IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1433/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 8th – Tuesday 9th January 2024

Before:
The Honourable Mr Justice Marcus Smith
Derek Ridyard
Timothy Sawyer CBE
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Dr Liza Lovdahl Gormsen

Class Representative

v

Meta Platforms, Inc. and Others

Defendant

A P P E A R AN C E S

Robert O'Donoghue KC, Nicholas Bacon KC, Tom Coates, Greg Adey and Sarah O'Keeffe
(On behalf of Dr Liza Lovdahl Gormsen)

Tony Singla KC, James White and Andrew Lomas Bird (On behalf of Meta Platforms)

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Monday, 8 January 2024

(10.30 am)

Housekeeping

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

Before you begin, two housekeeping matters.

First of all, the usual live-stream warning. These proceedings are being streamed, and an official recording is being made and there will in due course be an authorised transcript, by my authority.

It is, however, prohibited for anyone else to make a recording, whether audio or visual, to photograph or transmit these proceedings, and a breach of that injunction is punishable as a contempt of court.

So much for the usual warning.

Mr O'Donoghue, before you begin, I wonder if I can say a few words about how we see the two days working. This is of course not the first time that this matter has been before us, and you can take it that we are very familiar with the case as it was brought and of course with the new case that has very helpfully been put together, in particular, by Ms Scott Morton.

What we are minded to do is to somewhat inadequately summarise what we understand the essential thrust of your case to be, Mr O'Donoghue, for you then to take as long as you wish but ideally quite briefly to correct errors in our articulation of your case. And then, Mr Singla, for you to, as it were, go in as to why, on the basis of that summary, the application should not be granted and the proceedings not certified. And then, Mr O'Donoghue, for you to have most of the time to reply rather than articulate what I hope we understand already very well, which is the way you put your case.

So, I don't know if that meets with your general approval.

Mr Singla, does that disadvantage you in any way?

MR SINGLA: Sir, the sequencing doesn't disadvantage us, but the timing may be important here because I think Mr O'Donoghue and I broadly agreed that we would have approximately 50 per cent each of the hearing time.

As you know, we have a number of points, and we say the claim fails on a number of levels. And I noticed or perhaps picked up, that you envisage my dealing with these points more briefly than 50 per cent of the hearing time.

MR JUSTICE MARCUS SMITH: No, I certainly don't say that. What I am minded to do is to keep Mr O'Donoghue short in his opening. I certainly have no agenda in terms of confining your response. I think you should take as long as you need, whether that's 50 per cent or less will not depend on timing questions but on your unpacking the points that matter to your client, and you should take as long as you need.

MR SINGLA: Yes. I think, as you said, Mr O'Donoghue should spend most of his time by way of reply but you meant relative to --

MR JUSTICE MARCUS SMITH: Indeed.

And, Mr O'Donoghue, to be clear, I think we will try to assist you in your reply in indicating those areas that we would be assisted by, and indicating those areas where, if there are any, we don't need your assistance, but that will of course depend upon Mr Singla's efforts in articulating his objections.

So that is how we envisage matters going. The one thing that we do want to ensure that there is time to debate -- and it is in one sense anticipatory but nevertheless important -- and it's this. Assuming -- and of course I know that that is what we are here to debate -- but assuming we certify, we do want the parties to give careful thought as to how the case is to be managed going forward to a putative trial at the end.

Now, I appreciate that to an extent that is putting the cart before the horse. However, it is something that is moderately intrinsic to certification, because if we are talking about Microsoft Pro-Sys and the management of a blueprint to trial, it's likely to feature in your submissions anyway, and if it doesn't we are going to want to articulate it in some detail because, assuming we have to reserve the question of certification, I don't want us having to come back in fairly short order to debate case management again. I want us to be able to deal with that in one go if we have to.

So I would like the parties to be thinking about how, assuming certification, the matter can be dealt with going forward. It seems to us that there are three broad options in terms of case management, and we have a pretty clear view as to which of those three options would be best, but I'll articulate them and then you can think about them over today and overnight.

So option 1 is the conventional way of doing cases, which is, you have your pleadings, you have your factual statements, you have your expert evidence and, after exchange of written submissions, you have your trial.

That we do not consider to be a particularly attractive option in this case.

Option 2 is what we directed as a Tribunal in the *Boyle* trains litigation, which was obliging the Class Representative to put their complete case, ready for trial unilaterally, without any form of response from the Defendants, enabling the Defendants to know exactly what the case was, so that they could demolish it if they could.

The attraction of that course is that where there is a degree of uncertainty in the way an arguable case is being put -- as seems to us exists here -- namely, if one is looking at a pricing model for data, how exactly is that pricing model to work in a complex market that is two-sided?

Well, these are very difficult questions on which we can see real virtue in the Class

Representative putting their cards completely on the table first and for Meta to come back saying, well, look, your model simply doesn't work because if you price in this way the two-sided market collapses because the network effects are so adverse that it just doesn't work.

Well, that is something which we see operating in a sequential way. So, option 2 is the option that we favour.

And just to complete the set, option 3 is where one says that both sides should put together their case in parallel but without, as it were, interaction, and then they respond. That's what I did, with a degree of success, I think, in the High Court proceedings in *Optis v Apple*. But that was where both sides were saying, "Here is our FRAND rate", and each side really had an independent way of putting things, whereas that isn't the case here. Here, I think it is the Class Representative saying, "This is what we should be paid as a class for our data", and I think Meta saying, not to put too fine a point on it, "Well, whatever you say, you're wrong".

Now, that is perhaps putting it a little bit too crudely but I think it is what makes option 3 not a particularly viable option in this case.

But that's how we see the case management going forward. And if there's to be an argument about that -- and we welcome it if there is -- then we want to have that in the course of these two days, because we'd like both parties to leave the room understanding at the end of tomorrow, or soon if we can manage it, what they need to be doing if the case is certified. And we don't really want a second hearing to debate that.

Related to that will be things like would the parties be assisted by regular case management reviews so that the inevitable disclosure requests that would emanate, assuming we go down the option 2 route, from the Class Representative to Meta, that those could be managed in a very swift way with input from the Tribunal as

appropriate on perhaps a monthly basis. These are things that we are very up for debating and again we would like to debate if that is a matter on which the parties want -- as we suspect them to -- to have their say. That we see as part of the process. And by all means feed your reactions to that in your submissions or deal with it separately at the end. We leave that to you, but we do want that debated.

So subject to that rather overlong introduction, Mr O'Donoghue, are you happy for me to try to articulate what we think your case is and then you can mark our homework or is there something you want to say before we do that?

MR O'DONOGHUE: Sir, as you would have apprehended there are a number of preliminary points I wanted to make.

MR JUSTICE MARCUS SMITH: Of course.

MR O'DONOGHUE: Certainly, the case has changed very substantially. The draft Amended Claim Form and the two Scott Morton reports are considerable in length and it did seem to me that on some level for me to outline the changes had some utility. But, sir, I'm in your hands as to how much the Tribunal has downloaded but I had intended to take you through the architecture of the case. Not the archaeology, the architecture. That seems to me to have some value.

It may be, sir, that that is not inconsistent with what you are about to say. Meta, of course, has taken what I would call a kitchen-sink approach, and I suspect that a number of those points I will have to deal with in any event and it may be that there is then some coincidence between what Meta are saying and what the Tribunal has condensed. But I had intended to deal with those at some length in any event.

Sir, it sounds like the most efficient thing would be for the Tribunal to set out its stall and I will then try to Box and Cox in terms of what I had intended to say, to fit with that. I don't want to waste anyone's time. It may be things have moved on in some respects.

One point, sir, which is really a housekeeping point: as you will have picked up from our skeleton, Mr Bacon KC will be dealing with separate funding issues. Mr Singla has helpfully agreed that he can do that tomorrow in the interests of costs minimisation. So, in terms of the sequencing the sequence was that I would make whatever submissions were appropriate, Mr Singla would reply, then Mr Bacon would say his piece on the funding side, and then I would have a brief reply at the end of that.

So, I just wanted to make sure that Mr Bacon is not lost --

MR BACON: Not lost in the wash.

MR JUSTICE MARCUS SMITH: Indeed. And that is entirely helpful, Mr Singla. I'm very grateful to you for accommodating --

MR O'DONOGHUE: Sir, on the case management, I will obviously take that away with my team --

MR JUSTICE MARCUS SMITH: Indeed, and that's why I --

MR O'DONOGHUE: -- and cogitate.

MR JUSTICE MARCUS SMITH: -- wanted the debate right away because I do want everyone to be thinking about case management problems from the very beginning. I'm sure you have been anyway but it does seem to me that a degree of interaction is important.

Mr O'Donoghue, let me be clear, I think the extent to which you need to, as it were, open the case will depend on the degree of confidence that you have, first of all that the Tribunal has actually got what Professor Scott Morton has said, and secondly the extent to which you consider that you can appropriately outline the architecture to your clients' advantage in light of the points that Mr Singla makes.

But I do think in this context it is better, given what may be an incorrect appreciation of my understanding of the case, that we have the objections absolutely clearly

nailed from Mr Singla, for you then to respond, rather than for you to be telling us what we think we already know before Mr Singla gets on his feet. But I think we had better try to test that. And what I will now try to do is articulate -- Mr Singla, you --

MR SINGLA: Sir, just before we move to substance, in the spirit of points not getting lost in the wash, you will have seen, I hope, the correspondence whereby the parties have agreed that two points will be left over. That's class period and claim period, where we say that they are looking to extend the claim period as compared with the original claim which stopped at 31 December to 2019, and they are now looking to say that it should be stopped at the judgment or settlement.

We have said that that is impermissible under *Sony* and *Merricks*, and we have agreed to park that debate.

And there is also the question of business users, which was an issue on the last occasion but was parked then, and we've agreed to park it now. And that's the point that we say the case theory is all built around consumers. And indeed, their claim as originally framed had a carve-out for business users. We then explained that in fact it's not so simple to identify business users. And their response was well, we will put them back in. And we say that is completely unsatisfactory.

We have agreed not to take up time today and tomorrow because certainly from our perspective we think that we will never get to the stage of drawing up a CPO if you are with us on our points of substance, but I just wanted to put that marker down that those two points mustn't be forgotten, as it were.

MR JUSTICE MARCUS SMITH: That's helpful. But we would want, I think, to understand, assuming we are not persuaded by your primary objections, how these points will be dealt with. Is the anticipation that there will be an exchange on paper which we would then embed in our ruling or is it envisaged that there will be a further hearing?

MR SINGLA: I think what was envisaged was that you would consider the points of substance which we make. If you are with us, then as I say we never get to the scenario where a CPO is being drawn up. But what we do say is really two things. One, no CPO could be drawn up without grappling with these two points. And two, actually the onus is on the PCR, at least in the first instance, to explain why it is that on the claim period they are going beyond what is permissible under *Sony* and *Merricks*.

They have not explained why they are seeking to go beyond. They have changed their position and they are now saying it should be 6 October 2023, which is when they sent us the Amended Claim Form. We say, well, that's still not permissible under the authorities.

So the onus is on them in that respect. And likewise in relation to business users we say that in the first instance we want a proposal from them. It's their claim after all.

MR JUSTICE MARCUS SMITH: Well, that seems fair enough, that the piper calls the tune. And in this case Mr O'Donoghue is the piper and I don't anticipate there will be any serious push-back on that.

MR O'DONOGHUE: Sir, no, we are seeking certification currently.

MR JUSTICE MARCUS SMITH: Yes.

MR O'DONOGHUE: And what would be very unsatisfactory would be if these two points, which in my submission are not a bar to certification, are left in the ether. So, if Mr Singla wants to make the points, let him. If he doesn't, they should not be a bar to certification.

MR JUSTICE MARCUS SMITH: Well, look, what I'm going to provisionally indicate is this: I hope that, whilst we are obviously going to have to reserve the substance of the ruling – it would be impossible, I think, to do justice to both sides if we were to try to extemporise a substantial ruling – we will endeavour to give at least a firm

provisional indication at the end of the hearing as to where we are going.

If the firm provisional indication – and I stress it will only be provisional and we will revise it as we see fit when we write our full ruling – but if the provisional indication is in Mr Singla's favour, then we may park the question of the manner of dealing with these two points until we've actually done our full ruling.

If, on the other hand, we are firmly but provisionally in your favour, Mr O'Donoghue, what we will be minded to direct would be a very short sequence of exchange of written submissions on these two points, with the PCR starting first and Mr Singla responding, so that we could incorporate the outcomes to those questions in our ruling and have, as it were, certification, assuming we stick with our provisional view in your favour being dealt with in one go. But --

MR O'DONOGHUE: Sir, that's extremely helpful, if I may say so.

To put my cards on the table, what we really wish to avoid is for this to drag on and on for weeks and months. We want to get on with this case rather than have drift.

MR JUSTICE MARCUS SMITH: That accords entirely with the ethos of the Tribunal, which is to move things forward. And frankly, given the diaries that all three of us are labouring under, to say nothing of counsel, you wouldn't get a hearing for a number of months, I think, given the present state of play. So, I think --

MR O'DONOGHUE: Before we hear from the Tribunal, there's one final housekeeping point.

MR JUSTICE MARCUS SMITH: Of course.

MR O'DONOGHUE: As you'll have seen, sir, at tab 22 of the correspondence bundle there's been a letter from the CMA in relation to the proceedings, and they have indicated that on both unfair terms and unfair pricing there are a number of things they think they can assist the Tribunal with. As I understand it they haven't yet formally applied to intervene but they have put their head above the parapet at the

very least, and I just want to make sure that that hasn't been forgotten.

MR JUSTICE MARCUS SMITH: No, that's very helpful. I think -- I may be wrong, and it may be just an aspiration -- but I think we did respond to the CMA and the parties indicating that we understood why they were not present here, simply by reason of cost, and that we would obviously accommodate their attendance. But we would want a degree of understanding as to how they saw their involvement going forward, because we are happy either which way, but we do need to know for management purposes whether there's an intention to attend in person or whether it is simply a question of written submissions.

If I haven't articulated that in correspondence, then that's my failure of memory and efficiency but --

MR O'DONOGHUE: I suspect someone is --

MR JUSTICE MARCUS SMITH: -- that is our thinking, and we will obviously deal with that going forward if the matter does proceed.

I'm very grateful, Mr O'Donoghue.

Introductory summary by THE TRIBUNAL

MR JUSTICE MARCUS SMITH: I want to make very clear that this is no more than a skating across the surface of what is, after all, an extremely lengthy and detailed expert report. But we obviously are going to be dealing with the application for certification on its new basis and, if we certify, allow all the consequential amendments to enable that case to be dealt with. And what I'm saying now is no more than an attempt to assure Mr O'Donoghue that we have vaguely grasped what is under the bonnet of what is obviously not a straightforward case.

But although there are two abuses in play, we consider that the PCR is right to regard them as flip sides of the same coin, or as intrinsically related. To unpack

them in order, there's first of all what we can call abuse 1, which is essentially an unfair pricing case based upon the *United Brands* jurisdiction where it is said that the price charged by Meta was unfair within the terms of that jurisdiction.

Now, although it is instinctively or intuitively odd to regard a zero price as an unfair price, that is actually no more than the lawyers' hangup about things that transit the zero line. We see nothing odd in zero being an excessive price. It simply means that that which should have been paid for has not been, and it's as simple as that.

United Brands is a jurisdiction which is undoubtedly a difficult one to apply, but one which the courts across Europe and in this jurisdiction are increasingly familiar with. The sting in the *United Brands* jurisdiction is that whilst it articulates a test for determining whether a price is unfair, it does not deal -- indeed it explicitly says it does not deal -- with the question of, if an unfair price has been determined, what is a fair price?

That, in our understanding, constitutes the fault line or the transition between abuse 1 and abuse 2. So, at stage 1, abuse 1, it is necessary to say that the price charged by Meta to its Facebook client base was an unfair one. And if one establishes that, one has done no more than say that the price charged was an unfair one. What one has not done is worked out that which matters in this case but which does not matter in an infringement case, namely what is the proper or the fair price. And that, as it seems to us, is the pivot or transition point between abuse 1 and abuse 2.

Abuse 2, it seems to us, is much more virgin territory in terms of competition law, and it is working out how one ascertains what is a fair price. And it seems to us that this is something where the increasingly litigated FRAND jurisdiction, which is developing in this jurisdiction, is something which may very well educate and inform the process of ascertaining what is a fair price, assuming the price charged by Meta was unfair under the *United Brands* abuse 1 jurisdiction.

That of course obliges the PCR to assert and the Tribunal to grapple with precisely what rights are in issue. Is one to take a property rights analysis of the information that is ceded by the parties who subscribe to Facebook as the right way of analysing it? If so, how does one then value the property right, namely the information that is transferred? And that is an intrinsically difficult question which requires, we think, the Class Representative to steer a difficult course between two extremes, neither of which it is asserting and both of which would be difficult to compartmentalise into a class action.

And just to articulate those two extremes, at one extreme there is a pure loss-based analysis, which is to say that the extraction of the Off-Facebook Data is something which has caused harm or loss to the class members. The difficulty with that is that it is very hard to avoid the suggestion that that is an individuated loss. And if I have had my data extracted wrongly by Meta to be deployed and monetised, why is my loss exactly the same or to be computed in the same way as Mr Ridyard's on my left or Mr Sawyer's on my right?

Loss in that sense is essentially individuated and therefore not consistent with a collective action.

At the other extreme there is the disgorgement of profits case, which we understand is expressly disavowed – rightly – by the PCR, the notion that the mere fact that Meta have monetised the data and so made significant profits, and to have those profits disgorged is a case which we think was made last time round. We understand entirely that it is not made this time round, and entirely rightly because that is not a price, it is a holding to account, which is not consistent with the way in which a cause of action could be framed here.

I say that not because I expect them to be controversial but because it, as it were, bookends the second of the two extremes through which the Class Representative

must navigate.

So, the middle ground, which we think is the area for debate, is, how does one attribute value to, we think, the property right that is being transferred by the client base, by the class members, to Meta? In this case the property right in question being what we term the Off-Facebook Data, which is monetised in a way which is said to be done without paying a fair price. How does one ascertain what a fair price is for that data?

Now, that we can see is arguably part of a collective claim because one would expect, much as an intellectual property right is, there to be a single price that ought to be consistent across all of the class members. It's not a loss-based assessment, it's a rights-based assessment, and one would expect generally speaking the rights to be valued in rationally the same way. But how they are valued is something in which we see considerable difficulties both in terms of theory and practice, by which I mean economic practice. But that is how we understand the second abuse to operate.

So what one has really are two halves of a case. You need to succeed on both. If you fail on *United Brands*, then the price is *ipso facto* not unfair, and you never get to stage 2. If you succeed on *United Brands* then you have a whole additional area of complexity, which is, what price do you attach to that which has already been found to be unfair? And that is, as we see it, not a separate abuse but a second and sequential part of the same jigsaw puzzle.

Now, that, for better or worse, is my effort at articulating a much more complex and careful analysis in both your pleadings, Mr O'Donoghue, and in Professor Scott Morton's report.

Do feel free to be as rude as you like about what I've said. But I'll hand over to you.

MR O'DONOGHUE: Sir, as ever, that is extremely useful.

Submissions by MR O'DONOGHUE

MR O'DONOGHUE: Sir, there is a lot of common ground.

For example, one of the points Meta makes, and I think it's more than a quarter of its skeleton, is the point about compensatory damages, which they make at some length.

Now, I will deal with that head-on, which I think maps on to one of the points the Tribunal has raised. Sir, I do think nonetheless it would be useful for me to outline the architecture of our case because you are absolutely right, sir, we do see the two abuses as two sides of the same coin and we affirm that. But I did detect that we may not be on the same page in terms of which are the two sides of the coin.

And just to make this more concrete, the unfair terms, although it is the second side of the same coin, we see this as something which is somewhat different to *United Brands* and it's a different route of getting to the same conclusion, and I think it may be useful for me to explain why that is. But I do think, sir, there is a lot of utility in what the Tribunal has indicated, and I will try to meld my submissions to deal with those points as I go along.

Sir, you are absolutely right, we are not seeking disgorgement. You are absolutely right that, at least as pleaded, the case is a compensatory case, and we do put forward a case that these are 46 million individual losses pooled together. We are seeking compensatory damages on a common class-wide basis.

Sir, I will pick up these points as I go along but I think the starting point is it is extremely helpful that the Tribunal has seen the point that we see these very much as two sides of the same coin, and I want to unpack what we mean by that and, in particular, sir, how it maps on to damages.

Sir, a couple of further points. I entirely agree that when one moves to the liability stage in *United Brands* all you have done at that stage is identify what is unfair. It

doesn't, at least by necessity, then identify what is fair. That is the counterfactual exercise.

Now, having said that, of course, when one determines liability, one will in most cases be looking at evidence of comparators, other metrics that indicate fairness, and in my submission whilst the exercise at the liability stage is simply to work out unfairness, by implication in most cases, including this case, one would be considering various metrics of fairness in reaching that terminus. And when it comes to the question of damages and compensation those metrics and comparables may be of some evidential and forensic utility.

MR JUSTICE MARCUS SMITH: Mr O'Donoghue, don't get me wrong, in intellectually articulating two stages I wasn't saying that you couldn't establish or make good both stages by reference to the same evidence.

MR O'DONOGHUE: Indeed, you are absolutely right. Strictly speaking in phase 1 it is unfairness only.

Now, the other point I would say, sir, before I move on to one of the more detailed submissions, is of course once you establish unfairness, at least directionally, in a counterfactual you will understand that the counterfactual fair bargain must be better than the factual, because what the Defendant cannot do at the compensatory stage is say, well, it doesn't matter because I would have behaved unfairly in the counterfactual as well.

So at least directionally – I accept you need to put a number on this, this is a damages case – but at least directionally we know that the counterfactual will be better for the class even if that does not itself yield a number.

To put it in very simple terms, the objectionable factual is an unfair price of bargain. The lawful counterfactual is a fair price of bargain. So at least directionally –

MR JUSTICE MARCUS SMITH: Yes, so what you will be saying is that the outcome

would have to be that Meta would have to pay something –

MR O'DONOGHUE: Yes.

MR JUSTICE MARCUS SMITH: -- to the class because zero is the price. It can't be that the class would be paying anything to Meta; it would have to be in the other direction. So, zero in a sense constitutes the starting point for an assessment at stage 2 of how much goes from Meta into the coffers of the class.

MR O'DONOGHUE: Yes, there has to be a positive payment on the counterfactual. I entirely accept that that doesn't give me pounds, shillings and pence, but directionally we say the position is clear.

Sir, I will come back to everything you said in some detail, in particular the compensatory damages point and individualisation. They are extremely important, and I want to spend quite a bit of time on those. Sir, if I can make some initial remarks and then quickly move to the architecture and then move on to the handful of core points the Tribunal has helpfully identified.

MR JUSTICE MARCUS SMITH: That's fine. I mean, the only thing I would say is, you must take whatever course you see fit, but of course, given the 50/50 split, whatever time you spend now will be subtracted from a reply.

MR O'DONOGHUE: Yes.

MR JUSTICE MARCUS SMITH: So, I leave that in your judgment. I'll say no more.

MR O'DONOGHUE: Sir, can I start with the compensatory point, which I think is at the heart of at least one of the Tribunal's points. Then I will move to the question of individualisation, which I think is wrapped up to some extent in the same point.

Just to put Mr Singla's gloss on this, what they say in their skeleton at 69 is that the remedy being claimed is not compensatory and the basis of the assessment of damages remains focused on the gain to Meta rather than the loss to the class, which they say is not a permissible approach in law. And wrapped up in that is

the Tribunal's point about individualisation and in effect -- or in substance they say it's a quasi-disgorgement type remedy.

Now, we say this is simply wrong. Our case is compensatory and nothing else. And I'll explain how the individualisation component works.

Sir, it is important, in my submission, to debunk the gains to Meta of disgorgement point to understand the genesis of this. The genesis of this point first time round was Mr Harvey's initial approach.

Now, in a nutshell, sir, as you will recall, Mr Harvey -- there were two difficulties, or at least two difficulties. One was that for two of the then three abuses no counterfactual was put forward. And second, even for the unfair pricing abuse the approach was essentially, well, every penny above the WACC is compensation to class.

Now, if one thing is clear, that is not what we are saying this time round. So the genesis of this point is important.

MR JUSTICE MARCUS SMITH: You don't need to spend any time on -- I mean, I know that Professor Scott Morton says that is appropriate she takes the Harvey report into account. I think we can safely regard what work she has done as what an insurance company would call a cancel and rewrite of the round previously. So I don't think either of you need be troubled by any baggage that we will have around our necks as regards what Mr Harvey said. We made clear our position last time around. For our part we are content that there's been a substantial cancel and rewrite, and it is the merits of that which we are really concerned with.

MR O'DONOGHUE: That's extremely useful, sir. I mean, we were instructed to conduct a root and branch enquiry --

MR JUSTICE MARCUS SMITH: No, no, no --

MR O'DONOGHUE: -- and we did.

MR JUSTICE MARCUS SMITH: We would have been disappointed if you hadn't, and I think if you hadn't addressed the pretty fundamental concerns that we articulated in our last ruling then you would be getting a rather different ride --

MR O'DONOGHUE: I can imagine, sir. I can only imagine.

MR JUSTICE MARCUS SMITH: -- today.

MR O'DONOGHUE: And of course the gist of much of Meta's submissions is, well, it's the same thing all over again. It's déjà vu all over again. And it's simply not true as a starting point. So that was the genesis of Mr Harvey and I don't need to labour that point.

Now, by contrast, Professor Scott Morton, she clearly articulates the counterfactual. If we can go to 346 of her first report, Core A 3/310, paragraph 346. You see, sir:

"As such, I consider that in the counterfactual without the take-it-or-leave-it requirement the vast majority of consumers would have refused to consent to Off-Facebook Tracking absent some inducement. Given the commercial value of Off-Facebook Tracking to Facebook, Facebook would be strongly incentivised to find a value transfer which would obtain consent from users and share some of the surplus generated by their data."

Then a couple of pages on at 357 we see about two-thirds of the way down the paragraph:

"I would therefore expect that any value transfer to be from Facebook to users."

If we then go back to the draft Amended Claim Form at 176 in tab 1, we say:

"In the counterfactual, Users would thus have benefited from a fair bargain in relation to the collection of their Off-Facebook Data. The value that would have accrued to users and in that fair bargain represents the loss they have suffered by reason of Facebook's abuse. Accordingly, the same or substantially the same counterfactual methodology for quantifying damages applies whether as a matter of legal

classification the abuse is articulated as an unfair trading condition or an unfair price."

Now, the counterfactual of the monetary value transferred from Meta to the users, it is not simply assumed by Professor Scott Morton, who provides a compelling basis in fact for why the commercial value of the Off-Facebook Data to Meta is relevant to the assessment of loss. If we go back to her report at 330, please.

MR JUSTICE MARCUS SMITH: Yes.

MR O'DONOGHUE: You see the point about commercial value. Then there's a reference to the Tribunal's criticism from the judgment last year in relation to Mr Harvey. And she says:

"By contrast, my analysis derives the role of the commercial value of data for Facebook by isolating the incremental profits associated with the abuse concerning Off-Facebook Tracking."

Now, of course this is one factor in a model. There are two other factors. There's the bargaining parameter and of course the cost to users of giving up their data. So, Professor Scott Morton doesn't just crudely assume that all of Meta's profits above the WACC are compensatory damages. Instead, she has a bargaining model which seeks to isolate the effects of the unfairness abuse and translate them into compensatory damages. And in particular only the incremental profits generated from Off-Facebook Data are taken into account and not Facebook's overall profits, and they are really one of a number of inputs into that model and are not simply its output.

Sir, our case is that in a counterfactual, absent the abuse, users would, whether under unfair terms or unfair prices, have benefited from a positive value transfer for Meta to access the Off-Facebook Data. The factual position is that they received nothing for these data. And the missing link, if I could call it that, in Meta's analysis --

one can easily see in an unfair price, if the price is unfair as a matter of liability, then the counterfactual is some price that is not zero.

Of course, there are complex questions of calibration, but the counterfactual of the unfair price must be a price. But equally the counterfactual to the unfair terms is also a price, because the logic is that one cannot extract the data by a contractual fiat, an unfair contractual term. The users, as we see from the ATT incident a couple of years ago, are extremely resistant if given a choice, in tracking, and we see the same with Project Beacon in 2007. So, if you cannot extract the data by this contractual fiat, and users are resistant to giving up these data, in a counterfactual to obtain these data a payment has to be made to induce the users.

So that is how one transitions from a factual unfair term to a counterfactual price in the form of compensatory damages. So that is the link between the two sides of the coin.

And the aggregate damages we claim are therefore equal to the aggregate size of the transfer of value that the class would have received in the counterfactual, absent the abuse, in exchange for consenting to Meta collecting Off-Facebook Data. So, the damages compensate the users for the abuse of the collection of these data without any consideration return and which Meta would have paid instead, absent the abuse.

Now, one of the points made by Mr Singla is, well, in effect you are claiming user-based damages or seeking a gains-based remedy which is not permissible in law.

Now, with respect, that is not correct. As I've articulated, in both counterfactuals or both sides of the same coin, there is a counterfactual positive price payment to the users. This is not a case like *Lloyd v Google* where there is no financial loss to the individual and instead a user-based remedy must be imposed in the absence of

any financial loss. And this is a case where the counterfactual is a financial loss. The users had been denied the benefit of a fair bargain in the counterfactual.

MR JUSTICE MARCUS SMITH: Just to put it in more granular terms, what you are saying is this, that it's a perfectly feasible business model to operate Facebook using only on-Facebook data. And that is something which could be offered without any particular additional form of monetised consent.

MR O'DONOGHUE: Yes. For many years that's all that was offered --

MR JUSTICE MARCUS SMITH: Indeed, we understand that. The point is that the Off-Facebook Data is in and of itself valuable and monetised by Facebook. And you are not saying that that surplus that accrues to Meta should be disgorged to the class. What you are saying is, let's suppose there was a box that came up when you subscribed to Facebook saying: do you want just the use of on-Facebook data only? In which case, off you go. Or are you prepared to allow the use for these purposes of Off-Facebook Data at X price?

And although that sounds extraordinarily simple, the X price is likely to be quite significant in terms of both the number of people who subscribe -- it may be too low for them. They may well say, well, I don't want to pay that. That is something you are going to have to model. And then you have to say, well, if that price X is paid by Meta to the class as subscribed, however great that would be, what effects does that have on the network between the two markets which Meta are serving?

In other words, it may very well be the case that if you have a charge of X, whatever X may be, there is so diminished a number of participants in the Off-Facebook Data so as to render the monetisability of that data to be impossible.

Now, these are things which we can't hope to debate now but they are the sort of things that we will be dealing with in a trial if it takes place. But it does go to show that the choice to allow my use of Off-Facebook Data at price X, although it seems

a very simple question, is in fact one redolent with enormous complexity.

MR O'DONOGHUE: I accept that. Of course, we are not seeking payment in relation to on-Facebook data. And in relation to the Off-Facebook Data, the bargaining parameter currently specified means they will continue to keep at least 50 per cent of the incremental profit. And we see from ATT that if one extrapolates from Apple to the entire device universe we are talking about tens of billions of pounds.

MR JUSTICE MARCUS SMITH: Well, yes, I know you say 50 per cent, but that is something which is enormously up for debate.

MR O'DONOGHUE: It is up for debate.

MR JUSTICE MARCUS SMITH: The fact is that part – I query how much -- but part of the value that Meta are bringing is the aggregation and deployment of the Off-Facebook Data in order to monetise it, and that is something which doesn't emanate from the individual class member. All the class member is doing is providing the raw material. And so, the 50/50 split may be entirely wrong.

Now, that's not something which we want to debate about, save to say that it may be entirely wrong and --

MR O'DONOGHUE: There will be debate, sir --

MR JUSTICE MARCUS SMITH: There would need to be. I am quite sure there will be. I see Mr Singla nodding away. But that is something which we would need to have an understanding of, how one justifies a rate of 50 per cent, 10 per cent, 90 per cent, who knows?

MR O'DONOGHUE: Sir, that's entirely right. But we have set out why we say (a) there would be a positive payment, and (b) at least as a starting point a 50/50 split is a fair one.

Now, to look at this from the other end of the telescope, are we to understand that

a company potentially foregoing tens of millions of pounds of profits consistent with their fiduciary duties would throw their hands in the air and cock a snook at users or would they incentivise to reach a deal? That would be the debate for trial if we get there. It is a question of incentives at its core.

MR JUSTICE MARCUS SMITH: Well, it is. But it's not, I think, answered by saying: would Meta be cocking a snook? In other words, would they be foregoing an addition to their revenues above their costs? It's much more a question of what is a proper price as between the class members and Meta, which is not the same, I don't think, as: will Meta be increasing their revenue over their costs? I mean, on that basis you could justify a 99 per cent/1 per cent split between Facebook and the class.

MR O'DONOGHUE: Sir, that's right. To put this in *Hydrocortisone* terms, the producer and consumer surplus needs to be balanced. If there is a producer surplus that is justified that can be reflected in the bargain parameter, it can be adjusted left or right as appropriate at trial. I entirely accept that.

MR JUSTICE MARCUS SMITH: Indeed.

Mr Singla, I hope you are vaguely familiar with the *Hydrocortisone* language that we are using.

MR SINGLA: Sir, I'm very familiar with it. But just to be clear on this point that you have been discussing with Mr O'Donoghue, we are not saying today that the problem is the 50/50 split. We say there's a much more fundamental problem. We accept that if you were to certify we would take issue about the precise nature of the extent of a split. Our point is, we actually never get to this counterfactual bargain.

MR JUSTICE MARCUS SMITH: That's very helpful, Mr Singla, and I'm sure that Mr O'Donoghue will take that on board, because we are very keen to understand the fundamental objections that you have.

But just to be clear, *Hydrocortisone* is not dealing with precisely where a fair price is to be located. *Hydrocortisone* is a pure *United Brands* case where one is saying: is this price unfair? And one is assuming the question of what is a fair price, save in the directional sense, that you articulated in the beginning, which is why I said earlier that this is, at this stage, much more like a FRAND case where one is saying there is an obligation to reach a fair and reasonable non-discriminatory price, but what is a fair and reasonable and non-discriminatory price is not simply: does it add to Meta's bottom line in some way? And equally it doesn't mean that a 50/50 split is intrinsic --

MR O'DONOGHUE: Yes, all is up for grabs.

MR JUSTICE MARCUS SMITH: All is up for grabs.

MR O'DONOGHUE: I'm not drawing lines in the sand, at least on that.

Sir, in a nutshell, again, the reason we say the damage is compensatory in relation to both abuses is that the only counterfactual we've put forward is that there would be a positive value transfer to the users.

Now, Meta has said, well, there are other possibilities. Perhaps. We have set out in some detail why, based on the evidence, a value transfer to the users is the correct counterfactual. I will come back to unpack that a bit more. But that is why we say, at base, these damages are only compensatory because they are premised in the counterfactual on a monetary transfer to the users. It is not disgorgement of profits and it is not a user-based remedy which assumes there is no financial loss. Our case is that there has been a financial loss.

Now, a couple of further points.

MR JUSTICE MARCUS SMITH: But there's not been a financial loss in the sense of a person entering upon my land, trespassing, not doing any damage, in the sense that my land is as it was, and I've suffered no articulatable loss. It is simply

a payment to reflect the fact that the trespasser has obtained that which they are not entitled to, namely the benefit of entering on my land without payment.

MR O'DONOGHUE: Sir, it is a bit more than that.

MR JUSTICE MARCUS SMITH: Right.

MR O'DONOGHUE: First of all, we don't ground this in property rights as such. It is actually something much simpler, which is, the counterfactual is a fair bargain. A fair bargain results in a financial payment to the users. So what has been lost between the factual and counterfactual is the denial of the monetary benefit of a fair bargain. That's why -- I don't need to go as far today, and I don't need, to say, well, this is akin to a property right and you must compensate me, come what may. We say there is a direct financial loss because the denial of the fair bargain in the counterfactual has led to a financial loss to the users in the form of the denial of payment. And that is equally true of unfair terms and unfair prices.

The second reason, sir, why we put this slightly differently is that we do say that there is a compelling factual basis or some basis in fact for why users do value the Off-Facebook Data and therefore have suffered a loss in the counterfactual. Now, just to quote what Mr Singla says on this, he says at 69 in his skeleton:

"If the remedy claim were loss based then no damages would be recoverable by users who attribute no value to Off-Facebook Data."

Now, we say that is simply wrong in fact, because we see from ATT and Project Beacon that if people are given some semblance of a choice or if there is competition, the vast majority of users will simply refuse to give up Off-Facebook Data as things stand. But we do say there is a basis in fact for why users do value their data and why they suffered a loss in those data being used and misused.

And the cost to users, of course, is one of the key inputs in the bargaining model. That's at paragraph 328 of Scott Morton 1. And the higher the costs of data

extraction for users the higher the level of damages.

So we do say there is a financial loss, and it is not the case that the vast majority of users simply couldn't care less about their Off-Facebook Data.

MR JUSTICE MARCUS SMITH: No, I accept that, for the sake of argument, Mr O'Donoghue. The problem is, I'm not sure you can simply say the nature of that which the class member is giving up can be unclassified. And I think that is perhaps the key transitional point between your abuse 1 and your abuse 2. You see, if one had a situation where all we were deciding was "has Meta behaved improperly in using or extracting the Off-Facebook Data", well, that's a nice *United Brands* question, and no doubt you could say: well, naughty Meta, they've charged too much, that's an infringement; big fine; off you go. But that's not this case. That is only the starting point.

The next point is, well, what is the value that is not being accorded in Facebook's unfair price?

Now, if there was a future market where Facebook said, well, yes, we accept -- of course I appreciate you don't at the moment -- we accept that this is an infringement; the price is unfair; we are now going to put in place an offer where Off-Facebook Data is priced in some kind of fixed price way or even an auction -- I'm sure you can have an online auction for the price -- and you would get a market for the data and you would know what the price was. But we don't have that, because Facebook are saying: this is not an infringement at all; what we are charging is fair.

So the Tribunal is going to be in a position where we are going to have to work out how one evaluates, how one prices, that which is being given up. And I'm not sure that you can divorce the question of fairness from a theory as to what is being given up, which is why I'm going on to the question of trespass, property rights, that sort of thing, because --

MR O'DONOGHUE: I understand.

MR JUSTICE MARCUS SMITH: -- it gives at least a degree of intellectual coherence into what it is we are trying to do.

MR O'DONOGHUE: It may be we are at slightly cross-purposes. The property rights, of course, are like a patent, they have a particular connotation. Now, I do not say that data is akin to a patent right. What I'm saying is that these data are personal and extremely valuable, and that in essentially a hypothetical negotiation over these data, Meta would see their value and would be strongly incentivised to pay a positive monetary price for access to these data. So maybe the slight push-back from me is that I'm not saying this is on all fours with a property right. It is something close to that, but not exactly the same, if that makes sense.

MR JUSTICE MARCUS SMITH: Well, yes, I mean, I suppose what I'm saying is that is not for today but certainly for the purposes of any trial we would need to be in a position to understand what it is we are valuing as a starting point. I mean, when one is talking about a right that is clearly understood, an intellectual property right, a patent right, even when one knows the precise nature of the right in question, the question of valuation is extremely difficult, as I know from my own personal experience.

It becomes an order of magnitude harder when one hasn't actually framed the nature of the right that is being given up. And it does seem to me that we are going to need to understand, as part of your case going forward, what it is that we are valuing, because unless one knows exactly what it is one is valuing then one has a problem from the get-go. So it may be that it's not a property right that –

MR O'DONOGHUE: In a class –

MR JUSTICE MARCUS SMITH: And that's fine, but we will need to know what it is, not, as I say, today, but that is something which will be pretty fundamental to the

case going forward, because it is quite possible that this is simply a pure regulatory question.

Let me unpack what I mean by that. It's quite possible that, assuming – Mr Singla, I'm going to assume an infringement on Meta's part because the example only works if one assumes an infringement -- the position is that actually Meta has been behaving extremely badly by infringing by charging an unfair price. The outcome is not that there is any form of adjustment by way of compensatory damages. The answer is that Facebook have infringed. That is it. You shouldn't do it in the future. And maybe there's a fine for past conduct. But there's nothing more than that.

So it does seem to me that the nature of that which is being given up is quite fundamentally important to the valuation of what is being given up, because it's quite possible to say, well, what's being given up is worth nothing, has no price, it's just information. But in extracting it Facebook have behaved very badly and should be fined, you know, whatever amount they should be fined because they have infringed competition law by imposing an unfair price. So, there is no necessary connection.

MR O'DONOGHUE: I understand that. That will need to be specified and will be the key issue if we get to trial. What we are saying at base is that in a counterfactual negotiation -- I mean, these data are not just a raw material, they are the key essential raw material that allows the individualised targeted advertising that is so very profitable for Meta.

And again, at the risk of repetition, we see time and time again when users are confronted with any semblance of a choice as to whether they would want to give up these data, the overwhelming majority say, resoundingly, no.

MR RIDYARD: Can I ask a question about the minority in the ATT experiment. 80 percent didn't want to give it up but the other 20 percent were happy about giving it up. But in your approach to damages, you don't make any allowance for those.

You don't say, well, that 20 per cent reveal not to care about giving up the Off-Facebook Data, so there's no damage to them. So, in that sense that does reveal something about your approach to damages here, doesn't it? It really is derived from the profits to Meta rather than the cost to the consumer.

MR O'DONOGHUE: Sir, I don't think that is quite right, for a few reasons. First of all, of course we will need in due course to get disclosure as to what exactly has been happening with ATT. We have seen some raw numbers, but in terms of the alpha and beta testing the reactions to that and what exactly the users thought they were or were not giving up or opting in and out of, the details there would be important. For example, to put it in somewhat extreme terms, it may be that the 20 per cent of people who did opt in absolutely completely misunderstood what they were being asked. So, the details will matter here. I don't accept that the --

MR RIDYARD: It relates to the 80 per cent, too, doesn't it? But let's just take – I mean, you asked us to take the 80/20 at face value, which I think is reasonable for current purposes. I am just understanding, I mean, the nature of the damage is very much based on the excess profits that you believe Meta makes from the incremental data.

MR O'DONOGHUE: Yes, well, the incremental profitability is one input, I entirely accept that, and the cost of giving up data to the users is another input, and the bargaining parameter is another input. So, it's not the sole input. But the second response, sir, to your question is really a legal point, which is, there is nothing objectionable about collective proceedings in which the class -- well, two things: where the loss suffered by class members has a degree of variability or indeed that there may be some class members who suffered no loss at all. That is not some infirmity or frailty in the collective proceedings. And just to give you a couple of references to that, the first is the *Gutmann* case, which is tab 37 of the

authorities bundle. It's at 1808, paragraphs 41 and 42.

You will see in subparagraph (3) -- I can give you the quotation:

"A common issue does not require that all members of the class have the same interest in its resolution. The commonality refers to the question not the answer, and there can be a significant level of difference between the position of class members."

And likewise, in *Gutmann*, Court of Appeal again, 73 and 74:

"The existence of some no-loss claimants in the class was not an obstacle to certification."

So that's the second point, sir. And the final point goes back to a point the President made. I think the one thing that everyone is agreed upon is that if there is a counterfactual price it will be a single price for all users.

And you will know, sir, from other unfair pricing cases and indeed from competition law more generally it is inevitable in any unfair pricing scenario that there will be consumers who have a higher or lower or at least different willingness to pay, and there will be some degree of -- a billionaire may be less upset about an unfair price than an indigenous person. So, a degree of individualisation to that extent is inevitable, we suggest, in anti-trust analysis.

But the key thing is, if there is an unfair price, there has then to be a fair counterfactual price. And certainly in this case that counterfactual price will be a single price for all users. And it may be that that single price is somewhat different to the willingness to pay and willingness to accept of one or other individual class member.

And we say that is first of all not a defect under antitrust law as a general matter and, second, in the context of collective proceedings that is not an obstacle to collective certification.

The final point I should mention, which I think, sir, may be a practical answer to your

question, is if we go to paragraph 41 of Professor Scott Morton's first report. Core A, tab 3, 331. You will see the heading "Accounting for variation across class members." And if I can invite the Tribunal to read 421 to 423. **(Pause)**.

So, it's essentially an average exercise and there will be a single price. That is all I wanted to say on why these damages are compensatory and why, to the extent there is an individual element, it's not inimical to a class being certified.

MR JUSTICE MARCUS SMITH: That's helpful.

Mr O'Donoghue, we generally take a transcriber break. Would that be a convenient moment?

MR O'DONOGHUE: Yes, sir, it would.

MR JUSTICE MARCUS SMITH: Very good. We will rise for 10 minutes until midday.

(11.53 am)

(A short break)

(12.05 pm)

MR JUSTICE MARCUS SMITH: Mr O'Donoghue.

MR O'DONOGHUE: Sir, a couple of final points and then I will hand over to Mr Singla, and I can deal with what he says in reply.

Just to come back on the question of no loss because of different personal valuations of Facebook data. Just to be crystal clear, we make two points. One, in fact users do value their personal data: Project Beacon, ATT.

You will also see, sir, in appendix A2 of Scott Morton 1 there is a survey of quite a recent body of literature which essentially debunks the so-called privacy paradox. So we say there is a lot of literature, including that which is very recent, suggesting that users do in fact value their privacy considerably.

And second – and I think, Mr Ridyard, this really is the key point in relation to your

question – if there is a user who for whatever reason doesn't personally value his or her Off-Facebook Data very much, there is still, on our counterfactual, a loss, because what they have lost is the payment resulting from a fair bargain in the counterfactual.

In a counterfactual with a single non-discriminatory price being applied by Meta to users, all users will benefit from that fair price. And the loss to a user who doesn't, for whatever reason, value their data is the denial of the monetary benefit of the fair counterfactual bargain.

So that's why we say there is a loss that isn't directly at least linked to personal valuation.

Now, one way maybe to think about this is, suppose I am a teetotaller and I have a bottle of wine that is extremely valuable, and somebody takes it from me. Does the fact that I personally, because I'm teetotal, have more or less no valuation for this bottle of wine mean I suffer no loss? Well, no, because if the value of that wine as sold to a merchant is £100 then that is the loss that I have suffered.

So that may be one way of triangulating all this. Sir, that is all I wanted to say. I will deal with points by way of reply primarily.

MR JUSTICE MARCUS SMITH: That is very helpful, Mr O'Donoghue. Thank you very much.

Mr Singla.

Submissions by MR SINGLA

MR SINGLA: Sir, as you know, we submit that despite the PCR's amendments to the Claim Form and the new expert evidence the case does remain fundamentally flawed on a number of levels.

Now, I'm going to divide my submissions into five parts. I do want to say something first about the legal principles that apply at the certification stage.

Secondly, I will address you on the important question of causation and counterfactuals because, as you will have seen from our response and skeleton, we say there is a serious problem with this aspect of the revised case. And indeed, we say the problem means that the case is unsustainable in all the different forms in which it's put in the Claim Form. I'm going to take some time taking you through the Claim Form because it's important to see that the case is actually put, as regards infringement, in three different ways. It's said that -- what we have called abuse 1. Now that abuse 1 we have described as the imposition of the take it or leave it condition. That is said to be an unfair term and an abuse in and of itself.

That's the first way in which the case is pleaded. Secondly, the case is put on the basis that there is an unfair price. That's what we call abuse 2.

And thirdly -- and we say this is in fact, on analysis, the principal way in which the case is put -- it's said that both abuses need to be proved in order to get to the counterfactual, that they need to show that there was both an unfair term and an unfair price.

Now, that is really the way in which the case is put. It's not, with respect, sir, I think you described it as almost stage 1 and stage 2 that one starts with the unfair price, and the other allegation about unfair terms comes in only if the unfair price case is established. With respect, when I show you the pleading, you'll see in fact the way in which the PCR advances the revised case. And in relation to the principal way in which it's put, ie the PCR accepting that they need to prove both the unfair term and the unfair price, what they say in the counterfactual is that there would have been a bargain between users and Facebook pursuant to which (a) the same amount of Off-Facebook Data as is being collected or used now would continue to be collected or used in the counterfactual, but (b) what would be happening is that Facebook would be paying users, and in particular paying users a share of the profits.

We say that counterfactual bargain which arises in the event and only in the event that both abuses are established, we say that counterfactual bargain is hopeless, with respect, on a proper application of the Pro-Sys test, and we say that for a number of reasons which I'll develop later this afternoon.

First, we say there is no properly articulated causal chain as to how that alleged fair bargain would have come about in the counterfactual. So the case, in the revised form, simply leaps from saying there are these two alleged abuses – from the abuses they leap to this alleged counterfactual in which it's simply asserted or assumed that there would have been a bargain pursuant to which Facebook would have paid users. And all that the model advanced by Professor Scott Morton is doing, properly analysed, is actually quantifying how that split of profits generated by Facebook would be shared with users in the counterfactual fair bargain. But what it doesn't do, and what the PCR doesn't do, is provide a methodology for assessing what actually would have happened in the counterfactual. There's no blueprint, in other words, for how are they going to prove their case in relation to causation and counterfactual; it simply assumes or asserts a particular outcome, namely a bargain whereby Facebook shares profits with users.

And we say therefore this case does fail on an application of the Pro-Sys test, because there's no proper blueprint for how they are going to prove their alleged counterfactual, nor can the methodology, such as it is, deal with other counterfactual scenarios because by its very nature this model, the Nash bargaining model, only has relevance if one has established that in the counterfactual world Facebook would be collecting the same amount of Off-Facebook Data and would be paying users. If that is not the counterfactual established at trial then the model falls away entirely. So we do say there's no blueprint.

Moreover, we say it's not grounded in the facts because the collective bargain, by

their own admission, is completely divorced from reality. Professor Scott Morton candidly accepts it's merely a thought experiment, and of course she says she's not literally suggesting that Facebook should have sat down at the negotiating table with millions of users.

Well how is it that that thought experiment would actually manifest itself in the real world? We say they have no proper factual basis for alleging this thought experiment, nor in particular the idea that Facebook would pay users; we say that's simply not supported by any factual basis.

So, we say that this is not -- these are not trifling issues that can be dealt with down the line; this is a classic failure to comply or satisfy with the Pro-Sys test.

MR JUSTICE MARCUS SMITH: Just to give one of a myriad of hypotheticals, you can't say there would be a charge for Off-Facebook Data, and at the same time say that the proper compensation for that would be 50 percent of Meta's profits arising out of that Facebook data for a number of reasons, one of which might be that you would get a number of people who, at a price X, the price for the use of the Off-Facebook Data, and other people would say, "Well that's too low, I want more," and therefore only going to permit Facebook to use on-Facebook data, therefore the profits, one would assume -- again another variable -- the profits that are made out of the Off-Facebook Data would be less and so you have a smaller cake to divide amongst a smaller class of person. And these are the things that you say need to be at least capable of being articulated, at this stage.

MR SINGLA: Well, the -- what I suggested I'll deal with in the second part of my submissions is really the question of how does one get to this alleged cake? They just assert there would be this cake and it's a question of how that cake is shared and that's what the model will help the Tribunal with. We say what is the nexus, the causal nexus and the blueprint for getting from these alleged abuses to that cake to

be split? We say it fails for that reason.

In the third part of my submissions, I'll deal with the remedy, because we say these points are connected, but we say they are -- that the case is misconceived so far as remedy is concerned.

Now Mr O'Donoghue has helpfully narrowed the issues between the parties in the sense they have confirmed they are not claiming user damages or disgorgement of profits. Notwithstanding the reference to *FX* in the Claim Form and so on, there's actually no question of law. It's purely whether the aggregate damages claim which is being sought on the basis of the methodology does in fact seek to compensate for pecuniary loss. That's what they have to establish, and we say it obviously doesn't. I will come back to this in detail.

But the problem with the case -- and this really is something they can't get away from, nor is it something they can fix down the line -- they are claiming what they call financial harm to users, they are claiming that by reference to the commercial value of the Off-Facebook Data to Facebook. And with respect that is completely misguided because the two are very different things. The benefits or the profits to Facebook are not the same thing as the pecuniary loss suffered by users in relation to the data. And the reason we say that there is a close similarity with what they were doing last time around, and I will show you this in due course by reference to the transcripts, because the way in which they were seeking to justify Mr Harvey's approach was to say: in the counterfactual world what would have happened is a new bargain whereby Facebook would have paid its profits, the profits that it generates by aggregating the data and dealing with advertisers and so on, Facebook would have paid those profits over to the users. And it's true that they've repackaged things so there is now a Nash bargaining model, but that underlying premise is still the same: they are valuing what they describe as pecuniary harm to

the user by reference to the commercial value of the data aggregated in the hands of Facebook, and so there is in fact the same fundamental error as regards remedy. But the points are connected in relation to counterfactual and remedy.

Then in the fourth part of my submissions I'll cover what we say is an additional problem, a separate problem in relation to what we've described as abuse 2. So the unfair price case, whether that's being put on the basis that this is only an unfair price case or it's being put as part of the rolled up case, we need to prove the unfair term and the unfair price.

The problem that they run into here is that whilst it's common ground that *United Brands* applies, we say that the question that arises under the *United Brands* test is whether the non-monetary consideration -- we accept there's a zero financial price that is being paid, that's not the point we are taking. The question nonetheless is whether the non-monetary consideration given by users bears a reasonable relationship with the economic value of the Facebook service as a whole provided to users, when the case law is clear that that question needs to be grappled with at one stage or the other in relation to *United Brands*. But instead, what they've done in their revised case -- and I'll show you this in due course -- the pleading doesn't even ask the right question because it refers to economic value of Off-Facebook Data in the hands of Facebook. Well, that's not *United Brands'* test. And Ms Scott Morton, Professor Scott Morton doesn't consider the economic value of the whole Facebook service; instead, she focuses on whether Facebook has made sufficient improvements to its services since 2014 so as to justify the collection of the Off-Facebook Data. That's what we've described in the papers as the incremental approach. She's not looking at the value of the Facebook service; she's looking only at the incremental improvement in the service. She is saying were there sufficiently valuable improvements to the service commensurate with the collection of the data.

One can speculate as to why they have chosen to frame the case in that way, but we say obviously what's going on is if one were to ask the correct question about the value of the Facebook service as a whole, then the evidence would show that users in fact place an enormous value on Facebook, and Mr Parker makes that point in his report by reference to an article which Professor Scott Morton herself cites. It's well-trodden territory. The Facebook service as a whole generates an enormous amount of consumer surplus.

So, what they've tried to do is to sidestep that difficulty by taking this incremental approach, and we say that's contrary to the case law, no authority is cited in support of that approach, and we also say it's unsound as a matter of economics.

So, we say the unfair price case fails for those reasons.

Then finally, if time permits, I will say something about suitability, but I want to get into the substance now.

MR JUSTICE MARCUS SMITH: Thank you.

MR SINGLA: On the legal principles, I just want to go back, as it were, to basics and just remind the Tribunal without teaching you how to suck eggs, but it is worth recalling what the Supreme Court said in *Merricks* about the importance of the gatekeeping role, because that of course is what we are concerned with at the certification stage.

If I could show you the Supreme Court decision. It's at authorities volume 3, tab 24. **(Pause)**. I know the Tribunal will be well familiar with this decision but if I could just remind you, paragraph 4 where Lord Briggs refers to the important screening or gatekeeping role over the pursuit of collective proceedings. But then paragraph 98, which is in the judgment of Lord Sales and Leggatt which is 1225 of the bundle:

"A class action procedure which has these features provides a potent means of achieving access to justice for consumers, but it is also capable of being misused.

The ability to bring proceedings on behalf of what may be a large class of persons without obtaining their active consent and to recover damages without the need to show individual loss presents risks of the kind already mentioned, as well as giving rise to substantial administrative burdens and litigation costs. The risk the enormous leveraging effect which such a class action device creates may be used oppressively or unfairly is exacerbated by the opportunity that it provides for profit."

Then you will see the final sentence about those funding the litigation are, for the most part, commercial investors.

And then 154, which is directly relevant:

"If the applicant could not show that there was a realistic prospect that his expert's proposed methodology would be capable of application in a reasonable and fair manner across the whole width of the proposed class, then there would be a significant risk that a claim of this magnitude could unfairly be held over Mastercard's head *in terrorem* to extract a substantial settlement payment without a proper basis."

Then they go on to say:

"... a significant risk that if carried forward towards trial the collective proceeding would at some stage run into the sand and found not to be viable, so that it would have given rise to a great waste of expense and resources, and it is a risk [they say] not just for the defendant but also for the CAT."

And it's this concern about the cases running into the sand that underpins our challenges to methodology of Professor Scott Morton. These are not points, we say, that can merely be fixed by way of case management.

Also, this is reflected in the case law about the need for a blueprint at this stage. And can I remind you of the Tribunal's judgment in the first case here, which is in the core bundle A behind tab 7. **(Pause).**

If I could ask you to look first of all at paragraph 36. Of course, today we take a combination of summary judgment and strike-out points as well as Pro-Sys methodology challenges, but just in relation to Pro-Sys, you dealt with this at 36. If I could just ask you to look at the final sentence:

"The purpose of the Pro-Sys test is to minimise the related risks of the parties throwing away unnecessary costs; the Tribunal's time being wasted; and a matter coming to trial in an unmanageable form."

Then 38, you say "properly articulated pleadings" and so on, and then you talk about the purpose of the Pro-Sys test, and there are some parallels. And then 38(2) refers to collective proceedings having special requirements for certification, and in the final sentence of 38(2):

“It is entirely right and proper that the class representative’s intentions as to the future conduct of the litigation receive a scrutiny that is higher than that facing the individual claimant.”

And then at (3) you go on to say:

“It is entirely right and proper that the Tribunal be satisfied that the Proposed Class Representative knows how it has proposed to make the claim good, or - to put the same point another way - what directions the Tribunal will have to make."

And then at 40(2) you refer to the heavy responsibility as the gatekeeper. And then at 40(3)(i) at the very end, you say:

"We stress again that the Tribunal has no particular interest in the strength of the methodology … but the parties and the Tribunal need a blueprint, and absent very good reason collective proceedings will not be permitted to progress unless and until that blueprint has been provided."

And then at (ii) you say halfway down:

"Where … a proposed defendant makes clear that a certain point will be taken, then,

whilst the Proposed Class Representative does not have to have an answer to the point, it is incumbent on them to show - methodologically speaking - how the point can be addressed."

And then at 40(4) you refer to *McLaren* and you say that a failure on the part of the Tribunal to engage in this process is actually an error of law. Then at 40(5) you emphasise that:

"It makes no sense to certify proceedings whose triability is in doubt."

And we do say that those were correct statements of principle and they apply just as much now as they did on the first occasion.

MR JUSTICE MARCUS SMITH: Yes.

MR SINGLA: We also rely – I won't bring it up, but we also rely on what the Tribunal said in the second *Merricks* case on compound interest, at paragraph 92, that a methodology which assumes a particular answer or outcome fails the Pro-Sys test. That is obviously correct, with respect.

And what happened in that case was there was a mere assumption as to how class members would have acted in the counterfactual, but the Tribunal said that wasn't good enough under Pro-Sys because there was no means for assessing whether that actually would or would not have been the case in the counterfactual.

Can I come to the first issue which is counterfactuals. I want to start by showing you the pleading because it's important that we are clear as to exactly what case is being advanced. With respect, there was vagueness in the case on the last occasion and there remains significant vagueness in terms of what in fact is being alleged, but that's why we need to spend some time looking at the Claim Form.

MR JUSTICE MARCUS SMITH: Yes.

MR SINGLA: That's in core bundle A. If I could ask you first to look at paragraph 8, please:

"The PCR submits that Facebook's collection of Off-Facebook Data as a condition of access to its social media service involves an unfair bargain between Users and Facebook. In terms of further legal classification of this abuse, it can be looked at in two related ways that in practice amount to same thing and in essence involve the striking of an unfair bargain."

And you will see they refer to them as "the Infringements" in plural terms. And then they summarise each of the infringements in 8(a) and (b), and you'll see 8(a) is the first is that the collection of data pursuant to the take it or leave it offer involves an unfair trading condition.

And then (b):

"Further or alternatively --"

I emphasise those words because you will see this becomes a bit of a theme throughout:

"... there is an unfair price."

Then if I could ask you to turn to paragraph 150 which I think is page 93 of the bundle:

"By making access to its platform contingent on Users giving up access ..."

So contingent on users giving up access, that is a reference to the take it or leave it condition. They say:

"This abuse can be looked at in two related ways that in practice amount to same thing. The first is that Facebook imposed unfair terms and conditions; the second is that Facebook imposed an unfair price."

Then one turns to 152. They start with the allegation in relation to the alleged unfair trading condition, and that's said to be an abuse for the reasons pleaded there.

Then we get to 153, heading "Imposition of an unfair price." Again, I emphasise "further or alternatively" the collection of Off-Facebook Data involves imposing

an unfair price.

And then 155.

MR JUSTICE MARCUS SMITH: Sorry, before you go on to 155, just to backtrack to 150 which is the summary and looking at the last two sentences of paragraph 150. Is the problem, and do tell me if I'm summarising your position wrongly, but is the problem that both the first and the second way in which the case is put are intrinsically negative, in the sense that one is saying it's an unfair set of terms and conditions, and the other it's an unfair price? But what one doesn't have is the necessary flip side which is -- and this is the fair price, this is what our right is worth, and this is what we have lost because you haven't compensated us for this right. In other words, in 150 one has encapsulated the purely negative *United Brands*, as I called it, case, without transiting to the harder side which is going beyond the question of an infringement; we need, because this is not an infringement case, this is a give us money case, this is a compensation case, there's no articulation of that which actually has been taken away from the class. To take Mr O'Donoghue's bottle of wine example, I have no issue with the non drinker claiming for the loss of their bottle of wine; it's obviously right that they can recover that. But one does need to have a pretty clear understanding of the value of the bottle of wine by which one needs to have, in that case, a sense of, you know, vintage and quality, whether one can say well this is how one assesses the loss. And is the problem, and do push back if I'm getting this wrong, is the problem that we have no ability to ascertain what it is that had been taken away?

MR SINGLA: Can I unpack that?

MR JUSTICE MARCUS SMITH: Please do.

MR SINGLA: That is a summary of what we are saying but there are a number of points actually buried within --

MR JUSTICE MARCUS SMITH: Yes, I fear that's right.

MR SINGLA: I'm hoping in the course of today really to separate all of these points out, but they are connected.

I think what I would say in response to what you just said is the first point I am on at the moment, and the reason I'm going to take this relatively slowly is that one actually needs to look at the pleaded case, and the pleaded case, infringement is obviously the starting point -- I know Mr O'Donoghue spent his time this morning talking about compensation, but actually one needs to start with infringement, and one needs to look at what is pleaded; and what is pleaded, as I say, is a case that has three different heads to it. It's there is an unfair term take it or leave it condition is an abuse.

Secondly, there is an unfair price. Whether or not we are right about the unfair term, they say there's an unfair price; that is the further alternative.

Thirdly, they say, there's a scenario where we prove both abuses.

Now it's very important because one -- this is what I intend to do in my submissions: one actually needs to take each of those three ways in which they put the case and then work out what is the causal mechanism in respect of each of those cases on infringement, because each infringement case has to have its own causal chain. And loss -- one only gets to compensation or remedies if they've in fact proven, or pleaded properly, or have a methodology in relation to, the causal chain.

So that is where I'm going to -- what I'm going do is actually go through the three ways in which they put the infringement case and see what they have as regards causation.

The second point is -- well what you said earlier about the regulatory outcome, that is actually the gist of what we are saying in relation to causation. If I can foreshadow the submission, what they really doing is jumping from saying there's an unfair term

and an unfair price, we say -- the PCR says -- the counterfactual is a fair bargain. And we say that that may be what they would like to see in the counterfactual world, but there's no factual basis or no blueprint for establishing that counterfactual and the Tribunal is not in a world of rewriting terms or setting terms that might be quote unquote "fair or desirable" as far as users are concerned; one is actually looking at what would have happened but for the alleged abuses.

So, we do say there's a real problem as regards causal chain.

MR JUSTICE MARCUS SMITH: I see. So, looking at 150, which is a nice encapsulation because it has both the first case and second case and combination, all of them go only so far as to say that Meta did something it shouldn't have done. But that's as far as it goes, on your case.

MR SINGLA: Exactly. And how do they go from saying that we shouldn't have imposed an unfair term, we shouldn't have imposed unfair price, to "You should have paid users" or in fact "You would have paid users" in the counterfactual?

And then thirdly, separately from those points in relation to the way they put their infringement case, then the failure or the issues that I'll come on to in relation to causation, one then has a question at the end of that analysis. So, assume they did have a solid causal chain, the question is: is the remedy appropriate? And these points are connected because we say what they are claiming is in fact the commercial value to Facebook of the data when aggregated and collected across the board by Facebook, and they are claiming a share of that. I'm not getting caught up on whether it's 50/50 or whatever for the moment. It's the principle -- the underlying principle is that their damages are claimed not by reference to the cost to the user or the value to the user or the loss to the user in giving over the data, it's actually looking at the other end of the telescope saying: when Facebook collects all this data from all its users it manages to earn a great deal of profit and in the

counterfactual it would have shared those profits.

So we say that's a legal error and an independent error insofar as they are actually shooting at the wrong target on remedies.

But the points are connected because the reason they end up shooting at the wrong target on remedies is because they've constructed this completely artificial counterfactual world. So, their problems of causation inevitably then have a problem, a knock-on consequence as regards remedy. But they are independent points: we attack both, the issues as regards causal mechanisms, and also the remedy.

MR JUSTICE MARCUS SMITH: I certainly see that if you fail on causation, the remedy pleaded has to be defective in any event. How far they are independent points is quite hard to discern given the point you are making about causation, so we may need to understand exactly what is pleaded by way of causation.

MR SINGLA: Yes, I'll come on to all of these points, and I will develop each of those points, but I am just trying to give you a road map.

MR JUSTICE MARCUS SMITH: It's very helpful to have that -- don't get me wrong.

MR SINGLA: Let me finish with pleading, if I may. I was going to show you, I think, 155.

MR JUSTICE MARCUS SMITH: Yes.

MR SINGLA: They say:

"In all the circumstances the aforesaid aspects of unfairness or each of them ..."

So again, one can see the different ways in which the infringement -- I'm not even on causation yet -- case is put on a further alternative basis.

Then we get, and I'll show you this now, in relation to causation, if one starts at 173, "Facebook's breaches of statutory duty have caused loss and damage ...

"As a result of the abusively unfair bargain the Proposed Class Members were not

adequately compensated for the economic value of their Off-Facebook Data collected and monetised by Facebook."

That's their case as regards causation, loss and damage.

And then they go on at 175 to say:

"In the counterfactual, Users would not have been subject to the unfair trading condition which made the provision of Facebook social network services conditional on the collection of Off-Facebook Data ..."

Just pausing there, it has nothing to do with unfair price at this stage. They are saying the abuse is the imposition of the take-it-or-leave-it condition. Then they say:

"... and/or would not have been subject to the unfairly high price."

So that again is a good illustration of the point I've been making, which is that in fact there are three infringement cases being advanced: abuse 1, the unfair term on its own; abuse 2, the unfair price on its own or the "and", which is, we establish at trial the unfair term and the unfair price.

MR JUSTICE MARCUS SMITH: I think what you are saying -- again do correct me if I have this wrong -- is that my summary of the PCR's case was actually unduly favourable to them, in that I was eliding what is here made in 175 and in 150 under the *United Brands* test, the negative side of there being an infringement. And I think what you are saying is that the second stage of my articulation, namely what I call the FRAND side, this is the positive right, that you are saying is wholly absent from the pleading.

MR SINGLA: Well, let me show you one more paragraph.

MR JUSTICE MARCUS SMITH: Of course.

MR SINGLA: But with respect we do say your summary of the case was not correct. Whether or not it was unduly favourable it just simply does not reflect the pleading, because I think what you had in mind was that you start with -- or they are starting

with an unfair price.

Now, pausing there, we actually say the way they've gone about unfair prices is completely misconceived. *United Brands*, they actually got wrong. Separate point. But you were saying that you start with an unfair price and you somehow "pivot', I think was the word you described, or transition into -- I think you were saying the unfair term or the counterfactual.

In fact, properly analysed, the way the case is put -- and this is really very important because of the need for blueprint and gatekeeping and so on -- what is pleaded is that there was an unfair term. And I will come on to this. Well, if so, what follows? We say there's a complete lacuna.

Then they say: forget about the unfair term; there was an unfair price.

We say, well, what are you saying would have happened in the counterfactual on that basis? Complete lacuna in the pleading.

Then they say: we will prove there was both an unfair term and an unfair price. And then we get to 176 which is why I wanted to show you one more paragraph, because this is their counterfactual where they say, by reference to of course Professor Scott Morton's methodology: In the counterfactual there would have been this fair bargain.

And they say:

"The value that would have accrued to Users in that fair bargain represents the loss they have suffered."

That's the point Mr O'Donoghue was trying to articulate this morning:

"Accordingly, the same counterfactual and methodology for quantifying damages applies whether, as a matter of legal classification, the abuse is articulated as an unfair trading condition or an unfair price."

And we say this is just completely wrong, and that actually if one looks properly at the unfair trading condition on its own or unfair price on its own you actually end up

with completely different counterfactuals.

So, this is a rolled-up counterfactual assuming that both abuses are proven.

Then if I can show you what Professor Scott Morton is saying about this, because the language that these two abuses are two sides of the same coin derives from her expert evidence. It's now adopted by Mr O'Donoghue in his skeleton and in his submissions, but in fact just before I show you the expert evidence can I -- on the question of whether, sir, you had rightly summarised their case on abuse I could perhaps show you 31.3 of their skeleton argument, which shows that really this is the way they summarise their own abuse case in their skeleton. They say:

"By making access to its platform contingent or effectively contingent on Users giving up access to their Off-Facebook Data Meta was able to demand an unfairly high and abusive price or payment in kind."

So, sir, with respect it's not right to start and say, well, this is an unfair price *United Brands* case. They are actually coming at it in very different ways to say, the first attack, as it were, is on the take-it-or-leave-it condition. And they say that that's the vice. And they say in addition there was an unfair price. And if one looks at --

MR JUSTICE MARCUS SMITH: Yes. I think my point is that whether you call it *United Brands* or take-it-or-leave-it or whatever, this is essentially a negative case that equates to an infringement case, which is in an infringement case all you need to worry about. And that was my stage 1.

But that only gets you to the infringement. The second stage which I'm suggesting -- and you I think are agreeing -- was not reflected in the PCR's case and may or may not be over-generous -- and I don't expect you to concede that -- was that having established the infringement you then have to make a positive case, which you say is not being made, I think, namely where it gets you.

And that implies -- you are saying it's a question of the counterfactual, and I am

calling it a positive case. It may be there's no difference. But you do need to say what the thing is that is being valued. I don't think one would be right to insist on a value being articulated at the get-go, but you do need to articulate what it is that the Tribunal is at the end of the day having to value, so that you can then, if you work out what the value is -- in itself a difficult question -- what the implications on the cake on the Meta side and on the pool of providers of data on the other side -- and of course those are interrelated -- what the effect would be.

So if you have a value on the data of X, and as a result of that value being offered the class shrinks to 50 percent, that will have an effect on the monetisability of the Off-Facebook Data, including also the on-Facebook data because the two are, I assume, sold as one thing. And that will have an effect on the profits being made, which of course feeds into the price that you would demand, because all of these things are connected.

MR SINGLA: But, sir, with respect you are focusing in that on the monetisation and issues that arise downstream. I think what I'm on at the moment -- we certainly do make points at that level of the analysis, but I am actually focusing on a slightly earlier stage.

So just breaking down what you said, I think we do agree but perhaps with some nuances which I can try to add. First of all, we do say it's a negative case. So you shouldn't have done X and Y. But I think the point I'm on at the moment is that one needs to be very clear as to what in fact the negative case is. And what I'm showing you at the moment is that it's very easy to say loosely, well, they are two sides of the same coin or it doesn't really matter which, et cetera et cetera, from an economic point of view, and I can show you those references, but we say it does matter a great deal to understand precisely what the negative case is.

So what is it that you are saying is the abuse here? That's the first point and has to

be the starting point in any claim for damages. What are you saying was the abuse? And there's a real vagueness. And what I'm trying to help the Tribunal with here is to understand the way the pleading works, it is to say that there is an infringement in these three different ways.

That's point 1 and it has to be, with respect, stage 1 of the analysis.

Stage 2 of the analysis is then, well, let's take each of those strands of the case and work out what have they produced by way of pleading or blueprint for causation. And as I'll show you in due course, in fact all they've really done is address causation, purport to address causation, on what I might describe as the rolled-up case.

So, there's nothing on causation if they only prove an unfair term, and there's nothing on causation if they only prove an unfair price.

What they have purported to address, one might say the positive case, they have purported to address what would have happened if there was no unfair term and no unfair price. So if they establish both abuses they have at least purported to address that question. With abuse 1 as a distinct infringement or abuse 2 as a distinct infringement, as I say, there's nothing. But they have purported to address the question what would have happened if there was both an unfair term and an unfair price? And what we say about that is you have purported to address it but actually you have just assumed that there would have been a bargain pursuant to which Facebook would collect the same Off-Facebook Data, but pay users some value.

MR JUSTICE MARCUS SMITH: I think we are on the same page but -- it's important I think --

MR SINGLA: It's very important.

MR JUSTICE MARCUS SMITH: -- to make sure they (inaudible). I think what you are saying, and do, as you have been -- push back if you are not agreeing with this,

but I think what you are saying is that all that one gets if this negative case is made out is an absence in Meta to use the Off-Facebook Data. That's as far as it goes. So you don't get anything by way of what I'm calling -- and maybe that's my mistake to label it this way -- not getting anything by way of a positive case. And you say it's causation, but I'm not sure that's even the right label. I mean, if you simply say, establish the negative case, the causal consequence is that Facebook can't use the data and have used it wrongly. That's not helpful for anything other than an infringement argument. On that basis yes, Facebook have infringed and that's very bad but nothing to the point when one is talking about damages.

So, what you need is a positive case and you then need to assess the causal consequences of that positive case. And I think what you are saying -- which is my stage 2, what you are saying is there is no stage 2, there is no positive case and therefore there is nothing to which one can attach any causal analysis because it just isn't there. If one is applying a causal analysis to the negative case, well yes, the term isn't there; but in terms of a quantifiable loss, it gets you nowhere, because there is, on that basis, something that shouldn't have happened, but it isn't in compensatory terms a loss that can be quantified because you haven't set what I'm calling the positive case.

Now I appreciate you are not agreeing with my nomenclature but am I --

MR SINGLA: I think in substance we are on the same page.

MR JUSTICE MARCUS SMITH: Yes.

MR SINGLA: I think I would say this, I do submit that there are really three stages of the analysis in this case but in any case: infringement, causation and loss. That's really going back to basics as I said at the outset.

Just addressing you briefly on each of those, we are saying, infringement, they are running the case in all three different ways. For each of those ways in which they

run the case one needs to look at what have they got in terms of causation. What would have happened but for the unfair term? What would have happened but for the unfair price? And what would have happened but for there being an unfair term and unfair price?

So, let's say they pleaded a case which was there's just an unfair term – I will develop all of this this afternoon, but before the adjournment I really want to make sure that you've understood where I am going.

MR JUSTICE MARCUS SMITH: Yes.

MR SINGLA: Let's say, because as I've shown you on the Claim Form they are running the case in multiple ways, but let's say this was just an –

MR JUSTICE MARCUS SMITH: Yes, but I think the multiple ways all end in the same place.

MR SINGLA: Exactly, on their case they all end in this counterfactual world where Facebook collects the same data but pays the users. That's what they are saying would have happened but for –

MR JUSTICE MARCUS SMITH: Yes. But what you are saying and what I think I'm putting to you is that the outcome of their case is simply no right in Facebook to use the Off-Facebook Data. But it says nothing more than that.

MR SINGLA: And they're leaping from that to saying, well, what we would have done is actually paid us for the use of their data.

MR JUSTICE MARCUS SMITH: We are, I think, on the same page. Is this because unfair pricing cases are peculiar because there is a unity between the unfair price and the – in other words the existence of the unfair price and the causal consequences of it?

So, I mean, let's assume this was not an unfair pricing case. Let's assume it was some other form of abuse of dominance where let's say a group of claimants were

excluded wrongly from the social media market, in other words Facebook just said: if you come from Slough you can't participate and that's it; we are just excluding any inhabitant of the town of Slough because we've assessed the IP address and we just don't like Slough.

So, you would then say, well, that is something where one knows what the abuse is. The counterfactual is you are allowed in, and the counterfactual arises by defining the infringement. So, the infringement is you haven't been allowed to participate in social media. The counterfactual is you are allowed to participate. And the question is, what is the value of that participation. And the two are -- well, the causal consequences are defined by the infringement. The problem with unfair pricing is that you can't do it that way. You have to say, yes, the price was unfair in order to establish an infringement. But you can't, without saying what a fair price would be, actually establish the causal consequences in a single claim.

And that is what you are saying, I think, is absent here. You have the assertion by a variety of ways that the price is unfair and therefore certain data should not have been accessed. But there is -- obviously we will hear from Mr O'Donoghue -- but what you are saying is that there is nothing by way of what is a proper price and therefore nothing by way of establishing the consequences of that proper price on the size of the class and the size of the cake that will be divided amongst that class.

Now, I appreciate of course you say those points are downstream of what I am calling the positive case, but I am not sure that that is something I would regard as a very helpful distinction in this case, because the price affects all of these factors. And unless you see it as a unitary whole you are going to miss certain points. You can't simply say that the price needs to be ascertained first without considering the effect on the class or the effect on the cake, because the effect on the cake is going to inform the price because these things are all connected.

MR SINGLA: I think we are on the same page. But first of all, this is not just an unfair price case. That's what I'm quite keen to emphasise.

MR JUSTICE MARCUS SMITH: Yes.

MR SINGLA: It is not being said that this is just an unfair price case. So the counterfactual world has to be, and I think is said to be, there is no take-it-or-leave-it condition and there is no unfair price. So this is actually not as straightforward as -- or it's not the same as a pure *United Brands* case.

MR JUSTICE MARCUS SMITH: No.

MR SINGLA: But then we are agreeing, I think, that it's a purely negative case, because the starting point would be the infringement -- I do agree the infringement informs the counterfactual in many cases. Here, they are saying there's an infringement and we would quite like a world where there's a fair bargain and Facebook pays users.

And what we are saying is, well, how are you getting from A to C? What is the B? But then what I was referring to as downstream -- so that's our point as regards what I'm calling causation, but perhaps you are calling negative case and the framing of --

MR JUSTICE MARCUS SMITH: Yes.

MR SINGLA: But the point I'm making which is downstream is, we say, how do you ever get to this counterfactual bargain which is said to be a thought experiment? But then even if for some reason they are entitled to run that case, we say, well, there's a problem as regards the remedy because what you are seeking pursuant to that counterfactual fair bargain is in fact something measured by reference to the value of the data in Facebook's hands. You are not claiming loss by reference to the harm to the users. And that's why I say, whilst they are connected they are in fact distinct points, because we are saying there is no blueprint or proper methodology for getting from A to C, so this counterfactual bargain that is pleaded at 176 and is the basis of

Professor Scott Morton's evidence, we say, well, that just doesn't flow from that -- that's just not the consequence or it cannot be assumed to be the consequence of the but-for world.

That is point 1. And then point 2 is, when we actually look at your but-for world, (a) it's not grounded in the facts and it's completely unrealistic, but (b) the remedy that you are seeking pursuant to that counterfactual bargain is measured by the value to Facebook.

MR JUSTICE MARCUS SMITH: Yes.

MR SINGLA: So, there's a point on remedy as well as -- an anterior point as regards causation.

MR JUSTICE MARCUS SMITH: It may be -- and again this may be just a question of seeing the same issue slightly differently -- because let's suppose you have a case where in my terms it's a positive case where the assertion is first of all the price is wrong because it is either take-it-or-leave-it or unfair, and frankly I don't see a difference between those two. They end up in the same place, which is that data has been wrongly used by Facebook because there's been an abuse of competition law. And I'm not sure it matters whether you call it *United Brands* or take-it-or-leave-it. You may want to correct me on that but --

MR SINGLA: I will.

MR JUSTICE MARCUS SMITH: -- I'm just not sure it does. I think you get to same dead end, either which way, which is that you have no -- as you are saying, no ability to work out what are the consequences of the infringement.

So whichever way you put it negatively, you have to say the price is X. And that may be computed in all manner of ways. And I don't think you are saying that the way in which X is computed needs to be nailed down now. That's a matter of evidence, but you do need to say: here is how X is to be calculated, even if the evidence follows

later on.

Now, if one has a way of assessing what X is, the price that is to be paid by Meta to the class, certain consequences follow from that. First of all, some people will say, "At this price I'm still not providing my data". There's no reason you should say that every class member will say, "Yes, I'm going to take this price X and I'm going to subscribe to Facebook, allowing Meta to obtain the use of my Off-Facebook Data". There will be some people who will say, "Well, whatever X is, it's too low; I value my data, my Off-Facebook Data, sufficiently that I'm not going to provide it at this price". So, the volume of data that transits legitimately to Meta's use is going to fall, even if X is payable. How far it falls, who knows? But it will be less than the amount of the class as presently constituted. What the effect of that is on the monetisation of the data is another unknown.

Now, what is clear, though, and I think what you are saying, is that you have to factor in the diminution or the diminished quantity of the data on the monetised ability in Meta's hands of that data, because the cake, as it is at the moment, isn't going to be as it is at the moment; it's going to be something less because there's less data.

MR SINGLA: Our point is, you have to have a blueprint for investigating that very question. Exactly. It's a very fundamental point.

MR JUSTICE MARCUS SMITH: So what I'm saying is that these three questions, price, size of class and monetisability, are not really to be viewed sequentially because they are all interlinked. I mean, for instance -- Meta will know this better than anyone -- you will know what effect a diminution in Off-Facebook Data will have on your ability to extract a price from advertisers.

Now, if it is the case that a small diminution in the amount of Off-Facebook Data transiting to Meta has a massive effect on the ability to monetise that data then that in itself is going to have a massive effect on what X is. So that's why it's all

interlinked and not, as I would suggest, sequential, which is why it is such a difficult and interesting case if it proceeds.

MR SINGLA: I agree with all of that, but I think we are making -- I think --

MR JUSTICE MARCUS SMITH: What you are saying is, you can't simply say the cake as it is, the money that Facebook has made as of today, as in the real world, you can't say that that is what would be obtainable in the counterfactual.

MR SINGLA: Exactly.

MR JUSTICE MARCUS SMITH: Which I -- I accept -- price X has an effect on what data you receive.

MR SINGLA: Exactly. Exactly. The nub of it is, they are saying their counterfactual is the same amount of data going across, and Facebook starts to pay users. And we are saying you can't assume that because once you remove what is going on and what is said to be abusive now, a whole manner of things could happen in the counterfactual which need to be investigated. And that is exactly what the blueprint case law is referring to. How are you going to prove that case? And how are you going to deal with alternative counterfactuals?

And then we say -- that is the problem at that stage -- but then we say that where they've ended up is to say that the remedy they are claiming is a share of -- I keep coming back to this because I think it is a separate -- with respect, I think whilst they are related there is a distinct point that they are then saying in the counterfactual world they want the payment to users, but that is valued on the basis of what the data is worth in the hands of Facebook. It's not the loss to the consumer.

So the cake, as it were -- we say, well, how are you getting to the cake? They are saying: there's a cake at the moment and we want to share it. We are saying: what is the causal mechanism or what is the methodology for investigating whether the cake that there is today or is said to be there today would in fact be there today but

for the abuses? But then we are saying: you are also not entitled to claim a share of the cake because that is confusing the value of the data in the hands of Facebook and saying that that represents loss to users.

So, they are connected but they are slightly distinct in the sense that --

MR JUSTICE MARCUS SMITH: Yes, they are, but I mean, in a sense in reality they are not, because if I am with you on, whether you call it a positive case or causation, then I'm obviously going to be with you on the remedy.

MR SINGLA: That's, I think, an inevitable consequence of the way the whole case is structured, because they are saying --

MR JUSTICE MARCUS SMITH: It's linked.

MR SINGLA: -- you link to a world where Facebook starts paying users.

MR JUSTICE MARCUS SMITH: Put it this way: if it were the case, and it may be, we don't just don't know, but if it were the case that the offer of X made either no difference to class size or indeed caused the class to increase, which is quite possible, you might find that offering of X to subscribers of Facebook might actually attract people who wouldn't otherwise come in to monetise their data themselves, and you might find that the cake gets bigger.

That's quite possible. But your point is that it's not the same cake. It's something that needs to be established, and you can't simply cut and paste what is the case in this world into the counterfactual world where X is charged.

MR SINGLA: Exactly, and just building on that, we say all of that, and on top we say the particular scenario that they have posited is completely unrealistic, because the idea that Facebook would start paying users we attack as well because we say this counterfactual has to be grounded in the facts. We know that from the case law. So, we say there are all the problems in terms of how you get there, but what they have actually come up with, we say, is divorced from reality.

And so, sir, I'm just conscious of the time, but we do say, just perhaps coming back to what you said at the outset in respect of future case management options and so on, we actually say this: we are not in in that world of case management options. We are in the world of your first judgment where there is no adequate blueprint and pursuant to the gatekeeping role the case needs to be effectively refused certification now, because it's not triable.

MR JUSTICE MARCUS SMITH: Yes. I mean, Mr Singla, just so we're clear, the reason that I'm making sure that you understand, or I understand where you are coming from and we iron out the definitional question is really to assist Mr O'Donoghue in reply, so that when he's talking about positive cases and negative cases and causation and non-causation he's addressing the substance of the objections you are making.

So that's why we are having this conversation. I don't personally particularly care whether you call it causation or positive case. I just want to make sure that I am on board so that I can put to Mr O'Donoghue the points that you are making.

MR SINGLA: With respect, if perhaps after the adjournment I can come back and maybe just take these points in a bit more detail by reference to the --

MR JUSTICE MARCUS SMITH: Of course.

MR SINGLA: But I think that's been a very helpful exchange because you have encapsulated really what we are saying, and I think I would be able to assist you with a bit more detail in relation to --

MR JUSTICE MARCUS SMITH: That's -- you are educating me, Mr Singla. That's the reason these exchanges are so helpful, so that I can ensure that Mr O'Donoghue answers the points that you putting rather than points that you are not putting, because I am quite sure the points you are putting are better than the ones you are not putting.

So with that we will resume at 2.00.

(1.12 pm)

(The short adjournment)

(2.06 pm)

MR JUSTICE MARCUS SMITH: Mr Singla, good afternoon.

MR SINGLA: Sir, before the adjournment I was showing you the Claim Form --

MR JUSTICE MARCUS SMITH: Yes.

MR SINGLA: -- and trying to emphasise that the infringement case is put in three different ways. And the only paragraph concerning the counterfactual is 176 where they refer to the fair bargain, and that is derived from the expert evidence of Professor Scott Morton.

And if I could just show you her report, her first report, please, at paragraph 22, which I think is page 231 of the bundle.

MR JUSTICE MARCUS SMITH: Yes.

MR SINGLA: This paragraph clearly explains that the bargaining model, and indeed the expert evidence generally, is considering a counterfactual world where there is neither the unfair term nor the unfair price. Or put the other way around, this is a counterfactual that is said to arise if both abuses are proven. And 22 is a very clear statement to that effect. She says:

"I use the bargaining model to consider a counterfactual scenario where users and Facebook collectively negotiated … I believe this provides a good benchmark for what constitutes a fair bargain. It removes the take-it-or-leave-it element and the payment of a zero price … by having users bargain collectively it addresses the asymmetry of market power between Facebook and its users ..."

That's a point I will come back to. But then you see the final sentence:

"... provides an established framework to consider what constitutes a fair bargain …

and hence provides a benchmark for non-abusive conduct in this particular case."

Then if I could just show you paragraph 283 on page 295, where she says:

"For the purposes of designing the methodology [she assumes] that the abuse as pleaded in the Claim Form has occurred. In this case the abuse has necessarily led directly to consumer harm through the imposition of an unfair bargain."

And that's an important word because that's actually encapsulating the term and the price.

MR JUSTICE MARCUS SMITH: Yes.

MR SINGLA: "My methodology seeks to remove the abuse (the unfair bargain) ..."

Again, not specifically breaking that down into those two components:

"... and quantify the monetary value of the harm caused by the abuse."

There are other passages where there's a great deal of confusion, in my submission, where she says they are all two sides of the same coin; whilst they may be distinct from a legal perspective they are not distinct from an economic perspective. And so on. But the point I'm on at the moment is that whereas the pleading pleads three types of infringement case, the counterfactual model, this counterfactual bargain, really arises on the footing that they establish both the unfair term and the unfair price.

And we can see this again in the reply report which I think starts at 467. At paragraph 6 we see this mantra that from an economic perspective they are two sides of the same coin.

MR JUSTICE MARCUS SMITH: Yes.

MR SINGLA: Paragraph 7:

"I consider that the counterfactual is essentially the same in both scenarios, namely a value transfer to users, and my methodology for quantifying the harm to users establishes the amount of the value transfer."

That is actually a very helpful confirmation of the point I was making earlier that this is all about quantifying how the split would take place. It's not about actually a blueprint in terms of how you get to this counterfactual bargain.

Then she says at paragraph 8:

"If the same basic abusive conduct could be legally classified in two ways it certainly does not follow that the legal abuses have to be mutually exclusive, nor that they demand different economic counterfactuals."

Paragraph 9: two sides of the same coin, not economically distinct in her view. There's an unfair bargain.

Then at 10: This is all a counterfactual thought experiment which begins from either unfair element.

And then at 11 again two sides of the same coin, but she says:

"It seems intuitively highly unlikely that one would be in a scenario where only one of the unfair price and unfair terms abuses are identified. Indeed, that is my position as noted."

Then she goes on to say: But to the extent necessary the methodologies I propose are sufficiently flexible to cater for the removal of only one of the abuses.

I will come back to that because we say that's just assertion.

But the point I'm on at the moment is that it's very clear that the model as it stands and the evidence as it stands is premised on the idea that both abuses are established. So it's not right, with respect, to say this is principally an unfair price case, this is all *United Brands*. They are saying there is an abuse with the unfair term and there's an abuse with the unfair price, and but for A and B we would be in this counterfactual world where Facebook starts paying users for the same Off-Facebook Data.

And again, can you see at 12 she looks at if only an unfair price is identified, and she

says:

"I can adjust my methodology."

And I will come back to that. But you will see at 13, the final sentence, in this scenario where there's only an unfair price but the term is held to be fair, she says:

"That's contradictory to me, and consideration of what would happen in that scenario seems academic."

And then 17:

"If only an unfair terms abuse is identified ..."

So again, she's saying I can grapple with these points if I need to. We say it's all inadequate. But again, that's just confirmation that really the focus of the evidence and the methodology, such as it is, is on the rolled-up abuse case. And you see at 23 she says in the second sentence:

"Given that unfair terms and unfair price are two sides of the same coin, my view is that by far the most likely outcome is that an abuse consisting of both forms of conduct is found to have occurred. My bargaining models are based on that counterfactual, which goes to the heart of the alleged abuse."

The removal of the unfair take-it-or-leave-it offer.

Now, if we just look at our skeleton, first of all at paragraph 40 -- there are lots of references to two sides of the same coin but if I could just show you 42.4. The PCR says there's a gross mischaracterisation of Professor Scott Morton's position. It explains why they are two sides of the same coin. And it ignores the fact that her analysis of unfair price also has at its core the unfair nature of the take-it-or-leave-it terms imposed by Meta.

And then it's described as the main factor in her unfair price analysis.

Then it's said that we've ignored the fact that her bargaining model is expressly predicated on removing the take-it-or-leave-it element of the unfair bargain in the

counterfactual.

Now, what is clear therefore, in our submission, and what it's very easy to lose sight of because of the way this case is being presented both in terms of the submissions but also the evidence, is that one needs to analyse this closely. And on proper analysis they are riding three horses so far as infringement is concerned. There is, as I say, abuse 1 on its own, abuse 2 unfair price on its own, and then a scenario where both are established. But there is only one counterfactual at the moment, and the counterfactual is premised on both abuses being proven.

And what the PCR consistently does is to say, well, there's a huge amount of overlap between these two types of abuse. We are being too precious, as it were, in seeking to distinguish them. And one can see this in paragraph 42 of the PCR's skeleton where they say: There's a fallacy in our position.

And they go on to say that unfair prices and unfair terms have a common legislative basis. The core principles are very similar and so on.

Well, that's all very interesting but where we part company is in relation to questions of causation and the counterfactual. And when one is thinking about what would have happened but for an abuse, we say actually very different counterfactual questions arise if one is looking at an unfair term abuse or an unfair price abuse. And Mr Parker in his report, which accompanies our response, explains that for example -- it's at page 442 of core bundle A if you want to turn it up.

MR JUSTICE MARCUS SMITH: Yes.

MR SINGLA: Mr Parker breaks the case down into the three ways in which I've been trying to convey to the Tribunal that the pleading does. And you will see at 33, if one is looking at unfair terms on their own -- so 32:

"The unfair terms of the take-it-or-leave-it condition that makes access to Facebook conditional ..."

So the vice is really the lack of choice on the part of users, and that's really the focus of the German case that the PCR relies on. It's the lack of choice:

"The counterfactual analysis is what would have happened if they hadn't imposed the collection of data on users."

Then Mr Parker says:

"On a non-exhaustive basis there is a whole array of options. The alternatives include for example Facebook offering the same terms in respect of the collection of data, and a significant number of users agreeing to use the service on those terms, or offering terms allowing users to consent to a reduced amount of data."

Which, sir, is something that you were I think positing earlier, which was the diminution of the pool of data.

And then (c) again on a non-exhaustive basis but one other option is users paying a subscription fee for access without Facebook collecting the data.

Then what he's explaining is, if one is actually isolating this abuse those are the sorts of questions that one would have to grapple with. And of course, layered upon that is the multi-sided nature of the market, which is again a point the president was putting earlier, that actually it's much more complicated in this case because you have the advertisers' side of the market.

In contrast to that, if one was looking at what would happen but for an unfair price, again there would be a whole manner of options as to how to remove that alleged unfairness. So, Mr Parker goes on to say in his report, for example, Facebook could improve the non-price offer to render the zero price no longer excessive.

So, if it was held that the current arrangement is an unfair price, Facebook could resolve that for example by improving the non-price offer. There's a whole manner of things that could happen in the counterfactual if you isolate the two abuses.

So what is important, in my submission, and what one needs to do is actually go

through the three ways in which the infringement case -- just as you did in the first judgment, you went through the different types of allegation of abuse and you said, well, what flows or what is said to flow from each of the three ways, very different ways, in which the case was put then, because they've obviously dropped two of the allegations.

But the same analysis, with respect, needs to be applied here. So, if I can just make this submission: in relation to each of the three ways in which the case is put, what one needs to do, in my submission, is ask the following questions, really:

One, is there a proper nexus in the pleading? And that's *BritNed* paragraph 10 which is referred to in our skeleton at paragraph 7, where, sir, you said:

"In English law competition law infringements are vindicated as statutory torts". You need to show "an infringement and actionable harm or damage caused by that infringement… and proving actionable damage inevitably involves demonstrating a causal link between the infringement and the damage, generally using the but-for test."

And that is obvious in any case but that is the first question that needs to be asked. But the second question, because these are collective proceedings in which it is being asserted that there would have been a market-wide change to the bargain, one needs to ask the sorts of questions that you identified in the *FX* judgment.

If I can remind you of some of the paragraphs there where you set out the principles. Obviously on the facts it was a very different case. But I believe we can hand up some copies of the first instance judgment in *FX*.

I'm not sure that version is paginated but if I can ask you to turn to paragraph 169. **(Handed)**.

The Tribunal there refers to what I just said about *BritNed*, paragraph 10. The need to prove and demonstrate a causal link using the but-for test.

Then if we could jump ahead to 197 and 198. All of these are basic principles not unique to the *FX* case.

MR JUSTICE MARCUS SMITH: No.

MR SINGLA: Pleadings are important in modern civil litigation. That is true as much in competition as in other cases, and this is as true for collective proceedings as it is for individual claims.

And we respectfully agree with all of that.

Then 204, it is not appropriate for a party in individual proceedings asserting a causative link to do so without articulating that causative link in a pleading. Bare or unparticularised assertion is not enough: a pleading must set out all material facts."

Then 208:

"A pleading will be deficient and liable to be struck out if it fails to articulate with proper particularity a necessary element of a claimant's cause of action."

And that is true in a CPO as well as an individual claim.

At 209:

"No hesitation in saying that in those causes of action where actionable damage is a necessarily element (as here), a failure properly to assert a causal link will result in the claim being defective and liable to be struck out."

Same in the CPO context as in other cases.

And 210:

"... not enough for a claimant to commence proceedings unable properly to make the necessary factual averments sufficient to constitute a cause of action. In particular, a claimant may not commence proceedings in the hope that material will turn up later."

And then if I could ask you to look at 232 and 233 under the heading "Market-wide harm":

"Economic theory does not, in and of itself, constitute an arguable legal claim.

Economic theory does not automatically or easily translate into a legal claim. A civil action requires, amongst other things: (1) identified or identifiable claimants."

And then you will see 3:

"Some kind of actionable and identifiable harm caused by the defendants to the claimants."

Then 234(2):

"We do not consider that market-wide harm cases can be pleaded to the level of economic theory only."

And then 235, 236 and 237 explain that you would look to not only the pleadings but also the materials in support, ie the expert evidence.

And it's said at 237: not satisfied that a proper pleading has been articulated. There's no more than a detailed expansion of a theoretical position.

Then at 238(3)(v), which is on page 1427 of the report, you refer to Lord Justice Green in *Stellantis*, saying that the pleading was theoretical:

"It assumes what has to be proven and a number of pivotal links in the logic chain represent assumptions which are evidential leaps in the dark."

And 238(5) over the page:

"At best, the plea is one where there is the hope or expectation that something will come out in the wash."

And then reference to *Nomura* and allowing actions to proceed on a wing and a prayer.

Now, obviously we know what the Court of Appeal said about the *FX* case, but in respect of those passages they are just fundamental principles. But they are pleading methodology principles that apply just as much in this case as they did there. And what is more, I can show you the first judgment in these proceedings at paragraph 56. At 56(i) you say:

"We doubt very much whether any expert can articulate a methodology for assessment of loss to the class without clearly understanding and setting out or referencing in their report the legal basis for contending that a particular loss is caused by the infringement that's been pleaded. In short, there's a nexus between the exact breach of duty alleged, the framing of the counterfactual needed to put the claimant class in the position they would have been in had the tort not been committed and, three, the method of quantifying the damage … this needs to be clearly set out."

Sir, I'm about to go through each of the three ways in which the infringement case is put. We submit that in relation to each of those infringement allegations or three ways in which the case is put one needs to ask the following questions:

Have they pleaded a causal change with a proper factual basis with a nexus between the alleged infringement and the alleged counterfactual?

And then one needs to ask: have they advanced an expert methodology with an adequate blueprint to trial? So how is the PCR going to prove its case? Is it going to be able to test that proposition or investigate what would have happened? Or is it just assertion?

And we say really when you ask those questions the case does fall over. If we start with abuse 1, unfair term as a distinct infringement, there is literally nothing in the pleading in relation to the counterfactual. There is a complete lacuna. They do not advance a case which says: if we only establish the take-it-or-leave-it condition here is the chain of causation and this is why users have suffered actionable damage or recoverable loss. And what you would expect is to have a clear causal chain running from take-it-or-leave-it through to counterfactual through to loss.

And importantly, any such pleading or methodology would need to grapple with the scenarios that Mr Parker has posited. One can't just assume or leap from the

imposition of the take-it-or-leave-it to this counterfactual bargain. Indeed, in the abuse 1, the unfair term, they rely heavily on the German case, and you will have seen the references to that. But the German case makes clear that there's no pecuniary loss arising out of the unfair term. And they can't have their cake and eat it, with respect. They can't rely on the part that they like, which is where they say, well, there must be an abuse because look at what happened in Germany. But the other side of the coin is, it was specifically said there's no pecuniary harm.

And one can see exactly why that was the case, because if you are just looking at the take-it-or-leave-it the vice is the lack of optionality, the lack of choice. But trying to translate that into actionable damage is another thing altogether.

So we say, if one's looking just at abuse 1, unfair term on its own, we say there is a complete lacuna. And that's a problem both as regards the strike out summary judgment test and also methodology, because, as I said, paragraph 176 of the Claim Form is premised on Professor Scott Morton's evidence which, as I showed you, paragraph 22 of her first report actually assumes the removal of both abuses.

So, we say it's not permissible for them to advance a case which is just an unfair term. And that's a gatekeeping issue. The Tribunal shouldn't be allowing that case to proceed because there's really nothing in relation to that infringement on its own.

So, then I'm going to turn to the second way in which the case is put, and this is really the thrust of it. This is the case where both the unfair term and the unfair price are proven, and that's really what they are aiming at.

Now, here we make essentially four main points by way of attack on the methodology. We say the Pro-Sys test is not satisfied. First, we say there's a failure to provide a blueprint. There is an attempt here, unlike with the unfair term on its own, here they have purported to plead a counterfactual. 176 is the counterfactual fair bargain, assuming that both abuses are proven. But we say that's not sufficient.

MR JUSTICE MARCUS SMITH: Can we have 176 again so we can --

MR SINGLA: Sir, that's --

MR JUSTICE MARCUS SMITH: Page 121.

MR SINGLA: 121, I'm grateful. **(Pause)**.

Sir, 176 is based on Professor Scott Morton's evidence. One can see that, I mean, it's obvious, but one can see that in the footnotes.

MR JUSTICE MARCUS SMITH: Yes.

MR SINGLA: And you will see 175 in the counterfactual wouldn't have been subject to the unfair trading condition, and/or would not have been subject to the unfairly high price.

But what I was showing you is that Professor Scott Morton's model in fact assumes that both abuses are proven and then she says: but I can adjust it if it turns out that only one or the other is proven. But the case --

MR JUSTICE MARCUS SMITH: But she also says it's unlikely to make a difference.

MR SINGLA: She says it's academic that one abuse would be proven without the other. And then she says: but anyway the same counterfactual would apply.

MR JUSTICE MARCUS SMITH: Yes.

MR SINGLA: And I'm saying, well, actually let's just look at that assertion because -- I think I've just covered this -- if the unfair term alone were proven at trial the various imponderables that Mr Parker raises would need to be grappled with. And so, one certainly can't jump from an unfair term to this counterfactual bargain.

Now let's look at the scenario where both abuses are proven. Here, we say, well, yes, there's something in the pleading and, yes, Professor Scott Morton says what she says about the counterfactual bargain, but all her evidence really does is provide a basis for quantifying what the share of the profits would be in the counterfactual. There is no blueprint or methodology for assessing whether that actually would be

the counterfactual.

MR JUSTICE MARCUS SMITH: Yes. To what extent -- I know you'll be coming to this and it may be that you should just tell me to wait until you do -- but to what extent are these problems answered by what you refer to as the incremental approach of the PCR?

MR SINGLA: The short answer is not at all.

MR JUSTICE MARCUS SMITH: Okay.

MR SINGLA: That is a wholly separate problem with the case.

MR JUSTICE MARCUS SMITH: Right.

MR SINGLA: Which is, I'm assuming at the moment that they've gone down the right route so far as an unfair price case is concerned. Actually, as I'll come on to, the whole way in which they've pleaded and the methodology approaches *United Brands* is misconceived as a matter of law and economics. So, in a sense, I'm addressing you now without prejudice to that point because --

MR JUSTICE MARCUS SMITH: Yes, I think what I'm -- maybe I had better put this to you so that you can deal with it because it may be that Mr O'Donoghue uses it in his reply. I don't know.

But as I understand it the incremental approach is saying, look, as regards the on-Facebook data you have a viable business model; you are making not merely sufficient revenue to cover your costs but you are making a degree of produced surplus and therefore you have a viable model as it was previously without the Off-Facebook Data. You therefore regard the Off-Facebook Data as an entirely separate cake which is causally related to the infringements pleaded, ie the entirety of that Off-Facebook cake is obtained through the infringements.

You don't need to worry about a positive case because you have this separate cake that is acquired solely by virtue of the negative infringements that have been

articulated.

And so all you need to do is work out why or how that additional incremental cake based upon Off-Facebook Data is to be shared. And prima facie because it's pure profit over and above the already profitable on-Facebook monetisation business, a 50/50 Nash equilibrium split is right.

Now, I quite understand that you are going to say that the incremental approach is wrong, and we will come on to why you say that now, but assuming it's right, does it answer the questions that you have quite properly been articulating as problems for the PCR or, even assuming the incremental approach is right, does it not solve those problems?

MR SINGLA: It doesn't -- it's a separate problem, with respect, because the first question is, is there an unfair price?

MR JUSTICE MARCUS SMITH: Yes.

MR SINGLA: They say there is, pursuant to the incremental approach. And we say that's wrong.

What I'm now on is, let's assume you make good your unfair price case. How do you go from unfair price to a counterfactual world where Facebook starts paying users? And those are, with respect, separate problems.

The question here is, how are you going to make good this case? And can your evidence -- effectively is this a triable case? Do you have a blueprint for investigation a counterfactual or are you assuming a counterfactual world which you would like to see whereby Facebook starts paying users?

And the incremental approach in a sense is separate because we only ever get to this debate if they establish the unfair price. And we say they can't establish the unfair price because they have taken the wrong legal and economic approach to that.

But I don't see, with respect, how the incremental approach addresses the lack of a blueprint or the lack of a counterfactual which is grounded in the facts, which are the points I'm addressing you on now.

MR JUSTICE MARCUS SMITH: Well, I mean, I'm saying that I'm putting you to points that might be made against your position so that you can take it in that spirit. But if you disaggregate the returns to Facebook -- and by disaggregation I mean distinguish between returns that are based upon on-Facebook data and returns that are based on Off-Facebook Data. And I quite understand why you might say that those two data sets can't be separated. I'm sure you will be coming to that. But let's assume they can be and that there are therefore two distinct profit streams arising out of it. Why can't you say, look, we don't need to worry about the on-Facebook data or the model that would have occurred or what would have happened, because the real world answers that? We are not changing that model at all. All we are doing is providing an additional question which is directly relatable only to the Off-Facebook Data and saying, look, this data achieves this value; we don't need to worry about cost; we don't need to worry about class size; all we need to worry about is those portions of the class that would agree to sell their Off-Facebook Data for whatever price it would be. But that price is referable not to what would happen to Facebook's business generally; it is referable to the excess that has been generated by the abuse, namely the extraction of Off-Facebook Data through the infringements which have been pleaded, namely the negative ones. In other words, does it not operate as a form of shortcut to ensure that you are just looking at the direct consequences of the abuse, namely the monetisation of Off-Facebook Data, and saying, well, cause and effect are established because you'd never have got this money without this data? This data has been obtained through the infringements, whichever form negative infringement it is, and all we are talking about is carving up

the pot between the two.

And that may be a question of how you deal with the allocation of the elements of the pot, but 50/50 is a pretty good starting point given that there's no cost question and the business was operating anyway.

MR SINGLA: If I may say so, that's a very helpful question because, if I can say this, that actually demonstrates or allows me to demonstrate why their case is so flawed. It's actually failed three levels in what you've just said. Well, if Mr O'Donoghue is advancing that kind of case our answer would be threefold. First of all, the incremental approach would not work as a matter of establishing the unfair price. I will make submissions about that later. But it just doesn't work to say the economic value of what's been happening since 2014 -- the question is, economic value of the entire Facebook service.

So we don't even get off first base, as it were, because the incremental approach means that they can't establish the unfair price. They would also need to establish the unfair term as well, so that would also need to be factored in. But that's the first problem. The incremental approach is not a proper way of establishing the unfair price.

But even if -- and this is the point you were putting to me -- even if that were permissible -- and I stress we say it's actually completely unprecedented -- but even if they were entitled to establish an unfair price through the incremental approach, your example of the cake, as it were, which is just the Off-Facebook Data cake, the point we are making at this point in my submissions is that they would still need to explain how it is they get from the unfair price to the Off-Facebook Data cake.

And what Mr Parker is saying and what we are saying is, even if one is just zooming in on Off-Facebook Data you would still have to grapple with why do you leap from the unfair price to assuming that in the counterfactual the cake is the same, ie

Facebook is still collecting the same volume of Off-Facebook Data and Facebook starts to pay users?

So that's the problem at that level, which is the lack of a blueprint in terms of how do you get to the incremental cake.

And then the third problem would be that even if you get to this incremental Off-Facebook Data cake, we would still say that what you can't claim is a share of profits earned by Facebook having aggregated the data.

So if that's the line that he wants to take tomorrow we would say actually it's misconceived for all of those reasons.

MR RIDYARD: The second and third questions are, in a way, addressed by Professor Scott Morton in her approach. She says there is a big amount of profit, of rent, which is generated by Facebook's use of the Off-Facebook Data. If for some reason the users had given some rights to decide whether or not they gave that extra data up, then there would be a discussion between Facebook on the one hand and the users on the other. And her argument is, it's worth a lot more to Facebook than it costs users to give it up and therefore there's bound to be a solution. And that's where she comes to her bargaining situation, and she says let's split it 50/50.

She's saying it's overwhelmingly likely that a deal would be done, and her best guess on it is a 50/50 split.

MR SINGLA: Sir, if I may say so, that's really quite helpful, because that's all she says, actually, in relation to causation. So, the point I'm making at the moment is that the bargaining model is the outcome, as it were. She says, well, this is where we would end up in the counterfactual.

The only basis at all advanced for why it is we would get there is that they say, or she says, that users tend not to like handing over their data, and Facebook earns a lot of profit. So, as you say, there's bound to be a counterfactual bargain. And that's

precisely -- the point we are making is, that is just assertion. That may well be an argument or her view of the world, but the model is all premised on all of that being correct. And our point is, what the cases make clear is that you need to have a blueprint. You need to test whether any of that's actually correct. And you can't just assume that you are going to be right about that at trial, because the model will fall away entirely.

Let's say the Tribunal disagrees on the evidence at trial that this bargain would have happened whereby the same data would be collected with Facebook paying users. The model falls away entirely. So you are absolutely right, the high-water mark of their case is to say, well, in general terms users don't like to give over their data. Okay, well, so what? I mean, it's quite one thing to go from that to saying there inevitably would be a bargain where Facebook would start paying users. In fact, as I'll come on to, the examples they give themselves, ATT and subscription for no ads and so on, do not involve a payment by Facebook to users.

And then beyond all of that, coming back to ATT and the point you put to Mr O'Donoghue earlier, they say, well, 80 percent of people don't like to hand over their data. But your question, with respect, revealed the problem because you asked about the 20 percent. And I'm not actually sure I followed his answer, but the problem so far as remedy is concerned is that they are saying, well, everyone gets a share of this pie. And that can't be right, we say. That's obviously not a loss-based approach.

MR RIDYARD: So he explained it in terms of his bottle of wine, saying that even if I happen to not care about my data as a user, the fact that most people do care means that this negotiation takes place, and I happen to benefit from the fact that that's the case, just in the same way as if I don't value this bottle of wine that's sitting in my wine cellar, the market does value it and so I still get the benefit of it if

someone wants to take it away from me –

MR SINGLA: (Overspeaking) I will come to that when I address the remedy point in more detail. But we say that actually that analogy is completely inapposite because what one is actually talking about is not a bottle of wine with an objective market value; one is talking about an individual with a very specific subjective view of what cost, if any, they attach to their own data. And saying it is a sort of teetotaller is really missing the point, because if one was looking at this from a financial harm perspective, some people may not care about their data at all. Some people may care a lot about their data. That is a classic individualised enquiry.

And I'm jumping ahead to the submissions I will make on remedies, but really what is going on is they are seeking to claim damages which are framed by reference to the commercial value to Facebook when it has data from all users and aggregates them. And we say actually if you are looking at the financial harm to an individual user one has to look at what cost does that user attach to its own data.

And actually, one can see the problem with their model is that someone who doesn't care about their data receives a share of these profits, and indeed if Facebook starts to make more or less money from advertisers using the aggregated data set that will affect the damages that they receive. And that just reveals why this is not a loss-based approach.

Indeed, the only way in which this works as a collective action -- they've done this -- it's quite clear why they've approached it in this way, because if one were genuinely approaching this from a "what's the cost to each individual user" perspective, which we say is the only remedy available as a matter of law, that is a classic individualised assessment and could not be packaged as collective action.

So, the only way to purport to come up with sufficient commonality across the class is actually not to look at the cost to individual users but just to take the profits from

Facebook.

And I will come on to this, but that problem underpinned Mr Harvey's analysis. I do appreciate --

MR JUSTICE MARCUS SMITH: Just pause there.

It's quite different. I mean, I can see why you are saying it's a gains-based analysis. But the gains that Mr Harvey was looking at were the gains to Facebook in excess of WACC, whereas here, if you are taking a gains-based analysis it is the gains achieved through the Off-Facebook Data value, not what is earned in excess of WACC.

And I'm wondering whether we are not getting confused -- I'm sure it is my fault -- between methodological Microsoft and Pro-Sys objections and strikeout objections, because, as I see it, looking at the incremental approach it seems to me that it solves a very large number of methodological problems rather quickly but perhaps puts in place of those methodological problems a series of strikeout problems which are different. And that's why I was raising with you earlier the question of whether your very helpful submissions on methodology weren't answered by the incremental approach.

So, if one puts it extremely crudely -- let's assume that a data set, the Off-Facebook Data, has been obtained through an infringement of competition law. Now, that can be either take-it-or-leave-it or the unfair pricing. I don't really care which. Let's just assume it's been obtained by an infringement of competition law. And let us assume that that Off-Facebook Data has a value to Meta of 100X. I don't care what X is, but it has a value of 100X to Meta in the sense that this is money that has being generated to the benefit of Meta in excess of the money it would generate through its use of on-Facebook data.

So you don't need to worry about the on-Facebook data model because that is

unchanged and the profits there are unchanged. Everything in the real world continues to pertain. All one is talking about is the consideration of how one deals with the illegitimate gain -- and let's use those words -- the illegitimate gain by Meta as a result of its infringements.

Now, you could say, well, it's a gains-based analysis and there should be no claim. And although in the world where Meta was complying with competition law the 100X gain would not have been made, the fact that it is a gain but there's no market means that it's simply hung onto by Meta and there's no claim for compensation at all.

And I think what Mr Ridyard and Professor Scott Morton are saying is, no, you look at the gain, you ignore the rest of the Facebook business altogether, and you say: what is the appropriate price to be charged to the class by way of a fair price in order to make that gain? And Professor Scott Morton's analysis is that you take a Nash equilibrium of 50/50.

Now, I am sure you will be coming to all of the legal points as to why that is wrong, even unarguable, but methodologically speaking it's pretty straightforward, isn't it?

MR SINGLA: Sir, we would respectfully say that even in a world where the incremental approach is permissible, so they're entitled to establish that the starting point is an unfair price, and indeed an unfair term, but an unfair price by reference to the incremental approach, one still needs to explain how and have a blueprint for investigating how one goes from that abuse to a world where the same data is being collected and Facebook starts paying users.

Now, that may be the counterfactual that they would like to advance at trial. But the question at the certification stage is, how are they going to prove that case at trial and can they deal with other counterfactual scenarios?

So there are two big assumptions. And what I've just outlined is their counterfactual

that the same amount of data would be collected, and that Facebook would start paying users.

Now, there are two quite fundamental premises underlying that counterfactual. And our very simple but really quite important point is, well, that may be a counterfactual world which you would like to see, and Professor Scott Morton has written outside of this case that that would be a fairer, as she describes it, result for users. But that is a different question. When one is not in the world of regulating -- in another scenario, in a regulatory scenario for example, what the price ought to be, the question is what would have happened but for these abuses.

And they posit a particular version of a counterfactual, which we say is completely unrealistic. And I will come on to that. But we also say, even if that is what you would like to advance at trial the case is going to run into the sand -- using the words of Lord Sales and Leggatt -- unless you can actually have a proper blueprint.

MR JUSTICE MARCUS SMITH: So your point is, your answer is, we can say on my hypothesis what would have happened but for these abuses is that the 100K profit would not have been made. We know that. On my assumption.

MR SINGLA: Not necessarily, because that's something that has to be investigated, particularly given the two-sided nature --

MR JUSTICE MARCUS SMITH: If you say it's an unfair term, and you simply put a line through it saying you are not allowed to do it, the counterfactual is you can't do it.

MR SINGLA: That may well be right, but it would depend precisely on the finding of infringement.

MR JUSTICE MARCUS SMITH: Let's suppose hypothetically speaking the position is that it is unlawful to uplift this data. You can't do it. And you have done it. So the counterfactual, if the infringement wasn't committed, is that you don't do it. And you

don't make the money. But you have.

Your position is, well, the fact that you have is neither here nor there unless you can show what the term is. And what I'm putting to you is that that is not a methodological problem, that's a cause-of-action argument about whether this is an arguable way of putting the case.

And all I'm doing is giving you the opportunity to say: is there a methodological point to that argument or is it purely and simply that this is not a case that is tenable in law?

MR SINGLA: As you know, we do run the objections in both ways. But at the risk of repeating myself we certainly say the approach to establishing the unfair price is strikeable. That is just either right or wrong. Well, it's either arguable or not as a matter of law. And we say it's not, and I will come on to that.

But assuming that they are entitled to approach the unfair price question in that way, let's assume for the sake of argument that they had gone about it the right way in the pleading and in the methodology for establishing abuse. All I'm really saying is, beyond that question they then need to have a blueprint to go from A to C. And what's missing is B, in terms of how do you get from the unfair price to this new bargain involving a payment to users?

And we say it's just assertion. And Mr Ridyard put to me, as I say, that really the high-water mark of the evidence -- there is no methodology at all actually in this respect. The model is about quantification, once you've arrived at this counterfactual bargain, all there is in relation to how it is you get from the unfair price abuse to this counterfactual bargain is, as Mr Ridyard rightly said, all there is is this assertion that users don't like to give data up and Facebook earns a lot of profit from, they say, from the Off-Facebook Data. And therefore, they say there is bound to be this counterfactual bargain in the alternative world.

And what we are saying in response to that is, that is the way in which you wish to advance your case, and the methodological flaw, consistent with the cases that I have shown you, is that there is no blueprint for testing whether or not that would be the case.

In *Merricks 2*, for example, you are assuming the very thing you need to prove. You need to prove what would have happened but for the unfair price. And it's not, we say, adequate at this stage simply to assert a counterfactual and say, well, we'll see you at trial. We'll sit on our hands. We say actually a Class Representative has to do a lot more than that at this stage because they have to have a blueprint (a) for showing the Tribunal how it is that they are going to investigate that question, and (b) if they are wrong about it – if the Tribunal concludes at trial there's no way that Facebook was going to pay users in this scenario – and I will come on to why we say that's an unrealistic assumption – the Nash bargaining model falls by the wayside, because the Nash bargaining model is about proportioning the Off-Facebook Data cake.

And we are saying, but if Facebook doesn't pay users, then the model falls away. So, we do say there's a methodological problem assuming both abuses are established, but also they won't be able to establish an unfair price abuse given the the incremental approach they've adopted.

Sir, I am just addressing you on -- in the event that both abuses are proven, we say, for the reasons I've just given, there's no adequate blueprint and it's no good -- I think Professor Scott Morton says in various places including paragraph 425 that it would be fairer for the profits which Meta allegedly earns from the Off-Facebook Data to be shared with users. She also says at 261: "It seems problematic and unfair to me if" the alleged profits of Off-Facebook Data are not shared with users.

Then at 262:

"It would seem wrong to me as a matter of public ..."

Well, that's a separate point about network effects. But the basic point we are making is that where this case has gone wrong is that, unlike an individual action for damages where one needs to go clearly from infringement through causation to loss, what they have actually done is started at the other end of the telescope and said, well, we would like to see a fairer outcome, that would be the same amount of data, the status quo in that respect continuing, but Facebook starting to pay users for that data.

And we say -- and I will come on to this -- as my next point that is not grounded in the facts, but just on the blueprint point we say it's just assuming or asserting what would have happened but for the abuses. It's not providing the Tribunal with a blueprint for investigating that question.

If I can turn to the second problem. We say it's not grounded in the facts. So we say it's completely unclear, no blueprint as to how you get to this counterfactual bargain. But even when you get there, we make three points as to why it's not grounded in the facts. And I think Mr O'Donoghue cites some authority saying, well, a counterfactual is always hypothetical. And we of course understand that, but nonetheless they do need to be grounded in the facts. You can't just go on to say a counterfactual which is hypothetical but completely spurious. And indeed, *Gutmann* makes clear that there does need to be some factual basis.

And we say what they've arrived at is entirely artificial, for three reasons. First, it's common ground there is no collective bargain in the real world. It's just a thought experiment advanced by Professor Scott Morton. And they try to allege that this is some well-known methodology for calculating damages. That's paragraph 83 of their skeleton.

And we say that's not right, actually. The bargaining model, as Mr Parker explains,

and perhaps I can show you this. It's A-457, at paragraph 90.

"I recognise that any economic modelling involves the use of theoretical models. The proposed bargaining framework relates to a hypothetical bilateral monopoly situation in which there is only one buyer and one seller. To align this model with her proposed counterfactual, Professor Scott Morton hypothesises that users would collectively bargain to create a situation with one party on both sides of the transaction. In reality there are millions of users, each of which is acting independently."

And you will see at 93 and 94 he says these bargaining models are used in completely different contexts.

So we say there's a real artificiality about the collective bargaining model and there's no precedent for this being used in an action for damages, and none has been cited, none that we are aware of. And what is more, the second problem as to why this is all unrealistic and not grounded in the facts is that the model makes an assumption as to what would have occurred in the counterfactual. So in the model, Professor Scott Morton states in various places that she removes the so-called take-it-or-leave-it condition by allowing users the outside option of using Facebook's service without having to agree to the giving up of Off-Facebook Data.

So, within the model there is this baked-in assumption that if it wasn't for the take-it-or-leave-it condition users would still be able to receive the same Facebook service without giving up their data. And we say again --

MR JUSTICE MARCUS SMITH: Without giving their Off-Facebook --

MR SINGLA: Without giving up their Off-Facebook Data, you are quite right. But again, we say that's just an assertion or an assumption. And it's a very self-serving assumption because what that means, if that's the basis on which the elective bargaining takes place, one can see that it puts users in a very strong position,

because if they have the outside option of using the service whether or not they provide their data, that puts them in a very strong position when it comes to the collective bargain.

But we say it's just an assumption. It's just an assertion. It's not grounded in the facts that they would get exactly the same service from Facebook whether or not they --

MR JUSTICE MARCUS SMITH: Surely it's an attempt to describe a competitive situation, or at least a non-dominant situation, because we know you have a dominant company dealing with millions of users, then the outcome could well be one of the dominant firm abusing the consumer. And so that's the thing which is allegedly unlawful in this situation. So if we accept the premise that that is unlawful, that kind of exploitation, then you have to do something to, you know, to replicate what would happen if there wasn't such an imbalance between the dominant company and the millions of users. And this is the device -- like it or not this is the device that Professor Scott Morton comes up with to redress the balance.

So I think on her analysis it's not that you are giving consumers incredible or unreasonable power, you are just taking away the unfair power of the dominant company against the millions.

MR SINGLA: I was going to come on to that point in a moment, but you are absolutely right that is what she's doing and we say that's misconceived. Because what we are not doing here is considering a world where Facebook's not dominant. They are saying Facebook's dominant, we don't accept that. But you are right, what they are doing by giving the collective bargain thought experiment is giving the users countervailing buyer power. And the point I was going to advance in a minute is that actually what they should be looking at is a world without the abuses. But why is it that they are also removing dominance in that scenario?

MR JUSTICE MARCUS SMITH: Well, the alleged abuse is an exploitative one, so you have to try and find a way of eliminating the unlawful act, the exploitation. So I suppose the -- I'm sure Mr O'Donoghue will answer this question better than I can, but I suppose the way of looking at this is to say that not so much taking away the dominance, but it's taking away the unlawful conduct which is exploiting the imbalance, and so anything you do to even up the imbalance is a way of solving that problem of avoiding the exploitation, the unlawful conduct.

MR SINGLA: Sir, with respect, they are entitled to think about the counterfactual in a world where the -- let's say they make good that the term's unfair and the price is unfair, they are entitled to hypothesise as to what would have happened but for those two abuses. But what we say is, and this really ought to be uncontroversial, what they can't do is assume a world where Facebook is not dominant, because on their case Facebook is dominant. Facebook on this hypothesis are not entitled to set the terms and set the prices that they are doing.

But one has to then consider what the counterfactual is against a proper basis, and I'll look forward to hearing what he says about this. But the references I was going to show you on that point, I am jumping slightly ahead, but Professor Scott Morton refers to "the bargaining model removing the asymmetry of market power between Facebook and its users". And that's at paragraph 22, 285 and 302. And what we say is well that goes beyond removing the abuses.

So that's another feature that we say is artificial about the counterfactual collective bargain.

And then there's the point that the PCR has no factual basis for assuming that Facebook would pay users. And they rely on ATT. As you know they rely heavily on ATT. They also refer to the subscription for no ads. But in neither scenario is there a payment by Facebook to users.

Then I think there's one reference to something called Facebook Research, which is completely different. I will address this, perhaps if I need to, if Mr O'Donoghue presses reliance on that. But it's not a service at all, it's a research programme, so they can't infer from that that there would be a payment.

They seek to rely on ATT as what they describe as a natural experiment. You would have seen that phrase used by Professor Scott Morton. We can see from ATT what exactly would have happened in the counterfactual world they boldly assert, and we say well, where's the payment by Facebook to users? So, you can't rely on ATT as a natural experiment to the extent you like the experiment, but then when it comes to the payment by Facebook to users, which doesn't exist within ATT, they have no explanation as to why that would have come about in the counterfactual.

So we say there are some real problems, both in terms of methodology, no blueprint, how do you get to this counterfactual bargain? Then when you look at this so-called thought experiment we say it's completely divorced from reality.

Then my third and fourth points, the third point was going to be the treatment of dominance in the counterfactual. We say they've actually not only removed the alleged abuses but also the alleged dominance.

Then finally we make this point, which is we say a further problem with the methodology. Because Professor Scott Morton refers to the counterfactual involving either -- in her second report, paragraph 16, she says:

"The value transfer could be either in cash or in kind."

That, with, respect, is another problem with what they've put forward because there's no explanation of what the non-monetary value transfer would be. There's no methodology for assessing damages, if in fact the value transfer took place by way of a benefit in kind. And it's very difficult to see how that translates into a claim for damages, certainly not the claim for damages that's being asserted at present.

And what that does is it just reinforces our concern that this case is going to run into the sand, because it's based on a counterfactual that they can't explain how they get to. Then we say it's a completely artificial world anyway, there's no basis to think Facebook would pay for users. And then they say well of course this value transfer may not be a payment in any event. And we say how is this case sensibly going to progress to trial?

The final way in which the infringement case is put is abuse to unfair price on its own. You will recall I said they run the two abuses as distinct infringements, and then there's the rolled-up abuse which I've just been addressing you on. And the short point on looking at unfair price on its own is there's nothing in respect of causation or methodology if one's looking at unfair price on its own. And you will have seen from the skeleton, I think I've taken you to this already, that this is actually the clearest way to see the point. At 42 of the skeleton, 42.4.2 and 42.4.3 they say in terms that the model is expressly predicated on removing the take-it-or-leave-it condition.

MR JUSTICE MARCUS SMITH: Yes.

MR SINGLA: So we say actually if one is conducting the analysis that this Tribunal did in the first case -- on the first occasion and actually going through the pleading, seeing what is being alleged in terms of infringements, and working out whether they have anything in relation to causation and loss which flows, we say abuse 1 unfair terms; and abuse 2 unfair price, there's nothing. And so, the only attempt to address a causal chain is if both abuses are proven. And with regards to that, we say the methodology is flawed for the reasons I've been submitting.

Sir, I was going to come on to my next topic which is the remedy being claimed.

I wonder if that is a convenient moment for the shorthand writer's break.

MR JUSTICE MARCUS SMITH: Yes. Thank you very much. We will rise for ten

minutes, until about 20 past.

(3.13 pm)

(A short break)

(3.27 pm)

MR JUSTICE MARCUS SMITH: Mr Singla.

MR SINGLA: Sir, I was going to move to the next part of my submissions which concern the remedy being claimed. To a certain extent we've had some discussion about this and to a certain extent the points are connected, but we do say there are distinct issues, albeit they both arise because of the way in which the case is put together, but we say they are separate problems, both as regards the counterfactual and causation and then the remedy being claimed pursuant to the bargaining model.

The PCR has expressly disavowed a claim for disgorgement of profits or user damages. That is clear from paragraphs 77 -- 79 of the skeleton. And the PCR says in terms that what they are claiming in respect of is pecuniary loss.

We say that the pecuniary loss is not in fact what's being claimed pursuant to the model, because the pecuniary loss is said to be the value of the data in the hands of Facebook. And if I can just show what you the Claim Form says about this, core bundle A, page 122, paragraph 176(c):

"The use of the bargaining model reveals that under a fair bargain some of the commercial value of the Off-Facebook Data to Facebook would indirectly accrue to Users."

And then if you look at subparagraph (h):

"The bargaining model determines the size of the transfer of value to users necessary to ensure that the producers surplus generated by Facebook … is shared fairly with users in the counterfactual having regard to their interest in maximising consumer surplus."

But it's the producer surplus generated by Facebook.

And we can see, again if one needs further confirmation of this, if one looked at the PCR's skeleton argument where they summarise their own case, first of all paragraph 34, you will see:

"The case on quantum is that, in the counterfactual, absent the abuse, Users would have benefited from a fair bargain … under which they would have been fairly compensated."

But then they say:

"Some of the commercial value of that data to Meta would have been shared as a form of compensation for their work."

I will come back to that. But we don't understand this notion that the users are doing any work. It's a completely new point in the skeleton.

And then 36.1, you will see again they say that they've addressed the concerns which you have on the last occasion, because they say towards the end of the paragraph:

"Those revenues reflect ..."

Let's take this in stages. They say:

"The methodology does not seek to calculate loss to the class by reference to the gains … conceptually sound framework which reveals that the commercial value of Off-Facebook Data to Meta is one factor in determining the fair bargain … Those revenues reflect joint value generated by Meta and Users' data. It is legitimate in such a context to use a bargaining model to calibrate a fair bargain that compensates Users 'for their work' [quote unquote] in providing such valuable data to Meta for the purposes of targeted advertising."

So, what is clearly being said is they are not claiming the value of the data in the hands of each individual user, but only once it's monetised and aggregated by

Facebook.

And if I can show you Professor Scott Morton's report, paragraph 334, which is core bundle A, page 307. She says in terms:

"A key part of the harm to users is that the unfair bargain they struck with Facebook meant that they gave up an asset of commercial value to Facebook for nothing, something that would not have been likely to occur under conditions of reasonable effective competition. This means that even if consumers do not directly value their data or place no intrinsic value on the data the model predicts that they will still face a loss because they were not adequately compensated."

Then 335:

"Indeed, even if one assumes consumers place no intrinsic value on the data, my bargaining model predicts that a fair bargain would likely involve them receiving some value transfer."

Then if one looks at 396, which is page 323, you can see again the same point expressed slightly differently:

"But there is a 'lower bound' [quote unquote], damages estimation even assuming a 0 cost of disclosing data for users."

So all of those points make clear, we say, that this is not in fact damages based on the cost or the harm to users in giving their data -- each individual giving their own data to Facebook. That's not the way in which damages have been calculated. The damages are proceeding on the basis that once Facebook has Off-Facebook Data from all users, aggregates that data and then sells it to advertisers, that's really the basis on which damages are being claimed.

And Mr Parker makes these points, there's no need to turn up his report, but he says that again this non-loss-based approach is demonstrated by the fact that even users who actually positively like sharing their data, Off-Facebook Data, would be entitled

to damages on this basis. And if Facebook for some reason earns less from advertisers then users would get less by way of damages. And those are quite neat illustrations of the point, that they are starting at the wrong end of the telescope.

What the problem is, we say, is that they are equating the commercial value of the Off-Facebook Data to Facebook, they are equating that with loss to users whereas we say those are two fundamentally different things.

And just to deal with this analogy of the teetotaler and the wine bottle again, I think the reason it's inapposite is because first of all there's no loss in the sense of if the teetotaller gives up the wine bottle that's actually completely different to a user agreeing for the Off-Facebook Data to be used, because the user is not losing that data, it's not the same as the wine bottle being removed in terms of the transaction that's undertaken.

Secondly, of course the --

MR JUSTICE MARCUS SMITH: That's just a point about tangible property not being replicable, whereas intangible property is. So would the example be any the worse if one said it was an infringement of an intellectual property right, which can of course be infringed many times without the rights being lost at all?

MR SINGLA: It's a very helpful question because we say that actually demonstrates exactly what's gone wrong here, because this is not a user damages case, they have expressly disavowed that. In the property right case, in trespass or intellectual property courts have recognised that there is no financial loss to the claimant and that is why the doctrine of user damages exists; it's to hypothesise what they could have earned in a hypothetical bargain. But we are not in a world where the PCR is in fact advancing a claim for user damages, they are saying there is pecuniary harm that they have suffered. That is clear from the skeleton. So, the question is whether the bargaining model in fact reflects pecuniary harm to the users. And we say it

doesn't, because the -- first of all, we actually say there's no pecuniary loss at all suffered by users in this scenario. That was the view taken in the German case. But we also say it must be right because they are not -- they are not losing anything in the sense that -- it's not handing over a bottle of wine, it's in fact -- let's say a purchase is made by Facebook users on a retail website, what actually goes on is that the information of that purchase, the fact of that purchase, is transmitted from the retailer to Facebook. So actually, it's very different to a scenario where you have an asset which you are then giving over to the counterparty. Data, it just doesn't work in that way. And that's why we say there's no pecuniary loss --

MR JUSTICE MARCUS SMITH: But wouldn't that be true in however you put the case? Wouldn't that be a response to be made even if the case had been articulated as you say it should have been, with a positive counterfactual causative of a different pricing structure? I mean all you are talking about is receiving money for something which you are not losing. Isn't your answer proving too much?

MR SINGLA: If one's looking at this as a matter of first principles, we say there's actually no loss at all in terms of a pecuniary loss.

MR JUSTICE MARCUS SMITH: However the case is put?

MR SINGLA: Yes. But even if there were some pecuniary loss that -- users suffered some pecuniary loss, we say there's no pecuniary loss and that's why the common law has developed this doctrine of user damage which has been expressly disavowed. But even if they were able to say there's some pecuniary loss, the very fact of handing -- they don't even hand over the data in the example I have given. But the use of Off-Facebook data, let's say they are alleging some pecuniary loss is suffered, we would say that's exactly the sort of individualised enquiry that needs to take place, because if, if there is some pecuniary loss, or some potential for there to be pecuniary loss where a user allows Facebook to use their data --

MR JUSTICE MARCUS SMITH: Just to be clear, what do you mean by "pecuniary loss" in your language now? Are you saying that the extraction and use of Off-Facebook Data has in some way harmed the person whose data is being used?

MR SINGLA: That's what I say they would need to establish.

MR JUSTICE MARCUS SMITH: I see. That's helpful.

MR SINGLA: Because they are not claiming a disgorgement to profits, nor are they claiming user damages. So they are not saying this is an intellectual property case, this is a FRAND scenario, let's hypothesise what the bargain would have been. That's expressly disavowed and we say rightly so, given the authorities. So the only potential remedy available, they themselves accept this rightly, is pecuniary harm.

MR JUSTICE MARCUS SMITH: Right.

MR SINGLA: Their first question: what does that pecuniary harm look like in a scenario where (a) we are talking about data and not wine bottles, but (b) when one is actually thinking about what happens when Facebook uses Off-Facebook Data, it's actually the retailer transmitting information about the purchase, for example, to Facebook. So we say actually it's very difficult to conceive of any sort of pecuniary harm.

MR JUSTICE MARCUS SMITH: No. Mr Singla, I completely understand why you are saying this. But this is an answer which kills off a claim by the PCR even if it was dramatically reformulated in the way we were discussing this morning.

MR SINGLA: Absolutely. Absolutely. That's actually really quite an important point. Because we say this is the knockout issue. And the points are connected because the reason they end up claiming a remedy, which we say is misconceived, is because they've hypothesised this counterfactual bargain whereby Facebook pays users. Now we say the counterfactual bargain has its own issues and I have addressed you on that.

But in a sense it flows, inevitably once you have arrived at this counterfactual world where Facebook are paying users they try to claim the payment to users. But what that really misses is that the benefit to Facebook, the profits that it can generate by aggregating all of this data, completely different to pecuniary alarm as they describe it -- that's their phrase -- pecuniary harm to a user. And we would say if they want to advance a case for pecuniary harm, that's an individualised enquiry. Indeed, this case only works on a collective basis. As I think I said earlier because they are looking at the end of a telescope which is profits generated by Facebook they are entitled to say, well, everyone would get a slice of that pie.

If in fact one is looking at the right question, which is, "what's the pecuniary harm to users?", one would need to analyse on an individual basis how much value, if any, does each user attribute to their data. And the answer could be for some 0, the answer for some could be a lot. It's just not something that can be analysed on this collective basis. That's why it is a knockout point.

MR JUSTICE MARCUS SMITH: This is why, going back to the exchange that we had this morning with Mr O'Donoghue, the classification of the right in question may matter quite fundamentally. I mean if one were to say, which Mr O'Donoghue starkly disavowed, if one were to say that the Off-Facebook Data was a property right, then an assessment of the rights to licence that information becomes much more arguable. But you say that that's not the way the case has been put.

MR SINGLA: So what the case is on data, outside of this context, because this is obviously not a data breach case, as it were, it's a competition case, but --

MR JUSTICE MARCUS SMITH: It's a competition case where the assertion is that -- the assertion may be that there is a right that has been to something that has been extracted unlawfully, and the question is, what is the fair price for that right? Now I think what you are saying is that even if one has got a methodology blueprint

to trial which says: do you know what, the price for this data is X, and it's all being done to ten decimal places by Professor Scott Morton, your point is even then the case fails because it's not a loss.

MR SINGLA: Yes. It's not a loss and that's well-established, that there's no pecuniary loss in these scenarios, that's why user damages have developed in other contexts.

MR JUSTICE MARCUS SMITH: Yes.

MR SINGLA: And if they wanted to advance a pecuniary loss case then that's fundamentally different to the case they have advanced. So we I think in our skeleton, paragraph 72, we do highlight a point that you made in this context on the last occasion, which is there's a real question as to whether if one is looking at this the right way, ie not through gains to Facebook but through loss, the users, whether in fact there is a loss capable of being represented in the class action at all.

Now that may be a dramatic consequence of the argument but we say that is the right consequence in principle, that this only works as a collective action if you seek a remedy by reference to Facebook's gains. And it's different in the sense that there is now a bargaining model but they are still saying that the loss to users is the same thing as -- or can be measured by reference to the monetised value of the data in the hands of Facebook.

MR SAWYER: Is it fair to say that the only way to square the circle is by granting consumers a right to have a -- how they dispose of their data, how they allow -- whether or not they allow their data to be used by someone else because as soon as you create that right there then has to be a market value for that right and it's quite plausible that market value might be the same for all users even though what they are giving up from one user to another might be very different.

MR SINGLA: Well, if there was a statutory regime, for example, then the position

might be different. But I think this is very similar to the point that is being grappled with in *Lloyd v Google* where -- the cause of action was a statutory cause of action and the question there was whether the claim could be advanced under the statute, and one has to remember here what the cause of action is, it's not some breach of a property right, the cause of action is a breach of competition law. And the only remedy available as a matter of binding authority is loss-based. So they are right, absolutely right in their skeleton to say all they can possibly claim is pecuniary harm. But that then takes them to a dead end, as it were, because pecuniary harm is not a collective -- it's not something that can be dealt with on a collective basis. That's the real conundrum. That's why we have devoted so much time in our skeleton to the cases on user damages and disgorgement of profits, because we thought they were trying to break new ground, and that's why they referred to *FX* and Lord Justice Green's dictum and *Lloyd v Google* and so on in the Claim Form, we thought they were trying to break new legal ground. They have sensibly realised they can't do that, so they have accepted it has to be pecuniary harm. But the difficulty for them is that if you assess this on a pecuniary harm basis it's a classic individualised assessment.

And so, we say there is a fundamental problem with the case at those levels and the points are connected but they are distinct, the counterfactual question and the remedy. Because even if you are against me on blueprint, for example, even if you thought that they had done enough to establish a blueprint or a methodology for getting to this Nash bargaining model we say the end point is a flawed one, at least so far as a collective action is concerned.

MR JUSTICE MARCUS SMITH: Yes.

MR SINGLA: And you will see the sleight of hand in the skeleton with the new introduction to these references to "work done by users". And we say that really is --

as I said earlier, it's a new point but it also doesn't assist, because there's no work being done by users. And if what they mean by that is there needs to be some compensation for work done, I think is the way they are trying to now put it, that's actually very different to compensation for pecuniary harm. They are hypothesising some sort of bargain.

I think, sir, you have referred to FRAND on a couple of occasions --

MR JUSTICE MARCUS SMITH: Yes.

MR SINGLA: And if I can perhaps say this. We say the FRAND analogy is inapposite, both that the counterfactual level and at the remedy level. Because at the counterfactual level there is no, as it were, set obligation to negotiate, and so what they are saying is on the counterfactual we can assume that the counterfactual is this fair bargain whereby Facebook pays users -- collects the same data. But those are very -- the counterfactual here is not fixed in the same way that FRAND is fixed in the parameters and then the question what licence fee is fair and reasonable and so on.

So we say the FRAND analogy is inapposite because the very clear question that needs to be investigated here is what would have happened in the counterfactual: Facebook might take less data, it might take the same data and so on and so forth, all of that needs to be investigated, but one can't just assume the parameters of that bargain or the shape of the counterfactual. So, we say the FRAND analogy is inapposite at that level of the analysis.

But then when we come to the remedy, we say again the FRAND analogy is inapposite. Because what's happening in the FRAND case is it's a licence fee which is akin to the user damages. That's not pecuniary loss; it's working on the basis that there is a negotiation, and the price needs to be a fair and reasonable one and so on. But they are claiming pecuniary harm.

So, with respect we do say that the FRAND analogy is not the right way of looking at what they are entitled to do in this case in terms of this being a competition law cause of action and they need to prove loss, and that is common ground.

Sir, I was going to then move to my next topic which is again an important point, the question of the way in which the unfair price case is articulated. We make two main points here. The first is we say the incremental approach is misconceived and contrary to well-established principles, both legal and economic. And we also say, a separate point, that as part of the limb 1 unfairness question, Professor Scott Morton alleges that Facebook's overall profits are excessive, not profits derived from Off-Facebook Data, but overall profits. And we say there's no methodology at all for dealing with that question.

So far as the incremental approach is concerned, as the Tribunal recorded in the judgment on the last occasion there was some ambiguity previously as to whether the PCR was relying on *United Brands* or running a case based on *United Brands* but it's clear from the Claim Form and the expert evidence that they are alleging an unfair price within the meaning of *United Brands*, one can see that for example at 153 of the Claim Form.

Then that takes us to the legal principles. We say that *United Brands* contains an established two-limb framework to assess whether a price is unfair, first of all, whether the price is excessive, and if so then whether the price is unfair, either in and of itself or unfair when compared with competing products.

The cases make clear there is no fixed or definitive methodology to determine whether a price is unfair, and we accept that some adaptations will need to be made. As you said in your first judgment one has to take account of the fact that there's a 0 financial price, or nonmonetary consideration here; and secondly, the two-sided market point. So we accept that there's some adaptation or flexibility required. But

insofar as the authorities make clear, that as part of the test one must also assess whether the price has a reasonable relation to the economic value of the products supplied we say it's necessary to ask that question at some point in the analysis and that that's not a question of adapting or being flexible and so on, that is a necessary question to ask.

If I could just go to the *Flynn* case, which is tab 22, if I could start with paragraph 56 where you'll see the Court of Appeal referring to *United Brands* and then quoting paragraphs 248 to 253 of *United Brands*. You will see at 248:

"The imposition … of unfair purchase or selling prices is an abuse ... it is advisable, therefore, to ascertain whether the dominant undertaking has made use ...(Reading to the words)... In this case charging a price which is excessive because it has no reasonable relation to the economic value of the products supplied would be such an abuse."

And then you'll see they go on to say various other things:

"Other ways may be devised ..."

And so on. And I will come back to the reference to "advisable" in 249. But that is what *United Brands* said.

Then if we look at the Court of Appeal at paragraph 172, you will see the Court of Appeal say that they agree with the parties on this, four lines down:

"It is evident from the judgment in *United Brands* that the reference to economic value is as part of the overall descriptor of the abuse, it is not the test. The test should, therefore, when properly applied, be capable of evaluating economic value."

Then about halfway through the paragraph:

"In so far as an issue of fact arises which can be categorised as an aspect of economic value it needs to be measured and it can be evaluated in various parts of that test. If it is properly factored into 'Plus' or 'fairness' or into some other part of the

test, or is reflected in other evidence which can stand as a proxy for economic value, then there is no incremental obligation to take it into account again."

And then the final sentence:

"In short, economic value needs to be factored in and fairly evaluated, somewhere, but it is properly a matter which falls to the judgment of the competition authority as to where on the analysis this occurs."

So the question has to be asked whether there's flexibility as to where in the analysis the question is asked.

If I can show you *Hydrocortisone*, which is tab 45, the Tribunal here refers to the *Attheraces* decision of the Court of Appeal at 327:

"Lord Justice Mummery [you will see] began his consideration with *United Brands*, holding that the judgment in *United Brands* posed two questions."

There is the first condition and the second condition. So, the first is whether the price actually charged is excessive. And then the second condition:

"Assuming the first condition is met, the next question is whether a price is being imposed which is unfair in itself or when compared with competing products.

"Lord Justice Mummery identified the central concept in an abuse of a dominant position by excessive and unfair pricing is not the cost of producing a product or the profit made in selling it but the economic value of the product supplied. The selling price of a product is excessive and an abuse if it has no reasonable relation to its economic value."

Then there's consideration of what economic value means.

We say it's important that the reference there to economic value is the economic value of the product supplied. That's really the issue between the parties.

Then if we look at the *HG Capital* case, which my learned friend relies on in his skeleton, it's at tab 44. If we pick that up at paragraph 110, which is 2167 of the

bundle, common ground that *United Brands* applied.

MR JUSTICE MARCUS SMITH: 110.

MR SINGLA: 110, yes.

MR JUSTICE MARCUS SMITH: Thank you.

MR SINGLA: And then if we could go to 124, please, you'll see the citation from 172 of *Flynn*:

"The fifth main issue addressed by the Court of Appeal concerned the concept of economic value ... (Reading to the words)... there must be a reasonable relationship between price and economic value."

Then 126 you'll see what was being argued in this particular appeal:

"A central theme of the appeals was an argument that … the CMA had ignored the basic test for unfair pricing … which was the need to show that the dominant undertaking has reaped trading benefits which it could not have obtained in conditions of normal and sufficiently effective competition, ie workable competition."

Then at 131, this is in fact Mr O'Donoghue's submission:

"It was submitted on behalf of the Cinven appellants that the correct way to apply the workably competitive criterion was first to establish what workably competitive price levels look like in the market in question and then compare that to the challenge prices."

At 132, that submission was not well-founded, as Lord Justice Green held there was no rule that the Competition Authority must establish workably competitive prices at any stage.

And then at 133:

"There is no rule that the competition authority must start with workably competitive prices as a benchmark."

And so on.

Then finally at 137 on page 50, three lines from the top:

"The reference to 'workably competitive conditions' is not a mandatory requirement. ...(Reading to the words)... for the competition authority to ascertain whether the undertaking has exploited its dominance in a way in which it could not have done in workably competitive conditions."

And so, the reference to the workable competition test being advisable, that reflects *United Brands*, paragraph 249. But the application of the test itself is not an option or advisable. So one always has to consider the excessiveness and then the unfairness conditions, and then also, as *Flynn* makes clear, the economic value of the product must be taken into account somewhere.

And indeed, if we just look at the Claim Form, paragraph 153(e), you'll see it's common ground:

"Further and alternatively, collection of Off-Facebook Data involves directly or indirectly imposing an unfair price."

And you'll see a reference in (a) to "economic value within the meaning of *United Brands*."

So, we say so far so good in the sense that the principles ought to be uncontroversial. The question is economic value and an application of *United Brands*. But where we part company, and where the battle lines are, as it were, is that we say all of the authorities make clear that when one is considering economic value it's economic value of the product or the service as a whole. And that's why one sees in the cases all of these references to the economic value of the product supplied.

And as I said at the outset of this part of my submissions, whilst we accept that the test may need adaptation, and so on, to reflect the two-sided nature of the market and to reflect the fact that there's no monetary price paid by users, we do say that

this is a hard-edged point and it's a necessary feature of the *United Brands* test that one needs to measure the economic value of the product as a whole. And Mr Parker likewise says from an economic perspective that's also the only sensible approach, and that's paragraph 54 of his report.

Now contrary to what we say is a clear position as a matter of law and economics that one needs to look at the entire product supplied, let's see what the PCR is doing. And so if you still have 153A open in the Claim Form, you'll see that the Claim Form is asking the wrong question in the sense that whilst they acknowledge the *United Brands* and economic value test they say:

"There is valuable consideration flowing from users that has 'economic value' within the meaning of *United Brands*. In its basic and essential form user data is monetised by Facebook through the provision of advertising services."

So, we say that's misconceived because they are there focusing on the economic value of the Off-Facebook Data in the hands of Meta. What they are not looking at is the economic value of the Facebook service received by the users. We say the pleading, so far as it goes, is actually just asking the wrong question.

Professor Scott Morton doesn't make that mistake. We say she makes a different mistake, which is to ignore the overall service -- the economic value of the overall service, and instead favours her incremental approach. And if I could ask you to look at her expert report at paragraph 252, which is page 288 of the core bundle, she says:

"I understand that the case law on excessive pricing allows for prices that reasonably reflect the economic value of a product. To conduct my assessment of whether Facebook creates economic value to users that justifies the price charged to users I consider it useful to decompose the value of Facebook into different components."

And then 261:

"My view is that the right approach to assess the fairness of the price is not to look at the aggregate value of Facebook to users but to assess whether Facebook has struck a fair bargain as it has increased its data extraction over time."

And ultimately what she's doing is assessing whether there have been sufficient improvements in the service since 2014 when the Off-Facebook Data started to be used, whether those justify the so-called cost. And one can see -- the approach is so narrow that in her view the improvements would need to be directly arising -- any improvements would need to arise directly out of the collection of the Off -- or the use of the Off-Facebook Data. So in other words, she's -- the incremental approach is salami slicing the Facebook service and ignoring any aspect of the service that existed previously.

Then she also goes on to ignore any improvements in the service after 2014. But we say it's the salami slicing which is impermissible. And there is absolutely nothing in the expert evidence about measuring the value of the Facebook service as a whole. So, they really have nailed their colours to this particular mast. There's no alternative consideration of what we say is the right question, they've said, "No, this is the only approach we are taking".

MR JUSTICE MARCUS SMITH: Mr Singla, just to try and unpick this a little bit because I think it's quite an interesting point. The abuse, as it's now described, relates to the Off-Facebook Data, so they are saying there may or may not be excess profits earned by Meta, pre-2014, when it didn't have access to the Off-Facebook Data, but the complainant is sort of drawing a line under that saying, "If there is recent abuse there we will let it ride, and we are just focusing on what happened afterwards, the abuse we are focusing on is just the additional extraction of the Off-Facebook Data."

So what's wrong with looking at that conduct and that activity in the way that

Professor Scott Morton does in the bit you have just taken us to to say: well let's just focus on that and say well the extraction of that data, has that coincided with any increase in the quality of the product? And evaluates, you know, what Facebook's taken in that situation, which is the alleged abuse and say, has that been compensated for by any improvement in the quality of the product since 2014? What's wrong in principle with taking this incremental approach?

MR SINGLA: We say there's not a single authority or precedent which entitles them to, as it were, wash away everything that was going on before 2014 and essentially disregard any value that Facebook users get from the service as it existed pre-2014. We also say, this is a separate point, that actually she is wrong just to dismiss the improvements that did happen post -- that's a separate point.

MR JUSTICE MARCUS SMITH: Yes.

MR SINGLA: But we say that as a matter of law, and Mr Parker says this is consistent with economics, that effectively one has to look at the bargain as a whole and the service as a whole, and the reason that the cases talk about the entire product supplied, the incremental approach could only ever work as a matter of economics. We say it doesn't work as a matter of law. But it could only ever work where the nature of the arrangement before 2014 was on the very cusp of unfairness. So it would only ever be correct to focus on post-2014 onwards if you are absolutely at the tipping point prior to the event that occurs in 2014.

MR JUSTICE MARCUS SMITH: I'm not sure I can see that. Because if prior to 2014 Facebook was already earning excessive profits, by a big margin the PCR is not saying they are claiming any of that money back, we better take that one on the chin but what we want a claim for is the additional excess profits that have been earned since then by this particular act, aren't they?

MR SINGLA: They are not alleging any abuse prior to 2014. So the Tribunal has to

approach this on the footing that everything prior to 2014 was legitimate. They then say the abuse arises in 2014. So from 2014 onwards was focusing on fair pricing, but you have my submissions that they are in fact running two cases. But on unfair price they say the unfair price starts in 2014. And they say, "We will analyse whether or not there's an unfair price, by reference to *United Brands*. But we will assume for this purpose that the only economic value to users is that which follows from 2014. And we say that can't be right because -- well, that could only be right in a world which is not this world but where, as I say, there's a tipping point and effectively arrangement is on the brink of being unfair and then you introduce something else which is the collection Off-Facebook Data which they say is a tipping point.

But what one can't do is effectively assume that you start the clock at 2014 and you say, well from the users' perspective has there been value from 2014 onwards? Because you are disregarding the huge -- potentially huge consumer surplus that existed prior to 2014. That is why the cases all talk about the products supply. One doesn't analyse -- in all of these unfair pricing cases one doesn't look at every incremental price increase and say well, was there some distinct value that was introduced at the same time, corresponding improvement to the product or additional value conferred once the price goes up. One actually takes a step back and says, "Well what is the price? What is the value of the product?" and, "Is there a reasonable relationship?"

It would be wrong in principle -- it's both an economic but it is also a legal point, because we say the two are consistent. Effectively there could be an enormous consumer surplus prior to 2014 and what they are saying is, "Well don't worry about all of that, let's look at just the arrangement post-2014." We say the product is the Facebook service and so it would be wrong when assessing whether there's an unfair price for the product as a whole to disregard the consumer surplus that

arises prior to 2014; it's a completely self-serving approach.

MR JUSTICE MARCUS SMITH: Okay. Let me think about that. But leaving that to one side, the second question I had on the same thing is you sort of exhort the PCR to look at the Facebook product as a whole and there, there are some sort of back of the envelope kind of assessments of how valuable it is to users, on some basis it might be worth a thousand dollars per user to use Facebook, because it's such a great product and it's a good functionality. But if they did have to answer your question, looking at the value of the product as a whole, and it was found that it was a marvellous product, there was a lot of consumer surplus there, that wouldn't let you off the hook for excessive pricing, would it? Because I thought there was -- there's this whole willingness to pay fallacy that you would have to deal with. How would you propose that they deal with that willingness to pay fallacy by looking at the value of a product on the assumption that any monopoly situation where a monopolist has abused its monopoly, or the consumers who still buy the product at the monopoly price must value it at more than the inflated price that's being charged, so that doesn't kind of get you off the hook on --

MR SINGLA: No, just to be clear we don't suggest it does. And obviously the fact the consumers are paying doesn't ever let off someone from excessive pricing. But we say we haven't committed a particular form of methodology that they should be adopting. But what we say on any view they need to do is ask the right question and the right question is the price paid, which is obviously a non-monetary price, but it's not just Off-Facebook Data that's being used. So the right equation, as it were, is all the consideration that is being passed from users to Facebook, not a monetary price, but consideration. One has to measure that against all of the product that users are actually receiving.

And the privacy paradox and so on, we are not taking that point at the certification

stage but that will all feed into the extent to which consumer surplus is accrued, as it were, from the service as a whole. But at least that will be looking at -- it's a difficult question but clearly something that would need to be grappled with at trial. But at least that's asking the right question because it's asking what consumer surplus, or what value do users derive from the service as a whole? That's at least consistent with principle. But --

MR JUSTICE MARCUS SMITH: The answer to my question is even if consumers do derive a big consumer surplus from Facebook that doesn't prove that Facebook isn't abusing its dominant position.

MR SINGLA: No, and we are not seeking to suggest that that's the fundamental problem with the case. We are not saying there is no case that could be advanced. But what we're saying is they have nailed their colours to the mast, which is this incremental approach and that is the issue. To be clear it's very important, we are not seeking to suggest because users do this that somehow makes it fine. We are not saying no such case could ever be advanced. What we are saying is, and we could only attack what is has been put in front of us and indeed the Tribunal can only scrutinise what is being put forward, they've nailed their colours to the mast, which is they can forget about consumer surplus prior to 2014. And we say that can't be the right analysis because then in every case where you are looking at an excessive price you would start the clock, as it were, in terms of valuing the service or the product at the point in time where the price increase came into force and that's just not the way in which either the cases or economics really goes about the exercise.

MR JUSTICE MARCUS SMITH: Yes, thank you.

MR SINGLA: I said on a number of occasions that they've no authority in support of their approach and it's telling that in their skeleton argument they describe their approach at paragraph 9.2 as unimpeachable. And in paragraph 65, let me just

show you this, it's pure assertion that they are entitled to go about this enquiry in this way. You will see at the end of 65:

"In circumstances where the fundamental concern is that Meta was exploiting its dominance by imposing terms or prices it could not have done under conditions of reasonably (inaudible) workable competition, it is appropriate to consider whether those terms are themselves justified by commensurate value."

And there is no authority cited for this. And just to remind you, I think what I said at the outset was the reality of why they've gone down this incremental approach is because of the evidence about consumers putting so much value on the service as a whole, and that's speculation on my part. But Mr Parker makes that point by reference to some of the articles relied upon by Professor Scott Morton. So it's a deliberate choice, we say, to cast their case -- their second go at this case they decided to adopt the incremental approach because it's self-serving, we say.

And if you turn to paragraph 66, they say:

"This is not an issue that should prevent the certification of the claim."

We say that's wrong because this is a fundamental failure to advance a case either on the pleading or the methodology which is asking the right question. And they refer there to the *Kent v Apple* case, and I would just like to show you why that doesn't assist them, because the issue there was a very different one. *Kent v Apple* is in authorities bundle 4 at tab 35. If it's helpful to remind yourselves, paragraph 3 is a summary of the case being advanced.

MR JUSTICE MARCUS SMITH: Yes.

MR SINGLA: But then if we could look at paragraph 66 you'll see that Apple was arguing, at 66, that:

"The intangible value could not be measured through a cost plus approach which would ignore the demand side benefits."

Then you will see a reference to the "demand side benefits".

And at 68 you'll see, in particular subparagraph (4) to (6) there is considerable demand side value to the app store, needs to be measured, not sufficient in (5) to make the assessment of demand side factors.

And Apple were arguing the PCR had made it plain that she intends to disregard demand side factors.

Then if one looks at 69 subparagraphs (7) to (9), these were the PCR's responses to those arguments, they were saying there's a variety of methods which could be chosen to encompass all aspects of economic value including demand side factors. That's subparagraph (7).

Then (8), again you see a reference:

"Mr Holt is justified in concluding that the existence of a monopoly position which gives Apple the status of a gatekeeper is a better explanation of the excessive margins in any real demand side factor."

In any event in (9):

"... these undertake a number of exercises which do take account of the demand side."

Then if we get to the Tribunal's conclusions, we look at 70, we see a reference there to *Flynn*.

And then at 72 you see the other cases referred to, including *Attheraces*, and they say:

"Our approach is to consider the case by reference to principles set out in the *United Brands* and explained in *Flynn*. There is no single prescribed method to establish the abuse. ... it is important to avoid rigid rules."

Just to be clear we agree with that. We are not being dogmatic as to how they should go about this. But what we are saying is that they need to look at the whole

service.

And at 73 you can see:

"In relation to the question of assessing the demand side benefit ..."

And you can see why it is that this demand side benefit point has come up so often in the cases and it's clear from *Attheraces* and so on one that one needs to look at demand side benefits.

And 75 explains why there needs to be some consideration.

At 76:

"To the extent they exist it is necessary for those benefits to be taken into account."

And:

"The tools employed to make the assessment have to be capable of identifying and measuring that demand side benefit."

At 77 it is clear that cost plus is a conventional starting point. No basis to criticise that:

"The question is whether it sufficiently takes account of the fact as relevant to economic value including any demand side factors."

78:

"It is not necessary to quantity demand side benefit with precision."

79:

"We do not accept there is any established rule for assessing demand side factors. ... Each case needs to be carefully assessed on its merits by reference to the product and service in question ..."

I emphasise those words:

"... and the economic and other evidence."

And then 80 to 84, what the CAT does is it effectively rejects Apple's submissions on the basis that there was a methodology to assess the demand side factors. You'll

see 80 to 82, and then 83:

"These allegations are sufficient to give Apple more than adequate notice of the case being advanced in relation to demand side factors. We do not accept Apple's argument that the pleadings disclose a legal error."

Then 84, insofar as there is an attack on the method, you will see 84(3):

"They pleaded facts which could found a methodology that takes into account demand side factors."

And (4), it's a preliminary approach.

Then 91 on the summary judgment application they say:

"It is not correct that Mr Holt has ignored demand side factors."

And they say it is plainly not appropriate.

But then you'll see 91(4):

"It may well be the case that Apple would in due course be able to show that the methodology chosen by the PCR does not adequately assess economic value because it fails to take into account demand side factors. That, however, is a matter for trial."

That was a very different case because there they were asking the right question but Apple were saying: you are not sufficiently looking at the demand side factors and the Tribunal disagreed with that. Here, it's a completely different problem. The problem here is they are not looking at the whole service. And indeed this focus on demand side benefits, or demand side factors, we say actually confirms the submission that we are making, because when one's talking about demand side factors one's looking at the demand for the product as a whole. It would make no sense to talk about demand side factors for the Facebook service improvements post-2014. That's just completely incoherent.

So, we say that the cases recognise economic value of the product as a whole and

demand side questions are part of that and it's demand side in respect of the product or the service as a whole.

So, we say the position on the authorities is clear and we say as a matter of economics it's also unsound to look at the incremental approach.

And I would just like to take you through Professor Scott Morton's responses, such as they are, to the objection. If I could ask you to look at her second report --

Sir, just before I start this particular part of my submissions, I'm conscious of the time and it's going to take me longer than 7 or 8 minutes to deal with this aspect. I don't know whether --

Housekeeping

MR JUSTICE MARCUS SMITH: I understand. Let's just take stock in terms of how we are doing for time.

Mr Ridyard has an appointment tomorrow after court but away from London so we can't go beyond 4.30 tomorrow.

Obviously, Mr O'Donoghue, you have the bulk of your responses to go.

How much more time do you need, Mr Singla? I don't want anyone to feel under any --

MR O'DONOGHUE: We shouldn't forget about Mr Bacon.

MR JUSTICE MARCUS SMITH: Indeed.

MR SINGLA: Sir, I think with an hour in morning that should be sufficient. No more than. It's obviously difficult to tell --

MR O'DONOGHUE: Sir, might I, at the risk at making myself unpopular, suggest we start at 10.00?

MR JUSTICE MARCUS SMITH: Certainly that. My question is whether that's going to be enough.

MR O'DONOGHUE: If Mr Singla can commit to no more than an hour, we will cut

our cloth to measure.

MR JUSTICE MARCUS SMITH: Okay. Well let's say 10.00 tomorrow. We'll draw stumps now at -- not in terms of your submission now, Mr Singla, I don't think it would be right for you to embark upon a new topic.

But I think, Mr O'Donoghue, for your benefit, if I could identify those areas where your particular assistance would be helpful. It does it seem to me that we are, in considering the question of certification, going to have to be extremely clear exactly what it is we are certifying. And I'm sure it's our fault, not anybody else's, but there is a considerable mass of material, and it does seem to me that in the event of this case going forward, it doesn't arise obviously if it doesn't go forward, but in the event of this case going forward we would want to be extremely clear as to the nature of the case that was being run so that one could deal with any, as it were, developments, understanding whether they were an evolution of the case that had been put or a new departure.

With that sort of general point, it does seem to me that we need to understand a little more how important the incremental gain case is to the way in which the PCR puts its case. You'll have heard the debate that we all conducted with Mr Singla about the presence or absence of a positive case in the PCR's pleadings, and it does seem to me that there isn't a positive case in the sense of: here is the contractual term; or, here is the method by which one would assess the contractual term, that would be agreed between the class and Meta if the abuse were to be avoided.

MR O'DONOGHUE: Sir, forgive me for interjecting. You were shown partial extractions from the pleading.

MR JUSTICE MARCUS SMITH: Mr O'Donoghue I'm not ruling, I'm simply identifying things that --

MR O'DONOGHUE: Sir, all I meant to interpose with is there's quite a lot more we

wish to say --

MR JUSTICE MARCUS SMITH: I'm sure there is.

MR O'DONOGHUE: And we do not accept for one second we have not outlined our positive counterfactual case.

MR JUSTICE MARCUS SMITH: Right. Look, I'm trying to help.

MR O'DONOGHUE: I understand.

MR JUSTICE MARCUS SMITH: If you want me to shut up I will but --

MR O'DONOGHUE: I understand. A lot was said about the --

MR JUSTICE MARCUS SMITH: I'm quite sure that there are reams of points that Mr Singla has articulated that you disagree with, and please knock us dead with that tomorrow, but if you want to have a list of things that would assist us --

MR O'DONOGHUE: That would be extremely helpful, thank you.

MR JUSTICE MARCUS SMITH: -- I'm happy to try and provide it. It may be that they are points that can be dealt with very quickly and it may be that they are points that involve a misunderstanding of your case, well that's fine. I'm not saying they are right, I'm saying they are, at 4.28 of the first day, things that we think you may need to address.

MR O'DONOGHUE: Yes.

MR JUSTICE MARCUS SMITH: So I was on positive case. I don't think that the way you are putting your positive case is that you are identifying a granular methodology by way of which a counterfactual price for the Off-Facebook Data would be agreed, and I don't think you are articulating a methodology which involves the ascertainment of the effects of an ordinarily understood counterfactual case on both class and, as it were, profit earned by Meta. And that's not a criticism. It seems to me that the reason that that is not the way you are putting your case is because you have a case which is very much based upon the causal nexus between

infringement and harm being the additional profit that is accrued by reason of the abuse on your case, by Meta, which is the monetisation of the Facebook data, which is why there is so much emphasis on the incremental case.

Now if that's right then it very much will affect how we frame what it is we are certifying and what it is we are not certifying, so that is something on which I think we would be assisted in understanding. And if I've got that wrong then obviously we would be considerably assisted in that error being highlighted.

If incremental gain matters, then I would want initially a very staccato statement of exactly how that case works. By all means expand upon it going forward but it does seem to me that the nexus between the negative abuses, in other words this was a take it or leave it term, or this was an unfair price, but either which way, the Off-Facebook Data was stuff that Meta was not entitled to, that abuse ought to be fairly closely tie-able into both the causative consequences of that and the loss. And it seems to me that what you are saying, but again I may be completely wrong, the reason I articulate it so that you can tell me how wrong I am, it seems to me that you are ascertaining the consequences of the abuse at a macro rather than a micro level; in other words, what you are saying is there is this identifiable gain -- and I use the word "gain" advisedly because it leads into another problem which we are going to want your help on -- there is an identifiable gain which is solely attributable to the abuse, which let's assume is established, which by definition is only achievable by Facebook through the abuse in circumstances where it is in the interest of Facebook, Meta, to obtain that data by lawful means. And what one is then doing is one is pricing the gain by reference to what would be the price that would be agreed for the data in order to avoid the very abuse which you are pleading. And that is where I'm slowly coming to in terms of understanding your case. But if you want to spell out how wrong that is, absolutely be my guest because that's why I'm articulating this.

If that is right, then what is your answer to the "no pecuniary loss" point, which is a point that Mr Singla majored on earlier on this afternoon? And it seems to me the way he put it was actually it was an answer to your claim, however it was framed, whether it was framed by reference to incremental gain or otherwise, what he's saying is that you can't see, or you can't assert a loss in the ordinary tortious sense. To the extent that you can it is an individuated loss and you therefore lose through *Lloyd v Google* and we would like to know what the answer is to that.

Finally, and this is I think for both of you, Mr Singla you mentioned on a couple of occasions strike out. It may be entirely my fault, in which case I've been very negligent in reading these papers, but there's no actual strike out application before us, is there?

MR SINGLA: Sir, there's no piece of paper in terms of an application notice, but in our response we do make clear that we are objecting on various grounds. The way this case is being advanced is it's actually an application for permission to amend --

MR JUSTICE MARCUS SMITH: Yes.

MR SINGLA: -- and we are proceeding on that basis. And we say they don't meet the arguability standard in certain respects so they shouldn't get permission to amend and if we are right about that the case should be dismissed.

MR JUSTICE MARCUS SMITH: Mr Singla, that's very helpful. I'm not taking a technical point here, what I'm doing is making clear my own discomfort in dealing with strike out conclusively when we are still feeling our way as to precisely how the case is being put. And what I think I'm saying is that we'll want to take into account the points you are making by way of arguability in any ruling but depending on how that ruling is framed, if we were for instance to say we were minded to certify on the basis that there is -- let's take a purely hypothetical example, but there is an arguable case that there is a property right at stake, in other words that we have information

which needs to be licensed to Google, and that the damages can be assessed in that way, now that I can see is an arguable proposition, but it may very well give rise to points of law on which we haven't been addressed and which I would be uncomfortable in closing out at this stage.

I think what I'm saying is that we would not want to take these two days as closing out a focused strike out application on some of the rather more recognised points that arise in this case. We are very much on the cutting edge of law here and I'm very conscious that we are dealing with a case that is both hugely important and innovative and that's a very good thing. But those facts mean that to the extent we identify very crisp points of law and certify, notwithstanding concerns about that, I wouldn't want us to close out the prospect of considering those questions of law at a later stage.

MR SINGLA: That's helpful. Can I respond briefly.

MR JUSTICE MARCUS SMITH: Yes, of course.

MR SINGLA: Because I want to make sure you understand the way in which we have framed our objections. So the starting point is this is a permission to amend. We say permission should be refused for a combination of, if I may say, merits or strike out summary judgment points, that in certain respects their case is not arguable, we say. And we also say in certain respects, and they overlap, there are problems with the methodology, and we say it's good enough for us to succeed on either of those bases, permission to amend in a certification context shouldn't be granted if they fail Pro-Sys or if they advance something which not arguable.

And I would just add, by way of perhaps a marker at this stage, whilst -- I've read the transcripts of the last hearing and I understand the concern last time about not, as it were, shutting out the PCR and giving them an opportunity to correct their homework. We would have quite a lot to say about the idea of giving them a further

opportunity because if you were to conclude on the basis of this revised case that they've shot at the wrong target, so far as the remedy is concerned, we would say well having put forward a methodology which is by reference to commercial value of the data in the hands of Facebook, they'd had their opportunity to revise their case and they can't have multiple goes, as it were.

I know that's perhaps not what you have in mind at this stage but I just reserve my position at this stage as to, there comes a point at which one is at certification stage and if there's a point where we say it's strikable, it should be struck out now, I think is our position.

MR JUSTICE MARCUS SMITH: I think my concern was rather the converse, which is that we are traversing areas at some pace and I would not be minded to strike on the basis, or decline to amend, on the basis of a very difficult point of law without hearing very full argument on that point of law. So what you are likely to be faced with is, for instance on the question of -- we will see what Mr O'Donoghue says about this -- the question of the nature of the loss being alleged. I do think that raises a number of rather difficult questions. They are questions of law but arising in a particularly difficult factual context. What I'm saying is were we to certify, I don't want Meta to be regarded as conclusively closed out from mounting a separate strike out application on the basis --

MR SINGLA: I understand.

MR JUSTICE MARCUS SMITH: -- of the clear way in which we are certifying matters. Because I have to say I am quite troubled by the idea that this is purely a loss based case in a tortious sense. And my trouble is partly because I see instinctively information as being capable of valuation by reference to a property analogy, which immediately makes pecuniary loss a rather difficult shoehorn to apply.

Equally, we have an issue about the 0 price, because one could imagine a situation where let us say the class are paying Facebook, let us say £10 a month for the social media services they get, there is an abuse of exactly the sort that is going on. You could then say well in fact the loss is computable by reference to the sums that are paid over and therefore if there is unlawful extraction of information, there's been an overpayment which would be a loss, even on a tortious basis; and I'm a little bit uncomfortable in finding that the existence of the 0 price means that on your argument, which I completely understand, one is saying well, I'm sorry, Mr O'Donoghue, you lose, when, if there was a charge you might very well have an arguable case.

So these are difficulties which I raise now, not because I want full argument, we don't have time on that, but what I'm signalling to both is that depending on how we rule on matters, there may be very tightly focused questions of law which we may want to explore on an interlocutory basis. I stress may, because frankly my instinct would be, if we were to certify, to let the matter run and to deal with the points of law in the very specific factual context that would emerge. So I'm not sure we would be very keen on the strike out application but I certainly don't want Meta to feel that in certifying, if that is what we do, we are closing you out from considering that sort of application and I'm sure you would consider it responsibly.

MR SINGLA: Sir, I understand and I'm very grateful for that. I think what I would say, and obviously we would certainly reserve our position as to a future strike out application in the event of certification, but I think what I was very keen to stress is that we are at the certification stage, you do have a heavy gatekeeping role. The question we say that arises now, rather than putting off difficult questions we say the question actually is they have chosen to formulate their case on the second occasion, in no particular way, there is in fact, as things stand, no legal issue

between us because he's accepted, as he has to, all they can claim is pecuniary loss. So actually, we say the question today is: does the model reflect pecuniary loss?

And if you are with us on that, or if you think there may be a problem we say, as it were, you should have the courage of your convictions and exercise your gatekeeping role and not let this case drift into disclosure and so on because that's precisely the concern from a public policy perspective that Lord Sales and Leggatt were expressing, that that needs to be recognised now.

MR JUSTICE MARCUS SMITH: You are of course right, you have to get, even at a certification stage, a degree of finality, and the last thing we want is a process that is protracted -- I was going to say unduly protracted but we are already there in that we are a year after the first certification application, almost to the day. So the point you make there is well made. But it goes back to the point I made to Mr O'Donoghue at the outset, the importance of clarity. Looking purely at the pleading, I'm not sure how clear-cut your pecuniary loss point is. I can see that there's been certain statements made in written submissions and orally which entirely support your point. But at the end of the day this is something that doesn't need to be dealt with on the pleadings and at the end of the day, as you rightly say, this is an amendment application, and if there is a simple way in which to tweak the draft, then Mr O'Donoghue will be entitled to do exactly that, because there's no permission needed to amend a draft. So I think a measure of realism is required here.

We absolutely are going to ensure, to the extent we can, that this is a two-stop shop, the first stop having been last year, and the second stop being this year. But we don't want to completely straitjacket ourselves in something that is at the end of the day a significant case which, and let's face it, the chances of whoever loses this not appealing are pretty low, and it's probably better that we take our time and try and

get it right rather than take a unduly swashbuckling approach to what is on any view a difficult matter, as I think today has shown.

MR SINGLA: Would you bear with me just for a moment just to respond to that, because it's not a merely arid pleading point that we are making. The pleading is very clear, crystal clear, and I will maybe come back to this in morning, but they are clearly saying in the pleading their loss is to be measured by reference to this counterfactual bargain, which involves the commercial value of the data in the hands of Facebook; that's absolutely clear on the pleading. And it's not merely a case of them being able to tweak the pleading because that pleading reflects accurately the methodology put forward by Professor Scott Morton.

MR JUSTICE MARCUS SMITH: Yes.

MR SINGLA: So the point that is crystallised, whether one describes it as a summary judgment or refusal on merits grounds or a failure to comply with Pro-Sys, the point that is crystallised today, or at this hearing or at this certification stage, is it right to describe the model as representing pecuniary harm to users? And that's the point that we say is a point that has crystallised now and won't change, as it were, if one moves to a later stage of the litigation, that will remain the objection that we make. And so it's a pleading issue, but also a methodology issue.

MR JUSTICE MARCUS SMITH: Well no. I think the way you put it there is it's a point of law. I mean the fact is, looking at the way in which Professor Scott Morton's put it, it doesn't look like a pecuniary loss case at all, whatever Mr O'Donoghue's says.

MR SINGLA: And our point is that the real problem --

MR JUSTICE MARCUS SMITH: Your point is that that is a matter which is not a cause of action, presently recognised in English law, and what you are saying by way of side swipe is that Mr O'Donoghue is sold a bit of a past by not making more

of what for instance Lord Justice Green has said in *FX*.

MR SINGLA: It's a bit more fundamental than that because pecuniary harm we say is necessary individualised which means necessarily this Tribunal should not certify. That's the real vice.

MR JUSTICE MARCUS SMITH: I understand that. I think what I'm saying to you is that we are not -- given that this is both a novel process, and a pretty novel case, certainly in competition law terms, we are not going to be taking a, this is a conventional easy point of law matter and we are going to strike you out on the basis of something which would be unarguable in ordinary litigation. The fact is that I of course accept that gains-based tortious claims are not generally recognised, but that's precisely the point.

We have here on Mr O'Donoghue's case a claim which, on the face of it, certainly if one reads Professor Scott Morton, appears to be precisely that. Now it may be that the gains-based approach is effectively a proxy for what a negotiated outcome would be. It's why I'm so interested in the incremental case.

Now, if that's the way you do it then I would be pretty uncomfortable in striking it out on an arid technical point without hearing full argument in the context of what we understand the case to be.

And so what I'm trying to say, clearly quite unsuccessfully, is that <u>if</u> we certify a difficult case in this way, we are not thereby closing out Meta from taking a narrow and nuanced point if that is appropriate. I'm trying to help. But what I'm equally not inclined to do is in a case which is quite clearly of significance, in terms of information and data handling and claims, I'm not going to take an: oh, this is a common county court case for a tortious cause of action. It obviously isn't that. It's a very hard case which we need to treat appropriately in that way.

MR O'DONOGHUE: If I may indeed, one of the points I will be making tomorrow is

that of course the novelty of difficulty point is itself a reason not to kill things off at this stage. It's a well-established principle of strike out.

MR JUSTICE MARCUS SMITH: I have that in mind, that strike out is something to be done not in -- (overspeaking) --

MR O'DONOGHUE: As a last resort.

MR JUSTICE MARCUS SMITH: -- now indicated. But the concomitant of that is that we need to be extremely clear -- I don't think we are there yet, and that may require further consideration of a draft proposed amendment -- I'm very keen that we are absolutely clear, if we certify, what it is that we are unleashing on the world. And that is something which at the end of Day 1, and it's no doubt because of the complexity and volume of the material, I don't feel that we are quite there in terms of exactly what it is that is being said. And what I don't want is for a strike out point, or what would be a strikeout point in an easy case, to be sidestepped by saying, oh, well, it's not that case, when in fact the answer is it is a gains-based case or in part a gains-based case but of a particularly novel sort. If that's the position then I would like to know that, rather than us sidestepping the important point that Lord Justice Green made in *FX*. And difficult questions like *Wrotham Park* damages, that sort of thing, these are things which I don't want to duck, I want to address, but it may be that we don't have time to deal with that today and tomorrow, and that's the reason I am making the point that I'm making now.

MR O'DONOGHUE: The final point I would make, on that basis I think it would make sense for Mr Bacon to make his submissions probably after lunch tomorrow, rather than being diverted.

MR JUSTICE MARCUS SMITH: Okay. Well let's see how we go.

Does that cause you any problems, Mr Singla?

MR SINGLA: Not at all. We have relatively little to say about funding. Mr Bacon

apparently wants half an hour, and we have no objection to that.

MR JUSTICE MARCUS SMITH: That's very helpful. Thank you both very much. We will resume, then, at 10.00 tomorrow morning. Thank you.

(4.55 pm)

(The hearing adjourned until the following day at 10.00 am)