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IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1572/7/7/22 & 1582/7/7/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 23rd July 2025

Before:

The Honourable Mr Justice Leech
Mr John Alty
Dr Maria Maher
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Ad Tech Collective Action LLP

Class Representative

v

Alphabet Inc. and others

Defendants

A P P E A R AN C E S

Gerry Facenna KC, Niamh Cleary and Greg Adey (Instructed by Humphries Kerstetter LLP, Hausfeld & Co. LLP and Geradin Partners Limited) On behalf of Ad Tech Collective Action LLP

Meredith Pickford KC and Natasha Simonsen (Instructed by Herbert Smith Freehills Kramer LLP) On behalf of Alphabet Inc. and Others.

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Wednesday, 23 July 2025

(10.30 am)

Case management

THE CHAIR: Good morning. Before you start I ought to give the customary warning that an official recording is being made and an authorised transcript will be produced. It is strictly prohibited for anyone else to make any unauthorised recording, whether audio or visual, of the proceedings, and breach of that provision is punishable as contempt of court.

Off we go.

MR FACENNA: I am Gerry Facenna. I appear together with Ms Cleary and Mr Adey on behalf of the class representative. My learned friend Mr Pickford KC appears together with Ms Simonsen on behalf of Google.

There has been, you will have seen, a certain amount of movement over the last few days. When the tribunal received our skeleton argument at 4.00 pm last Thursday, the parties by that time had made somewhat limited progress towards narrowing issues for the CMC. You will have seen that Google's consistent position pretty much had been that disclosure or other substantive steps would have to await the parties' first attempt to settle a detailed list of issues, and the directions at this stage should therefore be restricted to fixing a trial date and setting a timetable for us to do that.

Now, the position set out in our skeleton argument was that this was unreasonable and obstructive, and was slowing down progress.

We then received, as you will see, a six-page letter an hour before the skeletons were due to be filed, together with draft directions for the first time. And that was followed by Mr Wisking's witness statement, which we received on Friday morning.

So, since then, there was a lot of work on our side to get to grips with that new material, because that was really the first time that we had ever seen an offer from Google,

either to provide any initial disclosure at all this year and concrete proposals for any discussions between the parties leading up to other meaningful directions.

Where we have now come to. I will come on to deal with, obviously, the detail of the proposals and where we are. I should say that it won't surprise you to hear me say that we believe we have considerable grounds for complaint about the approach and the timing that Google has taken. We provided a draft order, I think now more than six weeks ago or around six weeks ago, and it was only on Thursday last week in that correspondence that we actually had any concrete proposals at all on those draft directions.

We have also provided a draft list of issues, which you will have seen on 4 July. Google has not made any comments on that and maintains it will not be able to do so before September.

We have wasted costs preparing a skeleton argument to meet a position which completely changed at the very last moment. I have no doubt that it will have affected the tribunal's ability to prepare, not least because you will have received two skeleton arguments, one of them a day late and which addressed different positions, one of which the class representative has not had an opportunity to consider.

That, we say, could all have been avoided if Google had engaged meaningfully in recent weeks to discuss and try to agree positive proposals for directions, in particular in relation to disclosure.

Now, what has occurred is that to try to make sure that the CMC was not completely derailed, we did do considerable work to get to grips with the material in Mr Wisking's statement and Google's proposals and to see where we could narrow the disagreement. We wrote to Google late on Monday with a detailed response to their proposals and certain counterproposals, which are essentially a modified version of the draft directions they provided on the Thursday.

The letter that we sent is exhibited to Mr Streatfeild's witness statement. I know you only received that yesterday. If you haven't had the chance to look at it, then I can direct you to the relevant parts. But that witness statement explains the class representative's proposals which have developed in the light of Google's changing position and Mr Wisking's statement.

To bring you bang up to date, I think sometime around midnight last night, or at least overnight, we received a further letter and revised set of directions from Herbert Smith, which may or may not have found their way to you in some form. And there has been a bit more narrowing, particularly on one issue of initial disclosure, which I think was going to take up quite a bit of time today. But, actually, we don't have to deal with that now.

So, in outline -- and I will come on to each of the issues on the agenda -- there is agreement on timing for comments on a list of issues. We have effectively accepted the timetable Google asked for. But there do seem to be quite different expectations about what that list of issues needs to look like. I will make some brief submissions on that.

There is an agreement on the broad outline of a staged disclosure process. So there will be -- there will now be the agreed provision of some datasets. Initially, there were three datasets. Google was only offering to give two, last night they agreed to give us the third one. So I probably don't need to address you --

THE CHAIR: The DOJ's disclosure?

MR FACENNA: The DOJ's disclosure. So we now have agreement to receive that as well, which saves you having to listen to me make submissions on Rule 61.

So they will hand that over. They have agreed to our date for that, which is 26 September.

There is agreement that there should then be a process for identifying further relevant

material within that pre-existing disclosure for the other proceedings, so the FCA and CMA and the DOJ and so on. And a stage to identify and disclose other relevant documents from that pre-existing disclosure. Then a third stage, which will be other data and documents that Google has that are relevant, but that haven't already been disclosed in the other proceedings.

It does also appear to be agreed, at least in correspondence, if not in draft directions, that we can resolve this today; that in so far as the parties are able to agree on disclosure, there will then be disclosure on a rolling basis rather than everything waiting until the final date. But once we get into the nitty gritty of the order then perhaps we can figure out quite how that goes ahead.

There are, on disclosure, which is likely to be one of the big issues for today, there are remaining issues on the relevant dates for those three agreed stages. There is a difference in principle as to whether Google should be required to produce a disclosure report and an electronic disclosure documents questionnaire to meet the third of those dates. So that's the third tranche.

So that's broadly the outline of where we are in disclosure.

Aside from that, there are minor differences about the timing of CMC 2 at the end of this year. To some extent, that might follow from where we get to on the disclosure arrangements leading up to that.

To shortcut this, one of our concerns is to make sure that by a CMC at the end of this year that we have resolved, or at least crystallised, issues relating at least to all of that pre-existing disclosure, so we can sort that out by the end of the year. We can have some rolling disclosure of that by then.

If there needs to be some negotiation or some arrangements made about an EDQ and disclosure reports, part of our problem is, other than some quite general, high level points Mr Wisking has made, actually Google hasn't suggested when it would be able

to produce those documents. So we may have to hear more about that today.

Where we are very keen to get to is that we have a trial date which is fixed today, in 2028. Working back from that, by a CMC in May next year, we have effectively sorted out all the disclosure issues, including both the pre-existing stuff and the third tranche, because that will then enable us to get the factual witness evidence out at the end of next year and the CMA stuff at the beginning of the year after, and the expert reports, and everything then flows from that.

There is a disagreement today about whether the tribunal should, at this CMC, set down a timetable for factual witness evidence and the CMA's written intervention and expert reports, and an anticipated mediation. We say we should do all those things.

In relation to the trial listing, there is still a difference between us. I think Google's position is you shouldn't fix a trial at all today. But they sort of grudgingly say: if you are going to do that, it should be twelve weeks at the end of 2028 rather than eight weeks.

THE CHAIR: Can I tell you where we have reached? That might help truncate things. We do think a trial date should be fixed today. We have a preference, I think, for -- well, you can push against this if you want to -- October and for effectively giving up the whole of, where I come from, what I would call a term to the case. Effectively, devoting October to December, giving you -- whatever the length of trial is likely to be, it is very difficult for us to tell. We certainly don't have the level of visibility in relation to the issues that you all do. But, certainly, we want to give you that whole term.

Our preference, really, is a practical one. I know you think that allows Google to kick the can further down the road. But our concern is a purely practical one, which is going to be: you will get a judgment much more quickly out of us if you don't have a summer in between -- immediately after the trial, when everyone is extremely tired and they have gone through a period from April to July.

We think the sensible approach is to fix a trial. Fix it to start either at the end of September or beginning of October and you can have the whole term. So, you could have eight weeks with four in reserve or you could just have the twelve weeks. We would give you that and list that now.

If that is acceptable to the parties, then we can start to work backwards. It seems to us that that ought to be the first issue that we resolve, because until we know when this trial is going to take place, it seems a bit pointless to worry about when you are going to serve your factual evidence, who it is going to be and what date.

I think in relation to the rest of your timetable, what we would like to do is fix an early second CMC and focus on the issues that you have raised for this morning. Once we have a trial date fixed, then the other directions could be the subject of much more careful consideration at the second CMC.

Our reason for that is, again, a very simple one. It is not to allow one party to take a tactical advantage over the other; it is really that it seems to us the parties are going to be much better able to fix a timetable, rather than simply sticking a finger in the wind; by the second CMC, we should have a list of issues fixed; you should have had some disclosure; the trial itself will begin to take shape, and it ought to be much easier for the parties to come up with a timetable which should be -- what we are very keen to avoid is not fixing a timetable now which then ends up generating satellite litigation, as you say to that one, "You promised your witness statements on date X", and endless applications for extensions of time, which, ultimately, there would be a lot of heat and not much light and, ultimately, the extensions would be granted.

So, it seems to us, if we have a date in the diary for the second CMC this side of Christmas and a trial date fixed, that gives then the parties the parameters in order to work through what are going to be a very serious and challenging set of directions.

I mean, if either of you really want to push back on those two issues, then, please, do

that now, shall we? We can then begin to fill in some of the gaps in between, if you like.

MR FACENNA: Tempting as that invitation is, I will need to probably take some brief instructions on it. Just so I understand then, what I understand the tribunal's starting point to be is we should fix the trial date now; we will be looking at the end of 2028 --

THE CHAIR: Yes.

MR FACENNA: We would probably go for something like eight weeks with four in reserve.

THE CHAIR: You would have the entire term.

MR FACENNA: We can have the entire term. In reality, we think that is excessive. But I assume the position will be that as things become clearer we will be able to say actually we are looking at an eight-week trial, not --

THE CHAIR: We would assume by the time you get to the equivalent of a PTR, there will be a trial timetable which will be either eight weeks or twelve weeks. My experience of PTRs and trial timetables is that they usually bear no relation to what parties have thought right at the beginning of the trial.

It is only when they have seen all the witness statements, read all experts' reports and worked out precisely what evidence they are going to call and who they are going to challenge that they can actually come close to fixing a proper trial timetable anyway. And, even then, it usually turns out to be wrong when you get into the trial, so ...

MR FACENNA: Understood.

THE CHAIR: I don't want the parties to get hung up on the difference between eight and twelve weeks. You can both have that. I understand that for, obviously, cost budgeting purposes and timetabling of witnesses there are lots of practical issues about how long it should be. But, from our perspective, we can fix it and then give you both the amount of time you think you need.

MR FACENNA: If we can have disclosure by -- so when we come back in November/December, we would then be looking at fitting in dates for factual evidence --

THE CHAIR: Giving directions to trial.

MR FACENNA: Can I just have a moment?

THE CHAIR: Yes, of course.

MR FACENNA: From our perspective, provided we can deal with disclosure in a meaningful way before CMC 2, we are amenable to the tribunal's proposal.

THE CHAIR: Mr Pickford, do you want to say something about the --

MR PICKFORD: I do, thank you, sir. I am not going to attempt to push back hard against what the tribunal has indicated it would like to do. However, I do want to be transparent about the twelve-week estimate and why, in my submission -- whilst what the tribunal is proposing is obviously sensible for now, this is an issue we might need to revisit.

THE CHAIR: You might need more than twelve weeks?

MR PICKFORD: We might even need more than twelve weeks.

If I may, I would like to explain why. I am not asking for a longer listing now. But what I am saying is there are good reasons why neither of the parties, at the moment, is in the position to have a strong grasp on exactly how long this is going to take.

THE CHAIR: I am listening; I am just looking. Because you, actually, I think, in your order, anticipated we start towards the end of September, I think, to get the twelve weeks in; isn't that right?

MR PICKFORD: That's right. I mean, to be clear, our primary position was: don't fix a trial date. But our secondary position, given we thought there might be some pressure to list it, is: well, if you are going to list it, list it here.

THE CHAIR: Okay.

MR PICKFORD: All I am seeking to do now is to make clear that it is possible it might need to be revisited. There are a couple of reasons I would like to briefly explain --

THE CHAIR: Certainly. Please go on.

MR PICKFORD: The first is that there are two bases on which the class representative has said: well, we think it will be in this order of magnitude.

They have pointed to three cases before the tribunal that have been listed for eight weeks. Our understanding of those cases, insofar as one can discern it from the published documents in those cases, is there are up to about three different conducts that are said to be abusive in those cases.

In our proceedings, the tribunal will have seen that we have 17 different conducts that are said to be abusive. If one simply applied a linear scaling factor, that would take us up to a trial length of about a year. I am not saying: list this for a year.

I am just saying: we need to be a little bit cautious because this is a very, very big case.

That's the first point.

Secondly, they said: well, look, these proceedings only took three weeks in the US. So that gives you some idea of magnitude.

Of course, what they have left out is the deposition procedure in the US. I have taken instructions on how many hours of deposition there were. There were 550 hours. That equates to roughly 120 tribunal sitting days. Now, if one adds in the depositions, therefore -- or something equivalent to that -- that will be much, much bigger. Again, it will probably be getting on for about a year.

Point again is not that we should list it for that long. But, at this stage, given we have not even done the list of issues yet and this is a very, very big case -- not only 17 different conducts, but with ten different ways of getting to a damages figure -- we have to be quite cautious, in my submission, about how long this case is going to take.

So I understand the desire of Claimants generally to get something in the diary so we can start having something to aim at, and we are not trying to disturb that. But what my submission is, is that we are going to need to leave some leeway, potentially, for us to say, "In good faith we were hoping we could do this in twelve weeks, but, actually, now we have reached this further stage, we have the list of issues and we have thought about it further, we think the estimate is going to be bigger".

That's all I need to say on that.

THE CHAIR: Well, I think it is important you say that because if we are facing an application to adjourn the trial until later it's important you put down a marker now.

I think we would be very resistant. Just to let you know, I think my colleagues certainly are sceptical that eight weeks is going to be enough. But we are not in a position to challenge. But you have said, doing the best you can, at the moment, twelve weeks. We think it should be listed on that basis.

MR PICKFORD: Yes.

THE CHAIR: But we certainly understand. You will be asking -- what will you be asking us to do? You don't know yet. But, at worst, I suppose, adjourn the trial; at best, you would be saying, "Can we add some more time?"; is that right?

MR PICKFORD: Yes. Actually, could I raise one other point? It is not about trial length. It is about an issue which the class representative hasn't grappled with yet, which is the interaction with the CMA investigation.

So as the tribunal may have picked up from the documents, there is also a CMA investigation into ad tech. The tribunal also knows that by section 58A of the Competition Act, decisions of a competition authority are binding on this tribunal in civil proceedings.

So, if there is a CMA decision which overlaps with the issues that are raised in our proceedings, that will be binding insofar as it goes.

So what is going to be possible in these --

THE CHAIR: Do you go so far as to say it will give rise to issue estoppel in relation to -- because it would be an investigation, wouldn't it? It would be findings of an investigation which might well cut across.

We are interested in the overlap between the CMA investigation and this case, and very much so. We would like to know more about that.

MR PICKFORD: Yes. My submission is not quite that it is issue estoppel -- it may be helpful, actually, if we turn up section 58A --

THE CHAIR: That would be helpful.

MR PICKFORD: That's in the authorities bundle 1. I believe it is at page 9.

So 58A, at the bottom of page 9, we say ...

"Infringement decisions", and:

"(1) This section applies to a claim in respect of an infringement decision which is brought in proceedings -

"(a) before the court, or.

"(b) before the Tribunal under section 47A or 47B.

"(2) The court or the Tribunal is bound by the infringement decision once it has become final."

And it becomes final after exhaustion of appeals.

So it's not issue estoppel in the normal sense between the same parties. It's simply that there is an overriding statutory requirement on this tribunal that it must be bound -- the reason for that is, in principle, to assist in follow-on claims, because the whole purpose of it is that once there is a decision that's binding, then the claimants can rely on that, so --

THE CHAIR: I understand that. I am just interested to know what is meant, really, by "binding" in this context.

MR PICKFORD: That's a good question, sir. Because that is the type of issue that is typically the subject of a hearing. So, in the Google Shopping proceedings that are based on a Commission decision, that was also binding because it's pre-Brexit.

A couple of months ago, in March, we had a hearing over a number of days to determine two questions.

Firstly, what aspects of this Commission decision are going to be binding on the tribunal in the proceedings? Because there is jurisprudence on bindingness of decisions, what that means, and how far it extends.

Secondly, of those parts that are binding, what do they mean? Because there was some dispute from the parties as to: even if we are bound by it, what are we therefore being bound by? That was a hearing we had over -- I think it was about three days. The tribunal gave judgment on that very recently. And we don't know yet, but if there were a CMA decision in this case, that is one of the sorts of issues that we might have to grapple with in these proceedings.

There is a further complication that applies here that didn't apply in Google Shopping and that's this: the CMA takes decisions which are appealable to the tribunal. So a possibility, a real possibility we need at least to be aware of, is that this tribunal will be faced with both these proceedings and an appeal in relation to an overlapping decision from the CMA at the same time. And we are going to have to work out, if that happens, how we grapple with that.

Now, given that there is, as yet, no decision, I'm obviously not seeking to persuade this tribunal that we should therefore say, "This is all too hard. Don't do anything". But, again, for reasons of transparency -- because in my submission the class representative is somewhat with their head in the sand on this one -- this is potentially a very big issue coming down the tracks that may derail a trial, even if we put it in the diary now and even if it is, in fact, of the right length.

So those are the submissions I was going to make before.

In our view, we actually would say let us maybe hold off from listing the trial right now. Obviously, I stood up with the tribunal having already given its provisional view and I am trying to accommodate that. But I am keen to make sure that if and when these issues arise in the future, no one says: "why didn't we mention this before?"

THE CHAIR: You have very firmly put your marker down.

MR FACENNA: The first point on the time estimate. There is no point in us shadow boxing about that today. If the tribunal has an open mind, we know what Google's position is, we don't agree with it, but let's have the argument when we are actually to hear about that and things are a bit clearer. That's my submission on that.

If the submission is actually being made on instructions that you shouldn't fix a trial today, and if that is something you want to contemplate, then I will address you, particularly on that CMA point, because it's not true we haven't grappled with it. We have a different view about it. It's not a novel set of circumstances. It happens in other cases in this tribunal. It doesn't hold up listing proceedings.

If and when the CMA makes a decision -- they may make no decision at all. If it makes a decision, there might be a lengthy period of appeal. The outcome will be, if anything, to narrow, rather than broaden, the issues in these proceedings. We will have to deal with that if and when it arises. But it is certainly not a reason to not get on with this case, which is a standalone claim, not a follow-on claim and should be treated as such.

I do have more detailed submissions to make on that, if the tribunal is considering --

THE CHAIR: Just a moment.

We will fix a trial date. I am just trying to find -- I thought that Google had actually given a date in at least one version of its order. Perhaps, Mr Pickford, you could help me with this?

MR PICKFORD: For the start of the trial?

MR FACENNA: Oh, no, it has never been in the draft order, but it is in the correspondence.

THE CHAIR: It is in your skeleton, I think. There is a reference to it, which I am afraid I have now lost. I had it in mind it was 27 September; is that right?

What we will do is we will liaise internally, but we will fix a trial date to begin in the autumn of 2028, with twelve weeks until Christmas, effectively. We will make no decision as to the final length of the trial until later. We will fix a date to begin in sufficient time for us all to get in twelve weeks by December, I think. We will make sure we find the date.

MR FACENNA: I think Google have previously said the beginning of the final week of September.

THE CHAIR: The final week of September. I suspect that's what it will be, and that's the order we will make. We will make sure we get the right date in the order and work backwards from there.

We have heard what you said, Mr Pickford, and your reservation. It will come as no surprise if you say, some time later, "that's insufficient and we will decide what to do about that then".

MR FACENNA: There's a lot that could happen.

THE CHAIR: Quite.

MR FACENNA: So, what I might do then is turn to the list of issues and then disclosure.

THE CHAIR: Yes, Mr Pickford, did you want to say something?

MR PICKFORD: Just before heading to the list of issues, I don't suppose the tribunal is particularly going to want to spend a lot of time dealing with complaints about whose fault it is about how much progress we have made. We do not accept Mr Facenna's account as being either fair or accurate. If the tribunal would like, I can make

submissions on that. I imagine you don't --

THE CHAIR: I imagine there is probably a lot of merit on both sides. But, so far as we are concerned, it is water under the bridge.

We are grateful to everybody -- I tell you what I would like to say, and that prompts me to say: we are very grateful you have managed to close the gaps, and over a weekend and with a lot of hard work. That's directed to both parties.

How long it took you to get into that position is, so far as we are concerned, water under the bridge.

MR FACENNA: I won't twist the knife further on that. But my clients --

THE CHAIR: You can save it up, if you like. I am sure there will be an application when who said what to whom over the last three or four weeks will become very relevant.

MR FACENNA: To make the broader point, whether or not well founded, we are fearful that Google is motivated to try to slow progress on this claim.

Leave that aside, what we are urging the tribunal to do, and what we will do at every CMC, is to take a robust approach to active case management. We want to have the discipline of dates. We want the parties to be working in advance particularly on disclosure, so we don't all come back here in November/December and we haven't had any disclosure yet and we have not been able to progress matters.

THE CHAIR: I think I can also say we would like to encourage the parties to take a cooperative approach. But, if they are not cooperating, and if it does seem to us that they are behaving tactically. So, if it becomes the kind of trench warfare that I have encountered in other cases, then you can expect us to begin to make some -- first, to deliver some strict warnings before we start handing out yellow cards, but we will if we have to.

MR FACENNA: There is a point on disclosure in relation to this, actually. Mr Malek,

in another case, took an approach to disclosure where disputes which were arising could come informally to the tribunal for rulings so they are not all stored up for the next CMC.

When I come on to address that, our position is that may well be a sensible approach if it was one the tribunal would be willing to entertain in this case.

THE CHAIR: We are happy to accommodate the parties. But what we would not want to encourage is we get a weekly application.

So, again, whatever is going to encourage the parties to cooperate is -- cooperation is going to be essential in this case. It is huge. Obviously, we start from the point of view that you have particular positions to take. But, ultimately, what the procedural decision making made by the tribunal -- we are interested in only really one thing, which is the sort of efficient dispatch of this action and the overriding objective, which is in the interests of both parties, as well as other users of the CAT.

MR FACENNA: Understood. And for the class. Can I turn then to the list of issues? As I said, we have agreed on the dates for that. We have agreed on the dates partly on the basis that Google shifted its stance and now seems to accept that the list of issues isn't a necessary precursor to doing anything else. So we are content to allow them, I think, a date of 12 September to make comments on the list of issues.

We do, nevertheless, want to make some submissions and invite the tribunal to give an indication about its expectations regarding the length and general approach to the list of issues. As both parties recognise, the Commercial Court Guide discourages lengthy lists of issues and provides that generally they ought to be capable of swift agreement. That will be a document familiar to you. But perhaps for the other panel members, can I ask you just to look at that? It is in authorities bundle 3, tab 26, at page 1004.

The easiest thing might be if I ask you to read paragraph D5.1 through to D5.3.

(Pause)

MR FACENNA: So you see in the Commercial Court -- sorry, sir, go on.

THE CHAIR: I mean, what I would be interested in is what use you would actually expect the tribunal -- because my experience of the list of issues is that people can spend days fighting over them, they are then presented to the court as an agreed document and then nobody ever looks at them again.

Then, when you come to trial, the judge says to the advocates, "Well, am I going to decide this case by reference to the list of issues", and they say, "No, no, we can forget about that. We have all moved on from that. Just decide it on our opening and closing submissions."

I think in a case of this kind the list of issues could be absolutely critical, if that's the use to which it's intended to be put. If we are going to be deciding the case by reference to the list of issues. If it is going to be just a document to help us get into the case and to begin to understand the pleadings and to, ultimately, you know, sort of use as a mental checklist, then that would be something very different.

MR FACENNA: At this stage, we produced our draft list of issues partly in response to Google's position, which was: we can't do anything until we have a list of issues settled.

Really, the main purpose of it is to allow the tribunal to see the overall shape of the case and set appropriate directions to try it on.

From our perspective, that was the purpose of the draft we produced three weeks ago. We very much align ourselves with what the Commercial Court Guide says, which is: that is its purpose. It is not meant to be a 20 or 30 or 40-page summary of what is already in the hundreds of pages of pleadings. It is meant to be agreed relatively swiftly at a high level, focusing on the principal and the key issues, not involving 17 different sub-issues under every paragraph.

Our fear is that's where we could end up if Google take a different view about that. The noises they have been making in correspondence and so on about how long it is going to take to agree that, I think on their proposed timetable -- which we said we would live with -- we are talking about thirteen weeks or something like that.

They have had it for a few weeks. It is an objective document. It is a high-level summary of what's in the pleadings. Actually, it ought to have been capable of agreement by today, we say.

But, in any event, it is certainly not a process which should take over three and a half months. So we do want -- we would invite the tribunal to indicate that's not an exercise the parties should be getting bogged down in and we will have to come back and argue about. It should still be a concise list of issues. If it turns out that more detail is required subsequently, as you will see in the Commercial Court Guide, that can be revisited down the line. But we don't need to be arguing about all the sub-issues and sub-paragraphs now.

Just to show you, there are -- this tribunal in fact handed down a ruling on Monday of this week in Gormsen. It might just be helpful to have a quick look at that. It's in the sixth volume of authorities. So authorities 6, which I hope you have. Tab 54, 1907.

You will see there, paragraphs 25 and 26, there is a summary by the tribunal of the relevant principles and what the approach should be to the list of issues, and we pretty much endorse that approach:

"The list should list most issues in broad terms save where more particularity is required… A long list of specific issues can in fact lead to a too narrow disclosure exercise. The list once finalised should be a simple list with no commentary."

And so on.

So we are content to agree the timetable on the basis that it is not a process that

should hold up progress on other matters, in particular disclosure, and it is clearly understood that we are aiming for something that is short and concise and avoids unnecessary detail and expensive debate.

I think there is a proposal to deal with disagreements on the list of issues on the papers, or have I mixed that up with another?

Yes, I think in the correspondence last night it was suggested that if we can't agree the list of issues then we might be able to apply to the tribunal to deal with that on the papers. That's certainly something we would be amenable to, so that may be agreed if we can find a way to put that in the order. I very much hope that won't be necessary if the parties take a sensible approach.

THE CHAIR: Can we hear from Mr Pickford on the list of issues?

MR PICKFORD: Thank you, sir. Firstly, I did emphasise I was keen to avoid a tit-for-tat on things. Mr Facenna couldn't help himself, but then made complaints about how long we were taking to respond on the list of issues.

A very small point: his maths is not right.

He says we want to take three and a half months. We don't want to take three and a half months. Nine minus seven is two, and one of those months is August. Also three weeks of that time has been preparing for the CMC.

Actually, we are asking for, basically, three weeks in addition to August in which to respond. So I am afraid I can't keep listening to it being said we are taking three and a half months.

The second point is the tribunal asked, in my respectful submission, a pertinent question, which is: what is the purpose of this document?

If we could go back, please, to the Commercial Court Guide, which you were looking at a few minutes ago, so back in volume 3 of authorities, at tab 26. If I could take you to an earlier page, which is page 1002, one sees at D.2.1(c):

"The case memorandum, List of Common Ground and Issues and case management bundle be amended and updated or revised on a running basis throughout the life of the case and will be used by the Court at every stage of the case. In particular the List of Common Ground and Issues will be used as a tool to consider what factual and expert evidence is necessary and the scope of disclosure."

So, in my submission, in a case such as this, where we have many hundreds of pages of pleadings, it will be important at this stage to produce an appropriate level of detail in the list of issues that can guide -- in particular now -- the process of disclosure. Because obviously it's not helpful to have to wade through hundreds of pages of pleadings to try to do that. We need to synthesise that. But it has to be something that is meaningful that enables us to actually carry out those activities.

If we go back then to the list of issues that has been produced by the class representative, I would like to explain why theirs does not do the job. That's at B1, tab 1, page 6. It actually begins earlier than that, but I would like you to go to page 6.

THE CHAIR: You want us to go to page 6, do you?

MR PICKFORD: I start with page 6. I am going to go back to another one.

My first point actually involves the quantum issue, because plainly this is a claim for damages. They want over £13 billion from us, excluding interest. So the disclosure, and the factual and the expert evidence on that issue is going to be absolutely critical. It is a big deal.

What we see, at paragraph 23, under "Quantum" is:

"What is the quantum of the loss?"

If you were to read the paragraphs that it refers to, that doesn't actually get us much further because their pleading on that is very, very thin.

So, in my submission, a lot more work needs to go into this list of issues than has been done so far.

The problem for us is not that we couldn't respond on this and say: well, at the incredibly high level that you have done it, whether this does or doesn't reflect issues in the case.

The problem for us is we want this to be a document that actually helps us move the case management forward, and this document doesn't do it. If you go back to the description of the alleged abuses, they are set out beginning with paragraph 4. That's on page 2. Essentially, what one has throughout each of the abuses -- the first, second and third -- is lists of Google products. There is no real attempt to grapple what the nature of the abuse is, again, in any terms that is going to assist us or the tribunal, if it has to determine disputes, to determine what disclosure should go to.

So it's perhaps no surprise that the claimants were able to produce this list quickly. What we need to do is produce something that is meaningful.

Now, of course, we are well aware -- we don't want to produce something that's enormous because that's not going to help either, but it is going to need to be quite a lot better than this.

THE CHAIR: You have had it for a little while, so you must have some idea about the shape of the document you would like to see, even in the most general sense. I am not asking you how you amended it up, but you must have some -- if not a working draft, at least looked at this document and have some idea about how you intend to amend it?

MR PICKFORD: This is my third Google CMC in about as many weeks. I certainly haven't done that.

In terms of the team behind me, I anticipate that we have some very general ideas about a document that we would need to produce. But there is no draft, as far as I am aware. We have obviously, for this CMC, been focused principally on trying to grapple with the issues like disclosure, et cetera. It hasn't really been feasible for us to focus

on a list of issues --

THE CHAIR: This is not a criticism. Nor am I going back to what has been said. What I am simply saying is that you can pick individual issues. I mean, this is my introduction to this case, so simply working my way round the pleadings has been difficult enough.

MR PICKFORD: Yes.

THE CHAIR: For my own part, at the moment this doesn't look too simple a document. I would not want to see anything very much longer. I know that is a sort of feel the width point, rather than about the substance.

But, if I am going to be faced with an enormous document, which just -- the way I would be working -- if you don't produce a list of issues, I am going to produce my own and you will be stuck with the one I produce and you won't have had any input into it.

So, if you want to have some input into the way I look at the issues in this particular case, then you are going to have to engage with this document and produce something that is user friendly for the panel.

For my own part, with something that is 15 or 20 pages long, I am just going to, either sort of begin to focus on individual issues which I think are interesting, and those might not be the kind of issues you want me to focus on --

MR PICKFORD: Yes.

THE CHAIR: -- or I might begin to, you know, sort of truncate what you have given me. So, for a working document, I would not want to see something very much longer than this, because it then ceases to be of real use as a working document in ticking off -- let's say I am look at a witness statement prepared by Mr Wisking in relation to disclosure and I am trying to decide whether, you know, there ought to be further disclosure in relation to the issue. I might be using the disclosure list of issues to tick off what he's dealt with and where the gaps are. I don't know.

But, if I have a document which is three times this length, it is not actually going to be

terribly useful to me.

I am not proposing that we should limit the number of pages, or not at this stage. But, you know, if you are asking -- the kind of working document that the panel is actually going to find most useful in compliance with the Commercial Court Guide, then anything much longer than this is going to be difficult for us to make real use of.

Also, if you think we are going to sit down in a meeting, saying, "What are we going to do about X?" if we are going to make real use of the list of issues, I encourage you to produce a document that we can make use of in those circumstances. You have to give us something we are not scratching our heads about when we have to go to look up obscure references in the pleadings, "What is this point again?"

What we want is a document which anchors in our minds what the key issues are in the case. You may say this is too high level. But I suspect what you are saying is "it is wrong" -- although we might go for something high level, but a different form of analysis. That's fine.

In fact, the process of even adjudicating on the list of issues might be something actually quite useful for us, if we do have to decide it. But I am just saying to you that something very much longer than this is not actually going to do the job that you say you want it to do.

MR PICKFORD: That's very helpful to hear, sir. Because obviously we can allow that to guide our approach.

THE CHAIR: Lastly -- sorry to interrupt you -- just bear in mind the use to which we are going to want to put this document.

MR PICKFORD: Quite. That's the point I wanted to come back on, sir, if I may, which is that, if I may respectfully say, sir, the points you have made to me identify both core guiding principles for the list of issues, but also one of the tensions here, because on the one hand no one wants it to be longer than it has to be; on the other, another of

the points that you, I might respectfully say, would like to be made is that what you don't want to do is be going off to look up obscure issues in the pleadings.

You want a document that is self-contained, but actually enables you to do the job. Otherwise, if it is incredibly high level, you are constantly going to be abandoning the list of issues and going off to the pleadings to work out actually what is being said.

My example of quantum was meant to illustrate that for as much as I totally understand the desire of all parties and the tribunal to avoid excessive length, one line for quantum is not going to be good enough. There are ten different models out there for how they are proposing to assess quantum. We are going to have to have disclosure that helps the claimants or the class representative prove its case and us to respond to it. It is going to have to be more detailed. That is, in my submission, not a function of the fact that we come to this with some unduly precise mindset. It's because this is a very big and very complicated case and, necessarily, that is going to have some impact on the length of the discussions.

THE CHAIR: I am not going to guillotine what you put into it. If you can take away from this CMC that this is a good start, as far as we are concerned. It's an attempt to reduce what is, as you say, a very, very complicated case. You don't like it for various reasons.

But, when you come to reformulate it, bear in mind the use to which we are going to want to put it, which is as a case management tool and that it has to fulfil that function. It has to be a working document. It can be changed, undoubtedly, then we can all come back to it.

The answer is that we all have to suck it and see. You produce your version. You have not produced anything yet. You produce your version. They comment on it. If necessary, we say, "This won't work or this will work", or, "We like those bits. Can you improve on those bits?"

That's the way through this particular point.

MR PICKFORD: We fully endorse that pragmatic approach. Thank you, sir.

THE CHAIR: Would you like to say anything more about the list of issues?

MR FACENNA: Well, Mr Pickford appeared to be superficially agreeing with you while pushing back.

You understand our fear, which is that there is going to be a trawl through the pleadings to identify every point and subpoint, and we are going to end up with a document which is very long.

THE CHAIR: The risk for him is we just sort of file it in the usual place and make our own.

MR FACENNA: Yes. The risk for us of that is that it will then be a tendentious document and we will have to incur costs and time to engage with the 20 or 30-page draft which seeks to identify a bunch of sub-issues.

THE CHAIR: I made it clear: that's not going to help us.

I am sure Mr Pickford didn't mean this. It is to be a neutral document. It is of no value if it isn't. I really want to discourage the parties from using it as a way to start fighting the issues at trial. Because one has seen that.

DR MAHER: If I can make just a point of clarification, Mr Pickford raised the point about quantum and different models and various things. But I think we need to bear in mind that before actual disclosure and what data is available, and what the experts can actually do, a list of issues that tries to lay all that out now is not going to be very -- you know, saying: this methodology, that methodology, this methodology.

I think we need to get to some place where there will be quantum. How that develops will develop overtime. So, if that maybe helps you to see where I think -- we need to keep the list of issues at a fairly general level, rather than going into every specific action that is in the pleadings. If that helps.

MR PICKFORD: I believe so, madam.

The only point I am seeking to make -- which I think is where we are in agreement -- is it needs to be useful. So, if we are going to come to, for instance, a disclosure hearing, it needs to be useful for that. It needs to be at the right level for that.

MR FACENNA: Just to pick up Dr Maher's point there. On quantum, it is not at all unusual in competition cases that you have thin pleadings on quantum. The detail is in the expert reports.

THE CHAIR: In all cases, actually.

MR FACENNA: That might be right. In this case, in Latham 2, in Mr Latham's second expert report, there is an extensive explanation of the approach to quantum, the proposed methodology, the data that will be required. None of that detail needs to be in the list of issues at this stage of the proceedings.

THE CHAIR: Can I just ask this question: nobody is suggesting at the moment that there should be a split trial in terms of liability and quantum.

Both parties are agreed it should all be tried at once; is that right?

MR PICKFORD: That is our current position. It perhaps won't surprise you to know that I would like to reserve the right, if matters turn out differently from how we currently expect, to say: actually, we have realised there is a reason to do something differently. We are not proposing that now. But there are advantages, obviously, if we can, of doing it in one trial.

THE CHAIR: Yes. Shall we move on to the next -- the timetable for that is agreed.

I think we have explored, probably as usefully as we can, what the tribunal would like to see and what happens if there is a disagreement about the individual issues that we will rule on. If you want to put into the draft order the provision for the tribunal to decide on -- if you like, to settle the list of issues -- to use old fashioned language -- in the event of any disagreement between the parties, then that's what we will do.

MR FACENNA: That brings me on to disclosure.

As I said, there is agreement on the three stages.

The first stage, which is the handing over of the three datasets referred to in Kornacki 1. There is now agreement on that, so hopefully Google will be providing those to us, I believe, on 26 September.

I should have said, I don't know if you have a draft order --

THE CHAIR: We have several versions of it.

MR FACENNA: There are so many kicking around. We have marked up versions of our amendments to Google's latest from last night. To be honest, it's not a very easy document to read. I am working from the clean version of our order, which is exhibited to Mr Streatfeild's third witness statement.

THE CHAIR: Just to make sure I am working in the same one, and my colleagues are, paragraph 4 says:

"By 4.00 pm, on 29 August, the parties ..."

And then 5 says:

"By 4.00 pm, on 26 September ..."

MR FACENNA: Yes, I think that sounds like it's ours.

THE CHAIR: Then it has:

"Shall provide an explanation."

So the three categories from the specific pre-existing datasets is paragraph 6; is that right?

MR FACENNA: Paragraph 6.

THE CHAIR: That is now agreed, is it?

MR FACENNA: That's now agreed.

THE CHAIR: So all categories, A, B, C and D, there?

MR FACENNA: Yes, that's agreed.

THE CHAIR: So, paragraph 6, we can say "agreed" next to?

MR FACENNA: Yes.

THE CHAIR: Yes.

MR FACENNA: So what there is still some scope for disagreement on is what is in paragraph 5 in this version, which is the explanation of everything else that's in the previous disclosure. Then I will come on to deal with the third tranche, if you like, which is the stuff that's not in the previous disclosure.

DR MAHER: That's 5(b)?

MR FACENNA: No, it is all of 5. So the way this draft works is: 6 is hand over the three Kornacki 1 datasets. That's now agreed.

THE CHAIR: But the date is not agreed? The date is agreed?

MR FACENNA: The date is not agreed.

MR PICKFORD: On 6, the existing datasets, that date is agreed. We had originally suggested the 28th; they said the 26th.

THE CHAIR: That is fine. One was a Friday, one was a Monday. The 28th was a Sunday.

So, paragraph 6, both timing and content is agreed?

MR FACENNA: Timing and content is agreed.

THE CHAIR: So what you are asking for is the explanation in paragraph 5 at the same time?

MR FACENNA: Yes. I was going to make submissions on what that material is and why we say it is important and why we believe Google ought to be providing an explanation by the same date.

THE CHAIR: They have agreed to provide you with an explanation, haven't they?

MR FACENNA: They have.

THE CHAIR: And the date? Just so we can compare what they --

MR PICKFORD: Our date is 24 October.

THE CHAIR: But there is also -- it's not just timing. It is also content; is that right?

MR FACENNA: No one knows what the content will be yet. So there may be some discussion to be had about that. In terms of what they are offering to provide, which is the explanation, the only difference on the provision of the explanation is the date. So they are suggesting 24 October. I will come back to that in a moment.

What really matters is the next stage then -- well, the date matters because we want this to be resolved and crystallised by the next CMC.

THE CHAIR: Yes.

MR FACENNA: So the first date matters --

THE CHAIR: In terms of just drafting -- I am sorry to be --

MR FACENNA: No, not at all.

To cut to the chase?

THE CHAIR: I know you are going to explain in practical terms what the content is. But, just so that we can understand the difference between the parties on the drafting, paragraph 5, the only difference between you is actually the date, 26 September or 24 October. That's what I had understood when --

MR FACENNA: On paragraph 5, yes.

THE CHAIR: But the sting is, you say, when you come to look at 7 onwards.

MR FACENNA: Yes, because the way it works, the agreement is that they will provide the explanation. There will then be a month whereby we ask questions about it --

THE CHAIR: Yes.

MR FACENNA: -- and then come back at the CMC, if we can't agree what should be disclosed from the pre-existing sets.

THE CHAIR: Yes.

MR FACENNA: There is a difference between us, in that we say that when they

provide the explanation they ought also to tell us what they are willing to provide out of that pre-existing disclosure. So rather than just say, "Here is everything there is. What do you think you might want?", the onus is on them to say, "We already know X, Y and Z are relevant datasets".

For reasons I will come on to deal with, large parts of it will be relevant to the pleadings. That's the first area of disagreement. What's currently in our draft paragraph --

THE CHAIR: That's 7, isn't it?

MR FACENNA: That's 7, I think.

THE CHAIR: 7 is proposals. You say they should give both the explanation and put their proposal on the table, at the same time as they provide disclosure --

MR FACENNA: Yes.

THE CHAIR: -- of the specific pre-existing datasets.

MR FACENNA: Yes.

THE CHAIR: Then the timetable is 8, 9 and 10 follows; is that right?

MR FACENNA: 8, 9 and 10 follows. So there would then be around a month whereby we ask questions and seek agreement.

Then we provide, in our paragraph 10, that anything which is agreed shall be disclosed on a rolling basis. I think we understand in principle that Google is open to that. But then we have a long stop date of 13 November. So, before the next CMC, so we can have all the issues in the pre-existing disclosure sorted out. Then we can come back in November/December to deal with any disagreements.

Google's position is, first of all, they don't make provision for them setting out their own proposals. They have a month of us exchanging correspondence. But then they say in their draft order they wouldn't actually provide any of the disclosure -- well, their long stop date would be 21 March 2026.

THE CHAIR: Can we just compare that?

MR FACENNA: We are comparing our 9 and 10, as it were, with what is in Google's latest draft, 6 and 7.

So agreement by 21 November. Then come to CMC 2 to resolve disagreements in principle about what should be provided, but they wouldn't actually have provided anything on their draft before March next year.

We heard what Mr Pickford said about it. From our perspective, this is all material which has already been collated, is already sitting on storage devices, has been provided to other courts and regulators. Presumably, it is sitting on Google's system somewhere. We don't really understand why it is said, once there's agreement or an order about what should be provided, that they need another four months to be able to provide that material.

There are some high-level points for the very first time in Mr Wisking's statement from Friday where he refers to things like there might be some third parties who are affected and there might be some --

THE CHAIR: Maybe privilege review.

MR FACENNA: There might be some differences on privilege and so on.

THE CHAIR: That would be the difference between US lawyers and English lawyers?

MR FACENNA: Yes.

DR MAHER: There might also be differences in terms of what they provided to the other proceedings which have nothing to do with this.

THE CHAIR: Relevance issues.

MR FACENNA: That's a separate point. We are only talking about what is either agreed that is relevant or the tribunal decides at CMC 2 would be relevant.

But, even on that, they are saying: we are going to need months to do whatever kind of review --

THE CHAIR: Just so I understand, on your timetable, we would get the disclosure

from a specific pre-existing dataset. You get that. You then spend some time -- spend a month, I think, on both parties' cases, arguing about what -- whether they have given that adequate disclosure or what other disclosure they should give, having seen that material.

Because your paragraph 8 is:

"Reasonable questions about the pre-existing disclosure and the explanations and disclosure proposals provided."

So, really, what you are going to be arguing about over the next month is what more they are going to give. It is more likely that -- arguments about the gaps in what they have already given.

MR FACENNA: No. To be clear, I don't want the tribunal to be at all under a false impression about what they have agreed to provide. It is three datasets which includes a very narrow amount of auction data. It is three out of literally hundreds and hundreds of datasets. So it is a tiny proportion of the disclosure that has been provided in the regulatory US proceedings. So really what we are going to be arguing about is --

THE CHAIR: What comes next.

MR FACENNA: What else in that bank of documents and repositories is relevant to these proceedings.

THE CHAIR: I see. You either agree that in a month or you don't. Then you say any disagreements about that will be dealt with at the CMC 2?

MR FACENNA: Yes. That's agreed. We are agreed that should happen. The difference is that we say it should already be providing the stuff -- you should -- on an upfront basis, tell us what you are willing to provide straightaway and start providing it on a rolling basis. Then anything else we agree, you should start providing to us, and do that by November. So that we then -- all we have left to dispute on this section of disclosure at CMC 2 is stuff that we have not been able to agree is relevant to be

disclosed.

As I understand it, Google accepts that we should have a process which enables us to come back at CMC 2. But they are saying we are not actually going to get any of these documents. At least they were until last night, but they now seem to agree there should be some rolling disclosure. But they have a long stop date in there of March and we say we don't understand why that is necessary.

The issues in this case are absolutely familiar to Google. They are exactly the same issues that they are litigating in regulatory proceedings and legal proceedings all over the world.

They have had these pleadings for over two years. They know what they have. This is all material which has readily been disclosed. We accept there might be some need for some limited re-review for privilege or third-party material. But, frankly, that should have been happening before now. It is not good enough to say, without proper explanation, that means we can't have any disclosure this year and will have to wait until March next year.

We will be inviting the tribunal to order, so far as it is agreed, that material should be disclosed in advance of the next CMC.

What I was going to do was make some submissions about the overlaps of the relevance and why the extent to which -- well, why we are in a position to come before the tribunal and say, "Look, this is an easy task."

For Google, this is not complicated. There are direct overlaps with the other proceedings and I don't know if you have had the opportunity to look at Annex 2 to our skeleton argument, but one of the difficulties we have had was that, again, until last week, we have actually been asking about this material now since January of last year, some of it. And until last week, other than some very high-level assertions, we haven't had engagement from the defendants about the extent of the overlaps and the extent

of any differences.

If you are able to have a look at Annex 2 to our skeleton argument, which is in A1/2, at 24 ...

THE CHAIR: Could I just ask you this: you are not suggesting a sort of keys to the warehouse approach where they just hand over everything? You are expecting them to do a relevance review, privilege review.

MR FACENNA: Our position, because we had not had engagement up until last week, was that actually the sensible thing would be to hand over all the materials, and then we were willing to undertake the relevance reviews.

So Google was not willing to agree that. Once we received, for the first time, these proposals on Thursday night, we had shifted. We said: fine, we will agree to your staged approach.

And we now see what Mr Wisking has said about the need for a somewhat limited review. So we are not now asking --

THE CHAIR: It is a timing question, isn't it? I don't want to downplay the significance. But the question really is: how long is it going to take?

Is that fair? Or is it more complicated than that?

MR FACENNA: That may be the difference between us.

DR MAHER: Just to clarify: is it also that you are asking for them to provide proposals on the disclosure, and what's relevant in the first instance?

MR FACENNA: Yes.

DR MAHER: And does Google agree with doing that?

MR FACENNA: As far as I know, there is no agreement on that. Although I don't think we have had an outright refusal on that either.

THE CHAIR: Shall we hear from Mr Pickford? I would like to know from Mr Pickford how long it is going to take you.

On the face of it, the staged approach that is now being suggested by the CR doesn't look unreasonable to us. Perhaps you can explain your position and we can see the scope of the dispute, how best to go forward from there.

MR PICKFORD: Thank you, sir. The staged approach is actually our proposal.

THE CHAIR: Well, they say --

MR PICKFORD: Their version of that.

THE CHAIR: Their version of that, yes. They say they have come quite a long way to meet you. But they say you should do slightly more than you are currently offering.

MR PICKFORD: Yes. So --

THE CHAIR: "Slightly" is a tendentious word to use.

MR PICKFORD: The first point is simply the date by which we are going to explain what the documents that we hold already in these repositories are. So we say we would like until 24 October to do that. They say we can do that by 26 September, being the same time as providing the three large datasets.

Now, the task that we are required to do by agreeing to that -- and we are agreeing to it -- we say is a substantial one. It involves engagement with a significant number of outside counsel from Google in a number of different jurisdictions, because of course we have the US, we have France, we have the CMA --

THE CHAIR: Just so I can be absolutely clear: this is to present your proposals?

MR PICKFORD: No. To be clear, this is to describe what we have.

THE CHAIR: To describe what you have?

MR PICKFORD: So stage 1 is -- we have currently over 6 million documents. Up until last week, as Mr Facenna says, he said he wanted disclosure of 6 million documents. His solicitors tried to get that in a previous CMC a few weeks ago and the judge described it as crazy.

But, in any event, what we are going to do is describe as best we can what we have

and, insofar as we can, how we got it. So if we have information on how that information -- how those documents in those repositories were compiled, we will obviously provide that information, because that will be useful.

It may be that varies between the different jurisdictions as to how much information we can provide on that, because it depends on the degree of the audit trail for each of the investigations.

So that is no small task. There are a very large number of documents involved. We need to obviously make sure we get that right, and that means us -- we don't know that. Those instructing me don't know that. Google itself doesn't necessarily know all that. We will obviously have to liaise with the various law firms acting for Google in all those other matters in all those other jurisdictions.

We say that it is perfectly reasonable for that to take until 24 October, which is the time that we are asking for, for that. So that's the first point, which is: when do we do task number 1?

Task number 2, which the class representative wants us to do at the same moment is to make proposals for what we are going to give them from those documents. We say that there is a flaw in that approach, which is they want that to happen before we have even come to the end of the list of issues process.

We were just discussing, 20 minutes ago, that one of the core benefits of the list of issues will help us guide disclosure. It's a tool. It's what the Commercial Court says it is: a tool, to help us guide disclosure.

So it's not very sensible for us to try to make proposals ahead of knowing what the issues are that we are going to be making those proposals for. So that's why we say that should be sequenced to come after, firstly, the description.

So that's that point.

The next point on timing was when --

THE CHAIR: So 24 October is descriptive? Description of what you have?

MR PICKFORD: Yes.

THE CHAIR: Then you say proposals --

MR PICKFORD: We were going to seek to agree those with the class representative, in terms of what we would give them. Because they would then know by 24 October what we have. It would be sensible for us to see if we can actually agree what they should then get from it.

THE CHAIR: So after the 24th?

MR PICKFORD: After the 24th.

THE CHAIR: You have not built in any time in the timetable?

MR PICKFORD: We have built in that we would seek to agree that by 21 November.

THE CHAIR: Seek to agree by --

DR MAHER: 22 November, I think.

THE CHAIR: 22nd.

MR PICKFORD: I think somewhere it said 22nd. I think our most recent version has modified that to the 21st because the 22nd, I think, is the weekend, which is a mistake. So we are proposing that the parties seek to agree that by 21 November. Then, if they can't, we can address that at a hearing.

THE CHAIR: Which assumes CMC 2 will have to take place --

MR PICKFORD: After that date. It does. We were proposing CMC 2 took place in December to enable that to happen.

Now, I would like to make something very clear in relation to producing documents that we can produce. So if there are documents that it is agreed we should produce, we are happy to do that on a rolling basis. We are not for a moment suggesting we are going to store up everything and just give them a dump on 21 March. The reason for the 21 March date -- which is our long stop -- is we anticipate there are going to be

a number of stages we will have to get through before we can actually say, "There you go, that stage is now complete."

Because, firstly, they are going to get the documents about which there is no disagreement. However, if there is disagreement, that is going to need to be determined.

In relation to the provision of documents from these various categories of documents, we are actually going to have do quite a significant re-review. Third party confidentiality is no small, trivial issue.

What the tribunal does, in my experience, and also in similar cases I have done before the High Court, is there is a procedure typically we have to go through in relation to third party confidentiality where we notify people and, typically, no one, for the most part, is generally that bothered to come to make submissions to you. But they need to be given the chance to say, "No, no, no, there is going to have to be special treatment of this document because this is something that is very precious to us".

That is potentially quite a substantial exercise. So is any re-review we might need to do for privilege, which is under different law. And Mr Facenna said: well, we should have been doing all of that already.

We say that is wrong, because we are not going to do all that in relation to 6 million documents, significant numbers of which we may never disclose. That would be a waste of time and resources. We need to focus that activity on those documents that ultimately we are going to be disclosing.

Ultimately, that is a process which is going to take some time. The class representative's approach is understandably somewhat impatient, but we say they are ultimately trying to run before they can walk in relation to what is actually sensible for the tribunal to order.

So, on those stages, that's why we say we are going to need to take it in more steps

and we need to build in a fuller procedure in relation to it.

Can I just check there is nothing else on that issue?

I have just been instructed there is also a US court order by which we are required to engage with third parties in relation to confidentiality. Obviously in this jurisdiction you can't simply take documents that have been disclosed for one purpose and then give them out in another. There is quite a lot of obstacles that we are going to have to jump through to make sure that we do this properly.

MR ALTY: Just one question on the way the list of issues interacts with this process, because you are saying that you want to try to agree a list of issues by 24 October, but that you might not agree, and therefore it might come to the second CMC. Is that going to affect your proposals here for agreeing the documents for instance?

MR PICKFORD: I don't think it should. For a start, it may be possible that insofar as there is a problem with the list of issues, that's determined on the papers. So once both parties have gone through the intellectual exercise of the list of issues, I don't see why even if there is some subset of points where they say, "Well, we think you put it tendentiously ..." or whatever, that should, generally speaking, hold up this process. Because of course you could have disclosure, ultimately, stepping around that issue. It might be that the parties don't like the way that each other has phrased something. That doesn't necessarily prevent there being disclosure in relation to it. The likelihood is the tribunal is going to have enough information at that point to make an informed decision.

So whilst it is an exercise that needs to be gone through so we know in principle what we are aiming at, if there are small points that are left hanging in relation to it, I don't see that should be a fundamental stumbling block. I wouldn't be proposing to say that because of the disagreement in paragraph 23, disclosure is off --

THE CHAIR: I think you would get a frosty reception at CMC 2 if you --

MR PICKFORD: Yes.

THE CHAIR: But if there are real fundamental disagreements about the list of issues, it is going to be very difficult for us to resolve disclosure issues by -- well, the first time we kick the tyres in relation to the list of issues will be disclosure. So it is quite important that you get as close to agreement as you can.

MR PICKFORD: It is. But one can imagine, supposing there is some disagreement about something pretty significant, that doesn't necessarily prevent the tribunal -- if we are going to have CMC 2, and allied to that there is a disclosure dispute which stems from the disagreement over what's really in issue, that could all be resolved together, in much the same way as indeed in a hearing I have just done last week.

There were disputes about what was properly on the pleadings and whether there was an issue that was on the pleadings about which disclosure should be given. The tribunal is in a position to grapple with that, as long as it has sufficient time at the CMC, as part of the disclosure determination.

So, obviously, it wouldn't be able to do that across all the issues in the case. That's why the parties need to go through the process of seeking to agree as much of that as they can. But, if there are discrete points that are hanging over, that, in my submission, should not hold up determining disclosure at CMC 2.

MR ALTY: My only other reason for mentioning that is that you are making a big point about the fact you couldn't make any proposals until you had agreed the disclosure or the list of issues.

MR PICKFORD: Yes. The reason for that is because it's about the extent of the exercise. What we need to do is go through the intellectual exercise of saying: here are the X number of issues in the case by which we agree that we should provide disclosure. It is our sincere hope that that will cover, in terms of what we can agree, the vast majority of the issues between the parties.

So that does need to be done. My submission is if we are only at a stage where that is done 95 per cent, but there is then still a critical 5 per cent that is hanging over, that shouldn't prevent us from engaging in disclosure. If 100 per cent of it was left over, as in if you haven't even gone through the exercise yet, that would prevent us from engaging in disclosure, because then there would be far too many issues at large between the parties to enable this tribunal to make sense of them and to order disclosure accordingly.

So I would say our position is fully reconcilable. Indeed, one point is the logical corollary of the other.

THE CHAIR: Can I just ask you about the long stop date?

MR PICKFORD: Yes.

THE CHAIR: You have given yourself quite a lot of time, haven't you? I mean, quite a large part of the other side's point is that, you know, we should hold your feet to the fire if you don't begin the cooperative process of disclosure. One understands that, particularly in large cases of this kind.

The tribunal has had some engagement with the parties. You don't know quite how they themselves were approaching that. But, in a case of this kind, where we are starting off, it is good to see some cooperation in relation to disclosure.

MR PICKFORD: Absolutely.

THE CHAIR: It's not really very possible for us to, you know, take a view about how easy it is for you to do the process. So we largely have to take on trust what you have told us.

But I think if we do that, we would want to try to preserve the balance between the interests of the parties. We would like to see a CMC this side of Christmas, which does mean that it is quite a strict timetable which would have to be adhered to. That would, in large part, give the CR some of the comfort, effectively, that they are seeking

in relation to the disclosure process. So there won't really be much slippage if we adopt your timetable.

MR PICKFORD: Sir, I fully endorse that. Our proposals leading up to CMC 2 in December are not indulgent ones. They are actually going to require us to do quite a lot of work in quite a short space of time to be in a position that when we are back in front of the tribunal in December we can resolve any further issues on that tranche of disclosure.

THE CHAIR: Sorry to cut across you. What I want very much to avoid is that we turn up at CMC 2, things have been derailed, there is not very much we can do, so we have to kick the disclosure issues into the long grass until CMC 3, which is some way down the track and we can't fix the other directions.

I mean, part of the quid pro quo, I think, if we accept your -- we will take a break in a few minutes and we will discuss the position ourselves -- but part of the quid pro quo is, you know, expecting the parties really to -- if we say we hear what you say about the list of issues, you ought to have some time to formulate your proposals and agree them with the other side; you should also have time, you know, to just do the exercise because of the practical difficulties; part of the quid pro quo is that's your best estimate, which we are taking on trust.

Okay, if there is a slippage of one or two days, that's one thing. But I think what we would really want to avoid is turning up at CMC 2 to discover that virtually nothing has been done and the can has just to be kicked down the road.

MR PICKFORD: Sir, that is well understood, both by me and those behind me. I would just say: it's a little unfortunate from our point of view that Mr Facenna was able to make his submissions about why he says we have been delaying and behaving badly, when we simply don't accept that that is fair --

THE CHAIR: So far as we are concerned, that is water under the bridge. We are

looking forward not back.

MR PICKFORD: Yes. And we believe that we are being cooperative and we would like to continue to be cooperative.

Ultimately, this claim, we have a good amount of time currently before the trial date that has been set down and we need to make sure we are in a good position. It is in no one's interests, least of all mine if I am the advocate doing it, that everything is horribly pushed towards the trial date.

THE CHAIR: Mr Facenna, I was just going to take a short transcriber's break.

The point really that I was going to put to you after the break, so I will put it to you now, was really the one that Mr Pickford just said. If we can still get a CMC this side of Christmas, at which we can sort of, if you like, mark Google's homework in relation to the disclosure process, and they actually do the things that they have agreed to do, that largely gives you what you want. I know you feel that is still, you know, giving them more wriggle room than you would like, but in the scheme of things, where we can't really test the practicalities of doing it, we are faced with evidence that there is a huge number of documents that have to be gone through. We can't really test the practicalities of doing that.

I hear what you say about they have done this in umpteen other sets of proceedings all round the world. But without trying to get into that sort of practical debate -- which I think we would like to avoid -- would you be very much worse off if we had actually reached the position you want to be in at CMC 2 --

MR FACENNA: That is the key prize, isn't it?

THE CHAIR: Yes.

MR FACENNA: Can I leave you with these thoughts: first of all, I am not sure my learned friend engaged with the question as to why they can't provide their proposals on the same time as the explanation --

THE CHAIR: He says they need time to -- they need to look at what they have and also they have to see the list of issues formulated first.

MR FACENNA: If those are the points, then let me leave you these further points. If you haven't had a chance to look at Annex 2 to our skeleton argument, perhaps I can invite you to have a look at it briefly.

I won't take you through it then but the short point is this -- and it is addressed, I think, somewhere around paragraph 40 of our skeleton argument -- there are striking similarities -- I mean, first of all, what this goes to is for me to encourage the tribunal to have an extremely healthy amount of scepticism towards any suggestion that Google either doesn't know what it already has, doesn't know what has been disclosed in those other proceedings or has to engage in some difficult or lengthy process to identify what's relevant in these proceedings.

The issues in these proceedings are pretty much the same as the issues that it has been litigating for years in those other proceedings. They are the same on questions of the relevant markets, on dominance, on the various types of abuse in relation to AdX and DFP and the third abuse on this case. It is clear that very large proportions of those documents are obviously going to be relevant to the issues in these proceedings. Google already knows that. These documents are, we think -- there is no reason why they shouldn't already be in a state where they are readily producible. The suggestion that we need to engage in a process on the list of issues in this case and that that might have an effect on that disclosure process is one that we simply do not accept.

If the list of issues is going to be the sort of document which we discussed earlier, that's not going to tell Google anything it doesn't already know and hasn't known for years about what the issues are in this case and the way in which they mirror what it has already litigated in the United States and in front of other regulators. So we do

encourage the tribunal take a healthy dose of scepticism.

On the practicalities, there is one other point to bear in mind, which is there is still a third tranche of disclosure we haven't discussed yet, whereby we are inviting the tribunal to order that there should be an EDQ and a disclosure report. There is no doubt then going to be a process of negotiation and discussion over that. We are probably going to have to come back at CMC 3 to deal with that.

What we very much don't want to have is this process on the pre-existing disclosure, which ought to be relatively straightforward, push all of that back and then we end up having to argue about this stuff at CMC 3. We then haven't dealt with -- or Google is still saying, "We haven't yet got on to the other materials", that then knocks in towards the end of the year, because that will have a real knock-on effect on all the other proposals we make.

THE CHAIR: A little later than perhaps anticipated, we will take a break until ten past twelve**.**

(12.03 pm)

(A short break)

(12.15 pm)

MR PICKFORD: Sir, if I may just deal with a small administrative point?

THE CHAIR: Yes.

MR PICKFORD: It has been pointed out to me that although it is in the bundles -- at least in our bundles, although it might not be in yours -- there is a version of our order that we proposed as of last night -- there's obviously been a number of iterations -- would it be helpful if I provided that?

THE CHAIR: Yes, certainly, actually.

MR PICKFORD: Insofar as we are adopting that approach, that is then set out in black and white.

THE CHAIR: Thank you very much indeed.

We have sort of made up our minds, if you like, in relation to the disclosure issue, unless there is something more --

MR FACENNA: I'm not quite sure whether to wait and see what you say. Perhaps I should tell you, just before you had come in, we had agreed between ourselves at least on our paragraph 7, i.e. that Google would give us their proposals for what we should get at the same time as providing the explanation.

THE CHAIR: That's interesting, because that's what we decided they should get.

MR FACENNA: Great minds.

THE CHAIR: Thank you.

Can I just then briefly tell you, Mr Facenna, what we have decided in relation to the form of the order, otherwise I think we are just going round. If you take serious objection to it, I will let you do that.

We accept Mr Pickford's submission that they should be given until 24 October 2025 to provide the explanation. But as the parties have now agreed, we also consider that they should provide their proposals for disclosure as well during that period. So we will make an order as in paragraph 5 of the order that's just been handed up, subject to that qualification.

We do see that there is some value in having the list of issues agreed beforehand, but we don't think -- given the healthy degree of scepticism that you have invited us to have -- that that ought to prevent the proposals being given. We are pleased that's been agreed.

Our real reason for that is not so much the logical purity that Mr Pickford urges on us, but we can't be certain practically how long it is going to take. One has endless disputes when one has given a very tough disclosure timetable where the parties are endlessly coming back for extensions of time. So if that's what they say they need,

we have to accept it, I think, at this CMC. But as I say, they will get a frosty reception if they come back and say they can't comply with it very easily.

We also accept that they should have until 21 November 2025 to reach agreement with you over what pre-existing disclosure should be reproduced.

We will referee any disputes at the CMC 2, which we will list to take place before the end of the year. So we would invite the parties to give us dates to avoid after 1 December. Obviously you will need a little bit of time within which to take stock, put in evidence and try to argue the toss before we hold the CMC so it will have to be close to Christmas.

So in that sense we will accept Google's proposal subject to one qualification, which is we don't see that they need until 21 March 2026 to give the final disclosure. We think the order should have an obligation to give rolling disclosure. So if you agree most categories by 21 November 2025, then we would expect disclosure to take place immediately thereafter, and we would expect the first round of disclosure, if I can call it that, to be ready by 31 January 2026.

Obviously that could be moveable. There could be extensions of time. But that's the order we are going to make at this CMC.

MR PICKFORD: Can I just take instructions on that?

THE CHAIR: Yes.

MR PICKFORD: I just need to check. As we left, we put forward 21 March. I just want to check with those behind me that they don't want to say anything about the suitability of January instead.

THE CHAIR: Certainly. But we think it should be done more quickly.

MR PICKFORD: I accept that.

THE CHAIR: You can take instructions.

MR PICKFORD: Thank you.

MR FACENNA: From our perspective, we are happy with the proposals.

THE CHAIR: We will also incorporate into that, obviously, your paragraph 6: disclosure from specific pre-existing datasets. We will give them until -- my note is that actually 26 September was agreed.

MR FACENNA: That's right.

THE CHAIR: That is agreed, so paragraph 6 is completely agreed. That will be inserted into that timetable.

MR PICKFORD: May I just --

THE CHAIR: Yes.

MR PICKFORD: Sir, the only thing I would ask for is liberty to apply in relation to that date. We obviously heard what the tribunal has said about getting on with things, and we know that we are going to get a frosty reception if we appear not to be doing that. At the moment, we don't know whether there are going to be obstacles. Obviously if there are, then we would make the case and the tribunal might reject us or accept what we have to say on it.

THE CHAIR: The date we have given you allows for an extension of time before CMC 3 if it is absolutely required. It is to put enough distance if there are -- it is to put enough, if you like, flex in the timetable before CMC 3, so the process will be fully completed by the time we get there. So it is not a final order, or whatever people used to make, so if an extension of time is required, then you can obviously apply for one and if it is justified we will extend time.

MR PICKFORD: Thank you, sir.

THE CHAIR: Yes, Mr Facenna?

MR FACENNA: That then leaves the question of the further disclosure outside of the pre-existing disclosure.

THE CHAIR: I obviously know what an EDQ is, but perhaps you can just explain it to

my colleagues in a little bit of detail. And also perhaps just explain to me the difference between the rules in the tribunal. You can assume I am fully familiar with what an EDQ is in normal civil litigation, but you may have to educate us as to what it means here.

MR FACENNA: So the overall purpose here, if you have our draft directions, our paragraphs 11 to 13 essentially make arrangements to enable the parties and the tribunal to understand what other available and relevant documents Google has, and to assess whether they should be disclosed to these proceedings as well.

That's important because the disclosure at the second stage we have just been discussing is actually just reproducing disclosure that Google has given in other proceedings. It is actually not disclosing anything new. There will not be a direct overlap with this case. In particular, the repositories which are in the pre-existing disclosure don't cover the full period of the class representative's claims. So that's why there has been another exercise to find additional material.

THE CHAIR: There is a limitation issue, isn't there? Leaving aside questions of limitation, how far back do you go, just remind me from the pleadings.

MR FACENNA: It has been a while since I looked at that.

THE CHAIR: 2014, is it?

MR FACENNA: 2014, that's right. There is a limitation issue we need to come back to at some point, but it is 2014.

THE CHAIR: So for disclosure purposes, that is our period. It is 11 years.

MR FACENNA: Just on the proposals, then, the way it will work -- and then I will come on to the detail of the rules and what the documents are -- the proposals are that we have in there the date of 26 September. I made some comments at the start of this morning that we need to wait to hear what Google says about that, but you have heard my submissions about making sure they get on with it. They would file and serve a disclosure report and an EDQ. We would then have a process over a period of about

a month to try to agree categories of documents and data based on those documents, and then our idea was to come back and be able to deal with that at CMC 2 as well. That remains our current position, but we will see where we get to in the course of the discussions.

The reasons for doing this are addressed at paragraphs 28 to 33 of our skeleton argument. There has also been some evidence now in Mr Wisking's statement which is to some extent responded to in Mr Streatfeild's statement from yesterday. I hope it is 28 to 33 in our skeleton argument.

THE CHAIR: Yes.

MR FACENNA: Helpfully, so we know what we are talking about, we in fact have samples of what a disclosure report and an EDQ look like. I can hand up that up.

THE CHAIR: That would be very helpful, thank you.

DR MAHER: The point is (inaudible) disclosure report, or are they the same?

MR FACENNA: Let me hand these up and you will see.

I don't know if you have Mr Streatfeild's witness statement available to you. That should be, I think, in the latest bundle, which will be E1, I think, tab 3.

What Mr Streatfeild says about it is at paragraphs 18 to 24, on page 48.

You can see, essentially, from the templates I have provided you with, both of these are standard documents which are used in civil litigation. The purpose of them, really, is the disclosure reports, the way in which that were -- it is a document which has to be signed, the statement of truth and so on. It asks for, in a tabular form, all documents which exist or may exist and which are relevant to the issues in the case and, in respect of each such document, where and with whom it may be found and, in the case of electronic documents, how the same are stored.

So, effectively, the party who is giving disclosure, which obviously in this case is Google, would set out in detail which repositories, what data it has, who holds those

documents, where they are to be found and, essentially, those which are considered to be relevant going to the relevant issues in the case.

So you get a lengthy disclosure report. The EDQ then is a slightly more complicated document which provides more detail about how you are going to find the relevant documents and the type of searches you are going to undertake; who the relevant custodians are going to be; what key words you are going to use, exactly what form the documents take; how you are going to carry out the searches and so on and so forth. So it provides a more granular level of detail about how you are going to do the searches and the form in which the documents are stored.

Then you also see the EDQ. It asks for details about potential problems and how they might be encrypted or inaccessible and so on.

It is quite a detailed document.

The idea is to provide, in the disclosure reports, a broad outline of all the different documents which exist which may be relevant. Then the EDQ itself gives you a much more granular level of detail about the way in which the documents were stored; how they might be interrogated; how they might be searched and collated and so on. So it is a pretty standard approach in civil litigation.

As you will see in our skeleton argument, it's also an approach which is set out in the CAT's rules itself and which has been adopted in a number of other tribunal cases.

The purpose of them, really, is to enable the parties and the tribunal to understand the scope of the available relevant data and documents. If you have our skeleton argument, I think we make a point in footnote 13, which is a footnote to paragraph 30, that they are tools which are routinely used in this tribunal in collective proceedings.

So you see in footnote 13 of our skeleton argument we refer to: *Coll v Alphabet*; *Kent v Apple*; *Consumers' Association v Qualcomm*; *Gormsen v Meta* and *Neill v Sony*.

I gave you the references. I think the examples that you need are in the authorities

bundle, if you need to look at them.

They are well established tools. They are crucial in a case like this because there is overwhelming information asymmetry. Google holds all the information the tribunal is going to need to be able to resolve these proceedings, and we currently hold nothing. So, unless you have something like a disclosure report, an EDQ, it is simply not possible for the class representative to assess which categories of relevant data exist and are available, or the adequacy of any proposals that Google puts forward, including whether potentially relevant material might not have been identified or indeed been withheld.

So those documents will enable us, and in due course the tribunal, to take a more targeted and efficient approach to disclosure requests. So, for example, once we have these documents, we would not be seeking disclosure of material that has been disclosed in one set of proceedings if it obviously overlaps with material that we already have with the disclosure of the DOJ proceedings, for instance.

We can only start to assess the degree of that overlap and those kind of details once we have a comprehensive explanation in the form of disclosure information.

DR MAHER: Just for clarification: would the EDQ and disclosure report already include the list of what they have already given you or would it just be related to material that has not been disclosed in those other proceedings?

MR FACENNA: Yes, the pre-existing disclosure would be a subset of the overall disclosure.

DR MAHER: That would be replicated again here?

MR FACENNA: It will be -- well, I think we could expect to see it included. It would certainly be cutting and pasting the explanation they had already provided us in the disclosure report. Because that pre-existing disclosure we have been talking about is simply a subset of the overall universe of documents and data that Google holds that

is potentially relevant in these proceedings.

But, if I am understanding your concern, there wouldn't be some unnecessary duplicative process there. It would be immediately obvious from these documents which bits of it were the stuff that's already been disclosed under the previous arrangements.

I am reminded that under our -- our proposal was that there would be a disclosure report and an EDQ, which would be their explanation of what documents already existed. So it is partly because we have adopted the sequencing approach that we are now in a situation where there would be that first tranche and then we will get into the process of the EDQ disclosure report.

DR MAHER: Just for clarification on that: you are basically saying that what you are requesting is that they provide a disclosure report and EDQ on the date we agreed of 24 October, and then you might have a further EDQ and disclosure report --

MR FACENNA: No. What they are providing on 24 October would -- no one is being prescriptive about that. It is to be an explanation. I think we have a rough idea of what that would look like, but it won't be in the form of a EDQ and disclosure report. It effectively will be a summary of the datasets and documents which --

THE CHAIR: If we ordered an EDQ and a disclosure report, to save time, you could incorporate one into the other?

MR FACENNA: Yes. Sorry, maybe I missed the point. Yes.

THE CHAIR: So it is not imposing an additional burden requiring them to do it again? It's not a duplicative process?

MR FACENNA: No. No, precisely. On our proposal you could order the EDQ and disclosure report and that might --

THE CHAIR: Provide the explanation, yes.

My concern is about the additional material.

Also, perhaps before we come to the practicalities of it, you can just show us -- I am not sure I have ever actually ordered anybody to make an EDQ. Maybe I have just been lucky so far. Because it is normally, I think, a voluntary process under the CPR. But maybe I am wrong about that. Maybe it is just by the time disclosure issues reach me they have usually just been entered into.

MR FACENNA: That is what I was going to say. I think partly it is a sign of expectation in the Commercial Court. So, normally, probably, the expectation is you are going to do it without having to go before a judge and argue about the issue.

So I can show you the rules --

THE CHAIR: Show us the rules. It is also the stage in the procedure where you anticipate it would be made. You say it would be right at the outset of proceedings?

MR FACENNA: Yes. Indeed, that's what the rules seem to suggest.

MR ALTY: Can I clarify to the timing? Originally, you were saying 26 September; what time are you now suggesting?

MR FACENNA: Well, the tribunal has accepted Google's request to do it on 24 October. I am sure we could live with that.

MR ALTY: I just wanted to be clear.

MR FACENNA: So the tribunal's rules, unless you are looking at them separately, they are in authorities bundle 1, tab 3, and the relevant rules start at page 85. Well, 84, Rule 54.

So you will see, this is the rule in relation to the CMC.

Over the page, at 85, under Rule 54(3), it refers to the purpose of the first case management conference. For present purposes, this is the first case management conference. You will see that one of the things that the CMC is to consider is to give directions, including, at (e):

"To consider any issues relating to disclosure and the provision of a disclosure report

and completed EDQ in accordance with Rule 60."

Then, if we go to Rule 60, you will see it actually includes a description of what they are. So, under Rule 60(b):

"A disclosure report means a report verified by a statement of truth which ..."

And then you will see it enumerates the requirements in the report. Then an EDQ is defined as the same questionnaire as prescribed by schedule to PD31B in the CPR.

And then you will see at 60(2):

"Subject to paragraph 3 and unless the tribunal otherwise thinks fit, at the first CMC, the tribunal shall decide whether and when the disclosure report and a completed EDQ should be filed."

And:

"At a subsequent case management conference, the tribunal shall decide, having regard to the governing principles and the need to limit disclosure to that which is necessary to deal with the case justly, what orders to make in relation to disclosure."

So what the rules envisage is that at this first CMC, which normally -- unless you have been given the nod to -- order an EDQ and the DR. Then, if necessary, come back to it at the next CMC and decide what should be disclosed.

You will see there are then very broad powers under 60(3) as well, about how disclosure is to be given, and in particular the searches, what lists and so on.

And 60(4) refers to the parties' duty to disclose documents in its possession. Then there are some limitations on that in terms of other copies and so on.

Just beyond that, just to complete the picture, if you go ahead to rule --

THE CHAIR: What it says in (2)(a) -- I just want to know. It says**:**

"Unless the tribunal otherwise thinks fit, the tribunal shall decide whether and when the disclosure report and a completed Electronic Documents Questionnaire should be filed."

So it's not "shall order." It's not a maybe. It's: unless we otherwise think fit, we have to make a decision now.

MR FACENNA: Yes.

THE CHAIR: Who is the burden on in relation to whether or when you can argue the toss about -- but this is a "whether" case, isn't it? Because they say they shouldn't have to complete an EDQ and DR at all.

MR FACENNA: Yes, they say --

THE CHAIR: You say we should approach this on the basis that it is a normal requirement?

MR FACENNA: I do say that. And those other cases which are referred in to in our skeleton -- and I will show you one or two as well -- illustrate that it is a procedure which is routinely used in these kinds of cases in this tribunal.

Just to complete the picture on the rules, if you have a look at Rule 89, on page 101, there is then a very broad discretion on general power:

"To order disclosure … on any terms the tribunal thinks fit … by any party … to any other party, by the class representative ..."

And so on. So broad discretionary power to order disclosure in any way deemed suitable.

So I have given you the references in our skeleton argument, at footnote 13. I have made the point that -- why they are going to be useful, given the information asymmetry in this case. That we simply need it to be able to start the process of understanding what data there is and which will be relevant.

I don't know whether you have had the chance to look at it, in Mr Wisking's statement served last Friday, which is at E1, tab 1, he suggests in his evidence, at paragraph 87 to 90, on page 29, that dealing with this by way of correspondence would be more efficient because of the rigid and supposedly irrelevant requirements of the disclosure

report and EDQ. So that's the evidential basis on which Google comes to the tribunal today to say: well, you don't need it, we can deal with all this in correspondence.

But you will see from that evidence, it doesn't really provide any detail about Google's document repositories or why they should be unsuitable for what is effectively the standard process. In response to that, if you have look at Mr Streatfeild's evidence which is in the same bundle, tab 3, on page 48, beginning at paragraph 18. Perhaps you can scan 18 to 24.

But, effectively, his evidence is that the disclosure report and EDQ are absolutely essential tools for understanding what documents and data exist, how they are stored, and assessing the proportionality of what should be disclosed.

THE CHAIR: Which paragraph again?

MR FACENNA: It is 18 to 24.

He also sets out why in the class representative's case it's sensible and efficient for Google to prepare the disclosure reports and EDQ alongside the proposals for reproducing the pre-existing disclosure. That's the point I made a moment ago, the pre-existing stuff is in substance just a subset of the broader document holdings covered by the reports and preparing them all simultaneously will avoid duplication of effort and enable us to have a complete picture by CMC 2 of what is available and what process should be adopted in relation to disclosure.

Doing them alongside each other will also enable us, as we say, to compare the subset with the wider set and determine whether actually what's in the pre-existing disclosure might be sufficient on a number of issues, or whether it does in fact need to be supplemented by disclosure from the other categories.

Simply the other points in Mr Streatfeild's evidence which might be worth noting is of course there is a recognition that disclosure has to be proportionate. We are not in the business of requiring Google to hand over large amounts of irrelevant data. That's

in no one's interests. We will engage constructively on it. But, in order to do that, we actually do need to have visibility of the full scope of available materials.

In terms of resources and timing, preparing this document, we say, is one that ought to be eminently manageable for a company like Google. Again, it will be a large degree of alignment because what Google has already had to do with prior regulatory disclosure efforts to the CMA and European Commission and other regulators and they will be able to rely on that to make processing more efficient.

THE CHAIR: The disclosure report -- well, it may be that it will be burdensome in itself simply identifying custodians and databases. I take your point in relation to that.

But, if you actually were to try to fill in a disclosure report of every single -- I mean, you would accept categories of documents, wouldn't you, in the disclosure report?

MR FACENNA: That's the normal --

THE CHAIR: It's just looking at it the first time --

MR FACENNA: It's not individual, no.

THE CHAIR: You would accept fairly broad categories, wouldn't you?

MR FACENNA: Yes, it would have to be --

THE CHAIR: Some of the key material is: what searches are they planning to carry out, the key words and the custodians? That's what you are more interested in at this stage, I would have thought?

MR FACENNA: Again, this is not a process which we will be starting from scratch. This is a process they will have done lots of times over a number of years, in a number of different forums and jurisdictions, in relation to these positions, so there ought to be no difficulty.

Before you perhaps want to hear from Mr Pickford on it, can I just show you the example of the importance of the reports that Hodge Malek KC has taken in another case in this tribunal. That's the *Lenzing* ruling, which is in authorities bundle 6, at

tab 53.

It begins at 1873 and the first reference I want to show you is paragraph 19, on 1878. You will see there was no disagreement on the principle in that case that there should be an order for a DR and an EDQ followed by the making of requests and responses to requests for documents and categories, including proposals for specific search methodologies via the exchange of Redfern Schedules.

Redfern Schedules are effectively a tabular form of -- which are widely used in international arbitration and now in other forms of civil litigation, which enable the parties to exchange views about exactly those sorts of things, where you search and what you search for.

Mr Malek KC, in that case, left the timing to be dealt with -- timing of actual disclosure -- to be dealt with in a later order. You will see, if you go ahead then, there are a couple of paragraphs which talk about the exchanges that they are going to have.

But, if I can ask you to look ahead to 25 -- well, at 24, Mr Malek KC refers to Ryder as setting out the approach. You see, at 25, the approach that he takes as Chair is:

"The applicable disclosure regime for any particular case depends on the very facts and the type of case in issue. With regards to dealing with the process and working out any disclosure, a flexible approach is to be taken to dealing with these applications."

Then there is a citation from Trucks, the Trucks matter. Then there is the point, which I think I alluded to this morning, 27, where in this case he envisaged that there would be issues between the parties that would arise as they worked through it. He proposed, so they could be dealt with quickly, the party seeking disclosure could write to the tribunal and set out what the issue is and it may be decided by way of an informal ruling or the tribunal would determine whether there had to be a formal application.

That was in light of, in particular, the points made at 28 and 29 and 30, about the need to avoid significant costs and preparation of having further hearings, which are a diversion. But it is the same approach as he had taken in Trucks.

So, at 29, there, you see the warning:

"Any party that has acted unreasonably or failed to cooperate, there will be an adverse costs order. But if there are bona fide issues that need to be worked out, then the tribunal will want to assist the parties ..."

And doesn't want to deter them from seeking its assistance to do so.

In 32 and 33, again, in that case disclosure was ordered to be done on a rolling basis, at 32. So, when categories have been agreed, to start getting on with it in disclosing those categories. Quite a lot of emphasis there, in 33, on the importance of a rolling basis of disclosure, so the parties can get on and prepare the substantive case.

Then I had a note to show you 46 on initial disclosure. But since you have agreed the points on initial disclosure we don't need to worry about that.

So it was really just to show you the approach taken in another -- it is a recent ruling by a judge who is acknowledged to be an expert on disclosure matters, in this tribunal, and those are the sorts of principles that we say should apply here as well.

So, just to sum up on this point, based on the material that's been put before the court, Mr Wisking's statement in particular, it is not clear to us that there is any good reason why Google should not be required to adopt the standard approach to disclosure report and EDQ. It is common practice. There are good reasons for it to be adopted here, as the most efficient and orderly approach.

It is also particularly important in circumstances where -- I don't want to wind Mr Pickford up again -- to date our view is there has not been a cooperative approach in relation to disclosure issues and there are actually criticisms of Google in other proceedings for failing to preserve relevant evidence. So we are alive to those and

we want this process to be done in an orderly and efficient way, which makes sure that nothing gets missed and that we can start having disclosure as soon as possible to get going in preparing the case.

MR PICKFORD: Thank you, sir.

Our position here is that we should be guided by what is practical and pragmatic and not by formalism. I am very happy to make some suggestions, which I think are going to go some way to meeting the concerns that Mr Facenna identifies.

It's not that we have an absolute allergy to the words EDQ -- or rather to the electronic disclosure questionnaire or disclosure reports. The point is that what we should be required to do should be tailored to what would be most helpful and most efficient. So I am going to make some proposals that go some way to addressing Mr Facenna's point, but there are some points I am going to push back on.

So, as Mr Facenna emphasised, and the case of *Lenzing* is a good example, the tribunal takes a flexible approach. That's one of the core themes that is coming out of the passages that you were citing in *Lenzing*. It also emphasises the need to avoid unnecessary costs. The approach to be taken needs to be tailored to the case at hand.

Now, what we propose is this: starting at the end of the process, so when we are looking to identify documents that fill holes in disclosure. So, at this point, we have gone beyond the first process where we are giving disclosure by reference to the existing tranche of disclosures, the 6 million odd documents; what we envisage -- and I think it is agreed by the class representative -- is there will then be a process by which the parties will seek to identify: okay, well, that was all very well, but there are certain issues that we still have in our litigation that haven't been covered. Here's what we would now like you to provide further disclosure on.

In relation to that process, those remaining issues that haven't been sufficiently

covered, we are happy, if the class representative wants it to be by way of EDQ and DR, to do that by way of EDQ and DR. That is a focused, tailored approach to an EDQ and a DR which focuses on the process that we are going to engage in outside of the initial tranche of disclosure from the 6 million-odd documents.

What we are also willing to do --

THE CHAIR: Let me be clear, you are willing, if through the process of refinement that if they identify -- you are willing to, if necessary, to complete an EDQ and a DR, but you don't want us to order it now?

MR PICKFORD: I don't mind it being ordered now, as long as it is clear what it is we are going to be doing, so there isn't an argument between us and the class representative about whether we have done what the tribunal is expecting.

So what I envisage is that we have the stages that we were canvassing before the very short adjournment and, out of that, we then arrive at either an agreed position or, if we have to, come to the tribunal and seek the tribunal's input into it, a determination of what's now missing.

Because there are obviously a lot of documents that have gone through that staged approach. But we quite accept they may reasonably come back and say, "There are still things we just don't think we have a sufficient handle on yet. We need you to find some more documents." And we are happy, in relation to those -- if I can call them "holes in disclosure", to approach that process and those issues through an EDQ and a DR. We have to do it in some way. We are not particularly hung up about the precise form of words that attaches to that.

We suggested it is better to do it through correspondence. But, ultimately, it is all aiming at the same ultimate objective. So that bit I think we are in agreement with.

There is, however, an aspect of this where we are very strongly not in agreement.

If we then come back to the issues over which we are going to be providing disclosure

through the 6 million-odd documents. Now, when we describe that wealth of documents, and when we make our proposals for what we should disclose from it, if the class representative would like we could do that. We can do it on 24 October by way of a disclosure report. That will set out what we were going to do anyway, but we will call it a disclosure report. It will obviously satisfy the requirements of a disclosure report in terms of being signed by statement of truth, et cetera.

It needs to be one, obviously, that is relevant to what we are doing. So, if there were aspects to that disclosure report that you would ordinarily produce that aren't really relevant to the context of what we are proposing, then we couldn't -- we wouldn't be providing that kind of information. But we are happy to do something in a disclosure report that meets those objectives.

That is a disclosure report for the world of documents that are contained within those existing repositories.

What we say would not be appropriate is two things. The first is an EDQ for that. Because Mr Facenna has helpfully provided an example of an EDQ. If we put ourselves in a position of what are we going to -- how are we going to use this form to help inform what we are doing in relation to those documents?

The first thing we are required to do is identify the custodians or creators of the electronic documents and then we are supposed to -- there are various steps that follow from that.

Now, that process has effectively already been done by creating the repositories that exist. Insofar as we can say, because we know from, for instance, the audit trail in relation to a particular repository of information, "Well, these were the custodians who were searched", we can tell them that. But it is a slightly odd idea that we are going to be, generally speaking, engaged in a process focused on custodians when we already have just a great big set of data that we are proposing to give disclosure from.

So we say that this template doesn't entirely match the process we are going to actually be engaged with.

The second, perhaps more substantial, point is this: the whole reason why we are proposing -- and we have now agreed with the class representative -- that we are going to start with this huge number of existing documents is because that gives us a sensible way in to disclosure, which may well satisfy a large proportion of the class representative's needs for documents.

What would be, in our submission, inefficient and not proportionate is what we understand that is being asked from us, is that at the same time as doing all of that, we also have to engage in a standard form disclosure report and EDQ for the universe of documents at large that could be relevant to any issue in the case. Because that is likely to be highly duplicative and, in my submission, a wholly inefficient process for us to engage in. Far better that we give them the disclosure from the existing repository of information, we focus in on engagement with the class representative on what might be missing, and that's when we then engage in the DR and EDQ process for those further documents.

Otherwise, what we are being asked to do is effectively boil the ocean when they have already had potentially -- there is a cache of 6 million-odd documents there. We then have to, effectively, over a period of a decade, involving a huge number of products in an incredibly fast moving industry, re-do all that again. That, we say, is not sensible. Let's focus it on where the gaps are.

So that's my position on EDQs.

THE CHAIR: What is your proposal in relation to -- I remember the gap disclosure from Mr Wisking's witness statement and also from your draft order --

MR PICKFORD: Yes.

THE CHAIR: So the first time round, as I understand what you say, you are not saying

that we shouldn't ultimately order an EDQ and a DR if ultimately we think that's appropriate.

MR PICKFORD: Yes.

THE CHAIR: But, when we come to make such an order, if we do, it should be heavily targeted and after the process of preliminary disclosure has taken place?

MR PICKFORD: Yes. Exactly that.

THE CHAIR: So, in the meantime, in terms of the gaps; how are you going to get to the holes in disclosure in a way that is going -- between the parties? Are you just going to wait until the preliminary disclosure period is over and then begin to address that, or are you going -- is there some voluntary process?

MR PICKFORD: In our order, the one that I handed up, if you go to paragraph 8 --

THE CHAIR: This is paragraph 8?

MR PICKFORD: -- we proposed that the parties would seek to agree areas that hadn't been addressed. Then, insofar as there was any dispute in relation to that, that could be determined at CMC 3. Then we would then provide an explanation -- which we are happy to do -- via EDQ and DR, if that's what the tribunal would like, of what we can provide in relation to those further areas that the tribunal thinks is proportionate for us to focus on in terms of further disclosure.

But whilst it is obviously no skin off the nose at all of the class rep to say: well, just do it all again over everything.

We will be saying: that's just not sensible.

THE CHAIR: Just so that we can understand, when you talk about the repositories, are we talking -- let's say that you made -- you presumably have a database somewhere which has stored on it all the documents, for instance, that were referred to or disclosed to, for example, the FCA in France or whatever --

MR PICKFORD: My understanding, at least in relation to the US proceedings, is that

there are third party companies that deal with disclosure management who hold --

THE CHAIR: So, when you talk about the repositories, that is what you are talking about?

MR PICKFORD: Yes, yes.

THE CHAIR: Somebody has a server somewhere which, stored on it, has all the documents that were used in the DOJ proceedings, or were used more widely.

So, when you come to do your review in relation to pre-existing disclosure, you are going to go through, effectively, a list of documents which have already been disclosed, or whatever?

They don't have quite the same disclosure mechanics in US proceedings. I don't know how they -- the DOJ was a regulatory investigation as well, wasn't it?

MR PICKFORD: Yes, yes.

THE CHAIR: The original DOJ.

MR PICKFORD: That's why one ends up, potentially, with 6 million documents. We do not anticipate --

THE CHAIR: You are going to have to search them, aren't you?

MR PICKFORD: Yes, we are going to have to search them. But it would be an incredibly unusual case --

THE CHAIR: That's why I asked whether -- nobody is suggesting, either, Mr Facenna, or you, that there should just be the keys to the warehouse that you just hand over 6 million. They were asking for that originally.

MR PICKFORD: Yes.

THE CHAIR: You said no. So there is going to have to be a search process carried out, even in relation to whoever holds the -- you know, the data company that holds even the sort of disclosure from the DOJ proceedings.

MR PICKFORD: Yes.

THE CHAIR: And there will have to be search terms.

MR PICKFORD: Yes, and we can make proposals for those.

MR FACENNA: Sorry to interrupt, because I am lost on this.

In relation to the pre-existing disclosure, the DOJ materials, I don't think we are proposing that there should be an EDQ process in relation to that. It would all be covered by you giving us the explanation in other proposals for what you were willing to disclose and telling us what else there is.

MR PICKFORD: That is helpful.

DR MAHER: Maybe I am a bit lost --

THE CHAIR: I am getting slightly confused, too.

DR MAHER: I had thought that you wanted an EDQ on all the DOJ material, for example.

MR FACENNA: No. So I think where we got to in the exchanges that you and I had were, if the tribunal's view was that you could do it all at once and do an EDQ and disclosure report which covers everything, then that would possibly do away with the explanation process that we had settled on this morning.

But, if you are not contemplating doing it all at once, then we are not insisting on the formality of a DR and EDQ for the pre-existing materials. Frankly, that ought to be pretty straightforward because it's just reproducing documents which are already indexed and have already been disclosed in the other proceedings. It's not the same as saying: we have these other categories which no one's really searched, we have to agree how we are going to interrogate them.

THE CHAIR: I see the time. Shall we continue this at 2 o'clock?

(1.06 pm)

(The luncheon adjournment)

(2.00 pm)

THE CHAIR: Mr Facenna was on his feet when we left.

MR PICKFORD: Yes, we did have a discussion about that. I think originally it was me and then he interjected. I thought his interjection had come to an end, but if it hasn't --

THE CHAIR: It is probably useful you are on your feet rather than he is for the moment. I will tell you what we discussed over lunch time, had in mind, really, which is that if we go to your form of order --

MR PICKFORD: Yes.

THE CHAIR: We take your point about, if you like, the nature of the exercise and that it should be limited to what we, between us, have called the gap analysis.

MR PICKFORD: Yes.

THE CHAIR: So we are minded -- this is really to both of you -- to make an order in the form of paragraph 8 of your order, but to bring that forward and say by 5 December, or some convenient date, say that ...

The difficulty we have is, without knowing what these gaps are, he says, actually, it is dead easy for you to produce a EDQ and a DR. You say, no, it's incredibly complicated. You both agree it shouldn't necessarily include the documents that are being given in the pre-existing disclosure. Again, as with all disclosure issues at the very beginning of the case, it is very difficult for us to work out not so much who is right, but where the practical difficulties lie, no doubt the truth is probably somewhere in the middle.

What it seems to us is we ought to try to establish what the gaps are before we compel you to do anything, but we also feel that your feet should be held at least glowingly -- you know, close to the fire. So what we would propose is a kind of compromise, which is that we should try to establish what the gaps are in the way you have initially suggested, but before CMC 2, rather than CMC 3, so that we can decide

at CMC 2 -- we can resolve any issues, as in paragraph 8.

Then what we would propose to do -- we don't propose to make an order now, but we would anticipate making an order at CMC 2 that you provide an EDQ and a DR in relation to the gaps by --

MR PICKFORD: Yes.

THE CHAIR: This won't be set in stone because it will be a matter for debate at CMC 2. But we would expect to make an order that you provide that on 31 January, your long stop date. As I say, that date is not necessarily set in stone.

But the strength of your submission, as we see it, is that it is very difficult to see how you can do it all in one go. Then, if we accept your submission -- which we are currently minded to do, which is that you can't do it all in one go. I think Mr Facenna was beginning to lean that way in his submissions -- then the question is: where does it fit into the process?

It seems to us the right place to fit it into the process is before CMC 2 so there can, at least, be -- you can tell us and tell them in the normal form what additional material you have when you give the remainder of the pre-existing disclosure.

That seems to us where you slot that into the procedure as it now fits.

Now, as I say, both of you are welcome to push back on that, but that's where we came to after hearing from both of you before lunchtime.

MR PICKFORD: That's very helpful. If I may, could I just turn around and see whether that appears to be something that will work?

THE CHAIR: Yes.

Do you want us to rise for five minutes so you can think about it? We are happy to sit here.

MR PICKFORD: I think I am about to be able to turn around and give --

THE CHAIR: Mr Facenna might need a bit of time. If you want to talk it through,

then ...

MR FACENNA: It might be useful to rise for a couple of minutes. There might be some issues we can actually resolve between us.

(2.05 pm)

(A short break)

(2.10 pm)

MR PICKFORD: Good news. I understand that both parties are very happy with the proposal that the tribunal has made.

THE CHAIR: Thank you. That is very helpful.

MR FACENNA: That would be a replacement of paragraph 8. Then, as we understand it between us, we will come back at CMC 2 as to whether there should be a DR and EDQ --

THE CHAIR: We would expect to make an order in accordance with the rules which you have shown, unless it has all been agreed. Thank you.

MR FACENNA: I think that supersedes what is currently in 9 or 10 --

THE CHAIR: Thank you.

MR FACENNA: We are almost there then, my Lord --

THE CHAIR: Can I raise one point before I forget? Part of the thinking behind that was we would intend to fix CMC 2 -- which you say is important and we agree should be as soon as possible -- before the last full week of December. It will be useful to know whether the -- 15 to 19 December. Not Christmas week. You may be here on your own. Perhaps you can just --

MR FACENNA: We were talking about that at lunchtime. We will give you an indication.

THE CHAIR: Thank you. That's just so you have an idea that's when we were planning on fixing it.

MR FACENNA: I think the issue will be counsel availability, but we will try to give you an indication on that by the end of the day.

The only other issue, I think, in terms of directions for trial, the points we were going to cover, but which I understand we are now going to revisit at CMC 2 will be timetable for factual evidence and expert reports.

THE CHAIR: Yes.

MR FACENNA: The timetable for the CMA's intervention and whether there should be an order for mediation and the timetable at that as well.

THE CHAIR: You are asking, as I understand it, for an order for mediation; is that right?

MR FACENNA: We were going to be asking for that today, and I anticipate that will be our position.

THE CHAIR: That will be your position. Just out of interest, so when we come back to this point -- has the tribunal ever ordered mediation?

I know it is relatively new that the Court of Appeal has said that you can and should.

MR FACENNA: I don't know the answer to that, but I will by CMC 2.

Google has not said that it's not willing to mediate. I think the issue between us is whether you should order the window by which it should take place.

THE CHAIR: Order for mediation rather than just a stay or a window?

MR FACENNA: Yes, yes.

THE CHAIR: That's interesting. We will look forward to that argument.

MR FACENNA: The only other issue I want to cover then is the provision of costs information, which is covered in our draft order. It will be paragraphs 14 and 15. We have requested two figures from Google. It is covered in the correspondence. I don't need to take you to the correspondence.

But, essentially, it is information on its current total recoverable costs incurred today

as a single figure and its estimated total recoverable costs as a single figure to the conclusion of proceedings. We asked for that to be provided by way of a witness statement and for Google to provide an update in advance of CMC 3.

The reason we are asking for that is the class representative currently has £15 million of ATE cover in place, which it does consider adequate based on the current information available.

This is itself a much more circumscribed request because we were originally going to be applying for there to be a detailed cost budget from Google, but we are only asking for these two figures.

The reasons we are asking for it are explained in my skeleton argument, paragraphs 57 to 60. They are essentially, one, it will provide clarity as to the class representative's potential exposure to adverse costs enabling it to better manage that risk by ensuring it has adequate ATE cover.

That is particularly important because as Mr Streatfeild explains in his witness statement, at paragraph 29, the realities of the ATE insurance market mean that arranging adequate cover sometimes -- well, it requires some forward planning. It can take three to six months in his experience, in his evidence. It can be time consuming. You have to go to multiple insurers with updated case information and so on.

The second point he makes is that increasingly ATE insurers are generally reluctant to provide new cover as trial approaches, particularly within six to twelve months of trial. So, if we want to be prudent about that, we will need to have a good indication at an earlier stage if Google's costs are likely to significantly exceed £15 million. If we don't have that visibility, we won't be able to ensure that we have adequate cover and that is a particular problem here because we need to make sure that we continue to meet the requirements for certification, and one of them, under the rules, essentially is being able to meet an adverse costs order.

Google had previously refused to provide a costs budget. The latest proposal from Google, which is in Herbert Smith's letter of last Thursday, which is at D1 -- you don't need to look it up, but for the reference it is D1, tab 32, page 167. They had agreed that they would update us in correspondence if and when their incurred costs reached £12 million and they would provide an update to Google's total incurred costs to date prior to CMC 3.

So that's an improvement on the position, but it doesn't address the future estimated costs.

A mere indication from Google -- has there been an update on the position? I wondered if I had missed something.

We need to have an understanding of potential exposure, is the basic point. To manage the risk and ensure that we have adequate cover in place and that we meet the certification requirements. Merely indicating that they have spent -- that they have incurred costs of £12 million is not going to tell us anything concrete about what the potential liability will be in the future and it won't enable us to address the difficulties of the lead time having to go to market to put ATE cover in place. It will be a particular problem if it turns out that we are starting to get close to trial when obviously brief fees and so on will start to be incurred. There might be large chunks at that stage and we end up being in a position where we don't have adequate cover to meet the potential adverse costs.

So there is a good reason to have it. In terms of practice in this tribunal, this is not a significant departure from the normal procedure in the tribunal. We have addressed that in our skeleton argument at 55 to 56. If you have the rules, which are behind tab 3 in authorities bundle 1, Rule 53(2)(m), at page 84, it specifically envisages:

"The tribunal may give directions for the cost management of proceedings, including for the provision of such schedules of incurred and estimated costs as the tribunal

thinks fit."

There are a number of cases in which detailed cost budgeting has been ordered. Those are referred to in our skeleton argument.

THE CHAIR: Sorry, I am falling behind. Can you just take me to the rule again?

MR FACENNA: Yes.

THE CHAIR: Page 87, did you say?

MR FACENNA: Sorry, my Lord, it is 84.

THE CHAIR: So it is rule?

MR FACENNA: It is Rule 53, which actually starts on 83, and it is the "General case management direction powers". It is 2(m).

THE CHAIR: Cost management proceedings. I will just write it down, 53(2).

MR FACENNA: Other than have you turned to them. If you have our skeleton argument at paragraph 55 to 56, 55 makes the point on the rules which I have just shown you. And paragraph 56 in our skeleton argument, gives references to other proceedings in which parties have been required to provide costs.

Then the footnote gives the references to Vattenfall and to Agents' Mutual and to Belle Lingerie. Those are all in authorities bundle 1.

THE CHAIR: Do you want to take us to one of those?

MR FACENNA: I can show you them, if that would be helpful.

THE CHAIR: You have also cited Mr Justice Bryan in Glencore, in 58.

Your point there is that you can exercise this cost management power for the very purpose for which you are --

MR FACENNA: Good and efficient and effective case management in accordance with the overriding objectives. It is nowhere near as detailed as the costs budget would be. So actually much more detailed approach in a number of other cases in this tribunal. We are actually asking for now is one figure, which is their estimated future

costs.

Google's position has been that it's not necessary or appropriate to provide that information or to provide it in a witness statement. The benefit of having it in a witness statement is that it will of course be verified by a statement of truth. We can rely on it for the purposes of going to the ATE insurers. Given we are only asking for two figures, the witness statement can presumably be very short.

Google will obviously already know its incurred costs to date. And it would be surprising if it didn't have, from its lawyers, likely estimates of how much this litigation will cost in future.

THE CHAIR: Yes.

MR FACENNA: So those are my submissions on that cost information point.

THE CHAIR: Yes, Mr Pickford.

MR PICKFORD: Thank you, sir. We are willing to provide some cost information as Mr Facenna rightly observed, but we are not willing to agree, at least, to what he's sought.

Our position is as follows: firstly, what is being sought by the class representative has never been ordered in collective proceedings. Not one of the examples that he cites is a collective proceedings case. Collective proceedings cases are very complex. They are very difficult to make good estimates of costs in relation to.

The kinds of cases that he cites, for instance the one in the footnote, Belle Lingerie, I believe started life as a fast track case. I am not sure it is still a fast track case.

But, obviously, where you have small parties involved the tribunal may well be keen to provide some kind of cost protection to assist the bringing of those sorts of small claims by small parties.

That is not this case. This case is funded by a professional funder, who, by reference to the funding agreement, expects to make absolutely enormous returns on its

litigation. Enormous returns. There may be some risks that it has to take for doing that. We are not saying they shouldn't be entitled to try to get ATE cover in relation to those, but they are not in the same category of claimant for whom cost protection has been previously ordered. And Mr Facenna didn't try to persuade you otherwise.

The second point is it is suggested: well, they are going to need six months simply to arrange an extension in cover.

They have -- indeed, actually, to be fair to them, Mr Streatfeild's evidence, I don't think, does say that merely extending cover will take three to six months. He says it takes three to six months to arrange cover. Of course, they have cover already, what they might have to do is extend that cover. It is very hard to see why that should take as long as is being suggested, because in terms of the risks inherent in the litigation, they will have already been considered and thought about when the cover was being given in the first place.

The additional issue is: is the insurer willing to give additional cover?

That's the second point.

THE CHAIR: I am not sure I understand the second point. You are saying they don't need this information now or don't need it to extend cover?

MR PICKFORD: Sorry. What they don't need, we say, is a six-month period prior to when their cover might come into effect in terms of notice to be able to arrange additional cover.

What is being said in Mr Streatfeild's evidence is that it takes three to six months to arrange cover. My point is they currently have cover. You can understand why -- in terms of a provider of ATE insurance, why they might take quite a while to get to grips with what the issues are in the case and what they think the types of risks are, but that is then a different process if they need to extend that cover.

What we are proposing to do -- I probably should have started with this, because it

probably makes my submissions easier to follow -- is two things. We are willing to do exactly what Mr Justice Meade suggested we do in the *Stopford* litigation where the same solicitors asked for the same protection and, ultimately, what they received was, firstly, in the autumn coming up -- so this would be, I would suggest, in this case in time for the second CMC -- we would give them our costs incurred to date by that point in time. So they have a sense of the type of costs we have incurred so far.

Secondly, we would give them an indication of if and when our costs rise to £12 million. That gives them a headroom of £3 million before their ATE cover runs out.

My point is that if we gave them that kind of degree of headroom, it's exceedingly unlikely that they wouldn't be able to put in place additional ATE cover in time before a further £3 million worth of costs was incurred. So that was what it was asked that we do in the *Stopford* litigation. That's what we have agreed to do it there --

THE CHAIR: Can you show us that, do you think?

MR PICKFORD: Yes, I can.

There is no order, I think, agreed yet. But there is a transcript, which we have. It is in volume 6 and tab 55. It is towards the end in terms of the pages. Because I recall when we were discussing it -- I think it's about 40. Bear with me a moment.

THE CHAIR: Page 1926. Does that sound right? It's the start of transcript.

MR PICKFORD: That's the start of the transcript, yes. Then, in the internal numbering of the transcript, I have a feeling it is about page 40 of the internal numbering. If you just bear with me a second.

1986 of the external numbering. So external numbering 1986. I am not going to read it. I will allow the tribunal to read it from line 3, where we are explaining what we are proposing to do.

THE CHAIR: Did Mr Justice Meade give any indication one way or the other?

MR PICKFORD: Yes --

THE CHAIR: I noticed there is an EDQ in play on page 61 as well.

MR PICKFORD: Yes.

THE CHAIR: So he lived with that or he made some comment?

MR PICKFORD: Yes. He then said to the counsel for the claimant, "Are you happy with that?" and counsel for the claimant said yes.

That's not what they came to ask for. What they came to ask for is exactly what Hausfeld are asking for in this case as well. But there was some discussion and, ultimately, the class representative backed off and settled for what was being suggested was appropriate.

In that case, the additional thing we were asked to do -- which we are also offering to do now -- is Mr Justice Meade said, "In addition to telling me when you have reached £12 million; can you also give me a snapshot when you are basically stuck into the disclosure process because that's a good time for us to understand then where your costs are?"

And we agreed to do that. So that's not what was offered, but it's what we are offering now for parity with *Stopford*.

MR ALTY: Your costs so far point; is the last thing you said that or is it an additional point?

When you said, "When we get into disclosure and so forth"; is that what you have already included in the proposal you have made? You said you have given an indication of costs so far and then when costs got to £12 million, and then you talked about how costs are going during disclosure.

MR PICKFORD: So the point about how costs are going in disclosure was bound up with the point about giving a snapshot of our costs in the autumn.

MR ALTY: In the autumn. Right, okay.

MR PICKFORD: So there is, on a quite similar timetable to that which the tribunal is

envisaging in this case, a process of disclosure that is going on in *Stopford*. That also had its first CMC a couple of weeks ago and similar things -- slightly varied, but similar types of things are happening in the autumn. I can't remember, but there is a particular date in November that ultimately it was agreed that we would provide the snapshot because that corresponded to when we would have been engaging with some of the meat of the initial disclosure process. Not everything, but something akin to what we are doing here.

So what I am saying is: well, let's take the date of the first CMC and we can provide it sufficiently in advance of that, so the tribunal can take stock and can see where we are.

Then, additionally, we will do what we are also doing in the other case, which is we will tell them when we reach £12 million.

Does that answer your question?

THE CHAIR: Going back to the reticence about providing an estimate --

MR PICKFORD: Yes.

THE CHAIR: -- the point you made was that it is difficult to estimate.

MR PICKFORD: Yes.

THE CHAIR: But, you know, Mr Facenna wants a ballpark figure to take to his ATE insurers. I mean, is the reticence a commercial reticence, really?

One can see the negotiation value of not having given an estimate of costs both ways; is that something we ought to be taking into account?

I am just putting it crudely. You can see that in settlement negotiations that figure might be really quite important in deciding what -- why don't we call a spade a spade, really? If that's the reason, then it is quite an important reason before deciding -- because if the reticence is, "Well, we are just embarrassed about how much we are charging", then I think I probably will order you to give an estimate of the costs.

If it is because you really think underneath it does have a commercial significance, then that might be something we will take into account.

MR PICKFORD: In my submission, it would be certainly legitimate for the tribunal to take into account that commercial reticence. There is no reason why parties generally should be required to provide estimates of their costs. They never have been, ever, in collective proceedings. This would be a first in any collective proceedings.

THE CHAIR: But is that because it does have a commercial significance or is there some other reason?

MR PICKFORD: I would have to take instructions on the precise reasons why we are not willing to do it. My instructions are that we are willing to do what we have been asked to do in other proceedings. That's as far as it goes**.**

THE CHAIR: I am just trying to test out --

MR PICKFORD: To answer your question --

THE CHAIR: -- the proposition -- I am not asking you to take instructions because in a sense it was a rather mischievous point to put to you.

But one can see how particularly valuable it would be to know in collective proceedings where costs are likely to be very high. That seems to me be a particular reason for ordering it in a case like this, so everyone knows where they stand. Particularly given costs on both sides are going to be very, very high indeed.

And we are way beyond the cost budgeting regime, and it's not because cost budgeting should be a discipline imposed on the parties because of proportionality, but you can see the value in -- to create a level playing field and both parties knowing where they stand. If that's the real issue, it's quite an important one, it seems to me, which we ought to think about rather carefully before we make an order --

MR PICKFORD: The reason it is being advanced by the class representative is because they say, "We are worried about our costs exposure". We say, "We can meet

that. We will give you a whole £3 million worth of headroom in case that is a concern for you". Additionally, we say: remember who is funding this and the enormous rewards that they want to get. The fact they might have to face some risks, "Well, tough", is our position on that.

For our part, our position, as I said, is we are not willing to do it.

Certainly one of the reasons -- you have asked me not to turn around to find out whether there are others -- is because it is additional work that we have to do. They want it to be in the form of a witness statement. There is no particular reason why they can't rely on us just telling them. That's again what we are doing in *Stopford*.

We are a little concerned that this is just going to be used in the future as some basis for -- let's suppose this case goes on for longer than Mr Facenna might hope, because the CMA does take a decision and then it turns into quite a big case, bigger than anyone expects now, even. Costs may well be much, much greater than we are estimating at this point. Then we will have Mr Facenna popping up and saying, "Aha, you have massively exceeded your costs estimate, therefore that shows that your costs incurred must be disproportionate".

These aren't the sorts of figures that any other defendant in this type of litigation is required to provide. We are therefore reticent to provide anything further than has been ordered in any other, which is in *Stopford*.

Could I just turn around and just check there is nothing further to add on that?

THE CHAIR: Yes, of course.

MR PICKFORD: The only other point that's been helpfully made by those behind me is, of course, Mr Facenna said: it is just a guess. It only has to be a guess.

If it is just a guess, then it is slightly unclear why it needs to be (a) in the form of a witness statement and (b) how he's going to be able to rely on it to eliminate the risks that his clients are concerned about.

What we are proposing, we say, is a proportionate step to meet the apparent mischief at which the request is aimed.

THE CHAIR: Mr Facenna.

MR FACENNA: My Lord, in terms of the supposed difficulty of making estimates in these kinds of collective proceedings, that's in fact what every proposed class representative has to do prior to certification; produce a detailed litigation budget, which is then gone over in some cases with a fine-tooth comb by the defendants. It's not that difficult to do. We have had to do it and every other class representative has had to do it.

In terms of being able to extend our cover with our existing insurer, of course, there is no guarantee we would be able to do that. Particularly, if the only information we have is that Google is approaching £12 million, but we have no idea whether they want to spend another 5, another 10 or another £15 million. That's exactly the point.

THE CHAIR: If by the time of the second CMC they have already spent £12 million, you will have a pretty good idea they are going to exceed the 15.

MR FACENNA: We will have an idea they are going to exceed the 15, but we won't know about how much. Particularly when it's not linear; there are going to be lumps.

THE CHAIR: Can you tell me about the £15 million figure? It looks from *Stopford*, at least, that's the standard ATE cover in collective proceedings; is that right?

MR FACENNA: I think that's probably right. That's basically it.

THE CHAIR: Has that been simply because that's the best estimate to date that ATE insurers have come up with?

MR FACENNA: Can I just turn around?

THE CHAIR: Yes.

Did you want to say something --

MR PICKFORD: I was just going to say I think our experience is that 15 is a typical

minimum for ATE cover in these kinds of proceedings. I have seen more. Sometimes the funder just takes the risk. I mean, you don't have to have ATE cover.

THE CHAIR: There are two-ways of looking at it. One way is it is your basic minimum cover which gets you up to, I don't know, a certain stage in the proceedings and in order to have control over the proceedings, or at least the way in which they are being conducted or some input into them, the ATE insurer will only do it in steps. Also, the price you pay for the cover at various points during the action is going to change.

MR PICKFORD: Yes.

THE CHAIR: But I just wanted to know where the £15 million comes from. You say that's the minimum level of cover?

MR PICKFORD: I say that is typically a lower figure rather than a high figure. Secondly, not everyone gets ATE cover at all. A funder can just self-insure.

MR FACENNA: The overall litigation budget in this case is about £20 million. So the £15 million was intended to be broadly commensurate with that.

THE CHAIR: Your budget is £20 million?

MR FACENNA: Yes. So it could go up, and we anticipate that's a possibility.

THE CHAIR: So that's based on assessed costs, broadly based on your budget?

MR FACENNA: Broadly. But there is no point over-insuring, right, and there are significant costs in that.

THE CHAIR: If you can get a deal early; why would you want to buy cover of more than you need? I understand.

MR FACENNA: Essentially. If we do have some degree of transparency, even if it is an estimate, then again the overriding objective of proportionality and reducing the costs of the proceedings and the costs to the class and so on --

THE CHAIR: What will your ATE insurers need? Will they need an estimated budget in order to extend cover? Is that something that Mr Streatfeild deals with?

MR FACENNA: Yes, it would be an estimate of liability.

THE CHAIR: They would need an estimate of liability to extend the cover at all?

MR FACENNA: Yes. Those are my instructions.

Yes, so it would be difficult. My instructions appear to be that without the estimate of liability it would be difficult to extend the insurance cover.

THE CHAIR: Can you just show me the rule where it says in relation to maintenance -- you referred at the beginning of your submissions to the provision which says that you have to maintain sufficient ability to pay the costs.

MR FACENNA: I am just wondering if the reference is in our skeleton argument. If not, I beg your pardon.

THE CHAIR: I would just like to look at that.

MR FACENNA: I have a reference. It is Rule 78. I am looking at the bundle reference, unless you have the rules there.

THE CHAIR: We will find them easily enough. They are in volume 1, I think, aren't they?

MR FACENNA: They are in volume 1. It will be around --

THE CHAIR: Will you say the rule number again, please?

MR FACENNA: Yes, 78. Page 97.

DR MAHER: Tab number?

MR FACENNA: Tab 1, page 97. It is Rule 78(2)(d). It is in a footnote to my notes; that's why I couldn't see it.

The way the rules works, my Lord, under Rule 78(1):

"The tribunal can only authorise an applicant to act as a class representative if it considers that it is just and reasonable for them to do so."

And in determining that question the tribunal must consider, at that point, 78(2)(d), whether they will be able to meet recoverable costs.

So the only other point I wanted to make in reply is it is plain that the tribunal does have the power to make this direction. I showed you the relevant --

THE CHAIR: 53(2)(m).

MR FACENNA: Exactly, my Lord. We are asking for much less than would be required in a cost budgeting exercise. The very reason we have asked for that to be updated is to avoid the problem that Mr Pickford referred to where they give an estimate at one point and it then significantly changes because something happens with the CMA, for instance.

So we built in provision for the figure to be updated precisely to avoid those kinds of misunderstandings.

Then finally on *Stopford*, my Lord, can I just show you the transcript begins at 1926 in volume 6 of the authorities bundle.

First of all, I wanted to draw attention to the warning which is given at the top of the transcript. It is 1926. You will see the warning that it is a working tool for the tribunal. It is placed on the website for readers to see how matters were conducted and is not to be relied on or cited in the context of any other proceedings. So I do object to my learned friend relying on it for the purposes for which he seems to be.

On the substance of it, having said that, you will also see, if you go to pages 3, 4 and 5 of this transcript, that what had happened here was that the class representative had attempted to engage with Google over a period of weeks on directions and, lo and behold, on the eve of the hearing Google had started to engage. So very similar to this case.

The proposal effectively, my Lord, the -- the submission is that this proposal on the £12 million was something that emerged during the course of the hearing in that case. Google was put on the spot by the tribunal and that was the outcome. It's not any kind of precedent or authority for the approach that we say you should take properly in

accordance with the rules and the evidence you have before you in this case.

MR PICKFORD: May I just make one short point. Mr Facenna made a new submission where he said that they can't get an extension of cover without the estimate that they are seeking.

He doesn't have evidence for that and it doesn't make any sense, because they received £15 million of cover without the evidence that they are seeking. It is very hard to see how it could possibly be the case that they are precluded from going out to the market and getting any more extension without what they are seeking.

So I invite the tribunal to reject that submission because it's not based on evidence and it makes no sense.

MR FACENNA: Sorry, just to clarify -- I don't know if I misspoke -- my instructions were that we would need an estimate of liability to be able to go to the insurer. Obviously at the beginning of the proceedings, before the proceedings had even started, we had to come up with a basis for such an estimate of liability, and we would need to do so again if we were seeking an extension of insurance or a new cover. It is difficult to see how we could do that without having the information that we have asked Google to provide.

THE CHAIR: Mr Facenna, I think where we have reached -- certainly in our brief discussions, I will deliver a judgment if you want me to -- if it is genuinely right that the ATE insurers require an estimate of liability (which requires a costs budget or an estimate of budget from the defendants), then we would in principle be prepared to make an order.

We don't think you are near that now, because obviously you are at an early stage in the proceedings. Therefore we are inclined to accept the offer that Mr Pickford has made on behalf of Google for today, but to make it clear that we do think it slightly unsatisfactory that you have not produced evidence, but it does seem to us that there

is quite a strong reason for ordering what you require, if you can satisfy the tribunal that you do need that in order to obtain an extension of ATE cover.

I can understand exactly why you say you didn't need to provide it to start with and why you need to provide it now. I also hear what you say in relation to the fact that what is sauce for the goose ought to be sauce for the gander, and you have done this exercise and there is no reason why they shouldn't.

So in principle, I think we are prepared to make an order at the appropriate time provided you satisfy us, or Mr Streatfeild makes a witness statement confirming that he's been to ATE insurers and that's what they require, then we would make an order because of the Rule 78.

However, for the moment what we are minded to do is to accept Mr Pickford's order and proposal, to accept what he says which is a statement of incurred costs shortly before CMC 2, and a promise to inform you when they hit £12 million to give you sufficient time to extend the cover.

But what we are not doing is dismissing your application or deciding as a matter of principle that you are not entitled to the budgeted information. So as I say, if you provide us with proper evidence that it is actually required, then in principle we are minded to make an order. Although it seems to us we should probably hear the argument again and give you an opportunity to consider it.

MR FACENNA: Thank you, my Lord. That's a very helpful explanation. I am sure we will revisit that at the appropriate time.

THE CHAIR: It seems to us you don't need that order just yet, but you may do, we don't know when. But it seems to us you will probably survive until CMC 2 without getting that order.

MR FACENNA: My Lord, in that case, those are all the issues of substance we need to cover. I suppose it is then just a question of how we are going to go about drafting

the order.

THE CHAIR: Yes.

MR FACENNA: I anticipate you would like us to do that.

THE CHAIR: I am going to suggest that you have the carriage of the order.

MR FACENNA: Yes.

THE CHAIR: If that is possible. If you record what you think we've decided or has been agreed. If you could circulate it to the defendants, then we will look at it once you have done that.

MR FACENNA: I think there are one or two other points which are probably agreed which we have not covered with you today.

THE CHAIR: If you want to just submit the order with a short note telling us what they are, then we can do that. Unless you want to take us through them now?

MR FACENNA: No, I don't think so.

In that case, my Lord, thank you very much, nothing further from me.

THE CHAIR: Thank you.

(2.49 pm)

(The case management conference concluded)