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5 **IN THE COMPETITION**
6 **APPEAL**
7 **TRIBUNAL**
8

Case Nos: 1572/7/7/22
1582/7/7/23

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

12 Monday 16th October 2023

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14 Before:

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16 The Honourable Justice Marcus Smith
17 Mr. John Alty
18 Dr. Maria Maher

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

21
22 BETWEEN:

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27 **Claudio Pollack & Charles Arthur**

28
29 **Proposed Class Representatives**

30 **V**

31
32
33 **Alphabet Inc. and others**

34 **Proposed Defendants**

35
36
37 **A P P E A R A N C E S**
38

39 Gerry Facenna KC, Julian Gregory & Greg Adey (Instructed by Humphries Kerstetter LLP &
40 Hausfeld & Co. LLP) On behalf of Claudio Pollack and Charles Arthur

41
42 Meredith Pickford KC & Natasha Simonsen (Instructed by Herbert Smith Freehills LLP) On
43 behalf of Alphabet

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2 **Monday, 16 October 2023**

3 **(10.30 am)**

4 **Amalgamation application**

5 **THE PRESIDENT:** Good morning.

6 We have read the documents, including the very helpful written submissions.

7 Mr Facenna, you will obviously start. I think the aspects that would most assist us in
8 terms of unpacking is this: as you will have gleaned from the provisional ruling which
9 I handed down, which indicated a broad acceptance with the unification of the two
10 applications under one roof, and as was indeed foreshadowed in the case
11 management conference for the carriage hearing, we welcome this sort of
12 accommodation between the parties and want to facilitate it.

13 What I think is helpful is to understand procedurally exactly how you are achieving
14 that. Because my sense is we are arguing how far consolidation as opposed to
15 amendment is the way in which this should be done. Although one really doesn't
16 want the mechanics to take over, since we are here we might as well get the
17 mechanics absolutely right and see what force exists in the objections articulated by
18 Google to the course that you are advocating.

19 **MR FACENNA:** Yes, my Lord. Well, today I appear together with Mr Gregory and
20 Mr Adey on behalf of Mr Pollack, Mr Arthur and the LLP PCR.

21 My learned friend Mr Pickford appears, together with Ms Simonsen, for Google, the
22 proposed defendant. The tribunal has, as will you see, a joint application before it for
23 an order to the effect that the Arthur and the Pollack proceedings be consolidated
24 pursuant to rule 17 of the tribunal's rules and the tribunal's general case
25 management powers under rule 88 in particular and that the LLP act as the
26 proposed class representative in the consolidated claims.

1 As the tribunal indicated some weeks ago, the purpose at this stage is to deal with
2 the question of amalgamation of the claims and the way in which that is to be given
3 effect, whereas any substantive consideration of whether the claims meet the
4 certification threshold is undoubtedly a matter for the certification hearing in January
5 of next year.

6 The draft order that the tribunal has, my Lord, together with the consolidated claim
7 form and the various witness statements and so on that you have seen, explains the
8 basis on which the Pollack PCR and Arthur PCR have concluded that their
9 respective applications should be amalgamated in the best interests of the class.
10 They have set out the history, the reasons why they seek to bring their claims
11 together, and the differences between the consolidated claims and the claims as
12 originally articulated.

13 Given the exchanges that have led up to today's hearing and the helpful indication
14 you have just given me, my Lord, subject to your view, I don't propose to take you
15 through the content of Mr Starr's witness statement or any of the mechanics of the
16 documents. The position, put shortly, is that we have worked very hard since the
17 May hearing to find a way forward that avoids a carriage dispute and is in the best
18 interests of the class members. It's intended to be a way that will allow the tribunal
19 to proceed as swiftly as possible to the question of certification.

20 In our view, all of this, including the form of consolidation, is in accordance with the
21 governing principles and the tribunal's rules that cases should be dealt with justly
22 and at proportionate cost. And none -- this is an important point -- of what we are
23 doing today in our view causes any prejudice at all to Google's position. A party
24 which at this stage remains simply a proposed defendant to claims which have not
25 yet been certified.

26 The central objection that Google raises in its skeleton argument is that the tribunal

1 has no power to consolidate at all in these circumstances, because in a carriage
2 dispute there can be only one winner and the rules -- in particular rule 78 -- require
3 the tribunal to choose who that winner is. Google says that this is important, not just
4 as a matter of form but because consolidation as currently proposed avoids what
5 Google says should happen in these circumstances, which is that there is one claim
6 left standing, the other one or more have to be withdrawn, and the one claim which is
7 left standing has to apply to amend, together with potential consequences for
8 limitation and costs that may favour Google's position.

9 The other reason why Google says this matters is the complaint that there is now an
10 unjustifiably large number of lawyers and other representatives acting for the PCR,
11 and the concern appears to be that if the tribunal were to accede to the consolidation
12 application it would somehow be said to be endorsing --

13 **THE PRESIDENT:** I did want to take this opportunity to be quite clear on how this is
14 going to be assessed. We don't regard the substantive questions about how the
15 claim is going to be articulated, things like budget, personnel, to be matters for today.
16 They are matters, however, that will be important when certification comes through.
17 I am not going to invite you to justify the procedural details of how this matter is
18 going to be taken through to trial. We see that as part of the very important process
19 of certification.

20 The way we see this is: let's assume that there had never been two rival
21 applications, let's suppose the parties had discussed their rival applications before
22 issuing them and had come together and framed an application much as what has
23 been done here, we would never have had a carriage dispute, obviously. We would
24 never be asking ourselves: is the allocation of personnel to the case too generous or
25 not? Until one gets to the question of certification. That is very much how we see
26 this here.

1 We, as we indicated last time, are keen for the applicants to resolve their differences.
2 They are, for better or worse, choosing to bring themselves together, to merge two
3 streams. It is not for the tribunal --

4 I am so sorry, I am told we have just lost live stream. What I am going to do is I am
5 going to continue and I hope that the live stream catches up. But if the problem is
6 more extensive than that, we will work out what to do in the short adjournment.

7 Yes, we don't regard the manner in which the applicants have chosen to merge
8 themselves to be a matter that we ought to be second-guessing. It may be that
9 you've done a great job, it may be in fact you have done a terrible job.

10 **MR FACENNA:** Precisely, my Lord, in fact that's part of the problem. The exercise
11 that Google was inviting you and is still inviting you to engage in today creates
12 exactly the danger that we are all keen to avoid. Because either you are being
13 invited to say, "This looks pretty terrible, you have too many lawyers, it looks like
14 your budget isn't right", or you are going to say, "No, this looks fantastic, what a great
15 plan", and either way that is obviously going to at least seep into in some sense the
16 questions that properly arise for consideration on certification.

17 Subject to anything Mr Pickford wants to say about that, I will say no more about
18 those budget issues, other than perhaps I ought to put down the marker that you will
19 have seen in our supplementary skeleton argument that we say the points, even if
20 they properly arose today, are not well-founded. Actually, they are bad points in
21 terms of the budget and the equality of arms between the parties and so on. But
22 I can return to those if it becomes necessary, either now or indeed in January if they
23 turn out to be genuine concerns.

24 On the point on the rules then, the point that is really the focus of today, we say
25 broadly Google's approach is based on a misreading -- indeed an unjustifiably
26 narrow reading -- of the tribunal's rules and case management powers, the effect of

1 which is to suggest that the tribunal has no option but to make parties to a carriage
2 dispute fight it out so that only one claim can ever proceed.

3 The other interesting thing about today is that Google says that it wouldn't object to
4 what's being done in substance if it were done in the manner in which Google thinks
5 it should be done, namely Mr Arthur withdrawing his claim and Mr Pollack being left
6 to go it alone, subject to an application to amend to include some aspects of the
7 Arthur claim. But if the position, as we say, is that consolidation today is a relatively
8 straightforward mechanism for resolving the carriage issue, without prejudging any of
9 the points on costs or limitation or anything else that Google wants to raise at
10 certification, then we really are concerned today with a purely formalistic objection
11 and not one that has any real implications either for this claim or indeed for the wider
12 collective regime.

13 **THE PRESIDENT:** Yes. I mean, it does matter to this extent -- it may be that
14 resolving it today is helpful. It is this: if one looks at the question of limitation, in
15 other words how far back the claims reach, it's clear that Pollack has some months'
16 advantage over Arthur. So is a way of in fact establishing clarity on this and dealing
17 with the Google issues about consolidation to use the vehicle for amendment rather
18 than consolidation. What I would have in mind would be a process where one stays
19 Arthur, essentially cancels and rewrites Pollack so as to insert all of the amendments
20 that are in the consolidated application, including as to the class representatives and
21 the change there, and proceed under the single Pollack action number using the
22 date that that has been filed?

23 That would have the benefit of ensuring that these amendments would all have
24 a common filing date of the date of the Pollack filing, and one would lose the minor
25 disadvantage of there being effectively two sets of proceedings running under
26 a single banner, which is a point Google do make. I am not sure it particularly

1 matters but it is, perhaps, a little neater in terms of administration to have a single
2 claim number and achieve consolidation by a different procedural route that ends in
3 exactly the same place, except for the benefit of not having to look at rule 17, two or
4 more proceedings consolidated or heard together, but one set of proceedings with
5 exactly the same DNA in it, namely the consolidated application as you drafted it, but
6 under the rubric of the earlier claim?

7 **MR FACENNA:** That might work superficially in terms of just how the claim looks on
8 the claim form.

9 First of all, it would be interesting to hear what Mr Pickford has to say about that,
10 because I suspect that Google would say in those circumstances that there are
11 automatic consequences that arise both in relation to limitation on the third abuse,
12 which comes from the Arthur claim and which you would be adding to the Pollack
13 claim, and presumably in relation to costs, particularly if it is being suggested that the
14 Arthur claim is not being taken forward, albeit I understood you to say it would be
15 stayed.

16 So there are some issues that we would need to consider depending on what
17 Google's position is in response to that proposal.

18 The difficulty with that, and the reason why consolidation appears to us to be the
19 right approach -- I mean not just plainly within the broad terms of the rules -- is that
20 there is a fallacy inherent in the arguments that Google is putting forward today.
21 Two fallacies in fact.

22 The first is that the Arthur claim is being withdrawn essentially and what we have
23 done is amend the Pollack claim. That is wrong. What you have here are two
24 claims that have been brought on behalf of the same class essentially. The PCRs
25 are not the claimants, in fact the true claimants are the class members. The same
26 people have brought two different claims which are very similar indeed. So almost

1 all of Arthur was already in Pollack and vice versa. What we have then done is
2 say: how do we bring these together? I have not addressed [it], but bear in mind
3 there is a whole backroom set of considerations in terms of what happens with the
4 funders, the arrangements that the insurers have to come to, the management
5 arrangements for the LLP, the interaction between the law firms and so on. That
6 may well become much more complicated or to some extent might have to be
7 undone if we were in a position where it was being said that one of the claims was
8 going forward but not the other one.

9 But leave that aside, the true position is that both claims are going forward, because
10 you have the substance which is already common to both claims; you will have the
11 third abuse in particular which you get from the Arthur claim; as a result,
12 methodology which comes from Dr Latham's report, so the gross price effect in
13 particular, which was in the Pollack claim but not in the Arthur claim. We have the
14 Arthur funders, we have both the insurers, we have elements of both legal teams,
15 and you have Mr Arthur and Mr Pollack themselves who, as members of the LLP,
16 together with Ms Wellington, will be making the decisions collectively.

17 It is actually simply wrong to say that you have one claim going forward and not the
18 other. That seems to be a fallacy which is running through quite a lot of Google's
19 submission here, that effectively what we have done is taken the Pollack claim and
20 amended it to include elements of the Arthur claim.

21 **THE PRESIDENT:** Indeed. It is tolerably clear from the documents that we have
22 seen that we have a morphing of two streams into one. For our part we don't want to
23 get into how different or how similar they are to one or the other. What we are
24 concerned with, though, is the procedural regularity, so that we have efficient
25 management of the claim going forward, which means awkward questions ought to
26 be dealt with as soon as possible when they arise.

1 **MR FACENNA:** Understood, my Lord.

2 **THE PRESIDENT:** You mentioned two points which caused me to prick up my ears.

3 One was if we were to achieve consolidation by way of the route of amendment that
4 might cause difficulties in terms of the documentation that existed or exists behind
5 the documents we have seen; in other words, the agreement of funders, that sort of
6 thing which we have not seen and very much don't really want to go into in any detail
7 if we can avoid that.

8 So if that causes a difficulty we would like to know, though I must say staying the
9 later claim is something which one would think ought to solve that problem, but you
10 can help me on that.

11 The other thing, though, which is a definite advantage of having a single claim, is
12 that one does resolve the issues of limitation about, you know, the claim that was let
13 us say unique to Arthur but is then inserted into consolidated proceedings. Well, if
14 one says actually the vehicle in terms of filing date is Pollack, then everything relates
15 back to that date and one gets a degree of clarity. Whereas if one consolidates you
16 have two dates in play and one will anticipate all sorts of arguments going forward
17 about which particular bits of the consolidated claim go back which particular set of
18 six years, and that could cause a lot of problems down the line for the experts when
19 they are trying to work out the relevant data in the relevant claim period.

20 **MR FACENNA:** There would be an unresolved issue. In a sense we have tried to
21 be helpful to Google in that context, because we have said we are not looking at
22 limitation today, we are not determining limitation. If they have a point on limitation,
23 we are not doing anything which would prejudice their ability to raise it. I think what
24 you're suggesting to me is that we might in fact seek to resolve that today in a sense
25 in favour of the class by giving them the earlier Pollack date.

26 **THE PRESIDENT:** Yes.

1 **MR FACENNA:** I think that's why I would like to hear what Mr Pickford says to that.
2 If he were willing to do that, I dare say -- subject to instructions -- that might be
3 something we would be very happy with. But I would suspect that there might be
4 some argument about it. The trouble is, because we are not getting into the
5 substance of it today, we don't have the authorities, the submissions, or the
6 arguments if there really is a point on limitation here.

7 That's why we rather took the view that consolidation means both the claims are
8 going forward, you will have a single PCR, a single body of legal representatives
9 who are advising and acting for that PCR. We will have two claim numbers which
10 will have to be attached to the documents, but everything else in terms of substance,
11 costs, limitation points if there is one would really be for a later date.

12 **THE PRESIDENT:** No, I see that. It's simply that now that we are here there is
13 some virtue in dealing with -- provided the parties are able to do so -- the
14 implications of what's going on. I mean imagine a situation where we had heard
15 carriage and we decided that -- this example only works if I assume that Pollack
16 succeeded, so that's why I am taking Pollack as the winner. Let's suppose that
17 Pollack succeeded in persuading us that they should have carriage and that is what
18 we said, and then there was an amendment application by Pollack saying, well, we
19 see the good bits in Arthur, we would like to take them and run with them, here's our
20 amendment application, no conceivable prejudice to Google, because it's years
21 before the action is going to be heard, please can we insert this new cause of action.
22 We would say, well, provided the costs of the amendment are paid for by the class
23 representative, no problem.

24 But you would get relation back.

25 **MR FACENNA:** Subject to what Google says, perhaps I can --

26 **THE PRESIDENT:** Indeed, that's very helpful.

1 **MR FACENNA:** It seemed to us that -- I will have to have a think about what the
2 kind of backroom elements and complications might be, for instance, and maybe
3 I will come back to you on that. It seemed to us partly, as I say, to keep all of these
4 matters open and not prejudice anyone, the sensible thing was to have the two
5 claims going forward and that reflects the reality of what we have done --

6 **THE PRESIDENT:** Yes.

7 **MR FACENNA:** -- but if we are in a position where there is an alternative route
8 which actually certainly does not prejudice the class members, doesn't prejudge
9 anything that might be suitable for an argument on another day, that might well be
10 something that we could live with. But given the indication that you have given now,
11 I mean, I wonder if it might be worth hearing what Mr Pickford's response is to that.

12 **THE PRESIDENT:** No, I think, Mr Facenna, you make a perfectly fair point.

13 The only thing that I would say is that given the work that you have done and that
14 your experts would have to do for certification, it does seem to me that there is
15 probably a minor -- there is a material advantage in the dates being sorted out
16 sooner rather than later, just so that your experts can have a clear understanding of
17 what it is they are looking at in terms of backward-looking data. It would, I think, be
18 very unfortunate if in a consolidated application when your experts are considering
19 the Microsoft process blueprints to trials, they were scratching their heads saying,
20 "well, we think that this bit of the consolidated application came from Arthur and
21 therefore the data that we need to look at or the period we need to look at actually is
22 from this date, whereas this particular bit we think came from Pollack and therefore
23 the relevant date is X". It may not matter very much in the scheme of things, but it is
24 a complication that, if it is avoidable, we probably ought to avoid.

25 **MR FACENNA:** I understand that. I think our current view is that it is not a real
26 complication. If one wants to look at it another way, effectively what we are doing is

1 Mr Arthur and Mr Pollack are both coming to the tribunal and saying, "I want to
2 amend my claim to be in the form of a consolidated claim form and I want to
3 substitute myself with the LLP". So I mean you end up with two claims which are
4 essentially identical.

5 **THE PRESIDENT:** Yes.

6 **MR FACENNA:** Then I don't think even Google would dispute that you would
7 obviously consolidate those claims. That's the way in which we see it working. It
8 seems to us that if you are ending up with one identical claim and one PCR, the only
9 question might be then the point you are raising with me, which is if there is
10 a limitation point, are we in a position to resolve that today?

11 **THE PRESIDENT:** I think, Mr Facenna, unless there is anything more, you are right
12 we should probably hear from Mr Pickford, but I don't want to cut you off.

13 **MR FACENNA:** It might be helpful. Our basic position is as set out in the skeleton
14 argument, which is the rules are clear. The various authorities and so on that
15 Google cites we say are not a good guide to what the tribunal should do, because
16 this is not normal civil litigation. In normal civil litigation you have all sorts of
17 situations where different claimants bring different claims, there are then legitimate
18 questions to ask about consolidation. Again, looking at it we say the proper way you
19 have here two claims brought effectively by the same class, effectively very similar
20 claims, and we are going to take the best elements of both and bring them into one
21 claim, just as your Lordship said we could have done in the first place, had things
22 turned out differently.

23 Perhaps within those contexts and opening remarks it might be useful to hear from
24 Mr Pickford and I will respond as necessary.

25 **THE PRESIDENT:** Thank you very much.

26 Mr Pickford?

1 **MR PICKFORD:** Members of the tribunal, thank you. It is certainly correct that the
2 right procedural route for this application and the dispute between us and the PCRs
3 is a narrow one. But it is one that the tribunal must get right. That is because it does
4 have important ramifications for the correct date for the purposes of analysing
5 limitation. It is also arguably relevant to costs, but we have never shied away from
6 recognising that the court, the tribunal, has a broad discretion in relation to costs and
7 that's not why we are here arguing about it. We are hearing argument about it
8 because it matters on limitation.

9 There is quite a lot of common ground, in fact, between myself and Mr Facenna.
10 There is certainly no need for two PCRs to have a contested carriage dispute if
11 instead they can reach a suitable agreement to bypass that dispute. We have never
12 said otherwise. Mr Facenna's submission this morning that that's what we are
13 saying, it's not what we are saying, the question is: what is the right procedural route
14 in order to achieve that?

15 It is common ground between us, I think, that we can amend one or other of the
16 claims. It's common ground that one can amend to determine who the PCR is, if
17 necessary. It is also common ground that the tribunal would have the power to order
18 consolidation in a suitable case in the context of CPOs. We are not saying it can
19 never happen in CPOs, what we are saying is it's not fit for purpose in this particular
20 case to achieve what the PCRs wish to achieve.

21 The essential difference between us, then, is can consolidation of proceedings work
22 as the correct procedural route to achieve what the PCRs say they want in terms of
23 the claim that they want to advance in the new claim form that they have proposed?
24 We say they can't. My submissions on that are going to be in three parts.

25 Firstly, I am going to take you very briefly through what we say is the law as it
26 applies to consolidation.

1 Secondly, I am going to explain the two core reasons why it is problematic to
2 consider consolidation of proceedings in this particular case.

3 The first of those is because the Pollack and the Arthur claims overlap in relation to
4 the first and the second abuses. When one consolidates proceedings, what one
5 does is one takes all of the claims that are in the proceedings and they all go
6 forward. For very obvious reasons the tribunal will understand that we can't allow all
7 of the claims to go forward on the first and second abuses, because they are
8 essentially the same claims. Some distinction is going to have to be made there.
9 That's the first point, and I am going to expand that.

10 The second, and the point which really matters for limitation, is on the so-called third
11 abuse. Because we say when one actually looks at what the third abuse is, it is not
12 simply taking the Arthur claim, picking it up, and transposing it and putting it down in
13 the amended Pollack claim form. It's in fact a different claim. Therefore, even if I am
14 wrong on my first point about the ability to consolidate proceedings and allow
15 overlapping claims to continue, they are not even doing what they claim to be doing
16 on the tin in relation to the third abuse.

17 That's where the limitation point, as I will explain, really bites.

18 If we could start, please, by going to rule 17 of the tribunal's rules, which is in the
19 authorities bundle. That's D/1, tab 9, page 481. This is the essential power that the
20 PCRs wish to rely upon. It provides:

21 "Where two or more proceedings are pending in respect of the same decision or
22 which involve the same or similar issues, the tribunal may, on request of a party or
23 on its own initiative, order that proceedings or any particular issue or matter raised in
24 the proceedings be consolidated."

25 That's the essential power. One thing to note from that is that consolidation applies
26 to proceedings. It doesn't apply to the claims. It's a common feature running

1 throughout the tribunal's rules that claims and proceedings are not the very same
2 thing. Claims are brought within proceedings. One sees that again and again as
3 one goes through the tribunal's rules. Probably one of the best examples is perhaps
4 in relation to rule 77 itself, which is the determination of an application for a collective
5 proceedings order.

6 **THE PRESIDENT:** Yes.

7 **MR PICKFORD:** One sees that at 77, 79, 80. It's a consistent distinction made in
8 the rules.

9 **THE PRESIDENT:** Mr Pickford, it may be that this should have been unpacked
10 more, but it seems to me necessarily implicit in the consolidation application that
11 there is going to be not merely consolidation but amendment. I mean, the fact is we
12 have a collective proceedings claim form which is a total rewrite of that which has
13 gone before.

14 There are various ways in which one can incorporate that change, but the one thing
15 that is clear is that that which has been articulated by Mr Pollack in his application,
16 and that which has been articulated by Mr Arthur in his application, is not going
17 forward in that way. The first question is what, actually, are we consolidating?

18 **MR PICKFORD:** Quite, my Lord. This is a really important point.

19 **THE PRESIDENT:** I accept it is important. But the answer though, isn't it, is that we
20 are consolidating the two proceedings -- if we take Mr Facenna's unit of account --
21 which both articulate the claims as set out in the collective proceedings claim form.

22 **MR PICKFORD:** That's what he says, I think, is happening.

23 We say you can't actually consolidate in these circumstances, and there are two
24 reasons for that.

25 **THE PRESIDENT:** Yes.

26 **MR PICKFORD:** One is that if one looks at the first two abuses, they are to all

1 | intents and purposes essentially the same at least in terms of the abuse, putting
2 | aside the loss and damage that arises from it. But the abuse part of those is the
3 | same in each of the Pollack claim and the Arthur claim.

4 | **THE PRESIDENT:** But we are not looking at those anymore.

5 | **MR PICKFORD:** We are not, my Lord, but that goes to the issue of whether we are
6 | truly properly procedurally consolidating the two proceedings. One of my
7 | submissions is that one cannot consolidate two proceedings for the same loss on
8 | behalf of the same class. Because when one consolidates proceedings, what one is
9 | doing is bringing all of the claims together in those proceedings and allowing them to
10 | continue. And that's not what they actually want.

11 | It's obviously not what anyone here wants, because the whole purpose of this
12 | application is a form of rationalisation.

13 | **THE PRESIDENT:** Well, indeed. But isn't that -- I mean, no one in this room is
14 | saying that they want the old pleadings to continue. So something is amending.

15 | **MR PICKFORD:** Yes. Indeed. The fact that this is in fact, in truth, an amendment
16 | application --

17 | **THE PRESIDENT:** Right.

18 | **MR PICKFORD:** -- not a consolidation application, has an important implication for
19 | limitation. Because what happens -- I would like to come on to this in a moment, so
20 | I am not entirely stopping the first part of my submissions here, but as a preview, the
21 | essential limitation point is that if we are dealing with an amendment, then we apply
22 | the rules that apply to amendments in relation to limitation. That is rule 32 of the
23 | tribunal's rules --

24 | **THE PRESIDENT:** Yes.

25 | **MR PICKFORD:** -- and section 35 of the Limitation Act 1980. Those rules tell us
26 | whether in fact we can have relation back, as was being envisaged by the tribunal, or

1 we can't.

2 If we reached a situation today where what the tribunal were saying is:

3 "We are happy, in essence, to find a correct procedural means of allowing these
4 claims to continue pursuant to the amended claim form, but what we are not going to
5 do is prejudice any of Google's rights to argue that in relation to the amendment that
6 is implicit in bringing those claims forward now, they should be in any way prevented
7 from arguing that the application of section 35 of the Limitation Act and rule 32 of the
8 tribunal's rules is that they cannot have relation back in relation to the third abuse",
9 no doubt Mr Facenna, who seemed quite interested in that idea when it was raised
10 by the tribunal, would say, "Of course we can have relation back in relation to the
11 third abuse and the correct date for limitation purposes for that third abuse is the
12 date on which the Pollack claim was filed".

13 Our position is that that would be wrong in law, and that if one properly applied
14 section 35 and rule 32, one would see that, because it is a new claim which does not
15 arise out of the same or substantially the same facts as the existing claim, it doesn't
16 take the advantage of relation back. The relevant date for limitation purposes is
17 when that new claim is in fact filed.

18 If we are allowed to preserve that argument, then I think we could probably
19 effectively all go away and come back and have that argument at the certification
20 hearing. The reason why we are here today is because Mr Facenna's clients
21 appeared to want to sidestep that argument by insisting on saying, "This is just
22 consolidation". The reason why they were wrong about that is because were it just
23 consolidation, were it truly a picking up of the Arthur claim, the putting it into the
24 envelope of Pollack and those claims continuing side by side, then they might have
25 had a reasonable point about the correct date for limitation being that which applied
26 to the Arthur claim. So it matters procedurally what route we take. That's really the

1 absolute heart of it.

2 I have quite a lot of submissions that develop various points within that.

3 **THE PRESIDENT:** That's very helpful, Mr Pickford.

4 I didn't get the sense, though, that Mr Facenna's clients were seeking to, as it were,
5 steal a limitation march by consolidation. The reason I say that with such confidence
6 is because Mr Facenna is not up for arguing limitation today and indeed needs to
7 take instruction from his clients regarding the interplay between amendment and
8 consolidation because it may have an effect going forward in terms of the granular
9 detail of the very complicated agreements that sit behind the collective proceedings
10 claim form.

11 **MR PICKFORD:** Yes.

12 **THE PRESIDENT:** Can I propose this by way of a shortcut -- we will see if it is
13 a shortcut, it may be a long cut and won't work. I quite see that we can't, if it is
14 contentious between the parties, deal with relation back today. I don't think
15 Mr Facenna is ready to run it, I understand why, and I don't think we can say without
16 argument that relation back does or does not automatically follow.

17 **MR PICKFORD:** We don't even have the authorities to do that, so that must be right.

18 **THE PRESIDENT:** That's clear.

19 **MR PICKFORD:** I am not seeking to argue that.

20 **THE PRESIDENT:** What we need to do is we need to get in place the absolute
21 clarity that we need in order to have an argument in certification, if it continues. It
22 may be that when you both look at the authorities it's so clear that you don't need to
23 have the argument, but you, the parties, are entitled to clarity from the tribunal as to
24 what is going on.

25 So if we say that we are absolutely not going anywhere near relation to back today, it
26 is for another day, but what we are doing is we are amending both the Arthur and the

1 Pollack proceedings so as to delete everything that they have said to date and insert,
2 as a cuckoo in the nest, the collective proceedings claim form as it stands. We do
3 that in both but we say that pending further consideration we are formally staying
4 Arthur and we are going to regard the claim number of the now amalgamated
5 proceedings as the vehicle which goes forward so that we preserve the argument
6 that Mr Facenna may want to run regarding relation back of claim 3, in other words,
7 we put ourselves in a position of maintaining the best case for the class, but we still
8 have Arthur in the wings as a stayed claim with exactly the same pleadings sitting
9 there. We don't make an order for consolidation today, we simply have the two
10 claims sitting there with literally word for word exactly the same points.

11 We can resolve that philosophical issue at certification. I very much hope that that,
12 once relation back has been resolved, is agreed. One cannot, I think, sensibly
13 perceive both numbers going forward, because you would have duplicated claims
14 and we are really not in the business of hearing duplicated claims even if it makes no
15 difference. I think we need a degree of tidiness this side of the courtroom.

16 But is that a way in which we can at least establish clarity for both sides without any
17 form of prejudice to either, but for the tribunal's benefit of resolving the carriage
18 dispute so that we can move to certification, where all of these points quite rightly
19 need to be articulated?

20 **MR PICKFORD:** My Lord, I am just going to take instructions on that.

21 **THE PRESIDENT:** Should I rise? I think both of you will probably need to talk to
22 your teams about that, because the trouble with limitation and technical arguments is
23 if you don't get it right, then it will come back and bite you later on.

24 **MR PICKFORD:** Quite.

25 **THE PRESIDENT:** So we better make sure that this does work.

26 For my part, although I would be delighted to hear a great deal about the difference

1 between consolidation and amendment from you, Mr Pickford, if we can spare
2 ourselves that, it would be, I think, a benefit.

3 **MR PICKFORD:** I think it would be a benefit to everyone here, if we can spare
4 ourselves that.

5 **THE PRESIDENT:** But only if we achieve an outcome which will result in both
6 parties leaving the courtroom satisfied that they know where they stand.

7 **MR PICKFORD:** Yes.

8 **THE PRESIDENT:** Given that it is not straightforward and it is quarter past, shall we
9 rise for ten minutes for you to discuss? If you need longer, do please say.

10 Mr Facenna, is that a course that needs --

11 **MR FACENNA:** It is a sensible course.

12 To be helpful to everyone, I do need to take further instructions, but I think I have
13 relatively clear instructions already on one point, which is that the complications and
14 the difficulties underlying the negotiations and so on that have taken place, which are
15 set out in Mr Starr's statement and I was reminded that in Starr 2, paragraph 37 in
16 particular, the deed between the funder and Mr Arthur and the LLP is subject to
17 a condition precedent of the tribunal approving the amalgamation application in the
18 form sought, including the documents today. So the difficulty is with anything other
19 than what we put before the tribunal, you have one funder which is being asked to
20 take over another claim which is what you have there, that is going to be very
21 difficult, I am told.

22 You have a similar problem with the insurers. You would be asking the Arthur
23 insurers formally to start insuring the Pollack claim, which is not something that they
24 have done, not something that the current arrangements lead to. I will take more
25 detailed instructions, but I seem to have a clear instruction that we would not be in
26 a position to go forward with that proposal today.

1 **THE PRESIDENT:** I articulated a stay in respect of Arthur, rather than anything else.

2 **MR FACENNA:** Yes. Again the difficulty with that, my Lord, is that one of the things
3 that's happening here is that the original Pollack funder, Harbour, is dropping out and
4 the consolidated claims are going to be funded by Fortress. We would then be in
5 a position where you would be asking Harbour to step back, Fortress to step forward
6 and fund the claims up to and including certification, in circumstances where it
7 sounds like there might remain some uncertainty about exactly what the decision
8 was going to be in terms of amalgamation and whether there are going to be some
9 costs consequences, for instance, of that.

10 My impression is, I will take more detailed instructions, that that would undermine the
11 terms of the commercial arrangements and the agreements which have been
12 entered into.

13 **THE PRESIDENT:** Right, that's very helpful to know, Mr Facenna.
14 Before you go, and it may be we will say 15 minutes rather than 10, provided
15 Mr Pickford is happy with this course, and provided it is seen as a meaningless patch
16 to be resolved at certification, and provided my colleagues are happy and we will talk
17 about that when we rise, speaking entirely for myself, I would not have a problem in
18 laying over the stay to Arthur a consolidation of both proceedings, and for that
19 particular conundrum to be resolved in the months that we have between carriage
20 and certification.

21 In other words, we establish clarity that we have two identical sets of proceedings
22 which are running on the same -- literally the same -- claim form. We establish
23 a relative priority between the two, because you can't run two claims together so one
24 would have to be stayed and we think that that will have to be the later in time to
25 preserve the sense of which dates matter and to have a proper debate about relation
26 back. But if we overlay a consolidation order on the two, it's slightly inconsistent

1 between staying and consolidating, but I am not sure it's actually logically totally
2 inconsistent. It just looks a little bit odd.

3 But you get what you want. We get the clarity that Mr Pickford wants for later
4 argument and to the extent that you can ensure that those who are funding matters
5 can be made comfortable with, as it were, removal of consolidation in five or six
6 months' time, well maybe that would resolve matters but it may be we keep the patch
7 going as it is. I just think that it would be extremely strange to have two sets of
8 proceedings, identical word for word, proceeding to trial with two outcomes equally
9 successful or equally failing.

10 **MR FACENNA:** My Lord, that really wouldn't work (inaudible) apart from anything
11 else we would --

12 **THE PRESIDENT:** No.

13 **MR FACENNA:** -- have a single class representative.

14 **THE PRESIDENT:** Indeed.

15 **MR FACENNA:** So Mr Arthur and Mr Pollack are being metamorphosed in
16 a sense within the LLP. So in reality there will be one set of proceedings, that's what
17 we have been seeking to achieve through consolidation.

18 **THE PRESIDENT:** I threw it out there as a way of practically ensuring that we get
19 a degree of sense going in.

20 I think it is, as I said to Mr Pickford a few moments ago, necessarily implicit in your
21 consolidation application that there is also amendment. And what we haven't
22 unpicked sufficiently, I think, for our purposes is exactly where amendment begins
23 and consolidation ends. If nothing else, that's something where I think we do need to
24 get a degree of certainty.

25 **MR FACENNA:** Insofar as Google wants to say we must absolutely not be
26 prejudiced in relation to anything we want to say about that in terms of either

1 limitation or costs, I think we have been pretty clear and the tribunal has been pretty
2 clear that that's common ground.

3 **THE PRESIDENT:** You have. What we want to achieve is that degree of certainty
4 without any form of prejudging the questions that arise. That's why I put forward this
5 additional layer. I don't like it, but I can't see the harm.

6 **MR PICKFORD:** My immediate reaction, my Lord, I have to say -- although we
7 appreciate the imagination that goes into it -- I don't think we like it either. Because
8 I don't for my part -- and this is probably just my fault -- but I don't really understand
9 the concept of the consolidation as it applies between now and the certification
10 hearing, and how that doesn't prejudice the right analysis in relation to limitation.
11 Because our entire point, really, comes down to the fact that consolidation is not
12 a suitable procedural tool in these circumstances for the two reasons I have
13 explained.

14 One, when what it would lead to is two identical proceedings going -- sorry, two
15 identical claims going forward to get it in one set of proceedings. Because what
16 consolidation is all about is bringing all of the claims into one set of proceedings, and
17 so we say it just simply doesn't work for the first two claims. It also doesn't work in
18 fact for the third abuse because when one looks at that, it's not the same thing that's
19 being transposed into the Pollack claim from Arthur.

20 So for those reasons we say that the tribunal does not have the power to consolidate
21 these two sets of proceedings now, because it just doesn't make procedural sense,
22 with respect. Therefore, I think we are all struggling towards the same thing, which
23 is how can we find a means of protecting everyone's position appropriately and allow
24 us to have all of these matters out when we really want to have them out at
25 certification. I am not sure that the last tweak, as it were, proposed by you,
26 Mr President, actually helps to get us there.

1 What was previously being suggested, I think did work, which is basically amending
2 the claims.

3 **THE PRESIDENT:** Yes.

4 **MR PICKFORD:** Staying one claim, without prejudice to what everyone wants to do
5 in relation to that, and then taking the decision as to how those things all come
6 together at certification.

7 At that point, I think once the tribunal has dealt with the issue of limitation under the
8 correct analysis under section 35, at that point the practical implications of whether
9 we are right about this not being consolidation, or my learned friend is right about it
10 properly being consolidation, I think largely melt away. Because this is really -- this
11 is a limitation struggle we are involved in here.

12 **THE PRESIDENT:** Indeed. I think it is all about the running order, isn't it?

13 So let's suppose we make four orders in the following order. First, in Pollack, the
14 existing pleadings are deleted and in their place we have the collective proceedings
15 claim form that is articulated in the bundles that we have. Secondly, we do exactly
16 the same in respect of the Arthur claim, in other words, we kill the existing pleadings
17 in their entirety and substitute a collective proceedings claim form there. We then
18 consolidate the two: so we have effectively duplication of pleadings but not
19 duplication of class nor indeed duplication of class representatives, because they are
20 the same in both, but we do have the oddity of two claims running in parallel and we
21 do have a situation where, as Mr Facenna says, there may be a problem about
22 condition precedents in terms of consolidation being important. But we,
23 nevertheless, as the third stage, consolidate. And then we, as part of our case
24 management powers, say that we are staying all of the issues that arise in the later
25 claim, the Arthur claim, and we will make that as our fourth order in that order.

26 So it is amend, amend, consolidate, stay. And we then deal with the points that

1 matter, which is limitation, in the new year. I think the question is how far -- subject
2 to your thinking about it -- I think it meets your problems. Whether it is enough to
3 meet the concerns of the funders who are saying they must have an order literally in
4 the terms as drafted, well that's a harder question and it may require longer
5 communication with the funders than 15 minutes would allow. But if you need
6 longer, then longer you certainly can have.

7 **MR FACENNA:** Let me see. I think that is certainly closer to, I think, what we were
8 trying to achieve in any event.

9 Two short points. Presumably we would be substituting the LLP as the PCR in
10 both --

11 **THE PRESIDENT:** Yes, in both.

12 **MR FACENNA:** Yes.

13 **THE PRESIDENT:** I mean, it would no longer be pointful actually to say
14 "Pollack/Arthur", we ought to be saying "Ad Tech" --

15 **MR FACENNA:** Yes.

16 **THE PRESIDENT:** -- but actually we will have to continue to say Pollack/Arthur for
17 the moment because of Mr Pickford's limitation question.

18 **MR FACENNA:** Yes.

19 **THE PRESIDENT:** So we will probably have to talk about the Ad Tech/Pollack
20 proceedings and the Ad Tech/Arthur proceedings just so that we know which bits of
21 identical pleadings are deriving from which particular claim form.

22 But the sooner we get rid of this terminological problem, I think the happier we all will
23 be. But I think we are accepting that it has to subsist for a few months until we get
24 relation back to clarity.

25 **MR FACENNA:** Yes, my Lord. Obviously if the point is not clear enough we can
26 obviously amend the order to make sure that it is clear; that it is entirely without

1 prejudice to these limit -- I mean, the limitation point, essentially it is pretty
2 straightforward. Either it is going to be the three abuses all take the Pollack date;
3 two of them take the Pollack date and one takes the Arthur date; or it is going to be
4 some later date that Mr Pickford argues for either today or certification --

5 **THE PRESIDENT:** Not today, I think, but certainly without prejudice to any argument
6 in the future.

7 **MR FACENNA:** Also it doesn't seem to us that consolidating in the way that either
8 we have suggested, or perhaps the way that the tribunal is now suggesting,
9 prejudices any of those issues.

10 **THE PRESIDENT:** That is helpful. Take it away. The last thing we want to do is
11 create problems for the future. We are trying to solve the carriage dispute and no
12 more than that.

13 So we will resume at quarter to midday, but if you do need more time, let us know.
14 Thank you very much.

15 **(11.28 am)**

16 **(A short break)**

17 **(11.59 am)**

18 **THE PRESIDENT:** Mr Facenna.

19 **MR FACENNA:** My Lord, members of the tribunal, we are very grateful for the
20 opportunity to take instructions. We have also made various telephone calls and
21 so on as well.

22 The issue is, as I anticipated, not so much whether we have one claim number or
23 what form the amended claim takes, it's the underlying commercial deal and
24 arrangements which have taken an enormous time over the summer.

25 The real concern, actually, to go to the heart of it is potential costs and uncertainty.

26 What we have done -- this is important for the broader regime because in a sense

1 we say it will effect incentives and the approach that people take in the future -- if
2 you have competing claims where there is a will to find a way to work together and to
3 avoid expensive, costly and delaying carriage disputes, in practical terms it needs to
4 be on the basis that there isn't a winner and a loser, that the claims come together
5 and find a way to work together without somebody then having to bear the costs of
6 one of the claims being dropped or somebody having to drop out or it being said that
7 one claim number goes forward and not the other and then there are potential
8 consequences for insurers and for the funders.

9 That's the concern here, as a matter of policy -- leaving aside the rules -- if the
10 tribunal wants to encourage parties to find a way to resolve their disputes, to bring
11 the funders, insurers, legal teams and everyone together, the tribunal does need to
12 allow those parties the opportunity to come to a deal which means there is no
13 prejudice on either side and the claim can then be taken forward in a consolidated
14 way without the parties being forced that somebody is going to be on the line.

15 All of that said, we are very keen to find a way which avoids that unpleasant and
16 undesirable consequence, and effectively would, we say, have a chilling effect on the
17 sort of sensible pragmatic discussions we have had today.

18 The instructions that I have been given are that the tribunal's proposal as put to us
19 would be an acceptable way to proceed, subject to this point, which would be
20 an indication from the tribunal that to the extent that there are any costs
21 consequences which might follow from any subsequent decision about, for instance,
22 staying one of the claims, that those would be costs of the consolidated proceedings.

23 So that the concern there, if it is not obvious, is that if it is going to be said that
24 Pollack and its claim number is going forward and Arthur is going to be stayed, we
25 can't have a situation -- it's not within the terms of what's currently agreed -- where
26 the insurers for the Arthur claim might be said to be on the line in terms of the cost

1 consequences of that, in circumstances where they have all agreed to come together
2 and one funder is going to drop out and there is a sort of double insurance cover.

3 **THE PRESIDENT:** Yes.

4 **MR FACENNA:** There is no prejudice at all to Google in respect of that. It doesn't
5 change the cover. All of the insurers are currently on the line. There is double cover
6 at the moment. And the indication we would be asking for would not change that.

7 With those concerns, it would be acceptable to us to proceed in the way in which the
8 tribunal has indicated. But given the lingering uncertainty there would be in relation
9 to this question of stay, for instance, it would need to be expressly on the basis that
10 any costs orders in future would be costs of the consolidated proceedings as
11 opposed to the original Arthur or Pollack proceedings.

12 **THE PRESIDENT:** First of all, we, like you, are concerned to ensure that in this
13 case, and in future cases, a commercial outcome is achieved with a minimum of
14 costs and you, in a sense, bear the burden of being the front runner and there are
15 inevitably costs in thrashing out what exactly it is we are doing in what is still a new
16 regime. So we are in the business of ensuring that carriage disputes are
17 commercially resolved and, so far as possible, we want to keep the defendants out
18 of that, because their business really begins in certification not in carriage. That's
19 the plan.

20 I, for my part, can't see any difficulty in giving that sort of indication that we would
21 make costs orders going forward against the party responsible for the consolidated
22 claim, given that we have near total discretion in terms of costs, and given that we
23 can make costs against someone who was technically a third party regarding, as it
24 were, pre-consolidation matters. I can't see a difficulty in that.

25 If you want to draw up an appropriate recital that makes clear the tribunal's
26 intentions -- you can't bind us, but we can certainly make it clear what the thinking is.

1 And, frankly, provided both targets of the costs order are good for the money, we will
2 be led by the parties in that rather than anything else.

3 It seems to us you are asking for something which it is appropriate for us to indicate
4 that we will give.

5 One further thought we had -- because at the moment the running order of orders is
6 amend, amend, consolidate, stay -- it did strike us that actually there may be nothing
7 to stay at the moment, given that we are talking about the authorisation of the class
8 representative to take the claim forward. Actually, until we have certified, there is
9 literally nothing that the class representative can do. So it may be that we can omit
10 the fourth stage anyway, if that makes life easier, and again subject to anything that
11 Mr Pickford has to say.

12 I am bound to say, consolidation suffers from a similar theoretical difficulty, but for
13 our part we have no difficulty in ordering the consolidation of the applications if it
14 makes the position of the funders and the applicants easier, because we are in the
15 business of making this regime work rather than creating obstacles that are not
16 pertinent for the interests of either of the parties before us.

17 **MR FACENNA:** Or the class members --

18 **THE PRESIDENT:** Or of the class members.

19 **MR FACENNA:** That's a helpful indication, my Lord.

20 I should say insofar as it is of assistance to the tribunal, we certainly have no issue
21 with there being a new claim number or one claim number if that's the case
22 management decision the tribunal makes. Again, subject to the underlying concern
23 that you can't have a situation where carriage is resolved but you end up doing
24 something which creates winners and losers.

25 **THE PRESIDENT:** Okay.

26 Mr Pickford, does this work for you?

1 **MR PICKFORD:** I am not sure, my Lord, is the answer. I will need to take
2 instructions on the point about the costs, and it would be very helpful if I could do
3 that shortly.

4 **THE PRESIDENT:** Of course.

5 **MR PICKFORD:** I would also need to take instructions on deleting the stay. I hear
6 what you say, my Lord, and that seems to make sense to me, but I would like to
7 discuss that with my team.

8 **THE PRESIDENT:** Again, I don't think, given we are making orders that are at least
9 conceptually rather difficult to understand their substance, if it matters to you then we
10 can have a stay.

11 I don't think it makes any difference, Mr Facenna, to your position. I am just trying to
12 make things as simple as possible.

13 **MR FACENNA:** Sorry to interrupt, Mr Pickford.

14 Just to understand, I had understood the tribunal's position to be that we would be
15 consolidating today.

16 **THE PRESIDENT:** Yes.

17 **MR FACENNA:** So 1, 2, 3, orders --

18 **THE PRESIDENT:** 1, 2, 3, yes --

19 **MR FACENNA:** -- with the possibility that we might revisit the question of stay in
20 January.

21 **THE PRESIDENT:** Yes, what I was saying -- the proposal before we rose was
22 amend, amend, consolidate, stay. But given that there is nothing to stay, because
23 they are both applications for certification, it seems to me the stay is not something
24 that --

25 **MR FACENNA:** Certainly not for today.

26 **THE PRESIDENT:** -- assists.

1 **MR FACENNA:** I am grateful.

2 **MR PICKFORD:** There are those two points -- there was in fact a third problem that
3 we had, that I was keen to make submissions to you on.

4 **THE PRESIDENT:** Yes.

5 **MR PICKFORD:** As I sat here, I thought there may be an answer to it. I do
6 apologise because you rose --

7 **THE PRESIDENT:** Not at all.

8 **MR PICKFORD:** -- for that third reason I would also like to take instructions from my
9 team on whether in fact there is a solution to the issue in relation to amendment.

10 The difficulty, so that the tribunal knows where I am coming from, is that rule 32 only
11 gives the tribunal the power to amend in certain circumstances, including when it's
12 effectively not a new claim or a claim that arises out of similar facts or
13 circumstances.

14 I think there may be a way through that. What I wanted to make sure is that we
15 didn't have a problem where no matter what the order says we run into some
16 problem with the tribunal's rules. But if I could just take some instructions on that
17 issue, probably for another ten minutes, then I think we may be able to make
18 progress.

19 **THE PRESIDENT:** Of course. That's entirely understood. We are in the business of
20 flushing out difficulties.

21 I only would say in respect of rule 32 that it is applying to a claim form which this ... in
22 one sense it is, but it's also an application and we do have rule 88, which is
23 remarkably broad in terms of the discretion it gives to the tribunal in the case
24 management of collective proceedings. It is an unfortunate fact that the rules reflect
25 an accreting jurisdiction. Rule 32 sits under part 4 dealing with section 47A claims.
26 One then transposes what is said in part 4 into later parts, but with mutatis mutandis

1 changes and the problem is how far are those changes actually quite significant
2 when one comes to part 5, collective proceedings?

3 I think the answer is to the extent it is a big difference, rule 88 is couched in terms
4 that are so wide that we can, subject to following our judicial conscience, do what we
5 feel is right. I get that from 88(2) which, following on from the very general words in
6 88(1), says, "Without limitation to the generality of paragraph (1)..." we can do all
7 sorts of things to "common issues" and that sort of thing. But 88(1) is in itself
8 extremely broad.

9 I throw that in as an additional point to bear in mind in terms of what we can direct by
10 way of case management.

11 **MR PICKFORD:** Thank you.

12 In the light of that, might I ask until 12.30 pm to go --

13 **THE PRESIDENT:** Of course, we will rise then.

14 Mr Facenna, it may be that there are points that you need to further raise with your
15 team or with the funders, but, if not, you have time for a cup of coffee.

16 We will resume at 12.30 pm.

17 **(12.13 pm)**

18 **(A short break)**

19 **(12.34 pm)**

20 **THE PRESIDENT:** Mr Pickford?

21 **MR PICKFORD:** Thank you, my Lord. Sorry we took slightly longer --

22 **THE PRESIDENT:** Not at all.

23 **MR PICKFORD:** -- but I think we have hopefully got there.

24 Dealing with the easiest issues first. We don't have a problem in relation to any
25 costs applications that any costs that we might seek, which costs applications I think
26 should be reserved until the certification hearing, would be costs in the consolidated

1 | proceedings. So we are content with that.

2 | Secondly, we are also content with D, the stay, not being part of the order, because
3 | as, Mr President, you pointed out, nothing is really happening, so nothing really
4 | needs to be stayed.

5 | In relation to the thing that was giving us the most difficulty, which was ensuring that
6 | we were not prejudiced in our rights in relation to arguing points on relation back, we
7 | think that probably the simplest way through that is if one actually takes up the
8 | tribunal's rules -- this is the easiest way for me to explain this point.

9 | **THE PRESIDENT:** Yes.

10 | **MR PICKFORD:** I am looking at the authorities bundle, volume 1, tab 9, page 490.
11 | I am looking at rule 32.

12 | **THE PRESIDENT:** Yes.

13 | **MR PICKFORD:** To make the point very clear, I am going to explain what we were
14 | worried about and what we propose to do about it.

15 | What we were worried about is that ordinarily what would happen where
16 | an application has been made to amend is that one applies rule 32, and in particular
17 | rule 32(1) subject to -- the effect of that, effectively, is that if it is a new claim and it
18 | doesn't arise out of the same facts or substantially the same facts as the existing
19 | claim, then you can't actually allow the amendment. What you have to do is you
20 | have to start a new claim. You can obviously potentially consolidate proceedings, if
21 | that's appropriate or you can hear those claims together. That's how it works as
22 | a matter of procedure.

23 | What we want to avoid, therefore, is any way in which it is said because the tribunal
24 | has exercised its discretion to allow an amendment today, we can't argue all the
25 | points that we would wish to argue on relation back. The way in which therefore we
26 | propose to deal with that is to focus in particular on 32(1)(a), which is that a claim

1 form may only be amended with the written consent of all parties or the permission of
2 the tribunal.

3 We are willing to say we will consent to the amendments, but on the basis of certain
4 provisos. The provisos are that the issue of relation back is to be decided at the
5 certification hearing as if it were being decided for the first time at that hearing.
6 That's the essential point, that we would want there to be a recital that made it clear
7 that the PCR's were effectively signing up to that.

8 Just so I am clear about what some of the implications would be of that.

9 If we are correct in the argument that I anticipate we are going to make, which is that
10 the third abuse is a new claim which does not arise out of the same facts or
11 substantially the same facts, then the date of the limitation in relation to that claim
12 will be whenever the PCR's get round to issuing a new claim in respect of it. Which
13 so far as I am aware, they haven't yet done.

14 There's nothing to stop them from seeking to go away and doing that now.

15 **THE PRESIDENT:** Yes. But there may be, therefore, actually, some virtue in having
16 Pollack and Arthur running in parallel until this is resolved. Because you would have
17 one bit in one claim and one bit in the other. Provided it is sorted out at certification
18 then I don't have a problem with that.

19 Obviously, Mr Facenna, you are hearing what Mr Pickford is saying by way of
20 arguments that will come. If you need to issue, as it were, further protective
21 application then you obviously should do so. But my sense is that you already have
22 that.

23 **MR PICKFORD:** Just to be clear, then the implication would be if we won --

24 **THE PRESIDENT:** Yes.

25 **MR PICKFORD:** -- we would have to have a form of order which effectively treated
26 the situation as one where the amendment that's now being permitted was deleted.

1 As a matter of practice, I don't think we would actually need a new piece of paper at
2 that stage. We would just all have to be very clear that we understand that in
3 relation to the third abuse, it has a different limitation date. If it were an ordinary
4 case, pursued in an ordinary way, effectively what there would need to be at that
5 point would be a new claim form.

6 **THE PRESIDENT:** Yes.

7 **MR PICKFORD:** We do say that the relevant date is whenever they can issue a new
8 claim form, because it is up to them that they haven't issued it as a new claim yet,
9 but we say they are wrong about that and they should have done, at least
10 protectively.

11 **THE PRESIDENT:** I mean, there's a further question which is, how far the limitation
12 in 32(2)(a) follows through, given that we are not talking about an individual claim but
13 about a collective proceeding.

14 **MR PICKFORD:** Yes, my Lord.

15 Indeed, I think it would be open, if there is a point there, obviously my learned friend
16 could take it.

17 **THE PRESIDENT:** Yes. I certainly don't want to anticipate the limitation argument.
18 What I am -- not anticipating but seeking to deal with is the point that you're making,
19 which is that you don't want to have sneaking in through the back door an
20 amendment and/or substituting a new claim which inadvertently decides that that
21 new claim arises out of the same or substantially the same facts.

22 **MR PICKFORD:** Exactly, my Lord.

23 **THE PRESIDENT:** All of us in this courtroom have sympathy with that. But I recall
24 that there is an argument, I think -- you will probably know better than I -- that in fact
25 some people have said that relation back cannot be waived. In other words, that the
26 agreement that you're contemplating is not in fact something that anyone can

1 consent to, it is an automatic consequence of law which just happens the moment
2 the amendment arises.

3 That, it seems to me, is inapposite in this sort of case. It seems to me, given that we
4 are not talking about a claim form but an application rather than a claim form, we are
5 in fact in 88 territory, rather than 32, and what we ought to be doing is we ought to be
6 saying:

7 "These amendments come in, but it is by the tribunal's direction, and if you want the
8 consent of the parties on top of that you can have it, but it is by the tribunal's
9 direction that there is no effect until the matter has been resolved on limitation."

10 In other words, we hold the ring. We make the amendments but we hold the ring
11 until the question of a new claim arising out of the same or similar facts is resolved
12 on the certification. So the amendment would be an amendment but without
13 prejudice to relation back, if I can put it in a neutral way.

14 **MR PICKFORD:** Right. So it's an amendment de bene esse --

15 **THE PRESIDENT:** No, it would be an amendment.

16 **MR PICKFORD:** Okay.

17 **THE PRESIDENT:** But its effect would be one that would be determined in terms of
18 when precisely time ran by reference to argument that we are yet to have.

19 So I am adopting your wording, which you were extracting from Mr Facenna's mouth,
20 and putting it into ours.

21 Because the trouble is when we are talking about adding or substituting new claims
22 in 32, I am not sure that we are actually using claims in the same way when one is
23 talking about collective proceedings. We all know that collective proceedings do not
24 refer to the individual claim brought by class member A. We know from *Merricks* that
25 we are talking about a class-wide harm that is established by reference to the class.

26 The extent to which that makes a difference is a matter for debate going forward, but

1 | it does, I think, mean that the wording in 32(2)(a) does not axiomatically read across
2 | into collective proceedings, which is why I think one has, anticipating this sort of
3 | difficulty, the extraordinarily broad wording in 88.

4 | **MR PICKFORD:** Well, it won't come as a surprise, my Lord, to say obviously we will
5 | be seeking to argue that rule 32 is of applicability in relation to these amendments.

6 | **THE PRESIDENT:** Sure, of course you will.

7 | **MR PICKFORD:** As long as we are not --

8 | **THE PRESIDENT:** Just to be clear, the tribunal is not in the business of inserting
9 | differences which cannot be justified. So when one has a way of doing things which
10 | applies equally to the collective as it does to the individual, then we will want the
11 | same rule to apply to both.

12 | The point that I am making is that that is not necessarily the case here, subject to
13 | argument, but that is why one has the wiggle room in rule 88, which is in this
14 | instance giving you what you want, which is the ability to argue the point later on
15 | down the line -- which you absolutely must have -- whilst giving Mr Facenna the
16 | amendments he needs in order for us to have the consolidation that he requires for
17 | the reasons to do with his funders. That's how I am seeing the circle as being
18 | squared.

19 | **MR PICKFORD:** Yes, so long as it is clear -- which I think it has become clear in this
20 | courtroom -- that no one is going to take points against us in relation to when that
21 | matter is decided --

22 | **THE PRESIDENT:** Yes.

23 | **MR PICKFORD:** -- then I think hopefully there is a constructive way that we can
24 | take it forward.

25 | Can I just turn round? I don't want the tribunal to rise, but if I may just turn around?

26 | **THE PRESIDENT:** Of course. (Pause)

1 **MR PICKFORD:** Thank you, my Lord.

2 I think the only point is that we would consider there was more protection if, at least
3 in the recitals order, there is a clear undertaking by the PCRs, they agree that this is
4 how their claim will be treated in the future. So that they are prevented from turning
5 around in the future and saying, "Actually, we thought about it again and we realised
6 actually the tribunal didn't have the power to do what it thought it did, so sorry, but
7 we made an order you shouldn't have made and so therefore you lose".

8 I think is effectively --

9 **THE PRESIDENT:** I think what you are saying, Mr Pickford, and I agree, is what you
10 are saying is in order to keep the procedural trousers at the right level, you want belt,
11 braces and a piece of string.

12 **MR PICKFORD:** Yes.

13 **THE PRESIDENT:** I think to the extent we can achieve that, we should do exactly
14 that.

15 What I am going to invite the parties to do -- it can't be done in the immediate short
16 term, but we need to do it over the next day or so -- is get an order that does all of
17 these things by different routes. Because I think that there's not necessarily cast-iron
18 certainty about the route you want to do, i.e., consent. So we need to, I think, square
19 every circle, including undertakings not to make points, which I am sure Mr Facenna
20 will be only too happy to sign up to. So we get that wording right and then when that
21 is agreed you get a ruling which, entirely unsurprisingly, will say that we consider we
22 have jurisdiction to do exactly what the order says. If we can in good faith make that
23 ruling, then we can make the order at the same time and everybody hopefully is
24 happy for the future.

25 The one benefit we get out of this morning's hearing is that not only is certainty
26 achieved for the parties in this particular carriage dispute and the defendants to it,

1 but also we have a degree of certainty going forward for the next time round, which
2 hopefully will mean that these very interesting points can be dealt with in a quicker
3 way.

4 **MR PICKFORD:** Yes, my Lord.

5 **THE PRESIDENT:** That's no criticism of either of you. It is important that we air
6 these.

7 **MR PICKFORD:** In relation to that desire for certainty, the one point that we would
8 propose in relation to the consolidation, which as we understand it is very important,
9 is that this is an interim consolidation. It's not consolidation for the purposes of
10 certification. That would be something that we want to build into the order.

11 **THE PRESIDENT:** I think if we say it is a consolidation of the applications, then how
12 we deal with matters after certification, if certification occurs, will be a different
13 question.

14 **MR PICKFORD:** Okay.

15 **THE PRESIDENT:** Does that work, Mr Facenna?

16 **MR FACENNA:** It works. It certainly would not work if there was any suggestion
17 that this was not the consolidation --

18 **THE PRESIDENT:** No.

19 **MR FACENNA:** -- as perhaps the tribunal indicated it is going to order.

20 **THE PRESIDENT:** I think we can take advantage of the fact that this is actually
21 a two-stage process, in that you apply without being able to bring the claim but with
22 effect on limitation and when causes of action accrue through this process, but in
23 fact you don't get the authority or ability to bring the claims until certification. We can
24 use that to our advantage --

25 **MR FACENNA:** Yes.

26 **THE PRESIDENT:** -- in that we can dump the stay, because it doesn't arise, and we

1 can certify in absolute terms because all we are doing is certifying -- sorry,
2 consolidating in absolute terms, because all we are doing is consolidating until
3 certification, which is when the issues that go to trial are articulated.

4 **MR FACENNA:** Yes, my Lord.

5 **THE PRESIDENT:** I think on that everybody can be happy.

6 **MR FACENNA:** I think so.

7 In relation to this point on relation back, it obviously only arises insofar as you are
8 going back beyond the limitation period. It seems to be that the argument that might
9 be made relates only through the third abuse and only insofar as it is going back
10 more than six years beyond --

11 **THE PRESIDENT:** We're talking about the three or four months which constitutes
12 the difference between Pollack and Arthur, I think.

13 **MR FACENNA:** Is that the point?

14 **MR PICKFORD:** No, it is potentially more than that, my Lord, to be clear. It is the
15 difference between -- on one view, if there were relation back, then the right date for
16 limitation in respect of the third abuse would be the date on which the Pollack claim
17 was issued.

18 **THE PRESIDENT:** Yes. It is if that's not the case that we are now debating, isn't it?

19 **MR PICKFORD:** Yes.

20 But on another view, which is the position that we will be advancing, if it's a new
21 claim and it doesn't arise out of the same or substantially the same facts as already
22 pleaded, the clock doesn't stop ticking until they issue that new claim.

23 **THE PRESIDENT:** Indeed. Except that's where the Arthur claim may have a use,
24 because --

25 **MR PICKFORD:** It may or it may not, because you would have to analyse it.

26 **THE PRESIDENT:** Of course. To be clear, we are not going to do that today.

1 **MR PICKFORD:** Yes.

2 **THE PRESIDENT:** But just so that we know what we may or may not be arguing
3 about, Mr Facenna, you may be right that one is simply talking about the gap
4 between Pollack and Arthur.

5 **MR FACENNA:** No, my Lord, I understood it to be more significant.

6 **THE PRESIDENT:** Well, only if Mr Pickford is right on the ambit of Arthur.

7 **MR FACENNA:** What he wants to be able to argue is we can't have within the
8 consolidated claim by way of amendment the third abuse at all, I think is the
9 argument that he wants to run.

10 **THE PRESIDENT:** I think it is.

11 **MR FACENNA:** I think my point was at least insofar as it goes back more than six
12 years.

13 **THE PRESIDENT:** Indeed. But it may be that because you have, on the face of it,
14 two identical claims but arising out of differently pleaded facts -- because they come
15 in by way of amendment -- the amendment question is actually applying the
16 relation --

17 **MR FACENNA:** Back to the Arthur claim ...

18 **THE PRESIDENT:** Exactly. You may find you get your third claim in by a different
19 route.

20 **MR FACENNA:** I rather hope and suspect, my Lord, we might be arguing about
21 something which turns out not to have very much in it.

22 **THE PRESIDENT:** You took the words out of my mouth, Mr Facenna, but you never
23 know.

24 **MR FACENNA:** We never know.

25 Certainly, I mean, I don't wish to sound ungrateful for where we have landed, but
26 I think we were pretty clear in both of our skeleton arguments that we were not trying

1 to lock out any arguments about consolidation. It does slightly feel like we have
2 ended up going round in circles to give Google a reassurance, which actually was
3 always there from the very beginning.

4 There is one other point, just in case we forget it, which is there is an issue between
5 us as to one of the dates in the order as to when Google should put in its response
6 for the purposes of certification.

7 Shall I just deal with that briefly?

8 **THE PRESIDENT:** Yes. Why don't we deal with that very quickly?

9 **MR FACENNA:** You will remember in the order I think, which was dated in June
10 following the last hearing, the expectation was that we would have a contested
11 carriage hearing today, some period for judgment and then Google was given until,
12 I think, 14 December to put in its response for the purpose of the certification hearing
13 in January.

14 Things have obviously moved on from them, Google has known since the middle of
15 September that we were going to bring forward an amalgamated claim. They have
16 had the consolidated claim for I think two weeks now, from 2 October. There is no
17 longer going to be the lingering uncertainty. What we are anxious to avoid is Google
18 putting its response in on 14 December and we then have a period of four weeks,
19 which obviously would include the Christmas period.

20 **THE PRESIDENT:** I see.

21 **MR FACENNA:** Given how things have played out, it seems to us fair that Google
22 ought to be required to put its submissions in by 24 November, is the date we have
23 suggested, which would I think give it a total of eight weeks with the consolidated
24 claim form. Bearing in mind also it is effectively a consolidation of the two claims
25 which Google has had I think since March and November last year respectively.

26 That would mean that we could then put our response in in the following four weeks,

1 | which would be before Christmas, so that things were done before we then get into
2 | the corporate holiday period.

3 | **THE PRESIDENT:** Mr Pickford, we always like to go faster if we can. But is there
4 | any prejudice to Google if we take that sort of approach?

5 | **MR PICKFORD:** There is, I am afraid, my Lord.

6 | We had the original order and Mr Facenna has not advanced any reason why they
7 | couldn't still comply with the original order. They always had a certain period in
8 | which to respond --

9 | **THE PRESIDENT:** Yes.

10 | **MR PICKFORD:** -- and he's not said that that job has become any more difficult as
11 | a result of anything that has happened. So there is no justification for changing that
12 | order from their perspective. From our perspective we will be prejudiced by the
13 | bringing forward by a matter of I think it is now three weeks the time for our
14 | response, because our job has not become easier as a result of what they have
15 | done. It has now become harder.

16 | The consolidated application, so-called, is with respect not a consolidation of the
17 | claims. That's one of the points that we would have elaborated on in this hearing.

18 | It is a new beast, which is a hybrid which takes certain elements of certain claims,
19 | certain elements of other claims and brings them all together and then adds a few
20 | more ingredients for good measure. We now have a new document to deal with,
21 | which is quite a complex one, one of the things we need to do is actually work out
22 | the extent to which it relates to the different claims and which bits are brought from
23 | here, brought from there and which bits are new.

24 | We also have an expert report, which has been substantially developed. Again, it's
25 | not merely a consolidation in that respect. It's a large number of new parts and
26 | expert report accompanying the so-called consolidated claim. That report runs to

1 many hundreds of pages. The job that we now have to do in responding to the
2 amalgamated claim is worse than the job we would have done had there been
3 a contested application. In a contested application it would have been one or the
4 other and it would have been the same something that we had known about for
5 some time.

6 We have only had this new beast for a couple of weeks and we say, if anything, we
7 would need more time than we had, not less. We are not asking for more time. We
8 are simply saying that the original ordered timetable should stick.

9 We also now, obviously as a result of the amendments, have a number of difficult
10 issues in relation to limitation to grapple with that we didn't have previously before
11 there was this issue about consolidation and amendment.

12 For all of those reasons we, I am afraid, are unable to accept that our job has got
13 any easier. It has got harder.

14 **MR FACENNA:** I make the point that under the original timetable Google would not
15 have known which of the claims it had to respond to until a couple of weeks after
16 today. It was then given six weeks until 14 December. The reality is that it has
17 known the substance of these claims for months now actually, and has had this
18 claim form since the very beginning of October, and the sensible thing would be to
19 move forward as quickly as possible. If we can have the written responses done
20 before Christmas, then that is good for everyone.

21 **THE PRESIDENT:** Yes, thank you very much.

22

23 **RULING**

24 **THE PRESIDENT:** Having during the course of this morning effectively resolved
25 a carriage dispute between the two applicants for collective proceedings, a question
26 arises out of the timing of consequential matters to those applications. It is

1 suggested by Mr Facenna, who appears for the proposed class representatives, that
2 the timetable for Google's response be accelerated from 14 December 2023 to some
3 point before then.

4 Mr Facenna suggested the date towards the end of November as being something
5 which would enable the class representatives themselves to put their reply material
6 in before Christmas.

7 That is laudable. We would, if that was agreed between the parties, certainly
8 endorse that sort of approach. But Mr Pickford, who appears for the respondents to
9 this application, maintains that 14 December constitutes a date which remains
10 an appropriate date given the amount of work that must be done by the respondent
11 in order to deal with the consolidated application that the respondents now face.

12 It seems to us that it is not possible for us to say that the timetable laid down in our
13 early order is so materially deficient as to enable a change to be made over the
14 opposition of the respondent. Therefore, we are not going to order -- though we
15 would have acceded in an agreed amendment -- an acceleration of the time-frame.

16 I am afraid that does mean that there is going to be a degree of work over Christmas
17 by the class representatives and their legal teams.

18 I would only say that if -- I am not inviting an application now -- further time is
19 required consistent with the hearing of certification, more time is required, then we
20 would look sympathetically to an application by the class representative before
21 Christmas in order to stretch time appropriately. We make it clear that that is not
22 because it is needed, but because it is desirable given the holiday period, and,
23 provided there is no harm done to the process after Christmas, that is something that
24 we indicate we would look favourably upon.

25 **MR PICKFORD:** I am grateful my Lord.

26 **MR FACENNA:** I am grateful my Lord.

1 **MR PICKFORD:** The only point I propose to say is that costs be reserved, because
2 there may be some costs arguments but they are certainly not for now.

3 **THE PRESIDENT:** Yes, that makes sense, I think, Mr Facenna.

4 We will direct costs reserved.

5 Is there a point about confidential material?

6 **MR PICKFORD:** I beg your pardon, my Lord, there is one thing -- it has just been
7 pointed out to me -- that we need to deal with, which is confidentiality.

8 We don't yet have sight of the full funding agreement, in particular the nature of the
9 relationship between one set of funders and another in these proceedings. We say
10 that we are entitled to see that.

11 In particular, there may be issues that arise as to whether there is some sort of
12 damages-based award that lingers, even though the primary funding agreement now
13 doesn't appear to have one. We don't know how the funder that's sitting in the
14 background now is going to be remunerated.

15 **THE PRESIDENT:** Yes.

16 **MR PICKFORD:** There is no reason why that shouldn't be disclosed into the
17 confidential ring. The full unredacted funding agreements have been in the past.
18 We quite understand it is confidential, but Google's advisers need to see everything.
19 We can't just be given blank pages of paper in relation to certain aspects of the
20 funding in this case.

21 **MR FACENNA:** The position, as I understand it, is that those are pure commercial
22 arrangements between the funders, to the point where no one on my side, including
23 my instructing solicitors, have seen those arrangements either. They are
24 commercially confidential. They are not relevant to the claim. If no one on our side
25 has seen them or needs to see them, it is hard to understand why Google would
26 need to see these commercial arrangements between the two funders.

1 **THE PRESIDENT:** I understand, but in a sense, relevance is in the eye of the
2 beholder in terms of what arguments are being made.

3 You naturally are on the side of those wanting to uphold the funding arrangements.
4 It is Mr Pickford's job to pick holes in them. Of course we appreciate the commercial
5 sensitivity, but can that not be resolved by having an appropriately tight
6 confidentiality ring into which this material is disclosed so that Mr Pickford can satisfy
7 himself that you are right and there is no point arising out of these matters?

8 **MR FACENNA:** I don't have instructions from the funders. I don't want to say
9 anything which prejudices their position or anything they might want to say. If we
10 can take away what the tribunal has said and the indication given, we will let the
11 tribunal know as quickly as we can whether there is a problem or whether that sort of
12 arrangement can be managed.

13 **THE PRESIDENT:** Let me just make it clear without a ruling that as regards funding
14 arrangements, provided confidentiality can be respected and that's what
15 confidentiality rings are there for, we would want wide rather than narrow disclosure.
16 Obviously there are limits and it may be that you need to articulate them on the
17 papers for us to resolve on the papers if agreement cannot be reached. But we do
18 think that, particularly given recent events in the Supreme Court, particularly in those
19 circumstances, those who are opposing certification are entitled to leave the
20 certification hearing if they have lost knowing that they have had the opportunity to
21 take every point before the outcome.

22 That is in broad terms how we will exercise our discretion in terms of disclosure of
23 material. But obviously there are limits. At some point something becomes so
24 irrelevant that it clearly cannot sensibly be said that it is material to be disclosed.
25 I have to say my sense is we are not there yet, but we have seen rather less than the
26 parties have, even on Google's side, regarding the arrangements.

1 **MR FACENNA:** That's a helpful guide, my Lord. I am sure those behind me and the
2 funders will take that on board and we will see what we can do.

3 **THE PRESIDENT:** I am very grateful.

4 In that case, if the parties can pull together an order that deals with all of the points
5 we have discussed, but particularly to ensure that both sides are happy that they
6 have protected their respective positions to enable carriage to be put to bed, then we
7 will, in light of that order, both make it and consider whether it is necessary to hand
8 down a short ruling on top of that.

9 It may be that we can get away with a reasoned order which sets out our thinking in
10 briefer terms, but we will, I think, look first at the agreement that the parties have
11 reached before we articulate our hopefully enthusiastic endorsement of what the
12 parties have found resolves the question.

13 **MR FACENNA:** I am grateful, my Lord.

14 **THE PRESIDENT:** We are very grateful to all of you.

15 Thank you very much for dealing with and navigating these difficult procedural
16 questions. We are really very much obliged.

17 Thank you.

18 **(1.09 pm)**

19 **(The hearing concluded)**

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