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5 **IN THE COMPETITION**

Case No. : 1641/7/7/24 & 1644/7/7/24

6 **APPEAL**

7 **TRIBUNAL**

8
9 Salisbury Square House
10 8 Salisbury Square
11 London EC4Y 8AP

12 Friday 11th October 2024

13
14 Before:

15
16 The Honourable Mr Justice Roth
17 (Sitting as a Tribunal in England and Wales)

18
19 BETWEEN:

20 BIRA Trading Limited

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22
23
24 **Proposed Class Representative**

25 -and-

26
27
28 Professor Andreas Stephan

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30
31 **Proposed Class Representative**

32
33 v

34
35 Amazon Inc and Others.

36
37 **Proposed Defendants**

38
39
40 **A P P E A R A N C E S**

41
42 Nikolaus Grubeck On behalf of BIRA (Instructed by Wilkie Farr & Gallagher LLP)
43 Kieron Beal KC, Daniel Carrall-Green and Christopher Monaghan On behalf Professor
44 Andreas Stephan (Instructed by Geradin Partners)
45 Daniel Piccinin KC On behalf of Amazon Inc and Others (Instructed by Covington & Burling
46 LLP)

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Friday, 11 October 2024

(10.02 am)

MR JUSTICE ROTH: I start, as always with a warning. These proceedings are being live streamed, as are all proceedings in this Tribunal. An official transcript and recording of the proceedings are being made. It is strictly prohibited for anyone to make any unauthorised recording or take any visual image of the proceedings, and to do so is punishable as a contempt of court.

Case Management Conference

Thank you for your skeleton arguments which are helpful. I do appreciate that the parties here are working to quite a tight timetable and deadlines, and I think you'll appreciate that is to enable you to catch up with the Hammond case. Equally, the Hammond case has been held up, contrary to their wishes, to wait for the outcome of this dispute. So the result is that everything's a little bit truncated.

I think first, we'll deal with the question of expert evidence. I'll come on to the question of additional evidence from an algorithmic expert, which I see the BIRA proposed class representative wants to introduce. But otherwise, we will want to consider the expert evidence relied on in the applications and the methods proposed.

But we don't want, as I think has been made clear in a letter from the Tribunal, adversarial expert evidence as between the two proposed class representatives. We would like both economic experts to attend the hearing. We may wish to ask them some questions by way of clarification of their approach -- we haven't decided on that yet -- but that won't be anything like cross-examination and the sort of challenge to the expert evidence that will be no doubt pursued by Amazon at the eventual CPO hearing.

The hearing of the carriage dispute is not a sort of dress rehearsal for that in which you can each sort of warm up for the benefit of Amazon when it comes to the CPO dispute. That's why we've asked for, in the short supplemental statement from the

1 experts that they are not to critique the other side's expert.

2 I also wanted to raise this: as you know, the CMA made a commitment decision in
3 November 2023, and commitments come into effect six months later, so that's May of
4 this year. It appears, as I see it, to cover certainly both the alleged abuses in the BIRA
5 application and a good part of the abuses in Professor Stephan's application. Then,
6 there's also the Commission's commitments decision and those commitments came
7 into effect in June 2023, albeit they don't apply to the UK.

8 But it does mean that by the time there is anything like a substantive trial -- in other
9 words post-CPO being made and then pleadings and so on -- there will have been a
10 significant "clean" period as regards to some of the abuses.

11 I did wonder why it's not possible for the experts to consider whether the effects of at
12 least some of the abuses can't be assessed by -- when I say abuses, I appreciate
13 alleged abuses; they obviously have to be established and the commitments decision
14 doesn't establish them as we know; but the alleged conduct in any event -- comparing
15 what happened during the period prior to the commitments when the conduct was
16 being carried out and the period after the commitments came into effect in the sort of
17 traditional way, which is a lot simpler, it seems to me, than the more elaborate
18 techniques that the experts have used.

19 In particular, I think that may apply to -- Dr Houpis does consider this briefly -- he says
20 in his report, page 584 in the bundle but within his report it's page 159, at
21 paragraph 454, he refers to this, and he says:

22 "...I consider that even after the commitments are implemented and even if they bring
23 the ... conduct to an end [well, one assumes they do] it's reasonable to expect the
24 exclusionary effects of the conduct will continue to affect the proposed class. This is
25 because it will likely take time for Amazon's rivals in the online marketplace and
26 fulfilment markets to build scale and improve their competitiveness..." Well, I'm not

1 | sure that actually anyone is really suggesting there's going to be a significant rival in
2 | the online marketplace. I understand the point about the fulfilment --

3 | MR PICCININ: I apologise for interrupting, but I'm told the live stream is not currently
4 | working.

5 | MR JUSTICE ROTH: Oh. Thank you for telling me. We should have been told that.
6 | I'd better rise then. Yes. Well, thank you, Mr Piccinin. Did it work at all at the start?
7 | It's never worked? Right. Okay, I shall rise while that's sorted out. Apologies.

8 | (10.09 am)

9 | (A short break)

10 | (10.13 am)

11 | MR JUSTICE ROTH: We started this hearing at 10.00 am, but I was then told after
12 | some ten minutes that the live stream was not working. I hope that it is now. I helpfully
13 | had some nods from the courtroom.

14 | We had been considering the question of expert evidence. I'm not going to repeat that
15 | part of the short start of the proceedings. The transcript will be placed on the website.
16 | I was in the course of raising one question, having regard to the commitments given
17 | by Amazon to the Commission, but more particularly to the CMA as regards to this
18 | country, which came into effect in early May of this year.

19 | And asking, really raising for consideration, obviously not an answer today, but for the
20 | parties to explore a bit with their expert and I think, in particular, it seems to me for
21 | Professor Stephan to take up with Dr Houpis, whether as regards the buy box in
22 | particular, the abuse and the data abuse -- or, I should say the conduct which is
23 | alleged to be an abuse -- it's not possible to approach the analysis of effects by
24 | comparing what happened to sellers on Amazon during the period when the conduct
25 | was in effect and the period after the commitments came into effect, when the conduct
26 | will have ceased.

1 I appreciate that it won't cover the question about fulfilment and the conduct
2 complained of regarding fulfilment, but as I understand Dr Houpis' approach, he's not
3 using the algorithmic method to deal with the effect on fulfilment. He's doing that in a
4 different way by linear regression but it may be another way of looking at the area
5 that's covered by the algorithmic method and it's something that perhaps he can
6 consider.

7 It probably applies a bit less to Dr Nitsche because he takes the data abuse as the
8 fundamental abuse, as I understand it, and looks at that as then relating to the other
9 aspects of the conduct, but he may wish to consider this as well.

10 So I leave that for the parties to take up with their experts.

11 Now, our question of the algorithm, BIRA wants to put in what it says is a short report
12 for the purpose of this carriage dispute in the field of algorithm.

13 My initial reaction to that, and I've discussed it with the two other members of the
14 Tribunal, is that if there is going to be a submission made that the algorithmics
15 approach is unworkable, then that's not something on which counsel can give
16 evidence.

17 It would be helpful to have, what would, as I understand it, be something of
18 an expansion of what's already a four-page letter setting out the proposed expert's
19 opinions. But I emphasise short. It seems to me 12 pages would be more than
20 adequate to do that. At one point I wondered whether we need any more than is in
21 the letter, but I think to have it in the form of a proper report would be useful.

22 That has to be done very quickly and, of course then, as it is a critique of what
23 Dr Houpis is proposing, it follows that Professor Stephan can file a short report in
24 answer, whether from Dr Houpis or from another expert, if they so wish.

25 So that's my initial reaction to that, but if Professor Stephan's counsel wants to push
26 against that, obviously you've got a right to do so, I haven't heard from you on it. So,

1 I thought it's helpful to tell you where we are.

2 MR BEAL: Thank you very much, sir. May I take that as an invitation to, at least
3 explain, with the greatest respect, why we would suggest that's (overspeaking)--

4 MR JUSTICE ROTH: Yes.

5 MR BEAL: Something that would be determinative.

6 MR JUSTICE ROTH: Yes.

7 MR BEAL: Before doing so, please could I, on behalf of the bar, express our sorrow
8 at learning of the passing of James Flynn KC. He was a genial colleague. He will be
9 much missed. I think James would have wanted us to crack on and not dwell, so I'm
10 going to immediately crack on and not dwell.

11 MR JUSTICE ROTH: Yes, I can say that we were all deeply shocked by that very sad
12 news which came very suddenly.

13 MR BEAL: So, I apprehend that you've read the claim form and you've read
14 Dr Houpis's report --

15 MR JUSTICE ROTH: Yes.

16 MR BEAL: -- and that you've read Professor Stephan's witness statement.
17 The algorithmic evidence is sought to be adduced here, as I understand it, to enable
18 this Tribunal to conclude in a month's time that the rerunning of the algorithms without
19 any evidence as to what the algorithms are or how they work will inevitably be
20 incapable of producing a result. That is the test that has to be met.
21 The test to be applied -- that this Tribunal will be very familiar with; is set out in
22 Kent -- is whether or not this expert evidence is necessary and appropriate for
23 determining an issue that the Tribunal can be expected to deal with, and for these
24 purposes, to deal with in a definitive way because the test is whether or not the
25 methodology would inevitably fail.

26 Now, I would invite the Tribunal very briefly, please, to note that we had asked for

1 details of the calculations, for example, that lay behind Dr Nitsche's report. That's in
2 bundle tab 52, page 897. And when I give 897, the PDF reference, I think, will be plus
3 9. So that's the bundle for the hearing.

4 MR JUSTICE ROTH: Yes, tab?

5 MR BEAL: Tab 52, it's the correspondence. If you have it in two separate files, it'll be
6 the second of them.

7 MR JUSTICE ROTH: No, I've just got one. But this is a letter of 17 September?

8 MR BEAL: Yes.

9 MR JUSTICE ROTH: Yes.

10 MR BEAL: And in paragraph 2, my solicitors Geradin Partners said that:

11 "[They had] reviewed the exhibits and note ... that the underlying calculations for the
12 report are not contained. We've been informed by Frontier that to better understand
13 the quantum presented in Dr Nitsche's first report, it would help to have the underlying
14 calculations."

15 Now, the response then came back, in somewhat blunt terms, at page 900, behind
16 tab 54. The response in the second paragraph of that letter notes, or it's asserted that
17 no reason or explanation has been given; the carriage dispute will focus on
18 methodologies following the Hunter and Hammond approach; it then says:

19 "It is clear from prior carriage disputes that, to the extent that either PCR seeks to
20 persuade the Tribunal to prefer their claim on the basis of their expert report, the
21 Tribunal's evaluation will be at the level of the proposed methodology, rather than at
22 the level of individual calculations. As you will appreciate, the Tribunal will not be in
23 a position at a carriage dispute to consider or address detailed modelling issues."

24 Now, that was subject to some pushback from us -- page 905, that's behind
25 tab 56 -- where we pointed out that one would have expected, at first blush, the detail
26 behind the methodology to have been set out together with the assumptions and

1 estimates to enable the robustness of the calculations to be assessed, and that we
2 had ourselves given those calculations to the other side.

3 That was then rebutted at tab 59, page 910, where solicitors for BIRA pushed back
4 and said that:

5 "You have now said that you require the underlying calculations ... This is incorrect.
6 Section 4.2 of the Nitsche Report explains in detail how BIRA proposes to carry out
7 the broad-brush approach [and so on]." Section 5 sets out -- in detail -- all the
8 assumptions."

9 Turning over the page, there's a reference to the task that will be ahead of the Tribunal
10 when analysing the competing methodologies, and it says:

11 "This does not involve an examination of individual calculations. Whilst we appreciate
12 that the exhibits of the expert report of Dr Houpis contain his underlying calculations,
13 that does not form a reason why Dr Nitsche's should be provided, given that the
14 Tribunal's evaluation will be at the level of methodology rather than at the level of
15 individual calculations."

16 Now, it's therefore, with respect, somewhat surprising, that BIRA is now seeking to
17 have a definitive ruling in a month's time as to the inherent viability or otherwise of a
18 methodology, having taken what I think is best described as a high-level approach to
19 the task that lies for this Tribunal in November and having recognised that it's not an
20 appropriate function of the carriage dispute hearing to descend into the full detail.

21 I'll come on to explain why that is the case by reference to the approach that was
22 sanctioned by the Chancellor in the UK Trucks case.

23 MR JUSTICE ROTH: Yes, but I don't think we are seeking to go into a definitive ruling
24 as to the viability. Whatever we do, it will be open to Amazon at the CPO hearing to
25 attack the methodology and say it doesn't work.

26 But as I understood it, what is being said is, at a high level, that this approach won't

1 work because (a), the way algorithms work generally, they keep being changed and
2 therefore conceptually, it can't be applied; and secondly, that the data just won't be
3 there and I'll come on to that.

4 That's why I wondered at one point whether we need a report that goes beyond the
5 letter where that's all explained. I just think it's more satisfactory to have it in a short
6 report. But I don't think it's going to go into the detail, and if it does, I'm not sure that
7 will impress us very much. We just want to understand if there is a real conceptual
8 problem with the approach.

9 I appreciate also that you will no doubt say, well, that Dr Houpis has a fallback anyway
10 and so on. So it's not decisive, necessarily, but it's an argument that's going to be
11 made and it's going to be made that conceptually there are inherent problems and it
12 seems to me it's better explained by someone who's got expertise in that field. That's
13 as far as it goes, so I don't think it will be necessarily a definitive ruling.

14 One of the oddities about this whole exercise is that we have to form an almost
15 impressionistic view of, where there are two different approaches, which one seems
16 preferable or easier or whatever. Then that's one factor among all the other factors
17 that one takes into account.

18 So, it's not going to be that sort of definitive ruling and it's not going to involve a sort
19 of detailed scrutiny of the (overspeaking). So, I don't think we need to overplay it to
20 that extent.

21 MR BEAL: Two responses, if I may, one legal, one factual.

22 MR JUSTICE ROTH: Yes.

23 MR BEAL: The legal one is the test that I've indicated needs to be applied at the
24 carriage dispute hearing, is exactly how I phrased it and that's derived from the
25 judgment of this Tribunal, per the precedent in the Hunter and Hammond case. That's
26 bundle of authorities tab 4, page 84.

1 MR JUSTICE ROTH: Yes.

2 MR BEAL: If I could very briefly walk you through that, I'm sure it's very familiar to
3 you, but I do wish to alight upon the test that was, in fact, adopted.

4 MR JUSTICE ROTH: Yes.

5 MR BEAL: So if one looks at paragraphs 19 to 20, page 84, one sees that the CAT is
6 setting out substantial differences in the methodology that had been proposed by
7 Mr Harman and Dr Pike, the two competing experts.

8 "Dr Pike's methodology [had focused] on the [algorithm]. In order to establish a
9 relevant counterfactual, [he] proposed, if practical, to re-run a non-discriminatory
10 version of the [operation of the featured merchant algorithm]. In other words, he
11 proposes to operate the algorithm that was in fact operated by Amazon with the abuse
12 'stripped out'. If this is not possible, he proposes to model the outcome of such an
13 exercise."

14 Mr Harman, it's fair to say, expressed scepticism. Now, the evidence in that case was
15 scepticism, "we don't think this will work" versus "we think it will work, but if it doesn't,
16 then we've got another choice". So the parallels are quite strong.

17 Save that, in this case, what BIRA seeks to do is to say it's not just scepticism but it's
18 a conclusion that it will not work. Now, that's the factual issue I'll come on to in a
19 moment, but I'm simply foreshadowing where I'm going.

20 We then see, in paragraph 22:

21 "Each Applicant made substantial criticisms of the methodology proposed by the other;
22 ... oral submissions of counsel [were] helpful ... As we will come to describe, we
23 considered the expert evidence on different methodological approaches adopted by
24 the Applications to be the key differentiator."

25 And that's, I suspect, what lies behind the Tribunal's, with respect, perfectly sensible
26 suggestion that both sides concentrate on their positive case in a 20-page document

1 so that you can compare like with like.

2 We then see page 86, paragraphs 28 and 29, that the learned president said:

3 "In our view, each party was successful in raising doubt and challenges about the
4 methodology of the other; but neither was successful in persuading us that the other
5 was inevitably bound to fail. We also recognise that this case is still at a very early
6 stage, and these applications are (each of them) doing no more than articulating a
7 claim that will develop and change as it progresses towards trial, assuming
8 certification."

9 "It is also clear, given the complexity and differences ... that it is appropriate to make
10 a decision on carriage at this early stage, however 'rough and ready' the basis of the
11 decision may be."

12 Pausing there. So entirely, as you've suggested, quite rightly.

13 "To do otherwise, and to take both cases forward ... would lead not only to a lengthy
14 and expensive certification ..."

15 Then the learned president refers to the perils of having a "rolled up carriage" dispute
16 together with certification.

17 We then see in paragraph 31:

18 "We consider that the applications can rationally be differentiated by reference to the
19 different methodologies ... We propose to consider those rival methodologies under
20 two heads. First, why we consider one ... to be clearly and distinctly better ... [and]
21 secondly, whether there is a difference between these methodologies in terms of their
22 practical workability and whether -- taken at its most extreme -- it can fairly be said
23 that one or other of them simply 'will not work'."

24 So at the rough and ready stage of carriage dispute, there will be an evaluation,
25 necessarily, of the competing rival methodologies. But in order to get home on the
26 suggestion that one methodology is not workable, you'd have to show that it simply

1 will not work. So that's the test that's being articulated.

2 We then see that's borne out where the Tribunal comes on to consider the evidence
3 of Dr Pike and Mr Harman.

4 Then, at paragraph 35, page 88, the Tribunal said this:

5 "If Dr Pike's approach were so unfeasible as to inevitably fail the Pro-Sys test, then
6 this would be a reason for preferring Mr Harman's approach as a less satisfactory, but
7 more workable, proxy."

8 And they refer back to the evidence Mr Harman had given that he was "sceptical" as
9 to whether or not it would be possible to rerun the algorithms.

10 On the present evidence, however, and bearing in mind the approach to the resolution
11 of carriage disputes described above, Dr Pike's methodology appears to be sufficiently
12 workable, either as a rerun without the abuse, or as a proxy of the rerun to merit a
13 more detailed examination.

14 We are satisfied about this for essentially three reasons. First, Dr Pike has been clear
15 as to his methodology. He has considered the difficulties and considers they can be
16 overcome. That's what Dr Houpis has done: the Tribunal's read of Dr Houpis's report,
17 and you've seen at every stage where he proposes a methodology, he proposes an
18 alternative in case the data isn't available, or in case there's some problem with
19 obtaining either sufficient data for the rerunning of the algorithm or the automated
20 tools, and that runs like a stick of rock through his evidence, that he sets out his
21 preferred route and then he sets out his alternative route in case there are data issues.

22 Then says, and this is our second reason:

23 "Whilst Mr Harman certainly expressed scepticism in regard to Dr Pike's proposed
24 methodology, he stopped well short of saying that this approach could not be
25 undertaken or was impossible."

26 So it's no good for the evidence to be adduced by BIRA to stop short of saying that.

1 They therefore have to establish in a month's time before this Tribunal that this
2 Tribunal can say that the methodology proposed by Dr Houpis, relying on rerunning
3 the algorithms cannot be undertaken or is impossible.

4 MR JUSTICE ROTH: Well, they can seek to persuade us of that. Why should they
5 not seek to persuade us of that? I mean, the point made here is that Mr Harman did
6 not say that. Indeed -- I haven't read Mr Harman's report, of course -- "stopped well
7 short" of saying that it couldn't be undertaken.

8 Well, if they want to put in an expert who says "this approach cannot be undertaken
9 and is impossible", should they not be able to do so? They say well, we don't think
10 that, Dr Nitsche is the person to do that, because the reason it's impossible is to do
11 with the way algorithms are operated and that's not his particular expertise. So they
12 want to put in something from someone who is an expert in that field.

13 Whether they'll persuade us of that is another question, but that's what they're seeking
14 to do, and which is not what Mr Harman did. It seems to us, if that's going to be the
15 submission, and I think it is, then we'd like to understand from someone who's got
16 expertise on what basis it's being said.

17 MR BEAL: The evidence that has to be adduced has to be reasonably necessary --

18 MR JUSTICE ROTH: Yes.

19 MR BEAL: -- and go to an issue. I'm flagging at this stage that there is already
20 evidence from Dr Houpis in his expert's report that he and his data team at Frontier
21 consider that this can be done.

22 Of course, the implication of the submission made by BIRA is that the Tribunal was
23 wrong to have concluded that these algorithms couldn't be run. The Tribunal should
24 have concluded that it was impossible.

25 MR JUSTICE ROTH: In the Hammond case?

26 MR BEAL: In the Hammond case.

1 MR JUSTICE ROTH: Well, they didn't have the evidence. I mean, you can always
2 say, when different evidence is produced by a different party in a later case, that
3 means the previous court was wrong. Well, it's only wrong in the sense that if it had
4 had the evidence which the subsequent court had, it might have got to a different
5 result. Well, that's always the case. It doesn't mean that it was wrong, because we
6 decide on the evidence.

7 MR BEAL: I acknowledge this, that if what is being proposed is a 12-page report that
8 says, "We think it's likely there will be problems with algorithms", then in a sense, we
9 have nothing to fear because that can't sensibly meet the test.

10 MR JUSTICE ROTH: Well, it's going to say, presumably because it's going to come
11 from -- if I pronounce his name correctly -- Mr Kervizic, what he says in his letter but
12 in slightly greater detail and with a bit more explanation.

13 MR BEAL: Well --

14 MR JUSTICE ROTH: That's what we're going to have. You've got the letter anyway,
15 and it will give you a chance and Dr Houpis -- whether it's Dr Houpis, that's a matter
16 for you; if you prefer to have someone else, you can but if Dr Houpis is comfortable
17 dealing with it, that's fine -- just to respond. So we just have that set out and I think
18 we'd find it helpful. I'm not saying we will be persuaded by it. We may well not be
19 and, as I pointed out, I'm also alert to the fact that Dr Houpis says, "If this doesn't work,
20 I've got an alternative." So whether it will get them home or not, I've no idea.

21 MR BEAL: I've sought to persuade you, I think unsuccessfully, that this is going to
22 lead to extra time and costs for no discernible benefit. It won't be me saying "I told
23 you so" in November because I can't make the November hearing and I wouldn't
24 dream of saying that in any event. But I've put down my marker.

25 MR JUSTICE ROTH: Yes.

26 MR BEAL: Could I, being realistic there, then move on to make some brief

1 submissions on the form our response might take, to which the answer is, I don't
2 specifically know yet because we haven't seen the report.

3 The report may say, "This is how algorithms work. You can't possibly rework them,
4 it's all impossible", at which point we would wish to have an algorithmic expert to say
5 why that's wrong.

6 The report may say, "Dr Houpis in his report necessarily doesn't know what he's talking
7 about and the reassurance he gained from his data team at Frontier, who are used to
8 doing these things, is wrong", at which point Dr Houpis, I anticipate, would want to say
9 something about that.

10 So what I'm seeking, with respect, is flexibility in the response that we give -- within,
11 obviously, the page confines the Tribunal has in mind -- to deal with however the case
12 is put against us. If that involves a very short further report from Dr Houpis, then
13 I would respectfully suggest it's in the interest of justice that he faces the allegations
14 made against him and can respond.

15 MR JUSTICE ROTH: Yes, absolutely and I hope I made clear that of course you must
16 have a right to respond.

17 MR BEAL: It may involve a short report from an algorithm expert of our own and it
18 may involve a short responsive report only to the allegations that have been made
19 against Dr Houpis specifically.

20 MR JUSTICE ROTH: Yes.

21 MR BEAL: What it won't involve, in the light of your clear steer, is some all-out negative
22 attack on the nature and methodology.

23 MR JUSTICE ROTH: No, it's only responding to whatever is said by Mr Kervizic.

24 MR BEAL: Kervizic, yes.

25

26 MR JUSTICE ROTH: And it seems to me that Mr Kervizic, who's already written a

1 detailed letter, should be able to provide his report very quickly and he was, I think,
2 instructed back in mid-September at least and therefore the date I have in mind is
3 21 October, Mr Grubeck, and as I say, limited to 12 pages.

4 MR GRUBECK: I won't address you further on why this is a relevant report --

5 MR JUSTICE ROTH: No.

6 MR GRUBECK: -- unless you would like me to.

7 Just in terms of how it would be unpacked, the letter, and what Mr Kervizic proposes
8 to provide. He makes six points in his letters, you know, and I'll just very briefly take
9 you through these, as he has explained them to me, so as to explain how the
10 unpacking would work. It's on page 67 of bundle A.

11 The first point is he'll explain what an algorithm is and what something like the model
12 he's looking at would involve; it's not a single model, but lots of them. There's tens
13 of --

14 MR JUSTICE ROTH: I've read his letter and I see that he makes six points.

15 MR GRUBECK: Just in terms of unpacking it, we think that can be done very briefly.
16 We welcome your indication that it be done in a report because there's a bit more to
17 it, just to unpack these points.

18 MR JUSTICE ROTH: No, I see that and that's why his letter is four pages and I've
19 said 12 pages. Are you pushing against that?

20 MR GRUBECK: Can we have 15 pages?

21 MR JUSTICE ROTH: No.

22 MR GRUBECK: No.

23 MR JUSTICE ROTH: And 21 October.

24 MR GRUBECK: 21 October, I think, yes.

25 MR JUSTICE ROTH: Right, and then as a response, and it is going to be expanding
26 on the letter, I mean, I think, same length.

1 Mr Beal, 31 October?

2 MR PICCININ: Can I ask --

3 MR JUSTICE ROTH: Just a moment; just a moment.

4 MR BEAL: Yes, that should be achieved.

5 MR JUSTICE ROTH: Yes.

6 MR GRUBECK: Just from the response -- two very brief points. One is, I believe my
7 learned friends acknowledge that, it should be a response, not dealing with Dr Nitsche,
8 but dealing specifically with what's said by Mr Kervizic.

9 And the second one is, on its face, one would expect that response to come from
10 Dr Houpis; he's the one who puts forward the methodology. Presumably he's the one
11 who would defend it.

12 MR JUSTICE ROTH: I'm not going to restrict Professor Stephan as to who he uses
13 and if it involves three pages from Dr Houpis about his competence and nine pages
14 from an algorithmic expert -- that's what I meant to say -- that's fine but I'm not going
15 to direct who it's from.

16 Right, so that's that, but before we completely leave that, Mr Piccinin, we're grateful
17 for you attending and see the limited role you play in this dispute.

18 The Amazon defence in the Hammond case is there -- and bear in mind that whoever
19 succeeds on the carriage dispute, there will then be joint case management, at least,
20 of this and the Hammond case and that's the reason why the Hammond case has
21 been held up, so they will see it in the end, is there any reason why the defence of
22 Amazon, in the Hammond case, cannot be provided to the two proposed class
23 representatives in this case? Because it does, I think, address some of the points
24 dealing with the algorithmic approach.

25 MR PICCININ: I understand. May I just take instructions there?

26 Just to clarify, I take it you mean the CPO response rather than the defence?

1 MR JUSTICE ROTH: Yes, because I don't think the other defence has been served
2 yet.

3 MR PICCININ: Exactly, so in that case, no, sir.

4 MR JUSTICE ROTH: Yes. That can be provided, if not today, then on Monday.

5 MR PICCININ: Sir, yes.

6 MR JUSTICE ROTH: Yes. You will then both see, what Amazon has said regarding
7 the algorithmic method being proposed in the Hammond case.

8 MR PICCININ: Sir, I haven't looked at it to see whether there are any redactions that
9 would need to be made arising out of confidential information, belonging to the PCRs
10 in that case.

11 MR JUSTICE ROTH: Yes, though it would be hard to see if there's something
12 confidential, not confidential to Mr Hammond, but confidential to Professor Stephan.

13 MR PICCININ: No.

14 MR JUSTICE ROTH: That would be a little curious.

15 MR PICCININ: It's about funding, sir, that's all I had in mind.

16 MR JUSTICE ROTH: Yes, if it's about funding, then that's not really relevant, anyway
17 to this matter.

18 MR PICCININ: No, sir.

19 MR JUSTICE ROTH: So you both have that. And while we're on the subject of
20 disclosing documents, can I ask this. Has there been full disclosure as between
21 Professor Stephan and BIRA of the applications that you've respectively made?

22 MR BEAL: Yes, that was done by correspondence. It's in the bundle; each party
23 served the other with whatever it was appropriate to serve.

24 MR JUSTICE ROTH: When you say whatever is appropriate --

25 MR BEAL: There was a list of documents that accompanied both sides' letters setting
26 out what they had done.

1 MR JUSTICE ROTH: So you've seen the litigation funding agreements of each side,
2 have you?

3 MR BEAL: No. We have, I'm sorry, yes. I personally have not seen them.

4 MR JUSTICE ROTH: No. It's really the teams acting for them. I haven't seen that
5 list, can I -- which letter is it?

6 MR BEAL: It may be easier at this stage to pass up a chronology I'd prepared.

7 MR JUSTICE ROTH: I just want to see what are the documents because if they are
8 going to it, the Tribunal will have the full application and if we think something's
9 relevant with the application, and then I don't want somebody jumping up at the
10 carriage dispute hearing saying, "we've not seen that".

11 MR BEAL: I completely understand that concern. If you'd be kind enough, please, sir,
12 to turn to for example, tab 43, page 884.

13 MR JUSTICE ROTH: Tab 43, yes, claim form bundle (overspeaking) --

14 MR BEAL: It's a letter from Willkie Farr and Gallagher saying:
15 "Pursuant to the agreed terms between the parties, as set out in [Geradin's] letter
16 dated 16 August ... we will shortly send a compressed file [containing] ..."

17 Then it's the claim form bundle, the witness statements and so on. That doesn't
18 expressly refer, I think, to the funding agreement.

19 MR JUSTICE ROTH: That doesn't (overspeaking) --

20 MR BEAL: But I'm instructed from those who sit behind me that we have received the
21 funding agreement. I'm told it's in the exhibit.

22 MR JUSTICE ROTH: Yes.

23 MR BEAL: Then the responsive letter.

24 MR JUSTICE ROTH: And that will include also the litigation plan, I take it.

25 MR BEAL: Yes, that's certainly been included. Our litigation plan was exhibited to
26 Professor Stephan's witness statement.

1 MR JUSTICE ROTH: Right. I mean, they usually are all exhibited but I just wanted to
2 check that everything's ...

3 MR BEAL: If you'd be kind enough, please, turn to tab 38, page 875.

4 MR JUSTICE ROTH: Yes.

5 MR BEAL: That then sets out what was being proposed to be disclosed the other way.

6 MR JUSTICE ROTH: Yes, that does refer to -- no, it doesn't refer to funding, it just
7 refers to litigation. Can you tell me the funding has been done?

8 MR BEAL: Yes. There was a discussion as to disclosure of ATE's insurance policies,
9 which then follows from tab 39 onwards but that was dealt with and resolved in
10 correspondence because essentially the funders, in our case, are also providing
11 adverse cost protection.

12 MR JUSTICE ROTH: Yes.

13 MR BEAL: So it's been dealt with in that way. What I haven't --

14 MR JUSTICE ROTH: What one wants to see is the level of ATE cover but not the
15 premiums --

16 MR BEAL: Yes.

17 MR JUSTICE ROTH: -- which are very confidential.

18 MR BEAL: I don't think the underlying premia have been disclosed.

19 MR JUSTICE ROTH: No, I imagine not.

20 MR BEAL: And then, as far as I'm aware, at least for the purposes of this bundle, the
21 correspondence on that issue peters out.

22 MR JUSTICE ROTH: Yes. If you've got everything, that's fine.

23 MR BEAL: I hope that helps.

24 MR JUSTICE ROTH: Right. Then there's a question raised, I think, about further
25 factual evidence. I don't see that there's any need for further factual evidence and I'm
26 sure that both Professor Stephan and a director of BIRA will be present at the hearing,

1 if anyone needs instructions, but the idea that Professor Stephan should be required
2 to make a statement or disclose the details of the membership of the ROCC -- you've
3 asked the question, you've had an answer. I don't think it's of particular significance
4 that no great reliance is placed on it, but I certainly don't see that he can be ordered
5 or should be ordered, technically he can be perhaps, to make a statement. Again,
6 Mr Grubeck, if you want to try and push that point but I found it wholly unpersuasive.

7 MR GRUBECK: Just to deal with those in turn, I'll start with the request for information
8 which can be dealt with very quickly.

9 It comes down to: "here is an organisation that has over 125 years of experience
10 representing independent retailers".

11 MR JUSTICE ROTH: Yes.

12 MR GRUBECK: Many of those sell products on Amazon. Now, it will come as no
13 surprise that that is a feature of BIRA which we want to highlight at the carriage
14 hearing. It brings a degree of industry experience, connections, long term
15 accountability, we say, that's very hard to match, by an individual class representative.

16 MR JUSTICE ROTH: Yes.

17 MR GRUBECK: What Professor Stephan says, "I engage with UK retail associations
18 which may have some members falling within the proposed class."

19 Just to very quickly take you to what he says about that, it's page 721 of bundle B.

20 That's 728 of the PDF and 721 of the hard copy. He speaks of:

21 "I intend to engage with any UK trade or retail association which may have some
22 members falling within the Proposed Class, in order to take their views into account,
23 and potentially in order to benefit from any assistance [they] might be able to offer.

24 A particularly relevant association appears to be the [ROCC]."

25 He goes on to talk about that and then in the last sentence, he says:

26 "I have considered other well-known and potentially relevant associations [presumably

1 like BIRA] which have been brought to my attention by my legal advisors, but none of
2 these associations appear to specifically represent the interests of, or to have a
3 membership that obviously covers, the Proposed Class."

4 What he's saying is, "Well, the ROCC is more relevant." Now, we say that begs the
5 question of whether the ROCC's membership really is a better fit because if it's not, if
6 BIRA's members have significantly more retailers selling on Amazon, they are the
7 much more obvious contact point. That's something the Tribunal may want to look at
8 and in order to do that and to compare that, one needs to look at some basic details,
9 like the membership numbers.

10 MR JUSTICE ROTH: Mr Grubeck, sorry to interrupt you, but it's for
11 Professor Stephan. You made that point; I'm sure it's registered. If he wants to urge
12 at the hearing that the ROCC needs contact with them through his solicitors, who have
13 been instrumental, I think, in setting it up, is a real advantage then he will need to,
14 obviously, given the criticism you may say, well, how many members has he got? He's
15 already said in response to this that actually it's a very small number. We know that.
16 We don't need a witness statement --

17 MR GRUBECK: No, we don't need a witness statement, we simply wanted a
18 response. We want to be able to make the point saying we have thousands of
19 members, you have dozens.

20 MR JUSTICE ROTH: -- yes, well, I think you made the point and I think from what
21 Professor Stephan says, that's correct so what more do we need? We don't need to
22 know whether the ROCC has 23 or 32 or 41 or seven. Clearly BIRA is a much bigger
23 organisation and whether that, you know, how far that goes will be a matter for
24 argument at the hearing.

25 MR GRUBECK: Yes. No, very well. We will make that point at the hearing.

26 MR JUSTICE ROTH: I mean, you've given ample warning of it and if they want to

1 write a letter saying, "Actually, no, we have 3027 members and they're all active on
2 Amazon," they can do so but if they don't, the evidence won't be there. So, I don't
3 think we need any more on that.

4 I am, on one aspect of the factual evidence, struggling -- and I hope someone can help
5 me -- and that's on the class size. The classes, at least to the uninformed observer,
6 which is how I would describe myself, appear very similar in the class definition except
7 that the class period is very much longer in one of the cases, I think, it's in the -- give
8 me a moment -- BIRA case, it goes back several years earlier. But --

9 MR BEAL: I'm sorry to rise -- I can give you as a factual matter, point of information,
10 essentially --

11 MR JUSTICE ROTH: Yes.

12 MR BEAL: -- what the class sizes are.

13 MR JUSTICE ROTH: Well, the one in BIRA is said to be 35,000.

14 MR BEAL: Yes, that's (overspeaking) --

15 MR JUSTICE ROTH: Yes, and that's what's puzzling me, but Stephan is said to be
16 200,000.

17 MR BEAL: Yes.

18 MR JUSTICE ROTH: And I just do not understand how there can be such a
19 discrepancy, given the nature of the class. It seems to me something has happened
20 in counting that's gone wrong.

21 MR BEAL: Well, the scope of our claim is much broader.

22 MR JUSTICE ROTH: The allegations.

23 MR BEAL: The allegations are broader and therefore they cover more people.

24 MR JUSTICE ROTH: No, the fact that the allegations are broader doesn't mean they
25 cover more people but your class. Can we look at the class? The point is the class
26 definition, not the allegations.

1 MR BEAL: When I say our claim is broader, that isn't simply, we've got five abuses
2 and they've got one and a half. We are dealing with a whole range of selling products
3 whereas their case is confined to the entry onto the market of new products. So they
4 have restricted the scope of the data abuse allegation to new products only and it's
5 only people who are selling new products or substantially similar to new products that
6 are within the scope.

7 MR JUSTICE ROTH: When you say "new products --"

8 MR BEAL: They've classified the class by reference to an allegation that the effect of
9 the data abuse --

10 MR JUSTICE ROTH: Yes.

11 MR BEAL: -- is felt solely by people who would have been putting new products onto
12 the market and are seeking to put new products and sell new products via the platform
13 but have been prevented from doing so, either because Amazon have jumped in there
14 first or -- well, I shouldn't try and paraphrase my learned friend's case --

15 MR JUSTICE ROTH: But I thought it's also about people who are selling on the
16 marketplace. It's not just people that wanted to sell.

17 MR BEAL: It's people who are placing new products on the market; that's how they've
18 chosen to confine their claim for loss.

19 MR JUSTICE ROTH: By "new products", you mean not second-hand, is that what you
20 mean?

21 MR BEAL: It's products that haven't currently been marketed across the Amazon
22 platform, as I understand it.

23 MR JUSTICE ROTH: That's not my understanding of it. I thought, this is what I'm
24 trying to clarify, I thought it's people who use the platform. Perhaps we should look at
25 the class definition.

26 The BIRA class definition is in paragraph 109 of the claim form which is on page 148

1 of the bundle and it is, Mr Beal, as you say, new products, who actually sold new
2 products and by new, I take it, that is new as opposed to second-hand. Is that right?
3 MR BEAL: Yes.
4 MR JUSTICE ROTH: Just a moment. Is that right? Is that what is meant?
5 MR BEAL: We hadn't discerned that nuance.
6 MR JUSTICE ROTH: What do you mean by "new products"?
7 MR BEAL: As in products which have simply never been marketed before on the
8 Amazon platform so --
9 MR JUSTICE ROTH: Your relevant period goes back to 2015.
10 MR BEAL: It's people who are seeking to introduce a new line of products on a
11 platform, selling on the platform, and as I understood Dr Nitsche's position --
12 MR JUSTICE ROTH: And did actually do it?
13 MR BEAL: Either deterred from doing so --
14 MR JUSTICE ROTH: If people who sold new products --
15 MR BEAL: Yes.
16 MR JUSTICE ROTH: -- on the platform?
17 MR BEAL: Yes.
18 MR JUSTICE ROTH: So they must have done it.
19 MR BEAL: I infer that's correct, yes.
20 MR JUSTICE ROTH: Yes, so people who actually say -- it's not people who wanted
21 to sell and didn't.
22 MR BEAL: This is perhaps something that Mr Grubeck can address you on,
23 because --
24 MR JUSTICE ROTH: No, I'm looking at your -- I'm sorry. I'm so sorry, that's BIRA.
25 Your one, let's just look at your class definition which is paragraph 5 of your --
26 MR BEAL: 22, proposed class definition:

1 "The Proposed Class is restricted to the seller level of commerce ... [it's] restricted to
2 third-party sellers acting in the course of business [and it] includes all Sellers, because
3 all Sellers have contracts with Amazon in materially identical terms."
4 MR JUSTICE ROTH: Sorry.
5 MR BEAL: 22, page 349.
6 MR JUSTICE ROTH: Acting in the course of business not private sellers. But the
7 actual class definition is at page 347 at the top of the page under paragraph 18.
8 MR BEAL: Yes.
9 MR JUSTICE ROTH: "All UK-domiciled Sellers [but you mean commercial] that used
10 the platform."
11 MR BEAL: Yes, it's commercial sellers in the course of business, not private sellers.
12 MR JUSTICE ROTH: Yes, but it will be commercial sellers. Whether the product they
13 were selling is new or second-hand, is that --
14 MR BEAL: It's about people who have used the platform to sell products.
15 MR JUSTICE ROTH: Yes, businesses that use the platform to sell products.
16 MR BEAL: We haven't sought, I think, to distinguish any quality type of the products
17 they're selling, by reference to age, origin or anything else, as far as I'm aware.
18 MR JUSTICE ROTH: Yes, and that you say -- and that's at paragraph 5, I think -- you
19 say it's about 200,000 --
20 MR BEAL: Yes and it's also dealt with --
21 MR JUSTICE ROTH: -- in the period between 2018 and 2024.
22 MR BEAL: I think we go back to 2017 for some of the abuses.
23 MR JUSTICE ROTH: Right.
24 MR BEAL: So, it's true our period is shorter and we have a greater class.
25 MR JUSTICE ROTH: So then, that's why I'm trying to understand how you have
26 worked it out and I think it's explained -- your expert explains how he's calculated

1 | it -- Dr Houpis explains in his report how he gets his 200,000.

2 | Mr Grubeck, can you help me on BIRA -- what is the distinction?

3 | MR GRUBECK: On BIRA's first definition, we've got it, as you said, sir, in
4 | paragraph 109 of the claim form, page 148, bundle A:

5 | "Third-Party Merchants who, during the Relevant Period, sold new products on the
6 | Amazon UK Online Marketplace."

7 | Looking at our case, we're concerned with products where Amazon is competing with
8 | those merchants. So Amazon is introducing the same product on the marketplace
9 | and that context is where the data abuse is happening, where data they already
10 | have -- and that may limit the numbers to some extent.

11 | MR JUSTICE ROTH: That's not what the class says. It doesn't say "new products"
12 | which -- is there anywhere that it says it's products only, only people, third-party
13 | merchants, who sell products where Amazon is directly selling the same product.
14 | I didn't think it so limited.

15 | Indeed, we can go into the alleged abuses, some seem to me, to broaden that. It's
16 | just "new products". That's why I picked up the point about "new" only because I was
17 | wondering whether there's something about second-hand that -- but even that is when
18 | we're talking about merchants, not private sellers, in both classes merchants tend to
19 | sell new products, not second-hand products.

20 | MR GRUBECK: Yes, exactly.

21 | MR JUSTICE ROTH: So, I still don't understand why we end up with such a vastly
22 | different size of class and it would be important for the hearing to understand this or
23 | whether, in fact, given that you're both having to sort of try and extrapolate to work out
24 | what actually the number is prior to disclosure, but it's very relevant to the dispute
25 | between you -- what is the class size?

26 | MR GRUBECK: No, absolutely.

1 MR JUSTICE ROTH: That's why I'm trying to, ideally, iron it out now but if not I
2 would -- it's important we iron it out before the hearing.

3 I don't know, Mr Piccinin, if Amazon can assist on this, because you will obviously
4 have an idea, your clients, of how many people there are within the class.

5 MR PICCININ: All they can say at the moment is that we're also mystified by the
6 different estimates that are being put forward by the PCRs. I don't have an alternative
7 estimate for you today.

8 MR JUSTICE ROTH: But would Amazon be able to provide an estimate of the number
9 of merchants, so not private sellers, who sold products on its UK marketplace in these
10 periods? Presumably you could.

11 MR PICCININ: I don't know how easy or difficult that would be to do, standing here
12 today, depending on how the data is organised in Amazon's systems. But perhaps I
13 can just say that I've heard the request.

14 MR JUSTICE ROTH: Yes, I mean, we can make a formal request under the Tribunal
15 rules. But equally, to answer that question, it's important to understand if there is some
16 conceptual difference between the two classes. And at the moment, nothing I've heard
17 so far has clarified that.

18 MR PICCININ: Of course, we would need to understand that --

19 MR JUSTICE ROTH: Yes.

20 MR PICCININ: -- if we were going to try to answer that question.

21 MR JUSTICE ROTH: Well, I have to say it's very unsatisfactory at the moment.
22 Instinctively ... well, I won't say any more. The 200,000 figure is explained by
23 Dr Houpis in his report. I'm not sure the 35,000 figure is explained anywhere, Mr Beal.

24 MR GRUBECK: It's explained in section 474 of the Nitsche Report.

25 MR JUSTICE ROTH: 474?

26 MR GRUBECK: Yes.

1 MR JUSTICE ROTH: Have you got a page number? Is it 4.7.4? Is that what you
2 mean? No. What is that reference?

3 MR GRUBECK: So it's in the claim form.

4 MR JUSTICE ROTH: But I'm looking at the report, Dr Nitsche's report.

5 MR BEAL: Sir, if it assists, the relevant evidence I thought I had was at page 235,
6 paragraph 241. But it's my learned friend's case so I don't want to get it wrong.

7 MR GRUBECK: So, just to check, where are you in the report now?

8 MR JUSTICE ROTH: In the bundle, it's page 235 and it's paragraph 240 of Dr Nitsche.
9 But as I understand it, the classes are actually, apart from the longer period, the same.

10 MR GRUBECK: Sir, I hear you, this would be something that needs to be addressed
11 by the expert ahead of the hearing and that is a point that can be picked up in their
12 summaries.

13 MR JUSTICE ROTH: Yes. Well, I think it may need some correction. But Mr Piccinin,
14 you see what's said at 240:

15 "From public sources, I infer that the average number of UK domiciled Third Parties
16 active on Amazon's UK Online ... at any point during ... was likely in excess of 20,000
17 [footnote 143]."

18 MR PICCININ: Yes.

19 MR JUSTICE ROTH: But I imagine that Amazon will have a figure for that.

20 MR PICCININ: So, we stand here today without a request having been made
21 beforehand. I obviously don't know how easy or difficult it would be to find it, but what
22 I can say is that if the PCRs will tell us exactly what it is they want us to go find, then
23 we'll obviously look at what the best is that we can do.

24 MR JUSTICE ROTH: Yes.

25 MR PICCININ: We're anxious to help if we can.

26 MR JUSTICE ROTH: Well, I think, insofar as to reach a more accurate number, there's

1 | some information you need from Amazon, can you communicate with Amazon?

2 | MR GRUBECK: Certainly, sir, we can do that.

3 | MR JUSTICE ROTH: And if your requests are not involving vast amounts of work, I'm
4 | sure Amazon will be able to comply. I'd be astonished if Amazon doesn't keep tabs
5 | on the number of UK merchants on its platform.

6 | And, to refine that, because I remain as mystified now as I was at the beginning as to
7 | why there is such a vast difference, it seems to me they ought to be pretty much the
8 | same. But if there is an explanation, that's something we will need to understand at
9 | the hearing.

10 | MR GRUBECK: We'll refine that and, to the extent the gap remains, provide an
11 | explanation.

12 | MR JUSTICE ROTH: At least then we understand why and what actually the
13 | conceptual difference is, in the scope of the classes.

14 | Right, I don't think we can take that any further for the moment.

15 | Before we come to look at the timetable, and question of page limits and so on, are
16 | there any other major matters that we need to deal with today?

17 | MR GRUBECK: There's two more points on the factual evidence, sir.

18 | MR JUSTICE ROTH: Yes.

19 | MR GRUBECK: The first is relatively straightforward, but it should be clarified.

20 | Paragraph 22 of Professor Stephan's evidence says:

21 | "[He] does not accept that it is necessary for the topics to be covered by the evidence
22 | to be advertised in advance."

23 | The suggestion is that there might be further evidence provided with submissions. We
24 | say that any further evidence should be made clear now. I mean, it's --

25 | MR JUSTICE ROTH: This is with Professor Stephan's witness statement, you say?

26 | MR GRUBECK: No, it's his evidence. Sorry. It's his skeleton argument paragraph 22,

1 and it's on page 27 of the hard copy bundle A.

2 The genesis of this --

3 MR JUSTICE ROTH: Yes, I see, his factual evidence.

4 MR GRUBECK: Precisely. There's been correspondence where BIRA has asked,

5 "What further factual evidence, if any, do you propose to put in?" And

6 Professor Stephan has said, "that's a matter for me, and I will put it in together with

7 my submissions".

8 Our point today is that any further evidence should be made clear today and the

9 Tribunal is entitled and will want to control it.

10 MR JUSTICE ROTH: Yes.

11 MR GRUBECK: And we say that, other than the evidence by Professor Stephan,

12 which I'll address you on in a minute, there's nothing else that should be needed or

13 added by way of factual evidence at this stage.

14 MR JUSTICE ROTH: Yes, I see. I understand. Well, Mr Beal, are you intending and

15 wishing to put in further factual evidence?

16 MR BEAL: The position is this: we obviously haven't finished drafting our submissions

17 yet on what our case is, responding to the various challenges that have been made to

18 our case in correspondence, because the parties have had different styles of

19 conducting this litigation.

20 We have routinely faced very detailed, very complicated letters in which a series of

21 requests or factual statements are made. There's then been the application for this

22 particular series of directions to be made, which has been met with an 18-page witness

23 statement from Ms Clark of Willkie Farr & Gallagher, which contains a mixture of

24 submission and facts.

25 MR JUSTICE ROTH: It's mostly submission.

26 MR BEAL: It's mostly submission.

1 What we wanted was an ability, in our submissions, to refer to documentary evidence
2 without it being suggested that that documentary evidence, for example, needed to be
3 the product of written evidence adducing it.

4 Now, I've generally taken the view, I'm afraid, that witness evidence is not simply a
5 means for exhibiting a whole bunch of documents. If the submission refers to a
6 document that is in the public domain or which is otherwise to be disclosed for the
7 purposes of the carriage hearing, then that's a perfectly appropriate way of doing so.
8 However, if the objection were to be made, "you simply can't rely on this document
9 without having a witness explain why you're relying upon it and what it goes to", then
10 we would simply want to have a solicitor's witness statement that essentially trails the
11 disclosure and explains the context in which that disclosure is being made for the
12 purposes of supporting a factual assertion in our submission. It's that straightforward.

13 MR JUSTICE ROTH: Yes, I see --

14 MR BEAL: You know that we don't want Professor Stephan to give yet further factual
15 evidence. It's simply a means of getting material information before the Tribunal for
16 the carriage dispute which we are finalising at the moment.

17 So if, for example, there was a public website -- and the alternative, we simply could
18 have put all this information in correspondence and asked Willkie Farr & Gallagher to
19 explain their position on it, which is the tactic they've adopted. But we're trying to do
20 things in an easier way for the Tribunal, where the Tribunal, rather than having to go
21 through 16 different items of correspondence, has everything in one place.

22 MR JUSTICE ROTH: Yes.

23 MR BEAL: If you think we don't need a solicitor statement to do that exercise, then
24 we don't need one.

25 MR JUSTICE ROTH: Yes. I mean, if there's material in the public domain such as
26 published reports and/or websites, I don't think you need a witness statement just

1 saying that, still less exhibiting it.

2 If there's private information, such as Professor Stephan wants to say more about the
3 membership of the ROCC, which is what, in fact, BIRA was asking for, yes, that
4 probably would come in a short witness statement from him. But that's something you
5 don't want to do, as I understand it, so --

6 MR BEAL: Well, we don't think it's necessary to do that.

7 MR JUSTICE ROTH: Yes. But, I mean, it seems to me you can tell the Tribunal and
8 unless it seems a number that one considers astonishingly high, which apparently is
9 not the case from what you've said, and you're not suggesting it has a vast
10 membership.

11 Yes, I don't think you need a witness statement to deal with that. I won't preclude you
12 from putting one in, but I think you made clear that it would only be dealing with publicly
13 available information.

14 MR BEAL: Well, at the moment --

15 MR JUSTICE ROTH: Yes.

16 MR BEAL: -- obviously, that's the case, but would you be kind enough to leave it to
17 our discretion as to -- we will endeavour not to have to file a witness evidence; it would
18 be a solicitor's witness statement that simply explained a document. I can't, at this
19 stage, confirm categorically, because we haven't finalised the submissions, that it will
20 only be publicly available documents, but the anticipation is that it will be
21 predominantly.

22 Timetable

23 MR JUSTICE ROTH: When would it -- the real question is --

24 MR BEAL: It would be filed with the submission, which we're suggesting --

25 MR JUSTICE ROTH: Right, because if there's that sort of new additional material, is
26 it not helpful to have it potentially before submissions? But if we have submissions

1 fairly soon, maybe it doesn't matter and then it can be picked up in a skeleton
2 argument.

3 MR BEAL: We've noted what Amazon have said, and we're content to bring the date
4 for submissions forward. We have no objection to doing that. And so, I think on
5 timings, we were suggesting, I think it was 22 October yes.

6 MR JUSTICE ROTH: And a witness statement, if any, by the same date.

7 MR BEAL: And that is obviously only 11 days away.

8 MR JUSTICE ROTH: Yes. Well, Mr Grubeck, you've heard what's said. It's not that
9 they have some hidden rabbit that's going to be pulled out of the hat; it's a way of
10 getting through a solicitor's witness statement, it seems, publicly available information,
11 if necessary.

12 MR GRUBECK: It's the rabbits we're concerned about. Given that we have
13 submissions to deal with what each party's case is, our proposal would be that any
14 such witness statement, at the very least, should be provided ahead of submissions.
15 So there's no need to move the submissions date earlier; that can stay on 25 October.

16 MR JUSTICE ROTH: 22 October.

17 MR GRUBECK: But a witness statement should be provided well in advance of that
18 so we know what points we have to address in the submissions and that we can deal
19 with whatever material is provided. That's going to make the submissions vastly more
20 effective. There's no benefit in employing ambush tactics on this.

21 MR JUSTICE ROTH: Yes, but we're working on a tight timetable. It's going to be the
22 22nd, which is, you know, very close.

23 Would you be able, Mr Beal, to have the witness statement, because you're working
24 on your submissions, by next Friday, the 17th?

25 MR BEAL: Yes.

26 MR JUSTICE ROTH: Yes, so we'll say any witness statement by 17 October, if any,

1 | either side or both applicants by the 17th and then --

2 | MR BEAL: I heard a stage whisper behind me that Friday is the 18th.

3 | MR JUSTICE ROTH: 18th.

4 | MR BEAL: I think I can just about do that.

5 | MR JUSTICE ROTH: Yes, thank you, my watch is wrong, the 18th. Then, the

6 | submissions are by the 22nd. Amazon submissions, if any, Mr Piccinin, by

7 | 30 October.

8 | Skeleton argument,s 6 November? And authorities bundle -- well, if skeletons are on

9 | 6 November, it is hugely inconvenient for the Tribunal when we get skeletons with

10 | references to the hearing bundles left blank, and then we get another lot of skeletons,

11 | often the day before the hearing, with all the cross-references put in. So if we're going

12 | to have skeletons on the 6th, can we have hearing bundles, please, by 4 November

13 | so that you can put in the cross-references in the skeletons? Just checking that's not

14 | a weekday; 4 November is a Monday.

15 | MR PICCININ: So just to clarify, a hearing bundle including the authorities there as

16 | well?

17 | MR JUSTICE ROTH: No, no. Authorities can come on 7 November. Because it's

18 | rarely when you do your skeleton that you're clear what authorities you want. So no,

19 | it's the other prime documents.

20 | MR PICCININ: The other thing that is sometimes done is that people then file further

21 | updated skeletons with cross-references to the authorities bundle. I take it you might

22 | not find that helpful.

23 | MR JUSTICE ROTH: Well, I'm concerned I'd never look at them, so no.

24 | So, now that's clear. So any witness statement by 18 October; submissions by

25 | 22 October; any submissions from Amazon by 30 October; hearing bundles excluding

26 | authorities by 4 November; skeletons 6 November, and authorities 7 November.

1 4.00 pm in each case.

2 Page limits. I think, as far as the two proposed class representatives, a total of
3 40 pages is quite adequate for this sort of dispute.

4 It's then a question of how it's split. I would have thought that it's maybe sensible to
5 have a 25-page limit for the written submissions and a 15-page limit for the skeletons.
6 If you prefer a 20/20 split, that's fine, but it seems to me most of the stuff you want to
7 say is going to be in your submissions, and the time between them is so short, they'll
8 be read together.

9 Mr Beal, so I'm proposing that the written submissions, you have 25 pages and the
10 skeletons 15, because you're really just commenting on the other side's.

11 MR BEAL: Yes, I mean, the submission of my junior, probably not terribly sotto voce,
12 was whether you would permit 30/10, but we're conscious that there's been quite a lot
13 of -- how can we put this -- fire directed at our case in correspondence, and we've
14 chosen not to litigate through correspondence.

15 MR JUSTICE ROTH: Yes.

16 MR BEAL: So we might have to do a bit of work in our submissions, where we think
17 it's properly the place to set out one's arguments, responding to some of those
18 arguments. But I'm conscious that the Tribunal, as indeed counsel increasingly, are
19 wearied by the tree-killing exercise that routinely happens in this Tribunal. So, the
20 overall 40-page limit is not the problem, it's simply a question of discretion as to how
21 one splits it. It may be that 25 and 15 would be perfectly adequate, I just don't know
22 at the moment.

23 MR JUSTICE ROTH: I would have thought so. What do you think, Mr Grubeck?

24 MR GRUBECK: For us, we would like a 20/20 split and that is because, if our algorithm
25 expert evidence goes in on 21 October, but we don't see the reply until 31 October,
26 that's after the submissions so we will need to respond to that in our skeleton argument

1 and that will require a bit more space.

2 MR JUSTICE ROTH: Well, you only briefly comment on it. No, I think 25/15 is
3 appropriate. I think that I'm not persuaded either way to move from that. I think you
4 can share enough in 15 pages. It's only one small part, and we will be looking at the
5 reports and inevitably those, in this sort of case, will be read together. I think you may
6 want -- yes, I think 15 is fair as opposed to 1/1. Given your contrasting positions,
7 I think it should be the same for both sides.

8 Right. Is there anything else? You said another point, I think, Mr Grubeck.

9 MR GRUBECK: I had one further point that may be covered now by the directions
10 you've given, which is you've heard what we have to say on why Professor Stephan
11 should explain the issue we have raised. It's obviously a matter for him whether he
12 does so or not. Your direction on any witness statements covers whatever
13 explanation --

14 MR JUSTICE ROTH: Yes.

15 MR GRUBECK: -- Professor Stephan wishes to be put forward and we simply put
16 down a marker that this is a matter we're planning to raise at the carriage hearing and
17 that we may ask the Tribunal to draw inferences on, both in respect of whether these
18 claims can properly be combined in the class and also in respect of
19 Professor Stephan's suitability to be the class representative if that is not explained or
20 not adequately explained. But that's all I'll say about it.

21 MR JUSTICE ROTH: Yes, well you make the point about the conflict point, and I'm
22 sure that will be addressed.

23 MR GRUBECK: (Overspeaking) adverse inferences, we'll deal with by submission.

24 MR JUSTICE ROTH: Yes. Very well. Well, thank you all very much and we will
25 reconvene, though I gather not with Mr Beal, for the substantive hearing shortly.

26 That concludes this hearing.

1 (11.28 am)

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(The hearing concluded)

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