IN THE COMPETITION APPEAL TRIBUNAL

Case No.: 1342/5/7/20

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

Tuesday 22nd June 2021

Before:
The Honourable Mr Justice Marcus Smith
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Sportradar AG and Another

Applicant

v

Football DataCo Limited and Others

Respondent

A P P E A R AN C E S

Alan Bates and Ciar McAndrew (On behalf of Sportradar)
Kassie Smith QC and Henry Edwards (On behalf of Football Dataco Limited)
Ian Mill QC, Tom De La Mare QC, Tom Cleaver and Timothy Lau (On behalf of Genius)

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

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(10.30 am)

MR JUSTICE MARCUS SMITH: Good morning, everybody. Before I proceed to some housekeeping can I just make sure that I have got good communications with the advocates? Mr Bates, I can see you. Can you see and hear me?

MR BATES: I can, my Lord, yes.

MR JUSTICE MARCUS SMITH: Very good. That was extremely clear. Ms Smith, I can see you.

MS SMITH: I can see and hear you, my Lord.

MR JUSTICE MARCUS SMITH: Mr Mill, I can see you. Can you hear me?

MR MILL: I can see and hear you, my Lord.

MR JUSTICE MARCUS SMITH: Very good. Thank you very much. Before we begin with housekeeping specific to this case, can I indicate that, as you all know, this case is being heard remotely, but it is, of course, a hearing before me wearing two hats, that of the Tribunal Chair and that of a High Court judge in the three matters that are before me. The usual courtesies of a combined hearing apply in this case and the usual rules apply also. Although this matter is being live streamed for the public benefit, it should not otherwise be recorded, photographed, transmitted. That would be, which I am sure will not happen, punishable by contempt. Let me make it clear that I say that before all of my hearings and nothing should be read into the fact that I said it today.

More helpfully, may I express my appreciation for the very helpful written submissions that all of you have put in. I have read those with great care.

I also have attempted to get through the reading list that you referenced in the documents and I have before me electronically the hearing bundles in this

matter. My experience is that it is usually not as quick getting up hearing bundles electronically as it is paper files. So please do bear with me when you make reference to documents, and I will obviously get them up and read them, but it will be a little slower than usual.

With that general point in mind, I have done a list of sorts of issues. It seems to me that we should proceed on an issue by issue basis, the first of those issues being essentially when the two Chancery cases and the CAT case should be heard, in terms of both whether they should be heard together, whether they should be split off, and when, depending on what one does with those hearings, they might take place. I see those questions as to an extent interrelated.

I think the general view is that two of the three of you say they should be heard together, ideally in June or July of next year, whereas Mr Bates, I think you are saying they need to be split, with the Chancery matters following on after the competition case, and that the competition case should be heard I think in October of next year, rather than June or July. I think that in a nutshell is where we are at. I say that really just to show I have a vague grasp of the issues. I am minded to hand over on that issue to you.

It seems to me, Mr Bates, probably best if you go first, since I think you are in the minority on this case. Then I will hear from either Mr Mill or Ms Smith, in whichever order they please, and then you can come back in reply. Does that make sense?

MR BATES: Yes, my Lord. Thank you. The starting point, we say, is that the President decided in the transfer judgment in December that the competition law issues were factually severable and they should be decided first in the Tribunal, with the non-competition law issues being addressed, was the word

he used, subsequently. Everyone, of course, accepts that that should be the sequencing, in terms of the order that the trials should take place.

The proposal from Genius, which is for effectively back-to-back trials, as I understand it, in the Michaelmas term, we say is particularly impractical, because we will not know, or we may not know by the time of the High Court trial, what the outcome of the CAT trial has been, and that would clearly have very significant consequences in terms of the scope of matters and the background to the matters that needed to be determined in the High Court trial.

FDC's proposal is slightly different, in that, as I understand it, they are proposing that the CAT trial take place in July, on the basis that that would provide greater opportunity for the CAT judgment to become available prior to the High Court trial, but we say that that is clearly not practicable.

Indeed, Genius say that that wouldn't allow enough time to -- July would not allow enough time to prepare for the CAT trial. So what we are left with is Genius' proposal for the back-to-back trials in Michaelmas.

I note, by the way, they make that proposal even though they say that the competition trial has to be in early Michaelmas, because their counsel -- they don't say precisely which members -- are not available in November and December. Presumably, they have a different counsel team in mind for the High Court proceedings.

Even if the counsel availability is not a problem for them, their proposal means going directly from an intensive CAT trial of the competition issues straight into the Chancery trial, with possibly the judge knowing what the outcome of the competition trial was, but possibly with the parties having no inkling, or perhaps having been given some sort of indication, but no judgment.

That is problematic, because nuances in the outcome of the CAT trial could be very different, because there are a number of different permutations. For example, if the FDC/Genius agreement is unlawful, there will then be questions about how this affects the lawfulness of FDC's reliance on the attendee terms in support of that agreement, which is, of course, also something that will be determined in the CAT trial. That's obviously something that's going to be very significant in terms of the issues that then have to be determined in the High Court trial and the basis on which those matters would be argued.

So that's one reason why we say their proposal for back-to-back trials is not sensible, but it is also simply not sensible because it's a waste of costs. It is very likely to be a waste of costs, because the outcome of the competition trial, in practical terms, is that the High Court claims are very likely to settle. We set that out in our skeleton and made the point that really, whatever the outcome of the competition trial, the remaining issues to be determined in the High Court trial are going to be very narrow, and their practical significance is going to be limited. That's why we say they are likely to settle. But even if a High Court trial were required, it would be much more confined and focused, because the competition law issues will have already been determined.

So any further evidence and legal submissions could all be focused and prepared on that basis rather than potentially even during the High Court trial having to deal with multiple possible scenarios based on not necessarily knowing what the outcome of the CAT trial was.

MR JUSTICE MARCUS SMITH: Yes. Mr Bates, if I could just unpack a couple of those points, just so that you have a sense of where to direct your submissions. What I think you are saying is that there is such a nexus between the competition case -- let me call it the CAT case -- and the

Chancery cases -- sorry -- these are my labels but I hope they are clear -- there is such a nexus between those two strands, that having them so ordered, one after the other, without the outcome of the first being known for the second, that there are a number of inefficiencies created.

I think those inefficiencies, you say, are potentially unnecessary proceedings being carried on, because the Chancery proceedings you say are going to be radically informed by the competition, the CAT proceedings, such that they may settle or that there may be issues which are determined and clear from the competition proceedings.

So you really do need, you are saying, to have the outcome of the CAT case before you start with the Chancery cases. I think that's the basic thrust.

MR BATES: That must be right, my Lord, because stepping back from the proceedings as a whole, the key issues between the parties are really whether or not the FDC/Genius agreement is lawful or not, and if it's not lawful, what consequence that has in terms of the attendee terms, because if the attendee terms are ones that cannot be relied on, as we say, as part of our CAT claims, then that is clearly very significant in terms of where that leaves the High Court proceedings.

Equally, if it goes the other way, and it is found that the attendee terms are ones that can be relied on in any event, and that the agreement is lawful, then Sportradar have made clear that we will not be sending our scouts to the grounds anymore anyway, and we would accept that the attendee terms would then of course be ones that could be relied on.

So that's really the main debate between the parties. There are other matters that would perhaps be left over in the High Court proceedings, but they are going to be peripheral, in terms of their practical significance.

MR JUSTICE MARCUS SMITH: Let me just put to you what my thinking is, subject, of course, to what Mr Mill and Ms Smith have to say. I see the force in your back-to-back point. However, I have well in mind that Ms Smith and Mr Mill are both going to say that there needs to be a degree of speed in the process, and if one has, as it were, the competition case, the CAT case, with a big gap to allow for the determination, handing down a reserve judgment and potentially an appeal, one is pushing off the Chancery cases to the crack of doom.

Now, you may say that, depending on which way the competition cases go, the Chancery cases may not amount to a hill of beans, if I can be colloquial. We will see about that.

What I am wondering, though, is whether instead of going down your route of a split, one goes to the other extreme and says that we actually throw everything in one pot and we have the competition and the Chancery cases heard in one sitting, where effectively the Tribunal, which will be a three-person Tribunal, will have to work out which matters are pure Chancery matters, which I would have to decide, and which matters are competition matters, which would be the purview of the Tribunal, and deal with the issues about duplication and delay in that way rather than a large split.

Now, I raise this positively to invite pushback, but let me make clear what I think of the point that you may raise, and feel free to do so, but you may say that this matter has already been decided by Mr Justice Roth. I am not sure that that is right, simply because this is a separate and a new case management question to be decided by the single judge that Mr Justice Roth certainly did order should deal with the cases going forward, and it seems to me that I must, now that I have the parties before me in a combined situation, where

I am wearing both hats, consider the proper management of these proceedings; not de novo, but certainly with a sense that I must ensure that the litigation is managed in the best way going forward, in the light of the very helpful submissions I have received and will continue to receive this morning.

I throw that out there, really to provoke a response as to why I shouldn't go to the other extreme, as it were, and say I will find a month, either July or June or October, slot it in there, and just do everything.

MR BATES: Yes, my Lord. Can I say as a preliminary point, before addressing that suggestion directly, that Sportradar are not suggesting that the President has necessarily fully determined everything in terms of whether there should be a stay, etc, but what is recognised in the President's judgment is that logically the competition law issues come first, and therefore they need to be addressed first, with others coming afterwards.

Of course, we agree that the key determinant of the order in which things are dealt with should be what's efficient and what serves the overriding objective. In that regard, I would make two points in relation to your Lordship's suggestion.

The first is that a difficulty with that approach is it doesn't realise any of the efficiencies that would be realised by having the two trials with a gap in between, as we propose, because it would be a very complicated trial, for one thing, because of having to delineate the different issues that were for your Lordship rather than for the panel. Also, one would have to address the issues that were for your Lordship alone, on the basis of the different scenarios, as to what might be decided in the competition law side of things, with regard to the validity of the agreement, but also the impact of that on the reliance on the attendee terms.

That's why we say it would actually be more efficient and quicker, potentially, to deal

with things in more of a sequence. It is not necessarily the case that by agreeing everything together in one trial one would necessarily get to the end more quickly, especially if -- I mean, all parties have been proceeding on the basis that we would need at least until the July to prepare for the competition law trial.

The second point I would make is about delay and how much delay would be involved. We are certainly not suggesting that there should be necessarily a long delay before we get to the High Court trial. The beauty of the proposal that we have made is that in insofar as there are further matters to be addressed by the High Court after the CAT trial, they are likely to be relatively confined. If there needs to be additional witness evidence, that can be prepared relatively quickly.

I note that Genius and FDC in their skeletons say that there are substantial overlaps between the factual matters to be addressed by witnesses in the two trials.

MR JUSTICE MARCUS SMITH: Yes, they do.

MR BATES: If that is the case, then we would suggest that the evidence that's still relevant from the first trial can be ported across to the second trial and supplemented with any additional evidence relatively quickly, and that evidence will be able to be more focused.

MR JUSTICE MARCUS SMITH: Yes. Mr Bates, that, of course, I think is the essential question, because if you have this overlap, you can either, as you say, decide it in the competition case and port it across into the later Chancery cases, or you can take it as a firm indicator that the fact that one is porting things across means that one ought to be hearing everything together, my initial proposal.

I do take your point about sequencing and viewing combinations, but actually what

you are saying there is that when the judge or the panel, or both, are writing their judgment or judgments, they need to be very careful about sequencing, and that, I think, must be right. But it seems to me that that there is unlikely to be an excessive burden on the parties, as opposed to the court, in throwing everything together.

Before I invite you to respond to that, both sides have mentioned *Agents Mutual*, which I had the privilege of presiding over and case-managing. I have to say, speaking for myself, and hindsight is very firmly in play here, I'm not sure it was a particularly helpful split to the parties, because what one had was a resolution of the competition claims with a massive gap between the competition claims and the damages claim because of the intervening Court of Appeal judgment. So it was two and a half years before one got to the damages case. I can tell you this because I was listed to hear it. The competition case played no significant role in creating an early settlement of the damages and contractual claim, because I was listed to hear it and it settled the day before it started, a five-day trial on quantum.

What one can infer from that is that neither the competition judgment nor the Court of Appeal's judgment was particularly relevant, in terms of shortening the damages claim.

I entirely agree that, had the decisions gone a different way, the issues would have been framed very differently, but they didn't, I am afraid, assist in shortening the process. I must be very careful about translating my *Agents Mutual* experience to this, because every case is different, and of course I understand that, but I am a little bit troubled by the idea of the Tribunal handing down the answer to the competition issues, which everyone agrees feed into the Chancery issues, but there then being an argument by one or

other side that the Tribunal have got it hopelessly wrong. It needs to go to the Court of Appeal, and one then has precisely the sort of gap between the Chancery case and the competition case, which leaves the parties in a state of unnecessary uncertainty.

I suppose what I am saying is, is there a real benefit in having a single, albeit hopelessly wrong judgment from one party's point of view, which is then appealed as one thing, but which shows the parties where they stand in the round, rather than a single judgment of a substantial nature with a massive gap, because let me be frank, I am taking it as a safe assumption that there will be an appeal. I mean, there may not be, but I don't think one can bet against it, which means we are looking at an *Agents Mutual* type four-year process.

MR BATES: My Lord, the key considerations, I suggest, are, first of all, the framing point, about what the impact would be on framing the issues for the second trial, but also just the practical consequences of the first trial. So those are the two main things I rely on.

In terms of the framing, in these particular proceedings, the impact of the first trial on the High Court trial would be very substantial, for the reasons I have outlined. The burden on the parties of addressing the matters in the second trial at the same time arises from the fact that they are quite different issues, albeit ones that would be framed very differently, depending on the outcome of the first trial, because they are about breach of confidence and conspiracy, etc.

So it is largely legal arguments that may not need to be addressed at all, if Sportradar are right that they would settle upon the outcome of the competition trial.

Obviously, if that happens, all of the costs of dealing with those private law matters

would be saved.

But even if that isn't the case, it would be much more expensive, in terms of the costs of the High Court issues, to be trying to prepare to deal with them on the basis of the different scenarios that might arise from the competition trial rather than knowing what that outcome would be first.

So that's really the framing point, and that's all driven by the particular circumstances of these proceedings.

In terms of the practical consequences, as I have said, Sportradar have made clear that if we don't succeed on the competition trial, we will stop sending scouts to matches anyway. So this is not a situation where there's a basis for FDC and Genius to say: "Well, we are somehow going to be suffering these scouts carrying on coming to our grounds, etc, in the meantime". That's simply not the position. Any suggestion that the scouts would somehow do this off their own back, as it were, without Sportradar sending them, in my submission, really is fanciful.

With regards to delay generally, I have noted the suggestions in FDC's and Genius' skeleton that somehow Sportradar have been seeking to delay matters. The reality is that the position is absolutely the opposite of that. The delays that have occurred so far have been due to the fact that Genius and FDC took 17 weeks to provide their Defences in the CAT claim. They took until January or February in this year to --

MR JUSTICE MARCUS SMITH: Mr Bates, can I interrupt you there? I am strongly of the view that digging through the history is unlikely to help.

MR BATES: Indeed.

MR JUSTICE MARCUS SMITH: I am afraid it seems to me that the reason we are here today is because things were taking, in my judgment, too long simply to

get to a first joint CMC, and the reason, of course, you personally are here today is because I picked a date that was extremely inconvenient to your clients, and I want to put on record how grateful I am for you stepping into the breach.

The reason I say that, though, is I don't think that I am going to place very much weight on the arguments of the parties about urgency and speed of process. The reason I am saying that is because this Tribunal and indeed the Chancery Division consider that it is pretty axiomatic to the proper delivery of justice, full stop, that we move quickly on, and the reason I am pressing you on the *Agents Mutual* history, and why it is unsatisfactory is not, in any sense, because I am thinking that Sportradar are, as hinted at by the other parties, gaming the system so as to push off an inevitable adverse judgment to the crack of doom.

The reason I am really focused on speed of delivery is because speed of delivery seems to me intrinsically to be a good thing, and that trite proposition no-one is going to disagree with.

The question is whether, in my desire for ensuring that that objective is met, I rush my fences too much and create what you say is an unmanageable or dangerously risky trial of all three actions in one go, and that's where I think I will be most assisted.

Obviously, if you are right about that, and it is a process that just can't work or that is an undesirable process, because it will produce unnecessary difficulties for the court and unnecessary costs difficulties for the parties, that's something I have to take into account and consider a splitting of the sort you suggest.

That's a rather long indication that you don't need to assist me as about who is at fault as to why things have gone on for so long, because I don't think it is

going to make any difference to what I determine.

MR BATES: Of course, my Lord. The point I was making about it was not to criticise the other parties, but simply that Sportradar want to get to a practical answer as soon as possible. So our proposal is directed at doing that, because the competition law trial will provide a practical answer.

Now, obviously, that will leave some issues over, particularly in relation to the damages claims by FDC and Genius in the High Court, based on the breach of confidence and conspiracy. But those matters largely turn on matters of law, some of which are matters that are largely determined anyway by the Court of Appeal in the *TRP* case, which is itself potentially going to the Supreme Court.

We say, in that context, also it makes sense to deal with the competition issues first, which is the vast bulk of things. Once we get to the end of that, we can then see whether or not the private law issues have to be determined. We can also see what has happened with the Supreme Court in the *TRP* case, and if it's necessary to try those private law issues, that can be done relatively quickly, and based on limited additional evidence, which can be prepared quickly.

Now, if your Lordship is right that there are appeals in relation to the outcome of the CAT trial, it will, of course, then be a question for the court whether the outcome of those appeals should be awaited rather than proceeding with trial of the essentially legal issues in the private law claim. That will be a decision that will be open to be taken by the court at that point.

MR JUSTICE MARCUS SMITH: Thank you. Just remind me. The *TRP* case, the unsuccessful party is seeking permission from the Supreme Court.

MR MILL: Can I assist, my Lord, because I am acting in that case.

MR JUSTICE MARCUS SMITH: Please do.

MR MILL: SIS, who were the defendants in that case, have sought permission in relation to that aspect on which they lost in the Court of Appeal, which was the liability for conspiracy, and the issue on which they have sought to go to the Supreme Court is whether or not the Court of Appeal was right to say that knowledge of the unlawfulness was not required.

We are awaiting a decision of the Supreme Court on that. At the moment there is no cross-application by my clients in relation to the obligation of confidence, which we lost on the basis that the circumstances were not such as to impose an obligation of confidence on SIS.

If, on the other hand, it were to be the case, which it may not be, that the Supreme Court grant permission, then the position may be, and I can't say one way or the other, that we will seek to cross-appeal on that basis.

MR JUSTICE MARCUS SMITH: Yes, I see.

MR MILL: I should tell you that we will anticipate knowing the answer to at least the first of those points very soon, because the papers were lodged some time ago now.

MR JUSTICE MARCUS SMITH: That also is helpful. Mr Bates, before you resume -- thank you, Mr Mill. I am much obliged to you. Again, just by way of assistance to the parties as to how my mind is thinking, delaying or factoring in potential appeals on other matters is something which, of course, this Tribunal does quite regularly. It is something, though, which I only would want to do if it is quite clear that the decision of the Supreme Court is something that is so on point that it would be positively imprudent not to ensure that the decision had been handed down.

The reason I say that is because in the various collective action cases which are

before the Tribunal at the moment, a number of them were stayed because of the appeal of *Merricks* to the Supreme Court. To be clear, it seemed to me, as the judge who stayed one of the rather significant matters presently before the Tribunal, that was the right decision, because the test of what one needs to find for certification was fair and square exactly the same issue as was before the Tribunal in all these other cases, but the price of delay in terms of procedural inconvenience was, particularly in the action I am thinking of, enormous. It is for that reason that I say that I would be minded to attach quite little weight to an appeal, no doubt very important to the parties to that appeal, which was on a peripheral rather than the central issue that is coming up.

So *TRP* will be a factor, but I am bound to say I think it is a factor that is of lesser weight than some of the other questions, including speed of progress.

MR BATES: Yes, my Lord, that's understood, and, of course, if by the time the CAT judgment has come out it is apparent what the outcome of the Supreme Court proceedings will be, at least in terms of whether permission has been granted etc, that will be something that can be taken into account. I don't put it any higher than that.

A further factor --

MR JUSTICE MARCUS SMITH: I am so sorry to interrupt. I just wanted to make one further point that is related to the point you are very helpfully advocating on, which is: were I to order a single rolled-up hearing, that would be something that would be susceptible to adjustment by way of disaggregating at a later date for very good reason. There would have to be a very good reason to do it. But it is easier, as it were, to disaggregate for good reason than to aggregate for good reason if one has ordered a split trial.

It seems to me that there is an asymmetry here, in that if I go for your proposal of a competition hearing, followed by the Chancery hearings, where there is a judgment intervening, I couldn't possibly revisit that at a later date. Whereas, if I were to go for a single rolled-up hearing, it would be possible -- it would be highly undesirable -- but it would be doable to disaggregate, if of course there was a material change of circumstance which rendered that desirable.

So that's a factor. I don't put very much weight on that, because it seems to me we need to get this right today. But that is something which struck me.

The reason I say this, because I just want to nail another uncertainty which has been mentioned I think by Ms Smith's clients -- maybe Mr Mill's -- but the SCM proceedings under case number IL-2020-000040 are matters which have been mentioned as being a potentially relevant set of proceedings, at least on disclosure.

I am not going to invite any submissions on that, because the parties in that case are not before me today, but I think the parties should know that I took onboard what was said in the written submissions about the SCM proceedings, at least to this extent, in that I have ensured that those proceedings are docketed to me in any event.

Now, that does not mean I am going to throw them all into one melting pot, but it does mean I am in a position to factor in any commonalities on disclosure in the future. It seems to me that, without in any way pre-judging with these proceedings interrelate at all, the fact that they had been adverted to meant it sensible that I ask the Chancellor to docket this to me, just so that if there are commonalities that require a single brain to look at both sides of the equation, that is in place. It may not matter, but it seemed to me the parties ought to

know that.

MR BATES: I am very grateful for that, my Lord. That sounds extremely sensible, if I may say so.

I suggest that as between the proposal that your Lordship is putting to me, in terms of having the combined trial and what Sportradar are proposing, there is actually less difference than may first appear because, as I have already said, we are not suggesting there should necessarily be a long gap between the two trials.

The point is simply that before we resume simply with your Lordship, and the other members disappeared, that there has been a judgment on the CAT proceedings, a short time for any supplementary evidence that's needed, etc, before we then resume. So it doesn't need to be a long gap, but there are some things that would need to be done in that gap.

Just to illustrate that point, as we pointed out at paragraph 20A of our skeleton, if Sportradar succeeds on the competition law issues, then that will dispose of the High Court claims at least as those claims are presently pleaded, because, of course, those High Court claims are brought essentially knowing about but without regard to the competition law matters that we have then pleaded as a defence.

In my submission, if Sportradar succeeded at the CAT trial, then it would be appropriate for Genius and FDC to have an opportunity to consider amending their pleadings, if they wished to nevertheless go forward with any aspects of their High Court claims.

MR JUSTICE MARCUS SMITH: I see. Mr Bates, one other question. You very helpfully indicated that obviously only if they go one way, but if the competition case goes against your clients, there will be no question of the agents

continuing to encroach upon the other parties' rights.

I just want to be absolutely clear what you are saying. Let's assume the competition issues do go the wrong way, so far as Sportradar are concerned, but that Sportradar take the view that the Tribunal has got it so hopelessly wrong that an appeal is both well advised and very likely to succeed. Is your position that even in those circumstances there would be no encroachment pending the appeal on the rights of the other parties?

MR BATES: My Lord, I think that's right. I will take instructions from my clients, who will e-mail me if I am saying something wrong. Looking at what Ms Kreisberger has said at the transfer hearing, I think that is indeed our position.

MR JUSTICE MARCUS SMITH: I will take that as being your position, but if your solicitors e-mail saying "Hold on. He's gone too far", then do let me know.

MR BATES: Of course, my Lord, yes.

My Lord, unless I can assist any further on this matter, I think I have said what I can usefully say.

MR JUSTICE MARCUS SMITH: No. That's very helpful, Mr Bates. Let me just make one point clear for your benefit and I think for the benefit of other counsel. Whatever, as it were, configuration of trial I'm going for, my strong sense is that I ought to fix without reference to counsel convenience.

The reason I say that now is because, having had to work quite hard to get this one-day hearing in the diary, if we go down the route of juggling diaries of very busy practitioners for a trial next year, we are going to be throwing some very difficult diary questions into the mix in circumstances where, although I am absolutely sure the solicitors in the case have given hard thought to who they want to act as their advocate, given that we are at least a year away from

trial -- it may be much more -- it's going to be easily possible to change counsel. It is one of the great strengths of the bar that that is possible, and it seems to me that I should proceed on the basis that I am just not going to look at the diaries of the various counsel involved, but I raise that now to let you push back. In a sense, you will be rather hard pressed to push back, because, of course, you are the victim of the policy that I applied in this case, but I should hear you on that as well before I hear from the other two parties.

MR BATES: Yes, my Lord. We would accept that counsel availability is not an overriding factor, but where it can be accommodated we say it should be. When I say it can be accommodated, that's also for the Tribunal's convenience as well. Looking at what the parties propose in terms of their dates, I understand that Genius have some difficulties with November and December for their counsel, though I am not sure precisely when in November that difficulty kicks in.

We have difficulties certainly for early October, but that does leave a window in late October, possibly early November, which appears on my looking at the dates to work for everybody. If that would also work for the Tribunal, then it may be, in fact, matters can be accommodated in a way that works for everybody's diaries.

MR JUSTICE MARCUS SMITH: That's helpful, Mr Bates. Let me say this. I am certainly not going to go out of my way to pick a date that's positively inconvenient for counsel. That would be entirely wrong and not a serious suggestion, of course. What it seems to me I am going to do is I am going to reach a view about dates independent of counsel's convenience, but in a broad brush way. I am not going to define precise start dates. If, having reached a view as to roughly when I think the action or actions should take

place, there is a means of adjusting it by a week or so either which way, maybe more, then I will, of course, be open to dealing with that in a sensible way, but I think that's the way I will approach it. I will take a broad brush view about when these things should be booked, and then we can get into the details but without an argument that my broad brush indication of booking should be revisited, just so you are all clear about how I intend to see things. Mr Bates, thank you very much. I have no further points for you but I am much obliged for your submissions.

I see Ms Smith's finger is on the button. Are you going next, Ms Smith?

MS SMITH: It hasn't been discussed between Mr Mill and me but I am happy to go next, though I will rather selfishly leave any detailed submissions that need to be made on the *TRP* to Mr Mill who has a much better knowledge of the case, being involved in it himself, than I do, but it would I hope be helpful if I make first FDC's submission on the proposals before the court.

We have proposed, as you know, Sir, the sequential hearings of the CAT action and Chancery action, but we would also support your proposal for a single rolled-up hearing, and see great sense in taking that approach. Even if the CAT issues are not heard first, as a matter of timing, as you have indicated, my Lord, they can be heard first as a matter of logic, and that could work very well in a single rolled-up hearing. We don't think that that will, contrary to what Mr Bates says, overly complicate the trial. The court is quite able to deal with issues that are logically prior to each other in the right order for the reasoning of their ultimate judgment, and were this case to be heard in front of the High Court -- had this case been heard in front of the High Court that has jurisdiction to hear competition law claims, they would have heard the claims and counterclaims together, and have dealt with them in their judgment in the

order that they need to be dealt with. So we do see the sense in a single, rolled-up hearing.

By contrast, Sportradar's proposal, and they don't appear to have formally withdrawn that proposal, is that the Chancery action should be stayed, save for disclosure, until after judgment in the CAT action, which they propose should be heard in October 2022, and only then, once that CAT action has been determined and judgment has been given should a timetable to trial be set.

MR JUSTICE MARCUS SMITH: Yes. I think I had better shoot that hare or try to shoot that hare before we go any further.

Mr Bates, I don't think it is a necessary part of your submission that there be a stay until the conclusion of the CAT competition hearing. I can see that that would be one way of doing it. I probably should have raised it with you in your submissions. For my part, I would be inclined to try and lock in the hearings, if there is to be split hearings, at an early stage so as to minimise the delay, and actually put the Tribunal under a degree of pressure to produce a judgment very quickly.

Now, of course, it may be that the second date is lost because of an appeal, and it makes no sense to appeal when there's a trial of the Chancery matters coming along. But I didn't take it as a necessary part of your submission. It was more a detail, that there would be a stay of the Chancery actions now until the end of the trial.

It would be helpful to have your answer to that, because I think it will probably affect the way Ms Smith makes her submissions.

MR BATES: Yes, my Lord. Our proposal for a stay was in order to avoid the costs of preparing witness evidence that may not be needed specifically for the High Court trial. We don't have any objection to identifying and pencilling dates, if

that's helpful, for the second trial.

MR JUSTICE MARCUS SMITH: Yes. The way we could work it, it would be quite complicated, but one could have a sufficient gap between the competition case and the Chancery cases, both to ensure the rendering of a judgment and the preparation of whatever supplementary witness evidence was necessary. But one could put windows in for both trials on that basis and therefore avoid the extremely long consequences that both Ms Smith and Mr Mill refer to. One still has a delay, but it would be less. That from your point of view is a workable approach?

MR BATES: Absolutely. The suggestions in their skeleton we would be looking at 2024, that does not seem to me to be right at all. One could certainly pencil in dates in 2023.

MR JUSTICE MARCUS SMITH: Okay. Well, thank you, Mr Bates. I do apologise, Ms Smith. Let me be clear. It seems to me that I am certainly not regarding a stay as a necessary requirement of Mr Bates' proposal. I can see that it makes things easier in terms of booking now, but, against that, it does push things back, because you would be dependent upon the diaries as they exist at the end of the competition case. Speaking by way of an indication, I would be more inclined, if I am going down Mr Bates' route, to get you windows for both, even if the second window needs to be rearranged because of future events.

MS SMITH: Sir, that's an extremely helpful clarification from your Lordship and Sportradar. However, as you have already indicated, my Lord, even if a date is pencilled in for the Chancery action, there is still a risk of delay due to an appeal of the CAT action, if the CAT action is held separately and before the Chancery action. There could be several more years of delay, and you

have already referred to the *Agents Mutual* case, which took nearly three years.

Now, such extensive delay may be beneficial to Sportradar, who have indicated they will continue to send scouts to matches to collect data, in breach of ground regulations, in breach of ticketing conditions, without paying for that data. But it is of considerable prejudice to my clients, whose rights in the betting data are being devalued and whose right to licensing revenue is being deprived.

Mr Bates made some submissions about what Sportradar may or may not do, pending determination of the High Court action, but I think it is important, and if I may, my Lord, to take you to what their pleaded position actually is in that regard in the High Court action.

If I can take you to their Defence -- this is their Defence in the FDC claim. It is in bundle 2D.

MR JUSTICE MARCUS SMITH: Yes. Is it the Defence I need to look at?

MS SMITH: Tab 14 is their Defence.

MR JUSTICE MARCUS SMITH: I have that. Thank you.

MS SMITH: Page 38. I am working from the hard copy bundle. Internal page 10 of the Defence.

MR JUSTICE MARCUS SMITH: Yes, I have that. Thank you.

MS SMITH: It is paragraph 36.

MR JUSTICE MARCUS SMITH: Yes.

MS SMITH: This is what their pleaded position is:

"Sportradar has made clear and hereby repeats that if the Competition Appeal Tribunal determines all", and I underline "all", "elements of the CAT's proceedings against it, it will stop sending scouts to matches to collect LLMD in relation to ..."

MR JUSTICE MARCUS SMITH: I am sorry, Ms Smith. Which paragraph are you reading from?

MS SMITH: Paragraph 36 of FDC's Defence.

MR JUSTICE MARCUS SMITH: Page 38 of the bundle, page 10 of the Defence.

MS SMITH: Paragraph 36.

MR JUSTICE MARCUS SMITH: Right. It doesn't seem to match with what you are reading. Oh, yes, I have it. Thank you very much.

MS SMITH: "As to paragraph 61 of the POC, Sportradar has made clear and hereby repeats that if the Competition Appeal Tribunal determines all elements of the CAT proceedings against it, it will stop sending scouts to matches to collect LLMD in relation to the three leagues."

Then underline the following:

"Subject to any appeal."

So that suggests to me that they will continue to do this, subject to appeal:

"But otherwise", and this is important, "Sportradar intends to continue to engage scouts to attend matches to collect LLMD and to use such LLMD in the manner which FDC complains of."

So that is what their position is. So they make it clear that pending determination of the CAT proceedings and any subsequent appeal, they will continue to send in their scouts. They will continue to sell the confidential data that they have collected, due to those unlawful activities, and they will continue to cause ongoing substantial prejudice to FDC. So we are, in those circumstances, extremely loath to delay proceedings any further than is absolutely necessary.

My Lord, the idea that Mr Bates argued that the CAT proceedings may be wholly determinative, or at least there may be a settlement of the High Court proceedings after the CAT proceedings is over-optimistic. It is not realistic.

I would like to look at the situation that would happen if Sportradar lose in the CAT proceedings or even if they win in the CAT proceedings.

Dealing with the first, if Sportradar lose in the CAT proceedings and they fail to establish that the FDC/Genius exclusive agreement breaches competition law, and is thus unlawful, then there would obviously still need to be a High Court trial.

Mr Bates says that Sportradar would settle, but we really can't rely on that. There are still outstanding issues. Even given the indication in Sportradar's pleading, scouts will stop being sent to matches only if all elements of the CAT proceedings are determined against them.

Now, even if Sportradar lose, there will still be outstanding issues that need a High Court hearing. We say it is highly likely that a High Court trial will still be required. This is because Sportradar has raised various defences to our claim against them in the High Court that extend beyond and are quite independent of their reliance on the competition law issues.

For example, they have argued that the FDC data doesn't have a requisite level of confidentiality. That's paragraph 25 (b) and (c) of their Defence. They have also argued that Sportradar did not have the requisite level of intention to harm Genius by their actions, but rather they acted to protect their commercial interests. That's paragraph 35 (c).

So these are issues that they will rely on, on their pleaded case, even if they lose on the competition law issues. So even if they lose on the competition law issues, there will still be outstanding defences that Sportradar are running to the High Court claims that will need to be determined in the High Court claims.

MR JUSTICE MARCUS SMITH: Ms Smith, just to interrupt you there, obviously the

legal issues of the Chancery and the competition cases are extremely different, but it seems to me that what you are saying is that there is a sort of foundation of similarity that means that viewing the totality of the evidence in both actions would positively be beneficial in deciding the admittedly discrete competition and Chancery issues in one go. I mean, obviously there will be a question of order and things like that, but I think what you are saying is that there isn't a kind of sequential view of the litigation here, as one has in hiving off damages or preliminary issue. There is no particular harm in doing it all in one go.

MS SMITH: Yes, that is right My Lord. My points are, first, there is an overlap on the legal issues that would make it much more efficient for these issues to be heard either very close together, as we have submitted, or together, as your Lordship proposed. There is a real intermeshing of the competition law issues and the High Court issues, but also, from a procedural point of view, we say there are real efficiencies to be gained by hearing the CAT action and Chancery action back-to-back or together, as proposed by your Lordship.

These are as follows. First, Sportradar have already accepted that there should be coordination of the disclosure exercises across both sets of proceedings, and they explicitly accepted that there would be real efficiencies arising from that. I don't need to take you to their letter, but they say: "Yes, the coordination of the disclosure exercise…" -- and this is Sheridans' letter of 28th April 2011 -- "…is likely to be proportionate and cost effective. There is likely to be considerable overlap between the categories of documents, and the vast majority of issues relating to the CAT case, and the additional burden imposed by combining the exercise is therefore likely to be minimal."

So they have already accepted that the substantial work to be done as regards

disclosure should be done in a coordinated way. We say that substantial efficiencies would also arise from the coordination of the witness evidence. We say that for the following reasons. There is only one category we have identified of factual issues in the Chancery action that we don't think is common to the competition action. That is explained in Ms Hoy's third witness statement. I can take you to it but I can just summarise what she says.

MR JUSTICE MARCUS SMITH: If you could summarise it, that would be very helpful.

MS SMITH: It is paragraph 15 of her witness evidence. The issue, and this we have identified having gone through the process, at least on our side, of putting together a draft disclosure review document and identified the issues in the cases.

The only issue that we say is not common to both is the issue of the scouts and Sportradar's knowledge and intention for the purpose of the private law causes of action. But we say that the same witnesses who are going to give evidence on Sportradar's scout activities in the competition proceedings, in the CAT proceedings, are likely also to be the principal witnesses on the issues of knowledge and intention. Sportradar accept that in paragraph 30 (b) of their skeleton for today's hearing.

MR JUSTICE MARCUS SMITH: Yes.

MS SMITH: They don't say the scouts are not going to have to give any evidence in the competition hearing. They say that they are likely not to have to give substantial evidence in the CAT claim, but they accept that they are likely to have to give evidence in the CAT claim as well as give evidence in the High Court proceedings. I quote from Sportradar's skeleton:

"... for example on their level of knowledge at the relevant times."

So these individuals are likely to have to give witness evidence in both sets of proceedings, and if they are giving evidence in the CAT proceedings, then we say it is obviously efficient that they give their evidence on the High Court issues, on the private law issues, at the same time.

So we say that when one looks at the resource intensive, cost intensive process that has to be gone through for each of the sets of proceedings or each of the sets of issues, there are real efficiencies in doing those together, both the disclosure exercises and the witness evidence together.

Then, as I have already said, we do not consider that hearing both the private law issues and the competition law issues in one hearing would make that hearing over-complicated. You have heard what I say on that.

MR JUSTICE MARCUS SMITH: Yes.

MS SMITH: I had other points to make. I am not sure whether in light of the focus that you have given these submissions, my Lord, by your indication I need to make them. I think the main point -- perhaps just one final point. I have dealt with the position if Sportradar lose on the competition law issues. We say that even if they win on establishing that the exclusive agreement, the agreement between FDC and Genius, is in breach of competition law, it doesn't necessarily dispose of the issues. This just shows again how the issues are very closely meshed.

There are two points in that regard.

First, Sportradar's case is that even if they say there should not have been an exclusive licence, the licensing process in this case, which would have been competitive, would have been to license the data on a non-exclusive basis. They give the example of there being one official provider and three accredited providers.

We say that even if FDC had licensed the data on this non-exclusive basis, then Sportradar would not have been appointed as one of those licensed providers. In that case they would still be breaching our private law rights if they came and sent their scouts into the stadia.

The second and related point is that our claim in the Chancery action does not depend on the validity of the exclusive agreement. It relies on the restrictions contained in the ground regulations and the ticketing conditions. We argue that those restrictions, because they pursue a separate purpose to the agreement with Genius, there is no nexus between those restrictions contained in the ground regulations and the ticketing conditions, and Sportradar's allegations that the exclusive agreement violates competition law.

So we will argue that even if Sportradar manage to establish that the FDC/Genius agreement breaches competition law, and is therefore unlawful, it doesn't mean the ground regulations and the ticketing conditions are unlawful, because there is no nexus between them that makes them unlawful and unenforceable. They pursue a separate purpose.

This just shows how very closely interlinked and intermeshed the legal issues are in the competition claim and the High Court claim. In my submission, as well as the procedural efficiencies that would arise from hearing the two claims together, there will be real problems in carefully disentangling the legal issues to hear them separately.

So, my Lord, those I think are my submissions on why we say the CAT action and Chancery action should either be heard back-to-back or together, as proposed by your Lordship.

MR JUSTICE MARCUS SMITH: I am grateful, Ms Smith. One question. I raise it

more to prompt Mr Bates' reply, because I think I know what your answer is. Assuming, as it were, the worst case scenario, that is to say the biggest lump of litigation, whether it be back-to-back or all in together -- those are the options that require most work -- you say in your submissions that the CAT action can be done early June/late July, so that two-month slot. Assuming everything in together, do you say that if I were to say we are going to hear everything in some form or other on 1st June, that that is doable? So we are talking effectively 11 months from not a standing start but pretty close to a standing start? Now, I think you say that is doable, but I raise it now to get that answer on the record and also to give Mr Bates a bit of grist to his mill, if he wants to say it, that it is another reason either not to go for what you are proposing and what I have suggested or to push it on the other side of the summer.

MS SMITH: My Lord, in light of your indication at the beginning of Mr Bates' submissions, I did explicitly take instructions on my phone from my team as to whether we could do a combined hearing we thought in June/July of next year. My instructions are that yes, we can and we could. We were proposing a hearing for the CAT issues, a 15-day hearing in June/July. We were proposing a five-day hearing for the High Court issues. We do believe that we can prepare for what would end up being about a 20-day hearing, on our estimate, in the end of June/July. So I specifically took instructions on that. From the point of view of counsel's availability, I believe that's more convenient for our team than pushing it off into the autumn, but I think we could also do it in the autumn.

MR JUSTICE MARCUS SMITH: Ms Smith, thank you very much. I have raised the points that I have. I have nothing more to ask you at this stage.

Mr Mill?

MR MILL: Just picking up on that last point first, if I may, our position in fact, I think contrary to what your Lordship may have said at the outset, is that we envisage as realistic a trial commencing at the beginning of the autumn term, not in the summer. That is largely because of concerns over expert evidence. What I would invite your Lordship to do is not make any decision on the timing of the trial until you have heard arguments on our early disclosure application and with it the submissions of my learned friend Mr de la Mare on the question of expert evidence.

I am sure your Lordship is alive to the need to do that, but all I need to say at the moment, is that we would have concerns on the position of FDC on when the trial can realistically commence.

MR JUSTICE MARCUS SMITH: That's helpful. What I am going to do, I am obviously going to rule on trial format. I am going to give a provisional indication as to when that should take place but you are absolutely right, the devil informs the detail.

What I am going to do is give the parties something concrete to think about and, indeed, me something concrete to think about, in terms of the workability of the process up to whatever date I say, but it seems to me that it would be positively helpful if I were conclusively to decide the question of trial format and to provide a provisional indication as to when, whatever format I determine, when that should take place, but explicitly subject to exactly the sort of points of practical importance that drive when a trial can fairly take place, because, of course, I raised this with Ms Smith for exactly that reason. It does seem to me that there is a very real question which side of the summer the first tranche, whatever that is, whether it is the whole tranche or

whether it's a part, takes place. I think I would be forgetting my time at the bar if I were to say that a 1st June date was anything other than extremely challenging and a 1st July date less challenging, but nevertheless still pretty challenging. I don't think I need say more than that. I say that just to indicate that I have well in mind the sort of practical points that we will need to thrash out after I have decided the big picture point of format.

MR MILL: Yes. Thank you, my Lord. As I have said, that will be Mr de la Mare. He is, as it were, the competition expert in our team and I absolutely defer to him on such matters, but not on anything else.

My Lord, can I then very briefly, because I am very sensitive to the fact that I am a bit of a tail-end Charlie on this, and your Lordship has obviously formed certain views and he is not going to be helped by me rabbiting on at length and repeating points previously made.

Can I focus on this point, which I think may not have had sufficient attention from either Mr Bates or even Ms Smith. What is it that Sportradar say is the inefficiency of the course that your Lordship is proposing or, indeed, anything that avoids a stay of proceedings? It really amounts simply to the witness evidence. As Ms Smith quite rightly said, as it were, they have sold the pass on disclosure.

There is no question of expert evidence in the High Court proceedings, as distinct from the CAT. So we are talking about witness evidence of fact. As Ms Smith has quite rightly observed, the high probability is that the identity of the witnesses, certainly so far as everyone other than the scouts are concerned, is likely to be predominantly the same.

The evidence that will be needed for the evidence of fact to Sportradar witnesses for the CAT case, irrespective of when you deal with the Chancery claims, will

cover the vast gamut of factual issues in this action.

Ms Smith helpfully referred to Ms Hoy's witness statement as to what discrete issues of facts there are. We had a go by reference to the issues in our skeleton argument. Your Lordship may remember reading that at paragraph 23.4.

What we have done is we have put together a draft list of issues. Of the 22 issues that we identify, only four were ones that we considered to be particular to the High Court proceedings, and the issues of fact within those are very discrete and partial, in my respectful submission.

Ms Hoy has effectively picked up most of those in the passage to which my learned friend referred you. The only one which perhaps is not referred to by her is our issue 10:

"To what extent and by what means did Sportradar collect LLMD?"

I think, with respect to my own skeleton, it is doing myself a disservice, because actually that is largely material for the CAT case anyway, and to the extent that it is not, it is hardly likely to be contentious.

What I was going to propose, had the need arose, but I don't believe it does, in the light of your Lordship's observations, was insofar as there were discrete witness statements for the High Court trial, they should only address those issues of fact which are discrete to the High Court proceedings.

Viewed in that light, there is no inefficiency at all, because, as my learned friend has indicated, counterclaims are likely to happen in any event. I join with her healthy cynicism and indeed your Lordship's potentially healthy cynicism about the prospects of settlement. I am relatively aloof to these proceedings, in the sense that I have had less day-to-day involvement with them than other people -- obviously not Mr Bates -- but others who are listening to these proceedings and indeed Mr de la Mare and Ms Smith, but my observation

would be these are people operating in the same battleground, who have a healthy disregard for one another, and the prospect of having settlement is not one which fills me with enormous enthusiasm or optimism.

So I think your Lordship is right to assume that the probabilities for settlement are not that great.

Also, as Ms Smith has indicated, there will be no circumstance in which High Court proceedings will not be necessary in the absence of a settlement. We have, as your Lordship will have seen, acknowledged that we ourselves would not have a claim, were we to lose the competition claim, because, of course, we wouldn't be able to show we had suffered any loss, because our rights derive wholly from the exclusive licence which the Tribunal putatively has found to be unlawful. But, as Ms Smith has helpfully explained, that's not the case for FDC. They will have a claim, come what may.

I am afraid I take the view that the defence to that claim put up by Sportradar, in the event that they lose the competition claim, is simply one which is going to fail, manifestly.

Even if they win that, they still have the real difficulty, which I don't think Ms Smith adverted to, which is the problem that is created for them over severance. That's a matter that's pleaded in both our replies, in our paragraph 9 of the Reply -- I will not take your Lordship to it unless you find it helpful -- and paragraphs 9 to 11 in the FDC Reply. But unless they can get over the problem of severance, they are by no means home, in any event, on the applicability of the attendee terms.

So that's what I wanted to say on that. I would just make one further observation and then invite your Lordship to invite me to deal with anything else that he would find helpful.

We have heard about the so-called assurances from Mr Bates, on behalf of his clients, in relation to the activities, and Ms Smith has wisely taken you to the pleadings to see what actually the position of Sportradar is. What she has not drawn to your attention, although I think her written submission do, and ours do, is the fact that we have sought undertakings on countless occasions, on our case, back to October last year to address this issue, pending the outcome of the Chancery action, and they have been refused. Even today, Mr Bates has not offered any undertaking on behalf of his client. He simply relies upon assurances given in court. That is, in my respectful submission, telling.

My Lord, unless I can help you further, I thought those were perhaps additional points worth making.

MR JUSTICE MARCUS SMITH: No, I am very grateful to you, Mr Mill. I don't have any further points. I have raised them in the course of argument. Thank you very much.

MR MILL: Thank you, my Lord.

MR JUSTICE MARCUS SMITH: Mr Bates, your reply.

MR BATES: Thank you, my Lord. May I deal, first of all, with the nexus point? Ms Smith suggested that if Sportradar win, that doesn't necessarily dispose of the issues. To be clear, we say if we win the CAT claim, that will be a full and complete defence to the High Court claims. Whether that's right or not is a matter to be at least very largely determined in the CAT proceedings, given that, as I have said, an issue in the CAT proceedings is whether or not the admission terms can be relied on against us, in circumstances where the FDC/Genius agreement is unlawful, and those admission terms are being relied on in support of giving effect to that agreement.

So that will be part of the issues in the competition trial, which is another reason why we need to know the answer to that question first. Indeed, it is that point that Mr Justice Roth focused on when explaining why the competition issues had to be decided first.

The suggestion from Ms Smith that that's not the case is really built on a hypothetical of what would happen if FDC decided to grant non-exclusive licences, because then the admission terms would be enforceable. That may be right, but that's simply not the situation at the moment. If they want to put in place non-exclusive licensing arrangements, and then enforce the admission terms against us, which would then be enforceable terms, in that there be no competition defence against them, then, of course, they can do that, but that's not going to be the factual position as at the time when judgment is given on the CAT trial, and it would no doubt take them time to modify the arrangements accordingly. So that's on the nexus.

With regard to the assurance that Sportradar has given and what's meant by paragraph 36 of Sportradar's Defence to FDC's claim, I have to say, with respect to Ms Smith, I don't read paragraph 36, the words in brackets "(subject to any appeal)" in the way that she does. What's being said there is that Sportradar will stop sending scouts to matches if the CAT determines all elements of the CAT claim against it, but, of course, that doesn't mean indefinitely, because it is subject to any appeal, because if we won the appeal, then of course that would cease to be our position. It is not saying that we would carry on sending out scouts to matches if we appealed, and that's not our position.

Now, of course, in the High Court claims we have resisted FDC's and Genius' damages claims by contesting their private law rights to claim damages from

us, and that's the breach of confidence point, etc. But that doesn't show that we will send scouts when we say that we wouldn't, simply because we wouldn't have to pay damages on the specific bases on which they have claimed those damages from us.

For all of those reasons, we say the fears that Ms Smith expresses are really not well founded, in terms of the impacts on her client.

Finally, with regard to the question of whether there would be the same witnesses in the two different trials, your Lordship knows I am coming to this case new, but it is not apparent to me why there would need to be evidence from the scouts for the competition trial. But even if there were some issue that I am not aware of, where evidence would be required from the scouts, it would be of narrow compass.

In any event, the fact that two trials have some of the same witnesses does not necessarily make it efficient for all of the witness evidence from those people to be produced at the same time, when some of that evidence will be dealing with different issues that may not need to be addressed at all, whether because the evidence becomes irrelevant, due to the way that the CAT trial falls, in terms of its conclusions, or because, as we say, there is likely to be a settlement.

Now, of course, if any party thinks that at the same time as meeting with particular witnesses it would find it convenient to take proofs from those witnesses that go wider than dealing with the issues in the CAT trial, then they are free to do that. But in my submission that doesn't justify requiring the parties to prepare evidence for the High Court trial, which may not be needed and which will be an added workstream and actually cause diversion and additional work, rather than focusing on ensuring that we can get the bulk of the dispute between the

parties, what's really practically at issue between them, sorted out in Michaelmas 2022, and have a high level of confidence of being able to do that.

So those are my reply submissions, my Lord.

MR JUSTICE MARCUS SMITH: Thank you very much, Mr Bates. I am much obliged to you.

RULING

MR JUSTICE MARCUS SMITH: I have before me three actions: first, an action in the Competition Appeal Tribunal, under case number 1342/5/7/20, and, secondly, two actions in the Chancery Division, the first under action number IL-2021-000002, and the second under action number IL-2021-000003. I shall refer to the first of those three cases as "the competition case" and the second two, collectively, as the High Court cases. There is no need to differentiate between the High Court cases, and I do not do so.

The parties are variously claimants or defendants to two but not three, not in all cases three, of the actions that I have identified, and I don't need to specify their precise position in each of the cases. They are, respectively, and in no particular order, Sportradar, represented by Mr Bates, as the lead counsel for Sportradar, Betgenius Limited, represented for this part of the proceedings by Mr Ian Mill, Queen's Counsel, and Football DataCo Limited, represented by Ms Kassie Smith, Queen's Counsel, as the lead advocate for DataCo.

There are a number of issues at this joint case management conference which I must determine, and I am determining in this ruling the broad issue of trial configuration. I do so, I should say, working in a joint role as both the Chairman in the competition case and the docketed High Court Judge in the High Court cases.

I should also say, not that it matters very much for this present ruling, but it should be on the record that I am also the docketed judge in other proceedings under case number IL-2020-000040. These may or may not be related to the three cases that I have described, and I am certainly not saying anything about the conduct of those proceedings today, but it is important to note that the parties have mentioned these proceedings as being a background factor, potentially relevant, and therefore it seems to me important that I have the capacity to bear in mind those proceedings as well, although, as I say, the existence of those proceedings and my being the docketed judge in relation to those forms no part of the reasoning of this ruling.

As I indicated, this ruling deals with the configuration of the various hearings or hearing that may be needed to determine the three matters. It is unnecessary for me to go into the detail of the pleadings to identify the issues. It is sufficient to say that the competition case deals with the potential invalidity of various contractual provisions in agreements between the parties under Articles 101 or 102 of the TFEU, or the UK equivalents, the Chapter 1 and Chapter 2 prohibitions.

The High Court matters deal with related -- I park the question of how related -- questions regarding breach of confidence and breach of intellectual property rights arising out of the agreements between the parties. I will have to return to the question of the linkage between these two sets of proceedings and I will do so in due course.

First, however, it is necessary to articulate the differing proposals that are made as to how the three cases can be resolved. Those three options I am going to call the “back-to-back” option, the “all in one” or “all together” option and the “split” option.

Let me begin with the last. The split option, which is advocated by Mr Bates on behalf of Sportradar, is that the competition case should be heard first and that the High Court actions should be heard thereafter. There is articulation in Sportradar's written submissions that the High Court cases should be stayed pending the outcome of the competition case. I take that simply as a helpful shorthand on the part of Sportradar on how I should view the actions, because it was no part of Mr Bates' argument that a stay was necessary. What he was advocating for in his split proposal was that there be a sufficient gap between the competition case and High Court cases to enable a judgment in the competition case to be rendered so as to inform the work that needed to be done in relation to the High Court cases.

Mr Bates' position was that the decision or the outcome in the competition case would significantly inform, narrow and quite possibly wholly resolve the issues arising in the High Court cases, and that is something that I will be coming back to again, but that was the substance of his submission, as to why it was helpful and useful to split the competition case from the High Court cases and to hear it first.

I then move to the two other options, which were essentially advocated by the two other parties. It seems to me that there is actually no real difference between the two options. The back-to-back option is simply to hear the competition case first and the High Court action second, without any intervening gap to enable the judgment in the competition matters to be rendered.

It seems to me that if one were mapping the intellectual processes of the judge or judges determining everything in the round, it would undoubtedly be right that that judge or judges would proceed to determine the competition questions first, and the other questions, the intellectual property questions, if I may call

them that, second. That seems to me to be, as a matter of logical process, entirely right. But it does not, as it seems to me, indicate that there needs to be a back-to-back trial with one set of issues hermetically sealed in sequence from the other. It may be that that's a good way of organising the trial. It may not be. It seems to me there is, therefore, relatively little difference between the third option and the second option, the third option being to hear everything in one lump.

The fact is that the third option, hearing it all in one lump, will obviously be subject to quite detailed organisation of the trial, which will be a substantial one, in order to ensure that the evidence is called and the issues raised in an appropriate order, but that is a matter of detailed case management, and it seems to me that it should not be anticipated by my either saying that the hearing should be back-to-back or together.

So it seems to me that the options actually boil down to two: whether one hears it together, the three trials, or whether the High Court trials are split off, and that is how I propose to consider the rival submissions of the parties, entirely without prejudice to the framing of a single trial, an all together trial, and if that is the course that I choose to go down.

I turn then to the questions that I must consider as to which trial format I should opt for.

It seems to me that the matter is best approached by considering in series the potential advantages and disadvantages of each course, and that is what I propose to do.

I begin then with the question of delay. It seems to me, and none of the parties pushed back on this, axiomatic that a case should be resolved as quickly as it possibly can, consistent with the overriding objective of fairness and

consistent with the resources that the court and the parties can put to a case.

In short, if there is no difference between the two processes, an earlier trial is inevitably to be favoured over a later.

It seems to me that this is a significant advantage in relation to the all together option that I am considering. It means that the trial would take place and be determined in one go, either before or after the long vacation next year. So one would have a trial either in July 2022 or in October/November 2022, and that would be the point at which the issues would be heard, and there would be a reserve judgment determined thereafter.

The delay arises out of the splitting off of matters. If one were to split off the High Court proceedings, again there would be a hearing in July or October or November of the competition matters. There would then have to be some form of delay built in, in order to enable a judgment to be rendered, and for the necessary work, which might not be very much, but which would of course have to be undertaken, in order to factor in the matters decided by the competition case, which would be relevant to the High Court cases.

So it seems to me one would have to consider quite carefully when the High Court cases would be heard, and it seems to me that the likelihood would be that there would be a hearing of those cases at some point in either very late 2022, if one assumed a July trial for the competition issues, or early 2023, if one assumed an October/November hearing of the competition issues.

Now, that is not much of a delay, but it is nevertheless a delay of some months. There is also the very real prospect of an appeal of the competition decision. It seems to me that the issues both in the High Court cases and in the competition cases are ones where I should regard it as on the cards, to put it no higher than that, that there would be an appeal of both sides, but in

particular of the competition issues.

If the competition case was appealed, then it seems to me that there could not take place the hearing, as I have indicated, of the High Court cases. The very point of splitting them off involves an assertion that the correct determination of the competition case feeds into the decision-making process that occurs at the trial of the High Court cases and, therefore, if there was an appeal, the trial of the High Court cases would have to be put off.

That, of course, adds significantly to the question of delay. I have in mind -- it is not, of course, in any way, shape or form determinative, because each case is different -- what happened in the *Agents Mutual* litigation where I acted in a similar capacity as here, as both the High Court judge dealing with the Chancery questions and the Tribunal Chairman dealing with the competition questions. The competition issues were determined and determined relatively quickly by the Tribunal after a two-week hearing. There was then an appeal, such that the second part of the trial could not be listed until about two and a half to three years later, when it was indeed listed before me for a five-day hearing. The case settled the Friday before the Monday it was due to begin, but the fact is the whole process, end to end, was not 18 months or a year. It was three years and then some.

That it seems to me is a salutary warning that I must take into account when considering the relative advantages of the proposals that are being put before me today.

So it seems to me that the question of delay is one that is significantly in favour of the single hearing rather than a bifurcated split.

Of course, that only is right if delay is the only relevant factor. One has to ask oneself whether it is practical or feasible to have a rolled-up hearing of all

three trials, as opposed to a split. It seems to me that the three trials that have to be determined are going to be complicated matters, whichever route one takes. I do not see any particular advantage, in terms of the minimising of complexity, of opting for one option or the other. It seems to me this is a neutral matter.

In terms of the saving of expense, it seems to me that the saving of expense points very much in favour of a single hearing. I am, of course, going to be considering in greater detail the question of disclosure and witness statements, but it does seem to me that the parties are agreed there should be a common disclosure process is a powerful pointer in favour of treating all of the issues in all three trials as effectively related and best resolved in one place.

I appreciate that the question of a common witness statement process is a matter that is for debate, and I must not indicate too clearly which way my mind is thinking, and, of course, what I say now is subject to submissions from the parties, but it does seem to me that a common set of rules for witness statements is something that would be desirable in any event, and it seems to me that this would be better for the parties to produce a single set of witness statements for the combined proceedings rather than undergoing the rather difficult process of trying to work out what evidence needs to be adduced for the competition trial and what evidence separately needs to be adduced for the High Court trials.

We all know how difficult it can be to pigeon-hole issues of fact in one camp or the other, and it seems to me that a powerful advantage, both in terms of cost, convenience and the avoidance of error is to have a common process of both disclosure and witness statements in this action going forward, which is in

itself, to my mind, a very significant pointer in favour of a rolled-up, all together hearing.

I turn to two further matters, which I raise really only to discount. Ms Smith and Mr Mill both raised the question of prejudice if I were to opt for Mr Bates' proposed solution of a split trial. Their point was that their rights are, if they are right, presently and for the future being infringed by Sportradar, and that needs to be put to a stop pretty rapidly.

It seems to me that that is a minor point in this case, because, I think I should be clear, Mr Bates accepted that if there were to be a split hearing, and if on the basis of the split hearing the competition trial went against his clients, he accepted that the infringements alleged by the other parties would have to stop, and I make clear that if I were minded, which, to be clear, I am not, to go down the split route, I would be extracting some pretty clear undertakings from Sportradar, as regards what they would not be doing after the competition trial, if that went against them.

As it happens, the extraction of those undertakings is not going to be required, because, as I have indicated, I am going to opt for the single hearing which I have been describing so far.

The last point that I raise, purely and simply to dismiss it, is the question of settlement. It was articulated by Mr Bates that there was an advantage in a split hearing in that if the competition issues were resolved, then the High Court trials might well settle, without troubling the court further.

Of course, Mr Bates is right. The court is always keen to hear of the prospect of settlement, and certainly will do its level best to facilitate such settlement. But it seems to me that the dynamic of cases is such that one should be singularly wary of acceding to the siren call that a trial structure, which is otherwise

commending itself to the court, should be changed because it may make settlement more likely.

It seems to me that the context of a trial determination should be determined, and that settlement is a matter that will occur in that context, and it should not be the settlement tail wagging the litigation dog.

So it seems to me that I am not persuaded that either route is one that is going to render a settlement more or less likely of the multiple issues that arise between the parties, and I therefore attach relatively little significance to that.

In short, although the matter is not absolutely one way, it seems to me very clear that the factors point in favour of a single trial taking place at some point next year. I am going to indicate that the trial should either take place in July or in October. I make clear that I have a preference in favour of the sooner, but that is only because sooner is better than later. I know that Mr Mill, or rather his co-leader, Mr de la Mare, will be taking me through, as I am sure the other counsel will, the very many steps that will have to take place before there can be an effective trial either in July or in October of next year. But it seems to me that the parties, when making those submissions, should have in mind the practicality or otherwise of particular dates, and it would certainly I think be helpful if they articulated when we come to these matters why it is that certain trial dates are undesirable, not as a matter of counsel's convenience -- that is not a matter I am particularly prepared to take into account -- but as a matter of achieving what is, on any view, a very significant amount of work in a very limited space of time, whether one takes a July or an October date.

The final point, that I mention by way of a postscript, is something which I was not addressed on and which I would like to have taken into account when we come to making more detailed submissions as to trial date.

We have not discussed the question of quantum in relation to the High Court trials. It does seem to me that we ought to have in mind whether it is desirable to hive off quantum or to have it as part of the overall trial. That is a point on which I have insufficient data at the moment to reach any view, and I express none at the moment. The reason for raising it now is because it is something I want the parties to consider when they are making their submissions on the more detailed procedural points that lie in store for the rest of today.

I would only say this. Prima facie, all in one is better than hiving off. Quantum proceedings have a regrettable knack of requiring determined as part of the liability proceedings points which are not determined as part of the liability proceedings which hang open in an undesirable way. I say that by way of a general and not particularly strongly held view, again, for the parties' benefits.

For all those reasons, the three trials will be held together on one of the three dates I have indicated, and I am presently agnostic whether quantum is in or not, but it is something that needs to be determined in the course of today.

That concludes my ruling on the main issue. I see the time. I wonder whether it would be helpful if I gave a preliminary indication on a number of the procedural points that you very helpfully identified in the skeleton arguments so that you know which way my mind is thinking, and you can then, in a focused way, push back and tell me just how wrong I am. Mr de la Mare is very used to that, because we did the EMA case together. So I am sure he can tell me exactly where I am wrong on those matters, but that's why I am raising it.

I am not beyond expressing a provisional view whether it is to any of this, but I think it is important that you at least understand which way my mind is going.

Moving to disclosure and witness statements, it seems to me absolutely clear that one should, indeed must, have a common regime for both disclosure and witness statements. I don't think that's likely to be seriously argued about. The question is more whether one adopts the two practice directions or pilots used in the High Court, or whether one uses the CAT rules and one can mix and match.

My provisional thinking, and it is very provisional, and not strongly held at all, is that it would be sensible to adopt the disclosure pilot that operates in the Business and Property courts, in particular, the use of the disclosure report that the parties need to produce in order to articulate those areas of disclosure where there needs to be a particular type of regime.

It seems to me that the five regimes articulated in the disclosure pilot are actually very helpful in this type of case. However, if we go down this route, there will be one very significant addition which I would be minded to impose and that's this. Competition cases are by virtue of their nature singularly greedy in terms of the relevant factual material that they want to harvest, in order to enable the economists, in particular, to make the points that they want to make. Some of this material is in the public domain as part of their expert reports, but some of it involves pretty wide-ranging and pretty intrusive exploration of large volumes of documents in the possession of one or more of the parties, when actually what is required is not so much the documents as limited bits of data within the documents.

So what I have in mind is that there should be a further class of disclosure identified in the disclosure report, which would be the areas of fact that the experts would need to bottom line and articulate, in order to produce their expert reports, and I would want this addressed extremely early on, so that the

experts are thinking from the outset what they need and what they don't need in order to produce the opinion evidence that they need to do.

Now, that means, first of all, one is thinking early on about theory of harm and how one establishes one's case. One is also thinking precisely how the material can be obtained from a very early stage, and one is hopefully producing an agreed set of data rather than documents which have to be mined in order to find the data, again from a very early stage.

I have not formulated what the order would look like with any great clarity, but it seems to me, and it is probably evident from what I have said that I feel relatively strongly about this, that this is a course which should be undertaken whichever disclosure pilot or route adopted.

Moving on to witness statements, it seems to me that the pilot again in the Rolls Building is one that actually says very little more than what is good practice, and it seems to me that there's not much difference between the CAT regime and the Rolls Building regime, save that the Rolls Building regime operates as a salutary reminder to parties, and I am sure it is not needed in this case, but a salutary reminder that that is the route that one should undertake.

Amendments to DataCo's Particulars of Claim, I hope that's uncontentious.

The Request for Further Information that is raised for Sportradar to answer, I hope the parties can address me on that in the context of the disclosure schedule and the necessary amendments to pleadings that may or may not be needed in light of the decision I have made on how the trial is configured.

Early specific disclosure is again a matter that has been raised, as well as the formulation of expert issues. Again, these seem to me to be a necessary part of the disclosure process that I have been banging on about, and I hope the parties can address me on that.

That, on my very rough parsing of the issues, leaves costs budgeting. Given the amount of work that's going to have to be done in terms of planning disclosure and expert issues, and things like that, it seems to me that this might be a case where costs budgeting is of assistance or at least is easier to do, given the work that needs to be done in terms of planning.

So I am slightly inclined towards the ordering of costs budgeting, but I am very happy to hear pushback from the parties on that.

I have gone through that at something of a brisk rate, but I wonder if the parties would be assisted by my rising now and resuming at 2 o'clock, just to see what really is contentious and what is acceptable or vaguely acceptable to the parties in light of what I have said. Please do feel free to push back on any of these points as hard as you like, because I have raised them with that absolutely in mind.

Mr Bates, is that an appropriate course?

MR BATES: Yes, that sounds very sensible to me.

MR JUSTICE MARCUS SMITH: Ms Smith, do you have anything to say before I hear from Mr de la Mare, who I see has suddenly appeared.

MS SMITH: Your indications are very useful and we will consider them over the short adjournment.

MR JUSTICE MARCUS SMITH: Mr de la Mare, welcome.

MR DE LA MARE: Thank you, my Lord. I wonder whether it would make sense, given my perhaps rash anticipation that I might go first on the early disclosure, if I might take the intervening time to lunch just to open up some of the expert issues arising? I don't know how much pre-reading my Lord has managed, but I think understanding the nature and depth and extent of the expert evidence that's going to be required in the competition dispute in this case will

only serve to reinforce some of my Lord's pre-conceptions, because what lies behind our application for early disclosure of certain documents and indeed what lies behind our stance which is predicated on a much earlier engagement of the experts -- we want them to meet straight after this CMC. Sportradar was proposing a first meeting and issues being resolved some time in March 2022. What underlies that is the feeling in this case that this is a case where there is a massive job to be done for the experts. It's a dispute that will engage in very protracted analysis of market definition, and that's quite unusual, with respect. There will be an extremely protracted analysis on the plane of object infringement and restriction. And then, buried in all of it, and my Lord's question about the quantum of the High Court claim links to this, there is a potentially very sizeable dispute about what constitutes a reasonable fee.

That's an issue that can arise in both the High Court claim, as and when it comes, if we prevail, and therefore show that we are entitled to a fee, is the reasonable fee as set by the secondary licence the measure? How do you set the measure for the prior periods where Perform was in situ. It is also an issue that arises in the competition case because of course one of our answers is our willingness to enter into secondary supply licences. Mr Bates' client says "No, no, no. Amongst other objections, the price you are seeking to charge is excessive".

That takes you into what I could call loosely analogous FRAND context of what is a reasonable fee.

Each one of those three disputes is a potentially massive dispute. I am going to suggest to you that the market definition issues in this case are quite profound. Where this case differs to the cases my Lord alluded to is this.

This is a massively non-transparent market. Unlike, say, Air Cargo or copper tube fittings or cables, there is no commercially available data about this worldwide market. When you look at the SDSB services market, it is principally concentrated in five entities, two of whom are before the court as parties in this litigation, and the third, SCM, is involved in the other proceedings alluded to. There is then Perform, who held the rights before us, and then there is IMG.

There is no publicly available data, and that's one of the reasons that underlies our application for early disclosure, because what the experts need to do is get straight to the primary materials in order that they can begin to generate the kind of common agreed data sets that are then the foundation for later analysis. That is why we concentrated on the particular categories in question.

That's a very long run-up to my point, which is I am sure those sitting behind me can get on and discuss the mechanics of whether or not we use the CAT rules or the High Court rules, but I think it would be valuable if we have the time to just explain those issues in a little bit more depth so that we can then apply them to the issues arising in relation to how the expert process is going to work and what disclosure is needed and when to support it.

MR JUSTICE MARCUS SMITH: If I may say so, that's very helpful, and it may be that we should thrash out not the specifics but how I see and what order I am going to make regarding precisely this approach to disclosure.

If I may say so, I think you are very much pushing at an open door on the concerns that I have not about this case but about competition cases generally, in terms of how the experts are integrated into the process, but, if I may, I will explain why I think that, which is very much in line with what you have been

submitting, before I invite Ms Smith and Mr Bates to see just how far there is going to be argument about the in principle approach.

If there's no argument about that, then I think we can step into the detail of how the order is framed, which I suspect will be much easier, but before I invite you to come back and Ms Smith and Mr Bates to say their piece, it seems to me that what has been overlooked so far in competition litigation is the fact that experts, by which I mean the expert economists, have a dual function, which is unfortunately, generally speaking, dealt with in a single report.

They have their opinion function, where they say "Yes, the market is X" or "the abuse that I am defining is Y". Whatever the questions are, one has these opinion questions which come late in the day, but the economists also have a fact-finding role, in that they are assembling not merely from public data but also identifying in the disclosure process what material they need in order to reach those opinions.

No-one has any desire at this stage to shut out anyone from running any opinion they choose to articulate. What one needs to do, however, is to work out what sort of opinions one might like to run and what data one therefore needs in advance of the report, in order to run the opinion, and ideally have that data either agreed or the disagreements articulated, so that it can then be fed into the opinion with the parties saying: "Well, here's the data. We are agreed as to the data, but we are in radical disagreement as to what it means", which is quite common in competition cases.

What one wants to do is eliminate the: "We have divergent opinions. The divergent opinions are because our understanding of the baseline facts is different". That's something which renders competition cases practically untriable, because you have to work out what the facts are first, and then you have to

ascertain what in the light of those factors found affects the opinion questions that the economists assist on.

It seems to me, in some form -- I have used the disclosure protocol and the disclosure questionnaire as the vehicle, but I frankly don't care what the vehicle is, provided the material that is needed is identified and then extracted in the most efficient way. Let me be clear what I mean by "most efficient way".

In some cases it may be that the disclosure of large reams of documents is the only way to bottom out a particular area of fact, but it may very well be that what you actually want is a table setting out, for instance, data of information that had been provided at certain times of a certain class, and you don't need 100,000 documents. You just need a single page of data, and then the question is how is that single page produced? It can surely be produced by way of a table supported by a statement of truth. I float that as an example. One avoids the articulated lorries of data going across the parties, and instead enables the parties to focus on and test what actually matters.

I have gone on far too long. Mr de la Mare, if I have misunderstood you, then please say so. Otherwise, I will hear from Ms Smith and Mr Bates as to just how far there is a problem here.

MR DE LA MARE: Not at all, my Lord. You have hit upon some themes that, with respect, I intend to develop somewhat further about what the actual process will sensibly require, because ultimately my experience in competition litigation, and I am sure Ms Smith and Mr Bates would say the same thing, is that the fact-finding process that my Lord has identified that the experts are involved in is not a one-off exercise in any event. It is an iterative process.

If one is looking for an ambitious trial timetable, and I suggest we are, the sooner

that iterative process begins, the more likely it is we are going to arrive to trial in good shape.

MR JUSTICE MARCUS SMITH: Well, thank you for that. Ms Smith, Mr Bates, I hope the thinking that I have is at least tolerably clear. I am very much of the view, and I raise it now so that you can push back if you wish to, that Mr de la Mare is right, that there needs to be an engagement of the economist experts, maybe not tomorrow, but rather tomorrow than next week, if you see what I mean.

It seems to me this is something that needs to be dealt with as part of the disclosure process, broadly conceived, sooner rather than later, but I say that because I want to invite pushback before we get on to, if we have to, the detail.

Ms Smith, I will hear from you first and Mr Bates second.

MS SMITH: Sir, I was not proposing to make any submissions on Genius' specific application for disclosure. I absolutely agree with what Mr de la Mare has said about the need for expert involvement in the disclosure process and expert meeting, and your Lordship has said about the involvement of experts in the disclosure process at an early stage.

You have seen our position as set out in our skeleton argument, that we are strongly of the view that the disclosure process and the witness statement process, the witness evidence process should be subject to one common set of rules. We are of the view that the disclosure process can be most sensibly done under the disclosure pilot process, which sets out deadlines. It sets out the identification of issues around deadlines and so provides a very useful framework for efficient case management, but also for all sides, in fact, to be able to identify the relevant issues and the relevant documents.

We welcome I think, although I have not taken specific instructions on this point, the

addition that your Lordship has identified of data required by the economists.

Whether Mr de la Mare's application can be dealt with within the context of a disclosure pilot timetable, because I take his point absolutely that early disclosure might be required, but I also bear in mind the point that when it comes to identifying what is required by experts, it is useful to have all parties feeding into that process.

So it may be that it is most useful, subject to a realistic and speedy timetable, that we adopt the disclosure pilot with the addition of a tranche of data and documents that economists need, and it may be that we don't need documents if we can identify data, for example, into tables that can be populated, or whatever, but that we incorporate into that Mr de la Mare's proposals and application, but also, therefore, ensure in short order that both of the other parties are able to get their experts involved in that process as well, so that hopefully we are able to thrash out a list of material that we need for the purposes of the expert reports, and that we are able possibly to do that in an iterative way. We have a first round of material and second round, but it seems to me it is useful to do it under one pilot, under one umbrella, rather than having sort of piecemeal applications made for disclosure by various different parties.

It may be that I am able to add to those after the short adjournment because I have not had a chance to take detailed instruction.

MR JUSTICE MARCUS SMITH: All of this is subject to detailed instructions. We will debate where we go when I have heard from Mr Bates.

MR BATES: My Lord, I think there is going to be violent agreement between all of us on the main points, certainly about the need for involvement of the economic experts early in the process.

The way we put it in paragraph 43 of our skeleton is that:

"The process of providing material required by the experts should be approached pragmatically and collaboratively."

Clearly, the experts are very much part of that, because their input is going to be needed about what they would feel is helpful and what they need. So we certainly agree about that first point.

We also agree that requesting lorry loads of documents at the outset, and then leaving the experts to analyse it all or fish out what they need from this over-inclusive pool is not the most efficient way of proceeding, which is precisely why the expert input as to what they really want and need is helpful.

Those principles are certainly common ground.

As to which rule should apply, I don't think there is really a great deal of difference between the parties' positions anyway, in that it was always agreed that there should be request-led disclosure by reference to issues in the case.

So whether one went for the CAT rules or the disclosure pilot is perhaps not the main question. Certainly, if we go for the disclosure pilot, as Ms Smith says, that can be the broad framework, but there may need to be some tweaks in order to deal with the individual circumstances of these proceedings.

So we would effectively have CAT rules borrowing from the disclosure pilot and adapting it to the needs of this case, which I think there is common ground on that too is the sensible way forward.

MR JUSTICE MARCUS SMITH: Thank you. Mr de la Mare, before I indicate where we are going forward, do you have anything to say in response? No? That is helpful.

It seems to me the devil is going to be in the detail. What I would like the parties to think about over the short adjournment is what should constitute the embellishments, and they are going to be significant embellishments, to the

White Book regime. I say the White Book regime, because I think it is marginally the better one, but I am contemplating pretty aggressive surgery to accommodate the points we have been discussing to make it work, in particular, two things: first of all, self-evidently, the input of categories of documents and how they are going to be obtained by the experts is a given. That's clear from what you have all said and indeed what I have said; secondly, is the iterative nature of the process. One of the things that I think that is absolutely clear is that one should bank the low-hanging fruit early, get the disclosure that can be provided without undue cost, or which is clearly necessary and can be defined as necessary to provide early on, get that done very quickly.

Then one has, as it were, the disclosure report -- I will call it that -- which requires very careful thought and elucidation, ie it deals with everything that is not low-hanging fruit, and seeks to articulate precisely what needs to be delivered and when. To be clear, I want that happening pretty fast, even though I am contemplating a low-hanging fruit stage.

Then, because this is a difficult process and an important process, I have in mind that the parties can come back to supplement or delete the document that they have compiled with the experts, because thinking is going to develop. That is the whole point of this process. The economists are going to be required to do their hard thinking early. They obviously don't have to disclose what they are thinking, but they need to disclose what data they need in order to articulate the sort of reports they have in mind.

That process inevitably means wrong turns are going to be taken, in the sense that one includes categories of document that prove not to be needed, or one omits categories of documents that turn out to be needed. The process that

I envisage has got to accommodate that.

I am going to rise now. I am going to invite the parties to have a think about what I am going to determine after lunch, but I think, if I can give the parties a steer, it may be that I have given the parties sufficient indication as to where I'm going that it's going to be the drafting of the order that matters, rather than the articulation of arguments about where things are going, and we have actually a debate on a proper draft order as to what the parties need to do. That is the big question in my mind, and I would be grateful if you could address me on that at 2 o'clock when we will resume.

MS SMITH: My Lord, may I just, in light of what you have indicated, say it might be useful over the short adjournment if I could ask you to look at the draft disclosure review document that we have already prepared and provided to the parties and the court last week, in anticipation of this hearing. It is in bundle 5, for your note -- I am not going to take you to it now.

MR JUSTICE MARCUS SMITH: Let me make sure I have it. Bundle 5 you say?

MS SMITH: What we have done in our draft order is referred to the disclosure pilot, but we have already, in effect, started the ball rolling on that disclosure pilot by producing this draft disclosure review document, bundle 5, tab 2.

MR JUSTICE MARCUS SMITH: Yes.

MS SMITH: Just so you are aware, my Lord, we have put in and we have identified the issues for disclosure that we consider to arise not only from the High Court proceedings but also the CAT proceedings. So we have identified the issues for the High Court and the CAT.

Obviously, the next stage is the response by the other parties, first to whether they believe that those issues are either agreed, they need to amend those issues or add to those issues.

So my proposal would be that this already provides the framework for taking forward disclosure in this case. We have sort of made the first opening move. We have identified issues. Now Sportradar and Genius can amend those issues, add issues, add disclosure requests, which may also encompass what Mr de la Mare wants, and he may identify within this structure the material that his experts require, and it may be that that material is to be provided at an earlier stage than other material. I think this draft that we have already produced and the work we have already done on identifying all the issues may be a decent starting point for the process going forward.

MR DE LA MARE: All I say is I think this is a very helpful document, though it is principally concentrated on the factual issues in a conventional sense, i.e. the issues for resolution at trial. In respect of that, perhaps rashly, I suspect there is not going to be a great deal of difference between the parties at the end of the day, as to what materials bearing upon principally factual issues are to be disclosed.

Where the real magic I think in this case, the difficulty that requires case management really lies, it lies in two things. It lies in the extracting of data from document classes like the data rights agreements, the upstream data right agreements. I will come back to that.

MR JUSTICE MARCUS SMITH: Yes.

MR DE LA MARE: Secondly, it also will lie in the proportionate handling of the data both Sportradar and Genius possess. Forgive me for making this truism: they are both data companies, they are both awash with data about the matches they have covered, the many hundreds of thousands of matches they cover a year, who they have sold to, under what agreements and when.

Under the hood, in their databases, in their archives of data, there is a mass of

material. In my submission, the real issue in this case is going to be how to manage access to that data in a proportionate fashion and in a fashion that navigates us through the shoals of confidentiality, because these materials are the absolute trade secrets, the most sensitive subject matter of all of these fierce competitors. It is about their day-to-day sales, who they are selling to, in what territory, what's effective as a marketing strategy, etc. It's the Crown jewels.

So any access to that has to be very carefully mediated so that you get to the relevant materials, so that there is not an excess of data but also so that there's a sufficiency of data, in circumstances where none of this data, so far as our experts are aware, is any way meaningfully available. Compare and contrast international cargo figures, which are widely available from a range of governmental and official sources.

The data here is all proprietary. That's the real issue. Let's just take one example. The role of latency and off tube data. What the parties say and think, what Mr Lampitt thinks is going on in his business, what the data actually reveals, what you actually see has been achieved by way of sales in relation to off tube data may be quite different. What you think and what the data shows we all know can point in different directions.

There is going to have to be careful investigation of off tube data. That is absolutely apparent. The magic is finding a way to get to what are the boundaries of a proportionate and safe way of handling that data. What we propose by way of early disclosure is literally the first step on the iterative process. We completely agree that the experts have to be properly involved in devising a process that gets you straight into those issues, but these are basic building blocks, basically.

MR JUSTICE MARCUS SMITH: That's very helpful, Mr de la Mare. I am sure I have seen it, but do you have an expert document which is the expert equivalent of Ms Smith's volume 5, tab 2.?

MR DE LA MARE: We don't. What we have with our application in bundle 4, tab 2, pages 7 and 8, is an explanation from RBB as to why it is they want to start with these three categories of data. I don't know if my Lord has read that document?

MR JUSTICE MARCUS SMITH: I think I have, but I want to get it up now. Volume 4.

MR DE LA MARE: Volume 4, tab 1, is our application by letter, explaining the three categories that we are seeking. Maybe if I could invite you to re-read that over lunch, that would be very helpful.

MR JUSTICE MARCUS SMITH: Yes, of course.

MR DE LA MARE: Then the RBB letter, which is our experts, admittedly unilaterally, but no one was -- they don't need to be pejoratively -- no-one else was engaging with what we are saying was a concern. Everyone else was willing to put off expert issues until next year. We have been saying since 10th May that the process is critical and has to happen immediately after the CMC. This is RBB's unilateral explanation as to why they want to start with these three categories of documents for the very iterative process my Lord has described. That's what I propose to address, because we have to start somewhere.

MR JUSTICE MARCUS SMITH: We have. I think it is worth throwing this particular cat amongst the pigeons before the short adjournment rather than after.

The difficulty with the RBB letter process of saying "We would kind of like to know about this", is you have the problem of known unknowns. You simply don't know, because it is proprietary and confidential, how data is kept, what

material is retained, how it is retained, how it is measured. All these metrics are unknown to everyone apart from the holder of the database. That's actually the problem.

MR DE LA MARE: With respect, my Lord, the very first place you are going to get any insight into that, both upstream and downstream, is first of all from the upstream arrangements, which tell you what licence rights there are, so there may be restrictions on the uses permitted for the rights that are licensed, in what territories, under what revenue model, what scheme of payment, for what duration of term. That tells you quite a lot about how the rights are going to be sold. And then the bookmakers' agreements also tell you how the rights are going to be sold. It is with those two packages of information in hand that you can begin to make informed requests about what data may be held that bears upon the relevant issues in question.

Take the data rights agreements as an example. Undoubtedly, there is a process in which some poor solicitor or some poor assistant at RBB or Compass Lexicon, or whoever it may be is going to have to pick through each of the agreements and extract their material features, and the material features are likely to be term, exclusivity or non-exclusivity. If non-exclusivity, the form of non-exclusivity. The nature of the rights conferred, price, pricing, etc, royalty rates.

I can't actually see a world in which the underlying agreements themselves will not also have to be disclosed, because some of those categorisations are categorisations of some subtlety, particularly scope of rights and matters of that kind, but all of this needs to be sensibly tabulated by the experts. The sensible way, and we propose cooperation to that extent, is one side does their agreements, the other side does their agreements, to a common

standard, and then you join the data sets together and everyone has access, subject to confidentiality, to the underlying agreements.

We anticipate the process in relation to the bookmakers' agreements to be much more simple. If Sportradar's agreements are anything like ours, they are going to be much more homogenous, because bookmakers tend to contract on our standards terms, and we anticipate, maybe wrongly, that this is the same for Sportradar.

The DRAs, we know -- I can tell you because we have been through this exercise in pulling them up already in the SCM litigation, are heterogenous. Some are hundreds of pages long. Some are three pages long. It is as varied as the record recording contract can be. There is a vast range of DRAs out there, with varying degrees of sophistication.

Those data sets need to be got together and we also need to get to what is, I think anyone looking at this case would recognise, the key issues in market definition, the question of substitutability of off tube data, because the key thing about off tube data is you take it from the television. Why is that significant? The things that are televised are the things that tend to attract the most interest, the most viewing public.

Think of Ray Winstone.

They are the things people most bet on because you bet when you are watching the television. You are constantly encouraged in the advertising to bet on the game. You are constantly encouraged by the hoardings.

If you have ever been to a football match and tried to use your mobile phone at the football match, you will know the problem of mobile phones congestion at matches. It is quite a lot harder to bet in the stadium than it is at home with your home broadband access.

So that issue of off tube data and its substitutability for the critical and perhaps most popular matches, the English Premier League in LLMD terms, that is at the heart of the market definition exercise. The quicker we get looking at that data, the quicker we are going to get to an effective identification of the issues in the case.

That's why we have alighted on the three categories we have. My Lord will read the material over lunch and I will try and expand on that afterwards.

MR JUSTICE MARCUS SMITH: Yes, I will clearly read that over lunch. I think the more fundamental question isn't when. I think we are actually pretty much on the same page as to when, but how.

MR DE LA MARE: Yes.

MR JUSTICE MARCUS SMITH: It seems to me, so far as the confidential material for the economists is concerned, it may apply more widely, but let's confine it to that for the moment. It seems to me there are three models that one could adopt in relation to this sort of information.

Let's take the class of agreements you have just been referring to. I know that there are other categories, but let's take that as an example.

One could have a traditional process, where the documents are simply disclosed by one side, the producing party, to the receiving party, for the receiving party to analyse, and one needs obviously confidentiality rings and all the works to ensure that that process can carry on.

That's the traditional model.

The alternative to that, the first alternative to that, is, as it were, a producing party does the work model. That is where the agreements are not disclosed, but instead the documents are mined by the party who would otherwise be producing the document in order to extract the data that's needed.

The problem with that is that the producing party may have a very different view as to what is important and what is unimportant compared to the receiving party.

MR DE LA MARE: Yes.

MR JUSTICE MARCUS SMITH: That's why you have the traditional model, because with the best will in the world you, Mr de la Mare, framing the competition arguments for one party, will have a very different view as to what you need compared to, let us say, Ms Smith's views. Those views are actually fundamental to how the parties put their case. It is not surprising that one has a potential divergence. So I can see a real problem with the producer does the work model in anything but the most straightforward of cases where you can actually nail precisely what it is that needs to be produced and the producer then just produces the list and verifies it.

So the third model is that the receiving party does the work, and that would, to be clear, not necessarily not involve the disclosure of the agreements in the traditional way, but a very defined team being put in to look at documents effectively in the premises or -- the solicitors' premises or the parties' premises, producing those documents, being provided with an environment where they, a very limited defined team, a lawyer and an expert, maybe two lawyers and an expert, but very limited, come in under the most stringent confidentiality obligations, look at the material with it remaining, as it were, under the complete control of the producing party and mine the information for what they can see. So they get to see basically what there is and can work out what arguments become possible and what arguments become not possible.

Now there may be more models than that. Sorry, Mr de la Mare.

MR DE LA MARE: Might I suggest a fourth model and to an extent forgive me for

raising the dreaded SCM, because we have been through some of this in the context there. We have disclosed all of our relevant data rights agreements into a confidentiality ring in that case because of the IP issues arising there.

MR JUSTICE MARCUS SMITH: Yes.

MR DE LA MARE: I would suggest that the fourth model and the one that perhaps should be followed is one in which the documents are disclosed in full into the confidentiality ring, which is more than adequate to protect, to the inner ring of the confidentiality ring. Then effectively the experts agree so far as possible the categories of data that are to be mined and each party mines their own documents to produce common derived data, and it is that common derived data that then for trial, etc, is used so far as is possible, because there is likely to be less confidentiality concerns in relation to it. That combined with subsequent anonymisation of sports, of leagues holders, etc, can make for a much more workable trial.

I don't see for this 'raw agreements' type of material any route round the disclosure of the underlying documents. Where I think there is much more mileage for getting to that type of solution is in terms of data extraction, because the data in relation to sales -- what type of event are you selling; is it an off tube event; is it official data you are selling -- that is I think much more binary in its analysis.

MR JUSTICE MARCUS SMITH: Yes. I mean, if I may say so, your fourth proposal is really a variant of my first. It's a produce, disclose the agreements, but into a confidentiality ring --

MR DE LA MARE: Yes.

MR JUSTICE MARCUS SMITH: -- which is perhaps confined only to mainly experts and very limited lawyers, and it is effectively superseded by the work product

they produce, and once the work product has resulted in the mining of this data the information in the confidentiality ring effectively is sent back to the producing party and more or less deleted.

MR DE LA MARE: Yes. I think one should not get my Lord's hopes up too high as to how far that process is going to go, because the material is going to be relevant not just to market definition. It is also going to be relevant to questions about restriction and comparators, because the minute we go to excessive pricing and reasonable royalty fees we are going to have to start looking at comparators: first of all, comparators in football for other football rights -- let's say Serie A, La Liga, etc -- as comparators where there is no allegation of dominance and therefore presumably the prices obtained are untainted by abuse, but then also comparators for neighbouring rights perhaps of greater and more equivalent value. Tennis, for instance, is sold in much greater blocks than football. Basketball is sold on a per sport regional basis. All of those are going to have to be looked at for the purposes of the excessive fee case that effectively is raised by Sportradar.

So, you know, of course we need to keep the handling of these very sensitive agreements and matters as generic and under wraps as possible, but I can't see a world in which access to the actual documents by the lawyers and their economists even at trial is not going to be necessary. It may not be all of them. It may only be ten comparators or twenty or selected comparators or what have you. We can get to that, but we are nowhere near being able to narrow down in that way, because we haven't had the building blocks disclosed.

MR JUSTICE MARCUS SMITH: I understand. I think what we are talking about today is the --

MR DE LA MARE: I am sorry, my Lord.

MR JUSTICE MARCUS SMITH: No, no, not at all. This is very helpful, and we will break shortly, but I think it is well worth thrashing these things out. What we are talking about is the building blocks of the process rather than the building blocks that are needed for trial, and it seems to me that whilst there is perhaps a lot to be said for saying, "You are right. These agreements matter. Let's get them disclosed now into a confidentiality ring", I am more interested, because that is just the first step, in getting today a process which ensures that not merely that particular class but as many other classes and as many other further steps as to what one does with those classes of material is articulated as soon as possible.

Let me be clear. I am thinking about disclosure of documents that are obviously needed before the end of the month. So, I mean, I am not -- I don't think I am inclined, but you may persuade me, to make an order for early disclosure today -- I will hear what the parties have to say -- but we are certainly talking about the low-hanging fruit being captured within the course of this month with a view to refining the process further, but what I would like as the achievable or the deliverable out of today to be a clear grasp of where we are going with the process going forward so that the -- there is not going to be consensus on all points. Let us be clear about that. Obviously not. What I am keen to find out is a form of process that articulates very closely the dispute that the judge is going to have to resolve in the future; in other words, what I am seeking is a sharpening of the points of dispute, which I think involves an articulation of what it is you want and how you want it delivered, and there may be disagreements about both. You may say what, "What you want is what you don't need. Get lost" or it may be, "What you want is something you ought to

have, but I have grave concerns about how you want to receive it". Those are two separate forms of dispute, which I am quite sure I will be called upon to resolve in a number of cases. My self-interest is to ensure (a) those disputes are as limited as possible, ie as few as possible, and (b) when they inevitably emerge, I have the wherewithal to decide them ideally on the papers and ideally pretty quickly.

So that has been very helpful from all concerned. I have not made a decision, to be clear, about any of this. I am going to rise until I think 2.15. It will be helpful, but it may not be possible, if the parties could identify a way forward which would be either the way we frame a template or what one can give if a template takes a while to frame by way of early disclosure of low-hanging fruit. That would be something very helpful to do this afternoon, but I will hear what you all say once we have reached -- once we have resumed at 2.15, and if you need more time, and you may well need more time, do let me know, but provisionally I will say 2.15. Thank you all very much.

(1.19 pm)

(Lunch break)

(2.15 pm)

(Proceedings delayed)

(2.30 pm)

MR JUSTICE MARCUS SMITH: Good afternoon, everybody. Do we have everybody present? I see Mr Mill, Ms Smith and Mr Bates. You are both there. Extremely impressive.

MR MILL: There is a reason why it is me rather than Mr de la Mare.

MR JUSTICE MARCUS SMITH: Entirely in your hands. Welcome back. I see you have a very swiftly moving camera.

MR MILL: We are very tech savvy down this end.

MR JUSTICE MARCUS SMITH: I am so impressed.

MR MILL: Thanks to my colleague rather than me.

My Lord, if it is convenient, I have indicated to our friends that we thought it might be helpful if we just effectively disposed of what is likely to be non-contentious matters in the way that your Lordship was indicating he was minded to do.

My Lord, formally we have instructions to agree to your tentative proposal that disclosure should be done by reference to the CPR and the disclosure pilot, subject to obviously the qualifications that your Lordship chooses to impose upon that.

Secondly, so far as witness evidence is concerned, we are content to do it by reference to PD57AC rather than the CAT rules.

Thirdly, we will agree to cost budgeting.

Fourthly, my Lord, on the basis of the way that the discussion was leaning and your Lordship's evident desire to move matters forward urgently, we think in those circumstances our concerns over a July start are diminishing, such that we can agree to it, if that's what your Lordship is otherwise minded to do.

MR JUSTICE MARCUS SMITH: Well, Mr Mill, that's extremely helpful on all fronts. Can I just --

MR MILL: I am so sorry, my Lord. Can I just add one thing. So far as the trial is concerned, we have mentioned to our learned friends, and I think they agree, that a 20-day estimate for the rolled-up hearing would be appropriate as distinct from I think the 18, which was being proposed previously for the competition claim.

My Lord, so far as issues are concerned, I think your Lordship asked the question in relation to the Chancery claims damages.

MR JUSTICE MARCUS SMITH: Yes, indeed.

MR MILL: We consider that can be quantified and dealt with within the 20 days, essentially, because the court is in any event going to have considered what a reasonable licence fee would have been.

That is not the case, however, in relation to the quantification of Sportradar's claims in the CAT. All parties were agreed -- one of the things we were all agreed upon -- was that that issue of quantum would need to be hived off.

MR JUSTICE MARCUS SMITH: I understand.

MR MILL: 20 days is intended to include the claim, the quantification of the Chancery claims but not the quantification in the CAT.

MR JUSTICE MARCUS SMITH: That's extremely helpful, Mr Mill. Can I just check. I think I saw nodding on the part of Ms Smith and Mr Bates, but that's, as it were, common ground or not? No-one else wants to push back on those points?

MS SMITH: Shall I go first?

MR JUSTICE MARCUS SMITH: Yes, of course, Ms Smith.

MS SMITH: Obviously, under the disclosure pilot and the practice direction for witness statements, that is what we are asking for, so we are extremely happy with that.

Date of trial in July, yes, we have also indicated we can do that.

20 days for a full hearing, then we also had discussed that with Mr Mill and Mr de la Mare. We are happy with that.

I have just had instructions, we certainly are of the view that the damages claimed by Sportradar in the CAT trial should be hived off. It can't be dealt with within the 20 days. If all that we are determining within the 20 days is the reasonable licence fee for the purposes of the High Court claim, then my instructions are

that we do think that can be dealt with within the 20 days, but that is very much acting on instructions from my IP colleagues.

I think that's it.

We do need to discuss how we fold in the early disclosure that's sought by Genius and the involvement of the experts in determining --

MR JUSTICE MARCUS SMITH: Indeed.

MS SMITH: -- how we fold that into the timetable and how we fold that into the use of the disclosure pilot and the disclosure review document that we have already produced, but I can address that in due course.

MR JUSTICE MARCUS SMITH: That's very helpful. Thank you, Ms Smith. Mr Bates.

MR BATES: There are two points on which I would differ from my learned friends.

First of all, on the appropriateness or otherwise of having the trial start in July. It seems to us that the amount that needs to be done in getting ready for a larger trial than we had anticipated is substantial, and it would be much safer of the two options given by your Lordship to go for the October option, in order that there is some additional headroom in order to get all the work done that needs to be done for that trial. So that would be our preference. It also fits -- I know your Lordship said counsel availability shouldn't be a determining factor, but it does seem to fit with the availability of all counsel, whereas otherwise we would have to change our leading counsel, which would, of course, put more pressure on us, given how much we now have to do to prepare for the trial and the rapid timetable within which work needs to be done.

On the trial length, your Lordship will appreciate I am in a little bit of difficulty, not being instructed in the proceedings generally. The estimate that those who

are instructed gave for the CAT trial was 18 days, which was a few days longer than the other parties.

I understand it seems to be common ground between the other parties that the length of the trial that would be required for the High Court matters was five days.

On that basis, I would suggest that, if at all possible, we find a slot that can accommodate a 23-day trial, not because it will all necessarily be needed, but because if it is needed, we don't want to lose the trial dates.

MR JUSTICE MARCUS SMITH: Yes, I understand. I think, if we are talking about, say, 23 days, I suspect that one is saying that we would start -- and I am not indicating at all which month we start in -- but I can see a good argument for saying if it is going to be the summer, we start on 28th June and run through for 23 days there. That, I recognise, does sound extremely early. One of the things we are going to have to consider is the risks of there being delay in a timetable, which necessitates adjournment, and that is a risk that I absolutely am going to close out, because we can't have the parties working hell for leather for a trial which then becomes unachievable. So I have that well in mind, but that was the summer date.

If we move to October, I am not sure I am afraid when the term begins, but if we said -- I think it is around 4th or 5th October.

MS SMITH: Monday, 3rd, my diary says Michaelmas term starts.

MR JUSTICE MARCUS SMITH: Sorry. I am looking at the wrong year, which is not exactly helpful.

MR MILL: I believe it is 3rd October, my Lord.

MR JUSTICE MARCUS SMITH: I am very grateful. I think the date would be --- we would start 3rd October or perhaps the 4th, because of the usual beginning of

term meetings that we are all subjected to, and would run through to effectively the end of October. I think those are the two options.

What I suggest we do is, having identified them, we park that until the very end and discuss the broad brush directions that would be required in terms of immediate next steps. By that I obviously am focusing primarily on the big picture disclosure questions, but also I think we ought to get in mind what we have for witness statements and experts' reports so that we at least have a functional timetable that is running through to whichever trial date you consider is most appropriate.

Let me by way of final sort of guidance say I am not a fan of drafting by committee in hearings. There are obviously going to be a lot of moving parts in this order which are going to require quite careful attention. It may be that I ought to be writing a short judgment explaining why the order is framed as it is, when we have got it, but certainly I don't want us to even try to draft something or agree something which has everything laid down, because we will come a cropper.

What I would like us to do is identify the points of dispute so that you can go away and do a draft, which I can then review and come back to you on, with a view to getting an order out this week, so that we can, as I indicated before the short adjournment, aim to pluck some low-hanging fruit this month rather than next.

With that in mind, what I really want to identify is the party who has the most concerns about the broad brush process that we have been discussing, so that they can be brought out into the open and addressed, and I think that means absolutely not Mr de la Mare. You are too much of an enthusiast for this approach.

What I want to find is the person who has the most serious concerns about the broad

route that we have mapped out, so that they can be articulated and addressed, because -- make no mistake about it, and I am sure Mr de la Mare does not disagree with this -- this is quite a radical departure from what is normally going on, and we need to think it through carefully, and that means the best way of doing that is articulating the problems that we can spot so that we can address them or, if we can't address them, at least be aware of them and embark upon this course knowing that they are there.

Yes?

MR DE LA MARE: Would you give me two comments?

MR JUSTICE MARCUS SMITH: Of course.

MR DE LA MARE: I will taper my enthusiasm to put that in. The first comment is, in terms of the mechanics for a further iterative process in drafting the order, my Lord is obviously quite right. It is impossible to draft on the hoof.

There is one practical fly in the ointment, which was the reason I was not originally available for this hearing is I have a back-to-back preliminary issues trial tomorrow and Thursday. Therefore I am going to have limited bandwidth to be involved in the order, which I want to be obviously closely involved in. If that means the drafting of the order creeps into next week, I hope that's acceptable to my Lord. I can't really see any way round that.

The second point is we had a very constructive discussion between the three of us, and I thought I should just outline as neutrally as I can where we got to. I think where we got to is this. In terms of process, we are all agreed that the experts need to meet urgently. We are all agreed that the process in relation to the disclosure required to support the experts should, subject to any categories of identifiable early disclosure, be so far as possible expert-led. By that we mean, first of all, the experts should, with quite close particularity,

identify the issues of expert economics that they see arising, the sub-issues, if you like, under the headings of market definition, restriction by object, restriction by effect, etc, excessive licensing. So they need to identify with particularity the issues arising on which they propose leading evidence to support the analysis of the issue.

Then they need to identify the categories of factual material that they require in order to support their investigation of those issues, and either to complement, supplement or replace that, the categories of agreed data to be extracted, if you like, from primary materials. So any process of schedulising common data, etc, so we can all work to building effectively a common database. That process should be expert-led and agreed as part and parcel of the identification of the materials.

Then, lastly, I think we are agreed that the experts themselves should identify any process of prioritisation or early disclosure or sequenced disclosure that would support their rapid engagement with the issues. They have a far better idea where they need to begin the inquiry and from whence they can build, and they obviously need to meet and discuss that, and we hope agree it.

If that process produces any form of disagreement, whether as to the scope of documentation required, the form, the timing, etc, then we need to devise a short process where those types of disputes are either resolved by short written submissions on the papers or by a rapidly convened hearing.

That seems to be the basics of the process we require. We need some timings from that, and we are very much in my Lord's hands, but there I will get into enthusiasm, because I want everything done as soon as possible, and Mr Bates has some perfectly sensible points about the art of the practicable. We will have to grapple with that. A steer from the court would certainly be

helpful.

Then there is the slightly discrete issue as to what are the readily identifiable low-hanging fruit, even before the experts meet.

The proposal I made to my learned friend, and I make it now, is that I can see that category 1, the off tube data and the materials in relation to off tube data, is perhaps an issue to be sensibly explored or given further precision by the experts, if you like, a topic for priority consideration by the experts.

Categories 2 and 3 I say -- I will not expand why -- we can come back to it -- I say are things that are obviously going to require disclosure in any event, in the raw form. It may be they need to be live data, but it is something we can usefully, properly and sensibly get on with as soon as possible.

I am obviously in the position of some luxury to be able to say that, because we have already done it in part.

I understand Mr Bates' clients have not, and we are willing to be perfectly sensible, within the framework of general urgency, as to how we set timetables for that being done.

That's broadly where we got to. I hope my learned friends think that is a fair summary of our discussions.

MR JUSTICE MARCUS SMITH: Any corrections or additions?

MS SMITH: Yes. I am very aware that we don't want to have two processes for disclosure running in parallel that may run in different directions. This is a point I made when I discussed it with my learned friends.

I absolutely agree that we should have an expert meeting, and I think the date was by 6th July, proposed by Mr de la Mare, and we are happy to do that and can do a meeting by 6th July on our expert's part in any event, to identify issues.

I then think it is useful that the expert material -- let's call it that for the moment -- that

the experts are able to identify issues and categories of disclosure and data that they may require, and that they need to feed into the data process. But there will also be, in parallel, a process of more what Mr de la Mare has described as factual disclosure.

We have already, as I said, my Lord, started the ball rolling on that, and if you have the DRD --

MR JUSTICE MARCUS SMITH: I do, yes.

MS SMITH: That we sent round, at page 17 on that, we have already set out our Model C requests for disclosure, which include number 3, 4, 5, disclosure that goes to the competition issues.

My concern is that we don't have, as I said, two separate processes going on in parallel that don't ever meet.

My proposal would be that we have a meeting by 6th July of experts, that they are given, say 7 days, 14 days, from that date to identify the issues that they want to add, in effect, to this list.

That would take us to 20th July, if it is 14 days. It can be earlier, 13 July, if it is seven days. At the same time, and to that same date, you will recall in appendix 2 to the disclosure pilot, most of the deadlines are 14 days, steps of 14 days. So I would propose to keep to that sort of steps of 14 days. But for the same date that we are asking the experts to come back on identifying the issues -- say they give 7 days, 14 days, 20th July -- they also identify the requests for disclosure that they want. By that same date, on 20th July, the other parties, Sportradar and Genius, also identify the factual requests that they wish to add to section 1 (b) or respond to our requests in section 1 (b), and say "No, we can narrow the category" or "we want extra stuff".

So we are all working, both the experts and those working on the factual requests,

work to the deadline of, say, 20th July, to effectively fill in the columns, the next column of response or issues for disclosure in section 1 (b) and the section on issues for disclosure, section 1 (a).

Obviously open to discussion on deadlines, but I think there's a lot of sense in trying to keep both the expert-led disclosure stream and the non-expert led disclosure stream together, so that we can ensure that nothing falls out of the picture, or there is not a sort of tension between the two streams. So that would be my proposal.

We need to thrash out the dates, but the 14 days is the sort of deadline timing that is set out in appendix 2 to the disclosure pilot.

We proposed in our original draft order that anticipated a competition trial in July of next year that there would be full disclosure by 17th September. That's bundle 1, tab 5. I have not had any response yet. It may be they need to go away and discuss these dates and we can thrash them out in the draft order, but that's our initial proposal in our draft order, tab 5 of bundle one, disclosure by 17th September of this year. Obviously, if there can be earlier disclosure of the low-hanging fruit, then that's great.

We then set out a timetable for witness evidence, expert evidence, pre-trial review, which actually in our original draft order I see took us to a trial in July. It may be that the dates are a useful starting point for the draft order that we are going to thrash out offline, as it were, but we will certainly work to a similar timetable to that now (inaudible) by the Tribunal.

MR JUSTICE MARCUS SMITH: Thank you, Ms Smith. There are a lot of valuable points on that, which I will come back to after I have heard from Mr Bates, because I understand you have entirely understandably points to make in relation to what we are discussing. So over to you.

MR BATES: Thank you, my Lord. We agree with the principles of what Mr de la Mare was setting out in terms of being expert-led, etc, but we certainly share the concerns that Ms Smith set out about the need for this to be managed properly.

There is a risk, if you try to do too much at the same time, actually it just becomes chaotic and breaks down. If there is to be earlier disclosure, and we say there should be disclosure of materials earlier, where there are low-hanging fruit and they can be identified relatively easily, etc, we still need to make sure that they are searched for properly and that they are identified completely.

Also there are issues about the scope of what's to be given, because even, for example, for contracts with bookmakers and contracts to source data, etc, there will be issues about product scope and geographic scope of the customers as well.

So there are a number of matters which we suggest would be properly considered by the experts meeting early. They can then identify, as Mr de la Mare set out, what it is that they think they will need and what their priorities are.

The parties can then identify which of those materials that are needed as priority can be provided early, and how much time that's going to take, and have that dealt with in an organised manner, led by the experts, following their meeting, which is going to be pretty soon anyway.

In my submission, that's going to be rather more efficient than trying to give something before an experts' meeting, which may just be in a few days' time.

I would also respectfully agree with Ms Smith's suggestion that all this be managed through the DRD that her clients have very helpfully already produced, and which we may as well all take as a starting point, add to with the expert issues, and use that document to manage the disclosure process.

It doesn't mean everything has to be provided at the same time. It just means that we are not having lots of exchanges of correspondence and requests flying around from experts, etc, that are not being dealt with in a managed way.

MR JUSTICE MARCUS SMITH: Thank you again, Mr Bates. That's also very helpful.

Mr de la Mare, I will come back to you, but I am going to give a provisional indication as to where I think we want to go, because I want to articulate how we are going to address the concerns that Ms Smith and Mr Bates have quite helpfully articulated.

It seems to me that we want to walk before we run, and that we mustn't rush the process by which we frame the procedure that we are contemplating. It has a lot of moving parts. I think, Ms Smith, your point that one needs to ensure that we don't lose sight of, as it were, traditional disclosure in our concentration on the expert-led elements of disclosure is a very fair point, and it seems to me that we ought to be envisaging that the order that we are contemplating is one that might actually take us not into just the beginning of next week but perhaps the end of next week, or maybe even the week beyond, because this is actually tricky stuff and you are all I know busy people.

That I think is the first point that I take from what you are saying, that we need to take our time about this and get it right, but it seems to me that that doesn't mean that we sit on our hands in the meantime. I think it is perfectly clear that there are some directions that I can make which are in anticipation of the regime that we are going to agree, because they are so clearly going to be needed.

So it seems to me that I absolutely ought to direct that the experts meet to discuss

disclosure questions by 6th July 2021, and they just need to get on with it. Now, you are not going to be able to tell them what "it" actually is from this direction, but you are going to be able to tell them, with a high degree of specificity, what they need to be thinking about in very short order. So it seems to me that is the direction. I can make an order or you can just go away and realise that I will make a direction to that effect. I don't care, as long as you know that that is work that needs to be done.

The other area where I think we ought to, if only to signal the desire to get on with things, is whether we -- and I am looking here at Mr de la Mare's clients' order in the bundle, where he has articulated the categories of documents that he wants early disclosure of.

Looking at that, it seems to me that the specific disclosure that he seeks in paragraph 11 is not something that I am prepared to grant today. It seems to me it has too many moving parts that would be better governed through the prism of the process we are considering, but I don't think the same is necessarily true of the specific disclosure in 12 and 13.

Slightly contrary to what I said before the short adjournment, I would be interested in hearing from Ms Smith, you, and, Mr Bates, you, whether that is something that I can direct, entirely without prejudice to how the regime goes forward. We would simply treat this as low-hanging fruit that the parties can get on with, according to a time-frame that works, and we just get on with it, allowing us to focus on the importance of getting the rest of the regime right.

I am treating this as low-hanging fruit in the true sense of the word, but the question is whether it is indeed low-hanging fruit.

Obviously, Mr de la Mare is going to say: "It is low-hanging fruit of the most pluckable sort", but Ms Smith, Mr Bates, you may have very different views,

and if there are any hidden thorns amongst the low-hanging fruit, we had better find out what they are. That is what I had in mind by way of a broad process.

Before I hear from Mr Bates and Ms Smith on the low-hanging fruit, Mr de la Mare, you are the one who is pressing the "Let's move quickly" button.

Does that fit with the desire to move forward swiftly, but also with the equally important desire of getting it right? You are muted, Mr de la Mare.

MR DE LA MARE: Absolutely, my Lord, because, as you will recall from when I summarised where we were at, what I proposed is that we move category 1 from immediate disclosure --

MR JUSTICE MARCUS SMITH: You did.

MR DE LA MARE: -- to being effectively a topic for priority discussion amongst the experts. We think the whole issue of off tube is one of the critical issues in the case, but we can see the force in the fact that others may see different ways to skin the cat or formulate what data is required. That's an area where we think we would profit from discussion, albeit we suspect discussion also directed at early disclosure of that material. That would profit from discussion between the experts.

The other two categories are not low-hanging fruit. The fruit has fallen from the tree, at least in some respects. It also has the benefit of being not only material that we have gathered for other purposes, but obviously relevant on any analysis. Whatever the arguments are about the scope of the SDSB market, you know from the pleaded case, our case is essentially clearly that this is worldwide in bundles. The rights are bought worldwide. They are sold to bookmakers who buy the rights worldwide. Worldwide sports are used to compete with each other. If I don't have EPL, I might have Major League

Baseball, or whatever it was. That's the parameters of dispute.

We can't second guess whether the narrow or the wide market definition is right. We need to start with the materials. That being so, I can't see any world in which these agreements aren't going to be required to be disclosed, ditto the bookmakers' agreements, and we should be getting on with it.

That's what RBB said in the letter, and what they said makes a lot of sense. This is somewhere to start the analysis and start beginning to generate the common data. It is a burden for Sportradar. It is a burden for Genius. It is not a burden for FDC, so far as that is relevant, because FDC does not have any of these materials, certainly not on a systematic basis.

It is a very sensible place to start the process of inquiry, in our submission.

So yes, we agree that category 1 could and should be parked, subject to the provisos I have given, but we maintain our requests in relation to categories 2 and 3.

MR JUSTICE MARCUS SMITH: Thank you. Ms Smith, do you want to go first?

MS SMITH: I will be very brief, because these are not documents, as is made clear, that are sought from my client.

MR JUSTICE MARCUS SMITH: I understand.

MS SMITH: So it's really Mr Bates who will need to respond to you on the request in 12 and 13. This does appear to be sensible. One point I just want to clarify. At the moment, on the face of Genius' document, this is disclosure that is sought from the claimants. It is not clear to me, although it appears possible from Mr de la Mare's submissions, that disclosure of these documents will also be given at this date by Betgenius, who will give also disclosure --

MR DE LA MARE: It was very clear in our skeleton argument that we were proposing it be done on a reciprocal basis. Indeed, there will have to be some

disclosure from FDC, if only to disclose its own agreement and previous agreements. It is a pretty light burden. It should be a burden on all parties who litigate --

MR JUSTICE MARCUS SMITH: Yes. I think I am proceeding on the basis that these orders will be made in respect of all parties, although, of course, some parties will be affected more than others, and it is from those parties that I am principally wanting to hear. Unless I order to the contrary, these are going to be orders that are, in theory at least, applicable to everybody.

So thank you, Ms Smith.

Mr Bates, I think you are the person I most need to hear from on this.

MR BATES: Yes. I don't demur from the point that documents falling within 12 and 13 will be highly relevant and should be provided at an early stage. In terms of the scope of them, though, as I mentioned earlier, there are issues as to the precise scope of what's being asked for, which has an impact on how long it would take to provide them.

To take 13 as an example, that doesn't appear to be limited in any way, either geographically or in terms of the sports.

Sportradar is a substantial international operation. I don't know, because I don't have instructions on this and have had limited involvement generally, as your Lordship knows, how many contracts we would even be talking about there, or how many sports, etc. That is an important factor that will affect the timing.

I note that this early disclosure was being sought by these paragraphs by 20th August. It may be that some of these documents and the ones that are really needed could be provided rather earlier than that. That's why my suggestion is that we wait for the experts to come to a view as to what they need and then we seek to provide it as quickly as possible.

If Mr de la Mare is not happy at that stage by what we have offered, then clearly that's one of the things that can return to your Lordship in writing.

I should make clear as well that my instructing solicitors have not simply sat on their hands, having received the letter from RBB. They have consulted with Oxera Consulting about the RBB letter. Oxera's initial indication, although they have not had time to go into detail on it, was that they thought what was being asked for was rather more than they thought was really essential. As I say, the way to resolve that seems to me to be for the experts to talk to each other and identify more precisely what they need, and for us to identify how many documents that is.

I understand the position of Genius, in that they have already collected some documents that are relevant to their business and the way their business is structured, etc. I don't know if there's differences at all that makes that easier for them than Sportradar or not. I simply don't have that sort of knowledge. But they have done the work.

We, of course, would be gathering these materials, and some of the categories, for example, 12 (a), I don't know, for example, whether those contracts will be readily to hand or what search activity we would have to do in order to identify which of these contracts are for more than one sport, etc.

There is no unwillingness on my clients to be as helpful as they can. We just ask for the meeting with the experts to take place first and for us to then firm up what we are able to provide in the timetable.

MR JUSTICE MARCUS SMITH: Thank you, Mr Bates. That's very helpful. Mr de la Mare, do you want to come back on that?

MR DE LA MARE: Yes, my Lord. The question of the scope of these documents and which sports they encompass, our case literally couldn't be clearer from

the Amended Defence, that we say that competition in the SDSB market is by bundles of sports data that may or may not include live league match data. Indeed, we have pleaded that one of the principal competitors on the market, IMG, does not have and has never had an LLMD offering. Perform historically had such an offering and doesn't now. One of the other competitors, SCM, seems to have an offering predicated on scraped data, but not off tube or official data. As we know, my learned friend's offering is based on scouted data. We have been absolutely clear that we consider that the market definition is set by reference to all forms of sporting rights, in relation to all forms of sports on which there's appreciable live in play betting, not just football, and certainly not just English football or, more accurately, certainly not just that English football that's Three Leagues football, but is not FA Cup football, isn't the Euros, or anything of that kind.

The scope of the relevant agreements has been clear ever since our first Defence. It is not an issue that we are going to get behind with the experts. It is not going to alter the need for these agreements to be disclosed.

I can't really see how there's any material issue about whether or not the DRAs in relation to different sports or in different territories are going to require to be disclosed. They obviously are.

In terms of how onerous that exercise is, we can give you a reasonable idea, because in the SCM litigation the IP infringements claimed, the breaches of database rights, have necessitated the identification of every single one of our material database rights in relation to every sport in which we have an offering, all of which we think is being scraped by SCL. So we have done a comprehensive list of our agreements, and we understand that in broad terms Sportradar is an undertaking of roughly the same size as ours, roughly

the same number of DRAs. It is somewhere in the region of 150 to 200 agreements across the board, because obviously some sports, like football, are highly fragmented. There are different DRAs for the English Premier League, for La Liga, etc, etc, Other sports, tennis, for instance, or baseball, are highly concentrated, and there might be one agreement for the entire sport.

That's what we understand the position to be. It took us two or three weeks to get those materials together. We are happy to listen to anything sensible on that front. What there can't be any doubt about is that that exercise should be for the worldwide agreements in relation to all of the sports for which they have an offering.

I appreciate the difficulty my learned friend is in, having come into this case late. Whilst that might be an excuse for him, it does not excuse those who sit behind him, because these issues have long been clear. The issue of market definition has been looming for some time.

We do say the DRAs are low-hanging fruit and we do say that the bookmakers' agreements are low-hanging fruit. If you want proof positive of both of those things, in relation to the bookmakers' agreements, my learned friend's pleaded case says that they reserve the right to further particularise their case in relation to our alleged abusive activities or anti-competitive activities, once they have had sight of our bookmakers' agreements, not least because they make the allegation that we are somehow leveraging LLMSD into selling other forms of SDSB data.

If there is to be a further particularisation of the pleadings, it is obviously desirable that those agreements are identified and exchanged as early as possible, because we want the pleadings to be locked down as quickly as possible.

As regards the data rights agreements, my learned friend's pleaded case was that they were going to come with proposals about the disclosure of the DRAs at the CMC. We are now at the CMC. So it really does not behove Mr Bates to say that they don't actually have any proposals or have not applied their mind to it. They have had our application for over a month.

MR DE LA MARE: Yes. In those circumstances, I do invite you to pick the low-hanging fruit. The experts need to get cracking. If there is any prospect of a trial starting on 28th June, the quicker and further we can go in getting the experts the material, the better. It is really indispensable, for that sort of time-frame to be even realistic.

MR JUSTICE MARCUS SMITH: Thank you.

Mr Bates, I am going to give you the last word, because you are the most involved in this. You don't need to address me on the question of Sportradar sitting on their hands or in some way being dilatory. I don't need submissions on that. If you have anything about the process that I should take, using a forward looking view, then I will gladly hear you.

MR BATES: My suggestion, my Lord, would simply be that the experts have their meeting next week, that Sportradar then set out its proposal for providing documents within these categories, assuming the experts say that they are needed, and that we confirm the date by which we will be able to provide them early. As I said, if Mr de la Mare is not happy with that, he can, of course, immediately revert to your Lordship by e-mail. That's my proposal and I maintain it.

MR JUSTICE MARCUS SMITH: I am very grateful. Thank you very much, Mr Bates.

RULING

MR JUSTICE MARCUS SMITH: Further to my ruling of this morning, I have before me a number of consequential matters which will need to be embodied in a specific order, which is going to take some considerable time to draft. The reason it is going to take some considerable time to draft is because the issues of disclosure which arise in this case are not necessarily completely atypical of competition cases, but they do present the sort of disclosure difficulties that arise in competition cases and which need to be addressed if cases are to be efficiently and properly case-managed early on.

Accordingly, we are going to grasp the nettle of how to deal with the question of disclosure, including in particular in relation to economic evidence of disclosure, in an order that is, I consider, going to take some days to draft and get right. I don't want to anticipate in any shape or form the broad outlines of the order that I intend to make, but it will be the subject of detailed drafting.

It may be that I will make a short ruling at the time the order is finalised, explaining how it is intended to operate, as a template for future actions, but that is a matter which I will leave to myself to consider further.

The upshot is that on a number of the points that I have been addressed in the written submissions, I am going to make no particular ruling, because the parties know the direction in which they are heading and what the order needs to say.

So, for instance, I am not going to address costs budgeting, nor am I going to address the scheme that should apply for disclosure or witness statements, because those are matters on which the parties are broadly, if not in complete agreement, then in sufficiently substantial agreement to enable an order to be worked up.

What this ruling is going to deal with is the question of what happens during the time

in which it will take to draw up an order that is going to properly and competently govern this very complex process going forward.

Ms Smith put the point extremely clearly when she said, and I am summarising, that one should walk before one can run. She made the entirely correct point that if I am to make a series of orders today, there's a high chance that we will end up with effectively two regimes which compete against each other and serve no particularly clear purpose, and that is something I have well in mind in considering what orders I should make this afternoon.

I am going to direct that the experts meet as often as is necessary, by no later than 6th July, and I make clear that those meetings will have to continue until after 6th July, but I want at least one meeting to take place on or before 6th July between the experts, so that they can get the ball rolling, as it were. The order is going to be pretty unspecific, because the 6th July date is one that will have to be woven into the more detailed regime that will be drafted up.

More controversially, or more difficultly is the question of whether I should order any disclosure today.

Mr Bates, quite sensibly and entirely appropriately, submits that I should not be tempted down the path of making any form of order today. Rather, I should leave the matter over for the parties to consider in light of the indications I have given and in light of the more complicated and detailed regime that will be under draft. He therefore invites me that of the three categories of disclosure that are sought in Mr de la Mare's draft order, which are set out in paragraphs 11, 12 and 13, I should make no order in respect of any of these three classes.

To be clear, Mr de la Mare does not press the early disclosure sought in paragraph 11 of his draft order. He is entirely right not to press that, because

this is precisely the sort of area of economic disclosure which requires careful thought. It is a nuanced, and if I may say so, difficult head of disclosure that will require thought.

I am satisfied, however, that that does not apply in relation to the second and third categories of disclosure sought by Mr de la Mare set out in paragraphs 12 and 13 of his draft order.

It seems to me that the order properly caters for the confidentiality of the materials that he seeks in those paragraphs, in the later paragraphs of the order, and I make it absolutely clear that the disclosure orders that I make today apply, at least in theory, to all parties, and apply subject to the proper negotiation of a confidentiality protection that is, as I see it, provisionally drafted in paragraphs 14 and following of the order. But if the parties have any improvements to that order, then I consider that those can be articulated in short order and agreed.

I am going to order disclosure in respect of paragraphs 12 and 13, because it seems to me those classes are clearly going to be necessary, and also are, no doubt because they are so clearly necessary, going to be the subject of quite careful and detailed evaluation by the parties' various legal teams. So it seems to me important that we get on with it.

It seems to me also that this disclosure can be ordered today without prejudicing or damaging or making less clear the more detailed regime which, as I have said, will need to be drafted up quite carefully.

So I am going to order disclosure substantially along the lines of paragraphs 12 and 13 of the order, but with a couple of embellishments.

First of all, the date for disclosure is set at 20th August 2021 in the case of each of those classes. That to my mind is an extremely generous date, given the

process. I am not going to accelerate it, but I am going to say that the order should read as follows:

"By no later than 4.00 pm on 20th August, 2021, the parties give disclosure" and then there follows a description of that disclosure, "on a rolling basis."

So I am expecting that the parties will begin to produce agreements within the 20th August time-frame, as quickly as they practically can, and that those documents are disclosed on a rolling basis into the confidentiality ring.

I am also going to order, and this is out of deference to the fact that Mr Bates has been dropped into this case in a very late way -- he has done an excellent job for his clients, but it does seem to me that I must reflect on the fact that he has not been involved in the disclosure issues in the detail that perhaps other counsel have been, so I am going to insert a liberty to apply to review the orders I have just made in respect of disclosure, so that if, on mature consideration, there is a contention that Mr de la Mare's argument that worldwide agreements, for instance, should not be disclosed can be properly articulated.

Let me be clear, it seems to me that the disclosure, as formulated in paragraphs 12 and 13 is appropriate and should be made, but I have based that on the pleadings, and I have based it on the submissions of Mr de la Mare, and I want to give Mr Bates' clients at least an opportunity by way of a liberty to apply to say: "Hold on. We think that the order should be narrowed in a particular way".

I don't want that to be used as a reason for not beginning the disclosure process as regards these documents. It seems to me that any suggestion that the disclosure that I have ordered be narrowed will have to be made on or before 6th July 2020. So the liberty to apply extends only to that date, and after that

the order is set in stone.

That is as far as I think I am going to go in terms of orders today. I will, of course, hear from the parties if they consider that there are any other orders that I can appropriately make, by which I mean usefully make today, but otherwise I would be minded to leave the detail over to reviewing the draft that the parties have helpfully indicated they will talk about over the ensuing week or so.

Mr Mill, I see you have hove into view.

MR MILL: I have, my Lord, because I was wondering whether your Lordship was minded to make orders going forward in terms of disclosure more generally and witness evidences and experts' reports.

MR JUSTICE MARCUS SMITH: Well, I think I am in the parties' hands here. In one sense, if I make an order as to trial date, the parties will be equally incentivised to ensure that they get a workable order together. It does seem to me that these are matters which, when once one has got the foundations of the disclosure regime sorted out, which to be clear includes not just economic expert evidence disclosure but also all other forms of disclosure, the witness statements and expert report timings will probably fall into place without my having to make a direction today.

MR MILL: My Lord, sorry to interrupt you. What I was going to say, which has really flowed from what your Lordship was just saying to me, was that I was going to invite your Lordship to give a direction or a ruling as to when the trial should start and for how long, and then leave it to us to sort out the intervening, which I think is what your Lordship just said.

MR JUSTICE MARCUS SMITH: That's exactly what I was thinking about. It seemed to me that was the last item of business for us to address unless, Ms

Smith, I have missed something, which clearly I have.

MS SMITH: There is our Part 18 request that you indicated earlier you hoped might be able to be dealt with in the context of the Disclosure Schedule, but our request, if I could be given the opportunity to make submissions on it now or subsequent to you making a determination on trial date, is a request that goes to clarification of the pleadings, and I don't think will be able to be dealt with by way of disclosure or even by way of identification of disclosure issues. It is a pleaded case. It goes to the legal issues, and we do require an opportunity to explain to you how and why we need our request to be answered.

MR DE LA MARE: The other issue, my Lord, the other remaining issue I think a ruling is required on is whether or not the questions of quantum in relation to the High Court claims are folded into the case.

MR JUSTICE MARCUS SMITH: Yes.

MR MILL: That was contentious?

MR DE LA MARE: I am not sure Mr Bates agreed it.

MR MILL: Mr Bates didn't disagree it.

MR JUSTICE MARCUS SMITH: We will hear from Mr Bates, of course. My understanding was that the competition quantum claim was out but the High Court quantum claim was in. If I have got that wrong, someone will correct me. We all look at you, Mr Bates, I think.

MR BATES: That was also my understanding, my Lord. So there is no correction from me.

MR JUSTICE MARCUS SMITH: No correction there. Very good. Well, what we are going to do is we are going to deal with the trial date first and then we will go on to the RFI.

Let me just make sure I have got the right year in my diary before we do anything

else.

We are talking about a 23-day trial. Now that can be expanded or contracted within reason, and we are certainly not saying anything about how the order should be structured. I also have in mind the point made by Mr Bates about leading counsel's convenience, but I am afraid I think that, particularly since I am cracking the whip, the parties ought to get some benefit of the whip being cracked in terms of an early resolution of matters, so I am going to order that we have a trial that will run from Monday, 27th June -- now that may be a reading day. We can talk about that later, but that is the starting time for the trial, which will run until the end of term. That is more than 23 days. We can narrow it down in due course, but that is the period of time that the parties need to diarise as having to be available before the Tribunal, and it may be that I will allocate further reading time before that.

One of the advantages of having a docketed tribunal is that actually we do the reading as it comes in. So you can take the 27th as a pretty hard start date, if that's the date I actually said -- the 27th as a pretty hard start date for the trial.

MS SMITH: Can I just double check, my Lord? I have in my diary, but just for the record, that Trinity terms ends -- you said to the end of the term. I have in my diary that Trinity term ends on 29th July.

MR JUSTICE MARCUS SMITH: That's the Friday. We have essentially that month, a month plus 2 days. I think that's just about 23 days. If it is not, we will have to work to fit it in in that term. I know I can count on the parties' assistance in doing that. We will be discussing more specific things like timetables much closer to the date. It is just important that we have a time in, and that is the time.

That leaves us with the RFI. It seems to me important that we adjust the urgency

with which such clarifications are sought, in light of the trial timetable. It seems to me that where a party requires clarification of a pleading, when one has essentially a year to go -- we are at 12 months plus a couple of days -- we need to get all points in order.

Now, just remind me. I did look at these, but I can't remember which bundle they were in. It is bundle 2B?

MS SMITH: The request is 2B. Well, our request is in tab 6.

MR JUSTICE MARCUS SMITH: 2B, tab 6.

MS SMITH: Response is in tab 8, but the requests that we apply -- effectively they have answered our requests 1 through to 11. They have effectively refused to answer our requests 12 to 17.

MR JUSTICE MARCUS SMITH: Right. Let me re-read those.

MS SMITH: Those start on the bottom internal page 7 under the heading -- it is rather unhelpful -- "scope of duty to supply".

MR JUSTICE MARCUS SMITH: I am looking at the answers, because I want to look at the whole thing. So which page of the bundle is that?

MS SMITH: That's tab 8. Request 12 starts on internal page numbering 11, bundle page number 53.

MR JUSTICE MARCUS SMITH: 53. Thank you.

MS SMITH: Under the heading "Scope of duty to supply".

MR JUSTICE MARCUS SMITH: Yes, there we are. Thank you. What I am going to do, Ms Smith, is I have read these but I have read an awful lot in the last 24 hours. So I am going to re-read them before I determine how you can best assist me in the submissions. (Pause.)

Thank you very much. I have read those again. What I am going to do, Ms Smith, is I am going to invite Mr Bates to make the first move as to why these requests

should not be answered and give you the opportunity to respond, if that meets with your consent. I am very happy to require Ms Smith to set out argument, but I imagine that's pretty clear.

MR BATES: Yes, my Lord. If I can look at the two paragraphs of the claim to which this relates within the context of the Claim Form -- the Claim Form is tab 1 of the same bundle.

MR JUSTICE MARCUS SMITH: Yes.

MR BATES: The two paragraphs about which questions are asked are 93 and 98. So 93 is the one on page 45, which begins:

"For the avoidance of doubt ..."

MR JUSTICE MARCUS SMITH: Yes.

MR BATES: What that paragraph is doing is making clear our case which comes after we have already set out the abuse of dominance that's already pleaded at paragraphs 83 to 92, what we say the consequence of that is. We say the consequence of FDC's exclusivity approach is that FDC and the other holders of the property rights cannot rely on the admission terms to give effect to the unlawful abuse. Put another way, FDC can't say: "Okay, our exclusivity approach was an abuse but we can still rely on the admission terms against you, even though they were to facilitate and implement the abuse".

So that's what that paragraph is making clear. We note that the President considered the pleadings and did not find there to be any lack of clarity on what Sportradar were saying, including as to the consequences of the alleged infringements for the extent to which the admission terms could be relied on. Your Lordship has seen that from the judgment. So all that was clear.

Now, what FDC are really asking us to do is to respond to their legal arguments in their Defence, because what they have pleaded in their Defence is that

reliance on the admission terms could be an abuse only in exceptional circumstances, and that means, they say, where access to the live match data is essential in order to compete in the market. So that's their legal case. They are then saying to us: "Since that is our legal case, we now want you to plead some facts to answer that particular legal case".

What we say about all of this is there's no deficiency in our pleading of the abuse that we are alleging, and we don't consider it proportionate to require parties to bat each other's legal arguments back and forth through RFIs, in circumstances where Sportradar has adequately pleaded its own case, and obviously FDC can raise, you know, whatever they want in response.

Of course, essentiality is certainly already an issue in the proceedings. So there is no question over whether essentiality is something that's going to have to be dealt with, including by the expert evidence. So that's why we say requiring us to do more in relation to paragraph 93 is disproportionate.

In relation to paragraph 98, what we have set out in paragraph 98 is that had it not been for the two infringements, so Article 101 and 102 infringements, Sportradar would have been granted a licence.

We can't be more specific about that at this stage, in terms of what would happen in that hypothetical scenario, because it would be a matter for FDC to decide on the precise arrangements by which it sold rights to collect or access the live data under lawful non-exclusive arrangements. The assessment of how FDC would have done that and how that impacts on Sportradar's losses are matters for factual evidence and assessment. We have set out what our position is in 98, as far as we can.

Again, we say there is simply no need to dig into this further by way of RFIs at this stage.

We are not saying, we have never been saying that there would need to have been a free for all to collect data, or that FDC would have had to grant licences to all comers. So if that's what they are asking for clarification on, we have always been clear that that's not our case.

Our case has always been that what's made their conduct unlawful and the agreement unlawful is the exclusivity aspect, and that's very clear from our pleading.

MR JUSTICE MARCUS SMITH: I'm grateful, Mr Bates. Thank you. Ms Smith.

MS SMITH: Sir, I think it is important, if I may, to focus on what we actually ask for in requests 12 to 17. Just to outline how we understand Sportradar's case, their primary case under Article 102 is that we abused -- this is the Article 102 case, not the Article 101 -- is that we abused the dominant position by entering into the FDC/Genius agreement, on the basis that this exclusivity agreement and the grant of exclusivity (i) differs from normal competition and (ii) is capable of hindering competition in the relevant market. So they attack the FDC/Genius agreement. That's paragraph 87 of their Claim Form in the CAT action. That's their primary case. The exclusivity agreement is an abuse.

Their secondary case is that set out in paragraph 93 of their Claim Form, which is what's reproduced in the request, which is that insofar as we seek to rely on the ground regulations, ticketing conditions and property rights, as justification for the agreement, they will say that reliance on those separate contractual terms, property rights, is unlawful, because the holders of those property rights are required to grant access where barring entry infringes Article 102. So that's their secondary case.

They are moving from the exclusivity argument to saying that Article 102 gives them,

paragraph 93 says, an independent right to get access to the grounds.

We asked for particulars of both the primary case and the secondary case. In the primary case, which is that the exclusivity agreement itself is an abuse, one of our defences inter alia is that set out in paragraphs 123 and 124 of our Defence, which is what's reproduced in our Request for Particulars on page 54 of the bundle.

MR JUSTICE MARCUS SMITH: Yes.

MS SMITH: In summary, we say when we are dealing with intellectual property rights or property rights, or private property rights are involved, it is not a normal test of whether something is capable of hindering competition or it differed from normal competition in the market upon which the agreement operates.

A different test is to be applied, which requires exceptional circumstances or indispensability.

You will see it is paragraph 123 of our Defence, the top of page 54:

"A refusal to license can't amount to an abuse, in the absence of exceptional circumstances. It is only where the refusal or exclusivity relates to a product or service which is indispensable to the exercise of a particular activity on a neighbouring market, the refusal or exclusivity is of such a kind as to exclude any effective competition on that neighbouring market, and the refusal and/or exclusivity prevents the appearance of a new product."

That is based, as Sportradar is well aware, on case law relating to restrictions of competition in the context of IP rights, so cases such as the cases that we referenced in our skeleton argument and, in fact, were referenced specifically by Sportradar in our last hearing in front of the Tribunal, cases such as *Magill* and *Bronner*, cases on IP rights and the interaction of IP rights, property rights

and competition law rights.

We say there's a separate test to be applied where we are in the context of IP law rights.

Sportradar have failed completely to plead to, in their Reply, paragraphs 123 or 124 of our Defence. They have just not pleaded to them at all. So our requests in request 14 through to 17, if you look at our request 14, on page 56:

"Given Sportradar's failure to plead to paragraph 123 of FDC's Defence, please confirm whether there are exceptional circumstances."

Paragraph 15:

"If you do make such a case, please provide full details of such exceptional circumstances.

Without prejudice, please explain how you say that our grant of an exclusive licence to Genius relates to a product or service which is indispensable to the exercise of a particular activity on a neighbouring market and identify the product and the neighbouring market."

It is not just a question of law, but we need to know what their argument is, first of all, whether they accept that the approach taken in cases such as *Magill*, as set out in paragraph 123 of our Defence, applies in this instance. If they do accept -- and, if not, why not. If they do accept that the *Magill* type approach does apply, we need to know what their case is. What are the exceptional circumstances? What is the neighbouring market and what are the products. That is the real crux.

We have to know what they say, for example, what the neighbouring markets are, because without knowing that, our experts do not know what evidence they have to give, because they do not know what markets are in issue here, and they do not know what Sportradar's case is on what the neighbouring market

is and what the effect on competition in those neighbouring markets are.

So without having a pleaded case from Sportradar on that issue at this stage, we do not know what the ambit of our evidence needs to be in response. I give you the example specifically, request 15:

"What is the neighbouring market? Without that our expert does not know what she should be looking at."

The same in our request 17 on page 57:

"Please explain how Sportradar argues that the refusal to licence them or to grant access eliminates competition on the neighbouring market. Identify the neighbouring market and explain how competition on that market is said to have been eliminated."

So it is those sort of issues that we need clarified, as regards the primary case.

The secondary case is then the relationship between the exclusive agreement that we have entered into with Genius, which they say breaches Article 102, and how they jump from that to saying that the ground regulations, ticketing conditions and our property rights, a quite separate set of rights and agreements, are also said to infringe Article 102. They say the holders of the property rights in the stadium are required to grant access to rival data scouts, where barring their entry infringes Article 102. That's paragraph 93 of their Claim Form in the CAT action.

We ask in our requests 12 and 13 -- first we say, this is request 12:

"Confirm it is Sportsradar's case that we or the clubs are required, pursuant to Article 102, to grant them access to the grounds."

Then we ask for particulars of their case in that regard, paragraph 13.

Basically, we need to know what are the parameters of that access that they say needs to be granted. Are they saying we need to give everyone access if we

have a dominant position in the supply of this data? Do they accept that we can restrict access? If so, to what extent? Do they accept that we can impose charges for access, or do they say that such access has to be granted free of charge, and, if so, what do they say on the level of those excess charges?

These are fundamental issues. All that Mr Bates has said is that we have said, insofar as the exclusivity infringes Article 102, and he would rely on it to bar access to the grounds, that's also unlawful. We need to understand what are the positive obligations that they say arise, under Article 102, on us as the holder of the property rights in the grounds, and the person who has implemented ground regulations and ticketing conditions as a matter of contract law, what the nature and ambit of what they say we are required to do under Article 102, and at the moment we don't have those particulars. Again, those are the particulars that we see in requests 12 and 13, and these are not matters of evidence. These are matters of clarification of the ambit of their case against us. We require those particulars in order to be able to prepare the case and prepare our expert evidence in particular, and also our witness evidence to understand just what the nature of their case is against us in this regard.

MR JUSTICE MARCUS SMITH: Thank you, Ms Smith. Given the way I have ordered matters, Mr Bates, you absolutely have the last word. I imagine there are matters you would wish to respond to in respect of Ms Smith's submission. So over to you.

MR BATES: Yes, my Lord. I think I can be very brief and simply say this, which is that if the concern is that 93 (b) of our claim is a matter that they require us to unpack in some way, then if the request was for us to do that in relation to 93

(b), then it may be that that would be a proportionate request.

What we have a concern about is this long list of very precise questions, which is really asking us to set out our factual case, as I have said, in response to the way that FDC are putting their case and their Defence, and the matters which they say, as a matter of law, are the things that would have to be proved in order to show a separate abuse arising out of the not permitting access to the grounds for the purposes of collecting the data. That's what we say. It is disproportionate to do that when there is no inadequacy in our pleading. As I say, if what they want is clarification of 93 (b), then that is something which I suspect we would be able to provide to them.

MR JUSTICE MARCUS SMITH: Thank you very much, Mr Bates. I am much obliged, as ever.

RULING

MR JUSTICE MARCUS SMITH: Finally, today, I have before me an application for an order that Sportradar be required to respond further to requests 12 through 17 of the Request for Further Information served and filed by Ms Smith's client.

The application is resisted by Mr Bates, essentially on the basis that the pleading that his clients have framed is clear, and indeed found to be clear by the President hearing on an earlier occasion the question of a transfer to the High Court of certain claims, but also that the request for information of the pleading is unnecessary, because it essentially is seeking a legal answer to a legal question.

It seems to me that neither of those objections is well-founded. I make no criticism of the pleading articulated by Sportradar. It seems to me to be a well-framed and well-drafted piece of work. The peculiarity of competition litigation is that

it is important to be very clear about what points are in issue and what points are not in issue, because at a very early stage, and I mean by disclosure, it can be critically important to understand the precise parameters that are being investigated.

Equally, the elision between points of law, points of fact and points of expert evidence are much more fluid in this sort of case than they are in an ordinary commercial action, and it seems to me that in those circumstances it behoves the parties to raise early and to answer early questions like this.

It therefore seems to me that it is appropriate that these requests were made and that it is incumbent upon Sportradar to answer these questions so that everyone, the Tribunal included, has clarity about what exactly is being said.

So without in any sense making the implied criticism of a pleading that normally arises when there's a request for further information, I am not making that. I am saying, however, that this sort of clarity is desirable and therefore I am going to order it on this occasion.

So Sportradar are entitled to a reasonable amount of time to consider their response to requests 12 through 17. We are now at 22nd June. I am certainly minded to allow Sportradar until 6th July, but if you need longer than that, Mr Bates, do please let me know.

MR BATES: I think 6th July will be acceptable, my Lord, yes.

MR JUSTICE MARCUS SMITH: Well, that's very helpful, Mr Bates. I am much obliged.

I am going to do a roll call of further points. I will begin with you, Mr Mill or Mr de la Mare.

MR MILL: I am grateful to my Lord for doing that. It is not a point but it is just an observation, if I may.

MR JUSTICE MARCUS SMITH: Of course.

MR MILL: There is bubbling around on the peripheries of the documentation questions and uncertainties about various draft amendments which the parties have exchanged. I have absolutely no intention of drawing them to your Lordship's attention, but I would observe, and I am sure your Lordship would endorse this, that it would be about time for those parties who have not responded to whether or not they consent to do so in order that, if there is any issue, your Lordship can be made aware of it, but I would expect there to be a consensus around all issues to do with outstanding amendments. That's the first point.

My Lord, the second point is really addressed to Mr Bates, which is to say I very much look forward to seeing his first draft of the order.

MR JUSTICE MARCUS SMITH: Mr Bates, over to you and then I will hear from Ms Smith.

MR BATES: Yes. On the subject of amendments certainly my understanding was that nobody was objecting to others' amendments. It may be that for some of the amendments there will need to be consequential amendments to responsive pleadings, though that may be something that can be sorted out amongst the parties.

The only issue that we have raised about the amendments was simply in relation to costs the fact that we will have to respond to the amendments which plead for the first time matters to do with the variation deed -- the deed of variation to the agreement.

Now that is a document that existed at the time when Genius and FDC pleaded their Defences, so it is not clear why it is only now that that document has been disclosed when it was clearly a critical document and why the amendments

are only being made now. So for that reason we have raised an issue about costs of our needing to amend our Reply to take account of that, but I think, apart from that very minor point, everything is agreed.

MR JUSTICE MARCUS SMITH: Well, my understanding about the usual rule is where the amendment is allowed, the party who has to respond get the costs of and arising out of the amendment. Obviously there are exceptions to the rules, but that seems to me to be the usual rule.

I don't want at this stage to get into matters which, if I am frank, really do need to be dealt with by consent, and one of the things that I am going to suggest for future minor issues is that if the parties can't resolve matters in correspondence, they should sooner rather than later have a word with my clerk, explaining what the issue is in very neutral terms, and I will react accordingly. I have found that one of the big advantages of dealing with things remotely is that one can schedule a half hour hearing at 9 o'clock on a morning to deal with a discrete matter and nine times out of ten that matter is magically resolved by agreement before the hearing is necessary.

So I am going to invite the parties to at least communicate with my clerk, Mr Morris, or through the CAT -- I am happy for either route to be used, or indeed both -- and I will endeavour to be as proactive as I can in assisting the parties to reach a sensible outcome.

It is probably worth flagging that the parties have, entirely understandably, been copying the Tribunal into every piece of inter partes correspondence and that is the usual rule. I am bound to say the volume has been quite high, and what I would encourage is perhaps that the correspondence that the parties choose to copy to the Tribunal is the critical correspondence rather than the minutiae simply because I want to preserve not so much trees as electrons and ensure

that we don't spend too much of the administrative time of the Tribunal just reading material that is quite rightly being sent to us for noting.

So I am not saying we don't want to see what's going on. We do, but I would invite the parties to exercise a measure of judgment in terms of what they send in. I can't make that a direction. I am not going to. I am just making a plea that we have the material material rather than the less material material.

So, with that said, I am not going to rise to the question of amendments, but I am going to allow that to be a test case for the first hopefully non-event remote hearing in the next week or fortnight, and I hope that can be resolved.

More seriously -- again I am not going to make any kind of decision, but I would invite the parties to think about this -- we have now got three sets of proceedings being heard at a single date. Obviously disclosure is unified and equally obviously witness statements and experts' reports will be unified going forward. The pleadings won't be, and it may be that they don't need to be, but it may be that the parties just need to be alive, if there are future amendments, that some form of consolidation or resonance between the pleadings is needed. It may not be, because the issues are, of course, separate and there may be a positive benefit in keeping them separate, but I just raise it as something that struck me that I would like the parties to keep a watching eye on, that we don't have unnecessary work being created by, as it were, keeping well tended three sets of pleadings when a different course might apply, and I say that not in any way saying that I am advocating a consolidation -- I am absolutely not doing that -- that would be a terrible idea -- but I think some form of eye on the process would be useful in the saving of costs and in the saving of time.

With that said, I'm going to -- unless someone pops up with a further point, I am

going to end the hearing now with my very considerable thanks to all of the parties' advocates. This has been a difficult but a pleasurable hearing for that reason, and I am very grateful to you all for your very considerable efforts in bringing this hearing on so effectively. So thank you very much. I am really much obliged to all of you.

MS SMITH: Thank you very much.

MR JUSTICE MARCUS SMITH: With that I will end the hearing now. So thank you very much.

MR MILL: Thank you, my Lord.

(4.05 pm)

(Hearing concluded)