



**THE HIGH COURT
JUDICIAL REVIEW**

[2026] IEHC 657

Record No. H.S.2024.110

BETWEEN

DOGO MEDIA LIMITED

PLAINTIFF

AND

TEMPEST TECH LIMITED

DEFENDANT

**JUDGMENT of Ms. Justice Siobhán Phelan, delivered on the 8th day of
October, 2026.**

INTRODUCTION

1. This judgment concerns interlocutory motions brought by the parties following the conversion of these proceedings from summary to plenary proceedings pursuant to High Court Order (Nolan J.) of the 7th of April 2025.
2. In broad terms, the proceedings arise out of a Search Distribution Agreement entered into between the parties on or about the 24th of July 2023 (the Agreement). Under that agreement, the Plaintiff distributed internet search products and services provided

through the Defendant's monetisation platform and was entitled to receive a contractually defined share of revenues generated from that activity.

3. The action concerns the Defendant's refusal to pay the entirety of invoices rendered by the Plaintiff in respect of November and December 2023 and the Defendant's assertion that the Plaintiff generated invalid, non-compliant or fraudulent traffic in breach of the Agreement and applicable programme requirements.
4. The Defendant denies liability and advances a Counterclaim grounded upon alleged contractual breaches by the Plaintiff and a contractual liquidated damages provision.
5. Both parties now seek relief by way of further and better particulars and discovery. As a preliminary matter, the Plaintiff also seeks to exclude the Defendant's Counterclaim. Whether the Plaintiff succeeds on the application to exclude the Counterclaim has a bearing on the applications in respect of particulars and discovery arising in relation to the pleaded Counterclaim. There are essentially five applications before me advanced by way of three separate Notices of Motion.
6. The applications are:
 - (i) the Plaintiff's application to exclude or strike out the Counterclaim;
 - (ii) the Plaintiff's application for further particulars;
 - (iii) the Defendant's application for further particulars and, alternatively, to strike out paragraph 24 of the Statement of Claim;
 - (iv) the Plaintiff's application for discovery; and (v) the Defendant's application for discovery. I address them in that order.

BACKGROUND

The Agreement

7. The Plaintiff is a company incorporated in the United Kingdom engaged in the business of publishing internet search software. The Defendant is an Irish incorporated entity carrying on the business of search monetisation and search distribution services.
8. On or about the 24th of July 2023, the parties entered into a written Search Distribution Agreement for an initial term of one year. The Plaintiff agreed to distribute search

services made available through the Defendant's platform. Revenue generated was paid initially to the Defendant by third-party providers and thereafter shared with the Plaintiff in accordance with agreed revenue-sharing percentages. The Agreement referred to Guidelines (appended to the Agreement) and provided that a failure to comply with the Guidelines would constitute a material breach triggering an entitlement to liquidated damages in the amount of two times the cumulative payments made over the preceding year, relieving the Defendant of any outstanding payment obligations and vesting the Defendant with the right “*at its sole discretion*” to immediately terminate the Agreement (Clause 5(2)(e)). The Agreement defined “*unauthorised or fraudulent revenue*” (Clause 6.3) as including repeated manual clicks, the use of robots or other automated query tools or computer-generated search requests and clicks that are prohibited under the Guidelines or the unauthorised use of other search engine optimisation services or software.

9. The Agreement provided for revenue share entitlements of 73%, 77% and 80% depending upon monthly revenue thresholds achieved in accordance with a mechanism set out under the Agreement. Payments were to be made not later than ten business days after the Defendant received payment from the relevant third-party provider. The Agreement also provided for termination by either party upon 10 days written notice.

Chronology

10. During 2023, the Plaintiff distributed search products under the Agreement and generated traffic which, according to the Plaintiff, generated advertising revenue through the Defendant's arrangements with search providers including Microsoft-related entities.
11. The Defendant's position is that concerns emerged during the latter half of 2023 regarding the quality of traffic generated by the Plaintiff.
12. On or about the 3rd of September 2023, the Defendant communicated concerns regarding filtering levels affecting traffic associated with the Plaintiff.
13. On or about the 21st of September 2023, Microsoft communicated concerns concerning advertiser escalations, traffic quality and compliance issues affecting publishers within the syndication network.

14. During October 2023, Microsoft introduced a Partner Traffic Quality Score ("PTQS") system. The Defendant contends that the Plaintiff's PTQS score was 1.5, below the acceptable threshold of between 2.0 and 4.0, and that warnings were communicated to the Plaintiff.
15. The Defendant further contends that traffic quality concerns intensified throughout November and December 2023, giving rise to extensive filtering of traffic and compliance concerns on the part of Microsoft.
16. On or about the 20th of December 2023, the Plaintiff rendered an invoice in the sum of USD \$73,383 in respect of November 2023 revenue.
17. The Plaintiff's case is that the November figure was derived from Aptitude Dashboard data recording 1,743,039 searches, 197,140 clicks, a CTR of 14.68%, RPM of USD \$42.10 and revenue of USD \$73,383.
18. On the 11th of January 2024, the Defendant informed the Plaintiff that it considered the Plaintiff to have breached implementation guidelines and traffic quality requirements and asserted a contractual entitlement to terminate the Agreement, withhold payment and pursue liquidated damages.
19. On the 16th of January 2024, the Defendant paid USD \$18,336.67, representing approximately 25% of the November invoice.
20. On or about the 6th of February 2024 the Plaintiff rendered a second invoice in the sum of approximately USD \$29,822 in respect of December 2023 revenues.
21. The Plaintiff's case is that the December figure was derived from dashboard data recording 685,185 searches, 84,021 clicks, a CTR of 14.65%, RPM of USD \$43.52 and revenue of approximately USD \$29,821 to USD \$29,822.
22. It is common case that the December invoice has not been paid.
23. By letter dated the 7th of February 2024, the Plaintiff demanded payment of the outstanding balance and sought production of chargeback reports, log files, IP address information and other materials said to support the Defendant's allegations concerning invalid traffic.

24. The Plaintiff contends that no substantive supporting material was ever provided. The Defendant disputes any entitlement on the Plaintiff's part to the materials sought and maintains that its actions were contractually justified.
25. Summary proceedings were commenced in March 2024 seeking recovery of USD \$84,868.33 together with interest and costs.
26. An appearance was entered by the Defendant on the 8th of April 2024.
27. On the 2nd of May 2024, the Plaintiff issued a motion for summary judgment.
28. Extensive affidavit evidence was exchanged between the parties during the period from October 2024 to March 2025.
29. By order of Nolan J. dated the 7th of April 2025, the Court refused summary judgment, directed that the proceedings continue as a plenary action and gave directions in relation to pleadings, particulars and discovery.
30. A Statement of Claim was delivered on the 6th of May 2025. The Defendant delivered a Notice for Particulars on the 27th of May 2025 and replies were delivered on the 17th of June 2025.
31. A Defence and Counterclaim was delivered on the 7th of July 2025.
32. On the 29th of July 2025, the Plaintiff served a Notice for Particulars and a request for voluntary discovery. The Defendant served a corresponding request for voluntary discovery.
33. Replies to particulars were furnished on behalf of the Defendant on the 15th of October 2025. Prior to the delivery of these replies, the Plaintiff issued a motion seeking orders striking out the counterclaim delivered with the defence, compelling replies to particulars and directing discovery in respect of specific categories of documents.
34. For its part, on the 8th of October, 2025, the Defendant also issued a motion seeking orders directing discovery and directing a reply to Particular 10 of the Defendant's Notice for Particulars dated 27th of May 2025 and a further order striking out the final sentence of paragraph 24 of the Statement of Claim as disclosing no cause of action and as inadequately pleaded.

The Plaintiff's case

35. The Plaintiff alleges that it generated valid search traffic pursuant to the Agreement and that the corresponding revenues were received by the Defendant from Microsoft and other providers.
36. It maintains that the Defendant wrongfully withheld revenue to which the Plaintiff was contractually entitled and thereafter sought retrospectively to justify its conduct through generalised allegations of non-compliance, invalid traffic and fraud.
37. The Plaintiff contends that the Defendant has never produced the primary documents necessary to substantiate those allegations and that the Defendant's reliance on traffic-quality concerns, clawbacks, chargebacks and liquidated damages cannot be properly assessed without discovery of the underlying materials.
38. The Plaintiff also challenges the enforceability of the liquidated damages provision relied upon by the Defendant and contends that the Defendant's invocation of that clause amounted to enforcement of an unlawful penalty.

The Defendant's case

39. The Defendant denies repudiating the Agreement or wrongfully withholding payments.
40. It contends that the Agreement expressly entitled it to withhold payments, terminate the contractual relationship and seek liquidated damages where traffic was fraudulent, invalid, non-compliant or generated in breach of programme requirements.
41. The Defendant alleges that the Plaintiff utilised traffic sources that had not been approved under the Agreement, generated traffic of inadequate quality and exposed the Defendant's commercial relationship with Microsoft to substantial risk.
42. The Defendant further contends that Microsoft's traffic quality data demonstrated significant deterioration in performance during the latter part of 2023 and ultimately justified the actions taken by the Defendant.

43. By Counterclaim the Defendant seeks relief based upon the liquidated damages provision of the Agreement together with damages for breach of contract. The amount claimed is stated to be approximately €612,284.14.

EXCLUSION OF COUNTERCLAIM

Overview

44. In argument in relation to the application to exclude the Counterclaim made on behalf of the Plaintiff, I was referred to Order 19, Rules 2 and 27 and Order 37 Rules 7 and 10 of the Rules of the Superior Courts (RSC) from which it is clear that, on an application for summary judgment, the Court may adjourn the case for plenary hearing as if the proceedings had originated by plenary summons with such directions as to pleadings as may be appropriate, including such order as may seem just for the determination of the questions in issue in the action and on terms as to security, time and mode of trial or otherwise. Under the RSC, when delivering a defence, the Defendant may also deliver a counterclaim, subject to the power of the Court to exclude the counterclaim if of the opinion that it cannot be conveniently disposed of in the pending action, or ought not to be allowed or to strike it out if the pleading is unnecessary, amounts to an abuse of the process of the Court or may unreasonably prejudice or delay a fair trial of the action.
45. In seeking to exclude the Defendant's Counterclaim, the Plaintiff relied on the terms of the Order (Nolan J.) made on the 7th of April 2025 adjourning the proceedings to plenary hearing as if they had been commenced by plenary summons. The Order recites that this was on the basis that the action was unsuitable for determination in summary proceedings. In so ordering, the Court also made directions in relation to case progression and exchange of pleadings. These directions envisaged the delivery of a statement of claim, the raising of particulars, replies to particulars and the filing of a defence and the making of discovery but was silent in relation to raising particulars of Defence and reply thereto, filing a counterclaim or, indeed, filing a reply. On the 13th of October 2025, further agreed directions were made by the Court on terms agreed on consent by the parties. It had been agreed, subject to the Court, that the Plaintiff furnish a Reply and any Defence to Counterclaim by the 29th of October 2025.

46. The Plaintiff relies on the terms of the orders made to contend that they operate to preclude the maintenance of a counterclaim. I was referred in argument on behalf of the Plaintiff to *National Asset Loan Management Limited v. Kelleher* [2016] 3 I.R. 568, [2016] IECA 118 in which the Court of Appeal ruled that a defence dependent upon an entitlement to set off by reason of a counterclaim only constituted a *bona fide* defence where the connection between the claim and the counterclaim established a *prima facie* entitlement to set off based on a *bona fide* counterclaim. The Court of Appeal found that the court had jurisdiction upon the hearing of an application for summary judgment to make an order, as a condition of leave to defend, precluding a defendant setting up a counterclaim. It was noted in the judgment, however, that the defendant was free to bring his counterclaim by way of separate proceedings and did not require leave to do so.

Effect of the Order

47. I do not construe the Order adjourning the proceedings to plenary hearing as conditioning the defence of the proceedings in a manner which precluded the maintenance of a counterclaim. The order is silent as to the maintenance of a counterclaim and was addressed to matters of case-progression rather than the strength or weakness of any elements advanced on either side in respect of the claim. It was confirmed in argument before me that the Court when adjourning to plenary hearing understood the Defendant was advancing a counterclaim. Despite this, nothing in the order of the court sought to limit the defence of the proceedings or preclude a counterclaim, as one would expect were this the intention of the court (and as occurred in *National Asset Loan Management*).

48. In my view, this case is entirely distinguishable from *National Asset Loan Management*. As appears from the judgment of the Court of Appeal, the High Court in that case had adjourned the proceedings, commenced by way of summary summons, to plenary hearing on the sole issue of whether the plaintiff was estopped from enforcing guarantees and it was specifically ordered (Fullam J.) that the Defendant be precluded from raising his intended counterclaim at the plenary hearing. It was stated in express terms (see para. 13 of the judgment) that the case was being remitted on the estoppel

issue only, it having been determined that there was no reality to the plea advanced in respect of a breach of duty on the part of NAMA.

49. No similar express ruling was made in this case. Indeed, it is common case that in adjourning to plenary hearing, the court made no findings on the respective merits of any of the claims advanced on either side. Furthermore, the fact that the parties subsequently agreed further directions in which time was agreed for the raising of particulars on the counterclaim and the delivery of a Reply is not at all consistent with an understanding of the meaning and effect of the order akin to that now advanced on behalf of the Plaintiff to the effect that the Court's decision to adjourn to plenary hearing should be interpreted as precluding a counterclaim. I reject the Plaintiff's argument in this regard.

50. I also reject any suggestion that when adjourning the matter for plenary hearing as if commenced by plenary summons, it is proper to infer a requirement to obtain the specific leave of the court to advance a counterclaim. In the ordinary course, the Defendant is entitled to deliver a counterclaim with his defence to proceedings commenced by way of plenary summons. In the absence of an order expressly precluding the maintenance of a counterclaim on foot of a merits determination, I am satisfied that in adjourning for plenary hearing as though commenced by plenary summons simpliciter, no condition was imposed or envisaged by the court such as could operate to impede the delivery of a counterclaim.

51. I have concluded that the effect of the Order of Nolan J. is not to preclude the maintenance of a counterclaim in circumstances where the Rules permit a counterclaim with a defence, Nolan J. had power to restrict the issues when granting leave to defend but the order did not do so even though the Court apparently knew that a counterclaim was contemplated. In addition, the subsequent directions concerning the delivery of the Defence to Counterclaim are inconsistent with an understanding that the Counterclaim was precluded.

Whether the Counterclaim should otherwise be excluded or struck out

- 52.** As for whether I should now exercise a power to strike out the Counterclaim advanced, I have not been persuaded that I should. It seems to me that there is a clear link between the Defence advanced on behalf of the Defendant and the Counterclaim as pleaded. Indeed, it was conceded on behalf of the Plaintiff that even if I were to rule in his favour on this application, it would not “*torpedo*” his application for discovery or particulars as even without the Counterclaim, particulars and discovery sought remained necessary. Considering the terms of the Defence advanced and the Counterclaim made, I am satisfied that there is a very substantial overlap between the Defence and the Counterclaim as pleaded. In substance, the Counterclaim is built upon the same factual allegations and contractual provisions that underpin the Defence. The Defence uses those allegations as a shield against the Plaintiff’s claim, but the Counterclaim uses them as a sword to obtain affirmative relief against the Plaintiff.
- 53.** The extent of the overlap is apparent from even a superficial review of the pleaded terms. In its Defence, the Defendant admits entering into the Search Distribution Agreement of the 24th of July 2023 and contends that it should be construed in the context of the search monetisation industry. The Defendant says the Plaintiff’s right to payment under clause 6.1 was always subject to clause 6.3. It is maintained that Clause 6.3 entitled the Defendant to refuse payment for traffic that was invalid, fraudulent, automated, generated by robots, or otherwise in breach of the Guidelines. The Defendant denies wrongfully repudiating the Agreement. It says it was contractually entitled to withhold the November and December 2023 payments because the Plaintiff’s traffic failed to satisfy contractual quality requirements.
- 54.** The Defendant further argues that the fact Microsoft paid revenue to the Defendant does not mean the Plaintiff was, in turn, entitled to be paid. The Plaintiff only became entitled to payment if the traffic supplied complied with the Agreement and Guidelines. The Defendant denies any contractual obligation to provide Charge Back Reports or clawback information and says the Plaintiff had no contractual right to such material. The Defendant rejects the Plaintiff’s contention that the liquidated damages provisions are penalties or otherwise unenforceable. It says the liquidated damages provisions are valid contractual pre-estimates and are distinct from the issue of entitlement to payment.

In addition, the Defendant denies breach of contract, breach of duty, negligence, unjust enrichment, any implied duties, and any liability for the USD 84,868.33 claimed.

55. In its turn, the Counterclaim advances a positive case against the Plaintiff. The Defendant says the Plaintiff was authorised to send traffic only through an approved Google Chrome extension and that the purpose of this restriction was to ensure genuine user traffic. The Plaintiff allegedly failed to use the approved implementation. It allegedly supplied traffic from unauthorised sources and generated non-billable, invalid or fraudulent traffic. Microsoft-derived quality requirements were said to have been communicated to the Plaintiff. The Defendant pleads that the Plaintiff was expected to maintain a non-billable rate below 20%. In October 2023, the Plaintiff allegedly received a traffic-quality score of 1.5, below the acceptable threshold of 2.0, and was warned accordingly.

56. The Defendant alleges that traffic quality continued to worsen throughout November and December 2023. By early December 2023, it says the traffic had become wholly non-compliant. Traffic originating from the Plaintiff was filtered out on the 9th of December 2023 and no further traffic was accepted.

57. The Defendant says the alleged non-compliance constituted a material breach under Clause 5.2(e). It contends that Clause 5.2(e) entitles it to liquidated damages equal to twice the cumulative payments made during the previous year, relieves it of payment obligations, and permits termination.

58. The Defendant alleges damage to its relationship and standing with Microsoft and claims loss arising from the Plaintiff's conduct. The Defendant claims a declaration that the Plaintiff is liable for liquidated damages; judgment for EUR 612,284.14 (or such other amount as the Court may assess) or alternatively damages for breach of contract, together with interest and costs.

59. It is clear from the foregoing that the Defence and Counterclaim are based on the same factual allegations, namely, invalid, fraudulent, non-billable or low-quality traffic. The same contractual provisions arise for consideration, principally clauses 6.3 and 5.2(e). The same Microsoft-centred narrative is advanced relating to issues such as traffic quality standards, Microsoft requirements, and alleged risk to the Defendant's Microsoft

relationship. Reliance is placed on the same November/December 2023 events, specifically, the invoices for these months form the basis both for withholding payment and for claiming liquidated damages.

- 60.** The apparent substantial overlap between the issues arising in the Plaintiff's claim and its Defence and the Counterclaim is important because it demonstrates that the Counterclaim can conveniently be disposed of in the pending action and that its maintenance will not introduce a separate factual controversy likely unreasonably to prejudice or delay the trial. On the contrary, substantially the same evidence will arise whether or not affirmative relief is sought by way of counterclaim.
- 61.** As most of the factual and contractual groundwork is duplicated, with the Counterclaim effectively taking the defence case and adding an affirmative damages claim arising from the same alleged misconduct, I am satisfied that I would not be justified in exercising a strike out jurisdiction. The authorities repeatedly emphasise that the strike-out jurisdiction is to be exercised sparingly. This is not a case in which I have been persuaded that the counterclaim discloses no reasonable cause of action, constitutes an abuse of process, is bound to fail or has no reasonable chance of succeeding or is frivolous or vexatious. Accordingly, I refuse the Plaintiff's application insofar as it seeks to strike out the Defendant's Counterclaim.

THE PARTICULARS APPLICATIONS

The Plaintiff's application

- 62.** By Notice for Particulars dated the 29th of July 2025, the Plaintiff sought further and better particulars concerning the Defendant's Defence and Counterclaim. In broad substance, the Plaintiff sought particulars identifying:

- I. the specific acts said to constitute fraudulent or invalid traffic;
- II. the occasions on which such conduct allegedly occurred;

- III. the contractual provisions relied upon and the interpretation of these provisions;
- IV. the factual basis of the decision to withhold payment;
- V. the factual basis for termination of the Agreement;
- VI. the role played by Microsoft in the decision-making process;
- VII. the methodology used to assess traffic quality;
- VIII. the factual basis of the liquidated damages claim; and
- IX. the alleged losses to Microsoft's relationship and to the Defendant's commercial standing.

63. The Defendant replied to the Notice for Particulars on the 15th of October 2025 but declined to reply to certain requests for various reasons identified in its replies. Reasons given included that the request does not arise from what was pleaded, arose from a misreading of the plea, is directed to an argument the Plaintiff makes rather than a particular, relates to a hypothetical not arising from the pleas advanced in the Defence. Based on the motion papers, the Defendant's response to the Plaintiff's particulars application appears to be that the Plaintiff is seeking matters which are either already pleaded, have already been answered, constitute evidence rather than particulars, or are irrelevant to the issues properly arising on the Defence and Counterclaim.

64. The Defendant contends that it has identified the essential basis of its defence, namely:

- I. that the Plaintiff generated traffic which did not comply with the Agreement and applicable Microsoft requirements;
- II. that traffic quality scores fell below acceptable thresholds;
- III. that Microsoft's systems identified significant levels of non-billable or invalid traffic;
- IV. that the Defendant was contractually entitled to withhold payments, terminate the Agreement and invoke the liquidated damages provisions; and

- V. that the relevant contractual provisions are those dealing with fraudulent traffic, guideline compliance, withholding of payments and liquidated damages.

65. The Defendant's position is effectively that the Plaintiff knows the case it has to meet and does not require further narrative particulars. A recurring objection appears to be that the Plaintiff's requests move beyond clarification of the pleaded case and seek advance disclosure of the evidence upon which the Defendant intends to rely and are matters for discovery and evidence rather than particulars.

66. In resisting this application, the Defendant also relies on a number of matters that have already been disclosed through the pleadings and affidavits, including:

- I. PTQS ("Partner Traffic Quality Score", a metric used by the Defendant to assess the quality of traffic supplied by a syndication partner) scores of 1.5 when a score of 2.0 was the minimum acceptable threshold;
- II. Microsoft's stated acceptable thresholds;
- III. non-billable traffic rates exceeding acceptable levels;
- IV. alleged use of traffic sources other than the approved Chrome implementation;
- V. filtering of traffic by Microsoft during late 2023; and
- VI. concerns raised by Microsoft and the Defendant during the autumn of 2023.

67. The Defendant's position appears to be that these matters have already been sufficiently identified both in pleadings and in the extensive exchange of affidavits in the context of the summary application and do not require further elaboration in pleadings.

68. As regards the Counterclaim, the Defendant appears to maintain that:

- I. the contractual basis of the Counterclaim is identified;
- II. the relevant clauses have been specified;
- III. the liquidated damages mechanism has been particularised;

IV. the amount claimed (approximately €612,284.14) has been explained as being based upon the contractual formula of two times prior payments.

69. A major theme of the Plaintiff's application is a desire to understand precisely what Microsoft told the Defendant and what information the Defendant received from Microsoft. The Defendant's response appears to be that Microsoft communications are documents and that communications and reports will be dealt with through discovery. They are not matters requiring further particulars of the pleaded case.

70. The Defendant also appears to object to requests seeking information concerning third parties and general commercial conduct not directly concerning the Plaintiff. The Defendant's position is that such matters are not necessary to define the issues arising between these parties and extend beyond the scope of the pleaded dispute.

71. It is significant that the Defendant has provided replies in response to the request made but the Plaintiff has never explained through replying correspondence or on affidavit why it was not satisfied with those responses. In persisting with its application in respect of particulars, it has not assisted me that there was no correspondence on behalf of the Plaintiff indicating the basis upon which it was dissatisfied with any reply given or confirming that it was satisfied with others. Indeed, during the hearing before me certain concessions were made such that not all requests for particulars were pursued but the position in this regard was only clarified over the course of the day of hearing and was not known either to the Defendant or the Court in advance.

72. Suffice to say, it would have been helpful and a better use of court time had there been proper interrogation of the replies received in advance of proceeding to Court. This would have allowed the outstanding issues to be identified and netted down prior to hearing. This did not occur and in consequence the motion took longer than necessary and lacked proper focus. It has also been more difficult to decide the application as it has been necessary to piece together the Plaintiff's position with regard to the claim made across the pleadings, correspondence and by reviewing what was indicated in

court consequent upon the failure to clearly narrow the issues before presenting the application to the Court.

Ruling on the Plaintiff's Motion for Particulars

73. A party is not obliged to reply to every request for particulars by furnishing the details sought. The governing principle is that particulars are intended to ensure that the opposing party knows, in broad outline, the case it must meet at trial. They are not a mechanism for obtaining evidence, conducting discovery or compelling a party to draft its opponent's case. There is a balance to be struck between preventing oppressive litigation practices and ensuring that parties are adequately informed of the claims and points of defence against them. The balance struck seeks to achieve clarity in pleadings as a matter of fairness.
74. Order 19, rule 3 of the RSC requires pleadings to contain material facts, not the evidence by which those facts will be proved. A party is generally entitled to know the case being made against it, but not the evidence that will ultimately be relied upon to prove that case. It is legitimate to refuse particulars where they seek evidence or are addressed to argument, inference, or legal submissions rather than facts. Particulars are concerned with facts, not legal argument. A party is generally not required to provide explanations of the legal consequences drawn from pleaded facts or an argumentative justification for a pleaded contention. Where the material facts have been pleaded, the legal implications are ordinarily matters for submissions and trial. It is also legitimate to refuse particulars where the request imposes a disproportionate burden or amounts to an attempt to interrogate the opposing party before trial. A request for particulars must be directed to matters pleaded.
75. Having reviewed the pleadings, I am satisfied that in large part and with one important exception, the Plaintiff already knows the case made in response to its claim. The Defence and Counterclaim identify the alleged traffic-quality failures, contractual breaches, termination provisions and the liquidated damages claim. Insofar as the Plaintiff's remaining requests largely seek documentary proof and underlying evidence, particularly Microsoft materials and technical data, I agree with the Defendant that

these are matters for discovery rather than particulars, albeit I have been persuaded that an issue arises regarding the factual acts relied upon as constituting invalid, non-compliant or fraudulent traffic. In my view, many of the Plaintiff's requests for particulars impermissibly seek evidence rather than particulars. Insofar as the liquidated damages claim advanced is referable in its terms to the contractual provisions which have been agreed in writing, it seems to me that the claim has been adequately particularised and the extent of the losses allegedly sustained by the Defendant do not require to be further particularised to clarify the claim made. In large part, therefore and with some exceptions addressed below, further orders for particulars are unnecessary or inappropriate in this case.

76. For clarity and ease of reference and without repeating general observations set out above, I propose to now address each request briefly in turn.

77. Paragraph 1 of the Defence pleads reliance on the terms of the Agreement dated the 24th of July, 2023. In its Notice for Particulars, at paragraph 1(a), the Plaintiff requests the Defendant to specify whether the stated purpose of the Agreement, monetisation of data, is pleaded to have been to the exclusion of any other purpose. In reply, the Defendant states of the plea at paragraph 1 that:

“This sets out the general purpose of the Agreement and is self-explanatory. The question is however confusing as it must follow logically that one larger purpose would involve numerous sub-purposes or objects.”

At paragraph 1(b), the Plaintiff asks the Defendant to specify the significance for these proceedings of the plea regarding terminology to which the Defendant replies:

“the plea regarding terminology is as set out in the plea, namely that the terminology in the Agreement is that appropriate to the area of commerce and should therefore be construed accordingly.”

At paragraph 1(c), the Plaintiff asks the Defendant to specify whether it is pleaded that any terminology used in the Agreement bears a meaning other than its normal use in language once interpreted in accordance with any definitions furnished in the Agreement itself. In reply, it is stated:

“As is clear from paragraph 1, the reference to the terminology makes clear that it is appropriate to a specific area of commerce and it will be contended that it must be interpreted with that in mind.”

78. It seems to me that in these requests the Plaintiff seeks to interrogate the meaning and effect of certain contractual provisions. In my view, the proper interpretation of the contract is a matter of law. These are not appropriate matters for particulars.

79. At paragraph 2 of its Defence, the Defendant pleads that the Plaintiff's entitlement to payment under clause 6.1 was expressly qualified by clause 6.3 of the Agreement and that clause 6.3 entitled the Defendant to disallow claims for payment in respect of searches, impressions, click-throughs or conversions that it or a third-party service provider judged to have been generated through invalid means or otherwise in breach of the Agreement. The Defendant further pleads that it will rely on clause 6.3 as excluding any entitlement to payment in respect of traffic tendered by the Plaintiff which did not comply with the Guidelines.

80. In response, the Plaintiff raised a series of particulars directed not at the existence of clause 6.3 itself, but at the Defendant's exercise of powers under that clause. In particular, the Plaintiff sought clarification as to whether the judgment contemplated by clause 6.3 was subject to the requirement contained in the final sentence of the clause that any discretion be exercised reasonably, or whether the Defendant contended it enjoyed an unfettered right to make such determinations. The Plaintiff also sought

identification of whether reliance was being placed upon judgments made by the Defendant, by third-party service providers, or both, together with particulars identifying the relevant decision-maker in each instance. Finally, the Plaintiff sought clarification as to whether the Defendant asserted that the Agreement had in fact been terminated, the date and means of any such termination, whether reliance was placed on the provision in clause 6.3 extinguishing future payment obligations, and what event was said to have triggered that consequence.

81. In its replies, the Defendant did not identify who made the relevant judgments under clause 6.3, whether those judgments were made by the Defendant itself or by Microsoft or another third-party service provider, the dates on which such judgments were made, the factual material on which they were based, or whether the discretion exercised was subject to any objective requirement of reasonableness. The Defendant identified in response to request for particulars 2(c), however, that the Agreement was terminated by email dated the 11th of January 2024 and enclosed a copy of the said email. The replies in relation to paragraph 2 of the Defence largely reiterate the Defendant's position that clause 6.3 forms part of the contractual machinery relied upon and maintained that the plea is self-explanatory.

82. It is clear from replies to paragraph 2 that the Defendant rests upon a pleaded exercise of contractual judgment in reliance upon determinations that the Plaintiff's traffic was invalid, fraudulent, non-compliant or of insufficient quality, while also relying upon clause 6.3 to justify both the withholding of payment and the pursuit of substantial liquidated damages.

83. I acknowledge that the replies leave unclear whether those determinations were made by the Defendant, by Microsoft, or by some combination of the two and equally unclear whether the Defendant contends that any such determinations were required to be made reasonably. It seems to me that the case made on behalf of the Defendant is adequately

particularised, however, insofar as it sets out a plea of contractual entitlement, the proper construction of the contract being a matter of law. Furthermore, whether there has in fact been traffic of a type which justifies the Defendant's position in reliance on clause 6.3 as pleaded is, in my view, a matter for evidence. Accordingly, the particulars sought are not properly the subject of particulars insofar as they constitute a request for evidence rather than material facts, are outside the scope of the pleading, and are neither necessary nor appropriate for the purpose of defining the issues between the parties. Accordingly, I am not satisfied to direct further replies to the particulars raised at paragraph 2.

84. During the hearing of the motion before me it was confirmed that the Plaintiff was no longer pursuing the particulars raised in respect of paragraph 3 of the Defence. Although a welcome if late concession, for reasons already addressed above, it would have been better practice to have communicated this in advance of the bringing of the motion or at least in advance of the hearing to allow for a more focussed presentation of the application and a better use of court time.

85. Paragraph 4 of the Defence pleads that the Defendant was entitled to refuse payment to the Plaintiff because the Plaintiff failed to provide traffic that complied with the Guidelines and was not otherwise fraudulent. It is further pleaded that entitlement to payment depended not merely on the volume of traffic generated but upon compliance with the quality standards prescribed by the Agreement and the Guidelines, and that failure to satisfy those requirements disentitled the Plaintiff to payment.

86. In its Notice for Particulars, at paragraph 4(a), the Plaintiff requests the Defendant to:

"Kindly specify each and every particular of fraud alleged against the Plaintiff that constitutes a form of non-compliance with the Guidelines."

At paragraph 4(b), the Plaintiff further requests the Defendant to:

"Kindly specify each and every particular of fraud alleged against the Plaintiff that is other than a form of non-compliance with the Guidelines."

87. In reply, the Defendant states in substance that it does not plead fraud in the conventional legal sense and that the term "*fraudulent traffic*" is used in the manner contemplated by the Agreement and the Guidelines. The Defendant contends that the traffic in question was invalid, non-compliant and not eligible for payment under the contractual framework and maintains that its case concerns the quality and validity of traffic rather than allegations of fraud in the ordinary legal meaning of that term.
88. The difficulty arising from the exchange in relation to paragraph 4 of the Defence is that paragraph 4 of the Defence expressly relies upon concepts such as "*fraudulent*" traffic, invalid traffic and non-compliance with the Guidelines as the basis for denying the Plaintiff's entitlement to payment, yet the replies do not identify the acts, practices, traffic sources, data streams, conduct or events said to constitute the alleged non-compliance, although this may in part arise from the terms in which the request for particulars was cast using the term "*fraud*" rather than "*fraudulent traffic*" as contractually defined. Nor do the replies clearly distinguish between conduct said to amount to invalid traffic under the Guidelines and conduct said to be fraudulent independently of the Guidelines.
89. Accordingly, although the Defendant maintains that the Plaintiff supplied traffic which was invalid, fraudulent or non-compliant, the factual foundation for those allegations remains unclear. The Plaintiff is left without particulars identifying precisely what conduct is impugned, when it occurred, how it was detected, who determined that it had occurred or by reference to which provision of the Guidelines the alleged non-compliance arose. As a result, the central allegation underpinning both the Defence

and Counterclaim remains pleaded at a high level of generality notwithstanding the delivery of a request for particulars and the replies thereto.

90. It seems to me that the Plaintiff is entitled to know the factual foundations for the allegation that traffic was generated in a manner that was not compliant with the contract, specifically, the traffic said to demonstrate non-compliance with the Guidelines. The distinction between this request for particulars and other requests is between requiring the Defendant to identify the allegation it proposes to prove as opposed to requiring it to prove its allegation. The Plaintiff is not entitled by particulars to the technical data, reports or Microsoft communications by which the Defendant proposes to establish non-compliance. It is, however, entitled to know what conduct or traffic characteristic is alleged to have constituted non-compliance. It seems to me that without that information, it does not know the factual case it must meet.

91. I will direct a reply to paragraph 4 of the Plaintiff's Notice for Particulars on the basis that the particulars sought and directed are recast to confirm that the particulars raised relate to traffic which constituted traffic which was non-compliant with the Guidelines referred to in the Agreement and not otherwise fraudulent (to adopt the language of paragraph 4 of the Defence) relied upon to conclude that there had been a breach of contract justifying the withholding of payment and the termination of the contract.

92. Paragraph 5 of the Defence addresses the Plaintiff's contention that it was entitled to receive its contractual share of the advertising revenue generated during November and December 2023. The Defendant denies that the Plaintiff had any entitlement to what is described in the Statement of Claim as its "*proper share*" of that revenue. It pleads that entitlement to payment was conditional upon compliance with the Agreement and the Guidelines and that any payment received by the Defendant from Microsoft or other third parties did not of itself give rise to a corresponding entitlement on the part of the Plaintiff. The Defendant further pleads that the absence of any clawback or recovery by Microsoft does not establish the Plaintiff's entitlement to payment.

93. In its Notice for Particulars, the Plaintiff sought a number of particulars directed to the factual and contractual basis of this plea. In particular, the Plaintiff requested the Defendant to specify the contractual basis upon which it determined to make only a partial payment of the November 2023 invoice and how the amount paid was calculated. The Plaintiff also sought particulars of the pleaded "*separate arrangement between the Defendant and Microsoft*", including the parties to that arrangement, its date, its terms, and the basis upon which it was said to be relevant to the contractual relationship between the parties. The Plaintiff further requested particulars identifying who determined that the Plaintiff's product was non-compliant with that arrangement, together with the time, date, scope and authorship of each such determination. Finally, the Plaintiff sought confirmation that there had been no clawback or recovery of the monies paid to the Defendant by Microsoft.

94. In reply, the Defendant maintained that the Plaintiff's entitlement to payment depended upon compliance with the Agreement and that the Plaintiff's traffic was not compliant. The Defendant continued to rely upon the distinction between its contractual arrangements with Microsoft and its contractual arrangements with the Plaintiff and maintained that payment by Microsoft did not create any entitlement in favour of the Plaintiff. The Defendant refused to provide full particulars of the basis upon which the precise amount of the November payment was calculated, nor did it set out in any detailed way the terms of the separate Microsoft arrangement. Equally, the replies did not identify with precision the individual decisions, decision-makers or dates by which the Plaintiff's traffic was said to have been determined to be non-compliant.

95. I understand that the Plaintiff's difficulty arising from the exchange is that paragraph 5 relies heavily upon the proposition that the Plaintiff failed to satisfy contractual conditions for payment and that the Defendant was entitled to retain monies received from Microsoft notwithstanding the absence of any clawback. Yet the replies do not clearly explain why approximately one quarter of the November invoice was paid while the balance was withheld, identify the mechanism by which the amount withheld was

quantified or fully particularise the "*separate arrangement*" with Microsoft upon which the plea relies. Nor do the replies clearly identify the person or entity that determined the Plaintiff's traffic to be non-compliant, the criteria applied, or the material upon which those determinations were based.

96. It seems to me, however, that the particulars sought do not arise from the plea at paragraph 5 of the Defence where reliance is squarely placed on the terms of the Agreement. Instead, in my view, the requests in respect of paragraph 5 of the Defence involve what I consider to be an impermissible attempt to interrogate the legitimacy of the Defendant's position in light of the fact that it may have received payments from Microsoft in respect of the traffic which it is treating as non-compliant with the contract between the Plaintiff and the Defendant or the rationale underpinning the partial payment of an invoice. I have concluded that the particulars sought are not properly the subject of particulars and constitute a request for evidence rather than material facts which are necessary to ensure fairness in the pleadings.

97. In its Notice for Particulars, the Plaintiff did not direct any specific request to paragraph 6 itself.

98. Paragraph 7 of the Defence pleads that, although the Defendant withheld the balance of the November and December 2023 invoice monies, it was entitled to do so under the terms of the Agreement. The Defendant pleads that it was entitled to rely both upon its contractual right to refuse payment in respect of allegedly invalid or fraudulent traffic and upon the liquidated damages provisions of the Agreement. It further pleads that the Plaintiff had no contractual entitlement to the Charge Back Reports or other information sought in the letter of 7 February 2024, that the Plaintiff's requests lacked any contractual foundation, and that the Defendant was not unjustly enriched by retaining monies which, it says, the Plaintiff had not earned. The Defendant also pleads that invalid traffic from the Plaintiff had the potential to adversely affect its broader arrangements with Microsoft and other third parties.

99. In its Notice for Particulars, at paragraph 7(a), the Plaintiff requests the Defendant to:

"Kindly specify why the Defendant withheld the said material."

At paragraph 7(b), the Plaintiff asks the Defendant to:

"Kindly specify whether the alleged lack of a contractual entitlement to the material sought is pleaded by the Defendant as justification for threatening the Plaintiff with an action for penal damages, which had not been and would not otherwise be sought, if it pursued any further information from the Defendant regarding its withholding of monies from the Plaintiff."

At paragraph 7(c), the Plaintiff further requests:

"If the lack of the said contractual entitlement is not so pleaded or is not the sole pleaded justification for the said threat, kindly specify the justification or justifications."

100. In reply, the Defendant maintains that the Plaintiff had no contractual entitlement to the information sought and that the Agreement imposed no obligation to furnish Charge Back Reports, clawback information or equivalent material. The Defendant further maintains that its position in relation to the Plaintiff's requests was grounded in the terms of the Agreement and that the information sought fell outside the contractual disclosure obligations owed by the Defendant to the Plaintiff. The replies also maintain

the Defendant's broader position that the Plaintiff's alleged non-compliance with the Agreement justified the withholding of payment and the assertion of contractual rights.

101. The Defence as pleaded at paragraph 7, which it is sought to interrogate on through the particulars pursued on this application, rests entirely on the terms of the Agreement. It does not seem to me that the particulars requested are directed to clarifying the Defendant's pleadings but instead are directed to an argument which the Plaintiff wishes to pursue. I am not persuaded that this is a proper use of a request for particulars and the basis advanced for defending the claim at paragraph 7 of the Defence is adequately particularised in my view.

102. At paragraph 9 of its Defence the Defendant pleads, in substance, that it was contractually entitled to withhold payment otherwise claimed by the Plaintiff because the traffic supplied by the Plaintiff was not compliant with the Agreement and fell within categories of traffic for which no payment was due. The pleading relies upon the contractual provisions permitting the Defendant to reject or refuse payment in respect of invalid, fraudulent, automated, non-billable or otherwise non-compliant traffic.

103. The Plaintiff sought particulars directed at identifying precisely the traffic alleged to be invalid, fraudulent, automated, non-billable or otherwise non-compliant; the dates or periods during which such traffic was allegedly generated; the methodology by which the Defendant determined that the traffic was non-compliant; the criteria, metrics, thresholds or guidelines said to have been breached; the person or persons who made those determinations; the reports, analyses, audits, Microsoft communications or other documents upon which the allegation was based; and the extent to which the withholding of the November and December 2023 revenue was attributable to any particular category of alleged non-compliant traffic.

104. The replies made to the particulars raised do not identify individual traffic sources or transactions said to have been invalid. Instead, they maintain in general terms that Microsoft quality standards and programme requirements applied to the traffic supplied under the Agreement; the Plaintiff's traffic quality deteriorated during the relevant period; the traffic generated non-billable, invalid or fraudulent activity; Microsoft-derived data, metrics and quality assessments indicated that the traffic failed to satisfy required standards; and those matters justified the withholding of payment pursuant to the Agreement. The Defendant therefore adheres to the position that the withheld revenue arose from traffic quality concerns and non-compliance with applicable programme requirements.

105. It seems to me that the particulars raised of these pleas are primarily directed towards the evidential basis for the defence advanced, rather than the factual basis for that defence. To the extent that this request seeks identification of the acts or characteristics said to render the Plaintiff's traffic contractually non-compliant, that information will be supplied pursuant to the order I have already made in respect of paragraph 4. The balance of the request seeks the methodology, documentation and evidential material by which the Defendant proposes to prove that allegation and is therefore not properly the subject of particulars.

106. No particulars were raised regarding paragraph 10 of the Defence.

107. Paragraph 11 of the Defence pleads that the Defendant denies the Plaintiff's contention that the liquidated damages provisions of the Agreement are void, voidable or otherwise unenforceable as penalty clauses. The Defendant further denies the Plaintiff's alternative interpretation that any entitlement to liquidated damages arises only where the Defendant has suffered actual loss attributable to the Plaintiff. In its Notice for Particulars, in respect of paragraph 11 of the Defence, referring to the claim for damages for breach of contract, the Plaintiff requests the Defendant as follows:

"8(a) Particularly given the third relief sought in the Counterclaim, kindly specify the Defendant's current estimate of the loss which it has suffered in relation to the alleged breach of the Plaintiff, giving full particulars of the nature and quantum of each component of same."

The Plaintiff further requests:

"8(b) Kindly clarify whether it is pleaded that all possible instances of non-compliance under Clause 4.2 of the Agreement are equally injurious to the Defendant."

108. In reply to request for particular 8(a), the Defendant maintains that it lost a service agreement with Microsoft due to traffic quality issues. The Defendant said that when the issues came to light there were seven publishers in the Defendant's network who were specifically highlighted as sending fraudulent traffic and at the time of termination by Microsoft in June 2023, the Defendant had generated \$27 million in revenue and \$5 million of gross profit for an annual run rate of \$330 million revenue and \$60 million gross profit. It was only confirmed during the hearing before me that the Plaintiff was satisfied not to pursue this request for particulars further.

109. As for particular 8(b), the Defendant stated that the request did not arise from the pleadings. In argument before me, the Plaintiff maintained that the request was directed towards ascertaining whether the clause was a penalty clause but as far as I can see this had never been explained in correspondence. As I understand the position, however, the request is directed to an argument which the Plaintiff wishes to make but is not rooted in the terms of the pleaded Defence which rests squarely on the terms of the Agreement. The plea at paragraph 11 was that a liquidated damages clause is not necessarily related to the actual loss and is not intended to be the exact loss which arises in relation to any breach. The pleading is clear in this regard. It will be a matter for the

Court to determine whether penalisation arises on the application of the clause in the Agreement and the evidence in this case. Where the pleadings are sufficiently clear and I am satisfied that the Plaintiff is on notice of the defence it has to meet, I find that no requirement for further particularity in pleadings has been demonstrated.

110. During the hearing before me it was confirmed that the Plaintiff was not pursuing further particulars in respect of paragraph 15 of the Defence as these requests had been satisfactorily answered. As already observed, this ought to have been communicated in advance of the hearing to allow for a more focussed presentation of the application and a better use of court time.

111. Similarly, during the hearing before me it was confirmed that the Plaintiff was not pursuing further particulars in respect of paragraph 16 of the Defence, which had also been answered.

112. In relation to paragraph 17 of the Defence, it was confirmed that replies were not being pursued in respect of paragraph 11(a) and (b) of the Defence, but the Plaintiff maintained that the particulars at 11(c) of the Notice for Particulars had not been satisfactorily responded to. At paragraph 11 (c) the Plaintiff noted the plea that the entitlement to seek liquidated damages was not retaliatory but sought clarification as to whether its use in this case was also not properly characterized as retaliatory. I agree with the Defendant that this request is argumentative and does not arise from the plea advanced at paragraph 17 of the Defence which is merely to the effect that the Defendant is relying on a provision of the Agreement.

113. Paragraph 18 of the Defence is directed to paragraph 24 of the Statement of Claim, in which the Plaintiff alleges that the Defendant ceased operating syndicated Microsoft-search partnerships generally; that cessation occurred around the same time as the Defendant withheld monies from the Plaintiff; and the Defendant implemented a wider

policy of appropriating revenue shares from syndicated partners. The Defendant's plea, in summary, is that the allegations in paragraph 24 of the Statement of Claim are denied. Any suggestion of a broader cessation of syndicated partnerships is rejected. The Defendant pleads that insofar as there was any cessation of traffic, it related uniquely to the interpretation placed on events by the Plaintiff's principal concerning the filtering out of the Plaintiff's traffic in December 2023. It is this plea that prompted the extensive requests for particulars at paragraph 12 of the Plaintiff's Notice for Particulars seeking clarification as to:

1. whether the Defendant denied the cessation of other partnerships;
2. which partnerships had ceased;
3. whether only the Plaintiff's traffic was filtered out.

114. In its reply to the particulars raised at paragraphs 12 (a), (b) and (c) of the Notice for Particulars in respect of paragraph 18 of the Defence, the Defendant maintains that the request does not arise from what is pleaded. At hearing before me the Plaintiff did not press its request in respect of paragraph 12(c) of the Notice for Particulars but continued to seek a better response in respect of 12(a) and 12(b). I am satisfied that the Defendant is correct in the position it adopted, however, that these requests do not arise from what is pleaded at paragraph 18 of the Defence. It is sought to advance an argument based on third party relationships with the Defendant even though the Defence does not rely on or refer to any such relationship. Accordingly, I will not direct further replies to these requests.

115. At hearing before me it was confirmed that the request for particulars at paragraph 13 of the Notice for Particulars was not being further pursued.

116. The request for particulars raised at paragraph 14 of the Notice for Particulars related to paragraph 23 of the Counterclaim. These were adjusted at the hearing before me with the Plaintiff confirming that it was pursuing only requests for particulars 14(b), 14(c) and 14(d). I agree with the Defendant, however, that the request at 14(b) and 14(c) did not relate to any matter pleaded at paragraph 23 of the Counterclaim. Furthermore, the request at 14(d) related to the legal interpretation of the power to terminate under the Agreement and whether the Defendant's "*sole discretion*" was required to be exercised reasonably or not. This is a matter for legal submission and determination as a matter of law. For these reasons, I do not consider it necessary or appropriate to direct any further reply in respect of the particulars raised at 14 of the Notice for Particulars.

117. The Plaintiff confirmed at the hearing before me that it was not pursuing further its request for particulars at paragraph 15(a) and (b) of the Notice for Particulars but it pressed for a response in respect of 15(c) which sought clarification with respect to paragraph 24 of the Counterclaim of whether any partner with a worse non-billable rate than the Plaintiff had been retained by the Defendant after early-December 2023. Paragraph 24 of the Counterclaim includes allegations that Microsoft communicated required aggregate traffic-quality standards to the Defendant, the Plaintiff failed to meet the relevant quality metrics, including the alleged requirement to maintain a non-billable rate below 20%. The request at 15(c) does not arise from what is pleaded at paragraph 24 of the Counterclaim and is therefore not an appropriate matter for particulars.

118. Particulars were raised at paragraph 16 of the Notice for Particulars with regard to paragraph 25 of the Counterclaim. It was confirmed at the hearing before me that these were not being pressed further.

119. Particulars were raised in relation to paragraph 26 of the Counterclaim at paragraph 17 of the Notice for Particulars. Only the request at 17(c) of the Notice for Particulars

was further pursued before me, namely, when and by what method it became clear that the Plaintiff was not using the Google Chrome extension. It seems to me that this request is directed to matters of evidence, it being clear that what is pleaded is that the Defendant became aware that the Plaintiff was allegedly in breach of contract because it was not using the Google Chrome extension.

120. Particulars were raised at paragraph 18 of the Notice of Particulars in respect of paragraph 27 of the Counterclaim but it was confirmed during the hearing before me that these were not being pressed further. Similarly, it was confirmed during the hearing that requests at paragraphs 19, 20 and 21 were not being further pursued.

121. Most of the requests for particulars pressed at hearing before me did not relate to clarification of a pleaded allegation but were directed to the evidence relied upon or matters of argument or submission. I am satisfied to direct a further response only in respect of paragraph 4 of the Plaintiff's Notice for Particulars (as more fully addressed at para. 85-91 above).

The Defendant's application for Particulars and/or Strike Out

122. The Defendant seeks further particulars from the Plaintiff in respect of request for particular 10 of the Defendant's Notice for Particulars dated 27th of May, 2025 concerning paragraph 24 of the Statement of Claim or alternatively seeks to strike out paragraph 24 as disclosing no cause of action. Paragraph 24 of the Statement of Claim pleads:

"The Defendant is no longer operating any syndicated partnerships in relation to Microsoft search of the type of which the Plaintiff's and Defendant's relationship was an example. This general cessation occurred or commenced in or around the same period of time as the Defendant breached the Agreement by withholding sums of money from the Plaintiff. By electronic mail of 8 December 2023, the Defendant, its servant and/or agent, confirmed that it was not then

submitting anything to Microsoft's search engine for approval. For the final few invoicing periods, the Defendant implemented a general policy of appropriating revenue shares from its syndicated partners, which was wrongful and unlawful."

123. I am mindful that paragraph 24 of the Statement of Claim provides the foundation for significant parts of the Plaintiff's discovery application and has a bearing on how those applications are determined, impacts upon the cost and burden of discovery, and affects my assessment of proportionality on the discovery applications. In particular, it is relied upon to seek documents concerning communications between the Defendant and Microsoft, the cessation of Microsoft syndicated partnerships, the treatment of other syndicated partners, revenue shares withheld from other partners, the Defendant's overall difficulties with Microsoft's traffic requirements and the Defendant's internal deliberations concerning the continuation of the syndicated partnership programme.

124. I propose to address each of the Defendant's alternative applications regarding discovery and strike out in turn.

125. In its request for particulars, the Defendant sought detailed particulars of the alleged implementation of a general policy of appropriating revenue shares and syndicated partners, identifying (a) the final few invoicing periods referenced; (b) the syndicated partners (other than the Plaintiff) said to have suffered such loss and (c) the extent of such loss. It was reasoned that these documents were relevant to allegations of bad faith, unjust enrichment, alleged revenue-retention practices and the basis upon which the Plaintiff contends that the liquidated damages provision is unenforceable.

126. In reply, the Plaintiff effectively declined to provide those particulars in the form sought. The Plaintiff stated that it was "*perfectly clear*" what case the Defendant had to meet, that the precise information sought was more particularly within the Defendant's own knowledge and the relevant matters would be "*evidenced and computed through discovery shortly*." It was stated that the Plaintiff was not making a particular issue of the exact identity of every other affected syndicated partner, the precise deprivation of revenue suffered by each partner, or the exact invoicing periods involved, which might vary from partner to partner. The Plaintiff maintained that the

Defendant itself "*well knows who its other partners were and which ones it withheld actually-generated revenue shares from.*"

- 127.** Accordingly, the substance of the Plaintiff's response was that it maintained the allegation of a broader practice of withholding revenue shares from partners but contended that the detailed information sought was either unnecessary to plead its case or was already within the Defendant's own knowledge and would emerge through discovery.
- 128.** The plea at paragraph 24 of its Statement of Claim does not give rise to a free-standing claim. The allegation that the Defendant adopted a "*wrongful and unlawful*" policy is a legal conclusion rather than an independent cause of action unless connected to an identified legal wrong. The central contractual question remains whether the Defendant was entitled under the Agreement to disallow or retain the Plaintiff's revenue share. The Plaintiff would still have to establish the contractual entitlement to the unpaid revenue, the contractual or other duty allegedly breached, the absence of a valid contractual basis for withholding payment, the elements of any restitutionary claim and loss or other appropriate relief. Nonetheless, the plea advanced at paragraph 24 of the Statement of Claim is relevant to pleas concerning improper purpose, arbitrariness and bad faith (noting that paragraphs 20 and 21 of the Statement of Claim plead duties, or alternatively contractual terms, requiring the Defendant to exercise its powers and discretions reasonably, fairly, in good faith and for a proper purpose).
- 129.** The Defendant's pleaded justification for withholding payments is that the Plaintiff supplied invalid, fraudulent or guideline-non-compliant traffic and was therefore not entitled to payment. Paragraph 24 proposes a different explanation namely that, as the Defendant was withdrawing from Microsoft syndicated search partnerships generally, it adopted a policy of retaining revenue shares otherwise payable to its partners. If established, that allegation could support the inference that the withholding of the Plaintiff's revenue share was not genuinely based on defects particular to the Plaintiff's traffic but formed part of a broader commercial decision affecting syndicated partners and was motivated by the impending cessation of that line of business. Were this so, it might be found that withholding revenue share occurred otherwise than in exercise of contractual judgment undertaken for the purpose for which the relevant powers were

conferred, thereby supporting the pleas advanced by the Plaintiff concerning improper purpose, arbitrariness and bad faith which are central to the case made by the Plaintiff.

130. It seems to me that the Defendant is correct in identifying that the plea advanced at paragraph 24 lacks particularity. It does not identify the syndicated partners allegedly affected or the invoicing periods involved or the amounts appropriated. Unlike the position regarding other matters covered in requests for particulars, the allegation was not canvassed on affidavit in the context of the summary application. Accordingly, the Defendant does not have the benefit of the Plaintiff's affidavit evidence on this issue.

131. On the other hand, the information sought in the request for particulars relates to third party dealings with which the Plaintiff may not be intimately acquainted and may be dependent on litigation measures such as discovery or interrogatories to establish the precise facts. Undoubtedly, the Plaintiff's stance in response to the request for particulars whereby it points to the necessity for discovery creates a circularity risk as the Plaintiff relies on the allegation to obtain discovery while contending that discovery is needed to particularise the allegation. There is a distinction, however, between a properly pleaded allegation resting on some identified factual foundation and a speculative allegation used to justify a broad investigation of the Defendant's dealings with third parties.

132. The question is whether the Plaintiff's plea has a sufficient existing factual foundation to justify discovery capable of permitting its further particularisation, or whether permitting discovery would amount to allowing a speculative allegation to become the foundation for an investigation intended to discover whether that allegation can be made good.

133. It seems to me that the email of the 8th of December 2023 referenced by the Plaintiff supplies at least some factual foundation for the plea, even if its meaning is disputed. A statement that the Defendant was "*not then submitting anything*" to Microsoft may refer to the Plaintiff's traffic alone rather than to the syndicated programme generally such that the scope and context of that email could be important.

134. I agree that paragraph 24 is insufficiently particularised but I have concluded that it is not wholly speculative and some necessary information may only emerge from discovery, therefore further particulars should follow discovery.

135. In the circumstances, I am satisfied that in this case the plea at paragraph 24 should not be treated as entirely speculative but rather as one which is inadequately particularised. As it has been intimated, however, that discovery is required to enable the Plaintiff to properly particularise its plea in response to the Defendant's request for particulars, I will direct a further reply to request for particular no. 10 of the Defendant's Notice for Particulars dated 27th of May 2025 within ten weeks (or such other period as the parties may agree) of the making of discovery by the Defendant herein.

Application to Strike Out Paragraph 24 of the Statement of Claim

136. In the alternative, the Defendant further seeks to strike out paragraph 24 of the Statement of Claim as disclosing no cause of action. It seems to me that the purpose of the plea at paragraph 24 is not to advance an independent cause of action but rather to elaborate on the claim made by the Plaintiff that under the Agreement and as a matter of contract, the Defendant was required to exercise its powers and discretions reasonably, fairly, in good faith and for a proper purpose.

137. The jurisdiction to strike out a pleading for disclosing no cause of action is an exceptional one and is exercised sparingly because of the constitutional right of access to the courts. A court will not strike out merely because the claim appears weak, unlikely to succeed or difficult to prove. On an application of this kind, I do not determine disputed facts. Indeed, in principle, pleaded facts are generally assumed to be true for the purpose of a strike out application subject to being founded in something more than bare assertion. The primary question is whether, accepting those facts, the law recognises a cause of action.

138. While the plea advanced at paragraph 24 undoubtedly impacts on the scope of these proceedings, it seems to me that it is clearly connected with an identifiable cause of action under contract which it is common case is central to these proceedings. It is not a standalone cause of action but is comprised of a factual allegation relevant to the pleaded contractual duties concerning discretion/good faith/proper purpose. Therefore, in my view, the fact that paragraph 24 does not independently disclose a cause of action does not mean it should be struck out and its evidential foundation can be reassessed after discovery/particulars.

139. For this reason, I have not been persuaded that it would be proper for me to strike out on this interlocutory application and in advance of the completion of the discovery process, particularly having regard to the resulting interference with the Plaintiff's right of access to the courts and to an effective remedy. I am mindful too that if the Plaintiff is unable to establish an evidential basis for this claim and does not prevail at hearing in the contentions advanced, a likely consequence of pursuing this claim will be an increased adverse exposure in respect of legal costs.

140. Accordingly, in due course any unnecessary or unreasonable maintenance of an expanded claim can be remediated, at least to some extent, through orders the court may make as to costs. I thus refuse the application to strike out paragraph 24 of the Statement of Claim. This is an application which could potentially be renewed following the furnishing of particulars post the conclusion of the discovery process or at the hearing of this action.

THE DISCOVERY APPLICATIONS

Discovery sought by the Plaintiff

141. By letter dated 29th of July 2025, the Plaintiff sought discovery of ten categories of documents including:

- i. communications between the Defendant and Microsoft;
- ii. agreements and arrangements with Microsoft;
- iii. traffic quality investigations;
- iv. chargeback or clawback materials;
- v. revenue data relevant to the Plaintiff;
- vi. documents relating to withholding of payments;
- vii. termination-related communications;
- viii. documents relating to liquidated damages;
- ix. traffic quality analyses; and

- x. documents concerning treatment of other publishers.

142. The Plaintiff submits that these categories arise directly from the Defence and Counterclaim and are necessary for the fair disposal of the proceedings. The Defendant has engaged with the request for discovery and has agreed to make discovery on certain terms in respect of some categories while refusing other categories. By letter dated the 16th of September 2025, the Defendant’s solicitors replied generally as follows:

“We note that one of the more widely cast categories of discovery relates to paragraph 24 of the Statement of Claim. Particulars were sought in relation to this plea, which is extremely vague, despite the gravity of the complaint apparently made. A request for particulars of that claim was met with a reply which was entirely unsatisfactory and in respect of which we intend to issue a motion to compel replies.

We are therefore responding on the basis that, as the Plaintiff has made no sensible plea of fact and refused to elaborate on the very generalised plea, that any part of the request for discovery based on what is, in effect, not pleaded, will not form any part of the responding discovery which we offer.”

143. The letter proceeded to address each category in turn and I will now adopt this sequential approach also.

144. In considering each disputed category, I approach the discovery issue by asking whether the documents sought are relevant to an issue arising on the pleadings, whether discovery of them is necessary for the fair disposal of that issue or for saving costs and whether the category is proportionate having regard to the burden involved. In my view, relevance does not, without more, establish necessity, and an otherwise relevant category may require narrowing to satisfy the requirements of proportionality.

Category 1

145. Under Category 1 of the Plaintiff's Request for Voluntary Discovery dated the 29th of July 2025, the Plaintiff sought:

“All documents relating to communications between the Defendant and Microsoft (including Microsoft's affiliates, subsidiaries and group entities, whether Bing or otherwise) concerning the syndicated partnership programme of which the Plaintiff-Defendant relationship was an example, including:

- a. all documents mentioning or relating to the Plaintiff;*
- b. all documents mentioning or relating to the Plaintiff's traffic, including the traffic the subject of the November and December 2023 invoices, the sums generated thereby, and sums paid by Microsoft in respect thereof;*
- c. all documents mentioning or relating to the Defendant's standing or relationship with Microsoft;*
- d. all documents mentioning or relating to clawbacks and/or chargebacks, including chargeback reports;*
- e. all documents mentioning or relating to the assessment of invalid or fraudulent traffic in syndicated partner traffic, including the Plaintiff's traffic;*
- f. all documents mentioning or relating to click conversion rates on syndicated partner traffic, including the Plaintiff's traffic; and*
- g. all documents mentioning or relating to the Defendant's gross revenue from Microsoft in respect of the syndicated partnership programme during the period 24 July 2023 to 23 July 2024.”*

146. The Plaintiff's solicitor explained that discovery was required because Microsoft was central to the contractual relationship. The proceedings concern a scheme whereby traffic was directed to Microsoft's search engine and advertising revenue generated and remitted through that arrangement. Microsoft therefore had ongoing relevance to the relationship between the parties. The Plaintiff reasoned that any discussions between

Microsoft and the Defendant about the Plaintiff were inherently relevant, because the Agreement represented the connection between the Plaintiff, Defendant and Microsoft.

- 147.** It was pointed out too that the Defendant's own pleadings relied heavily on Microsoft-authored guidelines and alleged that the Plaintiff was disentitled to payment because of non-compliance with those guidelines (referencing paragraphs 2 and 4 of the Defence). It was further noted that the Defendant's counterclaim was based upon alleged actual or potential damage to its standing and relationship with Microsoft and claims for loss and damage arising therefrom. Communications with Microsoft were therefore directly relevant to those issues.
- 148.** In addition, reliance was placed on the fact that the Defendant pleaded matters concerning fraudulent or invalid traffic, aggregate traffic quality standards, and alleged Microsoft requirements in relation to those matters. The Plaintiff contended that communications with Microsoft concerning those topics were clearly relevant.
- 149.** The Plaintiff relied on paragraph 24 of the Statement of Claim, where it alleged: a general cessation of syndicated partnerships around the relevant period; and a general policy by the Defendant of appropriating revenue shares from syndicated partners. It was pointed out that the Defendant had denied both the alleged policy and the facts said to support it. The Plaintiff contended that the requested Microsoft communications were relevant and necessary to resolve those disputed issues.
- 150.** Finally, it was argued that the category was proportionate and readily searchable, likely involving communications between a limited number of identified Defendant and Microsoft email accounts, and therefore should not impose an excessive burden.
- 151.** As apparent from the foregoing, the essence of the Plaintiff's justification for requiring Category 1 discovery was that Microsoft was at the centre of the parties' business relationship and that the Defendant's own pleaded case concerning invalid traffic, payment entitlement, damage to its relationship with Microsoft, and the alleged cessation of syndicated partnerships made Defendant-Microsoft communications directly relevant and necessary for the fair determination of the proceedings.
- 152.** As made clear in its letter dated the 16th of September 2025, the Defendant objected to Category 1 on the basis that it was drafted in terms that were impermissibly broad, vague and lacking in relevance to the issues actually arising in the proceedings. It

contended that the category was not confined to documentation bearing on the Plaintiff's claim and would require extensive and disproportionate searches. The Defendant argued that the Plaintiff's Statement of Claim contains only a limited reference to Microsoft and no reference to Bing or other Microsoft-related entities. Accordingly, the request's extension to all Microsoft affiliates, subsidiaries and group entities, and its description of the Plaintiff's relationship as merely "*one example*" of a syndicated partnership, demonstrated that the request extended beyond the matters in dispute and sought material unrelated to the Plaintiff's own contractual relationship.

153. In relation to the individual sub-categories, the Defendant contended that:

Sub-category (a) ("documents mentioning or relating to the Plaintiff") was objectionable because a mere reference to the Plaintiff did not make a document relevant to any issue in the proceedings.

Sub-category (b) (the Plaintiff's traffic) was unclear and insufficiently precise.

Sub-category (c) (documents concerning the Defendant's standing or relationship with Microsoft) was not limited by time, context or connection to the Plaintiff's syndicated partnership.

Sub-category (d) (clawbacks and chargebacks) was drafted far too broadly and should, if relevant at all, be confined to whether any chargeback event or report existed.

Sub-category (e) (assessment of invalid or fraudulent traffic) failed to explain why information concerning other syndicated partners was relevant. The Defendant accepted that information relating to the Plaintiff's traffic and the applicable criteria might be relevant, but disputed the relevance of material concerning other partners.

Sub-category (f) (click conversion rates and related matters) suffered from the same defect in not being confined to the Plaintiff's partnership and would capture irrelevant documentation.

Sub-category (g) (gross revenue from Microsoft from 24 July 2023 to 23 July 2024) used a date range for which no justification was provided. The Defendant maintained that any relevant period should be confined to the duration of the Plaintiff's relationship with the Defendant, namely 24 July

2023 to 11 January 2024, and only insofar as it related to the syndicated partnership involving the Plaintiff.

154. More generally, the Defendant asserted that the Plaintiff's reasons for discovery proceeded on the incorrect premise that any document mentioning the Plaintiff was necessarily relevant. It also criticised the Plaintiff's reliance on paragraph 24 of the Statement of Claim, arguing that the paragraph lacked specificity, that the Plaintiff had refused to particularise a serious allegation, and that the Defendant's general denial had been necessitated by the vagueness of the pleading.

155. Finally, the Defendant maintained that the issues raised by paragraph 24 could not properly be described as being "*in full dispute*" because the Plaintiff had failed to articulate a sufficiently clear factual case. Given the breadth of the category, compliance would require substantial and disproportionate searches. The Defendant therefore proposed that the request be reformulated so as to make it both intelligible and confined to matters genuinely relevant to the litigation.

156. The Defendant proposed the following reformulation:

“All communications between the Defendant and Microsoft in relation to the syndicated partnership of which the Plaintiff was part, including:

- a) Documents referencing the Plaintiff's traffic, volume and quality, for the period 24 July 2023 to 11 January 2024 ("the Period")*
- b) Documents recording any quality issues in relation to the traffic submitted by the Defendant to Microsoft during the Period;*
- c) Documents recording any refund or chargeback sought by Microsoft from the Defendant and the response thereto for the Period;*
- d) Documents recording the assessment of invalid or fraudulent traffic in the syndicated partnership of which the Plaintiff was part, including that relating to the Plaintiff's traffic;*
- e) Documents recording the click conversion rate on the Plaintiff's traffic and on syndicated partner traffic for the Period;*

f) Documents recording the gross revenue received by the Defendant from Microsoft in respect of the syndicated partnership programme of which the Plaintiff was part for the Period.”

157. Notwithstanding the reformulated proposal of the Defendant, the Plaintiff maintains its request for discovery as it extends more broadly to capture internal documents and correspondence with other parties, albeit it was indicated during the hearing before me that Category 1(a) as originally sought was no longer being pursued whereas other categories were acceptable provided the temporal time limit proposed by the Defendant was varied.

158. It seems to me that the extent of the discovery pursued on behalf of the Plaintiff in relation to communication with regard to other syndicated partnerships is excessive. Communication in respect of other syndicated partnerships of which the Plaintiff was not part is not relevant to the Plaintiff's claim as pleaded. The plea at paragraph 24 of the Statement of Claim, cited on behalf of the Plaintiff relates to a general policy but in the reasoning advanced it is not clear how the documentation sought is relevant to the plea that the Defendant is no longer operating any syndicated partnerships. I note, however, that while the Defendant proposes to make discovery in respect of communication between the Defendant and Microsoft, the Agreement provided for services to Microsoft affiliates also. For the avoidance of doubt, it should be clear that communication from Microsoft or its affiliates in respect of search distribution services performed by the Plaintiff at the material time are captured within this category of discovery.

159. I will direct discovery in respect of Category 1 in the terms proposed in the Defendant's response dated the 16th of September, 2025 extended to capture communications in respect of syndicated partnerships with the Plaintiff in respect of services to Microsoft or its affiliates under the search distribution agreement.

Category 2

160. In Category 2 of the Plaintiff's request for voluntary discovery dated the 29th of July 2025, the Plaintiff sought:

“All documents relating to Microsoft (including its affiliates, subsidiaries and group entities) in relation to the syndicated partnerships of which the Plaintiff-Defendant relationship was one example, including documents mentioning, referring to, or otherwise relating to the Defendant's pleaded arrangement with Microsoft (including any contractual relationship between them and the contract or agreement itself, the Defendant's standing or relationship with Microsoft and the Defendant's gross revenue from Microsoft in respect of the syndicated partnership programme during the period 24 July 2023 to 23 July 2024.”

161. The Plaintiff maintained that these documents were relevant because the Defendant's Defence and Counterclaim repeatedly relied upon its relationship with Microsoft and an asserted separate arrangement with Microsoft, the Counterclaim alleged actual or potential loss and damage to the Defendant's standing and relationship with Microsoft, the Defendant pleaded that Microsoft communicated the applicable traffic quality standards and requirements, the Defendant's alleged "*separate arrangement*" with Microsoft was expressly pleaded and relied upon, yet had not been disclosed and the Plaintiff contended that the terms of that arrangement were necessary to assess the Defendant's assertions concerning entitlement to withhold revenue, invalid traffic, loss, damages and the propriety of its conduct.

162. In its replying correspondence, the Defendant contended that category 2 was a duplication of a number of the aspects referenced in Category 1 but conceded that the details of the contractual arrangements between the Defendant and Microsoft had some relevance. Accordingly, it was confirmed that the Defendant was prepared to furnish all documents recording the contractual arrangements between the Defendant and Microsoft in force for the period 24th of July 2023 to 11th of January 2024.

163. The Plaintiff confirmed during the hearing before me that discovery under this category was no longer contested and the Plaintiff was satisfied to accept the Defendant's reformulation. Accordingly, I will make an order for discovery in terms of the proposal at Category 2 contained in the Defendant's letter dated the 16th of September 2025.

Category 3

- 164.** In Category 3 of the Plaintiff's request for voluntary discovery dated the 29th of July 2025, the Plaintiff sought all documents relating to (whether constituting, evidencing, referring to, or relating in any other way to) the traffic the subject of the November and December 2023 invoices and/or the sums generated thereby and/or the sums paid over by Microsoft in respect thereof, together with any consideration given by the Defendant to returning those sums to Microsoft.
- 165.** The Plaintiff's stated rationale was that the Defendant's Counterclaim was based upon alleged concerns regarding its standing and relationship with Microsoft and alleged loss or damage arising from the Plaintiff's traffic. Furthermore, the Plaintiff had pleaded unjust enrichment, contending that the Defendant retained monies that had been paid over in respect of traffic generated by the Plaintiff. In addition, the November and December 2023 traffic was the very traffic relied upon by the Defendant to justify withholding payment, terminating or suspending the relationship and asserting a claim for liquidated damages.
- 166.** The Defendant responded to this request to say that it appeared to be a duplicate of what was originally requested under Category 1(b) which it was said was addressed by the response to Category 1.
- 167.** During the hearing before me it was indicated that discovery was not being pressed in respect of Category 3 and I am satisfied that to the extent relevant and necessary, discovery in terms of Category 1 suffices for the Plaintiff's purposes. I will not direct discovery in respect of Category 3.

Category 4

- 168.** Under Category 4 of its request for voluntary discovery dated the 29th of July, 2025, the Plaintiff sought all documents relating to (whether constituting, evidencing, referring to, or relating in any other way to) fraudulent or invalid traffic in the syndicated partner programme, including but not limited to its prevalence, tolerance and sanctions to be taken against it and including but not limited to full traffic logs, server data and the methodology used to assess invalid traffic.

- 169.** In setting out its reasons for seeking this category of discovery, the Plaintiff referred to paragraph 24 of the Counterclaim where the Defendant had pleaded that it had communicated to the Plaintiff a requirement to maintain a sub-20% non-billable rate so that the traffic submitted by syndicated partners would meet the standard required by Microsoft. The Plaintiff noted that, in affidavit evidence already given in the proceedings, the Defendant had asserted that it was required to maintain and did maintain its own independent review of traffic quality, regardless of Microsoft's ultimate decision whether to pay for that traffic. The Plaintiff said it was joining issue with that contention. The Plaintiff further observed that the Defendant pleaded in the Counterclaim that it had assessed the Plaintiff's traffic quality, determined that the Plaintiff was performing below an acceptable threshold and communicated those conclusions to the Plaintiff.
- 170.** Accordingly, the Plaintiff contended that documents concerning the prevalence of invalid or fraudulent traffic, the Defendant's tolerance thresholds, the sanctions imposed for such traffic, traffic logs and server records and the methodology used by the Defendant to identify and assess invalid traffic, were directly relevant to the central dispute as to whether the Defendant was justified in characterising the Plaintiff's traffic as non-compliant and in withholding payment and pursuing its counterclaim. In summary, therefore, Category 4 was directed at obtaining the underlying data, criteria and methodology by which the Defendant assessed traffic quality and identified allegedly invalid or fraudulent traffic across the syndicated partner programme.
- 171.** In its reply, the Defendant contended that the request in its terms overlapped with Category 1(e) and 1 (f) and was therefore not necessary. During the hearing before me, the Plaintiff argued that the wording at Category 4 was broader than the wording at Categories 1(e) and 1(f).
- 172.** I agree both that there is overlap and that the wording of Category 4 is broader. Unlike Category 1, Category 4 is not confined to communications with Microsoft. It seeks the Defendant's own operational records and technical data. Accordingly, while Category 1 is directed to communication with Microsoft, Category 4 is directed to documentation relied upon by the Defendant internally. While the material discoverable in both categories may duplicate each other, the request is not directed to precisely the same material.

- 173.** The central issue in the proceedings is whether the Defendant was entitled to withhold payment of the November and December 2023 invoices, classify the Plaintiff's traffic as invalid or fraudulent and pursue contractual liquidated damages. Those issues necessarily place in dispute the criteria used to determine invalid traffic, the standards allegedly applied by Microsoft and the Defendant, how those standards were measured and whether the Plaintiff was treated fairly and consistently.
- 174.** Accordingly, discovery of the methodology used to assess invalid traffic, documents identifying applicable performance thresholds, communications concerning the Plaintiff's traffic quality and documents showing how the Defendant assessed the Plaintiff's traffic would appear to me to be directly relevant and likely necessary for a fair disposal of the issues. The Plaintiff also pleads arbitrariness, bad faith, unreasonable exercise of contractual discretion and unequal treatment. To test those allegations, some comparator evidence concerning how invalid traffic was treated within the programme may have forensic relevance.
- 175.** Nonetheless, there is a difficulty with the breadth of the category. The request is not confined to the Plaintiff, the relevant period or the traffic underlying the November and December 2023 invoices. Instead, it seeks documents concerning fraudulent or invalid traffic in the entire syndicated partner programme, including prevalence, tolerances and sanctions generally.
- 176.** It seems to me that a more proportionate formulation of this Category would encompass documents describing the methodology used by the Defendant and/or Microsoft to identify invalid traffic, the documents identifying applicable traffic-quality standards during July 2023 to January 2024, documents relating to assessments of the Plaintiff's traffic, documents showing the Plaintiff's PTQ scores, non-billable rates and related metrics, documents evidencing decisions to filter, reject or withhold payment for the Plaintiff's traffic and a limited sample of anonymised comparator material sufficient to show whether the Plaintiff was treated differently from other syndicated partners. One way this could be achieved is by discovery of the anonymised PTQ scores of all other syndicated partners and any related, anonymised decision to withhold payment in the last quarter of 2023, together with redacted correspondence communicating that decision.

177. I will therefore order Category 4 discovery, but not in the terms sought. The category will be confined to documents describing the methodology used by the Defendant and/or Microsoft to identify invalid traffic, the documents identifying applicable traffic-quality standards during July 2023 to January 2024, documents relating to assessments of the Plaintiff's traffic, documents showing the Plaintiff's PTQ scores, non-billable rates and related metrics, documents evidencing decisions to filter, reject or withhold payment for the Plaintiff's traffic and a limited sample of anonymised comparator material sufficient to show whether the Plaintiff was treated differently from other syndicated partners. Comparator material will be limited to anonymised PTQS scores and associated decisions concerning withholding of payment during the final quarter of 2023, if any. I will hear the parties as to the precise formulation of the order if agreement cannot be reached.

Category 5

178. It was confirmed during the hearing before me that Category 5 discovery is no longer in contention and the Plaintiff is satisfied to accept the Defendant's proposed reformulation of this category. As reformulated, an order in respect of Category 5 will require the Defendant to make discovery of all documents recording or evidencing the use of unapproved or unauthorised sources or any breach of the guidelines issued from time to time to syndicated partners in the syndicate of which the Plaintiff was a member, to include any steps taken by the Defendant to prevent the use of unapproved or unauthorised sources by the members of the syndicated partner programme of which the Plaintiff was a member.

Category 6

179. Under Category 6 of the Plaintiff's request for voluntary discovery dated the 29th of July 2025, the Plaintiff sought all documents relating to (whether constituting, evidencing, referring to, or relating in any other way to) the performance of the Defendant itself, its software and/or any other product, in relation to overall and individual metrics in the syndicated partner programme with Microsoft.

180. In its replying correspondence, the Defendant proposed an alternative formulation which it was confirmed during the hearing before me is now acceptable to both parties. Accordingly, there will be an agreed order that the Defendant will make discovery of any documents relating to the performance of the Defendant, its software or any traffic submitted to Microsoft for the period 24th of July 2023 to 11th of January 2024 insofar as same relates to the syndicated partner programme of which the Plaintiff was a part.

Category 7

181. Under Category 7 of the Plaintiff's request for voluntary discovery dated the 29th of July 2025, the Plaintiff sought all documents relating to (whether constituting, evidencing, referring to, or relating in any other way to) the deliberations and decisions relating to the Plaintiff, including but not limited to how to handle the Plaintiff's payments, the November and/or December 2023 payments in particular, what percentage of those payments should be withheld, whether and when the Plaintiff should be terminated, whether and when the Plaintiff should be suspended, whether, how and when the Plaintiff's traffic should be filtered and whether, how and when the Plaintiff should be notified of any of those matters.

182. In justifying this request for voluntary discovery, the Plaintiff advanced two principal grounds for seeking this discovery. Firstly, it contended that discovery was necessary to understand the basis upon which monies were withheld (pointing to paragraph 20(d) of the Statement of Claim, where it pleaded that there was no contractual basis for the Defendant retaining a particular proportion of the Plaintiff's revenue share after Microsoft had paid the monies to the Defendant). The Plaintiff contended that, despite denying wrongdoing, the Defendant had remained opaque as to why monies were withheld, how the amount withheld was calculated, what process led to the decision to withhold payments and whether and how any decision to terminate or suspend the Plaintiff had been taken.

183. Secondly it was contended that the discovery sought was necessary to test the Plaintiff's case on good faith, fairness and reasonable discretion. The Plaintiff relied upon paragraphs 20 and 21 of the Statement of Claim, where it pleaded that the Defendant was under duties to act reasonably and fairly, to act in good faith, not to act arbitrarily or capriciously, not to act for an ulterior purpose and to exercise any contractual discretion reasonably.

- 184.** The Plaintiff argued that the Defendant's internal deliberations and decision-making process regarding payments, withholding percentages, suspension, termination, and filtering of traffic would directly bear upon whether the Defendant had in fact exercised its contractual powers and discretions fairly, rationally and in good faith, or instead acted arbitrarily, capriciously, or for an improper purpose.
- 185.** In summary, therefore, Category 7 was directed not at traffic data or Microsoft communications, but at the Defendant's internal decision-making process with the purpose of establishing the Plaintiff's allegations that the Defendant acted unreasonably, in bad faith, arbitrarily or for an improper purpose when dealing with the Plaintiff and its revenue share.
- 186.** In its response to the request for this category of discovery, the Defendant contended that the basis for seeking discovery was not appropriate to a contract claim. It repeated its position that the Defendant is either entitled to terminate and withhold money under the terms of the agreement, or it is not, and matters in relation to reasonable discretion and such like are merely a confusion generated by the Plaintiff which has no connection with the contractual rights. Despite this, the Defendant indicated that it was prepared to make discovery of the documents recording or evidencing the decision of the Plaintiff to terminate or cease dealing with the Plaintiff and to address the amounts to be paid or withheld from the Plaintiff consequently.
- 187.** The Plaintiff was not satisfied with this response, principally because it does not capture documentation in relation to deliberations as to "*when to terminate.*" While I am largely satisfied that the request at Category 7 was proportionate insofar as it is not directed at the Defendant's entire business, other partners or broad Microsoft-related issues but instead seeks internal documents concerning the specific decisions that lie at the centre of the litigation, it seems to me that the request could be more concisely stated.
- 188.** Although earlier deliberations concerning the timing of termination may have some relevance, I am not satisfied that discovery of every internal deliberation on that subject is necessary or proportionate. The documents recording or evidencing the decision to terminate, together with the other discovery ordered, should provide sufficient material to permit the Plaintiff fairly to advance its pleaded case.

189. I prefer the simpler reformulated terms proposed by the Defendant which I consider meet the exigencies of the case. I propose to make an order for discovery in favour of the Plaintiff in respect of Category 7 in the reformulated terms communicated by the Defendant in the letter of the 16th of September 2025.

Category 8

190. Whereas Category 7 sought documentation relation to the decision-making process, Category 8 seeks documents relating to whether, how and when liquidated damages would be sought from the Plaintiff, how the Defendant would respond to the Plaintiff's request for information and the decision-making surrounding the threatened invocation of the liquidated damages clause.

191. The Plaintiff's stated rationale for seeking this category of discovery was explained on the basis that the liquidated damages form the entire basis of the Defendant's Counterclaim. Reliance was placed on the fact that despite having already withheld payments, filtered traffic and identified concerns with the Plaintiff's conduct, the Defendant did not initially seek liquidated damages and only threatened reliance on the liquidated damages clause after the Plaintiff's solicitors requested information concerning the withholding of monies and sought Charge Back Reports. This has led to the Plaintiff pleading that the liquidated damages clause is an unenforceable penalty, the attempted reliance upon it was unlawfully penal and its invocation was retaliatory. As these allegations were denied by the Defendant, the Plaintiff contends that the documents are relevant to a live issue between the parties.

192. The Defendant does not accept this maintaining instead that this Category of discovery is "*simply immaterial*" (see letter from Byrne Wallace Shields on behalf of the Defendant dated the 16th of September, 2025) because:

"the entitlement to liquidated damages is determined by the contract and the Defendant is either entitled to it or it is not. The dispute in relation to its character as a penalty is a matter to be dealt with by reference to the nature of the contract terms and will not be assisted either positively or negatively by the timing of the decision to invoke the contract terms."

193. A view is certainly open that internal discussions about whether, how, or when to invoke the clause are not necessary for the fair disposal of the issues in these proceedings because the legality of reliance upon the clause is determined objectively by the contract and facts, not by internal discussions concerning litigation tactics. I have considered therefore whether the request constitutes a “*fishing expedition*” in respect of an allegation of retaliation. It is noted that the Plaintiff already has the letter of the 7th of February 2024 and the Defendant's response of the 21st of February 2024 in which the threat to seek 2 x liquidated damages is set out. Accordingly, it seems to me that the actual communications relied upon to make the claim are already available and the Plaintiff does not require discovery of every internal discussion leading up to them in order to advance its case.

194. On the other hand, the Plaintiff has expressly pleaded that the threatened invocation of the liquidated damages clause was retaliatory, penal, in bad faith and for an improper purpose. Those allegations feature repeatedly in the Statement of Claim and are denied in the Defence. To the extent the Plaintiff seeks non-privileged contemporaneous documents revealing the reasons for the threat, then at least part of the category sought is directly relevant to a live issue. It is noted, however, that there is no temporal restriction on the request. Furthermore, the request is directed to the formulation of the claim for liquidated damages rather than any specific allegation relied upon as justifying the request.

195. I have concluded that Category 8 is relevant to issues in dispute but that it is too broadly drafted. It is also apparent that issues of privilege may arise. I do not accept that the Defendant's subjective reasons for invoking the clause are relevant merely because the Plaintiff contends that the clause constitutes a penalty. That issue will fall to be determined principally by reference to the Agreement and the applicable law. The position is different, however, in relation to the Plaintiff's separate pleaded allegation that invocation of the clause was retaliatory, in bad faith and for an improper purpose. Contemporaneous non-privileged documents capable of showing why the Defendant invoked the clause are relevant to that issue.

196. In respect of Category 8 I will direct discovery of all documents recording or evidencing discussions, deliberations or decisions concerning whether liquidated

damages should be sought from the Plaintiff following receipt of the Plaintiff's solicitors' letter of the 7th of February 2024 and before commencement of these proceedings. Thus reformulated, the category is framed in terms which go directly to the alleged retaliatory motive. Any claim of privilege properly arising and invoked can be addressed on affidavit sworn to comply with this order. The narrowed Category 8 seeks to strike a balance between relevance and proportionality.

Category 9

197. In Category 9 of the Plaintiff's request for voluntary discovery dated the 29th of July 2025, the Plaintiff sought all documents relating to (whether constituting, evidencing, referring to, or relating in any other way to) communications had between the Defendant and the Plaintiff, not limited to the communications themselves.

198. It appears from its terms that this category was deliberately broader than merely seeking copies of correspondence. The Plaintiff justified the request by reference to the Defendant's pleadings, in particular paragraph 26 of the Counterclaim, where the Defendant pleaded that it had made "*efforts ... to engage with the Plaintiff in improving traffic quality*" and the Defendant's broader case, which portrayed it as having communicated appropriate information, standards and warnings to the Plaintiff concerning traffic quality and compliance requirements.

199. The Plaintiff also relied upon its own pleadings, namely that the Defendant unreasonably withheld information concerning online traffic, advertising revenue, the third-party search provider and performance metrics, misled the Plaintiff regarding the future of the relationship and the treatment of the Plaintiff's traffic and allowed the Plaintiff to continue investing time, effort and money in the relationship while allegedly already intending to halt the Plaintiff's traffic and withhold payments.

200. The stated purpose of this category of discovery was to determine what information was actually communicated to the Plaintiff, whether the Defendant genuinely attempted to assist the Plaintiff in improving traffic quality, whether warnings or concerns were accurately and fully conveyed, whether the Defendant withheld material information and whether the Defendant had already decided to stop accepting the Plaintiff's traffic while continuing to permit the Plaintiff to operate in reliance on the relationship.

- 201.** In its response, the Defendant stated that the request appeared to duplicate without limitation previous requests without “*any effort to make it relevant*”. It was stated that the request was based on a reason which does not appear in the Statement of Claim, namely an argument that the Defendant caused the Plaintiff to continue reliance on the contract and relationship and to expend time, money and effort when it was already determined to halt the Plaintiff's traffic and confiscate monies. It was contended that the Plaintiff had not in fact made any assertion that it expended money in reliance on the contract and the lack of clarity of the assertion in the correspondence was said to highlight the reason why it was not included as a plea in the Statement of Claim where the Plaintiff would have been required to particularise same.
- 202.** Despite objecting in these terms, it was confirmed that the Defendant is prepared to make discovery, albeit it undoubtedly overlaps with what is already requested, of documents recording or evidencing the efforts by the Defendant to engage with the Plaintiff in relation to the improving of traffic quality during the period 24th of July 2023 to the 11th of January 2024. The Plaintiff was not prepared to accept the proposed narrowing of this category.
- 203.** It seems to me that there is a difficulty with the request as originally formulated on behalf of the Plaintiff. It is so broadly drafted as to encompass virtually every internal document touching upon any communication over the life of the relationship and is not directed to the issues relied upon to justify the request.
- 204.** Having regard to the justification advanced for seeking this category of documentation, it would suffice to direct discovery of all documents evidencing or recording the Defendant's efforts to engage with the Plaintiff concerning traffic-quality issues between the 24th of July 2023 and the 11th of January 2024. This revised category removes the catch-all request for documents “*relating to*” every communication, introduces a defined time period and confines discovery to communications relevant to pleaded issues in the Defence and Counterclaim, targeting the Defendant's pleaded reliance on its alleged efforts to assist the Plaintiff with traffic-quality issues and avoids a burdensome search through documents concerning routine commercial communications having no bearing on the dispute.

205. I am satisfied that the reformulated terms of Category 9 communicated in the Defendant's response dated the 16th of September 2025 is more narrowly directed to the identified factual controversy. I am also satisfied that contemporaneous documents recording the Defendant's communications strategy, concerns regarding traffic quality and decisions as captured in the terms of the discovery directed in this and earlier categories have the potential to narrow the issues. Accordingly, I propose to direct the making of discovery in respect of Category 9 in the reformulated terms proposed by the Defendant.

Category 10

206. In Category 10 of the Plaintiff's request for voluntary discovery dated the 29th of July 2025, the Plaintiff sought all documents relating to (whether constituting, evidencing, referring to, or relating in any other way to) how and when the matter pleaded at paragraph 24 of the Counterclaim "*became apparent*", and to whom, and how and when the matter pleaded at paragraph 26 of the Counterclaim "*became clear*", and to whom.

207. This request was directed at the Defendant's pleaded assertions that under paragraph 24 of the Counterclaim, it became apparent that the traffic supplied by the Plaintiff included traffic that was non-billable or fraudulent and under paragraph 26 of the Counterclaim, it became clear that the Plaintiff had not used the approved Google Chrome extension and was supplying traffic from other unauthorised sources.

208. The Plaintiff therefore seeks documents showing how those conclusions were reached, when they were reached, who reached them, what information or material led to those conclusions, when that information first came to light and the internal process by which the Defendant moved from suspicion to determination.

209. In its reasoning, the Plaintiff explained that the assertions in paragraphs 24 and 26 of the Counterclaim formed a significant part of the factual foundation of the Defendant's Defence and Counterclaim, the Defendant relied upon those matters to justify withholding payment and pursuing liquidated damages and the Plaintiff denied those allegations. The Plaintiff maintained that the circumstances in which those matters allegedly "*became apparent*" or "*became clear*" were therefore directly relevant to the

dispute and the documents sought also bore upon the Plaintiff's claims concerning good faith, contractual discretion and unjust enrichment.

210. In its replying correspondence of the 16th of September 2025, the Defendant maintained that the request in the words identified to justify discovery referenced the issue concerning the level of traffic which was non-billable or fraudulent and was, in substance, already covered by the pre-existing categories relating to the traffic quality. It was further stated:

“For the removal of doubt, we make clear that the reference to it becoming apparent was to the Defendant as must be clear from context. We refer you however to the response given at paragraph 9 which deals with issues of quality. With respect, the issue has no connection with the arguments contained at paragraph 20 of the Statement of Claim which appear to be arguments as to the possible content of a duty while ignoring the fact that this is an entirely contractual range of obligations. The point made by the Defendant is that the Plaintiff was not entitled to be paid for non-billable or fraudulent traffic quite independently of any question in relation to liquidated damages which is not mentioned in paragraph 24 of the counterclaim”.

211. I have reflected on what, if anything, is new in Category 10, not already captured by other categories in respect of which discovery has been ordered. There is undoubtedly considerable overlap, but Category 10 nonetheless contains a distinct evidential focus. Category 10 is directed to how and when the matters pleaded at paragraphs 24 and 26 of the Counterclaim "*became apparent*" and "*became clear*", and to whom. In substance, it seeks the origin and chronology of the Defendant's knowledge from the time suspicions first arose to the time conclusions were reached, who reached those conclusions and what information prompted them. It seems to me, however, that Category 10 would inevitably capture some of the same material as captured by Category 4. Documents under this Category would also fall within the parameters of Category 7 where focus is on the decisions taken.

212. I agree with the Defendant that Category 10 is duplicative of earlier categories. It seems to me that the genesis, timing and evidential basis of the Defendant's conclusions will likely also be discernible from discovered documents in respect of the methodology, subsequent decisions or communications arising from those conclusions captured by discovery to be ordered in line with my findings set out above in respect of other categories of document. I have not been persuaded that directing separate discovery in accordance with the terms of Category 10 is warranted on grounds of distinct relevance or necessity in view of the discovery already ordered and in view of the requirements of proportionality. I will refuse discovery under Category 10.

Discovery sought by the Defendant

213. The Defendant seeks discovery in respect of six categories of document as set out in its letter of the 29th of July 2025 concerning traffic source information, analytics relating to the Plaintiff's Chrome extension, implementation and compliance records, traffic quality materials, negotiation and drafting materials concerning the liquidated damages provision and documents relevant to compliance with programme requirements. The documents sought are as follows:

Category 1

All documents relating to the source, origin and quality of the internet traffic generated by the Plaintiff, to include but not limited to:

- a. The origin, or source of any internet search traffic directed or generated by the Plaintiff;
- b. Analytics screenshots and data exports from any traffic acquisition platforms used to send traffic to the Chrome Extension or directly to Defendant's servers (i.e. Google Ads, Facebook Ad Network, Taboola, Outbrain, Pangle, etc.);
- c. The amount and quality of any internet traffic directed by or generated by the Google Chrome extension used by the Plaintiff;
- d. Screenshots and data exports of the Chrome Web Store analytics sections for

the Approved Extension - Installs & Uninstalls, Impressions, Users and Ratings, etc.;

- e. The amount and quality of any internet traffic submitted by the Plaintiff to the Defendant, other than by using the Google Chrome extension;
- f. The method and means used by the Plaintiff to generate, acquire or direct such traffic to the Defendant; and
- g. Communications to and from the Plaintiff directing the flow of traffic to the Chrome Extension or directly to the Defendant's servers.

Category 2

All documents relating to the Plaintiff's monitoring procedures, quality checks, compliance process, and the monitoring of the quality and/or performance of the traffic to ensure compliance with contract standards from time to time during the period of the contract.

Category 3

Documents recording or evidencing the negotiation of terms between the Plaintiff and the Defendant with reference to the liquidated damages provision contained at Clause 5.3(e) of the Agreement, including any negotiations undertaken with reference to provisions dealing with breaches of the contract.

Category 4

Documents recording the receipt and implementation by the Plaintiff of the Guidelines issued from time to time by or on behalf of the Defendant in connection with the quality of traffic.

Category 5

Documents recording or evidencing the assertion that there was a general cessation in submitting anything to Microsoft and a general policy of "*appropriation*" revenue share from the Defendant's syndicated partners.

Category 6

Documents recording the Plaintiff's traffic quality scores or issues in respect of the supply of similar traffic to Third Parties for the period September 2023 to January 2024.

214. The Defendant contends that these materials are necessary to establish whether the Plaintiff generated traffic in compliance with the Agreement and associated programme requirements.

215. In determining the Defendant's application, I adopt the same approach as to relevance, necessity and proportionality as I have applied to the Plaintiff's application for discovery. The starting point is the issues disclosed by the pleadings. A document may be relevant because it bears upon a pleaded factual issue, but relevance does not of itself establish that an order for discovery is necessary. In considering necessity, regard must be had to discovery otherwise agreed or ordered and to whether the same issue can fairly be determined without a separate or overlapping category. Proportionality also requires consideration of whether the category is appropriately confined by subject matter and time and whether its likely forensic value justifies the burden of making discovery.

Category 1

216. In relation to Category 1 documents, it is contended that that the documents sought went directly to one of the central factual disputes in the proceedings, namely the source, origin, quality and legitimacy of the internet traffic generated by the Plaintiff under the Search Distribution Agreement. The reasons advanced were that the proceedings arise out of the Tempest Search Distribution Agreement dated the 24th of July 2023, an agreement concerning the monetisation of internet-generated traffic. The Defendant's case is that the Plaintiff's performance under the Agreement was below standard because it generated poor-quality, substandard and non-compliant traffic. The Defendant further alleges that this defective traffic led to, or contributed to, the termination for cause of the Agreement. The Defendant maintains that because the Plaintiff disputes those allegations, the quality of the traffic is a live issue between the

parties. It is contended that the documents sought are “*essential to assess the quality of the source and the legitimacy of the traffic, which are core issues in dispute*”. It is further contended that the material sought, particularly Chrome Web Store analytics and related metrics, would permit an assessment of whether the traffic was genuine and whether it originated from the approved Google Chrome browser extension, which it is said are recognised industry indicators of legitimate traffic.

217. The Plaintiff's initial response to Category 1 was not an outright refusal to make discovery of this category but a challenge to the relevance and pleading basis of the category. In correspondence responding to the Defendant's discovery request, the Plaintiff stated that it could not properly deal with the category unless the Defendant clarified the foundation upon which it was sought. Specifically, the Plaintiff noted that the Defendant justified the category on the basis that the Plaintiff had generated substandard and non-compliant traffic which led to or contributed to the termination of the Agreement for cause. The Plaintiff then requested clarification as to when and how the Agreement was terminated for cause and identification of where that allegation was pleaded in the Defence and Counterclaim.

218. The Plaintiff's position was therefore that the relevance of the category depended upon a pleaded case that the Agreement had been terminated for cause because of the Plaintiff's traffic and it sought particulars of that alleged pleading before addressing discovery.

219. Following confirmation by the Defendant that the contract terminated on the 11th of January, 2024 and by letter dated the 12th of November 2025, the Defendant confirmed agreement to make discovery of all documents relating to the source, origin and quality of the internet traffic generated by the Plaintiff but the Plaintiff is not satisfied with the extent of this agreement and I am required to rule on the application.

220. Category 1 is directed to documents concerning the source, origin and quality of the internet traffic generated by the Plaintiff. In considering relevance, it is necessary to return to the pleaded issues. Paragraphs 4 and 9 of the Defence put in issue whether the Plaintiff supplied traffic which complied with the Agreement and Guidelines and whether the Defendant was thereby entitled to refuse payment. More specifically,

paragraphs 21 to 29 of the Counterclaim plead that the Plaintiff was authorised to send traffic through a single approved Google Chrome extension; that it failed to use that implementation; that traffic was supplied from unauthorised sources; that its traffic-quality metrics fell below applicable standards; and that the deterioration ultimately resulted in the filtering of all of the Plaintiff's traffic. Those allegations are denied in the Plaintiff's Reply and Defence to Counterclaim, including an express denial that the Plaintiff failed to use the Google Chrome extension. The source, method of generation and quality of the traffic are therefore facts directly in issue on the pleadings.

221. The documents sought are directly relevant to those issues. Records identifying the source from which traffic originated, traffic-acquisition data, Chrome Web Store analytics, records distinguishing traffic generated through the approved extension from traffic originating elsewhere and communications directing the flow of traffic are each capable of tending to establish or disprove the Defendant's pleaded contention that the Plaintiff supplied traffic otherwise than through the approved implementation. Traffic-quality data is likewise relevant to the pleaded allegation that the traffic deteriorated to the point of non-compliance. Those matters bear both upon the Defendant's defence to the claim for the unpaid invoices and upon the alleged contractual breaches relied upon in support of the Counterclaim.

222. I am also satisfied as to necessity. The Defendant cannot fairly be required to prove the source and manner of generation of traffic solely from information available to it as the recipient of that traffic where the pleaded issue includes how the Plaintiff itself generated or acquired it before transmission. The Plaintiff is the party likely to possess the primary records concerning the operation of its extension and any traffic-acquisition platforms used by it. The documents are therefore capable of providing evidence on a central issue which is not necessarily available from the Defendant's own records. Their discovery may also narrow the technical and expert evidence required at trial.

223. As to proportionality, the category as originally formulated is broad, particularly in its reference to "*all documents relating to*" the source, origin and quality of traffic. There would be no justification for requiring production of material concerning traffic

unrelated to performance of the Agreement. Following correspondence, however, the parties have agreed a reformulation requiring discovery of documents relating to the source, origin and quality of the internet traffic generated by the Plaintiff. I understand the agreed formulation to concern traffic generated or supplied for the purposes of the Agreement during the contractual relationship. So confined, the category is proportionate to the significance of the issue and sufficiently broad to encompass the identified subcategories without requiring separate orders in respect of each.

224. I am therefore satisfied that Category 1, as reformulated in the letter of the 12th of November, 2025, satisfies the requirements of relevance, necessity and proportionality and I will make an order in those terms.

Category 2

225. Having initially sought and obtained clarification in respect of this Category, by letter dated the 12th of November 2025, the Plaintiff refused to make discovery in the terms sought or at all. For the reasons advanced on behalf of the Plaintiff in this letter, I have not been persuaded of necessity for this category of discovery, particularly having regard to discovery which the Plaintiff has otherwise agreed to make.

226. Category 2 seeks all documents concerning the Plaintiff's monitoring procedures, quality checks and compliance processes, including its monitoring of traffic quality and performance during the period of the Agreement. The Defendant says these documents are relevant to whether the Plaintiff monitored its traffic, whether it was aware of irregularities and whether it took adequate steps to comply with applicable contractual standards. There is some connection between those matters and the allegations of non-compliance pleaded in the Defence and Counterclaim.

227. I am not satisfied, however, that the relevance asserted justifies discovery in the breadth sought. The pleaded controversy is principally directed to the traffic actually supplied by the Plaintiff: whether it originated from the approved Chrome extension or other unauthorised sources, whether it satisfied the applicable quality standards, and whether its characteristics were such as to constitute invalid, fraudulent or non-

compliant traffic. Paragraphs 24 to 29 of the Counterclaim identify the alleged failures by reference to traffic actually supplied, traffic-quality metrics, the alleged use of unauthorised sources and the filtering ultimately applied to that traffic. The Plaintiff has joined issue with those allegations. [https://irishcourts-my.sharepoint.com/personal/siobhanphelan_judiciary_ie/Documents/Microsoft Copilot Chat Files/Joint Booklet of Motion Papers - 13.11.2025.pdf](https://irishcourts-my.sharepoint.com/personal/siobhanphelan_judiciary_ie/Documents/Microsoft%20Copilot%20Chat%20Files/Joint%20Booklet%20of%20Motion%20Papers%20-%2013.11.2025.pdf)

- 228.** A general inquiry into all of the Plaintiff's monitoring procedures, quality checks and compliance processes is wider than those pleaded factual disputes. To the extent that documents show the actual source, quality or means of generation of the traffic, or the Plaintiff's response to particular traffic-quality concerns arising under the Agreement, such documents are already capable of falling within Category 1 or other discovery agreed or directed. What Category 2 additionally seeks is discovery of the Plaintiff's general systems and procedures independently of whether those procedures generated documents bearing upon the traffic actually in issue.
- 229.** Necessity has therefore not been demonstrated. Ordering this category in addition to Category 1 would create significant duplication and would extend discovery from documents evidencing what occurred to documents concerning the Plaintiff's general internal processes. The Defendant has not demonstrated why it requires that additional body of documentation fairly to establish the breaches actually pleaded. Nor am I satisfied that the potential incremental forensic benefit of such discovery is proportionate to the additional search and review exercise which the category, framed by reference to "*all documents*" concerning monitoring and compliance processes throughout the contractual period, would entail.
- 230.** I therefore refuse Category 2. This is not because the Plaintiff's monitoring of traffic is incapable of having any relevance, but because the Defendant has not established that discovery of the broader category sought is necessary or proportionate having regard to discovery already directed under Category 1 and the factual issues actually raised on the pleadings.

Category 3

231. Category 3 seeks documents recording or evidencing the negotiation of the liquidated damages provision and related contractual provisions dealing with breach. The Plaintiff has agreed to make discovery in the terms of this category. It is therefore unnecessary for me to determine the disputed relevance or admissibility which might otherwise arise in relation to pre-contractual negotiations. In circumstances where the category is agreed, I will make an order in the terms agreed

Category 4

232. Category 4 seeks documents recording the Plaintiff's receipt and implementation of Guidelines issued from time to time by or on behalf of the Defendant concerning traffic quality. The Defendant's pleaded case undoubtedly places compliance with the Guidelines in issue. Indeed, alleged non-compliance with the Guidelines is central to the Defence and Counterclaim and is relied upon to justify the withholding of payment and the contractual remedies asserted by the Defendant. That does not, however, mean that every document concerning the receipt or implementation of Guidelines is necessarily discoverable.

233. It is important to identify the particular factual controversy disclosed by the pleadings. There is no apparent dispute that Guidelines formed part of the contractual framework: the Guidelines applicable when the Agreement was executed were appended to it. The issue is whether the traffic subsequently supplied by the Plaintiff complied with the relevant requirements. There is no pleaded controversy, so far as I have been shown, as to whether the Plaintiff received the Guidelines appended to the Agreement which the Plaintiff executed. Discovery directed simply to proving their receipt therefore serves no necessary forensic purpose.

234. The wording "*issued from time to time*" creates an additional difficulty. The Plaintiff specifically requested that the Defendant identify the instances of subsequent issuance

to which the category was intended to refer. The material before me does not establish that further Guidelines, relevant to the pleaded breaches in these proceedings, were issued during the contractual period. In the absence of an identified subsequent Guideline or a pleaded issue as to its receipt, a general search for documents recording receipt and implementation of Guidelines "*from time to time*" would risk requiring discovery in order to ascertain whether a factual issue exists, rather than obtaining documents relevant to an issue already arising on the pleadings.

235. Nor has necessity been established in relation to the wider reference to "*implementation*". The ultimate pleaded question is whether the traffic supplied complied with the contractual requirements. The discovery to be made under Category 1 addresses the source, means of generation and quality of that traffic and thereby bears directly upon that issue. If particular documents concerning implementation of a Guideline also evidence the source or means of generation of the traffic actually supplied, they may be captured by the discovery otherwise ordered. What has not been demonstrated is a necessity for a separate category directed generally to the Plaintiff's implementation of Guidelines independently of the actual traffic in dispute.

236. Proportionality points in the same direction. Where receipt of the contractual Guidelines is not disputed, no relevant subsequent Guidelines have been identified, and discovery has otherwise been ordered concerning the Plaintiff's actual performance under the Agreement, a separate search for all documents recording receipt and implementation would impose an additional and potentially duplicative discovery exercise without sufficient demonstrated forensic benefit.

237. As there is no controversy in relation to the receipt of the applicable Guidelines which were appended to the Search Distribution Agreement executed by the parties and there is no evidence that any other Guidelines relevant to issues arising in these proceedings issued from time to time during the material period, the relevance and necessity for discovery in respect of this category of documentation have not been

established, considered together and in the context of proportionality. I refuse the order sought.

Category 5

238. The Plaintiff agreed to make discovery in respect of the documentation sought under Category 5 to evidence the assertion that there was a general cessation in submitting anything to Microsoft and a general policy of "*appropriation*" revenue share from the Defendant's syndicated partners, but on condition that it was reciprocal discovery.

239. The Defendant's stated reason for seeking this discovery was that paragraph 24 of the Statement of Claim contained a "*very serious allegation*" that had not been properly particularised and that the documents would establish the basis, if any, for that assertion.

240. In resisting an order for discovery in respect of this category of documentation, the Plaintiff's position is that this documentation is more likely to be in the custody and procurement of the Defendant. The Plaintiff for its part has separately sought discovery touching on the plea at paragraph 24 of the Statement of Claim. Given that documents recording or evidencing a general cessation in submitting anything to Microsoft and a general policy of "*appropriation*" revenue share from the Defendant's syndicated partners, if such a policy existed, should logically be in the possession of the Defendant, The Plaintiff characterised the Defendant's position as seeking documents to ascertain whether the Plaintiff had a basis for making the assertion, rather than seeking documents required for the fair disposal of the issues.

241. Category 5 seeks documents recording or evidencing the Plaintiff's assertion that there was a general cessation in the Defendant's submission of traffic to Microsoft and a general policy of appropriating revenue shares from the Defendant's syndicated partners. The relevance of this category falls to be considered by reference principally to paragraph 24 of the Statement of Claim. The Plaintiff positively pleads that the Defendant ceased operating syndicated partnerships in relation to Microsoft search of the type represented by the parties' relationship, that this occurred or commenced

around the period when monies were withheld from the Plaintiff, and that during the final invoicing periods the Defendant implemented a general policy of appropriating revenue shares from syndicated partners. Paragraphs 18 and 19 of the Defence deny that allegation and the Defendant expressly denies both the existence of such a policy and the facts said to evidence or give effect to it. The Plaintiff has maintained the allegation in its Reply. The existence or otherwise of the alleged wider policy is therefore a factual issue arising squarely on the pleadings.

242. Documents in the Plaintiff's possession, power or procurement which record or evidence the factual basis upon which it alleges the existence of such a policy are plainly capable of bearing upon that issue. The fact that the alleged policy concerns conduct of the Defendant does not mean that relevant documents must necessarily be confined to the Defendant's possession. Accordingly, the fact that the Defendant may itself possess documents concerning its own business practices does not answer the Defendant's request. The Plaintiff has positively pleaded the existence of the alleged policy. Documents in its possession, power or procurement which evidence or record the factual basis for that allegation are relevant to a live issue.

243. I am also satisfied as to necessity. The Plaintiff has maintained this allegation notwithstanding its inability to provide full particulars of the other syndicated partners affected, the relevant invoicing periods or the amounts allegedly withheld from them. I have permitted that plea to remain and have allowed the Plaintiff the opportunity to particularise it further following discovery. There is also an element of reciprocity. I have permitted discovery against the Defendant in respect of matters bearing upon the plea at paragraph 24. Where the Plaintiff itself has material recording or evidencing the assertion it has made, relevance, necessity and fairness require that such material should likewise be discovered.

244. This is not discovery designed merely to ascertain whether the Plaintiff has evidence for its case. It is discovery of documents relevant to proving or disproving a factual

allegation which is already pleaded and which remains a live issue between the parties. If the Plaintiff possesses documents which form part of the existing factual foundation for its allegation, the Defendant should have access to them in order fairly to meet the case advanced against it. The Defendant is not required to rely exclusively upon its own records to disprove an allegation where documents in the Plaintiff's possession may tend either to support or undermine the factual basis upon which that allegation is advanced.

245. Nor do I consider the category disproportionate. It is directed to an identified pleaded allegation rather than generally to the Plaintiff's dealings with third parties. The Plaintiff's own response to the request indicates that it does not possess detailed information concerning every partner, invoicing period or amount allegedly involved. That tends to suggest that the documents within its possession, power or procurement falling within the category is unlikely to be extensive. The burden of discovery is therefore likely to be modest when weighed against the significance which the Plaintiff itself attributes to the allegation in support of its wider case concerning improper purpose, arbitrariness and bad faith.

246. I am therefore satisfied that Category 5 meets the requirements of relevance, necessity and proportionality and I will direct discovery in the terms sought of documentation evidencing or recording a general cessation in submitting anything to Microsoft and a general policy of "*appropriation*" revenue share from the Defendant's syndicated partners.

Category 6

247. Category 6 seeks documents recording the Plaintiff's traffic-quality scores or issues arising from its supply of similar traffic to third parties during the period September 2023 to January 2024. The rationale advanced was that the Plaintiff had, without offering documentary proof, asserted that it was not only working with the Defendant but with other similar entities where the traffic quality scoring was not

so low, suggesting that it was the Defendant who was the relevant variable and not the performance of the data. The Defendant reasoned that if the Plaintiff is making comparisons with other entities similar to the Defendant, discovery of and access to such evidence is required to allow the Defendant to understand and meet the argument made that the Defendant or issues with Microsoft played any role.

248. I accept that such material could have some evidential relevance in the broad sense. If genuinely comparable traffic generated contemporaneously by the Plaintiff was assessed differently elsewhere, a party might seek to rely upon that fact as circumstantial evidence concerning the source of the difficulties experienced in this case. The test for discovery, however, is not satisfied merely because a document might provide material for an argument. The requested documents must be relevant to an issue arising on the pleadings and their discovery must be necessary and proportionate for its fair determination.

249. The central factual controversy disclosed by these pleadings concerns the traffic supplied by the Plaintiff to this Defendant under this Agreement. The Defence and Counterclaim allege that such traffic failed to comply with the Agreement and Guidelines, did not originate exclusively from the approved Chrome extension, included traffic from unauthorised sources, produced deficient traffic-quality metrics and ultimately became wholly non-compliant. The Plaintiff denies those allegations. The issue to be tried is therefore whether the traffic supplied under this contractual relationship possessed the characteristics alleged by the Defendant and what contractual consequences, if any, followed.

250. The Plaintiff has not, in its Reply or Defence to Counterclaim, pleaded that satisfactory traffic-quality scores obtained in its dealings with identified third parties establish that the traffic supplied to the Defendant satisfied the contractual requirements applicable here. Rather, it directly denies the Defendant's allegations concerning the quality, source and compliance of the traffic supplied under this Agreement. The comparison with other entities is therefore not probative of an issue defined by the pleadings.

251. I am not satisfied as to necessity either. Discovery has already been directed under Category 1 of the Defendant's request concerning the source, origin and quality of the traffic generated by the Plaintiff for the purposes of this relationship. That discovery addresses the primary evidence capable of establishing whether the traffic in issue was compliant. The Defendant is therefore to receive discovery directed to the very traffic upon which its Defence and Counterclaim depend. It has not been demonstrated why examination of the Plaintiff's performance under separate commercial arrangements is additionally necessary to determine the characteristics of the traffic supplied to the Defendant.

252. There are, moreover, significant difficulties of comparability. Traffic supplied to other entities may have been assessed under different contractual terms, technical criteria, metrics, time periods, filtering systems or commercial arrangements. Determining whether such traffic was truly comparable could itself generate collateral disputes and require examination of agreements and technical standards which otherwise form no part of the issues in these proceedings. Discovery which introduces such collateral inquiries requires a clear justification. I am not satisfied that one has been demonstrated here.

253. The proportionality consideration points in the same direction. The category would require the Plaintiff to search for and disclose material relating to its dealings with third parties who are strangers to these proceedings, with the potential engagement of their confidential commercial information. It could also necessitate further discovery concerning the terms and standards applicable to those third-party arrangements simply to determine whether any apparent comparison was valid. That burden and potential expansion of the proceedings are disproportionate to the limited evidential value of the proposed comparison where direct evidence concerning the traffic actually supplied under the Agreement is otherwise available through Category 1.

254. Comparisons in relation to the supply of similar traffic to Third Parties is not centrally an issue in these proceedings. While it is pleaded at paragraph 20(d) of the Statement of Claim that the Defendant was in breach of its duty to not arbitrarily or capriciously withhold some or all of the contractual sums of money, this plea is advanced with regard to the contractual relationship of the Plaintiff and the Defendant. It has not been established therefore that the discovery sought under this category is necessary to the fair disposal of any issue in the proceedings. I therefore conclude that Category 6 does not meet the requirements of necessity and proportionality and, insofar as it is advanced as a distinct category of discovery, its connection with the issues as pleaded is insufficiently direct. Accordingly, I refuse to order discovery in terms of category 6.

CONCLUSION

255. The approach I have sought to take in respect of these applications reflects the distinction between defining the issues and proving them. The Defendant is entitled to maintain its Counterclaim because it was not precluded by the order remitting the proceedings to plenary hearing and because it substantially overlaps with the factual and contractual issues already raised by the Defence. Each party is entitled by particulars to know the material factual case it must meet, but not to obtain the evidence by which that case will be proved. Discovery is correspondingly available where documents are relevant and necessary to the pleaded issues, but not in terms so broad as to permit an investigation of collateral matters or impose a disproportionate burden. The orders made above seek to preserve those distinctions while ensuring that each party has the material reasonably necessary for the fair determination of the proceedings.

256. I propose to make orders in the terms outlined above but I will list this matter for mention in respect of the form of final orders upon the expiry of 14 days from the electronic delivery of this ruling. Given the number and range of matters addressed, I will invite the parties to attempt to agree the form of my final order. I will hear the parties in respect of any consequential matters.