IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1283/5/7/18(T)

Victoria House,
Bloomsbury Place,
London WC1A 2EB

15 October 2018

Before:

THE HON. MR. JUSTICE BIRSS
(Chairman)
WILLIAM ALLAN
MARGOT DALY

(Sitting as a Tribunal in England and Wales)

BETWEEN:

UNLOCKD LIMITED & OTHERS Claimants

- and -

GOOGLE IRELAND LIMITED & OTHERS Defendants

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A P P E A R AN C E S

Mr Nicholas Gibson (instructed by Euclid Law) appeared on behalf of the Claimants.

Mr Tim Ward QC (instructed by Slaughter and May) appeared on behalf of the Defendants

THE CHAIRMAN: Mr Gibson.

MR GIBSON: Good morning, Sir. My name is Mr Gibson, I appear for the claimant administrators, and Mr Ward QC appears for the Google defendants.

THE CHAIRMAN: Yes.

MR GIBSON: May I just take a moment to check that some of the paperwork arrived safely with the Tribunal? I think on Friday a bundle of recent correspondence was provided to the Tribunal, a modest bundle of about 43 tabs.

THE CHAIRMAN: Inter-parties correspondence - is that it?

MR GIBSON: I suspect so. I am afraid it is a small bundle with probably not quite the same----

THE CHAIRMAN: Yes, we have got it.

MR GIBSON: Hopefully you have also received a copy of the witness statement on behalf of the administrators from Miss Brittain, with a one or two page exhibit just confirming by email that the first claimant, by the Australian administrators, is content for her to represent the interests of all three claimants.

THE CHAIRMAN: Yes.

MR GIBSON: As I understand it, Sir, the Tribunal's agenda for today is to consider the claimants' decisions in relation to the further conduct of the proceedings, i.e. item 1 of the provisional agenda of 6 September, and you will see that in Miss Brittain's statement she has sought to set out the claimants' position on that point and to deal with the four questions that were raised by Slaughter and May in correspondence dated 27 September around the stay that they had intimated the claimants wished to seek. As I said, the reasons for that stay are set out in her statement, and we sought by email late on Friday, and Slaughter and May kindly responded over the weekend, to verify what Google's position was in the light of everything in that statement. They indicated they would object to a stay on the basis that Miss Brittain's statement does not justify why this length of delay - i.e. a stay of four to five months - is necessary. Mr Ward will no doubt confirm whether indeed it is now Google's position that they do not object to a stay in principle, only to its length, or whether I should address the Tribunal as to the matter of principle first.

MR WARD: We do not object to a stay in principle, but plainly we do not want the action to proceed today, and we do not want the Tribunal to try and strike it out today, but we are concerned about the length of stay and lack of alacrity that has been shown by the administrators.

THE CHAIRMAN: Thank you very much, Mr Ward. There you are, Mr Gibson.

MR GIBSON: I am grateful. That is very helpful. I will then perhaps briefly outline, touching on the point that Miss Brittain has already made, elaborating on it as far as I can, as to the points that have been raised there, which is what has been done to date and what needs to be done going forward.

THE CHAIRMAN: Yes. You can take it, as I am sure you appreciate, that we have all read and digested Miss Brittain's witness statement.

MR GIBSON: Yes, indeed. Essentially, the point in relation to what has been done to date is that the UK administrator needs a stay because, from her perspective, she has only recently begun assessing the funding options to continue the UK litigation as a stand-alone prospect, and needs proper time to complete that process.

THE CHAIRMAN: Yes.

MR GIBSON: She was not involved in the auction process that was run from Australia. I do not know exactly when that process started, but we know, of course, that the Australian administrator was appointed on 13 June, and was working steadily towards to seeking to obtain funding until late September, so a process of three and a half months, and her understanding on those issues is set out at paragraphs 8 to 12 of her witness statement. My understanding on instructions is that the time taken by the Australian administrator during that time was to realise the assets generally, and obviously the Google litigation being one of those assets, but the time was taken up dealing with all of the matters that one would properly need to take into account consistent with the duties of the administrators to the creditors.

THE CHAIRMAN: Right.

MR GIBSON: As to the actions to date, you will see that the Australian administrator had taken a step of bundling together the Australian and the UK actions because of the similarity of the issues that arose in them. With the benefit of hindsight obviously, that perhaps was not the quickest way to proceed, but in the circumstances, with limited resources and the need for an administrator obviously to think about things through the prism of dealing with resources as carefully as possible, they had moved forward on that basis and had, until very recently, been confident that an offer would be put forward in good time in advance of this CMC towards the end of last month, which would have allowed this CMC to proceed in the way that would have hoped in a more substantive framework.

MR GIBSON: Right.

MR GIBSON: Contrary to expectations, those offers did not materialise, and I understand on instructions that one of the reasons for that is that the Australian action was urged to move

forward by reference to the need to file a statement of claim, and that compressed the time that consideration of the Australian funding could take place, and I understand that that is one of the factors that meant that the funders did not consider that they had adequate time to consider the Australian action and therefore did not proceed with funding.

That left the UK action as a possibility, but not as a bundle with the Australian action, and the Australian administrators effectively have said it is up to the UK administrators then to move forward with that as an option.

THE CHAIRMAN: The Australian action, what has happened to it? Has it come to an end then?

MR GIBSON: Can I just turn my back. (After a pause) I am afraid we are not entirely certain, but my understanding is that it has not yet been struck out, but because of a lack of funding the relevant statement of claim was not filed, and therefore my understanding is that it would need further steps in order that, if it were to move forward, and it does not look like it is at present.

THE CHAIRMAN: I see.

MR GIBSON: Whereas in the UK action all of the relevant pleadings were filed shortly prior to the adjournment of the CMC back in June following the voluntary administration of the first claimant, the Australian administrator, and we are now in a position obviously of needing to work out whether they have got funding in order to move forward.

THE CHAIRMAN: Yes.

MR GIBSON: You will see that there is interest----

THE CHAIRMAN: Sorry, just to be clear, you may have told me this, Mr Gibson, apologies if I am asking you something you think is obvious, but what you are now about is looking to fund the UK action on its own?

MR GIBSON: That is indeed the case, Sir, yes. The first and second claimants, through their administrator, are leading on exploring the possibilities that have been mooted, and they obviously will look at other possibilities as well. We are looking at the UK action alone.

As was outlined in Miss Brittain's statement, her understanding of the approach that the Australian administrators took was to consider the two actions as a whole in the hope that it would be more efficient to do that, rather than having two parallel processes for the two different funding options because of the similarity of the actions. Because of the location of the auction being in Australia, perhaps inevitably the focus was drawn to the Australian action, and we are now in a situation obviously where the UK action may be able to proceed on its own, but needs funding in order to do so.

That is what has happened to date, and obviously in relation to specifically the UK administrator's position, as was clear from her statement, she was appointed some two months after the Australian administrator, and it may be helpful in a moment for me to outline what happened after the last substantive steps in the UK action in order to bring us up date and why we are where we are, as it were.

The UK administrator's focus since her appointment has been on the plethora of issues that come up on a voluntary administration, dealing with creditors' proposals and the like, and given the scarce funds and the fact that the Australian administrator had already advanced the process of the bundle funding, if I can call it that, it was considered more efficient for her to leave those matters to the Australian administrator rather than seeking to replicate or involve herself too deeply in the process that would obviously incur further costs to the creditors of the UK companies, and, as is clear from her statement, she has only recently been notified of the fact that the bundle process has not borne fruit. That was on Monday, 24 September.

After that she was advised that there was a need to consider the next steps in the light of the timetable for this CMC. She wrote at very short notice setting out her position as best she could and taking a conservative approach of seeking a six month stay. She needs, essentially, to obtain a proper understanding of the UK proceedings. You have got a bit of a flavour of those from the pleadings in the bundles that were forwarded to you on 11 June. Obviously there is quite a substantial body of witness evidence that was filed before the Chancery Division in April and May, and she needs to understand that. She also needs to understand what happened in the Australian process, she obviously knows they are interested in relation to the UK action, but to ensure that, if there were anything that could be done better, things are done as efficiently and appropriately as possible in any UK process. Then obviously she needs to canvass what UK only funding options there are, and hence the application for a stay.

As I say, it seems that there is some criticism in describing what has happened as a delay or a lack of alacrity, but I would submit that - hindsight is obviously a wonderful thing - in the circumstances as they arose, we had limited funds - obviously that goes without saying given that we are in a voluntary administration situation, but that was set out very clearly in the evidence provided to the Chancery Division in May, and I will take the Tribunal to that shortly. Obviously there was an expectation that the Australian process would be effective. It was only at the very last minute that the funders resiled from their interest in that process. In those circumstances, I would submit that it was and is appropriate for the UK

administrator not to have duplicated the processes, but let the Australian administrator lead and now to have dealt with the processes consecutively rather than concurrently, the bundle first and now UK only. As I said, hindsight - if one had known what was going to happen with the Australian action one would have started the UK process earlier, and we would be in a very different place.

May I very briefly, before I turn to looking ahead as to what we want to do over the next 22 weeks, outline why we are where we are, and to remind ourselves that the only reason we are in a situation of voluntary administration and a situation where we are having to consider stays is because of the direct result of Google's actions in cutting Google Play and AdMob in the United States. This was precisely the outcome that Miss Martino, the CEO for the Unlockd entities carefully explained in some detail in her evidence for the hearings earlier this year before Mr Justice Roth, and essentially it came down to two points. She intimated that if the injunction in relation to the Boost App were not granted, and the Boost App was an app powered by Unlockd Technology in the United States, there would be two immediate foreseeable and substantial effects on the rest of the claimants' business, including the UK. The first of those was that there would be a financial effect because the business in the UK was not profit making at this time. It was dependent on funding from the other Unlockd entities and the primary revenue generator in the Unlockd company at this time was in the USA. It was the Boost App. So if the Boost App was cut off that would have an immediate and substantial effect on Unlockd elsewhere, including in the UK.

I do have, because I only realised it very late last night that the bundles that you were provided with on 11 June did not contain the witness evidence, some clips of the relevant evidence. I do not want to burden you, but perhaps it would be helpful, just in case we need to refer to it, if I can hand it up. (Same handed) I will just outline briefly what----

THE CHAIRMAN: We certainly do have some of this.

MR GIBSON: It may be that you have familiarised yourself with it already, and I apologise for adding to the paper. Essentially it was a financial effect because of the inter-dependence of the companies, and in particular in the months leading up to the hearings in May 2018 payments have been made to Tesco Mobile under partnership arrangement and have been made directly by the Australian parent to Tesco Mobile, so there was a direct financial independence there, and those inter-company transfers indicated that the UK business was dependent on the US and Australian ad revenue.

THE CHAIRMAN: What is the reference to that? That is in the third witness statement, is it?

MR GIBSON: Yes, that was explained most fully in the fifth witness statement, paragraphs 21 to 22, and 25 to 30.

MISS DALY: Which tab of the new bundle?

MR GIBSON: I do apologise. I think that is tab 4. I am sorry, in my haste to prepare I did not provide an index, I do apologise for that.

MR ALLAN: I am sorry, which paragraphs did you say?

MR GIBSON: It was paragraphs 21 to 22 and 25 to 30. I will come on to the other documents in a moment. That was the first impact that her evidence had set out in relation to what would happen if Google cut the access to Google Play and AdMob to the Boost App in the USA. The second immediate substantial and foreseeable impact was as to the reputation and brand of the Unlockd business around the world, including the UK. She sets that out in Martino 5, paragraphs 35 to 38, I believe, and in particular she said, and I am reading here from paragraph 35:

> "The third likely consequence of the third defendant acting on the threats to deny to deny access to Google Play and AdMob to the Boost App and/or the flybuys app …"

that was the app in Australia -

> "… is that it would also cause immediate and substantial harm to the Unlockd brand and to our business in the EU, UK and globally.
>
> 36 The loss of our key commercial partners would result in an immediate further loss of confidence, which would further damage the existing relationship with Tesco Mobile. In my view Tesco Mobile is, out of all of our current and prospective commercial partners, currently the most concerned about our court proceedings against Google. Whilst we are very grateful to the court for protecting the supply of business critical inputs for the Tesco Mobile app …"

because by this point Mr Justice Roth had granted a limited and narrow interim injunction protecting the existing business in the UK as the only app in Europe that was by then operational.

> "I anticipate that our relationship with Tesco could still be seriously damaged by news of any enforcement action taken by Google against our partners elsewhere in the world. As one would expect from a business with a global reach and outlook Tesco takes a global view in evaluating the partners it chooses."

Then it explains a little bit more about the importance of the Tesco relationship and inter-dependence on funding.

So, having outlined the financial and reputational effects in the evidence, the claimants also provided a short note - and this is tab 6 - in response to questions raised by Mr Justice Roth on Friday, 11 May. There was a hearing scheduled for Monday, 14 May, and Mr Justice Roth had a few points he wanted to check before that hearing at which he was going to make a judgment on the jurisdictional issue. If you turn to page 2, paragraph 7 explains the significance of the funding, given Tesco Mobile does not currently make a positive contribution to fixed costs.

Then at paragraph 8, but particularly 9 through to 11, there is further explanation of the funding issues, ending paragraph 11:

> "Were the flow of revenues from AdMob to Unlockd US and Australian operations to cease, the first claimant would, itself, be unable to survive without either a positive contribution from commercial revenues or the prospect of additional investment. The first claimant would be unable to continue to support the UK business in such circumstances resulting in an immediate and substantial adverse effect in the UK business, which would cease to be viable even if Google continued to support the Tesco Mobile app."

I should say that was the evidence that was available to Google before they took the action they did, but even at the earlier hearing on 9 May Miss Martino had given clear and uncontested evidence - uncontested because the evidence in response from Mr Liu and Mr Wang on behalf of the Google defendants did not even touch on the question of the Tesco and other funding. Her evidence was that the business would very likely fail if it did not obtain the injunction sought, including against Boost in the USA, and that is Martino 3, which is at tab 1, paragraphs 41 to 49, which is the non-confidential part, and then at the back paragraphs 50 to 52 set out the confidential part focusing on the Tesco relationship. There is still a confidentiality order of the High Court I believe in place in relation to that material, but whether or not it is still confidential I do not propose to go into the detail of that. It probably suffices to read from paragraph 44 of her statement on page 14 where she says:

> "Even a delay of six months until a trial of this dispute could very well kill a start-up business such as Unlockd …"

She had previously explained the risks to start-up businesses at this sort of nascent stage anyway -

"… as it would very likely become impossible to retain the confidence and support of existing commercial partners and to keep raising the capital to operate against the background of a threat to take away our critical business inputs."

She continues in a similar vein.

Google, despite having failed to put in any evidence actually contesting that point, objected to an injunction as broad as had been sought covering action in respect of the Boost App, and in effect claimed that Miss Martino's evidence was not credible.

My learned friend Mr Ward, at the hearing before Mr Justice Roth on 9 May said this, and I am turning here to tab 3, which is just an extract of what would be a rather long transcript. I have just extracted the relevant part, but I do have----

THE CHAIRMAN: Mr Gibson, I understand that you want to tell us about how we got here, but I am struggling to see why this is really relevant, given that Mr Ward has explained that the principle of an adjournment is not in dispute, the issue is really about practicalities.

MR GIBSON: Well, quite. I think----

THE CHAIRMAN: I understand that you say on behalf of your clients, "We told you so, and we've been proved right, and it's all your fault" - that is a summary of your submissions.

MR GIBSON: Yes.

THE CHAIRMAN: I got that, and I suspect my colleagues on the Bench understood that as well.

MR GIBSON: I am grateful for the indication.

THE CHAIRMAN: That is your case. I am not saying it and expressing any view as to whether you are right about that, but I understand that is your case.

MR GIBSON: Indeed. I do not wish to labour the point. I think what I was essentially trying to say is, we have a pattern here. Google did all they could to strangle us and prevent us getting the finances necessary to continue litigation before we went into voluntary administration, and that is precisely what they seek to do now in arguing about the length of time we need.

MR WARD: But we are not going to be able to decide that today at all.

MR GIBSON: I merely make the point that that is what we said would happen, and we had credible evidence, and it was refuted.

THE CHAIRMAN: We have that on board.

MR GIBSON: Thank you for the indication.

THE CHAIRMAN: I would encourage you to move on to some broader detail.

MR GIBSON: I will turn to other points, Sir, thank you, I am grateful.

Why do we need the length of time we now ask for? Miss Brittain has sought to provide a broad indication of the likely time line between now and 18 March, which is the date for which she seeks a stay. That evidence is set out at paragraphs 17 to 19 of her statement, and it is based on her colleagues' experience of securing funding for litigation in the context of company insolvencies. It is necessarily broad brush because it would depend on, obviously, how negotiations develop, and so on. I would note that the process in Australia ran for three and a half months and would have needed longer, is my understanding. The overall time that she now proposes, effectively four and a half to five months, which includes three or four weeks at the end of the process, assuming that funding is obtained, in order to allow time to prepare for any CMC, which I think is a sensible pragmatic step. There would be little point in trying to have a CMC immediately after securing funding, because the money needs to be spent in order to prepare for that. It is consistent with what is now sought for the UK action, particularly taking into account the fact that, one, this falls across the Christmas period. Whilst I am sure all of those on the Unlockd team would be prepared to work long and hard, notwithstanding the desire to spend time with their families, one cannot put that kind of pressure on the funders necessarily, and we are in their hands, as it were, as to what they would do over the Christmas period.

The second point, of course, is, as I said, the Australian process would probably have needed a bit longer in order to reach a successful conclusion. So we would say we do not wish to have a process that is unnecessarily curtailed leading to either an artificially compressed process and then having to come back for a further stay, or the process failing altogether at the outset. As I said, and we have not touched on principle, it is important to remember that, on the one hand, if a stay of a shorter length or no stay were ordered, that could potentially prejudice the ability the Unlockd claimants to proceed at all.

On the other hand, the Google defendants are not prejudiced in any way by having a stay, even a stay of six months, because they have made absolutely clear in correspondence, quite reasonably, that they will not take any action and will incur no further expenses whatsoever - and I can just briefly refer you to that, if it would be of assistance. In a letter of 22 June at page 15, Slaughter and May - and, as I say, we make no criticism of this, but we think it is an entirely pragmatic and sensible way to proceed - at the bottom of that first page of the letter, the paragraph begins:

> "In the circumstances, our clients wish to make clear that they do not intend to dedicate any further resources to the conduct of these proceedings, nor make any preparations whatsoever for trial unless and until the administrators have

confirmed that they intend to continue the proceedings and have satisfied our clients as to how they will be funded."

As I say, we make no criticism of that. Our application for a stay is completely consistent with that position. The stay will mean the defendants do not need to dedicate any further resources to the conduct of these proceedings and it also allows time, after confirming receipt of adequate funding, for the parties to prepare adequately for a CMC.

One also needs to remember, there are no *extant* obligations on the defendants anyway. The defendants' disclosure obligation has been stayed until further order. You see that at tab 19 of the bundle in the enclosures. The expedited trial has been vacated. That is tab 19 as well. The interim injunction has been discharged. That was a point that the letter from the CAT addressed, that it would need to be dealt with by the Chancery Division because it was a Chancery Division order. I am not sure the order is in the bundle, but the order was made on the same day, 29 June.

So Google has no need to undertake any further action in these proceedings or to incur any further costs unless and until the stay is lifted following obtaining further funding. In those circumstances, I would submit that what Miss Brittain has set out in terms of the timing is reasonable, and is an appropriate and just way to deal with these matters, having regard to the requirements of Rule 19(1) and (2)(n) in the CAT Rules, which I am sure the Panel is well familiar with, dealing with matters justly and proportionately, and I would submit that this application does just that.

May I just turn my back and check if there is anything else.

THE CHAIRMAN: Yes. I have got a question for you but you turn your back.

MR GIBSON: I will answer your question first, I apologise.

THE CHAIRMAN: No, no. Looking at paragraph 17 of Miss Brittain's witness statement, the bit that jumped out at me, and I would be grateful for any assistance you can give, is that it does not sound as though any credit is given effectively in terms of the work and the preparation and the thinking to information which I imagine must exist from the Australian process. Somebody must have valued the UK part of the bundle, and so presumably people have already done some of the work and, since the Australian company is a claimant, I presume you are entitled to access to it and you can use it.

MR GIBSON: Yes.

THE CHAIRMAN: So this seems to be effectively saying, "We've got to do the whole thing again", when, in fact, that is clearly not what happened. No thought seems to have been given to that. Have I misunderstood?

MR GIBSON: No, no, you understood what was drafted there. It is, in fact, a point that I should have mentioned. It had occurred to those instructing me and myself over the weekend, and we have sought some clarification. Can I just turn my back to check that we have got the point correctly?

THE CHAIRMAN: Yes.

MR GIBSON: (After a pause) Yes, I think I did have the point, but it is worth checking it. The first point is, this statement was drafted taking that into account, but the wording could have been fuller and clearer. At the time this still stands. This took into account the fact that there are data rooms available, and you are quite right that obviously those data rooms do not need to be rebuilt from scratch. Access can be given to those. In this virtual age I am sure there can be access very easily online. So that is all being set up. The time that is allowed here I think should have been more clearly expressed as a time necessary for the funders to consider those data rooms and the information in there.

As to the funding model, my understanding is that the model that was created for the purposes of the bundled auction process rightly or wrongly was built on a bundle basis. My understanding is that, unfortunately, that is not something that can simply be broken in two and taken separately, in part because I think that it had not actually taken into account whether, for example, any application for permission to appeal, out of time obviously, in respect of Mr Justice Roth's decision on jurisdiction might be made and what the implications of that would be in terms of the scope of damages, and therefore the financials underlying the desirability of the whole process to a prospective funder.

So you are absolutely right that the paragraph 17 language was perhaps not quite as clear as it could be, but hopefully that answers the point that you have raised, Sir.

THE CHAIRMAN: Okay, and the other question I wanted to ask you is - and my colleagues may well have questions too before you sit down - what guarantees are you offering the Tribunal or, for that matter, your opponents that this timetable will be met?

MR GIBSON: All I can say is that this has been put together on the basis of discussions based on people's experience. It is based on the experience of the Australian action so far as we understand it, and of other funding processes undertaken by her colleagues in relation to insolvencies and administration situations. Therefore, it is put forward as what is hoped to be a reasonable and sensible estimate. The original proposal of six months was considered to be unduly conservative. This obviously builds in, we hope, enough time for everything to be done.

I have produced a draft order consistent with what is said in the statement. I do not know whether that is helpful to----

THE CHAIRMAN: Why do you not hand it up? (Same handed)

MR GIBSON: It is a fairly short order which deals with the matters that have been set out in the statement. It includes provision for liberty to apply. That goes both ways, of course. If, as we hope, and the administrators have made clear, they have got no desire to perpetuate this any longer than it needs to. If they can secure funding in shorter order, then of course they would want to move things forward at an appropriate pace, and they would apply earlier than the current date that is suggested, mid-March, to lift the stay, giving an appropriate period for both parties to prepare for an earlier CMC.

Alternatively, if, unfortunately, the processes do take longer, and obviously we will do all we can to avoid that outcome, we would apply on good notice to advise you of that and to provide you with an indication of the reasons why the existing timetable had not sufficient. Obviously that is not a situation that we want to come to pass. We have come with a request for a stay that we consider to be reasonable and appropriate, and we certainly do not want to take any longer than we have to. It is not in the creditors' interests, and it is not in anybody's interests for this to be unduly prolonged.

MR ALLAN: Can I just take you back to paragraph 13 in Miss Brittain's statement, that we have been advised that there is interest in funding for the UK litigation, which is a quite Delphic observation.

MR GIBSON: I am not intending that.

MR ALLAN: I was just wondering if there is more that you can tell us about the nature and strength of that interest?

MR GIBSON: Sure. Can I just check that point. (After a pause) Sorry, sir, that comment was specifically related to one funder, and that funder maintains their interest and they are progressing matters with the UK administrator. Since writing the statement there is at least one more set of funders that has been told to communicate with those instructing me to understand better the nature of the claim. As I understand it, there are at least two in play. There are other funders who have been contacted and have yet to respond, or at least yet to respond substantively to those proposals. We are at a relatively early stage, if you like, of considering UK only action, but already I can say that one funder is in play, another is going to contact those behind me, and there may be others that come out in the intervening period, but that is as much as we can say at this stage.

MR ALLAN: Thank you.

THE CHAIRMAN: Thank you very much, Mr Gibson. Yes, Mr Ward?

MR WARD: Thank you, Sir. I apprehend that the Tribunal is not interested in the merits or the procedural history. You will, I hope, forgive me if I say though that the characterisation of that that Mr Gibson has offered is not accepted by my client, in particular the suggestion that my client has been involved in "strangling" the claim. On the contrary, if you were to read the inter-parties correspondence bundle, which I shall not ask you to do, you would see that my client has co-operated and has essentially asked repeatedly for clarification and information so that a sensible way to bring this claim forward, if that is to happen, can be found. In fact, very little explanation has ever been given until we had this witness statement from Miss Brittain in the course of last week.

The essential concern of my client is that these proceedings should not drag on indefinitely. This is the fourth time that the claimants have asked for a postponement since the first claimant went into administration on 12 June. Originally the case was due for speedy trial in September on the application of the claimants themselves. What we now have effectively is a request for a very lengthy stay whilst a second bite at the apple can be taken in terms of getting funding.

The reasons we are concerned about the lack of alacrity really are there on the page in Miss Brittain's witness statement. If I could simply invite you to turn it up and highlight a number of the matters in it, you will see that very easily. We can see in paragraph 7 that Miss Brittain says she was appointed as joint administrator in August 2018. The date, in fact, was on a day in the middle of August, for what that is worth - 13 August. So she was appointed on 13 August. She then explains at paragraph 8 that the Australian parent company went into administration on 12 June 2018, and they managed to hold an auction in three months, paragraph 11. The final deadline for submitting a funding offer in the auction process was 14 September. So it took just three months from the beginning of administration to holding the auction. Unfortunately, as she says, the auction was a failure and no offer was received. That result was communicated to the UK administrators on 24 September.

At that point there was a CMC due to take place in this Tribunal fairly shortly afterwards. So we can turn the page to see what she says at paragraph 15, which is that on 27 September she wrote an urgent letter to the Tribunal to apply for a stay, "As I explained in that letter we had only recently been made aware of the upcoming CMC", and the deadline for written submissions the next day:

"Our ability to make informed decisions as to the future conduct of the UK proceedings was also constrained by our not having had adequate time to review the current pleadings and other relevant documents…"

You will note that it was already six weeks at that stage since they had been first instructed. Then, in my respectful submission, remarkably, what she then says in paragraph in 17.1 is that she still wants another two or three weeks from the date of this CMC to just review the papers.

What we learnt from Mr Gibson's explanation of a few moments ago is that in essence Euclid, the body that has acted for the claimants throughout in the UK, has been, itself, actively engaging directly with funders. It sounds a little bit as though, to the extent that the issue is what is the content and merits of the claim, Euclid is driving that process more than the administrator. It is perhaps not surprising because Euclid is a firm of solicitors.

I only take that from what Mr Gibson said. It is not made clear in the witness statement and, as Mr Allan says, the observations about there being some interest in funding the UK litigation are cryptic, and we thought it was an odd thing to say in circumstances where the administrators themselves obviously have not even reviewed the papers. So what we are seeing though is that that step one is, at the very least, extremely late, but possibly unnecessary altogether.

Then she says, "We intend to follow up on the interest already expressed and solicit interest from future potential funders." We do respectfully ask: what have you been doing, even if you take 24 September as the relevant date when they were told the Australian auction had folded?

Then we have this very broad and, in my respectful submission, unduly leisurely proposed timetable through 2 to 5 based on a very generalised explanation of speaking to colleagues with previous experience of securing funding.

So we do submit that there is a lack of urgency about this. We ask the Tribunal to impose some procedural discipline. When you asked, Sir, what guarantee are you prepared to offer about this timetable, what came back was a draft order from Mr Gibson with no guarantee whatsoever. It is certainly not cast, for example, in the form of an unless order. Whilst it is true that my client has, if you like, stopped taking any preparatory steps for the action, this file of correspondence that you have in front of you shows that the continuous procedural coming and going in this case is, of course, racking up costs, and additional costs that may well never be recovered.

THE CHAIRMAN: Yes.

MR WARD: So we have, in my submission, taken a pragmatic approach here to accept that some kind of stay is the inevitable outcome of today's hearing. We do not want the matter set down for trial. We do not suggest the Tribunal should strike it out today, but what we do respectfully ask is for the Tribunal to assert its case management powers in a way that does provide effective control of this process going forward.

THE CHAIRMAN: Okay.

MR WARD: Unless I can assist further, those are the defendants' submissions.

MR ALLAN: What particular forms of procedural discipline do you suggest we impose?

MR WARD: There are two possibilities, sir. One is that you impose a tighter timetable, and a reasonable benchmark is the three months it took in Australia to go from the very beginning of administration to the auction. Here the UK administrators have been on the job since mid-August. So that, in my respectful submission, would be generous.

The other step that could be considered is something in the form of an unless order which would, if nothing else, focus minds.

THE CHAIRMAN: Okay.

MR WARD: Thank you, Sir.

THE CHAIRMAN: Thank you, Mr Ward. Yes, Mr Gibson?

MR GIBSON: I will turn my back after I have made a few observations. I think some of the points that my learned friend Mr Ward raises I hope I have actually already addressed, but I will just briefly - and I promise briefly - remind you of our position. There was a complaint that the administrator, UK administrator, was appointed some time ago. I have already explained the reason why the UK administrator has not taken action in relation to the funding of the UK actions was because the sensible pragmatic decision taken in order to preserve the interests of creditors was not to run two processes in parallel - i.e. to deal with things consecutively as it now turns out - in the hope that everything would have been dealt with by the Australian process.

The criticism of step one in relation to two to three weeks: step one perhaps was otiose. We were merely explaining that something would happen in parallel. I hope that the words at the beginning of step two, paragraph 17.2, make that clear. It says "in parallel there will be a process". So whatever criticism is made of what further investigations of the case file will be necessary, and we say that it will take them a while to familiarise themselves. Unfortunately, since 24 September they have been taking steps, but they feel they need more time. Step two, if you like, is perhaps the critical one.

There was a suggestion that Euclid is driving the process. I will check with those behind me, but my understanding is that the process was driven by the Australian administrator in conjunction with certain lawyers who have been familiar with the process in Australia and not the UK. Euclid have been kept apprised of things in order to update the Tribunal, and the inter-parties correspondence reflects their attempts to keep the Tribunal informed, and indeed Slaughter and May.

What has been happening since 24 September was asked. Again, I hope I have already said, we have been investigating the possibilities already presented, and investigating what more there might be. As I have indicated, we have got one in play, one potentially looking at the matter, and more we hope will follow.

Criticism of steps three to five is that they are leisurely. Step five, of course, is three to four weeks for both sides to allow preparation for the hearing. I do not think that is leisurely.

I think, if we were going to be doing a full CMC, we would need to think very carefully about where we stand in the light of the developments over the subsequent months, but we are in your hands on that.

The critical is steps three and four, and we have explained that the overall time period is consistent with what was done in Australia having regard to the fact that there is the Christmas period intervening and the processes are not identical. There are additional features of the UK litigation, including the appeal, as I have said, the possibility of an appeal, that would need to be taken into account.

As to the effective control point and the options available to you, you could, of course, order a shorter time period. What we are seeking to avoid is the necessity, in so far as possible, of having to come back and ask for more time. I hope it is accepted as being obvious that if one starts with a sufficient amount of time one is more likely to use that time effectively. If one has too little time one can try and do it hastily and then back, but that is rarely the most efficient way to proceed.

I would urge you very strongly against imposing an unless order, which I think would be unduly draconian in the circumstances. The overall justice of the situation is that we had wanted to move this forward on a speedy trial basis. We had sought an injunction to hold the ring for a relatively short period in order to allow our business - the funding, the continuing funding to allow it to do that up to a speedy trial, and set out in some detail why that would need to happen. I do not want to go over the procedural history, but the short point is that the speedy trial would have happened and been over now, and so the situation we are now in is one where we are trying to do our best to cope the voluntary administration

situation, and we have given a clear indication as to what we think is reasonable and how we will do our best to get to there. The effect of imposing an unless order would be that the action would die, even if it only needed a couple of extra weeks in order to finish matters. That would have a huge negative impact on our clients.

The other side of the balance of convenience is that Slaughter and May would have to sit on their pens and not write any more letters for a couple more weeks until the funding situation could be resolved. There is very little inconvenience to the Google defendants, I would submit. Obviously no one wants this to go on for longer than necessary but if there is a need to go further we would obviously the Tribunal of that and explain why. I should reiterate we have put this application for a stay on the basis that we think it will be situation.

THE CHAIRMAN: All right.

MR GIBSON: May I just turn my back, Sir?

THE CHAIRMAN: Yes.

MR GIBSON: That is all we wanted to say, Sir, thank you.

THE CHAIRMAN: Thank you, Mr Gibson. We will just retire for a few minutes.

(Short break)

THE CHAIRMAN: Mr Gibson and Mr Ward, we have decided what we are going to do. We candidly doubt that you need the time you are asking for, Mr Gibson, but it seems to us that the best way of managing these proceedings in a fair and efficient manner is to accept your submission about timing on the clear footing that you will not be getting any extension. So, despite Mr Ward's submissions that we should give you a shorter period of time, it seems to us that the best way of ensuring this comes to an end in a clean way is that we will, as it were, "buy it" from your point of view, having expressed the doubts I have just expressed, but I am repeating myself to make it absolutely clear that this Tribunal is not going to be at all receptive to any possibility of extending this timetable. Since, as you know, in this Tribunal, the Tribunal will be the same people, if you do come back, you can imagine what the reception will be if that is what happens.

We will, therefore, set a date for a CMC in March. We can discuss details in a minute. That will be a CMC which will, if the case is to proceed, make directions for the further conduct in the proceedings.

What we will also do is require your client to write to the Tribunal on a date - we can discuss the precise date in a second - during the working time this side of Christmas, something like the high teens of December, or something of that kind, where you need to inform us and your opponents of exactly how progress is going and what is happening.

We will also make the order in terms that you have put in your draft about notifying the Tribunal if things happen in the meantime, and that seems to us to be the best way of managing these proceedings in an appropriate manner.

Is that reasonably clear?

MR GIBSON: Yes, Sir, it is perfectly clear, and I will certainly do all I can to avoid myself having to stand up and make uncomfortable submissions which we do not want to make.

THE CHAIRMAN: Yes.

MR GIBSON: So we take that on board, and we are grateful for your listening to our submissions, and I hope you do not think there was anything improper in my supporting them, that they were genuinely made.

THE CHAIRMAN: No, no.

MR ALLAN: I think other people would say that we would want the corollary to your paragraph 2, which is that if it becomes apparent at any time that your attempts to secure funding have failed, you will promptly notify us and your opponents.

MR GIBSON: Absolutely.

THE CHAIRMAN: I should have added that we are not persuaded by Mr Ward that we should make an unless order in these circumstances. I am sorry to repeat myself, but I should also say, do not think you can get an extension next time by saying, "Oh, but this time you can make it an unless order". This is the last extension.

MR GIBSON: That is understood. Thank you, Sir, I appreciate your clarity on that point.

THE CHAIRMAN: Would it be of assistance to fix the date in March now, or is that something that would be better date off-line. Mr Ward thinks now, so I am prepared to do that. We will get our diaries out.

MR GIBSON: Does anybody know when Easter is next year?

MR WARD: It is mid-April.

THE CHAIRMAN: Shrove Tuesday is 5 March, so Easter is not going to be in March.

MR GIBSON: Right.

THE CHAIRMAN: You have put the date of 18 March in your order, Mr Gibson, what about that? Does that suit anyone?

MR GIBSON: That is a Monday, as is clear from the order, is that a convenient day of the week for the Tribunal?

MR ALLAN: It is a Bank Holiday in Northern Ireland, but apart from that----

THE CHAIRMAN: Last chance for someone to say they do not like 18 March. Mr Ward?

MR WARD: No, I am content with 18 March. This is a totally different point.

THE CHAIRMAN: Okay, let us just sort this out first.

MR GIBSON: I understand the following week is the ABA so all competition lawyers will have disappeared to America, so that sounds good.

THE CHAIRMAN: Fine. The CMC will be 18 March, and then the date in December, and that really affects you more than anyone else, I have in mind something like the middle of that week that starts with the last teen days, so something like Wednesday, 19 December?

MR GIBSON: Yes, thank you, Sir.

THE CHAIRMAN: Very good, so that is the date for your letter, your clients' letter, or I suppose your instructing solicitors' letter to be accurate. Very good.

MR GIBSON: Sir, will the Tribunal be drawing up the order in the usual way, or do you want me to amend the order I have already prepared?

THE CHAIRMAN: Why do you not draft something up, Mr Gibson.

MR GIBSON: I will do my best.

THE CHAIRMAN: See if you and Mr Ward can agree, and you can send it to the Tribunal. That will save us a bit of work.

MR GIBSON: Thank you, Sir.

THE CHAIRMAN: Mr Ward?

MR WARD: Thank you, I have just one other suggestion for the draft order.

THE CHAIRMAN: Yes.

MR WARD: Let us envisage the scenario where this claim is going to go ahead, and therefore the CMC on 18 March is effective in terms of plotting the future conduct of this litigation.

THE CHAIRMAN: Yes, you need to know in advance really, do you not?

MR WARD: We do need to know in advance.

THE CHAIRMAN: Yes, I agree with that.

MR WARD: So we need a reasonable period of notice, and CMCs in this kind of matter are usually somewhat involved, but the *sine qua non* of making useful progress will be to know whether the current pleaded case is going to be amended and, if so, how? The case was brought on a semi-prospective basis when the complaint was still that there was a potential harm to the claimants. Now matters have moved on a long way and it seems inevitable that the particulars of claim would be amended and, if so, that should happen in good time to make sensible progress.

THE CHAIRMAN: What about this, Mr Ward: Mr Gibson's proposal, the evidence from Miss Brittain, was that he wanted three to four weeks for adequate preparation for that

hearing, so if we said three or four weeks before 18 March seems to be a time when you ought to find out from Mr Gibson's clients, assuming that that is what happening----

MR WARD: Preferably with amended particulars of claim, if that is going to happen?

THE CHAIRMAN: Yes. What do you say about that, Mr Gibson?

MR GIBSON: Sir, I do understand the appropriate time to clarify our pleadings. My concern is the----

THE CHAIRMAN: I will tell you what, Mr Gibson, what we will do - sorry to cut across you - is we will set a further date for a letter four weeks before 18 March - I cannot do the maths in my head, but whatever that date is----

MR GIBSON: 18 February.

THE CHAIRMAN: Okay, and that will be a letter from your client to explain what the position is. I am going to say that you have to produce a pleading on that date, but you have heard what Mr Ward says and he obviously has a very sensible point, and if your clients are going to be amending pleadings then they need to have done that in advance of 18 March, put drafts in.

(The Tribunal conferred)

THE CHAIRMAN: Mr Gibson, just to be clear, what we are currently thinking as a Tribunal is that we will say the notification is the four weeks - that is 18 February - and 4 March, which is two weeks, the two weeks in between, is the date where any amended pleading has to be served on your opponents.

MR GIBSON: Yes. We are in your hands, but we had envisaged that one of the matters that would be dealt with at the CMC was the appropriateness of amending pleadings and setting out a timetable for directions about that. It is difficult to know now precisely how long the amendment process would take. I am conscious that is an extremely important document.

THE CHAIRMAN: Yes.

MR GIBSON: If the funding has only just been secured and we have got to start from that point, we do not want to be in a position where we amend in a hurry and then have to re-apply to amend if things need to be tweaked.

THE CHAIRMAN: Well, maybe, but the beauty of this is we are giving you what you asked for.

MR GIBSON: Yes.

THE CHAIRMAN: And you did not say until now that actually you envisaged at a CMC on the end of your timetable that you then wanted us to give directions which involved the wholesale re-casting of your case and another whole time before things got going. So I am afraid, Mr Gibson, that what we are going to do is stick with what we thought as a Tribunal,

which is the notification is the four weeks before, and if there is to be an amended pleading you have got to produce it on 4 March. It seems to me that there is ample time in this timetable for your clients to secure funding, if funding is ever going to be secured, and sort out their case.

MR GIBSON: Very good.

THE CHAIRMAN: That is what is going to happen.

MR GIBSON: Thank you, Sir.

THE CHAIRMAN: Any other directions required this morning?

MR GIBSON: I do not think so, but if anything occurs to Mr Ward and myself we will obviously make----

THE CHAIRMAN: Very good, and costs reserved over to the next - the order just says costs reserved, does it?

MR GIBSON: Yes, Sir.

THE CHAIRMAN: Very good. Thank you very much.