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

Case No: 1568/7/7/22

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

13 Wednesday 28th June 2023

14
15 Before:

16
17 The Honourable Mr. Justice Marcus Smith
18
19 (Sitting as a Tribunal in England and Wales)
20

21
22 BETWEEN:

23 **Proposed Class Representatives**

24
25 **Julie Hunter & Robert Hammond**

26
27 **V**

28 **Defendants**

29
30 **Amazon.com, Inc. & Others**
31

32
33
34 **A P P E A R A N C E S**

35
36
37
38 Robert O'Donoghue KC & Sarah Love
39 (Instructed by Hausfeld) on behalf of Julie Hunter

40
41 Ben Rayment
42 (Instructed by Charles Lyndon and Hagens Berman EMEA) on behalf of Robert Hammond
43

44 Jon Turner KC & Kim Dietzel
45 (Instructed by Herbert Smith Freehills) on behalf of Amazon & Others
46

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Wednesday, 28 June 2023

(10.30 am)

Case Management Conference

MR JUSTICE MARCUS SMITH: Mr O'Donoghue, good morning.

MR O'DONOGHUE: Good morning, Sir.

MR JUSTICE MARCUS SMITH: Before we begin I will do the usual LiveNote warning.

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Mr O'Donoghue, good morning.

MR O'DONOGHUE: Thank you, Sir. The cast will be depressingly familiar but let me give you the roll call. I appear with --

MR JUSTICE MARCUS SMITH: I have a screen here which -- is that better? Yes. I can now see you and you can see me, I hope. Sorry, Mr O'Donoghue.

MR O'DONOGHUE: Sir, I appear with Ms Sarah Love, Mr Rayment for the Hammond PCR, Mr Turner and Ms Kim Dietzel for Amazon.

MR RAYMENT: Sir, could I just mention on Mr Moser's behalf --

MR JUSTICE MARCUS SMITH: I think he's otherwise engaged.

MR RAYMENT: Yes, he is.

MR JUSTICE MARCUS SMITH: Not a million miles from here.

MR RAYMENT: He did ask me to expressly record his apologies not to be able to be here today, but the Tribunal is keeping him busy elsewhere.

MR JUSTICE MARCUS SMITH: Not at all. Thank you, Mr Rayment, and you are very welcome.

MR O'DONOGHUE: Sir, it's hard to imagine it's more interesting than this case.

1 The agenda is relatively short. There are directions which to a material extent have
2 been agreed. There's been some movement overnight in relation to further
3 amendments. I don't know if that's made its way the Tribunal.

4 **MR JUSTICE MARCUS SMITH:** The document that I have just received -- I haven't
5 read it, I'm afraid, but we can probably go through it when we have dealt with any
6 points of controversy.

7 **MR O'DONOGHUE:** Indeed, and there's a disclosure issue which we will come to in
8 due course.

9 **MR JUSTICE MARCUS SMITH:** Sorry, do go on.

10 **MR O'DONOGHUE:** We are in your hands as to the order in which you wish to take
11 us. It occurs to me, Sir, given that Mr Rayment is at least not directly affected by this
12 disclosure point, that doing the directions first might allow him to --

13 **MR JUSTICE MARCUS SMITH:** Indeed. It doesn't seem to me that there is a huge
14 amount to occupy time this morning as opposed to the importance of the matters that
15 are being dealt with. It seems to me we need to handle carriage first. Not only is that
16 what Mr Rayment is principally interested in, but, equally, it shapes everything else.
17 I detected, until Mr Turner's note last night, a general sense that the approach in
18 *Pollack v Alphabet* was common ground. I anticipate that is still the case as between
19 the PCRs, but I think, on that, Mr Turner I should hear from you regarding your sense
20 that the proposal to have 25-page notes from the experts makes this a case that is
21 different to *Pollack*. And then Mr O'Donoghue and you, Mr Rayment, can reply to that.

22 **MR O'DONOGHUE:** The one thing I would put into the mix, of course, the suggestion
23 of a paper, whether it's 25 pages or something else, is a detail. That was something
24 generated from the PCR side and it occurs to me that it may be useful for us to unpack
25 the rationale behind that before Mr Turner tilts at a windmill.

26 **MR JUSTICE MARCUS SMITH:** Mr O'Donoghue, if you think I will benefit from that --

1 **MR O'DONOGHUE:** It's a very short point, Sir.

2 **MR JUSTICE MARCUS SMITH:** That's great. We'll do carriage dispute first then we'll
3 at least map out what directions are appropriate in light of what I rule; and I'll rule point
4 right away obviously there.

5 **MR O'DONOGHUE:** Thank you, Sir.

6 **MR JUSTICE MARCUS SMITH:** We will I think then want to deal with any other
7 matters like confidentiality rings and publicity notification. And then we can leave the
8 disclosure funding arrangements until last.

9 Mr Rayment, I will leave it to you whether you stay or go at that point. In one sense
10 it's nothing to do with your client and in another sense you may get a benefit from how
11 the Tribunal sees things in terms of disclosure, funding arrangements, so if you wanted
12 to stay you will be very welcome.

13 **MR RAYMENT:** I'm grateful for that indication, Sir, and I will take that under
14 advisement with my team.

15 **MR JUSTICE MARCUS SMITH:** I'm grateful. Mr O'Donoghue.

16 **Directions**

17 **MR O'DONOGHUE:** So, carriage, there was violent agreement certainly on this side
18 of the court that in the light of Pollack the general if not overwhelming position is that
19 carriage should be dealt with first, should be dealt with swiftly; and following the
20 template in Pollack there could be a one-day hearing relatively soon, in which the
21 carriage issues would be determined. So that seemed to us not really up for serious
22 debate.

23 As you adverted to, Sir, there was a hint from Mr Turner last night that the pragmatic
24 suggestion that we have collectively put forward, that there would be some compare
25 and contrast emanating from the experts, that that somehow makes all the difference.
26 Now just to unpack the thinking behind that, I should say, first of all, as it happens it

1 was a proposal which came from Hammond, but we do not disagree. The thinking,
2 Sir, is very simple. We've a tight one-day hearing, it is, in my submission, obvious that
3 a relative comparison of the methodologies will be an important part of that hearing.
4 Given that this has been expert led, as you would expect, it occurs to us there would
5 be considerable efficiency in the compare and contrast between the methodologies
6 being front loaded, first, and, second, coming from the experts themselves. Because
7 the alternative of course is that Mr Harman or whoever, paraphrases what he would
8 have said and then I inelegantly, and no doubt less efficiently, incorporate that in my
9 skeleton, and in submissions. Again, I come back to the timing point. With a one-day
10 hearing that simply may not be efficient.

11 So it was a pragmatic proposal for harnessing the expert side of things, prior to the
12 hearing, so that we can hit the ground running in Michaelmas, whenever that is. We
13 say that has obvious practical merit, it is unrealistic to pretend that in some shape or
14 form some version of that would not surface in any event. We say it is far better to
15 grasp the nettle now rather than leave it till March.

16 We will hear what Mr Turner says, but we say at base it is surprising if that pragmatic
17 proposal would somehow make all the difference because of course, Sir, as you well
18 know from Pollack -- could we turn it up, it's in tab 8 of the authorities bundle.

19 **MR JUSTICE MARCUS SMITH:** Yes.

20 **MR O'DONOGHUE:** It starts at 25. The first point you made there, Sir, is that the
21 carriage as a preliminary issue:

22 "... will not determine any of the aspects of either the Authorisation Condition or the
23 Eligibility Condition."

24 I will come back to that in the context of the disclosure issues because one of my
25 submissions will be that should all be for another day, it is simply not relevant at this
26 stage.

1 Then of course, Sir, as you note in 25(1) and 25(2), first of all the defendants -- they
2 don't have to participate in the carriage dispute at all, your emphasis. And then (2),
3 you dismissed as fanciful the defendants' suggestion that their position:
4 "... might in some way inadvertently be prejudiced by the Tribunal favouring one PCR
5 over another at the carriage hearing and thereby be predisposed into thinking that the
6 PCR that succeeds in the carriage dispute should also succeed at the certification
7 hearing. The questions that arise at each stage are different, and Google can be
8 assured there will be no 'following wind' at the certification hearing emanating from the
9 carriage hearing."
10 So that's why we are very surprised that Mr Turner says that the obvious need to
11 engage in some level with the relative merits of methodology at the carriage stage
12 somehow makes all the difference in terms to the list his client has in relation to the
13 carriage dispute and/or their participation. We are very surprised by that suggestion.
14 **MR JUSTICE MARCUS SMITH:** Thank you, Mr O'Donoghue. I have a little bit more
15 sympathy with Mr Turner's position. The concern is perhaps less of substance and
16 more of proper process -- or how the process appears. One can see an outsider
17 looking in on the process, seeing great debate, including on the papers, as to whose
18 methodology is better, the Tribunal expressing a view, as it would have to, because
19 this clearly is relevant to carriage, and then somehow being seen, in expressing that
20 preference, in buying into the notion that the relative exercise feeds into the absolute
21 exercise that is relevant in certification.
22 It does seem to me that it is important that the forms be observed, so that no one gets
23 a sense that the respondent to these applications is not getting -- not a fair shake of
24 the dice, I hope everyone knows that they will get a fair shake of the dice, but that it is
25 clearly demonstrable to those observers that there is a process that is dealing with
26 this.

1 So, for example, I have said in 25(1) that there is no need for the respondent to attend
2 unless they choose to do so. And of course, they will have every right to participate
3 appropriately in a carriage dispute because I would not want a respondent to be shut
4 out from any part of the process. The same goes for ensuring that someone in the
5 position of Amazon does not feel that the deck has in some way been stacked, at the
6 certification stage, by this relative process.

7 We are concerned to ensure proper management of what may well be seen as
8 a perception issue, but actually perception issues matter almost as much as substance
9 in some point in --

10 **MR O'DONOGHUE:** Just to round off the references, if one then looks at 25(3):

11 "There can be no question of the Tribunal's consideration of the Authorisation
12 Condition or the Eligibility Condition on certification being either diluted or distorted by
13 the anterior consideration of carriage. All that carriage does is remove from the
14 equation one applicant ..."

15 Then the last sentence:

16 "It is not for Google but the Tribunal to determine how best the issues of carriage and
17 certification are to be resolved and --provided Google is not prejudiced -- the Tribunal
18 must exercise its judgment according to what is the best case management outcome."

19 So it's simply to note that the Tribunal has Mr Turner's message loud and clear.

20 I entirely accept that the appearances and the optics are important in these matters,
21 but the underlying concern and the relative nature of the exercise is extremely well
22 understood.

23 **MR JUSTICE MARCUS SMITH:** That is entirely fair, Mr O'Donoghue. I suppose the
24 only point I would make is that in 25(3) I was making the point in response to
25 submissions made by Mr Pickford in that case, and I think we should be seen as not
26 just talking the talk but walking the walk when Amazon make exactly the same point,

1 because although it is the same point, these are different proceedings. So that's really
2 why I'm concerned to engage in this. I'm not resiling from anything that was said in
3 Pollack. But it was said in Pollack, not in any other case. Mr Turner's note last night
4 seemed to me to be raising a point that, entirely appropriately, should be aired. It may
5 be right, it may be wrong, that's a matter for today, but the airing of it is important. So
6 I'm very grateful to you for setting out (**overspeaking**) --

7 Mr Rayment, do you have anything to add to what Mr O'Donoghue has said?

8 **MR RAYMENT:** Just very briefly. I mean, we totally hear what you say about the
9 need for appearances to be respected and of course that emerges loud and clear from
10 your judgment in the Pollack case. But as a matter of principle, taking principle first,
11 the fact is that the Tribunal on the carriage application does have to grapple with the
12 relative merits of the two applications and therefore that issue does have to be
13 grappled with, on the understanding of course, so far as the proposed defendants are
14 concerned, that that is not going to prejudice them when it comes to the separate issue
15 of certification. In a sense it's unavoidable that the Tribunal has to go into the relative
16 merits of the expert approaches, that is simply unavoidable.

17 The question is really, we say, how practically and efficiently can that be done; which
18 is again one of the Tribunal's other key priorities in this area which is to deal with these
19 matters without undue delay, to use your phrase in Pollack, and efficiently.

20 We, on our side, do not see that having a short position statement from the relevant
21 expert, as part of the submissions, either affects Mr Turner when it comes to
22 certification, nor, we say, does it affect the efficiency with which the Tribunal can deal
23 with the application. Indeed we think it can even enhance the efficiency with which
24 the Tribunal can deal with the carriage dispute.

25 And of course, you know -- I think we did propose the idea that the expert should be
26 able to provide some direct material to the Tribunal, I think Mr O'Donoghue's

1 contribution was 25 pages. We are not wedded to the 25 pages. What's important to
2 understand is that the written submissions and the expert material will obviously
3 co-exist and are interrelated.

4 So, I mean, if one puts in a 15-page expert report that will affect the length of
5 the written submissions so in terms of -- I've already addressed you on the question
6 of principle, but then on the practicalities and the efficiency with which the matter can
7 be dealt with, it's clear that it's probably neutral overall in terms of the impact on the
8 amount of material, because you know, longer submissions will be needed if the expert
9 isn't going to provide some direct testimony.

10 We, for our part, would like -- I would like to make one further submission which is that
11 there has I think in the background been a suggestion or the analogy slightly drawn
12 between the carriage dispute and a jurisdictional challenge in a sense that it's
13 something that needs to be dealt with at the outset of the proceedings, and should be
14 dealt with quickly. I think there's the classic statement of Lord Templeman we're
15 talking about hours rather than days. But whilst I think --

16 **MR JUSTICE MARCUS SMITH:** That's never succeeded.

17 **MR RAYMENT:** It's never succeeded. Well -- but also the thought process behind
18 that in the context of a jurisdictional challenge we say can only be taken so far in this
19 context, because at the end of the day the out-turn of the jurisdictional challenge is not
20 whether or not the case can proceed, it is where the case can proceed. And that is
21 a matter that can be dealt with on a quicker and dirtier basis, to use the sort of
22 colloquial jargon, than a case such as a carriage dispute which at the end of the day
23 we have to acknowledge raises -- it is not a trivial matter, a carriage dispute. I mean,
24 it may be in some types of cases. But in cases where you have two carefully
25 considered and prepared applications, albeit taking different approaches, the question
26 of which one will serve the interests of a very large class of UK consumers is a very

1 serious issue, given that the loser won't be able to proceed.

2 Therefore we think that a modest amount of written expert input is entirely
3 proportionate to the seriousness of the issues at stake on carriage.

4 **MR JUSTICE MARCUS SMITH:** Mr Rayment, I entirely accept that. The point is it is
5 at this stage, the carriage stage, that the Tribunal has more or less a once for all
6 opportunity to decide which formulation of a claim will best suit the interests of the
7 class to be represented. And entirely unsurprisingly, it is not a matter on which the
8 PCR's or the respondents to the application can be objective. Obviously each PCR is
9 going to be saying, "We're best", and that's as it should be. It is for the Tribunal to
10 grapple with the substance to ensure that access to justice is not merely a formulaic
11 thing of who could put together a claim, but where there are two claims the best claim
12 goes forward. That is a very difficult exercise because one is, to a very considerable
13 extent, crystal ball gazing as to what will happen at trial 18 months/two years hence.

14 So you don't need to persuade me about the importance of carriage. I think what is
15 more Mr Turner's point is that, yes, there is the importance of speed and
16 efficiency -- the same as of course all the things that were articulated in Pollack. But
17 the point he is making is that in this case -- and it may be it would be present in the
18 skeletons if it wasn't present in the notes from the experts -- there is a sufficient bleed
19 across between issues that will be aired in carriage and issues that will be aired in
20 certification to make this a different case from Pollack. Of course Pollack is going to
21 be cited in all these cases, but so too ought the decision in FX to go the other way.

22 I mean the fact is FX was the first carriage dispute to come to the Tribunal, we were
23 naturally very cautious about carving out a preliminary issue when we really didn't
24 know what we were dealing with. Pollack takes a different view informed by the
25 Tribunal's experience going forward.

26 I would say that both PCR's are right to treat Pollack as the default position, but there

1 will always be the exceptional case. That's why we are having this discussion now,
2 it's a question of how one manages these questions going forward.

3 **MR RAYMENT:** Very good, Sir.

4 **MR JUSTICE MARCUS SMITH:** I'm very grateful, Mr Rayment.

5 **MR RAYMENT:** Sir, you have our submissions this isn't an exceptional case.

6 **MR JUSTICE MARCUS SMITH:** I understand.

7 **MR RAYMENT:** It's not made exceptional by a bit of expert written evidence.

8 **MR JUSTICE MARCUS SMITH:** I entirely see where you are coming from. We will
9 see what Mr Turner says and you will obviously have the chance to reply.

10 **MR RAYMENT:** I'm grateful, Sir.

11 **MR JUSTICE MARCUS SMITH:** Thank you. Mr Turner.

12 **MR TURNER:** Sir, if I make two preliminary observations and then I'll explain my
13 position just a little bit more fully. The first is something that affects this CMC more
14 generally, which is that the Hunter PCR has promised to produce an amended
15 claim form, adding to their case, and a supplementary expert report addressing certain
16 features and methodology. We asked when that would be produced, we've not had
17 an answer even now.

18 To some extent this CMC is proceeding in the abstract because we can't see, even
19 now, the full extent of the methodology and the case that the Hunter PCR is putting
20 forward and we don't know when that's coming. So when it comes to the directions, it
21 will be our suggestion that there needs to be some discipline for them to produce, at
22 least in draft, those documents.

23 The second preliminary observation is that you were right on the money, you went
24 straight to the heart of why that is a concern for Amazon, which is the sense of
25 grievance that might arise if you see that the self-same issues that are likely to be
26 traversed at certification are being rehearsed at an earlier hearing where the ability of

1 the defendant to contribute is necessarily less, and where they may feel that views are
2 coalescing and findings then are made which are based on those views. So that is
3 absolutely the nature of the concern.

4 Having said that, I move to explain our position a little more fully. Our position, to be
5 clear, is that it does make good sense for the carriage dispute to be dealt with first,
6 provided the conditions in Pollock apply. We see there as being essentially three. To
7 summarise those, the first is that the carriage hearing ought to be relatively light touch.
8 We're in agreement with the PCRs about that. Just as you suggested in Pollack, it
9 ought to be capable of being disposed of in a matter of hours rather than days. In that
10 regard there is a similarity with jurisdiction disputes in commercial cases, which are
11 meant to be dealt with swiftly and economically at the beginning of the case because
12 the common feature is the importance of cost control.

13 The second point is that the assessment at the carriage hearing, to pick up the parts
14 of the Pollack judgment that Mr O'Donoghue referred to, shouldn't traverse the same
15 grounds as the certification hearing. As the Tribunal said in that case, the questions
16 that arise at each stage are different. Because if they do traverse the same ground,
17 contrary to that statement in paragraph 25(2) of Pollack, then the argument for
18 separating is weakened.

19 Third, and closely related to that second point, is the matter, Sir, that you raised, that
20 the defendant shouldn't be prejudiced by the sequencing or feel that they are going to
21 be prejudiced because matters relevant to certification will be gone into in some depth
22 at the carriage hearing, views coalesce and the defendant feels that they have not had
23 a proper say. That is what creates a sense of grievance.

24 As the Tribunal said in Pollack, each case has to be considered on its merits:
25 paragraph 17. Pollack is the default. Until we had received the skeletons at the end
26 of last week from the PCRs we didn't think that this case would present a difficulty from

1 the point of view of dealing with carriage first. The Tribunal would, we apprehended,
2 be looking, at least in significant part, into the sorts of thing that you find referred to in
3 the 2015 guide, that's an old document, at paragraph 6.3(2) which set out the matters
4 likely to be relevant in a carriage dispute.

5 Sir, you will recall that those include the class definitions and the scopes of the
6 respective claims because here we do have significant differences that will need to be
7 discussed. You will be aware that there is a marked difference in the claim period for
8 a start. In Hunter, this appears to begin no earlier than November 2016. It's
9 paragraph 9 of their claim form. In Hammond they are proposing a claim going much
10 further back, all the way to 1 October 2015, and then they have a provisional end date
11 of June 2020. So that's certainly something that this Tribunal will be extremely,
12 I imagine, keen to attend to in the carriage hearing.

13 Similarly, as Mr O'Donoghue has pointed out in his skeleton argument, the scope of
14 the abuses have material differences. Some of those were referred to in
15 Mr O'Donoghue's skeleton and there are others which are important too. One of those
16 is that the theory of harm is in one sense more narrowly tailored and targeted in the
17 Hammond case than in Hunter. Hammond's claim refers to specifically two respects
18 in which there was alleged systematic bias, but the Hunter claim is expressed in border
19 terms. So that is almost certainly going to need to be looked into.

20 Then there's a range of other things, notably a comparison of the quality of the
21 litigation plans and that will include funding arrangements. So already, if one's talking
22 about something being disposed of in a matter of hours rather than days, there's quite
23 a full agenda before one even gets to the question of each side critiquing the other
24 side's expert methodology. It is in that regard that we thought that the PCRs had taken
25 a step that we did not expect in their skeleton arguments and in the Draft Order that
26 they produced referring to 25-page expert statements. We had in mind, and I quoted

1 this in paragraph 7 of the supplementary note, Sir, what you said in argument in the
2 Pollack case, that you wouldn't expect there to be further expert statements for
3 a carriage hearing unless the Tribunal indicated that they wanted it. Yet the proposal
4 is 25-page expert statements or reports, carrying out these critiques of the other side's
5 methodologies.

6 Accordingly, it now appears that a significant feature of the carriage hearing that they
7 anticipate is that each side's expert methodology will be, to an extent, unpicked by the
8 other side and defects or disadvantages exposed. If that is what is in store then it will,
9 in my submission, cover, certainly be seen to cover, the same territory as the
10 certification hearing. And this is where the issue comes because it now therefore
11 becomes appropriate to consider how important that is in making this important
12 decision about whether there would be a rolled up hearing or continue with the default
13 position.

14 If I may, I'll illustrate the point by turning to the small clip of solicitor correspondence
15 that we flagged on the reading list for this hearing. It helps point out why there may
16 be a real overlap of the issues to be considered at certification and carriage, if the
17 carriage hearing takes the form that they propose.

18 If you have the main bundle, it's a little clip at paragraphs 37, 40 and 41 at the end.
19 It's tab 37.

20 **MR JUSTICE MARCUS SMITH:** I have that.

21 **MR TURNER:** That was a letter of 10 May. In it what we tried to do was shine a light
22 on what appeared to us to be gaps and shortcomings in the methodology of the Hunter
23 expert. We got a response which came five weeks later, that's at tab 40, on 16 June.
24 It answered one of questions. In our view it gave unsatisfactory answers to certain
25 others. Finally, if you turn to the end of it, paragraph 26, you see they say under
26 pass-on, because we said you haven't dealt with pass-on:

1 "It's our client's intention to file an amended Claim Form and a supplementary report
2 to address findings in the Commission's commitments decision ..."

3 Which they haven't done:

4 "... and the report will also address the methodology for addressing pass-on."

5 We asked, as I said at the outset, to know when we might expect to get those
6 documents because they could be material the Tribunal's case management at this
7 hearing. We still don't know.

8 If we go back to tab 37, I will just touch briefly on a couple of the matters that we raise
9 purely to show you the sort of point that's likely to come up in this case when you get
10 to certification, and which might also be intended by the PCRs to be canvassed at the
11 carriage hearing. Mr Rayment will obviously say if this is not the sort of thing that will
12 be touched on. If you look at paragraph 3 on page 604, the point there is that we were
13 remarking that the expert in Hunter is proceeding on the basis that the only two things,
14 the only two things, that should legitimately determine what offer Amazon puts in the
15 Buy Box when you buy on the product detail page are, one, price and, two, speed of
16 delivery. It appeared to us that this is, at first sight, pretty odd as a starting point for
17 the methodology because it's surely obvious that there are other product attributes
18 which do matter to customers.

19 I am making the assumption, Sir, that you do buy occasionally --

20 **MR JUSTICE MARCUS SMITH:** I possibly should have declared that. I'm afraid that
21 a number of book purchases in the Smith household has received a degree of criticism
22 in the past. But I hope that that won't disqualify me from dealing with matters.

23 **MR TURNER:** It would be difficult then to find a judge who was not disqualified but
24 also competent to do the case.

25 The point is that you'll therefore be readily aware there are various other features that
26 matter. There's the stock availability, other delivery features, accelerating and so on,

1 | which Amazon also puts into the mix. So we raised the question: how are these things
2 | going to be taken into account in the assessment? The answer comes back five weeks
3 | later. If we go back to tab 40 and look at -- it's in two places. Paragraph 15 is the
4 | most succinct explanation. Their position is that price and delivery time, they are the
5 | determinative factors of relevance to consumers preference. That's why their expert
6 | has used them in his report to filter out to find what is abusive self-preferencing in their
7 | approach. They say that the significance of other product attributes is all going to be
8 | tested further down the line, and that is going to be in assessing the quantum of loss.
9 | So that's a fairly major methodological point and it may be said, well, that's not going
10 | to be canvassed at the carriage hearing, but it is certainly one of the matters that may
11 | arise at certification.

12 | Just to show you a couple of others to give you a proper feel for this, if you go back to
13 | our request, page 605, paragraph 9, that is a paragraph where Amazon is picking up
14 | the point that the Hunter PCR says that there is a chunk of loss which results from the
15 | unavailability of there being cheaper logistics and delivery services and that feeds
16 | through to the prices that we pay when we buy on Amazon.

17 | The PCR's expert said in their report that the first step in their methodology here is to
18 | compare the Amazon fulfilment fees, warehouse and delivery, with the prices for
19 | equivalent services available from other logistics companies like the Royal Mail. If you
20 | just flick back to tab 6, and go to page 170, he summarises very succinctly how he's
21 | doing it in 7.5.8 and 7.5.9. He says at 7.5.8:

22 | "I propose to quantify this Further Loss based on, one, Amazon's fulfilment fee
23 | premium, the differential between the Amazon fees and other option fees that could
24 | be used; and two, purchaser's average willingness to pay for the Amazon premium."

25 | He goes on to say:

26 | "I consider that one can be estimated by comparing Amazon's fees with the prices

1 | faced by a third party retailer for equivalent services from other logistics companies
2 | like Royal Mail or Evri and a like-for-like comparison will need to be carried out."
3 | So that formed the basis, if we then go back to page 605, for our request. You've seen
4 | that their expert is at pains to stress that a like-for-like comparison of equivalent
5 | services has to be carried out. And he says that when you've done that a second step
6 | is for him to assess the purchaser's willingness to pay for any premium charged by
7 | Amazon, it might be a legitimate premium.
8 | We queried both steps, the first one simply that we were confused because the expert
9 | didn't actually follow through on their methodology of making a like-for-like
10 | comparison. So what they do say, if you go back to page 6, tab 155, at the top, two
11 | lines down:
12 | "I find that while FBA [which is the Amazon delivery, Fulfilment by Amazon] is priced
13 | at levels close to a similar Royal Mail service, it is often more expensive than the
14 | lowest priced one, like second class especially for lighter products."
15 | Then what he does is he chooses as his benchmark for the Amazon comparison the
16 | cheapest Royal Mail service regardless, it seemed to us, of equivalence. That was
17 | the first stage. At the second, in assessing the premium that customers might be
18 | willing to pay for Amazon, there was no indication of how the PCR was going to take
19 | account of Amazon's brand value to consumers, because Amazon's brand is, plainly,
20 | highly valued and that seem to us a gap.
21 | So we asked about that and the PCRs' response is, in tab 40 again, at page 612,
22 | paragraph 17 to 18. You can see -- and, equally importantly, the Hammond PCR can
23 | see -- the dynamic because at paragraphs 17 and 18 on the first point, the like-for-like
24 | comparisons, you see about four lines down in paragraph 17, what's said is that their
25 | expert didn't mean to pick a comparator that was cheaper and in all other respects
26 | equivalent.

1 They even go far as to say, in the brackets, that this notion of equivalence which their
2 own expert had used is not understood. So that's an important methodological issue,
3 that we have already stubbed our toe on, which may come up in certification depending
4 on the assertion of carriage if it's heard first.

5 Then on the second point, where we ask about how the PCR intends to take into
6 account Amazon's legitimate brand value in their methodology, you see their position
7 in the last sentence, beginning five lines up from the bottom, paragraph 18:
8 "Whether or not there's a premium for Amazon fulfilment will be assessed via the
9 PCR's methodology and is a factor expressly acknowledged by Mr Harman ...
10 I propose to quantify the further loss based on (i) Amazon's fulfilment fee premium ..."
11 What they are saying is this is all going to be dealt, but we are not told how. There is
12 no substantive answer. Our submission, again, is that this, in this case, in this
13 litigation, is the sort of thing that may well be coming down the line at certification.

14 Finally, and I showed you this before, the last paragraph of our letter, over the page in
15 tab 37, page 606, that was where we asked the simple question: how do you intend to
16 assess the degree of pass-on? The answer given is just that they intend to file
17 an amended Claim Form and a supplementary expert report.

18 So these are all important methodology questions. I apprehend that these are the
19 sorts of things, before very expensive, very long, litigation is commenced, that the
20 Tribunal may wish to be satisfied about from either PCR.

21 Now it's not to say that one of these PCRs is effective and the other is not. In
22 Hammond there is nothing about the brand value point, for example, and in Hammond
23 the expert does briefly acknowledge the need to deal with pass-on but in the most
24 cursory fashion. You see that if you go to tab 9, page 484, which is their expert's
25 report. I'm sorry, tab 10. My mistake, tab 10. It's page 484 at paragraph 388, which
26 is just three lines long. He says:

1 "It will require an estimate of the extent to which changes in [the fulfilment by Amazon]
2 costs are passed-on to consumers. To do so I will require [data]."

3 Essentially. But it's very, very exiguous.

4 I say no more about the detail. It's sufficient, I hope, for this hearing. But the question
5 then arises, on the question of a rolled up or separate carriage hearing, what does one
6 make of this? The first point, as I say, is that the Hunter PCR does have to be ordered
7 to commit, in my submission, to an early date for serving these new documents so we
8 know where we are before the rest of the process can sensibly proceed.

9 And on that, in view of the length of time that they have been sitting with this -- it's
10 since at least the date our letter on 10 May. You will see, when we look at the
11 Draft Order, we proposed next Friday, 7 July, as the date when they should do this to
12 enable the further steps in the almost agreed Draft Order to then follow.

13 **MR JUSTICE MARCUS SMITH:** Yes. That's not agreed?

14 **MR TURNER:** No. Since I circulated this, there have been some comments from
15 Mr Rayment. We have not yet had comments from the Hunter PCRs' representatives.

16 **MR O'DONOGHUE:** To be fair, the first we heard of this was yesterday.

17 **MR JUSTICE MARCUS SMITH:** No criticism, I just wanted to understand what was
18 ...

19 **MR TURNER:** It is not meant as criticism, just to understand what's been said.
20 I believe, Mr Rayment will confirm, that on the Hammond side it is understandable they
21 would also like clarity as to the Hunter PCR's case as soon as it can be delivered.

22 For these reasons we do see that there is a risk, certainly with expert statements in
23 the mix, new expert statements coming where they critique each other's methodology,
24 that the shape of a carriage hearing in this case, which focuses intensely on that sort
25 of issue, is going to cover the same ground that we are covering on methodology
26 issues. That is our concern because one can see from the defendants' point of view

1 how this might cause a risk of apparent or real prejudice. If we can be satisfied as to
2 that, if there is a way of devising this so that the carriage hearing does not create these
3 difficulties, we are content. But otherwise it's necessary for us to explain our position.

4 **MR JUSTICE MARCUS SMITH:** Thank you very much, Mr Turner, I'm very much
5 obliged.

6 Before you rise, Mr O'Donoghue, I am not going to call on the PCRs to reply on how
7 we are going to do those things. I want to briefly explain why that is.

8 We are going to proceed down the Pollack route but I want to make very clear why I'm
9 directing that course in light of what Mr Turner has said because I think there's a great
10 deal in what he has said.

11 The fact is that the Tribunal's initial reaction to carriage and certification was to hear
12 them together. That was the subject of considerable argument and a fairly detailed
13 ruling by the Tribunal as to why a preliminary issue was not appropriate. We then
14 went through the process of a combined hearing and at the end of that I think
15 the Tribunal was of the view that the process had not been efficiently conducted. We
16 had a large number of persons who, had carriage been dealt with earlier on, would not
17 have been present and significant costs would have been saved.

18 Moreover, our sense was that the very considerable submissions that we heard
19 directed to certification did not particularly assist in resolving the question of carriage.

20 Anyone who has read -- and I don't advise them to unless they absolutely have to, but
21 anyone who has read the FX judgment will see that we gave carriage a remarkably
22 short consideration and the line was, after seven or eight days' hearing, we still can't
23 tell which one is better than the other. It's a tiny margin between the two matters. That
24 is the other point which is very much informing the Pollack approach.

25 The problem that we have, and the reason I'm going to follow Pollack in this case, is
26 because the process has not been tested. It seems to me it would be a council of

1 some despair to say, well, we have tried one route, it was remarkably unsatisfactory,
2 because of concerns that we have not tested we are not going to try another route and
3 we are going to proceed down a route that has been found to be not the best way of
4 doing it.

5 Now, it may well be that it is the least worst doing things in a rolled-up way. We don't
6 know. I think we need to find out.

7 So I'm going to direct that we have a split hearing for essentially the reasons in Pollack.
8 I make absolutely clear that the assurances stated in Pollack we will endeavour to
9 carry through but I want to make this additional point, which is that Pollack is framed
10 in the abstract, it is a forward looking ruling as to how one manages something that
11 has not been managed in this way before.

12 All of the parties, but particularly Amazon, can take from this that we are very
13 alive -- we would have been anyway, but I'm very grateful to Mr Turner for raising
14 them. We would have been alive to these problems, we will continue to be so and we
15 will endeavour to ensure that not merely a fair process is undertaken but that it is
16 a transparently fair process to those viewing from the outside.

17 As I've indicated, I don't think there ought to be concerns about the former point.
18 Advocates and those who appear before this Tribunal are well aware of the somewhat
19 schizophrenic capacity of judges to park issues and actually not allow them to affect
20 other issues. That we will obviously carry forward in certification and carriage. But
21 I am concerned about the question of appearance where one is, at least arguably,
22 traversing the same questions twice over and that is a concern which Mr Turner has
23 appropriately highlighted and which we will have to keep a very close eye on.

24 What happens in the future, it may be that the experiences that the Tribunal has in
25 both the Pollack litigation and the Hunter litigation require a further rethinking. The
26 reason I'm proceeding down the route I am is because I would rather translate the

1 known unknowns of the problems that may arise into known knowns so that we may
2 take a further course.

3 I'm very conscious that the way in which the Tribunal handled matters in FX has been
4 the subject of some criticism. I'm not sure that is well-founded, but we have ourselves
5 noted that it is not the most efficient course going forward. That being said, later
6 experiences may well show it is actually the best way of doing things. I would not want
7 anyone to think that the fact that we have ruled in Pollack, but without the experience
8 of what Pollack delivers, means that we are going to carry forward for the moment.

9 So somewhat tentatively, because we don't know what it will be like, I'm going to
10 proceed down than route. But I do want Amazon to understand, as Google I hope
11 understood at the end of Pollack, that this is an issue which is potentially problematic.
12 We consider that those problems can be contained for the reasons given in Pollack,
13 but we then thought in FX that a rolled up hearing was a pretty good idea then and
14 that, you know, didn't work. So that is the basis on which we will go and that's why
15 I don't really want to hear from Mr O'Donoghue and Mr Rayment save on the question
16 of the refinements to your claim, on which I will obviously hear as a matter of
17 mechanics on the direction. But that's the reason we will go down the route I have
18 ordered.

19 **MR TURNER:** The outstanding issue then is the question of the modality, whether
20 there will be expert statements or whether there will not.

21 **MR JUSTICE MARCUS SMITH:** I'm going to give the parties the opportunity to put
22 their case as they wish. I don't think it is sensible to force a repackaging of material.
23 If the PCRs are of the view, and I can understand why, that it is better to have views
24 from the horse's mouth than otherwise, I think it would be an error to shoehorn these
25 matters into the submissions of lawyers. Frankly, if we have a problem then it's going
26 to be a problem however these things are packaged. So I don't want the problem to

1 be disguised, I don't want the divergence or the different ways in which the experts
2 are doing things translated into lawyer speak so that the very real potential for overlap
3 between carriage and certification is somehow disguised. I would much rather have it
4 overt so that we are seen to be handling it. The real question is: can we handle it in
5 a manner that is overtly and clearly fair to all of the parties?

6 The PCR's should take the course they wish to, I very much am in the school that
7 where one has capably instructed teams they should be given their head in how they
8 want to put their case. Actually I think it is a better way of articulating the problems
9 that you yourself have articulated, Mr Turner, in having the expert reports or statement
10 or note, whatever we call them, out there rather than buried somewhere in the
11 legalese. So that's the way I think we should do it.

12 I just wanted on the record a sense of the reason why I'm going down this route. I'm
13 not blindly following Pollack. Indeed Pollack is not, I suspect, going to be the last word
14 on this, we are learning by experience. Certification is something where there has
15 been a lot of thinking going on, carriage is something where we've had less thinking
16 because we've had fewer carriage disputes. The last thing we want to do is set
17 something in stone without knowing what the implications are. So that's rather a long
18 reason for saying I don't need to hear from PCR's but that is why.

19 Mr O'Donoghue, timing of your variations/amendments.

20 **MR O'DONOGHUE:** Sir, can I just put this into context as I fear it may have been
21 somewhat oversold by Mr Turner. If we go back to our letter in tab 40, you will see
22 from the last page, 614, that this was one of 12 questions we responded to. We do
23 not accept we have not responded. Mr Turner may not be happy with the answers but
24 that is for another day, but we have responded to each and every one of these
25 questions. So that's point one.

26 Pass-on is one of the 12 questions and, as you will see from 26, it's actually a very

1 narrow point. So the amendment covers only two issues, the public commitments
2 decision, which of course they're more than familiar with given it's their commitments,
3 and the pass-on of savings on logistics costs; and then you see 27.

4 Those are the only amendments that are being suggested and, indeed, we may well
5 take the view, given that the commitments decision is a public document, it doesn't
6 actually need to feature in, at least at this stage, an amendment or something of that
7 kind.

8 Just to anchor this to Mr Harman, again it's important to see this in context, if we look,
9 Sir, at his report in tab 6, and if we look at section 7 which is the table of contents, you
10 will see -- there are three components: at 7.3 elements of purchaser losses; 7.4 setting
11 the universal and choice losses; and 7.5 assessing the further loss. Those are the
12 three components.

13 If we then, Sir, jump forward to the third component, which is at 7.5.7, this question of
14 pass-on only arises in connection with part of the third component of his framework.
15 And as you will see, at 7.5.7, it is a single paragraph.

16 **MR JUSTICE MARCUS SMITH:** Yes.

17 **MR O'DONOGHUE:** It is actually a narrow amendment, it is not some root and
18 branch.

19 **MR JUSTICE MARCUS SMITH:** Mr O'Donoghue, in a sense I don't really want to
20 indicate a level of indifference as to your proposed amendments but actually I probably
21 am not that bothered about what they are. I'm more bothered about when they're
22 coming.

23 **MR O'DONOGHUE:** Yes. It's just to --

24 **MR JUSTICE MARCUS SMITH:** No, no, I mean that is, in equal measure, a sense of
25 how I regarded Mr Turner's submissions. I'm interested in the articulation of the case.
26 I'm not, at this stage, that bothered about what the case actually is because that's

1 a matter for the future and when we consider that in any substance I will have a full
2 panel. I'm very much concerned to hear about management rather than anything else.

3 **MR O'DONOGHUE:** Indeed, Sir.

4 **MR JUSTICE MARCUS SMITH:** So the point that I derive from Mr Turner's going
5 through the reports was the reason I indicated that we do need to tread carefully
6 procedural speaking because of the potential parallelism in terms of the approach of
7 the experts when considered first through carriage and then through certification, but
8 I don't think I got very much more from it than that.

9 **MR O'DONOGHUE:** Sir, I'm just trying to manage expectations as to what's coming
10 down the tracks.

11 **MR JUSTICE MARCUS SMITH:** I don't know whether Mr Turner will be happy or sad
12 to hear --

13 **MR O'DONOGHUE:** Who knows, Sir, who knows? Sir, in terms of timing it is simply
14 not the case that we've been sitting on this for weeks. Of course we have been
15 diverted for a substantial portion of that time by the hearing today. So we would
16 suggest 21 July, not as a sort of opening bid but as a realistic assessment of when the
17 amendments would be forthcoming. It's a difference of two weeks I don't know if
18 Mr Rayment --

19 **MR JUSTICE MARCUS SMITH:** Mr Turner, unless it is important to the dates for
20 carriage, I don't want to put any party under unnecessary pressure. Should we work
21 on 21 July as a date and see where we go --

22 **MR TURNER:** That's very helpful because it now allows us to set --

23 **MR JUSTICE MARCUS SMITH:** To work it through, I'm grateful. So we'll work at the
24 moment, unless it causes problems, 21 July. Do you want to walk me through
25 the -- I appreciate you've had it a very short period of time and it's Mr Turner's draft,
26 but I think, Mr O'Donoghue, it's probably appropriate for you to do the walking through.

1 But can I just stress, I have not actually read this so you had better --

2 **MR O'DONOGHUE:** I'm happy to do so. One, Sir, is England and Wales.

3 **MR JUSTICE MARCUS SMITH:** Yes.

4 **MR O'DONOGHUE:** Hopefully uncontroversial. On the ring, it is agreed, as
5 I understand it, between Amazon and Ms Hunter -- I don't know if Hammond have
6 reached a terminus in relation to that. So two of the trio are agreed in relation to that.
7 There's been correspondence on that.

8 **MR JUSTICE MARCUS SMITH:** Just to be clear, during confidentiality we need to
9 understand, up to and including carriage, how it's, as it were, a threesome
10 confidentiality ring and Mr Rayment -- well, firstly, Mr O'Donoghue, is this intended to
11 extend to both PCRs and Amazon?

12 **MR O'DONOGHUE:** Yes.

13 **MR JUSTICE MARCUS SMITH:** Yes. So parties are defined -- yes, I see.

14 **MR O'DONOGHUE:** It was tripartite.

15 **MR JUSTICE MARCUS SMITH:** Excellent. Mr Rayment, do you have a problem with
16 that?

17 **MR RAYMENT:** I don't have a problem with it, Sir. I just have a tiny
18 concern -- obviously we've not been party to the discussions about it. I'm sure 30 June
19 is achievable but I just have a little bit of nervousness agreeing to that. We have read
20 the order, we think that should be achievable.

21 **MR JUSTICE MARCUS SMITH:** Well, look, let's say 30 June, but --

22 **MR RAYMENT:** Liberty to apply.

23 **MR JUSTICE MARCUS SMITH:** Liberty to apply and I expect the parties, as they will
24 be, to be sensible about --

25 **MR RAYMENT:** I don't want to face a committal application.

26 **MR JUSTICE MARCUS SMITH:** Then we can sort it out. Okay, thank you.

1 **MR O'DONOGHUE:** Sir, then 3, in a sense, follows on from that, that then
2 prospectively, in relation to further documents in the proceedings, there will be service
3 on all parties. I think that is agreed subject to some wordsmithing in 3(b).
4 In a sense 4 follows on from 3.

5 **MR JUSTICE MARCUS SMITH:** Yes, that's why I was concerned to make sure
6 Mr Rayment (inaudible)

7 **MR O'DONOGHUE:** I think that takes us to 7, which we have resolved.

8 **MR JUSTICE MARCUS SMITH:** Yes, the 7th and the --

9 **MR O'DONOGHUE:** Twenty-first.

10 **MR JUSTICE MARCUS SMITH:** I'm looking at paragraph 9, and this is where we --

11 **MR O'DONOGHUE:** We're on to the directions for the carriage hearing itself.

12 **MR JUSTICE MARCUS SMITH:** Yes. Really, just on the dates, I think we need to
13 put in proper dates rather than dates that are referable to a hearing that is --

14 **MR O'DONOGHUE:** At large.

15 **MR JUSTICE MARCUS SMITH:** -- at large, but I think the parties are entitled to
16 a pretty clear indication as to what we are going to be tilting for in terms of a hearing.
17 So we are talking two days or one day?

18 **MR O'DONOGHUE:** Sir, we say one, on the basis that was the part proposal and,
19 frankly, given what is said about a light touch, we would be concerned if there was
20 mission creep into two. Now the directions have a day in reserve, that may be
21 sensible, but it should not be treated as a target. It is a concern, there's not much
22 point in having a justification for Pollack bifurcation, to save costs, if it becomes all
23 singing all dancing hearing.

24 **MR JUSTICE MARCUS SMITH:** I quite understand.

25 **MR O'DONOGHUE:** And two days are obviously harder to find than one, that is the
26 other issue. We think that one day would be the sensible course.

1 **MR JUSTICE MARCUS SMITH:** Yes. Mr Rayment, Mr Turner, anything to say about
2 that?

3 **MR RAYMENT:** Well, Sir, I hear what Mr O'Donoghue says and the order agreed was
4 one in reserve. We think that is sensible, but we'd all hope that it can be dealt with
5 efficiently in one day and we will all co-operate to try and achieve that. I think until we
6 have had the submissions we should proceed with a bit of caution given this is
7 a developing area.

8 **MR JUSTICE MARCUS SMITH:** Indeed. Mr Turner?

9 **MR TURNER:** We agree with Mr Rayment, because of the matters we've already
10 discussed and the uncertainty, it seems sensible to have a day in reserve.

11 **MR JUSTICE MARCUS SMITH:** What I'm going to do is I'm going to list it for a day.
12 I am going to make clear that we will have, as close as possible to that, a day's
13 guaranteed read in advance. So the parties should proceed on the basis that we will
14 deal with matters from a position of strength and understanding, and we will expect
15 the parties to address us accordingly on the day. We will if necessary, and I hope it
16 won't be, sit longer hours. So the parties should proceed on the basis that the hours
17 are going to be 10.30 to 4.30, with the usual two transcriber breaks morning and
18 afternoon. So that's the time you have to play with.

19 If that is a problem, then we will look to see whether more time can be found either on
20 the day or thereafter. But Mr O'Donoghue's point about one day being easier to find
21 a slot for than two is, for the period between October and December, well made.
22 I would like to list this for a day in October and we will go back and liaise with the
23 parties about what date fits best with the diaries of all concerned. That will be done in
24 parallel with finding a panel for this side of the courtroom and that will throw additional
25 complexities in.

26 So we'll work, therefore, to a date which will be in October, but to be fixed for

1 specifically. That, I think, means we need to ensure that everything is done sufficiently
2 well before that in order to ensure we have an effective hearing.

3 Let me be clear, if it turns out that when we do all the timetabling an October date is
4 not feasible, well, we'll obviously look again at the October date. But let's try and make
5 it work in October. If it's November then I think there are real problems, I don't think
6 I can do November. We'll then have to debate whether I find another Chair or whether
7 we do something else.

8 So what date are we talking about for the written submissions as to who is going to
9 win the beauty parade?

10 **MR O'DONOGHUE:** Sir, you'll see in 9 that everything then works back from the
11 hearing date.

12 **MR JUSTICE MARCUS SMITH:** Yes. Let's get our diaries out.

13 **MR O'DONOGHUE:** Six weeks for our submissions, that's 9.

14 **MR JUSTICE MARCUS SMITH:** Let's suppose we have ... It won't be this date, but
15 let's suppose it's 2 October that we actually do this. Six weeks is ... well, we are talking
16 an August date, aren't we? Are you both up for that?

17 **MR O'DONOGHUE:** Sir, it does present problems.

18 **MR JUSTICE MARCUS SMITH:** Right. Okay. Do those problems persist into
19 September?

20 **MR O'DONOGHUE:** As it happens our original proposal was four weeks rather than
21 six. So ... the first or second week of September might be more realistic.

22 **MR JUSTICE MARCUS SMITH:** Okay. Look, if we were to say -- what happens if we
23 were to say 15 September? That's two weeks into September. That's quite late.

24 **MR O'DONOGHUE:** Yes, that would be --

25 **MR JUSTICE MARCUS SMITH:** Nothing has been set in stone here.

26 **MR O'DONOGHUE:** We're testing the water.

1 **MR JUSTICE MARCUS SMITH:** We are just testing how this might work.

2 **MR O'DONOGHUE:** We can certainly do that.

3 **MR JUSTICE MARCUS SMITH:** Mr Rayment how gritted are you on your side?

4 **MR RAYMENT:** That's certainly a lot better than the first possibility that was mooted.

5 I think we could manage 15 September. What I'm not in a position to assist the
6 Tribunal with is how availability is in October.

7 **MR JUSTICE MARCUS SMITH:** No, I'm not either. So what will happen, as it were,
8 after this hearing is to work out what date in October can happen. We will have regard
9 in the first instance to the convenience of everyone, and in the second instance a date
10 will be imposed. I suspect we'll be looking towards the latter half of October rather
11 than the first half of October, given the date we've just pencilled in. But I'm really
12 concerned at the moment with the dynamics of workability, not anything more than
13 that.

14 **MR RAYMENT:** Sir, if, for example, it is subsequently identified that the hearing can
15 only practically be held towards the end of October, would it be possible to explore
16 relaxing the dates that we're talking about at the moment? There are a number
17 of -- sorry to talk across you.

18 **MR JUSTICE MARCUS SMITH:** Not at all.

19 **MR RAYMENT:** There are a number of issues. For example, our original proposal
20 was four weeks. Mr Turner has increased that to six weeks, using the before the
21 hearing date approach. That is partly to do with he wants to go -- he wants to put in
22 his submissions sequentially rather than simultaneously. So the pattern is PCR
23 simultaneous, Amazon on written submissions, then PCRs simultaneous on
24 skeletons, but with Amazon's sequentially afterwards; and we don't happen to agree
25 that that's the right approach. But that is the reason why --

26 **MR JUSTICE MARCUS SMITH:** How do you think it should work?

1 **MR RAYMENT:** I think it can be simultaneous.

2 **MR JUSTICE MARCUS SMITH:** But Amazon are in a slightly peculiar -- well, no, it's
3 the ordinary position of a respondent in these cases. They've got a very limited role
4 as we all acknowledge. It makes surely better sense for them to respond as
5 appropriate. They may have very little to say at all but it ought to be responsive, surely,
6 to what the PCRs are saying. I could see why the PCR will be simultaneous.

7 **MR RAYMENT:** It seem to us if they do have something to say as a matter of principle
8 about either or both of the applications which they have full visibility of, they should
9 say it. What I am concerned about is a world in which we put our submissions in and
10 then there's a sort of jumping on one side or the other. But ultimately it is a matter as
11 to how the Tribunal will find it most helpful.

12 **MR JUSTICE MARCUS SMITH:** My sense is that the Tribunal's focus is going to be
13 on what the PCRs say about each other and the extent to which Amazon can assist is
14 a matter where one would want to tread very carefully, and I suspect Amazon would
15 want to tread very carefully, in saying anything at all because their role really is to keep
16 their powder dry until certification and to assist to the extent they can, given that they
17 are parti pris themselves, in the Tribunal's choice.

18 Mr Turner, that's how I see your role. I don't know if you have anything else to add in
19 terms of what your role is at the carriage dispute.

20 **MR TURNER:** No, on the contrary this seems to be something where the approach
21 to be taken is reasonably clear. Because the way that this is set up, the PCRs will
22 critique each other in terms of suitability for the carriage dispute. We won't come in
23 independently, certainly not at the same time blind without having seen what they say.
24 It surely would make sense for us to come in afterwards, seeing the dispute that has
25 been set up, to tailor our submissions. Indeed, that is consistent with the need for
26 economy as well as everything else.

1 **MR JUSTICE MARCUS SMITH:** Yes, indeed.

2 **MR O'DONOGHUE:** Sir, I'm not going to die in the ditch with the responsive point. I
3 see the sense of that. What does concern me is, given that these are applications for
4 certification and preliminarily carriage, that we should, prior to the hearing, at least be
5 able to respond to what Amazon says. That seems to me to be the usual sequence.

6 **MR JUSTICE MARCUS SMITH:** I don't think that is being taken out. This is all how
7 far we can shoehorn the stages into the process.

8 **MR O'DONOGHUE:** On Mr Turner's proposal it is being taken out, because you will
9 see at 12 --

10 **MR JUSTICE MARCUS SMITH:** Let's go on.

11 **MR O'DONOGHUE:** -- his skeleton comes last.

12 **MR JUSTICE MARCUS SMITH:** We are on 9 at the moment. We have 15 September
13 in.

14 **MR O'DONOGHUE:** Yes.

15 **MR JUSTICE MARCUS SMITH:** Let's move on to 10. Just to answer Mr Rayment's
16 point, however, these dates we're testing the concept of an October hearing and we'll
17 see whether it is doable. So 10.

18 **MR O'DONOGHUE:** Sir, 10 and 11 could be taken together. We don't understand
19 why there need effectively a month to decide whether to participate and then to put in
20 a skeleton. We think that should be done much more quickly and everything else
21 shunted up.

22 **MR TURNER:** Just to explain, there may be a misunderstanding. The idea is after
23 the PCRs have exchanged their cases, which, let's say, is on 15 September, we have
24 a period to assess what's been filed and make a decision; and a week is very tight for
25 that. Particularly given the intention of the expert statements to be filed on the PCR
26 side, two weeks does seem a reasonable, tight and efficient period to enable Amazon

1 to produce its own case if it's going to participate. So this is Amazon's case following,
2 which would be on 29 September.

3 **MR JUSTICE MARCUS SMITH:** Yes. So that's it, I mean it's not four weeks, it's just
4 two weeks.

5 **MR O'DONOGHUE:** Indeed, but at the moment 9 and 10 is 2 plus 2. It should be
6 a single step, in our submission.

7 **MR JUSTICE MARCUS SMITH:** We may be looking at different documents. I only
8 see one two-week period.

9 **MR O'DONOGHUE:** My 10 says two weeks after the date in 9, 11 says two weeks
10 after the date in 10.

11 **MR TURNER:** 11 (inaudible) skeletons.

12 **MR O'DONOGHUE:** Yes, but my submission is that there should be -- if they want to
13 put in a skeleton, that should be done two weeks after our submissions. We don't
14 understand why they need two weeks of further gestation to decide what they're going
15 to do. If they're going to participate they could put in a skeleton --

16 **MR JUSTICE MARCUS SMITH:** 11 is referring to the PCRs.

17 **MR O'DONOGHUE:** Yes, but it links to 12 which is then Amazon's skeleton.

18 **MR JUSTICE MARCUS SMITH:** Let's start at the beginning and go to the end. Do
19 we have a problem in 10 with Amazon responding two weeks with their written
20 submissions on what comes in on the 15th?

21 **MR O'DONOGHUE:** No.

22 **MR JUSTICE MARCUS SMITH:** Right. So 10 is okay. So, after that, we get
23 skeletons. Now you want what in 11 -- why don't we have, at this point, a just general
24 exchange of skeletons by all parties?

25 **MR O'DONOGHUE:** Yes. I think that's effectively what Mr Rayment was proposing.

26 **MR JUSTICE MARCUS SMITH:** Right. So, Mr Rayment, you are happy with that?

1 **MR RAYMENT:** Yes.

2 **MR JUSTICE MARCUS SMITH:** Mr Turner --

3 **MR TURNER:** Well, were time not a problem then again it would seem to be sensible
4 for us to wait to see what their skeletons say. I appreciate that time is tight here and
5 if that's a consideration then -- Ms Dietzel suggests what we might do is shorten the
6 time within which we produce our skeleton from a week to three days after we see
7 their skeletons, to enable us to be as concise as possible. That does seem to be
8 sensible.

9 **MR JUSTICE MARCUS SMITH:** Okay. Well, starting with the PCRs, I think the
10 earliest we can do it is 13 October.

11 Mr O'Donoghue, Mr Rayment, does that work? 13 October for your skeleton
12 arguments in paragraph 11.

13 **MR O'DONOGHUE:** Yes.

14 **MR JUSTICE MARCUS SMITH:** Right. Then that leaves Amazon. Do we actually
15 want to encourage a skeleton argument stage from Amazon? The reason I say this is
16 we will have the participation and submissions on the carriage issue in 10. If I make
17 it clear we are of course is not shutting Amazon out, but that we would take whatever
18 comments, effectively as a stranger to this dispute, on carriage, but nothing else, is
19 a very short period after this, and let us say three days, appropriate for an extremely
20 short set of skeleton arguments if at all?

21 **MR TURNER:** Yes, we would be content with that and I have in mind the process that
22 led to me producing a very short supplementary note ahead of this hearing. If
23 something crops up in their skeletons that it would be efficient for the Tribunal to reflect
24 upon before the hearing, then a few days' grace in order to do that would be
25 appropriate. It would then mean the hearing, subject to, Sir, your comments, would
26 be in the last week of October.

1 **MR JUSTICE MARCUS SMITH:** Yes. So if so advised, in other words don't feel
2 obliged to do it, 18 October.

3 **MR TURNER:** Yes.

4 **MR JUSTICE MARCUS SMITH:** Mr Rayment, Mr O'Donoghue, does that work?

5 **MR O'DONOGHUE:** Sir, I can see the sense of that but we are concerned that we
6 should have the last word. That seems fair.

7 **MR JUSTICE MARCUS SMITH:** Yes, except ...

8 **MR O'DONOGHUE:** I would suggest three more days, if so advised, for us to
9 respond. Sir, while I have it, in Pollack, the orders at 464, what that envisages was
10 that Amazon, paragraph 9, would put in their written submissions, and then, in 10, the
11 PCRs came after that. So they did have the last word in that case, and that seems to
12 me entirely appropriate.

13 **MR JUSTICE MARCUS SMITH:** I think it is slightly misstating what Amazon are doing
14 here. You see, they're not actually having the last word on anything. They're not really
15 of an interest at all. So I wouldn't want what Amazon, say, to act as a distraction in
16 terms of what is the real substance of carriage, which is the PCRs' position. The real
17 reason -- you see, if I was concerned that it was important, for fairness of substantive
18 outcome, either that Amazon be present, because they had something relevant to say,
19 or if I felt that as a matter of public interest, if it was, say, a legality point, I wanted to
20 hear from them no matter what, then matters would be different.

21 The position here is, as was indicated in Pollack, I don't see any problem in Amazon
22 choosing to absent themselves in terms of deciding to resolve these things properly.

23 The reason I am not imposing such an outcome is due process to Amazon because
24 I wouldn't want them to feel that they were excluded from something where they might
25 have something relevant to say. It is in that light --

26 **MR O'DONOGHUE:** Well understood.

1 **MR JUSTICE MARCUS SMITH:** -- that I'm seeing the Amazon submissions as
2 responsive, not as the last word.

3 **MR O'DONOGHUE:** Yes.

4 **MR JUSTICE MARCUS SMITH:** If so advised. So what I'm going to do I'm going to
5 make no direction on further submissions. You know that the Tribunal is not bound; if
6 there is a need for a further note, as there was last night, we'll read it obviously. But
7 I don't think it is right to build into the order a formal stage to which the parties are
8 working. I'm not going to do so on the basis that I don't see it as being necessary. But
9 if the parties do, then we will of course look at what they produce.

10 **MR O'DONOGHUE:** Sir, that is heard loud and clear and of course it essentially
11 follows Pollack. But you will understand from my perspective, and Mr Rayment's, if
12 a note does surface, and as yet we have no idea what it would say, and there are
13 matters that we feel we do need to respond to, leaving that to the hearing may be
14 quite problematic.

15 **MR JUSTICE MARCUS SMITH:** I'm not saying no, Mr O'Donoghue. But I'm
16 absolutely not saying yes.

17 **MR O'DONOGHUE:** Yes, that's well understood.

18 **MR JUSTICE MARCUS SMITH:** That's how we will leave it.

19 **MR O'DONOGHUE:** Yes, okay.

20 **MR JUSTICE MARCUS SMITH:** So at paragraph 11 we have a split set of dates:
21 13 October for the PCRs; if so advised, and I underline those words, 18 October for
22 Amazon to respond as appropriate.

23 So paragraph 12 goes. And then we have a hearing -- and I think Mr Turner's right, it
24 will have to be the last week of October, won't it? Yes, I mean, we're really looking for
25 a day from the 25th to the 31st. I think that's it, isn't it? Is the first date -- if I say not
26 before 25 October but actually try for 25 October, is that going to be a problem for the

1 parties? This is subject to diaries and everything else. But I'm fairly conscious that
2 November is a point in time when I end up in difficulties.

3 **MR O'DONOGHUE:** Yes, Sir. I'm afraid the end of October is problematic for all three
4 of us.

5 **MR JUSTICE MARCUS SMITH:** So problematic in diary terms, let's leave the diary
6 to one side because I don't think discussing matters like diaries from a position of
7 ignorance is a good idea.

8 **MR O'DONOGHUE:** Yes.

9 **MR JUSTICE MARCUS SMITH:** Assuming no diary problems, you don't have
10 a problem with the 25th being the date on which the hearing could take place, given
11 that you would have Amazon's, if so advised, response on 18 October? There's
12 enough gap; assuming availability, you are happy with that?

13 **MR O'DONOGHUE:** Yes.

14 **MR JUSTICE MARCUS SMITH:** All right. That's very helpful.

15 **MR O'DONOGHUE:** I might just add -- obviously Ms Demetriou and I are both
16 involved.

17 **MR JUSTICE MARCUS SMITH:** Yes.

18 **MR O'DONOGHUE:** One of the benefits is it's more likely that one or other of us would
19 then be available. Given the loud and clear signals in Pollack on minimising and
20 saving costs, we would be concerned if for some reason we are both unavailable and
21 then somewhere else has to read into all of this and reinvent that wheel.

22 **MR JUSTICE MARCUS SMITH:** I understand. Okay. We have a workable timetable,
23 subject to diaries, with a hearing not before 25 October. Before I say that's where
24 we're going to go, does anybody have anything else to say by way of refinement or
25 concern about that direction of travel? No, silence.

26 I'm making it clear I'm not making an order to this effect. This is something which we

1 will debate in light of diaries, but this is the order I would like to make unless the diary
2 makes significant problems and we will take this further, off line, when I know my own
3 commitments, I have an idea of what commitments -- very clearly we will select the
4 panel by reference, amongst other things, to their diary commitments and we will also
5 invite the parties to give us their dates to avoid in the period commencing 25 October,
6 but going into, let us say, the third week of November so that we can see what's going
7 on. If that doesn't work, we'll have to revisit matters altogether.

8 **MR O'DONOGHUE:** Sir, it may not matter but for perspective, of course, we are at
9 least on track with Pollack. So we seem to be in the ballpark of something which could
10 fairly be called efficient.

11 **MR JUSTICE MARCUS SMITH:** Yes, the problems are not so much the theoretical
12 way of doing it, it is increasingly the diary that is the problem. So that's why I'm treading
13 so cautiously. I want to have a working thing in theory and then we can see whether
14 it would work in practice, because I do understand the concerns that you raise about
15 costs thrown away when you get someone else and if possible we would want to avoid
16 that, but diaries are what they are.

17 **MR O'DONOGHUE:** Yes.

18 **MR JUSTICE MARCUS SMITH:** Right. So that's 13. 14 -- that can be -- what stage
19 should we have that?

20 **MR O'DONOGHUE:** That's really a matter for you in terms of -- or the Chair, as to
21 what you find most convenient.

22 **MR JUSTICE MARCUS SMITH:** I think getting it done as soon as -- we'll have a -- it's
23 not an important day(?).

24 Right. Is there anything more on certification that is contentious? 15 through to 19.

25 **(Pause)**

26 **MR O'DONOGHUE:** Sir, yes, you'll see the six versus 12 weeks in 16. It just seems

1 to us the 12 was rather long. If the idea is to deal with carriage and certification swiftly,
2 12 seemed to us not to gel with that. But that's really for Mr Turner.

3 **MR TURNER:** Sir, this is the point that the certification hearing will require significant
4 attention. 12 weeks is the time period starting from the Tribunal's determination of the
5 carriage issue.

6 **MR JUSTICE MARCUS SMITH:** Yes.

7 **MR TURNER:** There will be a further step, which is paragraph 15, where that's
8 digested, the PCRs say whether they're going to stick with it or seek to challenge it.
9 The proposal is designed to give sufficient leeway for Amazon, which is then a full
10 party, to digest what has occurred and to prepare for a certification hearing.

11 **MR JUSTICE MARCUS SMITH:** Yes. We are looking for a certification hearing in
12 early 2024, aren't we?

13 **MR TURNER:** Yes. Paragraph 19, certification hearing shall be listed for tbc 2024.

14 **MR JUSTICE MARCUS SMITH:** Okay.

15 **MR O'DONOGHUE:** To the extent it matters again, in Pollack the period was
16 six weeks.

17 **MR JUSTICE MARCUS SMITH:** What we'll do is, I think, work on what is the best
18 use for the time when once we've got a fixed date for a carriage dispute. If we have
19 a late October date for carriage, then in a sense we can work out how the time is best
20 used between then and an aspirational date for certification. I don't think it's helpful to
21 lay down a timetable without knowing when that date is and also when the certification
22 date is going to be.

23 So you can expect a degree of communication about when that could take place, along
24 with our letter regarding diaries for October/November. In other words, if we have, for
25 instance, an April date for certification, then probably your 12 weeks won't be
26 a problem, Mr Turner.

1 **MR TURNER:** No, that's right.

2 **MR JUSTICE MARCUS SMITH:** If on the other hand it goes in January, then 12
3 weeks is likely to be a problem. So I think the key thing is to work out when we're
4 going to do certification.

5 **MR TURNER:** Yes. There are so many moving parts here. We don't know the issues
6 that are going to be raised, even for carriage. We don't know the time that will be
7 taken, whether there will be a challenge and so forth. Our position is simply that there
8 should be a not before buffer to give Amazon enough time to be able to prepare for
9 what will be the critical hearing.

10 **MR JUSTICE MARCUS SMITH:** Yes. What we will do, we will leave these
11 paragraphs in draft and untouched until we have further certainty on dates for both of
12 these very important hearings. And then we can have, ideally on the papers, not by
13 way of another hearing, a resolution of any disagreements that might arise.

14 Let me only say this, it does seem to me that if, as they should, Amazon, are taking
15 a low-key approach to the carriage, and not spending the time that they would if it was
16 carriage plus certification, then they ought to have the time post-carriage to deal with
17 these matters. Therefore I'm more inclined, without ruling, to go for the 12 weeks than
18 the six. That has a coincidental benefit that one has a substantive amount of new
19 material before the Tribunal, which will further create a break, a fire break, between
20 carriage and certification because it's far harder to say you are trying issues in parallel
21 if there's a significant amount of new material, which the Tribunal hasn't seen,
22 regarding, for instance, expert process.

23 **MR TURNER:** Yes, I think that is an important point in fact because otherwise one
24 may have the momentum from a decision on carriage into a very quick --

25 **MR JUSTICE MARCUS SMITH:** What would very much trouble me is if there was
26 a significant going to town by Amazon at the carriage stage. First of all, I don't think

1 it's necessary, but, secondly, I think you immediately suck certification into carriage in
2 circumstances where suddenly it begins to look as if one has the two streams
3 confused. I know that it's inherent in the Pollack way of doing things that you are not
4 a necessary party, but you ought to be there if you want to be. But that should inform
5 exactly what you are saying about the rival approaches and then we start afresh,
6 effectively with a one-on-one between the respondent and the remaining applicant.

7 **MR TURNER:** Absolutely. The concern will be that we will be responsive in the
8 carriage hearing to what happens.

9 **MR JUSTICE MARCUS SMITH:** Indeed.

10 **MR TURNER:** We will need to assist the Tribunal and protect our interests, those are
11 the two considerations.

12 **MR JUSTICE MARCUS SMITH:** I understand.

13 **MR O'DONOGHUE:** Sir, if I may respectfully, with not going to town on things, the
14 key basis on which we are content that Amazon would put in something, say, on the
15 18th with a hearing on or about the 25th, was on the understanding that one week
16 before the hearing they would not be going to town on things. If that proves not to be
17 the case, in spite of the Tribunal's very clear warning, we would have to see where
18 that takes us. But one week before the hearing to be confronted with --

19 **MR JUSTICE MARCUS SMITH:** Mr O'Donoghue, this is why I've taken the
20 supplicancy approach to Pollack. If we get the situation where Mr Turner is saying,
21 "I'm sorry but you are, Tribunal, going to have to read a massive response by Amazon
22 because we need to engage in carriage for the following very good reasons", well then
23 we will have an excellent demonstration as to why this doesn't work. If, on the other
24 hand, we get three pages saying, "You might want to know this but actually it's pretty
25 obvious from what the PCRs say anyway", well then it works, but I'm not going to
26 anticipate that.

1 **MR O'DONOGHUE:** No, Sir, of course.

2 **MR JUSTICE MARCUS SMITH:** The way we hope it works is exactly as you say.

3 **MR O'DONOGHUE:** Yes.

4 **MR JUSTICE MARCUS SMITH:** And that's how the timetable has been structured.

5 **MR O'DONOGHUE:** Yes.

6 **MR JUSTICE MARCUS SMITH:** If we find that, contrary to everyone's expectation,
7 this process derails, well, we'll reinvent the solution.

8 **MR O'DONOGHUE:** I have put down my markers as firmly as I can.

9 **MR JUSTICE MARCUS SMITH:** You certainly have. Very good. That arose out of
10 my sense, to the extent that there's debate about the parties, that in 16 I'm more
11 inclined for 12 weeks than for six. But let us see how we cut our cloth when we actually
12 have some dates in mind.

13 So that's written not in stone but something softer, the directions, and we'll take that
14 further off line.

15 The question of confidentiality rings I think we've dealt with as part of the order. Is
16 there anything more we need to say about that?

17 **MR O'DONOGHUE:** Certainly not from Ms Hunter's perspective.

18 **MR JUSTICE MARCUS SMITH:** No, I'm very grateful. Publicity notification, my sense
19 was that that's for another day in that one wouldn't want the market to be confused by,
20 as it were, rival PCRs saying different things about something where carriage is at
21 large. If that is common ground, we can --

22 **MR O'DONOGHUE:** Common ground, yes.

23 **MR JUSTICE MARCUS SMITH:** I'm grateful. So does that leave only the disclosure
24 and the funding arrangements?

25 **MR O'DONOGHUE:** Yes.

26 **MR JUSTICE MARCUS SMITH:** Mr Rayment, now is your time. You are very

1 welcome to stay, but if you wish to do something else then I will certainly not regard it
2 as any discourtesy.

3 **MR RAYMENT:** I'm very grateful, Sir. We are going to stay until at least the short
4 adjournment.

5 **MR JUSTICE MARCUS SMITH:** Very good. Thank you.

6 Can I give two broad indications as to how I provisionally see questions of disclosure
7 regarding funding arrangements. The first thing is I think the parties need to ask
8 themselves: is this material that the Tribunal itself might ask about, either at the
9 carriage or at the certification hearing? In other words, if these are areas where
10 the Tribunal is going to say, "I would like know the answer to X", then it's important,
11 I think, that the parties be in a position sensibly to address and answer the question of
12 the Tribunal. I'm less concerned about points that might or might not be raised
13 between the parties *inter se*, I'm more conscious of the Tribunal, whether that be at
14 carriage or whether that be at certification, knowing that the parties are in a position to
15 answer the sort of questions as well as, as a secondary matter, to take the sort of
16 points that they will want to be able to take.

17 The countervailing consideration, because that is very much a let's disclose rather
18 not -- of course subject to it going into confidentiality rings or appropriately being
19 protected. Subject to this countervailing consideration, is there a form of information
20 which, although relevant, gives a counterparty who would normally not see this
21 information too much leverage or advantage in the litigation process?

22 I regard that as a very narrow catch all category which is there more for the avoidance
23 of real injustice in the totally exceptional case than anything else, but I think it ought to
24 be there; but that's how I propose to approach things unless the parties persuade me
25 otherwise.

26 With that indication, Mr Turner, is it for you to make the applications for disclosure or --

1 **MR TURNER:** It's my application. May I ask if we could have a five-minute break.

2 **MR JUSTICE MARCUS SMITH:** We should have had a transcriber break some time
3 ago. So I will rise for ten minutes. If necessary, we can run into the short adjournment
4 if there's a chance of finishing. Otherwise we will resume at 2.00, rising at 1.00. But
5 we will see how you use the ten minutes.

6 I'll rise for ten minutes. Thank you.

7 **(12.20 pm)**

8 **(A short break)**

9 **(12.30 pm)**

10 **Application by MR TURNER**

11 **MR JUSTICE MARCUS SMITH:** Mr Turner.

12 **MR TURNER:** Sir, the issue is this, the Hunter PCR declines to disclose the funder's
13 fee or the priorities clause in the litigation funding agreement. If I may begin, given,
14 Sir, your articulation of the principles before the break, with some rules and principles.
15 The fundamental principle will be, at certification, that the Tribunal has to be satisfied
16 that it's just and reasonable for the successful PCR to act as the Class Representative.
17 It's rule 78.

18 Within that, there are four relevant points that arise for present purposes. These are
19 matters that are relevant to certification, and matters that may well arise in the carriage
20 dispute where the two PCRs are critiquing each other and making submissions as to
21 which of them is more suitable.

22 The first point that arises is this: the PCR will have to show that it has access to the
23 resources to fund the case to its conclusion reliably. So if, for example, you have
24 a situation where a funder is entitled to pull out if it perceives that the litigation project
25 no longer meets its internal hurdle rate for taking it forward, that can make it relevant
26 and important to know what are the terms of that arrangement: what is that risk?

1 A second point is this: the Tribunal in a general sense has to consider the costs and
2 the benefits of continuing the proceedings. We know from the cases now that is not
3 a narrowly drawn exercise, it involves a holistic appraisal of all the likely benefits to the
4 class, or maybe, to pick up remarks made by, Sir, yourself in the previous case, more
5 broadly to the public interest, against all the various costs that go to diminishing those
6 benefits, or which will be paid to the funders as a matter of comparison.

7 **MR JUSTICE MARCUS SMITH:** Just so I understand the scope of this view, to what
8 extent is this material going to be disclosed between the funders -- between the PCRs
9 themselves? No, so it's --

10 **MR O'DONOGHUE:** No way.

11 **MR JUSTICE MARCUS SMITH:** It's an objection in both ... okay.

12 **MR TURNER:** Sir, you are absolutely right, this is the significant point. This is
13 information that will not be available in the proceedings is what's suggested. And that
14 is why I'm laying out --

15 **MR JUSTICE MARCUS SMITH:** Including carriage?

16 **MR TURNER:** Yes.

17 **MR JUSTICE MARCUS SMITH:** Okay. Isn't it acutely relevant to carriage?

18 **MR O'DONOGHUE:** I will develop my submissions later. We say no. Of course one
19 of the oddities is that the application is only made against Hunter, there may be
20 a question of symmetry.

21 **MR JUSTICE MARCUS SMITH:** I think you can take it that what is sauce for the
22 goose will be sauce for the gander on that point since you're the first gander in the
23 firing line.

24 **MR O'DONOGHUE:** Yes.

25 **MR JUSTICE MARCUS SMITH:** Okay, we'll see where it goes.

26 **MR TURNER:** The first of the four points, looking at the task the Tribunal is going to

1 have to carry out, both in certification and carriage, concerns access to the resources
2 to fund the project and the circumstances in which that funding might be withdrawn.
3 The second is the general point that the Tribunal has to weigh up all the benefits
4 against the costs and that those costs might include, as this tribunal has articulated in
5 previous cases, a general comparison between the size of what the funder is looking
6 for compared to the benefits that the represented class, the consumers, expect to get,
7 to see if there appears to be a disproportionate balance there.

8 The certification judgment in O'Higgins -- I will give you references, Sir, but you will be
9 familiar. If you have the authorities bundle there, I'll just point these out to you very
10 quickly. At 5.1 we have the Tribunal's judgment, March 2022, in FX on certification
11 and carriage dispute. The key part of that, on page 218.8 of the bundle, is an extract
12 that was reproduced in the later Gormsen judgment, that one is looking at benefits and
13 disbenefits in an open textured and broader framework. So, you will be well aware
14 therefore of the open textured way in which this needs to be considered in deciding
15 whether information on funding that is being withheld might be relevant.

16 Equally, in a series of cases, the Tribunal has explicitly considered the funder's fee,
17 the datum sought to be withheld in this case, in the cost-benefit analysis, and has
18 asked itself whether the collective proceedings would be likely principally to benefit the
19 lawyers and the funders as opposed to the members of the class. An example of that
20 is the Gutmann CPO, which you have in tab 2 of the authorities bundle at page 107.
21 You see there, at the top of the page, paragraph 169, the Tribunal referring to the
22 funding arrangements there, leading on to the reasoning in 171, further down that
23 page, where the Tribunal expresses the concern and says that it would wish to attend
24 to the question of the balance between the money going to the class members on the
25 one hand, and the lawyers and funder on the other, as part of the consideration at
26 certification.

1 So that's an example of it. That's the second point, why this is -- one would normally
2 expect something that is going to be relevant to the general cost benefit weighing that
3 the Tribunal will carry out and one imagines may well arise at carriage too.

4 The third point is that the PCRs, the successful PCRs, certainly at certification, are
5 going to have to show the Tribunal that the financing arrangements do not involve
6 a conflict of interest as between the funders on the one hand and the class members
7 on the other. The CAT guide flags up, paragraph 6.31, that you can have a conflict of
8 interest arise in myriad ways. It's not possible to specify all the ways in which it could
9 happen.

10 A pertinent example which illustrates why it is appropriate to know the funding fee
11 sought to be withheld arose in the first Merricks decision on certification, which you
12 have at the beginning of the authorities bundle in tabs, for some reason, 0.2, which
13 I think means one fifth of tab 1.

14 **MR JUSTICE MARCUS SMITH:** Yes.

15 **MR TURNER:** If you open up that, you should have there the first Merricks judgment.
16 If you go in it to page 0.55 you have a heading towards the bottom "Termination of the
17 Funding Agreement". The first thing you see there is, recorded again, the funding
18 arrangements and the funder's fee essentially there set out in paragraph 99 with
19 a minimum limit of essentially £135 million in that case.

20 Then if you go forward to page 0.69, paragraph 139, you see the Tribunal considering
21 issues that might arise in the event of there being settlement discussions between the
22 Class Representative and the defendant in a case. You will see what they say there:
23 "The Tribunal considers settlement isn't reasonable because the amount the funder
24 can recover out of the unclaimed proceeds is excessive having regard to the total
25 amount of the settlement. The Tribunal would decline to approve it on that ground."

26 That should create an incentive for the applicant, and MasterCard defendant there, to

1 negotiate different terms. So the assumption already is that this is something that is
2 in play and known about, causing this to happen. It then goes on:

3 "If MasterCard [therefore the defendant in Amazon's position here] considered that the
4 applicant was failing to do so [the negotiations aren't working] because he was placing
5 the interests of the funder above those of the class members, Mastercard [the
6 defendant] could apply to the Tribunal to vary the CPO by appointing a substitute
7 Class Representative."

8 So here you have a concrete illustration of how it might become apparent, at least in
9 those circumstances to the defendant, that the Class Representative is placing the
10 interests of the funder above those of the class members. The comment made by
11 the Tribunal is that in those circumstances the defendant is enabled to perform
12 a useful role because it could apply to vary the CPO if that blockage crops up by asking
13 for the appointment of a substitute Class Representative.

14 **MR O'DONOGHUE:** Can you read 140, please.

15 **MR TURNER:** You can read 140 when you do your submissions.

16 The fourth principle is a matter of process which was articulated in trenchant terms by
17 the Tribunal in the Coll v Google case which the Hunter PCR, in our respectful
18 submission, seems to have overlooked in this case. That is that it isn't for a proposed
19 defendant to have to justify closely why the funder's fee should be revealed in this sort
20 of litigation. There the Tribunal set out what they consider to be the right approach to
21 be taken in this sort of case. The Tribunal said:

22 "The starting point in collective proceedings is that the whole of the PCR's funding
23 arrangements are relevant to the Tribunal's assessment."

24 If we open that up, it's in tab 4 of the authorities bundle, beginning at page 131.

25 **MR JUSTICE MARCUS SMITH:** Yes.

26 **MR TURNER:** If you go in that to page 141, the proposition I've just articulated is at

1 the bottom in paragraph 22(2):

2 "In our view, the starting point ... must be that the whole of a PCR's funding
3 arrangements are relevant to the Tribunal's assessment of the CPO Application."
4 Then if you go over the page, that Tribunal made two other key points. The first is in
5 the last three lines of subparagraph (3):
6 "... the Tribunal should be slow to permit any redaction in documentation relating to
7 funding arrangements that have been disclosed, solely on the grounds of irrelevance."
8 Irrelevance is essentially a factor; and the last four lines of the next subparagraph,
9 subparagraph (4) just below. If a PCR says that disclosing the information would lead
10 to another party gaining an unfair tactical advantage then it needs:
11 "to identify both the tactical advantage that's said to arise and the element of
12 unfairness that would result should disclosure be required."
13 **MR JUSTICE MARCUS SMITH:** Yes.
14 **MR TURNER:** You have to be specific. You can't say it's self-evident and that's the
15 end of it, you can't see it.
16 In view of those four principles to step back, the funder's fee has been consistently
17 disclosed to the proposed defendant, at least so far as our team can tell based on its
18 experience of those cases. It hasn't been argued in the Tribunal previously, let alone
19 successfully, that disclosure of the funding fee would be tantamount to revealing
20 privileged advice or that it would confer an unfair tactical advantage on the defendant.
21 Perhaps the closest that any case has come to it was the Kent v Apple judgment where
22 the disclosure of the funder's fee was initially opposed by Apple, but the Tribunal
23 judgment records that there was then agreement prior to the hearing to disclose it.
24 You see that in tab 3 of the authorities bundle, page 118, which is the first page under
25 the introduction part of the judgment, at paragraph 5 at the bottom. Essentially the
26 funder's fee was agreed to be disclosed.

1 It has often been disclosed into a confidentiality ring as in that Kent case, but in
2 a number of instances the amount of the fee is in the public domain. I've already read
3 you certain examples where that was the case. If I may, I'll draw your attention to two
4 specific relevant examples.

5 **MR JUSTICE MARCUS SMITH:** You don't have a problem with the use of
6 confidentiality rings in this case?

7 **MR TURNER:** No, absolutely not. The question is whether the information is available
8 at all.

9 **MR JUSTICE MARCUS SMITH:** Yes. That's how I understood your argument, yes.

10 **MR TURNER:** So two further short examples of where this was in play. Authorities
11 tab 1 is the Merricks remittal decision in 2021 after it's come back from the Supreme
12 Court. If you go in that to page 10 you see paragraph 26 at the foot of the page. That
13 records a clause of the litigation funding agreement, in 2021 in that case, and sets out
14 the terms explicitly. You can see those for yourself, and you will see at the very top of
15 the following page there was the hurdle rate subtotal set out -- they wanted -- they
16 sought to obtain at least £179 million as a return in the funding and if they aren't going
17 to achieve that then that's the threshold at which, subject to certain safeguards of
18 independent review, they become entitled to pull out.

19 So knowledge of the funder's fee is relevant in order to assess in any case the
20 likelihood of the termination provisions being triggered and the funding ceasing. In
21 a case such as that, and you will see that similar language arises in our litigation
22 funding agreement here in a moment, it's because it sets the threshold for economic
23 or commercial viability, as the phrase is used in these agreements, of the litigation
24 project for the funder. The higher the funding fee is the greater therefore the risk of
25 economic unviability.

26 The second case that I was going to show you finally was O'Higgins and Evans, again

1 | which is authorities 11, that this is for the submissions that were made in writing by the
2 | PCR. You need to go in it to page 376.

3 | **MR JUSTICE MARCUS SMITH:** Yes.

4 | **MR TURNER:** There you see that the PCR's counsel was setting out if you read from
5 | paragraph 34, in detail and transparently the structure of the funding arrangements in
6 | that case too. So there's none of the concerns that are raised in this case purely as
7 | generic matters, it is self-evident and it must be obvious that there's an unfair tactical
8 | advantage and so forth. And equally they do not go to the lengths required by the Coll
9 | Tribunal of being specific, or seeking to be, as to what this problem is.

10 | So with that, as the articulation in a nutshell of the rules and principles and what
11 | the Tribunal is going to potentially do with this information, we turn to the litigation
12 | funding agreement in the present case so you can see what they're seeking to
13 | withhold.

14 | **MR JUSTICE MARCUS SMITH:** Yes.

15 | **MR TURNER:** That is at tab 7 of the main bundle. It's probably best if I walk you
16 | through this very briskly. You begin at page 225 of the bundle with the definitions.
17 | I pause just to say that the identity of the funder is LCM Funding, as you see back on
18 | page 222 and 223.

19 | The first definition to draw your attention to is at 1.11 where you see capital deployed
20 | being defined. Essentially that means the funder's outlay.

21 | Then, at 227, you have 1.31, at the foot of the page, which is the funder's fee. You'll
22 | see the funder's fee is the capital deployed we just looked at, the outlay plus a multiple,
23 | an applicable multiple.

24 | At the foot of the page there's a redaction for the funding limit. I just pause to say, as
25 | I understand it, that funding limit has now been made known to us in correspondence.
26 | For your reference it was a letter of 19 April from the PCR's solicitors, but we do have

1 that and actually in fact I'll simply show you it for reference. It's at tab 15, it's a letter
2 of 19 April, it's paragraph 2 on what is page 537 of the bundle. I won't read it out, but
3 you'll see there the funding limit is described at the end of paragraph 2.

4 Then returning to the litigation funding agreement in tab 7, the next point is on
5 page 228. 1.39 describes the priorities deed. This is another document withheld and
6 information in it is withheld. This sets out the priority order for paying to each of
7 the funder, the claimant, the solicitors, counsel and the funding adviser, the ATE
8 insurance providers.

9 On the same page, next, is paragraph 1.41, defining what recovery means. You will
10 see that recovery by the claimant and/or the class members is defined to include, the
11 last subparagraph (6):

12 "Any payment by the defendant in respect of among other things the funder's fee".

13 So that funder's fee is explicitly a part of the recovery and defined as part of
14 the claimant's costs, fees and disbursements. That's important because of a point
15 that's taken in their skeleton so I mention it now. It's quite explicit.

16 Over the page at 229, finally under the definitions you have "undistributed damages"
17 defined. It means damages that have not been claimed within a period stipulated by
18 the Tribunal or agreed with the defendants, in a settlement context.

19 Then going into the operative part of this, page 232, you have the claimant's
20 obligations, clause 6; and at 6.2:

21 "The claimant must, through the irrevocable instructions to the solicitors, diligently
22 collect and enforce any award, settlement or compromise and seek to maximise the
23 recovery."

24 And the recovery, as we've seen, includes the funder's fee.

25 The key clause for present purposes is clause 9 which begins at the foot of 234 and
26 is entitled "Receipt and distribution of any recovery".

1 If you go over the page to 235, you have near the top clause 9.3:
2 "The claimant shall seek approval from the Tribunal for the payment from any recovery
3 of costs, fees and disbursements defined to include the finder's fee."
4 And then above 9.6 on that page, you have a heading "Payment of the funder's fee
5 other than wholly from undistributed damages".
6 So this is a scenario where the funder's fee is not just coming from undistributed
7 damages. In this scenario the stipulated returns are in the table which you have at the
8 top of page 236 and those are all redacted. So this is the crunch.
9 **MR JUSTICE MARCUS SMITH:** Yes.
10 **MR TURNER:** Similarly, in the scenario at the bottom of the page, you see the
11 italicised heading halfway down, which relates to payment from undistributed
12 damages, all the payments there, all the funders' returns, are again concealed.
13 Go over to 237, page 237, you have paragraph 9.10 at the top. This sets out the order
14 of priority for paying the stakeholders on the claimant's side. That includes the funder.
15 All of it is redacted. So that's the priorities.
16 On page 238, the arrangements that apply in the event of an appeal, financial
17 arrangements presumably, are all concealed as well.
18 Finally, on page 241 at the very foot you have a clause that we will be coming to in
19 a moment, clause 16.1 under "Breach, termination and abandonment". And that
20 provides that if the funder reasonably considers that the merits are no longer
21 satisfactory or that any claim is no longer economically viable, so therefore now raising
22 questions of quantum, as opposed to prospects of success on liability at all, it can
23 trigger an expert determination with a view to terminating the agreement, the
24 arrangement.
25 By expert determination if you go back one page to clause 14, you see from 14.2 they
26 have in mind appointment of an independent specialist Queen's Counsel, now

1 King's Counsel.

2 **MR JUSTICE MARCUS SMITH:** Yes.

3 **MR TURNER:** So that is what's sought to be --

4 **MR O'DONOGHUE:** Sorry, forgive me popping up. Clause 10 has been unredacted,
5 as I understand it, into the ring.

6 **MR TURNER:** I'm grateful.

7 **MR JUSTICE MARCUS SMITH:** So under the --

8 **MR O'DONOGHUE:** Yes.

9 **MR TURNER:** Thank you. So that being the articulation of the rules and principles,
10 and this is what's sought to be withheld now, what are the arguments put forward by
11 the Hunter PCR to try to justify withholding this information in this case? You need to
12 go to -- I'll do it, is to go to Mr O'Donoghue's skeleton.

13 **MR JUSTICE MARCUS SMITH:** Yes.

14 **MR TURNER:** In the bundle version of that I think it's page 9 at the top. This should
15 be within paragraph 13, if I have the right reference.

16 **MR JUSTICE MARCUS SMITH:** Yes, indeed.

17 **MR TURNER:** And you have (a) at the top. The first point that's taken, which straddles
18 (i) and (ii), is that it isn't necessary to know the funder's fee in order to take a view on
19 the likelihood of funding being terminated on the grounds it's no longer economically
20 viable.

21 Our response is that it is obviously an indispensable part of the picture to know what
22 the threshold is. If an independent expert considers the question of economic viability,
23 then the funder's fee is going to be the key reference point. It's not likely that an expert
24 KC would second guess that assessment of viability any more than the Tribunal can
25 do. So we need to know this. The information is therefore relevant, on that important
26 basis alone, for the Tribunal's purposes.

1 Then at (iii) the PCR argues that Amazon isn't harmed if the funder terminates the
2 arrangement because of ATE, after the event insurance. Now that may be true, but it
3 is not the point which is being made by us in favour of disclosure.

4 At (iv), you'll see, at the foot of the page, the PCR advances what to us is a rather
5 unusual argument and it deserves being dwelt upon. It says that the funder's fee in
6 this case is not relevant to the cost-benefit analysis.

7 That's the contention. And the reason given is at the top of the following page, 10. It
8 says that the PCR's litigation budget doesn't treat the funder's fee as part of the legal
9 fees and expenses in this case. See the end of how that finishes:

10 "The Funder's Fee is not part of those."

11 Ergo, according to Hunter, the funder's fee is simply not a relevant cost.

12 Now that argument to us is perplexing because the Tribunal has made clear, first, that
13 the cost-benefit analysis that needs to be done takes place in the broad framework,
14 not by reference to what is defined as a cost or expense in a particular litigation
15 budget, and that this can involve sizing up the funder's fee against the likely benefits
16 to the consumer class; and in any event, thirdly, the litigation funding agreement in our
17 case does explicitly treat the funder's fee as a relevant cost or expense of the litigation
18 as we have seen. That was clause 1.4, 1.6, go back to it on page 228. But you will
19 recall the funder's fee is part of the costs, fees and expenses of the litigation.

20 So in fact, this actually provides a second reason as to why the funder's fee should
21 not be concealed because it is relevant or it will be relevant to the question of
22 assessing holistically the costs of these collective proceedings.

23 Moving on, (v), at the top of page 10, here the PCR says that cost/benefit points in
24 previous judgments:

25 "... have generally focused on the litigation costs relative to the damages likely actually
26 to be collected ..."

1 Now that may well be a point here which will be in play once the more extravagant
2 elements of both the PCR's methodologies, we say, have had a collision with reality
3 which is to come. Essentially cost benefit is going to be something for which this will
4 be a relevant datum.

5 Sir, I'm conscious of the time but I'll just make a couple more points.

6 **MR JUSTICE MARCUS SMITH:** Of course.

7 **MR TURNER:** At subparagraph (b) on page 10 you see the PCR addressing the
8 possibility that there may be a conflict of interest -- so now we are on to conflict of
9 interest -- between maximising the funder's return on the one hand and maximising
10 the class member's return on the other. The first riposte to this, in the first sentence
11 of (b), is essentially that it's insulting, because it's suggesting that the PCR's advisers
12 might act contrary to their professional duties, third line.

13 It is not intended to be insulting or in any way to cast doubt on the integrity of this set
14 of advisers. The issue here is one of incentives and pressures in the real world. It's
15 not a suggestion of unethical behaviour. The Tribunal has in the previous cases been
16 perfectly willing to appreciate and grapple with that risk. And that is why, for instance,
17 the Merricks Tribunal on the remittal made the point that the PCR might turn out to be
18 placing the interests of the funder above those of the class members, so allowing the
19 defendant, in that case Mastercard, to apply to the Tribunal to deal with the situation.

20 Finally, turning to subparagraph (c) at the foot of this page, the PCR says that our
21 suggestion that the funder's fee might distort the incentives of the PCR in settlement
22 discussions, just as the Merricks Tribunal said it might, is actually a point in favour of
23 concealing it because the PCR says this only serves to underline the inherent strategic
24 sensitivity of the information. So it deploys the slogan. And that is wrong.

25 The simple point is that the funder's fee can act as a block in settlement negotiations,
26 it can harm the interests of class members, and if that is strategic sensitivity then it's

1 the wrong sort of strategic sensitivity.

2 The PCR then goes on to claim that the nature of the funder's fee is such that it would
3 ordinarily attract legal advice privilege, top of the next page. And that is not so either
4 because it isn't just legal advice that results in the funder's fee assuming a particular
5 structure or having any level. The funder's fee is the product of the market conditions
6 and the negotiations at a given point in time. The market can move, conditions may
7 develop, one doesn't know what is behind a particular figure.

8 It is far from obvious that an outsider can discern from the fee itself how a litigation
9 funder has appraised the merits of the case, as the pattern of previous cases of
10 consistent disclosure of the funding fee in this Tribunal has shown. And exactly the
11 same is true concerning the priorities clause which Mr O'Donoghue refers to at
12 subparagraph (d). That can tell you, too, about the incentives of the PCR's advisers.
13 To take a simple example, if the arrangement is that the lawyers and the class
14 members get paid only after the funder's fee has been fully delivered, that increases
15 their incentive to maximise the funder's return, it creates that pressure, and this needs
16 to be looked at holistically as part of the overall picture of the funding arrangements.

17 Sir, conscious of the time, for those reasons we respectfully submit that there is
18 a compelling case for lifting the redaction on the funder's fee in this case.

19 **MR JUSTICE MARCUS SMITH:** Thank you very much, Mr Turner. We will obviously
20 resume at 2.00.

21 It does occur to me that it is fortuitous, Mr Rayment, that you chose to stay. Does your
22 PCR have a position, not obviously on specific points but on the general question of
23 the disclosure of this sort of material?

24 The reason I ask is because I do mean what I say, that what is sauce for the goose is
25 sauce for the gander. If I were to conclude that this material was, for example, relevant
26 to the question of carriage, then I would exchange both ways, if necessary into

1 confidentiality ring; and I don't see how I could fairly exclude Amazon from that
2 exchange.

3 Now, I don't know whether you have got any instructions or a position on that. If you
4 didn't, I would quite understand.

5 **MR RAYMENT:** I mean, the answer at the moment, Sir, is I don't have any
6 instructions. But obviously we see where you are coming from, if I could put it like
7 that.

8 **MR JUSTICE MARCUS SMITH:** Yes. The reason I raise it now is because this
9 isn't -- Mr Turner, we don't need to resolve this this afternoon, do we?

10 **MR TURNER:** No, not this afternoon.

11 **MR JUSTICE MARCUS SMITH:** I mean, the timetable is important but this is
12 something that -- because what I'm minded to do, Mr O'Donoghue, is hear you and to
13 give Mr Rayment's clients an opportunity to row in, one way or the other, as to what
14 their position is. But I think it would be unfair to require Mr Rayment to address this
15 matter today. I mean, obviously for entirely understandable reasons, you came for the
16 directions, not for this. But I do think that it would be extremely strange if one hadn't
17 a symmetric position.

18 **MR O'DONOGHUE:** Also there is the point I made at the outset. Of course I'm good
19 to go, from my perspective the nature of the redactions -- very likely to be proposed in
20 the case of Hammond, the comparison between those, that may have a bearing on
21 what I would wish to say.

22 **MR JUSTICE MARCUS SMITH:** Sorry ...

23 **MR O'DONOGHUE:** If for reasons I understand Mr Rayment will not be in a position
24 today to deal with this.

25 **MR JUSTICE MARCUS SMITH:** Yes.

26 **MR O'DONOGHUE:** It must follow that if and when he puts his point forward that we

1 will not, subject to any reply, be in a position to deal with any points arising from that.

2 Now there may be perfect symmetry between us --

3 **MR JUSTICE MARCUS SMITH:** Let me say where I'm coming from. I at the moment
4 think that it is extraordinarily likely that we are going to want to see this.

5 **MR O'DONOGHUE:** Sorry, Sir, I missed that.

6 **MR JUSTICE MARCUS SMITH:** It's very likely that we, the Tribunal, are going to
7 want to see this, have to see it, in order to reach a proper determination on carriage,
8 let's leave certification on one side. But I just cannot see how, when one is comparing
9 the two, if, let us say, funder A is extracting X, and funder B, for the same package, is
10 extracting X times 10, how that isn't a relevant factor in carriage.

11 What I am interested in hearing is why you say that is something that is proper to
12 disclose -- and withhold, because I just need to understand where you are coming
13 from.

14 **MR O'DONOGHUE:** Yes, of course.

15 **MR JUSTICE MARCUS SMITH:** Now, how we deal with the tail end of the matter so
16 that you ensure that you have an ability to respond to what Mr Rayment is saying, well
17 that's something which we will deal with, but I do want to hear from you. I don't want
18 to hear from Mr Rayment, not because I don't want to hear from him but because
19 I don't want to put him in a false position -- and probably I should have clocked this
20 when I started thinking about carriage and disclosure yesterday evening. But there
21 we are, we are where we are.

22 **MR O'DONOGHUE:** Yes

23 **MR JUSTICE MARCUS SMITH:** The important thing is to resolve this fairly so that
24 both sides have something to say. Mr Turner, I know where he's coming from, it will
25 be the same point as against Mr Rayment as it is against you. The details may vary
26 but, frankly, it's the point of principle that matters rather than the granularity of the

1 detail.

2 **MR O'DONOGHUE:** Yes.

3 **MR JUSTICE MARCUS SMITH:** So what I'll do is I'll leave that with you, but we are
4 going to have to, I think, end this hearing in a half-baked way without a ruling from me
5 but with the clearest of indications to Mr Rayment that his clients are, as it were, at risk
6 from a regime of equal treatment; and I'd be surprised if either of you push back on
7 that. Clearly, if you did, I would want to understand why an asymmetric treatment was
8 justifiable, and that --

9 **MR O'DONOGHUE:** We may be at cross-purposes. My point was a process one --

10 **MR JUSTICE MARCUS SMITH:** Yes.

11 **MR O'DONOGHUE:** -- which would you prefer to hear from both of us in one go,
12 or do we break this into chunks? There may be a for and against, is the point I make.

13 **MR JUSTICE MARCUS SMITH:** Let me leave it this way, Mr O'Donoghue. I think
14 I would like to have an understanding, so that we have a bit of a discussion about
15 where you are coming from on this, because I think that would help me. But we don't
16 need to cross every argument, and I think it is right that you, before you conclude your
17 submissions to me, have an understanding of where the other PCR is coming from;
18 and that I think is only fair to you in just the same way.

19 **MR O'DONOGHUE:** That was the only point that I was making,

20 **MR JUSTICE MARCUS SMITH:** That's very fair.

21 Should we say this. We will resume at 2.00. I'll give you up to an hour to tell me why
22 my initial reaction that this is relevant is wrong, because I really do want to understand
23 that, and then we'll leave a spooling-off of, I would hope, submissions in writing. I'd
24 rather not -- I think it's going to be quite difficult to get another hearing this side of the
25 summer. We do need a hearing this side of the summer, so we'll have to do it on
26 papers.

1 Does that work, Mr Rayment, for you?

2 **MR RAYMENT:** Yes, Sir, I think it would. I mean, just trying to be actually clear about
3 how you see things working, I mean, on our side we had understood that you would
4 be giving an indication as to where matters stood between Mr Turner and
5 Mr O'Donoghue on Mr Turner's application against Hunter. And, you know, we would
6 anticipate that if Mr Turner was successful he would be writing us a letter saying: well,
7 you've seen what the President has ruled. We would have responded accordingly,
8 which would have been either: yes, here you go; no, there are some differences in our
9 case.

10 **MR JUSTICE MARCUS SMITH:** That's entirely true. But I think the problem that
11 really I have only just stumbled upon is that if I rule against Mr O'Donoghue then you
12 are not going to get much of a hearing in terms of an outcome that is dependent upon
13 your argument, simply because the pass would have been sold if I require
14 Mr O'Donoghue to disclose this stuff.

15 **MR RAYMENT:** Understood.

16 **MR JUSTICE MARCUS SMITH:** I cannot see circumstances where I tell
17 Mr O'Donoghue's clients: this goes into the other party's maws and they look at it; and
18 the reverse doesn't happen. I just don't think that's a defensible position, come what
19 may. There may be some outlandish circumstances that might make that a just
20 outcome, but for the life of me I can't think of it at the moment.

21 My point is if Mr O'Donoghue fails to resist this, of course Mr Turner's clients would be
22 writing to your clients saying: give us the same. My point is if you didn't say yes, with
23 enthusiasm, we would be back here and the answer would be pretty clear-cut; and
24 that's what I want to avoid. That's why I am suggesting this somewhat bifurcated
25 approach, so that your objections are actually heard at a point when they matter, rather
26 than being articulated when they actually really -- when the pass has been sold.

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

2 **MR JUSTICE MARCUS SMITH:** Mr O'Donoghue, we will resume at 2.00, we will have
3 an hour where you can just help me on the fault lines of the argument. I would keep
4 it generic rather than into the granularity because I think -- it's funding in general. Even
5 if it is the most self-sacrificing and generous form of funding, I think one still needs to
6 know. In fact that makes the point the other way: if anyone has a funder who is
7 spectacularly efficient or altruistic, or something like that, that ought to be a selling
8 point in favour of carriage one way. So we are not necessarily talking about venal
9 funders, we are talking about funding being just an important part of the backdrop.

10 **MR O'DONOGHUE:** Yes.

11 **MR JUSTICE MARCUS SMITH:** Very good. I'm very grateful, Mr O'Donoghue.
12 Mr Turner, you are on your feet.

13 **MR TURNER:** It was only a very short point, Sir, which is that I had understood from
14 what Mr Rayment said, maybe I am misunderstanding this, that his clients would
15 essentially not need to make submissions because they would consider that the
16 debate between myself and the Hunter PCR would be sufficient for their purposes. If
17 that's wrong then I quite see that there would need to be the opportunity; but if that's
18 right then there needn't be that delay.

19 **MR JUSTICE MARCUS SMITH:** Well that may be, but I don't think that's fair to
20 Mr Rayment. If I were to proceed on that basis I would effectively have closed out
21 Mr Rayment's PCR from making the substantive submissions when it mattered. It may
22 well be that the position of Mr Rayment's clients is: we actually don't care, provided
23 we are treated in the same way as Mr O'Donoghue's PCR.

24 But I don't really want to extract that commitment from Mr Rayment either, given it has
25 really only just arisen. The fact is that -- as I said at the outset I'm very glad,
26 Mr Rayment, you stayed, but everyone was of the view that in fact you were

1 a redundancy here, whereas in reality you are not. Your position is to be treated as in
2 the same way as Mr O'Donoghue. If your clients say: we don't mind, we just want to
3 be treated as Mr O'Donoghue's clients are and what's sauce for the goose is sauce
4 for the gander, then that's fine, you have a very short set of submissions to put it and
5 it would have turned out that we could have resolved this matter this afternoon. But
6 since there is no time pressure -- well, within reason, I mean, it has to be resolved this
7 side of the summer. But subject to that, I think I would feel much happier in my own
8 skin if you had the opportunity. Whether you take it or not is a matter of course entirely
9 for your clients.

10 **MR RAYMENT:** I'm very grateful, Sir. No, and our position was that, as you say, we
11 may take the stance that you outline but we might equally -- one last drag on the
12 cigarette.

13 **MR JUSTICE MARCUS SMITH:** These are clearly important questions and I don't
14 want you pushed into something when you haven't had a chance to discuss it with
15 your clients.

16 **MR RAYMENT:** I'm grateful.

17 **MR JUSTICE MARCUS SMITH:** Well that's been very helpful. We will resume at
18 2.00. Thank you very much.

19 **(1.24 pm)**

20 **(The short adjournment)**

21 **(2.00 pm)**

22 **Submissions by Mr O'Donoghue**

23 **MR JUSTICE MARCUS SMITH:** Mr O'Donoghue.

24 **MR O'DONOGHUE:** Sir, I bear in mind your suggestion that I deal with things at
25 a reasonably high level but it will be necessary for me to make some particular points.

26 **MR JUSTICE MARCUS SMITH:** You take your course, Mr O'Donoghue.

1 **MR O'DONOGHUE:** I think in any event, even as a hybrid approach, I will finish within
2 the hour. So you can at least have that comfort if nothing else.

3 Sir, by way of introduction, to our knowledge the Tribunal on the face of a contested
4 application has never ordered the disclosure of a funder's fee; and again to our
5 knowledge the Tribunal has never ordered the disclosure of a priorities clause either.
6 So this is manifestly an important application.

7 Now my friends of course referred to a handful of examples, I think primarily related to
8 funder's fees and I think the single example in relation to the FX case where it seems
9 that voluntarily some disclosures were made. Of course, we don't know the
10 circumstances in which those disclosures arose and in any event the point's been
11 taken now, so there's a question of: well, so what?

12 There have been I think up to something like 20 CPOs and the fact that in the majority
13 of cases, even on a voluntary basis, funders do not disclose this sort of information is,
14 in my submission, a pretty telling insight into at least, as a general matter, that these
15 things are seen with some considerable sensitivity. So that's by way of introduction.

16 Of course, Sir, I don't need to remind you the funding market is delicate in the sense
17 it all depends on the relevant incentives at any point in time and a disruption or
18 inflection point or change in those incentives will itself be a significant matter. That's
19 all by way of background.

20 Second, and very quickly, I want to deal with some points of principle which were
21 glossed over by Mr Turner. If we can go back to Coll, it's in authorities 4. You were
22 taken to some of -- tab 4, Sir.

23 **MR JUSTICE MARCUS SMITH:** Yes, I have it.

24 **MR O'DONOGHUE:** You were taken to some of 22, but by no means all. If I can ask
25 you, Sir, to read 22 and also, if you can, 20 and 21, and then I have a handful of points
26 to make about that. **(Pause).**

1 **MR JUSTICE MARCUS SMITH:** Yes, thank you.

2 **MR O'DONOGHUE:** Sir, I think I'm right in saying you were in Excalibur.

3 **MR JUSTICE MARCUS SMITH:** No. I know it very well, but no.

4 **MR O'DONOGHUE:** Of course. So I will come back to this, but just for your note, in
5 21 you'll see the quotation distinguishing legal advice privilege from litigation privilege.

6 **MR JUSTICE MARCUS SMITH:** Yes.

7 **MR O'DONOGHUE:** It's in subparagraph (3). A handful of points, we say, emerge
8 from these three paragraphs. First, in the special regime for collective proceedings,
9 there's already a high degree of transparency in that there is extensive disclosure of
10 the PCR's funding arrangements. As you saw, Sir, once one takes into account in the
11 litigation funding agreement you saw other things which have been unredacted in the
12 interim, in reality the level of redactions is minimal and extends really only to these two
13 clauses.

14 So, as a starting point, we have been, we say, extremely transparent, as a general
15 matter.

16 Second, Sir, we accept of course that relevance is a factor. As we see from Coll, in
17 particular, (a) it's a matter of degree and (b) it may of course be overridden by other
18 factors, in particular questions of privilege, questions of unfair tactical advantage, and
19 so on. So it is a starting point but by no means dispositive.

20 We say that the question really in terms of strategic sensitivity to the Tribunal is: well
21 what does this information go to? Why does the defendant need to see it, certainly at
22 this stage? And how and why will seeing this information help the Tribunal to decide
23 the suitability of the PCR and the suitability of the claim?

24 I will come back to how this works here but just to tee up the points of principle.

25 **MR JUSTICE MARCUS SMITH:** Yes, because I mean of course in your trawling of
26 cases that have come before the Tribunal for -- involved carriage. So in that sense

1 this is atypical amongst that universe.

2 **MR O'DONOGHUE:** Yes, it has a degree of novelty from that perspective.

3 So you have the basic point on privilege, that there may be privilege attaching, and in
4 Coll --

5 **MR JUSTICE MARCUS SMITH:** Well, yes, but when you say privilege attaching, what
6 you are saying is that there is a concern that one can, through the disclosure of
7 something which is not privileged, to work backwards as to what privileged advice has
8 been given.

9 **MR O'DONOGHUE:** Yes. And if that is right then privilege will extend to both, at least
10 that's the argument.

11 **MR JUSTICE MARCUS SMITH:** Yes.

12 **MR O'DONOGHUE:** And it's really the point in 22(6), Coll says, the premia payable
13 may possibly attract legal advice privilege, and that if not privileged disclosure of
14 premia reflects the insurers' assessment of the merits may give rise to an unfair tactical
15 advantage.

16 **MR JUSTICE MARCUS SMITH:** One could read it the other way, one could say
17 putting of the figure in a document that is not legal advice is a waiver of the advice.
18 I suppose you could argue that way.

19 **MR O'DONOGHUE:** Perhaps, Sir -- as of yet no waiver has been taken.

20 So what we also get from 22(6), again it's obvious but worth bearing in mind, is that
21 there is a distinction between something which may be privileged on one hand and
22 something which is not privileged but from which a tactical advantage can be gained.

23 Then finally, Sir, just on the principles, the questions of strategic sensitivity and
24 commercial sensitivity are different. The passage we've just seen from Coll was
25 concerned with strategic sensitivity, and it makes sense, therefore, to start with that
26 because of course if the information is privileged or if you decided it shouldn't be

1 disclosed because it would confer an unfair tactical advantage, the question of, for
2 example, disclosure into a ring doesn't really arise because there are reasons of
3 principle not to disclose it in the first place and the ring is not a panacea to those
4 concerns of principles. So that is briefly by way of principle.

5 Just to unpack what we say are the unfair advantages or the tactical or strategic
6 concerns and then I will come to Mr Turner's points. Starting, Sir, with the question of
7 unfair tactical advantage, I'm putting to one side for now the question identified in Coll
8 that because privilege may attach to an ATE premia -- or may possibly attach to ATE
9 premia, the same may possibly apply to the funder's fee.

10 In terms of the unfair tactical advantage, I hardly need to remind the Tribunal this is
11 an extremely important consumer claim. Amazon has become an unavoidable trading
12 partner for billions of transactions for UK consumers. Something like 80 to 90 per cent
13 of the sales are affected through the Buy Box. Our case is that Amazon has
14 manipulated the Buy Box to favour itself over other retailers or to favour those retailers
15 who took logistics from Amazon, over those who did not. We say the effect of this is
16 for many years consumers have not been shown either the cheaper prices or the best
17 offers and they have been substantially overcharged.

18 We say again it is obvious that there is no realistic prospect of those consumers
19 recovering by means other than a collective action. So this is an important piece of
20 litigation from a consumer perspective.

21 Sir, turning, for example, to the funder's fee -- you saw this before lunch with
22 Mr Turner. We can just go back to the clause to remind ourselves what the table says.
23 It's in tab 7, Sir.

24 **MR JUSTICE MARCUS SMITH:** Yes.

25 **MR O'DONOGHUE:** The clause is clause 9. As you will see, Sir, there a staggered
26 period and the funder's fee varies according to the period in question, starting from

1 six months up to 48 months.

2 Now we say there is a tactical element, an advantage, if you have all of the figures in
3 the rows in those tables because what you will then be able to see is: this is what
4 happens if we settle after X months; this is what happens if we settle after Y months;
5 and this is how long the funder is/was expecting the proceedings to last. But more
6 importantly we say there is a wider strategic advantage. The receiving party, in this
7 case Amazon, would be privy to information that they can use to work out what the
8 funder thought about the prospects, particularly relative to other collective claims, and
9 they can use that to inform Amazon's litigation strategy.

10 Now Amazon had protested that we've not identified any specific unfairness that
11 arises. With respect, we say this is somewhat surreal and does lead one to wonder
12 why the information is requested to begin with. In my submission, you only have to
13 state what you can infer from the information and the unfairness speaks for itself.

14 Indeed, we say in the garden of variety of litigation, this kind of information in no shape
15 or form would be disclosed, precisely because it is so sensitive and its disclosure
16 would give rise to a significant tactical advantage in relation to the receiving party. It
17 is, in shorthand, an insight into aspects of the merits of the claim and in particular
18 exposure over time.

19 Amazon of course says, well, there's already information out there on other funding
20 agreements. But we say in fact that compounds the problem, rather than being
21 an answer to it. There is a list in the Herbert Smith letter of 15 June of other
22 disclosures. Of course Amazon has very experienced and able advisers and they
23 may, for example, be able to draw on advice from brokers in relation to other litigation
24 funding agreements.

25 So we, say with the context of an unredacted table, aggregated with the other
26 information that has been obtained or can be obtained through, for example, brokers,

1 it is pretty easy, we say, to take the funder's fee and work out -- especially when you
2 have the company figures and quantum -- what the funder has been advised on in
3 terms of prospects, relative to the prospects of other collective proceedings.

4 For example, they mention the FX case. They would in a meaningful way be able to
5 work out whether the funders think this case is better or worse, or more or less risky,
6 than that case and to see what exactly the PCR's funder in those cases had bargained
7 for or indeed (inaudible) on the other cases in the list.

8 So we do say the tactical advantage is a meaningful one --

9 **MR JUSTICE MARCUS SMITH:** Well, up to a point, because even the FX
10 proceedings are highly speculative. So you don't know whether the deal is a good bad
11 or indifferent one even now. So aren't you playing, if you are trying to read into things,
12 with data that is actually completely unreliable? I could see why it's sensitive, but if
13 you were to build a litigation strategy on the prices built into a funding agreement and
14 say, you know, looking at what was agreed in FX, they were taking a very dim view of
15 the chances here. I mean that's just unreliable, isn't it?

16 **MR O'DONOGHUE:** Sir, there are inherent limitations in all of these forecast models,
17 for want of a better word, in the sense that the outcome isn't yet known. In a sense if
18 the case settles that will always be a known unknown, but my point is that, at the point
19 of the litigation funding agreements, hard nosed business people, advised by brokers,
20 lawyers and other personnel, will have formed a clear and really quite fundamental, in
21 terms of putting their money where their mouth is, view of the merits at that stage --

22 **MR JUSTICE MARCUS SMITH:** Not of the merits.

23 **MR O'DONOGHUE:** -- and going forward. Well, as best they can.

24 **MR JUSTICE MARCUS SMITH:** No. As best they can on the merits, but they will
25 also have been thinking about: what is the prospect of a decent settlement from
26 a company like Amazon if we get certificated? So they will be thinking --

1 **MR O'DONOGHUE:** Indeed.

2 **MR JUSTICE MARCUS SMITH:** -- let's look at the business parameters, if we get
3 certificated we have this big claim for billions against Amazon and they have very deep
4 pockets, they may just think it's a good idea to settle early. So they will factor that in.

5 **MR O'DONOGHUE:** It may well be a composite question. All I'm saying at this stage
6 is of course to get the litigation up and running there has to be merits and quantum
7 assessment -- (overspeaking) --

8 **MR JUSTICE MARCUS SMITH:** Sure.

9 **MR O'DONOGHUE:** -- obtained from counsel, and they --

10 **MR JUSTICE MARCUS SMITH:** Mr O'Donoghue, if we were talking about counsel
11 advice we would not be talking about it. It's so obvious. But we are not talking about
12 it, we are talking about a dim refraction of what may or may not have been a qualified
13 opinion from counsel's advice, into, feeding along with all kinds of other factors, the
14 price that is agreed in a negotiated outcome with the counterparties to the agreement.
15 I mean, of course I see the theoretical point, but as a matter of practice are you really
16 going to get anything out of this?

17 **MR O'DONOGHUE:** Sir, we say yes.

18 **MR JUSTICE MARCUS SMITH:** Okay.

19 **MR O'DONOGHUE:** Of course as the litigation evolves there will be different
20 permutations and combinations, but understanding the staging and the exposure that
21 the funders have dialled into their litigation funding agreement from the other outset is
22 a substantial and meaningful piece of information. In a sense, the question answers
23 itself because, if it were immaterial or entirely theoretical, then why is this table there
24 at all? It is meaningful to those who fund the litigation because they have tied up
25 capital for these periods of time, according to this table.

26 Of course, Sir, this is a composite application, the funder's fee plus the waterfall. And

1 | if we --

2 | **MR JUSTICE MARCUS SMITH:** This is just a reflection of the time value of money.

3 | **MR O'DONOGHUE:** In part.

4 | **MR JUSTICE MARCUS SMITH:** Well --

5 | **MR O'DONOGHUE:** In part.

6 | **MR JUSTICE MARCUS SMITH:** But that's going to be driving this in substance, isn't

7 | it?

8 | **MR O'DONOGHUE:** It will be one driver, yes.

9 | **MR JUSTICE MARCUS SMITH:** The whole point about the table is your money is

10 | committed without getting your money back for longer and longer periods.

11 | **MR O'DONOGHUE:** Yes, which is itself is a highly material piece of information.

12 | **MR JUSTICE MARCUS SMITH:** Okay.

13 | **MR O'DONOGHUE:** Sir, we then look at the priorities clause.

14 | **MR JUSTICE MARCUS SMITH:** Yes.

15 | **MR O'DONOGHUE:** Over the page. Again, Sir, just to test the sensitivity of this, let's

16 | assume, hypothetically of course, that under a priorities clause the lawyers sit at the

17 | bottom of the waterfall, so they are paid after the funder's fee has come out of the

18 | available sums recovered.

19 | **MR JUSTICE MARCUS SMITH:** Why should I make that assumption?

20 | **MR O'DONOGHUE:** I'm trying to bring out the point, Sir, about potential unfairness.

21 | **MR JUSTICE MARCUS SMITH:** Right.

22 | **MR O'DONOGHUE:** For the hypothetical purposes the sequencing in terms, of where

23 | people sit, can be varied in terms of the potential unfairness.

24 | **MR JUSTICE MARCUS SMITH:** Yes, I know, but I can't assess that because I don't

25 | know what the priority is.

26 | **MR O'DONOGHUE:** Sir, let me give the you example --

1 **MR JUSTICE MARCUS SMITH:** Okay.

2 **MR O'DONOGHUE:** -- and we can see where it takes us. In my example, let's assume
3 the lawyers sit at the bottom of the waterfall or priority, so they are paid after the
4 funder's fee has come out of the available pool of sums recovered.

5 Now, the defendant might think that we can offer a settlement that has a specific
6 relatively high cost element, so instead of a global sum we offer a sum in damages
7 plus a separate amount in relation to costs, let's say it's 90 per cent of costs instead
8 of 65 per cent of costs. Now, that will incentivise the lawyers to settle as it gives them
9 greater certainty on recovering their fees than they get if the case goes to trial or
10 potentially so(?).

11 Now our position on that hypothetical example is that the information shouldn't really
12 change anything. The lawyers have professional duties. Ms Hunter, for example, as
13 the PCR has an obligation to act in the best interests of the class and of course any
14 settlement would be scrutinised by the Tribunal in any event.

15 **MR JUSTICE MARCUS SMITH:** Yes, I mean are you saying that at settlement we
16 would not get to see this?

17 **MR O'DONOGHUE:** Sorry, Sir, I missed that.

18 **MR JUSTICE MARCUS SMITH:** Let's suppose a proposed settlement is agreed and
19 both parties come to Tribunal and say this is, you know, no deal's perfect but this is
20 a good deal for the defendant, it's a good deal for the class, the Tribunal is going to
21 want to know how the cake is being divided up, isn't it?

22 So let's suppose there's an offer of 30 million to settle a class action, the Tribunal is
23 going to want to know how that 30 million is going to be distributed, isn't it?

24 **MR O'DONOGHUE:** Sir, it will.

25 **MR JUSTICE MARCUS SMITH:** Yes.

26 **MR O'DONOGHUE:** That is our point. Because ultimately the Tribunal is both the

1 gatekeeper and gives the final sign-off and that is the protection which is --

2 **MR JUSTICE MARCUS SMITH:** Yes. But what I mean is in order to give that
3 protection any kind of force you would have to say yes, the 30 million, I'm afraid
4 a certain proportion is going to go not to the class but to the legal advisers and to the
5 funders. And the reasoning that's happening is because this commercial deal was
6 agreed right at the beginning between the PCRs and funder, eyes wide open, knowing
7 the risks you must factor that in when deciding that 30 million is right or wrong.

8 **MR O'DONOGHUE:** Yes.

9 **MR JUSTICE MARCUS SMITH:** How can the Tribunal do that without knowing the
10 question of priority?

11 **MR O'DONOGHUE:** I accept that. My point is that at the back end --

12 **MR JUSTICE MARCUS SMITH:** So you are accepting that this would have to be
13 disclosed at the --

14 **MR O'DONOGHUE:** At the back end. My objection is to disclose at the front end
15 which is the issue in these proceedings.

16 **MR JUSTICE MARCUS SMITH:** Right.

17 **MR O'DONOGHUE:** Though that distorts the strategic incentives and gives rise to
18 unfairness.

19 **MR JUSTICE MARCUS SMITH:** So it's "when", not "if".

20 **MR O'DONOGHUE:** Sir yes, but it's an important "when".

21 **MR JUSTICE MARCUS SMITH:** So, so far we have been talking about Amazon's
22 interests, you are going to have to focus on the carriage question.

23 **MR O'DONOGHUE:** Yes.

24 **MR JUSTICE MARCUS SMITH:** Let's suppose we have two funders, A and B. The
25 order of priority is completely inverted in the sense that one prioritises the funder and
26 the lawyers and they are held harmless to 100 per cent, and only the rest, such as it

1 is, goes to the class. And then let's take a different approach, where in fact there is
2 a guarantee of a substantial amount of money, let us say 80 per cent of the estimated
3 value of risk which is guaranteed to go to the class before any lawyer or any funder
4 gets a look-in.

5 Now, how is that not relevant to the question of carriage?

6 **MR O'DONOGHUE:** Well Sir, we say that if one looks for example at tab 7, litigation
7 funding agreement, it's recital C.

8 **MR JUSTICE MARCUS SMITH:** Which page?

9 **MR O'DONOGHUE:** It's 223.

10 **MR JUSTICE MARCUS SMITH:** Yes.

11 **MR O'DONOGHUE:** You will see under C:

12 "The Claimant's solicitors engaged a firm of funding advisors to advise the Claimant
13 that the terms contained herein represent the best terms that the market would offer."

14 **MR JUSTICE MARCUS SMITH:** Right.

15 **MR O'DONOGHUE:** And we say that in circumstances where you have a recital like
16 this, certainly at the carriage stage, that is sufficient.

17 **MR JUSTICE MARCUS SMITH:** Sufficient for what?

18 **MR O'DONOGHUE:** To understand the terms set forth in this agreement are highly
19 competitive in market terms.

20 **MR JUSTICE MARCUS SMITH:** But what happens if there's a similar assignment in
21 Mr Rayment's agreement but the agreements are different?

22 **MR O'DONOGHUE:** Well, that may then be a matter for Mr Rayment. If he wants to
23 gain an advantage by saying: well, it so happens that I have a particular clause or
24 concession in my agreement which is better; that may be a good point for him and
25 a point against me. The point at this stage is, should we be compelled to disclose this
26 information, given the obvious sensitivity?

1 **MR JUSTICE MARCUS SMITH:** Well yes, but I think you are misunderstanding the
2 role of the Tribunal here. Let's park Amazon for one moment. To what extent do you
3 accept that the Tribunal has a duty to do the best it can for the Proposed Class? In
4 other words, to assure itself within the limits that it can, that when it has the good
5 fortune to have two well-put-together PCR proposals that it is choosing the one and
6 putting it out of its misery the other in the best interests of the class.

7 Surely, just an assurance, which I'm quite sure was right, like a recital C doesn't enable
8 the Tribunal to do its job. I mean, do push back on this. If you say that the Tribunal's
9 responsibilities are as in ordinary litigation purely adjudicative in the sense that it is the
10 parties who choose which points to put forward and the Tribunal simply decides
11 between them, well I can see that as an answer. But that's not the only model for how
12 these proceedings are intended to work. If one takes a more expansive view of the
13 responsibility of the Tribunal towards the class, then do you accept this material is
14 really quite high in the order of relevant material to see?

15 **MR O'DONOGHUE:** Well Sir, we say on the basis of Coll it is a balance of course. It
16 may be that in that information surfacing at the carriage stage, that the unfair tactical
17 advantage that is discussed, then comes back to bite you during the course of the
18 litigation. So we say it's not a zero sum game. So a Class Representative may from
19 that narrow perspective be better in some respects but if that comes at the cost of
20 a significant tactical advantage being given to the defendants, that that may be
21 a relevant and material reason why disclosure should not be ordered. So it is
22 a balance.

23 Of course, in relation to if funder's fee specifically, that doesn't affect what the class
24 gets. That would only be true of the priorities clause.

25 Just to pick up a handful of other points made by Mr Turner. First, he says that there
26 may be disincentives on the PCR in relation to making a proper distribution of any

1 award of damages. We say that is a bad point for reasons of principle and practice.
2 To start with the practical point, the funder's fee is not something that gets paid, come
3 what may; it is paid only if there is money left from the sums recovered to pay after
4 damages have been distributed. That's the risk the funders take. And by the time the
5 PCR gets to the point of distribution, a settlement has already been reached, for the
6 claim has succeeded, damages are coming, and the funder has already made its
7 outlay, the money is spent or sunk and the funder at that stage has no ability
8 whatsoever to put pressure on the PCR or indeed anyone.

9 And even if we were minded to act that way, I will take you in a minute or two to
10 information relating to our particular funder, the idea that the PCR or the professional
11 advisers would be incentivised in those circumstances not to put forward the proper
12 distribution plan with a view to helping the funder to get paid in full the funder's fee,
13 instead of helping the class members to get their damages, is fanciful. So that's
14 why -- I keep coming back to the point the Tribunal's ultimate role in terms of either
15 settlement or other resolution of proceedings is, in my submission, an answer to all of
16 these points.

17 Now on the point of principle, although Amazon says that it's not seeking to impugn
18 the integrity of the PCR's advisers, the premise of the whole point frankly is that there
19 is some risk of them, and the PCR, not complying with their professional obligations.

20 If we go back to Coll in tab 4 --

21 **MR JUSTICE MARCUS SMITH:** Just pausing there, Mr O'Donoghue, let me say at
22 once that I don't think the point is being put that way and if it were I wouldn't be
23 accepting it. The way I see it is through the court's control of the fiduciaries.

24 Now, one has extremely swingeing rules concerning the conduct of a fiduciary
25 (inaudible), the party to whom that person is acting as fiduciary, and that's not because
26 of any kind of presumption of bad faith or acting contrary to professional obligations,

1 quite to the contrary it is a reflection of the importance of those professional obligations
2 and therefore the concomitant importance that they be policed.

3 So let me say this. There's no question of my thinking that there isn't anything other
4 than the highest standards of propriety being engaged here in what is, after all,
5 an extremely difficult process, these are not easy claims. But it is for that reason that
6 one would import the importance of court scrutiny in relation to relevant information.
7 So I see it as a buttress to the duty, not as an imputation that they are going to be
8 breached.

9 **MR O'DONOGHUE:** Sir, that's very helpful. In a sense, if we go to Merricks, it's in
10 tab 0.2, at paragraph 140. Mr Turner took you to 139, where it says -- you see the
11 Tribunal would decline to approve the settlement on that ground.

12 Then 140:

13 "Although we think that a term in the Funding Agreement to the effect that the
14 Applicant would use his best endeavours to distribute the "Proceeds" to the class
15 would have been desirable, given the powers of the Tribunal and the position adopted
16 by the Applicant in his unchallenged evidence, we do not consider that there is any
17 realistic prospect that the Applicant would be constrained from acting throughout in
18 the best interests of class, including as regards any negotiation with MasterCard and
19 distribution of any monies..."

20 My simple point is if one is even indirectly going to cast an aspersion on the PCR and
21 the adviser to that extent, there needs to be some basis for supposing that. And at
22 this extremely early stage in these proceedings we say there is absolutely no basis for
23 any suggestion to that effect. And on the contrary -- there is of course a litigation plan
24 which is in tab 8 of the core bundle.

25 **MR JUSTICE MARCUS SMITH:** Yes.

26 **MR O'DONOGHUE:** Sir, I think more than 80 pages long. If for example one looks at

1 280 you will see -- there are pages and pages in relation to the notice and
2 administration plan. And you can see, Sir, this is on Case Pilots.

3 And then, Sir, forward at 321, you will see there's a specific section running to seven
4 pages on how it is proposed the class members would be notified at the distribution
5 stage how they might claim damages. And again that will all be subject to scrutiny by
6 the Tribunal prior to certification.

7 **MR JUSTICE MARCUS SMITH:** Yes.

8 **MR O'DONOGHUE:** Then Mr Turner suggested well the funder's fee could be pitched
9 at such a level that it itself becomes an impediment or deterrent to settlement. This
10 exact issue, in our submission, has already been considered by the Tribunal in the
11 Merricks case. We go back to 0.2, and it's on page 0.67. You see the heading
12 "Potential conflict of interest", and so on. And you see 135, for example, the funding
13 agreement contains --

14 Sir, if I could ask you to look at 133 to 138, because we've already seen 139 and 140.

15 **MR JUSTICE MARCUS SMITH:** Yes. **(Pause)**

16 Yes.

17 **MR O'DONOGHUE:** We then go back to our funder's agreement again in tab 7. You
18 will similarly see, at 6.1 the PCR:

19 "must diligently prosecute the Action and pursue all the Claimant's and the Class
20 Members' legal and ethical rights in connection with the Claim and/or Action where
21 reasonable to do so."

22 So that reflects her obligation to act in the interest of class members, is absolutely
23 fundamental.

24 Then if we go forward to 8.1, you will see that she has control of the action, subject to
25 the provisions of the agreement. And 8.2, that that cannot be overridden.

26 So that is why we say it is no more than assertion and contrary to the clear terms of

1 the agreement, as in Merricks, that the PCR and her advisers might somehow act
2 contrary to their obligations. And again at Merricks 140, even if there were some
3 theoretical conflict of interest, such as what Amazon seems to be hinting at,
4 the Tribunal says: well, we are the ultimate arbiter and we will take care of that.

5 The third point Mr Turner makes is the termination provisions in clause 16. He says
6 well, they might decide to walk away. We say that is a bad point. The idea that
7 a funder, having spent considerable sums in bringing litigation to this scale might
8 decide unreasonably in view of the funding fee to exercise a termination right, walking
9 away with nothing but debt, we say is somewhat unrealistic. We are not aware of this
10 ever occurring in any collective proceedings that we are aware of. So again this is
11 extremely speculative. And of course you have the point, Sir, in relation to, you can't
12 just walk away, there are safeguards built into --

13 **MR JUSTICE MARCUS SMITH:** No, there's the --

14 **MR O'DONOGHUE:** The opinion.

15 **MR JUSTICE MARCUS SMITH:** -- opinion of third-party counsel.

16 **MR O'DONOGHUE:** And of course ATE Insurance.

17 So again we say this is highly speculative. And the Tribunal in Trucks, if we go back
18 to the authorities, at 0.3 -- it's paragraph 57 Sir:

19 "Mr Bacon and Mr Carpenter themselves submitted, the test should be 'whether there
20 is a realistic as opposed to fanciful theoretical possibility of termination.'"

21 We say again at this extremely early stage in these proceedings there is no basis in
22 which it can be said that risk is anything other than theoretical or speculative.

23 Then Sir, in the same bundle we have included some materials on the funder in this
24 case at 0.76 -- sorry, in core bundle, 26.1.

25 **MR JUSTICE MARCUS SMITH:** Yes, I have that.

26 **MR O'DONOGHUE:** As you see, about LCM. You'll see, Sir, the second paragraph,

1 25 years of experience, AIM-listed. They set out the principles they will adhere to.
2 And LCM as it happens, Sir, is funding collective proceedings which have already been
3 certified in the Govia Thameslink case. So there is certainly nothing to suggest that
4 this particular funder would cut and run, in fact all the evidence suggest the contrary.
5 So we say that staring at clause 16.1, and concluding on the basis of that text alone
6 and nothing else that the risk of walking away and terminating is anything other than
7 theoretical and speculative, we say at this stage is an impossible submission. There
8 really is no basis on which it could be said that this particular funder, based on their
9 contractual clause, would cut and run.

10 Of course there are endless permutations but the critical point for today's purposes is
11 well, is the contention on termination anything other than speculative? We say plainly
12 not. And if one goes back to paragraph 52 of Trucks 0.3, it's on page 0.76.

13 **MR JUSTICE MARCUS SMITH:** Yes.

14 **MR O'DONOGHUE:** There the Tribunal notes:

15 "...it is impossible to predict all that may happen in such litigation..."

16 And in effect, what Mr Turner is suggesting to you is that it is possible, based on
17 a contingency basis to predict what might happen in relation to termination.

18 The penultimate point that Mr Turner relies on, this is 29.4 of his skeleton, he says that
19 the priorities clause may give the funder too much influence in the conduct of the
20 proceedings, distort the ability of the PCR to act in the best interests of the client. But
21 again this is speculative. I've shown you the clauses where at least it is clear what the
22 obligations of the PCR are, and I've shown you 8.2 that there is no basis to think that
23 she would be subject to undue or illegitimate pressure from the funding side.

24 The final point, Sir, is the cost benefit point. And this is under rule 79(2)(b) which
25 concerns the costs and benefit of continuing the collective proceedings.

26 We understand Amazon's submission to be that when the Tribunal is looking at cost

1 and benefits they should do so on a holistic basis, they can look at everything,
2 including the funder's fee. And according to Amazon you need to see these clauses
3 because you ought to be assessing the claim, not only on the basis that the funder's
4 fee can properly be regarded as a cost to expensive litigation, but that there is a risk
5 that this Tribunal might order the funder, not only be paid in advance of the class
6 members, but be paid whatever is in the litigation funding agreement as the contractual
7 funding fee.

8 So as we understand the point, if that fee seems unreasonably high than that has to
9 be weighed in the cost-benefit analysis.

10 Now as we explain in our skeleton at paragraph 13, this is not actually the prism
11 through which the cost-benefit analysis has previously been viewed by the Tribunal at
12 the certification stage. And as Mr Turner I think took you to, that isn't just because of
13 the guide to proceedings, but we say that's also important, it's actually for reasons of
14 principle. Because again, and I do emphasise this point, the funder does not get paid
15 the funder's fee, come what may; it gets the funder's fee only: first, if there is money
16 left over from which to pay that fee; and second, subject to the supervision of a
17 Tribunal. So even if the funder's fee were unreasonably high it simply doesn't follow
18 that the Tribunal is going to say: yes, fine, the funder can be paid, even if there
19 is -- that's priority to, possibly even to the prejudice of class members. That is a wholly
20 unrealistic basis on which to conduct a cost-benefit analysis.

21 And the reality is the Tribunal is going to supervise this in the same way as it can
22 supervise costs. And as the Tribunal observed in the first Merricks certification
23 judgment, not only is it the arbiter for whether a settlement is appropriate but it is also
24 capable at that stage of assessing the appropriate price for litigation funding. That's
25 paragraph 116.

26 If we go back to the litigation funding agreement, the funder has already as a matter

1 of contract acknowledged and accepted that there is a risk of non-payment. We go
2 back to clause, 9.9 please.

3 **MR JUSTICE MARCUS SMITH:** Yes.

4 **MR O'DONOGHUE:** 9.11, which Mr Turner didn't show you, an important provision:
5 "The Claimant's application of the Recovery in accordance with clause 9.3 above
6 should fully discharge the Claimant's obligations to pay the Funder's Fee even if the
7 Funder's Fee calculated in accordance with clause 9 has not been paid in full."

8 So why, we ask, would the Tribunal predicate its cost-benefit analysis at the
9 certification stage on the risk that it will rubber-stamp a distribution that is more
10 favourable to the funder and less favourable to the class? So looking at this from the
11 perspective of the class members, and I entirely accept, Sir, that is the prism, we go
12 back to paragraph 52 of Trucks, back to 0.3, we say the perspective of the class
13 members, that is from the perspective from which the Tribunal should be conducting
14 the cost-benefit analysis, and you do not need to know the funder's fees to form a view
15 as to whether the costs are going to outweigh the benefits. Because ultimately, even
16 if they were on the high side, it's subject to control and oversight of the Tribunal. And
17 in fact the Tribunal has explained in the FX judgment the sort of exercise that Amazon
18 was contemplating would ultimately come down to an inappropriate attempt to
19 second-guess the judgment of the funder. If we could go to 5.1, please, in the
20 authorities.

21 **MR JUSTICE MARCUS SMITH:** Yes, thank you.

22 **MR O'DONOGHUE:** It's 288.2, it's on page 218.8 -- costs and benefits:
23 "It clearly would be inappropriate to override the commercial assessment of
24 the funders and the lawyers retained by the PCRs in seeking to second-guess their
25 willingness to take a financial stake in the success of these claims."

26 Of course, Sir, you will be very familiar with this, and we respectfully agree that this

1 has been deprecated -- the exercise is deprecated, rather than the judgment.

2 So we say, Sir, in conclusion, that what emerges very clearly from certification
3 judgments I've shown you, both at first instance and at appellate level, is a Tribunal
4 approaches the exercise in a realistic manner, it assumes the PCRs and the legal
5 representatives are going to act professionally and not breach their obligations, unless
6 there is an evidential basis for suggesting the contrary, and here of course there isn't.

7 It assumes that responsible, established funders are going to behave sensibly,
8 commercially and properly, they are not going to be looking to apply some illegitimate
9 form of pressure. And it bears in mind in all of this any settlement -- any order in
10 relation to a funder's fee is ultimately going to be subject to the control of the Tribunal.

11 We say that when one looks at Amazon's alleged concerns, whether in relation to
12 funder's fee and the priorities clause, they have no proper or realistic basis. It is simply
13 looking at the naked terms of the contractual provision and saying you should assume
14 the worst, or at least a possibility of the worst. We say the information contained in
15 those clauses for those reasons is not going to be relevant to carriage or indeed
16 certification. It may be relevant to the back end but it is sufficient for my purposes
17 today to establish that it is not relevant at the carriage and certification stage.

18 We say that even if you are against us in terms of strategic sensitivity, and for those
19 reasons of principle alone there would be sufficient reason to uphold the redactions
20 that we put forward.

21 Also -- I think I've said this more than once, but to be clear, we have no objection at
22 the back end -- sorry, the Tribunal at that stage of the litigation --

23 **MR JUSTICE MARCUS SMITH:** I understand that.

24 **MR O'DONOGHUE:** -- would at that stage see, for example, funder's fee. So we say,
25 Sir, in a nutshell the problem, if there is one, resolves itself.

26 **MR JUSTICE MARCUS SMITH:** Thank you very much, Mr O'Donoghue, I'm very

1 grateful to you.

2 Mr Turner, I don't think I want a reply from you until after we have dealt with
3 Mr Rayment. What I think we should do is we should have an on the papers pooling
4 of responses. So Mr Rayment, you would go next, I think then Mr O'Donoghue you
5 would have a right to deal with any points that arise out of Mr Rayment's approach,
6 and then Mr Turner I think you would have the last word, this being your application.
7 We need the to do this fairly quickly because quite clearly you are going to need
8 an outcome to this before the summer, rather than after the summer, given what we
9 are hoping to do in terms of carriage. So that is understood.

10 If I require further oral submissions of course I'll say so but can I just test that none of
11 you are pushing back now to say this is something on which you would want to be
12 heard orally at a later date. I appreciate I'm asking you to buy a slight pig in a poke,
13 but I want to ensure that I have a degree of buy-in to what I'm proposing.

14 **MR TURNER:** Sir, I think from our side it may well depend on the nature of the
15 submissions that come in.

16 **MR JUSTICE MARCUS SMITH:** Yes. I can see that. Well let's leave it there then.
17 I mean, I know you are ready to give a reply, Mr Turner, but I don't think it's
18 appropriate --

19 **MR TURNER:** I understand.

20 **MR JUSTICE MARCUS SMITH:** -- given what I said about the position of
21 Mr Rayment.

22 So Mr Rayment, written submissions, recognising you are going to have to have some
23 quite serious discussions with your clients, how long would you need?

24 **MR RAYMENT:** By 5 July? That's a week.

25 **MR JUSTICE MARCUS SMITH:** That's a week. That seems reasonable.

26 **MR RAYMENT:** Because discussions do have to take place and there are a few

1 | people I need to --

2 | **MR JUSTICE MARCUS SMITH:** I entirely understand. So 5 July.

3 | Mr O'Donoghue, you said you wouldn't get more than a week but can you cut it back
4 | any more than that, or is it a week from 5 July?

5 | **MR O'DONOGHUE:** A week.

6 | **MR JUSTICE MARCUS SMITH:** A week, okay.

7 | And then think, Mr Turner, a week after that for you.

8 | **MR TURNER:** Yes.

9 | **MR JUSTICE MARCUS SMITH:** So we are already taxing the process quite a bit.
10 | But at the moment I don't see any other option. Diaries being what they are I don't
11 | think we can schedule a hearing in, say, a week's time to deal with this again but I will
12 | actually think about that because three weeks is quite a long time to delay things, but
13 | let's proceed --

14 | Mr Rayment?

15 | **MR RAYMENT:** Sir, if it helps, I had to ask for a week because I have to protect my
16 | own clients' position and have adequate time to consult, but it is possible we could get
17 | back to you sooner.

18 | **MR JUSTICE MARCUS SMITH:** Well, if you can.

19 | **MR RAYMENT:** We will try to do that if we can.

20 | **MR JUSTICE MARCUS SMITH:** Then the timetable collapses to that extent and
21 | no one loses their week unless they want to, but if you can try and do that that is
22 | helpful. So that's a very helpful indication, Mr Rayment. I am grateful.

23 | **MR RAYMENT:** Thank you Sir.

24 | **MR JUSTICE MARCUS SMITH:** Mr Turner?

25 | **MR TURNER:** Sir, there is just one point of factual clarification --

26 | **MR JUSTICE MARCUS SMITH:** Yes of course.

1 **MR TURNER:** -- arising out of Mr O'Donoghue's submissions which would be helpful
2 to clear up now if that's possible. Because his position was that the funder's fee comes
3 only out of the undistributed damages, and then he built a submission on that. If we
4 open up the litigation funding agreement, let's go back to one of the parts that I took
5 you to in my address, on page 235, you will recall that at paragraph 9.3 at the top the
6 claimant seeking approval from the Tribunal for the payment of the funder's fee, from
7 the recovery. And then two mechanisms are referred to. Halfway down page 235
8 there's: payment of the funder's fee other than wholly from the undistributed damages
9 as the first option, which seems to be inconsistent with the submission that was made,
10 that it's only coming out of the undistributed damages.

11 One possible reason why this might be is because of a situation similar to what arose
12 in the Le Patourel case where -- just to remind your Lordship, that goes to the
13 Court of Appeal and one of the points that was argued there was whether if the
14 defendant ultimately is required to make recovery, it was BT, it can do so by just giving
15 an account credit to the customers on their bills.

16 And in a sense Amazon is in potentially a similar position to that because it has its
17 network of customers and gift vouchers or credits and so forth. And so, in that case,
18 in Le Patourel, it was paragraph 99, Lord Justice Green says well, in a case such as
19 this, it might not be that the funder's fee comes out of the undistributed damages and
20 the Tribunal would order a different arrangement.

21 And it appears, at first sight, as if this part of the litigation funding agreement here,
22 which is explicitly about payment other than wholly from undistributed damages, is
23 entertaining that there might be a situation in this case too where the Tribunal is not
24 being asked only for the money to come out of undistributed damages. Because it
25 formed part of the submissions that were made it would be very helpful to know what
26 exactly the situation is.

1 **MR JUSTICE MARCUS SMITH:** Well, it's almost asking on a piecemeal basis to
2 resolve the issues that are before us in the sense --

3 **MR TURNER:** It's a significant issue, but if there's a factual answer it would
4 be useful --

5 **MR JUSTICE MARCUS SMITH:** If there's a factual answer, Mr O'Donoghue, it would
6 be helpful.

7 **MR O'DONOGHUE:** We will check this of course, it's the first time this point has been
8 raised.

9 **MR JUSTICE MARCUS SMITH:** That would be very helpful, thank you.

10 On that slightly unsatisfactory basis, but I fear an inevitable basis, I am going to
11 adjourn this to be determined, ideally on the papers but if I see a way of fast-tracking
12 it to a hearing that you can all do, I will give that some thought, but I'm really quite
13 pessimistic, I don't think I have the capacity even if you all had a day that you could
14 make to fit it in. So we will proceed on the sequential written basis and I will obviously
15 ensure that there's a ruling or at least a determination before we rise for the summer.

16 **MR TURNER:** I'm obliged.

17 **MR JUSTICE MARCUS SMITH:** Thank you all very much.

18 **(3.10 pm)**

19 **(The hearing concluded)**

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