

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

IN THE COMPETITION

Case No. : 1433/7/7/22

APPEAL
TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 24th & Wednesday 26th November 2025

Before:

Hodge Malek KC
Derek Ridyard
Tim Sawyer
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Dr Liza Lovdahl Gormsen

Class Representative

v

Meta Platforms, Inc. and Others

Defendants

A P P E A R A N C E S

Sarah Ford KC, Sarah O'Keefe, Daniel Cashman and Ian Simester On behalf of Dr Liza Lovdahl Gormsen (Instructed by Quinn Emanuel Urquhart & Sullivan UK LLP)

Tony Singla KC, James White and Camilla Cockerill On behalf of Meta Platforms (Instructed by Herbert Smith Freehills Kramer LLP)

Wednesday, 26 November 2025

(10.30 am)

Housekeeping

THE CHAIR: Some of you are joining us via livestream on our website so I must start with the customary warning. An Official Recording is being made, and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as a contempt of court.

There's a lot of people here today. That does mean that there's significant cost. What I would like to say, which may be relevant for later on when it comes to any taxation exercise, is that I consider that what we're going through is so fundamentally important that the team members who have to carry out this disclosure exercise are fully entitled to be at hearings like this because what we're trying to do, by the end of the day, is to have a process that actually works, and this is a very complicated exercise, and many people would not have had the experience of running a disclosure exercise such as the present. If we get it right now it is going to run smoothly. If we don't get it right, I can see

1 all sorts of problems that have occurred in other cases.

2 Do you want to start?

3 MS FORD: Sir, I was proposing to update the Tribunal about
4 where we are in the light of progress that has been made
5 yesterday.

6 THE CHAIR: Can I just ask Mr Singla a couple of questions?

7 Mr Singla, what I think we need to have, if you
8 haven't already got it, is a designated solicitor who
9 the Tribunal knows who that person is, and if it changes
10 then it can change, who has got the overall
11 responsibility for this exercise. You clearly need
12 a sort of team leader. So, if you've already done that,
13 then you can tell us who that person is -- you can write
14 it in or whatever in due course. I think sometimes when
15 you do this, it is better not to have the person who is
16 running the case generally to be the designated
17 individual, but I'm not going to mandate that, but
18 I think that between now and the completion of this
19 exercise, whoever is going to be at the top of the tree
20 will probably have very little time to be doing anything
21 else, because this is going to require dedication and
22 focus and very careful monitoring, if it is going to be
23 done right, because you can see team members will come
24 in and out, you will have people with different
25 abilities and levels, and when we get to 4 o'clock today

1 I will give a ruling of the Tribunal as to how I
2 envisage this process should be done. I'm only here to
3 help you and to guide everyone on this process, because
4 I appreciate it is a massive undertaking, and the more
5 guidance you get from the Tribunal, probably the better
6 it will be.

7 MR SINGLA: Sir, that is all taken on board. Obviously
8 those behind me are better-placed --

9 THE CHAIR: Of course. What I'm saying is when we get to
10 4 o'clock that is going to be when I will express the
11 Tribunal's views as to how this process should be
12 undertaken.

13 MR SINGLA: Sir, I'm grateful for the indication of that, I
14 wonder whether I could ask you, perhaps, to give some
15 indication of provisional views so that if there's
16 something that you intend to say at 4 o'clock which I
17 would like to have an opportunity to address you on,
18 then it might be helpful to have at least --

19 THE CHAIR: Well, a lot of it has been coming up during the
20 hearing as we've been going on, but what I want is, just
21 as I want your team to have a proper audit trail of what
22 you are doing, is for the Tribunal to give its own audit
23 trail as to what we envisage, because sometimes there's
24 a disconnect between what we expect and what parties do,
25 and that is largely due to misunderstandings, or

1 whatever, that is why I want to make everything really
2 clear.

3 MR SINGLA: I understand you are trying to assist.

4 THE CHAIR: There is another thing that you raised
5 yesterday -- on Monday -- which -- about the pleadings,
6 and what -- sometimes, as I said, you say you do not
7 understand, and you genuinely do not understand it,
8 rather than a rhetorical point, and if there are any
9 points where you think there is a lack of clarity in the
10 CR's case which is material for the disclosure exercise,
11 then the designated solicitor should have the right to
12 write to their opposite number and say, "well, look, you
13 have said this at the pleading. It is relevant for the
14 disclosure exercise, I understand what you are looking
15 for and what you mean. Please explain". No one needs
16 to be defensive on this. We just want to get the
17 exercise right, but sometimes when you say you do not
18 understand, I understand it -- other times there is
19 a lack of clarity, and that you are fully entitled to
20 say "look, this bit, there is a lack of clarity on
21 this", and that is an area where things can go wrong.

22 MR SINGLA: Just to be clear, when I say I do not understand
23 things, that is following months of correspondence
24 between the parties.

25 THE CHAIR: Oh, I'm sure, I'm sure, but the thing is -- but

1 if there is a lack of clarity in the case that is
2 material for the disclosure exercise, the sooner we get
3 clarity the better. I'm just saying, no one needs to be
4 defensive about this. We just want to get this done
5 properly, and I would hope that just as this exercise is
6 going to be quite a burden for Herbert Smith, part of
7 that burden needs to be put on the other side. They are
8 the ones asking for all this disclosure, and if you have
9 legitimate requests to do it -- and if you have any
10 problems about this, you just write in to me and I'll
11 deal with it.

12 MR SINGLA: That is a very -- we're very grateful for that,
13 because this is a huge exercise. I mean, it is
14 one-sided and some of the points that we will come on to
15 discuss in the course of going through the Redfern are
16 actually points about workability, and there is a real
17 concern -- unless one has clarity -- as to how this is
18 going to operate in practice. It is easy to debate
19 these things in the abstract but those behind me and the
20 reviewers, and so on, will have to spend months actually
21 doing the work and so, for example, we will come on to
22 talk about an issue in relation to UK users. How does
23 a reviewer, actually sitting down with a document, make
24 that assessment. So some of the points we're going to
25 come on to actually feed into exactly what you are

1 saying which is, I think, trying to ensure that this
2 does not go off the rails.

3 THE CHAIR: What I have done in similar exercises for
4 various agencies where they have, let's say, huge
5 amounts of data to review, is I have drawn up a protocol
6 of what is expected, what to do, how you log things,
7 a review process where you go to a person if you are not
8 sure what it is, regular calls and meet-ups, and
9 practical guidance as to what these people are meant to
10 do, and I found that really, really useful, because it
11 leads to a proper audit trail and a proper
12 decision-making process, because what you will find is,
13 let's say you have a team of 20 people, that team is
14 going to be fluid. You are not going to have the same
15 20 people for the next ten months, and those people will
16 vary from, you know, really focused, let's say, very
17 bright, experienced people who have been doing
18 disclosure for years and know what they are doing, so
19 less-experienced people, because you are not going to
20 have 20 Rolls Royces on a disclosure exercise, but what
21 you are going to have to have is something that everyone
22 can follow, and that is why I normally, on these types
23 of exercise, get the protocol done, and if you have the
24 protocol done then you should be okay.

25 Now, I am not going to require a firm like

1 Herbert Smith to share the protocol with the other side
2 and then you are going to have a big debate as to what
3 the protocol should be. You know, these people know
4 what they are doing, but I do think that insofar as they
5 do not have one, then they should have one. Is there
6 anything that you want to say? You've got a message?

7 MR SINGLA: This is all very helpful and I do understand the
8 Tribunal is very keen to ensure that this is all
9 workable but the reason I keep making submissions about
10 proportionality is that the more requests that come in,
11 the bigger the exercise becomes, and the more
12 complicated it becomes.

13 THE CHAIR: I understand that. That is why this is
14 a complicated exercise. Hindsight is a wonderful thing,
15 okay? When I came into this case you and I know things
16 were not great, okay? That is where we were, and it is
17 to your credit that, you know, what your team has done,
18 has tried to work with what we have. If it was down to
19 me, if this came before me at the beginning of the year,
20 I would have started it again, but you did not do that,
21 and the consequence of that -- and ironically, it may
22 well be the list of issues for disclosure is probably
23 pretty helpful in ironing out any sort of
24 misunderstandings, but I have said what I have said last
25 time and there is a written ruling on this and hopefully

1 we're never going to have this problem again, but it has
2 not made the process any easier, and that is not your
3 fault.

4 MR SINGLA: No. Sir, in terms of the conduct of today's
5 hearing, I think our proposal was that we would just
6 carry on through the Redfern.

7 THE CHAIR: Yes.

8 MR SINGLA: I should say we received, I think -- we were
9 told we would receive something from Quinn Emanuel
10 yesterday morning which would have allowed us,
11 obviously, to work through things, but that came in the
12 evening, and so those behind me are still looking at
13 what came, so we may want to address some points of
14 substance but we cannot do that right now. I think for
15 the time being we would respectfully submit that the
16 best thing to do is just carry on through the Redfern.

17 THE CHAIR: I agree. That's fine of the look, if we run out
18 of time we run out of time and then we just have
19 a remote hearing and we just keep carrying on, and we
20 will find other dates between now and the next few
21 weeks.

22 We will just do it as long as it takes.

23 MR SINGLA: I fear we may need to take you up on that.

24 THE CHAIR: It is not a problem. We are here to help
25 insofar as we can.

1 MR SINGLA: Obviously, those behind me are very keen to get
2 clarity because they want to get on with the exercise,
3 until all this is finalised, which is why --

4 THE CHAIR: 100 per cent. You need to know what is required
5 before you start, otherwise you are going to have
6 problems.

7 MR SINGLA: Exactly. They are saying there has to be
8 a long-stop date of April. (a) that is, on any view,
9 not workable --

10 THE CHAIR: There is not going to be a long-stop date in
11 April. You do not need to worry about that. What there
12 will be --

13 MR SINGLA: We have to lock down what we need to be doing.

14 THE CHAIR: There will be a rolling disclosure exercise and
15 at the end of the exercise we will have a composite
16 list. The composite list will have a statement of truth
17 signed by a possible individual for Meta and signed by
18 the designated solicitor for the disclosure exercise.
19 That is what is going to happen. I agree with you. You
20 know April is not viable.

21 MR SINGLA: Sir, I'm grateful.

22 THE CHAIR: Yes, Ms Ford.

23 MS FORD: Sir, I was proposing to update the Tribunal
24 briefly about the proposal that the Class Representative
25 made because it may enable us, as we go through the

1 Redfern, to cut through quite a lot of this.

2 THE CHAIR: Great. That's the best news today so far.

3 MS FORD: We certainly hope so. It is a proposal that we
4 outlined in correspondence at lunchtime yesterday and
5 then we sent up a mark-up of the Redfern in the evening.
6 What we have sought to do is take on board the guidance
7 that the Tribunal gave on Monday and our proposal has
8 been summarised in a letter which is on Opus at
9 {E2/358/1}. I hope the Tribunal has an EPE screen.

10 THE CHAIR: Yes. Just summarise it. Don't worry.

11 MS FORD: Subparagraphs (a) and (b) over the page are simply
12 summarising paragraphs that we have made that are
13 intended to reflect the rulings that we made yesterday.
14 Subparagraph (c) is intended to put into place the "to
15 the extent reasonably necessary" wording that was
16 canvassed with the Tribunal concerning how one
17 approaches a dispute between custodial and non-custodial
18 disclosure {E2/358/2}, and so consistent with what we
19 understand was agreed, where the Class Representative
20 was proposing custodial and non-custodial disclosure and
21 the Defendants were only proposing custodial disclosure,
22 all the requests that fall within that box have been
23 amended to suggest that it will be custodial in the
24 first instance with non-custodial disclosure to be
25 provided to the extent reasonably necessary, and that

1 covers a large number of requests which are listed at
2 the end of subparagraph (c).

3 What we've then done is to try and carry through
4 that approach in principle to some of the other
5 requests, and so subparagraph (d) was explained that
6 there are a number of requests which are simply opposed
7 in their entirety, but in relation to those what we have
8 suggested is that if the Tribunal in due course does
9 direct those requests, then the approach will be --

10 THE CHAIR: As in (c). Yes.

11 MS FORD: As in (c), so custodial in the first instance with
12 non-custodial as a top-up. (e) is concerned with
13 a situation where, essentially, the dispute was the
14 other way around, so we were saying custodial and the
15 Defendants were saying non-custodial -- sorry, we were
16 saying both, in fact, but the Defendants were proposing
17 non-custodial, and again, what we've suggested is to
18 included the "to the extent reasonably necessary"
19 wording in relation to those issues as well, and that
20 then covers a large number of issues that are listed at
21 the end of (d).

22 There are exceptions which we've listed in footnote
23 4. There are three exceptions where we think that there
24 are discrete disputes about non-custodial repositories
25 and we will come back to address those, but in broad

1 terms the effect of carrying through that approach in
2 principle is that one can hopefully take quite a lot off
3 the table in terms of dispute between custodial and
4 non-custodial.

5 Subparagraph (f) we've explained that where the
6 parties have agreed that non-custodial disclosure is, in
7 fact, appropriate, but there were disputes about which
8 repositories should be looked at, what we've indicated
9 is that we will take out the suggested repositories that
10 we've specifically indicated on the basis that the
11 Defendants will have regard to those when they are
12 considering their approach on a non-exclusive basis,
13 essentially, and that they will take the -- consistently
14 they will take the approach that they will provide the
15 disclosure that is reasonably necessary to fulfil their
16 disclosure obligations, so again, what we've tried to do
17 is take off the specific dispute off the table.

18 Subparagraph (g) is simply amending the description
19 of the parties -- the wording of the parties' dispute,
20 so that is fairly minimal. Subparagraph (h) -- I'm
21 sorry -- subparagraph (h) is reformulating the
22 description of the dispute. Subparagraph (g) is
23 proposing that the ruling in respect of Facebook,
24 Instagram and WhatsApp terms will be carried through to
25 the requests that are identified in that paragraph, and

1 then the final subparagraph, subparagraph (i), is
2 concerned with the disputes on custodial repositories.
3 Our understanding is that the parties have been liaising
4 in respect of that and they are reasonably close to
5 having potentially resolved it, subject to maybe one
6 outstanding point, and so although the Tribunal
7 indicated at the end of Monday that it might be best to
8 hear from the juniors on that point --

9 THE CHAIR: You mean he has been saved? Is that what has
10 happened?

11 MS FORD: The misery continues, perhaps, is possibly
12 a better description but it did seem to us that it might
13 be best to allow the parties to continue to address that
14 and there may be a better time later.

15 THE CHAIR: I'll see what Mr Singla says to all this in
16 a second. Yes.

17 MS FORD: So, we have produced a further draft of the
18 Redfern which reflects those proposals. They do remain
19 proposals at the moment. They haven't been accepted,
20 but it did seem to us that that might be a constructive
21 basis to proceed to work through the schedule.

22 As a matter of practicality, desperate attempts are
23 being made to print out that version of the Redfern
24 schedule so that the Tribunal has a copy of it, and
25 hopefully those will arrive imminently.

1 THE CHAIR: That is all right. Okay. What I want at the
2 end of the day is one document that lists each of the
3 requests, says what they need to look for and how it is
4 going to be done, because this schedule, as you can see,
5 has got a number of columns, and if you are looking at
6 the people on the ground who have got to do this
7 exercise, they are going to be really confused. You
8 want something very, very simple. So, at the end of the
9 day, they will have a pack -- maybe an induction pack or
10 whatever -- an essential pack which will have things
11 like the pleadings and the list of issues for
12 disclosure, but they will also have this one document
13 which says what is being done, and how. To give them
14 the Redfern schedule, as it is, they are going to be
15 confused, but that is what we're aiming for, as long as
16 everyone understands, that before this disclosure
17 exercise is done, we will have this schedule where there
18 is no ambiguity in general terms as to what is required.
19 Mr Singla, is there anything else you would like to say
20 at this stage?

21 MR SINGLA: No. So, just to explain, we are in the course
22 of preparing a response to that letter.

23 THE CHAIR: That is all right. Yes.

24 MR SINGLA: A number of points will be agreed but not all of
25 the points will be agreed and I suggest that we have an

1 opportunity to address you once, obviously, the letter
2 has gone across and Quinn Emanuel have had a chance to
3 see that.

4 THE CHAIR: Once you know what the areas of disagreement --
5 you know, you are realistic enough to know that you are
6 not going to be asking us to rule on 120 requests. You
7 are both trying to come up with a situation whereby only
8 the things that you really need help from you are going
9 to have a ruling.

10 MR SINGLA: Yes. So, first of all, we will respond to the
11 letter, to the extent there are points of substance we
12 will bring them to your attention.

13 THE CHAIR: Yes.

14 MR SINGLA: There is also a second order exercise of just
15 working out whether the points in the letter have been
16 faithfully reflected in the Redfern, so --

17 THE CHAIR: I know. That is -- but look, we're not going to
18 have a finalised document today. Whichever way you look
19 at it, we're not going to have that. What we're going
20 to have is probably some further document which we can
21 then use to try and finalise everything next time round.

22 MR SINGLA: But where I think things have become more
23 efficient for present purposes is I think we don't need
24 to debate those requests today where the wording is
25 agreed, but there was or may still be a dispute about

1 repositories. I suggest that for present purposes we
2 focus on those requests where there is a substantive
3 dispute about whether a request should be in entirely --

4 THE CHAIR: Yes. Exactly.

5 MR SINGLA: -- or in part and then the repository question
6 is either going to be agreed or we can come back to you
7 insofar as it is not agreed.

8 THE CHAIR: As I said last time, you know, the mere fact
9 that something is in the list of issues for disclosure
10 does not mean we're keen to order disclosure, as you
11 say, we're going to have to figure out what is necessary
12 and proportionate and as you saw from last time, if I
13 did not think something was necessary or proportionate
14 it is not going to be ordered.

15 MR SINGLA: Yes. Well, that is going to be a key thing in
16 my submissions on proportionality.

17 THE CHAIR: Yes. Okay. Thank you very much.

18 Ms Ford, so what do you want to do now?

19 MS FORD: Before we do the process of working through, the
20 Tribunal asked to be reminded about the point on the
21 correct approach to redactions.

22 THE CHAIR: Okay, but the correct approach on redactions is
23 fairly conventional. You have a document, and,
24 ordinarily, if it is a relevant document, you disclose
25 the whole document. There is an exception. Where that

document deals with more than one issue and topic, and there is a topic in there that is not relevant to the issues in the action, and the passage is confidential, you can blank out. Following *Myers v Elman* {1940} House of Lords, it is the duty of the designated solicitor to personally review the redactions to satisfy themselves that the redaction exercise is carried out properly. That is all I probably need to say on that, but we will come back to that at 4 o'clock, because that is one of the topics I will cover on that, and the law is pretty clear, but, of course, Herbert Smith have got a choice. They can either say "we are going to do this redaction exercise" or they are going to disclose the whole document, or they are going to say "let's have a CRO in respect of these documents which have got mixed issues in them", they may have a combination of both of them -- any of those things. It is really down to them to decide what works, and it is only once you get into the exercise you can see how big the exercise -- that you can really take a sensible view because they may take the view, actually, this is going to be so time-consuming and expensive and complicated, we would prefer to put it in a CRO, but they may not take that view and they are perfectly entitled to go down the redaction route. Yes.

1 MS FORD: Yes. For our part we do not dissent from any of
2 that. The suggestion we had in mind was that insofar as
3 is adopted it might be helpful to have a schedule which
4 then sets out the basis for the redactions to enable
5 them to be scrutinised.

6 THE CHAIR: Well, I don't know. I think normally I'm happy
7 with -- at the end of the day, it is a question of how
8 much confidence the Tribunal has got in whoever is the
9 designated solicitor. I would be really surprised that
10 we're in the scenario where I am going to be concerned
11 as to whether or not it has been done properly.

12 Of course, if I had a concern, or if it does appear
13 that there are problems further down the line, then, of
14 course, we can revisit it, but ordinarily there has to
15 be an element of trust here. Thank you.

16 MS FORD: I think by the explosion of activity we should
17 hopefully have copies of the latest version --

18 THE CHAIR: Okay. Let's put that in. Yes. So what do I do
19 with that? Do I just put this on the top of the ones I
20 already have?

21 MS FORD: Yes. It is not agreed yet. It is in the Opus
22 bundle as {E2/360.1/1}.

23 THE CHAIR: I would prefer to have a hard copy.

24 MS FORD: Yes. We have hard copies for the Tribunal and
25 certainly for our part it is our proposal as to what we

1 say is the appropriate approach, and so --

2 THE CHAIR: Has Mr Singla seen this or not?

3 MS FORD: Yes. This is the version that was sent over
4 yesterday.

5 THE CHAIR: At what time?

6 MS FORD: The proposal went over at lunchtime.

7 THE CHAIR: Yes. That's okay.

8 MS FORD: I'm sorry I need to correct that. I'm told that
9 there is a further updated version which has only gone
10 over this morning with typos corrected, but the proposal
11 that -- as to how we approach custodial/non-custodial
12 repositories and matters of that matter was made in
13 writing at lunchtime. The implementation of that in the
14 schedule, in the Redfern schedule, was then sent over --
15 I think it is about 5.30 -- because, of course, those
16 matters take time to track through. (Handed)

17 So, starting with request 9 which is on page 3 of
18 this updated version --

19 THE CHAIR: All right, so we've moved on from 8 have we?

20 MS FORD: Yes.

21 Request 9 is actually one of the three exceptions to
22 the approach that I outlined to the Tribunal in
23 relation to custodial versus non-custodial repositories.

24 THE CHAIR: My copy is not coloured. The previous one was.

25 MS FORD: It should be in colour.

1 THE CHAIR: This has come out black and white.

2 Right. So we're back again. Yes? So what page?

3 MS FORD: Page 3, Request 9.

4 THE CHAIR: That is much better. Yes. {E2/360.1/3}.

5 MS FORD: This is one of the three requests in relation to

6 which we have taken a -- we have not adopted the

7 approach that I outlined of simply saying "to the

8 extent reasonably necessary" and the reason for that is

9 that the dispute concerning the custodial repositories

10 essentially appears on the face of the disputed wording

11 between the parties, so the Class Representative's

12 request is a focused one for particular types of

13 non-custodial documents. We are asking for analysis,

14 summaries, studies, reports, research, modelling and/or

15 similar documents relating to the testing and the

16 suitability of the terms of service and equivalents

17 identified in Request 7, Facebook, Instagram and

18 WhatsApp, including alternatives, so we have specified

19 that we are looking here for analysis, research, reports

20 and the like, whereas the alternative formulation that

21 is being proposed by Meta is simply specifying custodial

22 documents.

23 There are a couple of other disputes on this point

24 as well, but --

25 THE CHAIR: Yes, but instead of --

1 MR SINGLA: Sir, I can help on this. There is no longer
2 a dispute on the non-custodial repositories. We do have
3 a substantive point on the wording but we will agree to
4 search -- I think it is Research Library, and do you see
5 LAMA? I think we've agreed those, or we can agree those
6 now.

7 THE CHAIR: That's agreed. That's fine.

8 MR SINGLA: We're hoping to focus on the substantive points
9 today rather than the repositories.

10 MS FORD: Well, we're happy with that. I'm afraid I don't
11 know what then remains the dispute in relation to the
12 wording that Mr Singla is indicating.

13 MR SINGLA: Let me address you on that, then.

14 THE CHAIR: Just say what that is.

15 MR SINGLA: So the request, you will see the way it is
16 formulated, what they are asking for, do you see it
17 includes an equivalence identified in Request 7
18 including alternatives. Do you see that in yellow
19 wording? That is the CR's proposed wording, "includes
20 alternatives", and our formulation doesn't include
21 alternatives, and this question of whether alternatives
22 should be included arises here but also in relation to
23 some later requests.

24 Now, what we say is the position is we have agreed
25 to provide some relevant disclosure in relation to terms

1 under "other requests", so you will recall Request 7 --
2 I mean, to take a step back you understand that the
3 issue in the case is, insofar as the terms are
4 concerned, it is about whether the terms are
5 sufficiently transparent or contain an unfair trading
6 condition, it is that type of allegation. So you will
7 see there are quite a few issues which relate to terms,
8 so 7, we've already agreed to provide disclosure under
9 8, which governs how and for what purposes Meta
10 introduced, designed, displayed and implemented UK user
11 terms, and if you look at 12, for example, in relation
12 to why Meta presented the choice architectures that it
13 did in relation to the terms of service, and in relation
14 to 28 {E2/360.1/4}, on Meta's wording, we've agreed to
15 provide some disclosure in relation to the testing of
16 the terms that ultimately were implemented, so through
17 all of that disclosure under "other requests", the Class
18 Representative is going to get insight into what was
19 considered as an alternative but not implemented.

20 THE CHAIR: They will, will they?

21 MR SINGLA: Under those other requests?

22 THE CHAIR: But on this one, you --

23 MR SINGLA: In the light of those other requests, we say
24 that 9 is going too far because what they are seeking
25 under 9 is disclosure of any and all considerations and

1 testings of alternatives, and we say it is
2 disproportionate.

3 Ultimately what is this going to? So why do they
4 want disclosure in relation to testing of terms that
5 never saw the light of day?

6 THE CHAIR: Well, sometimes the alternatives are part of the
7 testing of the terms, aren't they? You need to see what
8 else --

9 MR SINGLA: That is why I say they are going to get some of
10 this disclosure under the other requests anyway.

11 THE CHAIR: So you are saying why did they need it -- they
12 may need it for others but you are saying in particular
13 why did they need it --

14 MR SINGLA: Well, we've agreed it in relation to others, so
15 why do they need it under 9 and what's being said, I
16 think, by Ms Scott Morton is she says it is plausible
17 that Meta will have considered transparency as one of
18 the factors it evaluated, and that will shed light on
19 the extent to which the implemented terms were
20 considered by Meta to be opaque and misleading. That's
21 the expert saying why Request 9 is a valid request, and
22 we respectfully submit there are two problems with that
23 explanation. One, it is actually not an explanation as
24 to why this disclosure would advance any economic
25 analysis -- it is not actually a point she should be

1 making -- but, secondly, there's no allegation that Meta
2 deliberately chose terms that are more difficult to
3 understand. There is no allegation, nor could there be,
4 that there is some deliberate decision to use what she
5 describes as "opaque and misleading", and what she says
6 is she wants to shed light on the extent to which the
7 implemented terms were considered by Meta, so we
8 actually say on a proper analysis (a) this isn't an
9 economic request at all, and (b) it doesn't relate to
10 any pleaded allegation concerning deliberate conduct,
11 and we say proportionality, again, where other requests
12 will bear upon alternatives. What one does not need,
13 again, one has to control this process. It is not an
14 exercise of trial. Again, it is quite a useful thought
15 experiment as we go through this Redfern as to how many
16 of these documents are going to feature at trial, so
17 where the complaint at trial is that the terms had an
18 unfair trading term because of a consent issue, that's
19 the allegation in relation to the final terms, what they
20 are trying to open up here is an investigation into all
21 the terms, any and all terms, that Meta considered by
22 way of alternatives which never saw the light of day.

23 THE CHAIR: At the end of the day, the issue is whether or
24 not the terms are unfair or unclear.

25 MR SINGLA: Exactly.

1 THE CHAIR: And that may have to be an assessment by the
2 Tribunal, and whether you have got it right or wrong is
3 not going to be conclusive.

4 MR SINGLA: The question is were the final terms compliant
5 with competition law, so this is just a fishing
6 expedition to start to go into, well, what other terms
7 did Meta consider but didn't implement and actually
8 we're going to give some disclosure in relation to that
9 anyway.

10 THE CHAIR: I can see in certain key areas they should look
11 at both, but the question is on this one, whether that
12 is really necessary.

13 MR SINGLA: Well, those are my submissions.

14 THE CHAIR: Yes. Thank you very much.

15 MS FORD: Sir, in our submission, Meta is trying to re-open
16 a debate that was determined against it fairly
17 conclusively at CMC 3. If we look, please, at
18 {A/29/103}?

19 THE CHAIR: What is that?

20 MS FORD: This is the transcript from CMC 3.

21 THE CHAIR: Okay.

22 MS FORD: Line 3 you see Mr Singla saying:

23 "The main problem we have with the CR's wording
24 here, which I think crops up elsewhere, is if you look
25 at the left-hand column bottom, two lines up, 'including

1 alternatives'."

2 THE CHAIR: It says the same that I said last time.

3 MS FORD: You did indeed. Mr Singla said the same as he
4 said last time.

5 THE CHAIR: But the only question is clearly you should be
6 looking at alternatives to a certain extent. The
7 question is on this one -- I have already ruled that we
8 should be looking at alternatives. The question is
9 whether, on Request 9 you've got a good ground for
10 saying that this should include the alternatives.
11 That's the only point. I'm not going to change what we
12 said last time because it took a lot of preparation in
13 that hearing, and I don't really want to go over what
14 I have already -- whatever we did last time.

15 MS FORD: Absolutely. So, to show the Tribunal what
16 Professor Scott Morton actually said about this,
17 because you've heard submissions about it but you
18 haven't been shown it, it is at {C7/5/3}, please. It
19 starts at paragraph 6 which summarises the request, or
20 quotes the request. Paragraph 7 cross-refers to the
21 report on the basis of which the Tribunal certified the
22 claim, and she says her preliminary view expressed in
23 that report is:

24 "... that there is a lack of transparency in Meta's
25 implemented terms of services which has limited users'

1 ability to make an informed decision regarding the use
2 of their data and their data privacy. Whether the terms
3 of service were transparent (or not) will inform my
4 economic assessment of whether Meta's conduct was unfair
5 in and of itself ..."

6 So, it goes to the United Brands limb two test, and
7 she notes that:

8 "Meta does not dispute the relevance of the
9 implemented terms of services ..."

10 But she makes the point:

11 "... understanding what alternative terms of service
12 Meta considered and tested but did not implement is
13 relevant to the question of transparency of the terms
14 that were implemented and the unfairness of those terms.
15 This is because I consider it is plausible that Meta
16 will have considered transparency as one of the factors
17 it evaluated when testing the suitability of the various
18 alternative options for the terms of service (and
19 equivalents); and relatedly, that the reasons why the
20 implemented terms were chosen over alternatives terms
21 will likely shed light on the extent (if any) to which
22 the implemented terms were considered by Meta to be
23 opaque and misleading compared to alternatives".

24 She makes the point that she also set out the
25 relevance of analysis of such alternatives in her joint

1 expert grid, so she has made the point that this ties
2 back to analysis and preliminary views that she set out
3 in her report in support of certification.

4 As to why we seek it under this Request 9 very
5 specifically, this is a targeted request for the
6 research and analysis and reports and such like that
7 Meta has done on this precise issue. It is asking for
8 the specific research from non-custodial repositories
9 such as Research Library and Launch Manager, which have
10 considered the testing of alternatives, and in my
11 submission --

12 MR RIDYARD: Are you saying that they might have thought
13 about an alternative and then said, oh no, we don't want
14 to do that because it's too transparent, we want to be
15 untransparent and therefore we will reject that one and
16 we will select something else.

17 MS FORD: Certainly we anticipate that they will have
18 conducted specific tests in relation to alternative
19 terms and how they might play out, but I wouldn't want
20 to speculate what conclusions or otherwise they might
21 have drawn, but it is one possible permutation, might
22 well be that we think that we can use these terms and it
23 doesn't put -- it may well engage with the extent to
24 which they want to be completely clear about certain
25 matters. These seem very obvious things to have been

1 tested, and in order to understand what was tested, what
2 was considered, what was rejected, one needs to see
3 alternatives, not just to what was implemented.

4 MR RIDYARD: In order to get to what their approach was you
5 need -- but do you need the -- the question is do you
6 need to look at everything they considered because
7 I think that is the objection, isn't it. There could be
8 an awful lot of things that they considered at various
9 points in time.

10 MS FORD: Well, the formulation is narrowed down in the
11 sense that it relates to the terms of service and
12 equivalence identified in Request 7 for Facebook,
13 Instagram and WhatsApp including alternatives, so this
14 is one of those ones that then refers back to how they
15 were defined in Request 7. If we look back -- I think
16 slightly unhelpfully, Request 7, the formulation has
17 though been taken out of that table, but it wasn't
18 simply all terms governing everything, it was the terms
19 governing the collection of off-Facebook Data, and so
20 this is not one of those ones where the responsive
21 documents will be AB testing for every single aspect of
22 every term ever, it will be narrowed down in the way
23 that prior Request 7 already has been to focus on what
24 specifically is at the core of the dispute in this case
25 concerning off-Facebook Data.

1 There's a passage in the disclosure report which
2 indicates that such documents are likely to exist, and
3 this is at {D/3/43}.

4 Now, just to draw the Tribunal's attention to the
5 heading at the top as to what this table is showing,
6 what this is doing is setting out the overview of the
7 custodial documents which are disclosed in Klein.

8 Ruling (Request 9) (Redacted for Approval)

9 MS FORD: Sir, I'm grateful. That takes us on to Request
10 11.

11 Request 11 is a request for -- the formulation that
12 we seek in relation to this is user flows or user
13 phrasing that prompts, or notification, including
14 prompts to accept options. I'm sorry I may have just
15 read out Meta's -- I have just read out Meta's wording.

16 THE CHAIR: Just clarify for me: who is green?

17 MS FORD: Meta is green.

18 THE CHAIR: Okay. Let me just read it again. So you want
19 me it look at number 11?

20 MS FORD: Number 11. (Pause)

21 THE CHAIR: Okay. You have to explain to me what the
22 significance is of the differences between you on this.

23 MS FORD: Sir, yes. There are three core disputes in
24 relation to this. The first concerns the sorts of
25 non-custodial documents that the Class Representative is

1 asking for, the second concerns the wording, "choice
2 architecture" and the third concerns the term
3 "off-Facebook Data".

4 Starting with the sorts of documents, this is
5 a request in respect of which the parties are agreed it
6 should be non-custodial disclosure, but we are seeking
7 disclosure of documents including but not limited to
8 screenshots and images. Meta, we understand, is
9 suggesting that the class rep should only get general
10 shots and images in response to this.

11 THE CHAIR: So what is missing in their formulation?

12 MS FORD: So it is the and/or wording is essentially the --
13 so we've asked for, in the yellow, non-custodial
14 documents (including screenshots/other images) that show
15 each element of the choice architecture. The counter
16 proposal from Meta is the passage in green
17 "screenshots/other images" so they are seeking to say,
18 as we understand it, that all you will get in response
19 to this request is screenshots and images.

20 Now, the oddity that arises from that is we have
21 agreed which non-custodial repositories to search, and
22 they will, we are told, be searching content management
23 system and board of directors records in respect of this
24 particular request, but if the search is to be limited
25 to screenshots and images, it is unclear to us what will

1 come back from searching repositories which one would
2 expect to contain text, for example, as well as
3 screenshots and images.

4 We do know that such potentially relevant analyses
5 exist, and if we go back, please, to the disclosure
6 report at {D/12/45}, this is the annex that I was about
7 to show the Tribunal which is showing custodial
8 documents in Klein, but the point we make is insofar as
9 they turned up in custodial disclosure in Klein, that
10 indicates that such documents exist and are likely to be
11 found in the relevant repositories, and there is an
12 entry "Data Collection and Use, Policies and Practices",
13 and the description of the documents that were comprised
14 in the Klein group under that heading are:

15 "Documents relating to Meta's Privacy Policy, Data
16 Use Policy and Terms and Conditions, including any
17 changes or proposed changes to these overtime. This
18 category also includes documents relating to Meta's
19 evaluation of its data collection and use practices,
20 including in relation to the impact of Meta's data
21 policies and practices on its users and competitors, as
22 well as its users' perception and understanding of those
23 practices. This category..."

24 If we just go over the page:

25 "... also includes documents regarding Meta's public

1 statements about its data collection and use practices".

2 That broad description seems to us to cover
3 documents which are responsive to this request, and we
4 are concerned that it should not simply be responsive --
5 it should not simply be limited to screenshots and
6 images.

7 THE CHAIR: Yes.

8 MS FORD: The second dispute concerns the term "choice
9 architecture". That is the Class Representative's
10 proposed formulation.

11 Meta has proposed changing that to refer to "user
12 flows or user-facing prompts or notifications including
13 prompts to accept options". We have sought
14 clarification from Meta as to whether that change in
15 wording is intended to affect the scope of the
16 disclosure sought. The reason we favoured the use of
17 the term "choice architecture" is because it was
18 a defined term in the list of issues for disclosure,
19 definition 3. Just to show the Tribunal that, {D/11/1},
20 please. Definition 3 on this page is defined as:

21 "The way in which firms and/or service providers
22 present information and choices to a user of their
23 services (including, for the avoidance of doubt, the
24 design of how choices are presented to users and the
25 manner in which those choices are described)."

1 So we've adopted that because it's already a
2 definition that has already been determined. We are
3 unclear what the intention is behind trying to change
4 the wording.

5 The final dispute on this concerns the qualification
6 "off-Facebook Data". In relation to various requests
7 throughout the schedule, there has been the proposal to
8 limit these requests to off-Facebook Data. We obviously
9 fully recognise that off-Facebook Data is the core of
10 the Class Representative's claim, but what we have
11 sought to ensure is that a qualification of that nature
12 isn't intended to limit disclosure to materials that
13 relate or refer specifically, expressly or exclusively
14 to off-Facebook Data, so it is not intended to have the
15 effect of removing things, for example, that do not
16 specifically refer to off-Facebook Data.

17 THE CHAIR: But at the moment the wording which talks
18 "and/or use of off-Facebook Data", that hasn't been
19 challenged. It is agreed.

20 MS FORD: I don't think it is agreed, what we are seeking to
21 establish, and this is one of the reasons why it is
22 shaded grey to indicate that there remains an answer of
23 a lack of clarity -- I say "a lack of clarity" rather
24 than a dispute because it may be that there isn't
25 a dispute, we wish to be assured that including that

1 qualification doesn't mean that documents which do not,
2 for example, specifically --

3 THE CHAIR: Sorry, which clarification are you saying?

4 MS FORD: It is including the reference to -- at the end of
5 formulation:

6 "Insofar as they relate to Meta's collection and/or
7 receipt and/or processing and/or use of off-Facebook
8 Data".

9 THE CHAIR: Just to understand, that's not being challenged,
10 that wording.

11 MS FORD: No, provided that the -- and this is why it has
12 been shaded grey -- to the extent that the dispute
13 between the parties or the lack of clarity relates to
14 matters that aren't challenged on the form of wording --

15 THE CHAIR: Is there a problem on this? I don't think there
16 is.

17 MR SINGLA: I don't know. I mean, the short point is the
18 wording is agreed --

19 THE CHAIR: I wouldn't worry about it. Okay. That's fine.
20 So we've got two issues --

21 MS FORD: An insertion which has been made into Request 28
22 to deal with this and if the same approach is going to
23 be --

24 THE CHAIR: We will come to 28 when we come to 28.

25 We've got two issues, Mr Singla. One is whether or

1 not the search is just limited to screenshots and
2 images, and the other one is the choice architecture.
3 On the choice architecture I would much rather stick to
4 what we've got in the list of issues for disclosure
5 because this is a defined term and I just want something
6 that is practical and easy for people to follow.

7 MR SINGLA: That is going to be our submission as to why it
8 shouldn't be choice architecture. That is exactly it.
9 We are the party doing the exercise, and we prefer the
10 concept of "user flows and user prompts" because that is
11 what we understand, and the question, therefore, is: is
12 there a delta between our wording and their wording and
13 I can address you on that, but what I think -- it
14 chimes, really, with the points you were making at the
15 outset, that this has to work for the party doing the
16 disclosure.

17 THE CHAIR: I know, appreciating who may end up having to do
18 it.

19 MR SINGLA: And it is 20 years of a disclosure exercise, and
20 the term "off-Facebook Data" is also one that is not
21 even used within Meta, so it is not really asking for an
22 indulgence, it is just suggesting that the party -- the
23 business ought to have the wording that reflects how
24 things actually operate because otherwise there will be
25 a problem, and in my submission the Class Representative

1 can only have a difficulty with that if, in substance,
2 they won't be getting something that they otherwise are
3 entitled to, and that's the only valid concern they
4 might have, otherwise -- but why should they control the
5 formulation of the disclosure which we are going to have
6 to provide? I mean, if, in substance, they are getting
7 what they are entitled to.

8 Can I just address you on whether there is, in fact,
9 a delta?

10 THE CHAIR: Okay.

11 MR SINGLA: Probably the easiest thing to do is to pull
12 up -- because to be fair to the Class Representative,
13 I think they sent a letter just asking us what the
14 difference was, and so if I just show you their letter,
15 it is at {E2/324/6}.

16 They were concerned with our use of language,
17 because it wasn't clear -- do you see paragraph 15 -- it
18 wasn't clear if it would address the wider context of
19 what is shown to users, and so if I just quickly address
20 you on A to E, so what triggers the presentation of any
21 prompts, how often and in what circumstances any prompts
22 are presented, well, we say in respect of this that what
23 matters for the purposes of 11, Request 11, is what
24 users actually saw, and so we do not accept any
25 disclosure obligation here should go beyond what users

1 actually saw, getting into the triggering of prompts and
2 notifications and so on. That is not a material point
3 on which disclosure should be provided here, because the
4 question is what, in fact, was presented to users, and
5 then C, I think we do agree that the default settings
6 for prompts fall within the user prompts. D I think we
7 do agree that falls within what we refer to as "user
8 flows", and E they say whether there are any elements of
9 personalisation. We say that, in fact, what this is all
10 about is the registration flows and the user prompts
11 which would apply across the board to all users. It is
12 not personalised, and subject to them changing over time
13 that is not a valid request, so just to take a step
14 back, first of all, our wording reflects the way the
15 business operates. Secondly, they say, well, are we
16 going to get A to E, and we agree with some of A to E
17 but not other bits, so that is the point on the
18 substance.

19 THE CHAIR: What is the date of this letter?

20 MR SINGLA: That letter was 11 November.

21 MR RIDYARD: What is it they are not going to get?

22 MR SINGLA: Well, A and B. I was just addressing you in
23 relation to A and B because we say, essentially, what
24 matters here insofar as there's a challenge to the terms
25 is what users actually saw, not anything under the

1 bonnet, as it were, triggering the presentation of any
2 prompts, user-facing flow -- I mean, what is being said
3 is that what ultimately was presented to users wasn't
4 transparent enough, so why do they need disclosure on
5 the underlying triggering of the prompts? It is just
6 nothing that the user ever sees.

7 So, in relation to A and B we do not actually accept
8 that they are entitled to disclosure. In relation to C
9 and D that is caught by our wording, and in relation to
10 E we say that is a non-point because all of this is
11 standard across all users, so that is actually the
12 dispute. Subject to that, we say it is obviously
13 sensible for our wording to be preferred as the business
14 doing the disclosure.

15 THE CHAIR: But you say on E the answer is that there
16 weren't any.

17 MR SINGLA: I think my answer is it's not clear what any of
18 this is going to, because the complaint is the standard
19 terms that were --

20 THE CHAIR: Because whether or not -- are the relevance of
21 personalisation or not.

22 MR SINGLA: But what is that going to? What is the pleaded
23 allegation in relation to which this gives rise to
24 a disclosure obligation? Insofar as they are relying on
25 Professor Scott Morton, she is not saying A, B and E are

1 required, so their objection to our formulation is set
2 out in this letter because they expect to get A to E, if
3 they get A to E they are content with our language. We
4 say "you are not entitled to A, B and E" --

5 THE CHAIR: So you can see within that there is a dispute as
6 to what they are going to get.

7 MR SINGLA: Yes, there is, but in my submission, unless you
8 are taking the view that they are entitled to A, B and E
9 over a 20-year period then you should go with our
10 wording, because in relation to C and D we do accept
11 they will get that.

12 I mean, again, one just has to have a degree of
13 realism about this. On the screenshots point as well,
14 the point there is that the type of information that is
15 being sought is going to be reflected in the general
16 shots. That is the very short point and again, there
17 has got to be an element of understanding -- you know --
18 or taking what we say, with a degree of trust. This
19 material will be captured by screenshots. There's no
20 one repository of screenshots, so this isn't a question
21 about where we should go looking, it is what sort of
22 documents would be responsive to Request 11 to which the
23 answer, again, Meta and Herbert Smith are saying this
24 will be in screenshots, because it is, again, what the
25 users are seeing when they use the service, so in my

1 submission that is, again, another straightforward
2 point.

3 Ruling (Request 11) (Redacted for Approval)

4 So that deals with number 11. Shall we have a break
5 now? Which is the next one that you are hoping to deal
6 with?

7 MS FORD: 12.

8 THE CHAIR: Right. Okay. There is a lot to go through,
9 isn't there?

10 MS FORD: There is, although I'm hoping that as the Tribunal
11 deals with these issues that come up for the first time
12 they can then be read onwards to some of the other
13 disputes and so the progress, as we go through, might
14 get quicker.

15 THE CHAIR: Okay. Progress is not a word that comes
16 straight to mind on this because we've done 9 and 11.
17 That has taken about an hour. Okay. So we're going to
18 have to speed up a bit. It does mean that we may rule
19 against you on certain things without you having a right
20 of reply. I would much rather not have ping pong, but
21 you say what you say, Singla says what he says, and it
22 is only if there is any real doubt in my mind or our
23 mind that we come back to you, otherwise it is just
24 going to just be like a piece of string, or a ball of
25 string. Okay. We will be back in ten minutes.

1 (11.39 am)

2 (A break was taken)

3 (11.55 am)

4 THE CHAIR: Okay. R12.

5 MS FORD: Yes. So, this is one of the ones that our
6 proposals about the approach to custodial and
7 non-custodial should hopefully dispose of the debate
8 about (Inaudible).

9 This is also one of the ones where (Inaudible).

10 THE CHAIR: Yes.

11 MS FORD: (Inaudible) through.

12 So the remaining live dispute on this concerns the
13 concept of UK users. This is a request where the
14 insertion of UK users has been proposed, and we've
15 indicated we do not object to it on the understanding
16 that disclosure will not be limited to materials that
17 relate or refer specifically, expressly, or exclusively
18 to UK users, and that is consistent with the indication
19 that was given by the Tribunal at the last CMC. This is
20 {A/29/33}, please.

21 THE CHAIR: Yes.

22 MS FORD: I wonder if I can ask the Tribunal to just run
23 your eyes over the debate -- it is a fairly extensive
24 debate we had last time round -- 33 to 39 in the
25 transcript, because we are concerned that the position

1 that Meta has now taken in correspondence is directly
2 contrary to what was taken last time round.

3 THE CHAIR: Can you just show me whatever I said?

4 MS FORD: Yes. So, the issue starts at line 18 -- the in
5 fact that in various issues of disclosure there have
6 been references inserted to "UK" or "UK users", and we
7 said we accept that, obviously, our claim is limited to
8 UK users. What we're concerned to assure is that we
9 don't lose out on disclosure of documents which are
10 potentially relevant to UK users in the sense relevant
11 by inference or, if we could go over the page, relevant
12 by analogy, but we get told that we won't get those
13 because they don't expressly or specifically refer to UK
14 users, and we give an example, if we go over the page,
15 please. Perhaps we can go over the page --

16 THE CHAIR: On the previous page you've got the comment that
17 we made last time, or was it the page before? Where I
18 give the example saying you've got a policy that is not
19 specific to the UK but does feed into what is going on
20 in the UK, and that should be covered.

21 MS FORD: Yes. You actually later gave a very specific
22 example about a policy which relates to US users which
23 would be potentially covered, notwithstanding it doesn't
24 mention the UK users at all, and that's really the crux
25 of the example. I wonder if we could --

1 MR RIDYARD: Page 37, line 10, isn't what Mr Singla is
2 saying there, does that not satisfy you?

3 MS FORD: It (Inaudible) satisfy the Tribunal last time
4 round, 37, line 10. {A/29/37}.

5 Yes, so the Chair is obviously then taking issue
6 with that, and this is an example:

7 "... let us say you have a document that relates to
8 the USA, okay? It makes no reference at all to the UK
9 users, but, clearly, that can still be relevant to the
10 issues in the action in relation to UK users because of
11 the points that have just been made by Ms Ford. If what
12 you are saying here is it has to specifically relate to
13 UK users, amongst other users, then it is too narrow..."

14 He says:

15 "We're not saying that".

16 Then he goes over the page {A/29/38}, and
17 essentially he is making the argument about those doing
18 the review need to understand what they are looking for.
19 The Chair says:

20 "If you have done an analysis in relation to US
21 users and say we're not going what they are doing in the
22 UK because of X, Y and Z, and it is clearly going to be
23 relevant to the issues in the action".

24 Then Mr Singla is largely taking issue with that as
25 an indication, if we could go over the page {A/29/39}.

1 Essentially, the summary that the Chair gives at 6, what
2 he is saying is:

3 "We were not going to confine ourselves to something
4 which directly refers to English users or relates to
5 English users in a more direct way, in a more indirect
6 way, it is on the transcript".

7 So this is where we got to, that essentially the
8 example that is being given of a US document that does
9 not refer specifically to UK users could conceivably be
10 a disclosable document.

11 The position that Meta has set out in correspondence
12 on Friday {E2/340/6}, please. We have this:

13 "It is the Meta Entities' position that, in order
14 for a document to be responsive to a request which
15 relates to UK Users ... it must explicitly, but not only
16 by express reference to "UK", relate to UK Users. Take
17 for example four documents which are identical and
18 potentially relevant, save that:

19 A. document (a) refers to 'global users' or 'users';

20 B. document (b) refers to 'UK Users' only;

21 C. document (c) refers to 'EMEA users' only; and

22 D. document (d) refers to 'APAC users' only.

23 "The Meta Entities consider that documents (a), (b)
24 and (c) may fall to be disclosed, but document (d) does
25 not. This is because whereas documents (a), (b) and (c)

1 may relate to UK Users (and also other users, in the
2 case of (a) and (c)), document (d) does not relate to UK
3 Users: it relates specifically to users in APAC".

4 That, in our submission, is directly contrary to the
5 indication that was given last time round. One doesn't
6 need to have an express reference to UK users, and it is
7 potentially possible that a document will be responsive
8 insofar as it relates to different geographical areas
9 because it could be responsive by inference. In our
10 submission this is quite clearly seeking to re-open
11 something that was dealt with last time round.

12 MR SINGLA: Can I just respond to that quickly?

13 THE CHAIR: Yes.

14 MR SINGLA: It is quite interesting that what the submission
15 amounts to, as you've already decided this, they are not
16 actually looking to develop the point as a matter of
17 principle. You didn't decide this last time. You said,
18 "if there's a problem we can talk about it at the next
19 CMC".

20 Now, the reason there is a problem, those behind me,
21 having considered this further, are minded that -- to
22 come up with something that is workable from a review
23 perspective.

24 Now, the question -- we've told them it is not
25 limited to UK users, and one has to actually wonder why

1 they want all this material, but be that as it may, they
2 are going to get (a), global users or users generally,
3 so a reviewer will see that that is a relevant document,
4 (b), UK users only, which is, brackets, all that this
5 claim is actually concerned about, (c) EMEA users only,
6 so the dispute is whether you are going to send us away
7 to give disclosure over a 20-year period which covers
8 documents that, on their face, refer to APAC users only,
9 or concern APAC users only.

10 Now, I mean, in my submission, for Ms Ford to say on
11 some inferential unexplained basis they want us to
12 conduct that disclosure exercise which covers documents
13 referring to APAC users only, what you are really being
14 asked to do is to ignore the scope of this claim and
15 order Meta to provide disclosure covering all users, so
16 I don't accept this was decided definitively. If it
17 was, I'm happy to say this I'm going to reargue it
18 because we've now considered how this is going to
19 actually work in practice, and just put yourself in the
20 position of someone conducting a document review. They
21 are not going to be able to make some calculation on
22 some inferential unexplained basis. They need to look
23 at a document, see whether it is relevant, so they are
24 going to get (a), (b) and (c), but why should they get
25 documents which refer to APAC users only, by way of

1 example? That is what is not being explained. What is
2 being said is that this was all argued before.

3 Can I just also, in relation to this request, make
4 this point, which is a different point? On the drafts
5 issue, we accepted in relation to Request 8 on Monday
6 the drafts would be in. The Class Representative is
7 still pursuing drafts in relation to a whole host of
8 other requests, including 12, but not limited to 12, but
9 I'm not going to address you on that because we need to
10 consider the latest correspondence, so I'm just putting
11 down a marker on that, but this UK users point is the
12 main point under 12, and it is really quite fundamental.

13 Sir, what you said earlier about protocols and
14 reviewers and so on, and fluid teams, can I just ask you
15 to think about how this is actually going to work on the
16 ground? There needs to be clarity.

17 Ruling (Request 12) (Redacted for Approval)

18 MS FORD: Sir, request 13 has been largely -- there was
19 a dispute about custodial versus non-custodial which
20 hopefully has been resolved by the proposal that we've
21 made in relation to the wording of that.

22 There is a dispute in relation to terms of choice
23 architecture which one would assume will be resolved in
24 the same way as the Tribunal's indication earlier today.

25 THE CHAIR: It will be, yes.

1 MS FORD: And I think I'm right in saying that's the extent
2 of the dispute on that issue.

3 THE CHAIR: So there is no dispute to resolve now. Okay.
4 Next point.

5 MS FORD: I'm awaiting confirmation in relation to the
6 wording on that --

7 THE CHAIR: Yes.

8 MS FORD: -- custodial versus non-custodial.

9 Request 14, there was also a dispute on custodial
10 versus non-custodial which we hope has been resolved by
11 virtue of the wording proposed. There was the issue
12 about drafts of terms which Mr Singla has just put down
13 a marker but for our part we consider ought to be
14 determined consistently with what the Tribunal said on
15 Monday about draft terms.

16 THE CHAIR: It should be, yes. Next one.

17 MS FORD: Request 15, the only dispute there was whether
18 Meta should search Research Library so that, again,
19 ought to be addressed by the wording that we've
20 proposed.

21 THE CHAIR: Yes.

22 MS FORD: Request 16, the dispute was on custodial versus
23 non-custodial, so that ought to be addressed by virtue
24 of the wording that we proposed.

25 THE CHAIR: Yes.

1 MS FORD: Request 17, this was a dispute about whether Meta
2 should search Launch Manager, again, hopefully addressed
3 by the terminology we proposed about custodial versus
4 non-custodial.

5 MR SINGLA: I do want to address you on a point in relation
6 to 17, if Ms Ford is about to move on.

7 MS FORD: I was going to point out that there is the
8 off-Facebook Data dispute in relation to that request.

9 MR SINGLA: That has gone, I think.

10 THE CHAIR: Mr Singla, what is the dispute in 17 --

11 MR SINGLA: A dispute has arisen in connection with Request
12 17 but it has ramifications for the process as a whole
13 and it is rather similar to the UK users point, because
14 it concerns workability from a review perspective. The
15 short point is it has been suggested by Quinn Emanuel
16 that the language, and I think I'm quoting, from
17 a letter, the language of the underlying IFDs should
18 govern the scope of Meta's disclosure obligations.

19 Now, we don't accept that because things have moved
20 on. The way this process has worked, rightly or
21 wrongly, is that the list of issues was drawn up, and
22 that was finalised, on the back of which the parties
23 have engaged in producing Redfern requests, which have
24 either been agreed or are being ordered by the Tribunal,
25 so when one comes to conduct the review, what the

1 reviewers need to have regard to is the Redfern request,
2 and not to superimpose the list of issues for
3 disclosure.

4 Now, we accept that --

5 THE CHAIR: Well, no, I think the list of issues for
6 disclosure is going to be a key document for every
7 member of the team to have, and to work from --

8 MR SINGLA: Well, can I --

9 THE CHAIR: -- but obviously you've moved on since then.

10 RESPONDENT: Exactly.

11 THE CHAIR: The next document will be whatever the document
12 comes out of this process as outlined this morning.

13 MR SINGLA: It is a staged process. Can I just make this
14 point --

15 THE CHAIR: I'm not -- I don't accept, if this is what you
16 are suggesting, that the list of issues for disclosure
17 is somehow irrelevant. It is clearly an important
18 document this has to be part of the -- let's say -- the
19 materials that the team is working from.

20 MR SINGLA: Well, can I just say this: insofar as the list
21 of issues for disclosure has defined terms like the
22 choice architecture point that you made before the
23 break, it has been agreed that those defined terms will
24 carry through to the Redfern requests.

25 THE CHAIR: Yes.

1 MR SINGLA: There is obviously a link in that sense, and
2 there's obviously a link in a more fundamental sense,
3 which is that the Redfern requests have been devised on
4 the back of the list of issues for disclosure, but what
5 we don't accept is that a reviewer on the ground in
6 relation to this exercise should have to check whether
7 a document is responsive not only to a particular
8 Redfern request, but to the list of issues for
9 disclosure. I mean, there's so many problems with that
10 document, as we've canvassed previously. We got to
11 where we were, but we tried to move on productively by
12 using that to produce the Redfern requests.

13 What we don't want is some suggestion, it is all
14 actually expressed in quite vague terms which is
15 slightly concerning in and of itself when we say that
16 the language should govern the scope of the disclosure
17 obligations, well, if what they are saying is the IFD is
18 what led to the Redferns then we agree. If they are
19 saying reviewers on the ground should have regard both
20 to the Redfern and to the 120-odd pages of the list of
21 issues, we don't agree, and we say it is exactly like
22 the UK users point. They are not having any regard to
23 the poor people on the ground who will be doing this.

24 THE CHAIR: Well, let's say -- sorry, did you want to say
25 something before I say something?

1 MS FORD: Sir, I do have a concern to express in relation to
2 this. The first version of the Redfern schedule that we
3 produced which is at {D/17/1}, in its first paragraph of
4 explanatory notes included the explanation that we had
5 summarised the issues for disclosure for convenience
6 only, and it wasn't intended that the summary of the
7 request in the Redfern would, in any way, alter the
8 scope of the underlying issues for disclosure. That's
9 the approach we took. We set that out from the outset.
10 Had there been a concern about that approach, in our
11 submission it should have been raised at that point in
12 time --

13 THE CHAIR: The list of issues for disclosure. That ship
14 has sailed in the sense that we have -- it was a painful
15 process, we got to the end of it, and it is an important
16 document, and whoever is -- the team members will have
17 to have regard for that in deciding what are the issues
18 for disclosure, that is there, but when it comes to the
19 next stage which Mr Singla is talking about, is what's
20 reasonably necessary and proportionate and how you get
21 to providing disclosure by reference to those issues,
22 the key document is clearly going to be this next
23 document, but I don't think you can look at them in
24 isolation from each other and I think it may all become
25 a bit clearer later on in the day, but that -- I do

1 envisage that the team members will be working from the
2 list of issues for disclosure as the sort of reference
3 point, but critically, when it comes to deciding what
4 they've got to do, and what's necessary and
5 proportionate and the extent of the searches, it's going
6 to be in this new document, but also I do expect people
7 to use their common sense in how you normally do
8 disclosure, which is you say, well look, we've agreed to
9 do this search, we look at this custodian, are we
10 actually fine that it refers to either there's a huge
11 gap here or it refers to some other place where there
12 will be documents that covers whatever this issue is,
13 which could be highly relevant to the issues in the
14 action. You don't put a blinker on and say "well, I'm
15 not going to do any further enquiries", and that's why,
16 in an exercise this complicated, you need to have a case
17 log, you have a case log, so when people make decisions
18 like that, they will say "we think we should do this
19 further enquiry" or say "well, we don't think we should
20 do any further enquiry" and then that goes to the
21 designated solicitor who will be monitoring the process
22 and making some of those difficult decisions. Whether
23 they get it right or wrong, they are not going to be
24 hammered if they use a judgment call when acting in good
25 faith and they don't get it right, because there's an

1 element of subjectivity in that, but as long as I'm
2 satisfied by the time we leave today everyone
3 understands how it is going to work, it is going to be
4 fine.

5 MR SINGLA: Can I just make two --

6 MS FORD: Well, I hadn't finished, actually.

7 THE CHAIR: Let him say what he wants to say.

8 MR SINGLA: Ultimately this is a point for those on my side
9 doing the disclosure, so the two points are these: one,
10 actually, it is very unusual to have a list of issues
11 for disclosure and a Redfern. What normally happens is
12 you have a list of issues for disclosure, for example,
13 under the Practice Direction, and then you have model D
14 or model C. This is an extraordinary process where
15 we've got both documents. So that's the first point.

16 The second point is the reason that it would be
17 manifestly unfair for the list of issues for disclosure
18 to be held over our heads, as it were, is because you
19 will recall the way this all came about at the last
20 hearing, many issues were slotted in subject to
21 proportionality, and we --

22 THE CHAIR: But they are though.

23 MR SINGLA: So therefore --

24 THE CHAIR: It doesn't make it irrelevant. What is
25 necessary and proportionate, okay, is going to be

1 governed by this new document --

2 MR SINGLA: Right. Well, we agree with that.

3 THE CHAIR: -- subject to the point I have just made which
4 is that you start the process and then if you see that,
5 actually, it is not generating the sort of information
6 that you think, and there is an indication that you are
7 going to get the same stuff some other way, you need to
8 consider it.

9 MR SINGLA: No, but that, with respect --

10 THE CHAIR: That is a normal -- that is normally how you do
11 it.

12 MR SINGLA: Well, no, but with respect I do part company
13 with you on the second point. The first point we agree,
14 so what is reasonable and proportionate is governed by
15 the Redfern request, but when you've just said, sir,
16 that it's not generating the sort of information that
17 you think, I think what I'm saying is the sort of
18 information would be the sort of information in the
19 Redfern request, and not the list of issues for
20 disclosure, and that's critical.

21 THE CHAIR: No, I accept that. Don't worry, I do accept
22 that.

23 MR SINGLA: I think we're on the same page.

24 THE CHAIR: We're on the same page, probably, because all
25 that I'm trying to make it clear is that you want

1 disclosure of the documents subject to the list of
2 issues for disclosure. How you are meant to be doing it
3 is going to be in this new schedule, okay? But if, when
4 you get to the front line, you see, for example, that
5 you think it is going to be in a particular custodian
6 and it is referred to in this schedule, and, in fact,
7 it's not held by that custodian, it is held by -- in
8 some other way, then using your common sense, you will
9 do what a solicitor normally does, is make a decision as
10 to whether or not it is going to be worthwhile,
11 necessary or proportionate, to look at that other
12 source, and that if a judgment call is being made by the
13 designated solicitor on something like that, whether
14 they get it right or wrong they are unlikely to be
15 hammered for that because as long as they are doing the
16 best they can using their professional judgment, it is
17 fine.

18 MR SINGLA: Well, I think we're on the same page. We are
19 going to conduct this exercise in a reasonable and
20 proportionate way, and with common sense, but that is
21 within the boundaries of the Redfern request, and we
22 will explain at the end of the process what we've done.
23 What we don't want is over the next six months, Quinn
24 Emanuel holding over our heads that we've got to do some
25 wider exercise in circumstances where the list of issues

1 for disclosure has been narrowed to the Redfern, so

2 I think we're on the same page.

3 THE CHAIR: I think we are. I think we are -- I know

4 there's an element of mistrust between both sides, and

5 that's quite common in litigation like this. We may be

6 sort of fighting shadows on this, and if there's any

7 problem you come back to me and then we will resolve it,

8 okay? Thank you.

9 MR SINGLA: Grateful.

10 MS FORD: Sir, it is a matter of concern that the Redfern

11 may be used to narrow the scope of disclosure that is be

12 to given in circumstances where we expressly indicated

13 in, essentially, the second sentence of --

14 THE CHAIR: We're going round in circles. I have said what

15 I have said. Thank you.

16 MS FORD: In that case, we're moving on to request -- so

17 I should just flag up that request 17 also raises the

18 concern we have about off-Facebook Data but I propose to

19 pick that up in relation to the formulation which has

20 been given in relation to Request 28 which we say can be

21 read across.

22 THE CHAIR: That's right. You are okay on that one. Yes.

23 MS FORD: Request 18.

24 THE CHAIR: Yes?

25 MS FORD: There are two limbs to it. It is asking for

1 standard form terms, policies and/or arrangements with
2 third parties, that's A, and terms, policies, and/or
3 arrangements with each of the largest 50 providers of
4 off-Facebook Data as measured by volume of Off-Facebook
5 Data collected/received/processed/ etc by Meta in
6 relation to UK users, and then those requests are then
7 narrowed down further. They are -- insofar as they
8 relate to (i):

9 "(i) Meta's collection and/or receipt and/or
10 processing and/or use of off-Facebook Data of UK Users
11 for personalised advertising on Facebook; and/or (ii)
12 the means by which those third parties collected, and/or
13 received and/or transferred UK Users' Off Facebook
14 Data".

15 Just picking up limb B first, what we are seeking
16 here is terms, policies or arrangements of the largest
17 50 providers of off-Facebook Data and the intention
18 behind this request is to get at the non-standard terms,
19 the bespoke arrangements. What we've tried to do, what
20 we've suggested is to adopt a sampling approach to
21 achieve that. We've suggested sampling by reference to
22 the volume of data that the relevant provider
23 essentially provides to Meta. That seems --

24 THE CHAIR: So it is a dispute, really, about non-standard
25 terms.

1 MS FORD: That's the dispute in relation to this limb. I'm
2 going to come on to address the slightly inter-related
3 dispute on limb A, because limb A is governing terms,
4 policies and arrangements with third parties that are
5 not bespoke as such.

6 THE CHAIR: You've got what looks like a sensible
7 formulation here that captures the standard terms, and
8 insofar as you've got big customers who have
9 non-standard terms you are going to get those.

10 MS FORD: That is what we've sought to achieve, yes.

11 To show you the reason why we think that
12 non-standard terms are particularly relevant {D/12/46},
13 back in the disclosure report, and in relation to
14 advertisers --

15 THE CHAIR: So what are you looking at now? The DR, is it?

16 MS FORD: This is the DR. This is the schedule that I have
17 shown the Tribunal previously, and there is somewhere on
18 this page -- it is under "Meta's Contracts with
19 Advertisers", there is a reference to bespoke contracts
20 with individual advertisers. It is in the US, but we
21 anticipate that similar provisions would apply in
22 relation to matters relevant to these proceedings as
23 well, so that's the exercise we're trying to achieve in
24 relation to limb B.

25 Coming back to limb A, the issue that arises here is

1 that in response to a request which is formulated in
2 terms of terms, policies and arrangements with third
3 parties, Meta's original proposal was that it would give
4 disclosure of Meta Business Tools Terms, and that is
5 a concept which is defined in Meta's defence, paragraph
6 10(b), if we look at {B/4/5}, please, and the Tribunal
7 will recall this paragraph because it is the one that
8 was subject to considerable debate when we were looking
9 at the definition of "Third Party Activity Data" which
10 is Meta's preferred terminology. This is the paragraph
11 which defines the Third Party Activity Data, and the
12 Tribunal will see halfway down there is a definition of
13 Meta's business tools, and it is pleaded that the third
14 party advertisers can choose to share their data by
15 integrating one or more of Meta's advertising products
16 on their own website or app, and that is what is defined
17 as Meta's business tools, and then the terms that govern
18 the use of such products are defined as Meta's Business
19 Tools Terms, and those are the standard terms that we
20 are being offered in response to R18, Request 18.

21 We have two concerns about that proposed
22 terminology. The first is, we say, it is excessively
23 narrow, and the second is that we say it appears to be
24 trying to re-open the dispute which the Tribunal
25 determined last time about the difference between Third

1 Party Activity Data which is Meta's favoured
2 terminology, and off-Facebook Data which is the
3 definition that the Tribunal has directed should be
4 applied.

5 We are concerned that if one limits things to Meta's
6 Business Tools Terms we lose out on potentially
7 important things. Those would include arrangements or
8 terms with third parties other than advertisers, because
9 the Meta Business Tools Terms applied to advertisers,
10 and an example of that is third party data vendors which
11 the Tribunal held at its disclosure ruling last time,
12 paragraphs 33 to 34, formed a part of the class rep's
13 case.

14 We're concerned that it would exclude policies or
15 arrangements as distinct from specific terms applicable
16 to third parties, and in our evidence and skeleton we
17 identified a series of particular terms which were
18 obviously not encompassed by this original proposal from
19 Meta, including Meta's Commercial Terms, Meta's Data
20 Processing Terms, and Meta's Platform Terms, and we were
21 also concerned that it wouldn't cover any predecessors
22 to the Meta Business Tools Terms.

23 Now, there has been some movement in terms of what
24 Meta says about this, but before I come to deal with
25 that I would just like to show you what Professor Scott

1 Morton says about this issue. She confirms that from an
2 expert perspective disclosing Business Tools Terms
3 wouldn't be appropriate, so this is {C7/5/5}, please.

4 Her paragraph 13 of her report for these -- for this
5 CMC refers to the fact that she understands that the
6 proposal should be restricted to what the Defendants
7 call the Business Tools Terms. She says:

8 "I do not consider this appropriate. I understand
9 that third parties are subject to various other terms
10 aside from the Business Tools Terms when interacting
11 with Meta..."

12 Then she gives a series of examples. She says:

13 "At this stage it is not clear to me which of the
14 various third party terms are the ones that govern the
15 sharing and/or transmission of data from third parties
16 to Meta. Without a holistic understanding of all the
17 terms that govern this sharing/transmission, I will not
18 be able to analyse in my Report Meta's contention that
19 third parties truly did 'choose to share' data on users
20 with them including the extent to which the range of
21 third party terms, policies and arrangements governing
22 such sharing/transmission of data to Meta from third
23 parties were sufficiently transparent".

24 So that's her concern behind confining it in this
25 way.

1 There was a proposal made on 21 November which is at
2 {E2/340/4}, and paragraph 14.

3 THE CHAIR: So this is Herbert Smith's letter, is it?

4 MS FORD: I'm sorry, yes.

5 THE CHAIR: And the date of it?

6 MS FORD: 21 November.

7 THE CHAIR: Yes.

8 MS FORD: What is being proposed to be provided is copies of
9 standard terms which are hyperlinked in the Business
10 Tools Terms, and they say they consider the following
11 standard form terms and policies of third parties to be
12 partly relevant and they give the list.

13 In our submission that is still falling short of
14 what we are seeking to achieve by this request. It
15 still fails to address arrangements that aren't
16 reflected in that particularly limited clutch of
17 standard terms. We are concerned that it doesn't appear
18 to cover terms with third parties other than
19 advertisers. It certainly doesn't give the holistic
20 understanding of contractual relationships that
21 Professor Scott Morton was indicating that she would
22 like to achieve. It doesn't include one of the heads of
23 terms that we specifically identified as being
24 potentially relevant, namely Meta's Commercial Terms,
25 and it is -- the position is set out on the basis of,

1 essentially, a further limitation which is that the
2 Class Representative should agree that searches under
3 subsequent requests, so requests 19 to 26, which
4 cross-refer to terms disclosed under Request 18, won't
5 include searches for that wider population of standard
6 terms, they will just be contracted back to the original
7 Business Tools Terms, and that, in our submission, is,
8 again, illogical, given that the way in which the
9 requests have been constructed is to define a population
10 of terms and then ask questions in respect of them, so
11 in our submission it is unsatisfactory to make that
12 position in any way conditional on saying that,
13 actually, you don't get that for the full scope of the
14 requests.

15 Ms O'Keefe has reminded me that there was sort of a
16 post script to this offer which was received in
17 correspondence last night. I think the key additional
18 suggestion for present purposes goes to the sampling
19 exercise that we proposed for non-standard terms under
20 limb B. We've sought the top 50 by volume of data.
21 I think the counter proposal there was to say the top
22 10, and it was in terms of -- I think it is in terms of
23 the value of the contract, rather than the volume of
24 data that is being provided which, we say, could
25 conceivably end up with a not necessarily particularly

1 representative sampling exercise if you go by value
2 rather than what we're really trying to get to the
3 bottom of, which is the volume of the off-Facebook Data,
4 so in our submission, and this is what we -- this comes
5 up again and again in subsequent requests -- what we are
6 seeking should not be limited to Meta's Business Tools
7 Terms.

8 Ms O'Keeffe has reminded me of a second point, which
9 is one of the reasons why the value of the contract
10 might not necessarily be the best metric to apply when
11 you are sampling is that there is an issue in the
12 proceedings as to the extent to which these third
13 parties understood the volume of data that they are
14 providing to Facebook, very much in dispute. If that's
15 the case, you might well have large contracts, but it
16 doesn't necessarily reflect the value -- sorry --
17 doesn't necessarily affect the volume of the data that
18 is being collected under them because it is not
19 necessarily something that they were aware of.

20 And vice versa in the sense that you could have
21 a low value contract, high volume of data or a high
22 value contract, low volume of data. Those are my
23 submissions on that.

24 THE CHAIR: Mr Singla?

25 MR SINGLA: We need to take this one in stages.

1 So the issues are as follows: what the scope of
2 18(a) should be, whether what you order in relation to
3 18(a) should then be tracked through to Requests 19 to
4 26, we say it shouldn't, they say it should, and the
5 scope of 18(b), but it has been agreed that 18(b) won't
6 be tracked through to 19 to 26. So that's the nature of
7 the dispute here.

8 Now, in relation to 18(a), the starting point, and
9 we say, in fact, the central documentation in relation
10 to 18(a) is the Business Tools Terms, so the Business
11 Tools Terms are the standard terms and policies which
12 govern the use of Third Party Activity Data for
13 personalised advertising, so that is absolutely at the
14 heart of the case, and we're going to give them, and
15 we're going to give them without any temporal
16 limitations. If there were earlier versions and so on,
17 we've told them that that is not a point we're taking,
18 so they are going to get those standard terms, and they
19 are also going to get those four sets of terms that you
20 saw in the Herbert Smith letter which are linked in the
21 Business Tools Terms, and those four other sets of terms
22 will mean that the disclosure goes beyond use for
23 personalised advertising, and they govern other use
24 that's made of that Third Party Activity Data, so they
25 are getting a lot in relation to 18(a), and we've

1 confirmed in the letter of last night which I'll show
2 you in a moment, but actually perhaps we can just bring
3 it up, it's {E2/359/1}, we've confirmed in
4 correspondence that these are, so far as we're presently
5 aware, the standard terms which relate to the procession
6 and use of off-Facebook Data, so if I could just ... if
7 we could -- you will see at paragraph 3, do you see the
8 A Platform Terms, B, data security terms, so those are
9 the four sets of terms in addition to the Business Tools
10 Terms that we've offered to provide. If we go over the
11 page, please {E2/359/2}, you will see at the top:

12 "... to the best of their current awareness the Meta
13 entities confirm are the standard form terms and
14 policies which govern the sharing of "Off-Facebook Data"
15 with Meta by third parties, including advertisers..."

16 They haven't actually identified any other standard
17 form terms, and then in the main paragraph, 4, you will
18 see that Herbert Smith explain that there is no temporal
19 scope concern, and then about halfway down do you see:

20 "The Class Representative at paragraph 10 appears
21 to complain that there may exist other standard form
22 contracts or other arrangements".

23 That's the underlined wording:

24 "... other than the Business Tools Terms or the
25 other standard form terms and policies ..."

1 So far as the Meta Entities are presently aware, the
2 standard terms are those --

3 MR OLSEN: Sorry, does this raise a question of terminology
4 then? So there is no delta, you're saying that these
5 documents represent everything that they're asking for?

6 MR SINGLA: Well yes and no. Insofar as they are asking for
7 standard terms they are getting all of the standard
8 terms that govern the use of Third Party Activity Data,
9 both in relation to advertising and other use and
10 processing, so that's our proposal in relation to 18(a),
11 but that then needs to be looked at in conjunction with
12 what we're offering under 18(b), so the concern seems to
13 be that --

14 MR OLSEN: I'm just concerned with 18(a) at this point.

15 MR SINGLA: Yes, no, you are -- but the complaint in
16 relation to 18(a) is it is limited to standard terms,
17 and it is limited to Third Party Activity Data. I mean,
18 insofar as I understand, what is being said as to why
19 18(a) is inadequate, we've said these are all standard
20 terms and that's the end of it. They say that's an
21 inadequate proposal for those two reasons, to which we
22 say, but look what you are getting under 18(b), so
23 that's why one needs to look at them as a package, and
24 that's what this letter helpfully explains, so you will
25 see at the end of paragraph 4:

1 "The Meta ..."

2 Well, paragraph 52 of Ms Vernon's statement
3 complains about the proposal:

4 "Insofar as third party activity", so this is the
5 point Ms Ford has just made, that they might be missing
6 out on terms with other parties than advertisers, and
7 she referred you to vendors, I think, so:

8 "The Meta entities anticipate that the Class
9 Representatives' concern regarding such potential
10 contracts or other arrangements will be addressed by the
11 proposal for 18(b). For the avoidance of doubt that
12 proposal would involve searches that go beyond Third
13 Party Activity Data".

14 So, what we say is 18(b) actually sweeps up any
15 delta that they are concerned about going beyond
16 standard terms, so that's the first point, what should
17 the scope of 18(a) be, but as I say, one needs to have
18 regard to what we're suggesting would be provided under
19 18(b) in that context, and I'll come on to the substance
20 of 18(b) in a moment, but before I do so, the question
21 then is in relation to 18(a), should that be rolled out
22 so that whatever you order in relation to 18(a) should
23 be the subject of 19, 20, 21 through to 26, and that's
24 the point dealt with at paragraph 5 of this letter where
25 we say it would be disproportionate to expand 19 to 26

1 to cover those four additional sets of terms.

2 THE CHAIR: So which paragraph are we looking at now?

3 MR SINGLA: Paragraph 5.

4 THE CHAIR: Yes. Okay.

5 MR SINGLA: So what we -- I think we accept that 19 to 26
6 would cover the Business Tools Terms, but the point
7 we're making in 5 is we don't accept it would be
8 proportionate for all of the disclosure from 19 to 26 to
9 capture these four additional sets of terms, and that's
10 because they really are ancillary.

11 The key terms -- let's just be completely clear
12 about this -- the key terms are the standard Business
13 Tools Terms. That's really what this case is going to
14 be concerned with. We've offered pragmatically to give
15 them the four other sets of terms in relation to 18(a),
16 but we don't accept this should then be extrapolated out
17 through to 19 up to 26, and just to give you a flavour,
18 we say in 5 that it is all disproportionate. To give
19 you some numbers, so that you understand, actually, what
20 the scope is, in relation to -- so if one were to extend
21 18(a), these four sets of terms, that we've offered to
22 provide under 18(a), if that offer were to be applied to
23 19 alone, so they are asking for it, to be clear, 19
24 through to 26, that would take this material, as I
25 understand it, to about 500,000 documents, whereas if --

1 if Request 19 was limited to the Business Tools Terms it
2 would be about 98,000 documents. It is actually going
3 to increase the scope of this disclosure exponentially.
4 That's just if you roll out --

5 MR RIDYARD: And you are saying that's 500,000 documents to
6 be searched rather than -- you are not going to produce
7 500,000?

8 MR SINGLA: Yes, that must be right, yes, responsive to his,
9 but that is just the four sets of terms being added into
10 19. You go from 98,000, on instructions, it's just the
11 business tools, it is 98,000. If it is adding these
12 four sets of terms, it is 500,000, and then you've got
13 to do that for 20, 21 -- you've got the point, so it is
14 an exponential increase, and the question is why should
15 these ancillary terms, which are really ancillary -- I
16 mean, they are referred to in the Business Tools Terms,
17 they govern other use and processing of data, but they
18 are not anywhere near the centre of this case, and so we
19 will give them under 18(a), but not under 19 through to
20 26, and those figures I have given you are just in
21 relation to emails and work chats, so even those numbers
22 will increase, so this is actually a very big point.
23 The reason I'm taking a bit of time over this is, again,
24 one can't be -- one can't just deal with these too
25 quickly because they have huge ramifications for the

1 scope of disclosure, so that's what we say on 18(a) as
2 regards scope and whether it should be rolled out, and
3 then on 18(b) you will see, if we could just go over the
4 page on the letter, please -- actually, sorry, could we
5 just go back a moment? If we could start at the bottom
6 of the previous page {E2/359/2}? So you will see as
7 regards 18(b) we have been considering a workable, and I
8 emphasise that word, reasonable, proportionate -- so the
9 Meta entities hold millions of contracts with third
10 parties for all manner of purposes, entirely unrelated
11 to these proceedings, so any indiscriminate or
12 poorly-targeted search would be grossly
13 disproportionate. Certain third parties may have
14 thousands of contracts with Meta, so one-third party
15 provider may have thousands of contracts with Meta, so
16 again, what is going to be workable and sensible and
17 reasonable and proportionate, you see the offer that has
18 been made which takes the largest 50 -- again, it is all
19 completely over the top. We've suggested 10, largest 10
20 rather than 50 providers, okay? If they have thousands
21 of contracts, each of them, just think about how much
22 disclosure that is going to result in, if it is 50, and
23 then we've changed volume to the specified value, and
24 there's no -- nothing sinister intended by that change.
25 It's just, again, what is going to be workable from the

1 business's perspective, and what is an objective
2 criterion to apply, and our position is that they've
3 specified a value in the contract, is the way to do
4 this, not by volume. So those are my submissions,
5 unless ... those are my submissions.

6 Ruling (Request 18) (Redacted for Approval)

7 MS FORD: Sir, moving on to Request 19 --

8 MR SINGLA: Before we move on, I'm not sure -- my real time
9 is not working so I apologise if you did deal with this,
10 but did you deal with the question of whether one then
11 tracks this through to requests 19 to 26?

12 THE CHAIR: Okay. I would rather look at it when we look at
13 19 individually --

14 MR SINGLA: I'm sorry.

15 THE CHAIR: -- rather than now because it all depends on
16 what those ones say.

17 MR SINGLA: Of course, I'm sorry. It is just because I
18 addressed it in my submissions, I wasn't sure --

19 THE CHAIR: I think you made it as a general proposition.
20 We don't want it to feed through 19 to 26, but when we
21 look at 19 to 26 we're going to have to look at them
22 one-by-one.

23 MR SINGLA: Of course. I understand, but, to be clear, the
24 way the parties have approached this is that it is
25 either 19 to 26 or it is not, so that was the reason I

1 addressed it. I'm happy to have a go on each one as we
2 go through.

3 THE CHAIR: No, but what will happen is Sarah Ford didn't
4 cover that, really, or at least not in enough detail for
5 us to come in a view on it.

6 MR SINGLA: Okay.

7 MS FORD: So, Request 19 is seeking -- they want a dispute
8 about custodial versus non-custodial but the way we
9 anticipate that -- it has hopefully been resolved by the
10 wording we put in, so it is documents in relation to how
11 and for what purposes Meta designed and implemented the
12 third party terms, policies and arrangements identified
13 in Request 18 insofar as it relates to Meta's collection
14 and/or receipt and/or processing and/or use of
15 off-Facebook Data, so this is a classic example where we
16 are now looking to understand how and for what purposes
17 these terms were designed, and in our submission it is
18 clearly necessary to understand that process in relation
19 not only to what Meta considers to be the standard terms
20 governing its Third Party Activity Data, but the full
21 spectrum or the holistic understanding that Professor
22 Scott Morton seeks of the total universe of terms which
23 governs the collection of off-Facebook Data, so in our
24 submission this is a classic example where it is
25 appropriate to grant disclosure in respect of the full

1 spectrum of terms.

2 THE CHAIR: Okay. So is that -- that's the issue, is it,
3 really --

4 MS FORD: That's the issue.

5 THE CHAIR: -- on 19 so we need to let --

6 MS FORD: I think drafts comes up in relation to this issue
7 as well, but again, one assumes, unless said otherwise,
8 that what the Tribunal has indicated in relation to
9 drafts would apply to this as well.

10 THE CHAIR: It should do. Drafts I think we've dealt with.
11 The real question here is to hear a bit more from
12 Mr Singla on why he says that the -- what was said on 18
13 doesn't feed through to 19, and if we're in his favour
14 on 19, it is likely to feed through to the rest of up to
15 26.

16 MR SINGLA: Sir, can I just take a moment?

17 THE CHAIR: Of course you can. It is not a problem.

18 MR SINGLA: I wasn't aware of the points. (Pause)

19 I'm sorry I need to just clarify something, just to
20 get clarification from Ms Ford as to what the difference
21 is between us. I think we had seen 19 as being limited
22 to standard terms. I just need to just check whether
23 what is being sought now is all terms, policies and
24 arrangements.

25 THE CHAIR: You need to know what she means. Yes. Okay.

1 Let's get that clarified.

2 MS FORD: Yes. I understand the ambiguity. We are not
3 seeking to track through the limb B disclosure from
4 Request 18 --

5 THE CHAIR: I didn't think you did, but -- no.

6 MS FORD: -- but insofar as we have made the submission that
7 limb A includes terms, arrangements and policies, and
8 should not be limited to the specified -- I think it is
9 five standard terms that --

10 MR SINGLA: Yes. I think --

11 MS FORD: Yes. The concern we've expressed that there are
12 various policies which, indeed, Meta has acknowledged
13 are potentially responsive to the earlier request, the
14 hyperlinked terms which are hyperlinked even from the
15 Business Tools Terms, Meta's position, as we understand
16 it, is that even those won't be addressed in response to
17 this request, they simply say you get the Business Tools
18 Terms and that's it, and in our submission that is
19 completely unsatisfactory, not least because the
20 Business Tools Terms are inextricably linked to the much
21 narrower definition of Third Party Activity Data that
22 the Tribunal has --

23 THE CHAIR: And we've already had that, but on 19 the very
24 minimum you are going to do is to clarify that this has
25 some feedback to 18(b), and Mr Singla is right to pick

1 you up on that because it is ambiguous on it at the
2 moment, and so the real debate here is whether or not
3 you look at Business Tools Terms or something wider, as
4 you suggest.

5 MS FORD: That is the debate, yes.

6 THE CHAIR: Thank you. Mr Singla?

7 MR SINGLA: I think you were right to say that we should
8 look at this as we go along, because the submission I
9 made in the context of 18 was actually by reference to
10 the proportionality of rolling it out, and the numbers I
11 gave you were in relation to 19, so if we just -- at the
12 risk of repeating myself -- on 19, if we were to limit
13 this to the Business Tools Terms, that would generate
14 98,000 documents, and that's only the --

15 THE CHAIR: 98,000 hits, yes?

16 MR SINGLA: -- yes, and that's only emails and work chats,
17 so that is an underestimate. If you add to 19, so it is
18 not just the BTT but it is also the four sets of terms
19 that we were talking about, that number becomes 500,000,
20 so we say it is manifestly disproportionate, and I think
21 as I understand Ms Ford to be saying, that even that,
22 the four, that is inadequate under 19, so she wants to
23 go beyond the four.

24 THE CHAIR: Let's just understand this. Let's say you get
25 200,000 hits. What are you going to do with those? Are

1 you going to use AI or some form of tool in order to
2 identify a subset of that that human beings will have to
3 look at, or are you saying that the whole of that is
4 going to be looked at by a human being?

5 MR SINGLA: Well, as you know --

6 THE CHAIR: The second is going to be quite expensive.

7 MR SINGLA: Well, this is all going to be hugely expensive,
8 and whether or not AI is used, and I don't want to
9 interpose the debate about AI now, we've said some
10 technology will be used but the precise details are to
11 be worked out, so some technology will be used, but I
12 wouldn't for a moment accept that that makes it all
13 right to send us away to do millions and millions of
14 documents on these ancillary issues.

15 THE CHAIR: I know, but the thing is, is that unless you use
16 technology sensibly, you are going to be unnecessary
17 spending a lot of money when technology is at least part
18 of the solution to the burden. It is in your interest.
19 Don't think other people don't do this. How do you
20 think vast amounts of data are analysed, for example,
21 for security purposes? You know, it's -- you know, it's
22 not --

23 MR SINGLA: My submission is the wrong way around. The
24 starting point is what order should be made, what's
25 reasonable and proportionate --

1 THE CHAIR: I know, but what's reasonable and proportionate,
2 a lot will depend on whether we're talking about a human
3 being, let's say, looking at 200,000 hits, or a human
4 being looking at a subset of that with TAR helping them
5 identify which are the ones that are likely to be of any
6 use, because if what you are going to do is go back to
7 how it was 15 years ago, it's going to be too expensive,
8 isn't it.

9 MR SINGLA: Yes. What we've said is TAR will be used. What
10 that does is it essentially tells you where one can cut
11 off the human review, but the thing is going to have to
12 be reviewed, ultimately, by humans.

13 THE CHAIR: I agree with that. No dispute about that.

14 MR SINGLA: It would be wrong to say that -- I mean, these
15 are vast numbers, and we're talking about a single
16 request. Request 19 out of a document which runs to 120
17 requests. It is going from 98,000 in relation to the
18 Business Tools Terms to 500,000 if you add in just the
19 four other sets of terms. Now, you may say, well, you
20 can use AI, but, with respect, if one adopts that
21 approach through the 120 Redfern requests, that is going
22 to be an extraordinary amount of material that will
23 ultimately have to be reviewed by humans -- not all of
24 it, I accept that -- but where the technology is going
25 to come in is it is going to tell us where one can cut

1 off eventually, even Quinn Emanuel will accept we don't
2 have to review absolutely everything but that is to be
3 debated in due course but you have to proceed on the
4 basis that there is going to be a significant amount of
5 human review, and I really would urge you to ask
6 yourself -- I mean, the points you made at the outset of
7 this morning's hearing were, in my respectful
8 submission, absolutely on point, that this needs to be
9 kept -- and the submission I'm making right now actually
10 applies across the board -- this does need to be kept
11 within proportionate bounds. That is something that
12 this Tribunal has been alive to for many years, and so
13 it really is a question of these ancillary terms are
14 going to absolutely balloon the scope of this exercise,
15 because we were just talking about 19, and I'm just
16 talking about four sets of terms, so those numbers you
17 need to have in mind then need to be extrapolated across
18 all these other documents which she now wants, and
19 across Request 20, 1, 2, 3, 4, 5, 6. The reason we're
20 not making progress in terms of this hearing is because
21 they really are asking for the absolute world here, and
22 we are pushing back because these points are --

23 THE CHAIR: Let's understand this. On 19, what is your
24 offer? Is your offer Business Tools Terms plus what
25 you've suggested in paragraph 14 of Herbert Smith's --

1 MR SINGLA: It's not --

2 THE CHAIR: And so it's not what's listed in paragraph 14 of

3 that letter?

4 MR SINGLA: Of the letter?

5 THE CHAIR: 21 November.

6 MR SINGLA: Is that the four sets of terms?

7 THE CHAIR: Yes.

8 MR SINGLA: No.

9 THE CHAIR: That's what you are saying. You have taken that

10 out because you say "once we include the four sets of

11 terms" you go from 98 to 500.

12 MR SINGLA: Exactly, and she is going beyond the four, to be

13 clear.

14 THE CHAIR: I know that. Of course that goes without

15 saying. Yes. Okay.

16 MR SINGLA: That's the point.

17 THE CHAIR: In relation to Request 19, this provides as

18 follows:

19 The issue between the parties is as to whether or

20 not it's reasonable and proportionate to go beyond the

21 Business Tools Terms in relation to these ancillary

22 matters. Herbert Smith in their letter dated 21

23 November 2025 at paragraph 14 pointed out that they were

24 willing in certain respects to give, in addition to the

25 Business Tools Terms, four sets of terms, but it's been

1 pointed out to the Tribunal that if that offer is
2 applied to 19 to 26, you are talking about 98 -- instead
3 of 98,000 hits you are talking about 500,000 hits. The
4 Tribunal does consider that the burden may well be
5 somewhat exaggerated, given the ability to use TAR to
6 reduce the amount of material that has to be subject to
7 human review. However, we do want this exercise to be
8 reasonably proportionate and what we are going to order,
9 that in the first instance these ones will be by
10 reference to Business Tools Terms, but if that does lead
11 to a too narrow amount of material, then there is
12 liberty to apply to the Tribunal in correspondence on
13 behalf of the CR. We're trying to come up with
14 something that's practical, and we do appreciate there's
15 a limit to how much can be expected to be done in the
16 time available and at reasonable and proportionate cost,
17 so we're not cutting out the CR on this, but what we are
18 saying is initially it should be by reference to the
19 Business Tools Terms. That's for 19 to 26.

20 As disclosure is going to be on a rolling basis,
21 what we don't want to happen is that if this debate does
22 come up again, it's left to the end the disclosure
23 exercise. One would hope that when it comes to
24 prioritising what comes first and what doesn't come
25 first, this is going to be an area that is prioritised,

1 so we can get to a crystallised position relatively soon
2 into the process. So this could be a battle for another
3 day, but we need to see what actually comes out to see
4 what works and what doesn't work.

5 Yes.

6 MS FORD: The next request is Request 20.

7 THE CHAIR: What we've just said now does apply to the whole
8 of 19 to 26.

9 MR SINGLA: Yes.

10 THE CHAIR: Yes.

11 MR SINGLA: In relation to rolling disclosure, can I say
12 something about that later?

13 THE CHAIR: Yes. We can come back to rolling disclosure.

14 MR SINGLA: You've mentioned it a few times. I just want to
15 say something about it later.

16 THE CHAIR: Okay. Well then, it is nearly 1 o'clock, so
17 Ms Ford, do you want to sit down? Let's just hear what
18 he wants to say about rolling disclosure. Yes.

19 MR SINGLA: Oh well --

20 THE CHAIR: It is a very short point, isn't it?

21 MR SINGLA: Well, we need to make some proposals, is the
22 short point, so --

23 THE CHAIR: Of course you do, yes.

24 MR SINGLA: I just want to say we're thinking about it, so
25 in case your remarks this afternoon were going to cover

1 rolling disclosure, I just want to --

2 THE CHAIR: It will do, but the thing is, I'm not going to

3 give you any dates and timings for rolling disclosure.

4 You will get to -- in relation to each, let's say, area,

5 you will get to a position by a certain date saying,

6 actually, we're now ready to disclose it, and so as and

7 when you've completed a discrete area, then you can --

8 you should provide a disclosure, but I'm not going to

9 give dates or anything like that.

10 MR SINGLA: I'm grateful.

11 THE CHAIR: That wouldn't be what I normally do.

12 MR SINGLA: We need to take away where we get to on the

13 Redfern and so on to look at the whole exercise in the

14 round. That's one of the issues.

15 THE CHAIRMAN: All I'm trying to avoid on the rolling

16 disclosure point is that we, in ten months' time, or

17 whenever it is done, the review by the other side starts

18 on that day.

19 MR SINGLA: No, we understand that. We haven't actually

20 made -- I just wanted to explain, we haven't actually

21 made a concrete proposal because it is all a very fluid

22 situation. We need to look at the scope of the

23 exercise.

24 THE CHAIR: I don't expect a concrete proposal.

25 MR SINGLA: I'm grateful.

1 THE CHAIR: And that is something that is the sort of thing
2 that you can work out as and when you go along. I think
3 it's unfair on your team to be told you've got to do
4 your first round by a certain date or anything. We're
5 going to have the end date, and I have to trust
6 Herbert Smith to a certain extent, that they ever going
7 to be sensible and when they work through a particular
8 area and they say, oh yes, we've done this bit now,
9 let's provide disclosure, that's what they are going to
10 do, subject to any topping-up, because, as you know,
11 what you don't want to do is say "here is our disclosure
12 in issues", let's say, 5 to 10, and then as you go on
13 you find more stuff on 5 to 10 and then you get hammered
14 by the other side saying, well, that was inadequate,
15 your disclosure statement wasn't right, because you
16 haven't picked up stuff, so that's why we will have
17 maybe interim disclosure statements, but you will have
18 a global list at the end with a full disclosure
19 statement which will make the other stuff superceded.

20 MR SINGLA: I'm grateful. Sorry to raise that now.

21 THE CHAIR: No, it is a good point to raise. You shouldn't
22 be apologetic. Yes. Okay. So what's the next one? Is
23 it going to be 20?

24 MR SINGLA: Yes. There's a point on 20.

25 THE CHAIR: But insofar as you are able, amongst yourselves,

1 to keep agreeing stuff over lunchtime, please just keep
2 talking. Okay. Thank you very much.

3 (1.02 pm)

4 (Luncheon adjournment)

5 (2.06 pm)

6 THE CHAIR: So, Ms Ford, you are not really sharing the
7 burden. Are you. Are we going to hear from your
8 juniors today?

9 MS FORD: Sir, what's slightly unfortunately happened is
10 that the parceling out of subject matter -- those things
11 that my juniors were proposing to address have largely
12 been resolved during the course of the --

13 THE CHAIR: That's okay. (cross talk).

14 So it's been a nil return on your side; Mr Singla,
15 it is going to be a nil return on your side as well?

16 MR SINGLA: For the same reason. The juniors are obviously
17 much more co-operative as they've managed to agree their
18 points.

19 THE CHAIR: Okay. Fair enough. We do want to encourage the
20 juniors.

21 MR SINGLA: We're very conscious of that and certainly for
22 the December hearing we will certainly give that some
23 more thought. It's just the way that things --

24 THE CHAIR: That's fine. It is the way the cookie has
25 crumbled. Yes.

1 MS FORD: We are, I hope, coming to a run of issues where
2 they ought to be largely disposed of, either by our
3 proposed approach --

4 THE CHAIR: Okay.

5 MS FORD: -- Redfern or by what the Tribunal has already
6 said.

7 THE CHAIR: Okay.

8 MS FORD: What I was proposing to do is just run through
9 what we say the issues -- and to the extent there is any
10 disagreement we can --

11 THE CHAIR: Which number are we on now?

12 MS FORD: We're on 20. We're just concerned with the
13 testing of the suitability of third party terms,
14 policies and arrangements.

15 THE CHAIR: Hopefully we sorted that one out already,
16 haven't we, from what we said already.

17 MS FORD: Well indeed. The issues that arise are the
18 Business Tools Terms point about the scope of this in
19 term of the terms which the Tribunal has dealt with.
20 There's the point about the inclusion of alternatives
21 which the Tribunal directed to be included last time
22 this point arose.

23 THE CHAIR: That's fine.

24 MS FORD: So, we would say the same applies. There is the
25 point about the definition of off-Facebook Data which I

1 simply --

2 THE CHAIR: We resolved that one.

3 MS FORD: I propose to come back to it under Request 28

4 because there's wording in --

5 THE CHAIR: We will look at 28. Yes.

6 MS FORD: There was an issue about non-custodial

7 repositories but that has now gone, and the drafts point

8 applies in relation to this one but that has been dealt

9 with, so from our perspective it ought to be done.

10 THE CHAIR: Okay. That should be fine. Yes.

11 MR SINGLA: On 20, there's one point that we make, but it is

12 an important one. It is the reference to alternatives.

13 We don't accept that this, as it were, stands or falls

14 with your decision earlier in relation to, I think it

15 was Request 9, and the reason this is different is

16 because this is in relation to terms with third parties,

17 so if we just take a step back, insofar as terms are

18 relevant to this claim it must be the terms -- or it is

19 the terms between the Facebook users and Meta, and the

20 earlier requests were all about how those terms were

21 designed and what they wanted and I was resisting, was

22 alternatives that were considered but not implemented.

23 That's all vis-à-vis the users.

24 Here, we're now talking about the standard form

25 terms with third parties, and now they want underlying

1 disclosure going back to consider the alternatives of
2 the third party terms, and we say that is both of
3 tangential relevance and disproportionate, because what
4 one can -- you've obviously ruled that it is appropriate
5 for them to have disclosure in relation to alternatives
6 of the user terms --

7 THE CHAIR: Correct. Yes.

8 MR SINGLA: -- but we say, in fact, actually, the
9 submissions I was making in relation to why that was
10 disproportionate, is that the position is a fortiori
11 here because now we are going off into a whole other
12 enquiry as to the terms between Meta and third parties
13 not the users, and not merely what those terms were, but
14 what alternatives were considered by Meta that were not
15 ultimately implemented, so that's why it is an a
16 fortiori point. I think Professor Ridyard asked the
17 question was to where all of this is going -- do you
18 really want everything that was ever considered. I
19 accept that I have lost that point in relation to 9,
20 but --

21 THE CHAIR: 9 was different, and at the time when we ruled
22 on 9 we made it clear that was not going to be
23 definitive, because we needed to have further argument
24 further down the line.

25 MR SINGLA: To be clear, where things do stand or fall with

1 your decisions, we are taking all of those points on
2 board but this one doesn't in our submission.

3 MS FORD: Sir, I haven't had the opportunity to address you
4 on it.

5 THE CHAIR: No you haven't. Okay. Let's hear what you've
6 got to say.

7 MS FORD: The first point is that this has already been
8 narrowed down to the standard Business Tools Terms, so a
9 submission that this is a disproportionate exercise in
10 my submission, it struggles when we've already narrowed
11 it down fairly substantially.

12 The second point is the submission that transparency
13 vis-à-vis third parties is somehow peripheral was one
14 which was expressly canvassed at the last CMC, and the
15 Tribunal did make a ruling on it. If I could show you,
16 please {A/29/124}? I'm wondering whether or not that's
17 the ... I did say 124 but I think it may be the wrong --
18 oh that is 104. 124. Thank you.

19 So I'm just showing you the beginning of the passage
20 where --

21 THE CHAIR: Yes, but the point on here is that I'm not
22 saying, or we're not saying that the third party terms
23 are not relevant, okay? They are clearly relevant on
24 the pleadings.

25 What Mr Singla is saying is that they are not as

1 central to the issues in the case as the other half, or
2 the first half of it, and so what we've got to address
3 is not that they are relevant because we've already
4 decided on that, but how far is it necessary for them to
5 search in respect of this half which is not as important
6 as the first half. That's all we're talking about.

7 MS FORD: Yes. The distinction between the first half and
8 the second half is that these now concern transparency,
9 vis-à-vis third parties.

10 THE CHAIR: Exactly.

11 MS FORD: That is the point on which you, sir, gave the
12 ruling at page 129. It starts at 20:

13 "Although these would not be regarded by the
14 Tribunal as part of the key issues for disclosure it
15 does not mean that they are not relevant for disclosure
16 purposes. We accept that the point being made in
17 relation to pleading the defence", which at various
18 parts refers to, third parties choosing to share in the
19 light of that we accept the wording which may be found
20 in the same exercise in relation to the earlier
21 subparagraphs.

22 So insofar as the issue was raised to suggest that
23 there is some distinction between transparency vis-à-vis
24 third parties and transparency vis-à-vis the earlier
25 exercise, the Tribunal's ruling was to retain it for the

1 purposes --

2 THE CHAIR: I have retained that. Okay.

3 MS FORD: The same rationale, essentially, applies in terms
4 of when you are investigating testing, you do need to
5 see alternatives. It's not, in my submission,
6 satisfactory to look at the testing of that which
7 actually ultimately got adopted, because it's not
8 informative unless you know what it has been adopted
9 over, other alternatives. That is the exercise which
10 tells you about what would be transparent and what
11 wouldn't.

12 MR SINGLA: Did I just very quickly -- because I'm not sure
13 you've been given a fair summary of the transcript.

14 THE CHAIR: Don't worry about that.

15 MR SINGLA: Well no, it is actually quite interesting. 129,
16 Ms Ford's submission:

17 "I have shown the Tribunal how this does arise in
18 the pleaded case. In my submission the objection Mr
19 Singla has just raised go to proportionality and they
20 are for another day".

21 THE CHAIR: I don't think I remember that.

22 MR SINGLA: No, well, I'm grateful because that is quite
23 misleading, actually, in my submission.

24 Ruling (Request 20) (Redacted for Approval)

25 MS FORD: Grateful.

1 THE CHAIR: I think Mr Singla agrees with that, so we're
2 okay.

3 MS FORD: There we go.

4 MR SINGLA: That has to be right more generally as well. If
5 they had targeted disclosure requests they want to make
6 later they can.

7 THE CHAIR: Of course they can.

8 MR SINGLA: We're talking about what they should have on
9 Day 1. That's why we're digging in on proportionality
10 grounds.

11 THE CHAIR: And that's why it is important, if we can have
12 a rolling exercise for disclosure, it is a question of
13 you figuring out -- I'm not telling you which ones you
14 target first -- but which ones you think are probably
15 more useful to get to the bottom of earlier, so if there
16 may be additional things coming out of that, then we
17 have the opportunity to deal with that well before the
18 finishing of the exercise.

19 MR SINGLA: Of course, you understand they are asking for
20 everything on Day 1 --

21 THE CHAIR: They are not going to get everything on Day 1.
22 Don't worry.

23 MS FORD: I would gratefully endorse the Chair's
24 observations there, that the emphasis on a staged
25 process does then make it very necessary that we don't

1 leave it until ten months to have this argument again,
2 and it can be dealt with on a rolling basis.

3 THE CHAIR: Yes. The Tribunal is happy to deal with any
4 issue on a rolling basis as and when either the
5 designated solicitor or your solicitor feels that you
6 need some guidance, just write in and we will deal with
7 it.

8 MS FORD: Request 21 is concerned with external
9 announcements and communications issued by Meta
10 applicable to UK users and third parties in respect to
11 the Request 18 terms. That raised the Business Tools
12 Terms disputes from the off-Facebook Data dispute both
13 of which, subject to coming to 28, have been addressed.

14 THE CHAIR: Yes. They have, yes.

15 MS FORD: Request 22, how and why Request 18, third party
16 terms were communicated to third parties and UK users in
17 the way that they were. The custodial versus
18 non-custodial dispute has been resolved by our proposal
19 on wording for that, as has the draft point on that.

20 Sorry, I should say the draft point presumably
21 follows from the previous indications.

22 THE CHAIR: That does, yes.

23 MS FORD: Business tools terms, also previous indications
24 and off-Facebook Data, so, again, all those issues have
25 largely been addressed subject to 28.

1 THE CHAIR: Okay.

2 MS FORD: Request 23 is the -- largely the counterpart to
3 the earlier request we looked at regarding screenshots
4 and images, prompts and other communications shown to
5 third parties in respect of Request 18 terms and reasons
6 why Meta contacted third parties in the way that it did.
7 The custodial versus non-custodial debate has been
8 addressed by the wording --

9 THE CHAIR: That all should be resolved by what we've
10 already said.

11 MS FORD: That should be, business rules terms, same
12 applies, off-Facebook Data and draft terms.

13 THE CHAIR: Correct.

14 MS FORD: Request 24, non-custodial documents regarding
15 monitoring, tracking or recording of third party
16 engagement and compliance with the R18 terms. That
17 raises the off-Facebook Data point.

18 THE CHAIR: We've had that.

19 MS FORD: And we've addressed the dispute as to
20 non-custodial repositories.

21 Request 25, how and why Meta introduced requirements
22 regarding the legal basis for off-Facebook Data,
23 notification by third parties of their own users and
24 users' consent. There was a dispute about custodial
25 versus non-custodial on that which has been resolved by

1 the wording, hopefully, and that raised the Meta's
2 business tools point which the Tribunal has determined,
3 and request 26, which concerns the effect of the DPA and
4 the GDPR on the Request 18 terms, that raised questions
5 about drafts. Custodial versus non-custodial, Business
6 Tools Terms and off-Facebook Data, all of which have now
7 been addressed.

8 Request 27 I think is one that is now a substantive
9 dispute. The Tribunal will see that there is some quite
10 extensive rival wording as between the two formulations.
11 This is a request which is driven by the expert
12 analysis, and so we rely on what Professor Scott Morton
13 says about this at {C7/5/5}, please. She summarises
14 what's being sought in Request 27 starting at paragraph
15 14, and what it is, in a nutshell, is a request for best
16 available evidence concerning matters relevant to market
17 definition and market power. She says at 15 that:

18 "Meta agrees with the general relevance of this
19 request but resists the provision of any underlying data
20 for certain sub-requests", and lists which ones she
21 understands to be in dispute. She addresses the need
22 for underlying data at paragraph 16, and what she is
23 really doing there is explaining what she is asking for,
24 when she says "underlying data", what she says is she is
25 seeking processible versions of the reported metrics,

1 and the reason that she is asking for that is so that
2 she can manipulate the data herself and turn it into
3 charts and compare it with other data and essentially
4 utilize it in the way that one normally would with data
5 as an expert, and in my submission that, as a request,
6 is not unreasonable.

7 There is also a dispute as to footnotes.

8 Now, the first complication is that the footnote
9 numbering keeps changing and I'm hoping it hasn't
10 changed since I last drafted the speaking note, but the
11 relevant ones which are in dispute, if the Tribunal
12 looks at the bottom of page 15, entirely predictably,
13 possibly, the numbers have, again, changed. It is
14 footnote 6 when she is asking for total daily active
15 users on a daily basis plus average daily active users
16 on a monthly basis. I think footnote 8 is the average
17 users on a monthly basis. I hesitate, on my feet, to
18 identify which are the -- how the footnotes correspond,
19 but what she is essentially doing is providing
20 additional detail in the footnotes as to the metrics
21 that she would like to receive in the text of the
22 request. It is quite a detailed request already, but
23 the point to emphasise is that these are not
24 duplicative. She is explaining what she would ideally
25 like to see in the data set that she is requesting, and

1 if we can go back to what she says about it, {C7/5/5}.

2 Sorry, over the page. Thank you. {C7/5/6}.

3 16 is the paragraph where she is addressing
4 footnotes.

5 THE CHAIR: On their formulation of the best available
6 evidence of, which ones are they not willing to give you
7 best evidence of? On your ones?

8 MS FORD: I think it is -- I think the two disputes are the
9 underlying data and the footnotes, unless I'm corrected.
10 There was a dispute about temporal scope which she goes
11 on to address at 19, but our understanding is that that
12 has been resolved by virtue of Meta's 20 November
13 letter, so it is a relatively granular dispute.

14 THE CHAIR: But when you asked for the underlying data, is
15 that -- do you want to check what they are doing?

16 MS FORD: No.

17 THE CHAIR: Why do you need the underlying data? Is it just
18 for the reasons set out in this report?

19 MS FORD: It is. She would like to -- rather than having to
20 do the process of extracting it manually from
21 a document, she would like to receive the data so that
22 she can use it and manipulate it in the way that you
23 normally would -- the expert -- that is her explanation
24 at paragraph 16, and her explanation in relation to the
25 footnotes is that this is not duplicative which we

1 understand is the point taken against us. This is
2 providing further details of what it is she is seeking.
3 Those are the relatively granular disputes on this
4 request.

5 THE CHAIR: Yes.

6 MR SINGLA: Sir, I hope I can be helpful here and try and
7 cut through it. The first point to make is we've
8 actually agreed to search for a number of sub categories
9 here, so to the extent there is a dispute it is only in
10 relation to part of this.

11 Can I make maybe four points? So Professor Scott
12 Morton has, I think, clarified that she is only seeking
13 processable data, as she describes it, and that is,
14 I think, welcome. She is not seeking raw underlying
15 data. When we come to --

16 THE CHAIR: That is what I was a bit worried about.

17 MR SINGLA: Well, that will be a significant worry when we
18 get to Request 56, but insofar as she is asking for what
19 she describes as processible, then we can provide it,
20 subject to that being, as it were, readily available.
21 None of this is off-the-shelf. I think we've explained
22 we're going to have to go into the repository called
23 Hive, and I think Hive only has the relevant data from
24 2008 onwards, but to the extent everyone is clear this
25 is processible data only, we're content to that extent.

1 Where things start to get more contentious, first of
2 all, if you look at the footnotes, I think the numbering
3 has changed, I think it is 6 to 15 on the latest
4 version. If you could just quickly cast an eye over
5 those footnotes, because what they are asking for is not
6 only the data as per the Redfern request, but also for
7 the data to be cut in various ways that are stipulated
8 in the footnotes, and that's what we object to. I mean,
9 you can't --

10 THE CHAIR: Will they have -- the processible data will
11 enable them to do that exercise themselves if they want
12 to?

13 MR SINGLA: I think certainly in part, yes. I can take more
14 detailed instructions but what we can't have is, as it
15 were, a concession that all they are asking for
16 is processible, but then they give with one hand, and
17 take with the other because they then say in the other
18 "it has got to be cut in this way". They will get what
19 is responsive to the Redfern request, subject to it
20 being processible, but we can't live with those very
21 prescriptive footnotes, and then there's another problem
22 with -- if you look at footnote -- I think it is now
23 footnote 3, this, again, we submit is inappropriate,
24 because we're content to be pragmatic about this and
25 give them the processible data that is responsive,

1 I think I have made that clear, but these conditions
2 that are being imposed in the footnotes are
3 inappropriate, so if you just look at what's now
4 Footnote 3 --

5 THE CHAIR: As regards request number 27 which provides as
6 follows --

7 MR SINGLA: Sir, I have got one further point to make.
8 Ruling (Request 27) (Redacted for Approval)
9 What's the additional point you want me to cover?

10 MR SINGLA: The additional point I describe as a footnote
11 point but it is important, so O, P and Q, do you see
12 what they relate to? So it is the number of unique UK
13 users who use products that compete with the user side
14 of Facebook. Do you see that? That is O.

15 THE CHAIR: Yes.

16 MR SINGLA: And Q is similar, so P and Q, essentially
17 what -- our wording --

18 THE CHAIR: I have accepted your wording.

19 MR SINGLA: Oh, I'm grateful. There was a -- I'm grateful.

20 THE CHAIR: I have accepted your wording. I was just trying
21 to compare where you diverge.

22 MR SINGLA: Okay, well -- that's fine.

23 THE CHAIR: As I said, on this point, there is liberty to
24 apply, but they shouldn't assume that the door is that
25 far open on it.

1 MS FORD: Move on to Request 28. Before we deal with the
2 substance of it I just wanted to pick up the point that
3 I have been flagging about off-Facebook Data which is on
4 page 20 of the latest version.

5 THE CHAIR: Do you want me to look at page 20?

6 MS FORD: Yes. The only reason I raise it is that there is
7 wording here in green {E2/360.1/20} beginning:

8 "References to off-Facebook Data in this request..."

9 So this is Meta's proposal which I understand to be
10 acceptable to us as to how one deals with the concept of
11 off-Facebook Data, and the only reason I would flag it
12 is because it has been put in this request but not the
13 rest of the requests, and our suggestion is that it
14 really would apply across the board.

15 So references to off-Facebook Data in this request
16 reflect the fact that Meta entities will search for
17 documents that relate to and/or capture off-Facebook
18 Data although for the avoidance of doubt a document
19 which is reviewed and which would otherwise be
20 responsive to this request does not fall outside the
21 scope of disclosure solely on the basis that it refers
22 to data which includes but expands beyond off-Facebook
23 Data. That is an acceptable approach to the concept of
24 off-Facebook Data --

25 THE CHAIR: Seems fine to me, yes.

1 MS FORD: I raise it only because we understand there to be
2 an on-going dispute as to -- well, concern about what is
3 meant by the qualification "off-Facebook Data" and it
4 has not yet been agreed between the parties that this
5 approach would be rolled out across all the requests.

6 THE CHAIR: Okay. The parties can work on that so when we
7 come back again we can look at that specific issue if
8 need be.

9 MR SINGLA: I was going to suggest can we come back on that
10 because I need some time to take instructions just to
11 make sure I've understood.

12 THE CHAIR: We're going to have another day, aren't we,
13 okay? So between today and the next day your team and
14 their team will all be working together, and then we
15 will have hopefully a schedule which should be the
16 disclosure schedule, and there will be bits which we
17 still need to clarify.

18 MR SINGLA: That is a point we will take away.

19 THE CHAIR: Because I don't expect you to deal with it
20 today, that's all I'm saying.

21 MR SINGLA: I'm grateful.

22 THE CHAIR: Okay.

23 MS FORD: Request 28 is another request which is brought up
24 by the expert process. I wonder if it would assist the
25 Tribunal to have an opportunity just to cast your eye

1 down the content of this request.

2 THE CHAIR: I think so.

3 MS FORD: Different formulations. (Pause)

4 THE CHAIR: Okay. So what's the difference between your A

5 to S -- they go to A to J, so presumably -- let's have

6 a look.

7 MS FORD: It may assist to see what Professor Scott Morton

8 has to say about it --

9 THE CHAIR: You think that will help us?

10 MS FORD: I would hope so.

11 THE CHAIR: Well, let's see.

12 MR SINGLA: It may help to try and make progress on this.

13 THE CHAIR: Try and make progress. He is not

14 a jack-in-the-box. His interventions are very helpful.

15 MR SINGLA: This could -- I mean, it is a proposal which, if

16 it is accepted --

17 THE CHAIR: Let's hear it, yes.

18 MR SINGLA: -- that's the end of it. Basically, our point

19 on this one was that there seemed to be a lot of

20 duplication in the sub categories.

21 THE CHAIR: I was looking -- there's a lot of subcategories.

22 MR SINGLA: I know, and it would take us forever to go

23 through and explain which ones we say are duplicative,

24 so that's why I say I'm trying to be helpful, because

25 we've agreed to search for ten of those subcategories,

1 and rather than taking up time to explain why the other
2 ones are duplicative, we would respectfully suggest,
3 just to try and save time, we're content to leave that
4 wording in which we say is duplicative and unnecessary,
5 on the basis that we won't do any additional searches
6 for those subcategories that we oppose, so that's point
7 one. I mean, otherwise we're going to have to go
8 through and explain why we say each one is duplicative.

9 THE CHAIR: If they are truly duplicative there's not
10 a problem, but if they are not truly duplicative, there
11 is a problem, but if they are duplicative and there's no
12 harm in having them though I agree it's not great that
13 you've got anything that's duplicative, but I don't
14 think, necessarily, it is a useful use of our time.
15 What I would propose is that the parties should try and
16 work on a non-duplicative version, and if you can't,
17 then we will deal with it when we come back next time
18 round, because I think given that it's -- the time that
19 it is now, and the amount of work that we need to do, as
20 long as we can start a process of trying to resolve this
21 issue, then you can start and insofar as there's
22 anything left over we will deal with it on whatever the
23 18 December --

24 MR SINGLA: I'm very grateful. The second point we were
25 going to take on this is that we've grouped the requests

1 in a different way, so leaving aside the --

2 THE CHAIR: I know, but the problem for me is given the

3 timing point --

4 MR SINGLA: Exactly.

5 THE CHAIR: -- and if it is an academic point, there's no

6 point wasting our time on academic points.

7 MR SINGLA: Yes.

8 THE CHAIR: And if there's something that you realistically

9 hope to resolve, which I would have thought you would be

10 able to resolve, let's come back to that later rather

11 than -- I'm not saying wasting our time but rather using

12 up our time on it.

13 MR SINGLA: Yes. I need to come back separately on 28Q, but

14 leaving aside Q which has its own --

15 THE CHAIR: If you want us to resolve Q then we can --

16 MR SINGLA: Okay. Are we content, then, on the rest of it?

17 We can always --

18 MS FORD: Well, it won't surprise the Tribunal to hear that

19 Professor Scott Morton doesn't think that they are

20 duplicative, but --

21 THE CHAIR: No, but to try and work on it, because it may be

22 a different formulation of these will work, but it seems

23 to me that the dispute hasn't actually crystallised in

24 a way that a decision at this stage is required, because

25 I do think this is one where the parties should be able

1 to resolve it. I may be wrong about that, but if I'm
2 wrong about it, then we deal with it next time round.

3 MR SINGLA: The nuance I was going to add is that leaving
4 aside duplication, the other difference between the
5 parties were, just so you understand was that we were
6 trying to group some of the sub categories on the basis
7 of custodial disclosure and the others non-custodial --

8 THE CHAIR: That debate has slightly moved on.

9 MR SINGLA: That is exactly what I was going to say. From
10 our perspective that ought to be not contentious because
11 it has now been -- after your ruling on Monday -- it has
12 been agreed that we should, in the first instance, be
13 able to choose which one, so that second aspect really
14 ought not to be controversial. The first we can
15 obviously continue to talk about between now and a --

16 THE CHAIR: From what we can see at the moment, the dispute
17 under 28 is not yet crystallised. There's still room
18 for scope. I hope that the parties can understand what
19 the direction of travel is, but if not, and it is still
20 not resolved, then I'll deal with next time.

21 MR SINGLA: Is now a good time to address you on 28Q then?

22 THE CHAIR: Yes. I think we can look at 28Q because then
23 that -- because if we resolve that, then that may assist
24 the process.

25 MR SINGLA: Right. So 28Q --

1 THE CHAIR: Well, let me get to it.

2 MR SINGLA: It just may be helpful to actually read ... so

3 there is some distance between the preamble and Q

4 itself, so just can I just ask you to read -- 28

5 starts --

6 THE CHAIR: This is one "strategies to respond to" --

7 MR SINGLA: Exactly. It is actually incredibly broad. Do

8 you see it starts with research, surveys, studies,

9 impact analysis, modelling, do you see all of that in

10 the preamble?

11 THE CHAIR: Yes.

12 MR SINGLA: And then you get to Q which is strategies to

13 respond to and/or mitigate the impact of the GDPR and/or

14 the DMA. Do you see that?

15 THE CHAIR: Yes.

16 MR SINGLA: Ms Ford says it then goes on to refer to

17 off-Facebook Data, but that is not really the point I'm

18 making. The objection we raise here is in relation to

19 the references to the DMA and the GDPR, and I would like

20 to just address you on this.

21 Taking the reference to the DMA first, I made some

22 submissions about the DMA --

23 THE CHAIR: Yes, we --

24 MR SINGLA: -- no, but -- on Monday, in the context of

25 Request 5 where they were seeking disclosure from one of

1 the DMA investigations, so you dealt with that, but I do
2 just want to spend a minute to explain why this is
3 a different point.

4 So what -- just to recap, what they are saying in
5 relation to the DMA, if one just takes a step back and
6 thinks about why does the CR say that the DMA comes into
7 this case, as you know we don't accept it is relevant,
8 but they say it comes in at two levels. One, in
9 relation to the terms, and, two, in relation to
10 counterfactual, and you heard submissions about the SNA
11 model on Monday, so just to be clear, we say in relation
12 to each of those points it is actually misconceived to
13 say the DMA is relevant.

14 On the terms, the DMA only applies in the EU, and so
15 by definition the DMA does not concern the relationship
16 between Meta and UK users of Facebook, and in relation
17 to the counterfactual, I made the point on Monday that
18 SNA is actually the opposite of what the Class
19 Representative is pleading would have been the
20 competitive counterfactual and we are certainly not
21 saying SNA is the counterfactual in this case, and I
22 made the general point -- I'm not rearguing points --
23 but I'm just reminding you of the context, the general
24 point which should be uncontroversial, is DMA is
25 distinct from competition law and I took you to the

1 recitals which made that clear, so notwithstanding those
2 points of context, we order disclosure in relation to
3 that DMA investigation relating to article 5.2. That's
4 where we got to on Monday and as I said I'm not looking
5 to reargue that, but there is, in my submission,
6 a separate question as to whether here and elsewhere
7 there should be DMA references in the Redfern request.

8 THE CHAIR: So you -- under Q, you just object to the
9 reference to DMA.

10 MR SINGLA: Well, and GDPR but the DMA is the principal
11 point.

12 THE CHAIR: Okay.

13 MR SINGLA: Just to explain why, first of all, we say --
14 just reminding you of the breadth of this request, it is
15 incredibly broad. That's the point -- that is why I
16 asked you to read it carefully because if you take the
17 preamble and then you take Q, it is a huge -- hugely
18 broad request, and then one has to consider, well, what
19 is this adding to the disclosure they are already
20 getting? So then if one goes back to the two areas of
21 the case where, as I said, they say the DMA comes in,
22 first of all, terms. What are they already getting by
23 way of disclosure in relation to terms? Well, there are
24 many requests in the Redfern concerning the design of
25 the terms. That's all of Requests 8 to 16. I mean, I

1 know you are very familiar, now, with the Redfern,
2 but --

3 THE CHAIR: Unfortunately.

4 MR SINGLA: -- but it is important to just remember how
5 many requests we've either agreed to or have been
6 ordered in relation to terms, so they are going to get
7 very substantial disclosure in relation to the design of
8 terms and what they describe as the choice architecture
9 and specifically I mention all of 8 to 16 but
10 specifically in relation to 16 which we may not have
11 looked at because it is agreed, can I just ask you to
12 look at that? Because that has the DMA expressly
13 referred to in 16, and also in relation to this
14 disclosure, where we got to on Monday, pursuant to one
15 of your rulings, is that all of that disclosure on terms
16 will cover not only Facebook but also extend to WhatsApp
17 and Instagram, so we say there is going to be a huge
18 amount of disclosure in relation to terms before one
19 gets to 28Q, and in relation to the counterfactual,
20 which is the other potential basis on which the DMA is
21 said to be relevant, again, elsewhere in this Redfern
22 they are going to get an enormous amount of disclosure,
23 so if one looks, for example, at 28F of our wording,
24 whether the Meta entities have made value transfers to
25 UK users in connection with the collection and/or

1 receipt and/or processing and/or use of data, and that's
2 all on our proposal, custodial documents containing the
3 Meta entities testing, analyses and studies, that is
4 28F, and then jumping ahead to Request 120 which is now
5 agreed, because one does have to look at all of this in
6 the round and in some respects one has to look at what
7 we've agreed to provide elsewhere, so if you jump ahead
8 to 120, custodial documents in relation to whether Meta
9 ever made or considered making a value transfer to UK
10 users in connection with the collection and so on, and
11 their case, just to be clear, is that in the
12 counterfactual, Meta would have made a value transfer to
13 users, so we say if you take a step back, why do they
14 say DMA is relevant? Terms and counterfactual. In
15 relation to each of those aspects they are going to get
16 a huge amount of material elsewhere in the Redfern, and
17 you've already resulted against us on that DMA
18 investigation, and so in that context we say 28Q should
19 not refer to the DMA, this is going too far, in
20 circumstances where the DMA is, itself, distinct from
21 competition law, so at best it is of tangential
22 relevance, and if you are against me on that, we would
23 say it has to be limited to article 5.2 of the DMA which
24 was the submission made by Ms Ford. It can't just be
25 DMA generally. That is what we say. I have got a very

1 short point on the GDPR but I'll leave that.

2 MR OLSEN: About what about the limitation to off-Facebook

3 Data? Is that significant?

4 MR SINGLA: I think that is related to the point that we're

5 going to come back on, I think, the way in which

6 off-Facebook Data is included in 28. I think that's ...

7 Ruling (Request 28) (Redacted for Approval)

8 MS FORD: Sir, moving on to 29, this one, I think the sole

9 dispute related to the approach to custodial versus

10 non-custodial and so our wording should address that.

11 THE CHAIR: This is fine. 29 is okay. We don't need to

12 give a ruling on that.

13 MS FORD: That's our understanding, yes.

14 THE CHAIR: Yes. That's good. Yes?

15 MS FORD: The next one is 31, and again, as far as we are

16 concerned we consider that to be resolved by our

17 wording.

18 THE CHAIR: Yes.

19 MS FORD: 32 is resisted by Meta because they say it is

20 duplicative of Requests 33 to 37 and therefore

21 disproportionate. 32 is a request for reports, analyses

22 and equivalents in relation to --

23 THE CHAIR: On duplication, I think I made it clear on

24 Monday that if it is true duplication in the way I

25 defined it, I don't want it, okay? If it is not true

1 duplication then, obviously, there's something to argue
2 about, but the duplication bit is something that the
3 parties should be able to resolve, and they can't come
4 back later, but -- I don't want unnecessary requests
5 which duplicate other requests. It is far simpler to
6 have a lower number of requests than a higher number,
7 and if something is truly duplicative and a complete
8 overlap, then I don't want two numbers doing it. You
9 can mold -- merge the two together into one request.
10 That's where we are.

11 MS FORD: Yes. I don't think we necessarily disagree with
12 that as a way forward. The duplication that we
13 understand is being raised here arises because this is
14 a request which is focused on non-custodial repositories
15 and is trying to get reports, studies and such like, and
16 the ones which are pointed to which are -- which it is
17 suggested are duplicative are custodial disclosure
18 requests, and so it is certainly possible that one could
19 merge the two, but we do know in relation to particular
20 requests that analyses exist which are responsive to it,
21 and non-custodial analyses that would suggest that one
22 should be looking for them, and the reason we say that
23 is what the disclosure report says at {D/12/46} and it
24 is the competitive analysis in user market. This,
25 again, is a reference to the annex which is indicating

1 what comes through from the Klein disclosure, but Meta
2 have documents relating to Meta's assessment of its
3 competitors, including discussions regarding competitive
4 features that Meta adopted in response to market
5 pressures, analyses of competitor's data collection use
6 practices, documents concerning Meta's analysis of user
7 engagement with a Facebook application or apps, websites
8 or other firms, and documents relating to Meta's
9 antitrust or competition tradings. These, we say, are
10 examples of non-custodial type documents that are
11 responsive to this request and wouldn't necessarily be
12 picked up on a custodial search. It may well be that
13 that can then be accommodated by coming up with some
14 sort of consolidated request provided things don't fall
15 through the gaps.

16 Ms O'Keefe has reminded me that in the reply column
17 we flagged up the extent of the substantive differences
18 between the requests that were said to be duplicative
19 and what we're looking for, this is the reply column 2,
20 Request 32, I think we're referring to the section that
21 says "nor is there complete substantive overlap with
22 requests identified, for example Request 32(b) concerns
23 UK users' reasons for using and spending material time
24 on Facebook, while requests 34(a) and (b) concern only
25 the reasons Meta considered most important. Request

1 32(c) makes express reference to users' views of
2 advertising whereas Request 34(c) does not", so there
3 are if not a complete overlap by any means, nevertheless
4 I can see the force in the point that it may be that
5 this is some consolidation.

6 THE CHAIR: I think we need consolidation. Yes. As regards
7 the Klein point, you know, that's a good point to make.
8 The documents in Klein in that category clearly need to
9 be searched and are potentially highly relevant, and you
10 don't want to miss out on those, but I'm sure you can
11 accommodate that in how you formulate the final version.

12 MS FORD: Yes, although we rely on it for a slightly
13 different point which is not just they are in Klein, it
14 is rather the fact that they arise in Klein indicates
15 that these sorts of documents --

16 THE CHAIR: Exactly. That type of document you would expect
17 to find, and insofar as that type of document exists,
18 that's -- the sort of documents that I would certainly,
19 for my part, expect to see on disclosure.

20 MS FORD: Absolutely.

21 THE CHAIR: Yes.

22 MR SINGLA: Sir, can I just say on that, and obviously we
23 wait to see what the --

24 THE CHAIR: I think that's all we can do.

25 MR SINGLA: Just to make this point which is that actually

1 what's going on is not so much a denial that this does
2 duplicate with other requests, it is actually
3 a submission that they should have custodial and
4 non-custodial, and the value of including 32, as I
5 understand it from those submission is that they get
6 non-custodial as well. Now, that -- the difficulty with
7 that point, they can obviously take this one away but
8 the difficulty with that is where we've got to, as
9 a result of the very helpful ruling on Monday, is that
10 essentially the Tribunal has said Meta should choose in
11 the first instance which route to go down, so this is
12 actually an example -- it is not really a duplication
13 point, they are actually trying to get custodial and
14 non-custodial, and so they can take that one away but
15 our position would be, in line with everything else, the
16 way forward is going to be one or the other per Meta's
17 proposals, and --

18 THE CHAIR: I think there is an element of judgment on this.
19 You may not know the answer until you start the exercise
20 as to which is the best way round, but there may be
21 certain categories of documents where you say to
22 yourselves, actually, we would expect it to be both
23 custodial and non-custodial. We can see that there is
24 likely to be gaps if you just use it on a custodial
25 basis, so we will look at both, but what I don't want to

1 do is to put the designated solicitor in handcuffs in
2 the sense that they really do need to have the ability
3 to do what is appropriate, because they are the ones on
4 the front line doing it.

5 MR SINGLA: That is what you said on Monday and that has now
6 been agreed between the parties but this is, I think,
7 a unique example of them saying "we want a particular
8 request in the Redfern" and what it is adding to the
9 other requests which we've said overlap, Ms Ford is
10 saying this adds to the other requests because this one
11 gives us non-custodial as well as custodial, and that,
12 I think, in my submission --

13 THE CHAIR: I understand what you are saying, yes, but maybe
14 we're at crossed purposes. There are some requests
15 where you say we start off with custodial. Other
16 requests you start off with non-custodial, but there may
17 be classes where, when you start doing the job you say
18 to yourselves, actually, we think we should be doing
19 both at the same time because clearly it is not going to
20 work out in the right way, as we go along, but it is
21 very difficult for us here without being on the front
22 line to know which exactly is going to work.

23 We just within the to see what works, but until you
24 start the process --

25 MR SINGLA: That's why we had agreed the "to the extent

1 reasonably necessary" wording. Anyway, I'm not sure this
2 is a productive use of time. If they are going to look
3 again at this request, then we will consider it --

4 THE CHAIR: Exactly. That's fine.

5 MS FORD: The submission that has just been made really
6 underlines why this is not, in fact, duplicative. We
7 indicated we were prepared to treat it as duplicative
8 but Mr Singla's submission is, well, you can only have
9 one or the other. If we can only have one or the other
10 then the answer is it is not duplicative and we would
11 press for this particular class of documents.

12 THE CHAIR: We may need to have a slight qualification.
13 You've got the ruling on Monday. I'm saying that there
14 is a third category as a starting position, or
15 potentially starting position, where you need to do
16 both, and you shouldn't exclude that possibility, but
17 whether it is right for us to determine that now is not
18 clear to me because it is the sort of thing that I would
19 hope that the designated solicitor will be taking
20 a decision on as they go through the process, and
21 saying, actually, we do need to do both, but that's not
22 necessarily the starting position. There's a limit to
23 how much we can be telling them what they need to do in
24 a case where the Tribunal has got full confidence in the
25 ability of Herbert Smith to do a proper job, you know?

1 This is -- they have a huge amount of experience in
2 dealing with these things, and they will know what we're
3 all looking for. I'm not sure how much more I should be
4 saying on this, but -- yeah.

5 MR SINGLA: Just to be clear, so what has happened is you
6 gave your ruling on Monday.

7 THE CHAIR: I did, yes.

8 MR SINGLA: The parties have now agreed a framework adopting
9 that ruling.

10 THE CHAIR: Yes.

11 MR SINGLA: And that is the "to the extent reasonably
12 necessary" wording. We are completely clear as to what
13 we need to do, and if -- insofar as anything is being
14 suggested now to unwind that, then I'll want to come
15 back but --

16 THE CHAIR: It is not unwinding.

17 MR SINGLA: I think we are on the same page, that it is
18 going to be for the solicitors to do the disclosure as
19 per the proposals, and to the extent reasonably
20 necessary, that's the formulation that has been agreed
21 with the other side, they will top it up. I'm not sure
22 one needs to --

23 THE CHAIR: No. I think the caveat is the scenario I have
24 just given, which is that I'm not going to prescribe it,
25 but it may be that in certain requests or categories the

1 designated solicitor takes the view reasonably that we
2 should be starting off with both, but that is not
3 a starting position, but the topping-up we all agree,
4 the question is: am I going to impose a requirement now
5 that there is a starting point of both, the answer is
6 no. It is all down to the designated solicitor to take
7 that judgment call.

8 MR SINGLA: But in my submission, before the Class
9 Representative gets excited by the reference, it is
10 a caveat --

11 THE CHAIR: It is not a caveat. It is how it should be
12 done.

13 MR SINGLA: But "to the extent reasonably necessary" would
14 apply on Day 1 just as much as it would apply in ten
15 months' time.

16 THE CHAIR: Exactly. It should do.

17 MR SINGLA: I think we're clear.

18 MS FORD: Sorry, sir, can I take instructions?

19 THE CHAIR: You take instructions. That's fine. (Pause)

20 MS FORD: Sir, I think we're proposing to leave this as we
21 will liaise with Meta as to the way forward in relation
22 to this particular request.

23 THE CHAIR: It is a useful discussion because it is
24 important that everyone understands how we envisage this
25 exercise to be done, and Singla has come up with an

1 appreciation that there may be categories where you need
2 to do both from the beginning because it is an on-going
3 obligation to top up as and when necessary. If, on
4 Day 1, you can make that assessment then you make that
5 assessment but if, on Day 1, you make that assessment
6 that, "we are only going to do one" and then you start
7 going through the exercise and you realise it doesn't
8 actually produce what's needed, you are going to have to
9 go to the other thing, and so sometimes it is going to
10 be more sensible for them to say "well, in relation to
11 this category we're going to start off with both" but
12 what I can't do is proscribe exactly how they are going
13 to do it.

14 MS FORD: That is fully understood.

15 THE CHAIR: But it may be that you are going to have to
16 revise the wording slightly to reflect what we've just
17 discussed.

18 MS FORD: I think that is what we envisage picking up and
19 exploring, yes.

20 THE CHAIR: Yes.

21 MS FORD: Request 33 --

22 THE CHAIR: Let me understand, with this process, is it the
23 idea that the solicitors will sit down together and work
24 together to resolve everything or are you just going to
25 be sending drafts to each other?

1 MS FORD: I'm afraid I haven't -- I'm not sure what the
2 mechanics that are envisaged, to be honest.

3 THE CHAIR: We will have to talk about that a bit later
4 because you just want to have -- there's always an
5 element of give and take and sometimes it is quite
6 difficult to do give and take when you just keep sending
7 documents to each other because it could be you will
8 give on one point and they will give on another point
9 and vice versa, and then you come up with something both
10 sides can live with. All I want to do is that you --
11 both firms come up with a mechanism in a spirit of
12 compromise with the result.

13 MS FORD: Absolutely, and both parties have been having the
14 solicitor meetings --

15 THE CHAIR: I know it is painful, I'm not saying it's not
16 painful to go through this, but it has got to be done.

17 MS FORD: Indeed.

18 THE CHAIR: Okay. Next one.

19 MS FORD: Request 33 I think is resolved --

20 THE CHAIR: No -- that's resolved. Yes.

21 MS FORD: -- Caveats concerning the wording.

22 Request 34 is another one where I think we are now
23 resolved.

24 THE CHAIR: Yes. Another one is resolved. Yes.

25 MS FORD: Request 35 is one where there is a substantive

1 dispute, and it concerns the references in the
2 formulation to addiction effects. The Class
3 Representative's formulation includes the reference to
4 addiction effects. Meta is attempting to exclude that
5 reference. This is something that, in our submission
6 has been decided against Meta at the last CMC.

7 THE CHAIR: Shall we just hear from Singla on that
8 because -- let's see if there is a live issue.
9 Mr Singla?

10 MR SINGLA: The first point is I really don't accept that
11 things were decided last time round. What was decided
12 last time round --

13 THE CHAIR: What we decided were the issues for disclosure,
14 leaving the door open to any arguments of necessity and
15 proportionality, so that we understand.

16 MR SINGLA: But you will understand that proportionality and
17 relevance are connected in the sense that if something
18 is of either peripheral or tangential relevance then it
19 becomes potentially disproportionate, so we do object to
20 the reference to addiction effects, and one might think,
21 given that we're talking about disclosure, the right
22 place to start is the claim form, which, as you know,
23 runs to 150 pages and it doesn't refer to addiction
24 effects at all.

25 THE CHAIR: Okay. So you are saying that there has been no

1 reliance on addiction -- let me just note this down.

2 MR SINGLA: There's not a single reference in 150 pages to
3 addiction effects. That's point one, and must be common
4 ground.

5 Then one has to actually ask oneself, well, what
6 does the 150 say about the alleged abuses in this case,
7 the unfair trading term and it is the unfair price, so
8 again, one wouldn't really think that anything about
9 addiction effects is connected to the pleaded abuses,
10 and I do emphasise that your own judgments in this
11 Tribunal have made clear that, in fact, it's not merely
12 relevance, it's also necessary for the fair disposal of
13 the claim, so if one is --

14 THE CHAIR: (Inaudible).

15 MR SINGLA: Sorry?

16 THE CHAIR: You've got me to say that more than once.

17 MR SINGLA: Yeah, well I'd like you to say it again in this
18 context, because if it's not even in the claim form,
19 don't actually accept that it is relevant, and if your
20 own test is it's not merely relevance but also
21 necessity, we do say this is a bit of a problem for the
22 Class Representative, so where does this actually come
23 in at all? Well, the claim form, as you know, was
24 accompanied by Professor Scott Morton's first report,
25 and there is a passing reference -- let's just have

1 a look at the totality of what she says about this. So
2 it is C1/1 --

3 THE CHAIR: Paragraph number?

4 MR SINGLA: 257. {C1/1/73}, please.

5 I think I may have given you a false reference. It
6 is 259. Do you see -- so 258:

7 "First, much of consumers' willingness to pay for
8 Facebook is likely to result from the network effect",
9 and there's quite a bit about network effects, and we've
10 accepted network effects will be the subject of
11 disclosure, but 259 she refers to a paper by Messrs
12 Alcott and Gentzkow:

13 "... Found that some of the willingness to pay for
14 Facebook reflected addiction effects".

15 THE CHAIR: Okay. Yes.

16 MR SINGLA: So, that is the sum total of the reference to
17 addiction effects. In the claim form there's nothing and
18 in Scott Morton -- it is not even actually Professor
19 Scott Morton expressing any views about this. She is
20 literally referring to some academic study. We say this
21 is all deeply unpromising as a hook for disclosure.
22 Now, the reply does plead to addiction effects, but it
23 is important to see exactly the way in which that is
24 put, so if we --

25 THE CHAIR: Which paragraph of the reply?

1 MR SINGLA: It is paragraph 3 --

2 THE CHAIR: Let's have a look at that.

3 MR SINGLA: -- which I think is B/8. {B/8/2}. That is

4 actually the claim form. {B/13/3}. Just to explain, to

5 put this into context, you will see it is a response to

6 paragraphs 5 to 7 of the defence and I'm just trying to

7 take this quickly, so I'll just remind you, what we do

8 at 5 to 7 is we plead a high level description of

9 Facebook, and this is a response to that, so if we look

10 at 3(a)(ii)(1) you will see that users' attachment -- to

11 the extent that Meta alleges users derive value from

12 Facebook, the CR avers that users' attachment to the

13 Facebook service is largely or wholly attributable to

14 network effects", again, no issue in relation to that,

15 but then if you look at number 2, the time or activity

16 of users on the Facebook service may result from users'

17 addiction effects and I'm not taking a technical point,

18 there's actually quite a substantive difference between

19 1 and 2. 2 is not a positive averment in contrast to 1.

20 That is actually an important difference, so network

21 effects is a positive averment that it is largely or

22 wholly attributable to network effects, then there's

23 speculation in 2 that time or activity may result from

24 user's addiction effects. So it is not a positive plea,

25 and there are two other references in the reply, but I

1 won't take up those -- it is just to give you
2 a reference. Paragraphs 38 and 117 -- actually, maybe
3 I should show you those quickly. So B -- I think it is
4 page 423. {B/13/43}. Right. So this is a response to
5 Meta's defence, paragraph 67, and this is all about
6 terms, so this is all about whether the terms were
7 onerous and opaque as alleged by the CR, and what we do
8 in 67 is we deny, and we say it is all completely clear
9 and readable and so on, and then they say in 38 of the
10 reply -- you will see what they said. I mean, with
11 respect, this has got absolutely nothing to do with the
12 transparency of the terms. How do addiction effects
13 bear upon whether the terms are opaque or not? So
14 that -- we say these -- that reference and the one I'm
15 about to come to, you can essentially discard and I'm
16 just showing you them for completeness.

17 This point about the unfair trading term is not even
18 what the study in Scott Morton's report is getting at,
19 so this is actually completely different, and 117 is at
20 page 72, but it is the same point. There are
21 essentially -- to recap -- this is, again, a reference
22 in the context of the unfair trading condition, you can
23 see that at the top, and there's a reference at --
24 I think it is A(ii) subparagraph 4 if we go over the
25 page, please {B/13/73} you will see, I think,

1 a reference in C. Yes. The effects of addiction, and
2 negative value spillover, so to recap where we are on
3 the pleadings --

4 THE CHAIR: So what is that last reference? Which
5 paragraph?

6 MR SINGLA: 117, subparagraph A, subparagraph (ii),
7 subparagraph 4, and then it is C in 4. Just to recap,
8 so nothing at all in the claim form, a passing reference
9 in Scott Morton by reference to the academic paper, and
10 then three references in the reply, one of which is not
11 even a positive averment, and that's the one at the
12 beginning, and then two of which are just on any view
13 completely irrelevant, because I just cannot see how
14 addiction effects has anything to do with the quality of
15 the terms, so that's the state of the pleadings, and
16 then if we see what Professor Scott Morton's now saying
17 for this hearing, which is {C7/5/1} and it is paragraph
18 40 --

19 THE CHAIR: Mr Singla, is the point that their case is that
20 you start off with Facebook saying the great thing about
21 this is we're not going to share your data with
22 anything, and then the users get addicted, and then you
23 are told, oh, if you want to carry on doing this you've
24 got to give these consents. Is that not -- how does
25 addiction effects come in?

1 MS FORD: It comes in in response to Meta's own case that
2 the Facebook service is of significant value to users,
3 because if one is saying -- if one is claiming it is of
4 significant value to users, it is relevant to
5 investigate whether it is of significant value because
6 of network and/or addiction effects, so it is a -- much
7 is made of the fact that this comes in reply. It is
8 quite proper for a point of that nature to come in reply
9 because it is in response to Meta's positive case that
10 its Facebook service has a particular value to users,
11 and we say, well, when you are assessing that, it is
12 important that you assess whether or not that value
13 derives from, amongst other things, addiction effects.
14 So in my submission it is really not an answer to
15 emphasise that it doesn't come up in the claim form,
16 this is a responsive point which deals with the quality
17 of the case that is being advanced by Meta.

18 MR SINGLA: I just want to make some points in response to
19 that. First, that is actually quite revealing. It has
20 got nothing to do with unfair trading terms so you can
21 genuinely disregard those two references at the back of
22 the reply, then it is said to be relevant to the case on
23 value, and it is said to be responsive. Now, in
24 relation to that, I would say two things. One, the
25 academic paper was referred to by Professor Scott Morton

1 which accompanied the claim form, so a view was taken
2 not to plead anything about this in the claim form.
3 Don't accept that it is somehow responsive to our case.
4 The paper was available to the CR when they pleaded
5 their case. They chose not to.

6 Second point on the pleadings is even if it is
7 responsive, it can hardly be said to be central to the
8 case. I mean, one has to always ask oneself in
9 disclosure: is this actually necessary for the fair
10 disposal of the case, and then the final point I would
11 make is if what is being said now is it is only relevant
12 to value, well that is a bad point because value -- the
13 value that users place on Facebook is covered by other
14 requests, so if one looks at 33 and 34 they are going to
15 get disclosure -- it is all agreed -- which is why the
16 spotlight hasn't been shone on those requests, but do
17 you see 33, custodial documents in relation to the
18 reasons for having used the user side of Facebook, and
19 34, custodial documents in relation to the -- which
20 reasons Meta considers to be the most important reasons
21 why UK users use the user side of Facebook, which
22 reasons Meta consider to be the reasons for which UK
23 users spend material time on the user side, and then C,
24 the user side features characteristics and
25 functionalities of Facebook that Meta considers to be

1 valued or disliked by UK users and why, so in my
2 submission this is really, actually, an unnecessary
3 request. It has no proper basis in the pleadings.

4 Insofar as there is an issue of value that is
5 covered, and so what is this adding over and above those
6 other requests? We say it is actually just fishing
7 around on the basis of a case -- there is no positive
8 allegation in the claim form about addiction effects,
9 and actually, in my submission, that should be the long
10 and the short of it, from your perspective.

11 Ruling (Request 35) (Redacted for Approval)

12 Yes, Ms Ford?

13 MR SINGLA: Can I just ask for an indulgence on that one
14 because we haven't -- I understand the ruling -- could
15 we take away some wording because we haven't actually
16 proposed any fall back wording in the event you are
17 against us on the principle of addition effects, so
18 could we try to come up with something and try and agree
19 something a bit narrower than --

20 THE CHAIR: Well, it is between you and Ms Ford. Well look,
21 we will take our break now and then if Ms Ford agrees
22 that that is a way forward, then we can. Otherwise we
23 will -- the wording will just stick with what it has got
24 at the moment.

25 (3.18 pm)

1 (A break was taken)

2 (3.31 pm)

3 MS FORD: So, moving on to Request 36 we consider to now be
4 resolved, subject to the wording about custodial and
5 non-custodial, and request 37 is now essentially
6 resolved.

7 Request 41 is now resolved.

8 Request 42 now resolved, subject to the reasonable
9 and necessary suggested wording, and Request 43 now
10 resolved, subject to the reasonable and necessary
11 wording. So by our count the next substantive dispute
12 arises in Request 44.

13 THE CHAIR: Those we sped up a bit, haven't we.

14 MS FORD: We have, and I would hope that that will be the
15 case throughout the entire table now.

16 THE CHAIR: Yes. We will be -- we will stop at 4 o'clock on
17 this and then we will talk about more general issues.

18 MS FORD: Request 44, we can leave aside the
19 non-custodial/custodial debate because we proposed
20 wording in respect of that, so the competing wording in
21 yellow and in green, the class rep's wording is relating
22 to all relevant privacy legislation, including the DPA
23 98, the DMA and the GDPR, and the wording proposed by
24 Meta in green is proposing -- to comply with relevant
25 privacy legislation (namely the DPA 98 and from

1 December 2015 the GDPR), so that limited to two specific
2 measures whereas the Class Rep's wording is "all
3 relevant privacy legislation including non-exhaustively
4 those matters which have been identified".

5 THE CHAIR: On the DMA would you be happy with putting
6 Article 5.2 in brackets on that?

7 MS FORD: Yes. We accept that it is Article 5.2 which is
8 the key issue, yes.

9 THE CHAIR: Yes. Shall we just hear what Mr Singla has got
10 to say? Because at the moment I'm inclined to give your
11 wording subject to the addition of Article 5.2.

12 MS FORD: May I simply add one point which is this, the
13 reason why we say the wording is non-exhaustive comes
14 from the underlying issues for disclosure, so the issues
15 for disclosure did not confine the requests to
16 particular measures and so we say that that brings in
17 any relevant privacy legislation. That is the basis on
18 which we take our position.

19 THE CHAIR: Yes. Mr Singla?

20 MR SINGLA: The first point, just to respond to that, I
21 mean, clearly unsatisfactory, just to have a disclosure
22 obligation in relation to all relevant privacy
23 legislation. One actually has to stipulate what
24 legislation is being referred to. This is not something
25 where even Ms Ford can say there's information

1 asymmetry. They know what the legislation -- that they
2 are referring to is, so we've accepted the reference to
3 the DPA and the GDPR, but we're not --

4 THE CHAIR: Look, at the moment I think that, you know, all
5 relevant privacy information is not going to help the
6 grunts on the ground.

7 MS FORD: Exactly.

8 THE CHAIR: And so what I was thinking of is that we have
9 a reference to the DMA and Article 5.2 and the specific
10 ones referred to, if you are happy with that I'm happy
11 with that and we can just move on to the next one.

12 MR SINGLA: As ever, I'm happy with a caveat.

13 THE CHAIR: You will never be happy. Is that what you are
14 going to say? That's fair enough.

15 MR SINGLA: So yes, I agree in principle, but the caveat is
16 in relation to the DMA -- so we would respectfully
17 suggest this needs to specify the types of legislation,
18 so we're content with the DPA reference and the GDPR
19 reference. What you are envisaging is the DMA with the
20 qualifier.

21 THE CHAIR: Well, Article 5.2, yes.

22 MR SINGLA: I would accept that as a fallback but my primary
23 point on that reference going in is actually that having
24 tried unsuccessfully to keep out 28Q, we're now in
25 a world where this is all compounding, so the question

1 now is whether the DMA, even with that qualifier which
2 has to go in on any view, but actually now this is all
3 becoming duplicative, and over the top, because if one
4 goes back to 28Q, despite my valiant efforts, they are
5 now going to get the huge amount of material -- do you
6 see the scope of -- if you just go back to remind
7 yourself of what --

8 THE CHAIR: I know what is in there. Don't worry.

9 MR SINGLA: Strategies to respond to and/or mitigate the
10 impact of the DMA Article 5.2. This is why I say this
11 all becomes a bit compounding because it is actually not
12 just 44, but when we -- if and when we get there, it is
13 also 59, 64, 67 and 105. We say, actually, having
14 succeeded on 28Q, this is now getting to the point where
15 one has to draw a line, and we can't just have -- even
16 with the qualification of 5.2, I mean, because 28Q is
17 framed in such broad terms, we do need some explanation
18 as to what this material is adding, and why is this
19 proportionate and necessary.

20 Ruling (Request 44) (Redacted for Approval)

21 Yes, Ms Ford?

22 MS FORD: Grateful. Request 45 we think has been now
23 resolved.

24 THE CHAIR: I would hope so. Yes.

25 MS FORD: The same, I think, goes to 46, subject to the

1 agreement of the proposed wording as to how that should
2 be -- the non-custodial wording.

3 Request 47, the non-custodial wording hopefully --
4 the non-custodial issue has been resolved. There was
5 a other Meta products point but I ...

6 Yes. This is a materially different another Meta
7 products point than the point on terms. The Tribunal has
8 obviously heard the extent to which we need disclosure
9 in respect of terms governing off-Facebook Data from
10 other Meta products. This request is concerned with the
11 sharing or transmission of off-Facebook Data between the
12 Defendants for use in relation to Facebook and in
13 particular for each type, category, format or other
14 delineation of off-Facebook Data when, from what
15 sources, how and why that sharing and transmission took
16 place. So, this is asking about each, essentially,
17 source of off-Facebook Data and further information in
18 relation to that.

19 It is absolutely at the heart of this case, the
20 sources of off-Facebook Data, when and how it is
21 collected, where it comes from, so the wording that we
22 are seeking is the wording in yellow, the Meta-owned
23 platforms and services. The wording that Meta is
24 proposing is that this is limited to Instagram which is
25 obviously incredibly narrow in relation to something

1 which, on any view, is absolutely at the centre of the
2 dispute between the parties.

3 MR SINGLA: Well, I mean, again ...

4 THE CHAIR: I'm not sure if she has finished yet, Mr Singla.

5 MS FORD: Yes. Ms O'Keeffe has reminded me to make clear
6 that this is -- what this is limited to is the other
7 Meta owned products, and so one would hope that there is
8 not a massive proportionality concern about Meta
9 identifying the sources of off-Facebook Data from within
10 other Meta products that they themselves own.

11 THE CHAIR: Let's hear what Mr Singla has got to say.

12 MR SINGLA: I'm sorry, if I could just take instructions?

13 THE CHAIR: Of course. Take instructions. (Pause)

14 MR SINGLA: It is a proportionally point. It has echoes of
15 a debate we had on Monday about other Meta products. It
16 is actually absurd, in my submission, to cast this wider
17 than where we got to on Monday. So we have put
18 Instagram -- a key difference in our wording is
19 Instagram.

20 THE CHAIR: You see what the difference is, yes.

21 MR SINGLA: So they are saying all other Meta owned
22 platforms and services, and what we can't understand is
23 (a) Instagram is the centre of the pleaded case, I think
24 I showed you the references on Monday, it has got
25 billions of users compared to the relatively small other

1 products, so at most this has got to -- the line has got
2 to be drawn, we say, at Instagram. You could add
3 WhatsApp, but what is very strange about the CR's
4 approach is that on Monday they were trying to persuade
5 you to add Oculus and Onavo, to Instagram and WhatsApp.
6 Here they've cast the net even more widely to cover
7 every possible product, so it's similar to that debate,
8 but we say Instagram is really at the heart of the case,
9 it is the sharing of the data from Instagram, and a line
10 has to be drawn.

11 There's a sort of related -- a follow-on point
12 about -- sorry.

13 THE CHAIR: That's fine.

14 MR SINGLA: I was just going to say there's a follow-on
15 point about temporal scope, because you will see their
16 date range I think is suggested as being 2005 to date,
17 and we say let's assume that you are with me on
18 Instagram, then the date should be from when Instagram
19 was first acquired which was 2012. That is, as it were,
20 a follow-on point is wherever you get to on the scope of
21 this, the temporal scope has to reflect when Meta
22 acquired that other product or service, otherwise --

23 THE CHAIR: That's logical.

24 MR SINGLA: That's an easy point. I think the harder point
25 is whether it should be limited to Instagram, but you

1 have the submissions --

2 MR RIDYARD: The timing problem will fix itself, won't it?

3 MR SINGLA: It should do. I can't really understand why
4 that is controversial but it is.

5 MR RIDYARD: You are raising it.

6 Ruling (Request 47) (Redacted for Approval)

7 MS FORD: 48 I think was solely a dispute about the approach
8 to custodial versus non-custodial, so hopefully that is
9 resolved.

10 49 does have a "other Meta products" point which
11 arises. This is a request for agreements, arrangements,
12 terms, policies, memoranda or understanding or similar
13 documents between Facebook and WhatsApp and/or Instagram
14 and/or Oculus and/or Onavo relating to the collection,
15 receipt, transfer and sharing of the UK users' data for
16 use in relation to Facebook, including the provision of
17 personalised advertising on Facebook. This is obviously
18 asking for the arrangements as between Facebook and its
19 own other -- rather than we've previously discussed,
20 external terms which govern the transfer of data,
21 vis-à-vis UK users, but in my submission there is an
22 obvious symmetry there in the sense that we've already
23 established that we should receive disclosure in respect
24 of the position vis-à-vis UK users for each of the other
25 Meta products identified in this request, and it would

1 make sense that we should also understand the position
2 internally as between Facebook and as between the
3 various Meta owned products as to how that data is then
4 transferred between them so we say there's an obvious
5 symmetry there and we would ask for disclosure in
6 respect of each of those other Meta products.

7 THE CHAIR: The issue between you is whether or not you
8 include Oculus and Onavo.

9 MS FORD: Yes it is, and we would say insofar as the
10 Tribunal was satisfied previously that we should see the
11 terms that govern UK users' Off-Facebook Data coming
12 from those platforms, it makes obvious sense that we
13 should also understand what are the arrangements as
14 within Meta in respect of that data.

15 THE CHAIR: Okay. Thank you.

16 MR SINGLA: It is a very short point because we say this
17 goes hand-in-hand with what you've just decided on 47.
18 This is all about the sharing that you've decided on 47
19 rightly, if I may say so, that it is limited to WhatsApp
20 and Instagram. 49 is essentially allied to that.

21 Ruling (Request 49) (Redacted for Approval)

22 MS FORD: Request 50 I believe is resolved as between the
23 parties, subject to the wording on custodial versus
24 non-custodial.

25 Request 51 also resolved.

1 Request 52 was originally a temporal scope dispute
2 but that is now agreed in the light of the position
3 taken in the letter of 20 November, and should now be
4 resolved in the light of the wording on custodial versus
5 non-custodial.

6 Request 53 should also now be resolved in the light
7 of that wording.

8 Request 54, I think this is a disputed request, and
9 the dispute relates to the wording in orange in the
10 indicated request, so we are -- the parties are agreed
11 non-custodial documents, and what sort is documents that
12 set out what steps are involved and/or what types of
13 auctions are used in Meta's ad deliver and ads auction
14 processes. That part is agreed, and then the class rep
15 also seeks disclosure as to when and how Meta has made
16 changes to these steps. This is, again, a request which
17 is driven by the expert process, and it is explained in
18 Professor Scott Morton's report at {C7/5/12}.

19 The relevant paragraphs are paragraphs 42 to 48.

20 THE CHAIR: 42 and 48 or is it the whole lot?

21 MS FORD: Sorry, 42 to 48, that passage.

22 THE CHAIR: That's what I thought. Yes.

23 MS FORD: 44, she explains that this goes to the central

24 issue of the value of off-Facebook Data which is
25 monetized by means of the selling of personalised

1 advertising.

2 45 she explains the extent of her current
3 understanding about how Meta's ad auctions work.

4 At 46 she explains that she is not -- it is not
5 presently clear to her how the availability of
6 off-Facebook Data translates into higher prices in
7 auctions, or higher bid prices and eventually higher
8 advertising prices or revenues for Meta, and so she
9 explains:

10 "It is therefore necessary for me to understand the
11 steps of the auction in order to understand the
12 mechanism via which off-Facebook Data becomes relevant
13 and how it might or does translate into higher
14 profitability".

15 If we go over the page, please, 47 is where she is
16 dealing with exactly why the disputed element of the
17 request is needed, and she says:

18 "Understanding when and how Meta's auction system
19 has changed over time is important because if changes to
20 the auction system have altered the way off-Facebook
21 Data drives revenues or profitability this will have
22 significant bearing on my expert methodology, for
23 example, if the use of AI algorithms has changed, the
24 importance of off-Facebook Data, or if the effectiveness
25 of off-Facebook Data for targeting has decreased I'll

1 need to factor this into my analysis".

2 She says:

3 "Although I would also need to consider how such AI
4 algorithms were trained on off-Facebook Data in the
5 first place".

6 48 then explains that she also needs to understand
7 the auction mechanism and related changes to ensure that
8 she properly interprets any internal analysis that Meta
9 itself has done on the value of off-Facebook Data, and
10 that her own analysis and estimates over both are
11 robust. She refers to Request 56, the fact that the use
12 of (Inaudible) auction data for her empirical analyses,
13 and she says it is important that these analyses should
14 be rooted in an understanding of how the auction
15 operates, "I highlight the importance of this topic in
16 FSM 1" which is obviously her report in support of
17 certification:

18 " ... where I made clear that I expect to learn more
19 about the auction mechanism following disclosure".

20 She cross-refers to her views on the relevance of
21 documents in ad auctions in the joint expert statement.

22 Mr Parker has also commented on this in his expert
23 report for the purposes of this CMC. It is at
24 {C7/9/11}. Paragraph 33, his view is that:

25 "... the experts will need to gain some broad

1 understanding of how Meta sets ad prices and the role of
2 Off-Facebook Data..."

3 Expresses the view that this request is going beyond
4 what is needed for the expert analysis, and the relevant
5 aspects appear to be already sufficiently covered by
6 other requests.

7 His reasoning in 34, over the page, is concerned
8 with market definition and market power. As we've seen
9 from what Professor Scott Morton says, that is not her
10 primary concern in relation to this enquiry.

11 At 36 he refers to the fact that off-Facebook Data
12 features in other requests, and we say that is, in
13 itself, completely unsurprising because this is an
14 absolutely central concept in the case, and at 37 he
15 says it is not clear to him how detailed information and
16 auction processes would benefit the experts' analysis.

17 In my submission Professor Scott Morton has
18 explained that in the passages I have taken you to from
19 her report and to be fair to Mr Parker he obviously
20 produced this evidence without having had the
21 opportunity to see what Professor Scott Morton said
22 about it, but in my submission what Mr Parker says
23 doesn't give any particular reason to doubt why
24 Professor Scott Morton has explained this, is relevant.

25 There was a dispute about temporal scope but our

1 understanding, based on the 20 November letter, is that
2 is now a moot point, so it really comes down to her
3 explained rationale for understanding when Meta made
4 changes and why.

5 MR SINGLA: I would like to keep reminding you of previous
6 decisions that you've rendered in this Tribunal, and one
7 of them says it is not a matter of what the experts just
8 ask for, because with due respect to experts, they
9 always want more, and so the Tribunal needs to approach
10 this again by reference to what is proportionate and
11 what is of central relevance to the case, so we do agree
12 that the experts will need to gain a broad understanding
13 of how Meta delivers ads. We do accept that, but this
14 is not a case about the advertiser side of the market,
15 however, this is a two-sided market, so what we object
16 to here, and the nub of the dispute, is really whether
17 the experts need to see disclosure in very granular
18 detail of how the steps involved in these ad auctions
19 and ad delivery changed over time. We're not trying to
20 say that ads are not relevant, it is really how deep
21 does one dig into the advertising side of the market,
22 and there's going to be quite a bit of disclosure in
23 relation to the advertising issues, so if I just show
24 you requests, for example, 41, how Meta used
25 off-Facebook Data; 42, how and why Meta collected and/or

received and/or processed and/or aggregated and/or used such data, and then the part of 54 which is actually agreed, so we're only disputing part of 54, because we do accept this is relevant to some extent, and also when we get to 55 our proposal envisages some disclosure under 55, concerning advertising side, then there's 87, non-custodial documents regarding the advertising and products Meta has offered, how such products enable advertisers to target their advertisements, the extent to which such products enable advertisers to identify UK users, and also, I think, Request 100, so this is all agreed. You can see 100 also concerns advertising, so the question is really how far does the case need to get into the ads delivery and auctions, and we say enough is going to be disclosed and although Professor Scott Morton is seeking to go further, we say that is inappropriate. It is not going to be a necessary line of enquiry at trial to understand the precise operational details of how this off-Facebook Data translates into auction outcomes. It is just a level too far. For example, one doesn't need to get into the underlying algorithms and so on. Where the case is concerned with the user side of the market, and there's so much disclosure already that is going to be received on the advertising side, the point Mr Parker is making

1 is what professor -- well, he doesn't say this in terms
2 but he is saying, essentially, the experts only need to
3 go so far, and Professor Scott Morton wants to go a lot
4 further, and that's why we say the Tribunal should
5 approach this with some caution, and say, well, experts
6 will always want to dig very, very deeply in things, but
7 is it actually of central relevance.

8 Ruling (Request 54) (Redacted for Approval)

9 So that is where we are for today on the Redfern
10 schedule.

11 MR SINGLA: I know you would like to get onto the general
12 knot, but --

13 THE CHAIR: I do.

14 MR SINGLA: -- I just wanted to make the point that Request
15 55, the debate is very similar so I'm not suggesting we
16 argue that now --

17 THE CHAIR: No, but you can work out where the direction of
18 travel is when you discuss with each other.

19 Now, the first thing is, Mr Singla, did you want to
20 say anything more about rolling basis other than what we
21 dealt with earlier?

22 MR SINGLA: No.

23 THE CHAIR: What's your position on timing as to -- what end
24 date are you looking for?

25 MR SINGLA: Well, we did put witness evidence in which says

1 it is ten months from --

2 THE CHAIR: I understand that, yes.

3 MR SINGLA: So, I mean, the short point that I can make now

4 is that what we need to do is to actually finalise this

5 process, work out the totality of the disclosure that

6 we're going to have to provide, and then consider quite

7 carefully the questions of timing.

8 THE CHAIR: That's really for next time, isn't it.

9 MR SINGLA: Well, it is certainly not for now. It is

10 obviously --

11 THE CHAIR: Once we've done the schedule then we're in the

12 best position to determine it.

13 MR SINGLA: Exactly.

14 THE CHAIR: But in principle it will be on a rolling basis.

15 MR SINGLA: Yes. I understand that you say that, but on

16 that basis we do submit that the long stop -- I think it

17 was ten months, the evidence was ten months.

18 THE CHAIR: We will come to it next time.

19 MR SINGLA: All right.

20 THE CHAIR: We've got to realise it's -- it is 4.05.

21 MR SINGLA: There's a lot still to do.

22 THE CHAIR: Hopefully most of it will be resolved before we

23 have the next hearing. Have we got a firm date for the

24 next hearing yet?

25 MR SINGLA: I think the parties have written to the Tribunal

1 suggesting 16 December.

2 THE CHAIR: That's fine. So we will have it on a remote
3 basis on the 16th. Yes. Anything else you would like to
4 say at this stage?

5 The Tribunal would like to give some general
6 guidance in this case. The disclosure exercise to be
7 carried out in this case is going to be an important,
8 massive and complex exercise. Where there is
9 information asymmetry between the parties as in this
10 case, disclosure will be an important -- will be
11 important in ascertaining where the truth lies in
12 resolving the many issues in this case. Experience
13 tells the Tribunal that the larger and more complex the
14 disclosure exercise, and the larger the team working on
15 disclosure, the more likely that errors will be made and
16 an inconsistency in searches arise. As long as there is
17 a proper and documented process, such problems will be
18 minimised so far as possible.

19 It is in everyone's interest that disclosure is done
20 properly. For both parties, disclosure in this case is
21 likely to be a bit of a curious egg. There will be
22 documents held by Meta that both supports and goes
23 against its case. Even though a large amount of
24 disclosure will be provided, it is likely that only
25 a small proportion will actually be referred to at

1 trial. It is likely that more documents are going to be
2 examined by experts and feed in their reports and inform
3 their analysis without those underlying documents
4 necessarily being produced before the Tribunal at trial,
5 so we envisage that there will be a lot of documents
6 disclosed, the experts will review what they want to
7 review and get what they can get out of that, and
8 finally, by the time it gets to trial, it is only those
9 documents which are really important and necessary for
10 the Tribunal to resolve the case that will be in the
11 trial bundle. We do not want to have a situation where
12 there is a trial bundle and -- like a one general bin
13 box which is all the documents in the case which we have
14 seen in other cases. The parties will have to work
15 together to decide what documents are in play at trial.

16 There is no expectation by the Tribunal of a no
17 stone unturned approach, as that would lead to delay,
18 unnecessary expense, and would be ultimately self
19 defeating. At this and earlier CMCs, the Tribunal has
20 been willing to circumscribe the request by the CR where
21 it considers what is being sought is not necessary or
22 proportionate. The mere fact that an issue features in
23 the list of issues for disclosure does not mean that
24 what is sought requires an extensive disclosure exercise
25 in respect of such issues. That depends on how

1 important the issue is, how much disclosure is likely to
2 assist in the resolution of that issue, what documents
3 are available, and the cost and practicability of
4 searches for such documents.

5 An exercise such as the present requires
6 a combination of dedication and professionalism from the
7 top downwards. Given the size of the exercise, it is
8 necessary to designate a solicitor in charge at Meta's
9 solicitors who, as an officer of the court, will have
10 the ultimate responsibility that the exercise is
11 properly carried out, and I'll define that as "the
12 designated solicitor". That does not mean that person
13 has to personally carry out all the tasks covered by
14 disclosure, as long as that person guides, controls and
15 oversees the project.

16 The Tribunal very much doubts that the designated
17 solicitor will be able to work on much else until the
18 exercise has been completed. In other cases, it has
19 been found to be efficient and give the best outcome if
20 the designated solicitor is not working as part of the
21 case team, but is simply concentrating on the disclosure
22 exercise. It has the advantage of giving a degree of
23 independence and ability to push back on what members of
24 the case are saying who want someone who is going to
25 exercise independent judgment and with the strength and

1 ability to say no, I think we should disclose this or we
2 shouldn't disclose this.

3 There needs to be guidance, and guidance and audit
4 trail and quality control for the exercise. There will
5 be a sizeable team working on -- and all of them will
6 need to be aware and understand the issues and what is
7 required of each of them. This will require a study and
8 appreciation of the issues in the proceedings, and the
9 practical issues that may arise. In the Tribunal's
10 experience it is often useful to have a detailed
11 protocol drawn up as a practical framework so everyone
12 coming in and out of the exercise understands the
13 required procedures.

14 Each member of the team should be provided with an
15 induction pack which can be a source of reference
16 throughout the process. This will include the essential
17 materials such as the pleadings, the DR, the EDQ, the
18 finalised disclosure schedule, any rulings by this
19 Tribunal and, of course, the disclosure protocol.

20 There should be a disclosure log for each team
21 member as well as a consolidated disclosure log for the
22 designated solicitor. These logs will record what has
23 been reviewed, by whom, and when, any problems and gaps
24 found, lines for follow-up and why certain steps should
25 be or should not be taken. An example of going through

1 a particular custodian -- one example of this is going
2 through the documents of a particular custodian. The
3 person can see that there is a huge gap of documents
4 which is missing or a time period is missing, and then
5 a decision needs to be taken as to what to do. Do we go
6 to non-custodial disclosure or do we seek to go down and
7 look at a different custodian? These are all judgmental
8 points for the designated solicitor, but it does show
9 that what the Tribunal is reluctant to do is to impose
10 a straitjacket on the designated solicitor as to how it
11 is to be done. An element of common sense needs to be
12 applied, and that can only be done once you appreciate
13 what is out there.

14 There should be quality control and the Tribunal's
15 persons, when different people review a particular batch
16 of documents for relevance, they should normally be --
17 or usually be able to identify the relevant key
18 documents if they have sufficient guidance and carry out
19 the process diligently, but it is not necessarily
20 a scientific exercise, and results may vary.

21 A significant divergence in selection between
22 different reviewers over the same file with one
23 individual omitting too many documents which ought to be
24 disclosed may indicate that at least one member of the
25 team needs further guidance or training. This is the

1 sort of practical problem that arises in these large
2 exercises. The logs should be monitored by the
3 designated solicitor to the extent that that person
4 considers that is required. It may be sensible to have
5 catch-up team sessions for the team to discuss progress,
6 uncertainty, practical problems and trends. It is
7 a significant responsibility to be the designated
8 solicitor in charge in a case like this. The personal
9 duty to the Tribunal is to get the exercise done
10 properly, and that any order is complied with to the
11 extent reasonably practicable.

12 The Tribunal requires that when it comes to
13 providing the statements of truth verifying disclosure,
14 that is given both by the designated solicitor and an
15 appropriate person from Meta.

16 The Tribunal is here to assist and provide guidance
17 as and when needed. If guidance is sought, it is better
18 to seek it as one goes along rather than leaving it all
19 to the end of the disclosure exercise when it may be too
20 late.

21 The Tribunal turns to a number of specific points
22 which have arisen during the course of this hearing.

23 As regards documents which refer to more than one
24 issue and only one issue relates to the issues in the
25 proceedings, Meta is entitled to redact material which

1 is irrelevant and confidential. The mere ground that
2 something is irrelevant is not a ground for redacting
3 a document, but if there is a passage dealing with
4 a different topic, and it is not a relevant topic and it
5 is confidential, then it can be redacted. The Tribunal
6 is prepared to accept that a broad definition of
7 confidentiality can be adopted for this purpose on this
8 specific case.

9 It doesn't -- just because there is a document with
10 passages which are irrelevant doesn't mean it has to be
11 redacted. The designated solicitor may decide it is
12 more appropriate to -- rather than redact -- to deal
13 with it by way of a CRO. If it goes to the CRO then, of
14 course, the confidentiality will be maintained. It may
15 well, at the end of the day, be a practical and
16 cost/benefit analysis as to which route Meta wishes to
17 go to, but in accordance with Myers v Elman 1940 Appeal
18 Cases it will be the duty of the designated solicitor to
19 review any redactions which have been compiled.

20 It was suggested at one point by the CR that
21 explanations for the redactions should be provided.
22 That is not the normal practice, and that is not what is
23 going to be required, at least in the first instance.
24 As long as it is done properly I don't think the
25 Tribunal needs to go behind whatever the assessment is

1 of the designated solicitor on relevance and
2 confidentiality. If there's a problem, of course you
3 can come back and then we can revisit it.

4 Another issue that has arisen in the submissions but
5 not pushed at the hearing so much is whether
6 admissibility is a touchstone for disclosure. There's
7 a distinction between disclosure and witness summonses
8 for this purpose. A witness summons is a requirement
9 that a person produce evidence for trial and of course
10 the documents or the information needs to be admissible
11 for that purpose. Disclosure is not tied to
12 admissibility. A requirement for disclosure applies to
13 documents which are both admissible and inadmissible at
14 trial. Of course, if a document is inadmissible, that
15 may be a factor in determining whether or not disclosure
16 is necessary and proportionate.

17 As regards the use of technology, the technology is
18 both a curse and a cure. It is a curse in that it has
19 led to an explosion of data which may need to be
20 disclosed in cases like this, but it does provide a cure
21 in the sense that technology, if appropriately used, can
22 speed up the process and reduce the cost of the process.

23 In some cases, technology has been of a great
24 assistance, and in other cases it has been a bit of
25 a hindrance, but one has to trust the judgment of the

1 designated solicitor as to what technology to explore
2 and to use, and what works and doesn't work, so we're
3 not going to be prescriptive and say, well, you've got
4 to use AI or whatever. The designated solicitor should
5 decide what is appropriate in all the circumstances, and
6 see what works.

7 As regards the relationship between the two sides,
8 so the CR and Meta and their lawyers, we do consider
9 that there has been a great deal of collaboration on
10 both sides. We've heard a few jury points over the last
11 couple of days about whether someone has been, let's
12 say, constructive or not constructive. In the view of
13 the Tribunal, both parties have endeavoured to be
14 constructive, and one would hope that this collaboration
15 can continue, and that the process can run, let's say,
16 smoothly.

17 As regards an issue that Mr Singla has raised about
18 meaning and clarity in the pleadings, the Tribunal does
19 not accept that on all the points he has raised that
20 there is necessarily a lack of clarity as to what the
21 CR's case is, but on the other hand there are elements
22 where he is correct, and where there is a genuine
23 concern by the designated solicitor that due to a lack
24 of clarity it is not clear what's required for the
25 disclosure exercise, they should have the ability to

1 write to the solicitors for the CR seeking
2 clarification, but -- so the clarification of the
3 pleaded case is going to be required to the extent it is
4 necessary for the efficient progress of the current
5 disclosure exercise, so I'm not envisaging another
6 opportunity to serve a detailed RFI on everything, it is
7 a question of whether there is discrete points which
8 factor into the disclosure exercise, where an answer is
9 needed so you can know what you are looking for. That
10 is something that should be provided for.

11 Finally, disclosure at the end of the day will be on
12 a rolling basis, but we can discuss this at the next
13 hearing which has been fixed for 16 December. At the
14 next hearing, the aim is to finalise the disclosure
15 schedule so that the whole process can then start, but
16 it is only once we get to that stage that we can
17 actually start talking about what are realistic
18 timescales for this process.

19 On costs, I think it is important to reiterate -- or
20 the Tribunal thinks it is important to reiterate -- the
21 approach taken on costs where you are going through
22 a Redfern schedule process as in the present case.
23 Sometimes the view is taken that you look at how many
24 requests have been agreed, and how many haven't been
25 agreed, and then you start thinking about an adverse

1 costs order. That's not the way this Tribunal on this
2 case thinks is the right route. What we don't want is
3 either party to feel that if they make concessions,
4 that's going to be somehow used against them when it
5 comes to costs. It's far easier to carry on the current
6 process without a costs sword hanging over the parties'
7 heads, than where there is always -- everyone is
8 thinking about, well, what is the implication of
9 agreeing this in terms of an adverse costs order, so we
10 do want to have an atmosphere where parties can freely
11 feel that they can concede points without any risk of
12 costs, and the final point on costs is that there are
13 a lot of people here, and we appreciate this hearing is
14 expensive, but we do think that where there is a hearing
15 looking at the fundamentals of this exercise and how it
16 is going to be put together, that the team members who,
17 at the end of the day, have the job of implementing
18 this, are present so they can see the direction of
19 travel and understand what is required.

20 Is there anything else that either party wants us to
21 give any ruling on at this stage? No. Okay. So we are
22 going to have a hearing on the 16th. I will want to have
23 a date by which I have the next version of whatever
24 we're working on to be given. Are the parties yet in
25 the position to start trying to draft, at least have

1 a first draft by the 16th, of the final disclosure
2 schedule? So we've got the Redfern schedule which is
3 one process, but what comes out of the Redfern schedule
4 is the disclosure schedule, and so I don't know how much
5 progress you are likely to make.

6 MS FORD: There is a document that we have been producing
7 that is the agreed and ordered disclosure which
8 contains, prior to this hearing, those that have been
9 agreed, and we've transferred some over into that
10 subject, I think, to some questions about wording. One
11 would hope that the progress that has been made
12 particularly on the custodial versus non-custodial issue
13 would enable a large volume of requests then to be
14 transferred over into that document and optimistically
15 one would hope that we will then have a much more
16 focused disputed schedule as and when we come back on
17 the 16th.

18 THE CHAIR: So if I can have a hard copy of both documents
19 so far as they've been done, the Friday before, because
20 I think the 16th is a Tuesday, so the Friday before,
21 whatever that date is, then I'll have the opportunity to
22 consider it properly before we start on the 16th.

23 MS FORD: The 12th. I think.

24 THE CHAIR: Yes. The 12th.

25 I'm not going to require further skeleton arguments.

1 I just don't think it is necessary at this stage.

2 Insofar as there's points to be taken they will be in
3 the Redfern schedule and I find it more useful at this
4 stage not to work from the skeletons. I think I
5 understand what your points are. I don't -- unless
6 someone feels they want to file some sort of skeleton?
7 No. Good.

8 MS FORD: I have just been given the Opus reference to the
9 agreed list as it presently stands. We can obviously
10 provide the Tribunal with a hard copy. The revised
11 version. Insofar as the Tribunal wants to see what it
12 is looking like at the moment it is at {E2/356/1}

13 THE CHAIR: I don't really want to look at it. There's
14 a limit to how much time I can spend on every hearing
15 and case. What I'm going to do is, unless I have to,
16 I'm not going to look at this again until the morning of
17 the 12th. I can take whatever time is necessary to get
18 the issues in my head by the 16th.

19 Mr Singla, is there anything else on your side?

20 MR SINGLA: Is there a particular time on the 12th that you
21 would like the materials?

22 THE CHAIR: Well, if I can have it by 12 o'clock on the
23 Friday in hard copy, you know, in this type of format or
24 whatever, then that would be very, very helpful.

25 MR SINGLA: And can I just say we're very grateful to the

1 Tribunal for making yourselves available to have
2 a hearing.

3 THE CHAIR: Yes, and, look, this has been a very helpful
4 hearing and everything has been done in a constructive
5 way, and I hope that, although there's an element of
6 rough and readiness, that both parties feel that we've
7 made some progress. Maybe we should have made a bit
8 more progress, but I think we're further down the line
9 than I feared at 10.30 this morning. Yes. Okay. Thank
10 you very much everyone.

11 (4.25 pm)

12 (Hearing concluded)