IN THE COMPETITION APPEAL TRIBUNAL CaseNo: 1720/7/7/25

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 8th July 2026

Before:

The Honorable Mr Justice Meade
John Davies
Robert Herga

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Proposed Class Representative

Or Brook Class Representative Limited

V

Proposed Defendants

Alphabet Inc. & Others

A P P E A R A N C E S

Kieron Beal KC & Ali Al-Karim (Instructed by KP Law & Geradin Partners) on behalf of Or Brook Class Representative Limited

Sarah Abram KC, Alfred Artley & Edmund Eustace (Instructed by Simmons & Simmons LLP) on behalf of Alphabet Inc. & Others

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Wednesday, 08 July 2026

(10.29 am)

Housekeeping

MR BEAL: (Several inaudible words) who is the class representative whose collective proceedings have already been certified.

THE CHAIR: Yes.

MR BEAL: On behalf of the bar, may I start by congratulating you, sir, on your appointment to the Court of Appeal. It's a very extravagant way of avoiding this case.

THE CHAIR: Yes.

MR BEAL: I hope, by way of housekeeping, that the Tribunal has hearing bundles A to E.

THE CHAIR: Yes.

MR BEAL: Bundle of authorities in three separate volumes, principal one of which is "A", and then also "B", and then a very small one "C".

THE CHAIR: Yes.

Opening submissions by MR BEAL

MR BEAL: Starting off by way of update, that small bundle C does have the Court of Justice's recent decision in the Google v Android case, in which all of Google's grounds of appeal were dismissed with costs:

"The Court of Justice has upheld the key abuses committed by Google, including tying of the Google search app, tying of the Chrome browser, the abusive nature of the anti-fragmentation agreements and the abuse of payment of conditional revenue streams to third parties." [as read]

What that means for practical purposes in this case is that the follow-on action -- or the follow-on portion of these claims -- is complete for the period up to 1 January 2021. It's arguably unsurprising, therefore, that Google has rightly not taken any issue with the strong claims that the PCR advances in substance against it in these proceedings. The complaints are all of a more procedural, non-substantive nature.

Now, Google has suggested we respectfully suggest, forensically, that our reply has made a number of concessions; it did no such thing. In our response to -- sorry, in our reply to that response, we simply dealt with a number of points which Google had raised for the first time in that response, one of which was, for example, limitation. When you have a pleaded case, it's customary for the defence to plead limitation and the reply then deals with limitation issues.

We respectfully invite the Tribunal to read our reply for what it is, rather than the summary that's given of our stance in Google's skeleton. One example of that relates to the Pro-Sys test, which, as you've seen from the correspondence, is no longer pursued as an objection formally to certification in this case. But for example, in their skeleton, Google suggests that we had only dealt with a methodology for a media agency pass-on, in our reply to their response. With respect, that's simply not right. If the Tribunal would be kind enough to turn to hearing bundle B, tab 3, page 258.

(Pause)

There's an entire section devoted by Professor Scott Morton to considerations of upstream pass-on by media agencies, and she sets out exactly what she's going to do, including an examination of contracts that are typically held by media agencies with their customers and then looking at other post disclosure issues, representative documentation and so on, and she will obviously conduct an examination of those issues and see what the position is. So the methodology has been set out as to how that would be addressed. It can't, therefore -- with respect -- be described as a new point taken only in reply.

Again, getting some of the starting observations out the way, we have seen something of a shift in Google's approach throughout the course of the procedural history. It won't be lost on the Tribunal that it was only in the first letter of 29 June 2026, which I will turn to in due course, but for your note, it's bundle E, tab 2, page 3, the substantial number of points were effectively confirmed no longer to be an issue.

Now, I don't propose to generate more heat than light on this; it's welcome that the issues have narrowed between the parties, but quite a lot of the to-ing and fro-ing on issues such as Hollington v Hewthorn, the Pro-Sys point limitation and in substance the issue of conflicts have fallen away.

What we say is not a feature of Google's objection to certification is that somehow the claim is weak or that it is untriable. It's not being suggested that aggregate damages can't be assessed, nor is it suggested that Professor Scott Morton's very detailed first report, as supplemented by her second and third report, is somehow defective in showing a blueprint to trial.

Where we are now is with the mechanics of collective proceedings and principally we will be looking at three or four issues: we'll be looking at the issue of opt-in versus opt-out, which encompasses within it a separate but discrete issue of cost/benefit analysis for the claim; the third issue is the distribution point, which has received a heavier focus in their skeleton than hitherto; and finally funding an ATE.

So those are the issues I propose; unless the Tribunal would like me to address them differently, those are the issues I propose to take here. What I'm proposing to do is start off with a very quick canter, if I may, through the claim form -- the amended claim form -- so that the Tribunal can see the scope of our case, and in doing so I'll try and deal with two -- what we call -- subsidiary points; I don't mean to denigrate them, but they are smaller points and that is the complaint about the amendments to the claim form and the class definition. If the Tribunal's content with that approach, I'll move on to look at the nature of our case.

THE CHAIR: Yes.

MR BEAL: I'm not proposing to take the Tribunal to the Stopford certification decision, because you wrote it, and therefore that would be unnecessary, in my respectful submission.

Can I then please turn to the amended claim form? This is hearing bundle, tab a -- sorry, bundle A, tab 3, starting at page 13. (Pause)

That shows amendments are shown in the traditional format. Paragraph 4 overleaf identifies markets in which Google is alleged to be dominant. The Tribunal will have noted that that doesn't include the search advertising market, because the search advertising market is the one that we say is impacted by abusive practices in the other markets in which Google is dominant.

At paragraph 5, we have a summary of essentially different facets of abuse summarising what those are: mobile application distribution agreements with OEMs and manufacturers of Android devices; AFAs, the Anti Fragmentation Agreements, that prevent the development of Android forks; PAs, RSAs and ISAs and so on, a series of agreements with third-parties; and then finally self-preferencing via the Google search tool known as SA360.

Paragraph 6 on page 16, there's an explanation of how those interlocking abuses interweave with one another in order to lead to a position where Google's rivals are detrimentally affected by the abusive conduct, which leads to an entrenchment of Google's position, which leads to the claim for diminished advertising quality and higher advertising costs. That, in a nutshell, is the case.

Cutting to the chase on things that matter for present purposes, if you'd be kind enough, please, to turn to page 24. We have here at the top of the page a definition of the class and it is all UK domiciled advertisers who -- during the relevant period -- paid for search advertising services provided by Google, whether directly or via a media agency. Those are the PCMs, as we call them.

Advertiser is then defined; it's expressly defined not to include media agencies. Domiciled date is a date to be proposed if and when a CPO order is made. And relevant period starts from 1 January 2011, ends on the date of the claim form, and one of the points that's taken against us is, well, that relevant date doesn't reflect what is now common ground that there is a four-year period from -- roughly 2015 to roughly 2019 -- where limitation impacts on some of the claims. The reason why we say that doesn't need to be amended, contrary to Google's submission, is that there are Scottish claims that are extant throughout that period on our case and it's common ground that the issue of Scots limitation will need to be determined ideally ahead of time at a convenient moment -- perhaps the next CMC -- so that the Scots law position can be bottomed out and a final landing can be reached on which claims span the entire period. But on our case at present -- and it's not suggested it's unarguable -- there are claims that run the gamut of the period.

The limitation issue goes to the quantification of the likely harm, because there will be a reduction to reflect the fact that some claims -- or even arguably most claims -- over that four-year period are now time barred, but given that we're not at distribution stage and we're not trying to pin the tail on the donkey of a specific quantum figure at this stage, my respectful submission is that has no bearing whatsoever on certification issues.

Coming back then, please, to paragraph 32: we have an estimate of the class size there, 250,000 members. We received permission yesterday to refer in open court, having chased the permission for many a week. We received permission finally to reveal the figure of 880,000 as the potential class in open court. We didn't understand why that was confidential because, of course, it spans a range from 2011 through to

2024, doesn't give away any commercial data of material relevance at this stage, given that it's a banded, bracketed, aggregate figure and it's an estimate. But anyway, I can now reveal it: so we now know that we're talking about 880,000 claimants on Google's analysis.

Page 43 -- sorry, page 32, sorry, paragraph 43, sets out our position on funding. As a litigation funding agreement as originally committed funding of £34 million, that's now in the region of £40 million committed funding for the dispute.

Paragraph 46 sets out the position on ATE insurance. I'll make a submission later as to what matters for certification purposes, is: is there sufficient cover in place to cover adverse costs in the event that Google is successful in its defence of this claim? The answer to that is that, following the consolidation of the Kaye and the Brook claims, there's now cover through to the end of the proceedings of up to £30 million, which is an improvement of the pre-consolidation position of £25 million. So the cover available to Google to satisfy any adverse cost liability has improved.

Moving on then, please, to page 34, paragraph 50. We plead that the class is identifiable, because it's possible, objectively, to determine whether somebody within the class, persons in the class, if they paid for search advertising either directly or via a media agency on Google search within the relevant period, albeit that the PCR seeks damages in relation to losses whenever suffered, including after the end of the relevant period. Google raises an objection to that amendment, amongst others and so I'm flagging that as being part of the scope of the objection that's taken to our proposed amendments.

Paragraph 54, we deal with why collective proceedings are appropriate. It's there said that 86 per cent of the proposed class have claims of £20,000 or less.

Page 42 please, paragraph 77. That deals with opt-in issues and there you have our pleading at 77 and 78 as to why proceeding on an opt-in basis only would not be practicable.

78 in particular says it wouldn't be practicable because of the relative modest amounts that many PCMs could recover (inaudible) complexity of the case, the size of the proposed class. Many of the PCMs are likely to be small or arguably medium-sized businesses, but either way, SMEs, as the parlance goes. We also rely on the fact that many PCMs might be deterred from actively participating because of a fear of detrimental impact on a key commercial partner, by putting one's head above the parapet.

The rest of the claim form then deals with matters that I anticipate the Tribunal is very familiar with, such as how Google works, how its search advertising works. At page 67, there's a distinction drawn between display and search advertising. We're dealing here with search advertising, not with display advertising.

At paragraph 122, this initially, we thought, was a concern that Google was expressing as to the scope of our pleaded case. We make it clear that the results in SERPs include both text advertisements and product listing advertisements. I apprehend that the class definition issue that's been raised in my learned friend's skeleton is a subtler point than that. We thought that's what they were talking about, but I think there's a subtler point, and I'll come on to deal with that in a moment.

That I think is all I need to show the Tribunal at this stage. As I said, it was a quick canter.

Paragraph 205, onwards -- sorry, I probably should show you page 105, paragraph 210. There's a series of further amendments then to which objection is taken, all of which are of a similar ilk. 210 pleads the first of five different abusive practices -- sorry, six different abusive practices, which at each stage we allege are continuing, because we plead that this practice, which, unless Google alters its conduct, will continue beyond the end of the relevant period. So we plead an ongoing

infringement through ongoing abusive conduct. And each time that particular bracketed assertion is made, Google objects to the amendment.
So I hope that that shows the Tribunal the lay of the land and the specific objections that are taken.
Could I deal first with the class definition issue that has been raised in the Google skeleton at paragraphs 20 to 22. What we made clear in the pleading I've just shown the Tribunal is that our pleaded case covered search advertising. The loss that was being sustained was in the search advertising market, not the display advertising market. We made it clear that that covered both text ads and product listing advertisements, PLAs, supplied by Google.
The crucial definition was that this was search advertising supplied by Google to PCMs. So it's a situation in which Google has a direct relationship with the purchaser of the advertising, either directly, or through the actions of an agent acting on behalf of a disclosed principal. Why is it a disclosed principal? Well, because advertising is not intended to be secret and therefore one needs to know the product or service that's being advertised and sold, and can therefore infer who the purchasers are of the advertising.
Mr Matthew notably, in his first report, did not have any difficulties in identifying the data which would identify the class. Please could I invite the Tribunal to look at bundle B, tab 6, page 449. Paragraphs 46 and 47, Mr Matthew deals with data that was provided by the CMA, or to the CMA, and therefore forms part of the CMA's OPDA report.
What he identifies in paragraph 47 -- and I shan't refer to any of the figures because they are marked as confidential still -- he does identify advertiser ID as a field in that data, which identifies a unique parent entity, ie, advertiser. Some advertiser numbers in the data -- there are multiple rows, and I have no information to determine whether

a unique advertiser is properly identified as a single row or a unique advertiser ID. He's tested those results and found that essentially it doesn't make a huge amount of difference between the figures. So we have, at least as a broad proxy, data that is capable of advertising the specific advertiser that is spending money, because this data shows the revenue associated with a specific parent entity, ie, advertiser, in Mr Matthew's own words.

It also contains -- see paragraph 47B, at the top of page 450. It also contained a field saying "search spend USD 2019", which shows the total amount of money in US dollars that the advertiser spent on Google search ads that were served in the UK in 2019. So again, if it's being suggested that somehow Google search advertising is an opaque or difficult to understand concept, the answer is that the CMA data from 2019 appears to have a specific data field that deals exclusively with search spend, in contrast to -- see paragraph C -- display spend or video spend.

Now I infer, and it's a matter for submission and/or evidence in due course, that display spend and video spend are different to search spend, and that the data therefore can draw a distinction between search and display advertising, and indeed video advertising. And it's the search spend that falls within the scope of this claim.

At paragraph 48, we then see that Mr Matthew was able to sort the total buckets of spending so that he came up with a conclusion, which I shan't read out, for a positive spend on search advertising. So insofar as it's suggested that our class definition is unclear, Mr Matthew, doing his best to assist the Tribunal, has been able to identify figures for 2019 which would appear to indicate the total search expenditure.

If I could then invite you, please, to read on at paragraph 50, because what Mr Matthew then covers is not the 2019 data as used by the CMA, but the data that is available to Google itself, and which has been provided in a data pack, covering the period, admittedly, from 2017 to 2024. We then see in paragraph 50 that this data had a number of fields, even internally. Bearing in mind that the data given to the CMA must have been capable of being separated into search and display spend, that can also be done, one would assume, with this data, because the 2019 data is a subset of the wider data resource.

We see that, under A, parent ID is the highest level of aggregation that Google has, so it can identify unique advertiser. It's invariant across years, meaning individual advertisers' spend over time can be analysed. As with the 2019 data, for the purpose of this analysis, I assume that advertiser was equivalent to a PCM. He hasn't sought to test that.

But we then see under B at the top of the next page, the parent name identifies the name of the parent company, and most parent ID numbers are associated with a unique parent name. There are a few parent names that have multiple values, vast majority of which appear to be spelling variances. Of course, parent name won't necessarily identify all of the legal entities, and there therefore may be even more legal entities as claimants than have been identified as the 880,000 from the 2017 to 2024 data.

But the figures were then capable of being looked at on a year by year basis, and broken down. In C at page 451, Mr Matthew then breaks it down by inventory type, and he says that this has various different fields which identify the type of what's described as "ad source". This can take on the following values: SERP, which he interprets as advertisements appearing on the search engine results page; Google Shopping; Google Travel; Image Search; Maps; and YouTube.

He then focuses his analysis on SERP, provides a robustness check for all inventory types, which is then contained in table 6. So he's looked at all of those categories and he's then focused on SERPs. But it shows that the data can be distinguished between those different categories of search advertising.

Now, it hasn't ever been spelled out, and indeed Google's skeleton is rather tight-lipped about what precise point they're trying to make here. But it looks as though they're trying to distinguish between advertised search advertising, which appears on a search engine results page, and search advertising that then pops up on Google Maps or Google Shopping, or if you go into Google Travel.

Now, that advertising will be search advertising. It is search advertising sold by Google, and it's therefore clearly within the scope of the definition I read to you from the amended claim form. What Google's ambition seems to be --

THE CHAIR: You said Maps. What was the other one?

MR BEAL: Maps, Travel. Images, I think, is another. Well, we've got here Google Shopping, Google Travel, Image Search, and Maps.

Now, YouTube may have video advertising. And video advertising is a separate category from search advertising. So we haven't been thinking that YouTube, predominantly, would be the focus of any of the claim. But given that the data that Google has separates out search expenditure, everything else, then our claim can clearly be dealt with by Google on the basis that its search expenditure across the board that's covered.

What we haven't done, and what Professor Scott Morton's not done, is try to distinguish between a search advertisement that appears on a standard Google search on a website page when you go to the Google search engine, and if you were to go into Google Travel and put in the travel arrangements that you were searching for, if you were searching for a flight, and a search advertisement appears in the context of that. You go on to Google Images.

Google Images comes up with effectively a search engine that allows you to search the product of Google Images for images. Now, if there's an advertisement that pops up as a result of that search, that's still a search advertisement. And the point here is that Google has data that covers all of these products because it internally classifies them as search expenditure. And --

THE CHAIR: Just give me one second, sorry.

So if I look at 50(C), Matthew's report.

MR BEAL: Yes.

THE CHAIR: You say the class does cover Shopping -- oh, sorry, Shopping, Travel, Search, Maps, but not YouTube.

MR BEAL: No, he said it does cover YouTube.

THE CHAIR: No, but your class, your claim --

MR BEAL: We don't -- the difficulty at the moment is he's included YouTube there as search expenditure.

THE CHAIR: Yes.

MR BEAL: Internally we had thought YouTube was a form of video advertising.

THE CHAIR: Right.

MR BEAL: If we're wrong on that, then YouTube's within the scope of the claim as well.

THE CHAIR: Right.

MR BEAL: All I'm saying is we hadn't anticipated that was so. But the point hasn't been spelled out, so I'm slightly shadow boxing. What I think is happening here, if I'm candid, is Google have in their skeleton said, "Ah, well, you're obviously just relying on search engine results pages, aren't you?" What they're trying to chisel out of the exposure to the claim is anything that arises other than on an SERP return, but arises as a result, for example, of a Google Images search, even though it's classed as search advertisements by Google.

Now, our internal analysis suggests that this is worth about 10 per cent, if one looks at the revenue figures, give or take. That's based on the US District Court Google search case, which indicated that SERPs advertising for search purposes accounted for about, I think, 92 per cent or so. Give or take 10 per cent, is the value attributed to this. And we apprehend that Google will say, "Ah, well, because it's only SERP, the claim is worth 10 per cent less than it otherwise would be".

Now, that isn't the point that's been raised expressly, at any stage. As I say, I am shadow boxing. If I've got that wrong, then I apologise, and I've been wasting your time. But I thought I would try and get my retaliation in first.

THE CHAIR: Okay.

MR BEAL: That's the class definition point. If you need to see how Professor Scott Morton deals with search advertising, it can be looked at in a handful of paragraphs, conveniently. Could we look, please, in this bundle, B3, starting at page 125.

Paragraph 229 describes an overall description of search advertising.

At 230, she confirms that she's not proposing to separately find the market for search advertising to establish an abuse, but that she will examine it.

At 231, she draws a distinction between -- 230, 231 and so on -- she just draws a distinction between search and display advertising.

And at paragraph 235, she summarises the results of the District Court's decision in 2024, which separated out potential market search advertising itself, general search advertising, and general search text ads.

At 236, the District Court in the United States concluded that the relevant geographic market -- two relevant advertising markets -- search advertising and general search advertising.

But the qualifier is that the advertising space here has to be sold by Google. So where Professor Scott Morton is talking about different platforms, other than Google, that may have search advertising on them, that isn't within scope. But when one talks about special vertical providers of advertising, for example, Amazon or Facebook, those aren't within scope because they're not advertising that we understand is sold by Google. It's search advertising, but it's search advertising within somebody else's website.

In contrast, we then see at paragraphs 247 to 249, page 129, Professor Scott Morton summarises there the work she's proposing to do to look at the candidate relevant market for the provision of search advertising. She says:

"Following disclosure, if necessary, I will assess the relevant demand supply side competitive constraints on Google's search advertising services in each of the three markets identified above." [as read]

Now, the definition of search advertising is search advertising supplied by Google as a service. We've seen that Google has the data for the search expenditure, and we've seen that it's capable of being determined, as a matter of evidence, what that specifically includes. The class definition doesn't need to be changed at this stage. If some objectively verifiable justification is advanced as to what is not within the scope of that which Google is concerned is within the scope of search expenditure in their internal data, then they can articulate that in due course. But we do say there's no need to amend the claim form at this stage to make the position any clearer. It doesn't need to be any clearer and the data available to Google and to Mr Matthew has made it clear that they know exactly what sums are at stake.

But the provisional indications from us are that almost all advertisers using these non-SERP services are very likely also to have purchased Google search advertising on SERPs as well. So the overall class number shouldn't change and therefore the inclusion of all aspects of Google search advertising in the definition only goes to what is the likely scope of recovery. With no discourtesy intended, this seems to be an attempt to chisel out 10 per cent from the claim value through a rather oblique complaint about class definition.

That complaint in any event wouldn't have really hit home because we have pleaded in any event umbrella effects in other markets; see our amended claim form at paragraph 24(8.2), bundle A, page 127 for your note.

Now, the next point to deal with, and if I may say get out of the way, is the objection to the amendments. As you've seen, the essential thrust of the amendment is, well, you're relying on an ongoing infringement but it's said you can't plead ongoing infringements because they don't exist yet, and you can't claim recovery for ongoing loss.

Now, if I could invite the Tribunal please to turn in the main bundle to page 476. So that's bundle A, tab 8, page 476. This is the Neill class representative case against Sony.

THE CHAIR: Are we in the authorities bundle?

MR BEAL: We're in the authorities bundle. Note to self says page 476 and then invites you to read paragraph 62 to 71.

THE CHAIR: So that's (inaudible) class of 475.

MR BEAL: I'm sorry. Yes, mine's currently downloading. (Pause)

The points to make from that are section 47B of the Competition Act brings together claims which either are or could be brought as standalone claims under 47A. Those claims must exist at the date of issue of the claim form otherwise you're not bringing a claim for anything because you don't have an established right to a cause of action. Therefore it follows that PCMs must have existing claims at the point at which the CPO is made otherwise a prospective class member or potential class member is effectively bringing something that has no entitlement to bring. What that means, in our respectful submission, is that PCMs must have an established claim at the time that the amended claim form is issued and when the CPO is made. Those claims will be claims for existing loss.

It's a separate issue as to whether or not that class member also has a claim for ongoing loss, because it's a continuing infringement. That raises a separate legal issue. It's distinct from the question of does the class member have an established claim such that it can be a member of the class at the date at which the CPO order is made.

Neill is the authority for the proposition that everyone who is a member of the class must have an existing claim at the date that the order is made. That is satisfied in this case because the relevant period is for claims going back to 2011 and continuing until the date of issue of the claim form in 2024. So by definition, those class members will have claims.

THE CHAIR: The relevant period in Sony was (inaudible) a final judgment.

MR BEAL: Yes.

THE CHAIR: Right.

MR BEAL: So we have dealt with the Neill v Sony objection by defining the relevant period in that way. There's a separate question as to do those class members who have existing claims also have an entitlement to recovery of loss as a result of a continuing tort? I'll come on to deal with that.

But there's obviously also then a cohort of prospective claimants who don't have claims at the moment because they haven't yet used Google services. They are not class members at the moment; how do we deal with them?

Well, the answer to that has always been -- and this was the approach that was adopted in Kent v Apple -- you have a final CMC or pretrial review shortly before trial at which an application is made to amend the claim form so that it is the date of the amended claim form that determines the class. That class membership is then up to date up until the point of the final CMC. So you get as many class members within the scope of the proceedings as you can if the Tribunal is happy to certify.

Now, in Kent v Apple what happened was two things. Firstly, there were two separate attempts to amend because the hearing date was put off, but the Tribunal did allow the amendments to be made to bring in claims up until essentially the 11th hour before the substantive hearing. The class representative then made an application post judgment to include members who had suffered loss all the way through to the delivery of the judgment. It's at that point the Tribunal said, "No, enough's enough, because that actually then is after the trial has taken place and we're not going to have new class members being added after the trial has been heard". So the position is, it was described I think as procedural gymnastics in Neill v Sony, but all it actually requires is a series of hopefully only one final amendment to the amended claim form to bring the classes up to date as you possibly can before the substantive hearing.

Can I then deal with a separate issue which is: is it possible for us to claim loss on an ongoing basis. Now, this is a slightly surprising submission because of course if one issued a claim in the High Court for damages for a breach that was a continuing breach and you didn't claim for future ongoing loss, I think an eyebrow would be raised. It's certainly common practice in 47(a) claims to claim not only for damages as they exist at the date of the claim form, but also for ongoing loss insofar as the infringement has not yet been brought to an end. That has been the established practice.

If one looks at Hole v Chard, this is an 1894 case -- this is bundle of authorities, tab 1, page 3. This is a case of a nuisance. It was slightly convoluted facts because there was a trial of the nuisance, a nuisance was found. The nuisance then continued, notwithstanding a requirement for it to be abated. Then there was a separate action brought essentially to claim the loss from the ongoing nuisance.

If the Tribunal would be kind enough please to read the ratio at pages 5 to 6. It begins halfway down the judgment of Lord Justice Lindley, halfway down what is internal page 295 of the report where it says:

"The question raised in the appeal is this ... what are the damages since the death of the original plaintiff?" [as read]

Then please would you read down to the end of Lord Justice Lindley's judgment. (Pause)

That establishes the proposition that through an order of the Supreme Court, as it was at the time, it was perfectly acceptable to have damages through to the date of the assessment of damages by the trial judge.

How true it is, there does appear to have been a common law rule expressed in McGregor on Damages. Now, if we turn this up please at authorities B this time. Tab 7, page 344. If we start perhaps at paragraph 12.026, "where there's a continuing wrong". Halfway down that page within the subheading "Where there is more than one cause of action, the exceptional case of the continuing wrong" there's a sentence that begins:

"Where there is a continuing wrong, and to a lesser extent where there's a single act causing separate damages on two separate occasions ..." [as read]

It then says:

"The further cause of action lies still in the future, and therefore it's impossible to bring an action to recover the prospective loss even if it's foreseeable." [as read]

The rule here is that where a single act constitutes a continuing wrong, damages at common law can only be awarded in respect of the loss accruing before the commencement of the action by issue of the writ. It then cites authority for that and it explains that it was a nuisance case.

But it then says:

"This inconvenient result for a claimant is mitigated in a number of ways. First, by a long standing rule of Court which started life as RSC Order 36, rule 58 ..." [as read]

That was the relevant provision that was looked at in the Hole v Chard Union case that I've just taken you to:

"The common law was modified so as to allow damages in the case of a continuing cause of action to be assessed down to the time of assessment." [as read]

It explains what that case was and I've just taken you to that.

We then see however overleaf that it appears that that specific provision, in what was the former Rules of the Supreme Court, is no longer to be found explicitly in the Civil Procedure Rules. The learned authors of McGregor on Damages deal with how the CPR might nonetheless be construed so as to allow the convenience of a continuing to recover ongoing loss through to the date of assessment, which obviously makes most sense because otherwise you can have a trial where, say it takes six years for a trial to come on, you can have six years worth of loss which the Court otherwise can make no award of damages in respect of, which is with respect absurd. So the learned authors say there must be a way of construing the CPR so as to allow that convenience to be continued to be applied.

Now we say, of course the CPR doesn't directly apply in this Tribunal, but what we do have are Rules of the CAT, and these Rules of the CAT can be seen at page 167 of this bundle; bundle B, tab 5, page 167. We have specific provisions dealing both with assessment of damages, rule 92, and distribution of an award, that's rule 93. So where it says:

"... the Tribunal makes an aggregate award of damages, it shall give directions for assessment of the amount that may be claimed by individual representative persons out of that award."

And that necessarily is capable of contemplating a direction from the Tribunal as to what the loss is, as at the date of the assessment.

THE CHAIR: (Inaudible).

MR BEAL: Well, the direction here is that the Tribunal makes an award of damages which it will ex hypothesi do at the end of the trial. It then gives directions for the assessment of the amount that may be claimed by individual representative persons out of that award.

So we see that there's a specific statutory provision by which the CAT will engage in quantification of an award for an individual representative person and gives notice to how that will then be dealt with.

We then see at rule 93:

"Where the Tribunal makes an award of damages in opt-out collective proceedings it shall make an order providing for the damages to be paid on behalf of the representative persons to class representative or such person other than the representative person as the Tribunal thinks fit." [as read]

So there's an express statutory provision whereby this Tribunal will assess the award of damages ex hypothesi at the end of the opt-out collective proceedings.

So you have a provision whereby the Tribunal is required to make an assessment and therefore we would suggest the statute is contemplating an award of damages that runs all the way through to the end of the collective proceedings. That's also, we say, the statutory provision. One looks in this bundle, page 115, when I say "statutory", I mean primary statute rather than delegated legislation that the CAT Rules are and if one looks at the wording of section 47C of the Competition Act, the power is conferred on the Tribunal under subsection (2):

" ... make an award of damages in collective proceedings without undertaking an assessment of the amount of damages ..."

THE CHAIR: Page number?

MR BEAL: This is page 115. (Pause)

THE CHAIR: Sorry, say that again.

MR BEAL: Subsection (2) confers the power on:

"The Tribunal to make an award of damages in collective proceedings without undertaking an assessment of the amount of damages recoverable in respect of the claim of each represented person."

That feeds into the Rule 93 power, you make an aggregate award of damages, and then you have a separate distribution stage where you work out a formula by which the loss will be returned to individual --

THE CHAIR: But all of this is silent as to the period it covers.

MR BEAL: What it does is it envisages an award of damages at the end of the process, and we say implicitly that must recognise that it can cover damages for ongoing loss, because the statutory function imposed on -- or conferred on -- the Tribunal is one to make sure that the aggregate amount of damages reflects the loss suffered by the class as a whole.

THE CHAIR: There'll be the same thing somewhere in the High Court, somewhere in the Senior Courts Act or something (inaudible) the Court jurisdiction. The Court has power to award damages.

MR BEAL: Yes.

THE CHAIR: But nonetheless (inaudible) go to the case law and seems to possibly leave a gap.

MR BEAL: The gap is in the CPR.

THE CHAIR: Yes.

MR BEAL: Because there is nothing express in the CPR about an award of damages down to the date of assessment.

THE CHAIR: But nor is there in --

MR BEAL: Well, here you have a statutory power requiring an assessment at the end of the proceedings.

THE CHAIR: Yes, but an assessment of (inaudible) is silent about that. It's all a bit silly, isn't it? Because if we sided with Ms Abram on this, it seems to me, well, we would roll on, and last moment, another claim form would be issued for everything else.

MR BEAL: Yes.

THE CHAIR: (inaudible) the intermediate period and there'd be a binding decision about liability and the inconvenience that (inaudible) referred to about the issue of another claim.

MR BEAL: Or we would simply amend -- at the same time as we amend -- to include the class. We would amend simply to say, well, it also now covers the loss that has now been accrued in the intervening period and if you gave permission for that, it would be within the scope of the amended claim form, and that would be it.

THE CHAIR: Okay. Well, we'll see what Ms Abram says --

MR BEAL: Yes.

THE CHAIR: -- in due course.

MR BEAL: I mean, I've had to deal with that rather tortuously, because --

THE CHAIR: Well, we'll see where we're going in due course.

MR BEAL: Can I come on to more pressing matters in terms of where the Tribunal's interest is, with respect, likely to lie? So I'm going to deal first with opt-in versus opt-out.

THE CHAIR: Right.

MR BEAL: Google is here proposing that the Tribunal should only certify the proceedings on an opt-in basis.

THE CHAIR: Yes.

MR BEAL: And they don't make a hybrid application. They say you've got to certify the entire claim -- if you're going to certify the claim, they say you've got to certify all of it on an opt-in basis.

Now, as I've indicated --

THE CHAIR: I think Ms Abram's skeleton says, provided you remedy matters that they object to in part A of their skeleton, then they don't object to opt-in certification, but they do object to opt-out certification --

MR BEAL: Yes.

THE CHAIR: -- even if the matters are remedied.

MR BEAL: And the things they complain about are the ground I've tried to clear --

THE CHAIR: Yes.

MR BEAL: -- up to now.

THE CHAIR: Yes.

MR BEAL: So we're now in a straight fight. Is the certification -- if it goes ahead -- to be on an opt-in basis for the entire class, or is it to be on an opt-out basis?

Opt-in basis for the entire class: as I've indicated, I have been proceeding with my preparation for this hearing on the basis that I would only be able to say the class is 250,000. It's now accepted that I can refer to the fact that Google recognises that the class size is 880,000. So on Google's case, therefore, opt-in proceedings involve my solicitors overseeing applications from 880,000 legal and natural persons. With respect, that's simply wholly unrealistic.

In the CICC claim, a great deal of work has been required to deal with an opt-in cohort, because it's a hybrid case, of around 200 legal entities and you have in your authorities bundle the decision from March 2026 which dealt with whether or not those opt-in entities, which had taken place largely on a group basis, had opted in validly because an objection was taken. You've mentioned a group, X plc, or you've mentioned X as a company. In fact, X plc has a series of subsidiaries. Those subsidiaries are all separate legal entities. Those legal entities need to establish that they have the valid claim and therefore you haven't validly opted in for anything like the number of people that you think you have and the Tribunal accepted that submission and said that opt-in had to be on a specific legal entity basis, which then puts a pressure on the class representative to make sure that the right legal entity has the right amount of the loss and therefore is the legal entity that has entered into -- in that case -- the Merchant Service Agreement with the Mastercard and Visa schemes.

Here, that would require looking at the parent ID number that Google has identified and working out which specific legal entities within that umbrella identification are the legal entities that have suffered the loss, because they are the ones that have paid for the advertising directly with Google, because they are the ones that have contracted directly with Google, or because they are the ones who have contracted with the media agency and the media agency has then procured the advertising as an agent for a disclosed principal.

But on any view, even putting aside those complications from the CICC decision, which is for which permission to appeal has been sought, we are still looking at a process that requires the onboarding of 880,000 different legal or natural entities.

Now, if we assume -- generously in my respectful submission -- signing up 20 claimants a day, giving them advice on DBAs -- Damages Based Agreements -- giving them advice on insurance cover, giving them advice on the scope of the claim, getting a sense of what their claim is worth to them so that they can work out whether or not they do it, so dealing with 20 of those a day: the process would take 75 years and I venture to suggest that the budget would no longer be there in 75 years time and nor would the process be article 6 compliant.

Now, of course, Google knows that this approach is only really designed to achieve one of two situations: either a much lower level of participation, reducing the size of the claim, but therefore leaving a large number of the affected class with no compensation at all and that is a recipe for Google profiting from its own wrong; the alternative possibility is that we have such an unwieldy piece of litigation that the budget would be rapidly exhausted and therefore the claim would have to be discontinued.

What we respectfully suggest is that proposing that 880,000 class members opt in on an individual basis to this litigation is not motivated by the interests of those class members. Google's skeleton at paragraph 34 implies that it's enough if you can try and get some sort of claim cobbled together, even if the number of claimants being brought within the scope of these proceedings is substantially lower than 800,000.

Now if, for example, Google's submission is that, well, you could get the top 20,000 claimants who have decent-sized claims and that would be a viable claim, what more do you need to worry about? That means that there's 860,000 claimants with no remedy, even though they've been identified as potential class members and even though these are strong claims brought against Google to recover the entirety of the loss that has been occasioned by their anti-competitive infringements.

Now, given that the Parliamentary intention was to secure efficient redress for claimants who have a very large number of relatively small value claims that would otherwise make individual litigation uneconomic and unrealistic, given that the purpose is also deterrence of anti-competitive behaviour and given the very high number of claimants who do have low value claims in this case, what Google is proposing is a solution which Parliament simply did not intend. (Pause)

If you'd be kind enough please to look at Mr Teague's first witness statement, that's in bundle A --

THE CHAIR: Just at that point in Google's skeleton, they submit at paragraph 33 now that, in "Trucks", 11,000 claimants did opt in. So there must be something wrong with your 20-a-day arithmetic, because that would have taken some hundred years or something. So there clearly are ways of boarding class members in their thousands.

MR BEAL: In "Trucks", there was a very strong network of truck operators who knew one another and then you had large fleets and there was a very active trade association that lay behind the claim. It also did take many years to build the book.

THE CHAIR: Right.

MR BEAL: So, but in that situation where you have a fleet, quite a lot of fleets had separate companies that had -- for example, were running different aspects. So the 11,000 is --

THE CHAIR: So it's 11,000 corporate entities and a smaller number of what you might call "real claimants".

MR BEAL: Exactly and those real claimants all knew one another through a trade association and through being truckers and they had a very strong and tight knit community. If you look at a case like Rodger, which has been certified on an opt-out basis, I think the number of (several inaudible words) and that was considered to be appropriate. I'll come to Rodger in a moment.

THE CHAIR: Yes, as you mentioned in the first place, of course.

MR BEAL: 2000 to 3000 and the Tribunal said, well, that's impractical to contact that many number for opt-in purposes.

THE CHAIR: Okay.

MR BEAL: Or at least it wasn't appropriate to de-certify the existing opt-out proceedings, but proceedings had been certified on an opt-out basis, in part because of practicability concerns.

THE CHAIR: Right.

MR BEAL: If I could invite you, please, to look at Mr Teague's first statement, that's in bundle A, tab 13 --

THE CHAIR: Can I just mention at this stage, so that everybody can be thinking about it. One of the points you make is that the (inaudible) claim is opt-out already. If we make this an opt-in claim, then what happens to the timings for the Stopford claim? Because clearly a discussion at some point about what, what can be tried --

MR BEAL: Yes.

THE CHAIR: -- jointly. I'm mentioning this to you because you're on your feet, but everybody needs to think about it.

MR BEAL: I can give you my answer to that. I'm instructed in CICC, so I've been privy to how long that's taken.

THE CHAIR: Right.

MR BEAL: One can see from the Tribunal's decision in that that a period of, I think, six months to get everyone opted in was simply insufficient, and the Tribunal acknowledged in its decision in that case that nine months would have been more realistic, and even that, frankly, has proved difficult to meet. The reality is that these book building experiences, as Mr Teague explains in his witness statement, take years. I know from other cases I'm in you can have a period of three, four years, if you're building an opt-in claim, where you're trying to onboard people and get them signed up so that you have a viable claim before it will get funding.

So the short answer to your point, Sir, is that if it's opt-in there will need to be a notice period. There will need to then be a period in which claimants are allowed to come forward. In my respectful submission, anything shorter than nine months is a recipe for chaos, and therefore you're looking at a delay of somewhere over a year in this case, if it's certified on that basis.

I anticipate that Ms Stopford won't be happy with that, and she will press for her claim to be brought forward sooner. You're then into the Kent and Ennis issue, Hammond and Hunter issue, where -- against Amazon, Hammond and Hunter; Kent and Ennis is against Apple. Hammond and Hunter have been combined so that pass-on can be dealt with between them. In Kent and Ennis it wasn't combined, and this Tribunal's experience of that is that two very substantial trials raising very common issues are being heard separately, with all the confusion that that causes.

So my submission would be that it's not appropriate to separate the consumer action and the advertiser's action, that they should be heard together, that the natural consequence of certifying on an opt-in basis will be that there will be substantial delay to the Stopford proceedings.

THE CHAIR: Okay.

MR BEAL: I should say, of course, the opt-out allows people to opt out. So if there's a very large member of the class that actually wants to plough their own furrow then they can. The experience, I think, in Amazon is that two of the class members have opted out, from a class of many thousands. 250,000 or so in that case was certified for roughly for opt-out purposes, and two have opted out. But the opt-out remains an option for big claims, if that's a concern.

Mr Teague has explained in his witness statement, page 383 and onwards, the very real practical difficulties with dealing with an opt-in claim. I don't know if the Tribunal's had a chance to read Mr Teague's statement.

THE CHAIR: Yes. Well, I speak for myself. I looked at it.

MR BEAL: I can probably just --

THE CHAIR: Any particular bits you want to --

MR BEAL: Well, it's just highlights, really. Opt-in is "more difficult, time consuming, and uncertain", paragraph 10. Decision-making changes. I mean, the example is then given at paragraph 13, of the CICC case, which I've explained to you.

Revised funding and revised ATE cover, as needed. That's paragraph 15.

Paragraph 18, you need to change the litigation plan.

Paragraph 19, you need a revised damages methodology. It then has to be a systematic and orderly process for identifying and contacting potential claimants -- that's 880,000 -- providing them with information about the case, answering their questions, bringing arrangements with them. You have to verify their standing.

The Tribunal will recall in the Air Cargo case there was strong criticism of a book build by a firm of solicitors on the basis that some of the clients turned out not to exist. There were a large number of Chinese claimants that were found not to actually be valid companies that had signed into the book build, and that drew some criticism. So my solicitors would have to make sure that the people saying that they want to opt in have a basis to do so, so standing.

We then see in paragraph 21 that individual DBAs are needed. You have to have an opt-in notice and an opt-in notice procedure. Reassurances and independent legal advice have to be made available dealing with, amongst other things, the funding arrangements, risk of having to give disclosure or witness evidence, exposure to adverse costs, and have to deal with the overall cost-benefit analysis for opt-in claimant of joining.

Paragraph 28 confirms a period of substantial delay would result, both in order to get the opt-in notice out, get the revised -- so when I've talked about nine months for the opt-in process, that's simply the response to the notice. Before you get to the notice, this Tribunal would have to look at the revised funding arrangements, the revised ATE, the revised litigation plan, and all of that is on the assumption that, in fact, a funder would be willing to fund an opt-in case. Part of the problem with funding, is that funders usually want to know that there is a viable claim before they will fund it. So you end up with a chicken and egg situation, unless you've done a book build in advance.

At paragraph 36 --

THE CHAIR: It does seem a little bit like that to be presenting us with a fait accompli.

Well, you say, "No". I mean, (inaudible) it's been put together on one basis, you come along. (Inaudible) this is the only basis it's been put together on, so you've got to certify it. (Inaudible) another way of doing it.

MR BEAL: Well, it hasn't gone forward as an opt-in claim.

THE CHAIR: Yeah.

MR BEAL: Unlike Evans -- and we say this is telling -- there is no other private claim out there which the top ten advertisers have grouped together in order to bring a book build claim in the private market. So in Evans there was. In fact, I appeared for one of the defendant's banks in that tranche of litigation. There were a series of very well financed users of FX services who collectively brought common proceedings in two tranches against the banks who were alleged to have conspired chat rooms in the FX market in order to rig the spot market rate. Two very large and substantial claims were brought in the High Court and have been compromised.

So, when looking at Evans, that is not this case. This case is not a case where the top ten, top 50, whatever they may be, have thought, "There's a claim here. We, as purchasers of Google search advertising, have a claim against Google. Let's get it funded. Let's club together and bring a funded private claim". Nor has anyone sought certification on behalf of advertisers on an opt-in basis.

Now, I obviously can't go into -- because they're privileged -- I can't go into the discussions that were had as to how to formulate this claim. But what you do know is that the claim has been formulated as opt-out, and it has secured funding.

The final points that Mr Teague makes, paragraph 36 and paragraph 39, are essentially well-recognised fears, generally, in these sorts of cases that if you are sticking your head above the parapet to bring a claim against somebody with whom you have a key commercial relationship, there will be a fear of a detrimental impact on that relationship, and that can have a chilling effect on the willingness of claimants to sign up.

We do say that it's appropriate for this Tribunal to consider the most practicable way in which collective proceedings can be brought, looking at all matters in the round. We derive that proposition from the bundle of authorities, please, the Stephan v Amazon certification decision. That's bundle of authorities A, tab 15, page 749. (Pause)

Decision of Mr Justice Roth, paragraph 152. He recognises the fact that the PCMs in the class are diverse and the fact that a very small minority of them have much larger claims than the rest are very likely to be correct. The same points can be made in many collective cases, but they are not the primary consideration. What you have to do is a single multi-factorial assessment of the best way of bringing proceedings for the class.

Paragraph 153 recognised that the fact that the PCM is a business, not consumers, who could potentially be contacted individually with the assistance expressly offered by Amazon does not mean that there is necessarily a practicable way to proceed by way of opt-in proceedings.

Could I then please invite you to read each of the subfactors that Mr Justice Roth said were relevant, 1 to 4, because we say they all apply equally here. Subparagraphs 1 to 4. (Pause)

THE CHAIR: Right.

MR BEAL: Now, on that last point, jeopardising crucial trading relationship, it's suggested in my learned friend's skeleton that we shouldn't have raised this, or that it's somehow fanciful. With respect, it's not. I'm going to make two short points on this and then invite the Tribunal to take the transcriber break. So this is bundle C, please, tab 29, page 333.

This is a response of a small advertiser to a CMC interim report. So we have a small advertiser that is submitting a complaint about Google's conduct that can be seen in the first three paragraphs on that page. I won't go into the details, because it doesn't matter terribly. The point is the small advertiser had clearly asked for anonymity and had received it from the CMA. There's another example of that at page 336.

THE CHAIR: I'm struggling with the task, but don't worry. I saw similar material in (inaudible).

MR BEAL: Well, we can see the outcome of all of this at page 340, which is an extract from the CMA's final report, paragraph 109. If you have that behind tab 31.

What they said was:

"In addition, we heard several concerns relating to Google enforcing its policies on ad and site content in an arbitrary way ... received similar submissions from several advertisers that Google's policies are not clearly formulated. They told us that Google often refused to elaborate on the details behind specific issues. Given Google's market power in search, all advertisers raising these concerns also submitted they had little choice to advertise on alternative platforms." [as read]

So complaints are being made, but the CMA is then anonymising those complaints in order to protect the advertisers from a detrimental impact on their commercial relationship, because it is a relationship where they have no choice but to use Google.

My point there is I'm responding to the suggestion that we had no evidence, and there was no basis for saying, per Amazon, that the risk of retaliatory conduct is not fanciful.

THE CHAIR: Yes. I mean, there's not evidence of -- I don't think you're saying -- specifically of Google maliciously, specifically singling somebody out and punishing them. You're not saying that.

MR BEAL: No, I'm not. What I'm saying is there's a risk of a fear of a commercial detriment -- "retaliation" is probably too strong a word. There's a risk of jeopardising the commercial relationship by putting one's head above the parapet, out into the public domain. That seems to have been a motivating factor to give anonymity to the complainants in the CMA investigation. That's as far as I need to go.

Clearly, I don't have evidence of Google threatening to do so with a PCM, because PCMs at the moment are not identified.

THE CHAIR: No. But, I mean, in a broader scope of things, there's no evidence of them doing (inaudible) either. It's a question of whether they've done it, on the one hand, and whether people are fearful that they might, on the other.

MR BEAL: Yes. In a sense, you don't need proof that they've done anything because it's the -- whether or not -- is it irrational for a PCM to be concerned that if they become an opt-in claimant it will jeopardise their key trading relationship? No, it's not irrational. Will that have a chilling effect and infer that it would.

THE CHAIR: Right, we'll take a break.

(11.43 am)

(A short break)

(11.54 am)

MR BEAL: So what I'm proposing to do now is briefly take the Tribunal to three recent cases that have looked at the issue of opt-in versus opt-out to show how they've been treated by this Tribunal.

The first of which is Stasi v Microsoft. This is in bundle of authorities, bundle A, tab 23. Picking it up, please, at page 1084. Now, whilst the claim was novel and the Tribunal declined to say it was a strong one, at paragraph 125 they did say that they feel that:

"The claim comfortably crosses the hurdle of having a real prospect of success and so we would not describe it as weak." [as read]

Now, obviously, in our case we've got a follow-on component where the Court of Justice has just confirmed basis for the follow-on claim, and we would say that the claim is a strong one and can be recognised as such.

At paragraph 127 the Tribunal noted that:

"Even Microsoft did not argue that it was practicable for the claim as constituted comprising all members of the proposed class ..." [as read]

Which for your note was around 59,000:

"... to proceed on an opt-in basis." [as read]

So even though the class number here was 59,000, as opposed to 880,000, Microsoft recognised that proceeding with that large class was simply not going to be practicable. Instead what they thought was a split should be adopted based on a volume of commerce approach similar to the CICC one.

At paragraph 128 there's a reference to the Supreme Court in Evans and the concept of identifying whether or not there are different elements within separate cohorts within the claim class which merit different treatment.

At paragraph 129 the Tribunal agreed that applying that guidance here we would start by agreeing with the PCR's submission that the limited data available in this case makes it difficult to have confidence that a reliable distinction can be drawn between claimant subgroups having different profiles.

At 134, page 1086, the submissions from Microsoft were not accepted. They proceeded on the false premise that the position of claimants spending over a certain amount per annum was sufficiently different from those spending less that the resultant subgroups can safely be spared out for the purposes of determining practicability. I'll show you in a moment that Professor Scott Morton has recognised that there isn't any material distinction based on the arbitrary thresholds she drew in her report to identify the number of claimants in a particular subgroup class.

At paragraph 136, just above paragraph 137 on page 1087, the Tribunal said:

"To put it shortly, we think that a single metric based on annual spend is rather too crude a measure from which to derive a reliable conclusion about practicability between different groups of this level of expenditure, even allowing for a generous margin of error. Quite apart from other matters we would say the figure is too low to warrant such a conclusion. The Microsoft submission [was] therefore rejected." [as read]

At paragraph 138 the Tribunal then identified the mischief that was aimed at by the Supreme Court's decision in Evans. Please, can I invite you to read paragraph 138. (Pause)

Can the Tribunal then, please, read paragraphs 141 and 142 at page 1089. (Pause)

Then finally at 144 one of the criticisms Microsoft made was, "Well, you haven't tried a book building exercise. How can you complain that it won't work?" To which the answer given was the PCR had been entitled to find that the obvious diversity of the class and the difficulty of doing that building case meant that they didn't need to have tried it in order to be able to raise the practicability issues that they did. So the number and array of businesses made a book building exercise unrealistic and no criticism could therefore be made of the PCR that it hadn't been attempted.

The next case is Rodger v Google which was an application for recertification. That's at tab 25, page 1189. Picking it up, please, at paragraph 21 initially. The claim in this case had initially been certified as an opt-out claim, notwithstanding that there were a small number of developers who owned a large share of the total developer revenue, ie 2 per cent or 3 per cent of the class suffered damages of more than 1 million. That hadn't stopped the claim being certified on an opt-out basis.

At paragraph 25 through to 27 the Tribunal then dealt with the attempt to rely on Evans to get the claim recertified on a different basis. Please can I invite the Tribunal to read paragraphs 25 through to 27, page 1190. (Pause)

The final case in the trilogy is Ennis v Apple. Please would you turn to page 1344 in this bundle in tab 28. At paragraph 77 the Tribunal summarises (overspeaking) and paragraphs 77 and 78 summarise the key takeaways from the Supreme Court's decision in Evans. Please would you read those. Then 79 through to 82 goes on to look at the consequences for the decertification application as a result. That's at 77 through to 82, please. (Pause)

At paragraph 83 the Tribunal mentioned a fear of retaliation or commercial detriment that might have a chilling effect on opt-in rates.

Then at 84 they're adopting an overall assessment of where the balance of justice lay. There were key features the Tribunal took into account at the bottom of page 1346, first of which was that the claims were relatively, even unusually, strong. We say that applies here because not least of the follow-on aspect to the claim.

The second factor was that the class was homogeneous. Again that's the case here. All of these advertisers are on a spectrum based solely on the amount of advertising spend that they've committed, but there's otherwise no obvious break between them on a distribution curve. There's no obvious distinction to be drawn between the various claims other than by reference to their size.

The application was for decertification of the class as a whole. Well, here it's for opt-in of the entire class and not some sort of hybrid solution. But in any event there was a significant cohort, a large number of whose claims, though relatively small, are nevertheless not trivial. So here we have even on the 50,000 cut off that has been used illustratively by Professor Scott Morton, we have a very substantial number of claims where a much lower level of damages is available but they're non-trivial damages, and there are many of them.

At subparagraph 4 there was a concern that if it were decertified then the claim simply wouldn't get off the ground. The real question was whether the overwhelmingly greater number of class members could not reasonably pursue their claims other than on an opt-out basis. If that is the case then did that impose an unfair litigation burden on Apple and the class to encompass also the large claims. The Tribunal did not think it did in the circumstances of this case. They are not unmeritorious claims as the evidence claims were perceived to be by the Competition Appeal Tribunal and then Supreme Court. And it's not a case where the larger operators were effectively the core nucleus of the number of the claims, as opposed to the value which is being considered. Rather, it's a case where certification of the class as a whole secures access to justice for the numerically large cohort of claimants with viable and serious claims. We say that can be read across without injustice to Google in this case.

The other point to note is that Evans has widely been treated as raising a legitimate concern about the problem with weak claims being used to leverage nuisance settlements against defendants. That, on any view, cannot be a serious point that's taken here.

Now, Google's skeleton talks about a small percentage, 1.5 per cent of the claims accounting for a large portion of the claim value. But we've seen that that type of revenue attribution exercise was not determinative in Ennis and we say it shouldn't be determinative here. If, for example, you were to say, "Well, the top 5 per cent that needs to be excluded", that would still produce a class of 44,000 claimants, and a 1 per cent cohort, if that was stripped out, would still produce 8,800 claimants. Of course, it's not Google's suggestion that there be this sort of hybrid approach, that simply is what they're saying: "Well, you could have a viable claim with that many people. That still requires us to contact 8,800 claimants", and we say it's wrong in any event.

In terms of the continuous distribution point I can't do much better than take you to bundle E, tab 2, page 6, where Mr Matthew recognises that the various different financial cutoffs are indeed arbitrary. So halfway down that page there's a paragraph that begins:

"Professor Scott Morton claims that her primary concern with my analysis and conclusions is its reliance on what seemed to be ..." [as read]

THE CHAIR: Sorry, I must be in the wrong place. (Pause)

MR BEAL: I'm halfway down that page. Professor Scott Morton makes a complaint about arbitrary thresholds. Mr Matthew's response is these arbitrary thresholds are the ones that Professor Scott Morton herself uses in Scott Morton 1 which Scott Morton 3 acknowledges.

Now, I don't propose to take you there, but for your note that's at page 475 of bundle B. But what Professor Scott Morton there does is say that she had chosen the thresholds for illustrative purposes, but they were arbitrary. She then conducted further empirical analysis, dealt with at page 478, paragraph 20, and she found no underlying structural break at £50,000 as a cut off. Effectively, there was a continuous distribution curve at which you could select any number of different putative thresholds, none of which would actually demonstrate a meaningful difference.

Now, it's going to inevitably be the case that within a very large class some claims will be bigger than others; that's to be expected. But it's not the case here that the nucleus of the case lies with a small number of large claimants who are capable of being readily contacted and can therefore form the core of a book-build exercise.

THE CHAIR: You mean because 8,000 is still 8,000?

MR BEAL: Partly because 8,000 is still 8,000, but more importantly because 860,000 is still a very significant number of claimants with tangible claims, valuable claims, that are being left out in the cold on Google's approach. If in reality they've got a claim for £15,000 they just don't think it's worth the candle to opt in with all the hassle that that will bring with it. That was the fear in Ennis. Essentially what's being done here is a defendant relying upon a concern legitimately expressed by the Supreme Court about quasi abusive leveraging litigation to stifle a perfectly legitimate claim for a large number of claimants, which is for non-trivial damages for substantial damages, which is exactly the purpose behind the collective proceedings regime.

There have also been some suggestions that this is all very easy, you can simply do it with a website. I'm afraid that simply doesn't meet the concrete evidence that Mr Teague has given you about the practicalities of getting this up and running.

Could I then, please, turn to cost-benefit analysis. Now, again for your notes, in Evans, in the Tribunal bundle of authorities, page 282, paragraph 288, subparagraph (2), the Tribunal made the point that cost-benefit is not simply a question of weighing up the costs of litigation to the funder and then looking at the rewards to the class, it's part and parcel of looking at whether or not access to justice is going to be meaningfully provided to a cohort of claimants who would otherwise not have the benefit of having their claims satisfied assuming that they are legitimate claims, which they are here.

So it's a wider issue than simply a mathematical or arithmetic one. But in any event, we say here Google's approach is illogical. They're saying that the cost-benefit analysis doesn't lead to enough recovery, but instead what they're proposing is that fewer claimants go ahead because the natural consequence of certifying only on an opt-in basis will be that fewer claimants will be covered by the aggregate damages award and indeed that it will then be more expensive, because the evidence from Mr Teague is that opt-in proceedings are much more complicated and therefore expensive to bring, so you end up with a cost-benefit calculus on Google's case, where the class is worse off. Goes back to my point: what is the motivation here? Motivation, from the defendant's perspective, is to try and get the claim either to fail, for practical reasons, or to be at a much lower level of risk of exposure for them.

Even assuming one adopts the cruder arithmetical approach, we are looking at a claim that is conservatively assessed by Professor Scott Morton at being £5 billion. That's an estimate, it's within a range. That mid-range, which I've selected, reflects a pass-on rate of 50 per cent.

Now, Mr Matthew was instructed to proceed on the basis that there was no pass-on rate at all.

THE CHAIR: Yes.

MR BEAL: And that would mean that the mid-range estimate was in fact £10 billion. (Pause)

Now, true it is that a portion of that will need to be reduced for the limitation four-year period for English and Welsh claims, but on our initial estimate, subject to litigation privilege, which I do not waive, we think it's probably worth about 20 per cent. So that would be the margin of error within the estimate. But I stress it is only an estimate and if we go with both no pass-on and factoring in interest in the period since the claim was issued, then the 20 per cent reduction shouldn't be applied to the £5 billion. So we're looking at a range between five and max 10 billion, it's therefore a claim of that size, which is significant.

Now, in terms of costs, you have a cost budget that's been updated following the consolidation with the Kaye claim as Dr Brook has explained in her second witness statement. The updated budget is in bundle C at page 607. (Pause)

And that shows likely expenditure for the period through to the -- sorry, maximum budgeted expenditure, doesn't mean it all has to be spent, through to the end of trial and you can see that a figure of roughly 28.8 million or so is budgeted to enable this claim to be brought to a successful conclusion.

Now, a number of points need to be made. Firstly: this shows the overall figure, including the ATE premium that has to be paid, which is the defined non-contingent ATE premium and it shows the anticipated payments to solicitors, counsel, experts and others. (Pause)

Following this Tribunal's decision in the Waterside case, which was the Salmon case, Dr Brook took a number of steps, as set out in her third witness statement, for your note. These are referred to from page 379 onwards, but let me just give you, if I may, the headlines, because time marches on: firstly, she had expressly taken into account the observations of the Tribunal in Waterside; secondly, she had reduced the anticipated budget expenditure by the class representative, she had transferred a chunk of money that was dedicated towards the class representative remuneration through to a contingency allocation and she had updated the cost budget, which is the one I've just shown you. She instructed my solicitors to pursue efficiencies between themselves and -- sorry, with the Stopford team and those efficiencies have been discussed; Mr Teague in his witness evidence -- that I hope the Tribunal has had a chance to see -- describes from page 399 onwards how he has had detailed discussions with Hausfeld, who represents Ms Stopford, to see where work can be shared and that produces an estimated saving of somewhere in the order of £2 to £3 million between the two teams.

We can't run a single case together because of pass-on being a conflict between us, but it's been made clear that the counsel team and the experts will share allocation responsibility between them with a view to reducing, so far as possible, any overlap and there will be shared services for electronic disclosure and document management.

THE CHAIR: I think I speak for all of us when I say we were surprised there wasn't (inaudible) efficiency to be allowed for the fact that pass-on is going to be a matter of dispute between (inaudible) Brook and Stopford. It seemed to us like any small degree of efficiency in working together.

MR BEAL: Would you give me a moment? Somebody is tugging metaphorically on my gown.

THE CHAIR: Yes. (Pause)

MR BEAL: Mr Teague tells me that he deliberately chose to be conservative with the figures because he wanted to have something that was sustainable and not ambitious.

But his intention and no doubt Hausfeld, represented by my learned friend, can confirm this. The intention is to seek efficiencies wherever they are available.

THE CHAIR: We weren't saying there was anything to be done about it right now or that if conditions -- any yes/no decision by us in this hearing. But (inaudible) the impression that that was less than we'd hoped for.

MR BEAL: Yes. I mean, going --

THE CHAIR: For sharing the work.

MR BEAL: -- forward, we do have Kain Knight, who have been appointed as independent cost lawyers for the Brook class representative and the results show that spending has been significantly reduced, once we got over the spikes of things where significant costs had to be incurred. Significant costs had to be incurred to get the thing off the ground -- there's a lot of upfront costs -- and significant costs were incurred on the (inaudible) dispute.

THE CHAIR: Yes.

MR BEAL: However, since Kain Knight have been appointed, my instructions are that the monthly expenditure rate is somewhere between £100,000 and £220,000 per month and when you factor that into, for example, a proposed 4 or 5 years of litigation, you are comfortably within the budget that is set out in the document I just showed you.

So the fact that what we recognise are high costs have been incurred to date, doesn't mean that that can be expected going forward and there will be significant rigour brought to bear in the close surveillance and monitoring of the costs, not only by the independent cost consultants, but also, of course, by the Tribunal on an ongoing basis at each relevant procedural stage.

A complaint has been made about Dr Brook's proposed remuneration via the special purpose vehicle that's been set up. It's £250 an hour, capped at £750 per day. She is a highly qualified academic specialising in Competition Law with considerable experience, who has navigated a £5 to £10 billion claim through the early stages through a carriage dispute to the point where it is, we say, collecting a very strong claim brought on behalf of 880,000 claimants and that is no mean feat and doing so for a cap figure of £750 a day while holding down her very impressive day job is, with respect, not something that should be criticised by Google.

I will deal with any points of detail in reply.

THE CHAIR: Okay.

MR BEAL: Moving on then please to distribution. (Pause)

It's important we say to recognise that in Merricks Supreme Court, for your note, paragraph 77, page 61 of the bundle of authorities:

"The purpose of the aggregate damages is not to award individual levels of compensation, but to provide an aggregate sum to be disgorged by the defendant and then distributed in a fair manner." [as read]

That's the provision of section 47C(2) that I took you to earlier.

Now, we've recognised that the distribution of any aggregate damages award is, of course, of central importance. We've instructed specialist claim administrators, Case Pilots, now Epiq, to prepare a detailed notice and administration plan to address not only notice, but also mechanics of claims administration, validation and distribution.

We've never thought distribution planning was static. Following the Tribunal's judgment in Waterside, Epiq has provided supplemental evidence and it's clear that we are treating the issue of distribution seriously. There is a distribution methodology that's been proposed in Professor Scott Morton's evidence that I showed you earlier and we are in a position where we are engaging seriously with the issue of distribution.

We've also -- I won't weary you with it, but there were a series of attempts in correspondence to chivvy Google into engaging with this process, the answer to which finally arrived in their second letter of 29 June -- this is bundle E, tab 3, page 11 -- where they finally recognised that they could indeed -- see page 12, paragraph 3:

"They could indeed identify the majority of the direct advertisers and media agencies who have purchased such advertising services." [as read]

But we've seen that media agencies buy advertising for, and on behalf of, individual advertisers and we've seen from Mr Matthew's evidence that the 880,000 or so claimants can be identified by reference to unique advertiser identifiers. So the interstitium of media agency buyers is irrelevant, so the fact that a large proportion of the revenue may be attributed to media agency buying doesn't mean you can't identify the cohort class underneath it; that's Google's own evidence. So that's a smokescreen, this idea of, "Well, we won't be able to compensate people because of the interstitium of a media agency buyer", the agency buyer is acting as agent for a disclosed principal.

THE CHAIR: Okay.

MR BEAL: We then have the suggestion in paragraph 4 --

THE CHAIR: Yes.

MR BEAL: -- that Google's assistance may be required, but it's said to be there are several reasons that make it impractical for Google to provide a distribution mechanism at the required scale. They then refer to the 70 to 90 per cent of total advertising spend. Well, their own data gainsays that as a relevant issue.

They then say, "Well, we obviously can't then contact customers directly". Well, they've got the identifier number, so that tells you the parent company ID. That parent company ID will then be the basis for contacting that parent and saying, "There's a sum of money available to you", and the experience of commerce over the ages would suggest that when money is available, people are more willing to contact you. If they're being asked to put their head above the parapet and get involved in disclosure, they're less so.

It then says even if Google were easily able to refund the agencies -- well, why can't they refund agencies? The agencies are buying large amounts of advertising spend on behalf of identified clients with Google. What is it about the $400 billion company Google that can't provide a refund to somebody who is doing considerable business with them? It beggars belief.

They then say even if Google were able to refund the agencies, each agency would then need to pass the refund to the end advertiser. Well, we've recognised that in our documents. We recognise that there will need to be a process of collaboration with media agencies to make sure it doesn't stay in their hands, but that it gets properly distributed to their own clients. But once it's publicly advertised that this money is available, media agencies are likely to want to do the right thing and let their clients know, because it's good for business; it's a good news story to tell their clients.

There's then a series of points that are taken by Google which, with respect, aren't well founded.

Firstly, they say their accounting systems have not been designed to facilitate a large-scale one off bespoke distribution exercise. Well, I don't think it can seriously be suggested that one of the most successful technological companies in the world is incapable of coming up with a means of making payment by refunds to its direct customers.

They then say, "Well, cash refunds would require Google to process up to date payment details". They have them for the media agencies, they have them for the customers that are in direct contact, they will have them so far as they have them. If they have the contact details for the customer, but they don't have a valid bank account, they can simply have a process whereby the customer is contacted and invited to provide up to date payment details; it's not beyond the wit of humankind. There's then a complaint about advertising credits, because one of the things we've suggested, following a very helpful paper from Dr Rachael Mulheron, based on rollback relief is, well, you could always give a credit for the next three, four years on advertising spend to future customers, customers coming back. It won't be a perfect science of giving compensation to the past cohort, but assuming a relatively common cohort across time, it does provide at least a means of redress for Google's customers from their behaviour. It's yet to be explored. The Tribunal, to my knowledge, has not sanctioned a rollback relief remedy, but it's certainly within the scope of what the Tribunal can do, with a bit of creative thinking.

Now, a series of objections are taken to that, all of which seem essentially to say that it's commercially unadvantageous for Google, including, for example, the suggestion that advertising credits would likely be accounted for as a reduction of Google revenue, the key financial metric for investors and analysts. Well, the alternative is to have an award of aggregate damages on your balance sheet, which does a great deal more damage than that, one might have thought, because it then has to go down as a cost to Google. The idea that, if Google is liable for somewhere between £5 billion and £10 billion, that that isn't going to be reflected properly in the investment market is ludicrous. It's going to come out one way or the other, quite rightly so.

Finally, a point is taken about, "Well, you'll mess with the auction process". I simply don't understand that. If you have an auction process that generates who buys the adverts, and that auction process is then stripped of the egregious elements that we complain about, then any individual getting the successful advert placed can then have the amount of money that they would have paid reduced by a given percentage. That applies on a level playing field; it's not skewing the auction. Everyone bids, but everyone knows that they're going to get a flat rate percentage reduction, whatever they bid, and it will apply to everyone equally. So I'm afraid I simply don't understand that criticism.

THE CHAIR: Well, I think it's that some -- I'm not sure it matters that much -- but some advertisers will have credits and some won't. Or they might have very different amounts. The behavioural science that if you're spending free money, more willing to spend it and it'll distort relative behaviour of people buying in the auctions.

MR BEAL: That implies that if you're spending more on the auction process and spending more successfully on the auction process, you're getting a bigger refund. But of course, if you're doing that, then you're likely to have been within the cohort of the big spenders anyway and therefore have suffered most loss.

THE CHAIR: Depends on timing of when you were doing it (overspeaking).

MR BEAL: Well, the timing issue is a difficult one, because you could end up rewarding or compensating people who didn't suffer any loss in 2012, but have suffered loss in 2024. There's no way around that, with rollover relief. I mean, it's one of the criticisms of rollback relief. But it's better -- given that the aim is not to come up with a compensatory figure for a given individual, necessarily. The requirement is to come up with a distribution of aggregate damages that is just.

THE CHAIR: Yes.

MR BEAL: And if the real concern is, "Well, we can't come up with a formula that perfectly compensates people for past loss", then my suggestion is that at least some sort of rollback relief on a go-forward basis is better than giving it to -- forgive me for saying this -- a charity that's already receiving quite a lot of money from the class action system. It's a solution.

THE CHAIR: While you're on the letter, a point they make at the beginning, which is also in Ms Abram's skeleton, is this point, paragraph 2, about a tension in your client's position.

MR BEAL: Yes. We had drawn attention to the fact that, according to some data, it appeared for the 2019 data that Google didn't have contact details for 41 per cent of the people identified in that. Google have come back and said, "Well, actually, we weren't being asked for contact details by the CMA. Therefore the data field was irrelevant and therefore the fact that the data field was empty doesn't matter".

We're happy to take it as read that Google's updated position is that they are able to identify the majority of direct advertisers and agencies, and therefore contacting those people is less problematic than we had thought. True it is that that then means that we can't say it's necessarily difficult to contact those people for opt-in purposes, but what we can say is contacting those people on an opt-in basis involves sending out emails to 880,000 claimants and then, more importantly, dealing with them.

THE CHAIR: Yes. So your position is we should take it as read that, in general, it's known who they are --

MR BEAL: Yes.

THE CHAIR: -- but it's the burden of dealing with such a large number once they do make contact.

MR BEAL: Yes. And/or the disinclination of those with relatively low levels of damages to get involved in the first place.

THE CHAIR: Okay.

MR BEAL: That's the Ennis/Rodger/Stasi trilogy that I took.

Now, I'm conscious that time marches on. You'll have seen our notice and administration plan, the litigation plan, and so on, which will deal with the issue of distribution.

I hope you've also seen the Epiq supplemental report. This is at bundle C, tab 35, page 349. What Epiq there provide, once the issue of distribution has been more squarely raised in Google's response, is an identification of what records could be obtained, how historical account information could be obtained. Relying on Google's ongoing relationship with both agency buyers and direct advertisers, there would be a means by which a process could be put in place that would have a good chance of securing effective distribution, is what Epiq say.

Now, that evidence would have been more meaningful, perhaps, if Epiq had known what only came to light on 29 June, that Google themselves say there's no problem with contacting the majority of the people.

My final point on distribution is to note what this Tribunal has said in the Spottiswoode case. This is bundle of authorities, please, bundle A, page 570. Tab 10.

At paragraphs 46 to 47, following on from some observations of the Court of Appeal in the Gutmann case and in Le Patourel, the Tribunal noted that distribution was something that might require some innovative or creative thinking. In particular, I suspect it was Lord Justice Green in the Gutmann case (sic) said at the bottom of page 570 that:

"Whilst we express no decided position on the issue, it certainly seems arguable that it's open to the CAT, if it accepts the ... gloomy forecast, to consider whether there are appropriate proxies to distribution to individual claimants such as ordering a prospective reduction in certain fares upon the basis that if it is impossible from a practical perspective to cure the past then a forward-looking remedy might suffice."

Then at paragraph 54, the Tribunal accepted that relative suitability of opt-in versus opt-out was a relevant consideration:

"... if only a small proportion of the class take up any damages award or no viable method of distribution can be found on (inaudible) that these proceedings would compare unfavourably with individual proceedings." [as read]

So it is a relevant consideration to look at distribution, but we suggest it can't sensibly be said that the current plans for distribution as formulated -- and the suggestions I've made to the Tribunal today with some potentially creative thinking if practical problems arise -- wouldn't meet the requirement for a just distribution of the aggregate damages that would be obtained.

That leaves me with funding and ATE issues to cover. There are a couple of observations, first, to make about funding in principle. Firstly, the Court of Appeal in Gutmann and this is at page 683 of this bundle, bundle A of the bundle of authorities, paragraph 78.

An argument had been advanced by Lord Wolfson that it was somehow a barrier to certification. Funder was proposing to take their compensation remuneration from payment ahead of the class distribution, and that was rejected by the Court of Appeal. Court of Appeal said that:

"The relevant statutory provisions do not prescribe what the class representative does with the damages once received. Accordingly, it's open to the class rep to pay the funder and the lawyers, subject to the control of the CAT under its supervisory jurisdiction. CAT will make an order for the proportion of damages to be paid on behalf of the class to such third party as the CAT thinks fit. These are wide, unrestricted powers given to the CAT, which can clearly include payment to the funder or lawyers of a proportion of the damages in priority to the class." [as read]

The idea that funders have to go second, and only from undistributed damages, is not right as a matter of law. The Tribunal, and indeed the Court of Appeal, have recognised that without litigation funding these claims would not be brought. If these claims are not brought, then the parliamentary objective of securing access to justice for victims of competition infringements would fail.

In terms of the funding here, Burford is recognised as a leader in the funding field. There is post consolidation with the Kaye case. There has been a consolidation of the funding arrangements. But importantly, as Dr Brook has made clear in her second witness statement -- that's page 354 and onwards -- the arrangements for the class representative remain with Burford.

So there's a participation agreement with the funders that were involved in funding the Kaye case. In a sense they're now a sleeping partner -- I don't use that term pejoratively -- but they're a sleeping partner within the funding arrangements.

All of the funding arrangements have remained the same. The funding agreement itself, you'll have seen, is at page 204 of bundle C, and it provides for, if I may call it, the post-PACCAR standard proposal for multiples of certain funds to be treated as recoverable over a period of time.

Now, within the market, those multiples are usually either based on committed funds or expended funds. Well, here, the funding arrangement that you've seen has the funds payable only from funds that have actually been invested, not from the committed total and so it's a waterfall arrangement based on the sums that have in fact been spent by the funder in funding the litigation and then there's the longer the litigation goes on, the longer they're out of a return on their funds and therefore the greater their recovery, unless and until there's a legislative change to PACCAR, which has been mooted but not brought forward. This is the only compatible way of getting a funding arrangement off the ground.

I've heard it said, including judicially within this Tribunal, that that doesn't mean it's not satisfactory, because a percentage distribution from the final amount awarded would align the class interests with the funder's interests more directly, but that wasn't a course that was available to funders post-PACCAR.

Beyond that, my submission is essentially that these funding arrangements are entirely standard. There's an entirely standard ATE arrangement. The provisions you'll see -- from page 228 for example, in bundle C in schedule 3 -- allocation of funds, allocation of remuneration to the funder only arises if the Tribunal permits it. So all of

these arrangements are subject to the Tribunal's imprimatur as to what can go back to the funder and indeed the ATE policy. The ATE policy is in bundle C, page 238, and there you'll see that Mr Kaye KC is now the secondary insured on certain conditions, subsequent being met. Page 239 confirms that limit of indemnity is now 30 million and there's an initial premium set at 4.5 million. The conditional premium is also identified, but there's been some redactions for that, consistently with case law.
There are essentially three objections to the funding and ATE provisions.
Firstly, it's said that the Kaye-funded expenditure in the provision for committed capital is inappropriate, because Google's take on the Kaye Brook consolidation is that the Kaye case is lost. Well, the Kaye case hasn't lost, the Kaye case has been merged with the Brook case, following the suggestion that this Tribunal made to me in October that the party should go away and think carefully about whether an agreement could be reached and Dr Brook took that suggestion away, she looked at what could be done, she considered what was in the best interests of the class, she considered that the case advanced by the Brook claimants remained a valid and good case to make, but she thought she could improve on arrangements for the class as a whole if the spectre of a carriage dispute was removed and if the Kaye and Brook teams joined forces and that's exactly what's happened. There's a precedent for that in the Hunter and Hammond case, encouraging consolidation, and that's what's been done.
In terms of -- well, that means that the Kaye costs are necessarily going to be treated, or Kaye funds expended are going to be treated as part of the return in due course: well, that depends entirely on whether or not this Tribunal sanctions the payment of those funds out of that distributed or undistributed damages in due course. It's not a matter we say that can be sensibly dealt with now because it amounts to a suggestion that the funds expended by Mr Kaye in bringing his claim are irrecoverable, come what may.

It may be in due course the Tribunal takes the view that substantial justification will be needed in order to allow for costs that have essentially been dealt with as part of a carriage dispute to be borne by the defendant, or indeed borne by the class. That was recognised in the Hunter and Hammond case, paragraph 23, see bundle of authorities, page 615. The Tribunal there recognised that there would be scrutiny of the treatment of the costs of carriage and funding issues when looking at adverse costs and recovery from the damages award. What they didn't say was that it was appropriate to deal with it at the certification stage. They said "On the contrary it's something we will look at in due course" and we say the same here.

In terms of ATE the complaint is that there was -- I should say there's a complaint about Kaye's costs on uplift basis for both counsel and solicitors I think, but in footnote 20 of their skeleton Google have with respect sensibly recognised that that's a matter that should more appropriately be dealt with in due course.

The final point on funding an ATE is to look at the insurance position. Mr Teague has said these are standard provisions in the market. See his evidence at paragraph 44 to 48, hearing bundle A, page 398.

Now, Google complained in its response that there might be double recovery if the insurer could recover both adverse costs award from the class recovery and its own premium. It's not clear, we say, whether that's still maintained, so I will necessarily advance this further in reply if I need to.

But with respect to "it conflates two entirely different payments", you have the premium paid to the insurer in order to cover a risk. Reimbursement of costs only arises if the policy has been called upon and the payment has been made under it.

If for example the Kaye claim is withdrawn, in due course if there's certification, and if for example a claim is made against the Kaye policy then the Kaye policy will have to pay out any adverse ruling on costs if there is one. That would be an expenditure from the Kaye policy. The Kaye policy would then have to claim.

That, however, is not the ATE policy that we have going forward. The ATE policy that we have at the moment makes it clear that coverage for the Kaye claim is not going to be something that is going to survive the certification of this case. So that will be a matter essentially for the old Kaye policy and not for the policy that Dr Brook has negotiated with the ATE insurer following the consolidation.

In terms of the overall arrangements, the second point is that having deferred and contingent premiums are standard. What matters for certification is whether or not there is sufficient cover in place to ensure that Google can take comfort that if it is successful at the end of a four year period of litigation, it can recover its costs. That's what the £30 million adverse costs cover does and that level has been set by Dr Brook through negotiation, following independent advice from costs counsel, privilege over which is not waived.

The next point is that none of this is going to affect Google anyway. The suggestion that contingent premiums are inappropriate only arises in the event of success. That success will be determined if an aggregate damages award is made by this Tribunal at the end of the proceedings. In that event, then there will be, no doubt, resolution of whether or not any contingent premium is payable. But that isn't going to be a sum that's paid by Google. It's going to be a sum that is borne out of the aggregate damages award. So what that shows is that whilst it's touching that Google has this concern for the class, it's not something that goes to certification and it certainly doesn't amount to double recovery.

There's then a suggestion now made in the skeleton paragraph 73(c) that the redaction of the contingent premium is inappropriate. This is a slightly odd submission from this particular defendant because we see that they didn't take that objection in the Coll case. That's bundle of authorities, please, bundle A, tab 5, page 117. The objection here -- see paragraph 23 -- the ATE premium broken down into two parts: the deposit premium, which we've called an initial premium payable in two stages as ours is; and the contingent premium. It's a contingent premium that Google says requires to be disclosed.

However, in this case the contingent premium like ours is only payable on success and only out of undistributed damages. PCR maintains that the amount of the deposit premium should remain redacted see; paragraph 24. But in fact, Google did not seek disclosure of the contingent premium -- see paragraph 25:

"The proposed defendants do not seek disclosure of contingent premium and maintain that the PCR ought to disclose the deposit premium." [as read]

Now here we've disclosed the initial premium which is in two stages: pre-CPO and post-CPO, and that's in the budget. So it's odd for Google to have changed its tune. We also say it's wrong to have changed its tune because in fact, not revealing the contingent premium is consistent with standard practice.

In Kent v Apple -- this is bundle of authorities, page 96 -- CAT set out some general principles at paragraph 19. Then at paragraph 21, page 97, the Tribunal dealt with the disclosure of the ATE premium. Specifically. Please, can I invite you to read paragraph 21, page 97. (Pause)

Reference to Mr Justice Roth's observations in Gutmann. (Inaudible) and the general practice was that insofar as the premium would risk disclosing strategic considerations, it wasn't appropriate to give the defendant the benefit of that tactical advantage.

At paragraph 28 on page 100:

"The Tribunal considered there is a risk that disclosure of the premium might disclose the assessment of risk and in that way confer tactical advantage on Apple. Assessment of risk and even of merit is not necessarily the same thing as legal advice on the merits, even if it does not clearly disclose legal advice, it might give an insight into the perceptions of the insurers. We consider that it's possible to gain an insight into the thinking about the strength of an opponent's case without necessarily being (inaudible) advice." [as read]

That was the approach that Mr Justice Roth had taken in Gutmann to ATE insurance premiums.

Paragraph 30 then said:

"Even if it could be said that the premium might have some limited reference (inaudible) discretion, we consider that the tactical disadvantage would outweigh such peripheral relevance and disclosure is declined on that basis too." [as read]

In other words, what matters for the defendant is are their costs going to be covered to the extent that their internal machinations relating to the setting of a contingent premium, which is only going to come to bear at the end of the case, and where it gives rise to the risk of revealing some sort of tactical insight into the party's thinking, it's not appropriate as a matter of discretion to require that information to be disclosed, and it would require a change of the overall stance of the Tribunal to such matters to require it to be disclosed now.

That said, I acknowledge in the Waterside case I think the contingent premium were voluntarily disclosed. The fact that it was voluntarily disclosed in one case doesn't mean as a matter of principle it should be disclosed in all others. But I'll come on to deal with any significant points taken on the Waterside case in reply if I need to. The point of principle is the one I've outlined.

Could you give me a moment? (Pause)

Unless I can be of any further assistance, those are the reasons why we commend our application for certification to you.

THE CHAIR: Thank you. We'll start again at 1.55 pm.

(12.54 pm)

(The short adjournment)

(1.54 pm)

THE CHAIR: Yes, Ms Abram.

Submissions by MS ABRAM

MS ABRAM: Sir, members of the Tribunal, there are four groups of issues on which there are live debates between the parties. First and mainly, opt-in versus opt-out which also wraps in the points on distribution and the PCR's costs. Second, the objections to the funding arrangements. Third, the proposed amendment to introduce the open-ended end date to the claim. Fourth, the class definition issue.

I'm going to deal with the first two groups of issues. Mr Artley is going to deal with the open-ended amendment issue, and Mr Eustace is going to deal with the class definition issue.

THE CHAIR: Right.

MS ABRAM: So, to start with the argument on certification on an opt-in basis. Our position on that has two prongs. So, first is that it's practicable for the proceedings to be brought on an opt-in basis in respect of those PCMs who make up at least the vast majority of the claim value.

Now, we don't accept that it's impracticable to expect any of the PCMs in this case to opt in. But if you're against me on that, and if you consider it is impracticable, that small tail of claim value in relative terms shouldn't be allowed to wag the much larger dog; that's what we say about that.

The key case on opting-in versus opting-out is Evans in the Supreme Court, which you haven't been shown. I'm going to show you it.

THE CHAIR: I've seen quotes from within the context of the later cases.

MS ABRAM: Right. The second prong, just to foreshadow what's to come, is that even if you do consider it would be impracticable for some of the PCMs with the small claims to opt in, the PCR's failure to put forward a proper distribution plan means that the Tribunal can have no assurance that any meaningful proportion of those small PCMs would actually receive their share of any award. I'm focusing in particular here on the up to 90 per cent on the PCR's case of advertising spend that went through media agencies. So on the PCR's current pleaded case that's about £4.5 billion worth of loss.
The sum total of the PCR's plan for distribution to those advertisers is you pay billions of pounds to the media agencies and you hope that they might return it to the right place. That is not credible. It does not meet the expectations that the Tribunal has set down in the leading case on this -- which you also weren't shown, which is Waterside, which again I'll show you -- and unsurprisingly it finds no support at all in the materials that have been submitted from the claims administrator for this case.
And so putting those two prongs together, we say that the implication of the absence of any plan for distribution, in particular to those advertisers who bought through media agencies, is that opt-out proceedings aren't fair, they're not a proportionate use of the Tribunal's resources, because you can't be confident that even if this was a claim that would ultimately succeed, it would actually deliver any meaningful benefit to any part of the class for whom you might consider it's impracticable to opt in. Mr Beal talked about this in terms of access to justice this morning, which (inaudible) a very apt prism through which to look at this. Of course, access to justice doesn't just mean a claim succeeding, it means actually delivering any award to the people who are members of the class and that's the bit of the jigsaw that's missing.
So I'm going to take those two aspects in that order on that main bit of our objections and before I show you Evans, it might be helpful just to take a detour by the Tribunal

Rules to show you how the framework is set out for this issue. So that's in authorities bundle B and it's tab 5 and page 163. (Pause)

And we're in rule 79. So if one starts at rule 79(3) which is asking that question, which the Tribunal must ask itself, whether proceedings should be opt-in or opt-out:

"The Tribunal may take into account [on the second line] all matters it thinks fit, including the following matters additional to those set out in paragraph 2 [and I'll come back to that in a moment] but the specific matters identified are the strength of the claims and whether it's practicable for the proceedings to be brought as opt-in proceedings." [as read]

And those set out in paragraph 2, you see, just above (3), are a list of factors that are relevant to suitability for collective proceedings in a broader sense and (b) on that list is the costs and the benefits of continuing the proceedings and I'll show you that the case law says that when we look at costs and benefits, we don't just look at that in an abstract sense, we also look at the plans for distribution, whether there's a realistic plan for distribution to return any award to the class.

So that factor is relevant at two points to the test: suitability per se for collective proceedings and specifically to opt-in versus opt-out, is what I get from that.

So with that by way of introduction framing, let's have a look at Evans, which is authorities bundle A, volume 2, tab 19, and I'd like to start at page 907. (Pause)

So 907, you see paragraph 44; the reason I'm showing you this is just it's a handy place to take the quote from the Guide to Proceedings -- the Tribunal's Guide to Proceedings -- and you see that's introduced in paragraph 44 and the sentence that we rely on from paragraph 639 of the Guide is at the top of page 908. You see:

"There is a general preference for proceedings to be opt-in where practicable." [as read]

That's all I wanted to take from that, before I show you the substance of the discussion.

(Pause)

And the discussion of this issue, the relevant passage starts on page 918 and I'm going to show you a few paragraphs of this in a bit of detail, because it really does -- unsurprisingly, it's the Supreme Court case -- really does frame the question that the Tribunal has to ask itself.

So paragraph 88 is helpful, because it frames the way in which the strength of the claim is a relevant criterion for the opt-in versus opt-out. You see on the fourth line:

"If a claim is weak, that militates against affording the claimants the advantages of an opt-out process, with the concomitant disadvantage that a defendant may feel commercial pressure to settle such claim, even though it would be likely to fail at trial." [as read]

And the reason I'm showing you that is to tee up the point that we say there's a similar interaction between the other elements of suitability, which you've seen are relevant under the test in rule 79, and the choice between opt-in and opt-out, and I'm going to show you as we go through how that's rooted in the Supreme Court's judgment.

So my argument is that if the Tribunal can't be satisfied that proceedings will actually deliver real world benefit to the class, because there is no plan for distribution that's worthy of that name, then the PCR shouldn't be given the benefit of opt-out proceedings to recover an award that the Tribunal has no basis to believe it would actually be capable of distributing. Instead, in those circumstances, any certification should be opt-in, so that any award relates to those class members that the PCR actually has contact details for can actually pay, actually has a relationship with.

And the interaction between the strength of the claims and the decision between opt-in and opt-out is really epitomised at paragraph 92 of the judgment. Now, before I show you the text, let me explain, paragraph 92 is dealing with rule 4.2. Rule 4.2 is our equivalent of the overriding objective under the CAT Rules, so it's quoted at paragraph 39 of the judgment. It says: cases should be dealt with justly and proportionately and if you pick the paragraph up on about the seventh line, near the end of the line, you see the sentence starting with "The method of dealing". That's the [opt-out], that's what they're talking about:

The [opt-out] method of dealing with a case would be unlikely to be proportionate to the amount of money involved and the importance of the case, since if the claims are unmeritorious, then ultimately no money is properly or substantially an issue and the case isn't important." [as read]

And the same logic we say applies where there's no proper plan for distribution, such that the Tribunal has no basis to think that PCR is actually going to be able to return any money to those class members who, on this basis, for whom it would be impracticable to opt in.

In just the same way that there's no money substantially an issue if a claim's weak, there's no money substantially in issue, there's no access to justice for class members who are never going to receive their share of any award.

If we skip forward then to paragraph 110, which is on page 924. Can I ask you just to read that paragraph? (Pause)

THE CHAIR: Right.

MS ABRAM: And I'm showing you that out of fairness to Mr Beal's argument, because of course one of Mr Beal's arguments is as to whether class members would in fact, opt in, and the relevance of that to opt-in versus to opt-out proceedings and what the Supreme Court is saying is, "Look, the fact that the case wouldn't proceed there on an opt-in basis is a relevant factor; it's not a trump card".

THE CHAIR: Right.

MS ABRAM: And just to explain, paragraph 5 of the same judgment says that in that case, the reason why the proceedings wouldn't in fact be brought on opt-in basis was that was not that class members couldn't opt in, it was that those with the biggest claims wouldn't in practice have opted in; they wouldn't be sufficiently interested to opt in.

The key ruling on practicability is paragraph 112 on the following page, so page 925 and we really emphasise the first couple of sentences of this paragraph. So the implication of rule 79(3)(b), which I've shown you, is that:

"If it is practicable for proceedings to be brought as opt-in proceedings, then generally they should be. The principle is clear: if it's practicable for claimants to bring opt-in proceedings, it's unlikely to be proportionate to confer on them the additional advantages associated with opt-out procedure and unlikely to be reasonable to expect defendants to have to face the additional commercial pressures to settle the claim, regardless of their true merit, which that would involve." [as read]

So, in a way, that sets out the preference for opt-in proceedings, but it kind of begs the question as to when proceedings will be practicable on an opt-in basis and the Supreme Court gives some guidance on that, at paragraphs 116 and 117, which is page 926 and what it's doing is identifying two different ends of the spectrum, one where opt-out proceedings may be appropriate and the other where opt-in proceedings at most may be appropriate.

So you see at 116, picking up on the third line:

"At one end of the spectrum, there may be a large class of ordinary consumers affected by a breach of Competition Law [skipping over] involving small sums for each individual, which would make each individual case economically unviable. Type of situation addressed in merits as the paradigm type of case in which opt-out proceedings are likely to be justified." [as read]

So the large number of [claimants] who can't opt in and the small sums involved are likely to make an opt-out procedure the only basis on which it's practicable to bring proceedings. That's the paradigm for opt-out.

Then we look at opt-in, the next paragraph, the other end of the spectrum:

"Claimants who allegedly suffered loss may be large commercial organisations well capable of looking after their own interests. The sums involved may be large enough to make it financially viable to contemplate bringing proceedings to seek recovery." [as read]

And then the final sentence of that paragraph explains:

"In such circumstances, it may not be appropriate for collective proceedings to be brought at all and if collective proceedings are considered appropriate, it's likely to be only on an opt-in basis." [as read]

So the question is: what do you do if you've got a mixed class of proposed class members and for some of whom Court may consider it's impractical to opt in and for very many of whom it will be practical to opt in? The answer to that is in paragraph 120 of Evans and that's on page 927. So halfway through that paragraph, near the end of the line, you see there's a sentence starting "In our view":

"In our view, where the Tribunal identifies groups of claimants with distinct profiles relevant to the assessment to be made, it should consider the practicability of bringing an opt-in claim for each group separately and if this yields a different conclusion for each group, it should then stand back and make an overall assessment of the balance of justice having regard to those underlying assessments." [as read]

That balancing exercise is the exercise that the Tribunal would be engaged on, if you weren't with me, that it's practicable for all of this class to opt in.

The last bit of that judgment that I need to show you, because we say it is squarely on the money in this case, is paragraph 124 on page 928 and so the last sentence of that paragraph, starting about five lines up from the bottom, you see, "It would certainly not be appropriate":

"It would certainly not be appropriate for the Tribunal to order opt-out proceedings simply to give large commercial operators the advantage arising from the expectation that the smaller entities for whose benefit the opt-out proceedings are supposedly being brought will increase the overall award of damages, but will not ultimately come forward at the end of the day to claim their share of the award." (Pause)

And so the Tribunal -- sorry, not the Tribunal, the Supreme Court there is squarely looking at the question of whether the money will actually get to the class as one of the questions that's relevant to opt-in versus opt-out certification.

THE CHAIR: (inaudible).

MS ABRAM: So the Supreme Court here is talking about one of those mixed classes in paragraph 120, where we've seen you've got the balancing exercise standing back interest of justice and what they're saying is: you don't -- where you've got a mixed class, but you're worried about whether the small class members who may not be able to opt in, won't actually claim their share of the award, it's not appropriate in those circumstances to order opt-out proceedings to help out the big ones who could opt in, just in the interest of the small ones who couldn't opt in, but they're not going to receive their award anyway.

So if I try and put into a nutshell what we derive from Evans in terms of the principles, starting point is the presumption in favour of opt-in, so that's paragraph 112. If it's practicable for proceedings to be brought on opt-in basis, they should be. What's practicable is determined by reference to the class as a whole. If opt-in proceedings are practicable for some of the class, but not all, Tribunal stands back and does the balancing assessment of what's in the interests of justice overall.

And then that balancing exercise, the balance of justice, takes into account all of the factors that are relevant to suitability -- we've seen that in the Rules -- considering the fairness to the defendants and the overriding objective equivalent, the need to deal with cases justly and proportionately, and so opt-out proceedings won't be justified for a claim that's unlikely to deliver benefit to a class, whether because it's weak or because the class members won't get their share of any award, even if it wouldn't be practicable for those class members to opt in.

Now, I should just join up the dots, perhaps, before I move on between Evans and what Mr Beal says about the strength of the claims in this case and we don't accept that this can fairly be said to be a strong claim in the sense that the Tribunal identified in Ennis v Apple, for example, but there's been an air at some times this morning as if there's a presumption that a claim that can't be said to be obviously weak at the certification stage should be certified on an opt-out basis; that's not right. The presumption is always for certification on an opt-in basis if practicable and strength is one of the factors that's relevant to the assessment.

So I'd like to move on to why we say that opt-in proceedings are practicable here and I should anchor that in the distribution of claim values across the whole of the proposed class and I'll show you the figures at E, tab 4, page 8. (Pause)

That's not right, sorry. It's E, tab 2, page 8.

So this is the letter -- part of a letter -- from Mr Matthew of NERA, which is Google's expert and it just shows that breakdown of the claim values. The figures in the table seem to be agreed by the PCR, or at least not actively objected to, for present purposes. You can see in the table, if you look at page 8, which is headed "Appendix A", that there are estimates prepared on three different bases. There is more detail on each of the bases in Mr Matthew's report, which just for the transcript is at B, tab 6. But suffice it for now to say estimate three is the most realistic and representative, so I'll use that.

But actually if you scan your eyes across you see that the different bases make very little difference to the numbers so that's not a big driver of the numbers in this case.

The granular figures in this table are confidential but we have designated the figures in the skeletons so the figures that each side wants to rely on to enable them to be referred to.

So if we look at the bottom of the table and I just highlight the points that we want to make about this. Bottom row of the table, so estimate 3, you see claims above £3 million. If you scan across to estimate 3 you can see that there is a relatively small absolute number of proposed class members who've got alleged claims in that value bracket, so about 500 alleged claims in that bracket. But they account for well over 50 per cent of the overall claim value.

Then if you look at the bottom half of the table to kind of illustrate the numbers in a different way -- so below the kind of triple line in the middle of it -- you can see claims over £50,000 account for over 90 per cent of claim value.

Then if you look at the top half, kind of conversely, you can see that really significant, Mr Beal says, absolute numbers of proposed class members have alleged claim values below each of the 20/40 and £200 thresholds, but they account for a tiny proportion of claim value. In fact, below £40 it's an indiscernible proportion of claim value, so that number of significant figures.

THE CHAIR: Right.

MS ABRAM: So, what do I take from that? Well, my primary submission is that one doesn't need to take anything from that analysis at all, in the sense that we say that it's practicable for all PCMs to opt in in this case. It's an all business class by definition; it's not a consumer class. All of the proposed class members will have administrative obligations in connection with the running of their businesses. They'll all have to file tax returns to submit accounts to Companies House.

By definition, to be in this class to begin with, they've all got the administrative capability to buy advertising from or through a media agency from Google. So this isn't the mass consumer class envisaged in 116 of Evans where the Supreme Court is saying "Look, it's just impractical to expect these people to opt in".

I would say certainly that if you can expect a business to keep records of its expenses to set off against its income for tax purposes, as we're all expected to do, or to claim a tax refund when it's due to it, you can also expect that business that allegedly has a claim worth hundreds or thousands of pounds to be capable of filling in a form to opt in to receive the money if and when it's due to it. So we say that it is practical to opt in for this class.

But putting it at its lowest, opting in is quite clearly practical for a large number of proposed class members who between them have an extremely significant claim value. So that bottom half of the table where you've got 90 per cent of proposed class members, all with claims above £50,000, I'm not saying there's any magic in that cut-off I'm just taking it as an example of a way to cut the numbers. There's no sensible scope for argument that it's impractical for a proposed class member with a claim worth £50,000 or more to be expected to opt in.

We know that collectively -- you can see that says that's 90 per cent of the claim value and you know the overall alleged claim value -- that those claims are alleged to be worth collectively billions of pounds.

Actually, Mr Beal didn't really try and argue that opting in was impractical for individual class members who have significant value alleged claims. What he said was that an opt-in claim was impractical because there were so many of them.

Now, we don't accept the basis for that. The explanation that was given, the idea that it was impractical, was that it would be necessary to give individualised advice from Geradin, the solicitors from KP Law, solicitors for the PCR, to each class member and have individual discussions with each of them. That isn't how opt-in claims work at all in this jurisdiction anywhere I'm aware of.

The way in which they work is there's a website which is publicised, of course, and it's necessary for people to sign up if they want to opt in to join the claim. There is not an individualised set of legal advice or legal discussions between solicitors for the class rep and every potential class member. Of course potential class members might want to get legal advice, of course, but in that case they go off and get their own advice in one way or another. It's not an onus on the class rep to go out and speak to hundreds of thousands of potential class members in that way.

THE CHAIR: Well, Mr Teague's evidence says that it is -- that for some potential class members there can be quite an administrative burden of answering their questions about the DBAs and representation and that sort of thing. So he says there is.

MS ABRAM: And maybe those questions would be asked by some proposed class members, perhaps those with the biggest claims. Then of course it would be for Geradin to decide whether to answer them or to say they needed to take their own legal advice. In the same way that if one imagines, for example, the 1.6 million class members who are in the GLO, the Diesel GLO, in these proceedings, it will not have realistically been the case that there were 1.6 million sets of conversations between the claimant solicitors in that case and the potential class members, and the same will apply here too.

THE CHAIR: Right, okay. I just think it's overselling it to say that there's no evidence that it's either (inaudible). It sounds from Mr Teague's evidence that quite a lot of people won't just tick a box on a website, and that they will contact the class representative's lawyers and have a bunch of questions to ask.

MS ABRAM: But what one does know is that in reality, either in collective proceedings, in the competition context, or similar vehicles outside the competition context, GLOs for example, it is in practice possible to put together very significant claims in terms of claimant numbers using effectively opt-in procedures. So I used as an example

Dieselgate which has got the 1.6 million -- very headline-grabbing number.

Other examples closer to home are Trucks, where as Mr Beal said, 11,000 class members opted in. In Evans, for example, there were 40,000 potential class members. There's nothing in the Supreme Court's judgment to say, "Oh, hang on 40,000's a bit much. That's not going to be practicable". In fact the Supreme Court says "Opt-in proceedings are the way forward in Evans".

So although you've got no evidence in response to Mr Teague you can see that in reality this size of opt-in claim really does work where there are people that are interested enough to be bothered to join up.

But I think the point that's put against me is perhaps, to give it full credit, a bit different. I think it's that the number of potential class members imposes such significant burdens on the PCR and the PCR's legal team that it's not realistic to have opt-in proceedings in those circumstances.

I give two answers to that. The first is that logically numerosity of the potential class must be a factor against the PCR in relation to the choice between opt-in and opt-out, not a factor in its favour, because the more numerous the potential class of members for whom it would be practical to opt in, the smaller the proportion that need to opt in for there to be viable proceedings that could be got up and running on an opt-in basis. So the presence of a large number of PCMs logically makes opt-in proceedings more, rather than less, viable. That's why I showed you that in Evans the Supreme Court says: if you've got a mass consumer claim, people that can't opt in, really opt-out may be the only option. It didn't make the mirror image point. It didn't say, "Well, if you've got an opt-in claim there's a realistic ceiling size on classes" because that would just be inconsistent with the way that mass litigation actually works in this jurisdiction. So numerosity is a point in my favour as opposed to a point in my learned friend’s favour. If the position is that not enough PCMs would be bothered enough about the proceedings to opt in for opt-in proceedings to be viable, well, that suggests that the class really wouldn't be bothered about the case, and that would go to whether it's just and proportionate for the Tribunal's resources to be spent on opt-out proceedings in that claim.

Now, it was suggested, I think, that my submissions on this amounted to saying that it didn't matter whether some of the class went uncompensated, as a result of proceedings being on an opt-in basis rather than an opt-out basis. You have my answers to that; it's twofold. It's first, well, you've got no basis to be confident that this class actually is going to be compensated, in particular the 90 per cent of spend that went through media agencies. So there's no difference there between certification and not certification.

Second, what we say --

THE CHAIR: Does that come back to your point about not having a distribution?

MS ABRAM: -- not having a distribution plan, that's it. Second, what we say is that class members can be given the choice to opt in. If they are sufficiently concerned to opt in then doubtless they will do so.

Now, the other kind of set of points on the size of the class making it unrealistic to have opt-in proceedings is the difficulties that are identified in Mr Teague's witness statement, not just with giving legal advice, but in terms of the amount of work that would be required from Geradin to get these proceedings up and running on an opt-in basis.

Now, some of these points are somewhat in terrorem because they are a suggestion that it will put the class rep to a lot of bother and to a lot of expense and a lot of time if they have to proceed on an opt-in basis. But if that's what they should have done to begin with, which is what we say, that's just the consequence of the application of the Tribunal's Rules. So we say that.

I also say that those questions are irrelevant to the criteria by which you decide between opt-in and opt-out proceedings. I've shown you in Evans what the test is that the Supreme Court says should be applied between opt-in and opt-out. Nowhere there did the Supreme Court say, "Well, if it would take the class rep solicitors quite a lot of work, if it would take them time, if it would cost money, then of course we won't have opt-in proceedings in that case", that is no part of the analysis. So all of those factors are not relevant factors and they, in my submission, shouldn't be taken into account by the Tribunal because they're not part of the legal test. That takes us to a particular --

THE CHAIR: I'm not sure it was exactly argued that way in Evans. But if the evidence were that it's just impossible to process the sheer number in a reasonable time frame, are you saying that's not a factor?

MS ABRAM: So if that were the evidence, and it's not the evidence, then --

THE CHAIR: It's not. But if it were ...

MS ABRAM: If it were, then I would invite the Tribunal to look at other cases in which claimant firms have managed to put together opt-in claims in this and frankly much larger sizes and to take judicial notice of that fact and say, "Well, hang on, it can't be right that you can't manage a class of perhaps 800,000 potential class members, when we can see that in -- I think, it's Pogust Goodhead in Dieselgate have managed 1.6 million."

So, you know, I'd ask the Tribunal to take note of that in those circumstances. Of course, there's a particular point in favour of practicability of opt-in proceedings here, which is that Google has got those contact details for the majority of direct advertisers and media agencies. So it's got identifiers, those parent ID identifiers that enables it to identify the direct advertisers and the media agencies.

Now, it was also suggested that the parent IDs enabled identification of the advertisers who bought through media agencies. We've never said that. We've never said that Google has the parent IDs for those. We've actually never looked at that question of whether, where advertisers bought through a media agency, the parent ID enables the underlying advertiser to be identified or just the media agency and account, for example. But --

THE CHAIR: Right.

MS ABRAM: So we don't know if that's right, but what we --

THE CHAIR: You could have looked into it couldn't you?

MS ABRAM: Well, it didn't come up actually until this morning. It's not a question that we were asked until --

THE CHAIR: You've been running the point that media agencies are a roadblock to transparency. So wasn't it up to you to say that that's true?

MS ABRAM: So we are not actually running a point that there a roadblock to transparency, the point that --

THE CHAIR: You are. That's exactly what you did.

MS ABRAM: Well --

THE CHAIR: You said -- because your point was, ie that Beal's argument is Google, if it loses, has to give billions to the media agencies. It's just -- it's a hope that they actually pass it on. So I think you are running the point to -- you can't see through the media agencies.

MS ABRAM: So in my submission, it's important to differentiate between notification and distribution.

THE CHAIR: Right.

MS ABRAM: So the media agencies are absolutely an obstacle to distribution in respect of class members who bought through media agencies. Because where bills to Google were paid by the media agencies, by definition, we don't have the payment details for the advertisers that lie underneath. So for that purpose, the media agencies absolutely are a roadblock to distribution. That's not the same as transparency. I think the --

THE CHAIR: What do you mean you don't ...? You mean you haven't got their bank -- you haven't got their sort code and account number?

MS ABRAM: Yes. Because the bills are paid by the media agencies on behalf of their principals. So the way in which it's proposed that distribution should work is that Google should do a credit or refund mechanism.

Now, for direct purchases, and you saw that -- Mr Beal showed you that letter saying, "Look, we're not sure that that would be at all possible. We've got some real concerns about it". But actually, that's not. The focus, the real problem, the insuperable obstacle on distribution is that for that 90 per cent of spend that went via media agencies, the payment details we've got are not the payment details of the advertisers. That's why I say --

THE CHAIR: You need to know who they are, not their bank account. You -- because you know who they are, surely they can be written -- I think this point is made in the document (inaudible) write to them and say, "You've got some money coming, but we don't have your sort code".

MS ABRAM: Yes. So if that's the case -- and that's quite different from a direct credit mechanism -- that involves, as you say, writing to them and saying, "Look, fill in this form. Give us your payment details."

I'll show you. There's been one case so far in which that's been tried in this jurisdiction. It achieved an uptake rate of less than 1 per cent.

THE CHAIR: Yes.

MS ABRAM: So that's -- sorry.

MR BEAL: No, I don't -- judge, I'll (inaudible). Just on the same point.

MS ABRAM: So that's why we say that one can't be satisfied that there are proposals that would actually enable money to be got to the class for those advertisers who bought through media agencies. So that's distribution.

The point that I think you were challenging me on -- I just wanted to make sure that you had the two separate in your mind, because distribution payment is really different from notification, which is the bit that I was thinking about. So what we've been saying to the PCR is we've got identifying details for the media agencies. We don't know whether we've got the identifying details for the advertisers that lie underneath the media agencies, but we can at least help tell you who the media agencies are. Then, of course, you can write -- the PCR can write to them and say, "Look, tell your clients that bought through you that there are these collective proceedings ongoing, and that there's a possibility of opting in". I just want to make really clear there's a difference there.

Sorry, you were saying ...

MR DAVIES: Are the media agencies among the people listed as the claimants, for example, on this table -- I'm still looking at this table. Are they likely to be essentially among the people who are identified as the "very big claimants"?

MS ABRAM: So we don't know the answer to that question. It's not something that we've looked at as to whether or not the parent IDs that the claim numbers were assembled from took into account that aggregation through media agencies or not. I don't know the answer to that question.

But we say that we are very, very happy, very willing, of course, prepared to co-operate with the PCR to provide the identifying details that we do have, whatever they may be, certainly for direct customers and media agencies to the PCR to enable that opt-in process to take place.

I need to respond to the points that Mr Beal made about why opt-in proceedings aren't practicable. I think there were really five points.

The first was that it would be terribly difficult in an opt-in process to work out who the right class member would be, because of this legal entity point. Now, that, with respect, that was a slightly odd point, because it was prayed in aid in this bit of the analysis, but then it was also the opposite point was praising aid in relation to the 11,000 class members in the truck's claim where it was said, "Well, actually, you may have had loads and loads of different entities from the same fleet opting in". So either it's difficult or it's not. But ...

THE CHAIR: I think the point is, with the 11,000 in Dieselgate, the number of contacts that might need to have been made was a lot fewer. So that's the point that I -- the (inaudible) I think the right people is (inaudible) the wrong company in the group. Before we know it, there's a challenge.

MS ABRAM: Yes, yes. So on that point, on the question of whether the trucks industry are somehow very homogenous and tight-knit and it's able to -- and it's very easy to notify them all in one go -- and obviously grateful for the knowledge of that particular industry that's been conveyed -- but we don't accept there's any basis for that evidence.

But even imagine it is right, it actually doesn't go to the point that was really being held as an objection to the opt-in proceedings. Because the point that was being made was not so much, "Oh, it's hard to contact people. It's hard to send out X thousand emails" -- of course, it's not particularly hard to send out X thousand emails -- the point that was made is that each class member might want to get in touch with you individually to take advice. The fact that it's a close-knit industry isn't going to make any difference to that. So we say that, actually, the objection that's being made to the difficulties of opt-in doesn't map across to the justification for why 11,000 was a piece of cake in Trucks, but would have been -- but a large class would be a challenge here.

THE CHAIR: I think you just said that in a sense that 11,000 is not the real number in Trucks, because a lot of corporate entities is in there, and whatever it might be, ten companies per group or something. So really it looks like 11,000, but actually it's only 1,000.

MS ABRAM: Yes.

THE CHAIR: That's one point. Whereas the point on entities in terms of strict notification and opting them in is that if you opt in parent company, and then it turns out that the company suffered the loss hasn't been opted in, then there's a procedural snarl up later on, and everything's held up by an objection by the defendant.

So I think there are two different points. One is about practicality. The other one is about, if you get the notification wrong, the consequence is therefore the burden on having to get it absolutely right with individual corporate entities.

MS ABRAM: Two different answers to them. On the first point, I'm from Volvo Renault Trucks, and I don't have the benefit of that knowledge about the composition of the class members in that case. So I would ask the Tribunal to approach that point with some caution, because, with respect, I don't understand the basis for it.

But second point as to identifying the right entity, that is going to be an issue sooner or later regardless. So if you have opt-in proceedings, it's an issue up front. One sees that because you need to get the right entity opting in, in order to have a valid legal claim. If you have opt-out proceedings, you've got to make sure you make the payment to the right entity. So it's just the same problem at one end of the proceedings or the other. So opt-out proceedings are not a free pass to avoid that problem.

THE CHAIR: All right. I mean, if you, at the end of the day, you pay out the money to the big company, strictly speaking, it should have been some subsidiary, that's that you've paid out. You don't have to then correct that to make sure that the payment actually goes to exactly the right subsidiary.

MS ABRAM: It's much worse than that, though, in this case, because the proposal is for payments to be made to the media agencies.

THE CHAIR: Right. I know you said that as a separate point. Your point, just now, was you've got to cross the bridge of working out exactly who the right company is either way, but I don't think you have. Why have you got to work that out when you're distributing cash?

MS ABRAM: So it is true (inaudible) probably say that in merits, as Mr Beal said, the Supreme Court held that what's important is getting the aggregate amount right; it's not all about getting precise distribution. So that is a fair point.

But nonetheless, I do say that it's going to be important to make sure, if one's trying to get some kind of individualised approximation of damages -- that's what's taken in this case -- then it will still be important to make sure that you're sending money to the right place. So that's what I say about the 11,000.

Second point that was made against me is that these thresholds that I've shown you from Mr Matthew's letter are arbitrary. So there's no qualitative difference between claims above and below the threshold.

We agree they're arbitrary. Mr Beal showed you the letter from Mr Matthew saying, "Yes, we agree they're arbitrary". We only chose those thresholds because they were the ones that Professor Scott Morton point, if we were proposing hybrids and proceedings with a cut off between opt-out and opt-in. But that's not the proposal that we're making. So we're not saying there's any kind of qualitative difference.

But I do pray that point in aid in this way, which is that, in the real world, even if you're not with me that all of these class members could practicably opt in, the reality is that there's unlikely to be a very clear monetary value at which you're going to be able to say, "Right. I think that all class members with claims above £200, say, should be expected to opt in. Those below, it's impractical to opt in".

Of course, it will depend on a whole range of factors. That's why it comes back to this balancing of the interests of justice point, this question about whether those smaller class members -- if you think any of those couldn't practicably opt in -- whether they would actually receive their share of any award. My challenge on that is that if there are hurdles, obstacles to small class members opting in, then there must always there must also, by parity of reasoning, be hurdles to those class members taking up their share of any award. Now, that's kind of inherently the case, but it's all the more the case where you just don't have a plan for distribution, in particular to the ones that brought through media agencies.

THE CHAIR: I think Mr Beal's (inaudible) behind the submission was that Evans was a case where there was a qualitative difference. I'm not saying he's right, but I think that was his point. Page 8, that we were looking at, you could kind of plot that as a smooth curve, but I think Beal's (inaudible) contention was that Evans was a case where it was a group of distinct big players and really quite a separate, (inaudible) separate tail.

MS ABRAM: There's nothing in the judgment to show that. I mean, it's true that the Supreme Court does say, "Look, for some of these class members it would be practicable to opt in, and for others it wouldn't". But it doesn't say, "Look, there are two totally separate groups here".

Third point that's made against me is Stopford. So you've certified Stopford on an opt-out basis, and you should have the same approach to advertiser level to ensure that there's not incomplete compensation at one market level.

Now, just setting aside our issues with distribution about whether there will be complete compensation anyway, as a matter of principle, that is not how the regime works.

We know it's not how the regime works from Waterside, for example. So in Waterside, which I'll show you, it's a case where there are ongoing retailer claims that are proceeding to trial. They're not collective claims, so certification wasn't required. They will be tried. There was a proposed opt-out collective claim. There is a proposed opt-out collective claim for a consumer class. That was refused certification, notwithstanding the existence of the ongoing parallel retailer claims.

So each set of collective proceedings has to meet the threshold for certification. Brook doesn't get a leg up under the statutory test from the existence of Stopford. Of course, the test for whether opt-in proceedings are practicable looks at the particular proceedings in issue in each case.

Now, I've shown you Evans, 116 and 117, I hope the Tribunal can see that it's completely credible that opt-in proceedings would be practicable at one market level and not at another market level. So the existence of parallel opt-in and opt-out proceedings is a totally reasonable outcome under Evans. So the Supreme Court was saying in Evans 116, you've got a consumer mass claim. Maybe only opt-out proceedings will do that. But for a more concentrated business-focused claim with large businesses, might be opt in or no collective proceedings at all.

So one can well imagine many industries -- just abstracting away from this case for the sake of being less controversial. I can imagine many industries where you've got a mass consumer claim at the bottom, which is opt-out, but a very concentrated market above it -- just say, for the sake of argument -- where you have opt-in only. Or even the Tribunal says, "Well, hang on, this isn't a collective proceedings case at all. Bring your own damages claim if you want to, if you want to bring claims on the basis of this".

So the existence of Stopford isn't some kind of leg up, as I say, for the PCR. The question that you asked, though, sir, that I want to answer is, "Well, what do you say about the implications for Stopford, if you go for opt-in in this case". You heard Mr Beal say that there might be a six to nine month timing implication for the progress of this case if an opt-in claim was certified. As you know better than anyone, disclosure process is ongoing in Stopford. There are those core common issues as to which there's been agreement and liaison between Stopford and Brook and Kaye, in fact. That process will continue in parallel to any opt-in proceedings in this case.

I would say to the Tribunal that there's actually precedent for this, or for cases catching up in similar circumstances. I'll give you the reference in the authorities bundle. Authorities A, volume 2, page 1184 paragraphs 2 to 6 is a judgment in Rodger.

Now, to give you a bit of context, Rodger v Google is a claim on behalf of app developers against Google. It was issued after a consumer claim in relation to the same value chain. What's happened is that the claim in Rodger has been told to catch up with the claim in Coll, with the consumer level claim. The Rodger claim was issued August 2024. It was certified in May 2025, and it's about to go to trial. The trial is about to start in September. So effectively, Rodger has had to catch up with Coll. There has been a change to the trial date of Coll to accommodate the joining of Rodger, because it happens at a later stage of the proceedings. But you can see there was progress of about in about 18 months from certification all the way through to trial in Rodger. So that is something that the Tribunal's got experience of and that can be done.

THE CHAIR: Right.

UNKNOWN SPEAKER: Rodger was opt-out though.

MS ABRAM: Yes, Rodger was opt-out. It's not the same. I'm sorry. I'm not making the point that it's the same facts pattern in the sense of opt-in versus opt-out, but I'm making the point about different market levels of the same value chain.

THE CHAIR: So sorry, what happens then? Just tell me how the catch up works.

MS ABRAM: So you tell the PCR that it can be certified on an opt-in basis, subject to them sorting the other bits out. The PCR takes there six months or nine months to get the house in order. One comes back here very end of this year, start of next year. Then the proceedings are ready to go on an opt-in basis. But with Stopford having made that progress in the meantime --

THE CHAIR: So your real point is that there's enough for them to be doing in the Stopford case that they won't reach the end of whatever they're doing at the moment?

MS ABRAM: Yes. You've kept us very busy in Stopford, and there's plenty of progress that can still be made. You know, as I say, better than anyone that in Stopford it's suggested that further disclosure will be sought from Google in relation to the common issues beyond the material we've already given.

THE CHAIR: Well, yes, I would expect that to be the same in this case as well. So --

MS ABRAM: Of course, much play is being made in Stopford as well of the extent of cooperation between the Stopford and Brook teams on those issues.

THE CHAIR: Yes.

MS ABRAM: You remember that counsel for Brook came to the Stopford CMC that we had in April. So it's not a question of one just sitting completely on the sidelines. You've made it clear that you wouldn't tolerate that. But, actually, this is a much less extreme version of kind of décollage, I suppose, between the two market levels in terms of the progress of the proceedings than Rodger and Coll, and it's manageable.

THE CHAIR: Okay.

MS ABRAM: Fourth point that's made against me is leveraging effect of opt-out proceedings. So the suggestion is Google's so big proceedings can't have a leveraging effect. We don't accept that is a relevant differentiator compared to the leveraging effect that the Supreme Court identified in Evans.

So in Evans the defendants are global banks like Barclays and JP Morgan. They could still, according to the Supreme Court, feel the effect of the leveraging of opt-out proceedings. Of course, anyway, leverage isn't just a simple question of how big the defendant business is; it's also a question of how significant the claim is that the business is facing.

So this claim is alleged to be worth somewhere between £3 billion and £14 billion. They're huge figures by the standards of any business, and of course it has a leveraging effect. You were shown Ennis on leveraging, but the Tribunal didn't suggest that leveraging could never be a factor in cases against big tech, and rightly so.

THE CHAIR: Just articulate for me, in human terms though, what this leveraging actually is --

MS ABRAM: Yes.

THE CHAIR: -- assuming that it were to be opt-in and the claimants with the big claims, and some of the small ones, did opt in, so that -- I'll pick some random number -- 65 per cent of the value of the claim was opted in. What's the different leverage that they would get from opt-out? Just a claim that's 30 per cent bigger or something?

MS ABRAM: Yes.

THE CHAIR: That's it?

MS ABRAM: Yes, that's it. But of course, given the numbers that are at stake in this kind of case, that's really significant. So if you've got an opt-in claim, you've got a claim by claimants who genuinely want to bring a claim, who are going to receive their share of money. Just for your reference -- I think it's paragraph 90 of Evans, where the Supreme Court describes leveraging in these terms, the idea that you'd be under pressure to pay out a significant sum of money for a claim that doesn't deserve it in circumstances where the class is very, very wide. So the leveraging effect is partly a consequence of the width of the class, the breadth of the class in opt-out, and also the weakness of the claim on Evans, and I say, in this case, the question mark over whether you'd be paying money out that's just never going to reach anyone.

THE CHAIR: Yes. The leverage described there is a weak claim nonetheless has a nuisance value, because the class becomes so big you have to pay more than that.

MS ABRAM: Yes.

THE CHAIR: I appreciate they go on to talk about (inaudible) that does seem to have (inaudible) to do with the leverage of a large number of claims.

MS ABRAM: Yes. It's a different point, but I say it's a parallel point, because both situations are ones where people who are entitled to money are not going to be justly compensated. So if it's a weak claim, there's no real right to compensation, is the point. There's no money substantially in stake. If it's money that's never going to reach the class members, again, there's no money substantially in stake in a sense that the Tribunal is interested in. Because, of course, you're here in order to administer the system by which compensation is delivered to the people who are entitled to it.

THE CHAIR: Yes.

MS ABRAM: You're not here to administer a system in which money is churned to PCRs, to lawyers, to funders without it ever reaching a class. So I say that those same concerns, through a slightly different guise, apply with exactly the same force where there's no proper plan for distribution.

THE CHAIR: Yes. I mean, it's just in paragraph 90 that you refer to -- I don't think (inaudible) to it earlier. The Supreme Court does seem to split out these claims, treat them as a different thing, relevantly different thing, from members who don't come forward to claim.

MS ABRAM: Yes. You're right that that's in the passage of the judgment that is looking at the weakness of the claims.

THE CHAIR: It's a big feature of your argument to make an analogy between a weak claim -- they'll never get the money because it's weak -- and a lack of a distribution plan -- they won't get the money because they won't claim it. I think the Supreme Court is treating them as different things there.

MS ABRAM: May I show you then paragraph 124 again, on page 98. So I didn't show you the first few lines of this paragraph:

"Difficult to see why financial institutions and large entities with substantial claims should be allowed to proceed by way of opt-out collective proceedings. Additional leverage that this would give them can't be justified having regard to their particular circumstances." [as read]

So that's a different presentation of the leveraging worry that those big institutions might be able to put pressure on the defendant to settle claims for more than they're worth and you see that the mischief that that is directed at that paragraph, final sentence that I did show you, is that the small class members won't come forward to collect their share of any award.

THE CHAIR: Yes. (Pause)

MS ABRAM: So final point that I think is made against me is this risk of retaliation and Mr Beal unfairly kind of downgraded that in oral submissions to the risk of jeopardising the relationship with Google. There is no proper evidential basis for this submission on the facts of this case. So the highest that the evidence goes in this case is that some advertisers -- many advertisers perhaps -- feel that they need to buy search advertising through Google.

So there's no suggestion that there's any evidence of Google ever having engaged in retaliatory conduct against any business. The case is different from Ennis v Apple, where there was evidence specifically before the Tribunal, as referred to in paragraph 35 of that judgment, of specific concerns about retaliatory conduct in that context and actually the PCR hasn't even, it seems, gone out to speak to any business to get evidence to say that it's worried about retaliation or that it would regard that as a hindrance to opting in. So you might have a world where there wasn't evidence of actual retaliation having happened, but there was still specific evidence from businesses saying, "Look, I wouldn't opt in, because I'd be worried about the prospect of retaliation", and there's none of that in this case.

Actually, in a recent CMC, a similar argument was run, in a slightly different context. In the Ad Tech claim against Google, it was argued that class members shouldn't be required to give disclosure, because it would put too much pressure on them and the Tribunal dealt with that in short order, effectively dismissed it, said, "Look, that evidence is not based on enquiries or consultation with class members and we're not attaching weight to it". For your note, that's paragraph 98, at A, tab 27, page 1303. So we say retaliation goes nowhere. (Pause)

So that takes me onto distribution. I want to anchor that back to where this fits into the legal test. So I've been focusing so far on distribution in the context of the choice between opt-in and opt-out, but you remember at the beginning I also showed that it's relevant to the cost-benefit analysis, which goes to suitability for certification in that more general sense as well.

There are really three elements to the cost-benefit issue in collective proceedings: there's the benefits, in the sense of alleged claim value; there's the estimated costs of litigating a claim, which obviously includes funders fees, success fees and so on; and then there's the potential real world benefits in the sense of distribution. And what's unusual -- in fact, in my experience, actually unprecedented -- about this case is that we've come to the certification hearing without the PCR actually having addressed any of those three aspects in a way that's compliant with the compulsory expectations that the Tribunal has set down in previous cases. I'm going to show you Waterside on that.

That combination of omissions is all the more striking because not taking into account the costs in Kaye, just taking into account the costs in Brook, the PCR has already spent £6.5 million on litigating these proceedings. It's an extraordinary sum, even by the standards of the costs of litigating these cases, which are often very high.

So let me tell you what we say about benefits, just to tick that box. You've heard from Mr Beal that it's agreed that significant parts of the claim are brought out of time. So it's eight years of the English and Northern Irish Law standalone claim and it's four years, Mr Beal says, of the follow-on claim under English and Northern Irish law. There is a dispute about Scottish Law and you've seen that we're content for that to be resolved at the first CMC.

Mr Beal and I are in agreement that that is going to have a major impact on claim value. We said in our skeleton it was something in the order of a quarter to a half, just based on some really rough sums, cutting the claim period in various ways. Mr Beal says, "Well, it's more like 20 per cent". In a sense it's a question of the order of magnitude, because if this is a £5 billion case, then 20 per cent is a £1 billion point; it's not small change. (Pause)

And that change hasn't been reflected in the PCR's pleaded case. So the pleaded case doesn't reflect the current alleged claim values and the oddity there is that the case comes to the certification hearing with the PCR's position on the benefit side of cost-benefit not being properly articulated because the pleaded case lags behind the acceptance on limitation. So that's not satisfactory.

THE CHAIR: Yes.

MS ABRAM: And just incidentally, while I'm on it, the point also hasn't been picked up in the draft collective proceedings order. So the PCR, I'd submit, can't be asking you to be making the CPO in the form in which there's a draft before the Tribunal, because this point changes the composition of the class and the point hasn't been addressed in the draft CPO. So the class at the minute identifies all UK domiciled advertisers who purchased advertising from Google between 2011 and date x; the open ended date is a separate issue. But the effect of this limitation point should have been reflected in the class definition.

THE CHAIR: Right.

MS ABRAM: Because of course it's common ground now that if you're a UK domiciled advertiser who bought advertising through Google and you've got a claim governed by only English and/or Northern Irish law between 2015 and 2019, you're not in the class. The class definition isn't right either, and it's just a detail, but over the next passage of my submission I'm going to try and build up a picture of numerous respects in which the claim documents before the Tribunal do not meet the requirements.

THE CHAIR: So just to clear up that last point --

MS ABRAM: Yes.

THE CHAIR: -- you say it's detailed because they could just change the class in the (inaudible).

MS ABRAM: They could. It's a drafting point, yes. It's a drafting point, but typically one comes to these hearings saying to the Tribunal, "This is the order that we're inviting you to make, it's big business, it's a big claim, we spend a lot of money on it, here's our work product, please sign it off", and we're not in this world, is the point I'm turning up.

Then on costs: I need to come back to costs in more detail, but I'm going to show you that the cost-budget just doesn't address a number of matters that the Tribunal has said have got to be dealt with at the certification stage; there are problems there too. But distribution is the focus and I want to show you Waterside on that, because that sets out what's now expected of PCRs on distribution and to explain, I'm going to show you the bits of Waterside that are relevant to distribution and also to costs, so that I don't need to come back to that case, because it goes to both bits of the submissions.

So Waterside is at authorities A, volume two, tab 22, and I'd like to pick it up at page 1026. (Pause)

So this is just a bit of background for the Tribunal.

THE CHAIR: What paragraph?

MS ABRAM: Paragraph 18. This is just a bit of background for the Tribunal, just taking it from here because it's handy. I told you, sir, in answer to your question, that in the only case that's so far gone to distribution, there was a take up rate of less than one per cent; this is authority for that.

So you see in Gutmann --

THE CHAIR: Yes, so that was an advertisement, right?

MS ABRAM: So that was case where there was an application form; is that what you mean?

THE CHAIR: The advertised settlement.

MS ABRAM: That's right, the advertised settlement and then class members had to fill in an online form. That's right, or a paper forms available.

THE CHAIR: I'm not saying it matters, but it's different from writing them an individual letter, if that were possible (inaudible).

MS ABRAM: Yes. Well, I don't say it's not possible; I say that we've got the identities of the majority of direct advertisers with us.

THE CHAIR: You say it's not possible for the media agency --

MS ABRAM: Yes, that's right. So this is just where you see that it's less than one per cent, "the award pot £25 million, actual take up about £200,000", so that gives you the figures you need there.

But to skip over to the meat of the judgment, paragraph 26, page 1030 and I show you this in fairness to my learned friend, because he would doubtless want to emphasise paragraph 26:

"We acknowledge that there may be cases where it's self-evident that an effective distribution method may be devised such that it's unnecessary at certification to focus on the details of distribution."

So if it's self-evident that an effective distribution system may be devised, you might not need to focus on that at the certification stage.

But then the key conclusions start on page 1038, paragraph 47. Can I ask the Tribunal to read paragraphs 47 to 49? (Pause)

THE CHAIR: Right.

MS ABRAM: And so I take two things from those paragraphs. The first is the final sentence of paragraph 47. So in cases where an assessment of the evidence indicates that cost-benefit is plainly against continuation, it wouldn't ordinarily be appropriate to certify. So that's point one, that's the overarching principle.

Then at the bottom of 138, second line from the bottom, paragraph 49, on an application for a CPO, the Tribunal is saying:

"It inevitably requires addressing the level of take up of damages awarded by individual class members. The failure of the PCR to address this, while at the same time advancing a cost-budget of over £20 million, means this case is not currently suitable for a CPO." [as read]

So a very clear and trenchant ruling by the Tribunal there.

THE CHAIR: Right.

MS ABRAM: And I'll come back to make my submission on that, but could I just show you the bits of the judgment that are relevant to the cost issues first?

THE CHAIR: Okay, yes.

MS ABRAM: So if you could look at paragraphs 38 and 39. Could I ask you to read those paragraphs, which are relevant to the cost issues.

THE CHAIR: In your skeleton, you say that funding, conflict of interest and class definition (inaudible) fully crystallised, they should be determined now and although they're not an absolute bar to certification, we should do it. But you do say if those are addressed, then you don't object to certification on an opt-in basis.

MS ABRAM: Yes.

THE CHAIR: So this is not a -- you're not running this to the level of no collective at all.

MS ABRAM: No.

THE CHAIR: The take up comes in at the level of deciding whether it's opt-in or opt-out.

MS ABRAM: That's right.

THE CHAIR: It's the structure --

MS ABRAM: In this case, that's the structure. Difference between this case and Salmon is that in Salmon Waterside, the per head award was below about £10 and so opt-in proceedings were for anyone; there were no big claims. So opt-in proceedings were not going to be a runner in Salmon, so that's why the angle is slightly different, but that is the bottom line.

So 38 and 39; can I ask you just to read those? Because you'll need them for the costs point. It's 1035. (Pause)

THE CHAIR: Okay.

MS ABRAM: So take two points from those paragraphs. The first is that it's necessary for the Tribunal at the certification stage to look at the costs spent so far and budgeted for the future, and to determine whether they're reasonable. Second, where there are parallel related proceedings, it's necessary to give serious consideration to how they should be case managed together and to factor that into the cost budget. So that's why, with respect, we submit that these questions about the amount of money that can be saved by cooperation with Stopford are absolutely matters to be considered at this stage, and not matters that could be considered later. You can see --

THE CHAIR: Between opt-in and opt-out?

MS ABRAM: Yes, sorry. That's right, sir. But I also say that the Tribunal couldn't certify even on an opt-in basis until the costs issues are addressed.

THE CHAIR: Okay.

MS ABRAM: So the problems with the cost budget need to be sorted before any certification on any basis.

THE CHAIR: All right. Is that what your skeleton says? Don't worry; you carry on.

MS ABRAM: Yes. So paragraph 4C. So we identified the cost management issues and then at 5B(i), I say, Google won't object to certification an opt-in basis once the issues noted above are identified.

THE CHAIR: That's A?

MS ABRAM: Yes, I'm sorry. That's the wrong cross-reference. So it should be a cross-reference to dealing with the problems at paragraph 4, as opposed to as opposed to A of paragraph 5. I'm sorry about that.

THE CHAIR: Okay. All right.

MS ABRAM: So back to 38 and 39. So the point that I was making about the overlap with the other proceedings -- just to make sure that I've shown you the bits of Waterside that that relates to -- you see at the bottom of page 135, very final line:

"It's incumbent upon a class representative and their legal advisers actively to address these matters ... look for the most cost-efficient manner of pursuing this litigation. This has not been done." [as read]

You can see that the Tribunal is unhappy with counsel for the PCR, whoever she may have been in that case.

Then at paragraph 40, just to give you a metric of the context in which those concerns were expressed, you see that the litigation costs are identified in that case in the order of 20 million. So you've got the 15 million cost budget, plus the cost of ATE insurance of about 5 million. So we're talking about 20 million.

There then I also draw your attention to paragraph 41. Second to fourth lines, you see the Tribunal says:

"It's explained that costs spent leading up to this point [so that's certification] approximately 25 per cent less than had been budgeted. [So about £2.5 million.] We still consider these to be high." [as read]

You've already seen that at paragraph 38. The Tribunal has described those costs as "inexplicably high". That's costs of 2.5 million, and here we've got costs nearly three times that level, and this was a matter of key concern to the Tribunal at the certification stage.

Another aspect of paragraph 41. You see, picking up on the fourth line:

"In the same letter and following direct questions from the Tribunal, the PCR provided further information on success and other contingent fees, which hadn't been detailed in our cost budget." [as read]

You see, a few lines lower down, that relates to fees, including contingent ATE premia.

Then the Tribunal says, at the end of 41:

"These sums only came to light following questions from this Tribunal at the certification hearing. It was wrong and potentially misleading not to present these contingent sums, alongside other legal costs, on the application for certification." [as read]

So not my best day in the office. But, on the other hand, it does show that the Tribunal does expect these contingent costs to be identified at the certification stage.

Then, final aspect of this judgment which, as I say, is just the centre of what's now required of PCRs in the context of certification on costs and distribution is paragraph 54. That's page 1040. You see in these proposed collective proceedings,

Ms Heal, who's the PCR there, is charging £300 an hour for her services.
Skip down to the bottom of the paragraph:
"A charge of £300 an hour vastly exceeds the remuneration that would ordinarily be expected for a person engaged in public service." [as read]
Over the page on paragraph 55, final sentence of 55:
"Ordinarily, we would expect the remuneration of a class representative to be in line with levels of remuneration received for work in the public sector." [as read]
So that, again, is the test that we're going to be applying.
Now, I'm conscious of the time. I wonder if that might be a good moment for the shorthand break, and then I'll make my submissions on those points.
THE CHAIR: I'm going to go on a little bit late to maximise the chance of finishing today. We think we should finish today (inaudible) past the normal ending time to make sure that we do.
MS ABRAM: I'm grateful.
(3.12 pm)
(A short break)
(3.22 pm)
THE CHAIR: Yes.
MS ABRAM: So just to pick up two points from before the short break.
On the skeleton, the cross-references in the skeleton. The skeleton is right; I got it wrong on my feet. So paragraph 4, opening words:
"Google defers to the Tribunal as to whether the application could properly be considered, whether it should be determined once the PCR has addressed the outstanding matters." [as read]
The outstanding matters are X, Y, Z, including costs. So we have identified that as a matter that we say needs to be addressed now.

THE CHAIR: Right. Okay.

MS ABRAM: The second point goes to the question that Mr Davies asked me about the Matthew table. I think I didn't get the answer to that quite right, then I came back to it later in response to you.

You asked me whether those numbers might include some media agencies, so aggregated claims. The answer to that, we think, is no, in the sense that we think that every unit within the 880,000 will be a different advertiser. The reason for that is that it's Google policy that where advertising is bought through a media agency, the media agency has to have different accounts for every advertiser. So we think that we will have, if a media agency has 100 clients, 100 lines, which will count as different accounts for that media agency. So we think that they're not presented at a level of aggregation in the table.

What we don't know, as I said in response, I think, to a question from you, is whether the parent ID field actually tells you the name of the advertiser that lies underneath the media agency or just has a code for each advertiser. I hope that's clear now.

THE CHAIR: Right. But they are unique, those IDs.

MS ABRAM: Yes. Yes. They are, which is, yes -- great.

THE CHAIR: Thank you, yes.

MS ABRAM: So, we were on Waterside. I've just shown you bits on costs, but I want to go back to distribution first to finish off that point.

So the first point to make about the distribution proposals is that, contrary to paragraph 49 of Waterside, there has been no attempt by the PCR in this case to engage with how much, if any, award would actually reach the class members. You've seen what happened in Gutmann, where there was less than 1 per cent effective distribution. The Tribunal referred to that in Waterside, and said, "Look, this is something that a PCR has got to address". It's for the PCR to persuade the Tribunal that it and its claims administrators would do better in this case than they did in Gutmann, in which the claims administrator was also Epiq. So if anyone's well placed to explain why they can do a better job here than it should be Epiq itself.

I just want to illustrate the point with some figures as to why it actually matters, because one could say, "Well, this is such a big high value claim that if the claim succeeds, even a low level of distribution would surely be okay". But we say not so.

Imagine, just for the sake of the argument, that the claim is worth £5 billion. That's the central figure that we've been talking about. We know it's not, because of the limitation point, but just imagine, £5 billion. Imagine they win on every single issue at trial and they get an award of £5 billion, and then take up is the same as it was in Gutmann. That would mean return to the class of £50 million. You've seen from my learned friend's submissions this morning, that would be less than the raw costs of bringing the case, even before you take into account any profit element for the funder or for counsel.

So £40 million cost budget, £30 million ATE, must reflect the expected costs on the Google side. So the level of return has got to be better than the one example the Tribunal's got so far in order for the case to wash its own face, even if they won on every issue. They haven't done that.

Now, I sense from a question that you asked me before the break that you might think, "Well, take up could be driven higher, if class members were contacted with an email, rather than just seeing an advert on the Tube", as happened in Gutmann. I, respectfully of course, understand where the Tribunal is coming from, but it's for the PCR to say how much higher, what it expects the level of distribution to be, why it thinks that its proposals will be more effective. These are points that the Tribunal has said the PCR has got to address, and it's just not done it. That just wasn't acknowledged, either in the skeleton or this morning. It's not consistent with

Waterside. That's the first kind of manifestation --

THE CHAIR: So what would that look like? Evidence like that. I mean they'd be doing it -- fresh ground, I mean.

MS ABRAM: It's fresh ground here, sir, but it's not fresh ground in the world. So England is a latecomer to collective claims and claims administrators like Epiq and others are available as well and have great experience in other jurisdictions in the US, in Australia, in Canada and other jurisdictions too of distributing class awards.

It's true that often levels of distribution are low, sometimes woefully low. I mean, sometimes they make the distribution level in Gutmann look good. That's why these points, the Tribunal said, it's got to be raised at this stage, because there's no point spending all this public money, having all this Court time devoted to cases where no money will actually get to the people that it's meant to be helping. On the other hand, lawyers and funders might do very well out of these cases.

THE CHAIR: Okay.

MS ABRAM: So that's on level of take up. Then on the detail of the distribution proposals. I mean, I've teed up my submissions on this by saying that what they're proposing on the media agencies in terms of distribution, as opposed to notification, is paying the money to the media agencies.

What I also need to tell you is that that proposal for billions on their case of award to be paid to numerous media agencies finds no support at all in the materials from Epiq. It's actually not mentioned at all in Epic's evidence. What Epiq says, much like Google, is, "Look, the media agencies should be able to help in identifying the advertisers who bought advertising through them so that those advertisers can then be encouraged to fill in an application form". So the sort of email that you've got in mind. Then, of course, we're in the application form world, which we were in in Gutmann, take up level of less than 1 per cent. Why is this case going to be any better?

So the distribution proposals advanced by the PCR don't match up with the material from Epiq, from the claims administrator.

What is also missing is any suggestion that the PCR has done any groundwork about this. So, for example, the PCR could have come to this hearing saying, "Well, look, I recognise this is all very new, but I've spoken to the ten biggest media agencies, and this is how we propose to do this bit of distribution". Absolutely nothing, not even any suggestion that they've tried to contact those media agencies.

Now, Mr Beal's said, as to why media agencies could be relied on for this task, that they would be likely to want to do the right thing. But, in my submission, that's just not good enough where you're talking about an award on the PCR's case of potentially billions of pounds for media agencies. There is no legal basis -- the starting point -- to foist an obligation like that on non-parties to a case. Media agencies aren't parties. There's no way they'd ever become parties. How on earth could the Tribunal require them to distribute an award in this way?

If one thinks about it in a legal sense, presumably they would be holding all of this money, effectively, as involuntary bare trustees, subject to fiduciary obligations to account for the money to the people who are actually owed it on this hypothesis. There's no legal basis for that arrangement, my Lord. There's absolutely no precedent for it. That's certain. There's no legal framework for it.

Even if it were legally possible, if one could find a legal framework -- it's for the PCR to do it, not me -- it would be a hugely time-consuming task for these media agencies, because one's talking -- you can see from the claim numbers -- about many, many thousands of class members. How's that going to work? How are they going to be required, or encouraged, to put the time necessary to making sure that the right amount of money gets to the right places -- potentially hundreds of thousands of class members.

What there also isn't is any proposal about how Epiq or the PCR or the Tribunal could exercise any kind of control or oversight over that process, which is all made exponentially more complicated because, of course, you're not just dealing with one media agency, you're dealing with many, many media agencies who may have different approaches, different structures, different views. It's a nonstarter is my submission, and it's not marginal. On the PCR's case this is 70 to 90 per cent of the claim value.

THE CHAIR: Yes. I think that's not in dispute.

MS ABRAM: Yes.

MR DAVIES: It might end up being a question for Mr Beal rather than you, but I mean what actually is the expectation for how any award would involve these media agencies? Are we talking about giving them the money and then getting them to distribute it, or are we just talking about trying to get information from them about to whom the money should be distributed, presumably by the class representative.

MS ABRAM: Mr Beal made both points, but ultimately the only distribution proposal that was advanced by the PCR was that there would be payments to the media agencies. In Epiq, they do talk about the media agencies providing information that we'd contact that would then enable an application form to be filled out. I'll give you the reference for that, I've got it.

MR BEAL: If my learned friend would also give me the reference for the prior proposition that the PCR has nailed its colours to the mast of distribution directly to the media agencies of sums held in trust?

MS ABRAM: I'll give both of those references. So the Epiq note on this -- let's have a look at it together -- is bundle C, tab 35, page 350. So paragraph 10 is the paragraph on media agencies. (Pause)

MR BEAL: If the Tribunal's reading paragraph 10, would you be kind enough to read paragraph 11 so we can come back to it.

MS ABRAM: Yes. Of course on paragraph 11 we don't have those records for advertisers who bought through media agencies. So that's a point that may obtain in relation to direct purchases, but not in relation to advertisers who bought through media agencies, which doubtless is why paragraph 10 is there to say use the contact details.

Then I think Mr Beal also wanted me to help him out with some references to his case on where he's suggested giving money via the media agencies. I'll give you a couple of references to that. One is paragraph 37.3 of the skeleton. So page 12 of the PCR skeleton. So halfway through that paragraph you see:

"Insofar as Google cannot make payments or give credits directly to advertisers because it only interacts with them via media agencies, Google can make the payments or give the credits to the agencies."

Then:

"... the Brook PCR will be able to liaise with the agencies to affect onward distribution."

That's the sum total of the proposal. This wasn't new in the skeleton. I'm not suggesting it was new in the skeleton. It did come out in the reply as well. So it's in paragraph 37. So that's A, tab 8, page 246. I think the skeleton is just copied and pasted from that bit of the reply you see from the third line. (Pause)

So that's where that proposal is and that's the sum total of the proposal in relation to the media agencies. That's all there is. And you've seen from Waterside the Tribunal has been very clear about its expectations, and that is just not good enough.

Now, there's also the question of direct credits to direct advertisers as well. My learned friend kindly took you to the letter where we set out the issues that we say arise with that. You don't need to decide today, for practical purposes, whether or not that direct credit mechanism would work for that 10 per cent to 30 per cent of the value of the claim, because the problem with the other 90 per cent is a showstopper by itself; it means that there is no effective distribution proposal for up to 90 per cent of the claim value. So the kind of complaints about the timing of our response to the questions about direct distribution to direct advertisers are really just an attempt to distract from that lack of a proposal on the 90 per cent.

THE CHAIR: I get your point. The ability to do that for 10 per cent is nothing to do with it if indeed the media agencies are the problem. I was just looking at the Epiq note at paragraph 8.

MS ABRAM: Yes.

THE CHAIR: "It's a level and transactional data held by Google enable direct ... highly effective and high level of uptake than broader public facing campaigns and unlike consumer class actions Google's got an ongoing relationship." [as read]

So I mean that's not at all quantitative or detailed, but they are saying that they think it's different from (inaudible) type situations.

MS ABRAM: Yes. That they could do better than 0.9 per cent here is what they're saying.

THE CHAIR: Yes.

MS ABRAM: But I'm not especially making a submission against Epiq in particular, but claim administrators have got significant -- the point of them is that they've got significant experience in distributing awards, and they are required by the Tribunal to know how effective they will be distributing any particular awards by any particular mechanism. The expectation goes further than "We'll do better than we did in the one case so far" where the one case so far was so wholly unsatisfactory that, frankly, that's what's given rise to the Tribunal saying, "Come on, you've got to try harder to say what the prospect of distribution is at the certification stage".

THE CHAIR: Yes. But if in fact Google would be able to find out who the individual customers were through the codes -- at the moment you just don't know -- then you've got a situation where both the PCR and Google, at the stage when the PCRs prevailed, assuming they have -- but that's the hypothesis now -- they both know who the money ought to go to individually if in fact the code does allow that. That sounds like a not unpromising scenario; distributing the money. I appreciate you saying that you can't actually send the money to their bank account.

MS ABRAM: Yes, that is what we say and we say that then gives rise to two questions. First if, or to the extent that's possible, that's an argument in favour of opt-in certification, because if class members are going to be sufficiently interested to take up their share of the award, why shouldn't they, by equal token, also be sufficiently interested to opt in?

THE CHAIR: We discussed this earlier.

MS ABRAM: I'm sorry, I'm -- and the second point is that although the best that you and I can do is to say, "Well, perhaps that's a promising start" or perhaps "that's not a promising start", that's not the same thing as having actually worked through distribution proposals before the Tribunal with evidence about what one expects uptake to be so that the Tribunal can actually, in an informed way, do the cost benefit analysis that 79(2) requires.

THE CHAIR: But a key bit of factual input to making this assessment would be: can Google in fact work out who its customers are through the burden of the media agencies?

MS ABRAM: Yes.

THE CHAIR: And the class representative could never have found that out; only Google knows that at the moment.

MS ABRAM: Yes. So just to finish off on distribution -- and there were some new points that were made this morning for the first time by my learned friend. There was a proposal for a roll-back mechanism and there was also a proposal -- which I don't know whether it was the same or different -- that there could be a refund or direct credit mechanism applied to existing customers rather than trying to compensate the true class.

Those were proposals that have never been mentioned in this case before. They were raised for the first time on my learned friend's feet. That is not an appropriate basis for a distribution plan before the Tribunal; it's not satisfactory. It doesn't take us anywhere. We haven't had a chance to consider it.

THE CHAIR: That just came out of a dictum of Lord Justice Green.

MS ABRAM: I think it just -- yes.

MR BEAL: I'm very sorry. It's cited in our reply. We cited a study by Dr Mulheron, who sits as a member --

THE CHAIR: Oh, yes, you mentioned that.

MR BEAL: And it's in a footnote in the reply. It's simply not right to say I didn't trail this.

MS ABRAM: I'd be really grateful for that footnote reference.

THE CHAIR: Okay.

MS ABRAM: So then to move on to beyond the distribution to tie that back up to the cases that were relied on by my learned friend, because you didn't see Evans, but you did see four other cases on certification. You saw Hammond. Now, Hammond is a case from July 2025. It was argued and decided before Evans. So it's not going to take you anywhere. That's ancient history with the greatest respect to Mr Justice Roth. It's not in the current legal world.

Stasi. It's also important to remember that the hearing in Stasi took place before judgment had been given in Evans and actually before either the hearing or the judgment in Waterside. For the Tribunal's information --

THE CHAIR: So Stasi, the hearing was before the judgment in Evans.

MS ABRAM: In Evans. And before both the hearing and the judgment in Waterside. So it kind of bridged the two eras. Just for your information, Microsoft are seeking permission to appeal against that judgment. So whether it will remain in place long-term is open to question.

But if we just assume for now that it does remain undisturbed on appeal. The central two points in this case didn't arise in Stasi. So, the first point was that, as Mr Beal showed you, Microsoft was arguing for hybrid certification in that case. So you'd have larger claims on an opt-in basis; smaller claims on an opt-out basis. So at the time of the hearing the Tribunal just didn't hear arguments in the same way that you have about the practicability of an opt-in claim for the whole of the class, and the balancing of justice -- the balance of the interests of justice point -- just wasn't raised in the same way in Stasi, perhaps because of the timing with which that case was argued. Instead, the focus was: should the class be divided in two, which is quite different.

The second point about Stasi is that there was no challenge in that case at all to the PCR's distribution proposals. Perhaps that's because it predated Waterside ; I don't know. I don't know anything about the facts of that case. But there seemed to be no debate about whether if the claim was sufficiently strong to meet that limb of Evans you could actually be confident that any award would reach the class. So that point, which is obviously central here, just didn't arise in Stasi.

There was then Rodger and Ennis which are a kind of pair of cases, because they're both cases in long established collective proceedings in which a defendant has sought decertification, as opposed to a case where this has been considered fresh at the certification stages as this Tribunal has the pleasure of doing. That makes the context very different.

So in Rodger, the application for de-certification was heard less than four months before the start of the trial and it was an application for re-certification on a hybrid basis, so a withdrawal of opt-out certification and re-certification on hybrid basis and the Tribunal held that it wasn't satisfied that the basis of certification could be changed without a real risk of completely derailing the trial; that was the critical point there and that's paragraph 30.

It was worried that you couldn't obtain the opt-ins in the time available for the trial, so four months. It's consistent with Mr Beal's suggestion that it might take six to nine months here.

It was worried that the change could lead to a collapse in the funding arrangements. The parties were under intense pressure preparing for a trial. It was a completely different paradigm in Rodger; it's just not comparable.

And then you've got Ennis; Ennis is similar to Rodger, in that it's an application for de-certification of ongoing proceedings. The trial wasn't as close, but the Tribunal was concerned that de-certification three years into proceedings after the disclosure of 1.7 million documents could derail the whole claim and there was actually evidence in that case from the funder that they wouldn't support opt-in proceedings, which of course you don't have here. So again, the context in Ennis is quite different and that's paragraph 86 of Ennis at page 1348. (Pause)

So those factors are quite different, but the substantive reasoning of Ennis is also quite different from this case and it might just be helpful to show you that. That is at authorities A, tab 28, and if we pick it up at page 1346. (Pause)

So you see 1346, 84.1. (Pause)

THE CHAIR: Right.

MS ABRAM: You see the Tribunal says, "The claims are relatively, even unusually, strong".

THE CHAIR: Right.

MS ABRAM: And the reason that they're saying that, just to give you the context, is that Ennis is a parallel claim to Kent v Apple, and Kent v Apple is the only collective case ever to have succeeded so far at trial in this jurisdiction. So Ennis has claimed excessive pricing against Apple in the context of apps and Kent is the consumer level claim and Ennis is the next level above from app developers. So it's in that context, the Tribunal saying it's a relatively or unusually strong case.

And then you can see how that filters into the conclusions. If you look at 84.5, so 1348, so my learned friend showed you this bit, but second half of 84.5 you see:

"Nor is this a case such as that postulated in Evans at 124 [so my favourite paragraph of Evans] where the larger operators are being given an unfair litigation advantage by bundling their claim with smaller entities which are unlikely to come forward to claim a share of any award." [as read]

Well, this case is quite different from that, in that respect.

And then:

"Rather, it's a case where certification of the class as a whole secures access to justice for the numerically large cohort of claimants with viable and serious claims which could not proceed in any other way." [as read]

And you've heard my submissions about how different this case is, in terms of whether it would actually secure access to justice.

THE CHAIR: What do you mean, because of distribution?

MS ABRAM: Because of distribution, yes.

So that's what I wanted to say about distribution. I need to say some things about costs and about funding now.

So cost budget: there are four problems with the PCRs and cost budget.

THE CHAIR: Yes.

MS ABRAM: One overarching and then three specific. So start with the overarching point, which is the overall quantum of costs.

So I showed you that, in Waterside, cost to the certification stage of just under £2.5 million were described as "inexplicably high". In this case, I've already told you costs so far are £6.4 million.

THE CHAIR: (inaudible) track of whether that includes carriage or not.

MS ABRAM: I think it does include carriage, but of course the carriage dispute costs -- sorry, carriage dispute costs; one knows what they are. They're in the order of 1 and a bit odd million, so we're still looking way, way -- yes, still an awful lot of money.

The explanation isn't the different complexity of cases. Waterside is a claim against five defendant groups relating to a seven-year alleged cartel, no prior regulatory decisions -- so we had to start from scratch in that case -- and this case, as you've heard, is partly follow-on, lots of documents in the public domain, benefit of documents available from Stopford that have been referred to at public hearings and despite that, there is no good explanation for how this much money has been spent and it's a particular concern, because my learned friend showed you that the LFA envisages that the Tribunal would order costs to be paid before the class gets anything at all.

So you heard from my learned friend that there are two ways of structuring LFAs in these cases: either awards of costs come out of undistributed damages, so after the class has got first pick at the pot; or there's provision for funds -- sorry, for costs and fees to come out before the class gets anything and my learned friend is absolutely right that the Court of Appeals held that there's nothing per se unlawful about provision for the costs and the fees to come out first; it's a question of whether it's reasonable in any individual case. So that's not a point I'm making, but I do say that a combination of that provision and the eye-watering costs that have been incurred do call for an explanation of whether the case is being litigated economically and efficiently by the

PCR's legal team and whether the PCR is trying as hard as is obligatory to control costs appropriately in the interests of the class. How have the costs got so high? And it's frankly -- it's not obvious that the PCR is taking this at all seriously.

So in the response, we specifically referred to these costs as "shockingly high" and the PCR has made no effort to explain how it got to £6 million, either in its reply or in its skeleton argument, despite Waterside having said £2.5 million at this stage is too high.

THE CHAIR: Okay.

MS ABRAM: That's point one.

Point two is hourly rate: my learned friend said that the hourly rate is £250 plus expenses; that's absolutely right. You also need to know that the hourly rates of the advisory panel range from £175 an hour to £1,000 an hour. So two panel members are on £500 an hour and two -- Mr Kaye and Ms Prevezer -- are on £1,000 an hour and those rates are enormously out of kilter with the Tribunal's indication in Waterside that a CR should be earning rates of remuneration that are in line with public sector payments. That wasn't a point that was expressly made in Waterside, in relation to advisory panel members, just related to the CR, but the point applies with exactly the same force. In either context, it's a role of public service, so there's no reason at all why CR should be held to public sector rates of remuneration and not advisory panel members and actually that points out with particular force in this case where Mr Kaye used to be a PCR.

THE CHAIR: I get that point.

MS ABRAM: It would be extraordinary for him to be able to earn so much more.

THE CHAIR: (inaudible), go out to members of the Bar who would otherwise be perfectly qualified and say, "I've got to do this at public service rates because ..."

MS ABRAM: Yes, it's a public sector -- public service role.

THE CHAIR: I understand that with PCR -- I mean, they may make that decision for different reasons, but you're hiring external expertise (inaudible) advisory panel. I'm not saying that £1,000 an hour is justifiable, but I mean, are you really going to be able to get people to serve on those boards as external advisors at whatever it is?

MS ABRAM: Well --

THE CHAIR: What the district judge gets; I mean, that just doesn't seem realistic.

MS ABRAM: There's been no suggestion that that wouldn't be possible and to be fair this is the first case in which this square point has come up, but the suggestion hasn't been made that wouldn't be possible.

I should perhaps tell the Tribunal, in case you're not aware: there's no judgment yet, the transcript also isn't available, but this same point also came up in another case I did last week, CPO case for Apple, in Le Patourel v Apple and Amazon, in front of the President of the Tribunal. Le Patourel's hourly rate in that case is £200, so less than Dr Brook here and the President of the Tribunal expressed the same concerns there as the Tribunal did in Waterside and their provisional view seemed to be that an appropriate rate of remuneration for a PCR was £50 to £100. That was not a firm expressed view: it was a preliminary view, was expressed in the context of a hearing, I'm not saying it's a final ruling, but I just thought it was important to draw that to the Tribunal's attention as well. If we may, when we get the public version of the transcript, we will send it to the Tribunal showing you the relevant --

THE CHAIR: So just help me with how this works: if some claim comes along -- not necessarily this one -- where there's been an agreement with the PCR that they're going to get (inaudible) pounds an hour, and we say that's too high, what do you do? The sanction is you just don't -- that in itself, you refuse certification, or is it a symptom of a broader problem?

MS ABRAM: Yes.

THE CHAIR: I can't be, can it -- or can it be -- that a carefully put together set of procedures like this just gets non-certified because the PCR is getting paid too much?

MS ABRAM: Yes, let me show you how it fits into the Rules, into the test --

THE CHAIR: Is that the result?

MS ABRAM: That can be --

THE CHAIR: (inaudible) certification just purely because the PCR is getting paid too much.

MS ABRAM: That can be the outcome. So there are two options.

Either you say: your concerns about this such that you haven't been persuaded, that the PCR is acting fairly and adequately in the interests of the class and therefore in this case doesn't meet the certification condition and that was part of the reason in Waterside why certification was refused.

Or there is actually provision in rule 77(2) for certification to be made subject to conditions. So in an appropriate case, the Tribunal might say, "Look, we would be minded to certify if you sort it out X, Y and Z.

THE CHAIR: Right, okay. (Pause)

MS ABRAM: So that's remuneration.

Third point is interaction with Stopford. So of course we're the first to acknowledge that there are divergent interests on pass-on, so of course we accept that that bit of the case will have to be litigated separately, but there is identity of interest on issues of liability. In fact, in the reply, the PCR quite rightly describes the two cases as in essence the same -- that's paragraph 343 -- and they're clearly right about that and there's no meaningful proposal for joint case management in just the same way that the Tribunal criticised in Waterside, where there are those parallel retailer claims that I mentioned earlier.

For example, there's no good reason why it wouldn't be possible to have a single trial of liability issues with a single team, jointly instructed, of counsel, of solicitors, of experts acting for both Brook and Stopford.

The point that's made against that is, "Well, what happens if one of Brook and Stopford settles, but not the other?" They're left high and dry. Well, not so, because if you've got a single team that's jointly instructed, then they can carry on with only one side of the instruction, if necessary.

This long passage in Mr Teague's witness statement that makes, with respect, these vague and non-committal remarks about cooperation, saving 5 to 7 per cent of the cost budget, maybe having two experts doing a joint report; it's just not good enough. It's not what the Tribunal expects. We've seen that in --

THE CHAIR: I mean, we agree with that, provisionally. The level of economy identified so far is much, much too low. But it does -- it is going to involve the Tribunal making an order at some point to make that stick. I mean this -- Brook PCR can't just say, "Right, we're going to do all of the case and Stopford won't do any. So our costs are fine and theirs have to come right down", or vice versa. An order has to be made, doesn't it?

MS ABRAM: Yes. What the Tribunal has posed as a challenge to me, as the class rep team in Waterside, is to produce another version of a cost budget that makes assumptions as to meaningful cooperation with the retailer claim, and that shows more meaningful cost savings on the basis those assumptions.

Of course, it's going to be subject to assumptions as to what order the Tribunal makes. But there's no reason why that shouldn't be capable of being done.

THE CHAIR: Right.

MS ABRAM: So, for example, assuming that single trial on liability with jointly instructors, counsel, solicitors, experts.

THE CHAIR: Right, okay. You know, fairly obvious, there should be contractual agreement that if they share an expert and one of them settles the party who's left behind gets to use the expert. That happens in lots, in various kinds of litigation.

MS ABRAM: It does, yes.

THE CHAIR: Right, okay.

MS ABRAM: Then final point on costs is the unredacted ATE schedule. I showed you that wrong and potentially misleading line as to non-provision, withholding of details of contingent ATE premia in Waterside.

The logic of the Tribunal there was, obviously, that it's relevant for the Tribunal, when you're assessing costs and benefits, to know the full amount that it's going to cost to bring the case to trial and contingent premia are a part of that picture, because if the claim succeeds then they will fall payable. That information hasn't been provided here. Mr Beal said about that, "Well, Google didn't ask for that information in Coll". Well, that may be true, but that was before Waterside, which ruled that it was wrong and potentially misleading for that information not to be provided. It's also true that in Kent the Tribunal said that it wasn't necessary for the PCR to provide that information. The difference there was that it was before Waterside, which, as I've said, was really influenced by the failure of distribution in Gutmann and the Tribunal taking a new view, also in the light of evidence, and saying, "Hang on, I've got to shake up these cases and just work out whether they're really delivering benefit to the classes that they're meant to be in the interest of". Part of that is really understanding the costs, the benefits, and the distribution.

THE CHAIR: I mean, I think Mr Beal's position is it's quasi privileged and, if they're entitled to withhold it, they'll withhold it.

MS ABRAM: Yes.

THE CHAIR: We say they're not, and I think they won't. So do we not just rule on whether strange sort of quasi privilege (inaudible) privilege, but it betrays your thinking on some (inaudible).

MS ABRAM: Yes.

THE CHAIR: If we rule that that doesn't hold, then they'll have to tell you.

MS ABRAM: They will. They absolutely will.

THE CHAIR: It's not the same. I'm just testing, really, whether it's the same as withholding information in a devious kind of way, or just making a claim to be entitled to withhold it, which may be right or wrong.

MS ABRAM: We are absolutely not suggesting that it's withholding in a devious kind of way.

THE CHAIR: So it's just they assert that we ought not to compel them. But if we do, they will.

MS ABRAM: Yes, that's right. To be fair to the PCR, for all the things I'm criticising them for, when they withheld this information, it was before Waterside that said that they were obliged to produce it. This isn't a point on which I'm --

THE CHAIR: They've withheld it in plain sight, as it were.

MS ABRAM: Quite right. Yes, quite right. It's just that they're now obliged to give it up, and so we say, please, have it.

THE CHAIR: If we rule that they have to, then no doubt they will.

MS ABRAM: That's it.

THE CHAIR: So it doesn't really go anywhere, does it? Because if we say they've got a valid claim to withhold it, they've got a valid claim, and if they haven't, then they're going to have to tell you. So I just don't see that it's really going to enter in the scales.

MS ABRAM: Well, subject to point though, sir, because the reason that contingent premia are relevant is that they're relevant to the cost benefit analysis. So they're relevant when you take into account, when you weigh how much the claim is going to cost against how much the class is going to get. So -- I'm not sure I'm disagreeing with you about that.

THE CHAIR: No, I can understand why it's relevant. But it wouldn't have been irrelevant in those cases where it's been said that they don't have to reveal it because it discloses what your view of the merits is.

MS ABRAM: Yes, that's fair. And the sea change is Evans and Waterside, because of the changes in the way that the Tribunal perceives the importance of understanding costs and benefits.

So funding is the final point, which I need to turn to briefly, because I'm conscious that there are two other short points as well. We object to various features of the funding arrangements. As you've seen, we say that some of the issues we've identified -- correct though we think they are -- can await the end of the proceedings.

The problems that we've got that need determination now relate to the resolution of the carriage dispute with Mr Kaye. Frankly, one of the reasons for that is that we regret that we're unlikely to have the same Tribunal for too much longer, and we think that it's important that these points should be determined by the Tribunal that heard the carriage dispute. So that's one of our reasons for pushing that forward now.

It might be helpful just to show you the Tribunal's judgment in Riefa, because that shows why this matters to the legal analysis. So it's authorities A. It's tab 13. If you just start at page 627.

So without at all wanting to teach the Tribunal to suck eggs, I just thought it might be helpful to identify that there's a passage starting at paragraph 23, which goes through the relevant authorities on funding at the certification stage, which is helpful.

But it's paragraph 29 that I wanted to draw your attention to, on page 628. So a quote from Gormsen v Meta, paragraph 34, so talking about funding at the certification stage:

"We accept entirely that funding gives rise to at least two issues in relation to which the Tribunal must exercise great care:

"1) First, the question of whether a funder is taking more from the class than they should." [as read]

Second point is not relevant for this case.

So if you go over to 35 on 629. In fairness, I should point out that the Tribunal says:

"Both of these points rise against a context of commercial and largely confidential negotiation into which the Tribunal should be slow to venture". [as read]

But then, 36:

"There do come points where funding arrangements contain provisions that are sufficiently extreme to warrant calling out, or in extremis a blanket refusal to certify." [as read]

So that's how the legal framework works. A passage later on illustrates why this mattered in Riefa. So at page 653 of the bundle, paragraph 106:

"In order to meet the authorisation condition, the PCR must demonstrate that it has a clear view of the interests of the class and can engage robustly and independently with advice. In order to do so, it must at the very least have a good understanding of a) the effects of the terms and b) the overall context in which it's being advised, including the position of its legal advisers and the risks of any conflicts of interest." [as read]

And you see that Professor Riefa was found not to be a suitable class rep because of concerns of that nature.

Now, if I could also show you the leading authority on the recovery of costs of carriage disputes, which is the previous tab, tab 12, page 614, and ask you to read paragraphs 22 and 23. (Pause)

So ordinarily appropriate order on the costs of a carriage dispute is no order as to costs.

THE CHAIR: As between the parties (overspeaking) --
MS ABRAM: As between the -- yes. Although there may be exceptions as between the parties.
Tribunal's got major reservations about carriage disputes leading to costs orders that burden the class rep or the class or the defendant. Class reps are encouraged to resolve carriage disputes consensually, but there's no suggestion that a consensual resolution would change the appropriate approach to the costs of resolution of carriage disputes.
So it might be helpful just to imagine what would have happened in terms of costs if there hadn't been a consensual resolution as between Brook and Kaye. If we just imagine that Brook had won, since that's the class rep that we've still got. Likely outcome would be that the funders in each of Brook and Kaye would have borne their own costs, or possibly you might have ordered Kaye to pay Brook's costs. There wouldn't have been an adverse Court order against Google, because we took no part in the carriage dispute, and there's no way in which the class would ever have borne Kaye's costs of the carriage dispute, still less a funder's fee on Kaye's costs of the carriage dispute, if Brook had won. Just taking that as an example.
But what's ended up happening instead is that the Tribunal is now being asked to approve funding arrangements that involve both Brook and Kaye's carriage costs being counted towards the total investment amount -- so potentially recoverable -- plus the funder's fee on both of those sums, up to six times those sums. Not even just that. Also, the success fees on Kaye's counsel for the carriage dispute, and also the contingent premia, under the Kaye ATE arrangements so far.
All of those are wrapped into the costs arrangements, the funding arrangements, under the consensual resolution of the carriage dispute. All of them, the class is potentially on the hook for, before they receive any share of the award. As I say, I'm

not saying that's per se unlawful, but it does give rise to questions about whether the PCR is acting fairly and adequately in the interests of the class in agreeing to those arrangements. Because in terms of costs on their own, they are much more disadvantageous to the class than an outcome would have been on the outside option, which is just letting the carriage dispute go to a resolution.

THE CHAIR: Sorry, just say that part again.

MS ABRAM: So the outside option for the PCR, instead of consensual resolution is either to say, "Well, let Mr Justice Meade decide the carriage dispute", in which case the costs arrangements will be as I described a moment ago. So that is the class is not on the hook for the loser's costs, at the very least. Or to say, "Well, I'm not agreeing to a consensual resolution on those terms. You're going to have to do a lot better on costs, or I'm going to let Mr Justice Meade decide and decide on carriage".

The class has ended up doing a lot worse on costs as a result of the consensual resolution that's been entered into. So how is that justified? Because if there's an upside to it, perhaps that's okay. Perhaps that justifies what the PCR did. Well, the explanation we've been given is Dr Brook thought that the Brook claim was better, that Geradin has a lot of experience, and that it would be helpful also to have the additional resource from KP Law and from Kaye's counsel team.

Well, fair enough, except, again, if one imagines the outside option, doubtless if the Brook claim was the better, was the preferable one, that's what you would have decided would have spared the class the cost consequences. If further resource was required that could have been obtained in the market without paying or without the class bearing all of these costs of the Kaye proceedings. So it all seems to be downside for the class.

Dr Brook also says that she relied heavily on input from Burford in making that decision. Burford is almost the worst person to rely on in that context, not because of any criticism of Burford personally, but because there's a plain conflict of interests for Burford in advising the PCR on the way to deal with the funding issues on a resolution of the carriage dispute. Because it's obviously in Burford's interest to get a consensual resolution that protects it from the downside risk of losing all its investment, and also reserves to itself a massive potential upside of getting all of its fees, plus also upside for Kaye's counsel, plus the ATE insurers.

So all of that gives rise to the Riefa question that I showed you at paragraph 106 of Riefa: is this a class representative who is understanding the funding arrangements, who is understanding the advice she's receiving and making sure she's receiving the right advice, and who's acting in the interests of the class in a clear-eyed, clear-headed way, rather than taking advice from a party with an evident conflict of interest?

So we say that the arrangements are so substantively unfair to the class as to warrant calling out in the terms of Gormsen. But we also say that all of that calls for an explanation, and that the Tribunal at the minute can't be satisfied that Dr Brook is acting fairly and adequately in the interests of the class on this point, because the explanations of why this was done just don't hold water.

THE CHAIR: Okay. So just very briefly sketch out what you say are for us to deal with (inaudible).

MS ABRAM: Well, the first thing you might want to do is ask for an explanation from Dr Brook about whether she considered those downsides that I've identified compared to the outside option of not having a consensual resolution, and why she thought that the upsides of paying all these millions of pounds to keep Kaye's counsel were worth the downsides.

The second thing you could do is say, "Well, until those points have been resolved in the funding document" so the substance of the points resolved in the funding document, "I'm going to withhold certification because the funding documents are not

fair and adequate in the interests of the class". That's all I wanted to say, sir.
MR DAVIES: Well, can we give consent conditionally on them sorting out what we say on the funding agreement.
MS ABRAM: Yes. I think that is possible. I'm not sure that's ever actually been done by the Tribunal, but I certainly can't make a submission that it's not possible for the Tribunal to do it.
MR BEAL: Exactly. That course was adopted in Hunter and Hammond, from memory, on the Amazon case. I'm sorry, it would have been Hammond.
THE CHAIR: Okay. Yes.

Submissions by MR ARTLEY
MR ARTLEY: Good afternoon, sir. I'm going to address the question of the open-ended losses in the amended claim form. So Google objects to certain paragraphs of the amended claim form on the basis they seek to introduce claims for open-ended losses. We say this is wrong, both as a matter of principle, and does not provide a practical basis for trying the claims going forward. So the amendments we object to are listed in paragraph 4 of our submissions in response to the amendment application. I don't propose to take you through them all now, but I think it might be helpful if we just turned up paragraph 11 as an example. So that's in hearing bundle A, page 20.
THE CHAIR: Okay.
MR ARTLEY: Yes. So as one can see there, the PCR is seeking to claim not just for losses suffered by class members during the relevant period, but also losses suffered subsequently and there's no cut off at all in that pleading, the list is just entirely open ended. It's not pleaded up to the date of judgment or date of trial or anything like that. So first on the issue of principle, the PCR's position on this has developed somewhat

in oral submissions this morning compared to what was in their skeleton. The position articulated in the skeletons, we understood it, was that this was all very simple because it was like a personal injury claim where it's possible to claim for ongoing loss of earnings. That was the example given in paragraph 58 of the skeleton.

But the problem with that example is it's a category error. Where there's a personal injury claim that's a single cause of action and it's trite that in those circumstances the claimant can carry on claiming for prospective loss after that. That's in McGregor, for your note at chapter 12, paragraph 24. That's a different bit of McGregor, that type of claim. That's very different to a competition claim where there are new causes of action that are accruing continually as each time losses suffered.

Now, in his submissions this morning my learned friend appeared to acknowledge that that's the type of claim which we're dealing with. That's why he took you to that same chapter, but a different section in McGregor chapter 12, paragraph 26 -- that is the correct analysis. We're agreed on that.

THE CHAIR: Yes.

MR ARTLEY: He also acknowledged that once you're in that scenario of a continuing claim with new courses of action accruing, then there is a common law rule that it's only possible to claim damages up to the date of issue of the claim. So the question then is whether that common law rule applies here. We say that the PCR wishes to argue that the common law rule doesn't apply; the burden is on them to show that. So far you haven't heard argument that justifies why that rule should be displaced.

So we were taken to Hole v Chard this morning -- again I didn't propose to go there -- but that, I think is accepted, is based on the old Rules of the Supreme Court, order 36; that's now gone. There's no parallel for that in the CPR or the CAT Rules.

My learned friend took you to rule 92 and 93 of the CAT Rules and also section 47(c) of the Competition Act. As the Tribunal fairly pointed out this morning, those are quite general provisions about assessing loss and, in my submission, they didn't say anything about the time at which you assess damages at all. So there's an issue of principle there which is live. But wherever it is on the principle, clearly there's no principle for an entirely open-ended period.

So then I'll move on to the second point which is one of practicality which I don't think my learned friend addressed directly in his submissions this morning, but there's quite a simple point really. It's just not practical for the Tribunal to quantify an entirely open-ended claim period. There has to be some cut off. So Google needs to know what it's providing disclosure for and the experts can go away and then do their quantification. There has to be some ending point somewhere.

There was a similar point that arose in the Riefa proceedings and while there was no judgment on it -- I think it's probably worth us just looking briefly at a passage of the transcript to that. So that's in the authorities bundle B, on page 106. That's lines 17 to 22. Mrs Justice Bacon is saying there, "There needs to be some end". I won't take you to it all now, but it's just for your notes, page 50 and 58 of the transcript, the discussion between the Tribunal and counsel which illustrates some of the practical difficulties of having an open-ended claim period, or a claim period that doesn't have a determinate point before the trial actually happens. So just from a practical perspective there needs to be a cut off somewhere. Now --

THE CHAIR: So what should that be?

MR ARTLEY: Well, this is an amendment application. So there's an amendment that's put forward. We're saying this amendment doesn't work because it's entirely open-ended. If the PCR wants to come back with another amendment, then we'll consider.

THE CHAIR: I think you can be a bit more constructive.

MR ARTLEY: Well, it's got to be -- sorry. It's got to be a point before trial, certainly.

In other cases it's been suggested that its disclosure because then you've got disclosure and you then quantify on the basis of disclosure. But that's one possibility, assuming the common law rule doesn't apply, of course, which they haven't displaced yet. So there's a legal argument and there's a kind of practical argument about how the Tribunal can go forward. It seems to be quite difficult to have a period that goes after disclosure, because how are the experts supposed to quantify that period if it's after disclosure?

THE CHAIR: I mean, I think you're accepting that they can do another amendment or wish you (overspeaking) capture a later date. So the question is, what's the pragmatic way of doing that?

MR ARTLEY: Well, they need to come back with something that we can then plead back to.

THE CHAIR: That's all very well, but I mean you can come up with a practical proposal to -- just chucking it in their laps is a little bit unhelpful.

MR ARTLEY: Well, I mean, it would have been helpful if there was something which we could have pleaded back to you or had to be able to respond to that was more concrete. I mean, in the skeleton it's now suggested that they're only claiming up to the point of judgment. But that's not what's actually in the claim form, which is totally open ended. Even up to judgment doesn't provide a basis for us because we wouldn't have the disclosure or expert evidence to cover that.

THE CHAIR: No, I understand that (overspeaking).

MR ARTLEY: -- to cover that, yes. So I mean, for those reasons, we say permission should be refused for the amendment in paragraph 11 and similar amendments further on.

THE CHAIR: Okay. Yes.

Submissions by MR EUSTACE

MR EUSTACE: Good afternoon. In light of the time I'll try and take this point really briefly. But it is first worth bearing in mind why this point on class definition actually matters. My learned friend this morning suggested this was just a tactic from Google to produce the claim value by roughly 10 per cent. We don't say that's fair at all.

Not only is this a clear definition required to make it so the class is identifiable under rule 79(1)(a) of the Competition Tribunal Rules, but also there are real practical concerns about not having that clarity. So for example, the proposed class members have to know whether they're actually in the class and so can claim. The PCR needs to know of whom to give notice to. And Google needs to understand the scope of the claim it has to fight and the nature of disclosure, et cetera.

We are not asking the Tribunal to determine the definition now or to stop them running a particular definition, we're just saying it's important that they do set out a clear definition. So it's not us trying to prevent 10 per cent of the claim coming in at all.

Now, the Tribunal will have gathered that this is a dispute as essentially to the clarity of what search advertising services means. That's not a term in the art, and it's not a term that's set out anywhere else in the claim form and indeed my learned friend didn't try and say that it was set out elsewhere in the claim form.

Instead, my learned friend relied on Matthew 1 -- so our expert report for the purpose of this hearing -- arguing that Mr Matthew, as an independent expert for the benefit of this Tribunal, could split out data from Google to give stats about the class and so there must be no confusion involved in the definition.

But first, this does not speak to whether the class members or proposed class members would understand what was covered. But also it's not even true. So if you go to Matthew 1, paragraph 50(C), which is on page 451 of bundle B. (Pause)

My learned friend took you to this paragraph this morning. Here he sets out the inventory type and the fact that there are different ad sources; so there's the SERP. So that's what he says is the advertisements appearing on the kind of general search engine results page. That is separate to the remaining: Google Shopping, Google Travel, Image Search, Maps and YouTube. So SERP is the general one and that's separate to the others.

The other ones, if we take Maps as an example, that's one that you can access separately and do searches on, and YouTube for instance is the same.

Now, in the next slide he says:

"I focus my analysis on SERP." [as read]

So Mr Matthew did not understand that a search on Google Maps that resulted in search advertisements, for instance, counted as search advertising services, and similarly with YouTube, because he only used the general SERP.

So rather than support my learned friend's case as to clarity, this actually demonstrates a lack thereof.

And it is still unclear, even after my learned friend's submissions, whether these non-SERP searches -- if I can term them as such -- would be covered under his definition. So a proposed class member who searched on Google Maps might not know if they were in the class and whether --

THE CHAIR: (inaudible) who advertised on Google Maps.

MR EUSTACE: Well, who paid for advertising on Google Maps.

THE CHAIR: They wouldn't know if (inaudible).

MR EUSTACE: Yes, indeed.

THE CHAIR: Right.

MR EUSTACE: And if that is the case, that the PCR's position is that these searches would be covered, then we don't think they have pleaded a basis for causation or theory of harm for such non-search ads. So for instance, they have an alleged dominance in provision of maps for instance, but we are not asking this Tribunal to determine that now, we just say that they should define search advertising services to clearly set out what is covered and therefore people know what's not covered and certification should be conditioned on that.

Unless I can help further.

THE CHAIR: Yes, Mr Beal.

Reply submissions by MR BEAL

MR BEAL: I have a handful of points in reply, organised chronologically, in response. That's the abiding theme.

THE CHAIR: Okay. Should we just tidy up the last two, so while it's fresh in our minds?

MR BEAL: In reverse order: class definition.

THE CHAIR: Yes.

MR BEAL: Not in the response, not in the skeleton, predicted by me as a rabbit from the hat. It's been produced, it's been delegated to my learned friend, I hope, on one of many visits to this Tribunal. Can I encourage him, please, not to pull rabbits from hats in the future? I realise it's been delegated to --

THE CHAIR: I mean --

MR BEAL: It's been delegated to.

THE CHAIR: Ms Abram used her full team very sensibly, I think.

MR BEAL: I'm not objecting to that, I'm objecting to the rabbit.

THE CHAIR: Let's not worry about that. These things happen. As it happens, as you say, you've got the huge advantage of being taken by surprise in a way which you predicted.

MR BEAL: Yes.

THE CHAIR: I'm not excited by that, Mr Beal.

MR BEAL: No, fair enough. I should --

THE CHAIR: As I understand, your position is: it's SERP plus Shopping, Travel, Image and Maps.

MR BEAL: Yes.

THE CHAIR: If it's --

MR BEAL: Because the prior categorisation which I took you to split up between search display and video.

THE CHAIR: Yes.

MR BEAL: That's the tripartite category we understand for revenue.

THE CHAIR: And you think, as far as you know, YouTube is only video, so you're not including (inaudible).

MR BEAL: Well, I don't know, is the answer. Insofar as Google classifies YouTube as producing video revenue for the purpose of their internal analysis, then it's obviously not going to be within search. Insofar as YouTube has search revenue, because they've used YouTube to give a search advertising service to somebody who's bought the advert, then it's within scope.

THE CHAIR: Right.

MR BEAL: I don't know.

MR DAVIES: Does the definition of SERP search there map on to, for example, the EC decision? I mean, taken by his last point, that would you, for example, have to demonstrate dominance in Maps in order to make your case on that?

MR BEAL: The EC decision uses search advertising as not being necessarily the dominant market; it's the affected market by the activity in other dominant markets. So it's the tying obligation ties the non-dominant market to the dominant market and produces foreclosure in that tied market. That's the theory of harm.

THE CHAIR: So I mean if we required you to make an amendment just to spell this out, that's not actually onerous, it doesn't have any consequences, as far as you're concerned?

MR BEAL: The strong advantage of the definition we've used is everyone knows that they've purchased advertising from Google, they think they've purchased search advertising and they've been billed for search advertising by Google --

THE CHAIR: Yes.

MR BEAL: -- and it's down in Google's records as being revenue for search advertising.

THE CHAIR: I mean, requiring you to make an amendment wouldn't be a criticism in any way, but if the amendment said, "By the way, we're not just talking about SERP, because we're also including anything that ...", that's in fact no drama for you today.

MR BEAL: Well, it's making a pleading that we think is unnecessary, because it was never restricted to SERPs in the first place. The way that Professor Scott Morton has dealt with it is not by reference to any of these points, it's by reference to: what are the sources of search advertising? True it is she concentrates principally on SERPs, but she's drawing a distinction between search and display -- which is a distinction Google draws -- and then between search that's available through SVPs, which is not Google and the key qualifier here is search advertising, not display advertising and it's provided by Google and that gets you where you need to, for the purposes of Professor Scott Morton's analysis of where the harmful effects are felt.

THE CHAIR: Right.

MR BEAL: But she's also said she'll provide more detail in due course on the precise contours of the search advertising market. But my concern with pleading it now is: it's in a sense trying to predict in advance what Professor Scott Morton's much more detailed analysis will be once we have all the evidence and you've asked me very fairly: do we say it's within YouTube? We just don't have disclosure as to how Google views search versus display advertising on YouTube.

THE CHAIR: Yes.

MR BEAL: That's not within my gift.

THE CHAIR: Okay.

MR BEAL: We don't think it's a pressing amendment. We're very happy to amend in due course; once we've seen all of the evidence there will be naturally be a large amount of amendments. We've already promised those.

So that's the class definition point.

Amendment and damages: we say damages go through to the assessment of aggregate damages, because that's the power conferred on the Tribunal and that's the remedy that sought and that provides -- it's very difficult to see how we would claim damages going beyond the point at which the Tribunal assesses what the aggregate damages are and that's a necessary limitation in the structure of the claim and the structure of collective proceedings. In any event, if we look in bundle authorities B, at rule 30 -- which is an additional rule that I'd like to draw to your attention and reply in addition to 92 and 93 that I took you to -- what is required for a 47A claim, page 137 of bundle of authorities B -- is:

"The relief sought in the proceedings, [at the bottom of that page] including, where applicable, an estimate of the amount claimed in damages supported by an explanation of how that amount has been calculated." [as read]

And so what we've done in our claim is to say we will be asking this Tribunal to make an assessment of an aggregate award of damages that will cover not simply the damages that reflect the loss suffered to date, but also loss suffered through, effectively, to the period of assessment.

Now, true, it is the pleader when making these amendments -- and I'm sure that probably includes me -- could have said through to the date at which the aggregate damages are awarded. And if that meets my learned friend's concern, so be it, that's what we'll do.

THE CHAIR: Right.

MR BEAL: But again, it's a rather -- if I may say so -- pedantic point, because it's apparent from the statutory regime that nobody's going to be -- it's not an open-ended claim for damages. It's not saying we're going to have judgment and then it carries on going. We haven't claimed injunctive relief and we haven't sought to stop the infringement, with the natural consequence that once you do have -- as in Kent -- a decision of this Tribunal, that brings down the guillotine on when damages will go to and if Apple keeps on charging what it has charged historically, there may be further claims that come out of the woodwork against Apple seeking further damages in the light of the Kent decision. That's a matter for Apple.

So the whole thing just seems rather -- as I say -- a highly technical objection that's capable of being met through a mixture of sensible construction of the Tribunal's statutory framework, coupled with the practical recognition that once the final amendment takes place for the claim form, not just the loss that's already been suffered to that date, but also any new members of the class can be brought within the scope of the claim and that's the easiest way to deal with it.

So, more than happy to amend our claim in due course to bring in the maximum amount of claims and claimants and we footnoted to that effect in the amended claim form, but the reality is that doing that now in order to try and justify some technical objection seems an expenditure of costs.

THE CHAIR: Making the cut off now.

MR BEAL: Making the cut off now and saying it has to be pleaded now as well. I mean, this is the other problem.

For every criticism that's made that requires us to spend money then feeds into my learned friend Ms Abram's complaint that the costs are too high.

THE CHAIR: Right.

MR BEAL: And I do have a general point about the costs.

THE CHAIR: That's fine. To Mr Artley's point, you can't have the cut off date first day of the trial, in case disclosure affects what the number is.

MR BEAL: On the first date of the trial?

THE CHAIR: Well, he doesn't know exactly when, but you can't go too close to the trial and have the cut off date, because if you've already had disclosure six months before that, you have disclosure to work out the numbers between then and the trial.

MR BEAL: The loss is ongoing for those claimants who are in the claimant cohort. Based on their advertising spend, the solution would be for -- Professor Scott Morton has set out a formula bible by means of which the loss can be calculated and then how it's distributed and I'll come to that in a moment. That formula looks essentially at the loss suffered by the class as a whole and then it divides it by reference to a proportion of advertising spend for a given advertiser so as to come up with effectively a per advertiser overspend -- per amount spent in pounds and pence. There is a percentage of that that is part of the overcharge.

THE CHAIR: Okay.

MR BEAL: And you would then apply that percentage formula to whatever the distribution arrangements are for the class members to come forward and claim, where the class members at distribution stage -- not at liability stage -- say, "My advertising spend over the period from 2019 to 2026 was x", and a formula is then presented to that expenditure, where they've proved that they have spent that money with Google and Google confirm it's been spent with them -- either directly or through a media agency -- and that produces a figure.

THE CHAIR: Okay.

MR BEAL: But it's at the distribution stage that that data analysis takes place and you know exactly what the quantum is. The reason for having the amendment of the claim form as close to the trial as possible is to bring in the maximum claimant class per the Neill v Sony case, but also to the extent it needs to deal with this point, it would also deal with this point.

THE CHAIR: Yes.

MR BEAL: We say it doesn't need to deal with this point, because the mechanism --

THE CHAIR: Essentially what you're saying is there's no point making an amendment now --

MR BEAL: No.

THE CHAIR: -- you will make it in due course and time that's appropriate to make, that will have to --

MR BEAL: As close to trial as possible, per the solution that was developed in Kent v Apple.

THE CHAIR: Okay.

MR BEAL: That's the two subsidiary points.

Coming back to more significant points, it was suggested we don't have a plan for distribution; we do. I've said Professor Scott Morton has dealt with distribution; she did. That's at bundle B at page 274. (Pause)

THE CHAIR: Sorry, that's which report of hers?

MR BEAL: That's her first report. So this has been in there from the beginning and it starts really -- the heading starts at page 273, "Potential means of distributing damages among PCMs". She then has a proposed methodology for damages estimation, then says:

"It remains to apportion those damages among the PCMs. My instructions require me to set out a methodology for quantifying loss for the proposed class on a class-wide basis, aggregate damages. My understanding is that the matter of distributing any aggregate award will be addressed later in the proceedings." [as read]

And that was the conventional position until Waterside suggested a greater degree of urgency was needed, not for the analysis of what the distribution will look like at the end of the day, but what is the likely take up? And I'll come on to deal with that.

However, for completeness, so whilst the convention was you didn't need to worry unduly about distribution as long as it was capable in principle of being done, she goes on to give a formula whereby her proposed approach is made clear and it is essentially the fraction of ad spend process that I described a moment ago. So she's dealt with it.

The notice and administration plan then deals with it -- that's page 96 of bundle C. (Pause)

And in particular -- bundle C of the hearing bundle. (Pause)

The distribution objective in paragraph 6 is identified. (Pause)

And in the right hand -- the table at page 97 then sets out on the right-hand side -- the right-hand column -- the steps that will be taken. (Pause)

So we see on that right-hand page:

"Objectives are set out giving notice to the class, notifying proposed class members of the terms of any settlement that's approval, establishing a claims procedure that takes account of the demographics, notifying the proposed class members about the availability of the process and the process for claiming damages." [as read]

There's then:

"Public relations put in place through media press releases, proactive engagement with print and online media, the press office is engaged, interviews and op-eds with the PCR encouraging those affected to submit their information." [as read]

There's then:

"Organic social media channels, Facebook, LinkedIn, X, and re-engagement with existing groups of advertisers on all three platforms, paid search advertising includes [somewhat ironically] on search network ads, Facebook, LinkedIn, efforts to advertise, YouTube, Google or Bing, (inaudible), out-of-home, [et cetera] direct notice." [as read]

Direct notice, obviously, is contacting the class members directly.

So the idea that we haven't set out what we're going to do is, I'm afraid, simply wrong.

Page 104. Notice strategy is given. There's as a notice strategy for giving information to proposed class members to let them know about the key stages.

Page 120. There's an entire section devoted to distribution. I don't have time at this stage, treading on your patience already, to go through that in detail.

But stage 3, there's a notice strategy, there's a dedicated website, there's then a detailed press release earned media, social media, all of the detail is given there of what is actually being proposed. There's going to be a PR company gets involved, there'll be a nationwide press release. This is all at page 122, communication strategies, so along the lines I've indicated.

Then paragraph 107. Importantly, at the distribution stage, Case Pilots will be able to circulate electronic claim forms to all registrants who have expressed an interest in the proposed collective proceedings by way of direct notice. If we've got the contact details from Google, the 880,000 claimants, yes, it's a big job, but we will notify them all with this form. This is what you can claim. This is the money that's on offer. You tell us your ad spend or tell us which ID numbers you have been given by Google for your advertising, and it plugs into Google's records and the distribution can be effected.

There's then an entire section dealing with making a claim:

"Exact process of filing a claim form and distribution will not be finalised until the aggregate award of damages is settled [but it then sets out what will be envisaged]." [as read]

113: "close consideration will be given to the design of the claim form".

112, it's envisaged to take place online.

Over the page, 124, paragraphs 117, 118, claim validation. Obviously, claim validation is going to be much easier if Google's involved, and indeed we say that in paragraph 118. Says, four or five lines down:

"Further, Google itself is likely to have at least some relevant information, since it will know the websites it has advertised on its search engine results pages. Further, alternatively, the media agency is likely to have records of the advertising it sold to the advertiser. We understand from the PCR that, if necessary, it would be willing to consider making applications for third party disclosure from media agencies." [as read]

Now, obviously, we'd rather have their cooperation, and when I was making my submissions earlier saying, "We will liaise with media agencies", it wasn't with a view to suggesting that we're simply going to give them a bucket of money and then run away. That's never been part of the plan. It's engagement with them with a view to securing the onward distribution, which is part of the Epiq evidence you have before you, which I invited you to read because it was being mischaracterised as to what we were suggesting. This is all about getting money back to the advertisers, and that's our objective.

THE CHAIR: So, I mean, I'm not saying it's right or wrong, but as Ms Abram focused on the question of whether it would have been possible for PCR to put forward, through (inaudible) or Epiq, quantitative estimates of the amount that can be distributed to satisfy themselves that it's better than the 1 per cent, and with the advertising type of distribution.

MR BEAL: What you have in the Epiq update -- now, I mean, this was given before we had found out that Google has direct contact details for the vast majority of advertisers, which is the impact of the 29 June letter. We'd been chasing that information since 7 May; it didn't come until the 11th hour. Spilled milk. Let's move on.

When one looks in bundle C, at page 350, the Epiq information says why it envisages that, if Google is cooperative, it should be possible to achieve a high degree of uptake. What they say in paragraph 8 is:

"If Google has the details to contact people directly, then that's going to improve things. We consider it this likely to be highly effective and to result in a higher level of uptake than broader facing public campaigns." [as read]

Paragraph 11, I invited you to read, so I won't read that out again. But paragraph 12, over the page:

"Direct payment by Google through existing payment channels or payment administered by Epiq using data provided by Google regarding those channels could significantly streamline the distribution process. Such an approach will substantially reduce the need for complex claim validation, whilst reducing the need for positive action by PCMs. The less that the class members have to do to receive the money that's due to them, the better, as it leads to friction." [as read]

Epiq then also adds that it's possible to proceed by way of a credit to existing account holders against future purchases, so the suggestion that rollback relief is only raised for the first time today is simply wrong, because in substance that's what's being done.

I was also asked for the footnote reference. I'll give you those. It was footnote 106 in the reply, which is A/246. Footnote 45 in the skeleton, which is bundle C, page 16. Both of those refer to the Dr Mulheron article, which is a good read, but not included in the bundle.

Back please to page 351. Mentions the credit possibility. Ultimately it says:

"The purpose of distribution is to get compensation to the hands of as many PCMs as possible. A high level of awareness, confidence in the legitimacy of the claim, and fewer points of friction as possible. To that end, the mere fact that Google send or are associated with communications is hugely beneficial in adding credibility and authority to the communication." [as read]

As I say, it's only on 29 June that Google has expressed its willingness to at least potentially be involved in the process.

Now, in terms of wider points about distribution and cohorts and so on, there are no distinct divisions between the various different claimants in this case.

THE CHAIR: No, that's accepted (inaudible).

MR BEAL: There's a distribution curve. Obviously the more you've spent, the more damages you're likely to be able to recover. But there's no actual underlying tangible difference between cohorts. So we are in the Ennis/Rodger/Stasi territory, where the idea that there is a separate cohort available is nothing to the point. The fact that there will be, and we accept this, a number to be determined of claimants who have higher value claims is inevitable when you have a very broad, homogenous claimant group.

There's no evidence from Google on distribution. We've had assertions by way of the letter and then by way of submissions today. In terms of how it will work, we have been clear in the various sources I've shown you that we will use a bunch of tools to try and effect as wide a distribution as possible. The evidence before this Tribunal, uncontradicted by any counter-evidence by Google in evidential form, is that Epiq says there is a good chance of a high take up. That's the analysis from (overspeaking).

THE CHAIR: So we have to assess that qualitatively, I think, because there's not a number. How would you do a number (inaudible)?

MR BEAL: It's very difficult to know what you would do for a number. It depends on what the number is and, in a sense, the spread of the claims. One would envisage, naturally, the more money's at stake, the more likely people are going to be interested. But there is a very high number, numerically, of claims. Yes, they're under 50,000, but they're above 5,000, for example.

THE CHAIR: Yes, these are the sort of middling ones.

MR BEAL: Yes.

THE CHAIR: Quite valuable per claim, but --

MR BEAL: Well, there's no way they're going to --

THE CHAIR: (Inaudible) smaller.

MR BEAL: Yes. But in terms of what's the likelihood of take up, well, it depends. I mean some people who have only got a matter of pounds may not bother. True. But you would have thought that if there's 10,000, 15,000 at stake for an advertiser who's being contacted by Google or with Google-backed communications saying, "We've got £15,000 waiting for you", certainly I would take them up on that offer, if I'd advertised my services on Google.

This is not a weak case. This is a strong case.

THE CHAIR: Don't worry about that.

MR BEAL: The suggestion was there was a small number of claimants that may have a large value claim. It's the class as a whole that needs to be factored in. This isn't the case -- unlike CICC for example -- where Google is saying, "Well, take the top 1000, take the top 50, and separate those off with a justifiable divide"; they haven't put forward a justifiable divide and my learned friend said in terms -- and I wrote this down -- "there was no magic cut off".

THE CHAIR: No.

MR BEAL: And that fits with the evidence I showed you.

Evans Supreme Court, just for your note, paragraph 99, there is no legislative presumption for opt-in or opt-out and Evans in the CAT, from bundle of authorities page 325 onwards, has a detailed section that looks at the composition of the Evans class. There are actually quite a few potential claimants in the Evans class, but the findings were that they were all -- a large chunk of them were financial institutions who had, in terms of volume of commerce on the FX market, somewhere approaching £3 billion worth of commerce in issue, which is a pretty chunky figure and therefore one can understand why the Supreme Court took the view that the relevant cohort of the class -- the nucleus of the class -- was a large number of financial institutions who were capable of looking after themselves.

That was what led to the Evans analysis and that's compounded in the Stasi case -- just for your note, paragraph 138, I invited the Tribunal to read it earlier -- where they set out that the evident concern of the Supreme Court in Evans was weak claims being used through an opt-out procedure which confers a tactical advantage on the PCR to leverage --

THE CHAIR: I think we've got that. I mean, Ms Abram kind of accepts that, but she analogises weak to undistributable -- I think we understand what the --

MR BEAL: That's why I dealt with distribution first off.

THE CHAIR: Yes, that's become central.

MR BEAL: Once that myth is seen for what it is -- I mean, my learned friend basically says, "Well, there's absolutely no evidence that there'll be high take up here", whereas in fact the evidence before the Tribunal is there's a method and a means by which you can contact the advertisers directly and tell them there's a chunky sum of money.

THE CHAIR: Yes. Well, we can make our own assessment --

MR BEAL: Yes.

THE CHAIR: -- how business people will act if they get a letter saying they can have a lot of money for a modest amount of effort.

MR BEAL: Yes.

THE CHAIR: You agree that some of them won't take it up if worth it and you say some might.

MR BEAL: Well, I mean the 0 per cent figure in terms of value of the claim -- not quite sure how you end up in the 0 per cent figure, it's no doubt a rounding error -- but if there are some people who have spent £2.50 on advertising -- I'd spent £2.50 on advertising -- I wouldn't bother.

See what happens when --

THE CHAIR: Well, we have actually.

MR BEAL: Well, we'll wait and see what happens with the Merricks case.

THE CHAIR: I'm always surprised how many reviews I see for Monckton Chambers when I happen to be looking up how to get there on my bicycle.

MR BEAL: Well, that's the opposition; I wouldn't recommend that.

THE CHAIR: Generic.

MR BEAL: Mr Matthew's evidence -- in fact, Mr Davies absolutely lanced this point, which is if it was media agencies that were included in the 880,000, then that would explain the very high distribution at a certain end. But in fact, I think where we got to, which was my understanding was: the data available to Google was such that the 880,000 figure was per advertiser.

THE CHAIR: Correct.

MR BEAL: So the media agency point for that reason doesn't bite, because if in fact you've got details for each of the 880,000 advertisers, yes, it's a pain in the neck to contact them all, but there is a means by which that contact can be effected and I accepted that for the purposes of the opt-in opt-out, it's just contacting 880,000 before you've got any money is very burdensome.

It was just I had no evidence for Trucks; the evidence I gave you was from the Amazon judgment where this was dealt with and unlike this case, when I was dealing with the Amazon certification case, we did have all of the Trucks judgments available for proper analysis. So I took a shortcut of referring you to Mr Justice Roth's decision -- that was page 750 of the bundle of authorities.

It was repeatedly said that I'd said there's only a six to nine-month delay; that, with respect, ignores what I did in fact say, which is the notice period that would be required to allow people to opt in would have to run from the date of certification of the opt-in claim to allow a period of opt-in for the opt-in exercise and I said that would need to be nine months.

THE CHAIR: Yes, you said it could be longer. You said some book building took years.

MR BEAL: So you've got a prior period before you get to that point. So realistically, it's much more likely to be at least 18 months, in my respectful submission.

In terms of Rodger, you've already heard from my learned friend, quite rightly, that if that had been opt-in it simply wouldn't have been capable of being joined with the Coll case. That was part of the factor why it wasn't recertified as an opt-in case, because it simply couldn't be done in the time available.

Leveraging. I recall seeing a submission from Sir Sydney Kentridge KC, where his response to a submission was simply, "Well, really". And leveraging the suggestion that Google will be leveraged by an opt-out claim in the way it's not going to be leveraged by a financially very valuable opt-in claim, I think the response is, "Well, really".

CPO and claims going back to 2011 and the need to amend our claim form. You've got my point that there are claims that extend over that period. The CPO notice will have to say there are claims over that period. Whether the claims are valid claims will have to depend on whether or not in fact -- well, because it's an opt-out claim, the claims that will be subject to distribution are only claims in aggregate that are within time. So the issue comes not at the claim stage, because it's impossible for the claim, as pleaded, to seek to recover aggregate damages for a period that's out of time. That's simply not going to happen.

Because it's an opt-out claim, there won't be a notification process for people to opt in requiring them to show that they have valid in-time claims. Instead where this bites is at distribution, and we will need to make sure that people aren't claiming for periods that are out of time, ie, a distribution of the aggregate damages awarded. But the aggregate damages will already be shaped by the volume of commerce that's attributable to only the in-period claims.

Cost budget. We say our cost arrangements and funding arrangements meet the test for certification. If you would be kind enough, please, to look in the correspondence bundle, at D/94. There's a letter from my instructing solicitors, Geradin Partners, two of my instructing solicitors, setting out the costs incurred by class representative to date for the Brook claim, not the Kaye claim. One sees, page 94, solicitors fees of 2.4 million-odd, counsel fees of 608,000, experts' fees of 2.2 million. Other costs: disbursement, 272,000, and ATE insurance of 806,000.

Now, I accept that ATE insurance is one-sixth or so, just under one-sixth of that component, and there's not much we can do about that. That's a market rate. I think we retain quotes and obviously pick the best cover for the best premium.

Solicitor fees I accept have been high. But it's part of the front loading I was talking about, and expert’s fees have been high. That is also part of the front loading I've been talking about. But this is a highly complex case where if you look at the costs that have been incurred there and compare -- well, if one takes the entire cost budget from start to finish of £40 million against a claim that conservatively is estimated at £5 billion, because it includes 50 per cent pass-on, then that is a 0.8% percentage of the recovery, which I think most litigants would say is not bad going.

If we continue, please, in bundle D, there's some further points here dealt with in this letter which are worth picking up. The approach to budgeting is dealt with at page 95, and it's made clear that the budget is not an aim -- it's not a target -- it's an upper bound. Because there's a temptation for the defendants to try and run the budget out of bounds, what you don't want is a budget that is capable of being rapidly exhausted because it would leave the claim high and dry with no means of securing it through to a successful outcome. That isn't the same as saying that every aspect of the budget will be spent. And we've recognised efficiencies can be realised with Stopford, and we're more than open to suggestions as to how that can be done. Of course, this Tribunal will case manage very effectively the proceedings to make sure that there isn't unnecessary duplication between experts on common issues or between counsel. So you are not going to have a succession, I hope, of counsel turning up and making points where one of them says, "Yes, I agree"; that isn't going to happen on the claimants' side.

And Mr Teague, giving me instructions earlier, made it clear that he had tried to come up with a defensible conservative estimate of the savings; we think we can do better and we will try and do better. The Tribunal, coupled with our cost control and oversight that's dealt with at the bottom of page 95, will make sure that happens.

THE CHAIR: I mean, you agree you can make a contractual agreement that: one of you settles; the other one can keep the expert.

MR BEAL: I've had difficulties with that in the interchange case because a number of parties did settle out. There hadn't been that sort of contractual arrangement. I think what we would --

THE CHAIR: (Overspeaking) something has happened in a couple of cases and it's caused an absolute shipwreck on the trial, but there's no reason why you can't agree.

You can't agree in relation to arson obviously because you've got to --
MR BEAL: I think we can do a contingent retainer of the experts so that if they divvy it up between them the other one is entitled to rely upon it in the event that only one of them goes through to trial.
THE CHAIR: Exactly. Then once you've done that then you ought to be able to carve a lot more out of the budget because you haven't done that yet --
MR BEAL: We haven't done that because we've been approaching things with separate certification. We couldn't turn up here with Stopford's expert report because it's not covering our case.
THE CHAIR: But the percentages in Mr Teague's evidence of the efficiencies that he's identified already does not include further reductions if you cut down to strictly one expert each part of the case where you're making common grounds. So there ought to be a lot more --
MR BEAL: I think, if I may say so, I'll take instructions, but we can certainly shave quite a lot off. (Pause)
Yes, Mr Teague's making the point, I think, that we agree respectfully with your observation, but we haven't been able to commit Stopford to agree to work --
THE CHAIR: But it must be --
MR BEAL: -- going forward.
THE CHAIR: It's impossible to conceive that the percentage economy that's been identified has been done entirely on the basis that there will only be one expert. (Inaudible) there's not a conflict that can't or -- and also -- so this is indeed -- if there's single coverage --
MR BEAL: I don't think it's taken place on that basis --
THE CHAIR: No, I don't think it can.
MR BEAL: -- because we haven't been able to speak for the Stopford party that they

are willing to engage with us on that basis. If the Tribunal says to us "You can only have one expert for any particular --

THE CHAIR: Exactly. (Overspeaking) you must anticipate, assuming that we certify and so on and so forth, that that will happen. And then there'll have to be a further round of working towards --

MR BEAL: Directions to that effect, I'm pretty sure, were introduced in Rodger in order to ensure that there was a separate claim against Google in the Rodger Coll case that in fact settled, which was brought by an individual entity in the United States. I distinctly remember attending the expert application in Rodger where we were told we could only have one expert on certain things.

Page 97, then, deals with Dr Brook's costs. It was suggested that her individual rate was inappropriate. With the greatest of respect, she's a highly qualified Oxford academic who charges out on consultancy rates at much higher than £250 an hour. She's a very valuable resource. If we look at what her actual spend has been, which is a more reliable guide as this letter says, paragraph 35, she's spent so far over the period of 15 months, £45,500, which equates to a monthly average cost of £3,000 and a median monthly cost of £2,625. So she regularly does not bill increments of less than 30 minutes, and she doesn't bill, for example, just following emails and so on.

See, when analysed, the average rate per year is approximately £36,000. There's a number of comparators one could draw. Government silks as I know to my costs, get paid £270 an hour and that's following a recent increase. But obviously as a government silk, there are certain advantages so one gets to do interesting cases typically at an appellate level. This is somebody who is helping to establish a £5 billion claim.

THE CHAIR: I think in the interest of time, Mr Beal, the place where I'm going to find that I need the most help is on the carriage costs; that's quite complicated.

MR BEAL: Carriage costs: the submission is essentially that we should have fought the carriage dispute through to a final outcome. You will recall that that was not a course that was urged upon the parties by this Tribunal. This Tribunal said, "We do think this is a difficult question, it's unlikely to be a clear result for one side or the other, there will be factors that go both ways", and in essence I understood that to mean that if it were fought through to a carriage dispute, there would be criticism levelled at both sets of proceedings for various reasons. Where --

MR DAVIES: I don't think the suggestion was you should have fought it through to, I think the suggestion was that it would have been better for Google if you had.

MR BEAL: Yes.

MR DAVIES: The cost implication.

MR BEAL: Well, their submission is essentially: we would have been better off if, contrary to the suggestion from the Tribunal and contrary to the case law that says compromise is to be encouraged in the carriage dispute, we had nonetheless fought it through tooth and nail to the end, and that somehow --

MS ABRAM: I should just interject, just to stop this going off on a wrong tangent. It's not about what's best for Google, because the Tribunal has made clear that it will be a rare case where it's appropriate to have an adverse costs award against the defendant in that context, it's what's better for the class, because under the arrangements, these sums come out first.

MR BEAL: Yes. Well, I mean that's very helpful, because of course Dr Brook took the view -- following advice over which privilege is not waived -- that the best course for the class was to compromise carriage dispute. Now, with the greatest of respect, it doesn't take a forensic genius to realise that if the Tribunal is about to launch a criticism of either side's case in a carriage dispute, then that can only play into the hands of the defendant and Dr Brook -- relying on advice over which privilege is not waived -- clearly took soundings appropriately from those who were assisting her in running the case and her clear evidence in Brook 2 is that she thought, rather than running a contested carriage dispute through to the final resolution, with the risk of criticism, et cetera, everything that goes with it, that the class was best served by consolidating those cases. She said: "I like the Brook case, I think the Brook case is a good case". What that means is the excessive pricing case did not get advanced, but Kaye case had the benefit of involvement of KP Law and the involvement of their counsel who are experienced in this area, the availability of greater resource and the ability to continue unimpeded by carriage dispute to enable the class claim to be brought.

Whether or not the class recovery ends up paying for that exercise is not a matter for now. That will be a matter for the exercise of the supervisory jurisdiction of this Tribunal when it determines what is the return to the funder and what are the costs that can be taken out of the pot.

So this issue will come out. I took you deliberately to Stephan, Amazon, paragraph 23, where Mr Justice Roth said, "I encourage parties to settle carriage disputes. Carriage disputes are frankly a distraction, it's good that they settle". The consequences of that settlement have to be considered very carefully and they will be considered at the end of the proceedings when you have a good picture of where things have ended up and what the contribution has been of the respective elements of the Kaye and the Brook case. So everything is for the final supervisory discretion of the Tribunal once the outcome is known.

It was also suggested that somehow Burford shouldn't have been involved. It would be a rash potential prospective class representative that didn't take the advice of their own funder when deciding whether or not to compromise the carriage dispute. Because if the funder says, "Well, this is all very interesting, you want to compromise it, but actually I'm not prepared to fund it anymore on that basis", then there would be a real problem. (Pause)

Yes, so I've been corrected that in Dr Brook's third statement, she makes it clear she didn't take their advice; what she did is kept them updated. I've been seduced by my learned friend's submissions into --

THE CHAIR: Well, I was going to say it didn't sound like advice anyway, you know, they had skin in the game. But anyway, there we are.

MR BEAL: She kept them consulted.

THE CHAIR: Yes, I've got it.

MR BEAL: The level of the consultation was: is this going to be a claim that can still be funded? It's not advice, it's simply them saying what their position is.

THE CHAIR: (inaudible).

MR BEAL: I'm sorry, I misspoke. (Pause)

Could I simply urge the Tribunal given that there's -- and you've sat well beyond the limits of patience -- can I simply urge you to read both Dr Brook's second and third statement that deal with the funding issue? We recognise that the question of funding and the inclusion or not of funded cases -- indeed costs from the both sets of proceedings will have to be grappled with -- our suggestion is it's not an impediment to certification and it is not something that needs to be dealt with.

Now, if I'm wrong on that and you are of a different view, you will tell us. (Pause)

Unless I can help further, those are our submissions.

THE CHAIR: Thank you very much. Thank you to all of the counsel who've --

MR BEAL: There's a point of detail, I'm very grateful to Dr Brook for drawing to my attention, which is the successive elements of costs: she's renegotiated those so that they're only payable after distribution, not before distribution.

THE CHAIR: I think it was in your skeleton actually.

MR BEAL: I think I just hadn't dealt with the submission.

THE CHAIR: No, I saw that in your skeleton.

Okay, thank you very much to everybody and thank you to the CAT staff for sitting late and helping us out in that way.

(5.14 pm)

(The court adjourned)

Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
…	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?