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4 record.

5 **IN THE COMPETITION**
6 **APPEAL TRIBUNAL**

Case No: 1533/5/7/22 (T)

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8
9 Salisbury Square House
10 8 Salisbury Square
11 London EC4Y 8AP

12 Thursday 23rd March 2023

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14 Before:

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16 Hodge Malek KC

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18 (Sitting as a Tribunal in England and Wales)

19
20
21 BETWEEN:

22
23 Commercial Buyers Group Limited **Claimant**

24
25 v

26
27 Associated Lead Mills Limited and Others
28 **Defendant**

29
30
31 **A P P E A R A N C E S**

32
33 Owain Draper (On behalf of Commercial Buyers Group Limited) (Instructed by One Essex
34 Court)

35
36 David Went (On behalf of Associated Lead Mills Limited) (Instructed by Hill Dickinson)

37
38 Tim Johnston (on behalf of British Lead Mills) (Instructed by White & Case)

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Thursday 23 March 2023

Case management conference

THE CHAIRMAN: Some of you are joining us livestream on our website so I must start therefore with the customary warning. An official recording is being made and an authorised transcript will be produced and it's 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.

Yes.

MR DRAPER: Good morning, sir. I represent the claimant, who I'm going to refer to as "CBG".

THE CHAIRMAN: Yes.

MR DRAPER: Mr Went, immediately to my right, appears for D1 and D2. I'm going to refer to them together as "the ALM defendants".

THE CHAIRMAN: Yes.

MR DRAPER: On his right, Mr Johnston appears for D4, a company trading as BLM British Lead, and D5, Eco-Bat Technologies. I'm going to refer to them collectively as "the BLM defendants".

THE CHAIRMAN: Yes.

MR DRAPER: Sir, in a nutshell, as you know, these are follow-on damages proceedings in which my client relies on the CMA's decision in the roofing materials case, which I'm sure, sir, you'll have the opportunity to look at.

THE CHAIRMAN: Yes, I've read that. And when will I be getting an unredacted version of that? Fairly soon, wouldn't it?

MR DRAPER: My learned friend is to address you --

THE CHAIRMAN: When we get --

MR WENT: Yes, it is part of the application we're making.

1 THE CHAIRMAN: It is, yes.

2 MR WENT: There's obviously a process that needs to be gone through on that.

3 THE CHAIRMAN: Once we go through the process, just make sure I get a copy
4 myself, because there are quite a few gaps and redactions and it's much easier to
5 follow from an unredacted version; you know that.

6 MR WENT: Yes, we will make sure that happens.

7 THE CHAIRMAN: Thank you.

8 MR DRAPER: Sir, we have the benefit of the agenda that you were able to provide
9 this morning.

10 THE CHAIRMAN: Yes.

11 MR DRAPER: For my part, certainly happy to proceed on the basis that you've
12 indicated and in that order.

13 THE CHAIRMAN: Yes, okay.

14 So forum: clearly this is the appropriate forum, so we can tick that one off.

15 Confidentiality: you've submitted a draft confidentiality ring order, haven't you?

16 MR DRAPER: The parties have directed that effectively an order proposed by the
17 defendants --

18 THE CHAIRMAN: Yes.

19 MR DRAPER: -- and the claimant's position is that we are content with it, subject to
20 a caveat that if in its operation it turns out to be unwieldy or overly complex, it may be
21 that we seek some variation to it in the future. But that's for another time.

22 THE CHAIRMAN: Well, that's what normally happens.

23 Then just show me the provision that deals with the rights of third parties whose
24 confidential information might be within the materials supplied from or indirectly from
25 the CMA.

26 MR DRAPER: Sir, I will say that given that it's an order that I haven't --

1 THE CHAIRMAN: Mr Johnston, can you deal with this?

2 MR JOHNSTON: Yes, sir. So your question relates to provision for confidentiality as
3 regards third parties?

4 THE CHAIRMAN: Exactly. I need to make sure that when we get the CMA materials
5 which are going to be put into the confidentiality ring, that third parties have the rights
6 to protect their own confidentiality and make submissions, et cetera.

7 MR JOHNSTON: To apply.

8 THE CHAIRMAN: Yes, because that's normal in these orders.

9 MR JOHNSTON: Sir, give me a moment, if I might just turn my back.

10 THE CHAIRMAN: Yes, of course. I think it should be there. **(Pause)**
11 As I understand it, Mr Draper, you're relatively neutral on the form of the order. So let
12 me deal with Mr Johnston and Mr Went on that.

13 MR JOHNSTON: I'm very grateful, sir. 12.2.

14 THE CHAIRMAN: Yes. It's somewhere at the end, yes.

15 MR JOHNSTON: So:
16 "There shall be liberty to apply to vary the terms of this order which shall be on notice
17 to any party if appropriate."
18 I'm not sure that quite captures what you're asking me.

19 THE CHAIRMAN: No, it doesn't.
20 Mr Johnston, can you just work on the order? I'll deal with it on paper.

21 MR JOHNSTON: I'll take instructions. It may be easiest if we amend that provision to
22 make provision for third parties to apply as well. So that might be the easiest route.
23 But I'm very grateful for your indication. You're absolutely right, there needs to be --

24 THE CHAIRMAN: They need to have the right to protect Pergan material, for example,
25 and that sort of stuff.

26 MR JOHNSTON: Yes.

1 THE CHAIRMAN: So their rights need to be --

2 MR JOHNSTON: Expressly preserved.

3 THE CHAIRMAN: Yes.

4 MR JOHNSTON: No, I'm grateful.

5 THE CHAIRMAN: And that insofar as there are third parties, in particular Calder,
6 I think they should be notified of this order, supplied with a copy and told what's
7 happening --

8 MR JOHNSTON: Yes.

9 THE CHAIRMAN: -- so, if necessary, they can appear. But you can make -- when it
10 comes to dealing with the rule 63 order --

11 MR JOHNSTON: Yes.

12 THE CHAIRMAN: -- you need to put a provision in that that provides for --

13 MR JOHNSTON: An application.

14 THE CHAIRMAN: -- an application, and that Calder in particular -- if there's anyone
15 else that you know may have confidential information, I think they should be given the
16 right to apply.

17 MR JOHNSTON: I currently don't anticipate any third party. But what we'll do --

18 THE CHAIRMAN: It's only Calder, isn't it?

19 MR JOHNSTON: I think that's right, it's likely to be right. What we'll do is obviously
20 copy the tribunal into any correspondence to Calder as well.

21 THE CHAIRMAN: Yes, exactly, so they know that they have a right to -- yes.
22 Then how are we going to deal with the documents? As I understand it, it's your
23 solicitors who obtained documents from the CMA file.

24 MR JOHNSTON: Not quite, sir. The position is that my solicitors were not acting
25 during the investigation phase.

26 THE CHAIRMAN: Yes, previous solicitors. The point I'm making is that documents in

1 the hands of your solicitors, even if it's former solicitors, are within your control,
2 because they're your agents.

3 MR JOHNSTON: Well, that's the position we've taken in correspondence with the
4 CMA. The CMA's position has been that that's not right. The CMA initially said that
5 Skadden couldn't disclose the materials to my client. They have relented in that
6 respect, but their position is still that it would be potentially a breach of the
7 Enterprise Act and a criminal offence for my client to provide those documents to their
8 instructing solicitors.

9 Now, sir, leaving aside whether or not that could ever possibly be right, that's why
10 we've made the application for --

11 THE CHAIRMAN: But in the absence -- but if I make an order that you can do this, is
12 that a defence under any strategy provision, that you've done it pursuant to a court
13 order?

14 MR JOHNSTON: That certainly seems to be the premise on the way the CMA is
15 approaching the matter. So the CMA's position is that it remains of the view that,
16 absent an order from this tribunal, the materials should not be disclosed. And in fact
17 they wrote further yesterday to clarify --

18 THE CHAIRMAN: I have that letter.

19 MR JOHNSTON: -- that they weren't supporting the application.

20 THE CHAIRMAN: I understand that.

21 MR JOHNSTON: But their position remained that, pursuant to an order from the
22 tribunal, there would be no concerns on their part.

23 THE CHAIRMAN: So what you need to do is -- I'll make the order.

24 MR JOHNSTON: Yes.

25 THE CHAIRMAN: But don't action the order until you've written to the CMA and heard
26 back from them --

1 MR JOHNSTON: I'm very grateful.

2 THE CHAIRMAN: -- saying, "This is the order that has been made. Please confirm
3 that it would not be a criminal offence for us to receive that material".

4 MR JOHNSTON: I'm very grateful.

5 THE CHAIRMAN: Because I've seen the correspondence; it's not great.
6 The other alternative is for me to make an order directly against the CMA for the CMA
7 to provide the file, which they probably wouldn't want either.

8 MR JOHNSTON: Well, I think they would obviously have to be here.
9 It's probably worth flagging that one of the possible future eventualities is that, having
10 seen the material that our client currently has, having been provided it by Skadden,
11 there does need to be a further application as regards the CMA because obviously,
12 having been a settlement case, there may well be wider documents on the CMA file
13 that are not there, but we just don't know that. So at the minute what we're doing is
14 we're taking it in stages and trying to deal with it proportionately, and we're just
15 applying today for permission for our client to disclose to us.
16 Your suggestion, sir, that we clarify that from the CMA's perspective there's no further
17 wrinkle, as it were, is very helpful and we'll do that. But it may be in future that we
18 have to return, but obviously I can't anticipate that because I have no understanding
19 of the relationship between what we're about to receive and what the CMA has.

20 THE CHAIRMAN: Okay. Then on that, you'll only put into the confidentiality ring
21 relevant documents.

22 MR JOHNSTON: Absolutely. That's a concern that's been raised by the claimant and
23 we fully understand that.

24 THE CHAIRMAN: There are two reasons. One is that you do not want to
25 unnecessarily disclose something that could be confidential --

26 MR JOHNSTON: Indeed.

1 THE CHAIRMAN: -- absent a court order that requires you to do so, and you're only
2 obliged to give relevant documents. Two is the needle and haystack point, which is
3 that you don't want to flood any material -- there's going to be enough material in this
4 case anyway.

5 MR JOHNSTON: (~~inaudible~~) The Claimant does not want boxes of files arriving of
6 wholly irrelevant material. So what we've undertaken to do is to only disclose material
7 relevant to the October 2015 infringement. You'll recall, sir, there are four
8 infringements --

9 THE CHAIRMAN: I understand. But there's one caveat on that though: let's say you
10 have a document that relates to the 2015 infringement but it also deals with the other
11 aspects.

12 MR JOHNSTON: Yes.

13 THE CHAIRMAN: I don't expect you to have to redact all of that.

14 MR JOHNSTON: No.

15 THE CHAIRMAN: It would just be an enormous cost. And also when you start
16 redacting documents, sometimes the meaning of the documents may change. And
17 this case is far too expensive relative to the amount at stake. So I'm not going to
18 require you to redact an otherwise relevant document if it contains stuff relating to the
19 other infringements, unless of course there's an issue of privilege or something like
20 that.

21 MR JOHNSTON: Yes. But that would obviously apply naturally to documents like
22 an SO or an SSO, of course, but there may be other materials as well. That's very
23 helpful as an indication, as a proportionate mechanism of ensuring we don't run up
24 huge costs reviewing the case file.

25 THE CHAIRMAN: The next issue I'd like just to raise with you -- I'm not sure if it's on
26 the agenda -- is the letter that the tribunal wrote on the facts and the decision --

1 MR JOHNSTON: Yes.

2 THE CHAIRMAN: -- and that you're saying you're not in a position really to answer at
3 this stage.

4 MR JOHNSTON: Well, it's very difficult, sir, because --

5 THE CHAIRMAN: But there are limits, obviously. You're aware of the decision in
6 Royal Mail in the Court of Appeal, [2020] EWCA Civ 1475, and I expect that to be
7 followed by both groups of defendants.

8 So when we come back to the next CMC, I will want that bottomed out. So the letter
9 you have in relation to those specific paragraphs, I will want a schedule for the next
10 CMC and we can put that as part of the order and Mr Draper can add that in. For the
11 next CMC, there will be a schedule setting out the defendants' position as to whether
12 or not they accept those paragraphs; and if not, why not.

13 You know how it works and that's --

14 MR JOHNSTON: Indeed.

15 THE CHAIRMAN: -- what we need, because that way we'll know exactly what facts
16 need to be proved and what facts don't need to be proved. I really don't want to have
17 to go over at trial things which should be common ground.

18 MR JOHNSTON: No. We're very grateful. And our response was carefully
19 considered; it wasn't an attempt to be cute in any way.

20 THE CHAIRMAN: No, no, no.

21 MR JOHNSTON: It was simply a recognition that we're slightly flying blind as
22 defendants at this moment. But that's going to change, and we --

23 THE CHAIRMAN: It will change. And you know what the rules are, you know what
24 the parameters are, and that we --

25 MR JOHNSTON: Absolutely.

26 THE CHAIRMAN: I don't need to say anything more about that.

1 MR JOHNSTON: No.

2 THE CHAIRMAN: Mr Went's solicitors' letter was very helpful and that explained their
3 position. But if we are going to have this schedule, you could incorporate whatever
4 points you want to have in the last column of your comments. But we just need to
5 know which paragraphs are not in issue or admitted, and so we can take as read,
6 which ones you do take in issue and why --

7 MR JOHNSTON: Yes.

8 THE CHAIRMAN: -- and then we can have an argument next time round whether
9 taking that position infringes the principles set out in *Royal Mail*.

10 MR JOHNSTON: Yes, indeed, (inaudible) case.

11 Sir, that's very helpful, and we will undertake to make sure that we articulate the why.
12 There's nothing more unhelpful in those circumstances than simply "not accepted",
13 because that leaves everybody wondering as to why or what. So we will do our best
14 to be as clear and helpful as we can.

15 THE CHAIRMAN: Yes. So that will be covered in the draft order. And you'll send me
16 this afternoon, or the tribunal secretariat this afternoon, the draft order in relation to
17 the confidentiality ring and the draft order in relation to the rule 63 application.

18 MR JOHNSTON: Yes.

19 THE CHAIRMAN: Yes.

20 MR WENT: Sir, just on that, you may have seen that we have an application as well,
21 an equivalent application, in terms of obtaining the CMA case file materials from the
22 former solicitors --

23 THE CHAIRMAN: Yes.

24 MR WENT: -- of our client. That was submitted, I'm afraid, rather late yesterday.

25 THE CHAIRMAN: It's absolutely fine. So we'll make the same order in respect of that
26 and make sure that you're covered in the way I've suggested. That's fine. Thank you

1 very much.

2 Then moving on to --

3 MR JOHNSTON: Sir, if I could just raise one point, a very helpful suggestion by my
4 instructing solicitor as regards Calder's right to comment in relation to disclosure.
5 The suggestion from my solicitor is that as well as within the confidentiality ring order,
6 it may assist to have that within the directions order, because the confidentiality ring
7 order is largely concerned with how the documents are to be treated.

8 THE CHAIRMAN: Absolutely fine, yes.

9 MR JOHNSTON: So we'll add that there as well.

10 THE CHAIRMAN: You should do, yes.

11 MR JOHNSTON: Thank you. I'm very grateful.

12 THE CHAIRMAN: You'll be writing to them anyway, so you'll send them the order from
13 the CMC and the confidentiality ring order. Yes, okay.

14 The next item is disclosure. Let me look at the draft order on that.
15 Let me look at each of the Redfern schedules quickly. Where are they?

16 MR DRAPER: Page 270, which in my bundle is D9. That's the claimant's proposed
17 disclosure schedule. Just following from there ...

18 THE CHAIRMAN: Yes, let me just look at that. I've looked at them already, but I just
19 want to make sure that I have everything.

20 MR DRAPER: Yes. So E1 and E2 are then the schedules for the defendants.

21 THE CHAIRMAN: Remind me: what's the final position you're taking on the
22 documents being held by the two directors and their devices?

23 MR DRAPER: Yes, our position on that is essentially that it depends really what
24 documents it is specifically they have in mind, and relevant to what issues. Because
25 obviously the directors aren't parties. CBG will have rights to access their documents
26 sufficient, in some circumstances, to bring those documents within CBG's control --

1 THE CHAIRMAN: Correct, yes.

2 MR DRAPER: -- but it depends what the documents are.

3 So when we see, for example, requests in relation to internal presentations from Abbey

4 Metals Trading Limited, which is an enterprise for which Mr Treherne now works, and

5 has since mid-2017, those are not documents to which CBG has any rights of access.

6 So in my respectful submission, the first step is for it to be identified on what basis it

7 is said that each category of these documents are relevant and on what basis it's said

8 that CBG controls them. Now, if they're relevant, CBG's position is we'd be quite

9 prepared to seek them on a voluntary basis -- so putting control to one side as to

10 whether that's a strict legal right.

11 THE CHAIRMAN: Yes.

12 MR DRAPER: Seek them on a voluntary basis. And if we obtain the refusal to provide

13 them, we can tell the defendants that and then they have one of two options available

14 to them: either they can contend that the documents are within CBG's control, such

15 that we ought to be forcing the individuals to provide them; or they can make a third

16 party disclosure application.

17 THE CHAIRMAN: Or they could even essentially go for a witness summons, couldn't

18 they, to turn up in court and produce the documents?

19 MR DRAPER: Yes. But in my respectful submission, the first step is --

20 THE CHAIRMAN: Yes, what you propose is eminently sensible. Okay, that's fine.

21 Let's look at the D2/ALM schedule. Who are your custodians, Mr Went? Have you

22 clarified in correspondence who they are?

23 MR WENT: Yes. The custodians are Barry ... Graham --

24 THE CHAIRMAN: Yes.

25 MR WENT: -- Barry Smith, Graham Hudson and Rose Tweed. So that's at page 202.

26 THE CHAIRMAN: Yes. I'm looking at 202, yes. I'm looking at that, yes.

1 MR WENT: So those are the custodians on our side.

2 THE CHAIRMAN: Yes, that's fine.

3 Then let's look at the -- I haven't looked at the Redfern schedule of BLM. Let me look
4 at that now.

5 MR JOHNSTON: Sir, that's immediately behind E --

6 THE CHAIRMAN: Yes, I'm looking at that.

7 MR JOHNSTON: Our custodian is Mr Aldridge, the reason being obviously that the
8 individuals involved at the time of the 2015 infringement are no longer with the
9 business. But searches will be conducted within the IT server that go to the first point;
10 and then the second and third are materials that are going to be disclosed pursuant to
11 the order, which we will then disclose into the confidentiality rings.

12 THE CHAIRMAN: But on this, is the rationale for not making an order specifically in
13 relation to the conduct which forms the cartel, et cetera, the basis that it's going to all
14 be in the CMA file? Is that what you're doing?

15 MR JOHNSTON: Sir, that's certainly --

16 THE CHAIRMAN: Because ordinarily I'd expect an order that you produce your
17 relevant communications, within the company and externally, that relate to the
18 October 2015 infringement, and I don't see that here.

19 MR JOHNSTON: Sir, as I understand it, what's being provided is documents that
20 relate to the application to open the credit account. So there's a relatively brief window
21 of time during which relevant documents are available. If you think it would be
22 appropriate to widen that, and to say, "and such other documents as may pertain to
23 the October 2015 infringement", I'll take instructions, sir. But my expectation is that
24 they would be held by the CMA; but equally, that there may not be a huge volume of
25 information.

26 THE CHAIRMAN: You have your own documents on that.

1 MR JOHNSTON: Indeed.

2 THE CHAIRMAN: I think we should have that on the order.

3 MR JOHNSTON: Sir, my instructing solicitors are content with that.

4 THE CHAIRMAN: So we amend the Redfern schedule to reflect that.

5 MR JOHNSTON: Just so that we don't end up in a discussion about ironing out the
6 wording --

7 THE CHAIRMAN: We'll do it now.

8 MR JOHNSTON: -- "such documents as are relevant ..."

9 THE CHAIRMAN: So it will be "documents relevant to the claimant's application to
10 open a credit account" --

11 MR JOHNSTON: Yes, "and such other documents ..."

12 THE CHAIRMAN: "... together with such other documents that relate to
13 the October 2015 infringement."

14 MR JOHNSTON: "... that relate to [it] ..."

15 THE CHAIRMAN: I know potentially it's quite broad, but it should be covered by
16 categories 2 and 3. This is to make sure there are no communications that you're
17 aware of that relate to squeezing out CBG.

18 MR JOHNSTON: Yes, indeed. So if we hold such material and it wasn't disclosed to
19 the CMA, then that will be captured by that.

20 THE CHAIRMAN: Exactly.

21 I just want to check on D2/D3 whether we have the same -- so I want the same order
22 in relation to ALM. Mr Went, do you agree to that?

23 MR WENT: That's understood.

24 THE CHAIRMAN: Yes. So we add that to your schedule. So what we'll have is we'll
25 have revised schedules that can go with the order so there's no doubt at all what's
26 being directed. Okay.

1 Maybe go back to the claimant's one again. **(Pause)** Yes, that's fine.

2 In the order, I do expect the usual provision to be provided as to the disclosure
3 statement. Can you take that, Mr Draper, from the Ryder and the *Dawson* group
4 judgment, [2020] CAT 3, at paragraph 47. So if you put the wording from
5 paragraph 47 into the order, that will be fine.

6 MR DRAPER: Thank you, sir. I will do that.

7 Just in relation to this "documents relevant to the infringement", we're grateful for the
8 indication that you've given, sir. We essentially had expected that to be dealt with in
9 large part once we saw the CMA documents, we could then pursue for further
10 materials. But no reason to put it off.

11 THE CHAIRMAN: There may well be documents that are relevant to the 2015
12 infringement that are not on the CMA file that you'll need. And this gives you -- what
13 I don't want to do is to end up doing all of this at the second CMC if the first round
14 gives you what you need. We're not following, as you know, practice direction 57AD;
15 we've got our own, in effect, bespoke way of dealing with these things.

16 MR DRAPER: Perfectly understood.

17 THE CHAIRMAN: So I would expect at a CMC that you'll do the equivalent of specific
18 disclosure of anything over and above what you've been given. But ordinarily,
19 everyone has to cooperate. And I expect the solicitors only to come back to court on
20 disclosure if, at the end of the day, it's just not possible to reach agreement; and
21 I expect any application to be dealt with by the parties preparing a Redfern schedule
22 which is crystallised by the time of the application, so when it comes to court, it can be
23 dealt with.

24 I'm happy to deal with, if it's necessary before the CMC, any application for disclosure
25 on a Friday, no more than two hours, and a bundle no more than one bundle. So we
26 can deal with it in a cost-effective way and quickly if there's a major issue on

1 disclosure; otherwise we can wait for the second CMC.

2 MR DRAPER: Thank you, sir. That's a very helpful indication.

3 THE CHAIRMAN: That's on disclosure.

4 The trial length: I think five days is realistic, but I am concerned about the costs. I've
5 seen the costs budget. Really it can't be right that when you add up all the figures in
6 the costs schedules, we come to a figure of way in excess of the maximum that the
7 CBG could possibly hope to recover.

8 MR DRAPER: Sir, yes, and the parties have agreed that they ought to exchange draft
9 budgets. So, very much at our instigation on this side of the court, the proposal is for
10 there to be costs management.

11 Obviously at an early stage we applied for allocation to the fast track, largely for cost
12 protection reasons. As you've just indicated, sir, based on the estimates provided by
13 the defendants, on which we've been able to reach a compromise view, it's too long
14 a trial for the FTP. But what we seek is something short of the FTP, but still putting
15 real downwards pressure on costs and leading to a cost-effective and relatively
16 streamlined process to trial.

17 THE CHAIRMAN: Yes.

18 MR DRAPER: So we certainly do anticipate that there will be strong and effective cost
19 management.

20 THE CHAIRMAN: Yes. But one way could be the defendants only having one expert,
21 you having one expert, or it may be there could be a joint expert. I don't know whether
22 it's too controversial to have one joint expert; we'll just have to see. We'll deal with
23 that at the next CMC. But expert evidence can be quite expensive in the tribunal, as
24 you probably know.

25 Yes, Mr Johnston.

26 MR JOHNSTON: Sir we haven't taken instructions on whether we would share

1 an expert with my co-defendant. I think it is unlikely that we're going to be able to
2 agree on a shared expert as between the three parties.

3 THE CHAIRMAN: But you think you can agree one between the defendants?

4 MR JOHNSTON: Well, I need to take instructions on that. So at least it's a possibility.
5 We'll go away and actively consider it.

6 THE CHAIRMAN: Look, in a way, the costs of the litigation put pressure on everyone,
7 don't they? It puts pressure on the defendants, because you're saying, "Why should
8 we spend all this money on a claim that's worth only £750,000?" And it puts pressure
9 on the claimant that their team is spending all this time and money, which they may or
10 may not recover at the end of the day. It just depends. So the costs are out of all
11 proportion with the claim.

12 MR JOHNSTON: I won't anticipate my submissions on security, but there's a certain
13 respect in which obviously, if security isn't ordered, cost pressure is not applied to the
14 claimant. But we'll revert to that in a moment.

15 THE CHAIRMAN: When we get to it, yes.
16 Fixing the date for the hearing. I doubt that I'm free in April 2024, so we're going to
17 have to fix it administratively; unless it's going to be fixed in June 2024, when I know
18 I am available.

19 MR JOHNSTON: I am not in May, if that assists, or at least for a part of May.

20 THE CHAIRMAN: But is everyone available in June?

21 MR WENT: I confirm I am, sir.

22 THE CHAIRMAN: You are?

23 MR WENT: I am.

24 THE CHAIRMAN: Good.

25 MR DRAPER: A question to which I ought to know the answer and most definitely
26 don't. But it will only take a moment to find out whether ...

1 THE CHAIRMAN: Mr Johnston, do you know if you're free in June?

2 MR JOHNSTON: I'm scrolling my diary as we speak.

3 THE CHAIRMAN: Brian, can you check with my clerk that I'll be free in June?

4 MR JOHNSTON: My current position, sir, is I think I am free in June; May, less so.

5 And that may create some slight complexities as regards having skeletons, but we can

6 iron that out. I've got a five-day hearing on 20 to 24 May, but I'm free in June.

7 THE CHAIRMAN: We can work it out --

8 MR JOHNSTON: Exactly, as regards skeletons.

9 THE CHAIRMAN: Yes.

10 MR DRAPER: June works for me sir.

11 THE CHAIRMAN: Okay. Well, Brian is going to check with my clerk whether June

12 works for me. But we can confirm that a bit later on in the day, because we have the

13 security to deal with.

14 Shall we just look at the order and just run through it?

15 MR JOHNSTON: Yes. It's behind our skeleton argument, which might be the easiest

16 place to find it.

17 THE CHAIRMAN: There's another version there, is there?

18 MR JOHNSTON: Yes, we tucked it in there just for ease of access.

19 MR DRAPER: It's at A1 as well.

20 THE CHAIRMAN: Yes. **(Pause)**

21 So where is the draft order?

22 MR JOHNSTON: In the supplemental bundle, it's at the end of my skeleton behind

23 tab 2. I think it is actually also in the main bundle.

24 THE CHAIRMAN: Yes, I'll just work from this one. Okay.

25 Well, on the Redfern schedules under recital 3, you would have to say something

26 about "as amended under the direction of the tribunal at this hearing".

1 We should add in ALM's request for the CMA file, Mr Went? On the draft order in the
2 recital, we need to add in your application?

3 MR WENT: Yes, indeed.

4 THE CHAIRMAN: Yes, we can add that in.

5 Okay, so forum is fine. Schedule of costs we'll come back to later. Disclosure: we've
6 amended that slightly, Mr Johnston, so you'll deal with that, to deal with the third party
7 and the application to the CMA. Confidentiality ring order separate, but you'll be
8 sending me the revised version. Cost budgeting --

9 MR DRAPER: Sir, if I could jump up on paragraph 5. It has been addressed, but I just
10 want to make clear we're on the same page.

11 The only point that my client takes in relation to disclosure arising from these case file
12 documents is that there should be an obligation to disclose relevant documents. You'll
13 see from paragraph 5 that it's drafted so as to be a permission to withhold irrelevant
14 material, but I think we're all on the same page that it's only relevant documents that
15 will be disclosed. It's not a permission to withhold irrelevant; it's an obligation to
16 disclose only relevant.

17 THE CHAIRMAN: Yes, okay. So what you're saying is at paragraph 4, "The fourth
18 and fifth defendants shall disclose the relevant parts of the case file". So put "the
19 relevant parts".

20 MR JOHNSTON: Take it as a positive obligation which is then qualified as
21 appropriate.

22 THE CHAIRMAN: Exactly. And why are we saying, "applying the approach in CPR
23 rule 31.6"? Why has that been added?

24 MR DRAPER: To identify the standard of relevance to be applied.

25 THE CHAIRMAN: So we can delete that then. So we delete "applying the approach
26 in CPR rule 31.6" because 5 is actually dealing with the right to withhold. 31.6 doesn't

1 deal with the right to withhold. We're dealing with relevance now in paragraph 4. So
2 we've covered it in paragraph 4.

3 MR DRAPER: As long as it's understood that we're using relevance as shorthand for
4 the tests that would apply under the CPR. I think that's implicit anyway.

5 THE CHAIRMAN: I think people understand.

6 MR JOHNSTON: That's not going to be an issue.

7 THE CHAIRMAN: Okay.

8 Cost budgeting is fine. All I'm saying is that the figures in the cost budgets at the
9 moment appear to me far too high and everyone has to think about cutting back the
10 costs.

11 This is not a particularly complex case. As cases come, this is probably the simplest
12 case I've had at the CAT since I've been here. I really don't want it to be War and
13 Peace; I mean, you know, war, let's say. This is a relatively straightforward type of
14 claim that you'd see day in and day out, effectively, in the King's Bench Division dealing
15 with quantum. I really don't want every point to be fought to the death if at the end of
16 the day they're not good points.

17 So everyone has to crystallise on what are the main points and what are the real issues
18 between the parties -- and we're going to come back to the list of issues in
19 a second -- and then decide on what ground you're going to fight this case. Because
20 if you're going to fight it on every ground, the costs are just crazy compared to what
21 everyone is fighting over. Of course everyone has a right to a fair trial and make the
22 points that they want to make, but it's generally better to concentrate on your strongest
23 points anyway.

24 So I've given that -- it's not really a warning but it's just saying how I look at it at the
25 moment.

26 MR JOHNSTON: Sir, that's well understood.

1 THE CHAIRMAN: Okay.

2 RFI, that's straightforward. Disclosure: well, that has to be amended.

3 MR DRAPER: Pausing there, sir, in the way the logic of the order runs, I wonder
4 where the schedule that you indicated would be appropriate in relation to --

5 THE CHAIRMAN: As regards the letter -- so under the recitals, refer to the letter from
6 the tribunal asking the defendants to clarify which of the specified paragraphs of the
7 CMA decision they wish to contest or whatever, and then say that the defendants shall
8 produce a schedule responding to the tribunal's request that's referred to in the recital
9 by two weeks prior to the second CMC. That will give everyone time to see whether
10 or not there's a real issue and to prepare skeleton arguments for any argument on it.

11 MR DRAPER: Sir, I wonder whether you might include provision -- it may turn out to
12 be otiose -- but provision for the claimant to indicate any paragraphs on which it
13 proposes to rely that aren't covered by the tribunal's letter? I'm not in a position to tell
14 you whether we will want to add any, but it would be good to shake that out as soon
15 as possible if there are any other relevant paragraphs.

16 THE CHAIRMAN: I think I've covered all the relevant paragraphs; I'd be really
17 surprised if there are any. If I've missed any, don't put it in the order, but you can just
18 add it by letter and say if there's any other paragraph that you want them to confirm
19 whether or not they admit. Then I can deal with that at the second CMC but I won't
20 put it as part of the order. But this is all recorded: everyone understands that if there's
21 a particular paragraph that you're concerned about, over and above the ones I've
22 identified, then of course you're free to do it and I'll resolve it at the next CMC.

23 MR DRAPER: Thank you, sir.

24 MR JOHNSTON: Sir, one thing that comes to mind at this point is that the presumption
25 is that it would only be the defendants articulating which paragraphs of the decision
26 they don't agree with or don't adopt.

1 THE CHAIRMAN: Or they wish to contest, yes.

2 MR JOHNSTON: Indeed. It's certainly our case that there are certain respects in
3 which the claimant's case differs from some of the findings in the decision. So it might
4 assist in that respect for the claimant to at least ask itself the same question, and even
5 if it's simply to confirm by way of a nil return that the decision is not relied upon in its
6 entirety and not --

7 THE CHAIRMAN: No, I think it's different, because they're not bound by the settlement
8 decision because they didn't settle it. So the decision in Royal Mail doesn't work both
9 ways. But I do think it would be helpful --

10 MR JOHNSTON: Indeed.

11 THE CHAIRMAN: -- that if there are any paragraphs in the decision that you
12 particularly rely on as against them, if you see what I mean -- and I know there's one
13 or two that I noticed when I went through -- you can write to them and ask them to
14 confirm whether or not they agree with those paragraphs and then we can deal with it
15 at the next CMC. So it may be you can just put in one provision in the order just
16 dealing with that.

17 MR JOHNSTON: I'm very grateful.

18 THE CHAIRMAN: You can word that and work with Mr Draper as to that, saying that
19 the defendants are at liberty to make a request of the claimant as to whether or not
20 the claimant disputes particular paragraphs of the CMA decision, and such response
21 shall be given by way of schedule, as appropriate, if they don't accept, giving the
22 reasons why they don't accept, and that schedule can be served two weeks prior to
23 the next CMC.

24 MR JOHNSTON: I'm grateful.

25 THE CHAIRMAN: So it's a sort of mirror image, but it's not the same thing.

26 MR JOHNSTON: No, indeed. The legal hinterland is different, as you say, because

1 the (inaudible) recitals judgment doesn't apply. And equally, for the purposes of
2 identifying the issues between the parties, it's helpful.

3 THE CHAIRMAN: Yes. Okay.
4 List of issues, that's absolutely fine.
5 Second CMC, week commencing 11 September, that's fine.
6 Witness statements, that's fine. Well, we don't have any experts at this stage, but you
7 just want to have a placeholder there so everyone knows what the timetable is now.
8 I think that is sensible.

9 Okay, pre-trial, trial bundle. Okay. Well, if we are going to have a June 2024 start, we
10 may not need to have the trial bundles so early, but if the parties are happy to stick
11 with what they've agreed, then we can.

12 Mr Draper, what do you say? We've confirmed June, okay. End of June? The whole
13 of June is fine. Okay. So let's fix the dates then.

14 MR DRAPER: In relation to the directions that --

15 THE CHAIRMAN: Let's just fix a date.

16 MR DRAPER: Sorry.

17 THE CHAIRMAN: The trial date. Brian, can you suggest the five-day window
18 that -- the first week of June?
19 So what's the first Monday of June?

20 MR JOHNSTON: If it helps, the first Monday of June I have marked in my diary as
21 court vacation. That may not be any reason why this tribunal couldn't sit, but it might
22 be a reason why starting on the 10th might make sense.

23 THE CHAIRMAN: Okay, 10 June. Yes, and that's five days. Yes.
24 Anything else on the order, apart from security for costs?

25 MR DRAPER: Just in relation to those directions that count back from the trial. So
26 you indicated --

1 THE CHAIRMAN: Yes.

2 MR DRAPER: -- we may want to make those slightly later, in light of a later trial date.

3 THE CHAIRMAN: You can, yes. Let's try and deal with that then. The draft index
4 bundle, when do you suggest?

5 MR DRAPER: My proposal would be to put them all back, essentially, a month.
6 Obviously unless these fall on Sundays, but we can organise that between ourselves.

7 THE CHAIRMAN: Put them back a month, yes.

8 MR DRAPER: That would apply, sir, to 27, 28, 29 --

9 THE CHAIRMAN: Are we having a PTR on them?

10 MR DRAPER: Paragraph 30 makes provision for a PTR in March. That now can
11 sensibly be, in my submission, April or even May.

12 THE CHAIRMAN: Yes, I would prefer to have the PTR no later than two weeks prior
13 to the trial date and no earlier than six weeks.

14 I know, Mr Johnston, you have a hearing though, haven't you? So what are the dates
15 of your hearing in May? But the thing is, I'm not sure whether I'm going to be free,
16 but --

17 MR JOHNSTON: I have five days in the Upper Tribunal starting on the 20th. In fact,
18 that's not quite true: I have three days floating across that week in the five days, if that
19 makes sense.

20 THE CHAIRMAN: So we don't want it that week.

21 MR JOHNSTON: We could do it in the week of the 13th.

22 THE CHAIRMAN: What, the 13th of ...?

23 MR JOHNSTON: May. So that would be consistent with your indication, sir.

24 THE CHAIRMAN: Okay. Look, I may be in court on something else. But what we'll
25 do -- a PTR shouldn't last more than an hour, and we could probably have it at
26 9 o'clock or whatever, or we could even do it remotely.

1 MR JOHNSTON: Yes.

2 THE CHAIRMAN: I think we should anyway say the PTR is going to be heard
3 remotely, so we'll put that as a remote hearing. That will enable me to be available
4 wherever it is. And then we can fix a time: if I'm in court, we can either have it at 4.30
5 or 5 o'clock or we can have it at 9 o'clock. But we will have it in that week, on a date
6 to be fixed.

7 I think all we can do is probably be more concrete about the date at the second CMC,
8 because our diaries will be a lot clearer then. In this way we're not going to interfere
9 with anyone's diary, if we're going to hear it outside normal court hours remotely.

10 MR JOHNSTON: Yes.

11 THE CHAIRMAN: Okay.

12 MR JOHNSTON: Sir, can I make two brief observations.

13 Firstly, given that the trial date has moved back by almost two months and we've
14 obviously moved other consequential matters, does it make sense to move the expert
15 evidence and witness statements as well, just in light of the fact things -- I'm not
16 pressing particularly earnestly for it, but I just wonder whether shifting everything --

17 THE CHAIRMAN: Well, I think we'll leave those as they are, but we'll obviously revisit
18 everything at the second CMC. But if there are major issues at the second CMC, that's
19 going to have a knock-on effect anyway.

20 MR JOHNSTON: On what comes afterwards. I'm content sir.

21 The only other point I wanted to raise was that as things stand, we have simultaneous
22 skeleton arguments five days before trial. In my submission, it's normally helpful for
23 them to be sequential. So it might make sense to have the claimant's skeleton ten
24 days before and the defendants' skeleton five days before, for example. I don't know
25 if that's -- I haven't made this suggestion --

26 THE CHAIRMAN: Normally when I make those orders I give no more than about two

1 | or three days for the defendants, because what normally happens is the defendants
2 | have their skeletons in draft --

3 | MR JOHNSTON: Yes.

4 | THE CHAIRMAN: -- and then you amend it at the last moment in light of what you
5 | see, so it's all done that way.

6 | Mr Draper, do you have any objection to that?

7 | MR DRAPER: I do, simply on the basis that there's no reason for them not to be
8 | simultaneous and that is the fair way to proceed. If there were anything in our skeleton
9 | argument that might potentially surprise them, I can see that they might want a short
10 | time to respond to it; that would be fair. But we all know what the issues are, we all
11 | know what matters are going to be set out in our skeleton and what are going to be
12 | set out in theirs. So there's no reason for anything other than simultaneous.

13 | THE CHAIRMAN: Mr Went?

14 | MR WENT: Sir, we would certainly agree that sequential is going to make sense.

15 | THE CHAIRMAN: Yes. So we'll have sequential, but yours are two days after you get
16 | the --

17 | MR JOHNSTON: So seven working days and five working days before trial.

18 | THE CHAIRMAN: Yes.

19 | MR JOHNSTON: I'm grateful.

20 | THE CHAIRMAN: Okay. Shall we look at the security for costs?

21 | MR JOHNSTON: Yes. I've agreed with --

22 | THE CHAIRMAN: The letter that I asked to be provided by the claimant about funding,
23 | has that been copied to everyone or has it just been sent to the tribunal?

24 | MR JOHNSTON: Yes, I've certainly received a copy.

25 | THE CHAIRMAN: You have it, yes. I've only just seen it. Okay.

26 | Right, so let's deal with the security for costs. On that, you can proceed on the basis:

1 (a) that I'm familiar with what the relevant principles are; (b) that I've read the evidence;
2 and (c) that I've read the skeleton arguments.

3 MR JOHNSTON: That answers my first three questions, sir. I'm very grateful.

4 THE CHAIRMAN: Yes.

5

6 **Application by MR JOHNSTON**

7 MR JOHNSTON: I've agreed with Mr Went that I will go first. There are certain points
8 that he's going to pick up after me, if that makes sense. In particular, he's going to
9 address you in relation to the Goldtrail case.

10 The factual background to this application is relatively stark and can be stated
11 relatively simply. Firstly, the claimant has clarified, in answer to questions from the
12 defendants, that if any order for costs is made against them, they will not pay it.

13 THE CHAIRMAN: You clearly have jurisdiction.

14 MR JOHNSTON: With that limb of the test, that provision is satisfied and I think that's
15 fairly accepted.

16 The claimant company only exists for the purposes of pursuing its claim and it's been
17 restored for that purpose.

18 Secondly, the claimant has confirmed in written evidence, in witness statement, that
19 the two directors of the company do not have substantial monthly cash flow. Now,
20 that has been evidenced in a fairly limited manner, let me put it that way, simply by
21 way of assertion; we haven't had bank statements and so on and so forth. But that's
22 not in issue, we're not suggesting it's not true, but we do say that that's --

23 THE CHAIRMAN: They could have given a bit more detail. But if I thought this was
24 one of those cases which was a one-way bet whereby they were funding this litigation
25 but they're not willing to fund a company if there's an adverse costs order, clearly that
26 would be a different scenario. And I don't accept, at least at the moment, the

1 submission that you can have a situation whereby you have a shareholder who is
2 funding the litigation who is unwilling to fund adverse costs orders. I can't take that
3 into account.

4 MR JOHNSTON: Yes.

5 THE CHAIRMAN: If I feel that that game is being played in litigation, I tend to order
6 security.

7 MR JOHNSTON: Yes, indeed.

8 THE CHAIRMAN: Yes. That's why I wrote that letter, because that letter does clarify
9 that the two directors are saying they haven't put one cent into this litigation and they're
10 not funding it at all.

11 MR JOHNSTON: Well, I think the position is slightly more nuanced, but only slightly
12 more nuanced. I think my understanding -- and Mr Draper will correct me if I'm
13 wrong -- is that some funds have been expended for the purposes of restoring the
14 company to the register and so on and so forth, £4,000. But we're in a CFA position,
15 absolutely.

16 THE CHAIRMAN: It's a CFA, yes.

17 MR JOHNSTON: The claim is being pursued on a CFA basis.

18 What's not being said by the claimant in their evidence is whether or not the directors
19 have any assets. So we've been given fairly limited evidence as to monthly cash flow.
20 We've not been told whether they would be in a position to secure, for example, a loan
21 against a property.

22 THE CHAIRMAN: Yes.

23 MR JOHNSTON: And it is a point to note that both defendants have written and asked
24 about the ability of the directors to provide security for costs and put that in issue, but
25 the claimants have chosen not to give evidence on this point.

26 That leads, we say, to one of two conclusions: firstly, that they haven't satisfied the

1 tribunal as to their impecuniosity; and secondly, that the tribunal can proceed on the
2 basis that they do have some illiquid assets against which they could borrow some
3 money. And that has been put in issue or that has been identified in the skeleton
4 argument and we haven't had a late witness statement saying, "No, this is not correct,
5 both of them are housed in circumstances where that is not possible". Now the tribunal
6 has to weigh what weight to place upon that, and I'll come back and address you on
7 that in a moment.

8 The next key element of the factual background is the answer that the claimant's
9 solicitors gave to the tribunal's letter of yesterday that you just adverted to, sir.

10 THE CHAIRMAN: What you're saying is that what they've done is they've dealt with,
11 let's say, their cash position, that they don't have the cash to pay, but what they haven't
12 done is deal with their capital position, i.e. their real estate and stuff like that.

13 MR JOHNSTON: Precisely, sir.

14 THE CHAIRMAN: Yes.

15 MR JOHNSTON: The claimant's letter of yesterday fairly straightforwardly said that if
16 the claim succeeds, the proceeds are going to be distributed to the shareholder
17 directors according to their 50 per cent shareholdings. So the simple facts are these:
18 that Mr Treherne and Mr Turner are going to be the direct beneficiaries of any
19 successor trial, and that's consistent with the fact that this company has been restored
20 and exists solely for the purposes of pursuing this litigation.

21 The final part of the factual backdrop concerns the claimant's attempts to obtain ATE
22 insurance.

23 THE CHAIRMAN: Yes.

24 MR JOHNSTON: Now, on a fair reading of the evidence, the background seems to
25 be that there were some discussions with Exton insurers in relation to a different claim
26 that might he was been brought by a wider group of claimants as a collective action.

1 Now, that claim hasn't been pursued because the CMA's decision doesn't sustain it;
2 the findings were much narrower than the claimant hoped for, with the result those
3 claims are not viable or at least are not being pursued. So what we have now is what
4 might be called a rump claim.

5 Now, following prompting from the defendants, the claimant has gone back to the
6 broker that they had been liaising with again this month, and it might be worth turning
7 that up. Sir, there is a separate bundle for security for costs. So it's in the security for
8 costs bundle and it's at tab 9, page 129.

9 So this is the letter which is described in Mr Tupper's statement. It's the first
10 major -- sorry, I'll --

11 THE CHAIRMAN: Page 229?

12 MR JOHNSTON: Page 129, behind tab 9 in the security for costs bundle.

13 THE CHAIRMAN: Yes.

14 MR JOHNSTON: So this the letter that's adverted to in Mr Tupper's witness statement.
15 The first paragraph, the first substantial paragraph below "Thanks for the below", is
16 talking about whether or not there would be litigation for funding available, and the
17 answer is effectively that the gearing just isn't going to work because the quantum is
18 too small.

19 The second paragraph is dealing with the possibility of adverse costs cover. What's
20 said is:

21 "We could go to the market in order to try and obtain a quotation but in our recent
22 experience, insurers are typically seeking an upfront premium of 15 per cent of the
23 limit of the indemnity plus IPT. Therefore, I would expect that if adverse costs cover
24 were available, the likely cost upfront would be in the region of £168,000 based on
25 £1 million of cover. Leaving aside whether the claimant has the means to pay this,
26 insurers are generally not keen on deals where proportionality is the issue, in

1 particular, where the premium would exceed 50 per cent of the damages."

2 Now, we're not in a scenario where the premium would exceed 50 per cent of the
3 damages on the claimant's pleaded case. So what's being said here is that insurance
4 cover is in principle available in this case but that it is going to cost £168,000. That's
5 the ballpark, that's the estimate. Now, as I understand it, the claimant's solicitors
6 haven't gone back and said, "Can you go to the market? Can you seek something
7 less expensive?"

8 So that's why the conclusion which is relied on by Mr Tupper in his statement in
9 paragraph 3 -- in fairness to him, "It is very unlikely we would be able to obtain
10 commercially attractive insurance cover" -- but what that presupposes is that
11 insurance cover at that rate would be commercially attractive. So two very brief points
12 as regards that final part of the factual picture.

13 Firstly, it's not that insurance cover is not available, but that it's going to cost a little
14 over £150,000. And I'm going to return to this point, but the second submission follows
15 from that. We don't accept that exposing our clients to very substantial risks of
16 recovering nothing at all is less desirable -- or less just, to apply the test -- than
17 requiring the claimant to purchase some insurance at that price.

18 Sir, as regards insurance, there is insurance available, but it's at a rate that the
19 claimant may well regard as undesirable. It's worth flagging in that respect, as
20 I understand it -- I suspect the figures are updated -- but the current costs incurred by
21 the claimant are £162,000, and it anticipates incurring obviously, as you've seen in the
22 cost budget, considerably more to trial.

23 So I won't address you on the law in any great detail. I'm conscious that you're
24 extremely familiar with the authorities, be they Keary, be they BCL Old, that were set
25 out in detail in our application.

26 The only point I want to make -- and I will return to some of the facts as set out by

1 Peter Gibson in that very well-known judgment. But the only point I want to make
2 upfront is that there's nothing sui generis about follow-on damages claims as regards
3 security for costs. And that's why, at paragraph 17 of our application, we've referred
4 to the Agents' Mutual case, Kerilee Investments. Security is regularly ordered in cases
5 for follow-on damages; there's nothing peculiar or particular about this environment.
6 So, sir, that's laying the groundwork. I don't propose to repeat the submissions in my
7 skeleton argument in full, but I do want to make just five key points. Mr Went is then
8 going to address you on a couple of further points, and then obviously I'll pick up
9 anything by way of reply.

10 THE CHAIRMAN: Yes.

11 MR JOHNSTON: The first point is a point that's already made in my skeleton
12 argument, so I won't repeat it at length, but it's important to start from this point. And
13 that is that this is not, first and foremost, a quantum fight.

14 THE CHAIRMAN: I know. You're fighting it on a number of fronts, and what I feel
15 I have is I have you lot saying -- I don't mean that derogatorily -- I mean your side
16 saying that this is a weak, ambitious claim, and the other side saying obviously this is
17 a very strong case and none of the defences have any prospect of succession, and
18 that it's not normal to go into the merits on a security for costs application for a number
19 of well-known practical reasons.

20 But what I can say is that I'm not going to proceed on the basis that this is a very weak
21 claim, I'm not going to proceed on the basis that it's a very strong claim. I can't decide
22 that in the absence of disclosure and the witness statements. I may have a much
23 better feel after that, but at this stage I don't have a feel.

24 Just looking at the material I have at the moment, I would say that the claimant is more
25 likely than not to recover something; but what that figure will be, it could be anything
26 between a nominal amount and the 750 claimed --

1 MR JOHNSTON: Indeed.

2 THE CHAIRMAN: -- and everything is up for grabs.

3 So ordinarily, one would say: well, if you're saying that on balance, just looking at the
4 material, you think that the claimant is likely to win something, well, you can say that
5 for many cases, but that shouldn't really be a major factor on a security for costs
6 application because everything is to play for.

7 MR JOHNSTON: Indeed.

8 Sir, the point is advanced for two key propositions really. Firstly, to make clear that:
9 yes, it's right, the defendants are going to be fighting tooth and nail as regards quantum
10 and we're going to be relying on all of the recent authorities that you're no doubt
11 familiar with in this jurisdiction about how one quantifies future losses. There will be
12 a fight on quantum, yes, but the primary defence of the defendants is not as regards
13 quantum.

14 THE CHAIRMAN: No, you're saying the cartel didn't have any effect: they could have
15 obtained their -- (a) that you are under no obligation to supply --

16 MR JOHNSTON: Indeed. I think that's accepted.

17 THE CHAIRMAN: -- and (b) that they could get their supply from elsewhere. I'm not
18 particularly attracted by saying they could have obtained it from abroad because of the
19 delay and the transportation costs. Ordinarily you're much better off buying within the
20 UK, if you're talking about metals like lead and steel. But you do say that they did
21 have other possibilities, if this was a viable, an attractive proposition for them to
22 operate this business: they could have gone to Calder, who hasn't been found to be
23 a party to the cartel.

24 On Calder they say: (a) it's irrelevant, because having to not deal with ALM and BLM,
25 which is in itself a major part of the market, has an impact; but (b), they say, Calder in
26 any event was, let's say, frightened off after a call. And that's something that we're

1 going to have to see what comes out on disclosure. Because is that something that's
2 just been heard on the grapevine which is not reliable, or is it something that is solid?
3 At which point, if there's a document that evidences it, it obviously has to be looked
4 for. You have to look to see when you give your disclosure and they'll be looking for
5 whatever they can get to prove it. And if necessary, they may have to go for non-party
6 disclosure against Calder or even subpoena whoever they say at Calder had that
7 conversation. But --

8 MR JOHNSTON: That's all further down the line.

9 THE CHAIRMAN: It's all further down the line. I'm not going to say at this stage that
10 your defences are anything other than properly arguable. And if they're going to say
11 it's completely hopeless, then they're going to have to take out an application to strike
12 out or for reverse summary judgment; and if they do that, then that would be
13 considered. But I'm never really attracted by the arguments, "Oh, this is a hopeless
14 thing, or hopeless that", if it's still on the pleading and they haven't challenged the
15 pleading in any sense.

16 MR JOHNSTON: Absolutely, sir. It's absolutely right that both parties have, if I can
17 put it colloquially, cast aspersions on the merits of the other side's case. I hear what
18 you say.

19 There's an important underlying point, which I do stress, which is that, as you
20 identified, sir, the first questions the tribunal is going to be deciding at trial are not
21 questions of quantum. Limitation, obviously we need to see the file. So we hold that
22 lightly, and we've very fairly said that we do.

23 But the critical causation point is that this company did not fail for lack of supply. It
24 always had supply that greatly exceeded any of its commercial needs, even on its
25 extraordinarily ambitious pleaded case, even after Calder left the market. That's the
26 point. And that's why we say that this claim is going to fail on causation grounds. It's

1 not a point that we make, if I can put it this way, glibly or lightly.

2 As regards Calder, you're right, sir: we're in a highly unusual position whereby what
3 the claimant says is that a third party found by the CMA not to have been party to the
4 infringement was told of the infringement and acted on that information and then
5 withdrew supply. Sir, we're just going to have to reserve our position as to what's
6 going to come out by way of the evidence. But it is certainly a peculiar position to be
7 in.

8 As I say, even absent Calder there is 10 per cent of this market in this jurisdiction. So
9 even after Calder's gone, that is going to be a very significant challenge for the
10 claimant to get over that.

11 As well as the other causation point that obviously I'm sure you have fully anticipated
12 and understood, which is a different point. We say at trial one of our primary defences
13 is going to be to say that, "We wouldn't have traded with you and/or we would've
14 withdrawn trade from you very shortly".

15 THE CHAIRMAN: I've already mentioned that.

16 MR JOHNSTON: Indeed.

17 So returning to the key point. I fully understand, sir, you're not going to take a view on
18 the merits today. But it's also important for the purposes of the security application to
19 recognise this is not a quantum -- and that's why BCL Old went the other way.
20 BCL Old went the other way because what the tribunal said was, "Look, what you're
21 running effectively is a pass-on defence, not" -- the pass-on is a defence actually, as
22 we all know; it's a question of quantum. "You're not actually contesting whether or not
23 the infringement caused loss". So we're not in a BCL Old situation, we're in a different
24 pleaded scenario.

25 So that goes, firstly, to what's the nature of the case. Secondly, it goes to the question
26 about impecuniosity, because the claimant's argument today is that it is impecunious

1 because of the infringement.

2 With respect to the claimant, that submission rests on presuming that it is going to
3 succeed at trial on the matters that are in issue between the parties. It's really, in our
4 submission, just another way of repackaging the submission, "This is a weak defence
5 and I'm going to win", because it rests on the proposition that actually the business
6 model was a very good business model and it was going to be successful and our
7 clients would've traded with them, would have been compelled by the exceptional
8 nature of the business model to trade with them, even though our clients' case is, "This
9 would have been entirely contrary to our commercial interests to do so".

10 So we say that the submission that the claimant is impecunious because of the
11 infringement is, as I say, no more than a repackaging of the submission that the
12 claimant is going to win at trial; and it requires the tribunal, if it's going to rely on that
13 factor at all, to effectively presume that the claimant is going to win. And we say the
14 claimant isn't going to win.

15 THE CHAIRMAN: I mean, I'm not prepared to do that. Look, what I've said is that
16 clearly one of the issues I can look at is to look at the probability that there will be
17 an adverse costs order. If I take the view that an adverse costs order is extremely
18 likely, then that's one thing; if I take the view that an adverse costs order is most
19 unlikely, that's another thing.

20 I can take into account that it's probably more likely than not there will be no adverse
21 costs order because I think at the moment the merits, from what I can see at the
22 moment, are in favour of CBG. But I said everything's up to play for because I'm just
23 looking at what I can see on the pleadings, and the fact that there is an infringement
24 which is admitted and it was directed to them. But I fully accept it's not as simple as
25 that, and that the way it may come out at trial is very different from where it may look
26 like on paper at the moment.

1 I've had so many trials where I started off thinking, "Well, it's going to go this way", and
2 when you hear the evidence, you come out with a completely different decision. And
3 this one is one where there are risks on both sides as to which way it may ultimately
4 go.

5 MR JOHNSTON: Yes. Well, sir, I am mindful --

6 THE CHAIRMAN: So it's not a knockout blow for either side on the merits. But if I look
7 at sort of an initial view on the very limited paper I've seen, I'd say that it's more likely
8 than not there won't be an adverse costs order, but that is very, very tentative.

9 MR JOHNSTON: Sir, I'm grateful for that indication.

10 THE CHAIRMAN: It's really tentative; I wouldn't take it as sort of bad news or anything.
11 That's how I feel at the moment.

12 MR JOHNSTON: I'm grateful for that, and I'm not going to take up lots of the tribunal's
13 time trying to persuade you as to the merits of the case. I hear what you say about
14 that.

15 You will anticipate my submission, and it's very brief, which is that we say it's rather
16 more likely than you've suggested just now that the defendants are going to get an
17 order for costs in their favour, because this is a company that -- that the premise of the
18 claimant's case is that it's coming into the market downstream from us and it's going
19 to shake this market up. It's going to come in -- there's never been a business of this
20 kind before, there's not been a business of this kind since. But the claimant says, "I'm
21 going to come into this market and I'm going to break the existing relationships, I'm
22 going to bypass the merchants altogether, I'm going to go direct from customer to
23 supplier".

24 Now, the CMA decision says the exact opposite to that; the claimant is going to have
25 to grapple with that. But that's their pleaded case now: they're going to break up this
26 market and they're just going to cut out the merchants. Now, you know what we say

1 to that, which is that there's no way we're going to do that business.

2 The second aspect of what they say they're going to do is they are going to insert
3 themselves into the supply chain, they're going to find deficiencies in this market. Now,
4 that's all a question for evidence and for trial, obviously, about whether there are these
5 efficiencies and whether participants in the market are having to see a downstream
6 entity come in and be a margin-taker. That's their case. We say there's absolutely no
7 chance that that would have happened and it would have succeeded, and we wouldn't
8 have done business with them.

9 But it's important that when the claimant says, "We're a novel business", we rely on
10 that. It's worth stressing that point. We rely actively on the fact that the claimant's
11 case is that it was completely different and never before known and never before seen,
12 and we say: we agree, and we wouldn't have done business with you for that reason.

13 It's worth -- because I anticipate my learned friend will make submissions to this
14 effect -- it's worth just knocking on the head two points at this stage.

15 Firstly, the suggestion in the skeleton argument that we say that this was all innocent.
16 It's not a defence case; we squarely accept that there's an object infringement here.

17 But it's also worth knocking on the head --

18 THE CHAIRMAN: There's a bit of a wrinkle on that in the CMA decision, isn't there?

19 MR JOHNSTON: Indeed, and we're going to have to --

20 THE CHAIRMAN: Work that one through.

21 MR JOHNSTON: -- work that one through.

22 But it's also worth making clear that it is not accepted by the defendants that the
23 claimant represented some kind of profound existential threat to us and that is why we
24 have this collusion. There's a pattern of conduct that is seen between the defendants
25 where, regrettably, certain employees have spoken to one another, and this is
26 something they have spoken to one another about, and they have said, in my learned

1 friend's case, "We're not supplying them. Are you going to supply them? We've said
2 no, we're not going to supply them either".

3 But to the extent the way the claimant is presenting its case is that we colluded for the
4 purpose of ensuring that they can't be in this market because they are a threat to us,
5 that's putting it too high, we say. We don't say that's a sustainable submission. But
6 these are all submissions which are --

7 THE CHAIRMAN: But they're going to have to put that to your witnesses, if you put
8 witnesses up at trial. They're not going to get home solely on the basis of the CMA
9 report.

10 MR JOHNSTON: No. No, indeed. Well, they're going to have to go further than the
11 CMA report as regards my client. They're going to have to --

12 MR DRAPER: Sorry, just so we're clear on that, the CMA did find that the object of
13 the infringement was to exclude CBG. So they certainly can't challenge that; they are
14 bound by that.

15 THE CHAIRMAN: Well, that's one of the issues we'll come to. But I think Mr Johnston
16 is making a slightly different point --

17 MR JOHNSTON: Yes.

18 THE CHAIRMAN: -- which is one level above what you've just said. Is that right,
19 Mr Johnston?

20 MR JOHNSTON: Indeed, sir. And I'm conscious that I keep promising not to address
21 you on the substantive merits and then failing to help myself. So I'm going to exercise
22 some restraint, sir. But you hear what I say.

23 THE CHAIRMAN: I hear what you say.

24 MR JOHNSTON: Then we come to the question of stifling that I think I do need to
25 address you on briefly.

26 THE CHAIRMAN: Yes, stifling is -- look, if you break it down, okay? The first is on

1 the merits and you've heard what I think about the merits. The second is stifling.

2 MR JOHNSTON: Yes.

3 THE CHAIRMAN: And the third, which you've partly covered but not fully, is the point
4 that Mr Draper is making is that the conduct of the defendants caused the
5 impecuniosity. So they're saying it's your conduct that caused the impecuniosity.

6 On the third point, I can take three different views. One is that I can find now that the
7 conduct did not cause the impecuniosity, in which case it's not a factor at all. Two is
8 I can conclude that there's a strong case that your conduct did cause the
9 impecuniosity, in which case it's clear the other way.

10 Or three, I could say that there's at the very least a good arguable case that your
11 clients' conduct did cause the impecuniosity and I can take it as a factor, but not
12 necessarily an overriding or conclusive factor; I just have to take that one of the
13 circumstances of this case is that it's alleged on at least on a good arguable case that
14 your clients' conduct caused the collapse.

15 MR JOHNSTON: Sir, let me encourage you -- I've obviously addressed you briefly
16 already as regards impecuniosity.

17 THE CHAIRMAN: You have, yes.

18 MR JOHNSTON: Let me revert to that briefly, before moving on to stifling.

19 As regards impecuniosity, our submission is that this case as it is now, as pleaded and
20 at this stage in the proceedings, doesn't reach the threshold where the tribunal should
21 be coming close to finding or even finding there's a strong case because the question
22 whether or not my client caused the impecuniosity is inseparable, we say, from the
23 question whether my client caused the claimant's loss.

24 THE CHAIRMAN: That's why, in a way, I have to be very careful --

25 MR JOHNSTON: Yes.

26 THE CHAIRMAN: -- in whatever I say. Because everyone has a fair trial right,

1 whether it's one side or the other, and it would be unfair for me to come to a concluded
2 view on an interlocutory application on something that is an issue at trial. Otherwise
3 I'd have to recuse myself on so many cases, if I keep doing that, and it just doesn't
4 work.

5 So I'm not going to find as a matter of fact that the impecuniosity of the claimant has
6 been caused by your clients' conduct. I don't think it's a proper thing for me to do,
7 given that's an issue for trial and that you're expecting me to be the chairman at trial.

8 On the other hand, I can take the view that there is at least a good arguable case that
9 you did. And it is an arguable case, and you will say that that's a case that's going to
10 fail, and all I can say is it's a good arguable case, and you know what that means in
11 percentage terms on the authorities. We're all professionals here. I'm not saying that
12 that even meets the balance of probabilities test, if one takes the view it's a good
13 arguable case.

14 MR JOHNSTON: Sir, I'm very grateful for that indication. I suppose my only
15 submission in response to it is to ask the tribunal to bear in mind that there is at the
16 very least a good arguable case that they didn't cause the impecuniosity. So if I can
17 put it this way, in footballing terms, sir, at the very most, this is a score draw.

18 THE CHAIRMAN: Well, not necessarily when it comes to when I'm looking at the
19 balance here, because if I feel that there is at least a good arguable case that they've
20 caused the impecuniosity, I can still take that into account on security for costs.
21 Because when I look at the balance of risk, one of the risks is I will, in effect, exclude
22 someone from trial who, on a good arguable case, may well have succeeded at trial
23 to prove that very fact.

24 So I think it's not completely neutral. But it's one of those things where you say to
25 yourself: well, it's there, it's a factor; it's not a conclusive factor.

26 MR JOHNSTON: No. Well, I'm grateful. I'm not going to address you any further on

1 that.

2 I do want to address you on stifling, and I think you're going to anticipate what I say
3 because you heard what I said by reference to the facts.

4 It's not established -- perhaps I should take a step back. The starting point is that the
5 burden lies on the claimant to establish that this claim would be stifled. They have to
6 show that to you on the facts, on the evidence.

7 Now, the running has been made by the defendants. The defendants have been
8 asking, the defendants have been pressing. You've seen the totality of what's been
9 sent and what we've received. We say it's not established on the facts that this claim
10 would be stifled; it's not established that the directors lack assets that could be made
11 available to pay security.

12 That's particularly pertinent because this is a stark case. The directors -- well, the
13 shareholders -- intend personally to take the benefit of any victory at trial. So if I can
14 put it this way, it's a free hit from the directors' perspective.

15 THE CHAIRMAN: Yes, but if I thought that there were shareholders behind this
16 company who were funding the litigation out of their own funds, and so they're willing
17 to use their own funds to fund the litigation, but they weren't willing to use those same
18 funds to meet adverse costs orders, I would take that into account as a factor. But the
19 problem we have is that what Mr Draper says is that you look at: would the claimant
20 be able to get funding from the shareholders, rather than: can the shareholders provide
21 funding if they so wish?

22 In many cases that argument is unattractive and it won't work. In some cases it does.
23 But on the facts of this case, looking at the pattern, the fact that they haven't funded
24 the litigation to date, and the fact that one director has had an accident and is living off
25 a compensation fund, and the other director has -- I don't want to put the figures in
26 open court -- but he has a limited amount of income, one can fairly conclude that they

1 will not in fact provide funding, even if I order security for, let's say, £200,000.

2 MR JOHNSTON: Well, sir, there are two answers to that.

3 The first is the point I've already made about illiquid assets. The tribunal, in my
4 submission, should be proceeding on the assumption, given the burden lies on the
5 claimant, that they have not demonstrated that they do not have illiquid assets that
6 could be relied upon. Given what the claimant says about the strength of the claim,
7 and given what the claimant says about the confidence that they are going to succeed,
8 that is something that the tribunal needs to weigh very seriously. The defendants have
9 made the running: we've asked for evidence, they haven't provided it in that regard.

10 Secondly, the evidence that there is ATE insurance available. It hasn't been pressed
11 very hard; there's been a question saying --

12 THE CHAIRMAN: They're saying it's £168,000.

13 MR JOHNSTON: Right. But, sir, we say in those circumstances: (a) it was incumbent
14 on the claimant to go back and say, "Well, can you go out to the market and see if
15 there's a better deal that can be found than that?"

16 THE CHAIRMAN: Can I just look at Mr Treherne's affidavit on the assets point.

17 MR JOHNSTON: I'm very happy to be corrected if the position is otherwise. My
18 understanding is that there isn't any evidence as regards Mr Treherne's assets.

19 MR DRAPER: Just to correct something that has been said several times --

20 THE CHAIRMAN: Yes, but I just want to follow up my last point.

21 MR DRAPER: Of course.

22 THE CHAIRMAN: Paragraph 20, that's what he's said.

23 MR JOHNSTON: Sir, we would obviously stress the words "there is nothing more
24 available from those sources". The question that arises, and that was squarely raised
25 in the skeleton argument and hasn't been responded to by way of a late witness
26 statement, is whether there's funding from other sources.

1 MR DRAPER: Sir, that's the point I wanted to correct. My learned friend is eliding two
2 things.
3 He keeps saying, "We've asked about assets". They very much haven't asked about
4 assets. They could have asked in correspondence, "We'd like to know whether
5 Mr Treherne or Mr Turner has a family home and whether there is a mortgage over it".
6 They could have asked that. They could have put in their application that that was
7 an issue. They could have put in their reply evidence that that was an issue.
8 When my learned friend says they've asked, what he means is that he's raised it in the
9 skeleton argument. It's just not good enough.

10 MR JOHNSTON: Well, sir, I think that's perhaps putting it a touch high. The position
11 is that what has been raised very squarely is whether or not the claimant will be in
12 a position to and have resources that would be able to meet an order for costs.
13 Now, if the objection is that there hasn't been a specific request as regards assets, it's
14 important to recall where the burden lies. The burden lies on the claimant. The
15 claimant had the full opportunity to put in evidence explaining the state or otherwise of
16 its financial position. I won't make the point again; you know what I say as to that.
17 And you know what I say as to ATE insurance as well, sir, which is that it may be -- as
18 my learned friend puts it, he says all of the options are suboptimal. So what's being
19 said is: it's suboptimal to have to purchase ATE insurance at the cost of £168,000,
20 which may well require the use of funds extracted from certain illiquid assets.
21 Well, that may well be suboptimal, sir. But it's also extremely important to recognise
22 what is also suboptimal in this case, and that is the suggestion that the claimant should
23 pursue its case, and if it loses at trial, it's going to shrug and walk away. If the claimant
24 loses at trial, and my client is exposed to hundreds of thousands of pounds in costs,
25 the answer is going to be, "Well, that's just the way the cookie's crumbled from the
26 perspective of the defendants". We say that's considerably more than suboptimal.

1 We say it's a highly unusual and a stark and a striking submission.

2 It's also worth saying at this point that my client has taken -- no criticism at all of
3 ALM -- we've just taken a different approach. But my client has thought very carefully
4 about how to go about making it possible for security to be provided in some form.
5 That's why we've asked for a sum that is far below what would ordinarily be asked for
6 in a case of this kind. We may have to return to it at another point if that becomes
7 necessary. But we've asked for a sum far below; we've said it can be paid in tranches.
8 It can be paid by any other method that the tribunal suggests, it could be paid in
9 a different sum that the tribunal suggests. But what is not appropriate, we say, is that
10 the claimant proposes to litigate and to pass all of the risk to the defendants.
11 Even if it's right that any order of security for costs of any sum at all would stifle the
12 claim -- and we do say that the case simply isn't made out on that -- even if that were
13 right, we say it's not appropriate in circumstances such as these for the claimant to
14 come to court, very candidly say, "Well, I'm just not going to pay if an order is against
15 me", and then say, "But nonetheless I wish to proceed to trial".

16 That leads to the final point that I adverted to in my skeleton argument, which is that
17 the BLM defendants are concerned about the distorting effects that this position is
18 going to have on this litigation. Because everybody "knows", in inverted commas, if
19 no security is ordered, the claimants are never going to pay any costs that are ordered
20 against it in this case.

21 So a rule 45 offer, for example, becomes effectively meaningless. There's no
22 mechanism by which my clients can make an offer to the claimants and shift any risk
23 to the claimants at all. We can't say, "Well, from now on, if you don't beat this at trial,
24 that's going to have consequences for you". It's not going to have any consequences
25 for them, because the claimant's position as regards costs is: "Well, all the risk and all
26 the burden has to lie solely and exclusively on you, and we will walk away if we lose".

1 So the reality is cases of this kind ordinarily settle.

2 THE CHAIRMAN: They do.

3 MR JOHNSTON: But the closer we get --

4 THE CHAIRMAN: But they are dependent on the lawyers. And if the lawyers consider
5 that there's a reasonable offer that should be taken, then they will advise that. They
6 have the power to do that.

7 MR JOHNSTON: They do have the power to do that. But what we have is a situation
8 in which there is no cost discipline at all for one of the parties.

9 THE CHAIRMAN: Well, there will be, because I'm going to look at the costs budgets
10 of all the parties. And it may well be that even the figure that the claimant is asking in
11 their cost budget is not going to be acceptable, because I made it clear already that
12 all the figures that have been given to me are out of all proportion with the amount at
13 stake.

14 They're claiming £750,000, and that's on a best case basis. But when you look at all
15 the arguments that could be made on quantum, and the speculative nature, arguably,
16 about how to assess damages when you're trying to look in the future, they may be
17 looking at a figure which is -- I can't say what the figure is; it's unfair. But they may be
18 looking at a figure that's, let's say, well below 750, and that that figure could be below
19 the figure that they're even saying that their own costs are going to be, because they
20 are saying their costs are going to be about £400,000.

21 So I'm not going to proceed on the basis that this is a claim that they're going to get
22 £750,000. They might do, but I can't put it on that basis. So I am concerned about
23 the costs of this litigation relative to the amount at stake.

24 MR JOHNSTON: Yes.

25 THE CHAIRMAN: One would hope that the parties will look at this and -- maybe
26 they've tried mediation already, I don't know, but they will consider mediation at some

1 stage, where everyone is being realistic. And if everyone is going to just take their
2 maximum position, of course you're never going to settle.

3 So this case could end up relatively quickly, certainly by the time we get to the next
4 CMC, whereby so much money and time has been invested by both sides, it's actually
5 not possible to settle: that they would have expended, let's say, £250,000 or £300,000,
6 you would have expended collectively probably more than that, and then there's very
7 little room to negotiate, because if you make an offer of £250,000, they'll say, "Well,
8 that's going to give us zero at the end of the day".

9 So if this case is going to settle, the parties need to sit down sooner rather than later,
10 given the view that I have that this case makes very little economic sense.

11 MR JOHNSTON: Sir, that is very gratefully heard and understood, at least on this side
12 of the room.

13 THE CHAIRMAN: I'm sure, Mr Draper, you understand that.

14 MR JOHNSTON: I'm sure Mr Draper will say the same, sir. I'm not suggesting he
15 doesn't; I just can't speak for him.

16 That crystallises precisely why we are so concerned about the absence of any
17 security, because one of the pressures that forces parties to accept offers is the risk
18 that they don't beat that offer at trial, and such sums as they recover at trial are then
19 diminished, considerably perhaps, by their exposure to the other side's costs. But
20 where we are now is that the claimant is going to ride free of that if no security is
21 ordered at all.

22 So that is why it is our submission that the absence of security makes this case very
23 much more difficult to settle, because the claimant's position is that it will not honour
24 any order for costs. So that becomes a wholly theoretical or wholly abstract process.

25 Sir, I don't propose to address you any further, unless those behind me have any
26 particular points. I may address any points by way of a brief reply, if it's necessary at

1 all.

2 But Mr Went had a small number of points he was going to address as well.

3 THE CHAIRMAN: Yes, let me just make a note of your last point. **(Pause)**

4 Yes.

5 **Submissions by MR WENT**

6 MR WENT: Sir, I adopt the submissions of my learned friend.

7 I just want to cover three areas.

8 THE CHAIRMAN: I normally say I adopt the submissions of my learned friend to the

9 extent that the tribunal finds them attractive! So you're not adopting the points which

10 are not so attractive.

11 MR WENT: I'm grateful.

12 I just want to deal with three points.

13 THE CHAIRMAN: Yes.

14 MR WENT: One point to return briefly to, ATE provisions. Second, about CBG,

15 obtaining funds from shareholders. Then third, just a few specific points in CBG's

16 skeleton.

17 THE CHAIRMAN: Yes, sure, that's fine.

18 Let me just see where we are on timing. So you can do all that by 12.30; yes?

19 MR WENT: I'm sure I can do that by 12.30.

20 THE CHAIRMAN: Thank you.

21 I'm thinking about the transcribers, they may need a break, that's the only thing.

22 MR WENT: We can take a short break now, if that makes sense, yes.

23 THE CHAIRMAN: I am just worried about the transcribers. If we take a break to, let's

24 say, 12.25, then you'll finish at 12.45. Then we'll hear Mr Draper, and we'll probably

25 finish at least his submissions by lunchtime, because there's not a huge amount for

26 him to cover.

1 Okay, thank you.

2 **(12.15 pm)**

3 **(A short break)**

4 **(12.25 pm)**

5 THE CHAIRMAN: Yes, Mr Went, your turn.

6 MR WENT: Sir, I was going to address you briefly on the ATE situation first. We just

7 reiterate what's been said: that the evidence on this is very unsatisfactory.

8 THE CHAIRMAN: Is the evidence that you can get ATE at a cost of £168,000?

9 MR WENT: That's correct in terms of response that came back from the broker. That's

10 of course for the full amount of security that's being sought. But that's in evidence.

11 But can I take you just very briefly through --

12 MR DRAPER: Sorry, just to clarify, that's the upfront element of the premium. They

13 would then take a much larger sum effectively out of damages. So there are two

14 elements.

15 THE CHAIRMAN: Yes, the upfront premium is 168; then they get a share of the

16 damages.

17 MR DRAPER: Quite, yes.

18 MR WENT: If I can just take you to the security bundle at page 49.

19 THE CHAIRMAN: Yes.

20 MR WENT: This is the 27 January letter when we first raised the issue of security.

21 Then just over the page at page 50 ...

22 THE CHAIRMAN: Can someone get my bundle? I was looking at it a second ago.

23 **(Handed)**

24 Start again.

25 MR WENT: So page 49, that's the 27 January letter from the ALM defendants first

26 raising security.

1 Then over the page, the response on 3 February from CBG:

2 "We confirm that our client does not currently hold ATE ..."

3 And the reason for this seems to be, third paragraph:

4 "You have failed to identify what your client's estimated costs might be."

5 Then over the page, on the next page, 51, this is ALM's response on 23 February.

6 And just to highlight the fourth paragraph there:

7 "For purposes of the request that we are making, you can assume that our recoverable
8 costs will be at least the costs estimated on the claimant's side."

9 Then again over the page, page 53, this is CBG's response on 27 February. Then
10 oddly again, CBG says it's not right to demand that CBG engage in a guessing game,
11 and if we wanted answers on ATE, we'd have to detail what our likely costs were going
12 to be.

13 Note that that's the extent of the correspondence on ATE between --

14 THE CHAIRMAN: And your case is that they didn't even seek to get a quote for ATE
15 until after security was sought?

16 MR WENT: Indeed. Indeed.

17 I think it's worth saying that obviously there is -- I think you've already been taken to
18 it -- the request that was made by the claimant for ATE, it's page 130 of the bundle,
19 which has a comment suggesting that advice had been sought in the past. But I think
20 we say that can't have been in relation to this particular ATE cover for this case,
21 otherwise surely that would have been raised in the correspondence previously. And
22 of course this only happened a matter of weeks ago.

23 So that's ATE. I just want to touch very briefly on the principles applied when
24 assessing CBG potentially obtaining funds from its shareholders.

25 You'll obviously be well familiar with the Supreme Court judgment in Goldtrail and the
26 Court of Appeal in Ingenious. They're at tabs 8 and 13 of the bundle. We don't need

1 to turn them up; I just want to point out a few paragraphs.

2 It's obviously clear that payment into court shouldn't be made if it would have the effect
3 of stifling the appeal. But obviously if the question is raised about the potential for
4 shareholders -- in that case of course the appellant was dealing with a payment into
5 court, as opposed to security. But if the issue of shareholders is raised, then the
6 appellant in that case needs to "establish on the balance of probabilities that no such
7 funds would be made available to it". That's at paragraph 23 of the judgment.

8 At 24 of the judgment: because of the dynamics at play between the parties, when the
9 court is imposing or thinking about imposing a condition which might stifle a claim, the
10 Supreme Court said:

11 "The court should ... not take the refutation [by the party against which the condition is
12 sought] at face value."

13 It needs to:

14 "... judge the probable availability of the funds by reference to the underlying reality of
15 the company's financial position; and by reference to all aspects of its relationship with
16 its owner, including ... the extent to which he is directing (and has directed) its affairs
17 and is supporting (and has supported) it in financial terms."

18 Obviously, CBG was set up by Mr Treherne and Mr Turner: they provided the financing
19 for it. They're the only individuals who are said to benefit personally from an award of
20 damages.

21 So we hear what you said already in terms of those individuals not, on the evidence,
22 providing any financial input directly into these proceedings, but certainly they're very
23 key to CBG and supporting it when it was set up.

24 Just to complement Goldtrail, the Court of Appeal in Ingenious made clear that there
25 needs to be full, frank, clear and unequivocal evidence before drawing any conclusion
26 that a particular order will have a stifling effect; that's at paragraph 31.

1 Then paragraph 32 of that judgment also explains by reference to Brimco Holdings
2 that if the case moves to considering whether security could be regarded as being
3 available from a third party, the burden, as we know, rests with the claimant, and:
4 "The claimant has to show realistically that there do not exist third parties who can
5 reasonably be expected to put up security for the defendant's costs."
6 We've obviously touched on and already looked at the evidence from Mr Treherne in
7 terms of their financial position. You've been taken through the evidence. We certainly
8 say that that simply doesn't pass the Goldtrail and Ingenious stifling tests, for the
9 reasons already explained.
10 I just add one brief point. It relates to paragraph 57 of CBG's skeleton. Sir, you've
11 already touched on this as well in the evidence. It says that Mr Turner doesn't work
12 following a serious cycling accident.
13 Just to be clear, I think the evidence shows that he did continue to work at least for
14 a period after the accident, because of course it was his compensation fund that was
15 used to fund the formation of CBG. That's at paragraph 20 of Mr Treherne's
16 statement.
17 Mr Treherne also made clear that Mr Turner was very much part of the CBG venture
18 and responsible for key aspects of the running of that business, and that's at
19 paragraph 7 of Mr Treherne's statement.
20 Then I was just going to turn to a few points made in CBG's skeleton.
21 THE CHAIRMAN: Yes.
22 MR WENT: At paragraph 40.2 of CBG's skeleton it's said that CMA found that the
23 defendants were successful in driving CBG into the market. That's simply not correct,
24 and there's --
25 THE CHAIRMAN: We've dealt with that point as well, yes.
26 MR WENT: I'm grateful.

1 THE CHAIRMAN: I've accepted the point made by Mr Johnston on that.

2 MR WENT: I'm grateful.

3 THE CHAIRMAN: Because that's a sort of gloss on what the CMA has actually found.

4 MR WENT: Indeed. I mean, it's the importance of the object infringement. And the

5 CMA is very clear that it didn't need to examine the actual effects or impact of the

6 infringement --

7 THE CHAIRMAN: Well, there's a glitch on that in the decision, because there is

8 a paragraph that talks about the effect.

9 MR WENT: Yes. Well, as I said, I think in the letter that was submitted yesterday we

10 made some points on that, in terms of --

11 THE CHAIRMAN: I understood that point.

12 MR WENT: I'm grateful.

13 THE CHAIRMAN: It may be at the next CMC we will return to that point. We probably

14 will have to return to that point at the next CMC, but it's not really for now.

15 MR WENT: I want to touch on paragraph 40.3 of CBG's skeleton. It says:

16 "It is inherently likely that where two of the three main suppliers in a tightly

17 concentrated market collude to exclude a new entrant, their collusion will have the

18 desired effect."

19 And that's all the more so where the effective alternative sources of supply are limited.

20 I know what's already been said about the merits and we're not going to be getting into

21 that. I do though just want, on that point, to take you to Mr Treherne's statement.

22 THE CHAIRMAN: Okay. What page?

23 MR WENT: That's at page 274 of the bundle.

24 THE CHAIRMAN: Yes.

25 MR WENT: Paragraph 8.

26 THE CHAIRMAN: Yes.

1 MR WENT: Perhaps I can just ask you to read that.

2 THE CHAIRMAN: I will read it again. **(Pause)** Yes.

3 MR WENT: So we know CBG was trading with Calder until November 2016.

4 CBG is saying here that it would have been offering large scale orders on behalf of

5 the contractor and its buying group. Then there was scope for a merchant to be the

6 winner and the supplier of that merchant to be the winner. So CBG's case is that once

7 it has started winning business for a particular rolled lead supplier, and shifting

8 business to merchants of that supplier, there was scope for that supplier and merchant

9 to be the winners. There's no reason, of course, why that couldn't happen with two of

10 the main suppliers not supplying rolled lead to CBG.

11 Presumably Calder would have been perfectly happy to be the winning supplier and

12 for one of its merchants it typically supplied to be the winning merchant in that

13 scenario.

14 We say that ultimately, of course, CBG had a year to prove its business strategy, with

15 supplies from one of the largest suppliers in the UK, but failed in doing so.

16 Sir, I make those points --

17 THE CHAIRMAN: One of your points is that this is a business that was going to fail in

18 any event, and it didn't need the alleged -- or the collusion between ALM and BLM to

19 put it over the cliff. If it was a good business it would have been a good business

20 dealing with Calder and perhaps someone else on the market.

21 MR WENT: Indeed, sir.

22 THE CHAIRMAN: Yes.

23 MR WENT: Indeed.

24 I want actually then just to conclude, just by stressing for my client's perspective, the

25 unfair pressure that they say that they're faced with --

26 THE CHAIRMAN: Yes.

1 MR WENT: -- without any security for costs being granted.
2 When considering that unfair pressure, the Court of Appeal in Ingenious has made
3 clear it's relevant that the lawyers are working for the claimant on full CFAs and the
4 lack of any ATE. That's at paragraph 30 of Ingenious.
5 You obviously are aware of the estimated costs on our side of defending the matter.
6 But particularly where ALM believes that their defence is strong and CBG's business,
7 as conceived, was bound to fail, they obviously see that the balance shouldn't come
8 down in favour of allowing the claim to continue without any prospect of the ALM
9 defendants recovering any of their costs if they would be successful at trial.
10 Certainly we would reiterate the points made in terms, for example at part 45, offers.
11 I mean, the dynamic is completely skewed in one direction and very, very unfairly so.
12 So we say the balancing exercise falls firmly in favour of the tribunal awarding the
13 security for costs.
14 CBG needed to satisfy the tribunal that it would be prevented by an order for security
15 from continuing with a litigation, but we say CBG has failed to do so.
16 So those are the additional points that I wanted to raise, unless I can assist further.
17 THE CHAIRMAN: Yes. Thank you very much.
18 Could you just deal with the ATE insurance, please.
19 **Submissions by MR DRAPER**
20 MR DRAPER: Sir, yes. If I could very briefly, sir, just on this point about pressure to
21 settle, would it assist for me to respond in 45 seconds to that?
22 THE CHAIRMAN: No.
23 MR DRAPER: I understand, sir.
24 THE CHAIRMAN: The only thing I want to hear you on is the ATE insurance.
25 MR DRAPER: I understand.
26 There is a point on the facts in relation to the ATE insurance, sir, I just want to ensure

1 we have entirely clear, which is that if you could turn up Mr Tupper's statement --

2 THE CHAIRMAN: Yes, I have it here.

3 MR DRAPER: It's at tab 8 of the security for costs bundle.

4 THE CHAIRMAN: Yes.

5 MR DRAPER: Paragraphs 18 to 20.

6 THE CHAIRMAN: Which one?

7 MR DRAPER: It's page 122 at tab 8 of the securities for costs bundle.

8 THE CHAIRMAN: Let me just read that. **(Pause)** Yes.

9 MR DRAPER: The point I just wanted to clarify was it's by no means the case that it

10 was only in February that Exton Advisers provided advice as to whether this was

11 a realistic candidate for funding or ATE. They had been in the background throughout.

12 As it says in paragraph 18, they had been more than pessimistic about the idea. Now,

13 they are experienced brokers and their views, as we see set out in the emails, are

14 entirely unsurprising. If there is a claim, the maximum quantum of which is vastly less

15 than the costs that the defendants will incur in defending it, ATE insurance is

16 uneconomic.

17 My learned friends seek to characterise that as meaning, oh, it's just not very attractive.

18 No, the point is it's essentially non-viable, it's a non-insurable case, on any realistic

19 view.

20 THE CHAIRMAN: It's very confusing they are saying you can probably get it for

21 168,000 upfront. And you will then have a huge amount for damages. You can say

22 it's commercially unattractive, or you can say it's unviable, but whichever way it is, it's

23 not great.

24 MR DRAPER: The important question to ask is from whose perspective? It's

25 important to distinguish here, in a way that my learned friends don't always, between

26 CBG itself, where the question is could it provide security? And very distinctly from

1 that, sir, as Goldtrail makes abundantly clear, when it comes to potential backers the
2 question isn't could they, but would they? So if you ask the "would" question as
3 regards potential backers, obviously my first point is there aren't any, there are no men
4 of means or powerful companies standing behind CBG, it has two shareholders, both
5 men of very modest means. As you've indicated, sir, it's obviously significant that this
6 isn't one of those ordinary cases where the claimant is funding its own legal costs but
7 refuses to provide potential for the defendants. That's not this case at all.

8 THE CHAIRMAN: Yes.

9 MR DRAPER: So my first point is, well, there are no potential backers because no
10 one has the funds.

11 THE CHAIRMAN: Thank you very much.

12 **Reply submissions by MR DRAPER**

13 THE CHAIRMAN: Anything you'd like to say on the ATE?

14 MR JOHNSTON: I can be extremely brief. The only point I wish to make is that
15 Mr Tupper hasn't exhibited any evidence of any of the earlier correspondence. So
16 what we have is something prompted by this application, in effect, and first pursued
17 with any vigour and sincerity at that point, or substance at that point, rather than
18 sincerity.

19 THE CHAIRMAN: What I'll do is I'll give a written ruling in the normal way dealing with
20 the whole background of what the law is, but I'll give my reasons now on the
21 submissions being made.

22 **RULING (extracted for approval)**

23 Mr Draper?

24 **Costs**

25 MR DRAPER: Thank you, sir.

26 You may recall from our skeleton argument that in the event the application was

1 dismissed, we do seek our costs -- not all of our costs -- but the costs of preparing the
2 evidence and the costs of arguing the application since then.

3 THE CHAIRMAN: Do the defendants resist that? That seems perfectly reasonable to
4 me. We'll have to see what the figures are, obviously.

5 MR JOHNSTON: We will have to see the figures.

6 Sir, it is resisted, very, very briefly, on the grounds that this was an unusual position
7 for the defendants to be placed in, and candidly it would have been extremely
8 surprising if the defendants hadn't made an application for security for costs given the
9 circumstances. It's also right to say that at least some of the answers to the underlying
10 questions have only been provided in the evidence that was responsive, and so to the
11 extent that sums are sought providing that evidence, they're resisted on that basis.

12 Finally, that the approach taken was proportionate and it was careful and it was
13 reasonable given all the circumstances.

14 A final submission, sir, if I may, which is that if, contrary to my submission now, you
15 were to order a payment of costs, my submission is that that sum could quite
16 properly -- given that the matter is being pursued on a CFA -- could quite properly be
17 paid in a security for costs. I know that you will take a view on that, but it's certainly
18 a sum of money that will be transferred to the claimant at that point, the point at which
19 they will become impecunious. But my first and core submission is that, given the
20 circumstances, and the hugely disadvantageous position my client is now in in this
21 litigation, it was a perfectly proper application to make. To penalise my client in costs,
22 given the overall circumstances of this case as regards costs, we say would be unfair
23 or, to use the term that we've been arguing about today, unjust.

24 Sir, that's my submission.

25 MR WENT: I'm content to adopt those submissions.

26 THE CHAIRMAN: That's fine.

1 As regards the costs on and occasioned by the applications, I consider that it is
2 perfectly reasonable for the defendants to pay those costs. I will want to assess those
3 costs now, and in assessing them I will take into account the fact that we are here
4 anyway for the CMC and that we are all -- so it is not necessarily going to be the full
5 amount of the costs of the security because it's very hard to disentangle the amount
6 of time that you need to prepare. This is a three-hour CMC, it would have probably
7 been a three-hour CMC with or without the security for costs. So what figure -- do you
8 have a schedule to show me and I can go through that?

9 MR DRAPER: The tribunal, I believe, does have it.

10 THE CHAIRMAN: Yes, but where is it?

11 MR DRAPER: A very fair question, sir.

12 THE CHAIRMAN: Can you help me where the costs schedules are? Is it in the
13 bundle?

14 MR DRAPER: It came after the bundle, sir, and was emailed to the tribunal yesterday.
15 If it may assist, it was yesterday morning at 8.32.

16 THE CHAIRMAN: Mr Went, do you have a copy of it? Do you have access to it?

17 MR WENT: I don't have a hard copy.

18 THE CHAIRMAN: But you have access to it. And, Mr Johnston, you are able to
19 access it. So I'm just waiting for someone to give it to me.

20 MR DRAPER: I am very sorry about that. **(Pause). (Handed).**

21 THE CHAIRMAN: Thank you, Brian, I can work from that.

22 MR DRAPER: I intend to give you a moment to read through it.

23 THE CHAIRMAN: I am going to read it first, yes.

24 MR DRAPER: Yes. **(Pause).**

25 THE CHAIRMAN: Let's work backwards. As regards your fees, you'd have to turn up
26 anyway for this hearing.

1 MR DRAPER: Of course.

2 THE CHAIRMAN: This figure here is separate from what you're charging from the
3 CMC; is that right?

4 MR DRAPER: It's a proportionate allocation by regard to --

5 THE CHAIRMAN: Well, what's the other half then?

6 MR DRAPER: I think this was two-thirds. Oh, forgive me, 80/20. So this is 80 per cent
7 of my fee has been allocated for security for costs. I can explain that to you
8 straightforwardly, sir, if you have my skeleton argument.

9 THE CHAIRMAN: Just tell me what the point is.

10 MR DRAPER: Well, it provides some indication that my skeleton argument runs to
11 18 pages, 16 of which are the introduction and security for costs, and everything else --

12 THE CHAIRMAN: The fact is -- look, look -- sometimes, you know, security for costs
13 is a separate hearing that you probably would get the full amount as a separate
14 hearing, but this is all rolled up as part of a CMC. So I'm going to order you get £7,000
15 on yours. Because you'll get the rest of your fees as part of the costs in the case on
16 the CMC.

17 MR DRAPER: I see. But when you refer to me as counsel specifically, then you're
18 going to deal with the solicitors' fees separately.

19 THE CHAIRMAN: In a second, yes.

20 MR DRAPER: I understand, yes.

21 THE CHAIRMAN: But I'm saying: by me saying that I'm assessing your costs at
22 £7,000, I'm assessing that as solely representing the costs of the security for costs. It
23 doesn't prevent you from claiming the balance --

24 MR DRAPER: I see.

25 THE CHAIRMAN: -- of whatever your global brief is --

26 MR DRAPER: Yes.

1 THE CHAIRMAN: -- as part of the costs in the case that I've ordered for the CMC.

2 MR DRAPER: Yes.

3 THE CHAIRMAN: Do you understand that?

4 MR DRAPER: I do. We'll have to draft the order such that everything else falls within

5 costs in the case, and this is effectively allocating ...

6 THE CHAIRMAN: I'll do the same proportion for -- well, for the solicitors' fees, I will

7 put that -- clearly the evidence has been prepared; there's been clearly a lot of work

8 on the correspondence, some of which the other side say is unnecessary. So I'll put

9 their costs at £9,500. So it's £9,500, the brought-forward figure for the solicitors.

10 Your advice on the documents I presume is solely in relation to security, so I'm leaving

11 that figure, okay?

12 So we have £9,500 for the solicitors, we have £4,000 on the documents, we have

13 £7,000 for your -- I'll just call "brief fee", if you see what I mean. Then what does that

14 add up to? That adds up to -- there's VAT. I'm not sure if VAT is claimable, is it,

15 Mr Johnston? If it is, then we're going to have to include it, yes.

16 MR JOHNSTON: Yes, I'll have to think about that. I think it's 20.5, unless I'm doing it

17 wrong: 11 plus 9.5, 7 plus 4 plus 9.5.

18 THE CHAIRMAN: Yes, so it's £20,500.

19 MR DRAPER: Those are the ex-VAT figures.

20 THE CHAIRMAN: Ex-VAT, yes.

21 MR DRAPER: On VAT, of course, in the ordinary course, CBG would be able to

22 recover VAT that it was paying effectively on its legal fees through setting those off. It

23 doesn't trade.

24 THE CHAIRMAN: Yes, I'm a bit concerned about this. I'm not quite sure what the

25 VAT position is going to be. So --

26 MR DRAPER: It's an application of the indemnity principle because CBG will bear

1 those costs.

2 THE CHAIRMAN: Yes. Look, I'm going to order the VAT figure, but if it does transpire
3 that there's no VAT liable for one reason or another, you'll write to the other side and
4 say there's a mistake and hand it back.

5 MR DRAPER: Yes, we will. We'll bottom it out.

6 THE CHAIRMAN: Of course. Okay. So it's £20,500 to be paid within 28 days.

7 MR DRAPER: I'm grateful.

8 MR JOHNSTON: Sir, I'm reminded to just --

9 THE CHAIRMAN: Plus the VAT, of course.

10 MR JOHNSTON: Plus the VAT. Just to remind you of my brief submission that that
11 might form a basis of a payment of security, am I to take it that you're not ordering
12 that?

13 THE CHAIRMAN: No.

14 MR JOHNSTON: I'm grateful.

15 THE CHAIRMAN: Because what I assume will happen is that counsel will be paid his
16 fee and the solicitors will be allocated that fee, and that's no longer available to the
17 claimant.

18 MR DRAPER: That's correct.

19 THE CHAIRMAN: Yes.

20 Thank you very much. Well, thank you very much everyone. We've managed to do it
21 within the three hours allocated.

22 **(1.10 pm)**

23 **(The hearing concluded)**

24

25

26