IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1720/7/7/25
1733/7/7/25

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 6th October 2025

Before:

The Honorable Mr Justice Meade
John Davies
Robert Herga

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Proposed Class Representative

Or Brook Class Representative Limited

- and -

Proposed Class Representative

Mr Roger Kaye KC

- and -

Proposed Defendants

Alphabet Inc & Others

A P P E A R AN C E S

MARK BREALEY KC, NICHOLAS KHAN KC & ADAM ALDRED on behalf of Mr Roger Kaye KC (Instructed by KP Law Limited)

KIERON BEAL KC & DANIEL CARALL-GREEN on behalf of Or Brook Class Representative Limited (Instructed by Geradin Partners Limited)

Lower Ground, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400
Email:
ukclient@epiqglobal.co.uk

Monday, 6 October 2025

(10.30 am)

THE CHAIR: Yes. Good morning. Just before you begin. In addition to the ever helpful CAT staff, I have a judicial assistant from the High Court scheme with me today who, as you'll be aware, observes and assists, but plays no part in the decision-making process.

MR BEAL: May it please the Tribunal, I'm appearing in this matter with my learned junior Daniel Carall-Green on behalf of the Or Brook class representative. My learned friends Mark Brealey KC, Nicholas Khan KC and Adam Aldred appear for Mr Kaye as a class representative -- proposed class representative.

Housekeeping

MR BEAL: In terms of housekeeping, I hope that the Tribunal has, bundles A to D, which contain the relevant documents. There's been a late arrival in the shape of supplemental bundle E, which has some further material in it that I'm not proposing to go to. And separately, I hope that the panel has two bundles of authorities, a main bundle of authorities and a supplemental bundle of authorities. The latter, I understand, was updated last night to have the right US Google DC decision in it rather than the wrong one, which was the summary judgment one. So I apologise for that.

I hope that the panel will have seen a proposed agenda for this carriage dispute. We're really in the Tribunal's hands as to whether or not you have any particular order in which you'd like to hear things.

One option is that I simply go through the four or five issues that we've sought to identify as being the key ones, my learned friend responds, and then we work out who, if anyone, needs to reply on any particular points and, if so, in which order; or we're in your hands, sir, as to whether or not you'd prefer to pick off a particular issue, and then between us, we'll try and work out who goes first and who goes second.

THE CHAIR: Right. Well, thank you very much. And thank you for the very helpful agenda, which we have discussed. I'm in a bundle A, tab 1 now at the agenda where you've got the list of topics in the subparagraphs (i) to (vi) of paragraph 3.

MR BEAL: Yes.

THE CHAIR: Yes. So we've got our own thoughts about the efficient way to do this, and we do think it's going to be better to split up the hearing by topic. We think what will take the greatest amount of time is items 1 and 2, which we doubt it's sensible to try and split off from each other. Those inherently go together. We think the other points ought to be shorter.

Can we just check for the purposes of setting the agenda itself, setting the order of the hearing itself, what is the state of play on point 3, suitability of the respective PCRs, it being, as we understand it, the situation that Google doesn't intend to make any submissions.

MR BEAL: So Google, in its response to the Tribunal's inquiry, said that they essentially stood behind our submissions on this point.

Our submission remains that, with the greatest of respect, it's difficult for a retired High Court judge to act as a proposed class representative for the reasons that the Judicial Office stated. The Judicial Office objection was to a former High Court judge acting. When looking at the perceived risk of bias, they focused on two factors. The first factor was that the PCR in question was a retired High Court judge; in that case, Mr Justice Barling. The second factor was that he was also the former president of the CAT.

We don't have to deal in this case happily with a situation where somebody is a, for example, King's Counsel or a senior solicitor who sits on a panel of the CAT but isn't a deputy High Court judge. Here we are dealing with a retired deputy High Court judge, who is still a High Court judge and has acted as a High Court judge and sat as a High Court judge.

THE CHAIR: Right.

MR BEAL: And I'll be making submissions as to why, with the greatest respect, that poses problems in the same way, for example, that members of the judiciary do not. There's a tradition at least, that they do not start pleading cases back before their former colleagues, at whatever level of seniority of court, in the same way it's ex hypothesi, or a fortiori, it's worse in a sense, or more uncomfortable, if one of the panel's former colleagues, say, we're then pleading a case in this Tribunal -- sorry, not pleading a case in the Tribunal, but acting as a party. That's in a sense, if I can put it this way, worse. It's a live issue.

THE CHAIR: But in any event that that remains as live as ever?

MR BEAL: Yes.

THE CHAIR: But you are effectively inviting us to conclude that there is a risk of bias, perceived risk of bias, and although Google aren't making submissions, you understand that to be their position too?

MR BEAL: I understood that to be their position simply because they said we'd set out the issues in our submissions, and it was for this Tribunal to take a decision on it.

MR BREALEY: I don't read it that way at all.

THE CHAIR: No, no, quite. Well, we'll have to we'll have to parse what they've said. I'm entirely open to hearing submissions about it, but I had understood that their position was that they weren't making an objection.

MR BREALEY: They read all the submissions, they read all the skeletons, and it's up

to the Tribunal.
THE CHAIR: Right, right. But anyway, it doesn't matter because your position is that even if they've said that, you may you maintain the objection?
MR BEAL: I'm happy to deal with the question of the construction of their letter.
THE CHAIR: Well, we might just ask them actually.
MR BEAL: That's another way of dealing with it, better from the horse's mouth.
THE CHAIR: All right. But anyway, thank you very much. That's extremely helpful. That tells us that we are going to need to budget time for that. So what we think we will do then is we will do 1 and 2. We'll come back to how we do that in a moment. And then we will do 3, 4, and 5, one by one and separately.
MR BEAL: I should also add that my learned junior, Mr Carall-Green is going to make submissions about the alleged conflict of interest.
THE CHAIR: Yes.
MR BEAL: In the form of Geradin Partners.
THE CHAIR: Yes, okay. Thank you very much.
One question we'll have in due course on that is whether Ad Tech's consent has been sought either formally or informally, because of course that would be a way of getting rid of the problem altogether.
MR BREALEY: I can take instructions on that.
THE CHAIR: Sure. I mean that that would obviously simplify things greatly, but you needn't respond to that now. Okay.
How we deal with 1 and 2 is the next question.
Yes, Mr Brealey.
MR BREALEY: Just, we tried to pin everyone down, but are there any other -- I asked rhetorically -- are there any other issues that we need to deal with? We've got the funding and the Geradin Partners conflict, and I just ask whether Brook is going to

raise any other issues that we need to be on notice of. For example, they've got the scope of the claim in their skeleton. I don't know whether they're pursuing that or?

THE CHAIR: Well, I think that comes into the interrelationship between the exclusionary cases and the exploitative cases.

MR BEAL: In part. And also, there are, for example, when one's dealing with the pros and cons of the exclusionary case and the unfair pricing case, questions such as limitation have been raised by both parties.

THE CHAIR: Yes.

MR BEAL: Limitation gets built into that as well.

THE CHAIR: Yes.

MR BEAL: I was proposing to deal with what I would call those subsidiary points in one go under the category of "suitability of the respective PCRs", which I take as a proxy for other aspects of the claims that need to be dealt with. But they'll be touched on as I go through my submissions on both exclusionary and unfair pricing.

THE CHAIR: Yes. We see suitability of the respective PCRs as confined to the perceived bias point, and the relative personal characteristics of the individuals, you know: is one more academic than the other, it’s those matters. Matters such as the additional points that come in under the exclusionary case, time period for the claims limitation. We intend that those fall within 1 and 2.

MR BEAL: So the only other issue then, just so that my learned friend's completely aware of what my submissions will be, is the scope of the class, and this issue as to whether or not they have a methodology in either of their exclusionary or unfair pricing claims that properly distinguishes between UK recipients of advertising and non-UK recipients of advertising.

THE CHAIR: Yes. We will -- these are slightly portfolio terms aren't they. But we will regard 1 and 2 as covering all aspects of what one might call the substance, scope, duration and class.

MR BEAL: Thank you.

THE CHAIR: And 3 is confined to matters specific to the identity and characteristics of the PCRs themselves.

MR BEAL: If my learned friend wants formal confirmation, we stand by everything we've said in our skeleton. If that helps.

THE CHAIR: Yes. Thank you very much.

Sorry, were you going to add something, Mr Brealey?

MR BREALEY: No, I just thought maybe on time. I've got a third day, and so on.

THE CHAIR: We do not think that the third day should be necessary. So that's what we'll aim to do.

We're sensitive to the parties' preferences, if they have them, but otherwise we think the most efficient way to do it will be for Mr Brealey to cover 1 and 2, because we think the efficient thing is for him to explain the relationship between the crucial -- and I mean that just simply in the sense of central -- issue of what the exploitative case adds. You say it adds nothing; Mr Brealey says it does.

But we think that's the efficient way to do it. There's no pre-judgment of who's right or wrong, but we just think that's the better way to do it.

Mr Brealey, is that all right with you?

MR BREALEY: Yes, fine.

THE CHAIR: Okay.

MR BREALEY: Okay. So, what I'll do then, with your permission, sir, is I'll go through the exclusionary claim, highlight the deficiencies in that and what we're doing, and then I will go to the exploitative claim, so I'll do it all in one go, and highlight why the exploitative claim adds value to the claim as opposed to the four standalone exclusionary claims that Brook say has value.

THE CHAIR: Okay.

MR BREALEY: I'll go through the respective exclusionary claims. As I go along, I'll highlight why the exploitative claim is beneficial, and I'll also look at the exploitative claim. Then I don't know whether -- those are the methodologies, and then we can part, maybe, the scope of the claim, whether it concerns the UK or EU-domiciled users. We can just put that tomorrow afternoon.

THE CHAIR: No, I think we'll try -- we'll do it all, please. I know it's a very crude and unfortunate term, but those I think of as all substantive in the loosest sense and the other ones as procedural or litigation-specific.

MR BREALEY: Well, the one thing that I was just told, in our skeleton, we put in an annex which had a table.

THE CHAIR: The green table.

MR BREALEY: Oh, it is green?

THE CHAIR: Yes.

MR BREALEY: I was told it was in black and white.

THE CHAIR: When I printed it on the judicial printer, it came out black and white, but I've helpfully been given a green one.

MR BREALEY: Hopefully everyone's got a green one.

THE CHAIR: Well, I think my colleagues are doing it from the electronic version, but I've got a hard copy, which I can reassure you is green. Okay.

MR BREALEY: I was just going to say, could you show them the green.

THE CHAIR: Yes. Could I also just mention, not perhaps majored on in either party's submission, we're in an unusual situation in many ways, but one of the features that we have to bear in mind is that the Stopford claim has already been certified, and the match or mismatch, as the case may be, between these parties' putative claims. We'd appreciate your assistance on what relevance that that that may have. It's relied on at one point in Mr Beal's submissions.

MR BREALEY: In a nutshell, the Stopford claim has the same exclusionary claim as us. It doesn't pursue the other standalone exclusionary claims, nor does it pursue the exploitative claim.

THE CHAIR: Yes.

MR BREALEY: If I was a betting person, which I am, if we were to be certified, I would guarantee almost that Stopford would seek to amend to include an exploitative.

THE CHAIR: Okay. Well, that's a helpful taster, but we don't want to overlook that because that's an important practical question.

MR BREALEY: No. Can I start, and -- I mean, I will motor on. I won't be long winded; there's quite a lot to do.

THE CHAIR: There is. Yes.

Submissions by MR BREALEY

MR BREALEY: Could I start, then, with the Brook's 5 September submissions, which are -- so hard copy, it's bundle A, tab 4.

THE CHAIR: Yes.

MR BREALEY: And for the electronic, it's -- do I need to do say HB, or can I just say A/92? I will say HB but it's the --

MR DAVIES: We'd prefer the numbers that match the page numbers in the PDF, I think if possible.

MR BREALEY: Okay.

MR DAVIES: There are 230 pages in the PDF.

MR BREALEY: Okay. Well, it's page 37 of tab 4 and it's HB-A/92.

THE CHAIR: Yes. Just do the HB; I'll be able to find my way.

MR DAVIES: Sorry, I don't think I will easily. I'd like to type in a number between one and 230 in this big PDF document and go straight to the page.

THE CHAIR: I think that will do that.

MR DAVIES: It can't do that.

THE CHAIR: So, the page you're -- what did you say, Mr Brealey?

MR BREALEY: The one on the bottom right --

THE CHAIR: Yes.

MR BREALEY: -- is HB-A/92.

THE CHAIR: Yes, so that should be page 37 of the --

MR BREALEY: Of the hard copy.

THE CHAIR: Yes.

MR BEAL: If it helps, sir, I think the PDF number matches the number on the written page on this bundle.

THE CHAIR: Okay.

MR BEAL: It doesn't for the authorities bundle where you may need for the main authorities bundle to add eight.

THE CHAIR: Okay. So I think if you do 92.

MR DAVIES: 92, okay. So I just ignore that?

THE CHAIR: Yes.

MR DAVIES: Okay.

THE CHAIR: Okay. So you can just give us the HB number, Mr Brealey, and we'll all find our way with that.

MR BREALEY: Thank you very much.

MR DAVIES: Yes.

MR BREALEY: So, I want to start with this, in the light of how you say you frame the exam question. It starts off with the damages. The Kaye exclusionary damages estimate is only, they say, only £3 billion. That is much less than the Brook estimate. But that, they say, is hardly surprising since, as they've set out, the Kaye exclusionary case is much narrower than the Brook case. It says no way of assessing quality effects; we dealt with that, we say it's wrong. But the Kaye exclusionary case is much narrower. Then at 78 below the bar, it says Dr Coscelli provides only a single damages estimate for the exclusionary claim, whereas they provide two estimates. So there is a disparity in the damages estimates based on the methodologies.

In our submission, this is a distorted illustration for several reasons, but I'll give four and then I'm going to expand on them. That is a distorted illustration, first, because Brook has not shown any link between its estimate of damages and its so-called wider claims. It has not shown any link between its estimate of damages and its so-called wider claim. Second, Brook has proposed four methods, but the damages estimate only relies on one method. So, Brook has proposed four, but the damages in this chart only relies on one method; that is method 1C, on pricing effects. Third, the method 1C calculations, which we'll look at, for its two estimates of £5 million to £9 billion, we say, are inflated; they're not robust and hardly implement method 1C at all. There is an absolute lack of any causal link between these damages and the methodology under 1C. So that's the third reason. The fourth is that Mr Kaye's exclusionary claim of £3 billion is conservative and is based on a provisional counterfactual -- and this is important -- of what market power Google would have had absent the exclusionary conduct.

I'm only dealing with the exclusionary claim here at the moment, and I'll come on to the exploitative claim, but those are our four main reasons. With that introduction, I would like to address the Tribunal on two matters which feed into these four reasons. The first is the importance of counterfactual in any exclusionary damages claim, the importance of counterfactual; and then second, the party's estimates based on the different methodologies. In order to make good those submissions, those four submissions, I want to look at the importance of the counterfactual and then have a look at how the parties have estimated these damages in this case.

With that introduction, can I start with the importance of a counterfactual, because you don't need a counterfactual in an exploitative claim. You have a benchmark, but you do not need to show a counterfactual market; you don't need to show any counterfactual price. That is one of the reasons I've put that bar chart right at the end of the skeleton, which puts it in colour.

So I want to start with the importance of the counterfactual. And if we can go to our skeleton, and I'll speed things up, I'll go, if I can, to our skeleton. That's at tab 3.

THE CHAIR: Yes.

MR BREALEY: Paragraph 3. So this is HB-A/32. It is agreed between the parties and the experts that you need a counterfactual in an exclusionary claim as a necessary precondition of any damages claim based on exclusionary conduct, contrary to section 18(2)(d). So, Professor Scott Morton -- and I apologise, sometimes I say Scott Morton, but Professor Scott --

THE CHAIR: Yes, thank you.

MR BREALEY: -- identifies this at paragraph 42 as a causal connection, and we shall see this causal connection when we look at method 1C.

"Harm to advertisers is equal to the difference between their economic outcomes in the presence of Google's Conduct (the actual) and those which would have prevailed absent Google's Conduct (the counterfactual). The quantification of this harm requires the specification of the counterfactual world had Google's Conduct not taken place. I therefore [she says] set out a proposed counterfactual that acts as a framework to quantify harm to the members of the Proposed Class."

So that's Professor Scott Morton saying she needs a counterfactual for her exclusionary claim. And Dr Coscelli similarly says:

"In order to assess damages suffered by Proposed Class Members under the

Exclusionary Claims, I must first consider what would have likely happened absent the conduct, i.e. the 'but for' counterfactual. [He again emphasises] 'the causal chain which explains how Proposed Class Members have ultimately suffered harm relative to the counterfactual in which the abusive conduct did not exist."

THE CHAIR: Okay.

MR BREALEY: That is, and I've read it out, but it is so important, the difference between the exclusionary claim and the exploitative claim.

THE CHAIR: Yes.

MR BREALEY: Now, we've seen the differences in the damages. I do need to emphasise the known facts that all the experts know about in adopting a counterfactual, even at this provisional stage.

THE CHAIR: Okay.

MR BREALEY: No one is pretending this is a final report; it is a provisional stage. But as one knows, with all counterfactuals, known facts can be relevant. It is inherently hypothetical, but known facts are relevant. And in order to work out the counterfactual, it is very important to see Google's entrenched dominant position prior to the infringement period.

THE CHAIR: Yes.

MR BREALEY: And I would just -- we set that out in paragraph 5 of our skeleton, but we should just go to the EU decision. That is in the authorities bundle, volume 7, and it's at tab 59. Thankfully, there's only passages from it. So this is page 4140 of the authorities bundle 7, tab 59, page 4140.

THE CHAIR: Let me just pause for a moment while we make sure we ...

MR DAVIES: Sharing arrangements.

THE CHAIR: 4140 for you is the front page, right?

MR BREALEY: The front page is my 4140. I don't know -- it's 414 -- 41 --

THE CHAIR: Yes, just give us a moment, Mr Brealey. Once we've established the method of doing this, I'm sure ... (Pause)
Okay, add eight is the recipe. Yes.
MR BREALEY: So, 4148. I don't know whether you can go over the page to -- so, in the hard copy, it's 4145, so 4153.
THE CHAIR: Yes.
MR BREALEY: So, at the bottom -- I'll take this quickly, but it is very, very important to realise that at the beginning of the infringement period, the significant market power that Google had.
THE CHAIR: Yes.
MR BREALEY: So, recital (674), "National markets for general search services", right at the bottom of the page:
"For the purpose of this Decision, the Commission concludes that Google holds a dominant position in each national market for general search ... since 2011. This conclusion is based on:
"(1) The market shares of Google ...
"(2) The existence of barriers to expansion and entry ...
"(3) The infrequency of user multi-homing and brand effects ... and
"(4) The lack of countervailing buyer power ..."
We'll just touch on these subjects. So you'll see there at section 951, it deals with the first one market shares. If you look at recital 679, you see there that Google in the United Kingdom owned 81.3 per cent in 2010.
THE CHAIR: Yes. I think you give that number in your skeleton.
MR BREALEY: And Bing had 4 per cent.
THE CHAIR: Yes.
MR BREALEY: So that's a massive difference.

We then go on to page 4150, which will be 4158. This is where the Commission sets out the barriers to entry and expansion. (Pause)

You will see there at 687, you need significant investment. At 688, you need scale. We go on to recital 700, if you can, 700 and 702 -- so that's page 4161 or 4153. I just want to emphasise that at 700:

"First, in the last ten years, a number of companies have exited the national markets for general search ... either completely or abandoning their general search in favour of third ... For example, Yahoo! abandoned the general search technology, including in the EEA, in 2009."

So that's two years before the infringement period. And then you get Bing:

"Since 2007, there's only been one significant entry."

Then if we go over the page to the third factor the Commission relies on for dominance, which is the infrequency of multi-homing and existence of brand effects, I would just emphasise recital 712, page 4156. You see here the Commission emphasising Google's brand:

"Uses trust in the relevance of search results. The further dissuades users of Google from multi-homing."

So the strength of the brand, and you see there in 2011 there was a study -- it was the most valuable global brand in the world.

Then the fourth factor over the page, 715, lack of countervailing buyer power. And you see at 718:

"Google does not contest the Commission's conclusion as outlined in this section."

So these are historic facts.

"Google does not contest the Commission's conclusion as outlined in this section."

You can put the decision away, but it's also important to note that Professor Scott Morton does not contest these historic facts as well.

THE CHAIR: No, I don't think they're contested for the purposes of this hearing at all.

MR BREALEY: No. But it is important, therefore, to -- so Google does not contest them, and Professor Scott Morton doesn't contest them. But it is important to realise that Google had at the start of the infringement period, 81 per cent.

THE CHAIR: Yes.

MR BREALEY: I'm not making any concession here; I'm not kind of throwing up and saying we're going to lose on the exclusionary. I'm just drawing the Tribunal's attention to the historic facts and trying to be realistic about what a counterfactual in the exclusionary conduct case will be.

THE CHAIR: Yes.

MR BREALEY: That is where I'm coming from.

THE CHAIR: Yes.

MR BREALEY: And one has got to be realistic.

THE CHAIR: Yes, it is a point that divides you because Mr Beal says that you're running up the white flag on day one, and your position is: no, you've just got to accept the facts as they are.

MR BREALEY: Correct. My flag of £3 billion is not necessarily running a white flag.

THE CHAIR: Yes.

MR BREALEY: £3 billion -- and that's a conservative figure, as we shall see. Dr Coscelli says that 3 billion is a lower estimate because it's based on the EEA blended average, because we know in the EEA, Google still have 90 per cent, as we'll come to see in a moment. So when we see Dr Coscelli, that is a conservative figure, but you can't shy away from the fact that in 2010, Google had over 80 per cent, and at the end of the infringement, it had 90 per cent.

What Brook has got to do, and we've got to do, and Stopford have got to do, is work out where Google's market power is going to go down to. That's the real point: how

far down is that market power going to go down to?
THE CHAIR: Okay. (Pause)
MR BREALEY: With that in mind, could I just go -- we're going to look at the digital marketing report quite a lot that is at authorities bundle 6 at tab 51 -- to see what the position is.
Now, you saw what the position was in 2010. It is important to see what how the competition authority, the CMA, views the position now. There is a difference between us and Brook as to why that is the case, but it is important to see what the CMA is saying. So this is authorities bundle 6, tab 51.
I would like to go to para 18. It's page 10 of the report. In the authorities bundle, it's 3283, and the electronic will be 3291.
THE CHAIR: Yes.
MR BREALEY: But it's important to see what the competition authority is telling us about the state of play. Now, Google -- this is 18:
"Google's had a very high share of the general search market for many years. Google has generated around 90 per cent or more of UK search traffic each year over the last ten years, generated over 90 per cent of UK search advertising.
"20. It is important to be clear that 'big' is not necessarily 'bad'."
Which obviously is true.
"Where a platform has gained a large market share by being consistently better than its competitors and where it must respond to continued competitive pressures to maintain that position, it may be considered to operate within a competitive market ... However, if potential competitors face substantial barriers to entry and expansion, such that the market is no longer properly contestable, then a high market share can translate into market power, giving the platform the opportunity to increase prices, reduce quality ..."

This is important.

"21. We have not seen a significant challenge to the position of Google ... for many years ... a number of characteristics that inhibit entry and expansion."

Then we get some of those that we saw in the EU Commission decision:

"network effects and economies of scale;

"consumer decision-making and the power of defaults."

Which is what, essentially, the Android exclusionary conduct was about.

"unequal access to user data;

"lack of transparency ..."

"22. The effect of any of these characteristics in isolation would be substantial ... mutually reinforcing, and in combination, provide an unassailable income advantage."

So if one goes to our skeleton, I think we can put that away, because we can see what the state of the market is. At paragraph 6, we say we're not raising the white flag. We know what the position was in 2010, we know what the position is now. But we do say it is a known fact that Google's share of the UK search market remains today at 90 per cent, which is the relevant market for the claims. This is seven years after the infringement decisions, five years after purported remedy, three years after the EU Commission required a better choice screen.

Now, the reason for this will be explored at trial. Whether it is simply because of Google's brand, its encompassing advantage, or because, as the experts say, and including Dr Coscelli, remedy of a choice screen was limited as it only applied to new devices, and certain agreements may have contributed to the foreclosure effect. That will be a question for trial.

But the important point -- and this is why I put in the skeleton, the table at the end, if we could go to that table. (Pause)

This table is at the end of our skeleton at A51. The exploitative claim will go all the way down, in principle, to a workable, competitive, ROCE level. We'll see that in a moment. The Court of Appeal has adopted a return on capital employed as a proxy for what would be achieved in a competitive market.

So the exploitative claim will, in principle, go all the way down. Clearly, standing here, I can't guarantee that it might be a little bit above or where it's going to be, but it is what the ROCE, the Return on Capital Employed, and the WACC is doing, is saying: well, anything above that is in principle unfair. So anything above the workable, competitive ROCE WACC will be, in principle, unfair. (Pause)

Now, compare that to the exclusionary claim, which has to prove a counterfactual. You strip out the default agreements, you strip out the other restrictive practices, and where is the counterfactual dial going to land? (Pause)

Now, we know that it started off with 81 per cent. We know it's 90 per cent. Is it going to go down, as with Turkey -- and we'll come on to Turkey in a moment -- to 62 per cent? Where is it going to be? So it is only once you've -- and I appreciate we're at a provisional stage.

THE CHAIR: Yes.

MR BREALEY: But, at least provisionally, is there a realistic counterfactual? The only way that the exclusionary claim is going to capture all of the harm that the exploitative claim does is if, in the counterfactual world, you strip out the Android exclusionary practice, the Apple practice, it comes all the way down to above workable competition. That's the only way that the exclusionary claim is ever going to catch up with the exploitative claim. In a nutshell, that is why we have -- we've done it for a reason.

The reason is -- and I don't want to sell the past today, because we've got an exclusionary claim, but we have taken a provisional view that it is at least realistic -- plausible. But in a counterfactual world, if you take out the Android exclusionary practices, the Apple exclusion, you are not going to get into that lighter shade green. You may get into the middle green somewhere along the line, but if the counterfactual dial on the exclusionary claim is only in that middle shaded green, it's never going to catch up with exploitative claim.

That means the advertisers will not be recompensed for all the harm they have suffered. That, in a nutshell, is why the exploitative claim captures more of the harm than the exclusionary claim.

I'll develop that when we deal with Professor Scott Morton's two methods, basically. Both experts have a first choice method --

THE CHAIR: Yes.

MR BREALEY: -- which is their comparative method. That comparator method depends, like -- looking at Turkey -- where is the counterfactual market going to land? If it's 60 per cent, then you know that the revenue is -- let's say it's the difference between 60 and 80 -- that 20 per cent is the unlawful revenue. Then you've got to do your regression analysis and work out how the reduction in market share equates/correlates to a decrease or increase.

So the market share is relevant to -- and we'll see this in a moment -- the comparator method: where is the market share going to be? Also, it's relevant to the counterfactual relevant to market power, which is Professor Scott Morton's method 1C, because she says: well, I can only attack certain pricing practices, and those are the pricing practices that would not have occurred absent the exclusionary conduct. (Pause)

We'll come on and see this in a moment, but she says: the extent to which Google can implement these pricing practices depends on the market power it has. The more market power it has, the more likely it will manipulate the market and have the price increases. The lower the market power, the less likely it will be. So even on her method 1C, it all depends on the counterfactual market power. I'm not making this submission, I'm just adopting what her evidence is. That's why this counterfactual is very important.

So can I, with that, then have a look at the exclusionary methods.

THE CHAIR: Yes.

MR BREALEY: So maybe we just pick this up. Before we go to Dr Coscelli's report, can we just go to paragraph 8 and 9 of our skeleton. I appreciate the Tribunal will have read it, but we kind of set the scene in paragraph 8 and 9 of our skeleton, dealing with the comparative method.

We say the method that both experts adopt as their first choice is the comparator method; Coscelli proposes this method and it's summarised, and we've given the -- Scott Morton describes this as her method 1A, and everybody knows that a comparator method is regarded as a robust method because it's based in large part on what has been observed; it's based on real life.

It considers the price effects, the cost to the advertiser, when Google's market share fluctuates. There are two main strands to this comparator method: first, it is necessary to define the counterfactual market share, because this will indicate Google's market power and its revenue; and secondly, it is necessary to establish the market share price ratio, which can then be applied to calculate the damages. So there are two strands to this comparator method. Both experts agree that.

And we say it is important to note -- and I asked the Tribunal to have in mind that paragraph 77 of Brook's bar chart in its submissions, how it's claiming this £5 to £9 billion -- that Kaye through Coscelli assesses both strands. He provisionally proposes a counterfactual market share, which is conservative in favour of Google, and has undertaken a regression analysis of 30 countries to establish a price ratio which can then be correlated with the difference between the actual and counterfactual market share. On this basis, he provisionally estimated a claim worth £6 billion, £3 billion with a 50 per cent pass on.

By contrast, Professor Scott Morton has done neither. She postulates reasons why there would be market entry but does not even provisionally estimate a counterfactual market share. Second, she has not undertaken a regression analysis to analyse the ratio between market share and price, so cannot even offer a range of possible outcomes. This also is the punchline: Brook's damages claim that we saw in that paragraph 77 is not based on any comparator analysis under method 1A. And that's very important. So the first choice: we've tried to implement method 1A, and we'll come on to see how Coscelli has done it, but when one's looking in that paragraph 77 bar chart, that £5 million to £9 million, which they say is because for obvious reasons it's wider, method 1A is not being employed to justify those damages.

THE CHAIR: Right. I mean, aspects of your paragraph 9 are disputed. There's dispute about to what extent Professor Scott Morton has done a counterfactual.

MR BREALEY: Well --

THE CHAIR: It's not accepted that she hasn't; it's (inaudible) just say that she's been less quantitative about it.

MR BREALEY: Well, it is undoubtedly the case -- and with great respect to her, she goes through in a lot of detail what could happen.

THE CHAIR: Yes.

MR BREALEY: There is scope, there is the incentive because it's super profitable, but nowhere is there any analysis of the likely counterfactual market share. It's not there. I mean, I think from memory, we see, if one goes to 486 of her report.

THE CHAIR: Yes, I'm not trying to take over your points, it's just that at points you've been saying certain things are agreed between the experts, and I think you've been right about that, for example, 84 per cent, but now I'm really just emphasising that in your paragraph 9 of your skeleton, you start to move into matters which most definitely I think are disputed.

MR BREALEY: Well, I would just like to push back on that.
THE CHAIR: Okay.
MR BREALEY: The reason I do that is because I do respect the analysis that she has done.
THE CHAIR: Yes.
MR BREALEY: But I would submit that there is no provisional counterfactual market share in the report. And if there is one, I'm sure Mr Beal will tell me. The reason that 486 stands in my mind; we can go to it --
THE CHAIR: Yes.
MR BREALEY: So, at 486 and this is HB-C/158 -- maybe we'll just go to this 486 physically. This is in volume 1 bundle C.
"In the counterfactual described in Section 5.2, Google would likely have been unable to engage in certain pricing practices" --
This is 486 on page 145 of the report. This is Professor Scott Morton, bundle C, volume 1.
MR DAVIES: What page?
MR BREALEY: C/158 at paragraph 486.
THE CHAIR: Yes.
MR BREALEY: Again, I maintain the position that there is no provisional market share in the report.
"In the counterfactual described in section 5.2, Google would likely have been unable to engage in certain pricing practices, as it would not have achieved the same dominant position with over 90 per cent share of traffic."
THE CHAIR: Yes.
MR BREALEY: Now, "the same dominant position". So, does that mean that it is plausible that it would have had a dominant position at 60 per cent, 70 per cent? Now,

if that is the case, that it has not the same but a different dominant position of 60 to 70 per cent, that shows that it's not going to catch what the exploitative claim does. She also goes to -- and we'll come back to this; we don't have to go to it -- in the last sentence:

"Google's dominant position likely enabled it to engage in certain harmful practices and allow me to establish a causal link between Google's Conduct and the concrete harmful effects to the Proposed Class."

Now, that is a very important statement, because the counterfactual market power will enable her to establish a causal link between the conduct, the unlawful conduct, and the pricing practices.

MR DAVIES: Following up on Mr Justice Meade's question earlier, you said earlier, I think, Mr Brealey, that that there are two things that's necessary to do: it's necessary to define a counterfactual market share -- share, not just market -- and that it's necessary to determine the price ratio, by which you mean the relationship between the market share and the price. And then you said, "The experts agree on that". I think that's the point we're questioning, isn't it, whether the experts do agree that those two steps, determining the counterfactual market share and then determining the relationship between market share and price, that they agree that that those two steps are both necessary. I'm not sure they do. (Pause)

Might be best to hear from the other side, I don't know. I might be misquoting you, but that's what I had written down.

MR BREALEY: Okay. Well, the people to my right will tell me; I'm 100 per cent certain that that is what, if I can just ...

MR DAVIES: And I think that's what you meant by "she defines the counterfactual", but she doesn't necessarily quantify it in quite the way that you do, or as much as you did.

MR BREALEY: If one goes to our skeleton at paragraph 15, this is our summary of what she intends to do in her comparator method, method 1A. So, this is a -- proposes at section 6.3.1 a comparator-based method as her first choice, but she doesn't offer a provisional view on a counterfactual and does not undertake any regression analysis.

So, at section 576, Scott Morton states that other countries may be a suitable comparator to determine a counterfactual. She refers to various countries; Turkey seems "particularly effective". So she does go through what countries would act as a counterfactual.

Then at 595, she states that, having established the appropriate comparators -- that's the countries or whatever -- she would "estimate how differences in Google's market power" affect prices paid by advertising. She proposes, like Coscelli, a regression model which she states is a "standard tool used by economists" to identify the relationship between "market power" and "price". However, unlike Coscelli, she does not undertake one. She does not undertake a similar analysis of comparing 30 different countries, as he has done a regression analysis and he's seen that a 1 per cent increase in market share correlates to a 0.5 per cent increase in price.

So, in my respectful submission, under her comparator method 1A, Professor Scott Morton is adopting what is standard in a comparator method. She needs to identify a comparator. If it's a country, is it Russia? Is it EEA? Is it Turkey? And the reason for that is to see -- it's a natural experiment. It's a natural experiment because you can see what happened to Google's market power, market share, when it lost its default Google status. So, in Turkey, for example, we see that it came down to 62 per cent. And then, as I say, she says, having got that reduction in market share, how does that translate into price?

MR BEAL: I'm very sorry to interrupt; I've been trying to keep quiet. But could I just emphasise that our case is that it's about market power, not about market share, and nowhere does Professor Scott Morton say there's this mechanistic link between market share and price. It's market power and price, but market share is not the same as market power. I just want to be clear on that.

THE CHAIR: Yes, okay.

MR BREALEY: I take that. I mean, obviously market share is an indication of market power. I'm quite content with market power, but it's a very odd submission to make that we're not interested in market share when market shares have, we've seen in the Commission's -- the very first thing the Commission says in its decision when it's looking at Google's market power is its market share. So, I'm not expecting any sort of precise market share, but I am expecting a provisional view on market power and a provisional view on market power would be shown by some provisional view on market share.

THE CHAIR: Okay. Anyway, you've highlighted Professor Scott Morton's paragraph 595 where she talks about a regression model and, in due course, Mr Beal can explain what that's about. I think your position is she's saying that it should be done, but your point is that it hasn't yet been. I'm sure we'll hear from Mr Beal about whether and to what extent that's an acceptance that it must be or that it's optional or whatever. It's a useful thing to have on the agenda for Mr Beal to review.

MR BREALEY: Yes. I mean, in my submission, the professor is saying you need a comparator and you then need a regression model to correlate the reduction in market share with the price.

THE CHAIR: Yes. Yes. Right.

MR BREALEY: That is standard. If Mr Beal wants to say that's not what she's going to do --

THE CHAIR: No, well, I understand.

MR BREALEY: But the bottom line is, it hasn't been done.

THE CHAIR: Right.

MR BREALEY: Coscelli has done it; he's done the first choice method. She hasn't done it.

THE CHAIR: And just for your assistance, Mr Brealey, what I had in mind when I said earlier that it was the Brook party's contention that Professor Scott Morton had gone into the counterfactual, what I had in mind was paragraph 37 of their responsive submissions where they say --

MR BREALEY: Of their --

THE CHAIR: Yes, HB-A/169.

MR BREALEY: Of the response, 37?

THE CHAIR: Yes.

MR BREALEY: Yes. Well, yes.

THE CHAIR: Yes. I'm just identifying what it was that I had in mind, which I perhaps inaccurately think of as they say she has reflected on it, thought on it and done this analysis, but it's not a quantitative exercise.

MR BREALEY: No. It's all very fair, what she's put out, that there is scope and there is incentive. But -- so to a certain extent, that's why, when you are looking at your comparator method, you are trying to ascertain a natural experiment, what actually did happen. And when Google lost its default status in Turkey, and Professor Scott Morton says that's actually not a bad example, it went from 90 per cent to 62 per cent. Therefore, we'll, I think we'll see -- do I need to have a break? Or, I don't know if anybody's doing a short ...

THE CHAIR: 11.45 am.

MR BREALEY: Okay. Can I then quickly go and see how Coscelli --

THE CHAIR: Yes, sorry, go on.

MR BREALEY: -- how Dr Coscelli does this comparator method.

THE CHAIR: Right.

MR BREALEY: And the reason I want to do this is because, again, this paragraph 77 of its first submission says it's hardly surprising because it's wider. Well, first of all, as I said, you never see any damages estimate on the basis of wider. It's illusory; it's not there at all. But secondly, it's important to see that Coscelli has adopted a conservative approach to his £3 billion claim calculation. So his report is at bundle C, volume 2 at tab 14. And this is at HB-C/1142.

THE CHAIR: Yes.

MR BREALEY: Okay. C/1142. Paragraph 214 sets the scene by saying that in the exclusionary claim you've got to adopt the "but-for" counterfactual which is crucial. And then we see at section 5.4.1 he starts with the Android exclusionary claim counterfactual. And at 219, he's looking at the position during the infringement period. And then at paragraph 222, he's not putting up the white flag on the 90 per cent; he is saying, "Okay, but from 2018, 2021, there was a 90 per cent market share that Google had, but the remedy is only applied to new agreements". There is this issue of the RSAs and placement agreements. I haven't got disclosure of those yet, but -- and this is what he says at the end of paragraph 222:

"My preliminary view, which may be refined following disclosure, even after the unlawful agreements were replaced by alternative agreements, Google still maintained a degree of market power and influence that it would not have existed absent the abusive conduct." [as read]

So he's looking at a counterfactual during infringement period, and he's looking at counterfactual after, because we know that the agreements were unlawful during the infringing period. But there is an issue about whether the agreements after the infringement are unlawful, whether they pursue the same objective, and that will have to be determined by way of disclosure.

But I still come back to the fact that Google have 90 per cent market share because of these various factors. And are you going to say that it's going to lose, go from 90 per cent to 25 per cent, simply because of these agreements? And this is the big -- this is the issue.

So we're in his comparator, so then he has to look at the comparators. If we go to 227 at C/1147 he, in his Annex 3, sets out a number of country case studies. And he looks at Turkey where it was required to abandon its default agreements which led to a significant reduction in its share of general search; mobile devices: Google's share of search queries fell from about 98 to 63 per cent; desktops: 94 to 61.

"While other factors will also likely impact market outcomes, this provides an example of a plausible market structure which could arise in the absence of Google's default agreements."

So he's putting forward to the Tribunal, and putting forward to Google -- because remember, Google is being sued for billions -- a plausible counterfactual market share, market power. He at 229 deals with Russia. Then at 231 he deals with the EEA. He recognises that the remedies were introduced. He says they were concerned with choice screens. And he's not waving the white flag as regards the EEA, but it is uncertain.

So what he does, for the purposes of the damages calculation, he takes a blended average of Turkey, Russia and EEA. So EEA is quite high; Russia is quite low; Turkey is in the middle. And he takes a blended average.

So at paragraph 234:

"While my preliminary view is that Turkey, Russia and EEA interventions may all provide helpful insights ... I consider that Turkey may be a more informative and relevant comparator ..."

So he's given a blended, but he's saying that he considers that Turkey may be more informative. That is a natural experiment, and he gives the reason there. And then at 236 he takes the case studies:

"I can compute an estimate for how Google's market share for general search may have evolved ..."

And remember this is observable market shares, as he says in 236, subparagraph 2. So these are observable. These are not simulation models or; these are observables. At 239, it is important when one is looking at Brook's criticism of Coscelli and his only 3 billion, paragraph 239:

"I consider the scenario I set out above, and the corresponding estimate for Google's market share in the counterfactual is likely to be conservative, my estimate of Google's general search market share in my Android Exclusionary Claim is likely to be too high."

First, he gives the reasons, but Turkey is probably the more relevant. So that is his Android exclusionary counterfactual.

He then deals at section 5.4.2 with his exclusionary, Apple counterfactual there.

You don't have the same observable, facts. And over the next few pages he postulates what might happen, and there's no issue taken with what he's done. At 258, he says.

"I ... consider absent the [Apple], Google would have had a lower market share in general search services."

At 259, reply again says this is conservative because of the dynamics of the market. And then he combines them. He then has to translate that lower market share into a damages calculation. He starts out -- and we can pick this up, I'm rushing through this. But at 278, so this is at HB-C/1168. So he's looked at the reduction in market share, the blended average, probably saying that it's a conservative. Then 278:

"To undertake a cross-country compare, I will use regression analysis to quantify how changes in Google's share of search traffic in different countries are associated with changes in advertising costs [which is the revenue] while controlling for other factors.

"279. I am testing that when Google holds a higher market share of general search queries in the country, it will be able to charge higher search ad prices in the form of a higher [cost per click]."

At 280, he says if it got certified, I would need, obviously, disclosure from Google.

THE CHAIR: Yes.

MR BREALEY: Which is understandable.

He then, at 281, sets out what his regression, what he would do. He obviously doesn't have Google's internal data. So, what he does, and this is at 285 on C/1172, he identifies a data set available by WordStream, which sets out the average cost per click in 2023 across some 98 countries. He takes 30 of them, and he does a regression analysis. At 287:

"After controlling for purchasing power, population, GDP, internet penetration, advertising spend ... click-through rate and conversion rate ... [This is the result of his provisional regression analysis] I find a 1 per cent increase in Google's search traffic share leads to approximately 0.52 per cent increase in [cost per click]. [That's the price to the advertiser.] This result is statistically significant at the 5 per cent level."

THE CHAIR: Yes.

MR BREALEY: Then at 292 and 293:

"I need to emphasise that the regression analysis set out above is preliminary. ... I will want to acquire more complete and accurate [cost per click] country dataset. ... [But] my objective [and this is important, at 292] at present is to show that this analysis is viable."

So he's trying to put forward to the Tribunal a viable analysis to sustain the £3 billion claim. At 293:

"I apply the provisional relationship I have found between market share and [cost per click] to the estimation of damages based on the market share differential that I estimate, between the factual and the counterfactual scenarios. The reasoning is that, in the counterfactual scenario where the Android agreements and the ISAs [Apple's] are not in place, Google would have a lower market share due to increased competition. As a result, it would have [been charging] a lower price for its search advertising. I set out my damages calculations ... in section 8."

I'll just finish that, then we can break.

The damages calculation: if one goes to C/1208, which is paragraph 384.

THE CHAIR: Yes.

MR BREALEY: This is section 8 of his report. So at 384 and 385.

"In Sections ... I outlined my proposed methodologies for assessing overcharge, and therefore damages ...

"Under the Exclusionary Claims, I assessed the counterfactual market share for the [Android and Apple Exclusionary Claim]. I then proposed a regression analysis to determine the relationship between market shares and advertiser costs (ie [cost per click]). I preliminarily found that a 1 per cent change in market share results in a 0.52 per cent increase in search ad costs."

And he calculates the damages on that basis.

And at 397, table 8.3 below sets out the cumulative estimate for the exclusionary claims with various pass-on rates.

And we see there at table 8.3, that's where you get the £3 billion. It would be 6, but it's 3 billion with a 50 per cent pass-on. Okay? In my respectful submission, that £3 billion claim has been -- Dr Coscelli has proposed a standard methodology, and he's implemented it to give the Tribunal some comfort that the £3 billion, which is conservative, is plausible, and that is the basis for the £3 billion.

I can only repeat, and then we'll have a break, Professor Scott Morton does not adopt

her first choice, method 1A to justify the £5 billion to £9 billion claim.
THE CHAIR: Okay. Thank you very much. Perfect timing. We'll take the break.
(11.44 am)
(A short break)
(11.56 am)
THE CHAIR: Mr Brealey, just before you carry on. We've reviewed Simmons and Simmons' letter of 3 October and we think it's better not to go forward in a state of unclarity. We can see the point Mr Beal has raised. As we see it, ultimately this objection would be that there's a danger of perceived bias against Google. If Google don't intend to say that, then that makes a difference to our attitude now.
So the CAT will write to Google to ask for clarification. I mean, the authorities say that if you're going to raise an issue of perceived bias, you must do it at the earliest opportunity. And so this is Google's opportunity, as we see it, albeit in an unusual format. So, I'm just clarifying that we see the way that Mr Beal says this should be read, but we don't intend to try and resolve it by parsing the letter like it was a contractual clause. We're going to find out what Google actually are saying. We will do that by means of a letter. But I'm really saying this now because they may have somebody in court listening who can pass the message back more quickly.
MR BREALEY: I haven't got in front of me. The way I read it was because -- we've taken note of the submissions.
THE CHAIR: Yes.
MR BREALEY: And then when it says "Brook's skeleton", that's because in our skeleton we don't deal with it. So what I read was: we've looked at all the parties submissions.
THE CHAIR: Yes.
MR BREALEY: And Brook's skeleton, because they raise it in the skeleton, and we

say we're not sure whether it's in issue.
MR BEAL: If it helps, if Google say in terms: we wouldn't take this point at certification or any time thereafter, the point is dead. If that helps.
THE CHAIR: That's how we see it, but whether this letter is meant to say that or not?
MR BEAL: That's the difficulty.
THE CHAIR: I'm afraid, the more one looks at it. I'm grateful for your indication. That's the pragmatic way to look at it. And we will just -- the CAT will write to Google to try and get clarification about that, I hope overnight, because then we can put this in the agenda for tomorrow and it will be live or not, and we'll know where were going. Thank you very much. Okay.
MR BREALEY: Let's then close off on the method 1A, and to pick up the point that the Tribunal made about whether Professor Scott Morton, what she's proposing. We should, in fairness, look at bundle C, volume 1, which is her report. Tab 1 and it's HB-C/187. It's paragraph 576 of the report, internal page 174. But it's 576, where she sets out her proposed comparator based method, method 1A, which is her first choice. She says at 576:
"In this method I intend to approximate counterfactual prices and ROAS by considering suitable comparators. These comparators may be other countries, time periods, rival GSEs other than Google. ...
"Below, I set out my proposed approach (i) to identify suitable comparators along different dimensions [so that is Coscelli's Turkey], and (ii) to estimate harm to the proposed class [that's his regression analysis]."
And just to highlight it: stage 1 is identifying the comparators. And if one goes over a few pages to HB-C/193, this is stage 2:
"Having established which geographies [et cetera] serve as appropriate comparators [that is Turkey], it will remain to estimate how difference in Google's market power

affect ROAS and/or prices. I will use econometric techniques -- in particular a fixed effects regression -- to isolate this relationship from other factors ...

"Regression analysis is a standard tool used by economists to identify and measure the statistical relationship between an outcome variable and a set of explanatory variables."

So that's what she would do, exactly the same as Dr Coscelli. I note in passing, at page 181, which is C/194, just to pick up Mr Beal's intervention. This is her regression, what she will do with her regression analysis. At 602, you see -- it means absolutely nothing to me -- one, two, three, four, five bullets down -- where is a measure of market power in a country, for instance, Google's market share. And that's simply making the point that I made, that market share is very often an indication of market power in a country. I don't really know what the point was. So that's the comparator method. Coscelli offers the Tribunal a method. She offers a method, but he implements it. Professor Scott Morton also advocates two simulation models, which we deal with in our skeleton at paragraphs 21, 22, and 23. This is HB-A/38, where she's going to adopt a standard oligopoly model, which is used in mergers. But again, it is trying --

THE CHAIR: I don't think we need to spend time on that at the moment.

MR BREALEY: No.

THE CHAIR: Let's see if anything turns on that. I think 1A and 1C are the important --

MR BREALEY: Yes. Royal Mail wasn't that impressed with simulation models. Again, I make the point that the paragraph 77 bar chart for damages does not depend on methods 1B and 1D.

THE CHAIR: No, I don't think they're material to this hearing, but if that changes in light of Mr Beal's submissions you can come back to them.

MR BREALEY: Can I then go to what is quite important, which is her method 1C.

THE CHAIR: Yes.

MR BREALEY: Because method 1C --

THE CHAIR: Yes, I mean clearly that is important.

MR BREALEY: Yes. Method 1C is important for two reasons: it is important because the Tribunal can compare the calculation in the exclusionary method 1C with Coscelli's comparator, and work out which is the more robust and well thought through; but it is also important because it compares to the Kaye exploitative claim.

In a nutshell, what we say is that if you compare the two exclusionary claims, what she has done for her method 1C is not robust, and certainly not as robust as Coscelli's comparator. But also, because of the limitations of an exclusionary claim and the need to prove counterfactual market share, market power and causation, it's quite clear that it doesn't catch all the practices that the exploitative claim will catch.

So that's in a nutshell.

THE CHAIR: Yes, yes.

MR BREALEY: So on the pricing effects, can we go to bundle C, volume 1. (Pause)

I just remind the Tribunal, paragraph 486 that we referred to, this is at C/158, because this is important to the submissions I'm going to make in a moment.

So 486 is important for two reasons -- this is at HB-C/158. Here we're looking at: would Google have had the same dominant position? We've already seen that, but it's the last sentence that I wanted to emphasise:

"Google's dominant position likely enabled it to engage in certain [and I emphasise the word "certain"] harmful practices."

So, we've got the flavourful: we're not going to catch all the practices; it's only certain practices.

"... and allow me to establish a causal link between Google's Conduct and the concrete harmful effects to the Proposed Class, [ie. the price increases]."

So we do know -- I'm not just making submissions -- we know that the method 1C is dependent on this counterfactual market power/market share. But you need to have a causal link.

So if we go to method 1C, we go to the report at 621. (Pause)

Just for the Tribunal's note, method 1C starts at paragraph 618. But we see what Professor Scott Morton proposes to do in method 1C:

"The rationale behind this methodology is that in a more competitive counterfactual ..."

So again, we've got the counterfactual.

"... Google would not have been able to engage in [certain] practices that artificially distort the outcome of auctions and harm advertisers ... Below, I propose a three-stage method to estimate the price ... that would have prevailed absent the harmful pricing knobs and distortionary practices."

So we've got the but-for test there again, the counterfactual.

"Stage I: Determine the extent to which each of the individual practices listed above harmed advertisers."

So these are how the conduct caused each individual practice. So we've got to look at each individual practice. Then, over the page at b:

"Stage II: Determine whether each of the above practices would have occurred in the counterfactual.

"c. Stage III: Aggregate the effects of all practices to yield a headline quantum of harm."

That is what she proposed to do; she's got to look at each individual harmful practice, certain ones, whether they would have existed in the counterfactual, and then those that wouldn't have existed, you aggregate up. So those are the three stages.

Within those three stages she proposes three steps. This is at section 7. Now, if there's any one section of this report, it is section 7.

THE CHAIR: Sorry?

MR BREALEY: If there's any one section of the professor's report, it is section 7. One --

THE CHAIR: I don't understand what that means.

MR BREALEY: Section seven is --

THE CHAIR: It's the most important section?

MR BREALEY: Yes.

THE CHAIR: Okay.

MR BREALEY: Well, they're all important, but -- I'm getting tongue twisted.

THE CHAIR: Okay. All right.

MR BREALEY: Thank you. Section 7, C/225.

THE CHAIR: Yes.

MR BREALEY: Because there is a lot that has gone before, namely 729 paragraphs, but the greatest respect this section is extremely thin. This section is the section which underpins the £5 to £9 billion in damages.

In this section, the professor proposes two ways to implement method 1C. Two ways. One way is: she takes the price increases that were found by the District Court in the US, so there's no independent analysis; she just takes -- we'll see this in a moment -- the price increase found by the District Court in the US; and the second, she lifts a finding by the CMA in its digital marketing report. There was no independent analysis, regression, we'll see what she does in a moment.

She says at 731 --

MR BEAL: Sorry, do you mind reading 730, in the light of your statement.

MR BREALEY: "As per my instructions, in this section I provide my preliminary assessment of the aggregate damages to the Proposed Class. As my preferred methods, outlined in Section 6, rely on data to be obtained through disclosure, my preliminary assessment is based on publicly available data. For example, I include estimates of price increases cited in Google Search (DC) and differences in price-bid ratios between Google and Bing in the UK, as reported by the CMA in its OPDA report."

Well, I think I've just said that.

THE CHAIR: Okay, (overspeaking).

MR BREALEY: Obviously, everybody's relying on public data because there has been no disclosure from Google yet.

"The specific steps I follow as part of my preliminary assessment are [as follows]:"

So these are within her stages:

"Estimate gross overcharge rate. The first step I follow is to estimate the relative difference between actual and counterfactual prices charged by Google for its search ads – ie the overcharge, as measured with respect to actual prices. I do this [with] publicly available evidence."

As does Dr Coscelli.

"The price increases that resulted from Google's intentional pricing ... I then sense check ..."

Then she calculates the implied gross damages to the proposed class and estimates the net damage. It's the first step which is quite important. As the Tribunal will be aware, what she does in these two pages is she calculates -- and we say this in our skeleton -- she calculates a 9 per cent overcharge and she calculates a 17 per cent overcharge. Then she applies that 9 per cent and 17 per cent on all the Google revenue going back to 2011. So it's a very, very simple calculation. She takes, essentially, the 9 per cent overcharge found by the US court, applies that all the way back to 2011. She calculates a 17 per cent overcharge based on the digital advertising report, and calculates that all the way back to 2011.

We have some fundamental criticisms about how that could possibly support claim between £5 and 9 billion. If one takes the very first one, so over the page at C/226.

This is where the professor is taking an overcharge that was found by the District Court in the US. So:

"Google implemented a series of intentional pricing practices in ad auctions ... Google sought to capture more of the value ...

"736. In this regard, when concluding that Google could 'profitably be charged supracompetitive prices', Google Search (DC) [the District Court in the US] added that 'Google has used various 'pricing knobs' to drive these [prices] increases, often between 5 and 15 per cent at a time, without a significant shift in advertiser spending to GSE competitors'.

"737. This range of price increases can be found, for instance, in Google Search [the District Court] (DC)'s disclosed evidence on practices such as ..."

And this is important.

"Format pricing, rGSP, and squashing. Importantly, advertisers appear to have been unresponsive."

So just to recap where we are so far, she's taken, at 736, what the District Court has said, she's taking the price increases, the practices that were identified by the District Court. We see that the price increases are often between 5 and 15 per cent at the time, and then at 738, we see her taking the 5 to 15 and then taking the midpoint as 10. So the District Court in the US found that these pricing practices often resulted in between a 5 to 15 per cent overcharge, and she has taken the midpoint as a 10 per cent price increase, which results in a 9 per cent overcharge.

Now, why do we object so much? We set this out in our skeleton at paragraph 27, and we give several reasons why this calculation is not robust enough.

THE CHAIR: Sorry, I didn't catch your paragraph.

MR BREALEY: Paragraph 27 of our skeleton.

THE CHAIR: Thank you.

MR BREALEY: We give various reasons there which, given the time, I'm not going to -- but I am going to emphasise the lack of any analysis as to any causal link. This is fundamental.

So far, we've got a 9 per cent overcharge based on these practices that were found by the District Court. We see at 737 that these are the practices: format, pricing, rGSP and squashing. These are defined in the District Court -- and also by Coscelli -- but they're defined at paragraph 141 of her report.

So we need to have a look at 141 of her report, and that's at HB-C/61. So these are the practices that she's identified at 737, and we see them in more detail at section 243 at HB-C/61. At paragraph 141, it is said:

"Over the years, Google has launched various changes to its search/auction setup."

She refers to the practices that are identified by the US District Court. She identifies that "squashing" -- and we just need to look at the squashing because it's relevant to her second method -- squashing -- so just by way of background, in these auctions, you bid, it's a second bid auction, basically. So you bid, but you will get -- and you win because you got the highest bid, but you actually only pay the --

THE CHAIR: Yes.

MR BREALEY: The second bid. What this squashing did -- that Google implemented allegedly, found by the District Court -- is artificially increase the second price bid so you end up paying what you bid for anyway, assuming a kind of a willingness to pay. But so squashing compresses, the price/bid ratio, essentially that's what it's doing.

Then over the page you've got the format pricing: charging advertisers for additional elements in their text ads. So that's just a standard: I gave it to you free before, now I'm charging you.

Then there's a randomised generalised second price auction, occasionally swaps the two around. So, it's like squashing, but it drives up the final price. So, these are the pricing practices that the District Court found. The reason that the main reason why the calculation to -- and this is for the £5 billion, this is not for the -- this is for the £5 billion -- is because if one looks at table 1 on HB-C/63, the squashing was introduced in 2017. The format pricing was introduced in 2017, and the rGSP practice was introduced in 2019.

Those practices, by definition, were introduced then, and were not introduced before. But what she does is she takes the District Court's finding that these practices resulted in a 10 per cent price increase, which she calculates at 9 per cent. If one then goes back a few pages to page 13 of this report, HB-C/26. Remembering that these practices were adopted in 2017 and 2019, she just takes the 9 per cent overcharge all the way back to 2011. So, it's a 9 per cent overcharge on revenue in 2011, 9 per cent overcharge revenue 2012, 9 per cent overcharge, 2013, 2014, 2015 and 2016.

There is simply no evidence of a causal link between that 9 per cent overcharge and the damages claimed for 2011, 12, 13, 14, 15, 16. That is an important, we say, criticism, an important flaw, when one is comparing with what Dr Coscelli had done with his comparator-based method. There has been some attempt to do a counterfactual, there's some attempt to do a regression model, you've got the £3 billion. This £5 billion is based on practices that were introduced in 2017 and 19, and just gone all the way back to 2011.

In circumstances where the stages, the three stage and the three steps that I've identified, that she says she must do, shows that she's got to establish a causal link. That is the first calculation which allegedly supports the £5 billion claim. It's even slightly worse for the 17 per cent. So if one goes back to section 7, HB-C/227. (Pause)

This calculation allegedly supports a claim for £9 billion. Another way of estimating a preliminary charge is by comparing Google's price to bid ratio in the UK with that of

Bing, under the assumption that the latter reflects the competitive price to bid ratio in a counterfactual without Google's conduct. It doesn't start very well. This assumption is not particularly realistic. And as I explain, it is about "umbrella effects", but that doesn't really -- what she says about the "umbrella effects" doesn't really alter that the Bing is not a competitive counterfactual because it's in a distorted market.

"The price-to-bid ratio [and we'll see this in a minute] represents the difference (in relative terms) between a winning bid and the price that is actually paid ... As noted by the CMA, '[t]o the extent that advertiser bids reflect willingness to pay, the price-[to-]bid ratio provides a measure of the ability of the search engine to extract advertiser surplus."

At 744, the CMA -- so this is just lifting, we'll see it in a minute, from the CMA, from its digital marketing report:

"Google's average price-to-bid ratio was 10 to 20 per cent larger than Bing's on desktop and 20 to 30 per cent larger than Bing's on mobile devices."

And she illustrates it, and that's taken from the digital report. From this 20 per cent bid to ratio difference, she calculates at 746 a 17 per cent overcharge. 17 per cent overcharge.

Now, just to be fair, all this is no independent analysis; this is just taking what the CMA said. So, let's just see what the CMA did actually say. Again, that is at authorities bundle 6 at tab 51. The relevant paragraph is 5.91. It's page 3508 which I suppose is 3516, but it is paragraph 91 of the digital advertising report, internal page 235. 3516. This is where the -- and we'll see this when we come to Dr Coscelli's case on exploitative, and remember this is an exclusionary case where you've got to show a counterfactual and a causal link. This is in the section 5 on the exploitation of market power.

"We have also compared the price-bid ratio across Google and Bing. The price-bid ratio measures the difference between the winning bid and the price paid. To the extent that advertiser bids reflect willingness to pay, the price-bid ratio provides a measure of the ability of the search engine to extract ... [we've seen that.]"

Then we go over the page, we see the figure of the 10 to 20, 20 to 30 that is referred to by Professor Scott Morton in her report, section 7. And then we get 5.93:

"Google's higher average [price] suggests that Google is able to extract more advertiser surplus than Bing. This could be caused by Google exercising market power. It could also be a result of greater bid density, arising from the propensity for some advertisers to single-home on Google."

So it's not actually a ringing endorsement that it's being caused by the exploitation of market power, let alone an exclusionary one.

Leaving that to one side, the reason that we criticise it so much, and we set this out in our skeleton at paragraph 34 onwards -- I won't go over all the reasons it's there, but the main one is the lack of any proper causal link. This calculation by the CMA was based on one week's data in 2020. One week's data in 2020. And we have seen, because Scott Morton says so, that the price bid ratio is distorted by the squashing.

THE CHAIR: Yes.

MR BREALEY: And we know that the squashing started in 2017, so you can readily infer from that that the squashing did not occur prior to 2017, yet this 17 per cent calculation goes all the way back to 2011, a 17 per cent overcharge on 2011 revenue, 2012 revenue, all the way back. We say that is just not a sufficiently robust calculation to say, "Well, I've got £9 billion worth of damages and it's hardly surprising [they say in paragraph 77] because it's wider". It's illusory. That's why we've said it's illusory.

And I'll come on to in a minute the exploitative, but when one sees these two calculations in section 7 -- the 9 per cent overcharge all the way back, the 17 per cent all the way back -- compare that to Dr Coscelli's exclusionary calculation, we say it is better thought through and it is way inferior to the exploitative methodology which brings you all the way down to a workable, competitive level reflected by WACC. That's what I'll go to now.

THE CHAIR: Okay.

MR BREALEY: So, the exploitative claim. What is the methodology for that and why is it wider, essentially? What I want to do is address the Tribunal on three matters: first, how the Court of Appeal has considered cost-plus -- how it's considered cost-plus, the Return on Capital Employed, the ROCE -- as a method for determining unfairness; second, how the CMA has applied the cost-plus methodology to Google; and third, how Coscelli has approached the concept of cost-plus and unfairness in this case. So, we need to first look at how the Court of Appeal, in particular Lord Justice Green, has considered cost-plus as a method for determining unfairness; second, how the CMA has applied it to Google; and third, how Coscelli has applied it in this case.

We set out a lot of the principles in our submissions, but it is important to see how the Court of Appeal has emphasised that cost-plus is a relevant methodology for determining unfairness and what would be achieved in a workably competitive market. There are, as my Lord probably knows, three cases that deal with unfair -- Court of Appeal unfair -- there's Attheraces with Lord Justice Mummery way back when, but there's now Phenytoin and Liothyronine. So, Phenytoin considers Attheraces and sets out at paragraph 97 the relevant principles. So I'm going to look at those two cases.

If we go to Phenytoin first, this is at volume 1 of the authorities bundle, and it is tab 7. All I want to do is kind of establish the main principles. If we go to paragraph -- so this is at tab 7, 271.

THE CHAIR: Yes.

MR BREALEY: We know it, but we just can see the text of section 18. If one wants to see it, it's at page 276:

"Any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position ... may affect trade ...

"Conduct [which] constitutes an abuse if it consists ... directly or indirectly imposing unfair purchase or selling prices ..."

Then Lord Justice Green conducts a 50-year review. It is a very, very comprehensive judgment. Can we pick it up at page 287, at paragraph 56. This is where Lord Justice Green starts his 50-year review of the case law and the literature. Paragraph 56: the seminal case is United Brands, as the Tribunal will know. It's a very, very short judgment:

"The imposition by an undertaking in a dominant position directly or indirectly of unfair purchase or selling prices ..."

I note in passing that in its original submissions it said, "Well, no, the exploitative claim doesn't get off the ground because Google is not imposing any price". It's about charging a price, and clearly Google charges a price. We've set out in all our submissions that the CMA and Professor Scott Morton and Coscelli says that the way that Google is imposing a price is because of the way it's manipulating the pricing practices. So I'll leave to -- I'll wait to see how that is developed, but it's, in my respectful submission, a thoroughly bad point, particularly when all the experts say and the CMA have said that Google exploits its market power by charging excessive and obtaining excessive prices, and Brook's own case is that Google has charged supracompetitive prices.

THE CHAIR: Yes.

MR BREALEY: Nonetheless, United Brands is a seminal case. We see here, at 250:

"In this case charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse."

That is true. You're looking at the economic value.

"[The] excess could ... be determined ... if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the profit margin ...

"The questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products."

This is, as you know, sir, is often regarded as limb 1 and limb 2. Sometimes people go through limb 1 and limb 2 slavishly. Dr Coscelli has looked at limb 1 and 2. Sometimes one just looks at whether it is unfair. Lord Justice Green has said there's no one right test.

THE CHAIR: Okay.

MR BREALEY: So yes, one tends to look at it as limb 1, limb 2, but there is no one single test.

So Lord Justice Green, and I'll just canter through this, giving you the paragraph number, because it's not that -- but it's important to see what Lord Justice Green is doing. So, he looks at United Brands, he looks at the cases at paragraph 772, the Tournier case. He looks at 76 at Scandlines, which is unfair port charges. He looks at Napp at 90, which was an unfair pharmaceutical price. At 95, he refers to Attheraces. I mentioned Attheraces and Attheraces is important because Lord Justice Mummery in particular articulated that section 18 is not about a prohibition on excessive pricing per se. One of the reasons for that is that the purchaser may be getting significant value for it. So, as Lord Justice Green says, the legislative test is whether it is unfair.

But we see Lord Justice Green referring to all the cases, including Attheraces, and the value to the purchaser is obviously important. Then he gets the conclusions flowing from the case law. This is at 97. So these are all the principles which we set out in our 5 September submissions. But these are the principles.

"The basic test for abuse, which is set out in the Chapter II prohibition ... is whether the price is 'unfair'. In broad terms a price will be unfair when the dominant undertaking has reaped trading benefits which it could not obtain in conditions of 'normal and sufficiently [workable] competition'."

"A price which is 'excessive' because it bears no 'reasonable' relation to the economic value of the good or service is an example of such an unfair --"

And it's not the test, it is an example. There was lots of debate about whether it was the test or he's saying it is an example of the test.

"There is no single method or 'way' in which an abuse might be established ...

"Depending on the facts and circumstances of the case [an] authority might therefore use one or more ... economic tests which are available."

And then (v):

"If a Cost-Plus test is applied the competition authority may compare the cost of production with the selling price in order to disclose the profit margin. Then the authority should determine whether the margin is 'excessive'. This can be done by comparing the price charged against a benchmark higher than cost such as a reasonable rate of return on sales (ROS) or to some other appropriate benchmark such as return on capital employed."

So this is where we're getting the endorsement of a ROCE.

"When that is performed, and if the price exceeds the selected benchmark, the authority should then compare the price charged against any other factors which might otherwise serve to justify the price charged as fair and not abusive."

He says at (vi) you can look at a range of factors, and then over the page at (vii):

"If a competition authority chooses one method (eg Cost-Plus) and one body of evidence and the defendant undertaking does not adduce other methods or evidence, the competition authority may proceed to a conclusion upon the basis of that method and evidence alone."

So, it is open to -- and Dr Coscelli has not done that -- Kaye to say, "I'm bringing this exploitative case on a cost-plus basis; the profits are excessive and by its nature unfair, and we'll see what Google says in response and then have the debate at trial". I want to just refer to a few more paragraphs. At paragraph 118 -- I won't go through this in detail -- there was a debate in Phenytoin, at 308 and 309, before the Tribunal about whether you had to show a counterfactual price in an exploitative case. You're looking at whether something is workably competitive; do you have to show a counterfactual price? The Tribunal was of the view that you did, and the Court of Appeal allowed the CMA's appeal on that and said that it's not necessary. Clearly, you can do to show that a price is unfair, but it's not mandatory to show a counterfactual price. And what the --

THE CHAIR: Sorry, just explain exactly what you mean by counterfactual price?

MR BREALEY: Well, the dominant company is charging £20 and you will say, "Well, in a competitive market, the price would be £10 and therefore it's unfair because it's --"

THE CHAIR: Right.

MR BREALEY: And that was in the context of, well, is cost-plus, is that a competitive price? And do you have to show a counterfactual price: absent, in a hypothetical world, what should you have charged? And what Lord Justice Green is saying in these paragraphs is that essentially -- this is why I'm coming to it -- is a ROCE, a return on capital employed -- you don't have to show counterfactual price; you can look at the real world -- and the ROCE can be a proxy for what you should be earning in a competitive market. And that is, in essence, the ground of appeal. And the analysis, 121, is important in this case, because Lord Justice Green at 121 at the bottom:

"Nothing suggests that in every case there is a need for the creation of a hypothetical benchmark, in the sense of an artificial construct. Indeed, the thrust of the OECD Paper and the literature it cites suggests that the counterfactuals of greatest practical value are often those drawn from real life, as opposed to some hypothetical model. The case law supports [that] conclusion."

At 122:

"As to whether that benchmark must relate to price, I agree with the CMA and the Commission. I also agree with the submissions of Ms Bacon for Flynn ... If the Judgment was to be construed as requiring a hypothetical benchmark in every case) ... The need for a comparator is economically logical since the concepts of fairness, excessiveness, and reasonableness are all relative concepts. They must be compared with their counterfactual, eg unfairness, normality, or unreasonableness. But case law and literature makes clear that there are numerous counterfactuals which might be used, and importantly this includes the costs of the dominant undertaking as well as benchmarks set by ROS or ROCE or some other ... measure."

Then the last one is paragraph 172, which is about economic value and where does economic value? We've heard a lot from Brook about economic value. This is on page 322:

"Second, the Tribunal did not agree with the submissions of all parties that economic value was simply a matter to be taken into account as part of other components of the test. The Tribunal held it was not part of the 'in itself' ... [or] 'more general assessment'."

The Court of Appeal disagrees with that.

"It is evident from the judgment in United Brands that the reference to 'economic value' is as part of the overall descriptor of the abuse; it is not the test. The test should therefore, when properly applied, be capable of evaluating economic value. So, for instance, as the CMA argues, when evaluating patient benefit it would be possible to measure its economic value in the Plus ..."

So, in other words economic value can be in the ROCE calculation. So we see this at F:

"In so far as an issue of fact arises [so this is always an issue of fact] which can be categorised as an aspect of 'economic value' it needs to be measured and it can be evaluated in various parts of that test. If it is properly factored into 'Plus' or 'fairness' or into some other part of the test, or is reflected in other evidence which can stand as a proxy for economic value, then there is no incremental obligation to take it into account again, as a discrete advantage or justification for a high price."

Then it goes on over the page at 173:

"The CMA has advanced what seem to me to be plausible submissions that given the very high disparity existing between cost, ROS and ultimate price the possibility of any 'economic value' attributable to patient benefit exerting any effect on the outcome is remote."

So, all that's saying is that economic value is a question of fact. It can be encapsulated in the ROCE element. We'll see this also in the Liothyronine case, which is in bundle 4, tab 29. I just want to go to two paragraphs: paragraph 77, which is on page 2103. This is where Lord Justice Green is emphasising that cost-plus and the ROCE can be -- it's not always, it's 'can be' -- can be indicative of what is fair.

"This judgment is not the place to embark upon an analysis of the literature. I observe only that there is agreement that competition law regulation does not proceed upon some theoretical, laboratory, model of perfect competition but upon the real world and focuses upon achieving the acceptable or adequate as opposed to the paradigmatic. Evidence of how a market reflecting 'normal and sufficiently effective competition' or 'workable' ... operates might ... be relevant, and even [more] important ... it is not mandatory ... There is no rule that a regulator or Court [or court, so this Tribunal as well] must seek out evidence of what might happen in an actual market said to exhibit the features of workable competition ..."

So, you don't have to establish a counterfactual market in an exploitative case.

"The premise which underlies the applicant's graphic depiction of a bright line test is unsupported ... The case law, as summarised in Phenytoin at 97 [we saw that] describes practical approaches to determining fairness as the legislative test. It is understood that, to make the law practicable, there must be evidential proxies for determining what a fair price would be if generated in sufficiently effective, workably competitive, market conditions. It also makes clear that there is a wide range of economic and accounting models, as well as a variety of sources of evidence (e.g. comparables) that are used to this end."

This is important:

"As observed this does not mean that evidence of a broad nature about market structure is irrelevant but it does mean, contrary the applicants submissions, that in an appropriate case Cost Plus, is a valid and sufficient way of establishing whether prices are 'fair' and, to this extent, can be said to reflect those that would be generated in a sufficiently effective workably competitive, market: United Brands paragraphs [248]-[252] and Phenytoin paragraph [97(i)-(v)]."

So this emphasised that that in an appropriate case, cost-plus is a valid and sufficient way of establishing whether prices are fair. The point is emphasised again that paragraph 199, and then I'll finish on (inaudible). 199, page 2149:

"The acceptance of Cost Plus as a test has been acknowledged in jurisprudence for nearly 50 years as providing accurate evidence of pricing in a workably competitive market (see [77]). That case law cannot now be gainsaid. Phenytoin made clear that in an appropriate case Cost Plus could be sufficient standing alone to establish excessive pricing but also highlighted the desirability of cross-checking any one piece of evidence (including Cost Plus) against other pieces of available evidence and emphasised that where an investigated undertaking advanced counter-evidence, the duty of the decision maker was to evaluate that evidence fairly and impartially. In this case the CAT conducted a comprehensive and careful analysis of the CMA reasoning on Cost Plus."

Again, I emphasise that -- why am I emphasising this? Because it is a different metric, a different methodology to determining whether Google has exploited its market power. This is another way of indicating whether prices are unfair.

THE CHAIR: Okay.

MR BREALEY: So cost-plus is an accepted method, and those are the principles. It's then important because the CMA, I want to then show how -- the second point I want to make is how the CMA has applied cost-plus to Google. I'll just start this and then maybe we can break, but we need to go to the digital advertising market study, which is at volume 6 of the authorities at tab 51. This is but one report. As we've set out in our skeleton and in our submissions, over the last five years, the CMA, the competition authority, has looked at Google's ROCE and found the profits to be excessive. We set those reports out in our submissions, but I'm only going to take the Tribunal to this one, which is squarely concerned with digital advertising.

THE CHAIR: Right.

MR BREALEY: But it is important to note that the ROCE method has been applied by the competition authority over the last five years on four occasions, and with some very intrusive and detailed investigations.

THE CHAIR: Okay.

MR BREALEY: That's why we have said in our submissions that actually -- and

Google accept this, really -- if one's coming to disclosure, there is already a data set there that the experts would just extract. Google has this information; it's already given it to the CMA. It also said it could give it to the European Commission. So, we know, you know what the direct -- so it's got its direct costs and indirect costs. It's there because it's --

THE CHAIR: Yes.

MR BREALEY: So I don't anticipate disclosure -- obviously, disclosure is never straightforward, but there shouldn't be too much resistance to it being provided to the CMA for so many occasions.

So, this is at tab 51. Maybe we just look at a few paragraphs and then -- but it is important that Dr Coscelli in his methodology is not necessarily following this, but these reports give support to what he has done in his report.

THE CHAIR: Right, okay.

MR BREALEY: So, if we go to paragraphs 9 to 12 and then we'll finish.

"Although services such as search and social media appear to be free to those ... the costs of digital advertising, which amount to £14 billion in the UK, are reflected in the prices of goods and services across the country."

That's why Stopford, I think, would be interested in this.

"These costs are likely to be higher than they would be in a more competitive market.

"10. Our analysis indicates Google's market power has a significant impact on prices and revenues. Google's revenues per search in the UK has more than doubled since 2011, and our in-depth analysis of Google Search prices suggests that Google's prices are 30 to 40 higher on desktop and mobile when compared like for like search terms.

"11. We have found that the profitability of Google has been well above what is required to reward investors with a fair return for many years. In 2018, we estimated that the cost of capital for Google was around 9 per cent, compared to actual returns of capital of over 40 per cent for Google. We would expect these excess profits to be shared more freely with consumers in a more competitive market."

So I think, maybe (inaudible).

THE CHAIR: But what else are you going to try to extract from this? Why it's said to support the exploitative claim. What is it that's between you and Mr Beal on this application that we're going to get from looking at this further?

MR BREALEY: Well, I would hope nothing.

THE CHAIR: Right.

MR BREALEY: I would hope that he would accept that the CMA has adopted a methodology based on ROCE and has found that Google's profits are excessive.

THE CHAIR: Right.

MR BREALEY: I would hope that he would accept that the analysis about the pricing -- because it also looked at the pricing ...

THE CHAIR: Yes.

MR BREALEY: I doubt whether he's going to disagree with that.

THE CHAIR: Okay. Well, I think what we'll do then is we must move along. Let's wait and see. I think we had a broad understanding of what was in there already. Let's wait and see what Mr Beal says about this before we spend time --

MR BREALEY: I won't go through this report.

THE CHAIR: No.

MR BREALEY: I'll just take the Tribunal to how Dr Coscelli has looked at his four factors.

THE CHAIR: Yes.

MR BREALEY: Why the prices are unfair --

THE CHAIR: That's fine. I'm just saying I don't think it's a good use of time to go through the report in detail, because you may just be adumbrating things that aren't in dispute. So let's see where Mr Beal comes in on this one.

MR BREALEY: Yes.

THE CHAIR: Okay. Thank you.

(12.58 pm)

(The short adjournment)

(2.00 pm)

THE CHAIR: Yes.

MR BREALEY: So we've looked at the Court of Appeal, we haven't looked at the CMA too much, but, can I now go to Dr Coscelli's methodology for the exploitative claim?

THE CHAIR: Yes.

MR BREALEY: Which is consistent with the principles of the Court of Appeal and consistent with the CMA. So it's in section 6 of his report, which is in bundle C, volume 2. It's HB-C/1176. It is section 6, that's where he starts.

Section 6.1 sets out the framework on the right-hand side. I mean, it essentially sets out what Lord Justice Green has said. What he does -- and I'll explain this -- his methodology for estimating the damages under the exploitative claim is based on four factors, so he has four factors:

First, he bases it on Google's profitability based on ROCE and WACC. So the first factor is based on Google's profitability based on R-O-C-E, ROCE and WACC.

Second, he bases it on Google's profitability when Google's prices are compared to Bing. So he compares Google's profitability when Google's prices are compared to Bing.

Thirdly, he looks at Google's pricing practices to increase price, which is basically the method under Scott Morton method 1C, but he looks at Google's pricing practices to increase price.

And fourth, he does a comparison with the ROCE and WACC of other comparator companies. He does a comparison of Google's ROCE with the ROCE and WACC of other companies.

THE CHAIR: Yes.

MR BREALEY: So if I can go to the first factor, which is the profitability based on the ROCE. That is at paragraph 318. HB-C/1185. And at paragraphs 318 to 337, he carries out an independent profitability analysis. So at 318 he says:

"I expect economic profitability analysis to be both viable and informative as to the question at hand. Economic profitability analysis seeks to determine the extent to which actual returns of a defined business have exceeded, over a sustained period of time, the returns of this business would be expected to earn in conditions of normal, workable competition."

He says at 319:

"Below, I set out my preliminary assessment of Google Search's profitability over the past decade and show that Google has enjoyed significant returns. [And importantly] I show that, even if Google's search ad prices were comparable to Bing's on a [cost per click] and a CPA basis, Google would still have considerable profit margin."

So at 320, he sets out the proposed methodology, which he implements.

"321. A common approach to assessing profitability is compare a company's ROCE to its WACC. This is, in fact, the approach used by the CMA ... The CMA assessed the ROCE for Google's global search business ... in 2018 and estimated to be at least 40 per cent, and possibly higher. The CMA compared this to an estimated WACC of 'around 9 per cent'. It is worth noting that the CMA, in this regard, wrote: '[W]e have ROCE scenarios ranging from around 40 per cent to a much higher estimate if we only attribute to search those costs directly identified as being required for the search business.'"

I'll just mention that because in the report, when it when the CMA has been looking at

Google's profitability, it's taken a quite a conservative approach and essentially has used the assumptions and factors relevant to Google. So if it was to take other factors, the profits would be even higher. So 322:

"Consistent with the CMA's approach, I consider that ROCE is the appropriate profitability measure ... provides a direct comparison with the cost of capital, allowing me to assess whether the Google Search business is generating returns ..."

And this is a phrase that we see from the case law:

"... persistently and significantly exceed its cost of capital."

THE CHAIR: Okay.

MR BREALEY: Importantly, at 323:

"I have therefore undertaken a profitability assessment of the Google Search advertising business from 2011 - 2023 by replicating, as closely as possible, the methodology used by the CMA."

So it's important here to note that he has undertaken his own ROCE profitability assessment for a time period from 2011 to 2023.

Go over the page of 326:

"In considering the relationship between ROCE and WACC, I note that in competitive markets, companies are generally expected to earn returns approximately equal to their WACC. This is because any excess profits -- returns above WACC -- would typically attract new entrants, increasing competition and driving down returns to the level of WACC."

That's exactly what the CMA said. Going over the page, 329, "Preliminary assessment of Google's profits". He's estimated the WACC and ROCE for the time period 2011/23. He comes to a conclusion at 330, 331, 332. I'm taking this as quickly as I can.

I would like to draw the Tribunal's attention to paragraph 333, because that has a figure 6.1, which shows the results of my preliminary analysis of Google's search

ROCE, which increased from an estimated value of 28 per cent in 2001 to 43 per cent in 2023. And there it's quite an important figure, that figure 6.1, because you see this figure has Google Search global ROCE, you see the Alphabet WACC, and then the shaded bit is essentially the excess profit.

So he has undertaken -- he's looked at what the CMA has done, he's done his own independent analysis, he's calculated it, and that's his provisional conclusion at 6.1.

THE CHAIR: Yes.

MR BREALEY: So that's the first factor. He's done what the Court of Appeal has endorsed.

THE CHAIR: Then he's compared with Bing.

MR BREALEY: Pardon? I beg your pardon?

THE CHAIR: You're coming on to the comparison with Bing.

MR BREALEY: I am, yes. So that is at 334 --

THE CHAIR: Yes.

MR BREALEY: -- where he refers to it, the 15 and 25 per cent lower revenues. The actual analysis is at 311, so that is back at C/1183. He does two things, a profitability based on Google's prices to Bing: he looks at it from a CPC basis, which is a cost-per-click, which is this is at paragraph 311.

THE CHAIR: Yes.

MR BREALEY: He does it on a cost-per-click basis, which is essentially what it costs the advertisers and what revenue Google get, and he does it on a cost-per-action basis, a CPA, which essentially is whether the click has resulted into anything. That is a proxy for what value the advertiser is getting.

He looks at paragraph 313 as a cost per click.

THE CHAIR: Yes.

MR BREALEY: He basically takes that from the CMA digital report.

THE CHAIR: Yes.

MR BREALEY: At 315, he then goes and looks at another metric which is the CPA, the cost per action. He looks at -- one source of this is WordStream, an online advertising company, and that gives an average for CPA -- this is a public document. So on the basis of these prices and profitability compared to Bing, he arrives at 316 with an overcharge of between 15 and 25 per cent, which he says is conservative because even at those levels, there is still a very large ROCE margin. But that's where you get the 15 to 25 per cent.

THE CHAIR: Yes.

MR BREALEY: And he sense checks that by reference to the ROCE. (Pause)

So if I could, just to nail that point, go to paragraph 335, at C/1190, this is where even if one hypothesised that Google had changed to a lower price, and therefore the 15 to 25, it would be changed, Google would still have a return comfortably above the WACC between 2011 and 2023.

There's a combination of factors of the ROCE and the comparison with Bing, and from this he's saying that the 15 to 25 per cent, which is a provisional figure, is a conservative figure.

He then also looks at Google's pricing practices, and they are set out at paragraph 301.

THE CHAIR: Right.

MR BREALEY: So this is the third factor at 301. It doesn't just take the US court. He takes the -- this is at 301 -- degree of market power in the relevant markets; he lists nine examples of the way that Google can manipulate the auction and increase price. These are set out in appendix Q of the digital advertising report.

Over the page, he references the US District Court's findings. So that is the third factor, and then the fourth factor -- and I'm taking this as quick as I can, sir -- the fourth

factor is the ROCE of other companies. This is at paragraph 338.
THE CHAIR: Right.
MR BREALEY: HB-C/1192:
"I have also considered other forms of benchmarks which could provide insight into whether Google's profits might be excessive."
He looks at Openreach and other general search engines ... Yandex ...
So those are the four factors that he puts into one part to give the Tribunal and Google a sense of the viability of this exploitative case.
THE CHAIR: Right.
MR BREALEY: He also, it's important to see, looks at section 6.4 -- this is at C/1995 -- about how this translates into whether the excessive prices are unfair, because as we know, the statutory test is unfairness. And at 347, he says there are prima facie evidence of these excessive profits being unfair. You've got:
First, the Google's prior exclusionary conduct. So that is the Android unlawful conduct; the extent and duration of the excess profits; the upward trend in prices of text over time; four, over the page, a series of pricing and non-pricing actions that's been taken, and; examples -- this is the fifth one -- of product quality degradation.
So it is absolutely untrue to allege that either Coscelli in the exclusionary, or in the exploitative, is not looking at product quality and value. So that is the methodology. We go to section 8.
THE CHAIR: Right.
MR BREALEY: Which is the damages calculation.
THE CHAIR: Yes.
MR BREALEY: Paragraph 386 at C/1208, he says:
MR BEAL: "Under the Exploitative Claims, I provisionally assessed both the profitability and pricing of Google Search's advertising business. The profitability

assessment is based on ROCE minus WACC, the latter considering market risks and comparable businesses to derive a fair return that investors expect a company like Google to generate."

The CMA, in the passage that I referred to you, said it was excessive returns, far beyond what investors would need.

"I showed that the returns generated by Google Search far exceeds WACC and the gap between these measures has increased over time. I also compared Google's pricing of search ads against its closest competitor in the UK, Bing, and found that prices on Google Search in terms of CPA [that's the action, which is the value metric] and CPC [the revenue metric] were both higher than Bing's, by 15 and 25 per cent, respectively.

"I also showed that even if one reduced Google's search ad revenues by 15 to 25 percent, Google's ROCE would still be higher than WACC in every year for which I have undertaken the analysis (2011 to 2023). I use these findings to calculate damages for the UK part of Google's business."

And then he does that, and just so that you have it, you go to the table at 403. Well, given the time, we'll look at the table at 403, this is at C/1216. The estimated damages under the exploitative claim is, with a 50 per cent pass-on, that's where you get the £12.4 billion, and the £7.5 billion damages claim, with 50 per cent pass-on.

THE CHAIR: Yes.

MR BREALEY: So that was a bit of a canter, but I go back to the graph in the skeleton in the shaded green.

THE CHAIR: Yes.

MR BREALEY: And it goes, that's why it's important to see how it, why we -- in principle goes all the way down past dominance, past oligopoly, to workable competition ROCE WACC levels. It is liable. And in my submission it is a very well thought-out methodology. It's consistent with the Court of Appeal, consistent with the CMA. And it would be wrong to exclude this claim. If I can give four short reasons why it would be wrong to exclude this claim and put it in the dustbin. It would be wrong to exclude this came from going forward for four main reasons:

First, it is a substantial claim proposing a methodology that has been endorsed by the Court of Appeal, and it is the most logical legal tool to claim damages for supracompetitive pricing behaviour. So it is a substantial claim based on a standard methodology. And the legal tool, it's the most logical and intuitive, which is section 18(2)(a), unfair pricing. We've seen -- Scott Morton herself said: this is the most lucrative business ever. We've seen Brook itself in its claim saying: these are super competitive prices. And yet they disavow the obvious legal tool to deal with supracompetitive prices, which is section 18(2)(a) on unfair prices. That's the first reason. It's a substantial claim based on what the most logical legal tool to catch supracompetitive pricing.

Second, it has advantages over the exclusionary claims. Why? Because it is not dependent on a market counterfactual or a "but for" test. Because it is not dependent on a market counterfactual or a "but for" test, it captures more of the harm than the exclusionary claims, as we've just seen in the shaded green. So it has advantages over the exclusionary claims.

Third, as a result, it is a better claim for capturing the pricing effects than under Brook's method 1C. Brook's method 1C depends on a counterfactual, and it is limited to certain pricing practices. So the third reason, it's a better claim, the exploitative claim, than method 1C. So if one's looking at what is more suitable to go forward to capture the pricing effects, and that is what Professor Scott Morton says 1C is designed to do: to capture pricing effects, the exploitative claim is a better claim for capturing those pricing effects. That's the third reason.

THE CHAIR: Just articulate again why that is. Because it doesn't depend on a counterfactual?
MR BREALEY: Yes. We saw one of the limitations with method 1C was we've got to prove causation. And you've got a 2019 practice which is alleged to have caused loss in 2000. That doesn't apply. With method 1C, you've got to look at causation and how the exclusionary practices cause the pricing practice. With exploitative, you're looking at actual market power and actual practices. You're looking at the real world, what actually happened. There's no hypothetical market power; you're looking at Google's actual power and actual practices. It is a real-world analysis.
THE CHAIR: Yes, okay. So just -- this is at the heart of it, perhaps. You set out the four factors. 3 is the Google practices to increase price in your 1, 2, 3 and 4. And I think you said, when you were dealing with that, that that was 1C, but I think, to be absolutely precise, what you mean is it covers the same factual ground as 1C. It's not actually the same methodology, is it?
MR BREALEY: It can't capture the same ground.
THE CHAIR: Yes.
MR BREALEY: The difference is that it will capture everything, whereas 1C only captures "certain practices”.
THE CHAIR: Right.
MR BREALEY: This is so --
THE CHAIR: The reason it captures everything -- I mean, there as a factor what Google does to increase prices, but the thing that actually gives you the numbers is 1, 2 and 4, isn't it, to get to the 25 per cent, the 15 to 25 per cent?
MR BREALEY: Well let's just take the ROCE. Let's just take the ROCE as the proxy for excess profits.
THE CHAIR: Yes, quite.

MR BREALEY: So you've got excess profits on our table, going all the way down to WACC.

THE CHAIR: Yes.

MR BREALEY: Now, let's assume for the sake of argument, that at trial Google persuade the Tribunal that it had an 80 per cent market share in 2010. And, okay, if you strip out certain of the exclusionary practices, it comes down to 75 per cent, or 70 per cent.

THE CHAIR: Right.

MR BREALEY: Now, the exploitative claim will capture even those practices that were exercised by Google as a dominant company with 70 per cent.

THE CHAIR: Yes.

MR BREALEY: The method 1C won't. Method 1C will only latch on to those price increases, those practices, that Google could have achieved because it had that additional market power.

Right.

THE CHAIR: Thank you.

MR DAVIES: You say it captures practices. I mean, are there necessarily any practices at all in the exploitative claim? I mean, can't it just depend upon essentially sort of the economics of the market in a way that's unaffected by Google's conduct, except insofar as obviously ultimately it does affect setting of price?

MR BREALEY: You've got -- section 18(2)(a) talks about conduct, and the conduct is unfair pricing. So you look at whether there are excess prices, and you look at whether any of Google's practices have led to those excesses. As we saw with the digital marketing -- if, for example, the excess prices are purely and simply because of value, then, and it's just a better product, you still might have some argument on section 18(2). But the real vice here -- I mean both in 1C and in the exploitative -- is how Google has manipulated the market. This is why the CMA report and digital advertising is all about how Google has exploited -- and it uses the word "exploit" --

THE CHAIR: Right.

MR BREALEY: The digital market report is all about the exploitation of market power. And the digital market report says: right, let's have a look at the evidence of exploitation of market power. Have advertisers paid too high a price? The returns on ROCE WACC are excessive. How have they achieved those excessive returns? Is it by competition on the merits? Or is it because they've exploited their market power? The CMA say the excessive returns are in large part because Google has exploited its market power. So the whole of the report is about the exploitation of market power. Now, that is what Kaye's exploitative claim is designed to replicate the actual exploitation of actual market power. And we just saw, my third factor, the examples by which Google has, or is alleged to have, exploited its market power, to achieve excess returns. So it's about practices. It's absolutely about practices.

And the third reason that the exploitative claim is to be preferred over method 1C is because method 1C will not catch all the price increases; will not catch all the pricing knobs; will not catch all the pricing practices. And, again, I come back to what we saw Professor Scott Morton saying: I've got to identify the practices that would not have existed had it been for the exclusionary conduct. We saw that. She has to apply a "but for" test. So in other words --

THE CHAIR: So you're saying you can run practices which make it unfair, but the practices don't have to have arisen from the abuse?

MR BREALEY: Correct.

THE CHAIR: Right.

MR BREALEY: That's exactly it. Whereas method 1C has got to look at a counterfactual and say: I can only claim damages for those price increases that would not have arisen if you hadn't have had the exclusionary conduct. That's why this market power counterfactual is so important. Because if -- if -- Google in the counterfactual still has, let's assume 80 per cent, let's assume that the exclusionary claim really suffers, and at the end of the trial, the Tribunal says: actually, in the counterfactual it would have 80 per cent, a very significant --

THE CHAIR: Which, as it happens, is what it had right back at the beginning.

MR BREALEY: Correct? Yes. So, in the counterfactual it would have what it had at the beginning: all the network effects, the scale, the brand, et cetera, et cetera. So let's just assume that, for the sake of argument.

The method 1C is only going to capture very few pricing increases because Google, with that significant market power at 80 per cent, will come to the Tribunal and say: Well, I would have carried those out anyway. They're not caused by the exclusionary conduct. Method 1C has to show a causal link.

THE CHAIR: I understand that now. So, I mean, is it possible to give us a concrete example -- I think you may have done already, in which case I apologise for missing it -- but what's a strong example of a practice that you can scoop up through the exploitative claim that can't be run through the exclusionary claim?

MR BREALEY: Well, I --

THE CHAIR: I appreciate what you say the underlying logic, rationale, justification is as a level of principle, but what's an example?

MR BREALEY: Well, we don't know yet. What I can say is that Brook, through Professor Scott Morton --

THE CHAIR: Yes.

MR BREALEY: -- says it's only certain practices.

THE CHAIR: Yes, I understand, yes.

MR BREALEY: Yes. We have a list which I've just given you at paragraph 301.

THE CHAIR: Yes.

MR BREALEY: These are practices that have been described by the CMA as an indication of exploitation of actual market.

THE CHAIR: Yes. Is there anything in 301 that doesn't match ones in Professor Scott Morton's case?

MR BREALEY: Well, that would be on a provisional basis, yes. She refers to squashing the format.

THE CHAIR: Yes, yes, yes.

MR BREALEY: And certain practices. Again, if in the counterfactual, Google has a very strong dominant position -- 80 per cent, as it did -- it would come to the Tribunal and say: well, the exclusionary conduct didn't cause that practice because I would have done that anyway; you know, applying a but-for test, I would have done that anyway.

If you don't have the exploitative claim, the advertiser is going to lose out.

THE CHAIR: Okay. Yes.

MR BREALEY: I said there were four reasons. I'll just recap: the substantial claim, it's the most logical legal tool; the second, it has advantages over exclusionary claim, it's not dependent on the market counterfactual or above for test; third, as a result -- and it's linked to the second -- that it is a better claim than method 1C; and fourth, on this carriage dispute -- this is the fourth reason -- being a significant claim.

On the evidence on this carriage dispute, it is more robust than Brook's four exclusionary standalone claims, that to date have not offered anything of value. So the Tribunal is faced with the Brook report, which says: I've got these four standalone exclusionary claims, which we've been through quite a lot in our submissions. For example, the RSAs that were actually found by the European Court not to infringe 102. It's got these four standalone exclusionary claims, and that's why I started with paragraph 77: our claim is far wider because we've got these four extra exclusionary standalone claims.

When the Tribunal is looking: well, what value do they have compared to the standalone exploitative claim? The exploitative claim, on the evidence, has far greater value. The Tribunal simply does not know, on the evidence today, what additional value the four Brook extra exclusionary claims add. Simply has no idea.

Brook has not offered one single penny of extra damages based on the four standalone exclusionary claims, even though they will involve significant cost, whereas the exploitative claim, as I hope I've shown you, is based on a standard methodology, and Dr Coscelli has done his own independent provisional analysis, and comes up with a very significant sum, which is liable to capture more of the harm.

THE CHAIR: Okay.

MR BREALEY: So those are the four reasons why the exploitative shouldn't be consigned to the dustbin.

Those are the methodologies. There is this issue of the scope of the claim, which I can address now.

THE CHAIR: Yes.

MR BREALEY: So I can take -- I mean, to a certain extent, the point hasn't been made yet, but -- on the scope of the claim, maybe we're just -- well, on the scope of the claim, we've seen from the submissions that Brook says that the Kaye claim is too narrow. Why is it too narrow? It is said that the Kaye claim does not cover people abroad clicking on a UK-related advertisement.

In its original submissions, it gave an example, so I'll give the same example. It gave the example of a UK university advertising its courses, hoping to attract British and foreign students. This is the example it gives.

THE CHAIR: Yes.

MR BREALEY: So persons domiciled in the UK click, and persons domiciled outside the UK also click on the advertisement, and the advertiser has to pay for that. Brook alleges that the Kaye claim is not claiming in respect of the non-UK, French-domiciled student. So it's only capturing British students clicking on the advertisement, not French students. It says that our claim is narrower in that respect.

We say that is wrong. That is not the way that our claim is formulated. We'll come onto in a moment that they relied on the Finance Act and the tax expert aspect of it, but it is wrong as a matter of reading our claim. And if I can just explain why the Kaye claim captures the French student.

THE CHAIR: Right.

MR BREALEY: So, if we go to the Kaye claim, that's in bundle B. (Pause)

Tab 6.

THE CHAIR: Yes.

MR BREALEY: The relevant paragraphs are 57 and 58. So again, the exam question is: is the Kaye claim designed to catch the British student and the French student?

THE CHAIR: Yes.

MR BREALEY: At paragraph 57:

"The Proposed Class, is comprised of:

"Advertisers which between 1 January 2011 and the date of filing this claim ... paid Google ... for Search Advertising displayed on Google's General Search Engine in respect of ads attributable to UK users."

And what Brook says is that "UK users" means "UK domiciled users"; only the British student, not the French student. We say that's not how to read the claim, and that's not the intention of it either. We say that for a few reasons, but if one then goes to paragraph 58 and the applicable definitions, the applicable definition, if we look at advertisers:

"Any private person or business entity ... who paid Google to advertise to users of Google's General Search Engine."

So users.

"Such Advertisers range from brands with international reputations to SMEs and micro businesses. The Advertisers which comprise the Proposed Class are those which were and are participating in the UK Search Advertising market. These Advertisers (regardless of location) paid Google to display ads for services, goods or other property on the search engine results pages ... of Google's General Search Engine to be served to users situated in the UK (based on device location information) or who, through their search queries, expressed interest in UK-related topics."

We say that is designed expressly to cover not only the British student in the UK, but the French student who, through their search queries, expressed interest in UK-related topics. In the footnote, 42 -- we haven't seen it, but -- we have a marketing expert, Professor Stephen, at Oxford, and the claim refers to his report at 61:

"The determinant of who is operating within this two-sided market is if search queries are UK related."

So it is UK related, which is the important bit.

"Advertisers using Google Ads select the UK ... as their target location in order to ensure that their ads are primarily served to users who are either in the UK (based on device location information) or who, through their queries, have expressed interest in UK-related topics."

That is how we have interpreted "UK users": you're using a UK-related advert.

We see this at paragraph 60, which is B/127, again:

"Although the Proposed Class is a large one, reflecting the duration and scope of the Abuse insofar as it affected the UK Search Advertising market, [et cetera], must have paid Google whether directly or indirectly in respect of ads attributable to UK users ([that is to say] ads acquired and/or displayed in the UK)."

Mr Kaye's witness statements at bundle C, volume 2 --

THE CHAIR: Yes, just tell us what it says.

MR BREALEY: Well, it -- yes, I'll tell you what it says. Basically, "UK users" means either "acquired in the UK" or "displayed in the UK".

THE CHAIR: Right.

MR BREALEY: And it's intended to capture the British student and the French student.

THE CHAIR: Right.

MR BREALEY: We also say that that interpretation is consistent with the Finance Act in their response -- in their skeleton, they say that the Finance Act doesn't cover what we say it means. In my submission, that is irrelevant: if we're wrong on the interpretation of the Act, which only came into force in 2020, so be it. The intention and the wording in our claim form covers the UK student and the French student.

THE CHAIR: Okay. Not quite sure where this goes because you've made your position clear in this hearing. If we held that you were wrong, parsing your pleading very carefully, you'd amend your pleading. So ... Okay. Right.

MR BREALEY: It's being --

THE CHAIR: No, I understand. But it's one of the ones that's a bit hard. Yes.

MR BREALEY: If there was any doubt about it, we would amend it and make it crystal clear. We think that it's clear.

THE CHAIR: Yes. Okay.

MR BREALEY: I don't know whether Mr Beal is going to deal with limitation. I mean, I'm going to go through the Acts. I should just say -- and we've said this in our skeletons, in our submissions -- if one goes back to, Professor Scott Morton's report and section 7, I can tell you what it says. This is at paragraph 732.

He's given this figure of between £5 and £9 billion, but she says that:

"However, damages as a percentage of ad spend are assumed to be constant over time - even though some aspects of Google's Conduct came about after the start of the relevant period and different limitation periods may apply."

THE CHAIR: Yes, you quoted that.

MR BREALEY: We've quoted that. We have limitation periods in the competition law, as you probably know. Limitation periods in the competition world in the last several years have been very, very confusing.

THE CHAIR: Yes, well, it came up in Stopford. If you recall, there was a case management aspect to that about what to do with the forthcoming Court of Appeal decision. We accept your submission that it's not easy.

MR BREALEY: But I think there is a bright line.

THE CHAIR: Speaking for myself!

MR BREALEY: If I can just tell you what my submission is, my view is.

THE CHAIR: Right.

MR BREALEY: If it's a follow-on play --

THE CHAIR: Yes.

MR BREALEY: -- where, the appeal has not been exhausted, the old rules apply. That's rule 31 of the Tribunals Rules.

THE CHAIR: Yes.

MR BREALEY: Because when the Tribunal acquired follow-on jurisdiction, it had a -- because it's a follow-on, you're following on the binding findings, and it introduced a special limitation period of two years --

THE CHAIR: Yes.

MR BREALEY: -- from the time that the decision becomes definitive, and that is then dependent on --

THE CHAIR: Yes, yes. And Google have still got their appeal on the point of law.

MR BREALEY: Correct, yes. Well, on the point of law and --

THE CHAIR: Well, I thought it was law anyway. But at least that, yes.

MR BREALEY: So that's why the follow-on can go back to 2011.

THE CHAIR: Yes.

MR BREALEY: But the stand alone is not in the follow-on category.

THE CHAIR: Yes.

MR BREALEY: In our submission -- and I think this is what Scott Morton is talking about, but Brook never articulated -- you can either go back to 1 October 2015, or it would be 2019, which is six years before the claim forms were issued.

THE CHAIR: Yes.

MR BREALEY: One of the reasons you might go back to 2015 is if there's been some sort of concealment, but although the rules have changed yet again, and so going forward it's going to be easy, in the interim period, we are still essentially on the six-year Limitation Act period, which the six years go back to from the date of the claim, and if you didn't know about it, and it's been concealed, it could go further.

THE CHAIR: Yes.

MR BREALEY: So it's either 2015 or, when the new provisions were adopted -- they've since been repealed. But you get new provisions in the Competition Act were adopted, gave you a six-year period with concealment. So the paragraph 77 bar chart for the Brook damages don't account for any limitation period on standalone.

THE CHAIR: Yes.

MR BREALEY: And that is not an unimportant point because, again I just remind the Tribunal of the reference. It is HB-C/26, which is the revenue figure. And it's in red; it's figure 5 of Scott Morton's report. It's taken from the CMA report. But if the limitation period is 2015 or 2019, the reason she's saying it may be overstated, exaggerated, is because, for example, the Apple standalone claim on Brook's case is going all the way back to 2011. And you're looking at pretty significant billions of revenue; you're looking at something like 15, 16 billion of revenue that that paragraph 77 claim is latching on to. Whereas we have taken 2015 accepting it might be 2019. But I don't believe what I've (inaudible) the Tribunal is an inaccurate summary of what the limitation (Inaudible) rules are.

THE CHAIR: Right.

MR BREALEY: In other words, following on 2011, standalone either 2015 or 2019, which is six years.

THE CHAIR: Yes. This is another one where I find it a little bit hard to see where it goes, because it'd be one thing if there was some aspect of the limitation regime where your position was less ambitious than theirs, and you were not making an argument that might lead to a greater recovery. But I haven't pinned down anything like that.

MR BREALEY: No. We've been conservative. We're being somehow criticised for accepting that these limitations might apply. And we haven't raised the limitation period. They -- Brook -- has. That's why I was just reminded I should deal with it.

THE CHAIR: Right. But likewise, if Mr Beal says, well, you've missed section whatever, 10021, and there's a brilliant point there, you would just amend it in I think, so I just don't -- This is really for Mr Beale's benefit when he comes to deal with it, which will probably be tomorrow now. What I don't get is what it is that's said to be left out by your case.

Right. Okay. Thank you. That's helpful.

MR BREALEY: I think those are the methodologies and the --

THE CHAIR: Well, I'll ask my colleagues in a moment what they want to ask about. But what you haven't covered is the downside of the exploitative claim. I mean, you said it's got a lot of upside. Brook's side say it's going to be tremendously complicated and expensive to bring and not worth it. So, I think that is an important part of the picture.

MR BREALEY: Well. Not worth it. It's still --

THE CHAIR: No, I mean relatively weighing the benefits against the cost. You haven't dealt with the cost.

MR BREALEY: Well, clearly it is a standalone claim.

THE CHAIR: Yes.

MR BREALEY: And I can't deny that it would be costly. I mean, these competition claims are. The question is whether we've put forward -- there's two issues on that. The first is whether we've put forward a plausible exploitative claim where the Tribunal can have some comfort of a significant claim being advanced in return for the costs that would be covered. So, clearly people who want to advance an exploitative claim, an unfair pricing case, will have to consider the cost and will have to consider whether the £12 billion that you might get as a result is worth the cost. So that's the first point; that the Tribunal will have to make a judgment call as to whether, thinking that the cost could be £2 million, £3 million, whatever, £1 million or whatever, however the Tribunal will case manage the costs, is worth the upside of a very large and significant exploitative, unfair pricing claim. So that's the first point. The cost benefit we say is obvious.

Secondly, and we can maybe have a look this. If we go to the Brook claim.

THE CHAIR: Yes.

MR BREALEY: So this is in bundle B, tab 1.

THE CHAIR: Yes.

MR BREALEY: You see here at the beginning, so if we go, HB-B/3 and then over the page, although you've got the PCR alleges Google is dominant, has abused its dominant position, in broad summary alleges that Google has restricted in the following ways.

THE CHAIR: Yes.

MR BREALEY: Paragraph 5. Well obviously the matters (inaudible) what we cover. Then they've got standalone claims relating to the RSAs, which the European Court has already rejected. But that is a standalone claim. That's going to be a costly standalone claim, arguing that the RSA and the MNOs foreclosed competition. He's saying if it had the same effect, why on earth, what is the cost benefit of doing that if it had the same effect?

THE CHAIR: Yes. I mean, you're counter-attacking here slightly, Mr Brealey. I'm asking about the cost of your exploitative claim.

MR BREALEY: But I am because I hope that I've shown the Tribunal that our methodology is a well-established methodology and that Google's profits are exceptional. As Scott Morton says, it's the most profitable business, refers to the most profitable business ever. And we've put forward a viable and plausible way for calculating the damages. So for a £12 billion claim, a standalone claim, to claim that, in my submission, it's cost effective. That's the first point. And the reason I'm doing this is, is because the Tribunal will have to weigh that with the four added standalone claims that Brook is.

THE CHAIR: Yes.

MR BREALEY: And so how expensive are they going to be? They've got four; we've got one.

THE CHAIR: Right.

MR BREALEY: So how expensive are the four standalone claims which seem to broadly replicate the Android exclusionary claims that have been found there, so really what is in it, in circumstances where these four standalone claims, although Brook in paragraph 77 says it's wider, have not offered any additional value for those four standalone claims. And we have.

THE CHAIR: Yes. Okay. And then the other thing which you touched on very briefly at the beginning of today is the question of matching with the Stopford claim, where you said that you were confident that Stopford would see it your way and amend in the exploitative claim. I just want to understand whether that's relevant, how it's relevant, what the facts on the ground are, why you say that we can be confident that Stopford would amend her claim to -- I'm using your pattern of just using the surname, no disrespect intended, to amend her claim to see it your way. I mean, is it relevant that you would be bringing a claim that was just different from --
MR BREALEY: Well. First of all, we are at parity with Stopford on the exclusionary claims.
THE CHAIR: Yes.
MR BREALEY: Which means that there would be additional work in Stopford if Brook goes ahead and then has the SA360, new market, new dominance, new this, new that. So there is going to be extra work in Stopford anyway. And, as I kind of --
THE CHAIR: You mean?
MR BREALEY: If it was joined.
THE CHAIR: I'm not saying it would be joined, but just. So I think what you're saying is that Mr Beal's clients have got extra exclusionary behaviours that don't match Stopford?
MR BREALEY: Yes.
THE CHAIR: So there's a mismatch if Brook is successful in the carriage dispute that has to be addressed.
MR BREALEY: Yes.
THE CHAIR: Right. So that's the other side of the coin.
MR BREALEY: Stopford only has exclusionary.
THE CHAIR: Yes.

MR BREALEY: You have a mismatch.
THE CHAIR: Yes.
MR BREALEY: When I looked at the CMA's digital report, the CMA is saying not only have the advertisers suffered because of the exploitation of market, it's actually that they regard it as going down to the consumer level.
THE CHAIR: Yes.
MR BREALEY: And if we were to go ahead, it Stopford would have to very carefully consider whether it would amend to include an exploitative.
THE CHAIR: Yes.
MR BREALEY: Because the consumers may recover far more of the harm that they say they've suffered.
THE CHAIR: Well, yes, if you're right about the arguments you're making now. But we're only going to reach at best a provisional decision on that. And Stopford may just see it differently.
MR BREALEY: Stopford may do, yes.
THE CHAIR: Right. But then is that relevant? Because obviously there's going to be a very lively discussion at some point about how to case manage these proceedings together and what issues get tried together, possibly.
I just want to have a practical view to what happens if, at that stage, if your prediction that Stopford will amend her pleadings to match yours turns out to be wrong and Stopford is still pursuing an exclusionary-only claim at that stage when your main thrust is the exploitative claim. How does that work?
MR BREALEY: There's two things on that. Clearly there's an overlap.
THE CHAIR: Yes.
MR BREALEY: Because a lot of the Stopford claim will be concerned with the pricing effects, as is method 1C. We just say that we capture far more of the pricing effects

than method 1C. So there's going to be a commonality whatever, because the whole of the Stopford claim is about a pass-on of an overcharge. And that's all about pricing effects. So there will be some commonality but, yes, there will be a mismatch on the exclusionary. And unless they want to piggyback on the Kaye claim, there would be a mismatch on the exploitative. I'm reminded that the budgets for whether it is Brook or the?

THE CHAIR: Yes, they're very, very close. Yes. Thank you. I mean, I'm not criticising you for mentioning it, but I did have it in mind, yes.

MR BREALEY: Yes.

MR DAVIES: Yes.

THE CHAIR: Thirty whatever it is, 31 or 32. Anyway, I know they're very close.

MR BREALEY: The budgets are close and I can only repeat it. But I think it's an important point. Sitting here today, the Tribunal knows that there is a plausible exploitative case that can have £12 billion. One simply does not know what these four standalone claims are going to add.

THE CHAIR: Okay.

Please.

MR DAVIES: Can I ask two sort of further questions about the exploitative methodology. And they're both kind of inspired by your green table and going all the way down to WACC. It strikes me that there's at least two reasons why you might not get all the way down to WACC, and therefore the claim would be reduced. One is a sort of: what if Google wasn't doing any of the pricing practices that that Dr Coscelli talks about in section 6.2 of his report, if Google was just charging what the market would bear? That that might nonetheless be well above, leave them above WACC, might it not?

MR BREALEY: With the greatest respect, that's not the way to look at it. The way to look at it, if one looks at the graph, it's not going upwards. It's every single pricing practice that comes down, and it only finishes when it comes to the WACC. Brook made this rather odd submission about this. In the exploitative case, there would be no pricing practice above workable competition. If I can just look at the table again, if you've got it. You start with the table. I'm looking at the exploitative. And for the exploitative, I'm not going upwards; I'm going downwards.

MR DAVIES: Yes.

MR BREALEY: And therefore it's every single pricing practice -- and there clearly overlaps between the pricing practices that we identify and Brook identify. But the pricing practices, you start with exploitative and you're going down, and you're going down. At some point, we say that it is likely in an exclusionary counterfactual, we're going to stop. But with the exploitative, you still keep going down and down until you hit the ROCE WACC. So you're not looking upwards; you're looking downwards.

MR DAVIES: So it doesn't necessarily matter what the increase in price resulting from the practices listed in Coscelli 6.2 are, even if Google were not trying to do anything to increase price, but just taking what the market would bear. You would still consider that to be an excessive price? Yes.

MR BREALEY: If, in the exploitative, it's not what the market will bear, in a sense. This comes back to another concept, as you well know, the willingness to pay.

THE CHAIR: Yes.

MR BREALEY: The advertisers have paid this. But if you look at the CMA report, they say that the exploitation of the market power has significantly damaged their businesses. I didn't take you to it, but there is a section on advertisers, where they say that the exploitation of the market power significantly damaged their business. And the shaded green will go all the way down to the WACC level. Because one is looking at actual market power; we're not looking at counterfactual market power when we're looking at exploitative. We're looking at Google having actual market power and actually exploiting that market power to the detriment. And at some stage, the fairness or the unfairness will cease when you get to the ROCE WACC level.

MR DAVIES: Yes. I think I understand. You're saying that even if Google were somehow able to demonstrate that none of those pricing practices in Coscelli 6.2 actually affect the price, you'd still be saying: well, this is the excess and this is unfair.

MR BREALEY: Yes, (overspeaking) the design of the auction, whether -- I mean, there are practices, but Google are charging too much. At the end of the day, Google are making super-competitive profits, charging super-competitive prices, and the question is: can the advertisers sue?

MR DAVIES: Then my second point related to that is: presumably, Google will want to make a lot of arguments on the basis of what the United Brands judgment calls "economic value". They'll say: we're not just like one of these pharmaceutical companies that's buying up a patent drug and putting up the price; we're doing something innovative and valuable. Might that end up reducing the value of the exploitative claim?

MR BREALEY: There's absolutely no doubt it could.

MR DAVIES: Yes.

MR BREALEY: I mean, that is something that is going to be for trial. Google, if one very quickly goes to it, this is authorities bundle 6. I can tell you what it says, but at authorities bundle 6, it's the digital report. Google will submit exactly what you've just said, sir, which is that this is paragraph 5.101:

"Google submitted that the provisional finding [et cetera] is not consistent with the evidence."

So, this is at 3511 of authorities bundle 6. Google says that.

"A full profitability analysis would have to disentangle those revenues that arise from market power from those which arise from genuine value-adds and competition on the merits."

That is true; that's what the trial is going to be about. That is why both experts -- and it's wrong for Brook to say that we don't allege it -- both experts have emphasised the reduction in the quality of the service, when at the same time, the price has been increasing. But that will be a question of fact.

That's why when I went to Phenytoin and Liothyronine, I wanted to emphasise the point that the value can already be in the excess profits -- can already be in the cost-plus. So clearly, the economic value, the value of the service is going to be a massive issue, but it doesn't mean to say that the methodology is somehow wrong. Because we see here Google saying: well, it all depends on competition on the merits, and then the competition authority at 104 rejects them. It says:

"In our view, these arguments are inconsistent with the evidence we reviewed."

This is at 5.102, 5.103, 5.104. So to a certain extent, you're absolutely right, sir, to ask this, and Google will do it, but it has been rehearsed a few times now by Google in front of the CMA. The CMA have still said: well, you've got excessive profits.

MR HERGA: I just have one point. I was just wondering to what extent it might be said that one of the cross-checks you referred us to that should be carried out on your ROCE test under the exploitative test, could it be said that one of the cross-checks actually takes you back to what the market would have been if Google hadn't been able to exclude competitors, or hadn't abused the exclusionary -- in that scenario. So does your exclusionary damages therefore provide a limit to your exploitative damages?

MR BREALEY: They are different in the sense that the exclusionary damages, for the sake of argument, will stop somewhere down on the right-hand side. The exploitative will come all the way down. As we saw in Coscelli's report, the exclusionary conduct has contributed to the excess profits -- has contributed to it, for various reasons. Nevertheless, you've got the -- and that is why, if you look at Coscelli's report, when he has to marry the two and work out that when you combine them. But the exclusionary damages don't in any way limit the exploitative; it is part of it, because we say that the exclusionary damages caused at least £3 billion worth of harm. The acid question, exam question, is whether you're limited to that and you can go further, and claim £12 billion, because you're not looking at a hypothetical market situation; you're looking at the actual exploitation of actual market power.

You don't have to look at a counterfactual price, you don't have to look at a counterfactual market. It's straight all the way down. So the exclusionary doesn't in any sense limit -- it's part of it; it doesn't limit it.

THE CHAIR: Yes. We'll take the break now.

(3.13 pm)

(A short break)

(3.26 pm)

Submissions by MR BEAL

THE CHAIR: Yes.

MR BEAL: Sir, I've been shown a copy of a letter from Simmons and Simmons on behalf of Google saying that they're not taking any point on the identity of Mr Kaye as a proposed class representative.

THE CHAIR: Okay, all right.

MR BEAL: They're most affected by the point; if they don't want to take the point, it's not appropriate for me to take it in their stead.

THE CHAIR: Okay.

MR BEAL: So that point is dead.

THE CHAIR: Thank you.

MR BEAL: Can I say that my learned friend Mr Brealey and I agree that Google has received an extraordinary amount of money by way of revenue. It had £200 billion in advertising revenues in 2024 on the back of processing 14 billion searches per day. That's not in dispute. It's not often that a company's name becomes synonymous with a service or a good. One can think of very few examples of that. And it clearly on any view has a considerable amount of market power.

It's also apparent, however, that maintaining that level of dominance is hard work. And our case, simply put, is that Google has worked hard to maintain its market power by adopting abusive, exclusionary practices. My learned friend took you to the CMA report which said, quite rightly, big is not bad. Our case is not that big is bad; our case is that bad is bad, and what they've been doing needs to be called out for being an anti-competitive exclusionary practice.

We say by having the widest range of exclusionary practices advanced on behalf of the class, you end up with a counterfactual analysis where those abusive behaviours are excluded from a workable structure of competition in the counterfactual, and you necessarily end up with a workable comparable in the counterfactual that maximises the recovery for the class. If you leave abusive conducts in the counterfactual, then you end up with a counterfactual price that is necessarily going to reflect that abusive behaviour, and the inference you would draw is that the counterfactual price will be higher than it need be. Therefore, we say it's important that the exclusionary case advances a case that clears as much of the abusive behaviour away as is feasible.

It's, in short, Google's foreclosing conduct, which lies at the heart of our case. We say it's not surprising that it's Google's foreclosing conduct which is laid at the heart of the judicial and regulatory condemnation of Google's behaviour in multiple jurisdictions. Now, what we don't have, from my learned friend's exploitative case -- he's calling it an exploitative case, in fact, I'm afraid it's an unfair pricing case -- he's not, for example, saying that the intentional pricing practices are abusive in their own right, as they might be said to be an unfair trading condition. He expressly disavows that case. So this isn't the case with the intentional pricing practices are said to be abusive.

The reason they come out of our case is because we say in the counterfactual, Google would not have been able to maintain those pricing behaviours -- that intentional pricing conduct -- because of the competitive threat it would face, either from a growing rival like Microsoft's Bing, or from a market entrant such as Apple, which is what we posit.

So we exclude those intentional pricing behaviours as part of the counterfactual analysis. We therefore don't need to allege that they are abusive and my learned friend's exploitative case has the problem that he's trying to shoehorn those intentional pricing practices into the equation, whilst he's forsaken them as a form of abuse. That's very difficult for their exploitative case, because Google's obvious response to the exploitative case when it's dealing with intentional practices will be the argument they ran in Stopford; you can't rely on these intentional pricing practices when you've said in terms they're not abusive.

Now, in Stopford, this Tribunal allowed the question of RSAs to go forward in the counterfactual, notwithstanding that the general court in the Google Android case had found that the Commission had not proven those cases, and Stopford have chosen not to allege, for example, that RSAs form any part of the abusive conduct. We haven't denied that approach because we are keen to maintain that as much abusive exclusionary behaviour is stripped out of the counterfactual as possible, and we think a viable case can be made for saying that RSAs, notwithstanding the general court's findings, can be found to be an exclusionary practice.

It's on that basis that they're built into our analysis and therefore get stripped out of the counterfactual. In Stopford, as I understand it, Mr Latham, the expert, is proposing to strip those out on the basis they would be abusive, regardless of any finding, from the European Commission that may have been overturned on appeal. But the point remains that you're still in a world where you've stripped out as much of the exclusionary conduct as possible, both in Stopford and on our case, and it's uniquely the Kaye case which is seeking to leave some of that exclusionary conduct on the table and capable of being deployed by Google in the counterfactual to justify higher prices in the counterfactual than would otherwise be the case.

That is, in a nutshell, one of the main problems with running an exploitative case when you haven't stripped out all of the exclusionary conduct from the counterfactual. You still end up with a counterfactual price which is higher than it otherwise should be. In answer to the suggestion, "Well, you can look at what the price would be in ordinary, workable conditions of the market, and that necessarily is going to be lower than that". Well, the answer from Google will be: well, hold on, you haven't criticised this conduct; you haven't said that this conduct is unlawful, therefore, that is -- to adopt Mr Davis's point, we end up with a position where Google are charging what the market would bear because they are big, not bad. That would be the way it would be put by Google when they are running this case.

Now, conspicuous by its absence --

THE CHAIR: Google will put it that way. You're not saying that Kaye is accepting that. I mean, they don't accept that.

MR BEAL: They don't accept that because what they say is that all you have to do is conduct a ROCE analysis using a WACC standard, find out what the so-called non-extraordinary profit making level of price would have been, and that's the price. The flaw in that case is that they don't give any account, or any proper account, for economic value. And in circumstances where my learned friend's submissions took this Tribunal, right at the start of this morning, to, I think, one of the CMA reports that said that Google has a massive brand presence, one would have thought some analysis of what the brand value of Google was, which is a qualitative aspect, had to be factored into what portion of the overcharge in the exploitative claim is attributable to brand value, what portion of that 15 to 25 per cent overcharge is attributable to network effects and first mover advantage and advantages of scale and scope and natural efficiencies. Now, none of that is apparent on the face of the methodology that has been deployed by Dr Coscelli in this case, because he says all you have to do is do an ROCE WACC analysis, and I'll take you to the passage in his report where he says, "Yes, I accept that economic value is going to be important, but I'll deal with that post certification".

THE CHAIR: Right.

MR BEAL: Now, that isn't a methodology at this stage or indeed at certification that is a blueprint to trial for how you deal with and grapple with those very important questions.

THE CHAIR: Yes. What I meant was, you say, take the RSAs, you're going to say it's abusive.

MR BEAL: Yes.

THE CHAIR: You say that Kaye is leaving that on the table, but they don't accept that they are, do they? Because their position is that they don't need to prove that it's abusive; they don't need a counterfactual; they don't need to prove -- they just will prove that the price is excessive and unfair, and the tools that get Google there are part of the picture, but they say they don't have to discretely prove that they're abusive.

MR BEAL: Well, that's their exploitative case. They're leaving it on the table --

THE CHAIR: Yes. That is for their exploitative case.

MR BEAL: -- for their exclusionary case.

THE CHAIR: Oh, sorry. I thought that's what you meant earlier.

MR BEAL: No --
THE CHAIR: You mean within the exclusionary case?
MR BEAL: Within the exclusionary case --
THE CHAIR: Oh, I see, yes. Okay. Sorry.
MR BEAL: -- their counterfactual is higher and I'm then moving on to the exploitative case; I'll explain why --
THE CHAIR: Beg your pardon, okay, sorry.
MR BEAL: -- as a separate matter.
THE CHAIR: Yes.
MR BEAL: The analysis doesn't work there because they've left out of account, for example, quality, economic value --
THE CHAIR: Yes. I'm sorry, I'm with you now. I was at cross purposes with you.
MR BEAL: I mean, I will hope to persuade you that abusive conduct, whether it's unfair pricing or exclusionary conduct or unfair trading conditions, all of it needs a counterfactual. I accept that what doesn't necessarily happen in an unfair pricing case is that the Tribunal will find that a competitive price is X, but of course, it's a necessary part of any unfair pricing case that what you do find is what the level of the excess is.
And in Le Patourel, which my learned friend has simply not taken the Tribunal to, what the Tribunal found, contrary to BT's submission, was that you don't try and find, as it were, the highest market price that would have obtained that wasn't abusive; you simply find what the unfair price was and what the market price would have been in the counterfactual broadly, so that you work out what the overcharge is. It's the differential between the unfair price and the price that would have obtained in the counterfactual that gives rise to what the overcharge price is. Therefore, you do necessarily have to determine that benchmark of what a competitive fair price would

have been. Within that, that then goes to form the measure of loss, measure of damages. Therefore, to suggest that this is simply a profitability analysis and nothing more is inconsistent, actually, with the way that the Tribunal dealt with this in Le Patourel and in Phenytoin 2, which again, you haven't been taken to, so I will need to go through those.

More fundamentally, the exploitative case, the unfair pricing case, doesn't have any judicial or regulatory support with existing findings. Any allegation of overcharging has always been tied to allegations of exclusionary conduct. So when my learned friend says, "Oh, the CMA has found that there are super competitive prices", yes they have. The CMA has pointed to allegations of exclusionary conduct as part and parcel of the framework within which they have recognised that Google has made sustained and persistent profits. But of course, what they haven't done is find that the prices that have been charged by Google are unfair, adopting an article 102 analysis. Indeed, the Turkish competition authority expressly rejected a suggestion that Google had charged excessively high prices. If I could invite you please, to look briefly at electronic folder, main bundle of authorities, page 4265. The paper page is page 4257.

THE CHAIR: Which volume is that?

MR BEAL: That's the main bundle of authorities.

THE CHAIR: I know, I've got several volumes of the main.

MR BEAL: Electronic, so I suspect it's around -- it's tab 60, if that helps. Folder 6, folder 5? Sorry, folder 7. Thank you.

THE CHAIR: Yes.

MR BEAL: Would you be kind enough, please, to read recitals 183 to 187. (Pause)

THE CHAIR: Right.

MR BEAL: So it's a practice-driven analysis that is the focus of the Turkish competition authority's findings, not any allegation by itself of excessive and unfair pricing.

THE CHAIR: This seems to depend -- it's the first time I've seen it, obviously -- on the proposition that the auction, as it were, works and is just an auction. And of course, that's not how ...

MR BEAL: An auction by itself will set a price that isn't set by the auctioneer.

THE CHAIR: Yes, sure. But the Kaye case is that that is not the Google auction.

MR BEAL: The Kaye case is the same as our case, which is that there are a variety of ways in which Google has influenced the outcome of the auction to its favour.

THE CHAIR: Yes. Yes.

MR BEAL: But the point is, the underlying conduct is therefore the exclusionary, abusive conduct by Google or, one might say, setting unfair terms and conditions. It's not the actual imposition of the price per se that is the abuse.

More importantly, this is the only regulatory decision that looks at the allegation of excessive and unfair pricing, and it rejects it. So our claim has better support, and we accept it's support only to the extent that our case is standalone rather than purely follow-on. Obviously, we both have an element of follow-on; we both have an element of standalone. But we do derive the greater weight of regulatory and judicial support for our case than my learned friend does for his.

Simply on the matter of the exclusionary case, there's no dispute that we have a wider range of allegations of exclusionary conduct. We have six distinct elements in response to my learned friend's, essentially, the Android follow-on claim and then simply relying on the Apple ISA as the additional element of an exclusionary case. The key question is to what extent does that matter? Because ordinarily one would expect, for the reasons I've given, that the wider case is to be preferred. See the criteria set out in BIRA, which I'm anticipating this Tribunal is very familiar with; the criteria for selecting between the two. One's in a position where one should try and find a case that will best realise the greatest results for the class. That's the ambition.

And here, not simply as a matter of mathematics, but because the six exclusionary conducts that we focus upon are all interweaving and mutually reinforcing behind a consistent theory of harm, which is Google is very keen to preserve its digital ecosystem in all its glory. All of the facets of the digital ecosystem Google deploys are geared towards maintaining and extending its very substantial revenues from search advertising. That's its core raison d'être; that's how it makes its money. All of these features go to protect that position, and therefore you want all of them in the counterfactual.

So, the key question in my respectful submission is, does the unfair pricing case fill the gap? That will ultimately, in my respectful submission, be probably where the linchpin of the decision-making for this Tribunal falls. Do you have confidence that the exploitative claim that's been deployed will cover any other gap when there are gaps in the exclusionary case? There, we, with respect, foresee a number of problems.

Firstly, my learned friend was asked, how expensive will this be, and he said, "I think £2 million to £3 million of additional costs for running this case". You will have seen that the costs claim in BT in Le Patourel for ostensibly a single allegation of unfair pricing extended beyond £22 million. Now, if your budget is 34 million and you're trying to deal with adverse costs and you've got adverse costs cover for at least some of that, then that's one thing. If you don't have adverse costs cover for that sort of claim and you're bringing it, and your own budget also requires you to bring an exclusionary claim, then it starts to look quite tight.

More importantly, we say the Kaye case simply failed to set out a blueprint to trial that will allow the key question of economic value to be determined in the class's favour. That's simply because Dr Coscelli has said, "I intend to deal with the difficult issue of economic" -- he doesn't say difficult -- "I intend to deal with the questions of economic value post certification".

We also respectfully suggest that going back to the "big is not bad" analysis, if it's right that simply being big in and of itself is not to be criticised, then the fact that you are big and you make profits is also not to be criticised. Imagine, for example, a company like Coca-Cola, which nobody, as far as I know, has suggested has indulged in any exclusionary conduct. It makes substantial profits year on year, has very high market share, it produces a product which clearly has both significant consumer value and brand value, for whether one likes Coke or not, one has to recognise that a substantial number of people choose to drink it. They are probably a dominant company, at least if you pick the product market as being cola-flavoured drinks; I don't know, I'm not proposing to start developing a case against Coca-Cola on my feet. But one can see a situation in which, on my learned friend's analysis, merely being a dominant undertaking with an extremely popular product that makes a commensurate profit consistently with its popularity is enough to bring you within the scope of the unfair pricing regime. And it amounts, in our respectful submission, to inviting the Tribunal to adopt the mantle of a price regulator rather than an adjudicatory body.

There is a reason, with the greatest of respect, why unfair pricing cases have seldom been brought and even less seldom have been successful, which is that high prices, high profits, if they are determined as such, and it is a competitive market will simply attract rivals to enter that market. The prices are a signal to other people to join in this market and provide that service, provide that good in lieu of the incumbent, and the incentive is the very substantial profits that are made. Markets can be relied upon to cure themselves more readily than it is easy for this Tribunal to try and regulate the markets for them. So that is why typically, you need a very clear-cut unfair pricing case where you've dealt with to what extent is the overcharge attributable to popularity, brand value, quality, all of those issues that don't resolve simply to a profitability analysis, and where, with respect, on Dr Coscelli's analysis, there is none. That's simply a lacuna in the overall case.

The other problem to mention is that of market shares; it's loomed large. On my learned friend's case, they posit a scenario in the counterfactual where Google still has a market share of 80 per cent. They rely in part on the fact that pre-the claim period, Google also had a market share of roughly 80 per cent. But of course, having a market share of 80 per cent means that there is probably something that's not been functioning in that market in the period since 2009/2010. If they've been able to maintain that market share and grow it to 90 per cent, and the counterfactual is only proposing to strip it back to 80 per cent, then that isn't a very propitious basis on which to launch a claim for damages on behalf of the class, because you're still baking in extreme amount of market share, which can be an indicia of market power, and you're inviting the Tribunal to assume that the market share would only drop to 80 per cent, which would still bring available to Google all of the arguments: "Well, we are simply popular; look at how we've still got predicted to have a market share of 80 per cent in the counterfactual. Nobody can really touch us, and we can therefore still justify higher prices than we otherwise would have done".

THE CHAIR: But I don't think they're actively pushing for 80 per cent; it's a recognition that that's what Google is going to say, and that there's a risk it will succeed.

MR BEAL: They take it down to 80 per cent on the basis of some provisional analysis that is looking at responsive market shares in, I think, the EEA, Turkey and, I'll be corrected if I get this wrong, Russia.

THE CHAIR: Yes. That's the blended average.

MR BEAL: That's the blended average.

THE CHAIR: I'm not quite sure what the mathematics is down in the guts of the blending, and it probably doesn't matter, but it combines numbers from 62 in Turkey up to higher in Russia, I think, and then -- not Russia, but anyway -- and then they get back down to 80. But the broader point is, they're not fighting for it to be 80; they're just recognising that it might be.

MR BEAL: Well, when you are pushing for a counterfactual analysis where you have built in a mechanistic approach to pricing, which is simply correlated on a linear basis to market share, accepting that the counterfactual market share will be 80 per cent is problematic.

I can give you an example of this. There's been a lot of mention made of section 7 of the Scott Morton report. If I can just explain the structure of Professor Scott Morton's report, and I may need to go to it in more detail tomorrow morning. You've got the section that explains evidentially what the exclusionary abusive conduct has been. You've then got the assessment that looks at the impact on the market of that behaviour; that includes a detailed counterfactual analysis of what would have happened if Google had not been able to, for example, pay £20 billion per year to Apple for its essentially, I'm going to paraphrase, staying out of the market. Let's just assume, for the sake of argument, that whichever PCR is capable of establishing that that incentive payment to Apple had the effect of deterring market entry, either by Apple itself with a general search engine or by a rival that Apple would team up with and say, "Right, we're going to develop Bing mark II", and therefore there'll be a third general search engine with significant capital behind the endeavour so as to get it across the line of a genuine and viable rival to Google.

Now, if you're in a position where the market share as a result of that perception of either genuine entry or threat of entry is still 80 per cent, then that can mean one of two things. Imagine, for example, that there's a viable competitive rival that either is growing its product like Microsoft with Bing, or it's a genuine new entrant. Then with that share, the position you can end up in is that Google, say, has a very significant market share, call it Google share of 99 per cent.

But then a new entrant arrives and offers a 30 per cent discount. Assuming that it's matching Google for quality and offers a 30 per cent discount, what is Google's reaction? Well, say that Google decides to match the new entrant and decrease its prices by 30 per cent, at that point, one would anticipate that Google would essentially keep its market share and nothing happens, save that the price charged by Google is then reduced by 30 per cent. That essentially is for everyone. If Google doesn't match the new entrant's price, let's say its share drops to 50 per cent of the market from 99 per cent, and that the new entrant therefore is able to gather 50 per cent of the market, capture the market 50 per cent by virtue of its 30 per cent price discount. Now, what then happens is that 50 per cent of the market benefit from a 30 per cent price reduction, and the others do not. So 50 per cent of the market gets a 30 per cent price reduction, but 50 per cent of the market gets no price reduction whatsoever. 50 per cent stay with Google, pay the full price; 50 per cent pay new entrant's price. Therefore, the market as a whole gets a 15 per cent price reduction. Whereas in the initial example where Google matches the new entrant's price, then the market share is 99 per cent, but Google would be charging 30 per cent lower.

One only needs to have a stylised example like that to realise that market shares can stay at a very high level as long as the incumbent undertaking matches the price entry of a rival, or is incentivised to decrease prices because of a viable competitive threat of entry. Then you end up with a position where market share has nothing to do with the price that will emerge in the counterfactual. And so the problem, if I may say so, with focusing solely on market shares is that it's mechanistic and doesn't produce a sensible analysis of the likely outcomes in a counterfactual. If you're imagining that Apple, being paid £20 billion a year, can't receive that money, can't receive its cut of the Google advertising revenue; and if we know, as we do, that Google had internal documents that predicted that they were going to lose 36 per cent of either the Safari browser traffic or 36 per cent market share full stop for its overall product on Google Search, that's a very strong incentive for somebody like Apple to be a viable competitive entrant into this market.

That's where the market share analysis simply falls down. Because instead of saying, well, Apple's a viable competitive entrant, that could lead to price and quality differences in the counterfactual things, you'd have a lower price, higher quality, if you simply say you're still in a position where, post Apple's entry, it's 80 per cent market share and that's what's driving the price, and if -- because this is where Dr Coscelli comes out on his overcharge analysis -- you're saying that for every 1 per cent market share you lose, there will be a price decrease of only 0.5 per cent, then you're talking about a 5 per cent overcharge for a decrease in market share from 90 to 80.

And, with the greatest of respect, the suggestion that Apple coming in with all its might, with the benefit of wanting to obtain, in lieu of its incentive payment, revenues in the order of £20 billion a year, that it won't be incentivised to try and do something to shake up the general search engine market and that would only lead to 5 per cent price decrease and only dent Google's market share by 80 per cent. That is selling the pass; I'm afraid that is raising the white flag, because it is not good enough to assume that all that a viable entrant like Apple would do is reduce prices by a maximum of 5 per cent by way of overcharge and only dent the market to the extent of 10 per cent.

And that's the problem with market shares as a proxy. They're just too blunt, they're too mechanistic and it doesn't really make sense, because market power is not simply about market shares. That's the Coca-Cola example. They've got high market share; do they have market power? Well, it depends. Can Coca-Cola raise the prices for coca Cola bottle by £2 a bottle? No, because Pepsi will come in and be a viable competitive threat, so they don't do that.

Market share is not determinative of pricing. The reality is that if a dominant undertaking actually fears that it will lose market share, it can respond by dropping prices or improving its quality of its products or both. The unfair pricing case necessarily has to grapple with that as well, because in a counterfactual where a workable form of competition leads to other people coming in and prices decreasing, then one has to posit the fact that the excessive prices charged by Google aren't going to persist. And so the only way you can say that they will persist is if you posit a world in which they are able to carry on maintaining exclusionary conduct to deter market rivals from coming into this market. It's another way, really, of wrapping up the argument that high prices signal market entry, and it's only if somehow you are blocking market entry through abusive conduct that the law should get involved.

There's then a point to be developed about exactly how Professor Scott Morton has dealt with her methodologies. True it is she has four of them, 1A to 1D. It was repeatedly said that 1A is the first and somehow the preferred. That isn't the way Professor Scott Morton has put it. She has said, "These are four different methodologies that I'm running. They are complementary exercises. None of them is the preferred or primus inter pares. They're all to be looked at once we have disclosure, once we have the data, because it's at that stage you know which of them is, in a sense, the best fit". Imagine you can't get any data, for example, or no credible data, for 1A because on analysis, it turns out that the experience in Turkey was very different from the UK. Therefore, as a comparator, it just doesn't work. You would fall back on 1C, but you could also, if you were struggling with data for the purposes of 1C, if the econometric analysis didn't work for whatever reason, you could then look at models 1B and 1D as another way of reaching a triangulation of analysis which gives you some comfort that the overall approach to loss is there.

It's also important to bear in mind that these methodologies are geared towards assessing the loss with the data from disclosure. You've got the theory of harm, you've got the expression of the abusive conduct, you've then got the counterfactual analysis, you've then got the methodologies that say, "On the basis of all of that, this is what we think -- this is the blueprint to trial that we will run once we've got the data which will help us establish what the actual loss to the class is". And then the paragraph I really invited my learned friend to read out, I'm sorry for that, was the one that confirms it's only because Professor Scott Morton does not have that data that she moves on to public data to come up with a proxy for what the overcharge will be shown to be once she has the full data and can do the job properly with methodologies 1A to 1D, and indeed 2A to 2D for umbrella and 3A to 3D for overhang loss.

THE CHAIR: Right. So it's dependent on disclosure which of 1A to 1D --

MR BEAL: So, when my learned friend said --

THE CHAIR: Let me finish. Is the roadmap to choose the best one, or it might be three out of four go forward or two out of four? What's the plan?

MR BEAL: The plan is to wait and see what the best analysis is once you can fill in the gaps with data.

THE CHAIR: Right. But then possibly run all of them?

MR BEAL: You could potentially triangulate with all of them, but you wouldn't choose to run a detailed simulation model if, for example, the data analysis from data disclosure enabled you to perform 1C perfectly well.

THE CHAIR: Sorry, say that again? You wouldn't --

MR BEAL: Imagine that the 1C approach took the econometric analysis and looking at actual factual evidence enables you to adopt 1C and come up with what you think the price would have been --

THE CHAIR: Yes.

MR BEAL: -- then you wouldn't necessarily need to build out a detailed simulation model; you could have a simplified simulation model that might operate as a cross-check. If, however, there's a problem with that data, then Professor Scott Morton has a fallback.

THE CHAIR: Which is?

MR BEAL: Well, 1B, 1D, 1A. They're all complementary.

THE CHAIR: Right.

MR BEAL: The question is, can you say at this stage which one will work? No. Therefore, they're all there on the table. As and when we have a better view of which one will work, there'll be a preferred way of doing things. In the same way, for example, in the recent past, on trial, in Umbrella Interchange, one of the experts had three different ways of establishing pass on, and they were all there to deal with sensitivity analysis in case one of the particular methods didn't work.

THE CHAIR: Right.

MR BEAL: So they're there as alternative or complementary ways of dealing with things.

THE CHAIR: So which -- how's the budget prepared then with that uncertainty about what's going to be going to trial?

MR BEAL: The budget's been prepared with an assumption that work will be done once data disclosure is in --

THE CHAIR: Right.

MR BEAL: -- which identifies the best way of putting in effect the different competing methodologies that might be available.

THE CHAIR: So, the budget's not sensitive to what -- does it have a range for whether all four are run or just one's run, or how does that work?

MR BEAL: So there is a budgeted figure for the fees from the consultancy firm that are tendering this expert evidence.

THE CHAIR: Right.

MR BEAL: Within that budget, no doubt there will be some play. There's always some play in budgets. What we don't have at the moment is a specific dedicated budget that will look at what it will cost to produce the next expert report once disclosure's in.

THE CHAIR: Okay.

MR BEAL: As far as I'm aware. We may have a budgetary range; I'm sure we have a budgetary range, but it won't have specified to that level of granularity. Are we budgeting to do something that will prove to be unnecessary? No. It's highly likely that the analysis of the disclosure will reveal the best fit for the methodology, and the work will be done. I mean, the work of processing the data and doing things with the data is necessarily been budgeted for, because I think both sides anticipate that regression analysis will be necessary. Depending on the volume of data, that can get quite pricey. That's true.

THE CHAIR: Okay.

MR BEAL: But seeing as both sides are budgeting for it and have budgeted for it, that isn't a difference between the claims. Now, what I'm trying to do is simply put the structure in place because my learned friend made great show of saying, "Section 7 is where it's all at". In fact, section 7 is simply what it says: it's an estimate on a preliminary basis of aggregate damages. What's it done? Well, it's looked at public data and it's identified two separate levels of overcharge, one derived from the CMA and the other one derived from Google US case. And true it is, that overcharge is not derived from the methodologies. But Professor Scott Morton's been clear about that. It's not derived from methodologies because she doesn't have the data to populate the methodologies that are in place. What her report does is provide a blueprint to trial of the methodology that will be adopted, depending on how the data turns out. So, section 7 was never going to be, "This is the loss for the actual class" on our case because we can't get to that stage yet. What is to -- I'm sorry, Mr Davies, did you?

THE CHAIR: Oh, of course. Yes, sorry.

MR DAVIES: Are you going to respond to Mr Brealey's specific concerns about the calculations in section 7 that they were taking sort of things that happen now and putting them into the past when they weren't happening?

MR BEAL: Yes. I mean, the sort of in a sense, it's an extrapolation backwards point that's being raised. The way we've advanced our case is that the counterfactual is analysed on the basis that Google, with a genuine threat either of rival entry or indeed an expanding, more powerful, more emboldened existing competitor would stop Google from doing all of the things that Google has done. So it wouldn't have been able to give incentive payments to browsers; it wouldn't have been able to give incentive payments to MNOs; it would have had to divorce the Play Store from its offering under the Android conditions; it wouldn't have been able to bundle the Chrome browser; and essentially from 2008/2009, you would have had a very different looking market because Google wouldn't have been putting in place the things that have been found to be unlawful in many jurisdictions and which we're inviting this Tribunal to confirm are unlawful in due course. So you end up with a world in which Google can't exclude rival entry, it can't foreclose the market. The market is therefore a competitive one, and Google's response is either to decrease prices and improve its quality, or to lose market share. And other rival entrants or existing competitors would grow their market share and be a genuine response.

Now, true it is that certain of the individual pricing practices were only developed in the course of the claim period, so for example, 2017/2018. There are other practices which have been there from the start. So for example, if we look at the US judgment -- and this is supplemental bundle of authorities, please, page 699 -- there's reference to the Verizon RSA going back to 2009. That's paragraph 367. So supplemental bundle of authorities -- do you want me to pull it up?

THE CHAIR: Where are you at?

MR BEAL: Supplemental bundle of authorities, page 699 in the electronic folder. It's the same, I think, actually this one.

THE CHAIR: Yes.

MR BEAL: So if we look at paragraph 367 of the judgment:

"Verizon's 'Core Devices' tier was developed through negotiations. Verizon has entered into RSAs with Google for over a decade. 'From 2009 to 2014, Google paid Verizon 40 per cent revenue share', and from 2014 to 2020, Google decreased the revenue share, paying Verizon 20 per cent."

So that's an example of a situation where the conduct goes all the way back to 2009 and in fact, the incentive payment reduces over time.

If we then look in the main bundle at our claim form, that's B page 64. There's an RSA with an OEM that's referred to at footnote 198. What one sees there is a reference to a Google Motorola MADA dated 1 May 2009, available in heavily redacted form, but is at least publicly available. And what that shows is that there was an MADA with a OEM, Motorola, going back to 2009.

Then if we look please in the main authorities bundle, we'll see that Apple had a default status agreement that goes back to 2005. That can be found please, main authorities bundle on paper page 3373; in the PDF, that is 3381.

THE CHAIR: Yes.

MR BEAL: Recital 3.97:

"Google holds very extensive default positions in relation to mobile devices ... It has had a default agreement with Apple for over 15 years."

Now, this was an OPDA report which is dated 2020, so that takes it back to 2005. So that suggests that Apple's had the sort of incentive arrangements we're dealing with in place since about 2005. So, you've already baked in quite a lot of conduct.

There's then I suppose, the separate question of why have we taken the pricing knobs behaviour backwards? Well, it's because they provide a proxy from publicly available data of what that sort of conduct did in terms of market price overcharge, and we're equating that with the sorts of overcharge that we anticipate Google has been able to achieve as a result of all of these other practices. But this is the only public data we have that would provide a clear handle on it. Bear in mind, if you would, that Professor Scott Morton's analysis of the preliminary estimates does not include quality effects, it does not include umbrella loss, and it does not include the overhang loss as such. So, these are estimates that are on any view underbaked.

And I think I will deal with this point while I think of it. Professor Scott Morton, you were taken to paragraph 741, I think, of her report. Give you a page reference: 227, bundle C.

THE CHAIR: Yes.

MR BEAL: My learned friend criticised the reference to the price to bid ratios being not particularly realistic. Professor Scott Morton refers to the reason why it's not realistic is that Bing's price has already benefited from an umbrella effect, and therefore they were higher than they probably ought to have been in a properly articulated counterfactual. She then says in this section my learned friend didn't read out:

"This approach may tend to understate the overcharge rate. That said, I believe it is an appropriate simplifying assumption for the purposes of calculating a preliminary order of the magnitude of the likely damages."

So it's never intended to be the implementation of the methodology; she recognises that can't be done at this stage. She's identified two separate proxies for overcharge. And instead of that approach, Dr Coscelli's approach is to say mechanistically, I anticipate market share would drop to 80 per cent from 90 per cent. That would

produce a difference in price of 5 per cent. Therefore, the overcharge is 4 point whatever it would be if one does the reverse calculation of overcharge.
That very, in a sense, simplistic and basic approach to overcharge is what's driving both expert's analysis of the loss for the exclusionary case. It boils down to a simpler thing as an estimate of what the overcharge would be, and one of them produces an overcharge of somewhere in the order of between 4 and 5 per cent -- I haven't done the maths -- and the other would produce an overcharge of somewhere between 9 and 17 per cent, and essentially a midpoint is achieved. That's what produces the range of £5 billion to £9 billion. But it's patently only there as a very preliminary estimate of what the likely range of damages might be. It doesn't claim to be anything more than that. So the great --
THE CHAIR: (Overspeaking) doesn't claim to be anything more than that -- the whatever it is, 9 to 15 per cent, you mean?
MR BEAL: The claim for our exclusionary case?
THE CHAIR: Yes.
MR BEAL: I think midpoint simple interest pass on 50 per cent is 5 to 9.
THE CHAIR: Yes.
MR BEAL: Yes. The exclusionary case for Kaye comes out at 3, and what I'm seeking to suggest is that part of the reason for the disparity is simply that whichever way you go about estimating an overcharge, their overcharge for the exclusionary case is much lower than that. That's what it boils down to. Why is their exploitative case higher? Well, because they've chosen an overcharge of between 15 and 25 per cent. That's what's driving it. They're saying the overcharge was 15 to 25 per cent; therefore, if you multiply that appropriately through Google's revenues over the period of time, you end up with a figure that is bigger. But that's simply saying, "Well, an overcharge of 15 to 25 is bigger than an overcharge of 9 to 17". It doesn't have any greater

theoretical value or evidential value than that. The question is how sound is the analysis by which you get to establishing the overcharge once you've got the data. That's critically what matters. And I will need tomorrow to take you through Dr Coscelli's report to show that the estimate of damages upon which so much weight is placed boils down to essentially relying on the situation in Turkey and the counterfactual in its response to regulatory intervention by the Turkish competition authorities -- ironically, because of course, they didn't find unfair pricing -- and then relying on a regression analysis with what is said to be 30 countries with either 31 or 32 observations -- which we don't quite understand, if there are 30 countries -- in circumstances where the regression analysis produces a counter-intuitive outcome whereby the greater the GDP of a country, the lower the charges for advertising will be. So it's got a negative relationship between GDP and prices for advertising, which doesn't make any sense. And I'll do a more developed critique of the regression analysis tomorrow. In the ten minutes --
THE CHAIR: Mr Beal, what you discussed with Mr Davies just now, what you called "extrapolation backwards".
MR BEAL: Yes.
THE CHAIR: I still don't quite get that. There are some abusive behaviours that didn't start until well into the period.
MR BEAL: Yes.
THE CHAIR: Can you say extrapolation backwards? Are you implicitly assuming that the behaviours that were in play from an early stage had the same magnitude of effect, in the aggregate, as the ones later on? I think you maybe.
MR BEAL: Well, one is not necessarily attributing to the later.
THE CHAIR: Yes.
MR BEAL: They haven't been categorised as an abuse by anyone. Nobody has said

that the intentional pricing aspects are an abuse; nobody's made that case. Arguably could have done, but that's not where we are. We didn't need to because we took the view that in the counterfactual, Google wouldn't have been able to do this.

THE CHAIR: I see. Right.

MR BEAL: And therefore they drop out. In answer to your question, sir, the initial conduct with the RSAs and the MNOs and the incentive payments and everything else would have deterred entry. That produces an anti-competitive outcome that necessarily, we say, has led to higher prices and diminished quality.

At some point, on top of that conduct, you have the intentional pricing, which [inaudible] the existing conduct and represents a reason why prices were even higher and the quality was even worse. The difficulty will not be, in due course, working out what the consequences of those may be, because you'll be able to do, for example, a before and after regression analysis of prices paid, following the introduction of squashing, for example.

THE CHAIR: Right.

MR BEAL: The issue comes with rolling back from an estimate of overcharge that only is derived from public data after a given point, and using that as a proxy to roll backwards.

THE CHAIR: Yes.

MR BEAL: So we have to work with the public data we've got. True it is that the analysis from Google -- the Google US court decision did not include all of the conduct that we are challenging, because the SA360 abuse was found not to be contrary to US law, because US law does not have the same law that we do about self-preferencing and dealing with a rival. They have a concept that you can decide to refuse to deal with a rival regardless of what the competitive consequences are, and we just don't have that same approach to the legal test. So the claim on the basis of SA360 before the judge in the United States failed. We don't have that problem, so we are running the SA360 abuse.

Sir, the US analysis of what the price differences were from the intentional pricing practices doesn't deal with that, but also more generally you don't get, necessarily from the US court, a full analysis of exactly what the overcharge would have been from 2009, based on the conditions in the market in the United Kingdom, because that wasn't any part of their role.

So it's necessarily an estimate based on a view as to how far can you take that analysis. You then compare that with the work that the CMA did on price/bid ratio, and again, that's a proxy; it's not an implementation of a methodology. It's simply saying if you look at things that way, one plausible overcharge, for that particular period -- admittedly it's based on a week's data from the CMA looking at price bid ratios and then taking that data from 2020 and saying: that has produced an indicative overcharge, on the basis of that data, of x.

I accept that neither of those proxies are going to be where we end up with a detailed analysis of any of the methodologies. But of course, Dr Coscelli's estimate of overcharge is also predicated on the very same data that we're relying upon, because there is no other public data. So he's had to look, for example, for his exclusionary case, at the existing practices, and he's had to look, for exploitative case, at data that is publicly available.

THE CHAIR: To my earlier question about behaviours, just to try and use a neutral word that didn't exist earlier in the time frame, am I right in saying that your position is that those that did exist from an early stage -- the ones you showed us, Verizon and so on -- they were enough to prevent competitive entry? So it doesn't really matter whether there's some other behaviours that came later, as long as there was enough to prevent competitive entry, it doesn't matter that you relying on things that didn't exist then? I just want to try and articulate why it is that --

MR BEAL: What I'm trying to do is say, yes, absolutely, our case is that by virtue of practices that were evident from 2009, at least onwards --

THE CHAIR: Yes.

MR BEAL: -- rival entry was deterred. That caused competitive harm. As a result, the class paid higher prices for advertising and received a lower quality of service.

THE CHAIR: The same amount of competitive harm as would have happened if there had been other behaviours on top? Is my question.

MR BEAL: As I said, the other behaviours on top are likely to have aggravated the level of competitive harm.

THE CHAIR: Right.

MR BEAL: The question comes: what are we relying on the two overcharged estimates for? The answer is: we're relying on them simply to give an estimate of what a plausible level of overcharge in this market is, and we've chosen two different plausible levels of overcharge that are admittedly based on the individual circumstances in 2017 or 2020, or whenever the assessment was conducted in each case.

But the point being that they're not being relied upon to determine what the actual loss is; they're simply a guideline of what a realistic, plausible level of loss might be. Because once you factor in umbrella losses, and quality effects, which aren't covered by those two overcharge metrics, you end up in a position whereby it's a reasonable proxy for the levels of loss that might plausibly be identified as being recoverable by the class.

Nobody ever wants to say -- well, you hardly ever have the data in a CPO application to be able to say: this is exactly what the measure of loss will be, because you don't have the tools available to do the job. Highly unlikely. So everyone's always very cautious as to what the boundary of the loss might be.

The reason you're providing an estimate -- and is only an estimate at this very provisional preliminary stage -- is to give an idea to the Tribunal of the sorts of level of recovery that can be expected. It's not written in stone.

THE CHAIR: Okay.

MR BEAL: And it can't be. It's to give it a spurious accuracy for Dr Coscelli to say: well, my claim's worth more because this is my prediction based on a regression analysis and the counterfactual with Turkey, because I mean --

THE CHAIR: You mean in the exploitative case?

MR BEAL: In the exploitative case, for example. It's necessarily a preliminary view because Dr Coscelli does not have what he would say is a fully functioning analysis of exactly what the loss to the class would be.

THE CHAIR: Yes. Right. But you're confident enough that within the exclusionary case, your numbers come out higher than the £3 million. You've given yourself a lot of wriggle room, but now you don't want to wriggle down to three or take a chance of wriggling down to three.

MR BEAL: No, we say our exclusionary case is wider.

THE CHAIR: Yes.

MR BEAL: And therefore necessarily excludes from the counterfactual conduct that will drive the counterfactual price down, and therefore it follows, we say --

THE CHAIR: It doesn't matter from the numbers; you can tell that it's bound to be more from the fact that you're taking more out of the counterfactual?

MR BEAL: Yes.

THE CHAIR: Right.

MR BEAL: It's a qualitative assessment, not a quantitative one.

THE CHAIR: Okay. Yes.

MR BEAL: As for the exploitative case, I'll need to come back and show you tomorrow why the greatest respect that is built on some ambitious assumptions.
THE CHAIR: Yes, all right. If that's a good moment.
MR BEAL: I -- well, the alternative is I go on and look at the Court of Appeal in Le Patourel, but I think probably --
THE CHAIR: Well, that will take more than three minutes.
MR BEAL: It would. And would test your patience.
THE CHAIR: Yes. It's welcome news that we don't have to do the apparent bias point.
MR BEAL: Yes.
THE CHAIR: We still think there's a great deal of benefit in finishing within two days. I think the chances that we will do that must have increased. I'm just wondering if we ought to start a bit earlier tomorrow to make sure we do.
Can we start at 10.00 am?
Okay, we'll start at 10.00 am. I think that should enable us to finish well within the day, but we will do that to give ourselves a bit more room for manoeuvre.
MR BEAL: Those who instruct me have contacted the class representatives in Ad Tech.
THE CHAIR: Yes.
MR BEAL: I will update you on that in the morning, or Mr Carall-Green will.
THE CHAIR: Yes, well, that would simplify things. That could simplify things further. Yes.
MR BEAL: It looks as though -- I don't want to count any chickens -- but I think two out of the three class representatives we've actually spoken to.
THE CHAIR: Yes.
MR BEAL: And they are content --
THE CHAIR: Yes.

MR BEAL: -- for Geradin Partners to act in this case.
THE CHAIR: Yes. Okay, thank you. Well, that's useful too.
All right, so we'll start at 10.00 am tomorrow.
(4.27 pm)
(The court adjourned until 10.00 am on Tuesday, 7 October 2025)