly the same across the two claims, in a way that is more economical and

timely.

That takes me on to the third point you raised about the question of appeal, because obviously if one losing PCR appeals that would cause material delay. So there's an open point about whether it's judicial review or appeal, which might affect the appetite of the losing PCR to appeal.

On that, we don't feel able to say that we would not appeal under any circumstance. Obviously it depends on what the judgment says. But Mr Pollack would emphasise that he appreciates that an appeal would significantly delay the progress of these claims, which are seeking to recover damages for his class members, and he would take into account the consequences of the delay in deciding whether or not to appeal were he to lose in the carriage dispute hearing. I think that's probably as far as we can go on that.

MR JUSTICE MARCUS SMITH: Mr Gregory, that's very helpful because I don't think any tribunal could reasonably expect a party, in advance of a ruling, to say that they weren't going to challenge it. That would be improper to suggest and mad to sign up to.

I think the interesting thing about carriage questions is that when they are easy they are very easy, and when they are difficult they are actually very difficult. And this is the lesson that I took from the FX case, because what one had there was two very well put together applications, which we found, as we said in judgment, extraordinarily difficult to separate.

So the easy question is where one has one applicant whose application is so obviously deficient that you can just say, well, you know, you lose, the other side wins, it's obvious. The harder case, which I anticipate is the case here, is where one has two well put together applications, well funded, with good teams, where it is extraordinarily difficult for anyone to determine which should go forward and which should not. And

that, of course, is why we define carriage disputes as narrowly as we do. If both can go ahead properly, then they should. It's only if they can't, because they are both opt out in respect of the same claims, that one has to make a decision. And that of course informs the way in which an appeal is construed. And it does seem to me that the tribunal ought to be making clear that its general position in relation to carriage disputes, if that's the way it's going to be done, is that parties should expect the answer to an application for permission to appeal, generally speaking, to be no, and for the Court of Appeal to act as the corrective in the case of a perverse decision by the tribunal, so that an appeal must be heard. And if that is, as it were, the expectation of the parties, that in the ordinary case -- of course one never says never -- but usually the answer is no, subject to appellate control -- that way one can at least bank, in part, the timing advantages of proceeding swiftly to carriage.

Of course, if things go wrong and the tribunal does make a decision that is arguably perverse, then the delay has to be sustained. And it may be, if that is the pattern of cases going forward, one has to re-think the virtues of a rolled-up approach. But at the moment it does seem to me that that is an advantage of the separating out of the carriage point.

MR GREGORY: Just in terms of how the carriage hearing might play out, I would be grateful if you could turn up paragraph 23 of our skeleton.

MR JUSTICE MARCUS SMITH: Yes, of course.

MR GREGORY: This is really a point of information but I think it's relevant to a number of issues you are going to consider. This section is just discussing the Arthur claim and its relationship to the Pollack claim.

The headline point is that there is a lot more that unites these claims than divides them. Both of them are -- Mr Pollack has an opt-in class of publisher partners. These are people who sell advertising on behalf of smaller publishers who don't have the

scale or resources to do it themselves, and that's a separate small group who doesn't. But other than that, we are both advancing the claims on behalf of publishers, which as far as I can tell from the definitions, will exactly overlap.

So the class is the same, and in both claims the allegations of abuse are predominantly based on the 2021 infringement decision made by the French Competition Authority. The subparagraphs to paragraph 23 identify a few areas where there are differences in the way that the claims have been put. And no doubt if we finish up in a carriage hearing we will both be highlighting these differences and saying, well, our approach is better. But standing back, there are a lot of similarities between the claims, and I think on Mr Pollack's part that's one of the reasons why he is willing to enter into discussions.

So that is why there is an openness to talking because, as I mentioned, it is not guaranteed that the discussions will be successful, because there are difficulties. We just don't know. But it's a possibility.

MR JUSTICE MARCUS SMITH: I mean, I suspect Mr Facenna will want to say something about this, but is there an advantage, if one was to bifurcate, in listing carriage early, simply because it will serve to concentrate the minds?

I mean, I do entirely appreciate that these are very complex matters to put together. The amount of work that is done behind the scenes by the class representative, the funders, the lawyers, you can absolutely take it that we understand the number of moving parts that exist. On the other hand, if one has a date in the diary that is sooner rather than later, at which one or other party is going to drop unless agreement is reached, that does have a certain salutary effect on decision-makers. I mean, if the decision-makers are anything like me, you put things off until you absolutely can't. And the hearing date does have the virtue of ensuring you can't put things off day on day.

MR GREGORY: We agree that listing a hearing will put some pressure on the parties

to conduct their negotiations and that may be no bad thing. I think one of the practical considerations that made us very keen for a timetable to be laid down today is that at the moment it can be quite difficult to get listings for hearings. You have to have a courtroom available. The relevant tribunal members have to be available. Ideally the parties' counsel will be available, though I appreciate the tribunal is not by any means guaranteeing that at the moment, and it's just difficult, and doing this at short notice is almost impossible.

So yes, I think if we could lay down hearing dates. One thing that we can talk about when we get into the sort of nitty-gritty of specific dates is that one possibility is that actually you could list more than one hearing date and give you some options, depending on how things progress.

MR JUSTICE MARCUS SMITH: Mr Gregory, I quite take your point about diaries, courtroom availability and such, but you can take it that we would do our level best to accommodate the parties. If, though -- clearly one can't have a hearing without both PCRs and, query, Google being fairly ready. So in terms of preparation -- let's assume a pure carriage dispute, not a preliminary issue but a pure carriage dispute between PCRs. What work needs to be done on the side of both your client and Mr Facenna's client in order to be ready for that?

MR GREGORY: In terms of preparing for the hearing?

MR JUSTICE MARCUS SMITH: In terms of preparing for the hearing.

MR GREGORY: I think we would envisage that there would be an exchange of written submissions and then exchange of skeletons arguments in advance of the hearing, both simultaneous, by the PCRs.

MR JUSTICE MARCUS SMITH: Right. And what would be the difference between written submissions -- I mean, there will be evidence, or would that be --

MR GREGORY: I think we were both envisaging there wouldn't be, and that actually

it is strongly preferable to try to limit ourselves from producing additional material in general.

MR JUSTICE MARCUS SMITH: So really one is talking about actually maybe one or two rounds of submissions, because if you said exchange, it would be, "Here I am; I'm better than the other side", and then a response knocking on the head why the other side isn't better than you. And that's all that would be required, leaving out of the account, for the moment, Google.

MR GREGORY: Yes.

MR JUSTICE MARCUS SMITH: So again, I'll hear from Mr Facenna on this because there's nothing else from your point of view that would need to be done to be ready for a hearing.

MR GREGORY: The only one caveat to that is, we received a letter from Google a few weeks ago suggesting that certain elements of our claim were liable to be struck out. We are preparing a response to that.

MR JUSTICE MARCUS SMITH: Yes.

MR GREGORY: I think we would want to be able to respond to that, whether by producing a revised pleading if we think it's necessary, or at least explaining why we don't think it is necessary, and to have those reasons taken into account for the purposes of any carriage hearing. And it may be that Google will make a similar point again in respect of the Arthur claim. But in general, I think we are keen to have an order to try to keep things as tight as possible.

MR JUSTICE MARCUS SMITH: Mr Gregory, thank you very much.

I have in mind that you will have quite a lot to say in response to Mr Pickford, and I wonder whether, in terms of the preliminary issue versus self-standing dispute, it wouldn't be better to leave your response to reply. I know exactly where you are coming from but I think Mr Pickford will have quite a lot to say about that. He's

nodding. And quite rightly.

I don't want to cut you short but I do want to enable you to appreciate how best you can help me. I mean, I understand exactly where you are coming from, but I wouldn't want you arguing against yourself, as it were. I'd rather you have something to push against in the form of Mr Pickford's points.

MR GREGORY: Well, I was proposing to address you on the fact that it's entirely consistent with the regime to deal with carriage before certification.

MR JUSTICE MARCUS SMITH: I don't think you need at this stage to address me on that. For the moment, subject to what Mr Pickford has to say, I consider that I have the jurisdiction to either order something as a preliminary issue or as a self-standing carriage dispute or not at all. But I take it from that we are violently agreeing and Mr Pickford will have something to say about that.

MR GREGORY: I'm very happy to do that. In that case, I will just quickly wrap up the more pragmatic timetable considerations.

MR JUSTICE MARCUS SMITH: I'm very grateful. Thank you.

MR GREGORY: If you could go to paragraph 37 in our skeleton argument.

MR JUSTICE MARCUS SMITH: Yes, thank you.

MR GREGORY: That is a very rough indicative timetable leading up to a combined carriage and certification hearing. You can see the problem that Mr Pickford mentioned at the outset, which is that the first real step in the process involves Google producing responses to the two applications. So in our case, as Mr Pickford says, that could potentially be happening at a time when the PCRs are negotiating and there's a possibility of an agreement, which would mean that the claims have to be repeated, and clearly that is not very sensible.

It would also mean that, if agreement was reached, the hearing date that had been listed, whether in January or thereabouts, would probably become unusable and we'd

have to come back and list a new timetable, and probably significant delay would result from that.

MR JUSTICE MARCUS SMITH: Yes.

MR GREGORY: In contrast, if you could look across at paragraph 35, this was a rough indicative timetable for separate carriage and certification hearings. So you can see that the first steps in this process involved action by the PCRs, not Google. And it's in two parts. The first part produces a resolution of the carriage issue by the end of the year. And the second part is then the successful PCR would move forward to a certification hearing and Google would become involved in that process.

If, instead of the carriage issues having to be resolved by the tribunal, the parties negotiated an acceptable arrangement to amalgamate the claims, then the second part of this timetable, including the listing for the certification hearing, may well remain workable.

So that, we say, is one of the key advantages of separating it out. It means the timetable laid down now would remain robust to that possible future development.

MR JUSTICE MARCUS SMITH: Yes, because what you are saying is that either the PCRs reach an accommodation with each other or one is effectively forced upon them by the tribunal by knocking one out and not the other. And subject to the issue about appeal, as you say, you either have an agreement or you have an imposed outcome, but the certification goes on regardless.

And the advantage from Google's point of view is that they know exactly what it is they are contending against. They don't have to say that both shouldn't be certified. One has already departed, and they can focus therefore on why the other should not be.

MR GREGORY: Yes.

MR JUSTICE MARCUS SMITH: That's very helpful. The only other point which I would be grateful if you could assist me on is this. It's implicit in your submissions

that it is possible to decide carriage properly without hearing all the matters that go to certification.

Now, it does it seem to me that there's a great deal in what you are impliedly submitting there, but I think it's worth getting it out into the open as a point on which I want to hear from all of the parties. And that is this:

At the moment, given the decision in Merricks, which of course post-dates FX, it's quite clear that for certification merits doesn't matter beyond the strikeout jurisdiction. At the time of FX, it seemed to us that merits might well assume a bigger role in certification, and that they were also of course more important in the context of carriage, which is one of the reasons we went for a rolled up hearing.

Now the question is, does that make a separation out of carriage and certification more prudent? Because the one thing that carriage is looking at, but certification is not, is, what is in the best interests of the class being represented? And I think it's implicit in your submissions that that is a question that can be resolved without all of the argument on certification and without Google having any significant input in terms of evidence or submissions, because looking at your timetable in paragraph 35 you don't anticipate Google having any particular role in the carriage dispute.

I mean, they can have, but it's not necessary from your point of view. I don't know if you have anything to add to that but, if you do, now's the time.

MR GREGORY: Yes.

So the situation in FX was that the defendants were saying the PCR should be certified on an out-in but not an opt-out basis. And that had the effect of bringing the merits into the carriage dispute to a greater extent, because the strength of the claims is relevant to whether or not certification should be opt out rather than opt in, and therefore that fed through into the carriage dispute because you were thinking about, well, if only one or neither of the claims was certifiable on an opt-out basis, there would

be no remaining carriage dispute. So we say that is the difference.

The number of publishers within the class here is estimated to be in excess of 100,000, and the overwhelming majority of them are likely to have suffered losses only in the tens of thousands of pounds. And the reference for that in the electronic bundle is paragraph 529 of the Latham Report, bundle B, tab 4, 284.

So that's one difference. In terms of the extent to which the merits would feed in where that isn't an issue, there are obviously three central tests we are concerned with. The authorisation test: is it just and reasonable for the applicant to be the class rep? There's the carriage test: which applicant would be the most suitable to be the class rep? And the eligibility test: whether the claims are brought on behalf of identifiable class, raise common issues and are suitable to be brought into collective proceedings.

So the tests are different, but in FX you said that whether carriage should be determined prior to certification depended on the extent to which the considerations relating to the authorisation and suitability test would also be relevant to the carriage test. And you may be familiar with your own reasoning, so I don't know if you want to turn up the --

MR JUSTICE MARCUS SMITH: I think you can take it that I am very familiar with it.

MR GREGORY: Then just for the transcript reference, it's at paragraphs 58 to 63 of the final carriage and certification judgment, which is at bundle F, tab 3, page 115, and it's paragraphs 58 to 64.

In essence, your approach was that one had to be careful before separating considerations of carriage, because some of the authorisation and eligibility considerations were potentially relevant. In particular, how the two claims are framed -- so the nature and scope of the claims -- and the appropriateness of the litigation claim.

So at a high level there are two possibilities. One is to say that those issues are

certainly not relevant to carriage; it's an entirely separate test. But that isn't the approach that has been taken in the cases to date, and I think it is actually quite difficult to maintain that you can assess who is the most suitable without having regard to any of the considerations relevant to authorisation and eligibility.

However, what can be said is that although some of the considerations will also be relevant to authorisation and certification, that does not preclude them from being considered at an earlier carriage hearing on the more limited or different basis. One possibility here is that only a subset of the considerations which are relevant to authorisation and certification are relevant to carriage.

And in your FX carriage timing judgment you acknowledge that a natural reading of the provisions suggests that only the authorisation criteria are relevant to carriage. There are arguments against that. But anyway, I think it's correct that that is one possible reading of the provisions.

You also noted -- and actually I might ask you to turn this up. The judgment is at bundle F, tab 2 of authorities bundle.

MR JUSTICE MARCUS SMITH: Yes, I have that.

MR GREGORY: Page 49. So this is a section where you were discussing the Canadian jurisprudence. In subparagraph (v) on page 49 you are discussing recommendations which were made by the Law Commission of Ontario. I'd be grateful if you could just read to yourself the quotation, running from "The LCIA agrees", just over the page to the final bullet on the next page. **(Pause)**.

MR JUSTICE MARCUS SMITH: Yes. Thank you.

MR GREGORY: So the LCIA's recommendation was that only a limited set of the criteria should be considered when determining carriage. And I would just note, because I'm going to come back to it, that one of them was the chances for success at certification. The CAT guide also highlights a subset of criteria that are most likely

to be relevant to carriage.

The relevant paragraph is paragraph 632. It's not, I think, in the bundle. You will obviously soon have it in the Purple Book, but I'm just proposing to read it out.

MR JUSTICE MARCUS SMITH: Of course.

MR GREGORY: So 632:

"The third factor relevant to the assessment of the proposed class representative applies where more than one applicant is seeking approval to act as the class rep for opt-out proceedings in representative of the same or overlapping claims. In such a scenario, the tribunal will consider who would be the most suitable representative. Rule 78.2(c). The tribunal will seek to arrive at a decision which is in the best interests of all class members and is fair to the defendants. The factors that are likely to be relevant to this assessment include the proposed class definition and the scope of the claims, the quality of the litigation plan referred to above and the experience of the lawyers and competing proposed class representatives."

So again, it's only a subset. And if only a subset of the authorisation and eligibility criteria are applicable, that makes it more manageable and economical to separate them out to a carriage hearing.

The other key point is that even if some of the same considerations are relevant at both stages, they do not need to be considered by reference to the same test or in the same level of detail at both stages.

In the carriage hearing, the only test the tribunal will be applying is which class representative was the most suitable. Even if some of the other considerations are relevant, they would be being considered for the purpose of applying that test, rather than a statutory test set out specifically for authorisation and certification. And nor would these overlapping considerations need to be considered in the same level of detail at both stages.

MR JUSTICE MARCUS SMITH: Mr Gregory, I think that must follow, because if we were in any way approaching a decision on either of the eligibility or the other criteria, then Google would have to be present. So the carriage dispute would have to be resolved explicitly on the basis that it was entirely without prejudice to anything that was going on in certification. And all the tribunal would be doing would be clearly not disregarding what is relevant for certification but would be applying a rather broader brush to working out which of the two contenders ought to proceed, entirely without prejudice to whether, come certification, those criteria were or were not met.

MR GREGORY: Yes. And there are obvious analogies. Application for strike out or application for interim relief are carried out on very similar basis.

MR JUSTICE MARCUS SMITH: Yes.

MR GREGORY: And obviously if you are determining something with a much broader brush there are potential downsides to that. But obviously there are potential upsides as well. These interim applications won't be taken on the same level of informed basis as at the final hearing, but they play a valuable and legitimate role in the process, as can separate and earlier carriage dispute hearings.

MR JUSTICE MARCUS SMITH: So in a way, Mr Gregory, that feeds into the appeal question we have discussed a couple of times. If one is saying that the lens through which one sees the carriage arguments is actually altogether more distant than the more granular unpicking on certification, then of course one couldn't, on appeal of a carriage question, say, "Oh, but the tribunal did not have regard to this particular detailed point which might or might not be relevant on certification", because it simply would not be on the radar at the carriage stage.

Have I articulated the point you are making correctly?

MR GREGORY: Yes. I understand.

MR JUSTICE MARCUS SMITH: I'm grateful.

MR GREGORY: And just stepping back a little bit, it's worth bearing in mind the implications to the regime. There are cases -- I made the example of applications for interim relief -- well, one can imagine a case where you might have a potential claimant who thought they were in the right, but if you told them the only thing they were going to get out of this was a final judgment three and a half years down the line, they wouldn't be interested in going forward because then they need a more rapid solution and it's critical for them. And if that were the case, they might simply not try to vindicate their rights.

There's an equivalent here, because people who are -- the regime in general is thought to be beneficial because it allows the vindication of claimants' rights to a greater extent, particularly large numbers of claimants who have suffered small loss, and as a result of that provides greater incentives for potential defendants not to engage in unlawful conduct.

The people who are considering funding these claims are obviously very interested in how quickly the claims progress and what the costs are. The costs, as I understand it, that resulted from having a combined hearing were very significant. And you can see that funders might have more enthusiasm for funding these types of claims if there's a way in which to avoid those costs being avoided in cases where there's a carriage dispute.

If I can just finish with one slightly more reflective submission. You might have noticed that in paragraph 28(b) of our skeleton we submitted that useful lessons are more likely to be learned if in this case the tribunal took a different course to the one that was taken in FX, and ordered carriage to be determined first.

I'm aware that that's a slightly unusual submission for a lawyer to make. We normally attach considerable weight to precedence, so it's much more common for a lawyer to submit: well, we will do X because X is what was done before rather than do X because

that isn't what was done before. But we are in a new regime and we are feeling our way, and appellate judgments are obviously useful, but so too is the practical experience of applying the rules in different ways and trying different approaches. Someone defined insanity as doing the same thing over and over again and expecting a different result, or you might define it as doing the same thing over and over again and expecting to learn something.

There is a possibility here, being conscious that it's a new regime, to try something different, and we might learn a bit more about what works best in these types of cases. Sir, unless you had anything further, those are my submissions.

MR JUSTICE MARCUS SMITH: I am very grateful, Mr Gregory. I have raised the points I had. Thank you very much. Mr Facenna.

Submissions by MR FACENNA

MR FACENNA: I should say Mr Arthur is obviously very grateful for the opportunity to be heard today, and indeed for the adjusted timetable which enabled us to go and look at the parties' skeletons and put it in our short written submissions, which I hope are helpful in setting out Mr Arthur's position.

The up-to-date position on Mr Arthur's claim is that all defendants have now been served, including in the United States and Ireland. So subject to receiving all of the acknowledgements of service, which will happen shortly, I imagine, we're in a good position to move forward expeditiously, and obviously the parties, including Mr Arthur, are under an obligation to co-operate with the tribunal to make sure that the proceedings do proceed in a fair and expeditious manner.

We've dealt with whether there should be timetabling today. The question then arises whether we deal with carriage separately from certification, and I'll address the various points that you put to us this morning.

Mr Arthur's position was explained in Hausfeld's letter to the tribunal and parties on

15 May, which you will have seen. Essentially, our view, which happily reflects the view that has been provisionally expressed this morning, is that whatever happened in FX and Trucks is not necessarily the right approach for this case. Those decisions were, as you said this morning and as you observed, taken before the Merricks decision, and in any event in Trucks there was an agreement that it made sense to deal with all of it together.

Whatever the Court of Appeal might say in either of those cases, the basic position we see is that the tribunal has a broad discretion on this question, and there will be cases where it is sensible and efficient to deal with carriage and certification together, and there will be cases where the right course is to deal with carriage separately at the outset. The way that we would characterise it is as a case management decision, effectively. It is not a preliminary issue, it's a threshold or gateway question that arises under rule 78 discretely.

Indeed, in some ways the approach or the reasoning in both FX and Trucks lent some support to that view, because if one goes back to the certification judgment in FX, not the original judgment on carriage, it seems to us that the tribunal's thinking had moved on somewhat. If one goes back to that judgment and looks at in particular paragraphs 58 to 64, the tribunal there sets out which aspects of the authorisation or carriage issue and the eligibility conditions contain relative elements, and which are not relative elements, so in a way that provides a road map enabling the tribunal to separate out its consideration of carriage from certification, and identifying how carriage can be addressed as a discrete issue.

MR JUSTICE MARCUS SMITH: Indeed. I think, Mr Facenna, you have made a very good point there. The prism through which we were seeing matters at FX was as a preliminary issue. That was how it was argued. The one thing one asks about preliminary issues as a court is: can the preliminary issue sensibly be detached from

the other issues that arise? The reason we obsessed a little bit about the relationship between the two conditions was because it didn't seem to us that they could actually be detached, in that one couldn't really decide the eligibility condition absent the authorisation condition or vice versa.

That's why, if I could put my cards on table, I regarded Mr Gregory's point that it's actually a different question as rather significant, because if one is saying, look, there may be some overlap or commonality between eligibility and authorisation and carriage, at the end of the day one is asking altogether different questions in carriage terms than one is later on in eligibility and authorisation terms, then it ceases to be a preliminary issue and it becomes an altogether separate issue, where the interests are entirely different and arise really only between the PCRs.

If that is the way one sees it, and one doesn't have to see it the same way in each and every case, in FX I think the parties were very much focused on what the conditions meant, and their submissions on carriage were rather tied to their submissions, particularly on eligibility.

Now, I'm detecting a distinct detachment in terms of how Mr Pollack and Mr Arthur are approaching it here. What you are saying is, look, come what may, eligibility and authorisation are going to have to be argued about at certification, and one needs to see what Google say about that, as is their absolute right. Anterior to that, there is a question that might be seen as superficially similar, but it is in fact very different, it is just: which one of those two applications should go forward?

That is the question, entirely detached from certification, that the tribunal must answer, and there's no good reason not to answer that first and several good reasons to answer it first. I think that's where you are both coming from.

MR FACENNA: Yes, precisely. At best what one might say, which is sort of where the tribunal seems to end up in FX and Trucks, was that you can't say that there's a

complete separation, because obviously some of the certification issues do need to be considered in some form at the carriage stage, but they're looked at through a different lens in a sort of relativistic way, I think is the way that the tribunal puts it.

Indeed again, after FX, if one comes back to look at the Trucks judgment, there the decision was everyone agreed you should deal with it together, but actually again if you go back to the Trucks judgment, the carriage question is really dealt with quite separately and discretely. It's paragraphs 197 to 231 in the Trucks judgment. In Mr Pickford's skeleton the suggestion is made that -- well, there's some reliance placed on the direction for a combined hearing in Trucks, and indeed reliance I think on the order rather than any aspects of the reasoning. That's a bad point, obviously, because there was no dispute about it, but again, when you come to look at the substance of what was actually done in Trucks and the reasoning, it is at best a subset of the certification issues, but dealt with in a completely separate way through a different lens.

As I think you've implied, or indeed stated even, provisionally, that leads then on to the question of appeal, which you have raised. If it is purely a case management decision, it would follow that one might be looking at judicial review rather than any right of appeal. It's been very helpful to hear that no one is being expected to sell the past on anything this morning, and I know that issue wasn't really resolved in FX.

Our position on that question is, if there is going to be right of appeal, whether it's judicial review or something else, best to get on with it straight away. If someone is going to appeal that decision, and I heard what Mr Gregory said, I'm not sure Mr Arthur would necessarily disagree with any of the description of Mr Pollack's position, in particular his view about taking into account the best interest of the class, but if someone wants to appeal that decision, best that they get on with it early, and then of course in parallel the tribunal will be able to manage what's happening with the rest of

the timetable, including on the certification issue.

So I hope that's a clear answer to those two points in terms of the characterisation of the decision, and the question of appeal.

In this case, we say that it is an appropriate case and it is sensible to deal with it in the way that the PCRs are proposing. The two claims are overlapping to a significant extent. They are similar in some respects, or many respects, albeit that Mr Arthur's claim in particular has a substantial aspect to it, you may have seen, in relation to the demand side platform market that's additional to Mr Pollack's claim, and there are certainly aspects of Mr Pollack's claim that are not necessarily mirrored in our claim.

But overall, the issues relevant to carriage we say could be quite focused and could be determined at a relatively short hearing, which as you may have seen, in accordance with our proposals, would be based on the applications as filed, so no further evidence from anyone. We would allow for an exchange of written submissions in advance of that and skeleton arguments, and I will come in a moment to the timetable for that. Then we suggest that it would be sensible to make some provisions for a joint expert session in the event the tribunal wishes to put points to the experts in respect of their preliminary reports.

Now if it's done in that way, we say it can be listed without too much delay, allowing time for the parties, including Google, to the extent it wishes to participate and the tribunal considers it valid for Google to participate, to prepare for that hearing.

We did have some discussions about timing in response to the indication you gave about summer. Our position is that it wouldn't just be ambitious, but it would be a mistake to seek to bring this forward to be dealt with in July. We're already at the end of May. It is very complex. There have been some very preliminary discussions, it's in the open that both parties are open to exploring the possibilities. We have not yet been able to exchange unredacted versions of all the documents, including funding

documents, although it's hoped that that might be dealt with through the confidentiality ring.

But behind that there are the insurers, there are the funders, there are several law firms involved, there are two large counsel teams, and there are two sets of experts, and you won't have had the opportunity to look yet, but there are significant differences of approach as between the experts. In order to get to somewhere where we find a way to collaborate or amalgamate the claims, it's going to be complex, it's going to take some time.

MR JUSTICE MARCUS SMITH: I understand. So, Mr Facenna, your point is it's not, as it usually is, the preparation for the hearing that is the problem, you can get a hearing up on carriage very quickly, it is the mechanics of ensuring that if an accommodation is to be reached it is done in a manner that is best suited for the class that both want to represent, and that is something that one can't squeeze into a month and a bit?

MR FACENNA: Yes. Insofar as that is one of the major benefits that we are suggesting might arise out of the timetabling ...

MR JUSTICE MARCUS SMITH: One shouldn't lose that.

MR FACENNA: The problem with doing it too quickly, is that our fear, aside from the complexities -- and by the way there are serious availability issues with both experts and all the legal teams and so on doing it in July -- but the fear is that you will push us into a position where we will have to get straight into the dispute, rather than trying to find a way to resolve the dispute and avoid one.

So it might be a case of making hay slowly in this case. And not too slowly, our proposal is early October, and we think that allows enough time for parties to get on with it. Of course it's in the interest of both PCRs to do it as quickly as possible. But there are significant issues to discuss and get forward and --

MR JUSTICE MARCUS SMITH: No, that's very helpful, Mr Facenna.

Again, subject to anything that Mr Pickford says and maturer consideration on my side, that seems to me to be the decisive point about timing. One doesn't want to bring a carriage dispute on for the sake of having a carriage dispute, if it can be avoided. If you are telling me, and I'm sure Mr Gregory will say if he disagrees, you are telling me that there is enough time to accommodate both parties having a discussion in running it to October rather than running it to, say, the end of July, then that is something which has considerable weight in my thinking.

I'm rather less persuaded by the question of availability of experts, still less availability of counsel, but I would hope, in contradistinction to what may be the case in certification, that carriage would be dealt with without -- unless, exceptionally, the tribunal indicated the need -- further expert involvement beyond what they have said in application.

It does seem to me -- and I recognise I'm probably echoing Lord Templeman on jurisdiction questions -- that carriage disputes ought to be resolved in a matter of hours, not days, and one of the virtues of what you are suggesting in bifurcating carriage and certification is that carriage can be done not merely quickly, subject to reaching accommodation, but also shortly in terms of the hearing.

I know the parties have raised the prospect of a two-day carriage hearing. My thinking, I must say, would be very much along the lines of a single day. Obviously, we would have the materials and the submissions in advance, but one would hope that this point can properly be articulated and dealt with in a day.

MR FACENNA: Yes.

MR JUSTICE MARCUS SMITH: With judgment to follow.

MR FACENNA: To some degree we are at a preliminary stage of our own thinking, because we have only really just started to see each other's materials and so on,

I think the thinking on the experts was that -- focusing on the carriage issues, i.e. suitability, interest of the proposed class members, it may be that the tribunal wants to explore to some degree the difference of approach on quantum and on the markets and on the scope of the claims and so on. It might be helpful to at least be able to put some questions to experts jointly. Our thinking hasn't really gone further than that. But I hear what you say on the question of timing.

So we do say that if it's done in this way, it will help to ensure that wasted costs are minimised. I have made the points arising from FX and Trucks that really deal with a subset, at best, of the wider issues that need to be considered in more detail at the certification stage. So to the extent that there are certification issues which are either irrelevant or at best neutral to carriage, it's obvious in a sense that there will be savings in time and costs if those issues don't have to be addressed by the tribunal, by a PCR and by Google in relation to a claim which is ultimately going to lose out in a carriage dispute.

We do all want to get on with it, and the suggestion of having the carriage hearing in particular is both to focus minds and to keep it in the diary should it be necessary, because given the complexities I've referred to, it might be that we get part of the way, or there are some issues that need to be resolved, and of course the tribunal will in any event have to be satisfied itself in relation to any proposals that come out of the discussions.

So the hope is that if we set the timetable in this staged way we'll have the discussions, either we will have the carriage dispute in October if we need to, otherwise we will have a hearing in the diary, and either the tribunal can endorse the position or make new directions in relation the claim being re-pleaded, or whatever needs to happen on the subsequent stages.

So the genuine view of Mr Arthur is that dealing with it in that way is in the best interests

of the proposed class members, because matters will be moved along, it will focus minds to see if there's an alternative way through carriage, and if there isn't, well, one way or another we'll know the settled position by the end of the year.

Now, in relation to Google's position, to some extent we await to hear what Mr Pickford says. We think it's difficult see what real prejudice there is to Google in relation to this. It's going to save time and costs by only having to produce a single response at certification stage, when we get there. The impact on the overall hearing is not going to be significant, we say, in the grand scheme of things. It may be that a second CMC could be avoided altogether.

Ultimately, when it comes to this question of Google's participation -- I know that this arose in FX to some extent, and I think there was even suggestion that there might be a closed hearing there, where the banks didn't see some of the material and submissions that were going between the PCRs. You may have seen that in correspondence we suggested that Google would have a limited role. I think we said something like it should be limited to matters which relate to funding and arrangements for adverse costs, since those are the only matters that would actually be particularly relevant to Google's interests.

Having heard the debate this morning, we didn't put it that way in the skeleton argument, our position is that there isn't necessarily a hard-and-fast principle that needs to be established here along the lines that this is a decision in which no proposed defendant will ever have a role to play. It's obvious that Google must have a limited role in relation to the question of carriage, not least because Google's interest in a way would be to have the weaker claim certified, so it's a direct conflict of interest in relation to the very question the tribunal is seeking to answer, which is what's in the best interests of the proposed class members.

Our position is that carriage should be properly focused on the issues that arise under

rule 78. There are ways in which participation could be limited; one could set a low page limit on submissions, one could make it very clear that these were the issues that had to be addressed as a matter of carriage, and ultimately one could take a view as we get closer to the hearing.

So our position is it's really for Google to decide whether it wants to participate at all, but one must obviously bear in mind the scope of the issues at that point and the extent to which it really has something valid to say in relation to the questions which really arise at that stage.

MR JUSTICE MARCUS SMITH: That's helpful, Mr Facenna, but just to be clear, you are not envisaging at the carriage hearing either PCR articulating matters which couldn't be heard in open court by everyone? In other words there wouldn't be a suggestion that the parties would open up to the court, frankly, their privileged thinking in terms of relative strengths, because that creates more problems than it solves, both for the tribunal and for parties.

MR FACENNA: I understand that. I simply mentioned it because I know it was something --

MR JUSTICE MARCUS SMITH: No, I'm very grateful it's important to have these things out there.

MR FACENNA: It brings me to some practicalities, which we'll probably come on to in due course anyway, but one of them is the confidentiality ring. I think the proposal, which I understand is not really in dispute, is that there should be a tripartite confidentiality ring, and the expectation at the moment is that all of the unredacted documents would go into the confidentiality ring. There may be a different approach to be taken in due course as to what stays in the ring and what comes out of it, but at least for present purposes that's the proposal.

MR JUSTICE MARCUS SMITH: Yes. So it really boils down to this: there's no

problem in Google fully participating, the question is much more to what extent can a defendant in collective proceedings, where there's a pure carriage dispute, helpfully assist the tribunal in reaching the correct decision regarding carriage. That is not a question of confidentiality or protecting information, it's more a question, as you said, of the conflict of interest that exists.

MR FACENNA: Yes.

MR JUSTICE MARCUS SMITH: In terms of a defendant really not wanting to have either party carry on against it.

MR FACENNA: Quite, yes.

MR JUSTICE MARCUS SMITH: And therefore that in and of itself acts as a limit to the extent to which a defendant, acting properly in his own interests, can actually assist the tribunal on the question of carriage.

MR FACENNA: Yes. To put it another way, nobody gets to choose who sues them, effectively.

MR JUSTICE MARCUS SMITH: Yes.

MR FACENNA: So it's interesting to think that that's an issue on which Google is really anticipated to have some strong or valid or relevant views, bearing in mind the conflict of interest question and the focus of what's being decided at the carriage stage. Those are my submission on those issues.

There are one or two points about the timetable. I think we have been discussing the two first weeks of October. We actually have a problem with the first week, so in an ideal world it would be in the second week. If it turns out we are only looking at one day, maybe that's helpful in that respect.

There's a question of notice and publicity which arises. There's some provisional agreement for that. I think the view on this -- well, our position is that it might be better to put that off altogether until after carriage.

MR JUSTICE MARCUS SMITH: Well that was, I must say, my thinking, if carriage was to be separated. It would be very confusing to have, as it were, publication of a proposed class action when the deckchairs might be thoroughly rearranged between the publicity and carriage decision.

MR FACENNA: That aligns with our view, or at least there needs to be some thinking done as to how it's done, jointly or in parallel, if it were to be done before carriage.

The final point, sir, is our view is that there would seem to be a good prospect of avoiding the need for a CMC at all in the Arthur claim. Subject to what is decided today, we anticipate that we will be able to agree parallel directions in the Arthur claim, and if we are not able to do that, we could let the registry know as soon as possible if we do need a hearing, but we don't think that that will be necessary.

Sir, I hope I have addressed the issues on which you wanted to know our position.

MR JUSTICE MARCUS SMITH: Thank you, Mr Facenna, that was very helpful indeed.

As I said with Mr Gregory, I suspect you may have more to say in reply, because a lot of the issues that we are going to have to grapple with need to be unpacked by Mr Pickford. Just so that you are clear, it seems to me that when we are having replies, it probably should be you first, followed by Mr Gregory, because I'm very conscious that this is his application and he ought to have the last word. So if you can plan to go first in response to Mr Pickford, and Mr Gregory, you then have the last word, I think that's the appropriate order. Thank you.

Mr Pickford, we had a break, it was quite early. I don't know if we ought to rise for five minutes just to enable the shorthand writer to catch his or her breath. We will do that. We will resume then at 20 to, thank you.

(12.31 pm)

(A short break)

(12.40 pm)

Submissions by MR PICKFORD

MR JUSTICE MARCUS SMITH: Mr Pickford, just for your timing, we have been going on for a bit. I think if you want to go on till 1.15 then do feel free.

MR PICKFORD: Thank you.

MR JUSTICE MARCUS SMITH: We will have three-quarters of an hour for lunch and we'll get a bit of extra time in.

MR PICKFORD: Thank you, sir.

My submission is that I'm going to seek to persuade you that a carriage hearing does in fact involve a preliminary issue, that that's the right characterisation in law, and that whilst there might in theory be some cases where such a preliminary issue is justifiably listed as a separate matter, they will tend to be rare, and most importantly, the tribunal is not in a position now to conclude that it will be appropriate in these proceedings, because the tribunal doesn't know the nature of the interrelationship between the various issues that will arise. Therefore the only way that the tribunal could make an order now for such a preliminary issue would ultimately be to commit an error of law in relation to the correct characterisation of the regime.

I'm going to take the tribunal through what I say is the regime, how it applies, and in the light of that, my submission will be sure, there might be -- let's give an example. There might be two claims where one of the proposed representatives has a criminal record and no funding, and it is plain for everyone to see, and the other representative says so, well this simply should not be allowed to continue, it's obvious. There's no interrelationship with anything else in these claims, let's just get that cleared off, and they can go home. That might be an example where you could order such a preliminary issue, because it is sufficiently clear to all the parties that there is no problem from doing so.

But we do not have that level of clarity in these claims now. That's the point I'm going expand on.

MR JUSTICE MARCUS SMITH: Yes.

MR PICKFORD: In my submission the question of which application is better, which is the supposed common carriage issue, arises in the context of a multifactorial assessment of authorisation under rule 78 and actually ultimately 79 of the tribunal's rules. It's interrelated with eligibility. We say in the general case it's not appropriately separated from other issues, even if there might be particular examples, and you can only, I say, accede to this application if you are able to say in a general case it can happen, because we don't yet know the specifics of the issues that are going to arise. If I might start, Mr President, with the CAT rules, which we can find conveniently in bundle F. They are referred to in the first of the FX judgments on page 59 of the bundle.

MR JUSTICE MARCUS SMITH: I have them separately as well. What is the rule number?

MR PICKFORD: I'm going to begin with the authorisation condition in rule 78.

MR JUSTICE MARCUS SMITH: Yes.

MR PICKFORD: That provides, 78, I'm focusing in particular on:

"The tribunal may authorise an applicant to act as a class representative ...

"(b) [the crucial one for my purposes] only if the tribunal considers that it is just and reasonable for the applicant to act as a class representative in the collective proceedings."

Sub (2):

"In determining whether it is just and reasonable for an applicant to act as the class representative, the tribunal should consider whether that person (a) would fairly and adequately act in the interests of class members; (b) does not have, in relation to the

common issues for the class members, a material interest that is in conflict with the interest of class members; (c) [and this is where the issue of carriage comes in] if there is more than one applicant seeking approval to act as the class representative in respect of the same claims [who] would be most suitable."

Then, critically, we see at subparagraph (3):

"In determining whether the proposed class representative would act fairly and adequately in the interests of the class members for the purposes of paragraph 2(a), the tribunal shall take into account all of the circumstances, including ..."

So there's a list of circumstances that are expressly relevant, but plainly, as the case law makes clear, the tribunal has a broad discretion, can take account of all of the circumstances that appear to it to be relevant in determining whether a class member would or would not act fairly and adequately in the interests of the class members.

In my submission, the issue that one is concerned with under 78(2)(c), the relative exercise of comparing one applicant to another, is bound up with and goes back to the question of acting fairly and adequately in the interests of the class members. The question ultimately is: who going to do that the best? That question takes account of all of the circumstances. So that's the starting point.

We say it would be wholly contrary to the entire sweep of jurisprudence in relation to CPOs that emphasises the holistic, multifactorial nature of the assessment of certification, to pluck out one aspect of it and call that a carriage dispute and determine that independently, apart from, as I said, in the exceptional case.

If we could go, please, to the judgment of Lord Briggs in Merricks. We are going to have to hand that up, but it's hopefully a familiar case.

MR JUSTICE MARCUS SMITH: It is certainly familiar, but it would be a pleasure to see it again.

MR PICKFORD: We are not going to be here long, but just for a statement of principle.

If you turn, please, to paragraph 64. This is Lord Briggs's judgment for the majority. At the bottom of the page, paragraph 64 on page 308 of the report, we see the statement:

"I regard the question of certification as involving a single, albeit multifactorial, balancing exercise in which too much compartmentalisation may obscure the true task."

That is the only sentence I rely on from Merricks, but it's very important. Determining which proposed class representative would better represent the interests of the class we say has no independent life or purpose. It arises exclusively in the context of certification. Therefore my learned friends were wrong when they suggested to you that it was basically a prior question. It's not a prior question. It's all part of the certification issue.

For that reason, it will be essential for the tribunal to know, when it is considering the carriage issue, what it is being asked to compare. What's the shape of each of the claims? What's its scope? What is the cogency of the evidence in support of each of those claims? I'm going to come on to show you how those are relevant issues when one comes to balancing one claim against another when they are vying for carriage.

What that means is that it's inherent in the task for the tribunal to come to a clear view on the extent to which each claim would be certifiable at all, and if so, the relevant merits and demerits of the applications.

Before coming on to some specifics, I'd like to just consider what the situation would be were it otherwise. Suppose we have this carriage hearing, independently of certification --

MR JUSTICE MARCUS SMITH: Just pausing there, Mr Pickford, just so I have your point on board. Do you mind if I re-frame it and you can tell me how far I've got it wrong?

MR PICKFORD: Of course.

MR JUSTICE MARCUS SMITH: You say that carriage is a criterion that goes to certification, rule 78(2)(c).

MR PICKFORD: Yes, it's part of the assessment.

MR JUSTICE MARCUS SMITH: Part of the assessment. So the only way in which one can treat the 72(2)(c) issue, the carriage question, is if it is properly susceptible of being framed as a preliminary issue.

MR PICKFORD: That's right.

MR JUSTICE MARCUS SMITH: And, given its intertwinedness in the other factors that go to certification, in most cases it can't be. It may be that there are some, your exceptional case, but most cases, because it's so embedded, you can't as a matter of law properly push off a preliminary issue, because it won't meet the general criteria of a preliminary issue, which is that there is an element of detachment, maybe an asynchronous detachment, but nevertheless an element of detachment from the main issue.

MR PICKFORD: Sir, that, if I may say so, eloquently summaries my submission on that point.

MR JUSTICE MARCUS SMITH: Thank you.

MR PICKFORD: What I was about to posit was, assuming against me that in fact we are going to have this separate carriage dispute, and suppose that in that carriage dispute the tribunal says, okay, well we actually might prefer the look of claim A, let's say for the sake of argument it's Pollack. This is literally for the sake of argument, we think actually there's very little between them, they are both brilliant legal teams, they are both well funded, they both have great economists, have to decide somehow. One of the ways we actually think we are going to decide is because we can see that Pollack has, it says, a methodology for getting much greater damages than Arthur,

and we think that if they are right about, then they should have the opportunity to do that, then that will lead to greater compensation, a better result for consumers. So we are going to prefer the Pollack claim over the Arthur claim on that basis. So let's suppose that.

Then let's suppose, because of course I think what the tribunal is contemplating is entirely without prejudice to certification, we then have a certification hearing. We then come along at certification and demonstrate that this separate element of the claim that Pollack had, that allegedly gave rise to greater damages, is strikeable. It's simply they were right in the Arthur claim not to have it, because it doesn't make any sense, or there's no sufficient blueprint for it to proceed, or some other way. And so we eliminate that consideration, which at stage one was the very consideration which led to one claim being preferred over the other.

MR JUSTICE MARCUS SMITH: You might even have a strikeout application heard at the same time as certification.

MR PICKFORD: Yes. And so we say that would make a mockery of the tribunal's earlier decision that it prefers one claim over the other, because that decision was in fact taken on the wrong premise.

So the situation we are in now is that we cannot rule out that type of issue arising, because neither of the PCRs has told us, well this is full extent of all the issues that will arise on carriage. They haven't told us at all what potshots they are going to take at each other. We, for our part, haven't yet had an opportunity even to really consider the Arthur claim to work out where we think the problems in that claim lie.

So in my submission it would be premature -- I mean, obviously my general submission is this is an area where the tribunal should tread very, very nervously altogether. It would be a rare case when it can do it. But certainly now it would be premature to make such an order, because we simply don't know what the issues are

and the extent to which there will be an interrelationship between them, and therefore this is a prime example of where one would not want to order a preliminary issue, because, as the tribunal is well aware, the core criterion for a preliminary issue is that it needs to be determinative, and it needs to not involve a read across into other issues that are yet to be determined.

With that general submission, I would like then if I may to go to some of the authorities. I am going to start with Trucks, which is in the authorities bundle at tab 4. As Mr Facenna noted, he said the section on choice, that is effectively the carriage issue, begins at paragraph 197 of the judgment. That's on bundle page 419, external page. Where Mr Facenna was, I'm afraid, entirely wrong is in suggesting that that was a separate analysis that could be divorced from certification. It wasn't separate at all. When one reads it, one could can see that in fact they are entirely integrated.

We begin at paragraph 197. This is obviously comparing the UKTC and the RHA:

"Having concluded that the claims are in principle eligible and suitable for inclusion in collective proceedings, it follows we have to determine which of the two applications before the tribunal is preferable."

So one sees at that point the way that the tribunal has structured it. First they are saying, okay, what are we dealing with, is each of them in principle certifiable? That becomes very important later on, because it actually knocks corners off certain of the applications to make them certifiable, and it compares two types of application that it would be prepared to certify. Not just two applications on their face.

We then come to class definition. At 199, the tribunal notes:

"The classes encompassed by the UKTC and RHA applications both omit different categories of potential claimants."

The nub of that is in 203, where we see that:

"... the UKTC action does not include any purchasers of used trucks whereas the RHA

class comprises acquirers of both new and used trucks."

So that was something that the tribunal thought was a difference, claimed was a difference. Then at 204, we see the tribunal's views in the light of that difference. It says:

"UKTC's justification for excluding claims for used trucks is that it limits the claim for loss to one claimant per truck and so avoids conflicts within the class. We address the conflicts issue separately below and conclude that for the RHA opt-in class the presence of both new and used trucks does not give rise to such conflict as to preclude the grant of the CPO. If [I emphasise the word if] the conflict problem is not a valid objection, then we consider that the inclusion of used trucks is a significant advantage of the RHA application as it will enable a large number of potentially affected SMEs to pursue their claims."

So what one sees there is that there is a preference for the RHA. The preference for the RHA's claim on that criterion depends on the tribunal's conclusion, which we will come to, about a certification issue, namely whether there is a conflict that precludes certification of new trucks and used trucks in the same class.

May I continue with that? I just wanted to check that there was no point arising from it --

MR JUSTICE MARCUS SMITH: No, no.

MR PICKFORD: -- that you had a question for me for.

So we then have the run-off period, where they compare the run-off periods that have been claimed, or it is proposed that were claimed, in each of the applications. What the tribunal says over the page at 208 is:

"In our view, neither approach to run-off is satisfactory."

Then at 212 it says:

"In our judgment, it is necessary to reach a view for to the purpose of certification and

avoid an over-broad class definition."

Then, concluding on the issue of run-off, at the end of paragraph 213 it says firstly, we are effectively telling the RHA that they need to cut down their run-off period, we don't like their long run-off period and we're not going to certify a long one, but if they cut it down, then on that basis we prefer their claim, because there are advantages in relation to how they have approached run-off as opposed to the UKTC.

So again their view on the comparison of each of the applications is depending on a deeper level assessment that the tribunal has come to in relation to the relative merits of the claims. Again, expert methodology, the same point arises. That is at paragraph 216. The tribunal prefers the expert methodology of Dr Davis for the RHA to that of Dr Lilico for the UKTC, so necessarily borrowing from an analysis that it had to go into for the purposes of certification.

Then we see the conclusion at 231 that:

"Taking all these factors into account, we have reached the clear view that the RHA opt-in proceedings are preferable to the UKTC opt-out proceedings, or even to the UKTC proceedings on an opt-in basis. However, that conclusion is based on a determination that the RHA action can comprise both new and used trucks, a question to which we now turn."

So illustrating very clearly there the interrelationship between those issues; the comparative assessment for the purposes of carriage, depending on the absolute assessment of a certification issue going to conflicts.

That illustrates from the Trucks case why the issues were highly interrelated. I don't want to spend a lot of time on FX because obviously I know, sir, that you are very familiar with it. I think it may just be potentially helpful just to remind yourself of a few paragraphs which we say are of general applicability, if that's okay. If we could start, please, with the decision on the preliminary issue which is at F2.

MR JUSTICE MARCUS SMITH: Yes.

MR PICKFORD: We were taken to this before. We were taken indeed, too, starting at page 48 at paragraph 39, where there's a comparison with the Canadian approach, and then what the tribunal goes on to say is, well okay, we've seen what Canada does, but there's some cautionary notes, and the tribunal noted areas of concern with the Canadian approach, which was in fact to determine carriage first.

Then what one sees in the judgment at the end of 42 on page 54, is the statement that:

"It seems to us to border on the irrational -- given that the object of a carriage dispute is to identify which representative will best represent the class in pressing the claims of that class -- to leave out of account factors going to exactly that point at the carriage stage, when those same factors will (on our reading of the case law) be considered at the certification stage. If these factors are relevant to certification, then they are even more relevant, as it seems to us, when it comes to the choice of class representative."

So in my submission that's a point of general applicability, and it's entirely right. There may be situations when one can make the shortcut, but they are going to be rare, and we don't know whether they apply here.

Finally, in that judgment, I'm just looking to see which bits I can go over very lightly. If we then go just briefly to the judgment on page 58, paragraph 54:

"Whilst we accept that we have jurisdiction to order that carriage be determined as a preliminary issue, we do not consider that it is appropriate to make such an order in this case. That is because we are of the view that the carriage dispute is not necessarily a discrete matter capable of being determined in advance of certification."

In my submission, true in that case, true in this case as we currently stand here.

55:

"We consider that a carriage dispute can only be regards as a discrete matter capable

of being determined in advance of certification provided there is no interplay between the eligibility condition and the authorisation condition, which we described above."

And as I have sought to show you, sir, there are many examples when there will be such interplay. I took you through Trucks on that particular point.

I am not going to labour it, there are other, funnily enough, similar statements in this particular judgment, given the conclusion that the tribunal reached.

MR JUSTICE MARCUS SMITH: Yes, indeed.

MR PICKFORD: Similarly in the FX determination itself, when the tribunal then came to certification, there are many references to the interrelationship between the various issues which vindicated the tribunal's approach to having heard all those points together.

So certainly again, in that case it was clear those points were interrelated, and it would have been an error in FX to have acceded to what was being advanced by in fact all the parties, that there should be a separate carriage dispute.

MR JUSTICE MARCUS SMITH: Well I do take your point, Mr Pickford, but I think the problem with that submission is that FX was really much more concerned with the substance of certification and the nature of the claim that's being advanced, and when one reads the decision it was that concern about opt-out versus opt-in in particular that was the driving concern, and certification in a sense was treated very much as a secondary question, because of the primary decision to certify opt-in rather than opt-out.

So in a sense I am accepting entirely what you say about the FX preliminary issue decision in 2020. I'm less sure that what one gets out of the substantive decision in 2022, simply because the focus was very much on the rolled-up question.

MR PICKFORD: Well, sir, there are references even in the second decision to why in fact the carriage issue is impossible to determine without determining the certification

issue. And as you say, sir, the core certification issue there was opt-in opt-out. But for example, in paragraph 36(2) there is explicit statement from the tribunal that you can't determine carriage without determining opt-in opt-out, which is part of certification. So obviously -- and my submission in relation to this issue is not that because of FX there is a general rule in every case; my submission is that FX is an illustration of where there is an overlap, and where you couldn't sensibly have carriage determined separately from certification, just as Trucks was another example of where you couldn't sensibly bifurcate the two.

The reason why in law that is the case comes back to the point that I made at the beginning when I took you, sir, through section 78 and 79 and the fact that it is necessary in considering issues of suitability -- and that means, in my submission, both absolute and relative -- to consider all of the circumstances. And one does rather wonder, from Mr Facenna and Mr Gregory's submissions, which is the subset of all the circumstances that they say are going to provide a bright line for this hearing on carriage, because if you accept their submission, there needs to be a very clear articulation of what it is that's going to be decided and what's not going to be decided. If it really is the case, sir, that it's all going to be decided entirely without prejudice to my client's ability to come along at certification and say, "Well, I'm afraid that was all very well; they heard argument on it; I'm afraid they got most of it wrong, and here's why in fact I'm afraid that decision proceeded on a false premise, and here is the right answer on certification", then obviously we are less worried by that because we get our shot.

However -- and certainly what we don't want and what we cannot do in fact is get dragged in by a side wind into having to make arguments on certification that we are not really ready to make yet, in case there's some sort of prejudice to us in relation to a later certification point.

MR JUSTICE MARCUS SMITH: I don't think that either PCR is advancing, nor do I think they actually properly could, that there is some kind of, as it were, bleed across between certification and carriage, such that you have a semidetached role in carriage which then in some way prejudices you on certification.

It would have to be the basis that there is an absolute bright line between the carriage question and certification question, such that if a point relevant to carriage is missed because Google aren't up to speed, for entirely understandable reasons, because they are not looking at certification until it comes on, if that point were to be missed then that is a dreadful dish that the tribunal and the parties in the class would have to eat on certification and accept.

In other words, your point about the undetected critical failure in the chosen carrier of the dispute, if on certification that appears, then one doesn't certify and a potentially good alternative is lost because it was excluded, you say wrongly, on the hypothesis, from the carriage hearing.

I mean, I will be corrected if I'm wrong in reply, but I don't see it working any other way without serious fairness issues to Google.

MR PICKFORD: Sir, we obviously endorse that, notwithstanding -- that's very much my secondary case because I am seeking to persuade --

MR JUSTICE MARCUS SMITH: No, no --

MR PICKFORD: -- you that you shouldn't go down that route at all.

MR JUSTICE MARCUS SMITH: I am merely putting down a marker.

MR PICKFORD: I'm very grateful.

MR JUSTICE MARCUS SMITH: If the class representatives envisage something different, then I'm sure they'll tell me and I'll factor that in to what we do. But at the moment I'm proceeding on the basis that if -- and it is an 'if' with underlining -- if we go down the route suggested by the class representatives, then there will be this kind of

wall between the two stages.

So I appreciate it's your secondary point, but I do think you are entitled to that clarity from me at this stage.

MR PICKFORD: Thank you, sir.

So I think, in the light of the discussion between Mr Gregory and the tribunal on reports of what judges might have said in the Court of Appeal, there's nothing that I need to say on that, save just to make very clear, in case one got a false impression, that the issues in that appeal do not concern the point that we are concerned with here.

So none of the judges were taken to any of the relevant judgments. It's not being argued, irrespective of what they may or may not have said.

MR JUSTICE MARCUS SMITH: Well, indeed, Mr Pickford, I mean, I'm just looking, because it's in bundle F at tab 5, at the press report where the Chancellor is recorded as saying that this is an absolutely classic example that it should not have been dealt with in the way that it has been, because the amount of money that will have been wasted by this issue is just mind-boggling.

Well, people say things in court all the time.

MR PICKFORD: Quite.

MR JUSTICE MARCUS SMITH: It is judgments that speak, not what one is putting to counsel. One can quite understand why one has a certain degree of frustration at having two parties where one would do, in a very heavy appeal following a very heavy certification question. But at the end of the day, what matters is the significance, to the extent it is significant, of the FX preliminary ruling decision, which, as I've said already, was not appealed.

MR PICKFORD: Quite so, sir.

I turn then to the issue -- oh, sorry, I see it's q quarter past.

MR JUSTICE MARCUS SMITH: Mr Pickford, when you reach a convenient moment.

MR PICKFORD: I have relatively little more to say on the primary issue, which is about whether we should have this preliminary hearing. In my submission actually it would be better for me to address the timetabling issues separately, because they all depend on what the initial ruling is. So I can literally finish in a minute or two --

MR JUSTICE MARCUS SMITH: Why don't you do that, Mr Pickford, and then we can work out what we do about timetabling after the short adjournment.

MR PICKFORD: Thank you, sir.

Finally, then, it's suggested, in particular I think it was Mr Facenna who picked up the baton on this, that there was no prejudice to Google in proceeding on the bifurcated basis that they wish for.

And we say that's wrong. Firstly, it means two hearings rather than one, so that will tend to increase costs.

Secondly, it means that if I am right about my submissions on how certification is to be addressed, and it's in a holistic manner, taking account of all factors together, then we will end up being caught up in what we say is in fact an incorrect way of going about dealing with certification, which is also ultimately likely to lead to the possibility of appeals and problems and increasing costs. So ironically which we have an interest in saving the PCRs from themselves at the moment because they might see some short-term advantage for themselves, but we say ultimately it's going to trip them up and there are going to be problems and we are going to be bystanders spending money in relation to that. So we would just like it to proceed on what we say is the correct basis in law.

There is also the issue which is prejudice for all parties, the possibility of two separate appeals on two separate issues. And again we would prefer, if there is going to be any appeal for there to be one appeal and not for there to be two appeals in which we have to participate.

There is also the point that with the best will in the world any decision-making body, tribunal, court or otherwise, if it considers submissions on a particular issue and reaches a particular view it can be hard for a party that comes along later but didn't really take part in that initial discussion in any particularly in-depth way to then shift the views. That's not a criticism I make of anyone at all, it's just a fact of human nature and how people make decisions.

So there is a risk for us, and this is one of the risks that concerns us, that if there's this effectively cosy debate largely focused as between the PCRs about certain points, and where it says, "Well, Google, you don't have much to say here; just keep quiet, stop standing up and being annoying, Mr Pickford", that a certain way of thinking about the case will settle and solidify, and that will be harder for us to then come and dislodge later on.

Obviously the tribunal will approach it entirely open-minded. But it's simply a fact of life, and that's something we would prefer not to happen.

MR JUSTICE MARCUS SMITH: I do take your point. The trouble is that's something which infects several stages of the class action process. One has exactly the same problem as the certification stage, where one might, as you say, inadvertently get sucked into a way of seeing things which can then affect the way one sees the substantive trial in 18 months' time. So yes, there's clearly a problem. But I suspect it is a problem which is more wide-ranging throughout the process than otherwise.

MR PICKFORD: Sir, what I'd submit in response to that is in fact there is an essential difference between my concern and the one that you have just articulated, which is that it is customary sometimes for there to be a preliminary assessment of matters in a case and then there is trial. And by nature of trial and the very great depth and scrutiny that one goes into issues at trial, a hearing, all the experts and the evidence, that does tend to mean that even if there were provisional views that were initially

adopted -- it's a very unusual case that those necessarily persist once -- well, when they persist when they shouldn't do, once there's then trial and one has weeks of hearing about the issues in much more detail.

The difficulty with what we are proposing here is two types of very similar exercise on apparently slightly different standards. We don't know, there's been no guidance from the PCRs as to what the guiding lights are for the standard that we apply for carriage and then the slightly greater standard apparently we apply to certification, albeit we all know that that's still very different from the standard that's applied at trial. And therefore because there are rather similar exercises but they had been bifurcated, in my submission the problems that I identify are more likely to be apparent in that kind of situation. That's all I say.

Sir, unless there are further points on which I can assist the tribunal, the concluding point I just wish to clarify, and this is something perhaps the PCRs can think about, is that we do assume from what they are saying that for example if one of them wins their prior carriage dispute and then we come along later and knock that claim out on certification, that's tough on the other claim.

They accept that the way they want this to be arranged is that there is a knockout initially and then thereafter it doesn't matter what happens, even if there is some regret in relation to that decision, then, well, it was their decision. And that's what I understand that they are saying, because obviously what would be totally unacceptable -- and this is very much in my secondary work-out(?) -- but what would be totally unacceptable is that there is then some sort of resurrection of the stayed claim where they pop up and say, aha, well, actually now claim A has been knocked out it would be in the interests of justice for us to proceed.

Because if that's what one of them thinks might happen, then there is absolutely no advantage at all to any of their suggested benefits from this bifurcated approach. But

obviously that's very much a secondary submission, because I've sought to persuade the tribunal as to why we shouldn't go down this route at all.

MR JUSTICE MARCUS SMITH: Well, indeed, Mr Pickford, but the disadvantages with a secondary course tend to infect the valuation of the primary course. So it does, it seems to me, raise a point on which I will want to hear from the PCRs, not least because the standard order, insofar as there are such things, is that the loser in the carriage dispute is stayed, not dismissed.

You have the point, but I put it out there so that Mr Facenna and Mr Gregory can deal with it, because it does seem to me that if one were to stay the loser, the resurrection point, in the event of there being -- well, the clearest case would be a strikeout application at certification which succeeds, and then the stayed loser says, well, the carriage dispute has now been resolved differently, so I'll come back.

Now, it may be that the solution lies in costs. But it's a point that clearly we need to think about.

MR PICKFORD: Well, in my submission the solution shouldn't arise in costs, because the only basis on which this is being urged on the tribunal is that this is the right way to proceed, because there will effectively be a stage one and there is only one winner from stage one. So they can't be allowed, in my submission, to actually go back on that and have one winner from stage one, except if it suits them. They have to sleep in the bed that they've made.

Can I just check before I sit down that there is nothing further that those behind me would like me to say.

MR JUSTICE MARCUS SMITH: That would be entirely appropriate. **(Pause)**.

MR PICKFORD: Sir, I have no further submissions.

MR JUSTICE MARCUS SMITH: Thank you, Mr Pickford.

In that case, Mr Facenna, we will resume at 2.00. Thank you all very much.

(1.30 pm)

(The short adjournment)

(2.00 pm)

Further submissions by MR FACENNA

MR JUSTICE MARCUS SMITH: Mr Facenna, before you begin and before I forget, I wonder if the parties could provide me with their best authority on the criteria to order all the preliminary issues. I know there are cases which say what a court should bear in mind. Given Mr Pickford's submissions, I think I just want to read and refresh my memory on what those criteria are.

MR FACENNA: Sir, I'm sure Mr (inaudible) straight on to it.

MR JUSTICE MARCUS SMITH: I have no doubt.

MR FACENNA: On Mr Pickford's submissions, his first point related to the nature of the multifactorial assessment that has to be carried out on the question of certification, and under rule 78 and 79.

We don't dispute that there's a multifactorial assessment. We certainly don't dispute what Lord Briggs said in Merricks. But none of that really affects the question as to whether you can have a separate consideration of carriage within that overall assessment but still be able to come back to the certification question in the round subsequently.

It's not the case that we say you deal with carriage and with authorisation and then when it comes to the multifactorial holistic assessment you say, well, sorry, we've dealt with that already in the carriage dispute. That is expressly not the approach which is taken. The way it's been put is that it would be without prejudice, essentially, to any issues that can properly and subsequently be raised on --

MR JUSTICE MARCUS SMITH: Mr Facenna, you are accepting the bright line point

that I made to Mr Pickford, namely that there would be no question of Google being shut out from any rule 78 and rule 79 consideration.

MR FACENNA: Yes, sir, we are. I mean, that necessarily follows from the characterisation of it as a sort of case management decision. It's in some ways similar to a permission to appeal decision or perhaps a permission for judicial review. I don't know, maybe the analogy doesn't go that far. But it's without prejudice to, in this case, any points that Google might want to raise subsequently which are relevant to certification.

And that is why actually it's quite difficult to see how it is properly characterised as a preliminary issue, because in fact it does not determine any of Google's rights or interests or any of the substantive issues that will subsequently arise either at certification or indeed at the subsequent trial.

MR JUSTICE MARCUS SMITH: Well, in a sense that brings us straight to Mr Pickford's point about 79(2)(c). If there is more than one applicant seeking approval, which will be the most suitable? And what Mr Pickford says is that that assumes a rolled-up hearing. In other words, that is assuming that if there is a carriage dispute it is dealt with with certification because it's listed there.

But I think what you are saying is that there's nothing to stop the PCRs agreeing between themselves that they want a court-imposed solution to carriage, such that that point is determined if they can't reach an accommodation otherwise, such that that point is determined without prejudice to any 78/79 consideration --

MR FACENNA: Yes.

MR JUSTICE MARCUS SMITH: -- in advance of the certification hearing.

MR FACENNA: Well, whether one does it in advance or in a so-called rolled-up hearing, they are separate questions. The authorisation question under rule 78 is separate to the eligibility question under rule 79. That's why it becomes really a matter

of sensible procedural approach and efficiency as to whether it's a suitable case to deal with one first before you get on to the other.

And as I say, Mr Pickford's submissions would only work if it can somehow be said that you must have a bright line between what are authorisation issues and what are certification issues. That's not our position. That's not the submissions that we made this morning. It's very clear from FX, including the certification judgment, and from Trucks, that there is an interrelationship between the questions. To make it obvious, if there is a fatal flaw which would prevent one of the claims being certified, obviously one would expect that to be raised in a carriage dispute. You would expect the competing claims to raise it and, subject to what Google decides to do in this case, you might expect a defendant to come along and raise it.

So there isn't a bright line between them, but that doesn't mean that they are properly characterised as a matter of law as having to be one complete, holistic decision. They are separate issues.

MR JUSTICE MARCUS SMITH: Well, in the same way as liability and quantum are separate issues but also related.

MR FACENNA: Yes.

MR JUSTICE MARCUS SMITH: Now, sometimes it is appropriate to order preliminary issues and sometimes it's not, between liability and quantum, which is why I am interested in the test for preliminary issues.

Can we test it in this way: let's suppose there wasn't consensus as there is at the moment between PCRs, and in fact you, hypothetically speaking, were saying: we'd like carriage dealt with earlier, but Mr Gregory was saying: no, we want a rolled-up hearing. How would the tribunal proceed in that case? Would it be a question of applying quite stringently the preliminary issue questions and saying, well, in this case, despite what here Mr Gregory is hypothetically saying, despite what he's saying, we

will have a preliminary issue on carriage, or is it to be characterised in some sort of different way?

MR FACENNA: Well, as I say, we don't think that the use of the preliminary issue language is necessarily helpful, because it isn't actually determining as a matter of, as it were, res judicata some issue that will arise in the proceedings. So I think in those circumstances it would be simply going back to the general objectives. So what's the just and proportionate thing to do? What's the most fair and efficient way to proceed? And no doubt you might have, in that scenario, Mr Gregory siding with Mr Pickford's submissions today, saying, well, it's not fair to us to do it this way because of x, y and z reasons.

So it would just be a sort of classic application of the objectives and the rules, having regard to the interests of the proposed class in particular, but no -- there isn't, as I say, a rule of law which says that you have to determine it in this particular way or that particular way. It will be a case-specific and discretionary decision for the tribunal in each case.

The example that Mr Pickford gave in relation to these proceedings was the fact that there's a significant difference between the experts' assessment of quantum in this case and the scope of the claims. And he was suggesting, well, you might in this case say that you would certify Mr Pollack's claim because on the face of it appears to be that they are going to be claiming more money for more people. And we all then proceed to certification, and only at that point Google would come along later and say, well, terribly sorry but actually these parts of this claim ought to be struck; it's not certifiable, or at least parts of it are not certifiable.

The answer to that is, of course, as we've said, Google should not be locked out from making those points at the carriage stage, in precisely the same way as it would be able to make them if you had a rolled-up carriage and certification hearing. And it's

also not realistic to suggest that the PCRs won't be making those points.

I mean, if it really is the case that there is a fatal hole in one of these claims, what we are anticipating, if we don't reach agreement, is that we are going to have a hearing, which Mr Gregory described as involving a knockout blow, where you will have an adversarial, hard-fought approach to determine which of the claims is more suitable, and on the sidelines presumably Google also coming in and making whatever points it wants to make, bearing in mind its conflict of interest.

The argument in any event proves to be much, because if it were true that you might subsequently realise there was a problem with your assessment, then you wouldn't be able to determine any issue until you got to trial.

I mean, it happens all the time in complex proceedings that matters are decided as you go along. They then become res judicata, and if it turns out later on that in retrospect you ought to have done something differently, well, then it's often too bad, at that stage.

Mr Pickford then took you to the Trucks judgment and paragraphs that I referred to myself this morning. And you saw there that the matters that the tribunal looked at when comparing the two claims in Trucks were such matters as the scope of them in relation to new and used trucks, whether there was an internal conflict that would affect certifiability, the run-off period, and the attractiveness of the respective expert methodologies.

First of all, as I said this morning, that is a discrete section of the judgment. On proper analysis, the matters which are dealt with there in relation to authorisation do not fall from some separate consideration of certification. It was also contemplated, I should say, and I understand it is still contemplated in Trucks, which has recently been argued in the Court of Appeal, that there may be two parallel claims. In that case you would have the opt-out claim and the opt-in claim.

So that is the prism through which one has to see what was going on in Trucks. You weren't having there a sort of hard-fought authorisation decision in the way that we are suggesting would happen here.

In my submission, when one looks at Trucks it actually provides clarity as to how the carriage issue can be considered separately.

And the same points can be made about FX. I think I said this morning, it seems to us that the tribunal's thinking had moved on between the carriage judgment and the certification judgment. And all that's really said in FX is that there are factors which are relevant to certification, which are also to be taken into account when considering authorisation, albeit in a more relativistic way or through a different lens.

What there certainly isn't, in either FX or Trucks, is any statement or even suggestion that there is a rule of law that the question of authorisation can only be dealt with as part of an overall assessment of certification and eligibility.

I've made the point that we accept it would be without prejudice, the difficulties that Mr Pickford suggests are likely to arise will be avoided by allowing a suitable law for Google at the carriage stage, again reflecting its interests, and acknowledging that any input it has to be properly focused on the question that actually arises under rule 78.

Mr Pickford's final points related to prejudice. First of all he said we are going to end up with two hearings rather than one. That is true, but we are already in discussion today envisaging a short either one-day or at most two-day certification hearing. We think that could be straightforward.

It is obvious that if you knock out one of the claims at that stage, your consent -- sorry, I think I said "certification"; I meant "carriage" -- your subsequent certification hearing will be shorter and more straightforward.

You have here two complex claims. Both the claim forms are in excess of 100 pages. Complex expert reports. It is clearly going to be more expensive to run a rolled-up

certification and carriage hearing on both of those claims in parallel. One only needs to look at FX to see --

MR JUSTICE MARCUS SMITH: You don't need to press that very hard.

MR FACENNA: No.

Incidentally, the certification issues in these claims are actually likely to be narrower than might be the case in some of those other claims. They are not, strictly speaking, follow-on claims. But both of these claims rely heavily on findings of the French Competition Authority. It seems to us, if I can put it colloquially, they are both certifiable on their face and certification is likely to be quite straightforward, we would say, at this stage.

MR JUSTICE MARCUS SMITH: Well, that is certainly something which the tribunal has learned more about in the last year, in that it is the case in a number of certification applications that all parties have said, yes, we are happy to do this on the papers, and it has been the tribunal that has insisted that the Is be dotted and the Ts be crossed by an oral hearing just to make sure the tribunal itself properly exercises jurisdiction, but that is very different from the FX.

MR FACENNA: That is what we anticipate would happen in this case.

The suggestion -- to use Mr Pickford's words -- that the PCRs need to be saved from themselves because we are going to engage in having a cosy chat in the lead-up to and presumably at any carriage hearing is a fanciful one. The assumption at the moment is that if we can't reach agreement, we will have a hard-fought adversarial hearing on authorisation, which, as I say, Mr Gregory has described as leading to a knockout blow.

So it's not realistic to suggest that we are, either of us, going to miss some critical or fatal point. And it will of course be very helpful if Google wants to come along and make its own observations.

Finally, subject to the point you raised with me earlier on preliminary issues, on the question of stay and what happens to the non-authorised claim, the position formally is that -- I mean, the question that's being answered under 78 is which of the claims is more suitable --

MR JUSTICE MARCUS SMITH: Yes.

MR FACENNA: -- at that stage, and so the other claim is stayed. I think the problem that's being posited is that you might have a situation in which, despite having won at the carriage stage, it turns out there is a fatal flaw or the one which is thought to be more suitable ends up not being certifiable.

That seems to us a highly unrealistic expectation, given what one expects at the carriage stage. But formally it is a possibility in that one-in-a-million case.

As we see it, it would be open to the stayed claim at that point to come along and say: well, you decided we couldn't be authorised at that stage; things have moved on; things have changed; these are our proposals.

And if the defendant wanted to argue at that point, well, it was abusive, or the tribunal could take a view about how that had developed, and in a sense it's no different from what might happen if someone brought a new claim. It you end up authorising a claim that then doesn't get certified, anyone can simply come along to the tribunal and say, well, we'd like to be authorised in relation to that claim. So that's not a good point.

While I've been speaking, my learned juniors have come up with some suggestions on the preliminary issue point, which seem to me to be good ones.

The relevant rule in the Tribunal Rules is Rule 53(2)o, I think. The two authorities which I have, one of which is a tribunal authority and the other is Court of Appeal. So the first one is Mr Justice Zacaroli in the Churchill Gowns case. The citation is [2020] CAT 22, and it's paragraph 6 to 8.

And in that judgment Mr Justice Zacaroli suggests that the overall test is to ensure that

the proceedings are dealt with justly and at proportionate cost. He then goes on to quote various factors to be considered, using a common sense and pragmatic approach.

And the Court of Appeal authority which it is suggested might be worth looking at is Bond v Dunster, which is [2011] EWCA Civ 455.

It's in bundles, is it? I don't have the paragraph number but apparently that judgment sets out that it is a multifactorial assessment where the court will effectively test the soundness of the proposal.

If we come up with something better than those, we will of course --

MR JUSTICE MARCUS SMITH: Mr Pickford, the same applies to you.

MR FACENNA: Sir, unless there is anything else I can assist you with at this stage --

MR JUSTICE MARCUS SMITH: No, Mr Facenna, I'm very grateful to you. Thank you very much.

Mr Gregory.

Submissions in reply by MR GREGORY

MR GREGORY: Sir, on the authorities point, we will provide one, if it is (inaudible due to cough) authority, as well as what Mr Facenna said.

Just to note that the position, we say, is materially different to your standard preliminary issue situation. So at least from a costs perspective, normally if you determine that point as a preliminary issue there will still be the same number of parties in the final hearing. So from a costs perspective what you are thinking about is whether it is more efficient to determine a point as a preliminary issue or at the main hearing in terms of the costs of the parties.

Here, of course, determining carriage first will affect, reduce, the number of parties at the certification hearing. So there is an additional source of significant savings.

In terms of Mr Pickford's point, I start with a heading called "Jurisdiction", which covers

a number of things, perhaps slightly imprecise. I was wondering at some point whether Mr Pickford was suggesting that actually the tribunal didn't have jurisdiction to consider carriage as a preliminary issue. I think it's common ground that the tribunal does have jurisdiction --

MR JUSTICE MARCUS SMITH: I don't think Mr Pickford is saying that. He is saying that, given the way in which rule 78 and 79 were framed it was quite difficult to see, in the general case, that the preliminary might be appropriate.

Mr Pickford, that's fair, isn't it?

MR PICKFORD: It is, sir.

MR GREGORY: In terms of your question to Mr Facenna about what would happen if the PCRs didn't agree, well, I think you could get to a carriage dispute hearing in a number of different ways. The tribunal has very wide case management powers, and if the PCRs were agreed that a carriage hearing was appropriate, then I would have thought it would be possible for the tribunal to order it under its case management powers. The question might be, for example, whether one of the PCR claims should be stayed, which I'll come on to.

I would also have thought it would be possible to order it as a preliminary issue, including in the case where the PCRs disagreed about whether carriage should come first. And you could think of an example where that might be very useful. So if you have a PCR with a claim that was obviously hopeless that was incurring a massive amount of costs and you just wanted to knock them out as quickly as possible. The preliminary issue would be, by reference to the wording used in the rules relating to authorisation, which applicant is the most suitable to act as a class representative.

On Mr Pickford's main point, which concerned the relationship between the carriage considerations and the authorisation and eligibility considerations, he emphasised that all circumstances are potentially relevant to carriage, including in particular the various

considerations laid out in the statute relating to authorisation and eligibility.

We do not dispute that. I think over time it is obviously possible that it may emerge from the judgments of the tribunal and the Court of Appeal which considerations are more likely to be relevant to carriage disputes. But we are not suggesting that any considerations relating to relevant authorisation or eligibility are excluded at the carriage hearing stage. Rather, the key point is the one that I made this morning, which is that at the carriage hearing stage these considerations will be being considered for the purpose of a distinct test, the more suitable test, and will be being dealt with in a more broad-brush way, analogous to considerations of merit in interim applications.

And I didn't hear really any significant response from Mr Pickford on that point.

As to Google's involvement, in part because there are various considerations potentially relevant to carriage which also could be relevant to authorisation eligibility, we are also not suggesting that Google should be shut out at the carriage hearing stage.

Its role should be more limited than that of the PCRs. But that could be reflected, for example, in the page limits that the tribunal imposes on Google submissions in their skeletons and so on.

But if Google considers at that stage that there's a fundamental flaw in one of the claims, then it can and should raise that point, for example that a claim is strikeable, that there's a conflict within the class, all those sorts of points that Mr Pickford referred to. And nor, like Mr Facenna, are we suggesting that Google should in some way be prevented from raising different issues or making slightly different arguments subsequent to the certification stage.

Finally, would the losing claim be stayed or have to be withdrawn? We also think the appropriate approach would be for the losing claim to be stayed. And I adopt the

comments that Mr Facenna made.

A key point here is that ultimately it is the interests of the claimants falling within the class which are the most important. They are not, unlike all the parties, present here and actively engaged in the proceedings, but this is what it is all about, ultimately. So you would have a situation, say, where one of the claims is successful at carriage; it moves forwards; it fails to get certified. So the scenario you would be contemplating is potentially a situation where the interests of the class -- they have no ability to vindicate their rights. Obviously someone could bring a new claim, but perhaps there would be limitation issues and so on.

So at the very least I think the tribunal would want to consider what is best in the interests of justice at that stage. And obviously that would remain an option if the losing claim is being stayed rather than completely withdrawn.

I also agree it's highly unlikely that that would result in never-ending processes that are common, for the reasons that Mr Facenna gave. The other PCR at least has a very strong incentive in the carriage hearing to point out major weaknesses in the other PCR's claim. So you would expect that the successful claim would be the one with the greatest prospects of being certified at the later hearing.

Nor does it mean, in the event that the successful claim doesn't get certified, that the losing claim at carriage would automatically be unstayed. The losing PCR would have to make an application to have their claim unstayed, and the tribunal would then have discretion as to whether to unstay the claim. And at that stage it could take into account the wider context.

If it thinks that the unsuccessful claim has exactly the same flaws that caused the successful claim ultimately not to be certified, then it can choose not to unstay it.

If it thinks that there are other really fundamental flaws with that claim, then it could also chose not to unstay it. And it could also take into account any arguments made

by the defendants that actually this is all just terribly unfair; the prospect of success are quite low; we've been having to incur vast costs over several years already, and it would be just be overly inappropriately burdensome to open up effectively a fresh set of proceedings.

They are all things this tribunal can take into account in deciding whether to unstay the losing claim. And here, as in other areas, there are unlikely to be hard-and-fast rules.

Those are the main points that I wanted to make in reply. I will just check if --

MR JUSTICE MARCUS SMITH: No, of course. **(Pause)**.

MR GREGORY: Those are all my submissions, sir, thank you.

MR JUSTICE MARCUS SMITH: I'm very grateful to you, Mr Pickford.

MR PICKFORD: Sir, sorry, if I may just assist on the issue of preliminary issues, and then also deal briefly with one new point that has now arisen in terms of what's being suggested that we actually hear.

On the first question that the tribunal directed at us, on preliminary issues, we refer the tribunal to two cases: Steele v Steele [2001] CP Rep 106, and the comments of Mr Justice Neuberger as he then was. And I'm going to refer to those in a moment. And then also the case of McLoughlin v Grovers [2001] EWCA Civ 1743, at paragraph 66. And those are the comments of Mr Justice David Steel in that case.

In Steele v Steele there were eight factors that are said to be relevant. First, the preliminary issue must determine at least one aspect of the case. That is somewhat cast into doubt by Mr Facenna's submissions, who said that this issue was going to be res judicata -- wasn't going to be res judicata on any issue on 78 or 79, and so obviously doesn't satisfy that test. The preliminary issue should significantly cut down cost and time pre-trial or at the trial itself. You have obviously heard submissions on that from both parties.

We disagree.

If it's a question of law, how much effort is involved in identifying the relevant facts?

And four, if it's an issue of law, to what extent is it being determined on agreed or disputed facts? The critical point there, we say, is that the facts are obviously disputed because the parameters of each of the claims would differ.

Five, where facts are not agreed, can the court ask itself the extent to which that will affect the value of the preliminary issue? So i.e., would it require an assessment of evidence?

Number six, will it unreasonably fetter any party at trial? Something we have obviously canvassed.

Seven, the risk of the preliminary issue increasing costs.

And eight, the risk that the preliminary issue turns out to be irrelevant or prompts re-pleading to avoid its effects.

So I'm not going to elaborate at length, but the tribunal will understand how my submissions fit within that framework.

The other point, if I may, just very briefly, is that there seems in reply submissions to have been something of a shift in terms of what is being proposed, at least by Mr Arthur -- less of a shift from my understanding of Mr Pollack -- because as Mr Facenna said, they don't seek an issue that is going to be res judicata of anything, and therefore not in fact a preliminary issue per se at all. It's an alternative form of adjudication.

And the tribunal suggested that in fact what the parties were asking for was simply a court-determined adjudication on the issue of carriage between the PCRs themselves, without prejudice to rules 79 and 79 of the tribunal rules.

MR JUSTICE MARCUS SMITH: Yes.

MR PICKFORD: Now, that is obviously very different from a preliminary issue. If it were the case that what was going to happen is that the two PCRs, without Google(?)

at all, simply said, okay, well, we've got an issue between us. We think it would be efficient(?) for the tribunal to decide this. If that was decided quite separately from 78 and 79, in my submission ideally by separate judge, so that the whole thing is hermetically sealed, as it were, then fine. We don't have a problem with that. That could happen, and they could do that between themselves, and then we could come along and just deal with one party in a certification hearing.

MR FACENNA: Just to clear any misunderstanding -- and if I misspoke then I'm sorry, I need to check the transcript. I envisaged that we would have a decision on authorisation under rule 78. That would be the decision after the carriage hearing, so I'm not suggesting that we have some sort of decision in a vacuum that doesn't actually have legal effect under rule 79. One of the claims would be stayed and the other would be authorised. If there is any misunderstanding about that.

MR JUSTICE MARCUS SMITH: Mr Facenna, what I want to do is, because this is important, I'm going to let Mr Pickford finish and then you and Mr Gregory can correct any misapprehensions there might be.

MR PICKFORD: Thank you, sir.

The reason I'm making the submission is that I'm trying to assist the tribunal on a clear distinction which I say arises depending on what type of exercise is being envisaged. And I think two different types of exercise have been mooted. It appears to me that in fact, in light of the clarification from Mr Facenna, the type of exercise that is being mooted by both parties is what I originally apprehended and it falls foul of those problems.

But if it's a second type, which is particularly what the tribunal was suggesting, which is as some sort of separate court determination of carriage without prejudice to rules 78 and 79, which is what I heard you, sir, say, then that is a different beast. And if that really does -- if that is capable of being done in a way -- I mean, we would be

happy to not be involved in that at all, as long as it genuinely is without prejudice, ie it's done by someone different and then we can come along and just deal with certification afresh, whoever is the winner of that.

That is very different, I think, from what is being proposed by the parties, who want a res judicata determination on one issue within the certification assessment, on which you have heard my submissions before.

Sir, those are the only further points.

MR JUSTICE MARCUS SMITH: I'm very grateful.

Mr Facenna, if you have anything.

And then Mr Gregory.

Further submissions by MR FACENNA

MR FACENNA: I make one simple point, which is, I have to say I don't really follow the theory that authorisation under rule 78 is part of the certification process under rule 79. They are separate on the face of the rules. There is an authorisation decision to be made under rule 78. It is, if then decided, absolutely without prejudice to the round, holistic assessment undertaken under rule 79, but the submission seems to be resting on the two being equated and all falling under the broad umbrella of certification.

MR JUSTICE MARCUS SMITH: Well, I think that's the extent to which a revisiting of the FX preliminary issue question may go to the heart of what's arising here, because what FX did say was that there was a nexus between 78 and 79, which meant that a traditionally formed preliminary issue was quite difficult to carve out because you couldn't decide in a cut-and-dry way something that was so firmly embedded in the list of factors that one had to look at.

So that's why I expressed an interest in the case regarding preliminary issues, and why I'm probing the question as to whether we are actually talking about a preliminary

issue here at all or something else.

MR FACENNA: Well, I hope I have made our position --

MR JUSTICE MARCUS SMITH: You have.

MR FACENNA: I think, in my submission the two FX judgments need to be read together and read in light of the fact that they firstly predated Merricks, the world has moved on, and there are all the specific circumstances of the banks and so on in that case that we've discussed.

So in my submission it doesn't lay down any rule of law. To the extent it does include a -- part of the ratio, as it were, is that this is a preliminary issue, and an aspect of certification, then in my submission that is probably not the correct characterisation. The question under 78 on authorisation is, as I said earlier this morning, a case management decision, a matter of discretion in the tribunal. And on the face of the rules, it is a separate question from the certification question which arises later.

Which is not to say that the two are not related. There obviously is an interrelationship between the two. There are similar matters that can be considered -- not necessarily that must be considered. There is the question of suitability that will also then arise on certification. But dealing with authorisation is not a preliminary determination of the question that will subsequently properly arise on certification.

That's our position.

MR JUSTICE MARCUS SMITH: I mean, clearly the question of authorisation arises whether there are one, two or three or more class representatives. One has to be satisfied independently that that condition is met.

MR FACENNA: Quite.

MR JUSTICE MARCUS SMITH: What I suppose I'm grasping at in the language of preliminary issues is this: one doesn't want, particularly in a novel process like this, to be unnecessarily enchained by the fetters of traditional thinking.

Now, traditionally speaking -- and I must say I will look at Steele v Steele with some care -- one has a list of factors which are all together sensible in terms of crafting whether it is in the interests of all concerned, parties and court, right to take out a particular point and to try it in advance of everything else. And there are all sorts of common-sense factors which militates for or against preliminary issues in the general sense. It's not a question of general justice, it's a question of actual practical case management.

MR FACENNA: Yes, quite. And (inaudible) sir, when you come to look at those authorities will see what's said. Steele v Steele is considered in that Court of Appeal judgment in Bond v Dunster which I referred you to, and actually there are many subsequent judgments. But if I can give you one other reference, because it includes a fairly helpful summary of the authorities and its relatively recent, it's High Court decision in Hutson v Tata Steel UK Ltd and the citation is [2019] EWHC 1608 (QB). In that case the court, having reviewed the authorities, warn that:

"No overarching conclusion can be drawn from the authorities and applications for the trial as a preliminary issue are in essence all case management decisions which are necessary fact-sensitive."

That takes me back to where I started this morning, it is a fact- and case-sensitive question and not one where it's helpful to try to set down hard-edged rules of law and approach.

MR JUSTICE MARCUS SMITH: Indeed. So given in this case that there is actually nothing to stop the Proposed Class Representatives from reaching accommodation, as we have been discussing, nor indeed anything to stop one of them saying: and we'd pull out; if both are suggesting that they would be assisted, if they can't reach accommodation, by a determination by the tribunal, then provided there is no prejudice to a fair outcome on certification to Google your point is, why not do it?

MR FACENNA: Yes. I'm grateful, sir.

MR GREGORY: May I address Mr Facenna's points very briefly.

MR JUSTICE MARCUS SMITH: Yes, of course.

MR GREGORY: Our position is that authorisation question as a whole will be determined at the second hearing, the certification hearing. The only thing being determined at the carriage hearing is the Rule 78(2)(c) question of which applicant is most suitable to be the representative.

Other considerations that will be relevant to authorisation at a later hearing may be relevant to that question but the authorisation question as a whole is not being determined at that stage.

In terms of res judicata there is obviously an oddity because the tribunal could order it as preliminary issue because if it didn't it would fall to be determined at the certification hearing, that having determined it, having determined it a winner, and the other claim being stayed or withdrawn, that most suitable question will not then arise at the later hearing because there won't be another competing claim that's pressing its case at that hearing so the issues sort of disappears into thin air, basically, once it's been determined at the carriage stage.

That was all the clarification I wanted to add.

MR JUSTICE MARCUS SMITH: Thank you very much, Mr Gregory, I'm very grateful to you.

Can I thank the parties all for their very helpful written and oral submissions. I am going to reserve briefly but you can anticipate a judgment in the course of next week. Timetabling is something which, as Mr Pickford said, can really only be considered in light of what is decided in that ruling so I will steer clear of making any statement as to timetable beyond broad brush indications and we can raise the question of what hearing should take place when in writing between registry and the parties.

I would only say this: what I said this morning about moving forward as expeditiously as possible is something that will happen whichever route we go down.

So with my reiterative thanks to the parties I will rise now. Thank you very much.

(2.50 pm)

(The hearing concluded)