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5 **IN THE COMPETITION**

Case No. : 1351/5/7/20

6 **APPEAL TRIBUNAL**

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9 Salisbury Square House  
10 8 Salisbury Square  
11 London EC4Y 8AP  
12 (Remote Hearing)

13 Wednesday 8 September 2021

14  
15 Before:  
16 The Honourable Mr Justice Zacaroli  
17 (Sitting as a Tribunal in England and Wales)

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21  
22 **BETWEEN:**

23  
24 Churchill Gowns Limited and Student Gowns Limited

**Claimants**

25  
26 v

27  
28 Ede & Ravenscroft Limited and Others

**Defendants**

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30  
31  
32 **A P P E A R A N C E S**

33  
34 Fergus Randolph QC (On behalf of Churchill Gowns)  
35 Conall Patton QC and Victoria Prince (On behalf of Ede & Ravenscroft)

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1  
2 (10.30 am)

3 **MR JUSTICE ZACAROLI:** Good morning. I can see Mr Randolph, Mr Patton and  
4 Ms Prince. Before we start a couple of housekeeping points. To remind  
5 everyone that this is proceedings in open court as much as if we were actually  
6 physically in the building. An official recording is being made and  
7 an authorised transcript will be produced. So it is prohibited for anyone else  
8 on this call either on the Microsoft Teams link or it is being live streamed to  
9 make any audio or visual recording, which is a contempt of court.

10 We will take a break mid-morning at an appropriate time, and if we get there,  
11 mid-afternoon as well just for a few minutes to give us all a break from the  
12 screens. Right. Who is kicking off?

13 **MR PATTON:** Good morning, Sir. I am kicking on behalf of the Defendants. as you  
14 know I am appearing with Ms Prince and we have divided the applications up  
15 between us. I will be addressing you on the further information application  
16 and then Ms Prince will address you on the disclosure aspects.

17 Mr Randolph is appearing, as you know, with Mr Rooney for the Claimants and he is  
18 addressing both applications but I was proposing that we deal with further  
19 information first and then get on to disclosure after that if that's convenient.

20 **MR JUSTICE ZACAROLI:** Yes. That makes sense.

21 **MR PATTON:** Sir, as you know, this application arises from an issue concerning the  
22 composition of the Claimants' gowns which surfaced towards the start of this  
23 year. As you may recall, if you have Bundle A at page 9, this is the claim  
24 form. You will see at paragraph 30 that the Claimants' original plea, so if you  
25 ignore the green amendments, in the fourth line was that the material used to  
26 manufacture their gowns and hoods was made from recycled plastic bottles.

1 Following testing conducted on behalf of the Defendants on the Claimants'  
2 gowns, which revealed that the gowns didn't contain a single fibre made from  
3 recycled plastic bottles, that led to the claim form being amended in the way  
4 that you see here. First of all, the deletion of the reference to hoods, the  
5 deletion of the reference to bottles, so no plea is made that they are made  
6 from recycled plastic bottles here at all, and then the qualification that in some  
7 cases it is wholly from recycled plastic and in other cases it is principally from  
8 recycled plastics .

9 **MR JUSTICE ZACAROLI:** Yes.

10 **MR PATTON:** So those are the amendments to the claim form. Then in due course,  
11 as I hope you will have seen, the Defendants pleaded a positive case that the  
12 Claimants had misled consumers about the composition of their gowns and  
13 that the way in which that was done either disabled the Claimants from  
14 recovering damages in this action altogether or at least affects the proper  
15 measure of damages.

16 We took care to ensure that our pleading, which we accept makes serious  
17 allegations, was as clear and properly particularised as it could be and we  
18 hoped for an expected a response in kind from the Claimants, so that the  
19 precise parameters of the dispute could be readily identified both for the  
20 parties and for the Tribunal in due course.

21 As I shall show you in a moment, we say that the response that came back in the  
22 form of the amended reply was uninformative and indeed that it has the  
23 hallmarks of what Lord Justice Henderson in the SPI case described as a sort  
24 of stonewalling defences that were often filed before the introduction of the  
25 CPR, consisting largely of non-admissions or bare denials without any  
26 reasoning.

1 As you may have seen, we gave the Claimants an opportunity to remedy those  
2 deficiencies by serving an RFI, but their stance has largely been one of  
3 refusing to answer the questions that we have asked, and that remains the  
4 stance before the Tribunal today.

5 Now until the skeletons there was no suggestion that there was any difficulty in  
6 answering the stance essentially taken was "we don't have to, so we won't".

7 Now Mr Randolph's skeleton, if you have that, at paragraph 13 -- my pages are not  
8 numbered, but it is about the fourth page.

9 **MR JUSTICE ZACAROLI:** Yes.

10 **MR PATTON:** He suggests that our application would require the Claimants to  
11 spend a disproportionate amount of time, money and effort on a single  
12 element of the case. We suggest that that submission is impossible to  
13 understand, because, as we will see when I take you through them, the  
14 questions are simple questions and they should be capable of being  
15 answered readily and concisely. We would suggest that it would have taken  
16 much less time and expense simply to answer those questions and make the  
17 position clear than it has taken, for example, to prepare to attend this hearing.  
18 You may have received the Claimants' statement of costs, which indicates  
19 they have spent over £16,000 in resisting this application alone and it would  
20 surely have taken much less than that simply to give answers in these  
21 questions.

22 **MR JUSTICE ZACAROLI:** Yes. I thought that point was linked to his slightly more  
23 structured point that actually none of this relates to trial one, but because it  
24 goes to damages, it is trial two. Now you have not addressed that, but what's  
25 your answer to that point?

26 **MR PATTON:** Well, I am not sure he goes that far. This is the second of the three

1 points that he makes in paragraph 12, which I was about to address while the  
2 skeleton is open. Can I just get out of the way. I will come to your question, if  
3 I may, in a moment, but if I just deal with them in the order in which he makes  
4 them?

5 **MR JUSTICE ZACAROLI:** Yes.

6 **MR PATTON:** The first point is he describes the pleadings as fulsome and long.  
7 We would suggest that's a never mind the quality, feel the width type of  
8 submission. If the case is obscure, the fact that it may be prolix actually in  
9 other respects and other aspects of the case can't be a good answer to this  
10 application. As I say, we are not seeking lengthy answers. We are seeking  
11 concise answers, but answers that make the position clear. So we suggest  
12 the first point is a bad point.

13 The second point is the one that you have raised, and what he says is that the sole  
14 relevance of the argument to the trial in January 2022 is that it is barred by the  
15 doctrine of illegality. As I understand it, Mr Randolph accepts that the  
16 question of illegality is a matter for the trial in January 2022, because it is  
17 a defence on liability. If we are right on illegality, we say that the claim is  
18 barred in its entirety, or alternatively it is barred in part, and the illegality point  
19 depends on us establishing our case that either the representations were  
20 made fraudulently or they were made without reasonable grounds in  
21 circumstances where that is a criminal offence. So these are issues for the  
22 liability trial. I understand him to accept that at least at that extent all of this  
23 will have to be decided at the liability trial.

24 **MR JUSTICE ZACAROLI:** Yes. I mean, that means one has to determine at the  
25 liability trial whether the representations were true or false and whether they  
26 were knowingly false. I think that's what you need to establish.

1 **MR PATTON:** Or we say that they were made without reasonable grounds, because  
2 even without fraud that is a criminal offence we say and that doesn't appear to  
3 be disputed.

4 **MR JUSTICE ZACAROLI:** Yes. We may come back to the detail of what you say  
5 on each of the three misrepresentations in due course, but you also run the  
6 argument that if we get to the second trial, if damages are due, then the  
7 calculation of those damages ought to be on a basis which represents -- the  
8 counterfactual world should be one in which misrepresentations were not  
9 made.

10 **MR PATTON:** Yes.

11 **MR JUSTICE ZACAROLI:** I suppose that's a pretty short issue. If you have  
12 established that misrepresentations were made, whether the counterfactual  
13 world should include the misreps or not is a short issue. Presently I would  
14 have thought that's also a matter which ought to be determined before one  
15 goes off to prepare evidence for the second trial.

16 **MR PATTON:** I respectfully agree. We would see that really as a question of  
17 causation and causation is a matter for the first trial and it is really -- if the  
18 Claimants are right and if their claim is not entirely barred and they say they  
19 would have been in a better position but for the anti-competitive conduct that  
20 they are able to establish, what position would they have been in? That's  
21 classically a question of causation.

22 As to what exactly that means in pounds, shilling and pence, that would be a matter  
23 for the quantification trial, but the question of principle would be a matter for  
24 this trial.

25 **MR JUSTICE ZACAROLI:** In any event you don't understand Mr Randolph to be  
26 saying that this is not the question of whether misrepresentations were made

1 and whether they were false and knowingly false is not a matter for the first  
2 trial. It plainly is on the illegality defence.

3 **MR PATTON:** Agreed. Then just dealing with the third point briefly which is that he  
4 says that questions arise out of the reply and the reply is optional and so we  
5 should be grateful for having had any indication of what their case is. I have  
6 dealt with that, as you will have seen, in my skeleton at paragraph 18. We  
7 say that can't possibly bar the Tribunal from exercising the powers which it  
8 has got to ensure that everything is made clear, that the key issues in the  
9 case are made clear and whether that's because it is a point that's raised by  
10 us in the defence to which they then don't either serve any reply or they serve  
11 a reply which is unsatisfactory, you still have plainly the power to ensure that  
12 things are made clear, and I can't really imagine that that will be controversial.

13 Now, Sir, so far as the rules are concerned I have set out the relevant rules in  
14 paragraphs 13 to 20 of my skeleton and I was not proposing to say anything  
15 further about that unless you had any questions.

16 What I was proposing to do, if slightly tediously, was simply to take you to the key  
17 passages in the pleading about which we are seeking clarification. That will  
18 involve a little jumping around. If you are working from the electronic bundle  
19 and you are able to simply insert the page numbers, it may be relatively  
20 straightforward to do it in that way.

21 **MR JUSTICE ZACAROLI:** Yes. In relation to some of the requests -- I have read  
22 the pleadings, the relevant parts of the pleadings in some detail. I can't say  
23 I have picked up every nuance you would have wanted me to pick-up, but  
24 I have tried. It may be quicker with some of the requests if I just give you  
25 where I have got to, which may shorten things.

26 **MR PATTON:** Absolutely. That would be extremely helpful .

1 **MR JUSTICE ZACAROLI:** So request 2, the question I understand to which this  
2 request relates is whether the Claimants' contention relates to the contention  
3 that their gowns contained some recycled polyester fibre. Now that in itself is  
4 because you served a report which said there was none.

5 **MR PATTON:** Yes.

6 **MR JUSTICE ZACAROLI:** But I think the key -- there is no pleaded issue to which --  
7 well, there is no essential issue you to which that goes, because we are here  
8 talking about the misrepresentations. The only relevance here is whether the  
9 representations were made, were false, were knowingly false. The  
10 representations are not that there was no -- there was any polyester fibre.  
11 The representations, as I understand it, are, first of all, there is the 100%  
12 recycled plastic bottles representation. Secondly, there is the 70% of the  
13 recycled plastic representation and, thirdly, there is the implied representation  
14 in the later part of the period that the 70% plastic included plastic bottles.

15 **MR PATTON:** Yes, exactly. You are right.

16 **MR JUSTICE ZACAROLI:** Really what we need to know -- what you need to know  
17 is what their response to the pleadings, your pleadings in respect of those  
18 issues are.

19 **MR PATTON:** Yes.

20 **MR JUSTICE ZACAROLI:** Now so far as the 100% recycled plastic bottles  
21 representation is concerned, that is denied. So that's clear. That's a matter of  
22 expert evidence and parties know where they are. In relation to the 70%  
23 recycled representation I am not sure what their position is and that may be  
24 where this matters. So you may help me there. What is their position on that  
25 representation's falsity?

26 **MR PATTON:** I think -- I am not sure they accept -- it is somewhat unclear whether

1 they accept that a representation was made at all.

2 **MR JUSTICE ZACAROLI:** Yes.

3 **MR PATTON:** I think they say in relation to 70% that it was true that there was -- in  
4 other words they deny that it was false.

5 **MR JUSTICE ZACAROLI:** Where is that?

6 **MR RANDOLPH:** Sir, I wonder if I can assist. I think it has been very helpful that  
7 you put before Mr Patton and myself our position as it stands at the moment.  
8 98M is in the amended -- re-amended defence. That's page 100, tab 2 of  
9 Bundle A. This deals with the 70% recycled plastics representation which,  
10 Sir, you were just raising:

11 "As the statement now made on the Claimants' website that each gown is made from  
12 70% recycled polyester which is manufactured from the recycled plastic  
13 waste, the 70% recycled plastics representation it is denied as pleaded that it  
14 is true."

15 Then they set out. Then, Sir, if you can turn on to the amended reply, the next tab,  
16 page 136, paragraph 57N, this pleads back to paragraph 98M and you can  
17 see there we say:

18 "Paragraph 98M is noted. The matters and/or assertions contained therein will be  
19 the subject of evidence."

20 That's pretty obvious by virtue of the fact it is all to do with a representation and what  
21 the Claimants were supposed to have represented:

22 "Pending service of the same the Claimants' rights are fully reserved."

23 I don't want to trespass on Mr Patton's submissions but I thought this might help. As  
24 Mr Patton has made clear in his skeleton, the factual witness statements were  
25 served on 20th August and as per our pleaded case, these matters, including  
26 in relation to 70% recycled plastics representation, were covered inter alia in

1 the witness statement, the factual witness statement of Mr Stefan Muff. That's  
2 all dealt with. This is part of the problem with regard to this application,  
3 because a lot of the matters that are sought have actually been dealt with as  
4 pleaded in the evidence. So that's where it is.

5 The reason, just so I can assist my learned friend, to come back and say "These  
6 should have been pleaded", in fact our case is pretty straightforward, if it goes  
7 to the state of mind of Mr Muff and/or the Claimants, then it is strictly speaking  
8 a matter of evidence which should not be in pleadings and should properly be  
9 in a witness statement. That's where the Defendants can find them.

10 I would say this in closing on this submission. It is interesting, to say the least, that  
11 my learned friend and/or the Defendants have not said anywhere in their  
12 submissions and/or their application that the witness statements which have  
13 been served, as I say, near the end of August, do not contain information  
14 relevant to the matters said or identified in the pleadings in the amended  
15 reply. So we say that is something that, Sir, you should take into account.

16 I didn't, and I apologise for this, but I did it deliberately, I didn't burden the Tribunal  
17 with more paper. There has been some back and forth on paper and about  
18 the amount of paper. I did not burden the Tribunal with the witness  
19 statements as served by the Claimants, because I didn't think it would be  
20 necessary, given the fact that it didn't seem to be disputed, or it was not  
21 raised at least, that the matters that we said would be covered in evidence  
22 were covered in evidence. As I say, one of those matters is the 70% recycled  
23 plastics representation.

24 Just so you know, Sir, and it will come as no surprise to you, it is denied that in his  
25 witness statement, Mr Muff's witness statement, that there was a false or  
26 negligent representation in regard to the alleged 70% recycled plastics

1 representation.

2 I hope that assists.

3 **MR JUSTICE ZACAROLI:** Well, that certainly assists in relation to some of the later  
4 requests where you made the point expressed in your skeleton that these  
5 matters are covered by evidence, but this particular point is actually  
6 a question of expert evidence I think, but before one gets to the expert  
7 evidence one needs to know whether it is your case that the statement, if  
8 made -- I know you don't accept it was made -- if the 70% recycled plastics  
9 representation was made, at the moment I am unclear, subject to clarification  
10 of what you just last said, whether your case is that that was true or false.

11 **MR RANDOLPH:** Well, Sir --

12 **MR JUSTICE ZACAROLI:** Just the point. That arises from your pleading at  
13 paragraph 57N which you just took me to which said "Paragraph 98M is  
14 noted".

15 **MR RANDOLPH:** It is also denied. 57N says that paragraph 98N is denied, and  
16 98N, which is their re-amended defence:

17 "By reason of the matters pleaded at paragraphs 98M.1 to 3 the Claimants have no  
18 reasonable grounds to believe that the 70% plastics representation is true."

19 So 98N is predicated on 98M. We have said 98M is going to be the subject of  
20 evidence, which it has been. We then say paragraph 98N, which pleads that  
21 we had no reasonable grounds to believe that the representations are true,  
22 that's denied. So that's quite clear.

23 Our case is that we did have reasonable grounds and Mr Muff makes the point  
24 explicitly in his witness statement. We did have reasonable grounds to  
25 believe that the 70% recycled representation was true. So the allegation to  
26 the contrary is denied. That is predicated, as 98N is, on the evidence given in

1 response to paragraph 98M.

2 **MR JUSTICE ZACAROLI:** I suppose what's missing, but it may be implicit in 98N,  
3 98N which says -- sorry -- 57N, which denies 98N, your denial of that  
4 assertion that there were no reasonable grounds means that there were  
5 reasonable grounds for believing it was true. I suppose it is implicit from that  
6 your case is it was true. That's your point, is it?

7 **MR RANDOLPH:** Well, indeed. I mean, we are pleading back to the case made  
8 against us, Sir and the case made against us is there were no reasonable  
9 grounds to believe. That's what they --

10 **MR JUSTICE ZACAROLI:** That's 98N, but 98M is it was false. I know it is put  
11 rather oddly in 98N, because they are denying something, but what they  
12 mean by that, though, is that they are saying it was untrue.

13 **MR RANDOLPH:** Well, as I read it, they are saying because what is set out at  
14 98M.1 to 3, the Claimants have and have had no reasonable grounds to  
15 believe that the 70% plastics representation is true. So their case is no  
16 reasonable grounds to believe that the representation was true.

17 **MR JUSTICE ZACAROLI:** Sorry. That's 98N. I was talking about 98M. 98M, the  
18 actual plea in 98M is the representation was not true.

19 **MR RANDOLPH:** Yes. So that extent, because -- you are right, Sir. Sorry.  
20 I misheard and that's my fault. M and N. So you have heard me on N. M for  
21 "mother", yes, absolutely, and because, as you say, we deny 98N for "night",  
22 in our 57N for "night", and because of the reasons set out in the evidence of  
23 Mr Muff as set out in 57M for "mother", it must follow that the representation  
24 was true to the best of the Claimants' knowledge and belief. In fact, that is  
25 what Mr Muff has said.

26 As I say, none of this is disputed post receipt by the Defendants of the Claimants'

1 evidence. So it is all clear. The Defendants seem to be saying: Oh, well,  
2 there's a lack of clarity." We don't know what our case is. One, the case is  
3 clear insofar as it can be on the pleadings, because it doesn't contain  
4 evidence. Two, it is even more clear after receipt of the written evidence  
5 which came in near the end of August, which was a substantial amount of  
6 time after the initial application for further particulars and indeed after the filing  
7 and service of today's application.

8 **MR JUSTICE ZACAROLI:** Yes. Mr Patton, I have shifted the debate in this a little,  
9 as you will appreciate, because as I say, the key issue here is about the  
10 misrepresentations. Now your request is about paragraph 29.1E of the  
11 defence, or at least the plea to that paragraph. Now as to that, as  
12 I understand the case, the Claimants' case, and this arises from the rather --  
13 I don't mean this pejoratively -- obtuse or round about way in which you have  
14 made the allegation in 29.1E because -- let me just pick that paragraph up.

15 **MR PATTON:** Page 46.

16 **MR JUSTICE ZACAROLI:** Yes. Your pleading is that it is to be inferred the  
17 Claimants admit Intertek's finding.  
18 Now they deny that. That doesn't itself mean they deny the findings. They have  
19 denied they admit it. As I understand their case, they do not admit it.

20 **MR RANDOLPH:** Exactly.

21 **MR PATTON:** Sir, I quite see Mr Randolph takes that point in the skeleton. It is  
22 a denial of the inference of admission, but so far as the substance of the  
23 request is concerned, I mean, the same point -- as it happens, we made the  
24 request by reference to that paragraph in the pleadings but one could have  
25 made it by reference to another paragraph in the pleading.

26 For example, if you look at paragraph 97D of our defence, which is on page 95,

1 that's a very clear plea that the 100% recycled plastic bottles representation  
2 was false. We say there were no recycled plastic bottle fibres in there, but on  
3 any view it was not 100%.

4 Then if you go to page 135 and you see the responsive plea to that, you get a denial  
5 of the plea as a whole and then you get cross-references back up to 11A. So  
6 the problem reappears here, but with no further explanation .

7 **MR JUSTICE ZACAROLI:** What's clear is they deny that plea.

8 **MR PATTON:** They deny that it is false, but why do they deny that it is false? What  
9 is the basis on which they deny that it is false? It is all very well to say they do  
10 not admit the Intertek report, but are they saying their gowns were made from  
11 100% recycled plastic bottles? They don't seem to be saying that, because  
12 they deleted the reference altogether to bottles in the claim form. Now why  
13 did they delete that if their case is it was made entirely from recycled plastic  
14 bottles? It doesn't make sense. That's why we have asked the follow-up  
15 question. If you are denying that the falsity of that representation, do you  
16 want to explain why it is that on the one hand you have deleted the reference  
17 to bottles altogether, so it forms no part of their own positive case, and yet on  
18 the other hand there is this unexplained denial of falsity.

19 So we are simply not clear what is their case as to whether their gowns were made  
20 100% from recycled plastic bottles or not, and if one thing emerged from the  
21 discussion between you and Mr Randolph, their point is simply not clear as to  
22 what their case is on that.

23 **MR JUSTICE ZACAROLI:** Right. My understanding from the simple denial of that  
24 allegation is that they are contending on the pleading that their bottles  
25 contained 100% -- sorry -- their gowns contained 100% recycled plastic  
26 bottles, because they are denying that that representation was false.

1 **MR PATTON:** Well, I don't know if Mr Randolph adopts that.

2 **MR JUSTICE ZACAROLI:** Let's hear what he says. Mr Randolph, what do you  
3 say?

4 **MR RANDOLPH:** Well, first of all, I am slightly surprised by Mr Patton sort of  
5 wandering off into another part of the pleading for which he has not sought  
6 particulars .

7 **MR JUSTICE ZACAROLI:** I am concerned to get the case straight. My concern  
8 here is less what each party is saying but what the actual case is.

9 **MR RANDOLPH:** Absolutely. I think we need to -- the case can be straight and can  
10 be clarified by reference to the matters that have sought to be clarified in the  
11 application. So that is 29.1E. It may be that the Defendants have now  
12 understood, as set out in our skeleton, that, in fact, we have not denied the  
13 Intertek report. We cannot deny the Intertek report. We have tried to find out  
14 about the Intertek report. We have not been successful in finding out about  
15 anything about that Intertek report. The only thing we can do is set out what  
16 we have done at our famous 11A and where we say -- this is page 112 of  
17 tab 3 of Bundle A. So this is going to 29.1B as it happens, which relates to  
18 the Intertek report. So request 2 is all about what is to be inferred that we  
19 admit that Intertek's finding that their gowns contain no recycled fibre. So in  
20 response to 29.1B we simply say:

21 "The Claimants aver" -- this is page 112 -- "that there is no test available  
22 commercially which provides conclusive evidence that there is no recycled  
23 polyester in any given fabric nor that any fabric does not contain any polyester  
24 recycled from bottles."

25 Essentially that is why we essentially deny the claim in 29.1E, second sentence:

26 "It is to be inferred that the Claimants admit ..."

1 We don't admit that. We actually deny it based on the fact that according to our  
2 position there is no commercial test available to make that point. So we say  
3 it's a really straightforward point, and we set it out on that basis.

4 As you, Sir, have made clear, this issue, this application, is all about representations  
5 and alleged misrepresentations. They have said "Oh, well, we have made  
6 various representations which were false and/or negligent" and one of the  
7 ways they are saying and trying to assist their case is by saying "Well, look,  
8 there was an Intertek finding that there was no recycled polyester fabric or  
9 fibre", and it must be taken that we admit that finding, which, therefore, will  
10 assist the Defendants in their case that there was a negligent and/or  
11 fraudulent misrepresentation as to the content of the gowns.

12 We say: Well, look, first of all, no. The case is clear. We don't admit Intertek's  
13 finding. It is not a question of denying the finding, but we simply deny that it  
14 can be inferred that we admit. We have made it clear beyond peradventure  
15 that we don't accept the Intertek test, and obviously that will be a subject for  
16 cross-examination at trial, if we get there. We say that there's no commercial  
17 test available, and we then at a later stage in the pleading say: Look, the  
18 misrepresentation all goes to the belief of the Claimants and in particular  
19 Mr Muff at the relevant time and therefore it is covered there. So I don't  
20 really --

21 **MR JUSTICE ZACAROLI:** Stop there. The representation does not just go to the  
22 belief of Mr Muff, does it? There is an objective question here whether the  
23 statement was true or false. The illegality allegation depends upon intention  
24 I think, certainly knowledge of falsity, but insofar as the counterfactual -- the  
25 building of the counterfactual world is concerned, all I am concerned with is  
26 I think is whether the representations were true or not. So there is

1 an objective element in this case which is in issue, ie was the representation  
2 true or false? At the moment, as I said a moment ago to Mr Patton,  
3 I understand your bare denial of the allegation that the representation was  
4 false. It necessarily follows that your clients' case is that the representation  
5 was true, in which case the expert evidence that will be being produced by the  
6 parties shortly will have to address that question as to whether those gowns  
7 contained 100% recycled plastic bottles at the moment on the pleading. That  
8 is your case, is it?

9 **MR RANDOLPH:** Sir, I just want to -- before I answer that, if I may, I'd like to just  
10 turn to -- this is slightly complex, because I am turning to material that's not  
11 before the Tribunal but is in the Defendants' hands; in other words, it is  
12 Mr Muff's witness statement, because I really don't want my words to be  
13 misconstrued. I want the words to be taken from the mouth of Mr Muff, who is  
14 a director of both Claimant companies.

15 He says in respect of the statements on the website with regard to made of 100%  
16 recycled plastic bottles, and I will give you, Sir, the paragraph number, and  
17 I am perfectly happy, and my friends will correct me if I misspeak, but I am  
18 going to speak slowly so it can be clearly transcribed.

19 **MR JUSTICE ZACAROLI:** If this is the statement of 23rd (inaudible), I have  
20 managed to find it. So tell me the paragraph number.

21 **MR RANDOLPH:** I wonder if you will. Gosh! I have just had a little box flash up  
22 saying "Bad audio" but I hope, Sir, you can hear me. So it is paragraph 42A:  
23 "In respect of the statements made on our website ..."

24 Sir, you can see if you go back to paragraph 38 -- this is Mr Muff. This is about the  
25 certificate:

26 "I understood it to be confirmed that their polyester yarn was made of 100% recycled

1 plastic bottles."

2 This is the point you are raising with me, Sir. Then you go to 42:

3 "In respect of the statements made on our website.

4 (a) the 100% recycled statement was made because we genuinely believed for the  
5 reasons I have set out above that the yarn used to make the gowns was  
6 made from 100% recycled plastic.

7 (b) Shanghai PT had certified that their recyclable polyester was made of 100%  
8 recycled plastic bottles."

9 Then it goes on to explain what the estimate of 28 bottles means and how that can  
10 equate to 100% recycled plastic bottles.

11 So that's his evidence. Now Mr Patton can, of course, cross-examine Mr Muff when  
12 it comes to trial, but to say that somehow our position is not clear and then go  
13 to a paragraph that is not covered in the application to seek maybe to avoid  
14 the difficulties of the paragraph he was seeking particulars about, but still  
15 making the point "Oh, well, it is not clear what their case is", the case is set  
16 out in Mr Muff's witness statement.

17 **MR JUSTICE ZACAROLI:** Well, if I interrupt, I don't think it is. What Mr Muff is  
18 dealing with is his belief, but that does not address the objective question  
19 whether the representation that the gowns were made from 100% recycled  
20 plastic bottles was true or false. That is not addressed by his statement. I  
21 wouldn't expect it to be, because it is actually a matter of expert evidence. So  
22 I still don't know what your case is then on that point.

23 **MR RANDOLPH:** It is as set out by -- I wonder if I could take you, Sir, to this point  
24 about Mr Muff and what the objective rather than subjective point is. If we can  
25 go to 98H of the amended -- re-amended defence -- this is page 97, tab 2,  
26 Bundle A. We have:

1 "In relation to the second and subsequent batches of gowns the Claimants, acting by  
2 Mr Muff, knew that the 100% recycled bottles representation was false or  
3 reckless as to its falsity."

4 Then they set out a great big long list of subparagraphs which seek to assist in that  
5 assertion. So their claim is that my clients through Mr Muff knew that the  
6 relevant representation was false or reckless as to its falsity. That's their  
7 case.

8 **MR JUSTICE ZACAROLI:** That's their case on that issue but they also have a case  
9 that the representation was false. That's at D.

10 **MR RANDOLPH:** Sir, as to that, their case in relation to this part of their pleading --  
11 put it this way. They need, it would seem to me, on the basis of the law of  
12 misrepresentation, to prove on the balance of probabilities that the Claimants  
13 knew or were reckless as to the falsity of the recycled plastic bottles  
14 representation that it was false. They have to show --

15 **MR JUSTICE ZACAROLI:** They need to prove that for the illegality defence. They  
16 don't have to do that, do they, for the argument that the counterfactual world  
17 should be one in which the representations are assumed not to have been  
18 made?

19 **MR RANDOLPH:** But then, Sir, we get into difficulty here, because, one, the issue  
20 of the counterfactual world and causation has not been raised in this  
21 application at all, and as you pointed out in a question to Mr Patton, that is  
22 an issue we would suggest, because it follows from 98Q, page 101, tab 2,  
23 Bundle A, it follows the questions of causation of loss and the quantification of  
24 loss must proceed on the footing that in the counterfactual the Claimants  
25 would have made accurate representations. That's fine. That's the point.

26 So Mr Patton has sought to side step that by saying "Oh, causation is all part and

1 parcel of trial one, query", but even if it was, which I am not admitting,  
2 quantification of loss certainly is not.

3 **MR JUSTICE ZACAROLI:** No, no. You say you don't accept. Can I just -- is the  
4 order that was made on the split trial, is that in the bundle somewhere?

5 **MR RANDOLPH:** Yes, it is, Sir. It is at tab 4, 140. Yes, Sir, you are absolutely right  
6 to have pulled me up on that:

7 "Issues arising in these proceedings to be split with issues of liability, including  
8 infringement, causation of damages and joint and several liability being  
9 determined first."

10 I will, therefore, give way on that, but the point is that it is intimately tied to  
11 quantification obviously, because -- and we say that there is little point -- first  
12 of all, we say this is not part of the application. The application is firmly fixed  
13 on a few questions that they have whittled down from the large number, the  
14 22 questions that were originally part of the application.

15 We say that this issue of the counterfactual is either tied to causation or, as we  
16 would suggest, tied to causation and quantification and more especially to  
17 quantification. It is not a matter for you, Sir, today, and, therefore, it is  
18 a matter that can be determined at stage 2 if we get there.

19 At the moment, you, Sir, are facing a very specific application based on very specific  
20 paragraphs of the pleadings and they have -- as I said, Defendants have  
21 sought to whittle those down, and I am very grateful for that, and it could be  
22 problematic, Sir, if we start engaging in a wide-ranging examination of the  
23 case outside of the strict confines of this application.

24 I have prepared, and so have my solicitors, on the basis of the application that has  
25 been put before us and I think it would be complex and problematic, with  
26 respect, if we started to look at matters that are not covered therein. We have

1 answers to the points that are raised. The points that are raised go to  
2 essentially the knowledge of the Claimants in relation to the illegality defence.  
3 That is covered off in the evidence, as we have all seen, and has not been  
4 denied by the Defendants, and so we say the central rationale for the bringing  
5 of this application was an asserted lack of clarity, almost quote unquote.

6 In so far as there may have been any lack of clarity in the pleadings, and I am not  
7 going to admit to that, but insofar as there was or things were left hanging  
8 over, they were left hanging over explicitly in terms of things to be covered by  
9 the evidence and they were. So, Sir, you have in 42A and B a clear  
10 statement in relation to the position of the Claimants in relation to the  
11 representation which goes --

12 **MR JUSTICE ZACAROLI:** (Inaudible) statements to their knowledge as to its falsity.

13 I think that's as far as it goes, isn't it?

14 **MR RANDOLPH:** Because he can't speak to anything else.

15 **MR JUSTICE ZACAROLI:** Exactly.

16 **MR RANDOLPH:** As you saw, Sir, it is being asserted against him in particular that  
17 it was the Claimants acting through Mr Muff. They knew that the  
18 representation was false or they were reckless as to its falsity. Well, that's  
19 what Mr Muff deals with and that's what we said he would deal with.

20 **MR JUSTICE ZACAROLI:** Right. So at the moment experts are being primed to  
21 prepare reports to address the question whether the gowns contained 100%  
22 recycled plastic bottles or were made from that. That expense is only  
23 necessary if you actually deny the representation was false as to 100%  
24 recycled plastic bottles. I think at the moment, as I said earlier, your pleading  
25 does contain a clear denial of that fact, the falsity representation.

26 As Mr Patton has pointed out, other parts of your amendment to the pleading are

1 inconsistent with that, or at least on the face of it been inconsistent. So he  
2 has sought to clarify what your case is. If not withstanding that inconsistency,  
3 your clarification of your case is that you maintain that the representation that  
4 your gowns contain material derived from 100% -- 100% from recycled plastic  
5 bottles, then experts will need to deal with that issue, but I make it very clear if  
6 that is, in fact, not your case, there will be very serious cost consequences  
7 rising from that, won't there, if it turns out that that was all unnecessary?

8 **MR RANDOLPH:** I completely understand that, Sir, and you are absolutely right to  
9 focus in on this. My concern is that I don't want to be -- as Mr Patton and  
10 Ms Prince knows, one does not want to be forced into a position where one  
11 does not necessarily want to be. That's why I have taken you, Sir, to the  
12 evidence which goes to knowledge.

13 I understand, Sir, your position in relation to the implication to be taken from the  
14 denial, and just to be clear, this is the denial at 98 -- 57N in relation to 98N.  
15 I just wanted to clarify. N for night.

16 **MR PATTON:** I think it is the denial at 57D of the reply of 97D.

17 **MR JUSTICE ZACAROLI:** That's right. That's the one that which it clear you are  
18 putting in issue -- not just putting in issue, are denying that the statement is  
19 false which I think is an implied positive case that it was true.

20 **MR RANDOLPH:** As I say, this is not part of -- that's why I am slightly concerned  
21 about answering this on the hoof. This was not part of the application.

22 **MR JUSTICE ZACAROLI:** It is in a sense because it arises out of request 2. I think  
23 the problem with request 2, and I am not going to lay blame at this point for  
24 how we got to this, but the fact that was pleaded by reference to the Intertek  
25 report I think has confused matters, because you have taken the very  
26 particular line that you have not denied the report. You have denied that you

1 admitted it was true. Fair enough. It is fairly clear to me what the Defendants  
2 are getting at, which is what is your case as to whether the representation  
3 was true or false?

4 **MR RANDOLPH:** Sir, you have seen our pleading and our skeleton on 29.1E which  
5 is what they asked for in relation to request 2 is as set out and that's why we  
6 have set out what we have set out in our skeleton. We were not asked to deal  
7 with 97D which my learned friend just went to. So I think this is slightly  
8 unfortunate, but I am more than happy -- you can see that I am not going to  
9 come straight out and say "Our position is X and Y" because our position is  
10 our preparation for this hearing is predicated on the request.

11 I am more than happy and I understand the point, Sir, very much about wasted  
12 costs. If experts have to go down paths that subsequently become irrelevant,  
13 that will be very unfortunate indeed. I wonder if I could ask for the Tribunal's  
14 indulgence and just park this and take instructions? Mr Patton can go on, but  
15 insofar as we are concerned we have answered request 2 and we are not  
16 answering -- here to answer anything in relation to 57D, but as the Tribunal  
17 has raised it, we are obviously more than happy to answer that particular  
18 point. So may I take, because I have not got instructions on that particular  
19 issue?

20 **MR JUSTICE ZACAROLI:** Yes.

21 **MR RANDOLPH:** I am very grateful.

22 **MR JUSTICE ZACAROLI:** Before we leave it there, I think the point that requires  
23 clarification covers both the 100% recycled plastic bottles representation and  
24 the 70% recycled plastics representation. It is very important that there is  
25 clarity as to what your clients' case is on the falsity of both those  
26 representations. Now, as I say, it seemed to me implicit from the pleas we

1 went through before that you were, in fact, denying both, but I think -- what  
2 I think is important is a clarification of whether you do continue to deny the  
3 falsity of both those representations.

4 **MR RANDOLPH:** Yes. Just for the record the 70% alleged representation is also  
5 covered in the evidence from the Claimants, but obviously that goes to  
6 knowledge rather than is this false or true and therefore goes to illegality  
7 rather than anything else. So I wonder if I could just ask my instructing  
8 solicitors for instructions on that .

9 **MR JUSTICE ZACAROLI:** Yes.

10 **MR RANDOLPH:** They should be listening.

11 **MR JUSTICE ZACAROLI:** I will give you a moment to do that. Let's just pause for  
12 a moment.

13 **MR PATTON:** Just for the record in relation to the suggestion that the real nature of  
14 the request has taken the Claimants by surprise, can I just draw your attention  
15 to paragraph 18 of my learned friend's skeleton where he says that we have  
16 spotted the error, what you have called the obtuse formulation point -- and  
17 now ask the Claimant to clarify, and then he quotes from our application which  
18 was issued some time ago before the summer, whether they have advanced  
19 a positive case that their gowns "do contain recycled fibres from PT bottles or  
20 they accept they don't contain such fibres or whether they adopt a neutral  
21 position."

22 I think, Sir, you would probably add the qualification 100% or 70% actually as being  
23 the question rather than zero percent, but subject to that we certainly made  
24 clear at the time of the application what it was we were seeking to understand  
25 and pinned up.

26 **MR JUSTICE ZACAROLI:** Yes. Slightly oddly request 5 does cover this point

1           precisely. It is 97D it is addressing. That was not pursued.

2 **MR PATTON:** That was really to avoid duplication more than anything else. On  
3           reflection it might be better to pursue 5 and drop 2.

4 **MR JUSTICE ZACAROLI:** I have made my position clear, I think this essential  
5           question does arise slightly tangentially from request 2 and is something  
6           which does need to be addressed. Anyway.

7 **MR RANDOLPH:** Sir, if it fits with the Tribunal's timetable, Sir, you mentioned that  
8           there would be a mid-morning break, which may not be now, but whenever it  
9           is, I will be able to talk with my solicitors then and then I will be able to revert  
10          back with the answer .

11 **MR JUSTICE ZACAROLI:** Yes. Good. Fine. Let's move on then.

12 So request 3. This goes to the question whether the representation -- the 100%  
13          recycled plastic bottles representation was made at all. Your case, Mr Patton,  
14          is that this is a matter which is peculiar within the knowledge of the Claimants.  
15          Therefore they should be able to make a positive pleading to it. My initial  
16          conclusion on this is that the Claimants, as I understand it, have admitted the  
17          facts, the documents, but they have not admitted the construction which  
18          should be put upon those. In other words, they have admitted the statement,  
19          but they have not admitted the representation to be drawn from them. Now  
20          I think they have a point there, don't they?

21 **MR PATTON:** I am not sure what the point is. Really here it is a question of  
22          understanding what their case is going to be. Presumably their case at the  
23          trial is not going to be "Here are all the statements we have made. We have  
24          not idea whether that means we were telling people the gowns were made of  
25          100% recycled plastic bottles". Perhaps it is possible, but that would seem to  
26          be a very surprising position for them to take.

1 Mr Randolph says it is essentially a question of construction and a question of  
2 construction admits of the correct answer and/or incorrect answer. Either the  
3 position is that they see the force of what we say and they can't think of any  
4 other construction that makes any sense and they simply don't want to make  
5 an admission on the face of the pleading so as to accept that that  
6 representation was made.

7 The alternative is they say we have misunderstood the materials we have actually  
8 quoted and they bear some different meaning. If that is the position they  
9 should be able to tell us what the reason for their position is, what is it that we  
10 have misunderstood. What is it about them that means they don't convey  
11 what we say they convey? Either way they must be able to tell us what their  
12 case is. Presumably they will have a case one way or the other. To make no  
13 admissions as to the point of construction where that is in dispute, it simply  
14 leaves the position completely obscure. That's really our point on this.

15 **MR JUSTICE ZACAROLI:** Their position is that they do not advance a positive  
16 case, they can't advance a positive case, can they, if they have simply not  
17 admitted the allegation. So, for example, what they can't do is point to other  
18 materials which should be taken into account in construing those statements,  
19 because that would form part of a positive case. They can't do that without  
20 applying for permission to amend, which after this hearing may be quite  
21 difficult unless -- if they accept they are tied to their current pleading.  
22 Obviously one cannot rule out that.

23 So I do think we are in the position that they don't have a positive case.  
24 Nevertheless they don't want to admit it because -- well, for whatever reason.  
25 Therefore they have put you to proof that that's, in fact, a reasonable  
26 inference to draw from the statements made. Is that accurate, Mr Randolph?

1 **MR RANDOLPH:** That is absolutely accurate. The difference between the parties is  
2 binary and non-binary, if I can use that. My learned friend says that this is  
3 a binary issue. Either it is yes or no. We say no, it is not binary. Actually it is  
4 all to do, as you Sir, have said, with the construction of the documents. We  
5 are putting the Defendants to proof as to their case. We don't deny that the  
6 statements were made. That would be odd, to say the least. The statements  
7 were there and they are correct to the extent that they have been written -- as  
8 they have been written and pleaded. The question goes to how you can --  
9 how the Defendants or how the Tribunal will eventually determine what those  
10 statements mean. We have simply, as we are entitled to do, put the  
11 Defendants to proof. That's their case.

12 They say they rely on these statements to back up their misrepresentation case.  
13 Fine. It is not nor us to make their case. It is not for us. We do not need to  
14 and this does not go to SFI (sic) or any authority that says you must as a  
15 Claimant, you must somehow enter into great detail on every single point  
16 that's pleaded. You are entitled where a positive case is being made against  
17 you to not admit that where appropriate and to force the party making that  
18 positive case to force that party to make this good, and that's what we have  
19 done .

20 **MR JUSTICE ZACAROLI:** Yes. You accept you can't at trial point to other  
21 evidence -- other facts which you say would support a positive case that a  
22 different interpretation should be drawn from them?

23 **MR RANDOLPH:** From those documents. You will have seen, Sir, the evidence  
24 that has been put in by Mr Muff, which doesn't contradict --

25 **MR JUSTICE ZACAROLI:** I have not seen the evidence. When I went to it, that's  
26 the first time I was looking at it a minute ago. So I have not seen it.

1 **MR PATTON:** So, Sir, if I understand it correctly, the Claimants will not be free to  
2 refer to any other materials to contextualise the statements that we have  
3 relied upon and they will not be free to advance a case, a positive case that  
4 the statements bear a meaning different from the meaning that we say they  
5 bear. They will simply be in a position at the trial of saying that they don't  
6 accept what we say and it is for the Tribunal to make up its mind whether we  
7 are correct or not about that.

8 **MR JUSTICE ZACAROLI:** Let me just put that to Mr Randolph. Is that the  
9 acceptance that you are making, Mr Randolph?

10 **MR RANDOLPH:** I am accepting that we have not put forward a positive case. We  
11 have made the Defendants make good their case. That will allow us to  
12 cross-examine and to make submissions as to any arguments, any  
13 submissions made by the Defendants in support of 97B. We can't -- what we  
14 can't have is a situation where we are hog tied, so to speak, where we are  
15 hamstrung, where we simply have to accept that the statements were made  
16 and therefore QED the Defendants' case is made out. That is not our case  
17 and that is not our position.

18 Our position is very much that we do not accept the case being made against us.

19 We don't put forward a positive case in that particular regard. We are putting  
20 forward a positive case obviously, as you, Sir, will have seen, in Mr Muff's  
21 statement, which we are entitled to do, that the 100% recycled statement was  
22 made because we genuinely believed for the reasons I have set out above  
23 that the yarn used to make the gowns was made from 100% recycled plastic.

24 **MR JUSTICE ZACAROLI:** (Inaudible).

25 **MR RANDOLPH:** Well, exactly. It seems to me that that evidence is admissible, as  
26 is the other evidence in regard to Shanghai PT. Mr Patton may well wish we

1 are hamstrunged, but we can't be, because we have not admitted this  
2 paragraph. We have put them to proof and as such we are entitled to use all  
3 the evidence that we are entitled to do, which allows us to make good the  
4 point that the 100% recycled plastics bottles representation was true to the  
5 best of the knowledge and belief of the Claimants, and in particular Mr Muff.  
6 So we are entitled to put forward that particular case, because otherwise we  
7 would be in a dreadful position. By virtue of a non-admission we would  
8 essentially be taken to have admitted that, which we can't be, I would suggest  
9 with respect .

10 **MR JUSTICE ZACAROLI:** My conclusion, subject to anything else you want to the  
11 say, Mr Patton -- is there anything else you wanted to say in response?

12 **MR PATTON:** It is simply that I don't take a huge amount of comfort from the  
13 answer Mr Randolph gave in response to my question, or rather you putting  
14 my understanding of his position to him, not least because it conflates the  
15 question of whether the representation was made with other issues such as  
16 knowledge and so on, but obviously it is for you, Sir, to make clear the basis  
17 on which the trial will take place.

## 18 **RULING**

19 **MR JUSTICE ZACAROLI:** I am reluctant to entirely dictate the parameters of the  
20 trial on the basis of an application like this. The most I will say is that I am not  
21 going to order further information to be given on this. The reason is that it  
22 seems to me that the Claimant is not bound to make a positive case in  
23 relation to an issue which is not within their knowledge. It is a question of  
24 objective construction of statements that they accept were made. So they are  
25 not bound to do so. Therefore I can't force them to admit or deny. They are  
26 entitled simply to not admit.

1 The consequence of that will be at least they are prevented from asserting a positive  
2 case and they can't adduce evidence in response because they are not  
3 asserting a positive case, but, of course, they are free to make arguments and  
4 free to cross-examine. I can't actually see that cross-examination is relevant  
5 on this point, but if it were, they would be entitled to cross-examine and make  
6 arguments, but they are not entitled to advance any evidence or assert a  
7 positive case on the point.

8 **MR PATTON:** I am grateful, Sir.

9 **MR JUSTICE ZACAROLI:** Request 6. I think this and 7 go together in the sense  
10 that the answer the Claimants give is "Well, it is all in the evidence now". First  
11 of all, it is reasonable grounds for belief, which I think is the point in the  
12 evidence Mr Randolph has just taken me to, Mr Muff, and 7 is recklessness --  
13 knowledge or recklessness as to the knowledge of that representation. Those  
14 are both closely linked factually questions.

15 So the question here is whether it is enough that they have now produced the  
16 answer in the evidence.

17 **MR PATTON:** We say it is not enough because the purpose of the proceedings  
18 before the Tribunal, as in court of the pleadings is to ensure that the issues  
19 are clearly defined. We have put our case in the conventional way. In point  
20 form we have identified each of the particulars upon which we rely, and the  
21 purpose of that was to elicit from them what they say in relation to each of  
22 these points. They simply have not done that.

23 So, for example, in relation to request 6, we say there were no reasonable grounds.  
24 We explain a particular point that has been raised in correspondence as to  
25 why that does not supply reasonable grounds and then they deny it. They  
26 don't say what are the reasonable grounds. If they have reasonable grounds,

1 they must be able to say what they were. There is no reason why that  
2 shouldn't be done with the clarity that a pleading brings to bear on such  
3 issues. We shouldn't be required to come through the witness statement and  
4 try to work out precisely what's being said.

5 The witness statements -- as you know, both sides have at least purported to  
6 comply, even though it doesn't directly apply in the Tribunal with the -- you  
7 may not know that both sides have sought to comply or say they have sought  
8 to comply with the new practice direction on witness statements. So the  
9 witness statements ought to be expressed in the witness's own words, which  
10 are fairly colloquial in some respects, and so quite rightly in a sense the  
11 witness statement is not a point by point response to the pleading and it is  
12 not -- they are not drafted with the clarity and precision that one would expect  
13 from the pleading.

14 The pleadings will define any further applications for disclosure. They will define the  
15 issues for the trial. It is not really not going to be satisfactory to be holding up  
16 the witness statement and working out which bits of it purport to respond to  
17 which bits of the pleading and what it really means and whether that's their  
18 case or whether that's simply the witness' view or reaction on a particular  
19 point.

20 It is quite hard to understand why that -- apart from all of that, Mr Randolph has not  
21 asked you to pre-read the witness statements, even though they were served  
22 some time ago. He has not sought in his skeleton and does not seem to be  
23 intending to seek to take you through and show you exactly how it is  
24 responsive to each of the points in the pleading or how it clearly identifies  
25 a positive case for us to be able to address.

26 Of course, if he is right about that, if he were right to say that it is all covered in the

1 witness statements, it ought to be the easiest thing in the world for him and  
2 his team to convert that into a response to this request for further information  
3 so that the position is set out formally in the usual way with clarity and  
4 precision so that we know where we stand and so that you as the Tribunal at  
5 the trial will know precisely what issues have been pleaded and haven't been  
6 pleaded.

7 So essentially we say we don't accept that it is adequately covered in the witness  
8 statements and Mr Randolph has not sought to really demonstrate that it has,  
9 but anyway that's not a substitute.

10 **MR JUSTICE ZACAROLI:** Yes. Mr Randolph.

11 **MR RANDOLPH:** Sir, may I make two points? First of all, pleadings should not  
12 contain evidence. 98F, which is what my learned friend's point request 6 goes  
13 to, which is at page 97, tab 2, Bundle A, says:

14 "The Claimants had no reasonable grounds for making 100% recycled plastic bottles  
15 representation."

16 And then sets out four subparagraphs as to why they say that or in support of that.

17 So no reasonable grounds.

18 We reply back to that in the amended reply at paragraph 57F.1.

19 **MR JUSTICE ZACAROLI:** Yes.

20 **MR RANDOLPH:** There are two 98Fs. That's why I was getting slightly worried. It  
21 is the second 98F, so 57F.1:

22 "98F6 is denied."

23 So it is denied:

24 "The matters set out between F1 will be the subject of evidence."

25 That's unsurprising because it goes to essentially whether they were reasonable,  
26 whether they had reasonable grounds. That goes to the evidence. That goes

1 to the mindset of the Claimants at the relevant time. So we say that will be  
2 the subject of evidence and accordingly the Claimants' rights are fully  
3 reserved. Then we don't need to go to 98 at all, because that's about a legal  
4 principle.

5 So for the first time my learned friend Mr Patton has said, because it clearly suits him  
6 to say so, "Oh, actually, despite the fact that we have put you on notice that  
7 this will be the subject of evidence" and indeed serve that evidence on 20th  
8 August, so that's two weeks ago, and despite the fact that we have set again  
9 this out in our correspondence and our skeleton, all of a sudden the content of  
10 the witness statements from the Claimants is not deemed to be sufficient.  
11 Well, that is not good enough I am afraid, with respect. That is just leaping on  
12 to a particular bandwagon.

13 They could have said at any time from the date of service of the witness statements  
14 on 20th August, some two weeks ago, "Hang on. We notice that in particular  
15 in relation to requests 6 and 7 that you say it is the subject of evidence. We  
16 have had a look at the evidence now and actually we don't think that it does  
17 cover it. Can you tell us what your case is?" No, they have not. As I said,  
18 they could have done. If they had a problem with it, they should have told us  
19 in correspondence, or indeed had the courtesy to tell the court in writing that  
20 that was not their position. We have acted on the basis that that was their  
21 position, because there was an absence of any response to that evidence.

22 So we say, Sir, no. This goes to matters that should properly be covered in evidence  
23 and, in fact, we could take a reverse argument to say actually what the  
24 Defendants are doing pointlessly is to encourage us to actually plead matters  
25 that strictly speaking should not be pleaded, and therefore go contrary to all  
26 sorts of things, including practice directions and the CPR to the extent that it

1 applies to the Tribunal.

2 So we strongly oppose the position taken by the Defendants. It is not a question of  
3 cost -- sorry. It is not a question of why we should -- why don't we just set it  
4 all out all over again. Well, because it shouldn't be there and it should  
5 properly, we think, be in Mr Muff's statement. We have set out our position.  
6 That is good enough. We say that is an end to both 6 and 7 .

7 **MR JUSTICE ZACAROLI:** Right. There are two points in there. One is that on any  
8 view whenever this request was made, it was inappropriate, because it is  
9 a request for evidence, not facts. That's your first point.

10 **MR RANDOLPH:** Yes.

11 **MR JUSTICE ZACAROLI:** Is that in your skeleton?

12 **MR RANDOLPH:** Yes.

13 **MR JUSTICE ZACAROLI:** Where is it?

14 **MR RANDOLPH:** 3, 20. Well, we say that it concerns the allegations represented  
15 or entirely made from recycled bottles. Sorry. We are looking at 6:  
16 "It is unnecessary for the ... reason for believing is the subject of evidence.  
17 Accordingly this request should be denied".

18 **MR JUSTICE ZACAROLI:** Yes. That's the second point. That's why -- I didn't  
19 notice the point being made that this is actually a request for evidence and  
20 therefore should be denied. That's not a point taken in your skeleton, but it is  
21 a point you are taking now anyway. Your second point is: It is no you in the  
22 evidence. There is no point in repeating it.

23 Now on the second point when was it first said to the Defendants that your answer is  
24 the particulars can be found in the evidence? Was it your skeleton or is there  
25 correspondence before that?

26 **MR RANDOLPH:** Well, we said that it would be covered in the evidence. They

1 didn't reply to that. They have never come back and said "Oh, well" -- I will  
2 just check whether there has been a more recent letter from -- so their  
3 application was on 8th July, Sir, which you can find at tab 8 of Bundle A.  
4 Then there's another letter on 25th June from Tuppens Law, which is at  
5 tab 10.

6 **MR JUSTICE ZACAROLI:** What is the date of that?

7 **MR RANDOLPH:** I am sorry. It is 25th June.

8 **MR JUSTICE ZACAROLI:** I have got that. I don't have tab numbers, but I have got  
9 that document.

10 **MR RANDOLPH:** Actually that doesn't -- you are right to ask, Sir, because that  
11 predates their application.

12 **MR JUSTICE ZACAROLI:** Yes.

13 **MR RANDOLPH:** But it postdates, if I am right, their request for further information,  
14 which is dated 15th June, and that is at page 177 of the bundle. So their  
15 request -- their original request for further information was under cover of  
16 a letter dated 15th June and indeed the RFI is dated 15th June. As I say, that  
17 starts on 177. I will not give you the tab number.

18 Then the following letter is a letter in response thereto at 182 and following. It may  
19 be that -- I am just going -- unfortunately -- so it would be request -- we were  
20 looking at request 6 I think.

21 **MR JUSTICE ZACAROLI:** Yes.

22 **MR RANDOLPH:** Yes. So:

23 "As you freely admit in your letter of 15th issues raised in the field of laboratory  
24 testing may require expert evidence to be used, in the premises our clients'  
25 reliance on such evidence is perfectly permissible."

26 Then 7 is idem. So in that it does appear there is reference to expert evidence, but

1 not reference to actual factual evidence, but we say that it was clear from the  
2 pleaded case, which was the amended case which was served some time  
3 ago, that, in fact, on the 4th June, that that would be our case. The witness  
4 statements were served and at no stage was it said that actually that is not  
5 the position. They have always known that is the position by virtue of the fact  
6 that they have sought to -- they sought to raise the request for further  
7 information on 15th June, so just after the amended reply was served.

8 So, Sir, we say that they have known what the position is. We have set it out in  
9 pleadings. It was done in the witness statements and they could have raised  
10 this with us. It is their application. They didn't, and so -- and to say now that  
11 somehow it doesn't cover it without going into details as to why it doesn't  
12 cover it is we would suggest not sufficient .

13 **MR JUSTICE ZACAROLI:** Right. Mr Patton, just dealing with the question of  
14 whether this is a request for evidence, not facts, can you deal with that point?

15 **MR PATTON:** Yes. You are right to say that that has not been an objection taken  
16 until today. It is clearly a bad objection. What we are asking for is if you deny  
17 that you lacked reasonable grounds, tell us what the reasonable grounds  
18 were. What is your case as to what the grounds were that were reasonable  
19 and that enabled you to make that representation? That's not a request for  
20 evidence. It is a request to understand what their case is.

21 So far as the next request, 7, is concerned, we have pleaded particulars of  
22 knowledge, the best particulars available to us, conscious that when you  
23 make an allegation of fraud it has to be properly particularised. There has  
24 never been any suggestion it was inappropriate for us plead these particulars.  
25 What we are asking for is what do you say about these particulars? Are they  
26 correct or incorrect? The approach that has been taken is simply to deny

1 knowledge in a rolled-up way but it is not clear from the pleadings which of the  
2 particulars they accept are true, but they say it doesn't mean they had  
3 knowledge, or which they say are completely false or somewhere in between.  
4 So pleading back to particulars of knowledge is a classically appropriate case  
5 for something to be done on the pleading. It is not a request for evidence.

6 So far as the other point, Sir, in relation to reliance on the witness statements, it was  
7 suggested that we had never taken the position that witness evidence would  
8 be an inadequate way of dealing with this. Can I just show you what we have  
9 said about this? At page 184.

10 **MR JUSTICE ZACAROLI:** Yes.

11 **MR PATTON:** Letter of Elias Law of 30th June, in response to their response to the  
12 RFI.

13 **MR JUSTICE ZACAROLI:** I have read that.

14 **MR PATTON:** The second paragraph.

15 **MR JUSTICE ZACAROLI:** Yes.

16 **MR PATTON:** Then we make exactly the same point in our application at  
17 paragraph 9. We say, of course, there may be evidence in due course, but  
18 the purpose of the pleadings is to clarify what the issues are. As you know,  
19 the witness statements were served on 20th August. In response to your  
20 question, which I don't think Mr Randolph ever answered, they did not write to  
21 us and say "Now you have the witness statements they supply answers to the  
22 questions and they can be found at the following paragraphs", and nothing  
23 was said to that effect until Mr Randolph's skeleton, as you correctly  
24 apprehended. Then it was dealt with in the very high level, vague way that it  
25 has been without any attempt to say "You can see precisely from the witness  
26 statements what the answers are to these questions".

1 **MR JUSTICE ZACAROLI:** Thank you. I think it is 11.47 actually. So we will take  
2 a break now until five to. I will mute my video and mic, but we will all remain  
3 in the court.

4 **MR RANDOLPH:** I will take instructions on request 2.

5 **MR JUSTICE ZACAROLI:** Yes.

6 **MR RANDOLPH:** Thank you very much.

7 **(Short break)**

8 **RULING**

9 **MR JUSTICE ZACAROLI:** As regards requests 6 and 7 the first principled objection  
10 taken by the Claimants is that they are requests for evidence and not facts.  
11 On this point I accept Mr Patton's submission that these requests are requests  
12 for facts, not evidence. They are requests of facts in order to clarify the  
13 Claimants' case on important issues. The Claimants' denial that they lacked  
14 reasonable grounds begs the question what is their positive case as to the  
15 reasonable grounds they had. It is up to them to identify those grounds.

16 As to request 7 facts have been pleaded by the Defendants as particulars of  
17 knowledge which it is alleged the Claimants had. Those particulars of facts  
18 have not been addressed at all and they should be.

19 The second objection, however, is this is now all in the evidence. First, as a matter  
20 of principle I do not accept the broad proposition that it is enough to say that  
21 the information is now in evidence that has been served. That would require  
22 the other party to trawl through witness evidence to identify the Claimants'  
23 case. That puts matters the wrong way round. Evidence is supposed to  
24 support the facts which are alleged as part of the case, not the other way  
25 round.

26 The Defendants do not, in fact, accept that all the necessary particulars are to be

1 found in the evidence. The one thing which I would not be prepared to do,  
2 and indeed no-one has asked me to do this, is to go through the evidence in  
3 this hearing to identify how and where the relevant information is provided.  
4 That would be the least efficient of all possibilities. It seems to me that the  
5 Claimants ought to provide those particulars, notwithstanding that they say it  
6 is somewhere to be found in the evidence. If they are right that it is in the  
7 evidence, then the process for them should be a very short one indeed. So  
8 I will require the information in requests 6 and 7 to be provided.

9 **MR RANDOLPH:** Thank you very much. Just to clarify, can that particularisation  
10 simply be dealt with by paragraph numbers in relation to the witness  
11 statement. So in relation to X paragraph on which they are seeking  
12 particularisation .

13 **MR JUSTICE ZACAROLI:** I think that could lead to problems down the line as to  
14 which parts of the paragraph, whether it is sufficient. I think you need -- it  
15 shouldn't be difficult for you to take the facts that are set out in the witness  
16 statement and list those in numbered form.

17 **MR RANDOLPH:** Okay. Thank you very much indeed.

18 Sir, I have now taken instructions on request 2. I am just going to read out my  
19 instructions because then I can't be accused of getting it wrong. Both the  
20 100% representation and the 70% representation are true to the best of the  
21 Claimants' knowledge and belief based on the documentary evidence that  
22 they obtained at the time.

23 Sir, that has been carefully worded, as you will doubtless have heard, and the  
24 reason is very straightforward. Unless one actually makes a gown or a hood  
25 or anything else, but hoods are not in this particular issue, one has to base  
26 oneself on whatever is available and whatever is available is set out inter alia

1 in Mr Muff's evidence and indeed the correspondence. So true to the best of  
2 the knowledge and belief of the Claimants. That's our case.

3 **MR JUSTICE ZACAROLI:** Well, I think you carried on "at the time they were made".

4 **MR RANDOLPH:** Yes. Based on the documentary evidence that was available at  
5 the time. So the 100% representation was true at the relevant time and the  
6 70% representation was true at a subsequent time based on further  
7 documentation. It is as simple as that .

8 **MR JUSTICE ZACAROLI:** I just wonder how much the additional words beyond -- if  
9 one stopped at the word "true", the extent to which the additional words which  
10 you say are -- I can understand -- are very important additions to it, they  
11 actually qualify the contention that the statements were true.

12 **MR RANDOLPH:** Sir, we can't admit to a blank statement "Are these things true  
13 you?" It could be said Mr Patton could be wearing a suit from China or  
14 probably from Hong Kong, lovely silk and it says "Made from 100% silk".  
15 Does Mr Patton know as a fact that that is made from 100% silk from the  
16 finest Chinese silk worms? No, he doesn't. He has based himself on that  
17 which is reasonable, because he has other things to do rather than check out  
18 whether the silk worms were Chinese or Bulgarian. That's why these words  
19 count, and I would suggest with respect, we can't possibly be asked to sign  
20 a statement saying "Yes, these are true, come what may". These are true to  
21 the best of the Claimants' knowledge and belief and that's based on the  
22 documentary evidence available at the time and is as far as we can go.

23 **MR JUSTICE ZACAROLI:** Yes. The critical question for the expert, because the  
24 experts are not going to be assessing whether they were true to the best of  
25 your belief at the time. That's obviously not what they are looking at. They  
26 are looking at whether it was, in fact, true that the gowns were made of 100%

1 or 70% or whatever. You are, therefore, are you, maintaining as part of that  
2 stance the free standing proposition as part of it -- I understand that -- that the  
3 representation was true, and that your expert evidence will go to proving that  
4 it was true?

5 **MR RANDOLPH:** Yes, to the best of our knowledge and belief.

6 **MR JUSTICE ZACAROLI:** But the experts can't --

7 **MR RANDOLPH:** I understand that. If we want to say "These representations were  
8 true subject to determination by experts and based on the best knowledge  
9 and belief of the Claimants", because that's where we are at. We are saying  
10 they are true, because we believe them to be true, because of the various  
11 things that we saw that made us believe that they were true. It won't be up to  
12 us, as you say, Sir, to actually determine whether they were true or not.  
13 That's a matter for an expert.

14 Therefore we will cross-examine, but this is all -- let's not forget, Sir, all of this and  
15 Mr Patton has made this very clear right from the get go, this is all about the  
16 misrepresentation cases --

17 **MR JUSTICE ZACAROLI:** I understand.

18 **MR RANDOLPH:** That's where it comes from. So to nail us to the cross of "This is  
19 true come what may", no. It is true obviously subject -- because it is said we  
20 were fraudulent or negligent in our representations, so we are fighting that  
21 case. We say we fight that because to the best of our knowledge and belief it  
22 was true, they were true, and therefore it is not fraudulent and/or negligent or  
23 we were not reckless in making them, but obviously that will be a matter for  
24 experts to assist the Tribunal.

25 You, Sir, will hear the evidence from Mr Muff and Mr Patton will cross-examine him  
26 up hill and down dale no doubt, and that's fine. Also I will cross-examine their

1 expert evidence as to why their expert may say, and I don't know because  
2 I have not seen the evidence, these representations were not true. That's  
3 where we have to leave it. Also, and I probably don't need to say this, the  
4 pleading is signed with a statement of truth from Mr Adkins. Now he has to  
5 say that the Claimants believe and sign that the facts stated in this amended  
6 reply are true. So that is what we can say. So we believe that the  
7 representations are true to the best of our knowledge and belief and we can't  
8 really go beyond that .

9 **MR JUSTICE ZACAROLI:** Well, you can and do have to go beyond that in this  
10 respect. I think you do, in fact, go beyond that. Is it unfair to summarise your  
11 clients' position as follows: Your clients believed these representations were  
12 true?

13 **MR RANDOLPH:** Yes.

14 **MR JUSTICE ZACAROLI:** It is their case, because they are going to call expert  
15 evidence on this point, that they were true.

16 **MR RANDOLPH:** Yes.

17 **MR JUSTICE ZACAROLI:** If it turns out that the expert evidence is not accepted or  
18 that the Tribunal at the trial determines against your client on that issue, you  
19 nevertheless maintain your proposition that you believed they were true at the  
20 time?

21 **MR RANDOLPH:** Exactly.

22 **MR JUSTICE ZACAROLI:** One possibility, therefore, is that your clients would lose  
23 the discrete point that the representations were true, but win on the points  
24 whether they were reasonable at the time and believed them to be true?

25 **MR RANDOLPH:** Exactly.

26 **MR JUSTICE ZACAROLI:** There are some discrete points in there. As I think

1 I articulated earlier, the first discrete point, truth or falsity as a discrete point,  
2 may be highly relevant to the construction of the counterfactual for damages.

3 The question of knowledge is highly relevant to the defence of illegality.

4 **MR RANDOLPH:** Indeed, and I take that point, and as we have discussed the  
5 counterfactual, it may well be that it has to fall under a heading of causation.

6 **MR JUSTICE ZACAROLI:** I understand that. It doesn't really matter where it falls  
7 for the present purposes. I just want to be absolutely clear what the case is  
8 and I think --

9 **MR RANDOLPH:** Absolutely, but we can say -- we can stand by what we have said  
10 in our pleading and we can say that it is true. Obviously, as you, Sir, have  
11 said, that pleading will have to be determined by the Tribunal based inter alia  
12 on the determination of the expert evidence, and if it comes out against us, it  
13 comes out against us, but that does not impact on whether we had  
14 a reasonable belief at the relevant time that the representations were true.  
15 That's another matter. That's a matter for Mr Patton to cross-examine Mr Muff  
16 and others.

17 **MR JUSTICE ZACAROLI:** There seems to me to be two possible ways to resolve  
18 the application in relation to request 2. The first is that whatever order is  
19 made contains a recital which recites your statement on behalf of your client,  
20 which would have to make it clear as part of that while accepting their case is  
21 they believed these statements to be true, nevertheless their case at the  
22 moment in these proceedings is that the representations were true.

23 **MR RANDOLPH:** Yes. I am happy with that.

24 **MR JUSTICE ZACAROLI:** I think if that were the position, no order needs to be  
25 made on request 2. As I have already identified and we discussed earlier  
26 there, there is a danger at request 2 going off at a tangent when you see it in

1 isolation. It seems to me that's the neater solution. If you are not prepared to  
2 accept that recital in those clear terms then I would need, I think request 2 to  
3 be answered in the way it is put or I think we need to modify it slightly, but we  
4 can come to that, but I think the simplest way is for a recital to be made in  
5 those terms.

6 Mr Patton, do you have anything to say about those two alternatives?

7 **MR PATTON:** Sir, well, provided the position is clear, as you rightly identified, the  
8 objective question as to what their case is. Of course one understands the  
9 case is always advanced subject to a statement of truth, which is belief, and  
10 that's understood, but the case itself is not dependent on belief, as you have  
11 said. There is a separate issue as to the state of mind. The case is either  
12 that the representation was true or that it was not true.

13 Mr Randolph appears to be saying that their case is that the representation was true,  
14 and just before he has finally confirmed that, and if he is prepared to confirm  
15 that, then so be it, but can I just draw attention to what we say at page 96 of  
16 the pleading, paragraph 97D.3, for example, and whether this has really been  
17 taken into account.

18 **MR JUSTICE ZACAROLI:** 97D.

19 **MR PATTON:** D.3. We have pleaded that this representation was made that all of  
20 the gowns were made from 100% recycled plastic bottles. Then we say:  
21 "Even on their case as re-amended the Claimants' gowns other than the first batch  
22 are not 100% made even from recycled plastic, let alone recycled plastic  
23 bottles."

24 Because their case now is that the second and third batches were made only from  
25 70% recycled plastic and they don't seem to say recycled plastic bottles. We  
26 simply at the moment don't understand how Mr Randolph can give

1 a confirmation that their case is that this representation that they were made  
2 100% from recycled plastic bottles, how his case can be that that is true  
3 generally when his case also is, as we understand it, that actually apart from  
4 the first batch, it was not even 100%. It was 70%.

5 **MR RANDOLPH:** The answer, Sir, is very straightforward and it is in the wording of  
6 the words that I read out:

7 "Based on the documentary evidence which was obtained at the time."

8 So that's why I say the position in terms of the representations changed. It was  
9 100% recycled plastic bottles representation and then that changed to a 70%.  
10 It doesn't mean that the recycled 100% plastic bottles representation  
11 continued ad infinitum. It didn't. It was replaced to the extent that it was  
12 replaced by the 70% recycled plastic bottles representation.

13 Sir, I am getting concerned I have to say, that Mr Patton is ranging widely across  
14 areas that have not been dealt with in this application. I am instructed to  
15 appear to defend this application and to oppose it and not to speak more  
16 widely about concerns that Mr Patton and his clients may or may not have  
17 had. He deliberately -- his clients have deliberately dropped 12 of the  
18 requests that were put in the RFI. He said we didn't need to go down those  
19 particular paths. Now he is seeking to reinsert them. I am concerned about  
20 that, I am afraid.

21 **MR JUSTICE ZACAROLI:** You have heard the concern. As I say, I think the  
22 simplest way -- I have heard you say, and again tell me if I have got this  
23 wrong, that it is, in fact, your clients' contention, your case in these  
24 proceedings that the representation of 100% recycled plastic bottles and the  
25 representation -- the subsequent representation of 70% recycled plastic were  
26 true?

1 **MR RANDOLPH:** At the relevant time based on documentary evidence.

2 **MR JUSTICE ZACAROLI:** Well, were true -- obviously were true at the time they  
3 were made. That has to be a proper clarification or qualification, but that is  
4 an independent point which your clients are maintaining in this case. Of  
5 course as a separate issue they maintain if they are wrong about that,  
6 because the expert evidence goes against them, they still maintain their case  
7 that they believed them to be true at all material times.

8 **MR RANDOLPH:** Exactly. We are ad idem, Sir.

9 **MR JUSTICE ZACAROLI:** In which case if those two points can be set out in  
10 a recital, I don't propose to make any order on request 2.

11 **MR RANDOLPH:** I am grateful.

12 **MR JUSTICE ZACAROLI:** I hope that's clear enough. Where were we? We had  
13 got as far as request 8 I think. This I think is the same as request 2, isn't it?  
14 The facts are pleaded. They have not pleaded the consequence in terms of  
15 construction. I think the same answer applies.

16 **MR PATTON:** I apprehended you would say that. There is a second limb .

17 **MR JUSTICE ZACAROLI:** That is 8A. 8B is different, isn't it?

18 **MR PATTON:** Exactly. 8D is different, because it is what they understand.  
19 Mr RANDOLPH says in his skeleton that's irrelevant but, of course, it is not  
20 irrelevant, because we make a plea of fraud here. The plea of fraud is made  
21 on the basis that they understood and intended that meaning and in that  
22 meaning it was false and they knew it was false.

23 **MR JUSTICE ZACAROLI:** Staying with the plea of fraud in relation to this  
24 representation because I did look earlier and found it in relation to the 100%,  
25 but this is dealing with the --

26 **MR PATTON:** Implied representation.

1 **MR JUSTICE ZACAROLI:** Which page?

2 **MR PATTON:** It is page 100. 98J is the implied representation, and the second  
3 sentence:

4 "It is to be inferred that the Claimants understood and intended this implicit  
5 representation because otherwise the reference to the quantity of plastic  
6 bottles would be irrelevant to the point being made."

7 Then the plea of knowledge is in 98L.

8 **MR JUSTICE ZACAROLI:** Then where do you build on this in terms of where that  
9 goes, because you do that -- it is a further and alternative paragraph. Yes.  
10 98R.

11 **MR PATTON:** Yes, exactly .

12 **MR JUSTICE ZACAROLI:** Oh, there it is. I didn't read on. It is clear, yes. So,  
13 Mr Randolph, the point made here is that this is a relevant plea to the claim of  
14 fraud. It is not relevant clearly to whether representation was made, you are  
15 right to say that, but it is relevant to the question of whether the representation  
16 was made fraudulently, therefore relevant for the illegality defence.

17 **MR RANDOLPH:** Well, the position is 98 -- I am just checking that we are talking  
18 about the -- so 98J is the defence, the Amended Defence. The last sentence  
19 quoted:

20 "Carries obvious implications ... that the material used is or may be made from  
21 recycled plastics. It is to be inferred that the Claimants understood and  
22 intended this representation, because otherwise the reference to the quantity  
23 of plastic bottles would be irrelevant."

24 They then go on to say -- this is 98K -- "the implied plastic bottles representation is  
25 false."

26 It is the false point, if there is a distinction between the two. They go on to say that

1 they have known since 1st January that the implied plastic bottles  
2 representation is false, because they have been provided with the Intertek  
3 test.

4 As we say in our skeleton at paragraph 25, we say that this is inappropriate, because  
5 our understandings and intentions are irrelevant to the question of whether  
6 that implied representation was made.

7 Now this is all about 98J, not about 98K, which deals with the false allegation; in  
8 other words, it was false .

9 **MR JUSTICE ZACAROLI:** Well, indeed, but the question of knowledge -- I mean,  
10 a person cannot be found to have made a representation fraudulently if they  
11 didn't intend the words that they spoke to give rise to the representation that's  
12 pleaded. So if they thought the words meant something else, then they  
13 couldn't be guilty of fraud. So that's the point here. It is a building block in the  
14 fraud case. What they are saying is the Claimants understood and intended  
15 what they had said to mean the implied plastic bottles representation.

16 **MR RANDOLPH:** With respect, Sir, it may well be a building block, but it is not  
17 actually the actual house, because the fraud case is put at 98R.1:

18 "As pleaded the Claimants have acted fraudulently in making the 100% recycled  
19 plastic bottles representation and since 2021 in making the implied plastic  
20 bottles representation."

21 So that is 98R.1 and we plead to 98R.1 simply by way of denial, and that is not part  
22 of any application before you today. What is part of the application is their  
23 case that it is to be -- essentially it is to be inferred that we understood and  
24 intended, and all we say back to that, as we are entitled to do, is at 57J, which  
25 is at page 136:

26 "Neither the asserted implication nor the asserted inference contained therein are

1 admitted."

2 So we put -- because it is their positive case -- they are saying -- it is nothing to do  
3 with fraud at this stage. This is just a brick in a building that is to be  
4 constructed. They are just saying; averment, the last sentence from this  
5 particular website carries the obvious implication to the reader; well that's  
6 a positive case and we simply don't admit that. Then they say it is to be  
7 inferred from that apparently obvious implication, which is not admitted, that  
8 the Claimants understood and intended this implicit misrepresentation. That's  
9 their case on misrep, and they made it on the basis of inter alia fraudulent  
10 misrep, but this paragraph simply goes to a positive case being put by the  
11 Defendants that there are obvious implications from a particular statement  
12 and it is inferred from that allegedly obvious implication that somehow we  
13 understood and intended.

14 We don't put forward a positive case. We are not obliged to do so. We simply do  
15 not admit it. They are put to proof. It is their case to make. That is why we  
16 say what we say at paragraph 25 of our skeleton:

17 "This is inappropriate. The Claimants' understanding and intentions are not relevant  
18 to the question of whether the implied representation was made. Accordingly  
19 this request should be denied".

20 **MR JUSTICE ZACAROLI:** Just let me give you an opportunity to respond to this  
21 point. What's being said against you is that the question of your intention --  
22 assuming that you are wrong, that intention is not irrelevant to this case,  
23 assuming that your intention is a relevant piece of the jigsaw, then that  
24 question of your intention is peculiar within your own knowledge. It is  
25 classically an issue which only you can know about and therefore you should  
26 be forced to admit or deny and not simply not admit.

1 **MR RANDOLPH:** Well, I am not going to bore the Tribunal with repetition. They are  
2 putting forward a positive case that we understood and intended the  
3 representation. Now we say we don't admit that. I am not 100% sure why on  
4 the usual pleading basis we simply can't put a flat pack(?) back. They know  
5 what they have to prove for fraudulent and/or reckless misrepresentation.  
6 They have to show the relevant criteria has been fulfilled. We are not  
7 assisting in them making that case. We simply don't accept that the inference  
8 that they say exists is there on the balance of probabilities and it is for them to  
9 prove.

10 I don't really see why as a matter of pleading practice we -- obviously if you are  
11 making a positive case of fraud, for example, one has to plead it very  
12 carefully, and sometimes it will be essential to plead back to it, but here their  
13 case is based on 98J on an inference, on an asserted inference. We are  
14 simply saying we don't admit the asserted inference. They can infer whatever  
15 they like.

16 **MR JUSTICE ZACAROLI:** What the Defendants are saying is based on Lord  
17 Justice Henderson in the SPI North case. This is something to your  
18 knowledge of a party and therefore they can't just bat it away with  
19 a non-admission. That's the argument.

20 **MR RANDOLPH:** But, Sir, with respect, that is to put the cart before the horse,  
21 because this is not a case where they say "Oh, the Claimants were fraudulent,  
22 because they did X, Y and Z and they intended to do X, Y and Z". In that  
23 case one might be in a different situation where to plead back, that would fall  
24 within the SPI case and the statement of Lord Justice Henderson. Fine. This  
25 is not one of those cases. The Defendants have very carefully circumscribed  
26 their pleading based not on the Claimants have acted fraudulently or the

1 Claimants intended to do this, but simply:

2 "It is to be inferred from a particular statement on a particular website that the  
3 Claimants understood."

4 Very different, and I don't think that that does -- it is not a question of what I think.

5 I would respectfully submit that that clearly does not fall within the dicta of  
6 Lord Justice Henderson, because this is based on a positive case being put in  
7 relation to an asserted inference. That's the case we have to meet. It is not  
8 the pure case of fraud. It is an inference based on a document and that's why  
9 we have -- I think it would be very difficult for us to plead to that without going  
10 into the inference and why we say the inference is right or wrong, and that is  
11 not our job. That assists or could assist the Defendants in making their case.  
12 They have said it is to be inferred. They have made their bed and they have  
13 to lie on it.

#### 14 **RULING**

15 **MR JUSTICE ZACAROLI:** I need not hear from you, Mr Patton, in response on this.

16 It seems to me that request 8B raises the question as to the Claimants' intention as  
17 to whether the representation called the "implied plastic bottles  
18 representation" was made; in other words, whether the Claimants intended it  
19 to be understood in the way that the Defendants have pleaded it. That is  
20 a relevant and essential element in the fraud case. There is a clear case in  
21 fraud pleaded involving that element.

22 The fact that intention is pleaded on the basis of an inference is irrelevant, because  
23 that is all the Defendants could possibly do. They do not know what is in the  
24 Claimants' mind. All they can do is point to sufficient particulars to give rise to  
25 an inference, which they have done. That does then put squarely in play the  
26 allegation that the Claimants had the intention. Whether they did or did not do

1 so is something peculiarly within the Claimants' knowledge, and therefore on  
2 the basis of Lord Justice Henderson's comments in the SPI North case, that is  
3 something which the Claimants ought to be required to plead positively to,  
4 whether as an admission or a denial.

5 **MR RANDOLPH:** Thank you very much. Could you just confirm your ruling relates  
6 to 8B?

7 **MR JUSTICE ZACAROLI:** Yes.

8 **MR RANDOLPH:** Which essentially, if I am right, is what is covered in the second  
9 sentence of request 8 in the skeleton, or is that incorrect as one goes to the  
10 actual --

11 **MR JUSTICE ZACAROLI:** If you look at the request, it is, in fact, 8B. It is separated  
12 by the sub-paragraph.

13 **MR RANDOLPH:** Thank you very much.

14 **MR JUSTICE ZACAROLI:** 10. Does 10 go with 6 and 7? Is there anything different  
15 about 10 than relates to 6 and 7?

16 **MR PATTON:** I would submit not. It is another reasonable grounds case where  
17 they simply don't say what the reasonable grounds were. As you pointed out  
18 earlier, I mean, they don't actually specifically respond to the allegation of  
19 falsity. It may be that it is tied up with their plea as well, but if they say what  
20 the reasonable grounds were, at least that would clarify the basis on which  
21 they deny falsity .

22 **MR JUSTICE ZACAROLI:** Yes. Mr Randolph, it does seem to be the same  
23 argument as we had on 6 and 7.

24 **MR RANDOLPH:** All I would say is that there is a slight concern that we have  
25 a slight difference in that the title above paragraphs 34 and 5 in Mr Patton's  
26 skeleton says:

1 "Requests 10A and B. Please state the grounds of the denial in the reply at 57N.

2 Please state whether paragraphs M1 to M3 of the defence are admitted."

3 Essentially the Defendants' skeleton at paragraph 34 seeks essentially to deal with

4 98N. The reply, as it says, pleads a bare denial and has ignored the

5 supporting particulars pleaded by the Defendants at 98M 1 to 3. We say that

6 98M is actually rather relevant. It is not just a 98N point, because the point

7 being made by my learned friend is that 98N contains a bare denial, but if one

8 goes to 98M, and you can find this, Sir, at page 100 of the -- so 98M sets out

9 the Defendants' case in relation to the 70% recycled plastics representation

10 and they set out a number of subparagraphs in that relation, and then 98N:

11 "By reason of the matters pleaded in M1 to 3 the Claimants have no reasonable  
12 grounds to believe."

13 The pleading back to that can be found at 57N, but only insofar as concerns 98N for

14 night. That is a bare denial. We admit that, but one cannot just look at 98N

15 and 57N for "night". One has to look at 57M for "mother":

16 "78M is noted. The matters and/or subjects contained there will be the subject of  
17 evidence."

18 Again this is a point that has been -- and we have been round this block before and

19 I am not going to repeat myself, but these are matters that have been covered

20 off in the evidence. So it is not correct to characterise this as a bare denial,

21 because N for "night" is predicated on M for "mother".

22 **MR JUSTICE ZACAROLI:** To be clear, I think I rolled up -- I rather went through

23 a shorthand, but the point that we have debated on issues 6 and 7 is whether

24 it is enough to say the answer will be in the evidence. I fully accept that you

25 have to read 57N with 57M. That's because 98N incorporates by reference

26 98M, but having done so, your response was "It will be in the evidence" and

1 that's the point which we have already debated and I have ruled on. I think  
2 there is no difference in the outcome.

3 **MR RANDOLPH:** I just wanted to raise that particular point about M and N, but yes,  
4 Sir, you are right. What follows in 6 and 7 will follow for 10.

5 **MR JUSTICE ZACAROLI:** Yes. Good. Well, I think that's -- then my ruling on 6  
6 and 7 applies equally to 10. It seems to me if we run out of time today for  
7 anything, then costs are the least essential part of this and can be delayed.  
8 So we ought to move on to the disclosure application.

9 Before we do, I need to say that the RFI was the easier part of the application in this  
10 sense, that the pre-reading directed me to a whole host of correspondence  
11 which I frankly found largely impenetrable. It is very difficult to read on-line  
12 anyway, but when one is dealing with cross-references to different  
13 paragraphs and different letters without a full understanding of each of the  
14 terms being used it is very difficult to follow. I have skip read it. I can't say  
15 I have understood the correspondence. I think I have a grasp of the issues  
16 from the skeletons, but you can't assume I have read the correspondence with  
17 any great detail.

18 **MS PRINCE:** I am grateful for that indication, Sir. I propose to deal with the three  
19 outstanding issues. I only need to address you on the other three issues  
20 which have been resolved in respect of costs at a later point. The first one is  
21 in relation to the identification by the Claimants of their confidential  
22 documents.

23 Sir, you will have seen from the skeleton that the parties agreed that they would  
24 make use of paragraph 3 of the confidentiality ring order and in the first  
25 instance disclose their documents only into the confidentiality ring and they  
26 agreed that they would amend that slightly so they would have four weeks to

1 then identify which of those documents were confidential.

2 In my submission the Claimants have not done this. They have not identified their  
3 confidential documents by reference to their April disclosure into the  
4 confidentiality ring. They have done something different. They have  
5 rearranged the folders in an online data room which they have used to provide  
6 their documents, and they have deleted the original disclosed confidential  
7 documents from that data room and provided different documents in different  
8 sub folders for confidential and redacted, which cannot be cross referred to  
9 the April disclosure.

10 So rather than identifying which of their disclosed documents were confidential, they  
11 have just provided a completely new set of documents and they ask the  
12 Defendants and subsequently the Tribunal to work from those instead and  
13 effectively disregard what they disclosed in April.

14 The Claimants' correspondence and indeed Mr Randolph's skeleton also have  
15 become very focused on what exists currently in the Claimants' data room, but  
16 their obligation was not to identify which documents in their data room as it  
17 currently exists are confidential. Their obligation is to identify which of the  
18 disclosed documents disclosed on 30th April are confidential and they have  
19 not done this.

20 This is not just a technicality. It causes real practical difficulties. So what the  
21 Claimants have done is they have in respect of all their confidential  
22 documents re-named them in their entirety. So they are all electronic  
23 documents. They all have file names and they have removed all of those file  
24 names and replaced them with numbering, but, of course, the Defendants and  
25 their legal team are not working from the Claimants' online data room. They  
26 took the disclosure in April. They uploaded it to an E disclosure platform.

1 There were some 4,600 documents, so really this is the only way to work with  
2 that many documents.

3 The Claimants' data room obviously has no functionality. The documents are just  
4 a mass of documents. They can't be searched. They can't be sorted. The  
5 legal team has no way to comment on them, tag them or do any of work  
6 product that one needs to do when one is reviewing the other side's  
7 documents. Actually the way the Claimants have done this would not have  
8 been a problem if they had executed their plan properly. If they had simply  
9 taken the April disclosure on the platform and created the sub folders, as they  
10 have, for confidential and redacted versions, but they had kept the original file  
11 names as they were, we could have worked with that. There would have  
12 been no difficulty. The difficulty does not arise because they were using  
13 a data room. It does not arise because the documents were uploaded to any  
14 disclosure platform. It arises only because a month later on around 25th June  
15 the Claimants took it upon themselves, for reasons which are still  
16 unexplained, to rename all the documents and they say they have kept no  
17 record of the original file names and they are therefore not able to work out  
18 and cross refer even themselves which of their numbered confidential  
19 documents are the documents they disclosed in April .

20 **MR JUSTICE ZACAROLI:** Let me just backtrack. Let me just get this clear. So in  
21 April the entirety of the disclosure was put into a data room which was then up  
22 loaded to your E platform?

23 **MS PRINCE:** Yes.

24 **MR JUSTICE ZACAROLI:** That included confidential and non-confidential  
25 documents.

26 **MS PRINCE:** At the time they had not been designated as such, but yes.

1 **MR JUSTICE ZACAROLI:** Potentially confidential and non-confidential documents.

2 They then rather than extracting from that total mass of documents the  
3 documents which are confidential, or for which they assert confidentiality, they  
4 produced a new list -- a new data room of documents or sub folder of  
5 documents which were new documents. What do you mean by them being  
6 new documents?

7 **MS PRINCE:** So initially at the end of May they were required to produce  
8 confidential and non-confidential versions. They did not actually do that.  
9 They provided the non-confidential versions. They created a sub folder called  
10 "Redacted" on the data room and created another sub folder called  
11 "Confidential". The redacted folder was purported to have redacted versions  
12 of confidential documents. The confidential folder ought to have had marked  
13 up, highlighted versions of the redactions, but in the first instance it did not. It  
14 had simply native copies of the documents. So what they said they had done,  
15 but this was done incompletely, was moved from the general mass of  
16 documents that were in the data room the confidential documents into the  
17 confidential folder.

18 **MR JUSTICE ZACAROLI:** And this is still their folder.

19 **MS PRINCE:** This is all on their own platform, but the problem was they had not  
20 executed this properly. So the number of documents in the confidential and  
21 redacted folders did not match each other, whereas there should obviously be  
22 one counterpart redacted for confidential.

23 **MR JUSTICE ZACAROLI:** Sorry to take this slowly but it is quite complicated.

24 **MS PRINCE:** I do understand.

25 **MR JUSTICE ZACAROLI:** The April disclosure is everything. What they, in fact,  
26 did, was to create a new data room. No?

1 **MS PRINCE:** On the same data room.

2 **MR RANDOLPH:** No, no.

3 **MS PRINCE:** On the same data room.

4 **MR JUSTICE ZACAROLI:** Let me get Ms Prince's story first and then I will come to  
5 you, Mr Randolph.

6 **MR RANDOLPH:** I understand, but it is only because it is what we did and if it is  
7 what we did, then maybe it would be helpful, but I am happy to let Ms Prince  
8 go. It is actually set out at paragraph 37 of our skeleton.

9 **MR JUSTICE ZACAROLI:** Yes, I am sure. It is just helpful to have this explained in  
10 words -- or orally rather than having to read it. Ms Prince, carry on. Yes.

11 **MS PRINCE:** So the Claimants purported to move any documents that were  
12 confidential into a confidential sub folder into the same data room.

13 **MR JUSTICE ZACAROLI:** I am not sure I am concerned with what they purported  
14 to do as to what they actually did.

15 **MS PRINCE:** What they actually did was move some of them into the confidential  
16 folder but there were duplicates. So there were still documents in the  
17 confidential folder and what I call the general folder, which is the remainder  
18 that was not supposed to be confidential. There were duplicates between the  
19 two where there should obviously be no overlap, because either it is in the  
20 general folder and it is not said to be confidential or it is in the confidential  
21 folder but some files existed in both.

22 **MR JUSTICE ZACAROLI:** So they moved some and copied others?

23 **MS PRINCE:** Exactly. The position was not clear. There are other problems which  
24 are not the subject of this application, but there were other problems with the  
25 way they had altered their data room in order to try to identify documents that  
26 were confidential, but it was clear that there were numerous problems with

1 this. That has resulted in the very lengthy correspondence that's in the  
2 bundle. My friend makes a point about aggressive correspondence, but it is  
3 repeated because there were very many problems which the Claimants did  
4 not address, but the position as at today --

5 **MR JUSTICE ZACAROLI:** Before we get to today, so that was the confidential  
6 documents sub folder. There is a redacted documents sub folder. What is  
7 that?

8 **MS PRINCE:** So that should be documents which can be shown to the Defendants  
9 but that are confidential but redacted where the confidential information has  
10 been redacted.

11 **MR JUSTICE ZACAROLI:** But should be a mirror image of this confidential folder  
12 with the bits redacted.

13 **MS PRINCE:** Exactly .

14 **MR JUSTICE ZACAROLI:** What is it, in fact?

15 **MS PRINCE:** Well, I believe it is now, but it was not. In May the confidential folder  
16 still did not contain highlighted versions. It only contained the native versions.  
17 They were only produced on 25th June. So the Confidentiality Order provides  
18 that where a party claims confidentiality over a document, it will provide  
19 a marked-up version showing the items that are said to be confidential. That's  
20 what that folder should have contained. The Claimants did not do that on the  
21 data greed, but they did it a month later.

22 **MR JUSTICE ZACAROLI:** Right. I am concerned with what we have now. So you  
23 have two sub folders. They are on their platform. Two sub folders. One is  
24 the confidential folder, which, as you say, doesn't contain just documents  
25 which have been moved but contains some additional or duplicate copies of  
26 what's in the general folder?

1 **MS PRINCE:** That issue has been resolved. It now only contains documents which  
2 are confidential which no longer exist in the general folder.

3 **MR JUSTICE ZACAROLI:** Okay. So that's not a problem any more. How was that  
4 resolved? The copies were deleted, were they?

5 **MS PRINCE:** As I understand it, yes.

6 **MR JUSTICE ZACAROLI:** The originals were moved?

7 **MS PRINCE:** Yes. So the number of documents in the folders has sort of changed  
8 throughout the period as the Claimants have resolved various issues and  
9 changed their mind about confidentiality on certain documents.

10 **MR JUSTICE ZACAROLI:** So now you do have a sub folder on their platform called  
11 confidential documents?

12 **MS PRINCE:** Yes.

13 **MR JUSTICE ZACAROLI:** Which is complete and accurate in the sense it is the  
14 documents over which confidentiality is claimed?

15 **MS PRINCE:** I believe so, yes.

16 **MR JUSTICE ZACAROLI:** Right. Then the reacted folder should be whatever is in  
17 that with the highlighted bits just redacted.

18 **MS PRINCE:** Exactly.

19 **MR JUSTICE ZACAROLI:** Is that the case now?

20 **MS PRINCE:** I believe so, yes.

21 **MR JUSTICE ZACAROLI:** We are okay now at least. I know there are problems on  
22 the way that you are going to come to. At least that's the position at the  
23 moment. Right.

24 **MS PRINCE:** The difficulty is when the Claimants were trying to resolve the issues,  
25 and I don't understand why they did this, but the documents that now exist in  
26 the confidential and redacted folders had all of their file names removed, the

1 original file names.

2 **MR JUSTICE ZACAROLI:** Right. So the April disclosure, which has everything, has  
3 original -- still exists. You have got a copy of that.

4 **MS PRINCE:** We have got a copy of it, yes.

5 **MR JUSTICE ZACAROLI:** But each of the two sub folders, they have just  
6 numbered the documents and taken the names off?

7 **MS PRINCE:** Yes.

8 **MR JUSTICE ZACAROLI:** Yes.

9 **MS PRINCE:** So whatever the Claimants do on their data room there has to be  
10 a way to link it back to the April disclosure.

11 **MR JUSTICE ZACAROLI:** Why?

12 **MS PRINCE:** Firstly, because we cannot work from their data room. It is impossible  
13 for the Defendants -- it is hosted by the Claimants for a start, but also it has  
14 changed a number of times along the way. The Claimants have no obligation  
15 to continue to host it. Even if they did, the Defendants' legal team have  
16 already reviewed, because there was two months' gap between disclosure of  
17 the initial native documents and the confidential versions, the Defendants'  
18 legal team have already reviewed all of the documents as they were disclosed  
19 in April.

20 **MR JUSTICE ZACAROLI:** Right.

21 **MS PRINCE:** That work product --

22 **MR JUSTICE ZACAROLI:** You have reviewed on your own platform.

23 **MS PRINCE:** Exactly.

24 **MR JUSTICE ZACAROLI:** Everything was downloaded to your own platform. In  
25 terms of reviewing you have worked off the April documents?

26 **MS PRINCE:** Yes, and in my submission that is the only way that it can be done. It

1 is impossible for the Defendants to work from a data room that has no  
2 functionality at all. They can't keep track of 4,600 documents they have  
3 reviewed on the Claimants' data room.

4 **MR JUSTICE ZACAROLI:** And you don't know -- is this right -- which of the 4,600  
5 documents that you reviewed are said to be within the confidential sub folder?

6 **MS PRINCE:** Yes. We have narrowed it down somewhat from that position by  
7 using the rest of the documents on the data room, which I call the general  
8 folder. Those should still have the original file names, which should match the  
9 April disclosure, and so by a process of elimination the file names were  
10 compared to what is on the Defendant's E disclosure platform and the  
11 documents that match are obviously not said to be confidential. They have  
12 been released to the Defendants. What should remain is the confidential  
13 documents. It should be 400 documents that the Claimants say are  
14 confidential. We would be able to ring fence them on the platform on that  
15 basis, but for reasons I cannot explain when we do that exercise, we do not  
16 get 400 documents. We get 514 documents that do not match anything in the  
17 general folder.

18 So as matters stand we are effectively working with 514 documents on the  
19 assumption that they may be confidential, but we don't know which of those  
20 514 are the 400 confidential documents, because there is no way to cross  
21 refer to what the Claimants now host on their data room.

22 **MR JUSTICE ZACAROLI:** Because the numbers have changed -- the name has  
23 been changed to a number?

24 **MS PRINCE:** Yes.

25 **MR JUSTICE ZACAROLI:** Who can do that.

26 **MS PRINCE:** I believe it would be a manual exercise. We have a copy of the

1 confidential folder as it was downloaded by the Defendants' solicitors in early  
2 June before the Claimants changed all the names. So the Claimants or  
3 someone would need to manually cross refer and work out which of the 400  
4 documents numbered now 1 to 400 are the documents disclosed in April.

5 I accept that that is going to be --

6 **MR JUSTICE ZACAROLI:** Sorry. Weren't all the documents disclosed in April?

7 **MS PRINCE:** Yes. All the native documents were disclosed in April, yes.

8 **MR JUSTICE ZACAROLI:** So the question is which of the documents numbered 1  
9 to 400 are confidential?

10 **MS PRINCE:** No, all of those are said to be confidential, but which of the ones we  
11 have by elimination identified, the 514, which of those are the 400  
12 confidential.

13 **MR JUSTICE ZACAROLI:** The 514 is what you have narrowed down from the  
14 general pool. Yes. So it is the other way down. Which of the 514 equate to  
15 the 400 which are confidential.

16 **MS PRINCE:** Yes.

17 **MR JUSTICE ZACAROLI:** If you look at the documents, you would be able to see  
18 whether they are the same, wouldn't you?

19 **MS PRINCE:** Yes. If one conducts a manual exercise and reviews all of the  
20 documents individually, that's something that should be able to be done.

21 **MR JUSTICE ZACAROLI:** How long would that take?

22 **MS PRINCE:** Well, because there are in certain instance very similar documents, it  
23 would actually be quite -- potentially a very onerous task. So, for example, if  
24 the Claimants have disclosed several documents that are similar but not  
25 identical, it would take a reviewer of some time to go through the entire  
26 document to work out where its counterpart lies from the April disclosure.

1 **MR JUSTICE ZACAROLI:** So what appears to be the same document but with  
2 a minor difference, one of them is confidential and the other isn't. Is that  
3 right?

4 **MS PRINCE:** Neither of them might be confidential.

5 **MR JUSTICE ZACAROLI:** The question, though, is whether -- you have got 400  
6 documents which you know are confidential. So it's a question of looking at  
7 each of the 514 and saying "Is this document in that pile over there?"

8 **MS PRINCE:** Somewhere, yes.

9 **MR JUSTICE ZACAROLI:** If it is pretty much there, because it looks to be exactly  
10 the same -- there might be a difference on page 3 but you can't tell -- but the  
11 idea of the one that does have a difference on page 3 being confidential  
12 whereas the one that doesn't have a difference not being, would be unlikely,  
13 wouldn't it? If it is substantially within that pile, then you know it is  
14 confidential, don't you?

15 **MS PRINCE:** That may be the case, although the confidentiality decisions appear to  
16 have been taken by the Claimants themselves and it is not always as one  
17 might expect.

18 **MR JUSTICE ZACAROLI:** I am concerned that this is -- yes, the Claimants have  
19 not done this in the way they should have. That is very clear from what you  
20 have said, but I will hear from Mr Randolph. Changing the numbers does not  
21 seem to have been very helpful, but we are where we are. There may be cost  
22 consequences down the line, but I am not sure we need to resolve those now.  
23 The question is what is the best way of identifying -- where is the additional  
24 514 that you are allowed to share with your clients and how important is it that  
25 you are able to share those documents -- I have no idea what's in them,  
26 whether these are really critical documents or whether they are really

1 peripheral.

2 **MS PRINCE:** Yes. There is the issue of sharing them with the clients. There is also  
3 the issue of what happens. How do we treat these documents when we get to  
4 trial, trial bundles. Does the Tribunal need to make certain measures when  
5 we are discussing these documents or not?

6 **MR JUSTICE ZACAROLI:** So the first question I think is are any of the 514 or the  
7 potential -- those which are potentially within the 114 which you are entitled to,  
8 are any of those of great importance to the case, or are they actually  
9 peripheral which no-one is ever going to look at again? That's a sort of  
10 preliminary question. Are we able to even get that far at the moment? Do we  
11 know whether that is the case? Are they peripheral or likely to be relevant?

12 **MS PRINCE:** I am afraid that review has not been conducted. What we have done  
13 is provide the Claimants with a schedule which is reproduced at annex 2 to  
14 the application, which simply has a list of the original file names and asked the  
15 Claimant to confirm which are confidential and --

16 **MR JUSTICE ZACAROLI:** They don't have those original documents any more, so  
17 they can't do that.

18 **MS PRINCE:** Well, we have provided them with a copy of the folder which was  
19 downloaded before they changed the names.

20 **MR JUSTICE ZACAROLI:** The question is which of you should do this?

21 **MS PRINCE:** Quite, yes.

22 **MR JUSTICE ZACAROLI:** Should it be done? Is it necessary, but someone needs  
23 to identify whether it is even worth doing I suppose, but there needs to be  
24 some level of review before you get to that question I suppose. That's what  
25 this is all about. Which of you should do the task so that the 114 documents  
26 within this 514 which are not alleged to be confidential can be freed up to be

1 reviewed by your clients and to be looked at, if necessary, at trial. That's the  
2 question, is it?

3 **MS PRINCE:** Yes.

4 **MR JUSTICE ZACAROLI:** That's what all this is about. There are other issues  
5 along the way, but those have all been dealt with, have they?

6 **MS PRINCE:** Yes.

7 **MR JUSTICE ZACAROLI:** Right. Do you want to say anything else before I hear  
8 from Mr Randolph?

9 **MS PRINCE:** I am not sure if it would assist to go through the correspondence. It  
10 doesn't sound like it would. I think we have covered the principles .

11 **MR JUSTICE ZACAROLI:** There are questions about lacking metadata et cetera,  
12 but again what can be done about that now?

13 **MS PRINCE:** No. Metadata arises in relation to another issue. I don't take any  
14 point in relation to metadata in respect of this issue.

15 **MR JUSTICE ZACAROLI:** The point was made once you have numbered them --  
16 anyway it doesn't matter.

17 **MS PRINCE:** Sorry. You have lost the file names. So if we don't carry out this  
18 exercise, effectively the file names are permanently lost. So, for example, if  
19 there's a document which on its face doesn't tell you when it was created or  
20 who it was created by but there may be something in the file name that  
21 actually tells you that, that's valuable insight that is lost if we rely on the  
22 numbered documents as they exist in the data room.

23 **MR JUSTICE ZACAROLI:** Again that's a theoretical issue. There may be  
24 documents where knowing the name of the file is important for a forensic  
25 purpose at trial. I don't know whether that's true in any particular case. That's  
26 a theoretical point.

1 **MS PRINCE:** I take your point .

2 **MR JUSTICE ZACAROLI:** Yes. Until you have done the exercise -- well, I don't  
3 know. To read 514 documents probably could have been done during this  
4 morning by somebody just to see what's in them, but no-one has even done  
5 that yet.

6 **MS PRINCE:** No, my Lord. The position has simply been that we consider that --  
7 well, we only recently realised that the Claimants have kept no record of their  
8 renumbering, renaming of the files. It ought to have been a very simple  
9 exercise if they had kept a record to simply provide us with the original file  
10 names for the numbered documents.

11 **MR JUSTICE ZACAROLI:** Yes. Right. Mr Randolph, let's start.

12 **MR RANDOLPH:** I can be brief. I can finish at 1.00 on this particular point. I will be  
13 brief. Change of numbering. Sir, you mentioned this. 38C of our skeleton.  
14 Documents were re-named so that the confidential and non-confidential  
15 versions of the same document were given the same number. Now there is  
16 no record kept of the original file and that is a fact. No point going back in the  
17 past. Essentially document 1 in the redacted folder is the non-confidential  
18 version of document 1 in the confidential folder .

19 **MR JUSTICE ZACAROLI:** Yes.

20 **MR RANDOLPH:** Just following on, 39, as at the date of filing and service of this  
21 skeleton argument, so two days ago, the general folder contains those  
22 documents for which no confidential treatment is claimed. So that's not  
23 a problem. The confidential folder contains those documents for which  
24 confidential treatment is claimed with the confidential information highlighted  
25 and the redacted folder contains the non-confidential versions of the  
26 documents in the confidential folder with the highlighted sections replaced by

1 reactions. As we say, therefore, the Defendants can see everything in the  
2 general and the redacted folders and the relevant advisers can see everything  
3 in the confidential folder.

4 Now insofar as -- I think, Sir, you mentioned 114. I have 110 based on the  
5 correspondence, but it may be because there were 514 documents involved  
6 or now 110. Anyway it is round about that sort of figure. It is said that 110  
7 documents are not in the general folder or identifiable as such. Then we say,  
8 and this is 44A, if they are not in the general folder, then either they have  
9 been deleted as a duplicate or draft or they will be in the confidential/redacted  
10 folders and therefore the Defendants should have no difficulty in identifying  
11 the documents containing confidential information, absent obviously the fact  
12 that sadly we are where we are in terms of file names and file numbers.

13 A decision was taken to try and ensure that one could see which document was part  
14 of -- was confidential and non-confidential, so dealing with it like that rather  
15 than by name. Now that was a decision that was taken. We are faced with  
16 that reality. So the position is that if they are not in the general folder, they  
17 must have been deleted. If they are in the general folder, then no confidential  
18 treatment is claimed in them at all.

19 Of course, if a document is in the general folder it doesn't matter that it may once  
20 have been in the confidential folder, because if that is the case, a claim of  
21 confidentiality is no longer made.

22 We then get, Sir, to your point about what to do now. We are where we are. What  
23 to do. As Ms Prince has very candidly and frankly and fairly admitted, this will  
24 be an onerous task. It is not going to be that straightforward. It will be  
25 a manual task, and as Ms Prince has also said, and as has been made clear  
26 in the disclosure skeleton, the exercise of disclosure was carried out by the

1 Claimants under the supervision of their legal team, but their legal team is  
2 very small in comparison with the Defendants, but as we say at paragraph 45  
3 of our skeleton, producing a skeleton will not now assist the Defendants  
4 further, for the reasons I have just set out in paragraph 44 and the earlier  
5 paragraphs, but it will involve the Claimants spending many hours  
6 unnecessarily and disproportionately, we would say, recreating records that  
7 were not kept.

8 We say in the great scheme of things, and bearing in mind the overriding objective  
9 which obviously applies in the Tribunal as well as other courts, that this is  
10 a matter that if the Defendants really want to dig down into this, then they can  
11 deal with it. They have had access to our data room and it is not actually  
12 correct to say, as has been suggested, that documents can't be searched or  
13 tagged. I am instructed that they can be on the platform. That may be  
14 a dispute between the parties, but those are my instructions.

15 We have bent over backwards. There have been difficulties. Nothing is perfect in  
16 life, but at the end of the day we have lots of things going on. We have reply  
17 evidence. We have expert evidence to deal with and then further matters,  
18 and really to spend or cause substantial, as is admitted, a substantial amount  
19 of time to be spent on something that is not necessary for the reasons that I  
20 adumbrated just a moment ago and are set out in the skeleton at amongst  
21 others paragraph 44, we say if they want to --

22 **MR JUSTICE ZACAROLI:** Can I interrupt just for a moment? You say it is not  
23 necessary. It is not necessary if one was starting now to review the  
24 documents, because your paragraph 39 makes it very clear that you can now  
25 tell which are confidential and which are not and which have been redacted.  
26 That's fine. The problem is that the Defendants have started to review and

1 spent two months reviewing the earlier versions of the documents and they  
2 can't now link those back to the new sub folders. That's the problem, isn't it?

3 **MR RANDOLPH:** Yes. That is a problem, but it has to be seen -- there were, as  
4 you will have seen, Sir, problems both sides. It is not just a problem on the  
5 Claimants' side. Disclosure has been delayed. We have agreed --

6 **MR JUSTICE ZACAROLI:** That may well be true. I am dealing with this problem at  
7 the moment to try to work out how to get from where we are now to trial.

8 **MR RANDOLPH:** You are absolutely right, Sir. When you weigh everything in the  
9 balance, yes, insofar as there is a problem, and we say actually you can look  
10 at the stuff you have got already. I know you have done the work but it was  
11 always a work in progress, not least because the confidential versions and the  
12 redacted version folders were not produced until May. So you rather jumped  
13 the gun. There we were. That has been done. If you want to go down this  
14 path, then you go down it. Is it proportionate and fair to the parties for the  
15 Claimant to be asked with its small legal team to incur the costs and time, or  
16 is it better that the Defendants should do it to the extent they need to do it,  
17 given the fact that in essence they jumped the gun when they worked straight  
18 off one file rather than the sub files, the confidential and the reacted versions  
19 that were produced in May. So it is a balancing act.

20 **MR JUSTICE ZACAROLI:** Do you say they were wrong to jump the gun? That's  
21 a pejorative. Do you say they were wrong to start reviewing when they did?

22 **MR RANDOLPH:** Well, it's a fact, Sir. It is a fact, and it is a fact that is relevant to  
23 this extent. It was started prior to the confidential and redacted folders being  
24 produced. So it was 30th April the Claimants gave disclosure. Then the  
25 Claimants had moved those documents on 10th May to a confidential folder.  
26 On 28th May there was a redacted folder. So it wasn't very long. So they

1 must have really done an awful lot of work apparently between 30th October  
2 and 10th May, because the documents were re-named following further  
3 correspondence, and again this came up. It is the way of the world in  
4 disclosure. Things have to be changed. It was thought by my instructing  
5 solicitors, and who is to say that they are wrong -- it seems very sensible to  
6 me -- that you link the confidential document to the non-confidential  
7 document. Now I don't know why the original file name was deleted but  
8 maybe it simply was just not possible electronically to keep that and the new  
9 numbering, but we are where we are, Sir, and to an extent -- I hesitate to  
10 blame the Defendants, because I wasn't involved in the disclosure process. It  
11 is not for me to do so, but the fact is there in the skeleton at paragraph 37.  
12 They acted apparently before the relevant folders were produced .

13 **MR JUSTICE ZACAROLI:** Whose paragraph 37, yours or theirs?

14 **MR RANDOLPH:** My 37, Sir, just sets out the timing .

15 **MR JUSTICE ZACAROLI:** Yes. There is no change of name at that point, is there,  
16 10th May? The change of name does not happen until some time later. They  
17 were able to carry on reviewing documents in the folders generally without  
18 worrying that the names might get change and get lost?

19 **MR RANDOLPH:** Yes, but they were changed further to correspondence between  
20 the parties saying, "We need to sort out the confidential and redacted  
21 bundles point". So the Claimants had to go, re-review documents in both  
22 folders and, where confidential treatment was no longer claimed, then move  
23 them back to the confidential folder and then deal with the redactions. So it  
24 was an ongoing process and we are where we are, but to impose  
25 an enormous burden at this stage of the process, a few months before trial,  
26 we would say is disproportionate, especially given the number. It is not as if it

1 is all the documents .

2 **MR JUSTICE ZACAROLI:** So what do you say should happen. We should just  
3 ignore these documents and pretend they haven't been disclosed, we can't  
4 work out what they are? You say the Defendants should do all the work?

5 **MR RANDOLPH:** All the work. Insofar as this work is required, and we say it  
6 actually isn't because they can use the data that they have got at present and  
7 they can interrogate the documents in our data room, if they want to just stand  
8 on their position saying, "Oh, well, we did all the work on 30th April or shortly  
9 thereafter and tough, we want to have you do work now to assist us in relation  
10 to that earlier work", well, we say no, actually we don't think that would be  
11 right and proportionate and it is up to them. They can work off documents  
12 now. They can determine what the files are. They can know what is  
13 confidential and what's not confidential. So it's a question of, "Oh, well, we  
14 started so we have got to finish". Well, I don't think that's correct. There is  
15 give and take and we would say in the great scheme of things and given the  
16 overriding objective the take should be from the Defendants and the give  
17 should be to the extent that it should be given to the Claimants that they  
18 shouldn't have to produce this disproportionate and lengthy piece of work.

19 **MR JUSTICE ZACAROLI:** Right. Thank you. Ms Prince, how long would you need  
20 in reply?

21 **MS PRINCE:** A few minutes, if that is appropriate, now.

22 **MR JUSTICE ZACAROLI:** Let's carry on then.

23 **MS PRINCE:** My friend talks in his skeleton about if the documents are in the  
24 general folder, then there is no issue, because we know they are not  
25 confidential. I hope it will be clear from my earlier submissions that the whole  
26 point is they are not in the general folder. They are not identifiable as such.

1 **MR JUSTICE ZACAROLI:** They are somewhere in it, but you don't --

2 **MS PRINCE:** They are not in their existing general folder where they have split out  
3 the confidential documents. When we compare what's in the April disclosure  
4 to those folders, we have already extracted all of those. We get to the 514 by  
5 extracting all of those. So these are not those documents. Where he says  
6 that the rest of them are either in the confidential or redacted folders, well, the  
7 whole point is we cannot cross-refer to those. So that's the problem.

8 My friend talks about the Claimants having a small legal team. I am afraid that's just  
9 not the case. There's a very similar make-up of legal teams other than, in  
10 fact, the Claimants in effect have a heavier legal team. You may have seen  
11 the costs statements, which show they have three band A fee earners working  
12 on this as well as their counsel team.

13 My friend says it will take very many hours for the Claimants to sort this out. Well,  
14 I am afraid if that is right, then it is plainly right that it should be the Claimants  
15 that bear that burden, not the Defendants, because it is nothing to do with the  
16 way the Defendants have carried out their own disclosure. It is the way the  
17 Claimants have chosen to rename the documents, which they ought never to  
18 have done.

19 He mentions that the Defendants' legal team have jumped the gun by reviewing the  
20 documents when they were disclosed. I am afraid there were ongoing issues  
21 with the files, but, as you identified, it was not until some time later that they  
22 stripped the files of their file names. That was only on around 25th June. So  
23 the Defendants' legal team could not have sat around not reviewing  
24 documents for two months until the deadline for witness statements was  
25 almost upon them. They had to get on with their review, which is exactly what  
26 they did.

1 **MR JUSTICE ZACAROLI:** So from 30th April to 25th June you were acting under  
2 the belief that you were reviewing documents the name of which would  
3 remain and you could identify those documents later?

4 **MS PRINCE:** Yes. The Claimants were to identify which of those documents were  
5 confidential on 28th May, and had they done so, then there would have been  
6 no issue with the fact that we had already started reviewing.

7 **MR JUSTICE ZACAROLI:** Yes.

8 **MS PRINCE:** Work product will be lost on the Defendants' side where we have  
9 reviewed these documents, and it is not clear why it should be then for the  
10 Defendants also to bear the burden of resolving the issues of the Claimants'  
11 disclosure.

12 My friend says that these are changes that -- you know, they move the documents  
13 on 10th May, so we would only have had to wait a few weeks, but that's  
14 simply not the position. If we had had to wait until the Claimants have  
15 produced the current form of their data room with the re-named documents,  
16 we would have had to wait until 25th June to start the review, which is just in  
17 my submission not a realistic prospect.

18 **MR JUSTICE ZACAROLI:** Just one question before we break for lunch. I think you  
19 told me there has been no review of the 514 to determine whether any of  
20 them clearly just are not going to be relevant so they can be disregarded from  
21 this process. That hasn't been done yet?

22 **MS PRINCE:** No. The documents had already all been reviewed by the time the  
23 Claimants changed their name. So we did not want to incur further costs  
24 re-reviewing the documents when they changed the file names and we  
25 realised we had this issue. We thought we would be able to get annex 2  
26 completed. They would confirm which of them were confidential and we

1 would simply be able to cross-refer.

2 **MR JUSTICE ZACAROLI:** Yes. There are two questions. One is are they relevant  
3 at all to these proceedings. I mean, clearly they are relevant because --

4 **MS PRINCE:** Presumably, yes.

5 **MR JUSTICE ZACAROLI:** But we have moved on. The trial is not very long away.  
6 You can tell -- I may be wrong with this, but I suspect you have a better idea  
7 at this stage where a document simply is not going to be relevant, does not  
8 need to be looked at further by any party at this stage, than you did a few  
9 months ago, but that hasn't been done again on these 514.

10 **MS PRINCE:** No, it hasn't. I would suggest that they are more likely to be relevant  
11 documents than not. If they contain confidential information, then they may  
12 be documents that are more sensitive and therefore more key, but, of course,  
13 I have not carried out that assessment.

14 **MR JUSTICE ZACAROLI:** No. Yes. Right. Anything further for now?

15 **MS PRINCE:** No.

16 **MR RANDOLPH:** I would just ask you to read paragraph 38 again, because it points  
17 out that actually the renumbering and everything else took place further to the  
18 Defendants' complaint that some of the documents contained in the  
19 confidential folder didn't deserve confidential treatment. So we then had to  
20 engage positively and deal with that. So it is not just us thinking on one bright  
21 morning, "Oh, let's just rename just to be annoying". It was done as part of  
22 a process, an ongoing cooperative process.

23 **MR JUSTICE ZACAROLI:** Well, I understand the Claimants were not just doing this  
24 off their own bat. They were asked to do something, but they were not asked  
25 to renumber the documents.

26 **MR RANDOLPH:** Yes.

1 **MR JUSTICE ZACAROLI:** In fact, weren't they asked not to renumber the  
2 documents? Is that ...?

3 **MS PRINCE:** Yes. Sir, they were repeatedly asked in correspondence to keep the  
4 files names identical to the April disclosure.

5 **MR JUSTICE ZACAROLI:** Right. We will break until ten past.

6 **MR RANDOLPH:** Very grateful. Thank you.

7 **(1.09 pm)**

8 **(Lunch break)**

9 **(2.10 pm)**

10 **MR JUSTICE ZACAROLI:** Good afternoon. We need to wait for the live stream to  
11 carry on before we can say anything. Right. We will continue. I was  
12 proposing just to deliver a ruling on the first of the disclosure applications  
13 unless anyone wants to say anything first.

14 **MR RANDOLPH:** I wonder if I may say something very briefly in light of Ms Prince's  
15 comments before the short adjournment about markings and ask you to look  
16 very briefly at page 68 in bundle B, which is my solicitors' letter dated 25th  
17 June. This is the middle of the page between the -- middle of the page under  
18 "further marking", second paragraph:

19 "We note your request that the marking should appear on the document itself. It was  
20 at your suggestion that the parties agreed to disapply the CAT guidance  
21 relating to marking of relevant documents because you were finding that too  
22 onerous. Given the parties' subsequent agreement to deal with this matter as  
23 they sought fit, irrespective of that balance, which agreement was of course  
24 made at your request, it is disappointing that only after disclosure had been  
25 provided you complain that the documents have not been marked as you  
26 would like."

1 Then there is a response to that by Elias Law. One can pick that up at pages 75 and  
2 76. In paragraph 7 they say they are still unable based on what we have  
3 provided to properly ring fence confidential documents within the 30th April  
4 2021 disclosure, despite us raising this issue some three weeks ago in our  
5 letter dated 10th June.

6 Pausing there, Sir, obviously if they had been starting with an assessment of the  
7 disclosure back in April/May and waited until 10th June to raise this. Then  
8 over the page they say at 8:

9 "However, as you now assure us that all confidential documents have been moved  
10 out of the general folder and into the confidential folder and no claim of  
11 confidentiality is made for any document not contained in the confidential  
12 folder, our clients have been given access to all documents disclosed on 30th  
13 April with the same file name or identical MD5/5 identical values as the  
14 documents in the general folder. This approach that we have been forced is  
15 not complete."

16 Then they raise the 514 documents. Then at 10:

17 "We enclose an Excel document with the names of the 514 files."

18 Just on that, Sir, obviously those documents -- and you asked this question of  
19 Ms Prince before I think the short adjournment -- there has been, and I think  
20 Ms Prince is on record as saying, as confirming, that they have gone through  
21 the 30th April disclosure in its entirety and they then enclose an Excel  
22 spreadsheet with the 514 files.

23 So insofar as your question, Sir, which you raised about relevance is concerned,  
24 they have already gone through the initial disclosure exercise, because they  
25 said they did it based on the 30th April material and disclosure.

26 Then just to round off this correspondence just so the full picture is seen, on 26th

1 July, and this is pages 88A and following, but we only need to look at 88A, so  
2 this is my solicitors back to Elias, 26th July in relation to the application that  
3 we are now determining, or you are determining:

4 "Identification of confidential documents."

5 You can see that in the middle of the page:

6 "The Claimants are unaware of anything in the rules or any order made that requires  
7 the Claimants to complete annex 2. A full response has been provided. The  
8 Claimants also reiterate what was stated in correspondence, namely all the  
9 documents outside the confidential folder do not contain confidential  
10 information, which mean the Defendants are at liberty to review the  
11 documents outside the confidential folder in such circumstances completing  
12 annex 2 appears to be wholly without purpose."

13 This is important:

14 "Our clients made changes to file names in the documents in the confidential and  
15 redacted folders so that these would match at your clients' request. They  
16 have not kept any records of the original file names and so this would need to  
17 be reconstructed involving many hours' work."

18 So that is the correspondence, Sir.

19 **MR JUSTICE ZACAROLI:** Right. Do I take it -- I had not looked at that. I take it  
20 your clients are content that these 514 documents be treated as being  
21 non-confidential?

22 **MR RANDOLPH:** I think that is correct but I can -- to that extent if that is correct,  
23 then, of course, everybody can see them. Obviously the relevant advisers  
24 can see everything. The general file can be seen and the redacted file can be  
25 seen by everyone, and it is just the confidential file that can only be seen by  
26 the relevant advisers .

1 **MR JUSTICE ZACAROLI:** But the problem is that the 514 documents, the  
2 Defendants don't know which of those within the 400 which are confidential.  
3 So -- sorry, there will be 400 of those which apparently are confidential, but  
4 are you content that the way through this is that all the documents in that  
5 bundle be treated as non-confidential, whatever you may have regarded them  
6 as being before?

7 **MR RANDOLPH:** Can I take very quick instructions on that? My instructing  
8 solicitors are listening to this. So they should be able to respond ASAP. The  
9 answer I give will impact potentially on the order that you, Sir, give now .

10 **MR JUSTICE ZACAROLI:** Yes, it cuts through this material, doesn't it? The only  
11 issue that I understood to be really argued about was being able to identify  
12 which of these documents are confidential. If your side are prepared to  
13 accept that these are treated as being non-confidential, whatever they may  
14 have been treated as before, then that's a very short way through it.

15 **MS PRINCE:** Sir, if I may interject, if that were the case, the Claimants would have  
16 no confidential documents. I don't believe that's what Mr Randolph intends to  
17 be the outcome of this.

18 **MR RANDOLPH:** No. The 400 are confidential. I have just had it by WhatsApp.  
19 So the statement in those letters did not say that the 400 were not  
20 confidential. They just said that all the documents outside the confidential  
21 folder do not contain any confidential information. There is still the  
22 outstanding issue as to the other documents, but I only took you, Sir, to that  
23 just to show you the genesis of the name change and the file numbers change  
24 .

25 **MR JUSTICE ZACAROLI:** Yes. Ms Prince, do you want to respond to that point  
26 then?

1 **MS PRINCE:** If I may. My friend refers to correspondence in which the Claimants  
2 say they have changed the names of the documents at the Defendants'  
3 request. That is not correct. The confidential and receive redacted folders  
4 contained documents from the outset whose names did not exactly match the  
5 April disclosure. We requested that they match each other and the April  
6 disclosure. I can take you, Sir, to the correspondence, but it is in a number of  
7 letters on 10th June, on 17th June the Defendants' solicitors expressly said  
8 "We must be able to match identically the file names to the April disclosure" .

9 **MR JUSTICE ZACAROLI:** Let me go back to where it says "at your request".  
10 I don't think I read it in the way you suggested it is being read but let's go back  
11 to that. Where was that?

12 **MR RANDOLPH:** This is the letter of Tuppens Law dated 26th July, 88A: "In such  
13 circumstances our clients may ..."

14 **MR JUSTICE ZACAROLI:** 88A was that?

15 **MR RANDOLPH:** Yes, indeed.

16 **MR JUSTICE ZACAROLI:** Let me just get that. Got it.

17 **MR RANDOLPH:** "... confidential information at your clients' request."

18 **MS PRINCE:** If I may, Sir, the issue was that originally the file names of the  
19 documents in the confidential and redacted folders did not match each other .

20 **MR JUSTICE ZACAROLI:** As I read this, the matching was at your clients' request.  
21 We asked throughout that they should match each other and the April  
22 disclosure.

23 **MR RANDOLPH:** We are all ad idem.

24 **MS PRINCE:** In relation to my friend's point about reviewing documents, the review  
25 started when the disclosure was given and we fully anticipated that the  
26 Claimants would identify by reference to that disclosure which of their

1 documents were confidential, so there was no need to hold off the review.

2 **MR JUSTICE ZACAROLI:** Good. I think that's -- go on.

3 **MS PRINCE:** If we have to then rely on the documents as they are in the data room,  
4 we will lose the work product of that review.

5 **MR JUSTICE ZACAROLI:** I understand. Thank you.

6 **RULING**

7 **MR JUSTICE ZACAROLI:** I need to consider, as the first issue of the disclosure  
8 application, an issue which has arisen in the following outline circumstances.

9 The Claimants uploaded all of their disclosed documents to a general data room.

10 Leaving aside glitches along the way, they then created two sub folders, one  
11 intended to contain documents said to be confidential with confidential  
12 passages highlighted and the other containing those same documents but  
13 with the confidential sections redacted. The Defendants uploaded the general  
14 data room provided by the Claimants to their own E-platform for the purposes  
15 of reviewing the documents, because the Claimants' own platform was a static  
16 one, and began work on reviewing those at the end of April. There was  
17 a delay in the Claimants' production of the sub folders, but that is not material  
18 to the present issue.

19 Towards the end of June, responding to criticisms by the Defendants of the  
20 Claimants' disclosure exercise, the Claimants recreated the sub folders, but in  
21 doing so removed permanently the original file name of the documents and  
22 replaced them with numbers. If the Defendants were to start from scratch in  
23 reviewing documents now, there exists a clearly delineated data room with  
24 general documents over which no confidentiality is claimed, and two clearly  
25 delineated sub folders, one containing confidential documents with  
26 highlighting, the other with the same documents but the highlighted passage

1 redacted, but because of the change from file name to a new numbering  
2 system, it is not at least immediately possible for the documents as now  
3 organised to be cross-referred to what was in the original data room, which it  
4 is to be remembered contains both confidential and non-confidential  
5 documents.

6 Having done a fair amount of analysis already, the Defendants have managed to  
7 narrow down the problem to approximately 514 documents. Of that overall  
8 sum they know that 400 of them are or should be in the confidential sub folder  
9 and therefore confidentiality over them is claimed, but they do not know which  
10 of the 514 is within that 400 confidential documents block.

11 The Defendants have two options. First, they can begin their review of the  
12 documents again by reference to the now constituted data sets and the sub  
13 folders. That would potentially waste up to two months of work carried out in  
14 reviewing the documents as originally provided by the Claimants.

15 The second option is to cross-refer the 514 documents to the original data room so  
16 that the new number assigned to each document can be linked to the original  
17 file name. Once that is done they would know whether the document they  
18 have reviewed was in the confidential sub-set or not. It is common ground  
19 that this too would involve a fair amount of work.

20 This part of the application essentially boils down to who should be responsible for  
21 that work. The Claimants say that the Defendants should do it because they  
22 jumped the gun in reviewing the documents provided to them before the  
23 Claimants had finished the uploading process, and because the Claimants  
24 have a significantly smaller legal team and the Tribunal should be very wary in  
25 a case like this of what I might term Goliath defendants over-burdening David  
26 claimants.

1 In the circumstances as explained to me this morning I don't accept that this is the  
2 right analysis. It is clear to me that the problem that now exists stems from  
3 the Claimants' error in removing metadata and particular file names of the  
4 originally disclosed documents. There is clear guidance against doing so in  
5 the CPR and the Defendants expressly warned the Claimants not to do so.

6 It seems to me I cannot escape the conclusion that, although the Claimants were,  
7 I genuinely believe, trying to be helpful, they are unfortunately to blame for the  
8 position the parties now find themselves in and the problem in identifying  
9 which of the 514 documents are confidential.

10 The Defendants' proposed solution is that the Claimants should fill out a long  
11 schedule, which would require them to identify the original file name and  
12 cross-refer that to the number of the document for every single one of the 514  
13 documents.

14 Since the only remaining complaint by the Defendants is that they cannot identify  
15 which of the 514 documents is non-confidential and thus may be used freely  
16 in the proceedings, it seems to me that that is on the face of it overkill and  
17 disproportionate, subject to anything further that the Defendants might say on  
18 this (because this is not something we really traversed in our discussion this  
19 morning), it seems to me that the issue can be resolved sufficiently by the  
20 Claimants being required simply to identify which of the 514 documents they  
21 wish to assert confidentiality over. They will have access to or already have  
22 access to the same underlying data sets as the Defendants do, including that  
23 originally provided by them in April, which the Defendants have retained, but  
24 since they have already undertaken the confidentiality review once, in addition  
25 to the fact that this stems from their error in the first place, it seems to me to  
26 make more sense that they should undertake that task. It may well be that

1 that is a much quicker task for them to do than to identify the original data  
2 number for each of these documents.

3 **MS PRINCE:** Sir, if I may, if I understand your order correctly, you are suggesting  
4 that although the Claimants should be required to say if the documents in  
5 annex 2 are confidential or not, but they should not be required to cross refer  
6 them to the numbered documents?

7 **MR JUSTICE ZACAROLI:** Yes.

8 **MS PRINCE:** In my submission that would still cause the problem of wasted work  
9 product where documents on the platform have been marked, worked with in  
10 various ways and they cannot be cross-referred to what's currently on the  
11 data room. We will be having to work with those versions eventually because,  
12 of course, they are the marked up, highlighted and redacted versions. So we  
13 will need to cross-refer at some point.

14 **MR JUSTICE ZACAROLI:** Once you know the -- does that relate both to the  
15 confidential and non-confidential documents because the confidential ones  
16 can't be used in the proceedings, can they?

17 **MS PRINCE:** Only to the extent that they are used in a form which doesn't allow  
18 public access .

19 **MR JUSTICE ZACAROLI:** I just wonder how real a problem that is.

20 **MR RANDOLPH:** It may be, Sir, we could do it in stages. It is always easy for  
21 counsel to undertake on behalf of solicitors, but I can undertake that they  
22 would carry out that task within a short period of time so that it may be that the  
23 514 documents, it may be that only a minor percentage of those remain  
24 confidential.

25 **MR JUSTICE ZACAROLI:** Well, no, because we know that 400 are confidential,  
26 don't we?

1 **MR RANDOLPH:** It is the 514. Well, it is -- we know that 400. So it is the 114  
2 remaining ones which is where this application came from. So it's whether we  
3 continue to assert confidentiality over the additional 114. That should be  
4 a task, although again it is easy for counsel to say this and more difficult for  
5 solicitors to implement it, but that should be a task that could be completed  
6 quite quickly. What I am loathe to -- then, Sir, I think you are right. If many of  
7 those documents do not have confidentiality attached, Ms Prince's concern  
8 about wasted work product, which is where this goes to, falls away, because  
9 anything that is non-confidential and is marked up, there is no wasted work  
10 product. That is straightforward. Query whether there is any wastage of time  
11 or effort in relation to confidential documents, because, as she frankly has  
12 admitted, those confidential documents can still be used in the process, albeit  
13 in a private sitting. So I don't quite see where there's wasted product, but it  
14 may be, as I say, a quick flick through the 114 documents, which this  
15 application concerns, to determine their confidential or non-confidential status,  
16 that could be carried out within X days, X to be agreed, and then if there's  
17 a further problem, then essentially the matter would come back not for oral  
18 determination, because, Sir, you have heard all the -- nothing has changed.

19 Then it would simply be a question of tweaking the order, but we would be very  
20 loathe for the reasons you have given for the order to be changed in any  
21 radical way so as essentially to get back to where the Defendants want you to  
22 go, which is annex 2, which is, as we have submitted, wholly disproportionate.

23 **MR JUSTICE ZACAROLI:** Ms Prince, what is -- your concern is -- as I see it, the  
24 debate this morning was essentially about being able to identify which  
25 documents could be freely used and which could not. The further concern is  
26 that when you know which of these documents fall into which camp, you will

1 have marked up the original version of them and you want to continue using  
2 the original version. Is that the problem?

3 **MS PRINCE:** Well, the documents that have been disclosed in April are unmarked  
4 documents. So 400 of them are confidential, but those native unmarked  
5 versions become otiose when the parties assert confidentiality and mark them  
6 up. So if we cannot match up --

7 **MR JUSTICE ZACAROLI:** Let me understand what you mean by marking up. I was  
8 thinking about marking as in you have worked on the documents, you have  
9 made notes. That is what I was referring to but you are referring to something  
10 different I think?

11 **MS PRINCE:** Yes. I am referring to the fact that the confidential folder holds  
12 highlighted versions of the documents and the redacted folder holds redacted  
13 versions of the documents whereas what was disclosed in April is a native  
14 version with no mark-up. I am also talking about marked-up in the sense that  
15 the Defendants' legal team has reviewed all these documents has, for  
16 example, tagged them to the various disclosure categories in the order and  
17 has made various comments, and if that work product cannot be carried over  
18 from the native version to the document which we will, in fact, be using, which  
19 will be either the highlighted or redacted version, then that is also lost work  
20 product.

21 **MR RANDOLPH:** But, Sir, just picking up on that, first of all, it is interesting we have  
22 further confirmation that the Defendants have reviewed all the documents,  
23 including the 114, but more importantly there seems to be a distinction being  
24 drawn by Ms Prince between 30th April native document disclosure and the  
25 disclosure given thereafter or the recalibration of the disclosure about ten  
26 days later in terms of the confidential file which was produced on 10th May, so

1 ten days after 30th April, and the 20 something of May, which was the  
2 redacted version.

3 I am not quite sure whether Ms Prince is saying that the work product -- all the work  
4 product was somehow done between 30th April and 9th May or 23rd May,  
5 because it would seem odd that they carried out this work willy nilly before  
6 getting the confidential and non-confidential versions. Insofar as any work  
7 has been carried out on of the confidential/redacted versions which were  
8 produced in May, then that work product either by mark-up in the sense that  
9 you and I understood it, or in the sense that Ms Prince understood, that can't  
10 be lost. That's there to be used.

11 **MS PRINCE:** I am sorry, Sir. That's not what I intended to mean. What I meant  
12 was there were three versions of documents. There is the native document  
13 from April which had not yet been reviewed for confidentiality and therefore  
14 contained no markings, no highlighting, no redactions.

15 On 28th May the Claimants produced redacted versions in the redacted folder, but at  
16 that point they had not provided highlighted versions. They only provided  
17 those on 25th June. For obvious reasons the Defendants' legal team carried  
18 on reviewing the native versions on the platform, because all that would be  
19 required once the Claimants had identified which of those documents was  
20 redacted would be to switch out the marked-up confidential and  
21 non-confidential versions for the native version that had been reviewed and  
22 the work product in commenting on documents, tagging them by issue,  
23 et cetera, so they could easily be worked with in future, would not be lost, but  
24 if we do what Sir is proposing now, that work product will still be lost. The  
25 Defendants' solicitors will have to re-upload -- will have to upload the other  
26 versions to the platform but will have no way of cross-referencing them to

1 what has already been reviewed and will effectively have to re-review them  
2 and re-tag them.

3 **MR JUSTICE ZACAROLI:** The 514 would have to be re reviewed and re-tagged?

4 **MS PRINCE:** The 400 which will be confirmed to be confidential. The others will not  
5 need that exercise because if they are not confidential, then there are no  
6 other versions. There is only the version disclosed in April .

7 **MR JUSTICE ZACAROLI:** Okay. I follow that. I mean, I am afraid, Mr Randolph, it  
8 does seem to me that my shortcut may be actually not the shortcut that  
9 I hoped it would be. I think, therefore, I am going to require your clients to do  
10 what the Defendants asked, which is to identify the original number -- sorry --  
11 not number.

12 **MR RANDOLPH:** We can't do that I am afraid, Sir. We cannot do that. We don't  
13 have the original number .

14 **MR JUSTICE ZACAROLI:** No, not an original number. The original name for the  
15 document, which you will have, don't you, because the Defendants, I thought  
16 they had provided it to you already. Whatever you provided to them you  
17 already have.

18 **MR RANDOLPH:** I don't know whether that -- I had understood that we don't have --  
19 it may be that we have snapshots of --

20 **MS PRINCE:** If I may refer, Sir, to the Defendants' letter dated 1st September. Let  
21 me just find that page reference. This is on page 88O of the bundle .

22 **MR JUSTICE ZACAROLI:** That takes a while to find, because it is not in a --

23 **MS PRINCE:** Yes. It is page 106 of the pdf.

24 **MR JUSTICE ZACAROLI:** I am there. Thanks.

25 **MS PRINCE:** In paragraph 5 on the next page:

26 "As for your statement that there is no further assistance the Claimants can provide

1 this is incorrect. We provide with this letter a link to a copy of the Claimants'  
2 confidential folder as it was downloaded by this firm on 8th June prior to the  
3 Claimants' renaming of the files."

4 And that is what was done .

5 **MR JUSTICE ZACAROLI:** Mr Randolph, this discussion this morning proceeded on  
6 the premise, as I understood it, that this is something that could be done. The  
7 only question was which side would have to do the work of cross referring the  
8 514 to the database which had been provided by you originally in April and  
9 which is being provided to you or has been resent to you by the Defendants.

10 **MR RANDOLPH:** I think that's right. I think it is -- I apologise if I said something  
11 different. I think the bottom line is that we don't actually have the  
12 documents -- the numbers -- the names, the file names have not been kept  
13 and that is why it is going to take us a lot longer to review these documents.

14 I do press on you that the shortcut is not going to be a long cut, because in order for  
15 us to review the relevant documents, as you initially suggested, as I say, it  
16 may be that the vast bulk of those documents are non-confidential on further  
17 review, which means that there is no problem with them at all, because, as  
18 Ms Prince has said, the original numbering remains. That can be  
19 cross-referred. There is no issue with native data or anything else. No work  
20 product has been lost. Ergo it would be most unfortunate if we had to  
21 undertake with the small skeleton staff we have, this extensive new task  
22 actually with a result of an elephant giving birth to a mouse.

23 Much better, I would suggest for us, and obviously we are a very small elephant and  
24 the mouse would be even smaller, but it would be much more effective and  
25 proportionate we would suggest and not problematic for the Defendants, for  
26 my solicitors to undertake a quick review of the relevant documents and to

1 confirm those initially, as you suggested, which are confidential and which  
2 aren't. If the majority are non-confidential, that's fine and then we can deal  
3 subsequently I am sure with any remaining confidential documents in that  
4 segment of documents.

5 If, on the other hand, they are not, then it may be that, given -- it may well be that  
6 given that my solicitors have heard what you have said and what Ms Prince  
7 has said and what I have said, that we come to the view that actually it will be  
8 sensible to produce that schedule, but it may be that schedule might be  
9 entirely pointless, or the vast amount of work spent on it entirely pointless.

10 **MR JUSTICE ZACAROLI:** Let me investigate that point with Ms Prince.

11 Ms Prince, going back to the point you made earlier, insofar as the documents are  
12 confirmed as confidential, this problem doesn't arise. Is that right?

13 **MS PRINCE:** No, it does. It arises for the confidential version. So that's the bulk of  
14 it. The 400 documents which are confidential out of the 514, they have three  
15 versions, a native version, a highlighted version and a redacted version. If we  
16 cannot match up the highlighted and redacted versions with what is on the  
17 platform, we will have to re-review those 400 documents from scratch .

18 **MR JUSTICE ZACAROLI:** Okay. So the process of identifying the original  
19 number -- not number -- the name of the file is only needed for those for which  
20 confidentiality is claimed.

21 **MS PRINCE:** Yes. By definition if the Claimants identify which of the 514 is  
22 confidential, they need not do anything else with the 114. We will understand  
23 they are not confidential and they can be released out of the confidentiality  
24 ring .

25 **MR JUSTICE ZACAROLI:** Right. So at least the schedule can be reduced to that  
26 effect. They need to identify the name for you for your benefit over which

1 confidentiality is claimed.

2 **MS PRINCE:** Yes.

3 **RULING**

4 **MR JUSTICE ZACAROLI:** It seems to me that the order should be in the form that  
5 the Claimants should identify the documents over which confidentiality is  
6 claimed, and in respect of that sub-set, if it is a sub-set, they should identify  
7 the original file name from the schedule -- from the database which they are  
8 being, or have been, provided with by the Defendants.

9 **MS PRINCE:** Sorry. If I may interject. They have been provided with the original  
10 file names. What they need to confirm is what the renumbered file name is.

11 **MR JUSTICE ZACAROLI:** It is matching up the numbered documents with the  
12 original file name.

13 **MR RANDOLPH:** It will be a schedule where you match up file names, say, hearing  
14 8th September, to document number 23, so you can read it across in  
15 a spreadsheet.

16 **MS PRINCE:** Sir, annex 2, which is at page 16 of the bundle, which is page 19 of  
17 the pdf, can be used for this purpose. So if you have that before you, it  
18 includes the file name, which is from the April disclosure. Then there's  
19 a column for confidential yes or no. Obviously if the answer is no, there is no  
20 further clarification required.

21 **MR JUSTICE ZACAROLI:** I don't mind the format you produce it in but the essence  
22 of what I am ordering I think is clear. The matching of file number to name  
23 relates to the documents over which confidentiality is claimed.

24 **MS PRINCE:** Thank you.

25 **MR JUSTICE ZACAROLI:** Right. Does that deal with issue 1 of disclosure?

26 **MR RANDOLPH:** Yes.

1 **MR JUSTICE ZACAROLI:** Before we move on, there is an issue about  
2 confidentiality and this hearing, because I don't know if we need to be  
3 discussing matters which the Claimants are trying to assert -- continue to  
4 assert confidentiality over and the very fact this hearing is being live streamed  
5 might destroy the confidence they want to preserve. Are we in that territory or  
6 can we deal with this by being careful and referring to people by letters rather  
7 than names where it becomes relevant.

8 **MS PRINCE:** I very much hope so.

9 **MR JUSTICE ZACAROLI:** It is really your concern, Mr Randolph. What do you say  
10 about that?

11 **MR RANDOLPH:** I think we can take the latter course.

12 **MR JUSTICE ZACAROLI:** Okay. We will refer to Mr S on issue 3 and it may not be  
13 required on issue 2.

14 **MR RANDOLPH:** No.

15 **MS PRINCE:** Thank you. Issue 4 in the Defendants' application, which relates to  
16 redaction of documents showing copying by the Claimants of the Defendants'  
17 products is what I'd like to address you on next. So there are examples of the  
18 redactions applied by the Claimants. They start at page 91 of the bundle,  
19 which is 115 of the pdf. I will, if I may, take you through those shortly, but  
20 I would like to stress that the application is not just in respect of those  
21 examples. Those are just examples of the category of confidentiality asserted  
22 by the Claimants, which is disputed by the Defendants.

23 **MR JUSTICE ZACAROLI:** Yes, although it would be quite helpful to see one,  
24 because it seemed to me what was being redacted as confidential was the  
25 content of the e-mail, not the identity of the person to whom it was being sent  
26 or received which I thought was actually the confidential bit, but I may have

1 got the wrong end of the stick here.

2 **MS PRINCE:** It depends very much on which example we are looking at and  
3 whether it relates to issue 4 or issue 5 in relation to Mr S.

4 **MR JUSTICE ZACAROLI:** Yes.

5 **MS PRINCE:** In relation to issue 4, when the Defendants' solicitors received the  
6 confidential versions of documents, they identified that the Claimants had  
7 redacted information relating to Ede & Ravenscroft. So if I can give  
8 an example of the first letter that was sent is on page 76 of the bundle, which  
9 is page 80 of the pdf. Paragraph 14, which starts just on the previous page:

10 "As to these new examples please explain."

11 In sub-paragraph 2 and 3:

12 "Why you consider the entirety of an order form from Ede & Ravenscroft and  
13 an image of an item purchased from Ede & Ravenscroft to be confidential to  
14 your clients."

15 In the next sub point:

16 "Why the posting of a hood from ... is considered confidential."

17 They received a response from the Claimants, which is at page 86 of the pdf.  
18 Apologies. I am just having issues turning this up. Sir, if you have that in  
19 front of you?

20 **MR JUSTICE ZACAROLI:** Yes.

21 **MS PRINCE:** In relation to paragraph 14.2 and 14.3, the same answer:

22 "Access to this document will reveal through the document's metadata aspects of the  
23 Claimants' commercial policy which are confidential."

24 Sir will understand that metadata of course, is data about data. It is not visible on  
25 the face of a document and therefore in my submission it is not possible for  
26 this justification to explain the redactions that have been --

1 **MR JUSTICE ZACAROLI:** Hadn't this gone away? I thought that the only issue  
2 being relied on now was the revealing of who the mystery shoppers were.

3 **MS PRINCE:** That may be the case from my friend's skeleton. It wasn't the case in  
4 correspondence. I wasn't sure if (inaudible) were pursuing that.

5 **MR JUSTICE ZACAROLI:** I am concerned what issue remains today. Mr Randolph  
6 can confirm. Is it just the mystery shoppers?

7 **MR RANDOLPH:** Absolutely. I am very keen to keep this to its proper bounds. It is  
8 all about mystery shoppers.

9 **MS PRINCE:** Understood. I am grateful for that clarification.

10 In relation to mystery shoppers, I have referred to the Umbro decision and the Act  
11 and the relevant provisions in my skeleton argument, and in my submission  
12 what the Tribunal will be looking at is whether there is significant harm that  
13 may be caused to legitimate business interests and the nature of information  
14 that is redacted on these grounds would be vital business secrets.

15 **MR JUSTICE ZACAROLI:** Again can we look at an example then? This is where  
16 I think it is helpful to see exactly what's being redacted.

17 **MS PRINCE:** The difficulty on this ground is that the examples provided don't really  
18 show mystery shopper techniques other than perhaps a document which is at  
19 page 91 of the bundle, which is 120 of the pdf .

20 **MR JUSTICE ZACAROLI:** Which is hard to read. It is a photograph.

21 **MS PRINCE:** Yes. So there's a photograph of a hood, which is one of Ede &  
22 Ravenscroft's hoods with an invoice overlaid over it, which is also from Ede &  
23 Ravenscroft. I am afraid with the quality of the image I am not actually able to  
24 see who is the purchaser on the invoice, but I suppose it may be possible  
25 potentially to see that.

26 **MR JUSTICE ZACAROLI:** But what confidentiality is claimed here? Is the whole

1 document said to be confidential?

2 **MS PRINCE:** Sorry. This is a confidential version so it has been highlighted in  
3 yellow and Sir will see that the entire image is highlighted in yellow.

4 **MR JUSTICE ZACAROLI:** I see. I was looking for highlighting but it is the whole  
5 thing.

6 **MS PRINCE:** That's precisely the problem. We have a justification for the  
7 redactions, and I will turn to really how credible that is in a moment, but  
8 actually on the face of the documents it is not clear that that is what has been  
9 redacted. Of the examples in the bundle this is the only one which could  
10 potentially give any insight at all in relation to mystery shopper techniques.

11 If I take you through the others, turning to page 97, which is 126 of the pdf.

12 **MR JUSTICE ZACAROLI:** Yes.

13 **MS PRINCE:** We do not dispute the redaction of the e-mail address. That's  
14 a contact e-mail address, but one line there is redacted and it doesn't appear  
15 to have anything do with showing mystery shopper techniques. In fact, it  
16 doesn't really seem to contain anything confidential at all other than  
17 a reference to a sample hood. So the word "sample" appears to be used by  
18 the Claimants when they are referring to the Defendants' products which they  
19 then send for copying.

20 **MR JUSTICE ZACAROLI:** Right.

21 **MS PRINCE:** If we look at the e-mail which is on the next page, there's a long chain  
22 of e-mails. If we scroll down -- this e-mail deals with issues the Claimants  
23 have had copying the Defendants' products exactly. If we turn to 130 of the  
24 pdf, which is further down that e-mail chain, Sir will see in the very last  
25 paragraph which is highlighted a reference to a sample which was sent, which  
26 is an Ede & Ravenscroft sample.

1 The rest of the e-mail effectively deals with difficulties the Claimants have had in  
2 matching that sample exactly. It's an exchange of e-mails with their supplier .

3 **MR JUSTICE ZACAROLI:** So nothing in that e-mail identifies the person who is the  
4 mystery shopper?

5 **MS PRINCE:** Not at all, no.

6 **MR JUSTICE ZACAROLI:** Yes.

7 **MS PRINCE:** If we take the document on page 105, which is 134 of the pdf, we see  
8 a bar code. All the content of the bar code has been highlighted and  
9 redacted. So we can see a reference to E&R and the institution that the hood  
10 relates to and a bar code. I am instructed that the Defendants cannot work  
11 out from a bar code who the purchaser was. It shows what the product was,  
12 not who the purchaser was.

13 **MR JUSTICE ZACAROLI:** Right. What matters is the individual who acted on  
14 behalf of the purchaser -- I suppose -- educate me. Is a mystery shopper  
15 always just an individual or is it an individual acting on behalf of some  
16 organisation? I don't know whether --

17 **MS PRINCE:** It is really not quite clear. What I had understood from the Claimants'  
18 correspondence is that they have a limited pool of numbers of people they say  
19 they can use to purchase items from the Defendants to copy them, and if the  
20 Defendants became aware of who those individuals were, they would prevent  
21 them from purchasing products for those purposes.

22 **MR JUSTICE ZACAROLI:** But generally the purchase of a gown would be by  
23 an individual. At least it would not be surprising if an individual wanted to  
24 purchase a gown. So a mystery shopper could be --

25 **MS PRINCE:** It could be anyone. It could be anyone, but the Claimants say "We  
26 don't want you to know who we use".

1 **MR JUSTICE ZACAROLI:** Yes, I understand their concern. We will come back to  
2 that. So, for example, if an e-mail -- if one of these documents was an e-mail  
3 or a letter which had the name of the mystery shopper, what would be the  
4 problem in that name being redacted?

5 **MS PRINCE:** Well, I would -- my submission would be it is not necessary to redact  
6 that. It is not necessary to protect vital business interests.

7 **MR JUSTICE ZACAROLI:** But what harm would there be? What is the relevance of  
8 the name of an individual shopper?

9 **MS PRINCE:** Well, quite. If that was all the Claimants redacted, then we might not  
10 have this issue but, of course, as Sir will have seen from the examples, that's  
11 not the way they have applied these redactions, and the stated justification for  
12 the redactions does not actually marry up with the redactions themselves.

13 **MR JUSTICE ZACAROLI:** Taking your point that there is a legal test to cross here,  
14 but I would like to -- I think it is necessary to balance that against why these  
15 documents are necessary. So what is it about these documents that you say  
16 is necessary for purposes of the proceedings?

17 **MS PRINCE:** As matters stand the Defendants obviously have not seen these  
18 unredacted documents. They are not able to provide any instructions in any  
19 detail on what the Claimants appear to be doing with their sample products,  
20 and it is relevant, because the Claimants state in their re-amended claim form  
21 that any gown manufacturer can produce gowns and hoods based on publicly  
22 available information, and they state in their witness statements also that that  
23 is what they do. They rely on Shaw's Academical Dress and the Burgon  
24 Society information.

25 So publicly available information in order to identify the designs required for their  
26 products, but in practice these documents show that is not what they are

1 doing, and the redactions prevent the Defendants' legal team from taking any  
2 particular specific instructions. For example, it prevents us from asking the  
3 Defendants about the particular institutions' products and design that these  
4 redactions relate to.

5 So the Defendants are not able, for example, to reply to the witness statements in  
6 relation to this issue and they are not able to give any instructions on any  
7 amendments to pleadings, any cross-examination points, anything of that  
8 nature. Of course, the Defendants are the experts in this industry, not the  
9 legal team. So without the Defendants being able to actually see what it is the  
10 Claimants have been doing with their products, we are missing a vital piece of  
11 the picture .

12 **MR JUSTICE ZACAROLI:** So it is relevant to the Claimants' assertion that they are  
13 able to copy the gowns from public information only.

14 **MS PRINCE:** Yes. They say they are able to make them. So they effectively state  
15 they don't need to copy. They can make them from scratch just based on  
16 public descriptions of documents -- of the academic dress schemes and they  
17 say that's what they do, but in practice it doesn't appear to be the case .

18 **MR JUSTICE ZACAROLI:** Yes.

19 **MS PRINCE:** If I can take you through the rest of the examples whilst we are doing  
20 this. On page 135 of the pdf there are some instructions which were sent to  
21 China on how to produce various hoods. Sir will see the yellow boxes, which  
22 are over the photographs of the samples and the name of the university and  
23 the fabric, which is a very generic description of the colour and fabric used.  
24 I take no issue at all in relation to redaction of the contact names or e-mail  
25 addresses for the suppliers.

26 Firstly, once again this has nothing at all to do with mystery shopper techniques and,

1 secondly, it is really not clear why any of this information is confidential to the  
2 Claimants. By definition if the Claimants are using products from the  
3 Defendants or any other supplier, then photographs of those products and  
4 descriptions on how to copy them cannot be confidential to the Claimants. It  
5 is not really their information .

6 **MR JUSTICE ZACAROLI:** The only ground relied on is identification of the mystery  
7 shopper.

8 **MS PRINCE:** Quite. I am afraid in that respect the photograph that I showed you  
9 earlier with an invoice on it is the only one that I am aware of that could  
10 tangentially relate to that.

11 **MR JUSTICE ZACAROLI:** Right.

12 **MS PRINCE:** On the very last page of the bundle is further instructions on how to  
13 make a hood. To the extent that this is how to copy exactly one of the  
14 Defendants' products I really don't understand how that could be confidential  
15 to the Claimants and again it has nothing to do with mystery shopper  
16 techniques.

17 Further, the image which is in the middle of that of the full hood on some decking,  
18 that image exists separately in its own document and that document was  
19 originally claimed to be confidential by the Claimants, but they have since  
20 acknowledged that it is not and moved it into the general folder .

21 **MR JUSTICE ZACAROLI:** Yes.

22 **MS PRINCE:** I don't understand, therefore, how it could be confidential in the  
23 context of this collage of different images. We have asked the question in  
24 correspondence. We have had no response.

25 **MR JUSTICE ZACAROLI:** Yes. Now the documents you have taken me to are  
26 some of the documents in the bundle, but are the documents in the

1 bundle merely some of the documents over which confidentiality is claimed?

2 **MS PRINCE:** That's right. Sir, the Claimants, of course, have agreed the  
3 bundle and they have not ever suggested that there are any other examples  
4 that ought to be brought to the Tribunal's attention .

5 **MR JUSTICE ZACAROLI:** Yes.

6 **MS PRINCE:** So turning back to the legal test of significant harm and protecting vital  
7 business interests, which is to be weighed against the rights of the defence  
8 and the overriding principle that the proceedings should be conducted as  
9 openly as possible, in my submission the redactions really have nothing to do  
10 with the justification put forward by the Claimants. So they cannot be upheld  
11 on that basis alone, but even if they were, the Claimants are free to ask  
12 someone else to purchase a gown from the departments. There is not  
13 a limited pool of people in the world who can order products from the  
14 Defendants. So it really would make no difference at all even in the worst  
15 case scenario where the Defendants took offence to the Claimants doing this,  
16 they made note of the individuals that the Claimants used to purchase their  
17 products and they blocked them from ever buying another product, they  
18 couldn't stop future purchases by the Claimants made by other individuals.

19 **MR JUSTICE ZACAROLI:** Yes.

20 **MS PRINCE:** So this is really in the order of an inconvenience that the Claimants  
21 might need to use other individuals to purchase products, certainly not in the  
22 nature of significant harm.

23 **MR JUSTICE ZACAROLI:** Yes.

24 **MS PRINCE:** On the other side of the balance I have explained the need for these  
25 documents on the Defendants' part. So it really is, in my submission, very  
26 important that these redactions which do not satisfy any of the limbs under the

1 Act should not be allowed and the Claimants should be required to release  
2 unredacted versions of them .

3 **MR JUSTICE ZACAROLI:** Mr Randolph?

4 **MR RANDOLPH:** Thank you. Sir, you will have read my skeleton.

5 **MR JUSTICE ZACAROLI:** Yes.

6 **MR RANDOLPH:** In the interests of time I am not going to go through it again, but  
7 you will have seen from that the importance of the mystery shopper  
8 technique. I can deal with mystery shopper, because that is first, and then  
9 I will deal with other matters after that.

10 Ms Prince says airily, "Oh, you can use someone else". It is not that easy to use  
11 someone else. Let's not forget where we are. Ede & Ravenscroft, this is the  
12 claim they are facing. They are dominant. They have a massive market  
13 share in the relevant market, as we assert. It is denied. I understand that,  
14 and that's going to be determined, but if we are right, they are massively  
15 dominant in this market and we all know that Ede & Ravenscroft gowns and  
16 hoods are around and have been around for a very long time. We are  
17 an incomer. As such we need to engage in perfectly lawful techniques in  
18 order to be able to try and compete with the behemoth, with the Goliath that is  
19 in operation.

20 One of the lawful ways of doing that is by way of using a mystery shopper. However,  
21 we can't just wander round the streets saying "Excuse me, would you mind  
22 being a mystery shopper?" One uses, so I am instructed, select individuals.

23 One of the points, Sir, that you might not have picked up from the papers, there is  
24 a very small number, as I am instructed, of gowns actually sold compared to  
25 hired. You will remember graduating. Often the choice was between hiring  
26 and purchasing. Many would hire rather than purchase. Why is that

1 important? Because the tag that we can see at 105 in the hard copy of the  
2 bundle, that is the bar code. Now that will only be relevant to a purchase.  
3 Relatively few purchases are made, as I say, and therefore it would be  
4 relatively easy for the Defendants if these bar codes are unredacted to trace it  
5 back to either an individual purchaser or a group, a small group of potential  
6 purchasers.

7 Now that is problematic, because we are not facing a pure contract situation or an IP  
8 dispute, and it is still not clear what the Defendants' position is with regard to  
9 IP, and they haven't put forward a positive case on that, but it is in essence  
10 a tortious anti-competitive case where the allegation is made that they have  
11 and are continuing to try and obstruct our business from either getting off the  
12 ground or growing.

13 My client's fear is that by unredacting the bar codes, for example, that would allow  
14 Ede & Ravenscroft to reverse engineer and find out who or which group of  
15 individuals purchased that and then take action, and we have set out in our  
16 case numerous actions that we say are anti-competitive. I appreciate that this  
17 is denied. It is a matter for determination at trial, but literally our business is  
18 not obviously wholly dependent on mystery shopper techniques, but it is  
19 an important part, not least with regard to new dress schemes. To have the  
20 possibility of that small additional assistant for the small competitor to the  
21 Goliath on the street is hugely important, and to have the possibility of that  
22 removed is the reason, is the proper reason and the adequate reason for this  
23 redaction and falls clearly within the scope of the relevant exemption.

24 Also the issue is how relevant is this to my learned friend's or the Defendant's case.

25 In essence it is not at all. It was suggested by Ms Prince that it is terrible  
26 there are all these documents that they can't take instructions on. Absolutely

1 not. They know what our case is. It is set out. They know about the mystery  
2 shopper technique. What are they going to be taking instructions on? The  
3 only instruction they could take on it is "Oh, how can we stop a mystery  
4 shopper technique, which is otherwise known as competition, to exist?"  
5 Because there is no other reason why they would need to question or  
6 otherwise interrogate this sort of document.

7 So, in other words, this is yet another attempt to stifle the Claimant's business. We  
8 do not accept unfortunately the Defendants' position as recently set out in  
9 submissions that you cannot identify a particular individual, group of  
10 individuals from the bar code for the reason I have just set out. So we say  
11 that is very important indeed.

12 The same, but to possibly a lesser, extent, goes to the other items in the exhibits to  
13 the application. Yes, the name of the mystery shopper is not mentioned, but  
14 the fact of the existence of the relevant e-mails is in itself, we would suggest,  
15 confidential or actually requiring protection in terms of requiring protection for  
16 the commercial interests of my clients, who are in a very different position to  
17 the well-established Ede & Ravenscroft, who are on the street. They are well  
18 positioned.

19 We are the new entrant, and in those sorts of circumstances this is not an equality of  
20 arms. Here we have real concerns that what might not matter to Ede &  
21 Ravenscroft will matter substantially to the Claimants, because of their small  
22 position on the market, and what might appear to you, Sir, as being  
23 a relatively trivial point actually is a relatively important point and one which in  
24 the great scheme of things could impact on the Claimants going forward.

25 Now, of course, there is one way of dealing with this apart from the bar code where  
26 we feel very strongly about that and we don't want any reverse engineering,

1 but I suppose the possibility that I am putting forward now might deal with this.  
2 As the Defendants know, and it is trite, disclosure can only be used for the  
3 purpose of the proceedings in which they have been disclosed, which means  
4 they can't be used for commercial purposes in any way, shape or form.

5 Now if that undertaking were formally reconfirmed, in particular specifically in relation  
6 to the documents other than the bar code that are appended to the  
7 Defendants' application for disclosure, then it would seem to me that we might  
8 be in a position to agree that those documents be unredacted. That's  
9 everything except for the bar code .

10 **MR JUSTICE ZACAROLI:** Sorry. Is that because everything other than the bar  
11 code does not enable them to identify the mystery shopper?

12 **MR RANDOLPH:** It may not enable them to identify as directly as the bar code. My  
13 instructions are that one could undertake a serious reverse engineering. It  
14 would take some time. It is the bar code that's the real kicker, if I can use that  
15 expression, but insofar as they confirmed that none of the other unredacted  
16 documents would be used in any way, shape or form commercially, in other  
17 words, complying with their strict undertaking in terms of disclosure that the  
18 disclosed documents should only be used for the purpose of the proceedings  
19 and no other purpose, then I think, unless I get a buzz on my WhatsApp, that  
20 we would be content to go along with that, but not the bar code, because the  
21 bar code -- once you get the bar code, that's it. I have had a buzz, Sir. I am  
22 sorry that one has to do this.

23 **MR JUSTICE ZACAROLI:** That's all right. That's the nature of these hearings. Go  
24 on.

25 **MR RANDOLPH:** It is. I have had "fine". Well, that's very nice to receive "fine".  
26 I am pleased.

1 **MR JUSTICE ZACAROLI:** I can see it. Ms Prince, you are under such  
2 an undertaking anyway, aren't you?

3 **MS PRINCE:** Well, quite. If the Claimants actually don't have any particular  
4 concerns and the documents don't actually show the mystery shopper  
5 techniques, then I am not sure on what basis they can maintain the  
6 redactions, and not just of these examples but of all the documents that they  
7 have redacted and it, in fact, confirms our suspicions that what they were  
8 actually redacting was the fact of their copying. That's what the Claimants are  
9 worried about. That's what the documents show. That's the way they have  
10 been redacted. It really has nothing to do with mystery shopper techniques.

11 Sir, in relation to the bar code, the image that has been redacted contains the actual  
12 bars but it also contains a description of the product and the fact that it comes  
13 from E&R. I am not sure whether my friend says all of this is very sensitive to  
14 him. My instructions are clear that they will not be able to tell who purchased  
15 that gown. I do take my friend's point that if only one gown has been sold,  
16 then they may be able to, but as Sir rightly pointed out, the Defendants would  
17 not be able to use that information for any purposes outside of the  
18 proceedings in any event .

19 **MR JUSTICE ZACAROLI:** What piece of information from that document do you  
20 say is relevant to the proceedings?

21 **MS PRINCE:** Well, it shows the institution and the degrees -- the item.

22 **MR JUSTICE ZACAROLI:** Explain to me -- we will not name the institution. It  
23 identifies -- is it an Ede & Ravenscroft bar code?

24 **MS PRINCE:** Yes, it is.

25 **MR JUSTICE ZACAROLI:** So it is their bar code identifying what, the purchaser or  
26 the institution to which the gown relates?

1 **MS PRINCE:** Sir, is that a question addressed to me?

2 **MR JUSTICE ZACAROLI:** Yes. I want to understand what you say it is. Why you  
3 say you need this document. What is it you want to get out of this document  
4 at trial?

5 **MS PRINCE:** This document shows (a) the Claimants have used the Defendants'  
6 products to design their own and they have not relied, as they say, on openly  
7 available information. It shows the degree awarded. By itself it is not key, but  
8 taken with other documents which show copying, it is the kind of document we  
9 would need to take instructions on in the whole.

10 **MR JUSTICE ZACAROLI:** As I understand it, what can be reverse engineered is  
11 from looking at the bars itself. Is that right, Mr Randolph?

12 **MS PRINCE:** I don't believe so. My instructions are that effectively the Defendants  
13 cannot do anything with this.

14 **MR JUSTICE ZACAROLI:** I know what you say. I want to know what  
15 Mr Randolph's complaint is. Mr Randolph, go ahead.

16 **MR RANDOLPH:** My complaint is very straightforward. First of all, there is  
17 a relevance issue, but insofar as the bar code is there, my firm instructions,  
18 and I asked about this, is that especially given -- Ms Prince has agreed insofar  
19 as there is one particular gown that is purchased, then you could trace it  
20 straight back .

21 **MR JUSTICE ZACAROLI:** So that's from the mere fact -- so the piece of information  
22 which you say the Defendants need or could use to trace back to the  
23 purchaser is the fact that a gown was purchased from Ede & Ravenscroft in  
24 relation to that institution. That's enough, is it? What about the date, there is  
25 no date on this, is there?

26 **MR RANDOLPH:** Well, Sir, it's a question of reading the bar code electronically.

1 **MR JUSTICE ZACAROLI:** All right. If the bar code were removed. Because the  
2 Defendants -- what they want to show is that there has been a purchase.  
3 There has been a purchase from them by your clients in relation to that  
4 institution. That's all they need.

5 **MR RANDOLPH:** If the bar code -- but in that picture -- forgive me if I am wrong --  
6 on page 105 of the hard copy, I just have a picture of the bar code.

7 **MR JUSTICE ZACAROLI:** Yes, but the bar code -- if we can break it down, that  
8 contains a number of pieces of information. First of all, one size, whatever  
9 that means. It has E&R and then it has the name of an institution and then it  
10 has the bar code itself with numbers underneath.

11 **MR RANDOLPH:** Yes. I think, and again I will be told if I am wrong, that if the  
12 words "One Size" and E&R and the name of the institution, query the number  
13 on the left-hand side, but certainly the bar code itself were removed, that may  
14 be sufficient, but I am not quite sure in terms of relevance how it is relevant  
15 that the Defendants sold a particular gown to a particular university. It is not  
16 denied. In fact, it is averred that they are selling/renting vast numbers of  
17 gowns, certainly renting, because they have got a very large share of the  
18 market. That's not in dispute .

19 **MR JUSTICE ZACAROLI:** No, no, but this is a purchase by your client. That's the  
20 point about this one. It is not that they are selling it. It is that your clients are  
21 purchasing it.

22 **MR RANDOLPH:** Exactly. Where is the -- I had understood Ms Prince to say it was  
23 all about the sale of the gown. It is about the purchase by the mystery  
24 shopper. Why is that relevant to their case, save for this, because Ms Prince  
25 rather let the CAT out of the bag I would suggest by saying it is all about  
26 copying. Copying depends on intellectual property. It is not accepted, and

1 I want to underline this, it is not accepted in any way, shape or form that Ede  
2 & Ravenscroft have intellectual property rights in their products, full stop.  
3 They have to prove that.

4 **MR JUSTICE ZACAROLI:** No. She has made it clear to me that the reason they  
5 want -- that this is relevant to the case is because of your assertion in the  
6 pleading that the gowns can be produced by your clients solely from publicly  
7 available information and it is that issue to which these go, not a question of  
8 IP.

9 **MR RANDOLPH:** It is not a question of IP. So it is only that these can be -- I am not  
10 quite sure how this -- how the sale of a gown from an institution to a mystery  
11 shopper actually goes to that point at all. How does it go to the point that --

12 **MR JUSTICE ZACAROLI:** It may be this is a bad example. The other documents  
13 I have been shown I think go to that. Ms Prince, what is it about this  
14 documents that's so important?

15 **MS PRINCE:** This document shows that the Claimants used this items from this  
16 university in order to produce their own products contrary to their assertion  
17 that they don't need to copy anyone else, because they can produce their  
18 gowns and hoods based on publicly available information.

19 **MR RANDOLPH:** It doesn't go to that at all. It goes to the fact that a mystery  
20 shopper on behalf of the Claimants purchased a gown from the Defendants in  
21 relation to a particular institution, full stop.

22 **MS PRINCE:** It makes no difference at all to the Defendants who it is that  
23 purchased on behalf of the Claimants when they copy the items. It is really  
24 not relevant .

25 **MR JUSTICE ZACAROLI:** So the bar code itself you don't need. When I say the  
26 bars --

1 **MS PRINCE:** The actual bars, no.

2 **MR JUSTICE ZACAROLI:** That's the bit that can identify the shopper.

3 **MR RANDOLPH:** Yes.

4 **MS PRINCE:** If my friend is happy to concede that all the other redactions need to  
5 be removed other than the particular lines on this document, then I will happily  
6 accept that position.

7 **MR RANDOLPH:** No. I am in so far because I have only dealt with this document.  
8 Insofar as this document is concerned, I am grateful for the acceptance that if  
9 the lines and the numbers thereunder which starts with a 9 and ends with a 1  
10 above the institution, all of that with the vertical lines underneath the words  
11 "One Size", they will remain redacted and I would suggest that the B3354 --  
12 I don't know what that refers to, but there seems to be -- there is no particular  
13 reason. I have not heard of any particular reason why that's necessary, but if  
14 that can be agreed, I think we can move on to the other documents .

15 **MR JUSTICE ZACAROLI:** Ms Prince, I think you don't need the bar code and the  
16 bar and numbers?

17 **MS PRINCE:** No.

18 **MR JUSTICE ZACAROLI:** The number on bottom left do you say you need that?

19 **MS PRINCE:** I am afraid I am not aware of what that relates to. I will have to take  
20 instructions.

21 **MR JUSTICE ZACAROLI:** That's very helpful. Now in relation to the other  
22 documents then I think, Mr Randolph, you have made your position clear.  
23 You say the Defendants should reaffirm the undertaking that they are already  
24 under, but if they were to reaffirm that, then you have no issue with the other  
25 documents?

26 **MR RANDOLPH:** Yes, because of the particular sensitivity. I appreciate, and

1 Ms Prince is right to say this, that yes, there is a general undertaking in  
2 relation to disclosure in all such cases. However, given the sensitivity of this,  
3 I think it is important that -- and certainly we would be very -- well, we would  
4 find it more than reassuring that a further undertaking were given in relation to  
5 the specific documents that are set out here in the application. It doesn't  
6 apply -- this doesn't apply to any other redactions. The Defendants have  
7 brought this application and exhibited various documents. They say they  
8 want the redactions in those documents, not all redacted documents, to be  
9 removed. We debated that. Having received instructions I am content to act  
10 on the basis that the Tribunal has just set out in relation to those documents.  
11 This does not apply to the other redacted documents in the redacted folder .

12 **MR JUSTICE ZACAROLI:** What do you mean by the other documents? I am only  
13 concerned with documents that have been redacted for a particular purpose.  
14 That's the mystery shopper purpose.

15 **MR RANDOLPH:** Exactly, but I understood that Ms Prince seemed to be suggesting  
16 -- maybe I misheard -- that this would apply to all redacted documents. That's  
17 not the case.

18 **MS PRINCE:** No, all documents redacted showing copies of the Defendants'  
19 products.

## 20 **RULING**

21 **MR JUSTICE ZACAROLI:**

22 As a matter of law redactions are permitted where disclosure of commercial  
23 information would or might significantly harm the legitimate business interests  
24 of the undertaking to which it relates as interpreted in *Umbro Holdings v Office*  
25 *of Fair Trading* [2003] CAT 26, which was a case concerned with the balance  
26 between the right of a party to conduct its defence and confidentiality.

1 The Tribunal there held that there was a presumption in favour of the rights of  
2 defence unless confidentiality was needed to protect some vital business  
3 secrets or for some other overriding interest. The hurdle is quite a high one.  
4 That must be balanced against whether the documents are relevant and their  
5 need for disclosure or for their use in the proceedings. The Defendants say  
6 the documents need to be disclosed to their clients, not just the legal team,  
7 because the documents are relevant to challenging the Claimants' assertion  
8 that they could compile and create their gowns solely from publicly available  
9 information. It seems to me that that is an issue to which these documents do  
10 go, and that the Defendants should be entitled to give instructions to their  
11 legal team in relation to them unless there is some strong reason of  
12 confidentiality.

13 The Claimants say that disclosure of the contents of documents which would enable  
14 the Defendants to identify mystery shoppers would damage its business,  
15 because it would be unable to use those shoppers in the future. To break that  
16 down, actually the concern is that if the Defendants were able to reverse  
17 engineer the identity of the shoppers used in the past, then if those shoppers  
18 were used by the Claimants in the future, the Defendants would simply refuse  
19 to sell to those people.

20 It is also said that the Claimants are a small concern and therefore they would have  
21 difficulty finding anybody else to act as a mystery shopper. There is not any  
22 evidence as to the actual level of difficulty in finding somebody else to  
23 purchase these goods. It is a wholly administrative and mechanical task, ie  
24 finding an individual who is willing to put their name to the purchase of gowns  
25 from Ede & Ravenscroft. I consider that the concerns in that respect are likely  
26 to be overstated.

1 In any event, cutting through this issue, the Claimants have made clear through  
2 Mr Randolph that in relation to the one document over which most discussion  
3 has taken place, containing only a bar code showing a particular purchase,  
4 they are content for that to be disclosed to the Defendants and any claim to  
5 confidentiality to be withdrawn in respect of it if the bars themselves and the  
6 numbers beneath them are removed.

7 The Defendants have no difficulty with that. That resolves the issue with that  
8 document apart from one point, which is that Claimants also say that the  
9 number in the left-hand corner should be removed. They have not put  
10 forward any argument as to why that should be so. Neither party knows  
11 actually what that number relates to. So, without any reason being provided  
12 for it, I am not going to order that to be redacted.

13 So far as all other documents are concerned -- I have been taken to a handful of  
14 them -- it is difficult to see how those documents could be used to identify the  
15 mystery shopper, which is the only basis of complaint which has been made.

16 Mr Randolph has accepted that if the Defendants were to reiterate as a part of this  
17 order the undertaking to which they are already subject that they could not  
18 use any documents disclosed other than for the purpose of the proceedings  
19 and therefore couldn't use them for any commercial purposes whatsoever,  
20 then the Claimants' objection to this particular issue would fall away. I do not  
21 think that any further undertaking is required. It has been highlighted during  
22 the course of this hearing that that undertaking undoubtedly applies to these  
23 documents. The Defendants are no doubt fully aware of that. I think the fact  
24 that such an undertaking already exists is more than sufficient protection for  
25 the Claimants therefore. I will therefore allow this part of the application  
26 subject to the one point made about the bar code.

1 **MS PRINCE:** I am grateful. Sir, I will address you now on issue 5 in the application,  
2 if I may?

3 **MR JUSTICE ZACAROLI:** Yes. Now on this your point is the cat is out of the bag?

4 **MS PRINCE:** Well, quite. Claimants themselves have not treated this individual's  
5 name as confidential. They have repeatedly referred to it in open  
6 correspondence. This is quite different from the approach they have taken  
7 over other information in the confidentiality ring. So they make a distinction.  
8 So if there is to be a distinction between this person's name and other  
9 information that has been redacted, which also goes to show the individual's  
10 business undertaking effectively. If I can take you to the example. This is at  
11 page 92 of the bundle, 116 of the pdf.

12 **MR JUSTICE ZACAROLI:** I notice the time. We will be a few moments on this,  
13 won't we?

14 **MS PRINCE:** We will.

15 **MR JUSTICE ZACAROLI:** We will take a short break. It is 3.27. We will reconvene  
16 at 3.35.

17 **MR RANDOLPH:** Thank you.

18 **(Short break)**

19 **MS PRINCE:** If I can show you an example of the redaction as applied, it is at 92 of  
20 bundle B, so that's 121 of the pdf. It is an e-mail chain that goes on for some  
21 pages where in response the first e-mail of the chain which is at the bottom is  
22 page 95, page 124 of the pdf. We can see that's an e-mail from Mr Adkins to  
23 a graduation office and this is the 23rd March e-mail from 2017, which is  
24 referred to in the pleadings and provided with the re-amended claim form.

25 The e-mails if one scrolls up through the bundle gets forwarded by the person at the  
26 university who has received the e-mail to, on page 93, which is page 121 of

1 the pdf, we see the e-mail address is ceremonies@jisc.ac.uk(?).

2 So this is a group e-mail address used by universities to discuss ceremonies  
3 including academic dress and photography, etc. The e-mail at the top on  
4 page 92, 121 of the bundle, is received obviously by someone within that  
5 group who then forwards it on to their -- from what appears to be a work  
6 business e-mail address to what appears to be a private e-mail address with  
7 G-mail and then forwarded on to Mr Adkins of the Claimants at the top of that  
8 page.

9 **MR JUSTICE ZACAROLI:** I see. Yes. What they are concerned about is  
10 apparently within the Ceremonies Group and has passed it to his own e-mail  
11 address and then passed it on to someone else.

12 **MS PRINCE:** Yes. So this is one example. There are a number of them within the  
13 Claimants' disclosure.

14 In correspondence prior to my friend's skeleton the Claimants had stated that they  
15 had applied these redactions because it would harm this individual's business  
16 interests if the Defendants were given access to information relating to him  
17 and his commercial activities. I am not sure from my friend's skeleton whether  
18 that is a justification for the redaction which the Claimants maintain, or  
19 whether they only maintain as set out in paragraph 56 of his skeleton that the  
20 disclosure contains private and personal data which does not belong to the  
21 Claimants and therefore the request should be disclosed. So I am afraid I am  
22 not clear whether the Claimants still rely on the business interests exception  
23 or whether they are now relying on personal private data. I can address you  
24 on both unless my learned friend wants to --

25 **MR RANDOLPH:** Please both.

26 **MR JUSTICE ZACAROLI:** I think paragraph 54 refers to a letter which does contain

1 the first or the second of those complaints.

2 **MS PRINCE:** Yes, it refers to that letter. That is correct. So the Claimants have  
3 described this individual as a business contact. That's on page 85 of the  
4 bundle, 88 of the pdf. That's in response to paragraph 25. They just say "Is  
5 a business contact".

6 Then in relation to paragraph 26 they say he is a third party. It would harm his  
7 business interests if the Defendants were given access to information relating  
8 to him and his commercial activities. In the letter which is at page 88K, 102 of  
9 the pdf, the Claimants' solicitors write again with a slightly more specific  
10 description of their concern, which is at the bottom of that page. They say:

11 "The Claimants are concerned that if it becomes known to others -- so sorry.

12 The first sentence there:

13 "Like you, we understand he runs a photography business".

14 **MR JUSTICE ZACAROLI:** Yes.

15 **MS PRINCE:** The disclosed documents show that he has had some contact with the  
16 Claimants. This is perhaps an odd way of describing it because presumably  
17 the Claimants know what contact they have had with him:

18 "The Claimants are concerned that if it becomes known to others, including the  
19 Defendants, that he had such contact, that may, however unfairly, harm his  
20 prospects of collaborating with those, including the Defendants. This is  
21 a legitimate concern and the relationship between our respective clients, and  
22 consequently between our clients and certain universities is not presently  
23 cordial. The Claimants do not believe that it would be fair on him to suffer any  
24 consequences of that."

25 The letter goes on on the next page to say:

26 "The Claimants bear in mind that he agreed to share information with them on the

1 express basis that they would keep the source of the information confidential."

2 In my submission it is evident from the content of the e-mails that he forwarded to  
3 Mr Adkins that the senders, the participants in the e-mail group, did not expect  
4 their e-mails to be sent on to the Claimants, and in my submission it shows,  
5 therefore, that he did so without their permission.

6 It is the fact also that he did this and he has agreed expressly with the Claimants that  
7 they wouldn't refer to him also shows that he did so without their permission.

8 So there is some wrongdoing I would submit there, that whatever term is  
9 applied to that group e-mail, it clearly was not an expectation on behalf of the  
10 other members of the group that it would be forwarded on to the Claimants.

11 Also there is the fact that the Claimants have apparently an express agreement with  
12 this individual about him sharing information from this group chat. In my  
13 submission that's really rather troubling. It is not clear what other terms there  
14 may be to that agreement. The Claimants have not explained what their  
15 relationship is with this individual. They have not explained why he would feel  
16 the need to forward this sort of information to the Claimants.

17 Going back to the test for serious harm and legitimate business interests, in my  
18 submission wanting simply to conceal potential wrongdoing in the way that  
19 this individual appears to want the Claimants to assert on his behalf is not  
20 a legitimate business interest. It does not concern vital business secrets in  
21 relation to this individual. The content of the e-mails have nothing to do with  
22 the individual. He is merely forwarding on information from the universities,  
23 and it is plainly right that the Defendants should be able to investigate who  
24 this individual is, what is this photography business. Is it a competitor of the  
25 Defendants? What is the relationship between that business and the  
26 Claimants? What are they doing acting together in this way to share

1 information? What is this individual's involvement behind the scenes in the  
2 claim or with the Claimant? None of that can be properly investigated unless  
3 the Defendants can identify who this is.

4 Now, of course of the Defendants already know the name, because it has been  
5 referred to by the Claimants in correspondence, but they don't have the e-mail  
6 signature, which is towards the bottom of that chain of e-mails, if I can identify  
7 it again. It is on page 125 of the bundle. Sir will see that this individual's  
8 company e-mail signature has been redacted. So that contains the full name  
9 of the company and it contains the website address for that business.

10 **MR JUSTICE ZACAROLI:** Yes.

11 **MS PRINCE:** And, of course, there is also the business e-mail address, which  
12 I referred to earlier. Without all of that information the Defendants are not  
13 going to be able to properly investigate. They are not, therefore, going to be  
14 able to provide any proper instructions. Even if they were to rely simply on  
15 the name that has been provided to try to work out who this is, to the extent  
16 they thought they would find the right person, their legal team would be in no  
17 position to confirm or deny whether that appeared to be the right person. So  
18 the investigation can't go any further.

19 **MR JUSTICE ZACAROLI:** Just help me again. You said you would like to know  
20 what his involvement is and what is going on, but why? What issue does this  
21 go to in the case?

22 **MS PRINCE:** Well, I'm afraid without knowing his involvement it is difficult to know  
23 which issue it may go to, but on the face of it there appears to be some kind of  
24 agreement between this individual and the Claimants to provide information  
25 which would be confidential to the universities, which is potentially price  
26 sensitive, potentially relevant to competition matters and some of the

1       allegations made by the Claimants in these proceedings. It may also be  
2       relevant for matters such as cross-examination, but, of course, without making  
3       those investigations it is very difficult to give you any fuller detailed answers  
4       as to what this might lead to and the ways it might be used further down the  
5       line.

6       In my submission the fact that this individual has forwarded e-mails and would rather  
7       nobody found out about it is not a vital business interest that is worthy of  
8       protection under the Act and --

9       **MR JUSTICE ZACAROLI:** The documents are clearly relevant, because they have  
10       been disclosed by the Claimants.

11       **MS PRINCE:** Yes. They are highly relevant. Information from these documents is  
12       also pleaded by the Claimants.

13       If I may interject, in fact, when the Claimants -- in the Claimants' claim form there is  
14       some information there about the way in which universities have responded to  
15       the approach by the Claimants, and it was difficult to identify where that  
16       information may have come from, but this disclosure makes it clear that this is  
17       the way in which the Claimants have become aware of these matters.

18       **MR JUSTICE ZACAROLI:** So just taking that e-mail chain, what has been disclosed  
19       openly is that this information that is apparently -- that may or may not be  
20       confidential to this group called "ceremonies@ ..." whatever e-mail account  
21       has been forwarded to the Claimant.

22       **MS PRINCE:** Yes.

23       **MR RANDOLPH:** Exactly.

24       **MR JUSTICE ZACAROLI:** That's known?

25       **MS PRINCE:** Yes.

26       **MR JUSTICE ZACAROLI:** Yes, and -- oh, I suppose the Defendants don't know

1           who it was that forwarded it.

2 **MS PRINCE:** Exactly.

3 **MR JUSTICE ZACAROLI:** Or that they have -- well, I'm not -- is that right?

4 **MS PRINCE:** They know the name now.

5 **MR JUSTICE ZACAROLI:** They do know it, because that has been revealed in  
6           open correspondence.

7 **MS PRINCE:** Exactly. They know the name, but it's not a particularly distinctive  
8           name, and in my submission without the additional information which shows  
9           the business name, the website, they are not able to take those enquiries  
10          further. As I say, if they were to try to search for this individual just based on  
11          his name, the legal team would not be able to confirm or deny whether or not  
12          they had found the right person and the right business.

13 **MR JUSTICE ZACAROLI:** Yes.

14 **MR RANDOLPH:** Sir, may I --

15 **MS PRINCE:** If I --

16 **MR RANDOLPH:** Go on.

17 **MS PRINCE:** If my friend is relying in the alternative on the fact that this is private  
18          and personal data, in my submission we are actually looking at primarily this  
19          individual's link to a photography business, so this is not really particularly  
20          private or particularly personal. It really relates to his business activities and  
21          therefore does not require protection under that limb of the Act either.

22 My friend has referred in his skeleton to the fact that some of these group e-mails  
23          have also been -- sorry -- some of the e-mails from the Defendants' disclosure  
24          have redacted names of contacts at universities, but in my submission that's  
25          on a wholly separate ground. That's on the basis that it would provide  
26          a disadvantage to the Defendants and a serious advantage to the Claimants if

1 the Claimants were suddenly to be effectively given the little black book of all  
2 the Defendants' contacts, e-mail address and names of all the institutions in  
3 the documents. So the redactions have been applied for a completely  
4 different purpose. That does not assist my friend.

5 Those are my submissions, Sir, unless I can assist further.

6 **MR JUSTICE ZACAROLI:** Yes.

7 **MR RANDOLPH:** Thank you. I can be brief, Sir. The CAT came out of the bag at  
8 paragraph 70 of the Defendants' skeleton and paragraph 67. Let's look at 67  
9 first:

10 "The individual has a photography business and is therefore a potential competitor of  
11 the Defendants."

12 If we can turn over to 70:

13 "The Claimants may be right that certain universities and Defendants would be less  
14 inclined to deal with the individual's business if they knew what he has done.  
15 However, it cannot be right that seeking to conceal potential wrongdoing  
16 amounts to a legitimate business interest. The Defendants require access to  
17 any unredacted documents to be able to properly investigate his involvement."

18 Now that, Sir, is very troubling, because it is clear that the Defendant is doing that  
19 which has been alleged of it in relation to the Claimants and it's trying to do its  
20 best to drive out of business in its own words a potential competitor. It wants  
21 all the personal details, and they are personal, because they are looking for  
22 the personal e-mail address of this individual, amongst other things, and they  
23 are seeking to punish that individual.

24 Now one has to ask oneself, and you asked it, Sir, and the answer from Ms Prince  
25 was revealing, when you said, "How is this relevant to your case?" It is  
26 relevant to the Claimants' case that the various communications took place

1 and those are not redacted. The individual's details are redacted for the  
2 obvious reasons that we have given in the skeleton argument, but the concern  
3 that we have has been made -- well, has trebled or quadrupled by virtue of not  
4 only submissions in the skeleton but also the submissions of Ms Prince this  
5 afternoon, because when asked by you, Sir, what on earth this went to, there  
6 were very -- it was the classic fishing expedition answer, which is, "Well, we  
7 have got to wait for something to turn up, because we didn't really know until  
8 we found it". Well, that's simply not good enough I'm afraid, with respect.  
9 Then there was, "Well, it could be useful for cross-examination". Well, it might  
10 be, but it might not be, and I can't see why it would be, why knowing the  
11 personal e-mail of an individual who is in their words a potential competitor  
12 and who is liable to be sanctioned for alleged illegality, which in itself we say  
13 is not illegal by virtue of their own illegal operations, we say this is actually  
14 rather helpful to our case overall, because it just demonstrates a particularity  
15 of another specific example of the anti-competitive behaviour of the  
16 Defendants.

17 But much more importantly in terms of this application, as we see, this is a disclosure  
18 application. We have already in relation to the previous point dealt with the  
19 whole issue of the undertaking. These documents are disclosed for the  
20 purpose of this litigation and this alone. You can't just use the documents to  
21 try to drum out of business a potential competitor, which is essentially what  
22 the Defendants will be seeking to do, because otherwise why would they --

23 **MR JUSTICE ZACAROLI:** That's your case. That's your assertion, but that's --  
24 I mean, that's not why they said they want it. They can't use it for that, can  
25 they?

26 **MR RANDOLPH:** Well, I hope not. They say, Sir, in their words:

1 "The Claimants may be right that certain universities and the Defendants would be  
2 less inclined to use Mr So-and-so's business if they knew what he has done.  
3 However, it cannot be right that seeking to conceal potential wrongdoing in  
4 this way amounts to a legitimate interest."

5 Then 71:

6 "The Defendants require access to the unredacted copies to be able to properly  
7 investigate his involvement."

8 Now his involvement links back to potential wrongdoing as, as we have seen in 67,  
9 a potential competitor. That is I would suggest remarkable, because they are  
10 on the face of this document suggesting that they want to take action outside  
11 of the bounds of this case in relation to something between them and the  
12 individual in question, nothing to do with this claim whatsoever.

13 That is I think my biggest concern, but all the other points that I have made in  
14 relation to relevance and indeed personal data -- it is not ours to give. We  
15 cannot give this individual's personal e-mail account. He has the rights over  
16 that e-mail account detail.

17 **MR JUSTICE ZACAROLI:** So let's deal with that. The personal e-mail account  
18 I don't think the Defendants have any interest in. Let's redact that. They have  
19 no interest in that whatsoever. So I concede that's a point. You have made  
20 a point about his personal information. Let's redact that. What's left of that  
21 objection? It doesn't apply to anything else, does it?

22 **MR RANDOLPH:** No. That is with regard to the personal e-mail, but we will have --  
23 just looking at the Defendants' skeleton, so they seek an order in the terms  
24 set out at B2, paragraph 5. Let's just go to B2, paragraph 5 for a moment.

25 **MR JUSTICE ZACAROLI:** What is the page reference?

26 **MR RANDOLPH:** It is tab 1, page 2.

1 **MR JUSTICE ZACAROLI:** Of the bundle?

2 **MR RANDOLPH:** Paragraph 5:

3 "So the Claimants will by 4.00 pm seven days from the date of this order disclose  
4 copies of documents which identify the individual with redactions for  
5 confidentiality of his identity removed. His identity shall not be treated as  
6 confidential."

7 So they want copies of documents which identify, with redactions to confidentiality  
8 removed. Those redactions go to his website address and his e-mail. If they  
9 want anything else, they haven't set it out there, but I am just checking insofar  
10 as their skeleton is concerned.

11 They say -- they have not actually -- they just reiterate paragraph 5, which identifies  
12 this individual with redactions of confidentiality of his identity. So it is very  
13 large. So we have agreed -- Sir, you have ordered that they won't get in any  
14 event this individual's personal e-mail. I am not sure what else they are  
15 seeking, because it is the documents I assume that are appended to the  
16 application to which we have been taken this afternoon by Ms Prince.

17 **MR JUSTICE ZACAROLI:** So, for example, it is the fact -- his name. His name has  
18 been redacted. So they want to remove that.

19 Now on his name what do you say to the point that, well, actually his name is already  
20 out there, because it has been referred to in open correspondence and  
21 therefore seen by the Defendants themselves?

22 **MR RANDOLPH:** I don't think we have a problem with regard to his name per se  
23 being out, because it has been referred to in open correspondence, but I will  
24 reiterate the point that I made just now and previously. The fact that the name  
25 has been disclosed cannot be used in the manner in which is set out in  
26 paragraphs 70 and 71 of their skeleton, because that would not only -- well,

1 that would be wrong, because it would be using disclosed information for  
2 purposes outside of this claim, not for purposes within the claim. In other  
3 words, if they seek to use it to investigate what they call potential wrongdoing,  
4 that will put them, the Defendants, Ede & Ravenscroft, in breach of this  
5 Tribunal's disclosure order and their undertaking thereto.

6 **MR JUSTICE ZACAROLI:** Right. So, taking it in stages, the personal e-mail  
7 address will remain redacted, but his name can be uncovered. I think that's it.  
8 The rest of it is what identifies his name, isn't it, or his business website, which  
9 they wish to retain. There is no personal information in that, is there?

10 **MR RANDOLPH:** No.

11 **MR JUSTICE ZACAROLI:** No. So actually -- so your position is with the personal  
12 e-mail address being redacted, the fact -- his name is already out there. So  
13 there actually can be no proper objection to removing the redactions -- all the  
14 other redactions, but you would wish to reiterate that the Defendants cannot  
15 use this information for the purposes intimated you say in paragraphs 70 to 71  
16 of the skeleton.

17 **MR RANDOLPH:** Exactly.

18 **MR JUSTICE ZACAROLI:** Yes. I think that resolves it, doesn't it, Ms Prince?

19 **MS PRINCE:** Sir, certainly, and the skeleton was not intended to suggest that the  
20 Defendants were going to use that information for anything other than  
21 investigating in the context of these proceedings and for those purposes only.

22 **MR JUSTICE ZACAROLI:** Yes. Well, just to be clear, I read paragraph 70 as  
23 accepting the Claimants' point that it may be detrimental to Mr S -- I will still  
24 refer to him as that -- because -- for other universities to know what he has  
25 been doing. You accepted that, but you say that's not enough. That is what  
26 that paragraph is about. Anyway if it was intended to be anything further, it

1 has been made absolutely clear that you can't do that.

2 **MS PRINCE:** I am grateful.

3 **MR JUSTICE ZACAROLI:** Right. That resolves that aspect. Now we passed over  
4 I think in relation to the first aspect of disclosure the time-frame within which  
5 things must be done. I imagine that's not agreed.

6 **MR RANDOLPH:** Well, we haven't had an opportunity, Sir, to discuss that.  
7 However, I have been informed on WhatsApp that this is -- this will not take  
8 too long. I wonder if I could -- I am sorry. I should have asked about this.  
9 Could we say seven days?

10 **MR JUSTICE ZACAROLI:** That's to deal with the disclosure of what's confidential  
11 and as far as it is confidential matching the document to the original  
12 document?

13 **MR RANDOLPH:** Yes. 400 odd.

14 **MR JUSTICE ZACAROLI:** I don't see that's reasonable, Ms Prince.

15 **MS PRINCE:** No. I'm happy with that. Thank you.

16 **MR RANDOLPH:** I am very grateful. Sir, whilst we are on timing, just a really small  
17 point. The witness statements -- I am so sorry. Go on.

18 **MS PRINCE:** If I may, in relation to the orders in relation to issue 4 and issue 5  
19 where the redactions are no longer going to be maintained, this will require --  
20 in instances where everything that was redacted is now no longer going to be  
21 redacted there will be no issue, but in instances where, for example,  
22 a document is partly redacted under one of those grounds but also partly  
23 under another ground which is not contested, then there will need to be a new  
24 version produced which only has the correct redactions.

25 **MR RANDOLPH:** Yes. I am sure those behind me or those in another room hear  
26 that, but that's very helpful.

1 **MR JUSTICE ZACAROLI:** The timing on that, seven days for the production of  
2 those amended documents? I don't think there will be very many of those.

3 **MR RANDOLPH:** I don't think there will be very many. So seven days. That will be  
4 -- I am grateful.

5 Just on the timing a very small point. Witness statements in reply are due next  
6 Monday, 13th. Now, Sir, there has been a short delay of six days in the  
7 Defendants producing non-confidential versions of their original witness  
8 statements, which necessarily impacted on the time -- sorry -- shortened the  
9 time within which the Claimants -- our Claimants, not the legal team -- could  
10 see, respond and work on those documents.

11 All we are asking for is that to be taken into account and a short extension of time be  
12 given until not even six days but to the end of that week, which is the following  
13 week, which would be Friday, 17th September at 5.00 pm.

14 **MR JUSTICE ZACAROLI:** What is the response to that, Ms Prince?

15 **MS PRINCE:** I am not sure how that impacts the rest of the timetable.

16 **MR RANDOLPH:** I don't think it does at all. The rest of the timetable is relating to  
17 expert witnesses.

18 **MR PATTON:** Sorry. I have had an indication that that's acceptable to the  
19 Defendants. So that will be fine.

20 **MR RANDOLPH:** I am very grateful.

21 **MR PATTON:** Sir, can I just raise in relation to the timing of the RFI responses we  
22 ask for that within seven days as well. I assume that's not controversial.

23 **MR RANDOLPH:** It shouldn't be.

24 **MR PATTON:** No. Sir, I don't know whether you have time to deal with costs now,  
25 which is the --

26 **MR JUSTICE ZACAROLI:** Well, before we deal with that, the one thing that I said

1 I would deal with today is the directions insofar as any are necessary for the  
2 bit that has been adjourned from today, which is the further costs  
3 management I think.

4 **MR PATTON:** Yes. Those are agreed, as I understand.

5 **MR JUSTICE ZACAROLI:** They are agreed, are they?

6 **MR PATTON:** Yes, they are.

7 **MR RANDOLPH:** Yes.

8 **MR JUSTICE ZACAROLI:** Remind me what they are. Take me through them  
9 again.

10 **MR PATTON:** Yes. Sorry. Give me a moment. In fact, maybe Ms Prince -- I don't  
11 know whether she is better able to deal with that than me.

12 The agreement is just in -- so the bundle reference is bundle C at page 68 and the  
13 agreement is at paragraph 60 of my friend's skeleton.

14 **MR JUSTICE ZACAROLI:** Right. Okay. Well, if it is agreed, I don't see any need to  
15 interfere with that.

16 **MR PATTON:** So, Sir, that just leaves questions of costs. Both sides have put in  
17 cost schedules. They are roughly the same in amount. So it has been  
18 treated on both sides that both of these applications were adversarial  
19 applications which would result in a costs order depending on how they were  
20 ruled upon.

21 We say that in relation to the RFI application we have been very substantially  
22 successful. You have disallowed the two requests which essentially relate to  
23 the question of construction, but that occupied a very small part of the  
24 argument.

25 In relation to request 2, that's going to be dealt by a recital, but in my submission the  
26 bringing of the application was reasonable, given the lack of clarity in the

1 Claimants' approach, and the recital will bring much needed clarity at least to  
2 some extent to what the Claimants' case actually is.

3 So far as the other requests are concerned, they were all objected to and I think you  
4 have ruled in our favour on those. So we would suggest that the application  
5 has been successful. In fact, all of this could have been avoided if they had  
6 simply answered the questions in the first place rather than putting us to the  
7 trouble of issuing an application.

8 So far as disclosure is concerned, I hope I can speak for Ms Prince in saying that  
9 that application has also been successful I think in its entirety essentially,  
10 subject to the redacting of the lines of the bar code and the number  
11 underneath it, which is a very small point indeed in the circumstances.

12 So we would suggest that the Claimant should pay the costs of both of the  
13 applications, which we would invite you summarily to assess.

14 **MR JUSTICE ZACAROLI:** Mr Randolph.

15 **MR RANDOLPH:** Sir, unsurprisingly we would oppose those applications, though  
16 they are not unexpected.

17 Insofar as the RFI application is concerned, absolutely correct description of the  
18 position as set out by my learned friend Mr Patton. Of the ten odd issues,  
19 three or four were ruled in such -- well, two were not allowed and two were  
20 covered off by way of the recital. There will be other issues that will be dealt  
21 with in not necessarily the way that was sought. The arguments were  
22 wide-ranging. My learned friend put forward arguments -- I don't complain  
23 about this; it is just a fact -- that were not in the application. We had to deal  
24 with those as well. We would say that in the circumstances, looking at  
25 everything in the round and using your discretion, that the appropriate  
26 approach would be to say costs in the case insofar as that is concerned.

1 We would argue that the same should be true, but for different reasons, in relation to  
2 the disclosure application, because insofar -- just going backwards, so insofar  
3 as the last issue was concerned involving the individual, the unnamed  
4 individual, the critical point was as set out in the skeleton in relation to the  
5 private personal data and in relation to this individual's e-mail and we were  
6 successful insofar as that is concerned.

7 Moving back to the redaction of copying academic dress, the key point identified in  
8 the skeleton arguments was in relation to the mystery shopper and the  
9 possible identity thereof through, as per my oral submissions, the bar code,  
10 and it was necessary for that to be debated and determined in the Claimants'  
11 favour.

12 Then looking backwards to the identification of confidential information, which is the  
13 remaining one, Sir, your initial position -- and indeed it is still not the position  
14 that was actually sought by the -- well, to be fair, it is -- your initial position  
15 was the halfway house, where a certain short step could be taken.

16 We say that that shows the merits of the arguments as put forward, and, in fact, at  
17 the end of the day yes, the Defendants may have got substantially that which  
18 they sought, but it took a degree of debate in order to get there. It wasn't  
19 an obvious matter on which we should have acceded, as was seen, Sir, by  
20 your willingness to entertain a halfway house at least initially.

21 So we again say, but for different reasons, that looking at everything in the round  
22 and using your discretion, that the proper application, bearing in mind the  
23 inequality of arms as between the parties, to be an order of costs in the case.

24 **MR JUSTICE ZACAROLI:** On the RFI can I just ask this: what are the costs that  
25 I will be ordering, because the requests for further information includes  
26 a number of requests which were not pursued? So I am not making any costs

1 order about those, am I?

2 **MR PATTON:** No. Right. It is only the costs of the application in the hearing that  
3 we are seeking, as I understand it, but subject to anyone telling me that that's  
4 not right, those are the costs that are set out in the cost schedule that has  
5 been served.

6 **MR JUSTICE ZACAROLI:** Right.

7 **MR RANDOLPH:** Sir, as Mr Patton correctly said, as it happens, and this is not  
8 often the case, the parties are pretty equal in terms of costs expenditure  
9 across the board. So I think neither of us I think it is fair to say -- Mr Patton  
10 will correct me if I am wrong -- neither of us are going to go into the details of  
11 item expenditure insofar as they properly relate to the applications. It is  
12 a question of, you know, should this sum be paid now or should they be costs  
13 in the case?

14 **MR JUSTICE ZACAROLI:** Yes.

15 **MR PATTON:** Sir, I have just been able to confirm the point that I made, that that's  
16 what the schedule relates to.

17 I don't know if you wanted to hear me in reply or Ms Prince in reply on the points  
18 about the costs of the disclosure application.

19 **MR JUSTICE ZACAROLI:** I will give Ms Prince a chance to respond on the detail.

20 **MR PATTON:** Yes.

21 **MS PRINCE:** I am grateful. My friend refers to the fact that the e-mail address of  
22 Mr S is going to still be redacted. The Claimants did not raise any point in  
23 relation to personal information prior to making the application and, in fact,  
24 made no such point. They were relying on protection of legitimate business  
25 interests up until service of my friend's skeleton argument on Monday. In my  
26 submission, therefore, the costs of the application were already by and large

1 incurred by that point.

2 In relation to their mystery shopper technique, of course, there have been only very  
3 minor amendments and the Claimants were in position at all times to make  
4 the concessions they made today, but they chose not to. In fact, even the  
5 documents in the bundle were already provided in correspondence prior to the  
6 making of the application.

7 As for the inequality of arms, Sir will have seen from the Claimants' statement of  
8 costs for the applications that they have three band A fee earners. They have  
9 incurred as many costs as the Defendants, despite being the respondents to  
10 the application, with a smaller burden to bear in respect of the applications. In  
11 my submission the Defendants have, therefore, prepared and attended these  
12 applications in a very efficient way.

13 **MR JUSTICE ZACAROLI:** Thank you very much.

14 **RULING**

15 **MR JUSTICE ZACAROLI:**

16 So far as costs are concerned, first of all, of the RFI application, as the Defendants  
17 have submitted, they were largely the successful party on that. I am only  
18 concerned with the parts of the request which were pursued at the application,  
19 and in respect of those it is true that they failed on two of them, but those are  
20 relatively small points. On request 2, although they did not get quite what  
21 they wanted, in substance they did, although I take Mr Randolph's point that  
22 the argument did range beyond the bare terms of request 2. It seems to me,  
23 as I said at the time, that what we were discussing was implicit or implicitly  
24 raised by request 2, and the fact that we focused on what really mattered in  
25 terms of misrepresentations was always there in the substance of the  
26 arguments.

1 Accordingly, the Defendants were substantially successful. Putting a very rough and  
2 ready percentage on the extent to which they were successful, I reach a figure  
3 of 80%. Therefore, they should have 80% of their costs of the RFI  
4 application.

5 So far as the disclosure application is concerned, the Defendants claim again that  
6 they were very largely the successful party. Mr Randolph for the Claimants  
7 takes the following points: firstly, that on the last part of the application in  
8 relation to a particular individual's identity and personal private data the critical  
9 point he says was indeed that point on personal data and that is the point on  
10 which the Claimants won.

11 I do not accept this. First of all, that point was only relied upon in the skeleton for the  
12 hearing as a secondary point. But in any event, there was never any  
13 objection, once the point was raised, by the Defendants to that particular  
14 e-mail address being redacted. That was a very small part of that aspect of  
15 the application.

16 Dealing with the redactions on copying academic dress, Mr Randolph submitted that  
17 the key point made in the skeleton was the mystery shopper point and that  
18 only relates to one document, that is the bar code, again on which he  
19 succeeded in part, because I accepted that that should in part remain  
20 redacted. In fact, however, the mystery shopper point was the only point relied  
21 on for all the reactions which had been made, and those redactions were not  
22 maintained for any of the other documents. The bar code was, in fact, quite  
23 a small part of the overall picture.

24 So far as the identification of confidential information is concerned, I accept that it  
25 took a degree of debate, as Mr Randolph submitted, to get to where the  
26 Defendants ended up, but that does not alter the fact that where they did end

1 up was that of a substantially successful party.

2 So again the right analysis is that the Defendants were the substantially successful  
3 party and they should have the bulk of their costs. Again taking a rough and  
4 ready approach, I think the appropriate portion there is 85%.

5 **MR PATTON:** I am grateful, Sir. In light of what Mr Randolph has said about the  
6 figures being essentially the same, is it fair to understand your ruling to mean  
7 that one applies those percentages to the amounts of the bill in the sense that  
8 there is no follow-up process of assessment? I don't think Mr Randolph wants  
9 to go through the bill and say, "I think 2.3 hours here rather than 2.1 hours" or  
10 anything. As Ms Prince has said, the costs are pretty similar, even though the  
11 bulk of the work fell to the Defendants.

12 **MR JUSTICE ZACAROLI:** I understood Mr Randolph not to be making an objection  
13 to any of the amounts claimed, but if it wasn't as clear as that or it's something  
14 different, let me know.

15 **MR RANDOLPH:** Your understanding is totally correct, Sir.

16 **MR JUSTICE ZACAROLI:** In which case I think it is simply that percentage applies  
17 to the amounts claimed in the cost schedules, which makes the matter easier.

18 **MR PATTON:** Thank you.

19 **MR JUSTICE ZACAROLI:** Right. Is there anything else?

20 **MR RANDOLPH:** In terms of the order would it be sensible for Mr Patton and  
21 Ms Prince to produce a draft order? I know the Tribunal's normal approach is  
22 for the Tribunal to draw it up, but would it assist, because it has been  
23 a rather -- well, put it this way. It's been an evolving process and it may assist  
24 the Tribunal if the order is initially drafted with agreement of the parties, but  
25 equally I am in your hands.

26 **MR JUSTICE ZACAROLI:** The referendaire will speak up if they object to what I'm

1 about to say, but it seems to me this is a case where they would undoubtedly  
2 be helped by the parties preparing a draft of the order for consideration by the  
3 referendaire and then consideration by me.

4 **MR PATTON:** We will, yes. Thank you.

5 **MR RANDOLPH:** Thank you very much indeed.

6 **MR JUSTICE ZACAROLI:** Is there anything further from anyone?

7 **MR PATTON:** No. Thank you.

8 **MR RANDOLPH:** Thank you very much.

9 **MR JUSTICE ZACAROLI:** Thank you very much, each of you, for your submissions  
10 today and your patience throughout the day. I will await the order. It may  
11 take some time for the order to be finalised, as I shall be away for the next  
12 period, but it hopefully can be done within the next few days. Thank you all  
13 very much and good afternoon.

14 **MR PATTON:** Thank you. Good afternoon.

15 **MR RANDOLPH:** Goodbye. Thank you.

16 **(4.16 pm)**

17 **(Hearing concluded)**

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### 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?