IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1572/7/7/22 & 1582/7/7/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Thursday 9th May 2024

Before:

The Honourable Justice Marcus Smith
John Alty
Dr Maria Maher

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Proposed Class Representative

Ad Tech Collective Action LLP

v

Proposed Defendants

Alphabet Inc. and others

A P P E A R AN C E S

Robert O'Donoghue KC, Gerry Facenna KC, Julian Gregory, Nikolaus Grubeck & Greg Adey (Instructed by Humphries Kerstetter LLP & Hausfeld & Co. LLP) On behalf of Ad Tech Collective Action LLP

Meredith Pickford KC, Conall Patton KC, Natasha Simonsen and Warren Fitt (Instructed by Herbert Smith Freehills LLP) On behalf of Alphabet

Digital Transcription by Epiq Europe Ltd
Lower Ground, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400
Email:
ukclient@epiqglobal.co.uk

Thursday, 9 May 2024

(10.30 am)

Submissions on behalf of PROPOSED DEFENDANTS (cont.)

MR JUSTICE MARCUS SMITH: Yes, good morning Mr Pickford.

MR PICKFORD: Good morning, Mr President.

Mr President, members of the Tribunal, the PCR's proposed claim is, to say the least, ambitious. The PCR seeks incredible damages of £14 billion, excluding interest. That is, to my knowledge, the largest in any claim brought before any Tribunal, possibly the High Court -- they are certainly up there.

Now the majority of those alleged damages, 9 billion of them, derive from the so-called gross price affect, which depends on two key propositions. First: but for the various abuses that it is alleged that Google committed, online Publishers would have somehow managed to obtain vastly higher prices in the auctions in which they sold display advertising inventory to advertisers. And second, that rather than therefore simply buying less online display advertising, advertisers would have happily paid those higher prices and increased their online display advertising budgets accordingly.

Now, that is a claim that, in an earlier incarnation of these proceedings, the Arthur claim, Arthur -- an experience economist, Dr Bagci, thought it was inarguable. Nor is it the subject of the Attorney General's complaints against Google in the US, nor is it the basis for the FCA decision. There is no more than a passing reference for the possibility of Publishers having had reduced yields in that decision.

The source of the idea that Google's auction design was so bad for Publishers that it left a staggering £9 billion on the table, even though Google obviously had an incentive to maximise that sum -- because its revenues were based on a percentage of what Publishers got -- the source of that is Dr Latham. There is no analysis in the FCA decision supporting that at all. As I will come on to show you, the bid translation

service is a total red herring.

MR JUSTICE MARCUS SMITH: Mr Pickford, just so that we are talking exactly the same language, could you identify which specific paragraphs in the claim form are not, as it were, replicated out of the anterior regulatory matters? Just so that we have a common language.

MR PICKFORD: Could you assist me, sir, with what you mean by that precisely, sir? My position is this: we have a substantial part of this claim, the gross price effect --

MR JUSTICE MARCUS SMITH: Yes.

MR PICKFORD: -- which is said to amount to £9 billion worth of damages.

MR JUSTICE MARCUS SMITH: Yes.

MR PICKFORD: And my point is that: that has, at best, cursory reference in the FCA decision. There was an impression given yesterday -- which I will come on to address -- that, in fact, the FCA has already analysed this. It has a method, it is the bid translation service. We say that is simply not correct. The FCA did not take bid translation service data and it didn't turn it into anything like the methodology that Dr Latham is now seeking to establish. That is the only point I'm making here.

MR JUSTICE MARCUS SMITH: Right. Is it a point that is going solely, or chiefly, to methodology of quantum? Or is it attacking the way in which the three abuses have been framed?

MR PICKFORD: Well, it is background, sir, to this.

MR JUSTICE MARCUS SMITH: Or both?

MR PICKFORD: Because the point I'm going to go on to make is -- as you will have seen from our response and our skeleton argument -- we attack, in particular, the gross price effect. And, in particular, we say there isn't a proper pleading there as to establish the relationship between the alleged abuses and the damages that are said to flow from it. That is going to be one of the key points of my submissions.

MR JUSTICE MARCUS SMITH: Okay.

MR PICKFORD: The reason why I am making this point now is that -- because it is important to appreciate that -- it is not like the gross price effect is this well-established idea that the Attorney General has been pleading, and that lots of people have been pleading around the globe. It is not. And, therefore, if it is a point that is going to be made -- we are not saying it can't -- that that alone means it can't be made, but it does need to be made very clearly and we need to understand the basis of it. That is the point that I'm seeking to make here. So it is background to that general submission that I'm going to make.

MR JUSTICE MARCUS SMITH: Okay.

MR PICKFORD: So the core problem, we say, with the proposed claim is that it is vastly over-ambitious. For all the length of the pleading and the accompanying expert reports, for all the ten different approaches that we have to quantification overall, of four different effects, proposing arising at the latest count, now 17 different conducts that are impugned, and for all the astronomical claims of damage, we say there is a fundamental lack of rigour in the PCR's approach.

That lack of rigour extends to the pleading, which we say is seriously deficient, and that is going to be the subject of the first part of my submissions. It also extends to Dr Latham's damages methodologies, which we say don't constitute a safe basis satisfying the Pro-Sys test for the Tribunal to conclude that there is an adequate blueprint to trial.

MR JUSTICE MARCUS SMITH: Yes.

MR PICKFORD: That will be the subject of the second part of my submissions. Then Mr Patton will address you on Friday, on the case-management issues raised yesterday, on limitation and admissibility of, for instance, the FCA decision. And I will address you on the other issue about split versus joint trial.

MR O'DONOGHUE: I don't wish to get bogged down in timetabling --

MR JUSTICE MARCUS SMITH: I did notice that we will be sliding into Friday.

MR O'DONOGHUE: We have had no consultation on this, and we are rather surprised --

MR JUSTICE MARCUS SMITH: Well, let's park the surprise for the moment. We will see how we go. Perhaps, though, I can assist in this regard -- I didn't raise it with Mr O'Donoghue because I didn't think it would be particularly helpful but I will raise it now because it may assist timing.

I think you all go quite light on the significance of anterior regulatory decisions. Obviously, if this matter is certified for trial, we will need to have quite careful consideration as to admissibility and weight. But, speaking for my part, I don't consider that the existence of relevant regulatory material assists either side. What matters is whether the claim has been put in an arguable manner. And what matters is whether the methodology for quantifying and establishing that claim is a feasible blueprint to trial. And on neither of those points does a regulatory traversing really assist.

MR PICKFORD: We couldn't agree more, sir.

Similarly, on that subject, unlike the PCR, we have largely avoided going into the merits of the issues raised on this claim. That is not because, as wrongly suggested by my learned friend, we don't have an answer. It is because -- as the Tribunal pointed out yesterday -- that answer is largely irrelevant at this stage. There are some aspects where we say the claim simply doesn't make sense, we discuss that. But, for the most part, we are not wading into the facts of the claim. But I do want to make this short point on substance, if I may. Which is that vertically integrated undertakings -- such as Google -- by their very essence, treat themselves differently from their rivals. Let's take AdX as an example, because that is the entity which is at the centre of these allegations.

So AdX necessarily interacts with its rivals above and below it in the ad tech stack through the market. Now Google can only treat itself identically to that if it also interacted with the other parts of itself through the market, and if it did that it wouldn't be vertically integrated any more.

So we say that the perpetual complaint that what Google did must be unlawful simply because it innovated in certain ways which it couldn't necessarily roll out to its rivals, at the time it did so, is misconceived. The truth, we say, is that Google's innovation helped drive forward and turn into a success story the very industry that has provided huge revenues to Publishers.

Google hasn't harmed the Publishers, like News Corp or Daily Mail Group that lie behind the complaints to the French Competition Authority -- and that is ultimately this claim. Google is the hand that fed them, but that hasn't prevented them from seeking to bite it.

So I turn, then, to the first part of my submissions, which is our criticisms of the PCR's pleadings. Now that criticism is twofold.

First, we say that the pleading of the 17 conducts alleged in the claim to be abusive, is deficient, because there is no proper articulation of a counterfactual for the vast majority of them. And, therefore, there is no way of testing the accusation that Google distorted competition.

Without an explanation of what Google should have done differently, in the non-abusive world, there is no means for Google, or the Tribunal, to be able to examine three critical issues in any competition case.

Firstly: whether that counterfactual world is realistic and, therefore, whether the allegation of abuse is real or in fact just illusory, because you would never have the alternative world which is alleged.

Secondly: whether, judged by reference to that comparison, the conduct is actually

capable of having an anti-competitive effect.

And then thirdly: what is the baseline counterfactual conduct which is the starting point for judging whether actual conduct caused damage -- the first link in the causative chain. But that is the first point and I'm going to be going through the analysis of counterfactual on that part of the case first.

The second point on the pleading is that the PCR, we say, has failed to plead the rest of the causal chain between each of the alleged abuses and each of the heads of damages, which is said to have arisen. Now, in many cases we say it is not just unclear, it is impossible to understand how the alleged abuse could have had the alleged effect it did. That is a particular problem, we say, for the gross price effect. That is the issue which I'm going to concentrate on in that context.

So if I may, then, turn to some of the key principles that are going to be relevant to our submissions. The governing --

MR JUSTICE MARCUS SMITH: I think, for my part, when you're doing that, it would be very helpful to understand why the relevant figure is 17 rather than three.

MR PICKFORD: Certainly.

MR JUSTICE MARCUS SMITH: It seems to me that what you are doing is -- take a particular driving case, say the accident was caused by negligence, you might particularise the negligence and have 17 different conducts that, causative, attributed to the accident.

The counterfactual is not what would have happened if each one of those particulars was present or absent individually; that counterfactual is the accident as a whole. And that is why I'm intrigued by the differentiation between, really, the three cases pleaded in the claim form versus some extraction out of those three which, 17 can be (inaudible).

What is it that you are looking at, when you are saying: the pleading of the 17 conducts,

each of them require a separately established counterfactual, and that is, I'm sure, where you are going, but that is what I'm quite keen to understand.

MR PICKFORD: Well I am going to address that in more detail, but just to foreshadow what I'm going to say: I think the difference between the analogy that has been drawn in relation to the negligence and our case here is that what we are -- what we are not saying is that you can't potentially, you can't potentially, on certain facts, have common consequences to a number of abuses.

So we accept it is possible -- I mean, it depends on the facts -- but it is possible that a number of different conducts would all have the same consequence. That is, in the road traffic example, a number of different parts of what was said to be done wrongly all had the same consequence of causing the crash.

MR JUSTICE MARCUS SMITH: Yes.

MR PICKFORD: But, when we are in the context of competition claim, as we are here, and when there are highly divergent types of conduct, we do need to understand what it is that we are said to have done wrong, in relation to each of them. I think it will become clearer when I come on to deal with the specifics, but if I can give you an example. Grouped together under the first head of a single abuse are a number of different conducts. One of them is that we allegedly gave an informational advantage to AdX. I'm going to deal with the specifics of that, but the question that arises on that is: how should we have arranged our activities differently not to convey that advantage? A totally different allegation under the same single abuse, according to the PCR, is the fact that we charged 5 to 10 per cent when we introduced open bidding, to allow others to take part in that.

That raises a completely different question as: well how is that wrong? What should we have done differently there? Should we have charged a different number, should we have charged nothing at all? Those are totally, we say, separate issues that the

PCR needs to identify to say what it is in each case that we did wrong.

The approach it has taken is to say: here is a host of things that we don't really like the look of, and we think that in some ways we didn't -- that this caused problems for other SSPs. But it hasn't, we say -- this becomes clearer when I deal with the individual cases -- it hasn't dug down into that to explain: what is the case? What in fact should we have done? And we say that is a missing element of this case.

That is the first part.

So that is the first reason why we say it matters which of the conducts you are talking about, and the second reason is this: when you come on to the next element of the chain of causation, the question is: what did the particular conduct cause? What were its consequences?

On the gross price effect, the way that the claim is put against us only focuses in on one thing that we are said to have done wrong, which is the giving of the informational advantage to AdX.

It does not explain how a 5 to 10 per cent charge for taking part in open bidding led to a gross price effect. It doesn't explain how the UFPA led to a gross price effect. It doesn't explain how any of the other things that are alleged to be abusive led to a gross effect price. It doesn't even attempt to do that. We say that is why it is important to dissect the claim for what it is and analyse each component and understand what it is said that we should have done differently. That is not to say that they can't plead a single continuous infringement, of course they can. But it is to say that they need to be more rigorous about explaining their case and both what it is that we did wrong and then the links from each of those elements to the damage that it says has been caused.

So then, coming back to the key principles that are relevant to our submissions, we have already covered in the response general issues concerning certification and the need to provide an adequate route to trial, etc. I'm not going to go over all of those,

but I am going to select certain points to concentrate on.

What I would like to highlight in particular is the need for an adequate pleading, and a number of authorities which I say are very useful, and which the Tribunal should bear in mind. The President will have them well in mind, I would imagine, because I think you wrote the judgment in most of them.

Also, a short comment on the Pro-Sys test which is relevant to something that was discussed yesterday about a methodology to which you need a methodology.

MR JUSTICE MARCUS SMITH: Oh yes.

MR PICKFORD: I think that is important. So that is the reason for going to that.

If we could start, please, with Forest Fresh, which is in the Authorities bundle, volume 6, at tab 152. Now, this was a claim for abuse of dominance brought by a soft drinks supplier against Coca-Cola, and they were seeking lots of profit and exemplary damages. And Coca Cola applied to strike out the claim, or for summary judgment or, alternatively, an order staying the claim until Forest Fresh had amended its claim properly.

If we could pick it up, please, very, very briefly at paragraph 24, which is on internal page 9 -- my version doesn't have an external page numbering I am afraid. It is 8103. Does the Tribunal have that?

MR JUSTICE MARCUS SMITH: The reason we are a little bit slower is, for my part, bundles do not differentiate which volume it is on the face of it. So it is trial and error.

MR PICKFORD: Is that the label at the --

MR JUSTICE MARCUS SMITH: The label is somewhat similar.

MR PICKFORD: Yes. That is a problem that I experienced. Maybe at one of the breaks someone could re-label. What I had to do was re-label all of mine, so --

MR JUSTICE MARCUS SMITH: But working on the tab numbers, once you're in the right bundle you get there. But it is a little slower than one would like.

MR PICKFORD: Right. 24 is simply rehearsing very well-established principles on strike-out and summary judgment.

MR JUSTICE MARCUS SMITH: Yes.

MR PICKFORD: "1: the court must consider the claim has a realistic, as opposed to a fanciful chance of success, and a realistic claim is one that carries some degree of conviction. This means a claim that is more than merely arguable ... "

The reason why I go to that is because: yesterday I heard my learned friend say that it is a low bar at this stage. But it is not a low bar for the pleaded claim. It is a low bar for the methodology that supports that. There is no authority that, just because you have a collective proceedings claim, you don't have to plead out your claim with the same degree of rigour, as you would in any claim. So it is not a low bar, it is in fact something that is more than merely arguable. That is the first point.

Over the page, at paragraphs 26 through to 28, we have some of the key principles in relation to a properly particularised claim. About a third of the way down the first, it is: "In essence, a party's statement of case must allow the other side to know the case it has to meet in order to ensure that the parties can properly prepare for trial. Unnecessary costs are expended court time, waste on points that are not in issue, and which lead nowhere. Furthermore, and importantly, Particulars of Claim should set out the essential facts which go to make up each essential element of the cause of action.

"27: the importance of proper particularisation in competition law has been repeatedly emphasised in the case law."

There is reference to Parks and Esso Petroleum. And then, a similar statement by Sir Andrew Morett, in P&S Amusements, and then the often-cited dictum of Mr Justice Roth in Sel-Imperial.

"It is important that competition law claims are pleaded properly. To contend that

a party has infringed competition law involves a serious allegation of breach of a quasi public law, which can indeed lead to the imposition of financial penalties as well as civil liability. A defendant faced with such a claim is entitled to know what specific conduct or agreement is complained of, and how it is alleged to violate the law.

"These are notoriously burdensome allegations, frequently leading to extensive evidence including expert reports from economists and accountants. The recent history of cases in which such allegations have been raised illustrate that they can lead to lengthy and expensive trials. It is only through the clear articulation of each party's position in its statement of case -- appropriate factorial detail -- that the other side can know what case it has to meet and what issues any experts have to address and that the court can effectively exercise its case management powers."

I lay that down a little bit because we say those are really important principles that are going to come on and bite when we go through the details of the PCR's pleading.

If we could then go to O'Higgins in the Competition Appeal Tribunal. So I'm sure the President will well know, this concerned two competing CPO applications. It is at volume 2, tab 60. That is page 2344.

It concerned currency manipulation in foreign exchange markets. The Tribunal addresses the importance of pleadings in particular with an emphasis on causation. That is why I'm picking it up here, at paragraphs 197 and following.

If I could ask the Tribunal, please, to read 197 and 198, tab 60. The page reference is 2441.

In view of the difficulties -- I will pause for a moment.

(Pause)

What I was going to say was: in view of the difficulties of sometimes finding the passages, would it be helpful if I just spoke them? There are not that many, or is it ... I see a nod on your left.

MR JUSTICE MARCUS SMITH: I don't want you spending too much time reading out.

MR PICKFORD: Okay.

MR JUSTICE MARCUS SMITH: We will read them to ourselves, and I'm sure we will get quicker as we navigate the electronics.

(Pause).

MR PICKFORD: Then 200 makes an important point here, which is that:

"An informational imbalance doesn't justify failing to advance a proper case with sufficient specificity."

That is at 200.

209 to 210 make the point that:

"Where there is a failure to assert a causal link between breach and damage, the claim will be defective and liable to be struck out."

And:

"It is not enough for a claimant to commence proceedings, unable properly to make the necessary factual averments, they have to do it at the beginning."

And then at 232, finally:

"The economic theory alone does not constitute a legal basis for a claim."

So that is that case, very briefly.

MR JUSTICE MARCUS SMITH: Yes.

MR PICKFORD: I don't need to go to it, but the Court of Appeal in Evans, at 78, endorsed the approach, as you know, of the Tribunal.

Then, again, very briefly, but to deal with a subtly different point: Gormsen and Meta -- I'm going to call it "Round 2" -- which is in the Authorities, volume 6, it is at tab 139, and it is at page 7730.

The key point that I derive from this is, in particular, in paragraphs 7(2)(iii) -- so on

page 7736 of the bundle, if that is the easiest way of getting there.

MR JUSTICE MARCUS SMITH: Yes.

MR PICKFORD: In that paragraph, through to subparagraph 3, the Tribunal is making what we say is a particularly important point, where there is a distinction being drawn between pleadings and supporting evidence.

It isn't good enough to say: "Oh well, we have an expert report and it is all in there." You have to set it out in the pleadings. And that is relevant to the point that Mr O'Donoghue said yesterday, that: "It is okay. Look, we have cross referenced Dr Latham."

We don't accept that Dr Latham does the work, anyway. But that is not an adequate approach. The pleadings need to be the guiding lights.

MR JUSTICE MARCUS SMITH: Yes.

MR PICKFORD: I mean, it should be, I hope, obvious why that is so, but there are basically, we say, two key reasons for that.

One: otherwise it deprives the Tribunal of its proper gatekeeping role, because it is the pleadings through which that operates. And expert reports don't have the precision nor the clarity of a pleading. So we can't be expected to ferret through them to try to work out what the pleaded case is. And, secondly, an expert may change their mind. Indeed they may be obliged to change their mind given their duty to the Tribunal. And, again, that is not appropriate --

MR JUSTICE MARCUS SMITH: It is the old distinction between: pleadings plead fact, not evidence; and the evidence is contained separately.

MR PICKFORD: Indeed, sir. I think that is a fair way of putting it.

Then, finally, we refer to paragraph 27, which is a reminder of what it means to plead a case of causation. And that is a reference to BritNed -- which I believe, sir, you referred to yesterday -- and we endorse what was said there in relation to the but-for

test by which one establishes causation.

MR JUSTICE MARCUS SMITH: Yes.

MR PICKFORD: Now, the next point of principle to make, I think I can deal with very briefly. There is a dispute about whether you need to plead a counterfactual in relation to abuse. We say you do. It was suggested by my learned friend that we cited only one 1960s authority for that, which is not correct. What we actually said is that it is such a fundamental principle that it goes on to become to the court's very first case of many, many cases thereafter. And we cite a large number of them at footnote 8 of our skeleton.

I can deal with it probably most briefly by simply taking up just one of those, which is Dune Group and Visa, and you should be able to find that, again, in Authority 6 -- I hope it will be easier to find now -- at tab 136, and the page is 7425.

Then, if we go on to paragraph 21 -- it is at 7435 -- if I could ask the Tribunal, please, to read paragraph 21 to itself.

(Pause)

MR JUSTICE MARCUS SMITH: Just to be clear what we are talking about, when we talk about 'absence of muted agreement', that is a reframing in the chapter 1 / 101 context of the test that the point of a tortious remedy is to put the claimant in the position that they would have been in, had the tort never been committed.

MR PICKFORD: Yes.

MR JUSTICE MARCUS SMITH: Because, here, the tortious act is the inclusion of an agreement that is said to be unlawful. And you therefore need to work out what the case would be if that tort, as a lawful agreement, didn't happen. That is the point.

MR PICKFORD: So we agree with that but we say that exactly the same principle applies in relation to a chapter 2, or an Article 102 case. Because, again, what you need to work out is what the state of the world would have been but for the abuse.

So, it is the exact same point. In one case the tort is the agreement, in another case the tort is conduct which it is said deviated from competition on the merits. But, in either case, it is exactly the same principle that one goes through, which is to remove that conduct, and look at the competitive situation in its absence.

So there is no reason for any logical distinction between --

MR JUSTICE MARCUS SMITH: None whatever, except that the framing of the abuse is rather more fluid in the case of chapter 2 than in the case of chapter 1, because of the nature of the tort involved.

I mean look, for instance, at the claim form, B1, tab 1 page 64.

MR PICKFORD: Sorry, B1, page 1, page 64?

MR JUSTICE MARCUS SMITH: Yes, to show how fluid these things might be. You will see the way in which the learned pleader made the first abuse is, no doubt in a very staccato form, put in the heading at the top of page 64, and that is really where my, "Is it 3 or is it 17" point is coming from. That, isn't it the situation that it is for the claimant to frame the abuse that they are interested in? And to -- having done so -- use that framing to inform the counterfactual.

In other words, to go back to the chapter 1 example, there would be no reason not to say that the entire agreement is anti-competitive. You could say that. You might pay quite a high price come trial, if in fact the point was not that the entire agreement was unlawful, but only one provision. But that is not a question of the framing of the counterfactual, that is a question of the framing of the case badly at the outset, which may have consequences for the trial.

MR PICKFORD: In my submission, sir, it may be a consequence of the framing of the counterfactual, because it all depends on the facts of the particular case. But we say that there will be some cases -- and this is one of them -- where it isn't adequate simply to say: the Google publisher ad services treated AdX more favourably than rival SSPs.

You have to explain precisely how that is so, and that doesn't just mean to say: well there were ten things that we didn't like. It means grappling with what realistically are you saying that Google should have done in the alternative. That is my point.

So I accept that there may be cases where there will be some choices that are reasonably available to a pleader to decide how to put their case. But that doesn't mean that they have whatever latitude they want to see themselves, in relation to how they then describe what it is that we should have done differently.

MR JUSTICE MARCUS SMITH: Of course I have picked, rather lazily, at the heading and we have more granularity in paragraphs that Mr O'Donoghue took us to yesterday, and I don't want to, unless you do, go through those again.

But my point is that, it isn't a factual question at this stage; that is for trial. The point about the pleading is to frame factual investigation going forward.

Now, if a pleader has done a bad job and framed a case either too narrowly or too widely, then at some point the consequences will be visited. But it is not for the Tribunal to say: Well, we think -- being entirely ignorant of the facts -- that you could have pleaded this better. That is not our role. Our role is certainly to test whether it has been adequately pleaded, but that is within the framework of the pleader's choice as to how to put their case.

It may be that it is that burden and duty that exists in the claimant, that is the explanation for the difference between the three and the 17, to which we are going to come.

MR PICKFORD: Well, I think that succinctly possibly expresses the difference between the point that I was putting to the Tribunal and you put back to me. I would say that when it comes to the specifics of these allegations, in relation to a large number of them, it is still not sufficiently clear what the case ultimately comes down to. And the Tribunal will have to form a view on that.

I mean, there is obviously no blanket margin of appreciation that a pleader gets to say -- I understand that is not what you're saying, sir, it is where one draws the line on that, I think, in relation to that scale, effectively.

MR JUSTICE MARCUS SMITH: It is, and I think you were right saying that the line is to be articulated by reference to the specific plea rather than by reference to generally articulated propositions.

I think the general propositions can be stated pretty uncontroversially. And certainly, for my part, I have no issue with the law that you have been articulating. The question is: at what point does a plea become so wide as to be, to (inaudible) language, de-moral? It is too wide.

MR PICKFORD: What I'm going to submit, as I go through each of the pleas, is: we need to know what is the essence of what it is said we actually did wrong, in terms of what should we have done differently. And the Tribunal will be able to form a judgment on that for each of those. It may agree with me that it is not sufficiently clear, it may agree with Mr O'Donoghue that it is sufficiently clear. But I think we can only really grapple with it, ultimately, by looking at the specifics of each of those pleas.

MR JUSTICE MARCUS SMITH: I couldn't agree more. Just in terms of logistics, are you going to go through all 17 or are you going to go through your top five?

MR PICKFORD: I'm happy to take in whichever order -- I'm happy to go through some selected ones, if that is most helpful. Because --

MR JUSTICE MARCUS SMITH: It does seem to me that, rather than canter through at great speed all 17 -- which is unlikely to do justice either to the pleading or to your criticisms of it -- that you pick your best examples and we look at those.

MR PICKFORD: That sounds like a very sensible way of doing it. When we get there, I will do that.

Before we do, can I go to one final authority which is relevant to the discussion

yesterday about methodology and, in particular, methodologies for methodologies. That is the case of Gutmann, in the Court of Appeal, and we are back in Authorities, volume 3, at tab 66. This is a paragraph that you were taken to yesterday. It is paragraph 53 on external page 280.

It begins in italics: "Not a statute ..."

The key point I want to emphasise here -- it is the only point I'm going to come back to -- is what is said about halfway through that paragraph about the nature of the Pro-Sys test. And it is that one needs something which is sufficiently credible or plausible, in terms of methodology, with some basis in fact, a realistic prospect of establishing loss on a class-wide basis. The methodologies cannot be purely theoretical or hypothetical. It must be grounded in the facts of the particular case. Some evidence of availability of the data which the methodologies is to be applied.

Now, for my part, I am sympathetic to the Tribunal's obvious desire to find an elegant way through what has obviously become quite a tricky aspect of the regime, which is dealing with: what is sufficient to satisfy this test? But we do say -- and it may be that this isn't what the Tribunal is suggesting -- but what we do say is that it wouldn't be open to the Tribunal to certify a claim on the basis of: Well, we have now a methodology to establish a methodology. There has to be something more concrete to that. So when we get to that part of the submissions, the Tribunal has to be satisfied that one of the methodologies that has been proposed satisfies this test here.

If it does, then obviously there is nothing stopping the Tribunal from going on to make further directions to say: Let's have some sensible engagement to refine that. But there does need to be that key concrete methodology in the first place.

What we can't say is: let's dispense with that all together, and --

MR JUSTICE MARCUS SMITH: I don't think that is what was being suggested yesterday.

MR PICKFORD: I'm very glad.

MR JUSTICE MARCUS SMITH: What was being suggested was: how does one manage the -- like the McLaren problem, of each side articulating their own methodology which, absent the alternative, would be enough to resolve the question, but which are mutually inconsistent.

Now, in that situation, it is undesirable for the Tribunal to be faced, at the earliest at trial, with those two rivals. My point was that that issue is one that ought to be grappled with as a matter of case management well before trial, so that the Tribunal can say: Well, you have each come up with an answer that resolves, let us say, this particular aspect of quantification. They both work, they are both diametrically opposed -- and one cannot predict in which way each exercise will go -- they are both diametrically opposed. We need to get a grip on how this issue is going to be resolved, and it may be that that is something that needs to occur at a significant hearing, well before trial, so that the data that informs the methodology or methodologies can be controlled.

So, I was making a case management point. I wasn't, I hope, suggesting that one could go off and say: Well, we don't know how it is going to be done, but we are confident that it can be done in the future, because there is a process in place. I mean, that is no more than a description of the process that occurs in other jurisdictions where you say: Well, we know how to try these cases: it is pleadings; witness statements; after disclosure, experts reports; trial.

Well, the issues in this jurisdiction are harder.

MR PICKFORD: I'm very grateful for that. That is very clear, sir, in which case I don't need to say anything more about it.

MR JUSTICE MARCUS SMITH: No.

MR PICKFORD: I wanted to make my point very clear about what it was that we agree

to and what we don't.

MR JUSTICE MARCUS SMITH: No. The only point that both sides should take from this is that if -- we are in the middle of debating this -- if this goes forward, we are going to want both parties to think very carefully about how this sort of control of methodology, or methodologies, is handled. And that is likely to involve -- if we certify -- pretty close engagement from a pretty early stage of the experts on each side.

MR PICKFORD: Okay. So, before going on to the specifics of each of the pleaded conducts, there are just a couple of general points I need to deal with in terms of general reasons given by my learned friend for why they didn't need to engage in that kind of exercise at all.

So the first answer is: they say there simply isn't a need in law for us to do that in relation to an abuse. And they, in particular, refer to National Grid in that context.

Now I make two related points in response to that. Firstly: if one steps back and thinks about it, it would be a very surprising result if what the PCR said was correct. Because the allegation that the defendant has harmed competition is pretty well the central building block for any competition claimant's entire case. And they need to be able to explain how that is so, relative to a realistic counterfactual world, or they have no case on damages.

So we say, even if National Grid were an authority -- which we don't accept -- with the proposition that a regulator doesn't need to consider a counterfactual in a purely regulatory context, we say that is irrelevant here, because a claimant who wants damages has to be able to trace through a causal connection between the actions that they complain of and the loss it suffered. That was the point made in the Authorities that I took you to, sir.

The second related point is this: the PCR does not ultimately in fact dispute the need

to plead causation of damage, but what it fails to understand is the implications of that. I think it is because it elides two different aspects of the question of causation.

We say that there, in this context, are two key things that can be considered analytically separate.

The first is: what is Google said to have done, or rather, what should Google have done differently to avoid the abuse, because that is what then frames the counterfactual for assessing what the consequences are. So that is the first point: what should we have done differently.

Secondly: judged by reference to that, what are the consequences of Google acting as it did for the represented class; i.e. what is the damage that allegedly flowed from Google not doing what it was supposed to do.

The mistake that my learned friend has fallen into is thinking that causation only relates to the second of those, the consequences part. But we say it relates to both. Causation is the chain all the way through, from the counterfactual world and what we should have done differently, through to damage.

The next point is -- this comes back to the single and continuous infringement point that we discussed a little earlier -- they say they don't need to plead separately in relation to each abuse, because they all comprise a single and continuous infringement, and their effects are, they say, multiplicative. We say that that is wrong. I'm going to come on to deal with the specifics, and it is probably easiest to understand it from specifics, but as a matter of principle first: a plea of a single and continuous infringement is an additional plea. You can't plead it without identifying the underlying abusive conduct. It is not a substitute for establishing the basic framework of your case. Once you have two or more conducts, you can then say: Well there was a single and continuous infringement in relation to both of them.

It is typically used by the commission for fining purposes. But we say it is definitely

not a get-out-of-jail card which absolves the PCR of explaining how everything that they say individually constitutes an abuse, in fact does so.

The claim form is very clear when it says that each abuse -- each conduct, each of the 17 conducts -- is to stand individually as well as cumulatively. That is paragraph 9 of their claim form.

I can see some interest in that. Let's turn to that, sir, very briefly.

MR JUSTICE MARCUS SMITH: Yes.

MR PICKFORD: That is B, tab 1, page 7, paragraph 9. The first sentence:

"Each abuse encompasses a range of conduct and practices ... [so a 'range of conduct and practices', that is the sub-elements of each of the three abuses that we are now talking about] ... whether considered individually or collectively ..."

What we understand the PCR to be saying is that: if they just win on one out of those 17 conducts, they have still won. Now, the --

MR JUSTICE MARCUS SMITH: But of course they we are saying it is three, not 17.

MR PICKFORD: Well, this is a key point, sir, because obviously you heard the submissions from my learned friend yesterday, saying that we are salami slicing. I think that is another way of making a point that, Mr President, you put to me. But, suppose the PCR wins -- let us consider what is called the 'first abuse' namely DFP favouring AdX. Now, one can argue about whether that is eight or ten conducts -- for the sake of argument say there are ten conducts there.

Let us suppose that the PCR wins on just one of those ten different behaviours. Is it going to say: No, that is just one salami slice, that is not good enough. We always set out our case, it was all-or-nothing for us.

Of course they are not going to do that -- or at least I would have said, until yesterday, of course they are not going to do that. There was then an interesting exchange that took place, when Mr O'Donoghue said that if they don't win on single and continuous

infringement, they accept they would have egg on their faces and that they would take the consequences. That seemed to imply that they accepted that the case would then fail. But in the afternoon he said: single and continuous infringement, that is our primary case. Therefore implying that they wouldn't accept that they had failed and, in fact, if they only won on one out of the ten, within the first category, they would still say: We have won and we get all of our damages please. Certainly, as currently pleaded, we understand the PCR is saying just that.

Now, it might be helpful for Mr O'Donoghue to clarify his case, if they are not saying that. But that is what, on its face, the first sentence of paragraph 9 says.

So, if it is their case that any one of those individual conducts would be good enough -- so, if they only win on one, let's say they only win on the informational advantage, that is good enough for their claim, well then they need to be able to explain the link between that and the damage. Or, if they only win on the 5 to 10 per cent fee, they need to be able to explain that and the link to the damage that they claim.

That is really, we say, at the heart, I think, of this issue.

In that context, Slovak Telekom doesn't go anywhere, that is just simply a separate case on different facts, where there is a single section on the effects of the conduct. So, in that case, a number of different conducts were capable of having the same effect. And that, we would say, is somewhat analogous, perhaps, to the take-rate part of this case.

But when it comes to gross price effect -- which is the key part of my submissions here -- we say that there is simply no analogy and, moreover, there was no debate in Slovak Telekom about whether the -- whether Slovak Telekom understood the nature of the case it had to meet. What it was said was that it should have done it differently. That is the key point that I'm making here.

There is just one final general point, which is: that there is reliance on information of

asymmetry. And, as I showed the Tribunal, that is not a good reason not to plead out your case properly, and I think the Tribunal well has that point.

MR JUSTICE MARCUS SMITH: Nothing further on that, thank you.

MR PICKFORD: I don't need to develop that any further.

So what I'm going to do for the next five minutes or so is just actually seek to get some clarity about what the case -- what the 15 or 17 abuses actually are. I'm not going to go through them individually but there are some bits at the edges where it is not actually clear what is in and what is out. Then, after that, I would probably suggest we take a break and I can hone in on my best examples, further to the Tribunal's helpful suggestion.

So, a good place, we say, to start this is to have our skeleton argument and annex A open. I hope that the Tribunal have those separately in hard copy, because what I'm going to suggest is that, if you go to tab 3 and right to the end of that, this is our attempt to summarise the different parts of the claim. And, because there is quite a lot of it, I certainly find it quite helpful to have this reminder of where I am in the scheme of the overall claim.

Now, what that does is set out what we identify as the 15 different conducts that are said to have been abusive.

Just to deal with a very small point: we noted in our skeleton argument that it might be 17, and it depends on how you divided up the ones from 1A, and it looks from the skeleton argument of my learned friend, that they are in fact seeking to divide those up separately as well. So, if so, that is 17. It doesn't desperately matter either way.

What is interesting, though, is if one goes to the -- perhaps keeping a finger in tab 3 -- goes to the skeleton of the PCR, at paragraph 10A, they set out there what they say are the core, the core parts of their case that are in play. They call them here "core conflicts of interest" which is a rebranding of the allegedly abusive conducts.

If one looks through 10A, which relates to the first part of the claim -- so that is DFP favouring AdX -- one does not see any mention of abuses 1D through to 1H. Then, if one goes to part C, that paragraph, one does not see any mention of abuses 3C or 3D.

The first point to make is that some of these seem to be very much subsidiary, even on the claimant's and proposed claimant's own case. One particular example, interesting example, is 1F. If I may, I would like to go to Dr Latham's evidence on this. So that is in bundle B and it is at tab 5.

So if we could go, please, to page 1737 of that bundle, and this is what corresponds to what we have labelled "Abuse 1F: the transmission of strategic information to AdX buyers, or SSPs, integrated in open bidding."

What is said at paragraph -- can I ask the Tribunal to look at 308 to 310, the key point that I am going to draw from it is that, at this stage Dr Latham is unclear whether there is, or isn't, a pleadable abuse here. He indicates that there might be, but he also announces that he is uncertain, and he will need to explain --

MR JUSTICE MARCUS SMITH: Where are you?

MR PICKFORD: That is at the end of 310. Perhaps if I let the Tribunal properly read it.

(Pause)

MR JUSTICE MARCUS SMITH: Is this saying anything at all? It is not saying a lot about the evidence, but ...

MR PICKFORD: His position, his position -- he is not talking specifically about the pleadings, sorry, sir, I misspoke if that is what I suggested.

What I'm saying is that it is less clear -- he says:

"It is less clear to me at this stage that there is in fact something that is capable of distorting competition."

So he says it will need to be explored further post-disclosure. That is in contrast to how he approaches other matters where he gives the view: there is a restriction of competition here in relation to other aspects of the case. But here, he doesn't. And so we are slightly unsure what the basis is for the plea in the claim form because, unlike the other aspects of their case, this doesn't seem to be something that their economist is going, necessarily, to support.

He says: "We are going to need more disclosure." That is not a basis for providing, we say, a positive plea of an abuse.

Next point, if I may, sir -- there is just one more point in terms of the contours of their case, and it is really a converse point, which is -- if we go back to paragraph 297 to 298 in this same report -- so it is just a couple of pages earlier, on 1735 -- there is a title headed "The Ability to Optimise the Functioning of AdX".

Now we haven't found, in the pleaded case -- there is no plea that has the ability, or corresponds to the ability to optimise the functioning of AdX. That, in itself, is not necessarily a problem. But then we come to 298 and we see that what Dr Latham is saying is that:

"I will seek to gather the data I need through disclosure to demonstrate how this conduct has materialised in practice. These conducts will also constitute separate abuses in their own right if they're capable of distorting competition and are not otherwise justified."

This would have been reviewed by the PCR's lawyers from a legal perspective, obviously, but we say this isn't an appropriate way of proceeding. There is no pleaded abuse that corresponds to this. So it isn't open to the PCR to say: We will have, nevertheless, some disclosure to see whether in fact, in fact we can plead it. They can make that application, but they seem to be contemplating -- Dr Latham is contemplating here, and presumably approved by the PCR, that there was going to be

disclosure in order to discern whether there is a pleaded abuse.

MR O'DONOGHUE: What was originally a strike on the pleading now looks like it is a strike out of Dr Latham's report.

MR PICKFORD: It is not a strike out of the report. It is a criticism of the fact that the PCR tells us -- through Dr Latham in this case -- that they are looking for disclosure via Dr Latham's report on issues that aren't actually even pleaded. That is the simple point.

I think now would be a very convenient moment, sir, if I may, to pause.

MR JUSTICE MARCUS SMITH: Yes, we will rise for ten minutes and resume with your top five.

(11.40 am)

(A short break)

(12.00 pm)

MR JUSTICE MARCUS SMITH: Mr Pickford.

MR PICKFORD: Thank you, sir.

Sir, I have chosen, as suggested, five examples. What I have done with those, I have chosen four which I say illustrate my point, and then I chose a counterpoint where I say they have actually done an adequate job; to show, by contrast, what we say is sufficiently precise as opposed to what isn't.

I will start, if I may, with open bidding.

So open bidding is the basis for the alleged abuses 1C, 1D and 1E. You will see that from the annex A table.

MR JUSTICE MARCUS SMITH: Yes. Which one? 1C and --

MR PICKFORD: It is 1C, 1D and 1E. It is three of the conducts that are impugned.

MR JUSTICE MARCUS SMITH: Right.

MR PICKFORD: Just for reference, it is described in the factual guide at section 12.

So what open bidding was, in a nutshell, is a service which Google launched for general use in 2018, which allowed third parties – ie, non-Google SSPs -- to compete against AdX for inventory using real time bidding.

It benefited Publishers because they were then able to benefit from fully real-time competition between advertisers using different SSPs. That was the purpose of open bidding.

Google charged Publishers a 5 to 10 per cent fee for using the service if a third party SSP won the auction. They charged a higher fee if AdX won the auction. They said: We are providing you the service and bringing everything together, so we are going to charge you something for using our service that brings these things together, even if it is a different SSP that ultimately wins.

To use the analogy that Mr O'Donoghue gave about estate agents, it is a little bit like when you have a buying agent who, in addition to the main estate agent, also takes a fee, because they are providing a service as part of the ultimate means of achieving a transaction.

Now, one of the three allegations made against Google -- indeed seemingly from Mr O'Donoghue's submissions yesterday, the main allegation -- concerns that very 5-10 per cent fee.

If we go to their claim form, which is in the B bundle at tab 1, page 73 -- and this is where they plead out the open bidding point -- and you see the basic point pleaded at 188, just as I described it. And then over the page, at 190, they plead as follows:

"The fact that open bidding treats AdX more favourably than rival SSPs participating in open bidding undermines their ability to compete. Most obviously, the 5-10 per cent fees as well as impaired user ID information, place them at a material disadvantage such that they are less likely to win impressions, undermining their ability to grow or maintain revenue and market share."

That is the allegation. But what we say we need to understand --

MR JUSTICE MARCUS SMITH: I think we had better locate ourselves in the pleadings as a whole. This is under the rubric of the First abuse?

MR PICKFORD: That is right. And it is, so it is open bidding (overspeaking) --

MR JUSTICE MARCUS SMITH: Specific allegation in support of that general abuse?

MR PICKFORD: That's correct.

MR JUSTICE MARCUS SMITH: All right. I think we will refresh our memory of 187 to 190. We had better read those, and then we will hear from you.

(Pause).

MR JUSTICE MARCUS SMITH: All right, okay.

MR PICKFORD: So what we say is: this does not explain what it is that we should have done differently. In particular, there are two very different alternatives here. One option, it might be that what they are saying we should have done differently is that we shouldn't have charged a fee at all, notwithstanding that we provided a service.

Now, if that is their case, we say that is a very peculiar case. It is rather like, if you can imagine --

MR JUSTICE MARCUS SMITH: Well look, it may be peculiar or it may not be, but that is not for today.

MR PICKFORD: If I may, sir? The reason why we think it is ambiguous and we don't understand the difference is: is it that, is it that we shouldn't have charged any fee? Because we don't really understand how that is sustainable. Or is it that we should have charged a different fee?

So they accept, in principle, the idea that if you provide a service you can charge a fee, but they are saying the 5-10 per cent fee is too high. Because, if that is their case, then we are going to need to lead a very different type of evidence to the type of evidence that we would need to lead just to say: it is legitimate to charge a fee if you

provide a service.

We are unclear -- because they don't tell us in sufficiently precise terms what the counterfactual is put -- which of those is the case that is being mounted against us.

I mean --

MR JUSTICE MARCUS SMITH: I must say, it does seem that paragraph 190 is very clear, isn't it? What it is saying is that: there is a discrimination in the open bidding system that is treating AdX more favourably than rival SSPs. And that one of the most obvious manifestations of this is the 5-10 per cent fees which, by my reading, is saying should not have been charged.

MR PICKFORD: If that is the case, then that is very well and we can address that particular case. But the reason why I raise it is because it is related, that we say that that case is very peculiar because we are providing a service.

MR JUSTICE MARCUS SMITH: Well, Mr Pickford, that is merits.

MR PICKFORD: Well, okay.

MR JUSTICE MARCUS SMITH: It may be a terrible case, peculiar -- well, fine. We will find that out in due course. But your point is: are they running this peculiar case -- as you call it -- or are they running something different? Now --

MR PICKFORD: Yes.

MR JUSTICE MARCUS SMITH: -- when I last looked at practice, this sort of ambiguity in my experience, to the extent that it is ambiguity, is worked out with a question of further information and with discussions between the experts.

I mean, I read it this way. It may be, if Mr O'Donoghue wants to say that it means something different, he will have to amend it. But that is a question of construction.

MR PICKFORD: I can't put my case any --

MR JUSTICE MARCUS SMITH: Okay.

MR PICKFORD: From the Tribunal's perspective --

MR JUSTICE MARCUS SMITH: Mr O'Donoghue, am I reading 190 right, or ...?

MR O'DONOGHUE: Sir, you are spot on.

MR JUSTICE MARCUS SMITH: Okay.

MR PICKFORD: Okay, well I will go on to my next example.

MR JUSTICE MARCUS SMITH: Okay. Just so that I know, was that the good or the bad example?

MR PICKFORD: That was the good example.

MR JUSTICE MARCUS SMITH: All right.

MR PICKFORD: There are four of them.

MR JUSTICE MARCUS SMITH: Okay.

MR PICKFORD: The next example is the universal first price auction. So this is the basis for abuses 1F, 1G and 1H in Annex A in the summary of the alleged abuses. So we are still in DFP favours AdX first abuse territory.

MR JUSTICE MARCUS SMITH: Let me just locate those in your ... You said 1F, 1G, 1H?

MR PICKFORD: That is right.

MR JUSTICE MARCUS SMITH: Thank you.

MR PICKFORD: This represents essentially an extension of open bidding. So when Google originally introduced open bidding, Google's AdX auction remained a second price auction whilst competing SSPs tended to be first price auctions. So the way that open bidding originally worked is that there would be the separate auctions and then they were bought together in a further auction which Google ran as part of open bidding.

What the UFPA did is effectively merged all of that into one single first priced auction, one unified first price auction. So it was a development in an extension from open bidding.

Now, one of the complaints that is made -- it is detailed as 1F -- is the provision of minimum bid to win information. It is said that after the auctions took place, anyone who took part was given relevant information about the kind of bid they would have needed to have given to win.

That is obviously valuable information. But we say: what is it that they are saying that we should have done differently? Should we have just kept that information to ourselves? Or are they saying that we should have provided it all for free? What we did is we provided it to people who took part in the UFPA and to whom we provided a service. We say, again, that it is ambiguous what it is that we should have done differently.

Now I anticipate, sir, that you may say that is the same issue.

MR JUSTICE MARCUS SMITH: Which paragraphs do you want me to read?

MR PICKFORD: If you go to the pleadings, it is at paragraph 192 to 195.

MR JUSTICE MARCUS SMITH: All right.

MR PICKFORD: You can probably just look at 192 and 193, because 194 is simply quoting the ACCC and 195 is quoting the CMA.

MR JUSTICE MARCUS SMITH: This is a continuation from the scenario which was already alleged to have been unlawful.

MR PICKFORD: Yes.

MR JUSTICE MARCUS SMITH: Its anterior state, okay.

(Pause)

MR JUSTICE MARCUS SMITH: Isn't this, again, the discriminatory point? It is an asymmetric provision of information which is what is being objected to?

MR PICKFORD: That is it, that is true, sir. But the question is: what are they saying we should have done differently? Are they saying we should have kept the information to ourselves, or are they saying we should have put it on a general website. Those

are two very different alternatives, they have two very different implications. And we don't know how it is that they are saying we should have cured this particular alleged problem.

MR JUSTICE MARCUS SMITH: Well, so we agree they are saying you shouldn't have discriminated?

MR PICKFORD: Yes.

MR JUSTICE MARCUS SMITH: So what you're saying is that where there are multiple ways of discriminating, it is incumbent upon the claimant to set out which way, given that you had the choice, you should have acted?

MR PICKFORD: Yes. It is incumbent on them to say what they say realistically would have happened. Because a counterfactual is going to need to be realistic, and they need to say what their position is on that. And then we can address that. Because otherwise, for almost all of these points, we have to address multiple different possibilities.

It might turn out that we plead to it, we produce lots of evidence on version X, and they say: no, no, that was never our case -- just as Mr O'Donoghue said today -- it was never our case that we were objecting to the amount of the fee. It is purely about the imposition of the fee.

Well, we say here --

DR MAHER: It is not necessarily the imposition of the fee but the fact that it is a discriminatory fee, meaning that you have charged rivals of AdX.

MR PICKFORD: Allegedly, yes. We can go into the merits of whether, in fact, AdX incurred costs, but that is obviously for another day.

DR MAHER: That is merits.

MR PICKFORD: Agreed.

MR JUSTICE MARCUS SMITH: You would accept, I think, that damages -- reputed

basis of the minimum that Google need to do, to prove, pleaded --

MR PICKFORD: Yes, as long as that is realistic.

MR JUSTICE MARCUS SMITH: That it would be wrong to claim damages, a remediation of a pleaded abuse was, whether there are other benefits issued, in the sense that it --

MR PICKFORD: Yes, I think so. I would need to think about that, but that seems right in principle.

MR JUSTICE MARCUS SMITH: Well, it goes back to the reason you pay damages, assuming the abuse is established, a reference to what would have happened if the repeated abusive tort had not occurred.

MR PICKFORD: Yes.

MR JUSTICE MARCUS SMITH: But, does one actually need to go further? A, it is a matter for evidence, not pleading, the account, the concept. Creating the abusive conduct. After all, this is Google's architecture. It is quite difficult at what the alternatives were.

MR PICKFORD: In my submission, sir, it is something that should be pleaded. Because that would determine what evidence we ultimately need to cover at trial. If it is never part of my learned friend's case, that option A would have been realistic, then, you know, they are not saying: we should have promulgated all the information entirely publicly, they accept that we should have charged for it -- we simply don't know -- then we don't need to address that.

But if that is going to be part of their case, then we need to address it.

Our key point is that: we need to understand, in relation to each aspect of the 17 things that are said that we have done wrong -- if they want, they might be permitted to say "We don't know, you could have cured it in two different ways" in which case we know that those two are in issue, and we can lead evidence on both of those things.

But our basic point is that just saying "this is discriminatory, this is abusive" isn't sufficiently precise to know what the contours of the case are going to be. Because we may very well find 50 per cent of the evidence that we lead -- let's suppose that there are generally two alternatives for solving these things, and we say in a lot of the cases that is true, on their case -- is it going to be: well you need all of that, or do we only actually need a proportion of that, because they are going to tell us that: we never really meant that we should solve it in way A, they only meant that we should solve it in way B.

MR JUSTICE MARCUS SMITH: Why is that relevant to the computation of damages? Isn't the counterfactual simply the case where there is no discrimination? In other words, what you're doing is, you are saying: here is an averment, you shouldn't have discriminated. That is the point on the merits.

The counterfactual is the case where there is no discrimination. You don't care how you achieve it. All we are doing is assessing what harm has flowed from the fact of discrimination, the counterfactual case being the non-discrimination case.

Now, it may well be that Google, as part of its defence, will say: Actually, your computation of damages, the harm flowing from the discrimination which shouldn't have happened, is in fact simplistic, because there is no way in which one can address the discrimination point without doing the following things. Which means that either there is no abuse, because you have to have some form of discrimination because of the nature of the process, or the consequences of eliminating discrimination are so adverse that, in fact, again there is either no abuse or there is no harm in the way you're going.

But I don't see the lack of clarity in the case, because Mr O'Donoghue doesn't care how you obviate the discrimination in this instance. What he cares about is--

MR PICKFORD: If that is right, and Mr O'Donoghue doesn't care, and if it is always

going to be that he is equally happy, he says: yes, deal with the discrimination however you want --

MR JUSTICE MARCUS SMITH: But isn't that, isn't that --

MR PICKFORD: Sir, may I take instructions just for one moment? Because I think we have touched upon a very important issue here, and it may be that there is a way through, in light of the comments --

MR JUSTICE MARCUS SMITH: First of all let us -- again, it is the draft of the pleading that is key. I'm going to look at that rather than what Mr O'Donoghue says about it. Nevertheless, if I'm barking up completely the wrong tree, I think it would be helpful to understand this.

Mr O'Donoghue, is it as simple as that? You're saying: there was discrimination, that is the abuse, it should not have happened, and we're going to have to work out a way of computing what harm flowed from the case, where there was discrimination when there shouldn't have been?

MR O'DONOGHUE: Well we can think of this in a very simple way. Imagine we were in a case of racial discrimination, the facts of the discrimination were made out. The defendant comes forward and says, "Your case fails because you didn't tell me how not to be a racist."

MR JUSTICE MARCUS SMITH: I think we will stick to software. But isn't the point that we are really moving from -- to use the language of American football -- offence to defence. We have the offence, saying: you shouldn't have discriminated when you did. The defence -- which is Google's job -- is to either say: there is no abuse because the discrimination, or what you call discrimination, is no more than a needful element for the way in which we are providing the service; or to say that the minimum way of curing matters was this; which in fact results in there being no difference between the harm in the factual and the harm in the counterfactual. But all of these things are,

aren't they part of Google's defence, not the claimant's offence?

MR PICKFORD: Well, in my submission, I think I have two points.

My first point will be: no, they should be being clearer. To use the discrimination -- of whatever type -- analogy, certainly in an indirect discrimination case you need to plead your comparator. You can't just say "I was discriminated against because I was black". You need to be able to say, in indirect discrimination, "I was discriminated against because I'm black, and here is how other people were treated differently, and they were white", for example.

So there is, even in that context, a need to draw out very clearly what you're saying is the counterfactual to justify the claim of abuse or tort or whatever it is.

So that is my first point.

MR JUSTICE MARCUS SMITH: That is entirely fair, but don't we have that? Because what we are saying is that there is a partial discriminatory provision of this minimum level of information, that some people get it and some people don't. It is that which is discriminatory, it is that which has caused the harm.

Now why do we need to get out, for purposes of understanding the claim, why it is that, or how it is that you would have cured that? It is not the, it is not the cost of cure that we are interested in, or even necessarily the ability to cure it. It is the fact that we have, on the assumed facts here, information that has been provided to some people but not to others. It is said that that is a discriminatory abuse, and all we need do, absent a defence, is proceed to quantify that.

MR PICKFORD: Can I try --

MR JUSTICE MARCUS SMITH: Please do, this is very important.

MR PICKFORD: So on the issue that we are on, which is the provision of minimum bid to win information, I have to hypothesise some facts to try to answer why I say it matters.

Let us suppose that there are two different ways of addressing the problem. Either we don't give the information to anyone, or we give it to everyone.

MR JUSTICE MARCUS SMITH: Right.

MR PICKFORD: Now let's suppose that in the first of those cases, that the way that we deal with the problem is that we don't give the information to anyone, we just keep it to ourselves. It might be that if we did that, if you compare what happened in the real world to that counterfactual world, there is no damage. No one has suffered anything as a result of that, because all that happened is that, in the real world, some people did better than that and they actually got some information.

So that is one possibility. There will be a link between the counterfactual world and what, then, the consequence of the conduct, as compared to the counterfactual. Because it is always critical to understand the but-for for the purposes of damages.

Now let's assume, let's go to the alternative that I'm hypothesising, and let's say that actually the way that it is cured is that we give the bid information to everyone, and we are obligated to provide it free of charge to the world at large. It might be, that compared to that world -- I'm simply hypothesising here, I'm not accepting it -- it might be that compared to that world, the claimants would be able to point to some kind of loss. They might say: "Well, compared to that world, the fact that you kept it to this restricted group did harm us, as against a world in which we got it all for free". That is why I say it matters, because it has an impact on the causative chain, the but-for that enables you to go on and calculate damages.

MR JUSTICE MARCUS SMITH: The problem is, we are getting into extraordinarily difficult questions of proper and improper information exchange.

You could say that any confidential bargain where price is negotiated, actually involves the exchange of confidential information. We have had that argument in other cases.

You could say that the retention of price information between A and B, and not

publishing it generally -- as one would on an exchange, in exchange-based transactions -- is, in and of itself, discriminatory. So it may well be that your first case -- provisional information to Google alone -- is actually, itself, not an answer to the case. That would rather depend on the nature of the vertical integration, Google with the other services, which is something which you have to explore on the facts.

But, does not that rather highlight the very factual nature of the point that we are unpacking, that: we do know what facts we need to be exploring, because what Mr O'Donoghue is saying is: one way or another, the discrimination needed to be removed. And it may well be that you're right, that the only way to do that is to publish. But that surely can't be a question for now. Because if we had all this granular narrative, all this evidence, well we could probably try the case today.

MR PICKFORD: Obviously determining that case is, determining that issue is not for now.

MR JUSTICE MARCUS SMITH: No.

MR PICKFORD: All that we are saying is that we would like to know what they are going to be saying on that, and if their position is: we can't tell you, and you will have to lead evidence on everything, well that is one option.

MR JUSTICE MARCUS SMITH: That is entirely appropriate, but -- an entirely appropriately tendentious way of putting it.

What is the point of this document? Let's ask ourselves that. It is not to provide the platform for arguments on Day 1 at trial. I mean, come Day 1 at trial, we probably won't even be looking at this document.

What it is intended to do is to enable the Tribunal to control, and the parties to understand, the factual terrain that they need to traverse. It does seem to me that 193 puts it clearly. Now I may be wrong, but at least it is, if it is wrong, wrong clearly. Because what they are saying is: this, which you have done -- I don't know if you did

it or not because this is just an averment -- a partial allocation of information, is wrong. And our loss is the loss that flows from that failure to treat people equally.

Given that the averment is that negative thing, I don't think you can read into the plea an obligation to publish.

The obligation is not to discriminate, and that means, I think, ensuring that everyone gets the same low standard of information, not a higher standard which may be published. I think that is implicit in the plea.

Now, whether that is a technical solution, or an averment that actually bears technical scrutiny, I have no idea. I can see a lot of difficulties in that particular case. But one of the difficulties I don't have is the nature of the averment.

MR PICKFORD: That is very helpful. I am not asking the Tribunal to rise but may I take instructions a moment?

MR JUSTICE MARCUS SMITH: Of course.

MR PICKFORD: Thank you.

(Pause)

I think, in the light of the way that you have articulated your position, and there is no demurring from the other members of the Tribunal, I'm happy to move on to the next point that I have on causation. Because all of the points that I have are of the same nature.

I mean, I make them still, but I don't need to articulate them orally because I think we will have exactly the same conversation in relation to all of them.

MR JUSTICE MARCUS SMITH: It has -- if I may say so, Mr Pickford -- been a very helpful conversation, because these are not straightforward matters where the delineation between an averment of fact and the production of evidence that enables the Tribunal to resolve it, is particularly clear-cut. I mean it is rarely clear-cut in even simple cases but here it is particularly hard.

But it does seem to me that the answer is not a: "we are not going to certify you" response to these points. The answer is, to the extent there is ambiguity -- and I must say I'm not sure that there is, but you're certainly entitled to have any lack of clarity in your mind resolved, and that is why we have a provision for further information.

Now if you think that what has been averred -- take the earlier point about: surely they can't be saying that you shouldn't have charged anything, which you described as "peculiar", now you're absolutely entitled to have an unequivocal statement from Mr O'Donoghue that that is indeed his case.

I think that is his case and he has confirmed it, but you probably want to have that nailed down, because if it is a peculiar case, then well, come trial, you will have a very good time knocking it down. And no doubt the bleed across from one bad point to another point is going to assist Google, not the claimants.

So you're absolutely entitled to that. But it does seem to me that you shouldn't be saying "I have read this point, it seems to me it is so bad that they can't really be saying this. Please can I have a better effort that will make Google break into a sweat resisting it". Well that is not the approach.

If Mr O'Donoghue is clearly making a bad point, clearly, well that is for trial.

MR PICKFORD: Yes. I certainly -- on that issue we are very happy with that answer from Mr O'Donoghue.

MR JUSTICE MARCUS SMITH: Okay.

MR PICKFORD: I'm happy to bank that. Indeed, I think we are also very happy with the basic principle that if the only thing that is being pleaded is "this was discriminatory", then it is really up to us to say: "Then here is how we should solve it."

MR JUSTICE MARCUS SMITH: Indeed. Because that is the only fair way to enable the rights of the defence to articulate it. It would really be extremely odd for the claimant to say: here is the most destructive to Google way in which one resolves this

non-discrimination issue.

It has to be, I think, for the defendant to say: there is nothing in your point, or your point is misconceived, because you misunderstood the very nature of the architecture and the products that we are producing.

So I have no idea, and I suspect Mr O'Donoghue has no idea, as to the reasons why Google did it in this way. In a sense that goes to the very heart of what is for trial. We have extraordinarily complex and sophisticated systems here which, as you said earlier, arguably provide benefit to a large number of people. And that is almost certainly right, because a large number of people are paying for the service, so there has to be benefit somewhere.

The question is whether, in the way you have set it up, there is an opportunistic use of the service – the beneficial service that Google is providing, which constitutes an abuse. But that is absolutely in the heartland of fact and evidence. We know what is being said, it may be totally wrong but that is not for today.

MR PICKFORD: Sir, you are well heard on that. If I may, I will move on to my next point.

MR JUSTICE MARCUS SMITH: Thank you.

MR PICKFORD: But thank you very much, that is extremely helpful, I think, for all parties.

So we have a second pleading point, and it is this: there is an inadequately pleaded causal link between the abuses that -- we are assuming that the abuses themselves are now sufficiently articulated but, nonetheless, what we don't find adequately addressed in the claim form is how each of those different conducts led to the gross price effect.

At best, there seems to be a claim about one of the conducts in particular. Out of the 15 -- if you count them -- one of them we broadly understand has been pleaded -- I will

come on to why I say it doesn't make any sense -- but there is at least that pleaded connection, and the rest of them there isn't a connection at all that has been pleaded. So that is my other pleaded point.

Now, just before delving into the detail of that, I think it is quite helpful to come back to the estate agent analogy that Mr O'Donoghue articulated yesterday. He said: if you are selling your house, and you have no option but to go through a single estate agent in the country, and there are less competing bidders, you will pay more commission to the agent and realise a lower sales price. It is really as simple as that.

That was his case for both take-rate and gross price effect.

Now, I think we can well understand the idea that if there is no competition for estate agency services in a particular place, a price of those services might go up. But that is analogous, effectively, to the take-rate. It might be that, if there is only one estate agent in area X, you have to rely on them, they put their commission rates up from 3 per cent to 5 per cent. So that bit is comprehensible.

The bit which isn't comprehensible, both in relation to the analogy and, more generally, in our case is the idea that if everything is channelled, if all the demand is channelled just through one party, which is what is being alleged, effectively, in this hypothetical -- Savills, for instance, has driven Jackson Stops and Knight Frank, etc, out the business, and they have now all the demand for a particular area, and it all comes through them -- in that world, there is no reason why, if there is an auction that is being held, you would expect that the price realised in the auction should be any lower than if it was Jackson Stops that was holding the auction, or some alternative party holding an auction. Because all the same demand -- on my hypothesised facts -- is coming, are now being funnelled through one particular provider of an auction.

So we don't see that the analogy with house prices reveals the simplicity of the gross

price effect at all. There is no reason to believe that if all demand comes through one auction, or most demand comes through one auction, that leads to lower auction prices.

What you need, if you're going to make that case, is a clear articulation of what it is in particular about the auction structure -- in our case, Google's auction structure -- that actually caused the problem that allegedly there were lower rates realised in the auction that would otherwise be the case.

We say that is far from illustrating why his point is very simple, it actually demonstrates why it is not.

DR MAHER: So, going back to the estate agents analogy, is it the case that if the hypothetical monopolist estate agent had to actually compete against other estate agents, the seller might actually realise a higher price for the sale of his house?

Is that equivalent, Mr O'Donoghue, to what you're stating?

MR O'DONOGHUE: I'm sorry, could you repeat that?

DR MAHER: Using the analogy of the estate agent, if I understood Mr Pickford's case, is that: there is no reason to presume that the seller would achieve a lower price for its house if you channelled all the demand through one place.

MR O'DONOGHUE: Yes.

DR MAHER: But, alternatively, using that same example, if the estate agent actually had to compete against other estate agents for the sale of your house, the seller might actually achieve a higher price?

Is that --

MR O'DONOGHUE: We say a number of things. First of all, with competition with estate agents, it is self-evident, they would be lower.

DR MAHER: We are not discussing -- we are discussing the gross price effect.

MR O'DONOGHUE: Yes. The gross price effect -- maybe in that context the estate

agent example isn't entirely helpful.

But the basic objection in terms of the gross price effect is that what the discriminatory practices have done, they have effectively precluded SSPs other than AdX from functioning as ad exchanges. And, in percentage terms, as I said yesterday, we were talking about 60 per cent of the market tied up in AdX, 40 per cent in other SSPs. What we are saying, in relation to that 40 per cent, that has for more than a decade been completely, or at least significantly, excluded from the market, the ability of Publishers to realise and secure the highest valuations, or the impressions, has been impeded.

That is our case.

MR PICKFORD: So that is the case.

MR JUSTICE MARCUS SMITH: Well, no, that is not the case. Because the case is in the pleading.

MR PICKFORD: Yes, quite.

MR JUSTICE MARCUS SMITH: So we will need to go to how it has been set out. But I think, just to complete Dr Maher's thought -- because I think it is introducing a variant in the way in which an absence of competition causes prices to be distorted to the disadvantage of the consumer -- this. The point you, Mr O'Donoghue, are making is that: if there is an absence of competition between estate agents, then there is no incentive to compete on commission. In other words, are you charged 2 per cent for the sale, when, if there was competition, it might be 1.5 per cent.

Dr Maher's point is that that may be the case but, in addition, if you have monopolists, they will not just be charging 2 per cent, but they won't be trying to do the best for their customer. In other words, they won't be saying: come to us and we will get, irrespective of the commission, the best sale price.

MR O'DONOGHUE: Yes.

MR JUSTICE MARCUS SMITH: So it is really the lazy monopolist point that --

MR O'DONOGHUE: Sir, I think we are saying the same thing in a slightly different way.

MR JUSTICE MARCUS SMITH: What you're saying is that there is, in some instances -- this is why I think your case is different from the estate agent -- in some cases there is a virtue in having demand channelled through a single route. It is like an exchange for stocks and shares.

MR O'DONOGHUE: Yes.

MR JUSTICE MARCUS SMITH: What you're saying is: if you fragment that market, and cause some demand for a generic share to be excluded, then you are not getting a proper reflection of demand and supply --

MR O'DONOGHUE: Yes.

MR JUSTICE MARCUS SMITH: -- because the fungible share is neither being supplied nor being purchased in a manner that reflects true market demand and supply.

MR O'DONOGHUE: That is absolutely right, sir. This is not speculation. You get a small window into the effects a Publisher yields at a bidding. And even that, in theory of a form of competition, has led to increases in yields of up to 70 to 80 per cent. This is not remotely speculative. There is empirical evidence already on the record showing, in spades, that even this limited form of inter and intra SSP competition has been enormously beneficial.

MR JUSTICE MARCUS SMITH: Yes. Mr O'Donoghue, I'm sure that if you are certified, we will get this evidence in due course. But, at the moment, I am just trying to understand --

MR O'DONOGHUE: The concept.

MR JUSTICE MARCUS SMITH: -- how the case is put. I mean, frankly, arguability

we can have an argument about, but I don't think that is where it is at. Where we are at is how it is being put, and I think, Mr Pickford, we need to start with what has been said in the claim form.

MR PICKFORD: I'm happy to do that.

MR JUSTICE MARCUS SMITH: And take it from there.

MR PICKFORD: Yes. If I might just complete --

MR JUSTICE MARCUS SMITH: Of course.

MR PICKFORD: -- in a sentence or so, the estate agent point.

The issue is, if one comes back to estate agents, what was posited, Dr Maher, by you, was the idea that: possibly if the monopolist is lazy he will not try as hard, but there is no equivalent of that, we say, in -- sorry, I will start again.

You need to identify what it is, what the mechanism is, that is said to cause the problem. Now, in your example it was: there was effectively a lazy estate agent who didn't try as hard as they might have done because they were a monopolist. We don't see a parallel for that in the pleading, and it does not follow like night follows day that just because all demand goes into one auction, you necessarily get worse prices. It depends on the particularities of one auction set-up versus another auction set-up.

I can come on to make that good in a moment, because we will see the proposed claimant's claim is all based around what they call informational advantage.

That is a specific plea, but it is not something that just follows naturally, we say, from the idea that where you have a monopolist, necessarily there will be worse prices that are achieved by that monopolist on behalf of their clients.

In our case, if you take a percentage cut, you have a very strong incentive to get the best prices for your client. And if all that is happening is that you're running an auction -- which is the most, the clearest analogy to the ad tech sphere, because this is all about running auctions -- if all of the demand comes through your auction,

there is no reason in principle why that isn't going to -- it is exactly the same demand, everyone has exactly the same -- the bidders have exactly the same desire for the house or whatever, there is no reason why it would make any difference whether that auction is organised by Savills as opposed to Knight Frank.

Because what it depends on is the amount of demand and the valuations that those people who are bidding put on that. That is the reason for starting off with the analogy, is that: there is no -- as Mr O'Donoghue put it -- as simple as that reason to expect a gross price effect at all. You have to look at the particularities of what is being said. Which I think is very much in agreement with you, sir.

MR JUSTICE MARCUS SMITH: Well, let's get to how it has been put, and see where we go from there. I think the past hour has certainly demonstrated that: get a degree of clarity, and very helpful clarity, by looking at that which has been said. Disregarding, altogether, the merits of the averment and simply looking at its comprehensibility. So frankly, it is not a matter for this hearing, whether the point has legs in terms of the merits to that, but the point is whether it has been put in sufficient clarity to enable Google to put it out of its misery if it gets what it deserves.

MR PICKFORD: Indeed. If we can then, in the closing minutes -- we may as well just go straight to the pleading.

MR JUSTICE MARCUS SMITH: Yes.

MR PICKFORD: Which is at bundle B1, and it is on page 106. It is paragraph 270. We are in the section dealing with causation and we have the plea on the gross price effect at 270. And if I ask the Tribunal to read from 270 down to the end of subparagraph 1.

(Pause)

Whilst we are here, I might as well ask you to go on to subparagraph 2 as well.

(Pause).

MR JUSTICE MARCUS SMITH: Thank you.

MR PICKFORD: So, first thing to say is that, when one gets on to look at Dr Latham's methodology, and reads it in conjunction with the pleading here, back in subparagraph 1 of 270 there is a reference to AdX's last-look advantage. It says:

"... e.g., AdX's last-look advantage is what is causing, what is at the heart of the problem."

Do the Tribunal see that?

MR JUSTICE MARCUS SMITH: Where is the "e.g.,"?

MR PICKFORD: Back in 270, sub 1, we see the sentence:

"In relation to the ..."

MR JUSTICE MARCUS SMITH: Oh yes, I'm sorry.

MR PICKFORD: "... restrictions imposed... " And then we have "... e.g., the last-look advantage ... ".

In my submission, the "e.g.," is somewhat euphemistic, because that is it. There is no further explanation, when one comes to analyse what it is said is causing the gross price effect, than the last-look advantage. One doesn't find -- and this is the essence of the submissions that I will make after lunch -- that link being made in relation to any of the other alleged abuses in the table.

So, in the table, it is effectively 1A. But it is not pleaded out as, or explained by Dr Latham, as the rest of 1B through to H, or et cetera 2 or 3. And that is the essential point that I'm going to be coming on to, combined with the further point that, even in relation to 1A, doesn't actually make any sense if you actually stand back.

Now the Tribunal may say: that is a merits point. In my submission, it is sufficiently clear that it is actually a pleading, or a strike-out point, but that will be obviously for the Tribunal to judge in due course.

MR JUSTICE MARCUS SMITH: Just to be absolutely clear about the counterfactual

assumption referred to in the opening words of 270, what is being said is that, in the counterfactual world there would have been no exclusion of any SSP such that all would have participated in the same process, and that is the abuse of conduct that we are seeking to quantify. Do I have that right?

MR PICKFORD: Well, yes --

MR JUSTICE MARCUS SMITH: Don't hesitate to say no if I --

MR PICKFORD: In which case I would say: only sort of, because, yes, it is put in those broad terms there, but my point, and the one that I want to come on to develop, is that actually when it comes down to it, when you look at what is actually complained about, and the way that Dr Latham says that there was a problem with the ad tech auction, it all comes down to this last, this so-called last-look advantage. So it is not actually --

MR JUSTICE MARCUS SMITH: So we have a mismatch between the quantification process and the averment of abuse?

MR PICKFORD: Yes, that is one way of putting it, yes.

MR JUSTICE MARCUS SMITH: Do I have, then, the averment of the abuse right? Which is, I think, the opening four lines of 270? Namely, that the self-preferencing, or the abuse, is that a certain number of SSPs are excluded from a single process.

MR PICKFORD: Yes, I think that is --

MR JUSTICE MARCUS SMITH: You think that is -- okay.

MR PICKFORD: Yes.

MR JUSTICE MARCUS SMITH: Mr O'Donoghue, is there consensus on that, do I have that right?

MR O'DONOGHUE: Yes.

MR JUSTICE MARCUS SMITH: Okay. Thank you. Well, I think I understand the battle lines. I don't think I understand the granularity of it, but what you're saying is

that there is a mismatch between the articulation of the abuse in the general part of 270, and the methodology for quantification in 271.

MR PICKFORD: It is a combination. It is both the articulation of the chain of causation, and that also corresponds to the methodology.

So the chain of causation focuses on this particular point about the last look, what they haven't -- I'm not going to explain it now but I will explain that they haven't made that link to other aspects of conducts that they complain about. So, to give one example, a 5-7 per cent fee for participating in open bidding, they don't explain how that causes the problem with the AdX auction. That would be an example. So that is the first point. In combination with the fact that when one looks at the mechanism, the last look, we say that it is self-defeating, and it doesn't actually make any sense when one examines it, to the extent that it goes beyond something which is merely a merits issue for later.

MR JUSTICE MARCUS SMITH: Thank you very much, Mr Pickford, we will resume at 2.00.

(1.03 pm)

(The short adjournment)

(2.00 pm)

MR JUSTICE MARCUS SMITH: Mr Pickford.

MR FACENNA: Can I turn back to the question of timing and, we haven't heard, as I said yesterday, on the other issues, the five other issues other than methodology -- it is really for Google to do the running on those -- and then I will have not only our reply on them but to deal with them substantively. A couple of them have some more in them, the limitation points, so they will take a bit of time.

In addition to me dealing substantially with those, Mr O'Donoghue will obviously have to reply to Mr Pickford's submissions. I think, on the other side, there is some expectation that Google might have the opportunity to have the last word on some of

the points.

If we don't start any of that until 2.00 tomorrow, we will be in trouble, I think.

MR PICKFORD: I understand.

MR FACENNA: So if Google's position is that it is going to go into tomorrow morning, I think there will have to be some hard stop so that we can then get on and deal with the substance of the other points, and make sure that there is time efficiency and fairness to deal with the reply.

MR JUSTICE MARCUS SMITH: Yes, it is the inverse of the problem that we had at the beginning, isn't it.

MR FACENNA: Yes, my Lord.

MR JUSTICE MARCUS SMITH: Thank you.

MR PICKFORD: Sir, we obviously support a fair division of time, and the Tribunal can rest assured that we will not take more than -- well, my intention, if I can, is to finish my submissions today. But even if I wasn't able to do that and wasn't able to sit down by the end of today and to have completed them, there is certainly no intention on our part to go beyond around the middle of tomorrow morning, including what Mr Patton has to say. Even if we took -- I'm not suggesting we are aiming to -- but even if we took until lunchtime, that would be one and a half days each, which would be a fair allocation. We are seeking to do better than that, significantly, but this morning was an extremely helpful session for everyone, but there is quite a lot of dialogue and that necessarily takes time.

MR JUSTICE MARCUS SMITH: There is no criticism, just a desire to ensure that all points are properly aired.

I mean is this, and if so to what extent, is limitation actually going to be a truly live issue, given the indications we have given on the force of the points under any, but on the case management implications of those, Mr Patton?

MR PATTON: Your Honour, I wasn't proposing to launch into substantive submissions on the limitation point. I was proposing to address you, in the light of what you said yesterday as to the appropriate time for those to be heard in an orderly way. So if Mr Facenna is expecting that I'm going to start by taking you through the Withdrawal Act, and so on, that wasn't my intention in the light of the indication that you have given.

MR JUSTICE MARCUS SMITH: That is very helpful. It may be that it is possible for parties to discuss the best way of case managing a limitation question. Or it may be that different answers pertain to the different limitation questions otherwise. But it seems to me that the choice is between saying "it is all a matter for trial" versus "it needs to be done sooner" because the effect of resolving that is going to affect the shape of the trial.

Now my sense -- but you will know far more about the merits and demerits of this than I -- my thinking is that, given the intertwinedness of the history, chances are we are going to be looking at the history whether the limitation points succeed or don't succeed. In which case, leaving it over to trial is probably better. But that is a dynamic, if the parties reach a common position, the Tribunal is unlikely to push very hard unless it has strong views that that is the wrong call.

So it may mean that, as I think you're suggesting, limitation can be very short.

MR PATTON: Yes. What I was proposing to do was address you on the timing points. Our position will be that it ought to be decided early as it doesn't seem as if there is an alignment of views between the parties but that...

MR JUSTICE MARCUS SMITH: Right.

MR PATTON: I will address you on why we say that would be the right approach. That was what I was intending to do and not to start addressing you on whether we are correct on our limitation point.

MR JUSTICE MARCUS SMITH: That is helpful. And I suppose the further question is: given this isn't, on any view, a certification point, it is a case management point to trial -- because the limitation only affects a portion of the articulated claim -- you might want to be thinking about a whole series of hearings controlling certain matters. The question really is: does limitation feature as one of the key features, or does it not? And there, I think my overriding concern is that: are we simply setting up ourselves for an appeal which will either mean that the trial needs to be pushed off so that we have confidence of outcome, or do we have a process where the limitation issues are determined but not appealed until after the trial? In which case you have to ask yourself: why bother doing them early?

So I do see this as a very pragmatic question. Normally you would want to get limitation done sooner rather than later. But I am wondering whether that is not the long answer in the rather curious facts of this case.

I think the question is: to what extent does the limitation point result in a serious slimming down of the issues at trial? And that is obviously a prize worth achieving.

If you're talking -- I'm plucking things out of the air here -- if you're talking about a 12-week trial which is reduced to eight if the limitation points fall away, then it is worth having a day on limitation to save four weeks and embed the appeal in that process.

If, on the other hand, you're saying: well frankly we can't tell but it is not going to be that significant, well then I don't know where an early hearing takes you beyond a distraction.

But, obviously the parties cannot reach a common position in time and that is why we will deal with that in perhaps five or ten minutes.

Mr Pickford, before you start, I want to ensure you that I have grasped the multiple auction analogy that we were discussing before the short adjournment correctly.

MR PICKFORD: Yes.

MR JUSTICE MARCUS SMITH: Because I think what I put either to you or Mr O'Donoghue, or probably both, was the notion of, at auctions that were operating between differentiated participants, in parallel, at the same time. In other words, one has a total market of 100 buyers and sellers, and they are split, in that some can participate in auction A and some can participate in auction B. And those auctions then proceed and you get two outcomes, which are the outcomes of the auctions process.

All it does, putting to Mr O'Donoghue, was that one might arguably lose something in the absence of the depth of the market. In other words, one might get a different price if all 100 were participating in the same auction process. And that was how I see the 270 point, trying to articulate it for the sake of my understanding.

Looking at the pleadings, it seems to me that analogy was not quite right, and I want to unpack why I'm saying that, because it may make a difference in terms of the point that you're making on 270 subparagraph 1.

I think that the case that is being pleaded by the class representative is that: in fact, there are two auctions but they are operating in temporal sequence, in that the output of one auction becomes, in some way, the input into the second auction.

MR PICKFORD: Yes.

MR JUSTICE MARCUS SMITH: And that there is, as a result of that interrelationship, a competition law abuse.

MR PICKFORD: Yes.

MR JUSTICE MARCUS SMITH: Now that, to my mind, is a very different dynamic to the temporally in parallel auctions that I was putting before the short adjournment.

MR PICKFORD: Yes.

MR JUSTICE MARCUS SMITH: I'm not saying it assists in understanding whether

there is or whether there isn't an abuse, because there are all kinds of pre-qualification processes for sales in all kinds of contexts, and very often one can see why that happens. I mean, in tenders one frequently has a set of qualification requirements before one is allowed to submit a tender, or allowed to participate in an auction. That is obviously, quite obviously, a merits point.

But I wanted to flag that I had moved on from the analogy that we had discussed before lunch to this one, in case it makes a difference in how you address me. I think it is just my error, but it is probably good to get it on the record.

MR PICKFORD: That is extremely helpful, sir. I concur with the way that you have put it. That is what I understand their case is.

I don't think we need to dwell -- we really don't need to go back to estate agents. I think the essential point I was seeking to draw from that is that there are no simple and natural analogies, in fact it all depends on the specifics.

MR JUSTICE MARCUS SMITH: I think if -- you have put your finger on why it is important to air this, because I think you're quite right, the estate agent analogy isn't apposite to this phased process.

MR PICKFORD: Exactly. That is the nub of it. That is what they say is the nub of it. I'm going to explain two things.

One: why that actually is internally inconsistent with other things that they say. So that that case, on its own, we say doesn't make any sense.

Secondly, that is all there is. There isn't, then, a whole series of other versions of it that relate to the other abuses. Because what you have just identified, sir, is one of the abuses. It is there in 1A. It is not 1B and 1C and 1D, et cetera. That is an important point, because it means that the claimant -- even if you object to my point that the 1A theory doesn't make any sense, that is all they have. If they fail on that, the gross price effect goes away, is what we say. But that is not how it is pleaded.

That is an important point I think we need to air, and that I'm going to seek to persuade the Tribunal on.

So we say that the way that it is articulated in the pleading and how, sir, you have just articulated it, is reflected in Dr Latham's evidence as well. It is helpful to look at that briefly. We can pick it up -- it is most concisely put in his reply evidence in the D bundle, and it is at tab 2, page 108.

MR JUSTICE MARCUS SMITH: Yes.

MR PICKFORD: Here he is in debate with Mr Matthews about whether there is an equivalence between auctions under the UFPA and the counterfactual. And he goes on to say what the competitive issue is. In the third sentence, he says:

"The competitive issue [this is the nub of their complaint] is not the distinction between a first- and second-price auction, it is the privileged information that is afforded to AdX by DFP."

Then he goes on to say:

"Prior to the transition to UFPA, AdX's informational advantage came in a last look."

He then goes on to make the case that, after UFPA, there is a different type of informational advantage. I will come back to that later because that relates to open bidding, and I don't want to confuse things at the moment. So, for the time being, we are just on the first part of that analysis.

Then one sees it, again, really reinforced in paragraph 166, which is on page -- it is the last part of 166, over the page on 120. He explains there:

"The key differences between the actual and Counterfactual, the effects of which I propose to estimate empirically, are (i) the sequential nature of the auctions in the actual, and (ii) its implication that Google was able to benefit from an informational asymmetry with respect to its rivals."

So, again, that is absolutely at the heart of matters as, sir, you rightly explained.

So what we say is the difficulty with that case is this: Dr Latham, rightly, accepts that the rational bid strategy for a bidder in a second-price auction -- that is what the AdX auction is -- is simply to bid one's full honest valuation. And one sees that in his third report that we are in, at paragraph 86, that is on page 100.

"... It is optimal for bidders to “bid their valuation” (the maximum amount they would be willing to pay for the impression). The intuition for why bidding your valuation is optimal in a second price auction is that, if you know you will pay the second highest bid if you win the auction, it makes sense to bid your full valuation to maximise your chances of winning safe in the knowledge that raising your bid does not increase the amount you will pay if you win."

So far, so good. Second price auctions, the AdX auction was: you bid your true valuation.

So it doesn't matter in that context what the price floor is, it doesn't matter what anyone else has bid, because you know that all you need to do is just bid your true valuation.

So the so-called informational advantage, even if we accept that there was some additional information that was given to AdX bidders, is no advantage. Because, in the way that a second price auction works, it is totally irrelevant to the bidding strategy of bidders.

Now it might be different if it were a first price auction, but it isn't, it is a second price auction. And, as Dr Latham explains, that means that there is no advantage that is given to those people who come in through the AdX auction, because they are going to bid what they bid anyway.

DR MAHER: I think the issue -- maybe two questions. First, let me ask: do the bidders who bid in the first price auction then bid in the AdX auction?

MR PICKFORD: No.

DR MAHER: No. The question is: they would have shaded their bids in the first price

auction, therefore you don't know what their true valuation would have been, if it had been a simultaneous auction, regardless of it being a second price auction. So they may have bid differently. That is what I think I understand Dr Latham's point to be.

MR PICKFORD: Well, with respect, that is a different point. That is not an informational advantage. His point is that there is informational advantage which allows you to beat -- and much play was made of this idea, that you can beat a previous bid by one penny. It is not about just bidding 1p above the other party's bid, from the third party SSP auctions.

DR MAHER: It might have maybe, Mr O'Donoghue put it as "a last look" but the abuse is still the self-preferencing. In other words, that AdX is treated differently from other supply side platforms. This is just a --

MR PICKFORD: Well then one has to ask oneself: what is the problem, then, if they identify that, that then causes the damage?

The problem that they say causes the damage is that everyone in AdX is given privileged information that allows them an insight that the other bidders didn't get. And my point is: that doesn't make sense on Dr Latham's own case.

MR JUSTICE MARCUS SMITH: I'm not sure that is quite fair, the way you put it, because that is losing the significance of the "e.g.," in 270, subparagraph 1.

I mean, one can see that there may be an informational advantage in the last look -- that is the point about the example -- but if one has two, on the face of it, separate markets producing two, on the face of it, distinct prices -- I am putting this very tendentiously -- then the outcome of market 1, that price, is then merely an input into market 2, then I see the potentiality for real problems.

If you have a form of pre-qualification and an understanding as to how the process works, then that's fine. But all we're doing at this moment is saying that there is some kind of preference to Google, in that the interrelationship between these two markets

is, in some way, allegedly favouring Google.

One of the ways in which it may be operating is by way of last look. But, frankly, the more pernicious way, if it works this way, is that you take the best price in the first market, and then you use it to leverage other prices in the second market, by way of the auction operation in the second market.

I have no idea whether that is good, bad or indifferent, but that seems to be the point that is being run. That is why, again from my reading, one has an "e.g.," that the last-look advantage is referring to an informational advantage, which may or may not exist. Well, that is a matter for evidence later on. But it may be that in the very structural relationship between these two staged processes, that there is something which is arguable and in need of evidence to work out whether the arguable is indeed the case.

MR PICKFORD: We do need to understand what that case is and they only plead -- I said the e.g., was euphemistic because there isn't another e.g.,. It is --

MR O'DONOGHUE: I'm sorry, if we look at 173 for example.

MR JUSTICE MARCUS SMITH: Of the pleading?

MR O'DONOGHUE: Yes.

DR MAHER: What page is that on?

MR O'DONOGHUE: Page 67. "... the idea to plead after the SSPs."

(Pause)

MR PICKFORD: With respect to Mr O'Donoghue, that is the same point, it is the very same point. It is because of the sequencing, there is an informational advantage that is given to those that participate through AdX. And my point is: there is no informational advantage in the circumstances where the second auction is a second price auction.

MR JUSTICE MARCUS SMITH: It is not saying "informational advantage", it is saying

unique advantage was effectively a form of insider trading. I appreciate that one can insider trade by waiving informational advantage, but there can be structural ways in which that advantage is embedded, which leads to more information.

MR PICKFORD: The only way in which that is developed in this pleading, or by Dr Latham, is the informational advantage. We certainly read "insider trading" as meaning "informational advantage". And it is suggested that that enables those in the AdX bid -- AdX auction to win by a penny. And that, we say, is entirely fallacious. And the reason why it is wrong is because, in a second price -- two points.

The first point I have made, that in a second price auction you just bid your true value. You don't try to beat something by a penny. And the reason why you don't do that is because you're not only bidding against everyone who has come from through from the SSP route, but you're bidding against everyone who is also coming through from AdX. So you can't just choose your bid to be one penny above the floor price.

The reason why it ends up, sometimes, one penny above the floor price is because, if there is no second bidder that beats you in the second price, then, by nature of a second price auction, that is how it is determined. But that is a different issue, Sir.

MR JUSTICE MARCUS SMITH: How could we possibly take a view on that today?

MR PICKFORD: Sir, I did apprehend that you might not like this point because you say --

MR JUSTICE MARCUS SMITH: No, no.

MR PICKFORD: -- it goes to merits.

MR JUSTICE MARCUS SMITH: It is very, very useful to have these matters threshed out, because what is becoming helpfully clear is that the forward management of this matter -- if it goes forward -- is something to which we are going to have to pay a great deal of attention. Because it is, on the face of it, beguilingly simple -- the arguments that are being pleaded -- but the moment you start drilling down, the management

questions are hugely difficult. Because this is a dynamic market which we are looking at, of some complexity, where there are numerous interrelated features, operating in overlapping series, and that is a causative nightmare.

It is -- you know where I'm going -- it is not something that is a pleading point. But it is, very much, a Microsoft Pro-Sys point, in the sense that we are going to have to ensure that embedded in the process is a means for ensuring that whatever methodology is finally articulated by each side's expert, that is properly road-tested, in terms of what data is needed to make -- I imagine both experts will run a model -- to make those models work. And then to ensure that the Tribunal has an understanding of those models, so that when it comes to debating the parameters of substance -- whether there is an abuse, and what the abuse was -- one has a quantification model that is fit for purpose, whatever the outcome that the Tribunal reaches.

MR PICKFORD: Quite so. And, to be fair to my point, the reason why I say it matters that the way in which it is articulated here we say doesn't make sense, about the informational advantage, is because you then trace back through, and you have to work out what is then going to happen in terms of the modelling.

No the Tribunal has put it to me that: maybe there is an alternative theory; maybe, if we step back up to the higher level, we don't perhaps put it in terms of informational advantage, but maybe it is something else, but the model is going to reflect the way that the case is put. So if, and the model that Dr Latham seeks to advance, at least in some of his models, is allegedly going to the informational advantage point.

So, if it is going to be a different theory, that will affect the model. So it is important, in my submission, to have clarity about this.

It isn't sufficient, we would say, to say: well at a high level there is obviously something here, but -- and even if it is not informational advantage, that doesn't matter.

But, sir, I mean, I have made my point on that, I can see what the response is to it.

MR JUSTICE MARCUS SMITH: No. I think -- well, what is it that, that to establish a satisfaction, the two requirements that we articulated right at the beginning, arguability and case manageability, what exactly is it that Google is asking us to do?

MR PICKFORD: Well, my position is that the case, as articulated currently, isn't properly arguable, and therefore the PCR should go away and -- well there are two options.

Obviously there is the nuclear option, but it is not our case that you just have to dismiss that now. That was an incorrect way of putting our case by my learned friend. The alternative, and obviously the pragmatic option, is: if the Tribunal thinks that there is a problem here, and it is not actually clear what the argument is, then there should -- there can be clarification by the PCR of its case. And it can amend its pleading, and then it can explain: well, actually, it is not about informational advantage, it is actually about X.

MR JUSTICE MARCUS SMITH: I'm sorry, I think the pleading is clear. It may be wrong but it is clear. So I thought your problem was the Latham methodology?

MR PICKFORD: Well, I think we are on -- there might be two different tracks here. The reason why I was talking about clarity here is because I -- the response from the Tribunal, I understood, to me was saying: this theory doesn't work, it is not arguable, is to say: maybe that bit doesn't, but if you step up, at the broader level we still think there is a possible problem here.

And my response to that is: if that is their case, if it is not really about informational advantage, it is about something else, we need to know what it is. So it then becomes a clarificatory problem.

DR MAHER: Possibly. I mean, I think the problem is calling the sequential nature of what is happening as an informational advantage. Whether that is the correct wording

to use to describe that abuse is a different matter. But I think the pleadings were clear in the sense that what they are saying is that: you have this previous auction, and you have the sequential auction -- I take the point that you're saying in the second phase auction, it is a second price auction and therefore people have bid their true valuations. The point was that, if they were not given the opportunity.

That is why my first question was whether bidders, who had participated in the first round, participated in the second round AdX option, and if they do not, they may have bid differently in those auctions which all happened simultaneously. It is that sequential nature that actually leads to what you call a "last look" or call it an "informational advantage". I think the pleadings were clear how the abuse is coming about. If that helps to clarify things?

MR JUSTICE MARCUS SMITH: I think Dr Maher has put it very well. I mean, your point is, in the second line of 270:

"There would have been a real-time competition between SSPs including AdX."

So what they are saying is that the abuse alleged is the temporal staging of the pricing process. The counterfactual is the collapsing of that temporal staging into a single phase, where everyone participates. And the damages that are caused by that need to be assessed by removing that -- I think Dr Maher is again correct -- informational advantage. Because, at the end of the day, markets are all about information: it is the price at which you chose to buy and sell. That is what markets do.

So the "last-look advantage" I'm not sure is a reference to perceived information, or communicated information. It is a reference to the fact that you have a part of the price allocating process operating temporally later than the other bit. That is all referable back to real-time competition.

MR PICKFORD: We might be beginning to go in circles, but what I would say to that is: that is no advantage. But I have made that point.

MR JUSTICE MARCUS SMITH: Put it this way, Mr Pickford: how can we possibly say, at a certification stage, that you are so right, that we just put a line through this, or other parts of the pleading, and say "This is no good, go away, try again."

MR PICKFORD: The reason why that becomes important, as I said before, is because, when you go on to the methods that Dr Latham employs, they follow, or they are said to follow, from what he identifies is the problem. And, if the problem is actually something broader and different, then that is going to affect the methods.

So, in my submission, it would be appropriate for the Tribunal, once it has heard all of my submissions, if it agrees with any of it, to say: actually we think there is a problem here because there seems to be a bit of a mismatch between what is being said in this part, and it perhaps doesn't really work in the way that it is suggested, and therefore the methodology needs to be considered again.

My submissions form a chain through, ultimately, to the Pro-Sys part of the case. I don't think I can really take it further in relation to this particular point, because I think it is very clear where the Tribunal stand on it. And I don't have an alternative point, in relation to whether this part of their case makes sense.

I say it doesn't. But that is, I think, probably as far as we can take it.

Because his case is, what he is talking about is what would have happened -- when you look at his methodologies, they concern what would have happened in the AdX auction. They are not about the point, Dr Maher, that you raised about: what about the bidders, the first set of bidders; they are about the AdX auction.

So we say that is why it is important that there is a correlation between these points. But I am not sure if I can take it any further.

MR JUSTICE MARCUS SMITH: Thank you.

MR PICKFORD: If I may, as we understood the pleading, there was a relationship between 1A and then the theory of harm. What we didn't understand is the relationship

between a whole set of other points that are pleaded as abusive and the gross price effect.

So, for example, in relation to enhanced dynamic allocation, if you go to the claim form which deals with this point at paragraph 165, it is said at the end, that:

"The introduction of enhanced dynamic allocation further increased AdX's advantageous position relative to rival SSPs."

So what we understood from that is that enhanced dynamic allocation was being alleged to be, in its own right, an additional concern. So it is the enhanced element of it that apparently causes an additional anti-competitive effect.

And yet, if we go to the reply, there then seems to be a different case which, if you go to the reply at D1, 31, which is paragraph 53A -- bundle D, tab 1, page 31 -- we see, at paragraph 53(a), that:

"The contention that the introduction of Enhanced Dynamic Allocation in 2014 cannot have depressed Publisher prices assumes, wrongly, that the relevant counterfactual must be the pre-existing position, [i.e. dynamic allocation cure, rather than enhanced dynamic allocation] rather than, as in fact the case, the scenario that would have arisen from 2014 onwards, absent Google's abusive conduct. As Dr Latham comments, it is to be expected that "*EDA's expansion of competition, the publisher inventory to guaranteed commitments to have taken place in broadly the same way in both the actual and the Counterfactual*."

So what we understand their case from the reply to be, is that there is nothing particularly pernicious about enhanced dynamic allocation. The pernicious aspect is dynamic application in general. But that is different from what is originally pleaded, which seems to be saying that there is something particularly bad about enhanced dynamic allocation. When it comes to the case that we have to meet, we need to understand what it is. And, also, we say that there is no relationship from enhanced

dynamic allocation, per se, to any of the abuses -- sorry, to any of the damages that are said to flow from them.

We have a similar problem when it comes to open bidding and the UFPA. Because there this not a pleaded link, we say, between open bidding and the UFPA, and the gross price effect in the claim form.

I explained, before lunch, what open bidding was and what the UFPA were, and the whole point of them is that they bring together the auctions. There is no last-look advantage anymore. In the UFPA, everyone is combined into one single auction.

Therefore, we are at a loss to understand how that can be said to be causing the gross price effect, which apparently depends on an informational advantage being granted to those that bid through AdX.

I think this touches on a point, Dr Maher, that you raised yesterday, about the robustness of the methodologies to different periods of time. Our answer to that is that it is very important that the methodologies are robust to different periods. And we don't really understand how any of the methodologies that Dr Latham is proposing properly grapple with the period from 2018 onwards, when you have this unification of the auction processes.

DR MAHER: My understanding of that, again, the abuse that is pleaded is self-preferencing. So it goes back to that.

Now, that self-preferencing may have taken different forms at different periods throughout the claim. And therefore, you know, whether -- some of the points that are on that go more to the merits, in a sense that maybe, once you get to a unified first price auction there is no gross price effect. But isn't that something more for case management going forward?

I mean, the abuse is still self-preferencing. There might not have been a last-look advantage, but there are other types of abuses going on, and they might have taken

some other form, in harm. For example, through the take-rate.

MR PICKFORD: I understand that point. That is a very fair point. But there is this important qualification which is that: if there is going to be a methodology that measures the abuse, it has to match up to the abuse. So it is not going to be very helpful if there is a methodology which purportedly deals with the abuse as put one way, if in fact what the Tribunal is considering is some different alleged type of self-preferencing, which doesn't match up with the methodology.

DR MAHER: I think Dr Latham has proposed several different methodologies to deal with the two different main abuse level of harms. One, which is the price effect, and the other being the take-rate. And they do have different methodologies.

MR PICKFORD: They do. And my points very much go to the gross price effect. Because, in relation to take-rate effect, we wholly disagree that there is a take-rate effect. But it is, at the very least, has some resemblance to an orthodox competition case, where you say: well you gained market power, you foreclosed the market, and therefore you were able to put up your prices. We thoroughly disagree with that.

We also take a number of points that Mr Matthews articulates, about why the PCR hasn't, we say, done a sufficient job in relation to its modelling. But at least there is something that, we say, corresponds -- we can understand the tracing through from what the problem is said to be to what the damage is said to be, to how it is allegedly going to be measured.

The problem that I'm focusing on is in relation to this, we say, very difficult-to-understand gross price effect, where one cannot map, cleanly, through from the conduct, to the damage, to the methodology. And what I think I'm hearing is: to some extent that may be their problem if they can't make it out at trial, but we are trying to ensure that the way that this case proceeds, if it is to proceed, is in some manageable form. Where there is actually going to be some correspondence between

the methodologies at the end of that chain and the abuses and the alleged damage at the beginning.

MR ALTY: Could I just make a point, see whether you agree. So I think what we have been putting back to you is that the claim does explain what the abuses are in terms of self-preferencing. It also postulates a scenario where there is a single auction with everyone participating at the same time, which was certainly not the case throughout this period. And, as far as I understand the methodology, it is looking at trying to replicate that situation to calculate what the different outcome would have been.

Now, you are obviously also arguing about whether the fact that part of the auctions weren't taking place at the same time is actually a problem or not. But leaving that to one side, it may be that the way that the methodology, that has been chosen, and the scenario of the single auction, has more impact at some points than at others.

You may be able to argue, if there is actually an actual practice, a single auction taking place towards the end of this period, then there is no -- the methodology will not be able to show any damage.

But, I think, if I have understood my colleagues correctly, we are saying that that is not a point about whether the case should be certified, because it may not achieve the full effect that the PCR is suggesting.

That would more be a question to be, having put forward those methodologies, they describe their sort of, the situation they think should have happened, they will then have to show how that results in damage from their methodologies.

MR PICKFORD: I mean, that represents what -- you have encapsulated what I'm hearing, which is fine: if you are right about some of these points, well then you may well then reap the rewards later.

The reason why I'm raising them now is because I say there is a danger of a lot of

these bits of the case going off the rails. It is fine if it works out, sir, as you have articulated. What is less fine is, if we get through a certain part, we get a long way into the proceedings, and then we discover that there isn't really a correspondence between -- we don't have the degree of correspondence that I say there should be, between the conduct, the damage, and the method. And then we are faced with potential applications to amend. And it is said: oh well, in fact we can just tweak things this way, et cetera. And that is, I think it is incumbent on us to say: we think these problems are there and they are going to arise.

Now, if the Tribunal is ultimately content to say: well we will deal with them as and when they arise, that is obviously in the Tribunal's gift. But my point is to articulate these issues now, because I say they are going to arise.

MR JUSTICE MARCUS SMITH: That is obviously not right. Because the whole point about the Microsoft Pro-Sys test is that a blueprint trial -- to take Lord Justice Green's very helpful phrase -- needs to be framed on the certification point. It is not a debate within the Tribunal's gift.

The question is: to what extent is the Tribunal obliged to hold collective proceedings to a higher standard than individual claims.

MR PICKFORD: I'm certainly not --

MR JUSTICE MARCUS SMITH: Now that higher standard, to an extent, clearly exists. Because the case law regarding Microsoft Pro-Sys has evolved in reference to collective proceedings. And one can understand why. Because it is there as a defendant protection mechanism.

That being said, in relation to Microsoft Pro-Sys, the Chancellor has said that the idea that you lock everything down at certification, so that you don't need to intervene in any other way, you can just press the certification button, sit back 18 months and have the trial, well that is not particularly realistic either, and is not my understanding of what

the Microsoft Pro-Sys test says.

MR PICKFORD: Yes.

MR JUSTICE MARCUS SMITH: You agree with that?

MR PICKFORD: Yes.

MR JUSTICE MARCUS SMITH: All right. So we need to find a proper medium which ensures that we will have a triable process which will have the interlocutory stages, between certification and trial, rather like individual proceedings, but where one has the assurance that there is not going to be a derailing element.

And that, where a derailing element has been identified, it is dealt with, and dealt with conclusively, at certification.

My concern, and the reason we are pressing you on this, is: we can see that we are not ready for trial now, it would be very surprising if we were, but I can't see the derailing element. I can't see the deficiency in the process and in the pleadings that we have, unless it is too much information.

I can't see the problem which can't be resolved through the ordinary interlocutory processes as they are applied to collective proceedings.

I think that is why we are pressing you. Is because you are saying: the only thing we can do, properly, is either kill the application dead, or stay it, a la Gormsen, so that Mr O'Donoghue can have another go.

Now, in Gormsen, the Tribunal made the running. The Tribunal took the view that they could not understand the way in which the case was properly put. And Dr Gormsen was sent away, tried again, and the outcome was what the outcome was. We see what the Court of Appeal says about that particular decision.

Here, I can see extraordinary difficulties in managing the facts, in controlling for a dynamic set of infringements that interrelate, that all affect the damages that are measured. But I don't think the point of a certification process is to make that which is

extraordinarily complex simplistic. It is to ensure that that which is extraordinarily complex, when it comes to trial, is tried properly. That is what a blueprint is. It doesn't mean "build the trial at certification", it means that you have a plan that is going to work. And it doesn't exclude for the future other forms of interlocutory intervention.

We want to keep them to a minimum, of course, and you want to proceed to trial as quickly as possible, of course.

But where is the deal breaker? Where is the point that obliges us to send the class representative away, substantially the loser, in saying: "Look, this just isn't good enough." Not looking at individual paragraphs, looking at the claim as a whole. "This isn't good enough, go away, do it again."

MR PICKFORD: Well, as I -- I think I'm at risk of repeating myself --

MR JUSTICE MARCUS SMITH: Okay.

MR PICKFORD: -- because I don't have an entirely fresh point. The points that I would make in response are these:

Firstly, in relation to what our case is, our case is certainly not that there are only two options. It is either: dismiss the whole thing or send them back. Obviously we totally understand that there is a third option, which is that the view is taken that the claim is sufficiently clear that it passes the certification threshold, but nonetheless there are issues that will need to be grappled with. And we would say, in that alternative, in that world, pretty profound issues, and there will need to be case management for that.

I'm not saying that that is not an option. It is obviously an option. In my submission, it is essentially a sliding scale in terms of the degree to which the Tribunal thinks that those things are problems.

I have sought to persuade the Tribunal that some of these problems are actually really pretty serious. Because there is not a correspondence when one gets to the methods -- which I haven't actually come on to yet -- between those and, for instance,

just general self-preferencing harms.

They are not built in that way. They are looking at things that are more specific, and the things that are pleaded that I say don't work. I don't think there is any point in me repeating those submissions because we have aired them.

My position is: it is a sliding scale, and if you're not with me on "they need to go away and think about it further", then obviously the next step down from that is: "okay, there needs to a post-certification process by which these matters are aired."

In some senses, it may, in some cases, not make an enormous amount of difference, whether it is pre or post certification. The same things will ultimately need to happen if the Tribunal's sufficiently convinced that underlying everything there is the nub of the case that needs to be answered.

So that is my answer to the point about what am I arguing for and what am I saying should happen.

In response to: what is the big problem? Well, I think I have said it. And so, if the Tribunal isn't convinced it is a big problem, well then I don't think -- I don't have another.

But the big problem, from our point of view, is that this so-called gross price effect, as pleaded, relates to something very specific. And (a) it doesn't work on those terms and (b) it is not actually pleaded in relation to the rest of the self-preferencing case. It is only at the very highest level. They don't explain how one gets from a particular concern about a particular behaviour -- like behaviour 1F or G or H, whatever it is -- through to causing the gross price effect.

That is important both in its own terms and for its implications for methodologies, when we come on to deal with those.

I can't put it any higher than that. Either I have convinced you on that or I haven't. And I think it is very clear to me that, at the moment, I haven't. But that is my answer,

sir, to the concern that we have with the pleading and this case.

I think, with that, it is probably appropriate to go on to the methodologies.

MR JUSTICE MARCUS SMITH: Indeed.

MR PICKFORD: So we have moved beyond the pleaded points and we are now on Pro-Sys.

Again, I'm only going to focus on the gross price effect. Because, for the reasons that I gave, that is where we say the real problems lie.

Now, Dr Latham originally identified five methodologies in connection with the gross price effect. And, in his reply, he tentatively seems to suggest there might be an alternative to the first, so we are potentially up to six.

So dealing with the first of those, which is method A1, this is his primary method, and it is based on Google's bid translation service, BTS.

Now that is described in the factual guide -- reference at paragraph 13.6 -- and it was a temporary niche service designed to assist smaller bidders with the transition from open bidding -- which was a second price auction for AdX bidders -- to unified first price auction which, as the name suggests, was a first price auction. And hopefully, by this stage in the proceedings, we are very clear about the difference in a second price auction -- where you pay what the next person is willing to bid, so you bid honestly -- and a first price auction, where you need to change your bid, because if you just bid your full valuation, well that is what you have to pay. So if you go into any auction like that, you will never get any surplus.

What the bid translation service was intended to do was to help bidders make that adjustment. So they can no longer bid purely honestly, they have to start bid shading.

And I make four points for why I say that the method that is developed by Dr Latham, on the back of the BTS, is not a safe method satisfying Pro-Sys.

So the first of those is this:

The bid translation service doesn't measure what Dr Latham needs it to measure. Because I explained that, I took you to the passages of his case where he said -- the nub of the problem is this informational advantage. And he actually goes, he said in terms:

"The competitive issue is not the distinction between a first and a second price auction, it is the privileged information that is afforded to AdX by DFP."

I am quoting him there at paragraph 126 of his third report.

So that is what he says the problem is. But the BTS, we say, doesn't reveal anything about that informational advantage. It is simply about the change from a second price auction to a first price auction. So it is not, we say, going to help him answer his fundamental question.

We say: if you were going to address that problem, as he posits in his reports, and as the claimant pleads as its only concrete example of the problem that it says arises, you would need to investigate what the informational advantage did, in relation to the following parties' behaviour.

So you would need to consider Publishers, and what effect it had in relation to them setting their floor prices. You would need to investigate bidders who used header bidding, and how it affected them. So that comes back to the point, Dr Maher, that you made about the issue of the interrelationship between those bidders that are coming from header bidding, and their choices, in relation to the framework within which they are bidding, as against the choices of those that come through AdX.

Lastly, you need to understand how it is going to affect those people who bid in AdX.

All these things come together, these are all the parties that have an influence over what the outcome is, of the auction. This is what all this is about. It is about: what price do we get out of these kinds of auctions.

We say that, through the BTS, Dr Latham has no means of examining or modelling

Publishers' choices, doesn't help him with that. He doesn't have any means of modelling headers bidders' choices. And we say, his approach to bidders who bid through AdX conflates the point of interest, for him, which is the informational advantage from sequencing, with the point that isn't of any interest, which is moving from second price to first price auction.

So that is the first reason why we say it doesn't work.

The second I'm not going to repeat, because it is a point that I made already. Which is, we said the reason why it doesn't work is because his case is internally inconsistent, but I have made that point already.

The third is, we say his method reveals that he is very confused about the relevance of header bidders. Because, if one goes, please, to his evidence at D2 119 -- so this is his reply evidence, bundle D, tab 2, page 119, at paragraph 164 -- I just submitted to you that one of the problems with his approach is, he is unable to assess what the impacts of the changing organisation of the auctions would be, on head bidders. And that is a point that Dr Matthews makes, and he is responding to that here, at paragraph 164.

He says:

"SSPs participating in header bidding already submitted bids under conditions of a first price auction in the actual, through header bidding. Equally, they were also required to consider the bids of buyers on AdX in the actual. To this end there is limited change in the conditions under which header bidding SSPs bid as between the actual and the Counterfactual. The real difference is whether AdX is competing in real-time or whether it has the last-look effect of which is what my method provides an estimate for."

He is saying there: well you don't need to worry about my first point. There isn't really any difference between the actual and the counterfactual there.

Yet, in the same report, at paragraph 103, he says something rather different. He says this:

"The existence [back at page 102] of the last look implies harm to Publishers, in particular because it affects bidder behaviour in the header bidding auction for the reasons given above."

So there he is saying that the reason why the allegedly abusive conduct matters, is because it affects what header bidders do. And yet when we say: sure, if that is part of your case, you better investigate, you better have a method of investigating what header bidders do and how that is going to change between your models, to which his answer is: oh no, it doesn't matter.

We say he can't have it both ways, and that that reveals a fundamental omission in what his model is going to look at.

Then, the fourth and final point on this part of the case, is data. We say that the reason -- one of the reasons why his method won't work is because there isn't going to be the data to allow it to work.

Now Dr Latham describes his method as inspired by the FCA's methodology. And he suggests -- and I think it was suggested yesterday -- that what he is doing is essentially what the FCA did. And we say that is simply factually incorrect. The FCA did not have data on bid shading or on the BTS from Google and, therefore, to our knowledge at all. Reference for that is Mr Kornacki, paragraph 33. I don't need to go to it. That is what the evidence is before the Tribunal.

So we say Dr Latham can't be correct when he says that that is what the FCA did, because they didn't have the data. And there is nowhere in the FCA's report, decision, that you were taken to yesterday, that explains that they carried out this kind of analysis.

So, sir, that is -- in a nutshell -- what we say is problematic about the bid translation

service.

I could go on to deal with further points about evidence, and what we do or don't have. It is traversed in Mr Kornacki's evidence, but essentially it is suggested against us: well, you're just being difficult and you're just creating roadblocks, but you're not helping. Actually we say that is not fair.

Mr Kornacki has explained what was provided to the FCA. And he explains the nature of it. And it is not going to help Dr Latham. So what they did get from us was 19 data transfer files that related to Publisher-specific data sets.

But that only comprised a limited number of Publishers, and it was only Google's data. So it hasn't anything to do with header bidders -- one of the things that I talked about -- and it hasn't anything to do with third parties, in terms of the other SSPs.

So it is not going to help him, ultimately, with the sorts of things that he believes he needs to model.

Second reason why it is not going to help him is because of the period that it relates to. Because Dr Latham says -- I'm quoting him here from paragraph 178 at his third report:

"The important thing for my methodology is to have some data from Google that corresponds to the period in which AdX operated a second price auction, i.e. before UFPA."

He is saying that he needs data from before then, because "... that is the key time when this particular problem I'm trying to investigate existed" but the data was provided to the FCA date from after the transition to the UFPA. And, in particular, after the unified pricing rules were brought in. The unified pricing rules are rules which said: you can't have any discrimination between different SSPs in the price floor that you have set if you are a Publisher in the unified price auction.

That, we say, will obviously be highly pertinent to whether the information that he has,

bears any resemblance to the period and the nature of the bidding that went on, that he wants to investigate.

And, indeed, you don't need to take my word for that. Even the FCA says that with the introduction of the UFPA, that effectively dealt with the issue that they were concerned about, in terms of the possibility of there being any informational advantage.

That is, I will just give you the reference to that: paragraph 180, at bundle B, tab 4, 1097.

So I have dealt with the first of the methods that was advanced both in the skeleton -- sorry, in the claim and in the skeleton, and also yesterday, as the primary method. And Mr O'Donoghue didn't really develop the other methods yesterday. So there is a question about the extent to which the Tribunal want to hear from me on why we say they also don't work.

I'm very happy to do that, but perhaps, if you would like me to do that, now would be an appropriate moment for a short pause.

MR JUSTICE MARCUS SMITH: Very good. Thank you, Mr Pickford. Ten minutes.

MR PICKFORD: Thank you.

(3.15 pm)

(A short break)

(3.45 pm)

MR JUSTICE MARCUS SMITH: Mr Pickford.

MR PICKFORD: Thank you, sir.

I'm keen, in the final half hour of the day, or 45 minutes of the day, to be as helpful to the Tribunal as possible. We have come on to the methodologies and I have addressed the first of those.

My original plan had been to go through and explain why, in relation to each of the

methodologies, there are problems, and if that would be helpful to the Tribunal I will be obviously very happy to do that. But I want to check, in the light of the dialogue that we have had so far, that that is going to be the most productive thing I can do.

One comment is that most of the methods weren't in fact opened by Mr O'Donoghue, so I'm going to be slightly jumping in and explaining what the problems are before we have actually heard the positive case on the methods. I'm very happy to do that, but I thought that, given the time, I should be clear about what it was I was proposing to do and whether that was going to be of assistance to the Tribunal.

MR JUSTICE MARCUS SMITH: That sounds very helpful.

MR PICKFORD: In which case we will crack on.

We have dealt with the bid translation service, which is what Dr Latham himself describes as his primary method.

I'm now going to turn to what is described, in Dr Latham's third report, as another approach to account for bid shading. So, if we go, please, to Latham 3, which is D, tab 2, page 120.

MR JUSTICE MARCUS SMITH: What was this called, bid shading?

MR PICKFORD: Yes. I was dealing with bid shading, which is also abbreviated as the bid translation service.

MR JUSTICE MARCUS SMITH: Yes.

MR PICKFORD: Those terms are used somewhat interchangeably, often, in the evidence. So the bid translation service is concerned with helping people go from a situation where you don't have to do bid shading to bid shading. That is why it sometimes gets called bid shading.

If we go, please, to Dr Latham's third report -- his reply report -- and pick it up on page 120 of the bundle, we see that Dr Latham says as follows, at 168:

"I will clarify that BTS [bid translation service] was presented as one of many ways to

account for bid shading. I expect to be able to assess bid shading through other data too".

He gives two examples.

"For example, Latham 2 proposed another approach that would monitor the average bid levels of AdX before and after the switch from first to second price auctions."

Referring back there to footnote 331 in his second report -- I will follow that up in a minute, but whilst we are on this page, it is helpful, also, to read paragraphs 169 and 170, which I will allow the Tribunal to do. They explain that he also says he can rely on what the FCA did.

(Pause)

My submission, that I'm going to make to you, is that neither of these provides an adequate methodology for the Tribunal.

The first one, then, to follow through, is back to Dr Latham's second report, and that is footnote 331. So the reference is B, tab 5, page 1782.

MR JUSTICE MARCUS SMITH: Yes.

MR PICKFORD: We see footnote 331:

"There is another approach -- will be to compare average bid levels before and after AdX switch from a second price to a first price setting. Again, I know this information exists since it was retrieved from Google by the FCA."

So there are two points to make here.

This isn't a methodology, this is just one sentence saying something he might try to do, but it is not a methodology capable of certification. And, secondly, the FCA doesn't have the information that he says it does. That is explained by Mr Kornacki -- I'm going to give you the reference. It is paragraph 36.3 of his report, and that is to be found in C3 189.

So that is the first of his alternatives. We say that doesn't fill in any gaps from the BTS.

The second is --

DR MAHER: Is the reference for that in Kornacki again?

MR PICKFORD: Yes, of course. It is paragraph 36.3 of first Kornacki, and the reference is bundle C, tab 3, page 189.

Now, the other thing that Dr Latham mentioned in his third report was the FCA decision. He said: "I can develop something based on what they did."

If we go to the FCA decision and see what they did, in fact, do. That is in bundle B, tab 4. I have it in hard copy but I think the Tribunal may only have it in soft copy, electronically. The page is 1096.

If I could ask the Tribunal, please, to look at paragraphs 174 to 175 -- ones that are cross referred to by Dr Latham.

(Pause)

This is a discussion by the FCA of the difference between second price and first price auctions and effects that may arise. It is not setting out a methodology for estimating the gross price effect. It essentially simply makes the universally accepted point that bids in the first price auction will tend to be lower than in a second price auction, because second price auctions promote honest bidding, and first price auctions require bid shading. That is not the informational advantage point, and it is not a methodology.

So, insofar as Dr Latham's reply to our criticisms of using the BTS, is: well don't worry, there are alternative ways of addressing bid shading, the two that he refers to, we say, are inadequate.

That then takes me to his next methods, which are described by Dr Latham himself as cross checks on his first methods. So we say they don't actually stand up, he is not presenting them as standing up on their own, if you don't like his principal method. But, in any event, we say they do not offer an adequate blueprint for the Tribunal.

So method B1 is the next one. That is an econometric analysis of the number of header bidding participants on the winning bid. So it is a regression which looks at the number of header bidding participants and looks at how that affects the winning bid.

That is purportedly quantifying the effect of adding AdX as an additional bidder into a header bidding auction. That is what it is set up to do.

And the essential problem, we say, with that, is this: the premise is comparing the absence of AdX all together -- so any real-time competition between header bidding and AdX -- and then adding AdX into the header bidding auction.

So the assumption for the factual is that AdX is totally excluded, and then he is comparing that to a counterfactual, in which AdX demand is brought in to play, into the header bidding.

The problem, we say, with that method is: it is misconceived, because there was competition in the factual world between AdX bidders and header bidders.

Now it is their case that that competition wasn't on sufficiently even terms, but it is certainly not the case that there wasn't competition. Because AdX bidders knew that they were facing the demand from SSP, and, in particular -- sorry -- from header bidding, and, in particular, header bidders knew that insofar as their auction results were then going to be fed into AdX, they were going to have to beat people who would be bidding through AdX.

So there was competition between the two. And we say, therefore, a methodology -- and Mr Matthews explains this -- a methodology which is premised on there being no competition at all, isn't going to measure what Dr Latham needs it to measure.

Just for your note -- I'm not going to take you to it -- but Dr Latham concedes, we say, the point that there was in fact competition between AdX bidders and header bidders.

It is in Latham 3, at paragraph 82, and it is D2, tab 2, page -- I think that is a bad

reference, I was going to say it is page 99, but I don't think that works. If someone can tell me what the right reference is. But, in any event, it is D2, and it is paragraph 82. Oh, it is 99. Sorry, we started again with numbering, so it is D2, 99.

So that is the first point I make on that.

The next point is that, again, in common with his other methodologies, we don't have the data on which it is premised. So, if I could ask you to go -- you don't have it open already -- back to Latham 2, which is in bundle B5 -- I apologise that there is quite a lot of moving from bundle to bundle here, but it is kind of inevitable, given how the evidence has developed. So we are back to B5, and we go to page 1782.

The paragraph I'm looking at is paragraph 483. This is where he explains his method, B1.

In particular, if you go on to page 1783, about halfway down the paragraph, he says:

"I would run a regression of the winning bid on the number of participants in header bidding - but I would use the past number of bidders on impressions located in the same area of the Publisher’s webpage as an instrument for the number of participants."

So, what this shows us is that there are two things in particular Dr Latham needs to know.

First: the winning header bid. And we don't have that data. The reference for that is Kornacki, paragraph 7.2, and it is bundle reference C, tab 3, page 179.

Then the second thing he needs to know is the number of bidders on impressions located on the same area of a Publisher's web page. We don't have that data either. That is Kornacki at paragraph 7.1 -- same bundle references as I gave.

Now, Dr Latham's response to that is essentially to say: well, I will make do with whatever I can. I can find a way through. And we say that that isn't adequate as a basis on which the Tribunal can certify his methodology.

The next approach that Dr Latham proposes is his method C1. It is actually developed at paragraph 484 there, of the report that we were on.

This is the auction modelling structural econometrics of auction data approach. This is a simulation model. And what it is seeking to do is to build a model of how the market works, and auctions that take place within it. And we say that this would be a very complex methodology, needing very careful specification in any context, any kind of modelling of a market is inherently a difficult exercise.

In relation to that point, the Tribunal, for example, has expressed doubts about similar types of simulation models, for example in the Umbrella Interchange proceedings.

MR JUSTICE MARCUS SMITH: True. But that was in the context of an interchange fee that was so small that it would vanish in statistical noise, such that in any regression **(inaudible)** and I think common ground experts make it simulation model complexity which you or I fashion. So, taking the interchange fee **(inaudible)** too small, and the modelling disappeared off the radar is rather severed in those circumstances.

MR PICKFORD: That is of course right, sir. As I recall, the case, I think consistently with that, makes the point -- I think it is a fortiori in what you said, Mr President -- which is that the type of modelling that is required in the simulation model is complex and it is difficult. That is not to say that you can never have one, but it is setting the framework for it being a difficult thing to do.

What we say is, in this context of this market, with the kind of complexity that we are concerned with, the multiple layers and different ways in which different auctions work and interrelate, that Dr Latham hasn't specified his proposed method to anywhere near the degree of -- in any way near the degree of detail that he would need for it to be credible.

Mr Matthews, who is our expert, has looked at what he said here and said: you know,

I understand that simulation models may work but they need a lot of, you know, they need a lot of specification to be sure that you're not going to try and develop something which is ultimately totally totally worthless. We haven't seen enough, Mr Matthews hasn't seen enough, to enable him to say: well, I think this method works. So, in our submission, it is inchoate.

MR JUSTICE MARCUS SMITH: Does Mr Matthews consider that it is possible, at this stage, to adequately specify what is required?

MR PICKFORD: Well, it depends a little bit on what it is doing, doesn't it. I think if it were merely as -- in fairness to Dr Latham -- it is presented as, which is a possibility of a cross-check, then one might say --

MR JUSTICE MARCUS SMITH: Let's take it as the primary.

MR PICKFORD: Yes.

MR JUSTICE MARCUS SMITH: Let's say the Tribunal, as a condition of certification, says: we are going down this route. I'm not saying for a moment that that is what we are going to do, but let's suppose that is the way in which we want damages to be assessed. Now what, given the Microsoft Pro-Sys test, what should we be demanding of Mr Latham? I take it, it is not a fully working model?

MR PICKFORD: No, it is obviously not a fully working model.

MR JUSTICE MARCUS SMITH: Because that is not possible, no.

MR PICKFORD: No, you're right, sir, that is not our case. Our case is that there are issues that are going to need to be grappled with, where we would expect to see more detail from Dr Latham than he has given. And that, inherently, those issues, we suggest, are going to cause difficulties for his modelling. I can explain what those key issues are.

MR JUSTICE MARCUS SMITH: I mean, are you expecting a fully fleshed out model, based upon the data that is presently in the possession of the class representative?

Is that what Dr Latham should produce?

MR PICKFORD: No. I think what we are saying is that he needs to explain how he is going to meet the kinds of challenges that his model is going to meet, in more detail than he has done. That doesn't mean setting out a fully-blown model but it does mean grappling with the sort of points that Mr Matthews raises, in which I'm happy to explain.

MR JUSTICE MARCUS SMITH: But is not the proof always in the evolution of these cases? You can, of course, have a theoretical debate of 'can you/can't you', but does that take us any further?

I mean, isn't what you are saying, in order to be satisfied that this is do-able we should be telling Dr Latham: you know that the information is incomplete in your hands; we know that data will, as the matter is certified, be receivable from Google going forwards. We know, therefore, that the model that you produce will have to be comprehensibly rewritten and binned. But, nevertheless, in order to satisfy ourselves that it can be done, please produce a prototype on the information that you have.

Is that what we ought to be directing the class representative to do?

MR PICKFORD: Well, I think what we need to see as a minimum is whether the way it is specified -- the way the model is going to be specified -- appears to represent a plausible representation of the market that it is seeking to model. We don't have any of that kind of engagement from Dr Latham at all yet.

MR JUSTICE MARCUS SMITH: Do you say that Dr Latham knows enough about the market in order to be able to do that?

MR PICKFORD: Yes, I think he should. I mean, after all, he is, he was the economist who has been involved in assisting the Publishers in relation to this issue for many, many years.

MR JUSTICE MARCUS SMITH: I have no doubt about his involvement on the class representatives' side. But doesn't the informational mismatch, which Mr O'Donoghue

referred to yesterday, come into play at this point? The Tribunal is pretty unsympathetic to information or mismatches when it comes to pleading a case. It has to be pleaded and they have to be vented, data has been disclosed, but it nevertheless has to be pleaded at the outset, from X if not (inaudible).

And, away from pleading arguability and into methodology, what I'm really trying to get a feel for is: bearing Microsoft Pro-Sys firmly in mind, is the way that we satisfy ourselves that it can be done, to tell the class representative: we know it is a pretty pointless exercise going to have all the data, nevertheless, so that we the Tribunal can be satisfied matters are triable, do your best, we will see what there is. And allow Google to kick the tyres, and work out whether, when data is provided from Google, the model can be improved still more. But we have at least a workable model at the beginning.

Is that how we ought to be proceeding?

MR PICKFORD: I think it may. Can I take instructions --

MR JUSTICE MARCUS SMITH: Of course.

MR PICKFORD: -- if I may, because this is --

MR O'DONOGHUE: (Overspeaking) as of today we have zero disclosure.

MR JUSTICE MARCUS SMITH: I'm sure you will come back on that, but let us carry on this debate with Mr Pickford.

(Pause).

MR PICKFORD: So, yes, sir, to answer your question: yes I think that would be sensible and appropriate. If I might emphasise, one of the reasons why we raise this is because simulation models can be incredibly involved and expensive. And if, ultimately, it is going to be a dead end, as indeed it has been in some cases -- I think it was in, you will correct me, sir, if I'm wrong, as in BritNed, I think there was a simulation model which ultimately didn't help anyone --

MR JUSTICE MARCUS SMITH: Well, there was a fairly straightforward analysis, and the reason it failed was because the -- this is no issue with the expert -- the reason it failed was because there was such a disparity in the data points that the outcome ultimately relied on didn't seem to be sufficiently reliable be of any use.

At least that is -- the reason I'm putting it this way is because I'm trying to explore with you -- helpfully, if I may say so -- the straitjacket that this Tribunal and the Court of Appeal may have imposed on the class representative through the Microsoft Pro-Sys test. You see what, you seem to be getting to the stage of inquiring, is to oblige the class representative to produce a simulation model which everyone knows isn't going to work, because it is based on incomplete data.

But the reason we do it is so that we can satisfy ourselves that, once we have the data, it will work. In other words, you get a poor man's prototype which we know isn't going to be used, but the expense -- and, as you say, these things are costly -- the expense is worth incurring so that we can be satisfied that there is a blueprint to trial. Because nothing less will do.

MR PICKFORD: Yes. In my submission, it is necessary to do that, because, for the exact reason, sir, that you highlight: it is not a worthless exercise because what it does is enable both the respondents to such an application, and the Tribunal, to do, is to engage with the question of whether there is a realistic way in which you could model the market. And for some markets there may be. What we say is that this is a very, very complex market, it is incredibly complex, and we are going to need to be careful that, if there is going to be a simulation model, it is one that bears a sufficient degree of relationship -- close relationship to reality -- that it is going to tell us something useful as opposed to it being entirely hypothetical. And by requiring the claimants to engage in that process, and specify -- at least with what they can get hold of -- how the model would work, we can engage in that enquiry.

DR MAHER: It would seem to me that on some level, more specific detail of how he would build a simulation model would become clear, once data and through disclosure and that might ... So I think that some of these things might be more an issue for case management. Clearly there are lots of auctions that do happen worldwide, and bidders that are bidding in, just say for example Telecoms auctions, do build relations models with inputs that they are estimating.

So the question is, now: it seems to me what you are requiring is a lot of detail, which the PCR, the class representative may not have, or Dr Latham does not have at this stage, but has put forward something that he has said is an approach to getting that.

MR PICKFORD: There is an important -- you make an important point about the data. And we are not expecting -- obviously Dr Latham produces a populated model that is going to represent the market with data with pre-disclosure, and he needs the data from us insofar as we have the information that he wants. I have already highlighted that Dr Latham in fact thinks we have a lot more data than we do have. But, putting that to one side, no doubt there will be some data that can be forthcoming, that he can potentially use. Or at least we are not at that stage yet, in any event, we are not at disclosure, we simply don't know.

But that does not stop him engaging with the questions, such as: in what way do I think demand effectively works in this market? What kind of recognised model am I going to adopt for the demand curve, or the way in by suppliers, you know, the way in which Publishers interact, or the way in which advertisers change their views on how much advertising they want to buy, depending on the prevailing price in auctions.

We say that he can give some thought to those sorts of things, from a first principles basis, even if he doesn't have a full set of data yet, to then populate his model.

My understanding is that is what Mr Matthews is asking for, is to say: tell us more how it is actually going to work. Then we can say: okay, fine, we can buy in that, because

if this is going to be certified, there will need to be some method that is going to be employed by the experts, that is going to be argued about and used, and they will no doubt say different things about it. Or it may be that we say: that is not going to work because it is too complex, and the way that you are trying to go about it, we don't think will be satisfactorily, so therefore we will need to look at some alternative.

Of course this is one of several possibilities that is being advanced. The Tribunal isn't required to certify all methods that are on the table.

In my submission none of them work. But, obviously, an option for the Tribunal is to say: we are satisfied in relation to method X, but not in relation to Y and Z.

MR JUSTICE MARCUS SMITH: The concern I have about an approach, which is articulated in theory without some data, is very much the same as I picked Mr O'Donoghue up on yesterday, and Mr O'Donoghue is making assertions about outcome which the methodologies he was describing intended to test for.

It seems to me -- it is on the transcript -- it seems to me that that was rather pre-judging what ought to be an evidence-led enquiry.

Now, isn't what you're suggesting here on the model just that? If we ask Dr Latham to bake in his preconceptions without data, aren't we actually building a model that is no more than an automatic confirmation bias of what is pleaded?

MR PICKFORD: I don't expect -- my answer to that is no.

MR JUSTICE MARCUS SMITH: No.

MR PICKFORD: And the reason for that is because there is a distinction, in my submission, between the formal workings of the model and its population with real data. We say that you can create, and you can give some thought to, how mathematically -- because ultimately it is essentially going to be a mathematical model -- how mathematically your model is going to actually work. And it doesn't desperately matter at that stage what the data is.

Dr Latham doesn't have to give a view on the data that is going to populate it. He just has to say: here are the mathematical relationships I'm going to model. Here is how I will bring them together. That will then inform, with that degree of specificity, the kind of data that he then needs. We say that is the appropriate way around of doing it, rather than to say, in large very general terms, "I'm going to build a simulation model" and then have that at large and in the world, as it were, which we say is not conducive to a disciplined approach in the Tribunal, and may well lead to very large amounts of wasted costs.

MR JUSTICE MARCUS SMITH: So you don't want to --

MR PICKFORD: We want the outline. I think what I'm trying to explain is: we want the outline simulation model. The particular data that goes into it I think is less critical, although obviously if he has data that he can use, then so much the better. It is the structure of how that model is to be put together that is most important.

MR JUSTICE MARCUS SMITH: Is the case, then, that relationships bedded in such a model -- mentioned earlier the modelling of advertiser demand -- are those relationships, entirely divorced from data, always outcome neutral? In other words, however you structure the model, the data will always correct any preconceptions so that you get a proper outcome?

MR PICKFORD: I'm not saying that the data will always correct preconceptions. It might be that once you then expose your model to the real world, that you have to adapt it.

MR JUSTICE MARCUS SMITH: Yes.

MR PICKFORD: But, without any engagement -- at the moment we have just simply got basically the statement "I'm going to build a simulation model" but without any further engagement in the detail of that.

We say that you can do more. My understanding, although I wasn't in that case, is

that in Trucks, in relation to the PCR there, there was a better, there was a more fully-developed model than in our case. I think it is a little difficult to get drawn into the detail of that but we don't have the evidence of what was available.

But, my point is that it isn't sufficient just to say: we will build a model. We need greater engagement with how it is going to work and how, mathematically, it is going to be addressed. And then we, on our side, can say: we think that has problems; or we can say, we think actually, despite our initial doubts, that, you know, that maybe that is a sensible way of proceeding. And then the Tribunal can scrutinise this.

DR MAHER: Another way of maybe thinking about this is that that is not the only approach that Dr Latham has proposed. He has proposed different methods, which may, at the end of the day, be more suitable. It will then become clearer once we have some disclosure.

So, to pin Dr Latham down to a particular approach at this stage seems to be a bit premature.

MR PICKFORD: I think there is a valid point there, about the context. Which is: is this the only thing on the table, or is it one of a number of potential options?

Now, as I have said, I'm seeking to persuade the Tribunal that none of these options, that have been developed, work. But let's suppose that, hypothetically -- to carry this debate forward -- the Tribunal rejects my submission on that and says: we think that one of these other ones does work.

And our view, and our position, is that if the Tribunal is not yet clear in its own mind about whether a simulation model will or won't work, what it shouldn't do is just say: well, let's -- we are certifying this, and you can have a simulation model. What it should do is, at the very least, take it in stages to say: well we are certifying this claim anyway, and you can have approach X. And in relation to a simulation model, well we are, we hear what the respondent says about that potentially being very complex and

very expensive, and so what we direct is that, the next stage is that you need some greater specificity in relation to that, and then we can decide whether, at that point, we say: yes, we give the green light to the simulation model or not.

Our concern is giving a green light to a simulation model now that potentially could run through to trial and then, at that point, everyone says: you know what, this simulation model doesn't really help anyone.

DR MAHER: So, is what you're asking, is that the Tribunal certify on the one or possibly two methods and exclude others, when Dr Latham does not really have the information, or the data, in which to decide which might be the most suitable approach?

MR PICKFORD: Well, yes, that is open to the Tribunal. Because, for example, in relation to the first one, the bid translation service, you have heard my submissions on to that.

Now, if you reject those submissions and say: no, we are not convinced there is a problem there, we think it will be all fine. But if the Tribunal is with me, and accepts that there are serious problems with that methodology, because it is not actually looking at what needs to be looked at, and the data that it is premised on doesn't exist, then we say it wouldn't be right for the Tribunal to say: yes, proceed on the basis of that methodology.

The right thing would be for the Tribunal to say: no, that methodology doesn't pass the Pro-Sys test.

Then it goes on and looks at each of the other methodologies and applies the same logic. It might be that one or more of those methodologies is considered to be sufficiently credible to the Tribunal that it says: yes, you can go ahead with that. Or it might not.

That is, in a case where you have multiple methods, in my submission that necessarily requires the Tribunal to engage in that kind of -- if there is only one method, there are

two options. You either allow the claim to go forward, or you say it doesn't meet the Pro-Sys threshold. There must be some claims that don't meet the Pro-Sys threshold. If there are multiple methods, you apply that test to each of them. You say: okay, this method looks sufficiently credible, we will allow it to go forward. And if it doesn't, we don't allow it to go forward on that method.

It is almost 4.30. I am nearly done but I'm not entirely done. I have obviously been trying my best to answer questions.

MR JUSTICE MARCUS SMITH: We have been asking you a lot of questions and it has been a very profitable exchange. So no criticism from us about time.

How much longer are you going to need tomorrow, and Mr Patton, how much will you need?

MR PICKFORD: For my part, I think I would finish within less than half an hour. It might be significantly less than that, but if I have 30 minutes I will be done.

I will allow Mr Patton to speak for himself, but I think --

MR PATTON: I think around 45 minutes, maybe slightly more/maybe slightly less.

MR JUSTICE MARCUS SMITH: So an hour and a half, is it really?

MR PICKFORD: Yes. Then we would be -- even if we then went until midday tomorrow, we effectively had half of the time each. I am not trying to constrain my opponents, I'm just saying that doesn't seem to be overly avaricious on our part.

MR JUSTICE MARCUS SMITH: We are going to indicate that an hour and a half is fine. Which, upon your two estimates is -- we will start getting a little bit itchy if we proceed over an hour and a half --

MR PICKFORD: That is understood.

MR JUSTICE MARCUS SMITH: So, that is very helpful.

Mr O'Donoghue, I think it would assist us -- because we made a lot of progress on what the Tribunal's approach is likely to be to the pleaded abuses -- if we had -- this is

a burden, if you can't do it, do say so -- if we had a table on no more than two pages of A4 which articulated the nature of the factual/counterfactual dispute. And then set out the various methods as regards that particular abuse, that Dr Latham was proposing to use to quantify those.

Let me give you an example of what I'm thinking of.

If we go to one of the early abuses that Mr Pickford took us to, at your claim form, paragraph 187. Page 73 of your claim form, in tab 1, bundle B.

This is the open bidding point. And you will recall the exchange that we had with Mr Pickford regarding paragraph 190, on page 74, where the question was: what actually was the averment of abuse, and what was the counterfactual case.

The point I put to Mr Pickford was, the point was that there was a more favourable treatment in the case of this allegation of AdX, and the counterfactual was a neutral treatment between the various participants, with the result that the fees that were discriminatory charged were not so charged.

I think that accords with what the pleader meant when those words were drafted.

MR O'DONOGHUE: Yes.

MR JUSTICE MARCUS SMITH: So, what we have in this instance -- and of course there are multiple abuses pleaded -- is, we have the abuse and we have the counterfactual of what would be the case were there no abuse. That, I imagine, can be set out fairly quickly in one column.

What I'm interested in -- which is where the harder work comes in -- is whether it is possible to cross reference, and in no more than two or three sentences, explain, in the case of each abuse, how Dr Latham proposes to measure the resultant harm that arises between the factual abuse and the counterfactual non-abusive situation. So that we can get a feel, really, to move away from the trees and to take a step back and look at the wood.

MR O'DONOGHUE: Yes.

MR JUSTICE MARCUS SMITH: I don't know if that is do-able overnight but I think it would assist us considerably.

MR O'DONOGHUE: I will have to take instructions, but we will do our best.

MR JUSTICE MARCUS SMITH: I knew that would be the answer, and I apologise for the lateness of that request, but I think it would make your job easier tomorrow --

MR O'DONOGHUE: Yes.

MR JUSTICE MARCUS SMITH: -- if there was something like that for us to look at. Because, I think the concern I have is that one moves, in the case of the experts, very swiftly into the granular, and -- it is a point that you made at the beginning -- it is pretty hard to avoid, because you can either say "here is how I generally intend to do it" or "here is how I really will do it", in a granular and specific way.

The problem with the latter course is that you immediately hit an informational deficit, in that that which you want to do, you actually can't do even if you did want to, because you don't have the material.

I'm looking for a way of squaring that circle, by way of how you say Dr Latham is going to deal with the various abuse allegations, unpacking them as we do.

In other words, we are not expecting the 17, we are expecting the abuses to be unpacked as you have pleaded them, given the exchanges that the Tribunal had with Mr Pickford this morning.

What we are trying to do is, using that prism, to see, methodologically, what Dr Latham is proposing to do in terms of quantum methodology.

MR O'DONOGHUE: I will take instructions. Of course the open bidding **(inaudible)**.

MR PICKFORD: I'm sorry, I think I --

MR O'DONOGHUE: The opening bid example you have just shown me is more than 17.

MR JUSTICE MARCUS SMITH: I'm not asking you to produce new material. I'm asking for a compilation, in a single place, of the two attacks that are made on your certification application.

MR O'DONOGHUE: Yes.

MR JUSTICE MARCUS SMITH: Which is that, on one hand it is said you have failed properly to particularise your case, and you therefore should fail for that reason. We had the debate this morning on that.

And then, secondly, you have got to face the question that: even if what you have done is pleadable and arguable on that basis, you haven't unpacked your methodology. And that isn't a pleading point, that is an expert methodology point.

What I'm looking to do is to tie it all up in one location so that we have a precise compilation between the two areas of attack on your application.

MR O'DONOGHUE: Yes.

MR JUSTICE MARCUS SMITH: I want to be very clear, I would be concerned if there was new material in this. That is not what we are looking for. We are looking for an extraction out of quite a lot amount of volume and certainly a high amount of detail, of the broader picture, which is what -- I repeat what I said at the beginning of this hearing -- is what we are tilting at.

We are not wanting to write a judgment that runs to a hundred pages, or 200 pages, on a certification application. That is defeating the object of these matters. But what we do want is an ability to produce 30 or 40 pages which makes entirely clear why it is, if we are satisfied, why we are satisfied; and if we are not satisfied, why we are not. So that is what I'm seeking.

MR O'DONOGHUE: That is very helpful. Just to clarify that we are on exactly the same page, I think one possibility is that we have -- our primary case is this single continuous infringement. Another option is disaggregating to three abuses. We

say: well here is the factual and counterfactual of those. The other option, which I'm instinctively resistant to, is that I go down the rabbit hole of 17 misconducts.

MR JUSTICE MARCUS SMITH: I'm trying to assist you in this **(inaudible).** I hope you heard the thrust of our exchanges with Mr Pickford.

MR O'DONOGHUE: Yes.

MR JUSTICE MARCUS SMITH: We are not very attracted by the 17.

MR O'DONOGHUE: No, sir.

MR JUSTICE MARCUS SMITH: So we, I think, received a degree of clarity in the helpful exchanges this morning, about what you didn't have to do.

MR O'DONOGHUE: Yes.

MR JUSTICE MARCUS SMITH: And what you didn't have to do was articulate what should have happened, to avoid, to stick with 190 -- the question of how one would achieve a participant neutral outcome. Obviously we will have to work out whether the exchanges with Mr Pickford this morning assist us in resolving matters or not, but assuming that what we were putting to Mr Pickford is our position, you don't have to deal with the, what would have happened in the counterfactual. You just have to say: the counterfactual is that the abuse would not have happened. How, then, do you measure it, that is what we are looking for.

MR O'DONOGHUE: Sir, I will take instructions and have a go. I suspect, if it is too dangerous, it is something that I will be addressing in my --

MR JUSTICE MARCUS SMITH: That is really why I -- I'm trying to keep you away from the trees and looking at the wood. That is why I think something which is brief. I'm not trying to close you out from saying anything, I'm trying to assist you to assist us.

MR O'DONOGHUE: We are on the same page.

MR JUSTICE MARCUS SMITH: Yes. Famous last words, but thank you very much.

We will resume then at 10.30 tomorrow morning. Thank you very much.

(The court adjourned until the following day at 10.30 am)