IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1379/5/7/20

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

Friday 29 October 2021

Before:
The Honourable Mr Justice Butcher
Peter Anderson
Simon Holmes
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Kerilee Investments Limited

Claimant

v

International Tin Association Limited

Defendant

A P P E A R AN C E S

Brian Kennelly QC and Timothy Parker (On behalf of Kerilee)
Laura Elizabeth John and Jack Williams (On behalf of International Tin Association)

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Friday, 29 October 2021

(10.30 am)

THE CHAIRMAN: Good morning, everybody. These proceedings are being live-streamed and there are a number of people who are joining on Microsoft Teams. I must start therefore with the customary warning.

These are proceedings in open court as much as if they were being heard by the Tribunal physically in Salisbury Square House. An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as a contempt of court.

So, as I say, good morning. Who is planning to start? Can we have an initial discussion as to the order in which we will be dealing with things.

MR KENNELLY: May it please the Tribunal, just by way of formal introductions, I appear for the Claimant with Mr Parker. My learned friends Ms John and Mr Williams appear for the Defendant.

Housekeeping

MR KENNELLY: We received your updated agenda and your indication as to the time available to counsel to speak. Subject to what Ms John thinks, we are content to follow that order, but we are very much in your hands.

MS JOHN: Likewise, sir.

THE CHAIRMAN: What we think is that we need to deal with the question of whether there should be preliminary issues. First, I mean first of the substantive issues to be discussed, that we should deal with the question of whether we can deal with security for costs and, if we can, whether there

should be security for costs. Second, as it were, consider questions of timetabling probably last of the substantive issues.

Does that make sense?

MR KENNELLY: I'm content for that sir, yes.

THE CHAIRMAN: Right.

MS JOHN: Likewise.

MR KENNELLY: I mean just in terms of your agenda, we agree that the forum should be England and Wales so that can be ticked off the list.

THE CHAIRMAN: Very good.

MR KENNELLY: I think I'm going to hand other to Ms John for the preliminary issues application.

MS JOHN: Before I begin, sir, I can check a couple of housekeeping matters and make sure that the Tribunal has all of the relevant materials because I'm aware there's been a little bit of back and forth with the registry during the course of yesterday. The Tribunal should have two volumes of CMC bundles which should run up to tab 28. The final tab should be a second witness statement from Mr Sellars that was served yesterday lunchtime.

THE CHAIRMAN: Yes. Certainly for my part I have that.

MS JOHN: Thank you. Then there is one bundle of authorities which runs up to tab 23. There's an additional authority that Mr Kennelly notified to the Tribunal some time yesterday afternoon.

THE CHAIRMAN: Neurim Pharmaceuticals?

MS JOHN: That's correct, sir, yes. There should also, I hope, be a version of the claim form at tab 4 of the CMC bundles that was substituted. Can I just ask the Tribunal to turn to tab 4.

THE CHAIRMAN: Of CMC?

MS JOHN: Indeed, thank you. The version in the bundles, if you can turn to page 57, using the numbering in the centre of the bottom page, this document should be dated 10 May 2021.

THE CHAIRMAN: Yes.

MS JOHN: Very good, thank you, then think we're all up to date.

MR HOLMES: Can I just raise one point as consequence of the revised bundle. Where appropriate if counsel could refer to the relevant paragraph of a document, that will remove the ambiguity of people working from different versions of the case bundle because obviously we have had working copies and then a new version provided, but that won't be a problem if you also refer to the relevant paragraphs if you are taking us to them.

MS JOHN: I will, sir. It would be helpful if the Tribunal could give me an indication whether you working off the hard copy bundles or electronic. I have both references but I will confine myself to one set if everyone is using the same.

MR HOLMES: I'm using hard copy for most of the documents.

MR ANDERSON: Just to add to difficulties, I'm mostly using hard copy but unfortunately some of most recent material I'm going to have to find on screen; but it shouldn't be a difficulty.

MR HOLMES: I'm in the same position but don't see a difficulty.

MS JOHN: Thank you. I will give hard copy references in that case and if you need electronic ones please stop me.

Application by MS JOHN

MS JOHN: For the preliminary issues application we take as starting point rule 4 of the Tribunal rules, if I could ask the Tribunal to remind itself of the terms of that. It's in the authority bundles at tab 4. The governing principles are rule 4(1):

"The Tribunal shall seek to ensure that each case is dealt with justly and at proportionate cost."

Subparagraph (2):

"Dealing with the case justly and at proportionate cost includes so far as practicable ..."

And I would highlight in particular:

"(b)Saving expense.

"(c)Dealing with the case in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues, the financial position of each party and ensuring that it's dealt with expeditiously and fairly."

With that in mind, we have proposed a way forward in this claim that we believe and trust will be a way of dealing with the case in a way that is just and at proportionate cost. I'm going to begin by showing the Tribunal the pleadings and explain the nature of the dispute between the parties and what we envisage would be dealt with at an initial hearing.

I'll then explain the benefits that we see as stemming from taking a staged approach to this claim, and, finally, I'll address the Claimant's objections to this as a way forward.

If we can start with the pleadings. They are at tab 4 of the CMC bundle. I begin with the claim form and can I ask the Tribunal to turn to page 21, and this is paragraph 26 at the top of the page. Here the Claimant explains that it's identified two interrelated markets which it says had restricted competition as a result of the conduct complained of. Already this is a case which is slightly more complex than the ordinary run of cases in this Tribunal.

Paragraph 27, the Claimant sets out what it contends are the first relevant market,

and note this is said to be one relevant market; it's market, singular.

In the heading it's described as "The international market for responsibly produced and supplied minerals in the form of concentrates and derivatives".

Let me pause there because there are a few terms that I need to explain. The first is the word concentrate, minerals in the form of concentrates. If I just give a thumbnail sketch of what the supply chains look like. Minerals are extracted from the ground in mines and they are extracted in form of ores. They then go through some initial processing, something like robust sifting to remove rock and dirt and what's left is called concentrate. Concentrate is the product that is then sent to smelters, usually exported to smelters, for further processing. There is a different type of process that each mineral undergoes, depending on whether it is tin, tantalum or tungsten. There may be different outputs from the smelter depending on what type of mineral we're talking about. It may be turned into metal, metal products or an intermediate. There may then be some further processing done; the product may be used as it stands, it may be transformed into something else. So the paths begin to diverge once one gets past the stage of the smelter.

But that is by way of brief introduction to the term concentrate, that means the product as between the stage of the mine and the smelter.

The other two terms that are used here are minerals and derivatives. If we turn back to paragraph 7.4 of the claim, these terms are defined. So if we turn back to page 9, this is a paragraph that's speaking about the programme, it's the programme that my clients and the TIC have established. But here we have the terms being defined. So the minerals are cassiterite, that is the concentrate of tin; coltan, the concentrate of tantalum; and wolframite, which is the concentrate of tungsten.

It's these concentrates originating in the DRC, Rwanda, Burundi and Uganda. So when the Claimant says, in paragraph 27, that the relevant market is the market for minerals in the form of concentrate it's talking specifically about minerals from these four countries rather than originating elsewhere.

Then at the end of paragraph 7.4, we have a definition of the derivatives and it's:

"Metal or metal products that are derived from the minerals ..."

So that's any product that the minerals are turned into:

"... and any other product containing the minerals."

So that's any product that the minerals are used to make.

Very widely framed, that term derivative.

With that if we turn back to page 21, paragraph 27, and we look at the first sentence again:

"The relevant market is the international market for responsibly produced and supplied minerals ..."

That is minerals from the four countries:

"... in the form of concentrates and their derivatives."

So anything that is made from them, or that contains them.

So the Claimant's case here is essentially that the entire supply chain is within the relevant market and the Tribunal has seen our comments in our skeleton argument about that. On this pleading, cassiterite is in the same market as a baked bean tin because cassiterite is a mineral in the form of concentrate, a baked bean tin is a product that contains tin, so it is a derivative. Indeed, as there is only one market pleaded here, this also includes wolframite, coltan and all products containing tantalum and tungsten; everything in one large market.

Then in the second sentence, we have this:

"The market extends to the countries where buyers and sellers of the minerals and derivatives are located."

So this is why the Claimant says that the market is international, in the first sentence. Every country where people who either sell or buy these products are located, is the geographic scope of this market. I will let the Tribunal cast your eye over the rest of 27 and 28.

Paragraph 28 essentially says the same as paragraph 7.4, that we are concerned with minerals just originating in these four countries. Paragraph 29 is a description of the Claimant's business and how it's said to fit within this market.

I'd now like to show you the Defendant's response to that. We have the Amended Defence at tab 5 of the bundle and if we could turn to page 98, we have paragraph 35. So taking it briskly, 35.1: we deny that cassiterite, coltan and wolframite are in same product market. We say that each of those are in a separate market.

35.1(a): we deny that the derivatives of each of the three minerals are in the same product market.

Again, we say they are all in separate markets.

35.2: we deny that there is a single market covering the entire supply chain. We say that they are separate markets at at least four different levels: mining and processing; export; metals; and transformed products.

35.5: we deny that there is a separate market for products that originate in Burundi, the DRC, Rwanda and Uganda. We say that beyond the first level of the supply chain products from other countries are substitutable.

Paragraph 36 addresses the geographic scope of the markets. We deny that there is an international market covering all the countries in which buyers and

sellers are located, and essentially the point here is that when asked to look at the location of the economic activity, not the location of the undertaking. And at the level of exporting concentrate, that means countries where the minerals are extracted from and the countries that they are transported to for processing.

So on the Claimant's case, pausing there, there is one -- we have called it vast and amorphous -- market covering the entire supply chain for all three products. On the Defendant's case there are a multitude of separate markets here, all of which the Claimant is trying to cover in this claim.

If we turn back now to the claim form at tab 4 again and turn to page 22, this is the second relevant market. We have the heading towards the bottom of the page "International traceability services market". We can see at subsection (2) that this includes certain services, although it's not said to be limited to the services outlined there.

At subparagraph (4) it says that these services are consumed by participants all the way along the supply chain. So, as we said in our skeleton argument, this includes the mine owner, who has members of ITSCI come and conduct field visits at its premises, it also includes the person who buys the tin of baked beans in Sainsbury's; participants all the way along the supply chain.

If we turn back to the Amended Defence to page 105, we have the Defendant's response to this and it begins in paragraph 40. At 40.1 we say that there is a secondary market complimentary to the mining and processing markets and the export markets. They are just the top two levels of the supply chain, for services assisting people in those markets to comply with their due diligence obligations.

At 40.2 we deny explicitly that the market covers the whole supply chain.

And at 40.3, we deny that these markets are international. We say that they are national in scope.

So those are the pleadings on market definition.

With that, can I ask the Tribunal to turn to the terms of our draft order. It's in tab 2 of the bundle at the back of our skeleton argument and we're looking at paragraph 6 in particular.

Let me say at the outset, we have framed this as a direction for a preliminary issues hearing under rule 53(2)(o) of the rules. Equally we could simply treat this as splitting the trial and making a direction for a stage 1 hearing. The formal mechanism doesn't matter. The Tribunal has powers to direct such directions as it thinks fit to secure the proceedings are dealt with justly and at proportionate cost. So we don't need to get too hung up on the formal mechanism here.

Can I ask the Tribunal now to read the first proposed issue under paragraph 6.

(Pause)

I appreciate at first blush this draft may look a little bit complex, but actually once one has looked at the pleadings this is actually quite a straightforward reflection of the parties' two positions. All we have done is in subparagraph (a) said: is the Claimant right that there is a single product market, or is the Defendant right that there are separate markets? Subparagraph (b) simply says what is the geographic soap of those markets. Subparagraph (c) says: is the Claimant right in its definition of the second market or is the Defendant right in its definition of the second market? Subparagraph (d), what is the geographic scope.

So this is intended to be a very neutral summary of the dispute between the parties on market definition. We haven't understood the Claimant to take any issue

with the proposed drafting of this order as opposed to the high level principle of whether the order should be made at all.

I then come on to the second proposed issue in paragraph 6, this is the question of applicable law. I can take this more quickly. The Claimant says that English law is applicable. On that basis it pleads to a breach of the Competition Act 1998 and also the TFEU through the route of English law being applicable. It does not say that the law of any other Member State or indeed any third country outside the EU is applicable.

If we can turn up quickly the provisions of the Rome II Regulation in the authorities bundle. This is at tab 2 and this is the regulation by which we go about determining what the applicable law is.

On page 7 --

THE CHAIRMAN: Sorry, could you just repeat that.

MS JOHN: Authority bundles tab 2.

THE CHAIRMAN: Yes, thank you.

MS JOHN: At page 7 you have Article 6, and there is specific provision made for cases of unfair competition and acts restricting free competition.

Now pause there. If we turn back to recital 23, which is on page 4, we can see that:

"For the purposes of this regulation the concept of restriction of competition should cover prohibitions on agreements between undertakings."

So Article 101 of the TFEU, section 2 of the Competition Act.

Then part way down:

"... as well as prohibitions on the abuse of the dominant position."

So that covers Article 102, TFEU, and section 18 of the Competition Act.

So if we turn back then to Article 6 we are concerned with Article 6(3). Subsections (1) and (2) are concerned with unfair competition. Here we have a case about

restriction of competition.

In subparagraph (3)(a):

"The law applicable shall be the law of the country where the market is or is likely to be affected."

So, for the Claimant to establish that English law is applicable to this claim it has to show that there is a market in the UK that has been affected by the conduct complained of. And it's the Defendant's case that it cannot do that. The reasoning is set out in detail in paragraph 49 of the defence, but broadly speaking the case is once one defines the relevant markets properly the UK is not part of them.

So the second issue that we have proposed is essentially a corollary of the first.

Sir, that brings me to the benefits that we see as stemming from deciding these two issues now ahead of the rest of the case; and in my submission there are four.

The first is that an early determination of these issues might be dispositive of the entire claim. If we are right that English law is not applicable then that will be a dispositive, and there's no need for the parties to incur costs in investigating the conduct complained of, whether it amounted to an infringement or the Claimant's case on loss and damage.

Second, is even if it's not dispositive of the whole claim it might be dispositive of parts of it. So let's say we're wrong and English law is applicable, there may still be parts the claim that would fall away following a stage 1 hearing. The most obvious candidate for this is the allegation that my client was in a dominant position.

Now, as the Tribunal will appreciate, for the purposes of English law the dominant position has to be held either in the UK or in the EU internal market.

Section 18(3) of the Competition Act says that a dominant position is one held in the United Kingdom, or a substantial part of it. Article 102 of the Treaty states that it's concerned with the dominant position in the internal market.

So if, for example, there were to be dominance in Uganda, the DRC, even if it existed that would not be relevant for the purposes of the prohibitions in English law and European law. And that means it is very useful to determine in advance whether the market that my client operates in includes the UK or the EU. If it doesn't, half of the claim will fall away; everyone will be spared the expense of trying to work out whether my client is in a dominant position or not.

The third benefit is that if any part of the claim does continue it will do so in a much more streamlined and efficient way. Now I've shown the Tribunal that in this case the parties are a very long way apart on market definition, a very long way apart. If we proceed to trial without a determination of these issues in advance then all of our evidence, all of our submissions, will have to be prepared on a contingent basis. So, was my client dominant in the market as the Claimant defines it? Was it dominant in the market as we define it? Did the first category of conduct restrict competition in the market as the Claimant defines it? Did the first category of conduct restrict competition in the market as we define it? And so on.

And that assumes, of course, that the Tribunal agrees that the markets are to be defined as one or other of the parties has proposed. Now, given the distance between us on market definition, it's not inconceivable that the Tribunal might conclude that the market is in fact some permutation, somewhere between the parties.

So, for example, you may conclude that there is a single market covering the whole

supply chain but only for tin, and tantalum and tungsten separately. There are different permutations because there are so many points of disagreement between the parties. The Tribunal may decide that the Claimant is right on some points, and we're right on others.

So the evidence can be much more streamlined if the parties know in advance what relevant market is to be their reference point, rather than having to address the multiplicity of different markets which can only increase costs.

The fourth benefit, although this is obviously primarily a matter for the Tribunal, it does seem to us that it would be much more manageable from the Tribunal's perspective to take this case in stages. Now it's true that this is not a case with 20 different parties that have to be managed, but it is one that is potentially quite complex technically because of the extreme breadth of the Claimants' pleaded case on market definition and the sheer extent of the ground that we have to cover. So we suggest that a staged approach would be much more manageable than a single juggernaut hearing that the Claimant appears to be envisaging.

Finally, let me turn to the objections that the Claimant has raised. The first point is they say, well, the parties' pleadings are tentative because we need to go away and get expert evidence, and it may be that when we've got that evidence we need to make some amendments to our pleadings. There are two answers to that. The first is we don't agree that the pleadings are tentative. Both parties have set out the case they intend to pursue and they signed a statement of truth. They believe that to be an accurate position.

Now of course economists are independent and in due course they may or may not feel able to support the entirety of the parties' case, and it's possible that the parties may want to seek permission to amend, once they have seen their

expert reports. But what one envisages in that regard is that the parties may want to provide further particulars of their position, they may want to tweak their position slightly. But it's certainly not envisaged that either party is going to engage in a wholesale change of case further down the line. So if that is what the Claimant intends to imply by saying the pleadings are tentative, we disagree with that.

The second point is in any event this is not something that points away from making the direction we've sought, because, irrespective of whether we take a staged approach or not, expert evidence is going to be filed before the hearing. So this factor is neutral. It's something that's going to arise however we take this case forward.

The second objection taken is that there is going to be an overlap between market definition and liability. We don't agree. We don't see the overlap and the Claimant hasn't explained how or where it says this overlap is going to arise. Market definition is a discrete issue, albeit a very important one; and findings on liability are not going to affect the market definition, it's a prior question.

But even if there were to be some overlap, and perhaps Mr Kennelly will explain in a moment where he sees it coming in, we say it's not one that's going to give rise to any sort of inefficiency. There is no greater cost to the parties in producing that evidence for a preliminary issues hearing than there would be if it had to produce it for a full trial; and there's no risk of duplication. So if we do have to go to a stage 2 hearing, if this is not dispositive of the claim, then the Claimant will be able to rely on the evidence that's already served. It will not have wasted its costs of producing that evidence. So we don't agree that there is a concern here.

So stepping back and winding back to where I started with rule 4, whether it is just

and proportionate to take staged approach to this case, we don't see the Claimant has identified any risk of injustice or disproportionality as a result of proceeding in the way that we have proposed. This proposal will lead to efficiencies. So the Defendant maintains that it would be consistent with rule 4 to make the direction proposed.

The only final point is that Mr Kennelly has produced an additional authority yesterday afternoon, the Neurim Pharmaceuticals case. I will let him make his submissions about that and I will address anything that arises in reply, but just at a headline level we say principles that are outlined in this case are entirely consistent with the proposal that we have put forward.

THE CHAIRMAN: Thank you very much.

Mr Kennelly.

Submissions by MR KENNELLY

MR KENNELLY: Thank you, sir. I make three broad points in response. First, the split market definitions which the Defendant seeks will still lead to relevant markets which include the UK in their geographic scope. So the English and EU competition law is still likely to continue to apply in any event. That goes to the point of whether this is decisive.

The second point is the more granular market definition which the Defendant seeks is unlikely to make any difference to the competition case ultimately, to the result of it. I will explain why that is, and that is also relevant to whether this is going to be decisive of whole or part of the case.

Thirdly, and finally, I will explain why these preliminary issues would be a treacherous shortcut particularly because of the very significant overlap between them and the questions of dominance and causation.

We're not averse to a staged approach to this case and one can certainly see

elements of the quantum part of the case being carved out, but this staged approach, members of the Tribunal, would not be appropriate.

So I will take my first of those three points, why splitting the market definitions will still lead to relevant markets including United Kingdom. I will start, if I may, with what we call, the Claimant calls, the first relevant market, the market for the minerals and derivatives sourced responsibly from the territories. If I could take you first, please, to the very basic supply chain illustration which you have in the Amended Defence in the first CMC bundle behind tab 5. It's on page 100 of the CMC bundle. It's figure 1.1, and to explain:

"The Claimant Kerilee operates at a number of levels on this chain. The Claimant's pleaded case is that from London it operates as an exporter because it has an agreement, an offtake agreement, with the mine in Uganda and it takes that mineral and exports it."

I shan't take you to that, there's no need. I'll give you a reference, it's the CMC bundle 1, tab 4, page 63.

But the Claimant is also a trader operating in these export markets and it is also a toll trader. The Defendant accepts that the Claimant is, among other things, a toll trader trading in London and that is trading in minerals and their derivatives. The Claimant buys and sells these minerals and derivatives to and from various countries but from its base in London.

If I just take you, please, to the Claimant's pleading first on this in the Statement of Claim, first CMC bundle, tab 4, page 22. You see at paragraph 29:

"The Claimant's business in the first relevant market is the financing and trade in the minerals and derivatives and the supply of minerals and derivatives downstream to smelters, refineries and the makers of intermediate metal products in Asia, China, Europe, the UK and the United States."

So it's operating not only upstream, in supplying to smelters and refineries, but also as a trader it supplies metal products to manufacturers which are located in countries which include the United Kingdom.

And if you go to paragraph 58, it's on page 32 of the CMC bundle, that's pleaded explicitly and the Tribunal can see that short passage.

Now, the Defendants' case, as you have seen, is that each metal, each mineral and derivative, is in a different market; but the Defendant does admit that metals which are responsibly sourced are in different markets. You see that if you could turn that up, please, to the Amended Defence, paragraph 35.6 and that's behind page -- that's at page 102 behind tab 5.

35.6 is the paragraph. Having set out its market definition, the Defendant admits that:

"Concentrates sold in the mining and processing markets and/or export markets which are supported by the due diligence evidence are in separate product markets from those which are not so supported."

And the Defendant also admits that the export markets, which as I've said the Claimant pleads that it trades in, are multinational. You see that at page 103, over the page, paragraph 36.2, about six lines down:

"The markets for concentrates for export are multinational."

The Defendant's case is the geographic scope of those markets include the countries from which those minerals are sourced from which the concentrate is transported to the countries in which the smelters are located.

The Claimant's case is that that market includes the location of the trader or the exporter who is procuring that export from one country to another. But the export of course can take place, even on the Defendant's definition, to the United Kingdom.

Then on the question of derivatives, the Claimant's case is that it trades derivatives, as you've seen, and the Defendant admits that the market for derivatives in these mineral may be international. You see that 36.3, the same page, page 103:

"It is admitted that some of the markets for metals and/or for transformed product, which the Claimant refers to compendiously as the derivatives, may be international."

That is important, members of the Tribunal, because of course if the market is international it includes the United Kingdom, and the dominant position of that market would include the United Kingdom or the restriction on competition on that market would include the United Kingdom. And of course, as I've said, our case is that we trade derivatives on that international market.

To be clear, the Defendant acknowledges that when the Claimant trades these minerals and derivatives in certain circumstances it takes legal ownership of them and then sells them on. Again, no need to give you the reference -- no need to take it up, the reference I think is sufficient. That's in the defence at paragraph 22.3.

So in relation to what we call the first relevant market, the Defendant wants to slice it up per metal and split it between the different stages in the supply chain, some of which the Defendant may show do not involve the UK. One could see the irony from the Defendant that at the very beginning of the supply chain, the mines in Africa, for example, they could say, well, if that's a separate market that does not involve the UK. But even on their case once they've sliced these markets up it appears that the export markets and the derivatives trading markets do include the United Kingdom.

The Defendant hasn't denied that the Claimant trades or seeks to trade in those

markets if they are, as they say, separate markets.

Of course you've seen our pleading that these markets, which include the UK, are affected by the actions of ITSCI. Our ability to compete in the minerals and derivatives market, or markets if that is how it is ultimately defined, is restricted.

That's the first part of the market definition issue.

The second, of course, is what we call the second relevant market for ITSCI's due diligence services. We have pleaded that to trade effectively in the supply chain -- or chains, if my learned friend is right. To trade effectively in those market or markets, the ITSCI services are indispensable. Our pleaded case is that to trade effectively in those supply chains we need to show that we have done so through the ITSCI programme, at least in order to trade them into the EU or the UK. The Defendant's argument is that those due diligence services don't affect competition in any market which includes the UK, but let's see how they plead the role of the ITSCI programme.

Turn, please, to the Amended Defence at paragraph 21 on page 75. It explains here the purpose of the ITSCI programme, how it came to be, how it was established by the corporate members through their trade association:

"As a consequence of the concerns raised internationally about conflict minerals in this region, in consequence of the NGO campaign and above regulatory measures, downstream market participants and consumers have become increasingly aware of the need for due diligence and choose to factor it into their purchasing requirements."

Downstream and end-users want to make sure that the minerals they get are responsibly sourced.

Then at paragraph 59.1, this is on page 124, we see the categories of full ITSCI

membership and associate membership. In order to satisfy not only the broader public concerns about conflict minerals, ITSCI is established to address and to ensure that the members satisfy legal requirements under the Dodd-Frank and under the SEC Rule.

So here are the categories of membership. Full membership, available to upstream operators including miners, and my learned friend referred to that, local traders or exporters, but then this, international concentrate traders. So full membership, that is the full tracking service, is available to international concentrate traders. They need to show due diligence compliance in their international trade.

Just pausing there, of course the due diligence services, as the Defendant admits, include not just tracking but auditing. If an international concentrate trader is in London and is a full member of ITSCI, ITSCI reserves the right to audit that trader in London. The auditing is not limited to sites in the territories in Africa.

But then we have associate membership, associate membership of ITSCI: available to downstream operators including (inaudible) traders and exchangers, component manufacturers, product manufacturers, original equipment manufacturers, OEMs, and even retailers.

They use the ITSCI services as part their own due diligence to ensure they are using responsibly sourced minerals.

Then would you go, please, to page 169, in the same Amended Defence, paragraph 90.4. This part of the Amended Defence is dealing with exemption, the part of their plea that says: even if we are in breach of the competition rules, prima facie our conduct should be exempt because of the benefits that our conduct generates.

90.4, this is part of their justification, consumers in what they call the supporting

information markets that is the due diligence services market, and in the mining and processing markets and the export markets:

"All receive a fair share of the benefits, the identification and promotion of responsible sourcing for minerals, the ability to demonstrate credibly that trade and minerals are not associated with (inaudible) risks acts to the benefit of all participants in the minerals metal supply chain and to end consumers of products derived from these minerals and metals."

That is because all participants in the supply chain and end consumers are concerned to receive responsibly sourced minerals.

I rely for those purposes really on ITSCI and the ITA's own defence. You see more in annex A to the Amended Defence. Here we have how ITSCI defines itself. Annex A to the Amended Defence is behind tab 6 in the -- sorry, page ... 209 -- sorry, this is the annex to the reply, but it's an ITSCI document. It's page 209 of the CMC bundle behind tab 6. You see, at page 209, ITSCI's document on the traceability and due diligence programme. Some of this may be difficult to read, members of the Tribunal. Certainly with my failing eyesight I trouble with the tiny text, so I apologise in advance for that.

The text I want to take you to, if I may, is on page 211, and I will begin with the foreword on the right-hand side. I rely on what ITSCI says about itself about its own programme. On the first column on the left, about two lines down, it says:

"The common standards based around OECD guidance for due diligence which helps prevent multiple audits and visits to operators by customers from different tiers and supply chains and avoids confusion in the administration of multiple systems. ITSCI also provides a mechanism for supply chain information exchange and transparency that recognises business

confidentiality ..."

Then this:

"... while encouraging continued sourcing by downstream companies and continued access to international markets."

And then, moving to the column on the far right, bottom paragraph:

"The diagram opposite 'ITSCI programme overview' illustrates how ITSCI cooperates and coordinates with governments [in red], OECD guidance [yellow], upstream and downstream companies [blue] and ITSCI members [in green]."

My copy of this diagram isn't coloured, but it's useful in that it shows the role of ITSCI at every stage of the supply chain and the importance of the programme.

You have on the right-hand side of the oval a large cog that refers to the upstream companies, but on right-hand side you have a large cog that has downstream product manufacturers written into it and below that the ITSCI associate members. It shows how the ITSCI associate members which are downstream operators, including manufacturers and end-users, liaise with the broader market for downstream product manufacturers.

And then below that, very small text, it says:

"The ITSCI programme is the cross-industry mechanism focused on three key minerals which practically assist upstream companies to implement the OECD guidance, therefore enabling continued access to international markets and economic and social development for the miners."

And so forth.

Then if you go, please, to page 213, staying in the ITSCI document, the right-hand side picture step 2, I focus on the bottom right-hand corner of that right-hand picture under the heading "Outcomes". The outcome of the traceability programme:

"Confidence in a monitored supply chain, smelters process minerals into metal and sell to the international market."

Including the downstream product manufacturers, and below that:

"ITSCI provides a mechanism for supply chain information exchange which protects the information, provides transparency, necessary for companies to monitor, improve and have confidence in the global supply chains."

I'm taking you to all of this, members of the Tribunal, because you'll see the very different approach which the Defendant takes in the pleading, and it is relevant to whether these preliminary issues should be ordered.

Staying in with how ITSCI describes itself -- and this is the last passage on this issue. We don't have the particular ITSCI document that I want to take you to, but in the second CMC bundle, behind tab 15, we have our RFI response where we also refer to some further ITSCI material and I'll show you that now briefly. It's behind tab 15, page 697. Here again, in answering the Defendant's queries about market definition, we refer them back to their own material and I rely on the italicised text on paragraph 3, quotes from the --

THE CHAIRMAN: Could you repeat where you are.

MR KENNELLY: Forgive me, sir. I'm in the second CMC bundle, tab 15, page 697.

THE CHAIRMAN: Thank you.

MR KENNELLY: I am relying on paragraph 3 and the italicised text which is taken from the ITSCI website. And there, ITSCI is setting out its purpose. The first part of that italicised text I have taken you to. Below that:

"ITSCI follows minerals into the international market through the upstream supply chain in which instances of fraud [and so forth] remain a risk. Our members are located in more than 40 countries including more than 30 smelters, about half of which are in Asia."

Over the page:

"The international tin supply initiative has set the record for high ... and ensuring responsible sourcing in high risk and conflicted areas, helping miners have access to the international market."

Paragraph 4, referring again to ITSCI's document, the italicised text, indented:

"Without implementation of the ITSCI scheme opportunities for access to international markets will be lost."

Then 5, as to its geographic reach, ITSCI's 2019 annual report notes that:

"It works with upstream and downstream companies in global supply chains across 46 countries including in Europe."

Now, our pleaded case, as the Tribunal has seen, is that, although ITSCI doesn't provide a formal certification, receiving its due diligence service is a signal to the market that the US legal requirement, the Dodd-Frank Act and the SEC rule, and the OECD guidance are satisfied. You see that in our Statement of Claim, tab 4 in the first CMC bundle, page 15. Please go to that. It's paragraph 16 of our Amended Statement of Claim.

So we say:

"In practice downstream market participants, up to ultimate end-users, treat materials and derivatives which have been documented through the ITSCI services as certified conflict free."

It's the gold standard for conflict free assurance.

Then, subparagraph 3:

"With very few exceptions, it is not commercially viable for a refiner or a smelter sourcing the minerals or derivatives to follow the guidance and pass conformity standards such as the ARMAC(?) ones ..."

Over the page:

"... without use of the ITSCI services as a necessary input for their due diligence.

Subparagraph 4:

"Without access to the services, entry to or activity in any part of the market upstream the smelter, including as a trader, is either impossible, significantly more difficult or more costly depending on the precise activity."

And then subparagraph 5:

"In downstream markets, including the United Kingdom, minerals or derivatives originating from territories which have not been sourced through ITSCI, or certified through it, are difficult or impossible to sell or can only be sold at significantly reduced and loss making prices."

The Defendant's pleaded case is that these ITSCI services affect only markets upstream of the smelters. They say there are smelters in the EU but no smelters in the UK. Their case is that these ITSCI services do not affect competition in any market downstream of the smelters. We see that in their defence, paragraph 30A.4.2. That's in page 84 of the CMC bundle behind tab 5.

This the their case, paragraph 30A.4.2:

"To deny that ITSCI is concerned with metals and other products derived from or containing minerals ..."

It says that. Then this:

"ITSCI does not track products past the point of their entry into a smelter."

That's true as far as physically tracking the minerals is concerned. But their information services, the Defendant's audit services, it's reason for existing in the first place really is centrally concerned with ensuring that metals and other products are capable of being consumed in the UK and in the broader EU. That's no doubt why, we say, the reason -- the reason why it's corporate

members set it up and fund it, so they could comply with US legal requirements and OECD guidance.

Now, in relation to the downstream verification, the Defendant disavows ITSCI in this sense, that if you look at paragraph 40.2 -- that's on page 106. I'm looking at the bottom, members of the Tribunal, of paragraph 40.2 about four lines from the bottom of paragraph 40.2. So rather than relying on ITSCI, the Defendant says, downstream market participants verify where, to the extent necessary, the responsibly sourced origins of the products they purchase by other means such as the RMI smelter audit listings.

And you have seen that also in the Defendant's skeleton, no need to turn it up, paragraph 18. They say:

"No one who uses ITSCI services in relation to trade in minerals is in the UK. No one who uses ITSCI's due diligence services is in the UK."

But that is, we say, unreal. It is the opposite of what ITSCI has said publicly. And what of the Claimant? The Claimant is in the UK and desperately needs the ITSCI kitemark in order to trade effectively on international markets.

Now, the Claimant claims not only that it was excluded of course, but that an ITSCI rule prevents ITSCI members from dealing with it. And that plainly affects the market in the United Kingdom. In fact the Defendant's position begs the question: why do international traders based in the UK want to be ITSCI members? Because they need to be able to trade effectively. Why do downstream companies want the associate members? To ensure they are getting responsibly sourced minerals and can say so to their consumers and regulators.

On any view, this is why it's relevant to the preliminary issue, there is a major dispute of fact as to the extent to which downstream operators do expect to see ITSCI

due diligence before they will purchase minerals or derivatives from a trader like the Claimant.

Turning, then, to my second broad reason why the preliminary issue would be a treacherous shortcut and the fact that the more granular market definition which the Defendants seek is unlikely to make my difference to the competition case. Because if we assume that the Defendant is right, and there is, for example, a separate market for the trade of tantalum from a smelter in the EU to a UK manufacturer, the Claimant's pleaded case is that it operates on that market. And it's pleaded case is that it's ability to compete on that market is being restricted by the Defendant. But even if the smelter and the end-users are outside the UK, the operator from whom the Claimant purchases and the operator to whom the Claimant sells are outside the UK. The United Kingdom market is still affected because the traders are here.

If the Claimant is excluded from trading, let's say, for example, responsibly sourced tantalum from The Democratic Republic of Congo, competition is affected in the international market where the Claimant trades, which includes the United Kingdom. So even if the Defendant is right and the ITSCI services may be split by metal or by stage in the supply chain, the Claimant still needs those services to compete effectively in each of those submarkets.

As I said at the beginning, it may be that when the markets are sliced by metal or by stage in the supply chain some of the original markets, the ones most closely linked to the mines, may fall away, but on any view the majority will remain. There's no doubt that the Claimant's pleaded case is that it trades from London in each of those market and I have given you the references. I would include paragraph 3 and paragraph 29 of our Statement of Claim.

So that suggests, members of the Tribunal, that either the Defendant's approach will

not be decisive or it will at least involve a major investigation, a factual investigation, of the markets in which the Claimant operates.

My final broad point on the lack of a clean split is that the preliminary issue as framed will lead to duplication and waste, because, however it is resolved, the very same disclosure and evidence is likely to be relevant to the questions of dominance and causation because the factual questions in the preliminary issue are mixed up with questions of dominance.

We said in our skeleton that the preliminary issue as framed is inextricably linked with other questions of liability and my learned friend said, well, there's no link at all and referred to the various allegations of exclusion that the Claimant has raised. But of course the question of dominance is a key component in the liability trial, the liability stage of the proceeding, and the factual questions that this preliminary issue raises are very closely linked to dominance. Because you have seen that the Defendant wants to argue that the ITSCI services don't affect competition downstream of the suppliers. That's part of their preliminary issue. Our answer is, and will be, that the ITSCI services are very important at every stage of the supply chain, in particular the trading stage and the trading stage of sales to manufacturers and end-users which is the business that the Claimant does.

But that's very similar to the question of whether ITSCI is so indispensable as to be dominant in the second relevant market, because the dominance question involves asking whether the ITSCI services are indispensable or very important in those markets and whether there is in fact a viable alternative to ITSCI. You see that in the Amended Defence it's behind tab 5, page 1018. It begins at paragraph 56.1. Here the Defendant is answering the allegation of dominance. They say, 56.1:

"There is no requirement for any undertaking in any country to use ITSCI services."

They say no one is bound to use ITSCI, which of course is true but not the point, we say. We say that even, if there's no legal requirement to use them, they have status which makes them indispensable for our operating in the market.

Over the page, continuing 56.1, the Defendant says:

"There are other options from other providers in the minerals markets, the Better Sourcing Program, BS -- operated by the RCS Global Group, BSP, which the Claimant is understood to have at least considered using, and therefore to other ways in which due diligence can be provided, and systems such as RMAP and TICMC in the markets downstream of the smelter."

56.1(a):

"Further, smelters can source concentrates from any country in the world in which they are mined without the need for any of the operations upstream."

Then 56.3.1, they admit that ITSCI is internationally recognised and respected. However, they say, that other service providers are effectively just as credible. Other competitors that enter the market gained market share. Over the page, again they deny that ITSCI has been given special recognition.

At 56.4.1 on page 121, the Defendant makes further pleas about the extent to which there are competitors in what we say the traceability services market. They extol the virtues of the RCS Global Group, they say it has been active since 2013, and they deny, over the page, 56.4.2, that there was any problem with the geographic scope of the BSP providers, that using those services is uneconomical and isn't a substitute for ITSCI.

You have seen that, in order to resolve the preliminary issue, in order to address whether the traceability services market or markets, to use the Defendant's definition, affects competition in the UK, a key question is: to what extent are

ITSCI's services necessary for the Claimant to trade in an international market?

And that question is intimately linked with whether in fact ITSCI is indispensable or whether there are alternatives, such as the programmes listed in the defence, that of course -- that second question is also the key question, as the Defendant acknowledges, for dominance. So even if the questions are not exactly the same, the factual enquiry for both is very similar.

Then we have the question of causation because, when we look at causation in this case, the question will arise as to whether the fact that ITSCI excluded us caused us any loss. Even if, for example, ITSCI is dominant, even if we succeed in showing ITSCI's dominance -- and there are plainly alternatives. We say they are less attractive, they are uneconomical, but there are other companies offering due diligence services. It will be said against us that: your exclusion hasn't caused your loss because alternatives were available to you which you could have used and which would have allowed you to undertake the due diligence that you needed to offer your products in international markets. That will involve, again, an enquiry as to whether these are viable alternatives, whether these companies do have the proper reach, the reputation, enough for their services in a cost effective way or a way that is competitive with ITSCI services. That question, which is a causation question again, is very closely linked to the issues that will arise both in dominance and under the Defendant's proposed preliminary issue.

One can see how the same experts that the Defendant intends to call for the preliminary issue -- the experts, for example, that are expert in how those markets operate or market operates will be the same experts who will speak to the role of ITSCI and the role of the competitors of ITSCI which the

Defendant says provide an alternative service. So the same expert evidence and disclosure is likely to be necessary for all of these issues.

If we have this preliminary issue and we succeed for example -- I mean whether we succeed or not, it's not going to be decisive, but on any view all of these experts have to come back and the evidence re-opened on the questions of dominance and causation. So plainly, if there is to be an established approach, it needs to include questions of dominance and possibly causation also.

So we come then, if I may -- and this why I include Neurim in the bundle. The principles for preliminary issues are well understood and I hope the Tribunal doesn't mind me adding an authority just for the point. It's useful to turn it up briefly just to recall the cautionary words of the courts in adopting preliminary issues and to remind ourselves of the principles. I chose this case simply because it's recent and in general the first instance authorities go into this in more detail than the appellate authorities. The applicable legal principles begin on page 2. This is at the very back of the authorities bundle, tab 23 of the authorities bundle. It's a judgment of Mr Justice Mellor, and I go to his paragraph 7, where he records the factors identified by Mr Justice Steel in McLoughlin v Jones. I am now looking at the indented passage at the top of 56:

"The right approach to preliminary issues should be as follows. Only issues which are decisive or potentially decisive should be identified."

Pausing there we say, no, this preliminary issue will not be even potentially decisive, even if resolved in the Defendant's favour.

And because there's no circumstances, we say, in which, even on their approach, it will be found that no UK you can't market affected.

And (b):

"The questions will usually be questions of law."

There will be questions of law wrapped up in the preliminary issues but they are overwhelmingly concerned with questions of fact.

Then (c):

"They should be decided on the basis of a schedule of agreed or assumed facts."

That will be an impossibility in this --

THE CHAIRMAN: These are considerations in relation to preliminary issues which are very often not adhered to.

MR KENNELLY: Yes.

THE CHAIRMAN: And he had a particular type of preliminary issue in mind. I think one shouldn't over-generalise the importance of this guidance.

MR KENNELLY: And I don't. I didn't refer to it as a legal standard, sir. I'm conscious that it's guidance and -- but I -- but one can see, and this is why I took you through the pleadings quite slowly, I tried your patience. The factual enquiries involved are really extensive and that is a reason why the Tribunal ought to be slow to order the preliminary issues involved.

THE CHAIRMAN: I understand that point of course.

MR KENNELLY: And then on significant delay, even on the Defendant's approach, you have seen from their skeleton that they propose that the preliminary issue be -- ready for listing for trial at the beginning of November 2022. So, even on their approach, they say it's going to take a year before even set the trial down. You see on their draft directions they say at the beginning of November 2022 the trial should be set down for ten days at a date convenient to the parties. The trial therefore could be some time after November 2022 on their approach.

Of course we know from this guidance, and it's logical, that in deciding whether a preliminary issue will cause delay one has to take account of any appeal. If there's an plea from this preliminary issue, and there certainly would be in view of its complexity and the issues it raises, that adds potentially another 18 months because that is unfortunately how long it can take to resolve appeals in the Court of Appeal. So there is very significant delay even on the Defendant's approach. We say that's an under-estimation in any event because they only allow for one witness of fact and to two experts. And they say that the whole trial, although it's ten days, it will be one week of court time, as I understand it. We think that's an under-estimation in view of the complexity of the factual issues that are involved.

So in terms of the criterion of avoiding significant delay, will the preliminary issues save cost and time, just no way, we say, unfortunately, although we all seek shortcuts and ways in which things can be resolved more efficiently. This will generate massive delay, at very significant cost and not provide the benefits which are normally needed where a preliminary issue is ordered. That's not to say that the -- there could be a way to stage the case. One could certainly see how leaving the discrete quantum issues to the end, to split them, that might well make sense. But the preliminary issue as framed in our submission should be rejected.

Those are my submissions.

THE CHAIRMAN: Thank you very much.

Yes, Ms John.

Submissions in reply by MS JOHN

MS JOHN: Thank you. Mr Kennelly's first argument was to say that a preliminary issues hearing would not in fact be determinative of the entire claim because

there cannot be a world, essentially, in which the UK is not within a relevant market. The Tribunal has been treated to a prelude of what the preliminary issues hearing might in fact look like. There are just a couple of points to come back on, on the substance of what he said.

The first point is he took you to paragraph 36.2 of our defence. Could we turn back to tab 5, page 103. He says, look, the Defendants accept that the market here, the export market we're referring to in this paragraph, is multinational. And so we do. But as I indicated in opening the application, we say you define it by reference to the location of the economic activity and not the location of the undertaking who is engaged in that activity.

So when we are talking here on our definition, when we are talking here about these markets, and we are looking at the identity of the countries in which the smelters are located, and the places in which these minerals originate, there are none in the UK. That is admitted in the reply, there are no smelters here of these minerals.

So this point really underlines the importance of having an early determination of market definition, because if the market is defined in the way that we say it would be this market doesn't extend to the UK.

His second point was to refer to the fact that we have what we call associate members. Those are members who operate in the market downstream of the smelters. It's true we do have such members, there are six of them. None of them are located in the United Kingdom. So that's not relevant.

The third point to pick up was he said that the services provided by my clients are indispensable for trading on the different markets. Can I just show the Tribunal another paragraph of our defence, it's 30F, on page 95. 30F.3.2 can I ask the Tribunal to read that for a moment. (Pause)

THE CHAIRMAN: Sorry, I was looking at something else. Could you just remind me of the page.

MS JOHN: Tab 5, page 95, paragraph 30F.3.2. (Pause)

So in my submission, again, this actually underlines the need for clarity early on about market definition. Mr Kennelly's submission that my client's services are essential is predicated on the Claimant's case that we are only concerned with minerals originating in Burundi, the DRC, Rwanda and Uganda. If we are right, that minerals from other countries are substitutable, then his case on the indispensability of my client's services will look very different indeed.

A final point to highlight on this, if I can take the Tribunal to tab 20 of the bundle. This is Mr Sellars' first witness statement. I'm going to be looking at this again a little later when comes to question of security for costs. I just want to underline what's said here in paragraph 3, if the Tribunal has that. Page 766, what he says here:

"The Claimant has concluded a valuable supply agreement with an EU based smelter in 2019."

He does go on to allege that it's incurred some additional costs in sourcing due diligence elsewhere. But here I simply make the point that the Claimant can't have this one both ways. If we are excluding them from these markets, if we are indispensable, that is the word that has been used, this agreement would not have been possible.

His second point was that, even if he's not right -- even if he is right, it's not decisive. There would still be efficiencies, in my submission, from proceeding with this anyway. So he sought to highlight that there's going to be a major factual enquiry that's going to be required in order to determine these issues. That may be right. But the question is: is there a benefit in getting that out of

the way now, before delving into all of the further issues that need to be investigated in order to take the claim forward?

And in my submission, the more complex that enquiry is actually the greater reason there is to get this out of the way, rather than try to decide that alongside questions like: did my client engage in the conduct that's been alleged, what effects did that have? What is its position on the relevant markets, is it in a dominant position? And an investigation into causation and loss.

On the question of overlap, Mr Kennelly referred in particular to the issue of dominance and we don't agree that there is an overlap here. Of course the questions are closely linked, they are closely related. But dominance is about market power in a particular market and that is a different enquiry. There's a difference between saying what is the relevant market that ITSCI operates in, and saying does it have power in that market. That's a different enquiry. That will require us to look at things like the position of competitors to ITSCI, the alternative ways in which people can go about complying with their due diligence obligations. Mr Kennelly illustrated that by showing you the bits of our pleadings that refer to those alternatives.

He then said there's going to be some overlap between the identity of the experts in particular. And he said, well, they're all going to have to come back another day if we have a stage 2 hearing. That may well be right. But again, the question is: is there any inefficiency in them doing that? Is there going to be any duplication in the work they are going to be engaged in? And we say there will not be. In fact when they come back for stage 2 their work will be streamlined because they will know what reference point they are using as the relevant market.

The final point that was made was about delay. This is quite a difficult one to

respond to because of course the Claimant hasn't proposed anything by way of taking these proceedings forward. It just says: let's have another CMC some time in the New Year. So we really have nothing to compare in terms of how long it would take to get the entire case to trial as compared with how long it might take to adopt a staged approach. But the Tribunal has my submissions already that this might be dispositive of the entire claim, obviously there would be a time saving in that event, or part of it, or that the evidence will be streamlined. In my submission that will mean that the stage 2 hearing can be brought on more quickly as a result of the issues having been narrowed.

On the question about a possible appeal, well of course one never says never about such things. But it's difficult to imagine the Court of Appeal would be particularly enthusiastic about an appeal on a question of market definition, which is a very technical exercise conducted by a specialist Tribunal. One struggles to envisage that it's actually likely to go on appeal at this stage, albeit, as I say, one can never exclude the possibility of course.

Unless the Tribunal has any questions, those are our submissions.

THE CHAIRMAN: Thank you. I'm not sure whether any questions wish to be asked by the other members?

MR HOLMES: Nothing from me, thank you, sir.

MR ANDERSON: Nothing from me at the moment.

THE CHAIRMAN: What we will do we will take a break here and we will consider what we are going to do in relation to that issue. How should we let you know when we are going to resume?

MS JOHN: For my part, sir, I'll simply mute and turn my camera off.

THE CHAIRMAN: That's the easy way.

MR KENNELLY: I will do likewise.

THE CHAIRMAN: Very good, thank you.

(12.01 pm)

(A short break)

(12.15 pm)

Ruling

THE CHAIRMAN: I'm going to give a ruling in the question of whether there should be preliminary issues.

This is a claim brought by the Claimant by way of a stand-alone damages claim under section 47A of the Competition Act 1998. It is brought by the Claimant which is a United Kingdom company which is or has been or intends to be engaged in the extraction and sale on international markets of cassiterite, coltan and wolframite. The Defendant is a trade association consisting of tin producing and processing corporate members.

What follows is intended to be an uncontroversial summary of the claim. It concerns the supply chains for tin, including the ore concentrate cassiterite and all intermediates, metal products, the metal tin and transformed products containing tin; tantalum, including the ore concentrate coltan, and again intermediates and metal products, the metals tantalum and niobium and transformed products containing tantalum; and tungsten, including the ore concentrate wolframite and all intermediate metal products, the metal tungsten and transformed products containing tungsten.

Cassiterite, coltan and wolframite originating from certain countries have historically been identified as conflict minerals. There are legal requirements in the United States and in the EU for certain parties dealing in these minerals to conduct due diligence as to their origins, as well as guidance, adopted by the

OECD, on how actors in the supply chain should identify, manage and minimise the risk of their mineral products being associated with conflict or serious human rights abuses.

The Defendant, together with the Tantalum-Niobium International Study Center, which established a programme in 2011 called ITSCI, which offers services to those who mine, process and/or export the concentrates cassiterite, coltan and wolframite originating in Burundi, The Democratic Republic of Congo, Rwanda and Uganda. The services consist, broadly speaking, of providing logistical and human resource networks to miners, processors and exporters in providing local information and monitoring services to traders and smelters in order to assist those operators to comply with their due diligence obligations under the OECD guidance.

The Claimant contends that the Defendant is the only provider of such services that has been certified by the OECD as aligned with the relevant OECD guidelines. The claim alleges, in summary, that the Defendant has engaged in anti-competitive agreements and abuse of a dominant position in breach of both the Competition Act 1998 and TFEU. It contends that there are two relevant markets: one market for responsibly produced and supplied cassiterite, coltan and wolframite concentrates and the metals and other products derived from or containing them originating from Burundi, the DRC, Rwanda and Uganda; and one market for international traceability services provided by the Defendant, which is said to be an international market. The customers in this market are said to be participants all the way along the supply chain.

On this basis, the Claimant says that English law is applicable to the claim. It contends that the United Kingdom is part of the relevant markets and

therefore the market in the United Kingdom is affected by the conduct complained of. They contend that the Defendant acted unlawfully and in breach of sections 2 and 18 of the Competition Act 1998, and Articles 101(1) and 102 of the TFEU, by maintaining exclusory membership practices by discouraging or preventing ITSCI members from dealing with non-members by providing unfair price or cost subsidiaries to ITSCI members and by embargoing or imposing unfair and discriminatory treatment on non-ITSCI members.

The alleged conduct about which the Claimant contends spans a period from 2013 to, as I understand it the date of the claim, 31 December 2020. The Claimant claims substantial damages of some US$25 million plus interest and costs as well as an injunction.

The Defendant says that the claim is unsustainable. It contends that the Claimant's market definitions are flawed. It says that the United Kingdom market is not affected by any of the conduct complained of, and that the law applicable to the claim is not that of England and Wales. It contends that the Defendant is not dominant on a United Kingdom market, for the purposes of section 18 of the Competition Act 1998, or on the EU internal market for the purposes of Article 102 of the TFEU. Further and in any event, it contends that none of the allegations for infringement is sustainable and none of the conduct complained of has caused the Claimant loss.

The Defendant has proposed that there should be a trial of certain preliminary issues or, by way of a split trial, that there should be the dealing with a set of issues in the first tranche and leaving other issues to be resolved in a second tranche. Specifically, it has proposed that there should be a trial of two preliminary issues or matters which are to be included in the first tranche of

a trial which may be summarised as follows. First, what are the relevant markets for the purposes of these proceedings? And secondly, if the Defendant had engaged in the conduct alleged in the amended claim, would the market affected or likely to be affected by that conduct be in the United Kingdom for purposes of English law being applicable under Article 63A of the Rome II Regulation?

The Defendant points out, in relation to the second, that the Claimant has relied on English law. It has contended that section 47A is applicable or that the TFEU is applicable via the application of English law and that the Claimant has not pleaded the applicability of any other.

The Defendant argues that if it is right in relation to these issues that will dispose of the claim. It says that the parties and the Tribunal will be spared the significant time and expense which would otherwise have to be incurred in investigating the conduct which the Claimant complains of which spans an eight-year period and concerns events in Burundi, the DRC, Rwanda and Uganda. Further it says that even if English law were applicable, and some issues in the claim still require a determination at a second hearing, nevertheless some issues would be likely to fall away or be limited in particular issues in relation to dominance; and in any event it says that a judgment on what the relevant markets were would ensure that any such issues would be dealt with more quickly and efficiently than they otherwise would be and the parties could focus on any relevant issues and including in particular any issues as to dominance and as to the effects of the alleged conduct in a more focused and streamlined fashion.

The Claimant has opposed the ordering of the preliminary issues or a split trial of the type proposed by the Defendant on essentially three grounds. The first, which

was included in its skeleton argument, is that the questions proposed arose out of tentative pleadings which are liable to change when expert evidence is received. The second, which was the matter which was developed by Mr Kennelly, Queen's Counsel, today, is effectively that the answers to the issues as to the relevant markets will mean, in almost any case, that the relevant markets include the United Kingdom.

In relation to the first of the markets, this is in part because the traders or exporters may be exporting to the United Kingdom, and further that the Claimant is trading derivatives on an international market which includes the United Kingdom.

As to the second, the traceability services market, international concentrate traders and consumers are involved in this international market and downstream verification is a feature of the ITSCI scheme and affects a market which includes the United Kingdom.

So, Mr Kennelly says, these issues will not be decisive.

Alternatively, he says that in any event a granular approach to markets is unlikely to make much difference to the competition case because even if there are multiple markets the Claimant still needs ITSCI services to trade in those markets and the Claimant trades in each of those markets from the United Kingdom.

The third point, which the Claimant relies on to oppose the ordering of these preliminary issues, is that the evidence going to the issue of market definition is inherently bound up with the evidence on liability and that there will be a duplication and waste if preliminary issues are ordered; and in particular there will be duplication by reason of, as Mr Kennelly says, the duplicative investigation which will be involved in issues of dominance and causation.

In our judgment the present is indeed a case in which it is appropriate to order the preliminary issues suggested. The power to make such an order is expressly recognised in Rule 53(2)(o). We consider that to order preliminary issues furthers the objective of dealing with the case justly and at a proportionate cost and contributes to saving expense and allotting to it an appropriate share of the Tribunal's resources.

If the Defendant is correct in relation to the definition of the relevant markets, then English law will not be applicable under Rome II. Furthermore, even if English law were applicable and there were further issues to be resolved at a further hearing, a determination of the relevant markets would be of great assistance in narrowing the issues and allowing the parties to concentrate on the issues of dominance and the effects of the alleged conduct by reference to the markets as found. Without such a determination the parties would have to produce evidence in relation to a very considerable number of different possible markets on a contingent basis.

Furthermore, given the breadth of the pleadings and the number of permutations which are potentially involved, the proposed way forward makes the case, in our judgment, more manageable for the Tribunal. In our view, the objections made by the Claimant to the proposed course do not carry conviction. In relation to the first, which is one which Mr Kennelly did not dwell on or indeed I think mention, which is that the pleadings are tentative, we would say only that the pleadings are now both extensive and detailed. The parties have pleaded the cases which they wish to pursue, and in our judgment this matter has to be considered on the basis of what the parties' pleaded cases now are.

In any event, the possibility of new input from independent experts is one which would arise even if there were to be a unitary trial.

In relation to the second main point which I have summarised above, namely the suggestion that the preliminary issues would not be determinative because the United Kingdom will always be part of that market, or the answer to these questions wouldn't make very much difference, we would say only, without having formed any more concluded view than this, that there does indeed seem a possibility that the markets as properly defined would not include the United Kingdom for the reasons given by Ms John in her reply. But in any event, we see real advantages in defining the markets to reduce the scope of any further arguments and evidence, including in relation to issues as to dominance, and the way in which the remaining issues arise will be both narrower and clearer on the determination of these preliminary issues.

As to the third of the grounds, we do not consider that there will be much, if any, overlap between the evidence in relation to liability and the issues going to market definition. But in any event, to the extent that there is such an overlap, we do not consider that it will cause inefficiency or waste and we are certainly not persuaded that any inefficiency in that regard outweighs the advantages of having the preliminary issues which have been outlined.

Mr Kennelly also made a point that to proceed by way of preliminary issues is likely to cause delay. As to that, we are not persuaded, as we have said, that there is the possibility that the preliminary issues will be dispositive. In any event it seems to us that there is a good prospect that the determination of the preliminary issues will allow for a second hearing which is streamlined and may come on quicker than the combined and full unitary hearing with all the many permutations which is the only alternative which has actually been proposed.

So, for those reasons, we will make directions in due course providing for the

determination of the preliminary issues proposed by the Defendant.

MS JOHN: I'm very grateful, sir, thank you.

I have an eye to the time. Would it be convenient if before lunch we aim to deal with the question of whether the security for costs application should be determined today and then the Tribunal can consider that over lunch? I'm quite happy to make the application as well. I just have an eye to what would be more convenient, given the hour.

THE CHAIRMAN: Have you spoken to Mr Kennelly as to dealing with it in that bifurcated fashion?

MS JOHN: I haven't, no.

MR KENNELLY: I'm happy for Ms John to take her own course. I'm afraid if the Tribunal decide to proceed with the application then I won't have much to say, based on the material before me. So I am in your hands. But yes, the bifurcated approach seems certainly more just from my perspective.

THE CHAIRMAN: When you said that you might have 45 minutes each, I really envisaged that as being 45 minutes to deal with both of these issues. But certainly I think that it would be quite sensible for you to deal with the issue of whether we can go ahead now or at least to start on that.

MS JOHN: I'll begin then and we will see where we are by the time I've got to the end at that point, whether it's a convenient point for Mr Kennelly to respond or for me to continue.

Application by MS JOHN

MS JOHN: The Claimant has asked that the Tribunal should hold over our application. These were its submissions of Tuesday. It's asked for another six weeks in which to file its evidence in response and then it suggested that we be given two weeks to reply to that and that we should file our reply on

Christmas Eve. We firmly resist that request and we do urge the Tribunal to proceed to determine the application today.

On this particular point, my submission is that the key question is this: has the Claimant had a fair and adequate opportunity to put its best foot forward today? If it has, then there is no unfairness in the Tribunal proceeding with the application today. We say that it has indeed had a fair and adequate opportunity.

I'm going to start by running briefly through the chronology. I appreciate the Tribunal will have the timelines on board by now from the evidence, but I'd like to show you some of the underlying documents.

So, for this, we are in tab 12 of the CMC bundle and if I can ask you to start at page 507, please. This is the first letter that we sent on 26 February of this year. If we can just skip through the headings for these purposes, we can see the first heading refers to the accounts. Sir, we wrote to Claimant to say:

"We have had a look at your accounts at Companies House. This is what we read from them."

There's then reference to the Britcon litigation, so that is the costs order that is outstanding against the Claimant in the DRC.

We set out what we anticipated at that point would be the likely costs of the litigation. In the final paragraph of this section we indicated, beginning in the third line:

"Regrettably if the position hasn't materially improved we'll be forced to consider making a security for costs application at the first CMC."

As early as February we flagged we thought this was a matter for the first CMC.

The final section, we requested further information, because we indicated we appreciate the position might have changed, since those accounts were filed. And in the final paragraph we invited the Claimant to consider making us

some sort of offer in the event that it couldn't satisfy us as to its financial position.

If we can turn next to tab 15 of the bundle, if we can skip forwards -- I'm sorry, that might be skipping into the second volume. I have moved all of mine into a new folder.

THE CHAIRMAN: Which page?

MS JOHN: 685.

THE CHAIRMAN: Yes, that is bundle 2.

MS JOHN: This is letter that we wrote in March, and this was in response to a Tribunal request that the parties liaise regarding the first CMC which was originally listed back in May. Over the page, we set out what we saw as being the agenda for the first CMC and --

MR HOLMES: Apologies, which tab is this?

MS JOHN: Tab 15.

MR HOLMES: Thank you.

MS JOHN: At page 686, and at (iii) we indicated that we thought our potential application for security for costs was an item 4 of the CMC agenda. That was in March.

If we then turn to tab 12 -- and I apologise for skipping between the two files. Tab 12, page 535, here I'm looking at the third paragraph on the page, beginning, "We note your intention". We refer here to all the various chasers that we have sent in the interim, asking for a response to our letter of 26 February. We identify that we have seen that new accounts had been filed at Companies House, that the position doesn't appear to have improved materially, and we ask for a response by reference to the most recent accounts.

So that was May.

We turn on to page 543 in the same tab, this is a letter 24 September --

THE CHAIRMAN: Sorry, which page?

MS JOHN: 543.

THE CHAIRMAN: Thank you.

MS JOHN: We can see, from the first paragraph, that this was a letter sent regarding CMC business generally in the hope that we might be able to narrow the issues between us ahead of today.

If we turn forward to page 545, section 3 addresses security for costs. In the second sentence, we indicate:

"In order to allow the orderly preparation of this application, we ask once again that you explain your client's reasons for declining to provide security or any reassurance as to its solvency. If you intend to oppose the application, please explain the basis for that opposition."

We could not have put that more clearly.

We then continue:

"We enclose a cost budget in the form of the High Court's precedent ."

So that indicated our present estimate of what we thought the proceedings were likely to cost. We indicated the amount that we were intending to seek.

In the final paragraph of this section, we put them on notice that if they continued to refuse to engage with us on this matter then we were going to seek our costs of the application in any event.

Page 550 -- sorry, 549 it commences -- we finally have a response from the Claimant on 15 October. Page 550, they address security for costs and here they say:

"We will separately provide a substantive response to your application. For reasons which will be provided shortly, neither the gross figure nor the amount

requested by way of security can be justified."

So they will respond separately, reasons will be provided shortly. That was a Friday evening. We waited another two working days. It got to the Wednesday morning and we filed the application by lunchtime. Skeletons were due on Friday.

Of course the Tribunal then gave the Claimant just short of a week in which to respond, it asked for a response by 4.00 pm the following Tuesday.

Now, against that backdrop, it is, to borrow Mr Marmor's words, "remarkable" for the Claimant to suggest that it was our fault that it is unable to give the Tribunal a proper account of itself today. The Claimant has had copious opportunity to identify what its financial position is and to prepare an explanation for the Tribunal. It knew what we were going to say about its financial position. It knew that an application was going to be made if our concerns were not addressed.

The simple truth of the matter is that the Claimant hasn't got its house in order and it wants a bit more time to try and do that. We say the fault for that should not be laid at our door, this was far from being an ambush. And we say enough is enough. The Claimant should not be permitted to protract this matter any further. It's had the chance to explain itself and there is no unfairness if the Tribunal proceeds today on the information that is currently available.

I will briefly address two points made in Mr Sellars' witness statement which he says the Claimant could not have raised ahead of the hearing today and should be allowed time to address. So there are various points they have not addressed and they would like a bit more time with, but there are two ways he says he could not address it.

The first is about the Claimant's contracts. It says: we could not disclose these any

sooner because there's no confidentiality ring in place and these contracts will show future income streams. Now, given the time restrictions, I'm not going to focus on the question of whether these could have been brought to our attention a long time ago. We say they could have been, I don't need to go into the detail. The important point is that, whatever these contracts might contain, they are not going to impact this application. In that regard I'm going to ask my Lord to turn up the second witness statement from Mr Marmor. It is at tab 27 of the bundle -- sorry, I think I have a false reference. It is page 27 --

THE CHAIRMAN: Tab 27.

MS JOHN: I'm sorry. 786 is the page number. Can I ask the Tribunal to just refresh its memory of paragraphs 16 and 17. (Pause)

Let me just pick up on the point in 16(b)(3). I'm going to show the Tribunal quickly the Claimant's most recent accounts to make good that point. It's back in tab 12 and page 387 is where the accounts commence. If we turn to page 390, we have the statement of financial position. We can see that the Claimant has no stocks, cash at the bank of £33,000, amounts falling due within one year of around 6 million; and it's net position is minus 275,000 in 2019, a net minus position of 320,000.

So stepping back, whatever might be in these two contracts it's not going to be enough. There is a six-figure annual shortfall in these accounts. There is a £6 million debt to be repaid, and we have Mr Sellars' indication in his witness statement that the Claimant wants to seek third party funding. So in my submission, in those circumstances, there is really no need for the Tribunal to wait and see these contracts; they are not going to move the dial.

The second point Mr Sellars makes, which he says could not have been addressed

ahead of today, is about the need to approach third party funders. It says it's been told that it can't do that until pleadings have closed. Now, in my submission, this has not been adequately explained. We have no explanation of why it's necessary to approach third party funders as the only option. We understand that the Claimant's financial position is weak, we take that indication from Mr Sellars. But what Mr Sellars doesn't give us is any indication of whether the Claimant has tried to obtain after the event insurance. We can't see why that would need to await close of pleadings.

We have no explanation, no suggestion, that it's spoken to its directors, its parent company, its associated companies. These are all potential sources of funding. No indication that they've been explored, let alone exhausted.

There's also no suggestion that the Claimant's representatives are working on a CFA or any sort of deferred payment arrangement; and that means that the Claimant is finding funding from somewhere, if that's right.

The Claimant has also not provided evidence that it has approached a range of funders and that they all took the view that the Claimant would have to wait until pleadings had closed. We've been given no particulars of what these discussions consisted of, who were they were with, when they took place. There are no email chains exhibited to Mr Sellars' witness statement, nothing.

Be that as it may, in my submission this is not a reason to hold over the application. The appropriate response is to determine it today. If the Claimant does really need to approach third party funders, it will have the time to do that before security has to be provided.

Now we have no difficulty at all with the structure of the order that we've proposed being modified to accommodate that. So if the Claimant needs more time to have those discussions, or if the payments need to be made in stages, we

would certainly have no objections to that.

But we say that that is the appropriate way to deal with this. It is not to push the entire application back to January or February, with all the delay that that will entail and all of the additional costs to my client in coming back another day, and of course potentially its cost exposure in the meantime.

So, for those, reasons we invite the Tribunal to proceed today. If the Tribunal is intending to rise at 1.00, I don't think I have quite got sufficient time left to complete the substance. So I don't know whether Mr Kennelly has time to respond or whether it's convenient perhaps to break now.

THE CHAIRMAN: Mr Kennelly, how long would it take you to address the issue of whether we should go ahead or not? I don't want you feel under any pressure of time.

MR KENNELLY: About 10 to 15 minutes is what I need for that.

THE CHAIRMAN: I think what we will do is we will hear you on that now, if we may, and then we will hear Ms John if she wants to add anything to that, that's it, and then we will break for lunch.

MS JOHN: Very well.

Submissions by MR KENNELLY

MR KENNELLY: Members of the Tribunal, three points of background which are important to recall in the context of this application of whether it should be heard now. The first is the Claimant is an SME. The Claimant is a small and medium-sized enterprise which has, by its own admission, struggled financially. Our case is that it had struggled financially because of the behaviour of the Defendant, but it's in a weak financial position. I appreciate that cuts both ways on how the Tribunal approaches security for costs, and I will come back to that. But that has to go for explain in part why the

Claimant has approached this matter in the way that it has. It can't be viewed in the same way as one would view a well-resourced multinational.

The second important background point is that -- and this is important point of principle -- the Claimant's failure to engage in correspondence does not mean that it is not entitled to proper time to respond to an application. A proposal, a threat, in correspondence is not the same as an application. My learned friend's submission treats the proposal and correspondence as if it were an application. The thrust of her submission is because the Claimant did not engage in the correspondence it should be deprived of the time they would ordinarily be allowed to have to respond to an application in this Tribunal. And that is not correct. Even if we don't engage in correspondence we are entitled to a proper time to respond to an application. There may be consequences in costs, of course, but we're not deprived of our time to respond to the application because of the Claimant's failure to engage in correspondence.

The third and important point is the timing. The application was made one clear day before skeletons and six clear days before this hearing. Now. Under the guide to proceedings, one of the considerations which you are encouraged to have regard to is whether the application will stifle the claim. But if evidence is to be adduced by the respondent to the application, to the effect that the claim will be stifled, the Claimant is under a duty, an important duty, to explain that by way of full, frank, clear and unequivocal evidence of its immediate financial position, and indeed to answer the questions that Ms John said ought to be answered in her submissions a moment ago. That's a legal duty on the Claimant and they can only do so by evidence. They can't could do so in one clear day before skeletons or six clear days before this hearing.

In the Commercial Court, if this were an ordinary application, one needing less than half a day like this, the respondent would be allowed 14 days to adduce evidence in response and time will be allowed for reply evidence and submissions.

So true it is, true it is, that the Claimant failed to engage in correspondence and it may be that the Claimant preferred not to incur the cost of it, hoped, perhaps wrongly, that the application wouldn't be made. But the Claimant's failure to engage since February cuts both ways, because the Claimant gave no encouragement to the Defendant that it was going to respond; clear since March or April that an application was required to compel the Claimant to act. But they waited until one clear day before the skeletons were due to go in. The application could just as easily have been made in September, when it was expressly said by them that they would make the application.

THE CHAIRMAN: I understand all that. I suppose that the exception to that might be the letter of 15 October.

MR KENNELLY: Indeed, sir, but that was very, very late. And I say that's too late, because even at that stage that did not allow us proper time to put in the evidence that we needed. The reason I say that is because of the factors that the Defendant relies on to say that security should be given. There are three factors that they rely on: the Claimant's accounts; the court order in the proceedings in Congo against the Claimant; and the fact that we've not paid the costs order made against us in these proceedings. Those three factors are prayed in aid against us. And they couldn't have been answered, even if an application be made on 15 October in time for this hearing. They do need time to allow us to respond.

On the first, the accounts, that is informed by the transactions which the Claimant

hopes to explain in evidence, the recent transactions where, despite great difficulty, it has managed to procure some business, notwithstanding a lack of ITSCI accreditation.

On the second point, the DRC proceedings, our evidence is that there is an appeal and a counterclaim in these proceedings. But we need to put in evidence to explain that, and we need to do it by reference to the original documents which have to be translated. That can't be done in a couple days.

On the final point, why haven't paid costs order made, we have important points to make about that and I will make it later in summary when we come to look at whether a payment on account should be made. There are serious discrepancies in the bill of costs that we were sent in respect of the costs order which have caused us to challenge it. Again, that needs to be explained in evidence to you.

You can't simply assume, as my learned friend invites you to, that we have no answer and that you can proceed to make the order against us as if our evidence will contain nothing of substance, that that assumption can be made us. That would be unfair and inappropriate, not least because of the way the Defendants themselves have put the application.

On the question of litigation funding, again my learned friend says, well, we've not got good evidence of that and we've not been very clear. That's the very point: that's what the evidence has to address. Giving us one clear day before submissions, or six days before the hearing, isn't enough time to set out that evidence. So it's simply unfair, it puts me in an impossible position to answer the application. I don't have the evidence, that the law requires me to have, in answering an application like this.

Those are our submissions.

THE CHAIRMAN: Thank you, that was very clear. Yes, Ms John.

Submissions in reply by MS JOHN

MS JOHN: I can be very brief.

Mr Kennelly's first point was the Claimant is a small company and in a poor financial position. That may be true. We would simply say that it has, nonetheless, elected to launch this litigation. It has elected to do so on an extremely wide-ranging basis and it has done so without, it would appear, having given any thought, certainly not any proper thought, to how it was going to fund the proceedings. And that's simply not appropriate: even small Claimants have to make sure that they give these matters some consideration.

His second point was he said that the Claimant is entitled to proper time to consider the application, even if it hasn't engaged in correspondence. That's true. We would say it's had that time, the Tribunal gave it until the following week, it didn't require it to respond in its skeleton argument, it gave it the additional time. The Claimant should have availed itself of that opportunity.

Finally, Mr Kennelly referred to various other matters. He referred to the litigation in the Congo where there's a cost order outstanding. He also referred to the costs of our amendments and he says he wants to put additional evidence in on those points. We say, yes, he may do, but he could have done it before today. There's no reason given why that could not have been done before.

Unless there are any further questions, those are the only points to pick up.

THE CHAIRMAN: I don't know whether there are any further questions from my fellow members?

MR HOLMES: Not from me.

MR ANDERSON: Not from me.

THE CHAIRMAN: Thank you very much. We will consider that over lunch and we

will tell you what we've decided at 1.45.

(1.02 pm)

(The short adjournment)

(1.55 pm)

THE CHAIRMAN: I think we have everyone now. Welcome back.

Ruling

THE CHAIRMAN: The issue which we have to determine is whether we can and should proceed today with the Defendant's application for security for costs. We have, with some hesitation, concluded that we should not. It is true to say that the possibility of an application for security was raised by the Defendant as long ago as February and that it has been chased by the Defendant in correspondence regularly since. But it is also fair to say that the Claimant did not give any response and that has two aspects. It was obviously unsatisfactory that the Claimant did not reply, but equally the Claimant did not, as Mr Kennelly says, give any encouragement to the idea that it would be dealt with, that is at least until a letter of 15 October of this year which was already somewhat late. The application, and this is not a criticism of the Defendant but it is a statement of fact, was only issued I think on 20 October. The Claimant says that it cannot deal with that application and that it needs time in which to deal with it properly.

We have decided that, because of the potential consequences of this application to the Claimant and the claim, we need to give the Claimant more time.

We should, however, make three things clear. First of all, at present there appears to be a clear prima facie case for security for costs. Secondly, if the Claimant is going to continue to oppose the application for security for costs, we would expect full, frank and detailed evidence in relation to the Claimant's financial

position and possible sources of funding, including from directors or shareholders. Thirdly, we intend to set a timetable in relation to dealing with this application for security for costs which is considerably more abbreviated than that which has been proposed by the Claimant, leading, we would hope, to a hearing in relation to this on 3 December.

THE CHAIRMAN: I don't know who wants to speak now.

MR KENNELLY: Sir, in no particular order then. I am unavailable on 3 December. These things are not set out for counsel's convenience of course.

THE CHAIRMAN: Not for leading counsel for security for costs, Mr Kennelly.

MR KENNELLY: No. In order to do justice to my client, I will ask, because two weeks should make no difference really, if we could have it in the week beginning 13 December, for the sake of two weeks, and for the fact that I have basically prepared this and it will lead to duplication to expect my junior to do it. We ask that the hearing take place on the week of the 13th. It does not even have be two weeks, it could be Monday the 13th -- whatever date suits the Tribunal of course.

MS JOHN: I can respond to that briefly, sir. We are very grateful for the Tribunal's indication that it proposes the timetable should be abbreviated. We would be content with 3 December. Mr Kennelly does of course have a junior who will also have been working to prepare this case for today and who I am sure is perfectly capable of stepping into his shoes for these purposes.

MR KENNELLY: I'm sorry to cut across my learned friend. My junior has sent me a message by WhatsApp saying he has a court commitment on the 3rd. I'm sorry, Ms John, I should have said that before. I didn't have that information when I made my submissions. So we would have to instruct fresh counsel which would involve unnecessary costs. I do apologise, I appreciate that

inconveniences the parties but I can be available at any time in the week of the 13th, if that's --

THE CHAIRMAN: What is the last day of term?

MR KENNELLY: 21 December.

THE CHAIRMAN: Right. Well, I think I could say with -- for my part, I don't know about the other members of the Tribunal, I could do half a day on the 17th. Can the court accommodate us on the 17th?

MR HOLMES: I can do that.

MR ANDERSON: I can do that too.

THE CHAIRMAN: Right. Well, then, we will say that, the 17th.

MR KENNELLY: I'm very grateful.

MR HOLMES: Are we fixing a time for that, on the 17th?

THE CHAIRMAN: I was going to say 10.30, unless something crops up which makes that impossible, but 10.30.

MR KENNELLY: I'm grateful.

THE CHAIRMAN: What I had thought we would do, however, is set the rest of the timetable for the phase 1 now, because, as you will hear, it is a timetable which should be set bearing in mind the timetable to deal with security for costs and the potential, if security is ordered, what that might be. But it does seem to me, subject to what you say, that the Tribunal might as well get on and make further directions orders if it can.

MS JOHN: May I jump in at that point, sir. Before we proceed to do that, there are a couple of other matters to raise. The first is that, in view of that ruling, we would like to request a general stay of the proceedings until this particular issue has been determined. Of course my client is keen to get this matter heard and disposed of. On the other hand, it is genuinely deeply concerned

about the cost exposure that it's currently subject to and would request that it's not required to do anything further until this matter has been dealt with.

That's not to say that we can't still deal with directions this afternoon, but it is to say that I will be asking that we shift the hearing back and we then set dates by reference to X number of weeks from the determination of the security for costs application, rather than setting fixed dates if you see what I mean.

THE CHAIRMAN: Am I wrong to think that it's sensible to proceed to fix dates at all or should all of that be rolled up into the hearing on 17 December?

MS JOHN: I think for practical purposes it probably makes little difference either way unless the Tribunal is intending to hand down a judgment on 17 December. If you are intending to reserve it, then of course we will still be in a position of having to ask for directions that are set by reference to X number of weeks from the date of the determination.

MR KENNELLY: Sir, may I intervene there. Now we know there will be a preliminary issue trial, having seen the directions that my learned friend has proposed I think they can be agreed. Rather than go through it now, working back from a hearing date two months later than November 2022, it may be better for myself and my learned friend to work up an agreed timetable which then the Tribunal can apply on the 17th if that's -- because I also (inaudible) stay for my own selfish purpose, which is that our clients will be fully occupied on our evidence for security for costs. That is going to be a major task and we would rather focus on that than deal with disclosure reports and EDQs.

If the Tribunal is minded, we would agree with my learned friend's proposal to take no steps save those in relation to security for costs before 17 December. But in the event that you decide to proceed, or make orders, then we will have an agreed timetable to give to you.

THE CHAIRMAN: Right. Do the other members of the Tribunal want to comment in relation to that?

MR ANDERSON: If I could speak first, simply because I think Mr Holmes may not have unmuted when he was offering any observations there. I would be content to what's proposed. It will always be subject to our review and assessment as to whether we think it's appropriate. Of course I do know that what you'd considered, sir, was a timetable that was taking account of the need to meet a prospective award of costs if one was to be made. But an easy answer is to allow the proposal that's been advanced both by Ms John and Mr Kennelly, and we can then ratify it or otherwise in December.

MR HOLMES: Apologies I was on mute. I was saying I was happy with what was being proposed.

THE CHAIRMAN: Right. So that's what we will do. The proceedings will be stayed for all purposes other than dealing with the application for security for costs until 17 December, or, should that date for some reason be impracticable, until security for costs is dealt with by the Tribunal. You will try and agree directions and the Tribunal will consider and either ratify or amend that proposal on the occasion when security for costs is considered.

MS JOHN: Sir, can I clarify, are you envisaging that Mr Kennelly and I will also try to agree directions leading up to the hearing on the 17th or should we deal with that now at least?

THE CHAIRMAN: No, I was planning to deal with those now. Why not?

MS JOHN: Thank you.

MR KENNELLY: In that case, sir -- sorry, Ms John, you go ahead, please.

MS JOHN: I was going to suggest working backwards, that that would mean skeleton arguments on 10 December; our evidence, if any, say, on

3 December, that would give Mr Kennelly a week to address that in submissions. On the basis that we have two weeks to deal with what Mr Kennelly produces, that would mean their submissions are due on 19 November.

THE CHAIRMAN: Evidence.

MS JOHN: Sorry, evidence, I beg your pardon.

MR KENNELLY: Sir, if I may, the most important thing in this exercise is the production of the evidence, our evidence. Therefore it should -- it should take an extra week. My learned friend does not need two weeks to address that evidence from us. This is already a much more restricted timetable than the one we proposed to the Tribunal and so we would ask until 26 November for our evidence. They won't need more than a week to address it and deal with it in submissions. So we will need until the 26th.

I think realistically, the timetable being so constrained already, that is the minimum we need to produce the evidence that's required.

MS JOHN: Well, it's a little bit difficult for me to say how long we're going to need because we've got really no idea what's going to be landing if we agree to that timetable. I would hope it's on the understanding, if we need a little bit more time, that Mr Kennelly's clients will be accommodating.

MR KENNELLY: Of course, because we are expecting submissions, so of course if that's necessary -- but we record the burden is very much on us. If the evidence we produce is inadequate, if there are gaps that will be to our detriment. So any problems with it I'm afraid will be a problem for us and not for my learned friend.

THE CHAIRMAN: Yes. Why shouldn't the Defendants have, let's say, until 6 December? I know that's largely a weekend just but a bit more time if they

needed it. If I gave you, the Claimants, until 26 November, the Defendants could have until 6 December.

MR KENNELLY: I would be content with that, sir.

MS JOHN: I would appreciate that extra time, thank you.

THE CHAIRMAN: So are the other members of the Tribunal content with that, Claimant's evidence 26 November, Defendant's evidence 6 December, skeletons 10 December?

MR ANDERSON: I'm content, thank you.

MR HOLMES: Fine.

THE CHAIRMAN: Yes. Now what else do we need to deal with?

MR KENNELLY: My learned friend has an application for -- in terms of contested matters, I think that leaves the application for payment on account of the costs order that was made in their favour by consent. So it is again for Ms John. I have submissions to make in response.

MS JOHN: One additional item, sir, it also leaves application for costs of today's hearing. I am happy that we park that and deal with that also on the 17th, but we have applied for our costs in any event. As it turns out our preparation for today has to a large extent gone by the wayside. We do say that this is in large measure the Claimant's fault.

THE CHAIRMAN: I do remember Mr Kennelly saying, during the course of his submissions, that if a Claimant simply fails to respond to correspondence it may have cost consequences.

MS JOHN: I also believe I heard him say that, yes, sir.

MR KENNELLY: Indeed. But those costs consequences should be visited on us at the 17th, when you have seen our evidence and decided the merits of the application. That may be material to just how severe those consequences

are.

THE CHAIRMAN: We'll come back to that.

MS JOHN: Very well.

THE CHAIRMAN: We will come back to the issue of costs of today later.

MS JOHN: Yes, that was understood, thank you.

Application by MS JOHN

MS JOHN: Sir, then we have our application for a payment on account of costs of the amendment. This is a fairly discrete and quite simple point. The Claimant hasn't filed any written submissions or any evidence in response to it. The submissions and Mr Sellars' evidence only addresses security for costs. We have asked for an interim payment of £40,000 on account of these costs.

Could I remind the Tribunal of the order that was made in July, at tab 12 of the bundle at page 505. The Tribunal will recall that this order was made by consent. Over the page, at paragraph 4, is the order that was made. It's:

"The costs of and occasioned by the amendments, including the costs of responding to allegations in the original claim form now withdrawn."

So in principle these costs are due, but the amount has not been agreed and they've not been submitted for detailed assessment. There are three points for me to address today. The first is whether the Tribunal has jurisdiction to make an order for payment on account. The second is why it's appropriate to make it. The third is what the amount of the payment should be.

On the first question, jurisdiction, in correspondence the Claimant had suggested that the Tribunal does not have jurisdiction --

THE CHAIRMAN: Is that point pursued?

MR KENNELLY: Sir, I am taking instructions. I am taking instructions. I can't speak

before --

THE CHAIRMAN: You are taking instructions.

MR KENNELLY: -- I have confirmation, sir.

MS JOHN: Let me briefly complete the point then. It's not correct, so I don't --

THE CHAIRMAN:

MR KENNELLY: Sorry, Ms John, I don't want to waste your time. We are not taking that point.

MS JOHN: I'm grateful. So the question is whether it would be appropriate to make this order now. The reason why we seek it, in simple terms, is that this is another topic on which the Claimant has not engaged with us and as a result the Defendant is being kept out of its money for longer than it should be. Mr Marmor has set out the chain of events in his witness statement. We don't need to turn it up I appreciate the Tribunal will have read it. But for your note, sir, it's at paragraph 37 onwards.

For now I'm simply going to show you how matters presently stand. Could we go to tab 15 in the bundle and turn up page 757.

MR HOLMES: Do you know what page that is on the electronic? I'm on the electronic one --

MS JOHN: That is 854.

MR HOLMES: Thank you very much.

MS JOHN: This is a letter from the Claimant dated 20 October. If we turn to page 759, we have a section 5 "Cost of the amendments". What we can see here is generalised assertions followed in the final sentence of the second paragraph by the familiar refrain, "We will respond in detail on this separately". That was now nine days ago, we've heard nothing more, and it's now been two-and-a-half months since we first wrote to the Claimant setting

out our quantification of our costs. It's not been addressed in correspondence, it's not been addressed in Mr Sellars' witness statement.

In the circumstances, we say it is appropriate for us now to request that the Claimant should make a payment on account.

Turning to the quantum, we have asked for £40,000. I will show you briefly where that number comes from. If we turn back to tab 12 of the bundle, on page 541, this is a letter from 17 August where we set out a breakdown of the total costs that we had incurred as a result of the amendments. So if we have a look at the table, the second row refers to:

"Preparation of responding to the allegations in the original claim now removed".

So that's one category of amendments that's been covered.

There were parts of the original claim form that have been dropped. So, for example, there was originally an allegation that the ITSCI programme amounted to what was called "closed industry standardisation". That's been dropped. And there are other examples, there was originally a claim for reputational damage, there were claims for declaration, which the Tribunal has no jurisdiction to make, and so forth. Parts of the claim has been abandoned. Here we have calculated 7 per cent of the original costs of preparing the defence.

Then in the next category, preparation of the Amended Defence, there have been some slight corrections that have been made to this table in correspondence. The Claimant is aware of them. Just for the Tribunal's note, for Sherrards Solicitors the figure should be --

THE CHAIRMAN: 35,372.50.

MS JOHN: Thank you, and the total then comes to 29,927.

THE CHAIRMAN: Point 39.

MS JOHN: Quite so, yes, thank you. Now in my submission that is a reasonable amount. The Claimant's amendments were significant in their volume. The Tribunal has looked today at the pleadings. You have seen the amount of the red pen that is in there, if I can put it in those terms.

I also need to emphasise that the amendments went through multiply iterations. So the Tribunal saw yesterday, with the issues over the bundle, that there was a version originally served in March. We raised some questions about that. It led to the Claimant amending its amendments. So the version that was ultimately filed on 10 May is not the version that was originally put to us.

I believe that you have a tab 4A which is a compare between the March version and the May version. Could I ask you briefly to turn to that. I'd just like to show you the significance of the amendments in terms of their content, so not just their volume but also their content. If you could turn in this tab to page 21, we have a mark-up of market definition which we already looked at this morning.

If the Tribunal has that, I would just ask you to look at the first sentence of paragraph 27. What this shows is that the amendments we were originally sent in March didn't include the derivatives. We asked some questions, the Claimant came back with a new version of amendments that included the derivatives. Now that's only two little words. But that is an entirely different case on market definition and the entire case had to be reconsidered in the light of that shift. So each iteration has put us to additional costs, in addition to the fact that this, is to start with, an extensive set of amendments.

So in my submission 92,000 is not an unreasonable sum and today we are asking for 43 per cent of it at £40,000. In my submission it is likely the Defendant is going to recover more than that at detailed assessment and the Tribunal can and should feel confident in directing a payment of that amount today.

MR HOLMES: Can I ask why 43 per cent?

MS JOHN: A figure 40,000 has been chosen. There's no particular magic to it, Mr Holmes, I'm afraid. The point is simply it's less than 50 per cent.

MR HOLMES: As I thought, I was just checking I hadn't missed something.

MS JOHN: Not at all.

MR ANDERSON: Could I just ask you one question about the claim for fees and costs in relation to responding to allegations which were removed. I'm just a little unclear as to why that should have involved any great time and effort at all. If it's gone, it's gone. All right, the pleadings needed to be tidied up to reflect that, but surely that wasn't very time-consuming or onerous?

MS JOHN: Yes. I see your point, sir. The reason that we claim those costs is that when the defence was originally filed, so the original one back in December, we incurred costs in responding to those in the original defence, and those costs have been wasted because those elements of the claim had not been pursued. So that's the reason for that separate category.

But you are quite right to observe that it's a small amount. As you saw in that letter from August, we've had to do an estimation, because we can't say precisely, but we've suggested 7 per cent.

THE CHAIRMAN: The order of 26 July was in fact for the costs of and occasioned by the amendments and including costs of responding to allegations in the original claim form now withdrawn. So that covers the first of those categories.

MR ANDERSON: Thank you. I understand the explanation.

THE CHAIRMAN: Mr Kennelly.

Submissions by MR KENNELLY

MR KENNELLY: Thank you, sir.

As you've seen, from the letter from my solicitors that you were taken to by Ms John, we have challenged the 98,000-odd cost bill because we identified discrepancies and, as we said in the letter that she took you to -- we didn't set out what those discrepancies were in that letter envelope, unfortunately, and I would take you no those now. That explains why we have a concern about paying even the reduced amount on account because the discrepancies are really quite large.

If we could go back, please, to the costs which are listed in the hard copy bundle at page 541, in the first CMC bundle, and I think in the electronic bundle it's 575. It's the letter from Sherrards dated 17 April 2021. The first --

THE CHAIRMAN: Sorry, I'm not with you yet. Which page is it?

MR KENNELLY: In the hard copy, it's page 541. In electronic, which I don't have in front of me, I am told it's 575. I hope that's right.

MR HOLMES: This is Sherrards letter of 17 August to which Ms John talk us a moment ago.

MR KENNELLY: It is indeed, sir, yes. We will begin with the original claim. Now the original defence to the original claim was itself a substantial document. It was the 79 pages long and we see the cost that was incurred in drafting it by reference to the 7 per cent figure. So because we're told that 7 per cent of 24,000 for the solicitors, 7 per cent of 41(?) for counsel, the total cost of producing the original defence was £66,170. You will see also that no expert costs were incurred in producing the original defence. Expert, 7 per cent of zero in relation to the original defence to the original claim.

As I say, the total cost of that is just over £66,000, and obviously we amended and they produced the Amended Defence.

Just pausing there, the Amended Defence was served on 26 July 2021. There were obviously some major amendments, it added 44 pages to the original defence. The original defence was 79 pages long. Just in terms of a crude assessment of how much was added, 44 pages were added, including amendments reflecting our developed market definition.

But pausing there, the Defendant's market definition case remained the same as it had been in the original defence, which is that each metal is a separate market, at each stage of the supply chain the market is separate. That remained their case. Plainly they had to answer what we had said, but their core market definition remained exactly the same as it had been in the original defence.

But then we look at the costs incurred in this amendment, and it adds up to just below £99,000, significantly more than they'd incurred in drafting the original defence. And in fact now we see that the total for drafting the original defence and the amendments is about £165,000 in total.

So dealing at this stage, we have a real concern about how such significant costs were incurred in making amendments which vastly exceeded the costs incurred in drafting the original defence for a claim which the Claimants have said consistently is extremely weak, and that's the Defendant's consistent position, and which they address comprehensively in the original defence which was already a lengthy document.

THE CHAIRMAN: This is responding to a claim which has been recast by you, isn't it, Mr Kennelly?

MR KENNELLY: Yes.

THE CHAIRMAN: That might add to the cost.

MR KENNELLY: We wouldn't be surprised if it did. It's one thing to say it adds to

the cost, but then to say that nearly £100,000 is needed to make amendments for a defence, which already had the benefit of Ms John, and so it was a comprehensive and thorough document. It's very odd that the amendments should vastly exceed the costs of drafting the original defence, to which Ms John herself contributed significantly, we see, by the costs incurred in relation to counsel.

So we wrote back -- and here at least we have some correspondence. We wrote and said we thought it was exorbitant. They replied to us and adjusted the figures down to 92,000 which, although we're grateful for the adjustment, did give rise to concerns that the figured may not be entirely reliable.

But then this, members of the Tribunal: we compare it to the cost budget. If you go back -- I think Ms John refers to this document -- to the evidence budget, dated 7 September 2021, so two months after the Amended Defence was actually filed. That's in the CMC bundle, page 496, electronic bundle I think page 530. In the hard copy it's page 496. Does the Tribunal have that document?

So this, as I say, was their budget dated 7 December 2021. So significantly after the Amended Defence had been drafted and we see the costs incurred and the costs estimated for statements of case. So the work done and to be done is the column on the far left, and the second item is "Issue statements of case" which we take to be the Amended Defence. And we see that the costs that are incurred, these are the total costs incurred, both for the original defence and for the amendment, because this is now in September 2021, add up to -- incurred, it's £64,000 plus £19,000, which is about £83,000 incurred, then estimated further costs, much lower figures, adding to a total of £88,936. That's the total cost for their pleading, including future estimated costs, in

circumstances where we are told that their total costs actually are £165,000 in the letter that I took you to earlier. That is a major discrepancy, in our submission.

It may be explained by the fact that one sees the breakdown over the next page. On page 497 of the hard copy, so it's the next page of the cost budget, we see the breakdown, and halfway down on the left-hand side we see "experts' costs", we track that across, "experts' costs to the question of issue statements of case --"

THE CHAIRMAN: I'm very sorry, I have now lost you.

MR KENNELLY: I'm sorry, sir. On the left-hand side we have the column of the various cost units, those that incur cost, and experts' costs are about halfway down the left-hand column.

THE CHAIRMAN: You are still on 496?

MR KENNELLY: No, 497, sir. This the breakdown which you see in 496 --

THE CHAIRMAN: I'm with you. I understand.

MR KENNELLY: Now we have the breakdown. So on the left-hand side we have "experts' costs" and these are of course costs as at 7 September 2021. And so we track that cross-examination and we see that in relation to statements of case the figure given for experts' costs, both incurred and estimated is zero. That explains in part why the total -- which doesn't answer entirely because the figure is so divergent, but that explains why we have the total figure for the statement of case of 88,936. It's said here that no experts' costs have been incurred in relation to the pleading at all and that's reflected later in the same document. And this in circumstances where we're told in that letter that I showed you earlier, about -- the figure that's given, £20,440 is incurred by experts in preparing the Amended Defence but that's not what the cost budget

says and it doesn't come close to explaining such a massive divergence between the £83,000 said to be incurred in the budget in total in relation to the Amended Defence, and the £165,000 we are now told in the August letter.

So in view of those discrepancies we are reluctant to pay even 40 per cent of what's said to be the total because the gap is so enormous, and we want to raise these queries with the Defendant in correspondence and see what they say. We plainly accept we have to pay their costs, we've accepted that, but there's a significant disagreement between us on their quantum of those cost and until that is resolved it would be inappropriate to make a payment on account.

THE CHAIRMAN: Yes, thank you.

Submissions in reply by MS JOHN

MS JOHN: I will do my best to respond to those points. Obviously I have had no notice of them so I am slightly limited in my ability to discuss the detail of this.

My headline submission is that these are matters for detailed assessment, not for today. But to take the points in turn, the first point was Mr Kennelly said well look at what was spent on the original defence, we can work it out, you tell us what 7 per cent was we can work out what 100 per cent was, and that looks like it's less than what we have on the Amended Defence.

The difference between these two numbers is quite simply because the amendments required us to involve our experts. So you can see that the amendment costs include £20,000 for our experts, the costs withdrawn don't; and that's because the points that were withdrawn were not matters that required expert input. That's the reason for that difference.

Mr Kennelly said, well, the Defendant's market definition didn't change as a result of the amendments. That's true. But we obviously had to think about whether that was still the correct market definition or not. An entirely new case had

been presented to us, we had to consider that, it was right that we involved our economists in doing that. Yes, the output was that the position didn't change but that doesn't mean that costs weren't incurred in reaching that position.

Then as to the cost budget, we said quite explicitly, both in Mr Marmor's statement, and in our skeleton argument, that we have carved out from that budget all of the costs that are being claimed in the July order. That's the reason that they don't bear that much relation to each, it's because those are being treated as entirely separate.

THE CHAIRMAN: So the costs budget is completely separate.

MS JOHN: It is, absolutely.

THE CHAIRMAN: The only cost which are left in there for pleadings are the non-ordered costs, you say.

MS JOHN: Yes, precisely so. We wouldn't seek security in relation to costs that we're already entitled to claim elsewhere; and that was the purpose of this budget, was to calculate a number for the security for costs application.

Beyond that, sir, it's (inaudible) for detailed assessment, I can't go into the figures any more than that because I'm not prepared to do that. We were given no notice of what the detail of these arguments were going to be, but in my submission 40,000 is a reasonable sum, given the extent of the amendments, the changes in the position that was put forward in those amendments, the work that was required, and you can be confident we will recover more than that at detailed assessment.

THE CHAIRMAN: Yes, thank you. I think we should probably speak amongst ourselves for a short while in relation to this. So we will come back when we're ready.

(2.41 pm)

(A short break)

(2.46 pm)

Further submissions by MR KENNELLY

MR KENNELLY: I appreciate you've probably made up your minds and since I ambushed Ms John I can hardly criticise being ambushed myself, but on her last point I did have a point to make, the point about the costs budget, which I would have made had I had a moment to make it.

THE CHAIRMAN: You had better make it, Mr Kennelly. I don't want you to think that you have a very good point which we haven't heard.

MR KENNELLY: It won't take very long, whether it's good is a matter for the Tribunal.

She said that the cost budget made sense because it carved out the July order. The July order of course covers the cost of the amendments and 7 per cent of the old defence. So that figure of £88,000 that's there for the statements of case still makes no sense, it should be 93 per cent of the cost of the old defence, it should be 93 per cent of £66,000, if it does genuinely carve-out the July order. Because it shouldn't cover any of the costs of the amendments. But instead of being 93 per cent of £66,000 it's just over £88,000. That's my point.

THE CHAIRMAN: Thank you.

Ms John, do you want to say anything in response to that?

MS JOHN: I'm not in a position to respond at that level of granularity, I'm sorry.

THE CHAIRMAN: Right. Thank you.

Ruling

THE CHAIRMAN: The application is made for an interim payment by the Claimant on

account of the costs which were ordered by the Tribunal's order of 26 July 2021, paragraph 4, whereby the Claimant:

"... was to pay the Defendant's costs of and occasioned by the amendments to the original claim form, including costs of responding to allegations in the original claim form now withdrawn in an amount to be assessed if not agreed."

As I have said, that order was dated 26 July 2021. Since that date there has been no agreement. There has been no payment by the Claimant of any part of those costs and two-and-a-half months have elapsed.

In those circumstances, if a sum can be shown to be one which is likely to be recovered by the Defendant on a detailed assessment, it appears to us appropriate that an order for an interim payment should be made. The question then arises as to what amount might be appropriate. A sum which has been put forward is a sum of £40,000. That is based on a figure which is contained in a letter from Sherrards Solicitors sent on behalf of the Defendants on 17 August 2021, albeit somewhat adjusted. That involves a calculation of the Defendant's wasted costs, at that stage said to be £98,852.39 which has been altered and adjusted downwards to a sum of £92,927.39 made up of a sum of some £4,000-odd in respect of the preparation of responding to the allegations in the original claim now removed, and a sum of some £88,000-odd in relation to the preparation of the Amended Defence, including sums in respect of the solicitors of £35,000, counsel £32,000 and the experts £20,000.

The Claimant contends that there are sufficient discrepancies in relation to what has been indicated by way of costs for it to be inappropriate for there to be any order for an interim payment on account of costs. We are not able to accept that. It appears to us that we can proceed, albeit with caution, of course, as to

the amount which would be recoverable on the basis of the figures which I have just indicated, and that we can have the appropriate degree of assurance that a sum of £40,000 is one which is likely to be recovered on a detailed assessment.

Accordingly, we intend to make an order for an interim payment on account of costs of £40,000 payable by the date which, although I should hear Mr Kennelly on this, but prima facie it appears to us that the date which was given by the Defendant as the date that they sought this payment to be paid by which was 30 November, that should be the date.

MR KENNELLY: Sir, unless I'm told otherwise, yes, we can accept that.

THE CHAIRMAN: Right. Is there anything outstanding? I suspect there isn't anything contentious outstanding.

MS JOHN: That's correct, sir. There are a couple of other items of business that we can usefully deal with. The first is the confidentiality order. The parties have agreed the terms. Obviously it's a matter for the Tribunal whether it's content to make the order in those terms. I don't know whether you would like to hear from myself or Mr Kennelly about that, whether the Tribunal's had a chance to read it. It's at tab 7 of the bundle.

THE CHAIRMAN: Well, I have read it, but would you like to draw our attention to any unusual or salient points if there are any matters which you think we should particularly be considering?

MS JOHN: As far as we are concerned, sir, this is on entirely standard terms. It's a precedent that I've used in the National Grid v Cables case and also in one of the interchange cases that's before the Tribunal. It is essentially a two-tiered structure, whereby one has an inner confidentiality ring that's confined to external advisers, so solicitors, barristers and any experts who are

instructed; and then there is an outer ring which allows individuals within the clients to access a more limited subset of confidential information where that's necessary in order for the parties to be able to take instructions properly. Then there's provision made for applications to be made in the event of disputes about who is in the ring, what information goes into which ring and so forth.

MR KENNELLY: I have reviewed the draft order as well and can adopt everything that Ms John has said to you about it.

MR HOLMES: It looked familiar to me, it may be it was from National Grid.

MS JOHN: It was indeed, sir, yes.

THE CHAIRMAN: I think we are all happy to approve the terms of the confidentiality order.

MS JOHN: Thank you.

Then I think the only other item left over, subject to Mr Kennelly and myself agreeing directions, is the question of expert evidence. I believe Mr Kennelly and I are agreed on the experts that we would wish to instruct, but again this is subject to the Tribunal confirming that it's content for us to proceed in that way.

So we would both request permission to instruct an expert economist, and the economist will address just market definition for the purposes of the preliminary issues hearing, albeit in due course there will be other matters for them to address as well if the claim proceeds past stage 1.

We also ask for permission to adduce evidence from an industry expert, and the essential reason for that is to make sure that the economists have all of the information that they need about how the various supply chains work for them to be able to give their opinions about where the lines are to be drawn for the purposes of market definition.

MR KENNELLY: And the Claimant will need also an expert economist and an industry expert for the same purpose. Plainly as much will be agreed as is possible but at the moment we'll need our own experts.

MR HOLMES: Will you be giving consideration to having a common industry expert? Or is it already clear that you will want separate industry experts? I appreciate you have separate economists.

MR KENNELLY: In an ideal world one would have a shared industry expert because it should be common ground, but I think in reality it would be inefficient to try and have a common expert because it would effectively mean instructing a third expert. Neither side is going to give up the expert they need themselves for the purpose of the preliminary issue.

MR HOLMES: Understood.

MR KENNELLY: But the experts will of course seek to agree between themselves as much as possible and that is what the Tribunal expects.

MR HOLMES: Thank you.

THE CHAIRMAN: Right. Subject to any different views being expressed by the other members we're happy to say that you should each be able to instruct an economist and an industry expert. Obviously in the ordinary way we would expect as much as that as possible to be agreed.

MS JOHN: I'm grateful, sir, thank you. I think that concludes the business from our perspective.

THE CHAIRMAN: Very good. Is there anything else from the other members of the Tribunal?

MR HOLMES: Not from me.

MR ANDERSON: Nothing more from me.

THE CHAIRMAN: I am reminded, we did say something about costs of today.

MS JOHN: We did. I apologise, sir, my junior in fact nudged me in the break and said he thought that was a matter for today. I'd understood you to be parking that for December. Let me turn to that now.

THE CHAIRMAN: I haven't decided one way or the other. We haven't discussed that in any detail.

Further submissions by MS JOHN

MS JOHN: Yes, of course.

We made an application for our costs of today in any event on the basis that if the Claimant had engaged with us properly and in a timely fashion in correspondence we would not have incurred the costs of making today's application, or if we had, they would have been lower or they would have been properly focused. We say it was plainly unreasonable to ignore all of the correspondence on this issue in the way that the Claimant had done. And on that basis we've asked for our costs of the security for costs application today.

We've filed a statement of costs and I'm happy to address you on quantum, or I don't know if it's more convenient for me to pause there.

THE CHAIRMAN: I think the next thing is to hear Mr Kennelly in relation to the question of whether we should be making any order today as to costs.

Further submissions by MR KENNELLY

MR KENNELLY: Thank you, sir.

Sir, when you come to consider costs in relation to the security for costs application, plainly your discretion is broad and you will take into account a range of considerations. The ultimate evidence that is deployed by the Claimant and the ultimate result of the security for cost application will be material considerations that you will take into account. The point that I made earlier in my submissions when I raised the question of costs was to the effect that

even if we succeed in resisting the security for costs application in December the Tribunal may well take the view that in view of the correspondence a different order may be made by you than that which would ordinarily be made. That's the point I was making to you about how you would reflect our conduct in your costs order. It will be premature, in my submission, to deal with costs now because you don't have the full picture, the full picture will be before you when you come to resolve it in December, and to the extent that you want to reflect the correspondence, or the lack of it, that will be the appropriate moment to do so.

THE CHAIRMAN: Right. So you are saying that the costs of the security for costs application should be reserved.

MR KENNELLY: Reserved indeed, and the costs of today for the --

THE CHAIRMAN: The costs of the CMC bit of this should be costs in the case.

MR KENNELLY: Costs in the case, indeed, and the security for costs application should be reserved.

THE CHAIRMAN: Yes.

Ms John, do you want to say anything further?

MS JOHN: I was just going to jump in and say we agree that the costs of today, other than security for costs, are costs in the case. No dispute about that.

THE CHAIRMAN: I think the Tribunal should just have a brief discussion about that.

(3.01 pm)

(A short break)

(3.03 pm)

Ruling

THE CHAIRMAN: The Tribunal has decided that in relation to the costs of today we will reserve the costs in relation to the security for costs application and the

rest of the costs will, as the parties agree, be costs in the case.

MR KENNELLY: I'm grateful, sir. I think in those circumstances there is nothing further from the Claimant.

MS JOHN: And nothing further from me, sir, thank you.

THE CHAIRMAN: Good. Thank you very much indeed, everybody, and we will see all or some of you on 17 December. Thank you.

(3.04 pm)

(The hearing concluded)

Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
…	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?