IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1351/5/7/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Remote Hearing)

Tuesday 12 January 2021

Before:

The Honourable Mr Justice Zacaroli
(Chairman)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

(1) CHURCHILL GOWNS LIMITED
(2) STUDENT GOWNS LIMITED

Claimants

- and -

(1) EDE & RAVENSCROFT LIMITED
(2) RADCLIFFE & TAYLOR LIMITED
(3) WM. NORTHAM & COMPANY LIMITED
(4) IRISH LEGAL AND ACADEMIC LIMITED

Defendants

A P P E A R AN C E S

Paul Skinner (instructed by TupperS Law Limited appeared on behalf of the Claimants)
Michael Armitage (instructed by Alius Law appeared on behalf of the Defendants)

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Tuesday, 12 January 2021

(10.30 am)

Case management conference

THE CHAIRMAN: Good morning. Can I just check that I can see and hear Mr Skinner, first of all. (Pause).

MR SKINNER: Excuse me. Can you hear me now, Sir?

THE CHAIRMAN: I can just hear something. Speak again.

MR SKINNER: Sorry. Is that any better?

THE CHAIRMAN: Yes.

MR SKINNER: I think this microphone might be slightly muffled, according to what your usher told me.

THE CHAIRMAN: It is a bit, yes.

MR SKINNER: I'm not sure I can do anything immediately about that, I'm afraid. If it causes any problems, I might have to log back out and log back in again or something like that, but --

THE CHAIRMAN: It's okay for the moment. Right. Mr Armitage?

MR ARMITAGE: Good morning. Can you hear me okay?

THE CHAIRMAN: Yes, I can. Yes.

MR ARMITAGE: Thank you.

MR SKINNER: I think there are five topics, really, for this morning. Before just turning to those, can I just deal with housekeeping. You ought to have had an electronic bundle which contains everything that you'll need for today. It's updated the previous one, so you shouldn't need the previous bundle from the earlier CMC. You should have had a skeleton from both parties. You should

have had a witness statement on behalf of Ms Taylor, who's the claimants' solicitor.

THE CHAIRMAN: Yes.

MR SKINNER: And I think this morning, you should have had some also from the defendants' solicitors -- I should say the defendants' solicitors, not the claimants and from the defendants, you ought to have had an updated table dealing with the categories of documents that it's proposed that they disclose, which has now a fourth column.

THE CHAIRMAN: Yes.

MR SKINNER: In which case, the order in which I propose to deal with matters, and if it's convenient to the Tribunal, it may be that you want to give a ruling in respect of one before you move on to another, I'll leave that in your hands entirely. One is the sort of uncontroversial matters that are agreed but which still require the Tribunal's approval. I don't anticipate that will take too long, subject of course, to the Tribunal. The second is the claimants' application in respect of the earlier disclosure which we say hasn't been given in accordance with the Tribunal's previous order. Third, following on from that, is disclosure generally, as it's been termed. The fourth issue is whether or not there ought to be a further CMC and whether the costs budgeting ought to be adjourned to that, what would be a CCMC in fact, and then if you're with the claimants and consider that either there shouldn't or that costs budgeting in any event, shouldn't be adjourned, then there's costs budgeting. Subject to the Tribunal, I intend to deal with matters in that order. It may be that we take a break after disclosure for a ruling on those matters or something like that.

THE CHAIRMAN: Yes, that seems fine.

MR SKINNER: So there are two uncontroversial matters which is the first topic. The

first is the claimants' disclosure. The list of categories which the claimants proposed and the defendants agreed to is set out at page -- in the PDF, it's 338 to 342. I anticipate the PDF numbers are probably the -- PDF page numbers rather than the pagination itself might be more convenient, but do, obviously, let me know if not.

THE CHAIRMAN: Sorry, what am I looking for?

MR SKINNER: So it's the claimants' disclosure documents. It's 326 of the bundle or 338 of the PDF.

THE CHAIRMAN: Thanks, I've got that.

MR SKINNER: The parties are agreed that disclosure in this case should be done by category, in effect, lots of specific disclosure requests. These are the categories that the defendants sought from the claimants and which the claimants have agreed. Parties therefore seek the Tribunal's approval of those categories. Obviously, if the Tribunal has any views about any of the things, then we can consider them. But I hope and anticipate that that's not terribly controversial. I am waiting for a direction approving that as the relevant list of categories.

THE CHAIRMAN: Can I just ask, this is relevant to both claimants' and defendants' disclosure, when it talks about documents "going to", is any particular standard of search or disclosure understood by both parties to be applicable? So, for example, essentially, is one looking for what you would find in, I think, model C of the disclosure pilots, which is documents that are likely to support or adversely affect your case or any other party's case; is that the basic understanding of what "going to" means?

MR SKINNER: Certainly for our part, yes. Essentially, it's the old sort of standard disclosure test of does it assist one or other party or detract from their case

which I think is subject to a subtlety that I might have missed, more or less what you just explained in relation to standard for the disclosure 2.

THE CHAIRMAN: Importantly, what it's not including is the sort of old Peruvian Guano type extended disclosure test. That's not within the remit of this?

MR SKINNER: No, I mean, the -- one of the features of this case is that the defendants have, at least in relation to liability, the bulk of what the documents may be. It may be that if there is a train of enquiry to be had, we make an application later on, but certainly at this stage, we're not seeking to go that far.

THE CHAIRMAN: Yes.

MR ARMITAGE: Sorry, Sir.

THE CHAIRMAN: Go ahead, Mr Armitage.

MR ARMITAGE: I'm sorry to speak across Mr Skinner. Unless I'm very promptly told otherwise by my instructuring solicitor, that is also my understanding of the nature of, as you say, the words "going to", and it would not cover train of enquiry type documents at this stage, certainly.

There is just one point to clarify, in addition to the list that my Lord has before him at the moment. There were two additional categories mentioned in my skeleton argument. They were taken from the claimants' disclosure and as far as I'm aware, they're not opposed but just for the avoidance of doubt, it would be helpful if Mr Skinner could clarify that those two narrow categories are also covered by his client's agreement.

MR SKINNER: I suspect so, but I'll just need to take formal instructions, if I may. Maybe, could we just park this point for the moment and come back to it once I have those.

THE CHAIRMAN: Yes. Subject to that I'm happy to approve that disclosure

document.

MR SKINNER: I'm grateful. The second area of agreement between the parties is the scope of expert evidence and you find the agreed list of the areas that we anticipate the expert will cover at page 292 of the bundle which is on page 303 of the PDF.

So, again, unless the Tribunal has any concerns, issues?

THE CHAIRMAN: No, I have read this, but it would be helpful if you just took me through it, would you mind, just to explain to me what issue each bit goes to, so I understand it.

MR SKINNER: Of course. One of the central issues from an economics point of view in this case is the scope of the market that's in issue, because competition has to be distorted on the relevant market. So the first issue is the relevant market. So the claimants' case is that the market is a national one and the defendants' case, if I remember rightly, is that it's university-specific, alternatively global, alternatively commonwealth and so, obviously, in determining the size of any particular market or the definition of any particular market, then the substitutability of products is also relevant. So we see the identification of the relevant market is the first topic and that's both product and geographic. So then it's put in broad terms rather than in terms of the parties' cases but what are the relevant product and geographic dimensions of the markets, are there separate markets? Is there a separate market on which UK universities offer the opportunity to enter into these arrangements? And the reason that's there is because the defendants have said that -- in fact, their primary case, as I understand it, is that the market is the opportunity for the entering into official supplier arrangements with universities, not in fact, a market for the supply of academic dress to students

which we say is --

THE CHAIRMAN: How much of this issue is a pure legal question and how much is something which is purely for the remit of the expert?

MR SKINNER: I think it's fair to say it's a mix of the two. It is an economic issue in terms of the assessment of substitutability between -- so we have the product of substitutability -- this is from the supply side -- so to what extent can a supplier substitute gowns from one university in seeking to supply another university. The same would apply for hoods or some question on the part of hoods. The same question that arises as to the extent to which you could supply gowns made for a British university to universities in Nigeria or Australia or whatever and then there's the buy side substitutability, so the extent to which a student could go to a different supplier with the criteria necessary for compliant hoods and gowns and have the supply substituted by a different supplier.

Those, obviously, factual questions are to an extent, factual questions, but the assessment to which those then feed into the analysis of what the market is on which competition is affected, is then an economic question and that's really the economic (inaudible), the extent to which competition is affected. The extent to which the legal test is then met is obviously then a question of law, but those two questions are obviously very closely related. Some might say, perhaps, indistinguishable in every case but that's that.

In relation to paragraph 2, whether the defendants, first and fourth defendants, held positions of economic strength which enables them to prevent effective competition being maintained on the relevant market. Well, this goes to the question of the dominance of the position on the market. That is a straightforward economic question. Obviously, there is then a legal question

to be answered as to whether the relevant test is met but that's a straightforward economic question.

The counterfactuals. You will recall from the first CMC that the counterfactuals in this case are potentially many and varied, but once one has assessed what the relevant breach of competition law is, one then has the question of assessing what would have happened on the counterfactual competitive market, in order to assess damages. So the questions of market and counterfactual are necessarily -- one might think of them as two sides of the same coin in some respects.

Four, whether the arrangements have the effect of conferring on the defendants de facto exclusivity or near exclusivity of supply. So the way the case is put is that the arrangements between the defendants and the universities conferred de jure, alternatively de facto exclusivity or quasi exclusivity. So we say, our primary case is as a matter of law, when you look at the contracts and the arrangements, as they're called, that goes strictly wider than the strict contractual interpretation question, whether they conferred exclusivity, but then also, if not, whether they had in fact, the effect of an exclusivity arrangement on the market. So did they cause all or almost all students to buy their hoods and gowns from or hire, probably, their hoods and gowns from the defendants, in breach of competition law.

So that's, again, a question for the experts.

Ede & Ravenscroft's conduct in entering into the arrangements or any of them, was that reasonably likely to harm the competitive structure of the relevant markets. So, again, that's a question of looking at the effect of the conduct in entering into those arrangements, both the entering into the arrangements themselves but also, you may have seen, in relation to the sort of pre-contract

discussions that we'll talk about in relation to disclosure. There's a part of the claimants' case is that, in relation to abuse of dominant position, there appears to have been, and this is why we want disclosure, there may have been an attempt to persuade or give the impression that either universities or the defendants had relevant intellectual property rights in respect of gowns which we say they didn't have and that is an example of conduct reasonably likely to harm the competitive structure of the relevant market, if those intellectual property rights didn't, in law, exist and, obviously, the arrangements themselves, the extent to which those arrangements would be likely to harm the competitive structure on the relevant markets. Obviously, the answer to that depends to some extent on what the relevant market is, so that all follows through from question 1.

THE CHAIRMAN: Yes.

MR SKINNER: Six, what, if any, are the effects of the arrangements on competition in the relevant market, as compared to the relevant counterfactual. That's pretty straightforward. Whether the arrangements or any of them were necessary to ensure that Ede & Ravenscroft were and are able to recover investments which are or were required to be made so as to meet the investor's requirements. One of the defendants' justifications for any anti-competitive effect on the market is that these arrangements were reasonably necessary in order to recoup investment in, one assumes, although I don't think it specifies, stock, and that goes to that question and again, that is an economic question. Again, allied very closely, as these matters often are, to the legal question of objective justification, and then whether the arrangements or any of them had or have or were liable to have an effect on the pattern of trade. Well, the question is, obviously, the pattern

of trade is in the UK in the domestic competition case, so that, again, ties in with the market and the effect on the markets, not specifically, necessarily, the markets in this case but insofar as they're different to trade within the UK, the trade within the UK question.

THE CHAIRMAN: Okay. That's very helpful, thank you. Mr Armitage, nothing to add to that?

MR ARMITAGE: No, that's a helpful and fair summary.

THE CHAIRMAN: I'm happy to approve that list of issues for the economic experts then.

MR SKINNER: I've also had instructions whilst going through that, in relation to the two additional categories in the defendants' skeleton. All those are agreed.

THE CHAIRMAN: Good, thank you.

MR SKINNER: That deals then, with the uncontroversial issues.

The second topic, as I said at the outset, is our application in relation to the earlier disclosure order.

The order that we seek is set out at -- it's page 417 of the bundle. It was set out in correspondence. That's 432 of the PDF, if that's the most easy way to get there, subject to two caveats that I just wanted to introduce, if I may. Do you have that, Sir?

THE CHAIRMAN: I do, yes.

MR SKINNER: The paragraph in italics on bundle page 417.

THE CHAIRMAN: Yes.

MR SKINNER: So:

"On or before 4.00 pm on 19 January, the defendants shall give initial disclosure of the documents containing ... "

I think we should strike through "or evidencing" because that is wider than the

original order:

" ... the terms or arrangements with any institution under which they supply or at any time during the period 1 July 2016 to date, have supplied academic dress for use at graduation ceremonies of any institution, other than those for whom the documents were disclosed on 8 December."

I would also be content to add in "have supplied as official supplier, academic dress for use at the graduation ceremonies."

We don't understand that they supplied academic dress to any institution other than as official supplier but just insofar as they have, we're interested, for the purposes of this, we're interested in their official supplier arrangements under the terms thereof. So I'm happy for that, insofar as there is a narrowing, that narrowing to be inserted into the terms sought.

You'll recall the order that was made at the last CMC. There was a dispute about it and the order that was made is at -- I've set it out at page 3 of my skeleton. That might be the easiest place to find it:

"On or before 8 December, the defendants shall give initial disclosure of all documents containing the terms of the OSAs, as defined in the defence, to which they or any of them are currently a party."

Because of the way in which the defence is pleaded, we expected about 136 universities to -- sorry, I should say the defence and the RFI -- we were expecting about 136 universities to be disclosed because it's said that there's -- I think it's 80.5 per cent of the market by recognised bodies is supplied by the defendants and that is about 136. And, as I've said already, it hasn't been asserted that any supply takes place outside of official supplier arrangements.

What we've got is 84 universities were sort of official supplier arrangements. Ms

Taylor's witness statement served yesterday, explains in a little bit more detail, the defendants' approach to this and I think it's fair to say that the defendants' position is that the annexe A to their RRFI contains all of the current official supply arrangements, not just the formal ones which is what we thought -- by virtue of an answer to the RRFI which said that that was the ad hoc arrangements, we thought that was just the ad hoc arrangements and not what I'm going to call the formal ones. So it's clear that there are official supplier arrangements which are for a number of years in most cases, three, four, five, whatever, and in a number of cases, those are simply allowed to roll over, effectively, and we had understood that the 88 universities listed at annexe A were just those that had rolled over, by virtue of the fact that the defendants had said that in answer 4 in their RRFI.

Ms Taylor's statement explains that that's not the case and, in fact, what they meant is that that's a list of all of the official supplier arrangements that they say they are currently party to, including those with which they have current, and I emphasise the word current, for the reasons I will come to in a second, including current ad hoc arrangements.

But this, in my submission, is based on a nice distinction that they tried to draw in respect of those OSAs that have rolled over, so what have been called ad hoc official supplier arrangements, in respect of which no ceremonies are taking place this year, because presumably, of Covid, and in respect of which they therefore say there are no arrangements in place. And we see this in paragraphs 11 and 12 of Ms Taylor's statement. Probably the easiest place just to deal with this. It's page 4 of her statement, paragraphs 11 and 12.

She says:

"I'm instructed by the defendants that there's been few discussions or agreements

with the universities outside those that are subject to formal OSAs that are currently in force in the last year and essentially none that have led to any contractual arrangement."

So what she's saying is -- she then says:

"It's obviously possible to roll forward existing but expired contract terms, thus creating a new or extended contract. There's still a question as to whether this has happened in any given case."

What the defendants are saying is that the annexe A, putting aside the four annexe A universities for which they haven't disclosed any documents, the annexe A universities are the 88 that they currently have official supply arrangements in place which they seem to effectively say that they've got a contractual arrangement in place, as they see it.

Now, the difficulty with that position in my submission, at least for the purposes of a disclosure exercise, is that we're not here to discuss whether or not -- or I anticipate we are not here to discuss whether or not -- there is a nice argument about the contractual interpretation, about whether or not the practice of the universities and the defendants have led in this year, to particular contractual arrangements being in place. What we were looking for and what the order was looking for disclosure of, was in my submission, effectively, where there is arrangements in place between Ede & Ravenscroft and universities which hasn't been superseded by some arrangement with another supplier.

So you'll recall that at the CMC, it was said that there should be -- I think it was in the terms of your ruling, so it was those that contain terms and it's in the order itself, OSAs to which the defendants are currently a party. That was in intended, in my submission, to exclude, not cases where a contract has rolled

over and but for Covid, there probably would be an arrangement, in which case there are contractual arguments to be made about whether there is still a contract in place, simply one in which no goods are being delivered or services provided in this year because of the particular circumstances that pertain. You know, this is a disclosure exercise but, effectively, historic agreements that weren't arguably now still in place because, for example, a tender process had been undertaken and another supplier had been granted the tender, were being excluded.

This wasn't an excuse to enable the defendants to restrict the scope of these central documents to this case, to any documents which they considered because, obviously, we have no basis to go behind the assertion of law in Ms Taylor's statement that there is no contractual arrangement in place, it is after all, a mixed question of facts and law, whether there's a contract, and to unduly narrow the scope.

So the way we've put it in the order that we seek is designed to avoid that, what I'll call, a nice distinction between those which the defendants say asserts that there's no contractual arrangement without, effectively, having to get into that argument, because we're not here to have a trial on whether or not, at this stage at least, there are contractual arrangements in place this year. This is a disclosure exercise that was intended to give early disclosure of documents that were of central relevance to the case, which, given that the Chapter 1 case on the anti-competitive effect of the agreements themselves relies on, if the market is a national one, there being a network, a UK wide network of similar agreements, in order for us to assess that case -- and this is relevant to settlement discussions, it's relevant obviously to what disclosure's given, by way of early disclosure it would relevant to the evidence that's given, et

cetera, it's certainly relevant to the expert -- we need to see the arrangements that relate to the universities that are supplied over the contract period. Now, two limits were drawn, one that was effectively current terms, so not historic arrangements, and in my submission those in respect of agreements which have, on their face, expired but which have rolled over, but simply in respect of which no supplier has been given this year because of Covid, should or do fall into that category. And the other limit, in the order you made, Sir, was with respect to documents that simply evidence discussions where terms are being discussed, so pre-contractual negotiations, where those don't evidence the terms and we're not in this, seeking to go behind that at all.

So in my submission, either there's been non-compliance, because the defendants have adopted an overly narrow approach to the exercise which they undertook.

Insofar as the Tribunal's against me as to whether, strictly, they've not complied with the order, I would ask for the order to be varied, to reflect the terms set out in that letter, subject to the two caveats I've given, in order that the intention that lay behind the original order can be given effect. Because the narrow way in which the defendants have interpreted it does not, in my submission, give effect to what was intended to be achieved by that order when it was made. And this issue about ad hoc arrangements that have rolled over from the express contracts and those which have been -- you know, pursuant to which no supplier has been given this year because of Covid, wasn't but could have been or at least at the last hearing, and in those circumstances, one might think is a tactical point that's been taken by the defendant so as to avoid disclosure of these documents at this stage and in my submission, it's appropriate for an order in those terms to be made.

THE CHAIRMAN: Can I just ask, we're about to deal with disclosure and make orders in relation to disclosure. When would these be provided? Because these are documents which are clearly responsive to the disclosure orders about to be made. When would they be provided in response to that?

MR SKINNER: So the parties haven't discussed -- so I think we were going to suggest eight weeks from today for the provision of disclosure, which would take one to 9 March. I mean, obviously, it could be the Friday, 12 March, if that were more appropriate, but there or thereabouts is eight weeks. I don't know when the defendants -- sorry, I can't recall if the defendants have given a date that they propose disclosure to be given by. I can see the Tribunal's thought process here is, if this is going to be given shortly anyway, then why make an order in relation to it now. I anticipate that the defendants are going to say disclosure generally, shouldn't be given for as long as possible.

The difficulty we have is that -- these really are the key documents, these show the terms of the arrangements that were in place that we say were anti-competitive. They, therefore, influence everything from the discussions that we have with our experts, through to the evidence that our lay witnesses put together, through to settlement discussions, because obviously, we can't assess our case properly until we've seen these agreements. So the earlier the better in a case of this sort for this limited -- it is a limited category of additional documents.

In my submission, it is a case where quick initial disclosure may well have real benefits.

THE CHAIRMAN: Yes. Is there anything further?

MR SKINNER: No, I think that's it, Sir.

THE CHAIRMAN: Yes. Mr Armitage. First of all, Mr Armitage, what is the timescale

for disclosure of these documents in the ordinary course?

MR ARMITAGE: So it's somewhat dependent -- as my Lord will have appreciated, there are some outstanding issues as to the scope of the defendants' disclosure. I think, based on a brief discussion with my instructing solicitor, we had in mind, bearing in mind that the deadline for the witness evidence has already been set as 2 July, we had in mind that the defendants' disclosure would be carried out by -- in the vicinity of mid April. As I say, somewhat subject to the fact there are some outstanding points of dispute. But that is the sort of overall timeline we had in mind, bearing in mind, as my learned friend has said today, a greater disclosure burden will fall on the defendants in this case, because it's their conduct that is in issue in terms of the alleged infringement. So I think my learned friend said middle of March for claimant disclosure. We're entirely happy with that.

MR SKINNER: Sorry, I was suggesting disclosure on the same date by both parties, rather than sequential disclosure.

MR ARMITAGE: What I meant to say was, if that's the indicative timescale for his disclosure, I'm not suggesting there should be sequential disclosure or anything like that, I'm simply pointing out, as I say, this point has not been canvassed in detail in correspondence, but we had in mind that we would need a little longer, but not a great deal longer, perhaps mid April, and as I say, given the existing deadline for witness evidence, it's not anticipated that that would cause any real difficulties.

THE CHAIRMAN: Right. So we're talking about a small category of documents, probably no more than 50 at most, which I think will be contracts that were in place immediately pre-Covid and had been being rolled over at that stage. They were contracts some time ago that were being rolled over consistently

up until Covid. That's the category of document we're talking about.

MR ARMITAGE: My Lord, that is not the nature of the application and it's not the application as it was put in the letter --

THE CHAIRMAN: Let's look at how it may be framed. As I understood Mr Skinner, he'll correct me if I am wrong about this, that's essentially what they're after. That class of document they thought they would be getting anyway, which is agreements which were in place had been on an ad hoc basis and might be expected to have continued during the Covid period but haven't because of Covid.

MR ARMITAGE: I'm in some difficulty, my Lord, because that is not the application that was made. The application that was made in the letter to the Tribunal of 7 January, based solely on alleged non-compliance with the initial disclosure order at paragraph 9 of the first CMC order, was essentially a copy out of the order that was sought at the first CMC.

THE CHAIRMAN: I take that point and I would have strong resistance to such a broad order. But it may be helpful if Mr Skinner would comment either positively or negatively on the way I've just framed what I think he's asking for.

MR SKINNER: So I think the fairest way of putting it is that's what we anticipate as being the documents that would respond to the request, subject to the two caveats that I've already mentioned, the way it's put and in particular, the removal of evidencing terms rather than containing terms. But that's what we anticipate would be responsive to the request that's made.

One could limit, for example, the time period, so that it -- for example, at any time during the period from 1 July 2018, for example, which would then cover the -- two years was the graduation ceremonies just passed or even make it 2019. But --

THE CHAIRMAN: I don't see any basis for it going any time before the last academic year, because as I understand it, it's the last academic year, because these ceremonies occur at the end of the academic year. So the last academic year, being 2020, is the one where there have been no or virtually no ceremonies, so no need for gowns. So an agreement that was in place for the prior academic year only, which would have been expected to continue on an ad hoc basis, as it had before, but has not done because of Covid.

MR SKINNER: Yes, subject to two points. The first point is that, although you're right, entirely, that the biggest graduation ceremonies take place once a year, most universities run graduation ceremonies throughout the year but my concern is that, for example, if there was a formal OSA in place, it didn't continue for one year for some particular reason but then, effectively, was renewed subsequently, that would then be excluded also or -- sorry, my concern is that that ought to be included because that's still an arrangement that would be considered to be in place.

THE CHAIRMAN: But if it's been renewed, it will have been caught within the 88, won't it, because if there has actually been a renewal in the current year, then that must be caught by the existing order.

MR SKINNER: I can see the logic of what the Tribunal's saying. I can see that there are circumstances in which that wouldn't quite capture everything that we anticipate -- effectively gives us all of the arrangements with all of the universities with which the defendants have entered into during the claim period.

THE CHAIRMAN: Right. So Mr Armitage, with that clarification, as I say, I'm treating this as an application that relates to the agreements that were in place immediately prior to the 2019/2020-year but which were continuing on an

ad hoc basis but have not, for the reasons Ms Taylor gives in her witness statement, have not been continued -- at least I don't believe them to have continued in this current Covid crisis. So it's a pretty limited clarity.

Now just focusing on that range, and taking your point that the application asks for something broader, what are the objections to that particular requirement?

MR ARMITAGE: So, my Lord, I'm speaking without instructions and it may, in fact, be that a very short conversation between my instructing solicitor and I would be helpful because as I say, this is not the application that was pursued and I really do want to emphasise, this is not the defendants taking a -- as my learned friend put it, a nice contractual point. We set out the current contracts to which we considered ourselves to be party in a pleading on 12 November, that's annexe A to the response. That was never queried and that understandably, therefore, informed the disclosure that was given. I appreciate my Lord may not want to hear submissions in detail and, of course, my Lord has written submissions on the point. I do not want to emphasise orally though, we strongly reject the allegation that we have not complied with the initial disclosure order.

THE CHAIRMAN: I take that. I also note in support of that, that answer 3 of the RFI, you stated that annexe A was the agreements currently in force. So it might be said that the language was slightly inconsistent with answer 4 but it was pretty clear what was being said.

MR ARMITAGE: I'm grateful. That's a further point I was going to make.

THE CHAIRMAN: Yes.

MR ARMITAGE: So in relation to the narrower category that is now the subject of discussion, in my submission, I think that would probably cover in the region of 50 contracts because this has all stemmed, as my Lord will have

apprehended, from an admission in the defence in relation to the number of universities supplied in the 2018/2019 academic year and in my submission, a misunderstanding as to the number that was still in force out of those -- I think 136 is the number. As I say, I'm speaking without instructions but I apprehend the objection will be twofold. First, it is not right to say that that is necessarily a very limited category of documents that can immediately be called to hand. I appreciate, and I should say there's no dispute that they will need to be disclosed along with other arrangements that have been in force but are now expired during the claim period. But it's not a straightforward exercise of just pulling out 50 documents.

In relation to the disclosure that has already been provided in relation to the annexe A contracts, my Lord has seen in Ms Taylor's statement that that's actually -- in many cases there are multiple documents that are necessary to contain the terms of the arrangements in question.

So the first point is it can't be assumed that this is a straightforward exercise that can be provided tomorrow or in very short order.

Ms Taylor's second statement, albeit dealing with the more expansive application that I'd understood to have been made, paragraph 21, she makes the fair point that complying with another order for initial disclosure would be time consuming at a time when, as my Lord says, the parties are about to embark on the general disclosure process.

A third point that occurs to me, and again I say, speaking without instructions, as to whether this category might be one that the defendants could agree to provide rather quicker, my learned friend said that the value of having these contracts early is that it will -- in particular, I think he said, assist the expert analysis that is going to be carried out. My learned friend, of course, already has

arrangements in relation to 84 universities and a multiple of 84, in terms of the number of documents. That gives plenty to be going on with, in terms of -- and those are, of course, the current arrangements, so of particular relevance to the conditions of competition on the market at the moment.

The expert analysis process is -- I'm afraid I don't have the order to hand, but well down the line. In my submission, there is no need for further documents to be provided at this stage and earlier than the ordinary disclosure deadline covering disclosure generally, in order to assist with that process, for example. So, subject to instructions, we would resist the narrower category but as I've made clearer, we would very, very strongly resist the order that is in fact sought in the letter of 7 January and, indeed, resist the suggestion that there has been any non-compliance. As my Lord says, the position was made clear in the RFI response.

I don't know if it would be convenient if I could take a minute or two to get instructions on the --

THE CHAIRMAN: Yes, certainly. Why don't you do that. We won't leave the hearing room. I'll just mute my microphone and video for, say, three or four minutes to enable you to take instructions.

MR ARMITAGE: I'm grateful.

(11.15 am)

(A short break)

(11.22 am)

THE CHAIRMAN: Mr Armitage, I'm just wondering how we're getting on.

MR ARMITAGE: My Lord, could I trouble the Tribunal for another few minutes?

THE CHAIRMAN: Yes, go ahead.

MR ARMITAGE: I'm very grateful. Perhaps another five minutes. I'm very grateful.

(11.23 am)

(A short break)

(11-p 28 am)

MR ARMITAGE: If anybody can hear me, I'm ready to speak.

THE CHAIRMAN: We need to wait for the live stream. We'll be told when it's back on.

CLERK: We are ready to begin.

MR ARMITAGE: I'm grateful for the additional time.

The concern that persists with my client in relation to the proposed, somewhat narrower category of documents is that firstly, if disclosure is to be ordered by reference to -- I think as canvassed in argument, expectations as to what the position would be in the period after the 2018/2019 academic year, in relation to those contracts where the supply in that year was not pursuant to a fixed written agreement but a more ad hoc basis, we're concerned that that does not give sufficient clarity such as to avoid being, essentially, in the same position where there's a dispute over compliance. We genuinely, of course, want to comply faithfully with any order that is made.

My Lord, that concern about clarity would be remedied substantially if the order were confined to those arrangements that were in force during the academic year 2018/2019, subject to being precise about the precise temporal period covered by the 2018 to 2019 academic year. I think the usual approach is September to August.

I'm instructed that, if that sort of more objective, if I can put it like that, category were to be ordered by way of initial or secondary initial disclosure, that would cover in the region of 50 further arrangements. It would take at least a month to give initial disclosure of those documents, bearing in mind that the 84

arrangements that were disclosed pursuant to the first CMC order -- I think if memory serves, the first CMC was on 27 October and it took until approximately 8 December to give that initial disclosure. So we're talking a substantial exercise, bearing in mind that it is an exercise in the defendants' view, that is an historic disclosure exercise, it relates to agreements that are no longer in force. Of course, the wider the disclosure exercise that the defendants are about to embark on covers historic contracts, there's no dispute about that, subject to some potential disputes about the precise wording of what is covered by that historic arrangement category and my submission is simply then, that there is no good reason to carve that out from the general disclosure exercise which, as I indicated, the defendants would expect to be able to complete within approximately three months from today, bearing in mind, as I say, very substantial disclosure of current arrangements has already been given and the claimants are well able to make a start on that consideration of that disclosure as they see fit. So we do resist even the narrower category that's been discussed in argument today, albeit we would strongly argue in favour of -- if a narrower category is ordered, that it excludes subjective language, such as whether the defendants expected an agreement to continue, in light of Covid, and language to that effect.

So unless I can assist further on this point, as I say --

THE CHAIRMAN: Just one other possibility is you're going to be undertaking an extensive disclosure exercise, I accept that. In the course of that exercise, your solicitors will come across documents that fulfil this particular category or fall within this category. There can be no doubt as to any issues of privilege or anything like that, concerning these documents. They are agreements between your clients and universities. So they will be obviously disclosable.

What's to stop you being required to disclose those -- and it may be difficult to police, but one trusts experienced solicitors to take these obligations wisely -- what's to stop an obligation to disclose as and when they are discovered?

MR ARMITAGE: My Lord, I'm sorry to say it's not a point I've considered with my clients.

THE CHAIRMAN: I know. You wouldn't have.

MR ARMITAGE: I can't immediately see a difficulty, other than the point I've already made which is that it is not always the case, in fact it's often not the case, that a particular arrangement is constituted by or contained within a single document, although that isn't obviously a complete answer to my Lord's point, because one would be able to tell from a particular document whether it at least goes to the issue in question.

Just for clarity, does my Lord have in mind, if this were the route the Tribunal went down, that this would only cover the 2018/2019 category or any arrangement where the current 2018/2019 or earlier, would fall within the rolling obligation?

THE CHAIRMAN: It would have to be narrow, and that may well be one of the problems with it, the difficulty in defining precisely what it relates to is not straightforward.

MR ARMITAGE: I think again, the basic position -- I appreciate these are, of course, relevant documents and that's why there's never been any objection to providing them as part of general disclosure, the position is just what is the pressing litigation need for carving it out and potentially causing problems/delays with the wider disclosure exercise, where they'll get these documents anyway, for the sake of, say, a month.

THE CHAIRMAN: Yes. Thank you, Mr Armitage.

MR SKINNER: Sir, briefly in reply, Mr Armitage makes essentially two points, one is

administrative difficulties and the other is a sort of law of diminishing returns point. In relation to the administrative difficulties point, my submission is that they've done the exercise once, they ought already to know where these documents are and it may well in fact be that, in the searches that they've already done, many of these documents have already been come across, even if they've not then, obviously, been disclosed because the view was taken that they're outside the scope of the order.

So it should be easier this time round and, just to meet the point that my learned friend made about not defining the scope of any order by virtue of expectation, and I can see the force in that, the simplest way of doing that, in my submission, if the Tribunal was minded to limit the order to effectively those contracts that were in place in the 2018/19 academic year, is to make the order by reference to those university students that were supplied by the defendants in that year, given that it's not alleged that any supply took place, other than by virtue of official supplier arrangements. That, I think, would cover, other obviously, than the universities that have already been disclosed.

So I think that would cover that point.

In relation to the: well you've had 84, do you really need the other 50 diminishing returns point, the defendants' case in this litigation, or one of its alternative cases is that each of the markets in which the defendants operate is university-specific. So in terms of how we assess economic anti-competitive impact or impact on the market in any of those universities in respect of which disclosure hasn't been given, well, we can't and our expert can't, if that's the right premise.

Now, obviously, we say the market is nationwide and part of our case on that is that there is a network of agreements that cover that market. So, again, if it's a

national market, we need the other agreements to be able to put -- you know, to put together a picture of what is the impact on that market.

So either way, disclosure of these 50 is not simply: well, you've got 84, you can be getting on with some work. It's actually the assessment of the impact on the market depends on being able to see, preferably, all of them and if not -- by which I mean all of the OSAs on the market, not just those to which the defendants are a party -- but absent those, then all of those to which the defendants are a party, because that, as we've said, should cover 80 per cent, by institution, of the market.

So that deals with those two points.

In relation to your question about why not, as and when discovery -- you know, as and when they're discovered, we do have concerns in this case about being able to police that sort of an order but also, having done the exercise once, it ought to be, as I've said, relatively easy to know where these documents are. So it's not the case that somewhere in this large disclosure exercise that the defendants are going to have to be undertaking, these documents will be found. They ought to be -- particularly if it's done by reference to the universities that were in fact supplied in the 18/19 academic year, it ought to be relatively easy to find those documents.

In relation to the timeframe, I'm obviously in the Tribunal's hands, but we've asked for a week. I certainly wouldn't object to two, perhaps three but, you know, this litigation is progressing and we do need to see these documents to be able to assess, among other things, the strength of our own client's case.

Unless I can assist the Tribunal any further, those are my submissions.

THE CHAIRMAN: Just give me a moment.

Ruling on application for further disclosure

THE CHAIRMAN: I need to deal with an application by the claimants for further early disclosure.

The order made at the last CMC was in terms that on or before 8 December 2020, the defendants gave initial disclosure of all documents containing the terms of the OSAs, as defined in the defence, that is the official supply agreements with universities, to which they or any of them are currently a party.

The claimant now seeks a wider order, essentially covering documents evidencing OSAs entered into since 2016. An order in those terms was sought and rejected at the previous CMC but the new order is sought in the following circumstances. The claimant says they expected that 136 agreements approximately, would be disclosed, pursuant to that original order. In the event, only 84 were disclosed, on the basis that the defendants said those, plus the four others for which there are no documents, are the only ones in respect of which there is currently an agreement in force.

That is based, at least in part, on the proposition that, given the lack of any degree ceremonies or very few degree ceremonies in this current year, as a result of the Coronavirus pandemic, there has been no continuation, at least no agreement for any continuation, of arrangements which were ad hoc prior to the beginning of this academic year. So it can't be said that something which was being continued on an ad hoc basis in the 2018/19 academic year, currently continues to exist.

The claimant says that the order was, in essence, meant to look for arrangements in place that had not been superseded by any arrangement with an alternative supplier, ie, it should have covered those arrangements which were in existence pre-Covid and which would ordinarily be expected to have

continued during this current academic year.

What is sought is, as I've said, a form of early disclosure. We are, however, at this CMC, considering the orders to make in respect of disclosure generally, and I anticipate that orders will be made for disclosure shortly. There's been some discussion as to when that disclosure would be provided. The claimants would wish disclosure within, I think, 8 weeks; the defendants, because they have a larger disclosure exercise, will be looking for an order requiring them to disclose a little later, some time in mid April.

There's no doubt, and it's accepted by the defendants, that the additional documents sought are clearly within the scope of the disclosure that is about to be ordered.

The claimants say, nevertheless, these are absolutely key documents. They determine whether the agreements were anti-competitive. So the earlier they get them the better. They're needed so that investigations with the expert can be progressed as soon as possible and they may be relevant to shaping the case overall and to settlement.

The defendants object that this is not necessarily a limited class of documents, it's likely to extend to something over 50 agreements, although that doesn't mean just 50 documents. It's likely to include many more documents than that. The disclosure exercise that was previously ordered took some six to seven weeks to be completed.

The defendants say, if the value of having the contracts earliest to assist experts, well, there are already 84 agreements that have been disclosed and those are the ones that are currently in force and in any event, the documents will be provided under the normal disclosure procedure, sufficiently early for the experts to see them before consideration is given to their experts' reports.

In terms of the time the defendants say they need to complete this extra task, they envisage it requiring another four weeks or so for compliance, if this were to be ordered now. That is, of course, in conjunction with, at the same time, having to deal with disclosure more generally.

The key point, it seems to me, arising from that, is that the difference in terms of timing between ordering this disclosure now and ordering it within the normal run of disclosure, is a matter of weeks at most, maybe six or seven weeks at tops. First of all, I do not accept that there has been any breach of the order. It seems to me the defendants have complied with the letter of the order that was made at the first CMC. They have made it clear in their RFI response in November 2020 that there were currently 88 agreements in force, so there was no doubt about that at the time.

Whether or not the claimants were right to expect that they would be receiving broader disclosure under the original order, it seems to me that any further order would indeed be an order for disclosure beyond that which has been already ordered.

As to that, taking into account all of the points that have been made to me this morning by both parties, I'm not persuaded that there is a sufficiently pressing litigation need for this further disclosure to be ordered at this stage, in light of the fact that we are, as I said, about to embark upon large scale disclosure exercises by both parties which will undoubtedly cover what is required. So for those reasons, I'm not going to make the further order sought by the claimant.

MR ARMITAGE: My Lord, I'm grateful for that ruling. I did mention in my skeleton argument that the defendants would seek their costs associated with this application. I'm afraid I don't have a summary schedule of costs but in terms

of the principle, I can make my submissions very shortly. In our submission, the application should not have been made, both because there was no breach and because as my Lord has also found, the application is essentially otiose, in circumstances where they will be getting the documents that are the subject of the application in due course in any event. So those are some very short points but as I say, I don't have a summary schedule, so it be would an order for costs in principle.

THE CHAIRMAN: Yes. Mr Skinner, what do you say about that as a matter of principle?

MR SKINNER: Well, I think in my submission, the starting point is that we are at a CMC which was going to happen anyway. We get all sorts of applications made in the course of case management. The normal approach is costs in the case for case management issues. At its highest, it might be defendants' costs in the case, but this isn't a separate application that has led to considerable separate costs and in those circumstances, I would submit, obviously, costs in the case as my primary submission; alternatively, defendants' costs in the case.

THE CHAIRMAN: Mr Armitage, I've heard both your submissions on the point of principle, but I'm not going to make a decision on this until the end of this CMC. We can revisit it then, I think.

MR ARMITAGE: Thank you.

THE CHAIRMAN: Right. Shall we move on to -- it's disclosure more generally now, isn't it?

MR SKINNER: It is. This is in relation to the categories of documents sought by the claimants from the defendants. The most straightforward way, I think, of dealing with this is if the Tribunal has both my skeleton argument and

Mr Armitage's helpful table that was sent through this morning, because the parties have since -- things have moved on slightly, so this I think, is probably the easiest way of dealing with it.

From possibly having flicked through the earlier version of the table, you will see a number of categories are agreed, so I anticipate this shouldn't take too long.

The first category is a central one and it is where a number of the documents that we were just discussing will fall. What was originally sought was -- or suggested, was:

"Documents evidencing the defendants' arrangements with relevant universities in relation to the supply of academic dress to students, whether in the form of an official supplier arrangement or otherwise and for the avoidance of doubt, evidencing contractual terms and one or both parties understanding of the operation and/or effect of the relevant arrangement as regards the provision of academic dress to university students by the defendant and/or other suppliers."

The defendants' objection, you can see, is that it's too wide because it would include many irrelevant routine or mundane communications, like logistics, of getting gowns and things to ceremonies and the like and, secondly, it's suggested that the party's understanding of the operational effect is irrelevant, given that the claim, they say, concerns the effects of the arrangements themselves. And then there is a reference to pleadings. And then they say they're prepared to give disclosure to the extent given of those OSAs or documents containing terms of any contractual arrangement relating to the supply of academic dress, et cetera, et cetera, which was enforced in any part of the claim period, including documents containing the terms of renewed or rolled over forward to ad hoc arrangements, as they've been called, but wouldn't

include documents evidencing discussion, negotiation of contracts and doesn't include documents going to logistical arrangements of particular graduation ceremonies, such as timescales(?), personnel, logistics, numbers, et cetera.

We've agreed that there should be a carve-out for that latter category of documents. So with one, perhaps, word to be added. So we agree that that shouldn't include documents going solely to logistical arrangements of particular graduation ceremonies, such as timescales, personnel, logistics, numbers, et cetera. Those are clearly not relevant.

Insofar as those documents contain terms or are in discussions, negotiations of terms, then those should be disclosed. So the key point of difference between the claimants and the defendants is that we consider that documents evidencing discussion or negotiation of contracts, so the defendants' first objective category, ought to be contained within this. And the reason we say that is that it's important to remember that this is not actually a contractual dispute, it's a competition dispute, and in determining whether or not the arrangements that are in place have an anti-competitive effect on the market, one is not just looking at the terms of the contracts themselves, one is looking at how they were understood subjectively by the parties to them and moreover, in an abuse of dominant position case such as this, where it's alleged that there is a strategy of seeking to exclude or stifle competition, what's contained in these pre-contractual negotiations is likely, in my submission, to contain evidence relevant to that. So, for example, it's said that the defendants caused the universities, wrongly, to believe or assert that they held -- the defendants or the universities held IP rights in the design of its academic dress, when there is none, and it's alleged that there were

pre-tender discussions with universities which had the objective or effect of designing a tender process which would likely exclude the defendants' competitors, particularly of new entrants to the market.

Plainly those are not going to be -- the documents that tell one way or another in relation to those, are not going to be contained -- or unlikely to be contained in the contractual documentation themselves. Insofar as there was discussion of those issues, it's almost certainly going to have taken place in the pre-contractual discussions and so for that reason, documents evidencing discussions or negotiations of contracts are plainly relevant and ought to be disclosed, in my submission.

THE CHAIRMAN: Can I just ask -- so you've identified two particular points. Negotiations generally, it's difficult to see why the negotiations for the contract generally would be relevant. What you need to know is what was agreed but the effect of that is a different question. That's, again, not really helped by what the negotiations were. You've identified two points within the negotiations which you particularly rely upon. One is the IP rights point. There is going to be disclosure, isn't there, of discussions relating to IP rights, so wouldn't that cover that?

MR SKINNER: Bear with me. So your first point about there wouldn't normally be disclosure of negotiations of contracts because it's the terms that matter, that would be correct in a straightforward contractual dispute of course. But when one is looking at what we say is the strategy of the defendants to exclude competition from the relevant market, what I'm not praying the negotiations in aid of is to interpret the contract. I'm praying that in aid because it's relevant to the strategy that we say the defendants engaged in.

In relation to intellectual property -- bear with me one moment. So category 25 is

that which deals with the IP rights. What we originally sought was "documents going to whether and if so, to what extent the defendants and/or universities hold or held intellectual property rights." The defendants' objection in that regard was that's a legal question, that's not something that needs to be evidenced, where they in law, hold those rights. So what we proposed was that it be amended to "documents going to whether and if so, to the extent that the defendants and/or universities consider that they hold or held intellectual property rights in relation to the design of items." That's not quite the same as saying documents which, in the course of negotiations, show that the defendants sought to persuade the universities that they hold those rights because it might be that that strategy failed in respect of a university. So there may be no documents that go into whether the defendants consider that they -- the defendants or the universities, and this is an example, held or hold IP rights but it is -- so I suppose the difference is one is documents seeking to persuade and one is documents showing the understanding.

THE CHAIRMAN: But the defendants' proposal is broader than that, isn't it, in one sense, because it's disclosure of documents, of correspondence between the defendants and the universities in relation to the existence of IP rights. That's broader than whether -- I think it's broader than whether someone considers they hold them.

MR SKINNER: I'm just trying to see the --

MR ARMITAGE: If it assists, Mr Skinner, that's a new offer, if you like, that's arisen from the document. As I say, it is actually in relation to category 1, --

MR SKINNER: I see, sorry.

MR ARMITAGE: But if one looks at the second page of the document I circulated

this morning or my solicitor circulated this morning, one sees the terms of the proposal in relation to IP rights.

MR SKINNER: Can I just take a moment, just to consider the wording?

THE CHAIRMAN: Of course.

MR SKINNER: Bear with me one moment.

I think that does cover that issue. What that doesn't cover is the designing of the tender process.

THE CHAIRMAN: Let's come on to that in a moment. So I'll be concerned if the reference to the existence of IP rights, whether it might be said by the defendants that doesn't cover communications seeking to assert IP rights or claiming IP rights which in fact don't exist. I think it should be the existence or potential existence of IP rights. Mr Armitage, do you have any immediate thought about that?

MR ARMITAGE: I don't think the intention was to exclude documents in relation to potential existence. So unless I'm told otherwise by my solicitor, I don't think there will be any objection to that minor reworking. As I say, that's what was envisaged.

THE CHAIRMAN: That deals with the IP rights.

Dealing with the tender position, your concern, Mr Skinner, is that to discover documents passing between the universities and the defendants, where the defendants sought to affect the design of the tender process itself, I think; that's your point, isn't it?

MR SKINNER: That's right, yes.

THE CHAIRMAN: Why isn't that a category of documents that is properly identifiable in its own right, as opposed to just all pre-contractual negotiations?

MR ARMITAGE: My Lord, I'm sorry to interject, it's identified and it's agreed, it's

category 31.

THE CHAIRMAN: All right. Thank you. Let's just look at that. Yes.

MR SKINNER: Sorry, just bear with me.

I suppose there is a more general -- so I think that does deal -- that deals with designing of tender processes.

The difficulty we have, and this arises because the defendant has effectively all the documents as to liability, is that while we have been able to infer a strategy from these two particulars -- I mean, we've pleaded that there is a strategy to exclude or stifle competition. We would expect that that would be evidenced in the pre-contractual documents. We obviously have these two categories which are able to be dealt with separately, but insofar as there is a strategy, it is likely to be evidenced more generally in those documents.

THE CHAIRMAN: Just let me see the pleading. What is the reference in the pleading to that allegation?

MR SKINNER: Paragraph 47 is the general plea as to the strategy and bundling is also included in that, so the way in which the defendant provides hoods and gowns is you can only buy one if you buy the lot -- not buy, hire, at least, and that's also in paragraph 42 and in fact 42 generally is the steps that the claimants have reason to believe E&R, Ede & Ravenscroft, has caused, directed or otherwise agreed with universities to be taken to preserve exclusivity rights when threatened by competitors. And then we have a number of competitors who have been threatened with litigation that never eventuated in relation to intellectual property.

We then see communications between the universities and Ede & Ravenscroft about taking legal advice and the like and then bundling in subparagraph (d). The inference that's drawn is that bundling was part of -- (a) it was acquiesced in

by some or all universities but it was part of their strategy. Their broader strategy of excluding or limiting competition from rivals such as the claimants. Then, as I've said, 47 is then the broad allegation and the basis of it.

The difficulty we have is that we're in the dark as to what he's saying, but there is enough evidence there for us to allege that there is a broader strategy and we infer that on the basis of these examples. But the pre-contractual documentation goes to that broader strategy and that's why I'm reluctant to suggest that it's adequate or be taken to concede that it's adequate, that simply those two categories of documents are sufficient, when, you know, this is an abuse case. We are looking at the steps that the defendant took to preserve its position on the market and exclude others from it and that will most likely be shown by the communications. So while I entirely appreciate the Tribunal's entirely understandable starting point that normally, pre-contractual negotiations aren't relevant where contracts are in issue, this isn't that sort of a case, as I've said, and really, this whole strategy, we anticipate will be evidenced by the pre-contractual negotiations.

THE CHAIRMAN: Yes. Mr Armitage, what do you say about that general point?

MR ARMITAGE: My Lord, it may not surprise you to hear that we resist disclosure of pre-contractual documents. My learned friend said a short while ago, this is not a contract case. Well, that's true but it is very substantially a case about the effect on competition of contractual arrangements, be they formal or informal or ad hoc, as the defendants have put it in some of their pleaded case. There's no general allegation in this case that there were separate pre-contractual understandings between the defendants and universities that harmed competition. That simply isn't a feature of the pleaded case. There are two specific allegations. My learned friend says they're examples of a

general allegation in relation to a strategy to harm competition. My Lord has seen we agree to give disclosure going directly to those two specific examples.

In my submission it's simply not good enough for my learned friend to point to an inference there was some more general strategy that goes beyond the specific examples identified. That's in the territory of train of enquiry type disclosure which I invite the Tribunal -- it's a route I invite the Tribunal not to go down.

As I say, if anything comes out of disclosure that prompts further enquiry on my learned friend's client's part, that could be addressed at a later stage, but at present, there is simply no basis for the wider disclosure sought.

What's more, it's evidently the case that, as drafted, disclosure of all documents evidencing pre-contractual negotiations would inevitably be an extremely wide and in my submission, disproportionate category, given matters such as the issues in dispute in this case and the total sum claimed by way of damages. As I say, we're perfectly willing to give disclosure that pertains to very specific issues in the pleaded case but the wider category is resisted, for the reasons given.

THE CHAIRMAN: Mr Skinner.

MR SKINNER: Just to add, in relation to which the issue of whether there is an overall strategy is an issue in this case, it's might be worth turning to page 79 of the bundle, which is page 86 of the PDF, paragraph 77E of the defence, amended defence. You'll see the defendants do not and have never had such an overall strategy. So it's clearly a matter in issue and essentially in issue.

In relation to disproportionality, in my submission, the carve-out that I've accepted, of any documents going solely to the logistical arrangements, et cetera, is the

way to meet that. That carve-out is, in my submission, sufficient to meet that criticism.

Ruling

THE CHAIRMAN: Right.

So on this category 1, the claimants are seeking all documents, in essence, in relation to the pre-contractual negotiation, in addition to the contractual documents themselves. While I accept that this is not a contract case but a competition case and I accept that there is an allegation of a broad overall strategy against the defendants, an anti-competitive strategy, nevertheless, insofar as the claimants identify particular points in issue, that is as to IP rights and as to the allegation the defendants were wrongfully involved in designing the tender process so as to exclude competition, those are matters upon which disclosure will be given specifically. I don't think that the fact that an overall strategy is alleged is sufficient reason to require disclosure of all pre-contract negotiations.

As Mr Armitage pointed out, to the extent that disclosure of documents gives rise to further potential lines of enquiry, those can be the subject of future disclosure requests. At the moment, I'm going to limit it to the documents themselves, plus the other points in relation to IP rights and tender process, as already discussed.

MR SKINNER: Thank you. That then takes us to category 2.

This is documents relating to tender processes which the defendants have participated in, in respect of OSAs or otherwise which do or are intended to cover any part of the claim period. The defendants say it's too wide, that the pleaded references don't support it, but they say they're prepared to give

disclosure of invitations to tender that were issued to the defendants, whether or not the defendants tendered and/or won the contract concerned and the documents containing contractual terms concluded, following a tender process in the claim period.

I mean, the same argument applies, really, in relation to this, that any discussion about the design of a tender process is excluded from that category --

THE CHAIRMAN: That takes you on to category 21, doesn't it?

MR SKINNER: Let me just -- yes, I think it would do. I think in light of what you've said, I'm not going to pursue this. I think that what the defendants are prepared to give, I think is fair, given what you've already said in relation to category 1 and the fact that category 31 covers it.

Category 3 is now agreed.

THE CHAIRMAN: The next one in dispute is 15, isn't it?

MR SKINNER: It may well be. Yes.

So this goes to market share. The issue to which the defendants object is that the period -- so in respect of all of the other disclosure requests, we accept that it should be for the claim period over which the documents go, so from July 2016. For this one category, we've suggested a period of five years before that and the reason we've said that is that the question of dominance of an undertaking depends on many factors, but the size of market share and the time period over which that market share is maintained, the defendants have said in this category, for the first time today, that they've not argued or intend to argue that the market shares in the five year period prior to the claim period were materially lower than their market shares during the claim period. But equally, if they were higher, that's still relevant to the question of market definition. And so in my submission, that's not an answer to the point that we

make, which is the persistence of the market share in the market, the fact that it might have fallen a bit, for example. I mean, if you have a 100 per cent market share, it then falls -- you've got a monopoly. Let's say that falls to 95 per cent of the relevant market. That may or may not be relevant -- well, it will be relevant to whether you now have a dominant position on the market and this also comes back to the question about what the size of the relevant market is, because obviously, if you have an OSA in respect of a university and that's a university-specific market, as the defendants allege, then there are going to be -- insofar as the universities have lost OSAs, then that will be relevant to whether they're dominant on those particular markets over those periods and that would include -- but equally, if they gained OSAs in particular universities and then maintained it, then that would be relevant.

So in my submission, this isn't really a point. It just goes to the persistence of market share as a key element in the assessment of dominance and there's no reason to limit it to the claim period because the assessment of dominance in that period will be materially informed to a significant degree, by the extent to which that dominant position is maintained in the period prior to it. The fact that the claimants weren't on the market is neither here nor there to that question.

THE CHAIRMAN: Right. So your key point is that, if the market share was higher in the previous period, that would be materially relevant to the question of dominance. That's the point you make? Because, if it's the same, well they've accepted it's the same, so there's no issue there.

MR SKINNER: I'm not sure they have accepted that it's the same. They just say they haven't asserted and won't assert that it's different or lower but --

THE CHAIRMAN: They must accept it's the same then, it seems to me, at least the

same.

MR SKINNER: At least the same, yes. But it being higher is nevertheless relevant to the question of dominance and what the defendant is trying to do here is limit the scope of the disclosure exercise to the period in which the claims are brought. But in answering the question about the dominance on the market during that time, one has to know or be assisted in knowing what the position was before that time.

THE CHAIRMAN: Right. Mr Armitage.

MR ARMITAGE: Yes. Sir, the defendants' only purpose here is to restrict the disclosure to material that will be useful for this case, in particular the expert analysis. As made clear in the comments in the final column of the document circulated this morning, the defendants are not intending to argue -- although I should take a step back. It's not in dispute that as a matter of principle, the extent to which a high market share is endured over time is relevant to an assessment of dominance, but as I make clear in the final column of the table, this is not a case in which the defendants intend to argue or have argued thus far, that their market shares in the period prior to the claim period were materially lower.

In relation to the possibility that their market shares may have been higher and come down during the claim period, well, that would be an argument against dominance during the claim period rather than in favour of it. So that would be an argument that would assist my clients, unsurprisingly. Had that argument been available to my clients, it would have been a feature of the pleaded case and it isn't, as my Lord would have apprehended.

So, my Lord, our simple position is that this is not a category of documents that is going to assist the expert analysis in the circumstances of this case and one

has to bear in mind the way in which the competing positions on market definition are put.

There are a number of nuances but the two major rival contentions are that the relevant markets are university-specific.

Well, if that's the case, then the question of market shares is not going to be particularly informative in relation to the assessment of dominance because if it's university-specific, then you have 100 per cent of the supply is held by a given supplier at a particular time, subject to potentially some supply at the margins. And, if it's a wider UK wide market, as I say, there may be other arguments about competitive constraints on the defendants which is obviously relevant to the assessment of dominance, but there aren't going to be arguments about the precise level of market shares. And my Lord will have seen in the defence, essentially, the position as to the market share in terms of number of universities and students supplied, at least in the 2018/2019 academic year. There's no dispute about that. So in my submission, this is not a case in which market shares are going to be the kind of disputed point that are highly relevant to the expert analysis.

My Lord, if the Tribunal is minded to give some disclosure to cover off this category -- and I should say there are no allegations in the claimants' pleaded case as to the market share held by the defendants prior to the claim period. If, nevertheless, my Lord is minded to give some disclosure in this category, I would invite the Tribunal to limit it substantially.

As far as I can ascertain, there's no particular basis for the request for a five year period and that would be, potentially, very substantial, given the disclosure sought is all documents going to the defendants and their competitors' shares of supply during that five year period. So I would invite the Tribunal to limit

the pre-claim period disclosure, if any is going to be given, to a period of nor more than, say, one or two years. That would be, in my submission, ample for the point that my learned friend may wish to make in relation to those pre-existing market shares.

THE CHAIRMAN: Can I just be clear, the acceptance you make is one that you intend to be bound by, as in you will not be able to argue beyond this point, if I were to limit disclosure in the way that you ask, you would not be able to argue that your market share was any less than in the previous five years?

MR ARMITAGE: It's a statement based on my client's current understanding of the factual position -- sorry, I'm speaking very quickly there -- the understanding of the factual position and, as I say, had my client had arguments available to it about the pre-claim period position, in terms of market power, that would assist it in relation to dominance. Well, the pleadings have finished and those arguments have not been made. So one can never exclude an application being made to amend the pleading to make such points but as I say, there is no intention to go behind what is set out in that final comment of the table.

THE CHAIRMAN: I think I would have to accept that, if I were to not allow this extended disclosure as asked for, on the basis that it's your position that the market share in the previous five years was no lower or not materially lower, then if at some point you wish to amend, the fact you had avoided giving this disclosure at this stage, on my acceptance, would count very heavily against you.

MR ARMITAGE: I can't get away from that, but as I say, I think it's vanishingly unlikely that this point will ever arise. But I hear what the Tribunal says on that point.

THE CHAIRMAN: Yes, Mr Skinner.

MR SKINNER: I just want to deal with one point that Mr Armitage made, which is that higher market share -- I didn't quite get this far but, effectively, could only assist his client. That's not right to this extent. The defendants' primary case is that the market in question in this case is a market for the tender of official supplier arrangements, effectively, and that that is a university-specific market. Insofar as the defendants had an official supplier agreement before the claim period, it might be said that they enjoyed an advantage in obtaining the next one and so, therefore, the fact that they had a large market share by virtue of a previous OSA could well be relevant to the claimants' case, if the defendants' definition of the market is found to be correct.

THE CHAIRMAN: So that's a university-specific market.

MR SKINNER: A university-specific market for the tender of OSAs rather than for supply to the students of gowns.

THE CHAIRMAN: Yes.

MR SKINNER: My learned friend is correct that there's no magic to the five years that we've suggested. We suggested it because that seems to us to be a reasonable period which would inform the question of dominance in the claim period. So my learned friend's correct that there is no pleaded allegation as to the size of the dominance on the market prior to the claim period but that's not why this disclosure is sought. This disclosure is sought because the issue to which is goes is relevant to the dominance during the claim period and so, while it's true that there's no magic to the five year period, it does need to be sufficiently long, in my submission, to show or not show the persistence of the market share that the defendants had.

THE CHAIRMAN: So is it that you're really concerned to see whether there was a change, the point your clients came on to the scene?

MR SKINNER: No, not particularly. Because what one's looking at is whether the large market share operated as a competitive constraint or an anti-competitive constraint on the market.

THE CHAIRMAN: Well, given it's accepted that for five years previously, it was no less than, what's the particular relevance of a --

MR SKINNER: So what's unclear from the defendants' acceptance is what market they're talking about there, because if it's accepted that in the five year period, they didn't enjoy a higher market share in respect of any university that they were then not the official supplier of during the five year period, that's a very different proposition than accepting --

THE CHAIRMAN: Isn't Mr Armitage's point a good one, that we're talking about -- you're asserting exclusive supplier arrangements. What's the relevance of market share if your agreement is exclusive? It's not an issue, is it?

MR SKINNER: To the extent that there is not an official supplier agreement in place anymore but has been, whether -- so in a competitive market, one would anticipate seeing that different suppliers would gain the official supply agreements, insofar as they're reasonably necessary from year to year. Insofar as the defendants have had -- sort of sown up the bulk of the official supply agreements over a number of years, that is of great assistance to us in showing --

THE CHAIRMAN: You say the bulk of the agreement, but when you say the bulk, you're talking about multiple universities now or year to year?

MR SKINNER: So the point applies to both. The point that the defendants make in their table appears to be predicated on the correctness of the claimants' assertion as to (a) the type and size of the geographical scope of the market. But we can't argue the case on the assumption that that's correct. It seems to

be being suggested that they've not argued and don't intend to argue that the market shares in the five year period were materially lower than during the claim period and it seems to be -- maybe I'm reading too much into this, maybe that's not the premise but it seems to be the premise that what is being discussed there is the proportion of student gowns, for example, that are supplied by Ede & Ravenscroft over that period to the student body as a whole.

Insofar as any particular university, they are not conceding or rather, insofar as any particular university, what they're suggesting is that -- let's say in 2017, they won a tender process which they didn't have in 2016. The relevance of knowing -- and let's say that the successful tender continues to this day, just for ease. So from 2017 onwards, they have on our case, a monopoly or quasi monopoly over the student market --

THE CHAIRMAN: At a particular university.

MR SKINNER: At a particular university but didn't have that in 2016. If they did have that -- let's say that one year was just an aberration and Ede & Ravenscroft weren't able to supply for that year or the university thought: let's try somebody else to see whether we prefer somebody else, but they had got an OSA in the previous three years, this concession wouldn't apply to that university because it would be saying: well, we didn't have a lower market share than zero, despite the fact that in the case of that hypothetical university, they had an OSA previously and subsequently to that one year.

THE CHAIRMAN: I think I just need some clarification from Mr Armitage on this, because I think he can only be talking here about the UK market, as opposed -- it wasn't different for each particular university. It doesn't seem to be make sense then. Can I just check with him that that's what he means.

MR ARMITAGE: There's a certain amount of confusion on my part now. If one looks at what's sought in category 15, it's clearly relating to the question of supply of academic dress to students. There is an issue on the pleadings as to the relevance or otherwise of the market for the conclusion of OSAs with universities, the concession, if one wants to put it like that, in the final column of the table on category 15 is simply making clear that the defendants do not intend to argue that insofar as they supplied academic dress to students in the pre-claim period, they are not going to argue that they did so to a materially lesser extent than during the claim period. So that's --

THE CHAIRMAN: You're not talking about a number of different markets being each university separately, you're talking about the UK?

MR ARMITAGE: I think even if the -- well, that raises a question as to the precise parameters of that market. I wasn't intending to exclude either the local market point or the UK wide -- but in relation to whatever the relevant market for the supply of academic dress to students, my client is not going to be taking a point about the pre-claim period position that is relevant to the analysis of dominance on those markets.

THE CHAIRMAN: So is one to assume, therefore -- let's take a market being university X.

MR ARMITAGE: Hm-mm.

THE CHAIRMAN: Does your concession then mean that if there was an exclusive supply arrangement in place at the commencement of the period, indeed throughout the period, the claim period, you're content to accept that that had been in place for a previous five years?

MR ARMITAGE: I don't think the concession goes as far. I see my Lord's point. I mean, that may not be right on the facts.

THE CHAIRMAN: No. It would be unusual if it was right for every university.

MR ARMITAGE: The concession is the defendants would not be arguing that because there had not been one in the pre-claim period, that that was somehow relevant to the assessment of market power. I think that's as far as it goes. So it's a point about the arguments that would be made. As I understand the submissions that are now being made, what my learned friend appears to be interested in is whether and to what extent the defendants were party to official supplier arrangements in the pre-claim period, as opposed to the question of market share for the supply of academic dress to students and he hasn't sought disclosure on that issue. I understood that to be in dispute. So I'm afraid I don't, at the moment, see --

MR SKINNER: Can I just clarify that. That's not what -- the market share to students is necessarily determined in many cases, by whether or not there is an official supplier arrangement in place, otherwise the official supplier arrangement wouldn't be working. That's the purpose of our case, is to give the supplier the large bulk of the market. So I'm interested in supply to students, not specifically whether there is an OSA in place, but, as you've identified, the concession doesn't seem to meet the point unless one assumes the correctness of the way the claimant puts the case on market definition.

Ruling

THE CHAIRMAN: Yes. I'm afraid to say I don't accept that this is a point which is of any great importance to the market, to the extent that one's dealing with university-specific markets, where the question of market dominance seems to me to be far less relevant, given that you either do or do not have an exclusive supply arrangement. And, indeed, during the claim period, the

Tribunal will have all the material available to it to know whether, for each year during the claim period, the defendants' relationship with the university was exclusive or not and the extent to which it had something approaching a monopoly. I think this goes more to the UK wide market issue and in that respect, given the defendants' acceptance that looking at the UK market, they are not going to argue, subject to any application which, for reasons I've been given, would not be likely taken to amend, but they're not going to argue that their market share in the period prior to the claim period was anything materially lower than that during the claim period, I do not think that disclosure under this category is necessary.

MR SKINNER: For that earlier time period.

THE CHAIRMAN: For the earlier time period. Yes, obviously.

MR SKINNER: Then it's category 25 is the next one.

THE CHAIRMAN: Yes, we discussed the answer to this, because it links to category 1. Is there still an issue over this, because I think with the word "existence or potential existence of IP rights" included in the defendants' most recent offer, I thought that was agreed?

MR SKINNER: So what I was going to propose in this respect is -- so what we have proposed and what I've proposed in my skeleton is "documents going to whether and if so, to what extent the defendants and/or universities consider that they hold intellectual property rights in relation to the design of items making up university academic dress", that should be "or assert that they do." And then I was just going to add "including correspondence in the period July 2016 to present between the defendants and universities in relation to the existence or potential existence of IP rights."

Sorry, because this is coming rather late, I just made some notes in scribbles on my

version of the table. Let me just try and decipher what I've written here. I suppose the point is that the internal discussions within the defendant about whether or not it can seek to maintain its market position by persuading universities to believe or create IP rights in their academic dress wouldn't be covered by the defendants' proposal but would be covered by ours and that's again relevant to the strategy of exclusion point. Other than that, I mean, I can see that the two proposals are quite close, but that's the key category that would be missing and which we would say ought to be included.

THE CHAIRMAN: I suppose one might say that the defendants' offer of disclosure of correspondence would exclude where there had been telephone discussions of which there were records.

MR SKINNER: Exactly.

THE CHAIRMAN: So I would be open to the suggestion that that should be extended to correspondence or communications between.

With that, that would cover because I think internal considerations within the defendant would be irrelevant unless anything was done about it, unless any communication was made with a university to take that further.

MR SKINNER: It would be relevant to the question of whether the defendants have a strategy of undertaking that. Obviously, if they then went further, if we don't have those documents but we do have communications which appear to implement such a strategy, then obviously, the Tribunal may make inferences about whether there were such a strategy, but if there is direct evidence of it, then so much the better, one doesn't need to draw inferences, you can actually look at the direct evidence.

THE CHAIRMAN: Mr Armitage, what do you say about this category? Given my addition of the wording, I think it would need to be "disclosure of

correspondence or documents evidencing communications between."

MR ARMITAGE: No issue, subject to, as I say, my solicitor telling me otherwise, but I apprehend no issue with that. The offer used the word -- I should say the defendants' proposal in relation to category 25, included the word correspondence but that wasn't intended to exclude other forms of communication. In relation to the purely internal documents, I adopt what my Lord says, those are not relevant. It's not an abuse of dominance to have an unenacted strategy, to do anything in particular, the question is always, what was the effect on competition.

So in terms of any internal documents, whether or not any exist that merely show an aspiration in this regard, those would not be relevant and therefore we would invite the Tribunal to limit the disclosure accordingly.

THE CHAIRMAN: Yes. Mr Skinner, anything come back on that?

MR SKINNER: Only on that latter point, if I may. Just it's quite right, obviously, that an internal strategy will not, of itself, win this case but whether there was an internal strategy is, as we've seen, a key plank of the claimants' case and that, together with the evidence of implementation, would then be what won it, but without the evidence of the strategy, it's rather difficult to then say that the -- what the defendants would say is that subsequent emails or whatever, unless they themselves disclose a strategy explicitly, which there's no reason for them to, given that they're communications with a single university, or likely to be in many cases, communications with a single university, one wouldn't expect to see those documents as disclosing the strategy which is the necessary prerequisite for the success of a case, based on implication of such a strategy.

THE CHAIRMAN: Yes. At the moment I think the defendants' offer but with the

words I've already identified, extending to evidence of communications between them and the university, is sufficient to cover this category, so I'll order it in those terms.

MR SKINNER: I'm grateful. Then category 40 -- give me one moment.

So this was originally "documents evidencing discussions between defendants and universities concerning commission payments or other benefits in kind provided by the defendants to universities." That's been suggested as too wide and so in my skeleton at 1512, I've reformulated it as "documents evidencing discussions between defendants and universities concerning", and then I've added "agreements for or arrangements in relation to commission payments ... " was meant to then mean or other benefits in kind provided by the defendants to universities.

The defendants now say that's still too wide because it would pick up a manner of mundane correspondence and they would be willing to disclose "documents evidencing discussions between the defendants and universities concerning agreements in relation to commission during the claim period." I'm just trying to see the difference.

THE CHAIRMAN: Is it the words "or arrangements"? Is that the only difference?

MR ARMITAGE: It is.

THE CHAIRMAN: You think arrangements could include the actual mundane matters of paying commission?

MR ARMITAGE: That's the basis for the objection and therefore, if my learned friend is content to carve out such categories, then I don't think there is, in fact, anything in dispute.

THE CHAIRMAN: Yes, I think the claimants will be concerned to include something which is an arrangement which falls short of an agreement but nevertheless

exists.

MR ARMITAGE: Yes.

THE CHAIRMAN: Whereas you want to avoid the mundanity of revealing all the payments?

MR ARMITAGE: I think that really is all there is -- it's a practical issue rather than anything else. Agreement in the competition law context, as my learned friend points out in his skeleton, is a somewhat broader concept than a formal written agreement, but if necessary, to ensure that more informal agreements are --

THE CHAIRMAN: Could it be said to cater for the problem then, could we have "concerning agreements (whether formal agreements or informal arrangements)"?

MR ARMITAGE: I think perhaps "agreements, whether formal or informal", would address the point. As I say, it really is only to exclude what you might call purely transactional matters.

THE CHAIRMAN: Yes. So Mr Skinner, with that identified, are you happy with that wording, "agreements (whether formal or informal)"?

MR SKINNER: Yes, just save the defendants have missed out or other benefits in kind, which was in the original suggestion. They just said "in relation to commission." I think that's because in my suggestion, I didn't expressly set that out. I put ... on the assumption that that would cover the rest of the part.

MR ARMITAGE: I think that was probably my error. If one looks at the penultimate column on category 40, we had originally said "commissions and other benefits in kind." So it would be "agreements (whether formal or informal) in relation to commission payments or other benefits in kind." I think that would again -- unless I'm suddenly told otherwise, I think that would reflect what the

defendants are willing to give.

THE CHAIRMAN: Yes.

MR SKINNER: I just want to be clear that what's intended is documents evidencing discussions concerning agreements, formally or informally, or potential agreements, because what we're not looking for is just a discussion of what the agreement means, for example, we're actually looking at --

THE CHAIRMAN: Yes, so you're looking for the discussions, whether they resulted in agreement or not.

MR SKINNER: Exactly.

THE CHAIRMAN: I don't see that being objected to.

MR ARMITAGE: Save that I'm not sure what the relevance of documents concerning agreements that don't ever come into being would be in this case. That would be the only basis for the objection. Again, if the concern is that the defendants are somehow seeking to exclude less formal agreements, then that's covered by the wording we're now considering. So --

MR SKINNER: The issue is that, if one takes commission payments, for example, the effect we say of commission payments is necessarily to increase the cost of gowns that are purchased by students, because Ede & Ravenscroft pays a commission to the universities and presumably they have to recoup that payment from their customers. Discussions as to the levels at which those commissions are set, for example, will be relevant to the defendants' defence of objective justification as to whether or not it's spread out, you know, whether they can recoup their costs over time for the investments that they say they made and it goes back to this strategy point. So it's not just -- it's looking at the strategy that they were entering in in entering into those agreements and discussions with the universities about the levels of

commission that the universities were looking for, levels of commission that Ede were offering and all those sorts of things. I mean, for example, if the universities weren't looking for commission at all, and one could imagine a situation where a university, like Oxford and Cambridge have, or Ms Taylor says they have anyway, several official suppliers, then you can see that the level of commission that an official supplier would be willing to pay to those universities might be less because they're buying less of the market effectively with that commission payment, if they're only one of four, say, but equally in those circumstances the universities might say, well, hang on, we're not selling you the market here, we just want to make sure that those people that supply us adhere to our standards. So if you're going to supply our students, we want to have you on our roster but we don't want a commission and if Ede then say, "well, no, look, have a commission, but in return for that we want a bit of the market", then that's relevant to the anti-competitive effect of the agreements and in terms of the strategy of entering into them.

THE CHAIRMAN: Mr Armitage, any objection?

MR ARMITAGE: Yes. I think provisionally I can see that discussions as to the level at which commission should be set may be relevant irrespective of where the parties actually -- I think I can see that that could be relevant to the objection and, put in that way, I'm going to have to say provisionally, because I haven't got instructions, but I can see --

THE CHAIRMAN: So I think I'm going to direct we follow the wording of the claimant on that issue.

MR ARMITAGE: Yes. So could I just ask you clarify where that leaves us on the wording? I know we'll have an order. So it's --

THE CHAIRMAN: "Concerning arrangements (formal or informal) in relation to

commissions and other benefits in kind" and I think perhaps include the words then "whether resulting in an agreement or not", close brackets.

MR SKINNER: Can I just suggest a slightly more straightforward way might be to say "arrangements or potential arrangements (formal or informal)".

THE CHAIRMAN: You mean agreements?

MR SKINNER: Sorry, quite. Agreements, brackets-- sorry, agreements --

MR ARMITAGE: Or potential agreements.

MR SKINNER: Or potential agreements whether informal or informal.

THE CHAIRMAN: Yes. Okay. I'm happy with that.

MR ARMITAGE: We're probably violently agreeing on this category.

THE CHAIRMAN: Now, what's left?

MR SKINNER: So I think the rest we've agreed on general disclosure. There are -- I mean, some of it's agreed in the table, some of it's been agreed in the skeleton and then been agreed by the defendants subject to caveats as to the date period. As I've said, in respect of all the documents save that we asked for the earlier period I'm content for that. So I think those are all otherwise agreed.

Going back then to my original list of topics, the next is -- I've just seen the time, but I think the next logically is the defendants' request for another CMC and a request that the cost budgeting issue be adjourned to that CCMC. It may be you want to hear from Mr Armitage first on that.

THE CHAIRMAN: Yes. Let me say at the outset -- I'm going to need a break in a minute by the way but at the outset I would say at the moment I'm not persuaded we should adjourn the question of costs budgeting to any further CMC. It seems to me we are here, the table's been produced, we're able to deal with it and to the extent that anything arising out of the recent request for

clarification of the claimant as to what its gowns are made from, anything arising out of that can be dealt with by way of amendments/applications in the ordinary course. It may or may not come to anything. So at the moment, subject to anything Mr Armitage says immediately, I'm not persuaded that we should adjourn this question to a further CMC.

Do you want to address that immediately, Mr Armitage?

MR ARMITAGE: Perhaps just by way of preliminary response, my Lord. I think we had floated the possibility that it may be prudent to defer some or all of the cost budgeting exercise if the Tribunal is with me that a further CMC should be listed to address potential issues arising out what I've called the recycled plastics concern. We're in the Tribunal's hands of course. As my Lord knows, the defendants have instructed separate representation in relation to cost budgeting issues, that's Ms Archbold, who is here and perfectly able to deal with cost budgeting issues today if my Lord wishes to. So it was simply raised as a matter for the Tribunal to consider, but I'm not going to spend time arguing over it, if my Lord is inclined to do cost management today.

THE CHAIRMAN: Yes. So I am inclined to do cost management today which is then the next major topic.

There seems to be quite a bit to argue about in that, unless things have moved on since the most recent exchange of correspondence. Just before I consider a break, how long do you think we'll need on this? Mr Skinner first of all?

MR SKINNER: I would hope that we'll get -- I mean, I hope we can take each of the items relatively shortly. So I would hope we'd get through it in a hour.

THE CHAIRMAN: Yes. I think this was listed for a half a day, wasn't it, this CMC?

MR SKINNER: I have no idea what it was listed for, I'm afraid. I'm not sure.

THE CHAIRMAN: In my diary it is and therefore I have other things I should be

turning to this afternoon. But I notice the time now. Given I need to take a break now, I suggest we break for lunch now but, unless anyone has any strong objection to this, we recommence at half past one, with a view to getting through this by half past two at the latest. Does anybody on this call at all, whether counsel or anybody else who's participating, have a violent objection to that?

MR ARMITAGE: Only to clarify that there is also the issue of the recycled plastics that in my submission it would be sensible to deal with today, at least if only in terms of considering whether a further CMC is needed. Provided my Lord considers he has time to --

THE CHAIRMAN: Yes. I'll deal with that.

MR ARMITAGE: Very good. Then no objection to returning at half one.

THE CHAIRMAN: In which case we'll continue at half past one.

MR SKINNER: I'm grateful.

THE CHAIRMAN: Thank you.

(12.49 pm)

(The luncheon adjournment)

(1.30 pm)

THE CHAIRMAN: We're just waiting to be told we can start by the live streaming having commenced.

CLERK: We are ready to begin.

THE CHAIRMAN: Right. Good afternoon, Mr Skinner. Hello, Ms Archbold.

MS ARCHBOLD: Good afternoon, my Lord.

MR SKINNER: Just before we move onto budgeting and I know Mr Armitage is here in the background, there's just one issue on disclosure, which is the date by which the general disclosure exercise should be conducted --

THE CHAIRMAN: Oh, yes.

MR SKINNER: -- which isn't agreed. I had suggested eight weeks. There's obviously a tension here because, obviously, the defendants need long enough to do what is likely to be a larger disclosure exercise, in terms of final documents but as I have said several times today, this is a case where we haven't seen the vast bulk of the documents and we're going to need a considerable period of time before witness statements are due on, I think 2 July, to digest the documents, consider whether they affect the nature of our case at all and then obviously get the witness statements drafted.

So I originally suggested eight weeks from today, which takes us to 9 March.

I'm happy to give a couple of more weeks than that, I'll be loath to give beyond the end of March. We're going to need April, May and June to really consider the documents which we anticipate are going to be quite voluminous.

THE CHAIRMAN: Yes.

MR SKINNER: And then, obviously, draft witness statements.

THE CHAIRMAN: Mr Armitage, what do you say about that?

MR ARMITAGE: My instructions are that that is a little too tight, bearing in mind we have the practical example of the time taken to comply with even the initial disclosure order in this case and also factoring in the fact that I believe Easter holidays start on approximately 1 April. We do need a little more time, I'm instructed and I think for that reason, I'd invite the Tribunal to give until 16 April, Friday 16 April. That's still very significantly before the existing deadline for witness statements of fact. So in my submission that does give ample time and ensures that there won't be the need for applications for extensions and the like.

THE CHAIRMAN: What's the date of witness statements, Mr Skinner?

MR SKINNER: 2 July, I believe.

THE CHAIRMAN: Right. Well, I think the 16th is slightly too late. I'm going to order 9 April, which gives the defendants until the few days after the Easter weekend to finalise what they're doing. Obviously, the case has been going on for some time and they are revealed of the potential further burden that they might have had. So I'm going to say 9 April.

MR ARMITAGE: I'm obliged.

THE CHAIRMAN: Good. Is that it? We can move onto the costs, can we?

Now, Mr Skinner, before we deal with the detail, can I just have some education as to the process here. As I understand it, the consequence of either ordering or approving a cost budget is that when it comes to assessment, to the extent that the party has spent more than or claims more than is in the costs budget, they would then have to justify that to the costs judge?

MR SKINNER: Yes and no. In respect of incurred costs, which --

THE CHAIRMAN: Agreed, leaving aside incurred costs, we're talking about budgeted costs.

MR SKINNER: That's entirely correct.

THE CHAIRMAN: And if they've spent less, what's the position then?

MR SKINNER: So the starting point, if one's spent less, is that that's prima facie a reasonable and proportionate sum to have spent. So one doesn't normally then, reassess costs a second time. It's only when one is above what you anticipate to be a reasonable and proportionate amount to spend on any particular phase or even the total, that then the costs judge will really get involved.

THE CHAIRMAN: There is an oddity about this, isn't there, because this is pretty much a summary process. It's nothing like the process that would be

undertaken in a detailed assessment of costs. So there are three options, aren't there, for me? One is to approve the amount, the budget. The second is to require it to be reduced and approve it in a lower amount and the third is simply to decline to approve at all, simply to leave it open, and that might be appropriate, if I simply don't have enough information and I think the costs judge will be much better placed to determine issues such as -- I'm not going to take one at random now, but one particular issue the costs judge would be better placed to deal with. Is that right?

MR SKINNER: It is open to the Tribunal to decide to make a costs management order that effectively doesn't make a cost management order in relation to a particular phase. Pretty unusual approach but it is a power that the Tribunal has. I mean, as you rightly say, this isn't a detailed assessment exercise and essentially -- and I'm obviously grossly paraphrasing, but essentially, the exercise that the Tribunal is engaged in is one of considering what, having regard to the nature of the issues in dispute, is a reasonable and proportionate amount to spend in litigation of this sort.

THE CHAIRMAN: Yes. I mean, but that involves all sorts of difficult questions about which I have no information, like what's the appropriate market rate for counsel's brief fees in a case like this, all those sorts of issues. I don't have information before me to judge whether they are reasonable -- proportionate is a different question -- reasonable, I suppose.

MS ARCHBOLD: My Lord, I do apologise to interrupt my learned friend. As you say, those options are quite rightly available to your Lordship. If you were to decline to make an actual costs management order, what happens at the end of the substantive action is that the entirety of the action would be subject to detailed assessment. Now, of course, the cost assessing officer or costs

judge would have the budgets as reference but it would be merely in the capacity of an estimate. All of the costs would still be subject to a line by line assessment.

THE CHAIRMAN: Even if I were to approve the costs budget in respect of items 1, 2, 3 and not just item 4, the whole lot would then have to be assessed on a detailed basis?

MS ARCHBOLD: Not quite, your Lordship, you do have the option to make a costs management order in part, say for example, in certain phases. However, the only thing that I would say is that may pose some difficulty as to the preparation of any final bill of costs, as it would create quite a difficult detailed assessment, with some phases to be assessed and some simply to be subject to the cost management regime because it may not be quite easy to say that all of these costs fall within X phase, if you see. But yes, of course it is an option open and available to you.

THE CHAIRMAN: Yes. I mean, the oddity is that there are costs judges who are experts in this area who deal with these matters and, obviously, judges are having to become more expert but they're nowhere near the expertise that cost judges have and it's slightly odd that one's binding the hand of a costs judge to some extent, in approving a budget. Anyway, there you are, that's the regime, is it?

MR SKINNER: Well, it is and normally, in the chancery or the QBD, would be dealt with usually by masters rather than judges. But I'm afraid I've got another one next week in front of a judge, so as I say --

THE CHAIRMAN: I have come across them, it's just that it's --

MR SKINNER: It is right that to some extent they're a bit of a finger in the air exercise, given the sort of feel for the cases that you have, having seen the

pleadings and the issues and given some case management directions already to trial.

THE CHAIRMAN: Yes, and I assume -- again, this is by way of preliminary and you can come back to this on a point of detail -- a comparison of what one party is proposing to spend is a relevant factor. It's relevant to compare that with the other party, is it?

MS ARCHBOLD: Yes and no, my Lord. No is the first answer, the budgets need to be considered on an individual basis but of course, I do think it's prudent to have consideration to both.

My Lord, I don't actually have instructions on this point and I'm sure I'll be advised in the background if my client takes issue with it. I'm conscious of the time we have available and I'm conscious that my learned friend Mr Armitage does have one further point in respect of the recycled plastics he wishes to raise. If it were the case your Lordship were not to be making a cost management order for the entirety of the parties' budgets, would it be prudent to have the recycled plastics issue to go first, see where we are in terms of timing for the parties' budgets and see how we go? The only reason I say that, my Lord, is I'm very conscious of how complex a detailed assessment could become, if both parties' budgets are approved only in part or if there's no cost management order made at all.

THE CHAIRMAN: So you're saying I just get Mr Armitage's point out of the way first, are you?

MS ARCHBOLD: It might be prudent, my Lord.

THE CHAIRMAN: Mr Skinner, what do you say about that?

MR SKINNER: I won't be asking the Tribunal to make cost management orders in respect of only certain phases, I will be asking the court to budget the whole

thing but I don't mind which order we go in. I don't anticipate Mr Armitage's recycled plastic point will take very long.

THE CHAIRMAN: I'm not quite sure what the point is. There is no application as such, for further information or anything like that at the moment. You've simply written, asking for answers to various questions, haven't you, Mr Armitage? So what are you actually asking me to do?

MR ARMITAGE: Three things, although I think one of them has probably fallen away. The first is in light of the issue that has arisen, and I hope my Lord has had the time to read the letter of 1 January.

THE CHAIRMAN: I have.

MR ARMITAGE: The point is set out in some detail. There are a number of potential -- leaving aside, and, as I say, obviously no allegations are made at the present stage, although we do say it's rather unsatisfactory that, having had the letter since 1 January, we still have no information whatsoever from the claimants in response to the matters raised. So leaving aside the point that it's always a matter of concern where a pleaded case, verified by a statement of truth, may be unsustainable, there are also a number of potential implications for the proceedings. It's for that reason that we've suggested it may be prudent to list a short further CMC within, say, four weeks and just to run through the potential implications. I can say with close to certainty, subject to, of course, the precise nature of the claimants' response of the 1 January letter, that the defendants will now be wishing to amend their pleading so as to deny the various allegations in relation to the recycled plastic content of the claimants' gowns. Currently that's a matter which we've required the claimants to prove, on the basis it's outside our knowledge but obviously things have now moved on.

It may well be the case that the claimants wish to amend their pleadings first, depending on the investigations they say that they're currently carrying out.

There are then also, obviously, potential implications for disclosure. The defendants have not, so far, sought focused disclosure going to this specific issue, taking the view, in my submission quite properly, that it was necessary to see the claimants' response to the 1 January letter first but self evidently, this has the potential to prompt further disclosure requests and orders. Potentially, my Lord may have seen -- I'm not sure my Lord has had the opportunity to read them but there are four rather technical looking laboratory reports which were attached to the 1 January letter, the conclusions of which are quite clear, but simply by way of saying there may be the need for at least consideration of whether expert evidence on this particular point may be necessary.

There may be other implications. The only other one I wish to mention and I say this very tentatively because I really am conscious not to prejudge the response the claimants may provide, but it is important to recall that on their own pleaded case, and on the facts, the claimants compete with the defendants in relation to -- I think the current number is 39 of the universities that are the subject of official supplier agreements with the defendants. The claimants set that out in their response to a request for information that the defendants made, which -- I don't need to turn it up, but it's at page 173 of the e-bundle.

Now if, and it really is currently only an if, if the position is that Churchill has been marketing its products to students who would potentially be my client's customers on the basis of marketing claims that are incorrect, that may give rise to the potential for counterclaims, which is a matter of potential complexity, given these proceeding are in the Competition Appeal Tribunal, which has a jurisdiction that is confined to competition law claims, broadly

speaking, so there may well be matters of some complexity if non-competition law counterclaims need to come into the fray. And I only raise that for the sake of transparency so that the Tribunal is aware there may be some rather delicate case management issues and there was a recent judgment of the Tribunal of, I think, Mr Justice Roth, on this very point of where counterclaims raising non-competition law issues are raised in the course of competition law claims and how that ought to be managed.

THE CHAIRMAN: Yes.

MR ARMITAGE: So there are a number of issues. As I say, as in relation to the floated suggestion of deferring the cost budgeting issues until the future CMC, we only raise this as a suggestion. We're entirely in the Tribunal's hands. If the Tribunal's preference is that we await the claimants' response to the letter of 1 January and make any applications at that stage, then so be it.

What we would ask for, though, given that the matters have now been out in open correspondence since 1 January without any response, is that the Tribunal in this respect, in my skeleton argument, is that the Tribunal direct that a response is provided by a particular date. We had suggested seven days. Admittedly there are a number of questions in section 6 of the 1 January letter that, when one looks at them, and perhaps if we could turn them up very briefly -- I don't know if my Lord has the letter to hand, but it begins at page 373 of the e-bundle and then the list of questions is at page 380 and this is the PDF numbering, page 380.

THE CHAIRMAN: Yes.

MR ARMITAGE: So my Lord will have seen there are essentially two -- just by way of background, there are essentially two issues. The first is the lab reports which appear to conclusively, at least so far as those lab reports are

concerned, show that a number of different samples are not, in fact, made from recycled plastic at all and then there's a separate issue as to the information that Ms Nicholls of the claimants provided, when she received a query about the claim that the claimants' products were made from recycled plastics and the documents that she provided in response to that query simply didn't support the claim that the claimants make in their marketing on that front. So the questions here are a mix of questions that go to both of those issues. But just taking a look, for example, at -- just to pick one out, question 6.3:

"What information do the claimants have at present as to the content or composition of gowns and hoods which they manufacture or others manufacture on their behalf for sale or hire in the United Kingdom?"

Now, that is a request for information in the claimants' possession at the moment, about essential aspects of not only their marketing but also their pleaded case in these proceedings. That ought to be, if not at the claimants' fingertips, very close.

The same is true of a number of other requests here.

THE CHAIRMAN: What's the point of that request? I mean, just thinking of the proceedings, the issue is whether they do or do not contain recycled plastics or are made from recycled plastic, is the claim made and that's the issue, isn't it, and that's the issue for the proceedings because if they're not -- as I understand it, you've got a number of different arguments you would want to advance. But that's the essential question, isn't it, for the purposes of going forward in these proceedings?

MR ARMITAGE: Well, yes, I agree that's one question, subject to the point I made about potential counterclaims and also the veracity or the basis on which

statements of truth were entered in respect of --

THE CHAIRMAN: That's not relevant to the proceeding. There may be some consequential applications you would want to make, based on the way in which the statement of truth has not been complied with, but that's a slightly tangential point. For the purpose of the proceedings, the issue is whether or not your concern now turns out to be true. That's the really important question, isn't it?

MR ARMITAGE: That I would agree with, but just by reference to the category that we were just looking at, plainly the information that the claimants have in their possession on this issue is going to be informative as to any further steps because --

THE CHAIRMAN: Well, is it? Let's assume the answer comes back: no, they are all made from recycled plastics. You may chose to believe or disbelieve that. If you disbelieve it, you may want to amend your defence to raise the point -- to argue the opposite, in which case it becomes an issue in the proceedings and then the normal trial processes of disclosure, witness statements apply to it and indeed there may be some appropriate requests for further information, there may or may not be. But answering this broad range of questions, it puts them on the spot, it raises a great difficulty for them, but does it advance the case particularly? A lot depends on what their primary answer is.

MR ARMITAGE: I do take that point, my Lord. I think the issue is were it the case that we were in a position today where at least that primary answer had been given, that would be one thing and, my Lord, I agree that that is the essential matter for present purposes, in terms of the future conduct of this litigation, subject, as I say, to potential issues relating to statements of truth and, indeed, potential counterclaims. So, my Lord, that is I think, what we need to

know much sooner rather than later because we're at the second CMC, there is already a detailed timetable down to trial. If this matter is going to delay matters or cause substantial revisitations of the case management timetable, it really is important that that is addressed very soon. So, my Lord, if the Tribunal were minded to make some order requiring an answer to at least some of these questions, we would invite the Tribunal to focus on what my Lord has identified as the main question, which is what is now the claimants' case in light of the matters raised, whether they would wish to amend their pleading.

THE CHAIRMAN: So if I were to order that, then the next step is potential amendments, applications, potential -- I mean, if the amendments are allowed, then disclosure automatically, it seems to me, will follow because it becomes an issue on which disclosure is obviously necessary.

MR ARMITAGE: Yes.

THE CHAIRMAN: I can't believe there will be any issue about that that needs a CMC to resolve it, nor indeed, about the amendment application. Those can be dealt with on paper, I'm pretty sure, and if not, a short telephone or short video hearing. In the new world, we can do video hearings at short notice. Expert evidence, depending on what the position is on the pleading, it may or may not be necessary. I don't think we need to set a CMC now, on the assumption that everything's going to go belly up, as it were, on all these applications. Let's be slightly optimistic and hope we can deal with those points on paper.

MR ARMITAGE: My Lord, I'm in the Tribunal's hands, my only thought had been that listing a CMC can have the effect of focusing minds and ensuring the matter is addressed quickly, but if my Lord were to give the more limited

direction sought, in terms of the provision of information in relatively short order, I think, as I say, we're in the Tribunal's hands as to whether to list a CMC now or to deal with that as and when it arises, so I'm not going to seek to persuade you --

THE CHAIRMAN: Mr Skinner, in terms of the provision of information, it seems to me this is an important point which might have ramifications and you ought to be providing an answer to the basic question, are your gowns made or not made from recycled plastic, pretty promptly.

MR SKINNER: I don't disagree with that in principle. It's not correct that we haven't responded to this letter. We wrote yesterday and it hasn't made its way into the bundle, this letter. It's very short and if I can just read it. It says:

"Thank you for just letter dated 1 January 2021. You've written to us shortly before the CMC with a long list of questions. Both we and our clients take the matters raised very seriously and accordingly, we are working through the questions carefully. We will respond substantively as soon as we are able and we expect this to be by the end of next week."

So Mr Armitage's concern that a CMC might focus minds, I can assure the Tribunal that minds are very much focused on this question. It isn't quite as straightforward as simply us giving an answer because it's involving communications with our third party suppliers and obtaining various documents from them and also from Churchill Australia. It isn't a case we can respond immediately. We anticipate being able to respond by the end of next week. In the circumstances where my client is fully engaged with the issue and fully intends to respond as soon as they can and hopefully by the end of next week, in my submission it's not necessary for the Tribunal to make an order in that regard. We are doing what we can.

Insofar as we don't manage to reply by the end of next week, that's because we haven't been able to, not because of any lack of diligence and we don't want to be in a position where we're having to apply to the Tribunal for an extension of time, just simply because it's not been possible to comply with the Tribunal's order. It is in hand and it will be responded to.

THE CHAIRMAN: Right. So that's answering all the questions, that's what you're attempting to do, which is undoubtedly in everyone's interest, that the more information, the less is provided. Nevertheless, is there any reason why the bare question, is your case still that your gowns are made from recycled plastic, can be answered by me ordering it by a certain date and if it's Friday next week, it's Friday next week?

MR SKINNER: As I say, we anticipate being able to respond by Friday next week. Can I ask the order gives us a little bit more time, just in case there's a little bit of slippage, so say to the 27th.

THE CHAIRMAN: I'm not going to make an order requiring you to answer these questions by next Friday. I simply take the Tribunal has heard, the defendants have heard that you intend to answer all these questions and will do so. I'm considering only making an order that the question whether your case continues to be that the gowns are made from recycled plastic is answered by next week. If that's alone and the rest waits a few days, so be it.

MR SKINNER: I'm not going to push back. I suspect the answer is going to be yes, it is still our case.

THE CHAIRMAN: I'm going to order that. For the moment, that's all I'll order. You heard what I say about applications to amend. They should be dealt with in the first instance by applications to be dealt with on paper and we will go from there.

MR SKINNER: I'm grateful.

THE CHAIRMAN: It may have an impact on cost budgeting but those can all be added, I think, to whatever we decide today in relation to cost budgeting. Good. Thank you both very much for that.

MR ARMITAGE: I'm grateful.

THE CHAIRMAN: Right. Back to the costs. Sorry to waste your time with those preamble questions but it's helpful to get some points of principle out the way. Shall we turn then to the categories.

MR SKINNER: I don't mind who goes first or which budget we take first. In my skeleton, I've dealt with the defendants' budget first, just because there's marginally more to discuss with that one, but I'm in the Tribunal's hands.

THE CHAIRMAN: Remind me, the claimants' budget, I think it's probably best to start with the defendants' budget, on the basis it's the larger one, if for no other reason, and there's nothing, I think, in the defendants' skeleton on the detailed point. I think it's -- yes, it's left for oral argument, as I understand it.

MR SKINNER: I think that's right.

THE CHAIRMAN: Disclosure then?

MR SKINNER: Disclosure --

MS ARCHBOLD: I do apologise to interrupt again, my Lord. Just a minor point on the CMC phase, just a point that was raised in the claimants' skeleton. In respect of the CMC phase, so obviously there's been agreement between the parties that costs up to and including the date of the CMC are to be treated as an incurred cost and therefore shall be subject to detailed assessment which of course is correct. However, there is an additional point raised by the claimant -- I do apologise, I'm skipping ahead to the claimants' budget in respect of their contingency for costs.

THE CHAIRMAN: Okay. Right.

MS ARCHBOLD: Disclosure phase is the first.

THE CHAIRMAN: Yes. Now, there's not much difference between the parties on this amount. So looking at the defendants' disclosure, I think probably who goes first, probably Mr Skinner you go first, don't you, in challenging the budget?

MR SKINNER: I think that's probably right. I'm just going to extract our hard copy, because at the moment, I'm looking at everything askew. There we are. So in respect of disclosure, the real criticism here is the level of solicitor that's doing the work. The defendants have claimed for 82 hours of partner time on the disclosure exercise which if one looks at the division, is certainly greater than one would normally expect on disclosure. One sees 82 hours for partner, 53 and a half hours for senior associate, 72 hours for junior associate, 13 hours for paralegal, D, and in my submission, that's really too much for a supervising solicitor to be doing -- that's must be the nuts and bolts of a large proportion of the disclosure exercise and so we offered 40 hours as sufficient and therefore offer the figure that we've set out in the skeleton of just under £65,000 for future disclosure costs.

THE CHAIRMAN: Well if you look at the hours overall, it's 221 hours for defendants on disclosure. The claimants anticipate spending 210 hours on disclosure, as I understand it, and this is an area where it seems to me one side's estimate is a very good guide as to the overall amount of work involved.

MS ARCHBOLD: Maybe if I could make one brief point. I didn't wish to cut across Mr Skinner if he's not yet finished his submissions. Whilst I appreciate the overall hours, we do need to take into account, and of course, the hourly rates, these are just the constituent elements. It's, of course, a global figure

for each phase that we're concerned with. It's simply to assist the Tribunal in arriving at a sum. The offer that the claimants have made on the defendants' phase does take into the level of the incurred costs. So you can see here that the defendant has incurred just under £35,000. If I could turn your Lordship's attention to the claimants' phase, you'll see that they have zero incurred in their budget and it is inappropriate for them to base an offer based purely on their future costs alone, for two reasons. One, they will of course have done work on disclosure already. This point has actually been raised by the defendants within their budget discussion report and the claimants have responded to say that work that has been done so far to date, bearing in mind that this budget for them has been prepared on 14 December, so work will have been done, has been included within the pre-action and their issue statements of cost phase.

The only reason that I mention this, my Lord, is that their costs are incredibly high and it's impossible for both the defendants and the Tribunal to identify what costs have been incurred to date on disclosure and whilst, of course, we are looking to assess the incurred costs, it's very much important to look at the trend of spend to date, in order to know how to proportionately set the future costs going forward. So the offer by the claimants firstly, we say is inappropriate because it draws a comparison of the phase total, so the claimants taking into account their incurred costs.

In respect of the individual elements, the solicitors' time profit costs, the offer by the claimants is basically £58,485 which is actually below what the claimant is seeking in their own phase --

THE CHAIRMAN: Hang on, where do you get that figure from, £58,000-odd?

MS ARCHBOLD: The £58,485, my Lord, is detailed within their budget discussion

report, which, if it would assist, it's at page 359 of the PDF of the bundle.

THE CHAIRMAN: I'm looking at the skeleton which offers £64,485.

MR SKINNER: If you take £6,000 off of that, you get to my learned friend's figure and that takes off the disbursements which was the £6,000 offered for those and in fact, that's what was claimed for disbursements. So my learned friend is right that £58,485 is the solicitor time cost that we've offered on that phase, against the claim of £91,000.

MS ARCHBOLD: So the difficulty we have here, my Lord, is that, obviously, the defendant has a far more greater task when it comes to disclosure than the claimant and it's difficult to see how the claimant is firstly reducing the costs, the future costs, by the defendant in actual fact offering them less than what they claim in their own budget, which is the £71,000, also bearing in mind that they have incurred, probably, costs in the pre-action issue phase already. So it doesn't stand to reason that their costs should be greater than the defendants'.

Now, during negotiations ahead of the hearing, the defendants did actually make a counter offer, purely to try and reach an agreement and that was based on £86,000. That was the £6,000 disbursements as agreed by the claimants and £80,000 for profit costs going forward and bearing in mind the directions that we have just set, I would submit that that is actually a figure that falls within a range of reasonable and proportionate costs, considering the task for the defendants they have ahead.

THE CHAIRMAN: Yes. So the figure I'm being asked to approve is -- the only issue is taken in relation to the figure for solicitors' costs, estimated costs going forward, which is currently £91,000-odd and you're asking me to substitute for that, what?

MS ARCHBOLD: £80,000, my Lord.

THE CHAIRMAN: £80,000. So that's what you're asking?

MS ARCHBOLD: Yes, my Lord.

THE CHAIRMAN: Mr Skinner?

MR SKINNER: Can I just can respond to the point that my learned friend makes about the parity of exercises. It's obviously right, as we've discussed, that the defendants have a greater amount of doing disclosure in terms of they'll have more documents to disclose, but the disclosure phase of the budget includes our consideration of those documents and the time taken to consider the documents that we have disclosed and vice versa, so any documents we disclose, the claimants will have. The time to consider those is in this phase as well. So we don't accept that. Although there is a greater exercise to be done in terms of providing the documents, the overall work to be done within this phase, we don't accept is significantly different. We do come back to the point that I agree with my learned friend that what we're talking about is the overall sum and the reasonable -- and proportionality of it but it's still relevant to look at how that's arrived at and the fact that so many hours, 82, are at partner rate at sort of double what you would expect, that, in my submission, is excessive.

THE CHAIRMAN: Yes, it's right to look -- the claimants' costs going forward, so ignoring -- and I understand that you can't ignore entirely what's happened so far, but just looking at what the prospective costs are, the claimants' solicitors are estimating just over £71,000 solicitors' costs going forward. The defendants' offer is £80,000 for the same exercise on their side. I must take into account, mustn't I, also, that the claimants are proposing to spend £44,000 on counsel for the same exercise?

MR SKINNER: Yes. You don't leave that out of the account certainly.

The reason our prospective costs are higher is because we haven't significantly started our disclosure exercise yet, whereas the costs of the early disclosure order are incurred costs, £35,000 of incurred costs that have already been undertaken and that exercise doesn't need to be duplicated or I certainly hope it doesn't and so that's why our future costs are higher than the defendants' because --

THE CHAIRMAN: I'm not much impressed by that because we all know that doing a disclosure exercise twice is more expensive than doing it in one go which is one of the considerations I took into account when I made the order originally.

MR SKINNER: Doing the early disclosure exercise once doesn't require it to be done a second time. I appreciate there will be a degree of overlap but one wouldn't expect the whole of that £35,000, or £34,726, to be reincurred a second time.

MS ARCHBOLD: My Lord, the only point --

THE CHAIRMAN: I don't need to hear you any further on this point. As you say, this is an exercise where I'm supposed to look at the overall budget. Yes, I take into account how it's made up but the fact is that the claimants and the defendants have chosen to distribute the work among solicitors and counsel fundamentally differently. Looking at the overall amounts, there is actually no material difference between that asked for by the defendants and that proposed by the claimants. So, with the adjustment of the £91,000 figure down to £80,000, I will approve the budget as asked by the defendants.

MS ARCHBOLD: I'm grateful, my Lord.

THE CHAIRMAN: Witness statements.

MR SKINNER: Defendants have claimed £172,000-odd for this phase, which, again,

is over 300 hours of solicitor time and 232 and a half, you know, more than two thirds of the time to be spent is partner time. I have cited in my skeleton the decision of Stocker v Stocker, where the High Court held that it should be the witness's own words and none of this is controversial anyway and that an assistant ought to be able to do most of the work and what we've got here is the reverse of what the situation ought to be. You've got the most expensive people, who ought not to be doing the bulk of the work, doing the bulk of the work and so in my submission, the total time to be taken, the 300 hours and the distribution, is disproportionate and so we've suggested a total of 89 -- just 90,000, essentially.

THE CHAIRMAN: Yes, Ms Archbold.

MS ARCHBOLD: I'm grateful, my Lord. Firstly, the offer again, we say obviously is too low. The offer of £89,000, it's less than what the claimants seek themselves in their own phase, which is at £104,000, which again, doesn't stand to reason. The budget is prepared and both parties' budgets are prepared on the basis that the defendants shall have seven witnesses, the claimants shall have five and, obviously, we have provision for witness statements in response. It's clear that the cost --

THE CHAIRMAN: Sorry, is that right? I thought it was the other way round. Seven for the claimants, five for the defendants?

MR SKINNER: It is the other way round.

MS ARCHBOLD: I do apologise, yes. Seven for the claimants and five for the defendants. I do apologise.

THE CHAIRMAN: Right.

MS ARCHBOLD: So we say that, obviously, the costs need to be taken into account when dealing with that point.

The claimants wish to seek to reduce the profit costs on account of lack of delegation, however, it's difficult to see how the claimants can make this point when in their own phase, their counsel's fees, which total £57,500, which is actually higher than the profit costs in their own budget, it's difficult to see how this delegation point can be made. And as my learned friend says, within the skeleton argument, witness statements must be within the witness statements phase, so it's difficult to see how those level of fees can be justified by counsel.

In any event, looking at the overall totals of the phase, it's £160,000 in profit costs and only £10,000. So the defendant is not taking issue with the £10,000 of counsel that has been agreed, it is merely the £162,170 in dispute and the other £80,000. Again, in an effort to agree the phase ahead of the hearing, the defendants made a reduction to the phase which is in the sum of £156,000, being £146,000 profit costs and, again, the disbursements as agreed, at £10,000.

THE CHAIRMAN: Yes. My concern here is not so much looking at the minutiae of the distribution of the costs between solicitors, counsel, et cetera, but the fact that such high proportion of time spent by lawyers on witness statements, suggests over-engineering of witness statements and which are supposed to be a proof of evidence. We all know for years there's been complaints made by a number of different courts about the way witness statements do not reflect the requirements in practice. You'll be aware there's a brand new practice statement, I know not relevant to the Tribunal, but still relevant overall, to try and limit further, the way in which witness statements are engineered by lawyers, whether solicitor or counsel. So I'm concerned that such a large amount of time does suggest the wrong approach to witness

statements from the ground up and would be minded to cut this, for that reason alone. What do you say to that, Ms Archbold?

MS ARCHBOLD: I do appreciate the point, my Lord, and it's something we're conscious of. However, it is still work that needs to be gone through and I appreciate it will be in the witness' words but the claimants will have the same problem, the work still needs to be done by the solicitors or in the claimants' case, by counsel and given the level of the witnesses, the number of issues that they are covering, the defendant hasn't actually chosen to have involvement of their expert within that phase, the claimant has, but is issues that will go to other phases of the matter. It will impact upon expert evidence and also the disclosure phase, for example. So I do feel it is important to have a sufficient level of work for the solicitors although I do appreciate the comments your Lordship makes and that has been taken into account in the reduced offer by the defendants in the sum of £156,000.

THE CHAIRMAN: Yes. I'm minded to reduce that further however, for the reason I've just given. As everyone agrees, this is rather a rough and ready approach. I do not have the sort of information that the cost judge will have after the event, but I am concerned at the very extensive amount of hours proposed to be spent by the defendants, particularly in contrast to the claimants and I would, I think, looking at that contrast, £172,000, I'm going to propose reducing the figure to £135,000.

MS ARCHBOLD: I am grateful.

THE CHAIRMAN: Do you wish to argue against that specifically?

MS ARCHBOLD: I just wanted to double check. The £135,000, is that in respect of the profit cost, so it is exclusive of the £10,000 agreed?

THE CHAIRMAN: No, the total at the moment is £172,000, isn't it?

MS ARCHBOLD: That's correct --

THE CHAIRMAN: I was proposing reducing that to £135,000.

MR SKINNER: Thank you. That then takes us on to experts. The fees proposed for the defendants' experts are £175,000. We say that's disproportionate. Our expert, we've budgeted for £100,000 and we suggest that's ample for an expert that's going to be giving evidence for a day, anticipated, and we also say that the partner hours again here are high and so overall, we've suggested just short of £160,000. I mean, the bulk of that is obviously the reduction in the expert's costs from £175,000 to £100,000.

THE CHAIRMAN: Yes. Now, when we're looking at an expert's costs, I mean, in a sense we get to this with counsel as well. These are disbursements. An expert, perhaps more so than counsel, how am I to judge what's appropriate for an expert to be charging? In a sense I can't judge that. I can only focus here, can't I, on what's appropriate to charge between the parties in relation to the expert?

MR SKINNER: Exactly, so the question for the Tribunal is not what is it reasonable for the expert or counsel to charge their client, it's what's reasonable to expect the other side to pay by way of costs and that's why we say that, you know, almost double the cost of the very distinguished expert we've managed to find, is just disproportionate.

THE CHAIRMAN: Yes, Ms Archbold.

MS ARCHBOLD: Just briefly on that point, I do agree. It's a cost that should be reasonable and proportionate, referable to the parties. Having said that though, obviously, I would say that the cost does fall within a reasonable and proportionate range. The offer made by the claimants is too low, it's £200,500. That's based on £33,875 for profit costs and £125,500 for the

disbursements.

The offer in respect of profit costs of £33,875 is too low, especially when you --

THE CHAIRMAN: Again, can you show me where you're finding these figures from. I am looking at the skeleton, perhaps I should be looking somewhere else.

MR SKINNER: The easiest place might be at 359 of the bundle, the budget discussion report.

THE CHAIRMAN: Yes.

MR ARMITAGE: Yes, my Lord, that is where I'm getting the figures from. so it's 359 and here you'll be able to see how the claimant breaks down their offers.

THE CHAIRMAN: Let me just find the right bit. Yes.

This is the defendants' offers, is it?

MS ARCHBOLD: So the claimants' offer is on the defendants' budget and it should be -- at 359 and we're looking at the experts report phase, so you'll see that they have made the offer.

So the profit cost is £33,875 which is a huge reduction on the costs that the defendant is seeking which is just over £55,000. We actually say you'll see that the defendants have agreed the claimants' budget, in my submission, which we feel is low. However, that is a matter for the claimants themselves and it appears that this offer that they had put forward purely is based on the figures that the claimants seek themselves, of £30,000. Now, as we touched on earlier, my Lord, we aren't to draw a direct comparison between the parties' budgets and we would say that the hours, the profit cost offered here, is unrealistic and it fails to account for all of the work that is going to be done within this phase. I appreciate it's the expert reports phase but, of course, solicitors are tasked with shepherding and dealing with counsel, advising clients, et cetera, and we say that the £33,875 is much too low and we would

say that the £55,352.50 as claimed, falls within the range of reasonable and proportionate costs.

In respect of the expert reports fee, when obviously, the budget is approved, that figure within the costs management order, will stand, absent of good reason in accordance with rule 3.18 and any costs assessing judge cannot go back and change that, so I feel it's really important to get the right figure for the experts, especially considering the level of expert here.

When preparing the budget for this matter --

THE CHAIRMAN: Before you go on, sorry to interrupt, but are you saying that -- I'm not going to fix a figure for the expert him or herself, am I? I'm going to fix an overall cost for this phase, so it doesn't mean within that phase, I'm fixing the expert at £175,000 or anything else?

MS ARCHBOLD: No, my Lord. Unless you specifically say, you will give a global figure. However, it will inadvertently fix and, of course, the defendants will have to cut their cloth accordingly and there will be no changing that, absent of good reason, so yes, not directly but inadvertently the figures will be fixed and it will only -- for example, if there is a change in directions, number of -- length of trial, additional issues that the expert needs to address, that is the only way that those figures will be able to be revised.

THE CHAIRMAN: Right.

MS ARCHBOLD: In respect of the expert's fees itself, when the defendant was preparing their budget, we approached in order to obtain a number of quotes, to ensure we were falling within range of reasonable and proportionate costs and this fee was the most reasonable and proportionate, the £175,000.

I think it's important to bear in mind the level of work that the expert has got to do here. It involves without prejudice discussions between the experts, it's the

preparation of a substantial report and finalising it, it's any expert reports in reply. It's also without prejudice discussions and the joint statement. Now, that's not including conferences with clients and, obviously, the back and forth between solicitors and counsel in obtaining instructions from clients. So there is a lot of work to be done.

Now, the offer that the claimants make on the defendants' budget, they don't take issue with counsel's fees, so they're only offering £100,000 for the experts and we say it's much too low. I think it's important to note that the defendants have correctly prepared their budget, that experts' fees are only included here, except for the trial phase, whereas the claimants have decided to include experts' fees across other phases. They've actually included just over £15,000 elsewhere in the budget already, so in the pre-action issue phase, et cetera. That needs to be taken into account and given the level of work, we do say that the £175,000 is a reasonable and proportionate cost, particularly the issues in this matter.

Now, as I said before, the counsel's fees of £15,000 for leading counsel and £10,000 for junior counsel, the claimants do not take issue with within their budget discussion report.

THE CHAIRMAN: So it's £15,000 elsewhere for expert fees, is it, in the claimants' budget, in addition to the £100,000?

MS ARCHBOLD: Yes, my Lord.

THE CHAIRMAN: So you say, and this is one of the problems, I suppose, that wouldn't a cost judge have some reference point for the reasonableness of the costs being charged by the expert, which I simply don't -- what you tell me, I take on trust. But I've got no other benchmark against which to measure this point, other than the claimants have found an expert willing to do this for

£115,000.

MS ARCHBOLD: Yes, my Lord, this is the difficulty. The detailed assessment, the cost judge will go through line by line, they'll have the full file of papers, they'll have all the information before them and this is the difficulty of cost management at very broad brush approach.

THE CHAIRMAN: Yes, Mr Skinner, what do you say about the points?

MR SKINNER: Can I just clarify what rule 3.18 says, because I don't want the Tribunal to have the impression that the cost judge at any assessment, is stuck in relation to the expert. The experts' fees are not in any different position to any of the other costs. Just it's a very short rule, so if I can just read it. 3.18 says:

"In any case where a costs management order has been made, when assessing costs on a standard basis, the court will (a) have regard to the last approved or agreed budget for each phase of the proceedings, (b) not depart from such approved or agreed budgeted costs unless satisfied that there's good reason to do so and (c) take into account any comments which were made pursuant to 17.3 and recorded on the face of the order."

And those comments are where the judge doing the budgeting exercise comments that they consider that the incurred costs appear to be disproportionate. So although you don't have a jurisdiction to reduce the incurred costs, it's open to you to make such a comment.

The fact that the claimants have managed to find an expert at £115,000 is a relevant benchmark against which to assess the reasonableness and proportionality. The experts are looking at the same questions and they're going to have to do the same work. So in my submission, it is -- I mean, there's two points really. One is the comparison point but also £175,000 for an expert is simply a lot of

money, which -- and there's no criticism --

THE CHAIRMAN: It is a lot of money, but these things are all relative. This is a specialist area. There are a number of issues to be addressed. I can't agree or accept one way or the other that it's a lot of money -- that it's too much money which is the point you're really making. Of course it's a lot of money, depending on your benchmark but how can I say it's too much money?

MR SKINNER: Well, you can say it's a disproportionate sum for the claimants to have to bear if we lose in this litigation.

THE CHAIRMAN: That's the question but even on that --

MR SKINNER: On the basis that we've managed to find an expert for almost -- well, not quite half that, but two thirds of that. That being so, in the absence of anything that justifies the additional amount, it's prima facie disproportionate, in my submission.

MS ARCHBOLD: My Lord, can I briefly -- just on three points. Firstly, in respect of the rule, I'm grateful for my learned friend pointing it out, but I do think it's important to note that definition of good reason has not been helpfully defined by the rules and therefore it is open to the discretion and, based on case law to date, the threshold to depart from a budget is incredibly high. Therefore, it would not be a good reason to depart from any figure that is approved for this phase, in particular for the expert report, simply because, perhaps, the figure that was set was either too low or too high and that is the concern with setting a figure at this point of time, that it will stick, absent a good reason, and an example, for example, for good reason is a whole change in the case, new issues for the experts. And the second point, very briefly, my Lord, the fact that the claimant has had the fortune of finding an expert that will do the matter cheaply, is not the test of proportionality. It's a case of whether the

costs fall within a reasonable range of reasonable and proportionate range of costs and we say that they do. These are incredibly expensive experts covering a huge amount of issues and it's clear from the defendants' budget, looking at the other issues, the other costs, it is within a range of reasonable and proportionate costs and there would be a concern if the budget is set too low, that there wouldn't be sufficient monies in order to complete the case.

MR SKINNER: Can I just make -- I think my learned friend thought I was taking a broader point than I was. I accept that in order to depart from the budget at the detailed assessment point, you have to show a good reason and I also accept that the case law on good reason does impose a relatively high standard. It does have to be some sort of significant change in the case or some such issue like that. But the point I was simply making is that this isn't an issue related to the expert in particular, that's true of all aspects of the budget and there's no difference in assessing the expert's fees simply because -- I mean, it's not a disbursement only rule or anything like that.

So the same issues that arise in relation to any other aspect of the budget, arise here in the same way.

I also do resist the accusation that's been levelled that we're somehow under-budgeting this phase. We're not. We've -- you know, our budget is £158,000 on this phase. That's a significant amount of money, it's £100,000 for an expert, if I'm right -- I'm pretty sure that's right, and then my learned friend is right that there are certain small amounts contained in other phases where that expert will be doing work in other phases of the litigation, so £115,000. But in my submission, the expert report phase, just when looked at globally, the defendants are seeking £256,000 -- just under £1,000 and that's just too high.

THE CHAIRMAN: Yes.

MS ARCHBOLD: My Lord, I'm very conscious of time. I've just been helpfully provided some instructions, I don't have the reference but we can find it if needs be, but in the Gascoigne Halman case, Mr Justice Roth, he broadly, in a similar abusive (inaudible) case before the Tribunal, he approved a total of £240,000 for expert costs. If that can give any gauge of reasonableness to show the level of costs of the defendants' phase.

MR SKINNER: I'm sorry, I object to that being taken into account. The costs to be incurred in a wholly different case, raising different issues, despite the fact it's a competition case, I'm sorry, that's just -- that we haven't been provided.

Ruling

THE CHAIRMAN: Right. Okay. Dealing with the budget for the experts' phase, it seems to me that expert evidence is going to be of considerable importance in this case. A lot will turn on it. The order I have made today identifies something like eight different areas for the experts to deal with. There is undoubtedly a lot of work to be done. I don't take issue with the amount of hours that it's proposed counsel or solicitors on either side will spend with the expert. As I say, these are important issues and one would expect the legal advisers to be engaged heavily with the expert in preparation of the case generally and the report.

The real difference here between the parties is between the amount being proposed to be charged by the expert. The claimants have managed to find an expert who will be charging for this phase, £115,000. The defendants say that they need £175,000. I don't have any information on which to base a conclusion as to what experts in this area generally charge. It seems to me the

information as to what both sides are going to pay is of only peripheral help, because I don't know what the market looks like. I do take into consideration, therefore, and place particular emphasis on what I'm told by the defendants' counsel, which is that the amount that is being charged by the expert is at the conservative end of the range of quotations they've obtained from those in the market and on that basis, I am content in these circumstances, to approve the budget as asked for.

MS ARCHBOLD: I'm grateful.

MR SKINNER: So that leaves the PTR and where it's claimed just shy of £45,000. A large proportion of that is junior counsel's fee, who it's proposed will attend, in the sum of £20,000. With all great respect to Mr Armitage, he and I are of almost exactly the same call and I don't anticipate charging half of that for a PTR or a CMC. £20,000 for a half day hearing is a very, very high sum indeed and so we also suggest that the proper costs of the PTR at £24,260 are high and we've therefore offered what we consider to be a reasonable and proportionate offer which is just shy of £25,000 in total for the pre-trial review.

THE CHAIRMAN: Can I just ask, I mean, it may be split between two of you, but there is a proposal that the claimants' budget has £20,000 for counsel's fees, doesn't it, for the PTR?

MS ARCHBOLD: Yes, my Lord, both parties are seeking the exact same figure for the PTR, £20,000.

MR SKINNER: That is right, but that is split between two of us.

MS ARCHBOLD: That is correct, yes.

My Lord, as my learned friend points out --

THE CHAIRMAN: Before you go on, is that the only point, Mr --

MR SKINNER: So we suggest profit costs are too high at £24,000 for the PTR and

we've offered £12,130, so that's half of the profit costs and then we make the point I've already made about counsel's fees.

THE CHAIRMAN: Yes. So go on Ms Archbold, do carry on.

MS ARCHBOLD: I'm grateful. So the claimants seek to reduce profit costs and within the budget discussion report the offer that's contained, it's £12,130 for profit costs and £12,500, as my learned friend says, and the basis to seek to reduce the profit costs is purely based on a comparison with the claimants' own budget and also by the fact that the defendants will not be tasked with bundle preparation.

Now, that shouldn't come into it. Bundle preparation is not a cost that's recoverable inter partes in any event and the defendants would submit that the claimants' budget is clearly too low and it's an unrealistically set phase and it shouldn't be used as a comparison to reduce the defendants' budget by. For example, in the claimants' phase, they say they're only going to spend £29,900 for a PTR for half a day, which is clearly unrealistic, considering they spent just shy of £60,000 for the first CMC. So it's not a realistic guide to say that's what they will spend going forward.

In respect of the profit costs as claimed by the defendant, a total of 51 and a half hours is claimed. It's claimed across a number of file handlers and it's a realistic amount of time for a defendant to prepare for half a day of a PTR of this nature, particularly if there are going to be issues that will be raised.

In terms of counsel's fees, as I said before, £20,000 is claimed for a single counsel. £20,000 is claimed by the claimants, which has been agreed by the defendants. I appreciate it's split between two. However, there should be a cost saving exercise of having two barristers attending the PTR and as we say, one is sufficient. £20,000 is a perfectly proportionate sum.

So we do say that the £44,760 is proportionate. However, in an effort to agree the matter ahead of the hearing, the defendants made a proposed reduction of £40,500. That's based on £20,000 profit costs and £20,500 for the disbursements as claimed.

THE CHAIRMAN: Yes. I mean, this is an area where the overall -- did you want to come back?

MR SKINNER: Just a point about the comparison with the CMC. The CMC cost was two CMCs, not the first CMC, so you half the CMC cost -- if you half the defendants' own CMC costs, you come down to £34,000 -- half it so it's split by two, which is £10,000 less than their estimated PTR costs and, obviously, PTRs come in different shapes and sizes but you wouldn't normally expect a PTR to be significantly more expensive than a CMC and it's significantly more expensive than they've spent on their own CMC prep and more than that spent by us.

MS ARCHBOLD: I'm grateful for the point but unfortunately, on the claimants' budget, they have spent £59,645 on the first CMC, £24,650 on this, so for the two CMCs, the claimant proposes to spend £84,294.

THE CHAIRMAN: Yes. We're talking about amounts here of relatively small differences and I think we're in danger of entering the realm of being too detailed in an area which is supposed to be an overview. In the scale of this litigation, I don't think that the offer of £40,500 is out of kilter with reality and I think that that's a reasonable sum to budget in this case.

MS ARCHBOLD: I'm grateful.

MR SKINNER: That then takes us to trial preparations which includes counsel's brief fees for the trial and with respect, the fees for a seven day trial that is proposed for counsel in this matter are very, very high indeed. We've

suggested ten days preparation time for a seven day hearing, at 10 hours a day, plus the first day, at £900 an hour for leading counsel. On any view, that is a very high hourly rate for leading counsel. I'm not saying that's undeserved but that's a fair and reasonable offer and we've offered £50,000 for junior counsel, which is more than the amount being offered for me as the second counsel in the case and on that basis, we invite the Tribunal to budget £214,560 for this phase, so £215,000, simply on -- the vast proportion of that £450,000 for disbursements is leading counsel and I don't see how anybody can suggest that ten long days preparing for a seven day trial at £900 an hour is not within the range of reasonable costs to incur for leading counsel.

THE CHAIRMAN: Yet. Ms Archbold.

MS ARCHBOLD: I'm grateful. As my learned friend points out and as is detailed in the budget discussion report, the claimant is not taking issue with the profit costs claimed by the defendant, that has been agreed, it's only counsel's fee being the brief fee. Firstly, I would submit that the offer made of £100,000 for a brief of QC for a trial of this nature is just simply too low. Secondly, the point needs to be made that the defendants' budget has been prepared on the basis that this is a seven day trial with two days in reserve and also it takes into account the fact that the judgment will be handed down on a separate day, whereas the claimants' offer appears to only take into account seven days. It's not taken into account those two extra days, so --

THE CHAIRMAN: Yes. Sorry, go on.

MS ARCHBOLD: But it did need to -- I appreciate it may be that seven days and that might be good reason to depart downwards. However, the claimants' budget did need to take that into account. So the brief fee does need to be adjusted slightly anyway, on account of that.

So secondly, again, when preparing this budget, we obtained quotes from counsel. I appreciate a quote is a quote. However, £100,000 for a QC of this nature is much below what you would expect the brief fee to be. It would be incredibly difficult to find someone to accept. £300,000 is far more the norm and within the range of reasonable and proportionate costs and again, the junior's fee, £150,000 for a brief fee for seven days, plus two days in reserve, is what the claimants say is reasonable and proportionate.

I don't think that the claimants have also taken into account that within this phase there will be the pre-trial conferences and that, of course, that fee will have to be factored into the brief fee. I'm not sure whether that's been worked into and I don't wish to draw reference to the claimants' budget which we say is too low, but that's a matter for the claimants, and it shouldn't be a reason to draw a comparison with the defendants' fees.

THE CHAIRMAN: How am I to calculate the reasonableness of a brief fee then? What goes into it that I should be regarding as reasonable to charge the other side for, and of course, what counsel charge their own client is a matter of market forces but what should be recoverable from the other side is a different question and £300,000 for a seven to nine day trial, how is it made up? I mean, Mr Skinner's identified ten days of preparation as being a reasonable amount, that's two weeks, ten hour days, as a reasonable preparation period for a trial of that length. That doesn't sound unreasonable. So £300,000 seems a lot to be charging for that sort of work, doesn't it?

MS ARCHBOLD: My Lord, in terms of how the fee has been estimated, the quotes were compiled by counsel's clerks, so I'm not able to actually answer that myself. But, based on my experience, I appreciate the basis how Mr Skinner has arrived at the offer, a hourly rate, a number of days, but that isn't simply

how counsel fees have been compiled and I am sure on other cases aren't. It's to do with tranches of work and pre-trial conferences and when the work will be done, so it simply can't just say it will be ten days worth of preparation. There will be other work in addition to that and that is how they have arrived at the figure of £300,000, bearing in mind as well the level of a QC's fee will be much higher than that of a junior and given the complexities, the value of the case and the number of issues, the expert evidence as well, this case does justify not just QC but also a junior in addition and that needs to be taken into account and that will have an impact on the fees.

THE CHAIRMAN: This is a prime area where some information about the way in which counsel's brief fees are dealt with on detailed assessment by cost judges would be invaluable. Is there any information either of you could give me on that?

MR SKINNER: Not to hand. My submission is that you've alighted on the correct question, that it is a question of what's reasonable for the claimants, obviously two small businesses, to pay in a claim to try and vindicate their right to access a fair market or a competitive market.

THE CHAIRMAN: I mean, the trouble is I must make the assumption against the paying party every time, mustn't I? I must assume the claimants have lost otherwise they won't be paying these costs and I don't think I can take into account, can I, the claimants' size? I have to take into account equally the impact on the defendants of these proceedings. Is it proportionate and reasonable for the defendants to spend this money to defend themselves.

MS ARCHBOLD: Yes.

THE CHAIRMAN: I'm asking Mr Skinner this. Let Mr Skinner answer that.

MR SKINNER: I think I'm not suggesting that any of those factors should be left out

of account wholly. In my submission, when one's assessing the proportionality of costs, one has the sort of overriding objective in the back of one's mind, which obviously includes inequality of arms and those sorts of issues. So the relative disparity between the parties and their resources is not an irrelevant consideration. Obviously what weight to give it will vary from case to face by in my submission the fact that this is a bit of a David and Goliath battle is a relevant factor.

THE CHAIRMAN: Yes. Ms Archbold, I interrupted you.

MS ARCHBOLD: No. I apologise for overspeaking.

In respect of how fees would be addressed at a detailed assessment, unfortunately there's nothing that I could say that would assist you now, my Lord. It's very much of a case looking back at what has been done and you would be able to forensically unpick and assess on a line by line assessment of fees. Here unfortunately we just have to take a broad bush approach, so there's not any information I could offer that would assist, save to say that £300,000 would fall within a reasonable range of what you would expect for the tranches of working, including the pre-trial conference and additional work and the preparation of trial.

In terms of proportionality, unfortunately the size of a claimants' firm is not a factor that is to be taken into account in an assessment of proportionality. As I set out earlier, the relevant factors to be taken into account here are the sums in issue, the value of the pleaded case, the complexity of the matter and any other issues such as the reputation of parties. The size of a company doesn't come into it.

So, taking all of those factors into account, we say the profit costs have been agreed and we say that the leading counsel's fee and the junior's counsel briefs are

reasonable and proportionate and we would ask for the £502,000.

Ruling

THE CHAIRMAN: Right. This is an area where there's a particular difficulty in identifying the correct or an appropriate figure given the lack of information about (a) what counsel might be available to do a trial of this size and what they might charge and (b) how a costs judge would approach this on a detailed assessment.

My overall concern is that the disparity in the amounts to be paid between the parties on trial preparation is enormous. It may well be that counsel will charge their own clients, and perfectly rightly charge their own clients, the sums being asked for but I am concerned that this is an excessive amount at this stage to be budgeting between the parties. I therefore propose to cut the total amount and I'm not going to divide this up between solicitors, counsel or anything like that, but to cut the total amount budgeted by the defendants by one fifth. That's by £100,000. So it's roughly £400,000 will be allowed.

MR SKINNER: I'm grateful. We're almost there.

There are three points that are set out at paragraph 19.6 of my skeleton in relation to the trial phase. I'm very conscious of time, Sir, so I propose just to ask you to read those three points. I'm not sure I've got anything really to add to them.

THE CHAIRMAN: No, I've read those.

Yes, these are the points made at 19.6 of Mr Skinner's skeleton.

MS ARCHBOLD: Yes. I'll be brief, my Lord. I'm conscious of time also.

So in respect of the experts' fees, the defendant is seeking £50,000 plus £1,000 worth of expenses. The claimant seeks to offer £7,500 in direct comparison with their own budget.

We say this is unrealistic for two reasons. The claimants' budget is prepared on the basis that their expert will attend for one day and the defendants' is not. The £50,000 includes the fee for the expert to attend the pre-trial conference and any work in the preparation of trial and also to attend trial for two days and of course the £1,000 worth of expenses, which is normal and reasonable and proportionate for a case of this nature.

So to offer a direct comparison of £7,500 is unreasonable and we would ask for the £51,000 in total for the experts.

In respect of profit costs, the defendants seek to reduce this. Within their bundle discussion report, they offer a total of just shy of £49,000. This is unrealistic and unreasonable for two reasons. One, it is less than the claimants' own profit costs. Now, bearing in mind their budget only is prepared on the basis of a seven day trial, the defendants' budget is prepared on seven days with two days in remainder and also for judgment to be handed down on a separate day. Therefore that offer should be disregarded.

We say that it's too low anyway in terms of the hours offered. There is a lot of work that will be required within this phase. It's not merely just attending trial. It's also the work that goes around in dealing with judgment, which can actually be quite a lot in a case of this nature.

In terms of counsel's fee, the claimants do not take issue with neither the leading counsel's fee or junior counsel's fee. They do take issue with the other disbursements though.

So the defendant is seeking £14,000. That is a total of £5,000 worth of expenses for trial. Now the budget at the moment is prepared on the basis that this will be a remote trial, so seven days with two days in reserve plus judgment on a separate day. Bearing in mind the number of days, we say that that is not an

unrealistic level of expenses to be needed in a case of this nature.

The additional sum for the other disbursement is £9,000. Now, that is for a transcript. The claimant is offering £5,000. Again, that's on a basis of the seven day. It's not taking into account those two days in remainder and also the one day of judgment. So, taking that into account, we say that £9,000, particularly in light of the expenses already incurred on this matter, is reasonable and proportionate.

So taking all of that into account, my Lord, we would ask for the profit costs as claimed, the experts' fees as claimed, counsel's fees are agreed, but we would ask for the other disbursements as claimed. So that would be the phase total of £261,877.50.

THE CHAIRMAN: Any reply, Mr Skinner?

MR SKINNER: Well, I still don't understand what this £5,000 for expenses for attending a trial is. I mean, the fact that it's remote doesn't make it more expensive to attend. If anything, you don't have to travel, so it's cheaper. That's wholly unexplained. I appreciate in the global scheme of things it's a relatively small amount of money but I'm still at a loss as to what that £5,000 is for.

We do say the profit costs are excessive for a trial of this nature and once you get to trial, I appreciate there's work to do, but it's a very large sum of money.

THE CHAIRMAN: Okay. Right. There are a large number of hours being projected by the defendants compared to those projected by the claimants, oddly in respect of the same trial period, but there we are, and I do find that the experts' fee for attending, even though it's budgeted for two days plus a PTR, is high in the circumstances.

For those reasons, I think there should be some reduction to this budget of

£262,000. I was tempted to put a limit on it of double what the claimants are charging or projecting but I think that's too rough and ready. I'm going to reduce it by £30,000. So it's £232,000.

MR SKINNER: I'm grateful. Then the last one is the ADR. We've offered 40 hours of partner time, 15 hours of senior associate time on ADR. This is again about -- well, we don't think that the hours spent should be markedly different on each side for trying to resolve and settle the case and so we suggest a reduction of the hours to broadly --

THE CHAIRMAN: Am I right in thinking that the amount, the overall amount for this phase, is the same for both side?

MR SKINNER: It is broadly the same, yes.

THE CHAIRMAN: I'll cut through this. It seems to me that's a reasonable amount for ADR, however it may be split up. Therefore I approve that for both sides.

MS ARCHBOLD: I'm grateful. My Lord, can I just briefly double check, was it £232,000 or was it £230,000 for the trial?

THE CHAIRMAN: £232,000.

MS ARCHBOLD: I'm grateful.

THE CHAIRMAN: Right. There was a couple of points on the claimants' budget, were there?

MS ARCHBOLD: Yes, my Lord. There's only a very few minor points, given that the majority has been agreed.

Firstly, just a preliminary point by the defendants as raised within their budget discussion report that the incurred costs of the claimants are not agreed and are a matter for detailed assessment.

In respect of the CMC phase for the claimants, there has been agreement between the parties that the costs up to and including today are to be treated as

incurred costs, which is perfectly fine, and those costs detailed in a future column will be moved over and subject to detailed assessment.

However, at paragraph 20.2 of the claimants' skeleton, there is a suggestion that costs of their contingency be moved into this phase. I think there may have been a bit of confusion, my Lord, because that has not been agreed and that is disputed. So I say that the CMC phase shall remain as is, no additional cost be added, and I propose that we challenge the contingency phase when we arrive at it later in the budget.

MR SKINNER: Well, I'm afraid there has been a misunderstanding. I assumed from the correspondence that the suggestion that the defendants had made was to move the contingency, which obviously was our application today, into the CMC phase, given that it was to be dealt with at the CMC. But I'll obviously wait to hear from Ms Archbold when we get there.

MS ARCHBOLD: The first phase in dispute is the disclosure phase.

Now, we touched on this briefly, my Lord, when we were talking about the defendants' budget. You will see that there is a zero incurred in the incurred cost for the claimants' budget, which simply cannot be right. The budget's prepared on 14 December. However, we flagged this in correspondence in the budget discussion report and the claimant has helpfully explained that basically the work that they've done on disclosure to date they have simply included within their pre-action phase and they have included within their issue phase. Now, of course, we aren't looking to approve the incurred cost but it's very important to have consideration in order to look at what to proportionally allow going forwards.

The reason I flag this, my Lord, is that to date the claimant has incurred a grand total, just in their pre-action and issue phase, shy of £396,000 whereas in

comparison the defendants' is £109,000. So they have incurred a lot of money and it is impossible to see what they have spent exactly on disclosure, which creates some difficulty.

The defendants dispute that there should be parity for this phase for the two parties. As we've already touched on, the defendants have a far great burden in respect of disclosure, with potentially thousands of documents the defendants will need to sort through. I appreciate that both parties need to consider these, but the defendant has the task of actually searching, sorting and going through everything. That needs to be taken into account.

In terms of the profit costs that are claimed by the claimants, the numbers are high, it's 210 hours, but, looking at the overall figure for the profit costs, it's over £71,000. The defendants have offered them £60,000 going forward and I say that is a reasonable and proportionate sum and it's difficult to see how the claimants can dispute this, based on, one, what has been approved for the defendants' budget and the fact that they've already done work but we just don't know what the total of that is.

In terms of the expert's fee, £7,500 has been claimed. We take no issue with this. In terms of counsel's fee, this is wholly excessive and disproportionate. It's £44,000 for both the QC and the junior. That's nearly two thirds of what's claimed for profit costs and also, just to put that into context, for the junior, £35,000 alone is being claimed. That's almost the exact same amount that is being claimed within the pleadings phase, which it can't stand to reason. The fees are too high. So I appreciate something is required for counsel in this phase and the defendant offers £6,000 as parity, which is claimed by the defendant. So that would be a total offer of 73,500.

THE CHAIRMAN: Instead of the £122,000 claimed?

MS ARCHBOLD: Yes.

THE CHAIRMAN: Yes.

MR SKINNER: Sorry, I didn't quite catch the figure that was offered. £73 --

MS ARCHBOLD: 500.

MR SKINNER: 500. Thank you.

MS ARCHBOLD: And, to assist, that's £60,000 profit costs, experts £7,500, £6,000 for the counsel.

MR SKINNER: So can I just deal with this point about the phasing. My learned friend criticises us for having included disclosure in pre-action and statement of case phases. That's not the wrong way of doing it. There are lots of issues about cost budgeting which are not yet decided. There is, as far as I'm aware, no authority to suggest that that's the wrong way of doing it, because inevitably some disclosure has to take place in advising your client whether they've got a case before they issue and writing pre-action correspondence and all of that sort of stuff and equally, when one is drafting pleadings, you need to think, well, hang on, have we got any documents to support that.

Necessarily one can do this in one of two ways. You can put all of the type of work into a particular phase or you can put it into the phase of the litigation that you're in at any one time and there isn't anything to suggest, as far as I'm aware, that one of those approaches is right or wrong. So I just resist the criticism that is made in relation to the work that's been done on disclosure that's been included rightly, and certainly not wrongly, in my submission, in the other phases.

The broad point is that the sum claimed for disclosure is not terribly different, the total sum that's been incurred and budgeted, and incurred still subject to detailed assessment, so the defendants may not get all of the £34 or 35,000

that they've incurred and then obviously the budgeted costs have been reduced by about £11,000. That's not in my submission materially different to the amount that's sought for disclosure on the claimants' side and the work that's been done in the earlier phases is really very minimal. I don't have the number of hours to hand or anything like that but -- so, are you getting some feedback when I speak? I just wonder -- okay. No. Fine.

So in my submission the sum that's budgeted is a reasonable and proportionate amount. The criticisms that are made of the level of detail that's not necessarily appropriate for an exercise like this, we've set out our answer to those criticisms in paragraph 20.3 of my skeleton. The way in which the legal team has divided up the work is not a way that is cost inefficient in the way that I was criticising the defendants for. It is a way that is cost efficient among the team. So the fact that some of it's in the counsel team rather than the profit costs column is really beside the point.

In my submission, £122,625 that we've budgeted for is reasonable and proportionate, particularly given, as I've said, yes, the defendants are going to have more documents to disclose, but these are not documents -- for example, they're not going to be straightforward readable email chains that you can just assess. You know, these are detailed contracts which are going to have to be considered in detail by us when we receive them, as well of course we going to have to undertake of course our own disclosure searches and exercise ourselves which is obviously not an insignificant task either. You'll have seen the issues that are raised in relation to our disclosure are many and varied as well.

So in my submission that's a fair, reasonable and proportionate sum to seek.

THE CHAIRMAN: Ms Archbold?

MS ARCHBOLD: Very briefly, my Lord. Just in terms of the phasing issue, I don't want to labour the point too much and I appreciate my learned friend's comments. However at paragraph -- direction 3, paragraph 10 there is a clear guidance as to the phasing of items, what can and cannot be included, and all disclosure must be included within disclosure. I feel it would be inappropriate to compare the defendants' incurred and future solely against the claimants' future cost and that just needs to be taken into account and, again, the defendants clearly have a greater task here, not only in considering the documents but in locating and sorting them.

THE CHAIRMAN: Just to be clear, have, Mr Skinner, you've told me what amount of pre-action costs relate to disclosure or not?

MR SKINNER: I haven't, but partly because it's such a small amount, I think, that we didn't -- you know, the criticism was made as to the phasing but we know, or my instructing solicitors know, because they were doing that bit of work, that it was such a minimal part of the time that was undertaken.

I mean, the costs in relation to pre-action and statements of case, if the Tribunal thinks they're too high, then obviously the Tribunal can, as I say, indicate that it thinks that those are disproportionate but it can't reduce them at this stage, obviously then that's something for the costs judge to deal with at the end. But there was a huge amount of work that had to go into investigating this case and trying to get under the skin of what's been going on, which is why they're so high. That, in my submission, as I say, is a minimal amount of work that's been done on disclosure at that stage, because, as I've said earlier today, the whole reason why disclosure is so important in this case is because the claimants have so little of documents in relation to liability and so the disclosure that it was undertaking at the beginning relates -- for example, we

had one historic agreement that the client had managed to obtain. So when the solicitors asked to see that agreement, that would have been the disclosure costs, but we're talking minimal amounts of disclosure at that stage rather.

That's a long winded way of answering your question, I apologise.

THE CHAIRMAN: Thank you. I mean, on disclosure, I do start from the premise that the claimants' disclosure should be less onerous than that of the defendants' in the circumstances of this case. I don't place much emphasis on the fact that some disclosure will have been undertaken in the pre-action phase. I'm told on instruction that that's a relatively small amount of money because there was a relatively small amount of disclosure provided. That makes sense in the context of this claim, but it does seem to me that I would expect them overall going forward to do something less than the defendants will be required to do, given the issues raised in this case.

That said, the number being claimed overall is not far short of what the defendants are being permitted by way of budget. I therefore propose to cut the claimants' budget by £12,000. It's going to be £110,000 overall.

MR SKINNER: I'm grateful.

THE CHAIRMAN: Yes, and the final point?

MR SKINNER: It's witness statements. I'll let my learned friend deal with it.

MS ARCHBOLD: I'm grateful. In respect of witness statements, my Lord -- do bear with me one second.

THE CHAIRMAN: Yes.

MS ARCHBOLD: As we touched on briefly, it is of course that the claimants will rely on seven witnesses, the defendants obviously rely on two further witnesses and witness statements in response for all parties.

The claimants' budget here is a bit of an oddity. They have £44,375 for profit costs, yet they have £57,500 for counsel. It cannot be that counsels' fees are higher than the solicitors', particularly in the witness statements phase.

Now, as we said before, the claimants point out in their own skeleton at 19.2, witness statements should be in the witness' own words. So we don't take issue with the level of profit costs and we don't take issue particularly in respect of the experts' fees. However, counsel's fee needs to come down. There is no justification for what counsel could possibly do for that level of fees.

So the defendants in negotiations made an offer of £78,125, which that was profit costs as claimed, the expert's fee as claimed and it was a reduction for counsel's fee down to £31,250, which in actual fact is very generous. So that's £78,125.

THE CHAIRMAN: Right. I needn't hear from you, Mr Skinner on this. I'm going to allow this in the full amount.

It seems to me this is one of those areas where the parties have chosen to distribute the work that will be done between solicitors and counsel fundamentally differently. The defendants are loading the work onto a partner, the claimant is loading the proof taking on to counsel, which is not an inappropriate thing to do. Overall, the claimants are budgeting substantially less than the defendants, notwithstanding they have more witnesses. I'm going to allow their budget in full on this issue.

MR SKINNER: I'm grateful.

Just in terms of order then from today, I think the Registrar --

MS ARCHBOLD: I do apologise. There's still the contingency --

MR SKINNER: Oh yes. Quite right. Sorry.

MS ARCHBOLD: Could I just double check? My microphone went slightly out. Is it

the claimants' budget as claimed, the £104,000, that's been allowed?

THE CHAIRMAN: Yes.

MS ARCHBOLD: Yes. I thought so. Sorry.

Just turning to the contingency, so obviously the defendants' position, just briefly, is that we dispute it. But I wonder if this might be impacting, my Lord, on the order that you're going to be making in respect of the claimants' application that failed and perhaps I might, if you are going to address that point now, pass back over to Mr Armitage.

THE CHAIRMAN: Just before we do, so what is this contingency?

MR SKINNER: That was just the application in respect of initial disclosure that I made to your Lordship this morning.

MS ARCHBOLD: Well, the only thing is, at the time the budget had been prepared, which was 14 December, no application had actually been made. Whilst I appreciate that the contingency breaks it down, it's £10,000 worth of profit costs, in addition counsel's fee extra on top of what has been changed for the hearing for the CMC, £5,250.

Now, the application made by the claimants is a one page letter. It's hard to see how £15,250 can be justified, particularly so when they were not successful on the application. So it will depend on what you order in terms of the application, my Lord.

THE CHAIRMAN: Well, on any view I'm not going to order the claimants their costs of this application, because it's an application they lost.

MS ARCHBOLD: Exactly.

MR SKINNER: So what we were discussing this morning was whether it would be costs in the case or not or defendants' costs in the case, because that's -- I mean, they're separate questions, so can we just keep them separate for

a moment.

The question of whether it's appropriate to order that the defendant gets it costs of the claimants' application is one that I was proposing to address globally when dealing with the costs of the CMC. Obviously, if you make a costs order that is that either we don't get our costs because it's defendants' costs in the case or that they even get their costs, then I have no problem with it not being on the budget, that's fine.

THE CHAIRMAN: Yes.

MR SKINNER: If it's costs in the case, then it ought to be on the budget still.

What was suggested by the defendants was that this be wrapped up into CMC -- as incurred costs, because by the time -- normally -- so the costs of a CMC are treated as incurred and so they wouldn't normally be something that the court even has jurisdiction to look at. Now, because my learned friend's correct that at the date that this budget was filed we were only considering whether to make that application, so we put it as a contingency, so I don't say that, because it's been able to be made at the CMC, that that means that it can't be looked at in terms of proportionality and in terms of the Tribunal's jurisdiction but I do -- I mean, insofar as any of it's unreasonable or disproportionate, because it will, on what I understood the defendant was suggesting, be wrapped up into incurred costs for the CMC and therefore subject to detailed assessment and therefore, if anything's unreasonable or improperly incurred, can still be looked at, that to my mind is a very sensible way of dealing with it. If it's now suggested, no, actually it should be left in budgeted costs, well, the amount that's claimed is relatively small, it's reasonable and proportionate in my submission and ought to be allowed.

THE CHAIRMAN: Yes. All right.

Well, shall I hear from Mr Armitage then on the question of costs, incidence of costs? But before I do that -- or, well, as I do that -- Mr Skinner, what you're telling me is that the sums claimed here are the claimants' costs of that application isolated from anything else in relation to the CMC.

MR SKINNER: So they're the estimated costs before the application was made of what that application would cost.

THE CHAIRMAN: Yes. Right. So, with that Mr Armitage -- well, I have your submissions from this morning. You wish to have your costs of the application.

MR ARMITAGE: Yes. The only --

THE CHAIRMAN: Mr Skinner's point was that you shouldn't because they're all wrapped up in the CMC but the fact that those costs for the claimants have been identified -- I know an estimate, but they are a discrete part of the costs that have been incurred by the parties on this CMC, it seems to me there will be a mirror image amount of costs on the defendants' side which they should have since they won the application.

MR ARMITAGE: Indeed. That was the only point I wished to add to the brief submissions I made earlier. That shows that they are not matters that can merely be subsumed into the overall CMC costs, they are discrete and on that basis we do apply for our costs in relation to that application only.

MR SKINNER: Can I just make one further point in relation to this?

THE CHAIRMAN: Yes, of course.

MR SKINNER: Well, I may have more than one, but I have one that occurs to me at the moment. The claimants obviously were successful on their earlier application for initial disclosure and in relation to the split trial application at the last CMC and we accepted, I think, that those ought to be costs in the

case because they were case management issues despite the fact that the claimants' application, either of these applications, could have been described as separate applications for which there are costs.

Now, just because they can't be specifically identified on a budget doesn't mean that those costs were not incurred or it wouldn't be possible to assess them or whatever and so in my submission there's a real unfairness in making costs in the case in respect of two applications that the claimant successfully made but to then allow the defendant its costs of an application that it made. It's not being said by the defendant, no doubt deliberately, that this was an application that was unreasonably made. This isn't unreasonable litigation behaviour, it's just an application which understandably arose from a misunderstanding as to the scope of what annexe A was, given that the defendants had two contradictory things in its RFI and that didn't get explained until Ms Taylor's witness statement was served yesterday. She alleges in that statement that she explained this in correspondence. She didn't, she asserted it in correspondence, that the annexe A universities were all of the universities but never explains how that list had come about. The four universities that are even on that list for which no disclosure has been provided were -- again, the reason for that lack of disclosure wasn't explained other than a bald statement to say there are no documents. All of that came yesterday in Ms Taylor's statement.

There's no basis for saying that there's been any sort of unreasonable behaviour by the claimant. That being so, in my submission, this is a case management decision and there's no justification for departing from what on any view is the normal rule that there be costs in the case.

THE CHAIRMAN: What's the difference, Mr Armitage, between this application and

those that were made at the previous CMC which the defendants didn't succeed on?

MR ARMITAGE: Well, the differences are twofold. First, the claimants didn't apply for their costs in relation to the application made at the first CMC and that's sufficient, because there's no unfairness in circumstances where the claimants didn't try to persuade you to order costs in relation to that matter.

But secondly it's not right to say that the defendants were unsuccessful and the claimants were successful. My Lord will have seen the claimants sought a much more expansive order than was in fact ordered and, if my Lord recalls, that followed argument in which my Lord accepted submissions that I made in relation to the unnecessary and expansive nature of the order that was sought. So it wasn't anything like complete success. In contrast, today the application was dismissed in its entirety.

On the question of unreasonable litigation behaviour, as my learned friend put it, we don't accept that that's the test. This was a contested application and my side prevailed. But if and insofar as necessary, we do say the application should not have been made in light of the very clear clarifications that were provided in correspondence about annexe A of the RFI. It wasn't as late as yesterday that those points were made. They were made in correspondence much earlier, I can take my Lord to that if necessary, but we say it may not be necessary because it's not necessary for us to show unreasonableness. The fact is we prevailed on the application.

THE CHAIRMAN: No, what about -- I'll make a decision once we've discussed the cost of the remainder of today. What position do either of you or both of you take on the costs generally of this second CMC, leaving aside that application for the moment?

MR SKINNER: We say they should be costs in the case in the normal way.

MR ARMITAGE: Yes. I don't have instructions to seek costs on any other issues.

THE CHAIRMAN: That's was what I would have assumed you'd say.

MR ARMITAGE: Yes.

THE CHAIRMAN: Right. Do you have right of reply, Mr Skinner? Is there anything you want to say in response to what Mr Armitage just said?

MR SKINNER: No, I don't have any sort of -- I think all the points are canvased.

THE CHAIRMAN: No, I do think that the application for further disclosure was a discrete and separate application. I don't suggest in any way it was unreasonable for the claimants to make it, that is not the basis on which the costs are ordered. It's simply on the basis that the application was made and failed. So, to the extent that costs were incurred in relation to that, and I have no way of knowing how much that is, because it's a matter that will have to be dealt with at detailed assessment, but, insofar as there were such costs, then they are to be ordered to be paid by the claimants to the defendants, which disposes of the budget question.

MR SKINNER: It does.

MR ARMITAGE: I'm grateful.

THE CHAIRMAN: Right. Someone was asking about the order.

MR SKINNER: I understand that the usual matter is for the Referendaires to draft an order but I suspect in a CMC of this sort that they might appreciate some assistance from Mr Armitage and I.

THE CHAIRMAN: I would imagine they would. They will speak up otherwise, but I'm going to suggest that you do provide drafts for them to work from.

MR SKINNER: I'm grateful. We'll do that as soon as we are able.

THE CHAIRMAN: Anything else for this afternoon?

MR SKINNER: No.

MR ARMITAGE: No, my Lord.

THE CHAIRMAN: Thank you very much to the three of you and all those sitting behind you for the preparation of this matter and we'll meet again. Thank you.

MR SKINNER: Thank you.

MS ARCHBOLD: I'm grateful.

MR ARMITAGE: Thank you.

(3.13 pm)

(Hearing concluded)