IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1359/5/7/20

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

Thursday 10 June 2021

Before:
The Honourable Mrs Justice Bacon
(Chairwoman)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

REST & PLAY FOOTWEAR LTD

Claimant

v

GEORGE RYE & SONS LTD

Defendant

A P P E A R AN C E S

Matthew Kennedy (instructed by Maitland Walker LLP appeared on behalf of the Claimant)
Anneli Howard QC (instructed by Womble Bond Dickinson (UK) LLP appeared on behalf of the Defendant)

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Thursday, 10th June 2021

(10.30 am)

CASE MANAGEMENT CONFERENCE

MRS JUSTICE BACON: Thank you very much. Before we continue, can I check you can both hear me all right?

MR KENNEDY: I can, yes.

MRS JUSTICE BACON: Thank you for your extensive argument and for the updated CMC bundle. In addition to the bundle, I have also had one additional witness statement from Miss Virgin. That's a witness statement. Is there any further factual material or is that everything?

MS HOWARD: That's everything, my Lady. There is one letter that was not included in the bundle which I attached as an annex to our skeleton as a PDF link.

MRS JUSTICE BACON: Yes, I have that.

MS HOWARD: I am hoping that your Ladyship has that. We also submitted a draft CMC order which we thought we could use for the agenda.

MRS JUSTICE BACON: Yes. I have got that and I have got two authorities bundles marked 1 and 1A. In addition to those, I have in any event, referred to as necessary the relevant provisions of the Competition Act, the Enterprise Act and the CAT rules. I think those are all the authorities that we will need to refer to this morning. I note that there is some reference to the CPR. I also have that if necessary. What I would propose to do is to take the rest in order unless either of you are suggesting that we should take any point out of order?

MS HOWARD: We have been discussing the draft order overnight and we have made considerable progress this morning. I think we are very, very nearly there on the request for information. We may just need a short break for counsel to liaise just to try to finalise that. So it might be better to take specific disclosure and

the RFI later just to allow ourselves a five minute break.

MRS JUSTICE BACON: What I was in any event going to propose was that we should have a five minute break mid-morning and mid-afternoon. It might be that by the time we have dealt with confidentiality and the fast track procedure, which are the second and third items on the agenda, that might be an appropriate time anyway, possibly slightly earlier or slightly later, but we could possibly break then and then you could let me know where you have got to on agenda item 4 I think you are referring to.

MR KENNEDY: The other issue was the question of your power to strike out the counterclaim.

MRS JUSTICE BACON: Shall we deal with that when we get to the strike out?

MR KENNEDY: Madam, I don't think it will affect the order, but we see sort of two ways through, if you like. If I can sort of give you the conclusion. We hope it can be dealt with today one way or another and to avoid any further costs, but we can raise that at the appropriate time in the agenda.

MRS JUSTICE BACON: All right. So shall we then start off with the opening items on the agenda. Number 1 is forum? It is agreed that shall be England and Wales. The second is confidentiality and the various confidentiality requests are set out, Miss Howard, in your skeleton argument in the annexe and I have gone through those. I don't know whether you want to say anything more about your requests or whether I should indicate my view on those at this stage?

MS HOWARD: I think the provisions of how to manage the confidentiality issues have been agreed between the parties in the draft order. There will obviously be some liaison between us as to what actually counts as commercially sensitive information or that is worthy of protection. I tried to set out in the schedule where our main concerns are and they are mainly three-fold.

One is genuinely commercial sensitive information; there is going to be a lot of information disclosed about costs and data, more from the Claimant than from our side, but obviously because of the relative recent date of these events, they will still have a degree of commercial sensitivity. We can manage that process. I don't think there is any problem with disclosure of that information between the parties. It is just disclosure in public.

The second category is third party information. That links into the third category that I have set out in my skeleton, which is there are other third parties who are not represented before the Tribunal whose interests may be affected by the nature of these proceedings.

MRS JUSTICE BACON: Yes.

MS HOWARD: It is really creating a mechanism so that those third parties are protected when they are not here to make representations. I think trying to involve them in some kind of consent process or pushback redaction process is going to be so time-consuming and difficult and would just add layers of costs. So we will try to find a practical pragmatic way of anonymising or referring to them through code words so that their identities are not revealed. I am sure we can find practical ways to do that.

MRS JUSTICE BACON: Yes. I don't have a problem with the provisions in the draft order as a mechanism, but I do think that there is a real question as to whether the redactions -- proposed redactions set out in the schedule in Annexe 1 to your skeleton argument are properly categories that should be regarded as confidential. That has been raised, as I understand it, by the Claimant as an issue. I think it may be helpful for me to indicate my view on that now for the purpose of your future discussions and, if necessary, to give a ruling on that. I don't know if that will be necessary.

It seems to me that, in relation to some of the categories of confidentiality which refer to admissions of anti-competitive conduct in agreements between the two parties, I find it very difficult to see that there's a valid claim to commercial confidentiality in that regard. The finding of that is going to be an integral part of the assessment of the claim to damages and the fact that liability in this case is admitted, it doesn't seem to me to make any difference to that.

So insofar as the claimed confidentiality or the claimed redactions attempt to redact the admission of involvement of the parties themselves in anti-competitive conduct. I don't think that's a matter of commercial confidentiality at all.

As to the involvement of third parties, it seems to be suggested in the column giving a reason for confidential treatment that there is an admission of involvement of other retailers in an anti-competitive agreement or concerted practice, but as I read the schedule of proposed redactions, I don't see any such admissions. At the moment it seems to me that the defence asserts that the Defendant gave instructions to unnamed third parties regarding the pricing of the relevant products, but there's no pleaded case as far as I can see that the third parties adhered to those instructions. Indeed, your case is the opposite. Nor is there a pleaded case that any of the third parties agreed to the Defendant's price recommendations or stipulations and I have not found any identification, at least in the schedule, of any specific third parties with whom the Defendant is said to have communicated. There is reference to unnamed third parties, for example, in paragraph 24, second page of your schedule, third row.

MS HOWARD: My Lady, there is a named retailer at para 13, which is the third row of that schedule.

MRS JUSTICE BACON: Yes. I mean, that's not an admission of any agreement with a named retailer. We can come on to that in a minute, because I was going to

address named references to third parties separately, but as I read it, that's not a reference to an agreement with that named retailer.

MR KENNEDY: Madam, you may see that in RFI we have sought clarification of this aspect of the Defendant's case. Although this is not an issue at the moment, it may become more of an issue, if I can put it that way, once we have received that RFI response. I had intended to address you on the question of admissions as between the two parties to the proceedings already. You have seen my submissions on the applicability of Pergan. I don't, Madam, from what you said, need to address you on that but just to flag that the RFI response may complicate matters a little bit in the future.

MS HOWARD: I find your indication really, really helpful. Thank you. I think we can take that forward, but I am trying to future proof this arrangement so that we don't have to keep coming back to the Tribunal or keep falling out over it. I am just thinking, as the case evolves and we get into witness evidence or disclosure, that we have a mechanism to identify that information upfront, especially third party information.

The third aspect was kind of the loop that comes back by the fact that it is the Defendant that has revealed the involvement, if any, and to what extent of other retailers, which then has a commercially sensitive impact on its business dealings with them. That's the concern under the third category.

MRS JUSTICE BACON: Yes. Well, I mean, as regards named competitors I think that it may be legitimate if there is recent information about the sales pattern of a particular competitor or the Defendant's dealings with a particular competitor for the name of that competitor to be redacted. If there is historic information about a competitor's pricing, and I do think that the reference in paragraph 13 which concerns correspondence in 2014 about the pricing of a particular

competitor, I do wonder if it can be said on any basis that that is sufficiently current to be commercially sensitive. One has to be realistic about this. This is now, what, seven years ago?

MS HOWARD: Uh-huh.

MRS JUSTICE BACON: By the time it gets to trial it will be even longer. The fact that a complaint has been made about the low pricing of a particular competitor seven years ago seems to me to not fall into the category of case where there can be said to be substantial harm arising from the disclosure of that. If you look at the relevant test in the Enterprise Act 2002, It is:

"Commercial information the disclosure of which would or might significantly harm the legitimate business interests of the undertaking to which it relates."

Even without trying to go to those third parties, it is very difficult to see that a vague complaint made by Mr Hollis about a single competitor seven years ago could be said to even remotely cause significant harm to the business interests of that undertaking.

MS HOWARD: I can see that in line with the case law the Tribunal has applied a two years' cut off in previous cases, but then European jurisprudence gives five years. It might be helpful if we can have a sort of steer of the number of years that the Tribunal would consider to be sensitive just so we can help create a framework to work within.

MRS JUSTICE BACON: Well, I am not sure that it is appropriate now without seeing any of the disputed material that might fall within the grey area for me to set down a particular year cut-off. I think it's going to have to be approached on a case by case basis, looking at what the material is, but all I can say is on this particular quote it relates to a vague complaint made seven years ago, and without any specific commercially confidential information being disclosed

about that competitor, it is just simply a complaint by Mr Hollis.

So I think that that on any view can't really be regarded as falling within the categories of information that the Tribunal would normally protect. That's one example.

The other example of a named competitor is at paragraph 31. I can see that this is much more recent, and that might fall within the category of a case where you redact the name of the competitor and just refer to it by a letter, if necessary. On the other hand, I think it is necessary to look at where the information comes from. If the information comes from something that is in the public domain anyway, the fact that it concerns the business of a particular competitor is neither here nor there, if it is not actually confidential. It is not apparent to me from the extract where that information comes from. So that's obviously going to need to be a matter for discussion between the parties.

So I think those set out some general principles regarding third parties. There are some other proposed redactions which relate to the ranking of the Claimant among the Defendant's retail customers and the strategic efforts of the Defendant to support the Claimant.

Now I can see that you might wish to redact the name of the Defendant's largest customer, if that is still the current largest customer, but again on looking at whether some of this is historic and no longer of any commercial relevance, my understanding is that the Claimant no longer stocks the Defendant's products. Is that correct?

MR KENNEDY: That is correct, Madam, yes.

MRS JUSTICE BACON: Well, if that's the case, I do wonder whether it is -- whether there is any remaining sensitivity in disclosure of the Defendant's strategic interactions, if I might call it that, with the Claimant, because in a sense it is water under the bridge. It is historic.

MS HOWARD: It is not, because it is still fairly recent. This was happening in 2019. So there is a potential fall out for the Defendant if its other customers became aware of the strategic efforts it made on the Claimant's behalf. That's the concern. They will all want some of it. It will become very difficult, you know, to deal with.

MRS JUSTICE BACON: I can see that but I would encourage the parties to be pragmatic about this and to consider realistically whether there is anything that will significantly damage the Defendant's business in relation to its dealings with a historic customer.

MR KENNEDY: Madam, if I might, on the question of strategic efforts, there seems to be potentially some suggestion that this is said to be part of the infringement, the infringing agreement, some sort of quid pro quo. That's something else we have queried in the RFI. I see my learned friend shaking her head. If that's wrong, then fine. It does not arise. If it is correct then we say that falls into sort of category 1, if you like, of things that are not protected by Pergan.

Similarly just to put down a marker as to the alleged commercial sensitivity of it being the Defendant that names other participants in the agreement. We see that those third parties may have some legitimate interest in not being named without an opportunity to address that allegation, but insofar as it is simply concern about further claims against the Defendant, we say that that again falls squarely within the lack of Pergan protection, if I can put it that way, Madam.

As I say, just a marker. If I have the wrong end of the stick on strategic efforts, then the point falls away.

MS HOWARD: No. On the strategic efforts, this goes to the allegation in our defence on countervailing benefits and we say the Defendant has received benefits as a result of the strategic efforts which were made, which then had to be offset

against the damages. It is also relevant to the counterclaim, because one of the orders was rejected and not paid for was precisely the end product of these special arrangements between the Claimant and the Defendant.

MR KENNEDY: Madam, the fact -- pardon me. After you.

MRS JUSTICE BACON: It may be this will need to await the Defendant's response to the RFI.

MR KENNEDY: All I wish to say, Madam, is it is the fact that it is put as a countervailing benefit that must be taken into account that led to the understanding that it had some connection with the infringement and that that's based on the recent case law for the causal connection between the wrong in question and the benefit. But we need more detail of the pleaded case before we can reach an agreement on this, Madam.

MRS JUSTICE BACON: Just for the avoidance of doubt, my first category of case in which there were admissions of anti-competitive conduct is not intended to say that anything that remotely relates to such admissions has automatically to be regarded as non-confidential. What I was suggesting was that the fact of an admission of anti-competitive conduct, for example, the first row of the schedule annexed to the Defendant's skeleton argument, that does not seem in itself to be confidential.

I can see, however, that there might be an argument that insofar as further -- the response to the RFI or witness evidence might implicate a third party who hasn't had the opportunity to comment on this or necessarily is not party to the present proceedings. It might be appropriate to redact that, but I think that's something that's going to have to be perhaps parked at this point. It is not suggested that I make any ruling as to hypothetical further pleadings. All I can do is really look at the schedule of redactions formally and give my view on what is there.

Now I take the point about strategic efforts. I think all I need to say at this point is any view that's taken on confidentiality needs to look at how historic the nature of these efforts are, and if this is something that was going on in, say, 2014, 2015, I think it is going to be far less relevant than something that was perhaps happening a year ago.

The last category that I had was what I have perhaps referred to as the Defendant's strategic information. An example of that is paragraph 42.3. I am obviously not going to read out the proposed redacted part of the defence, but to me at first blush it is difficult to see how this paragraph concerns any sensitive issue as to the Defendant's pricing strategy or is commercially sensitive in the meaning of the definition of the Enterprise Act. It seems to me rather a simple trite point of fact. Indeed, it may well be an integral part of the Defendant's case on the benefit to it and potentially -- and any disadvantage to the Claimant.

First of all, it is difficult to see how one is going to address that in open court anyway, if the Defendant does maintain that. It is not something you can simply substitute with a code word. Secondly, as I said, I really do question whether that is genuinely commercially sensitive and whether disclosure of that paragraph is going to cause any harm to the Defendant.

MS HOWARD: I think the concern is that the scrutiny of different retailers and different approaches might cause prejudice to the business relationships going forwards.

MRS JUSTICE BACON: You are not asking me to reach a view on this immediately, but I do have considerable scepticism as to how that is going to -- how disclosure of that is going to harm the Defendant in its negotiations with any of the retailers.

MS HOWARD: Okay. Thank you very much for that guidance. I think the best thing

is that we take it forward and we try to create a system. We will look at this schedule and review it and assess it again in the light of your comments.

Again going forwards with the response to the Claimant's RFI which is due on 18th June, obviously we will mark and highlight any matters that we consider to be confidential in the light of the guidance that you have given, and then we can discuss between counsel if there's any objections to that and try to resolve them.

MRS JUSTICE BACON: Yes. If I were to resolve any of these right now it would require the Tribunal to go into camera which is obviously undesirable, and neither of you are asking me to resolve those immediately. So I think that that's right. You will have to liaise with the Claimant as appropriate and I think it is appropriate also for you to refer any remaining disputes to be determined by the Tribunal on the papers without a hearing as proposed in paragraph 3 of the order. So does that deal with confidentiality?

MS HOWARD: Yes, my Lady.

MR KENNEDY: It does, my Lady.

MRS JUSTICE BACON: So the next item on the agenda is the fast track procedure. My understanding is that the Claimant considers a fast track procedure should be ordered. The Defendant is neutral, although I have noted, Miss Howard, your doubt expressed as to whether it is entirely realistic for this to continue on the fast track procedure, given various factors that you have referred to, including the fact that on any view the parties are not saying that the hearing should come on six months hence.

I have read the comments that both of you have made in your skeleton arguments. Is there anything more that either of you want to say to add to what you have already said there, perhaps starting with you, Mr Kennedy?

MR KENNEDY: Madam, just two points. We say it matters whether or not it is badged formally as fast track for two reasons. One, we say it is determinative of whether or not you have power today to strike out the counterclaim.

MRS JUSTICE BACON: Yes.

MR KENNEDY: I can address you on how we get there.

MRS JUSTICE BACON: That's rather the tail wagging the dog, isn't it? I can't designate as fast track purely in order to decide that I have got power to strike out the counterclaim.

MR KENNEDY: Well, Madam, we don't suggest that you do it for that reason alone. We suggest that it is appropriate for the case to be allocated to fast track in any event for the reasons given in my skeleton argument. We say that Rule 58 ought to be interpreted flexibly, and in particular the six-month limit ought to be interpreted flexibly, in circumstances where the parties have made great efforts to devise a procedure which is bespoke and only slightly greater than that six-month limit but does seek to have a tightly focused and expeditious procedure that sees us go to trial and hopes to avoid trial by having a hiatus of one month after four months, halfway through, in which the parties can settle.

So we say, if you like, the statutory test for application allocation to the fast track is met. The three-day limit for hearings is not a hard and fast rule. That's clear from Rule 58(3)(b) on its face, Madam. The President also made that clear in the Breasley case. I don't suggest you turn that up in the interests of time, Madam. It is in bundle 1A of the authorities, tab 8.

MRS JUSTICE BACON: Yes, I have looked at that. Can you help me? You have just said there is a one month hiatus. Where does that come exactly in the timetable?

MR KENNEDY: It is after the exchange of the second -- the Defendant's without

prejudice position paper as it has been called. I think that's paragraph 23. Then it is intended that in the course of October the parties meet. It is not quite a month, Madam. I spoke too soon, but it is intended in that period following receipt of the Defendant's WP paper that the parties will have meetings both between the experts and between the legal teams in the hope that the case can be settled.

Then you see, Madam after the heading "Directions for trial phase two", it sort of picks up again and in a sense it goes back to the start and we go back to disclosure, only this time it is factual disclosure which is directed at allowing the parties to prepare full factual witness statements and then runs through to the preparation of proper, if I can put it that way, expert evidence.

So the idea is after the preparation of the initial expert positions there is time in which the parties can seek to resolve this whilst avoiding the need for any trial at all.

MRS JUSTICE BACON: Yes. I don't really see there is a hiatus as such, because you have got the initial quantum disclosure being given by the end of July. There's obviously then during the course of September -- I think it is -- yes, during the course of September the experts setting out outline positions. In a way that can be regarded as further particularisation of your respective cases following initial disclosure, which is going to be necessary in any event, and what's being said, and I have read the skeleton arguments on this point, what's being said particularly by your client is that your client is simply not in a position to give a set of counterfactual numbers at this point, and that that will necessarily have to follow in the experts' outline position papers and then in due course in their final reports.

So although that is happening in September, that's going to be a necessary part of the directions to trial in any event, because there's going to have to be some

particularisation of what your case is, whether it's in July or September or some other time, before witnesses of fact serve their statements.

I can see you have a bespoke procedure, but it doesn't entail any sort of suspension of the trial timetable and on any view it is significantly longer than the six months. Even assuming that both of you are available on 25th February for four days, that's eight and a half months away. It is not clear to me that the timetable in Rule 58 can be interpreted flexibly. It seems to me somewhat mandatory.

MR KENNEDY: Madam, you saw my submissions on whether it is mandatory or flexible. I don't propose to re-raise that in oral submissions.

MRS JUSTICE BACON: No.

MR KENNEDY: Our position is that the rationale for the fast track procedure is to try and ensure that small claims are resolved as quickly as possible and as cheaply as possible, if I can put it that way. Our proposed directions have the same underpinning rationale. We of course, accept that it is eight and a half months and not six months. We submit that that ought not to be determinative, but I hear, of course, what you say, Madam.

MRS JUSTICE BACON: Yes.

MR KENNEDY: I've addressed you on the question of the power to strike out and I can come to that further. The second point -- doubtless you picked this up, Madam -- it is relevant to the question of costs. Although Miss Howard said she is neutral, she is not particularly neutral in that they seek their costs in the event -- they say in the event that we withdraw the application. Our position is that having agreed the proposed directions, which we say do fit within the fast track broadly conceived, if you are not against me on that, Madam, we say that theirs is an unduly obstructive approach in the circumstances. It is a case

management conference, the idea is to try to find a suitable procedure that serves the interests of parties and meets your approval. One of the proposals was fast track. A subsequent proposal is these agreed directions and we say costs should be in the case. I will not detain you further.

MRS JUSTICE BACON: Costs I will deal with at the end of the CMC. Again that's not a reason to make an order for the fast track procedure. That would definitely be the tail wagging the dog.

In relation to the substantive issues can I just check a few things? First of all, my understanding is that you are both agreed on a four-day estimate. Is that correct?

MR KENNEDY: That is correct, Madam, I think.

MRS JUSTICE BACON: Yes.

MS HOWARD: It is unless the experts' analysis is kind of truncated because of the ADR process. It may be something that can be shortened if a lot of that ground has been cleared in advance.

MRS JUSTICE BACON: Yes, provisionally you are agreed on a four-day estimate. Mr Kennedy, are you saying that there is any particular urgency in the case?

MR KENNEDY: No particular urgency, Madam, other than the desire of the parties to see it resolved as quickly as possible, but that's not particular to our clients. I appreciate that.

MS HOWARD: Can I just clarify the Defendant's position as well? We feel this case has drifted. We did ask for ADR in October last year. That was not successful. I think that it is really tragic that the parties were not able to manage their expectations and reach a settlement. I am obviously not going to enter into the content of the WP discussions. That was largely because we consider, and I don't want flare up the arguments, but there was a lack of particularisation and

a lack of economic analysis of quantum on the Claimant's part, which meant we went in blind and the Defendant then had to engage its experts and incur those fees of coming up with possible methodologies and possible settlement proposals. So its costs of ADR are almost double that of the Claimant's in their really genuine attempts to try to settle this dispute.

We are neutral on the fast track provided that there is rigour on these deadlines, because to date the claim has proceeded in an inefficient manner, and because the costs and the time will always expand to fit the deadlines. It is important if we are going to go through ADR again that this is effective and the parties are fully committed and fully engaged to make that process as effective as possible.

MRS JUSTICE BACON: You have provided very helpfully largely agreed directions on the timetable, which I consider to be sensible. It seems to me that the parties have made considerable progress in agreeing a bespoke procedure by which the Defendant can get clarity of what the Claimant's position is and that in the course of doing so there will be another chance to engage in mediation, which everyone hopes will settle the claim without it being necessary to come to trial.

I very much bear in mind the comments that you have made that the parties' costs are likely to be significantly in excess of the Claimant's claim. It seems to me that it is obviously desirable for the claim to be settled at an early stage, if that is at all possible.

I don't discern any suggestion on the part of the Claimant that these deadlines are likely to slip, and indeed the application for fast track inevitably -- whether or not that is granted -- inevitably implies that the Claimant is intending to adhere to those deadlines.

MR KENNEDY: Madam, that is correct. The only issue is one around the precise date for the first WP outline position paper. The long vacation is causing some

trouble, but I anticipate that that can be agreed between us. Otherwise we are absolutely fully committed to all of these deadlines and wish to see it resolved quickly, just as the Defendant does. I will not address you on the points about the previous ADR attempts --

MRS JUSTICE BACON: I don't think it is necessary --

MR KENNEDY: You don't need to hear me on that.

MRS JUSTICE BACON: No, I don't need to hear anything. Just to confirm, Mr Kennedy, whether or not the fast track procedure is offered, are you committed to adhering to these dates or are you suggesting that there is a possibility of further slippage?

MR KENNEDY: There is no possibility of further slippage, Madam. We are committed to those dates regardless of the outcome of the fast track procedure question. Those are agreed, come what may.

MRS JUSTICE BACON: Yes. All right. Miss Howard, unless you want to say anything further, Mr Kennedy has obviously seen the points that you have raised in your skeleton argument and has responded to those to some extent orally now. I propose to give a short ruling on the fast track procedure aspect of the dispute. Does anyone want to say anything more before I do so?

MR KENNEDY: Not for my part, Madam.

MS HOWARD: No.

MRS JUSTICE BACON:

For ruling, see [2021] CAT 18

MRS JUSTICE BACON: So that leads us then on to item 4 on the agenda, clarification of matters in dispute. Now is this the point at which you would like me to rise for five minutes while you discuss further?

MR KENNEDY: Yes, Madam, I think it is.

MRS JUSTICE BACON: All right. I will do that and I will come back -- I will return in five minutes and then I will see what you have to say about agenda item 4.

MR KENNEDY: Thank you, Madam.

MS HOWARD: Thank you very much.

(Short break)

MR KENNEDY: Madam, I think my learned friend is still taking instructions.

MS HOWARD: Thank you very much. I am sorry. I can't hear you. You are on mute.

MRS JUSTICE BACON: We just need to wait for the live stream to be announced.

MS HOWARD: Shall I shall just explain where we have got to? We have been discussing overnight and this morning and it might be useful to give you some of the background. There are various interlocking parts that link together here. In a way, the specific disclosure ties in with the RFI and then that ties in with this process of ADR in September and October. They are all sort of interconnected. It might be a way to update you on what we have agreed and whether you are satisfied with that and make a reasonable timetable going forwards.

MRS JUSTICE BACON: I don't think I need the history. I just need where you have got to now.

MS HOWARD: So dealing with the RFI first, you will see in the draft order it is divided into two tranches.

MRS JUSTICE BACON: Yes.

MS HOWARD: We have done that in paragraphs 9 and 10, because paragraph 9 covers basically factual information that is in the Claimant's possession. The second witness statement of Miss Sheree-Ann Virgin now states she can get access to this information with ready availability.

MRS JUSTICE BACON: I noted, yes.

MS HOWARD: Paragraph 9 is now agreed. So by 30th June the Claimant is to provide answers to questions A, B, C and part of D. My Lady, if you perhaps were to bring up the Tribunal's RFI, which is I think B11. I am looking at the wrong screen.

MRS JUSTICE BACON: I just need the pdf page number.

MS HOWARD: Sorry. I have it colour coded.

MRS JUSTICE BACON: Is it 106 or 107?

MS HOWARD: It is 107. So the Claimant is happy to provide for each of the relevant years in the relevant period the actual quantity of Grisport products sold.

MRS JUSTICE BACON: Yes, A, B and C. Then what part of D?

MS HOWARD: There is a complication with the profit, because obviously you can't work out the profit unless you know what the costs are that were attributable to that element of the business, because the Claimant obviously has two businesses and some of its costs are -- it will have common costs between its hiking business and the lawn-bowling business.

So what we have suggested is the economists, at their meeting on 18th June, will come up, as part of the agreed methodology, with a way of identifying and apportioning those costs which will then enable the Claimant to calculate the profits.

MRS JUSTICE BACON: Yes.

MS HOWARD: As to 1(d), there is obviously a factual element there about what the Claimant would have priced at and how its automated pricing software worked and what floors and limits were imposed within that software to make sure that the Claimant priced at a profitable level. So there can be a factual description and that is going to be provided by 30th June. But, obviously, for the detail of the counterfactual prices, they say they won't be able to assess until they have

seen the disclosure, the Initial Quantum Disclosure.

MRS JUSTICE BACON: What do you mean by factual description of matters responsive to D?

MS HOWARD: I think we were going to take it off line and just agree between counsel exactly what's covered, but really it includes what was their commercial strategy in relation to pricing, how did they react to discounting by other retailers or the presence of other retailers in the market? How did their automated software work and what limit and floors did they have in it so they didn't go down to rock bottom?

MRS JUSTICE BACON: Yes.

MR KENNEDY: There will be a witness statement from Mr Hollis, Madam.

MRS JUSTICE BACON: I see. Is that going to be provided in the order?

MS HOWARD: That will be provided in the order. Probably 1(d) is going to be answered in the form of a witness statement with a Statement of Truth.

MRS JUSTICE BACON: Yes. What about --

MS HOWARD: The other questions again will be as a response to the Tribunal's RFI, again with a Statement of Truth.

MRS JUSTICE BACON: So then where do we get to -- yes, Mr Kennedy?

MR KENNEDY: I am sorry to interrupt. There seems to be some confusion. I don't think it has been agreed that 1(a), (b) and (c) will be in the form of an RFI. I think what has been agreed is the relevant data but we don't see that that's sort of easily disclosable in the form of an RFI. We are talking about 40,000 observations, Madam. I think it can easily be resolved. I think it is just a question of format. They are primarily data points, Madam. It is likely to be an Excel file.

MS HOWARD: That's not very helpful to the Defendant. We don't want a data dump

without any explanation of what it means.

MRS JUSTICE BACON: I can see that you are going to give the data dump, but I agree with the Defendant that it ought to be possible, especially if the experts have met by some weeks before that, to simply answer on the basis of those data, especially if it is in an Excel spreadsheet, the questions in the RFI. What is requested from the Tribunal is that for each year you give an answer to what is the quantity sold, what prices were charged and what was the revenue and profit on those sales.

MR KENNEDY: Madam, of course, we would be very happy in a narrative document to cross refer to the relevant spreadsheet, but just to be clear I don't think what's envisaged is an RFI response that lists each of the prices that were charged for each of the products sold over the period. That would simply be a Word version, if I can put it that way, of the Excel spreadsheet, which I don't think would be of any greater assistance.

MRS JUSTICE BACON: Is it not possible to answer quite shortly what was the quantity that the Claimant sold of each product during the year?

MR KENNEDY: Well, Madam, there's a range of products. We could give the total number of product X and product Y, I imagine, Madam, and we could give the total number overall, which we think is 40,000, but just to take (b) as an example we don't think that it makes sense to say on date X product Y was sold at price A and so on and so forth. That doesn't seem to us to make much sense.

MRS JUSTICE BACON: Can I just pursue this with Mr Kennedy? I can see that you sold a number of different categories of footwear and I can see that to set out the prices charged on each occasion is going to be effectively replicating the contents of the spreadsheet. At the very least it seems to me what can be done is to set out for each year what quantity of the particular categories of footwear

were sold and you can then sub divide it according to the different types of footwear that were sold.

MR KENNEDY: Absolutely, Madam.

MRS JUSTICE BACON: As to the prices, are you able to give a range at the very least?

MR KENNEDY: I don't know the answer off the top of my head, Madam. I can check with those metaphorically behind me. I don't think our expert is in attendance. He is the one who is closest to the data. We can of course follow up on that with you, Madam.

MRS JUSTICE BACON: Yes. As for (c), (c) is not asking for a disaggregated schedule of the revenue and profit on each sale of the individual however many thousand items, but what you can do is give an aggregated figure for each year, which is what the question is asking. So you could say for each year in that period and for each category of the footwear what was the total revenue on the sales, which I would have thought would be capable of extracting fairly easily from the spreadsheet, and the profit that was earned on those sales in so far as --

MR KENNEDY: That should be possible, Madam, yes. It may be that there is a backup which shows the relevant cost data which is the point that Ms Howard has alluded to, but I am sure there will be no objection to a sort of technical back up which has all the Excel workings, if I can put it that way.

MRS JUSTICE BACON: Yes, you will need to provide that. You will need to provide the Excel spreadsheet with the underlying figures, but it seems to me that you should also do your best to give answers to the RFI in such form as you can obviously with a sensible amount of aggregation.

MR KENNEDY: We can absolutely do that, Madam, of course.

MRS JUSTICE BACON: Miss Howard, is that sufficient?

MS HOWARD: Yes. I was just going to say, if it assists, I think what the experts are doing is they are looking at samples, so within the Grisport Footwear there are particular names of different models. So there is the Dartmouth model, there is the Exmoor model. It might be helpful to categorise them by model or to take the best selling ones as -- that may be something that's worked out at the meeting on 18th June as a workable way forward rather than trying to deal with 40,000 different units.

MRS JUSTICE BACON: Yes. In the meantime we have to have some sensible wording of the orders I am going to make.

MS HOWARD: Yes. I think what is intended by category might be the model of the footwear.

MRS JUSTICE BACON: Yes. The request for information is for answers by year and by category of footwear. So it seems to me that it is not unreasonable to word the order as it is currently worded. The Claimant is to provide answers to questions 1(a), (b) and (c) at the Tribunal's request for additional information, insofar as it is able to do so together with the underlying sales data, which Mr Kennedy has said will be necessarily provided, and then you will have to work out the wording of an order in relation to the witness statement to be provided by Mr Hollis. All right. So that deals with paragraph 9.

Paragraph 10 is the answers to the remaining questions, which I understand is going to follow, and the question to me is when that can be provided. Again that will necessarily involve some degree of aggregation. As a quasi-pleading I totally appreciate that the figures are going to be indicative and pending any further factual disclosure. Given that there will be initial disclosure at some point in July, and there will be before that a meeting of the experts based on further

refinement of the analysis of the spreadsheet provided by the Claimant, is 23rd July the earliest that the answers to questions D, E and F can be provided or have you agreed something different?

MR KENNEDY: We have agreed something different, which is that other than the witness statement in D, which we have referred to, D, E and F would not be pursued any further and the relevant responses would be covered in the first instance in our expert's without prejudice outline position paper. As I have said in my skeleton argument, that would be entirely duplicative of that. Of course, it will be covered in open evidence if we get there in the expert report which is due towards the back end of the year. So that's what has been agreed, Madam.

MS HOWARD: That was agreed. I just discussed this with my learned friend off-line, in the light of your comments that you said earlier about needing to have some kind of pleaded case. Obviously we want to facilitate settlement discussions in the month of September, but at some point the Claimant will need to update its pleadings and plead out what its case is on loss in the light of disclosure and in the light of its economic analysis.

Really it is a question of timing as to when that is done, because I don't want to be bounced into witness evidence if ADR fails without a properly pleaded case because obviously there is a link between the witness evidence and the expert evidence, and we need to make sure the relevant points are covered.

MR KENNEDY: Madam, we are happy to (overtalking).

MRS JUSTICE BACON: Hang on.

MS HOWARD: We are doing most of the work in September in responding to the Claimant's position paper. That might be a good time for them to put in a pleading of what their case is on the quantum, having had the disclosure and the expert analysis.

MRS JUSTICE BACON: Would it not be sensible for the Claimant's pleading to be provided together with the outline position paper?

MR KENNEDY: Madam, my concern about that is it may render the WP exchanges between the experts more difficult. If we have had to go into print on the basis of our WP position paper and sign a pleading saying this is our position, it then makes it rather more difficult for our expert to take on board any sensible points that may be made in the WP negotiations, as is often the case, and he may want to revise his methodology in light of the exchange that is had in that period. That's my concern on that front. If it is simultaneous, then our flexibility in that process may be hampered in that way.

MRS JUSTICE BACON: Well, it seems to me, Mr Kennedy, you were just saying that the reason for not providing the answers to questions D, E and F, the requests for additional information, in July was that it would be duplicative because those were going to be provided in any event in the experts position papers. Now if that is the case, it seems to me that you do at that stage at the very latest need to set out your pleaded case. I understand that you say it is duplicative, but then at some point your position has to be set out and it has to be set in a properly pleaded way.

That doesn't, of course, preclude you from saying that the figures you are giving are indicative and pending further disclosure, which is a normal form of words in any pleading of this nature.

MR KENNEDY: Madam, provided --

MRS JUSTICE BACON: Nor does it preclude you then from later on agreeing to a midway compromise on the basis of the expert discussions but there has to be a starting point and, in order to go into those discussions, the Defendant needs to know on an open basis what your position is.

MR KENNEDY: Madam, provided it was on that basis and without prejudice to our formal economic evidence in due course and without prejudice to the further factual disclosure, then we would be content with that of course.

MRS JUSTICE BACON: Yes. I think you need to do that. So 10 goes, but an equivalent of 10 is built in to whenever the Claimant's experts provide their outline position on the quantum.

MR KENNEDY: Yes, Madam.

MRS JUSTICE BACON: That effectively is your pleaded position on those issues. Miss Howard, will that meet your concern about pleading?

MS HOWARD: I am very grateful, my Lady. That's fantastic. There is a kind of crossover link with this with our request for specific disclosure, which is paragraph 7 of the draft order. Perhaps it is best that I address your Ladyship on that now, because they are linked together.

MRS JUSTICE BACON: Yes.

MS HOWARD: We have requested specific disclosure of the financial -- the full financial statements that have been approved by Rest & Play as part of their tax returns for the financial years from 2016 to 2021. Now we anticipate that the actual approved statements may not be available for 2020 or 2021 and in that case we are asking for management accounts.

MRS JUSTICE BACON: Yes.

MS HOWARD: That's resisted by the Claimant because they say that those documents are not relevant or are not going to be helpful. We do consider them to be helpful and our experts have given us quite detailed reasons of why they think they are valuable. There are three main reasons.

Firstly, as your Ladyship will be aware, you know, data is not just the volume of the data but really depends on how clean it is for carrying out quantum

assessments. Our experts consider these statements will provide a valuable cross-check for the quantum exercise, and that's for both assessing actual costs and counterfactual costs and then calculating the profit margins as a result. So they --

MRS JUSTICE BACON: And do you say that that is the case even on aggregated figures that don't disaggregate the relevant parts of the Claimant's business?

MS HOWARD: The detailed profit and loss account will give detailed costs, fixed and variable costs, for the business. Now obviously yes, they are aggregated across both the bowling and the hiking shoes businesses, but the hiking business accounts for a certain percentage -- I don't know whether I am entitled to reveal that, but you may have seen a percentage in the papers -- and it will be possible to find some way of apportioning the costs but it will be useful to have actual cost data for those years.

MRS JUSTICE BACON: I am sorry, Miss Howard. Who is going to do the apportionment of the costs because I have seen in your skeleton argument the suggestion that the Claimant should be able to apportion the figures to the hiking footwear, but that's not what you are asking for at this stage. You are simply asking for the aggregated figures.

MS HOWARD: At the experts' meeting on 18th June -- we have discussed this between counsel -- we are going to ask the experts as part of that agreed methodology to come up with an approach towards costs, which costs should be included, how common and variable costs should be treated and how they should be apportioned between the businesses. Obviously there are still underlying cost assumptions when you come to that calculation. So our experts have said it would be useful to have these statements. They have given me three reasons, which I can dive into.

They can look at the share of the sales that are attributable to the Grisport products and, combining that with the financial statements, they can do a top down analysis of quantum. That will serve as a useful cross check so when we get the data dump and we get the Claimant's explanation of it, our experts can look at the financial statements and do a cross-check exercise to make sure they agree with the assumptions that have been made.

MRS JUSTICE BACON: Yes.

MS HOWARD: They secondly say, you know, the accounts will give both revenue and costs data, but some of the revenue data may come from other sources. So, again, the cost data really matters in terms of determining quantum. It will enable the experts to estimate the Claimant's revenues on Grisport products, but also obtain valuable information on other relevant cost items such as their retail margins on the sales of Grisport shoes. It is that retail margin that's really critical, not just for the historic period, but also in extrapolating that to the future period.

Lastly they say that the financial statements will usually have yield gross and net margins. Again those can be used as a cross-check against the Claimant's calculations. That's a reliable of source of information, because all of those financial statements will have been approved by the directors under the Companies Act with their duty to ensure that they are a true and fair view of the company's assets and liabilities and its financial performance.

So it is a critical part of the ability of our experts, obviously seeing the Claimant's data for the first time, and having a very short time to respond -- they have got from 23rd June until some date in September that is not fixed yet.

MR KENNEDY: July, Madam.

MS HOWARD: We have two and a half weeks to reply. We really do need that data

in advance so we can start working on it over the summer holiday and come up with where we think models will be.

Then the last --

MRS JUSTICE BACON: The bottom line is that your experts are saying they can use those statements even on the aggregated basis that they will have them.

MS HOWARD: They can. Because of the agreed methodology, they can then apply that to test the assumptions and the proxies and any other approximations that have been used to cross-check and make sure they are reliable.

MRS JUSTICE BACON: Yes. Is there anything else you want to say about the reasons why --

MS HOWARD: The other aspect is it is a concern for my clients of the Claimant's ability to fund and meet any adverse costs awarded in this litigation. That is a key consideration in ADR, where there is a real prospect that there may be a battle of settlement offers.

MRS JUSTICE BACON: That's another issue. That seems to be dealt with by consent now.

MS HOWARD: Yes. We do have a description of what they are able to do but, by having access to the latest management accounts, particularly the presence of directors' loans, we will have the latest position. You will have seen from the Defendant’s witness statement that the Claimant's shareholdings and cash in the bank is a sum that is very much lower than the amount of costs that they have spent to date on this litigation, let alone the Defendant's costs, and in a situation where there is going to be competing offers, if the Claimant rejects an offer out of hand and does not beat it, then obviously then the Defendant will want to apply for its costs and needs to know that the Claimant is going to be in a position to meet that and needs to know where its exposure to costs is.

MRS JUSTICE BACON: Yes. You are going to get that anyway. It has been agreed that they are going to provide a statement of that.

MS HOWARD: It is, but that would be a descriptive statement. I would also just comment that the cost budget the Claimant has submitted has not been signed. We have signed our cost budget in accordance with --

MR KENNEDY: Madam, I am sure that's inadvertent. I will take instructions, but I don't think there is any significance in that at all.

MRS JUSTICE BACON: Yes. All right.

MS HOWARD: It is just having the up-to-date management accounts or the financial statements would help to show the company -- the financial state of the company and its ability to fund and continue this litigation.

In summary, we say they are relevant and they are going to be very useful as a cross-check exercise when we have to respond, in short turnaround, to the Claimant's position paper.

MRS JUSTICE BACON: All right. Mr Kennedy.

MR KENNEDY: Madam, could I ask you so turn up Mr Jurkiw's witness statement, which is at tab 36 of the bundle and page 36.

MRS JUSTICE BACON: I need a pdf.

MR KENNEDY: It is page 36 of the pdf. If you type that into the little box it should pop up. About half way down you will see the heading "Request for Disclosure". You will see paragraph 28 simply recites the terms of the order sought. Nothing substantive there, Madam. 29 says:

"That information", so the information in the financial statements, "will be needed to be disclosed as part of any disclosure but there is an advantage in the disclosure now as the parties can use that information to engage meaningfully in ADR with a view to it settling."

Now, Madam, Miss Howard has just given evidence from the Bar of the position of her experts. That's not included in the statement or included anywhere else. It is the first I have heard of it. I am being expected to respond to it on my feet with no input from my experts in circumstances where the application was intimated -- this is in Miss Virgin's second statement -- intimated on 24th May. This took two weeks to produce Mr Jurkiw's statement, only for there to be one substantive paragraph and for that evidence now to be supplemented with expert evidence or quasi expert evidence on the day of the hearing. We say it is simply unsatisfactory that we are expected to respond to detailed points about top down calculations of loss by reference to revenue from other sources.

The first point made is about whether the data is clean. We say that's obviously a red herring, Madam, insofar as the cost data that's to be provided on 30th June will be arrived at by way of an agreed methodology. That's obviously cleaner data than the aggregated data in the financial statements.

So, Madam, I say that if they want to persist in their application, it should be adjourned until we have time to respond to it, any evidence they want to rely on from their expert so that we can put in evidence from our expert. I don't see how I can fairly be expected to respond to these points.

MRS JUSTICE BACON: This is not a question of going away and looking for detailed documents that may be hidden among the e-mails of various different custodians. As I understand it, the request is for documents which it is not disputed exist and are readily available. The question is simply those documents that are readily available, should they be handed over now or not? Is there any reason not to hand them over?

I appreciate you don't want to hand over vast amounts of irrelevant material, but when there is -- when it is said that the evidence is prima facie relevant -- it may not

be decisive, but it is prima facie relevant for the purpose of cross-checking the data that is exchanged and the positions that are exchanged at the expert meetings, is there any reason why this shouldn't simply be given rather than engaging in further debate about this, which is going to rack up yet further costs on both sides?

MR KENNEDY: Madam, we say there is a reason to resist it because the predicate of the expert process with the 18th June meeting and the without prejudice papers is that the agreed methodology by reference to an agreed data set is arrived at, and that is the purpose of the disclosure to be given on 30th June and further disclosure to be given on 23rd July. The idea is that you cut costs by having the experts refer to the same numbers, which numbers are arrived at by an agreed process. That is the whole point of agreeing the apportionment of the costs.

If what happens is we disclose these statements and then two weeks later we disclose further cost data which had been apportioned and we don't find out until the WP position paper coming from the Defendant that they disagree with the assumptions we made about apportionment despite it having been agreed previously, then we will be no further forward and we will be back to square one as to how costs should be apportioned and how that factors in. That is my concern, Madam. It is not a proportionality argument. We say it is duplicative and may cause difficulty further down the line.

MRS JUSTICE BACON: I don't see how it can be duplicative. There is no suggestion that these documents are going to be disclosed later on. Your question is whether they are going to be disclosed at all. As far as I can see they are readily available. They can be handed over. It is going to take somebody to press a button presumably to send them, a matter of minutes and not hours,

I would imagine. We are already spending a number of minutes arguing about this.

Now if the experts are saying that they consider that those would be valuable, we have got in evidence, and I agree the evidence is somewhat sparse, but it is in evidence that the parties -- the Defendant at least considers that it would be meaningful to have that information. I cannot see why it cannot be handed over and it will then be a matter for the experts to discuss whether any of this is relevant.

If your expert considers that none of this is relevant and that the only relevant thing is that this aggregated data that will be provided, that's the position of your party. The position of the Defendant's experts is that there is some relevance in having this as a cross check. I don't see on what basis it can be reasonably withheld from disclosure.

MR KENNEDY: Madam, you have my position on the point. There is nothing I wish to add.

MRS JUSTICE BACON: In which case I am going to order that that is going to be disclosed. Is there any reason why it cannot be disclosed by about 4:00pm on 11th June?

MR KENNEDY: Madam, we would ask for Monday. I can take instructions but it may be that things need to be pulled together and sent across.

MRS JUSTICE BACON: All right. I am willing to order that. So that's 4.00 pm.

MR KENNEDY: 14th, Madam, I think.

MRS JUSTICE BACON: On 14th June. So that deals with further information.

I understand that the Claimant's request for further information is agreed.

MR KENNEDY: Yes, Madam.

MRS JUSTICE BACON: Disclosure is agreed. That's paragraphs 11 and 12 of the

draft order.

MR KENNEDY: There is no longer an issue between us on 16. There are a few words which were previously disputed, which is the statement about our ability to fund. That now falls away.

MRS JUSTICE BACON: What is the agreement, that those words will stand or be removed?

MR KENNEDY: That those words will stand, Madam.

MRS JUSTICE BACON: Right, but before we get there we need to deal with the strike out application. I was hoping that would we could deal with that potentially before lunch.

On the strike out application, given I have not ordered the fast track procedure, I do not think that I have the power to strike out at this hearing sitting alone. Do either of you want to submit that I do have the power to strike out at this hearing?

MR KENNEDY: No, Madam. It is agreed that you don't. Having made your order on fast track, you do not have power to strike out. However, we do say that you do have power -- I believe this is common ground, but I will be told if otherwise.

MRS JUSTICE BACON: To dismiss the application if I consider it is invalid?

MR KENNEDY: I didn't catch that, Madam.

MRS JUSTICE BACON: I can find in the Defendant's favour. I can't find in your favour at this hearing.

MR KENNEDY: That is not the position I was going to advance, Madam. I think you do have the power to make an order under Rule 34 declaring that the Tribunal does not have jurisdiction. Perhaps it would be convenient to turn up the rules.

MRS JUSTICE BACON: I see.

MR KENNEDY: Rule 34 is not one of those listed in Rule 110 and therefore the power

may be exercised, Madam, by you sitting alone I believe. As I say, I thought that was common ground. I may be told otherwise now, but I did discuss this with my learned friend yesterday and said that we saw two ways through.

MS HOWARD: I don't want to reveal the content of things. There were two options. One of them was the fast track. The second one you ran through very, very quickly and I didn't actually understand. It might be helpful --

MRS JUSTICE BACON: Why don't I hear Mr Kennedy's submissions on the way through as a matter of procedure and then we can look at substance. So I have Rule 34. So your suggestion is there should be an order under Rule 34 that the Tribunal has no jurisdiction to hear the claim.

MR KENNEDY: Yes, Madam and further provision is made at 34(6):

"An order containing a declaration that the Tribunal has no jurisdiction or will not exercise it may also make further provision as to the disposal or the stay of proceedings."

Now, Madam, we say as a matter of ordinary language "disposal" would encompass strike out. However, given the position with Rule 110 which prohibits you from exercising the right to strike out under Rule 41, we don't ask for that, but we say that if you are with us on the substance, you should make a declaration that there is no jurisdiction and you should stay the counterclaim, and what we hope is that the matter could be resolved by agreement of the parties if that's where you got to, Madam. So we say that is the way through in terms of determining this one way or another, whether you are with me or against me on the substance today, Madam.

MRS JUSTICE BACON: Yes. Miss Howard, just addressing the question of procedure?

MS HOWARD: Yes.

MRS JUSTICE BACON: Can I have your response on that?

MS HOWARD: I am sorry. I don't really see how Rule 34 applies, because obviously this is made on the Defendant's application where they are contesting the jurisdiction of the Tribunal to hear a claim presumably because it is not the most appropriate forum.

MR KENNEDY: The counterclaim is a claim for the purpose of the rule, Madam, which is common ground (Overtalking).

MS HOWARD: In this instance (overtalking).

MR KENNEDY: It does apply as set out in our witness statement which we served with the application. So I am afraid that's simply not correct. You set out in your skeleton argument that you agreed that a counterclaim is the claim for the purposes of the rule and we say it follows that Rule 34 does apply to the defendant to a counterclaim.

MRS JUSTICE BACON: Yes.

MR KENNEDY: There is no reason why it shouldn't. It may be that some times (overtalking).

MRS JUSTICE BACON: All right, Mr Kennedy. Can I hear Miss Howard on this? As Mr Kennedy has just said, they are the defendant to the counterclaim. The question is whether the alternative --

MS HOWARD: Yes, but we are not disputing your jurisdiction to hear the counterclaim. So the opening chapter of Rule 34(1) is where the defendant is disputing the Tribunal's jurisdiction to hear the claim.

MRS JUSTICE BACON: They are the defendant.

MS HOWARD: -- that the Tribunal should not exercise its jurisdiction. We are not arguing that. (Overtalking).

MRS JUSTICE BACON: They are the defendant to the counterclaim. They are

disputing the Tribunal's jurisdiction to hear the counterclaim.

MS HOWARD: Sorry. I was speaking at cross purposes. Sorry. I am just going to find my --

MR KENNEDY: Madam, if I may just say, this has been the way it was put in our application. The relevant paragraph is paragraph 21 of Miss Virgin's first statement. That's at page 30 of the pdf and it says:

"There is therefore no basis on which it can be said that the Tribunal has jurisdiction and I respectfully submit that the counterclaim should be struck out pursuant to Rule 34(6) and/or Rule 41."

I have moved my position slightly on the proper interpretation of Rule 34(6) in light of the wrinkle presented by Rule 110, but it can't be said that we have not put forward our position that Rule 34 applies to the substance of our application. So this is not a late ...

MRS JUSTICE BACON: I would like to hear Miss Howard on that.

MS HOWARD: Sorry. I am trying to bring up Rule 110. This may create a way forward for your Ladyship. I think most of my arguments are directed towards the actual substance of Section 47A and Rule 39 as to whether this is an additional claim, and then the Claimant's arguments on transfer.

MRS JUSTICE BACON: Yes.

MS HOWARD: If you interpret Rule 34 in that manner, that they are the defendant to the counterclaim and we regard the counterclaim as being a claim for the purposes both of Section 47A and the rules, then that may be a way through for them to dispute jurisdiction.

MRS JUSTICE BACON: So you accept then that I can make an order today. Rather than making an order for strike-out, which I can't do, you accept I can make an order declaring that the Tribunal doesn't have jurisdiction to hear the

counterclaim?

MS HOWARD: I think you can, yes. It is not going to be a strike out as formally as that, but it would be a dismissal of the claim I guess.

MRS JUSTICE BACON: It would effectively be --

MS HOWARD: Summary judgment.

MRS JUSTICE BACON: It would effectively dispose. So you accept that that is an order that I can make today as a matter of form. Now is there any reason procedurally why I should not make that order if I am against you on the substance in circumstances where it appears that both of you want me to determine the issue at this hearing?

MS HOWARD: I think it needs to be determined at this hearing, because the costs of going to another hearing and constituting the entire Tribunal of three members I think is disproportionate.

MRS JUSTICE BACON: Yes, I agree.

MS HOWARD: To the effective conduct of these proceedings. On my reading, I think you do have jurisdiction to hear the counterclaim. Obviously we will come to those arguments in due course.

MRS JUSTICE BACON: There is a third way forward, which is that it is certainly within my jurisdiction, as I see it, and no-one disputes that, that if I dismiss Mr Kennedy's arguments, I simply dismiss the application for strike-out or for a declaration of no jurisdiction. There's no suggestion that I can't dismiss those. So I could do that.

Now if I am with Mr Kennedy on the -- if I am in principle with Mr Kennedy on the jurisdictional question, I could give an indication of that without making a formal order, leaving it to you to then replead in the County Court. Mr Kennedy may not find that attractive, because he wants a formal determination of that at this

hearing.

MR KENNEDY: That is my position, Madam. We have asked for such an order in the alternative. We see no reason why not to have that.

MS HOWARD: We don't think it would be a County Court claim, because the Claimant has already indicated in the pre-action correspondence that it would intend to raise a competition law defence to that claim.

MRS JUSTICE BACON: Yes, but it has not done so yet.

MS HOWARD: Before the Chancery Division.

MRS JUSTICE BACON: It may end up in the Chancery Division.

MS HOWARD: Then we will have to transfer it to the Tribunal.

MRS JUSTICE BACON: I appreciate that that involves something of, you know, a merry-go-round with the competition points ending up in the Tribunal, but that is all contingent on whether a competition law defence is pleaded. A competition law defence may not be pleaded, or if it is, one course might be for that to be stayed if that raises no different arguments to the competition law issues in the claim.

MS HOWARD: I think this comes down into the substantive arguments that I was going to address your Ladyship on the links between the two and the scope of Section 47A.

MRS JUSTICE BACON: On any view the consensus appears to be that although I don't have the power to strike out, given that I have not ordered the fast track procedure, I do have the power to make an order declaring that the Tribunal has no jurisdiction to hear the counterclaim, and the consequence of that will be that if I made that order that the counterclaim would then have to replead as a stand alone claim initially in the County Court, and then subject to any defence raised that may or may not raise competition issues, it may then have

to be transferred to the Chancery Division and in due course then there would need to be directions as to how to manage that. That would be the way forward and it is agreed that is procedurally within my powers for this hearing, and both of you want me to determine the issue at this hearing, in which case I will then hear the strike-out application and I will then make a final order either dismissing it or ordering that the Tribunal has no jurisdiction, depending on the outcome of that.

So, Mr Kennedy, that's your application?

MR KENNEDY: Madam, I am grateful. You may already have it open, but if I could ask you to open Miss Virgin's first statement. That's at tab 5 of the bundle.

MRS JUSTICE BACON: I have that.

MR KENNEDY: Scroll to page 26. This may be a convenient place to pick up the relevant law. You will see at paragraph 9. I am not sure whether this is disputed, but I will run through it quickly in case it is. We say that the counterclaim is clearly an additional claim within the meaning of Rule 39(a). We set out Rule 39 there. It provides that:

"In this rule and Rule 40 an additional claim means (a), a counterclaim by a defendant against the claimant or against the claimant and some other person."

It is not disputed a counterclaim by the Defendant against the Claimant falls within that rule. Then there is 2, which is:

"An additional claim is to be treated as if it were a claim."

Which is the point we have canvassed in the construction of Rule 34. Then (3) and (4) provide two alternatives:

"A defendant may make an additional claim". We can read those words: "Counterclaim under Section 47A of the 1998 Act other than a claim for contribution or indemnity within paragraph 4."

Paragraph 4 gives the second option, which is that you can have a claim for a contribution of indemnity, which I think is common ground needn't be a claim within Section 47A.

Now, Madam, if there is any doubt about the proper construction of Rule 39, we say that's done away with by paragraph 5.77 of the guide which I have set out at paragraph 10 which says, and I have underlined it:

"Any such additional claim," which is a reference back to a counterclaim in the preceding sentence, "has to fall within the ambit of Section 47A of the 1998 Act."

MRS JUSTICE BACON: Mr Kennedy, I believe it is common ground that it does have to fall within the ambit of Section 47A. That is the starting point.

MR KENNEDY: That had been my understanding but something my learned friend said in her introductory remarks led me to think this may no longer be. She is shaking her head. I am grateful for the indication and I will move on to the proper construction of Section 47A, which, as you say, had been my previous understanding to be the starting point for the dispute.

We say on the proper construction of Section 47A a claim must satisfy two conditions. The first is that it must be a claim for damages, any other claim for a sum of money or, in proceedings in England, Wales and Northern Ireland, a claim for an injunction. I am taking this from Section 47A(3), in respect of an infringement decision or an alleged infringement of the listed provisions of competition lawful. So that is Chapter I, Chapter II, Articles 101 and 102.

We say that the second condition is that it must be a claim which a person who suffered loss or damage may make in civil proceedings brought in any part of the United Kingdom.

By contrast, Madam, GRS contend there are also two conditions but they say the

conditions, as I understand their argument, are different.

The first condition they say is the claim must be a damage for damages, any other sum of money or, in proceedings in England, Wales and Northern Ireland, a claim for an injunction and, secondly, it must be a claim which a person who has suffered loss or damage may make in civil proceedings brought in any part of the United Kingdom in respect of an infringement decision or alleged infringement, etc.

Madam, we say our interpretation should be preferred for two reasons. We say it is clearly preferable as a matter of statutory construction alone and we say that it is at least indirectly supported by the authority.

Madam, turning first to the statutory interpretation, GRS's case is that provided the proceedings overall are in respect of an infringement decision or an alleged infringement, the individual claims within those proceedings need not be, provided that they are for a form of the prescribed relief -- that's the three types of relief that you can seek under (3) -- and of a type that can be brought in proceedings that are in respect of one of the prescribed competition infringements. We say that that interpretation is contradicted both by logic and by the language of the provision itself.

As to logic, Madam, GRS don't explain what it means for proceedings to relate to an infringement decision or alleged infringement. Proceedings are, of course, only claims, comprised of claims. Quickly one returns to the question of whether the claims within the proceedings are in respect of an infringement or an alleged infringement. It is not clear to me if it is GRS's position that provided that at least one of those claims is in respect of an infringement decision or an alleged infringement, the proceedings can be said to be in respect of an infringement position or alleged infringement in the relevant sense, or whether

a majority of the claims must be in respect of an infringement decision or alleged infringement, and so on. I submit that that thought experiment alone shows that the interpretation must be wrong.

Turning, Madam, to the question of language, we say that the interpretation advanced by GRS fails to give effect to the language of Section 47A(2). On GRS's case I have set out the second condition is that the claim in question must be a claim which a person who suffered loss or damage may make in any civil proceedings brought in any part of the United Kingdom irrespective of an infringement decision or alleged infringement of the various provisions.

Now, Madam, that interpretation fails to give any effect so far as I can see to the words "In respect of an infringement decision or alleged infringement", because, as I understand their case, any claim, provided it can be brought in civil proceedings, is a claim that can be brought in civil proceedings in respect of an infringement decision. In this case it is a claim in debt or in damages for breach of contract, but there's nothing in what GRS have said about their interpretation that would rule out, for example, a claim in tort for misrepresentation or the like.

Therefore, you could omit the words in question, the words "In respect of" and following, and reach exactly the same conclusion that is advanced by Miss Howard.

MRS JUSTICE BACON: I am not sure that's the case, because on their view -- I think you raise a valid point, on which I will hear Miss Howard in due course, as to whether it is a majority of the claims within the proceedings that have to relate to an infringement decision or just some part of the claims that have to relate to an infringement decision, but on any view I don't think Miss Howard is remotely suggesting that it is sufficient simply to delete those words and say it's a claim

of the type specified in subsection 3, because there has to be on her case some link to an infringement decision or an alleged infringement. So I am not sure that she would agree and I don't see how it could be the case that you could simply red pencil in (a), (b), (c) and (d) in the line ahead of that.

MR KENNEDY: Madam, we say that to give any sensible meaning to those words, the words "In respect of an infringement decision or alleged infringement". The effect must be to cut down the category of claims from claims that may be brought in respect of civil proceedings, or rather brought in civil proceedings, to some sub-set of claims that may be brought in civil proceedings, and we say that the obvious sub-set, if you like, is claims, a constituent element of which is the existence of a decision or alleged infringement of the listed competition law provisions, for example a claim for breach of statutory duty. We say that it has to be a cause of action arising out of one of those things for the condition that there must be a claim that can be brought in civil proceedings, etc to have any effect, and we say that that interpretation is the same as our interpretation, which is that the words "In respect of an infringement", etc, qualify the claims and not the proceedings. We say that is the only way to give a sensible interpretation to the words without leading to the difficulties that I identified as to how many claims and so on.

Finally, Madam, a final point of construction. We say that our interpretation is also consistent with subsection 4, which says for the purposes of identifying claims which may be made in civil proceedings, any limitation rules, etc. So we say if GRS were correct, that would have to read:

"For the purpose of identifying claims which may be made in civil proceedings brought in respect of an infringement decision" and so on.

Of course, it does not say that. So we say the relevant qualification that has been

inserted into subsection (2) is that the claim must be a kind which a person who has suffered loss or damage may make in civil proceedings. We say that the obvious mischief that that is directed at is any attempt to bring such a claim which could only properly be brought in criminal proceedings. One can easily imagine, although it may be relatively rare, conduct that amounts not only to an infringement of the relevant competition law provisions but is also, for example, a criminal fraud. There are cases historically where that has been the case.

We say that's what the qualification is driving at and that for that reason our interpretation it to be preferred. Madam, I said our interpretation was also supported by authority. You helpfully drew our attention to the Tribunal's recent decision in the Sportradar v Football Dataco case, which is at tab 4 of the first authorities bundle. It starts on page 105, Madam.

You will recall, Madam, in that case, Sportradar commenced proceedings in the CAT for breach of Chapters I and II and the equivalent European provisions. The defendants served full defences on what were referred to as draft counterclaims because they recognised, and it was common ground between the parties, that the counterclaims were outside the jurisdiction of the Tribunal. That's at paragraph 22, Madam, on page 110 of the bundle just after letter (e). Then if I could ask you to just turn over the page, you will see what the counterclaims were. At paragraph 25 it said:

"The claims against the scouts."

The scouts, Madam, were the individuals who were going to collect the data which then got back to the betting companies. It is alleged that they were in breach of contract, of the ground regulations and the ticket conditions, and/or liable in trespass. It was said that the relevant data, the LLMD, was confidential. So

there was an allegation of breach of an equitable obligation of confidence.

You see in the subsequent paragraphs, Sportradar, the claimant, was alleged to be a joint tortfeasor for having procured the acts of trespass and/or breach of confidence. It was said that the information was also confidential in their hands independently. So there was an independent claim for breach of confidence. Finally, there was a claim for unlawful means conspiracy, with the unlawful means being the wrongs alleged to have been committed by the scouts.

It was common ground between the parties that those claims fell outside the jurisdiction of the Tribunal. Mr Justice Roth did not determine the question of whether or not they were, but it is notable, we say, Madam, that he did not demur the parties' agreement on this front. On the contrary, it seems from what he said in passing at paragraph 54, Madam, which is at page 119, that he agreed with that. He said:

"The indicative counterclaims which FDC and Genius within the absence of a transfer have to bring by way of a separate action in the High Court are based as set out by one of the private law rights", etc.

So although he did not decide it, he seems to have agreed that that was the correct analysis of the scope of the Tribunal's jurisdiction in respect of counterclaims brought by a defendant to a vanilla Section 47A claim.

Madam, if GRS's interpretation was correct, then the counterclaims in Sportradar, which were also claims for damages, which is set out at paragraph 58, would also have been claims of a kind which a person who suffered loss or damage may make in civil proceedings brought in respect of an alleged infringement, in this case the infringement alleged by Sportradar.

Now, Madam, that was not the case. As I say, I acknowledge it wasn't determined but we say, notwithstanding that, that Sportradar unequivocally supports our

interpretation of Section 47A.

Madam, in my skeleton --

MRS JUSTICE BACON: Well, unequivocally but indirectly in the sense that if it was common ground that was the position and, as you said, the Tribunal appears to have agreed with that without formally deciding the point.

MR KENNEDY: Absolutely, Madam. I completely accept that, but we say given that it was the President and in light of fairly heavily staffed legal teams with experienced competition counsel it is not without some weight and you ought to take that into account.

Madam, I refer to the Unwired Planet decision. That's a case regarding the transfer provisions. It is again not direct authority because the construction of the transfer provisions is not the same question as the construction of Section 47A, but we say nonetheless it is indicative of the policy rationale, if I can put it that way, underpinning both the circumscribed jurisdiction enjoyed by the CAT and the transfer positions that seek to give effect to that.

As you know, Madam, in Unwired Planet, the FRAND obligations that were part of the dispute arose at least in both contract and competition law.

MRS JUSTICE BACON: Yes.

MR KENNEDY: Mr Justice Birss held that the contract law dispute could not be separated from the competition law dispute and would not fall within the scope of the transfer provisions. Although we acknowledge that's not the same as not falling within the scope of Section 47A, we say again that that's something that should be taken into account.

I did not cite Agents Mutual, Madam, in my skeleton argument, but again we say the way in which the competition law issues were hived off there, that was a claim for breach of contract brought I think in the Chancery Division. Only the

competition law defence was hived off in that case. We say that the clear direction of travel, if you like, of the transfer cases, if I can call it that, it is only pure competition law claims, only those in respect of a cause of action arising out of an infringement or alleged infringement of competition law that fall within the scope of the Tribunal's jurisdiction. We say that's eminently sensible and if one recalls, of course, that the Tribunal is a specialist Tribunal, which is designed primarily, and we say exclusively, to hear competition law disputes.

Madam, I have only two further points. The first is GRS's reliance on pre-action correspondence in the witness statement of Mr Jurkiw. We say that's obviously irrelevant to the proper construction of Section 47A and therefore not something that needs to be taken into account. You will note that the correspondence was written prior to the claim being issued in the CAT and had the claim been issued in the High Court which has concurrent jurisdiction then the counterclaim could have been brought. So we say there is nothing to the point.

Madam, I think we have canvassed this already, but we say that in terms of the sort of practical implications we acknowledge that it is rather byzantine, because it could result in any competition law defence coming back to the CAT, but, Madam, that's a function simply of the respective jurisdictions of the respective tribunals and courts and not any doing on our part. We do acknowledge that the possibility would be that any competition law defence would come back and we think through sensible case management -- Madam, you suggested a stay, but there may be other solutions, any issues arising out of the different timings of the different courts could be sorted out. That goes, Madam, also for the set-off point. That was a point that was expressly considered by Mr Justice Roth in Sportradar case when that was put to him.

So, Madam, as I say, we say that our interpretation has both the benefit of being more

faithful, if I can put it that way, to the text of Section 47A and also indirectly supported by both Sportradar and by the transfer cases, as I have called them.

MRS JUSTICE BACON: Can I just pick up on your last point about stay and settle? Do you agree that if you were to be successful in your main claim, then it might be necessary to stay that pending resolution of the counterclaim if it were by then proceeding in either the Chancery Division or the County Court?

MR KENNEDY: Madam, we think in the event that any competition law issues arose in the counterclaim the more sensible course would be for the private law issues to be stayed wherever they are, likely in the Chancery Division, and for the competition law issues to be resolved first and then in the event that there was any question of private law that remained, as I said in my skeleton argument, it may be that in the event that we do raise a competition law argument and in the event we were successful, they simply don't arise. It may fall away. So we say that it should be that part of the proceedings that is stayed.

On the question of damages we say that the precise kind of order made, it may be that to account for different speeds a stay is required to prevent execution of the judgment. So no money would actually be paid until both.

MRS JUSTICE BACON: Yes.

MR KENNEDY: But we see that that would be the sensible way to do it. The weight of the proceedings is obviously on the competition law issue, we say, regardless of whether or not a competition law defence is run. If a competition law defence is run, then we say that it is obvious that the competition law issue should go first.

MRS JUSTICE BACON: Let me just get this. So in the event that you are successful on your competition claim in circumstances where there is an outstanding debt claim by the Defendant pending, wherever that is, you accept that execution of

the judgment might need to be stayed in order -- to provide -- in order that there may be an effective offset of the payment -- of any payment by the Defendant against any claim it has against you?

MR KENNEDY: Yes, Madam. We say that some procedural solution should be found to account for the possibility of set-off, whether that's a stay or something else, we don't know, but absolutely we agree that that may be necessary.

MRS JUSTICE BACON: Thank you very much, Mr Kennedy. Miss Howard.

MS HOWARD: I would like to address you on three matters. Firstly, there is the statutory construction of Section 47A. Secondly, I would like to deal with the Sportradar case, which I say supports our position rather than undermines it when it is read in full.

Then, thirdly, to the extent that your Ladyship has a discretion whether to dispose of this claim or permit it, I would like to assess that discretion and the considerations that your Ladyship should take into account in exercising that.

So, turning first to statutory construction, the parties are at odds as to the wording of whether it is the claim that has to be in respect of the alleged infringement or whether it is the proceedings that have to be in respect of the alleged infringement in Section 47A(2).

My learned friend takes a very narrow construction of the provision and insists that the provision is narrowed to the subject matter of the claim. Actually he goes narrower than the wording in the statute because he is applying a narrow gateway that the claim, the cause of action, must relate to an alleged infringement.

MRS JUSTICE BACON: All he is saying is that the words "in respect of an infringement decision" and so on qualify the word "claim" and don't qualify the word "civil proceedings". That's all he is saying.

MS HOWARD: Yes, my Lady. That was my point. If that were the case, one would expect the statutory drafter to have put that qualification at the front of that section so it would be:

"This section applies to a claim of a kind specified in subsection 3 in respect of an infringement decision or alleged infringement and which is made in civil proceedings brought in any part of the United Kingdom", but it's not -- the wording is not drafted like that. We submit that its position in that sub-clause indicates that it is actually qualifying the civil proceedings.

If you stand back and look at the scheme of the Act and also the scheme of the CAT's rules, that must necessarily be the case. I can't think of many cases where a counterclaim against an alleged competition law infringer, that counterclaim would in itself necessarily allege an infringement by itself. There is competition law raised as a defence where there is a claim for a debt but not where the claimant is alleging there is some kind of infringement. You don't counterclaim with another alleged infringement and necessarily it will be a claim in contract or a claim in debt, or some other claim like a tort claim that's not a pure competition law claim.

MRS JUSTICE BACON: Maybe we shouldn't just be looking at what kind of a counterclaim may be brought, because it's common ground that the counterclaim, the ambit of Section 47A. So what we are really construing, and this seems to be an important point, is what is the ambit of Section 47A. That doesn't only address a counterclaim. Incidentally it does, because there's a rule providing a counterclaim needs to fall within 47A, but the primary provision is what the claim needs to contain, and the question, it seems to me, is whether a claim that is brought before the Tribunal is a claim in respect of an infringement decision or whether -- which I understand to be your case, is

that civil proceedings have to be brought in respect of an infringement decision, and if that is the case, what do you mean by proceedings being brought in respect of an infringement decision. Is it that one of the claims within the proceedings has to meet that condition? Is it that the majority of the claims within the proceedings needs to meet that position? What's your submission on that?

MS HOWARD: Well, competition law proceedings are very complex. It is very common to have a mixed claim. So you may have an alleged infringement, but at the same time be claiming for the tort of conspiracy, for example, conspiracy to defraud. We have seen that in the Air Cargo litigation. You may have a competition claim that is also together with patent issues relating to standard essential patents and there may be FRAND issues, which straddle the two.

MRS JUSTICE BACON: Are you saying that in any case where you have a Competition Act infringement or part of your claim relates to an infringement decision and no matter how big or small that part is, that is sufficient as a gateway to get into Section 47A.

MS HOWARD: I think this has already been addressed by the Tribunal in the Sportradar case. If you read that judgment carefully, then you will see that in that judgment there was a blend of different claims within the same set of proceedings.

I can bring that up. It is bundle 1. Sorry. I am on screen.

MRS JUSTICE BACON: I have got it. I am also on screen. So I have got the case.

MS HOWARD: If you look at paragraphs 24 to 26 of that judgment, which I've marked up but not tabbed, it is quite clear that those claims related not just to competition law claims but there were claims against the claimant and also third parties.

MRS JUSTICE BACON: But those were the counterclaims, not the claims.

MS HOWARD: The counterclaims related not just to breach of contract --

MRS JUSTICE BACON: Yes, they did.

MS HOWARD: -- but also torts for conspiracy, trespass, breach of confidence and breach of trade secrets.

MRS JUSTICE BACON: Yes, but the problem was that it was common ground that because those counterclaims raised issues -- if you read paragraph 22, those counterclaims were draft because the Tribunal recorded they recognised, as is indeed common ground, that the counterclaims raise issues and seek relief that is out of the CAT. That's why they were not served as actual counterclaims. They were served as draft counterclaims. What was said is that they were the pleadings that would be served if the action were transferred as a whole to the High Court. That's precisely the point. It was common ground from the outset and the Tribunal did not demur and indeed at paragraph 54 -- I think it was 54 -- indicated that the Tribunal agreed with the position that those had to be brought in the High Court.

MS HOWARD: If I could -- well, I would disagree with that interpretation of paragraph 54, because I think a snippet has been taken in isolation out of context. If your Ladyship turns to paragraph 43 --

MRS JUSTICE BACON: Let us just go back to 22. You accept 24 to 26 set out a blended range of counterclaims. That's absolutely correct, but 22 makes clear that it was common ground between everybody that those could not be brought in the CAT.

MS HOWARD: That was obviously what the parties agreed, but I think the comments of the President at paragraph 43 are quite revealing, because at paragraph 43, which is at internal page numbering 304, and it is (d) and (e), Mr Justice Roth

says:

"I do not think the fact that the defence to the claim potentially raises difficult issues of private law -- here confidence, database rights and the TSER -- is a good reason for transfer out of the CAT."

Of course, this is transfer, not the jurisdiction.

"Standalone competition proceedings under Section 47A of the CA98" -- and note he says "proceedings", not "claim" -- "will often raise legal issues outside pure competition law. I consider it most unlikely that this would serve as a good ground for transfer out of the CAT."

Then he refers to a case and says, "Look, if the defence to a competition claim raise questions of intellectual property law, the judge chairing the Tribunal hearing the case may be no different from the judge who would hear the case in the Chancery Division if it were transferred".

That's exactly the situation we are in here. Your Ladyship has a ticket in the Chancery Division as well as on the Tribunal. You would be hearing exactly the same evidence and exactly the same issues, because they overlap.

MRS JUSTICE BACON: Yes, but that comment was made in relation to a particular argument that the entirety ought to be transferred out, because in response to the competition aspects of the claim there might be private law issues raised. So the point was being made that the claim was a competition claim. The defence to that claim, leaving aside the counterclaim, could involve the CAT, the Tribunal, having to look at issues of private law. The President of the Tribunal says, "That in itself is not a good reason for transferring everything, because the Tribunal is quite capable of dealing with issues of private law". What he was not saying was that the Tribunal would deal with a claim or a counterclaim that was wholly outside the scope of 47 in the sense of not being

a claim of an infringement of competition law.

MS HOWARD: I think it is a useful analogy. I think his comments about the scope of the proceedings that they will often -- they will not necessarily be ones of pure competition law; they will often be incidental private law issues that are raised in the claim -- now whether that's defence to the claim or whether it's a counterclaim -- and I also think his comments at paragraph 46, which are on internal page numbering 305, are also helpful. Again he is saying this in the context of transfer, but I think it is also helpful. He says:

"The proceedings should be viewed as a whole, including therefore any potential counterclaim which the defendant seeks to advance."

Then he sets out the considerations that should be taken into account. Particularly relevant when considering transfer are whether proceedings involve competition issues within the jurisdiction of the CAT and non-competition issues, which falls outside its jurisdiction. So there he is anticipating that proceedings may have blended competition law and non-competition law issues, and that includes if there is a counterclaim, and then he sets out some criteria as to what the CAT should consider, which is the relevant significance and complexity of the competition issues, whether the competition issues are separable and what are the likely consequences in terms of costs and delay.

So whether or not it is sensible in case management terms for the competition issues to be heard before the non-competition issues may be material, again relating to transfer, but he says as his last remark:

"The separate but overlapping jurisdictions of the CAT and the High Court should be made to serve, not to constrain, the sensible case management of the proceedings."

MRS JUSTICE BACON: So what do you think he means by "the separate jurisdiction

of the CAT"? In what respect would the CAT have a separate jurisdiction if, as you say, any claim whatsoever as long as it involved some element of -- some competition claim could be brought in the CAT?

MS HOWARD: I am not saying that a pure claim of intellectual property, breach of copyright or breach of trademarks could be brought before the Tribunal.

MRS JUSTICE BACON: Well, no, but what you're saying is --

MS HOWARD: It is clear that the proceedings have to include an allegation of an alleged infringement to fit within Section 47A, but within that there may be a bundle of claims that both raise competition issues or other non-competition law issues, whether they are tort, contract or debt. That is par for the course. Obviously there is a broad range of competition law claims that can be brought before the Tribunal in different contexts, whether it is intellectual property, breach of contract, and so these counterclaims can raise issues, but they are not going to dominate the whole proceedings. They are probably an integral part of the assessment of the quantum and there is an overlap of the two.

MRS JUSTICE BACON: Yes. I think we need to draw a distinction between this case, because again it's one fact of this particular case, but we need to look at the broader implications of that. You accept that the implications of your construction are that a case which could have let's say ten separate heads of claim, of which only one of those is a competition claim, and all of the other heads of claim are based on other causes of actions, in tort, in contract, on patent infringement or whatever, you accept that the consequence of your construction is that that claim could properly be filed within the Competition Appeal Tribunal. The Competition Tribunal has jurisdiction -- whether or not in its discretion it hears all of that, but you say the Competition Appeal Tribunal has jurisdiction to hear all of those claims, including the ones that have nothing

whatsoever to do with competition law.

MS HOWARD: Because of the way in which section 47A is drafted in terms of the proceedings, yes, it would have jurisdiction. How it case manages those and prioritises certain issues over others is a matter for the Tribunal in determining its case management.

MRS JUSTICE BACON: All right. So going back to my previous question about Sportradar, in what respect then does one give meaning to the comment about the separate but overlapping jurisdictions of the CAT and the High Court? On your construction the only difference is that for it to be within section 47A and therefore come within the jurisdiction of the CAT at least one of what may be a multiplicity of causes of action has to be a competition law cause of action whereas that's not required in the High Court.

MS HOWARD: That's right, but obviously the CAT may decide that it is more efficient for certain issues -- perhaps intellectual property if it is, you know, a very technical patent dispute -- certain issues to be hived off and transferred back, as happened in other litigation, to the specialist courts that deal with those. It doesn't mean CAT doesn't have jurisdiction. It just means it is flexible case management.

MRS JUSTICE BACON: That completely subverts the jurisdiction of the High Court and the different lists that are within the High Court, because you know if you want to file an intellectual property claim within the High Court, it may well have to be filed within the Patents Court. Other courts may be -- other claims may be required to be filed within the specialist lists within the High Court.

On your construction all of this could be completely run through with a claim that is filed in the Competition Appeal Tribunal that avoids any of the list management and goes straight to the competition judge and which in its discretion the

Competition Appeal Tribunal can decide the entirety of.

MS HOWARD: Well, I don't know what criteria the Tribunal would apply within section 47A to try and determine the kind of centre of gravity of the claim.

MRS JUSTICE BACON: There is nothing in 47A that requires a determination of the centre of gravity. That's the problem. It doesn't say that the centre of gravity --

MS HOWARD: (Overtalking). They do talk about if you are going to allow a claim in Rule 40, it does refer in Rule 40 to whether it relates to the same subject matter.

MRS JUSTICE BACON: That's talking about a counterclaim or an additional claim.

MS HOWARD: That's talking about a counterclaim and in this --

MRS JUSTICE BACON: That's this case, but we have to go back to what the implications would be for the general construction of 47A. On your construction the Tribunal would have jurisdiction to decide what is a claim for which the centre of gravity is a patent claim, no matter how technical, as long as there was wrapped up within that a claim of competition infringement.

I am not aware of any precedent whatsoever that suggests the Tribunal could have that power, and indeed it would be completely contrary to the comments of Mr Justice Birss, as he was then, in Unwired Planet in paragraph 44 talking about the quite circumscribed jurisdiction and responsibility of the Competition Appeal Tribunal. End of 44:

"The CAT is a specialist Tribunal for dealing with infringements of competition law. Nothing in the 2002 Act or the 2015 regulations demonstrates any intention by the legislator to broaden the scope of its responsibilities beyond that."

That being the case, I am not sure how one can interpret section 47A to give the Tribunal jurisdiction under statute, leaving aside the rules, to decide a case for which the centre of gravity is a patent infringement, or a tort or a contractual dispute.

MS HOWARD: It may be that I have expressed that in too broad terms, but I think here, if we look at this situation, where you have a counterclaim, where there is a very clear overlap between the two claims, and they do relate -- they are between the two parties, they relate to the same subject matter -- and perhaps I could just tease that out.

MRS JUSTICE BACON: That's true. That's this claim, but you don't say there is any different rule for counterclaims and claims. You have accepted, and that was common ground at the outset -- it was one of the first comments that was made by Mr Kennedy -- that the counterclaim has to fall within the ambit of section 47A. So you have to give a construction to section 47A that works for claims in general. There is no carve-out. There is no different rule for counterclaims.

At the moment I don't see a construction of section 47A that allows you to succeed on your counterclaim on the position that you advance without expanding the jurisdiction of the Tribunal beyond the bounds that are expressly referred to by Mr Justice Birss in Unwired Planet.

MS HOWARD: But is it because a counterclaim, it is treated as if it were a claim, if you look at section 3. So there is a slight difference between a counterclaim and a broad claim that might be brought under patent or trademarks or any other specialist category.

MRS JUSTICE BACON: Yes, but 47A does not carve out a different rule for counterclaims. 47A provides for the scope of a claim that may be brought in proceedings before the Tribunal. A counterclaim is a counterclaim and Rule 39 makes clear that the counterclaim will have to fall within the ambit of section 47A. So your construction of 48(a) has to apply not only to this particular counterclaim but to every claim that is brought within the Tribunal. There has

to be a sensible construction for every claim. At the moment your construction, as I have said, would allow nine claims in a proceeding to be completely non-competition-related and one claim to be competition-related and that would be sufficient to get you through the gateway of 47A(2).

MS HOWARD: It is difficult to sort of put words into the statutory wording there, whether you have an assessment of what "in respect of" means. You know, that has to be the central aspect of the proceedings. There is no basis there for doing that --

MRS JUSTICE BACON: No, there is not.

MS HOWARD: -- (inaudible).

MRS JUSTICE BACON: No, it doesn't.

MS HOWARD: As a matter --

MRS JUSTICE BACON: It is now 1 o'clock. Would you like to reflect on that and then we will turn at 2.00 and you can continue your submissions then?

MS HOWARD: I am grateful, my Lady. Thank you.

(1.00 pm)

(Lunch break)

(2.00 pm)

MRS JUSTICE BACON: I think you will have both received an e-mail from the Tribunal over the lunch adjournment. In short, I am wondering if I do have jurisdiction to make the order you are asking me to. I don't know if you want to continue your submissions on substance or address the jurisdictional question again, because it does strike me that if I don't have jurisdiction to make the order, then ultimately I am not going to be able to give a ruling fully even if I were, for example, to be minded to find in favour of Mr Kennedy. That kind of circumscribes what I am going to be able to do and it may make it desirable to

find another way through rather than continuing with a full blown argument that's not on one view of the case going to be able to result in a judgment from me.

I wonder if you have had a chance to discuss it with Mr Kennedy and you would like to make submissions as to how you would both like me to proceed.

MS HOWARD: Sorry, I have been taking instructions from my solicitors. I have not managed to discuss it with Mr Kennedy in the recess. The problem here is that under Rule 34(2) I don't think an acknowledgment of service has been filed. I think simply there was a reply to the defence and a very limited objection on jurisdiction grounds to the counterclaim.

MRS JUSTICE BACON: Yes.

MS HOWARD: Which means the application is premature.

MR KENNEDY: Madam, this point was actually addressed in our witness evidence in support of the application. I don't know if you have that in front of you?

MRS JUSTICE BACON: Yes.

MR KENNEDY: It is paragraph 14, which is on page 28 of the bundle of pdf numbering:

"An additional claim including the kind of claim that is treated as a claim."

That's common ground:

"However, the Tribunal's guide to proceedings states at 5.78", and if I could ask you to read that. The significant part is the final sentence where it says:

"Where the additional claim is a counterclaim by the defendant against the claimant, the claimant has to comply with Rule 35 regarding the filing of the defence."

That's to be contrasted with the preceding sentence which is what you might call an ordinary part 20 claim which provides that a third party recipient has to file an acknowledgment of service and a defence. We say, although it's perhaps

a footnote to this, in this case there were no directions for service given by the registry in respect of the counterclaim, and equally no directions given for how that should be acknowledged. So we proceeded on that basis.

We say it is simply, you bring the application before the time for service of the defence under Rule 35, and we say that's made good by the words "Subject to Rule 34". So in the event that an application is brought, then you don't need to, and that's consistent, Madam, also with rule, if I may just scroll up, Rule 34(4).

MRS JUSTICE BACON: If I could just shortcut that, I don't think it is at all suggested, and I don't read Rule 34 as implying that in addition -- that an acknowledgment of service was required in any event as opposed to simply putting in your response. However, I think the problem is that if you were the defendant to the counterclaim, the question is whether you may make use of the provisions in Rule 34.

What I was wondering -- I am not suggesting in any way that the procedure that your clients adopted in relation to defending the counterclaim was improper, and that's explained in part in the witness statement of Miss Virgin, but the question that we have before us now is whether Rule 34 is to be construed as applying to a counterclaim as opposed to a claim. I think the issue is whether, if one looks at Rule 34(2), that implies that it is only a defendant properly so-called as the defendant to the main claim that may apply to the Tribunal for an order of no jurisdiction. I think that's the issue. The issue is not the way in which you responded to the counterclaim procedurally, but whether in this case a defendant to a counterclaim is within the provisions of Rule 34, because on one view the fact that Rule 34(2) refers in detail to the acknowledgment of service and then Rule 34(3) makes a point about a defendant filing service doesn't lose any right to dispute jurisdiction, I can see on one view that implies

that this was a provision that is intended to apply to the defendant, if I could call it that, rather than a defendant to a counterclaim who is the claimant, and that this provision is intended to apply to the situation a priori when the claim is initially filed.

At first blush and subject to any submissions that you may make, that would seem to make sense of 34(2) and (3), although I completely take your point that if you just look at 34(1) in isolation, that would seem to apply equally to a defendant to a counterclaim. It is reading that with the other provisions that's the problem.

MR KENNEDY: Madam, that would seem to lead to the curious result, if I can put it that way, it would be a defendant proper, if I can call it, who could use 34 and a contribution defendant could do so and the only person who couldn't would be a defendant to a counterclaim. Then there's no specific provision for a defendant to a counterclaim to make an application to dispute the Tribunal's jurisdiction. Perhaps, Madam, your point is they do so pursuant to Rule 41

MRS JUSTICE BACON: Yes, that was my --

MR KENNEDY: As well as to the possibility of an application. But the alternative view is that, although generally "defendant" should be read to apply to defendants to counterclaims and ordinary defendants and contribution defendants, because of the gloss in the guide, if I can put it that way, as to what a defendant to a counterclaim needs to do with respect to acknowledgement of service, is that there simply is a different rule or an amended rule or an amended procedure under Rule 34 that applies to defendants to counterclaims.

If we step back slightly, Madam, and think about that in terms of the purpose of the acknowledgment of service, which is to ensure that someone, who has not been before the Tribunal previously, acknowledges that they are said to be subject to the Tribunal's jurisdiction. A defendant to a counterclaim is obviously in

a slightly different position, where they voluntarily come before the Tribunal. They acknowledge they are, for at least one purpose, subject to the jurisdiction and they are sort of on the Tribunal's radar, if I can put it colloquially.

So we don't see that there is any mischief in practical terms to our reading of 34, which says that in the event that you are simply a defendant to a counterclaim, you don't need to file an acknowledgment of service and the relevant time for making your application is before the defence is due. We see no mischief to the other side and no mischief to the Tribunal.

MRS JUSTICE BACON: Yes.

MR KENNEDY: So that's my position on the question of construction. It leads to a curious result where we are singled out in circumstances where we might be thought to be the party least to be singled out because we are before the Tribunal.

MRS JUSTICE BACON: Yes, I can see that, but the problem is that the rules are quite clear, and it is difficult to see how one can circumvent the rules. Certainly, as I say, at first blush Rule 34 suggests that this is all about the proceedings getting off the ground, that the Tribunal doesn't have jurisdiction to hear the claimant at all.

The other relevant point that arises from that is, as you have said, that the consequence of that would be that the Tribunal would determine the strike-out application under Rule 41. There is also the point that in a way insofar as the application of Rule 34, even if that could be used by a defendant to a counterclaim, insofar as that leads to a strike-out, or what would effectively be a strike-out, then that would be to circumvent the rule requiring a strike-out to be heard by the full Tribunal.

So I do have some concerns about the way forward in this regard. One possibility, it

seems to me, was the third way that I canvassed, which was that following submissions, I give an indication as to my view on the substance. If that is -- if I would otherwise be minded to find that the Tribunal did not have jurisdiction, then I would necessarily not be dismissing the application for strike-out, and I would give reasons for that, and then the Defendant would be able to then take that on board in deciding what to do next. It doesn't give closure in a way, but it provides an indication of what the way forward may be.

I am somewhat reluctant to proceed to make an order if there is some doubt as to my jurisdiction to do so. I have heard you, Mr Kennedy. I think I will hear Miss Howard, because in a way if she agrees with that position then I think I would invite her submissions as to how I deal with this.

MS HOWARD: I have been considering the provisions over lunch as well. I think there is a real risk that the fact that there is no provision for a defendant to challenge jurisdiction of the Tribunal in Rule 34 sort of begs the question, given there have been countless other references to counterclaims within the rules, you know, whether that is the appropriate way to be doing it, and whereas Rule 41 is a very clear provision which gives the Tribunal power to do that. I think this also ties up with consequences, because if your Ladyship were minded to strike it out, the counterclaim, then I think we would need to make -- rather than having to go through the whole rigmarole and expense and delay of issuing and transferring a claim to the CAT and the Claimant have already said they would seek their costs of any application to transfer, we might want to put in an application to transfer the whole --

MR KENNEDY: We have not said that we will seek those costs. I don't know where that has come from.

MS HOWARD: You have in your letter of 25th March 2020, which is exhibited at AJ2,

you said you would seek your costs of us issuing it in the County Court and transferring it. We would then consider applying to transfer the whole of these proceedings to the Chancery Division to be allocated to yourself so that you could hear both sets together, because in terms of logic and common sense it just makes no sense to divide the main damages action against the counterclaim when they both raise the same issues and they are between the same parties. The issues in the counterclaim are sub-issues of our defences on countervailing benefits, on mitigation, and also there is the issue of offsetting.

MRS JUSTICE BACON: Yes, but that raises the Sportradar point as to whether it is appropriate to transfer. That would then put you in exactly the same position as the parties in Sportradar where the Tribunal refused to transfer the whole proceedings to the High Court, but said that the appropriate course was to list the parallel proceedings before the same judge. If that was the route we were going to go down, I was minded in any event to suggest that I would then be the allocated judge for the counterclaim, and it may not need to be heard, as I said -- I am calling it the counterclaim -- it would be the debt claim properly so-called. Once it gets to --

Firstly, although there has been an intimation that a competition law defence will be pleaded, that has not yet occurred. If no competition law defence is pleaded, then the counterclaim will just be determined quickly and easily in the County Court without any competition law issue arising.

If a competition law issue is pleaded, then that can be sensibly and hopefully efficiently case managed, which may involve simply staying that, because if, as you say, the competition issues are precisely the same, it doesn't need to be heard again, but that's a question of case management at that point.

MS HOWARD: Yes.

MRS JUSTICE BACON: The question is -- and I think again there is a risk of the tail wagging the dog. It is obviously relevant to consider what the case management solutions would be, but the a priori question is whether I have jurisdiction to make an order under Rule 34.

MR KENNEDY: Madam, can I clarify what your third option is? That you would give an indication and reasons for that indication, but given the doubt over the question of your jurisdiction, you would not make a formal order. Is that correct?

MRS JUSTICE BACON: Yes. Obviously if I considered that the strike-out application can be dismissed, as I said, I can do that, but if I consider that it can't be dismissed, then rather than simply saying that I am not going to say anything about it and relisting this for a full Tribunal, and I agree with Miss Howard that would be wasteful if a more efficient course can be found, I would give an indication of why I considered that it cannot be dismissed, and then that would allow Miss Howard's clients to withdraw the counterclaim and then replead it as a County Court claim and then that to be case managed from there.

MR KENNEDY: Madam, I am grateful. I am conscious of the public aspect to it, if you like. As you said earlier, it is an important point and would benefit from reasons being given so that others can be guided by them. That was the only point I wished to clarify. Thank you.

MRS JUSTICE BACON: Yes.

MS HOWARD: I think that would be more efficient than deferring it to the Tribunal. Obviously if we were forced to withdraw and reissue, we would want to get on with that so that it could come to a head by the end of the ADR process.

MRS JUSTICE BACON: Absolutely.

MS HOWARD: And we can proceed with that debt claim efficiently so that it is resolved or transferred or whatever on the same timetable as the rest of the main claim.

MRS JUSTICE BACON: Absolutely. I think there would then have to be a decision from your clients as to whether you were then going to withdraw it, because if you don't withdraw it then what's going to happen is that the application would have to be relisted.

MS HOWARD: Well, I think we need to get down to the prior question, which is what is the scope of 47A and how do these rules that all refer to counterclaims fit in with that, because it is clearly envisaged that a defendant can bring a counterclaim and that's treated as additional claim and it does not need the permission of the Tribunal if it is issued at the same time as the defence, but how are they supposed to interlock together?

I have been considering your comments over the break, and I can see the concerns that if you have this free range ability of the Tribunal to take on whatever claims, regardless of their specialist nature, (a) the Tribunal does not have resource to deal with all of that with everything else on its plate and (b) does not have the expertise either, and that does negate the specialist jurisdictions.

So unfortunately, I mean, the wording of Section 47A is very open and very vague, but we would submit that even if you took my learned friend's submission of the claim in respect of an infringement, that wording is broad and it does not mean the same as alleging an infringement. So if we brought a counterclaim as a debt claim for a sum of money, that is still a claim within Section 47A, because it is in relation to the infringement, and if you stand back and think about how was this pricing restriction agreed between the parties, there has

been an ongoing course of conduct, and each time that an order is placed and an order is accepted, that is on the basis of the underlying agreement between them.

MRS JUSTICE BACON: So you would presumably say that it's a claim in respect of an infringement decision. So you would say this is a claim of a kind specified in subsection (3). So it's a claim for --

MS HOWARD: Sum of money.

MRS JUSTICE BACON: -- sum of money or alternatively damages, but primarily a sum of money. So let's stick with that. A claim for a sum of money, a debt claim, in respect of an alleged infringement of the Chapter I prohibition.

Now what I am struggling with is how you can say that a debt claim is a claim which doesn't in any way relate to the infringement of the Chapter I prohibition. How can that fall within Section 47A?

MS HOWARD: I was just looking -- I am doing this on the hoof. I apologise if this is a red herring. I thought it was quite interesting if you look at schedule 8(a), the schedule 8(a) of the Competition Act. Part 1 of that deals with interpretation. I don't know if your Ladyship has the Purple Book if front of you. It is at page --

MRS JUSTICE BACON: I don't. I am just going to try to find schedule 8. Yes, I have schedule 8.

MS HOWARD: Schedule 8 has further provision about claims in respect of loss or damage before the court or the Tribunal, and in paragraph 2 under the section of "Interpretation" there is a definition of competition law and:

"A competition claim is a claim in respect of loss or damage arising from an infringement of competition law, whatever the legal basis of the claim which is made by a person who suffered the loss or damage."

MRS JUSTICE BACON: Yes.

MS HOWARD: Then it differentiates between competition damages claim, which is a competition claim to the extent that it is a claim for damages, and competition proceedings, which are proceedings before the Tribunal to the extent that they relate to a competition claim.

So this may not be that helpful, but it just shows you there can be proceedings before the Tribunal that are not solely or predominantly based on what I say, pure competition law. There may be other features in them that go beyond that, and that's clearly anticipated by the Act, and whether that helps you in your interpretation of Section 47A by looking at the Act as a scheme, that a claim may still be a -- a counterclaim may still be regarded as a claim for the purposes of Section 47A even if it is not strictly speaking a competition damages claim, but has been raised in competition proceedings.

MRS JUSTICE BACON: Well, you would have to take me to a provision which used the term "Competition Proceedings" and explain how that relates to the term in that context, because it is just a definition section and Section 47A does not contain those terms.

MS HOWARD: Those provisions.

MRS JUSTICE BACON: No.

MS HOWARD: I mean, this is the schedule that carries across the implementation provisions of the damages directive into domestic law. So it's got all the provisions on use of evidence and quantum of damages.

MRS JUSTICE BACON: Yes.

MS HOWARD: And the effect of settlement, for example. Some of those, you know, have come into force at different dates.

MRS JUSTICE BACON: Yes. The fact that there may be proceedings before the Tribunal that raise other issues does not mean that Section 47A itself, which

refers strictly to an infringement decision or an alleged infringement of Chapter I, Chapter II, Article 101 and 102, doesn't mean that that is so broadly defined as to bring within it a debt claim that doesn't have a competition aspect.

MS HOWARD: We say there is a very -- I am sorry. I am trying to help your Ladyship. There is a clear common sense approach. We would say that a counterclaim -- it relates to the same facts, the same parties. There is a substantive overlap of the issues and the evidence that's going to be heard in both. As a matter of common sense and logic it should be able to be consolidated and heard together with the main claim. That's the common sense approach, but the wording of Section 47A is very broad and ambiguous and I would submit produces absurdity and perverse results if you are forcing the Defendant to go and issue a claim that relates to exactly the same dispute in a County Court and then to pay to transfer it. I mean, just the issuing fees alone of issuing this claim in the High Court will probably wipe out a large chunk of that counterclaim.

MRS JUSTICE BACON: The problem is the section is as it stands. If you are accepting -- it is not clear that you do accept -- but if you accept that to read the words "In respect of an infringement decision" as relating to civil proceedings wouldn't work, because it would mean that a claim can be brought whose centre of gravity did not involve competition law, but as long as there was one competition cause of action within it, it could be brought within the Tribunal. If you accept that's not the right interpretation of Section 47A, then it seems that I am bound by the statute.

MS HOWARD: I think that there are two alternative interpretations. They both centre around what does "In respect of an alleged infringement" mean. The words "In respect of" are very broad, vague and ambiguous. It is either you apply it to the

proceedings but you give that a very narrow construction to say that there must be some nexus to the alleged infringement in those proceedings and it must be that the centre of gravity of those proceedings relates to competition law, because that's the Tribunal's specialist jurisdiction, or conversely you look at the claim that has been brought and you say "Well, in respect of -- if it does qualify the nature of the claim, that's not so narrow as to mean that claim must allege an infringement, because that would be nonsensical. If you look at the scope of counterclaims that might be brought, they are not all going to allege an infringement of the Act. There will be a claim in private debt.

MRS JUSTICE BACON: Yes.

MS HOWARD: There must be some very strong link, and I was trying to draw on, I think it is Rule 40, on the strike-out powers there -- there must be a very strong link both between the parties that are concerned and the subject matter. Here we say that these orders relate to bespoke products and products that were ordered on the basis of the arrangements between the parties. The same facts and evidence relate to the defence and countervailing benefits something and the defence of mitigation, and then there is the issue of off-set.

So we say it is an integral part of the main claim, which avoids an award of over compensation, which obviously the Tribunal is aware of its duties not to allow over compensation and there must be some off-set.

MRS JUSTICE BACON: Precisely the same argument would have applied in the Sportradar case, because there was a single set of facts. Out of that set of facts there was a competition claim and a counterclaim, which relied on non-competition arguments -- counterclaims. It all arose out of the same set of facts.

MS HOWARD: Yes.

MRS JUSTICE BACON: That would have been an obvious answer. If that was all that was required, that would have been the immediate answer and it wouldn't have been common ground that the counterclaims could not be filed in the CAT proceedings. That's the problem.

You know, it may be that that in some cases produces an unsatisfactory result where there is a non-competition counterclaim and that in certain cases the answer to that may be to transfer or apply to transfer the whole proceedings to the High Court. I appreciate that in this case that's going to be an additional expense, which is why the solution, it seems to me, would be to replead in the County Court. You pay the County Court fee. Then if and only if a competition law defence is pleaded will the matter need to be transferred to the High Court. Without looking back at the detailed provisions, it's not clear to me that you would be then be paying an additional High Court fee, but I don't know that. In the First Instance you would be filing within the County Court because of the value of the claim.

MS HOWARD: I think where we get to is we need clarity so we can proceed with it and know where we stand, because I think the rules have been very confusing. We have been actively encouraged by the Claimant in their letter to raise this as part of the counterclaim against the threat of adverse costs if we didn't. We have acted purely in good faith on the basis of that and have ended up being penalised.

MRS JUSTICE BACON: That is why I am trying to find a way forward that, irrespective of my jurisdiction, gives clarity. The problem is without hearing the submissions of either of you, it seemed disproportionate to convene a full Tribunal in the event that the counterclaim was going to be struck out before hearing submissions.

I think the way forward, unless there are any other submissions from you, is for me to give a ruling at least as to my jurisdiction to proceed under Rule 34 and then to make a ruling on either dismissal of the strike-out application or non-dismissal of it but with reasons.

MR KENNEDY: Madam, with respect to further submissions, I don't know if you want to hear me on some of the new points, if I can put it that way, raised by my learned friend. The new interpretation of the words "In respect of" and the relevance, if any, of schedule 8A?

MRS JUSTICE BACON: Yes. Let me just say, so, Miss Howard, as I understand it, on the procedural question you do agree that there is a problem with my jurisdiction under 34, Rule 34. You do not agree that I have jurisdiction to strike-out -- to make an order declaring that I have no jurisdiction under Rule 34 because, as I understand it, you do submit that Rule 34 applies to a defendant properly so-called. Is that your position?

MS HOWARD: That's where I started at and I said this is to do with a normal jurisdiction charge on forum of the main claim.

MRS JUSTICE BACON: Yes.

MS HOWARD: Which was always my understanding of it.

MRS JUSTICE BACON: Yes. So, as I said, if you just look at Rule 34(1) in isolation, that wouldn't seem to be the case. If you look at Rule 34(1) with (2) and (3) of the remaining provisions, that does seem to be how it is framed. So that's your position. So your position is, therefore, as I understand it, and correct me if I am wrong, that I must either dismiss the application or I should not dismiss it with reasons?

MS HOWARD: Yes, we are content to go down that route, because then that provides us with clarity.

MRS JUSTICE BACON: Yes.

MS HOWARD: It is disproportionate to try to relist this in front of the Tribunal. We would be very appreciative of just some guidance and then we can decide how to proceed.

MRS JUSTICE BACON: Yes. All right. So that's your submission on the procedure. Do you have any other submissions on substance, and before you do that, am I right in thinking that you no longer rigorously press on me the argument that it is sufficient for any of the claims within the proceedings to be a competition claim, or do you still maintain that as your primary position?

MS HOWARD: My primary position is that the qualification applies to the proceedings and not the claim, but there obviously has to be a strong driving force of the proceedings relating to the competition and the alleged infringement. So if you were to bring a pure, you know, trademark infringement or claim, then obviously the CAT would not have jurisdiction there, but if the claim -- there is a cross-nexus between the main allegations of the competition infringement in the proceedings and the additional claim or counterclaim is a necessary part of that 1ent, then it can fall under that.

MRS JUSTICE BACON: I am not sure I understand that. Are you saying that at the very least the proceedings have to mainly have as their centre of gravity a competition claim or some such thing?

MS HOWARD: Yes, or predominantly. It may be predominantly. Obviously the statute does not give the wording. When this is ambiguous like this, you have to try to give it a construction that's going to make sense and be in line with the aims that you are trying to achieve in terms of the efficient and fair administration of justice. I am not going to dive into case management considerations but you have to try to make it make sense and avoid absurdity

or perversity.

So my submission is that the words "In respect of" in relation to the proceedings would have to be predominantly in relation to, because that is the CAT specialist jurisdiction, and to the extent that the claim is based on a different type of law, there must be a sufficient nexus between that element of the law, that it is an integral or necessary part of the determination of the infringement anyway or its consequences.

So here for the counterclaim, it's a debt claim. It is either the debt is due or not, and that it is a necessary part of quantifying the total amount of damages, including any offset.

If you are looking at wider types of cases, you might say a FRAND claim, a counterclaim based on a FRAND, would be an integral part of the alleged infringement under Article 102, but other types of claims like a conspiracy claim or an economic torts claim would not. So it is quite context specific. Obviously we are dealing with the easy case here, the counterfactual between the same parties relating to the same agreements and the same factual subject matter, you would say the counterclaim is necessarily integral and a part of the main assessment of the parties' contractual relationship, but obviously as a judge you are also mindful of creating a precedent that's applicable to wider scenarios as well. So that's my first argument.

If you are not with me on that, then my alternative is even on the Claimant's construction that the qualification in respect of the infringement applies to the claim, we say this claim still is in respect of the infringement. Okay, it does not allege a breach of Article 101, because very few counterclaims will do that, but it is again very closely connected to it, relates to the same facts, the same parties, the same subject matter, and a lot of the arguments in the main claim

directly crossover with the arguments for the counterclaim.

I know obviously the Claimant has not pleaded to it yet, but their professed intention was to plead that these orders and agreements were invalid because of the very same infringement. So that's another nexus between them.

Then my third argument is in using and trying to interpret this provision, I think the rules for the CAT, although they are not statutory, they are a helpful guide as well, where it clearly envisages that a counterclaim can be brought. It envisages that the Tribunal can give permission, that the defendant can bring a counterclaim at the same time as issuing its defence to the main proceedings.

MRS JUSTICE BACON: Yes.

MS HOWARD: And also settlement offers under Rule 45 also state that they can include or take account of the counterclaim.

MRS JUSTICE BACON: Yes.

MS HOWARD: So the way in which the Tribunal's rules are structured clearly envisage that counterclaims can be brought and will be considered alongside the main claim.

MRS JUSTICE BACON: Yes. I don't think there's any doubt about that. The question is what sort of a counterclaim may be brought.

MS HOWARD: Yes, I think that's the problem. I think it is hard -- it might be easy to find a rule for an easy case and put it to court but it has to work for other cases.

MRS JUSTICE BACON: All right. Are those your submissions, Ms Howard?

MS HOWARD: Those are my submissions. I may have something on costs but that's for a later date.

MRS JUSTICE BACON: Mr Kennedy, do you want to address, first, the procedural question and, secondly, if there's anything more you want to say, and if there's not, then simply address Ms Howard's issues in reply.

MR KENNEDY: Madam, I think you know my position on the procedure, but I will quickly summarise it. We say there is a way through on Rule 34 and that's by reference to what the guide says about the lack of any need for acknowledgment of service. We say a modified version of Rule 34 applies to defendants to counterclaims, but we don't say, as you know, that you have any jurisdiction today under Rule 41. That requires a full Tribunal. We also don't say that this should be adjourned and reconstituted as a full Tribunal. We think that would obviously be disproportionate.

So we agree that if you are against me on the modified Rule 34 argument, you should either dismiss the application or give reasons for not dismissing it, which will provide a steer to the parties.

If I could briefly reply on the substance. In terms of the primary argument, I already explained the problems with drawing the line and we have heard a number of qualifications namely, predominantly, necessary, integral. We say that it is obviously unworkable and that's even before one even considers that there is no basis in the statutory language for this centre of gravity test, if we might call it that.

Additional practical problems can easily be envisaged. Imagine the case where a counterclaim is anticipated to be a competition claim, but the main claim is not a competition claim, and so a claimant makes an application or files a claim form anticipating that a competition claim will be made in response and says that the Tribunal has jurisdiction, because eventually the proceedings will be brought in respect of an infringement issue.

Alternatively a more vanilla example is where a competition claim is brought together with non-competition claim, so an example might be unlawful means conspiracy plus competition, for whatever reason the competition law claim is

struck out later. Do the proceedings at that point cease to be proceedings in respect of an infringement or infringement decision and have to be transferred out with all the associated costs?

We say that the primary argument is simply at a practical level and at a linguistic level misconceived. On Sportradar we agree, Madam, with your observations with what has been said in paragraph 34. If there was any doubt, my learned friend took to you 46. You will see there that it was put beyond doubt, because Mr Justice Roth refers to:

"Non-competition issues that fall outside the jurisdiction".

What you see there is a dichotomy or a binary between non-competition issues which are outside the jurisdiction and competition issues which are inside the jurisdiction.

With respect to the new argument that was advanced after lunch, it suffers from many of the same defects as the primary argument in that it becomes quickly untethered to the language of the provision and whether or not a claim is said to be in respect of an infringement decision or alleged infringement, turns on, it seems, whether it forms part of the same factual matrix, whether or not there were issues that are necessary to be determined in the course of the competition claim, and one can readily see that the same problems that affect the primary argument affect that. Where is the line to be drawn? We say that it is simply unworkable and the only sensible interpretation of claim in respect of an infringement decision or alleged infringement is that the relief sought, damages, sum of money, injunction, arise out of the alleged infringement. This is concerned with competition law claims. They may have different legal bases. We acknowledge that, but it has to be that it is a claim that arises out of the infringement itself. Anything else is clearly unworkable.

Madam, we say Schedule 8A adds nothing. As you pointed out it would be necessary to consider those definitions in context at the very least before anything could be drawn from them, but even if we look only at competition proceedings, it says:

"Competition proceedings mean proceedings before a court or a tribunal to the extent they relate to a competition claim."

We say that the reference to a court there makes clear why the words "To the extent" are used, because of course in the High Court you can have what you might call hybrid claims, Unwired Planet, Agents Mutual and so on and so forth. So we say that there is nothing in Schedule 8A.

Madam, the final point, an appeal to common sense and convenience, I think we all agree that it is inconvenient, but that does not change the nature of the rules. I acknowledge that it leads to byzantine procedural hurdles, but that's a function of the respective jurisdictions, and it is said that not all counterclaims will be competition claims. People may want to bring debt claims or conspiracy claims. That simply begs the question as to whether or not they can do so. It is clear that counterclaims can be brought. No-one disputes that. The rules are very clear on that.

The question for you, Madam, today is what types of claims can be brought, and the rules are equally clear that it is only claims within Section 47A. So we come back to the start. Appeal to what the parties may want adds nothing to the point.

Madam, those are all the issues I wish to address you on.

MRS JUSTICE BACON: Right. So I will give a short ruling on both the procedural and the substantive aspects of the strike-out application.

For ruling, see [2021] CAT 18

MRS JUSTICE BACON: Without dealing with costs yet, is there any further order that I need to make in that regard for the purposes of the order on the record?

MR KENNEDY: Madam, I hate to raise a further procedural wrinkle, but we are in something of a no man's land with respect to the defence to counterclaim, which has not been filed, and with the application neither determined nor undetermined, it is unclear in what time we should do that. So I think what we would ask is just that the order reflects that we are not required to file the defence until further order of the Tribunal perhaps is the simplest way. That gives the parties time to discuss the matter.

MRS JUSTICE BACON: Yes. Ms Howard, do you agree with that?

MS HOWARD: Yes, I agree with that. I would just like to say thank you very much for giving that ex tempore judgment, which was very clear and has provided guidance to parties. We will take that away and discuss it and then we will write to the Tribunal just to let you know what we proceed to do in terms of the consequences, but in the meantime we are happy for there to be a stay of any defence to the counterclaim.

MRS JUSTICE BACON: Yes. All right. As I said, I think it would be efficient for a swift decision to be made by your clients, because if you decide not to withdraw the counterclaim, then the inevitable consequence will have to be that the strike-out application is relisted to be disposed of before a full Tribunal.

MS HOWARD: Yes. I think all parties agree that's not really a cost effective way forward.

MRS JUSTICE BACON: No. All right. So that deals with the strike-out application. Now in the normal way we would be having a short break in fifteen minutes, but I am wondering whether we can deal with the rest of the issues in that time.

As I understand it, if I move on to the next item on the agenda, that's costs. From the

skeleton arguments I had understood that the only dispute to be the words in the relevant paragraph of the order relating to "funding this litigation and". My understanding is that those words are now going to stand in paragraph 16.

MS HOWARD: That is correct.

MR KENNEDY: That is correct, Madam. I think 15 and 16 are therefore agreed.

MRS JUSTICE BACON: 15 and 16 are therefore agreed entirely.

So then directions for trial.

MS HOWARD: While we are just on costs, my Lady, it was just the point I made out -- which may be an oversight -- that the cost budget was not signed, but also there was reference to an appendix in it that has not been provided. If we could just have a copy of that annex or appendix so we have a full set with a signature, that would be gratefully received.

MR KENNEDY: Of course. I confirmed that the lack of signature was entirely inadvertent. So we will send a signed one with the annex later on today or tomorrow.

MS HOWARD: Thank you very much.

MRS JUSTICE BACON: Yes. As to directions to trial -- and I have considered the parties' skeleton arguments on this -- it seems to me it is likely to be most productive for there to be sequential expert reports. It may in some cases be that the parties can quite effectively do a simultaneous exchange, but given the issues that have been ventilated, it seems to me that the usual sequence should apply, which should be that the Claimant should go first in the modified procedure that's proposed in I think it is paragraph 22.

MR KENNEDY: That's agreed, Madam.

MS HOWARD: Sorry. We have had discussions overnight and I think we have now agreed that the green wording should stand. We just can't agree on the dates.

That's probably contingent on the Tribunal's planning and availability, from the trial date working backwards.

MRS JUSTICE BACON: I see. So can I strike through the blue wording at the start of paragraph 22?

MR KENNEDY: Yes, Madam.

MS HOWARD: Yes. What we could replace that with might be the alternative wording in paragraph 10 about the pleading, but we can sort those details out.

MRS JUSTICE BACON: Yes. I mean, that's going to have to go in there anyway. So we are in the green wording with sequential exchange. Is the only debate as to the 3rd or 10th September?

MR KENNEDY: I have taken instructions. I apologise to my learned friend. I have not updated her on this. The earliest we can do is 17th. I appreciate that's unwelcome, but it is to do with the availability of our expert. He is away, out of the country, until the 10th and we only clarified that last night. So I do apologise for the inconvenience, but the earliest we can do is 17th.

MS HOWARD: We have a slight kind of equality of arms issue here, because it does mean that the Claimant has from the date of disclosure on 23rd July will have had nearly two months to put in their position paper whereas we will be given, in that case, if we stick to the dates, less than two weeks to reply. We want to keep this relatively focused and short so that we can keep ADR --

MR KENNEDY: We wouldn't ask that they only have two weeks for the reports.

MS HOWARD: -- and a timetable to trial at the start of the judicial term. That was the aim, that by the time the judicial term started in October, if the settlement was not possible, we would then be into factual disclosure and witness statements. So that will have knock-on consequences for the rest of the timetable and hearing date.

MRS JUSTICE BACON: Yes.

MR KENNEDY: The position is -- sorry, Madam.

MRS JUSTICE BACON: I appreciate that. I was going to say, Mr Kennedy, are you willing for everything else to be pushed off by, say, another week?

MR KENNEDY: We are content for there to be a waterfall effect, Madam. We don't want things to drift beyond that. This was the only date that we do wish to deal with, but if everything else gets pushed by a week, we are content with that.

MRS JUSTICE BACON: Well, just going through this, starting with your date, Mr Kennedy, is your position that your expert is completely unavailable at the start of September?

MR KENNEDY: My understanding is he is out of the country from 30th August until 10th.

MRS JUSTICE BACON: Does "out of the country" mean that he is effectively not working and unavailable or --

MR KENNEDY: He is on annual leave for those two weeks, Madam, yes.

MRS JUSTICE BACON: He is on leave for those two weeks.

MR KENNEDY: We have other leave within the legal team prior to that. So the reality is either it would have to be done before the long vacation, which would give us a week, or it has to be 17th September. We accept that it is a bit of a Hobson's choice, but it's a function of the long vacation and people's annual leave I'm afraid to make it conditional upon that, but that's the case.

MRS JUSTICE BACON: Yes. So if we were to say 17th, then, Ms Howard, are you then able to respond by 8th, because you will, of course, have had, as I understand it, the expert meeting in the middle of June, which will have given you some clarity or some discussion at least on appropriate methodologies?

MS HOWARD: I am just taking instructions quickly by e-mail. Yes. I mean, we will

have also had a pleading by then and presumably some time -- I have not got a date for that -- but some time in September if we had the pleading as well, that would help.

MRS JUSTICE BACON: Well, earlier on I had said that I thought that the pleading would have to be provided at the same time as the expert evidence.

MR KENNEDY: That was my understanding, Madam. That was the basis we proceeded on. We are very happy with that.

MS HOWARD: I suppose we were thinking it would be early September. What we are worried about is just making sure that -- this was one thing I discussed with my learned friend overnight, which he didn't object to -- is obviously we have this agreed methodology and then we go into the dark so far as the Tribunal is concerned without prejudice for all these position papers. I wondered if it is worth us after the agreed methodology updating the Tribunal and sending the approved version to you for approval, or if the rest of the Tribunal members wanted to consider it and give their input as well, but what happens if we get something on 17th, which is both the pleading and the position paper, that actually we just don't agree with the assumptions; we don't agree with what has been done. That is the problem. We only have three weeks then to respond if there are things that we don't understand or don't make sense or we think are ludicrous assumptions that have been made, for instance. It may be that's covered by liberty to apply, but I want to make sure we're protected against that circumstance, which hopefully won't arise.

MRS JUSTICE BACON: The problem is, as it seems to me, in looking at this in too rigid a way, because this stage of the proceedings is designed, first of all, to require the Claimant to set out what is their position on the counterfactual, which will be done in the pleading, and the second is to set out their outline position

justifying that. It is a sort of a draft of the expert report that will then be finalised in due course and it's a without prejudice document.

Your response, you have not been asked to replead in response. There is no suggestion that within three weeks you should provide a response to the Claimant's counterfactual. All that is required is that your expert sets out its outline position, and if one looks at it through the prism of a sort of expert-led mediation, I think it would be normally thought to be adequate for there to be, say, three weeks for your expert to look at the expert report and set out an outline position. I emphasise these are supposed to be outline documents. I am not expecting that either side is going to be producing 100-page expert reports at that point.

So on the assumption that this is an outline only and it is a without prejudice document; it is not -- I don't understand this to be something that will even be filed with the court at that stage.

MS HOWARD: No. It is aimed without prejudice to facilitate settlement.

MRS JUSTICE BACON: It's aimed to be used to facilitate settlement. I think it would be appropriate for you to then put in your position paper on 8th October. Then that means that the next deadline then goes back to probably -- if you are putting your position paper in, then it goes back to really 15th. So the parties' experts have a week to meet and to discuss and narrow the areas of disagreement.

Then the next date would most appropriately be around 22nd October to meet on a without prejudice attempt to settle the claim.

MS HOWARD: Yes.

MRS JUSTICE BACON: Then we will work on from that. By 29th October the parties to file and serve something disclosure reports. I think everything else then gets

pushed back by two weeks.

I wonder if we can then -- the disclosure reports and EDQs are to be filed by 29th October. Do we really need such a long time for the parties to agree a list of further -- oh, I see. It was intended that it should only be a couple of days after that.

MS HOWARD: Yes. It will be the following Monday, which will be the --

MRS JUSTICE BACON: That's rather short.

MS HOWARD: -- 1st November.

MRS JUSTICE BACON: I see. Okay. So 1st November.

MS HOWARD: Then there was two weeks I think for inspection was how that was going to work.

MRS JUSTICE BACON: Right. Then the next date in paragraph 28 is 12th November.

MS HOWARD: That's right, yes.

MRS JUSTICE BACON: Then witnesses of fact by?

MS HOWARD: 3rd December.

MRS JUSTICE BACON: Reply statements. Can this be brought to 17th December? Is two weeks sufficient? We have got very few witnesses anyway.

MS HOWARD: I think it should be. You would expect that we would have gone over the issues, and because the methodology of things, that should clarify the issues.

MRS JUSTICE BACON: So I will say 17th December.

MS HOWARD: If there's a problem, there is liberty to apply anyway.

MRS JUSTICE BACON: Yes. Now I am wondering if the January date cannot stand, because really the factual issues are quite separate from the expert issues. It seems to me that it ought to be possible for the expert reports to be progressed

in parallel with the factual evidence.

MS HOWARD: There may be crossover. So obviously a critical issue, which we are trying to find a solution to, is what were other retailers doing and the extent of any disclosure on those points. Now it may be there is not any --

MRS JUSTICE BACON: Yes.

MS HOWARD: -- because our client's case is we never monitored the prices that retailers charged. That was no concern of ours. So we don't have reams of data of other retailers' selling prices. So we may have to have some factual content, whether it is in the statements in chief or in reply, to address those issues, and likewise for the Claimant, which the economists may need to take into account.

MRS JUSTICE BACON: Yes. The question is whether that's going to have a huge bearing on the content of their expert reports, which will presumably be quite far progressed by then.

MS HOWARD: One would hope so. They will hopefully as part of the agreed methodology have found a way of assessing counterfactual pricing and volumes.

MRS JUSTICE BACON: Yes. Mr Kennedy, do you have any comments to make on that? My proposal is we should stick with 7th January for the experts.

MR KENNEDY: Not on that date, Madam. As my learned friend said, we need to find some solution to the date availability problem, and before factual statements go in that needs to be addressed now in initial quantum disclosure and in the WP meetings between the experts, but that's a matter for us, but 7th January can stay, we say.

MRS JUSTICE BACON: All right. So I will then keep 7th January.

Now what about the words in brackets in paragraph 31?

MS HOWARD: Sorry. I was just -- those expert reports are simultaneous.

MRS JUSTICE BACON: Yes.

MS HOWARD: We were arguing over whether those should be simultaneous or sequential, but I think if we have had sequential position papers, most of the ground should have been trammelled to death. So, therefore, we are happy to accept simultaneous reports.

MRS JUSTICE BACON: I don't think we need the words in brackets.

MS HOWARD: No. It was just a marker just to let you know.

MRS JUSTICE BACON: All right. Then the rest of the timetable will then stand.

MS HOWARD: Yes.

MRS JUSTICE BACON: Then the Tribunal will simply need to liaise with the parties, following this case management conference, to list an appropriate date after 25th February. I think this is going to have to be reasonably soon after that, because I am in a long trial starting after Easter next year. So I am assuming that you have both got good availability at the end of February or the start of March next year.

MR KENNEDY: Yes, Madam. I have a trial later on after Easter as well, but that's not until then.

MRS JUSTICE BACON: And Ms Howard?

MS HOWARD: I think one of my trials has just been put back. I know there's other cases that they are trying to fix hearings for which are still moving. I will update the Tribunal on my availability.

MRS JUSTICE BACON: All right. The Tribunal will liaise with the parties in due course. So that deals with the directions to trial.

Shall we just have a five-minute break and we can then consider if there is anything else I need to deal with apart from the issue of costs, which I will deal with after

a five minute adjournment?

(Short break)

MRS JUSTICE BACON: Thank you. Are there any remaining applications, first of all, or other things I need to deal with before we get to costs?

MR KENNEDY: Not for my part.

MS HOWARD: No, my Lady.

MRS JUSTICE BACON: All right. Costs.

MS HOWARD: My Lady, at the last section of the draft order at paragraph 34 we have sought an order that the Claimant bear the Defendant's costs that it has incurred I would say in responding to the fast track application, and in its application for specific disclosure for the financial statements, and also dealing with responses to the Tribunal and the Defendant's requests for information, because it has been validated on those three matters. Your Ladyship has ordered prompt disclosure of the financial statements on the basis that they are in the Claimant's possession and readily available. It has ordered a response to the Tribunal's RFI, as we sought, to the end of June, and also, even though it may not be the form yet of an RFI, the responses to questions D, E and F are to be put into a pleaded statement in September.

We say that we have been vindicated on those points and deserve to have our costs of those applications.

In relation to the fast track application, we did remain neutral on that, but we noticed that a lot of the arguments that your Ladyship used in saying -- and the concerns that we raised were consistent with the arguments that we made in our response to the application, and those concerns that we set out initially have been validated. So we would apply for our costs on those three matters.

MRS JUSTICE BACON: So fast track application, number one; number two, the

application for specific disclosure -- that is of financial statements?

MS HOWARD: Yes.

MRS JUSTICE BACON: -- and, three, the costs of dealing with -- the costs of dealing with the RFI. Has any attempt been made to disaggregate those from the totality of the costs that have been incurred in relation to the present case management conference?

MS HOWARD: I am not sure that we have, but we can supply that.

MRS JUSTICE BACON: I don't believe that there is a cost schedule that refers to those costs, is there?

MS HOWARD: I don't think it disaggregates them. We have obviously the cost schedule in the cost budget of the costs for the CMC, but that's a global figure I think, but we can produce a disaggregated version.

MRS JUSTICE BACON: All right. Mr Kennedy.

MR KENNEDY: Madam, with respect to fast track, we acknowledge that you decided that against us, but we would note that you acknowledged that there were a number of aspects of the case which did tell in favour of it being subject to fast track. So we would say this is not a case in which the fast track application was misconceived and we say this really ought to be properly viewed as one amongst eventually a number of proposed case management solutions and we therefore say costs should be in the case.

For the application for specific disclosure, we say there should be no order as to costs. Had the information which was put forward today with respect to GRS's expert's view been sent to us sooner, rather than the cursory paragraph in Mr Jurkiw's statement, it might have been capable of agreement. As it was, that was not forthcoming.

On the Defendant's request for information, that was compromised last night and this

morning between us. We made an agreement as to what the order should be, the details of which were worked out with your Ladyship, Madam. We say there was no agreement as to costs. There should be no costs on that front.

With respect to the strike-out, we say although there has not been an order for the jurisdictional reasons you gave, we clearly in substance won that application.

Taking that all in the round, Madam, we are content for there to be no order as to costs or costs in the case, but we don't think there should be any money moving from one side to the other at this stage, Madam.

MRS JUSTICE BACON: Yes. Ms Howard, do you want to respond on the strike-out application as well as the proposal that overall there should be no order for costs, either that, or costs in the case in relation to the entirety?

MS HOWARD: Okay. I don't want to set off the blue torch, because I think we are both trying to rise above that and keep this on a civil and productive basis when there has been a level of mistrust between the parties, but this litigation has been characterised by the Defendant trying to get information from the Claimant. They have resisted the whole way through, not just before the pleadings, initial proceedings, but subsequently and during the ADR.

We raised our points about the specific disclosure of the financial statements and the RFI very early on. Even in advance of filing our defence we said that the response to the Tribunal's RFI was deficient. We could not reconcile it with the financial statements that we had seen, even the abridged ones on Companies House. Therefore we needed full access to the full statements.

That has been resisted the whole way through. It was really late last night that the Claimant began to move. We consider that, given the expense that the Defendant has had to incur that you will see from the costs budget in trying to push through the ADR to have some meaningful discussions, the Defendant is

entitled to its costs particularly on those two aspects.

For the strike-out, we are very grateful for the guidance that you have given. There is obviously a huge amount of uncertainty regarding section 47A and its interaction with the CAT's rules and this overlapping jurisdiction, so that as a matter of public interest I think that has helped to provide certainty, but we would also draw your Ladyship's attention to that letter of AJ2 of 25th March.

Now that letter was in the context of discussions about the debt claim, and you might want to bring that letter up. It is at 49 to 50 of the bundle at A6, where the Claimant said:

"As we have already advised you, we are instructed to issue proceedings against you for a flagrant breach of the competition rules, which will be issued in the next few weeks. In relation to your claims for the account, we would suggest if your client wishes to pursue the matter, this will most efficiently be dealt with by way of a counterclaim in the competition infringement proceedings. If your client chooses to issue proceedings separately, we will seek to join the proceedings into our client's action with an appropriate order for costs."

Now, faced with that letter in March of last year, our client refrained from issuing a debt action in the County Court and awaited the issue of proceedings, which he thought were imminent. They were not actually issued until five months later. We have now suffered over a year's delay in pursuing that debt claim, because it has been wrapped up with this main competition proceedings when we could have actually got clarity on that and have a judgment for it.

So I think it would be very unfair in the light of those instructions, and particularly the threat of costs against us if we did decide to issue separately, that we should now have to bear the costs of the strike-out in an area that was very, very uncertain and we were just trying to act in a way that we thought was consistent

with the efficient administration of justice in this case.

MR KENNEDY: Madam, I have already pointed out that the letter was written before the proceedings were issued in the CAT and at a time when proceedings it was anticipated would be issued in the High Court. That accounts for the suggestion in the final paragraph and ought to be read in that context.

MRS JUSTICE BACON: To be fair, the letter does not say where the proceedings were intended to be brought. It just says they are intending to issue within a few weeks. Yes. All right.

RULING

MRS JUSTICE BACON: On the question of costs there are applications on both sides. The Defendant seeks its costs of defending the fast track application, for applying for specific disclosure and applying for -- making an application for orders in relation to provision of responses to the Tribunal's request for information.

The Claimant for its part seeks an order for its costs of bringing its strike-out application on the grounds that although it didn't obtain an order for strike-out in the particular procedural circumstances that I have already discussed, it clearly in substance won that application.

It seems to me that there are matters to be said on both sides. The fast track application did fail, although, as Mr Kennedy said, it was not obviously entirely misconceived, given that certain factors were -- did in my view indicate that the fast track procedure might be appropriate.

It is also the case that to a certain extent some of the issues in dispute between the parties have been compromised. Nevertheless they were issues that needed to be raised. It is the case that I did make an order for specific disclosure.

On the strike-out application it is also the case that Mr Kennedy has been substantially

successful. However, as Ms Howard has pointed out, there is obviously considerable uncertainty about the ambit of Section 47A in the particular circumstances of this case, and that is exemplified in part by the fact that on 25th March 2020 the solicitors for the Claimant specifically urged the Defendant to hold off issuing its debt claim and to pursue that by way of a counterclaim in the competition infringement proceedings, with the threat that if the Defendant chose to issue proceedings separately, it would seek to join the proceedings into their action with an appropriate order for costs.

I appreciate that at that time it was not clear where proceedings were going to be issued, whether in the High Court or the Competition Appeal Tribunal.

Having said that, I am sympathetic to Ms Howard's submission that her client was seeking to pursue the most efficient and procedurally economical course of action by bringing its counterclaim in the existing competition proceedings rather than commencing separate debt proceedings, particularly in light of what it had been told by the Claimant's solicitors.

In those circumstances, and having regard to the fact there has been some success on both sides, I consider that the appropriate order is that there should be no order for costs of this case management conference, and that extends to all of the issues, because the issues that I have referred to are essentially the issues which have taken up the time in this hearing. So that deals with the costs.

Can I then just raise the logistics of finalising the order? As you may or may not know, I am going to be unavailable from tomorrow for several weeks. So there are two options. Either the order is finalised tonight and I can sign off on it tonight, or you are both content that there is sufficient clarity in what has been decided today that you are able to proceed without having a finalised order for the next couple of weeks until I return.

MS HOWARD: I don't think the changes -- I have been marking it up as we go through. I will be very able hopefully with my learned friend's assistance to turn it around. I just don't want to take your evening up approving it unnecessarily. I can turn it around now, if that would help, straight after the hearing.

MRS JUSTICE BACON: Yes. If you are able to do that, and if you are able to do that and you are able to send it through to the Tribunal by, say -- can we say 5 o'clock, then I can quickly review that and will approve that this evening. If it comes later than this evening and I would say probably if it comes any later on that, it may not be dealt with today, and therefore I just need to make sure there's going to be no dispute between the parties as to how they are going to proceed in the next couple of weeks at least.

MS HOWARD: I think we have made very constructive headway and I hope that we can continue the constructive dialogues we have been having.

MRS JUSTICE BACON: All right.

MR KENNEDY: I am told we can finalise the order in the next hour, Madam, yes.

MRS JUSTICE BACON: Yes. All right. Thank you very much, both of you, and also thank you for your constructive liaison overnight and during the course of this hearing so that the issues were minimised efficiently. All right. So I will receive the draft order by 5 o'clock this evening then. Thank you.

MR KENNEDY: Thank you.

MS HOWARD: I am grateful, my Lady.

(3.38 pm)

(Hearing concluded)