IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1262/5/7/16

Victoria House,
Bloomsbury Place,
London WC1A 2EB

26 July 2016

Before:

THE HON. MR. JUSTICE PETER ROTH
(President)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

AGENTS' MUTUAL LIMITED Claimant

- and -

GASCOIGNE HALMAN LIMITED T/A GASCOIGNE HALMAN Defendant

AND BETWEEN:

AGENTS' MUTUAL LIMITED Claimant

- and -

MOGINIE JAMES LIMITED Defendant

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CASE MANAGEMENT CONFERENCE

A P P E A R A N C E S

Mr. Alan Maclean QC and Mr. Josh Holmes (instructed by Eversheds LLP) appeared on behalf of the Claimant.

Mr. Paul Harris QC and Mr. Philip Woolfe (instructed by Quinn Emanuel Urquhart & Sullivan, UK LLP) appeared on behalf of the Defendant, Gascoigne Halman.

Mr. James Hall (instructed by Gordon Dadds LLP) appeared on behalf of the Defendant, Moginie James.

THE PRESIDENT: Yes, Mr. Maclean, I have seen everyone's skeleton arguments and written submissions for today, and points raised. I think it is sensible, first of all, to order that the competition issues in the two cases are heard together. I do not think it is necessary formally to consolidate, and I think that would have to be done for the whole action. It could not just be done for the bit transferred. I will direct that they be heard together, and that the evidence in the one stands as evidence in the other.

MR. MACLEAN: Sir, yes.

THE PRESIDENT: Can I ask, have you given notice, or has anybody given notice to the CMA of these proceedings?

MR. MACLEAN: Yes, I know that Hill Dickinson, who were previously the solicitors instructing Mr. Harris, did so. There has been some correspondence with Eversheds, who instruct me, and the CMA. So the answer to your question is, yes, they know about these proceedings.

THE PRESIDENT: They do know about the proceedings. They have had a copy of the----

MR. MACLEAN: They have had a copy of the pleadings in both actions.

THE PRESIDENT: Thank you.

MR. MACLEAN: Can I start, first of all, by saying, as you know, Sir, I act for the claimants in both cases with my learned friend Mr. Holmes. Mr. Harris QC and Mr. Woolfe appear for the defendant in one of the cases, which I am going to refer to as Gascoigne Halman, and my learned friend Mr. Hall appears for the other defendant, Moginie James.

You will know, Sir, the reason we are here is that Sir Kenneth Parker made an order in the Chancery Division, and I am sure you have had an opportunity to see that order, which is bundle 1, tab 1, and there is a joint letter sent by Quinn Emanuel, who now instruct my learned friend Mr. Harris, of 11th July, which you may have found at p.415 of the correspondence bundle, but it is not necessary to go to that now.

You have seen skeleton arguments from all the parties. We appended to our skeleton proposed directions. Obviously the most pressing matter for today, Sir, is to make directions leading to a trial of the competition issues in this Tribunal. What we have done, and we hope this is helpful, and we have provided this to my learned friend, is prepare a table which just shows what the rival dates are. Can I hand that up? (Same handed)

THE PRESIDENT: Before we get to that, which obviously we do need to deal with, can we just look at the agenda that we have indicated to the parties, because I think that certainly helps me. The first issue is confidentiality. What is the position there? Is it thought that we will need a confidentiality ring? There was a suggestion that someone might be drafting something.

MR. MACLEAN: Yes, the position has moved on since the skeletons, and the position is as follows: you will have seen from our skeleton argument at annex 1, that para.1 of our proposed directions proposed a caveat for inspection so that the parties would be entitled to withhold any documents containing confidential material pending the establishment of the confidentiality ring if that were necessary. Gascoigne Halman raised some concerns about that. They suggested the Tribunal should set up a confidentiality ring now into which any documents could be disclosed as necessary so as to avoid the disclosure and inspection stage. We, for our part, are content with that, and in terms of the practicalities we have suggested that the parties liaise to agree a form of order for a confidentiality ring and provide a draft, agreed obviously in so far as possible, to the Registry of this Tribunal by the end of the week.

We propose that the membership of the ring be confined to named external lawyers and the economic experts, at least in the first instance. I think, and I will be corrected if I am wrong, the issue at least between my client and Gascoigne Halman - I am not sure what the position of the Moginie James is - is that Gascoigne Halman suggest that the ring should at this stage also include in-house counsel.

What we respectfully suggest is that the appropriate way forward is that the ring be established at this stage and be confined to external advisers at this stage. As you will have gathered, Sir, there is going to be another hearing in this matter in September to deal with a number of matters, mostly concerned with costs of one sort or another, and we suggest that if there is any need to fiddle with the ring it can be revisited then when the parties will have a better view as to what, if any, confidential documents have turned up in the course of disclosure.

THE PRESIDENT: Who has got in-house counsel? Do you have in-house counsel?

MR. MACLEAN: No, we do not. I think it is Gascoigne Halman who want to widen the ring.

THE PRESIDENT: Mr. Harris, your client has in-house counsel?

MR. HARRIS: Absolutely, Sir, thank you, and that is from whom I principally take my instructions. He is present in court today, Mr. Kelbrick, and we say Mr. Maclean characterises this as expanding the scope of the ring, but the default position should be that I am entitled to take instructions on the matters that emerge through the disclosure process. Mr. Kelbrick, of course, has professional duties, and he is available to sign relevant undertakings. You will know, Sir, that the practice of this Tribunal has been to provide sometimes for slightly different undertakings for the in-house counsel.

So, far from expanding it, we say that Mr. Maclean's proposal is an undue narrowing of the normal course. Of course, the problem is it is Mr. Kelbrick, principally from whom I take my instructions, so we say the sensible course would be for my learned friend's team to produce a draft order. The default position should be external advisers and in-house counsel. If, during the course of the disclosure process my learned friend's team turns up documents that it says are super confidential such that Mr. Kelbrick, bound by his undertakings, as he will be, cannot see them, then they are at liberty to show them to the external counsel only. If we can reach agreement that that is their status, so be it. If we cannot, then the proper course should be in the usual way for my learned friend's team to come back and persuade this Tribunal that there should be a second tier into which those documents should go.

We are also keen to get this sorted out now.

THE PRESIDENT: I think we must get it sorted out now, you do not have to persuade me. Mr. Hall, does your client have in-house counsel?

MR. HALL: No, it does not, Sir.

THE PRESIDENT: So this concerns really one gentleman who is in-house counsel at Gascoigne Halman.

MR. MACLEAN: As we understand it, he is not in-house counsel for Gascoigne Halman. You will have gathered, Sir, that Gascoigne Halman was taken over by Connells, who are a very large group of estate agents, and that is when the trouble started vis-à-vis Gascoigne Halman on the one hand and my client on the other.

THE PRESIDENT: He covers the group.

MR. MACLEAN: Yes, and he is presumably also giving instructions to other members of the group, including Matthew Sayer, who are another group of estate agents in the North East of England, who were also taken over by Connells, who have also recently started listing on Rightmove and Zoopla and On The Market, and that has been the subject of some controversial correspondence which, for incomprehensible reasons, is said to be of confidentiality, and the relevant correspondence has been taken out of the bundle; I am going to say a bit more about that later. But, he is not a gentleman, as we understand it, who is in-house counsel for the defendant. In our respectful submission, at this stage, if the ring is established for external counsel and external advisers, the disclosure process will take place and if there is any necessity to widen the ring beyond that the matter can be dealt with at the next hearing in September.

THE PRESIDENT: The disclosure process is to enable also people to consider position with regard to how they conduct the case. If he is the primary instructing solicitor, of course, it gets the documents to counsel, but normally it is the solicitor who has the greater swathe of them. It does not strike one, I have to say, as the sort of case where there are a lot of highly commercially sensitive documents, it is pricing information or customer lists, it cannot be that it would cause huge damage if it got to the other side.

Is there a real problem with the course Mr. Harris proposed, namely, that this gentleman is included in the list gives the usual undertaking, but if, in preparing your disclosure you come across some documents which you are really concerned about, then you can write to say you are disclosing them only on the basis it should be confined to outside lawyers and you may not be able to make an immediate application to the Tribunal if the date is August or whatever, but you can come back in September and it can be argued out if people really want to.

MR. MACLEAN: I am content with that course.

THE PRESIDENT: Yes, I think we will proceed that way so it is legal advisers and experts, but the claimant has liberty if there is any highly sensitive document to disclose it on the basis that it not be shown to the in-house lawyer working at Gascoigne Halman, and to apply to the Tribunal at the next hearing for there to be a super-confidentiality ring.

MR. MACLEAN: Very good, Sir.

THE PRESIDENT: Let us deal with it that way. Again, before we get to timetabling, so I can understand the impact on this, disclosure and the issues, and so on. If one goes to the pleadings, Mr. Harris has made a whole series of points about the pleadings, some of which he can pursue when he addresses me, if he wants to, but there are just a couple of points I wanted to be clear about.

The first concerns - and I have got your Amended Particulars of Claim against Gascoigne Halman----

MR. MACLEAN: Have you seen the Amended Reply, Sir, which was appended to the skeleton argument?

THE PRESIDENT: Yes, draft Amended Reply, I have. The first concerns the question of dominance and Rightmove. As you know, dominance has, as it were, two meanings. It has the ordinary meaning of being large and powerful, and it is a term of art in competition law with a particular meaning.

MR. MACLEAN: Yes.

THE PRESIDENT: What I am keen to understand is whether you say Rightmove is dominant in the competition law sense or is dominant in being large and powerful?

MR. MACLEAN: Can I deal with that straight away? It is one of Mr. Harris's complaints in his para.29, and one of the bases on which they contend there should be an unless order.

THE PRESIDENT: I am not interested in an unless order, I just want to get it clarified.

MR. MACLEAN: Can I deal with that directly. Our case is that Rightmove does have a dominant position on the UK portal market in the competition law sense. If one takes the Defence, which is at tab 5 of bundle 1, Mr. Harris's pleading, and if we take the unamended version----

THE PRESIDENT: I have got the amended one.

MR. MACLEAN: If you take the amended one, and it is an annex to it, and go to p.78.47, which is behind tab 5A, this is the information which Gascoigne Halman have pleaded as to the share of business, and you will see the percentage. Sir, in the Amended Defence, if one looks at para.4 of the Amended Defence, you will see that in 4d Mr. Harris pleads:

> "It is admitted and averred that, at those times and continuing to date, the portal operated by Rightmove …"

and the original Defence said -

> "… was the dominant portal on the market, measured by any and all reasonable metrics."

If one goes to para.36d of that same pleading, the Amended Defence, which starts at p.78.30:

> "By reference to the above counterfactual(s), the Exclusivity Requirement … rule has had, and is continuing to have, the following appreciable anti-competitive unlawful effects (or any or all of them) …
>
> d since the launch …"

THE PRESIDENT: Remain dominant. I have seen that. I am not asking you to argue the case, I just want to understand what it is you are saying. You have answered the question. You do not have to go further.

MR. MACLEAN: Can I give you two further answers, Sir. The second part of the answer on Rightmove is that although we say, as a matter of fact, they are dominant in the competition law sense, we also say it does not matter to the really important question which is whether the OOP rule is or is not lawful. It does not matter whether Rightmove is dominant in the competition law sense. That is the second point.

The third point, and this is, I suspect, what lies behind your question, Sir, in the original version of the Particulars of Claim the word "dominant" was used in a rather looser sense, applying both to Rightmove and to Zoopla. Mr. Harris in his skeleton argument has set out a table over a number of pages which identifies the issues in the case. We, for our part, have no real difficulty with his characterisation of the issues in the case, except for his number 2, and this is p.12 of my learned friend's skeleton, "Market Definition of dominance":

> "The definition and structure of the relevant markets, including whether Rightmove and/or Zoopla/Primelocation individually or collectively dominate the property portal market …"

We do not contend, for the avoidance of any doubt, that Zoopla or Zoopla/Primelocation is itself dominant in the competition law sense, and it is no part of our case that Zoopla or Zoopla/Primelocation is, together with Rightmove, collective dominant in the competition law sense. The entity which is dominant in the competition law sense is Rightmove, but, as I have just mentioned, whether it is or it is not is, in fact, neither here nor there for the resolution of the issues in the case.

THE PRESIDENT: So when you use the word "dominant" in para.8, you mean dominant in the competition law sense, and similarly in 11.1 and 8.

MR. MACLEAN: Yes, 11.1 and 8, that is right.

THE PRESIDENT: I understand, there is no collective dominance. Can I then also ask, you have not amended the Particulars of Claim against Moginie James? You have not made the corresponding amendments. The two claims unsurprisingly track each other in the way they are framed. For example, you have amended para.1 in Gascoigne Halman to substitute "incumbent" for "dominant", but you have not amended para.1 in the Moginie James claim. It does seem to me, as they are being heard together, you ought to be tracking amendments.

MR. MACLEAN: You are right, Sir, we will do that.

THE PRESIDENT: And that can be done by Friday?

MR. MACLEAN: Yes.

THE PRESIDENT: Right, 4 pm on Friday. Relevant market: as I understand it from the Defence - Mr. Harris, this, I think, concerns you. You say the relevant market is the market for the purchase and supply of property portal services in the UK - is that right? Mr. Harris, is that right? That is my understanding of your pleading.

MR. HARRIS: Sir, there are two relevant markets to identify. I am just trying to find the paragraph number.

THE PRESIDENT: Paragraph 35.
MR. HARRIS: It is not quite 35.
THE PRESIDENT: Paragraph 35b says "a relevant market". So you are talking about a relevant market----
MR. HARRIS: It is para.30, Sir.
THE PRESIDENT: -- and 35a says "the relevant market".
MR. HARRIS: Sir, if you were to turn two pages earlier to para.30, it is most helpfully set out there. "The relevant product markets are" and we identify two. "(i) the market for the provision of services by estate agents", so that is a market in which the estate agents compete with each other as to how they provide their services to property vendors and property buyers. That is the one that is ignored, as we apprehend it, by my learned friends.
THE PRESIDENT: It is not ignored, but it is obviously another market.
MR. HARRIS: Yes. And "(ii) the online property portal market" and in their Reply one of the things----
THE PRESIDENT: "The online property portal market", that is the same, is it not, as what you are saying in 34. "The purchase and supply of property portal services", that is what you mean by the "online property portal market", is it?
MR. HARRIS: Correct, Sir, yes.
THE PRESIDENT: And that is a relevant market?
MR. HARRIS: That is right, Sir. We say two relevant markets and what my learned friend's team does is they say that the second of them, the online property portal market they agree is of primary relevance and they say various things about it. But, what we do not have in the pleading at all, as far as we can make out, is a response to the other market, namely, between estate agents. That seems to be overlooked or ignored, notwithstanding the facts that there are one or two references in the draft Amended Reply to a market in which estate agents compete with each other. I am happy to take you to these references. What we say is unsatisfactory as we do not know. We do not know what my learned friend's case is.
THE PRESIDENT: That is what I want to clarify. It is the second market, is the market in which the claimant competes?
MR. HARRIS: That is right, but not with us, with other portals.
THE PRESIDENT: With Zoopla and Rightmove and so on. And that is agreed?
MR. HARRIS: That has now been clarified.
THE PRESIDENT: And that is what they call the "UK portal market"?
MR. HARRIS: Right.

THE PRESIDENT: Yes, I understand, thank you. Right, so that market definition is agreed on your part, and is that agreed also, Mr. Hall?

MR. HALL: Yes, Sir.

THE PRESIDENT: Thank you. The other market that is referred to is the market for provision of service by estate agents to customers, vendors and letting agents and so on. Is that market definition agreed as a market definition, it is a separate market?

MR. MACLEAN: I believe it is, Sir. I do not believe there is anything in dispute between the parties. There is lots of sparring and----

THE PRESIDENT: Yes, I just want to clarify whether or not it is agreed?

MR. MACLEAN: Can I describe what my client's understanding of the position is. I apprehend it is common ground for all fair thinking people looking at these. The position is as follows: there is the UK portal market.

THE PRESIDENT: Yes, that is agreed?

MR. MACLEAN: That is agreed – in which compete, amongst others, Rightmove, Zoopla/Primelocation and my client. That market, it is common ground as I read the pleadings, is a double-sided market in the sense that the portal is used by estate agents, who are obviously the customers of Rightmove or Zoopla or my client, in order to advertise properties either for sale or for lease. The portal is also used then by those who are prospective purchasers of prospective lessees of the property. So the ultimate consumers, if you like, are either the people who want to buy or lease property on the one hand, and on the other side of the double-sided market, the ultimate consumers are the estate agents' clients, namely, people who are trying to sell or lease their property.

But, there is clearly, obviously, a market beyond the UK portal market, which is the market which my learned friend identifies at para. 30 of his Amended Defence, which is the market for the provision of services by estate agents, but that is not a market on which my client competes with Gascoigne Halman, as Mr. Harris said. But it is, as it were, downstream of the UK portal market, which is the market as we say in para. 27 of our Reply, which is of primary relevance. Mr. Harris jibs at the words "primary relevance".

THE PRESIDENT: Do not worry about the wording, and do not worry about the slightly combative way this is being addressed in the skeletons. I just want to be clear what is agreed and what is in dispute, and as I understand what you are saying is it is agreed that there is that market as they are defined in the UK. You say that it is of little or no relevance to the issues in this case. Mr. Harris may disagree with that, but as to the terms of definition there is not an issue, and the experts do not have to spend time, and we do not need

disclosure, which is the point that concerns me, which can be extensive where the dispute is about market, as to what the definitions are.

MR. MACLEAN: I believe you are right, Sir.

THE PRESIDENT: This is a draft Amended Reply and, therefore, has not been served, it would be helpful, for good order, if you added a sentence to, probably, para. 27 to the effect that the market (i) in para. 30 of the Defence, it is admitted that it is a market, whatever you wish to say, but it is not considered relevant to the issues in this case, or whatever you want to say.

MR. MACLEAN: We will do that.

THE PRESIDENT: Just a short sentence.

MR. MACLEAN: I am very grateful. Sir, while we are there, can I just take this very short opportunity, if you have the Amended Reply at para.30, which is responding to para. 32 of the Amended Defence, and it is dealing with the whole period, which you will have gathered is at the heart of the case. Can I just indicate for the benefit of my learned friend, Mr. Harris, if one looks at subparas d and f, which do not, at the moment show any amendments. Two of Mr. Harris' complaints and bases for his supposed unless order are the ones admitted in d and f. Sir, we are entirely content to strike through, and will strike through the words "is admitted" in subpara d and subpara f.

THE PRESIDENT: I think the words you strike through – sorry to interrupt you – are "admitted and".

MR. MACLEAN: You are right, Sir, I cannot read my own writing, "admitted and" and that, I think, allays my interest on those points.

THE PRESIDENT: One other point on the pleading in terms of the two actions, in your Amended Particulars of Claim, 19 on internal p.6, you have made some amendments there on the construction of para. 6.

MR. MACLEAN: On the procure point.

THE PRESIDENT: Yes, but proper construction and so on, of the Group. I do not when you are, as now agreed, amending the Particulars of Claim in the Moginie James claim. Is it appropriate to make the same amendments or is that not necessary?

MR. MACLEAN: As I understand the position, there is no group in Moginie James, as far as we are aware, and hence the point does not arise; that is why we have not had to press that point.

THE PRESIDENT: I understand. The last point I wanted to raise on the pleading is on your draft Amended Reply, para. 36, this is s.9 "Exemption". I can understand what your essential

case is on the competition law allegation, namely, that this was a market, the portal market, in which there were two major players, which together have very high market share. The formation of your client introduced a third significant player and therefore further competition in the market when it had been a duopoly, and the arrangements that are being attacked were essential in order to overcome the barriers to entry in to that market and therefore introduce more competition. That seems to be your basic case, if I have understood it correctly.

MR. MACLEAN: Your Lordship has.

THE PRESIDENT: Therefore, you say it is not anti-competitive at all. But then there is the alternative plea for exemption in para. 36.

> "The arrangements (i) contribute to promoting economic progress whilst allowing consumers a fair share of the resulting benefit. (ii) do not impose restrictions which are not indispensable to the attainment of such economic progress. (iii) do not afford the possibility of eliminating competition in respect of any substantial part of the products in question."

On the first of those three, allowing consumers a fair share of the resulting benefit, there is the benefit that you say is more competitive, but it is not very clear to me just from that plea what actual resulting benefit you have in mind. Is it lower prices, is it greater choice, is it that properties will be listed that were not listed before on the two big sites? It is not really spelt out and I think it could be and should be, unless I have missed it somewhere. There is reference at various points in the pleading to price movements, but it is not actually tied in with this.

MR. MACLEAN: Can I help, Sir. We are entirely content to treat the letter from Quinn Emanuel of 20th July, which is the one last week, which in a number of ways, not with conspicuous charm, raised complaints about the Reply - we are content to deal with the requested further information on para.36 in the way that Gascoigne Halman suggest, and to provide further information or further particulars of para.36 by the date which they suggest. We do not accept - I do not want to arid debate - that this is a mere bare pleading or a mere incantation of the words of the statute, and there are some cases about that. We do refer back to para.15.

THE PRESIDENT: Yes, I understand that.

MR. MACLEAN: I accept that s.9 is obviously a different beast from the anterior sections of the Act. As Mr. Harris himself accepts, there is, or often is, a factual overlap.

THE PRESIDENT: I am not getting into that dispute. I can understand points 2 and 3 in your para.36, as first covered by para.15, but I did not actually see the resulting benefit was particularly dealt with in para.15. I think it needs to be identified more clearly, and you can either do it by way of further information or, depending on when this pleading is going to be served, by particulars in the pleading.

MR. MACLEAN: Sir, it is not for me to bargain with the court, but can I make the following suggestion: we do take seriously the point that you have made, which is reflected to some extent in the Quinn Emanuel letter. We would like to discuss the point further with our economic expert. If we are able to do that with dispatch then we will deal with the amended Reply. We do not want to hold up the formal service of the Amended Reply simply to deal with this point. If that is not possible with suitable dispatch, by which I mean the end of the week, then we will do it as soon as we can by way of further information.

THE PRESIDENT: I think we need a date for the further information. I can understand if you say you might not be able to do it by Friday.

MR. MACLEAN: The other side have asked us to provide responses by 18th August.

THE PRESIDENT: You are content with that date?

MR. MACLEAN: We will do that, Sir, and we will do it sooner if we can.

THE PRESIDENT: I will say "by 18th August". I am only dealing with that as regards para.36. I am not at the moment concerned with the other matters.

Then the other thing, before we get to timetabling, on pleadings, is this: Mr. Harris, you say you want to serve a rejoinder?

MR. HARRIS: Yes, Sir.

THE PRESIDENT: Why?

MR. HARRIS: Because of the way in which this competition case has emerged, namely, it was envisaged conceptually that there would be a competition response when the particulars were put in, but, strictly speaking, that is a breach of contract set of particulars, not raising competition law formally. The first time that the competition issues arise formally in our action, and similarly with Moginie James, was in the Defence, now amended. That is, to some extent, the starting point for the competition law.

Then it has been defended, but that, of course, technically takes the form of their Reply, and it would be absolutely par for the course in any competition claim, particularly where there is an exemption plea raised for the first time in what is akin to the defence, for there to be a reply. So that is the first reason.

The rejoinder, although technically called a rejoinder in this case, is effectively substantially a reply in a normal case, and that would be an orthodox way of proceeding.

Secondly, the Amended Reply, as you will have seen, Sir, is a very substantial document, 40 pages. It raises not just legal matters to which we would like to respond, including the exemption plea when particularised, but also some factual matters which, in an expedited case, we think could be sensibly dealt with at the outset whilst the pleadings are being finished off.

THE PRESIDENT: What are the other factual matters?

MR. HARRIS: For instance, just to give an example, we had pleaded in our Amended Defence at the end of para.39 or 40 a meeting between----

THE PRESIDENT: Yes, the four party meeting.

MR. HARRIS: The four party meeting, and certain things are said by way of factual response to that in the Amended Reply, and we have things to say about that upon which we are taking instructions right now.

There is a draft rejoinder in existence. Sir, I am not in a position to circulate that now, but there are quite a lot of other things that we say could sensibly and helpfully be clarified by way of what is akin to a reply in a normal case.

I also note that there is a rejoinder, no doubt for the same reasons, albeit a short one in the Moginie James action.

THE PRESIDENT: That is to do with a wholly different point about the disclaimer, is it not?

MR. HARRIS: It is, but of course it is not wholly different in this sense: that point is taken against us as well in the draft Amended Reply, and we would like to close the pleadings on that point in the same way as Moginie James has closed the pleadings in response on that point in its case.

THE PRESIDENT: That is nothing to do with the competition issues, is it?

MR. HARRIS: No, that is a fair point, Sir, but we would like the pleadings to be finished off, not least of all because, as I am going to develop later, we say that disclosure should be moving forward, and it is a good idea to try and bring the pleadings to a close, including for that reason.

I respectfully submit that the matters that Mr. Woolfe and I have already been able to plead into a draft rejoinder will be of assistance, and that is why they are done. We are not proposing to reply by way of rejoinder on every single paragraph, or every point, that is not its purpose. They will be of assistance, in our respectful submission, and that is why we would seek permission.

Just dealing with the dates, Sir, because you were speaking to Mr. Maclean about that, we say that the sensible course is, if they are going to have until no later than the 18th in order to update their pleading on all the points that you have mentioned, with which we obviously completely agree, then what they should do is amend so as to include the further particulars they are going to produce on the exemption, s.9. In that way at least all of their pleadings are closed.

THE PRESIDENT: You will get that by 18th August at the latest. It is sensible for you to deal with that in any rejoinder.

MR. HARRIS: Exactly, Sir.

THE PRESIDENT: What date would you suggest?

MR. HARRIS: We had suggested in our skeleton the end of August for our rejoinder. Could I just add this ever so slight caveat, Sir: if it were a few days beyond that because, we would just identify to the court, with summer vacations it is possible that there might be a little slippage, but we are going to work to the date of 31st August, providing----

THE PRESIDENT: No, we will have a date. There will not be slippage. You will have to apply if you want to extend that.

MR. HARRIS: I accept that, Sir.

THE PRESIDENT: I will make it Friday, 2nd September.

MR. HARRIS: I am grateful, that is a sensible course.

THE PRESIDENT: I will make clear, I think it is right you should reply to the exemption point. It seems to me those are pretty full pleadings. One does not always need a reply to all, particularly with an expedited trial, and I do not think the Tribunal is helped by detailed point by point High Court style replies. As you know, pleadings here generally take a different form anyway. I think, if you just focus on those paragraphs where factually there is something, or by way of legal assertion, and leave the rest, so it need not be another long document.

MR. HARRIS: We agree, Sir.

THE PRESIDENT: That will no doubt help you get it done in time.

MR. HARRIS: Sir, I am very grateful. Those directions are effectively agreed.

Sir, whilst I am on my feet there are one or two other matters. Obviously, we are very grateful that the court should have taken this opportunity to seek to have Mr. Maclean clarify his case and then plead it out.

THE PRESIDENT: I think, as I said, apart from this one point, I thought the case was very clear, but there we are.

MR. HARRIS: Sir, can I just take a few moments to identify one or two other areas that are troubling us, and it will not take very long. There is a miscellany of points that we have identified in correspondence and/or in the skeleton argument. Forgive me, if it looks like we are switching from place to place, but that is the nature of the beast. In the Amended Reply at para.10, internal p.8, there is some confusion in our mind here that although my learned friends want to reply the word "Defendant" with "ZDG", which was an obvious error, he persists in using the words just prior to that “price increases”. He is referring here by way of reply to paras.9 and 10 of the Defence, but if you then go down that sentence he is talking about “paras.4a and 5a above”. So the critical thing is to just turn up 4(a) and 5(a) above in his own pleading in the Reply, because what he is doing is saying “the price increases as set out above”. If you look at 4a, and the same thing happens at 5a, these are not price increases, Sir, and that is where our confusion arises. What is pleaded here is something that is a term of art in the industry, “average revenue per advertiser (‘ARPA’)”. Then there are various particulars given about Zoopla’s ARPA and its alleged growth, and so on. Then over the page the same thing is said about Rightmove - Rightmove’s ARPA moved in this way, that way and the other way. The plea that is made against us is that these are price increases.

This is not an arid point, Sir. If it is intended to say “the ARPA increases”, so be it, but can that please be made clear, “price” deleted and replaced with “ARPA”? If it is just a slip, no problem, but let us correct it.

If, however, what is intended to be meant is somehow that ARPA is analogous with, or can be drawn as part of, or indeed forms a price increase, or something like that, that needs to be explained because we do not follow it.

THE PRESIDENT: There was reference to fees being charged in the Particulars of Claim, which was not ARPA, it was actual fees, prices.

MR. HARRIS: Exactly, Sir, yes, and that is another confusion. Just taking them in turn, that is one, and this we pointed out but it has not been responded to.

Some of them are relatively minor, Sir, but this, hopefully and I respectfully submit, is an opportune time to have guidance from the court because we have reached an impasse in the correspondence.

I accept the next one, but because it is close I will turn to it next, is relatively minor. There has been a change in the Reply at para.7. In the Amended Reply there was another ZPG, and it has been changed - no problem. What had happened, if you read it, Sir, is that it originally read in para.6, “ZPG admits the network effects but illogically declines to admit”,

etc, “this non-admission is inconsistent with”. So when it was originally pleaded it was ZPG was saying such and such, but it is inconsistent with such and such. Then the particulars that are given are ZPG’s particulars.

THE PRESIDENT: And Morgan Stanley’s.

MR. HARRIS: Yes, certainly at (a) and (c) it is about ZPG. When we originally read it, we thought, we do not agree, but at least we can see that what you are saying is ZPG is admitting (a), but that is inconsistent with what ZPG is saying elsewhere at (a) and (c). However, because ZPG is now being crossed out because it was a mistake, what we have more difficulty with understanding is why it is now said that the defendant admits so and so, but that is inconsistent with, and then it is not what the defendant has been saying, it is what somebody else has been saying.

THE PRESIDENT: What is wrong with that?

MR. HARRIS: What we do not quite understand is whether it is intended to remain the case that my learned friend for the claimant is saying that the inconsistency arises between, on the one hand, what the defendant is saying or doing or alleged to be admitting as opposed to other people.

THE PRESIDENT: Yes, that is what is said.

MR. HARRIS: If that is the case----

THE PRESIDENT: It clearly is, is it not?

MR. HARRIS: I beg your pardon, Sir?

THE PRESIDENT: It is very clear, is it not?

MR. HARRIS: Sir, we thought there was a difficulty, but if that is the case, so be it.

THE PRESIDENT: I do not think Morgan Stanley was ever a party to this litigation either, as far as I know.

MR. HARRIS: The clarity that we require has been provided. The next point, and apologies, some of these are more minor than others. The Amended Defence that we, at para. 14, see, this is raised in the skeletons and the correspondence, Sir, the Amended Defence para. 14(c), if you see it towards the bottom, p. 78.8:

> ""“Further, insofar as the OOP rule allegedly reduces or limits agents’ costs which is not admitted it does so not by creating any pro-competitive efficiencies, but solely by restricting the services (output) that the members of the claimant are permitted to provide, in that such members are not permitted to provide their property vendor clients with listing on more than two property portals.”

In other words, this is an output restriction on the market between estate agents, that was (i) in para. 30. We thought that was very clear, and it is not the only reference we make to output restriction in that market in the pleading.

What had happened in the Reply is that my learned friend's team says that they do not understand that, and as a result they have not pleaded to it. If you turn up in their Amended Reply, to p.11 at d. The point where we would either like further information or clarity, or both, is where they say in the middle they do not understand our plea, and therefore they have not responded to it. We say the plea is clear and, in any event, it is certainly clear now.

THE PRESIDENT: Well, they do not know, it is clear, but . . .

MR. HARRIS: This plea at d misses the point altogether, perhaps because they did not understand it at the time.

THE PRESIDENT: I do not think it is something they need to respond to. It is clear what you are saying.

MR. HARRIS: It may be that my learned friend's team will have to clarify this anyway because it goes to the question of exemption and they have offered to provide further particulars on the s.9 plea, because what we are saying is that it is not a pro-competitive benefit to have an output restriction. Put another way, if the cost saving, assuming this is even going to be put forward by my learned friend, we do not know because we do not have his exemption plea, but if it is going to be attempted to be said that there is a cost saving, then we say, as a matter of competition law, it does not count as a pro-competitive benefit to have a cost saving if the only reason you have it is because you are restricting output.

THE PRESIDENT: I expect it is something you will say in your rejoinder again to the s.9 Exemption.

MR. HARRIS: The only reason I raise it now, Sir, is simply that if my learned friend is going to be updating his pleading by no later than the 18th, and he has heard clearly what the case is, it would facilitate everybody's life and the job of the Tribunal if he can respond properly.

The next point is in the Amended Reply at 15 f, it is talking about "benefit to consumers on both sides of the market" but you are not clear here which consumers my learned friend is referring to, if he is going to clarify his pleading----

THE PRESIDENT: Is it not what he has referred to in the Particulars of Claim, para. 4?

MR. MACLEAN: It is admitted at para. 6, Sir, of the Defence.

THE PRESIDENT: It is absolutely clear, Mr. Harris. Paragraph 4 talks about it as a two-sided market, two sets of customers, and that is what he is talking about, the customers on both sides of the market.

MR. HARRIS: But, Sir, this is where he is putting forward the benefit to consumers, which goes to the question of the exemption. That is, of course, one of the subparagraphs within s.9.

THE PRESIDENT: Are you saying it is not anti-competitive, it is pro-competitive? It is not about exemption; you are saying it is not anti-competitive at all.

MR. HARRIS: I accept that, Sir----

THE PRESIDENT: However you want to characterise it, you are saying it is not clear. It is said at the outset there are two sets of customers, estate agents on the one hand and prospective purchasers and tenants on the other, the two sides of the market. Now, they are saying the consumers on both sides – is it not obvious that is what is being referred to.

MR. HARRIS: What we are saying, Sir, is there are estate agents on one hand, and there are people who want to sell or lease their properties which is part of the other side of the market----

THE PRESIDENT: No, it is people who look on the website, who want to buy; those are the people who go to these websites, prospective purchasers.

MR. HARRIS: Yes, Sir, but people also go to the websites who want to sell their properties.

THE PRESIDENT: They might do to see what the prices are, but they do not----

MR. HARRIS: And to see what services are offered, in order to choose the portal upon which you decide to sell your property or lease your property as a landlord or a vendor, you have to choose between these portals. Do you go to Rightmove because they have great functionality, etc? Or do you go to Zoopla, or do you go to both of them, and that is relevant to the dynamics of competition in the UK portal market. How do they get their hands on----

THE PRESIDENT: I did not appreciate this, owners of properties, the people who put properties on the websites are not only estate agents you are saying?

MR. HARRIS: I beg your pardon, Sir. (After a pause) Sorry, I have missed out a step in the reasoning, for which I apologise.

THE PRESIDENT: Let us clarify that point because it would be helpful to know. If I want to sell my house, I might go into an estate agent and ask them to market it, and they might put it on, leave out the claimant, on Zoopla. Are you saying that I could circumvent the estate agent and go straight to Zoopla?

MR. HARRIS: No, Sir, let us rewind a minute, and I apologise. I missed out one step in the reasoning. When you are a vendor or landlord, it makes a difference to the estate agent that

you choose as to which portal that estate agent is going to be using in order to sell or rent your property.

THE PRESIDENT: Yes, but that is not two-sided, that is not what makes the UK portal market a two-sided market. They are talking about the users of the portal to search and advertise. It seems to me that, unless I am told otherwise by Mr. Maclean, the reference in para. 15f is to the two sets of customers in para. 4 of the Particulars of Claim. I can see that is being affirmed, so you do not need any further clarification.

MR. HARRIS: I am happy for that clarity, Sir. The next point is if you were to turn up our skeleton argument, please, for today's hearing.

THE PRESIDENT: That is the admitted and averred point.

MR. HARRIS: Yes, and we dealt with two of them, but on my counting there are----

THE PRESIDENT: This is a somewhat trivial point. It seems to me that Mr. Maclean has agreed to look through it and clarify that, but if they have admitted something that you say you have not actually alleged it does not do any harm. We are not going to spend time on that now.

MR. HARRIS: There we go. It is unhelpful in our respectful submission. We have already had to spend time on it. The last point, Sir, is something that you have already dealt with, with Mr. Maclean, but I just want to revisit very briefly, which is the use of the word "dominant". I understand now, well, we have gone back to an original understanding. We had originally understood that there was a clear dominance but then we received the amended particulars, and what is a bit confusing on the face of the Amended Particulars now is that the word "dominant" has been crossed out in para. 1, and it has been crossed out in para. 7, but it remains in in para. 8, and it remains in in para.11, but it has been crossed out in para. 12.

THE PRESIDENT: Yes, but that was explained. I raised that for that very reason. I took your point on the skeleton, that it was not clear, and I raised it, and it has been clarified. The reason it has been crossed out is it might have given the impression there was an allegation of joint dominance, so it is made clear it is not. It is dominance only by Rightmove, and it is dominance in the competition sense. So I take your point, that you raised it, and I have pursued it and I think the answer has now been given.

MR. HARRIS: Right, so that only leaves one point, Sir, and this is really a matter for Mr. Maclean and/or unless you, Sir, have any observations, which is that in 11(i) where it is most clearly pleaded that Rightmove was in a dominant position, whether the claimant, who is making that allegation, should provide in what would be the normal way, some

particulars of the market and/or the reasons for the dominance. For example, as we pointed out in our pleadings, 65 to 85 per cent market share by reference to what metric and in precisely what market? That is what one would normally expect to see as a minimum in a plea of dominance.

THE PRESIDENT: I am not sure you have, perhaps, got a (inaudible). Now that it is clarified have you actually responded to the clarified allegation?

MR. HARRIS: Now that it has been clarified we will, ourselves, have to have a look at whether there needs to be any tinkering with the Amended Defence, and we will take account of the clarification when we are doing our rejoinder.

THE PRESIDENT: You have given, I think, with your Defence a ranking by visits which shows Rightmove way out above everybody else, and over 50 per cent. They have said it is viewed as a must have portal by agents. There is no allegation of abuse of dominance here by Rightmove, it is not a case against Rightmove. It seems to me, whether they are technically dominant or not, as Mr. Maclean said, it is not an issue that need be explored in the case.

MR. HARRIS: So be it, Sir.

THE PRESIDENT: The facts seem to be, you might say, they are not a must have – fine. You can put in evidence about that, but the fact on which it is said they are in a very strong position and can increase their prices.

MR. HARRIS: I can leave it there; the important thing is that it has now been clarified in court today what is meant.

THE PRESIDENT: There is one point you raise that I want to take up with Mr. Maclean, and that is about the price.

MR. MACLEAN: Yes, Sir.

THE PRESIDENT: I think it does seem to me, unless you can set me right, that Mr. Harris has a point. There is reference in the original Particulars of Claim to fees in para. 8, fee increases. Then there is a reference in the Amended Reply and the draft to the ARPA. They are different things, I think.

MR. MACLEAN: I accept they are different things, and para. 10 of the Amended Reply goes on, as you will have seen, in the second part of that paragraph to deal with the rates charged by Rightmove to the defendant set out in para. 10 of the Defence, which appear to have remained static. I accept that there is a difference between the rates charged, and the average revenue per advertiser. Mr. Harris' point, such as it is, I suspect can be dealt with

by replacing the words "the price increases by ZPG" with the words: "The increases in the average revenue per advertiser" or words to that effect.

THE PRESIDENT: Yes.

MR. MACLEAN: I am not suggesting that the two are coterminous. I accept that they are different. I am not suggesting what my learned friend suggested I might be suggesting, that some clever point was to be made as to the interaction between the two. All we are doing is setting out the fact of the average revenue per advertiser and what had happened to it as regards both Zoopla on the one hand and Rightmove on the other. Then in the second part of that paragraph we make the point that the rates charged by Rightmove appear to have remained static and to have increased at a lower rate than the historic rate of growth in our client. So if you look at the last sentence, we have not been crediting Mr. Harris with this amount of credibility, but we have in fact identified in the last sentence the difference between price increases on the one hand and ARPA on the other. We will deal with the first sentence so that even Mr. Harris will be able to see that we have understood that distinction.

THE PRESIDENT: So it will be ARPA instead of price increase?

MR. MACLEAN: Yes, exactly.

THE PRESIDENT: It may be, I do not know, but if part of your case on exemption and benefits is lower prices or lower ARPA or both, that will be spelt out.

MR. MACLEAN: We will distinguish between the two, Sir.

THE PRESIDENT: Because that may come into the exemption.

I think it was important, although we have taken time on it, to clarify these points, because they will affect both the scope of witness evidence and disclosure. That, in turn, will feed into the timetable.

As far as disclosure is concerned, I have to say I am a little concerned about standard disclosure in this sort of case because it can easily get out of control and therefore end up in very considerable costs. We do not need disclosure on market definition after the discussion we have had. In particular, I am concerned about what may be involved if one approaches it that way in the Gascoigne Halman, if I call it, supplementary allegation. That is not in any way to reduce its significance, but there is what is termed the "collective boycott" allegation in the Amended Defence at paras.38 to 40. That suggests in a somewhat perhaps, say, speculative way that there were various discussions and meetings at which things may have been said. There clearly were discussions and meetings, but what was said is another question. There are a lot of people involved. I do not want this case to then proceed on the basis that, over what may be quite a long period, all the correspondence

between these people, all the emails, have to be trawled over and then be produced if they discuss the forming or operation of the claimant, so then there can be a fishing expedition to see if they say anything that might suggest a collective boycott. That would be disastrous in terms of costs. I have to say, I do not think that is warranted.

I have not been presented with any proposals for more targeted disclosure, and it is really not for the Tribunal to produce them, because it is for the parties to think about how more targeted disclosure could be conducted. Because of the time of year we are at, it is really not possible for you to come back in two weeks, or even for me to look at any written submissions in two weeks because I will not be here. I am a little bit at a disadvantage.

Clearly there has to be disclosure about the setting up of the claimant and also the prices in the market and the rates, and so on. How far is it envisaged it is going to go? This is really the disclosure that would be sought from you by, in particular, Gascoigne Halman.

Mr. Harris, I would like to hear from you on that? What actually are you expecting by way of standard disclosure?

MR. HARRIS: I will take this in stages, Sir. We are envisaging a process in which we would seek to agree with the claimant both custodians and search terms, and in that sense it is standard disclosure but founded in what I submit is the usual way, by sensible and reasonable proposals about disclosure, search terms and dates. That is point number one. However, we have no reason to think that cannot be achieved.

THE PRESIDENT: The dates would be what - what do you have in mind?

MR. HARRIS: I would have to go back to paras. 38 and 40 to give you a precise answer to that, which I am happy to do in a moment, Sir. I would make the following second and then third points, Sir, just so that you have the fuller picture.

The first is that we are obviously at a huge informational disadvantage on the boycott allegation. This is what we pleaded. We have done the best we can at the moment, but this is a secret group in our pleading. We have said this is a secret collective boycott that we do not have a great deal of information. That is notwithstanding, of course, that Gascoigne Halman was a member of the claimant from a certain date.

THE PRESIDENT: Yes, that is why I thought you would have some information. There really is not much pleading in all this that amounts to a fact supporting a boycott.

MR. HARRIS: That is because we say, Sir, that has been kept from us.

THE PRESIDENT: On that basis you say one could allege a price cartel and say we want all the disclosure because then we are going to find it. That cannot be right.

MR. HARRIS: With respect, Sir, we have gone to quite some trouble and effort to give particulars over several pages in 38 to 40 and they do include the particulars of the four party meeting, Sir, which are senior representatives. Our case on that, as pleaded, is that that was a direct attempt to obtain buy-in to the collective boycott by the claimant itself through its chief executive.

THE PRESIDENT: Is it firm on your pleading?

MR. HARRIS: Yes, but, Sir, that is a proper particular from which one can infer that the claimant was engaged in the earlier stages before it reached Countrywide, LSL and Connells, to participate in a collective boycott. The way in which it worked chronologically, Sir, is that they had, on our case, been participating in this collective boycott and they wanted, towards the latter end of the process to sign us up into the collective boycott because they were not having enough impact upon the market. They were not having enough effect. They needed to get the 20 per cent of estate agents around the country that comprised Connells, Countrywide and LSL into the collective boycott. That is the evidence that we will be giving.

THE PRESIDENT: That is entirely speculative.

MR. HARRIS: No, quite the opposite, Sir. We say in the pleading that that was what was going on.

THE PRESIDENT: You say it is to be inferred, but there is no evidence at all. I have read your para. 40, and all its sub-paragraphs and all its sub-sub-paragraphs - "it is likely to be abused", and so on. What period? It will help me if you tell me what dates you are seeking this very extensive disclosure to cover?

MR. HARRIS: Sir, may I come back to the dates in just a moment. We have pleaded emails at 40g and h, from which one can infer the existence of the collective boycott.

THE PRESIDENT: I do not see how it can possibly infer that. Those emails can be disclosed; you have obviously got them. This seems to me an absolutely speculative claim, but you tell me what period. I appreciate the four party meeting; you do allege expressly there was an attempt to achieve a boycott. In para. 39 you say "some time prior to January 2013", and in para. 40k you are talking about January 2016, so what period are we talking about?

MR. HARRIS: Yes, those are periods, Sir.

THE PRESIDENT: "Some time prior to January", what is that?

MR. HARRIS: In recognition of the constraints of litigation we would have to no doubt start from January 2013, and then go up to - it is a continuing behaviour, Sir.

THE PRESIDENT: That is three and a half years. You are asking me to order that for these custodians all their emails, all their correspondence, for three and a half years, is to be gone through?

MR. HARRIS: As it relates to the issues on the pleadings, Sir.

THE PRESIDENT: Never mind what is in them relates to, they all have to be disclosed?

MR. HARRIS: Absolutely, Sir. These are serious allegations. This is as we have pleaded. I have put my name on this. My chief executive of the group has signed this document. We firmly believe that this is what has happened, and we aim to prove it. We are at a huge informational disadvantage by this secret hardcore behaviour.

THE PRESIDENT: I daresay, but you need some firmer basis. You are talking about running up vast costs.

MR. HARRIS: Sir, that may well be the proper function of the fact that this behaviour has occurred. If this pleading stands - nobody is suggesting that this pleading should be struck out or cannot proceed, therefore these pleadings are on the papers. We, therefore, have the entitlement to disclosure. I am not saying standard for the moment, but disclosure. It had been agreed between at least the parties that it should be standard. We are at this massive disadvantage. This is serious hardcore anti-competitive behaviour, and we are entitled to plead it, and I have put my name and put Mr. Livesey's name on it, and therefore for it to be pursued. I am entirely with the Tribunal that we should manage that process as best we can. That includes custodians, it includes search terms and it includes dates. Those are the dates - January 2013 to date.

The third piece of the puzzle, Sir, that----

THE PRESIDENT: January 2013 I suppose to the date of the Defence which was fairly recent.

MR. HARRIS: May 2016 is the Defence. What I should identify to the Tribunal as well, Sir, since it is only proper, is that there may be a need to obtain on our part third party disclosure because there is - that is more properly a matter for us against these third parties as opposed to involving the claimant, but we are alert to that. These are allegations that start with other people who are not parties to this claim.

THE PRESIDENT: That is not before me today, is it?

MR. HARRIS: No, but I did not want it to be said later that there was a CMC at which we were talking about these things, and I did not identify that.

THE PRESIDENT: This very extensive disclosure you say is necessary because you are alleging serious hardcore anti-competitive behaviour. We then have to consider when that can be done?

MR. HARRIS: Yes, and this has been dealt with between the parties in correspondence and the claimant's team has had this pleading for over two months, and they had said, and I paraphrase, we do not see a problem with standard disclosure, and indeed we do not think it is very extensive and we can manage it by the date suggested. Then they brought forward the date.

THE PRESIDENT: I know that, but I am not sure how far that took on board the sort of disclosure you say standard disclosure here envisages. The custodians in the claimant are----

MR. HARRIS: There is likely to be few in the actual claimant. We have identified the members of the board, Sir, and there is Mr. Springett, and I expect there is----

THE PRESIDENT: The members of the board are there, and so far as they communicate with Mr. Springett, yes. So far as they communicate elsewhere they may be doing it in their capacity as directors of other companies and will not be in the control of the claimant.

MR. HARRIS: I accept that, which is why there might be a need for third party disclosure.

THE PRESIDENT: I understand that. So it is obviously Mr. Springett in particular. Let me hear from Mr. Maclean. What do you say about disclosure and when it can be done? You understand now what is being asked for?

MR. MACLEAN: Yes, Sir. Can I just make the observation, first of all, that disclosure in the Moginie James action has taken place. Although the competition points are pleaded much more shortly, the same issues arise, and obviously there are separate factual issues about the particular misrepresentations. When one prints out all the disclosure which my clients have given to Moginie James and puts them in files, one gets six lever arch files of material, so not on any view a heavy documentary case.

We were a little surprised to see in Mr. Harris's skeleton argument the suggestion that there was going to be voluminous disclosure because we did not see where that was likely to come from. We accept, of course, that Mr. Springett is clearly an important player in this drama, and we accept that his electronic emails and so on are going to have to be searched for some period by reference to some search terms or other, we accept that. I, frankly, do not know on my feet whether there are other ancillary characters who may also be searched, but clearly Mr. Springett is an important player. So we accept that his documents will have to be interrogated, and as you know the usual way of doing that is to have a time period and then agree search terms, which can sometimes be a life shortening experience in litigation, but you agree the search terms because you can only carry out this electronic interrogation once. You then get spat out of the sausage machine the relevant material which you then

have to read through with human beings in order to see what, if any of it, has anything to do with the price of tea in the litigation.

Our position is simply this, that we are not anticipating searching Mr. Springett's email, or anybody else's email boxes, for three and a half years or anything like it, until we know what the search terms are, which are being asked for, presumably Zoopla will be one of them, I infer, it is hard to tell. But our position is that we anticipate being able to give proportionate disclosure in this case by early in September, that is our answer to your question, Sir.

THE PRESIDENT: That is apparently going to cover three and a half years of his correspondence and emails. You have heard what is involved.

MR. MACLEAN: I am not accepting that the three and a half years is necessarily the appropriate period. What one can do in the disclosure process, the critical thing is to search each batch of material only once. In this case, for example, since these allegations, such as they are, appear to centre on the four party meeting----

THE PRESIDENT: I do not think they do, you see, Mr. Maclean. Mr. Harris will correct me if I am wrong. That, as I understand it, is the culmination but it is said that this has been going on since at least January 2013. So it is three and a half years, that is what is being alleged. There are not much particulars to support that in the early period. There are various things from which it is said it can be inferred, or this suggests that something else was really going on. So that is what you are being asked to do. If you only provide that sort of disclosure round the four party meeting, I am sure it would be said that that is not adequate, so we need to address this now not in late September.

MR. MACLEAN: The obligation, obviously, to provide standard disclosure is to do a proportionate search.

THE PRESIDENT: Yes.

MR. MACLEAN: First, you identify the custodians, and that is essentially Mr. Springett and I am not sure who else, so far as my clients are concerned. If Mr. Harris wants to go asking for disclosure against third parties that is a matter, I am pleased to say, entirely for him. But so far as my clients are concerned, it is essentially Mr. Springett. So it is common ground that he is a relevant custodian, that he is a relevant custodian, that is obvious.

So, the next question is what are the parameters of the reasonable electronic search, and one question is dates, and the other question is search terms. I rather suspect it is the search terms which are going to be the critical factor, and the parties, I am afraid, as far as I am aware, have not liaised about the identification of those search terms, and, Sir, your putting

your finger on this issue highlights the fact that that is something, I suspect, that ought to be done sooner rather than later.

THE PRESIDENT: I am concerned about it, because I note in these cases that these matters can prove problematic.

MR. MACLEAN: They can.

THE PRESIDENT: And we are now in July, and there will not be anyone to deal with any issues on that in August. If you are aiming to give disclosure by the end of August, having a hearing, or even dealing with written submissions in September, because sometimes it can be dealt with in writing, it is rather late.

MR. MACLEAN: Can I just take instructions?

THE PRESIDENT: (After a pause) Mr. Maclean, can I interrupt you for a moment? Rather than you having to take instructions hurriedly, while you are on your feet, as it were, it is now five to one, if we park this until 2 o'clock, and you can consider it with your instructing solicitors and a representative of your client----

MR. MACLEAN: Mr. Springett is here.

THE PRESIDENT: It is very helpful that he is here, and then, maybe you can discuss it also before we come back – and if we want to put it back to 10 past 2 I can do that – with Mr. Harris, but I think it would be helpful to everyone if we had, at least in terms of period, obviously you will not agree every search term now, but to get an understanding of what is involved, and a realistic date by which it can be done, because I do not want the timetable where then it turns out you cannot do it and we are here in mid-September and then everything else starts getting out of kilter, and I suggest we deal with it like that, and then move on.

The next thing I think is experts. You want an economist, an expert. Gascoigne Halman want one economist. I think it is appropriate for the defendants to have a joint expert. I am not quite clear from what I have read in the skeletons whether that is agreed. You have said, Mr. Harris, you are quite happy for the other defendant to rely on your expert evidence, that is not quite the same as being a joint expert.

MR. HARRIS: No, very much so. The way we see it is these are separate cases with separate parties not consolidated, but to be heard together because of the overlapping issues. We are in a position to and propose to, call an economist to address the issues on the competition side of the case that we have fully pleaded out, we have thought about, we are in advanced work with that economist, and unsurprisingly, Sir, it has a price tag attached to it and it is because of the way that we see our case in conjunction with our expert. We do not mind in

the slightest if Moginie James wish, to put not an unkind term on it, to free-ride on the benefits, such as they are, for those parts of its competition case that overlap with ours, which may be their entire competition case.

THE PRESIDENT: I think it is.

MR. HARRIS: It seems to be, theirs is less fully pleaded.

THE PRESIDENT: If it is not, we need to know. But my understanding is that it is.

MR. HALL: Yes.

THE PRESIDENT: That is right, Mr. Hall, yes.

MR. HARRIS: But that is not the same as a joint instruction which also would imply, indeed, mandate, joint payment. We have not reached any agreement with Moginie James about joint instruction and joint payment, and it does not look that likely that we would, and yet these cases are not consolidated.

The second point, which is closely related is that if, and insofar as Moginie James wished to make any new, different, or additional points to that which our expert is going to address, and we are happy to liaise with them closely as to how our expert is progressing and what we are likely to say so they will know in advance whether they need it, then they can ask for permission to have at their own instruction, and their own cost exposure, any additional and new and different points. If they do not have any new additional and different points, no problem, because then they can just, to use this inapt phrase "free-ride" off the benefits of our expert. But what we do not agree, and have not been able to agree, and we are not sure it is being proposed is that there be formal joint instruction, and I anticipate that would be difficult because there would basically, as a minimum, have to be a 50:50 price split, and then everybody would have to work in exactly the same way on the same timetable to the same ends, and yet that is not appropriate for the cases where they are separate cases. So that is how we see it.

THE PRESIDENT: I see; would you be content to let Moginie James see your expert's report in draft so that they could then say: "There is this additional point" or ----

MR. HARRIS: Can I check over the short adjournment. I imagine that will not be problematic but can I check?

THE PRESIDENT: Yes, that would be helpful. Mr. Hall, as I understood it, you do not want to understandably, go to the expense of instructing an expert who would be duplicating, no doubt, a lot of what the other expert from Gascoigne Halman is saying, is that right?

MR. HALL: Yes. Can I update your Lordship?

THE PRESIDENT: Yes.

MR. HALL: Those instructing me have spoken to another expert in the last few days. He would be able to produce a rather shorter form report, if necessary, in pretty quick time, provided we had sight of a draft report from Gascoigne Halman at a relatively early stage, either to be used by us in the background or, if necessary, for him to give evidence in accordance with his report, on the issues that are pertinent to our claim, which are the same as those in the Gascoigne Halman Defence, I should put it, but my client's concern is that if it simply is able to rely on the expert evidence gathered by Gascoigne Halman, it will not have any measure of input, or have a very minimal measure of input, even if there is this possibility of additional points later on the draft report. It ought, really, to be able to have its own expert, at least to some extent, and have some input and control over the nature of that evidence.

So, there are now two options, Sir. The first, which would be appropriate in my submission, is that as you intimated there be a single joint expert, which would enable my client to have input on the instruction of the expert, and have more confidence then in the output as it were, but bearing in mind that the estimated fees according to the latest cost budget for Gascoigne Halman's expert are somewhere in the region of £250,000 in the entire case and, bearing in mind, as I have set out in the skeleton argument submissions Gascoigne Halman's case is far wider ranging than ours, it would not be appropriate in my submission for my client to bear 50 per cent of the cost, and something of the order of 20 per cent would be more appropriate.

That sort of cost, let us say around £50,000, for my client to bear is, in fact, based on the quotes that those instructing me have obtained so far, similar, possibly slightly less than the cost of my client obtaining its own shorter form report from its own expert. I am not wedded to the single joint expert idea provided that my client was given permission to rely on its own expert as well. A suitable alternative might be to allow us to rely on Gascoigne Halman's expert and then, assuming that time permits, to get our own expert report at that stage, once we have seen their report in draft.

THE PRESIDENT: I cannot, as it were, negotiate for you what share of the expert's fees is appropriate. Mr. Harris says it must be 50/50. I do not think it must be 50/50. There are issues raised by Gascoigne Halman that your client has not raised. Equally, the fact that it is not consolidated might not make any difference if there were two defendants. Equally, each defendant might want their own expert. It is not a formalistic approach. I think there may be practical difficulties in the expert, as it were, responding to the views of the market put by the two different estate agents, or group of estate agents in Gascoigne Halman's case,

who instruct him or her. I think it might be preferable to leave it you can have an expert whom you are discussing matters with, which you might want to know anyway for the benefit of, for example, cross-examining the claimant's expert. You will see the expert report of Gascoigne Halman's expert in draft, which you can share with your expert, and then you can serve an additional report only in so far as it makes additional points, not repeating their points through a different mouth.

MR. HALL: Yes.

THE PRESIDENT: Does that seem satisfactory to you?

MR. HALL: Sir, yes. I would just respectfully submit that I think you do have the power to control the payment. In so far as CPR Part 35 is applied by anything here, it does provide for the court to set how fees for joint experts are to be paid. Equally, I am perfectly happy with your suggestion, Sir.

THE PRESIDENT: You are probably right in correcting me that I do have the power. I think, just in practical terms, it might be difficult at this stage. One does not know quite how the work is going to divide out. Clearly your share would be less than 50 per cent, but whether it is 20 per cent, whether it is 35 per cent, it is difficult to say at this stage. It is easier to do afterwards.

MR. HALL: Indeed.

THE PRESIDENT: That, it seems to me, subject to anything that the claimant says, sensible, and that you are different party.

MR. HALL: I am very grateful.

MR. HARRIS: Sir, I do have instructions to agree to the notion of a sensible sharing of draft reports in good time.

MR. MACLEAN: Sir, I do not want to trespass on the debate as to who pays what share in the first instance of the expert. You will appreciate my client's concern in all of this, that both defendants, if they are right and if their cases succeed, will no doubt be seeking ultimate payment from my client. Our concern obviously is that in a case where the competition allegations of Moginie James are entirely subsumed within the somewhat wider allegations advanced by Gascoigne Halman, there is no proper justification for there being more than one expert. Mr. Harris in his skeleton refers to there being a new, separate or additional matter. First of all, there are not, none have been identified, and Mr. Hall does not identify any, but even if there were there is no good reason why a single expert could or should not deal with any such new, separate or additional matter.

Sir, we are content with your proposal subject to this: it would be appropriate, in our submission, for the Tribunal to order now that the defendants, collectively, shall only be entitled to call at the hearing of the competition issues one expert without further order of the Tribunal - in other words, there is a very clear presumption that there will only be one man or woman giving evidence at the trial. There will be one expert for me to cross-examine without further order of the court, which gives Mr. Hall the opportunity if, for reasons that one cannot presently fathom, the facts demand it, to ask for somebody else to come along and something else on some other aspect of the case. The Tribunal ought, in my respectful submission, to stamp firmly on the suggestion that there might be two experts covering the same ground at the hearing. Of course Moginie James can instruct whoever they like to help them in the background, and we can have arguments in due course about recoverability of costs. Obviously, if my clients win this litigation the point will not arise in any event.

THE PRESIDENT: There will be a PTR in this case. I think the way to deal with this is to have it rather earlier than is envisaged in the various proposals that are currently before the Tribunal, and have it in November, after experts' reports have been exchanged on the basis that initially there will be one expert with the arrangement that has been outlined, that his or her report will be shown in draft to Moginie James. At that PTR, Mr. Hall, you can apply for permission to serve an expert's report for your client, no doubt explaining in the application what the additional separate points are that you think it is right you should have permission to cover. I think it is highly undesirable in a case like this that there should be two experts pointing to the same conclusions. It may be that you say there are clear differences and there is a very important point that your expert wants to make. I think that can be accommodated in November.

MR. HALL: The only thing I would say about that, Sir, is that I have seen the helpful table from my learned friend Mr. Maclean which sets out the proposals, and at present it is 4th November on the claimant's timetable for expert reports and 2nd December on the defendants' side. There is a point I will make later about why I would not want that to come forward in any event.

THE PRESIDENT: In that case it might be that it is in December, but it will be after the exchange of experts' reports.

MR. HALL: The only difficulty with that is that if we are working to a February trial, and we might be working to a January trial on the claimant's timetable, but we say February, there might then be some difficulty in getting our report, just in terms of time. If my client does

not have permission for an expert at this stage then it will be incurring those costs without permission and, *prima facie*, unable to recover the same from the claimant on success. What I would prefer, respectfully, is that I at least have permission to rely on evidence. Of course, if my client goes off and gets a report, which it did not really need then, regardless of our permission, the claimant can argue that we should not recover the costs of that in any event. At least it will give me the ability to recover those costs at a later stage if I have that permission for at least a written report, and then at the PTR I can address the issue of oral evidence from the expert.

THE PRESIDENT: Before we just finally resolve that, dealing with the hearing date, because this sort of links into that, Mr. Maclean, on what is said, it seems to me the amount to be done here, having the trial in early February as opposed to mid-January is not going to make a huge difference. You have got the undertakings, as I understand it, from both defendants - is that right?

MR. MACLEAN: We have undertakings from both defendants, but as we have sought to explain in our skeleton argument there are other things happening. In particular, there are other tentacles of the Connells empire which are now listing on Rightmove, Zoopla and on my client, and, as matters stand, undertakings have been sought from that Connells undertaking and those have been declined. No undertaking has been given. What is going on here is that my clients, as the start-up entrant into this market, are being assailed on a number of fronts, put to very great financial cost. One can see why, from Connells' point of view and Zoopla's point of view, Connells being a significant shareholder in Zoopla, that all makes good capitalist sense.

Sir, it is very important for my clients that this case comes on as soon as practicable. Of course I accept that it cannot come on impossibly quickly - of course I accept that. I also accept that the difference between January and February clearly is only one month.

THE PRESIDENT: No, it is less than a month, because I think you are saying 16th January and they are saying the beginning of February.

MR. MACLEAN: I accept that to many courts on many occasions that sounds as if we are dancing on the head of a smallish pin - I take that point. What we are really concerned about is that the case comes on as soon as practicable. We respectfully submit that practicality can be achieved by that date in mid-January. If the court considers that it would be sensible to take those extra two or three weeks, then so be it. We understand that the Tribunal can accommodate either January or February, and we can work accordingly.

THE PRESIDENT: I see the problems that your client has - you do, of course, have a damages claim - and the pressures you are under. I do not think that it is going to make such a difference to your client's economic survival if this case is heard three weeks later. What I have in mind, and I will throw this out to all of you so you can think about it over lunch and therefore the timetable that we should achieve, is that the trial is probably about 11 days on the basis of openings, one day, witnesses of fact, four to five days, experts, one to two days, and it may be a case where the experts' evidence can be heard concurrently - in other words, a hot-tub - two days off to prepare written closings for the parties, one day for the Tribunal to read those written closings, which has to be factored in, and then one day for the actual oral closings.

I was not quite clear from some of your time estimates whether you are allowing time for the Tribunal to read written closings or not, but it is no good you producing them and turning up the next morning. That has to be factored in. That does not include pre-reading. We do not factor in pre-reading in our listing, and we do pre-read extensively, but that does not have to be accommodated. On that basis, because there will be pre-reading, we would start on 3rd February, which is a Friday, with the openings, and that will give the Tribunal the chance then to do some more reading over the weekend after openings, which is always helpful, so that we go straight into the evidence on the Monday.

That is just a few days, I think, earlier than the defendants may have suggested, but not much, one working day earlier, and a matter of a couple of weeks after the date you had advocated.

If you want, in the light of that, to think about the timetable in which we have now included the further pleadings, that the further information for the intended reply is 18th August, the rejoinder is 2nd September, and therefore disclosure and everything else, and I will reflect on the question of the experts, there is not a lot between you all but there is a little, what would be the appropriate orders as regards the position in Moginie James. We will come back to that at 2.15.

MR. MACLEAN: Depending on how your reflection goes, Sir, I would like, if you were remotely attracted by what Mr. Hall said in his last intervention, to say something about that, if you were minded to give permission to both defendants at this stage to adduce evidence, even only in written form from their own expert, as opposed to the proposal which you put to Mr. Harris and Mr. Hall earlier, with which, subject to the point I made earlier, I do not dissent from.

THE PRESIDENT: I will give you that chance.

MR. MACLEAN: I am very grateful.

MR. HARRIS: Sir, if I could say one thing before the short break, because it is going to happen over the short adjournment, I have been asked specifically to draw to the Tribunal's attention that in the discussions over the short adjournment about who the custodians are and how long it might take to deal with them, can we please have an indication from the claimant's team how big in, if you like, in computer terms megabytes or whatever it is, the inbox of Mr. Springett is? Then we will be able to take instructions over the short adjournment about how manageable that is even if it is for X period or X plus Y period.

Sir, simply because you were addressing the timetable, can I draw to your attention an update to our skeleton. We said in the skeleton we thought it was likely to be four witnesses of fact, and the Tribunal has just said that the witnesses of fact on this 11 day timetable will be four to five days. I am not sure that this makes a difference because there is obviously flexibility in there, but it is more likely, for our part, that we will have six to seven witnesses. We have done some further thinking about that and there may need to be witnesses who are from third parties, but who are called by us. That was not fully in our mind when we named four in our skeleton. I am not sure it makes a difference but I did not want the Tribunal to be unaware of that update.

Sir, it would help us if the Tribunal could indicate that, to facilitate the discussions over the short adjournment, we would like to know the size of the inbox.

THE PRESIDENT: You may not get it in strict quantification terms. I do not know what is available in a short time, but you will get some indication.

MR. HARRIS: I am grateful, Sir.

THE PRESIDENT: It may be that we should say that witnesses of fact are likely to last five days, not four to five, and perhaps even five to six. Exact timetabling is difficult until all these things have been ironed out, but it will not change the start date.

Can you come back at 2.15? I have to finish at 3.30 today to go to meetings, but I think that should not present a problem given what we have achieved so far.

MR. MACLEAN: I think we have made some good progress, Sir.

THE PRESIDENT: So 2.15.

(Adjourned for a short time)`

THE PRESIDENT: Can I just say in light of what Mr. Harris said, just before we rose for lunch, on the length of trial I will say 11 to 12 days, beginning on 3rd February, and it can end on 20th February, which is the Monday. It must finish that day so it is a fixed end, which would then be oral closings if it is possible to do them on the Friday so much the better, but

we need a fixed end because, as you will appreciate, we have two members who are not full-time, and have other commitments. That will give sufficient flexibility, I think, within that period, for how long experts need, how long witnesses of fact need, and that will be clearer at the PTR when you know exactly how many witnesses you have and the nature of their evidence.

MR. MACLEAN: I am very grateful. Can I indicate the progress that we have made over the short adjournment?

THE PRESIDENT: Yes.

MR. MACLEAN: Can I deal with directions first of all? Taking on board your Lordship's indication that the trial will start on Friday, 3rd February, can I then invite you, Sir, to take up the little table that we handed up this morning? Unfortunately, it does not include disclosure, which is the next step. I am going to take the Gascoigne Halman proposals, Mr. Harris' proposals. We have already dealt with the date for the particularisation and so on of 18th August and the rejoinder on 2nd September, you have dealt with that.

On disclosure, Gascoigne Halman suggested 23rd September. We are content with that. I am going to say a little bit more about our proposal for the ambit of disclosure in a moment. Picking up the right hand column, 21st October for factual witness statements, we are content with that. Reply statements on 11th November. Experts' reports on 2nd December. Then we pause there because we need to interject before the next step, the PTR, for one day at some point in December, we do not have a date for that, I do not think anybody has a date, but we can no doubt find one, so we need to find a date in December for the PTR. Expert reply reports can I come back to in just a moment, if I may. The experts joint statement we suggest 16th January, just a very slight tweak. Trial bundles brought forward to 18th January. There is no reason why trial bundles cannot be in production while you are waiting for the experts' joint statement, which is usually only two or three pieces of paper. The PTR, of course, is moved to December. Skeleton arguments five days before the hearing. Now, if that means five clear working days in a sense I do not mind, I do not care. But if it means five clear working days then that would be 26th January, heading towards a start date of 3rd February, assuming that skeletons were to be exchanged. As you know, Sir, we suggest, and we can perhaps have this debate a little later. We suggest that it is appropriate for skeletons to be sequentially served, and we would be suggesting that the defendants' skeletons would be served on Thursday, 25th January, i.e. one day earlier than Gascoigne Halman's proposal, and our skeleton in response be served on Monday, 29th

January, i.e. one working day after the Gascoigne Halman proposal on the Monday, with the case starting on the Friday.

The point I have not dealt with then is the experts' reply reports. The position is that our expert has profound difficulties in December. We can live with the date of 2nd December for the main report, because it would be in the can by the end of November, but he is simply not available in December, and so we have to push the date for expert reply reports into January, and our proposal, which I have discussed with my learned friends for the defence is Monday, 9th January. Mr. Holmes tells me that our skeleton should be Monday, 30th January, not 29th.

Those dates are, as I understand it, pretty much agreed between all the parties, I think Mr. Hall has one little wrinkle with factual witness statements, which he can explain. I do not understand there to be any dissent from the slight tweaking I have suggested to the expert reply reports the joint statement or the trial bundles. There is obviously an issue about sequential or exchange of skeletons, but subject to that I think that is the shape of the directions which we would be suggesting.

THE PRESIDENT: I would like to introduce one additional stage, as I understand you said factual reply evidence 11th November.

MR. MACLEAN: Yes.

THE PRESIDENT: Experts' reports 2nd December. I would like there to be a without prejudice meeting between the experts before they prepare their reports, I find that can assist and, as you may know, it is the practice in the TCC, that is without prejudice, experts only, no lawyers in attendance; so if I say by 21st November, the exact date they agree between them. A without prejudice meeting between experts with no lawyers in attendance by 21st November. So there is a little tweak you said about the witness evidence that Mr. Hall wants to raise.

MR. MACLEAN: Yes, and then we have to pick a date for the PTR. The other thing, my Lord, is I want to tell the court what we are proposing by way of disclosure on the----

THE PRESIDENT: Let us pause there, let us try and finish the time. If the PTR was in the week of 12th December, for a date to be fixed but in that week.

MR. MACLEAN: For one day?

THE PRESIDENT: For a day, yes. Let us try and complete that, shall we? Mr. Hall, you have a point on the witness evidence, is that right?

MR. HARRIS: Yes, Sir. There is the extant security for costs application, the entirety of my client's application, and the balance of Gascoigne Halman's application, and because of

counsel's availability generally, and potentially the Tribunal's and the court's availability as well, that cannot be heard until the week commencing 12th September. There are, I think, a couple of dates that Mr. Maclean and I have identified in that week which would be suitable, but even if we take one of those dates, say, 14th September, if security is ordered, and 14 days are given to pay it, it would be the end of September before that security is paid, if it is paid. Bearing in mind the issues about the claimant's impecuniosity, and the fact that they have conceded in relation to Gascoigne Halman that when the criteria for costs are met it is a matter of amount rather than principle, then in my submission there is a legitimate concern that they may not, in fact, be able to meet any security payment, and my client should not be put to the significant cost of witness statements prior to that security payment being made. In order to give a sufficient buffer to commence that work after security is paid, if it is paid, all we ask for is one additional week; we have asked for two but, bearing in mind the rest of the timetable, one additional week to 28th October is not unreasonable and should not cause a problem with the rest of the timetable. We would also ask for an extra week on reply statements, but I am less concerned about that. It is the first date of 21st October, which I would like pushed back to 28th.

THE PRESIDENT: Anything you want to say about that, Mr. Maclean?

MR. MACLEAN: I neither commend nor otherwise that suggestion, it is a matter for you, Sir.

THE PRESIDENT: It is not going to cause a problem with reply or experts, is it?

MR. MACLEAN: Mr. Hall's clients, as I understand it, intend to call two to three factual witnesses. It is a little difficult on the pleadings to see what the factual witnesses at Moginie James are going to bring to the competition issues party. They do not have the slightly more fact heavy allegation that Mr. Harris advances about the anti-Zoopla collusion and so on, but if he wants an extra week I do not go to the wall over it, Sir.

THE PRESIDENT: Mr. Harris, are you asking for an extra week?

MR. HARRIS: Can I run through them, quite a lot are agreed.

THE PRESIDENT: Sorry, I thought they were not agreed.

MR. HARRIS: Quite a lot are agreed. Just from the top: Reply on 18th August, yes. Rejoinder on 2nd September, yes. The current agreement between myself and the claimant is 23rd September for disclosure, but if it is to be the case that you are persuaded, Sir, to change the factual witness statements' date from 21st to 28th October, as to which my client is entirely neutral, we hear what Mr. Hall has to say, we understand it, and we are relaxed if that goes to 28th. But, if it goes to 28th then we respectfully suggest that it makes sense to add a corresponding week on to the date for disclosure to make it 30th rather than 23rd.

Likewise, if it is to go to 28th, then it makes sense to perhaps add at least a few days on to 11th November, maybe to 14th or 15th, maybe not a whole week, because it is the gaps that have been thought through as well as the dates. So those are the comments to there. We have no objections, Sir, to a WP meeting of experts about 21st November. No objections to experts' reports on 2nd December. No objections to a PTR in the week commencing 12th December subject to finding a date that is convenient to the Tribunal and counsel. I think there are some availability issues for various others in that week.

So, so far so good. Sir, the next point is expert reply reports, Monday, 9th January. We have no difficulty with that on the basis that we have been told that my learned friend, Mr. Maclean's expert is simply not available in December, so be it. What we say though, however, is that there is now a relatively unduly short gap between the reply report and the experts' joint statement. We suggest that rather than bringing that forward from 18th to 16th, that seems to be the wrong direction. We would be better to have that moved two days the other way to 20th and then the gap between the reply report and the expert joint statement is from 9th January to 20th January, or at any rate at least not brought forward – it is obvious why not.

We see, however, no difficulty with trial bundles being on 18th January, even if the experts' joint statement is not done until 20th because it can simply be slotted in.

THE PRESIDENT: Yes.

MR. HARRIS: That then leaves a dispute about skeleton arguments, which I will address you upon in a minute, but then the last thing, Sir, which is not dealt with at all in this timetable, but needs to be dealt with in our submission today has been adverted to just now by Mr. Hall. There needs to be, in our submission, some directions preparatory to the security for costs and fortification.

THE PRESIDENT: I think that is understood. We are coming back to that.

MR. HARRIS: We will come back to that.

THE PRESIDENT: As far as witness statements, Mr. Hall, I hear what you say. I am not persuaded. It seems to me that if you do not get security for costs and they do not park the money, you have incurred expense then you will recover that expense. One thing to say they cannot give security a whole trial, but for the expense of preparing some witness statements, for those costs I do not think you are at serious risk of, so I will keep those dates 21st October, 11th November, and the experts' joint statement 9th January. Mr. Maclean, I think Mr. Harris has a point, there is no difficulty slotting the statement into the bundle, so it can be 20th January.

MR. MACLEAN: I think you just said "the expert joint statement 9th January"?

THE PRESIDENT: Sorry, the experts' reply reports 9th January. Experts' joint statement 20th, but trial bundles 18th.

MR. HARRIS: That only leaves the dispute about skeleton arguments.

THE PRESIDENT: And disclosure we have to deal with as well. So skeleton arguments, it is a question of whether they are sequential or concurrent.

MR. HARRIS: We say one of the reasons of making sure these pleadings are fully clarified is that everybody knows exactly what they are going to be addressing and, after all, my learned friend is actually the claimant, and yet he is suggesting that we should go first. He bears the burden of proof on various of these matters. They are all set out in the pleadings. There is no reason to depart from a usual order of everybody does it at the same time, and that is the order that we do suggest, namely, five days before but everybody exchanges.

THE PRESIDENT: I am not sure he bears the burden of proof on the allegation that there is a breach of Chapter I. I would have thought you bear the burden of proof.

MR. HARRIS: All I am saying, Sir, is there are matters going in either direction. Some people have the burden on this, some people have the burden on that. There are evidential burdens. All I am saying is the key point is that we have all got to a stage now where the pleadings will be fully ventilating the issues, so everybody knows what they are addressing so there is no need for sequential----

THE PRESIDENT: I agree with that. Mr. Maclean, I am going to have concurrent skeletons.

MR. MACLEAN: So be it, Sir.

THE PRESIDENT: Then we come to the outstanding question of the expert, and of Moginie James' position. Mr. Maclean, you wanted to consider that, and address me on it. I appreciate that there is a substantial overlap. They have been pursued in separate actions. They may approach it rather differently, given that there are very different kinds of estate agent practice, as it were. In saying that, I, of course, have in mind that the allegation is that what your client did is anti-competitive not the defendants, but nonetheless I think, subject to what you want to say, and you reserved your position quite fairly, to address me about it, it would be right to allow Moginie James to serve an expert report, supplemental to the experts' report, served on behalf of Gascoigne Halman, if so advised, to advance any additional analysis. But they will be at risk as to not recovering their costs of that, irrespective of the outcome of the case, if the Tribunal feels it was not a proportionate thing to do. I will apply my mind to that over lunch, but you can try and persuade me otherwise.

MR. MACLEAN: That is very helpful. My clients have two concerns about this. The overriding concern, as you will appreciate, is one of cost – proportionality and keeping costs within reasonable bounds. It seems clear enough that one of the defendants in this litigation has fairly deep pockets, and is happy to dip into those deep pockets in order to inflict financial damage on my client; that is obviously what is going on in the Gascoigne Halman/Connell litigation. Moginie James are in a different position, I accept that, and I accept that if one is Moginie James' position why my learned friend wants his position.

My client's overriding concern is that, at the end of the day should, heaven forfend, my clients lose the litigation, there is no good reason which discloses itself on the face of any of these extensive pleadings as to why we should be on the hook for any more than one set of proportionate expert costs. But, the caveat that you have just described, does go, I can see, some way towards dealing with that concern.

The second concern is that if I understood my learned friend, Mr. Hall, correctly before the short adjournment, what he has in mind is that his clients might file some written evidence, some written statement from an expert on some supplementary matters, without calling that expert at trial. How Moginie James play their evidential hand is, of course, a matter for them and not for me. If I could just, as it were, put a marker down, that we would have great concern about a party seeking to submit or adduce written evidence without calling the author of that----

THE PRESIDENT: I will not put any caveat about that. It will be an additional expert's report – a report from an additional expert – insofar as it raises additional matters, supplementary to the expert report from Gascoigne Halman, and if they do that then that expert must be available to attend to give evidence and be cross-examined. It will not stand as written evidence if you wish to cross-examine.

MR. MACLEAN: And on the basis that that is or might be at their own risk as to costs, whatever the outcome of the action, then I think that addresses my concern.

THE PRESIDENT: Yes. Mr. Hall, this is on the basis that you will receive sight of – I do not think I need order that, it has been said in open court by Mr. Harris, a draft of the report from Gascoigne Halman's expert so you can consider it. I think it will be, at the end of the day, a matter of proportionality, so that if you decide not to call an expert, but there is in your costs several thousand pounds for considering the draft report and taking instructions on it, but you have gone no further, that might be regarded as reasonable, so I think that protects your position without my having to decide what share of the joint expert----

MR. HALL: No, that is very helpful, I am most grateful.

MR. HARRIS: Sir, there is one other matter in this timetable before we turn to other issues, which is the question of staying the non-competition issues in the High Court. It had been agreed – there is one slight disagreement – that disclosure, so the 23rd September deadline, would be the same for all issues in the whole case, competition and non-competition. The reason for that, Sir, is principally proportionality and cost effectiveness of the actual mechanics of doing the searching. It must be everybody, certainly our view has been that it is going to end up being cheaper to do one search all at the same time, even if we then park the non-competition issues for other purposes, such as witness statements, etc. I assume that that is an agreed suggestion, so probably for the same reason, but we would need a direction for a stay of the remainder of the non-competition issues somewhere in the directions.

THE PRESIDENT: Is there not a slight problem that I am not sitting as a Judge of the Chancery Division at the moment, and I am not the allocated judge, and there has not been an allocated judge in the Chancery action. I can fully see the obvious sense of what you are saying, but I think it is difficult procedurally to put in an order of this Tribunal to stay High Court proceedings. What you can do, perhaps, is if you submit an agreed order, a consent order in the High Court proceedings, agreeing a stay in the Chancery Division – if you can do it today, it is a very simple order to draw up – and send it to my clerk, and I will try and circumvent the normal route so that I can make that order as a Judge in the Chancery Division, but I do not think it can be in the Tribunal order.

MR. HARRIS: I take that point.

THE PRESIDENT: It may be that at some point down the road it can be listed in both.

MR. HARRIS: Can I raise two related matters. There is not a hundred per cent agreement on the stay. It is a stay, we thought, for everything, save for any already outstanding applications. We thought those wordings had been agreed because, of course, technically, some parts of my learned friend's application for security and mine are technically in the High Court bit as well as in this bit. So we thought it was a stay for everything bar them, but it transpires from my learned friend's skeleton that they are apparently thinking of issuing some new applications in the High Court part of the case, the non-competition issues, and they would like, somehow, to be carved out from the stay their ability to prosecute an application that they have not yet even decided to take, let alone issue. We say that that is not appropriate if it is going to be pursued. So, if it is going to be pursued, I would like the opportunity to address it again, but assuming it is not pursued then I apprehend that we could draw up the consent order along the lines that you raise, Sir.

The second related issue that you just raised is the question of allocation. Is there anything that you, Sir, apprehend that the parties should be doing because there has been an order for allocation to, if you like, a joint judge, and we just want to make sure it happens.

THE PRESIDENT: I am not sure, although Sir Kenneth Parker made the order. Normally, decisions on allocation are reserved to the Chancellor, and it is not in the gift of any High Court Judge that there should be docketing, but he was sitting as a Deputy, and so probably did not appreciate that.

No, there is nothing at the moment. We do not yet know who will be the judge, and there are various uncertainties in listing in the Chancery Division over this period, which will be resolved by October, that is why that has not been determined. It could conceivably be me, but I think it is unlikely.

Can I clarify the stay? What is the problem, Mr. Maclean?

MR. MACLEAN: The idea of the stay I think came about because it was thought – I am not entirely sure this was a wise course, but anyway it was a course that the parties got to – that disclosure would take place in the High Court action as well as in the competition issues, and then the High Court action would stop. It makes sense for it to stop, because why should the parties be spending money preparing for something that is so far down the road that everybody is going to be concentrating on the competition issues. Then the suggestion was that there should be a stay. Of course, the reason why the date was picked for the stay to take place after disclosure was partly because of disclosure, and partly because there are extant applications, as my learned friend Mr. Harris says, by his clients, and by Moginie James, for security for costs, which, of course, were applications issued in the High Court. My clients are actively contemplating proceedings for an application for summary judgment in relation to the misrepresentation allegations which are levelled against us, which are met, we say, by the disclaimer in the information memorandum, which my client produced.

What we are not prepared to do is to agree to a stay of the High Court proceedings, which would, illogically, in our submission, prevent the High Court from hearing an application for summary judgment which, if successful, would knock out all, or very nearly all on one view, but in our submission all of, the High Court action, and that is consistent with there being a stay. There is no reason why the allocated judge could not be hearing an application for summary judgment in relation to the rest of the High Court proceedings, while the parties were preparing for the competition issues.

So our ‘carve out’, if you like, from the proposed stay is no different from the carve out for the security for costs applications, which Gascoigne Halman and Moginie James have on

the stocks. I appreciate, of course, we have not yet issued that application and we need to do so.

THE PRESIDENT: This is in which action?

MR. MACLEAN: Certainly in the Moginie James action, where the allegations are put fairly and squarely in terms of misrepresentation.

THE PRESIDENT: Is it in the other one as well?

MR. MACLEAN: My learned friends, in the Gascoigne Halman case, first, they do not rely on the same representations, and they put the point slightly differently, and they do not, as such plead a case in misrepresentation. They rely on alleged misrepresentations becoming terms of the contract and allege breach of contract. It may well be that the disclaimer catches them as well, but the point is put differently by Moginie James on the one hand, and Gascoigne Halman on the other.

THE PRESIDENT: If you are going to make any such application – the security for costs application is covering the High Court action and other competition issues?

MR. MACLEAN: At the moment it is, and so what has happened with the security for costs applications is that the Gascoigne Halman application has been met by my clients under Sir Kenneth Parker's order with a payment of £0.5 million which has been paid for security of their costs. They want to come back for more and there will be a debate about whether they should have some more and, if so, how much more and covering what periods. The Moginie James security for costs application, which was issued rather later than the Gascoigne Halman one, has not been heard at all, yet, but that application, as it stands, covers the whole shooting match, the competition issues and the High Court proceedings. Anticipating what is going to be said by somebody like me at the next hearing is obviously premature for the allocated judge – obviously it would not be a matter for this Tribunal, but it is a bit premature for the allocated judge – wearing either of his/her hats, we will be submitting, to get involved in giving security for costs for the High Court part of the proceedings, which are not going to be got to, on any view, until this Tribunal has given judgment in relation to the trial that we have just fixed for February. So that is all a matter over the horizon. So that is where we are with the security for costs applications.

Just to fill out the rest of the menu, as you will have gathered Moginie James have very recently issued an application for fortification of the cross-undertaking given by my clients in respect of their undertakings in lieu of injunction. So that has very recently been issued and that is now on the stocks, and that has to be heard, and directions are to be given for my clients to respond to that, and evidence in reply. That was issued the other day.

We are going to issue, fairly imminently, applications which are related to the security for costs applications, for cost management orders by this Tribunal and, in particular, for cost capping directions. I think it is common ground among all the parties – I think Moginie James will cavil at this – it is obviously sensible in our submission that the security for costs applications against my client, and our application – it is not just an intended application, we are going to make an application – for the Tribunal to exercise its cost management powers, including its cost capping powers. But those applications should be heard together at the same time because they are obviously interlinked.

Clearly, if the Tribunal was to exercise its costs management powers in a robust way that would obviously bear down on the amount of any security for costs that the Tribunal was otherwise minded to order. So, I think it is more or less common ground, or certainly should be that those applications should all be heard together and I think the parties have in mind that they should be heard by the Tribunal for a hearing of one day, and it has been suggested in the week beginning 12th September.

THE PRESIDENT: They cannot all be heard together with a summary judgment application in the High Court. A summary judgment application, if successful will impact on the amount of security, because it will impact on the scope of the case.

MR. MACLEAN: Only if the security for costs applications were seriously going to get into any question of giving security for the High Court part of the proceedings, which in our submission would be premature.

THE PRESIDENT: Why is there any need to proceed with the High Court, apart from disclosure where there might be some scale, any part of the High Court proceedings before February, that is to say your summary judgment, security for costs in the High Court action? Why is it not just put on hold so that, other than disclosure, nobody does any work in the High Court action? We do not need to deal with security for costs of the High Court action, and we do not need to deal with summary judgment in the High Court action.

MR. MACLEAN: I respectfully agree that we do not need to deal with security for costs of the High Court action. So far as the summary judgment application is concerned, my client is keen for there to be a resolution of what it considers to be ill-founded allegations of misrepresentation which are being made against it, not only in these proceedings but what would appear to be similar allegations threatened in other things. If I can just trouble you, Sir, to look at one letter, which is in vol.2 of the correspondence bundle, p.447. This is a letter from Gordon Dadds, who instruct my learned friend, Mr. Hall, on behalf of Moginie James. Do you have this letter?

THE PRESIDENT: 13th July?

MR. MACLEAN: 13th July, that is right. "We now understand that the hearing of the CMC will take place on 25 or 26 July." Then if you go over the page: "3 The OOP Rule. We are also aware from a report on the website" – this is the confidential correspondence which Gascoigne Halman wanted taken out of the bundle. It is so confidential that it is in 'Property Industry Eye', and it is also referred to in Gordon Dadds letter. So they refer there to Paul Dubberly Estate Agents and Rook Matthews Sayer – Rook Matthews Sayer has been taken over by Connells.

Then:

> "4 Further claim
>
> We have now learned that, as well as the litigation against our client and Gascoigne Halman Limited, your client has now received a Letter Before Action . . ."

which is true, we have recently received a letter before action:

> ". . . from Tollers LLP on behalf of numerous claimants . . . The report from 'Property Industry Eye' published today states that the claimants in that action seek rescission of their contracts with your client . . ."

i.e. they have claims in misrepresentation which, if good, would give rise to rescission not merely to damages. Those claims have not been issued yet, but you can see immediately that my clients are facing very similar allegations and we say they are all met by the disclaimer. So, if all we had to worry about was Moginie James' misrepresentation claim then the point you put to me, Sir, may well have great force. We would want to focus our attention and our resources in dealing with the competition trial, which is the first and biggest item on the current menu, but we are not facing that, we are facing not only the attrition being waged against us by Connells on all these various fronts, drip feeding claims against us, we have also got other people jumping on the bandwagon, all no doubt being keen consumers of 'Property Industry Eye' – this week's guest publication, and are bringing misrepresentation claims against us. If the disclaimer point is a good one, in answer to Moginie James, then the sooner that is held to be so by a High Court judge the better.

THE PRESIDENT: You would have to issue an application. It does not have to be heard by the same judge. You would want it heard as vacation business in the High Court, would you not?

MR. MACLEAN: Possibly.

THE PRESIDENT: It cannot be heard in this Tribunal, because that is not an issue referred to the Tribunal. If it is a summary judgment, I do not know on what basis the argument will be, but it does not have to be heard by the same judge hearing everything else, does it?

MR. MACLEAN: That may be right, Sir.

THE PRESIDENT: There may be difficulties if it wants to be heard urgently.

MR. MACLEAN: If there were an allocated judge who had, by now, been appointed, that might be different, but there is not.

THE PRESIDENT: I do not think there will be for September.

MR. MACLEAN: I understand that.

THE PRESIDENT: Because I think it is only in October that the various listing issues, which I need not trouble you with, will be resolved. That is due to the fact we are a couple of judges short in the Chancery Division at the moment and that causes great problems. What you are saying is there should be a stay, save for disclosure, for pending applications for security for costs and any application for summary judgment.

MR. MACLEAN: Yes.

THE PRESIDENT: But, equally, another way of dealing with that is that you would have liberty to apply and you will apply to lift the stay for the purpose of bringing an application for summary judgment, saying: "This is very urgent because there are these other actions being threatened.

MR. MACLEAN: The trouble with that is that once the stay is imposed and there is liberty to apply, one starts not only Love/15 down, but Love/30 down, in getting that under way.

THE PRESIDENT: Not necessarily, but I see what you are saying, that you want to be able to bring an application for summary judgment to remove part of the claim and not have to wait until March.

MR. MACLEAN: Exactly. If we are right, that the disclaimer is an answer to these claims, then we all know where we stand. It is hard to see what the prejudice is, for example, to Moginie James, from not having the point determined. If we are wrong and our summary judgment fails, no doubt they will make an application for their costs.

THE PRESIDENT: What do you say about that? It is particularly directed at you, I think, your client. They want to have the freedom to pursue that.

MR. HALL: It is up to them whether they bring that application, I have not seen it yet, it is difficult for me to comment.

THE PRESIDENT: They may not bring it, but they do not want to be locked out.

MR. HALL: There is, of course, the fortification application, which my learned friend, Mr. Harris has mentioned, it is not just the security for costs, and that, in fact, could and ought to take place regardless of the summary judgment application in my submission. There are now many applications, and potential applications on foot, or possibly seem to be on foot, and in those circumstances I think I have to concede the stay seems odd, because there are so many matters left to deal with, trying to have any kind of effective stay and then carve things out of it does not seem an appropriate way forward to me.

THE PRESIDENT: What would happen if there is no stay? There have been no orders, no directions for witness statements, and non-competition issues.

MR. HALL: In fact there has been a stay of the directions given by Master Matthews in the Moginie James case already, and that is in Sir Kenneth Parker's order.

THE PRESIDENT: Paragraph 19.

MR. MACLEAN: We do not object to that, Sir, that is fine, that is merely staying----

MR. HALL: In fact, they have been suspended.

MR. MACLEAN: All very sensible.

MR. HALL: Indeed. As you say, Sir, nothing else is currently to happen in that case other than dealing with security for costs, fortification and any application that may be made. So there is no massive urgency imposing a stay at this point.

THE PRESIDENT: It would seem to be sensible. There are some applications that people want to bring. There are some applications some people are thinking about bringing; there may be some other applications that people have not thought of today but will think of tomorrow, that not to stay the High Court proceedings is not going to cause anyone any difficulties.

MR. HALL: I respectfully agree, Sir.

MR. MACLEAN: I also agree, as they say.

MR. HARRIS: Sir, we do not agree, for a number of reasons. In no particular order, the proposed application for some kind of summary judgment on the disclaimer, there will be no need to do that at all if we succeed on the competition issues. There will be no need to go through any of the non-competition issues, no need to spend any time or money on any of them if we succeeded in demonstrating that the OOP Rule, and the group procurement obligation, etc is all illegal and void.

One of the rationales, that now seems to have been forgotten by some people, for proposing a stay is that it is a proportionate case management tool because the competition issues might resolve the entire dispute between the parties, so that is one point.

The second point is that Mr. Maclean, as he has now just explained it, suggests that he needs to get some kind of resolution of his disclaimer point, including because he is about to be sued by a group represented by Tollers, who have written their letter before action. But, of course, if and when that action actually takes place, there is absolutely no reason why he cannot issue his summary judgment application immediately, he will not even have had to have done a defence if his point is so good. He can do it and get the clarity that he needs in that other action then; that is not affected by the stay.

THE PRESIDENT: The misrepresentation, I have not actually focused on that part of the case in terms of looking at the pleadings. What is said is that there is a misrepresentation in the way it was promoted to estate agents.

MR. HARRIS: That is right, and there is a distinction that you have already drawn between the Gascoigne Halman Defence, and the Moginie James Defence, and Counterclaim. So, in my case, Gascoigne Halman, we have pleaded a number of representations that we say were false, and that became terms of the contract. Those terms were breached in a repudiatory manner and that has led to the termination of the contract. That is my case.

But, in the Moginie James case they have not only run that point, but they run two additional points. They say that the representations were misrepresentations for the purposes of a misrepresentation defence, namely rescinding the contract. That is not part of my case; it is part of their case. They have additional factual materials that they were able to rely on and they pleaded, so that is the additional point, the first point.

The second point is they rely upon the same points that they pleaded in defence under the heading of "Misrepresentation" as a counterclaim, so they repeat them all and say: "We want the damages for the misrepresentations".

That is potentially relevant because Mr. Maclean, despite saying that this application is "imminent", at one point that was the word that he used, he appears not to have decided whether or not it is coming against my client, or against my client and Moginie James. We would say, unsurprisingly, Sir, when you think about this, that if there is to be a new and weighty additional application, not contemplated in any of the budgets, in the face of an impecunious claimant then that could not even be prosecuted until we get security for costs of the application. That is a new and additional amount of expenditure, and we say we are entitled to security before it could be progressed against us and so that complicates matters.

None of this arises, Sir, if there is a stay as we advocate.

Another point that has been overlooked, if I may respectfully put it like that, is that it is unsatisfactory in our submission to come to this CMC in an expedited action where there

have been months for the pleadings to go ahead, and say to the Tribunal: "Actually, we are thinking of doing this, we might do that. We have not decided who it is against, and we have not issued". It is incumbent upon them, if they wanted to make this point about carving out from the stay, that they want to prosecute a certain application, for them to have produced the application because, *inter alia*, we could have then said: "We now see that it is against us and we want security for it", and so that could have all been dealt with.

What has happened now is unsatisfactory, it is an uncertain procedure, uncertain in what the substance is, uncertain against whom it is to be prosecuted, if anybody and, therefore, the question of security for that cannot be addressed.

We respectfully say for that combination of reasons and, at the risk of repetition of the first one, this will just not be necessary at all if we proceed and we succeed in this expedited competition action, that the stay should be the one that we advocate, namely all matters post-disclosure in the High Court claim, save only for those applications that already exist and have been issued, indeed, the current contemplation is that they will be heard before the disclosure deadline in any event, namely in the week commencing 12th September.

THE PRESIDENT: Those applications are for the costs of the competition issues being heard here?

MR. HARRIS: At the moment they are for the costs of everything, but we do accept, Sir, that if this stay happens that can have a material bearing upon amounts, but that is another reason why we should get some certainty about what the stay is and is not. I do accept that.

THE PRESIDENT: It would have to be if it is stayed, and if, as you say, the competition issues are all the court is dealing with. You say it is a complete defence and knocks out the claim that it be limited to the competition issues.

MR. HARRIS: Yes, save only for this minor caveat, Sir, that there are some costs of the non-competition issues already incurred, and we would be entitled to request security for the costs of the non-competitions already incurred. But, I do accept, of course, that if the stay bites then it has an impact upon the quantum, but we are so far away from being satisfied as to the quantum provided to us today that it seems inconceivable to me that if you order the stay that I advocate, it will so knock down the overall quantum that we will not be here arguing for more quantum.

THE PRESIDENT: I am sure you will be arguing for more quantum. It might be a lower total ceiling than otherwise, or a combination of the two by the sound of it.

MR. HARRIS: Whilst we are just on that topic, because it is in your mind, Sir, if I can put it like that, you will appreciate that there is a dispute here about precisely what is in issue in the

security for costs applications, because what has happened is there have been a number of changes of stance by my learned friend's team – I can show you the correspondence if needs be, but what is critical is that we have in very short order a completely clear explanation from the claimant as to what issues of substance, within a security for costs application and, for that matter, from my learned friend, Mr. Hall's fortification application, remain in dispute, because we had prepared on the last occasion on the basis of a letter I could easily show you, that said: "We do not concede any----"

THE PRESIDENT: You want directions for that.

MR. HARRIS: Yes, there are two things, Sir. Directions for just preparatory matters.

THE PRESIDENT: Let us take it in stages. Let us deal with the stay. Mr. Maclean, I do find this troubling. This was all sent here on the basis, as I understand it from reading the order of the Deputy High Court Judge, that this should be dealt with first. It is a complete defence is it not, if successful.

MR. MACLEAN: Sir, as Mr. Harris has explained, Moginie bring a counterclaim for damages for misrepresentation. The Competition Act points have nothing to do with that counterclaim. They have absolutely nothing to do with it. Is it seriously to be suggested that my clients are not able----

THE PRESIDENT: So the counterclaim is a damages claim?

MR. MACLEAN: A damages under the 1967 Act for misrepresentation.

THE PRESIDENT: If the agreement----

MR. MACLEAN: If the disclaimer is a complete answer to that----

THE PRESIDENT: No, if the competition defence succeeds you say that counterclaim still stands?

MR. MACLEAN: That counterclaim still stands. That counterclaim depends upon there being actionable misrepresentation.

THE PRESIDENT: There is no such counterclaim by----

MR. MACLEAN: Mr. Harris has been very careful not to plead a counterclaim, no doubt for clever reasons I am too dim to work out.

THE PRESIDENT: Yes. So the [same force] as a summary judgment does not apply as regards Gascoigne Halman?

MR. MACLEAN: Mr. Harris seems very excited about it, but if I were in his position I would be rather more relaxed.

THE PRESIDENT: Well, you are not. The position is that you have been rather hesitant in addressing the question of whether there might be a summary judgment application against Gascoigne Halman. The argument you have just put forward would not apply.

MR. MACLEAN: It does not apply.

THE PRESIDENT: If it were to allow you make a summary judgment application against Moginie James, but no one else.

MR. MACLEAN: I would be content with that.

THE PRESIDENT: That would deal with that point.

MR. HARRIS: I cannot object to that. That would be for Mr. Hall.

THE PRESIDENT: It deals with the point you were concerned about.

MR. HARRIS: Yes.

MR. MACLEAN: So that is that.

THE PRESIDENT: That would be a pure High Court application if you are going to issue it?

MR. MACLEAN: Yes.

THE PRESIDENT: I see some sense in that.

MR. MACLEAN: I think that deals with that.

THE PRESIDENT: I think it is only fair to Mr. Hall. It would allow that application, if brought. It will be a stay. What you will do, and I cannot order it now, I can only invite you to send a draft order to me in the High Court, drawn up in the two actions, or two orders. Perhaps there should be two orders as there are two actions, one saying, "Stayed, save for disclosure and any pending application for the security for costs", I think, and the other action, which is Moginie James action will say, "Stayed, save for disclosure and any pending application for security for costs and fortification of the cross-undertaking". I think that is an application you wish to bring, is it not?

MR. HALL: It has been brought.

THE PRESIDENT: It has been brought, so that application can be identified, and any application for summary judgment.

MR. HALL: May I make one suggestion, and that is that, given that we are still talking about a hypothetical application for summary judgment, the stay - I think you just used the phrase, "any pending application for summary judgment", but there is not one yet----

THE PRESIDENT: No, I meant any pending application for security for costs and fortification of the cross-undertaking, and application that may be made for summary judgment.

MR. HALL: I would ask for it within a certain time, perhaps "such application be brought within the next 14", or at worst "21 days". Part of the reasoning is that we ought to try and deal

with all these applications at once if we can, albeit it can be dealt with by a separate judge, of course, and we ought to know sooner rather than later what the shape of those proceedings is.

THE PRESIDENT: Mr. Maclean, you have been asked to commit to a date.

MR. MACLEAN: Can I just take instructions? (After a pause) I am afraid I did not catch what Mr. Hall said. Did he say 14 days?

THE PRESIDENT: He suggested that, but his main concern is that there should be finality about it.

MR. MACLEAN: I understand that. 21 days we are content with, 14 would have been a problem.

THE PRESIDENT: Yes, 21 days, so be it. You will draw up those orders?

MR. MACLEAN: Yes.

THE PRESIDENT: And they will be with me in the High Court before 10.30 tomorrow morning?

MR. MACLEAN: I certainly hope so.

THE PRESIDENT: If they are not, they will not get made.

MR. MACLEAN: I am conscious of the time, Sir.

THE PRESIDENT: That is the stay point sorted out. There is disclosure and there is the directions for the security.

MR. MACLEAN: Can I deal with the disclosure point? Would you take----

MR. HARRIS: Sir, I am sorry to interrupt, but I am also conscious of the time. The disclosure point is not agreed. It is not likely to be agreed before 3.30. It is likely to take up quite a lot of time today. We suggest that it be dealt with urgently in correspondence, and what we cannot afford to do is leave today without there being directions preparatory to the security for costs applications, and we have 16 minutes.

MR. MACLEAN: I do not think the directions will take us very long, and I do not think disclosure will take very long either.

THE PRESIDENT: Just tell me where you are on disclosure?

MR. MACLEAN: Can I invite you to take up the Amended Defence, Sir, at tab 5A, bundle 1, and would you turn, please, to para.40. It begins at para.38, p.78.33.

THE PRESIDENT: Yes, I have it.

MR. MACLEAN: What Gascoigne Halman plead in 38 is:

> "Further or alternatively, the OOP will form part of a wider concerted practice that also beats s.2 of the Act, namely a concerted practice initially between:

a the six founder members of the claimant …"

which are then identified -

"… or some of them, and Mr. Springett, the current chief executive of the claimant and the claimant, and subsequently …

and so on. Then 39:

"It is understood that the said agreement or concerted practice commenced at some time prior to January 2013, but was deliberately concealed in whole or in part from the claimant."

Then at 40a:

"Prior to disclosure the best particulars the defendant can give are that said agreement of concerted practice consisted in and/or is to be inferred from the following facts and matters; an agreement, alternatively a fair …"

THE PRESIDENT: There is no need to read it all out.

MR. MACLEAN: The point is that in the third line, from the date that it came into existence on 30th January 2013:

"… that, upon the launch of OTM the founder members or some of them …"

The launch of the OTM was January 2015, Sir. What we have suggested to my learned friends for Gascoigne Halman is that if you glance down to 40(a)(iii) do you see the identification there of the said senior executives? These are the board members, of whom there are six, Mr. Abrahams and Mr. Bartlett, and so on. What we have suggested is this: we will search Mr. Springett's inbox and outbox by reference to the search term 'Zoopla' or derivatives thereof, whatever shorthand there might be, but Zoopla or other synonyms, for the period from January 2013 until January 2015, searching for communications between Mr. Springett and any, or any or all of, the gentlemen identified in para.40(a)(iii).

THE PRESIDENT: This is from 1st January 2013?

MR. MACLEAN: Yes, January 2013 until January 2015 inclusive.

THE PRESIDENT: That is 1st January?

MR. MACLEAN: Inclusive, yes, Sir. If, which we do anticipate to be the case, those searches throw up 10,000 documents or fewer, we will manually review all 10,000 documents and provide disclosure of such of them as fall within disclosure.

If, which we do not anticipate to be the case, there are more than 10,000 documents, then, and only then, will we have to get involved in trying to agree some further search terms with the other side. We will not get there, Sir.

THE PRESIDENT: And that can be done by?

MR. MACLEAN: That can be done by the date that we have suggested for disclosure. That can be done in relatively short order.

That means, of course, that if that exercise throws up documents which put Mr. Harris on to the scent that he thinks he has got something else to sniff out, then of course he can make applications.

THE PRESIDENT: That is by 23rd September - is that right?

MR. MACLEAN: Yes, that is right. In our respectful submission, that is a sensible and proportionate approach that deals with the concern which you, if I may say so, rightly raised this morning. Mr. Harris's clients have raised the further questions of whether we should get into producing organograms and CVs. They say, "We do not whether there are other custodians", and so on. I can tell them, if I can address the other side through you, Sir, which I know I should not, the position is that in January to August 2013 Mr. Springett was the human embodiment of my client. It is true that by August 2013 he was joined by a more junior colleague, a Miss Helen Whiteley, but I am clearly and unambiguously instructed that communication with the board members went through Mr. Springett and there is no realistic prospect that the searches I have described to you will miss anything relevant to this embryonic allegation of this concerted practice, which are otherwise to be found. It is not a question of organograms. My client was a very small start-up organisation at this time, and Mr. Springett was its human embodiment. Those are the searches which we propose to conduct as a proportionate search for standard disclosure.

I am not sure you actually need to make an order about it, Sir, because it is for the parties in the standard disclosure in the first instance to make a proportionate search and to describe in their disclosure list what proportionate search they have made. If the other receiving party complains about that, then they can make an application. I am not actually sure that it is a question that needs to be ventilated in correspondence or in argument before you, Sir. I am simply, as it were, telling Gascoigne Halman what we are going to do, what we say is a proportionate search is, and if they do not like it they can make an application in due course.

THE PRESIDENT: The only other thing I think you should do quite separately from that is, there is an allegation about a particular meeting on 21st January.

MR. MACLEAN: Yes, you are right, Sir.

THE PRESIDENT: You should disclose any notes or emails arranging or immediately following that meeting confirming what was said at the meeting.

MR. MACLEAN: We will do that as well.

THE PRESIDENT: I am not being asked to decide anything, but I do think, Mr. Harris, that that is a sensible approach and that you will see those documents. If you are not happy with what you get you then come back and say there should be more. If one takes any other approach I think it becomes a mountain that is not justified for that part of this action.

MR. HARRIS: Sir, that is, I respectfully submit, partly because you have not heard what our objections are to this proposal that was----

THE PRESIDENT: That may be, but I am not going to hear them now. As I say, you can make a further application to, hopefully by then, a determined Judge or Chairman in October. It will not, in any event, affect your evidence because you say it was concealed from you. So this is for cross-examination.

MR. HARRIS: I accept that, Sir. My point for today is just that we have learnt over the short adjournment, and indeed on my learned friend's feet just a moment ago, that there are some obvious omissions from his proposal. This is on his own explanation to the Tribunal. For instance, it is now said that Miss Whiteley, Helen Whitely, I believe her name is, joined from August 2013, as I noted it down, and was the other senior member of the claimant.

THE PRESIDENT: 2013?

MR. HARRIS: That is how I noted it down. If that is not right then from whatever date----

THE PRESIDENT: That is right. What is said is any communications of this nature will be reflected in Mr. Springett.

MR. HARRIS: Sir, on the question of the proportionality, if there are only two of them within the claimant organisation, then it should at least include the communications between those----

THE PRESIDENT: I am not going to rule on that. It seems to me that you should see what comes out of those documents and, based on that, you can ask for more in October.

MR. HARRIS: Sir, the other point that has not been addressed is that, as we have pleaded, there is a whole series of local meetings setting up these group or collective meetings of estate agents, at which they were invited to join and/or, on our case, invited to participate in a collective boycott. That, of course, is potentially critical to where these collective boycott behaviours took place. That is not contemplated at all by my learned friend's suggestion, and yet that is a clear part of our case.

There is one other point after this, but that one is not included at all. Let me give you an example, Sir?

THE PRESIDENT: I have read it, and I know you rely on meetings and you identify emails, and so on. I have read what you say about them. I am not persuaded that it is proportionate on the way that you have pleaded it to order any more at this stage.

Can we deal with the directions for----

MR. HARRIS: Sir, I am not quite finished on disclosure, if I may.

THE PRESIDENT: You want directions in the next five minutes?

MR. HARRIS: That is right, I do, but can we at least be clear, Sir, that this is the limitation on the pleading at paras.38 to 40? There is no such limitation on the other competition law pleadings or disclosure?

THE PRESIDENT: I think that is understood.

MR. HARRIS: I would have thought that was obvious.

THE PRESIDENT: Yes.

MR. HARRIS: What it means, Sir, of course, is, regrettably, there is every chance of an application for at least a further period because if one were to have regard to Mr. Springett's first witness statement at para.8 of the Particulars of Claim, as it happens also at para.8, he makes clear that he was involved in the setting up of the claimant, which we say is the relevant period of time, from 2010. So I would have sought to persuade you, Sir, that the time limitation that my learned friend seeks to impose is inappropriate, but you have said that----

THE PRESIDENT: You did tell me when I asked you, and I pressed you, before the adjournment what is the time you are asking for, that it is from January 2013.

MR. HARRIS: Yes, Sir, and what happened was that you invited to reflect upon that over the short adjournment, and this is my first opportunity to address you on that, and we have reflected upon it and we have identified both in para.8 of Springett 1 and para.8 of the pleading, that Mr. Springett, himself, acknowledges and admits that he was in the set-up period. What we would say is it is highly proportionate for Mr. Springett, seeing as how it is going to be limited on the Tribunal's current direction to one man, for his relevant inboxes and outboxes to be searched for that entire period, 2010 onwards. Indeed, if anything, that is highly cost effective, because they can be captured all at once and searched----

THE PRESIDENT: I am not going to do that. I have to say that I presently take the view that if nothing comes out of those two years that lends support to this allegation, which I find a rather curious allegation, I have to say, given the realities of what happened, and what everybody knew had happened, I would be reluctant to direct any more, but you can come back. You may find things and things may look very different, so let us leave it there.

Security for costs, the directions: at the moment we have not got a hearing date. It is to be heard in September, if necessary. That should be heard effectively in a joint hearing, should it not be, in the High Court and the Tribunal.

MR. HARRIS: Yes, that is right.

THE PRESIDENT: A joint hearing, it can be listed that way. If there is not an allocated judge I can hear that. I know a bit about the case now. You are suggesting that that should be heard in the week of 12th September?

MR. HARRIS: That is what has been suggested, the week of the 12th.

THE PRESIDENT: I think that is all right.

MR. MACLEAN: I know from my point - I think Mr. Grant, who leads Mr. Hall in this application, is available for a big chunk of that week. For my part, I can readily do Wednesday, Thursday or Friday of that week.

THE PRESIDENT: I can do that week. Is that week suitable for everyone?

MR. HARRIS: Sir, I cannot do the Thursday or the Friday of that week.

THE PRESIDENT: So you want it is on the 12th, 13th or 14th?

MR. HARRIS: Yes, Sir.

MR. MACLEAN: Wednesday is, I think, a common date.

MR. HALL: My leader, Mr. Grant QC, has asked for the 15th, that is the Thursday, which Mr. Harris is not available for.

THE PRESIDENT: I will not fix it, I will say it is to be in that week, and you can go away and try and agree a date.

MR. MACLEAN: If it is to be in that week, I cannot do the Monday for sure, and probably cannot do the Tuesday. Would you be content, Sir, that it should be in that week, if possible, or as soon thereafter as possible.

THE PRESIDENT: I can tell you, I cannot do the 19th.

MR. HALL: It sounds like it has to be the 14th. Can we leave it this way: that it is provisionally the 14th, and I will revert by tomorrow, if there is a problem with that, for it to be fixed on a different date?

THE PRESIDENT: Very well, 14th September. On that basis, and I have not looked at whatever has been put in on that, but who is it who is next to make submissions? I will tell Mr. Harris tell me.

MR. HARRIS: Sir, we say that in the light of what happened on the last occasion, and you have read about that in the skeleton, so I will not repeat it, there needs to be a significant advance date for the next round of evidence from my learned friend's team. I thought it had been

agreed, ten working dates before the hearing, so the week commencing the 12th, for any and all further evidence from the claimant, and then five working days before the hearing for any reply from us. These dates would apply in the same way to Moginie James. Then three working days for skeleton arguments. That had been agreed by the parties, but it is the first you have heard of it, Sir. There is a preceding direction that we also seek, which we say is very important.

THE PRESIDENT: If this is Wednesday, 14th September, I would think skeletons should be by 4 pm on the 9th, otherwise it is the 12th, which is effectively only one day. So 4 pm on Friday, 9th September. Then working back from that, you say Monday, 5th for your evidence in reply?

MR. HARRIS: Yes, that sounds right, Sir. Then five full working days before that for my learned friend's evidence.

THE PRESIDENT: Which is Monday, 29th August, which is claimant's additional evidence. So claimant's additional evidence, 29th August, evidence in reply, 5th September, skeletons by 4 pm on 9th September.

MR. MACLEAN: Sir, the 14th is fine for me, but I know I have got a big problem at the end of the week of 9th and 10th September. Would your Lordship be prepared to move the skeletons until perhaps noon on the Monday?

THE PRESIDENT: Yes, alright.

MR. MACLEAN: I am grateful.

MR. HARRIS: Sir, that only leaves what we say should happen this week, which is that, in the light of the background and the changes in position of my learned friend's team, we need to have absolute clarity as to what substantive issues within the scope of a security for costs or fortification application are, in fact, contested. In a nutshell, Sir, the background to this was, we had prepared on every issue impecuniosity, whether it is just, and on quantum for the hearing that ended up taking place before Sir Kenneth Parker, only for that morning it to be conceded that at least £500,000 was properly payable, and yet for it not to be formally conceded that there was a reason to believe that the claimant would be unable to pay the defendants' costs if ordered to do so. We say we put this in correspondence beforehand, "Can you please just clarify exactly what is that we are preparing for, do we have to go into all the ins and outs of your financial evidence so as to prove impecuniosity, or are we only arguing about the reasonableness and justice of the amount of quantum?" The claimant's team has flatly refused to clarify their position on that. The position in correspondence as it stands is that there is no concession at all. If that remains the position, can we, please, just

hear it unequivocally now so that we know that all issues have to be prepared for? The reason for that----

THE PRESIDENT: When you say "all issues", the issues being?

MR. HARRIS: Impecuniosity as well as reasonableness, equity of getting it and quantum. The reason for that is because when it was said at the last hearing that because there was this last minute *volte face*, and, amongst other things, we said, "That has thrown away a lot of costs, because if only you had done this before, we would not have had to do the same amount of preparation". Surprise was expressed on that occasion by my learned friend, Mr. Maclean, that we had even had to spend any time and money dealing with impecuniosity as if that issue was not in dispute. We are now in a state of confusion. There is absolutely no prejudice to anybody, no skin off the claimant's nose for it to just send a letter saying this issue is in dispute, this one is not, etc, and we want that this week so that we can----

THE PRESIDENT: Are not the financial circumstances of the claimant clear now?

MR. MACLEAN: Yes, they are.

MR. HARRIS: Whatever evidence the claimant has put in, but what is not clear is whether, at the resumed hearing for my application and the new hearing for Mr. Hall's application, the claimant is ever going to argue that there is not reason to believe that the claimant will be unable to pay either of the defendants' costs if ordered to do so. If they do not make that clear, each of Mr. Hall and I will have to prepare on the basis that we have to establish to the court's satisfaction the impecuniosity question. That is a costly question.

THE PRESIDENT: I am a bit puzzled, because, from what I saw, it is not a company with great reserves. You know the financial position of the company. The only question is whether it is going to be said that the members of the company are prepared to offer assurances.

MR. HARRIS: That is another very good question, Sir, because they have not been clear on that. Are they going to say, "Actually, the members can provide the money"? At one point in correspondence they said, "No, this is a stifling attempt".

THE PRESIDENT: They have got to put in their additional evidence by 29th August, and if they are going to rely on someone else offering to stand behind them, they have to put that in their evidence, otherwise it just stands on their own account and their profitability.

MR. HARRIS: That point, yes, Sir, but there is no prejudice at all to the claimant making clear in the light of the way - I have not shown you the full history, there has been 'flipping and flopping' from one side to another, and not just on this issue - and all we are saying is, "Can you please make it completely clear, do you accept that the claimant is impecunious within the meaning of the CPR Rule, namely there is reason to believe it will be unable to pay, so

that, if you have conceded that as a matter of principle, we do not need to spend time and money addressing it for the hearing". What we do not understand is why there is any difficulty with them saying one way or the other, and they should say that sooner rather than later, so there is not yet further wasted costs as there was on the last occasion.

THE PRESIDENT: What was done on the last occasion?

MR. HARRIS: On the last occasion, because there was no formal concession, but they did not offer really any meaningful financial evidence to show that they could pay, I had to prepare on the basis that I would have to persuade the court that what was in the financial evidence did not demonstrate that they would be able to pay my costs if ordered to do so.

THE PRESIDENT: The financial evidence was what?

MR. HARRIS: It involved at least two sets of abbreviated accounts and then some scattered references to what that meant in some evidence that my learned friend's team had adduced. We said, "That is not enough and it shows impecuniosity". Because it was not formally conceded I had to work at the point, and there are costs associated with it. That is my point, Sir.

At the risk of repetition, there is absolutely no reason why they should not clarify this point, none at all. What they seem to be impliedly conceding is that they are impecunious because, amongst other things, they have said, "We will need to look at ATE insurance", and impliedly accepted it, because they have, in fact, paid £500,000 into court. What they should do now is definitively clarify either that point is in dispute or it is not. If it is, fine, but when we win on the point we will want the costs of that point. If it is not in dispute, nobody needs to spend any money on it.

THE PRESIDENT: Yes. Is there anything you want to say about that, Mr. Maclean?

MR. MACLEAN: My learned friend, I fear is - Mr. Justice Langley used to accuse me of 'tilting at windmills'. We have disclosed the financial statements up to, as I remember, January 2016. We have put in evidence explaining that nothing material has changed in relation to the wherewithal or otherwise of my client. We have already agreed to make, and have made, a substantial payment into court, both in respect of security and to fortify the cross-undertaking under Sir Kenneth Parker's order. It is a matter for submission and a matter for the Tribunal to decide what further payments, if any, are needed, having assessed what costs should be recoverable in the proceedings.

Given that we have to file our evidence by 29th August, I respectfully agree with you, Sir, that if we are going to explain that we have got some sugar daddy or sugar mummy, we will have to explain that in our evidence. If we do not, then the financial wherewithal will be the

financial statements that we have already disclosed. I am afraid I am at somewhat of a loss as to the list of issues that Mr. Harris wants now.

THE PRESIDENT: That was an offer by you, I think, or was accepted, to pay the £500,000, that that was not justified. It was accepted that that was an appropriate payment.

MR. MACLEAN: That was an appropriate payment to make at the time and it covers a certain period of the litigation. To what extent they are entitled to any more is another matter. Sir, I know we are trespassing on your time.

THE PRESIDENT: I am not going to make any further direction. You will see what the evidence is when it comes.

Can I mention two other things regarding experts and disclosure? There is a list of issues the experts might look at. I do not think it is necessary or appropriate for the experts to have to consider whether or not - both of these points concern the experts - Rightmove was in a dominant position for the purpose of competition law. That is not something that need be covered in their expert evidence.

Secondly, if any party provides their expert with data from their internal resources, that is data which should then be disclosed to the other side. It is not right that any side should receive from the other in an expert's report reference to a whole lot of material which the expert culled from the party instructing them, which has not been disclosed to the other side's expert. What they obtain from public resources is a matter for them, but if they get things from the party instructing them it must be disclosed to the other parties.

MR. HARRIS: Sir, can I just make one final matter for the record: in so far as there is going to be a summary judgment application on the disclaimer point against Moginie James in a separate action to which we are not party, it could never sensibly be said that it was somehow an abuse we are not participating in it. I just wanted to make that clear.

Secondly, of course, strictly speaking, we are not bound by that, because if he wants to run the same point against us we are not a party to whatever happens in that action.

THE PRESIDENT: Absolutely right.

MR. MACLEAN: I know we are well into your time, Sir, there are two other matters which we ought to mention. One is Moginie James's application for fortification, which only applies between Mr. Hall and myself. They have issued an application. I think this is common ground, but what we would suggest is that we apply the same timetable in terms of evidence to that application----

THE PRESIDENT: And then it be heard with the security application?

MR. HALL: Indeed.

MR. MACLEAN: That is the first point. The second point is that we are going to bring, and will bring, by 15th August costs management application orders. We would respectfully suggest that the same timetable be used for that.

THE PRESIDENT: Yes, thank you for mentioning that. We have jurisdiction to do it, but it would be very unusual to impose costs capping, as such, in the Tribunal. We do it in a fast-track case for particular reasons. It is not something we would normally do in a civil trial, other than fast-track. It would raise particular questions as to whether we should do it in an action where the Tribunal is hearing only particular issues as part of an overall Chancery action when the Chancery Division would not impose costs capping in those circumstances.

MR. MACLEAN: I understand.

THE PRESIDENT: One can go down the route of costs budgeting, which is different, but you might want to think carefully whether it is really appropriate to try and persuade the Tribunal, even though I think we have got broad powers to do all sorts of things in costs management, but that is not a case we are inclined to take.

MR. MACLEAN: Whatever it is that we ask the court to do, can I take it that your Lordship is content for the timetable to be the same----

THE PRESIDENT: The same timetable would apply. I must go because I have got some rather important people waiting for me in Whitehall.

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