IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1427/5/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 5 April 2022

Before:
Bridget Lucas QC
Professor John Cubbin
Anna Walker CB
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Belle Lingerie Limited
Claimant

v

Wacoal EMEA Ltd and Wacoal Europe Ltd
Defendants

A P P E A R AN C E S

Anneli Howard QC and Khatija Hafesji (On behalf of Belle Lingerie Limited)
Matthew O'Regan (On behalf of Wacoal EMEA Ltd and Wacoal Europe Ltd)

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Tuesday, 5 April 2022

(10.30 am)

Case Management Conference

Housekeeping

THE CHAIRWOMAN: Good morning. We are doing a bit of musical chairs. I will just sort my bundles out.

Right. Good morning everyone. Some of you are joining on a Microsoft Teams platform. I start therefore with the customary warning: an official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as a contempt of court.

If you could just give me one second I am going to check everybody has the papers in the right seat.

Thank you. Yes, Ms Howard.

MS HOWARD: I am grateful.

We are hearing today the Claimant's application for a costs capping order, alternatively cost management of the Defendants' costs in these proceedings and just by way of housekeeping you should have two additional bundles to the original bundles for the CMC. So there is a supplementary costs CMC bundle which contains the applications and a further witness statement from Ms Sheppard and the relevant correspondence. There's also a supplementary authorities bundle relating to costs. We did inform the Tribunal this morning and my learned friend that we would be relying on one other authority, which is the Red and White case that I think the Tribunal has been given copies of. I think there was a further reference to another case,

Harrison. We are not relying on that case, that's a case related to detailed assessment. There should also be extracts of correspondence from the parties relating to the timetable that I think we have also arranged for hard copies to be given to you.

THE CHAIRWOMAN: Yes, we have those.

MS HOWARD: Then there was just one aspect that was missing from the bundle, which was the draft order for this CMC, which the parties have liaised over. We've produced a composite version of that order and I am arranging for hard copies to be delivered shortly for you and we suggest that as tab 5 of the costs CMC bundle is empty it could be inserted there.

THE CHAIRWOMAN: Thank you.

MR O'REGAN: Madam, I hesitate to rise but the agenda for this morning, it seems to me, in our submission, that the first issue is to address costs budgeting management and then to consider whether it's appropriate, having done so, to consider the application for the costs capping order, because costs capping orders are only imposed where costs which are considered to be reasonable and proportionate, which is the object of cost management, are nevertheless considered in the specific circumstances to be, for want of a better word, excessive and therefore should be reduced to a level that is below what the Tribunal considers it is just and proportionate for the Defendants to incur in defending these proceedings. So until one has determined the question of the Defendants' and the Claimant's approved budgets one can't then consider the issue of costs capping at all, in our submission.

THE CHAIRWOMAN: Yes. Thank you, Mr O'Regan. I think there may be something in your point but there's probably a point I should raise with you first and that is I have seen a suggestion in the correspondence that the time

estimate for this trial isn't actually even long enough now in your clients' view.

MR O'REGAN: Well, yes, madam. We have worked with my learned friend last week to try and move tiles on the chessboard around so as to try and squeeze everything into five days and whilst we've managed to achieve something, in our view that's not actually realistic or practical in practice because it involves sitting for -- I think starting at ten on four mornings, finishing at five on three, with two days or maybe three days it is with hearings between ten and five with absolutely no slippage in that timetable to get everything done within the five days. That also involves, and we don't agree this, moving the timetable for trial out of the usual order of opening, witness statements, dealing with factual witnesses first and then secondly dealing with the experts and then having closing submissions at the end. I don't know if it would be helpful if we were to first address the issue of timetable then, madam, rather than --

THE CHAIRWOMAN: It seems to us it may have an impact on costs budgeting and indeed on any direction or guidance we can give as to how the timetable will proceed at the ultimate hearing. Are you making a formal application to adjourn before us?

MR O'REGAN: No, madam. We are intending to deal with the issue of the trial budget as directed by the Tribunal -- the trial timetable as directed in correspondence from the Registry, which I think is an indicative timetable. Then we would then see where we get to at the end of that process as to whether or not the Tribunal considers that five days is appropriate because if that is the Tribunal's order then we will obviously comply with those directions and have to squeeze things as best we can. But in our submission it's just not possible to achieve that realistically within the five days given the number of

factual witnesses and experts that need to be heard, plus there is the issue of the injunction.

THE CHAIRWOMAN: Mr O'Regan, this presents us with a certain difficulty because if you are saying that the time estimate is inadequate then that needs to be raised of course at the first possible moment and that is today.

MR O'REGAN: I will just take instructions then, madam.

THE CHAIRWOMAN: Yes.

MR O'REGAN: Yes, madam, in that case we make a formal application now to consider the appropriateness of the five-day trial timetable.

THE CHAIRWOMAN: The difficulty with that is I haven't got a skeleton argument or any background to that application. We've just got a letter in correspondence relating to it and, as you say, the costs budgets have been prepared on basis of a five-day estimate and so it seems that this is being raised rather late in the day.

MR O'REGAN: Well, I apologise for that, madam, but it was only on, I think, last Thursday that I spoke to my learned friend in the evening as to how we might squeeze everything into five days and then I don't know when it was sent to the Tribunal. It might have been yesterday, I think, that matters aren't agreed.

THE CHAIRWOMAN: Well, at the moment you are quite right to say it's listed for five days. If you wanted to formally apply to adjourn then I think that would -- well, I think that would have to be on another date, but I suspect we will traverse this ground because what is the reason you say that five days is inadequate?

MR O'REGAN: I don't know if it would be helpful to bring up the timetable that the Claimant's solicitors sent through to the Tribunal.

THE CHAIRWOMAN: Yes, we have that.

MR O'REGAN: Which I think is in a freestanding document.

THE CHAIRWOMAN: Yes, we have it.

MR O'REGAN: You will see that there are on days one, two, three and four starting at ten and I think on days two, four and five we are finishing at five. Now, we are obviously prepared to work within that but that's effectively an extra day and a half of trial hearing, that's three and a half hours, so it's more than half an extra day. It's only allowing 4 hours for experts, when I think I had understood that five would be the appropriate number for that, effectively a full hearing day possibly with some time at the beginning of that day to finish off the factual witnesses if we were unable to do so.

THE CHAIRWOMAN: So of course the difficulty we have is we don't have your proposed draft timetable.

MR O'REGAN: No, madam. Unfortunately I can only apologise. I mean, I think what's agreed, madam, is that opening will be one day, closing is a day and oral argument on the injunction will be approximately half a day, although it's not agreed as to how that time will be split. The Claimant seems to want significantly longer than would be allocated to us. Industry experts we are agreed would be two to two and a half hours, so a morning.

THE CHAIRWOMAN: And the factual witnesses?

MR O'REGAN: Well, the Claimant says that it could deal with all of the Defendants' witnesses in, I think, about 4 hours.

MS HOWARD: I will let you speak and then I will respond, otherwise I will be popping up and down.

MR O'REGAN: I think we agreed four to four and a half hours is what you are saying would be required but we don't really know because we haven't seen any witness evidence yet from either side, so at the moment everything is

entirely indicative.

THE CHAIRWOMAN: I understand that.

MR O'REGAN: And the same to some extent with the experts.

THE CHAIRWOMAN: What I am struggling with, Mr O'Regan, is that you are telling me that you have formed the view that five days is inadequate but then I don't have a timetable from you which shows why you say that. We are keen to get this trial determined quickly --

MR O'REGAN: As are we, madam.

THE CHAIRWOMAN: -- and expeditiously and when we gave a direction of five days we thought that that was appropriate and it seems everyone has prepared their costs budgets on the basis that it is. So I am slightly perturbed now to hear that that might not be the case.

MR O'REGAN: If the matter is to do with cost budgeting then perhaps the practical answer is an extra day of time is allowed as a contingency should the Tribunal order that we move the trial from five days to six. Because there's absolutely no slippage whatsoever in the time that's been allowed on the Claimant's timetable.

THE CHAIRWOMAN: Of course the issue we have with that is that no one can sit on 22 September.

MR O'REGAN: We understand that, madam.

THE CHAIRWOMAN: Yes.

MR O'REGAN: I mean, one possibility that I would traverse is whether we have openings and then all the witness evidence in days 1 to 5 and then come back for a further day of closing submissions which can, if necessary, include the injunction, because the injunction issue, whilst it really falls within liability, is only something that will need to be finally determined if the Tribunal were to

find for the Claimant on liability. If the Tribunal finds for the Defendants, then the issue never arises. Even where the Claimant would be successful at trial, it is by no means certain that the necessity for an injunction would still arise because the Defendants in that situation may well take stock of the situation and decide to resupply the Claimant in any event.

Now, that's obviously just a hypothetical at this stage but if that were to be the case then there would be no need to hear argument on an injunction either. In that case we could then have the hearing within five days.

We also of course object to, effectively, the witnesses being taken out of order, particularly as regards the submissions on the injunction. I had agreed with my learned friend that we could deal with the industry experts first, not least because that may then provide some kind of context for what is to follow given that one of the key issues in this case is to do with the selling of products on eBay and it may well be very helpful for the Tribunal and for the parties to have heard that evidence first. It may well be that then some of the issues are further narrowed down at that point. So no objection to hearing of the industry experts first. Of course what we were also trying to achieve was to accommodate both my learned friend but also the understandable position of Mr and Mrs Dutton, who would not wish to be cross-examined either side of the weekend. So it really is extremely difficult to try and fit everything together and to squeeze it into the standard five hearing days.

I appreciate that we have not submitted a trial timetable of our own, although you do of course have the -- there is a consolidated version which has the parties' positions on it that was filed by the Claimant.

THE CHAIRWOMAN: Yes, and as I understood that, I thought you didn't agree to the industry experts being on the Friday.

MR O'REGAN: Well, in the ordinary course of events they would follow on but if it would make practical sense for them to go first we would not object to that. Again that was to try and accommodate my learned friend's unavailability on the Friday. Of course, madam, the only reason we are looking at September is because the Claimant didn't accept a hearing date in August, which then of course would have provided some extra time in September if needs be for closing submissions. But it's not that we are trying to delay this hearing, not at all. But it's simply that trying to be as realistic as we can be as to ensuring that the trial takes place both expeditiously but also fairly and that all issues are appropriately dealt with.

THE CHAIRWOMAN: So if we look at the timetable which is not agreed for the trial, I just want to get this out of the way before we start on costs, am I to take it that you wouldn't object in principle to the Claimant's industry expert and the Defendants' industry expert being heard on the Friday morning but you would object to the injunctive relief?

MR O'REGAN: Yes, madam, because it's not a preliminary issue. If it were a preliminary issue we would be determining it before the trial takes place. It's not something, in our submission, that should take place in the middle of evidence, it should be left to the end; indeed, in my submission, it may well be appropriate given the practical difficulties we are facing trying to get everything into five days that that then be moved off to a post-judgment hearing if and when it's required. Clearly that does not sit within the quantum phase of these proceedings, if we ever get to those. It's not something that necessarily needs to be considered in the trial. Then the extra half a day or so that would give us may mean that we can get this hearing done within the five days.

THE CHAIRWOMAN: Yes. Okay, thank you, Mr O'Regan.

Ms Howard, what do you say about --

MS HOWARD: Well, the first that we heard of this was Thursday evening and it was rather a shock to hear the Defendants protesting against the very order that they themselves had asked for, which was for the injunctive relief to be heard as part of this phase 1 hearing. They said this was a very discrete issue involving a narrow question of law that wouldn't take more than half a day and on that basis the Tribunal ordered that it should be heard and it was efficient to hear it together with the liability issues in phase 1.

What we are concerned about, and it is a discrete issue, it is separate from the factual evidence, it is separate from the legal issues on liability, but obviously it's a very useful precursor to have before we go into any kind of settlement or quantum phase 2 hearing.

We are at a stage at the moment where we don't know exactly how many witnesses are going to be called and how long that cross-examination is going to take. We've allowed a run-over onto the morning of day 4 for the Defendants' witnesses and obviously I want to make sure that the Claimant has sufficient time to cross-examine the Defendants' witnesses but we already anticipate that we may not need to cross-examine all six, so that space does provide some leeway.

The other issue is that we are concerned and put down a marker, and we have done in the costs budgeting submissions, that the economic evidence in this case will be able to take on a life of its own and this is a very common feature in competition claims of this nature but we feel that this unwarranted exploration of economic issues is not necessary, relevant or indeed helpful to the Tribunal in this case because we've been at pains to explain that this is an RPM case,

it's an object infringement, the conduct that has been complained about are all manifestations directly or indirectly or RPM behaviour and therefore it's very difficult to see what evidence is really going to need to involve detailed empirical analysis of anti-competitive effects when we are dealing with an object case.

We are concerned because the economic expert evidence is probably the most expensive element of this trial and so there is an implication between cost management and cost budgeting and we do think it needs to be very carefully scrutinised and controlled and to give the Defendants free rein to call their economic expert to explore all of these issues in great detail, which actually isn't going to assist the Tribunal and will have a materially adverse impact on costs, we think is not appropriate or fair or proportionate.

So for day 4 at the moment we have allowed what we think is a generous allowance of 4 hours for economic experts, which I have only been given permission to help the Tribunal on four narrow issues, if we go back to the CMC order, and especially if we use a hot-tub to hear evidence concurrently we don't see why that estimate is unrealistic. But in any event there may be some leeway in using that prior slot in the morning.

So I think that is the main issue of my learned friend's objections to the timetable. Then we have the problem of day 2. Why we thought it was sensible to bring both the industry experts forward and the injunctive relief is because those are two discrete issues that do not depend on the factual witness evidence and I am desperately conscious that the problems on Friday arise as a problem with my availability, for which I give heartfelt apologies, but I am trying to navigate a very tricky balance here of having to work through August and not completely destroy the weekend that has been organised as a surprise.

I am worried that because I am not available in the afternoon we are then going to leave a gap that can't be used, which is not an efficient use of the Tribunal's resources. The Claimant would not be content for the lead witness to appear on Friday afternoon without leading counsel there during cross-examination and I don't think that would be fair as a matter of the administration of justice, let alone holding them over the weekend. So it either leaves a fallow period during the Friday afternoon, and we felt that it would be better to make use of that time by bringing the injunctive relief arguments forward where we have arranged for alternative counsel to make those discrete points of legal submissions to the Tribunal, which should not then affect the rest of the timetable to trial. We thought that was the most efficient way to proceed and to make sure that the full trial window is utilised for all parties.

We would be very concerned if we effectively have any adjournment or any run-over which means that that trial window is lost because we are facing a moving target at the moment. Obviously we thought this would be a fast-track case. We had budgeted for a hearing of two to three days. Even a slippage of one day additional, making it a six-day hearing, will be a vast increase in costs. We only have to look at the costs budgets for not just the Defendants' solicitors, which are £10,000 a day; but their expert evidence, another £10,000 a day; and their industry expert, another £10,000 a day. So we are looking at a minimum of £30,000 and that's not including their counsel fees for an extra day of the hearing, which imposes a disproportionate burden for the Claimant in managing their adverse cost risk.

So we would urge the Tribunal to maintain the timetable as we propose and to maintain the five-day window and make the parties cut their cloth accordingly. This is a small claim. It is relatively narrow issues and we feel that five days is

adequate to deal with this.

THE CHAIRWOMAN: Mr O'Regan, can I ask you --

MR O'REGAN: Yes, madam.

THE CHAIRWOMAN: -- do you accept the proposition that the injunctive relief argument would not require any factual evidence to have been heard before hand?

MR O'REGAN: Well, it's predicated on the basis that there is a finding of infringement, so a submission whether it's at the beginning or the end is going to be on that basis, so it's not going to require any evidence at all because it is, as my learned friend says, a stand-alone issue. But it can't be put on the basis of a finding of infringement because the Tribunal, even if it's heard at the end, will not have determined that because that will still be a matter for judgment. So, yes, it is something to that extent that is discrete.

Our main point is whether or not this is actually an effective use of the trial timetable. Now, I understand my learned friend's difficulty on the Friday but that's not, with all due respect -- and it's no personal criticism on her at all, it's actually none of her fault and it's something that could happen to any of us, and indeed we have a witness who is in a similar position and will need to give evidence remotely because since the last CMC a family member has decided to get married overseas at that time, so I fully understand my learned friend's personal difficulty and I am not trying in any way to undermine that, but that is what it is. There's no reason why my learned friend's junior cannot attend on that day if that is what is required. Of course we are only here because the August date was not acceptable. I understand that was for other reasons but the Claimant needs to start making some choices, in our submission, as to whether it wanted it heard in August, in September with the attendant

difficulties or, as we think is the most appropriate timetable, is the longer timetable which will probably have to be in January due to the unavailability of both leaders from probably I think it is the beginning of October onwards I think for a five-week trial listed for November into December.

So we are trying to move around a huge number of pieces and our overriding purpose in all of this is to get a trial timetable that's realistic and allows all of the issues. It's not about extending things out. We are not going to allow our expert economist to roam over anything and everything. They have been asked to provide their fee estimate and their work plan on the basis of the four issues that were covered in the Tribunal's order. So from memory it's market definition and then there's issues to do with the VAPs and the platform ban. I regret I can't remember the other one off the top of my head but they are the four points. And there won't be much empirical evidence because most of the evidence is going to go to the question of whether or not the conduct that is complained of, if established, and that's for the Tribunal, is conduct that by its very nature is capable of having a negative effect on competition so as to constitute a restriction of competition by object under the Chapter 1 prohibition. It's really that straightforward. It is going to be largely evidence on economic principle but looking of course at whether or not the conduct complained of is capable of having those effects and it's really limited to that, there's going to be no empirical evidence except possibly in relation to the platform ban and that is because a platform ban is not in itself a restriction of competition by object but only by effect. That's the Claimant's pleaded case. So that's what we've asked them to respond to. It's not about trying to spin things out and incur additional unnecessary cost. The Defendants are equally costs conscious. Now, it's been put to us on numerous occasions that we are

running some kind of Rolls-Royce, gold-plated defence. That simply isn't the case at all.

THE CHAIRWOMAN: We'll come to that.

MR O'REGAN: We'll come to that in due course, but I just wanted to make that point. As regards the attendance of the industry experts, they will only be in attendance for such time as they are required to give evidence which, on current timing, would be on the Friday morning, or whenever it is. We will not be expecting them to attend the entirety of the trial. The position is different as regards the member of the economist team, we'll get to that in due course as well, but we are just really trying to be realistic as to how long this trial will take and what can be achieved.

THE CHAIRWOMAN: Yes. No, I understand that. Do you agree the time estimate that's been given for the argument on injunctive relief, so that is 4 hours?

MR O'REGAN: Is it 4 hours? Yes. Well, we think that can be dealt with in 4 hours as a matter of legal submission. There is an issue I think as to how that time is shared out. The Claimant seems to think they can have two hours and then 30 minutes in reply as opposed to the Defendants having an hour and a half. Obviously there will need to be time for reply, that's accepted, but it would be more appropriate and fair, in our submission, if time for submission on that were equalised, which would be I think an hour and three-quarters each.

MS HOWARD: If I could maybe explain why there is a difference. Obviously it's our application so we allowed ourselves an extra 30 minutes in opening essentially to lay the ground work for the application and to explain the wider grounds that make an injunction necessary in this case. We do think there's quite a lot of extensive case law that we'll need to go to on that case, not just from the United Kingdom but in other states, so we will need additional time to

make those arguments and the Defendant's arguments will largely be responsive, I would imagine, to the points that we have mad, so that's why there is a slight difference in that time.

MR O'REGAN: It's going to take as long to respond as to make, in my submission, those arguments. There won't be any less material to traverse. That's why we say an hour and three quarters each, if it is that we have 4 hours to deal with it. I have made the point before, and this may be something actually in costs, if we are going to get this done in five days it may be more efficient to move this off to a half-day hearing post-judgment if required.

THE CHAIRWOMAN: Now, I take it the parties would like to have an indication from us as to whether we thought the time estimate was still appropriate at five days and as to the Claimant's proposal as to what we can do with the Friday?

MS HOWARD: I think that would be very helpful because then it will frame the discussions on the costs management of these proceedings as well.

THE CHAIRWOMAN: I suspect everybody will want to know what the answer to that is so that everyone can start planning and know where they are. Because of course if we don't accept the proposal for the Claimants to take these items out of order, then of course that has implications for the Claimant.

MS HOWARD: That is correct. Because whether we preserve this trial window or we have to move to another date or instruct alternative counsel, we'll have to take those considerations into account. Thank you.

THE CHAIRWOMAN: We will rise for 10 minutes to consider the points that you have made.

(11.06 am)

(A short break)

(11.16 am)

Ruling

THE CHAIRWOMAN: We have considered the suggestion made in Gateley's letter of 1 April 2022 that a five-day trial estimate in this case is unrealistic and unworkable. This matter has been raised in the course of this second case management conference which is primarily fixed to consider cost budgeting. There is no formal adjournment application before us and whilst I did press Mr O'Regan whether he was asking us to adjourn the trial on the basis the time estimate was inadequate I will not treat it as such. At the moment we consider this remains a five-day case. We are concerned at the suggestion the trial may take longer. It appears that the possibility that it might take longer principally arises because of a material difference in view between the parties as to the extent of expert evidence and consequently the time that will be needed at trial to address expert evidence.

That is an issue that has principally arisen in the context of costs and cost budgeting, which we'll come to later in this CMC. I think the best position is that if, having explored the issues in this CMC relating to expert evidence, Mr O'Regan's clients consider the time estimate to be inadequate, they will have to make a formal application to the Tribunal to adjourn at that point.

I think that deals with the suggestion that the time estimate is inadequate and we can proceed in this hearing on the basis of a five-day estimate.

We have also been considering a proposed trial timetable which has been put forward principally by the Claimant with a view to accommodating some availability issues that have arisen for Ms Howard QC. We have heard this morning that the proposal involves a slight change of order to the normal course of events in the trial timetable such that day 1 would consist of the

Claimant's openings and the Defendants' openings and day 2 would consist of the industry experts being heard in the morning and arguments on injunctive relief in the afternoon. Ms Howard would hope to attend in the morning of day 2 remotely and in the afternoon her presence would on that basis, if we were to accept the proposal, not be required.

We do not necessarily consider it to be wholly satisfactory that the order of events is being changed, but on the other hand we have heard this morning from the Defendants that they do not object to the industry experts proceeding in the morning and further that - in relation to the arguments on injunctive relief - they are not fact dependent; in other words, it is not essential that the factual witnesses are heard before we hear arguments on the issue of whether or not injunctive relief is appropriate in this case.

Bearing that in mind, and the availability issues of Ms Howard, which we have some sympathy with, we would be prepared to consider a proposal along these lines. So, in essence as a fallback position that is how we see day 2 could pan out and that would mean that Ms Howard's issues could be accommodated. If, on the other hand, the parties have other proposals to make nearer the time as to how her availability could be accommodated which they'd like to put forward for we would obviously consider those. So if, for example, there was another discrete issue that could be included on that day either in addition to or in replacement for one of those then we would consider it, but as a fallback position so that the parties know where they stand we would be prepared to proceed on the basis of that sort of timetable on day 2 which should mean Ms Howard can attend to her other commitments.

Submissions by MS HOWARD

MS HOWARD: Thank you. I am very grateful for the Tribunal's leniency and accommodation on my behalf. How I propose to deal with it is in reality there is a spectrum of case management here for the Tribunal to consider which ranges from cost budgeting through to cost management and through to a cost cap and really it depends on the level of the scrutiny and control that the Tribunal wishes to have over the likely costs. So I had actually prepared my arguments on the basis that I could give you survey of the terrain, as it were, and I was going to start with just -- because my learned friends object to the Tribunal having any cost capping powers at all I was actually going to just lay the landscape to show where the Tribunal could derive its powers and the criteria and then those criteria actually deal with cost budgeting and cost management anyway and whether that's an adequate mechanism for dealing with the issues. So at that point I was planning to delve into cost management and cost budgeting before returning to the cost cap. So I'm wondering if that would be a helpful structure for my arguments.

THE CHAIRWOMAN: Yes, that would be, thank you.

MS HOWARD: So I present them as a whole.

So at the moment the Tribunal's case law on costs capping involves two claims in Socrates and in the Melanie Meigh case where claims have been allocated to the fast-track, but that does not mean that the Tribunal does not have a general power to impose a cost cap in an appropriate case in order to secure that proceedings are dealt with justly and at proportionate cost. We submit that the specific cost management powers in rule 53.2(m) do include the provisions of incurred and estimated costs and it also has a general power under rule 53.1 to give such other directions as it thinks fit in order to secure

that the proceedings are dealt with justly and at proportionate costs.

Now, those powers are to be read in the light of the governing principles in rule 4, predominantly that the parties are on an equal footing, saving expense and dealing with the overriding objective so that the case is dealt with in a proportionate manner.

I won't bore the Tribunal with reading that out further. But obviously that draws an inspiration from the provisions of the CPR and particularly the cost management powers in Part 3.19 and 3.15 to impose cost management, cost budgeting and a cost cap. The Tribunal's rules are derived from the CPR and are interpreted consistently with them.

I think it's just worth standing back. I am not going to take the Tribunal to the authorities. We dealt with them at some length at the last CMC. So I was just going to give you the references for your pen. But obviously in the Melanie Meigh case, that's authorities bundle 12 at paragraph 2, it's the Tribunal held that, albeit in a fast-track context, the cost cap exists to ensure that smaller businesses and traders who would otherwise be deterred from bringing claims can bring reasonable and genuine claims and that applies regardless of whether the claim is allocated to the fast-track or not.

Similarly, Socrates at tab 17 of the authorities bundle, paragraph 3, it's the policy behind the cost cap regime is to enable SMEs to obtain access to justice and so it's very important that the Tribunal strikes the right balance between access to justice on the one hand as well as a measure of protection for the Defendant, at paragraph 14.

So we submit that the Tribunal does have cost cap power and can draw on the criteria in CPR 3.19 by analogy. Just to flag, a cost cap can be imposed in respect of the entire litigation or in respect of issues tried separately. That's

subparagraph 4. It can be applied against all or any of the parties. That's subparagraph 5. So it can be imposed in a one way and not a mutual way.

Then the criteria are set out in 3.19 of the interests to justice, substantial costs risk being disproportionate; thirdly, whether the cost risk is controllable by case management or budgeting, that's what we call ex-ante controls, or ex-post controls through a detailed assessment of costs. Then the last element is obviously there is an exercise of discretion to further the overriding objective.

So I think what I will do at this point is I will delve into the cost management and cost budgeting aspect and come back to why we submit that that is not sufficient and it would help to have a cost cap.

On the cost management, dealing first with ex-ante powers, a cost budget does not normally set an overall maximum for the entire proceedings. All that it does is set phased limits, indicative limits for the different stages of the proceedings which are then taken into account at the detailed assessment stage later. So although it provides a guide, it doesn't impose a ceiling and it's always open to the Defendant to revise its budget on the basis of a significant development. If that threshold of significant development is met, then revision is mandatory and that's if you look at CPR 3.15(a). And what is more, the Defendant can make repeated applications to vary the cost budget throughout the proceedings.

Now, there is a broad concept of significant development and I am just going to give you note for the pen, but if you look at the White Book page 197 there are examples of what counts as a significant development in 3.15(a). That includes the disclosure of more documents than was initially foreseen, the need for further expert evidence or the increase in a number of days for trial. Here, we are already seeing the issues of the experts appear to be expanding

quite rapidly. So we have moved from what we understood to be a narrow issue of what was the effect of conduct that took place in the US and Canada and did that have an effect on the UK market, the competition on the UK market. That now seems to be expanding into a broader analysis of what were the anti-competitive effects of the Defendant's conduct, particularly in relation to the platform ban and in relation to discrimination. So we have put a marker down that we are concerned that the issues on which expert evidence may be prayed in aid by the Defendants may expand and we are concerned about that not just for our own costs budget but obviously for the adverse cost risk as well.

The Defendant is already making noises about the trial length and whether there is a need to expand the trial length and we are concerned that, as often happens in competition cases, the economists often drive the litigation strategy, they come up with new arguments which then the parties have to respond to and the case takes on a life of its own.

What's crucial, as Ms Sheppard has set out in her evidence, is that the Claimant has certainty. I am not going to take the Tribunal to the confidential evidence that we adduced in Ms Dutton's statement. You will remember the redactions at paragraph 20 and onwards.

THE CHAIRWOMAN: Yes.

MS HOWARD: But the Claimant is in a difficult financial situation. She's referred openly to levels of debt and to cash flow issues. And that financial situation, we submit, has been the direct result of the Defendants' conduct. She has behaved very responsibly in bringing this litigation, both by trying limit the scope of the claim to what is absolutely necessary to prosecute it, to try to bring it on a fast-track basis, which ultimately wasn't successful, but really to

cut her cloth to focus on the issues that really are necessary and relevant to the claim.

The Claimant is very concerned that should the costs of this litigation escalate she has already increased her costs budget by a significant amount. The original estimate was that the adverse costs would be 220, was the original level of the cap. In the light of the Tribunal's directions and the Defendant's arguments on the need for economic evidence, she has revised that cost budget and more than doubled it to 450,000 and has actively sought out an increase in the ATE insurance. But obviously there is both a limit in the ATE insurance and the premium that's payable and her ability to afford additional costs over that ATE insurance when the Claimant is already in a position of indebtedness. At some point the cost benefits of bringing this litigation are a finely balanced question anyway but, as Ms Sheppard has said in her second statement, there is a risk that she will simply not be able to afford this litigation and to continue if the adverse costs risks is too high.

So what she needs to pursue these proceedings is certainty and transparency. Because leaving the Claimant bearing a costs risks that exceeds the level of its ATE insurance will threaten the very existence of its business. While we consider that there is a strong case on RPM in this case, she has to be responsible and mitigate that adverse costs risk but she needs to be able to have the transparency and certainty of exactly what her risks are going to be. We do not consider that simply applying costs budgets will give her the necessary level of certainty that she needs.

The other angle is whether detailed assessment is going to be satisfactory ex-post. There are difficulties at that end of the equation as well because the Defendant can always argue that there has been a need to depart from the

cost budget that was given by the court. It can still argue that its costs are reasonable and proportionate and insist on detailed assessment, which will be very expensive in itself and adds a further uncertainty.

As the court recognised in the Tidal case, which is in the supplementary authorities bundle at tab 3, although the costs cap jurisdiction is in an exceptional case, there are still cases which merit consideration. So this case at tab 3 is a ruling by the Court of Appeal by Lady Justice Arden.

THE CHAIRWOMAN: Can I just pause you there whilst we all find it. I think the panel all has a tab open at the top of our screens.

MR O'REGAN: The bundle is at page 63, madam.

THE CHAIRWOMAN: Thank you. We have four electronic bundles so I am just anticipating we need to locate the right one.

MS HOWARD: Tidal Energy, yes, thank you.

So this was a case, it dates from 2014 so it's quite an early case in the history of costs management because the reforms were only introduced in 2013. The actual facts of the case are not really relevant. It was a claim brought by a start-up company against a very substantial payment which unfortunately arrived in the wrong account holder and so it was a claim against its bank in respect of a payment which was removed and can't be returned. But Lady Justice Arden at paragraph 7, having set out the criteria under 3.19, focused on the adequacy of the control of costs by case management directions or detailed assessment and at paragraph 10 in that case she felt that cost management or detailed assessment was a sensible approach but she put down a clear marker that a mechanism can only "constitute adequate control if it neutralises or satisfactorily manages the risk" and "it may not be possible to eliminate a risk but only to manage it."

Then over the page in that case she considered that cost management would work but at paragraph 13 she says:

"I would add this. The decision ... does not mean that in another case a party may not be able to lead evidence ... that the cost judge could not adequately distinguish between costs reasonably incurred and costs unreasonably incurred, for instance, of very extensive and detailed litigation on a technical matter [and that each case turns on its specific facts]."

So the Tidal case obviously turned on its specific facts, which we say are very different to the present case, and that this case, involving competition law with economic evidence of effects, it's going to be very difficult for a cost draftsman to really draw the line between what's reasonable and unreasonable after the event because if the Defendant is successful in defending the claim, that then shifts the narrative and there's almost a presumption that the Defendant under the ordinary costs rules is entitled to their costs and they will argue that those costs are entirely reasonable and proportionate to the issues, whereas even if the Tribunal were to say that not all of this evidence was helpful, it would be very difficult for the Claimant to overcome the natural assumption that the Defendant is entitled to their costs.

THE CHAIRWOMAN: Can I just pause you there. I was looking at the Tribunal's powers in terms of costs when they arise. I was looking at rule 104. I just wonder if you have it handy.

MS HOWARD: I am just trying to bring my screen up but my screen has frozen. One second. Thank you.

THE CHAIRWOMAN: In substance the point is really this, that the Tribunal has quite wide powers when it comes to determining costs and sub-rule two suggests that we may at our discretion at any stage of the proceedings make

any order it thinks fit in relation to payment of costs in respect of the whole or part of the proceedings and sub-rule five seemed particularly pertinent, that we may assess the sum be paid under any order and we may direct the assessment be by the president, a chairman or the registrar.

So it may be that we might be minded to assess the costs ourselves at the conclusion of the proceedings.

MS HOWARD: Yes.

THE CHAIRWOMAN: Would that address your concerns about the detailed assessment?

MS HOWARD: So what I had envisaged was that if the Tribunal weren't minded to issue a costs cap on our primary argument, then there are alternative mechanisms in addition to costs budgeting that you could have recourse to, whether under the Tribunal's rules or under CPR Part 3 or other relevant parts of the CPR and I was going to suggest those alternative bells and whistles, if you call them that, might help to manage the costs process going forwards, if that would help.

THE CHAIRWOMAN: Thank you.

MS HOWARD: So in this case we consider that if this case had been allocated to the fast-track then a cost cap would have been mandatory in any event and the sole reason why the case is not on the fast-track is because the multiple witnesses and the economic evidence mean that the hearing has expanded beyond the window that's normally allocated to fast-track cases and there are additional economic arguments that make it more complex. But we feel that the mere label that's being given to the case, whether it's fast-track or not, should not deprive the Claimant of the benefits of a cost cap if that's necessary to secure access to justice and give it some protection against

adverse costs.

If I could turn into cost management first, let's explore those and then we'll come back to the powers. I think there are three main concerns that we have in relation to the Defendant's costs budget. Firstly is the overall level of the costs, which we say are excessive for a claim of this nature. I think we just need to step back and to put the Claimant in the position of having looked at the CMA's monitoring notices. So if you look at this case there have been three warning letters from the CMA regarding RPM which are referred to in Ms Sheppard's statement. I would like to just take the Tribunal to the first one just to show the practical realities of bringing this trite litigation. It's at, I think, tab 41 of the original CMC bundle. The CMA's letter starts at F13.

THE CHAIRWOMAN: Yes.

MS HOWARD: Now, this letter dates from 20 June 2017 and this is the general industry-wide warning letter that the CMA sent to both suppliers and resellers regarding re-sale price maintenance. It followed on from the fine that had been imposed in the light fittings case. But the CMA referred to the steady stream of RPM complaints and the need to provide guidance for businesses and consumers to protect them from anti-competitive behaviour. At the bottom of page 13 it notes that the internet is an increasingly important channel for businesses to advertise and sell their products, it opens up markets, provides customers with more choice and enhances price competition.

Then over the page at F15 and F16 it refers to the key points to know, if you are supplier, you must not dictate the price, you must not impose a minimum advertised price, you mustn't use threats such as withholding supplies or offering less favourable terms to make resellers stick to the re-sale prices and

you can't hide the agreements.

Then if you are a reseller, over the page on F16, it makes clear that you are entitled to set the price of the products, whether online or through other channels, suppliers are not allowed to dictate the price and you should report this to the CMA otherwise you might be found to be breaking competition law.

Now, we know that this letter has been followed up in 2018 with a specific warning letter to the lingerie sector and I would also check the CMA only update its website on an annual basis but there has been another further letter in the lingerie -- I am going to say I am sorry I have not presented evidence on it but I can do, it's public record -- there was another warning letter in the lingerie sector which was sent in 2021. So this is obviously of grave concern to the CMA and what is a reseller supposed to do in this situation because the warning letters aren't working? And so the Claimant in this case has taken a stand to try and protect its position and to call out the breaches of competition law that are arising and are endemic in this industry.

We submit that there is a very significant public interest in this case and we have referred to the Corner House principles, which obviously we understand is a judicial review case, but we submit that the Corner House principles at paragraph 74 are relevant here. And it's not just for the Claimant's own private commercial interests. This isn't the same type of case as a contractual dispute or a clinical negligence claim which is a bilateral claim confined to the parties' private interests. There is a wider important public interest here, not just for the Claimant but for other resellers in the market, for the process of competition in these markets and most importantly for consumers, who are entitled to have the benefits of choice and lower prices. And so this case does have important ramifications not just for this sector but also for other

industry sectors because there is very little case law on RPM and refusals to supply that really set the marker down of what is expected and a ruling from the Tribunal will have significant impact for industries going forward.

So there are additional interests here, we say, why a cost cap is necessary in the interests of justice and for effective enforcement of competition law. Secondly, we have the risk that the claim will be stifled and the Claimant will be unfairly exposed to the risk of insolvency if costs are not managed in a sensible way and there is a real risk here that the costs are going to be disproportionate. The Tribunal referred earlier to the kind of philosophical divide between the parties as to what this case is actually about. From the Claimant's perspective RPM is a straightforward object infringement and you do not need to prove anti-competitive effects. The conduct that we have complaint about we say are all manifestations of the same overall common plan which is directly or indirectly to bring about price stabilisation in the market and to stop internet resellers like the Claimant discounting.

Now, obviously the Defendant is entitled to their world view of this case and they are entitled to bring in their complex economic effects arguments and theories, but there's no good reason why the Claimant should have to pay for that if those arguments are actually not necessary, not relevant and are not going to assist the Tribunal.

THE CHAIRWOMAN: If I can just pause you there, I think this came up at the CMC and I think my issue with that, and it would be very helpful to have your explanation, is to how much this case has to do with effects because effects are pleaded in your claim form. So I don't know if you can assist us on how much this is an effects case.

MS HOWARD: We have pleaded and when you pushed me I did not want to

relinquish that pleading of the effects but it's very much in the alternative because we have various strands of conduct here, so we have what we say are direct RPM provisions in the VAPs which we say are just plain vanilla object infringements, written terms, insisting on minimum advertised pricing or minimum retail pricing. Then there are the refusals to supply, which again we say are just an ancillary measure that is part and parcel of the RPM because that is the threat or the sanction that's being imposed to enforce it. There is the platform ban as we say, the eBay platform ban, but the wording and the correspondence that I took the Tribunal to last time is rather curious because the Defendant's sales representatives appear to accept that products can be listed on eBay provided they are at the right price. They only object if the price is below the MRPs. So again we say that is just another form of RPM.

The last element is discrimination, and this was explained in the witness evidence of Ms Sheppard, we say we could show that relatively simply through screenshots of the thousands of other resellers that were entitled to sell on eBay or were allowed to discount on eBay. So our primary case is that we don't need to go into effects in great detail, we just need to show the conduct and that this all forms part of the same overall plan.

The Defendant obviously, their world view, which they are entitled to, is that this conduct just took place in Canada and the US and it was ring-fenced and it didn't have any effects on markets outside the US or Canada. So there is an assessment of what were the effects and did they migrate across international borders into the UK. That's their case. But we say that effect is not necessary because actually when you look at the evidence, and obviously this will be a matter for evidence for the Tribunal, this conduct, these practices were imposed directly on sales in the UK, so they were implemented directly

in the UK. It's not just a migrated effect from overseas.

Really the issues of anti-competitive effects, we say, are subsidiary. They are not the primary argument because we don't actually need to show them. All we need to show is there is an object infringement or a hardcore restriction of passive sales and that is almost presumptive of harm that's been caused.

For an object infringement one of the elements that arises from the Court of Justice case law is that the conduct has to be the nature, the nature of the conduct or the type of conduct is such that it is likely to cause harm, and that rises from the Court of Justice case in British Airways v Intel, and so there is then an economic kind of theory, an argument of what types of conduct are so injurious to the nature of competition and effect of competition on the market that they are presumed almost to have those effects. That is a matter of economic theory. As my learned friend said, it doesn't require any empirical analysis of the evidence. You are not actually having to demonstrate an actual anti-competitive effect. So really the effects analysis, as competition lawyers are well attuned to in damages cases, is not necessary in this case because of the nature of the conduct that we are complaining about.

That's why we have been saying from the outset that really the economic analysis should be relatively self-contained, it's market definition. I mean, even a lawyer could give you the relevant factors and considerations, it's not going to involve too much detail because it's an object kind of logical process and this effect is a survey of the academic literature and applying it to the legal test.

THE CHAIRWOMAN: So you say that the effects analysis is principally limited to economic theory?

MS HOWARD: That's right, and to the extent that we need to show discrimination,

we can do that relatively simply just by a pointing out the numbers of resellers that were not subject to the same restrictions as the Claimant was.

THE CHAIRWOMAN: Thank you.

MS HOWARD: I am just going to take one instruction. Sorry, my instructing solicitor has just reminded me of course this is not a purely vertical case, there are horizontal elements principally because the Defendant is a retailer themselves and the evidence is that they were setting up their website in the UK at the same time as this conduct was implemented and so there is a horizontal dynamic here that makes it even more serious and makes it an object infringement.

THE CHAIRWOMAN: Thank you.

MS HOWARD: We are concerned that there is on the Defendant's world view a risk here that the economic evidence is going to take on a life of its own and will run out of all sense of proportion to the case. And having been in previous small claims of this kind, however much you try to contain the economic expert evidence, it always ends up being much higher and more significant than you anticipate the first time because of the reporting. At the moment we have simultaneous exchanges of expert reports and replies and then the joint statements and the joint meeting and the joint statement but things get thrown up during that which you are not expecting that you then have to respond to and that can cause the economic experts' bill to escalate quite quickly.

THE CHAIRWOMAN: I don't know if now is an appropriate time to raise it but I think in your solicitor letter you mention the possibility of sequential expert reports.

MS HOWARD: Yes, I think sequential expert reports are helpful in normal cases because it avoids the problem of ships in the night and not meeting. The

problem in this case is obviously our assessment of the economic evidence is going to be very, very short. The Defendants, we anticipate, will come in with a great deal of material and a great extent of new arguments that we don't anticipate are necessary or relevant and then we will need to be able to respond to them. So it's going to need, even if they were sequential, a further reply from our experts in order to deal with them fairly because the Defendant is the party that is really driving the economic analysis in this case. Unless you reverse the order and they went first and we went second.

THE CHAIRWOMAN: Is it your submission that sequential expert reports would assist with cost management?

MS HOWARD: I think it would, provided the Claimant had an opportunity to reply to them, but that then involves in itself an additional layer of expense.

THE CHAIRWOMAN: Thank you.

MS HOWARD: Perhaps now is the point to really focus in on our concerns with the cost management in this case and how the Tribunal might consider dealing with them --

THE CHAIRWOMAN: Yes.

MS HOWARD: -- on the particular elements of the budget. It might help to have the Defendants' cost budget open, which is at tab 2 of the supplementary bundle. I just want to make a point at the outset that obviously our submissions focus on the Defendants' cost budget because we have applied for cost management of their budget. We are not suggesting that there should be management of our budget and there has been no application to manage our budget or any objections raised to elements of our cost budget. It's quite permissible under the CPR rule 3 and under Tribunal's rules to apply what is a one-way cost budgeting cost management to any party in the proceedings.

So it does not have to be both parties. We submit that there is no suggestion that the Claimant's budgeted costs are excessive or disproportionate when we are all working on reduced rates with deferred and conditional payments. So it's our submission the Claimant's budget should not be subject to cost management at all but there is a concern with elements of the Defendants' budget.

Looking at their budget so far, obviously the Tribunal doesn't have any ability to impose costs management over the incurred costs to date but the incurred costs by the Defendants, which you can see on the left-hand side, the yellow columns, both by their solicitors and their counsel, are substantial. They are well over £200,000 so far, which we consider is hefty when you compare to the Claimant's costs when obviously the Claimant has had to do all the running so far in establishing the claim, dealing with the pre-action correspondence, getting ahead of disclosure, engaging the expert and dealing with the expert, which we are pretty advanced down the track and we've already made extensive disclosure of our documents.

You will recall at the last CMC my learned friend admitted that the Defendants had not even engaged with disclosure and had not responded or considered any of the categories that the Claimant had requested back in 2019. So those costs of incurred costs are significantly higher than our costs relatively speaking and we don't know what they've been spent on. You cannot impose any controls over those and I think it's a sad story that we've put in our costs application in December 2021, over three months ago, and the Defendants did not engage with that and did not submit even a cost budget until it was ordered to by the Tribunal. Obviously that has opened the window for incurred costs, unfortunately, which are now beyond the Tribunal's control, but

we wanted to put a marker down that even if you don't have the ability to control those through the cost budgeting system, you can make comments on them that will be taken into account at the detailed assessment process.

Our second concern is that there is no overall figure for the proceedings as a whole. That is why we wanted to take the Tribunal to the new authority in Red and White, which has been handed up in hard copy version. I would suggest it's added to the supplementary authorities bundle at tab 4.

THE CHAIRWOMAN: Yes.

MS HOWARD: We consider that this case is instructive because it is a competition law claim. It was by Mr Justice Birss sitting in Cardiff.

Now, I think it's helpful just to explain the context and facts of this case. I will summarise, basically, paragraphs 1 to 6 because this was a case involving bus services in Cwmbran and the allocation of slots at the Cwmbran bus station and the Defendant raised the competition law arguments by way of defence, as you see in paragraph 2. But it was all relating to competition law and land law leases. But it was a much more complex claim than this claim, if you look at paragraphs 2 and 3, because it alleged not just a chapter 1 infringement but also chapter 2 abuse of dominance infringement. So there were extensive issues about market definition which were going to be very significant, dominance, effect issues under chapter 1, questions of abuse and quantum. So it was a complete trial. It was going to be ten-day trial, you'll see midday down paragraph 4, with two economic experts and seven factual witnesses. It was also a multi-party case because there was a third party that intervened who was the freeholder of the bus station.

If you look at paragraph 5, where the parties' costs budgets are set out, the Defendant's cost budget was just under 300,000, which the Tribunal

considered to be too low, but the Claimant's and the third party budgets were each 1.5 million for a claim that was worth in the region of £80,000 to £120,000, you'll see at paragraph 6.

Now, the judge in this case referred to the authorities of ways in which costs budgeting had been dealt with previously. This is at paragraphs 9 to 17. I am just going to summarise but there was one case, the Willis, case where the judge refused to make a costs management order at all and left the whole issue of costs to go to detailed assessment. That's at paragraph 9. Then another case was Mr Justice Flaux in Wright v Rowland and that's at paragraph 10. In that case, the judge decided to manage some parts of the cost budget but then leave other parts to be done at a later stage when the complexity of the claim became clearer.

Then in this case Mr Justice Birss talks at paragraph 18 onwards: how do I resolve solve this? He went on to consider proportionality of the claim, the costs budgets in comparison to the value of the claim.

I think the important paragraphs to take the Tribunal to are paragraphs 23 to 24 and 26 to 29. You might like to just read those while I summarise. He referred to the fact of competition law having a public law aspect, it being a very serious matter:

"However [that] cannot be used in ... itself as a form of trump card justification for a very high budget. The significance of approving a budget is that the costs are more likely to be recoverable from the losing party. Thus a very significant aspect of budgeting is concerned with the other party's cost risk. This is obviously something of concern to the Defendant in this case."

Then he carries on:

"Costs budgeting is not directly concerned with how much a party can actually spend

to protect their reputation either. Wealthy litigants can spend what they like but whether they can recover what they spend from the other party is a different matter. The budget is concerned with recoverable costs. In other words ... how much a party can spend whereby the other party then has to bear the costs risk that they might have to pay ... if they lose the action."

In this case at paragraphs 26 and onwards he held that:

" ... a costs budget of £1.5 million is not just on the high side, it is disproportionate. It is and should be possible for a competition law claim about a bus station to be tried at a more modest costs level than that. Cost proportionate to the issues in a claim like this ought to be lower. The question which needs to be grappled with is what to do about that."

Now, stopping there, you can see that with contingencies the Defendants' costs budget in this case is in equivalent ballpark to the 1.5. They are 1.15 million. And obviously our claim is worth a lot more than the 120,000 that was estimated in this case. So the proportionality assessment is different. 1.084, I am corrected. So obviously the proportionality balance between the value of the claim and the cost budget is slightly different in this case but the issues, we submit, in this case are not as complex as an abuse of dominance case, which will have a lot of economic analysis and market definition and dominance let alone the effects of the abuse.

Obviously this is a single claim by a single Claimant against a single Defendant. It's not having a multi-party dynamic either.

So at paragraph 27 Mr Justice Birss marks down the budget for experts, which again he felt was entirely disproportionate. It might make sense to just turn over the page because he helpfully annexed a schedule of the likely costs and you'll see in that case the budgets from the claimant and the third party for their

experts were 150,000 and 190,000, which he held were disproportionate and surprising. In our case the total economic experts' bill is 220,000 from the defendants and the industry expert is 45,000. So he continues at 28:

"Simply to send this case away on the footing that the costs budgets are disproportionate helps nobody. Also, simply to decline to make a costs management order also helps neither side and [makes] the situation worse by prolonging uncertainty."

Then at the bottom of that paragraph he continues:

"The problem in this case is about the overall figures, not the detail."

Paragraph 29 is important. He says:

"It seems to me that if the court can come up with an overall figure which is appropriate, then that is the course that the court should take. In doing that I must bear in mind what is at stake, both in terms of the quantum but also ... the ... wider issues that particularly the Claimant and third party have emphasised [and his experience in high value commercial litigation]."

At paragraphs 31 to 32 he takes an approximate approach to estimating a proper overall level for the future costs of one party and in his judgment the appropriate overall figure in that case should be 800,000 and that's double the initial estimate from the defendant.

Then in paragraph 32 he goes on to again comment about the incurred costs which he felt were not proportionate and were out of kilter with the reasonable incurred costs. He added that as a point of detail. So I think there is a helpful parallel from this case where in effect what Mr Justice Birss was doing was using the cost management powers to impose an overall figure for the litigation as a whole. We suggest that this may be an approach that's akin to a costs cap by focusing -- you can focus on the detailed stages of the litigation

to then arrive at an overall figure for the proceedings as a whole and that might be a reasonable compromise in providing the claimant with a relative level of certainty about the costs risk they are exposed to as well as making sure from the Tribunal's perspective these proceedings are managed and conducted on a proportionate basis.

THE CHAIRWOMAN: Thank you.

MS HOWARD: If I might now just delve into that which you will see we've set out in the correspondence on the cost budget: we could not understand the Defendant's high cost for its economic experts and its industry experts and so we sought clarification from them in correspondence. I am just going to bring it up, it's tabs 7 and 8 of the bundle. The Defendant's estimated costs for their economic experts are 175,000. That's just for the reporting stage. That does not include their attendance at trial. That compares to the Claimant's budget of 25,000. Obviously reflecting the difference between the parties as to what role economic evidence should play. We consider, the Claimant considers that the four discrete areas that the Tribunal gave permission for are relatively self-contained. You will see that at paragraph 20 of the order. Those limits are important because the evidence should be restricted to what is necessary to ensure fairness. That's an instrumental part of giving permission for the parties to adduce expert evidence. The evidence must be necessary to decide an issue, not merely helpful. So there are a series of questions that the Tribunal needs to ask itself whether if it's not necessary in the first place is it actually going to assist the Tribunal and is it reasonably required when you look at the proportionality of the claim bearing in mind its value, the significance and effects of the judgment either way and who is responsible for the costs.

Now, in this case the Defendant's reporting costs for economic experts are over ten times the level of the Claimant's expert fees. In fact they are spending more on their expert reports than they are on their solicitor pre-action costs, which we have already said we consider to be disproportionate. So we tried to tease out exactly how these costs were being spent and given that they are commensurate with the solicitor and counsel fees, where you have to set out the members of the team and their level of seniority and their charge-out rates, we wanted to know exactly how many economists were being instructed. The Defendants' letter, which you'll see at page E4, at tab 8, deals with this and explains that the expert, at the top of page E5, will be a partner at a well-known consultancy and will be assisted by one or more junior colleagues. So that's plural. But we don't know their level of seniority or how much they will be charged out at, which does not give us transparency over how the work is going to be allocated on these issues.

The Defendant has already conceded and in fact conceded this morning that no detailed economic empirical analysis is necessary, that the economic input is going to be based on abstract theory working from first principles. So we don't really see what or why the reporting costs are so extensive.

We have also asked them what is going to happen in terms of disclosure. What happens in many of this competition claims is that the economic experts are just given wholesale access to the entire case file and they are given what's called a free-roaming access to analyse all the data and the evidence and the witness statements to basically pick the bones and see if they can come up with new arguments. The Defendants in their letter say:

"The expert will, as is usual, be granted access to the documents and data disclosed in the claim, including those that he may specifically request, and it will be for

the expert to determine the use of the documents and the data."

Now, our solicitors on the Claimant's side are being extremely cautious of how their budget is being spent and analysing the data in order to make sure that the expert is given a package of relevant materials and is not sifting through at vast expense of irrelevant materials. Similarly we don't understand why the expert should need to review all the witness statements when there is no connection between the factual facts and the expert opinion that they are being asked to provide here which is principally based on economic theory.

We would ask the Tribunal to exercise its powers under CPR Part 35.4, which may be the equivalent in rule 104, to limit the amount of expert fees and expenses that are recoverable from the Claimant. We can put forward some suggestions as to suitable caps but we think that reductions have to be imposed at each stage of the reports, the reply reports and the joint meeting and joint statement, but we don't have a breakdown of those. You'll see the breakdowns at the top of E5.

THE CHAIRWOMAN: Yes.

MS HOWARD: But given that just one element, one line of that, the reply statements, are more than the entirety of our expert costs altogether.

Next on industry experts, again the Defendant has provided a budget of £25,000 for their reports and the joint meeting and joint statements. But it's a mandatory prerequisite under CPR Part 35.4 that before permission is given the party is to provide details of the expert, the issues and the likely cost. But the Defendants explained in their letter that they haven't even engaged an expert yet and they haven't actually surveyed the market to see what the costs are likely to be. So they've completed the details of the cost budget without actually enquiring as to what the likely costs are to be.

The Claimant on the other hand has taken steps to come up with a market figure, which is £5,000 for the reports. It's submitted that that benchmark is the reasonable and proportionate limit for input from the industry experts. We would add actually in this case the nomer industry expert is a bit of a misnomer because really this evidence of fact, it's all to do with eBay functionality and how listings work. There's not really much opinion.

Lastly we've raised issues with attendance at trial and we've explained that there are excessive amounts both for the solicitors' attendance at trial, the expert and the industry expert. At the moment the solicitors' attendance bill is a total of £50,000 for five days, so that's £10,000 a day, which is equivalent to the entire team of four lawyers attending every day for 8 to 10 hours a day and we submit that is not proportionate, there's no need for the senior lawyers such as partners and legal director to attend every day, particularly when they can watch it on livestream back in the office.

Similarly, there is a bill of £45,000 or £9,000 per day for the experts, but they don't need to attend every day. They certainly don't need to attend to hear opening and closing submissions. They don't need to hear injunctive relief or the industry expert. And we would say there is no connect between the factual evidence and expert analysis in this case. So really there should be one expert in attendance for the half a day of their evidence, which should be at about £4,500 rather than £45,000.

Similarly that also applies to the industry expert. There's been an estimate of £10,000 for their attendance at trial when they are only going to be there for half a day and especially when this is a discrete issue. I think we've allowed £1,000 for the attendance of our industry expert at trial.

THE CHAIRWOMAN: Can you remind me what your solicitor's attendance costs are

for trial per day?

MS HOWARD: Yes, I shall look for that. It would help to have numbered rows, wouldn't it? I think it's 25,000. But obviously we've only got one solicitor.

THE CHAIRWOMAN: Yes.

MS HOWARD: I do need somebody to take instructions from.

THE CHAIRWOMAN: Yes, it's 25 I think.

MS HOWARD: Yes, thank you.

THE CHAIRWOMAN: And what cap were you going to propose for the economic experts?

MS HOWARD: We consider that the economic experts should be reduced by approximately 130,000. We broke that down as taking 50,000 off the reports, 45,000 off the reply and 30,000 off their attendance at trial. That would bring their total economic expert bill down from 220 down to approximately 90,000 I think. Which we submit is a pretty hefty economic bill in a case of this size anyway.

THE CHAIRWOMAN: Yes.

MS HOWARD: Then for the industry expert again we thought that should be reduced by 20,000. Even if it was reduced by 20,000 that would still be 15,000, which is more than double the allowance that we've had for our industry expert. So that could come down further.

THE CHAIRWOMAN: Thank you.

MS HOWARD: I think there are two alternatives for the Tribunal here. Firstly whether you can use the case management suite of tools to effectively manage this case. We submit that merely allowing for cost budgeting is not going to be sufficient because of the flexibility for the Defendants to increase that cost budget and to pray in aid significant developments in terms of trial

length or economic evidence in this case, there is a risk of a movable feast here. But if you are minded to go down that route we feel there do need to be additional bells and whistles and that you should use your powers under Part 35.4 to limit the amount of expert fees and expenses that are recoverable to impose an overall limit similar to that imposed in Red and White for the overall level of the fees, try to limit the opportunity for the Defendants to apply for variation or to seek to departure from the approved budget at the assessment stage. So that where it has included contingencies, for example, it's not allowed to vary or depart for those issues it's already flagged and make comments about level of incurred costs and whether they are entitled to all be recovered.

THE CHAIRWOMAN: Yes.

MS HOWARD: But for the Claimant and for the reasons that we've set out with the uncertainty, the public interest considerations here, the limits of costs budgeting and detailed assessment, and the risk of oppressive behaviour where costs are being used here to make the Claimant more vulnerable -- I am trying to be careful because I don't want to make free-wheeling allegations, but it is a constant theme of this litigation that the Claimant has had to do all the running and you will have seen from the pre-action correspondence we set out a 44-page letter before action, we received two very sort letters in response. Even the issue of the timetable, the Defendants didn't engage, the Claimants had to do all the running of setting out the timetable, producing all these beautiful drafts and amending them and writing letters to encourage the parties to come together only to find that objections are raised at the last minute.

We've had applications to amend which we then had to produce the detailed matrix

to explain and track back the evidence of the pleadings to show it was baseless. We've had requests for disclosure that we've then gone through and found all the relevant emails and disclosed them as part of our evidence to then be criticised for doing that. Those small day-to-day grates just serve to add costs on to our cost budget and to add costs to the Defendants' side as well which then intimidate the Claimant into not pursuing this litigation and there is a real risk here that if costs management is used to push up the costs that this claim will be stifled and the costs benefits of this litigation will simply become unfeasible and the claim will not continue.

Ms Sheppard has set out those risk very carefully in her second statement of the extreme caution that she's taking to manage the Claimant's costs on her side and we feel that the same degree of scrutiny should be applied to the Defendants' costs to make sure that they are kept and contained within reasonable and proportionate limits. I am conscious of the time so I will stop there.

THE CHAIRWOMAN: Can I ask you one issue before you do. Is there any scope, given that there is this difference between the parties as to the economic issues that are in dispute, is there any scope, do you think, for having the experts agree a more particularised list of issues? Because it just occurs to me at the moment we have some fairly broad assertions in the order as to what it's anticipated should be covered, but it occurs to me and it occurs to my fellow panel members that if we can get a little bit more clarity and drill down into exactly what needs to be covered then that might keep expert evidence -- it might make sure that we don't have ships passing in the night and it may ensure that expert evidence costs stay within reasonable bounds.

MS HOWARD: I have certainly used that approach producing a common

methodology in quantum assessment before the experts embark and it's been very helpful, so I think that might help. I think what it might do is flush out the differences so you know where the areas of disagreement are rather than necessarily the areas of agreement, but that may help at least assess where the risks are and the likely costs that are going to ensue.

THE CHAIRWOMAN: Thank you.

MR O'REGAN: Madam, I wonder if I might pray indulgence for a two-minute break, if that's possible.

THE CHAIRWOMAN: Yes, certainly.

MR O'REGAN: I am grateful. Literally 2 minutes.

THE CHAIRWOMAN: We will rise until 25 to.

MR O'REGAN: I am grateful.

(12.28 pm)

(A short break)

(12.35 pm)

MS HOWARD: Sorry, I have just risen on my feet because my learned friend has asked me to clarify the scope of our application and whether we are still maintaining that we want a cost cap and what I have explained is obviously there is a spectrum of approaches you can take to this which is obviously in your discretion based on proportionality. We are maintaining our application for a cost cap. We feel that our cost cap of 450,000 is a sensible and proportionate approach to the conduct of this litigation. If you approach the cost management approach and you do take off the reductions that I have suggested, that still brings the cost budget down within contingencies to £700,000, which again is not binding and can be increased and may not be -- may increase and that would put the Claimant in a significant difficulty, partly

because if the economic expert ramps up, she then also has to incur upfront costs in instructing her own experts to address those problems. So it's not just the adverse cost risks but also a parallel impact on the actual costs that she has to bear upfront and whereas Ms Sheppard than modulate her own costs and defer them so they're not payable upfront, she can't do that with the experts. So we are seeking -- our primary case is a cost cap of 450,000 but if the Tribunal is not with us on that then we ask for the costs budgeting costs management with the extra adds on that I suggested for the overall costs and the detailed limits for experts and attendance.

THE CHAIRWOMAN: Yes, there's one point if I could just raise with you on that. Reading the correspondence from, is it, Temple, it seems that it's not an absolute limit to ATE policy, it could be increased.

MS HOWARD: Yes, I think the problem is the issue of certainty and the level of the premium that would be payable because their letter does explains -- it's in the confidential bundle, isn't it -- that there will be an element of delay, there is a requirement for additional opinions, which obviously carry cost consequences, they have to go through an approvals process, so they can't say whether that approval process will be given and at what level they would be consider. And for the Claimant there is obviously then, because of the waterfall structure that applies under these arrangements, you have to take off the ATE premium, which is not recoverable, you have to take off success fees, the actual amounts of damages that comes to the Claimant at the end of the day is significantly reduced if the ATE premium is increased. So while the client is trying to change practices in the industry, she's not totally altruistic and at some stage she does need to get some damages to recover for the loss that's inflicted on her business so that that would be factored into the cost

benefit of pursuing the litigation.

THE CHAIRWOMAN: Thank you.

Mr O'Regan.

Submissions by MR O'REGAN

MR O'REGAN: Madam, I thought it might be helpful to start by first of all responding to some immediate points that my learned friend has made plus taking the Tribunal through what this case is and what it isn't, which again I think is something my learned friend has taken you to.

My learned friend has confirmed that she's maintaining an application both for costs management but also for a costs capping order. Now, in her submissions, in my submission, she's elided the two concepts. It's very clear that the first step that needs to be to determined is what for both parties -- and we for avoidance of doubt think that the Claimant's budgets need to be cost managed as well and that's what we had understood that the Tribunal would be doing at today's hearing, that's why costs budgets were served -- the first step is to determine whether a party's costs are reasonable and proportionate because that's the whole idea and purpose of cost budgeting and then to move on if necessary to consider the second question that whether or not those costs are reasonable and proportionate for the party, the Defendants in this case, to fight its case at the lowest cost possible that is reasonably possible whether or not it's still necessary to reduce the recoverable maximum costs even further. That's the second question. That's the costs capping order question. So it might be helpful if I could understand how you would like me to address you on those points, madam, as they are quite discrete and, in our submission, sequential.

THE CHAIRWOMAN: Yes, if you would deal with the costs management issues first.

MR O'REGAN: I am grateful.

THE CHAIRWOMAN: Then we can move on to the costs capping order. I think you are probably right because the costs capping order comes in once you've considered what the reasonable and proportionate costs are as an extra sort of break, as I understand it.

MR O'REGAN: Yes, madam. First of all just to respond to some points my learned friend made. The Defendants are not running this case as a money no object Rolls-Royce gold-plated service with the intention of running up wholly unnecessary costs purely for the purpose, whether it's intended or otherwise, of intimidating the Claimant. This is not what the Defendants have been doing at all. I don't need to take you to it, my learned friend has already taken you to, *Red & White*, Mr Justice Birss made it quite clear that competition law claims are serious and that therefore they need to be litigated and managed appropriately. That's where the Defendants are. The Defendants have been accused of an extremely serious breach of competition law and they are entitled to take reasonable steps to defend themselves and that, in our submission, is what they are doing.

In terms of our incurred costs to date we've merely been responding to the pleadings, dealing with fast-track and costs capping orders. In relation to the claim of disclosure, that was merely pointing out that various documents that should have been served with the Claim Form had not been. So that's clearly just an ordinary course event not something to place undue expense on the Claimant.

In terms of the Reply, we were merely identifying new points that had been made by

the Claimant. It was up to the Claimant whether to spend a weekend drafting a 49-page document saying what were and were not new points. We were not expecting them to do that. There has been a lot of time and effort spent on issues of confidentiality but they have really arisen because the Claimant was taking an unrealistic approach as to what was and was not confidential, as indeed was confirmed by their acceptance that various points they'd applied for were not actually confidential at all.

So we are not running a Rolls Royce service or a gold-plated service. It's a point that's been made repeatedly by the Claimant. In our submission, it's completely without merit whatsoever. We are merely running this claim in terms of, certainly the solicitors and counsel, how we would run any other case in which we are defending a claim as a defendant in the same circumstances.

Turning to what this case is and is not, this case is, in simple terms, a claim under section 47A of the Competition Act for damages. That's a private litigation brought by the Claimant in its personal interest. My learned friend has taken you in writing but also this morning to a number of cases relating to the treatment of costs and costs capping in judicial review cases. They are clearly only appropriate and relevant to cases brought in the Admin Court or judicial review in cases that are brought in the public interest. I don't think I need to ask you to turn up the references but it's quite clear from both *Plantagenet* at 59 and 60 and *Corner House* at paragraph 76 that those principles where the protective costs order is put in place are only applicable first of all where a case is brought on a general fundamental point of public importance and interest and where the Claimant has no personal interest in the case whatsoever so is effectively bringing it on behalf of the public at

large. That's clearly not the case here. So any reliance that my learned friend wishes to place upon those principles as set out in *Plantagenet* and in *Corner House* is completely misplaced, in our submission.

I mean, the Claimant seems to be trying to run this case as some kind of test case when it really is nothing of the sort. It's clearly a claim by it for damages that it alleges were suffered by the acts of the Defendants. We of course deny those but it certainly isn't a case that has been brought either in the interests of the public generally or in the interests of consumers. It may well have some wider effects, indeed any litigation will set out what the law is on various points and that will lead to everybody now and in the future having a clearer understanding of what the law is but that doesn't make the case a public interest case or a test case brought in the interests of consumers. This case is nothing of the sort, it is purely a case that has been brought by the Claimant for damages, interest, costs and an injunction.

In relation to the Defendants' costs, our submission is that those costs are a reasonable and proportionate estimate. We were only asked to provide an estimate. This is not full Precedent H cost budgeting. It's a reasonable and proportionate estimate of the costs that will be incurred to trial on the question of liability. Our differences are largely to do with the costs of the economists and the industry experts but I think it's fair and reasonable to point out to the Tribunal that the Claimant actually intends to spend considerably more on legal costs from the start of the claim until conclusion as do the Defendants.

In terms of base costs though without contingencies, the Claimant is at £743,000-odd and the Defendant at £675,000. With contingencies I think their legal costs will be higher, £868,000 for the Claimant and £816,000 or thereabouts for the Defendant.

THE CHAIRWOMAN: Can you just give me those figures again.

MR O'REGAN: Yes, madam, it comes from the costs budgets. The Claimant's base legal costs, so that's solicitors and counsel, and I have included, I think, within that paralegal costs as well in the case of Claimant, who obviously might have to hire in support, not having it in-house. The Claimant's on the base costs, so without upon contingencies, are £743,450.

THE CHAIRWOMAN: Yes.

MR O'REGAN: The Defendants' are £675,000. With the various contingencies the Claimant's will be £867,950 and the Defendants' £815,990.

THE CHAIRWOMAN: Thank you.

MR O'REGAN: That is despite the Claimant's solicitors working on significantly reduced rates, we are told, with CFA uplifts on top. Obviously, the CFA uplifts are not something that is recoverable from the Defendants but nevertheless that gives an indication that the high numbers that have been identified by the Claimant for legal costs are despite them working on reduced rates.

The suggestion is again we are running this on a gold-plated basis and that the Defendants are a large multinational with considerable means and a large legal team and that we are not cost sensitive. The Claimant says that in paragraph 21 of my learned friend's skeleton, and that we are seeking to obtain tactical advantage through lengthy drawn out timetables. We've merely attempted to be realistic but obviously we've taken on board your ruling of this morning, madam, in relation to that, as to whether or not five days appropriate.

In terms of applications, the Defendants have only made one and that was the one on paper, an extension of time to serve a defence due to non-availability of leading counsel, whereas the Claimant has now made three, all of which have

necessitated hearings at costs management conferences. So that's the FTP, the CCO and the issues on confidentiality, all of which have taken up considerable time for the Defendants, both in writing and at the hearings, at CMCs.

The amended pleadings point, as I've mentioned, is only in relation to the new issues in the Claimant's Reply but we were not otherwise intending to amend our own pleadings save in relation to one typographical error that we'd identified which in any event could have just stood as it was.

We've not been holding multiple CMCs. The CMC and today's hearing were both in the ordinary course of events. The Defendants don't have in-house counsel, so rely on instructing solicitors. They are based in Manchester. So they clearly are working at considerably lower hourly rates than the Claimant's solicitor, who is based in London. Mr Lye, who has conduct of these proceedings, who is behind me, he is an experienced legal director who has conduct of the proceedings and you will see his rate is on the costs budget, obviously if Mr Lye is content for me to disclose that, yes, that's £315, whereas the Claimant's solicitor is at considerably higher than that and starts with a five.

THE CHAIRWOMAN: Yes.

MR O'REGAN: In terms of other lawyers being involved, there's not been any duplication, a different solicitor handled the pre-action phase of the proceedings and whilst he's had some involvement since, it's been extremely limited. There are a couple of other names that appear on the team that's on the Confidentiality Ring Order, two of those are senior lawyers who provided an extremely limited amount of input to Mr Lye on specific issues in which they had would have experience but he did not, so it's not a case of

duplication but just the ordinary course of solicitors in a larger firm using each other's resources and then a junior associate may be used for disclosure, which in our submission is cost effective, and then there is some potential time for a trainee, if that trainee indeed is even charged for.

THE CHAIRWOMAN: Yes.

MR O'REGAN: It's clearly appropriate for leading and junior counsel to be instructed because that is what the Claimant has done. One could rhetorically ask if the Claimant is so cash-strapped so as not to be able to afford the litigation, why they are instructing a silk on a claim that they say is worth £1.5 million, it's actually pleaded at, £7.7 million is the maximum liability. That again is an important factor that one needs to take into account, that this is not a small claim, it's not in the hundreds of millions, but £7.7 million is nevertheless a significant amount of money for both parties. It's considerably more than the sum in dispute in *Red & White v Anslow*, which was £80,000 to £120,000, and yet nevertheless costs admittedly for a full trial on liability and quantum of £800,000 were considered to be reasonable. So reasonableness and proportionality isn't just the amount of time it's going to take but also the value of the claim and our submission is our costs are reasonable and proportionate on the basis of that.

In terms of the experts, we've certainly not been instructing them on the basis that they can incur as much costs as they like. The economists, and I will turn to economists first, but the point also holds or will hold in relation to the industry expert. We are still finalising the instruction of an economic expert. It's literally the dotting I's and crossing T's stage. It has taken slightly longer than one would have hoped for but we have had indicative budgets from them.

As my learned friend said, the expert who will give evidence is a partner in a

well-known consultancy with considerable experience of expert witness practice in both the High Court and the Tribunal in competition claims.

In order to get the costs estimate from them they had been provided with the relevant pleadings and orders, so they've had a full understanding of the issues involved in the case, so they have prepared their estimate on the basis of that. The instructions are to provide a report fully and squarely within the four corners of the CMC Order at paragraph 20. In our submission, the Claimant seems to have rather either underestimated the legal and economic issues involved in this case or have simply chosen not to engage with them.

THE CHAIRWOMAN: Are you able to summarise for us what you see them to be?

MR O'REGAN: Well, they are as set out. What is not in dispute is that if resale price maintenance is implemented in the United Kingdom and it has an effect on competition and trade within the UK that is a breach of the Chapter 1 prohibition. There is case law in that. It's the Tribunal's judgment in *Roland* and obviously there are a number of decisions of the European courts to like effect. That's not really in dispute. That's not what this case is about. As I submitted at the last CMC, this case is about whether or not restrictions that are imposed on a UK-based internet reseller using eBay.com, eBay.co.uk, whether or not those restrictions on them, either the use of that platform to sell to customers in the US and Canada or to require them to sell at a minimum retail price, which is the price that's prevailing in the United States and Canada, whether or not that is sufficiently serious and is capable of having effect so as to affect competition and trade within the UK and competition being affected and harmed by object and not by effect. So it's quite simply that is the key point is it's a matter of -- it's pleaded against us - that that is an object restriction. That is there is no case law on that, certainly not that we

are aware of. So clearly that is in some respects new ground.

As to whether or not restrictions on export sales from the UK can nevertheless constitute an infringement of the Competition Act Chapter 1 prohibition, we say that clearly whether or not it's capable of doing so is largely an economic question. So, as my learned friend says, it will predominantly be based upon economic theory.

Now, my learned friend also has pleaded and confirmed this morning that the Claimant will continue to claim or maintain an effects case. That will obviously also require expert evidence. It won't require, as we understand things at the moment, an enormous amount of quantitative assessment as one might expect in a damages claim where it's quantum that is in issue but there will clearly need to be some effects, there will need to be analysis of whether there are any effects at all in the first place and, if so, whether they are appreciable.

Ultimately, they are matters for the Tribunal but they are matters upon which it will be assisted by expert evidence from the economists. There's clearly also, as my learned friend said, the question of market definition, which I think is particularly relevant in the context of the effects case but also is relevant to the object case.

Those, we say, are the key economic inputs into the case. It's not about doing an enormous, huge roam through vast databases to conduct empirical analysis. That's not what this case is about. Indeed, we would expect there would be relatively limited empirical data at this stage because we are dealing with liability and not with quantum. No doubt there will be some. But in order for the expert to be able to give a full report that assists the Tribunal, it will of course be necessary for them to be appraised fully of the facts of the case,

and that's both as pleaded and as in evidence. So an expert will require sight of the pleadings and the witness statements and any relevant documentation that's disclosed.

So it's not that we are giving our expert carte blanche to engage in an enormous unrestricted fishing trip expedition. It's not at all that. It's simply that they will require access to those documents in order to write their report and assist the Tribunal. That is the basis upon which they have been instructed. That is the basis upon which we have received the estimate that we have inserted into our budget. They are the numbers that the expert has come up with. We've not asked them to come up with a particular number. They are the numbers that they believe, the expert believes, will be reasonably necessary for them, based upon what they know at the moment, to write their report, any reply report and --

THE CHAIRWOMAN: Can I just ask you how much of the documentation they will actually need to see? There is a suggestion that there is going to be a sort of open door policy with all the documentation, and yet generally there is some form of sifting process where someone says, well, these documents are relevant for your analysis --

MR O'REGAN: Yes, and that will be undertaken, but we don't know what those documents are as yet, so at the moment we are assuming they will see such documents as are relevant, but we expect they will actually be relatively limited in this case.

THE CHAIRWOMAN: Relatively limited documents.

MR O'REGAN: But we just don't know what's going to come out of disclosure on either side at the moment because that exercise has not been undertaken.

What the expert has confirmed to us is that his report and evidence will be on market

definition and what he puts as the conceptual analysis of the potential harms that might flow from the complained of behaviours, which we say is entirely focused on liability. There will be no work on causation or quantum at all because that's clearly for phase 2, if we ever get to phase 2.

But quite how much documents and data the experts on either side will need to have available to them, never mind what they have to see, we just don't know at the moment, but we are not expecting it to be in the millions of data points.

THE CHAIRWOMAN: Is it fair to say that most of the documentation would actually be in your client's hands at the moment?

MR O'REGAN: Some documentation will, which relates to correspondence that they have had. It depends on what my learned friend wants to -- the Claimant seeks disclosure of but, as I understand it, they want disclosure of internal documents relating to pricing and communications that the Defendants have had with other retailers. That's what I understand they are looking for. So that clearly, other than in relation to correspondence with the Claimant, will be held by the Defendants.

Now a key issue in this case is going to be, on the Claimant's side, what exactly Mrs Dutton did in response to the requests by the Defendants to comply in relation to sales to the US and Canada with the VAP policy, and that's obviously something that, partly, she will have to give evidence as to what she did and no doubt there will be documents showing what she's done or did at the time, but that will also partly be a question of expert evidence as to what could have been done and whether or not she actually took the right approach.

THE CHAIRWOMAN: That's more the industry expert, is it?

MR O'REGAN: It will be, yes. It's a question really, as my learned friend said,

mainly of fact but with some opinion as to what would be a potentially reasonable approach to addressing the issue of restricting sales to the US. That will be a question for the industry expert, but obviously the economist will need to understand that in order to give a view and opinion on whether or not that conduct is capable of having economic effects in the UK, which I think is why the industry experts are going first with their reports. The economists will then have sight of those as part of the factual matrix in order to answer those questions of principle, largely, as to what is an object restriction.

THE CHAIRWOMAN: Whilst we are still on the topic of economic experts, I mentioned it to Ms Howard, can you give me your view about sequential reports and also the possibility of defining a more instructive and particularised list of issues for the experts to cover and the impact that that may have on costs management.

MR O'REGAN: I think there would be some benefit but the difficulty here, as I think the parties, as my learned friend put it, are ships in the night at the moment. They are just seeing the case in completely different ways which means we may well end up in that position again. It may be worthwhile experts incurring a limited amount of costs, but it may well be that the parties are still in disagreement with each other and the experts will need to prepare their reports accordingly and then comment on each other's reports in reply.

THE CHAIRWOMAN: I am not altogether sure that necessarily follows because it seems to me that the Tribunal could then manage the issues that it wanted to hear evidence about, the issues that it thought would be most instructive.

MR O'REGAN: Yes, madam, the Tribunal always has that power and that is quite clear from the rules, I can't remember which rule off the top of my head, but it's clearly within the scope of the powers on directions as to --

THE CHAIRWOMAN: What we don't want to have is ships passing in the night.

MR O'REGAN: Absolutely, madam. So it may be there is some value in seeing what agreement can be reached, but if there isn't agreement, and I suspect that will be the case simply because the parties see the case in completely different ways -- we are basing ourselves upon the pleaded case that we have to meet and we say that these issues arise, the Claimant disagrees, but in our submission, I think the Claimant either isn't engaging with them or has not appreciated them.

THE CHAIRWOMAN: Or the Claimant may reply: well, actually we are not going to take you on on that, we are happy to take that as read.

MR O'REGAN: Yes.

THE CHAIRWOMAN: Our major issue on this is --

MR O'REGAN: So there may be some value in both saving costs but also focusing on the issues for the experts to at least, once they've had an opportunity to read all the documentation, to have a pre-discussion, if you like, a pre-meeting, as to where there is agreement and disagreement both as to the answer but also what questions --

THE CHAIRWOMAN: Exactly.

MR O'REGAN: Well, on both hopefully and then we can really narrow the issues down. But if there's still substantial disagreement, then it may be we have to return to the Tribunal for further guidance and ruling on what the Tribunal wishes to hear evidence on.

THE CHAIRWOMAN: Yes. I am quite tempted by that course. That's why I am asking you for your submissions on it.

MR O'REGAN: Yes.

THE CHAIRWOMAN: Just because it does seem you are poles apart and your

costs budgets are therefore poles apart. So I will leave that with you. We have got a lunch break coming up in a few moments. I just want to address you on that.

We have an availability issue with Mrs Walker from 3 o'clock this afternoon. Now I am quite conscious that the Tribunal took the time to consider the proposed timetable and what should be done about Ms Howard's availability. So we took time out of this case management conference so obviously I am not going to say stop now.

Do you think you will be able to finish your submissions by, say, 2.30?

MR O'REGAN: Starting again at what time, madam?

THE CHAIRWOMAN: That's what I was coming to really. How long do you think you'll need, and then we may have to tailor the lunch break accordingly?

MR O'REGAN: Probably another half an hour, I would imagine.

THE CHAIRWOMAN: Another half an hour.

MR O'REGAN: I think we are getting well -- possibly less. We are getting well through the points I think that need to be addressed on costs budgeting because they are largely about experts and on some attendance at trial points. In a lot of areas, if one breaks it down, the costs budget estimates of the parties are reasonably close and in some areas the Claimant has spent substantially more. Most of those incurred costs are obviously not something we can take account of in costs management going forward. So I think it may be that I only merely need to address you on costs capping. I think if we were to start, say, at quarter to two, then I think -- or even earlier. I was not expecting to still be on my feet but --

THE CHAIRWOMAN: Yes.

MR O'REGAN: A relatively short lunch adjournment. I don't think we need an hour.

THE CHAIRWOMAN: No, I am grateful for that.

MR O'REGAN: If Mrs Walker has a hard stop at three, and I am assuming you will be wishing to make a ruling on costs management and/or cost capping by 3 o'clock, then I would suggest we restart in half an hour at most. I am entirely in your hands on that, madam.

THE CHAIRWOMAN: I have to say, with all of the authorities that we have been referred to, I doubt very much whether we will be giving a ruling by 3 o'clock. I suspect it will be reserved, and I appreciate that's adding that to my homework, so don't worry about that.

MR O'REGAN: Obviously Ms Howard needs some time to reply.

THE CHAIRWOMAN: Yes.

MR O'REGAN: I think if we were to start again at a quarter to two, I think we would both be finished by 3 o'clock.

THE CHAIRWOMAN: Thank you.

MR O'REGAN: Unless there is anything else we also need to consider by 3 o'clock?

THE CHAIRWOMAN: For my part, and the rest of the Tribunal, I don't think there is. So if we rise now and come back at a quarter to two then.

MR O'REGAN: Yes, madam.

(1.08 pm)

(The luncheon adjournment)

(1.45 pm)

THE CHAIRWOMAN: Yes, Mr O'Regan.

MR O'REGAN: Good afternoon, madam. I think we were part way or nearly to the end of economic experts, so if I may just address you on the remainder of that.

THE CHAIRWOMAN: Yes.

MR O'REGAN: I have given you our submissions in relation to the extent of their reports and the fact they will not be given free licence to roam over the plains of the economic data without restriction.

The proposal from the expert is that he is assisted by a number of individuals, it may be one, it may be more than one, simply because that's the most efficient and effective way of doing the work, partly because obviously the expert's own availability is somewhat limited, he's as I understand it a very busy man and is giving expert evidence in a number of other cases before the Tribunal and it's simply neither time nor cost effective at his particular charge-out rate to do all the research and write the report on his own. It may be the Claimant's expert is prepared to do all of that but in our submission the most cost-effective way of preparing the reports is for a team, but an efficiently constructed team, to manage that. It's not a case of having lots of people working on it adding no value, there certainly won't be any passengers on the team, it is going to be tightly controlled and managed, as one would expect.

Obviously, this is an estimated budget at a high level, it's not a full Precedent H and at this stage it won't be possible to identify with precision exactly who is going to do what hours, that's why it's an estimate, but it has an upper bound to it and that upper bound is what you see in our budget. We are not saying we are going to come back and spend more unless of course the case changes dramatically but it's not something that we are intending, that's obviously something that, if that were the case, would be for the Tribunal consider. We'd have to make an application for a further costs budget. That's certainly not our intention or expectation. The four corners of the expert's evidence have already been set and we don't expect anything more. It's not a case with a quantum dispute where lots of other issues may arise at any point. The

case will be the expert will give his evidence in respect of those issues the Tribunal says he may and within the four corners of the pleaded case.

In terms of his attendance at trial, the rate, the estimate obviously includes attendance at trial but also preparation. It's not a case where an expert can turn up without preparation, that would not be of assistance either to him or the parties or the Tribunal, so clearly there needs to be an element built into the budget for appropriate preparation, including or expected to include a conference with counsel at some point. Obviously one part of the expert's work is to identify issues for cross-examination of the other party's experts. So there will be some form of preparation and conference and that has been budgeted for.

We are expecting that there will be one day required, whether that's four hours or five is immaterial, in our submission, the expert is not going to charge on an hourly rate. It will be for the full day. Now, when the budget was prepared we took a contingency that he may be required to give evidence over two days, we just didn't know at that stage, but if it is going to be one day then that's obviously something the Tribunal can take into account. But in our submission, it will be necessary for a member of the team to attend trial throughout because there may be economic issues that arise either in submission or in evidence and that would be an entirely proportionate and appropriate approach to take. That wouldn't necessarily be the expert, and one wouldn't expect that he'd necessarily want to be available for the four or five days, but a junior member of the team may attend. So that deals with the attendance of an expert at trial.

In terms of the actual numbers, if it may assist, I can break those down for you, the Tribunal. No costs have been incurred to date because they've not been

instructed, we are still at the early stage. The report, the upper bound is £115,000. Reply report is at £30,000. Joint statement is another £30,000. Obviously that will entail preparation, attendance possibly at an all-day meeting with the Claimant's expert and then drafting the points of agreement and disagreement.

Trial has an upper bound at £45,000 on the basis of two days with the expert and then another junior member of the team, plus preparation for the expert.

THE CHAIRWOMAN: Do we have any more visibility about how that £45,000 is broken down, other than the bare details you've just given me?

MR O'REGAN: I don't have any further details. I will see if those instructing me do, madam but I don't think so. No, I regret we don't have any further breakdown at this point, madam, so the assumption is two days of trial attendance, plus a junior member of the team for the other three days, and preparation time. So those are the upper numbers, which come to £220,000, which is the number that's in the budget. That was reduced down from the original figures once the Defendants' experts became aware of the terms of the Order and precisely upon what evidence was required. So we've not asked them to come up with numbers, we've just asked them to tell us what their fee would be -- and those rates I am instructed are at a 10 per cent discount off the normal rates that would be charged by this firm.

THE CHAIRWOMAN: Thank you.

MR O'REGAN: In transparency, they are the upper ranges.

THE CHAIRWOMAN: Yes. Were they also asked to provide, if you feel you can answer this, I don't want to you to say something you don't feel you can, were they asked for any lower or mid range --

MR O'REGAN: I can give you the lower range, if that would assist. Expert report

£65,000.

THE CHAIRWOMAN: Thank you.

MR O'REGAN: Reply and joint statement £25,000 each. Trial would also be £25,000.

THE CHAIRWOMAN: Thank you.

MR O'REGAN: That gives a total of £140,000. But obviously at the present time it's very difficult for them to identify precisely what work would be required without more information.

THE CHAIRWOMAN: Yes.

MR O'REGAN: But in our submission the upper numbers are proportionate and reasonable and maxima, not numbers that are to be exceeded and then claimed for in due course. So those would be what we submit are the appropriate budgeted numbers.

The Claimant's costs are extraordinarily low. They total, I think, £30,000, including costs already incurred, including £2,500 for attending trial. That seems to me to be extraordinarily low for an expert including preparation time even if the expert were attending only for one day. Obviously, we have no indication as to what those rates are, whether they are heavily discounted, whether or not there is an amount of pro bono time thrown in, we just have no visibility, but they do seem, on even a straightforward claim, even claims on the fast-track, economists' costs are considerably above £30,000 or so.

Of course the £ 30,000 number is almost exactly the same as the initial budget that was filed with the fact-track application, which was at £28,000, including £12,000 already incurred, which now seems to have come down to ten.

So it seems to us either the -- I keep repeating myself - , but either they haven't engaged with the issues we think are necessary or have underestimated the

work or £30,000 just doesn't seem -- in a claim raising these issues, even on liability without the need for significant empirical analysis, £30,000 does seem extraordinarily low.

So, in our submission, it would it be unfair, unreasonable and disproportionate for the Defendants' costs to be capped to what the Claimant is prepared to pay or their expert is prepared to accept.

So that's all I have submissions on in relation to the expert evidence.

Briefly in relation to the industry expert, the Defendants are still in the process of identifying an expert. It does not seem to be a particularly easy task to identify someone who might be suitable, although there is somebody they have in mind who they will be speaking to in the next few days. So we basically had to estimate and that is simply on the basis of five days in total for the report, reply and the joint meeting and statements, everything up to trial. Then one day of trial. Again, an expert is not going to charge on an hourly rate when effectively they will be committed for the full day. One day of preparation. That will be seven days, effectively, of work, it may be less in reality but we've budgeted -- estimated and it's no more than an estimate -- seven days at £5,000 a day.

Again, £1,000 for trial and £5,000 for the full report by the Claimant’s industry expert does seem to be quite low.

Again, in relation to documents, they will be provided with the pleadings, the witness statements, et cetera, and any relevant documents that go to the use of eBay but nothing further because they don't need to see anything further because it really is about how eBay works and how online retailers can adjust settings on eBay to effectively blank out the United States and Canada and, if so, how that can be done and what impact, if any, that has upon sales to the rest of

the world, including within the UK. So it is fairly tightly constrained. So I think in reality the number will be significantly lower but we just have no knowledge and it's a best estimate at this stage.

So just to conclude on the Defendants' costs, there was some objection taken to the costs of attendance at trial. We've dealt with economists and industry experts. The industry expert will not attend other than when giving evidence. It's not like the economist. The intention is at the moment there will be two solicitors and a trainee dealing with different issues. Mr Lye behind me is an experienced litigator but not a competition litigator. There is another partner in the firm who deals with competition and others issues and effectively advises the Defendants on those issues, so that is why he is intending to attend trial.

The suggestion from my learned friend is that they can all watch online. I don't really, with respect, follow that suggestion. Obviously, it's something one had to do during pandemic but we are past that stage and it would be far more effective and efficient for those instructing me to attend in person, as indeed would the Claimant's solicitor.

The trial days now are from, at least on three days, 10 until 5, the Tribunal actually sitting. So in reality that means time in the Tribunal precincts, if one wishes, 9.30 to 5.30, that's 8 hours straight through, and obviously there will be later preparation and conference and that obviously needs to be factored in and we have factored that time into the numbers we've given. So it won't be a short day of 6 hours, it will be a 10 to 12-hour day likely for all lawyers on both sides and that's what we have budgeted for.

THE CHAIRWOMAN: Just on that, I am not saying that this timetable is necessarily what we will be adopting, I hope I made it clear earlier, it may be that when we

come back or shortly before trial the parties will be able to produce a different timetable and it may be that we can start a bit later or rise on time but anyway that's the intention, it's not written in stone.

MR O'REGAN: No, it's not. Obviously, those instructing me are not based in London, so there is travel time and hotel accommodation and train tickets and the like on top and as we are over a weekend there will be two return trips to London. So that is all factored into the costs of attending trial as well and again that's reasonable, in our submission.

Now, my learned friend suggested that costs management wouldn't be sufficient to give certainty and protection to the Claimant because the Defendants would be able to increase their costs. Now, whilst that is theoretically possible and costs do increase in hearings before the Tribunal, clearly that requires a good reason and it requires the permission of the Tribunal. So that provides a degree of control. So if additional costs are not reasonable and proportionate, then they won't be allowed. If they are, then they will be allowed. And it's by no means obvious that any additional work necessitating an increase in costs would be as a result of the Defendants making an application. It could well be that the Claimant wishes to deal with additional issues and that therefore obviously they will need to be budgeted and paid for on the Defendants' side as well.

My learned friend took you to *Red & White.*

THE CHAIRWOMAN: Yes.

MR O'REGAN: I don't think we need to turn it up, I just wanted to draw a few key points from it and the paragraph numbers. That was a competition law counterclaim for maximum of “120,000 in an abuse of dominance case involving a bus station. I would expect the economic evidence would have

been fairly limited as to the relevant markets. I mean, bus stations have a limited geographic footprint and a relatively small number of users, so it would be fairly obvious if a bus company were being adversely affected by not having access to the bus station, which was the case in that case.

This case is obviously somewhat different. That claim was, as I say, for £120,000 and yet the costs budget was approved at £800,000. Each case is obviously completely different and one can't read across from one case to another but what Mr Justice Birss' judgment does show is that competition litigation is expensive. That's the first point. As the learned judge did in that case, one needs to take account of what is the proper level and in that case, at paragraph 26, a £1.5 million budget was disproportionate in a claim for £120,000. We are clearly not in that category, we are at £7.7 million at its highest.

Interestingly, in that case, at paragraph 27, the learned judge found that the defendant's budget was too low and the costs for its experts were, in his words, "surprisingly low". So it's clear that limited guidance as to what is reasonable and proportionate can be gained by looking simply at the costs that one party has put into their budget. One needs take a step back and look at things in the round. That's clear from *Red & White*.

The second authority that my learned friend has sent to the Tribunal, I think either last night or this morning, is a case called *Harrison*, which my learned friend did not take you to. So that is the second one that was handed up this morning. That was a medical negligence case and the issue there was post trial to do with whether or not a cost judge can go behind a budgeted cost amount and, if so, when; do they need to have a good reason to do so or can they do so without a good reason? So that is the point that was being

considered.

It was held, it's not the relevant point I want to take you to, in that case that they could only do so with good reason. The same would clearly apply here. But I'll take you to paragraph 29.

THE CHAIRWOMAN: Yes.

MR O'REGAN: It's on internal page 9.

THE CHAIRWOMAN: Yes, I have it.

MR O'REGAN: I am grateful. Now, it says:

"I have to say that I was a bit bemused by some of the aspects of the arguments advanced before us. At times the citation not only of authorities but also of what were described as 'extra-judicial documents' almost descended into a kind of arms race in collecting views or comments which might lend support to one point of view with regard to costs budgeting in preference to another."

It's somewhat where we feel we are in the case we have been put to, that there is a lot of material that is being presented, whether it to be to do with the approach taken in the *Corner House* cases on judicial review and cost capping there, there's references in my learned friend's skeleton to the approach under section 88 in relation to judicial review cases and cost capping there, but the Claimant really is casting around for a way in which they can avoid the usual costs consequence of, if they lose, having to meet the successful Defendants', the receiving parties' reasonable and proportionate costs. In our submission, there is no reason for that and the appropriate course is simply for the Tribunal to determine what level of costs is reasonable and proportionate, which in our submission is the number in the budget.

THE CHAIRWOMAN: Was there another point?

MR O'REGAN: There's also, moving on to the Claimant's costs, we take no specific issue with any of the budgeted costs other than to observe significantly that the incurred costs to get to this stage are, in our submission, very high. It's well over £300,000 to date by a Claimant who claims that they have no resources, that seems to be a very large amount of money in what they say would have been a claim dealt with in two to three days on the fast-track where costs at those levels are extremely unusual.

So in our submission, it's appropriate that the Tribunal should apply its cost management powers to both parties' budgets and it's not appropriate, in our submission, as the Claimant suggests, that a limit should be imposed only upon the Defendants' costs and the Claimant can effectively incur whatever costs they like, only subject to detailed assessment in due course at the end of the proceedings. That's not likely to assist in leading to these proceedings being dealt with justly and at proportionate cost.

Those conclude my submissions, madam, in relation to costs management.

THE CHAIRWOMAN: I just have one question in relation to that.

MR O'REGAN: Yes, madam.

THE CHAIRWOMAN: We are looking at the budget and you say that we should determine that the costs set out in the budget are reasonable and proportionate.

MR O'REGAN: Yes, madam.

THE CHAIRWOMAN: In relation to a number of the points you said this is very much an estimate and we actually don't know what will be involved at this stage because we haven't seen it, and I understand that and we are at a very early stage in the proceedings, but is your proposal that we basically sign off on the costs budgets and say these are reasonable and proportionate and

they are not revisited once we realise that perhaps the work isn't required, for example?

MR O'REGAN: Well, I am not exactly sure our's is in respect of both parties' budgets. In any budget it's an estimate as to future work that may or may not be required. Experience tells us in some areas the budgeted numbers are too low, in others they may be a little bit too high. We are very much in your hands, particularly on the industry expert, where we have effectively taken a very broad brush unscientific estimate as to what we thought the highest level of costs might be. In relation to the economist, we have bound numbers, that's what they say their maximum cost is going to be and that is the maximum cost to prepare a report that deals with all the issues but in a reasonable and proportionate manner. So those are the appropriate numbers to put into our budget. Obviously, I have given you the lower numbers and the Tribunal will need to come to a view upon that question but our view is that the higher range is the more realistic one. If they are lower, then the Defendants will be charged less and there will be less to recover. It's not a case that if less work is required suddenly the rates will go up to £1,000 an hour to meet the upper level of the cap. That's not what is intended. If that were to be done, I am not saying it will or it won't, but if that were hypothetically to happen, that would be dealt with post trial --

THE CHAIRWOMAN: In detailed assessment.

MR O'REGAN: In detailed assessment, yes, madam. If I may address you on costs capping.

THE CHAIRWOMAN: Yes.

MR O'REGAN: You will see from our written submissions we basically have three points here. First of all, the Tribunal does not have power to make the order

that sought, it's not provided for in the rules. Secondly, if you don't accept that argument then we submit that CPR 3.19 should apply by analogy, which again is the approach my learned friend was urging upon you this morning. But, three, in any event, the application should be refused. I will explain why.

Very briefly, in terms of power to make an order, making a costs capping order is very much an exception to the general approach in litigation, which is that the successful party should be able to recover their costs from the unsuccessful party.

Now, we are not on the fast-track so rule 58(2)(b) simply doesn't apply. Where costs capping is an exception, it requires specific provision, whether in CPR 3.19, section 88 of the Criminal Justice and Courts Act 2015, which is the one I couldn't remember a moment ago in relation to certain but not all judicial review claims, but in those cases that's where the applicants don't have any personal interest in the proceedings, and thirdly in the Tribunal we have obviously rule 58.3(b) on cases on the fast-track.

So they are all exceptions that have been laid down by the rule makers and we see the same in a slightly different context in environmental claims with the Aarhus Convention cases where costs are capped at £50,000. So they are all exceptions to the general rule. Now, if the rule makers had intended that there would be an exception and that cost capping orders were permissible outside of the fast-track then the rules would say. Our submission is they simply don't.

The cases my learned friend took you to, *Socrates* and *Meigh v Prinknash Abbey*, they are both fast-track cases, so of no real assistance.

The second ground is that if the Tribunal considers it does have the power to make a cost capping order nonetheless, CPR 3.19 should be applied. That seems

to be common ground now.

That obviously only applies in relation to future costs. And there are three grounds that must be taken into account, which my learned friend took you to this morning. First, it needs to be in the interests of justice. Secondly, there must be a substantial risk that without an order, costs will be disproportionately incurred. The third point is that the court cannot manage that or the Tribunal cannot manage that by case management directions and detailed assessment.

If I can take you to *Black v Arriva*, which is in the original authorities bundle at tab 4. That's page 130 on the electronic PDF.

THE CHAIRWOMAN: I am just going to take you back to the jurisdiction point because this actually quite important. We might have skated over it a bit. I think Ms Howard referred to rule 53.1, which provides that:

"The Tribunal may at any time on the request of a party or of its own initiative at a case management conference give such directions as are provided for in paragraph 2 below [and we all know the list] or such other directions as it thinks fit to secure that the proceedings are dealt with justly and at proportionate cost."

Do you say that does not encompass a costs capping order?

MR O'REGAN: That's our position, madam, yes, because costs capping is such an extreme exception to the general rule on costs that it's something that ought to be provided for expressly in the rules or in the legislation and that is the case in the four other examples that I took you to and that includes obviously in the Tribunal on the fast-track. That is our position on that.

THE CHAIRWOMAN: But just because some things are expressly provided for somewhere else does not mean that quite wide wording "such other directions

as it thinks fit to secure proceedings are dealt with justly and at proportionate costs" don't also cover the very eventuality that has been highlighted in a separate part of the CPR, does it?

MR O'REGAN: The CPR makes specific provisions for costs capping within the general provisions of CPR rule 3, including costs management and costs budgeting. So therefore it follows that that is an exception to the general approach. It's a very significant exception it. It deprives a successful defendant in this case of the ability to recovers its reasonable costs in the ordinary way and if that had been the intention of the rule makers, and it is the intention in relation to cases on the fast-track and there's a good policy reason for that, if that were the reason, then in my submission the rule makers would also have made that provision in rule 53. Indeed there are plenty of other small cases that are not on the fast-track for various reasons in which it's cost management that applies not costs capping. Costs capping is a lex specialis that really, in our submission, only applies, in Tribunal proceedings, to those on the fast-track.

Now, it may be unfortunate for the Claimant that this case is not on the fast-track but it never was suitable for the fast-track and that's why the Tribunal --I have not received your written reasons for that, madam, but the Tribunal refused that application. This was never going to be a two to three day case.

THE CHAIRWOMAN: But isn't the significance of rule 58 that it's mandatory that there's costs capping if it's a fast-track case?

MR O'REGAN: Yes.

THE CHAIRWOMAN: Rather than you can't have costs capping in any other case.

MR O'REGAN: It's mandatory and in my submission it's been made mandatory because there's a policy reason and the rule makers have taken account of

that policy and the exception in which a successful defendant will not be entitled to their full recoverable costs. I can't assist you any further, madam, that that is giving effect to that exception to the general rule.

THE CHAIRWOMAN: But the distinction between, as I see it, CPR rule 3.19 and rule 58 is that rule 58 is actually saying costs capping is mandatory. Rule 3.19 does not say costs capping is mandatory in any particular form of civil litigation.

MR O'REGAN: No, but that applies to all civil litigation by exception, a specific exception, and we see the same specific exception for other types of specified litigation and we see the same thing in the personal injury field with qualified one-way cost shifting, again where there is a policy reason why a claimant should not be liable for costs. Indeed one of the authorities on costs capping is the *PGI v Thomas* litigation, which again was a qualified one-way costs case. I can take you to that case in a moment. I am conscious of time, I probably can't address you any further on that particular point, madam.

THE CHAIRWOMAN: No, no, that's fine. That's been helpful. Yes, let's move on to your submissions on 3.19.

MR O'REGAN: Yes, madam. If you've got *Black* at the authorities bundle, tab 4, original authorities bundle, tab 4, page 830. If I take you to paragraph 12, which is on page 133 of the bundle. At the very end of that paragraph, Lord Justice Christopher Clarke states that:

" ... the indication in the Practice Direction [that's a Practice Direction to rule 3.19] that an order for costs capping should only be made in exceptional circumstances."

In our submission, there are no exceptional circumstances because costs can be appropriately managed through cost budgeting and through a detailed ex-post

assessment of costs. I am conscious of time. That's addressed in writing at paragraph 36 of our skeleton and the reference to *Black v Arriva* is at paragraph 35.

THE CHAIRWOMAN: Yes.

MR O'REGAN: In that case costs capping was refused even though the case was of general wide importance, because it was a disability case and it was really about the obligations of bus operators to accommodate people in wheelchairs. So whilst it was brought as a claim for damages, that probably being the only way it could be brought, in reality it was really a test case, so it was very different to the circumstances that we are in in the present case. But even then, despite the disparity in resources between the parties, which the court expressly took notice of, a costs capping order was refused because there was no exceptional reason why the defendant, if successful, should not be entitled to recovery of its costs. We are in a very similar position here. There's no good reason why costs capping or detailed ex-post assessment of costs would not be sufficient to control costs.

My learned friend said in relation to the *Tidal Energy* case that this is the exceptional case where the Tribunal cannot manage costs either ex-ante or ex-post. In our submission, that clearly isn't the case. There is nothing exceptional about this case whatsoever. It's a fairly standard competition claim. Costs are being budgeted at quite a high level of transparency and, certainly will be on assessment as to the costs that have been incurred and that is something that the Tribunal and the High Court in its parallel jurisdiction deal with all the time on a day in day out basis, whether on the basis of summary assessment or detailed assessment. They are quite capable of identifying what costs are and are not reasonable. Indeed *Red & White* shows that. The court was able

there to bring down claimed costs of £1.5 million to £800,000 and that was at a very broad brush preliminary level.

So, in our submission, there really is no risk in this case of disproportionate costs not being controlled and it's clear from the judgment of Lord Justice Coulson in *PGI v Thomas*, which is at paragraph 37 of our skeleton, that a CCO should only be made if protection against disproportionate costs cannot be controlled by either costs management or cost capping and this case is nowhere near that kind of level, it is clearly a case that can be appropriately dealt with.

Those extraordinary exceptional circumstances have the effect, of course, as Lord Justice Coulson observed at paragraphs 26 to 28 of his judgment, that the successful party's recoverable costs are less than the minimum sum reasonably required for it to fight its case. So in this case the Claimant is expecting, notwithstanding it spending the best part of £800,000 on its own budget, expecting the Defendants to fight their case not just through these proceedings but, as I understand it, also through Phase 2, if we get ever get there, for a maximum of £450,000, which is not much more than half what the Claimant is expecting to spend on Phase 1. In our submission, that just simply isn't fair, just or reasonable and isn't necessary.

Again, in *Black*, if I take you back to *Black* at 11, Lord Justice Christopher Clarke makes it clear that the function of costs capping orders is not to remedy problems of access to finance for litigation. The Claimant says it can't afford to litigate. Now, that may well be true, but that's not a reason for making a cost capping order. If it can't afford to bear its own costs of litigation, and in our submission the reasonable costs of being unsuccessful, then it shouldn't be bringing the litigation in the first place, which is something I will come on to expand upon in our third ground.

As we say in our submissions in writing, *Black* is entirely on point here. It's not distinguishable. It's clearly a very similar case in which a claimant, as on the Claimant's case here, suffered a cost disparity but in that case really was bringing public interest litigation, whereas this is clearly a private case entirely. Whatever the Claimant says, it's not a test case and it's clearly not a collective proceedings.

Very briefly our third ground is that if you are not with me on that, the Claimant has nevertheless not made out any good reason why a cost capping order should be made in the sum of £450,000. The Claimant has not actually made an application to change its application to amend the figure of the cap from the £220,000 in its application but I understand £450,000 is the number but if the Tribunal is not satisfied that that is the number and that an appropriate number would be a higher number, then the Tribunal cannot substitute a higher number. That's clear again from Lord Justice Coulson's judgment in *PGI v Thomas*. That's at paragraph 33. So it's £450,000 or nothing.

In our submission, £450,000 is unreasonably low. And £450,000, it isn't certain they will get ATE cover at that level, it's just been confirmed in principle, they clearly haven't entered into an agreement to that effect. It's too low, basically, in relation to what the Claimant now expects to incur, which is £783,000-odd without contingencies or £908,000-odd with contingencies. So the disparity becomes even larger if some of those contingencies arise, not all of which are within the Defendants' control. So the Defendants will be effectively hamstrung in their defence or will have to face the consequence of having to bear their own costs even if successful, which we say is not reasonable and proportionate.

In terms of the reasons, the Claimant, as we understand it, is simply seeking a CCO

because this claim could not continue in the absence of one, which is a point my learned friend took you through again this morning. Now, whether or not the Claimant can afford its own costs at trial, that's not a matter for a costs capping order. What Mrs Dutton says in her evidence, and I will give you the references, it's in the confidential bundle from the first CMC at tab 3 and that's page A19.

THE CHAIRWOMAN: yes.

MR O'REGAN: She says, and I don't think this is confidential: we cannot afford long-term litigation. That's at paragraph 20. And: it's essential we know the costs risks to our business from the outset. It's said: we cannot be sure whether this litigation poses a threat to the survival of our business without first knowing what maximum adverse legal costs will be. We've passed that point already because the litigation has started but in any event that will be appropriately addressed through costs management and costs budgeting.

Ms Sheppard gives similar evidence about the Claimant's wish to protect itself against exposure to adverse costs above the level of the ATE insurance. So in reality, in our submission, what the Claimant's principal motivations are to obtain greater certainty, costs management will provide that, and the second one seems to be that it wants to continue this litigation without regard to the financial consequences of the claim being unsuccessful and that's obviously something that every litigant, whether a claimant or a defendant need to take into account, so there's nothing exceptional there.

What the Claimant doesn't do is provide any evidence whatsoever that it would be unable to meet the Defendants' costs or an adverse cost liability if it were unsuccessful at the time of judgment. Now, that's in about probably nine months' time, something like that, judgment, if we have a trial in

mid-September, one would expect judgment to be handed down by the end of the year. There's absolutely no evidence whatsoever from the Claimant on that. No accounts have been submitted or exhibited. Even the audited accounts, the only audited accounts are the ones that we've exhibited to, I think it's our fast-track application response. So the Tribunal had absolutely no evidence whatsoever as to the Claimant's actual position now beyond its level of indebtedness and its turnover. That doesn't give the Tribunal any indication at all as to its ability to meet these costs. There's no evidence of any of the profits or cash flow. There's no evidence of any additional sources of funding which may be available. There are no management accounts. There's no cash flow forecast. There's no profitability forecast. There's nothing. The Claimant simply has not met the test that it needs to meet, and it's a high test, that it would be unable to meet the Defendants' costs and that would stifle the claim. It says it might discontinue because it's too expensive but that's not the same thing. So clearly the Claimant just hasn't shown, in our submission, what it needs to show in order for a cost capping order to be made. Now, we've made that point more than once in previous written submissions, which the Claimant will have seen. But it's just not been addressed, it's not been engaged with.

So, unless I can assist you further, madam, those are our submissions in relation to both the Defendants' costs, the need for costs management of the Claimant's costs, although we don't object to any costs to be incurred in the future and in many areas they are the same, experts are the main area of difference, and thirdly that the application for a costs capping order should be refused.

THE CHAIRWOMAN: Thank you very much.

MR O'REGAN: I am grateful.

THE CHAIRWOMAN: Ms Howard.

Reply submissions by MS HOWARD

MS HOWARD: I am just going to take the points mainly in the order the Defendants have raised them. I may not address every single point.

Dealing first with the public interest and the Defendant's criticism of us drawing on loads of external documents. We have drawn an analogy with the judicial review provision but that's in exactly the same way as the Defendants themselves did when they referred and said:

"It's submitted the principals to cost capping in proceedings in the High Court can be applied by analogy."

And they refer explicitly to the judicial review cost capping procedures at paragraph 13 of their response to the cost capping order at B370 and also over the page they refer to the case of Hawking. So I think both parties seem to be at least in agreement that there is a useful analogy.

Secondly, the Defendants have criticised that this is not a public interest case because the Claimant has a private interest here. That was a condition in the Corner House requirements but obviously that judgment was an early judgment that predates the 2015 Act and when Parliament actually looked at the criteria they did not put in a condition requiring that there was no private interest as part of the test. The reference is AB on page 537. That's also quite clear from Plantagenet at paragraph 27. That's the authorities bundle at page 52.

Now, I have already given the Tribunal my arguments on why this is public interest case. We do regard it as a test case, particularly for this sector, and I am just going to refer to the confidential bundle, confidential witness statement of

Ms Dutton at paragraph 18. I am not going to reveal the contents there but just for your pen why this case has important ramifications for conduct in the industry.

My second point is the challenge to the Claimant's cost budget. I do think this is an important point. We served the cost budget purely for the indicative purpose of comparing to what the Defendants' cost budget was. It's our application for cost management and a cost cap has always been what we call an asymmetric application controlling the Defendants' costs budget. We have never suggested that there should be a limit to the Claimant's budget, and that's predominantly because we are all working on reduced fees, on a deferred and conditional basis, and the Defendants have never taken issue with the Claimant's costs. It's not put in any application to apply costs management to the Claimant's budget. Even today my learned friend said that they weren't taking issue with the Claimant's costs.

We submit that this has always been what we call a one-way application to impose limits and scrutiny over the Defendants' costs budget precisely because of the economic evidence that they are wishing to adduce.

Now my learned friend compares the legal costs and seeks to argue that they are comparable, but obviously he is ignoring the fact that for a claimant the cost burden is much higher precisely because they have to create the momentum for the case, they have to set out the case, and there are various elements of the claim that the Defendants do not have to engage with. The Defendants' case is more limited because it's largely responsive to the claim.

So in the particular case, yes, the Claimant's incurred costs are high, or higher than the Defendants, but that's because they have had to front-load a lot of the necessary steps that might appear later. They've had to send out the two

letters before action, engage with the experts, get some quantum assessment for issuing the claim, dealing with ATE insurance and getting the level of quantum to justify that twice over. They've also had to deal with disclosure and going through the documents at a very early stage.

Then, just in terms of actually keeping this case on track, the Claimants again have had to do a lot of the running, particularly drafting the confidentiality ring order, which the Defendants objected to, they said it wasn't necessary, but then at the CMC they caved at the last minute and said it was fine. Again, providing additional evidence that the Defendants sought, dealing with the timetabling, all those sorts of issues where the Claimant finds opposition at every stage does engage costs and protracted correspondence which then is dropped at the last minute. So it's not fair just to compare the Claimant's costs and the Defendants' costs as a like for like because that's comparing apples and pears.

Dealing with the expert costs in the detail, my learned friend has now just been given new evidence about the input of the economic experts which is totally inconsistent with the position that was set out in Gateley's letter when we requested clarification. In that letter, there was no sifting process. The experts, it was contended, as was usual, would have access to all the data, they would have access to all the witness statements and they needed to sit in during the entirety of the trial. My learned friend's submission begs one question: if the economic input is as limited as he now contends, we don't see how that can amount to £175,000 for the expert's reports. That is obviously the high end of his estimate, but even at the low end of his estimate we submit that's disproportionate for an object infringement of this case where most of this economic analysis will not be needed.

He tries to defend that cost budget by attacking the Claimant's costs as being extraordinarily low and predicted -- that estimate is predicated on our analysis of exactly what economic input is necessary and relevant to this claim. We've obviously added in a contingency to deal and respond to any wider issues that the Defendants raise, but we don't see that as actually pertinent to the core issues in dispute and so we have expressly said we need to have a contingency for those elements.

Similarly, with the industry experts, which predominantly relate to questions of facts within that expert's knowledge, there is no need for them to have access to all the documents and to have access to all the witness statements, or to sit in during those elements of the trial, as Gateley contended in their letter.

In dealing with the powers to deal with the cost capping order, my learned friend submitted that the rules in rule 53 are not wide enough to build in or graft in the powers under CPR Part 3. I just wanted to flag that there are a number of orders in the bundle where the Tribunal has explicitly referred to CPR Part 3 and exercised those powers by analogy under CPR Part 3 when applying rule 53.

Just for your pen, there is the SSE order in authorities bundle 2, that was Mr Justice Jacobs, at paragraph 5, on page 5. I don't know if you want to turn that up. But, there, he explicitly refers to CPR management. Hang on, I am just going to ...

THE CHAIRWOMAN: Where is it?

MS HOWARD: Sorry, I have the ...

THE CHAIRWOMAN: Tab 23.

MS HOWARD: Sorry, I have it. Yes, my pen has gone too quickly.

THE CHAIRWOMAN: Tab 23, I think.

MS HOWARD: It's tab 23, I am grateful. I think it might be the one before actually. I think it's tab 22 and it's page 5. Paragraph 5, on page 5, refers to cost management:

"The SSE application that cost management be dispensed with, pursuant to CPR 3, is dismissed", and then the parties were ordered to file their costs budgets. There was actually a cost cap application in that case, but then I think the claim settled. I was acting in those proceedings on behalf of the Defendant, but I think they settled before it came for determination.

Over the page, in the Churchill Gowns case, which is at tab 24, at paragraph 12, again the Tribunal there refers to "rule 53.2(m) and rules 3.13 to 3.19 of the CPR and the Practice Direction shall apply by analogy", and so it's there grafting those cost management, including the cost capping provisions of 3.19, to its powers under rule 53.

The next authority is Rest & Play, just the next tab along. Now this was not a fast-track case: if you see at paragraph 6, the Tribunal ruled that designation was refused. But it went on to apply a cost cap, over the page at paragraph 17, and the cost cap was capped at 120,000 for both parties in those proceedings.

Then, again, similarly in the Vattenfall, which is at tab 27, Mrs Justice Smith --

MR O'REGAN: Sorry to interrupt you, but can you give me the reference to the *Rest~& Play* case.

MS HOWARD: Sorry, that is at tab 25.

MR O'REGAN: The paragraph?

MS HOWARD: The cost cap was imposed at paragraph 17.

MR O'REGAN: 17?

MS HOWARD: Yes.

MR O'REGAN: I am grateful.

MS HOWARD: Again, similarly in the Vattenfall, at tab 27, Mrs Justice Smith, this is a transcript, but if the Tribunal could look at page 3, at lines 6 to 9, there she also refers to the notes in the CPR at 3.15.3 and whether the value of the claim has been overvalued and she goes on to consider the expert costs at page 6 and then the counsels' fees and trial costs.

So that provision relates to costs management, not specifically cost capping, in the Vattenfall case there, but you can see there is frequent use of reliance on the CPR cost management provisions by the Tribunal when exercising its case management powers.

THE CHAIRWOMAN: Can I just stop you there. When you made some earlier submissions you seemed to be suggesting that we shouldn't exercise our cost management powers in relation to the Claimant's costs.

MS HOWARD: Yes.

THE CHAIRWOMAN: Now if I look back at the order that was made at the CMC, that's tab 4 in the supplemental bundle, in paragraph 6 we ordered that the claim shall be subject to costs management, pursuant to rule 53.2(m) and then at paragraph 9 we would determine how the cost of the proceedings are to be managed, including your costs capping order. I am not quite sure how we can carve out --

MS HOWARD: I think that was a slip, a drafting slip, because where we got to at the last CMC was that I was urging the Tribunal to say that there should be some cost management in principle, but obviously matters -- discussions were going to be deferred until this cost CMC to define exactly how those powers were going to be exercised and what level, but it was always in the context of our application, the cost capping application, which, if I take you to it, was always

an asymmetric cost cap.

Maybe it's worth bringing that application up. I think we also dealt with it in our skeleton. It's at tab 8 of the main bundle at B359. You will see at paragraph 1 of that:

"The Claimant seeks a phased asymmetric order limiting the costs that are recoverable by the Defendant from the Claimant in the event that the claim is successful, and in the event that the claim is successful the Claimant will seek to recover its costs in the normal way."

Then we go on to explain why this asymmetric nature is justified.

THE CHAIRWOMAN: Can you just give me the reference again. I am just struggling to find it.

MS HOWARD: Sorry, it's the main CMC bundle.

THE CHAIRWOMAN: Yes.

MS HOWARD: For the last CMC and it is at tab 8.

THE CHAIRWOMAN: Tab 8.

MS HOWARD: On page 359.

MR O'REGAN: B359?

MS HOWARD: B359.

THE CHAIRWOMAN: I had understood your costs capping order was asymmetric but not the requirement for costs management to apply to both parties, if you see what I mean.

MS HOWARD: I think by cost management, because I had asked that we have some wording in the order to establish that in principle, obviously you had not resolved whether it should be a cost cap or a cost management, and I think for me that meant it was a term of art that covers cost budgeting, costs management, a cost cap, as a broad term. I did not intend it to be specifically

a costs management of the whole claim, and the wording probably should have been, to reflect the application, the costs management of the Defendants' costs, but I think in shorthand at the Tribunal that wording slipped in unfortunately.

MR O'REGAN: That's not the Defendants' understanding of the wording at all.

MS HOWARD: I think if I can take you to the Defendants' response, which is at the next tab, B9, 3364, in the very first paragraph this is the Defendants' response:

"As set out below, the CCO application is for an [italicised] asymmetric costs order which, if granted, would prevent the Defendant, if successful, from recovering in full its reasonable and proportionately incurred costs while allowing the Claimant to do so in the event that it is successful."

Then it continues:

"For the reasons set out, it is respectfully submitted that the CCO application for an [italicised] asymmetric CCO is premature, unsupported, misconceived and be dismissed and the Tribunal should proceed to exercise its costs management powers in the ordinary way."

So I think the Defendants did understand our application.

THE CHAIRWOMAN: I think he -- I might be able to assist here, Mr O'Regan. I think Mr O'Regan's understanding may have been similar to mine, which is that the CCO is asymmetric but then in paragraph 2 he's going on to say that the Tribunal would then have a subsequent CMC where we look at both sides' costs budgets.

MR O'REGAN: It may assist, madam, if we look at paragraph 1. It simply says that if a CCO was granted, the Defendants would be prevented from recovering their reasonable and proportionately incurred costs, whilst the Claimant would

not be in the event that it's successful. That is not a concession that the Claimant's costs are not to be subject to costs management: the Order is quite clear, they are. There's never been any concession or otherwise by the Defendants that the Claimant's costs should not be costs managed in the ordinary way, and that's clearly not what the Order means. In paragraph 9 of the Order, it refers to the costs capping order being determined later. It doesn't mean that that is the only issue in relation to this CMC. This CMC is to discuss costs management and that's at paragraph 6.

THE CHAIRWOMAN: Yes, and I have your submissions on --

MR O'REGAN: Otherwise why would the Claimant be needing to file a budget at all?

THE CHAIRWOMAN: Ms Howard, I don't know how significant this point is for your submissions. I have to say I read the order the same way Mr O'Regan did, which was that we were going to be looking at both of your costs budgets and we had subjected the claim to costs management, and in any event the Tribunal could do it of its own motion. So I am not sure if it is a point you want to press any further.

MR O'REGAN: I don't recall the precise genesis of the drafting of the order, but the order was first drafted by the Claimant's counsel for the last CMC and obviously we'd by then commented in reply upon our different wording, but I doubt very much that that wording changed. That was the wording and it would make no sense. We'd always understood, both before and after the hearing, the first CMC, that there would be a second CMC at which costs management generally would be considered.

THE CHAIRWOMAN: I am not sure, Ms Howard, that it does affect --

MS HOWARD: I think it does affect it because the cost budget that the Claimant has

put in you'll see where, particular on industry expert reports, where we have put in for 17,500. That's on the assumption that there is a submission of a limited expert economist report, the main case involves object breaches with a limited response to D's economic arguments. Similarly, on the industry expert we do not understand that we need to undertake extensive work in reply. I don't think the contingency, if you see for the industry expert reports, there's no contingency in that budget for responding to any wider economic issues that are raised, either by the industry expert report or by the economic experts.

THE CHAIRWOMAN: Yes, I know it's a problem that besets most costs budgeting exercises where everyone is making certain assumptions and making certain estimates.

MS HOWARD: The problem, as my instructing solicitor explained, is obviously that cost budgets, particularly for experts, have to be paid upfront. She can try and mitigate the cash flow consequence for the Claimant through her fees, because she can not get paid effectively and can defer them right until the end of trial, but she cannot do that with the experts, the expert's fees.

MR O'REGAN: Perhaps for a moment, if I may, as regards the industry expert, there's no suggestion on either side so far today that the industry experts will need to see the economic reports, they come before it, and there seems to be a degree of common ground that the purpose of the industry expert report is to opine on how eBay works and how merchants can manage their sales through it. That's completely unrelated to the economic issues. My learned friend has said principally it's a factual issue, and if that's the case then there's no need for the industry experts to revise their reports on the basis of the economists, it's more likely to be the other way round.

MS HOWARD: My learned junior just found -- I was looking for the original draft of the case management order ahead of the first CMC, which is actually at A, tab 2, I think it is. If you bring up that order where the claim -- it was the one where there was blue and green writing. You'll see on page 4 of the costs management ...

THE CHAIRWOMAN: I have the original costs management bundle. Have you got a reference in the bundle?

MS HOWARD: My version -- I think this was because it was handed up in the morning because we'd been trying to agree things overnight -- mine only has internal page numbering. But it was -- was it A3? I have it at A2.

MR O'REGAN: What document are we looking at, sorry?

MS HOWARD: It's behind tab 2.

MR O'REGAN: The draft order.

MS HOWARD: My junior says it's page A3.

MR O'REGAN: My version has placeholder.

MS HOWARD: Yes, there was a placeholder.

THE CHAIRWOMAN: The.

MS HOWARD: The version in our bundle, and I can hand it up if that helps, had mixed blue and green writing, and the Claimant's preferred wording was that the costs recoverable by the Defendants should be subject to a cost cap, it was 220 at that point, but the Claimant's costs should be subject to ordinary principles of cost recovery. Then the Defendants' preferred wording was to seek -- defer the costs capping order to a further CMC, but there was nothing in there.

So we wanted the Defendants to file their cost budget because they still had not done that to be considered. The Defendants wanted the parties to file their

costs budgets and we said we've already filed our budget already.

THE CHAIRWOMAN: Then paragraph 17.

MS HOWARD: Then paragraph -- so there's some confusion between what the scope of the costs management was, but the Claimant's position was that it was always in respect of the Defendants' costs budget.

MR O'REGAN: Madam, that was the position --

THE CHAIRWOMAN: I think I can safely say that it would be slightly unusual for us to manage one side of the costs equation in a case and not manage the other.

MS HOWARD: Yes, but there's power to do that under CPR Part 3. It can be over any or all of the parties, which is the provisions I took you to this morning.

THE CHAIRWOMAN: Yes.

MS HOWARD: So it can be just imposed against one party.

THE CHAIRWOMAN: Yes.

MR O'REGAN: Madam, the transcript will determine what your order on this point was. What was drafted before the hearing is only a guide as to the parties' intentions.

THE CHAIRWOMAN: Absolutely. The order says what the order says.

MR O'REGAN: Indeed, madam. I don't have a full note of the hearing, but my notes do say: "adjourn cost issues to a separate hearing, file budgets, further submissions, cost capping, 4 April, half a day".

THE CHAIRWOMAN: Yes. The order says what the order says. I hear what you say, Ms Howard, and I will give it consideration. But, as I say, it would be unusual for us to consider one side of a costs management exercise and not the other. It's fair to say Mr O'Regan has not raised many issues with your costs budget.

MS HOWARD: Yes, and I think the objections that we've raised to their budget,

I think the lawyers are on similar figures in terms of their trial, but obviously we say we have much more work to do than their lawyers have because we are raising the claim and having to be proactive and move the claim forward and set out the case, whereas they are largely responsive. But also we have not included these contingencies, figures for these contingencies for the experts, in this cost budget that we have added. So we are concerned that if it's capped at this level of our costs budget and then there is a huge development in economic costs -- issues that are raised by the Defendants, we are going to be held to that, and that creates injustice.

THE CHAIRWOMAN: There's always the power to apply to --

MS HOWARD: There is a power to apply.

THE CHAIRWOMAN: Yes. Is therefore anything else, Ms Howard?

MS HOWARD: Sorry, I was just going to raise one point. Just I wanted to come back on the Tribunal's suggestion of having a sort of list of issues about the experts. We've had time to reflect on that over lunch. I think what today's discussions have shown is that the parties have completely differing views as to what this case is about, because certainly when I was listening to my learned friend's explanation that just seemed to reinforce that any restriction on exports is a hardcore restriction on passive sales. So there is a fundamental, as I said, philosophical divide between the parties.

I think it would be very helpful for the Tribunal, if you need the assistance of the parties as well, but for the Tribunal to almost set out a list of questions that it feels would assist the Tribunal but also the assumptions on which those questions are going to be answered, because at the moment the parties are starting from opposite ends of the telescope and we are never going to meet in the middle if one party is starting from one assumption and the other is

diametrically opposed. So I think it would really help to marshal the expert evidence to have this shopping list of questions that the Tribunal thinks is going to be relevant and necessary to assist it.

THE CHAIRWOMAN: As you may have guessed, we had given that some thought ourselves.

MR O'REGAN: The difficulty with that, madam, is simply then that may mean that one party or other, on a point that they consider is important, is overlooked. It is for the parties to present their case and there is a massive gulf between the parties here.

THE CHAIRWOMAN: Well, Mr O'Regan, I hear what you say about that and it wouldn't be -- if we went down this route, and we will give it further consideration, it would not be something that the parties would have no input in. So, for example, if there were issues that the parties thought were significant for reasons that the Tribunal perhaps had not fully appreciated, then they could be raised with the Tribunal. It may be that the parties are the best place to start with this exercise and that the Tribunal has its input after the event, but I am very keen to avoid these ships on a collision course and/or --

MR O'REGAN: (Inaudible due to overspeaking)

THE CHAIRWOMAN: -- disappearing over opposite horizons. Exactly. So we will give some thought as to how to deal with it, but there will certainly be, when we give our ruling, some directions as to how we expect the parties to cooperate and have some clarity as to what the issues are on which we'll have to reach a view.

MR O'REGAN: I am grateful, madam.

MS HOWARD: Just to conclude, in summary we do still maintain our application for

a cost capping order. The figure that we have proposed of 450,000 is very close, it's 56 per cent of what would be our costs for 800,000 effectively, so we do think that is a rational and proportionate approach to a cost cap which is approximately the same as the level of costs that we anticipate spending in these proceedings.

But if the Tribunal is not with us on that, then we would respectfully request that there is very stringent cost management of the costs that have been spent, particularly in relation to economic expert and industry expert evidence and attendance at trial, and perhaps with a limit on the overall proceedings (sic) that can be spent, in line with the Red v White case that we took the Tribunal to.

I am grateful.

THE CHAIRWOMAN: Thank you.

MR O'REGAN: Madam, there's just one small point my learned friend raised right at the very start of her reply which was about the *Hawking* case.

THE CHAIRWOMAN: Yes.

MR O'REGAN: Now my learned friend suggests that that was an analogy to the availability or we were conceding that that was an analogy for the application for the CCO in these proceedings. That isn't what paragraph 13 says at all. Paragraph 13 was merely directed at the question of filing of evidence. At that stage of course we were still pre your ruling on the fast-track.

THE CHAIRWOMAN: Yes.

MR O'REGAN: So it's merely a point that evidence needs to be filed if you wish to apply for a CCO. It's nothing more. It's not a concession that the CCO does apply in these proceedings. We are obviously off the fast-track.

THE CHAIRWOMAN: Thank you, Mr O'Regan. I will be sure to read paragraph 13

carefully.

Thank you very much for your detailed submissions which have been really helpful.

We will reserve our ruling and we will add that to the other rulings, which I appreciate are outstanding, and we will get those to you as soon as we can.

Thank you very much.

(3.01 pm)

(The hearing concluded)