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IN THE COMPETITION

Case No. : 1433/7/7/22

APPEAL
TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 15th July 2025

Before:
Hodge Malek KC
Derek Ridyard
Greg Olsen
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Dr Liza Lovdahl Gormsen

Class Representative

v

Meta Platforms, Inc. and Others

Defendants

A P P E A R A N C E S

SARAH FORD KC, SARAH O'KEEFFE & IAN SIMESTER On behalf of Dr Liza Lovdahl Gormsen (Instructed by Quinn Emanuel Urquhart & Sullivan UK LLP)

TONY SINGLA K.C. & JAMES WHITE On behalf of Meta Platforms, Inc. & Ors (Instructed by Herbert Smith Freehills Kramer LLP)

Tuesday, 15 July 2025

(10.35 am)

THE CHAIRMAN: Let's see who's here today.

MS FORD: I appear with Ms O'Keeffe and Mr Simester for the Class Representative. Mr Singla, King's Counsel, appears with Mr White for Meta, and this is the third CMC in these proceedings.

The Class Representative has filed a proposed list of issues for the CMC, which is at {F8/1.3/1}, and unless the Tribunal has any particular preferences I was planning to work through it in the order that we have set out in that list.

THE CHAIRMAN: Let us just see where we are going, because the list of issues is not in a form that I would usually expect to have, let us be honest. When you look at CPR PD 57AD para 7, you look at the various authorities that deal with it, it should be a relatively concise document.

We are where we are. I am always quite happy to be pragmatic and I can see what was the intent behind drafting in that particular way where you have lots of issues, but we can be constructive about it if we have a clear understanding of what use we are going to make of it and how we are going to approach disclosure, and if the aim is to have a Redfern Schedule process, then I

1 can see that this list of issues has some value.

2 So what you would do is we finalise the list of
3 issues today or tomorrow whatever, and then we start the
4 process of having a Redfern Schedule, and at the next
5 hearing we will go through the Redfern Schedule in the
6 normal way. You will highlight the ones which are
7 perhaps in issue, and we just go through them one by one
8 and make a ruling so everyone knows where they are on
9 disclosure.

10 That is one way of doing it, but I think I need to
11 hear from you and Mr Singla as to whether that is how you
12 both envisage it, because if that is how you envisage
13 it, then I think this is a very useful exercise.

14 MS FORD: Yes, those indications are very helpful.

15 Just to address the point about the volume of the
16 list of issues. This is a complex case and it is in
17 many respects a novel case, and it is a case where the
18 pleadings in total are relatively lengthy, and we have
19 in those circumstances done the best we can to condense
20 the issues for disclosure down into something like 36 or
21 37 headline issues and then, again, in order essentially
22 to assist, we have then added in sub-issues.

23 In my submission that is a necessary product of the
24 nature of the claim, the complexity of the claim.

25 THE CHAIRMAN: You say that, but the fact is that I have

1 looked at all this, I have read the pleadings, I have
2 been through the schedule, and (unclear audio) and I
3 have been doing this longer than most people here. I
4 have never seen a list of issues that long or complex.
5 I have seen similar things, which are that the first
6 column for a Redfern Schedule, and that is why I think
7 that once you have not followed what I think the list of
8 issues should look like, there is something positive in
9 all of this. It is the work has not been wasted
10 if we are going to go down the Redfern Schedule route,
11 and so we do not need to blame anyone because I can see
12 it has been done with the best of intentions,

13 but I think in future, people should know that the
14 list of issues should be something more simple and more
15 concise, and what I would hope that comes out of today,
16 if not tomorrow morning, is a finalised list of issues,
17 because remember, a list of issues is not an end of the
18 world-type issue; it helps provide a framework for the
19 next stage, which is deciding what is going to be
20 disclosed and what's not going to be disclosed, and that
21 merely because something is not in the list of issues,
22 does not mean, for example, that when it comes to
23 looking at the Redfern Schedule, if it is me, I do not
24 know if it will be me, that I will exclude a category
25 merely because it is not on the list of issues,

1 because I can see that a list of issues primarily
2 should be by reference to the pleadings, but
3 exceptionally there may be other issues which are not
4 directly pleaded in the pleadings which arise in
5 disclosure. The two normal examples are similar fact
6 evidence and the other is, in the exceptional case where
7 it is appropriate to have disclosure which goes to the
8 credibility of a party's case or their main witness.
9 There are examples that you can think of.

10 So what I would hope we will have is a list of
11 issues that is numbered 1 to 100, or whatever the number
12 is. Please don't make them sub-numbers, okay, just
13 numbers 1 to 100. We can use that as the starting point
14 for the Redfern Schedule, and I would like the list of
15 issues to be cross-referenced to all the pleadings. So
16 if it relates to a particular paragraph in the statement
17 of case which includes the further information, that
18 should be there.

19 So we are not going to have lots of columns. Just
20 say the issue, you describe it, and then afterwards you
21 will put where it is in the pleadings. Then that can be
22 used by everyone as a simple framework for the Redfern
23 Schedule. Do the Redfern Schedule in the way that I
24 normally like, and I think you have seen enough on other
25 cases as to how that should be done, and then we come

1 back in September, we go through whatever items are in
2 dispute.

3 I know it looks bad because you may say we will end
4 up with a Redfern Schedule of 100 pages, or whatever,
5 and you will find there will be a certain percentage
6 which is not agreed, but my experience is once you
7 start going through the Redfern Schedule, if it has been
8 done properly and clearly, it is not that bad because
9 you start going through some and when you give a
10 decision on some it feeds into the others.

11 Mr Singla, have you got anything to say about what I
12 have said so far?

13 MR SINGLA: In a nutshell, we completely agree with what you
14 said, that this process is out of control and you will
15 understand that we have never seen a list of issues that
16 is 186 issues. So we were very concerned when we
17 received it, and the background to this, as you will
18 have seen, is that they were unwilling even to produce
19 the first iteration.

20 THE CHAIRMAN: Mr Singla, if I were to rule in this case
21 I would have said just start again, okay, but you have
22 engaged with it, and that is to your credit. We are
23 where we are now, and you know what I think about the
24 list of issues so we do not need any jury points.

25 MR SINGLA: No, no, but can I explain what we have done,

1 because in addition to engaging on every single issue,
2 we have actually produced an updated version of our
3 Disclosure Report which I do not know whether you have
4 had an opportunity to consider.

5 THE CHAIRMAN: I have not, but that is what we are going to
6 look at after we have done the list of issues.

7 MR SINGLA: Can I just explain, because it is very relevant
8 to next steps, because what Herbert Smith Freehills
9 Kramer have now done is, in relation to each of the
10 issues, they have identified the 77 proposed custodians
11 and they have actually gone through in great detail,
12 issue by issue explaining which of the proposed
13 custodians will be searched for each issue, and moreover
14 which search terms will be applied to each of these
15 issues.

16 So we are obviously keen to make progress, and I
17 understand we are where we are and so on, but I just
18 want you to understand at the outset that we do not mind
19 the label Redfern schedules, but what we regard as the
20 appropriate and efficient next step, as it were, once
21 the list of issues has been locked down is for the Class
22 Representative to consider -- and I will take you to it
23 later, but it is 300 pages, the Disclosure Report. They
24 have absolutely chapter and verse as to what we intend
25 to do on an issue-by-issue basis.

1 That is quite actually remarkable. I have never
2 seen that sort of engagement either. So we are now at a
3 stage where the next step, in my submission, is plainly
4 the ball is back in their court. We have told them in
5 relation to every single issue, which custodian, which
6 search terms. If they have a problem with that, they
7 can tell us and we can either agree something or come
8 back to the Tribunal.

9 What we do not regard as being the next step is what
10 you might have seen and, in fact, I have seen, for
11 example, *Trucks* where one has a Redfern Schedule,
12 party A says we want to see the following disclosure
13 because we have made so much progress over the last few
14 months. In my submission, the only efficient way to
15 proceed is for the Class Representative to consider what
16 we have done, and it is quite concerning.

17 So it is not a jury point, but it is quite
18 concerning that in response to the 300-page disclosure
19 report, they are now saying the next step should be that
20 we should go away once the list of issues has been
21 finalised and produce another version of that 300-page
22 document.

23 I mean, that sort of approach is just not going to
24 cut through things in a way --

25 THE CHAIRMAN: The problem we have though is that in an

1 ideal world, we would have had the list of issues done
2 before you finalise your DR, but we have not.

3 So the question on this is, and we will come to this
4 at the end obviously, are you going to be required to
5 do, to reformulate what you have done on the precise
6 issues that have been finalised by the Tribunal?
7 Because I think that I just want something that is
8 simple -- you know how simple. I do not want anything
9 too complicated when it comes to finalising any issues
10 on disclosure.

11 MR SINGLA: But we have to --

12 THE CHAIRMAN: We will have to come back to this at the end,
13 because I think -- let me get a better feel for where we
14 are and everything, try and come to a ruling on these
15 four issues, and once we have done that we will go
16 through any remaining issues between the parties.

17 So I do not envisage that what we are going to do is
18 leave issues hanging in the air on that list of issues
19 by the time we finish. I do not want -- because that is
20 a recipe for disaster, because you are having problems
21 agreeing things and there comes a point where the
22 Tribunal has to say "This is the list of issues, it may
23 not be perfect and we will have to deal with things
24 possibly flexibly further down the line," but we do
25 want a list of issues done, because if you get to this

1 stage and you have not even got an agreed list of
2 issues, it does not give any great hope for how things
3 are going to go on at the next CMC.

4 MR SINGLA: Can I suggest this? So I think we are agreed
5 between the parties that the four overarching issues
6 should be dealt with at this hearing and first on the
7 agenda, but could I suggest that at some point before
8 we come back to the question of next steps the Tribunal
9 does cast an eye over the Disclosure Report --

10 THE CHAIRMAN: Definitely. I want to do all of that. There
11 is no doubt that we need to see where we are going to go
12 once we have the list of issues finalised, but we need
13 to get that list of issues finalised insofar as --
14 hopefully we can get that all done now. Then we talk
15 about how we envisage making, dealing with any contested
16 issues and how to map through. So when we have the next
17 hearing, there is a clear understanding of how each
18 party is going to present their cases on the disputed
19 issues.

20 As I said, I tend to prefer on these types of cases
21 a Redfern Schedule because I am just used to doing it
22 and it is convenient for me, but I may not be the
23 person who deals with the next hearing, but we will
24 look at your amended DR. When was that filed?

25 MR SINGLA: That was filed at the end of June. It was based

1 on the list of issues for disclosure that was in
2 circulation at that time, but I will come back to this
3 if I need to, but just to put a marker down, I do not
4 accept that to the extent there are some outstanding
5 points on the list of issues, which there plainly are,
6 that we should then go away and read -- when I come back
7 to this, I will show --

8 THE CHAIRMAN: We will come back to that --

9 MR SINGLA: Yes, but just for your information it is
10 bundle D, tab 3.

11 MS FORD: But perhaps I can put Mr Singla's mind at rest on
12 this, because he seems to be under the impression there
13 is a lot in issue between us on the way forward.

14 We do have concerns about some aspects of the
15 Disclosure Report that has been produced, not least
16 that, as Mr Singla just confirmed, it was produced based
17 on their position as at 4 June. So it was essentially
18 out of date as at the time it was served and very much
19 more out of date now,

20 but nevertheless, subject to updates to reflect
21 matters that have been agreed since and matters that
22 will be determined by the Tribunal, we are not averse to
23 engaging with the Meta Defendants in respect of their
24 Disclosure Report in order to progress the list of
25 issues.

1 There appears to be an impression that we are
2 proposing some sort of fundamentally different way
3 forward. I think in fact there is very little
4 between us.

5 THE CHAIRMAN: I think what he is worried about, maybe I
6 have misunderstood, is that you are going to be asking
7 him to produce a revised DR by reference to the issues
8 finally determined, and he -- and we will have to deal
9 with this. He says that is going to be a burdensome
10 exercise. It may not be. It may be that I will take
11 the view looking at it that what he should do is revise
12 it by reference to the finalised list of issues.

13 I am not saying that is what we are going to decide.
14 I am just saying that is one option out there, but it
15 depends on how big the task is and how useful it is.
16 But what I am trying to do is to see what is going to
17 happen at the next CMC and what is going to be
18 digestible for the Tribunal to make the appropriate
19 order for the disclosure in this case going forward, and
20 if it is going to be treacle as we have at the moment,
21 that is not an easy task.

22 MS FORD: So the Tribunal understands where we are. We very
23 much welcome the indication that we can get the list of
24 issues settled by the end of this hearing. That is very
25 much --

1 THE CHAIRMAN: I have never had a hearing that has spent
2 more than an hour finalising the list of issues, but
3 now, you know, you are talking about possibly two days
4 and then you are also saying we are going to have to go
5 away and try and work out and perhaps negotiate further
6 on some of the issues. Look, we cannot work like that.
7 It is a complete waste of time.

8 MR SINGLA: You have mentioned a few times that we want to
9 finalise the list at the end of the two-day hearing.
10 I think we are keen for this thing to be locked down,
11 but it may be ambitious to think that the precise
12 drafting --

13 THE CHAIRMAN: We will just have to see.

14 MR SINGLA: No, I am just informing you that I think the way
15 this hearing has been arranged is that the Tribunal will
16 determine some points of substance, but the precise
17 detail of some drafting in the light of your guidance.

18 THE CHAIRMAN: I may not agree to that. I may say this
19 merry-go-round has got to stop.

20 MS FORD: For our part, we are certainly in a position to
21 address the granular issues of drafting and we are very
22 happy to do so and very keen to get a settled list at
23 the end of it.

24 THE CHAIRMAN: In other cases, I have had the partners involved just
25 standing up answering questions and we finalise it there

1 and then.

2 Do not be under any illusion, we want to get this
3 list of issues done and something practical for the way
4 forward. Without any criticism of anyone, we are where
5 we are, we need to be in a position that by the time we
6 come back to the next CMC we can actually make a proper
7 decision on any contested issues of disclosure.

8 Mr Singla, anything else you would like to say at
9 this stage before we go into the four issues?

10 MS FORD: Just so the Tribunal understands where we are
11 coming from in terms of the Disclosure Report, we do say
12 that there is a process of updating that needs to be
13 done because it relates to Meta's preferred approach to
14 the list of issues as at 4 June.

15 THE CHAIRMAN: Yes, but what I am saying is I may agree with
16 his objection. So look, we cannot make that decision
17 until we have ruled on this because it may be that on
18 some issues I am on your side, some issues I am on his
19 side. It may be that at the end of the day it is not
20 going to be a huge amount of updating.

21 On the other hand, I could be against him on all
22 four issues, or we could be against him on all four
23 issues, in which case there will be more substantial
24 work, but let us work that one out when we get to it.

25 So the first issue is in relation to the definition

1 of data, and you put the rival wording in your skeleton
2 argument and what I am trying to understand is what is
3 not covered using Meta's definition. I just need to
4 understand what is between you. On one way it is
5 semantics. On the other is ordinarily I order the issue
6 as per the pleaded case.

7 So you pleaded the case in a particular way, you
8 have got your definition, and you would normally say
9 that is how I am going to formulate the list of issues.
10 I have got conduct of it, obviously, to the other side
11 and the Tribunal.

12 Mr Singla has come up with a different definition of
13 data, and what I need to understand from both of you is
14 why does it matter, because it seems as though both
15 sides are worried about what the other side are looking
16 for in their own definitions, and if we can get to an
17 understanding about that, then we may be able to get an
18 answer pretty quickly.

19 MS FORD: Yes. So, the Tribunal obviously has the point
20 that the definition that we have put forward is the one
21 which essentially has been derived from our pleaded
22 case, and we do say that that is important.

23 So if I can show the Tribunal, first of all, Claim
24 Form S.5, which is at B3, page 2 {B/3/2}.

25 THE CHAIRMAN: Is that going to come up on the screen?

1 MS FORD: I do not think we have an Opus operator, I'm
2 afraid. So the Tribunal may have to find it
3 electronically, or I believe we may have paper bundles.

4 THE CHAIRMAN: Where is it?

5 MS FORD: It is B, bundle B.

6 THE CHAIRMAN: Yes.

7 MS FORD: Which is the pleadings bundle tab 3, page 2.

8 THE CHAIRMAN: Yes.

9 MS FORD: S.5, the S-paragraphs are the paragraphs that
10 essentially encapsulate the summary of the claims.

11 THE CHAIRMAN: I have highlighted that.

12 MS FORD: So S.5 is making the point:

13 "The data that Facebook has collected from its Users
14 has included 'Off-Facebook Data' throughout the Claim
15 Period, consisting of detailed User data concerning
16 Users' activities Off Facebook's social network
17 platform, including in particular data on User activity
18 from: (i) other Meta products and services
19 (eg Instagram); and (ii) third-party websites and apps
20 visited, or used, by the User."

21 So as is entirely conventional the origin of the
22 definition we have sought to include in our issues is
23 our pleaded case.

24 Meta has pleaded in response to that in its Defence
25 paragraph 10, so B4, page 4 {B/4/4}.

1 THE CHAIRMAN: Yes.

2 MS FORD: What it essentially said --

3 THE CHAIRMAN: What paragraph?

4 MS FORD: That is paragraph 10 of the Defence.

5 THE CHAIRMAN: Yes.

6 MS FORD: What it has essentially said --

7 THE CHAIRMAN: I have, yes. I have read that.

8 MS FORD: It fails to reflect the way Meta operates. So

9 that is the origin of Meta's preferred language.

10 THE CHAIRMAN: They are saying it is easy for us if the

11 definition is by reference to how they operate and they

12 say it may be easier to get the material together.

13 MS FORD: That is what they say. (Inaudible) represented

14 was pleaded in the Reply, paragraph 6. So this is B6,

15 page 7 {B/6/7}. She has essentially said:

16 "The [Class Representative] maintains that her claim

17 concerns Off-Facebook Data as defined in the Claim Form

18 (which includes, but is wider than, what Meta refers to

19 as 'Third Party Activity Data')."

20 THE CHAIRMAN: (inaudible).

21 MS FORD: This is the Reply. So B6, page 7.

22 THE CHAIRMAN: Yes.

23 MS FORD: Paragraph 6, she has pleaded to paragraph 10. She

24 has said:

25 "... categories of data collected by Meta (and the

1 way in which that data is collected and used) will be a
2 matter for disclosure and evidence in due course. The
3 Class Representative maintains that her claim concerns
4 Off-Facebook Data as defined in the Claim Form ..."

5 So the starting point in our submission is that the
6 Class Representative has expressly joined issue with and
7 resisted Meta's attempt in its Defence to reformulate
8 the way in which the Class Representative's own claim is
9 expressed. Accordingly, when she is formulating the
10 list of issues, she has adopted a formulation which is
11 based on her pleaded definition.

12 THE CHAIRMAN: But that is entirely standard.

13 MS FORD: Indeed.

14 THE CHAIRMAN: What I am trying to understand are the two
15 questions, or basically the same question, what is the
16 difference in reality between both what is going to be
17 captured in your wording that is not captured in
18 Mr Singla's wording? I just need to understand that.
19 You are saying I just don't know.

20 MS FORD: Sir, indeed. We have tried to get to the bottom
21 of this because it is very much a matter within Meta's
22 knowledge, and not ours, what data it collects and what
23 difference it makes for its attempt to reformulate these
24 issues.

25 What we do say is that the formulation that we have

1 advanced is clear and workable. If the Tribunal looks
2 at the contested wording, what we have done is
3 essentially defined Off-Facebook Data negatively. So it
4 is data collected and/or received and/or processed
5 and/or used by Meta on users' activities which does not
6 arise from activity on Facebook UK website or app.

7 So it is a simple and straightforward concept. It
8 says: it does not arise from activity on Facebook and
9 therefore it is off Facebook.

10 So that is intuitive and it is clear and it is
11 workable. One of the points on which the parties have
12 engaged is Meta's claim that it simply cannot understand
13 the formulation that we have put forward.

14 Now, that is what it said in its skeleton argument
15 at paragraph 23. If I could ask the Tribunal to look at
16 Meta's skeleton. It is F8, tab 2 at page 15 {F8/2/15}.
17 The Tribunal will see the second paragraph of
18 paragraph 23 the claim that:

19 "... 'Off-Facebook Data' is not a term that is
20 commonly used and clearly understood by Meta ..."

21 But actually if we look a little further on in their
22 skeleton, it is clear they do understand exactly what it
23 means. So if we look at, for example, paragraphs 32 and
24 33, this is a different section of their skeleton. This
25 is a section of their skeleton when they are dealing

1 with non-Meta products and they are trying to argue in
2 this context that the Class Representative's disclosure
3 should be confined to Facebook UK, and in that context
4 they are saying in the third line of paragraph 32
5 {F8/2/20}:

6 "... Meta of course accepts that 'Off-Facebook Data'
7 comprises data that is generated off 'the Facebook
8 social network service', including from other Meta
9 products."

10 Which is precisely the formulation that we have been
11 proposing.

12 Then paragraph 33 over the page {F8/2/21}:

13 "In other words, whilst the data with which the
14 proceedings are concerned extends to data the origin of
15 which is not user activity on Facebook itself ..."

16 Again, exactly the way in which we have approached
17 defining this issue. So we say this is a concept which
18 is fully understood by Meta.

19 We also see Meta engaging in this concept in its
20 Disclosure Report, which Mr Singla has been keen to show
21 the Tribunal.

22 If we look, please, at D3, page 10 {D/3/10}.

23 THE CHAIRMAN: When you look at the decision which is
24 referred to at paragraph 23A, they say that the
25 description, definition, of Off-Facebook Data

1 incorporates a number of averments of significance,
2 which is not completely clear, but there is a
3 difference between at the averments not being
4 particularly clear but it is a question of whether the
5 definition itself is clear.

6 MS FORD: Yes, that must be right. We say the definition is
7 clear for two reasons. I was working through the first
8 one, which is that it is essentially defined negatively.
9 It is essential data that Meta either collects, receives
10 processes or uses on users' activity which does not
11 derive from activity on the Facebook website.

12 That is really the first point, and the second point
13 that I am going to come on to elaborate on, it is a
14 definition which is expressly non-exhaustive, and that
15 is reflected in the definition itself. It is expressly
16 pleaded in our Amended Claim Form, and there is a good
17 reason for that.

18 It was a conscious decision and it reflects the fact
19 that there is the well-known difficulty of asymmetry of
20 information, and pending disclosure the full extent of
21 Meta's data-gathering and monetisation practices are
22 matters that are simply only known to Meta.

23 So we have a definition which is clear, but it is
24 also deliberately non-exhaustive, and I am going to come
25 back to explain why that is particularly important as

1 well, but we were looking at whether there is any force in
2 the suggestion that this is somehow a definition that
3 Meta finds completely impossible to understand, and the
4 point I was going to show the Tribunal was that it is
5 engaged with the definition in the context of its
6 Disclosure Report.

7 So we see D3, page 10 {D/3/10}. The Tribunal should
8 have paragraph 3.5.2(C).

9 THE CHAIRMAN: Which page?

10 MS FORD: Page 10 within the bundle.

11 THE CHAIRMAN: D3, 10, yes.

12 MS FORD: Yes. So the actual paragraph begins on the
13 previous page, but the relevant paragraph we are looking
14 at is subparagraph (C), and this is in the context of a
15 paragraph which is describing Meta's document
16 preservation measures.

17 Then in that context we see Meta referring to people
18 working on Meta's receipt and use of Off-Facebook Data.

19 In our submission --

20 THE CHAIRMAN: (C), is it?

21 MS FORD: Subparagraph (C), yes. This is in the context of
22 Meta describing the document preservation measures that
23 it has put in place and it is utilising the term
24 "Off-Facebook Data".

1 MR SINGLA: Could you read the footnote, please? I will
2 come back to that when I make submissions.

3 MS FORD: Similarly if we look at the sort of search terms
4 that Meta is proposing using in the context, again, of
5 the Disclosure Report.

6 What we see is, again, they are not strictly aligned
7 with the terminology that Meta is saying it is necessary
8 to adopt in order to enable Meta to understand the Class
9 Representative's case.

10 So, for example, if we look at this document,
11 page 159, there is their sub-issue 6(5), which is
12 concerned with how Off-Facebook Data contributes to the
13 features, characteristics and functionalities of
14 Facebook. There is a column:

15 "Proposed Search Term for Meta's Updated DR/EDQ."

16 We can see that Meta has run a sample search using
17 the terms "third party data" or "off-site data" or
18 "external data" or "partner data" or "signal" or "event"
19 or "cross-site data" or "cross-platform data" or "Meta
20 product data" or "Instagram data" or "WhatsApp data" or
21 "Messenger data".

22 The simple point we make is that we do not here see
23 this rigid adherence to terminology failing which Meta
24 is unable to understand what is in issue.

25 THE CHAIRMAN: Normally what happens, in my experience, is

1 that when people say they do not understand, they do
2 understand. It is a sort of rhetorical thing that you
3 are really saying it does not make much sense; it is not
4 appropriate, but you can be sure that Mr Singla
5 understands what you are saying. He is saying it does
6 not actually fit in with how we organise things
7 ourselves, but ...

8 MS FORD: Sir, we very much expect --

9 THE CHAIRMAN: I am never normally impressed by people
10 saying they do not understand. If at the end of the day
11 we think it lacks clarity, then it lacks clarity, it
12 needs to be amended.

13 If we think it is clear and it is workable, then, of
14 course, then that follows. Normally one goes by the way
15 that it is defined in the pleadings, but I still need
16 to get to the bottom of is there anything substantive in
17 this debate and is it going to make any practical
18 difference to what comes out of the disclosure exercise.

19 That is where I'm a bit unclear. I have read both
20 sides' submissions, obviously. I have read them twice
21 now, but I am still a bit unclear where the dividing
22 line is actually between both sides.

23 So I am not impressed by I'm not sure if I
24 understand, I do not understand. Either it is clear or
25 not clear, either it is workable or not workable, but

1 I can understand what you are saying and I understand
2 your definitions. I am trying to understand that those
3 two things, one, what is the real difference between the
4 parties, and two, is this definition, as opposed to
5 Mr Singla's definition, going to cause problems in the
6 disclosure exercise for -- probably going to be, you
7 know, document review people doing the exercise that
8 they are going to have to do, because every time I make
9 an order like this, I think what is going to happen on
10 the ground, is it simple enough, is it something that
11 people on the ground can follow?

12 Because we can come up with all sorts of things, but
13 if at the end of the day it does not reflect what people
14 can easily follow when they do the disclosure exercise,
15 you are going to have a problem.

16 MS FORD: Sir, absolutely, and the Tribunal has my
17 submissions that our definition is workable for that
18 reason, because it is essentially anything that is not
19 On-Facebook Data is Off-Facebook Data, and that is
20 simple, workable and easily applicable by those doing
21 the disclosure process,

22 but I am going to come on to the substance of what
23 you, sir, are asking me, which is what is the material
24 difference. That is exactly what we have been asking
25 Meta and we have not received a straight answer, but we

1 do have concerns that there might well be things that
2 fall outside the scope of Meta's definition.

3 This brings me to the point that I flagged earlier,
4 which is the fact that our definition is non-exhaustive.
5 So it explains that Off-Facebook Data includes, but is
6 not limited to, and then it gives two categories of
7 data: data on and/or from users' activity on Meta
8 products and services other than the Facebook app or
9 website, and data from users' activity on the websites
10 and apps of third parties.

11 Now, I have explained why we made a conscious
12 decision to do that, but it becomes particularly
13 important, because Meta points to certain parts of the
14 Class Representative's definition which also correspond
15 to its own proposed reformation and says: there we go,
16 there is no prejudice to the Class Representative in
17 adopting Meta's formulation.

18 So to show the Tribunal --

19 THE CHAIRMAN: What Mr Singla seems to be saying is do not
20 worry, whatever you are trying to capture is captured
21 within his definition.

22 MS FORD: He does try to say that, yes.

23 THE CHAIRMAN: That is what he is saying, and that ...

24 MS FORD: Yes. Can I show the Tribunal why we say we are
25 concerned that that may not be the case?

1 THE CHAIRMAN: Exactly. Let us try and get that, because if
2 there is no distinction between either view, it could go
3 either way, to be honest. I could just say, well, just
4 follow the normal route, which is you go by what is in
5 the pleading, or if it is something that is practical
6 and it is going to make the disclosure exercise more
7 difficult for Mr Singla's clients unnecessarily, then we
8 are likely to go with his definition.

9 So you say you have some sneaking submission that
10 there is something in this dispute that means that
11 potentially you are going to be prejudiced by his
12 definition.

13 MS FORD: I do say that, and we say they would not be
14 pressing it quite so hard if it really made no
15 difference whatsoever.

16 But perhaps, I can elaborate on why we have this
17 concern. If we look, please, at the defendants'
18 skeleton argument at paragraph 27(a). So this is
19 {F8/2/17}.

20 What they do is to quote from a selected part of
21 paragraph 61 of our Amended Claim Form. So they quote:

22 "... data on User activity from: (i) other Meta
23 products and services (eg Instagram); [and] third-party
24 websites and apps."

25 Then they say that data falls precisely within the

1 form of words proposed by Meta.

2 If we look at the full version of paragraph 61 in
3 the pleadings bundle tab 3, page 35 {B/3/35}.

4 THE CHAIRMAN: You want us to look at your Amended Claim
5 Form, yes?

6 MS FORD: Sir, yes, please.

7 THE CHAIRMAN: What paragraph?

8 MS FORD: Paragraph 61. This is the paragraph a section of
9 which has been quoted by the defendants' --

10 THE CHAIRMAN: Oh, yes, I have got it, yes.

11 MS FORD: -- skeleton. The full version refers to:

12 "... detailed User data concerning their activities
13 off Facebook's social media site, including in
14 particular ..."

15 Then the passages that Meta has selected.

16 So what Meta has not quoted is the part of the
17 definition which makes clear that it is non-exhaustive
18 and it is not limited to the particular illustrative
19 examples that Meta has reproduced.

20 Now, the Tribunal has the point that we have
21 received somewhat mixed messages from Meta about whether
22 its reformulation does materially narrow the scope of
23 disclosure. On some occasions we were told that it
24 would make no difference, but at least on one occasion
25 in correspondence we were told that our formulation uses

1 extremely broad terminology, and that would tend to
2 suggest that Meta is concerned it does make a
3 difference.

4 We do say it is for Meta to tell us what impact
5 their reformulation would have, but it seems to us that
6 there are a number of respects in which it is likely to
7 result in materially narrow disclosure, and we have
8 given examples of those at paragraph 14 of our skeleton
9 argument.

10 Before I work through them, I should emphasise that
11 these are not new examples. They have already been
12 canvassed in correspondence and they were set out in our
13 10 June submission. So it was, of course, always open
14 to Meta to say we see the examples that you have raised
15 and put in evidence to confirm that these are not in
16 practice omitted from their version of the definition.
17 They have not done that; they have had a lot of time to
18 do so and they have not done it, and we say that really
19 is quite telling.

20 THE CHAIRMAN: If they do that, would that make any
21 difference to your position?

22 MS FORD: It does still engage -- it would have been an
23 improvement certainly, but it does still engage the
24 concern that we have made a conscious decision to plead
25 a non-exhaustive definition, because it is a matter

1 known to Meta, and not to us, what exactly they do
2 collect off Facebook.

3 THE CHAIRMAN: In a way as part of this exercise for
4 disclosure one question you could be asking the other
5 side, maybe ordered at the next CMC, is they answer that
6 precise question, because, look, you have got, as you
7 say, asymmetry, and that at the end of the day you are
8 entitled as a matter of disclosure to that information.
9 It is probably cheaper to have a statement from them
10 explaining what they have done, obviously dealing with
11 your point at paragraph 62, and say whether there is
12 anything else, because you do not want to miss out on
13 something because you don't necessarily know what they
14 have been doing but you are trying to figure out what
15 the sources are.

16 MS FORD: Sir, indeed. We have in fact asked exactly that
17 question. It is issue for disclosure 8.1:

18 "From 2005 to date, what data on UK Users has been
19 collected and/or received and/or processed and/or
20 aggregated and will be used by Meta?"

21 We have asked a very basic question. As it happens,
22 that is one of the issues where the wording is disputed,
23 because Meta is seeking to confine the inquiry to what
24 it has defined as Third-Party Activity Data and/or data
25 on or from certain other Meta products, for example,

1 Instagram, which of course fails to get to the bottom of
2 the asymmetry of information that we are trying to resolve.
3 We do need to know exactly what Meta collect,
4 but as it happens, the way in which we formulated
5 our definition is deliberately crafted such that it is
6 defined negatively, there is either On-Facebook Data or
7 Off-Facebook Data, and that works notwithstanding the
8 present position we are in that Meta has not confirmed
9 exactly what it is they do and do not collect.

10 THE CHAIRMAN: When you collect an issue for disclosure in
11 the way (inaudible), you're not prejudging the form in
12 which that disclosure comes out and so, as you know,
13 sometimes the Tribunal will say a statement that covers
14 this, or an RFI. Other times they will say, well,
15 perhaps we can do it on a sample basis and see where we
16 go. Other times we may say we want the expert to
17 address it.

18 So this one, you are just trying to find out what
19 the answer is, what use there is. You are not saying
20 "I want to see every single documents on the exact
21 collection points", I do need to know what they are.

22 MS FORD: We have certainly indicated that we are open to
23 discussing the use of a narrative statement rather than
24 full document disclosure in appropriate issues.

25 THE CHAIRMAN: Obviously now is not the time to decide that

1 issue. That would be for the next CMC.

2 MS FORD: The form. Yes, unless it can be agreed between
3 the parties in the meantime, yes.

4 THE CHAIRMAN: Absolutely, unless it can be agreed, yes.

5 MS FORD: But we have not(?).

6 THE CHAIRMAN: Yes.

7 MS FORD: Yes, Mr Simester is pointing me to the relevant
8 correspondence where we specifically posed the
9 question: how does your proposed reformulation of this
10 terminology affect the scope of disclosure?

11 So it is in the correspondence bundle, E2/193,
12 page 4 {E2/193/4}.

13 THE CHAIRMAN: Say the reference again?

14 MS FORD: It is Quinn Emanuel's letter, E2.

15 THE CHAIRMAN: Give me the date of the letter first.

16 MS FORD: The date is 25 June.

17 THE CHAIRMAN: Okay, and where is in it in the bundle?

18 MS FORD: It is correspondence bundle E2, tab 193, and then
19 within that, page 4.

20 So this is in response to a letter from solicitors
21 for Meta which were expressing the concern that the
22 Class Representative's definition of Off-Facebook Data
23 was extremely broad.

24 We make the observation:

25 "... the defendants now consider that: (a) the

1 terminology proposed by the Defendants is deliberately
2 narrower than that proposed by the Class Representative;
3 and (b) the scope of disclosure in these collective
4 proceedings should be narrowed by reference to the
5 defendants' proposed terminology.

6 "If that is correct, please confirm: (a) what has
7 caused the Defendants' position to change from that set
8 out in your 20 May letter; (b) how the Defendants
9 consider that their proposed terminology will affect the
10 scope of disclosure in these collective proceedings
11 (and, in particular, what would not be captured using
12 the defendants' preferred terminology that would be
13 captured if the parties were to adopt the class
14 representative's terminology; and (c) why the Defendants
15 consider that narrowing the scope of disclosure in the
16 manner proposed is appropriate."

17 So we have asked very clearly please tell us what is
18 the effect of your proposed reformulation.

19 We have not been given an answer to that inquiry.
20 What we have done is identify in our skeleton argument
21 four respects in which we think their formulation is
22 narrower, and they have not come back and said do not
23 worry, that is not the case.

24 The Tribunal will see in paragraph 12:

25 "In so doing, please also address the concerns

1 expressed by the Class Representative in relation to the
2 ways in which the Defendants' proposed terminology risks
3 being materially underinclusive, as set out (in
4 particular) in paragraph 23 of the Class
5 Representative's submissions and in our 3 June letter."

6 So these examples have been put forward on a number
7 of occasions and we have said if we are mistaken about
8 this, please do tell us, and they simply have not.

9 So with that introduction, perhaps we can work
10 through the four examples that we have put in our
11 skeleton argument.

12 THE CHAIRMAN: There is a limited amount of time everyone is
13 going to have to spend on each issue, you know that, if
14 we are going to get through today. You are not going to
15 spend an hour on each issue because we just do not have
16 that time.

17 You have to realise that we have read the skeletons,
18 so it is not as if -- with me, advocacy is in two parts.
19 The first part is your skeleton, and we read that, and
20 then the second part is primarily you just highlighting
21 what you think is really important and us addressing
22 questions on that.

23 It is a different approach for trials, obviously,
24 but for CMCs that is the approach I always adopt.

25 So what do you want me to look at?

1 MS FORD: I was seeking to address very briefly the four
2 examples we have given of what we say is the difference
3 between the definitions and that these are the examples
4 that have not been addressed.

5 The first is the Meta Defendants' reference to user
6 activity data, and our concern is that that is capable
7 of limiting information collected about a particular
8 user, and we have drawn the Tribunal's attention to what
9 the CMA Market Study says, which we have pleaded in our
10 Claim Form paragraph 52, about the fact that in addition
11 to information about a user's engagement with the
12 service, Meta also collects device data.

13 THE CHAIRMAN: So you are looking at paragraph 14(a), are
14 you?

15 MS FORD: Of our skeleton, yes.

16 So the first concern is activity data is likely to
17 be limiting the information collected about the
18 particular user, and we know that other categories of
19 information exist, such as device data to which the CMA
20 refers.

21 The second point is that the Meta definition refers
22 to user activity data on websites or apps of third
23 parties. That seems to us to narrow the origin of the
24 data on user's activities, and we understand, for
25 example, that user data can be collected by operating

1 system operators, by hardware providers, by browser
2 providers, and those are sources of information in
3 addition to third party websites or apps which appear
4 capable of falling outside the definition.

5 The Meta definition then refers to user activity
6 data that those third parties share with Meta. So it is
7 drawing a link between the third parties and the entity
8 doing the data sharing. We say that potentially
9 excludes categories of data that can be obtained by
10 being shared by other entities other than those third
11 party apps and websites.

12 We have drawn attention to the fact that the Meta
13 Disclosure Report identifies a source of information
14 which is not third party apps or websites; it refers to
15 data hosted in MINT related to the UK, which is
16 comprised of aggregated, anonymised as well as
17 de-identified user-level apps usage data obtained via
18 off-the-shelf purchase from third party data vendors.

19 So they have in their Disclosure Report identified a
20 source of data which originates from somewhere other
21 than the apps or websites of third parties.

22 Then fourthly, we say that the scope of user
23 activity data is then limited to data transmitted or
24 received by Meta's business tools, and that is likely to
25 then exclude data transmitted or received by other

1 means. Indeed, the point we have made in our skeleton
2 is we do not really understand what it adds to talk
3 about Meta business tools in this context, because
4 Meta's business tools as explained in the Defence are
5 designed to be integrated into a third party's website
6 or app.

7 So by definition, if one is already narrowed down to
8 information coming from a third party website or app,
9 the reference to Meta's business tools really does not
10 seem to add anything,

11 but the point we would really emphasise to the
12 Tribunal is these are not new examples. We have raised
13 them. We have received no substantive response to them.
14 So in our submission there is no justification for
15 departing from at the usual way in which one would do
16 this, which is to use the terminology which is in the
17 Claimant's pleadings.

18 At the very least our submission is, the
19 Tribunal should favour the Class Representative's
20 definition over Meta's definition unless it can be
21 satisfied that there is no risk that it is materially
22 underinclusive.

23 THE CHAIRMAN: Thanks very much.

24 Mr Singla, your turn now.

25 MR SINGLA: I understand what you say about timing, but can

1 I just stress this is actually quite an important point
2 of all the points, frankly --

3 THE CHAIRMAN: Look, let us get this right. I understand it
4 is important. We have also been through your skeleton
5 argument, looked at the pleadings, and there is a number
6 of key issues which have arisen out of this. Of course
7 you are going to have time to deal with those,

8 but you have to realise that the Tribunal expects
9 that by some time this afternoon (inaudible) on all four
10 issues, and that this issue is something that we will
11 rule on this morning,

12 but, you know, you are a very experienced advocate.
13 You always know which buttons to press and what to
14 concentrate on, and at the moment we have got an open
15 mind as to who is right and who is wrong. The way I am
16 looking at it at the moment, there are two big issues.
17 One is, is their definition one that you can work with,
18 or is there practical reasons why it is unworkable? The
19 other is what is the gap between both of you? Is there
20 something out there in the universe which, on your
21 definition, is not caught by their definition,

22 because their definition is non-exhaustive in
23 circumstances where they say "We do not know exactly
24 what you have done, and so it is safer for us to have
25 our definition which we have pleaded", but, you know,

1 where the battlegrounds lie are fairly simple to
2 identify.

3 MR SINGLA: Sir, you are absolutely right.

4 Can I just say, with respect, you have identified
5 those are the right questions, but can I just take this
6 in stages.

7 THE CHAIRMAN: Of course.

8 MR SINGLA: Because this perhaps started, this debate, as
9 one which we understood to be semantics, and if it were
10 merely semantics we would be saying to the Tribunal that
11 if the same data is what both parties are referring to,
12 then the party doing the disclosure, i.e. Meta, that
13 wording should be adopted because it is workable for
14 those carrying out the disclosure process.

15 So that would have been the only submission, as it
16 were: that it is important to go with the wording that
17 is understood and used within the business,

18 but what has now emerged latterly is the
19 non-exhaustive point, and you are absolutely right to
20 ask the question would they not get something, as it
21 were. The answer to that is yes, but the reason for
22 that is because we do not accept that this case was
23 either pleaded or certified on a non-exhaustive basis.

24 That is why I do need to take a bit of time, because
25 it is all well and good saying," well, look at this word

1 and that word," but one actually has to look quite
2 carefully at the pleading. You will have seen what this
3 Tribunal said about the stage of the pleading at the
4 outset. It is not right, and let me just make this
5 completely clear, because this is why you will
6 understand this is so important. It is not merely a
7 definitional point.

8 We say, and I will explain why, through this
9 definitional issue, they are actually quite
10 significantly broadening their case in a way which is
11 not pleaded and was not the basis on which the case was
12 certified.

13 The data in question -- I will take you through the
14 pleading, but one needs to actually follow this through
15 quite carefully, because if one goes down this
16 superficially attractive route saying, well, that is all
17 information asymmetry, actually in my submission this
18 case is going to head and the disclosure process is
19 going to head in a direction which is not justifiable,
20 either on relevance grounds, still less on
21 proportionality grounds, but let me --

22 THE CHAIRMAN: You are saying that the additional sources
23 which they have specified may exist and you are not
24 prepared to give disclosure of those additional sources

1 or what they might be. Is that what you are trying to
2 say?

3 MR SINGLA: Well, let us just focus --

4 THE CHAIRMAN: Because, look, we need to understand where we
5 are going, because if that is what it is, I can well
6 understand why the CR is taking the position that they
7 are taking, and the difficulty -- you are going to have
8 to show me in the pleadings. I have looked at the
9 pleadings carefully, but the difficulty is when I look
10 at the pleadings, pleadings are deliberately pleaded on
11 a non-exhaustive basis. That is how the pleading is,
12 and at the moment no one has struck out that pleading.

13 As you know from pretty basic disclosure law, the
14 court goes on what is in the pleadings, and if something
15 is in the pleadings, even it is contested, it is not
16 removed from an issue for disclosure even if it is
17 contested, because otherwise you end up having trial
18 arguments at the disclosure stage, which is exactly what
19 you should not be doing.

20 MS FORD: Sir, can I say this. This point has only emerged,
21 as it were, through the disclosure discussions, but it
22 is an important pleading point --

23 THE CHAIRMAN: I can see it is important.

24 MR SINGLA: -- and I do not accept -- and I will explain
25 why, but the bright line, as it were, is we say they

1 have defined Off-Facebook Data in a particular way.

2 If I just give you this example which is mentioned
3 in Ms Ford's skeleton, you just saw it, let us just
4 think about the example of purchased data, which is now
5 something they refer to in their skeleton, as being
6 something which they will not get if Meta's definition
7 is adopted.

8 So I want you now to look at the pleading. I will
9 show you -- and the question for you, sir, is whether
10 you think that the pleading covers purchased data.

11 THE CHAIRMAN: As an example?

12 MR SINGLA: Yes, as an example, but I will show you why it
13 is completely false, in my respectful submission, to
14 suggest that the pleading is on a non-exhaustive basis,
15 and one actually needs to impose some rigour on this.

16 So if one starts at paragraph 7 of the Amended Claim
17 Form. I'm afraid I may be working off the old CMC
18 bundles, but it is page 14 on the internal page
19 referencing if you have the Amended Claim Form.

20 Bundle B, tab 3. If you start at paragraph 7,
21 please. You have the summary.

22 THE CHAIRMAN: You said S.7?

23 MR SINGLA: No, it is the main Claim Form. There is a
24 danger, in my respectful submission, in using that
25 summary, so let us look at the main pleading which is

1 what was before the Tribunal at certification.

2 So in paragraph 7 you will see, second sentence
3 {B/3/14}:

4 "During the Claim Period, Facebook imposed on its UK
5 users various requirements that involved extraction of
6 data concerning the activities of [users of
7 Facebook.com], notably user data from activity on: (i)
8 ... and (ii) ..."

9 It is important, to Meta products and services, and
10 third party websites and apps.

11 Okay. Those words are important, third party
12 websites and apps. So to the extent we are talking
13 about data which is not on Meta, it is third party
14 websites and apps.

15 Then if you look at paragraph 38 {B/2/23}, heading
16 "Facebook's business model".

17 THE CHAIRMAN: Yes.

18 MR SINGLA: "... Users had to give their consent to Facebook
19 collecting and processing detailed user data transmitted
20 to Facebook from third-party websites and apps."

21 This is why I asked you to bear in mind the example
22 of purchased data. You will not find a single reference
23 to that sort of data in the pleading.

24 If you look next at paragraph 51, heading "Extensive
25 personal data collected" {B/3/32}:

1 "Throughout the Claim Period ... obtained extensive
2 personal data --

3 THE CHAIRMAN: What paragraph are you on now?

4 MR SINGLA: Sorry, sir, 51. So:

5 "... obtained extensive personal data ... (from the
6 Facebook platform itself, from other Meta products and
7 services such as Instagram ..."

8 All of which we accept, so there is no issue about
9 that:

10 "... and/or from third-party websites and apps."

11 So all of that is caught within our definition.

12 What we do not accept is that they are entitled to
13 go any further.

14 So if one now goes to 61, it is quite interesting
15 that Ms Ford can only point to really one word in the
16 pleading "including in particular data", but in my
17 respectful submission, there is actually case law on
18 this as well that when one uses the words "in
19 particular" those are narrowing words.

20 It is not acceptable to say, well, because it is
21 "including in particular" that is somehow
22 non-exhaustive. One actually has to look at the
23 pleading as a whole.

24 So 61, again one sees other Meta products and
25 services and third party websites and apps.

1 Sir, this is very important. 62, sources of
2 Off-Facebook Data, they go on to list various sources,
3 third party websites and apps you will see over the
4 page. Those are all Meta business tools and we
5 understand all of that, and those data that are the
6 subject of these tools are within our definition. That
7 is the claim that is pleaded and was understood by the
8 Tribunal at certification.

9 When you look at 95 --

10 MS FORD: Before the Tribunal moves on, can I trouble you to
11 read paragraph 64.

12 MR SINGLA: Ms Ford has had her chance to make submissions
13 on this.

14 THE CHAIRMAN: No, do not worry (inaudible).

15 MR SINGLA: 64 says they are not in a position to provide
16 full particulars of the extent of the Off-Facebook Data.

17 Now, in my submission that does not advance things,
18 because we are debating the definition of the
19 Off-Facebook Data. So of course, prior to the
20 disclosure they may not know at the full extent of it, but
21 that is quite different, in my respectful submission, from
22 saying the data goes beyond that which is defined
23 elsewhere in the pleading.

24 So if one then goes on to look at 95, this is why it
25 is so important, sir, to look at what is actually

1 pleaded in the round. If you go to 95(h).

2 THE CHAIRMAN: Mr Singla, when you look at 61 --

3 MR SINGLA: Yes.

4 THE CHAIRMAN: -- and third party websites and apps, you are
5 saying none of that -- you would not be getting data
6 from third party websites and apps if you paid for it.
7 Surely that could include purchased data, could it, or
8 not?

9 MR SINGLA: No, the whole case, sir, with respect, if one
10 takes a step back, and this is actually important not
11 merely for this overarching issue, but one of the other
12 ones that I will come back to, we will all come back to,
13 the case, the allegation if one just takes a step back
14 from this point, the allegation is that there was a
15 so-called unfair bargain between Meta and Facebook
16 users.

17 THE CHAIRMAN: Yes.

18 MR SINGLA: What they are saying is effectively you had our
19 Off-Facebook Data and you derived value through the
20 personalised advertising services on Facebook.

21 THE CHAIRMAN: Correct.

22 MR SINGLA: So the scope of the data is that which is coming
23 from the users on the Class Representative's own case.
24 It is the user's third party data. So it is the
25 activities on these third party websites and apps.

1 It is really quite fundamental, sir. That is why I
2 said I need to take some time over this, because
3 throughout some of these disclosure points, one needs to
4 remember what the case is. It is about the so-called
5 unfair bargain and it is about the data on user
6 activity -- I stress those words as well in these
7 paragraphs. It is about user activity.

8 If Meta goes off and purchases some data, it is
9 completely irrelevant to this case. This is all about
10 user activity and it is all about user activity in two
11 places: other Meta products and services; third party
12 websites and apps.

13 Sir, that is not, as it were, a surprise, because
14 the case, as you have seen at 62, is based around the
15 Meta business tools, all of which is common ground, the
16 business tools, and all of which is going to be the
17 subject of disclosure on our proposal,

18 but what we cannot accept through the disclosure
19 process is a broadening of the pleaded case because, as
20 it were, if one goes beyond these two, (i) and (ii),
21 which we have all proceeded on since certification,
22 where does one draw the line?

23 That is the problem. It is no good, with respect,
24 Ms Ford saying, well, we have deliberately pleaded in
25 the negative on a non-exhaustive -- they have to

1 particularise their case. We actually do not understand
2 where one draws the line if one goes beyond the (i) and
3 (ii), and that is why we have been proceeding on this
4 basis.

5 If you, sir, go to internal page 57. It is easier
6 to pick out the page number here because this is a long
7 paragraph. You will see it is 95(h), and actually, sir,
8 maybe you should see the preamble. So if one goes back
9 to the heading:

10 "Changes to Off-Facebook Data collection over time."

11 What they are complaining about is the incremental
12 increase of the amount of Off-Facebook Data that is
13 being collected over time with the exploitation of
14 Off-Facebook Data for the purposes of advertising having
15 commenced.

16 So that is what the complaint is all about, sir.
17 Again, this will be important for one of the later
18 issues.

19 The case is all about using this Off-Facebook Data
20 for the purposes of advertising on Facebook platform.
21 When you go to 95(h), you will see it is, again since
22 June 2014 collection from third party websites and apps.

23 Let me just finish this tour through the pleadings
24 by showing you what the expert report says. This is the
25 expert report on the basis of which certification was

1 applied for. So this is Professor Scott Morton's
2 report. I do not know whether you have had a chance to
3 look at that, but it is -- I am not sure where it is,
4 actually. It is in bundle C1, tab 1, if you have that
5 to hand, sir {C1/1/1}.

6 THE CHAIRMAN: Yes.

7 MR SINGLA: This is the expert report. As you know, at the
8 certification stage an expert report is commonly
9 provided.

10 If I could ask you to turn up internal page 23
11 {C1/1/28}, we will have to come back to this document
12 later on another point, but on this question of what the
13 scope of pleaded case is, you will see at 77, 78 and
14 then, crucially, 79, you will see, again, it is users
15 and activities from third party websites and apps. It
16 is actually completely bizarre to suggest that they were
17 storing up some other unpleaded case which would cover
18 things like purchased data.

19 Let me now just show you or remind you of what the
20 Tribunal understood the case to be. So if you look at
21 the certification judgment.

22 THE CHAIRMAN: Can I just finish reading --

23 MR SINGLA: Sorry, sir, of course.

24 THE CHAIRMAN: Look at 77 to 79.

25 MR SINGLA: 79, third party -- Ms Ford is now saying third

1 party data which her own expert was dealing with in 79.

2 THE CHAIRMAN: Let me just read that. Yes.

3 MR SINGLA: Then can I show you the certification judgment,
4 which if you have the bundle A, sir, it is A, tab 15.

5 THE CHAIRMAN: Yes.

6 MR SINGLA: So I would just like to show you, if you could
7 pick it up at paragraph 16, please.

8 THE CHAIRMAN: Sorry ...

9 MR SINGLA: The reference to Off-Facebook Data came in in
10 the second iteration of the claim. So at 16 {A/15/10}:

11 "For the purposes of the draft Claim Form, a
12 critical distinction is drawn between 'On-Facebook Data'
13 and 'Off-Facebook Data'."

14 Then the Tribunal quotes paragraph 7, which I showed
15 you. Just to remind you, halfway down, what does
16 paragraph 7 say:

17 "... notably use data activity from activity on: (i)
18 ... and (ii) ..."

19 All of which is caught by our proposed definition.

20 This is all about, sir, other Meta platforms and
21 third party websites and apps. Then.

22 If one looks at 17(2), the Tribunal says it is all
23 completely unclear, but at 17(2), you will see that the
24 Tribunal has understood this case to concern only:

25 "... Data that is provided to Meta via other

1 products (e.g. Instagram)," we agree that is covered, "and
2 Off-Facebook Data that is derived from third party
3 websites and applications ..."

4 You will not find a single reference, sir, in any of
5 these papers to things like purchase data or anything
6 going beyond third party websites and apps.

7 So can I just now quickly deal with the examples in
8 paragraph 14, because this is where the real
9 battleground is. It is whether the matters in 14 of the
10 Class Representative skeleton, whether those are points
11 that ought to be the subject of a disclosure order given
12 those pleadings.

13 THE CHAIRMAN: Can I just quickly look at your definition.

14 MR SINGLA: Yes, sir, where are you? Paragraph 10 of the
15 Defence is maybe the best place.

16 THE CHAIRMAN: Is it not in your skeleton, how you propose
17 to ...

18 MR SINGLA: I'm sure it is. I am grateful. It is
19 paragraph 25.

20 THE CHAIRMAN: Yes, that's it, yes.

21 MR SINGLA: Yes. So, to be completely clear, sir, just
22 pausing here --

23 THE CHAIRMAN: Can I just read it?

24 MR SINGLA: Yes.

25 THE CHAIRMAN: In your definition, do you need the words at

1 the end "via Meta's business tools"?

2 MR SINGLA: I will have to double-check the position, but
3 the point I am on at the moment, sir, as you will
4 understand, is, as it were, the earlier wording, user
5 activity data on websites or apps of third parties. At
6 the moment, we are having a dispute about whether that
7 is --

8 THE CHAIRMAN: We are having a dispute on everything, are we
9 not?

10 MR SINGLA: The point I am currently addressing is the idea
11 that the website or apps of third parties, as Ms Ford
12 would have you believe, is not materially underinclusive.
13 As I have just shown you, that is actually is covered by
14 the pleading and was the basis of certification.

15 So the business tools specific to what, I can come
16 back to. We probably do not need it, but really the
17 bigger point is the websites or apps.

18 So if I now just quickly address the examples in 14
19 of the skeleton. So really the question, sir, for you
20 is whether, given the pleadings, these are the sorts of
21 matters that should be the subject of disclosure.

22 If you look at the complaint at 14, it is that
23 things are going to be materially underinclusive. They
24 say it is limited to user activity data. Well, I am
25 afraid if you plead a case based on user activity data,

1 then you are not entitled to disclosure going beyond
2 user activities. That is actually quite a basic point.

3 The example they go on to give by reference to the
4 CMA Market Study, and I will not take up time, but let me
5 just say this. The CMA Market Study in that passage, if
6 one reads the passage as a whole, is actually talking
7 about the data that Meta collects when a user is using
8 Facebook, so that is on-platform data, and here they are
9 trying to use it as an example of third party activity
10 data being materially underinclusive, but that does not
11 support the point they are making.

12 THE CHAIRMAN: Yes.

13 MR SINGLA: At 14(b), they say {F8/1/6}:

14 "User activity data 'on websites or apps of third
15 parties' is likely also only to be a subset of the data
16 available ..."

17 Well, just pausing there, that is why I stressed
18 throughout the pleading and the expert report of the
19 Class Representative it is all about websites and apps.
20 So they cannot now say, well, it is only a subset.

21 Then if you go on to look at the examples they give,
22 we actually just cannot begin to understand when they
23 talk about user data being collected by hardware.

24 Now, the reason this is so important, sir, is if you
25 send us off to do a disclosure exercise on something

1 which is unpleaded, not understood, then this case is
2 going to go off the rails. It is just completely
3 unparticularised: user data being collected from
4 hardware. It is not only out with the scope of the
5 pleading, it is just difficult to understand.

6 Then paragraph 14(c), they say, ah, it is materially
7 underinclusive because there is a:

8 "... Link between the third parties and the entity
9 sharing the data, which excludes data shared by other
10 entities ..."

11 Footnote 11, they refer to this data posted in MINT.

12 Well, pausing there. That data mentioned in our
13 Disclosure Report is actually metrics on how many users
14 are using particular apps, so it has got nothing to do
15 with user data that is the subject of the claim, and it
16 is also data which is purchased, and you will see in
17 footnote 11:

18 "... data obtained via off the-shelf purchase from
19 third-party data vendors ..."

20 I throw this gauntlet down. Ms Ford can try and
21 show you a single reference in the pleading or the
22 expert reports to that sort of data being within her
23 claim; she will not be able to, I can guarantee it.
24 Then, if one looks at 14(d), again, they are talking --
25 you will see at the end of 14(d):

1 "... Facebook Data that Meta may purchase ..."

2 Just not pleaded.

3 Then, at 15 -- this is very significant, actually,
4 sir, so 15, if you go over the page {F8/1/6-7}, can I
5 ask you to read the whole of 15, then I will ...

6 (Pause).

7 Sir, that last sentence of 15 is absolutely crucial
8 in my submission, because that really demonstrates why
9 we are having this debate and why it is important:

10 "... the Defendants' purchase and use of
11 Off-Facebook Data from data vendors (including
12 amalgamation of that data with Off-Facebook Data derived
13 from other sources) ..."

14 Now, that is really a completely new point, the idea
15 that the amalgamation of data purchased by Meta, the
16 idea that that falls within the scope of the CR's
17 claims, no references to the pleading you will notice,
18 because it is simply outside the scope of this case, and
19 so we do submit this is not merely a semantics point. We
20 are not looking at being materially under-inclusive, they
21 will get disclosure by reference to the data which is
22 the subject of the pleaded case and the case that was
23 certified, but we are not prepared to do the
24 paragraph 14 and 15 disclosure.

25 THE CHAIRMAN: What you say then is that if they want 14 and

1 15 disclosure, then that has got to be something on the
2 pleading, and then if it is on the pleading, they are
3 going to have to -- obviously have to get consent to
4 amend and then obviously it clearly does become an
5 issue. You say, on the face of the current pleadings,
6 although the consent would actually include paid data
7 obviously, the same consent would cover it, you are
8 saying actually there has been a deliberate pleading
9 point and that was the basis of certification --

10 MR SINGLA: Yes.

11 THE CHAIRMAN: That did not include Off-Facebook Data.

12 MR SINGLA: Yes, and, critically, it is not just one should
13 not merely look at the definitions of Off-Facebook Data,
14 I have made my points on that, but there is also the
15 point about what is the ultimate alleged abuse here, and
16 it is quite clearly delineated as the so-called
17 "bargain", two things happening in opposite
18 directions: Off-Facebook Data, what is coming from
19 third-party websites and apps to Meta, and in return,
20 the Facebook service. So as soon as one starts to go
21 beyond those tramlines and starts to bring in other
22 data, it does not merely affect the definitional point,
23 it actually quite materially alters what is said to be
24 the bargain.

25 Those are my submissions, sir, unless I can assist.

1 THE CHAIRMAN: No, that is fine.

2 Ms Ford, how long are you going to be? We are going
3 to have our break in a minute, but ...

4 MS FORD: I would like to take the Tribunal to a couple of
5 pleading references which demonstrate that Mr Singla's
6 understanding of the pleaded case is excessively narrow.

7 THE CHAIRMAN: I think that is the key point, because if he
8 is right on the pleadings, then he is right -- he is
9 probably right about the definition, but if he is wrong
10 about the pleadings, then you are probably right. So it
11 has -- it has been actually a very useful exercise to
12 have this debate, because the sooner we know the scope
13 of the case the better and one possibility is, if he is
14 right, then you are going to have to amend your pleading
15 and then see what happens, and if you get the amendment,
16 then obviously your definition is the right definition,
17 but show me on the pleadings where you say it does
18 include purchased data. You may say it does not really
19 matter whether they are making a purchase or not, it is --
20 you are getting the consent for the same item, the same
21 data, whether they paid for it or not does not make any
22 difference, but then, Mr Singla says, no, you look at
23 the actual way you pleaded the case; it is not covered,
24 but let us see where we go on that.

25 MS FORD: Paragraph 63 in the Amended Claim Form, page

1 {B/3/38}.

2 THE CHAIRMAN: Yes.

3 MS FORD: Which is under the heading "The nature of
4 Off-Facebook Data", so --

5 THE CHAIRMAN: Let us have a look. (Pause). Yes.

6 MS FORD: It is quoting Meta's privacy policy:

7 "In its current Privacy Policy, Meta describes the
8 information it collects from third parties in the
9 following terms:

10 "'We collect and receive information from partners,
11 measurement vendors, marketing vendors and other third
12 parties about a variety of your information and
13 activities on and off our Products.'"

14 In our submission that very clearly engages the
15 question of purchasing data from other third parties and
16 it gives a long list:

17 "... the examples of information that we receive ...

18 Your device information.

19 Websites you visit and cookie data ...

20 Apps you use.

21 Games you play.

22 Purchases and transactions you make ...

23 The ads you see ...

24 How you use our partners' products and services,
25 online or in person.

1 Partners also share information such as your email
2 address, cookies and advertising ... This helps us match
3 your activities with your account ...

4 We receive this information whether or not you're
5 logged in or have an account on our Products ...

6 Partners also share with us their communications
7 with you ...

8 Partners use our business tools, integrations and
9 Meta Audience Network technologies to share information
10 with us ..."

11 In our submission, this is quoting the extremely
12 broad Meta policy, which includes -- it is broad enough
13 to include purchases from third party data vendors, and,
14 of course, the privacy policy is only one of a number of
15 sets of terms and conditions that feed into the overall
16 nature of the bargain. It is immediately after that
17 very broad paragraph that we then see what the Class
18 Representative says about it, and Mr Singla was quite
19 keen to skip over this paragraph:

20 Pending disclosure and evidence, the PCR is not in
21 a position to provide full particulars of the full
22 extent of the Off-Facebook Data that Facebook has
23 collected from its Users at all periods throughout the
24 Claim Period. As detailed in the section, there is
25 considerable asymmetry of information between the PCR or

1 Facebook since Facebook has not been clear or consistent
2 in describing the full extent of its data-gathering
3 practices and, moreover, those practices have altered
4 over time. Indeed, as set out at para 50 above,
5 Facebook has at times misled Users as to the true
6 position with respect to data collection. Accordingly,
7 the PCR reserves the right to amend further this Amended
8 Claim Form, particularly in the light of disclosure
9 provided by the Defendants, including disclosure made
10 for these purposes to courts and/or competition or
11 regulatory authorities considering analogous matters.

12 "Without prejudice to the aforesaid, the PCR sets
13 out below a non-exhaustive summary of the Off-Facebook
14 Data which, to the best of the PCR's knowledge, Facebook
15 collects on its Users via each of the sources set out
16 above."

17 It was expressly non-exhaustive and it was expressly
18 non-exhaustive for a reason, which is the asymmetry of
19 information.

20 Now, Meta's stance in these proceedings appears to
21 be to attempt to preclude disclosure which would then
22 disperse the asymmetry of information, it is essentially
23 saying: "You have not identified it in advance and so
24 you do not get it. You never find out what it is we
25 collect about you,"

1 but we do say even the citation from the privacy
2 policy makes clear that third-party data vendors, which
3 are simply one example, Mr Singla has focused on them in
4 his submissions, but it is one example of things which
5 fall outside. What has become clear now is that the
6 definition that Meta is seeking to apply is very
7 deliberately narrower than that proposed by the --

8 THE CHAIRMAN: What he is saying is that, (a) it reflects
9 how they do business and certainly easier to operate
10 from, and (b) it reflects what he says is the scope of
11 the pleaded case and there is obviously a dispute
12 between you, and if he is right about the scope of the
13 pleaded case, he is probably right about this issue. If
14 he is wrong about the scope of the pleaded case, then
15 you are probably right, so I think that -- is there any
16 other part of the pleading you want us to look at?

17 MS FORD: Sir, yes, there is then the parts of pleading
18 which then deal with aggregation of data and it is
19 actually from paragraph 88 onwards {B/3/49}. This is
20 under the heading of Off-Facebook Data: sensitivity and
21 value.

22 THE CHAIRMAN: Yes.

23 MS FORD: The point is made that while:

24 "Off-Facebook Data is extremely valuable to Facebook
25 ... in isolation ..."

1 It says:

2 "... more importantly, when combined with data that
3 Facebook also collects on-platform, including both data
4 that Users explicitly provide ... and data generated
5 from Users' activities on the Facebook platform
6 itself ..."

7 So it is making the point that aggregation of data
8 sets is important:

9 "By merging these datasets and associating the
10 Off-Facebook Data collected from individual Users with
11 their individual Facebook accounts via the use of unique
12 identifiers, Facebook is able to create extraordinarily
13 rich and detailed profiles on its Users ..."

14 Then 90 {B/3/50}:

15 "While data collected on-platform and Off-Facebook
16 Data is separately useful and valuable to Facebook,
17 combining those two datasets into a single dataset on
18 that User enables Facebook to make further inferences
19 about the User's characteristics, preference, and the
20 types of products and services they are likely to
21 purchase, inferences which could not have been discerned
22 from considering the two datasets separately."

23 So the notion that this body of data is aggregated
24 together becomes particularly valuable when aggregated
25 together has been expressly pleaded, and that is

1 something that the Tribunal itself fully appreciated
2 when it certified proceedings.

3 Just before we go to the Tribunal's judgment,
4 paragraph 84, on page {B/3/48}, makes a similar point by
5 reference to Meta's previous data policy:

6 "The merging of data across Meta products and
7 services was more explicitly spelled out in Meta's
8 previous Data Policy ..."

9 Then it cites the relevant paragraphs.

10 THE CHAIRMAN: Yes, okay.

11 MS FORD: This was a point that was then appreciated by
12 the Tribunal, if we look at {A/15/13}, please. The
13 relevant paragraph is paragraph 23, it is referring to:

14 "[A] split in the price between On-Facebook Data and
15 Off-Facebook Data ..."

16 It says this:

17 "... was reflected in neither the service received
18 by Users nor in the manner in which Meta monetised the
19 data it obtained from Users."

20 Subparagraph (2) is dealing with:

21 "The manner in which Meta monetised the data it
22 obtained from Users."

23 The Tribunal says:

24 "Although the technical details were not before us,
25 it is not the PCR's pleaded case that the monetisation

1 of Off-Facebook Data somehow constituted a separate body
2 of data, deployed and monetised independently of
3 On-Facebook Data. It would be very unlikely were Meta
4 to hamper its business operations in this way. It
5 follows from this that the revenue received by Meta from
6 its operations cannot without more be split or allocated
7 as between Off-Facebook and On-Facebook Data."

8 The Tribunal then cites paragraphs 88 to 90, which
9 are the paragraphs that I have just shown the Tribunal.

10 So we have seen paragraph -- I have shown the
11 Tribunal a number of paragraphs where the definition of
12 "Off-Facebook Data" is non-exhaustive. It gives examples
13 that it is expressly non-exhaustive. That is spelled out
14 particularly clearly in paragraph 64, which I have shown
15 the Tribunal, and it is also expressly spelled out and
16 fully understood by the Tribunal when it certified that
17 the Class Representative's case includes the aggregation
18 of bodies of data in order to monetise them. So in our
19 submission, while Mr Singla may wish to try and
20 constrain the Class Representative's case, pleaded case,
21 to the very narrow tramlines that Meta have chosen to
22 set out, he is -- Meta, his client, Meta, is consciously
23 seeking to limit the disclosure that the Class
24 Representative gets on their fully pleaded case, and in
25 our submission, that is not legitimate.

1 MR SINGLA: Sir, just before you rise, Ms Ford is
2 addressing a complete strawman. There is a pleading
3 reference, and you have seen it in the Tribunal's
4 judgment, to aggregation, and if you read that passage
5 carefully, it is aggregation of On-Facebook Data and
6 Off-Facebook Data. We completely accept the concept of
7 aggregation is in, but only in that context.

8 The question and what I was addressing was the new
9 suggestion in the skeleton that amalgamation of
10 Off-Facebook Data with purchased data so -- and the
11 question is whether any of that is within the four
12 corners of the pleaded case. When one looks at the
13 abuse paragraphs -- sir, I am conscious I do not have a
14 right to reply, but can I just give you two references,
15 because when one looks at the abuse paragraphs, which
16 you have not actually been taken to yet, on page 110,
17 internal 110, and we will have to come back to these
18 paragraphs later, but 152 {B/3/110} and 153 {B/3/114}
19 are the abuses, alleged abuses. {B/3/110}, you will see
20 (b) (ii), this is part of the plea in respect of
21 the first alleged abuse, the unfair trading condition,
22 (b) (ii):

23 "As discussed in para 95.h above, from not later
24 than June 2014, Facebook would leverage code on
25 third-party websites and apps ..."

1 I showed you 95(h), the cross-reference is there.

2 So the alleged abuse is founded only on third-party
3 websites and apps, and if you go likewise to internal
4 page {B/3/120}, which is part of a very long paragraph
5 in respect of the second alleged abuse, the unfair
6 price, you will see paragraph number (7):

7 "As noted at para 95 above ... new tracking policies
8 were announced in 2014-2017 ..."

9 So the whole case, when one looks at what the
10 alleged abuse is, is confined to third-party data, that
11 is how we have defined it, Third-Party Activity Data.

12 THE CHAIRMAN: Ms Ford, anything else you want to say?

13 MS FORD: Sir, the Tribunal has the numerous references in
14 the pleading --

15 THE CHAIRMAN: I have. We have got what we have got.

16 MS FORD: -- which makes clear that it is not limited in that
17 way.

18 THE CHAIRMAN: Okay.

19 So we will have a break now and then give a ruling,
20 if we can agree it, when we come back.

21 (12.08 pm)

22 (A short break)

23 (12.19 pm)

24 THE CHAIRMAN: What we will have at the end of the day is a
25 proper ruling where but -- where I will set out what the

1 background is, what the relevant law is as regards lists
2 of issues for disclosure and the potential approach we
3 are going to adopt in this case. I will then set out
4 what the respective positions of the parties are on
5 the -- each of the issues.

6 (Ruling given - published separately)

7 Ms Ford can we move on to issue 2 on temporal scope.

8 MS FORD: Sir, yes.

9 THE CHAIRMAN: On temporal scope, the -- we need to look at
10 it in a bit more detail, but what I am trying to figure
11 out is whether or not, at least in respect of some of
12 the broad questions, that there is a halfway house that
13 is practical, because, on the one hand, I think it is
14 really useful for those who carry out disclosure
15 exercises on the ground actually have a start date to
16 work from, because if you do not have a start date, you
17 do not know how far data you have got to go back and it
18 is extremely expensive to upload/collate data, even just
19 for the processing exercise, particularly when you go
20 back and look at potentially old systems, but one way
21 of looking at it is you pick a year prior or the period
22 obviously prior to the alleged infringement period, but
23 that is the -- effectively the prima facie data, but
24 that if, going through the disclosure exercise, it
25 appears that there is other relevant data from an

1 earlier period, then they need to go back and look at
2 that earlier period, because that is what will happen in
3 reality --

4 Ms Ford, let us just listen, okay?

5 MS FORD: I am sorry, sir.

6 THE CHAIRMAN: What would happen in reality is if we fix it
7 let us say, generally, let us say, 2011, okay? They
8 provide you with the 2011 onward stuff, and then you
9 read it and you can see, within that, there is
10 references to something that is earlier that is highly
11 pertinent to your claim, you come back to court and say
12 "Well, I am not bound by the 2011 date in the list of
13 issues and disclosure, and, clearly, we should have that
14 disclosure". So to cut short things, the practical way,
15 normally, would be to say you have got your start date
16 of 2011, or whatever, but if, during the course of your
17 review, there is references to material that is relevant
18 for that particular issue going back further, then you
19 go back further. That is what one normally does when
20 you go through a disclosure exercise,

21 but that is just a broad thought that may be
22 attractive to both sides, but I do sympathise with
23 the -- with Meta on this, that you need to know at least
24 prima facie what your start date is in relation to each
25 of these categories because then you have got to go

1 through the exercise of getting that data together and
2 pulling it out and putting the relevant search tools
3 onto it. So that is where we are just in broad terms,
4 but we will see what more specifically that the parties
5 want, because some of them we have to give actually
6 specific rulings on specific dates here.

7 MS FORD: Well, I am grateful for that indication. It may
8 be that I can take instructions from those behind me as
9 to what extent that would work.

10 One factor that springs to mind immediately is that
11 the present date that has been offered of 2011 has been
12 pinned to a very specific date, which is the date that
13 Meta has identified of January 2013, when it first
14 received Third-Party Activity Data for use in personal
15 advertising, and one of the points that I will be
16 enlarging upon in my submissions is that that is not
17 necessarily the correct date for the purposes of this
18 exercise and so -- and that -- that must be particularly
19 true given that we now know that third-party activity
20 data is consciously narrower than the definition of
21 Facebook data that the Class Representative has been
22 seeking to apply.

23 One possibility, and it is one that I have not yet
24 had the opportunity to take instructions on, but it
25 occurs as a consequence of, sir, your observations, is

1 that if Meta were to put in an evidenced statement
2 indicating when it first considered collecting -- and
3 there is obviously the formulation collection, receipt,
4 processing use -- when it first considered collecting,
5 receiving, processing or using Off-Facebook Data, that
6 would inform a concrete date, because we have been
7 driven to suggesting the formulation that we have used
8 because we have not been given what we think is the
9 relevant date for the purposes of the date which
10 underpins the Class Representative's claim. What we
11 have been told is a date for a very specific purpose.
12 I can elaborate on that, but that --

13 THE CHAIRMAN: Yes, well, what we are trying to do is to
14 avoid going back too far at a cost which is really going
15 to be very expensive when you start trying to recreate
16 data. You know, every year counts, but on the other
17 hand, if there is stuff out there that goes back
18 further, that is identified in the course of the process
19 of going back to 2011, that also should be disclosed,
20 and that is what one would normally do when you go
21 through the disclosure exercise, but then you may say,
22 "Well, look, we have identified something going further
23 back, we think this is the proportionate way forward",
24 and then they can suggest a proposal with you, and if
25 you cannot agree, we deal with it, but you have got --

1 you are saying the sensible thing is Meta to answer that
2 basic question and the answer to that question will
3 drive what year you go back to.

4 MS FORD: It will, for the purposes of one of the two
5 categories.

6 THE CHAIRMAN: That particular -- one or two categories.

7 MS FORD: Yes.

8 THE CHAIRMAN: Then -- but then there is nothing stopping
9 this Tribunal from making a direction that they provide
10 that information, and obviously it will still be caught
11 by the formulation that I have suggested, because let us
12 say the date is 2011; if they answer and they come back
13 and say, "Actually, it is earlier", then in all
14 likelihood you go back earlier for that purpose, but it
15 is certainly a sensible question on that particular one,
16 but I would not expect the -- Meta to be able to give an
17 answer to that today. You know --

18 MS FORD: No, absolutely not.

19 THE CHAIRMAN: -- these are really important things and, you
20 know, they are careful people, they will want to make
21 sure that any answer they give is accurate, otherwise
22 they have a credibility problem. So it is still
23 possible to accommodate what you want, having a
24 direction with a specific year because you can still ask
25 that particular question, and when we get the answer, it

1 is still caught within the wording.

2 MS FORD: Yes, so the Tribunal will have appreciated from
3 our skeleton that we identified two separate categories
4 of issues for disclosure. The first one is the one that
5 is concerned with the exercise of collecting, receipt,
6 processing, use of Off-Facebook Data, and that is the
7 one that is really engaged by the Tribunal's suggestion
8 that we can ask Meta for a concrete date.

9 The second category is the pleaded case and the
10 expert report, which both envisage engaging in a process
11 of examining Meta's historic conduct and the way in
12 which Meta's behaviour changed from the point when it
13 did not have market power and how it changed to the
14 point when it acquired market power --

15 THE CHAIRMAN: That is going back a long way and we are
16 going to have to find a proportionate way of getting the
17 information that you seek, because, you know, I can see
18 on one view, if you just say, "I want disclosure of
19 documents in this category", you are going to get -- it
20 is going to be an enormous task. If, on the other hand,
21 you have properly formulated questions that need to be
22 answered, like we did in the *Trucks* case, then you get
23 that answer and then you come back to court to determine
24 what documentary disclosure is necessary in the light of
25 that statement, because that statement may actually

1 answer or provide at least a substantial amount of
2 information in view of having documentary evidence,
3 because, look, I am conscious, although Meta is a sort
4 of big organisation, it does not mean that everything is
5 a free lunch. You know, everyone has got money,
6 everyone has got cost constraints, and at the end of the
7 day, if they spend far too much money on this, it has an
8 impact not necessarily just on Facebook. So I am always
9 conscious of the costs of disclosure, and you know that
10 from previous hearings, but we -- if I am -- I may not
11 be involved in this case again after today, this may
12 just be a guest appearance, but if I am involved on
13 this, I will be quite keen to keep an eye on what the
14 cost is of things.

15 MS FORD: Sir, that is absolutely understood. One point we
16 would emphasise is that we are presently concerned with
17 defining the substantive issues for disclosure --

18 THE CHAIRMAN: I know, that is all we are --

19 MS FORD: -- and questions of proportionality, cost, can be
20 addressed --

21 THE CHAIRMAN: That is going to come later.

22 MS FORD: -- at the next stage. Absolutely.

23 THE CHAIRMAN: I agree, but what Mr Singla probably does
24 not want to have is a lack of clarity that is
25 unnecessary in relation to when the temporal period

1 starts, because I would have thought that is something
2 that the team doing the disclosure needs to know and I
3 proposed a way of dealing with the lack of clarity
4 point, which is we come to a date, but I know that, the
5 second point you are making, potentially goes back a
6 long way, but you are saying, actually, you are not
7 determining now what documentary disclosure has to go
8 back that far because there are different ways of
9 providing disclosure other than in the form of
10 documents.

11 MS FORD: Sir, let me take the points in order --

12 HODGE MALEK KC: Let us do it now. Let us -- I am just
13 throwing out some ideas. Let us now -- you just take
14 things the way you want to take it through.

15 MS FORD: So dealing, firstly, with that first category,
16 which is about Meta's collection, receipt, processing
17 and/or use of Off-Facebook Data, we --

18 THE CHAIRMAN: Just show me where we are in your skeleton
19 and then we will --

20 MS FORD: We are -- that is a good question, paragraph 18
21 {F8/1/7}.

22 THE CHAIRMAN: Yes. Paragraph 18, yes.

23 MS FORD: So, we have identified the two categories and I am
24 going to deal, first, with the one that is essentially
25 related to the activities relating to data, that is the

1 one where we have taken a pragmatic approach, we have
2 said that those --

3 THE CHAIRMAN: What, (a) and (b), yes, and you are talking
4 about A now?

5 MS FORD: I am talking about (a), and that starts at
6 paragraph 20 {F8/1/8}. What we have done, in
7 the absence of a clear date being provided, is to
8 suggest that it goes from the point at which Meta first
9 collected and/or received and/or processed and/or used
10 Off-Facebook Data, or alternatively, in relation to
11 certain issues where it is relevant to know whether Meta
12 took steps in anticipation, we have suggested that that
13 would be from the point at which Meta first considered
14 collecting and/or receiving and/or processing and/or
15 using Off-Facebook Data, and the very obvious rationale
16 for the approach that we have taken is that we have
17 sought to tie disclosure to the actual time period
18 during which Meta was engaged in this conduct.

19 Meta's position is summarised in its skeleton
20 paragraph 16(a) --

21 THE CHAIRMAN: Right, I am just -- so that takes us up to
22 paragraph 26 of your -- yes.

23 MS FORD: Sir, I am engaging with what is said against us,
24 it is {F8/2/11}.

25 THE CHAIRMAN: Yes, what paragraph is that?

1 MS FORD: Paragraph 16(a). This is the basis that Meta
2 says:

3 "... 2012 is sufficient for disclosure purposes ...
4 because the alleged abuse ... exclusively concerns
5 Meta's receipt and use of what the [Class Rep] refers to
6 as 'Off Facebook Data'."

7 Meta's position is:

8 "Per the pleadings, Meta started to receive ...
9 those data (i) at the earliest in 2012 in respect of
10 data from other Meta products ... and (ii) 2013 in the
11 case of Third Party Activity Data ..."

12 Footnote 26 refers to Defence paragraphs 138(c) and
13 154(a). Just to turn those up very briefly, bundle
14 {B/4/88}. These are --

15 THE CHAIRMAN: Let me just find it. One moment. (Pause).

16 Okay, so where are we now?

17 MS FORD: At paragraph 138(c), which is the first paragraph
18 that Meta has footnoted.

19 THE CHAIRMAN: Let me ... What bundle is it?

20 MS FORD: This is the pleadings bundle, so {B/4}.

21 THE CHAIRMAN: Bundle B -- that is the Defence, yes?

22 MS FORD: The Defence, yes. So this is essentially the
23 pleading paragraphs that underpin --

24 THE CHAIRMAN: What paragraph?

25 MS FORD: Paragraph 138(c) on page 88.

1 THE CHAIRMAN: That is paragraph what?

2 MS FORD: That is paragraph 138(c), and it is the last
3 sentence:

4 "Meta has received Third Party Activity Data for use
5 in personal advertising On-Facebook since around
6 January 2013."

7 Then they also rely on 154(a), which is on page
8 {B/4/100}. There they say:

9 "... Meta has received Third Party Activity Data for
10 use in provision of ads services since early 2013."

11 Now, three points --

12 THE CHAIRMAN: What paragraph is that again?

13 MS FORD: That is paragraph 154(a) of the Defence.

14 THE CHAIRMAN: Yes.

15 MS FORD: Three points about these paragraphs. First, they
16 are referring to third party activity data, not
17 Off-Facebook Data, and we now know there is a material
18 difference between them, so to the extent that Meta's
19 definition is materially narrower, it does not tell us
20 anything about the date from which Meta actually started
21 using Off-Facebook Data. Secondly, as the Tribunal will
22 appreciate, this is a carefully worded statement. First
23 of all, it refers to the date when Meta first received
24 third party activity data, and so that raises the
25 obvious question: is that the same date as when it first

1 collected that data, when it processed it or when it
2 used it? Then it refers to receiving third party
3 activity data for a very specific purpose, namely for
4 use in personal advertising, and that is important,
5 because, again, it begs an obvious question: when did
6 Meta start collecting this data for other purposes or
7 indeed when did it start collecting this data at all
8 without any particular purpose in mind?

9 Now, I want to make clear, and I am sure the
10 Tribunal appreciates this, that our submission is not as
11 it has been characterised in paragraph 20(c) of Meta's
12 skeleton {F8/2/14}, it is not speculating that Meta's
13 pleaded dates are wrong. That is not what we are
14 saying. The point we are making is that this is
15 a consciously narrowly worded statement and so it does
16 not give us the confidence that the dates being given
17 here are in fact the relevant dates for the purposes of
18 disclosure. Again, these concerns --

19 THE CHAIRMAN: But you do not know what the dates are then,
20 do you?

21 MS FORD: We do not. That is why we resorted to a
22 formulation when we said, "from the point where Meta
23 first collected, used, received" the formulation that we
24 tried to use. We have adopted that because we have not
25 been able to obtain clarity about what the relevant date

1 actually is.

2 Just to emphasise, this is not just legal quibbling,
3 this is a concern that has been expressed by the class
4 representative's expert as well. If I can show the
5 Tribunal the joint expert statements, it is in
6 bundle {C7/20/1} starting at page {C7/20/23}.

7 THE CHAIRMAN: Again, that is where?

8 MS FORD: It is the joint expert statement {C7/20/23}. This
9 is a passage of the joint expert statement which is
10 being put forward by the Class Representative's expert
11 economist. What we see is that the two points I have
12 emphasised about the lack of clarity in the wording have
13 also been raised by her, so paragraph 4.6 in the last
14 bullet.

15 THE CHAIRMAN: I am just trying to find where we are. So
16 look, it is C1, is it?

17 MS FORD: C7.

18 THE CHAIRMAN: Supplemental bundle, yes?

19 MS FORD: Tab 20. Page 23. Looking at paragraph 4.6, first
20 of all, and it is the last bullet in that paragraph.

21 She makes the point:

22 "... while Meta says it began receiving Third Party
23 Activity Data for use in personal advertising in
24 January 2013, such a definition rests on the exact
25 technical nature of the storage and transmission of

1 personal data. My economic analysis likely will not
2 depend on whether Meta 'received' personal data as
3 distinct from using it in a way that benefitted the
4 company regardless of exactly how that data is
5 physically handled."

6 So she has expressed a concern about why is this
7 emphasis being placed on "received" to the exclusion of
8 others. She makes a further point in paragraph 4.9 on
9 page {C7/20/24}, and this relates to the second point
10 that I made, which is about the purposes for which data
11 has been received. This is the last sentence of 4.9,
12 she says:

13 "... it is not clear to me whether 'From 1-2 years
14 prior to the date when Meta started receiving Third
15 Party Activity Data for use in personal advertising on
16 Facebook' ... would actually pre-date the point at which
17 Facebook began collecting the data to which the [Class
18 Representative's] claim relates."

19 So we have resorted to the formulation that we have
20 proposed because we have not obtained clarity about what
21 the relevant date actually is.

22 The third point to emphasise is that there are good
23 reasons to think Meta began collecting and using
24 Off-Facebook Data well before 2011 or 2012, and we have
25 pleaded one particular example, and that is at the

1 Beacon product which began in 2007. So if I can ask the
2 Tribunal, please, to look at Amended Claim Form at
3 S.7(b), this is bundle {B/3/3}, and this is where the
4 Class Representative pleads:

5 "... Users indicated strong opposition to
6 Off-Facebook Data collection. In November 2007,
7 Facebook released its 'Beacon' advertising product.
8 Beacon was Facebook's first attempt at tracking Users on
9 third-party websites, allowing it to monitor and record
10 Users' activities on such websites, and was immediately
11 controversial. Beacon allowed Facebook to track
12 the activity of all Users off the Facebook platform,
13 regardless of whether they had provided consent. Faced
14 with a public backlash, Facebook initially allowed Users
15 to opt out of Beacon, before eventually announcing in
16 September 2009 that it was shutting Beacon down
17 entirely."

18 THE CHAIRMAN: So what paragraph is that?

19 MS FORD: That is paragraph S.7(b) at {B/3/3}.

20 So that is one example of which the Class
21 representative is aware which goes back to 2007. Meta
22 has addressed the Beacon project at paragraph 21 of its
23 skeleton {F8.2.15}, and what it says there is that
24 "Project Beacon operated for a discrete period of time",
25 and that Meta has agreed to provide disclosure in

1 relation to issue for disclosure 16, which is the one
2 which is specifically concerned with Beacon, and then it
3 says:

4 "... the mere fact that Project Beacon operated
5 between 2007 and 2009 does not justify [using] 2007 as
6 the temporal scope for ... other IFDs ..."

7 THE CHAIRMAN: But they are saying, presumably, that is not
8 going to be lost because that is covered by one of the
9 issues?

10 MS FORD: No, so that, we say that misses the point, because
11 it is an example of Meta connecting and using
12 Off-Facebook Data well before 2012 --

13 THE CHAIRMAN: Yes, but is it not an example of where, where
14 they are aware of data/information that is relevant to
15 the issues in the pleading, prior to let us say, the
16 trigger date, they will be giving you that if they
17 become aware. The stuff that -- so the formation I have
18 given you earlier would cover this.

19 MS FORD: Well, in that respect it is not so different than
20 the formulation which we have been advocating, which is
21 essentially when Meta -- I do not want to misread it:
22 from the point at which Meta first collected and/or
23 received and/or processed and/or used Off-Facebook Data.
24 In that respect, insofar as they are aware of it
25 earlier, they need to give it earlier, and so, to that

1 extent, there is no dispute, but what we do say is that
2 Beacon is one example of which the Class Representative
3 is aware which suggests that it is not right to say,
4 "Well, you simply had no activity to this effect prior
5 to 2012"; this one started in 2007, and that is the one
6 of which we are aware.

7 Meta has relied on what its expert says about this,
8 and if you just turn this up, it is {D/6/2}. In fact,
9 the Tribunal will see, this is a statement from
10 Mr Parker which addresses his views on temporal scope.

11 THE CHAIRMAN: You are talking about bundle D, yes?

12 MS FORD: Bundle D, tab 6 and the relevant page is page 2,
13 paragraph 4. His view, and this is particularly on
14 issues which relate to use of data, or use, collection,
15 receipt, that formation, he says:

16 "For issues that primarily relate to an assessment
17 of the Data to which the [Class Representative's] claim
18 relates and/or any parts of the expert assessment that
19 would require considering Facebook's conduct and the
20 broader market context during the same time when the
21 Data to which the [Class Representative's] claim relates
22 was used in personal advertising, disclosure from 2013
23 would be appropriate, given that Facebook first started
24 using the Data to which the [Class Representative's]
25 claim relates in personalised advertising in

1 January 2013."

2 Then footnote 5 cites paragraph 138(c) of Meta's
3 Defence, which we have already looked at.

4 In our submission, Mr Parker is not adding any
5 independent expert perspective or insight in making this
6 observation. What he is doing is simply pointing,
7 presumably on instructions, to Meta's pleaded case about
8 when it started using Third Party Activity Data for the
9 particular purpose of personalised advertising. We say
10 that that date has all the obvious limitations that we
11 have already discussed and it does not really add
12 anything for Mr Parker to point to that date and say,
13 "and therefore that is the right date to use".

14 So in our submission, given that Meta had it within
15 its gift to dispel the uncertainty about what was the
16 relevant date and it has not seen fit to do so, our
17 proposed formulation in the list of issues makes sense.
18 That is our position on the first category of data we
19 have identified -- first category of issues for
20 disclosure, I am sorry.

21 THE CHAIRMAN: Let us look at your wording then.

22 MS FORD: Mr Simester reminds me, in terms of whether that
23 is workable in the absence of a particular date, there
24 is an agreed issue for disclosure which is disclosure
25 issue 32, which also contains a formulation with no

1 specific date, so it is from the point at which Meta was
2 aware Apple intended to introduce ATT, the point being
3 that it has been accepted that it is not an obstacle to
4 have an issue for disclosure which runs from the point
5 at which Meta was aware.

6 THE CHAIRMAN: No, that is clearly right, but it is much
7 easier to have a date if you can, sometimes you cannot,
8 and you are saying because they have not provided you
9 with the information, you do not know what the start
10 date is.

11 MS FORD: Sir, yes, that is our position.

12 THE CHAIRMAN: Okay.

13 MS FORD: Moving on to the second category, and these are
14 the ones which involve a comparison of Meta's historic
15 conduct over time.

16 THE CHAIRMAN: Can you just show me your wording for the
17 first category?

18 MS FORD: It is --

19 THE CHAIRMAN: In your skeleton.

20 MS FORD: Probably best in the skeleton, yes, so
21 paragraph 20. Yes, so {F8/1/8} is the reference for
22 that.

23 Moving on to the issues that relate to an
24 examination of historic conducts, I would just like to
25 show the Tribunal very briefly where this occurs on the

1 pleadings and where it arises in
2 Professor Scott Morton's expert report. On the
3 pleadings, if we start, please, in the Amended Claim
4 Form, paragraph S.7, so {B/3/3}

5 THE CHAIRMAN: So where are we looking now?

6 MS FORD: The Amended Claim Form. I am just showing the
7 Tribunal where this comparison of historic conduct comes
8 from in terms of the pleaded case. S.7, as a sort of
9 a headline pleading, says:

10 "When it faced at least some competition, Facebook
11 sought to position itself as a privacy-centric service,
12 in an effort to differentiate itself from rivals. As it
13 ... gained market power, however, Facebook has
14 significantly ramped up the volume of data that it
15 collects, with more and more User data being collected.
16 In particular, Facebook has dramatically increased the
17 amount of Off-Facebook Data that it has collected from
18 its Users, and its monetisation of that data, over
19 time."

20 Then there are particulars of that plea in the
21 subparagraphs, and I would just ask the Tribunal to note
22 subparagraph (a) refers to "the early period" of
23 Facebook's operation and the fact that it:

24 "... placed significant emphasis on user
25 verification and portraying its services as maintaining

1 the privacy of those using its services and their
2 personal data."

3 Then subparagraph (b) is the paragraph pleading
4 Beacon from 2007.

5 If we then move on to S.19, which is on page
6 {B/3/7}, this is the section summarising the class
7 representative's case on abuse, and it pleads:

8 "The Class Representative contends that the
9 Off-Facebook Data Price is unfair insofar as Facebook
10 would have been unable to impose it under conditions of
11 reasonably effective competition. In this regard, the
12 Class Representative relies inter alia on the fact that
13 ... under conditions of reasonably effective
14 competition, Meta was only able to impose an on-Facebook
15 data 'price' prior to the Claim Period ... it was only
16 when effective competition was eliminated that Meta
17 switched from a price based on on-Facebook data to one
18 based additionally on Off-Facebook Data."

19 Importantly:

20 "This provides a form of 'before and after'
21 comparison of the kind frequently used in unfair pricing
22 cases."

23 So the comparison of the period before Meta had
24 market power and the period afterwards is one which
25 underpins the allegation of abuse.

1 Then paragraph 49 on page {B/3/28}:

2 "Over time, as Facebook gained market power, its
3 conduct and [terms and conditions] moved from an initial
4 emphasis on user privacy as a means of competing and
5 competitive differentiator towards providing less
6 privacy protection, without adequately communicating
7 this to Users."

8 Then, again, there are particulars of that
9 allegation, which include, at subparagraph (a),
10 reference to the early period of the operation, and then
11 subparagraph (b) {B/3/29}, referring to Beacon, and
12 subparagraph (c), comparing Facebook's 2009 privacy
13 policy with its more recent iterations.

14 Then paragraph 55 on page {B/3/34}, this is engaging
15 with the suggestion that use of data might be necessary
16 for some particular purpose, and it is pleaded:

17 "Much of the personal data of Users collected and
18 processed by Facebook, especially that obtained from
19 third parties, was not necessary for the objective of
20 social networking on Facebook as evidenced, inter alia,
21 by the fact that such data were not historically
22 obtained by Facebook when it first started to provide
23 its social networking service (... at a time when
24 Facebook faced at least some semblance of competition)."

25 So in the context of addressing Meta's putative case

1 that this is all pursuant to some legitimate objective,
2 there is a reliance on the position historically, when
3 Facebook first started providing its social networking
4 service.

5 In paragraph 96, on page {B/3/62}:

6 "In contrast to the ramping up of the amount of
7 Off-Facebook Data which Facebook has collected from its
8 Users and exploited over time, Facebook has not made
9 commensurate or related improvements to the service it
10 provides to Users which reflect the increased extraction
11 of Off-Facebook Data."

12 So that is a comparison essentially of the relative
13 fairness of the bargain.

14 Then specifically in the section pleading abuse, so
15 this is on page {B/3/121}, paragraph 153, subparagraph
16 (d), subparagraph (v), subparagraph (1).

17 THE CHAIRMAN: What page is that?

18 MS FORD: That is page 121, and it is the subparagraph (1)
19 at the top of the page. This is pleading to limb 2b of
20 the *United Brands* test. It makes the point:

21 "Prior to the Claim Period, and in particular prior
22 to it achieving market power and/or dominance, Facebook
23 provided the same or materially similar social network
24 services without using or monetising Users' Off-Facebook
25 Data and remained very profitable ..."

1 There is a cross-reference to Professor Scott
2 Morton's report, and it makes the point:

3 "This provides a 'before and after' comparator of
4 the kind routinely used in unfairness case[s]. It shows
5 that in the period before the Infringements in the
6 present case Facebook did not impose (or could not
7 successfully impose ...) Off-Facebook Data collection
8 and, therefore, Off-Facebook Data price."

9 So, in our submission, there is a central theme of
10 the pleaded case which is to engage in a comparison of
11 Facebook's historic conduct and that pleaded case
12 expressly relies on the position in the early period,
13 not just a few years prior to the 2013 date. That is
14 then reflected in the class rep's expert economist's
15 proposed methodology, which is the basis on which the
16 claim was certified. If we can look, please, at
17 Professor Scott Morton's first report, in bundle
18 {C1/1/68}. Paragraph 237 is the first relevant
19 paragraph and she explains there:

20 "I have examined the development of Facebook's
21 user-facing offering over time and constructed the
22 timeline below. My assessment, which I will need to
23 refine post-disclosure, is that the key user-facing
24 functionalities were already in place prior to the roll
25 out of Off-Facebook Tracking (which began around 2010)

1 and the use of this data for advertising purposes (which
2 I understand occurred in or prior to 2014)."

3 She then, at paragraphs 241 to 243, page {C1/1/70},
4 sets out is what she calls:

5 "Comparator 1: using the 'pre-period' before
6 Facebook achieved market power as a benchmark for the
7 fair bargain."

8 So that is one comparator she is proposing to use.

9 Then, at paragraph 253 on page {C1/1/72}, she is
10 referring here, under the heading, "How should the
11 'economic value' of Facebook to users be accounted
12 for?", she is again referring to an exercise of
13 comparison over time. So she says:

14 "First, it is useful to distinguish the value
15 generated over time. I see three relevant
16 components ..."

17 The first is:

18 "... the value users received from using Facebook
19 prior to the imposition of Off-Facebook tracking ..."

20 So part of the methodology which the Tribunal has
21 certified to engage in this historic comparison, it does
22 appear to be common ground between the parties
23 respective experts that some pre-period is necessary in
24 order to do that exercise. If we can please look at
25 what Mr Parker has said about it in his statement, this

1 is going back to {D/6/3}, and he says in his
2 paragraph 5:

3 "... I consider that information on some pre-period
4 prior to the Claim Period is relevant for the assessment
5 of market definition and dominance on the user side and
6 the issues relevant to the assessment of the alleged
7 abuses."

8 Then further, at paragraph 7 {D/6/4}, we see him
9 saying:

10 "As a general principle, I agree that a firm's
11 prices or terms of supply shortly prior to allegedly
12 becoming dominant can potentially be a suitable
13 comparator for assessing whether its prices or terms of
14 supply shortly after becoming dominant were abusive ..."

15 What pre-period does Mr Parker consider to be
16 suitable? We can see that in paragraph 8. He says:

17 "I have considered what starting date for the
18 pre-period may be relevant. I understand that the Claim
19 is about the commercialisation of the Data to which the
20 [Class Representative's] claim relates, which I
21 understand that the Claim identifies occurred from
22 June 2014. I also understand that Meta started
23 receiving Data to which the [Class Representative's]
24 claim relates for use in personal advertising since
25 January 2013. I thus consider, on a conservative basis,

1 that starting the pre-period in 2012, or 2011 at the
2 earliest, would provide for a meaningful and
3 sufficiently pre-period (1-2 years prior to when Meta
4 first received the Data to which the [Class
5 Representative's] claim relates for use in personal
6 advertising). A longer pre-period is unlikely to be
7 informative due to the significant and rapid changes in
8 the relevant services and markets that I expect to have
9 occurred in prior years."

10 So, conveniently, he says that the same bright line
11 cut-off of 2011 that the prize in respect of data, or
12 IFD's concern with data also applies for the purposes of
13 conducting this historic comparison as well. In our
14 submission, with respect to Mr Parker, his position here
15 does not make sense, because the dates that he has
16 referred to have nothing to do with comparing the
17 position before Meta had market power with comparing the
18 position after. That is a point that Professor Scott
19 Morton has made in the joint expert statement. If we
20 can look at {C7/20/23}, this is back in paragraph 4.6
21 which we are looking at earlier. She says, in the first
22 bullet:

23 "As noted in my prior reports Facebook appears to
24 have initially taken a more privacy-focused approach
25 when it faced competition ... then to have increased its

1 data collection after the market 'tipped' in its favour.
2 Pre-disclosure it is not possible to say exactly when
3 this tipping point occurred, but it seems likely it
4 could have been between 2008 and 2010. If this is
5 correct Mr Parker's approach is likely to limit
6 disclosure to a period after which Facebook was already
7 dominant. I would not therefore have access to
8 disclosure in respect of a 'clean' period in which
9 Facebook did not have significant market power."

10 Just to highlight the point that we make, that the
11 dates that Mr Parker has focused on are not actually
12 related to a comparison of pre-market power and
13 post-market power at all, this is the point that she
14 draws out in the second bullet, she says:

15 "Put another way, Mr Parker's proposal provides
16 a period pre the use of Third Party Activity Data for
17 use in personalised advertising but not a period pre the
18 accumulation of market power. Further, it is quite
19 possible that Meta would have started collecting the
20 data to which the claim relates some time prior to using
21 it directly to personalise ads. Mr Parker's proposal
22 therefore risks limiting disclosure to a period after
23 the relevant data was first collected and therefore not
24 covering the Facebook's decision making around the
25 original collection of this data."

1 So that is Professor Scott Morton's concern, that
2 this 2011 date simply does not have anything to do with
3 the methodology she is actually trying to carry out.

4 If we go back to what Mr Parker --

5 THE CHAIRMAN: Are you able to propose a date or not?

6 MS FORD: We have proposed, in relation to this category --

7 I am just looking for my formulation. I think we
8 have -- depending on where it appears in the particular
9 issues for disclosure, I think we proposed various dates
10 between 2005 and 2007. I will be corrected if I am
11 misremembering that. There may be some later ones. We
12 have made it quite specific according to the various
13 IFDs, but they are all the ones that are necessary for
14 the purposes of conducting this historic exercise.

15 Mr Parker has given us some reasons why he says you
16 should not go back that far, and they are in his
17 paragraph 7 {D/6/4}. What we say about them is that,
18 essentially, Mr Parker is trying to argue points of
19 substance now, when actually they need to be saved for
20 trial. So if we look for example at subparagraph (a),
21 he says:

22 "... much of the information relating to Facebook's
23 activities in the early years of its existence is
24 unlikely to provide a suitable comparator, given that
25 there are likely to be many ways in which the relevant

1 markets, services, technologies and user preferences
2 changed in addition to changes to the degree of
3 Facebook's market power (if any)."

4 Now, whether this information is a suitable
5 comparator or it is not a suitable comparator is
6 precisely what, in our submission, the Tribunal will
7 have to decide in due course, but we say it cannot
8 possibly take a view about that now in advance of trial
9 for the purposes of disclosure.

10 Similarly subparagraph (b), Mr Parker says:

11 "... in any event, many of Facebook's actions in
12 those early years of its existence will have been
13 unrelated to the types of actions described in the
14 [Class Representative's] claim, including, for example,
15 by virtue of the data policies Facebook may have
16 experimented with in the early years of its existence
17 having little resemblance to the allegedly abusive
18 policies regarding the Data to which the [Class
19 Representative's] claim relates."

20 THE CHAIRMAN: Okay, we will hear the rest at 2, and then,
21 at 2, will you just show me the respective dates that
22 you propose in relation to the issues --

23 MS FORD: Yes.

24 THE CHAIRMAN: -- so we can start off with that.

25 We will rise now. Thank you.

1 (1.07 pm)

2 (Luncheon adjournment)

3 (2.05 pm)

4 THE CHAIRMAN: Yes, Ms Ford.

5 MS FORD: The Tribunal asked me to address you on the dates
6 for the second category of issues for disclosure, which
7 is the one we are concerned with historically.

8 THE CHAIRMAN: On that, as I understand it, your expert
9 evidence is that dominance was achieved by about 2008.

10 MS FORD: She says she doesn't know but it could be around
11 2008 to 2010.

12 THE CHAIRMAN: You say that the relevant period extends even
13 prior to that because you want to compare what they were
14 doing when they did not have dominance with when they
15 did have dominance, but the thing is even if you are
16 right, any disclosure has to be proportionate and they
17 will come to a stage whereby the amount of disclosure
18 would have to be pretty minimal the further you go back.

19 MS FORD: We certainly recognise that proportionality has a
20 role to play, but we say it is at the next stage
21 essentially.

22 THE CHAIRMAN: Let us look at it, but let us say we go back
23 to 2005 as has been suggested in your submissions. What
24 is that going to achieve? Well, you will get stuff
25 whereby, for example, they consider imposing these terms

1 but they say "No, we had better not do that because we
2 are going to lose business because we are not in a
3 dominant position", and then they revisit it and they
4 then get to a stage where they say, well, "we have enough
5 power, having had the Beacon experience, we have enough
6 power to impose these terms so that is what we can do."

7 That would probably generate very few documents just
8 to prove that simple proposition, but what I am keen
9 that we avoid is by putting in an early date, it sort of
10 changes the dynamics of what is going to be disclosed,
11 because I would have thought it is unlikely that we
12 would want extensive disclosure the further you go back.
13 You know, you can establish some basic propositions
14 either by a statement or an RFI or limited disclosure
15 without getting the kitchen sink. I am just conscious
16 that we do not want to impose a date unless it is
17 clearly understood that it does not mean there is going
18 to have to be some massive disclosure being provided the
19 further you go back, but anyway, you just say what you
20 want to say about the dates and then we will take it
21 from there.

22 MS FORD: Sir, just to respond to the point you just put to
23 me, two points in response. The first is you put it to
24 me that it is disclosure to go to that basic point, but
25 it is important to emphasise that that is actually at

1 the heart of the Class Representative's case. It is
2 unfair because Facebook is able to impose these terms by
3 reason of the market power it acquired. So it is
4 absolutely essential to be able to compare what it was
5 able to do before effective competition and what it was
6 able to do after.

7 THE CHAIRMAN: That is clear, and that is why, as I said at
8 the beginning, generally lists of issues for disclosure
9 is defined by what is being pleaded. It may be they do
10 not agree with your pleaded case. They may think it is
11 nonsense, but the fact is it is not the role of the
12 listed issues to determine contentious issues. It is
13 simply to determine what the universe is for the
14 purposes of disclosure, and even then it is not
15 conclusive.

16 MS FORD: Absolutely, and that brings us to the second
17 point, which is if there were to be a concern about the
18 proportionality regarding a large volume of disclosure
19 going back that far, then that is something that can be
20 addressed when we come back at the beginning of the
21 Michaelmas term, possibly by reference to some sort of
22 further information about whether that is a genuine
23 concern or not, whether or not hits to produce large
24 volumes of documents or not and what is the
25 proportionality of addressing them. In that context,

1 the Tribunal can give directions concerning which
2 custodians, which depositories, all those issues, in
3 order to manage that concern,

4 but I would not respectfully endorse the point the
5 Tribunal makes that the first stage is what is the
6 substantive issue that we are giving disclosure against.

7 THE CHAIRMAN: So what is your (unclear audio).

8 MS FORD: So the Tribunal should have at bundle D, tab 9 the
9 latest version of a table that has been produced between
10 the parties essentially encapsulating the differences in
11 the wording between the two parties for each of the list
12 of issues.

13 Probably the easiest way to show the dates is to go
14 through and flag up those which fall under this heading
15 of the historic comparison and show you what the dates
16 are. This is an exercise that we have run through
17 essentially over the short adjournment, so --

18 MR SINGLA: I'm sorry to interrupt. We filed a corrected
19 version of this document. It may be more useful to use
20 that document, because otherwise --

21 THE CHAIRMAN: If there is a corrected version, let us work
22 from that.

23 MS FORD: So there is a version at D8, which was a tracked
24 changes version that was --

25 THE CHAIRMAN: (inaudible) Mr Singla?

1 MR SINGLA: Yes, we have corrected what they said --

2 THE CHAIRMAN: I saw the letter that you wrote.

3 MR SINGLA: Exactly. It is just helpful because you can
4 then see what our position is.

5 THE CHAIRMAN: Okay.

6 MS FORD: So we then responded with a further version, which
7 is D9, which accepted the proposed changes and made some
8 consequential, we say essentially uncontroversial
9 changes. So the up-to-date version that accepts Meta's
10 proposals is at D9.

11 THE CHAIRMAN: Okay, so we will start at D9 then, yes.

12 MS FORD: I'm told that we received the letter at around
13 10.30 this morning saying that that version is fine. So
14 the D9 version we understand is an accepted version now.

15 THE CHAIRMAN: Okay. What do you want to show me on D9?

16 MS FORD: I was simply going to take you through and show
17 you -- and it may be after a while the Tribunal gets the
18 idea -- but the dates, the relevant dates.

19 So, for example, these are the dates for those
20 issues that fall within this category involving historic
21 comparison. So the first one is issue 1, sub-issue 4,
22 and this is asking for information about which entities
23 within Meta made decisions in respect of the use of
24 Facebook data relating to UK Users. The date for that
25 is 2007. The Tribunal should have that on page 4

1 {D/9/4}.

2 THE CHAIRMAN: Within that one there is two issues, are
3 there not? One is the definition point, and we have
4 resolved that.

5 MS FORD: Yes.

6 THE CHAIRMAN: The other is effectively the start date.

7 MS FORD: The temporal scope, yes, and the purpose of this
8 little clump of issues is to try and understand which
9 entities within Meta were doing what they were doing at
10 the various times.

11 THE CHAIRMAN: Yes, what is the next one?

12 MS FORD: The next one is 3(1) under the heading of:

13 "Relevant terms of service, policies and/or
14 arrangements."

15 That is asking from 2005 to present, what were the
16 terms of service and/or policies applicable to UK Users.
17 Then there are three subheadings: the user side of
18 Facebook; data generated as a result of their activity
19 on the user side of Facebook; and Off-Facebook Data
20 essentially asking about terms and conditions, and that
21 is 2005 onwards.

22 THE CHAIRMAN: Yes.

23 MS FORD: The next one is issue 5 on page 7 {D/9/7}. I
24 should say we have done this exercise of running through
25 over the short adjournment, so I apologise in advance if

1 I inadvertently go over one of them.

2 Issue 5 is under the heading "Facebook's features
3 and functionality, use and reasons for use", and it is
4 asking about Facebook's user facing features from
5 February 2005 to date.

6 THE CHAIRMAN: Yes.

7 MS FORD: Then over the page, page 8 {D/9/8}, issue 5(2):

8 "How did Meta personalise the content on the
9 user-side of Facebook for UK Users."

10 That is from 2009 to date.

11 Issue 6:

12 "For what reasons have UK Users used the user-side
13 of Facebook from 2005 to date and what is Meta's
14 consideration and/or analysis of the --

15 THE CHAIRMAN: Which one is that?

16 MS FORD: That is issue 6. Then under issue 6 is a
17 sub-issue 6(3), which is asking for:

18 "... Meta's assessment of the role that:

19 "from 2005 to date, network effects; and.

20 "from 2009 to date, addiction effects.

21 "Have in user's use of the user-side of Facebook."

22 THE CHAIRMAN: Yes.

23 MS FORD: Issue 6(4) is:

24 "From 2007 to date, Meta's consideration and/or
25 analysis of the reasons for which UK Users value,

1 dislike, change their behaviour in relation to
2 advertising on the user-side of Facebook ..."

3 THE CHAIRMAN: They do not put a date on that.

4 MS FORD: They propose 2011, so their proposal --

5 THE CHAIRMAN: Which one -- you are looking at 6(5), are
6 you?

7 MS FORD: I'm sorry, 6(5), yes, 2011.

8 THE CHAIRMAN: I thought you said -- you are not looking at
9 6(4) then?

10 MS FORD: Yes, 6(4).

11 THE CHAIRMAN: On 6(4) you put 2007 to date. They have not
12 put in a date.

13 MS FORD: Yes, that is true. On prior 4 --

14 THE CHAIRMAN: Or someone may have.

15 (Unclear - simultaneous speakers)

16 MS FORD: Just 2011.

17 THE CHAIRMAN: Is that 6 in general? So their date is 2011
18 in general, okay.

19 So we have done 6(4). Then 6(5), yes.

20 MS FORD: No, 6(5) is one of the category 1, so from the
21 point when they first collect it etc, that is
22 category 1. Over the page, 8(1) {D/9/9}.

23 THE CHAIRMAN: Yes.

24 MS FORD: Under the heading:

25 "The collection, receipt, processing and/or use of

1 users' data."

2 We asked:

3 "From 2005 to date, what data on UK Users has been
4 collected and/or received, and/or processed, and/or
5 aggregated or used by Meta?"

6 This is the headline issue that I drew the
7 Tribunal's attention to where we are saying what has
8 Meta done over this period with data essentially.

9 THE CHAIRMAN: So your wording is in subject to the date
10 point, which we have already ruled on overriding
11 issue 1, have we not? So we look at 8(1).

12 MS FORD: Yes, so the definitional issue does feed in here.

13 THE CHAIRMAN: It does.

14 MS FORD: We have not confined our inquiry to --

15 (Unclear - simultaneous speakers)

16 THE CHAIRMAN: No, you have not. That is what I am saying.

17 The only remaining contentious point really on 8(1) is
18 the date point.

19 MS FORD: Well, they -- even having -- even taking into account
20 the Tribunal's ruling on the definition, they are still
21 seeking to confine this inquiry to third party activity
22 data and/or other Meta products. Whereas we are asking
23 about the entire universe of data collected by Meta.

24 So even in the light of the Tribunal's ruling about
25 essentially the equivalent of Off-Facebook Data, we are

1 asking about both On- and Off-Facebook Data, whereas
2 I think they are suggesting it be confined.

3 THE CHAIRMAN: Okay.

4 MS FORD: Next one is 8(13) on page 11 {D/9/11}.

5 THE CHAIRMAN: Ms Ford, what we will do at the end of the
6 day is once we have decided the four overriding issues,
7 we go back through this again and finalise it.

8 MS FORD: Yes, that will be --

9 THE CHAIRMAN: Probably that is going to be the exercise for
10 tomorrow. Yes. Okay, carry on.

11 MS FORD: 8(13) on page 11. This is asking in relation to a
12 particular pleaded allegation:

13 "... was Meta's commercial motivation and/or aim in
14 any way, and if so, in what way, to maximise the
15 collection and/or receipt of Off-Facebook Data on UK
16 users?"

17 We then have -- and that is from 2007, I should say.

18 We then have 15(1) on page 15 {D/9/15}.

19 THE CHAIRMAN: Yes.

20 MS FORD: This is an inquiry about essentially data
21 protection legislation, and we are going to come back to
22 address that in the context of the --

23 THE CHAIRMAN: (unclear audio), yes.

24 MS FORD: The issues which are opposed, but the proposed
25 date for that is from 2005.

1 Then we have over the page issue 17, this is in the
2 context of user side market definition. There is a
3 headline in issue 17 in relation to the user side of
4 Facebook from 2005 to date, and then that applies.

5 THE CHAIRMAN: So are you saying -- we look at 17, yes, at
6 the top?

7 MS FORD: Yes. So that then applies to all the sub-issues
8 which come under that.

9 THE CHAIRMAN: Yes.

10 MS FORD: Issue 17(12) at the end asks how 1 to 11 have
11 changed since 2005, if so why and how. Issue 18 on
12 page 17 {D/9/17}.

13 THE CHAIRMAN: Yes.

14 MS FORD: It is about essentially use of products that
15 compete with user side, and that is 2005 to date.

16 18(7) similarly asks how have all the sub-issues in
17 18(1) to (6) changed since 2005, if so why and how.

18 Issue 20 is asking about Meta's assessment of the
19 role of network effects and addiction effects, and it is
20 relevant to 20(3), switching costs for users. Again,
21 that is an issue which is posed in its entirety, so we
22 will come back to that.

23 Under the heading F "Volume of users", towards the
24 bottom of this page, issue 21 is asking about the number
25 of UK Users and time spent by UK Users on the user-side

1 of Facebook from 2005 to date.

2 THE CHAIRMAN: Yes.

3 MS FORD: Over the page, page 18 {D/9/18}, there is a
4 subheading:

5 "Meta's relationship with third parties/advertisers
6 - advertiser side market definition."

7 In this context, issue 24 is asking:

8 "From 2007 to date:

9 "What advertising products and/or services has meta
10 offered and/or made available ... to third parties,
11 including advertisers?"

12 Various sub-issues under that head.

13 Then over the page we then have page 19, {D/9/19}
14 24(8), which is asking how the sub-issues (1) to (3) and
15 (5) to (7) have changed from 2007 to date, and if so
16 when, why and how.

17 Issue 25 is dated from 2007 to date. The Tribunal
18 will see it is to do with Meta's advertising auctions.

19 25(3) is asking how that changed in 2007 to date.

20 26 --

21 THE CHAIRMAN: Can I just make a note of something?

22 Okay, I have noted up to 25. Which is the next one
23 after that?

24 MS FORD: 26 -- for your attention, 25(3) which is asking
25 essentially how --

1 THE CHAIRMAN: How it has changed, yes.

2 MS FORD: How it is changed. 26(1) is asking:

3 "From 2007 to date, why and to what extent did
4 advertisers and/or other third parties use Meta's
5 advertising products or services?"

6 Go over the page, {D/9/20} 26(5) is asking how the
7 sub-issues in (1) to (4) changed from 2007 to date.

8 Page 21 {D/9/21}, issue 29 is asking:

9 "From 2007 to date:

10 "How did the returns generated for advertisers using
11 Meta's advertising products and/or services compare to
12 other advertising channels ..."

13 Again, within issue 29 there is a sort of sweep-up.
14 29(5):

15 "How and why have (1), (2) and (4) changed from 2007
16 to date?"

17 Under the heading:

18 "Regulatory and Other Developments impacting Meta's
19 products and services" is a heading:

20 "From 2005 to date," in issue 30. I should flag up
21 that there is a typo in issue 30(4), which currently
22 says 2004, but should be 2005.

23 THE CHAIRMAN: Yes.

24 MS FORD: That, on a whistle-stop tour, is the list of the
25 ones that fall within the category we have described as

1 potentially historic comparisons.

2 Just to draw the Tribunal's attention while we are
3 in this document, there is a series of issues on page 23
4 {D/9/23} under the heading "Cost, Revenues and
5 Profitability". Those go back to 2004, and the temporal
6 scope for those are agreed in the sense that it is
7 common ground that the assessment of profitability --

8 THE CHAIRMAN: Yes, I can see why that is contentious.

9 MS FORD: Yes. Of course, it does involve matters that Meta
10 will positively wish to point to say, well, look at
11 all these investments we made that we want to factor
12 into the bargain. So it is in their interest of course
13 to go back to 2004 in order to factor in all those sorts
14 of factors they will wish to point to.

15 I should also address two specific issues for
16 disclosure that Meta has drawn out in its skeleton, and
17 then that will bring me to the end of my submissions on
18 this point.

19 The first one is issue for disclosure 13.

20 THE CHAIRMAN: (inaudible).

21 MS FORD: I'm sorry, sir, I didn't hear what you said?

22 THE CHAIRMAN: I am just going to make a note. What do you
23 want me to look at?

24 MS FORD: Issue disclosure 13, which happens to be on
25 page 13 of the document.

1 What I am addressing are the two issues for
2 disclosure that Meta has addressed in paragraph 13 of
3 its skeleton.

4 So issue for disclosure 13 is concerned with what
5 choices third parties had in relation to the collection
6 and/or receipt and/or processing and/or use of
7 Off-Facebook Data.

8 We have proposed timing which says:

9 "From the point at which Meta first collected and/or
10 received and/or processed and/or used Off-Facebook Data
11 to date."

12 So that is the first formulation, the first
13 category. Meta's position, consistent with what it said
14 elsewhere, is that it only started receiving third party
15 activity data for use in personalised advertising from
16 2013.

17 So it is challenging this particular issue for
18 disclosure on that basis, as we understand it. In my
19 submission, that suffers from all the same ambiguities
20 that I have already identified concerning the 2013 date.

21 Their point appears to be, well, if you are looking
22 at what options were available for users in relation to
23 this data, it does not need to go back earlier than when
24 we were processing the data, but that still begs the
25 question, well, then when were we?

1 THE CHAIRMAN: Yes.

2 MS FORD: Then the other particular issue that Meta have
3 drawn attention to is issue 14(2), which is over on
4 page 14, and this one asks from 2010 to date --

5 THE CHAIRMAN: Is that in the same paragraph?

6 MS FORD: It is page 14.

7 THE CHAIRMAN: In their skeleton?

8 MS FORD: Yes, same paragraph of their skeleton, I think.
9 Paragraph 17. Yes.

10 THE CHAIRMAN: Yes.

11 MS FORD: Now, this issue is asking from 2010 to date, what
12 tools were available on Facebook to UK Users to access
13 their online data held by Meta; when, how and why were
14 these introduced by Meta.

15 As we understand the point, Meta is saying, well,
16 this is a paragraph of your claim which concerned with
17 the Claim Period, so you only need to see disclosure in
18 respect of the claim period.

19 The point we make is that this issue for disclosure
20 is asking when, how and why these measures were
21 introduced by Meta, and that wording is not contested.
22 It is accepted that we are entitled to disclosure about
23 when, how and why were measures introduced by Meta.

24 Meta has pleaded in its Defence at paragraph 66(d)
25 that since 2010 it offered users a 'Download your

1 Information Tool', and in Defence 74(a)(iii) it pleaded
2 that since 2014 Meta has introduced more than a dozen
3 new and updated privacy settings.

4 THE CHAIRMAN: You say refers to what, 2010?

5 MS FORD: 66(d) refers to 2010.

6 THE CHAIRMAN: Say that again?

7 MS FORD: 66 subparagraph (d) of the Defence. It is at
8 {B/4/44}.

9 THE CHAIRMAN: That refers to 2010.

10 MS FORD: Yes.

11 THE CHAIRMAN: 74(a)(iii) refers to when.

12 MS FORD: Pleads that {B/4/45}:

13 "Since 2014, Meta has introduced more than a dozen
14 new and updated privacy settings to put users in control
15 of their information."

16 THE CHAIRMAN: Okay.

17 MS FORD: Now, the simple point we make about this is that
18 given that no objection has been taken in principle to
19 this issue for disclosure covering when, how and why
20 tools were introduced, logically if you have tools that
21 were introduced in 2010 or in 2014, then you need to go
22 back to those dates in order to get that information.
23 That is the simple point we make.

24 So unless I can assist further, that is our position
25 on temporal scope.

1 MR SINGLA: Sir --

2 THE CHAIRMAN: A lot of this is not live or die, because of
3 the things I said earlier, but what strikes me about
4 many of these questions is they are effectively like a
5 form of interrogatories and not a list of issues for
6 disclosure.

7 Some of these questions, I fully understand why they
8 are being asked, but you would normally have that by an
9 RFI or a request for disclosure statement, or something
10 like that. We are in this odd world that we are trying
11 to address as part of the list of issues. I mean, that
12 is quite different, and the function of the list of
13 issues is not this,

14 but, look, I appreciate you have done your best to
15 engage with it and we have all got to live with what we
16 have got, but I am under no illusion about how messy
17 this has been, for the reasons I have expressed before.
18 It has been messy, but I am not criticising anyone
19 because I don't think any of this work is going to be
20 wasted if we go down the Redfern Schedule route, but it
21 is difficult for you to deal with some of these, because
22 I think that whether the date is 2004, 2011, 2010 is not
23 really going to be determinative of what is going to be
24 disclosed when we come back to it later.

25 MR SINGLA: Just to respond to that, I mean, first of all

1 you know we say this is completely unsatisfactory and we
2 are trying to do our best.

3 THE CHAIRMAN: I know you are. I understand.

4 MR SINGLA: But on something like temporal scope, the
5 process has been made even more difficult because of the
6 different dates that are now being suggested. I will
7 come to our proposal in a moment.

8 THE CHAIRMAN: We can probably go through them one by one
9 later.

10 MR SINGLA: We do not need to on our view of the world, and
11 I will explain why.

12 The issue on this temporal scope question is that,
13 with respect to Ms Ford, it is not good enough to say we
14 are just talking about framing the issue and
15 proportionality comes in at the second stage, because
16 you will understand, if the issue says from 2005,
17 question, then that will inevitably have consequences
18 for what has to be disclosed down the line.

19 So on temporal scope, it is very important, sir,
20 that you grapple with how the issues are being framed.
21 We cannot accept, with respect, a disclosure exercise
22 going back 20 years. You will understand why. I mean,
23 you have given two --

24 THE CHAIRMAN: The thing is a lot depends on what you mean,
25 because if -- we understand about their cases that you

1 have a predominance period and a dominance period, and
2 the predominance period you don't have effective behaviour
3 that they said. They said you waited until you had a
4 dominant position to then impose this term.

5 We understand all of that, but it does not mean you
6 need to have the kitchen sink to establish that. The
7 odd thing is we are sort of worried about the next phase
8 when we are just trying to formulate the list of issues
9 which is -- you know, normally these lists of issues,
10 and certainly in any case I deal with, are relatively
11 short documents, they are not going to be in this sort
12 of detail, they are definitely not going to be in an
13 interrogatory, and they are closely tied to the
14 pleading, subject to a couple of exceptions which I
15 explained at the beginning.

16 Well, just going to through it.

17 MR SINGLA: We obviously couldn't agree more. This is not
18 the way a list of issues are generally approached, but
19 we are dealing with what has come our way.

20 THE CHAIRMAN: I agree.

21 MR SINGLA: On this, they are pressing the Tribunal to put
22 2005 into the list of issues and we are resisting that.
23 I'm not really sure, in my position, sir, that I can do
24 anything other than say to the Tribunal you shouldn't
25 put 2005 into the list of issues, and I will explain our

1 proposal, but we are very pleased, sir, that you are chairing
2 this because it is your two judgments in *Trucks* that you
3 know we rely on in our skeleton, and I will show you the
4 passages in particular, but essentially, we say this is
5 completely disproportionate, and it is disproportionate
6 now to put 2005 into the list of issues. It is not good
7 enough to say, well, do not worry about proportionality,
8 we will come back to that.

9 So let me just explain what we say the Tribunal
10 should do at this stage.

11 THE CHAIRMAN: Yes, sure. Interesting. Carry on.

12 MR SINGLA: So our proposal, just to be clear, is in respect
13 of certain discrete points like profitability we are
14 happy to go back to 2004. You just saw that.

15 THE CHAIRMAN: I understand why you do that. That is
16 absolutely fine.

17 MR SINGLA: In respect of Beacon, there was a specific
18 functionality.

19 THE CHAIRMAN: That is a special --

20 MR SINGLA: Exactly. So we have gone back to 2007, 2009 for
21 Beacon, but otherwise, apart from the two issues that
22 Ms Ford addressed at the end, we say 2011. Let me just
23 explain why that is in my submission eminently sensible.

1 One has to remember, you have actually not heard this
2 date this morning, but the Claim Period, this is a Claim
3 Period that starts in 2016.

4 THE CHAIRMAN: I know that.

5 MR SINGLA: So we are talking about a claim that starts in
6 2016.

7 THE CHAIRMAN: We are going back five years --

8 MR SINGLA: Correct.

9 THE CHAIRMAN: -- and that should give you enough data.

10 The problem with that is that on their pleading they
11 pleaded in effect a much wider period, as you know, and
12 that raises the question that when we frame the issues,
13 do we do it by reference to the wider period even though
14 you do not agree with its relevance, and that is the
15 control mechanism at this stage or the next stage?

16 That is the fundamental point, because I can
17 understand if they say you became dominant their best
18 guess is 2008, they want to have some information that
19 goes back before that, and they are probably entitled to
20 that even if it is just a relatively non-taxing exercise
21 of providing an information statement in the form you
22 have seen in other cases,

23 but what your worry is, is that by putting in an
24 early date it raises a presumption that you have got to
25 do some sort of massive disclosure exercise going back

1 many years, and I can see why your fear is that I do not
2 know who will chair the next one down. They may think
3 differently to how I am looking at it, then your fear is
4 that you will end up with someone who -- I do not mean
5 it unkindly, but you will end up with a situation that
6 the earlier dates have taken us, yes, you have got to
7 give some wider extensive exercise from that earlier
8 date, but that wouldn't happen with me.

9 MR SINGLA: Sir, with respect, one has to grasp the nettle,
10 but they are essentially saying to the Tribunal there is
11 an issue on the pleadings which we understand what the
12 issue is said to be, but what they say follows is that
13 they should be entitled to disclosure going all the way
14 back to 2005.

15 THE CHAIRMAN: I am not sure that is right. What it is,
16 when you frame the issues for disclosure, I am sure I do
17 not need to tell you this, but you know, you look at
18 what is in the pleading. You say this is the issue, you
19 give the paragraph numbers of the pleading and then you
20 go from there, and then the next stage is the stage
21 where you make firm decisions about what needs to be
22 disclosed, from when and under what format,

23 but I understand what your fear is, and we are going
24 to have to think about what is the best way of doing it,
25 because certainly at the moment my intention is not to

1 give you some massive burdensome exercise prior to the
2 period of 2011.

3 I can see why 2011 has been chosen, I can see why
4 you say that is a sort of good working rough date to
5 sort of start working from, but there clearly may be
6 relevant evidence and relevant considerations prior to
7 that date going back as far as 2005.

8 It is how you reconcile those two positions that we
9 need to get to without prejudicing either side for when
10 it comes to the next phase.

11 MR SINGLA: But, sir, I am grateful for the indication that
12 you broadly see the sense of 2011, but I think that the
13 problem is the suggestion that one should go back,
14 frankly, in any form, so I obviously accept and I am
15 grateful for the idea, that we would not have to do a
16 big disclosure exercise pre-2011, but I am actually
17 saying --

18 THE CHAIRMAN: (inaudible) likely to.

19 MR SINGLA: I understand, but I am actually saying to the
20 Tribunal that one has to consider really whether we
21 should be doing anything in relation to pre-2011.

22 THE CHAIRMAN: (inaudible) some of it, because in some of
23 the issues you accept we do anyway.

24 MR SINGLA: No, I am parking the issues with Beacon and
25 profitability. Those I put to one side for the purposes

1 of this discussion,

2 but insofar as the Tribunal is considering some
3 lesser exercise, whether it is -- I think you mentioned
4 statements and things of that sort, I respectfully
5 submit that there is a balance to be struck, as indeed
6 you pointed out in the *Trucks* judgments, between
7 relevance and proportionality. Ultimately, it is
8 obviously within the gift of the Class Representative to
9 say, well, we would like to go all the way back to the
10 beginning and we would like to explore every logical
11 avenue and we want to see the changes in the predominant
12 stage.

13 That is fine for them to run that sort of case, but
14 it does not follow, with respect, that they are then
15 entitled either to disclosure or, indeed, to some lesser
16 material.

17 THE CHAIRMAN: I think what we were dealing with in the
18 judgments you are referring, or the rulings you are
19 referring to was I was focusing in there at the later
20 stage, as you know. I am not focusing on what should be
21 a simple task of a list of issues for disclosure.
22 I wasn't focusing on that.

23 Whatever date we put here is not going to determine
24 what specific categories are going to be ordered, but
25 what they want is the flexibility at least to say, well,

1 the period that is under consideration next time around
2 is an earlier date than what you are suggesting, but
3 whatever date we impose on this, let us say, pre-2011
4 date has got to be subject to further argument next time
5 around in relation to each specific category, because
6 I cannot see how we can fairly close them out on what is
7 meant to be a list of issues.

8 You are confusing what the list of issues is, is
9 what is going to be disclosed further down the line. We
10 are just scoping the universe, the potential universe,
11 and certainly when it comes to going back many years,
12 I know that quite often the data is corrupted, very
13 difficult to get. That is why we are always willing to
14 consider things like statements where you get someone
15 who knows what they're doing. So: this is what we were
16 doing in this period, we decided not to do that, and
17 then the other side then comes back and says, well, we
18 want specific disclosure on this and that.

19 I understand where you are coming from. I also
20 understand where they are coming from.

21 MR SINGLA: No, but sir, if I may say this, I understand
22 what you just said, if one were dealing with a CMC, as
23 it were, in the High Court with a Practice
24 Direction 57AD process. We are actually now in this
25 case and at this hearing in a different world, because

1 in addition to the discussions that have been going on
2 in relation to the formulation of the issues, as you
3 know because I have said this a few times, we have
4 already done a considerable amount of work in terms of
5 explaining to the Class Representative just how
6 voluminous and expensive and time-consuming this
7 disclosure will be.

8 So this is why it is important that you grasp the
9 nettle, because let me just take you to the disclosure
10 report because it is actually quite important for you to
11 see that we are not, as it were --

12 THE CHAIRMAN: Which page are you looking at?

13 MR SINGLA: It is in bundle D behind tab 3.

14 THE CHAIRMAN: Is this the updated version?

15 MR SINGLA: It is.

16 THE CHAIRMAN: Because I was looking at one. Let us see if
17 it is the same one --

18 MR SINGLA: I hope I gave you the right reference earlier,
19 but it is D3, and to explain for the purposes of this
20 version of the --

21 THE CHAIRMAN: This is 4 June version?

22 MR SINGLA: Correct.

23 THE CHAIRMAN: Yes.

24 MR SINGLA: We --

25 THE CHAIRMAN: There was an earlier version which was

1 not ...

2 MR SINGLA: You just need to look at the updated version for
3 this purpose, because it now runs to 300 pages.

4 What is set out here on the basis of the temporal
5 scope going back to 2012, but as you know we have
6 pragmatically now proposed 2011, but just on the 2012
7 basis, if you go to internal page 25, it is paragraph
8 4.29A.9, internal 25, internal page 25 {D/3/28}.

9 THE CHAIRMAN: Is that the easiest way?

10 MR SINGLA: It may be the easier way to navigate.

11 THE CHAIRMAN: Yes.

12 MR SINGLA: Do you have paragraph 4.29A.9?

13 THE CHAIRMAN: Yes.

14 MR SINGLA: You will see the volume of material we are
15 talking about, millions of documents. This is based on
16 a sampling exercise and extrapolation. You will see
17 3 million documents, emails and/or work chat document
18 hits and 4.4 million, including family documents. Do
19 you see those numbers?

20 THE CHAIRMAN: (inaudible) in the past and the --

21 MR SINGLA: So that is --

22 (Unclear - simultaneous speakers)

23 -- important. If you go to internal page 36, which
24 is paragraph 5.10 {D/3/39}.

25 THE CHAIRMAN: Yes.

1 MR SINGLA: You will see the cost estimate to be in the
2 region of 7 to \$8.5 million. Do you see that?

3 THE CHAIRMAN: That is really helpful. That is what I
4 always want people to do, so if there is an order for
5 disclosure we know what the cost is.

6 MR SINGLA: Right, but my hesitation about leaving these
7 sorts of points to a second stage, the reason I am
8 pushing back on that is because we are not at the moment
9 looking at the list of issues in the abstract. The way
10 this process has evolved, and I am not going to get into
11 why we are here, but we are here, and the process now is
12 we are trying to settle the list of issues, at the same
13 time on our side we have done a considerable amount of
14 work to explain who the custodians would be and what the
15 cost and time would be.

16 Notwithstanding that on a 2012 temporal scope it is
17 \$7 to \$8.5 million, and Mr Wisking explains this will
18 take 6 months in his third witness statement. I am sure
19 you saw that. Notwithstanding we have explained the
20 size of the exercise, the Class Representative comes
21 along to the Tribunal saying we want the temporal scope
22 to be 2005 with some other wording and other places,

23 but that is their position, and what I am
24 submitting, with respect, is if the Tribunal simply says
25 we are not getting into what the actual searches would

1 be, we are just framing the issues.

2 THE CHAIRMAN: That's right. That is what we normally do at
3 this stage,

4 but where we have gone wrong is that we did not sort
5 out the list of issues before you went through this
6 exercise. Hindsight is a wonderful thing, you know. If
7 you had come to me and you had said here is this list of
8 issues, you say, Malik, what should we do with this,
9 I would say just get them to do it again, I will explain
10 what is needed and then they will do it.

11 Instead, you have engaged with it, which has been
12 really helpful and it has thrown up issues, which is not
13 a waste of time, but it had made the job of everyone
14 harder. It would have been much easier if you had
15 rejected it on day one, and it also would have been much
16 easier if you did not go through this exercise until we
17 have the draft list of issues finalised by the Tribunal,

18 but we are where we are, and I can see where you are
19 coming from, but this is a very useful document, having
20 looked at it now, where I have an idea what all these
21 things have got cost, because quite often people do not
22 put the cost in it, as you know, and then you are a bit
23 in the dark on the day, but this is helpful.

24 MR SINGLA: Yes, but we are trying to, as it were, head off
25 at the pass --

1 THE CHAIRMAN: Yes, I know what you are trying to do.

2 Whether I let you is a different question.

3 MR SINGLA: But what Ms Ford has just not engaged with at
4 all, with respect, is that on the 2012 basis this is the
5 cost and this is the time.

6 THE CHAIRMAN: I fully understand that, but as you know,
7 issues of proportionality and also what is the right
8 remedy, if there is going to be a remedy, and what form
9 of disclosure is for next time, but you are pre-empting
10 next time, but let us just keep moving because we do
11 need to keep moving.

12 MR SINGLA: Can I just explain this?

13 Their position, I actually, with respect, would
14 suggest that the two categories that Ms Ford has
15 referred to, that is actually something that could give
16 rise to confusion.

17 What they are actually saying, and this has actually
18 been their position since day one on the list of issues,
19 they say go all the way back. Where there happen to be
20 issues that refer to our data, instead of dropping in a
21 date which is 2005 or 2007, they have used this
22 formulation which is first considered,

23 but in substance, if one takes a step back they are
24 saying to the Tribunal that because they have this case
25 about changes which goes back before the alleged

1 dominance, they can essentially have all disclosure from
2 2005. So one does not actually need to get into the two
3 categories.

4 THE CHAIRMAN: The main fact is we put in a date as the
5 relevant date consistent with the pleadings does not
6 determine what order for disclosure is to be made. This
7 is a fundamental problem with this list of issues,
8 because it is a -- I have already said what I think
9 about it, but, you know, there is a fundamental
10 problem, and the result is that you are being defensive,
11 for understandable reasons, because you are worried that
12 if the list of issues is misunderstood and treated as
13 something other than it should be, then you are looking
14 down a precipice with no bottom.

15 MR SINGLA: Sir, with respect, I don't really accept the
16 suggestion that we are acting prematurely or jumping at
17 shadows here.

18 The Class Representative is saying to the Tribunal
19 that these issues, which are issues for disclosure,
20 should go back to 2005 or should have wording such as
21 when did you first consider something. That is the
22 Claimant's proposal.

23 What are we to do other than to say it is
24 unacceptable for disclosure to go back 20 years at the
25 cost of so many millions?

1 Now, there is no point in my submission in, as it
2 were, kicking this off to the next stage, because we
3 already know they are going to say notwithstanding that
4 it is \$7 to \$8 million, we want 20 years of disclosure and
5 we are entitled to that because it is our pleaded case.

6 THE CHAIRMAN: I don't think that follows, because they will
7 need to look at your DR. They will see what you say
8 about the estimated costs, and what I think the
9 estimated costs we are looking at is the cost of a full
10 disclosure exercise going over many millions of
11 documents, whereas the true cost is something different.
12 The true cost is what would be either a sampling basis
13 or looking at a disclosure statement whereby you give a
14 statement answering questions. Then it does not follow
15 that by framing the list of issues in this way that will
16 follow, but, you know, part of the problem you have is you
17 do not know what approach someone else might take.
18 I know what my approach would be and you know what my
19 approach would be because you have been before me enough
20 times, but other people may take a different view.

21 MR SINGLA: But the process was set up, sir. I mean, one
22 does not need to go over the history, but the way this
23 process was set up was that they insisted that the first
24 step -- well, actually they changed position, but they

1 turned up at the CMC, the first CMC, saying that we
2 should produce a Disclosure Report. That was what they
3 wanted as the first step, and they refused to provide a
4 list of issues.

5 So what has happened as a result of that history is
6 that the Disclosure Report and the list of issues have
7 become, as it were, conjoined. I think what you are
8 envisaging, and I completely understand why, but you are
9 envisaging a different world where one comes with the
10 pleadings and tries to work out at a high level what the
11 issues of disclosure are going to be. Obviously at that
12 stage proportionality doesn't come into it, because one
13 is just trying to work out or scope what the issues of
14 disclosure are going to be.

15 Here we are in a different situation where we have
16 given, on a 2012 temporal scope, we have said how much
17 it is going to cost, and they are saying notwithstanding
18 that -- you say Ms Ford needs to engage with it. Well,
19 they have had it for at least two weeks.

20 THE CHAIRMAN: Look, in the context of a case this large,
21 and I am sure their team have got other cases to work
22 on.

23 MR SINGLA: No, but we are here to debate disclosure, and
24 notwithstanding those figures, Ms Ford is saying to you
25 today the time period should go back 20 years.

1 Now, that leaves me in a very difficult position, as
2 you'll understand, because what we cannot have is a
3 situation where the list of issues is finalised on the
4 footing the temporal scope should go back that far. I
5 just cannot accept that, either as a matter of
6 proportionality or as a matter of workability.

7 Now that we have had the ruling on the scope of the
8 data, what you are actually envisaging is that the list
9 of issues for disclosure has built within it all of the
10 data going all the way back, and so you will understand
11 in my position it is not satisfactory to leave that to a
12 second stage because we have done absolutely -- we have
13 worked tirelessly over months, both on the list and on
14 the Disclosure Report, and they are essentially ignoring
15 all of that saying "Our pleaded case is our pleaded
16 case". That is why we rely on the *Trucks* judgments.

17 That is why we are hoping, sir, that you will bring
18 some rigour to this and to make clear they will not get
19 disclosure going back 20 years.

20 THE CHAIRMAN: Yes. I can debate this with you
21 indefinitely, but, you know, the rigour comes at the
22 next stage, but the problem we have now got is that the
23 list of issues where it is been framed, you have got a
24 concern that actually it is no longer, or never has
25 been, a list of issues in the conventional sense, but

1 it is more like interrogatories or further information
2 at least in respect of some of them, and it is not tied
3 closely to the pleadings.

4 Remember what I said at the beginning. I will
5 expect when we get the final version of the list of
6 issues to be able to see where both sides say each issue
7 fits in with the pleadings. I do not want to have a
8 situation where -- let me make this clear so one can
9 note it down. If anyone wants to have a reference under
10 an issue to any paragraph in any statement of case, they
11 can have it in. I am not going to have an argument
12 about whether you should have this reference or that
13 reference. I just want a simple list of issues, you
14 list them, each side can put in whatever paragraph
15 reference they want in any statement of case, and that
16 is how it is going to be finalised.

17 MR SINGLA: It is slightly early, but can I suggest we take
18 a break and I just take instructions based on these
19 instructions?

20 But just before we do that, I will just say this.
21 At some point this Tribunal is going to have to grapple
22 with the question of whether it is appropriate for
23 disclosure to go that far back. If you do not grapple
24 with it now we will be met between now and September
25 with requests going back to 2005. So we will be having

1 this debate at some point.

2 THE CHAIRMAN: Of course. Look, there is no doubt that this
3 debate is a useful debate and it is a good marker that
4 you have raised, but what I am saying is that we are
5 not necessarily going to accept the dates that have been
6 proposed by the Class Representative, but whatever dates
7 we adopt, it does not stop any argument by either party
8 raising proportionality and the form of disclosure.

9 So it may be you have something that is a list of
10 issues for disclosure and the Tribunal looks at and says
11 actually we are not going to order any disclosure, or it
12 can say, well, we are going to order disclosure in this
13 limited form, or it can say sampling, whatever all the
14 different mechanisms that we have had in previous cases.

15 MR SINGLA: Let me take instructions, but just to maybe
16 finish with this observation. It is actually quite
17 important to understand that the abuse case -- the Claim
18 Period is 2016. The abuse --

19 THE CHAIRMAN: Yes, starts in 2016.

20 MR SINGLA: The abuse, the alleged abuse is about the
21 monetisation of this data. So I will not go over what
22 that data is, but whatever the data is that they are
23 referring to in their pleading, the alleged abuse
24 remains the monetisation for the purposes of
25 personalised advertising.

1 Now, that, as a matter of fact, commenced in 2013.
2 So we are already giving -- the 2011 proposal already
3 gives them two years before the alleged abuses, five
4 years before the Claim Period, and it is going to cost
5 the vast sums of money that we have referred to.

6 Now, we are not, as it were, saying -- well, so just
7 to put that into context, it is actually a combination
8 of relevance and proportionality. As you said in one of
9 your judgments, it is a question of what is reasonably
10 necessary.

11 So if they want to run some case based on changes,
12 fine, but they do need to explain why the disclosure
13 should go back earlier than 2011. If they get some
14 disclosure and want to make targeted requests in the
15 future once they have had some disclosure, then we can
16 obviously deal with those in due course, but at the
17 moment they are saying on a blanket basis we have a case
18 based on changes and we are therefore entitled to
19 disclosure going that far back.

20 Indeed, on issues, as I say, on Beacon, for example,
21 it is no good referring to Beacon --

22 THE CHAIRMAN: That one is justified.

23 MR SINGLA: Exactly. So where they have managed to justify
24 a request going back earlier than 2011, like Beacon, like
25 profitability, we have said sure, but what they are

1 asking is essentially across the board all data going
2 back to 2005. That is what they are asking.

3 THE CHAIRMAN: No, you are exaggerating to make a point.

4 They are not asking for all data going back to 2005.
5 That would be barking mad. They are not asking for
6 that. They are saying that the framework for disclosure
7 goes back to 2005.

8 If I thought their proposition was the one that you
9 were saying, then I would shut it down in a couple of
10 seconds. It is not.

11 MR SINGLA: That is --

12 THE CHAIRMAN: It is a false target, because it is not going
13 to be acceptable that you are to be expected to disclose
14 every piece of paper, every communication, going back to
15 2005. It is just never going to happen, but if you
16 want to take your break now, get instructions --

17 MR SINGLA: Yes, let me take instructions.

18 THE CHAIRMAN: Because I do not think in reality there is a
19 huge gulf between what you are saying and what I think
20 should happen.

21 MR SINGLA: Well, that --

22 THE CHAIRMAN: But the gulf is whether or not we can put in
23 dates earlier than 2011. That is where the gulf is,
24 but when it comes to dates earlier than 2011,
25 anything prior to that date has to be clearly justified

1 at the next stage. So putting in a date -- look, I will
2 give a ruling anyway. So in case I get run over by a
3 bus people can see why the order has been made in the
4 form it has been,

5 but at the moment I am saying anything prior to 2011
6 has to be justified at the next time and that it does
7 not stop you from arguing that disclosure of documents
8 will be disproportionate, and it does not stop them from
9 arguing that there should be some other form of
10 disclosure other than disclosure of documents. You
11 know, the whole parameter is we all understand what the
12 parameters are. I would have to put in a short ruling
13 so that you're not prejudiced.

14 The last thing I want is anyone to go out of this
15 room thinking that there is going to be the kitchen sink
16 going back to 2005. That bus is not leaving the station
17 if that is what bus is proposed,

18 but we will have a break now. Come back at about 10
19 past 3. You can all think about what you want to do
20 about these issues. I am quite happy to rule. I
21 probably need to give a ruling anyway so everyone knows
22 what the basis of what these dates are going to be, but
23 I do not like at the moment the idea of having no date
24 at all as the start date, as the potential start date.
25 That is why you need to be a bit more, let us say,

1 flexible on the opening start date because of the way
2 the approach should be done, because I do not want to
3 prejudice the other side whereby we say the start date
4 for everything is 2011 and then they say at the next
5 hearing, well, we want something earlier. You know, how
6 can we prove our counterfactual case unless we have
7 something from earlier, which is probably a good point.

8 MR SINGLA: Can I just check, so you are envisaging that
9 there will be dates in the list of issues? You are
10 saying that we need to be more flexible as a start date,
11 but it does not follow from the start date in the
12 document that they will actually get disclosure going
13 back that far. Is that --

14 THE CHAIRMAN: Absolutely. That is what I would normally
15 do.

16 MR SINGLA: I think implicit in what you have said is also
17 that we are not going to have wording such as "when did
18 you first consider something", because that seems to us
19 to be, on any view, unworkable.

20 THE CHAIRMAN: That is wholly unworkable, but what that
21 does not preclude is a request for information whereby
22 they ask you that specific question and then you give an
23 answer in the normal way, and that answer may lead to a
24 date where you say actually the date is much later than
25 you thought, or it could lead to saying, well, actually

1 we first considered it on this date, this was the
2 example and they say, well, maybe we should have some
3 disclosure about it, or the Tribunal may say, well, now
4 you have said what it was we do not need any further
5 disclosure.

6 MR SINGLA: On the RFI idea, I mean, one of the problems is
7 if they RFI us and say when did you first consider, it
8 would be a very difficult question to answer without
9 doing the disclosure exercise that the RFI process is
10 designed to avoid.

11 THE CHAIRMAN: It all depends. It is amazing what data
12 people can get at a relatively small cost. It all
13 depends on luck; you know, do you have people from that
14 period who is around? You may, for all I know, have
15 some sort of guru who knows a lot of these things just
16 having been part of the furniture for so many years.

17 MR SINGLA: Let me take instructions.

18 THE CHAIRMAN: Yes, okay.

19 (3.03 pm)

20 (A short break)

21 (3.15 pm)

22 MR SINGLA: I am grateful for the time.

23 THE CHAIRMAN: That is okay.

24 MR SINGLA: Can I perhaps try and summarise where we
25 respectfully submit it would be helpful to end up at

1 this hearing?

2 THE CHAIRMAN: Yes.

3 MR SINGLA: So you have our submissions as to relevance or
4 lack of relevance or diminishing relevance as one goes
5 further back in time, which is Mr Parker's point.

6 THE CHAIRMAN: As to relevance and additional cost the
7 further you go back.

8 MR SINGLA: Correct. So diminishing relevance as you go
9 further back, additional costs. That is the headline
10 point.

11 So we say 2011 is sufficient, and what we would
12 suggest in the light of very helpful exchanges that we
13 had before the break, we would respectfully submit that
14 if we left this hearing with 2011 as the date insofar as
15 the list of issues requires a date, then the onus should
16 be, between now and September, insofar as the Class
17 Representative wants to pursue any disclosure requests
18 pre-2011, which is already five years before the claim
19 period and two years before the monetisation of the
20 data, they should make properly justified narrow,
21 targeted requests, and this being their claim,
22 ultimately they should know what documents they want to
23 prove their case.

24 So it would be helpful, in my respectful submission,
25 if 2011 were set as the default and what they should do

1 in the light of your indication that it is barking mad
2 to go for everything from 2005 onwards, they should go
3 away and look again at the list and work out exactly
4 which categories are sufficiently important that they
5 warrant going further back in time.

6 We are trying to come up with a way to move this
7 forward so we are very concerned as to the lack of
8 progress that has been made. We do have a trial date
9 that has already been set, and you will appreciate the
10 context of all of this is that in these collective
11 proceedings disclosure falls entirely on the Defendant.

12 So we are trying to work with the proposals, but we
13 submit ultimately this is the Claimant's case. They
14 need to prosecute it. They should be able to narrow the
15 requests that they have made to date.

16 Then in September, sir, we can consider pre-2011
17 disclosure on specific issues and we can actually have a
18 meaningful discussion about specific disclosure requests
19 in that early period, but at the moment it is not
20 appropriate to have a blanket early date, and as I'm at
21 pains to emphasise, where they have already properly
22 justified going further back in time, Beacon and
23 profitability, we have been willing to accept that, but
24 beyond those two issues we do not, with respect, accept
25 that they have properly focused their position.

1 I did want to say something about those two
2 individual issues, but I do not know whether -- you will
3 have heard Ms Ford deal at the end of her submissions
4 with the two exceptional issues where we say on any view
5 a later date should apply.

6 Can I just maybe spend two minutes dealing with
7 those or --

8 THE CHAIRMAN: I am looking at their skeleton, or is it your
9 skeleton, paragraph 17 and 18.

10 MR SINGLA: That is right, yes.

11 THE CHAIRMAN: Let us look at that.

12 MR SINGLA: Yes, I can make very short submissions on these
13 because I understand you have already read --

14 THE CHAIRMAN: You have made those submissions but let us
15 have a quick look at it. (Pause)

16 Yes.

17 MR SINGLA: I mean, I can be very, very brief.

18 Essentially, what we say on issue 13, which concerns
19 choices that third parties had, the third parties had
20 choices. This all arises out of the business tools, the
21 Meta business tools that we saw pleaded at paragraph 62
22 of the Claim Form, and it was from 2013 onwards that the
23 business tools were being used for this data.

24 So we cannot see, on this narrow issue which only
25 concerns the choices the third parties had, we cannot

1 see why that should go further back than 2013.

2 The second point is IFD14(2). The Claim Form pleaded
3 that the terms and conditions change throughout the
4 Claim Period, so that is from 2016 onwards, and we have
5 mentioned in a paragraph in our Defence that there was a
6 tool since 2010, but that does not change what the
7 pleaded issue is.

8 THE CHAIRMAN: So which one are we on now?

9 MR SINGLA: I am sorry, sir, are you looking at paragraph 17
10 of our skeleton?

11 THE CHAIRMAN: Okay. So 14(2) we are looking at?

12 MR SINGLA: That is right.

13 So the reason we say this one should start in 2016
14 is because the issue, what the Claimant complains about
15 at paragraph 47, and we have quoted it, is that the
16 terms and conditions "changed on a regular basis
17 throughout the claim period". That is the issue.

18 In response we have mentioned that there was a tool
19 since 2010, and so what they are now doing is they have
20 changed position and said, okay, we will have disclosure
21 from 2010, but the issue here is throughout the Claim
22 Period the alleged changing on a regular basis of the
23 terms and conditions. The mere fact that there was this
24 tool that began life in 2010 does not affect what the
25 issue is.

1 So we say for the reasons in paragraph 17 that those
2 two issues warrant later start dates than our general
3 2011.

4 THE CHAIRMAN: Then on the issue 13, what year are they
5 proposing? Is it 2011?

6 MR SINGLA: They definitely will not be proposing 2011,
7 because that is --

8 THE CHAIRMAN: What are they proposing?

9 MR SINGLA: Let me be absolutely clear.

10 THE CHAIRMAN: Let us just check, can you?

11 MR SINGLA: Let me check.

12 THE CHAIRMAN: So I understand for 14(2) it is 2010. I have
13 that.

14 MR SINGLA: They are saying 2010.

15 MS FORD: Issue 13 is one of the ones that says from the
16 point first collected and/or received and/or processed
17 on the basis that we do not know when the relevant date
18 is.

19 MR SINGLA: You have my submission on that. It is
20 completely unworkable.

21 MS FORD: Sir, I have two short points in reply.

22 THE CHAIRMAN: Okay.

23 MS FORD: The first concerns the emphasis that has now been
24 placed on the claim period starting in 2016. I
25 appreciate that the reason for that is limitation, and

1 then it goes six years back from the date of issue, does
2 it not actually --

3 THE CHAIRMAN: You say that the behaviour, the alleged abuse
4 started in 2013?

5 MS FORD: We have not specified that, I do not think.

6 MR SINGLA: No, but the way that arises is what they have
7 specified, just to be really clear because this actually
8 leads into the next point we are about to debate, the
9 complaint throughout the Particulars of Claim is about
10 the monetisation of the so-called Off-Facebook Data for
11 personalised advertising on Facebook. That is the
12 claim.

13 THE CHAIRMAN: You say that starts in 2013?

14 MR SINGLA: That did, and there is just no question about
15 that. That is our pleaded case, but there is no basis
16 to go behind that. That is the complaint.

17 MS FORD: Sir, to be clear that is not the complaint, and it
18 is indeed the subject of next section, but there is,
19 you will be unsurprised to hear, a very clear dispute
20 between us on whether in fact that is the complaint --

21 THE CHAIRMAN: (inaudible) 2016, okay, because you say you
22 have done that because you have got limitation issues.

23 MS FORD: That is the only basis for 2016.

24 THE CHAIRMAN: But when do you say the abuse started?

25 MS FORD: We say that the abuse is in an unfair bargain, and

1 it arises as a consequence of essentially extracting
2 consent to use Off-Facebook Data as a condition.

3 THE CHAIRMAN: When did you start seeking that consent?

4 MS FORD: Insofar as it ties to the use of Off-Facebook
5 Data, we are back into the area where we do not know
6 because Meta have not told us, they still have not told
7 us, when is the relevant date for those purposes.

8 It is utterly bizarre that we are being told that
9 Meta would be happy to leave this Tribunal with a date
10 of 2011, but there is no principle basis whatsoever for
11 a date of 2017. It simply has not been tied to their
12 conduct.

13 THE CHAIRMAN: At some early stage we are going to have to
14 have an answer to that question. It is not a
15 particularly difficult question and they are not going
16 to have to do too much work to get something so
17 fundamental as that, and they must have sufficient
18 history to be able to answer that question.

19 MR SINGLA: With respect, on the next overarching issue -- I
20 am intending to show you the pleading, but the key point
21 is what they complain about is the monetisation for
22 advertising purposes.

23 THE CHAIRMAN: Yes.

24 MR SINGLA: That began in 2013 and Instagram was only
25 acquired in 2012. It is not for us, as it were, to tell

1 them when we first started doing things. They have
2 pleaded a case and got certification on a case on a very
3 specific basis, which is the monetisation through
4 advertising, personalised advertising. That is the
5 unfair bargain, and you need to be very careful to read
6 152 and 153 of the Claim Form which make that
7 completely clear.

8 MS FORD: Sir, I can indicate again that there is very much
9 a dispute between us as to the basis of our claim, and
10 we can both refer to the relevant paragraphs of the
11 pleadings on that.

12 THE CHAIRMAN: Okay, do not worry.

13 MS FORD: The point that I make is that the emphasis on 2016
14 does not bear any relation to the period of the actual
15 conduct in respect of data, and it does not bear any
16 relationship to the methodology that our expert has
17 indicated she wants to conduct relating to the
18 pre-dominance period.

19 We're told that Meta would be delighted to leave
20 this Tribunal with a date of 2011, but it still has not
21 explained any principled basis on which that should be
22 the relevant date.

23 The submission was made that it should be for us to
24 justify going back any further than 2011. In our
25 submission, that gets it completely the wrong way round.

1 We have a pleaded case that for good reason goes back
2 further than that. Unless Meta can show that it is
3 disproportionate for them to provide disclosure in
4 respect of our pleaded case, they should be providing
5 it. So we say it is absolutely the wrong way around for
6 them to suggest that we have to justify going back
7 further than 2011.

8 Sir, that is the first point.

9 THE CHAIRMAN: There are things inherent in the point you
10 are making, which is that in order to make final orders
11 for disclosure there may be the need for further
12 information for some of the issues to make a concrete
13 order.

14 So if you say we do not know the date on which
15 something commenced, you do not know what the sources
16 are or what the uses are, then you may need to have that
17 information before going forward to make final orders,
18 otherwise you can have orders which are just not quite
19 directed at the right thing, or not correctly targeted.

20 MS FORD: It is certainly the case that a final order with a
21 specific date would need to be an evidenced and
22 principled date, and at the moment Meta have not given us
23 any basis to identify that date. That is the reason why
24 we have sought to pin it to Meta's conduct and say from
25 the point where Meta first collected, used, processed,

1 that is the rationale for that.

2 To the extent that it does become necessary to say
3 "from this particular date", then that is a matter
4 within their knowledge and not ours, and they really do
5 need to tell us.

6 The second strand that ran throughout submissions on
7 behalf of Meta was reliance on the DR and EDQ. We have
8 indicated that we have very serious concerns about that
9 as a document and it is absolutely not right to suggest
10 that we have not engaged with it.

11 Just to show the Tribunal, by way of example, a
12 letter that we sent at {E2/227/1}.

13 THE CHAIRMAN: I am not going to accuse anyone of a lack of
14 engagement. I think in some respects there has been too
15 much engagement but looking at the wrong target. So no
16 one is going to end up being criticised at the end of
17 the day for lack of engagement.

18 MS FORD: Well, what the letter does do is indicate the
19 reasons why we have very serious concerns about this as
20 a document, and so --

21 THE CHAIRMAN: We will come to that later, about where we go
22 from here,

23 but I do not think any of the work up until today in
24 drafting these documents is actually wasted. I think
25 that when we decide what we are going to do going on

1 from here, we are going to try and use as much as
2 possible what we have already done, but I am conscious
3 that when it comes to the next CMC, if I am doing it
4 I want to have it in a form that I can digest, because,
5 on one view, we may end up having a large number of
6 categories in issue. In respect of those categories,
7 I will want to have something at least in respect of
8 those categories which are contentious, some sort of
9 schedule.

10 It may be that you will start off by using what is
11 in the Disclosure Report for each party to actually
12 start again putting what their columns are going to be,
13 and then we have something that is actually useful.
14 This way you may need fewer columns than normal, because
15 you can -- basically you know what the other side is
16 going to say, or you should do from the DR document,
17 but anyway, that is by and aside, but that is looking
18 forward to tomorrow if we do not resolve everything
19 today.

20 MS FORD: Yes. Where it fits in for the purposes of this
21 debate is that you were shown what was essentially an
22 extremely high level figure saying, well, this exercise
23 on a series of fairly heroic assumptions will result in
24 X million numbers of documents, it might result in Y
25 million in terms of costs, which I think people will

1 appreciate is an extraordinarily high level observation
2 is not enough to enable anyone to engage properly with
3 the question of whether or not, in respect of any
4 particular opinion issue for disclosure is or is not
5 proportionate or disproportionate to go back to a
6 particular date, it is not sufficient in our submission
7 to simply point to that high level piece of information
8 and say and therefore the Tribunal should apply a
9 guillotine of 2011 on a completely unprincipled basis
10 and put the onus on us to justify going back further.
11 In our submission, it simply does not bear that
12 weight and that would be getting things the wrong way
13 around.

14 THE CHAIRMAN: Thank you. I will rise for a couple of
15 minutes.

16 (3.31 pm)

17 (A short break)

18 (3.35 pm)

(Ruling given - published separately)

1 MS FORD: Sir, can I just clarify in relation to the other issues
2 that use the formulation that was in issue 13, so from the
3 first point when Meta - do the same principles apply?

4 THE CHAIRMAN: The ones that have that, it is the same principle and

1 that when you produce the updated version of this hopefully
2 overnight we can have at least some of the dates, things are
3 clarified or whatever. Then, as you know, the aim, if we can,
4 is to have this finalised tomorrow so people could be working in
5 the light of what we have said.

6 MR SINGLA: On the first considered issues it is 2011
7 subject to the RFI.

8 THE CHAIRMAN: Correct.

9 MR SINGLA: On the other ones where it is 2005 or 2007, it
10 is that is subject to your overarching caveat that it is
11 for them to justify going back before 2011. Have I
12 understood that?

13 THE CHAIRMAN: What it is, is that the further they go back
14 the more than, say, justification they are going to have
15 to show for that category.

16 So I am saying yes, in principle it goes that far
17 back, but when it comes to anything prior to 2011 on
18 those, it is subject to the result of any RFIs that they
19 may provide, but it is going to be more scrutiny the
20 earlier you go back, and anything before 2011 is going
21 to have more scrutiny than anything else.

22 MR SINGLA: That is clear.

23 THE CHAIRMAN: That is clear. So that deals with the second
24 overriding issue.

25 Now, the third one. (Pause)

1 Yes, we have got -- so I have read Vernon fifth on
2 this, that deals with that, and in your skeleton at 31
3 to 36.

4 MS FORD: Yes. This is obviously concerned with whether
5 Meta should have to give disclosure in respect of Meta
6 products other than Facebook. Our headline submission
7 is that Meta has adopted a really quite extreme position
8 that it should not be required to give disclosure of any
9 data and documents that do not concern the provision of
10 Facebook. We say that, that is simply not consistent
11 with the parties' pleaded case.

12 There are four strands of the parties' pleaded case
13 that feed into this issue. I am going to set out what
14 they are and then deal with them in turn.

15 They are the Class Representative's case that Meta
16 entered into an unfair bargain; the counterfactual;
17 Meta's case that it uses Off-Facebook Data for a
18 legitimate and proportionate purpose; and the question
19 of transparency.

20 Starting with the unfair bargain, the Class
21 Representative's case is that by making access to
22 Facebook contingent on users permitting Meta to collect
23 and use their Off-Facebook Data without a corresponding
24 value transfer to users, Meta entered into an unfair
25 bargain with users.

1 We can see that, for example, pleaded at Claim Form
2 S.13 {B/3/5}. So this is the headline allegation:

3 "By making access to its platform contingent on
4 users giving up access to their Off-Facebook Data
5 without a corresponding transfer to Users, Facebook
6 infringed the Chapter II prohibition and/or ...
7 infringed Article 102 ..."

8 For the Tribunal's note, one sees the same
9 formulation repeated at paragraph 150 at {B/3/104}.

10 There are obviously two sides to the unfair bargain.
11 There is the user's side of the bargain and there is
12 Meta's side of the bargain.

13 Where, in our submission, the Defendants go wrong in
14 their skeleton argument is that they focus solely on the
15 user's side of the bargain. To show the Tribunal what
16 we mean by that, if we could look, please, at the
17 defendants' skeleton argument paragraph 31. It is
18 {F8/2/19}.

19 What we see in this paragraph is a lot of emphasis
20 on the fact that for the user's part, they were users of
21 Facebook and what they received was access to and use of
22 Facebook. So, says Meta, it is all about Facebook and
23 that is all we, Meta, need to disclose.

24 THE CHAIRMAN: Then they are getting permission from the
25 user that is basically much wider than that, and you say

1 you need to see across a spectrum as to how it has been
2 used and processed and monetised.

3 MS FORD: So, we say: what about the other side of the
4 bargain, what about the value that Meta received? It
5 received and used users' Off-Facebook Data, and that is
6 what has to be valued in order to assess the fairness of
7 Meta's side of the bargain. We say it would materially
8 undervalue what the users supply to Meta, the value of
9 what Meta received, if it excluded how Meta then uses
10 Off-Facebook Data on other Meta products such as
11 Instagram.

12 So that is the first point. It is an unfair
13 bargain, and it is not right to suggest that the unfair
14 bargain is narrowed right down to look solely at
15 Facebook.

16 A similar point arises in relation to the
17 counterfactual absent the unfair bargain. Our case on
18 that is pleaded in the Amended Claim Form at
19 paragraphs 175 to 177.

20 THE CHAIRMAN: Yes.

21 MS FORD: Paragraph 176, first sentence, pleads that:

22 "In the counterfactual, users would thus have
23 benefited from a fair bargain in relation to the
24 collection of their Off-Facebook Data."

25 What the remaining paragraphs go on to particularise

1 is how Professor Scott Morton proposes to get to the
2 bottom of the content of a fair bargain in the
3 counterfactual, and what she proposes to do is to use a
4 Nash Bargaining Model under which some of the commercial
5 value of Off-Facebook Data to Facebook would accrue to
6 users under the fair bargain.

7 THE CHAIRMAN: I have that. On the first one, what
8 paragraph of the Amended Claim Form should I be
9 looking at?

10 MS FORD: I cited S.13 and Amended Claim Form 150, which
11 both give the same formulation.

12 THE CHAIRMAN: Yes, exactly. So those are your two key
13 points.

14 MS FORD: 2 and 4.

15 THE CHAIRMAN: Okay. If you win on one of them, you are in
16 luck, but okay, let us hear the other two.

17 MS FORD: It is true, but I would like to spread my bets.

18 It is also a composite case. I say that point
19 lightly, but one should not take these strands in
20 isolation because they form a composite whole. Under
21 unfair bargain, we then have to say, well, what would be
22 the position in the counterfactual? The same point
23 applies when you are considering the counterfactual.

24 THE CHAIRMAN: Where are we in your skeleton? Let us have a
25 look at your skeleton where you deal with this. 31

1 to 36.

2 MS FORD: Yes.

3 THE CHAIRMAN: So ...

4 MS FORD: So within paragraph 32, and what we have addressed
5 in 32 are two sides of the Class Rep's pleaded case.

6 The first is the content of the unfair bargain and the
7 second is the counterfactual.

8 The point we make about the counterfactual is if you
9 are trying to work out whether Meta would have been
10 prepared to pay for permission to use this data and, if
11 so, how much it would have been prepared to pay in the
12 counterfactual if it couldn't have obtained this data in
13 a way which we say was essentially abusive, we say it is
14 self-evidently necessary to consider the totality of the
15 value to Meta that it would have got from obtaining the
16 data in question.

17 One cannot undertake that analysis by looking at a
18 subset of the economic benefit or the economic gain to
19 Meta by that exercise. So we say, again, in the
20 counterfactual it is necessary to look at a totality of
21 the benefit to Meta that derives from the Off-Facebook
22 Data.

23 The third element of the pleaded case is actually
24 Meta's pleaded case about the use of Off-Facebook Data.

25 If we look at Defence paragraphs 19(a) and (b), so

1 this is {B/4/8}, what Meta is pleading is that its
2 receipt and use of Off-Facebook Data serves a legitimate
3 purpose and is proportionate to that legitimate purpose.
4 The Tribunal will have the point that we made in our
5 skeleton that when one looks throughout the Defence at
6 all the different ways in which the legitimate purpose
7 is pleaded, there is a degree of variation.

8 THE CHAIRMAN: Let me just get the pleading. We are looking
9 at 19(a) and 19(b)?

10 MS FORD: So the headline plea is 19:

11 "Meta's position is that its receipt and use of what
12 the CR terms 'Off-Facebook Data' as a condition of
13 providing the Facebook Service does serve a legitimate
14 purpose and is proportionate thereto ..."

15 THE CHAIRMAN: Yes.

16 MS FORD: So that is the headline contention.

17 Then you see the various factors in (a) and (b) that
18 it relies on to say that.

19 THE CHAIRMAN: Yes.

20 MS FORD: The point I was making is that there are various
21 expositions throughout the Defence of what is this
22 legitimate purpose, but to take one example,
23 paragraph 231(b)(iii), so this is page 138 of the
24 Defence.

25 THE CHAIRMAN: Yes. Where do you want me to look at?

1 MS FORD: So it begins on 138, but the actual passage that
2 we are looking at of this paragraph is on the following
3 page {B/4/139} and we see the plea:

4 "As above, Meta used what the [class rep] terms
5 'Off-Facebook Data' for the legitimate and proportionate
6 purpose of providing the Facebook Service free of charge
7 for users and in order to compete for advertising spend
8 in the advertising market during the claim period."

9 Now, in our submission that exposition of what Meta
10 used Off-Facebook Data for is not, on its face, limited
11 to competition for advertising on Facebook. Actually,
12 it is very clear from Meta's own case that the uses that
13 it puts Off-Facebook Data to are much broader.

14 So we can see, for example if we go to page 155 in
15 the Defence, {B/4/155} what Meta is doing here is
16 setting out a full quote concerning what Meta's terms
17 and conditions say about its uses of Off-Facebook Data.

18 So here are the ways we use the information, to
19 provide, personalise and improve our products, and if we
20 look down we can see that products include:

21 "... your Facebook Feed, Instagram feed, Stories and
22 ads."

23 "To promote safety, security and integrity ..."

24 "To provide measurement, analytics and business
25 services."

1 "Lots of people rely on our products to run or
2 promote their businesses. We help them measure how well
3 their ads and other content, products and services are
4 working ..."

5 "To communicate with you ..." and somewhat
6 delphically:

7 "To research and innovate for social good."

8 These uses are broad, and on any view they are not
9 limited to Facebook.

10 We say in any event whether Meta is right to claim
11 that its use of our Facebook data is legitimate and
12 proportionate is going to be a key issue in dispute
13 between the parties, and when assessing that issue, the
14 Tribunal is going to self-evidently need to consider the
15 full scope of the uses to which Meta puts Off-Facebook
16 Data.

17 That is the third point: Meta's own case about what
18 it does with this data.

19 Then finally, disclosure in respect of Meta products
20 is also relevant to the issue of transparency.

21 The reason we say that is that it is an important
22 part of the Class Rep's claims that Meta wasn't
23 transparent in its approach to the collection etc. of
24 this data, and that such lack of transparency is
25 relevant to the alleged abuse.

1 We can see that pleaded in the Claim Form
2 paragraph 153(d)(iv)(5) and (6). So these are the
3 paragraphs which begin --

4 THE CHAIRMAN: What page is that?

5 MS FORD: Page 119 in the Amended Claim Form {B/3/117}.

6 THE CHAIRMAN: So that is 153, yes, (d).

7 MS FORD: (d)(iv)(5) and (6), so it is on 119 and 20.

8 THE CHAIRMAN: (iv) and then item (5) and (6):

9 "As the Court of Appeal stated in Gutmann ..."

10 MS FORD: That is the beginning of it. So this is the core
11 passage where we plead the relevance of transparency to
12 the question of abuse.

13 THE CHAIRMAN: I have got that, yes, okay.

14 MS FORD: We rely on what the Court of Appeal said in
15 Gutmann, that a lack of transparency can be relevant to
16 whether conduct is abusive.

17 So we are essentially there setting out the legal
18 position. Halfway down that passage, we say:

19 "The PCR relies in this regard on the lack of
20 transparency in Facebook's terms and conditions, its use
21 of choice architectures which prevent users from
22 effectively limiting the collection of Off-Facebook Data
23 and the misleading, erroneous or incomplete public
24 statements concerning its data collection practices ..."

25 THE CHAIRMAN: I have read that, yes.

1 MS FORD: I am going to come back to the relevant parts we
2 rely on for this particular purpose. Then over the page
3 at subparagraph (6).

4 THE CHAIRMAN: I have read that. I have been through it.

5 MS FORD: The point to emphasise is that case about lack of
6 transparency is not confined to the terms and conditions
7 of Facebook itself. It also extends to those of other
8 Meta products through which Meta either collected
9 Off-Facebook Data or then shared amalgamated
10 Off-Facebook Data or On-Facebook Data together for use
11 by Meta.

12 THE CHAIRMAN: Yes, I have that.

13 MS FORD: So if we look, for example, at paragraph 48 on
14 page 27, and there is the plea the headline plea:

15 "The various [terms and conditions] imposed on Users
16 were onerous, opaque, and difficult to understand even
17 for the most determined reader."

18 Then subparagraph (b) alleges that:

19 "Other services owned by Facebook (such as
20 Instagram), or partnered with it, had further lengthy
21 terms and conditions, which also affected the user data
22 collected by Facebook. In order to find out and read
23 the 'other' terms and policies that applied, users had
24 to click on a separate list of tabs appearing next to
25 Facebook's Terms of Service. Only after multiple clicks

1 were users directed to the further list of documents
2 regarding Facebook's data collection policies."

3 We then plead at 82 to 86 on page 46 {B/3/86} a case
4 in relation to Meta's products, which we say includes
5 inter alia Facebook, Instagram, Messenger and
6 Marketplace. It says:

7 "Meta's policy states ..." and we set out
8 essentially the privacy policy that applies across all
9 those products.

10 At 83 {B/3/47} you have the plea that we looked at
11 earlier in the day, that it then combines the data it
12 collects from each of its products, and at 84 that the
13 data is merged across Meta products.

14 THE CHAIRMAN: Okay.

15 MS FORD: Just for completeness, page 56, paragraph 95(f)
16 {B/3/56} specifically pleads that on 19 January 2013:

17 "... Instagram updated its privacy policy to allow
18 for the sharing of user data and information with
19 Facebook."

20 That is the Class Rep's pleaded case on
21 transparency. To flag up two relevant passages in the
22 Defence: at Defence paragraph 68(d), we see Meta
23 pleading that it has a desire to provide.

24 THE CHAIRMAN: Which page is that in the bundle?

25 MS FORD: Am I reading the right one there? 68(d) {B/4/45}.

1 Yes:

2 "... [a] desire to provide transparency and clarity
3 to users ..."

4 That is the passage that starts at the bottom of
5 page 45.

6 THE CHAIRMAN: Where are we at in the -- you are looking at
7 Defence?

8 MS FORD: I am looking at the Defence page 45.

9 THE CHAIRMAN: That is what I need, the page number.

10 MS FORD: Then 68(d), bottom of the page pleading that Meta
11 has a:

12 "... desire to provide transparency and clarity to
13 users ..."

14 Similarly, Defence paragraph 70 {B/4/47}, it says in
15 the second line:

16 "Meta ensures that Facebook users understand how
17 their personal data is being used ..."

18 The Class Rep has specifically joined the issue with
19 Meta in relation to those assertions in its Reply. So
20 if we look, please, at {B/6/35}, and the relevant
21 passages are 27(b), where the Class Representative:

22 "... joins issue with Meta as to the transparency of
23 its Terms and Policies or its collection and use of
24 Off-Facebook Data ..."

25 Then on page 44, paragraph 39(d), {B/6/44} we

1 specifically deny Meta's alleged desire to provide
2 transparency and clarity to users.

3 Then on 41(a) on the same page:

4 "Meta's allegation that it 'ensures that Facebook
5 users understand how their personal data is being used'
6 is [also] denied."

7 So the transparency of Meta's conduct in relation to
8 its collection and use of Off-Facebook Data is, in our
9 submission, a key issue at the heart of these
10 proceedings. That is going to require disclosure of
11 contemporaneous documents fairly to resolve.

12 For that reason too we say there is no proper basis
13 for limiting the scope of such disclosure by reference
14 to purely the Facebook platform.

15 Those are the four strands of the pleaded case we
16 rely on in relation to this issue. It might assist if I
17 take the Tribunal briefly through the issues for
18 disclosure we say that this actually bites on by
19 reference to the table.

20 So the first one is issue 2(1) ...

21 THE CHAIRMAN: Let me get (inaudible).

22 MS FORD: Issue 2(1) is one of these ones asking --

23 THE CHAIRMAN: Let me get there.

24 MS FORD: Sorry.

25 THE CHAIRMAN: Yes.

1 MS FORD: This is one of those issues which are essentially
2 seeking to establish which Meta entity is responsible
3 for certain things, and in this case it is for providing
4 advertising services to advertisers in relation to UK
5 users. The disputed wording is that in red on the far
6 side in Meta's column. They would like to add after
7 "for providing advertising services to advertisers in
8 relation to UK Users" "for advertising purposes on the
9 advertising side of Facebook".

10 THE CHAIRMAN: Okay. So just to identify which ones are in
11 issue, we will do the same as last time. We will give a
12 general ruling and then we go through it one by one.

13 Okay, so which ones are we talking about?

14 MS FORD: 2(1) we say there is no basis for limiting this to
15 advertising services to advertisers on Facebook.

16 THE CHAIRMAN: Yes.

17 MS FORD: The next clump are 3(3), 3(4) and 3(6), and they
18 are on page 5 {D/9/5}, and these are in the context of
19 issue 3 as a whole, which is dealing with the relevant
20 terms of service policies and/or arrangements.

21 THE CHAIRMAN: Yes.

22 MS FORD: What they are asking is which Meta entity was
23 responsible for how terms and policies were designed and
24 displayed to users, how Meta communicated terms and
25 policies to users and what choice architectures were

1 presented and why.

2 The Tribunal will note that 3(1), we looked at this
3 in the context of the temporal scope, there are three
4 categories of relevant terms and conditions here. There
5 are the ones in relation to the user side of Facebook,
6 the ones in relation to data generated as a result of
7 activity on the user side of Facebook, and the ones
8 concerned with Off-Facebook Data.

9 What Meta is proposing is that issues for disclosure
10 3(3), (4) and (6) should only apply to (a), so they
11 should be limited to disclosure of terms and policies
12 applicable in relation to the user side of Facebook, not
13 data generated as a result of activity on the user side
14 of Facebook and not Off-Facebook Data. We say that is
15 manifestly not consistent with the pleaded case that
16 they are meeting, and particularly in the context of the
17 disputes about transparency. That is, in our
18 submission, completely inappropriate.

19 THE CHAIRMAN: Yes.

20 MS FORD: The next one is 4(1), 4(2), issue 4 generally, is
21 the issue concerned with Meta's terms of service and
22 policies with third parties, and they ask what are the
23 terms of service and policies that govern Meta's
24 collection of Off-Facebook Data and how and for what
25 purposes Meta designed and implemented those terms and

1 policies.

2 THE CHAIRMAN: Okay.

3 MS FORD: Meta has proposed to combine those into data for
4 personalised advertising on the user side of Facebook.

5 So this is really quite a tight limitation that is
6 being proposed here. It is not just the user side of
7 Facebook, but it is to personalised advertising. We say
8 that is particularly extreme. We know that Meta's use
9 of such data is not so limited, so we say there is
10 simply no basis for limiting disclosure in this way.

11 THE CHAIRMAN: Next one.

12 MS FORD: Then finally, issue 8(8), (9), (11) and (13) on
13 pages 10 and 11 {D/9/10-11}.

14 THE CHAIRMAN: 8 ...

15 MS FORD: 8, and then sub-issues -- sorry, 8(8), 8(9), 8(11)
16 and 8(13).

17 THE CHAIRMAN: Yes.

18 MS FORD: Now, all of these appear in overarching issue 8,
19 which is specifically concerned with Meta's collection
20 etc of user's data. So it is very much on point for the
21 matters in issue in the entirety of these proceedings.

22 8(8) asks when, from where, how and why data was
23 shared or transmitted between the defendants or other
24 platforms or services owned by Meta. 8(9) asks when,
25 from where, how and why Meta collected etc such data for

1 the purposes of providing products and/or services to
2 advertisers.

3 8(11) asks pursuant to what agreements or
4 arrangements such data was transferred or shared between
5 Meta services and platforms, and 8(13) asks whether
6 Meta's commercial motivation or aim was to maximise the
7 collection or receipt of such data.

8 In the case of each of those sub-issues, Meta has
9 sought to confine the inquiry to Facebook only. Again,
10 in our submission, it is completely artificial to
11 suggest that it should be limited in that way and it
12 does not reflect the reality of the pleaded issues.

13 Sir, unless I can assist further, those are our
14 submissions on issue 3.

15 THE CHAIRMAN: No, that is fine. Hopefully we are still on
16 track for finishing today for overarching issues so we
17 can spend tomorrow finalising the list of issues and
18 then deciding where we go from here. That is what we
19 want to do.

20 MS FORD: Certainly the fourth one is a very short one.

21 Obviously the Tribunal needs to hear from Mr Singla in
22 relation to what we have just discussed.

23 THE CHAIRMAN: Of course. We will sit until we can do it.

24 Mr Singla never wastes our time, do not worry.

25 MR SINGLA: So this is another example in our submission of

1 the disclosure sought simply not reflecting the pleaded
2 case and again this is actually very important to try
3 and nail down exactly what the Claimant's case is and
4 what it is not, and so can I take you back through the
5 Claim Form.

6 THE CHAIRMAN: Yes, no, that is suitable. Look, if it is a
7 pleaded issue, then certain things will flow from it.
8 If it is not pleaded, then they are not going to get
9 disclosure on it.

10 MR SINGLA: I understand.

11 THE CHAIRMAN: So the main issue is what is pleaded and we
12 have been taken to really four points by reference to
13 the pleadings and they say what issue you have off
14 Facebook of this data is an issue and it goes on
15 various levels, that is what they seem to be saying.

16 MR SINGLA: It is a completely false presentation of the
17 case. Let me just explain. I will show you the
18 pleading, but let me just explain what the case actually
19 is. The case is and is said to be an unfair bargain.
20 It is said to manifest itself in two ways, which was
21 said to be two sides of the same coin. The first
22 alleged abuse is said to be effectively that the terms
23 and conditions for Facebook are on a "take it or leave
24 it" basis, so it is said that the lack of choice, as it
25 were, is abusive as an unfair to trading condition. That

1 is the first abuse. The second alleged abuse is it is
2 an unfair price and this is the important bit. It is
3 said to be an unfair price because whereas the users
4 give their Off-Facebook Data, the Off-Facebook Data is
5 said to contribute to Facebook's profits in a way that
6 is essentially disproportionate and renders the price
7 unfair.

8 THE CHAIRMAN: That is what they are saying.

9 MR SINGLA: Right, but no that -- that is different to what
10 is now being sought because the Claimant's pleaded case
11 on the other side of the bargain so the users receive a
12 Facebook service for free and on the other side of the
13 bargain, it is said that the profits to Facebook are too
14 high. Those profits are said to arise through the
15 provision of personalised advertising. That is the
16 point and that is why we say it is entirely proper to
17 narrow the disclosure to the provision of personalised
18 advertising on the Facebook platform.

19 THE CHAIRMAN: But let us say it feeds into personalised
20 advertising on Instagram.

21 MR SINGLA: That is a good example. It is completely
22 outside the scope of the case. Let me show you.

23 THE CHAIRMAN: You say that is outside the scope?

24 MR SINGLA: It is.

25 THE CHAIRMAN: But what they are saying is there is an

1 unfair bargain because on one side they say the user
2 gets nothing, though I fully accept that is not what the
3 position is.

4 MR SINGLA: I understand, yes.

5 THE CHAIRMAN: Because that is their pleaded case.

6 MR SINGLA: Yes.

7 THE CHAIRMAN: On the other side not only are you getting
8 the advertising revenue in relation to Facebook but you
9 are getting advertising revenue in respect of Instagram.

10 MR SINGLA: Yes.

11 THE CHAIRMAN: I think that is what they want to be able to
12 say.

13 MR SINGLA: That is exactly what they are saying in support
14 of their disclosure proposal and that is what I am
15 saying is not within the scope of --

16 THE CHAIRMAN: But you are saying that's not within the
17 scope --

18 MR SINGLA: But just to explain, I'm going to take some time
19 over this. I do not, as it were -- I cannot rush this
20 point because this is quite a significant broadening of
21 the case. Just to explain, sir, why this matters, let
22 us assume that the way in which Ms Ford has put it today
23 is part of the pleaded case, the reason that is
24 fundamentally different is because that would actually
25 change the so-called bargain, okay, because if it is

1 being said that they have always had this pleaded case
2 that the value arriving -- arising out of any use on
3 Instagram is part of what they are complaining about,
4 well, then the other side of the bargain is not merely
5 Facebook, it would also be what the users are getting
6 from Instagram and that is obviously outside of the case
7 because this is all about a class said to be Facebook
8 users. So actually that point demonstrates why this is
9 not the unfair bargain that is part of the pleaded case
10 because what you can't do, as it were, is say the claim
11 on one side is all about Facebook users and the value
12 they derive or do not derive, on the other side it is
13 about value that is being derived beyond Facebook.
14 That, I hope, as an introductory submission demonstrates
15 why this is so obviously outside the scope of this case.
16 Mr Ridyard will know from previous hearings that the
17 whole way in which this is proceeded is it is said to be
18 two sides of an equation, we, the Facebook users, get the
19 Facebook service and you, Meta, get lots of profit on
20 the Facebook service arising out of this Off-Facebook
21 Data. As soon as you start to say on one side of the
22 equation it is actually all value completely undefined
23 but they now say the totality of the value, that changes
24 the whole fundamental bargain that is said to lie at the
25 heart of this case but let me show you in the pleading

1 where this is reflected.

2 THE CHAIRMAN: Let us look at the pleading, yes.

3 MR SINGLA: I hope you have understood that fundamental
4 point. Paragraph 8, if you start at the summary.

5 THE CHAIRMAN: Yes.

6 MR SINGLA: Actually if you start at 7. Do you see 7 where
7 we had looked at this earlier?

8 THE CHAIRMAN: Is it S.7 you are talking about?

9 MR SINGLA: No. I will repeat this point. One has to look
10 at the main pleading because --

11 THE CHAIRMAN: That is all right. I do not mind.

12 MR SINGLA: No, because the summary was produced post
13 certification, so this is exactly what you need to look
14 at. Paragraph 7 if you look at the final sentence, the
15 Off-Facebook Data were combined with the data that
16 Facebook collects on-platform. So that is all about
17 data which we have debated already {B/3/14}:

18 "... and monetised by Facebook without a
19 corresponding value transfer to users to obtain
20 multi-billion revenues on the advertising side of the
21 market, by permitting advertisers to target adverts at
22 users based on this data."

23 This is incredibly important, sir.

24 "Users" is the Facebook users. You can see that is
25 defined in line 4 of the same paragraph.

1 So the complaint, 7 and 8, the summary of the case,
2 the complaint is the value that is being earned by
3 permitting advertisers to target adverts at Facebook
4 users based on these data.

5 So that is 7.

6 If you look at 8, so if you look at 8(b) {B/3/15},
7 which is the unfair price allegation, second sentence.
8 So it is said to be an unfair price:

9 "Off-Facebook Data from users generates tremendous
10 value for Facebook through monetisation via advertisers
11 and yet Facebook extracted these additional data without
12 a corresponding value transfer to users."

13 So that is the summary of the case. Not a single
14 mention of Instagram or any other use. It is just the
15 value is said to be the monetisation through the
16 personalised advertising to Facebook users.

17 Then when you work through the pleading, paragraph
18 30 -- if you pick it up at 37 {B/2/23}, just so that you
19 can see the heading, "Facebook's Business Model". Do
20 you see that? Sir, do you see 37? But I would like to
21 show you 39 to 43, because again what is being pleaded
22 here because it is the subject of the complaint is the
23 monetisation. So 39 {B/3/24} you will see, third line:

24 "... Facebook used it to generate vast amounts of
25 revenue without a corresponding value transfer to users

1 ... In particular, Facebook charged advertisers to show
2 highly targeted adverts to users based on their personal
3 data, ie advertisers paid Facebook to place their
4 advertisements with particular types of users."

5 Nothing to do with Instagram or any other use or
6 whatever Ms Ford was referring to. This is all about
7 placing personalised adverts onto Facebook users and
8 that is the monetisation that you see in 40, very
9 significant profits; 41, advertising revenue; 42, you
10 will see as a result of this business model Facebook was
11 incentivised and so on; then 43 towards the end, you
12 will see {B/3/25}:

13 "... embarking on an advertising-based model that
14 generated 'real money' for Facebook ..."

15 Then if you carry on, go to 95 that we have looked
16 at previously, but at 95 you will see that the paragraph
17 starts {B/3/54}:

18 "... Facebook has incrementally increased the amount
19 of Off-Facebook Data that it has collected from its
20 users over time, with the exploitation of Off-Facebook
21 Data for the purposes of advertising having commenced in
22 or before June 2014."

23 So this is all about the only use is said to be
24 advertising.

25 Again, 95(h), which we have looked at, under the

1 quoted text {B/3/57}, Facebook from 2014 was exploiting:

2 "... user data it collected from third-party
3 websites and apps for ad targeting purposes, thereby
4 enabling it to generate substantially greater
5 advertising revenues."

6 Then when one gets -- this is very important because
7 we need to actually look at what the abuse is said to be
8 in the later part of the pleading. If you pick up
9 paragraph 150 {B/3/104}, that just refers to the
10 gravamen being the unfair bargain. That is the final
11 sentence of 150.

12 Then when you get into the long paragraph at 153,
13 which deals with the alleged imposition of an unfair
14 price, could I ask you to look at 153(a) {B/3/114?

15 So:

16 "... there is valuable consideration flowing from
17 users ..." in its basic and essential form, "... user
18 data is monetised by Facebook through the provision of
19 advertising services to advertisers on the other side of
20 the market."

21 Then if you turn the page, sir, so if you pick up
22 page 116 {B/3/116}, if you look at (d)(iii), the expert,
23 Scott Morton:

24 "Under limb 1 of United Brands ..."

25 So this is the question of whether it is excessive

1 pricing. She demonstrates:

2 "... that Facebook is ... making excessive profits
3 on an overall platform basis ..."

4 Platform being Facebook. I will show you her report
5 in a moment. What is being said is Facebook is making
6 excessive profits, and then they say:

7 "... the specific incremental data at issue as
8 respects Off-Facebook Data is contributing very
9 significantly to these profits. Scott Morton 1
10 estimates the incremental Facebook profits associated
11 with Off-Facebook Data to be "... and you will see the
12 figures.

13 Then you will see:

14 "... by virtue of its commercialisation of users'
15 Off-Facebook Data, Facebook earned substantial excess
16 profits ..."

17 So what they are doing is we are going to
18 demonstrate why this is an alleged abuse. This is an
19 unfair price because overall Facebook is and the
20 Off-Facebook Data is contributing to those profits.
21 This is nothing about any other platforms. Then if you
22 look at 153 -- if I just give you the page reference
23 again, so 120. Page 120 {B/3/120} you will see again at
24 paragraph 8, so this is within the alleged abuse section
25 still:

1 "Scott Morton 1 explains that the enormous increases
2 in Facebook's revenues stemming from Off-Facebook Data
3 collection ..."

4 That is what is being complained about. Ms Ford
5 took you to the causation section, so let me just take
6 you back to 176, if you look at page 133.

7 THE CHAIRMAN: You are saying this is all in terms of
8 Facebook's profits and Facebook revenues?

9 MR SINGLA: Yes, it is, and let me just finish this because
10 the expert also explains --

11 THE CHAIRMAN: How long do you think this point is going to
12 take?

13 MR SINGLA: I need to address it.

14 THE CHAIRMAN: I just need to know for the times.

15 MR SINGLA: Maybe ten more minutes.

16 THE CHAIRMAN: Yes, that is fine. Yes, can I just make a
17 note of that last point.

18 MR SINGLA: Sorry, Ms Ford spent a long time dealing with
19 this and it is going to have very significant
20 consequences for the --

21 THE CHAIRMAN: No, it is important we get to the bottom of
22 the --

23 MR SINGLA: I am grateful.

24 THE CHAIRMAN: If you are right that it is not a pleaded
25 issue, then your position is going to flow. If it is a

1 pleaded issue, I take a simple view, if it is pleaded,
2 then prima facie it is in and so you are going to take
3 me through this to say it is not a pleaded issue and
4 then we will have to hear from Ms Ford again to see what
5 she says -- shows us where she says that the use and
6 revenues and profitability for Meta through other, let
7 us say, products or engines is something that they are
8 claiming for. If it is something they are claiming for,
9 that is fine. If they are not claiming for it, then we
10 have to see where it is. They are saying it all forms
11 part of the bargain and we need to see what the other
12 side of the bargain is and all that. If they have
13 pleaded it, that is fine; if they have not pleaded it,
14 it is also fine, because we understand where we are
15 going to go.

16 MR SINGLA: You have my submission that it actually would be
17 completely incoherent to describe the bargain as
18 Facebook users getting the Facebook service.

19 THE CHAIRMAN: Okay. So the transcriber requires a break so
20 I think what we will do then, we will pack up for today
21 and we will deal with this tomorrow morning because by
22 the time we come back, there is not going to be much
23 left and people having to get home.

24 MR SINGLA: Can I just -- I was literally going to show you
25 one more paragraph so at least I will then have finished

1 taking you through the Claim Form.

2 THE CHAIRMAN: Finish the Claim Form and then we will carry
3 on tomorrow morning.

4 MR SINGLA: So I think I asked you to look at page 133 and
5 so Ms Ford says -- so Ms Ford presented this as having
6 four strands in the pleadings.

7 THE CHAIRMAN: So, I am looking at 176.

8 MR SINGLA: She say this is all very relevant to the
9 counterfactual case.

10 THE CHAIRMAN: Looking at (b), are we?

11 MR SINGLA: That is what they took you to. Let us again --
12 I will show you Scott Morton tomorrow, which puts the
13 point beyond any doubt, but what is being said in the
14 pleading, trying to essentially paraphrase what the
15 expert is saying, is she proposes to specify her
16 bargaining model, her way of quantifying damages by
17 identifying what is being bargained over. It identifies
18 each of the party's threat points. So for users this is
19 the value they would get by using Facebook. So far, so
20 good. That is the service. For Facebook, this is the
21 profits it would generate without collecting
22 Off-Facebook Data and then she determines the pie to be
23 split. This is the impact of the Off-Facebook Data
24 extraction on Facebook's profits plus the value of any
25 incremental services to users less the cost to users of

1 providing their Off-Facebook Data.

2 So the whole way in which this case is put starting
3 with the description of Facebook's business model, going
4 through the alleged abuses, through to the
5 counterfactual and the causation in quantum is all about
6 the profits to Facebook.

7 THE CHAIRMAN: Okay. We have got that. Okay. That is
8 fine. Just to say where we are, at least on a provisional
9 basis, on the next issue so you all can consider it
10 overnight. At the moment, looking at paragraph 37 of
11 the CR skeleton argument, we think that there is a lot
12 of value in 1 and 2 because we all understand what that
13 is, so we are looking at paragraph 37. On 3, we think
14 that is rather vague and that does not -- it could lead
15 to be quite difficult to apply. It is vague on at least
16 two levels, so we are not inclined to order 3. We are
17 inclined to order 4, subject to taking out reference to
18 3. That is where we are for now. You know, both sides
19 can try and persuade us to change that view, but if you
20 can talk to each other and see whether or not that works
21 for both of you, then that is fine. If not, we argue,
22 you know, that point number 4 tomorrow.

23 If someone could start working on the list in the
24 light of what we have ruled so far today, that the aim
25 tomorrow, as you know, is to have -- to leave finalised

1 list of issues for disclosure. Okay, so that's it for
2 now. Thank you very much everyone.

3 It is always good to hear two such good advocates
4 because I always think you can't both be right but you
5 are both let us say extremely persuasive. We will rise
6 now, thank you.

7 (The hearing adjourned until 10.30 am
8 on Wednesday, 16 July 2025)