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

IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1433/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 16th December 2024

Before:
The Honourable Mrs Justice Joanna Smith
Derek Ridyard
Timothy Sawyer CBE
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Dr Liza Lovdahl Gormsen
Class Representative

v

Meta Platforms, Inc. and Others
Defendants

A P P E A R AN C E S

Robert O'Donoghue KC and Ian Simester On behalf of Dr Liza Lovdahl Gormsen (Instructed by Quinn Emanuel Urquhart & Sullivan UK LLP)

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

Digital Transcription by Epiq Europe Ltd
Lower Ground 46 Chancery Lane WC2A 1JE
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Email: ukclient@epiqglobal.co.uk

1 **Monday, 16 December 2024**

2 **(10.30 am)**

3 **Housekeeping**

4 **MRS JUSTICE JOANNA SMITH:** Some of you are joining us on the livestream on
5 our website, so I must start, therefore, with the customary warning. An official
6 recording is being made and an authorised transcript will be produced, but it is strictly
7 prohibited for anyone else to make an unauthorised recording, whether audio or visual,
8 of the proceedings, and breach of that provision is punishable as contempt of court.
9 Good morning, everyone.
10 Mr O'Donoghue.
11 **MR O'DONOGHUE:** Madam, members of the Tribunal. I appear on behalf of the
12 Class Representative, Dr Gormsen, in this matter with my learned friend, Mr Simester;
13 to my immediate right, Mr Singla and Mr White for Meta.
14 **MRS JUSTICE JOANNA SMITH:** Yes. Before you begin, can I raise a couple of
15 housekeeping matters. We have a transcript today, so could we please have a break
16 mid-morning, and if we get there, mid-afternoon as well. Could you keep your eye on
17 the clock in relation to that.
18 The second is a more substantive issue. I have been discussing with the Tribunal the
19 way this case should be managed to trial and we are all somewhat concerned at the
20 prospect of a 12-week trial which is likely to be extremely unwieldy.
21 In those circumstances, our very clear view is that this trial will need to be split in some
22 way. Whether that be liability and quantum or whether it be by reference to preliminary
23 issues, we don't have a clear view at the moment.
24 We are not inviting you to make submissions about that today, obviously. But what I
25 am going to suggest is that we have a hearing towards the end of March or early April,
26 and we have identified the dates of possibly 24 March or 4 April, with 4 April being the

1 preferred date for us, as dates on which we could have submissions as to how the trial
2 could be split in order to make it more manageable.
3 Now, the reason I am raising that at this stage I hope will be obvious. It means that
4 some of the issues that may be before us today are unlikely to be relevant because
5 we are not going to set directions to a 12-week trial in 2027.
6 **MR O'DONOGHUE:** Yes.
7 **MRS JUSTICE JOANNA SMITH:** But, I mean, I am very happy for you, either side, if
8 they wish to make preliminary observations about that, that's fine. But equally, if you
9 wish to keep your powder dry in relation to that, given that I have only just raised it,
10 that is also fine. But I wanted it to be clear that that was our current thinking.
11 **MR O'DONOGHUE:** Yes, madam. I probably need to speak to those behind me
12 before I --
13 **MRS JUSTICE JOANNA SMITH:** Yes. Certainly.
14 **MR SINGLA:** Could I just perhaps rise to make this point: that is very helpful to hear
15 at the outset, but I wonder if I might have an opportunity to take instructions in terms
16 of what that indication that you have just given means for the agenda today?
17 **MRS JUSTICE JOANNA SMITH:** Yes, of course. I certainly can see that it does
18 affect the agenda today because we won't need to deal with everything. If you would
19 like to take ten minutes in which to take some instructions about that, that's absolutely
20 fine.
21 **MR SINGLA:** I am very grateful.
22 **MRS JUSTICE JOANNA SMITH:** Is ten minutes enough, Mr Singla? I am quite
23 happy for you to have 15, if you would prefer to have longer.
24 **MR SINGLA:** Can we say 15? I would be very grateful.
25 **MRS JUSTICE JOANNA SMITH:** It has only just gone half past, so we will sit again
26 at around quarter to.

1 **MR SINGLA:** I am very grateful.
2 **MRS JUSTICE JOANNA SMITH:** Thank you all very much.
3 **(10.33 am)**
4 (A short adjournment)
5 **(10.47 am)**
6 **MRS JUSTICE JOANNA SMITH:** Mr O'Donoghue.
7 **MR O'DONOGHUE:** Madam. We are grateful for the short adjournment, it was very
8 helpful.
9 Now, if we can quickly look at the list of issues for today, just to navigate in terms of
10 what we can deal with today and what may need to be parked until March or April.
11 **MRS JUSTICE JOANNA SMITH:** Yes.
12 **MR O'DONOGHUE:** Madam, it is in tab 1 of the core bundle.
13 **MRS JUSTICE JOANNA SMITH:** Yes.
14 **MR O'DONOGHUE:** In our submission, we can and should make at least some start
15 on disclosure.
16 **MRS JUSTICE JOANNA SMITH:** Yes.
17 **MR O'DONOGHUE:** Issues -- we can in that context more generally, I think, certainly
18 touch on the question of experts. Of course, whether there is a split or a preliminary
19 issue will bear on that to some extent. There are issues of principle as to where the
20 CMA fits. Again, there are questions of timetabling, depending on a split. We can see
21 on issue four, timetable to trial, that those steps at this stage cannot be set down in
22 full.
23 **MRS JUSTICE JOANNA SMITH:** Yes.
24 **MR O'DONOGHUE:** But we can at least, I think, give some consideration to the
25 approximate sequencing.
26 So, madam, if we then map that on to where the parties differ. In the Schedule 1 to

1 our skeleton, we had a compare-and-contrast of the parties' positions.

2 **MRS JUSTICE JOANNA SMITH:** Yes.

3 **MR O'DONOGHUE:** If we can quickly look at that. So, madam, running through the
4 column on the left, obviously the defence and reply, agreed.

5 **MRS JUSTICE JOANNA SMITH:** Yes.

6 **MR O'DONOGHUE:** We would like a disclosure report and EDQ -- we will come back
7 to that. Then you will see, madam, there is provision for discussion of the production
8 of a list of issues.

9 **MRS JUSTICE JOANNA SMITH:** Yes.

10 **MR O'DONOGHUE:** Then early engagement between the experts on disclosure.
11 Then, I think, the April or March hearing would intervene.

12 **MRS JUSTICE JOANNA SMITH:** Yes.

13 **MR O'DONOGHUE:** And we could, subject to what occurs in March and April, then
14 set down a further date for a disclosure hearing. I think in terms of the CMA
15 observation sequencing, I think we can --

16 **MRS JUSTICE JOANNA SMITH:** Well, I think I would be inclined at the moment to
17 set down a date for the disclosure hearing, in any event. I think our current view is
18 that it would be preferable to have that sooner, rather than later. So I know you were
19 talking about June, I think, but --

20 **MR O'DONOGHUE:** Well the Defendants suggested June, we suggested May --

21 **MRS JUSTICE JOANNA SMITH:** Sorry, I have it the wrong way around. I think we
22 would be looking at some time in May, simply because we want to keep control over
23 the case management of this case.

24 **MR O'DONOGHUE:** Yes, that's very helpful.

25 Then madam, obviously there are tentative directions on factual evidence, expert
26 evidence and so on.

1 **MRS JUSTICE JOANNA SMITH:** Yes. Yes.
2 **MR O'DONOGHUE:** They can be parked --
3 **MRS JUSTICE JOANNA SMITH:** I think they can be parked.
4 **MR O'DONOGHUE:** -- until March or April. So, madam, they are the tectonic plates
5 for today. I am obviously in your hands -- it may be useful for the Class Representative
6 to start on how we see disclosure, but I'm in your hands as to whether you have
7 a different sequence in mind.
8 **MRS JUSTICE JOANNA SMITH:** No, by all means, but just bear in mind, we have
9 read the witness statements and the skeleton arguments that repeat what is in the
10 witness statements. So by all means make your submissions, but we don't need
11 extensive submissions on the question of disclosure. We have the points.
12 **MR O'DONOGHUE:** Yes. Well, I will be as brief as I can.
13
14 **Submissions by MR O'DONOGHUE, KC**
15 **MR O'DONOGHUE:** So, madam, as the Tribunal will be aware, our proposal is
16 a conventional one. We say the first logical step in this complex and valuable case is
17 that there needs to be an EDQ and disclosure report from Meta.
18 Now, the claim is, on any view, a wide-ranging and complex claim raising matters of
19 considerable, we say, public importance. Against this backdrop, there are two further
20 difficulties, one common to many competition law cases and the other specific to this
21 case.
22 The asymmetry of information is of course a particular feature of collective
23 proceedings, which we say is important to address with the cards-on-the-table
24 approach to English litigation. Meta says that's a feature of lots of cases, but we say
25 that is why precisely the EDQ and disclosure report are necessary to resolve the
26 asymmetry of information.

1 Now, that's a general point. In this case we say the asymmetry of information is
2 particularly acute. First, this is a user claim. The users are not, for example, like the
3 advertisers, active in the market, so they lack this important contextual knowledge.
4 As Meta's witness statement makes clear, Meta is a multinational entity that is going
5 to store relevant data and documents across the globe in different systems, in the
6 hands of multiple custodians.
7 In this context, we note in the skeleton that a lot of Meta's growth in this sector has not
8 been organic, but has been through acquisitions, notably of WhatsApp and Instagram.
9 So the M&A context will complicate aspects of disclosure in terms of repository
10 locations and so on.
11 The Tribunal will have seen from Kate Vernon's second witness statement and from
12 our skeleton that there are a large number of litigations and investigations proceeding
13 in this country and other jurisdictions, which overlap with the issues in these
14 proceedings, and we are at this stage completely in the dark as to how these
15 investigations map on to the issues in this case. Meta, of course, is familiar.
16 So we say at this stage the Class Representative is, essentially, flying completely blind
17 on the key tectonic plates of disclosure.
18 Now, just to give you a quick reference to this, it is in Kate Vernon's second statement
19 in the core bundle, tab 4, paragraph 28.
20 **MRS JUSTICE JOANNA SMITH:** Yes.
21 **MR O'DONOGHUE:** Madam, in hard copy, it is in page 17, electronic, it is 16 to 17.
22 So she says at 28.1 and following: the Class Representative needs to understand as
23 a first step in relation to the ongoing regulatory and litigation matters mentioned above
24 matters such as how the documents contained in any production of pre-existing
25 disclosure are relevant to the matters in these Proceedings, and what issues would
26 not be covered by any such production, the time period and custodians, other

1 repositories, search terms, format, geographic scope and relevance, whether any
2 potential relevant documents exist but are unavailable, other potentially relevant
3 material.
4 So at the moment, there is a complete vacuum of knowledge on these important
5 issues.
6 So we say that the first critical step to unlocking the asymmetry of information is
7 an EDQ or disclosure report. The disclosure report is, of course, expressly mentioned
8 in Rule 60 of the CAT's rules. I will come to the text of the rule shortly.
9 **MRS JUSTICE JOANNA SMITH:** Yes.
10 **MR O'DONOGHUE:** We have given numerous examples, madam, in our skeleton of
11 other collective proceedings cases in which an EDQ and disclosure report was
12 a feature. They include *Coll*, *Sony*, *Qualcomm* and *Kent*.
13 **MRS JUSTICE JOANNA SMITH:** I understand that, Mr O'Donoghue, but I'm going to
14 be less influenced by what's been done in other cases for the purposes of case
15 management, where obviously every case must be managed in its own particular way,
16 suitable to the context of that particular case.
17 **MR O'DONOGHUE:** Indeed. Indeed. We do note parenthetically that these are
18 high-tech and digital platform cases for the most part. And we note that in those cases,
19 the defendants actually agreed to produce EDQs and disclosure reports, which makes
20 Meta's resistance in this case somewhat surprising.
21 The EDQ and disclosure report process is widely used under the CPR, given its
22 obvious benefits, and in particular the need for documents to be accompanied by
23 a statement of truth is an important discipline, we say, on the disclosing party in
24 relation to their disclosure responsibilities and they are not mere technicalities.
25 Fundamentally, what the EDQ and disclosure report achieve is they allow the Class
26 Representative, and indeed the Tribunal, to shape the approach to disclosure on

1 an informed basis, and in particular they provide a benchmark against which any
2 assertions by Meta that it has discharged its disclosure obligations can be tested by
3 both the Tribunal and the Class Representative.
4 Now, again, just to unpack this in a little more detail, if one looks at the standard form
5 EDQ, it is in the authorities bundle, page 8. Again, madam, you will be very familiar
6 with this from other contexts.
7 **MRS JUSTICE JOANNA SMITH:** Yes. Yes.
8 **MR O'DONOGHUE:** It is simply to know the content; the obligations to identify the
9 date range; who are the custodians, the databases, the repositories; the types of
10 electronic documents; use of key words; issues with the extent and accessibility of
11 electronic documents; document retention and so on. Of course, crucially, again,
12 a statement of truth --
13 **MRS JUSTICE JOANNA SMITH:** Yes.
14 **MR O'DONOGHUE:** -- at the end.
15 **MRS JUSTICE JOANNA SMITH:** Yes.
16 **MR O'DONOGHUE:** Likewise on the disclosure report, this is Rule 60, page 48. That
17 is Rule 60(1)(b).
18 **MRS JUSTICE JOANNA SMITH:** Yes. Next time you come to court, could you make
19 sure that the electronic page references are the same as the page references at the
20 bottom. So, for example, your authorities 48 is actually my page 51 in my electronic
21 bundle. I rather suspect it is the index or something, but it is quite important we make
22 sure it is all consistent. Thank you.
23 **MR O'DONOGHUE:** Thank you.
24 Madam, it is Rule 60(1)(b): disclosure report means a report verified by a statement of
25 truth which describes what documents exist or may exist, are or may be relevant to
26 the matters in issue in the case; describes where and with whom those documents

1 may be located, how those documents are stored, broad range of costs and so on.

2 **MRS JUSTICE JOANNA SMITH:** Yes.

3 **MR O'DONOGHUE:** Again, we emphasise the statement of truth.

4 So we --

5 **MR SINGLA:** Madam, just to save time, could you please look at sub-para 2(a): the

6 discretionary (inaudible).

7 **MRS JUSTICE JOANNA SMITH:** Yes. Thank you, Mr Singla.

8 **MR O'DONOGHUE:** So, madam, we say as a starting point in a complex

9 consumer-facing valuable claim of this nature, where repositories and custodians are

10 likely to be located all around the globe and where there is an asymmetry of

11 information, the EDQ and disclosure report process is a critical first step of cards being

12 placed on the table.

13 So that is what we would suggest as a first logical step.

14 Now, madam, as you are aware, Meta has proposed by contrast that we would get

15 a subset of disclosure from a US case called *Klein*.

16 **MRS JUSTICE JOANNA SMITH:** Yes.

17 **MR O'DONOGHUE:** Can I very briefly address you on what we say are the issues

18 with that proposal.

19 **MRS JUSTICE JOANNA SMITH:** Certainly.

20 **MR O'DONOGHUE:** We say there are five fundamental problems with this proposal.

21 First, and fundamentally, it offers no information equivalent to what would be provided

22 to the Class Representative, and indeed the Tribunal, through an EDQ or disclosure

23 report. It is not merely the absence of a statement of truth albeit that is important.

24 There would be no obligation on Meta to set out where the documents relevant to this

25 case are held, by whom, in what format, have they been retained and so on.

26 We ask, given this starting point, how would the Class Representative or the Tribunal

1 be assured that Meta has even turned its mind to the universe of potentially relevant
2 documents and that a reasonable search has been made by reference thereto.
3 As we saw in Rule 60(1)(b), it is fundamental that the defendant identifies what
4 documents exist or may exist that are or may be relevant to the matters in issue in the
5 case. We say it is not simply a question of lack of assurance, it is also in the absence
6 of any positive obligation on Meta to state formally where relevant documents are
7 located, that neither the Class Representative or the Tribunal will have the tools to
8 assess the adequacy of Meta's disclosure.
9 In short, our first objection is that Meta appear to want to avoid having to consider or
10 inform the Class Representative or the Tribunal at all what potentially relevant material
11 to the issues in the case it actually holds. We say that would be stage one in any
12 sensible disclosure exercise.
13 The second objection is, we say, based on the evidence from Meta. It is plain as
14 a pikestaff that the proposed *Klein* disclosure is not remotely a substitute for the steps
15 involved in the Class Representative's proposal and that there would be very, very
16 substantial gaps indeed.
17 Mr Wisking's statement does not tell us which custodians were searched, which
18 databases, how the search was undertaken and other basic information that would be
19 contained in an EDQ or disclosure report. Indeed, in fairness to Herbert Smith
20 Freehills, it seems they have no direct knowledge of how this was undertaken because
21 the search in that case was undertaken by a US firm, WilmerHale.
22 We know --
23 **MRS JUSTICE JOANNA SMITH:** I think it is being suggested, isn't it, you would have
24 information of the search undertaken, of the sort provided in the American
25 proceedings.
26 **MR O'DONOGHUE:** Madam, that anticipates my next point. What Meta propose is

1 that after having dumped these 480,000 documents on the Class Representative, at
2 that stage they would explain their approach.
3 If we look at what Mr Wisking says, in the core bundle, tab 5, page 57.
4 **MRS JUSTICE JOANNA SMITH:** Sorry, which paragraph of Mr Wisking?
5 **MR O'DONOGHUE:** 57, madam.
6 **MRS JUSTICE JOANNA SMITH:** Paragraph 57. Right. Page 59. Okay.
7 **MR O'DONOGHUE:** Madam, it is the second half of 57. So they say:
8 "the information that has been provided to the US Plaintiffs in the *Klein* Proceedings
9 as to how the disclosure covered by the *Klein* disclosure set was produced. This will
10 involve working with WilmerHale to collate the information given to the US Plaintiffs
11 as I understand the parameters of disclosure were agreed as part of an iterative
12 process and so there is not a single existing document that can be used to provide this
13 ..."
14 **MRS JUSTICE JOANNA SMITH:** So your point is they have not done the exercise of
15 understanding the parameters of disclosure?
16 **MR O'DONOGHUE:** No. It is concerning to the Class Representative, who has a fixed
17 budget for these proceedings, that half a million documents will be dumped on us
18 without any indication at this stage or, indeed, any indication the exercise has even
19 been completed, as to who were the custodians, what was the process, what was
20 searched and so on.
21 So we say at this stage, on the evidence, there is no good basis on which to apprehend
22 that this will result in the disclosure of anything, of any significant utility.
23 Certainly when one sees the proposed liaison with WilmerHale, the Tribunal, we say,
24 can have no confidence that it is remotely a substitute for the kind of
25 cards-on-the-table approach one would expect in a disclosure report or EDQ.
26 **MRS JUSTICE JOANNA SMITH:** Yes.

1 **MR O'DONOGHUE:** And we say Mr Wisking's statement is particularly striking for
2 what it does not say. In particular, there is no assurance in Mr Wisking's statement
3 that most or all of the proposed initial disclosure is going to be relevant. And indeed,
4 Mr Wisking indicates that the proposed disclosure has not yet even been reviewed for
5 relevance, such that we infer that Meta, or at least Herbert Smith Freehills, has no idea
6 of the extent to which the pack of documents they propose would be relevant. That is
7 paragraph 45 of Mr Wisking's statement.
8 So the high point of Meta's evidence in these proceedings today is an unevidenced
9 assertion that the *Klein* disclosure set would provide the Class Representative with
10 some documents on potentially overlapping issues.
11 We say that isn't a very high point at all. If the Tribunal cannot be confident that at
12 least a very significant percentage of the documents that Meta propose to disclose are
13 relevant, there is no basis, we say, for thinking that Meta's proposal will provide a fair
14 and efficient means of resolving the issues in dispute or that it would be just and
15 proportionate.
16 Now, just to pick up on Mr Singla's skeleton, he says at paragraph 27(b) -- and he
17 refers to the provision, and I quote, of "hundreds of thousands of relevant documents".
18 With respect, there is simply no evidential basis in Mr Wisking's statement for that
19 assertion.
20 Indeed, if we go back to Mr Wisking's statement, there is literally one, we say, elliptical
21 sentence in a 34-page witness statement giving any hint of a suggestion about what
22 the *Klein* disclosure was concerned with.
23 **MRS JUSTICE JOANNA SMITH:** Which paragraph?
24 **MR O'DONOGHUE:** 43.4, madam.
25 So he says it includes the terms and conditions for the provision of Facebook platforms
26 over time, the entities which Meta consider to be competitors and Meta's use of data.

1 So that is the extent of the description.

2 Now, one of those issues, of course, only relates to dominance, so that does not take

3 us very far on the substance of the case.

4 **MRS JUSTICE JOANNA SMITH:** Yes.

5 **MR O'DONOGHUE:** The other two indications -- and they are vague indications -- we

6 say are extremely elliptical. The use of data can cover a multitude of sins; it may mean

7 everything, it may mean nothing.

8 From Mr Wisking's description, it is not even clear any of this relates to the

9 UK -- certainly, there is no suggestion by Mr Wisking that it does -- and basic and

10 obvious questions remain completely unanswered. For example: how if at all does the

11 *Klein* disclosure address the terms and conditions for the provision of Facebook to UK

12 users, as opposed to US users; were the terms and conditions in force the same for

13 UK and US users throughout the claim periods; do the competitors referred to by

14 Mr Wisking relate to US markets -- because the Tribunal will have picked up from our

15 pleading we plead a UK geographic market.

16 **MRS JUSTICE JOANNA SMITH:** Yes.

17 **MR O'DONOGHUE:** And how if at all does the *Klein* disclosure address the use of

18 information by the Second Defendant, which is Meta's European headquarters and

19 data controller, and the Third Defendant, which we understand to be Meta's primary

20 UK entity, which processes data on UK users provided by the Second Defendant?

21 Now, given the issue of *Klein* was raised as far back as February of this year, it would

22 have been very easy, in our submission, for Meta to provide a statement from

23 someone familiar with the *Klein* disclosure, which said words to the effect that: I have

24 read the Amended Claim Form and Professor Scott Morton's first and second reports,

25 and I am confident, based on my knowledge of the *Klein* disclosure, that most of the

26 disclosure Meta proposes to give on *Klein* is directly relevant to the issues in the Class

1 Representative's pleaded case.
2 But there is an eloquent silence on this rather fundamental point.
3 So if one goes back to paragraph 57 of Mr Wisking.
4 **MRS JUSTICE JOANNA SMITH:** Yes.
5 **MR O'DONOGHUE:** It is the second sentence, he says:
6 "Meta has already provided sufficient information regarding the disclosure it proposes
7 to reproduce from the *Klein* proceedings to allow the Class Representative to
8 understand Meta's proposal."
9 With respect, we say that is simply wrong, or at the very least in relation to the pleaded
10 issues in our case and the UK market there is nothing in Mr Wisking's statement that
11 gives the Tribunal any confidence that it is remotely on point.
12 Of course, it would also have been easy to provide the information provided to the US
13 plaintiffs in *Klein* at any point prior to today, and that hasn't been done.
14 Now, we also apprehend from Mr Wisking that another reason the *Klein* disclosure is
15 not remotely a substitute for the process we have in mind, is he is at pains to
16 emphasise the extra work that would be required to complete disclosure in this case,
17 based on the Class Representative's pleaded case.
18 We can pick this up in his statement first at 52.
19 **MRS JUSTICE JOANNA SMITH:** Yes.
20 **MR O'DONOGHUE:** Madam, it is in the middle. He says:
21 "Meta would likely have to carry out an extensive exercise to locate further relevant
22 documents and data. I understand that this will involve liaising with teams of Meta
23 based both in the UK and US, and the Meta stores documents and data across multiple
24 systems that would add to the time required to identify, collect and process the
25 disclosure ..."
26 And so on. We say that underscores our point that this exercise has not been done in

1 any shape or form to date, and that only something analogous to an EDQ or disclosure
2 report will tease out these issues.
3 On the same point at paragraph 58 --
4 **MRS JUSTICE JOANNA SMITH:** Yes.
5 **MR O'DONOGHUE:** -- the second sentence, he says:
6 "The broadly pleaded allegations in the Amended Claim Form go to the heart of Meta's
7 business model. The potential sources of relevant documents are therefore very
8 extensive and will be disproportionately time-consuming and costly for Meta to
9 produce either document in respect of the entirety of the issues in dispute."
10 Again, we strongly infer from what is said there that that exercise has not been scoped
11 or completed because all of this is referred to in, essentially, provisional or future
12 terms.
13 Then, of course, we have the very large exclusions from the *Klein* data set, just to give
14 you the points quickly.
15 **MRS JUSTICE JOANNA SMITH:** Yes.
16 **MR O'DONOGHUE:** It would involve receiving no data, as we understand it -- that is
17 Mr Wisking, paragraph 45 and footnote 64. And indeed if we can quickly look at 45.
18 **MRS JUSTICE JOANNA SMITH:** Yes, this is where he says it only covers custodial
19 documents.
20 **MR O'DONOGHUE:** In the US.
21 **MRS JUSTICE JOANNA SMITH:** Yes.
22 **MR O'DONOGHUE:** It is the US that we underline. Again, we pleaded a UK market.
23 So no data, which is fundamental to our case across multiple dimensions. If one looks,
24 for example, at footnote 64.
25 **MRS JUSTICE JOANNA SMITH:** Yes.
26 **MR O'DONOGHUE:** He says:

1 "I understand that data disclosed in the *Klein* proceedings covers a range of topics,
2 including Meta's revenue, time spent on Facebook by users, data on engagement with
3 Facebook by users. The data is either global data or just for the US."
4 This is the data they are proposing not to give us.
5 The point of these proceedings, is that this data in relation to the UK users is
6 fundamental to our case, so none of that would be disclosed as part of the *Klein*
7 disclosure.
8 The next set of exclusions is, again, fundamental. We would not get the depositions.
9 Again, paragraph 45. The advertising side of the market, those documents would be
10 completely excluded. You see that at 44.3.
11 But in our case, we plead extensively to the advertising side of the market and, indeed,
12 the Tribunal back in January of this year directed us to address whether we thought
13 the advertiser side of the market was, for example, also suffering from unfair pricing.
14 **MRS JUSTICE JOANNA SMITH:** Yes.
15 **MR O'DONOGHUE:** We have addressed that in detail, for example, in paragraphs 11
16 and 12 of the summary, and section 3.4 of Professor Scott Morton's first report.
17 Of course, the Tribunal would have seen this. This is a two-sided market and the
18 advertiser side of the market is a critical part of the Class Representative's case in
19 addition to the user side.
20 So no advertiser documents, no app developer documents either. Mr Wisking says
21 that is not relevant to our case. But that, with respect, is wrong. A key issue in this
22 case is Meta imposing off-Facebook data tracking in respect of app developers'
23 applications. That's an important part of our case. Nothing from the Federal Trade
24 Commission proceedings, despite that also having been disclosed into *Klein* itself.
25 On depositions, what Mr Wisking says at paragraph 45 is interesting. He says one of
26 the reasons we don't get the depositions from *Klein* is they would have to be reviewed

1 for relevance. This underscores my point that there has been no exercise whatsoever,
2 it seems, to consider whether the *Klein* material is remotely relevant to the issues in
3 our case.
4 The third reason why the *Klein* proposal is, we say, defective, and indeed likely to lead
5 to injustice, is that *Klein* is simply one of about two dozen litigations or investigations
6 into Meta's conduct and practices. We have listed, I think, about two dozen separate
7 investigations in Vernon 2, paragraph 14.
8 **MRS JUSTICE JOANNA SMITH:** Yes.
9 **MR O'DONOGHUE:** There are a number of obviously relevant investigations. So the
10 Tribunal would have picked up that there were two CMA investigations, a market study
11 from 2020 and a more recent unfair conditions case.
12 **MRS JUSTICE JOANNA SMITH:** Yes.
13 **MR O'DONOGHUE:** The Tribunal will have picked up that we have relied very heavily
14 on the German Facebook proceedings, which raise very analogous questions to the
15 issues in this case, and a preliminary reference to the European Court in that case as
16 well. We say these proceedings are obviously relevant to the issues in the Class
17 Representative's case.
18 And just to give you a couple of references, if I may -- if we look, for example, at the
19 CMA market study, it is in the second supplemental bundle at 818.
20 **MRS JUSTICE JOANNA SMITH:** Yes.
21 **MR O'DONOGHUE:** If I can start at 146 -- you will see, for example at 3.250, there is
22 a finding in relation to Facebook's enduring market power in social media, which is
23 obviously highly significant for our case.
24 Then at 149, page 821, you will see there is a whole section in this report about users'
25 control over their data.
26 If we then go to 1.12 at page 711.

MRS JUSTICE JOANNA SMITH: Yes.

MR O'DONOGHUE: You will see the CMA says:

"The extensive data we have been able to gather directly from market participants has enabled us to carry out analysis on a wide range of market outcomes, including revenues and shares of supply, pricing for search and display advertising, profitability, fees charged by advertising intermediaries and many others".

And so on.

So a large range of data, including from Meta, was supplied to the CMA as part of this market study report, including in particular data on Meta's profitability, which is critical, for example, to the first limb of the unfair pricing test in *United Brands*.

So we make the simple point that there is, on the face of these documents, a wide range of data that has been submitted to the UK's public competition authority.

And back to my cards-on-the-table point, those cards need to be put on the table, so that the Tribunal and the Class Representative can see what potentially relevant documents have been produced not just in *Klein*, but in a wide range of other proceedings, which seem to us much more directly on point. And, again, this goes back to my point that the EDQ and the disclosure report format is something fungible and is the most effective way to tease out these issues.

The penultimate point. Meta trumpets its *Klein* proposal on efficiency grounds. We say there is simply no good reason on the evidence to think that disclosing a subset of the *Klein* materials would lead to efficiencies and, indeed, strong reasons to consider that it would be a pointless and expensive diversion.

I have already mentioned the concern on the Class Representative's side that we have a fixed budget and having to blow a substantial chunk of that budget wading through 500,000 documents, whose relevance to the issues in the case is at best unclear, we say is the antithesis of efficient. We say it is important not to conflate expediency with

efficiency.

Fundamentally, Meta says that it will have to review the *Klein* documents anyway, so its own proposal creates inefficiencies because both parties have to do this.

So we can see this in Wisking 41. He says Meta would in any event need to review the disclosure in the *Klein* proceedings for relevance as part of any issues-based disclosure.

So that really underscores my point that this seems to be, at best, stabbing in the dark, but there is nothing in the evidence that would suggest there has been any exercise by Herbert Smith or Meta to understand how the *Klein* disclosure maps on to the issues in this case. In any event -- there is no efficiency-saving if the review has to be conducted in any event.

The same point is made at 45 and, indeed, in Mr Singla's skeleton at paragraph 20, where he says, and I quote:

"It is all but inevitable that Meta would in any event need to review the disclosure given in *Klein* in order to identify the materials within the full *Klein* disclosure set for documents that are potentially relevant to the issues in these proceedings."

Now, we say, given those two paragraphs in Mr Wisking's statement and the skeleton, why does Meta consider the 480,000 documents in *Klein* should not be reviewed by Meta before production? Surely, it is inefficient for both parties to have to do a relevance review.

Now, by contrast, we say that the Class Representative's proposal, does permit for efficiencies. The first step is identifying where the relevant documents are held, by whom and how; and the second step is to extract the relevant documents in a way that is just and proportionate.

Now, to be clear, the Class Representative has no objection to Meta leveraging disclosure work done in other Meta proceedings but that must involve Meta first

1 identifying the relevant pool of documents and then explaining, if true, how the work
2 was done on disclosure in these other proceedings, how it overlaps with the issues in
3 the present case and instead of doing that, we say Meta wants to put the cart before
4 the horse.
5 Now, just to pick up one point in Mr Singla's skeleton on this at paragraph 28.
6 **MRS JUSTICE JOANNA SMITH:** Yes. This is where it is suggested that you want to
7 engage in a fishing expedition in relation to investigations throughout the world?
8 **MR O'DONOGHUE:** Yes. With respect, that gets it backwards. What we want is
9 stage one being Meta telling us, based on the issues in this case, where are the
10 relevant custodians, repositories and so on. Having done that, as step two, if it is the
11 case that the disclosure from other cases can be leveraged, good; if it cannot, then so
12 be it.
13 It is perfectly legitimate in this context to ask what has been disclosed in these other
14 cases and to test if it can map on to the issues in these proceedings. It is not a fishing
15 expedition, it is step two in an efficient process to see if there is something ready-made
16 that crucially maps on to the issues in this case.
17 Fifth and finally, we say the Meta proposal is practically unworkable. They propose to
18 dump nearly 500,000 *Klein* documents on us at the same time as the Defence, and
19 then give us six weeks to formulate further disclosure requests. So we would have a
20 six-week period to draft a Reply which would be a substantial document, review
21 500,000 documents whose relevance seems at best questionable, formulate further
22 disclosure requests, apparently final ones, and prepare a list of issues.
23 We say that is a highly prejudicial proposal for the Class Representative and is not
24 remedied in any way by a faint suggestion that we could have a little bit more time to
25 chew over this.
26 In the same breath as saying we can review the documents in six weeks, we raised

1 this proposal as a scoping exercise as early as February and there is no reason in that
2 ten-month period Meta could not have done exactly the same exercise in reviewing
3 the relevance of these documents.
4 Our concern, madam, to be candid, is what I would call "an anchoring effect". We get
5 deluged with material that seems of dubious relevance to the issues in these
6 proceedings; that then becomes an anchor in these proceedings to resist any further
7 meaningful disclosure by Meta.
8 And you will have seen in Mr Singla's skeleton there is reference to hundreds of
9 thousands and other large cardinals, so that, we say candidly, is the concern we have
10 that it is the veneer of doing something that is said to be substantial, completely
11 decoupled from its relevance to the issues in these proceedings, and then using that
12 as a cantilever or platform, to say: well, you have had hundreds of thousands of
13 documents and you will have to fight jolly hard to get anything else.
14 We see, dare I say, a certain cynical or gaming element in some of this proposal,
15 particularly given how reticent Mr Wisking is to say what the *Klein* disclosure actually
16 contains.
17 Just to pick up in very quick-fire format four points in Mr Singla's skeleton.
18 **MRS JUSTICE JOANNA SMITH:** Yes.
19 **MR O'DONOGHUE:** The first point is that Mr Singla's skeleton, with respect, basically
20 tries to give evidence on the relevance of the *Klein* disclosure. He says at
21 paragraph 12:
22 "Those circa 4 million documents include documents that are potentially responsive to
23 the following issues in these proceedings ..."
24 Then he provides a list of what he says are overlapping issues.
25 Then I showed you at 27(b) his reference to what he says is hundreds of thousands
26 of documents that are responsive to the issues that arise in these proceedings – 27(b),

madam -- and you will note that no reference is given in the skeleton to any part of Mr Wisking's statement.

That isn't surprising, we say, because there is no equivalent statement on the evidence. We say the statements in the skeleton, some of the hyperbolic statements, they need to be approached with considerable caution. The skeleton in effect purports to give evidence that Mr Wisking studiously avoids giving himself.

MRS JUSTICE JOANNA SMITH: There would appear to be an inconsistency between those paragraphs in themselves, in any event.

MR O'DONOGHUE: A fortiori, indeed.

MRS JUSTICE JOANNA SMITH: Potentially relevant or responsive.

MR O'DONOGHUE: Yes. We can see Mr Wisking's statement -- certainly Herbert Smith Freehills have not in any way shape or form, based on their evidence, considered the relevance of the *Klein* disclosure to the issues in these proceedings. So it would be very, very strange, madam, if in the same breath they were able to say: well, they are relevant.

The skeleton in any event goes far, far beyond anything which is attested by Mr Wisking's statement, which is concerning.

MRS JUSTICE JOANNA SMITH: Yes.

MR O'DONOGHUE: So we say there is an evidential vacuum.

And, again, they have had months and months to consider describing the *Klein* disclosure in much more detail, and in particular its relevance to the issues in these proceedings. They have been remarkably coy and carefully curated in terms of what is said. So we do have concerns as to whether this is an expensive wild goose chase.

Three further quick points. At 14(a), Mr Singla says:

"Meta proposes to take a wide view of the documents that are potentially relevant to the overlapping issues listed above. This will ensure the *Klein* Disclosure Set does

1 not inadvertently exclude documents that might be disclosable in these proceedings."
2 **MRS JUSTICE JOANNA SMITH:** If it does not know which are relevant, it would have
3 to take a very wide view in order to give you something that might be relevant.
4 **MR O'DONOGHUE:** Or pointless.
5 Of course, I have shown you the numerous exclusions they propose to make from the
6 *Klein* data set.
7 **MRS JUSTICE JOANNA SMITH:** Yes.
8 **MR O'DONOGHUE:** So, in fact, they are not offering a wide approach in any sense.
9 If one looks, for example, at 14(a) of their skeleton, what is said there is not set out
10 anywhere in Mr Wisking's statement.
11 At footnote 14 of Mr Singla's skeleton, he justifies the exclusions from the *Klein* set on
12 the basis that certain of the documents in the list are subject to a protective order. For
13 our part, we don't understand the point being made there, because Mr Wisking says
14 at paragraph 46 that Meta will disclose some information within the 480,000 document
15 subset within the Confidentiality Ring in these proceedings. So we are not clear why
16 the fact that exclusions are in the protective order really matters.
17 Then finally, there is a reference in paragraph 3 to the fact that Quinn Emanuel, who
18 instruct me in these proceedings, that they act for the plaintiffs in *Klein*. Now, that is
19 true as far as it goes, but what is omitted from paragraph 3 is that the protective order
20 is very prohibitive in that Quinn Emanuel US cannot speak to Quinn Emanuel London
21 about any of the issues in discovery in *Klein*. In practice, therefore, it is as if these
22 were two separate firms for these purposes. So, with respect, that's a bad point.
23 So, madam, we say our proposal is orthodox, logical and just. We say Meta's proposal
24 is more significant for what it doesn't say. And based on the evidence before you
25 today, I would respectfully suggest that on its face, this seems to be a very expensive
26 distraction that is practically unworkable for the Class Representative.

And fundamentally, madam, this is the crux of the issue. We need to understand where are the documents relevant to the issues in this case located and giving us a subset of *Klein* does not begin to engage with that question.

You see very clearly from multiple places in Mr Wisking's statement that he makes a virtue of the point that there were all kinds of other custodians and repositories that would be relevant to the issues in these proceedings, and he would need to search those to respond to the disclosure questions in this case.

That underscores my point that the *Klein* proposal, even on their own terms, does not seem to be in any way a proxy, a surrogate or remotely fungible for the type of disclosure needed in this case.

Madam, that is what I wanted to say by way of disclosure.

MRS JUSTICE JOANNA SMITH: Thank you very much indeed, Mr O'Donoghue.

Mr Singla.

Submissions by MR SINGLA, KC

MR SINGLA: I am conscious you want to try and move things quickly, but I need to take some time -- this is an important issue and Mr O'Donoghue has mischaracterised various points. What he said orally betrays a lack of understanding as to what Meta is proposing.

Madam, if I can begin and make some preliminary points and then we can break for the transcriber.

MRS JUSTICE JOANNA SMITH: Of course.

MR SINGLA: The starting point is both parties are agreed the Class Representative will have to provide a list of issues for disclosure, and then there will need to be subsequent engagement between the parties leading up to a CMC.

The key dispute is what is the most efficient or appropriate way to start that process.

As you know, we say they should prepare their list of issues by reference to the pleaded issues in this case and with the benefit of almost half a million documents from the *Klein* proceedings.

Now, in relation to the *Klein* proceedings, notwithstanding everything he said this morning, it is in fact common ground, and has been since Quinn Emanuel wrote to us in February, that those proceedings raise issues that overlap. I will show you the letter after the short adjournment.

Secondly, they say in terms in Ms Vernon's statement they are not, in fact, opposed to the provision of pre-existing document productions. That is at paragraph 38.

Thirdly, in my submission, early disclosure is something to be welcomed both by the Tribunal and by the Claimants.

MRS JUSTICE JOANNA SMITH: Well, only if it is going to be relevant disclosure and is not going to swamp the other side with so many documents they don't know where to turn.

MR SINGLA: I will come to that, madam. The short answer to that is it is 480,000 documents out of 4 million that were disclosed in *Klein*. Perhaps to foreshadow what I will tell you after the adjournment, in circumstances where it is common ground the *Klein* disclosure is relevant, indeed, Quinn Emanuel's starting point in February was to ask for all 4 million documents.

With respect, it does not really lie in their mouths to say either they don't understand the overlapping issues or the degree of relevance, or to complain that Meta is proposing to carve out obviously irrelevant material, with a view to providing them with a targeted set of early disclosure.

That is precisely the sort of thing that the Class Representative should be welcoming. I will come to this later. Insofar as they are complaining about lack of time, we have said: well, you can have longer. Insofar as they are complaining about lack of budget,

we are saying: do you really want all 4 million? One has to be careful what one wishes for.

The headline point, which I will develop, is our proposal is the much more efficient and proportionate way of proceeding to ensure that disclosure requests in these proceedings are kept targeted and focused.

By contrast, we say that the Class Representative's approach is, in fact, back to front because what they want to do is to kick this process off with a disclosure report and EDQ covering all manner of investigations that have absolutely nothing to do with this case.

Again, I will come back to this, but one can see from the list in Ms Vernon's statement at paragraph 14, some of those matters, madam, absolutely plain, based on what she herself says, they have nothing to do with this case.

Then, if I can perhaps invite you over the break to look at paragraph 14 and also paragraph 28. The level of detail that they are seeking in this disclosure report and EDQ is, in our submission, completely inappropriate.

MRS JUSTICE JOANNA SMITH: 14 and 28?

MR SINGLA: Yes. Yes. So that is really the dispute. Whether one should kick this process off with a roving inquiry into Meta's entire universe of materials, whether or not relevant to these proceedings, and to give chapter and verse as set out in paragraph 28.

So could I just --

MRS JUSTICE JOANNA SMITH: When you talk about a roving inquiry, Mr Singla -- forgive me -- the ordinary approach to disclosure of this type would be for you to identify the scope of the documents you have, where they are located, the custodians and so forth, and then for issues to be identified following on from that; why is that not an appropriate approach here?

1 **MR SINGLA:** Madam, I take issue with the suggestion that that is in fact the ordinary
2 or normal approach. Indeed, I'm going to make five preliminary points -- it is important
3 because you are absolutely right that that is how Mr O'Donoghue characterises things.
4 And with respect, that's a point that I will address in a moment.
5 In fact, there is no normal procedure here and what we are doing is entirely
6 appropriate, for reasons I will come to. So if I could give you five preliminary points
7 before we break.
8 **MRS JUSTICE JOANNA SMITH:** Certainly.
9 **MR SINGLA:** To some extent, these are obvious points, but they do bear emphasis,
10 in my submission, given the way the Class Representative is putting things.
11 So the first point is that the Class Representative is only entitled to disclosure which
12 is relevant to the issues in this case. The issues in this case will be defined by the
13 pleadings, obviously, and we know that pleadings have not yet closed. So the issues
14 in dispute will in fact crystallise in the new year when Meta serves its Defence and the
15 Class Representative serves its Reply.
16 The second point is because disclosure has to be tied to the pleaded issues, the fact
17 that Meta might in the past have provided some disclosure in relation to other issues
18 in the context, say, of foreign proceedings or regulatory investigations, that has nothing
19 whatsoever to do with the question of what disclosure needs to be given.
20 By definition, there have been investigations or other proceedings concerning issues
21 which are not pleaded here. It is entirely irrelevant. So when Ms Vernon says, well,
22 there has been a Nigerian investigation into WhatsApp, an Italian investigation in
23 respect of the WhatsApp terms of use, an Indian authority fining Meta in respect of
24 WhatsApp's terms of use or a South African investigation relating to WhatsApp,
25 madam, you can see in circumstances where WhatsApp is completely outside the
26 scope of this claim, the fact that Meta might have provided documents to the regulators

1 in those contexts could not conceivably assist, either the parties or the Tribunal, to
2 determine what is the appropriate scope of disclosure in this case.
3 In paragraph 28 what she says is they want to understand in great detail the
4 composition of all of that disclosure, the way it was assembled, what search terms
5 were used, what format the documents were in and so on. With respect, that is why I
6 invite you to read paragraphs 14 and 28, because those paragraphs neatly illustrate
7 what we say is the problem with the approach.
8 Because first of all, as a matter of principle, the Class Representative has no
9 entitlement to that sort of information to the extent it is irrelevant to the present claim.
10 She does not have some general entitlement to conduct an inquiry.
11 **MRS JUSTICE JOANNA SMITH:** Well, let's assume that's right. Let's assume that's
12 right. That is not a reason not to order an EDQ or a disclosure document. That is just
13 a reason for saying: well, what they think they are going to get out of that is rather
14 more extensive than what they will actually get out of it.
15 **MR SINGLA:** I completely understand that point. So you may say: well, they take
16 an overbroad view of relevance. In my submission they plainly do. You may say: well,
17 what is the problem with doing a disclosure report or an EDQ on what we say is the
18 relevant material. But in my submission, in and of itself this process, this CMC, has
19 demonstrated why the disclosure report and EDQ process will turn into a satellite
20 dispute, because if we can't even agree at this stage -- if they are asking for that sort
21 of information at this stage and they are coming to the Tribunal, trying to persuade the
22 Tribunal these Italian, Indian, Nigerian investigations are relevant, what we are
23 concerned about is this whole process becomes a satellite dispute. Where we are
24 trying to get to is to ensure they have the disclosure that is relevant and proportionate
25 to this case. Providing the sort of information they are asking for would not conceivably
26 advance that process.

1 The third preliminary point is moving away from relevance and addressing
2 proportionality. As you know, the governing principle in Rule 4 of the Tribunal Rules
3 is what is the most efficient and proportionate way to deal with this. What we
4 emphasise in our skeleton is a point in the Tribunal's Guide to Proceedings at
5 paragraph 587 -- we have quoted it, I think, at paragraph 7 of our skeleton --
6 **MRS JUSTICE JOANNA SMITH:** Yes.
7 **MR SINGLA:** -- "the purpose of disclosure […] is not to be used", the Guide says, "as
8 a weapon in a war of attrition." This, in my submission, actually deals with the
9 exchange we have just had because our concern is that the way in which the Class
10 Representative is proceeding is likely to turn the disclosure exercise into a war of
11 attrition.
12 That is something which the Tribunal should be particularly careful to guard against in
13 the context of collective proceedings, whereas you know the disclosure burden falls
14 on the defendants. It is one-sided.
15 In those circumstances, where it is a one-sided disclosure process, there are no
16 checks and balances because there is no, as it were, incentive on the other side to
17 ensure the disclosure is kept proportionate because they are not having to make
18 disclosure themselves.
19 That is the point that Mr Wisking of Herbert Smith is making. If you read the entire
20 article and not merely the cherry-picked quotes in the skeleton, that is the point he is
21 making: in collective proceedings you have to be very careful not to allow the Class
22 Representative to turn disclosure into a war of attrition.
23 The fourth point: as far as disclosure in collective proceedings is concerned, there is
24 no one-size-fits-all approach. In my respectful submission, you were quite right to call
25 out this reference by Mr O'Donoghue to what is normal or what happens in other
26 cases.

1 His skeleton is replete with references to the orthodox approach, the norm in large
2 scale litigation and so on. But in fact it is wrong, in my submission, to draw any real
3 analogies with High Court proceedings. We know because the Tribunal has said in
4 the *Coll* case that PD57AD does not apply in the Tribunal.
5 So the practice in the Tribunal is different to the High Court. The Practice Direction
6 does not apply and, in fact, one does not see in every case disclosure reports and
7 EDQs being ordered. The Tribunal Guide and Rules are much more flexible about
8 these matters. It is Rule 60(2), which I invited you to look at.
9 **MRS JUSTICE JOANNA SMITH:** Yes, which I read.
10 **MR SINGLA:** There is a --
11 **MRS JUSTICE JOANNA SMITH:** It is in the discretion of the Tribunal.
12 **MR SINGLA:** Exactly. And that is reflected not merely in the Rules, but it's also
13 reflected in the cases. So whereas Mr O'Donoghue refers to, I think, two cases, *Kent*
14 and *Coll*, where the defendants agreed to do this, in fact there are other cases where
15 no such disclosure reports or EDQs have been provided.
16 We have cited, I think, *McLaren* in our skeleton, but there are other cases such as
17 *Spottiswoode* and *Le Patourel* in the authorities bundles where no disclosure reports
18 or EDQs were ordered.
19 The question, in my submission, for the Tribunal today is not what was done in other
20 cases, but what is appropriate here.
21 **MRS JUSTICE JOANNA SMITH:** Yes.
22 **MR SINGLA:** There is nothing which suggests that we are required, as it were, as
23 a starting point or as a default position to do this. Mr O'Donoghue keeps using the
24 phrase "cards on the table". In my submission, that's a misuse of the phrase. There
25 is nothing in the phrase "cards on the table" which says we have to provide
26 a disclosure report or EDQ. That is not either in the rules or in the cases.

1 All the "cards on the table" in, I think it's *Davis v Eli Lilly*, the Court of Appeal were
2 simply saying disclosure has to be carried out properly, so the adverse party receives
3 the material to which it is entitled. We agree with that as a general proposition, but it
4 does not follow we have to adopt a particular procedure. Still less does it follow the
5 submission in fact is completely impossible to understand that we should already have
6 provided this information. So Mr O'Donoghue says why have we not done this already;
7 well, the simple answer to that is that until October we had an appeal pending before
8 the Court of Appeal and the parties had agreed a stay pending that.
9 So that is the fourth preliminary point.
10 The fifth and final one is you will have seen in the skeleton of the Class
11 Representative -- I think it is paragraph 19.3, but it is also made earlier at
12 paragraph 10 -- there is a point being made -- it wasn't advanced orally, but what they
13 say is there is a concern that Meta has not been transparent with users and that that
14 should somehow feed into the discretionary exercise which you have to undertake
15 today. And they say that the Amended Claim Form pleads a large number of such
16 instances that Meta has not thus far gainsaid.
17 With respect, that's a hopeless point. They know the claim is denied in its entirety.
18 The only reason we have not thus far gainsaid the Claim Form is because we have
19 not served our Defence. The idea that the Tribunal should take into account the merits
20 of some of these obligations when deciding the appropriate way forward for disclosure,
21 we say really is absurd.
22 I will come on after the short adjournment to explain our proposal properly because I
23 don't actually think Mr O'Donoghue has all of the elements of our proposal in his mind,
24 and then I will explain why we say our proposal is much more efficient and
25 proportionate.
26 **MRS JUSTICE JOANNA SMITH:** Okay. Thank you, Mr Singla.

1 It is nearly 11.50 so we will rise until about three minutes to 12.00.
2 **(11.49 am)**
3 (A short break)
4 **(11.58 am)**
5 **MRS JUSTICE JOANNA SMITH:** Mr Singla.
6 **MR SINGLA:** Madam, I mentioned some other cases before the adjournment in which
7 no EDQ or disclosure report were ordered. Can I just show you the *Le Patourel* order
8 in case you have not had a chance to look at any of these previous disclosure orders.
9 If you could, please, look at authorities page 379, you will see a good example of
10 a staged disclosure order akin to what we are proposing. So if you have page 1, you
11 will see the second recital refers to the first tranche disclosure.
12 And by way of background, this was a case in which the claim had been looked at,
13 essentially, Ofcom had previously looked at some very similar issues and made some
14 provisional findings. So what was set out here is the first tranche of disclosure was all
15 of the materials that had been submitted to Ofcom and that would kick off the
16 disclosure process.
17 Then if you look at paragraphs 7 and 8, there would be a second tranche and a third
18 tranche of data and custodial documents. That's a good example. Again, I'm not
19 suggesting what happens in other cases should necessarily dictate what you do, but
20 that's a clear example of a staged disclosure proposal without an EDQ and disclosure
21 report.
22 Another point I made before the adjournment was it was very surprising to see the
23 Class Representative resisting our staged disclosure proposal, and in particular
24 somehow questioning the relevance of the *Klein* disclosure. If I perhaps show you
25 what they were saying about this back in February, there can actually be no doubt as
26 to the relevance and proportionality of our proposal because it's what Quinn Emanuel

1 themselves were proposing.

2 If I could ask you to look at supplemental bundle 2, at page 1297.

3 **MRS JUSTICE JOANNA SMITH:** Yes.

4 **MR SINGLA:** So they were writing to us back in February post the certification

5 hearing, which was premature because there was an application for permission to

6 appeal. What is interesting -- and Mr O'Donoghue did not take you or even refer to

7 this -- if you look at paragraph 13, the heading is "Initial disclosure of readily available

8 documents", they make the point in 13 about notwithstanding the issues of information

9 asymmetry, they have already identified certain categories of documents, and

10 Professor Scott Morton has prepared an annex and the categories are summarised in

11 the Class Representative's litigation plan and in Appendix C of Professor Scott

12 Morton's first expert report, which I can show you later if there is time.

13 Then they say they have carefully considered how best to approach the issue of

14 disclosure, and they say at the end of 14:

15 "... premature to adopt such an approach until we have pleaded a Defence and the

16 scope of the issues between the parties are crystallised."

17 At 15, instead, they propose there should be initial disclosure of readily available

18 documents by the Defendants accompanied by disclosure certificates. So I accept at

19 this stage they were still asking for a disclosure certificate, I do accept that, but what

20 they were saying was that in parallel to preparing their Defence, the Defendants should

21 now disclose the same disclosure, including transcripts of any depositions, I -- will

22 come back to any depositions. For example, we should now disclose the *Klein*

23 disclosure because the Class Representative has identified that the *Klein* disclosure

24 is substantially complete, relevant to the issues in dispute, considers it could be

25 provided to the Class Representative without delay and at minimal cost.

26 Then there is a reference to other proceedings which they say may be of relevance.

1 You can read all of it. Footnote 5 Mr O'Donoghue would like you to read, but I accept
2 they were asking for a disclosure certificate as well, if I didn't make that clear.
3 Then at 17:
4 "The proposal set out immediately above will allow the parties to understand at
5 an early stage the universe of potentially relevant documents … there should be no
6 barrier in terms of timing or cost to the Defendants producing the *Klein* disclosure and
7 a disclosure certificate in parallel to preparing their Defence. Furthermore, the Class
8 Representative notes that the Tribunal is supportive of staged disclosure [references
9 to Peugeot and Trucks] ..."
10 At 18:
11 "In short, there are strong reasons of proportionality, efficiency and fairness in favour
12 of the above approach to initial disclosure."
13 Now, again, I stress it's true that at that stage they are asking for a disclosure
14 certificate as well, and it is also true at that stage they are asking for all 4 million *Klein*
15 documents.
16 But the important point in my submission, which I keep coming back to, it is very
17 surprising to hear the Class Representative question the relevance of the subset of
18 the *Klein* disclosure in circumstances where what we have proposed to do is actually
19 carve out obviously irrelevant material, and they are now resisting the idea of staged
20 disclosure when in February they were saying that is actually a proportionate, efficient
21 and fair way to proceed.
22 So can I explain precisely what it is we are proposing to do, so there can be no
23 ambiguity, because we have never suggested that this *Klein* subset is all the
24 disclosure that they will be entitled to. That, plainly, would not have been a reasonable
25 approach to take. We have also not suggested that this should somehow anchor the
26 rest of the disclosure exercise, which was the concern Mr O'Donoghue said he was

1 being candid about.

2 What they will get, on our proposal, is our Defence on 20 January, which will then
3 allow the issues to crystallise on the pleadings; they will get 480,000 documents from
4 the *Klein* disclosure where we have tried to strip out the obviously irrelevant material --

5 **MRS JUSTICE JOANNA SMITH:** Well, how are you doing that, Mr Singla? Because
6 the evidence does not tell me that even a straightforward review for relevance has
7 been done in relation to these documents, so I can't have any comfort on the evidence
8 I have seen that many of those documents will even be relevant.

9 **MR SINGLA:** I will come back when I show what Mr Wisking says on exclusions. The
10 short answer is the starting point, which is why I took you to the Quinn Emanuel letter,
11 is it is common ground that the *Klein* proceedings overlap with the existing
12 proceedings, common ground that the *Klein* disclosure is of interest to the Class
13 Representative because they were asking for all 4 million documents back
14 in February.

15 So the way our proposal works is they will receive the disclosure that was provided in
16 *Klein*, minus materials which are obviously irrelevant or, in the case of depositions,
17 materials which Meta needs longer to review.

18 To be clear, the excluded material is not material that the Class Representative will
19 never be entitled to, it is just not suitable for early disclosure.

20 So in a sense, it is the other way around. Rather than Mr O'Donoghue's way of looking
21 at it, which is: we need Meta and Herbert Smith to have conducted a document review
22 before giving us the *Klein* subset; what we have done is say: you, yourself, were asking
23 for the 4 million, what we are going to do is strip out the obviously irrelevant because
24 the proceedings are not identical -- and I will explain this in a moment.

25 It works the other way around, madam, because what they will not get is material that
26 is either completely irrelevant, or material that one needs longer to review, so it is not

1 suitable for early disclosure.

2 They will get in January our defence -- I keep coming back to the point it is pleadings
3 in this case that should inform disclosure; they will also get 500,000 -- or 480,000-odd
4 documents; and they will also get the information about how -- the information that
5 was provided to the plaintiffs in the US about how the disclosure in *Klein* was
6 produced.

7 **MRS JUSTICE JOANNA SMITH:** What is the nature of that information? Why could
8 that information not already have been provided to them, so that they could see how
9 the documents have been produced? That might have been a sensible way of
10 potentially cutting through some of the issues at this hearing.

11 **MR SINGLA:** What Mr Wisking explains is -- he does actually give evidence -- I will
12 show you in a moment -- he does actually give evidence about the number of
13 custodians searched and so on. But what he says is there is no one document from
14 the US proceedings that has all of this information assembled in it, and so it will take
15 some time -- only until 20 January, we are not actually talking about months, we are
16 talking about giving this information at the same time as they get our defence.

17 One must remember, with respect, our proposal is for early disclosure. So this is
18 ahead of time. I mean, these proceedings have not progressed because the first case
19 was essentially struck out, then we had the application for permission to appeal. We
20 are at the early stages of this litigation.

21 In my submission, early disclosure is something which this Tribunal should be
22 welcoming of. And, indeed, I think that we saw in the Quinn Emanuel letter there is
23 precedent -- and the *Le Patourel* case also is a precedent for taking disclosure in
24 stages, because what they will get on our proposal is the Defence which will inform
25 the issues in the case, a subset of early disclosure which will then allow the parties to
26 progress discussions about the further disclosure.

1 And we have been very clear in the evidence that we accept that further disclosure will
2 be required. The question for you today is: what is the efficient and proportionate way
3 of starting the process? Everyone is accepting there will need to be "top-up
4 disclosure". This is just the beginning of the process. We say, having the Defence
5 and therefore, the issues being clear, having some documents and having information
6 about how the documents were disclosed in *Klein*, will then enable the Class
7 Representative to start the process relating to these proceedings.
8 So what then needs to happen is they need to tell us in this case, the issues are as
9 follows -- this is what we described as our stage two. Stage two will be: you have our
10 Defence, you have some documents, so you can see how Meta custodians were
11 communicating and so on, what the documents looked like. You can then, with that
12 information, provide a list of issues, the issues on which you consider further
13 disclosure is required.
14 There is nothing unclear, I think it is said in the skeleton -- Mr O'Donoghue says our
15 approach is unclear. It is not, with respect, unclear. We are saying with the benefit of
16 all of that material in January -- and if they need longer that is of course fine, so we
17 don't accept that it has to be six weeks and this is all very prejudicial -- if they need
18 longer, of course they can have longer.
19 But in terms of the best way to kick this process off, that will then enable the parties
20 and the Tribunal to have a meaningful discussion about what further disclosure is
21 required by reference to the issues in this case.
22 Now, importantly -- and this is something that again Mr O'Donoghue just has not
23 addressed -- at that stage -- once they are telling us what their position is as regards
24 the issues in respect of further disclosure, at that stage of course Meta will have to
25 engage in relation to things like document availability and so on.
26 This is why we say this is such an important point because this, in my submission,

1 reveals why their proposal is back to front, because we are keen to ensure the
2 disclosure in this case is tethered to the issues in this case. And one obviously has to
3 address relevance and proportionality, but what they are looking to do first is to
4 understand what all of the documents out there look like. And I hope you had a chance
5 to look at paragraph 28.
6 **MRS JUSTICE JOANNA SMITH:** I did.
7 **MR SINGLA:** The level of detail that they want, and all we are saying is: first of all,
8 have some material which is readily available and which you accept is relevant, and
9 have been saying is relevant as long ago as February.
10 So have that material, have our Defence, tell us what disclosure you think is required
11 in this case. At that stage, we will then have a sensible discussion about where the
12 documents are, what it is proportionate for Meta to do and so on and so forth, rather
13 than the disclosure report and EDQ being the starting point.
14 So that is the second stage where we say the parties should have a meaningful
15 discussion, with responses and replies and so on.
16 Then the third stage would be the Case Management Conference, at which we
17 said June, they said May -- we may need to come back to the precise timing later -- but
18 the third stage would then be the Tribunal having a hearing if there are still disputed
19 matters and the disclosure order can be made.
20 Finally, when the disclosure is provided we intend to provide a disclosure statement
21 which, of course, you are familiar with, but the disclosure statement in the usual way
22 will explain the extent of the searches and -- the extent of the searches that have been
23 made and the respects in which the searches have been limited on reasonableness
24 and proportionality grounds.
25 So we don't actually, with respect, accept the characterisation that we are somehow
26 being evasive or not putting our cards on the table. All of that is actually

1 a mischaracterisation of our proposal. Our proposal is looking to get to a place where
2 the Tribunal can make a disclosure order next year, but what we don't want is for there
3 to be a satellite dispute around these disclosure reports and EDQs.
4 Now, perhaps in relation to *Klein*, I have already dealt with, in a sense, why we say
5 you don't need to be worried about the relevance of the *Klein* disclosure, because
6 notwithstanding the protestations now, the parties have been proceeding on the
7 basis -- or the Class Representative has been seeking the *Klein* disclosure
8 since February.
9 **MRS JUSTICE JOANNA SMITH:** There is a difference between saying: well,
10 obviously there is an overlap and there are 4 million documents, and as by way of
11 very, very early disclosure just give us everything you have got; and now getting to
12 a stage where we are rather more progressed in the proceedings and the Class
13 Representative wants to see only relevant documents and -- I mean,
14 an acknowledgment there are going to be relevant documents in that scope of 4 million
15 does not necessarily mean the 480,000 are relevant. The Class Representative does
16 not know how you have necessarily chosen those beyond you saying: well, we have
17 stripped out certain documents we think you shouldn't have.
18 **MR SINGLA:** That is precisely what we have done and that should be adequate.
19 Again, if one looks at the background, they were asking back in February for all
20 4 million. You see what they said. In terms Quinn Emanuel, the plaintiff's lawyers in
21 America as well, they are saying in terms the Class Representative has identified that
22 the *Klein* disclosure is substantially complete and relevant to the issues in dispute.
23 So the 4 million -- they were saying, the 4 million documents are relevant to the issues
24 in dispute. That was their position back in February.
25 What Mr Wisking is now saying -- and actually one needs to look at this because the
26 point about relevance is in fact -- in my submission, it is actually not a good point

1 because when you look at the exclusions, you will actually see that 3 million of the
2 4 million -- this is paragraph 44.4, it is core bundle page 51 --
3 **MRS JUSTICE JOANNA SMITH:** 44.4. That is on electronic bundle page 54. Core
4 51, I think.
5 **MR SINGLA:** I'm so sorry. 44.4. So this is the list of excluded categories, and you
6 will actually see in 44.4 that over 3 million of the 4 million relate to proceedings initiated
7 by the FTC investigating Meta's acquisition of Instagram and WhatsApp.
8 Pausing there, I think even Mr O'Donoghue would accept there is nothing in his claim
9 form about the acquisition of Instagram and WhatsApp, so that actually is completely
10 clear as in terms of something irrelevant to this case.
11 We are talking about over 3 million of the 4 million relating to that. What seems to
12 happen, as Mr Wisking explains, is those documents were, as it were, interposed into
13 the *Klein* proceedings.
14 So, therefore, actually that leaves 1 million-odd documents, of which we are providing
15 480,000. So to the extent there is a difference between the 480,000 and 1 million, it
16 is these other exclusions.
17 **MRS JUSTICE JOANNA SMITH:** Yes.
18 **MR SINGLA:** If one looks at what those other exclusions are, so 44.1, named plaintiff
19 documents, that is material relating to the specific plaintiffs in the US, completely
20 irrelevant to this case; 44.2, correspondence with non-parties which contain
21 negotiations with non-parties about the process for disclosure. This correspondence
22 does not contain contemporaneous documents. Again, very difficult to see what the
23 issue is there.
24 I think 44.3, Mr O'Donoghue is saying he now does not accept all of that is irrelevant.
25 Well, (a) we don't agree because in *Klein* there are claims being brought by consumers
26 or users, and also by advertisers, so we actually can't see for a moment why the

1 advertiser plaintiff documents would be relevant. But in any event, they would have
2 an opportunity to apply for this material in what we describe as our stages two and
3 three. So, they would not be shut out from this material forever. If they think it is
4 relevant, they can apply for it.
5 44.5, again, he tried to argue today some of this may be relevant or they may be
6 interested in it. First of all, difficult to see why an internal investigation about app
7 developers does have any relevance even to his pleading.
8 Again, they are not being shut out forever.
9 So when one actually starts with the Quinn Emanuel proposal back at February,
10 asking for all 4 million and asserting in competent terms that it is all relevant, then you
11 look at what they are getting and what the delta is, as it were, it is actually very difficult
12 to see what the problem is.
13 That is why I really do take issue with the way this was presented this morning, that
14 somehow they are being dumped, I think is the word used. These are materials that
15 they were after. They weren't entitled to them back in February, you obviously have
16 that point, because certification was still being challenged before the Court of Appeal.
17 You say we are now at a more advanced stage of the proceedings. With respect, we
18 have not yet put our Defence in. We are offering something which is really quite
19 a generous proposal, whereby they get our Defence and 480,000 documents, and
20 they can then have all of that material with which to frame their disclosure requests in
21 this case.
22 So that is the relevance point about the *Klein* disclosure and the way in which one has
23 gone about it is to strip out the obviously irrelevant material.
24 **MRS JUSTICE JOANNA SMITH:** To be clear, there has not been an analysis of the
25 480,000 with a view to identifying relevant material, you have simply stripped out what
26 you consider to be irrelevant, presumably on the basis you have taken issues and

1 removed all those documents, but have not gone on to look at the 480,000, with a view
2 to identifying whether there is material in there that is also irrelevant?
3 **MR SINGLA:** No. There has not been a review, as it were. That is because the
4 starting point was it was common ground that all of it was relevant. In my submission,
5 it is slightly unfair to have expected Meta and Herbert Smith to have conducted
6 a review of the 480,000. What they have actually done is they have taken the Class
7 Representative's starting point, and said: we are not going to give you 4 million
8 because why do you need all of this irrelevant material? So it is slightly surprising now
9 for the Class Representative to say they ought to have done a detailed review of those
10 documents.
11 So that deals with the relevance of the *Klein* disclosure -- we describe it as the *Klein*
12 disclosure set, by which I mean the 480,000. That deals with relevance. As to the
13 scale of the disclosure exercise undertaken, again, Mr Wisking deals with this. So if I
14 could ask you to look at Mr Wisking's statement at paragraph 26.
15 **MRS JUSTICE JOANNA SMITH:** Yes.
16 **MR SINGLA:** I hesitate to give you page numbers.
17 **MRS JUSTICE JOANNA SMITH:** Don't worry, I am there. It is 46.
18 **MR SINGLA:** It is paragraph 26. He understands from WilmerHale who have conduct
19 of the *Klein* proceedings for Meta that extensive disclosure has been provided
20 amounting to over 4 million.
21 Then at 27:
22 "I understand from WilmerHale that the custodial documents provided in *Klein* cover
23 various issues, including the terms and conditions for the provision of the Facebook
24 platform over time, the entities which Meta considers to be its competitors, Meta's use
25 of data and Meta's response to the introduction of ATT."
26 Then if one turns to paragraph 42 -- I think we have seen this already -- Meta

1 construed the potential overlapping issues in dispute widely.
2 Then 43, you will see 43.2: carrying out over 230 searches over the documents from
3 73 custodians; 43.3, the disclosure process took many months in the *Klein*
4 proceedings.
5 Then 43.5, you will see the date range in the *Klein* disclosure set overlaps with a large
6 proportion of the claim period.
7 Then at 57 is where he makes the point that Herbert Smith will work with WilmerHale
8 to collate the information because there is no single existing document.
9 So this was a very substantial disclosure exercise conducted in the *Klein* proceedings.
10 That much is clear. The question really is whether one should leverage off all of that
11 work that is being done in overlapping proceedings to inform the disclosure process in
12 this case.
13 We say that is obviously a proportionate and efficient way to proceed, rather than
14 trying to build the disclosure from the ground up.
15 On the one hand, they say -- Ms Vernon says -- and Mr O'Donoghue said this
16 morning -- they are not objecting in principle to the idea of using re-productions or
17 document sets from other proceedings. They are not objecting to that. We know that
18 they are interested in the *Klein* disclosure from their correspondence, and so what is
19 it about this proposal that is objectionable? It is actually quite difficult to understand
20 why they are resisting receiving this early disclosure.
21 What we say is the obvious advantage, is that when the parties come to talk about the
22 further disclosure required in this case, it will actually move things along much more
23 efficiently for them to have our defence and this *Klein* material as opposed to
24 a disclosure report, which is -- in a sense, they are asking for a disclosure report and
25 EDQ in the abstract.
26 I think she says -- Ms Vernon says at paragraph 28 that they want to understand how

1 all of these investigations -- I will just make sure I use her words -- paragraph 28:
2 "The Class Representative is keen to understand how these past and ongoing
3 decisions, investigations and proceedings might map on to the Defendants' disclosure
4 obligations."
5 That is what we say is really the problem with the approach. It is just completely the
6 wrong way around to ask about how things might map on to disclosure obligations.
7 One should start with the pleadings and some early disclosure that is relevant.
8 So we do say there is no coherent explanation as to why our proposal has not found
9 favour with the Class Representative.
10 Can I pick up various points that have been made along the way. They say it would
11 not now be meaningful early disclosure because the proceedings have already
12 advanced to a stage where Meta is pleading its Defence. So this is an attempt to
13 explain away what they were saying in February, and say: oh well, now it's not really
14 early disclosure.
15 We say, with respect, that's a false point because we can't have been expected to
16 provide any disclosure at a time when we were still appealing before the
17 Court of Appeal, and the proceedings are still at an early stage because they have not
18 yet got our Defence. That point goes nowhere.
19 There is a point that is made -- the second point, is: well, they have insufficient
20 information about the composition of the *Klein* disclosure set. I think I have been
21 through all of that. We have explained in Mr Wisking's evidence what has been
22 stripped out, and he has explained that against the background of Quinn Emanuel
23 asking for the full 4 million, and they will get further information about the composition
24 of the *Klein* disclosure set in January, so in a few weeks' time.
25 The third point is they complain about the breadth of the exclusions. Again, I have
26 addressed that. First of all, it is difficult to understand the objections, given what those

1 exclusions relate to; but secondly, they can have an opportunity to apply for that
2 material in due course, they are not being shut out of the excluded material forever.
3 I think the fourth point being made is about their budget. This is a new point, I think,
4 that features in the skeleton, but it really is difficult to understand because, as I
5 mentioned earlier, they were originally asking for the full 4 million, so if they had the
6 budget now to review the full 4 million, why don't they have the budget now to review
7 the 480,000? It actually does not make any sense at all.
8 In fact, our proposal protects their budget because it ensures they're not receiving, for
9 example, the 3 million FTC documents. If one stops to think about that point, it is
10 a point against them.
11 On timing -- their fifth main objection seems to be timing. They say six weeks is not
12 enough because they will be busy with their Reply. Well, the simple answer to that is:
13 have some more time. We have been completely open about that, and it may
14 be -- with the Tribunal's indication as to a further case management hearing in any
15 event, it may be that they can build in a bit more time before that hearing.
16 So for all those reasons, we do say our approach is the proportionate and efficient way
17 to proceed. And I think I have asked you to look at paragraphs 14 and 28 as to the
18 total breadth of --
19 **MRS JUSTICE JOANNA SMITH:** You have.
20 **MR SINGLA:** And I think, maybe just a very final point to deal with asymmetry of
21 information, because their main argument in support of their position is what they
22 describe as the "total asymmetry of information".
23 **MRS JUSTICE JOANNA SMITH:** Yes.
24 **MR SINGLA:** Again, one needs to be careful with that kind of submission because in
25 fact they have already been able to produce a pleaded case -- I think it is over
26 150 pages -- and both their pleading and their expert evidence extensively refer to

1 factual evidence which presumably they have reviewed.

2 If I can perhaps show you. There was reference to this earlier. But the expert has
3 already prepared a list of categories of disclosure that she says she would be
4 interested in, so that is at core bundle, tab 10, page 690 -- or it may be 693 for you. It
5 is Appendix C to the first report of Professor Scott Morton.

6 **MRS JUSTICE JOANNA SMITH:** Yes.

7 **MR SINGLA:** You will see there, the Appendix C, "Data I would request from
8 Facebook to apply my quantitative methodology", as the heading.

9 And you will see quite a long list of categories of disclosure. I mean, this is a case
10 they have obviously thought about. When they say there is a total asymmetry of
11 information, it has not stopped Professor Scott Morton from compiling a long list of
12 categories of disclosure.

13 **MRS JUSTICE JOANNA SMITH:** Well, it is slightly different being able to say what
14 you want. That is different from the assertion that there is an existing asymmetry of
15 information. They have not got it at the moment. She is able to say: this is what we
16 want. But they have not got it.

17 **MR SINGLA:** It is not right to say they are completely in the dark. One has to start
18 with relevance, then turn to proportionality. The first question is: can they formulate
19 a list of issues? It is common ground the Class Representative will need to go first
20 next year with a list of issues on which disclosure should be provided. That is actually
21 common ground.

22 The question is: what happens between now and then? Should we have to do
23 a disclosure report covering all manner of investigations or should they review our
24 pleading and the early disclosure? That is what this debate boils down to.

25 But not only are they some way along this process, so they have a list of categories
26 they are after. They will have in January the material about the composition of the

1 *Klein* disclosure set. As I say, beyond 20 January, there will then be an iterative
2 process, engagement between the parties, and as part of that, we do accept that to
3 the extent they put forward some requests for disclosure by reference to the issues in
4 the pleadings, we will have to provide them with information about proportionality and
5 so on. We do accept that.
6 **MRS JUSTICE JOANNA SMITH:** Well, these issues, for example, as identified in
7 Appendix C, can you say whether those are addressed by the documents -- in the
8 480,000 documents you are proposing to give to them?
9 **MR SINGLA:** Well, I can't at the moment, no, but I'm not actually sure, with respect,
10 that's the right question. Because the question -- again, I think -- if I can say this
11 respectfully, I think that's absolutely eliding two different points. Will the 480,000 be
12 relevant and informative and enable the Class Representative to make targeted
13 requests for further disclosure? Yes.
14 **MRS JUSTICE JOANNA SMITH:** Yes.
15 **MR SINGLA:** That is where the 480,000 fits into the analysis for today. When they
16 produce their list of issues, will they be better able to do that as a result of having
17 actual documents from Meta that they themselves were after back in February?
18 The answer to that, we say, is: yes. The relevance of the appendix is that it
19 demonstrates that the Class Representative does not need the disclosure report and
20 EDQ to get this process moving, which is their position.
21 They have to persuade you that they could not conceivably produce a list of issues for
22 disclosure in this case without understanding, as Ms Vernon says, how all of these
23 other investigations might potentially map on to the disclosure obligations.
24 The reason I refer to Appendix C is that is just completely wrong. What they will
25 have -- they already have a good starting point, their experts thought about these
26 matters; in January they will have our Defence, so they will understand what the issues

1 are from Meta's perspective in this case; they will also have some early disclosure;
2 and they will also have some information about the composition of *Klein*.
3 Then the process starts. With all of that -- armed with all of that, they can then produce
4 a list of issues for disclosure. That, in our submission, ought to be much more
5 targeted. If they do it with the benefit of all of that material, that ought to be much more
6 productive than if between now and the first draft of list of issues for disclosure, all that
7 happens is Meta produces an extremely wide-ranging disclosure report and EDQ.
8 That is really, as I say, the question for you today, is what is the best way of moving
9 this case forward between now and the list of issues for disclosure that the Class
10 Representative will have to provide? All we are saying is that to the extent they do
11 identify relevant issues, armed with all of this material, at that point the parties can
12 then have a discussion about proportionality, availability, locality and so on, of
13 documents. But why should we have to go off and do it in the abstract? It is not
14 disclosure tethered to the issues in the case.
15 **MRS JUSTICE JOANNA SMITH:** In the context of those sorts of discussions, on the
16 basis that we were to make the order you are seeking, you would not be coming back
17 to court, saying: well, look at the amount of disclosure we have already given them,
18 they are obviously not entitled to anything else; you would accept they are entitled to
19 other things insofar as they meet the issues identified in the case?
20 **MR SINGLA:** Of course -- I won't take time now, but Mr Wisking says in terms -- I
21 think Mr O'Donoghue was trying to use it as a point against me -- but it is a point in
22 our favour. We absolutely recognise this is the starting point because, first of all, it's
23 only 480,000 documents from a case which, although it overlaps, there are obviously
24 issues in this case that aren't in *Klein*.
25 That is point one.
26 Point two, for example, depositions, and Mr Wisking says, well, actually one needs

1 longer to review depositions, so that is why they are being carved out, to the extent
2 there is relevant material there.
3 Thirdly, data. All of the *Klein* proposal is focused on custodial documents, so we
4 absolutely accept that this is just the beginning of the process and there is going to
5 have to be further work. But we do object to the idea that in order to start that
6 meaningful dialogue between the parties, one should start with a disclosure report and
7 an EDQ, as opposed to starting with staged disclosure of the sort they, themselves,
8 were asking.
9 **MRS JUSTICE JOANNA SMITH:** Would you anticipate an EDQ and disclosure report
10 at a later stage, even if you provide the *Klein* data subset?
11 **MR SINGLA:** It shouldn't be necessary. One can't necessarily rule that out, but in our
12 submission, it should not be necessary because the discussions that happen as part
13 of what we describe as stages two and three, that information -- to the extent they are
14 entitled to that information, that will be flushed out as part of the back and forth of what
15 is readily available and proportionate to provide and so on.
16 As I said earlier, when disclosure ultimately is provided, they will have a disclosure
17 statement. Just as in the other cases, *Le Patourel* and *Spottiswoode*, there is no order
18 for EDQs and disclosure reports. If the process is done properly, there is no need to
19 do it. Certainly, it should not be the starting point.
20 Unless I can assist further, those are my submissions.
21 **MRS JUSTICE JOANNA SMITH:** Thank you, Mr Singla.
22 Mr O'Donoghue?
23
24 **Reply submissions by MR O'DONOGHUE, KC**
25 **MR O'DONOGHUE:** If I may briefly come back on some points.
26 **MRS JUSTICE JOANNA SMITH:** Of course.

1 **MR O'DONOGHUE:** Madam, first of all, in my submission, the elephant in the room
2 remains the one identified. What Mr Wisking does not do, in any shape or form, is
3 provide any evidence to the Tribunal that the *Klein* disclosure will be relevant in
4 a material sense to the issues in this case.
5 **MRS JUSTICE JOANNA SMITH:** Well, Mr O'Donoghue, Mr Singla points out that
6 your own solicitor said it was relevant and, furthermore, they said 4 million documents
7 were relevant.
8 **MR O'DONOGHUE:** Yes. Well, madam, in my submission that's a rather uncharitable
9 point. That of course was indicated back in February. We now have Wisking 1, where
10 they have had ten months to think about what *Klein* does and does not contain. They
11 are unable to tell you which custodians were searched, which repositories, what
12 process and, crucially, they are fundamentally unable to tell you -- having had a long
13 time to think about this -- that it will cover the changes to the UK users' terms and
14 conditions, the testing of those policies, the reaction of users to those policies and so
15 on.
16 So at this stage, having had a long time to think about this from an evidential
17 perspective, there is nothing before you today that gives you any comfort whatsoever
18 that the *Klein* disclosure, in any material sense, will contain relevant documents.
19 We say that is a fundamental failing. You asked Mr Singla fair and square: well,
20 Appendix C of Scott Morton 1, is that in *Klein*? And he could not even answer the
21 question. Again, they could and, in our submission should, have reviewed this
22 material, they say, in six weeks. But the fundamental gap in Wisking is we have
23 literally no idea what process was followed in *Klein* and he singularly fails to state, in
24 any shape or form, that it maps on to the issues in this case.
25 Of course, it is quite striking that instead of going to Mr Wisking, Mr Singla went time
26 and time again to a letter in February of this year from the Class Representative.

Things have moved on. Having put in Wisking 1, it was perfectly open to Meta to say, or perhaps WilmerHale: we have looked at the UK pleadings, we have looked at Scott Morton 1 and 2, and we can assure the Tribunal with a statement of truth that the disclosure in *Klein* in a very material sense covers the issues in the English litigation. That is what they have singularly failed to do.

Mr Singla's submissions with respect were more concerned with what was obviously irrelevant than with the central point of what is relevant. I mean, fundamentally we have no idea what custodians were searched, what repositories, what process and so on. That is the fundamental issue. Of course, the fact that this information would only be provided after the document dump really says it all. Because what happens if in January it transpires these custodians are completely off beam, that only US repositories were looked at, no UK market material was looked at in any shape or form, then the whole thing will have been an expensive shenanigan.

That is why it seems, for tactical reasons, it was incumbent on Meta to be upfront in its witness evidence to persuade the Tribunal of the central and obvious relevance of the *Klein* material and why it is inadequate and, in my submission, uncharitable to go back to a letter from the Class Representative, made from a position of complete asymmetry, back in February. Things have moved on and if the best they can do in December of this year is point back to a letter in February earlier this year, having put in a witness statement, in my submission, that is thin gruel indeed.

So that is the fundamental point. There is no evidence whatsoever before the Tribunal that gives any credible basis for suggesting the subset of *Klein* disclosure is remotely relevant to the issues in this case. In a sense, Mr Singla made my point for me, because one of his mantras is: well, unless and until the Defence is lodged, the issues in these proceedings will not have crystallised. Now, if that is true, how can he say in the same breath: well, don't worry, *Klein* covers significant relevant material to the

1 issues in this case. He can't have it both ways. So that's the first point.
2 The second point is I showed you paragraphs 52 and 58 of Mr Wisking's statement
3 and there he says, in black and white, if the disclosure exercise for the issues in these
4 proceedings needed to be conducted in something akin to an EDQ or disclosure report
5 format, that would involve very extensive enquiries, because custodians and
6 databases are located here, there and everywhere. That is a second piece of
7 evidence that, in my submission, strongly supports our submission that the *Klein*
8 disclosure -- even on their own case -- does not map in any meaningful way on to the
9 disclosure of the issues relevant to those proceedings.
10 It is quite troubling that essentially on a wing and a prayer Meta would dump half
11 a million documents on the Class Representative, without any affirmative statement
12 as to their relevance to the issues in this case.
13 I am bound to say that it does therefore seem like an essentially tactical decision to
14 rack up and waste our costs, to send us on a wild goose chase to no end whatsoever.
15 So that is the second point.
16 The third point is -- again, at the risk of repetition -- what we are saying is there is
17 a two-stage process. Stage one, which Meta wants to completely avoid, is that
18 Mr Wisking makes good what is indicated at paragraphs 52 and 58 and they tell us
19 who are the custodians, repositories and so on that are relevant to the issues in this
20 case. That is step one and it is fundamental, because that is the only way we can
21 begin to address the asymmetry.
22 Step two: if it transpires that the disclosure given in other proceedings then is a suitable
23 surrogate or proxy or is fungible for the disclosure that they say needs to take place
24 for the issues in this case, then we have no objection to that. But Meta, with respect,
25 want to invert the process. They don't want to open the kimono in terms of where are
26 the custodians and repositories for the issues in this case. They want to dump us with

1 the *Klein* stuff and then force us to essentially guess as to where these other
2 custodians and other repositories might be located.
3 With respect, we say that is obviously problematic, because it prevents the Class
4 Representative and, indeed, the Tribunal from assessing the adequacy of disclosure
5 at any stage. Because what is coming out loud and clear from Mr Wisking and
6 Mr Singla is they will not commit at any stage to setting out the suite of custodians and
7 repositories that are relevant to the issues in this case. Even simple issues such as
8 organograms: we have no information on the organisational structure of Meta for the
9 purposes of these proceedings. We have no information on who are the custodians
10 for the purposes of the UK proceedings.
11 I mentioned that we plead a UK only market: that is the geographic scope. It is distinct
12 from the United States. All of this needs to be engaged with upfront in a transparent
13 manner. Essentially, what Meta want to do is, again, deluge us with *Klein* and then
14 use that as what Mr Singla euphemistically referred to as a basis for top up disclosure.
15 The fourth point, madam, is we accept, of course, that disclosure is not one size fits
16 all but we do say two things. First of all, the EDQ and disclosure report process: it is
17 mentioned in the Rules expressly, and there we say for a reason, and; second, it is at
18 least a common approach, particularly in platform cases or digital cases. So that is
19 certainly the position.
20 But we do also say that in this case, there are particular features which commend the
21 EDQ and disclosure report process. First, this is obviously a large ranging claim in
22 temporal terms: it starts back in 2006/07 with the before period where Meta did not
23 have market power and then continues up to the present day, as it acquired
24 a dominant position.
25 It concerns a wide range of interactions within Meta. The first facet of Off-Facebook
26 data tracking is that Meta collects user data not just on the Facebook platform, but

1 also many other Meta services including Instagram and WhatsApp. The Tribunal will
2 also be aware that many of Meta's products are not ones it has organically developed,
3 but it has acquired through mergers and acquisitions. So there are complex
4 interactions within the Meta undertaking.
5 There are a wide range of interactions between Meta and various third parties. There
6 are the interactions between Meta and the website publishers, since Off-Facebook
7 data tracks user activity on third party websites. There are the interactions between
8 Meta and the app developers, since Off-Facebook data tracking also tracks user
9 activity on third party apps. There are the interactions between Meta and the mobile
10 operating system providers: Apple's iOS system and Google's Android operating
11 system. They are fundamental to our case. You may have picked up from the
12 skeletons something called Apple ATT --
13 **MRS JUSTICE JOANNA SMITH:** Yes.
14 **MR O'DONOGHUE:** -- which is a critical issue in this case. There are, of course,
15 interactions between Meta and the regulators.
16 So we say there is a complex triangulation across time within the Meta undertaking,
17 between the Meta undertaking and third parties, that are features of this case that
18 justify the step of an EDQ and disclosure report. I go back to where I started, which
19 is we do not understand where these custodians, repositories and databases are
20 located. Meta needs to come clean on that basic point for the purpose of the issues
21 in this case as a first stage and unless and until that first step is unlocked, there is
22 a very significant risk of injustice through the Class Representative essentially
23 stabbing in the dark periodically over time. We say that is an unjust approach to
24 disclosure in this case.
25 In a sense, Mr Wisking can't have it both ways. He has indicated: well, there is
26 a complex multi-jurisdictional analysis of the custodians and repositories and so on,

1 but does not propose to tell us. Because he has been very, very clear that the *Klein*
2 exercise will not replace that.
3 So, madam, in terms of what we therefore suggest. If we go back to Schedule 1 to
4 our skeleton in the core bundle.
5 **MRS JUSTICE JOANNA SMITH:** Yes.
6 **MR O'DONOGHUE:** So you will see the pleading dates which are common ground.
7 We say an EDQ and disclosure report should be ordered. There is a dispute as to the
8 dates, perhaps we can split the difference. So that would be step one. Then step two
9 is a list of issues: you see that in the fourth row and there is a dialogue envisaged
10 between the parties for that to occur. Step three is the experts then weigh in on
11 disclosure matters.
12 You will have seen the provisional indication in Appendix C of Scott Morton 1. There
13 are a whole range of issues -- including, for example, profitability -- that the experts
14 need to weigh in on. All of that leading to a disclosure CMC. Now, again, if having
15 gone through that, we say, logical and fair exercise it is the case that *Klein* disclosure
16 or CMA disclosure or Bundeskartellamt disclosure maps on in a material and useful
17 way to Meta's disclosure obligations, then of course we favour those efficiencies. But
18 it would be quite wrong in our submission, given the carefully curated nature of Wisking
19 and what it doesn't say is essentially to subvert that process with a, we say, skewed
20 document deluge that in the real world, in spite of Mr Singla's encouraging words, will
21 be used as a form of anchor to limit us to what he called top up disclosure.
22 That is our fundamental concern: there is a real risk, we say, of injustice to the users
23 and the Class Representative who represents them through this skewed approach to
24 disclosure. Meta needs to put their cards on the table, tell us where the documents
25 are and that is the way we can then move forwards.
26

1 **Reply submissions by MR SINGLA, KC**

2 **MR SINGLA:** Madam, I know I don't have a right of reply but just before you rise, as
3 it were, I would not want there to be any misapprehension as to what we are proposing.
4 Again, in Mr O'Donoghue's submissions just then, it does look as though he perhaps
5 is not understanding. He keeps saying there is a degree of injustice about having to
6 make disclosure requests without knowing custodians and data repositories and so
7 on. Our point is they will get that information, but they don't need that information now
8 in order to make the disclosure requests. The requests they should be making, they
9 should be able to make by reference to the pleaded issues.
10 So they are not being deprived of the information about custodians and repositories.
11 We are simply saying first identify the list of issues for disclosure by reference to the
12 pleadings and by reference to the *Klein* disclosure which he himself was telling the
13 Tribunal was low hanging fruit and would get the ball rolling in a very significant way:
14 that is day two of the certification hearing.
15 So I wouldn't want there to be any misunderstanding that we are somehow not ever
16 going to provide the custodian and repository information.
17 **MRS JUSTICE JOANNA SMITH:** You say that will be provided in the disclosure
18 statement, in due course.
19 **MR SINGLA:** No, as part of the --
20 **MRS JUSTICE JOANNA SMITH:** Well, there are two different things, aren't there?
21 There is your provision of information in January in relation to the *Klein* disclosure and
22 the information about custodians and so forth, which has been put together on
23 an iterative basis because it is not all in one document, as I understand it. But that
24 does not tell the Class Representative about the global nature of the documents you
25 have. It will only tell them about the documents in the *Klein* proceedings. So when
26 are they going to get the information about where all the other custodians and relevant

1 documents are located?

2 **MR SINGLA:** This is very important. I'm sorry if I didn't make this sufficiently clear
3 but it is really quite important. You are right. The information they will receive about
4 the *Klein* disclosure will be about the *Klein* disclosure only.

5 **MRS JUSTICE JOANNA SMITH:** Yes.

6 **MR SINGLA:** At the end of the process when disclosure is ultimately provided, they
7 will get a disclosure statement. But critically -- and this perhaps I didn't make
8 sufficiently clear -- critically, what we are saying is once the Class Representative has
9 produced a list of issues for disclosure, there is then going to be a process of
10 engagement in the summer of next year. So this is before the disclosure is actually
11 provided and before the disclosure statement, which is at the end of the process. What
12 we have said is that we envisage a back and forth process and as part of that, they
13 will get information about custodians and data repositories and so on. But all of that
14 will be pinned to the list of issues for disclosure.

15 So our point is they don't need all of that information, ex-ante, through the disclosure
16 report and EDQ. They should go first, as they would in an ordinary case, and say:
17 having regard to the pleaded issues in this case, this is what we want disclosure on.
18 Then at that stage, we would then say we either agree or disagree as to whether things
19 are relevant, but insofar as they are relevant we would then say this is what we are
20 going to do. That is exactly the kind of argument that we would envisage having at
21 the summer CMC on disclosure. Because if they said "well, you should go off and do
22 X, Y, Z" and we say "no, that's disproportionate" that is something the Tribunal could
23 determine. So that middle stage is really quite important.

24 **MRS JUSTICE JOANNA SMITH:** So that middle stage does not involve you
25 complying with any order of the Tribunal: it presupposes cooperation between the
26 parties for you to provide information, as and when it is being requested by the other

1 side?

2 **MR SINGLA:** Yes. It has happened in the other cases. It is obviously all subject to

3 the Tribunal's jurisdiction and if we weren't giving sufficient information they would no

4 doubt make an application immediately. So one is doing this against the backdrop of

5 a CMC which we are both accepting is going to take place to deal with disclosure

6 issues. But as in the other cases where there wasn't a disclosure report or EDQ, that

7 is exactly how it has been handled.

8 But I think that middle part of our proposal is really quite important, because they will

9 get custodian and repository information, but only once the list of issues for disclosure

10 has been settled. The question is: how should the Tribunal send away the parties to

11 produce that list of issues for disclosure? We say when they were describing this and

12 telling the Tribunal it is low hanging fruit which would get the ball rolling in a very

13 significant way -- Mr O'Donoghue's submissions -- that *Klein* disclosure will put them

14 in the best position to produce a list of issues for disclosure.

15 What we don't accept is that without a list of issues for disclosure, so without regard

16 to the pleadings, they are asking for a disclosure report and EDQ. That is what we

17 are taking issue with, because why should they get custodian information, repository

18 information, if it is not tethered to the pleading?

19 **MRS JUSTICE JOANNA SMITH:** Well, I can see that, Mr Singla. I can see that is

20 also an argument for saying that insofar as the Tribunal decides that there should be

21 a disclosure report and EDQ, that should only come some time after close of

22 pleadings. It could not be provided before pleadings have closed.

23 **MR SINGLA:** But even at that stage we would -- well, obviously I would agree --

24 **MRS JUSTICE JOANNA SMITH:** I appreciate that.

25 **MR SINGLA:** I would agree, on any view I would agree with that. But we would say

26 at that stage it would not be necessary because we would be straight into the

1 conventional back and forth: they say they want disclosure on these issues, we say
2 yes or no, or yes but it is disproportionate. Then actually, the disclosure report and
3 EDQ in a sense it is just a parallel process. It is a satellite process. Then, of course,
4 we come back to the Tribunal insofar as there are disputes about relevance and/or
5 proportionality.
6 But what they are actually trying to create is almost a work stream in and of itself and
7 in the abstract. That's the fundamental point. They are not being shut out of any
8 information, they are just asking for everything on an overbroad basis and also ahead
9 of time.
10
11 **Reply submissions by MR O'DONOGHUE, KC**
12 **MR O'DONOGHUE:** Madam, two points. One, in my respectful submission, you
13 fastened upon a very important point which is Meta does not seem to envisage that
14 there would be any disclosure order at this stage. I go back to the point I mentioned
15 more than once which is in circumstances where there is no benchmark against which
16 it can be tested whether Meta has divulged the relevant custodians, repositories,
17 databases and so on, how can the Tribunal test whether reasonable and proportionate
18 disclosure has been given? That is a fundamental failing, we say, in Meta's proposal.
19 Now, it is interesting Mr Singla has now made this proposal. It does not appear
20 anywhere in Mr Wisking's statement or his evidence. But in substance, if one looks at
21 Schedule 1 of our skeleton, that is what we have proposed. When the pleadings close,
22 at that stage Meta should produce an EDQ or disclosure report as something fungible,
23 crucially of course with the statement of truth, and Mr Singla referred more than once
24 to this being an abstract process. But in normal civil litigation, when a disclosure
25 report/EDQ is produced, it is done at the close of pleadings because then the issues
26 have crystallised and the disclosing party can tell the other side who are the relevant

1 custodians, repositories, databases and so on.
2 So there is nothing unusual, in any sense, about our proposal and, indeed, it is the
3 orthodox way by which EDQs and disclosure reports are done.
4 Thirdly, Mr Singla's, again, warm and encouraging words. It is inevitable, in my
5 submission, that his approach whereby there is no benchmark whatsoever established
6 upfront will lead to satellite disputes and what he called a war of attrition on disclosure.
7 We need a benchmark upfront. We see in Wisking 52 and 58, they have already
8 formed a view that the custodians and repositories would not be located simply in
9 *Klein*. We simply say they complete that exercise and I do make the point that we are
10 not dealing with a poor grandmother: this is a £138 billion turnover company which
11 processes the most data of any company in the world. We say in those circumstances
12 our request is, in context, a modest one.
13 **MRS JUSTICE JOANNA SMITH:** All right. Thank you both very much, indeed.
14 What we will do is we will rise now and consult between ourselves and I will give
15 a short judgment after the short adjournment. So it is nearly 1 o'clock, we will sit again
16 at 2 o'clock.
17 Have you had an opportunity to think about the remaining issues that need to be
18 addressed?
19 **MR O'DONOGHUE:** Well, madam, I will have a word with Mr Singla, but it does seem
20 to me that many of them at least may be difficult to --
21 **MRS JUSTICE JOANNA SMITH:** Yes. It might help if you have an opportunity to
22 discuss between yourselves what remains to be dealt with usefully now.
23 **MR SINGLA:** From our perspective, it will be a couple of points around expert
24 evidence. But the lion's share, we definitely agree that disclosure needed to be
25 resolved. I think experts we would like to address you on but, from our perspective,
26 we would be willing to park everything else. But we can talk about that.

1 **MRS JUSTICE JOANNA SMITH:** All right.
2 **MR O'DONOGHUE:** Madam, we do say the public authority needs to know how they
3 are fixed in terms of their role. It may be useful to address that. We can address that.
4 **MRS JUSTICE JOANNA SMITH:** All right. I don't think that will take very long. Very
5 well. Thank you. We will see you again at 2 o'clock.
6 **(12.58 pm)**
7 **(The short adjournment)**
8
9 **(2.00 pm)**
10
11 **Ruling**
12 **MRS JUSTICE JOANNA SMITH:** This is the first CMC in this matter at which the
13 tribunal is called upon to decide an issue on disclosure. The parties agree that
14 an issue-based approach to disclosure is appropriate, that a CMC should be listed to
15 deal with disclosure following the close of pleadings; that it is, or at least may, be
16 appropriate for expert engagement to take place in advance of the disclosure CMC;
17 and that a disclosure long stop date could now be set for October 2025. That final
18 point of agreement may fall away in light of discussions that we have had earlier today
19 in relation to the potential for a split trial.
20 The parties disagree over the way in which disclosure should now proceed, and in
21 particular whether, as the class representative says, disclosure should proceed in what
22 they refer to as "the orthodox way", with Meta being required to file a disclosure report
23 and electronic documents questionnaire, the parties then seeking to agree a list of
24 issues for disclosure and appropriate disclosure orders then being shaped by
25 reference to those documents at a disclosure case management conference.
26 Or, on Meta's case, that ‘initial disclosure’ should be given of around 480,000

1 documents, being a subset of the disclosure (running to something in the region of
2 four million documents) given in a set of US proceedings involving Meta, referred to
3 by the parties as "*Klein*".
4 It is proposed by Meta that, on its approach, the class representative would then have
5 six weeks (or a further time if necessary) to review the *Klein* documents in parallel with
6 preparing her Reply, and that she would then formulate targeted requests for further
7 specific disclosure and/or a list of issues in respect of which further targeted disclosure
8 is required.
9 Against that background, Meta says that there is no need for an EDQ, or disclosure
10 report or any other similar documents, because issues relating to disclosure can be
11 discussed between the parties following the provision of the *Klein* documents and any
12 issues addressed by the tribunal in due course as necessary.
13 The tribunal's attention was drawn to Rule 60 of the Competition Appeal Tribunal Rules
14 at subparagraphs (1) and (2). I do not read those out now for the sake of brevity, but
15 we have regard to those paragraphs.
16 In deciding the issue of disclosure, we also bear in mind that we must have regard to
17 the Governing Principle, set out in Rule 4 of the rules, of dealing with cases justly and
18 at proportionate cost.
19 During the course of submissions, the tribunal's attention was also drawn by both
20 parties to other cases in this court in which a particular approach has been taken to
21 disclosure. We do not find those cases particularly helpful in the context of a case
22 management decision such as this. Each case will turn on its own facts and
23 circumstances, and, as Mr Singla KC on behalf of Meta recognised during his
24 submissions, there is no "one size fits all" approach.
25 The issue arising was very well argued on both sides today, but in the end the tribunal
26 prefers the approach advanced by Mr O'Donoghue KC on behalf of the class

representative, essentially for the following reasons.

This is a wide-ranging and complex case, involving the activities of Meta over a long period, together with extensive interactions with various third parties. We accept that this means that there is an inevitable asymmetry of information, and that it is important for the class representative to be provided with full information about the potential universe of the available disclosure. That the class representative's expert has already been able to identify categories of disclosure she wishes to see does not, in our view, undermine this point.

Meta's proposal for the provision of the *Klein* documents by way of initial disclosure does not address this requirement for full information. We agree with the class representative that the evidence from Meta is lacking as to the relevance of the 480,000 documents it proposes to provide by way of initial disclosure. We are not persuaded by the fact that the class representative originally anticipated in February 2024 that the *Klein* documents might all be relevant.

We are concerned at the prospect of such an enormous number of documents being provided without the tribunal or the class representative at this stage being clear as to their relevance. Mr Wisking, a solicitor acting on behalf of Meta, deals in his statement with the categories of irrelevant documents which have been excluded from the universe of *Klein* documents in order to arrive at the sub-set of 480,000, but it remains wholly unclear exactly what issues the 480,000 documents are said to go to. It was open to Meta to identify those issues in its evidence, but it has chosen not to do so.

We are not satisfied that disclosure provided in this way will be efficient or proportionate, and we consider there to be a serious risk that the class representative will be deluged with documents whose relevance is certainly, at present, at best unclear.

We consider that the class representative's proposal, on the other hand, allows the

class representative and the tribunal to approach disclosure on an informed basis. That is not to say that the class representative has a licence to then request all sorts of documents which do not answer any issues in the case, and the tribunal will be vigilant to preclude such requests.

However, we do think the class representative is entitled to know what documents exist, where they are held and who the custodians are, and so forth, before she identifies the documents that she requires. It is only by approaching disclosure in this structured way that the tribunal and class representative can be assured that Meta has turned its mind to the relevant documents that are available.

The class representative made clear during submissions that she is not averse to leveraging the *Klein* documents as a platform for disclosure in due course, if appropriate. She is not asking for a disclosure exercise to be done from scratch if it is unnecessary, but she wants, with justification in our judgment, to understand how, if at all, the *Klein* documents answer to the issues in the case first, i.e. what is the relevant pool of documents in the *Klein* disclosure. As I have said, we consider that she is entitled to understand this.

Having regard to Rule 4, we consider the approach proposed by the class representative to be likely to be more efficient. It is not efficient, although it may be expedient for Meta, for 480,000 documents of uncertain relevance to be provided to the class representative now. In any event, Meta accepts it will have to review the *Klein* documents for relevance in due course, and it is obviously inefficient for both parties to undertake that task.

Further, we accept that requiring the class representative to review such an enormous quantity of documents, even in an expanded time period, is unlikely to be workable. We accept that, given the other tasks that are to be completed by the class representative in the next couple of months, this is only likely to be prejudicial to her.

1 Finally, in his responsive submissions, Mr Singla clarified that it was not Meta's case
2 that the class representative should never have information about document location,
3 custodians and the like, but merely that such information could be provided as part of
4 discussions between the parties following provision of the *Klein* material.
5 We are not persuaded in the circumstances of this case that that is a satisfactory
6 approach, or that it is likely to lead to fewer disputes or satellite litigation between the
7 parties. We consider it is important that a structured and coherent approach is taken
8 to disclosure, with Meta understanding clearly its duties in that regard. We consider
9 that this is best achieved by the order sought by the class representative.
10 For all those reasons, we will order an EDQ and a disclosure report to be provided
11 after close of pleadings.
12 We will now hear the parties on timing.
13 **MR SINGLA:** Madam, I'm grateful. Before we get to timing, could I, please, clarify,
14 the disclosure report and EDQ --
15 **MRS JUSTICE JOANNA SMITH:** I said "EQD", didn't I? EDQ, you're quite right.
16 **MR SINGLA:** Madam, in my submission, the disclosure report and EDQ should cover
17 those matters which Meta considers to be relevant to the issues in this case, and not
18 some unilateral position of what Ms Vernon says.
19 **MRS JUSTICE JOANNA SMITH:** Correct. No, it must cover the issues that Meta
20 considers to be relevant, and if then the Class Representative thinks that issues have
21 been omitted, that will be a matter for argument in due course.
22 **MR SINGLA:** I'm grateful. As to timing, Mr Wisking dealt with this in his evidence at
23 paragraph 59; we would respectfully ask for until 3 March.
24 **MRS JUSTICE JOANNA SMITH:** It does seem to me, as I have indicated earlier, that
25 you shouldn't be providing such a document until all the pleadings have been closed.
26 **MR SINGLA:** Yes, which is 3 February, which would be ahead of their reply.

1 **MRS JUSTICE JOANNA SMITH:** Well, I think their reply is due on 3 March, so
2 I rather wonder if you actually want a little more time than that.
3 **MR SINGLA:** That's the point being made by those behind me. Could I just take
4 instructions?
5 **MRS JUSTICE JOANNA SMITH:** Of course. **(Pause)**
6 **MR SINGLA:** Could we ask for until 3 April, and that will be four weeks, essentially,
7 from the reply which is on 3 March?
8 **MRS JUSTICE JOANNA SMITH:** Until 3 April. I'll hear from Mr O'Donoghue and see
9 what that does to the rest of the timetable, Mr Singla.
10 **MR SINGLA:** Madam, you mentioned the hearing on 4 April, but from our perspective
11 we don't see that that document needs to be produced sufficiently in advance of
12 the April hearing. The April hearing needs to discuss trial issues.
13 **MRS JUSTICE JOANNA SMITH:** It will; will issues around disclosure feed into that?
14 **MR SINGLA:** No. We were actually going to propose a further hearing be listed to
15 deal with disclosure.
16 **MRS JUSTICE JOANNA SMITH:** Yes.
17 **MR SINGLA:** I think you touched on this earlier.
18 **MRS JUSTICE JOANNA SMITH:** In May or June.
19 **MR SINGLA:** Exactly. We still, with respect, suggest June would be more
20 appropriate, just to allow a sufficient gap, but in a sense it can be a parallel track to
21 the split trial discussion on 4 April.
22 **MRS JUSTICE JOANNA SMITH:** All right. Mr O'Donoghue.
23 **MR O'DONOGHUE:** Madam, two points. On the date, we are concerned that if we
24 now are shunted to 3 April for a disclosure hearing in May or June to be effective, there
25 is a risk of a concertina effect. We think if it's a gap of something in the order of eight
26 weeks, that's highly unlikely to be sufficient for that disclosure hearing to have

1 maximum impact.
2 So there's a concern about the compression.
3 We do say on split trial, obviously without prejudice to what's decided in April, that the
4 divisibility of disclosure would be a potentially relevant consideration to the question
5 of split, because if it transpires that certain things are not practically divisible, the
6 Tribunal, in my submission, needs to know that in April rather than in June. So for
7 those reasons we think April is too late.
8 Madam, you may be able to perhaps split the difference between --
9 **MRS JUSTICE JOANNA SMITH:** Yes, I was wondering whether we might go for
10 something closer to 20 March for the EDQ and disclosure report.
11 **MR SINGLA:** Could I just take a moment?
12 **MRS JUSTICE JOANNA SMITH:** Yes, certainly.
13 **MR O'DONOGHUE:** We would be content.
14 **MRS JUSTICE JOANNA SMITH:** Thank you.
15 **MR SINGLA:** We're content with that.
16 **MRS JUSTICE JOANNA SMITH:** Thank you very much.
17 Right, we'll have the EDQ for 20 March, and it will then enable us to have a hearing
18 on 4 April in relation to the split trial. Insofar as disclosure issues are relevant, we will
19 know what they are by that stage.
20 **MR O'DONOGHUE:** I apprehend that will be a one-day hearing.
21 **MRS JUSTICE JOANNA SMITH:** I think it will be a one-day hearing, with a further
22 hearing listed to deal with disclosure matters and any other case management
23 issues --
24 **MR O'DONOGHUE:** Yes.
25 **MRS JUSTICE JOANNA SMITH:** -- probably now in June -- middle to end of June.
26 **MR O'DONOGHUE:** Yes.

1 **MRS JUSTICE JOANNA SMITH:** Because I think May will be too soon. I was
2 thinking that we ought to have one day, with a second day in reserve.
3 **MR O'DONOGHUE:** I was about to say it could be quite a chunky hearing, and
4 important in terms of future momentum.
5 **MRS JUSTICE JOANNA SMITH:** Yes, all right. Do you want to fix a date for that
6 now? It might be sensible to do so. We haven't discussed a date for the middle to
7 end of June, but ...
8 **MR O'DONOGHUE:** Would the Tribunal like to rise for five minutes?
9 **MRS JUSTICE JOANNA SMITH:** We'll rise and come back. If you could just take
10 some instructions about dates in the meantime, middle to end of June.
11 Thank you.
12 **(2.14 pm)**
13 **(A short break)**
14 **(2.18 pm)**
15 **MRS JUSTICE JOANNA SMITH:** We've identified 26 and 27 June, a Thursday and
16 a Friday, as being dates that suit the Tribunal, if it also suits the parties.
17 **MR SINGLA:** Fine for us, madam.
18 **MR O'DONOGHUE:** Madam, at the risk of being difficult, I'm starting a trial then.
19 **MRS JUSTICE JOANNA SMITH:** On those dates?
20 **MR O'DONOGHUE:** Yes. Two days later, 30 June. It's a four-week trial, so it's not
21 a walk in the park.
22 **MRS JUSTICE JOANNA SMITH:** That's always going to create problems because
23 we're not going to be able to do this much earlier, and if you're going to be in a trial,
24 you're not going to be doing, potentially, the hearing in any event from the sounds of
25 it, because I want to have this before the summer vacation.
26 **MR O'DONOGHUE:** Yes. Well, I think we'll have to --

1 **MRS JUSTICE JOANNA SMITH:** All right. We'll fix it for 26 and 27 June.
2 Right. Where do we go next?
3 **MR O'DONOGHUE:** Madam, I had a helpful discussion with Mr Singla. I think we
4 agree in relation to the Competition and Markets Authority. Given the trial shape may
5 evolve, it's maybe premature to nail down their role today, so that can be revisited in
6 either April or perhaps in June.
7 **MR SINGLA:** Merely as a point of fairness to the CMA, who obviously have made
8 representations on a different premise.
9 **MRS JUSTICE JOANNA SMITH:** Exactly -- it makes sense to park that for now.
10 **MR O'DONOGHUE:** Yes. It may well be that, depending on the shape of trial, it's
11 uninteresting to them, I doubt it, or it may be that they're even more interested.
12 **MRS JUSTICE JOANNA SMITH:** Yes, okay. We shall see.
13 **MR O'DONOGHUE:** We shall see. I think Mr Singla has a couple of issues on
14 experts.
15 **MR SINGLA:** Yes. In terms of expert evidence, you will have seen from our skeleton
16 argument that we raise two points. One was in relation to competition economics.
17 The parties are agreed that there should be permission, obviously subject to the
18 Tribunal, but that permission should be granted today and in today's order, to allow
19 the parties to call expert evidence on competition economics.
20 **MRS JUSTICE JOANNA SMITH:** And you want two experts, I think.
21 **MR SINGLA:** Yes, exactly so. We've explained that it's to do with the scale of the
22 exercise, and we would respectfully ask for permission to call two experts. That does
23 happen in other cases. The other side haven't dealt with this in their skeleton, so it's
24 unclear what their position is.
25 **MRS JUSTICE JOANNA SMITH:** You presumably wouldn't object to them saying,
26 "We also want two", if that were to be the position?

1 **MR SINGLA:** Of course not, no.
2 That's the first point.
3 The second point is in relation to accounting evidence. This may take slightly longer.
4 The short point here is we plainly -- and I can explain this in due course, but we plainly
5 need accounting evidence to deal with some of the points that Professor Scott Morton
6 deals with. And I can show you the relevant sections of her report. We say that
7 permission should be granted so as to enable us to respond to the relevant parts of
8 her report. The Class Representative in Ms Vernon's evidence, their position is they
9 do not actually object in principle --
10 **MRS JUSTICE JOANNA SMITH:** Yes, they say it's premature.
11 **MR SINGLA:** Exactly, and we, respectfully, don't accept it's premature. We say it
12 would be helpful for the parties to have clarity so that we can actually involve the
13 accounting expert in the disclosure discussions that are going to take place.
14 Mr O'Donoghue mentioned this morning that there will be discussions, for example,
15 about disclosure of profitability and so on. It's very difficult to understand why the
16 Class Representative doesn't want the Tribunal to grasp the nettle now.
17 **MRS JUSTICE JOANNA SMITH:** One of the things that occurs to me is that,
18 depending on the nature of the split, it may not be necessary to have disclosure in
19 relation to quantum documents, for example, at an early stage, unless both parties
20 agree that for the purposes of, say, considering a settlement, they would need to see
21 those early. One sometimes does provide disclosure for those reasons, but that might
22 be something that will play into the issue around the split trial, might it not?
23 **MR SINGLA:** Well, possibly, but, madam, it's important to understand -- I can show
24 you Professor Scott Morton's report. It's not merely quantum that this accounting
25 evidence goes to, it also goes to liability issues -- or one liability issue, and also
26 quantum.

1 I can show you that in a moment. Can I perhaps just deal with the prematurity points,
2 and for this purpose if I could ask you to look at paragraph 48 of the Class
3 Representative's skeleton.
4 **MRS JUSTICE JOANNA SMITH:** Yes.
5 **MR SINGLA:** We raised the need for accounting evidence as long ago as, I think,
6 13 November in correspondence. Ms Vernon says there's no objection in principle.
7 What's said in the skeleton is that you shouldn't deal with this. If you look at
8 paragraph 48, they say it's an already busy agenda.
9 Obviously, that is no longer the case. 48.1, wait for the issues to crystallise, but, as
10 I will come on to show you, it's already clear from Professor Scott Morton's report that
11 we will need accounting evidence. So I'll come back to that. But in a sense one
12 doesn't need to wait for the pleadings, and so on, to see the need for the evidence.
13 48.2 is curious because they say that they can't currently address matters, such as
14 the precise directions. That was a surprising submission, given that we raised this
15 back in November. In any event, you're not going to be making directions for the
16 service of reports and so on, but we would nonetheless ask for permission in principle
17 to be granted today.
18 Then 48.3 is another odd point. They say that another reason to defer this question
19 is it's clear that Meta's already provided information on profitability to various
20 regulators. And then they say: the Class Representative will first need to understand
21 what profitability data has been supplied to competition regulators before a final view
22 can be formed.
23 This also underscores the importance, and so on. There's then a point back to the
24 disclosure topic. With respect, that is incoherent, because either there is a need for
25 accounting expert evidence in these proceedings, or not.
26 Then at 49, they say there's no practical issue, there's no prejudice to Meta, because

1 we can essentially involve the intended expert in any event. And obviously that's
2 unsatisfactory because we want to know whether we have permission or not.
3 So we do say there's no real force in the prematurity point, and either there's
4 an objection in principle, in which case we should have that debate now, or there's not,
5 in which case permission should be granted.
6 **MRS JUSTICE JOANNA SMITH:** Can you show me the section of the report that
7 raises the issue.
8 **MR SINGLA:** Yes, of course. Her report is behind tab 10, I think, of core bundle 1.
9 **MRS JUSTICE JOANNA SMITH:** Yes.
10 **MR SINGLA:** To summarise, I'll show you the sections in the report, but to summarise,
11 the first issue is in relation to the excessive pricing allegation, she covers whether
12 Meta's overall profits were excessive. So what's being said as to why the price is
13 unfair is at limb 1 of the *United Brands* test. She says that the overall profits earned
14 by Meta are excessive, and the Off-Facebook Data, as it's defined, is said to contribute
15 materially to those overall profits.
16 That's the first liability aspect.
17 **MRS JUSTICE JOANNA SMITH:** Right.
18 **MR SINGLA:** Then there's a quantification aspect which I'll show you as well. There
19 are two points.
20 The first relevant section for you to look at is at page 585 in my bundle, paragraph 198,
21 section 4.3.1, if you have that.
22 **MRS JUSTICE JOANNA SMITH:** Just bear with me a moment. Yes, page 588 in our
23 bundle.
24 **MR SINGLA:** I'm grateful.
25 You'll see the heading, "United Brands Limb 1, Excessiveness".
26 **MRS JUSTICE JOANNA SMITH:** Yes.

1 **MR SINGLA:** If you could turn to paragraph 200:

2 "My preliminary view is the appropriate way to assess limb 1, the excessiveness limb,

3 from an economic perspective is to consider two issues: whether Facebook is

4 achieving excessive profits overall, and two, whether the Off-Facebook Data is … of

5 significant commercial value, such that it is materially contributing to these returns."

6 **MRS JUSTICE JOANNA SMITH:** Yes.

7 **MR SINGLA:** Then one sees in this section a discussion about the overall profitability.

8 If you could cast your eye over 202 onwards.

9 **MRS JUSTICE JOANNA SMITH:** Yes.

10 **MR SINGLA:** One can see, if you turn the page, paragraph 211, under the heading,

11 "Assessment of the First Limb", and then 210, she says:

12 "There is evidence that the Off-Facebook Data gathered by Facebook was of

13 significant commercial value and that Facebook as a platform generated significant

14 profits."

15 And then you'll see at 211, she uses the introduction of ATT as a natural experiment

16 to assess the value of off-Facebook tracking to Facebook. She uses ATT, she

17 describes this as a natural experiment. If I could just ask you to look at 211.

18 **MRS JUSTICE JOANNA SMITH:** Yes.

19 **MR SINGLA:** So that's one aspect of her evidence. This is all on liability, this is *United*

20 *Brands*. And then 212, she also says:

21 "Another approach adopted … focuses on an empirical analysis."

22 And this is her before/after approach. This is explained in 213, she compares the

23 factual revenues and profits against a situation where the growth in average revenues

24 is more in line with industry standards.

25 You'll see at 214 references to increases in revenue per user and profitability. Again,

26 over the page, you will see, at 216:

"Facebook overall made significant profits."

MRS JUSTICE JOANNA SMITH: Yes.

MR SINGLA: So a long section there within the context of *United Brands*, so this is all the question of whether there was an excessive price, an analysis of profitability. And then in respect of quantification, if I could ask you -- perhaps if I just give you the internal page number, it's page 95 of the internal referencing.

MRS JUSTICE JOANNA SMITH: Thank you.

MR SINGLA: Do you have section 5.4.1, "Methodology to quantify the incremental value"?

MRS JUSTICE JOANNA SMITH: Yes, I'm there. 5.4.1.

MR SINGLA: I'm grateful. So we're now in --

MRS JUSTICE JOANNA SMITH: 628.

MR SINGLA: I'm grateful. We're now in section 5, which is "Quantitative methodology to assess harm to the class". So this is quantification, as, madam, I think you had apprehended. What she says in relation to profitability, you'll see, 370:

"The first element I need to estimate is the incremental profits Facebook generates from off-Facebook tracking."

And then at 372, she proposes to conduct multiple strands of related empirical analysis to quantify these revenues: one, detailed analysis of ATT; and two, before/after analysis; and then three, some internal studies.

And then she expands on each of those items at 373 onwards. You'll see the ATT natural experiment. That's all about -- at 375 you'll see in bold, "Estimating the impact of ATT on Facebook's revenue generation".

Perhaps to assist, what she says is that ATT, when that was introduced by Apple, is a natural experiment as to how users would behave if they had choice. What she's trying to do here is to work out the effect on Facebook's revenue generation of ATT

1 and then extrapolate what that means for the loss allegedly suffered by the class.
2 Then if you perhaps -- I don't want to labour this, but if you just look at 376 and 377,
3 there are references to differences in approach to ATT, which obviously Mr Ridyard
4 will be familiar with, those econometric ways of dealing with these points; and 382 is
5 the extrapolation point, so the ATT analysis is being used to inform the quantification
6 of the alleged harm.
7 Then one sees at 384 onwards, under the heading, "Before and after analysis", and
8 there are some later references as well. Let me just see ... yes, if I just ask you to look
9 at paragraph 438. So that's core 645 in my bundle, you may need to add a few pages.
10 **MRS JUSTICE JOANNA SMITH:** Yes, page 648.
11 **MR SINGLA:** Again, the heading, 6.1, "Estimating the incremental profits", and then
12 6.1.1, "ATT, natural experiment approach". Then if you skip ahead to paragraph 452,
13 it's the before and after analysis.
14 In a nutshell, this profitability analysis really permeates the report. It feeds in both at
15 the liability stage and the quantification stage, and we submit it would be appropriate
16 for us to have permission to call an accounting expert to deal with those points.
17 As I say, the Class Representative doesn't object in principle -- that's Ms Vernon's
18 words -- and we do submit it would be useful to have permission today, so that the
19 disclosure discussions can take place on that footing.
20 **MRS JUSTICE JOANNA SMITH:** Yes, I follow.
21 **MR SINGLA:** Unless I can assist any further.
22 **MRS JUSTICE JOANNA SMITH:** No, thank you very much.
23 Mr O'Donoghue.
24 **MR O'DONOGHUE:** Madam, could I deal first with the question of two experts.
25 **MRS JUSTICE JOANNA SMITH:** Yes.
26 **MR O'DONOGHUE:** First of all, contrary to what Mr Singla suggests, this is a highly

1 unusual suggestion. I'm not aware of any case I've been involved in ever where there
2 are two economists. That is the starting point.
3 For the Tribunal's record, in the *Kent* proceedings, [2023] CAT 22, at paragraphs 40
4 and 42 -- it's not in the bundle -- and 44, but there the Tribunal will see that the Tribunal
5 rejected in that case an application for more than one expert.
6 That's the second point. [2023] CAT 22, paragraphs 41, 42 and 44.
7 The third point is --
8 **MRS JUSTICE JOANNA SMITH:** What were the grounds for rejecting it? I can't tell
9 whether that assists me or not, unless I know on what grounds they rejected it. If it
10 was because, for example, one expert was entirely capable of dealing with all the
11 relevant issues and that two experts was an overkill, then that might be relevant here.
12 **MR O'DONOGHUE:** Yes. Madam, I have it in front of me -- it's not in the bundle. It
13 was on the basis it wasn't necessary, and there was an issue of delineation, which I'll
14 come on to.
15 The third point, madam, is the one you mentioned, that unless and until we know the
16 shape of the trial -- and the logic of a split trial is there would be some savings to the
17 Tribunal and the parties -- because Mr Singla's main point is, well, this is rather a lot
18 of work for one expert.
19 There are two responses to that: one, well, our expert is content to deal with this on
20 her own; and two, in any event, until we know the shape of trial, it is premature to
21 suggest that the expert would be overwhelmed. For example, it may well be that this
22 becomes much more tractable if one or two issues are shaved off. So that's why we
23 say it's premature.
24 Of course it ties in with Mr Singla's accounting expert point: if he gets his accounting
25 expert, then it follows there will be even less work for his competition economist to do.
26 But the fundamental objection -- and I think this is the point made in *Kent* -- the

1 divisibility of the issues between the competition economists in this case, we would
2 suggest, is likely to be very, very difficult indeed. Because if, for example, one
3 considers the question of dominance, network effects will be a very, very important
4 component of that.
5 But then when it comes to liability, the extent of market power will be highly material
6 to the question of exploitation. So we think these issues are, essentially, holistic, and
7 we're concerned at this stage as to how the division is proposed, and we envisage
8 issues at trial without a clear delineation. We would suggest that is another reason
9 why this needs to be revisited probably in April when Mr Singla can, with a list of issues
10 and with further knowledge on disclosure, then triangulate all of that on to what he
11 says is the division of labour between the competition economists.
12 At first blush, this seems to us problematic because the reason there is typically
13 a single expert is these issues are approached on a holistic basis. So we think it may
14 be unworkable, and indeed counterproductive. But Mr Singla can explain this in more
15 detail in April. It's been done, in our submission, rather on the hoof. In my submission,
16 what one needs to do is have the list of issues, explain what one expert is doing
17 compared to the other, and then, and only then, can the issue of delineation be
18 satisfactorily approached.
19 So he's certainly not shut out, we say it's premature and impractical today. And there's
20 no prejudice with having to wait until --
21 **MRS JUSTICE JOANNA SMITH:** You're comfortable your expert can do everything,
22 so you're not going to be suggesting you want two experts -- or will you, if they get
23 permission for two?
24 **MR O'DONOGHUE:** No -- well, it goes back to my delineation point, it depends on
25 the shape of the trial. But as things stand, yes, she is content to deal with all the
26 issues, and that would be the typical position.

1 And then on the accounting experts, again, it is not a usual order. In every unfairness
2 case I have done, the competition economist has dealt with the limb 1 profitability
3 analysis. And we make the point in our skeleton that we're concerned with the
4 economic costs, rather than what would traditionally be understood as accounting.
5 **MRS JUSTICE JOANNA SMITH:** So you wouldn't be proposing to call accounting
6 evidence because your economist is going to deal with this, herself?
7 **MR O'DONOGHUE:** As matters stand, yes, you saw that in her report. So there is
8 a question of whether this is necessary and proportionate.
9 Then a couple of points. Mr Singla expressed some bemusement at the CMA
10 dimension, and if we can just go to Professor Scott Morton's first report.
11 **MRS JUSTICE JOANNA SMITH:** Certainly.
12 **MR O'DONOGHUE:** It's in tab 10 of the core, and it's 589, at least in the hard copy.
13 It's paragraphs 215 and 216.
14 **MRS JUSTICE JOANNA SMITH:** Page 592, yes.
15 **MR O'DONOGHUE:** Yes, the bundle gremlins again. It's 215 and 216.
16 **MRS JUSTICE JOANNA SMITH:** Yes.
17 **MR O'DONOGHUE:** As you will see in limb 1 to do with profitability, Professor Scott
18 Morton relies on Meta's own data on profitability submitted to the CMA, and you see
19 the charts there. Then at 216 you see the CMA's conclusion:
20 "Facebook is consistently earning profits well above what is required to reward
21 investors with a fair return."
22 And you see the components of the analysis set out there.
23 So again, our point of prematurity is there seems to be a lot of ready-made Meta
24 material submitted to the CMA, explicitly dealing with profitability. And we say stage
25 one of the analysis should be for the experts to discuss to what extent this can be
26 repurposed in these proceedings, and then and only then can we consider the

question of the necessity of an accounting expert. Because if, as we apprehend, the profits are through the roof on any measure, one might question what is there left for an accountant to say.

So that's the prematurity point.

Then, finally, you were taken to Apple ATT. If we can just quickly go to where this is anchored in the pleadings, it's in paragraph 95(n) on page 206 in tab 7.

MRS JUSTICE JOANNA SMITH: Page 208, yes.

MR O'DONOGHUE: The gremlins again.

Madam, it's the last sentence of (n), where it says "Meta's CFO"; do you see that?

MRS JUSTICE JOANNA SMITH: Yes, on the following page, 209. Yes.

MR O'DONOGHUE: "Meta's CFO quoted an analyst call ...in relation to the financial impact on Facebook it’s in the order of 10 billion, so it's a pretty significant headwind for our business".

So we make the point that, in the first instance, there seems to be an awful lot of factual material and contemporaneous documents within Meta, dealing with the financial impact of dealing with ATT. Again, it's the prematurity point. We think it makes more sense for the experts and the law firms to discuss what is available, and then we can see the necessity and proportionality of accounting evidence.

That's all I wanted to say on the accountant. Again, I've given you the reference, but in paragraph 44 of *Kent v Apple*, CAT 22, 2023, there the CAT warns of the problems caused by excessive bodies of expert evidence. That's paragraph 44.

So that's the question of proportionality. So we say these issues can, and should be revisited, once we have the shape of trial. There isn't a practical issue with these being parked for today.

MR SINGLA: Could I just respond very briefly.

MRS JUSTICE JOANNA SMITH: Certainly, Mr Singla.

1 **MR SINGLA:** I'm content not to press today for the order for two competition experts.
2 For what it's worth, we have proposed a clear delineation. We say, one will deal with
3 market definition and dominance, and the other will deal with other matters, but if
4 Mr O'Donoghue wants us to come back and apply for that, we'll do so.
5 **MRS JUSTICE JOANNA SMITH:** When you do that, I'd like you to identify the specific
6 issues to which you say each of their evidence will go, so that we can be comfortable
7 that there is no overlap or difficulty around having different experts.
8 **MR SINGLA:** Of course, we'll definitely cater for that. But I do press today for an order
9 in relation to accounting evidence. With respect, that is something that we should be
10 entitled to have clarity on before the disclosure discussions begin.
11 I have shown you there are multiple references to Facebook -- or Meta's -- profitability
12 in Professor Scott Morton's report, and she seeks to analyse that in different ways,
13 both through the lens of the ATT so-called natural experiment, and also the
14 before-and-after approach.
15 The fact that there may be some documents or disclosure or factual material
16 concerning profitability is hardly, in my submission, a reason not to grant permission
17 for expert evidence. Indeed, it's a point actually in support of the need for expert
18 evidence, to allow an expert to marshal that material for the assistance of the
19 Tribunal --
20 **MRS JUSTICE JOANNA SMITH:** Mr Singla, I understand where you're coming from
21 in relation to this, but in terms of timing we're looking at the EDQ and disclosure report
22 being provided on 20 March, and there's then a hearing on 4 April in relation to a split
23 trial. The progress that the experts are going to make in discussing disclosure
24 between those two dates is unlikely to be very great.
25 And as things currently stand -- and I haven't taken the views of those sitting next to
26 me, and I need to in a moment -- but my own view is it's not clear to me that we would

1 want to a make a decision on this prior to the split trial hearing, because if we then
2 allow you an expert at that point, you can then have that expert taking part in the
3 disclosure discussion, i.e. you won't be in any way prejudiced from doing that at that
4 point.
5 **MR SINGLA:** I understand that. Can I just perhaps -- if you can bear with me -- one
6 point is that it would be helpful to allow the relevant accountant to contribute to
7 disclosure, but there's also the further point I made earlier, which is that irrespective
8 of the split, or the way in which case management goes, profitability and the analysis
9 that I showed you is going to feature prominently, both in respect of the liability
10 question of "Is there an excessive price?", and also the quantification question.
11 So in a sense -- I understand where you're coming from, madam, but in a sense the
12 points that have been made by the Class Representative are bad points, and they are
13 bad points today and they will remain bad points on 4 April. So we respectfully ask
14 the Tribunal to grasp the nettle.
15 What one needs to understand, although Mr O'Donoghue says this doesn't happen in
16 other cases, one actually has to understand -- you may have seen this in the
17 certification judgments in the judgment of the Court of Appeal -- on excessive pricing
18 they are adopting an approach in this case which is completely novel and
19 unprecedented, it's the so-called incremental approach, and we say that's all
20 completely misconceived.
21 **MRS JUSTICE JOANNA SMITH:** Yes, I follow that.
22 **MR SINGLA:** But what that does mean is that they can't say: well, other excessive
23 pricing cases don't involve accounting evidence; they've chosen to put a case in this
24 completely novel way. She -- Professor Scott Morton wants to look at profitability in
25 the way that she has set out.
26 In my submission, there's a limit to how far one can borrow from other cases. One

1 has to look at the case on its merits. In circumstances where she is assessing
2 profitability, we say it follows that an accountant would assist the Tribunal.
3 When Ms Vernon is saying in terms they don't object as a matter of principle, it's
4 actually quite difficult to follow why they're now saying it's premature, because the
5 Scott Morton report is before the Tribunal, so why are we going to be in a better
6 position to have this debate on 4 April?
7 I understand, madam, where you're coming from, but I would respectfully say we're
8 not going to be in any different position, and the fact that they don't want an accounting
9 expert is neither here nor there, that's a matter for them.
10 **MRS JUSTICE JOANNA SMITH:** All right. Thank you, Mr Singla.
11 **MR RIDYARD:** You said only two economists, do you think they would be dealing
12 with separate and separable issues? So you think there would be a clear delineation
13 where one ended their evidence and the other began their evidence.
14 But on the second economist and the accounting expert, they would both be dealing
15 with excessive pricing -- or the second economist would be dealing with conduct -- the
16 alleged conduct here is about excessive pricing -- and the accountant will be dealing
17 with the same. So is it inevitable those two experts would be jointly giving evidence
18 on one topic?
19 **MR SINGLA:** They would dovetail. It's a very good question. They would dovetail in
20 the sense that the accounting expert evidence would be an input into the competition
21 expert's evidence. They wouldn't be duplicating. They would obviously both be
22 covering, in a sense, at a very high level, let's say the excessive pricing question, but
23 coming at it from very different angles. So the profitability analysis is a subset of what
24 Professor Scott Morton is doing on excessive pricing, and it would be that subset that
25 is dealt with by the accountant.
26 **MR RIDYARD:** Just to put a hypothetical, if we were to have a hot tub on the limb one

1 question, do you think your economist and your finance person would be sitting in the
2 hot tub at the same time --
3 **MR SINGLA:** That really would depend on the split. The hot tub question would
4 depend on the split and precisely what issues are actually live, as it were, once one
5 gets to that stage. But yes, they would both be dealing with elements of
6 Professor Scott Morton's report. So if she feels comfortable dealing with profitability,
7 then we would have an accountant to address the profitability aspects of her report.
8 **MR RIDYARD:** Yes.
9 **MR O'DONOGHUE:** With respect, this very interesting discussion provoked by
10 Mr Ridyard's question underscores my point which is, unless and until we know the
11 trial shape, we can't begin to address the question of divisibility. Mr Singla's approach,
12 whereby there's an expert giving evidence on another expert's evidence, is bizarre.
13 Even in terms of the hot tub, getting two bites of the cherry versus our one is quite
14 problematic.
15 So I think there's a lot to digest here, and it is not for today.
16 **MRS JUSTICE JOANNA SMITH:** All right. We'll rise for five minutes. Thank you
17 very much.
18 **(2.48 pm)**
19 **(A short break)**
20 **(2.53 pm)**
21
22 **Ruling**
23 **MRS JUSTICE JOANNA SMITH:** I must now deal with a request for permission in
24 relation to an accounting expert sought by Meta.
25 The Tribunal wishes to indicate that it has sympathy with Meta's request for
26 an accounting expert, and understands why accounting evidence may be sought in

this case, but on balance the Tribunal considers that it is better to leave the question of whether to grant permission in relation to an accounting expert until 4 April 2025, when we will be hearing submissions as to a split trial.

We accept Mr Singla's submissions that the arguments may not be very different on that occasion, but we think the shape of the case will be clearer at that point, and we would be very much assisted by having a list of issues to which the evidence of the accounting expert would be going on that occasion.

MR SINGLA: I'm grateful. For our part, that deals with business today.

MRS JUSTICE JOANNA SMITH: Thank you.

MR O'DONOGHUE: And us.

MRS JUSTICE JOANNA SMITH: Thank you very much indeed, both of you, for your very helpful submissions. We will see you on 4 April.

(2.54 pm)

(The hearing concluded)