IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1351/5/7/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Remote Hearing)

Tuesday 27 October 2020

Before:

THE HONOURABLE MR JUSTICE ZACAROLI
(Chairman)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

(1) CHURCHILL GOWNS LIMITED
(2) STUDENT GOWNS LIMITED

Claimants

- and -

(1) EDE & RAVENSCROFT LIMITED
(2) RADCLIFFE & TAYLOR LIMITED
(3) WM. NORTHAM & COMPANY LIMITED
(4) IRISH LEGAL AND ACADEMIC LIMITED

Defendants

A P P E A R AN C E S

Christopher Brown and Paul Skinner (instructed by TupperS Law Limited appeared on behalf of the Claimants)
Michael Armitage (instructed by Fladgate LLP appeared on behalf of the Defendants)

Digital Transcription by Epiq Europe Ltd
Lower Ground 20 Furnival Street London EC4A 1JS
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Email: ukclient@epiqglobal.co.uk

Tuesday, 27 October 2020

(10.30 am)

Housekeeping

THE CHAIRMAN: Good morning, everyone, can everyone hear me okay?

MR BROWN: Yes.

MR ARMITAGE: Yes, thank you.

THE CHAIRMAN: Just an obvious housekeeping point, I am sure everyone is on mute but could they please stay on mute throughout the call unless they are speaking. I don't know how long this will last but if it is likely it will last more than half the morning we will take a break midway through the morning, about 11.40, for about 10 minutes, to give us and the transcribers a break.

Right, Mr Brown, I think.

MR BROWN: Yes, Sir, good morning. I appear together with Mr Skinner for the claimants. Mr Armitage appears for the defendants at this CMC.

Hopefully, Sir, you have received the updated hearing bundle, which was sent in on Friday.

THE CHAIRMAN: Yes.

MR BROWN: Which takes on board the skeletons, in particular, but also a witness statement filed by Ms Taylor of the defendant's solicitors on Friday morning.

THE CHAIRMAN: Yes.

MR BROWN: I am grateful. The Tribunal should also have an authorities bundle, ten authorities.

THE CHAIRMAN: Yes, again.

MR BROWN: Thank you.

May I take it that the Tribunal has managed to peruse the skeletons in advance of the

hearing?

THE CHAIRMAN: Yes, I have read the skeletons and I have also read Ms Taylor's witness statement.

MR BROWN: Excellent.

The final housekeeping point, I think, is that Mr Armitage put together a short schedule yesterday afternoon, which hopefully has made its way to the Tribunal.

THE CHAIRMAN: Yes, thank you.

MR BROWN: Very good.

Sir, we have received, of course, the Tribunal's provisional agenda, for which many thanks. I can say that the parties have cooperated to narrow the issues for the CMC, as the Tribunal would expect. The matters still in dispute, as you will have seen from the skeletons, are, first of all, whether, as we have requested, there should be a split trial.

Secondly, the scope of the Tribunal's order as to early disclosure of the arrangements at the heart of this case.

Third, whether the Tribunal should set down directions to trial now or defer that issue to the disclosure CMC early next year, which the parties are agreed should take place, subject of course to the Tribunal. And if so, in other words if the Tribunal should set down directions for trial now, what those directions should be.

I think the fourth and final issue is whether the costs management conference, which again the parties are agreed should take place, whether that should take place at the same time as the disclosure CMC or be pushed off to a separate hearing thereafter.

THE CHAIRMAN: Yes.

MR BROWN: So those are the issues. May I just suggest to the Tribunal that it may not be necessary, as we go through the split trial application, which I propose

we deal with first, but certainly it would be worth having to hand the composite draft order which is attached to Mr Armitage's skeleton. That seems the most convenient version of the draft order to have to hand.

THE CHAIRMAN: Yes, I have that, thank you, in hard copy. So I have that.

MR BROWN: Yes. Now, there are a number of items on the provisional agenda. I am in your hands, Sir, as to whether we run through one or two of them now or whether I just get on with the split trial application, and I say --

THE CHAIRMAN: Go on.

MR BROWN: I say the latter just because a number of things are likely to follow from the outcome of that application.

THE CHAIRMAN: No, I agree with that entirely, it seems to me quite a bit does flow from that.

It may be worth saying at the outset as well, in terms of timing I see there is a debate as to whether the trial should be listed now at all and, if so, is it October next year or later. The reality is that I am a docketed judge in a trial beginning -- well, taking place in the autumn term next year. So, in fact, I am not available either in October or for the rest of that term. So, unless the parties are seriously considering this matter being ready for trial before the long vacation, which doesn't seem to be anyone's proposal, I am afraid the reality is we are looking at January 2022. That, of course, will have a knock-on effect on other timings.

MR BROWN: Yes, that is very helpful indication indeed, Sir and we can address that as we go. But you are quite right to say that no party is pushing for a trial of this matter before the summer vacation.

THE CHAIRMAN: Yes.

MR BROWN: Well, without further ado I will proceed to open the split trial application.

Split trial application by MR BROWN

MR BROWN: Our formal request for a split trial was contained in the letter from my solicitors of 20 October 2020, which is at page 143 of the bundle. Perhaps we can go to the composite draft order, just to see what it is that we are suggesting. The order we seek is at paragraph 35. You will see that there is wording in different colours to reflect the parties' competing positions.

That proposal has to be read alongside paragraph 37, which defines the issues of liability. That, in turn, refers to a list of issues. The list of issues, hopefully, Sir, you have seen. That is at page 252 of the bundle and it is perhaps worth just going there.

Just pausing there, Sir, I intend, unless this is inconvenient, to refer to pages of the bundle rather than the specific sub folders within the bundle. If it would be more helpful for me to do that I am happy to but --

THE CHAIRMAN: It is much easier to go straight to the page number.

MR BROWN: Yes, very good.

So if you are already there, Sir, you will see that the draft list of issues starts at page 251.

THE CHAIRMAN: Yes.

MR BROWN: We have liability. So breach of the chapter 2 prohibition, section 18 of the 1998 Act; then breach of the chapter 1 prohibition; and then joint and several liability. I will say something about that towards the end.

So that is the order we seek. Essentially we seek to have a first phase trial of the infringement issues in this case, together with the question of joint and several liability. The questions of what loss and damages the claimants have suffered, and whether the defendants' conduct or the agreements caused that loss, would be, on our position, for a subsequent trial.

Now, our overarching submission is that bifurcating the issues in this way is more likely to achieve the overarching objective of dealing with the case justly and at proportionate cost. We say that when one considers the infringement issues that arise, or are going to arise in this case, one can easily see considerable scope for a trial of them first to lead to real savings of costs and time.

May I just address the law briefly to start off with. You will be glad to know it is common ground. It is contained, or at least the relevant legal principles are contained, in two judgments of the High Court. First, Electrical Waste Recycling, and second, the Daimler judgment of Mr Justice Bryan from earlier this year.

Perhaps we can go straight to the Daimler judgment, which is at page 261 of the authorities bundle, so tab 10 of the authorities bundle. It starts on page 254 but the relevant principles are set out at page 261. In fact, the bottom of page 260 you will see the heading "the law relating to the split trial application".

THE CHAIRMAN: Yes.

MR BROWN: Reference is made to Leaflet Company and Electrical Waste Recycling at paragraph 26.

At paragraph 27 we see the reference to a non-exhaustive list of relevant factors. Those factors we set out and I think Mr Armitage also set out in the skeletons.

At paragraph 28 the task for the judge is to undertake a pragmatic balancing exercise. Then, at paragraph 29, Mr Justice Bryan stresses the importance of a demarcation of a boundary between the two trials. We will come on to that. And then he says, with regard to factor 4:

"Whether a single trial to deal with both liability and quantum will lead to excessive complexity and diffusion of issues or place an undue burden on the judge hearing the case."

He says that one example of excessive complexity that a single trial can lead to is

where a large number of possible permutations of loss and damage may arise depending on the judge's conclusions as to liability. I am going to be addressing you specifically on that point in just a moment.

The judge's dicta continues through to paragraph 33 so if I could invite you, Sir, just to cast your eye over those paragraphs.

(Pause)

THE CHAIRMAN: Yes, thank you. The factors blend into each other quite a bit, obviously. They aren't really a list of independent points. It seemed to me that the two critical, most critical questions here were whether there was a clean split if causation issues in particular are separated out from liability. There, my concern is the extent to which factual investigation of matters would be required in relation to liability and causation. It doubles up with each other, or overlaps with each other. My concern is that points towards no split.

The factor which might point towards a split is the one you have just mentioned, which is the extent to which findings on liability might lead to a number of different possible avenues for quantification of loss. That might suggest a different split to the one you are suggesting, between liability and causation on the one hand and quantum on the other. I think we need to address that possibility as well but that seems to me to be where the main battleground lies here. I am not stopping anybody from making any wider submissions on other points, but that seems to me to be where it lies.

MR BROWN: I am grateful for that. Those are the points I intend to focus on in my submissions, and I imagine Mr Armitage will be focusing on those points as well.

Can I turn to the claimants' pleaded case, and I will take this fairly rapidly.

I assume, Sir, that you have managed to cast your eyes over the pleadings --

THE CHAIRMAN: Yes.

MR BROWN: -- and will be familiar with the issues that arise in this case. But if we take it at page 4 of the hearing bundle.

THE CHAIRMAN: Yes.

MR BROWN: We see the essential allegations at paragraph 18. Just to summarise, what is at issue insofar as infringement is concerned is, first, whether Ede's so-called official supplier arrangements with a large number of universities -- and I think the total is somewhere in the region of 130, representing around 80 per cent of the universities in the UK -- whether that conduct in entering into those agreements constitutes an abuse or abuses of a dominant position or positions, contrary to section 18.

Second, whether those agreements -- so here focusing on the agreements rather than the specific conduct of Ede -- but whether those agreements infringe the chapter 1 prohibition because they had a likely or actual effect which is restrictive of competition.

Sir, just to emphasise that there are two possibilities there; either these agreements individually infringe the chapter 1 prohibition, they individually have a likely or actual effect which is restrictive of competition, or when considered as a class. We see that, just going forward to page 26, you will see at the top, paragraph 81:

"Each exclusivity agreement has the likely or actual effect ..."

And then at paragraph 82 we see that market definition, at least on our case, will be relevant here.

Now, just pausing there, Sir, the parties are not at one when it comes to market definition. We have said that there is a national supply market, the defendants, to the contrary, say that there are specific university specific markets for the

supply of academic dress. I will address that in just a moment and the relevance of it but, just for these purposes, we say that if there are university specific markets then the effect of each agreement is to confer market power and restrict competition and so on. Then there is a list of sub-points.

Then, at paragraph 83 -- this is our primary case on market definition -- if the market is UK wide then the exclusivity agreements, along with similar arrangements entered into by other suppliers with other universities, cumulatively have a restrictive effect.

So those are the two ways in which we put the chapter 1 allegations.

Then, of course, we say that the conduct and/or the agreements have stymied our ability to enter the market, or markets, properly and profitably.

Now, as you will have seen from my skeleton, and as you foreshadowed Sir, a very important point in our submission is that there are a substantial number of different permutations in respect of the infringement issues. I would like to take you through them because it is an important point.

First, there is the dispute about market definition. Our pleaded case, as I have said, is that there is a national market. We see that at paragraph 59 of our claim form, which is page 20, just for your note.

THE CHAIRMAN: Yes.

MR BROWN: The defendants' primary case is university specific, as I have said, and, for your note, that is paragraph 61 of the defence at page 68.

But it is worth looking at paragraph 66, as well, of the defence, which is on page 69 of the bundle. They say:

"In the alternative to the existence of university specific markets, and to the extent that essentially the market is not university specific, [they say] the relevant geographic market is worldwide."

Then at 66.2 they say:

"The relevant product market goes wider than academic dress, it encompasses legal dress, clerical dress..."

So there are a number of permutations when it comes to market definition.

In my submission, the Tribunal's determination of these market definition issues is itself liable to have a direct impact on the quantum issues, because if the defendants are right then the infringements, if any are found, will relate to specific university markets, or possibly a worldwide market, with potentially different competitive constraints on the players in the market compared to the position if there were a national market. In my submission, it is likely that, if the defendants are right that there is a university specific market, the sort of exercise that would be needed when it comes to quantum, quantification, will be more granular; looking at the loss that was caused in respect of each particular infringement, each particular market, each university specific market.

THE CHAIRMAN: It depends upon the agreement that has actually been reached between the defendants and each university, because I don't understand this to be uniform terms across the entire field of universities.

MR BROWN: Sir, exactly. That is a point I was just about to come on to. It very much overlaps with the point I am about to make, which is that it is conceivable that we will prevail on certain infringement issues but not others. It may be, for example, that we don't prevail on abuse of dominance, because the Tribunal may end up accepting Ede's case that they are not dominant. That is their pleaded case. It may be that the Tribunal agrees with that. But, at the same time, the Tribunal may uphold our claim insofar as we are alleging anti-competitive agreements. As you have just pointed out, Sir, it may be the case that the Tribunal finds that some of those agreements had a restrictive

effect, or have a restrictive effect, on competition and others don't. When we recall that there are some 130 odd agreements in play -- and we are talking there about the agreements which are currently in place, the claim period dates back to 2016 and you will have seen in the context of the early disclosure application that there are a number of agreements which are relevant to the claim period but which have expired. There is obviously no guarantee that the terms of those, and any broader understanding between Ede and the university in question, will be the same as it is currently.

So already you can see that there is very substantial scope for different permutations, a very significant number of permutations, to emerge from the liability or the infringement issues.

So we say that the defendants are wrong in their skeleton argument to say that this case is not one with a large number of possible permutations. That is what is said at paragraph 35 of the skeleton. We say our quantum claim is bound to look quite different, and the investigation needed in respect of it is going to be very different, if it is established that Ede were party to, say, 30 or 40 restrictive agreements rather than 130.

THE CHAIRMAN: Yes. I can see how that works in relation to quantification of damages but I need a bit more help on why that causes difficulties in relation to causation.

MR BROWN: Yes. Can I address causation in due course, because the defendants have made some submissions about it and put in some witness evidence about the extent to which there is going to be -- to which causation arises and is a distinct issue, or not. So I will --

THE CHAIRMAN: Yes. For my part, at the moment, the submission you are currently making, one which favours a split of quantification alone or one which favours

a split of causation and quantification from liability, which is your current submission aimed at?

MR BROWN: My current submission was aimed at a split of infringement issues alone. Our case is that, whilst we accept that the defendants' case is the causation of any loss is denied, that is their pleaded case, we say that the Tribunal can be confident that, following a trial of the liability issues, we will have established some loss, some minimal loss. But even if we don't, that is not in itself a reason -- or even if the Tribunal is concerned that that won't be the case, the Tribunal should not accord that significant weight in the overall balancing exercise, because it is not necessary for the purposes of a split trial to have causation, even of minimal loss, determined definitively as part of a first phase trial, as we will see from the Leaflet Company case that I will take you to in a short while.

So that is the infringement issues.

The third set of possible permutations relates to the counterfactual which, of course, is bound up with the infringement issues but it is a specific issue, sub issue, that will have to be addressed. We say that the Tribunal's conclusions as to the counterfactual will have a material bearing on the quantum aspects of the case.

It is common ground between the parties that the counterfactual is an important aspect of a competition claim such as this, under both sets of allegations, both the chapter 1 and chapter 2 allegations. But I think it suffices for present purposes just to focus on the chapter 1 allegations.

The case law, which isn't in the bundle but I apprehend won't be controversial, establishes that assessing a restrictive effect on competition requires a comparison between the state of competition with the putatively restrictive

agreements or provisions, and the state of competition without them. In short, is the market more competitive without them than with them?

You will have seen from our pleaded case, in fact from both parties' pleaded cases, that there are, again, a number of permutations. We can see, if we go to -- conveniently I think this point is brought out at page 117 of the hearing bundle.

THE CHAIRMAN: Yes.

MR BROWN: Paragraph 54.3, which clarifies the claimants' case on the realistic and likely counterfactual.

You will see the second sentence:

"Either the universities would not have entered into any agreements with Ede relating to the supply of academic dress, or else they would have entered into agreements conferring official supplier status but without the exclusivity effect, without any obligation on their part..."

That is to say the University's part:

"... to require or strongly encourage to obtain their academic dress requirements from the official supplier/suppliers."

So there are at least those two possibilities, and of course it would always be open to the Tribunal to find a different counterfactual if that is what the evidence ended up suggesting to the Tribunal.

We say, again, the Tribunal's determination of this counterfactual issue could have a material impact on the quantum issues. I am not making any omissions or concessions at this stage but you can see it is at least conceivable that, if in the counterfactual there were official supplier arrangements but shorn of what we say is the exclusivity effect, then it may be the case, the evidence may be, that more students would be inclined to use the official supplier than would be the

case if there were no official supplier arrangements, if no one supplier was given the official supplier badge. So there is at least the scope for quantum to be affected by the determination of that counterfactual issue which is at large.

So we say that there are, even looking at those three issues, those three sets of issues, we say that when you analyse the various permutations there is a real prospect of cost savings by separating out infringement from quantum. That is even before you factor in the possibility that there won't be a need for a quantum trial at all, either because Ede wins outright on liability or because the claim is compromised.

Can I at this stage just go to a point made in Mr Armitage's skeleton at paragraph 36. I don't know if you have that loose, Sir.

THE CHAIRMAN: I don't.

MR BROWN: It is -- I will give you the bundle reference. It is in the hearing bundle --

THE CHAIRMAN: I do have it separately, but not loose. It is on a separate screen. Which paragraph?

MR BROWN: Sorry, yes. It is page 284, paragraph 36. I don't know if you have that in front of you, Sir?

THE CHAIRMAN: Paragraph 36?

MR BROWN: Paragraph 36 of Mr Armitage's skeleton.

THE CHAIRMAN: Yes, I have that.

MR BROWN: Thank you.

He says:

"It is telling that a split trial was not ordered in the Daimler case, notwithstanding that the defendants were able to identify a large number of issues relating to jurisdiction, territorial and temporal scope of EU competition law, limitation or matters of exemption, on the basis of which certain parts of the defendants'

liability might have been extinguished."

So he says, look, in that case there were lots of permutations and it is quite telling that Mr Justice Bryan didn't order a split trial.

Can we go back to the Daimler judgment, which again is at tab 10 of the authorities bundle.

THE CHAIRMAN: Yes.

MR BROWN: We see, if you go to page 266 of the authorities bundle --

THE CHAIRMAN: Yes.

MR BROWN: -- a number of issues were raised. These are the issues, I think, that Mr Armitage was flagging in his skeleton. You will see that, depending on the answers to these various issues, it would extinguish at least certain defendants' liability in respect of certain time periods. That is a slightly condensed submission but the point is that there were specific legal provisions relating to the transport services in issue there which may have had the effect, if I have understood it correctly, of meaning that the competition rules didn't apply during certain time periods. There was also a limitation issue.

So those are the various permutations that Mr Armitage's skeleton is pointing to and you will see in paragraphs 47 and 48 a summary of the respective parties' arguments. If I could just ask you to cast your eye over those two paragraphs, I won't read them out.

THE CHAIRMAN: 47 and 48, you say?

MR BROWN: Yes, of the Daimler judgment. You will see a reference to a large number of different permutations.

THE CHAIRMAN: Yes.

(Pause)

Yes.

MR BROWN: The judge's conclusions start at paragraph 49 and this is where he sets out why a liability trial wouldn't produce significant savings. The first point he makes -- you will see at paragraph 50 he makes the point that this case was largely what is called a follow on claim. So, just to summarise, the claim in the Daimler case was the majority of the claim value related to an infringement decision of the European Commission, establishing definitively that an infringement took place. 54 per cent of the volume of commerce related to that bit of Daimler's damages action and the rest related to what is known as a standalone claim, because Daimler alleged that the collusion went further than the commission had found. So what the judge is saying in paragraph 50 is, there is bound to be a quantum trial in any event. There is no possibility that a further trial on quantum will be unnecessary.

Just pausing there, that is not a factor that applies here.

But then, paragraph 52, the third reason, he says it is likely that data from the periods in question -- that is to say the periods in which, if the defendants were right about their various legal arguments, that period would not itself be an infringement period. But he says that it is likely that data from those periods will in any event be relevant when considering the quantum of the overcharge. That is because, as you will see in sub-paragraph 1, the defendants' economic expert proposed an overcharge analysis which compared the period before the cartel, the period during, and after the cartel. So, essentially, he is saying that, even though there are a number of permutations on liability, the data, the data disclosure, is going to be the same regardless.

We see in paragraph 54, his fifth reason:

"It is said on behalf of the defendants that there will be savings and expert evidence in the split trial as the expert would not have to consider each possible

permutation on liability. Set against that is the evidence of the claimants' expert, where it appears from his evidence that different calculations of loss for each period essentially amount to running a different set of data through the same economic model. It is not unduly onerous for a model to be run for different periods."

So, essentially, the permutations point in Daimler didn't go anywhere. We say that is in stark contrast to the position here.

So that is just to address paragraph 36 of Mr Armitage's skeleton.

Sir, that hopefully addresses the permutations point. If I can now move on to the divide between liability, causation and quantum.

THE CHAIRMAN: Yes.

MR BROWN: As I have indicated, and as you have alluded to, Sir, the defendants have taken the point that they deny causation in toto, such that, under our proposed split, the phase 1 trial won't address an important part of their liability defence. We see that at paragraph 10 of my learned friend's skeleton.

He also submits that our proposal does not provide for a clean split. He says that the defendants intend to call evidence which goes to issues concerning both liability and causation and loss, and that the witnesses will be one and the same for those purposes. I am going to turn to that now. He says that they would all be needed twice in the event of a split trial, so there would be huge amounts of duplication and cost.

We obviously accept the trite point that, in order to make out a breach of statutory duty, we have to show some minimal loss. I have already made the submission to you, Sir, that if we are able to show that Ede's arrangements are restrictive of competition, that their likely or actual effect is to foreclose competition, well, from the one party, which is us, who have seriously sought to challenge the

status quo, then we say the ready inference is that we will have suffered some loss, however trivial. But, as we have said, we don't rule out the possibility that, at the end of a first phase trial which deals only with infringement issues, the Tribunal may not be satisfied that it can, as it were, give judgment for the claimants because they are not -- the Tribunal is not yet, at that stage, satisfied that we will have suffered at least minimal loss. We say, in that event, that possibility, as I say, is not in and of itself a reason to decline to order a split trial. The point of having a split trial is to try issues which might render a trial of other issues unnecessary or enable it to be conducted in a more focused manner. The possibility that the findings in the first phase trial might not get the claimants fully over the line is not a strong factor to weigh in the balance.

As I think I alluded to earlier, that was not a factor which swayed the Chancellor in the Leaflet Company case, which I can go to briefly. It is at tab 2 of the authorities, starting at page 26.

The Leaflet Company v Royal Mail. This was a claim based on Articles 81 and 82, as they then were, Articles 101 and 102 now, and their equivalents in the Competition Act, which are both at issue here. We see at paragraph 1 a summary of the action, and we see the Chancellor says;

"The issues included liability, as well as causation and damage. The claimants wish to defer all issues as to damage so that, in effect, at the trial in November, it should be assumed that the claimant has sustained damage sufficient to complete his cause of action."

Paragraph 2 sets out the various allegations of abuse. There were a number in that case. Then paragraph 4 sets out the claimants' submissions in support of the application for a split trial. It was submitted, you will see halfway down, that the effect on the market, which is an integral part of the allegation of infringement,

is different to the loss to the claimant and would require evidence of a different character. I am going to come on to that in just a moment.

Paragraph 5, summarising the Royal Mail's arguments in opposition to the split trial application, which you can see:

"... is likely to be a considerable overlap between proving the allegations essential to infringement, which on any view will fall in the first trial if I direct a split, and consequential damage suffered by the claimant."

It was argued that it would likely lead to a duplication of evidence.

Then at paragraphs 7 and 8 we get on to the Chancellor's conclusions. At paragraph 7 he says he is:

"Satisfied that there should be an order for a split trial. To include in one trial not only the difficult issues involved in the infringement issue but also of all consequential damage would seem to be a waste of both time and money. The evidence on damage would have to cover all of the eventualities in the judge's conclusions."

A **point we have already canvassed.**

Paragraph 8:

"What if the damage necessary to complete the cause of action is true, as Royal Mail's counsel submits, that the proof of infringement will in many, if not all, cases also involve proof of some sufficient damage. On that basis, there is much to be said for including the causation issue in the main first trial. But if I do then it seems to me to leave to the first trial not only proof of the minimum damage required to complete the cause of action, but all of the damage caused by the claimant not specifically dealt with in the subsequent paragraphs of the particulars of claim."

Essentially, he is saying that if you include causation, causation of minimal loss,

essentially it is difficult -- as I understand it, what he is saying is it is actually very difficult to separate out causation of minimal loss from the detailed causation and quantification issues that would arise. So you would actually lose the benefit of having a split trial and dealing with infringement issues first. The judge in that case, the Chancellor in that case, was not put off by the possibility that there would not be findings on the question of causation of some minimal loss.

THE CHAIRMAN: What were the issues of causation that were raised by that case?

MR BROWN: I am not sure. I might be wrong but I am not sure they are spelt out in the judgment of the Chancellor. Perhaps we can -- if that is wrong, I am sure my learned friend, Mr Skinner, will alert me to it on a different screen. Can I come back to that if I am wrong?

THE CHAIRMAN: Yes.

MR BROWN: Could I now, please, turn to Ms Taylor's witness statement, filed on Friday. That is at page 316 of the hearing bundle. Do you have that, Sir?

THE CHAIRMAN: I do, thank you.

MR BROWN: Thank you. And if we go forward to page 320.

THE CHAIRMAN: Yes.

MR BROWN: We see here a section where Ms Taylor sets out the evidence which the defendants anticipate adducing in these proceedings. You will see at paragraph 21 there are eight sub-paragraphs dealing with, or identifying, a number of witnesses, largely the defendants' personnel, but not exclusively. What I would like to do, Sir, is to go through them one by one to show that, in my submission, the defendants' solicitors' fear that all of these witnesses will be required to give evidence at both trials if there is a split, is misplaced.

As far as we can tell from the summary, to the extent that the witnesses are expected

to give evidence relevant to liability and causation issues, very few of them appear to be concerned with the issue of quantum of loss. To the extent that they are giving evidence on liability, which might also impact on causation in terms of some minimal loss, from the description given we struggle to see how their evidence would differ if they were giving evidence simply on infringement. So we say that there isn't the significant concern as to duplication that the defendants have suggested.

If I can start with Mr Middleton. It is paragraph 21.1. Ms Taylor says that he is anticipated to give evidence on three things. First, the allegations that the defendants have entered into anti-competitive agreements. Well, yes, that is squarely a liability issue. He would explain the requirements of many/most institutions for event management services at graduation ceremonies rather than simple gown hire services. Again, that is an infringement issue and that will conceivably go to the objective necessity argument that the defendants have raised. Sir, I am not sure how familiar you are with that argument but essentially the defendants are saying that, even if their conduct does amount to exclusivity arrangements, and even if it is prima facie problematic, they say that their conduct is objectively justified by reference to, among other things, the university's own requirements and so on.

Thirdly, he will also give evidence as to the emergence of new competitors into various markets that are relevant in these proceedings and how those new entrants have built or not built their businesses as compared and contrasted with the steps taken by the claimants.

Again that squarely goes to the question of infringement, and in particular whether the arrangements that Ede entered into have the likely or actual effect of foreclosing competition. It seems that this evidence will go, in particular, to what is said in

the defence at paragraph 77.3A on page 75 of the bundle.

THE CHAIRMAN: 75. Sorry, let me just get that.

MR BROWN: Sorry, yes, page 75 of the hearing bundle.

THE CHAIRMAN: Yes.

MR BROWN: You will see:

"It is further averred that … the OSAs are not reasonably likely to harm the competitive structure of the market and nor do they have the capacity to or are likely to foreclose competition."

So that is a key issue on infringement.

"On the contrary, the practices of universities offering OSAs facilitates entry into the markets by ensuring that a new entrant will have a sufficiently long period of promotion so as to have a sufficient opportunity to recoup the investment necessary for entering into the market."

That is why we say the evidence that he is proposing to give there is squarely an infringement issue.

So we say that none of these three things that it is said he will give evidence, or is anticipated to give evidence on, is a distinct quantum or causation issue.

THE CHAIRMAN: Just take me back to where the three issues are identified in the statement, although I have now changed the page. What page were we on in Ms Taylor's statement?

MR BROWN: I think it is 317. Sorry, it is page 320.

THE CHAIRMAN: Thank you. To what extent, however, do those issues that he describes, or she describes in that paragraph that Mr Middleton will deal with, to what extent do those also relate to causation issues?

MR BROWN: Yes, I accept that they do -- I accept that in particular the third of those does go to causation as well.

THE CHAIRMAN: Yes.

MR BROWN: What I am saying is that it is very hard to see how his evidence would differ depending on whether causation is treated as a first phase issue or a second phase issue. In other words, there wouldn't be duplication of his evidence. He would give his evidence on that issue in respect of infringement at a first phase trial and that evidence -- his evidence on those issues when it comes to causation, it is very difficult to see how it would differ if he were only giving that evidence in relation to causation.

THE CHAIRMAN: You would hope that no one's evidence differs depending on which issue it goes to.

MR BROWN: No, when I say "differ", I mean whether the evidence would be more -- would be of a different character, would be more extensive, would address other issues. Of course, what I don't mean is that he would be giving contradictory evidence.

THE CHAIRMAN: No. So you would accept that the investigation of the factual matters going to causation will be done, therefore, in relation to Mr Middleton's evidence at the the first trial anyway.

MR BROWN: Yes, that's right. That is one of the reasons why we say that it is -- if we prevail on the infringement issues, then it is extremely likely, the ready inference is, that we would also have established at least some minimal loss, even though the quantification of the loss would remain to be determined at a subsequent trial.

THE CHAIRMAN: Let's try and take a concrete example, if we may. The counterfactual, which part of his evidence goes to I think, what would have been the position. Assuming that the agreements reached with a particular university or universities were anti-competitive and infringing -- assume that for the

moment -- the question then is, well, what other agreements could properly have been entered into which wouldn't have been infringing? As I understand it, that is the essential counterfactual question, or an essential counterfactual question. That is highly relevant to what the claimants could have done in the counterfactual. So their evidence, and the defendants' evidence, as to what communications they had with the universities, what the universities are prepared to do and what they would be justified in doing, all of that is relevant to both liability and quantum. So all of that needs to be investigated at the first trial, doesn't it?

MR BROWN: Well, yes. He is going to be giving evidence about the -- well, what is said there in the witness statement, he is going to be giving evidence about the way in which new competitors have managed to enter the market in the circumstances which have actually obtained.

THE CHAIRMAN: So what are you suggesting? That his evidence is all taken at the first trial but any decision that the Tribunal makes about causation is left over until some later date, not withstanding it has all evidence it needs to reach a conclusion on those issues of causation?

MR BROWN: No, I am not suggesting that. I am suggesting that the Tribunal -- the Tribunal would not have to determine the issue of causation under my proposed split. But, of course, if the evidence were such that, following that first trial, the Tribunal is satisfied that there is at least some causation of minimal loss, then the Tribunal could make that finding.

THE CHAIRMAN: Yes, I am not so much concerned about the more technical question as to you need to find some loss in order to find liability at all, I am more concerned with the duplication in effort for the Tribunal and the parties in that evidence being given in relation to two different questions at two different

times.

MR BROWN: Well, my point, Sir, is that it is very difficult to see what more Mr Middleton would be adding in terms of his evidence if causation and quantum were left over to a second trial, because he would already have given all of the evidence he intends to give when it comes to the question of infringement. So we say that we don't see the scope for the duplication of evidence in respect of his evidence.

THE CHAIRMAN: Just to cut to the chase, is that the same point for each of the witnesses?

MR BROWN: Yes, it is certainly the same point for Ms Middleton, so perhaps I don't need to address you on that.

We have accepted in our skeleton, Sir -- we have accepted, as you will have seen, that a limited number of the witnesses do appear to -- it does appear to be anticipated that a limited number of them have distinct evidence, evidence which goes to the distinct issue of quantum and causation. Perhaps I could just take you to Mr Cormack. This is 21.3. He is a member of the design team.

THE CHAIRMAN: Yes, 21.3.

MR BROWN: Of the witness statements. It is over the page.

THE CHAIRMAN: Yes.

MR BROWN: It is said that he would address the allegations to the effect that the defendants have caused or directed institutions to change the design of their academic dress. So that is an infringement issue, because we say that that is -- we have -- one of our allegations under the infringement issue is that the defendants have engaged in a broader strategy; a strategy to ensure that they have exclusivity. So he is going to be giving evidence about that particular issue. But then he is also going to give evidence about the look and feel of the

claimants' product offering, and he will be giving evidence about his compliance or non-compliance with the specific requirements of universities.

THE CHAIRMAN: Is he able to give evidence about that? That sounds rather like expert opinion evidence.

MR BROWN: Well, it may veer into expert evidence, but it may be that he is able to express a view based on his own experience. I am not -- I don't want to be taken as accepting that all of this evidence will be admissible. To the extent that it is, if that is what he is going to be giving evidence about then we can see that that evidence will go to -- if, for example, he has evidence that actually the claimants' product offering simply doesn't comply with universities' requirements with their published scheme, then that is relevant to whether we would have been able to make any sales at all.

THE CHAIRMAN: Yes, I can see your point. It is separate from his evidence on liability.

MR BROWN: Yes. So we accept that Mr Cormack would have to come back and give his evidence on two separate occasions but we say that is not in and of itself problematic, because, first of all, if there were a split trial then his evidence at the first phase would be narrower and would of course impose less of a burden and strain upon him. He may never have to give evidence at a second phase trial and, if he did, we say that there is limited if any scope for duplication of his evidence.

Can I just, in fairness to the defendants, the other witness who we say falls into that bracket is likely to be the finance witness. This is at paragraph 21.7 of Ms Taylor's statement:

"The defendants anticipate calling a witness from the finance department of the first defendant to address the allegations in relation to the amount of investment

required to acquire sufficient stock to carry out official supplier functions."

Just pausing there, this goes squarely to the objective necessity argument I alluded to a few minutes ago. The defendants say, well, even if these agreements otherwise appear on their face to be problematic, they are necessary because, in order to be an official supplier, universities require you to basically stock -- have a full suite of stock; be able to supply anyone who wants it and that comes at a great cost. We have to make very significant investments and we need to have the security -- I think that is the word used in the defence -- we need the security, essentially an assurance that we will actually make enough sales to be able to recoup that investment. So that is plainly an infringement issue. Indeed, that is what Ms Taylor says halfway down the paragraph.

Then in addition she says that the witnesses will give evidence as to market size, production costs and so on, and other matters going to the profit margin achievable by the defendants. As Ms Taylor says, that is evidence which goes to the issue of causation and loss.

So it seems to be accepted by Ms Taylor that, again, there will be no duplication insofar as that witness is concerned by virtue of having to give evidence at two separate trials. The same submission I made in respect of Mr Cormack would also apply to this witness.

Sir, I am very happy to take you through the other points in relation to the witnesses but if you would prefer me to move on, I can do.

THE CHAIRMAN: Essentially, it will be illustrations of the overarching point that their evidence would be the same when it goes to liability and causation/quantum, and therefore they give their evidence at the first trial and then at the second trial their evidence is taken as a given, I think is what you are talking about.

MR BROWN: Yes. The Tribunal will have made findings and those findings will

obviously be binding on the parties at the second stage. It is the same parties so we can't go behind those findings. So yes.

There are a number of other detailed points I could make about the witnesses but perhaps I should -- if I need to I can deal with them in reply. But the same points will apply to each of them so I don't think I do need to go through them all, in the interests of time.

Sir, just pausing there, I am conscious that the Tribunal wished to break, is that right, after an hour?

THE CHAIRMAN: An hour and ten minutes. Let's give it another ten minutes.

MR BROWN: Certainly.

So we say no serious risk of duplication of evidence or witnesses. By contrast, there is significant scope for cost savings in the event of a split trial. We say they are, first, there may be no need for a quantum trial, because, you know, either we lose on the question of infringement, in which case there are no further costs to expend on either side, or we prevail in full, or to some extent, and there is subsequently the possibility of a settlement, either early or following disclosure and possibly evidence.

One of the aspects in which -- or one of the main issues on which there will be potentially a very significant saving of costs relates to expert evidence. We note that in Mr Armitage's skeleton it is suggested, I think for the first time, that the defendants intend to seek the Tribunal's permission to adduce expert evidence in the field of forensic accountancy. Thus far the parties have -- until then, the parties had been focusing on expert economic evidence, which they both contend will be necessary. Now, we reserve our position on the appropriateness of granting permission pending proper explanation, but the simple point for today's purposes, or for present purposes, is that if permission

for such an expert, or such expertise and evidence, is grand, that will be a very significant cost, we apprehend. This litigation is already expensive enough for a very small enterprise like the claimants. In my submission, it should not be made more so unless absolutely necessary. So we have the costs issue.

THE CHAIRMAN: So that is a costs saving if the claimants lose at the liability trial, otherwise it is not.

MR BROWN: Yes.

THE CHAIRMAN: If they were to win at the first trial the costs of that expert would be the same, whether called at the first or second trial, surely?

MR BROWN: Yes. That is right. Well, the costs may not be the same, the costs may be more limited in the event that we win, because of course we might have won on more limited issues.

THE CHAIRMAN: The permutations point.

MR BROWN: Yes, certainly.

I have already made my submission that any quantum trial will be more focused, whereas if there is a composite trial the quantum issues will be, in my submission, significantly more diffuse.

In his skeleton argument Mr Armitage has taken the point that we have already agreed that only two extra days are needed for quantum. He says, look, there is really very little difference between five days and seven days and that, in itself, shows that there is little additional costs to having a composite trial. It is true to say that we agree with him, we thought seven days plus two in reserve sounded about right for a composite trial. In my submission, given the various permutations which we have been working through, we think it will be more likely to be at the outer limit of that sort of timetable. We note that the defendants themselves have said in correspondence that the trial may be even

longer. That is at page 305 of the bundle.

This was a letter -- in fact the letter starts at page 304 -- from the defendants' solicitors. You will see at paragraph 6, over the page, page 305, that it may be that the initial trial estimate needs to be closer to 12 to 14 days. Subsequently, they have suggested seven days plus two in reserve but I think that illustrates that this composite trial would be a significant undertaking. We think, on reflection, that seven days may be rather tight, in particular if we need to deal with all of these permutations. So we are far from convinced that the difference between a liability or an infringement trial and a composite trial will be just two days, whereas the scope for a more focused quantum trial is all the greater when the permutations have been ironed out.

Can I just address the question of the risk of delay in the event of an appeal? This is a point that Mr Armitage makes at paragraph 34 of his skeleton. Now, of course, in any case where there is a split trial there is at least a risk, but no more than that, of an appeal against liability findings and the possibility that permission to appeal will be granted. We say two things. First of all, the Tribunal will still retain discretion as to what to do about quantum in the meantime, but we accept that it could mean that quantum is put on hold. But we say the appeal point really cuts both ways. An appeal in respect of the liability issues would likely be more focused than an appeal after a composite trial. Secondly, if there is an appeal following a composite trial, there is a real prospect -- there must be a real prospect of a remittal with the Tribunal having to reconsider quantum in the light of the Court of Appeal's findings. I simply note that this has happened in a number of cases in the competition sphere, including one that is now back on the Tribunal's books, the interchange litigation. In that case the Tribunal had heard Sainsbury's claim in full, that is to

say whether the interchange fees were an infringement of competition law and, if so, whether that caused Sainsbury's loss and how much? Following the Court of Appeal and very recent Supreme Court judgments in that case, the Sainsbury's litigation is now back at the Tribunal for reconsideration of all of the issues afresh. So we say that the appeal issue does cut both ways and that the Tribunal should not attach any significant weight to that point in the balancing exercise that the Tribunal is going to be undertaking.

Sir, those are my submissions in respect of Mr Armitage's skeleton. I have obviously had his schedule of overlapping issues since yesterday afternoon, which I have managed to give some thought to, and I think I probably ought to address it at least in summary now. But, if I may, I would quite like to hear what Mr Armitage says about it and reserve my position to come back in reply, seeing as it was only filed quite late yesterday afternoon.

THE CHAIRMAN: I understand you to not dispute there are overlapping issues.

MR BROWN: There are.

THE CHAIRMAN: Your point is that the evidence going to the liability aspect would be all of the evidence that the witnesses could give and they wouldn't need to come back and give it again, that is your point, isn't it?

MR BROWN: Yes, that is the essential point, yes. But if there are points of detail that Mr Armitage makes and you want me to address you on in reply, perhaps that is the best --

THE CHAIRMAN: Yes, that is fair.

MR BROWN: This is obviously getting rather ahead of ourselves on the claimants' side but if the Tribunal is minded to order a split, could I just mention the joint and several liability issue. At the outset I take you to the list of issues and we can go back there. It is page 252 of the bundle. Over the page, 253, joint and

several liability. You will have seen in the correspondence and skeletons that the joint and several liability issue is about to be the subject of a pleading amendment. That is all agreed. But there is clearly a -- assuming that the defendants' position is that the second defendant does not and did not exercise decisive influence over the third and fourth defendants, there is going to be a factual issue, there is going to be an issue for factual investigation at trial about whether that was in fact the case. That is likely to be relevant to the question of whether the second defendant is liable for the breaches, if any, committed by the third and fourth defendants.

The reason I mention this now is that if that is likely to involve extensive factual investigation, it may be that this issue would again, for similar reasons, be best hived off to a subsequent trial, because the issues relating to -- the factual investigation of that issue will be quite different from the factual investigation of the infringement issues. That will be about whether -- the factual investigation required for issue 4 will relate to the day-to-day and practical links between the parent company, the second defendant, and its subsidiaries. So it may be that we -- that it makes sense to hive those issues off for a subsequent trial.

THE CHAIRMAN: Okay.

MR BROWN: Sir, those are my submissions in opening, unless you have any further questions for me?

THE CHAIRMAN: No, thank you. That is very helpful.

We might as well break now. It is a natural time, so we will break for ten minutes now.

MR BROWN: Ten minutes. I am grateful.

(11.37 am)

(A short break)

(11.47 am)

THE CHAIRMAN: Yes, Mr Armitage.

Submissions by MR ARMITAGE

MR ARMITAGE: My Lord, on this application the Tribunal is faced with a choice as to the overall shape of the way in which this litigation will progress. As my learned friend put it today, the claimants propose a first stage trial of, as he described them, the infringement issues. If that trial results in a determination in the claimants' favour, they say there should then be another trial, of a length unspecified by the claimants, on issues of causation and quantum.

In contrast, as my Lord knows, the defendants propose that there should be a single trial of all disputed issues, avoiding all of the delays that would be associated with a split trial. Importantly, until my learned friend's submissions this morning, there was an agreed position that an all issues trial, as the defendants propose, could be disposed of in seven days, with two days in reserve for any overspill, as opposed to the five days that the claimants say would be required for their preliminary trial.

My Lord, as I understood my learned friend's submissions this morning, for the first time there was a faint suggestion that the estimate of a seven day trial for the combined issues may in fact not be sufficient time. My learned friend didn't, as I understood it, actually resile from the time estimate. He, I think, described it as being at the outer limit. We agree with that and that is precisely why we propose that there ought to be two days held in reserve for any overspill.

He referred -- and I will deal with these points at the outset -- to a letter at page 304 of the bundle, which my Lord has seen, in which there was a reference from my solicitor to an estimate of 12 to 14 days. That was an initial estimate given some time ago for the purposes of some of the discussion about costs

budgeting. The basic point is that that is not the time estimate that we presently consider to be appropriate. We consider seven days with two days in reserve would be sufficient for a trial of all issues and, as I say, until today that was also the defendants' position.

The basic point in relation to the, as I say, until today agreed position, that including the causation and quantum issues in a single trial of all issues would only add two days to the overall trial estimate, is that it essentially undermines my learned friend's key point about the permutations and the idea that they are so complex that they would somehow generate major additional time and costs in relation to a single trial as opposed to a split trial. We say it is not helpful for my learned friend to come along today and express doubt about the agreed time estimate. I note he still hasn't offered an actual time estimate and, as I say, he simply says that the previously agreed position of seven days is somewhat tight, or towards the outer end of the necessary time.

We say, just to foreshadow my detailed submissions, given the extent of the overlap between the issues that would need to be considered at the first phase trial and second phase trial on issues of causation and quantum, really that second stage trial, if those issues were brought into the first stage, would not add a great deal to the time estimate. We do accept some time and costs would be added, in particular we accept that any forensic accountancy evidence that we might be permitted to adduce would indeed only come in at the stage of detailed quantification. We say those points are limited and outweighed by the substantial factors weighing in favour of a single trial of all of the issues.

So, my Lord, we say that when the choice is put that way, ie a choice between a five day preliminary trial on some issues, and a seven day trial, or perhaps up to a nine day trial, of all of the issues, there is only really one answer. The latter

is the course which would best secure the Tribunal's governing principles of dealing with cases expeditiously and justly and at proportionate costs, which includes dealing with cases expeditiously, of course.

My Lord, we also say by way of preliminary remarks that it is telling that almost all of the points my learned friend made in his oral submissions this morning were really arguments in favour of detailed quantification issues being put off to a second stage trial. This is the point that my Lord made from the outset about the possibility of a different split from those proposed by the claimants. I hope my Lord has our basic position. We would oppose that split also but it is fair to say that we do regard it as significantly preferable to the claimants' proposal.

Just in terms of the structure of my detailed submissions, in my skeleton we have advanced six basic points against the claimants' application. I don't propose to repeat them, particularly in light of the indications from my Lord as to the points which my Lord has identified as particularly important. We entirely agree with my Lord's characterisation of those. In particular, the clean split point.

Essentially, the points we have advanced in our skeleton are versions of the same point, which is that the split trial as proposed by the claimants is precisely the type of treacherous shortcut that is warned against in the authorities -- you have Tilling v Whiteman, for example, in the bundle, I don't propose to turn it up, in relation to the general case law on preliminary issues and the cautionary tales that those preliminary issues can sometimes give rise to.

So rather than going through my skeleton argument, I intend, first, to make some submissions about the precise proposal advanced, ie splitting out causation from other issues of liability; secondly, I will go through the factors identified by my learned friend in his skeleton and particularly those focused on in oral argument this morning; and thirdly, I will briefly address the reliance my learned

friend has placed in his skeleton and that the claimants have placed in correspondence on the Socrates litigation and the approach taken by the President in that case.

In relation to the claimants' precise proposal, in substance they seek a preliminary issue trial on the question of whether the defendants' arrangements infringe the Competition Act 1998. The question of whether any such infringement by the defendants caused the claimants to suffer any loss is squarely within the claimants' proposed quantum trial. My Lord has seen that by reference to the draft order and the list of issues.

There is, if I may say so, some confusion in relation to the precise proposal that is being put forward. In the letter to the Tribunal by which the claimants applied for directions today, that is in the hearing bundle at page 144, the claimants appeared to accept that it would be necessary, at a first stage trial, to demonstrate that the allegedly unlawful conduct has had some effect on the claimants, which on its face read as though it might be accepted that causation would need to be considered at a first stage trial. My solicitors sought to clarify that point. I don't need to turn up all the correspondence but, for my Lord's note, at page 313 of the hearing bundle, paragraph 7B of the letter from the claimants' solicitors, they confirmed in terms that they do not intend to have causation issues addressed at the first stage trial. We had thought that had clarified the matter but, in my submission, some further confusion was introduced today, because my learned friend suggested that the Tribunal could make findings at a first stage trial, if it were satisfied based on the evidence before it at that stage, that the arrangements had caused the claimant some loss. Then he said that if the Tribunal was not satisfied then the matter would fall to be considered again, essentially, at a second stage trial.

So, essentially, what the proposal appeared to be is that the Tribunal would consider and potentially rule on questions of causation, at least of some minimal loss necessary to complete the cause of action, potentially twice. It didn't seem to be, in the final analysis, a split trial proposal at all. We say that somewhat tortuous analysis illustrates very clearly the problems of seeking to split out causation in a case such as the present, where, as I will come on to, there is a significant overlap between liability, causation and quantum issues.

My Lord, on the basic legal point, which is not in dispute but I do want to take you to two authorities on the point because they help in informing some of the decisions before the Tribunal, could I ask you first just to turn up the Arriva the Shires case. It is a decision of Mrs Justice Rose, as she then was, and it is at the fourth tab of the authorities bundle.

THE CHAIRMAN: Can you give me the page number?

MR ARMITAGE: Yes, I am sorry. It is paragraph 51 of the judgment, I will just find the page reference, bear with me. It is page 58 of the authorities bundle.

THE CHAIRMAN: Okay, yes.

MR ARMITAGE: In fact it may be convenient for my Lord just to read that paragraph.

THE CHAIRMAN: Paragraph 50?

MR ARMITAGE: 51. It relates to the fact that causation is an element of the cause of action but, in particular, it is the judge's discussion of the Leaflet Company case that I wanted to draw my Lord's attention to, over the page.

THE CHAIRMAN: All right.

(Pause)

Yes, thank you.

MR ARMITAGE: So, my Lord, by way of context, the allegation under consideration by the judge here was an allegation that a tender process for access to the bus

station at Luton airport -- I don't know if my Lord is familiar with the case -- an allegation that that process was conducted in a way that was so unfair that it amounted to an abuse of the dominant position by the operating company in respect of the airport. My Lord, towards the end of the page, the sentence that begins on the last line of page 58, Mrs Justice Rose makes the point:

"There is usually no difficulty in the parties accepting that, if there is an infringement, there is at least some loss suffered, albeit that the precise quantification may raise complex issues."

What we see here is a recognition that in many competition law cases, if there is an infringement, it will logically follow that some loss at least has been suffered. In such a case, for obvious reasons, taking causation out of the scope of a liability only trial is unlikely to be problematic. But, as we see from the judgment here, Arriva itself is not an example of such a case because, as the judge goes on to say, she says:

"As regards this aspect of the abuse [ie the allegation as to the conduct of the tender exercise] there is a dispute that the abuse caused any loss."

The basic point made on behalf of the defendant, which in fact found favour with the judge, was that the claimants' bid was so low that, irrespective of the way in which the tender was conducted, it would never have won anyway. So it was a basic dispute about causation of any loss.

Then the judge refers to the Leaflet Company case, which my Lord has seen, as an example that falls into the other category, ie a case in which a finding of infringement effectively determines the question of basic causation as well.

My Lord, I don't necessarily need to turn the Leaflet Company case back up but my Lord has seen it today and will have apprehended that it was a case in which

it was alleged that Royal Mail had infringed the Competition Act in relation to a number of its terms of service for the door to door delivery of the promotional materials that were provided or distributed by the claimant. My Lord will have seen that there were 16 different, separate infringements of the Competition Act alleged. They included matters such as an allegation that the pricing charged by Royal Mail for its services was so excessive that it amounted in itself to an abuse of a dominant position.

One can immediately apprehend that there may have been all manner of arguments about whether those prices were indeed so excessive that they amounted to an abuse of a dominant position but once that was established -- and my Lord you asked my learned friend whether there were any particular causation issues in that case -- once that was established, bearing in mind the nature of the allegations, there would have been effectively no scope for controversy about causation. The claimant was a purchaser of the services about the terms of service for which it was contending, so a finding that the prices that the claimant had paid were excessive and hence abusive necessarily resulted in a finding that some minimal loss had been suffered. Although there may then have been arguments about precisely how much had been bought of the service, potentially arguments about pass on of loss, but in terms of that basic point about causation, one can see there is essentially a logical link between the finding of infringement and the finding of causation.

My Lord, we say the present is an example that falls into the Arriva category, rather than the Leaflet Company category, because this is a case in which basic causation is not determined -- would not be determined by a finding on issues of infringement, or not necessarily determined, and basic causation is indeed a hotly disputed issue in this case.

THE CHAIRMAN: When you say "basic causation", what do you mean by that?

MR ARMITAGE: I mean a finding that the infringement has caused the claimants at least some loss necessary to complete the cause of action.

My Lord, I think I will make that point good by going directly to the defence, so that my Lord can see how this point is put in the pleadings. If my Lord would turn, please, to paragraph 90.

THE CHAIRMAN: I need the page number again, I am afraid.

MR ARMITAGE: Yes. Sorry, I have discarded the reference but I will turn it up.

(Pause)

I am so sorry, it is paragraph 96 of the defence, it responds to paragraph 90 of the claim form, and it is page 90. That was the confusion.

THE CHAIRMAN: Thank you. Yes, I have it.

MR ARMITAGE: So we see there is an initial pleading which refers back to some deficiencies that have been identified in the pleaded case on causation. Those, my Lord may have seen, are the subject of an outstanding RFI. The defendants advance a positive case that the true reasons for the claimants' failure to establish a profitable business include a number of specified matters. My Lord will have apprehended that this is not a case in which an established business is alleged to have been harmed by anti-competitive conduct. This is essentially a start-up business, not previously active on the relevant market or markets, who allege that they have been prevented from making millions of pounds in profits because of certain pre-existing arrangements that cover the market or markets in issue. We say that is the essential reason why this is a very long way from a case in which it necessarily follows from a finding of infringement that the infringement caused the claimants any loss at all. The Tribunal will only be able to make such a finding if it is satisfied on the evidence that the

infringements, if established, were the cause of the claimants' failure to establish themselves as a profitable undertaking. Put another way, the claimants will need to show that they would have established a profitable business on the market absent the defendants' arrangements of which complaint is made. If they cannot show this, their claim for breach of statutory duty must fail.

My Lord, one sees a number of points made in the defence as to why the true reasons, it is alleged, for the claimants' failure to establish a profitable business were nothing to do with the defendant's arrangements. They include matters such as the claimants' inability to pre-qualify for tenders to supply academic dress, questions concerning the quality of the products offered by the claimants, and then various points about general deficiencies in the claimants' business model.

My Lord, the Tribunal is obviously in no position today to adjudicate on the likelihood of these points succeeding. The critical point though is that causation is a major bone of contention in this case. Carving it out of the liability trial that the claimants propose should be taken at the first stage, would mean that a central plank of the defendant's defence to the question of liability is not even considered at the first stage trial. That is a point that feeds into a number of the detailed points I make on overlap. It is also, we say, a critical issue when it comes to the suggestion that a split trial might facilitate settlement.

We say the Tribunal cannot be confident of that on any view because, even if the claimants establish an infringement of the 1998 Act, that leaves a whole raft of substantive points, as my Lord has just seen, that the defendants would want to advance before any finding of liability could be reached in this particular case.

My Lord, I was going to add that there is another illogicality in the claimants' precise proposal, which is the suggestion that issues of joint and several liability should

be decided at the first stage trial. My submission was going to be that joint and several liability depends on primary liability and, if causation is carved off until the second stage trial, in my submission it makes no sense to decide joint and several liability issues before a finding on primary liability has been arrived at.

My Lord, it is now not entirely clear to me what proposal is being advanced. There was a suggestion, I think, that joint and several liability issues might be carved off until the second stage trial also.

My Lord, you have the defendant's primary point that there should be no split trial in this case. We don't accept the submission that there should be yet some further carve out of joint and several liability issues. Those should go along with the main trial.

My Lord, turning to the principal factors on the basis of which my learned friend put his case in support of the precise split trial proposal that is being made by the claimants, and, as I say, picking up in particular the clean split point. The first point in fact made in my learned friend's skeleton -- and I should say, my Lord rightly pointed out that these factors essentially overlap, they are not statutory requirements and one could consider the relevant issues under a number of different headings. But just looking at the way in which the point was put in the skeleton, the first factor, and indeed Mr Justice Hildyard's first factor in the Electrical Waste case, is whether the prospective advantage of saving the costs of an investigation of quantum if liability is not established outweighs the likelihood of increased costs in the aggregate if liability is established and a further trial is necessary. My Lord, the claimants assert that the aggregate costs are likely to be lower, or at least not substantially higher, if liability is established and a second trial is necessary than if liability and quantum are tried together. My Lord, as Mr Justice Bryan put it in the Daimler case, that is

a surprising proposition even in the abstract. It would seem obvious that two separate trials would be more expensive than one single trial, in circumstances where the parties, their legal representatives, their factual and expert witnesses would have to turn up only once, with the Tribunal compendiously addressing all of the issues.

The obverse of that is that two trials, especially with the prospect of an interlocutory appeal between the two, would increase costs.

It is noteworthy that there has been no attempt in the present case to quantify the alleged saving. That was a point Mr Justice Bryan relied on at paragraph 56 of the Daimler case. I don't need to turn that up but it is at page 270 of the authorities bundle.

Indeed, the claimants have not, to my knowledge, even said how long they think a second separate quantum trial would take. Instead, they have relied on two points based on the pleaded case. The first is to refer to the numerous, they say, possible counterfactuals. The permutations point. It is obviously an important point. On that basis, they say that a trial of quantum issues would be less costly to prepare than if it had to be prepared to meet multiple possible eventualities. That was the first substantive point made by my learned friend this morning.

Secondly, they say that the claimants have alleged infringements of both chapter 1 and the chapter 2 prohibition. They say it is conceivable that the approach to quantum will differ, depending on the Tribunal's findings on the two infringements that are alleged.

Now, as the case was put on permutations this morning, my learned friend referred to three specific respects in which he said that the findings at a proposed first stage trial could have a bearing on the scope of the second stage trial. The first

related to questions of market definition. My learned friend said that the Tribunal's determination of these issues is liable to have a direct impact on quantum issues because of the dispute over the precise geographic and product scope of the relevant market. My Lord raised the possibility that, if the defendants are correct on their primary case, that there are separate university specific markets, that raises the possibility that there may be different findings on liability as between different agreements.

My basic response is to say that that concern is not borne out when one looks at the way in which the case is put. The vice of all of the infringements alleged in the present case is essentially the same. We see that from paragraph 41 of the claim form, which I will ask the Tribunal to turn that up. It is at page 14 of the CMC bundle.

Sorry, I have skipped ahead somewhat. There is a primary point from the claim form. Sorry, if my Lord can go back to page 9, paragraph 38. This is the basic description of the vice of the agreements --

THE CHAIRMAN: Yes.

MR ARMITAGE: -- complained of. It is the allegation that:

"In general terms, pursuant to such agreements, the university grants to the relevant member of the E&R Undertaking the exclusive or quasi-exclusive right to supply students with academic dress for use at its graduation ceremonies, expressly or otherwise, and irrespective of any label used such as 'preferred' or 'official' or 'approved' to describe its supplier status."

That is an allegation that is made by reference to some specific examples. There is a particular example of an agreement that the claimants have somehow managed to obtain between the first defendant and the University of Dundee, which is set out at paragraph 39 of the claim form. Then at paragraph 40 there

is an inference that the other, what they call "exclusivity agreements", are in materially the same or similar terms. The complaint, in essence, in relation to all of them -- and the claimants go through a large number -- is this conferral, they say, of contractual or de facto exclusivity, or near exclusivity.

Then, at paragraph 40 there is the related -- I am sorry, at paragraph 41 there is the related complaint -- that is at page 14 -- that, in addition to conferring what they describe as a right of exclusive supply, these agreements also impose certain obligations on the university.

My Lord, the basic point is that the essential complaint that is made is the same in respect of all of these agreements, so the suggestion that, depending on questions of market definition, there may need to be some granular exercise looking at the precise terms of these individual agreements is a speculative one.

The claimants' case, as I say, is that each agreement has these particular problematic features.

THE CHAIRMAN: Yes, but they may or may not succeed on that with different universities. That is the problem, isn't it? Their case is the same, but their case may be successful in relation to some only of the universities, which is what you need to know before you can work out quantum.

MR ARMITAGE: Well, my Lord, the submission is that, given -- the argument that the agreements are anti-competitive is put in terms that apply to all of the agreements. There is a -- it is true that there is a point on the pleadings about whether the agreements contain terms that require the universities to warn students against using academic dress provided by rival suppliers, but there is no dispute about the basic structure of the agreements; they are official supplier agreements and they have these particular features. The questions are as to

the legal characterisation of those agreements.

THE CHAIRMAN: Is that right? The University of Dundee does contain a clause, at least the one pleaded here, giving Ede & Ravenscroft the sole right to hire and sell academic dress. So there looks to be an exclusivity there. But you would say that, if that is true there, it is not true in other places, so there may well be a difference in the facts as between the different agreements.

MR ARMITAGE: My Lord, yes. The basic point -- as I understand it, that agreement is somewhat unusual. In fact, the defendant's position is that the universities are not able to confer an exclusive right, and my Lord will have seen the basic outline of the defence. Although they may be described in particular cases as conferring exclusive rights of supply, obviously the university has no legal ability to control the ability of suppliers to sell directly to students. That is an important point in this case.

So, my Lord, just stepping back, the basic point is that there may be differences between these agreements. Those differences will be relevant irrespective of the precise market definition that the Tribunal arrives at and will need to be considered on any view at a first stage trial.

There is a point -- I accept there is a conceivable state of affairs in which the Tribunal arrives at the view -- and on the assumption that the Tribunal accepts that these agreements do give rise to some degree of restriction of competition, bearing in mind the primary defence that the reason for the exclusivity, or rather the official supplier nature of these agreements, is that such provisions are necessary to effectively protect the investments that it is necessary for the defendants to make, it is conceivable that the Tribunal might draw distinctions between the lawfulness of particular agreements based on their length. That is a possibility that we recognise. Some agreements may be regarded to be too

long to be proportionate to the aim of allowing the defendants to recoup their investments. Obviously we deny that any of them are too long but that, we accept, is a theoretical possibility.

Two points in relation to that. The first point is as I have said in relation to the terms of the agreements. It is hard to see how the Tribunal's determination of questions of market definition will affect the need for the first stage trial to consider those different permutations. More fundamentally, I think as my Lord noted, this doesn't seem to be a point that goes to the question of basic causation, bearing in mind that the defendant's case is that, irrespective of matters such as market definition, the claimant would not have been able to operate profitably on this market in any event.

I do accept that this is a point that is capable of affecting the determination of detailed quantum issues. I do accept that there is a possibility that, based on some of the permutations that may be possible on the Tribunal's findings at a first stage trial, that may have some effect on the scope of the evidence and submissions necessary in relation to detailed quantification. There, my Lord, we fall back on the overarching point that, even on the claimants' view, adding in those issues would not add a very significant amount to the overall time estimate of the first stage trial. So it is a slightly different point, I can see, on basic quantum and detailed quantification.

Those fundamental points apply to the other two permutation points that were made by my learned friend. The second was that he said the claimants advance a case under the chapter 2 prohibition and a case under the chapter 1 prohibition, so abuse of dominance and restrictive agreements. My learned friend, however, did not actually seek to identify how different findings on those allegations would impact on questions of causation or indeed detailed quantum.

The factual allegations set out broadly in the first half of the claim form are essentially the same. There are differing legal points that may result in a different outcome in terms of those allegations, for example if the Tribunal accepts the defendants' case that the defendants did not occupy a dominant position on any relevant market. But fundamentally, as I have said, the basic factual allegation is that the agreements have the effect of conferring exclusive or near exclusive supply on the defendants. So if one of the two separate allegations of infringement were to fail because of, as I say, a legal point such as dominance, in my submission there is no basis for thinking that that would affect the scope of a second stage trial in relation to causation, or indeed detailed quantification points.

My Lord, in my submission this could not be more different from the Leaflet Company case, where there were 16 different infringements relating to an array of different factors in respect of Royal Mail's terms of supply. In that context, it was understandable that the Chancellor thought that including all possible permutations on causation and quantum, in particular quantum, would overburden the trial judge, and indeed the parties and their witnesses in preparing for that first stage trial.

We have two basic allegations of infringement. The factual allegations underlying them are the same. So we say this point doesn't take my learned friend any further.

My Lord, the third point that my learned friend made under the heading of "permutations" related to the counterfactual. He said this could have a material impact on quantum issues, depending on the precise conditions of competition that the Tribunal thinks would have obtained in the absence of the arrangements complained of. The point there being that it is possible that the

Tribunal might reach an intermediate view between all of these agreements in place and none of these agreements in place. It may be, as I say, that the Tribunal reaches the view that agreements of a certain length might be justifiable in particular cases.

My learned friend, as I understood him, in his submissions this morning did not say that this is a factor that would impact on the question of causation of some loss, as opposed, again, to detailed quantification issues. Again, we say it is hard to see how these considerations could affect the basic question of causation.

My Lord, that brings me to the Tribunal's point that a different split, where causation is addressed at a first stage trial and detailed quantification issues are carved out --

THE CHAIRMAN: Just on that point, then, which links to addressing the third point made by the claimants, the counterfactual is critical for liability, as we have all agreed.

MR ARMITAGE: Yes.

THE CHAIRMAN: And, until you know the counterfactual, you wouldn't know what steps the claimant would have to have taken in order to obtain a share of this market, and therefore whether it could have done so, given its own business and its limitations, if any. So until you know the counterfactual, you can't really begin to work out which particular head of quantification, or manner of quantification, is the appropriate one to carry out.

MR ARMITAGE: My Lord, it is important to bear in mind that the counterfactuals that are actually on the table, if I can put it like that, are of course -- well, there is the defendants' position, which is that the arrangements were perfectly lawful. It is obviously a matter -- or rather, were not an infringement of the 1998 Act --

THE CHAIRMAN: We don't get in to quantification then. Yes.

MR ARMITAGE: The two counterfactuals advanced by the claimants can be seen on page 27 of the hearing bundle. It is paragraph 82D, perhaps I could invite my Lord to read that.

(Pause)

THE CHAIRMAN: So will the Tribunal be stuck with a binary decision on this? That is, either it accepts that proposition, that the counterfactual would have been as in paragraph D, or not? Or is it possible that the Tribunal might come to a conclusion somewhere in between?

MR ARMITAGE: My Lord, in my submission, not least because the defendants may well wish to advance, for example, in their evidence, including their expert economic evidence, different points on the counterfactual, yes, in my submission it is perfectly open to the Tribunal to come to a view that does not directly map on to the counterfactuals advanced in the alternative by the claimants. The Tribunal will form its own view based on the evidence. That is always an issue in competition law cases, of course.

My submission is that, in relation to the -- again, returning to the distinction between causation of basic loss, causation of some loss, and detailed quantification issues, my learned friend has not articulated how different permutations on the potential counterfactual will direct -- will be relevant to the scope of a second stage causation and quantum trial in relation to the question of causation. Again, I accept that the precise finding on the counterfactual will clearly be relevant to detailed quantification, because the conditions of competition that the claimants would have faced, as my Lord says, in the absence of the defendants' arrangements, the precise conditions of competition that the claimants would have faced would be relevant to the extent to which the claimants may have been able to make profits or not make profits.

So, my Lord, I return to the basic point. There is a very important distinction here between causation and detailed quantification issues. As I say, although we resist any form of split trial, it is very, very clearly preferable that, if there is to be a split, that causation of basic loss is included in the first stage trial.

My Lord, I will return to this point when we come to overlapping evidence but the counterfactual is a particular area of overlap that gives rise to particular concerns, because it is a point for expert evidence in particular. Both parties intend to call expert economists, as is common in cases of this kind, to opine on what the conditions of competition would have been in the absence of the arrangements of which complaint is made. That is very, very clearly an issue that is relevant indeed to liability, causation and detailed quantification. It is a good example of an issue that overlaps in all three of those areas.

I will return to that when it comes to my submissions on overlapping evidence.

My Lord, I should say it is right to say, as the claimants do, that if the defendants were to succeed in establishing that there was no infringement, then there would be no need at all for a second stage trial. That would obviously result in a costs saving.

Just a number of points in response to that. It is always true that, for any split trial proposal where a potentially dispositive issue is taken first, there would be a cost saving if the case were disposed of at that first stage trial. As my Lord knows, that hasn't stopped the senior courts from warning about the treacherous shortcuts that preliminary issues can pose. Given, as I have referred to a number of times, the agreed position that these matters could be added to the first stage trial without a major impact on the overall time estimate, the saving is, in any event, reasonably limited. I have accepted already that, for example, forensic accountancy evidence may not need to be given. But

overall, given the overlaps that I am going to come on to, my submission is that the savings would be very small, and they would in any event certainly be outweighed by the additional costs associated with having to come back for a second stage trial if the first stage trial were to be decided in the claimants' favour.

Indeed, given the prospect of an appeal from a finding in relation to the first stage trial, there may well end up being no saving at all, depending on the outcome of that appeal.

So we say, as in Daimler, as Mr Justice Bryan put it, this is a case where the reality is obvious, to use his words. With two trials, costs are likely to increase, and that is the primary submission on the basis of which we say that the claimants' proposal ought to be resisted.

My Lord, I think I will turn directly to the overlap point.

THE CHAIRMAN: Yes.

MR ARMITAGE: Which is obviously an important one in the present case.

I am sorry, I ought to briefly deal with my learned friend's attempt to distinguish the Daimler case, because that was relevant to the point about permutations. Essentially, as I say, my learned friend made various points with a view to distinguishing that case and showing that the permutations were not as complex as in the present case.

If we could just turn up -- my Lord has already seen it -- paragraph 46 of the judgment in Daimler, page 266 of the authorities bundle.

THE CHAIRMAN: Yes.

MR ARMITAGE: As my Lord has seen, this illustrates the, in my submission, very wide array of different permutations that were at issue in that case. Just to take one example, the second point that Mr Justice Bryan refers to is a question as

to whether the court has the jurisdiction to apply Article 101 of the treaty to events that occurred before 18 October 2006. Obviously, that is a situation where, depending on the outcome of that decision, there is a potential for an effect on the scope of any subsequent trial. There are a number of other such examples of jurisdictional and limitation matters set out there, which affected the scope of the liability and therefore gave rise to different permutations on any second stage trial.

My learned friend then took my Lord to the factors which persuaded Mr Justice Bryan that, despite these different permutations and complexities, this was not a case in which a split liability and quantum trial was appropriate. In my submission, the only material point of distinction that my learned friend was able to point to was the first factor relied on by Mr Justice Bryan at paragraph 50. This was the point that, in Daimler, in contrast to the present case, there was a follow on element to the claim. So there was a commission decision which had established that there was an infringement on particular routes for a particular period of time, but Daimler was bringing a wider claim that also incorporated, in particular, allegations that there was a worldwide infringement that extended back before the time period covered by the commission decision.

Now, I accept, of course, that is a point of distinction from the present case. I can't say otherwise. But, my Lord, when one looks at the other factors relied on by Mr Justice Bryan, in my submission almost all of them do apply with equal force in the present case.

Skipping to the third factor, for instance, Mr Justice Bryan-- and this is paragraph 52 -- relies on the fact that data from the periods in question -- I think that must mean periods not specifically covered by the commission decision -- will in any event be relevant when considering the quantum of

overcharge. So, my Lord, what you may have seen is, in this case, the basic points made in relation to split trial by the claimants was that they were intending to call expert economic evidence on issues relating to both liability and quantum. They were going to call evidence as to the effect of the alleged cartel on price, and they said that was equally relevant at the liability stage for the standalone elements and at the quantum stage. My Lord, it is a short point but we say, essentially, we are in the same position here, where expert evidence, as I have already said, is relevant to matters going to liability in relation to the nature of the counterfactual, but also potentially of serious relevance in relation to causation and quantum. My Lord, I don't need to go through the factors but the short point is that, although of course every case has to be decided on it is own facts, in fact the points which persuaded Mr Justice Bryan that are enumerated here, many of them do in fact apply with equal force in the present case.

My Lord, turning then to the overlapping issues point -- and I take here Mr Justice Hildyard's third and sixth factors together, which are factors that themselves overlap, so it is whether the trial will impose unnecessary inconvenience on witnesses and whether there are difficulties in achieving a clean split. We say that this is a clear example of a case in which no clean split is possible because many of the issues that are relevant to questions of liability are closely bound up with issues of causation but still to an appreciable extent with detailed quantification issues. It is precisely for that reason that the witnesses of fact on both sides, and indeed the parties' expert witnesses, have relevant evidence to give at both the claimants' proposed preliminary trial on infringement and at the envisaged second stage trial.

My Lord will have seen that the inability to obtain a clean split were highly important in

both the Electrical Waste case and the Daimler case. I don't propose to turn them up but they were clearly factors which weighed heavily in the balance.

My Lord, the claimants themselves accept, quite properly, that there are factual overlaps, or overlaps between the issues in these cases. My Lord, I just want to spend some time identifying the sheer extent of that overlap.

THE CHAIRMAN: Well, I think you can probably take that as read. The claimants accept that there is considerable overlap. I won't stop you going to the schedule because I think, in any event, it is important that you do so Mr Brown has a chance to respond to it, but his key point, I think, is there is overlap or duplication but that doesn't matter because the evidence they will give at the first trial will be evidence which covers all of the points and therefore they don't need to come back and give evidence at the second trial.

MR ARMITAGE: Well, my Lord, the short response to that is we see that as a point in our favour rather than his favour. That is the very vice that is identified in the authorities in relation to split trials where it is impossible to achieve this clean split. Bear in mind that the allegation is that having a second stage trial following a determination on the issues of infringement in light of all of the evidence would save time and costs. Well, the position is, if the evidence that needs to be given to establish an infringement is heavily overlapping with the evidence that will decide certainly causation and, to a lesser but still appreciable extent, detailed quantification issues, it is plainly more efficient for the Tribunal to consider those issues in one go at a first stage trial rather than, in a sense, holding the evidence given at a first stage trial in the bank, potentially reaching a view on causation at that stage, although my learned friend said it may need to reconsider those issues at a second stage trial. When one starts to consider it in that light, we can see that, in fact, to the extent that the evidence of the

witnesses exactly overlaps in relation to liability and causation and quantum issues, that is a point in favour of a single trial rather than a split trial.

That said, there are also witnesses, and my learned friend recognised this, who have distinct evidence to give at both stages. We say, in fact, that the summary of the proposed evidence from Ms Taylor is of course only an indicative summary and we don't exclude the possibility that many, if not all, of the witnesses will have both strictly speaking overlapping evidence, ie evidence that is equally relevant to both stages, but also distinct evidence that goes to both stages of the inquiry. In relation to a situation where a witness gives different evidence at both stages then the vice is slightly different. There we have the problem identified in the authorities about witnesses having to turn up for two separate trials when, in fact, particularly in light of the convergence between the parties as to the length of a single trial, it is more efficient, we say, for witnesses only to have to do that once, only be cross-examined once, and so on and so forth.

My Lord, on the schedule, I don't propose to go through it, unless it would be of assistance, line by line. This was essentially an aide-memoire that I was preparing for my own use and it just struck me that, since I was going to be using it, it would be sensible for the Tribunal and my learned friend to have this. I appreciate it was sent only yesterday afternoon so, of course, I have no objection to my learned friend replying on these points. But what we see -- what I have sought to do in this schedule is group the basic allegations of fact into categories and then to seek to illustrate that they are relevant, essentially, at all three stages of the enquiry. I think, looking back at this document, the third column should in fact be relevance to infringement as opposed to relevance to causation. Because the first stage trial, as I say, is envisaged to concern issues of infringement. So that should be relevance to infringement. So the liability

trial that the claimants propose.

Just taking the first entry in the table, there is a group of allegations in the claim form, as my Lord knows, about what the arrangements in this case oblige universities to do in relation to their students, and also an allegation that the universities have in fact acted pursuant to those obligations. That is a matter that is centrally relevant to the way in which the case on infringement is put. If universities are obliged to, and in fact do, direct their students only to purchase academic dress from the defendants or other official suppliers, then that is a matter of obvious relevance to the question of whether the arrangements have a restrictive or foreclosing effect on competition. So squarely relevant to infringement.

It is also, in my submission, an area of factual allegations that is relevant to the question of causation, because whether universities in fact discourage students from using non-official suppliers or giving their customer to non-official suppliers, is obviously relevant to the question of whether Churchill have been restricted by those arrangements, or by the universities' actions pursuant to those arrangements, in their ability to attract custom from their students. So that is causation.

Also, there could be an enquiry as to the extent to which particular universities have in fact taken action pursuant to these arrangements. That may be relevant to the precise issues of quantification. I accept the overlap is stronger between infringement and basic causation, as I have characterised it.

That is a central aspect that goes right to the heart of the case on infringement.

As I say, I won't go through all of these, but the second group of allegations is the allegation that the defendants have caused, directed or agreed with the universities that the universities will take further steps to preserve what are

described as the defendants' exclusivity rights.

Of course, that is another set of allegations that is relevant to the case on infringement. Presumably the allegation is that, by taking these further steps, the defendants have further restricted or foreclosed competition which is relevant to both chapter 2 and chapter 1. But what is striking, and perhaps I will just turn the claim form up -- I will only take my Lord to one aspect of the pleadings. If one looks at page 14 of the hearing bundle, paragraph 42 of the claim form.

THE CHAIRMAN: Yes.

MR ARMITAGE: Could I just ask the court to cast an eye over 42 and the sub-paragraphs to it.

THE CHAIRMAN: Yes.

(Pause)

Yes.

MR ARMITAGE: So, my Lord, the important point here is that these allegations, a number of these allegations, relate specifically to steps that have been taken in relation to the claimants. So, as well as being relevant to the basic question of whether these steps have contributed to an infringement of the 1998 Act, they are also clearly relevant to the question of whether the claimants have been prevented from entering the market, so a causation point. And again, the extent to which these steps have been taken and have in fact been effective in dissuading the claimants from entering the market is a matter of potential relevance to detailed issues of quantification.

My Lord, I don't propose to go through the document in full.

THE CHAIRMAN: Yes.

MR ARMITAGE: My Lord, the point is the same, essentially, in relation to each of them. There is a very, very significant degree of overlap and, as I say, I don't

think that point is actually disputed.

My Lord, in relation to the point about witnesses having to give evidence twice, I think I have essentially addressed that point already. In their skeleton argument, my learned friends begin by referring to the fact that only two of the witnesses whose prospective evidence is summarised in Ms Taylor's statement are described as having distinct evidence to give on questions of infringement and questions of causation or loss. They say that the remaining witnesses mentioned by Ms Taylor have evidence that, if it is relevant to both stages, it is evidence which is equally relevant to both stages of the analysis. As I have said already, we don't necessarily accept those characterisations, we are obviously at an early stage where the precise evidence hasn't yet been formulated, but, as I say, the more fundamental point is that, with respect, the claimants appear to have misunderstood the vice of overlapping evidence. It is precisely when evidence is not distinct that the absence of a clean split is most pronounced. That is the situation which, as I say, weighed heavily with both Mr Justice Hildyard in the Electrical Waste case and with Mr Justice Bryan in the Daimler case. The fact that it is not, in fact, possible to split out evidence that goes to liability from evidence that goes to causation.

There is of course also a distinct unfairness and inefficiency in requiring witnesses who do have distinct evidence to give at the first stage and at the second stage to turn up on two occasions -- I have already made this point -- and submit themselves, potentially, to a second bout of cross-examination.

One example of the latter was Mr Cormack, whose prospective evidence is summarised at paragraph 21.3 of Ms Taylor's statement. We don't actually need to turn it back up, my Lord will recall this is the person who is intended to give evidence on allegations that go to the question of whether the defendants

prevailed on the universities to change the design of their garb, and also the allegations as to whether the quality of the claimants' products conformed with the requirements of universities.

My Lord, we have heard the observation about that potentially straying into matters of opinion evidence. We will obviously consider that but, obviously, there is a clear factual point about conformity with universities' requirements.

We say it is obviously inefficient for Mr Cormack to give evidence in relation to one set of issues at a first stage trial and then return to give evidence in relation to similar but distinct issues at a second stage trial, as opposed to having him turn up for one session at a single trial, all in the context of the claimants' prior acceptance that that would not add more than, say, two days to the overall trial estimate.

As Ms Taylor notes at paragraph 22 of her statement, it is presently envisaged that all of the proposed witnesses would have evidence that pertains to both infringement issues and causation and quantum issues, or certainly at least causation issues.

For good measure, I should add that the claimants have said that they are proposing to call at least one witness of fact from Mr Adkins who, as we understand it, is the director and, I think, founder of the company. We know from the claim form that Mr Adkins is going to be giving evidence on the core factual allegations underlying the alleged infringements, as one would expect. That is paragraph 54B of the claim form at page 19. But it is equally certain that Mr Adkins will be giving evidence on whether, and to what extent, the arrangements caused the claimants to suffer what they claim to be £3.7 million or thereabouts in lost profits. Some of that evidence may be overlapping, in the sense that it is the same evidence that is relevant to both stages of the enquiry.

Some of it may be properly distinct. Either way, it is not just the defendants' witnesses but also the claimants' witnesses who have to turn up on two occasions.

My Lord, briefly on expert witnesses. I just want to take the Tribunal to one example of the considerable overlap that arises in relation to expert evidence, with all of the concerns in terms of duplication of time and costs that arises. My Lord, it is common ground, I think, that expert economic evidence is going to be relevant to the issues of infringement. There are questions in this case of market definition, dominance and anti-competitive effects, and they are all the classic terrain of expert economists in the competition case.

My Lord, if we could turn up paragraph 73 of the claim form, page 24 of the CMC bundle.

THE CHAIRMAN: Yes.

MR ARMITAGE: We see here an allegation about the effect of the alleged exclusivity agreements on the prices charged to students as compared with the counterfactual competitive market, and also an effect on consumer choice. The fact, if it is a fact, that prices would have been higher or that would there would have been less consumer choice in the counterfactual than in the actual conditions where these OSAs were in place, it is obviously of central relevance to the question of infringements.

I should say there is an equivalent allegation -- the allegation I have just shown you pertains to the case on abuse of dominance -- there is an equivalent allegation in relation to the chapter 1 case, and that is at paragraph 85. It is exactly the same allegation. It is not just an allegation, in that context, about the defendants' pricing, but also about prices in the market generally. Expert evidence on that issue is also -- I think my Lord has the point -- highly relevant

to causation and quantum issues, because the price which the defendants, and indeed other suppliers, would have charged in the absence of the OSAs of which complaint is made are relevant to the claimants' ability to set its prices and the extent to which they would have been able to operate a profitable business.

Likewise, the number of suppliers. You will recall the allegations about limiting consume are choice. The number of suppliers is an another matter that is of obvious relevance to causation and quantum issues. It is just one example but it is a general point that the expert economists, at least, would be opining on what the competitive landscape would look like absent the agreements of which complaint is made.

I took my Lord to the paragraphs of the Daimler case in which a similar consideration weighed very heavily against ordering a split trial.

My Lord, in conclusion on the overlap issue, in my submission it is not necessary or appropriate for you to decide today, finally, whether there will in fact be overlap between the two proposed trials or the precise extent of that overlap. My Lord, the correct approach to take is that taken by Mr Justice Hildyard in Electrical Waste at paragraph 14. He specifically says:

"I don't think I need to decide on the precise extent of the overlap."

The point is, if you can apprehend that a clean split is likely to be unrealistic, that is factor, as I say, that weighs very heavily against the claimants' proposal.

My Lord, I think that has addressed the main points made this morning.

THE CHAIRMAN: Yes, thank you.

MR ARMITAGE: I have some submissions on the other Electrical Waste factors but I don't, in fact, propose to go through them. My Lord has my --

THE CHAIRMAN: No, I have read your skeletons. I have your points generally on

them but I think you have dealt with the main points.

MR ARMITAGE: I am very grateful.

The only other short point was just in relation to the Socrates matter. Again, I have addressed this in my skeleton. The short point is that, when one looks at the transcript -- and I can take my Lord to it if that would be helpful -- that was in fact a case in which causation was not deferred until a second stage trial. The question of whether the infringement in that case had caused some loss to the claimant entity was retained as part of the first stage trial. So we say that there is not an example of a case that mirrors the claimants' proposal here.

As I have said, it would be open to the Tribunal to direct -- of course it would be open to the Tribunal to direct that detailed quantification issues should be decided at a later stage. We resist that, principally because we don't think that overall it would result in major savings, certainly not in terms of time but, as I say, we accept that would be open to the Tribunal and indeed it would be distinctly preferable. The critical point in relation to all of the issues about the permutations and about the savings in time and cost and overlapping evidence is that, including causation in the second stage rather than the first stage, is a recipe for inefficiency and precisely the kind of treacherous shortcut that the authorities warn against.

THE CHAIRMAN: Yes.

MR ARMITAGE: I think those are my basic submissions, unless I can assist --

THE CHAIRMAN: No. Thank you, Mr Armitage.

Mr Brown?

Reply submissions by MR BROWN

MR BROWN: Sir, I am grateful.

We have not got long until the short adjournment but I might be able to take the points relatively swiftly. I will focus on the key points I need to come back on.

THE CHAIRMAN: Yes. If we go over slightly, it doesn't matter. I want to finish this before we break. We can break a few minutes late if necessary.

MR BROWN: Understood.

The first point is the trial length estimate. Mr Armitage says that I made a faint suggestion this morning that seven days wouldn't be sufficient time and that seven days was our outside estimate. What I was saying was that we agreed with the seven days plus two in reserve which the defendants had suggested and my submission to you this morning was that, having considered the issues, having considered all of these permutations, we think it is much more likely that we will be at the outer nine day estimate rather than stretching to seven days. So we think we are not looking at a difference of two days between an infringement only or a liability only trial and a full trial, we think it is going to be longer than that.

I might also say that, at this stage, we are at a very early stage. It is possible that the parties -- each of the parties -- will form a different view as we go along, depending on disclosure and evidence, and it may be that we have to come back to the Tribunal, we would hope not, to say that actually the time estimate is unrealistic and we think it is going to take longer. What I would say about the time estimate is that we think it is going to be longer than just a two day difference. There is at least some uncertainty about whether even a seven to nine day timetable will end up being appropriate. That is our best guess and that is all we can do for the time being.

So that is the point. Mr Armitage was keen to stress that essentially all that divides the parties is two days. We think it is going to be rather more than that if it is

a composite trial.

Very briefly on the Tilling v Whiteman point that Mr Armitage made. He didn't take you to the authority but it is true to say that in Tilling v Whiteman -- this is tab 1 of the authorities bundle -- the House of Lords, Lord Wilberforce, warned against taking preliminary points of law. Whether that would be academic depended on the resolution of a very simple factual question. So, if you go to tab 1 of the authorities bundle you will see, at page 2 in the headnote, there was a preliminary issue ordered in the County Court about whether:

"One of two joint owners of a dwelling house let on a regulated tenancy who occupied it as his residence was an owner-occupier entitled to recover possession of it under Case 10 of Schedule 3 to the Rent Act 1968 if the court was satisfied that the dwelling house was required as a residence for himself."

You see that the judge decided this case on a point of law.

If we then move on to page 17, what is said by Lord Wilberforce, towards the bottom of the page, is that:

"The judge took an unfortunate course. Instead of finding the facts, which should have presented no difficulty and taken little time, he allowed a preliminary point of law to be taken so that the case has reached this house on hypothetical facts."

The only reason I mention it is that in Tilling v Whiteman, the observation is well known and quite understandable, but that is a long way from what we are faced with, potentially, here.

I am just looking through my notes to make sure I capture the key points.

THE CHAIRMAN: Yes.

MR BROWN: The point on which Mr Armitage had greatest difficulty was the question of the permutations. He relied on the fact that our essential complaint is the same in respect of all of the agreements as a whole. As, Sir, you pointed out

to him, that is our case but it may not succeed. Of course, we don't at the moment have the agreements, the official supplier agreements, or the exclusivity agreements, as we have termed them. We obviously don't know their terms. We don't know to what extent, if any, those terms encapsulate the full understanding of Ede and the relevant university as to the arrangements.

The short point is that the defendants have no answer to this point. This is not a case where there are a limited number of permutations, there are in fact more than 100 permutations. So, contrary to Mr Armitage's case that this is a much more simple matter than the Royal Mail, the Leaflet Company case, in fact it is considerably more complex when it comes to the question of infringement than that case.

I think I have dealt with the Daimler distinction. I don't think I need to go back to that. Mr Armitage says that that third factor I took you to, and so did he, relied on by Mr Justice Bryan, he said that Mr Justice Bryan's observations apply equally in this case because he says expert evidence will go to both the issues of liability and causation and quantum. We say that is no answer. The factor that weighed heavily with Mr Justice Bryan was that the evidence, and the data in particular, would be the same and would need crunching in the same way regardless of the outcome on the permutations. In other words, whether the earlier period covered by Daimler's claim was an infringement period or a clean period. Because either way you would be wanting to use that data to assess the overcharge. So the Daimler case is distinguishable, in my submission, for the reasons I gave this morning.

Mr Armitage said that a submission made this morning actually went against me on the question of the split. He said that if witnesses are going to be giving evidence on causation at the infringement trial then where is the cost saving?

Well, we see a very significant costs saving when it comes to detailed quantification. Mr Armitage was very keen to point to the overlap and he stressed very heavily the overlap between infringement and causation issues. Then he was rather more lukewarm about the duplication when it came to detailed quantification. In my submission, he was right to be lukewarm.

You have my submission that causation issues are likely to be, or the Tribunal is likely to be able to come to a view about minimal causation, even if it only hears an infringement trial. But Sir, you canvassed with me, and with my learned friend I think, about the possibility of the first phase trial including what Mr Armitage refers to as basic causation. That hasn't been our primary case but if the Tribunal considers that would be a more appropriate split, then we consider that that would certainly be better than no split at all. We see significant scope for costs savings by hiving off detailed quantification to a second trial and keeping issues of basic causation within the first trial.

Can I just touch on the schedule briefly? Mr Armitage only took you to two entries, perhaps I can take you to the same ones.

THE CHAIRMAN: Yes.

MR BROWN: In respect of the first allegation that he has put in the table, the allegation that the arrangements oblige universities to instruct and so on students to hire from Ede and warn them off hiring from others, and universities haven't in fact done so. Quite rightly, he says that is relevant to the issue of foreclosure of competition and also that there is overlap with the issue of basic causation. Again, I say that issue will therefore not require duplicative evidence at a second trial, but the question of the concrete effect of that, if we make it out, on particular students' decision making in respect of Churchill is a discrete issue. We say that is likely to be -- to the extent it is a matter for witness

evidence, it is likely to a matter for Churchill's witnesses rather than Ede's. Ms Taylor doesn't suggest otherwise.

I think the second entry was the other one that Mr Armitage took you to. He pointed to paragraph 42 of the claim form. Again, in a sense there is little between us; the issues on infringement and causation do overlap here. The evidence in respect of this allegation, insofar as it goes to infringement, in my submission, for the reasons I gave you earlier will be -- it is hard to see how the relevant witnesses' evidence would be different when it comes to the question of basic causation than the question of infringement. But the effectiveness of the strategy, which is what Mr Armitage has put into the detailed quantification box, we say that raises distinct issues which again are going to be addressed by, principally, the claimants' evidence. So that tells us that there would be no unnecessary duplication if one were to have a split trial.

I think the final -- sorry, I am just checking my notes, Sir.

THE CHAIRMAN: Yes.

(Pause)

MR BROWN: Yes, Sir, I think the other points I have covered off, either in my skeleton or in oral argument this morning. I don't think I need to go back over it, given the time. Obviously, if you have any questions for either of us, please say.

THE CHAIRMAN: No, thank you both very much.

It is 1.05, so we will break now. I need to think about this for a little but I hope to be in a position to give you a ruling at 2 o'clock. In the meantime, given my indication about the trial date and the inability from the Tribunal's perspective of doing it before 2022, it might enable you to have a further discussion about some of the timings that are currently in dispute. There is no point in arguing about a few weeks here or there if they make absolutely no difference to the trial date, so

I encourage that conversation if that is possible.

We will meet again at 2 o'clock. Thank you.

(1.06 pm)

(The luncheon adjournment)

(2.05 pm)

THE CHAIRMAN: Mr Brown, Mr Armitage, are you both there? Yes. Sorry to keep you.

Right, I will give a brief ruling on the split trial issue before we deal with the other matters.

Ruling on split trial application

(For Ruling, see [2020] CAT 22)

MR BROWN: Sir, I am grateful for the ruling. I am sure Mr Armitage is too.

Just before the short adjournment, Sir, you asked us to put our heads together in terms of the trial timetable.

THE CHAIRMAN: Yes.

MR BROWN: We have done our best but unfortunately, due to a slight difficulty in tracking down the relevant people, for which apologies on both sides, we would be grateful for, at some stage, a short adjournment in order to put our heads together and hopefully avoid unproductive argument and discussion in front of you.

THE CHAIRMAN: Yes.

MR BROWN: Whether we do that now or whether we deal with the early disclosure application, which I apprehend will be a pretty short bit of today's proceedings, I am in your hands.

THE CHAIRMAN: Let's deal with the other points of principle first. Again, it might

make the discussion easier amongst you later on.

MR BROWN: Certainly.

THE CHAIRMAN: So advanced disclosure is the next point, is it?

MR BROWN: Yes, I propose we take that next unless anyone has any objections. I can deal with this very shortly.

THE CHAIRMAN: Yes.

Application for advanced disclosure by MR BROWN

MR BROWN: You will have seen our request, also contained in our letter to the Tribunal of 20 October. We are seeking disclosure at an early stage of documents containing or evidencing the official supplier arrangements, or exclusivity arrangements as we have termed them. We say that these are plainly of central relevance to the claim and I don't understand that to be at all disputed. Our position is that having as full a suite of the arrangements, the agreements, as possible at this stage would allow us to be getting on with the undeniably extensive review exercise sooner rather than later, rather than waiting for another few months when we will have a lot more besides to review. As Mr Armitage's skeleton rightly points out at paragraph 61.2, disclosure will be an extensive and intensive exercise.

It strikes us that it may well also assist us to have as full a set of official supplier arrangements at this stage, when it comes to discussing broader disclosure issues with the defendants. For example, as I mentioned in argument this morning, some of the arrangements at issue in this litigation have since expired. Obviously we haven't seen them, we don't know how far back those agreements go, when they were struck, and so on. But, by having copies, even of agreements which fall within the claim period but which have since expired,

that should help us in turn to assess how far back the defendants' searches should go on the broader disclosure exercise, and indeed whether there can be a tailored approach, depending on the university in question or the arrangement in question.

Now, the defendants initially resisted the proposal for early disclosure altogether, but their position has certainly become more constructive since we made the request to the Tribunal. If you look at paragraph 7 of the composite draft order --

THE CHAIRMAN: Yes.

MR BROWN: -- you can see what they are proposing to give, which is all OSAs to which the relevant defendants are currently parties, to the extent that those agreements are set out in a formal written contract. So we have two caveats: current agreements and only those which are contained in a freestanding written contract.

But the defendants have said that not all agreements are contained in a formal written contract, some of them are contained in email correspondence and so on. So it goes beyond formal written contracts.

They say -- and perhaps the best place to take this is Ms Taylor's witness statement, which is page 318 of the bundle. I am just trying to locate my own copy of it, it seems to have gone loose. Yes, it is paragraphs 11 and following. Ms Taylor sets out the defendants' position.

They say it would be disproportionate -- paragraph 15 -- in terms of time and costs for them to go further than their proposal for now. They say that this would involve searching across hard copy and electronic documents held by three different defendants, each with their own computer system and filing systems, and so on. That is actually the exercise they have anticipated doing for the broader

disclosure exercise, so there would be some duplication there.

Our reaction to that is we find it somewhat surprising to see the defendants saying it would be a particularly time consuming exercise to find either recently expired formal contracts and/or agreements which are contained in documents other than formal contracts. We have made the observation that these are surely key documents for the Ede business and that they set out the rights and obligations on each party in circumstances where a significant amount of money is at stake, whether it be in the form of commission payments which would be due from Ede to the university -- that is accepted in Ede's pleaded case -- or in terms of the amounts that the Ede parties stand to make from students pursuant to these agreements, or in connection with these agreements. We are somewhat surprised to hear that the documents may be spread out all over the place and aren't contained in some form of central repository, such is their importance, or at least they would be relatively straightforward to find. Indeed, we assume that they would have to collate them on a reasonably frequent and regular basis, if only to show to their auditors, given that the agreements do provide for payment of commissions, which we assume will be costs of sales.

So we say that it is rather surprising that the documents are said to be so difficult to find. We say that, actually, there is a real, very good reason for those documents to be provided at a very early stage, so that we can hopefully telescope and focus the disclosure requests, or disclosure discussions, which will follow subsequently.

Those are my submissions on the early disclosure application.

THE CHAIRMAN: Thank you.

Yes, Mr Armitage?

Submissions by MR ARMITAGE

MR ARMITAGE: My Lord, you will have apprehended that the defendants do not resist the application in its entirety. You will see from the rival text at paragraph 7 of the composite draft order. I will just ask my Lord to turn that up.

THE CHAIRMAN: Yes, I have it. Yes.

MR ARMITAGE: You will see from the blue text, that is what the defendants are willing to provide by way of early disclosure. My Lord, I am instructed that, as a matter of fact, that will give them approximately 80 contracts. Bearing in mind that this is a case in which, I think as my learned friend put it this morning, there is something in the region of 130 arrangements with different universities in issue, that is a very substantial -- it is the majority of the arrangements. In my submission, the Tribunal should decline the invitation to go further than that at this stage.

If I could just develop that for a few minutes.

THE CHAIRMAN: I understand the problem is one of duplicating searches which you are going to have to do at some stage anyway. That is your concern. I think that just needs interrogating a little, and perhaps could you address this. If an agreement is contained in an email, or an exchange of emails, there you are, you have it. Why does it take so long to search for the emails which contain the relevant exchange of terms which comprise the agreement?

MR ARMITAGE: I think, my Lord, the best I can do is -- if I could -- and I am not trying to dodge the question, I think it is obviously an important question and I intended to come to it.

THE CHAIRMAN: Yes.

MR ARMITAGE: If I may just make one preliminary remark, which is this is the claimants' application for, essentially, disclosure out of the ordinary course.

THE CHAIRMAN: Yes.

MR ARMITAGE: It is for the claimants to establish that there is a need, not just for disclosure of relevant documents -- I am sorry, my Lord, I think may have lost you?

THE CHAIRMAN: Have I been lost to everybody?

MR ARMITAGE: No, it was the image had frozen but as long as you can hear me.

THE CHAIRMAN: Okay.

MR ARMITAGE: In my submission, it is for them to establish that there is a good specific reason for early disclosure, bearing in mind, as my Lord has seen, that there is agreement that there will be a detailed disclosure exercise in the period following this CMC, disclosure reports and production of EDQs. Insofar as this argument is put on the basis that these documents are relevant, we say that isn't a sufficient reason for ordering early disclosure.

My Lord, in terms of the proportionality of the requests, it is important to look at the wording of the proposed order. As I say, I will come momentarily, my Lord, to specific queries, but if one looks at the red text at paragraph 7 of the composite draft order.

THE CHAIRMAN: Yes.

MR ARMITAGE: It isn't just documents containing the terms of the OSAs, it is all documents evidencing the terms of the OSAs, for both current contracts and any contracts that have been in force at any time since July 2016. So potentially going back to the period before that, to the extent that there was agreements that expired after 2016 but were entered into before that. So it is capable of covering, say, an email from a university to the first defendant about a graduation ceremony in 2017, evidencing the services that the first defendant had agreed to provide in relation to that particular arrangement. So there is

potentially, in my submission, a vast number of documents that are potentially responsive to this category.

Just on that basis, we say that the request is overly disproportionate.

In relation to what would actually have to be done in order to comply with this request, my Lord has the evidence of Ms Taylor beginning at page 318 of the hearing bundle. Paragraph 16 over on page 319 is the particular paragraph on which -- that is the evidence before the Tribunal on the nature of the exercise.

THE CHAIRMAN: Yes, that is explaining the complexities of the search exercise. What I don't quite understand is if one went to each of the defendants and said, "where is your agreement with X institution?" and asked that 130 times, or whatever it is, why wouldn't they be able to say, "well, our agreement with this institution is here, and this one is here, and here they are"? What is the complexity in producing an agreement you would expect them to be able lay their hands on relatively quickly? If any dispute ever arose under that agreement, for example, they would want it find the terms pretty quickly.

MR ARMITAGE: My Lord, the point is, bearing in mind it covers both current and historical documents that are, as I say contain or reference the terms of these agreements, what my Lord has is a large number of different arrangements with universities, in force at different points in time and, as I say, potentially going back substantially before 2016. One has three separate defendants. As Ms Taylor points out, one has multiple different computer systems and potential different custodians. So, for the cases in which there is no standalone document evidencing the terms of the relevant agreement, it isn't a straightforward matter of simply asking somebody what are the terms of the current arrangement. As I say, this is dispersed across multiple different defendants and multiple different custodians, some of whom have left the

business.

My Lord, you are quite right, if the reality is that a particular arrangement is set out in, say, one email or a short exchange of emails, it may be that that particular set of arrangements could be disclosed quite readily. One doesn't know until one carries out the exercise and, as I say, in circumstances where it is agreed that, immediately following this CMC, there will be, as envisaged by Rule 60 of the Competition Appeal Tribunal Rules 2015, that is the process which is intended to identify where the relevant documents are so that the parties can formulate their disclosure requests accordingly. In my submission, given in particular that a very substantial body of documents is going to be provided by way of early disclosure, my friend simply hasn't identified a good reason why it would also be necessary to undertake this duplicative further search -- I am sorry, my Lord?

THE CHAIRMAN: I was going to say, the reason given, I think, is that it would help the parties narrow the broader disclosure requests which are going to arise at the next stage. If you know what the basic terms of the agreements are with each institution, that helps in narrowing the disclosure exercise.

MR ARMITAGE: Yes. I can see that that is a reason for giving -- well, my Lord, that is a reason why Rule 60 envisages the approach that it envisages. So all of these steps in terms of narrowing issues can be picked up in that context. In my submission, again, there is going to be a substantial, as I say, quantity of documents provided. Those can be reviewed. That will in itself be a time consuming exercise and that can be utilised in order to inform the Rule 60 process, of course. The submission is particularly in light of the extremely broad nature of the wording of the request. As I say, "any document evidencing the terms", not simply documents setting them out.

THE CHAIRMAN: If it were narrowed in that way -- if it were narrowed to the documents containing the terms, would that make it easier?

MR ARMITAGE: Well, it would make it easier, albeit that I think the primary position would still be that it would be necessary to undertake the exercise set out in terms in paragraph 16 of Ms Taylor's statement. The point being that, until that exercise is carried out -- and as I say it is duplicative of the exercise we will be doing anyway pursuant to Rule 60 and the agreed position -- until one does that, one doesn't know which particular agreements -- bearing in mind, again, a large majority of them are set out in single contractual documents, as one would expect -- we are talking about the others and, as I say, the historic documents. That is the position.

My Lord, it is not as though, for example, it is said that these further documents are necessary for the purposes of pleading a case, or indeed responding to the outstanding RFI that my clients have made. If they had been necessary for those purposes, no doubt my learned friend would have said so.

My Lord, the basic point -- and my learned friend can say that he is surprised by Ms Taylor's evidence but that is the sworn evidence before the court -- this is not a case in which there is a central repository of all current and historic contracts. They are spread over different custodians, in relation to universities of different sizes, different periods in history, and, as Ms Taylor puts it, it would indeed be a time consuming and disproportionate exercise. Given that it is going to happen anyway in relation to the general disclosure exercise, what is the good reason -- and there must at least be a good positive reason -- for ordering this broader exercise to take place, essentially, twice?

THE CHAIRMAN: Yes.

MR ARMITAGE: Those are my -- I will see if I have any other electronic instructions

but I think those are my submissions.

THE CHAIRMAN: Thank you.

Reply submissions by MR BROWN

MR BROWN: Sir, may I come back very briefly on the points?

THE CHAIRMAN: Yes, do.

MR BROWN: Mr Armitage suggests that I haven't given any reasons, or any good reasons. He says that relevance in itself isn't a good reason. That isn't the reason I gave. I said that the documents are centrally relevant, there is no dispute about that, but I said that there are two good reasons why we should get these documents, or as full a suite of them as possible, now. One of them is that it will ease the burden on the claimants' team in terms of the review process, because there will be undoubtedly a very large number of documents to be disclosed. The sooner we can get on with reviewing a decent tranche of them, the better. That is one good reason.

The second good reason is that it will assist in the broader disclosure exercise. Sir, you have given one reason for that but there is a second reason which I alluded to in opening this application, which is that the claim period goes back to 2016. Once we know the start date of the expired agreements we will be in a better position to assess and to discuss with the defendants' solicitors the timeframe, or the time period, covered by the liability or infringement disclosure. That too is a good reason for us seeing these agreements now.

We don't have copies of any current agreements. We have a copy of one expired agreement. So we are very much in the dark. Mr Armitage says that it is not necessary. The claimants aren't saying this is necessary for pleading purposes but we have said in terms in the claim form -- and I can try and find the reference

if need be -- we have said that we expressly reserve the right to apply to amend our claim form once we have seen these documents. I certainly can't rule out the possibility that we will be applying to amend, I just don't know.

It is important that the Tribunal has that point.

Sir, in response to your suggestion that we limit our requests to documents containing rather than evidencing the terms of the OSAs, Sir, we are in your hands. That sounds like a way of making it more concrete and, hopefully, assuaging some of the concerns that Mr Armitage has expressed.

THE CHAIRMAN: Thank you. Thank you both.

Ruling on advanced disclosure

(For Ruling, see [2020] CAT 22)

THE CHAIRMAN: Is that clear to both of you?

MR BROWN: Yes. I am grateful for that.

Would now be the appropriate time to have a short adjournment to try and knock our heads together?

THE CHAIRMAN: The only thing I think, then, that impacts timing is whether the next hearing is costs and disclosure.

I should say -- again, I will hear argument, but my instinct, just to let you know where I am thinking on this, is that it would be preferable to have both a costs case management conference and the disclosure discussion at the same time. I recognise the possibility that it may be that a final conclusion couldn't be reached at the hearing and I will have to go away and think about it and produce something in writing afterwards, that is always a possibility. But I do think that the Tribunal will be assisted by the cost estimates, which will include ranges, I think, of estimates for different disclosure exercises. That can only, it seems

to me, help the court in deciding which disclosure versions to go for. It is at least a relevant factor.

So that is my instinct. I would prefer that to happen.

Do you want to just address that between you, with me now? Because that will impact on timing.

MR BROWN: Sir, I suppose strictly speaking --

THE CHAIRMAN: It is for Mr Armitage, I think, because he is the one that wants to separate them.

MR BROWN: I was wondering whether it might make sense for him to go first.

THE CHAIRMAN: Yes.

Submissions on the scope of the next hearing by MR ARMITAGE

MR ARMITAGE: My Lord, yes.

As my Lord knows, the parties have agreed in this case that cost budgeting would be beneficial. There is some precedent for that in other decisions of this Tribunal, notwithstanding that there is no default cost budgeting on that position in the High Court. The parties are also agreed on what cost budgeting would practically involve. The disagreement is about timing. As my Lord has said, it is about whether, essentially, cost budgeting should take place simultaneously at the disclosure CMC that the parties are agreed should take place, if the Tribunal is able to hear it, in January next year.

We say, as my Lord will have apprehended, the suggestion that those processes should take place in parallel is problematic. Experience suggests that disclosure is likely to be a major element of the parties' respective costs budget, but the scope, and therefore the anticipated cost, of the required disclosure will not crystallise until the proposed disclosure CMC. The purpose of which,

pursuant to Rule 62 of the 2015 Rules, is for the Tribunal to decide what orders to make about disclosure. We say it is far more efficient for cost budgeting to take place by reference to the disclosure that the parties are actually going to be providing.

My Lord, just to take my Lord's point that the Tribunal will be assisted by having information about the costs associated with disclosure at the January CMC, if I understood my Lord's point, that will be before the court anyway. Does my Lord have access to the 2015 Rules?

THE CHAIRMAN: Yes.

MR ARMITAGE: Rule 60. If my Lord has it.

THE CHAIRMAN: Yes, I have it. Yes.

MR ARMITAGE: The definition of "disclosure report" at 60.1(b) at (iv):

"That disclosure report will include estimates of the broad range of costs that could be involved in giving disclosure in the case, including the costs of searching for and disclosing any electronically stored documents."

So that information will be before the Tribunal. Obviously, in relation to particular orders and questions of proportionality, the Tribunal will be able to take those broad estimates into account.

What we say would be inefficient is for the Tribunal to take decisions on the budget actually allowed to the parties, or at least budgeted for, in relation to the disclosure exercise, because that may well differ from the broad indications given in the disclosure records, because of course the Tribunal may decide that certain aspects of disclosure sought by a particular party should not be ordered.

My Lord, insofar as the claimants have sought to contest this proposal for a staged approach, the main point that they advance, indeed the only point that they really advance in their skeleton, is that, in High Court proceedings, cost

budgeting does take place at the first CMC, often alongside questions as to the scope of disclosure. They say that is invariably the case in the High Court, that is not correct. In fact, my Lord you have in the bundles an example, a rare example, if I may say so, of a competition case in which costs budgeting actually took place, due in particular to the relatively low value of the claim.

Perhaps I could just turn that up very briefly. It is the Office Depot case. And it is at -- sorry, I don't know if my Lord has the tabs but it begins at page 213 of the authorities bundle. 213.

THE CHAIRMAN: Yes. I did look at this before, Ms Pat Treacy's judgment.

MR ARMITAGE: In fact, most of the judgment, as one would expect, is taken up with detailed points about costs budgeting. The point is simply that what occurred in this case is there was, as one sees from paragraph 2, there was a costs and case management conference in the ordinary way for High Court litigation, which took place on 20 November 2019. As the judge says:

"Various matters, particularly relating to disclosure, were resolved, but issues relating to costs budgeting remain."

What had happened is that the parties had exchanged budgets and budget discussion reports in advance of the first CMC, as of course is the requirement under the relevant part of the CPR, but there was then a major debate about the scope of the disclosure to be given at the CMC itself. One can see that from paragraph 15 of the judgment, page 218 of the hearing bundle.

THE CHAIRMAN: Yes.

MR ARMITAGE: The court at the CCMC, it is fair to say, had approved the budget submitted by the defendant, subject to an adjustment to brief fees, which is not a point that is material today, but also an invitation to the defendants to:

"Revise the estimates proposed for disclosure and experts, in view of the fact that

a number of aspects of the defendant's applications for disclosure were refused at CCMC."

Then various points are there set out. So what happened in that case is that, in light of the disclosure orders that were made, the defendant, in particular, had prepared their cost budget on the basis that the disclosure they were seeking -- I think my Lord has the point -- the disclosure they were seeking would be ordered. It was not ordered and therefore they were sent away to revise their cost budgets. Further time and costs that didn't need to be incurred in advance. It took another month, approximately, for a ruling.

My Lord, all we are trying to do here is offer an efficient way forward, based on experience. We are not suggesting major delay, we are suggesting that, almost immediately following the proposed disclosure CCMC, there could be a short process where the relevant documents could be exchanged and, if necessary, a further short hearing. It avoids the situation in which budgets are prepared, essentially, on a provisional basis, and a basis which may turn out to be false in light of what the Tribunal actually orders.

THE CHAIRMAN: What is the difference in the work required for each party to produce (a) a costs estimate for the purposes of Rule 60 and (b) a costs budget?

MR ARMITAGE: I think the exercises are somewhat different because the Rule 60 process essentially concerns -- as the wording of the rule provides, it is broad estimates of the costs that would be associated with giving disclosure of the documents identified in the disclosure reports, as opposed to the budget to be allowed for the disclosure that is actually going to be given.

I am not sure I can make the submission that there is a major difference in terms of the work, the real issue is not so much the work, it is the inefficiency of the

Tribunal making decisions on one and the same occasion.

THE CHAIRMAN: Right, okay.

MR ARMITAGE: So the potential -- as I said, the advantage of the defendants' proposal is just to avoid the situation of the parties having to go back and essentially do part of the budgeting process again. It is not just disclosure, as one sees from the Envelopes case, it may also affect other aspects of the budget, in particular expert witnesses, if the disclosure that they are going to have to consider is different in scope.

So it is really an efficiency suggestion. What is proposed is a further short process and a short hearing. Indeed, no hearing at all if these matters can be agreed, which is at least theoretically possible, my Lord. So, as I say, it oughtn't to cause any overall delay and we say it would be the more efficient approach as a matter of principle.

THE CHAIRMAN: Okay. Thank you, Mr Armitage.

I think, despite your valiant efforts, I am going to require it to all happen at the same time. Insofar as efficiency is concerned, I think I need to assume that there will be a hearing because if it can all be agreed, it is the same whether one has it on one occasion or two. So we are trying to cater for the position where the parties can't agree.

It seems to me that, since there isn't a huge amount of difference in the work the parties have to do in preparing costs estimates and a costs budget, and the real difference will be for the Tribunal itself, I think the Tribunal can probably live with the need, if necessary, to defer decision on something to a further date. But I think the parties are better served by not having to attend for a further hearing so I shall require everything to be wrapped up in one hearing.

Before you go away and discuss dates, you should know that the Tribunal can

accommodate this proposed next CMC in January, not on the 11th but on any of the 12th, 13th and 14th.

How long do you think you want to talk?

MR ARMITAGE: My Lord, I need to finalise some instructions on a helpful revised order that my learned friend, Mr Brown, has circulated. I expect 15 minutes should be enough, if that is agreeable to your Lordship?

THE CHAIRMAN: Yes, indeed. Will that dispose of everything else we need to consider, other than going through the Is and Ts of the order?

MR ARMITAGE: My Lord, there is potentially still a point of principle about whether there should be any directions given at all. The best approach there, in light of the indications my Lord has given and the fact there is now a revised proposal, is to take instructions on that issue as well to see if agreement can be reached on it.

THE CHAIRMAN: I had assumed your discussions about timing are on the assumption I am going to make directions for the timing of various matters. I think my position is that, if the trial isn't go be going to be until January 2022, we ought to fix that now, in which case we can start putting in dates between now and then.

MR ARMITAGE: I understand. I am grateful.

THE CHAIRMAN: 15 minutes then, we will resume at 3.05 pm.

MR BROWN: I am grateful.

(2.50 pm)

(A short break)

(3.20 pm)

Housekeeping

THE CHAIRMAN: Hello, how have we fared?

MR ARMITAGE: Thank you for the time, my Lord.

MR BROWN: Do you want to go first, Mr Armitage?

MR ARMITAGE: My Lord, I think it is fair to say substantial progress. My learned friend, Mr Brown, has helpfully sent a revised set of directions with most of the dates in, with which we are entirely content, subject to a couple of points that I think Mr Brown still needs to take instructions on but I apprehend may not be problematic. I don't know what the most efficient course is.

MR BROWN: Sorry, perhaps I should just clarify. I don't mean to criticise Mr Armitage for it but we have just had a conversation while we were awaiting your return, Sir, in which he read out some alternative dates to me. I have just been liaising in real time via another platform with my solicitors. We can run through them but I think I am getting okay responses to just about all of them.

There is probably one issue that Mr Armitage -- well, if you would like us to just go through the dates immediately we can, or I can just canvas the one issue where perhaps we need to have a brief debate?

THE CHAIRMAN: Shall we turn to the order, because we need to settle all parts of the order. So perhaps if we now turn to it and take it in turn.

MR BROWN: Yes.

THE CHAIRMAN: Paragraph 1, no problem; 2 to 6 is all agreed, I have no problem with any of that, so that is fine; 7 we have dealt with; 8 through 10 --

MR ARMITAGE: My Lord, I am sorry to interject. Just on 7 --

THE CHAIRMAN: Yes.

MR ARMITAGE: We had agreed to the date of the 27th on the basis of the offer that we had made of the somewhat more limited category of disclosure. I am instructed that if we could have until 8 December, for purely logistical reasons

because the category is somewhat more broad than we had been seeking. I raised that with Mr Brown, I don't know if he has an objection to us having a little bit of extra time. The major reason for us having a little bit more time is to do with the Covid-19 related difficulties referred to in Ms Taylor's statement.

MR BROWN: I can satisfy Mr Armitage that we are okay with that.

THE CHAIRMAN: Okay, thank you. 8 December.

MR ARMITAGE: Very good.

THE CHAIRMAN: The confidentiality ring, I don't think I have any substantive issues on that, other than two points. One, the Tribunal will separate that out into an independent order; secondly, the terms, as drafted, seem to contemplate the Tribunal being aware of who is in the confidentiality ring, who the relevant advisers are, but nowhere is it made available to the Tribunal. I think there should be a schedule to the order identifying the relevant advisers for each party. Then if the process under 17 is gone through, people are added, then that can be done, the Tribunal can be informed and the schedule can be updated.

I am seeing nodding with that, so I think everyone agrees with that.

MR BROWN: Yes, that's right. We are perfectly happy with that, Sir.

Can I just go back to paragraph 8 --

THE CHAIRMAN: Yes.

MR BROWN: -- before we leave this page. Mr Armitage has proposed slightly revised dates for the disclosure -- oh, sorry, apologies, we will get to costs budgeting, I am getting confused. We will get to costs budgeting in a moment.

THE CHAIRMAN: Right. Is there anything else on anything up to and including paragraph 23, which is the end of the confidentiality provisions?

MR BROWN: No.

THE CHAIRMAN: No. Right.

So 24, I think that has gone, hasn't it? We are looking at the substantive directions now.

Right, here we get to dates. Why don't you take me through the rest of the provisions.

MR BROWN: Yes, I am happy to do so, or I am happy for Mr Armitage to do so.

MR ARMITAGE: Why don't I do so and then I can raise any --

MR BROWN: Yes.

MR ARMITAGE: 25, agreed on a new date of 2 July 2021 --

THE CHAIRMAN: Yes.

MR ARMITAGE: -- subject to my Lord.

26, reply witness statements agreed on a new date of 13 August.

THE CHAIRMAN: Yes.

MR ARMITAGE: I think there will need to be -- just turning to 27 -- some finessing, obviously, of various bits of the draft in relation to the split trial point, but that I think is a matter which I expect my learned friend and I can sort out after the hearing, if that is agreeable to you, my Lord.

THE CHAIRMAN: Yes.

MR ARMITAGE: There is one substantive suggestion that I had made in my skeleton argument, just that, in relation to the proposed expert economic evidence, it would be helpful if the parties could liaise to agree the precise questions to be covered by that evidence, as opposed to merely the broad field. What we had in mind was that that liaison could happen and the parties seek to agree the scope of the expert evidence by 21 December, and any dispute could be considered along with disclosure issues at the CMC in January.

THE CHAIRMAN: That makes sense. I do think it is important to identify the scope, so that is sensible to me.

MR BROWN: Sir, can I just -- I don't wish to push back against the idea of the scope being clarified, but experience -- at least my experience -- tells me that seeking to identify or agree detailed questions for the experts can quite often prove unproductive and incur serious costs. We would certainly agree with a list of issues for the experts.

THE CHAIRMAN: I think that is what I understood, rather than the questions to be put to them; the issues which the experts are to address.

MR ARMITAGE: The specific issues as opposed to just, say --

THE CHAIRMAN: Economics.

MR BROWN: In which case we are ad idem.

THE CHAIRMAN: Good.

MR ARMITAGE: Then, 28, without prejudice discussions, agreed on a new date of, I think, 3 September 2021.

THE CHAIRMAN: Yes.

MR ARMITAGE: Paragraph 29, expert reports, agreed on a new date of 18 October 2021.

Reply expert reports agreed on a new date of 19 November.

MR BROWN: Sorry, may I just jump in. On the expert reports, paragraph 29, I think it was 8 October rather than the 18th. I might have misheard, but I think it was 8 October.

MR ARMITAGE: I meant to say 8th, so apologies if I didn't. 8 October.

THE CHAIRMAN: But it is still 19 November, is it? Because that is quite a long time.

MR BROWN: Yes. For the expert reports and reply --

THE CHAIRMAN: Yes.

MR BROWN: -- we felt it was safe to build in a slightly longer period than the parties, or at least we had anticipated in our initial draft directions, just to cater for the

possibility that the reports are very detailed. Hopefully it won't be necessary to have quite such a long period but we thought it sensible to have a period which minimises the risk that the parties will be coming back to the Tribunal or having to seek to agree a new date.

THE CHAIRMAN: Right.

MR ARMITAGE: Yes. That was also agreed on our side.

Similarly, agreement on a new date for joint expert statement, 3 December 2021, my Lord.

THE CHAIRMAN: Yes.

MR ARMITAGE: Then, subject here, of course, to the Tribunal, we had agreed upon a new window for the pre-trial review of the week commencing 13 December, with the time estimate of half a day.

THE CHAIRMAN: Yes. We will have to come back to that but let's see the rest.

MR ARMITAGE: Paragraph 32, in relation to the trial bundle, I had suggested to my learned friend that it may be more useful for that to be in place in advance of and therefore available at the pre-trial review. It could even be prepared following the submission of the joint expert statement as that is the last document. I see Mr Brown nodding. So we can build that in.

THE CHAIRMAN: Yes. So that is available before 13 December?

MR ARMITAGE: Indeed**.**

THE CHAIRMAN: Yes. Sorry, you were going to put a date in no later than a date some time before 13 December, say 10 December?

MR ARMITAGE: Yes.

Skeleton arguments, we had suggested that sequential exchange would be more useful to the Tribunal. I am not sure if Mr Brown has been able to take instructions on that but our proposal would be that the claimants' skeleton would

be 7 January, we would reply and would put in our skeleton on 14 January, and then in advance of a trial on a date subject, again, to availability, but 24 January was the date we had in mind, so seven days after the -- sorry --

MR BROWN: Ten days.

MR ARMITAGE: Yes, exactly. Just to repeat: 7 January for the claimants' skeleton, 14th for our skeleton and then 24th, or whatever date thereafter for the trial. I am not sure if Mr Brown has had full instructions on that.

MR BROWN: Yes. We have no objection to sequential skeletons if that is the Tribunal's preference.

THE CHAIRMAN: It is, yes.

MR BROWN: All we were concerned was that we have enough time to prepare following receipt of the tome we will receive from the other side.

THE CHAIRMAN: Okay. That makes sense.

MR ARMITAGE: I have just spotted that there is no provision for authorities bundles. That probably ought to be provided for. I think on a day in between the defendants' skeleton and the commencement of the trial, so potentially -- well, it is a matter for the Tribunal how far in advance one would need those.

MR BROWN: Sir, if I may suggest that the authorities bundle be produced either simultaneously, or finalised simultaneously, with the defendants' skeleton, or at least almost immediately afterwards, so that we all have a chance to work on it for as long as possible.

MR ARMITAGE: Yes.

THE CHAIRMAN: It would make sense to produce it on Monday the 17th. Would that work for you both? So it gives the weekend to finalise it.

MR BROWN: Yes.

THE CHAIRMAN: Just before we get to the trial, whilst we are still on bundles, both

the trial bundle and the authorities bundle, at the moment I am minded to direct that they be purely electronic bundles produced. But we have no idea what the world will look like by January 2022. It may be that the Tribunal Panel as will then be properly comprised might prefer hard copies. I suggest that we leave it at the moment that the trial bundle be produced in advance of the PTR in electronic form but that, either at the PTR or earlier if the Tribunal contacts the parties, the Tribunal reserves the right to change its mind and ask for hard copy bundles of some form, maybe just a core bundle or something like that.

MR BROWN: Yes.

THE CHAIRMAN: We will leave that flexible for now but at the moment it is electronic bundles.

MR ARMITAGE: I think that takes us to cost management.

THE CHAIRMAN: Before we get to that, the trial will be listed on 24 January, subject to final confirmation with listing, for seven days with two reserved? What is the estimate given now I have split the trial in the way neither of you asked for?

MR BROWN: Yes, I confess to not having given that any thought. It would be, I think, sensible to err on the side of caution.

THE CHAIRMAN: I think so.

MR BROWN: And add a day or two. What we don't want to do is find that we get to seven or eight days in and find we are running out of time. So I would have thought six days with two in reserve, possibly seven with two in reserve.

THE CHAIRMAN: I am going to suggest seven with two in reserve, given that I can envisage the causation issues -- well, I think causation -- the evidence that goes both to infringement and causation could itself take quite a bit of time, so I think seven plus two for the moment. It can always be modified later on.

Right, costs, then.

MR ARMITAGE: Yes. So looking at the dates in red, I had suggested to my learned friend that in fact those dates should come slightly forward, just to avoid budget discussion reports going in just after the new year. We had suggested in fact that costs budgets could be exchanged seven days earlier, so 14 December. Then 21st for the budget discussion reports, bearing in mind that there will be potentially skeleton arguments to do before the January CMC, which would then be done shortly after the Christmas break.

MR BROWN: Yes, no objection.

THE CHAIRMAN: Right, so 14th in (b), 21st in (c), and then the date -- had you fixed on a date in the week of 11 January? I couldn't do the 11th but I could do the 12th, 13th or 14th.

MR BROWN: I think they are all okay on our side. I am just awaiting final confirmation, having just spoken those words. But I think so.

MR ARMITAGE: Yes, I am available on any of those dates.

MR BROWN: Yes, I have had that confirmation.

THE CHAIRMAN: It is early days, have you any idea what you think the Tribunal might require in terms of pre-reading?

MR BROWN: No, not yet.

THE CHAIRMAN: I would have thought if we put half a day's pre-reading, that means the 12th is a possibility because the 11th is only a half day in the High Court, given there are meetings going on in the morning. So if we said the 12th for the hearing.

MR BROWN: Yes.

THE CHAIRMAN: Yes. I am going to build in half a day's pre-reading.

Good. You don't need 37 now, do you?

MR BROWN: No.

THE CHAIRMAN: And everything else is fine?

MR BROWN: Yes.

THE CHAIRMAN: Good. Thank you both very much.

Just -- are you going to provide a further version of the order? I am not sure of the procedure. Do we leave it to the referent there to produce the order generally? We will certainly produce one that is the confidentiality ring but we will need the names provided to us.

MR BROWN: I think the Tribunal's usual practice is to take the order forward itself but if it is more helpful we can knock our heads together.

THE CHAIRMAN: I think we are fine. We have a note of the date, so we can do that. Yes.

Thank you both very much. Anything further?

MR ARMITAGE: No.

MR BROWN: Not from us.

THE CHAIRMAN: Thank you both very much indeed.

(3.40 pm)

(The hearing concluded)