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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Tuesday, 9 January 2024

(10.00 am)

Submissions by MR SINGLA (continued)

MR JUSTICE MARCUS SMITH: Mr Singla, good morning.

MR SINGLA: Good morning, sir.

If I may just very briefly by way of recap, our position is that there are three fundamental problems with the revised case and the new expert evidence. Just to repeat in summary what the points are:

First, we say that PCR simply asserts that in the event that they can make out both abuses, in the counterfactual world what would have happened but for those abuses is that Facebook would have collected the same amount of Off-Facebook Data and Facebook would have paid users. In other words, the status quo continues but with a payment to users.

And we say in respect of that that applying the principles of pleading as explained in *BritNed* and the *FX* case at first instance, and applying the Pro-Sys test in exactly the same way as you did in your first judgment in this case, certification ought to be refused. And that is because there is no blueprint for investigating whether that would in fact be the correct counterfactual.

The Nash bargaining model -- and it's important to be really clear about this -- only operates in the event that the PCR is correct in the assertion that there would have been this collective bargain whereby the same amount of data would have been collected but a payment paid to users.

The bargaining model falls away entirely if that's not the right counterfactual, and it's really important to understand that they are not seeking to test whether that is the right counterfactual, they are seeking to quantify what the split of profits would be in the event that the assertion is correct as to the counterfactual.

Our short point -- a very important point but a short one -- is that this is precisely a scenario where on the authorities the case will run into the sand for lack of a blueprint. And we also say, as you know, the counterfactual in any event is not grounded in the facts. It's completely divorced from reality and so fails the Pro-Sys test. And also, as you know, we say that they have actually switched off dominance as well -- that's the exchange I had with Mr Ridyard -- because they've taken the collective bargain as way of removing the asymmetry of bargaining power.

And also you know that we say under this ground that they don't even commit to the counterfactual being a payment, a financial payment. They've left open this idea that in fact it would have been a benefit in kind. And there's absolutely nothing by way of methodology to explore that counterfactual.

So that's the first fundamental problem with the case.

The second, again just by way of recap, is that we say the remedy being claimed is misconceived because as a matter of law they can only claim pecuniary loss. And we set out that point in detail by reference to all of the authorities, including Court of Appeal authority Devenish and so on, including the Supreme Court in *Sainsbury's*, which recognised that in competition law claims only pecuniary loss can be recovered.

And we say that in this situation there is no pecuniary loss when users consent to Facebook using their Off-Facebook Data. If one were seeking to measure some sort of pecuniary loss, that would be a classic individualised enquiry: how much Off-Facebook Data is being used in respect of each user? What value does each user subjectively place, if any, on their data? And *Lloyd v Google* makes absolutely plain that those sorts of issues are individualised assessment, and that is exactly why the representative action failed in that context.

And what the PCR does in this case is to get around that problem by presenting

the Tribunal with a case brought on a collective basis by saying that in the counterfactual every user would have received a share of the Facebook profits. But they are looking at the wrong end of the telescope. That's not measuring loss to user. The profits to Facebook reflect the aggregation of all of the users' data and what Facebook can obtain for that aggregated data from advertisers. It's not the same thing as loss to users.

So if we're right about the first or the second points -- they are connected, of course, but we say they're distinct -- the entire case falls away.

Then, sir, the point that I was dealing with towards the end of yesterday, an independent point, we say going back to the first question of proving an infringement and, as you know, they say unfair term and unfair price, but focusing on the unfair price allegation, we say what they've done is misconceived. This is a permission to amend application, and we say it's neither arguable nor satisfies the Pro-Sys test, and therefore permission to amend should be refused.

And we say that because, as I took you yesterday to the pleading, that doesn't even address the right question. It refers to economic value of the Off-Facebook Data in the hands of Facebook. On any view we say that's misconceived. And Professor Scott Morton takes the incremental approach, and crucially only takes the incremental approach.

So, if you are with us that that is completely unsupported by any authority and unsupported by any economic principle then we say abuse 2 falls away entirely.

Now, the authorities we say speak with one voice. The question is whether the price paid bears a reasonable relationship with the economic value of the product supplied. And there is not a single case which looks at a particular price increase in time and considers whether there is an excessive price by reference to what happened to the product or service in question after that price increase.

And crucially, sir, the fact that there is no monetary price in this context doesn't change this analysis. So we accept that *United Brands* is a test which needs to be adapted, we accept that in this case there's no monetary price and therefore an adaptation will be required for that reason, but one still, in our submission, has to ask the right question. What one has to ask is a comparison between all of the non-monetary consideration being given by users and comparing that against the entire Facebook service that users are receiving.

And indeed, all of the cases refer to the need to consider demand-side value. And if one just steps back and thinks, well, what is demand-side value in this case, it's demand-side value in relation to the whole Facebook service. It's a complete nonsense, we submit, to look at *United Brands* here by taking an artificial price, which is namely only part of the consideration that users are giving, and to take an artificial product or service, namely that bit of the service post-2014. In reality there's only one service, which is the Facebook service.

And there's nothing at all in the methodology to assess the economic value of the overall service.

Now, even if -- so if I'm wrong about all of that, even if it were legitimate to look only at the position post-2014, we say there's a problem with their case at that level because Professor Scott Morton simply dismisses the idea that any material changes or improvements were made to the service.

And if I can show you her first report at paragraph 237, page 284 of the bundle, you'll see the heading "The extent to which the value of Off-Facebook Tracking accrued to Facebook versus users."

She says:

"I have examined the development of Facebook's user-facing offering over time … My assessment, which I will need to refine post disclosure, is that the key user-facing

functionalities were already in place prior to the roll-out of Off-Facebook Tracking and the use of this data for advertising purposes."

Then at 238:

"The only major consumer facing features that I am aware have been added are Facebook Live, reactions, Facebook Marketplace, Facebook Dating, and Facebook Reels. However, these are not personal social networking functions and many of the defining Facebook features … were introduced well before 2014. Furthermore, the features that have been added closely resemble other platforms' features, such as Reels replicating Tik Tok, rather than representing new innovations. My preliminary view is therefore that Facebook has not significantly invested in core or unique features to the benefit of consumers in recent years."

Then relatedly, if I can ask you to look at 261, she says:

"My view is that the right approach ..."

Just perhaps to show you the heading above 255:

"Can the data extraction be justified on the basis that Facebook is significantly valued by users", she says at 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."

Then you will see what she goes on to say at 262, that it's not appropriate for Facebook to justify its prices based on a value which reflects the network effect.

So she dismisses any value in the network effect.

Then if I could just show you what Mr Parker says about this, because these are obviously hotly contested issues. If I could ask you to look at --

MR JUSTICE MARCUS SMITH: Of course they are, but that's for later, isn't it?

MR SINGLA: Well, the determination of those issues is for later, but the blueprint

needs to be present today. That's the point.

MR JUSTICE MARCUS SMITH: Well, yes, but I think what she's saying is that there's been no change in the Facebook service but there has been an increased exploitation of data, namely the Off-Facebook Data. Because there's been no improvement in the service -- let's assume that's right -- you can treat the Off-Facebook Data as pure profit which has been extracted -- again assuming in the PCR's favour they are right -- by an abuse of the dominant position, with the result that the monopoly profits, the incremental approach, can be regarded as the battleground in terms of ascertaining what is the unfair extraction of value from the class.

It may be right, it may be wrong, but it's actually quite simple, isn't it?

MR SINGLA: Well, three points. First, we say it's wrong, as you know, to focus --

MR JUSTICE MARCUS SMITH: I know you say it's wrong --

MR SINGLA: Exactly. So our first point is it's wrong to look only at the post-2014 world. The second point is, if you are entitled, which we say you are not, to look only at the post-2014 world, then you need a blueprint today, at the certification stage, as to how are you going to assess the value of things post 2014, because she says "I don't put any value on them", Mr Parker says "Our position is obviously we put huge amounts of value on these things"; you need a blueprint for assessing the value of those things.

So we say, even on the incremental approach, there's not a sufficient blueprint.

But the third point, sir, if I can just show you four --

MR JUSTICE MARCUS SMITH: I'm sorry, I really don't understand that, because she's not saying I need to assess the additional value that's been provided, she is saying there's no additional value.

MR SINGLA: Exactly, but that's purely an assertion.

MR JUSTICE MARCUS SMITH: Yes.

MR SINGLA: But that's the question for the Tribunal at trial.

MR JUSTICE MARCUS SMITH: Look, I understand the case. It can be stated in a sentence. It may be wrong, but that's not a question of blueprint, that's a question of evidence.

MR SINGLA: Yes, but what we are saying is --

MR JUSTICE MARCUS SMITH: What she's saying is, you are getting additional profit out of an abuse for nothing. Now, isn't that rather easy?

MR SINGLA: Sir, we say, on the authorities --

MR JUSTICE MARCUS SMITH: You say it's wrong, and you say it's an impermissible approach --

MR SINGLA: Yes.

MR JUSTICE MARCUS SMITH: All of that I get. But the blueprint point I simply don't understand.

MR SINGLA: Well, the blueprint point is really just that on the basis of the authorities they need to do more than simply assert something.

MR JUSTICE MARCUS SMITH: Well, no. You can assert something that is as plain as a pikestaff without articulating a blueprint. It may simply be a wrong pikestaff. But that's not a blueprint question, that's an arguability question, isn't it?

MR SINGLA: We would respectfully submit that at the certification stage the Tribunal needs to be satisfied that the PCR is going to be able to investigate these issues in due course.

MR JUSTICE MARCUS SMITH: No. I really don't understand that. I mean, if you are saying there has been a material improvement in the Facebook offering, but I discount it for no very good reason, then you do need to work out why she's discounting it for no very good reason. But if the point is that there's just been no

change, then that's something which Facebook obviously will say is wrong, but it's not a methodological point, it's an evidential point which, if it's wrong, means that the case is undercut.

MR SINGLA: With respect, in my submission we are in the former scenario. So we are in the scenario where there have, on any view, been changes. That's why I was taking you to 23 --

MR JUSTICE MARCUS SMITH: Yes, but that's my point. That is an evidential argument as to whether there have or there haven't. You are asserting there have been changes and they are asserting there haven't.

MR SINGLA: Sir, with respect, I think it's common ground that there have been changes. That's 238, for example:

"The only major consumer-facing features that I am aware have been added ..."

So there's no question, it's common ground, that there have been changes to the service. What she says is, but I'm going to disregard those. For example, at 238 we see she says, well, I'm going to disregard those because they are not personal social networking functions and because they simply resemble things that have been done by other platforms.

And what we say, but Mr Parker says as well, is, well, you can't merely discount those points, because we say as a matter of law you need a blueprint. It's not -- sir, I apologise if I wasn't sufficiently clear in the earlier submission, but we do say we are in a world where it is a matter of common ground that there were changes. And her approach, which we say is entirely self-serving, is to say, well, I'm going to disregard those changes. And that's why we say it is a blueprint point.

So the third of my three points -- the first one is you can't do incremental. The second is you can't disregard things that did actually change just because they don't suit your case. But the third point is to look at what she says or how she says she

will account for differences. So if one looks at 401 to 402, which is page 324 of the bundle, you will see:

"Even though I regard it as unlikely, the extraction and monetisation of the Off-Facebook Data may in principle have permitted Facebook to improve the quality of the service to users. If so, such incremental improvements act to reduce damages due to the class. In such a case I would want Facebook to specify exactly which services and features it believes consumers valued, and which were introduced as a result of the Off-Facebook Tracking."

So she is only prepared to take into account things that were introduced as a result of the Off-Facebook Tracking. Then she says:

"I would seek to quantify their value in monetary terms" and effectively reduce the aggregate damages being claimed.

And we say again that is making a serious error, because we are not here talking about quantification, we are talking about proving the abuse. We are actually at first base. You are alleging that there is an unfair price. You are accepting it's *United Brands*. You are taking this incremental approach which we say you can't. But this is all about infringement. This is not about just, well, I'll deduct something from the aggregate damages.

So that's what we say. And can I just address you on the justifications or the purported justifications for the incremental approach which Professor Scott Morton gives in her reply --

MR JUSTICE MARCUS SMITH: Yes.

MR SINGLA: -- evidence. If I could ask you to turn up 473 of the bundle, you'll see the heading:

"Mr Parker's criticisms of my incremental approach."

Just to foreshadow what I'm going to be submitting, she gives six reasons in this

section and we say none of them engage with our point that what one needs to look at is the whole service and not some incremental part of it. But I will just take you through the points. You will see at 24:

"Mr Parker takes issue with my incremental approach."

At 25:

"Mr Parker argues that my approach does not make economic sense. He argues that my methodology should be based on the user value of Facebook as a whole."

That's the point I've been making. Then she says:

"I make six points by way of response."

The first, you will see she says towards the end of paragraph 27:

"as I set out in my first report, this assertion without more [Facebook's assertion or Meta's assertion] is no different to a firm which charges an unfair price for a product arguing that because consumers are happy to continue to pay the price they must therefore attach a level of economic value to that service that is at least the same as that price."

Now, with respect, that is a completely false point because we are obviously not saying that just because consumers are paying the price there must be no unfair price. That's absolutely not what we are submitting. It would be completely incoherent to make that submission. What we are saying is, you just have to look at the full service. That's the quote from Mr Parker in 25:

"One needs to look at the user value of Facebook as a whole."

So we say that doesn't amount to a justification for the incremental approach.

Then the second response you'll see at 29, she says:

"It's important to note what I set out in my first report concerning my instructions."

And towards, I think it's three or four lines from the bottom, you see the instructions say:

"The application to the present case needs to acknowledge ..."

Sorry, just to be clear this is actually a summary of what she says in her first report about her instructions:

"The application to the present case needs to acknowledge that the situation at hand is a barter situation in which consumers give up their data in exchange for using Facebook as a platform."

So there is actually nothing in her own summary of the instructions which refers or justifies the incremental approach. And I would actually just like to show what you the instructions do say. They are at core bundle A, tab 13, page 847. You'll see the letter of instruction at 847 dated 5 October 2023. If one looks at 858 -- perhaps I should just take you to the paragraph 16 on the preceding page so you can see the heading "Abuse":

"In terms of legal classification the abuse alleged … is articulated in two ways."

And then one sees at paragraph 70 references to case law including *United Brands*, and you'll see a reference to the *Flynn Pharma* case and also to *Hydrocortisone*.

Then at 18:

"... ultimately a legal question whether the conduct is abusive, we ask you to address ... "

And at (d):

"Whether and, if so, how the economic value of the Facebook personal social network to users should be taken into account in the assessment of the alleged abuse."

And we say that's correct, that one needs to be looking at the value of the entire service. So we say the instructions do not instruct her to adopt what we say is the artificial incremental approach. It is very much her decision to go down that route.

Then if one goes back to the six responses -- so that was the second response.

MR JUSTICE MARCUS SMITH: Well, that's better than her having been told how to undertake her analysis, isn't it?

MR SINGLA: I'm sorry, sir, I didn't hear.

MR JUSTICE MARCUS SMITH: Don't you think that the fact that Professor Scott Morton is taking the incremental approach as an expert economist is better, in terms of an articulation of what is the heart of an economic case, than her being instructed to take that approach?

MR SINGLA: Sir, the simple point I'm making is that insofar as paragraph 29 of the reply report is pointing to the instructions, I'm just making the point that the instructions don't mandate the incremental approach. That's really the short point.

Then if one looks at the third and fourth points that she makes at 31 and 32.

MR JUSTICE MARCUS SMITH: Sorry, which page is it?

MR SINGLA: Sorry, sir, do you mean her reply report?

MR JUSTICE MARCUS SMITH: Yes.

MR SINGLA: It begins, I think, at 473, or at least, yes, it starts at 467 of core bundle A. If I could just use the internal page references it's page 5. I'm grateful.

I was now turning to the third and fourth responses at 31 and 32, and what she says is:

"My report does have a section analysing why in my view the essential features of the Facebook service have remained materially unchanged since the abuse started.

"Given this analysis, I find it surprising that Mr Parker does not put forward any evidence showing what specific improvements in Facebook's service I failed to account for."

Then she refers to asymmetry of information, and Mr Parker and those instructing him are best placed to specify the service improvements. Then she says:

"Were Facebook to put forward evidence of any service improvements post

certification I would evaluate that evidence ..."

And so on. Then she says at the end of 32:

"My approach does not preclude Facebook from seeking to make such arguments, and my bargaining model is flexible to incorporate such consumer benefits as are found to exist."

And we would say really three things in relation to those points. The first is we say it's an improper attempt to reverse the burden of proof. It's not for us to put forward evidence at this stage of specific improvements.

The second point is, I've just shown you in her first report she does acknowledge that there were changes to the service, but she disregards them. So at least in relation to those changes to the service it's actually not a question of information asymmetry but simply her assertion that they don't count for anything.

And then the third point is, when she says at the end of 32:

"My bargaining model is flexible to incorporate such benefits as are found to exist."

The point I made a few minutes ago is that when she says she can incorporate, what she means is I will reduce the damages. But that's not the right question, because we are here looking at whether or not there was an infringement.

Then we say the third and fourth responses don't withstand scrutiny.

And the fifth point is in paragraph 33. She says here by reference to Mr Parker:

"It's clear that there will likely be significant disputes between the PCR and Facebook as to whether the alleged value users place on Facebook represent a legitimate benefit."

Then she goes on to say:

"In particular a significant issue will be how to account for the value derived from network effects. My view is that they were already substantially present."

And here we do say, well, how are you going to test the value of these network

effects? You are rightly acknowledging that there's a significant dispute, but how is this case going to proceed to trial? What is the methodology for assessing the value of the network effects? You can't simply assert that you don't, in your subjective opinion, attach any weight or value to them.

And then the final response at 34 is that she doesn't agree with Mr Parker's analogies. And I haven't shown you those but what he does in his first report is he gives some examples where he essentially makes the point that where one is dealing with a bargain it's not correct to focus on one particular aspect of the bargain; one has to look at the overall transaction, as it were. And that's a rejection of the incremental approach. If I could perhaps -- in a sense, her particular examples, we don't reject the criticism of those examples, but one can illustrate the point in a manner of different ways.

What we are really saying, just to perhaps give a further example, is that if a dominant company incurs significant costs in initial development of product or services and over time increases its prices, so at the outset charges modest prices so as to secure a customer base, the logical consequence of this incremental approach is that that company could never gradually increase its prices over time unless each time it is increasing its prices it is commensurately improving the service or quality of product.

And we say that is just economically incoherent, and the fact that it is economically incoherent is borne out by the authorities, which always look at the entire service.

MR JUSTICE MARCUS SMITH: I think, Mr Singla, that's a fair point and what it would be incumbent upon the PCR to show is that there's something particular about the deployment of Off-Facebook Data that is not an incremental evolution of an established business but a departure, an incremental, severable part of the business that is entirely illegitimate. I think that's -- I mean, we'll see what

Mr O'Donoghue says in reply, but let me try to articulate what I think he may be saying and you can explain why it's wrong.

If you take the view that one has an entirely sustainable and capable-of-development business that is based upon on-Facebook data, and you, Meta, are entitled to do whatever you can in terms of developing it, changing the prices for it and so on, but you can leave that on one side because it's an entirely independent and sustainable form of business, what you have overlaid on that is something that is entirely illegitimate -- obviously assuming everything in favour of Mr O'Donoghue -- something that is entirely illegitimate. And you have a gain that is therefore capable of entire segregation from what would otherwise be an entire business.

Now, that involves a number of factual arguments about whether it is severable in that way, but one can understand the case. So what they are saying is that in terms of the entire analysis you can junk the legitimate form of business, the on-Facebook exploitation of data, and all you need look at is the illegitimate form, and you are simply then saying, well, the profit there obtained, in other words profits derived from on-Facebook data, subtracted from the totality of profits including the Off-Facebook Data, that difference is something which needs to be accounted for. There would, because it is very profitable, be a bargain between the users and the provider, Meta.

What those terms would be is what Professor Scott Morton is all about. She's saying, well, it won't be 100 per cent with the class, but it also won't be 100 per cent with the provider. It lies somewhere in between. And the purpose, really, of her economic analysis is to work out where the bargain would be struck in terms of the buying of the consent of the class that needs to be provided in order to avoid the infringement.

Now, I may be getting it completely wrong. That may not be their case. But if it is --

MR SINGLA: I think --

MR JUSTICE MARCUS SMITH: -- why is it wrong?

MR SINGLA: Yes, I think that is actually an encapsulation of what they are saying. And we say it is wrong, for essentially three reasons. I don't want to labour these points, but it is important to just explain at what stage of the analysis that you have just developed our points come in.

So at the end of the analysis, we say you are not entitled to a share of Facebook profits. I think the Tribunal understands that. They are claiming a remedy base on the commercial value of the data to Facebook. We say that's not pecuniary loss. So that's the compensational remedy point that comes in at the end of that analysis.

At the intermediate stage, we say, it's all well and good asserting this counterfactual bargain but how are you actually going from A to C? So that's the causal or counterfactual issue that we say arises as a matter of pleading and methodology. What's the blueprint or what's the basis for your asserting that that would be the counterfactual? You are not proposing to investigate that question. You are simply asserting that that would be the case.

MR JUSTICE MARCUS SMITH: Right.

MR SINGLA: But then the point I'm now on is at the earliest stage of the analysis, so infringement, as it were, working back through the various steps, and at infringement we say that what you just put to me is flawed because it's treating Off-Facebook Data as severable. And there is no magic to Off-Facebook Data. The only reason we are focusing on Off-Facebook Data is they have decided to recast their case by reference to Off-Facebook Data because they think the German case gives them some assistance.

But it's not right to proceed on the basis that there's a severable service. In fact it's common sense that a user is using the Facebook service. But that's why we say actually they start from the wrong premise. If one's looking at the first question, "Is

there an infringement? Is there an unfair price?", it's completely artificial and there's no legal or economic basis for saying, well, I'm going to forget everything that was going on before, and I'm only going to focus on 2014 onwards.

And indeed we say it's completely self-serving because -- I think I made this point yesterday -- if one adopted the correct approach and said, "Facebook users have a service; let's see whether they are paying an unfair price", if they ask what we submit is the right question, the evidence would show there's a huge consumer surplus and there's no way there's an unfair price.

But what they've done is avoid the right question and focus in on post 2014. And we say that's obviously wrong because in my example of the dominant company increasing costs over time one doesn't just ignore all the value that the service or the product was giving pre 2014. I mean, in the pharmaceutical cases one's not looking at: every time the price goes up was the product changing or being developed commensurately? One is actually stepping back and saying: what was the price? What was the product? Was there an unfair price?

So that's why it's a very helpful articulation of what they are saying, but we do say the departure point is completely wrong. It's not right. There is one service, and the fact that we are talking about Off-Facebook Data is not reflective of what users are actually receiving, which is one platform.

MR JUSTICE MARCUS SMITH: Yes.

MR SINGLA: Just two final points on this topic about incremental, because two points emerge in the skeleton which we say again miss the point or don't adequately justify the incremental approach.

First, one sees in the skeleton a mantra that the fundamental question as they describe it is whether Facebook's conduct would have been viable under conditions of reasonable, effective competition for users. And one sees that a number of times

in their skeleton.

In relation to that, first of all that was the submission Mr O'Donoghue made in the *Hg Capital* case and was rejected. That is just a legal point about whether one always needs to ask that question or whether it is simply advisable. But more fundamentally for present purposes, whether or not one is asking that question one still has to look at the whole service. So simply restating a formulation of a legal test, we respectfully submit, doesn't assist on the particular point that we are concerned with, which is whether one can look only at incremental changes to the service.

And the second point, if I can show you at paragraph 61 of the PCR's skeleton, you'll see that it's said at 61:

"PCR's approach applies the principles appropriately."

And then you'll see at 61.1:

"Under limb 1, Professor Scott Morton considers whether Facebook is achieving excessive profits overall, in addition to whether the Off-Facebook Data it is extracting from users is of significant commercial value. Accordingly she analyses the issue of excessiveness by reference to profits and in relation to the platform as a whole and not solely those services associated with Off-Facebook Data."

Then they go on to explain what she does in relation to limb 2. And then you will see a reference to what they say is the fundamental question about workable competition and so on in 61.3.

But then at 62 they say:

"In sum, the PCR's approach reflects the *United Brands* framework faithfully and considers whether the factual Off-Facebook Data Price would be achievable under conditions of workable competition."

Then:

"By applying this framework she necessarily considers whether the provision of

social networking services as a whole justifies the Off-Facebook Data Price."

We say, with respect, that's not an accurate reflection of what she's doing. She's not considering the value of the service as a whole. The only point at which one sees reference to what's going on overall is at limb 1. It's right that she does look at whether Facebook's profits overall are excessive, and I'm going to come on to that. There's a separate point that we make in relation to that. But it's wrong, we say, for them to describe Professor Scott Morton as looking at the value of the social networking service as a whole. That's not what she's doing.

MR JUSTICE MARCUS SMITH: No. Isn't she saying -- again we'll see if Mr O'Donoghue accepts that's the way they're putting their case -- what they're saying is that no part of the Meta offering through Facebook is attributable to the Off-Facebook Data use, and you can provide each and every part of the value to subscribers to the Facebook service without the Off-Facebook Data.

MR SINGLA: Yes. But the problem with that -- I keep coming back to two points. First of all one can't ignore all of the value from the service as whole, because there's no severable service that the consumers are receiving. And secondly, insofar as there were changes you can't just disregard them.

MR JUSTICE MARCUS SMITH: The question can be reformulated in this way, could it not: if there was no access to Off-Facebook Data, would the offering to the class be any different?

MR SINGLA: Sir, with respect, that sort of question might have some relevance at quantification, but we are not -- it's very important to understand we are not talking here about quantification.

MR JUSTICE MARCUS SMITH: Not talking about quantification --

MR SINGLA: Absolutely not, we are talking about whether there was unfair price. And we say, if one is assessing whether there was an unfair price it's actually just not

asking the right question to say, well, was a particular increase in price commensurate with some increase in the service? Actually, one needs to look at: what was the price? Yes, here is a zero price, but we still say it is wrong to focus on part of what was the non-monetary consideration. And one has to ask: what is the transaction? What is the arrangement or the bargain? I mean, the bargain is the word they use. Well, what is the bargain? The bargain is not: I give you some Off-Facebook Data; you give me some part of the Facebook service. It is just nonsense, with respect. And that's the problem.

If one is establishing an abuse here, they need to apply *United Brands* and they need to apply that to the real-world product and the real-world price.

So that's all we say about the incremental approach.

Then in relation to the unfair price abuse we also make a further point, which is, as I've just mentioned and I think we've just seen in the skeleton as part of limb 1, what Professor Scott Morton proposes to do is to say, well, was the price excessive at stage 1? And she proposes to assess that by looking at Facebook profits overall. And then she says, well, I can see that the Off-Facebook Data contributed significantly to those overall excessive profits.

And I could perhaps just show you where she says that. At 18A in the summary of her first report. That's page 228.

MR JUSTICE MARCUS SMITH: Thank you.

MR SINGLA: She says:

"Excessive profits … I consider that the appropriate way to assess whether an unfair price or bargain has been struck is to assess Facebook's profitability so as to consider whether Facebook is achieving a supracompetitive financial performance across both sides of the platform and whether the incremental data for Off-Facebook Tracking is contributing significantly to this financial performance."

Then she says:

"I conduct a preliminary assessment of Facebook's profitability and show that it has persistently made financial returns in excess of cost of capital, a conclusion consistent with the analysis by the CMA."

And then you'll see she goes on to refer to the ATT and the econometric before and after approach:

"Both approaches show significant incremental profits associated with Off-Facebook Tracking."

And if we look at paragraph 200 we see that what she is doing at limb 1, and actually all that she's doing -- just to be clear, this is the scope of the limb 1 exercise -- she's going to consider whether Facebook is achieving an excessive profit overall and then whether the Off-Facebook Data it is extracting from users is of significant commercial value such that it is materially contributing to these returns."

And you'll see it's also helpful perhaps just to look at 209:

"To understand whether the price charged by Facebook was excessive I have undertaken a preliminary analysis of publicly available data to estimate incremental revenues and profits earned by Facebook … and Facebook's overall level of profitability."

Just to be clear, what she's saying at limb 1 is, I'm going to look at overall profits because the overall profits were excessive. So nothing incremental about that question. They are saying the overall profits were excessive.

And what we say really in relation to this is really two points. The first is, insofar as she's saying at the moment that there's evidence to think that there were excessive profits, that's based only on the CMA, which was something -- they say in their skeleton that Facebook didn't challenge what the CMA had to say, and that is wrong.

But we say it's not sufficient simply to rely on what the CMA has said in relation to

whether the profits are excessive. There needs to be a proper blueprint for analysing that question, because it's so critical to what they are doing at limb 1.

But secondly, the analysis is not only to work out what Facebook's profits actually were, but also whether they were excessive and whether they were excessive taking into account the multi-sided nature of the market.

And what we don't see in the expert evidence is any real explanation of how they are going to substantiate or how she is going to investigate this question of whether the overall profits (a) were excessive and (b) were excessive taking into account the two-sided nature of the market.

And that is obviously something that the Tribunal was very focused on on the last occasion. The point arises in a slightly different way with the recast case. But where it really arises, it arises in two main places, first in relation to counterfactual. The two-sided nature of the market is relevant there because one has to think, well, if you take out the abuses, what Facebook might have done needs to take into account the two-sided nature of the market.

But here the two-sided nature of the market really comes in as well, because if your starting point at limb 1 is: your overall profits are excessive; that's how they are going to prove the unfair price, well, okay, but how are you going to prove that the overall profits were excessive and how are you going to prove that they were excessive notwithstanding the two-sided nature of the market?

And we say that that actually runs straight into the problems that they had on the last occasion.

Sir, that's all I really wanted to say on what we submit are the three fundamental problems. I have a point on suitability and cost-benefit, but I wonder, because I will need to refer to some confidential material and it may be convenient to hear from me on those points slightly later in the afternoon rather than disrupt the hearing, because

I think it may be necessary -- unless --

MR JUSTICE MARCUS SMITH: Do you want to sweep them into your response to Mr Bacon if you have any? Would that be a good --

MR SINGLA: The point simply is a practical one, which is I may need to ask you to sit in private, and I don't want to disrupt the hearing now.

MR JUSTICE MARCUS SMITH: That is very helpful and considerate. Yes, our preference would be to ensure that you raise these points but later on if we can do that.

MR SINGLA: Yes, I won't be very long. I think I have stuck to my agreement on time.

MR JUSTICE MARCUS SMITH: That's very helpful, Mr Singla, but don't forget. We will try not to.

MR SINGLA: Sir, I'm grateful.

MR JUSTICE MARCUS SMITH: Thank you.

Submissions in reply by MR O'DONOGHUE

MR O'DONOGHUE: In terms of my order of points I want to start with a couple of contextual preliminary remarks and then we can touch on a couple of certification cases. I then want to give you a brief summary of our case in a nutshell. But the bulk of my submissions will obviously be focused on the four points Mr Singla has helpfully teed up this morning. So I will get to those asap.

Obviously, sir, the three critical points for my purposes are the evidence on the positive case, the question of compensatory damages, and the incremental approach Mr Singla has criticised, and then touching briefly on the profitability criticisms.

In terms of preliminary points, sir, two points if I may. First of all the context of this case: a dominant, indeed we say a monopoly firm, using and misusing data

belonging to those who otherwise interact with the platform is one of if not *the* most important aspects of competition law enforcement globally. The President described the case yesterday as important, cutting edge and innovative, and we respectfully agree and aver that point.

In my submission it is also hardly profound futurology to suggest that the role of competition law in data based markets will expand materially going forward. This is not an *in terrorem* submission to say that the broad and flexible framework that the competition legislation represents must be capable of adapting to these data-driven developments. And indeed, if not, vast sectors of the economic would for practical purposes become off-limits for competition law, which would be obviously unacceptable.

And in this context the Tribunal's collective regime is particularly important, particularly of course for consumers such as in this case who realistically have zero prospects in the real world of vindicating their rights against someone like Meta, one of the largest and most profitable companies in the world.

The prospect of an individual consumer litigating for £50 or £100 against Meta is frankly for the birds.

The Tribunal in this context of course doesn't need me to tell it that the law on unfairness is a developing area of the Tribunal's case law and indeed that of the appellate courts. Since the Tribunal's original judgment in these proceedings last year we've seen a large number of cases, including in particular CPOs, concerning unfairness abuses. I'm referring of course to *Liothyronine*, *Hydrocortisone*, the second *Phenytoin* case, *Boundary Fares*, *Kent v Apple*, *Ennis v Apple*, *Apple Batteries* and *Neill v Sony*. And several of those cases are also likely to be before the appellate courts in the near future.

Sir, of course the reason I raise this is to make good the point that this is very much

a developing area of law, which, all else equal, makes it much less susceptible to summary or interlocutory determination, which of course is what Mr Singla seeks to do today.

MR JUSTICE MARCUS SMITH: That is true, but I think the corollary of that is that it is incumbent on those who are pushing the boundaries in the developing area -- I quite take your point there -- to be absolutely clear about the boundaries they're pushing.

MR O'DONOGHUE: I accept that. There is a balance; I accept that.

Now, the President put to Mr Singla yesterday that his argument under remedy in a sense prove too much in that no unfairness case when it comes to user data would on his case pass muster. And it is of course a pretty extraordinary submission to say that an abuse of dominant position cannot lead to any damages for consumers. It is a particularly extraordinary submission in the context of a CPO regime whose very *raison d'être* is to facilitate the vindication of consumers' rights. The right to damages engenders defendants' compliance with competition law.

I'll just give you a reference on this, sir, it's the *Le Patourel* case in the Court of Appeal, in tab 32 of the authorities bundle.

MR JUSTICE MARCUS SMITH: Volume 4.

MR O'DONOGHUE: Volume 4. 1566, paragraph 29:

"The principal object of the collective action regime is to facilitate access to justice … in particular consumers who would otherwise not be able to access legal redress ... finally, emphasis is laid on the benefits to judicial efficiency brought about by the ability to aggregate claims."

MR JUSTICE MARCUS SMITH: Yes.

MR O'DONOGHUE: So the collective regime as an element obviously of compensation for consumers and an element of deterrence in the public interest

vis-á-vis defendants.

The second preliminary point, sir, is to be clear what is not challenged in these proceedings by Meta. It is not suggested that the conduct in question is not at least well arguable for the purposes of a strike out or summary judgment, subject of course to Mr Singla's incremental point, which I'll deal with and we say that's a bad point.

The corollary of that is that if there is an arguable case on abuse then there is in principle a right to damages and there's a right to an effective remedy.

In terms of the counterfactual and methodology it is also, on Meta's part, essentially an evidence free and purely negative approach. They have resorted to criticising aspects of the PCR's methodology, based on assertion but without putting forward a single concrete item of evidence to support their assertions.

I will come to various examples, but just to give you one for now: as Mr Singla just outlined, the PCR relies on the CMA's recent analysis of Meta's profitability, and Mr Singla's skeleton says there are serious flaws in Professor Scott Morton's profitability analysis. But what Meta does not say is what is wrong with the CMA's conclusions. It did not challenge them at the time. It does not challenge them now. There is a single footnote in Mr Parker's second report, if we can look at this at A12/842, please.

MR JUSTICE MARCUS SMITH: Mr O'Donoghue, I don't want us running up to 4.30 or 4.25 with really important questions unaddressed. You've quite rightly said that the regime of collective proceedings is to ensure collective redress and access to justice. And of course we accept that. But I don't think it is good enough for you to say that if we have an arguable abuse there must be a loss somewhere. It does seem to me that there is a degree of uncertainty -- it may be entirely our fault -- but there's a degree of uncertainty at least in my mind as to how you are classifying the

loss in this case.

Now, Mr Singla says it's asserted by you to be a pecuniary loss.

MR O'DONOGHUE: Yes.

MR JUSTICE MARCUS SMITH: If it is, then I don't understand how it is such a thing, because it seems to me it is a claim that you, the class, have been deprived of something for which you could have charged, which is not a loss, it's a loss of a gain if you like.

Now, I have no problem in that being the way you put your claim. But if it is a typical tortious loss that you are asserting then it does seem to me that what Mr Singla is saying is having a degree of force. You are straight in *Lloyd v Google* territory, where you are going to have to show on an individual basis that the abuse of data has occasioned loss in the true tortious sense.

Now, I don't have problem in pushing the boundaries but I would like to know which boundaries are being pushed, if they are being pushed.

MR O'DONOGHUE: Indeed. Sir, I will come to that in some detail. To be clear, I am scene setting at this stage.

MR JUSTICE MARCUS SMITH: You are, but I think we have the scene and we'd like to get to the granularity.

MR O'DONOGHUE: Yes, sir, I will move on.

MR JUSTICE MARCUS SMITH: Okay.

MR O'DONOGHUE: Point taken.

Sir, just to give you our case in a nutshell, and I will then immediately come to the question of counterfactual and then the question of compensatory damages.

Our case in a nutshell can be divided essentially into a three-phase story. At the time Meta was a new entrant in the early 2000s it was competing on the basis of being a privacy-centric company. We can pick this up at the Claim Form at A1, page

18, please.

MR JUSTICE MARCUS SMITH: Mr O'Donoghue, why don't you set out a series of propositions, just without reference, and then expand upon them. So just give us -- it's a three-phase story, you say?

MR O'DONOGHUE: Yes.

MR JUSTICE MARCUS SMITH: Give us the phases and then we can understand the overall picture and you can expand it.

MR O'DONOGHUE: Yes.

Phase 1, new entrant, very much focused on maximising user privacy.

Phase 2 we see Meta dip their toe in the water in an effort to dramatically ramp up data collection, and then facing such user resistance to those data collection practices that they had to be reversed. This is the Project Beacon from 2007. And Mr Zuckerberg called that initiative a mistake.

And what this episode shows is that when at least there was some semblance of competition it was not simply possible for Meta to foist Off-Facebook Data extraction on users. The absence at that stage of a monopoly position allowed the users to push back.

Phase 3 then is really the early 2010s to 2014. By this stage the market has tipped in Meta's favour which then allowed it to behave with more or less impunity when it came to forcing data extraction on users. I will quickly give you the reference, sir. There was historically a user-based referendum on privacy changes. That was abolished by Meta because there was a roadblock. We have set out in paragraph 50 of our Amended Claim Form a series of frankly deceptive activities by Meta in relation to its data collection practices. We know the Off-Facebook Tracking was introduced in June 2014. And we can go quickly, sir, to paragraph 91 of the Claim Form. It's internal page starting at 91B.

Sir, just to give you a sense of the scale and scope of Off-Facebook Data tracking.

"Two popular menstruation apps shared extensive sensitive personal data with Facebook as a result of code added by Facebook. They found ... *inter alia* information on users' mood, their use of contraception, the date of the last period, the duration of their periods, the duration of their cycles."

Then (c):

"20 NHS Trusts had been sharing browsing with Facebook … about the user viewing a patient handbook for a particular HIV medication, with the name of the drug and the NHS Trust in question, along with the user's IP address and details of their Facebook user ID."

The Metropolitan Police, again, sharing sensitive data with Facebook. And the quotation:

"Facebook received a parcel of data when someone clicked a link to securely and confidentially report rape or sexual assault. This included the sexual nature of the offence being reported, the time that the page was viewed and the code denoting the person's Facebook account ID."

Then 92:

The Kosinski study shows that " easily accessible digital records of behaviour, Facebook likes, can be used to automatically and accurately predict a range of highly sensitive personal attributes including sexual orientation, ethnicity, religious and political views, personality traits, intelligence, happiness, use of addictive substances, parental separation, age and gender."

Then the last sentence in that quotation:

"For example, merely avoiding explicitly homosexual content may be insufficient to prevent others from discovering one's sexual orientation."

Then at 93 there's the suggestion not merely of reacting to preferences but altering

users' future behaviour.

So the Off-Facebook Data is data of the utmost sensitivity and importance. There are reports for example of women who have miscarried being continued to be bombarded with pregnancy-related product advertisements whilst on Facebook.

MR JUSTICE MARCUS SMITH: Right. So your first point is that there is a clear distinction to be drawn between On-Facebook data and Off-Facebook Data.

MR O'DONOGHUE: Yes.

MR JUSTICE MARCUS SMITH: And that is a bright line.

MR O'DONOGHUE: Yes.

MR JUSTICE MARCUS SMITH: And what do you say about Mr Singla's point that in fact it's all data which is aggregated and monetised generically by Facebook?

MR O'DONOGHUE: Sir, that is chronologically untrue, because of course for many, many years there was only on-Facebook data. So one can see chronologically the Off-Facebook Data is something new and discrete.

Now, of course there is some triangulation with the on-Facebook data. We see this from ATT. The additional commercial value generated by the Off-Facebook Data specifically is astronomical. It is night and day compared to the on-Facebook data.

MR JUSTICE MARCUS SMITH: I mean, what's the answer to Mr Singla's point that this is just a business developing. They are seeking to monetise what they can in the way any undertaking does. It provides a service and it seeks to obtain the maximum value from its consumer base for that service?

MR O'DONOGHUE: Well, the terms and/or prices at which these additional data are extracted may well be abusive, in the same way as someone says, well, I'm expanding my service, for which I can charge a premium, and that premium may well be (inaudible word). Nothing different there.

MR RIDYARD: One point Mr Singla made was about the need to look at the overall

business and the overall profitability of Facebook at a point in time. But your comments here are flagging up to me the need to take a dynamic look as well because, in these earlier phases, what if Facebook wasn't making much money at all or was loss-making? Which is quite plausible in some of the earlier phases. When you look at the snapshot of the profitability into 2024, to what extent do you need to take into account the journey that the company -- the dynamic incentives for rewarding winners when they have won a long-fought battle?

MR O'DONOGHUE: Sir, two points. First of all, we have pleaded and it has not been contradicted that prior to Off-Facebook Data being introduced in June 2014 Meta was already enormously profitable.

MR RIDYARD: That doesn't address my point, which is, how big a payoff does it need now to justify the *ex ante* risks and investments that it made, you know, ten years ago?

MR O'DONOGHUE: Well, the second point then, sir, is that by 2014 the market has tipped. We say at that stage, when you have acquired effectively a monopoly position, to then foist on users these dramatic data extraction requirements, that is unnecessary and disproportionate and indeed we say at an unfair price.

MR RIDYARD: I know you are saying that, but as you were going through it it was making me think that maybe this is a justified payoff from what happened earlier.

MR O'DONOGHUE: Well, sir, this is I think one of the two or three most profitable companies in human history. Most of those profits, as we understand it, are driven by Off-Facebook Data in the context where they were already substantially profitable prior to extracting Off-Facebook Data. And we say that if that is the payoff it is manifestly excessive.

MR JUSTICE MARCUS SMITH: So, are you saying that your case would fail if Facebook were not profitable simply on the basis of on-Facebook data exploitation?

MR O'DONOGHUE: Sir, there's no guarantee or no right to an automatic profit. It may be that it turns out to be a bad investment decision or the fixed costs are so high that they can never be recovered.

MR JUSTICE MARCUS SMITH: Right.

MR O'DONOGHUE: But in any event we say, and we have not been contradicted on this, that on-Facebook data was enormously profitable certainly by 2014. So we say it's a theoretical point at best.

MR JUSTICE MARCUS SMITH: But taking Mr Ridyard's point of having to look at the overall history of investment in any new business -- and let's talk hypothetically here. Let's suppose that Meta invested billions in trying to develop their service, and those costs historically incurred need to be recovered. And let us suppose that the exploitation of on-Facebook data, which is how the model starts, is enough to recoup some of those costs and, perhaps over many years, all of them. But developing the business incrementally, Facebook, as they get established in the market, seek to extract more by way of price, the in-kind data that they received, so that they can recoup their costs more quickly using Off-Facebook Data.

Now, you may be right, they may be profitable on the basis of purely on-Facebook data. But why should one ex ante ring-fence and segregate the profits derived from on-Facebook data and the profits derived from Off-Facebook Data simply on your say-so? Isn't Mr Singla right when he says that when you are looking at what is an unfair price -- here the price being the extraction of data and its value to Meta -- you need to take an holistic approach and say, well, if you are taking as a price this data, the question is, looking at the overall service and what is received in return, you need to look at the whole service and the offerings either which way in the aggregate. And your *ex ante* disaggregation of on-Facebook and Off-Facebook Data is simply an assertion which can't be made good without some kind of

methodology.

MR O'DONOGHUE: Sir, I will come to the incremental point shortly.

MR JUSTICE MARCUS SMITH: Okay.

MR O'DONOGHUE: But --

MR JUSTICE MARCUS SMITH: We are already at the incremental point because you are drawing a bright-line distinction between two forms of data where the very point, as I understand Mr Singla to be making it, is that there is no such distinction to be drawn without it being justified.

MR O'DONOGHUE: Sir, you have my point on the chronology that in fact --

MR JUSTICE MARCUS SMITH: Purely a chronological point.

MR O'DONOGHUE: It's more than that, sir, of course. What is lost in all of this, of course, is that the bargaining parameter we put forward is that they would continue to keep 50 per cent of the Off-Facebook value. It is not the case that the *ex ante* reward is being completely ignored. There is a balancing of producer and consumer services, but there is a substantial reward of tens of billions of pounds or dollars in aggregate which they would, on our bargaining parameter, be permitted to keep going forward.

MR JUSTICE MARCUS SMITH: But all that's saying is that the gain to Meta ought, as a matter of fairness, to be shared. That's just a gains-based analysis, isn't it?

MR O'DONOGHUE: I will come on to the compensatory damages question. In terms of hard cash --

MR JUSTICE MARCUS SMITH: Yes, but that's not how this process works. We start with a claim, and what I'm trying to understand is the basis for the very hard line that Professor Scott Morton draws between two different types of data.

On the face of it it's quite hard to understand why the line is drawn in that way, because the data is aggregated and sold as a whole. There's not one service where

you are saying, okay, here, advertiser, you can get eyeballs derived from Off-Facebook Data, and here is a separate service where you can get eyeballs derived from on-Facebook data, and here's a third where we aggregate the two. What you get is an aggregation of the data on-Facebook and Off-Facebook which provides a unitary service.

MR O'DONOGHUE: Sir, on Professor Scott Morton's model, that isn't correct. What she has done is extrapolated from ATT to work out the incremental profitability that is associated solely with Off-Facebook Data. And the other --

MR JUSTICE MARCUS SMITH: I'm not disputing that there isn't value in the Off-Facebook Data and that you can attribute a value to it. My point is not that. My point is that, in terms of how one extracts value, one isn't selling two separate services in terms of data streams. Facebook are selling a single corpus of data. Well, they are not selling data, they are selling what the data identifies, but you will permit the shorthand. They are not separating the two. They are selling a single aggregated pool of data.

MR O'DONOGHUE: Sir, that's true, but one can causatively isolate the component associated solely with Off-Facebook Data.

MR JUSTICE MARCUS SMITH: Okay, let's assume that's right, that you can say there is a specific value derivable from a specific form of data, but nevertheless it is monetised in the aggregate. Why does the fact that you can identify a specific value to the Off-Facebook Data matter in terms of the distinction you are drawing?

MR O'DONOGHUE: Sir, it's my before and after point. We understand pre-monopoly that they were able to monetise the service very profitably through the Off-Facebook Data. We then transition into a monopoly and it is only at that stage, coupled of course with the network effects, that we tip into Off-Facebook Data extraction. It's a classic before and after.

The other point, of course, sir, is that one can see in very clear and tangible terms -- we saw what Off-Facebook Data entails. It is millions of websites all around the world, huge numbers of apps all around the world and the Meta services other than Facebook itself. And there is a fundamental question, which is, for example, why, for me to send a photograph to my mother on Facebook, does Meta need to track me all around the world on millions of websites and millions of apps?

There is a question as to whether those particular data are necessary and proportionate or, to put it in *United Brands* terms, whether the consideration paid by the user for continuing to access the service is too high, put in those terms. So we say there's a substantial qualitative difference between activity on-Facebook and activity on websites and apps Off-Facebook.

And to put this in competition terms, we say that under conditions of effective competition Meta could simply not get away with imposing Off-Facebook Data requirements on users. That was the Project Beacon experiment which blew up in their face. So we have what we say is a classic before-and-after experiment, and the after period is the monopoly period in which the data extraction we say, certainly absent the payment, simply should not have taken place. So it is causally related to the abuse.

Now, to put this into more economic terms, if we can go to Professor Scott Morton's first report.

MR JUSTICE MARCUS SMITH: Yes.

MR O'DONOGHUE: A3, paragraph 109/255.

MR JUSTICE MARCUS SMITH: Paragraph 109.

MR O'DONOGHUE: Yes.

MR JUSTICE MARCUS SMITH: Thank you.

MR O'DONOGHUE: She says:

"The two-sided nature of Facebook's business model means that the users are both consumers of the Facebook platform but also providers of the necessary input to Facebook's advertising business. Facebook must but that input by offering users terms for providing that input. Facebook buys this input with the provision of the social networking service ... Seen through this lens, Facebook's users are akin to workers. They provide their labour, attention and data, as an input in the production process. As Facebook is the dominant buyer of users' attention as the dominant social network platform, it has market power over users. This allows Facebook to dictate the wage for users' labour. In the present case this leads to the concern that users have been insufficiently compensated for their labour, allowing Facebook to make significant incremental profits."

Then she says:

"Because this is an important way to frame the issues in the present context, I briefly discuss the economics of monopsony power."

Now, pausing there, one point Mr Singla made is this idea of the users being workers is a new one. As you can see it's been in the case from the outset. We then go over the page to 118:

"I predict under conditions of effective competition, social network platforms would compete for users' attention by compensating them for being on the platform … it is essential for platforms to secure the attention of users because under competition there is a crucial link from the productivity gains and associated pass through of these gains from platform to users."

Then 119:

"The factual situation in this case however my assessment is that Facebook has been able to avoid compensating its users because of its dominant position in the provision of social networking platforms."

So put in economic terms, you have a monopoly purchaser effectively of labour or eyeballs or attention, and they can depress the wage or compensation that is paid to the users on the platform.

Then you see in the second half of 119:

"This is similar to the monopsolistic firm in the example above that does not increase wages because it is more profitable not to adequately pass the productivity gains through to users but rather to keep the profitability per user high."

So sir, in basic terms that is how the case is put economically and factually.

I'm now going to move on to respond to Mr Singla's three core points.

MR JUSTICE MARCUS SMITH: Yes.

MR O'DONOGHUE: Sir, would that be a convenient moment?

MR JUSTICE MARCUS SMITH: As we started at 10.00, I think if it's convenient for you we will rise for ten minutes.

(11.21 am)

(A short break)

(11.32 am)

MR JUSTICE MARCUS SMITH: Mr O'Donoghue.

MR O'DONOGHUE: Sir, let me give you three quickfire references before I move on to my first main point. To pick up on this dynamic incentives and fruits of labour point. If we could go to Professor Scott Morton's report at A/291.

MR JUSTICE MARCUS SMITH: Yes.

MR O'DONOGHUE: You'll see at 270:

"Can the data extraction be justified as the fruits of Facebook's prior investment?"

Then you see at 271 there was a 36 per cent EBIT margin 2013 and an absolute EBIT value of 2.8 billion.

That's one reference. Then, sir, just over the page to 262 and 263, at 263 she

says --

MR JUSTICE MARCUS SMITH: Paragraph 263?

MR O'DONOGHUE: Yes. She says:

"I see some parallels between the discussion above and *Hydrocortisone* ...the *Hydrocortisone* Judgment distinguishes between three cases."

Then 264:

"The situation of transit from case 2 to case 3 seems to me to be an apt description of the situation with Facebook, which has seen the market tip in its favour and has been able to rely on the barriers to entry created by its network effect to impose conditions that would not be achievable under a competitive or contestable market."

I think what she's saying there is that there was a period until sometime around the middle of 2014, which was perhaps case 2, when we have tipped into case 3 in the interim.

Finally, sir, one of the questions was, well, how can one segregate on- and Off-Facebook Data? Of course, one of the other things we know from ATT is that for the small proportion of users who continue to receive -- who have opted out in effect, they are only tracked on the basis of on-Facebook data. So we have an identifiable cohort today within the Apple user base who are only subject to on-Facebook data tracking. So they are real people in the real world who have been segregated, for want of a better word, in that fashion.

My first point, sir, is to respond to Mr Singla's criticism, well, we have pleaded a negative case, but what is the basis for the positive case in terms of the counterfactuals we purport?

Now, just to build this up, sir, in a couple of layers. The first layer is, we have set out a basis in fact for a counterfactual involving a payment to users. The first building block is that users strongly dislike Off-Facebook Data tracking. We have seen in the

Claim Form Project Beacon 2007, paragraph 95(a).

We've seen in response to the addition of on-Facebook data tracking the rise of ad-blocking software by users to try to resist new tracking policies. That is 95(k). The clearest illustration, of course, of the dislike of Off-Facebook Tracking is ATT, where the overwhelming majority of users when given at least some semblance of a choice simply refused to consent to Off-Facebook Data.

Then there's the evidence in appendix A2 of the first Scott Morton report where she sets out a range of literature on users' latest attitudes to privacy. So that is the first building block: the dislike of Off-Facebook Tracking by users.

The second point, which is the more substantial one, is that Professor Scott Morton does deal in considerable detail with why she considers in the counterfactual the transfer of value would have occurred absent the abuse.

If we can go to her first report, sir, I just want to take this reasonably slowly because it's important. If we could start at 282, please, which is paragraphs 227 to 229.

MR JUSTICE MARCUS SMITH: Yes.

MR O'DONOGHUE: At 227 she says:

"Had Facebook offered users an informed choice as to whether to permit Off-Facebook Tracking it is highly likely that most users would not agree to be tracked without some kind of inducement.

"This is consistent with the experience of ATT where, as I set out in section 2.5, most users did not agree to be tracked."

Then 228:

"Given the value of Off-Facebook Data to Facebook's advertising operations, Facebook would have strong incentives to induce users to agree to Off-Facebook Tracking. As long as the value to Facebook from tracking exceed the cost to users of giving up their data … I would Facebook to find a value transfer sufficient to

encourage users or at least a significant majority to voluntarily give up their data."

That's the starting point.

Then on a few pages at 318 to 321, the Tribunal will see an entire section, "Why is it realistic that consumers would have been compensated in cash or in kind for use of their data?"

You will see then at 318, 319 and 320 there is reference to some recent CMA studies. But at 321, an important series of evidential points. She says there are multiple examples of platforms compensating their users in other industries. And she refers to credit cards. We are all familiar with these reward schemes. Third sentence:

"There are also examples of digital companies compensating users for their data. Tapestri offers users cash in return for location data – it is estimated that users can earn between $8 to $25 a month. Meanwhile Invisibly offers users access to paywalled articles in exchange for demographic and behavioural data. Similarly, Caden aims to aggregate user data across various online services that are then sold to other companies."

We see $10 a month. And Facebook itself has also previously paid users for their data. “From 2016 to 2019 Facebook paid users up to $20 a month to install the Android Facebook research app which gives Facebook access to users' phone and website activity."

Then at 324 there's an article from Mr Parker where he says:

"One interpretation of fair is to correct any imbalance of bargaining power in the two sides and to replicate the outcome of negotiations in a competitive market, in other words a fair deal for both sides."

Then you will see reference to FRAND cases in terms of a fair bargain.

We then jump forward to 330, and you see where she addresses in further detail the

question of incentives. She says at the end of 331:

"My analysis derives the role of commercial value of data of Facebook by isolating the incremental profits associated with the abuse concerning Off-Facebook Tracking."

And then a couple of pages on at 344, second part:

"Users bargain with Facebook over whether they will agree to Off-Facebook Tracking and have the option to use Facebook without Off-Facebook Tracking if no agreement is reached."

And 345:

"This differs from the actual where Facebook maintained a take-it-or-leave-it offer, they could not continue to use Facebook without giving up their Off-Facebook Data. This meant that users' threat point was extremely weak as if they did not agree to the Ts and Cs they would lose access to Facebook entirely."

MR RIDYARD: Mr O'Donoghue, just trying to understand the balance of this negotiation. So to pluck a number, if it's worth £40 per user for Facebook to get the Off-Facebook Data, but then you say that users don't like giving up their data, does her prediction that a deal will be done -- does it follow that the cost that users associate with giving up their data must be less than £40?

MR O'DONOGHUE: Yes. Or to put it differently, given that I think it's common ground that there would only ever be a single price to all users, it must be a high enough price to satisfy the average of users' data costs.

MR RIDYARD: Well, if it is just high enough to satisfy the average one then you would only get half of the people signing up, wouldn't you?

MR O'DONOGHUE: Well, it would be a single offer --

MR RIDYARD: Only half of them will accept it.

MR O'DONOGHUE: -- and it's money for nothing.

MR SINGLA: Sorry to interrupt, but can I make clear that it's not common ground that there would only be a single price. This is part of our problem that we say there are a whole manner of things that could happen.

MR RIDYARD: Okay, but even before we get into that, just keeping it simple, let's say it's a simple price, a £40 offer per user. If that equates to the average cost to the user -- obviously that's a subjective value that each individual user must attach to losing their privacy.

MR O'DONOGHUE: Yes, well --

MR RIDYARD: If £40 is the average then you will only sign up half of them.

MR O'DONOGHUE: There is a question the President raised, which is, depending on user uptake the pie may stay the same, get bigger or indeed shrink. So there may be a question of scale effects in terms of the impact on the pie. At this stage, what Professor Scott Morton processes is a single figure based around the average user. And of course one of the inputs in the model is the cost to users in giving up their data.

MR JUSTICE MARCUS SMITH: The (inaudible) cost -- what do you mean?

MR O'DONOGHUE: Sir, it's picked up in 54.3.

MR JUSTICE MARCUS SMITH: Which paragraph?

MR O'DONOGHUE: A whole section, sir. It's 391. (Pause). It's long, so I wasn't going to read it all.

MR JUSTICE MARCUS SMITH: No, no, I was hoping for just --

MR O'DONOGHUE: The two building blocks are, first: "Experimental studies to elicit value of product attributes and willingness to be tracked."

And then user surveys and conjoint analysis. So they are the building blocks.

To Mr Ridyard's question, the answer is, of course there may well be users who say, well, I value my data more than £40. And of course, technically speaking the loss to

them may be -- well, the cost to them may be even greater. And the choice they are faced with is, well, would you like £40 or nothing?

MR JUSTICE MARCUS SMITH: Yes.

MR O'DONOGHUE: Then if we jump forward to 421 there is a further section entitled "Accounting for variation across class members in their cost of giving up data."

You see at 422 there's the average class member point. Again, I would invite the Tribunal to read that. But to come back to my core point about the counterfactual likelihood, we then go back to 357 and 360. 357:

"Facebook will be better off if agreement is reached. Meanwhile, users will be worse off, as evidenced by the preference for privacy in the ATT natural experiment. Therefore in a counterfactual bargain the model predicts that Facebook must convince users to agree to a deal by compensating them."

Then 360:

"Because Off-Facebook Tracking increases Facebook's profits it is in Facebook's interest to come to an agreement with users. As set out above, as long as those profits exceed the cost to users it will be possible and also rational in all of these situations for Facebook to compensate users and make a value transfer to them to obtain their consent Facebook will have an incentive to make such a value transfer because its profits, even net of the value transfer to users, will be higher than if it could not obtain consent."

Now, in a sense we would suggest this is blindingly obvious because the prorated number we get from ATT is that just based on the Apple user-base alone there was an incremental revenue hit of $10 billion.

Now, we understand that iOS devices are about 20 or 30 per cent of the market. But if this is extrapolated across the entirety of the device user-base plus desktops, we

are looking at something of the order of magnitude of $50 or $60 billion.

And the suggestion that, faced with the loss of all or most of this incremental profit stream, Facebook would shrug its shoulders, sit there not think about paying a penny or a cent, is completely and utterly unrealistic. They have overwhelming incentives --

MR RIDYARD: Isn't that what it has done in respect of the iPhone users?

MR O'DONOGHUE: But I will come to the ATT and SNA examples specifically. The point we get from ATT is, with respect, a slightly different one. It's essentially twofold: one, most users intensely dislike being tracked off Facebook and, two, it gives you a starting point, only a starting point, for the incremental profitability impact.

The relevant metric, in my submission, isn't the subset of iOS users, it's all device users, plus desktops. And what that allows you to do is to pro-rate across all of the users, which is the relevant counterfactual question, and not just the Apple users.

I will come back to ATT and SNA because there are particular points we have picked up there as well.

What is striking, we say, about Meta's response to these points is really what they don't say. There is no pushback from Meta that users strongly dislike Off-Facebook Data tracking. There is no suggestion that the PCR is wrong that other platforms and businesses pay users for their data. There's a half-hearted attempt in the skeleton but notably not in any sworn evidence to downplay the fact that Meta has paid users in the past. And there is no attempt to say that the PCR's factual case that Meta would have had overwhelming financial incentives to pay users in the counterfactual is wrong. Look to ATT. There is some hinting by Mr Singla that a payment cannot be assumed but it may not be entirely straightforward and that there are other possibilities. But not a shred of evidence has been filed by Meta on this point.

Now, it would have been the easiest thing in the world, in my submission, for Meta to file a short sworn statement saying, "We have in fact analysed on multiple occasions paying users and we have always said no", and to give reasons for this.

And instead of doing this, Meta has chosen its words and Mr Parker has chosen his words very carefully indeed. And this is concerning, in our submission, because if Mr Singla gets his way on his strike-out, and if, as seems overwhelmingly likely to be true, there are documents in which Meta has considered paying users, those documents would never see the light of day in this litigation, on the basis that at this stage we have not, they say, done enough on plausibility.

And we say, at the certification stage, the approach of destructive activity, a negative case, casting aspersions on plausibility but without a shred of concrete evidence, will not do. It would be profoundly unjust to the PCR if all this were permitted to be gainsaid at this stage.

Now, just to give one authority on this, it's the *FX* case. It's in tab 47 of the authorities, volume 5. And it's paragraph 80, 2582. Mr Justice Green says:

"I should add one final observation concerning the applicant's criticism of the banks and the position they adopted. Having declined, no doubt for tactical reasons, to put forward an application to dismiss backed by expert and other evidence and even early disclosure, it is said by the applicants that the banks opportunistically stood on thr slide line throwing rocks …If the CAT has concerns, it always has the option to adopt a 'wait and see' approach."

And we say it would be quite extraordinary, in the absence of a shred of evidence from Meta, for the Tribunal at this stage to say, well, as a forensic or plausibility question the counterfactual of payment -- as put forward in some detail in our pleading and in Scott Morton -- doesn't even pass the lab test and therefore all this must be struck out at this stage without more.

We say that would be quite unjust, premature and it really rewards the defendant for a purely tactical approach.

Now, of course the Tribunal will have well in mind that on these particular issues there is a profound asymmetry of information. At this stage all the PCR can do is fillet the public materials for what we can understand from those.

Meta knows its business better than anyone. What it has actually done in terms of consideration of payment will be a fundamental question of this litigation. And the idea that all this can be swept aside at this stage on Mr Singla's say-so we say is profoundly unattractive.

So that's all I wanted to say in relation to the positive case on the counterfactual.

We say in both the Claim Form and in Scott Morton we have articulated with as much specificity as we can at this early stage, given the asymmetry of information why we say a payment to the users is a likely and plausible counterfactual.

Turning, sir, to the second point, which we know is of keen interest to the Tribunal, which is the question of the gains to Meta and compensatory damages.

Sir, if I may I want to look at this in two slightly different ways. I want to go to some of the key domestic cases which we say show very clearly that the counterfactual damages we put forward are a compensatory loss and nothing else, and the mere fact that in that context one of the inputs being considered is profits to Meta does not transmogrify our claim from a compensatory damages claim into something which is impermissible.

We say it's entirely consistent with compensatory principles for some regard to be had to Meta's profitability as part of the damages assessment. And I will make good that point.

Now, what I want to do is really start with the other end of the telescope, which is to look at this in terms of a competition law infringement and counterfactual.

An unusual if not unique feature of an unfairness abuse is that the counterfactual to an unfair bargain involves the parties having to conclude a fair bargain.

To state the obvious, there isn't much point condemning an unfair price if in the counterfactual the dominant firm can simply re-impose an unfair price. That would be completely circular. And we would respectfully suggest that Mr Ridyard was entirely correct when he said yesterday that in an unfairness case you must, in the counterfactual, deactivate the exercise of market power, otherwise you are back to square one.

And indeed, the same is true in a FRAND case, which as the President found in *Optis* is essentially a first cousin of the generic unfairness abuse, in the counterfactual the parties must apply FRAND terms. They must negotiate under the shadow of FRAND.

Now, in its basic and essential form, Professor Scott Morton's model deactivates the abuse of exploitation of market power and not dominance itself. Indeed, in respect of the revenues from on-Facebook data and Meta's position in relation to advertisers, these are left entirely untouched by the model.

In other words, it is the exercise of market power that is switched off by resetting the bargaining position. It is not simply removing dominance for its own sake or for the hell of it.

So the starting point is, the law on unfairness requires a fair counterfactual bargain to take place. Now, we say, once this is understood as a legal obligation, which it is, it is not difficult then to see how the dominant firm's profits will play at least a role in the counterfactual assessment. But that is not some improper gains-based or user damages remedy. It is simply giving effect to the remedial obligation to have the fair bargain in the counterfactual. And what the counterfactual model or the fair bargain is trying to do is to work out essentially a fair intersection between the willingness to

pay of one party and the willingness to accept of the other.

It is, in the words of *Hydrocortisone*, working out a fair balance between consumer surplus on the one hand and producer surplus on the other.

Sir, you made the point entirely correctly that the balance of producer surplus referred to in paragraph 325 of *Hydrocortisone* is at that stage dealing with the question of liability. Equally, of course, in the counterfactual remedial stage the balance between producer and consumer surplus is no less fundamental. Indeed, if anything, it is more fundamental because it has to be a fair balance.

Now, in this case we say that, under the model, Facebook's willingness to pay for Off-Facebook Data is correlated to Facebook's incremental profits from Off-Facebook Data collection. Users' willingness to accept Off-Facebook Data collection is essentially a function of the cost to users of Off-Facebook Data collection. The bargain to be struck in the counterfactual, the fair bargain, will be somewhere between these two points. We say, looked at in that context, it is hardly surprising that Facebook's incremental profits of Off-Facebook Data collection feature at least as part of the bargaining model. It determines essentially the upper limit, the maximum, that Facebook would be willing to pay for Off-Facebook Data.

We say the counterfactual would involve a transfer of value because Facebook's willingness to pay exceeds the user's willingness to accept. We can test that at trial by quantifying each of these elements, for which Professor Scott Morton has provided a methodology.

MR JUSTICE MARCUS SMITH: Let's start with the easiest. Let's go to a case which really we are familiar with, *BritNed*, where you have a cartel rather than abusive dominance, but you have a situation where the allegation is that the cartel has caused a greater price to be paid for a product than would have been the case absent the cartel.

And what you do is, you say, well, that is the price that was paid. We need, assuming the cartel exists, to establish what would have been paid absent the cartel. And you don't look at fairness there. What you look at is you look at what evidence there is in order to assess the non-cartelised price. And the damage is the difference between --

MR O'DONOGHUE: The two.

MR JUSTICE MARCUS SMITH: -- the one and the other.

Now, the first question: is this case difficult because we are talking about a price that is monetary?

MR O'DONOGHUE: Sir, we say not fundamentally, because of course --

MR JUSTICE MARCUS SMITH: You don't see that as a difficulty?

MR O'DONOGHUE: Not -- in the following sense, the example you put to Mr Singla yesterday, I mean, if this case was about an unfairly high price it would be easy to understand, well, a price of 10 is fair and a price of 20 is unfair. So that is the sort of monopoly on fairly high price.

We say that, equivalently, for a monopolistic unfairly low price it is no different. The price actually paid is zero and the price that should have been paid is a positive number. We say from that perspective there really is no difference.

Now, on the cartel case, in a sense of course --

MR JUSTICE MARCUS SMITH: You see, the reason I'm looking at this is, ought one not to be framing the price in monetary terms at all? I've been looking at your pleading and entirely fairly you say the Meta terms and conditions are so elusive it's rather hard to track what's going on where. But let's leave that to one side and let's suppose one has a very clear transition to what is being consented to by the subscriber to Facebook, that on day 10, T10, the terms and conditions say we, Meta, can use for whatever purpose we choose your on-Facebook data. So, the term is

absolutely they are clearly there in black and white on your monitor or on your mobile device. That's what you are agreeing to. And you're not paying anything more than that, that's what you are paying. It's a non-monetary consideration transferred to Meta but nonetheless valuable for all that.

Then on day 100, T100, the terms and conditions change and says: look, we are now moving to a different extraction; we are, if you want to use our service, moving to a use of all your data on Facebook and off-Facebook, and we want your consent to that, and that's the price from day 100 that is paid.

Now, the first question is: is this second price, let's assume the first price is unimpeachable, you -- ie no one is making an attack on it, on T10 -- but the second price is attacked. First of all, you have to articulate your competition or infringement by reference to a somewhat unusual price, a payment in kind, in other words it's not the zero you are looking at, it is the data that is extracted, and in particular in this case the shift at day 100 to expanding the data that it's extracting from on-Facebook to off-Facebook.

Now you can say, well, that's a take it or leave it abuse or it's an unfair pricing abuse, but the thing you are looking at is not monetary consideration, you are looking at an in-kind payment.

Now, is that the way you are seeking to articulate the case or are you looking at the monetary consideration? I mean what's the unit of account, if I can call it that, of the abuse that we need to be factoring in in our consideration?

MR O'DONOGHUE: Sir, it's very straightforward. Any way you look at our unfairness case, we say there's an unfair bargain. Whether it's terms or price doesn't matter at this stage. In a counterfactual there would have been a fair bargain, or barter, and the monetary value and therefore the compensatory damages is a difference between nothing and a positive counterfactual price. So the reason

the damages is compensatory is that any way you look at this, in the counterfactual the users would receive a positive payment to secure their consent that they were denied in the factual.

So to put it another way, the compensation is not for some loss of privacy for some individual right, it is the failure to pay a single aggregate average figure by Meta. It is the financial loss of not receiving that payment in the counterfactual, versus an actual payment of zero. That's why we say front and centre, start and finish, it is a monetary amount. It is the denial of the payment to secure the consent in the counterfactual; that is a financial loss, fair and square.

Now before we've move on to the domestic authorities which I think will make good the point I've just made in spades, if we can just to round off the points on willingness to pay and willingness to accept. If we go to Professor Scott Morton's first report. It's at 311, which is page 302. This is a report by NERA, funded as it happens by Meta. What it is focussing on is essentially a bargaining model between the platform and publishers for access to the publisher's content, and it's talking about the notion of fair value in that context. It relies on a bargaining framework. You will see the individual components:

"1, buyer's maximum willingness-to-pay. 2, seller's minimum willingness-to-accept. And 3, the relative bargaining strength of the parties. The difference between the seller's minimum willingness to accept and buyer's maximum willingness to pay determines the range of possible outcomes from voluntary transactions and defines the total economic value of surplus created. The relative bargaining strength of the parties, which is determined by factors like risk aversion and business acumen, determines how the surplus is divided."

So that's why we say the two critical inputs, the willingness to pay and the willingness to accept, they lead in a counterfactual to a positive monetary payment,

and the damage is the difference between that level of payment and the previous price of zero.

MR JUSTICE MARCUS SMITH: Is that what you are trying to value, or are you trying to value the difference between the putatively fair price, that is to say the provision of on-Facebook data, and the putatively unfair price, the provision of Off-Facebook Data?

MR O'DONOGHUE: It's the price needed to secure the consent of the average user. To put this in more conventional monopsony terms, if this were a case of a dominant employer paying an abusively low wage, there would be no issue with saying the employer must pay a fair wage, and the employee could in that context say that his or her work was a valuable input that was central to the employer's success. And that, in its most basic and essential form, is what Professor Scott Morton's model is doing. It is trying to work out Meta's willingness to pay where profit is key, and the employee's willingness to accept leading to a single counterfactual payment to the employee.

But that is still compensation; it is fair compensation for the employer's wage.

To put the point in more economic terms, if you were to draw a competitive equilibrium and the monopsonous profit-maximising point, you would see that the monopsony point has a lower wage for the input and a lower amount of input. Essentially you are sliding down the demand curve.

Now consider our job of sliding from the monopsony point to the competitive one. We go where the demand curve intersects supply. What determines the demand curve of Meta? We say lots of the same factors that determine its profits. What else determines profits besides demand? Costs. Labour is part of the costs, so the location of the demand curve we are sliding up also matters.

We say there is therefore a principal way of finding the new price using the same

inputs that determine profit, but not in the same way. The enquiries are related but they are not the same thing. And of course, another reason to look at Meta's incremental profits is that they should not be obliged to make a payment that would lead to them losing money. But it is inevitable in any event that you will want to have some regard to Meta's profitability to ensure they are kept whole.

And we say in substance what we are urging on the Tribunal is no different to what occurs in every other unfair pricing case where there is no question but that an ordinary loss has been suffered. In a monopolistic pricing case, user being charged 20 for a product when they should have been charged 10; the user is out of profit by £10; that is the damage. Our case is no different simply because there is a zero price. If we would have been paid a fair price in the counterfactual, then that is the measure of the loss. It is the difference between the factual price of zero and the higher counterfactual price.

And the President put to Mr Singla yesterday essentially that point, which is: well why do you say there would be damage in compensatory damages in the first example, not the second? And with respect, Mr Singla did not have a good answer.

We say the concern in both cases is identical. The dominant firm can exploit its position to deny the user the financial benefit of the payment in the counterfactual.

So before we come on to the domestic cases, of course one footnote on *BritNed*, as you will recall, sir, one point which is central to the counterfactual analysis in that case was the marginal analysis. That of course is an assessment of comparator profitability before, during and after the cartel. So even in the cartel example there is at least some regard being paid to profitability as part of the exercise of arriving at a counterfactual, lawful price. We say in a sense profitability, to a greater or lesser extent, will almost always feature in counterfactual assessments under competition law, as one is trying to work out, at least in part, the difference between the gain to

the infringer and the factual relative to the counterfactual.

Just to move on to the domestic authorities, and again my headline point is it is entirely consistent in compensatory damages to have some regard at least to the defendants' profitability. If I could start, sir, with the textbook, the McGregor damages book. It's in authorities, tab 61, page 3528.

MR JUSTICE MARCUS SMITH: Which volume?

MR O'DONOGHUE: Volume 7, thank you.

MR JUSTICE MARCUS SMITH: Which tab?

MR O'DONOGHUE: It's tab 61.

MR JUSTICE MARCUS SMITH: Thank you very much.

MR O'DONOGHUE: It's 3528, it's 14-005.

McGregor says:

"In some cases there will be a proved consequential loss. If A would otherwise have negotiated with B for a licence fee for the use of the horse, then B's act of taking the horse would have deprived A of the negotiated licence fee. In such cases, the common label for these damages, negotiating damages, is entirely apt because they are concerned with assessing the compensation by reference to a genuine and reasonable negotiation that could have taken place. In these cases the licence fee damages fits the conventional notion of compensation comfortably."

And this is the point we are making. We say that absent the abuse, Facebook would in fact have made a transfer value to the users for their Off-Facebook Data, that the abuse in the factual has deprived users of that transfer value, hence the users have suffered a loss. To paraphrase McGregor: the damages for such loss fits the conventional notion of compensation comfortably.

A bit further down over the page at 1406, there's an explanation of Wrotham Park, which contrasts with what we are claiming. McGregor says, and I quote:

"In other cases a loss in consequential terms is more difficult to identify. Negotiation is not always possible or even desired. For instance, in the well-known case of *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* which is considered below, the claimant might never have negotiated for release of its rights. Yet as Lord Justice Fletcher Moulton had earlier said, the licence fee is awarded even if it were not the claimant's practice to grant licence."

Now, this category of course is akin to what we have labelled "user damages", and are allowed in circumstances where the counterfactual would not in fact have involved a payment. Again, our counterfactual is that there would in fact have been a payment, and that is why we are not claiming user damages because it fits comfortably within compensatory damages.

The next case I want to turn to is the *One Step* case from the Supreme Court, volume 2, tab 18, paragraph 29, it's internal page 708. This is Lord Reed. He's referring to the (inaudible) *Wass* case. He says that the approach adopted in *Wass* was described as "user principle".

Then he quotes from the case:

"It is an established principle concerning the assessment of damages that a person who has wrongfully used another's property without causing the latter any pecuniary loss may still be liable to that other for more than nominal damages. In general, he is liable to pay, as damages, a reasonable sum for the wrongful use he has made of the other's property. The law has reached this conclusion by giving to the concept of loss or damage in such a case a wider meaning than merely financial loss calculated by comparing the property owner's financial position after the wrongdoing with what it would have been had the wrongdoing never occurred."

So, user damages that can be claimed even if there is no pecuniary or financial loss. But what this passage does, in our submission, is effectively explain what pecuniary

or financial loss is: it is the loss arising out of the financial position of the claimant, with the wrongdoing being worse than in the financial position without the wrongdoing. This is exactly what we are claiming here. We say the users were financially worse off in the factual where they received nothing, than they would have been in the counterfactual, in which Meta would have made a transfer of value in order to convince them to consent to Off-Facebook Data collection.

The next case sir is *Morris-Garner*, also a well-known case.

MR JUSTICE MARCUS SMITH: Yes.

MR O'DONOGHUE: Further in the same tab, it's 728. Sorry, there's a discussion of *Morris-Garner*, forgive me. It's at paragraph 100. You will see there's a discussion of the *Morris-Garner* case. That case seems to have permitted evidence of a hypothetical release fee negotiation to be adduced if they were relevant in quantifying the loss, as long as it was understood the negotiating damages were not the measure of loss in the technical sense, that being the financial loss claimants actually sustained.

We then look at 100. It says:

"The judge has ordered a hearing on quantum. That hearing should now proceed, but it should not be, as he ordered, an assessment of the amount which would notionally have been agreed between the parties, acting reasonably, as the price for releasing the defendants from their obligations. The object of the exercise is that the judge should measure, as accurately as he can on the available evidence, the financial loss which the claimant has actually sustained. How that assessment is best carried out is, in the first instance, a matter for the judge to consider, proceeding in accordance with this judgment. If evidence is led in relation to a hypothetical release fee, it is for the judge to determine its relevance and weight, if any. It is important to understand, however, that such a fee is not itself the measure of the

claimant's loss in a case of the present kind, for the reasons which have been explained."

Now, just to look at what Lord Burrows, as he now is, says in one of the articles in the bundle about this particular passage in the judgment. It's at tab 59 of the authorities. Volume 7.

MR JUSTICE MARCUS SMITH: Yes.

MR O'DONOGHUE: It's at 3491. You'll see, sir, the bottom of the page the "final wrinkle":

"A final wrinkle with Lord Reed's judgment that is indicated above, he accepted that Lord Sumption made a lot of this point in his judgment, that a reasonable release fee could be used by the judge in this case as evidence in assessing the claimant's loss of profit. In other words, a reasonable release fee could be used, and it would appear can always be used by a judge, if thought helpful, not as an alternative measure to the conventional measure of compensation, but as an evidential technique or two, as Lord Sumption expressed it, in applying the conventional measure.

"This distinction between the evidential tool and the measure is not straightforward, but, in practice, what it means is that the claimant, by using the reasonable release fee evidence should not knowingly be put in a better position than the conventional measure would dictate. Therefore in the *One Step* case, the claimant could not recover more than the loss of profit, known to have been suffered, by claiming a higher reasonable release fee … In *One Step* the claimant had precisely sought negotiating damages as an alternative measure, not as an evidential tool in assessing loss of profit, so that it was claiming a higher sum of negotiating damages than the loss of profit applying the conventional measure. It was that which was impermissible."

Again, in our case we are simply seeking the difference between the price, zero, and the factual and the counterfactual payment or release fee which would have been made by Meta. And looked at in that way, the consideration of profitability in Professor Scott Morton's model as one of three key inputs, really it's no more and no less than an evidential tool in the context of assessing traditional compensatory damages. That is the critical point.

A couple of final cases. First in *Wass*, which we have seen briefly touched upon. It's in authorities 6, 112 to 123.

MR JUSTICE MARCUS SMITH: Authority 6. Which tab?

MR O'DONOGHUE: Volume 1, tab 6.

MR JUSTICE MARCUS SMITH: Volume 1, tab 6. Sorry. Yes.

MR O'DONOGHUE: It's at 1418, and H, where it starts "Disturbance" at the bottom of the page.

MR JUSTICE MARCUS SMITH: Which letter are you at?

MR O'DONOGHUE: Very bottom of the page, sir. "To start with an existing fact".

MR JUSTICE MARCUS SMITH: I have that.

MR O'DONOGHUE: And the critical bit is over the page:

"If on the one hand the unauthorised other day market has caused and is causing no loss, either of stallage or tolls or under any of the other heads of loss which may affect the owner of the market right, there is no cause of action. There is, in that event, no question of applying the user principle. If, on the other hand, the owner of the market right does sustain loss under one or more of those heads, damages must surely be commensurate with the quantum of loss so sustained. The damages will correspond, so far as the court can fairly assess them, with the amount of loss flowing to the owner of the market right from the respects with which he has in fact been damnified in his enjoyment of the right by holding of the unauthorised, other

day market."

Again, there will be no place for awarding user principle damages in a sum greater than the amount of their loss.

So on that case, if Stowe Council had been able to prove some loss of custom, then there would have been no need to have recourse to user damages; the loss of custom would have been the money that the council would have earned but for the breach. And again, the analogy with our case is obvious: it is again the difference between the price of zero and the counterfactual payment which would be made by Meta.

A couple of final points very quickly, sir. First touching on Devenish which is in tab 12 of the same bundle. It is on page 360, paragraph 74.

MR JUSTICE MARCUS SMITH: Yes.

MR O'DONOGHUE: (Pause). Sorry, sir, forgive me, that's the first instance judgment at 360. It is the Court of Appeal judgment.

MR JUSTICE MARCUS SMITH: Yes, 360 is the judgment of Lady Justice Arden, isn't it?

MR O'DONOGHUE: Yes. Thank you. It says:

"The ratio of the judgment of Lord Justice Norse, with which Lord Justice Mann agreed, is therefore that the user principle ought not to be applied to the infringement of a right to hold a market where no loss had been suffered by the market owner. He would, however, have awarded some loss of custom if some loss had been shown."

Now, what is the loss of custom? It's the difference between what you earned in the factual, and what you would have earned in the counterfactual. That is exactly the same as we claim here.

One final point of the domestic authorities. Mr Singla said yesterday that while we had referred to the comments of Lord Justice Green in *FX* in the amended

Claim Form, that we had somehow abandoned our reliance on that case. That is a mischaracterisation of our case. We do rely on paragraph 106 of the *FX* case but not for the reason Mr Singla thinks. We say that in paragraph 106 Lord Justice Green was addressing two distinct points. The first is that having regard to profits in working out damages is not inconsistent with the principles of compensatory damages. We do rely on that and we do say, for the reasons I've shown you, it is entirely consistent with the domestic case law.

There is separate point at the end of paragraph 106 where Lord Justice Green is discussing the situation where there is no loss at all or it is impossible to work out any loss, and in that situation he does refer of course to disgorgement. We don't rely on that for the simple reason we don't need to. Our model is consistent with compensatory damages principles. The reference to paragraph 106 wasn't put in there as some afterthought, it is something we rely on but not for the reason Mr Singla seems to think.

That is what I want to say about Meta compensatory damages.

The next point I want to move on to under the same rubric is the point about individualised loss. Mr Singla has said, well first the loss to users is individualised and therefore is not suitable for collective proceedings at all. I want to make a handful of points on this, it's quite important. Mr Singla, in my submission, has omitted a series of uncontroversial principles that are firmly against him.

The first proposition is the fact that the loss suffered by each class member is variable is not a bar to certification of collective proceedings. We say that is plain as a pikestaff from the case law. To start with *Gutmann*, which is in tab 37, volume 4. It's at 1809. This I think is actually quoting *Merricks*. So it's subparagraph (3):

"Common issue does not require that all members of the class have the same interest in its resolution. The commonality refers to the questions, not the answer

and there can be a significant level of difference between the position of class members. Therefore the question may receive varied and nuanced answers to payment situation of different class members, so long as the issue advances the litigation as a whole."

That's a quote from Merricks.

Then within the judgment itself at 73, halfway down:

"The starting points for the CAT's analysis were the broad propositions that the existence of some no-loss claimants in a class was not an obstacle to certification."

Then at 74:

"In our judgment this was the appropriate point of departure."

And at the end:

"We can identify no error in this analysis, and we do not repeat the CAT's assessment here."

Mr Singla made a number of references to *Lloyd v Google*, and essentially his core point is, well, this is *Lloyd v Google* wearing the clothes of competition law. That's essentially his point. With respect, we look at this but *Lloyd v Google* actually is a case dead against what Mr Singla is contending for.

If we go to the judgment at tab 28 of volume 3. So the claimant in that case–- this was a Data Protection Act case of course. The only difficulty they encountered was because there was an attempt to bring a class action through to CPR 19.6 representative procedure, but not under the competition law regime. And the core point, as the Supreme Court made clear more than once as we shall see, that this issue would not arise under the CPO regime. So if we pick this up at paragraph 4 on page 1384, Lord Justice Leggatt says:

"... the only sector for which such a regime [a collective regime] has so far been enacted is that of competition law. Parliament has not legislated to establish a class

action regime in the field of data protection."

And then at 5:

"Mr Lloyd has sought to overcome this difficulty by … an innovative use of the representative procedure ..."

And so on. And it says:

"... one or more persons as representatives of others who have 'the same interest' in the claim. Mr Lloyd accepts that he could not use this procedure to claim compensation on behalf of other iPhone users if the compensation recoverable by each user would have to be individually assessed."

Then over the page at 8 you will see:

"In this judgment ..."

And then about a third of the way down:

"... in particular, the representative procedure which the claimant is seeking to use. Whether that procedure is capable of being used in this case critically depends, as the claimant accepts, on whether compensation for the alleged breaches of data protection law would need to be individually assessed. I will then consider the claimant's arguments that individual assessment is unnecessary. For the reasons given in detail below, those arguments cannot in my view withstand scrutiny. In order to recover compensation under the DPA ... for any given individual, it would be necessary to show both that Google made some unlawful use of personal data relating to that individual and that the individual suffered some damage as a result. The claimant's attempt to recover compensation under the Act [again the Data Protection Act] without proving either matter in any individual case is therefore doomed to fail."

So *Lloyd v Google* is authority, we say, for the proposition that you don't need to individually assess loss in a CPO action. Just to make that good, we can pick this

up, it starts at 24, where it's talking about collective address generally. And then at 29 if the Tribunal see over the page there's a discussion of competition law in particular. And the key passage is paragraph 31. It says:

"A second significant feature of the collective proceedings regime is that it enables liability to be established and damages recovered without the need to prove that members of the class have individually suffered loss: it is sufficient to show that loss has been suffered by the class viewed as a whole. This is the effect of section 47C(2) of the Competition Act, which provides:

"'The Tribunal may make an award of damages in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person.'

"Such an award of damages is referred to in the ... Rules as 'an aggregate award of damages'."

Now Mr Singla gave you no authority for the proposition that you need to show individual losses in a CPO context. We say it would be plainly contrary to both the legislation, the Act, and indeed what Lord Justice Leggatt has interpreted as the clear wording of the Act to contend to that effect. Of course countless CPOs have been certified to date, and it has never been suggested that the fact not all class members have suffered same loss, or some of them might have suffered no loss, was an issue that prevented certification.

So we say as a starting point Mr Singla is simply wrong in law as a basic matter of the legislation.

Three further points.

First, the issue of individual subjectivity. That is principally relevant to the issue of the cost for users of Off-Facebook Data tracking, which is one of the three key inputs for Professor Scott Morton's model. And it is accepted there that users are likely to

face different intrinsic values in the data, but Professor Scott Morton's model predicts that users will still face a loss, even if they do not directly value their data.

That is at paragraph 334.

The penultimate point is that the PCR does not suggest that the transfer of value Meta would have made would have varied based on individual user's particular characteristics, or the value they personally place on Off-Facebook Data. From our perspective, it may not be common ground but we say it's blindingly obvious, it seems overwhelmingly likely that Meta would have offered the same transfer value to all users on say a monthly or per annum basis for access to their Off-Facebook Data, akin to a subscription in effect.

And finally perhaps this is worth turning up, we have touched on it briefly. In any event, Professor Scott Morton says she can account, to the extent necessary, for variation across the Proposed Class Members and their cost of giving up data.

That's at A3, 331, paragraphs 421 to 423.

MR JUSTICE MARCUS SMITH: Yes.

MR O'DONOGHUE: And in particular 422.

That is why we say this question of individual loss, with respect, goes nowhere, certainly at this stage.

Sir, that's my second point.

I'm now moving on to my third of five points. I'm making good progress which is the incremental approach we touched on to some extent already.

Meta says that the PCR does not propose to assess the economic value of the entire products supplied and that this approach is contrary to a clear position, they say, at law and contrary to basic economics. I want to respond to this in two ways; one is short, the other is a handful of more granular points. The short version is there's essentially two ways of looking at this.

Professor Scott Morton considers whether the Off-Facebook Data price would be achievable under conditions of workable competition, and she concludes that it would not be.

That we say is manifestly the right test because the concept of workable competition is one of the foundational building blocks of *United Brands* itself.

It is also of course based at least in part on economic reasoning around the question of monopsony pricing, but also on an essentially before and after approach, because she has two comparators. One is Project Beacon, which is under conditions of competition. This could not be imposed, user backlash. And then when the market tips in 2014 we see the sudden imposition of network effects having accrued in Meta's favour, which is the after comparator.

And ATT equally is a comparator benchmark of sorts because it shows when the question of automatic extraction is put to one side and users have to actively opt in and make a choice, most will choose not to do so.

So in a sense she's applying a very orthodox analysis which is, is there evidence that Meta could have done this under conditions of reasonably effective competition? And she has come up with essentially two real world examples of comparators to make good the conclusion that they could not. We say, viewed from that perspective, it is sort of plain vanilla application of *United Brands* in the sense that it is contrasting a before and after period and coming up with other comparables for whether this would be achievable under conditions of competition.

MR JUSTICE MARCUS SMITH: So, the "before" is a provision where there is consent to the use of on-Facebook data. One then has a state of dominance, and the after situation is the unfair extraction of consent to the use of Off-Facebook Data.

MR O'DONOGHUE: Yes. Sir, to be clear there are four periods. One example is Project Beacon of course, which is a perfect natural experiment because they tried in

effect to impose --

MR JUSTICE MARCUS SMITH: I'm trying to understand your case generally.

MR O'DONOGHUE: Yes.

MR JUSTICE MARCUS SMITH: That's how you put it.

MR O'DONOGHUE: Yes. It's one way we put it, yes.

On that analysis, we say, given that it looks like Meta was not able to impose the same price and terms when it faced competition, it makes sense to ask, we say, is the Off-Facebook Data price nevertheless justified by improvements to the service made since the period, since the predominance period; and the answer on current information is no, which confirms that the Off-Facebook Data price would not be achievable under conditions of workable competition. We say looked at in that way it's pretty standard *United Brands*.

Now the other way of looking at this, again in short form, is we know that before it acquired a position of dominance Meta provided the same service, social media service, without tracking. So in other words at a much lower data price. After it became dominant, Meta provided the same service but at a much higher price in the form of the consideration of the data required. That in itself doesn't necessarily answer the question of whether the higher price, the Off-Facebook Data price, could be achieved on the competition. But it is very suggestive, we say, and is a very helpful comparator.

Given that that is so, a relevant question is: is the higher price in the form of consideration for the Off-Facebook Data justified by service improvements since the predominance period? Again, that seems to us an orthodox question to ask as a matter of economics. That is the short form way in which we put the case.

Mr Ridyard, and I think the President to some extent, will remember elements of this and say the *Phenytoin* case. One of the key comparators in that case was that in the

PPOS period, for many, many years, decades in fact, the price of *Phenytoin* had been extremely low, and then in the period of alleged abuse it had gone up by hundreds if not thousands per cent. And one of the comparators used in that case for unfairness was before and after. We say that same analytical exercise underpins Professor Scott Morton's approach in this case.

That's the short form response.

Now, there are a handful of points which are a bit more granular but go to the same point. One important point of course is that the incremental point by Mr Singla is only made in relation to the unfair price abuse. He does not make the same point in relation to the unfair terms abuse. And indeed, in our submission, in an unfair terms case the whole point is that the particular term, in this case the term imposing the extraction of Off-Facebook Data at zero price, it is the particular term that is unfair and not necessarily the entirety of the contract as a whole. So, if anything, when it comes to unfair terms, it shows that the law on unfairness does apply an incremental approach by focusing on the term in question. We say in fact the unfair terms abuse is completely unimpeachable from that perspective.

So, it doesn't get him to where he wants to be is the first point. At best it attacks one of the two ways in which we put our case.

The second point is that his characterisation is not a fair characterisation of what Professor Scott Morton has done. He has essentially left out of account a wide range of factors he has considered and her chain of logic. And, as the President put it to Mr Singla, it is actually very straightforward. He says: on the evidence available at this stage I have looked at these improvements, they do not seem to me material; if and when Meta come back with further information and evidence I will carefully consider those points but at this stage I do not see any improvements which justify this additional extraction.

And again, looked at from that perspective, we say it is unimpeachable. As the President put to Mr Singla where frankly he didn't have an answer, it's essentially an evidential point as the case moves forward. It may well be there is a lot of evidence emanating from Meta on this or that improvement.

Professor Scott Morton at this stage, given the asymmetry, there is a tangible limit for what she can reasonably be expected to do, and as I will show in her report we say she has more than exceeded the analysis that could reasonably be expected of her at this stage.

Just to make that good, if we could start at paragraph 238. It's on page 285. If we can start actually at 236, you will see there's a heading saying "The extent to which the value of Off-Facebook Tracking has accrued to Facebook versus users". You will see at 237, she has in a chronological way looked at all of the alleged -- of the changes in relation to the product. And as you will see in the table, there are a relatively small number which post-date the Off-Facebook Data tracking. I think there are only four.

Then at 238 she unpacks the table and we can see what she says. So it is simply not the case that Professor Scott Morton has buried her head in the sand and said, "Well I'm unwilling to have an open mind in any shape or form in relation to any improvements to Meta's service." She has catalogued the developments of which she is aware, and most of them, as it happens, pre-date the Off-Facebook Data tracking. We see at 238 what she says about the ones that post-date and why she thinks at this stage they should not be taken into account.

Now as the President put to Mr Singla, that may well be right or wrong. That will be an issue in the case as we move forward. It will more likely be an issue at trial if we get there. But at this stage the suggestion that her approach is so fundamentally flawed that the baby should be thrown out with the bath water we say is extreme.

This is an issue for trial, a forensic point which will be determined by disclosure, evidence, submission and no doubt further reports.

She goes on of course. We then, for example, look at 265. Sorry, forgive me. One thing I should note parenthetically, if you go back to table you will see a reference to "Facebook Marketplace". Just to give you the reference, sir: at paragraph 103B of the Amended Claim Form we refer -- there is a CMA investigation into whether the tying of Facebook marketplace with the Facebook service is itself an abuse. Of course, one obvious reason why the Facebook marketplace should not be taken into account is that it is the result of an abuse of time. So there is -- that really underscores my point that there is a long way to go in terms of the resolution of these particular improvements. It is an ongoing picture. The main investigation has not concluded. These are issues for further down the line and not for dispositive resolution today.

Now if we jump forward to 265, again an entire section, "Can the data extraction be justified on the basis that Facebook improved the quality of its service commensurately in other respects?"

And you see what she says. And again, it is striking that in each and every one of these points not a shred of evidence has been submitted by Meta. It would have been the easiest thing in world for them to say, as we'll see Apple did in a case I will come to: you left out of account the following 57 improvements; here is why they are relevant to material; here is why you are wrong at this stage not to consider them. But there has been radio silence. Instead, what we have is Mr Singla essentially on the hoof saying, well this is jolly good and that is jolly good. That, with respect, will not do.

The next section of course is 269: "Can the data extraction be justified on the basis that the data extraction directly improved the quality of service to users."

Again she fairly accepts:

"Were it the case that the data gathered by Off-Facebook Tracking facilitated qualitative improvements in the social network service …. then these effects would be a relevant consideration to the assessment of abuse. Pre-disclosure I am not aware of evidence of such effects, but I acknowledge the possibility that they may exist and that they can be taken into account by analysis of the economic issues relevant to abuse and in the quantitative framework."

And again, this is yet another clear invitation to Meta. They've had this report for months now. It's a clear invitation to Meta: well, tell us what we are missing here. And not a shred of evidence emanating from Meta. It is, with respect, part of a rather, frankly, cowardly approach where they are content to fire rocks in our direction, and not to put in a shred of evidence, which is exclusively within their sphere to make good any of these points in any shape or form. And the notion that our case should be kicked out entirely today based on hinting at these possibilities in the absence of any evidence when for all we know everything we say is entirely justified and correct is profoundly unattractive and in fact profoundly unjust.

MR RIDYARD: This might be a question that belongs later on in process, but I am still interested in it nonetheless. Is what you are saying about the obligation on the dominant firm, because with this incremental approach it seems to be saying once you are dominant, every innovation or new product or new initiative you do that is going to increase your profits, you have to sit down and say, "Oh half of these we have to give to consumers and half of them we can collect for ourselves."

That's obviously a bit of caricature, but isn't that what you are saying here? That this incremental approach requires you to say everything -- once you passed the dominance sort of threshold, then everything you do has to be split 50/50 with the consumer.

MR O'DONOGHUE: I don't think, with respect, that Professor Scott Morton puts it in those dogmatic terms.

MR RIDYARD: I'm putting it in a deliberately provocative way. It seems to be a not completely unreasonable interpretation of what you are saying here. Or is there something specific about the Off-Facebook Data that distinguishes it from some other initiative or innovation?

MR O'DONOGHUE: As I read the report, all she is saying is: I have looked at the evidence available to me now, I do not see a justification; if and when evidence has come forward I have an open mind and I would assess it going forward.

MR RIDYARD: But that itself implies that you have to justify -- once the Dom Co has gone over the dominance threshold it has to justify every new thing it does, in relation to saying well this is adding more value than something else or -- there has to be some justification for what it does going forward.

MR O'DONOGHUE: In a conventional unfairness case, in a sense, to go back to *Hydrocortisone*, every unfairness case is asking, well, is there something distinctive about the product or service that justifies some form of premium. From that perspective, if indeed you are dominant and alleged to have charged unfair prices, there is nothing objectionable about trying to understand why do you say this premium is justified? What is the particular factor why you say something is justified?

So the President and Mr Ridyard will recall in *Phenytoin* there was a question about does continuity of supply justify a premium? In a case like *Napp* there were questions as to whether follow-on revenues, or the efficiencies in the home sector, the hospital sector, justified an uplift.

So in all these cases there will be a discussion as to whether the premium the dominant firm has imposed is objectively justified or is it a legitimate part economic

value.

MR RIDYARD: It is interesting that you raise the pharma cases. You will know them much better than me. But I mean -- I didn't think it was the case that in those cases it was the actual increase in price that was regarded as the abusive act; it was just the level of price that was regarded as abusive and it was assessed against the total costs of provision of the product.

MR O'DONOGHUE: I think the overnight dramatic increases were front and centre of the case. In many -- that was the CMA's primary objection. The before and after -- night and day.

MR RIDYARD: Was the abuse the increase in price, or was the abuse how high the prices were once the price had been increased?

MR O'DONOGHUE: It was both.

MR RIDYARD: Okay.

MR O'DONOGHUE: Sir, I see the time. Will that be a convenient moment?

MR JUSTICE MARCUS SMITH: Yes. We will resume -- we are doing all right for time.

MR O'DONOGHUE: Sir, yes, I'm making good progress. We are very conscious there's hard stop at 4.30. I think we are really on track in relation to that.

MR JUSTICE MARCUS SMITH: In that case we will resume, then, at 2.00. Thank you very much.

(1.00 pm)

(The short adjournment)

(2.00 pm)

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

MR O'DONOGHUE: Good afternoon, sir.

Sir, before the lunch break I was taking the Tribunal through the reasons why

Professor Scott Morton has applied the approach she has applied to the alleged improvements. One further reference is at paragraph 270 of the report, which is at 291 of core 3.

I took you to this earlier for different reasons:

"Can the data extraction be justified as the fruits of Facebook's prime investment?"

Then at 271 you see the profitability metrics. There was a 36 per cent EBIT for 2013, EBIT value of 2.8 billion. So even in a world of only on-Facebook tracking, this was an enormously profitable undertaking.

The third point in relation to the incremental approach is this. Professor Scott Morton doesn't say, well, I'm applying an incremental approach for the hell of it. She explains and motivates why she's doing so. And if we go back to 254 of her report, and if you look at 261. What Mr Singla did is, he said, well, look at 261. And he says the right approach is to assess the fairness of the price not (inaudible) but assess whether Facebook has struck a fair bargain as it increased its data extraction over time.

And he says: aha. What he has left out of account, of course, is, if you look at 255 to 60, and in particular 258, 259 and 260, she explains why she has applied the approach she sets out in 261. You will see in 258 "Network effect, lack of alternatives."

Then 259, "Addiction effects".

Then 260:

"User-facing functionality of Facebook pre-dates the intensification of Off-Facebook Tracking. Off-Facebook Tracking was not necessary to deliver those benefits."

But these are all essentially disclosure related issues. But we have set out our stall as best we can at this stage and these are some of the reasons, among others, why she has applied the approach she has. So it's not as if she has plucked something

from thin air for some obtuse reason and said, well, this is what I'm doing. She has explained why she adopts that approach.

And again, a point I have made more than once already, on 258, 259 and 260 it's perfectly open to Mr Parker to say your point on network effects is wrong, for the following reasons of evidence. And again, radio silence from Mr Parker and not a shred of evidence from Meta.

So it is yet another example of a willingness to wound on the part of Meta and no willingness to strike in the form of actual evidence. And that's why I have said more than once that this is a negative, reductionist and destructive approach.

Now, the fourth point is that Meta is not necessarily shut out, on Professor Scott Morton's approach, from saying in in due course, well, such-and-such a feature justifies the price.

And if we look at 401 of her report, at page 290, she says:

"Unlikely that the extraction and monetisation of the Off-Facebook Data may have in principle permitted Facebook to improve the quality of of service to users. If so, such incremental improvements act to reduce damages."

Then she says:

"In such a case I would want Facebook to specify exactly which services and features it believes consumers valued and which were introduced as a result of the Off-Facebook Tracking. I would then want to test these claims against the data and documents provided in disclosure. If it was indeed established that these value-accruing services were introduced as a result of Off-Facebook Tracking, I would seek to quantify the value in monetary terms having cross-checked against any internal Facebook studies."

So, this is yet another example where for several months now there's been an open invitation from the PCR to Meta: give us the studies, some initial disclosure on these

points, or at least set out a positive case on your part. And if and when you do that, we'll consider it.

Again, nothing coming in the other direction.

So, Professor Scott Morton, with respect, at this stage in the foothills of the case re disclosure has done rather a lot, we say. And it is not fair to criticise her for being even more pre-emptive than she has already been.

Now, the final point is really that the legal argument that Mr Singla says is a core and binary principle of law. Now, we say the suggestion that there some rigid principle, that you can never apply an incremental approach, and the only approach you can ever apply in unfair pricing is some form of non-incremental or whole approach, is simply wrong.

Now, just to pick this up in our skeleton. I can take this quickly. It's in tab 11, paragraph 59. You will see, sir, at 59(1), where the Master of the Rolls said: It is wrong in principle to apply *United Brands* as a deed.

And that is exactly what Mr Singla is doing: he's saying, well, aha, look at the words 'the product' in 248 of United Brands. Underline those. Therefore there is an inviolable principle of law that you can only ever look at the totality the product when it comes to assessing economic value.

And that, with respect, is exactly the deed-like approach of *United Brands* which the Master of the Rolls deprecated in *Flynn*. Mr Singla in effect wants to have his cake and eat it. He concedes because he has to, well, we are not saying this is a rigid principle or that it cannot be applied broadly and flexibly, but in reality the principle he purports to put forward is about as rigid as one can get.

And the notion that at the strike-out stage -- I mean, if there is one area of competition -- well, competition law in general does not have hard edges. If there's one area of competition law that has the softest edges of all, it is unfair pricing and

unfair terms.

And again the suggestion that, today, two words in paragraph 240 of *United Brands* is a sufficient basis to strike out the entirety of the PCR's case is completely and utterly unrealistic and, we say, unjust. He is placing more weight on those two words than they can reasonably bear.

I have addressed the Tribunal in some detail as to why the before and after approach that Professor Scott Morton adopts is entirely consistent with the *United Brands* framework. It is contrasting a situation of competitive conditions prejudicial (audio distortion) with monopoly conditions where you could not, and that is a perfectly orthodox approach.

And if one, for example, maps this on to the *Boundary Fares* litigation, which has been certified in a number of cases, of course the passengers get significant benefit in travelling from A to B. That goes without saying. They are on the train, getting to the destination. It does not follow that because they are getting to the destination they can be stiffed on boundary fares. And in a sense that is an incremental approach.

And Mr Ridyard asked me, fairly, well, are you saying that each and every time there's an improvement half of the profits must be handed over? Well, of course not. What we are saying is that if the terms on which the price has increased or the terms worsened are abusive, then there may be, in the counterfactual, a financial remedy in the form of damages. It's not some form of socialisation of profits. It is linked to specific abusive conduct.

Mr Singla took you to the Apple case. And as you will see in our skeleton we rely on the Apple case. If we just turn that up quickly at authorities 1761. Volume 1. It's tab 35. This is *Kent v Apple*.

MR JUSTICE MARCUS SMITH: Yes.

MR O'DONOGHUE: So, we rely on Apple. What we say in relation to Apple is that in that case Apple, unlike Meta, put forward a long list -- we pick this up, sir, at paragraph 67.

You see at the bottom, sir, Professor Hitt, for Apple, provided a long list of the innovations which Apple has made, and we see all the examples.

Now, of course Meta hasn't done that. We don't have a shortlist never mind a long one. So the central point we make on the back of Apple is, even in a world where the defendant had put forward a long list of specific innovations that the PCR's expert had not contended with, that was not a barrier to certification. And we say this case of course is *a fortiori*.

Now, Mr Singla then makes a different point. He says, well, look at paragraph 84.

MR JUSTICE MARCUS SMITH: Yes.

MR O'DONOGHUE: He relies on 84(3) which says:

"In this case the PCR has pleaded facts which could found a methodology that takes into account demand side factors. In particular, the pleaded case" there's a case on comparators."

Now, we also of course have a case on comparators. Project Beacon, ATT and so on. So we do rely on comparators. So that's a bad point.

And I would also ask you, sir, to look at 84(1). "The precise method to be adopted proving this abuse is not prescribed by the cases."

So again this is a further underscoring of a lack of a rigid and binary principle of the kind Mr Singla contends for.

And indeed, if one looks at 81 while we have it:

"The PCR also asserts that the persistence of the rate of commission and the exceptionally large and increasing profitability of the App Store indicate that the market is not competitive. She alleges as a result that the commission does not

reflect the economic value of the App Store but is a fee paid under duress by developers who are wholly dependent on Apple for distribution."

We also in effect say the same thing. That is another similarity with the Apple case. So we say if the objections by Apple in the presence of this long list were insufficient to prevent certification, then Mr Singla frankly has no hope whatsoever, at least on this front, because he hasn't put forward a single concrete thing that we are said to have left out of account.

So that's the third point. Two final points, sir, which are much shorter. And I think Mr Bacon is limbering up as we speak.

The first point I think was put rather faintly but I will respond to it. There's a suggestion that our counterfactual was not grounded in the facts. Now, I have taken you to my first point, the evidential and factual basis for our positive case, and I'm not going to repeat that. And in truth, these points from Meta both orally and in writing are rather half-hearted or a bit of an afterthought.

Now, the first point Mr Singla make is, well, the bargaining model is simply a thought experiment and is hypothetical and therefore does not accord with the real world.

Now, two points if I may. First of all, in my submission Mr Singla is missing the main event of the main point. The point of the bargaining model isn't to have 46.6 million people sit down with Mark Zuckerberg and have a wonderful negotiation. What the bargaining model does is -- and this is back to my point of compensatory damages -- it works out, using a variety of incentive metrics, what is the price that Meta would offer to users to get them to agree.

So what the bargaining model does, it's a method to get you to a price. It is not literally saying there is an actual multinational negotiation. Now, we can pick this up in Professor Scott Morton's report. It's at paragraph 49. It's the second report, at tab 5.

Paragraph 49:

"I am not literally suggesting that Facebook should have sat down at the negotiation table with millions of users. Rather, a bargaining model is a thought experiment which considers a collective negotiation between the users and Facebook. In this context, it is an economically rigorous way to quantify the counterfactual absent the abuse by considering outcomes in which there was a more balanced relationship between users in terms of how to split the surplus."

And so on.

So that is entirely consistent with the point I'm making, which is, the bargaining model is a methodology, an evidential tool, to get you to an end price that is the measure of damages because it is the price that Meta would have paid in the counterfactual. And what the model is doing is it is calibrating, in a series of logical steps that can be scaled and are tractable, a fair bargain. And it is saying that for various reasons Meta would have paid one or perhaps more than one price to the users in the counterfactual.

And we say that is unimpeachable. And of course, sir, in a FRAND context there may be extremely detailed actual negotiations or there may indeed have been a failure to negotiate, and there may be various gradations in between. But ultimately if the court is seized of a dispute on the FRAND terms it has to work out what would have been the FRAND terms had a FRAND-type negotiation taken place. And the fact that the negotiation didn't complete or that it failed to launch would not be some frailty in that exercise.

What this underscores is that these bargaining models are simply a tool, a structured tool, to get you to an endpoint, whether it's a licence fee or a positive price. The idea that there is some fundamental criticism that, well, there may or may not in fact be an actual negotiation, is nothing to the point. It completely misses the purpose of the

exercise.

Then of course we had the point Mr Singla emphasised: well, even with ATT we did not in fact pay. And then with the SNA late last year in fact there is a proposal that there would be a payment by users rather than a payment by Meta.

Now, taking these in turn, what we say is plain as a pikestaff from ATT is that the overwhelming majority of users would not agree to Off-Facebook Tracking based on the service levels to date. We have seen the opt-in rates and they are frankly pathetic.

I have made the point already that we are not using the $10 billion in ATT as the actual measure of damage in this case. What we are saying is something different, which is that when one pro-rates from that subset of the user base across Android and desktop we are looking at something in the order of $50 or $60 billion. And I have made the point already: in what rational universe is Facebook going to leave that money and those users on the table?

So ATT is a building block in our model. It is not the endpoint or its totality by any means.

Now, one further point, Professor Scott Morton refers expressly to testing by Meta in the context of ATT. If we can quickly look at that. It's in footnote 207, which is on page 321.

You will see there is evidence that Facebook conducted testing in relation to the impact of ATT. Then we see a reference to a 50 percent drop in audience network publisher revenue. Again, it would have been the easiest thing in the world for Meta to say, well, you refer to that; here you go. In fact, we didn't consider payment. We never would have considered payment, for the following economically rational reasons. And again nothing.

Now, Professor Scott Morton also says as you will see at 387:

"Technology firms can conduct alpha and beta testing."

And she says she will need that evidence from Meta as well. And again it is not suggested that Meta doesn't have these data and they have not disclosed them.

Then if we jump forward to 585 and 586, there is an entire appendix setting out the data she would expect Meta reasonably to have. And we've had no engagement on whether these data exist, still less any early disclosure.

One point that the President made as well: the pie might be the same, it might shrink or it might get bigger. And of course that is intimately wrapped up with the question of scale and scope effects at the user level. You will see for example, sir, from 588.9.D, for example:

"We request data on how the resulting advertising quantities and prices are related to the above-mentioned factors."

And essentially in 6, 7, 8 and 9, a variety of information on the ad business, and the prices and costs and so on, is requested.

So we say all that is yet to come. And the suggestion that today the Tribunal should unambiguously assume that the mere fact that to date they haven't paid iOS users is definitive proof that they would never pay anyone anything is unrealistic and unjust.

Now, of course we have the see what the disclosure says. It is obvious there may be myriad reasons why at least to date they have not paid. Of course, if you pay a small cohort of iOS users, the pressure to then pay every other user, Android and desktop, may be overwhelming, and there may be a concern about setting a precedent.

We have set out in section (F) of the Claim Form that there are multiple competition regulatory and litigation proceedings in which the use and abuse of these data is said to be unlawful and they give rise to pecuniary sanctions and/or damages. And one can see in that context why there may be a tactical decision on the part of Meta

not to pay, given the wider implications for these proceedings, and penalties and damages and so on.

There is also evidence in Professor Scott Morton's first report, at paragraph 107. At page 254 she says:

"I understand that Facebook has found several workarounds to reduce the impact of ATT and increase its ad revenues from users of iOS devices."

We made the same point. It's at 95.o of the draft Amended Claim Form. Now, of course it remains to be seen what precisely these workarounds are. As we understand it, they are still effectively accessing at least some of the Off-Facebook Data. And it may well be that those methods are themselves abusive. But that all remains to be seen. So, it certainly shouldn't be taken as given today and that this is the last word.

So there may be a variety of reasons why at least to date payment has not been made. All this will need to be investigated. But in any event the question is not: would they pay iOS users? It is: would they have paid the universe of users in the counterfactual? Which is a different question, where the (inaudible word) incentives are dramatically increased.

Then turning to SNA, our first point in relation to that is that there are already at least two complaints on the GDPR and consumer law that this change in the terms of surplus is unlawful. It certainly cannot be assumed today that the SNA transition is a lawful one. It may indeed be a further abuse. As we understand it the tracking continues, the prices are raised, and we say that can't possibly be fair. It's a bit like saying that I must pay the person who took my wine bottle so they won't do it again.

SNA of course arises in the context where Meta remains dominant and where the market has tipped in its favour, and therefore it is not a true counterfactual. It has not yet been rolled out in the UK. And the bottom line is we will need disclosure in

due course of all Meta instances concerning potential payment, including ATT and SNA. These are clearly issues for trial and disclosure in due course.

Sir, my final point, which is very short, which is the question of profitability. Here, Meta makes three points in relation to Professor Scott Morton's analysis. Now, before I respond to those three points can we look at what she has actually done. Mr Singla either glossed over it or he didn't actually take you to the full extent of it.

It's in her first report at 214 and 215. Sir, you see 214 and 215 and figure 4. She has the EBIT of Meta, which is impressive. She has the EBIT margin of Meta. Then you will see, sir, at 216 she has a recent complete profitability analysis by the CMA. And then she has the incremental profitability associated with Off-Facebook Data in particular.

Now, Mr Singla's first point, he says, well, the CMA's analysis, that isn't a blueprint for trial. But what Mr Singla doesn't say, and Meta has never said, is what is wrong with the CMA's conclusions. It didn't challenge them at the time. And looking at the EBIT we can see why they were not well advised to do so. He doesn't challenge them now. I showed you the footnote in Parker 2 in relation to intangible assets.

And just focusing on that, I mean, Mr Parker, he doesn't say, well, what are these intangible assets that were left out of account? Why would that result in a conclusion that excess profits are not being made? Again, it is hinting at a possibility without a specific piece of evidence being put forward.

But the bottom line is that they are free to make any and all these arguments. And again it is hardly a reason today to wipe out the entire case and refuse permission to amend.

If we look at Professor Scott Morton's second report in tab 5, paragraph 38, she says:

"I would be happy to revisit these requests in collaboration with him [Mr Parker] to

identify the internal Facebook financial metrics information that would best help address the question of the extent of Facebook's economic profits."

So she has extended an open invitation to Mr Parker to have an expert-to-expert discussion of the relevant data. And of course, sir, you will well understand that at this stage, pre-disclosure, in a sense we've been fortunate that the CMA has done the analysis it has done. In most cases the asymmetry of information will be at its most profound when it comes to the cost data of the undertaking. So the fact that at this pre-disclosure stage we have the four items we have identified, we say, in context is actually quite impressive.

The second point Mr Singla made in writing, but notably not orally, he says, well, Professor Scott Morton's analysis of profits is defective because it doesn't consider whether these profits fall into cases 1, 2 or 3 of *Hydrocortisone*. That is 85(b) of his skeleton.

Now, with respect this is a thoroughly confused point. As you saw from our first report, at 214 and 215 Professor Scott Morton is only considering limb 1. Under limb 1, the exercise is to work out the gap between the reasonable rate of return and the price charged to determine whether in the first instance there can be said to be excessive, or I think "demonstrably immodest" were the words used before Christmas.

Now, at the limb 1 stage there was no need to pigeonhole phase 1, 2 or 3. It was only after having worked out the demonstrably immodest gap one gets to the allocation of cases 1, 2 or 3. So in effect that is a limb 2 point. So it is a misconceived criticism to say, well, under limb 1 it hasn't unpacked *Hydrocortisone*. But in any event it's wrong even on its own terms.

If we look at 263 and 264 of Professor Scott Morton report she does consider *Hydrocortisone* cases 1, 2 and 3, and says expressly that Meta has transitioned

some time ago from case 2 to case 3. That's 263 and 264.

You will see there are two paragraphs discussing *Hydrocortisone*. So, one does actually wonder whether Meta has read all of Professor Scott Morton. If they had, I don't understand how they could make the point they do. And of course, what is also conspicuous is that Meta has not come back and said, well, we are not case 3 and here is why.

A final point, again pushed quite hard in writing but barely a mention orally, is that they say Professor Scott Morton doesn't consider whether advertisers have themselves been subject to excessive prices.

Now, with respect there was a good reason for that. If we go to 414 of her report, first report, page 329. So the two responses. First of all, her starting point. She does consider dominance on the advertisers' side in the context of relevant market dominance in section 2. And her conclusion is that although there is some market power on the advertisers' side, it falls below the threshold of dominance. And if there is no dominance, there can't be an excessive price.

Unsurprisingly, perhaps, Meta has not sought to argue that it is dominant on the advertiser's side. Then in 414 she also says, well, I do not think, even if there were dominance, the prices are excessive. And again, Meta hasn't addressed them if they are.

And then over the page at 415 she says, well, look, in any event, if this is an issue the model can be easily adapted to deal with it, and one could apply a haircut to reflect the fact that some of the excess profits stem from the overcharging on the advertiser side.

Sir, that's why we say there is really nothing to these profitability points.

If I can just check.

MR JUSTICE MARCUS SMITH: Of course. **(Pause)**.

MR O'DONOGHUE: Sir, those are my submissions.

MR JUSTICE MARCUS SMITH: Thank you very much.

Mr Bacon, shall we hear from you next?

MR SINGLA: Sir, that's fine. I wasn't proposing to reply to Mr O'Donoghue's submissions. I mean, we have quite a lot to say about where this leaves or doesn't leave the case, but perhaps we should come to that after suitability and funding. And the short point is, we say you couldn't possibly certify on the basis of where we are. But I can address you at the end of the afternoon on that.

MR JUSTICE MARCUS SMITH: Yes. Thank you.

Submissions by MR BACON

MR BACON: Good afternoon, sir.

May it please you, sir, I appear on behalf of the class representative in respect of funding issues.

They started their life some months ago in a much broader number of issues. They have been filtered down to two very discrete points, one of which I don't think is being pursued today.

Just to give you some sort of architecture to the submissions, you have our skeleton argument, I hope, and you also have, I know, Mr Singla's skeleton in relation to funding issues, which you see or know that paragraph 90 and 92 are the two paragraphs that deal with funding, in quotes, issues. As I say, they are very limited.

Paragraph 90 -- and I should make this point now -- contains, as do my responses, confidential information, and I'm probably going to be required to refer to that. The Tribunal may or may not at this stage wish to sit in camera so that that can be undertaken. Or else I could steer the Tribunal -- and I have given it some thought -- through my submissions, drawing your attention to confidential information when we come to it.

MR JUSTICE MARCUS SMITH: That would be our preference. Shall we try to do that?

MR BACON: We will try to do that.

MR JUSTICE MARCUS SMITH: If it causes you undue difficulty --

MR BACON: I don't think it will, but I will tread carefully.

MR JUSTICE MARCUS SMITH: I'm grateful.

MR BACON: We will see how we go. I only suggest it because of the narrowness of the points you are really being asked to rule upon.

MR JUSTICE MARCUS SMITH: No, that's helpful, Mr Bacon. Thank you.

MR BACON: Sir, the first point there contained in paragraph 90.

MR JUSTICE MARCUS SMITH: Yes.

MR BACON: And there's a concern, the issue there is that the terms give rise to "perverse incentives" in the context of potential settlement discussions. That's the concluding sentence of that. So I call that the perverse incentive challenge.

And the second set of challenges is in paragraph 92 under the heading "Miscellaneous funding issues". They are stated helpfully, if I may say so, by Mr Singla there for the purposes of the record, but they have been -- as that paragraph reveals, there are no miscellaneous funding issues outstanding.

I'm going to take you to the relevant documents just to make that good. So, we are really concerned with paragraph 90. That's the argument. So far as the relevant documents are concerned, you do have the confidential bundle A and you will find in that bundle the amended and restated litigation funding agreement at tab 1.

I'm going to take you to some of those clauses in a moment. Again, if I can tread carefully without saying too much about them, on the basis that you will see what they say.

So that's the first relevant document. Again, just a bit of architecture of the bundle.

Tab 2 contains the fifth amendment agreement and an appendix to that agreement at page A/101 to A/103, which are relevant.

Then as you know, sir, you have in tab 3 the response to the CPO application. And for your note or at least for the record, the submissions I am addressing in relation to that paragraph 90 derive from paragraph 134 of that response.

As I say, the original arguments occupied a few paragraphs of the response from 134 onwards. The skeleton at paragraph 90 reveals the shrinkage of the point that's being developed.

Some key points on the litigation funding agreement. It's an agreement entered into by Innsworth Capital Limited, a well-known reputable funder. And in my submission it contains broadly what might be referred to as standardised terms of litigation funding in this arena. There is nothing, in our submission, which should cause the Tribunal any concerns at all so far as certification is concerned.

The definitions are helpful in that they provide the premise for the overall spending costs limits. You'll see that, sir, at page A/8. There are substantial sums that are being afforded by the funder in respect of adverse costs. I say "substantial"; they are very much in excess of what we have seen in other cases. That's the definition of adverse costs limit.

MR JUSTICE MARCUS SMITH: Yes.

MR BACON: Then A/14 defines the total commitment amount. Again, a very significant sum. Again, in excess of what we have seen in other CPO applications.

MR JUSTICE MARCUS SMITH: Yes.

MR BACON: Clause 3 of the agreement splits the funding of Project Costs between the pre-CPO and post-CPO period. Again, a fairly standard clause. And then for the purpose of responding to paragraph 90, the argument about, quotes, "perverse incentives" especially in the context of any potential settlement discussions, it's

basically being said that the funder has some perverse incentive, I assume to delay proceedings so that it can profit more from the outcome of the longer proceedings by virtue of the way in which the commissions are calculated.

I can't say more than that without going into too much detail, but you have my point.

With great respect to Mr Singla or those who instruct him, this is a very bad point. And it's actually quite a scurrilous point, if I may say so, on the part of a responsible funder that somehow they have engineered an agreement which creates perverse incentives.

And it's dealt with quite straightforwardly if I may say so, sir, by a fair reading of the LFA itself, which at clause 4 you will see expressly recognises that the Funder recognises that the Claimant maintains the independence that you would expect the Class Representative to have over all decisions in the case.

MR JUSTICE MARCUS SMITH: Yes.

MR BACON: That is hardly commensurate with perverse incentives.

You will also see, sir, in the definition section at A/11 there is a reference to an overarching purpose which underpins the agreement. You have that at the bottom of the page, A/11.

MR JUSTICE MARCUS SMITH: Thank you.

MR BACON: If one just quickly reads that. You can take it from me, but you'll doubtless read the agreement if you have to, that this obligation permeates the entirety of this agreement for both parties.

There's an express obligation on the parties to the agreement to ensure that the overarching purpose is met. And again, that is not commensurate with perverse incentives being incorporated into the agreement, deliberately or otherwise.

And an example of that manifests itself in clause 4.2(d) on page A/18, which again I'll leave you to read.

MR JUSTICE MARCUS SMITH: 4.2.

MR BACON: Sir, at (d). That is one example. It does actually appear elsewhere, but that's the reference to the overarching purpose and the obligation of the claimant.

MR JUSTICE MARCUS SMITH: Yes.

MR BACON: And that's wholly inconsistent with the submission that is broadly made against us.

And then more particularly, because the so-called perverse incentive is said to especially arise in the context of settlement, can I just draw your attention to the settlement provisions within the LFA. They start at clause 7, that's A/21.

These again are familiar clauses that we see in other LFAs. And insofar as it's said that the Funder may have some role to play in settlement discussions, you will see that the obligations that are set out are all subject to requirements of not to be unreasonably withheld or delayed responses, with a mechanism within the LFA for disputes arising. We refer to independent KCs.

Again, the idea that there is some deliberate attempt on the part of the Funder to undermine the Class Representative's ability to settle is just not made out at all.

So far as clause 8 is concerned – you will see the Resolution Sum heading, clause 8, and again this is another point that we take in our skeleton in response to paragraph 90, that all of this argument about perverse incentives to settle and so on fails to recognise or certainly fails on its face to appreciate that ultimately the Funder's return is going to be considered and dealt with by the Tribunal at the end of the claim, assuming there is that outcome which justifies payment to the Funder.

And the authorities have been clear in the *Sony* case most recently, and ultimately whatever one may say about Sony the Tribunal does conclude that questions of amount and perverse incentives are going to be considered, if they are relevant at all, at the end of the case by the Tribunal. And we obviously pray that in aid here.

The skeleton is making reference to the return, in fairly emphatic ways, and we say that questions of returns need to be dealt with at the end – at the suitable time. And moreover, as, sir, you know, this agreement has been drafted in a way that ensures that the Funder's return is calculated and deducted in a certain way, leaving the class able to benefit from any award that is made. Put it that way.

And you'll see that the fact that the Funder does not give way plainly to the jurisdiction of the ribunal is amplified throughout the agreement. Clause 8.4 is one example where the clause which identifies and sets out the applicable priorities in terms of payments begins with the words "Subject to any ruling of the court".

Then finally, it's said as part of paragraph 90 of the skeleton – it's not in the skeleton but it's part of the response to our CPO application – that the Funder has certain termination rights, if for example a certain minimum sum isn't likely to be recovered.

These are terms which have been considered in the past in *Merricks*. And indeed, this agreement has been drafted in the light of the alterations that were made in the Merricks case, containing the very same clause, albeit with a different figure. None of these clauses have been criticised in the past as creating perverse incentives.

The relevant clause is at clause 12, for your note. And you might recall -- I'm not suggesting you will necessarily -- but in the earlier *Merricks* case, and it's in the authorities bundle and just for your note there are a number of obviously *Merricks* cases but the one that is relevant here is at tab 26, where the Tribunal recommended including some adage to the ability of the funder to terminate, provided that it had independent legal and expert advice in advance of making that decision, so it wasn't a self-serving decision.

And that has been incorporated into this agreement, as I imagine you would expect us to incorporate it.

So really, they are my points in response to paragraph 90. The idea that this

application for a CPO application should be refused on the grounds of some perverse incentive on the Funder to act contrary to the interests of the class, by, it seems it's alleged, by implicitly extending or creating a lengthier outcome than would otherwise be the case is frankly fanciful literally.

Those are my submissions, sir.

MR JUSTICE MARCUS SMITH: Thank you very much.

Submissions in reply by MR SINGLA

MR SINGLA: Sir, I can start my submissions on this topic but I'm afraid I will need to ask you to sit in camera when I turn to the agreement itself, because I think our point really concerns the amounts and the way in which those amounts change over time. Obviously Mr Bacon it suits him not to take you to those parts of the agreement. I'm afraid I don't think I'll be able to address you fully on this topic. I can certainly start to make my submissions, but when I get to the agreement I'm afraid I will need to take you to those bits which are --

MR JUSTICE MARCUS SMITH: Well, make a start, and we'll take our break when you need to move into closed session, because it will take a few minutes to ensure that we bring down the live-stream and make sure we are actually in private.

MR SINGLA: I'm grateful. It will be very short, if that's any consolation. The session in camera will be very short.

MR JUSTICE MARCUS SMITH: No, not at all. We expect the application for an in-private session has been made responsibly and I am sure you have good reason to make it.

MR SINGLA: Sir, I'm grateful.

Sir, the way in which these points arise is, we say that in addition to all the fundamental points of substance that you have heard argument about in the last two

days, we say the claims are not suitable to be brought.

Essentially the first basis on which we say that is if you are with us on the substantive issues then we say it follows that the proposed claims cannot be fairly or appropriately resolved in collective proceedings. That's rule 79(2)(a). And nor are the proposed claims suitable for an aggregate award of damages. That is 89(2)(f). So those points stand or fall on suitability with the points of substance.

But we do say independently that the Tribunal at this certification stage needs to consider the cost-benefit analysis. And that, as the authorities make clear, is a fact-sensitive assessment which depends on the specific circumstances of each case.

Now, the PCR estimates at this stage that the damages per class member will be £44, excluding interest, or alternatively £66. That's the figure that we see in Professor Scott Morton's report, which I'll show new that moment. And just to be clear, those figures are based on what's now an extended claim period. So when this application was last before you the claim period stopped at 31 December 2019. And that was because, as they said in the Claim Form, they accepted that once the Off-Facebook Activity tool came into force that was the end of the alleged abuse.

Now they've rewritten their claim and they are no longer seeking 100 per cent of the profits but 50 per cent. They have offset that discount, as it were, by extending the claim period. So the figure that we now see -- if I can ask you to turn up Professor Scott Morton report at paragraph 468, page 346. You will see that she has two approaches. One can see at 466, this is the ATT approach. And 471 is the before/after approach. And at 468 you can see the £44 and £56 per class member.

And you will see in 466 that this number is based on not only the extended claim period but also the 50 per cent of the share of the profits, but also the $5 cost per user. Do you see that, in 466? And you've heard reference to this from

Mr O'Donoghue. Within this model as an input is something called the cost per user. Now, I think the Tribunal has my submission as to there not being any pecuniary loss here at all. But leaving that to one side for the moment, what they've done is they've assumed across the whole class that there's a $5 cost per user, and that then feeds into the model, which then feeds into what price would Facebook have paid, which then gives them the £44 and £56 figure you see there.

And just while we are on this, you can see in table 5, in the notes, they also say there that they assume a cost of $5 a year per user as a result of disclosing data.

And if you look at the before/after approach in 471 you'll see essentially the same thing. So in 471 itself the class member recovery, assuming they succeed on everything and 50 per cent of the profits are shared, then that's £66 recovery. But if you look at the notes to table 6 you see in the second sentence:

"We assume a cost of $5 a year per user as a result of disclosing data."

And you can see if one goes back to paragraph 433, the point really I just made, that the estimates, the £44 up to £66 depending on which approach, those estimates at 433 are based, she says, on a privacy cost of users giving up their data of $5 per user.

And then she says that because these estimated privacy costs are preliminary she's also computed a conservative lower bound for the quantum estimates which does not account for privacy costs at all, ie it assumes a privacy cost of zero.

Sir, I'm not going to go back over the points we've already debated about remedies and so on, but that does, in my submission, neatly illustrate that the delta between what they describe as cost per user, which we say is the individualised issue, but they jump from the $5 per head to £50 or £60. And that is exactly the issue; we say, on the substance, they are claiming a share of profits.

Now, we say, based on those figures and comparing those figures, and those

obviously represent the PCR's best case, as it were, at the moment, when we come to look at the returns to the Funder we say on a cost-benefit analysis this case is not suitable. And this is something that the Tribunal should be alive to at least, and it is our responsibility, as it were, to draw your attention to these issues at the certification stage.

And before I come to the LFA itself, I would like to show you the *Sony* decision, because one can see from Sony that these points are all concerns for the Tribunal, and it is absolutely right for us to raise these points.

Sony can be found in volume 6 behind tab 48. If I could ask you to pick up the judgment at 145, just so that you can see that there were various points being advanced by *Sony*, and the one that really is relevant for present purposes is 145(3):

"The effect of the funding arrangements on the incentives of the PCR and the funder. *Sony* argued that the funding arrangements, taken as a whole, create perverse incentives which are contrary to public policy."

So that's where "perverse incentives" has come from.

Then if one looks at paragraph 160 where this argument is considered. It's considered at 163 to 171, but if I could just show you the relevant paragraphs.

You see at 161 Sony's submission that the current LFA gives rise to perverse incentives contrary to public policy:

"*Sony* focused on two aspects, one … the application of a multiple to the total funding commitment, rather than amounts actually spent, dramatically increased the amount payable to the funder."

"This effect was amplified by the provisions relating to the funder agreeing further funding commitments and the consequences of the proceedings lasting beyond four years, both of which served to increase the multiple."

In other words, there was a ratchet.

Then if I could ask you to look at 166, the Tribunal refers to its own responsibility to manage the risks and has a variety of means of doing so.

At 167:

"It is a matter of judgment for the Tribunal as to how it employs those tools and levers to deal with the inherent risks arising from the funding model."

And it's absolutely right and we acknowledge. At the end of 167:

"We consider that in this case any concerns about the proportionality of the funder's return by reference to the risk and level of funding commitment it has made is best dealt with in the context of any judgment or settlement."

However 168:

"That view was potentially subject to one exception, being the provision that imposes an increase in the multiple four years after the application for a CPO with further increases each year thereafter."

What I have just described as the ratchet provision.

"Our reading of the clause was that it increased the relevant multiple by a factor of 100 percent. We were concerned that this provided for an arbitrary and steep increase in the multiple after four years which might create unhelpful incentives as that point in time approaches.

"We invited the PCR to discuss that matter further with the funder and then subsequently advised in correspondence that the intention of the drafting was to increase the multiple by 1 every year after the fourth year, not by 100 per cent." -- sorry, "was to increase the multiple by one every year after the fourth year not by a 100 per cent. So, for example, a multiple of 3.75 would become 4.75 in year four. And the PCR also suggested that the effect of this could be smoothed."

Then you can see at 170 Sony filed a short response.

Then at 171:

"Taking these developments into account ..."

That's understanding the smoothing provision and so on from the PCR:

"... we do not consider the funding arrangements to create unacceptable risks of perverse and unmanageable incentives at this time. We note the arguments advanced by Sony about the potential size of the return but we agree this is not the time to determine the reasonableness of those outcomes."

So what we say is -- we accept that insofar as one's looking at the level of return, the overall level of return that may be a matter for another day. But we do want to put the marker down we do in relation to the overall level. But in relation to the ratchet just as it was something that concerned the Tribunal in *Sony* at the certification stage we say that is something which it's proper for the Tribunal to grapple with now. And that's with those submissions I'd like to turn to the LFA itself.

MR JUSTICE MARCUS SMITH: Yes.

MR SINGLA: Perhaps as discussed --

MR JUSTICE MARCUS SMITH: That would be a moment to -- very good. We will for reasons articulated by counsel, move into private session, we will obviously try to keep that short as possible, but when we resume after a ten-minute break we will I hope be in private. We will rise for 10 minutes.

(3.05 pm)

(A short break)

(3.15 pm))

In Camera Hearing (extracted)

(Hearing resumed in public)

MR JUSTICE MARCUS SMITH: Mr O'Donoghue, I think it would be helpful if you very briefly articulated what you would say is, of the three options, the route forward

and we'll see if Mr Singla has anything to say. If he has nothing to say then I quite understand because no one likes to buy pigs in pokes. On the other hand I would like to have a feel for how -- notwithstanding the fact that we are not going to say anything more about outcome, how you at least see the matter as best being run.

And Mr Singla, if you have anything to say then we'll hear it. But we will quite understand if you said there's nothing to say and you can't assist us.

MR SINGLA: Sir, yes.

MR O'DONOGHUE: Sir, we are keen to keep our momentum. I would like to say something.

Further submissions by MR O'DONOGHUE

MR O'DONOGHUE: Sir, we are putting our flag firmly in the ground for option 2, which is the *Boyle* module, if I can call it that.

Now, to Mr Singla's point, of course it goes without saying that the directions should not commence until certification is -- let's assume is granted. There is of course one subsidiary point. The business users and class definition points, there a further run of submissions on those. We are proposing to put in our submissions on Friday, we suggest Meta responds by Wednesday. So that's one short point.

MR JUSTICE MARCUS SMITH: Right. Well that's helpful you've raised that because although we are not going to give any kind of indication one way or the other, I think that would be irresponsible, we do want to have all of the points sorted out. So you are saying Friday of --

MR O'DONOGHUE: We will expedite that.

MR JUSTICE MARCUS SMITH: I think Mr Singla, Wednesday is too short.

MR SINGLA: I'm grateful.

MR JUSTICE MARCUS SMITH: But can you do it in a week?

MR SINGLA: We ask for an indulgence. This is the first we heard of the proposal

and we obviously haven't seen the submission, so we are not looking to delay but if we could have two weeks, then we can provide something which --

MR O'DONOGHUE: This of course has been ventilated at some length.

MR JUSTICE MARCUS SMITH: Well look --

MR SINGLA: Can I just actually come back on that, because the new point, if we are actually getting into the detail, the business users' point we say is actually --

MR JUSTICE MARCUS SMITH: Mr Singla, I was going to say we are not going to be producing a judgment that will require this input within a week.

If, Mr O'Donoghue, you are comfortable acting by Friday, if you want longer then say so now.

But since it actually does no harm I will be inclined to give you the two weeks.

MR SINGLA: I'm grateful.

MR JUSTICE MARCUS SMITH: But Mr O'Donoghue --

MR O'DONOGHUE: If we are being generous we would ask for a week.

MR JUSTICE MARCUS SMITH: Very good. Problem solved.

MR O'DONOGHUE: Yes. Sir moving to the shape of things to come, you, sir, are obviously much more familiar with *Boyle* than we are, but from the Tribunal's website we have divined the following. *Boyle* of course was not in foothills as we are. As I understand it, sir, the defendant in that case had given some limited disclosure, there had actually been the defence and there was the enforcement issue with Mr Harvey.

MR JUSTICE MARCUS SMITH: Yes.

MR O'DONOGHUE: And it was in the context of some disclosure and the defence that the full case proposal then emerged in the form of an expert report from Dr Davis.

Now, we say in principle a similar format would be appropriate here but adjusted for

the fact that we are in the foothills compared to *Boyle*. So what we would suggest, Meta should plead out a defence in the Amended Claim Form, in parallel -- and I will come to this -- they should provide disclosure of what I would call low hanging fruit, and I will explain what that means. In respect of other disclosure, so in other words the fruit that is not hanging low there would be a witness statement of disclosure, a statement from Meta outlining what they have and haven't got, which would then be used as a platform, if you'll forgive the term, for further targeted requests, then depending on the Tribunal's position and that of Meta there may be further disclosure and response to that. And then having had at least some disclosure, we would then file our -- what the Tribunal has called our full case, as best we reasonably can at that stage, I think in the form of further report from Professor Scott Morton.

Now if I can just quickly unpack those handful of points. I've said on multiple occasions today one of the issues we face is that -- this isn't a criticism -- the approach to date of Meta has been bare and minimalist and essentially not forthcoming in terms of their position. They have yet, for example, to plead to any document with a statement of truth which seems to me significant. This may be a marker point, but we think the Tribunal and the PCR would be assisted with a defence that was not a further exercise in bare minimalism.

If of course the PCR is required to produce a full case before seeing a defence from Meta there is a real risk, in my submission, that significant time and money would be spent, wasted on seeking disclosure and on addressing points that are actually not in dispute. And that was, as we understand it, the issue, sort of ships in night, that led to the Tribunal ordering parallel positive position statements from *McLaren*.

We don't go as far as that today. But we do think we need to know from Meta its basic position on the core issues in the case, at least from a defence before we can produce a full document. Because there is a realness, of course, that in the absence

of that we would be tilting at multiple windmills, or that we are not even ships in the night, and it's actually something much more profound.

Now, on disclosure, the low hanging fruit I'm referring to there is the *Klein* proceedings in the United States which we set out in section F of the Claim Form. A substantial volume of disclosure has already been given by Meta in those proceedings, they concern very analogous issues. That has all been done. As it so happens the claimant law firm in that case is also Quinn Emanuel, so this is not merely just one click away, it is one office away. So we say that is an obvious repository of low hanging fruit, the claimant should be ordered, at essentially no cost, which will get the ball rolling in a very significant way.

And that in a sense is the sort of catch-up with *Boyle*, which is in a world where today we have nothing, at least if we have that low hanging fruit in parallel with the defence substantial progress can be made, we think quite quickly.

I've taken you to appendix C of Scott Morton 1, in which she sets out a number of requests. We think we do need engagement on those from Meta. I understand of course that probably should be expert-led for the most part. So we have set out set our stall in appendix C, we need some of reciprocation and co-operation.

And finally, of course, the Tribunal's very helpfully indicated we could have ad hoc or at least regular disclosure hearings, perhaps on the first Friday of every month or every other Friday, something like this, which has been done in other cases.

That leads me then to really the final point which is for obvious reasons the full case we will provide will be a function of the raw material that we can harness in advance. To put it another way, it's very difficult for us to advance a full case in the absence of any, or at least any substantial, disclosure and a pleading from Meta. So if the objective is to get to a fuller case asap that is meaningful and moves the dial in a significant way that will primarily be a function of the disclosure we get, a clear

statement of position from Meta, so there's a sort of symbiosis between those two things which is obvious. And we can of course in parallel with that full case from Professor Scott Morton then perhaps have a short position statement accompanying that, setting out where we see, if that is the case, but gaps remain including on disclosure. So sir, that is the comprehensive proposal we put forward at this stage. I haven't, I'm afraid, discussed it with Mr Singla for obvious reasons but I'll – (overspeaking) –

MR JUSTICE MARCUS SMITH: That's very helpful.

Before you rise, Mr Singla, just let me push back on the Tribunal's part a couple of points. The thinking behind the *Boyle* order was that there was too much going on by way of a phoney war in that there was an awful lot of time and money being spent, in particular by the defendants, in articulating points which, in order to work out whether they were good or bad, required further articulation of a case by the Class Representative in circumstances where the Class Representative had already done enough first time round to obtain certification. That was the unusual element there, certification had been obtained and then for reasons that we won't go into but wasn't the Class Representative's fault, the expert left the scene and left them in need of instructing very early on a new expert. And in order to avoid all parties incurring costs on certification, what we said was let's have the Class Representative put forward a fully-articulated case.

Now, that of course implied an assistance from the Tribunal in terms of obtaining documents from both the defendants and the intervenor in order to articulate that case but without a defence and in the expectation that something would be produced that would be ready for trial. Of course, it wouldn't be ready for trial because the defendants' response would have to be articulated. But the plan is that when this fully-articulated case is produced there will then be a point in time at which the

fundamental issues which the defendants have articulated as being a game-changing killer set of points will either be abandoned in light of the fully-articulated case or pursued when this case is developed, with the Class Representative effectively left with nowhere to go, not being able to say, "Well, we can improve this in due course", they can't, because they've had every opportunity to do so. That's why they have nowhere to go and if the point is well made then certification is removed and effectively you have a summary judgment at that stage, with the incidental advantage that the costs of the defendants are kept to the absolute minimum because they are not doing any work in defending a case which is a moving feast.

Now I understand that you might want some indication of Meta's stance to certain points. However, we have said, we have all of us said, that these are new and difficult cases, it does seem to me that the Class Representative ought to proceed on the basis that the Tribunal will expect an articulation of the claim which is capable of being understood and justified, irrespective of Meta's concessions on certain points, because even if Meta were prepared to concede something I'm not sure you might necessarily accept that we would take it, without more, that an agreement between the parties, the point doesn't have to be explored, should be just ignored.

So my sense is that there is an advantage in obtaining a full articulation of case, with the Tribunal's assistance in terms of obtaining material from Meta to the extent that's not voluntarily provided. Of course we would expect the experts to communicate while that work is being done, not merely to provide disclosure but also to understand what are the genuinely hot points of dispute and what are the points where, you know, the experts might argue but you can narrow the areas of argument. We would expect that. But that can be done without a properly articulated or even summary form of defence. And then we get an ability to give

Meta the chance to take any fundamental points of objection in light of the fully-articulated case.

And Mr Singla, I say that fully conscious that you said yesterday, rightly, that this is not a multiple bite of the cherry case. If this case is unsustainable now then we will say so. What I'm thinking about though is a situation where the matter is on the material and argument we've heard today arguable going forward but where, in light of its full articulation, given this is difficult and new law and fact, one can avoid a trial. Because even though, Mr O'Donoghue your team have done great work with the disclosure from Meta that they've obtained, it just doesn't get off the ground. And that is something which does seem to us is important to build in if Meta see a point that is able to shortcut matters.

MR O'DONOGHUE: Yes.

MR JUSTICE MARCUS SMITH: That's how we see it working, broadly, I think as you've articulated it, but minus the Meta defence. I don't know if you want to push back on that at all so that we understand the -- (overspeaking) --

MR O'DONOGHUE: Sir, there is of course a practical trade-off, because, being candid, the less -- at the moment we have produced I think something close to 500 pages, put them in the Claim Form, and Scott Morton 1 and 2. We have squeezed the lemons until the pips have burst in terms of public material.

Now, for us to sort of move to the next level it will require meaningful disclosure. Just to give you one example --

MR JUSTICE MARCUS SMITH: Mr O'Donoghue, don't get me wrong, when I say no defence I don't just mean no defence and no disclosure. I mean no defence. I would not want a disclosure exercise in the traditional sense of a list of documents being provided by Meta.

Assuming certification, assuming we go down this route, I would expect

Professor Scott Morton to say: well, in order to produce a final version of what I have done so far, I need to see -- whatever it is. And Meta will either say: well, we understand why you need to see that and we can produce it, and here it is, or they'll say: we don't understand why you need it, and it's actually quite onerous to produce so you are going to have to toddle off to the Tribunal and get an order.

Well, that's fine. So you are not going to be deprived of material. What you are going to be deprived of is a further articulation of, we accept, the very limited articulation of Meta's position at the moment. But I don't see a problem with that, given that this is your case at this stage.

MR O'DONOGHUE: Yes. That's all well understood and that's very helpful.

MR JUSTICE MARCUS SMITH: That's helpful, Mr O'Donoghue.

Mr Singla --

MR SINGLA: I can be brief. Can I say this. We really see the way forward in three different ways. The first, and I keep coming back to it, but we do submit that this shouldn't be certified.

MR JUSTICE MARCUS SMITH: No, no.

MR SINGLA: I know, but in terms of about the hierarchy of options or the menu of options we say they've had two bites of the cherry, they need to satisfy you not only that the claim as recast is arguable but also that they have a blueprint, and we say, so point 1, is it shouldn't be certified.

Point 2 we say that if you on reflection consider that there's some other case out there that might satisfy the certification criteria, we would say that you need to not certify and give them a chance to recast their case post-certification, the proper course would be for them to see what you say in your judgment and we should then have an opportunity to address a third iteration of case before certification.

MR JUSTICE MARCUS SMITH: Yes.

MR SINGLA: The third option on the menu, we would submit --

MR JUSTICE MARCUS SMITH: Look, I'm not sure actually options 1 or 2 are on the menu at all in the sense that we are talking about certification of the case as it's been pleaded in draft form. That's what we are talking about.

MR SINGLA: We are dealing at this hearing with their application for permission to amend.

MR JUSTICE MARCUS SMITH: Yes.

MR SINGLA: And if you reach the view that the amendments are either unarguable or --

MR JUSTICE MARCUS SMITH: Then game over.

MR SINGLA: Exactly, exactly. But our primary position is it is game over.

MR JUSTICE MARCUS SMITH: Mr Singla, that's what we've been talking about over the two days; I understand that.

MR SINGLA: I understand --

MR JUSTICE MARCUS SMITH: So look --

MR SINGLA: The second option is if you were to reach the view that the current case doesn't work, but you are unwilling to shut them out forever --

MR JUSTICE MARCUS SMITH: That is something on which we would have to think very carefully, because you have already said they've had two bites of the cherry, we gave them, you would say, and I think I would agree, generously, an opportunity to recast things, and this is second time round. We have that on board.

MR SINGLA: No, that's fine.

MR JUSTICE MARCUS SMITH: What I'm really asking you to consider is let's suppose we take a look at the documents as they stand, and we say, "We heard two days of argument, I'm sorry, Mr Singla, you lose, they win, we are certifying on this basis", how, going forward, do we manage that?

MR SINGLA: Yes, and that was option 3 on my menu. And in respect of that we would say, assuming certification, I think we welcome what you've just said to Mr O'Donoghue in the sense that we would have an opportunity to say this case doesn't add up to a row of beans, even at that stage, without incurring huge amounts of costs and time and so on.

I think where we would part company with both Mr O'Donoghue and, with respect, you, sir, is I think you were saying to Mr O'Donoghue, minus -- or Mr O'Donoghue proposal minus defence. We would submit it should be minus defence and minus disclosure, because we say this is a classic scenario of the claimant hoping that something turns up.

MR JUSTICE MARCUS SMITH: No, no. Look, there are two ways of doing this. One is to require you to put in a defence, have disclosure, experts, all that sort of stuff, or to do it in parallel. But the one thing you are not going to get out of, assuming we certify on the basis pleaded, is an obligation to disclosure, and you will be giving that.

MR SINGLA: I'm perhaps not conveying this sufficiently clearly. I think all we're really saying is -- obviously we understand the way the procedural timetable will work from certification to a trial. But I think what I'm saying is, insofar as the Tribunal is saying that Meta should have the ability to say what -- "You, the PCR, your full case doesn't add up to a row of beans and certification is to be revisited", that there should be a provision for that sort of application to be made sufficiently early in the process, that the parties haven't wasted a huge amount of time and costs and it becomes disproportionate, because if they are --

MR JUSTICE MARCUS SMITH: You have misunderstood where we are coming from.

Mr Singla, I asked you to assume -- I know that this isn't Meta's position and we

obviously have to consider it, but you have to assume that we have certified on the basis of the case as pleaded.

MR SINGLA: Yes.

MR JUSTICE MARCUS SMITH: I know you say "No way, it's a terrible case, don't do it". Well we have. The question is what do we do next? And what I'm saying is that we would want, without requiring Meta to incur the costs of a defence, we would want to get Mr O'Donoghue to convert a certified case into a case ready for trial. Now, that has to involve disclosure for Meta, there's no way around that. And we are not going to entertain any suggestion to the contrary on the assumption that we have certified.

Now the question is -- I mean option 2 is usually resisted by the Class Representative because they don't get to see the colour of the defendants' money until extremely late in the day. Mr O'Donoghue has not pushed back very hard on that. We're grateful. So what I'm interested in is whether there are practical objections to that course being adopted.

MR SINGLA: No --

MR JUSTICE MARCUS SMITH: You have to take it as read that we will have rejected your point about strike out, because that's intrinsic in certification. You've made that point and it's right.

MR SINGLA: Sir, I think perhaps I'm not making myself sufficiently clear. I totally understand that what you are hypothesising is a post-certification world and you are I think very clear that at that stage you would like to see the PCR develop the case with the benefit of some disclosure.

MR JUSTICE MARCUS SMITH: I would like to see them develop the case ready for trial.

MR SINGLA: I think all I'm really saying is -- is really putting down two markers at

this stage. I'm not resisting the *Boyle* principle, as it were, as to structure. But I think all I'm really saying is if and when we see that full case we do reserve the right at that point, instead of going into defence and further procedural steps, we do reserve the right, as indeed exists in any case, to say, "Well, we've seen your full case; you've asked for disclosure and we still say this doesn't meet certification", because certification can be kept under review.

And I think, as you were suggesting yesterday, there might be a strike-out post certification, as it were, if there's a crisp point that one can identify at that stage in the process. I think all I'm really saying is that we reserve the right to take that sort of step.

The second point, again putting down a marker, and we have seen some of the disclosure requests -- the proposed requests made by Professor Scott Morton. This is obviously not a matter for today or even -- this is some way downstream, but we regard some of those requests as being disproportionate for the purposes of pleading a full case. But that's obviously not something that we can get into now.

MR JUSTICE MARCUS SMITH: I don't think you are on the same page as I am.

MR SINGLA: Right, I apologise.

MR JUSTICE MARCUS SMITH: We are not talking about a pleading of the case. What I'm envisaging by option 2 is that Class Representative produces not simply a fully-articulated pleading, we pretty much got that. Not just an expert report prior to disclosure, we've already got that. What I'm expecting, if we go down this route, is a case that is ready for trial. In other words, Mr O'Donoghue's clients are closed out from making any further positive case. That's why disclosure is an intrinsic part of it. The attraction of it is that in the light of a fully-articulated case, this is the best we can do, you have a delta at that point, one delta is to say, "Well, it's a case we disagree with, but the only which we can win is by going to trial", or -- and/or actually there is

a fundamental flaw in the analysis, having looked at it in the round, and Mr O'Donoghue's clients having had the opportunity to articulate it in the light of disclosure from Meta, that you can knock it out early.

Now frankly I regard that as vanishingly unlikely. But yes, you should have that option, and you get it before you've incurred very much expense, except by way of disclosure. That's how I see it working.

MR SINGLA: I think we are on the same page. May I just take a moment to take instructions?

MR JUSTICE MARCUS SMITH: Yes, of course. **(Pause)**.

MR SINGLA: Sir, I think that's been very helpful. I'm not sure I can address it any further, it may be that in the light of your judgment we can have a further --

MR JUSTICE MARCUS SMITH: Yes, because to be absolutely clear if we are falling short of a, as it were, unconditional certification, if we say well we can see a sniff of a case that could be certified but it isn't here, well then we will have to think about what our stance it and it would be I think irresponsible for us to not ensure that the parties addressed us on that point. Mr O'Donoghue may very well say we've misunderstood what he's pleaded and you may very well say that we understand it perfectly correctly and we should put the case out of its misery right away. That is something which I understand is part of the argument we've had in the last two days. It's not something that I want to have as part of this case management debate.

MR SINGLA: I understand. I'm afraid there's a limit to what I can really say about --

MR JUSTICE MARCUS SMITH: There is, and frankly there a limit to what we can do by way of active case management because at the moment there's no case --

MR SINGLA: That's really the point.

MR JUSTICE MARCUS SMITH: -- to manage. But we have I think -- at least have a sense that of the three options that I canvassed in outline yesterday, there's no

commitment here, the parties are on the whole more inclined to option 2 than option 1 or option 3.

MR SINGLA: That is fair.

MR JUSTICE MARCUS SMITH: That is helpful.

MR SINGLA: All I'm really saying is we are not on board with the idea that we should plead a full defence and we would reserve on any basis the right to say this doesn't work. But I think, sir, it may be proper productive to revisit these issues in light of your judgment.

MR JUSTICE MARCUS SMITH: Indeed. I think that's true for everyone.

MR SINGLA: I'm very grateful.

MR JUSTICE MARCUS SMITH: I'm grateful, Mr O'Donoghue, for ensuring we could at least have this limited debate.

I see the time. Mr Ridyard has an appointment. Is there anything more that we need to address before we rise?

(Pause).

MR O'DONOGHUE: Sir, no. Simply to state the obvious, which is that -- this is a novel route, subject to Boyle in terms of case management, and there will be some devil in the detail, but that's for another day.

MR JUSTICE MARCUS SMITH: It is. And I'm sure we haven't heard the last of this case, whatever we decide.

Can I express my thanks to all of the parties and their legal teams. We are very grateful for the assistance we have received. We obviously reserve our judgment, we will endeavour to get something to you as quickly as possible because we don't want this case to hang around, particularly given the ratchet. So, thank you very much.

(4.21 pm)

(The hearing concluded)