IN THE COMPETITION APPEAL TRIBUNAL

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

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 7th 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)

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(9.59 am)

Submissions by MR BEAL (continued)

THE CHAIR: Yes. Good morning, Mr Beal.

MR BEAL: Good morning, sir.

What I'm proposing to do is to deal with the legal principles behind exploitation, then look at the exploitation case, where we propose to make essentially four core points. Firstly, that there is no assessment or methodology for assessing economic value on the Kaye case. Secondly, it wrongly conflates the limb 1 and limb 2 analysis. Thirdly, it necessarily needs an exclusionary case to justify the unlawful harm, and for that reason, seeing as the exclusionary case does not cover the full ambit of exclusionary conduct, it does not serve to bridge any gap between the exclusionary case and the exploitative case. I'll then move on to look at the exclusionary cases.

THE CHAIR: That was three.

MR BEAL: No economic value, conflates limb 1 and 2, needs an exclusionary case and, four, therefore does not bridge that gap.

Exclusionary case again, just distilling it to four core points. Firstly, it's acknowledged that our case is wider. Our case in that sense covers both dynamic conduct as well as static conduct, and it adopts a holistic approach to the assessment of Google's conduct as part of an overarching theory of harm. Secondly, it rightly focuses on the return on ad spend, because that is the metric of value from the perception of the advertisers who are the class in question. Thirdly, we respectfully suggest our methodologies are more comprehensive, complementary, and cover potential

obstacles. And fourth, the consequence of having a narrower counterfactual in the Kaye case is that money is essentially going to be left on the table. That's shown in its most stark form when one looks at the viable competitive entry from Apple or emerged competitive threat from Microsoft, leading to what on the Kaye case is only a 10 per cent reduction in market share.

Turning if I may to the law, please, could I pick it up in Phenytoin in the Court of Appeal. My learned friend took you to paragraph 97. Please, could I invite you to look at electronic folder main authorities bundle, page 306, internal bundle I think will probably be volume 1, page 299. This is Phenytoin in the Court of Appeal, the judgment of Lord Justice Green, 298 on paper, 306 electronically. And his Lordship there cites --

THE CHAIR: Where do you want us to go to?

MR BEAL: Paragraph 96, sorry, at the bottom of that page.

The claimants in that case argued that the test was cost-plus. The defendant argued that the test was based on economic value of the product, and in the first sentence over the page, there's a citation from the judgment of Lord Justice Mummery in the Attheraces case, where he says:

"As already noted, the Commission's decision in Scandlines supports the view that the exercise under [what is now article 102], while it starts from a comparison of the cost of production with the price charged, is not determined by the comparison. This is in itself is sufficient to exclude a cost + test as definitive of abuse ..."

So you start with cost-plus. That's not where you end up. Now, to reinforce that, would you please turn to page 318 on paper, which is going to be 325 electronically. There I hope we have paragraph 153. Please, would you be kind enough to read paragraphs 153 to 156? (Pause)

The way that the CMA then put its case can be seen in 158 and 159. In a nutshell, it

said we did take into account economic value. We looked at patient benefit specifically, and we found that there was no additional economic value from the capsule. What had happened in that case was that a patented product had been unpatented and then sold as a generic, and the price had increased because it was no longer caught by the regulated price scheme set by the Department of Health for the benefit of the NHS.

We then see, please, at paragraph 166 and 167, the Court of Appeal's rejection of the conclusion that the CAT's findings were somehow wrong couldn't be impugned. At 167, one sees that the Court of Appeal found that the fact of dependency on the product did not remove the need to assess the economic value to be drawn from the product. Just because the patients in question were dependent on the product didn't mean that there was not still room for some economic value, not necessarily to reflect the full price demanded, to reflect some of the price differential between the price at the hiked price and the price as it had been under the regulated scheme.

There was then an issue about materiality, and at 171 we see that the Court of Appeal says -- this is page 330, the electronic bundle 322:

"The Tribunal observed that this was clearly a legal test. The categorisation of this as a 'legal' concept seemingly led the Tribunal to treat economic value as a discrete component of the test in law to be applied. It is 'legal' in the strictly limited sense that it has been ascribed a meaning in a court judgment, but, at base it is an economic concept which describes what it is that users and customers value and will reasonably pay for and it arose in the United Brands judgment [1978] ECR 207 as an economic description of the abuse of unfair pricing."

172, four lines down, then says:

"It's evident from the judgment in the United Brands that the reference to 'economic value' is a part of the overall descriptor of the abuse; it is not the test."

And then at little F:

"[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 ..."

Sorry, "if", I missed out the "if".

The point is you can either do it as a limb 1 analysis or a limb 2 analysis, but you do need to have it in either limb 1 or limb 2, because otherwise you're not giving full effect to the proper test, because this is an economic descriptor of a key component of unfair pricing.

"The analysis of the Tribunal, for instance articulated in para 443(6) of the Judgment (set out at para 40 above), suggests that it is a requirement discrete from other components of the test to be applied only after all those components have been worked through. But if this were so it would (wrongly) risk compelling a competition authority to double count economic value. In short, economic value needs to be factored in and fairly evaluated, somewhere, but it is properly a matter which falls to the judgment of the competition authority as to where in the analysis this occurs."

Now, our point is that that's a recognition that you do need to have an analysis of economic value. It needs to be in there somewhere. Our point is nowhere is it to be seen in the methodology, methodology that Dr Coscelli has advanced at this stage, and therefore before certification.

Could we then please turn to the decision of the Court of Appeal in the Le Patourel case. This will be seen in the bundle of authorities, tab 31, physical page number 2227.

THE CHAIR: What ought they to do then? Why would it be for the Kaye case to make an argument about economic value. I can understand why it must be recognised that Google might do that. But why must Kaye pre-empt that?

MR BEAL: You need to show a workable blueprint to trial.

THE CHAIR: Right.

MR BEAL: And in order, because the burden is on the person who alleges abuse, they have to show limb 1 and limb 2 is satisfied. And in Phenytoin, Lord Justice Green was saying you need to factor it in some way. It doesn't matter whether you incorporate it into your limb 1 analysis or limb 2, but it needs to be somewhere. I'm about to take you to where the Court of Appeal was a bit more dirigiste than that, and what they said is essentially the way that the CAT dealt with this in Le Patourel was to treat economic value as part of limb 2.

Once you've worked out that there is an excess, you then look at what is the level of excess and can you justify that? Now, true it is that is a justification exercise. But that doesn't mean that there isn't an evidential burden or indeed an obligation on the party who alleges abuse, to show that there is no reasonable relation between the price charged and the value of the product, which means that they can't dodge the issue of engaging with what is the value of the product.

When I show you Dr Coscelli's report later on -- I'm afraid I will have to look through it -- he recognises that value and brand are important considerations, but he's proposing to do them post certification. So therefore it follows he hasn't addressed a blueprint to trial which enables those issues to be considered.

What should he have done? Well, he should have developed a methodology that could explain what value he was proposing to ascribe to Google's brand value, for example, what value he was proposing to ascribe to the reach of advertisers. If you've got a service that has a broader reach in terms of end-user audience figures, eyeballs, as they're often called, if you've got a service that has a broader range of eyeballs looking at the product, that is worth more than a service that doesn't have as many eyeballs. Therefore, you need to be able to factor into your assessment of what the

competitive level of price would be, the impact of quality. If you can't assess that impact of quality, you can't come up with a workable theory of what price competition would have led to in the counterfactual. And that's the key issue.

Can I please take you to Le Patourel, which, in my respectful submission, whilst it leaves open the possibility of -- Le Patourel will be electronic file 2235, on paper it's main bundle of authorities, tab 31, page 2227. Paragraph 3 on paper 2227. Please could you read paragraph 3. It explains the nub of the claim in this case and the relevant principles. (Pause)

THE CHAIR: Right. Okay.

MR BEAL: Paragraph 5, one notes that at face value, it seemed that the class representative had an attractive case. Ofcom had earlier found that BT was overcharging, and BT had agreed through a commitment to reduce its prices for landlines. The class representative had put forward an excess of selling price over cost-plus that was somewhere between 74 and 90 per cent except for one particular year, margins that had in other cases been found to amount to unfair and abusive pricing. So that was a reasonable basis for the claim to be brought.

We then see in paragraph 7 what the CAT did, and it looked at cost-plus analysis as part of the limb 1 determination, and it analysed all issues relating to value and justification for the differential in limb 2. See paragraph 7. They explain then the CAT explanation of dealing with it that way is cited, which is:

"It enables the Limb 1 exercise, complex and challenging as it may be, to focus on the linear process of deciding (a) the relevant competitive benchmark, (b) the excess of the price (if any) over that benchmark, and (c) whether such excess is significant ..."

That's what might be uncharitably described as a mechanical process.

"Nonetheless, we consider that it is, from an analytical point of view, 'cleaner' and more efficient if the question of economic value can be considered as part of Limb 2

unfairness ..."

So what you don't get from this is any suggestion that an excess of price over a reasonable return on investment or over cost is going to be unfair, unless it's of such a level that the clear excess is unfair in and of itself. That still requires an analysis of economic value.

THE CHAIR: Right.

MR BEAL: We then see at paragraph 9 the conclusion that had been reached by the CAT, that the excess, in fact, rather than being the 78 per cent average claimed, was only 38 per cent. It was on the basis of that starting point that the CAT then proceeded to answer the limb 2 questions, namely, whether the differential was justified and hence fair. On the facts, it was justified and accordingly fair.

What we then see please, at page on paper 2249, electronic 2257, at paragraphs 57 to 58 is the Court of Appeal's rejection of the suggestion that the CAT had acted inappropriately by taking the difference between the excess claimed by the class representative and the excess in fact established as being the starting point. The CAT was entitled to have formed the view that the fact that the class representative had contended for an excess of 78 per cent but had only established an excess of 38 per cent was an appropriate factor to build into the starting point of to what extent is that excess unfair.

We then see at paragraphs 62 to 63, a few pages on, on paper 2251, electronically 2259, the CAT's treatment of the interaction between cost-plus and the unfairness inquiry. Please could I invite you to read 62 and 63.

THE CHAIR: Right.

MR BEAL: That second paragraph in particular, we respectfully suggest, is flatly contradictory to the submission you heard yesterday from my learned friend that it's sufficient for these purposes to look at ROCE, compare it with WACC and, if there is

an excess of ROC over the WACC benchmark, that is necessarily an unfair price. That's the opposite of what the Court of Appeal is here saying.

THE CHAIR: Right? Sorry, I understand why you say that that's progress for you, but why is that a fatal blow?

MR BEAL: Well, because it means that merely -- well, it means two things --

THE CHAIR: I mean, I can understand, in terms of the great green chart --

MR BEAL: Yes.

THE CHAIR: -- it means you can't automatically go down to the bottom of the dark green.

MR BEAL: Yes.

THE CHAIR: But it doesn't mean that the whole claim must be misconceived, surely.

MR BEAL: What it means is that you've dealt with the limb 1 analysis; you haven't dealt with the limb 2 analysis.

THE CHAIR: Right. Yes.

MR BEAL: That's the flaw. And to say that, "Oh, well, it's enough that we've done the limb 1 analysis; that gives you a prima facie answer for unfair", no, it doesn't, because that's exactly what Lord Justice Green is rejecting in this paragraph. And it's what was rejected by the CAT -- I'll come on to show you if you need to see it -- the CAT's own treatment of it. I mean, in a nutshell, what the CAT did was it said, "Well, you produce an excess of 38 per cent", which, by the way, is higher than the excess that is contended for here.

THE CHAIR: Yes. I question whether you can just compare numbers, but anyway, I take your point.

MR BEAL: Well, I mean, Mr Justice Waksman said the threshold for excess would be around 20 per cent.

THE CHAIR: Right.

MR BEAL: So, that was sort of anything below that and you would struggle, frankly, to show an excess.

Starting with 38 per cent, he said that's not enough. You therefore have to look at the value. In terms of value, he said some people do switch.

THE CHAIR: Yes.

MR BEAL: Therefore, you know, they recognise that if you stay, that consumer is attributing value to BT service. BT's brand was assessed. And the fact that BT gave what were called "gives", which were supplemental or ancillary services to its customers, was perceived to be part of the value as well.

THE CHAIR: Okay.

MR BEAL: Now, that analysis is wholly lacking from Dr Coscelli's report. What he says is, "I will deal with economic value post certification".

THE CHAIR: Right.

MR BEAL: What we then see, please, is paragraph 68, page 2252 -- electronically that will be 2260 -- with the statement:

"There is no principle of law or economics which requires the prices of a dominant undertaking to pivot around Cost-Plus. There might be some markets where on the facts this will be so but, equally, there may be markets where a margin above Cost-Plus is evidentially justified. If it were otherwise there would be no point in the Limb 2 test which has been part of the case law ..."

And my learned friend's submission yesterday was stark because he said "No, it's sufficient for me to show an unfair price, that there is an excess of ROCE above a reasonable WACC". That was his submission, and I'm afraid it's simply contrary to the direction of Lord Justice Green in this case.

The treatment then of the gives is dealt with at paragraph 79, page 2258, so 2266 electronically. Essentially, the Court of Appeal went and looked at all of the things that

BT evidentially had said justified --

THE CHAIR: I mean, that's just an element of value on the facts, isn't it, I don't --

MR BEAL: Yes. It is.

THE CHAIR: Yes.

MR BEAL: Paragraph 84, the Court of Appeal said two things. Firstly, there was no need specifically to say this particular service will justify a 10 per cent increase above the WACC rate. You can have a summary in narrative or adjectival terms of the value that's attributable to the various elements, but you do need to have that sort of analysis.

Paragraph 87: there's a recognition of brand value, which is important in this case because it's recognised by Professor Stephen on behalf of Kaye that Google does have substantial brand value.

THE CHAIR: Yes. These are just factual elements of value aren't they? I mean --

MR BEAL: They are.

THE CHAIR: -- but there's no point comparing facts. Your analytical point is that you've got to do value.

MR BEAL: Yes.

THE CHAIR: It doesn't matter -- I mean, the value analysis in this case would be totally different from the one the Court of Appeal's considering. But your point at a legal level is you've got to do value?

MR BEAL: Yes. That's the legal subject.

In the light of that, I'm not sure I need to turn to the specific details in the CAT Le Patourel case. I mean, in essence, they looked at the very things that we've just been examining. They looked at the figures; they said the figures can't justify a finding; I need to look at value. They looked at value, they looked at brand value, and they looked at the services that were additionally offered.

THE CHAIR: Yes.

MR BEAL: So, you're absolutely right, sir, that that is necessarily a fact sensitive exercise. That's what the CAT said and it's what the Court of Appeal endorsed. But the point is, when one's at this stage, pre-certification, you need a methodology that will address those very issues, because otherwise you haven't completed the task you need to do for limb 1 and limb 2.

THE CHAIR: Right.

MR BEAL: Now, the next point was the suggestion that somehow you don't need a counterfactual in a pricing case. Could I take you please, to the Cinven Capital case. It's the Liothyronine case, Court of Appeal. It's at bundle of authorities, tab 29. I'm sorry, I don't know the volumes because I've been working electronically. Volume four, thank you.

THE CHAIR: Before you do that, obviously this is the Court of Appeal's ultimate decision on the merits. Indeed, you've just been showing us that. I think this is referred to as Le Patourel 2 sometimes, isn't it? Yes. But obviously the claim was certified at an earlier stage. I think that might have gone on appeal itself actually, didn't it? Yes.

MR BEAL: It was certified, yes.

THE CHAIR: Right, so when it was certified, was there an analysis of value in the class representative's claim?

MR BEAL: The class representative's application dealt with very high levels of excess. They dealt with Ofcom's decision that it was unfair and therefore needed to be reduced. My understanding is that the application also looked at the absence of switching and then evidentially, a lot of that case unwound. I mean, I could go through the CAT's decision where they look at precisely how the claim was put and what the answer was. The reason I'm not doing that is because, as you've pointed out, sir, circumstances are everything in these cases. My point is the legal one that you do

have to account for value.

THE CHAIR: Yes. Sorry to interrupt you. We're not even at the certification stage; we're at the carriage stage. Your submission is that this is a crucial point because Mr Kaye's proposed case doesn't deal with value, and it must.

MR BEAL: Yes.

THE CHAIR: And if it doesn't, it'll fail at certification.

MR BEAL: Yes.

THE CHAIR: Yes. I understand the submission, and I see why you're showing us the Court of Appeal's decision on appeal on the decision on the merits, but surely we should also be looking at what happened at the certification stage in Le Patourel because if the case was certified without an analysis of value, then it's relevant for us to know that, surely.

MR BEAL: Well, we can look to see precisely the way that the case was put at certification stage.

THE CHAIR: Yes. I think it's important. I think, if you wouldn't mind, you can look at it in the break or at lunchtime, but I mean, if the claim when it was certified did tackle this, then it's at least consistent with your position and possibly positively supporting it. On the other hand, if it didn't, that would undermine this submission, I think. So I think I would like to know.

MR BEAL: Yes. No, I can understand your desire for the basic information.

THE CHAIR: Yes. I'm not talking about getting into the facts; I just want to know, at a general level, what was the treatment of value at the certification stage.

MR BEAL: My response is, by all means, we'll try and give you the factual answer. Can I explain why it doesn't matter?

THE CHAIR: Let's see what happened, and then you can tell me what it is that doesn't matter. Don't feel under pressure to deal with now, Mr Beal; come back to it when

you've had a chance to look at it. (Pause)

Honestly, I think it's best not to try and deal with it on your feet. Take the time in the break.

MR BEAL: My assiduous junior has found the certification judgment.

THE CHAIR: Yes. No, I'm sure the judgment can be found, but I don't want to put you under pressure to answer about what it contains without time to --

MR BEAL: Doing it on the hoof is probably unwise.

THE CHAIR: And of course, Mr Brealey's side will be doing the same exercise.

MR BEAL: Yes. So, could I please go back to Liothyronine?

THE CHAIR: Yes. Sorry, in the excitement, I lost the reference that you gave me.

MR BEAL: On paper, my learned friend helpfully indicated it's bundle 4, tab 29, page 2076. So on electronic, that's 2084. That's where I'll start. That just shows you the name of the case. But if we could then turn please to page 2117 electronic, 2109 on paper, hopefully you there have paragraph 92. Please can I invite you to read paragraph 92. The proposition that emerges is that when you're looking at conditions of workable competition in a pricing case, you have to eliminate all the contaminating anti-competitive effects of the dominant position to work out the counterfactual competitive market conditions which then drive an analysis of the competitive price. (Pause)

So that goes to the point that we respectfully suggest was made by the panel yesterday, Mr Herga, when he said, "Surely you need to strip out the abusive exclusionary conduct in order to generate a workable theory of competition in the counterfactual which then goes to establish the overcharge, ie the unfair price judged against the price that would have prevailed".

THE CHAIR: Sorry, just say that again?

MR BEAL: You have to strip out the exclusionary conduct, even from an unfair pricing

case, otherwise you don't get to workable conditions of competition. So if you have a counterfactual that still builds in exclusionary conduct, you are not going to end up with a workable system of competition for the purposes of analysing what the competitive price would be.

THE CHAIR: Right. I mean, this may not be at all inconsistent with your submission, but what the Court of Appeal's dealing with here, isn't it, is the usefulness of looking at the actual circumstances of the market. Isn't it?

MR BEAL: Yes.

THE CHAIR: Yes.

MR BEAL: No, I fully accept you start from what are the features of the market as they are now; what are the features of the market as they should be.

THE CHAIR: Yes.

MR BEAL: My point is if your features of the market as it should be still leaves in place anti-competitive exclusionary conduct, that's not great because it means you don't have a workable system of competition in the counterfactual as properly defined. Workable or normal means consistent with broad parameters of competitive conduct. So, if you still have anti-competitive conduct in the counterfactual, it's a bad thing.

THE CHAIR: All right.

MR BEAL: Could we then please look at Phenytoin 2, which in the Competition Appeal Tribunal came back on remittal from the Court of Appeal. Could we pick it up please in bundle of authorities 21, probably volume 3.

THE CHAIR: Yes.

MR BEAL: Page 1436 on paper, 1444 electronically. (Pause)

THE CHAIR: Okay.

MR BEAL: What we see at paragraph 196 on page 1436 is a reference to three cases that were stated in the Hydrocortisone case as dealing with why producer surplus

might exist, i.e. why elevated prices and elevated profits might be sustainable.

"The first case (Case 1) arises because in Real World Competition there are limits to the supply of Product (i.e. scarcity on the supply side), and [so on]."

We then move on to case two please, which is paragraph 197, "generation of distinctive value". So obviously in case one, one of the reasons you need to look at are: are there barriers to entry that produce the scarcity? If so, are those barriers to entry natural or are they generated by exclusionary conduct? That's an issue.

Case two, however, is different. Case two at page 1438, paragraph 197:

"[C]oncerns the fact that Sellers in the real world compete by product differentiation, not just price."

So this is competing on quality grounds.

"The perfect competition model assumes the sale of a single undifferentiated Product. It makes no provision for innovation or product differentiation, which is a key driver to the market economy. Sellers sell many products, and the way that they assist the public good through self-interest is by meeting demand not by merely competing on price."

So again, you need to factor into an analysis of prices the quality dimension. Then finally case three, paragraph 199 on the next page:

"[I]s the case where Producer Surplus is generated without added value to Buyers. The distinction between Case 1 and Case 2 (on the one hand) and Case 3 is by no means easy to draw. Indeed, there is no particular magic in [them]. The point being made is that Producer Surplus is not necessarily a feature of markets with impaired competition. Such Producer Surplus can arise in properly functioning markets; that is relevant to questions of unfair pricing."

So that's the classic Hydrocortisone definition of the three cases. What we see, please -- electronic page 1457, on paper 1449, at paragraph 1217 -- is the treatment

by the CAT on remittal of economic value. Please would you read 217? It's a fairly long paragraph that goes down to, on paper, page 1451. (Pause)

THE CHAIR: Okay.

MR BEAL: A couple of points: firstly, economic value needs to be properly articulated; and secondly, it's not appropriate simply to rerun limb 1 for limb 2 purposes, in a nutshell. It's possible that mere excessiveness could justify a conclusion that the unfair limb by itself is satisfied -- if, sorry, if that were enough, then you would conflate the two tests.

Then please at paragraph 232, which should be at page 1467 on paper and 1475 electronically. Sorry, it's at the next page, so 1468 on paper, 1476 electronically. You see that:

"The Excessive Limb is concerned with the extent of the Producer Surplus, whereas the Unfair Limb is concerned with the reason why the producer surplus exists."

That's the key point. If you are adopting a methodology as a blueprint to trial, you necessarily need to deal with both. Otherwise, you fall foul of conflating limb 1 and two as a matter of law, and you fail to establish a blueprint to trial for the limb 2 analysis.

That, in a nutshell, is our legal case on the exploitative case as to why, I'm afraid, Mr Kaye's case is not done the necessary on additional value economic value.

MR HERGA: Do you say that the comparison of cost per click or conversion rate is not a value test, which I think is argued by Mr Brealey?

MR BEAL: Cost per value -- cost per click -- simply tells you what the cost is; it doesn't tell you what the value is -- from the advertiser's perspective, what is value is the return on ad spend. Advertising is one of those strange products where if you spend a lot and it's highly successful, you increase demand for your product. One only needs to think of Levi’s jeans adverts in the 1980s and suddenly everyone was buying Levi's

jeans.

Therefore, cost by itself does not tell you in a sense what the benefit to demand is. If it's a successful advert that's high quality and reaches a lot of people, it's going to drive up demand for your product. So whilst it's a cost, the additional benefit you get from it is great. That's why the key metric is return on advertising spend.

MR DAVIES: Maybe related to that, am I right in thinking that, limb 2, to what extent do you really need to go into the reasons for economic value in limb 2? Or can you do it just with an analysis of comparator prices?

MR BEAL: Well, in my respectful submission, you need to engage with what are plausible explanations for why you have excessive profits, if they are said to be excessive in this case. Where you've got a range that goes from 15 per cent to 25 per cent in terms of the alleged excess, Mr Justice Waksman in Le Patourel said 20 per cent was the threshold.

You've got a midpoint that is at the cut-off threshold for excess, and then you haven't factored into account the fact that some of that profit may be attributable to brand value or qualitative reach; the number of eyeballs you're getting, the benefit of the Google brand name, everyone goes to Google because it's the established advertiser in the market, therefore, you'll get the bigger reach from your audience. All of those things, plus Google's own services that Professor Stephen deals with, and I'll come on to explain why.

All of that needs to be capable of being explained. It doesn't necessarily need to be 15 per cent of that overcharge is attributable to brand, and then another 15 per cent is therefore pure excess. I have seen that done in expert reports, where they come up with a proxy for what they think the brand value would be reasonably attributable to in terms of the excess, and then they look at the incremental difference. But I mean, that isn't what they've done. But at least if they described a methodology for saying how

they were going to deal with it, how they were going to assess it, even adjectivally, that would be something. But simply saying: we're going to put this off until post certification, and we don't need to do it now, is just wrong in law. It's as simple as that.

MR DAVIES: Yes. I suppose my question was more about, I mean, that is the comparison of, in our case, Google's price to cost. But it seems to me that, rightly or wrongly, the United Brands test would seem to imply that there is a different limb 2 test, which is just comparing Google's price to the price of competitors, which is a slightly different point. Are you saying that, even within that, if there is an excess of Google's price over its competitors price, that you would then need to go into those questions of economic value?

MR BEAL: Yes. So for example, using Bing as comparator gives you a differential between the two. But if the evidence is that Bing doesn't have the coverage that Google does, and if the evidence as it is, is that Bing, for example, has a more elderly demographic in terms of the people that use it as a search engine, those are qualitative differences. If Google's search engine reaches four times as many people as Bing's, then that's a qualitative aspect that needs to be taken into account, because those qualitative differences may explain the discrepancy in pricing.

So it's a multifactorial assessment, but you can't get away from the need to establish economic value. And it's not good enough, with respect, to say we're going to deal with the issue of Google's brand and extensive coverage post certification, because that doesn't provide this Tribunal with an explanation of how it's going to be addressed by the expert in his methodology.

Now, could I then make good some of the propositions I've been saying about exactly what Dr Coscelli's case is by looking at it. I'm afraid I ascertained that the quickest way to do this, rather than taking discrete thematic points, is simply to walk you through. It may sound a dull way of doing it, but I can't think of a quicker way of doing

it. So I'm going to start, if I may, with Google's pleaded case.

THE CHAIR: What are we looking to find here? Well, the point that he says he's going to do value post certification -- he says that, but -- you need to do it clearly and I'm not trying to take you out of your way, but what are we looking for in this exercise?

MR BEAL: What we're looking for is: how does Google plead its case?

THE CHAIR: Right.

MR BEAL: Firstly: is this an exploitative case that is wider than unfair pricing case, that's the first point.

THE CHAIR: (Inaudible).

MR BEAL: Forgive the slip.

The second point is, looking at Dr Coscelli's approach, what does he actually deal with? Because Mr Kaye said in his submissions -- they complain that we haven't dealt with quality. We have. So I need to answer that point. It was a series of points made about the extent of the exploitative case that, frankly, I've determined rather than trying to pick them all up one by one, take you to it and take you somewhere --

THE CHAIR: Right. I just wanted to know (inaudible). Yes, okay.

MR BEAL: Well, a number of assertions were made yesterday which I need to respond to, I'm afraid. The quickest way is to -- there was a bit of island hopping yesterday, what I'm trying to show you is the broader topography.

THE CHAIR: Yes.

MR BEAL: So could we start, please, with the Kaye application for a CPO. That's bundle B, paragraph 165, page 225. Paragraph 165, we see how it's pleaded: "Exploitative Infringement" is described in the subheading as "Excessive and Unfair Pricing".

We then see that the first limb of establishing that case is to establish dominance in the search advertising market. Now, the intentional pricing issues are then identified

in 166 as being relevant to dominance and not an abuse in their own right. What is said is:

"Exploitative abuse is so named ... relates here to the imposition ... of excessive and unfair prices. The means by which that [was] possible ... may need to be explored ... Certain practices ... have affected pricing."

But crucially, we then turn over the page and look at paragraph 167:

"[Mr Kaye] is not seeking to advance a case that any of these taken separately by Google would amount to separate exploitative abuses."

So it's disavowing any suggestion these intentional pricing practices are themselves unfair trading conditions or abusive. That's important because, of course, if you're not stripping out conduct that you say is abusive, it will still feature in the counterfactual.

202, please, at page 235, asserts that:

"Under ... UK law, the imposition of excessive and unfair pricing by a dominant company is an abuse ... Also it creates a direct relationship between Google and the Advertisers, it is not reliant on establishing a chain of causation between abuse and loss. As soon as the excessive and unfair price is paid, the payer has suffered loss."

So it's recognising this is all about pricing. You're comparing the unfair price with the price that would have obtained under conditions of workable competition. You need to show, see page 204(sic), that the price that was in fact charged has no reasonable relation to the economic value of the product. Supplied. That's halfway down paragraph 204, so the pleaded case recognises --

THE CHAIR: Mine's printed -- I can't see the --

MR BEAL: Sorry, it's paragraph 204, it's page 236.

THE CHAIR: Yes, I can't see the --

MR BEAL: I can't either.

THE CHAIR: What's the internal page of the --

MR BEAL: The internal page is 72. Paragraph ...

THE CHAIR: A quote from --

MR BEAL: It's the quote from United Brands. They're quoting United Brands to set out the relevant principles.

THE CHAIR: Right.

MR BEAL: And that includes -- and they've underlined it:

"No reasonable relation to the economic value of the product supplied."

THE CHAIR: Right.

MR BEAL: So it's part of the task they're setting themselves is to meet the criteria for excessive and unfair pricing. That includes showing that there's no reasonable relation to the economic value of the product supplied.

Paragraph 217, page 239, so a couple of pages on. We see:

"At all relevant times, the prices for Google's Search Ads ... were significantly and persistently in excess of competitive benchmark/s."

They then identify an overcharge between 15 and 25 per cent. If we turn back to paragraph 214 on page 238, the assertion is made that:

"[T]he prices are unfair in themselves. In particular the Defendants have maintained excessive prices while also engaging in exclusionary conduct ... so as to protect its ongoing pricing policy."

So their unfair pricing case is necessarily predicated on an explanation that Google has been able to maintain these high prices because of its exclusionary conduct, and if, in fact, their exclusionary case is narrower than ours, then you end up with what I've described as the "unfortunate and deficient counterfactual" on their case.

We then see, please, at paragraph 226, page 241, reliance as part of the particulars of unfairness on the pricing and non-pricing actions, or the intentional pricing, rather than international pricing. Those are then identified, but they're identified as particulars

of unfairness in circumstances where they haven't been said to be abusive. So the obvious response would be: well, if they're not abusive, they're part of the lawful framework, and the lawful framework means that they can't be excluded from the counterfactual.

Finally, page 243, paragraph 231, Kaye pleads, in terms:

"[E]xcessive prices being charged by Google for Search Ads bear no reasonable relation to its economic and/or distinctive value."

So they have put in issue on their own case this question of economic or distinctive value. But what we don't have is any proper analysis of that. Indeed, unpromisingly, arguably, at page 244, paragraph 233:

"The [proposed class representative] reserves the right to plead further particulars of excessiveness and unfairness as appropriate should he be certified."

And of course, what that, with respect, doesn't do is set a blueprint for trial at this stage with a clear methodology identifying what will be done, notwithstanding that in subparagraph h:

"[Mr Kaye] proposes to consider from an economic/legal perspective, having regard to Le Patourel, if and to what extent economic value is a relevant factor."

Now, that's recognising, with respect, that this is an important consideration, but not for now. Our short submission is "not for now" is not good enough; you need to come before this Tribunal with a methodology that will explain how you deal with this very important aspect of your pleaded case.

This is particularly important because, as I think Mr Davis's intervention yesterday confirmed, we're not concerned with high prices in and of themselves. If you have a high price, it's usually a signal for market entry, market should over time correct themselves, and therefore economic value is crucially important. You can't simply have a limb 1 analysis and say: that's enough.

Their unfair pricing case, we say, needs therefore to assess the extent to which profits are attributable to economies of scale and scope. For example, you may have somebody who is making large profits, but they're attributable to efficiencies -- economic efficiencies. They may be simply the best in the market at doing what they're doing because of the IT they've developed, and the high profits they make from those sorts of activities are a reward for efficiency, and not to be condemned by this Tribunal.

Therefore, if you're developing a blueprint to trial, you need to explain why the high profits by themselves are a bad thing -- big is not bad. That's completely absent. It's no good for Mr Brealey to simply say: well, I'm relying simply on the fact of the excess; that by itself tells you where you need to get to. Not least when you're dealing with very low -- well, comparatively low excess here. We're not dealing with a 6,000 per cent excess that you had in some of the drugs cases, we're dealing with between 15 per cent, which is below the threshold for excess, and 25 per cent.

Now, looking at brand value, for example, is something that evidently should have been dealt with because of the evidence filed by Professor Stephen. That plea is in hearing bundle C, page 1003. (Pause)

If you could just track through some of the paragraphs here, I'll give you edited highlights for reasons of time.

Paragraph 46:

"Google [has played] a leading role in introducing new features, adding technological innovations, and changing the way that search ads are bought."

Paragraph 49, last sentence:

"In the case of Google's search advertising, its algorithms appear to be very effective in matching (ie finding the 'right' audience for a given ad) and it provides access to a very large audience due to the extremely high level of usage of Google's search

engine."

Paragraph 55, page 1006, third sentence:

"Google's search engine is ubiquitously available to UK users via web browsers and on mobile devices' dedicated apps. Public sources estimate ... market share at 90 per cent. This means that the addressable market for search advertising on Google is very large."

57:

"This may not be the case for other, smaller search engines (and their search advertising services) such as Bing because the size of the user base is substantially smaller. I am also of the preliminary understanding, based only on publicly available information, that Bing's user base is less demographically comprehensive than Google's. Bing, for instance, is reported to be popular with older Internet users."

Then please, paragraph 60, top of page 1008, the last sentence on the previous page:

"Additionally, the sale of Google's search engine also means that Google 'knows' more about what UK internet users are interested in based on their search queries, which means that Google has greater knowledge that could be of use to advertisers looking for customers. [It's also] introduced new features."

Then, please, page 1014. There's a section that begins:

"Google's Position in the UK Search Advertising Market from the Perspective of Advertisers: Attractiveness of Google Ads to Advertisers."

84 says:

"With respect to what makes Google Ads in the UK attractive to advertisers, there are several factors to consider in addition to the sheer scale of the addressable market."

We then see that the professor goes through the variety of ad formats, the specific features, campaign organisations, best practice and how to guides that are provided by Google, before turning to look at substitutes.

So Professor Stephen, whose evidence is relied upon by Mr Kaye himself, is recognising these qualitative differences. Those are simply not featured in the Kaye case. That's particularly important because, for example, it's recognised in Professor Scott Morton's report, paragraph 229 just for your note, that the more users that use Google's general search engine, the more valuable the platform becomes to advertisers. So it's the proxy between: the greater the reach of the audience, the predicted number of eyeballs that will be looking at the adverts, the more valuable it is, other things equal, to the advertiser.

Now, in terms of Dr Coscelli's approach, we've identified some flaws with respect in that. Could we pick that up, please, in the same bundle, page 1088. So that's C, it's going to be tab 14. (Pause)

Now, the first point to make under paragraph 80 is that the exploitative claim, the unfair pricing claim, depends upon defining two new markets. Firstly, there is said to be:

"A relevant product market for general search text ads on [general search engines]."

But it's then said:

"There is a relevant product market ... for either PLAs [that's a specific type of advertising] or a wider market for 'image-based search ads'."

Now, in fact, again, if you look at Professor Scott Morton's evidence, just for your note at paragraph 235, the Google US District Court decision did not think Google was dominant in the broader search advertising market, and thought that PLAs were not part of the relevant market. So there's that wrinkle to deal with.

But putting that to one side, if we then look at page 1106, paragraph 135, it's under "Preliminary conclusions", Dr Coscelli is not able to come to a conclusion, even provisionally:

"As to whether the relevant market is ... PLAs on [general search engines] or PLAs on GSEs and SVP search ads."

Notwithstanding that, he has assessed damages for both the text ad searches in his defined market and for PLAs.

We then see that unfair pricing analysis proper begins at page 1176, with what is said to be exploitative claims, but in fact it's an unfair pricing claim.

Paragraph 294, he says:

"[I]n particular, through the charging of excessive and unfair prices."

But there is no allegation that the imposition of any of the, for example, intentional pricing practices was abusive, and that's disavowed in the pleaded claim. So it is simply unfair pricing.

We then see there's a reference to the Phenytoin case. This is at 296, he deals with Phenytoin. But he, of course, hasn't cited -- doesn't emphasise the subsequent findings that are made in that case on the need to establish economic value. Admittedly, either is limb 1 or limb 2, but you need to do it somewhere. That was what Lord Justice Green said then, and then post Le Patourel, the easiest and simplest way of doing it is to have a straightforward excess price for limb 1 and then consider unfairness economic value -- is there a justification for the discrepancy in price? -- as part of limb 2.

THE CHAIR: Give me just a minute. (Pause)

Okay.

MR BEAL: So just for your note, he hasn't cited paragraphs 159 to 172 of Phenytoin.

At page 1178, paragraph 301, this is under a section:

"Assessment of whether Google has been in a position to charge excessive/unfair prices."

So what this is looking at is market power, and indeed, 301 says: I'm now looking at "the degree of Google's market power". He considers this as:

"[E]xemplified by a range of conduct showing that it can act independently of

customers (whether advertisers or users)."

It also has to act independently of competitors applying the right test, but putting that to one side.

What we then see is a description of the intentional pricing practices. This was raised by Mr Brealey yesterday as being, I think, the third of the four criteria that he said he Dr Coscelli was applying for the unfair pricing case, but in fact, properly analysed, this goes to the prior question of: does Google have market power such that it's able to act substantially independently of its competitors, which is one of the core questions.

So: (a) these haven't been treated as an abuse; and (b) they're then factored into an assessment of dominance/market power as an explanation for the high prices, rather than being part of the abusive conduct. So these aren't going to be stripped out of any counterfactual because they're explaining why the position has arisen in the first place, i.e. you've got market power because you can do this, but we're not saying they're unlawful in and of themselves.

What we then see at paragraph 307, page 1181, he reaches the conclusion here, which is:

"[T]hat Google has a very high degree of market power in the UK ... and is therefore in a position to charge excessive ... prices."

That's a separate question from: you may be in a position to charge excessive prices, but do you in fact do so?

Then Dr Coscelli moves on to that second stage analysis: are the prices in fact excessive? It's here that he looks at economic profitability and price benchmarks, profitability levels and so on.

Paragraph 310, he proposes to use Bing's prices as a comparator, which necessarily implies that Bing is a competitive rival, albeit one that is assessed not to be a significant competitive rival so as to drive down the market power of Google. But he

is at least comparing and contrasting Bing's prices. He then proposes to look at, Bing's WACC, I think as well -- sorry, no he proposes to look at Bing's prices without looking at Bing's WACC, which is a slightly strange way of doing it.

Paragraph 310. He goes on to:

"ii. Assess [whether] the extent of any excess profits ... by evaluating ROCE against Weighted Average Cost of Capital ('WACC') following a similar approach to that of the CMA in its Online Platforms Report."

And he's calculated them all on a pretax basis.

Paragraph 312 on the next page, he says:

"I note I do not have any evidence available to me which allows me to consider the price of text ads separate from PLAs. As such, for this preliminary analysis, I consider Google's search ads together."

So he's not been able to reach a definitive market definition for PLA, but he's nonetheless considering the amount of money spent on both types of advertising for the purposes of his unfair pricing case. I should say case analysis.

We then have at 313 the core findings essentially that "Google's cost per click was 30 to 40 per cent higher than Bing's". Just pausing there, how much of that is attributable to quality? We simply don't know. He implies from that figure that Bing's revenue is lower than Google's. He takes the midpoint range to serve as justification for the comparison.

What we don't understand from this analysis is how, if Bing's prices undercut the prices for Google Search, why wasn't Bing able to make more headway in the market? That's where the theory of harm becomes very important, because the theory of harm helps explain why Google can charge this extra money and, in a sense, get away with it without the market correcting it. That's where the exclusionary theory of harm becomes super important, because it provides an explanation as to why the market

has allowed this to happen. If you've got a series of practices that are clearly designed to foreclose rivals, stop competitive entry, you have a coherent theory of harm which explains why supracompetitive prices have been charged. If you don't have the underpinning of the explanation for this, it simply means that you've got a dominant firm charging a high price to which the answer obviously would be, "Well, is it so high that in and of itself it's manifestly unfair and exploitative? Is it gouging somebody?" And when your difference with your competitor is about 25 per cent, it's very difficult to reach that conclusion.

Now, I'm not expecting this Tribunal to rule on the merits at this stage, but it is important to see the strength of the case underlying all this. And when you haven't explained what percentage of that difference is attributable to quality or to brand reputation or to any of the other economic value factors, you have a significant flaw in your methodology. It simply doesn't work for certification purposes. And it won't be me making this point at certification; if you go with Mr Kaye, it will be Google and they will be going to town on it. So it's important, we say, to grapple with this point now.

Could we then please look at 315. Essentially, because no disclosure is available at this stage, Dr Coscelli relies on public data in order to provide a comparison of Google's and Bing's prices. What of course he doesn't have is any finding about Bing's WACC, and therefore the relevant profitability or pricing of Bing versus its own internal rate of return.

We then see at 317 that Dr Coscelli, to be fair, recognises that, in making any comparisons between Google and Bing's prices, he will need to be mindful of differences in quality. He will need to consider whether Bing's prices actually represent a competitive benchmark, given its scale and market environment, and he intends to consider this further post certification, including whether he will need to make adjustments to Bing prices to ensure that the benchmark price accords with what

would be expected under conditions of normal, workable competition.

What we say is it's not sufficient to say, "I will deal with this post certification"; it needs to be grappled with now, and it needs to have a methodology that can explain what's proposed to be doing now. It's not sufficient to say, "I will do this in due course". Having clocked that it's an issue, having pleaded that there is no reasonable relation to value, they need to say what their case on value is.

At 319, there's then an attempt to, in a semi-counterfactual, reduce Google's pricing to Bing's level and to conclude that there would still be a considerable profit margin on that basis. But of course, if Google were pricing in a counterfactual at the same level as Bing and Google's return on that pricing level was higher, that could simply reflect economies of scope or scale; could simply reflect efficiencies; it could reflect a better developed, more innovative, innovative algorithmic system for dealing with searches; could reflect better data analysis. We simply don't know. All of those factors may mean that even if the prices were held the same, the extent of the profit differential can be readily explained. But of course, again, there's no methodology that looks at any of that, looks at the possible explanations for any of that.

At paragraph 328, we have a recognition from Dr Coscelli that an ROCE above WACC does not automatically imply competition concerns or exploitative behaviour. If that's the case, then he needs to explain what the additional factors are that do justify that conclusion.

We then have the core findings at paragraph 330: there's a range developed for WACC, 5 to 16 per cent. He takes a midpoint. And in regard to ROCE in 331, he again gives a range and takes a midpoint. That then drives us the difference between the two and it's that difference that's then said to be the overcharge.

At paragraph 341, please, page 1193, he notes that another competitor, Yandex, which is a Russian search engine, achieved an average ROCE of 13 per cent and had

a maximum ROCE of 25 per cent in 2012, which of course is just below the bottom end of the range that Dr Coscelli considers is inappropriate for Google.

Paragraph 342, page 1195, when looking at the limb 2 test, Dr Coscelli emphasises the exclusionary conduct as supporting the contention that the pricing is unfair of itself. But that, we say, turns on having all of the exclusionary conduct properly before the Tribunal so that you can look at that.

Page 1197, please, paragraph 351. He deals in passing with Le Patourel but doesn't draw any conclusion from that based on the need to show -- he highlights a passage in the judgment that I'm afraid rather does down the importance of economic value. He says:

"The fact that a product may have some --"

350, sorry, that is.

THE CHAIR: You're in section 6.4 now? Whether it's unfair in and of itself?

MR BEAL: Yes. Yes.

THE CHAIR: So, there are his factors at 347.

MR BEAL: Yes.

THE CHAIR: You need to attack those, don't you? I mean, it's not like --

MR BEAL: I mean, they are based on exclusionary conduct. That's the point. The point is you've got, as I said, a relatively low excess that you're seeking to say is unfair in and of itself. In my respectful submission, it doesn't reach the level of excess that was recognised in Le Patourel to be sufficient to call out for a finding that it is unfair of itself. So, in order to point to unfairness, the Coscelli case, the Coscelli analysis necessarily has to rely on the underlying exclusionary conduct. And so --

THE CHAIR: So, if we're at 347, he has five subheadings.

MR BEAL: Yes.

THE CHAIR: The first one certainly is exclusionary conduct.

MR BEAL: Yes. The second is excess profits, which is --

THE CHAIR: Just take it slowly so we see which ones are exclusionary conduct and which aren't. I mean, there is exclusionary conduct, so he certainly takes that into account. But then he has the extent and duration of Google's excess profits.

MR BEAL: Which is the limb 1 analysis.

THE CHAIR: Right. Why is that necessarily only limb 1?

MR BEAL: Well, because in order to show excess, you need to have shown excessive profits for a sustained, persistent period of time. That's the test.

THE CHAIR: Okay.

MR BEAL: So there's nothing new in that test that isn't in limb 1.

THE CHAIR: Okay. Price going up --

MR BEAL: Price is going up over time.

THE CHAIR: -- without any increase in quality.

MR BEAL: That can in theory be an indicia of lack of rival entry in the market, but it's a statement that basically they've been able to get away with increasing prices over time without an increase in costs. But in order to do that, you would have to show that somehow that increase in price was not attributable to any other factor.

THE CHAIR: I understand that, but I mean, you're buying something that was 100 one day and a year later you're buying at 150 and it hasn't got any better.

MR BEAL: Yes. But what --

THE CHAIR: It might be unfair.

MR BEAL: Well, it depends, doesn't it, because how much the price has increased and what are the justifications that have been put forward.

THE CHAIR: Yes.

MR BEAL: The reference is back to -- if one looks at footnote 401, there's a reference to the District Court's opinion, judgment. Four-year period: "text ads prices steadily

climbed over the same period". But, I mean, it doesn't deal with the extent to which that's attributable to or -- he says "without any corresponding increases in costs or product quality", but there's no justification for that second statement. He hasn't looked at what the cost structure would be, and he hasn't looked at product quality.

THE CHAIR: He's just saying he's not aware of any, but not sure how he would go and scour the world for an absence of -- he's just saying that well, we can't see any sign that it was -- I appreciate you say obviously it would have to be made good on the facts, but as a matter of the nature of the argument that it is, it's not just excess profits, it's not justified by cost or quality increase. But as a type of point to make to justify the fact that the price is are not only excessive but unfair, is it not a legitimate type of point to make?

MR BEAL: Well, imagine somebody has charged X, as in the Liothyronine or the drugs case, they charged X when they were regulated by the NHS, and then it was X times 6,000 per cent for the generic drug. It's a very extreme example of price going up with no indicative underlying analysis of costs.

What we don't have here is any suggestion that prices have gone up comparably with any cost. There's no explanation of the extent to which price over cost has increased, if that makes sense. We don't have the 6,000 per cent figure.

THE CHAIR: No. Sure. It's totally different level of quantity.

MR BEAL: Yes. So, it's simply saying prices have gone up. Now, that could be attributable to several things. One could be an increasing cost. Two could be an improvement in quality. Dr Coscelli simply says, "I'm not aware of any countervailing feature". So the trouble is the probative value of it is extremely limited.

THE CHAIR: Right.

MR BEAL: And it doesn't -- he's not using that as a basis to say, "Of that 25 per cent excess, taking the higher range, I rely on the fact that's unfair because but for, in

a counterfactual, the price increase would only have been X or it would have been a price decrease". There isn't that type of analysis, comparing like with like.

THE CHAIR: Yes. (iv), I think I know where you're coming from because that is the intentional pricing and your point is they haven't alleged that's abusive so --

MR BEAL: Yes.

THE CHAIR: -- it goes into the counterfactual and (v) is a positive assertion that there's quality degradation.

MR BEAL: Yes. But the trouble is that unlike the Brook case, there's no methodology for assessing that quality degradation. Whereas if you look at, as we will, the Scott Morton report, she focuses on quality. She says in terms, "These are examples of Google deliberately downgrading the quality of the adverts in order to maximise revenue", much to the advertiser's chagrin. That's covered in the Scott Morton report; it's absent from the Coscelli report.

THE CHAIR: Right.

MR BEAL: So that's an example. And then also the focus on return on ad spend is what matters for advertisers. That's the quality metric that one needs to adopt. Again, Dr Coscelli focuses only on price.

MR HERGA: The proposition is that these five subheadings are all picked up by your wider exclusionary claim, but anyway. But do you see a problem in pleading excessive in the alternative?

MR BEAL: Well, if I may say so, it's a very good question. We obviously, in good conscience, when we saw the Kaye claim, looked at the feasibility of running an unfair pricing claim. Because if they've spotted something that the market has missed and regulators have missed, then we should adopt it. But in good conscience, I'm afraid we took the view that we just didn't think it would fly. I mean, I'm not going to give away internal privileged discussions, but I think it's reasonable to infer that a view was

taken that it didn't have a better than evens prospect of success, and it comes at a very substantial additional cost. It tallies very badly with the Stopford case, puts them in a difficult position where they have to decide, do they then adopt it? They don't have the funds for the case; they have presumably taken a view on the merits themselves; they're not proposing to amend their claim to introduce -- as far as I'm aware -- an unfair pricing case. So they've taken the view, and you're then in a position where this class is going forward with the Stopford claim. And if the position is twofold, firstly, Stopford suddenly gets bundled into a class claim by, *ex hypothesi*, Mr Kaye that has a very expensive unfair pricing case that they either have to adopt and they don't have funding for; or if on the merits they choose to decide that it's not worth the capital as we have, they're then in a position where they have to sit as a bystander and let all this go ahead. They have to incur the costs of engaging with it, or at least dealing with it.

But the real problem here is that the Kaye claim, because it undermines the exclusionary claim so much by saying, "The exclusionary claim only gets to 80 per cent market share, therefore that's why we need the unfair pricing case", they've sold the pass on the exclusionary claim; they've degraded the value of the exclusionary claim; and you're then in a position where the Stopford class say, "Hold on, you're claiming a counterfactual that's 80 per cent that doesn't move the dial, really, in counterfactual terms, and we disagree with that". So you've got an actual positive conflict between the Stopford class interests and the Kaye class interests that will have to be resolved by the Tribunal. Meanwhile, Google's saying, "A plague on both your houses, you're both wrong and we win".

That's really, really difficult because if this were a slam dunk unfair pricing case that added significant value for little or no cost, everyone would have adopted it. And the fact that we've chosen not to, with respect, tells you something, at least. I mean, it's

something of a jury point but I don't refrain from making it.

THE CHAIR: They say you're running exclusionary points so they're going to be very difficult to prove.

MR BEAL: Well, we're running exclusionary points that have a regulatory or judicial precedent for each of them or are based on facts and findings elsewhere, which is all part of a coherent theory of harm where they are all interweaving points that go to a single and continuous infringement.

THE CHAIR: (Several inaudible words), that's --

MR BEAL: Well, I need to show you the way Professor Scott Morton deals with it. She doesn't say, "Here are four or five abuses, exclusionary abuses, all on a standalone basis, all pursued as a standalone basis and that's the way we run our case". She says, "Here's the theory of harm, here's the evidence of what's been going on, this is how they all fit together".

Somebody ought to probably say to them that I am in the middle of making submissions.

THE CHAIR: Please turn it right off, if you would be so good. Thank you very much.

MR BEAL: So, Professor Scott Morton's point is you don't strip each of these back in their individual abuses. It's all part of an overarching theory of harm. And they all go to show what would have happened in a counterfactual where essentially, you're then positing if you hadn't done all these things, all these things serve to keep out competitive entry.

THE CHAIR: Yes.

MR BEAL: That's the central focus.

THE CHAIR: No, I understand at a high thematic level why you say exclusionary is good, but to say that they're all, you know, straightforward, endorsed by what's already happened, is that -- well, we're going to come to them.

MR BEAL: Yes, we'll need to go through that.

THE CHAIR: But just the question about comparison is extremely important -- in a comparison between the two cases, it is extremely important.

MR BEAL: What does the unfair pricing case bring?

THE CHAIR: Yes, I understand, yes.

MR BEAL: That's how I understood.

THE CHAIR: Yes, absolutely, it was.

MR BEAL: Is it covering a gap somewhere? The answer is no. The reason why it's no is a high level of theory that having high prices, high profits, by itself is not bad. So you need to have a theory of harm as to why those high prices are bad. And that typically means something exploitative. You've charged a price that bears no reasonable relation to economic value, to the actual economic value. That's the harm.

THE CHAIR: Yes.

MR BEAL: But you then have to posit workable conditions of competition to work out what the price would have been in a counterfactual. You still have to look at the counterfactual. My learned friend is quite wrong to say you don't look at what the workable conditions of the competition would be in order to derive what a fair price would have been.

If you have a counterfactual which doesn't have all of the exclusionary conduct excluded from it, then you necessarily are leaving on the table things that aren't part of what should be a workable concept of competition, and which therefore necessarily still bake into the counterfactual, consumer harm; in this case, advertiser harm.

THE CHAIR: Just coming back to 347, we've worked through them. You say in (3), not enough done to look at why or whether there was an increase without an increase in cost or quality. And (5) I think you accept -- I think you do accept -- that positive product quality degradation could be a factor going to not just excessive, but unfair,

pricing. But you say that your analysis is better?

MR BEAL: I mean, clearly, if you're charging an increased price with decreased quality, then that goes into the matrix as to the comparison, the proper comparison between what the price should be in a workable system of competition and what it isn't.

THE CHAIR: Yes.

MR BEAL: Whereas Professor Scott Morton deals with that crucial price quality distinction, Dr Coscelli doesn't. And so when he refers back to, as discussed in section 6.2 --

THE CHAIR: I understand the point that you say your analysis is better, but I'm just trying to understand if you can really go so far as to say that there's absolutely nothing to the Kaye claim but excessive pricing, with nothing to rely on for unfairness. I mean, there seems to be at least two subparagraphs here where you do have to accept that there's some indication of unfairness on top of excessiveness.

MR BEAL: He's described adjectivally something that could go into the matrix for what is unfair.

THE CHAIR: Right.

MR BEAL: What is absent is any methodology to go about how you determine that. And that's completely absent.

MR DAVIES: On a slightly different point, you've said a few times that because the Kaye claim doesn't include some of your exclusionary abuse, that they're leaving those in the counterfactual. Is that right? I mean, if you take the sort of most extreme case, they're just going to go all the way down to WACC and that's going to exclude sort of everything that wouldn't be in a competitive market. Now, they may end up, as we've now discussed extensively, sort of adding something to that for quality or other justifications. But in a sense, they're not taking as given those exclusionary abuses in

the current market because they're looking at a completely different competitive benchmark based on cost-plus to begin with. Right?

MR BEAL: Well.

MR DAVIES: They automatically strip out everything, right down to bedrock, before adding anything back in.

MR BEAL: (Overspeaking) strip everything down to anything that leads to a ROCE that's higher than WACC equals unfair, then that's wrong in law, and I don't think I need to address that.

The bit I do need to address is what happens if ROCE is higher than WACC by, say, 25 per cent. Is that in and of itself enough to make it unfair? Answer: no, because there's no analysis of economic value, and it's the absence of methodology for economic value that absolutely kills the unfair pricing case, because you simply cannot get it certified, with respect, unless a methodology is in place that tells you how you intend to go about dealing with economic value. And when, as I've shown you, Dr Coscelli says, in terms, "I recognise economic value is a very important consideration, but I'll deal with it post certification", you are necessarily failing the process test and the need to show blueprint to trial, because it's just not there.

And this is part of the problem. If we then look at paragraph 351, page 1197, Dr Coscelli says in terms you don't have to just take my word for it.

"My preliminary view is that, regardless of whether Google's search ad services provided economic value to Proposed Class Members, on the basis of the position taken by the CAT in Le Patourel vs BT, if Proposed Class Members have no realistic alternative, it cannot be said that the excessive price bears a reasonable relation to its economic value ..."

Now, just pausing there, that, I'm afraid, misstates the approach that was adopted in Le Patourel, and the reference to essentially that would be a natural monopoly. If

somebody's got no choice but to take a service from a particular person, one can see why relying simply on -- if you're essentially a trapped consumer, you've got nowhere to go, then the willingness to pay fallacy becomes relevant. Here, Dr Coscelli has relied on Bing as a comparator. He's relied on Bing's prices as a comparator, and he's recognising that Bing is a rival, albeit one that has been constrained by the deterrent effect of exclusionary practices. But he's recognising that Bing as a rival. Therefore, it simply isn't right to say that class members have no realistic alternative to Google. They can go to Bing. Nor has he dealt with the practice of multi-homing, where an advertiser might have an advertising campaign that puts ads on the Google Search engine pages and on the Bing search engine pages. That simply isn't dealt with anywhere.

And so this is, I'm afraid, simply an assertion: I don't need to deal with economic value because everyone's trapped by Google, fails as a matter of law, and fails as a matter of fact. What we then see is no attempt to deal with switching patterns. I should add, if you needed confirmation that Bing is treated as a rival, see paragraph 348, where he says Google's biggest general search rival, Bing has only accounted for a small fraction of general search queries, but it is recognised to be a rival.

Our case is in the counterfactual Bing, not facing the exclusionary foreclosing conduct, would have reached a greater scale and been a more viable competitor, and that would have led to price decreases and/or quality increases.

We then see that limb 2, i.e. the price is unfair when compared to competing products, it's dealt with very shortly. It's paragraphs 353 through to 359. But in substance, the only competitor identified as a comparison is Bing, making the point I've just made. And we see that post certification, Dr Coscelli, at paragraph 348, would propose to review relevant disclosure materials to assess Google's contemporaneous views. So, this is the extent of the limb 2 analysis as matters stand.

This is all the more problematic, with respect, because what matters for welfare loss for advertisers is not cost per click or cost per action, which is what's being compared with the Bing prices, it's return on ad spend. It's the point I made earlier and that's not covered at all. Professor Scott Morton proposes to analyse the difference between return on ad spend in the factual and the counterfactual, which then properly captures the actual welfare loss suffered by advertisers.

Here, the unfair pricing case is only about price. It does not and cannot capture counterfactual quality. And again, it cannot somehow plug gaps in the exclusionary case. My learned friend cannot dismiss this point by saying that the fair price would reflect quality, because, on his methodology, it does no such thing. It simply says the price has to be driven down to the level that would leave no ROCE over WACC, regardless of quality. So the methodology essentially simply ignores quality.

Finally, if I may end on exploitation, just before the break for the transcribers, damages assessment starts, then at page 1199, and at paragraph 398, page 1214, we turn to the exploitative claim and the PLA exploitative claim. Again, both of those are lumped into the damages assessment. But there's been recognition by Dr Coscelli that they can't actually define the right market for the PLA exploitative claim. No adjustment for quality is made, paragraph 398. The table then, table 8.4, the £12 billion figure is predicated on a 15 per cent overcharge, and the £20 billion figure is predicated on the final result coming in at the upper range of the estimate. If it's a 15 per cent overcharge, then it's below the threshold set by Mr Justice Waksman in Le Patourel for excess in the first place. So at face value, that claim would simply fail.

If we then look at table 8.5, if you exclude PLAs because you can't come up with a market definition for them, then the claim value drops even further. What's driving these claim values is the estimation of the overcharge, the points I made yesterday. None of this is actually plugged into, necessarily, the final methodology that will be

used. It's simply coming up with an overcharge based on the figures, at least for the exploitative, unfair pricing claim, it's based on some CMA figures that estimate ROCE over WACC, and that will obviously be subject to fine tuning. That's the public data that Dr Coscelli's relying on, whereas Professor Scott Morton, in order to produce a preliminary estimate, no more, not an implementation of a methodology, also relied on CMA data, public data, to come up with an estimate of what the overcharge might be.

In terms of the overall cost and straightforwardness or otherwise of this, can I refer you to the second expert report of Professor Scott Morton?

THE CHAIR: Let's take a break before we do that because that could be quite important. I don't want to rush you, and you are moving away from the Coscelli report itself now.

MR BEAL: If the Tribunal has had a chance to read Scott Morton 2 --

THE CHAIR: We have, yes.

MR BEAL: -- then I don't need to say anything more about it.

THE CHAIR: All right. At some point, could you show me where Mr Justice Waksman explained the cut-off? You're relying on it quite heavily. I think I better just have a look at it so we've got just in mind, at some point.

MR BEAL: I'll do that immediately when we come back.

(11.30 am)

(A short break)

(11.44 am)

THE CHAIR: Yes, Mr Beal, just before you go on, one of the things we've been reflecting on, members of the Tribunal, is the arguments that are made by both sides: on your side, that if Kaye's side succeed in getting carriage, it will be disaster for Stopford; and Mr Brealey's submission that they'll be delighted and they'll immediately

amend. We'd rather not be in the quantum state of not knowing whether it's a disaster or a triumph. And we do wonder if there's been discussion with them or, if there hasn't been, whether there should be.

MR BEAL: We have a representative from Hausfeld, Ms Jukes, at the back of the court. Mr Streatfeild, who has conducted the Stopford case with Ms Jukes, was attending the CAT yesterday.

THE CHAIR: Right.

MR BEAL: I'm sorry, was that Simon Bishop? I'm sorry. I thought it was Luke Streatfeild. I'm sure the question can be asked.

THE CHAIR: Yes. Well, we rather think it should be you know, it's a very unusual situation.

MR BEAL: Yes.

THE CHAIR: And it exponentially increases the complexity.

MR BEAL: As I understand it, the question that will be asked is the one upon which Mr Brealey placed a bet yesterday: if the unfair pricing case is certified, would you, Stopford, adopt it? No, sorry, if it's advanced at certification stage, would you choose to adopt it, or are you assuming that it is certified? There's a different parameter which is, obviously, if one assumes that the unfair pricing case is certified, then you've rejected my submission that it's not capable of being certified.

THE CHAIR: Yes.

MR BEAL: If that makes sense.

THE CHAIR: Yes. Rather more binary way than I have necessarily seen it as being. You know, the Stopford party might say -- I'm talking totally hypothetically now, of course, there are lots of different scenarios.

MR BEAL: Yes.

THE CHAIR: But they might say: we don't want to adopt it because of the budget.

MR BEAL: Yes.

THE CHAIR: But we think we can live with it. You know, if obviously, the Kaye parties win the carriage argument, we, Stopford, can live with it. That's one thing. I don't envisage us putting it to the Stopford parties as a binary question, it's a question of their attitude, but my logically prior question was: has this been discussed with them yet? And the answer I think is, as far as you're aware, no.

MR BEAL: I don't think it's been discussed in those terms, but we can certainly reach out to Stopford representatives and say: you've been in court, you can feed back to your class representative for instructions.

THE CHAIR: Right.

MR BEAL: And what would your position be, and leave it open --

THE CHAIR: Yes.

MR BEAL: -- regardless of the parameters.

THE CHAIR: I mean, we're not by any means reaching a conclusion on the extent to which this Stopford attitude is determinative by any means.

MR BEAL: No.

THE CHAIR: But it could be important, or at least it certainly could reasonably be argued to be important, and, you know, one wants to avoid a procedural car crash from the point of view of the Tribunal, of causing a clash down the road which could have been avoided in either direction.

MR BEAL: I hope I've consistently been clear that information is a good thing, and I think, sir, what you're asking for is information.

THE CHAIR: Right.

MR BEAL: And why not get it?

THE CHAIR: Yes.

MR BEAL: My only observation, if I may be permitted, is if one were an economist,

one would say the fact that they haven't pleaded an unfair pricing case is a revealed preference. So it's telling you what their decision was by virtue of the outcome of the decision. Namely, they haven't pleaded an unfair pricing case.

THE CHAIR: But there's other possibilities too. They might just be waiting to see what happens, or who knows? Who knows? You're right, perhaps they could have looked at it and said ... there's a range of possible.

Mr Brealey, you'll think about that as well. There's no need to comment on it now.

MR BREALEY: I'll obviously (inaudible).

THE CHAIR: Yes.

MR BEAL: Sir, you asked me a question: where does Mr Justice Waksman in Le Patourel deal with excess and the threshold. Please would you turn electronically in the main authorities bundle to page 1832. That will be tab 23 on paper, page 1824. I'm not going to hazard a guess as to where 23 is -- volume 4?

THE CHAIR: Thank you.

MR BEAL: Page 1824 on paper, 1832 electronically. What we see at the bottom of the page there, paragraph 925. (Pause)

THE CHAIR: Yes.

MR BEAL: It summarises the results, and the simple average overcharge across the seven years, as broken out in the table, comes to 38 per cent. So that's the simple average overcharge across the seven years.

Then at 926, the CAT says:

"In respect to those figures, we consider any excess would have been significant if it was 20 per cent or more above the competitive benchmark. Given the figures which we have found, it follows that for each year of the claim period, the percentage excess is clearly established as significant [i.e. that's 38 versus 20]. Even if a significant threshold was as high as 25 per cent (which we do not accept) the relevant excess

would be established. Yet further, even if that were not the case the last year in particular, it remains the case that on the average basis across the claim period, the percentage excess would be significant.

"927. In the light of the figures above, we also conclude that the excess was persistent."

So those are the two -- persistent excess that's significant is the test for the excessive pricing. So in my respectful submission that is marking out as problematic anything that falls below the 20 per cent threshold, because it would not be attributed to be a significant figure.

Now, in terms of the more --

THE CHAIR: All right. Sorry, so -- okay. Thank you.

MR BEAL: In terms of the more general proposition about blueprint to trial and having to deal with it now, please, could I -- while I have the main authorities bundle open -- go to electronic page 705, which is the Gormsen case. It's at tab 14, please. On paper it's going to be page 697.

There's a paragraph that begins:

"The 'not my problem' fallacy."

THE CHAIR: Yes.

MR BEAL: Please would the Tribunal be kind enough to read that subparagraph. (Pause)

I accept that that analysis is looking at quantum and methodology for quantum, and it's saying you have to deal with something that will be an obvious issue. We say that reasoning applies a fortiori when you've pleaded that there is no reasonable relation between the price charged and economic value, but you've then not got a methodology to deal with that key element of the test, namely: economic value.

THE CHAIR: So the decision of the Tribunal in that one was to give the proposed

class representative six months to fix it, I think?

MR BEAL: They had to go back and do the job again and then come back.

Unless you have any additional questions for me, those are our submissions on the unfair pricing case. I propose to move, with your permission, to the exclusionary cases.

I apprehend that the Tribunal has well in mind the way our case is pleaded, I don't need to do a run through that. We've got our six practices that we're relying on as part of a cumulative, mutually reinforcing case on exclusion. We plead a single and continuous form of infringement, but at the same time, we recognise that if it were necessary to do so, we would treat them as alternative elements of abuse.

The first practice is tying between the Google Search app and the Play Store; that's based on the Android decision.

The second practice is tying Chrome Browser to the Play Store, which then gets tied to the Google Search app. Google defaults to Google Search as the search browser, that's the second practice, so that's Android as well.

The third practice is the anti-fragmentation agreement, preventing the development of Android forks.

The fourth practice is the Android-specific money incentives.

The fifth practice is other browser money incentives.

And the sixth practice is SA360.

That's how we formulate the six different practices, and you'll recall that some of those elements, even if not pleaded in Stopford, were nonetheless permitted to be considered as part of the counterfactual analysis.

Now, in terms of moving on to Professor Scott Morton's report, she did prepare a summary, as her report is understandably detailed, comprehensive and quite long.

MR HERGA: It's at tab 3, isn't it?

MR BEAL: It's at page 356 of bundle C, I think it is tab 3. (Pause)

THE CHAIR: Well, I read this the other day because I think it was on your reading list, or I believe I found it in the bundles of these documents, I don't know, but other members of the Tribunal -- yes, I think you can take it that we've all looked at this reasonably recently. So do please take us through it, but yes, you can do that on the basis that we've got something out of it.

MR BEAL: (Overspeaking).

THE CHAIR: Yes, yes. Thank you. That's ideal.

MR BEAL: Paragraph 5 to 7, you'll have seen, develops the overall theory of harm, which is excluding rivals, stopping rival entry and therefore isolating the Google Search engine from competitive threat, leading to higher prices, degraded quality.

Paragraph 7 says:

"Rivals are deprived of scale both in terms of user traffic and spend. Collectively, these practices form a coherent and effective foreclosure strategy because scale is key to compete in the presence of strong economy of scale and network effects."

So it's the overall holistic approach to looking at the practices that coalesce to drive this rival deterrent strategy on the part of Google.

We then see paragraph 8 deals with the incentives to foreclose, and that comes from the high profitability of Google -- there's rich rewards available if you can sew up the market. As for effects, we then see that that's examined by looking at the anti-competitive effect of foreclosing rivals by depriving them of scale.

Paragraph 10 then looks at harm. That's premised on the fact that in the counterfactual, absent Google's conduct, there would have been greater competition, more intense competition which would have led to lower ad prices and higher quality for value, both of which benefit advertisers. The notion of ad quality captures the fact that, for example, advertisers may end up buying a bad ad, i.e. an ad that has little

value to them, but generates profits to Google. That's the example given in the report where Google decided deliberately to adopt changes to the quality of the ad in order to drive revenue up at the expense of ad quality for the advertisers.

If we then please look at paragraphs 14 to 20, that gives the overall shape of what she's doing. This is very important because there was a tendency yesterday to hop between different sections and say: it follows that this is the implementation, for example, of something.

Section 3 discusses the relevant markets.

Section 4 looks at the specific anti-competitive practices, not from the perspective of the individual pleaded case, but from the overall anti-competitive harm that is generated.

So it's the tying practice; it's additional ties that serve to further insulate Google's Android from competition; it's payments for exclusivity or for default position to OEMs and mobile network operators; it's payments to web browsers in exchange for default status; and it's the self-preferencing practices under SA360. All of those are well recognised concepts or theories of harm that hurt the competitive structure of the market and in this case cause harm to the advertisers.

We then see at paragraph 44, that Professor Scott Morton deals with things collectively. So she looks at Android practices constituting:

"[A] mix of tying and exclusivity practices [with] a common objective."

Namely to essentially entrench Google's established position, and then leveraging its market power into the search advertising market. So, she looks at tying and exclusivity practices, then browser practices again there's a form of offering money incentives for revenue sharing agreements with browser developers to obtain default status for its general search engine.

Then finally, SA360 practices which look at the market in SEM, management, tools

which deliberately restricted the ability of the Google tool to take or interface with the Microsoft Bing, for example, offering. So it offers a tool for delivering multi-homing in advertising that self-references the Google advertising product over the Microsoft advertising product. That's certainly -- and many of the browser practices -- are not present in the Kaye claim.

If we then please look at paragraph 48:

"[Professor] Scott Morton provides a preliminary assessment of the causal mechanism by which [that] exclusionary conduct resulted in harm to the Class."

She looks at a counterfactual world where Google did not engage in those practices, and:

"[I]ncumbent search rivals would have likely expanded and new rivals would have likely entered. [That] increased competition would have exercised the competitive constraint on Google ..."

Which would have led to lower prices and higher quality.

She then sets out a methodology for assessing that harm on that basis. She's looking at:

"[A] preliminary view [as to whether it] would have been more competition among search engines in the counterfactual, both for advertisers and end users."

That obviously feeds into some of the methodologies of loss in due course. She then says:

"51. Absent Google's conduct, potential and existing rivals would have had the incentive and ability to enter and expand ... given that margins are high, and the likes of Apple and Microsoft would be well placed to enter and expand."

She then, in her preliminary assessment, looks at:

"[T]he specific mechanisms by which Google's Conduct likely harmed advertisers."

That includes looking at "intentional pricing"; degradation of the search engine payoff,

because there were too many adverts, which then gets in the way of organic traffic and become less attractive to search engine users; "keyword coarsening"; and:

"Other potential practices, such as degraded bid automation, reporting, and analytical tools."

Now, I think you asked a question yesterday as to: to what extent do the intentional pricing practices identified by Dr Coscelli mirror those of Professor Scott Morton? In answer to that, both of them have focused on the key ones, but they're not exclusive; there are other practices that go in there that help explain how prices have been able to be increased over time.

So they're both looking at the same underlying conduct. The question is: what is the best juridical hook to bring a claim based on that same underlying conduct. We say, with respect, that because our counterfactual envisages a scenario in which none of these practices can be entertained -- because of the competitive constraint -- that deals with all of these factors without needing to develop an unfair pricing case.

At 54, then a reference to the ROAS, return on ad spend framework. Again, it's looking not simply at "price effect" but "value effect". We see the helpful diagram with the pincer movement on welfare from advertisers, with both value being degraded and prices being increased. It's that pincer effect that generates the levels of harm which are necessarily going to be higher than in the case in which you simply look at the price effect by itself.

55 then looks at revenue increases and price increases, as well as decreases in quantity as part of the analysis of that pincer effect. So Professor Scott Morton is already looking at increases in prices, degradation of quality, without needing to do so through the framework of an unfair pricing case. She simply looks at that as part and parcel of explaining how the exclusionary practices have led to competitive harm.

Paragraph 61, and the diagram there, then sets out how the different methodologies

fit in together: they're not just methodologies for assessing loss to the class -- damage to the class -- on the basis of ROAS. They also look at umbrella prices and overhang, and that step 2 and step 3, encompassing methods 2A to 2C, 3A to 3C are absent from the Coscelli approach.

Those methodologies are both top-down and bottom-up, and they are done that way on purpose to enable -- top-down approaches we see at the top of page 373:

"[C]onsists of multiple practices that may interact. Therefore, [the professor sees] value in estimating harm through quantification methods that follow holistic, or top-down approach."

And she intends to "derive a counterfactual" using either method 1A or an economic model of competition, method 1B.

Then bottom-up approaches obviously depends on the quality of the data you get:

"I also see value in quantifying the effects of individual practices in which Google engaged in that would not have been present in the counterfactual. [And they served] to incorporate the specificities of the search ad auctions that ... Google's Conduct likely distorted."

And that's either based on empirical and/or econometric analysis, method 1C, or it uses an auction modelling to the same effect, method 1D. So she would look at the parameters of the auction bidding process and then rerun them with the exclusionary practices excluded and the intentional pricing practices excluded.

She then summarises in more detail those individual methods. I'm proposing to go to those in the main report, just to show you how they're dealt with in the main report, but the summary is there.

That then leads to step 2, which is quantifying the "umbrella price" having quantified the main loss.

Step 3 is the "overhang", and then she looks at "Considerations of upstream pass-on

by media agencies", which I think hasn't been a relevant point of distinction between the claims.

It's only then at the end that section 7 is summarised, that Professor Scott Morton says:

"My preliminary assessment follows a structured approach which estimates the overcharge rate based on publicly available data, calculates gross damages, and determines net damages to the Proposed Class after considering ... pass-on."

She makes it clear that she's estimating the gross overcharge rate not by any of the methodologies that she's developed at section 6, but she's using a different proposed metric derived either from the Google Search case or from the CMA's OPDA report. She's doing that because those are publicly available sources of an estimation of overcharge, which is all this is. On that basis, she reaches the conclusions that you're very familiar with.

That's the overall shape of it. I should point out that at paragraph 90, back in the looking at the methodology and before the preliminary estimates, the professor does say in terms:

"The proposed methodology is robust to alternative findings made by the Tribunal regarding issues such as limitation and the breadth of the Proposed Class."

So you can adjust, calibrate the methodologies to reflect such findings as may be made on both those issues.

That, in my respectful submission, shows a comprehensive, detailed approach. When we then turn to the actual report, you'll have seen that it's an impressive work, very comprehensive, a feat of great scholarship, if I may say so.

If we could pick it up, please, in terms of some of the detail at page 95 of the bundle.

(Pause)

At paragraph 258 through to 260, the professor sets out the context in which the

foreclosing conduct should be seen. If you just would be kind enough to cast an eye over those paragraphs, I'll then make a short point. (Pause)

In a sense, cui bono from the perspective of Google: why are they doing this? It's to maintain their advertising revenue because it's so profitable for them as a company. In order to do that, they engage in a series of mutually reinforcing conducts, and they're all paths up the same mountain with the same purpose and the same intent. It's important, we say, to capture them all, because the key here is to posit a situation in which: imagine those practices cumulatively were not there, would somebody like Apple enter? Would somebody like Microsoft be able to expand and achieve greater scale than they already have?

Bearing in mind that Microsoft has invested £100 billion in the quality of its search engine, Bing and Apple received 20 billion in revenue a year -- or certainly did -- from Google. Is there a realistic prospect that either Apple would enter either by itself or with another market operator? Or is there a realistic prospect that Bing would gain market share and market power, or at least be perceived as a risk of doing so by Google?

We say the obvious answer to that is yes. Once you've gone down that process and that analysis, then you're in a world in the counterfactual where even, regardless of where the market shares may end up in the counterfactual, Google is having to respond to a credible entry threat or a credible risk of losing market share to a rival by decreasing its prices or improving its quality. And it's at that stage that the class as a whole benefits, because you don't have to show this switching between Google and somebody else; you can posit a situation in which customers stay with Google and remain with Google and are better off.

If you simply have this market share obsession, with: market share has to drop for price to drop, then you don't end up with a situation where if Google drops its prices,

everyone's better off for the class. That dynamic context is wholly absent from the Kaye case, but it's a very important feature of the Brook case. It's the static versus the dynamic analysis that it really lies at the heart of: where are you going to get to in a counterfactual analysis of the competitive harm that has been caused by Google's practices?

What we then see at paragraph 262 to 264 is essentially how Google is incentivised to try and drive as many people as possible to its interlocking platform, search engine and browser. In of those things, it's trying to drive everyone into the Google bubble, excluding people from going to rival search engines.

We then see at page 99, paragraph 272, the professor sets out her framework for establishing the tying practice -- the analytical framework.

At 282, just in passing, it was suggested that somehow we had ignored the findings in the general court on Google Android. The reality is in Google Android, what happened was the general court found that the European Commission's implementation of the "as efficient competitor test" was flawed, and they found that they hadn't properly considered the extent of the coverage of the relevant RSA agreements. They therefore found essentially the evidential base and/or the implementation of the test was flawed. They weren't saying, and they didn't say, the sorts of RSA agreements we have here are not a competition problem concern. It was essentially that the European Commission hadn't established that there were a concern; it wasn't giving them, a --

THE CHAIR: We looked at that in Stopford.

MR BEAL: Yes. And of course, in Stopford, this Tribunal recognised that the issue could be raised in the counterfactual analysis, therefore it's an arguable point.

What we then see please at page 110, paragraph 312 to 314 is an analysis not simply of the existing MADAs, but also the replacement agreements that were brought in with

effect from 2018. So the Kaye case stops at 2018, says: nothing to see here after that. This is where Professor Scott Morton looks at the replacement agreements and analyses the anti-competitive effect of those as well.

Her provisional conclusion is that essentially what's put in place post-2018 does the same job in practice as what went before. She looks at the RSAs, notwithstanding the annulment of the commission findings, and explain why she's done that.

Page 113, paragraph 317 -- sorry, I should say 318 deals with the annulment point I just made.

319 then looks at Android exclusivity practices in relation to foreclosure by reference to some findings that have been made by the US District Court and that came out post the European Commission decision, so it's an additional evidential basis. Obviously, we don't rely on the findings of the US District Court on US law, which aren't going to help. They're not something that is going to be capable of being treated as in any way probative because we're applying a different legal test in different circumstances. But what we do see is that the underlying evidential basis and the underlying analysis of competitive harm is capable of being rolled out and put into the appropriate domestic law framework. And that's what the professor does.

Page 116, we then see a distinction drawn, at paragraph 326, between Android practices and browser practices. And then at 329 to 330 on the next page, 117, there's a succinct summary of the browser practices and the foreclosing effect of them. And it isn't simply Apple, it's also Mozilla and Opera. So there are two further browsers which are the subject of the Brook claim that are not covered by the Kaye claim.

The effect of that is then dealt with in 330: it led to:

"... the near-complete foreclosure of rivals across different devices and [operating systems]. The collective market coverage of these agreements was, therefore, particularly high."

And the point is not necessarily that, yes, of course, Apple's the big one; the point is you're not just shutting down Apple, you're excluding 99 per cent of the rival market from operating as a competitive constraint through somebody being able to team up with another browser as the default search engine.

That analysis of exclusionary behaviour is dealt with at page 121, paragraph 338 through the Intel criteria. One sees on page 121 the section beginning, "Preliminary assessment of the Intel criteria". That then provides the framework for Professor Scott Morton's analysis of the exclusionary practices.

At page 132, paragraph 372, she then moves on to look at the SA360 situation, and they're subject to a separate section of analysis starting at page 132 and going onwards. Again, none of the SA360 practices are considered in the Kaye case. Mr Kaye says, "Well, the US court found, as it did, that they didn't constitute an infringement of US law". That was because of the specific test set by US law, which does not in all respects or indeed in some important aspects come close to mirroring the test set by EU or UK law. Professor Scott Morton here has explained, as a matter of her analysis of the underlying evidence and facts, why that conduct amounted to economic self-preferencing, which is contrary to EU law if it operates to foreclose the market -- see the Google shopping case.

More importantly, she then looks, at page 134, at the particular economic concepts of self-preferencing and why they are problematic. Firstly, somebody is able to extract more economic rent profit than they should have done; leads to dynamic foreclosure; and it also means that the competitive threat to Google from multi-homing is less effective. That's all a perfectly tenable approach.

What we then see at page 138, having looked at the economic framework for analysing this abusive conduct, she then emphasises at paragraph 409 to 419 the collective effects. Please, could I invite the Tribunal at least to cast an eye over it. I'm

conscious that you've read it before, and it's not my task to read long swathes of this. But if you could be kind enough to just cast an eye and see how comprehensive this approach is. It's a holistic approach. (Pause)

THE CHAIR: Where do you want to go down to?

MR BEAL: 419, please:

"Google successfully deterred entry by Apple."

The point about this analysis is, yes, it has a substantial foothold in the Google Android decision, which is binding as matters stand on Google. The follow-on aspect is there, but it very much builds on that Android conduct to say, "This is simply part of a wider overall strategy of driving users to Google search, because that's where Google makes most of its money". And it's by looking at the range of exclusionary behaviour in total, collectively, that you get a full sense of the harm to the market.

Now, true it is that you could also splice and dice that by the individual six abuses and say, "They've got two, we've got six", but that isn't the way that Professor Scott Morton approaches this. She says we can do that if we need to, but it's crucially important in the context of a digital ecosystem where the overall conduct is all part of an overarching attempt to foreclose rivals, to see everything in the round. And that is a significant benefit, just theoretically, of the Brook claim, because it stands the best chance of capturing the full extent of the competitive harm through Google's conduct. It's not simply a question of two versus six; it's a bigger picture point than that.

There's then a lengthy section starting at page 142 dealing with counterfactual. All of section 5 is geared at how was the class likely harmed, and this is a qualitative approach to harm. It's saying, "These are the ways in which if the conduct had not taken place in the counterfactual world, this is what I think would have happened to the overall state of competition in the market and what the outcome would have been". It's a very important section. My learned friend said it's all about section 7. In my

respectful submission, the linchpin of this report is this section 5. And it's this analysis of the counterfactual which Mr Kaye, in his skeleton argument, paragraph 29, says lacks proper analysis and I'm quoting there. So let's just see, does this lack proper analysis?

Well, we start please, at paragraph 423:

"[Explaining] that, in a counterfactual world in which Google did not engage in the Practices discussed [and outlined] in Section 4, incumbent search rivals would have expanded, and new rivals would have likely entered."

That's the overall theory in the counterfactual. The professor then sets out how she's proposing to structure her analysis, and she deals with both the proposed approach to the counterfactual, explaining how qualitatively she's assessing that competition would be better in the counterfactual; and then thirdly, as a matter of theory, why advertisers were harmed. She then looks at empirical evidence that would be consistent with that preliminary assessment and then she looks specifically at the umbrella effects. Again, unlike the Coscelli report, this is not a case where the umbrella effect is specifically factored into a methodology. The preliminary assessment she reaches based on the counterfactual is that all of Google's conduct -- see 436 -- that is, the Android practices, the browser practices, and the SA360 are ultimately found to be abusive and are therefore necessarily expunged. However, the mechanism by which each practice is likely to have affected competition is broadly similar across all three. So they're all different ways of foreclosing the market and deterring rival entry, and that's the key theory of harm that is being deployed with this counterfactual.

There's then some general observations about the need to remove unlawful conduct from the counterfactual. Really, the core element of reasoning can then be seen at paragraph 436, page 145, where the professor analyses that there is scope for

multiple efficient search engines. This is not a natural monopoly. You could have had more than one operating at scale.

Secondly, she reasons that rivals' incentives and ability to enter would expand in the counterfactual. There's a high reward at stake. People would want to enter if they can. If you remove the foreclosing effects of the exclusionary conduct, then they have a higher ability to do so.

There's then the spillover effect of competition from the general search market into the search advertising market, i.e. if you have more competitive search engine competition, then that translates into a better quality or lower price product on the advertising side of the platform. Then you have strengthened competitive constraint from specialised search. All of those are core features of her analysis.

Now, in terms of what does that mean, possibly, for looking into the tea leaves and seeing what would this have looked like? I'm being facetious; obviously, it's an analytical judgemental exercise, but necessarily predicated on future conduct which hasn't happened, or hypothetical conduct which has not happened. So, there's an evaluative element to it, but she does actually put it in concrete terms.

If we turn to page 150, paragraphs 458 to 463, the professor is positing that Bing would have had unprejudiced access to users through key search points such as Safari and Mozilla, and browsers on Android OEM devices. That does not depend on the precise arrangements Bing would have had or, I should add, nor does it depend on posited market share. That isn't the exercise that's being done here. This isn't a "Bing would have had 10 per cent in the counterfactual and Google would have had 75 and somebody else, a new entrant would have had 5". That's a spurious accuracy. What she's looking at is, is there a genuine and viable threat of either competitive entry or competitive expansion which would have exercised a competitive constraint on Google? Answer: yes.

So, she then looks at how Bing would have reacted, 459. She looks at:

"The idea that Google would have lost material query traffic to rivals absent default status is well substantiated."

She provides the evidential basis for that from the Google Search. She then looks at Apple, 461. What would Apple have done if it didn't have £20 billion a year in shared advertising revenue? Well, chances are it would have tried to get some of that pie by either entering itself or teaming with a partner to try and capture some of that highly profitable market revenue from advertising. And she looks at that in more detail.

We then see at 467, she posits entry by Amazon and Meta, two highly capitalised profitable companies -- well, I shouldn't say profitable because that depends -- but two highly capitalised, valuable companies which are, in our respectful submission, capable of being viable market entrants if the prize was there. And she goes on through 467 to look at how search engine rivals might have fared -- Yahoo, DuckDuckGo and so on -- if they had been able to be selected as the default browser and so on.

469, she says in terms:

"It is important to note that the question of which of these firms would have chosen to enter or expand [and] what their success would have been, [whether they] could have maintained a material long-term presence ... cannot be answered definitively. Following disclosure, I intend to define my counterfactual predictions more precisely through empirical analysis."

So she's saying, as a matter of theory, this is what I think would happen once we've got disclosure, for example, of Google's own internal documents that identify market threats and then respond to them. Once we've got that sort of disclosure, you've got a much better chance of providing a greater degree of predictive certainty to the counterfactual exercise and that's something she recognises.

Google is, of course, not a natural monopoly, and Apple would have had a much reduced effective entry price precisely because it would have been in a space where it could have identified specifically the benefit it could have received from market entry.

Paragraph 474 at page 154, she identifies that:

"Moreover, in a ... competitive general search market in which no individual platform serves the overwhelming majority of end user queries, [general search engines] would likely compete more aggressively on other parameters of competition that matter to advertisers. [Other] such parameters include price, the quality of analytics tools, narrow keyword targeting, et cetera."

So you'd have a better service, more bolt-ons, more gives, and a lower price in this more competitive world.

Importantly, at page 158, paragraph 487, Professor Scott Morton notes that the relevant metric to assess advertiser harm is return on ad spend. That's the difference between the value that accrues to a particular advertiser from a given click, and the price the advertiser pays for that ad. Then she identifies, as you've seen from the summary, the pincer effect of quality and price. And then she identifies at a high level at 489 the specific effects, the specific harm: price and value effects due to the intentional pricing practices; price effect from paid traffic replacing organic traffic -- so you have a worse ad load, people get more bored by seeing too many adverts and they don't use your browser as much; therefore, the advertising is less valuable -- and then price and value effects due to keyword coarsening: i.e. you're paying for something, but you're being lumped together with a whole bunch of people who aren't specific in the product and therefore you're facing a diminished return on your advert from being lumped together with other people whose adverts are not as well suited for matching the specific keyword search.

She then looks, at the top of page 160, at other potential effects due to degraded bid

automation, reporting and analytical tools. Those are the additional bolt-on bits that Dr Coscelli's referred to on top of the three core intentional pricing practices, and Professor Scott Morton covers those as well.

THE CHAIR: I don't want to stop you, but I'm sure this is a very long report and we have read the summary.

MR BEAL: Yes.

THE CHAIR: I think there has to be some proportionality to the amount of time you spend telling us how good the report is. I mean, we are not cold to the amount of work that's gone into it, but in terms of using up the time of this hearing ...

MR DAVIES: Some of us have read the whole report.

MR BEAL: Okay. I can pick up the pace, and I'll show you the key points, really. Some of this is now simply going to show you responsively why the way that Professor Scott Morton deals with things is not the way it was described yesterday, so --

THE CHAIR: Well, that's fine. Obviously if you want to focus on --

MR BEAL: Focus on those.

THE CHAIR: -- the torpedoes that have been fired at it, that's very helpful.

MR BEAL: Yes. Page 165, paragraph 499. As I've explained, Professor Scott Morton looks at the practices in the counterfactual and says, due to competitive constraints, essentially Google wouldn't have been able to do the intentional pricing practices. So, the way that the intentional pricing practices are built into our case, they're not described as being an abuse in and of themselves; they're excluded because in the counterfactual, Google would not have been able to do them. And if that's made good evidentially, empirically, then there's no need whatsoever to have any aspect of that dealt with through an unfair pricing case, because you get to the same result and more importantly, you strip out all of those underlying practices from the counterfactual,

producing a world in which the analysis necessarily doesn't feature them. Whereas in fact, if you have a case which doesn't treat them as an abuse, doesn't feature them in and therefore they are baked into the counterfactual, you have a problem. An example of that is, for example, the quality dimension, which -- I'll sound like a broken record if I say that isn't properly addressed on the Kaye claim, but we see an example in figure 33 of Google deliberately choosing to rank ads in a suboptimal fashion in order to generate more revenue. So that's a classic example of a quality degradation.

Page 176, paragraph 528, there's a reference to umbrella effects. That's then dealt with.

We then move on at page 180 to section 6, and it's important to place this in context. So, having identified the counterfactual and qualitatively what that would mean for competitive entry and therefore harm to advertisers in the factual compared to the counterfactual, there's then an explanation of how Professor Scott Morton would propose -- this is blueprint to trial stuff -- how are you going to work out both the price effect and the value effect? And it's in that context that she deploys methodologies 1A to 1D. What she does -- see paragraph 549 -- is outline the general principles she will use, the empirical techniques that will be deployed and how that approach remains adaptable to any specific findings. So this methodology is capable of being calibrated for whatever findings the Tribunal may make, both on limitation and on class size and everything else.

We then see, top of page 182, that the general principles are all based on higher prices or lower return on ad spend. So the quality dimension is baked into the analysis that she is proposing. She then sets out, at 560, more precisely how she will rely upon disclosure from Google and internal documents from Google in order to empirically assess and perform, if necessary, regression analysis on certain aspects of the overall procedure. She recognises that when looking at return on ad spend and the evaluative

part, it's highly likely that Google has worked out roughly what advertisers get with certain permutations. So, what benefit does an advertiser get from having auction time bidding included within the service that's now offered? That will be something that Google's analysed, because it's either declined to offer auction time bidding to Bing through SA360, or it's at least worked out what the value would be. The reason for doing that is set out at paragraph 550 on page 182, which is price effects by themselves will not quantify the full effect of the competitive harm.

We then see at page 187, paragraph 576, the beginning of the explanation of the comparator-based approach. The professor intends to approximate counterfactual prices and return on ad spend by considering suitable comparators, either from geography, time periods or rival GSEs -- so this isn't simply looking at price, it's also looking at ROAS -- and she sets out exactly how she's proposing to do that.

At 582, importantly, the analysis is not confined simply to a share of user traffic on a search engine; it goes wider than that. It's looking at, in particular, empirical evidence of market power rather than market share. And so internal Google communications and studies may highlight regional idiosyncrasies beyond traffic share, such as higher prevalence of user multi-homing or greater user sensitivity to increasing ad loads, ie you have more adverts on the splash page and that puts people off.

So she's looking at parameters of market power and differentials in market power between geographies that extend beyond simply market share. And so when my learned friend said yesterday, her approach boils down to just looking at market share, and that's what's factored into the regression analysis, I'm afraid that's simply wrong. Her parameter for market power goes wider. It will include things such as number of rivals in the market, HHI, as an index of market power, and so on.

At page 192, paragraph 593, she confirms again that she will look at the extent of

contamination by umbrella effects on rivals' prices ROAS, and at 595, she then says, having identified the relevant comparators, you then need to estimate how differences in market power impact on ROAS and/or prices. So it's again market power, not market share, that is being used as the tool by which to analyse things. And that then feeds into the regression analysis that is proposed, such that the variable that my learned friend took you to yesterday, at 602, where he said, "Ah, that shows that they're relying on market share". The relevant metric in 602 is five bullet points down, and it says, "Sijt is a measure of GSE j's market power." It gives an example of market power, for example, market share. But that is not the sole derivative for the regression analysis. There's going to be a broader analysis of market power than that.

And paragraph 601 and 602 say how the model would be specified. The focus, again, is not on price, it's on ROAS such that the total advertiser harm that we reach at 605 is based on an ROAS metric rather than a price metric.

The second methodology, at 606, is based on an economic model of competition, which she identifies has been deployed in merger contexts and used by some competition regulators to assess merger situations. She recognises at 612, page 197, that it's not appropriate to set out a fully fledged model at this early stage. The existing practice and economic literature show how such models can be usefully implemented to estimate effects on market outcomes and reduction in competition.

So it's another means of providing a triangulated approach to what is the harm suffered by the class in this case.

Methodology 1C is then dealt with at page 198. It's made clear that there'll be an empirical analysis of the effects of the various intentional pricing practices. At paragraph 621, page 199, she explains that the rationale behind this methodology is that in a more competitive counterfactual, Google would not have been able to engage in practice as that artificially distort the outcome of auctions.

So the suggestion that this wasn't a detailed methodological approach for working out the impact of these particular prices is simply wrong. It is grounded in reality. It looks at what will happen -- what has happened -- in the real world. It then looks at what would have happened in terms of the effect on ROAS if those practices had not taken place, and that's then dealt with at a granular level for them. And she explains how she's proposing to do that, and how she will use a regression analysis and econometric techniques to derive an answer from that.

So method 1C is a standalone method. It's got a perfectly plausible way of looking at things, and it deals with the intentional pricing practices because they are treated as being excluded in the counterfactual.

Finally, methodology 1D is at page 209. This involves auction modelling. What she's proposing to do is derive an auction in which the various abusive conducts are excluded, and it will be rerun as a model. It's another way of deriving a result of the impact of removing the abusive practices from the counterfactual, which is capable of producing a result.

Now, all of these different complementary methodologies are ways of estimating loss and harm. We're not saying any one of them is the primary way of doing things. We are prepared to do all of them if circumstances suggest that's a good idea and we'll know more once we have disclosure as to, the relevant weight to be put on each of the complementary methodologies.

But we've got these methodologies available for use so that we can cater for any particular outcome on the disclosure process. So if, for example, the disclosure of the data doesn't help regression, if there's data issues with regression analysis, that's not the end of our case. We're not sunk if that is the situation.

THE CHAIR: Okay.

MR BEAL: What then happens in section 6.7, obviously the overhang effects are dealt

with, but then at 6.7, page 222, paragraph 718, Professor Scott Morton starts analysing what would happen if certain things were or were not found; to what extent are these, robust methodologies catering for different factual circumstances even if different elements of the abuse are not established. And so she posits a world, for example, where the Android practices are deemed abusive but nothing else -- see paragraph 723. Then, conversely, if only the browser practices are found to be abusive. So they are separately separated out and analysed. So she's catering for different permutations of conclusion.

We then come on to section 7, and I make no apology for referring back to the caveat at the top of section 7, page 225, paragraph 730. We don't have the data to deal with any of the preferred methods for assessing loss. So what we have to do is fall back on a preliminary assessment. That preliminary assessment necessarily has to be based on publicly available data. And the professor has found two proxies for overcharge, based on publicly available data. Those proxies, she assesses, to be comparable to a reasonable estimate of the likely harm that would be identified if you were able to populate the four different methodologies that she has put forward.

Section 731 sets out the method that was followed. As we've seen, paragraph 732 says:

"My preliminary estimates only incorporate damages incurred due to price effects ... that is, damages derived from value effects, umbrella effects ... and overhang damages are not included. ... 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. This may, therefore, overstate some damage components. Nevertheless, the approach applied in this section is intended to be indicative of the order of magnitude of expected damages, which I do not expect these caveats to grossly alter."

The point there is she's left out of account on our case some quite important features, namely the impact of degraded quality, umbrella effects, and overhang. So there's something missing. She recognises that you might need to claw something back because limitation periods and/or what I described yesterday as, extrapolating backwards from subsequent pricing conducts. That's been recognised but she still assesses, in her expert opinion, that it's a reasonable estimation -- and it's no more than that -- of the likely levels of harm.

Contrary to my learned friend's submissions, it is not intended to be a plug-and-play of the earlier methodology. She recognises you simply can't do that. So to suggest that somehow -- I think it was put in as a fatal flaw because of causation -- she's identified the causation issue. She said: I've taken this into account. But it's simply not trying to do what it was suggested by my learned friend it was intended to do. This isn't the implementation of section 6. This is a reasonable estimate of the overall level of harm, based on public data, doing the best we can at this stage.

We then see, in any event, that a conservative approach is adopted, page 226, paragraph 736. The District Court in the US has suggested overcharge as a result of different elements of the pricing knob led to price increases that varied between 5 per cent and 15 per cent. Then a midpoint from that is taken on the conservative basis. But, of course, the individual pricing knobs analysed by the US District Court did not extend to the full extent of the pleaded case in the Brook claim. And, therefore, there are other elements that are necessarily not included in that.

There's then a reliance at page 227 on some analysis conducted by the CMA. My learned friend rather uncharitably suggested yesterday that Professor Scott Morton had lifted the analysis from the CMA. I think with respect, that's --

THE CHAIR: Well, don't worry about that.

MR BEAL: Right. Well, what she's done is looked at this OPDA report in the same

way that Dr Coscelli did, and taken from it figures, findings, statistics, data analysis, and used it, as in this case, a proxy for the level of market harm. She says exactly what she's done. She explains why she's done it, and she identifies a 17 per cent overcharge as a midpoint ratio.

I reiterate, it's those overcharge figures that then drive the eventual estimate of damages, which is an estimate and no more.

That's then passed through into an analysis of estimated quantum with different overcharge sensitivities at page 232. Both sides now -- didn't initially -- both sides now have identified that in order to compare like with like to the extent that it's helpful, it's the 50 per cent pass-on figure that's being used with no admission. That's the right pass-on figure, but just to compare like with like. That then is our positive case.

Can I turn please to the Kaye case. And here the short point is that Mr Kaye himself acknowledges -- see bundle A/127 -- that his case is narrower. That's detrimental for a number of reasons, because you are not capturing the full extent of the competitive harm. That is both because your overarching theory of harm does not include some important facets of Google's behaviour, but also because in the counterfactual, they're not going to be excluded from the competitive landscape that you are judging the situation by reference to.

So, there will be money left on the table if you don't capture the full impact of harm. And that is not simply because of having practices 1 to 6, versus practices 1 to 3. It's also because of the overarching theory of harm and the impact on quality. Nowhere in the Kaye approach is there a meaningful determination of what the impact of quality means in terms of damage to the relevant advertiser class.

Now, if we could look, please, at the Kaye case. This is in bundle B, starting at page 217. It should be 140 in the CPO application. Page 217, paragraph 140 in the CPO application by Mr Kaye. What we see at paragraph 140 is a self-denying

ordinance from the Kaye team, and:

"... "it's not open to the PCR to rely upon the findings as binding in these proceedings." Those findings relate to RSA conclusion that was overturned by the general court on the challenge.

THE CHAIR: Yes.

MR BEAL: But they've therefore excluded it from their analysis, whereas we've maintained it.

At 148(c), page 219, there's a reference to a direct relationship between Google's market share in search and the price on the advertising market, and reliance is placed on the metric 1 per cent versus 0.52 per cent in order to derive mechanistically, an impact on price in the advertising from a reduction in the search engine traffic through a reduction in market shares.

Now, the Android claim is framed as follow-on, and so in principle ends in 2018. We have gone beyond 2018 and relied on conduct that post-dates 2018. The standalone exclusionary claim is based solely on the ISA with Apple, not with any other browser or MNO. We see that page 221, paragraph 155. So the only browser arrangement, the incentive arrangements that Google had with various browsers and various MNOs, the only one that's actually relied upon is the ISA with Apple.

At paragraph 184, page 231, again, there's a link back to this mechanistic link between market share and price increases and therefore price decrease from a decrease in market share, that lies at the heart of the Kaye case.

There's a reference alluding to return on expenditure on advertising in paragraph 183, but that never features methodologically in anything that's established by the Kaye case. At 186, I said that the decision was adopted in 2018, and essentially there isn't an allegation of unlawful conduct after that. It's fair to point out that the allegation is that the decision substantially prevailed until September 2021. But therefore, even at

its highest, their Kaye claim stops in 2021.

Because of this mechanistic link, affirmed at paragraph 188, between share in search market traffic and prices in the advertising market on the other side of the platform, it's crucial that the Kaye case can show a significant decrease in market share for Google in the counterfactual, but it doesn't actually analyse to any extent what the impact of competitive constraints would have been on Google pricing, even if they had kept a high market share. And so the Kaye case necessarily focuses on the proposition that people will be switching from Google to somebody else, represented by the decrease in market share, and that alone is the source of the harm. The source of the harm is confined to a mechanistic reduction in price as a result of that loss of market share.

What that doesn't capture is two things. Firstly, people who would have stayed in the counterfactual with Google that the competitive constraint would have led to lower prices and better quality by Google that is of benefit to the advertising class. And that's a very chunky aspect of the Brook claim. Because we say Google could have stuck with, say, for the sake of argument, 65 per cent, 70 per cent market share, but being pressurised into charging lower prices for advertising and offering better quality services. That is a means of harm, competitive harm, capable of being reflected in a damages assessment through one of the four methodologies developed by Professor Scott Morton that's wholly absent from the Kaye case.

The second point is the quality point, which is if you're simply looking at price, you haven't factored in quality, and that's why the ROAS metric is the necessary one to capture advertiser welfare harm, and you don't get there with a (inaudible) mechanistic link between share price and share volume of user traffic and price.

So those are two key features of harm that are left off the table, just as a matter of theory, on the Kaye case, and therefore they have no methodology that is capable of

assessing that very chunky value in the Brook case.

I'm about to look at Dr Coscelli's report, as quickly as I can because I appreciate that you've probably read it, and my learned friend went through some of it yesterday. But I do need to show you what's, in a sense, missing and what's absent and why, with the greatest of respect, this market share analysis is too simplistic to (a) actually convey market power or (b) have a meaningful way of determining what the level of harm in the counterfactual would be. So I do need to cover that, but I'll do so as quickly as possible. And I would hope to be no more than 45 minutes this afternoon, finishing off that part of the case.

THE CHAIR: Sorry, which part of the case?

MR BEAL: My entire submissions, save for a couple of very short points.

I can give you my points on limitation, which is in the light of your observations, sir, yesterday, that as far as you were concerned -- and I think this is right -- limitation must be the same for both class representatives, whichever way you skin it.

THE CHAIR: Yes.

MR BEAL: I'm not going to bother with any of that.

THE CHAIR: Right, okay.

MR BEAL: And then, in terms of class definition, I will make some very short points on that.

THE CHAIR: By class definition, do you mean the person in France? That sort of (overspeaking).

MR BEAL: Yes.

THE CHAIR: Right, okay.

MR BEAL: Your response, as I understood it, was entirely pragmatic one, with respect, and quite right is, well, what's to stop them repleading? Well.

THE CHAIR: Well, they said they don't need to, but that depends on a detailed parsing

of what they've got at the moment.

MR BEAL: I can make the point probably in two sentences. Why don't I give it to you now and then its --

THE CHAIR: No, no, no. I'll speak for myself: then I would have to retrain my mental equipment.

MR BEAL: Let's stick with where we are.

THE CHAIR: Any update on Ad Tech consent, by any chance?

MR BEAL: Yes. Can I pass over to my learned junior because he's dealing with this?

THE CHAIR: Yes.

MR CARALL-GREEN: I don't think there's any update vis- à-vis yesterday. We've got -- you'll know that the Ad Tech class representative is an LLP with three members. Two of the three members have indicated in writing that they would be content for Geradin Partners to act. So if the Tribunal is looking for informal consent, which I think was part of the question that was put to us yesterday, then that has been given. Insofar as it's necessary for that to be formalised, then we think there ought to be no problem with that being done, and we could supply the relevant paperwork at some point after the hearing. One of the LLP members is based in Australia, and of course, the LLP has to go through a proper sign off process to go into writing on issues such as this and so a certain amount of time is taken to make sure it's done properly.

THE CHAIR: Okay.

MR CARALL-GREEN: Whatever's required can be supplied. We haven't yet -- that's right -- the third member that hasn't indicated consent is the Australian member.

THE CHAIR: Yes, yes. But I mean, obviously one hopes they will and then everything will be tidied up. Sorry, what happens if they don't?

MR CARALL-GREEN: Well, two out of three is good enough --

THE CHAIR: Is it? Oh, fine.

MR CARALL-GREEN: -- under the LLP's decision-making method.

THE CHAIR: I see. Fine. Okay. Thank you very much.

MR CARALL-GREEN: So, we already have the consent of the LLP.

THE CHAIR: Right.

MR CARALL-GREEN: I don't have a witness statement in front of you that will confirm that, but we do in fact have consent.

THE CHAIR: Right, okay. Thank you very much. Okay. Well, we'll resume at 2.00.

(12.57 pm)

(The short adjournment)

(2.00 pm)

THE CHAIR: Yes.

MR BEAL: Please would we now turn to Dr Coscelli's report. It's in bundle C, picking it up, please, at page 1072, paragraph 48. I'm proposing to do a pretty whistle stop tour of some points that Dr Coscelli makes, what the analysis is and what it isn't, if I can put it that way.

At paragraph 48, Dr Coscelli confirms that he's aware that Google has entered into agreements with MNOs, but he focuses on agreements with OEM and browser developers, given that these relate to the handset. So the MNO analysis isn't included, and at footnote 73, he notes that it's not an exhaustive list of the agreement types in the Google ecosystem.

At paragraph 52, page 1074, in the last sentence, he says:

"My current understanding is under that the new [form] EMADAs (differently from the earlier MADAs), the Search and Chrome apps are no longer directly tied to the licensing of the Play Store."

He doesn't then go on to analyse the impact of the EMADAs in the same way that Professor Scott Morton does.

Page 1076, paragraph 58, he analyses or at least addresses RSAs across a range of countries with OEMs, the Android RSA and third-party browsers, eg the Mozilla RSA. But that doesn't form any part of the Kaye pleaded case.

At page 1113 -- so I'm skipping forward quite substantially -- paragraph 149, in the last sentence it says:

"I have ... been instructed that I do not need to assess Google's conduct with respect to these matters for this period."

So he's not looking at the underlying Android conduct because he says he's instructed to take it as read from the Commission decision finding. So he's not introducing any separate analysis of that; he's simply saying, "This is a finding of liability and I don't need to review it any more". So he doesn't look at the Android infringing behaviour in the context of the other behaviour.

Page 1121, paragraph 169, he confirms he's not instructed to provide an opinion on conduct related to the MADAs and AFAs for the period between January 2011 and July 2018. He's not therefore undertaken such an assessment and he's not therefore proposing to look at the interaction between those, even post certification.

On the next page, page 171, halfway down that paragraph, he says:

"I intend to consider the effects of the AFAs post certification (eg the extent to which the AFAs prevented the emergence of alternative search [evidence])."

So again, this is an important facet of the Brook case that is being postponed for post-certification analysis, seemingly, by Dr Coscelli.

At page 1127, paragraph 186, having summarised the impact of the EU Commission decision, he says he intends to consider the likely effects and he identifies that:

"During the Relevant Period, Google's default agreements with OEMs foreclosed a substantial share of the general search services market by raising barriers to entry ..."

So, he's recognising that there was a foreclosure effect.

"In the absence of such agreements, Google would have faced stronger competitive constraints in the market for general search services."

So, that's consistent with the approach we've adopted. At footnote 248, he says:

"I understand that Google's ability to adopt non-infringing practices on placement and RSAs may, to some extent, have allowed it to make life harder for rivals in the counterfactual."

So just pausing there, two of the aspects that we focus on and which we allege are exclusionary conduct are expressly going to be stripped out from the counterfactual -- or seemingly going to be stripped out from the counterfactual because they're non-infringing practices -- on Dr Coscelli's approach, and to be dealt with in more detail post certification, notwithstanding he recognises they make life harder for rivals to enter, so he's not capturing the full extent of the harm.

Over the page at (b) and (c), he recognises under (b) that the ability to set auction mechanisms in order to extract greater revenues would be more limited in a more competitive counterfactual, ie the approach we've adopted of saying, "In the counterfactual, Google wouldn't have been able to get away with its intentional pricing practices" is something that Dr Coscelli recognises. And at subparagraph (c), page 1129, he recognises that:

"Advertisers' willingness to pay for Google may be lower [in the counterfactual] owing to it no longer being the primary way that advertisers can reach the vast majority of GSE users. Google's vast scale ... serves to increase the value of the platform for advertisers, which is then reflected in their [willingness to pay] via the Google auction."

So he's recognising the extent of the eyeballs -- the reach of the audience is a relevant factor, but of course, that then doesn't feature in the analysis that is subsequently adopted for his methodology.

At subparagraph (d), the top of page 1130, he also notes that in the counterfactual, the quality of search advertising return pages would improve with more organic results over paid adverts. So, he's recognising the quality impact but he has no methodology to assess that.

Then at paragraph 188, he identifies the overhang effect but again, that doesn't feature in his methodology.

At page 1143, paragraph 220, Dr Coscelli has recognised the impact -- see halfway down -- of RSAs and placement agreements. He says:

"These agreements provided financial incentives for manufacturers to pre-install and set Google Search as the default ... As such, my preliminary view ... is that even after the MADAs/AFAs were replaced by alternative agreements, Google still maintained a degree of market power and influence that would not have existed, absent the abusive conduct."

The problem is that the methodology he's proposed doesn't cover that, and indeed, it is not consistent with the pleaded case in relation to the Kaye claim, because they don't rely on the illegality of the RSAs and the placement agreements.

He also then, in 221, tellingly, assumes that the Apple ISA did exist in the counterfactual for the Android exclusionary claim. So, rather curiously, even though Mr Kaye does in fact impugn the Apple ISA, his expert is nonetheless including it in the counterfactual for the Android exclusionary claim which, with respect, makes no sense.

We then see at page 1146, paragraph 225(i) and (ii), that:

"With greater competition, [he recognises] the pursuit of higher-quality SERPs ... could drive a higher proportion of organic links ..."

So, with greater competition, quality could improve. And also he then says:

"With greater competition, search ad prices would be lower."

Those are the twin pincer effects that Professor Scott Morton puts at the centre of her analysis of loss but which the Kaye methodology, the Coscelli methodology, doesn't capture. And he recognises that those could pull in different directions in terms of the overall pricing impact. So obviously, if prices go down, that's an aspect. If quality increases, all other things equal, one might expect prices to go up. And there's no assessment capable under the Coscelli methodology of discerning which of those two countervailing factors would prevail or how they would interact, because quality simply isn't dealt with in those terms because he looks only at price and not at ROAS.

Instead, what Dr Coscelli does at 226 is simply assume that those two opposing forces would cancel each other out. That, I'm afraid, is not empirical analysis; that's simply an assumption. Professor Scott Morton's approach enables that assumption to be (a) both analysed and (b) quantified in terms of loss, because quality and price are two important aspects of the harm.

Now, the methodology that Dr Coscelli then alights upon starts really at paragraph 228. And as you've seen, he essentially says, "I'm going to look at instances of other examples where regulatory intervention in other countries has produced an impact on market share". The first one he alights on at 228 is Turkey, and then at 229 he looks at Russia. He then over the page starts assessing the Google share of the Russian mobile market before and after the remedies and so on, sees what the consequence was; plots them essentially, as I understand it, as a scatter graph.

He recognises at paragraph 233, page 1150, that this comparison is "imperfect and adjustments may be required to account for cross-country differences". One obvious cross-country difference will be market share, on his case, and one obvious cross-country difference could well be price. The other obvious cross-country difference is ROAS, which he doesn't cover. So the value to advertisers in these

different jurisdictions is simply not within the scope of the methodology.

At 236, he says he proposes to model the impact of regulatory interventions in Turkey, Russia and the EEA on market shares. The data he relies upon is summarised in ii. For Turkey, he has roughly five years of data to observe; for Russia, roughly five years; and for the EEA, three years. But the starting points for each of those data sets is different, and there is not a coextensive overlap in the data sets over time.

At footnote 311, he says:

"My approach of starting the index from September 2021 may serve to underestimate the true impact of the interventions following the EC Android Decision. On that basis, I consider this approach is conservative."

But of course, the problem with that when dealing with the EEA figures is that he may be understating the impact of regulatory involvement in the EEA on what would have happened in the counterfactual. So he may be understating the impact on the advertising class of the changes that were necessitated by the EC Android decision.

What we then see at page 1153 and figure 5.4 is, in a nutshell, the very strong influence of Turkey in particular on the overall analysis. It's not, with respect, clear to me how these averages were weighted; whether they were weighted by volume of end user traffic, by volume of advertising revenue. I'm simply not in a position to assist with that.

What happens is that that approach then, at subparagraph vi on page 1153, is applied specifically to Google's market share for search queries on Android mobile devices, which relates to 34 per cent of all UK general search queries. So he's basically extrapolating from what is principally the impact of Turkey's regulatory intervention on a likely counterfactual for market share only in the UK.

He specifically assumes a very high market share for Google on absolutely everything else, whereas our holistic approach chisels away at the different elements of the

Google ecosystem to produce a more realistic counterfactual.

What that means therefore, unsurprisingly perhaps, at page 1155, is that figure 5.5 doesn't really move the dial between the Android counterfactual and the actual in terms of market share. Because of the mechanistic approach to counterfactual pricing, the element of loss reflected in the decrease in market share in the counterfactual doesn't amount to very much, or compared to what it could be capturing if one had adopted a different approach based on viable competitive entry, driving down prices and increasing quality across the board.

Now, in contradistinction to that approach, if we then look at page 1161. (Pause)

At paragraph 253, he notes:

"Given Apple's ability to compete in general search services and the sizable share of Google's search queries being entered on search access points covered by the ISA, my preliminary view is that if Apple did launch its own GSC, it is likely that the adverse impact on Google would have been substantial."

It's that impact in the counterfactual that he's chosen to exclude from the Android analysis. So he's recognising that there's a significant anti-competitive impact as a result of the difference between the factual and counterfactual when Apple is considered. Rather than looking at this from the dynamic perspective, he's chosen simply to look at it from the static perspective.

That produces, see page 1162, lower market shares in the ISA counterfactual, because it's recognised to be a significant impact, but they all remain at or above 80 per cent in the counterfactual analysis. As I've indicated, that moves the dial only to the extent of saying that Google would potentially have sacrificed 10 per cent market share, and it has to proceed on the assumption that they wouldn't have responded to competitive threat by lowering prices or increasing quantity. Or if that is addressed, it's not apparent from the methodology that that can be disentangled from

the mechanistic market share analysis.

At page 1163, paragraph 259, he notes that, with respect to the Android exclusionary claim counterfactual, the idea that essentially there could be vigorous competitive entry and therefore more effective competitors -- he dismisses that as second order effects that are not incorporated into his counterfactual. So he's recognising this dynamic impact may take place, but he's not choosing to model for it or to deal with it.

What then happens at 1163 is he moves on to the proposed approach to estimating damages, and at 264 to 265 on the next page, he relies solely on a comparator based approach, and he says he does not intend to rely on structural models. He's going to adopt a comparator-based approach with "cross-country comparisons", "time series comparisons", and "within-country comparisons", at least in principle.

At paragraph 268, page 1166. Last sentence, he says:

"My preliminary view is ... that I will not need to control for quality differences when making cross-country comparisons."

But as we'll see, the relevant countries had different prices and different market shares. That's the whole point about his provisional regression analysis. He's trying to regress market share onto price. But if there are differences, those cross-country differences need to be explained. And he said: I'm simply going to assume that the quality differences for each of those countries is the same.

At paragraph 273, having said he would think about a before and after analysis within country, he's saying he does not intend to do a before and after analysis in the UK market.

He also, at 274, dismisses the relevance of Bing's pricing in this context. At 275 he says:

"[It's only] post-certification, and with the benefit of disclosure evidence I intend to also investigate the potential impacts on quality."

So he's expressly parking: not my problem at the moment; I'm going to deal with quality post-disclosure, post-certification. That, we say, is a very significant lacuna in the overall approach.

Now, what then happens is we have the regression analysis that so much of my learned friend's case now depends upon, it seems. The proposition I'm going to be advancing is that, with respect, this regression analysis (a) doesn't show very much; and (b) is significantly flawed.

At 277, the data for this -- it was initially 98 countries, seemingly it was stripped back to 30 -- but all of that data is a single event at a single point in time and it's an average CPC for a given year. So it's one pricing point, effectively, per year for 30 countries. It's for that reason, when we look at the table at page 1173, table 5.2, for reasons that I don't fully understand, the observations are 32, 32, 32, 31, 32, 32.

Seemingly, there are 30 countries. I'm not sure quite which countries being doubled up as an observation, but it is essentially between 30 and 32 data points that are being compared for variation purposes.

The hypothesis that is being tested at paragraph 279 back at page 1168 is that higher market shares in Google general search engine services lead to greater attractiveness to advertisers who then bid in greater density with higher prices and compete more fiercely, such that if you lose market share, the opposite happens and prices decrease. That's essentially what's being done.

What we see at footnote 334 on page 1169 is a statement to the following effect:

"I have not undertaken a detailed assessment of how Google's service quality compares to rivals and/or how its quality has evolved over time; I intend to consider such points post-certification."

He notes that the US court's opinion is to the effect that Google had itself served to degrade the quality of its text ads, but that isn't part of his case. Again, that is not

a lacuna that the Professor Scott Morton report suffers from.

We then come on to the regression analysis itself. Could we look at paragraph 283? The dependent variable is the CPC and the independent variable is the market share. Both of those are measured in natural logs. There's a series of control variables that are set out, but there's no indication of how either the CPC or the GDP variable have been adjusted by reference to the purchasing power parity, or PPP; it's just stated that they have been.

Paragraph 285, page 1172, confirms that it's a single data point for 2023 in some 30 countries, which were considered to be the most important. So to the extent that we're being criticised for having taken a data analysis reflecting conditions at a point in time in 2023 and then rolling it back, the same could be levelled back at using this regression analysis to work backwards to either conditions or effects that predated 2023.

Paragraph 285 also shows that in fact it's only 30 single data points that are therefore being used to chart a regression between the two. Table 5.2 shows the results. There's a number of results that are not statistically significant. In fact, only, I think maybe four or five results have three stars, but there are some results which have either not covered or simply aren't statistically significant. The favoured outcome, which is specification three, only has three explanatory variables:

Firstly, Google's market share; secondly GDP per capita; and thirdly, non-search related advertising spends per capita. Those are the three explanatory variables that are being relied upon.

Then if we see the correlation between GDP and CPC which is the second row down, but the third row down for the purposes of the statistical results that are being revealed, they're all negative. So in that third row down, starting with (2), (3), (4), (5), (6), for the different models that are being run, one sees that the correlation between GDP and

advertising spend is negative. In other words, the richer the country, the less you spend on advertising. That produces, I'm afraid, a fundamentally counterintuitive result. It strongly suggests that the model's mis-specified or that there's an omitted variable bias.

THE CHAIR: And what are we supposed to do with this, Mr Beal? Crack into all this detail and make a conclusion or what?

MR BEAL: Well, what I'm seeking to suggest --

THE CHAIR: This is way below the level of detail, you know, the extraordinary level of detail for a carriage dispute. I mean, we're looking for clear differentiators, and this sounds like sort of closing speech or cross-examination for Google at the trial, to be honest.

MR BEAL: Could I pass up a simplistic way of viewing it, which is that my --

THE CHAIR: Viewing what, the regression analysis?

MR BEAL: Yes. It's a scatter graph. If I could simply pass a scatter graph analysis. (Handed)

MR BREALEY: Obviously, we've never been put on notice of any of this. It could have been Scott Morton's witness statement 3 or --

THE CHAIR: Well, I mean, I was about to ask if there was evidence supporting these criticisms. I'm not saying they can't be made at some point, but it just seems like a ...

MR BEAL: So much weight has been put on this.

THE CHAIR: Yes, no, I understand that, but --

MR BEAL: It's said to be a proof of concept, right? If on a superficial analysis in the five minutes I've just been speaking on this topic -- if on the most superficial, rudimentary analysis, the regression analysis can be shown to be fundamentally flawed, then it's not proof of anything; it's proof of a bad concept.

THE CHAIR: Right.

MR BEAL: Therefore, it does go to which case should be preferred. This is a very straightforward way of putting it and I can make my criticisms of this regression analysis simply by reference to this picture. What we're charting here is the 32 observations as a scatter graph with residualised log CPC against residualised log market share.

One sees on the right-hand side a high degree of similarity between a number of the data points in relation to market share, spread over a much more varied CPC. They're all clustered on the right-hand side of the scatter graph. If those right-hand side data points were simply charted by themselves, then you would have a very different line showing the mean line between the various different data points, and therefore the low degree of variation, at least by reference to market share.

In contrast, when you add in the Russia, South Korea and Japan data points, you get a very different picture. And it's the Russia, South Korea and Japan data points that are driving the finding of variation. My point is that three out of 32 observations, in order to derive a purported correlation, is very difficult. If in fact you excluded those, and you simply drew the correlation by reference to market share, what that would show is that different market shares are capable of having very different price points.

So this is fundamentally inconsistent. If you strip out the outliers, it's fundamentally inconsistent with the central premise of the Kaye claim as advanced by Dr Coscelli.

But in any event, we then look at, paragraph 289, page 1174.

THE CHAIR: I'm a big believer in everything finding its place in the bundles.

MR BEAL: I'm sorry.

THE CHAIR: So in due course we'll put that at the back of your skeleton.

MR BEAL: Thank you very much.

THE CHAIR: So we all know where it is. That's okay.

MR BEAL: Top of page 1174, paragraph 289. We see:

"This suggests that the regression model is effective in showing that the independent variables collectively have explanatory power. Moreover, it also shows that Google's share of search traffic alone is insufficient to meaningfully explain the variation in the CPC value."

So none of this actually goes to prove the fundamental premise that Dr Coscelli relies upon, that there is a causative link between decreases in market share and decreases in price. Essentially, the lack of variation and the impact of the outliers produces a different result.

There's a more fundamental point, which is the theoretical one, which I'm afraid is theoretical in terms of regression analysis, which is: regressing price on market share is conceptually flawed. That's because of endogeneity. Because market shares are determined by cost, consumer demand and firm pricing strategies, you are necessarily building in a measure of one against the other, where there's an element that has already been included. It gives rise to the risk of reverse causality as well.

The trouble is that using market shares, therefore, to predict price becomes circular, because they're essentially a substantial part -- a product of the price. This type of regression has been discouraged by economic literature in the industrial organisation sphere since the 1970s.

But even if I'm wrong on all of that, taken at its highest, what does this show? It shows a correlation between some data points and not causation. So you can't infer from this that higher market shares cause higher costs for advertisers, because it would be open to a search engine advertiser to have a high market share but to keep track of a competitor's price. There is no proxy between market share and the price that must necessarily be charged by the advertiser.

So my point is that this regression analysis is a very little evidential weight. It suffers from deeply flawed concepts. It's also wrong, in my respectful submission, to say that

an estimation of market shares is fundamental to any claim for damages. It's not fundamental to our claim for damages.

The estimation of market share is only fundamental to the Kaye case because it chooses, mechanistically, to equate market share with market power and market share with pricing. What we don't see in Dr Coscelli's report actually is the very thing that we're accused of not producing, which is an indication of what the counterfactual market shares would be. Dr Coscelli nowhere says Amazon would get 5 per cent, Meta would get 5 per cent, Apple would get 20 per cent, therefore the market share is this. So what we're accused of not doing is something that actually Dr Coscelli hasn't done. Coupled with the fact that this regression analysis --

MR DAVIES: He does have a counterfactual market share for Google though, doesn't he? That was derived from the Turkey analysis.

MR BEAL: He does, he takes it to 80 per cent.

MR DAVIES: Yes.

MR BEAL: The only point I'm dealing with is it was said against us: Well, you should have worked out what you thought Apple and others would get. He said what the counterfactual market share would be on his inference from the three jurisdictions he's looked at. It takes it from 90 per cent to 80 per cent. He has not speculated what the market share for the others would be. And that's something we're accused of not having done, but my point is he hasn't done that either.

MR DAVIES: I thought you were accused of not having worked out what Google's market share would be in the counterfactual. Am I wrong about that? I hadn't realised that the issue was about the third players in the market, the other players in the market.

MR BEAL: That's because we haven't stipulated what the market shares would be full-stop. If I've got that wrong, I apologise, but just dealing with this point, of course, the market share is, as we've seen, driven by the Turkey analysis, the Turkey market

share post regulation was 30 per cent below. So if that's right, and if Turkey is the main driver of this analysis, then it means actually the estimated market share drop should be three times more than what it is.

MR DAVIES: Sorry, It wasn't Turkey, was it, it was the average of the comparators.

MR BEAL: No, but my point is Turkey was the statistic that dropped it down.

MR DAVIES: You're saying it should be Turkey, rather than the average of the three.

MR BEAL: Yes. If one were taking Turkey then the counterfactual market share drops to 60 per cent. That's my point. And therefore you've understated the available claims for damages, the loss, by threefold. Again, that's left on the table.

THE CHAIR: If it should have only been Turkey?

MR BEAL: No. I'm not suggesting it should only be Turkey. This is a critique of the internal reasoning of Dr Coscelli's regression analysis.

MR DAVIES: The estimation of the market share; that's --

MR BEAL: No, that's quite right.

MR DAVIES: It combines the two. This tells you how much price you get for a market share drop and the comparison with not just Turkey but three, it tells you how much the market share drop is.

MR BEAL: But if what we're relying on empirically is essentially just the figures for Turkey, then my point is: your estimate of loss should have been three times higher. Because the market share counterfactual is 60 rather than 80. Consequently, that feeds in mechanistically to price, and the prices would have been, for those who switched, three times lower.

MR DAVIES: Yes.

MR BEAL: My final point really on exclusionary is that another thing we're accused of is failing to identify individual counterfactuals for individual elements of the exclusionary conduct. Can I simply leave for you the following reference to the

Ad Tech case in the bundle of authorities, tab 18, starting at page 1118, and the points dealt with on paper 1127, electronically 1135, and, in particular, paragraphs 18 to 25, where the CAT in Ad Tech said, contrary to Google's submission in that case, you don't need to have a separate counterfactual pleaded for each separate head of abuse that you're relying upon. The claim in that case had been sufficiently pleaded, and it was important to determine what the working conditions of competition would be in the counterfactual that didn't necessarily involve splicing each individual abuse separately and coming up with a counterfactual for each of them.

So that's simply a legal response to the allegation that we haven't done something we should have done. As it happens, the methodology deployed by Professor Scott Morton makes clear that the methodology is sensitive to the outcome, not being the full suite of abuses, you can calibrate it accordingly.

There are two further points before I sit down. One is you asked me about the Le Patourel and the certification. Could I please pass that up. (Handed)

So the first thing to note is on page 1, this is a September 2021 judgment, and there has obviously been developments in the case law since. That's the first caveat. The second caveat is that there was more to the BT case, arguably, than a pure standalone case, because BT had been told to reduce its prices by Ofcom and it had done so. So one of the comparator data points available for the abuse case was: Well, you were charging this before with the same costs as you charge subsequently.

Similarly with quality, of course, the quality of the service hasn't changed, but you're still able to charge less than you were charging previously.

Paragraph 42, page 18. This is summarising Mr Parker's evidence at this stage, where he had identified possible benchmarks to the cost-plus approach. And he said the 2009 price itself, that had been directed by Ofcom, was itself, in substance, a cost price approach. Paragraph 43 then says:

"In his assessment as to whether BT's prices were excessive, he said that the relevant test was whether the relevant prices were 'significantly' and 'persistently' above the competitive benchmark. He considered that they were. He went on to reject the presence of any countervailing factors, such as 'competitive rebalancing', with other services provided by BT."

Now, the learned judge then recognises in 44 that his conclusions are framed in terms of excessive rather than unfair.

"However, it is clear to us that Mr Parker had in mind the need to address both limbs of the United Brands test at paragraph 252, rather than focusing solely on the first limb notion of excessive price."

He then explains why he had looked at whether or not the price bore a reasonable relationship to economic value, and then, at 45:

"On any fair reading, it is clear that Mr Parker was concluding that BT's prices fell foul of both the first and second limbs of the United Brands test."

And there's then some findings set out at the top of the next page, which recites some of the relevant expert evidence and how that's factored in.

Then, at 47:

"In our judgment, and subject to our evaluation of 6 Objections ..."

So these objections have come in from BT in the course of a certification application, with a reverse summary judgment application being made, six objections voiced by BT, but nonetheless, prior to an evaluation of those objections, Mr Parker's evidence had at least established "a prima facie case for abuse."

Now, it's true that when coming on to deal with the individual objections, i.e. a formulated BT response, further thought is given to the limb 2 analysis. That's at page 30. And the argument is made essentially that you've been collapsing the limb 1 analysis back into the limb 2 and therefore you're essentially using the same

methodology for both. But, in fact, what that boiled down to was not that the same methodology was used for both, but the same benchmark price was used in respect of both limbs, and the CAT noted, at 84, the PCR agreed that there were two limbs under United Brands, both of which must be satisfied. But it's consensus is it's a non-sequitur to then say that a single benchmark cannot, in the appropriate case, be used in relation to both limbs. So that's a question of what does the benchmark tell you. Which is why I started by saying the case was unusual because within one dominant undertaking you had two separate prices, both of which had the same underlying cost bucket behind them, and both of which reflected the same quality of the service. So you've got an internal comparator, before and after pricing, based on a regulatory intervention. And that seems to have carried the day.

In particular, paragraph 87, it's thus clear that Mr Parker had in fact addressed both limbs, limb 1 and limb 2. I don't read that decision as saying you can in fact collapse limb 1 into limb 2. I think it's saying the opposite. Even if it weren't saying the opposite, we now know from the clarified case law that you can't simply collapse limb 1 into limb 2.

What this doesn't suggest is that you can simply have cost-plus by itself, and that's enough. I'm not sure we draw an awful lot more from it.

THE CHAIR: No, equally, it doesn't do value as such. That was my question this morning.

MR BEAL: No. Because if value is the --

THE CHAIR: Your submission is this shows you've got to have something to satisfy limb 2.

MR BEAL: Yes.

THE CHAIR: And you can't just say because I win on limb 1 I win on limb 2. Your point is that they had the whatever year it was, the 2009 price, and so then, as you

say, within the same dominant undertaking, you can see whether it's unfair from that, but the case was certified without a value assessment having to be done to satisfy limb 2.

MR BEAL: Well, it's true that they didn't explore, seemingly at this stage, the gives, which then featured heavily in the subsequent decision, or indeed brand value. My point is where, as here, you don't have the benefit of a regulatory intervention saying your price must be X, you don't have the benefit of that additional piece of evidence, and you do know economic value is important, you do need to cover it, because that's what the Court of Appeal has said on several occasions. You need somewhere either in limb 1 or limb 2, to address whether or not the prices bear reasonable proportion to the true value. And if there's no methodology for that, then that is a lacuna. I've taken you through Dr Coscelli's report where he says, I'm not going to do that until post certification.

THE CHAIR: Right. But it bears on the "not my problem" line of thinking, doesn't it? Because what couldn't be said of the class representative here is that they'd say "it's not my problem", I just can ignore limb 2. They had a solution, but it wasn't prescriptive in terms of how that could be satisfied.

MR BEAL: No.

THE CHAIR: The Tribunal didn't say you've got to do it through value, and I guess value came in between the certification and the substantive decision because BT raised it.

MR BEAL: BT was seeking to justify the price differential.

THE CHAIR: Through the gives.

MR BEAL: Yes, through gives and brand value. But that was in the context of Mr Parker's report having been found on analysis to satisfy both limb 1 and limb 2.

THE CHAIR: But this suggests it's not illegitimate for the class representative to say

I can satisfy limb 2 with this, whatever it may be, but it's not value, and for then value to be factored in when the dominant undertaking raises it as a defence.

MR BEAL: Well, with respect, I'm not sure that the second point would apply here for the simple reason that it's evident that we're not in a situation like BT, where there was a before and after price comparison for the same service.

THE CHAIR: There may be other means by which --

MR BEAL: But they haven't been identified.

THE CHAIR: Well, I think that's in contention between you.

MR BEAL: And on any view --

THE CHAIR: It can be done through value anyway.

MR BEAL: Well, there is no analysis of how quality or economic value will be dealt with in the methodology. And my legal submission to this Tribunal is that that's an error of law for the reason identified in Gormsen, which is you need to show a blueprint to trial which has a methodology that's capable of dealing with the issues. In circumstances where this class representative has not pleaded a before and after price as a basis for unfairness, this class representative has pleaded expressly that the prices can't be justified by economic value considerations, and that the price paid bears no reasonable relation to the value of the service. So they've adopted and born an obligation to plead and prove the economic value issue. And, by the way, that's entirely consistent and appropriate given the direction from the Court of Appeal post Phenytoin in Le Patourel and the approach in Le Patourel that you simply can't ignore economic value.

THE CHAIR: Yes.

MR BEAL: The final point, and then I will --

THE CHAIR: So we'll put that right at the very back of the authorities then.

MR BEAL: Thank you.

Can I just deal with the issue of Hausfeld. My understanding is that they are taking instructions on the observations that have been made, but that's as much as I can say. I'm getting from Ms Jukes at the back.

THE CHAIR: Right.

MR BEAL: Unless I can assist any further, those are our submissions on what we say are the core points. I've reflected on the limitation point; I'm not proposing to say anything more on the class definition point. We rely on our skeleton. The short point is they've chosen to nail their colours to the tax mast. In particular, they say in paragraph 58, subparagraph c, I think, of their claim that Google will be able to work out who's in the class by virtue of the tax they've paid for digital service tax purposes, and the definition of who has to be paying the tax are UK users who are domiciled in the UK. And so you don't pay the tax on adverts that are seen abroad. There's a scheme in the taxing statute for splitting on a proportionate basis, the volume of effectively the volume of eyeballs in the UK and the volume of eyeballs elsewhere. That's the way they've chosen to do it. The reason I'm not going to town on that is for the obvious reason that you, sir, have made it clear that they can amend in due course. I hope that helps.

Reply submissions by MR BREALEY

MR BREALEY: So, a few points by way of reply. I'll start with the exclusionary.

THE CHAIR: Yes, just as you please. Yes.

MR BREALEY: Yes. I don't know whether the Tribunal has the transcript from yesterday? If not, I can just give you the references. Just so you know, I'm going to just deal with six points. There's no implementation of any methodology; the second point is extrapolation backwards; the third point is market entry; fourth point is dynamic pricing and market power; the fifth point is quality; and the sixth point is regression. Those are, I think, the six points that I highlighted by way of reply. So, no

implementation, extrapolation, market entry, dynamic pricing, quality and regression. I don't know if the Tribunal does have the transcript?

THE CHAIR: I'm afraid I received it (overspeaking)

MR BREALEY: Doesn't particularly -- I can just give you the references.

THE CHAIR: Yes.

MR BREALEY: But I think it is important for the Tribunal to note that Brook has said that there is no implementation of any methodology. So, at page 101 from yesterday: "[It's true] that [the] overcharge is not derived from the methodologies."

That's what he said, page 101.

Page 104, he said:

"[The bid to price ratio] was never intended to be an implementation of the methodology."

101 and 104. Page 108, again:

"[The overcharge] is not an implementation of a methodology."

At at least three points, it was said yesterday, overcharge calculation, the 9 and 17 per cent, is not an implementation of any (inaudible). Moreover, it was also said that section 7 is not concerned with any actual loss at page 101. Page 109, again, it is said section 7 is "not ... determine what the actual loss is".

Right. Now, why am I mentioning that? For two reasons. Essentially, there is no real way of knowing whether the exclusionary claim is worth more than £3 billion. It is said that it's worth five and nine; he really doesn't know whether it's lower or higher or equal to our £3 billion. Secondly, there's no real way of knowing whether their exclusionary claim is less than our exploitative, which is £12 billion. So, if you come to the Tribunal and say, "Well, we haven't implemented the methodology, and actually, the damages we're claiming is not reflective of actual loss", the question is whether they can really say that their exclusionary claim is higher than our exclusionary claim, or it's broadly

the same as our exploitative. There's an issue of robustness there.

THE CHAIR: Okay.

MR BREALEY: That's the first point. On the second point, by way of reply, the extrapolation backwards. Again, this was -- Mr Beal was asked a question yesterday, and the exchange is at pages 102 to 103.

THE CHAIR: Yes.

MR BREALEY: I won't go through it, but when the Tribunal sees those pages, Mr Beal goes back to 2008 and 2009, it gives a Verizon agreement, but everything that Mr Beal referred to was 2008 2009. That is odd because it doesn't really address extrapolating backwards in the way that we submitted. It doesn't actually say how the Android conduct from 2011 onwards could cause any practice in 2008. So, my point is, you're referring to 2008 and 2009, so the Android unlawful practices can't cause any practice in 2008. More fundamentally, there's no allegation that any of these practices in 2008 and 2009 are unlawful.

THE CHAIR: Yes.

MR BREALEY: The claim starts on 1 January 2000(?). You can't just say, "Everything that happened in 2008, 2009, 2010 is unlawful". It's got to be stripped out. So that's the second point by way of reply as from yesterday.

The third point is a very simple point. A lot of talk was made of market entry. I just want to emphasise the point that even if there was market entry and, for example, there were one or two new players in the market, it would still be an oligopoly. As I've shown on that table, the green table, Lord Justice Green in Liothyronine says that oligopolistic pricing does not reflect competitive pricing. So, even if there was one -- I mean, Bing has, for example, has got to go from 4 per cent to something pretty significant. Even if Bing did -- and I remind the Tribunal of, I mentioned it yesterday, footnote 709 of Scott Morton's report -- she says there that, you know, Apple could

take many, many years to come to market. So even if there was one extra player or two extra players, you would still end up with a very tight oligopolistic market. And if you adopt what Lord Justice Green said in Liothyronine, you're still not going to get to a competitive price. Therefore, the exploitative claim will still capture everything below that oligopoly. That's the importance of the exploitative. That's the third point.

The fourth point: it was said time and time again that Dr Coscelli doesn't deal with dynamic pricing and ignores market power. That is just wrong. Rather than go through it, I'll give you the paragraph numbers of Coscelli where he deals with dynamic pricing. That is paragraph 239 and 254. He is accepting that there could be dynamic pricing and he would have to look at that.

THE CHAIR: Just give us one -- since there's only a couple of paragraphs, we'll just have a quick look.

MR BREALEY: So the 239 is at C/1155.

THE CHAIR: Yes.

MR BREALEY: And what he's doing there at 239 is he's saying his estimate is conservative firstly because of the EEA, Turkey, and then secondly:

"The market share lost by Google in the counterfactual ... This would increase the scale and corresponding quality of rival GSEs, which would increase the competitive intensity ..."

THE CHAIR: I'm sorry to interrupt, but in a nutshell what you're saying is it's preserved there as something that he will do, but it isn't in at the moment?

MR BREALEY: Correct. And he says, the last sentence is:

"Post-certification, I intend to explore this potential ... effect."

And the same is made at 254 about the --

THE CHAIR: Yes. I mean, there may not be anything between you because I think it might be that Mr Beal's criticism is it's not in now, but it's not out forever. And the

middle ground is it's not out forever, but it's not in now. So -- all right.

MR BREALEY: Can I just give you -- and also this distinction between market power and market share. Clearly there can be a difference between market power and market share. But to say that Dr Coscelli ignores market power -- for the transcript, it is at paragraph 220, 283, 301, 307, 317, 349 and 357 -- he repeatedly refers to market power. Constantly refers to market power.

THE CHAIR: Okay.

MR BREALEY: The fifth point that I just want to make by way of reply on the exclusionary is this notion that even on the exclusionary claim, Dr Coscelli ignores quality. And again, that is just simply wrong. And we dealt with this in our responsive submissions at paragraph 64(a). And he deals with this at paragraph 280 and 283. It's the 283 that deals with the regression analysis. In that paragraph 283, you see references to market power and you see a reference to the average click through rate and the average conversion rate, CBR. So, to say that Dr Coscelli is not concerned with quality is just simply wrong. (Inaudible) regression analysis is examining quality. The last point on the regression: the only evidence that you have is from Dr Coscelli. You haven't got any evidence from Professor Scott Morton. You've essentially been bounced into this table.

THE CHAIR: You mean this?

MR BREALEY: Yes. I'm sure we'd have something to say had it been given to us in good time. Can I then turn to -- unless the Tribunal has any questions on the exclusionary, can I turn to the exploitative.

THE CHAIR: Yes, please.

MR BREALEY: It is said that we don't make any account for any economic value. Again, that is just plainly wrong. And I do need to just show the Tribunal why this is so wrong. Can we go to Phenytoin first.

THE CHAIR: Okay.

MR BREALEY: That is the authorities bundle volume 1.

THE CHAIR: Yes.

MR BREALEY: It's tab 7, and I simply do not agree with Mr Beal on the law. So again, the principles, 97, which is at page 299.

THE CHAIR: Sorry --

MR BREALEY: Sorry, this is Phenytoin.

THE CHAIR: Yes.

MR BREALEY: Authorities bundle 1 and it's paragraph 97 on page 299. We did look at this, but it's important.

THE CHAIR: Yes.

MR BREALEY: Lord Justice Green -- and he hasn't, in any of the other cases, departed from these principles. But 97, just above G, you see where Lord Justice Green refers to the cost-plus ROCE.

My Lord, you asked a question of Mr Beal about, well, is value also a question for Google? And the answer to that is over the page in (vii), where Lord Justice Green is saying:

"If a competition authority [or a claimant] chooses one method (eg cost-plus) and one value of evidence and the defendant undertaking does not induce other methods or evidence, the competition authority [can] proceed to a conclusion upon the basis of that method."

So, just on its most basic, the Kaye claim could say excessive pricing. And then if Google doesn't come back and say, "Well, what about value?" You can continue with the excessive pricing case. Because to a certain extent there is an evidential burden on Google to say, "Well, value".

THE CHAIR: Sorry, are you saying that -- I'm sure Lord Justice Green didn't intend

any tension between them, but at (i), he says that it's got to be "unfair", and then (ii) "excessive", which bears no "'reasonable' relation to ... value" is unfair.

Then (vii), he's saying if one method is chosen, and the defendant doesn't come back with any other dimension to the team, then you can just stick with whatever the competition authority's chosen.

MR BEAL: Yes.

THE CHAIR: But you're not saying that excessive on its own is enough?

MR BREALEY: It can be right.

THE CHAIR: Right.

MR BREALEY: That is the difference. I mean, we saw that yesterday in Phenytoin and in Liothyronine.

THE CHAIR: Right.

MR BREALEY: Can be.

THE CHAIR: Okay.

MR BREALEY: Those are the principles. I mean, we can go -- I can --

THE CHAIR: No, I'm just working my way through this. But it's not realistic in the circumstances of this case if the Kaye claim is given carriage and then certified, but it's not realistic that Google will say that's enough, is it?

MR BREALEY: No, and I'm going to come on to other aspects of it, but this is a question of law. Could you say, come to court and say: well, these prices, the profit margin is off the scale, and I leave it at that.

If Google was not to say: well, okay, they're high, but you've calculated the direct cost wrong, and it doesn't say, well, anything about value, then as a matter of law you would not get into value, because the excessive pricing can encompass any value that is attributed.

THE CHAIR: All right. Okay.

MR BREALEY: As a matter of law. Those are the principles. That's why I emphasised yesterday cost-plus, we saw those in the two paragraphs. So just two from the note, it is a paragraph 172 of Phenytoin, 172. And in Liothyronine, it's paragraph 77 and paragraph 199.

THE CHAIR: Okay. Right.

MR BREALEY: So I mean just to name -- and I'm going to come on to other aspects, but Lord Justice Green, at paragraph 77 of Liothyronine says:

"Cost Plus, is a valid and sufficient way of establishing whether prices are 'fair' and, to this extent, can be said to reflect those which would be generated in a sufficiently effective, workably competitive market."

THE CHAIR: This is your -- just give me the reference again.

MR BREALEY: Yes, sorry. Yes. So it's Liothyronine, authorities bundle 4, tab 29.

THE CHAIR: Yes.

MR BREALEY: It's paragraph 77.

THE CHAIR: Yes.

MR BREALEY: 2104. It's at the end:

"Cost Plus is a valid and sufficient way ..."

Also 199:

"The acceptance of Cost Plus as a test has been acknowledged in jurisprudence for nearly 50 years as providing accurate evidence pricing in a workably competitive market."

THE CHAIR: Yes.

MR BREALEY: And he says:

"That case law cannot now be gainsaid."

THE CHAIR: Yes. (Pause)

It just seems rather remote from this case, because you're not just doing it -- I don't

think it's your case that you're just doing it from cost-plus.

MR BREALEY: It's not, but that is just kind of the starter.

THE CHAIR: Right.

MR BREALEY: But it is also -- Mr Beal referred to: well, we don't have anything to do with brand. Now, that will be encompassed to a large extent in the cost-plus methodology.

We didn't go to it yesterday, but I think the Tribunal does need to see this. If one goes to the digital, so that's volume 6 of the authorities bundle, it's tab 52. We didn't go through this yesterday, but to the digital reporting study, there was an appendix D, and that's tab 52 of the authorities bundle.

It's important to see what one is doing in the cost-plus test. So again, I know we've got time, but if we go for example to page 3725, at the top of paragraph 53. This is the CMA's:

"Our approach to analysing the profitability of Google Search."

Then it's going to just above 55, you see, "Revenues and direct costs". This is how the CMA always does it's cost-plus. Then over the page you're looking at indirect costs.

Then at page 3728, you will see asset-based base assumptions where the competition authority's estimating the asset base:

"In estimating the value of the asset base which directly relates to search we use publicly available information ... Our assumption for the asset value of search reflects all of Alphabet's fixed assets with the exception of goodwill relating to businesses which are not engaged in activities relating to search."

What will happen in limb 1 when you're looking at the cost-plus, you will be looking at the value of the intellectual property rights; you'll be looking at the value of this; you'll be looking at the value of that; and then coming up with a cost-plus conclusion.

But the notion that you're not looking at intangible value, you're not looking at goodwill -- and goodwill is brand -- that is part and parcel of the cost-plus. But it goes beyond that, because we do know -- we've seen this many, many times now -- that at paragraph 347 of his report, in limb 2, "Unfairness", Dr Coscelli is looking at quality. That's at HB-C/1195.

We've seen this already, but he will be looking at whether pricing is unfair because of a reduction in the level of quality. This is going to be an examination. (Pause)

So that's specifically there. (Pause)

Yes. I know it's late, but also paragraph 348, 350 and 351 is relevant. Dr Coscelli does not misunderstand anything. If one remembers, I refer -- I won't go back to it -- in Phenytoin, at paragraphs 172 and 173, Lord Justice Green was referring to economic value and willingness to pay. If profits are so excessive, then it's likely that value is going to be encompassed.

These paragraphs are concerned with that willingness to pay fallacy. In other words, if the prices are excessive -- let's assume they're excessive -- and the customer has no real ability to switch, hasn't really got an alternative, Lord Justice Green in paragraph 173 of Phenytoin, and in Le Patourel, is saying: well, you won't need much evidence of value because value is going to be encompassed in the excessive pricing. That's what these paragraphs are capturing. Is there going to be a huge debate about economic value if prices are excessive and the customer doesn't have great scope to switch? That is what 348, 349, 350 is talking about.

So if one looks at 348:

"Furthermore ... it is likely that at least some advertisers see Google as an unavoidable trading partner ... unable to shift all (or a large proportion) of their advertising spend onto a different platform."

We see this again -- I hesitate to go to more documents ...

That is the evidence of Dr Coscelli, that there is very little switching. That was also the evidence that the advertisers gave the CMA. I can give you the reference to this; this is again the digital marketing report, appendix Q at tab 54. Appendix Q is "exploitation of market power", on which we rely.

The advertisers at paragraph 107 complained about Google's practices that exploited the market power, increasing the prices. At 109, the CMA says:

"Given Google's market power in search, all advertisers raising these concerns [these price increases] also submitted they had little choice to advertise on alternative platforms despite these issues severely impacting their businesses.

This is going to be a question of fact. I doubt whether Google are even going to take it on certification. This will be a question of fact as to alternatives, and the fact that advertisers are paying, does that mean that they're getting value? Just for the Tribunal's note, this was the sense of paragraph 90 in Le Patourel.

For the Tribunal's note, this is paragraph 34 and paragraph 90, which talks about economic value. That's what the Tribunal was concerned with: this judgment, this willingness to pay, whether the claimants there had any alternative, and BT said they did have alternative. BT was saying: well, they did have alternative; they stayed with BT; therefore, what they paid must have been reflective of value. That was the argument. Try to strike it out on that basis, and the Tribunal certified it (Inaudible) really is not a matter for certification, and fanciful or not that's got to be dealt with at trial.

Paragraph 90 of Le Patourel has got everything to do with what Lord Justice Green said about willingness to pay, switching. Again, you can be dominant and people can still switch; the fact that you're dominant doesn't mean you've got 100 per cent. So the more you've got an alternative, but you still stay there and pay, then you then there is an inference that you might find there is some value there. If you don't -- if you

haven't got any alternative -- then the evidence of value may be less.

But that is a question of fact. But the fact that Brook said that Dr Coscelli kind of ignores concerns about value there.

I would also remind the Tribunal -- we've made this point before -- that he does look at value. So for example, if we go to paragraph 311, 315 and 316 of his report, he talks about the pricing analysis. The question here is: is Dr Coscelli referring at all to value. The cost per click to a certain extent is an indication of value, but the more important point is at 315.

315 and 316, the CPC is the cost per click, which is a revenue -- it's what the advertiser is paying, but the CPA is the conversion rate. What actually -- how the advertisement is translating into a successful outcome, and whether it is giving value. (Pause)

Whether it's in the exclusionary order or in the exploitative, value is always being considered.

That's the first point on exploitative. I'm going to be about five minutes, so maybe I can finish before.

THE CHAIR: Why don't you finish five minutes? Because then we need to take stock of what else we have to do in the time for that. So why don't you conclude it, and then we'll take the break.

MR BREALEY: Can I go then to paragraph 347, because there's a second point. I just want to address certain conceptual issues that Mr Beal made about stripping out pricing conduct, stripping out the exclusionary abuses. Now, paragraph 347, this is in the context of exploitative unfair practice, whether it is unfair. We saw the five examples, one of which is the pricing. If we just go over to (iv) and (v).

THE CHAIR: Yes.

MR BREALEY: (iv) is the pricing, and the first one is the exclusionary conduct. The simple point about an exploitative claim is you don't have to strip out anything; you are

looking at the real world; you are looking at what actually happened. You ask yourself the question: does the company have (Inaudible) market power? How is it exercised that market power?

Point number 1, it entered into certain exclusionary conduct. If that increased prices, well, that is an exclusionary practice, but it's also an exploitative practice. So the two would overlap.

The pricing, series of pricing, which is said to be it's not just a question of market power, as Mr Beal said, it's actually Dr Coscelli who's saying that the pricing conduct also caused harm. That's how you get such a big margin between the ROCE and the WACC; it happens somehow. So the significant margin, the significant profits are because of the pricing practices.

I need to deal with the point, and I can give you the references. Mr Beal went to our pleading where, in paragraph 166, we list a series of pricing practices.

MR BEAL: Yes.

MR BREALEY: Then we say we don't have to show that they are individually abusive, but taken together they have led to a net effect of an unfair price at various times. But in the exploitative, you don't have to prove that each individual mechanism was abusive. If you're looking at it on more holistic basis, a combination of them has led to an unfair charge -- an unfair cost. Otherwise, you would be -- if there were 500 pricing practices, you would need to prove 500 uses. You don't have to do that; you're looking at whether Google exploited its market power by certain mechanisms, which increase price, which led to excessive profits and a supracompetitive price. That is what Dr Coscelli has done. So as a matter of law, in an exploitative case, you don't have to exclude or strip away anything. Looking at what has (several inaudible words) and the abuse is the unfair net price.

THE CHAIR: Yes. I mean, this is the most fundamental point that divides you, I think,

on the exploitative case.

MR BREALEY: That's why I'm addressing it. But Mr Beal can't -- if you have 100 practices which have led to a supracompetitive price, the question is, do you have to show that those 100 practices individually are abusive? (Inaudible) an unfair -- you're looking at the net cost. You're looking at the cost at the end of the day.

THE CHAIR: Right.

MR BREALEY: Therefore, the section 18 is looking at what you have actually paid and whether that is excessive, whether that is supracompetitive (inaudible).

THE CHAIR: Right. You're not alleging that they're collectively abusive, I don't think, in the sense of exclusionary.

MR BREALEY: (Inaudible) unfair.

THE CHAIR: You're not saying -- yes, but you're not saying that you show that they're abusive in the exclusionary context, if I can say that.

MR BREALEY: Oh no, in the exclusionary -- no, we're not. In the exclusionary --

THE CHAIR: Neither individually or collectively, you're saying that they do factor in regardless of their individual or collective status as abuses because they lead to an unfair price at the end of the day.

MR BREALEY: Yes.

THE CHAIR: But this seems to be just the most top of the pops of the biggest analytical point that divides you about how we should look at this.

MR BREALEY: Yes. And you can have a series of practices which lead to an unfair price. You may lose -- you know, Google may say, "Well, actually, that price gave you value; take it out". But you've got to look at it in a more holistic basis. The test is whether the price that you are paying is unfair.

THE CHAIR: Okay. Right. Thank you.

MR BREALEY: And then lastly, on the 20 per cent figure, well, all I say on that is that

the Tribunal was not laying down any guidelines as to whether a 20 per cent overcharge is good (several inaudible words) find the Tribunal that Dr Coscelli has advanced a conservative 25 per cent. And it is conservative, and I give the reference and that's paragraph 386 and 337. He has said that even at a 25 per cent overcharge, in fact they're still earning significant (inaudible).

THE CHAIR: Yes.

MR BREALEY: So that would again have to be teased out later on, saying that 25 per cent looks conservative when you're looking at the profits that they actually made.

THE CHAIR: Right. Okay.

MR BREALEY: Those are -- and as I ...

THE CHAIR: Yes. If you could let us have your side's view of the wisdom or otherwise of trying to find out what the Stopford party thinks, that would be helpful. You don't have to do it now --

MR BREALEY: I did discuss this at lunch, and I don't know what the answer is. Do we know what the answer is?

THE CHAIR: No, okay, well, you can tell us after the break. Then after the break, we'll also go back to the agenda and just check what we still need to do.

(3.27 pm)

(A short break)

(3.37 pm)

Reply submissions by MR BEAL

THE CHAIR: Yes.

MR BEAL: Might I be permitted, please, just five extremely short responsive points, because the order of batting was suggested by the Tribunal.

THE CHAIR: Okay.

MR BEAL: Firstly, oligopolistic pricing is not unlawful, even with conscious parallelism. That's the first point.

The second point is that the click-through rate or the conversion rate is a measure of cost, not quality. Indeed, it was treated as a control variable in the regression conducted by Dr Coscelli so that its effect could be taken out of the equation. You treat as a control variable something that you want to not have an effect.

Next point is the suggestion that you don't --

THE CHAIR: Cost not quality?

MR BEAL: Cost not quality.

THE CHAIR: Right.

MR BEAL: And to confirm that, if it were relevant to an analysis of the relevant impact on price versus market share or, if quality were being taken into account, it wouldn't have been treated as a control variable.

THE CHAIR: I understand that point, but the other side, the control variable --

MR BEAL: Well, it's --

THE CHAIR: Why does it tell you something about quality just in terms of what it is?

MR BEAL: Because the click-through rate and the conversion rate don't tell you what the advertiser values the service.

THE CHAIR: No, it's not an ROAS, I understand that.

MR BEAL: I mean, that's the point.

THE CHAIR: But it's a little bit more quality than cost per click.

MR BEAL: Well, you've got cost per click, you've got cost per action, both of which are pure costs, neither of which tell you anything about what the advertiser actually values the service it's receiving as. What one's seeking to do with value is, subjectively or objectively, work out what value the advertiser attributes to the service it's receiving. That's the ambition. To what extent are they willing to pay more because they value

the quality of the service they're receiving? You can have a situation in which an advertiser is paying a price, but actually values the service more highly, for example. So, the analysis of what does the advertiser value this service as necessarily has to look at subjective and objective characteristics. The case law, Le Patourel as an example, says you have to consider what value the consumer places on the services being received, even if objectively you think they're a bit mad for paying as much as they are willing to pay.

THE CHAIR: Okay.

MR BEAL: And there are plenty of product markets -- I won't name and shame any -- where people pay more than probably you or I would pay for a good or service. The next point was going to be to invite you to look at cases 1 to 3 as dealt with in Phenytoin 2 which, rather than looking at consumer surplus and what does the consumer value a particular good or service at, looks at the producer surplus and says you need to explain producer surplus in an excessive pricing case. And the three cases, one of which they are providing a product with distinctive value, and one of which is they're providing a product with no distinctive value whatsoever. The difficult one is case one where there may be elements and you can reach a position where some of the price excess is attributable to value and the rest of it isn't. And so you can have this proportionate approach to what element of the overcharge is attributable to an excess and an unfair price as opposed to simply an excess.

The next point is that the costs of IP and goodwill are all costs. They will have to be split on a common costs basis when analysing the cost-plus approach. None of that is then dealing with the consumer perspective of value. Those are internal costs incurred by Google. It's not a reasonable attribute or proxy for advertisers' perception of value.

The final point was then going to be the one in fact I've already covered, which is CPA,

cost per action. It's still a cost; it's not part in any event of Dr Coscelli's methodology and ROAS is the correct metric.

There is an overarching point I would like to make, just in case my position isn't clear. I suspect it is, but can I just reiterate it. In the precedence to date of certification cases, the Tribunal has been very, very clear that we are going to certify this case on the basis of what you've produced thus far. And carriage dispute should be based on everyone's bringing forward their best case for the purposes of certification with a view to winning. What you can't do is keep something in the locker for future deployment, because otherwise you're not comparing like with like. Any defendant at certification would be saying, in a parallel position to where we are now, "You have not shown a blueprint to trial for your methodology to explain how you're going to do something". That's a common submission, and it sometimes finds favour with the Tribunal and a case does not get certified.

Now, the fact that Dr Coscelli has referred occasionally to value or occasionally to ROAS or occasionally to these other things is not the same as having a methodology that provides a blueprint to trial for doing something. And the reason why I took you to his report where he says, "I propose to do this later", is that that later answer has never been a satisfactory answer for this Tribunal at certification. And so if it suddenly becomes a satisfactory response, we're changing the parameters of the game for certification at this stage. And I'm not raising that as an in terrorem argument.

THE CHAIR: That's (inaudible), you mean the "not my problem" sort of point?

MR BEAL: Yes.

THE CHAIR: Yes, yes. So ...

MR BEAL: But the point is, "not my problem" is not a justification for not having a methodology at this stage.

THE CHAIR: No, or to put it another way, we're looking now at the carriage stage, but

there's not, you're submitting anyway, an opportunity to improve things substantially now, between now and certification.

MR BEAL: You have to assume that both of our cases are the best it's going to be at certification stage.

THE CHAIR: Right.

MR BEAL: And in the counterfactual where Google were here, they would certainly be saying that the absence of economic value means there's no satisfactory blueprint to trial for that important part of the excessive pricing case.

THE CHAIR: Yes. On the other hand, you know, sometimes not my problem doesn't succeed because the Tribunal says, "Well, you have got a blueprint to trial; you have got a method. I can see that the dominant undertaking is going to raise this point, but that's for them to raise and overall, okay, that will be part of the dispute at the trial, but not a reason not to certify". So but what you're saying is that little IOUs dropped here and there don't get you into the category of it already being in the case?

MR BEAL: Let me give you another example: pass on. It's highly unlikely that a business claim that seeks certification for a CPO will survive certification if it simply said, "Pass on is not my problem. We'll see when it's raised. I have no proposed methodology for dealing with it". Every CPO application I've seen or I've read about where it's a business case with a potential consumer pass on defence tries to deal with the issue of consumer pass on.

THE CHAIR: Understood.

MR BEAL: If it's a big ticket point, if it's a big picture point, which economic value clearly is, you have to predict it. And I reiterate that they've pleaded their case on the basis that there is no economic value that explains the price discrepancy.

Anyway, thank you very much for indulging me with those limited points.

THE CHAIR: No problem.

Discussion regarding funding

MR BEAL: There remains the issue of funding. I'm not actually proposing to say anything on funding. Our submissions are in our written case.

THE CHAIR: Right. So we'll hear from Mr Brealey in a moment, but the point that did catch our eye that we wanted to ask you about is about the confidentiality of the agreement.

MR BEAL: Yes.

THE CHAIR: We'd like to know what the reason and what the justification for that is. It troubles us. We don't understand why it would be so.

MR BEAL: So, the Brook class representative has said that the funding arrangements will be disclosed on the website to the class members, and we have the letter from the funder, Burford, confirming that that is an appropriate thing to do. The only thing I think that will be redacted is certain strictly commercial confidential information, but the broad parameters of the funding arrangements will be disclosed. I'm pretty sure that's in the Burford letter, is it not?

THE CHAIR: Just -- sorry -- (inaudible) the broad parameters.

MR BEAL: I think the only thing in which redaction is ever applied is the premium paid for the ATE. I'll be corrected if I'm wrong. My understanding is that's the only thing that is treated as commercially confidential because -- I'm told it's treated as privilege.

THE CHAIR: No, that's fine.

MR BEAL: It's just --

THE CHAIR: That answered my question. But it's slightly different from saying that the broad outline, it will be there and the detail won't. That's the only thing that's redacted.

MR BEAL: That's what I'm being told.

THE CHAIR: No, that's fine. That's --

MR BEAL: Mr Teague of Geradin is the guru on funding, and he tells me that's the only thing that would be --

THE CHAIR: No, no, that's fine. Okay. All right.

MR BEAL: And then there's the conflict issue. I think the ball is in my learned friend's court.

THE CHAIR: Yes. Agreed, yes. Yes, Mr Brealey.

MR BREALEY: So, on the funding, it is as per our skeleton. There were three issues. There was the confidentiality; there was could Burford change the allocation of the budget; and the ease with which you could terminate funding. Three issues raised in our skeleton.

THE CHAIR: Yes.

MR BREALEY: In their responsive submissions, there's a letter from Burford. They said basically, notwithstanding the LFA, our intention is it should be disclosed. So we have to take that at face value. They also said that essentially, there was a bit of a strained interpretation, but we can't unilaterally change the allocation of expenses. So although I don't actually understand how they get there, take that at face value.

THE CHAIR: Right.

MR BREALEY: And the last one is as per the --

THE CHAIR: Termination.

MR BREALEY: -- because Burford don't address that at all.

THE CHAIR: Right.

MR BREALEY: And so there is -- I think it's just a straight factual issue, which I don't think is contested, which is that, Burford have a far easier right to terminate the funding if they're not going to get their from entitlement than our funder. So the position is that the LFA for Brook is more restrictive in (Inaudible) circumstance.

THE CHAIR: Right.

MR BREALEY: That is in the skeleton.

THE CHAIR: Yes. So, Mr Beal, that sounds like that's the one that's still run. If all you want to say is in your written submissions, then we'll take it from there. If you want to add anything, now's your opportunity.

MR BEAL: Well, all I would say is that the right to terminate in the Burford LFA is an industry standard clause which I've seen typically in pretty much every LFA I've seen. I don't understand why, if a point arises where it's apparent as a result of circumstances that the claim is suddenly worth an awful lot less than it otherwise was, that the funder can prospectively say, "Right, I'm out, but I'm going to be responsible for all of the adverse costs thus far and all of the funding you've had so far is with us". One would anticipate that actually, what would happen in practice is that there would be an offer of settlement and that offer of settlement would either be accepted or it wouldn't be, but the funder is entitled to say that the parameters of the case have changed dramatically, and therefore the circumstances are different. I mean, it's not substantially different from what happened in the Merricks case, where a claim that was worth £10 billion was suddenly worth £1 billion as a result of a ruling from the CAT, or the High Court, I forget which.

But the point being, our clause is an industry standard clause. There are other clauses in the Burford contract which give them nine times multiple which ours doesn't have, and a far stronger control over the settlement process. But the reason why I'm not addressing you on those is it seems to me that people in glass houses shouldn't throw stones and there are pros and cons to each of the funding agreements. Ours is an industry standard funding agreement. My funder is a member of the association of litigation funders, and follows a code of practice set by that group. And, you know, throwing stones at Kaye's funding arrangement isn't terribly profitable.

THE CHAIR: Okay.

MR BREALEY: I'm not throwing stones, but ...

THE CHAIR: Well, we've got the matters we need to consider there.

Discussion regarding Ad Tech

THE CHAIR: So, the next thing is the Ad Tech conflict.

MR BREALEY: Well, yes. It's not really the Ad Tech; it's the Brook conflict (inaudible) because Geradin act for the publishers in Ad Tech.

THE CHAIR: Yes.

MR BREALEY: The advertisers in Brook.

THE CHAIR: Yes.

MR BREALEY: And the risk of conflict, which you've articulated and I can go through -- it may well be that we'll can put something in writing, but I can address it now anyway. But the conflict arises because the advertisers are Geradin's clients.

THE CHAIR: Yes. No, I've studied closely what the nature of the conflict is, but why is it not met? As I understood it, the issue with the conflict was if, at the moment they don't feel they're conflicted, they're carrying on. But if it became an acute problem, they would have to drop out, Geradin would have to drop out, and that would be a terrible dislocation for the litigation. But if there's been a conscious assent by both sides, both of their clients, then there it is.

MR BREALEY: So, the conflict is for the advertisers in this room today, in this courtroom today. We're not in -- the Ad Tech class rep can be (inaudible) all day long because publishers get, to a certain extent, confidential information confidential to the advertisers. So I'm not sure what interest the publishers have got; it's the advertisers' interest which is the main concern, which is the advertisers who Mr Kaye acts for and the advertisers who (inaudible) company act for.

And I will take you through why we say there's a conflict, but I'm not sure it's an easy -- so, we're not really interested in what the class rep in Ad Tech will consent to

because it would be in their interest to get all sorts of confidential information from (inaudible). It's whether the advertisers are happy to disclose information in this case which could be used to their disadvantage vis-à-vis the publishers. So is it the case that just by asking Brook: do you consent, there may be a real issue as to whether a class rep can consent as easy as just writing a letter and saying: I consent that ...

THE CHAIR: Just to explore this. Your written submissions had a number of strands in it. There was a what you would call a true conflict of interest: they're on the opposite side of the same transaction. They can't -- That's not what you're focusing on now.

MR BREALEY: No. Well, I will come to that.

THE CHAIR: Right.

MR BREALEY: But it's more about the confidential relation(?) whether Brook can say, "Dear Geradin, I consent that you can get all the information from the advertisers in circumstances where you also act for the publishers".

THE CHAIR: Right, okay. So in that area of the law, risk of leakage, there can be appropriate steps taken to prevent it happening, and, you still have to ask about consent because you want to make sure that the firm that holds information on both sides of the information barrier isn't under an obligation professionally to one client to give it to the other. So you have to have consent, but there hasn't yet been a discussion about whether there's an actual, in fact, risk of leakage of confidential information.

MR CARALL-GREEN: Sir, if I may, the point that you make, which is the consent from the Ad Tech class representative is helpful, is an answer to the point. Because if the mischief is that advertisers' confidential documents will go into Geradin Partners and then be required to be disclosed to Ad Tech, if Ad Tech has waived that right, then that's an end of the problem.

THE CHAIR: It is, but that's not quite how it's been described so far. And, anyway, it

might be necessary for there to be a reassurance to the Tribunal, the litigants involved, that there's protection against inadvertent risk of leakage of information, but that happens all the time, that happens every day in intellectual property cases. You just have to do it. But it hasn't come up until this hearing that there needs to be a focus on inadvertent leakage of confidential information.

MR BREALEY: Okay. I mean, shall I just outline where we are on this?

THE CHAIR: No. I'm not shutting you out from the point at all. It's very helpful to have this discussion. I had thought that consent would be enough, but I understand why you're saying it might not be.

What I think we'll do is if you, please, would put in writing in a short note why -- because I have carefully read your submissions about it -- to what extent and why those are not answered by consent.

And if, please, the Brook side will consider giving some explanation to provide reassurance about inadvertent leakage of confidential information. I imagine they're probably separate teams. I can't imagine that there are people on the same team.

MR BREALEY: They are the same team: same partner, same --

THE CHAIR: Oh, is it? Okay. Well, then that will have to be addressed. You appreciate that who's on the team is not a living thing for me in the same way that it is for you, okay. So all right, they are on the same team, so that does need, that does need addressing.

It doesn't mean it has to be addressed right now. They don't need an information barrier right now because it has to be in place in time for the provision of the confidential information.

MR CARALL-GREEN: Sir, I think part of the problem here is that there's no documents actually being sought from the class.

THE CHAIR: Not yet, no.

MR CARALL-GREEN: Or at all.

THE CHAIR: What do you mean, "at all"?

MR CARALL-GREEN: Well, as we've set out in our submissions and the witness statement of Professor Geradin, there is no plan in either of the sets of proceedings to seek any client confidential information.

MR BREALEY: Well, yes. I mean, I think the best thing is to put it in writing. But the response to that is: Well, that's all very strange. Because you're asking for this very sensitive information from Google, which you say is relevant. You're asking for the advertisers' budgets for their pricing, which would be relevant to, Ad Tech, but you're saying -- So that doesn't kind of solve the problem. The confidential information is going to go. But the notion that: Well, we're not asking it directly from the advertisers.

THE CHAIR: Yes, but, as I say, I'd hoped that consent would be adequate and a complete solution. I totally understand that you want to argue that it's not. But I have not got my -- when I say "I", it's because, as you appreciate, it's the poor litigator on the Tribunal -- It's my baby -- so that's purely why I'm expressing it that way. You should be entitled to explain why consent is not a good enough response. And I think it would be helpful if you fleshed out why it's inconceivable that there will ever be any confidential information in play.

I appreciate it's covered in your submissions already, but I'm not sure that I fully --

MR CARALL-GREEN: Yes. Although our primary position will be that there's no conflict in the first place, of course.

THE CHAIR: I appreciate that.

MR CARALL-GREEN: Yes. It will only be as a fallback that we would have to say --

THE CHAIR: Yes and no. I mean, you have in fact taken the step to get consent. So that's happened now. So the conflict of duty conflict has gone away. I think that truly has gone away.

MR CARALL-GREEN: Yes, that's right.

THE CHAIR: But the argument that you have an obligation to take the information of A and give it to B or vice versa, that's gone because there's been consent.

MR CARALL-GREEN: I think that's helpful. So if the live point is strictly confined to the issue of whether or not, in the event of client confidential information being provided, it could be held securely, effectively in a silo, then we can deal with.

THE CHAIR: I think the logical sequence, Mr Brealey, is for you to go first.

MR BREALEY: Yes.

THE CHAIR: Write why the consent does not meet the objection, and to what extent. And then, Brook, Geradin can respond to that.

MR BREALEY: Yes.

THE CHAIR: Thank you. Okay. I would like to do that fairly briskly because --

MR BREALEY: We can do that by close of play tomorrow.

THE CHAIR: I didn't mean that -- I think it needs a little bit more thought than that. If you do it by the end of the week, please.

And if you do it middle to the end of next week, your response please.

MR CARALL-GREEN: Yes.

THE CHAIR: Right. Thank you. Good.

Did you want to say anything more about liaison with the Stopford party? I think you were taking instructions still.

MR BREALEY: Well, there was a partner in charge in Hausfeld. I don't know whether Brook have managed to contact them. My instructing solicitors tried to contact the relevant partner. They haven't yet.

THE CHAIR: Yes.

MR BREALEY: But what we can do is we can set out in writing tomorrow or -- exactly where we are. I don't want to do this on the hoof. They've tried to contact them, they

haven't been able to.

MR BEAL: If it helps, I've just --

THE CHAIR: One second, one second.

MR BEAL: Well, I've got some information.

THE CHAIR: Right.

MR BEAL: Which is that Ms Jukes from Hausfeld is in court and she's promised to send correspondence on this issue to the Tribunal by the end of close of play today.

THE CHAIR: Okay. Again, that's not that urgent.

MR BEAL: I don't know.

THE CHAIR: I'm very grateful, genuinely grateful for the assistance. I think it's an important part of the picture.

What is actually asked, really, just looking, from you, Mr Brealey, is just whether you think it's a good idea, and to talk to them about it, and whether you're willing to do that.

MR BREALEY: I think we're willing.

THE CHAIR: Yes.

MR BREALEY: I'm hesitant. I mean, we haven't been in contact with them, and obviously Geradin have. So I think there has to be a bit more transparency as to what is going on.

THE CHAIR: Yes.

MR BREALEY: So in principle, obviously, yes. Whether it is the silver bullet, I'm saying not necessarily, because the fact that it's been certified and they're acting for the consumers doesn't necessarily bind.

THE CHAIR: No.

MR BREALEY: Absolutely, it is relevant, but it doesn't kind of get rid of everything that we've been talking about, necessarily.

THE CHAIR: Just to be clear, we, the Tribunal, entirely agree that the fact that they've

been certified first doesn't make them the judges or gatekeepers of who wins. But it is said, at least contingently on both sides, that their attitude (a) may be important; and (b) will be such and such.

So we don't want to act in ignorance of that. But, no, to be clear, it's not a veto, but helpful discussion can take place. I would prefer to say this, so that Hausfeld can hear this. I would prefer that there's some discussion before the Tribunal are brought into the loop. Because everybody will feel that way, and it is not on a 48-hour time-critical turnaround. I think mature discussion will may help, and you must feel that you've had access to them to discuss it and that there's not a lack of parity of arms in terms of discussion with them. I don't think we need to hear further from the parties or from Hausfeld before the end of the week.

Take a few days to get it right. I think it's much more important to do it right than do it fast.

MR BREALEY: Okay.

THE CHAIR: All right. Thank you.

Quite a bit of the undergrowth has been cleared during the course of these two days. The issue with the case, personal position, has gone away. Progress has been made on the Geradin conflict. Funding has come down to a very narrow issue we'll be able to resolve quite quickly. So it seems to us that the critical issue is the methodologies. We have not reached a decision now. We have been very grateful for the very detailed and careful submissions. We are mindful that the parties tried to agree to amalgamate the claims and did not get there. We think it is unlikely that we will reach a decision that this is a clean decision all one way. I think it is much more likely we will reach a decision that there are factors in both directions.

So against all of that background, we do encourage the parties to think about whether it is worth a further discussion. We do not want to intrude on the reasons why it did

not happen before; we are not going to interrogate about those sensitive and potentially privileged matters. It may be that there is some roadblock that means that what I am saying is completely unreal, but some points have fallen away, and we hope the indication that we do not see this as an easy clear cut one might provide some food for thought. But I stress that does not mean we have reached a decision; we have not. You know, skilful advocates often lead to difficult tasks for the Tribunal. That's certainly the case here.

Unless you want to say anything about that, I am not inviting observations, but we do think this is an opportunity to mention that.

Okay, so I have set a timetable on the conflict and a loose indication about the sort of timing that we're looking for for communication from and relating to the Stopford. Okay. Thank you very much for everything, thank you to the representatives.

(4.09 pm)

(The hearing concluded)