IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1351/5/7/20

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

Monday 13 December 2021

Before:
The Honourable Mr Justice Zacaroli
Paul Lomas
Derek Ridyard
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Churchill Gowns Limited and Student Gowns Limited

Claimants

v

Ede & Ravenscroft Limited and Others

Defendants

A P P E A R AN C E S

Fergus Randolph QC and Derek Spitz (On behalf of Churchill Gowns)
Conall Patton QC and Michael Armitage (On behalf of Ede & Ravenscroft)

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Monday, 13th December 2021

(10.30 am)

MR JUSTICE ZACAROLI: Good morning, everyone. Just a reminder of the usual procedure. This is a live streamed hearing. They are in open court as much as if we were in the building in Salisbury Square House. There is an official recording being made and authorised transcript will be produced. It is strictly prohibited for anyone else to make any unauthorised recording, audio or visual, of the proceedings and a reminder that a breach of that can be punishable as a contempt of court.

Before we start, can I get everyone to introduce ourselves in turn so we can check our microphones and the transcribers know who everyone is. I think it is obvious who I am. Mr Lomas?

MR LOMAS: Yes. This is Paul Lomas, speaking for the transcribers.

MR JUSTICE ZACAROLI: Mr Ridyard?

MR RIDYARD: Derek Ridyard, on the Panel.

MR JUSTICE ZACAROLI: Mr Patton.

MR PATTON: Conall Patton for the Defendants.

MR JUSTICE ZACAROLI: Now there is quite a bit to get through, as it turns out, much of it last minute. What I propose to do is take things in the following order, in sections I suspect, so we can retire and consider the conclusion on each section.

We want to start with timetabling which will include things such as whether shortening the hearing in January to fit everything in there or finding alternative days for written and oral closing submissions afterwards.

The second bundle will be the amendment application, then the confidentiality ring issues, then issues about experts, unless we have dealt with this in passing on the way through, in particular hot tubbing or not. Then consideration of the remote witnesses, again to the extent we have not dealt with this before, and, finally, bundling. I think that's everything. If I have missed anything off, could someone speak now.

MR RANDOLPH: No, sir. Good morning. The only point I would make, obviously guided by the Tribunal, in terms of the way in which it wants to deal with the issues before it, the only suggestion I have is in relation to 1 and 2, timetabling amendments. You might consider reversing that order. The only reason I say that is not to be obtuse, but the determination of the amendments issue may impact on other issues, including timetabling. I am in the Tribunal's hands. If the Tribunal would rather deal with timetabling first and then we can put that into a little box and then we can deal with amendments, on the basis that whatever the decision on the amendments issue, that could possibly cause the reopening of the timetabling box. I am very much in your hands, sir .

MR JUSTICE ZACAROLI: Yes. I had not really appreciated that the amendments application could have any impact on timing. Mr Patton, what do you say about that?

MR PATTON: I also had not appreciated that and I have no preference either way as to which order you wish to deal with it. I thought the Tribunal's order was entirely sensible, but I don't have a strong view either way.

MR JUSTICE ZACAROLI: We may need to revisit timetabling as we go through the rest of the hearing anyway, but let's deal with the major timetabling issues first of all.

As you know, the hearing has been long listed for seven days plus two in reserve, and that is, in fact, now the nine days is all that the Tribunal can cope with, in terms of personnel and time availability. If there is to be anything hived off, the only period in which we could hold a hearing until long into the future, given other commitments, is those three weeks or two and a half/three weeks we have identified at the end of March, beginning of April.

MR RANDOLPH: Yes.

MR JUSTICE ZACAROLI: The ways that have been explored for ensuring we can cut the case to meet the time, the first is to explore with you whether the full-time required for cross-examination is actually needed of factual expert witnesses. Second is this question of finding two days for further argument on the legal points.

A third possibility which we would like to moot with you is whether the misrepresentation claim in terms of facts and expert evidence could be hived off. The legal issues that gives rise to are relatively short and could be dealt with on an assumed basis, in terms of the legal aspects. So that's a possibility. We would like to explore whether that would save any material time and, if so, that would be a way through. We are here I am afraid looking at this least worst of options. In an ideal world you would have all the time you want. We don't have that time. We have to find a way of meeting that. So those are the three possibilities.

Can we therefore turn first to the question of cross-examination, the time that's needed. We have in the draft timetable I think two and a half days set aside for cross-examination for Claimant's witnesses and the same for the Defendant's witnesses. I don't think we have any breakdown as to the time that's sought to cross-examine each witness, other than the two that are going

to start early because they are abroad.

So perhaps, Mr Patton, you would start, because you are the one who has to justify, as it were, the two and a half days of cross-examining the Claimant's witnesses.

MR PATTON: Yes, sir. We do consider that we will need the two and a half days. I don't know if you have had a chance to glance at the Claimant's witness statement, but they are quite lengthy I suspect. Because I have not done the sums, because I suspect if you add up by page length alone the length of the Claimant's witness statement, including a quite lengthy reply witness statement, they will be at least as long, if not considerably longer, than the Defendant's witness statement.

We do have our case in fraud to put to the Claimant's witnesses and that will take time. Mr Muff is hoping to appear by video link. Although the technology has improved, experience suggests that that may go more slowly than if he were physically present in the court room.

Obviously, the Claimants give evidence as to reasons why they have not broken into the market, and they will have to be explored, and also a key point for this trial is the question of causation, which really turns on the Claimant's evidence and therefore that is going to take a considerable amount of time to explore in evidence.

In relation to the factual witnesses, we think that the estimate is right. In relation to the expert evidence, the only point I seek to make in relation to the Tribunal's suggestion that we revisit the estimate, I think it is correct that both sides in our estimates for the economics experts said a day to a day and a half for the economics experts. Now, if both sides were willing to limit themselves to the day rather than a day and a half, so the lower bound of the estimate for the

economics expert, that would release a full day, which might be sufficient to enable closing submissions to be made immediately after the evidence.

That was the only thought I had in relation to how one might complete it within the existing nine days. In relation to the factual witnesses, I do think it will take the two and a half days.

MR JUSTICE ZACAROLI: Yes. On the experts, where do you stand on the idea of hot tubbing?

MR PATTON: We had not proposed ourselves and neither had the Claimants -- we were intending to cross-examine in the traditional way. I think that was true on both sides. Hot tubbing is really, it seemed to us, primarily a matter for the Tribunal, as to whether the Tribunal would find it of more assistance for it to lead the questioning. Obviously, that puts a burden on the Tribunal in terms of deciding how it wishes to approach the questioning. We don't have any particular view about it. It is not a case we think particularly calls out for hot tubbing. Equally, no doubt, it will be possible to have hot tubbing.

What we do think is important is that we should have the opportunity to cross-examine, and there's a question as to whether it would be preferable for the Tribunal's questioning to come first, followed by cross-examination, which I think is what Mr Randolph has suggested so far, or whether it would be preferable for the parties to conduct their cross-examinations essentially in the normal way, and then for the Tribunal to have some time with the two experts together, where they can ask questions that have occurred to the Tribunal independently, or matters arising from the cross-examination, whether they would find it helpful to hear the two experts in confrontation with each other.

As I say, we did not come to the question of timetabling with a view that hot tubbing would be particularly helpful in this case, so we had not made any provision

for it.

Obviously, the Tribunal has raised it. We don't really have any strong view one way or the other. It is really as to whether the Tribunal thinks it would prefer to proceed in that way, rather than leave counsel to cross-examine, with the option for the Tribunal to ask questions at the end, perhaps with both of the experts present, to clarify matters that have not been fully clarified during the cross-examination.

MR JUSTICE ZACAROLI: Just while I have got you, it might be worthwhile having your views on the question of hiving off your fraud claim, the factual element of your fraud claim. Which witnesses would be relieved of attending at all, if that was the case?

MR PATTON: Much of Mr Muff's evidence is directed to the fraud case. I am not sure that all of his evidence would go, but it is right to say that much of his evidence is directed to that. We would strongly oppose -- I have not obviously had a chance to take instructions but I apprehend that we would strongly oppose a hiving off, and I am not sure it can really be done fairly.

First of all, plainly, if we establish that there has been fraud, that would affect the Tribunal's assessment of the evidence generally, in relation to the Claimant's witnesses, or at least in relation to some of them. Therefore, it would be difficult for us to make our decisions on what findings you should make about the Claimant's evidence, without having had a chance to put all of our case to them in relation to fraud.

Second of all, on any view, you would have to be making findings as to the counterfactual, and the counterfactual may be different depending on whether you find fraud or don't find fraud. If you find fraud, the counterfactual will be a world in which there had not been any fraud. If you don't find fraud, that will

not affect the counterfactual.

Similarly, if you have fraud, you may be likely to give less weight to those assertions than if you find otherwise. I don't really respectfully see how one could approach that on a hypothetical basis. It would be quite confusing for me to make submissions to you in closing about their evidence, but inviting you to approach it differently depending on whether you find that there has been fraud or has not been fraud.

So we would respectfully suggest that that would be the worst of the three posited that have been raised.

MR JUSTICE ZACAROLI: Right. Mr Randolph, first of all, time for cross-examination of factual and expert witnesses?

MR RANDOLPH: Thank you, sir. I am on the same page essentially as Mr Patton. I mean, we have four factual witnesses to cross-examine: Mr Middleton, Miss Middleton, Halls and Telfer. Then there is Mr Johnson, who will be giving expert evidence on the eco or rather evidence on the eco claims. So I really think it would not be possible to move away from the timetable, not least because there are more people involved. Again, for the same reasons, but sort of mirror image, that Mr Patton gave, we really need to dig down and examine the evidence that has been put on behalf of the Defendants, because they seek, as they would, to undermine our case, and that needs to be examined. I genuinely don't think that that can be done in a period of time that's less than that has been timetabled. So essentially Mr Patton and I are on the same page on that.

In terms of the hot tub, I agree with Mr Patton that neither party had thought about it and neither party suggested it, but now that the Tribunal has put it forward we see quite a lot of benefit for the Tribunal in that happening, but we would

agree with Mr Patton that essentially, insofar as there was a hot tubbing session, it could either be preceded or succeeded by targeted cross-examination. The question is that if there were to be a hot tubbing session, that should go first so the Tribunal can lead the hot tub discussion and then, based on that which has been said in the hot tub, the cross-examination shorter can take place in a more targeted fashion, and I think from our perspective that would make a great deal of sense. But the overall effect in terms of the timetable would be such that it would be essentially the same time as that set out in the draft trial timetable.

So yes, good idea, but it is not going to impact on the length of the trial. It is particularly not going to -- the way we would be viewing it, it wouldn't shorten the time.

Insofar as misrepresentation, the fraud case, although one might think at first blush "Oh, yes, that sounds sensible", actually, digging down, the points that Mr Patton raised, but also we are very seen to have this matter dealt with as soon as reasonably possible. If the fraud/misrep case was hived off, there would have to be a hearing for cross-examination of the witnesses, Mr Muff and the other witnesses, dealing with this. There would have to be written submissions, possibly oral closings as well.

Now, that might or might not be able to fit in some of the days that have been suggested by the Tribunal. That might not. Who knows? Our concern is really one of timing for the eventual closure of this case, but we do take on board, and it is not for me to make any easier Mr Patton's job, but in terms of how he was describing the counterfactual and how it is going to have to be put if the fraud/misrep case were split off, there might be the sort of difficulties that he identified.

For all those reasons, I don't think we would be pushing the Tribunal to hive off the misrep case. We would rather have all the evidence heard within the nine days, but then with a period thereafter for closing submissions.

One option that has occurred to me that hasn't been raised is the possibility, and this often happens in arbitrations, of simply having the closing submissions in writing. So one would have -- as I say this often happens in arbitrations. So you would have in the usual way the submissions. So it would have to be sequential because that would be the way it would be done orally. So you would have sequential Claimants, Defendants, and then short written response by the Claimant.

MR JUSTICE ZACAROLI: Can we come on to that in a moment because I want to explore -- the ideal would be for a further hearing, if we cannot fit this all into the nine days. Can I just explore that possibility first. I agree that the last resort may be written closings only, but before we get there, the weeks that the Tribunal has said it is available to hear two days of argument, as I understand it, the Defendant have written to say their counsel is only available on 14th and 15th April. Is that right? Have I misunderstood that?

MR PATTON: There is an error there. The dates are, in fact, 13th and 14th April. We had not appreciated that. As I understand it, Mr Randolph is also available on those dates. If the 13th and 14th are convenient to the Tribunal -- I say convenient -- if you are able to accommodate us on those dates, all sides would be available there.

MR JUSTICE ZACAROLI: We understood it to be a problem because it is Good Friday, but if it is not ...

Mr Randolph, I interrupted you. If there are two days available, then I don't think we need to resort to just written closing submissions, provided the parties don't

object significantly strongly to there being that delay. I mean, it is still a long delay unfortunately that's the only --

MR RANDOLPH: Absolutely. I would rather go now, if you will, on those two days and then it is in the diary and it is fixed and we work to that, and that's it. There is no change to that. We have the nine days of evidence in January/February, and then we have the closing oral submissions preceded by written submissions.

We may want to come on to that, sir, in terms of what the content of those written submissions are. Essentially, if we have had written submissions and then short closing orals, they should definitely be able to take place within that two-day period and, in fact, must.

MR JUSTICE ZACAROLI: Yes. I will come back to Mr Patton in a moment. One of the possibilities for written closings is that you do it in two stages. Whilst the facts are fresh in everyone's mind, you do written closings on the factual conclusions you would be asking the Tribunal to draw from the evidence we have just heard, and that would be a relatively short timescale, so not only you but also the Tribunal will have the chance to consider that in our (inaudible) for you to work up the written submissions in terms of the law. Right.

MR RANDOLPH: Certainly, from our perspective, I think we would be happy with that suggestion, as long obviously as the written closings on the law were exchanged in a sufficiently reasonable period before the oral hearing. One would not want them the night before.

MR JUSTICE ZACAROLI: Of course not. Mr Patton, what do you say about that.

MR PATTON: Of course, I can understand why the Tribunal would want the submissions on the evidence as soon as possible. So if that facilitates that,

there is no difficulty about it. I mean, I don't know really whether it will be necessary, and perhaps this can be revisited in due course, to have separate written submissions on the law. You have given us permission to put in 50 page written openings, which one would normally expect to set out the relevant law, and it may be that that will remain the relevant law, even once the evidence has been heard. So it may not be necessary or it may be that the submissions can be quite short, if there are further submissions to be made on the law.

As I understand it, the parties, in relation to the letter that came from the registry, there was a suggestion that the hearing in March or April might be limited to legal argument. As I understand it, you would expect to hear from us on both submissions on the law and on the evidence. That's the only thing I wanted to make sure, that the oral submissions would be dealing with both, insofar as there are points to be made, for example, responsibly to the written submissions.

MR JUSTICE ZACAROLI: I think if you have put in detailed written submissions on the facts soon after the hearing, I don't think we can shut you out making submissions which you say are essential in order to understand the legal points to reference the facts, but we would hope that can be dealt with far more shortly, rather than taking us at length through the evidence as we will have considered your submissions in detail I suspect by the time of the hearing. Whether further legal submissions are required, that's a decision to be made at the end of the hearing as to what else we might want to hear from you on.

MR RANDOLPH: That sounds sensible.

MR JUSTICE ZACAROLI: If Mr Ridyard or Mr Lomas have no questions before we

retire --

MR LOMAS: No.

MR RIDYARD: No.

MR JUSTICE ZACAROLI: We will retire to consider the timetabling issues now. Just to remind everyone that when we come back in there is always a pause before we go live.

(Short break)

RULING ON TIMETABLE

MR JUSTICE ZACAROLI: We are live. As to the time estimates for cross-examination of either factual or expert witnesses the parties have agreed that at the end of the hearing we will have a break until the hearing to be refixed on 13th and 14th April. That is two days. We will require written closing submissions on the factual issues within a relatively short time. We can discuss the precise time at the hearing. There will be the option for further written submissions on the legal points to be at a later date. We can discuss whether that's necessary, and how long they should be, at the hearing. We will require there to be hot tubbing, and we propose that happen first, with cross-examination by the parties to follow on. Whether it saves time, we cannot know, but we think it is a useful procedure in this case. I think that is everything on timetabling.

As to starting early to accommodate certain witnesses, we are content to do so, particularly for the foreign witnesses.

We are assuming the hearing will take place in person. We hope fervently that the hearing will take place in person, but we have to recognise that the picture is changing fast. It may be that we will be having a wholly remote hearing.

I understand that everyone is content to go ahead even if the hearing is wholly remote.

MR PATTON: Yes.

MR RANDOLPH: Yes.

MR JUSTICE ZACAROLI: If there are any questions on timetabling or anything I have missed, please speak now, otherwise I will move on to the amendment application.

Can we take the amendments separately? Can we deal, first of all, with paragraphs 66 and 98(m), which is the Defendant abandoning two different parts of its case. Is there any objection to those amendments?

MR RANDOLPH: Just give me one moment, sir. The amendment at 66, which is at 1056 in your bundle, is consequential essentially on the proposed amendments in paragraphs 60 and 61. We have been described as being opportunistic by the Defendants in their skeleton at paragraph 30 about not accepting that. That's not so. The amendment we say is parasitic on paragraphs 60 and 61 and therefore our position, with respect, is that one should look at paragraphs 60 and 61 first, see whether those amendments are allowed, and then obviously if they were to be allowed, then it would follow that paragraph 66, the amendment to 66, should be allowed.

If, on the other hand, paragraphs 60 and 61 are not allowed to be amended, then paragraph 66, the suggested amendment thereto will fall by the wayside. So that, sir, is our position on 66.

I am sorry. The next reference was?

MR JUSTICE ZACAROLI: 98 (m), which is also abandoning the case. I think you are also going to say it is also parasitic on 98HA.

MR RANDOLPH: Yes.

MR JUSTICE ZACAROLI: In that case my shortcut does not work. Let's deal with 60 and 66 together. Mr Patton, it is for you to make the submission, isn't it?

MR PATTON: Yes. The Tribunal will be familiar with the principles concerning particular amendments made shortly before the trial. The only point I wanted to pick up from the authorities, if you have the Claimant's authorities bundle, it is page 71 of the authorities bundle.

MR RANDOLPH: Oh, I see. I am terribly sorry. My authorities bundle has not been paginated.

MR PATTON: It is the CIP case at paragraph 18.

MR RANDOLPH: Thank you.

MR PATTON: If the Tribunal has that, this is Mr Justice Coulson's judgment in the CIP case, but I want to rely on it for is his citation from the Hague Plant case at the bottom of the page in paragraph B, from Lord Justice Briggs, as he then was. Paragraph 32 does not really concern us. He says:

"The judge distinguished between very late amendment cases and late amendments."

In 33, just over the page, the point he makes is:

"I consider the judge was entitled to approach the relevance of lateness in this way. Lateness is not an absolute but a relative concept. As Mr Randall put it, a tightly focused, properly explained and fully particularised short amendment in August may not be too late, whereas a lengthy, ill-defined, unfocused and unexplained amendment proffered in the previous March may be too late. It all depends upon a careful review of the nature of the proposed amendment, the quality of the explanation for its timing and a fair appreciation of its consequences, in terms of work wasted and consequential work to be done."

We essentially say that the limited amendments we seek to make fall in the first

category, properly explained and fully particularised. They are very limited tweaks to the current pleadings, clear and precise. They don't raise any new issues that would require further factual or expert evidence. So they cause no prejudice.

Turning to the first amendment, the market definition point, which is the market definition point. As we have said in the skeleton, it is commonplace in competition cases for market definition to be addressed in expert evidence, and for any necessary updating of the pleadings to happen after that.

I don't imagine my learned friends with their experience of competition litigation will dispute that, but it is helpful to see how they themselves pleaded their market definition case in the bundle at page 31, paragraph 58 of the claim form. In paragraph 58, they say:

"Market definition is a matter for expert evidence at trial, to the extent required, given the extent of the evidence available in the public domain. Pending the production of expert reports, the Claimant's position is as follows."

So, in the same way as is commonplace in competition litigation, (inaudible) we say that the position might need to be updated following the production of expert reports.

If I can just use our draft amended pleading to show you what was originally pleaded and then to address the updates, it is at page 1054 of the PTR bundle. Paragraph 58 of our defence in the original:

"Notwithstanding that the question of market definition is for factual and/or expert evidence in due course, the Claimant's pleas as to market definition are inadequate. (Inaudible) of proper particulars and preparation of relevant evidence on market definition, the Defendants plead as follows."

The point made in the next paragraph:

"It is denied it is solely a matter for expert evidence."

Clearly a recognition that the expert evidence may affect a plea on market definition, not solely the expert evidence, but certainly pending the preparation of relevant evidence on market definition.

One sees in paragraph 60 a plea that their primary case is too vague to be responded to, and we can ignore the purple for the movement. In 61:

"Whichever product market they mean to refer to, it is denied that the geographic extent of the market is national."

Then, ignoring the purple changes:

"It is rather university specific."

So the original pleaded case was it was university-specific. You will see the amendment made here is extremely small, which is that there exist a series of university-specific markets for the supply of graduation services. I will come back to those in a moment.

If one scrolls down to paragraph 66, that's the alternative plea. So that's simply an alternative plea no longer being pursued.

Then paragraph 67:

"Without prejudice to the foregoing, the Claimants have failed to define the core market in issue on no claim, namely the market in which certain universities offer the opportunity to conclude OSAs."

We said that the claim was liable to be struck out. So the market that is pleaded in the defence originally is the market in which the universities offer the opportunity to conclude OSAs. Those are the official supplier agreements and those are the agreements which provide for the Defendants to provide a number of different services to the universities.

That was the originally pleaded position. On the basis of that, the parties drew up

and the Tribunal approved a list of issues for the experts. We have that conveniently set out in Dr Neill's first report at page 828 of the bundle. So this was approved by the Chairman at one of the CMCs in the case. One sees, issue one, that was agreed with the experts:

"Identification of the relevant markets in this case (inaudible) consideration of both product and geographic dimensions. The following are relevant markets:

(a) What is/are the product and geographical dimensions of the markets on which suppliers of academic dress supply academic dress to UK university students, and.

(b) Is there a separate market in which UK universities offer the opportunity to enter into official supply arrangements and, if so, what are the product and geographical dimensions of that separate market?"

So it was anticipated by the parties and approved by the Tribunal that the experts would identify the product and geographical dimensions of these two markets that were identified.

Then in Dr Neill's first report -- so he is our expert -- at page 857, this is paragraph 3.1 of his report under the heading "Market Definition", he refers here simply to the list of issues for the experts that ask the following questions about market definition and then he simply recites those two questions. So that's the context in which his analysis appears.

Then, if we go to paragraph 3.11 at the top of the page, he says:

"The market described in the list of expert issues is one in which UK universities offer the opportunity to enter into official supply agreements exists and has characteristics of a bidding market. Providers of academic dress hire services compete for access to the university students who require academic dress. In this market, universities are the entities to award services to a provider of

graduation service, in return for receiving services and a commission payment. In other words, universities also designated as an official supplier in the market. This is important to bear in mind."

So he is referring back to our existing pleaded case as to what the market is.

Over the page at 861, paragraph 3.14, he is now identifying the product market definition. He says:

"Why the market is that for bundles of graduation services including academic dress hire." He says in 3.14:

"Academic dress is not typically procured by universities (inaudible) but rather as part of a broader range of graduation services. This, therefore, raises the question, as also reflected in the list of expert issues, of whether the relevant market is that for the bundle of graduation services or for academic dress only."

So that's a question arising out of his consideration of the expert issues. Then, finally, at 862, 3.18, one sees his conclusion. He says:

"I prefer to define the market as comprising academic dress hire and other graduation day services, excluding photography. Consistent with the evidence I have set out, I call this the market for graduation services."

What we wish to do is simply to track his definition of that market. It is not inconsistent with the market that we have pleaded, and he does not see it as something different from that. It arises out of his consideration of that market, but we would like our pleading to be on all fours with the market that Dr Nils has defined. That was the first aspect.

Just on why we have added the words "a series of university markets", one sees that at page 865. It is paragraph 3.3 1 at the bottom of the page. He says:

"My assessment indicates that the supplier of graduation services is likely to

comprise a series of university bidding markets."

Then he gives the reasons. So we have made that small tweak to our reference to university specific markets to reflect what he has said there.

That's our expert report. More importantly perhaps in the context of this application is the Claimant's expert report from Dr Marr. Go to 791 of the bundle. This is paragraph 135 of her first report, served on 10th November. The top of the page, again identifying the relevant product and geographic market. 135, she says:

"The Defendants raise several possibilities about the market definition in the alternative. (a) The relevant market is the market in which certain universities offer the opportunity to conclude (inaudible)."

We have seen that was our originally pleaded case. Then she deals at (b) with the alternative point:

"(c): The geographic market is university-specific rather than national."

Then she deals in (d) with the alternative case. So that's how she understands the currently pleaded case. Then a few pages on at the bottom of the page, paragraph 144:

"As noted above, the E&R undertaking stipulates that there is an alternative relevant market in which universities offer the opportunity to conclude OSAs. The pleadings do not offer any further detail as to how such a market might be defined."

Then she says, in 145:

"In order to consider what the relevant product market may be in this case, I considered the range of products and services that the universities are procuring, so procuring a range of products and services relating to their graduation ceremonies. I address these in turn."

One is not concerned with the detail.

Then, if one goes on to paragraph 150 at the bottom of page 794, she says:

"In summary, given the (inaudible) official supply arrangements, and how these arrangements have become intertwined with how they are funded, I find that there is a relevant product market for the procurement of graduation ceremony services by universities and that there are (inaudible) markets for the various services individually."

So on product market she has looked at exactly the same one as Dr Nils has looked at. She finds that it exists. She thinks it is not the relevant one, but she has looked at it and considered it.

Just in relation to geographic market at 152, she says in summary she finds that the relevant geographic market for procurement of graduation ceremony services is local for some services and for others it could be wider. By "local" one assumes she means specific to the university, effectively what we have pleaded.

Both of the experts have looked at the existing pleaded case. They have understood what it means. They have been able to consider it, but there is a refinement, which is the formulation that both of them use, a market for graduation services rather than the formulation that we used.

So there's no inconsistency, as my learned friends have suggested in their skeleton, but it is a slightly different formulation, although one that they naturally came to when considering the originally pleaded case.

We think it is clear and we would prefer for our pleaded case to be exactly what Dr Nils has considered, but also, as it happens, what Dr Marr has considered in her report.

Now, the Claimant's first complaint about these events is one of timing. The expert

reports were served on 10th November and we served these amendments in draft on 3rd December, so just over three weeks between the two.

As it happens, it is a matter of record that my learned junior, Mr Armitage, was in a very heavy appeal in this Tribunal from 1st to 19th November, so he was otherwise engaged and was not able to assist us with the amendments. But I don't accept that the timing is material here, because these are simply tweaks to our pleadings on points that had already been addressed by both of the experts in their first report.

Obviously, if Dr Marr had missed this point entirely, we may have been under a duty to act more quickly to get our draft amendment out, so that she could consider it in her reply report, but that was not the position. She had actually already addressed the plea that we have now formulated. Had we been able to get these amendments out a week earlier, of course we would have done so, but it would have made no difference to anything of importance.

The second complaint that they make is the suggestion that this will risk derailing the trial has already fully considered and addressed this formulation of the market. She has done that in her first report before she had even seen the draft amendment. Of course, since then she has now served a reply report to Dr Nils. So she has had an opportunity to say anything further that she wishes about it.

We say it is striking that in the period while we were preparing the amendments and before we served them there was no objection at all from the Claimant to Dr Nils' report. There was no suggestion that his evidence dealt with something that was unpleaded. That was never suggested.

It may be, if we had let sleeping dogs lie and had not bothered to update our pleading, that this point would never have materialised. That seems likely to

have been the case. We thought it was preferable to address the issue head on, and make sure that our pleaded case as we go in to the trial is on all fours with the formulation used in Dr Nils' report.

So that was really the first amendment to market definition.

So far as the deletion of paragraph 66, we are not pursuing -- it is an alternative case. It does not hinge on whether we get permission for the earlier amendments. We are not pursuing those in any event. It may be we could have said nothing about this for the time being or we have could have written a letter, or said in our skeleton that we are not pursuing it, or said so orally at the trial, but we thought the right way was to address this head on by removing them from the pleading, and it is impossible to understand why they should oppose that. They ought to be content that there is a point that we were arguing which we are not arguing that narrows the issues that they now don't need to address, rather than something that they do need to address.

I am very happy to answer questions on any of the tiny points that arise along the way.

The third category in the skeleton is in relation to the recycled plastics case. The main amendment here is in 98 (h) (a).

MR RANDOLPH: Could I reply to my learned friend, for two reasons. First of all, I think the Tribunal was looking at this on a section by section basis.

Secondly, and more importantly, on reflection, in relation to the appeal in the round, and in line with the overriding objective, we are content to consent to those amendments. So the only issue in relation to the amendment is out of -- and it is not just 60, 61 and 66. There are other amendments which we will come to. But essentially all the recycled plastics slight amendments follow on from evidence or otherwise are -- we don't accept this in terms of the competition

case -- are adding up exercises (inaudible) to consent to them being made on the usual basis, in other words, any costs consequential thereon should be for my clients and we should obviously, to the extent necessary and appropriate, be entitled to respond thereto, within a period of time. I hope that assists in terms of --

MR JUSTICE ZACAROLI: We can focus on 60, 61 and 66. I am not sure what else there is then because those at the only ones identified in the argument. Let's focus on those. Mr Patton, are there other amendments related to 60, 61 and 66, which we need to deal with.

MR PATTON: I don't think so.

77(b) is a consequential change. It reflects the fact that we have defined a market in relation to -- in the same way that Dr Nils does.

MR JUSTICE ZACAROLI: I can't find this. 77.

MR PATTON: Sorry. It is on page 1061. Previously, it was formulated as "the Defendant's purchasing services on the market for OSAs", which reflected how we have pleaded the market definition. Now we have pleaded it the other way round as responding to the demand from universities for the provision of graduation services, so that is a consequential change.

Then, at the bottom of 1062, there is a small addition where we plead that the Defendants' prices have declined in real terms. Now, the best objection that could be made here is that that is pleading evidence and that we should not do that, and if that's the objection being made, I can understand that. That's simply a reflection of some analysis that Dr Nils has done in his report. I can take you to it at page 934, where he looks at what has actually been happening to the prices in real terms, and he finds that they have declined. One sees that at paragraph 5.13 and following.

It may be that they have to be pleaded and probably it doesn't have to be pleaded, since we would expect any economist worth her salt to know what the effect on prices is of what they are considering, whether there has been affect on competition. If Mr Randolph thinks that shouldn't be pleaded, it need not be. That's understood. But it doesn't cause any prejudice for it to be pleaded. Dr Marr has responded to that in her supplemental report at paragraph 108, and she appears to accept that there has been a decline in prices in real terms, but she says it doesn't tell you anything.

Then I think (inaudible) are the completion. We have dealt with that.

MR RANDOLPH: Oh, I see.

MR PATTON: I think the next one is at page 1066, (v). We previously said that something was irrelevant, or rather we denied its relevance. We are no longer denying its relevance. So that is the abandonment of a point, which one might expect to be welcomed.

That point then repeats itself three times. One sees it again at 1068, at the top of the page. I think there is one further place where it appears. It is exactly the same point. So we had previously -- it is on 1075. We previously said something was irrelevant. We are not pursuing that point. One expects that will not cause any difficulty to the Claimants, because we say it is relevant.

MR JUSTICE ZACAROLI: Right. Mr Randolph then. Thank you, Mr Patton.

MR RANDOLPH: Thank you, sir. I will follow, if I may, the approach taken by Mr Patton. So he took you to the judgment of Mr Justice Coulson in CIP Properties and he took you to paragraph 18(b) and particularly 33 of the Hague Plant case.

If I could take you to paragraph 19, which sets out a useful summary of the position. I don't need to take you through it, but (a):

"An amendment is late if it could have been be advanced earlier."

Clearly these amendments could have been advanced earlier. With the greatest possible respect, the fact that Mr Armitage was in a long or difficult or time-consuming case is neither here nor there. It is either late not late. It could have been made earlier. Therefore it is late.

An amendment at (b) can be regarded as very late if permission to amend threatens the trial date. We will come on to that, if I may, when we look at particularly paragraphs 60 and 61. The history of the amendment has to be looked at, at (c). (d), particularity or clarity. That's the point that was made by Mr Patton. (e):

"The prejudice to the resisting parties if the amendments are allowed will incorporate at one end of the spectrum the simple fact of being mucked around to the disruption of and additional pressure on their lawyers in the run-up to trial."

We place emphasis on that, given that we are where we are and we have until 7th January, and obviously between now and then there is the Christmas period. We have until that date to get our skeleton up. It is, as you will have seen from the correspondence, sir, in their letter of 3rd December that came in, as Mr Patton admitted, three weeks after their expert evidence was filed, and, of course, Dr Nils would have known what his position was, one would assume, earlier than the morning of 10th November when he filed the evidence.

So the three week gap is very much a minimum. But in all events we have, as you will have seen from the letter of 3rd December, the Defendants themselves have suggested that we should have 14 days to respond, which would take us to 27th December, thereby leaving us very little time indeed to get on with the skeleton.

So that we say (e), 19(e), the reference to the Bauk(?) case, the structure and added pressure on their lawyers in the run up to trial is very relevant, and (f), prejudice to the amending parties, so that will be Mr Patton's clients, if the amendments are not allowed will obviously include its inability to advance its amended case, but that's just one of the factors to be considered.

Moreover, if that prejudice has come about by the amended party's own conduct, it is much less important. It is not denied here that the reason for this application to amend was due to, in essence, Dr Nils not agreeing with their pleaded case. That's a matter for them.

MR JUSTICE ZACAROLI: Just on that point, if I may -- sorry to interrupt, Mr Randolph -- you say there would be prejudice to the Defendants here because of their inability to advance the amended case. Is that right? If the amendment is not allowed, since the original pleading on both sides said this will be a matter for expert evidence which will be served in due course, if there is no amendment, what happens to the point?

MR RANDOLPH: Well spotted, sir. I was just about to come to this. It was extraordinarily interesting to listen to Mr Patton, because what he said, in terms of the pleaded case, the original pleaded case, was actually correct, and it is very different to that which I think you, sir, were thinking about, which appeared in their skeleton.

At paragraph 26 of their skeleton, they say, Mr Armitage and Mr Patton:

"The defence has made clear from the outset that the question of market definition was for factual and/or expert evidence in due course. This is the routine approach in competition cases."

Then 28:

"No useful purpose will be served by refusing these amendments, since that would

simply leave intact the Defendants' currently pleaded position that they would rely on the market definition set out in their expert evidence."

If you read those two paragraphs, sir, you would think that there is no pleaded case. That's the impression that certainly was given in their skeleton. But, as Mr Patton has correctly mentioned, actually, they do plead out their case. They plead out a relevant product market. They plead out a relevant geographic market and then they go one better. They plead out an alternative case to both those markets.

So it is incorrect I am afraid to say that there is no pleaded case and Mr Patton has made my point for me by saying in terms that they have a pleaded case.

What he says is: "Oh, well, it doesn't really matter, because what Dr Nils says is not inconsistent with the actual pleadings".

Well, that may be a matter for submissions. We think there are substantial differences in relation -- just to make good the point, sir, if I may, just in case I have not hammered it home, just to make good the point on how they have actually pleaded out their case to date, prior to any amendments being considered, if you, sir, look at paragraph 61.

MR RIDYARD: Page number, please.

MR RANDOLPH: You can see.

MR JUSTICE ZACAROLI: Page number, please, Mr Randolph, for that. What's the page number?

MR RANDOLPH: I am so sorry. Page 1054.

MR RIDYARD: Thank you.

MR RANDOLPH: I could give the page numbers for the original pleading, which for your note is at B7, 346, so you can see it a bit more clearly. But essentially they say there, whichever the Claimants mean to refer to: "It is denied that the

geographical extent of the market is national. It is rather university-specific."

So they deal with that there.

Then at paragraph 66 in the original re-amended defence you can see what they set out, because it is all sought to be deleted.

"In the alternative to the existence of university-specific markets, [which they have defined as 'geographic'] and to the extent that the supply side substitutability is such that (inaudible) academic dress is university-specific, then, 66.1, the relevant geographic market is worldwide."

They go on to say alternatively it is the Commonwealth. Then 66.2:

"The relevant product market comprises academic dress, legal dress and clerical dress."

So this is the alternative product market. So we have the alternative geographic market. We have got the alternative product market and we have the actual asserted product market and geographic market. So they have covered all the bases in their present pleading.

That is why when they say in their skeleton "no useful purpose" -- this is at paragraph 28 -- "would be served by refusing these amendments, since they would simply leave intact the Defendant's currently pleaded case that they would rely on the market definition", well, that's not correct.

They now seem to have U-turned on that and they have admitted that they are product market and geographic market. The reference, sir, to these markets being determined by factual and expert evidence, yes, that is correct at the end of the day, but it doesn't mean it hasn't got to be pleaded. The Claimants say the same thing and the Claimants plead out their asserted product and geographic markets. The case is today still the case, but they told us on 3rd December: "Oh, no, we don't actually want to take that case forward. We

would like to change it", and it is said to be limited.

Well, we don't see that the amendments at paragraphs 60 and 61 and the consequential amendments at 66 are limited in any way, shape or form, and it is not a tidying up exercise. Essentially, we have moved to a brand new case on a series of university markets, and it is not just university markets for academic dress, supply of graduation services, excluding photography. That is important, because that gives rise to all sorts of questions that will need to be determined in the light of disclosure, because to date obviously the disclosure has been made on the basis of the present case and their present pleaded case is as set out in their re-amended defence, and it is not what is set out in their suggested re-re-amended defence.

The disclosure obviously does not cover these new areas both in relation to the case on relevant market, and amongst other things, sir, we would think that in relation to paragraph 60 and 61 there will have to be or there would have to be disclosure in relation to communications between the Defendants and the universities which identify the newly identified market graduation services, which need to go back to the whole of the contractual period rather than just the claim period to see the history of the situation, because it is they now, the Defendants, who are arguing that there is this newly identified market of the supply of graduation services to universities.

Insofar as the geographic extent of that market is concerned, there exists a series, which is not defined, of university-specific markets for the supply of those services, so we need communications between the Defendants and the universities. You need documents going to what the asserted series of universities-specific markets are and how the graduation services are bundled. You need documents going to the Defendants' income streams from

universities. If the market is as posited, as asserted actually exists, there should be proof of payment by universities for the Defendant's supply of graduation services. There should be documents going to supplyability, in other words, the extent to which Defendants used the same products for different university contracts -- that's a serious point -- as well as the costs of those products, and documents relating to competitor offerings in the photography market, because it is all very well having asserted markets in an expert report, but where they are not backed up by contemporaneous material and/or factual evidence, the weight to be given to such assertions is very much -- well, it will be very much lighter, very different to that which would ordinarily arise and would have arisen had these amendments been made more promptly.

The problem obviously that we face is we are where we are. We very much want the trial to proceed and I believe, sir, that you and your colleagues do as well. We are not asking for an adjournment. What we are asking for, particularly in the light of Mr Patton's clear statement to you about half an hour ago, that Dr Nils' evidence on which most of these amendments or, in fact, all of these amendments are based, is not "inconsistent" with the present pleadings, fine.

Leave the present pleadings as they are. We don't need to go down the path of disclosure. It could be a question for legal submission as to the fact that there is no disclosure, and we may well have a set-to, we may well have a disagreement as to whether there is a consistency or inconsistency, but this whole idea of tidying up something that had not been set out before and filling in the picture, there is nothing further from the truth. This is a wholesale change of a critical part of their case because as you, sir, and gentlemen will be aware, obviously in Chapter 2 cases the description and identification of

the relevant product and geographic market is absolutely critical, not least because Dr Nils has admitted in terms that Ede & Ravenscroft hold a substantial position on the market place. So it is obviously to the Defendant's benefit to try to widen the market out as wide as possible. That's totally normal.

What is not totally normal I would suggest, with respect, is to have this volte face so close, 20-odd days before our skeleton is due to go in.

To bring this point to a close, if I may, we would be happy for the case set out by Dr Nils to be put. It is not -- I would be delighted to be corrected, but I did look over the week-end to see whether the approach taken to factual the new case, where a couple of our allegations as set out in the witness statements were struck out, by virtue of the fact they had not been covered off in pleadings. I was hoping to find some authority that could read across into expert reports, but that authority is not there. It is not there for one good reason.

What we would be content to have is a situation where the amendments were refused, the case put forward by Dr Nils could be put, not least because of the fact that, in Mr Patton's words, (inaudible) his findings are not consistent with the present pleadings and then we can fight it out should be given to that fact. That, sir and gentlemen, would avoid the problem of a disruption to the timetable, because there is going to be -- if those amendments were going to be made we would press very strongly for further disclosure, query witness statement evidence, and once you get into that very late amendment, the definition of which we have seen, which is where the timetable is likely to be impacted, then one really does get into great difficulties.

If I may, sir, in closing on this point, just go to tab 7 in the authorities bundle, which is

the Quah Su-Ling case, paragraph 38. Do you have that, sir?

MR JUSTICE ZACAROLI: Yes, I do. Thank you.

MR RANDOLPH: So it's Mrs Justice Carr drawing the authorities together. Then B:

"Where a very late application to amend is made" -- we say that's the case here --

> "the correct approach is not that the amendment ought in general to be allowed, so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission."

Then E:

"(inaudible) in the modern era it is more readily recognised that the payment of costs

> may not be adequate compensation."

Over the page, (f):

"It is incumbent on a party seeking the indulgence of the court to be allowed to raise

> a late claim to provide a good explanation for the delay."

You have heard a much stricter view is taken nowadays of non-compliance.

Then, finally, sir, paragraph 96, the last page of this judgment:

"For all those reasons, I dismiss the application for permission to amend. This may

> be seen as a harsh decision, given its consequence for Miss Quah."

You will see at 97 the consequence was dramatic. Her case was struck out:

"But this is modern day commercial litigation. (inaudible) applications for permission

> to amend in circumstances where (a) there is no good reason for the delay and (b) amendment would result in real disruption or prejudice to the parties and/or the court are unlikely to be allowed, irrespective of the merits of the

proposed amendment. This is such an application."

Finally, sir, just in terms of the act of disruption, rather than just being mucked up -- we are certainly being mucked up -- disruption, so we are 20 working days, including Christmas Eve and New Year's Eve from Mr Spitz and myself having to file our skeleton on Friday, 7th January. The Defendants have themselves suggested, as I say, 14 days for our consequential amendment. That would take us to 27th December, leaving nine working days until the filing of our skeleton. We say that firmly falls within the disruption which I just took you to, sir. Those are the points on 60 and 61. Obviously 66, as I say, is parasitic we say on it.

MR JUSTICE ZACAROLI: It is an abandonment. So you don't object to that. If it is not parasitic, you are not objecting to them abandoning, are you?

MR RANDOLPH: No. Obviously it is up to them, but if 60 and 61 aren't allowed in as amendments, then 66 would I assume stay, because there would be no point --

MR JUSTICE ZACAROLI: I don't think it does. I don't think Mr Patton said that.

MR RANDOLPH: If he wants to do it, come what may that is fine.

MR JUSTICE ZACAROLI: You don't need to spend time on that. It is not an issue I don't think. Can I come back to your point about the expert case, based on the expert evidence contained in -- is it Mr or Dr Nils?

MR RANDOLPH: Dr Nils.

MR JUSTICE ZACAROLI: You are not objecting to that being run?

MR RANDOLPH: I would like to but I have not been able to find any authority which allows me to.

MR JUSTICE ZACAROLI: You either are or you aren't. The reason doesn't matter --

MR RANDOLPH: I don't. It is admissible --

MR JUSTICE ZACAROLI: Also they are entitled to run a case (inaudible) in, as I understand it, the expert report.

MR RANDOLPH: You have heard my submissions.

MR JUSTICE ZACAROLI: You have said you have not applied to strike it out. I don't hear any foreshadowed application to strike it out. If you were, you would have to put election pretty quickly.

MR RANDOLPH: No.

MR JUSTICE ZACAROLI: You are not seeking to strike it out. Therefore, they can run a case based upon it.

MR RANDOLPH: The problem they have is they can put Dr Nils in the witness box to be there to be cross-examined on his evidence. We will be making submissions in due course in relation to the weight to be given to that evidence if these amendments are not permitted. If these amendments are permitted -- sorry -- if this Tribunal is not minded to go down that particular path, and say "We are tempted to allow this amendment", we then fall into the problem of very late amendment. It doesn't go to admissibility. It goes to consequence.

There are real consequences to be drawn. (a), this is a problem of their own marking. We are not saying that Dr Nils' expert evidence is inadmissible as being we say inconsistent. Of course, it is my learned friend's case. He is on the record. He said it is consistent. So to that extent, fine. It goes in, and then it is for us to deal with that evidence as we see fit, both in cross-examination and legal submission. But what we suggest is exactly the wrong thing to do would be to give them the benefit of the doubt, allow them to escape the problem of very late amendments and thereby possibly

prejudice the trial of this action, because we would be seeking -- if they amend, we will be seeking disclosure on the points that I have suggested. If they (inaudible) impact in terms of timing, particularly on the words of Mrs Justice Carr, in relation to the run-up to preparation. We have 20 days. It is not a long time, including the Christmas break, and we don't need to do this. The Tribunal is busy. It doesn't want to have, with all due respect, this type of foothills battle before it. But it is important. I think we are entitled to have the ability to challenge the evidence in any way we see fit, based on the pleadings as they stand at the moment, rather than on the amended pleadings, because we are not asking for any disclosure on the basis of Dr Nils' expert report, because it is not a pleading. Disclosure is a right which is reasonable and lawful, but what we say would not be correct would be to allow for the amendments.

As I say, my case has been I would suggest very strongly reinforced by the admission of my learned friend, Mr Patton, that actually his pleading is not inconsistent with Dr Nils. If it is not inconsistent, this is just a tidying up exercise. He has already said that he is willing to move away from the pricing point, and we would like him to, thank you very much, but on the other stuff, just move away. If it is not inconsistent, don't tidy it up. If it is going to be tidied up, unfortunately consequences will arise, which include the point --

MR JUSTICE ZACAROLI: What do you say to the point that Dr Marr, if that's the correct pronunciation, has herself accepted there is a market. She finds that there is a relevant product market for the procurement of graduation ceremony services by universities, and there may be sub markets of various services individually.

MR RANDOLPH: Indeed .

MR JUSTICE ZACAROLI: (inaudible) the parties.

MR RANDOLPH: Again, sir, that's fine. She can be cross-examined on that as to whether she was right in terms of not necessarily the existence of the market but whether it is the relevant market, because she says, in terms, that it is not the relevant market.

The point is that this is a point that is being put against us by Dr Nils, because Dr Nils says this exists and it is the relevant market.

MR JUSTICE ZACAROLI: Let's focus on that for a moment. The issue between the parties is whether it is the relevant market. Your resistance to the application is put at least to a large extent on the basis it is a very late amendment, because you had put such work in terms of disclosure and other evidence that it is unfair to do that now, given the closeness of the trial. What disclosure and evidence would be required in relation to the question of whether it is the relevant market, given that it is common ground the market exists. So what prejudice in terms of disclosure that you would need, etc, that you would otherwise get is there?

MR RANDOLPH: I mentioned earlier --

MR JUSTICE ZACAROLI: You say you want those but are those actually necessary for the question of determining the question of the relevant market?

MR RANDOLPH: Absolutely, because it will show whether it actually exists in the real world rather than as a construct. All that Miss Marr is saying is that essentially, at the end of the day, there could be -- paragraph 150 -- first of all, this is all predicated on 144, E&R's stipulation that there exists an alternative. So this is all based on the alternative relevant market in which universities offer the opportunity to include OSAs.

Of course, I think I am right in saying that that was the subject of the deletion at

paragraph 66, in terms of the markets for academic dress and university-specific markets. But even if it is not, the pleadings, however, do not offer any further detail. So she, therefore, helpfully at 145 goes on to say:

"Well, in order to consider what the relevant markets may be, I considered the range of products that university are procuring."

That's all fine. She is trying to assist the Tribunal and come to an independent opinion, which is what this is, independent opinion evidence, and she differs in the same market. That's fine. She can be taken through that as to why she doesn't believe it is the relevant market.

The problem we have is that Dr Nils has gone one step further and said not only is this a market, it is the relevant market. In order to test that, in the ordinary way, one would have access to the type of documentation that I mentioned, in other words, communications between the Defendants and the universities which identify this market, because they are saying that there is a link, there is a clear link between the universities and the Defendants. It can't be looked at in a void. It must be looked at in a factual context.

It is all very well for the experts to say: "Here there may well be a market here, but it either is or it is not the relevant market".

We, sir, need to convince you -- both sides need to convince you as to the relevance of that. In order to do that, we have got to anchor it in reality. It is trite in economics and in competition law generally (inaudible) in theory, but one is looking at it in reality. So did it actually exist in the reality of the situation.

In order to do that, one has definitely to look at, amongst other things, communications between Defendants and university, communications going to what the asserted series of university-specific markets are. It is all very well for my learned friend, Mr Patton, to go back to Dr Nils and say "that's

where the serious point comes in". We have no idea what they are. How are we going to deal with that?

You might say: "Oh, well, you can send out an RFI if these are amended". That's fine, but that gets very tight in terms of timing. That's the problem. Consequences have actions. This is very late. The very fact that Mr Armitage may have been busy is, I would suggest, neither here nor there, but if the whole of their pleaded case rests on Mr Armitage's shoulders, so be it. But we are where we are.

If these amendment are allowed, as I say, we will be seeking those types of document, plus documents going to the Defendant's income streams from universities. There should be proof of payments by universities for the Defendant's supply of graduation services. We don't know that. We don't know, because that has not been sought to be disclosed, because that wasn't part of the relevant market as posited by the Defendants until the afternoon of 3rd December.

Also, as my learned solicitors pointed out, the issue of photography is important, because they are trying to scrape out photography, which might be seen as an ancillary point, but it is an important issue in relation to the manner in which these services are said to be bundled. One has to look at the competitor suppliers of photography in the market again to test the assertion that's being put forward by Dr Nils, but, as I say, all of this now almost is academic because of my learned friend's admission or assertion that Dr Nils' evidence is not inconsistent with their existing pleading. As I say, fine, and then we can make our submissions on that.

MR JUSTICE ZACAROLI: Can I just ask if any of my fellow members have a question for you before I return to Mr Patton?

MR LOMAS: I do have one for Mr Randolph, which is in practical terms, how would the scope of disclosure that you would be looking for go beyond that which has already been asked for and given?

MR RANDOLPH: Thank you, Mr Lomas.

At the moment, disclosure has obviously been restricted to the pleaded case and the pleaded case in relation to the Defendants in terms of the relevant product market was limited to, firstly, primarily academic dress and then, in the alternative, academic, legal and clerical dress. The geographical markets were either worldwide or Commonwealth, and now it has been removed down to a (inaudible).

So the disclosure has not been made in the light of this new disclosure. There's been no disclosure in relation to the graduation services market as a market. It has not been looked at in the context of what presently are an unparticularised series of university markets. It has been looked at in the context of, from the Defendants' perspective at the very least, either worldwide or Commonwealth.

So it is not changing. It is not turning the telescope round, if I may use that, looking at somewhere which is not -- I am not saying it is a 180 degree turn, but it is somewhere which it wasn't before.

In other words, the manner in which the disclosure was carried out was obviously in relation to the pleaded case, and this is not a tidying up exercise. These are changes.

Now, my learned friend may say they are not inconsistent. Well, fine. If that's what he wants to say, that's what he wants to say. There will be -- and also what I have not mentioned, photography, that was not part of anything. It has just been carved out by the Defendant. I am not going to go into now -- now is not

the time to seek to rationalise whether Dr Nils may be going down these paths, but obviously it is in order for him to come to the conclusions he came to.

MR JUSTICE ZACAROLI: Sorry, before you go on, can I just interrupt with this question. Can you point us to a particular disclosure request, a new disclosure request which would pick up documents based on this new pleading which would not have been picked up by a disclosure request under the original disclosure orders?

MR RANDOLPH: Sir, the disclosure orders were predicated on the pleadings.

MR JUSTICE ZACAROLI: I know that. We are looking at, as Mr Lomas pointed out, at a practical example, where documents which you now say would have to be disclosed wouldn't have been disclosed by reference to the existing disclosure process.

MR RANDOLPH: I have not got the disclosure list in front of me. I am terribly sorry, sir. Go to the issue of -- well, just go to photography. That will not have been in the disclosure at all. Documents going, as I would think, but I have to say I haven't got the disclosure list, going to income streams from universities in relation to the supply of graduation services.

MR LOMAS: Mr Randolph, photography is out of the new definition. It was out on both cases. So why should it affect disclosure?

MR RANDOLPH: By out, sorry, Mr Lomas. I didn't --

MR LOMAS: It was neither in the market that you contend for or was originally defined, nor in the market as the amended pleading defines it, so why should you want disclosure in relation to photography services?

MR RANDOLPH: Because we want to demonstrate in so far -- it wasn't part of our case. You are absolutely right, sir. But insofar as the Defendant's case is

concerned, they are saying: "Hey, the new market is graduation services, excluding photography".

Now, in order to be able to justify that, in order to be able to challenge why they have graduation services excluding photography, we need to look at the photographic service market. You are absolutely right, sir. It wasn't part of our case and ergo it wouldn't have been part of disclosure, and it hasn't been part of disclosure to date. But where we are in a situation where photography services are now hived off, we need to be able to review that and to be able to possibly challenge Dr Nils as to why photography services are outwith his new market of graduation services, because everything else is in it. In order to do that we would need to see disclosure in particular in relation to the Defendants and photographic -- universities in terms of graduation services. One, do they, for example, say: "Oh, by the way, we would be happy to provide services, including photography". If they do, that makes my job cross-examining Dr Nils a little bit easier. If, on the other hand, he says, "Oh, PS, by the way, photography is never included", well, fine, but we don't know because we have never seen that.

Actually it is really important, because if photography is in the graduation services market, that impacts, we would say -- and I am not going to give the game away in terms of where we are going in terms of cross-examination, but you can guess -- we would say that would impact markedly on his eventual analysis of the position of Ede & Ravenscroft on the relevant market, on that market, because it will be seen that actually at the end of the day they are in the position that we say they are in, which is agreed to by Dr Nils, which is they're in a leading position in the market, and what Dr Nils says is, "Oh, don't worry about that, because actually there's an awful lot of pushback from the

purchasers", in other words, from the universities purchasing these packages. Once you factor in photography, that position will change. So photography might seem to be small, but actually it's big, and as you have said, sir, that has not been part of disclosure, because it's not been part of anybody's case until we saw it in Dr Nils' report and then picked up. (Overtalking).

MR JUSTICE ZACAROLI: I'm sorry. The disclosure that has been required -- I'm just going back to the CMC order --

MR RANDULPH: Yes.

MR JUSTICE ZACAROLI: -- of January 2021. So the Defendants were required to provide:

"Disclosure of OSAs and any other documents containing the terms of any contractual arrangements between the Defendants and UK universities relating to the supply of academic dress and associated services."

MR RANDOLPH: Yes.

MR JUSTICE ZACAROLI: And then -- I'm just randomly picking another category:

Documents going to universities' expectations suppliers of academic dress will also provide a range of other services."

MR RANDOLPH: Yes.

MR JUSTICE ZACAROLI: So won't disclosure have already picked up anything which might fall under this, if it's a new case, new case?

MR RANDOLPH: Well, sir, not as far as we're aware. Not as far as we're aware, because it could be services that don't include photographic services. It could be the management of the gowns on the day. It could be all sorts of things, but it may not include photographic services, and we would actually want, because it is quite important -- we say very important -- we need disclosure of that, but we also -- the fact that at 61 the suggestion, "Oh, there is just

a series of university-specific markets", again, I am not going to give the game away. We know why that sort of finding might be found, but, of course, Dr Nils has come to his own objective independent opinion on that, but I will want to challenge him. I literally have no idea. There is no disclosure on university-specific markets for graduation services. So one has to -- and certainly not a series of university-specific markets for the supply of graduation services. No-one knows that that is.

The trouble -- when I read this proposed amendment pleading first off, I and some of the legal team, there was a concern, "Oh, this has been done deliberately to try to move the case off". I'm sure it isn't. I take Mr Patton's word. Of course I do. From their perspective they're doing what they're doing. We are very keen not to fall into the heffalump trap, very, very keen, of saying, "Actually we do need this. We do need that" to make it fair, and, of course, when determining applications for late and indeed very late amendments, the Tribunal, as every Tribunal and court, will have regard to the overriding objective, including that justice should be done or that parties should be treated fairly and be put on equal footing. We don't want this trial to go off. We genuinely want this to be determined as soon as possible, but we don't want to be prejudiced in going into a trial where we can't examine the evidence properly because there has been a very late amendment. My analysis of the law is that unfortunately we can't say that expert evidence that is inconsistent with the pleaded case is per se inadmissible. It doesn't mean I can't make submissions as to its weight, but, as I said, it is clear, we would suggest, that consequences do have actions. There will be further disclosure required in relation certainly to paragraphs 60 and 61. We don't think that can fit, as I say, going back to Mr Patton's approach of non-inconsistency with the

present pleadings, and we say let's crack on on the basis of what we have. Let us, as they say, get on with the preparation for trial, which is not very long away, and then we can make our submissions as we see fit, but to open Pandora's box now, where there are clear issues -- it might be said, "Oh, well, don't worry, Mr Randolph. You can make the point. There's no evidence backing this up. It goes to weight". I would rather not, actually because I think that's not the right way. They have made the amendments. They have sought to make the amendments very late, because if there is disclosure, it will impact on the trial. There is no dispute about that. The burden is very firmly on them and it's a very heavy burden. We don't think it has been discharged and in the light of Mr Patton's admission that there is no inconsistency, we don't need it.

MR JUSTICE ZACAROLI: Right. Thank you very much, Mr Randolph. Mr Patton?

MR PATTON: Thank you, sir. I will not repeat the points I have already made. I just have a few short points to make.

First, Mr Randolph was not able to identify anything inconsistent between what was originally pleaded and what we wished to plead by amendment. He was not able to explain why if this was, as he would like to call it, a volte face, it is something that Dr Marr had already considered and addressed in her report. Indeed, that was not a point he was going to address until Mr Lomas asked him about it. Dr Marr has already been able to address this in detail in her report. She never suggested in her first report that she lacked any documents or evidence that she needed in order to be able to decide whether this was a market that existed or whether it was a relevant market. So she plainly was satisfied that she had the material she needed to consider this issue.

I respectfully suggest, secondly, that Mr Randolph was not able to meet actual areas

of new disclosure that would not already have been covered.

I respectfully agree with the point on the existing disclosure order at page 504 and in particular item 17. If academic dress is being supplied along with other services, including photography, then we will have already given disclosure in relation to that, pursuant to the existing disclosure order. So there is no new disclosure arising out of the amendments.

Mr Randolph referred to e-mails in which the market was being discussed. It is unreal to suggest that in a competition case one is going to be looking at contemporaneous e-mails to see whether they were thinking about the competition economics issues that the Tribunal has to decide. Indeed, it is actually common ground that this market exists and the question is whether it is the relevant market. That's a question for economics expert evidence, the question of whether it's the relevant market, being essentially is this the market which is informative to look at in order to understand the competition dynamics that are at play? That's something on which you will be assisted by the two experts, who will have considered and reached conclusions on that.

You are not going to be looking at contemporaneous e-mails to see whether sales people thought that it was a relevant market. That simply does not arise.

He made some points about services, such as photography. What he didn't show you -- if I can just show you the layout of Dr Marr's first report at page 781. You can see she sets out the market background in some detail. At 782 you can see the heading "Overview of Graduation Services and the Associated Services". Then she sets out some information about that from paragraph 73 onwards, as to what the other services are.

Then, at the next page, 783, she deals specifically with ticketing and other event preparation for graduation day ceremonies. She deals with those in detail. At

85 the heading "Ceremony day services, ushers who are present, people who help dress the students", that has all been considered by her. She does all of that before she even reaches the question of academic dress.

Then if you to go on beyond that to 789, she specifically deals just above paragraph 126 with photography services and she sets out information about that.

So the suggestion that because of the form of the existing pleading that everyone has focused on academic dress and it has not occurred to anyone that there are other services being provided for graduation day is completely inconsistent with the whole (inaudible) as well as being an entirely unrealistic approach, given the issues in this case.

Fourthly, we do say there would be no useful purpose in refusing these amendments, because, first of all, the original pleading made clear that we would rely on expert evidence on market definition and the list of expert issues (inaudible) that the experts will opine on the geographic product mentions. Mr Randolph accepts that Dr Nils' evidence will be admissible at the trial, that we will be free to run a case based on it and to put that to Dr Marr, and that you will able to make findings on that. That concession shows that there is no prejudice for allowing amounts, because if there were prejudice, he was saying it would prejudice them unfairly.

There is, however, a down side of refusing the amendments, which is that Mr Randolph apparently contemplates that while the whole of the trial can proceed on the basis of Dr Nils' evidence, there may then be a dispute at the end as to retrospectively whether that case was outwith the scope of the existing pleading.

Now that is a recipe for a procedural muddle and it is entirely unsatisfactory, the idea that the case should be conducted on the basis of the evidence but with the

ability for them retrospectively to say that that was not a point that was pleaded and so it should all be ignored on that basis. That's not a sensible way of running the trial.

He said at one point that they might want to make submissions as to the weight that should be given to Dr Nils' analysis by reason of the pleading point. That's a point they can make anyway. If they want to say less weight should be given to it because it wasn't originally pleaded by the Defendants, that submission for what it's worth is open to them.

Until there are any other points on which I can assist you, those are my submissions in reply.

MR JUSTICE ZACAROLI: Can you just help me with the original pleading as to product scope?

MR PATTON: Yes.

MR JUSTICE ZACAROLI: It is slightly hard looking at it with all the amendments in, but we are looking at 60 and 61 for the original case, are we not, on product market? I am just looking at 66. No. It is 60 and 61.

MR PATTON: Yes.

MR JUSTICE ZACAROLI: So in 60 the original pleading was nothing more than ...

MR PATTON: It is too vague.

JUDGE MATTHEWS: It is too vague. Supply doesn't capture sale and hire. That's the only point made?

MR PATTON: Yes.

MR JUSTICE ZACAROLI: Then 61:

"Whichever product market the Claimants mean to refer to it is denied that the geographic extent is national."

So the only particular given at all was in relation to geographical market.

MR PATTON: Yes. That's fair. The point really made at 67 is the Claimants have failed to define this market, and it is fair to say that we don't -- there is not a positive plea there that the product dimension of that market is anything in particular. So the original defence does leave open the question of the product dimension of the market for expert evidence. There was no RFI seeking to pin us down on that. Presumably that's because it was recognised that it would be dealt with in expert evidence.

MR JUSTICE ZACAROLI: Yes. Your alternative case, however, did descend to particulars of the product market. So in the alternative if it is not a university-specific market -- this is 66 -- 66.2:

"The product market comprised academic dress, legal dress and clerical dress."

MR PATTON: Yes, that's true. So that expands it beyond academic dress and no party is supporting that position now. Neither of the experts is.

MR JUSTICE ZACAROLI: That's only if it is not university-specific?

MR PATTON: Correct, whereas our case is it is university-specific or a series of university specific markets.

MR JUSTICE ZACAROLI: In that context there was never any pleading as to what the product market was.

MR PATTON: As to whether it was for the university-specific markets, no, that's fair. I agree.

MR JUSTICE ZACAROLI: Okay. Thank you. Anything else from Mr Lomas or Mr Ridyard for Mr Patton? No. Right. We will take a break. We need to take a break anyway. We will combine a natural break at this point with a break to consider the pleading issue.

(Short break)

RULING ON AMENDMENTS

MR JUSTICE ZACAROLI: We need to consider an application by the Defendants to re-amend the defence. This is, as Mr Randolph for the Claimants contended, a late application, but, as Mr Patton submitted, lateness is a relative concept and the court's attitude towards lateness depends upon, in particular, how substantive the amendment is and what prejudice, if any, is caused to the other side.

In this case we are satisfied that the Defendants' description of the amendments, that is that it ensures the pleading are aligned with the evidence that is already contained in the experts' reports served by the Defendants, which we note the Claimants have not sought to challenge, is the correct description. The Defendants' pleading so far as product market was concerned was initially merely to say that the question of definition of the market is a matter for expert evidence, which will be served in due course. There was no further elucidation of its case in relation to product market in relation to its primary case certainly, although it is true to say that an alternative case relating to the global market, which is now sought to be abandoned on any basis, was limited to academic dress and clerical dress and the like.

The Defendants' expert then produced a report, which identified the relevant product market as graduation services to a specific university. The market being said to be university specific at the outset, we do not see anything new in the addition of "series of university-specific markets". By definition since it is not only one university in play in this case, there must be a series of separate university markets in play.

The Claimants' expert not only addressed the question of graduation services as a product market, but she also concluded that there is such a market. The

experts, having dealt with these issues without the need for any further disclosure, we do not accept the Claimants' argument that to allow this amendment would lead inevitably to further disclosure, so as to prejudice the Claimants.

We note that the issue of associated services was squarely within the scope of existing disclosure orders. In particular two paragraphs of the order affecting the Defendants at paragraphs 1 and 17 would have required any document relating to contracts between the Defendants and universities for academic gowns and associated services, whether actual or prospective, to have been disclosed already. We therefore do not accept that there is a likelihood that any further disclosure would be required.

On one view the amendment is unnecessary, because the Defendants can continue to run their case on the basis the pleading says nothing more than the product market is explained in the expert evidence. Indeed, the same would be true for the geographical market.

Mr Randolph intimated, however, that if the amendment was not allowed, whilst he had not so far found authority to support the view that the expert evidence could be struck out if it went beyond the pleaded case, he reserved the right to do so at some later stage. We think it would be unfortunate for this case to go ahead with that level of uncertainty.

Since we have concluded the amendments can properly be made, notwithstanding that they are late, and given that we do not see that they cause any prejudice to the Claimants, we will give permission for the amendments to be made.

That covers paragraphs 60 and 61 (which merely is the abandonment of a claim). We will hear further from Mr Randolph as to which paragraphs are consequential on paragraphs 60 and 61.

MR RANDOLPH: No, that's true, sir. So going to --

MR JUSTICE ZACAROLI: Can I cut through it, if I may, Mr Randolph?

MR RANDOLPH: Of course.

MR JUSTICE ZACAROLI: 77.4(d) I think it is, where all that has happened is the plea has been abandoned I can't see any objection to such an amendment.

MR RANDOLPH: Save as to consequences, but that will be picked up in the ordinary way. I think there is an amendment before that, which is 77.1(b).

MR JUSTICE ZACAROLI: That's the only one I think which doesn't fall into the category.

MR RANDOLPH: Exactly -- sorry -- and 69. I do apologise. So this is constrained by -- sorry. This cross-refers to a present pleading. That is fine. Then 77.1(b) is -- yes, this is the pull/push point. This goes to an important aspect of Dr Nils' report, which is that essentially, despite the position that Ede & Ravenscroft Limited and the Defendants find themselves on the market, in his words not a dominant but a full position on that market, because of the manner in which he sees the market, there's a bidding market, and this deals with the Defendants merely responded to the demand from universities for the provision.

So that is a change, because if you see, sir, what the --

MR JUSTICE ZACAROLI: Just before you go on to that can I say this? Isn't this the one which is consequential on the amendments we have just allowed, because it is merely changing it to meet -- so the language matches the amendment to the product market?

MR RANDOLPH: On our side, if I may be so bold, first of all, 60 and 61 deal with the relevant market and this is dealing with abuse.

THE JUDGE: I understand it is slightly different, but it is a change necessitated by the description of the market having changed. That's all.

MR RANDOLPH: Well, sir, if that's the position, then you would find that, as we would contend, there was actually a primary relevant market described in 60 and 61 and alternative market at 66. Insofar -- the difference here is the response. So in the original words at 77.1(b) it was "The Defendants merely purchased services in return for commission from relevant universities". This is merely responding to the demand. So it's looking at something -- the provision of graduation services is in the scheme of things neither here nor there. That is consequential. The original pleading just talked about services. What the difference is here is that the original pleading which presently exists is the Defendants are purchasing services whereas in the amended -- suggested amendment it is -- forget about purchasing. They are just responding.

This goes to Dr Nils' bidding markets theory. To that extent we would -- we do say that -- rather bizarrely, but this is just a point that I make, this suffers from the embarrassment of not actually being mentioned in my learned friend's skeleton at all. We don't know why that is. We assume it is still being advanced. We have not been told otherwise, but it is a major change. It does deal with abuse. It does deal with the manner in which they set out why they say their behaviour was not abusive and not done before in terms of the admissibility of Dr Nils' evidence, but we do say that that actually does require substantial disclosure, which hasn't been given to date, because it is a brand new case.

Essentially they -- well, put it this way. In the normal course of events, had this happened months ago, we would have asked for disclosure of all

communications showing Defendants were merely responding to demand from universities rather than what they said before, which is purchasing. We have not done that today, because we only saw this the other day.

Now there are two ways of dealing with this. Given, sir, that you have given permission for at least some amendments to be made and we have agreed to others, just let this through and then we deal with it on the basis that it goes to weight, and insofar as Dr Nils wishes to put forward this case, then it is open to us to say that's fine, because there won't be any evidence.

MR JUSTICE ZACAROLI: Yes. Perhaps I can cut through this by asking Mr Patton. I think in dealing with this you said it was a consequential change, just to deal with the definition change. There may be said to be a difference between responding to a demand and purchasing. Would your amendment be the same? Would you be content with an amendment that merely reflected the change in definition by "The Defendants purchased graduation services from the universities" or is that --

MR PATTON: We provided the graduation services to the universities.

MR JUSTICE ZACAROLI: Sorry. Yes.

MR PATTON: So it would be the other way round.

MR JUSTICE ZACAROLI: Yes, but if you kept the language of "purchase" rather than "demand"?

MR PATTON: Yes. I think it would be -- I would much prefer the formulation that we have given here. In relation to Mr Randolph's point about disclosure, you have already seen paragraph 17, documents going to universities' expectations that suppliers will also provide a range of other services. So disclosure has been given on that. So there is no new issue for disclosure here.

So my primary position is that there was no prejudice in allowing us to formulate it the way that we have, but if you are against me on that, then expressing it more neutrally in terms of providing the services, that will at least ensure that it is consistent with how we formulated the market.

MR JUSTICE ZACAROLI: I think I would prefer that, because this is not otherwise a matter of expert evidence at all, is it? This is a question of fact. Were services demanded with a university bundle or was it more -- it was something else. I think the neutral formulation leaves that open.

MR PATTON: I understand. I think "demand" is used here in the sense of "supply and demand" rather than a demand such as for a ransom payment.

MR JUSTICE ZACAROLI: Let's leave the language neutral, because it doesn't contain that ambiguity.

MR PATTON: I understand.

MR JUSTICE ZACAROLI: That's 77.

MR RANDOLPH: I am very grateful. I think it follows from Mr Patton's earlier concession that 70 should go as well, because, as you just said, sir, that's a matter of fact:

"The Defendant's prices for academic dress hire was declined in real terms."

MR JUSTICE ZACAROLI: It is not so much fact as evidence. Mr Patton's point was if it is properly evidence, he doesn't mind it going out. I think that's the solution there.

MR RANDOLPH: I am very grateful.

MR JUSTICE ZACAROLI: Right. We propose to permit obviously any consequential pleading if necessary, but given the limited nature of this, you may feel it is not necessary, until the end of the year given the holiday break, so 31st December.

MR RANDOLPH: For our responsive pleading to that?

MR JUSTICE ZACAROLI: Yes, yes.

MR RANDOLPH: Very grateful. Very grateful. Thank you.

MR JUSTICE ZACAROLI: Right. Moving not so swiftly on, can we go to the confidentiality issue?

MR RANDOLPH: Indeed, sir. Mr Spitz going to deal with this and I am going to be a mechanical operator. So if it goes wrong. That's not Mr Spitz. There's Mr Spitz.

MR SPITZ: Thank you very much, sir and members of the Tribunal. I am going to deal with then the confidentiality issue as it has now arisen. I will start off by saying this. My instructions are -- and this is the reason why this has some real (inaudible), this point -- there is a noteworthy significant difference between the extent of the confidentiality designations that the Claimant has made with respect to the trial bundle and those that the Defendants have made. My solicitors tell me that the Claimants have sought confidentiality over approximately 4% of the documents that will form part of the trial bundle whereas the Defendants by contrast have asserted confidentiality claims of approximately 85% of the documents that were then in the trial bundle. Some of these designations will relate to the identity of individuals on e-mail chains, but not the majority. So there is a stark difference.

When it comes to assessing whether the confidentiality regime that has been place for the purposes of disclosure in the earlier phases of the trial remains appropriate for the trial stage itself, there are a variety of further considerations, and the Tribunal will probably have seen some of those picked up in the authorities set out in the skeleton argument, but essentially there are two principles at play in relation to the public. There is the open

justice principle and in relation to the Claimants there is the natural justice principle.

The current regime is what the cases describe as an "external eyes only" confidentiality ring, which means that no members of the Claimant have access to anything designated as confidential and have been placed into the confidentiality ring or to which redactions have been made.

That is the first concern that the Claimants have. It is one thing for that to be the case in earlier stages of the trial. It is quite another matter when one comes to the trial itself.

The second concern -- and I will take the Tribunal to some of the examples -- is that the Defendants have, in fact, been over-zealous in their designation of material and now is the appropriate time to sort that out in the run-up to the trial.

Again what one can live with in the earlier stages and the reasons why a confidentiality ring may be and often is appropriate for the purposes of disclosure fall to be reconsidered when one moves into the trial stage.

Again the authorities in our skeleton make the point that what is critical here is the stage at which one looks at the (inaudible) and we are now at the trial stage. It would not have made sense to raise the issue at any earlier stage. The trial bundle is now in the process of finalisation. We know at this point in a way we didn't when disclosure was taking place what is in that trial bundle and what is out and we know the extent of confidentiality designations.

What I propose to do is just to rehearse the (inaudible) of valid claims of confidentiality. That, sir, as the Tribunal is aware, is in Schedule 1(2)(b) of Schedule 4 to the Enterprise Act. It is not necessary to turn it up. It is referred to in Rule 101.2 of the Tribunal Rules.

"The recognised grant for an assertion of confidentiality is that the documents constitute commercial information, the disclosure of which would or might in the opinion of the Tribunal significantly harm the legitimate business interests of the (inaudible)."

What I propose to do in making these submissions is, first, briefly to show you how the Defendants have gone about invoking confidentiality by category rather than by document. I would then like to point to a small number of examples of the Defendants' documents which have been designated as confidential to demonstrate the very broad approach that the Defendants have taken and, thirdly -- and to make the point the documents over which confidentiality has been asserted are the core documents in this case. They go to the original supplier -- official supplier arrangements, that's the OSAs, the invitations to tender, the ITTs, the requests for proposals or RFPs and the responses to those documents. So we are dealing with documents that will come up on several occasions one can anticipate in the course of the trial at court. They go to the questions of exclusivity and the extent of that exclusivity. So we are likely to face concerns as we move into the trial about how practically to deal with that and in addition to the practical considerations are the principled ones that I mentioned earlier.

Sir, the last part of what I would like to demonstrate and show the Tribunal is how, in fact, there's an inconsistency in the approach (inaudible). Whereas in Dr Nils' expert report there are descriptions of a number of the provisions of the OSAs and ITTs and the RFPs, those documents nonetheless have been heavily redacted. What we take from that is that, in fact, the confidentiality designations, if they are well founded, need to be demonstrated.

This is not the time to rule on particular documents and that is not what we are

proposing to do. What we will suggest to the Tribunal is it is time now, given the impending trial, for the Defendants to really decide what the absolutely essential confidential documents are over which they persist in claiming confidentiality and to set out a justification for that that can be evaluated. One hopes that that will approach something like the small number of documents that the Claimants seek to maintain confidentiality over, but this is a necessary exercise and now is the time.

I turn then to what the approach the Defendants have adopted to confidentiality is and to ask you to refer to an appendix to the Defendants' letter of 28th May 2021, which is at pages 989 to 990 of the bundle. There, sir, you will see that what they have done is they have identified a number of categories, seven categories, over which they claim confidentiality. So that's a categorical approach rather than a document by document approach. We are concerned with three of those categories and the concern is because those are at the core of the trial.

The categories themselves that we are concerned with are categories 2, which the Tribunal will see is said to involve sensitive financial information. I will not (inaudible) the description of the category. In the right-hand column of appendix 1 one can see the asserted reason for the confidential treatment. So that's category 2.

Category 3:

"The terms in the contracts that record value exchange and/or the consideration paid by either party, save where such terms form part of an institution's unamended standard terms".

At the bottom, the last paragraph of category 3:

"Where the contracts themselves are expressed to be confidential the entire

agreements have been withheld from inspection outside the confidentiality ring."

In other words, no more detailed analysis has taken place other than the Defendants contenting themselves with the label from presumably a university that the document is confidential. The justification for this category is then set out in the right-hand column. So that's category 3.

The third category that we are concerned with is category 5:

"Responses drafted by the Defendants to any invitations to tender. The ITTs themselves have not been withheld or redacted unless they are expressly stated to be subject to confidentiality restrictions."

Again a similar point there. (Inaudible) of the ITTs designated these as confidential, that has been from the Defendant's point of view the end of the enquiry. So that's the approach that they have adopted.

To get an idea of what this means in practice it is worth looking at section B of our supplementary hearing bundle. I propose to show the Tribunal a number of examples of what the Defendants have done with confidentiality.

The first one is at page 79 of the supplementary bundle. It is on Ede & Ravenscroft notepaper you will see there. You will see the date of this agreement. It is a fairly recent agreement, May 2021. I am obviously not going to read out the provisions that have been reacted, but I would ask the Tribunal for a moment to scroll through and to look at those. The Tribunal will see some of them, scrolling through, have been redacted.

One can see on page 81, paragraph 2 there's a rather substantial redaction of quite an important provision at the core of this case. Similarly clause 3 also a fairly important provision has been redacted.

Then one scrolls further down to page 83 and I am looking at clauses 5.2 to 5.4.

MR JUSTICE ZACAROLI: Yes.

MR SPITZ: Difficult on the face of them to see anything confidential about these provisions but they would obviously need to be justified. They seem to regulate liability in a not unusual way.

Clause 6 has been redacted. Then one comes to clause 11. Also not clear to me why that would attract a confidentiality designation in any way.

Then scrolling down through past the signature blocks and into schedule 1, which deals with the services, and, sir, there you will see that all of the services that are provided pursuant to this contract have been redacted and confidentiality asserted over them.

The same applies to paragraph 3 of this schedule and to paragraph 4. That OSA is not an anomaly. It is a typical example of the approach to the OSAs that the Defendants have adopted.

The next document, which starts at page 91 of the supplementary bundle, is you will see a university's ITT, invitation to tender. You will see the stamp across the top on the first page, on page 91. That has been as far as the Defendants have felt they need to go, because the entire document, if you scroll through, is redacted.

MR LOMAS: Sorry. One question. As an ITT would this document be, if not publicly available, available to a number of other people in the market?

MR SPITZ: Sir, absolutely. You would expect so, that whoever was invited to tender would have seen this document, which exacerbates the fact that it is difficult to understand why it has been placed in the confidentiality ring and no-one else is able to see it.

MR JUSTICE ZACAROLI: Well, presumably it is because of the rule you referred us to earlier, that where a document is identified as confidential, then it has

been treated as confidential.

MR SPITZ: That doesn't give justification --

MR JUSTICE ZACAROLI: I am not saying it does. That would explain why this is the way it is I think.

MR SPITZ: Indeed. That is as far as the inquiry has gone.

MR JUSTICE ZACAROLI: I notice the time, Mr Spitz. You have the wrong name up there. Can I just ask this? You are not suggesting, are you, that it is just not appropriate to have an "external eyes only" order through a trial in a competition case?

MR SPITZ: Sir, what we are suggesting is that there would need to be exceptional reasons to have it, and it may be that there is not -- one should never say never in this environment. However, the weight of the authorities is pretty firmly on the side of making sure that these are absolutely -- that an "external eyes only" is absolutely necessary. Short of that, it is unworkable for the members of the Claimant not to be able to see the documents. So to that extent we are saying "external eyes only" only if it can be demonstrated that this is absolutely necessary.

MR JUSTICE ZACAROLI: The nature of the business in the Competition Appeal Tribunal would necessarily lend itself to such an order, wouldn't it, because you are dealing with almost by definition competitors?

MR SPITZ: Provided it falls foursquare into the space for confidentiality designation, one can see the issue arising, but, sir, it is dealt with in different ways. The resistance to an "external eyes only" has often meant that one fashions a different approach, such as a member of the Claimant or the Defendant in their case is entitled to see the documents on the basis of signing appropriate undertakings. So even if --

MR JUSTICE ZACAROLI: That could have been a problem throughout this case. In a sense one would think that's a greater problem when you are preparing for trial as opposed to at trial, when it is really handed over to the lawyers to a large extent. I know it is not absolute, but there has been no problem with the way this regime has worked to date, at least not a problem sufficient to get you to come to the Tribunal to try to vary it before now.

MR SPITZ: This is the time that we are seeking considerations that are particular to the trial.

MR JUSTICE ZACAROLI: Yes. Well, we will pick this up at 2 o'clock again.

MR SPITZ: I am grateful. Thank you.

(Lunch break)

(2.00 pm)

MR JUSTICE ZACAROLI: Yes, Mr Spitz.

MR SPITZ: Thank you, sir. I would like to pick up on the third document that I wanted to refer the Tribunal to, which starts at page 112 of the supplementary bundle. It is a William Northam document. It is another example of an OSA. The Tribunal will see there the extent of the redactions. It is not confined to the pricing information, for example, but it includes pretty much the whole of that OSA. The last example is an RFP and that's one of the university documents, and that appears at page 114 and following of the supplementary bundle. That is entirely redacted to page 121.

I said that what I would then do is show an inconsistency in the way that these confidential documents have been approached by the Defendants, particularly when regard is had to the way the expert, Dr Nils, has described many of these materials, because he makes open reference to, summarises or comments upon these materials, which again suggests that they do not, in

fact, require confidentiality restrictions at trial.

Just to show the Tribunal a few examples, these appear in Dr Nils' report from page 903 of the trial bundle, and it is worth having a look at a few of the paragraphs there, and after we have done that I will refer to the Court of Appeal decision that gathers together the authorities on the point.

So, sir, you will see at 903 under Dr Nils' assessment of the agreements that in paragraph 4.7 he refers to the fact that:

"Universities often consider that appointing an official supplier is the best way to ensure that all their requirements are met."

Then at paragraph 4.8 he says:

"The official supplier status offers the following key benefits",

and then he lists some of them.

4.9, he refers to the fact that the universities will often recommend that students use the successful tenderer for academic dress hire and that in certain circumstances the contracts involved agreed not to involve an alternative supplier of academic dress hire.

Then, at 4.10, bottom of page 903:

"The OSAs are usually for a fixed term of a number of years."

Dr Nils carries on in his assessment of the agreements at 4.15 on page 904, where he refers to some of the additional services provided, for example, booking, maintenance of stock, on the day robing services. Then he says that:

"The services also include a commitment to guarantee certain outcome on the day."

4.22, on page 907, Dr Nils says:

"Universities usually require extra services to their benefit and to the benefit of their student body and personnel, such as free staff hires, catering for ad hoc requests of specialist stock or for special events and other value add items,

such as sponsoring student academic prices and providing a certain number of free hires to graduates who qualify for hardship assistance."

4.77 is the last example that I need to refer to and that's at page 921, where Dr Nils says -- he makes the points that commissions are usually structured as a percentage of the hire price. So that is the way in which he assesses and describes some of these agreements. But the agreements themselves are said to be confidential. So the short point is there is an inconsistency in the treatment of these agreements and it is not at all clear, given what Dr Nils has said in his open report, for confidential treatment of these documents.

MR LOMAS: Mr Spitz, can I just clarify one point? Is the point that the expert report is dealing with generalities and ways in which the market typically operates, whereas the redacted documents are dealing with the terms looked for by specific institutions on what is alleged to be a university by university market. So the general point is not particularly confidential, but the terms by the specific institution might be?

MR SPITZ: I think that may be the case, and that may be the position that the Defendants adopt on it, but it remains difficult to see why that information would be -- if those are descriptions of the terms of the agreements concerned and references to particular services, as they appear to be, it is difficult to see why they remain confidential information that needs to be protected from the Claimant.

There is also a point about timing and publicity. That is that the confidentiality is sought on the basis of commercial sensitivity, but insofar as the ITTs, RFPs and past OSAs are concerned, difficult to accept that those remain commercially sensitive, and, of course, the point that, sir, you raised earlier, for those ITTs and RFPs that were public, they are obviously not confidential

and should not be redacted.

Relatedly, insofar as existing ITTs, RFPs and current OSAs are concerned, unless there is some commercially sensitive novelty or significant departure from the contents of the older documents, equally difficult to see a reason that would found an assertion of confidentiality.

Sir, the Tribunal raised with me just before the adjournment the question of the eyes only confidentiality ring. It is worth simply referring to one of the authorities. They are set out in the skeleton and we rely on them all, but for the purposes of the submissions I think it is sufficient just to go straight to the Court of Appeal decision, which canvasses a number of the authorities and draws the relevant principles together.

That is at tab 6 of the authorities bundle. It is the case of OnePlus Technology Limited v Mitsubishi Electric Corporation, tab 6. It is the judgment of Lord Justice Floyd. Walking through that relatively quickly, I would like to refer the Tribunal to paragraph 1 to start off with. Halfway down that paragraph which starts off:

"It is not uncommon ..."

It is the sentence halfway down:

"It is not uncommon in intellectual property and other types of litigation, however", and the court continues, "for highly confidential documents to be subject to more restrictive measures designed to prevent the documents from entering the public domain or being used for collateral purposes. These appeals are concerned with the treatment of commercially confidential materials in the context of litigation about standard essential patents."

The court then goes on to discuss the various authorities under the section headed "Legal Principles", which begins at paragraph 19.

If we pick it up at paragraph 22, what I will be highlighting is the extent to which the eyes only confidentiality ring is an exceptional approach, and particularly when one gets to the trial phase, the care that needs to be exercised before persisting with that.

You will see there the Court of Appeal is referring to the Warner-Lambert decision and the judgment of Lord Justice Buckley, and that's quoted at paragraph 22. I would be grateful if the Tribunal had a look at that paragraph and I will pick it up two-thirds of the way down.

So this touches on the point that the Tribunal raised with me, where Lord Justice Buckley says:

"Even so, if the action were to go to trial, it would seem that sooner or later the party would be bound to learn the facts, unintelligible though they might be to him, unless the very exceptional course were taken of excluding him from part of the hearing. Even where the information is of a kind the significance of which the party would himself be able to understand, it may nevertheless be just to exclude him, at any rate during the interlocutory stages of the action, from knowing it if he is a trade competitor."

Then the Court of Appeal goes on to refer to the Roussel Uclaf decision in paragraph 23. It is the second part of the quotation that I would like to pick up on, once the Tribunal has had an opportunity to look at that. Here Mr Justice Aldous in Roussel says:

"However, it would be exceptional to prevent a party from access to information which would play a substantial part in the case, and as such would mean that a party would be unable to hear a substantial part of the case, would be unable to understand the reasons for the advice given to him and in some cases the reasons for the judgment. Thus, whilst disclosure necessarily

entails not only practical matters arising in the conduct of the case, but also the general position that a party should know the case he has to meet, should hear matters given in evidence and understand the reasons for the judgment."

The Court of Appeal goes on to refer in paragraph 25 to the House of Lords' decision in Al-Rawi. At paragraph 12 of that decision, and the extract is in paragraph 25, and paragraph 20 of the Court of Appeal refers to Lord Dyson's judgment at 64 of Al-Rawi. Recognising an exception to the principle of natural justice again picking it up at the bottom of the paragraph:

"At least in the initial stages ..."

and continuing on to the next page. This is the Supreme Court:

"Such claims by their nature raise special problems which require exceptional solutions."

Then the court goes on to say:

"I am not aware of a case in which the court has approved a trial of such a case proceeding in circumstances where one party was denied access to evidence which was being relied on at the trial by the other party."

I will show the Tribunal what the Court of Appeal does when it gathers these various authorities into a set of principles.

Before I get there, the next paragraph that is relevant is paragraph 33, where the Court of Appeal is referring to the TQ Delta case, also a case that we refer to and rely on in our skeleton. I will pause for a moment for the court to look at the extract -- sorry -- for the Tribunal to look at the extract.

Then the Lord Justice says at paragraph 34, commenting on Henry Carr J's judgment in TQ Delta:

"I agree that an external eyes only tier is exceptional. I also agree that it is wrong to place the onus on the receiving party to establish that a document is

non-confidential. I do not agree, however, that an approach where prima facie highly confidential documents are first disclosed on an external eyes only basis is wrong in principle. The authorities established that staged or progressive disclosure of confidential information is permissible."

That touches on the point I was making earlier, that when one gets to the trial stage, these further considerations come into play.

At paragraph 35 of the judgment the court says:

"It appears that what concerned Henry Carr J was the exclusion of access by one of the parties to the relevant parts of the key document. I agree that should not be the result of the establishment of an external eyes only tier."

I am not going to read them out, sir, but paragraphs 37 and 38 are also important in setting out the approach that the court adopt, but 39 is the place where the authorities are then gathered together. The judge says:

"Drawing all of this together, I would identify the following non-exhaustive list of points of importance from the authorities."

Paragraph 39.2 is particularly important:

"An arrangement under which an officer or employee of the receiving party gains no access at all to documents of importance at trial will be exceptionally rare, if indeed it can happen at all."

Sub-paragraph 3:

"No universal form of order suitable for use in every case or even at every stage of the same case."

Sub-paragraph 4:

"The court must be alert to the fact that restricting disclosure to external eyes only at any stage is exceptional.

5:

"If an external eyes only tier is created for initial disclosure, the court should remember that the onus remains on the disclosing party throughout to justify that designation for the documents so identified."

Then, in paragraph 40, the reference to the external eyes only confidentiality ring.

What we would say is that the approach whereby documents are put into the confidentiality ring and it is then left to the other party to challenge on a document by document basis is not the appropriate approach when one comes to trial. It must be for the party asserting confidentiality to make that case and justify it document by document.

When one is dealing with the kind of discrepancy that I mentioned at the beginning, it seems to me that in this case the appropriate approach is to encourage the Defendants to revisit their confidentiality designations with the hope that these are narrowed to what is truly confidential and warrants protection, at which point, if there is a need then to debate the extent to which the Claimants require access on signing appropriate undertakings, that would be the moment to determine that.

One might hope that that turns out to be unnecessary, but the kind of blanket approach is wrong in principle and also is going to lead to difficulties in the practical management of the trial. For example, if the trial is in person, some of the screens that are used would not be able to pull up some of the confidentiality documents because of the risk that people are people who are not in the ring might see them. We are well aware of the fact that one can manage to some extent by not reading out confidential material in open court, but the cross-examination will be referring to the key documents in the case and one can envisage an unsatisfactory situation where members of the public, including the Claimants, are excluded from significant parts of the

cross-examination.

The final point to make about all of this is that now is the appropriate time at the PTR to raise all of this and to, as I say, encourage the Defendants to take a second look at their confidentiality designations.

That's all I wanted to say about the confidentiality point. As far as the practical arrangements are concerned, of course, those documents that are properly designated as confidential will not be read out in open court. There is a deeper issue, though, that one need to grapple with. Thank you, sir.

MR PATTON: I am sorry, sir. You were on mute when you spoke just now. Are you content I should respond?

MR JUSTICE ZACAROLI: Yes, please, Mr Patton.

MR PATTON: I don't think there is any disagreement with the general principles that apply in relation to confidentiality both before and at a trial. Can I just draw your attention to two points, though I suspect from something you said earlier that you have our points on this well in mind.

In the authorities, the In Federation case, the case that is closest to the situation with which we are concerned, since it is dealing with competition cases, and if I can just draw your attention to page 91 of the authorities bundle, this is a decision of Mr Justice Roth. First of all, just at paragraph 29, he says:

"The reference to the special problems raised by intellectual property proceedings may in my view similarly apply to competition law proceedings, where rival commercial interests are involved."

That's obviously the nature of this case. It is a claim between direct competitors in a market. Then at page 95 of the bundle, paragraph 40, he says:

"I observe that a number of competition cases and also in IP cases some parts of the evidence at the final trial have remained subject to a confidentiality ring of

lawyers and experts."

He goes on to give some examples of that and cites from a decision of Mr Justice Birss in an IP fran case.

Then he says, in 41:

"Similarly, in competition cases I think that restrictions of this kind may sometimes be justified and, when properly confined, I do not believe this has caused problems in the lawyers getting instructions from their clients. In the Pay TV No. 1 Appeals before the CAT concerning the terms of licences to be granted by BSkyB of sports programmes, some of the appeals were against the decision of OFCOM, some of the appellants were in effect on opposing sides and confidentiality rings restricted to lawyers and experts ordered the only issue which arose concerned whether in-house lawyers could be included. Similarly, confidential rings comprising only lawyers and experts were established and applied in the recent CAT appeal in the Viasat where the appellant challenged the decision of OFCOM."

At the end of that he notes:

"In Holland on Documentary Evidence the learned editor observes that the position could hardly be otherwise where the parties are business competitors."

He says:

"Generally, the parties concur in these arrangements, although they still require the approval of the court, having regard to the principle of open justice."

So trials have been and continue to be conducted in competition cases with confidentiality rings limited to external lawyers and experts. It is exceptional, but it is because of the exceptional feature of competition cases that they are brought often between direct competitors and, as we will see, if we go back to OnePlus, at page 149, I think Mr Spitz invited you to read paragraph 37.

Just looking at it again, having seen what is said in In Federation:

"In In Federation, Mr Justice Roth added the observation that confidentiality rings were sometimes established in competition cases to prevent leakage in both directions of confidential information."

Then Lord Justice Floyd adds this:

"Sharing of pricing information can of course contravene competition law, and the court ought not to facilitate it by means of the disclosure process, unless it is impossible not to do so."

So that's the particular concern. It is not sort of amour propre in relation to confidential information where there is a particular concern that actually the litigation process brings about breaches of competition law if material that competitors would otherwise never have had access to is shared between them by virtue of the disclosure process in the litigation.

Just while I have OnePlus open, not on this point but on another point, if we could go back to paragraph 36 on the same page, which Mr Spitz I think didn't read out, if the Tribunal could just read that paragraph, please.

I mention that paragraph because Mr Spitz implied that because there isn't an onus -- because the onus isn't on the receiving party to show that confidentiality is unjustified, because of the question of the onus, it was not acceptable to have a regime where documents are designated but with the ability of the receiving party to challenge them, and it is quite clear from what Lord Justice Floyd says that he regards that as equivalent to a system where all the confidential documents are first considered by the Tribunal and ruled upon as to whether they are confidential.

So the fact that the mechanism works by documents being designated confidential, with an ability to challenge, doesn't address the burden of proof if there is

a challenge, but is an acceptable system, that it is left to the receiving party to challenge, subject obviously to the disclosing party's good faith.

So I think Mr Spitz may have overstated what OnePlus says about that question of burden.

My first point was that we are in exceptional circumstances, because it's a competition case between competitors and the special requirements that arise from that.

The second point I wanted to make is that the order that the Tribunal has made in this case, and if I can go to 489 of the PTR bundle. This is the order dated 27th October 2020, which establishes the confidentiality ring. There are two points which I should make in the correct order in which they appear. 486.

MR JUSTICE ZACAROLI: Sorry. I missed the page number. Which is it?

MR PATTON: If we could start at 486, please, the first page of the order. Just while we are here, so this is the definition of confidential information for the purposes of the order at the bottom of the page:

"Information justifying confidential treatment by the Tribunal in accordance with rule 101 of the rules."

Mr Spitz read out that definition. So that is the test. The test that's applicable under this order is exactly the same test as applies at a trial, because that's the test in the Tribunal's own rules. So it is not the case that this order provided an interim mechanism in relation to disclosure, but with a stricter regime applying at the trial. The regime is strict from the outset. It has got the rule 101 definition incorporated into it. That's therefore a definition that applies for the purposes of the proceedings at all stages, whether in relation to disclosure or at trial. I will come back to develop that point.

The point I immediately wanted to make is at 489. These are paragraphs 12 and 13

of the order. These paragraphs provide a mechanism where if the receiving party needs to show a document which is marked as confidential to someone who is not in the ring, they can make a request and undertakings can be given and, if necessary, the Tribunal can rule on whether the document can be shown to someone who is outside the ring.

So the order, although it is an external eyes only regime, contains itself a mechanism where, in an appropriate case, permission can be obtained to show documents to those outside the ring. Therefore, if any need arises to take instructions from a client representative, for example, in relation to a particular document, that is already baked into the order which the Tribunal has previously made, and it is the case, as I understand it, that no attempt has ever been made by the Claimants to avail themselves of this procedure. So there has never been any request, never any need identified, before the letter of last Monday, to take a document which has been designated as confidential and seek instructions on it, or anything of that kind.

So the regime is, as it exists, flexible enough to cater for that, should it arise, but so far there has been no suggestion that that is needed. That was my second point.

My third point was -- I have shown you the definition now of confidential information. It is a definition that is apt for disclosure, but also apt for the trial, because that is the test which the Tribunal has to apply under rule 101 of the rules.

The suggestion that's now being made, that this was an order really created for a limited purpose, in relation to an interlocutory phase of the litigation, and not for the trial, makes no sense at all. It wouldn't have made sense for the parties to agree to this order, to have it approved, to comply with it in relation to everything in the case so far, only for all of that effort to be rendered null,

because some new regime was to be introduced right at the moment when everything matters, namely at the trial. That simply does not make any sense. That was not ever suggested by the Claimants at the time this order was made. It wasn't suggested by anyone, and it is not an appropriate way to have approached the case management of the litigation.

There isn't any evidence before you. There is no specific reason given as to why it would be necessary now to rearrange the regime that has applied thus far.

As the Chairman put to Mr Spitz, one would expect that if there were some pressing need to take instructions on a particular document, that is something that would have arisen in the course of the litigation so far. It is not something that's likely to arise in the next six weeks, where the lawyers, as the Chairman put it, will be preparing cross-examination and so on.

If it does arise, there is a mechanism in the order to deal with it, and that can be applied.

Fourthly, there is, as we have said in correspondence, no concrete proposal really put forward as to what a revised regime would look like. Mr Spitz's submissions ended really by suggesting that you should give encouragement to the Defendants to do something. There is no draft order. There was no application to vary the existing order or anything of that kind.

At one stage Mr Spitz referred to party representatives on both sides being added as members of the ring. There's no application of that kind or evidence to support it or any identification of who that could possibly be. The Claimants' witness statements say there are two fume time members of staff at the Claimant. They are fully involved in all operational aspect of the business, they say, and they couldn't possibly put confidential information out of their minds when carrying on the business, distinct from this litigation, since there

is no identification of any possible individual who could occupy that role.

It is sometimes the case that in larger organisations there is an in-house litigation lawyer, who really isn't involved in the business, and so if they were privy to confidential documents, that wouldn't affect any business decisions of that entity going forward. But there is no such person here.

So far as the question of principle is concerned, as to whether the regime should be varied, there is not an application or any specific proposal to vary it, but we would suggest, given that it's been in place, that it has worked well so far in the litigation, that it is in accordance with the recognition of the exceptional circumstances in competition cases, and that it was made with the agreement of all the parties, that the existing regime should stand and should continue to operate for the purposes of the trial.

Turning to the suggestion that the Defendants have made excessive confidentiality claims and claims that cannot be justified, Mr Spitz seemed to emphasise that the reasons we gave for our confidentiality claims, we did that by category, rather than going through each individual document and producing a separate schedule for that. What he didn't say, but I hope the Tribunal knows, is that that is an approach that was expressly agreed between the parties in correspondence, and it is the approach that the Claimants themselves have adopted as well. In fact, they didn't originally provide any reasoning for their confidentiality claims, but then, when we provided our schedule, they agreed to do the same thing. It is in the bundle. Nothing turns on what it says, but it looks very similar to our document.

So the approach of justifying confidentiality by category has been a matter of longstanding agreement between the parties, and no good reason has been put forward as to why the Claimant should now resile from that agreement

very shortly before the trial.

As you have seen, we served our list of categories on 28th May 2021. That was the document you were shown at page 986.

986 is the covering letter and the schedule begins at 989. So the Claimants have had that schedule of the categories of confidentiality and the explanations that are given for six months. The Claimant's lawyers have had it, obviously.

My understanding is that they have not raised any queries at all before last Monday about the categories or the justification for them. So there has never been any query about it, let alone an outright challenge to those categories.

That is so even though, as the Chairman may recall, we had a hearing in September where we brought an application challenging some of their confidentiality claims, and the Chairman ruled on that. So there was an obvious occasion where, if there was a difficulty about any of our confidential claims, it could have been raised, but it wasn't. It has never been raised until, as I say, Monday.

It is very concerning for this sort of point to be raised now, when the trial is only six weeks away. We are obviously very fully occupied with preparing for trial. Sad to say that two members of our team have in the last three days been diagnosed with Covid. So we are not on full steam from that point of view. The huge disruption that could be caused now, if there was any attempt to revisit the confidentiality claims that have been made and have been unchallenged for six months is obvious.

So far as the individual justifications are concerned, so far as the tenders are concerned -- that was one of the categories that Mr Spitz raised -- it is correct that we have redacted those where there is expressed to be confidentiality, so where they are stated on their face to be confidential. If they are not stated to

be confidential, we have not redacted the tender documents at all, by that I mean the document emanating from the tenderer. We have redacted the responses, but that's obviously a different issue. It is only where the ITTs are expressed to be confidential that we have redacted them.

If you look at the examples that Mr Spitz took you to in the supplemental bundle, the first one is at 92. It begins at page 91. If you look at 92, at paragraph 1.3, if you can see (vi) of 1.3, and then two dashes down a requirement for an undertaking in respect of confidentiality to be given. If you could also look at page 100.

MR JUSTICE ZACAROLI: Is that moving on to a different document?

MR PATTON: No, it is the same document. The Claimants have not included the appendix I think in the version they have uploaded to the bundle on Friday night, but one can see that it is there.

There is something further. Page 100, at the bottom of the page, the heading at paragraph 2, and then if the Tribunal could simply read clauses 2.1 to 2.5 .

MR JUSTICE ZACAROLI: Right.

MR PATTON: So there is an element of repetition in those provisions but the message is clear.

That's all I wanted to say about that document. I don't know if you had a --

MR JUSTICE ZACAROLI: The justification for confidentiality there is not the overall justification one sees in a competition case, that you are revealing your secrets to the other side, to a competitor. This is solely based on a third party's confidence, isn't it?

MR PATTON: That's correct. That's true in relation to the tender documents. That's correct.

MR JUSTICE ZACAROLI: That normally in itself wouldn't be a bar on disclosure in

court proceedings, would it?

MR PATTON: If disclosure is required by law, then it wouldn't be a bar on disclosure. The question of whether it would be accorded some special confidentiality treatment then arises, once disclosure has happened.

MR JUSTICE ZACAROLI: Yes. The first thing you would think about there is -- let's assume this is still this year, isn't it? So assume it is still current. Then disclosure is a latter of law -- disclosure required by law, therefore you overcome the confidentiality restriction. The court or the Tribunal might think: "Well, rather than prejudicing this particular third party by becoming entirely public, we will allow disclosure under a confidentiality regime here, which means it won't be referred to in open court" -- that's a matter to be determined later -- "and in particular that the receiving party will be required to give their own confidential undertaking, if necessary, given they are bound by an implicit one already". Why should this remain subject to an external eyes only order?

MR PATTON: All I can say in relation to that is that was the regime that the parties agreed for all confidential documents. We designated it within that regime, and there's never been any suggestion that the Claimant's lawyers wished to take instructions on it from the Claimants. If they intimated that, I think our position would be that the confidentiality is that of the third party. We don't have any particular independent view in relation to a document like this.

MR LOMAS: Which does contain, at 2.2.1, the usual carve out:

"Where disclosure is required by law or any court".

MR PATTON: Indeed. I was pointing to my screen as I mentioned disclosure by law. Certainly, we have given disclosure, plainly, and we recognise that none of these provisions was a bar to that. So the only issue is whether nevertheless this should remain confidential.

MR JUSTICE ZACAROLI: Your point on this one really is they have not applied.

MR PATTON: Exactly .

MR JUSTICE ZACAROLI: They have not applied now, because they have not sought to operate the mechanisms of the agreement. They have just challenged the way in which you have identified or relied on confidentiality.

MR PATTON: I am not even sure if they are doing that. It is still a bit unclear what relief is being sought from the Tribunal.

MR JUSTICE ZACAROLI: I am relatively clear I think. What Mr Spitz is doing is he is pointing to examples where, to put it not neutrally but to put it one way, the Defendants have made an over-aggressive claim for confidentiality, and if we are satisfied that appears to be the case, well, you had better go away and do it again. That I think is what he is asking for.

MR PATTON: Understood. Yes. Anyway, I will make my submissions about it .

MR JUSTICE ZACAROLI: Yes.

MR PATTON: I mean, I don't think I need to show you the RFP which he showed you at 114. There is a similar -- there is a confidentiality provision which he didn't show you at page 119, clause 1.17. That's essentially the same issue.

MR JUSTICE ZACAROLI: Yes.

MR PATTON: Now, Mr Spitz suggested these documents may have been public. I think Mr Lomas raised a question about that. My instructions are that tenders generally go to a limited pool of tenderers, sometimes following a pre-assessment.

Obviously, if documents were made public, then that would be a complete answer to the designation as confidential. In our letter in response to the Claimants we said to them, of course, if they are aware that any of these document were made public, please let us know, since that would be highly material, and

there has been no response on that. It remains as a kind of point of abstraction rather than anything more concrete than that.

MR LOMAS: I think my point, Mr Patton, was not just whether they were public but whether they were available to other tenderers, and if this is a competition question, then that information in the ITT is available to the market, if you like, and therefore you would question the competition impact of disclosure.

MR PATTON: I understand that. In relation to tender documents, which don't have any input from us on them, in other words, in relation to the questions I don't think I am making a competition law point specifically, this is the confidentiality of third parties that's engaged.

There is then a separate issue in relation to this class of document, which is that we are now six weeks before the trial. They have had these document for six months, without raising any concern at all about confidentiality and the approach that we have adopted, and the dislocation that would undoubtedly cause to our preparations for the trial, if simply by writing a letter last Monday and raising the matter today we were forced to divert all of our resources to questions of confidentiality between now and the trial, and that I think is an important point for the Tribunal's discretion in relation to this class of documents.

The other documents that he referred to are the contractual documents. Again, we made clear back in May what our approach to these was. If they were expressed to be confidential, we designated the entire document as being confidential, and if they are not expressed to be confidential we designated key commercial terms as confidential, and those terms vary from contract to contract, of course, and what matters is what was a specific term in relation to a particular contract between one of the Defendants and a particular

university, and that's what we have designated as commercially sensitive and therefore confidential.

Knowing precisely what commercial terms we agreed with a particular university, that's something that would feed into the Defendants' assessment of the viability of that contract, in terms of the return on investment, for example. There is a competition law concern there, if the Claimants are able to gain an insight into what terms we agreed with the universities, which may enable them to reverse engineer the assessment of return on investment that we made in entering into particular contractual terms.

That's different from the question of what sort of terms might appear in these contracts generally. Obviously, in relation to that, we don't assert confidentiality. We don't assert a competition law problem about identifying in general the sorts of terms that may appear, not linked to particular contracts. That is why there isn't any inconsistency with the approach that has been taken to the redaction of Dr Nils' report, and this was a point that Mr Lomas identified. All the passages that Mr Spitz took you to in Dr Nils' report are entirely generic. It wouldn't be possible for the reader to work out which term is in university A's contract or university B's contract, how exactly is it formulated, what is the risk allocation, what is going to be the impact on return on investment. So the inconsistency point simply doesn't arise.

So we don't accept that we have been overzealous in the approach we have taken to designating documents as confidential. What's clear is that we have been completely transparent about how we have done it from the outset. We set out our categories in May with their agreement. They never raised any concerns or objections about the approach that we have adopted in the six months since then. The suggestion that we should now start the exercise all

over again, six weeks before trial, that is going to cause great dislocation and diversion of effort for the Defendant's legal team, as I say, a team that is constrained by recent events. We would suggest that is simply unfair.

No good reason has been given as to why this is being raised now rather than some time over the past six months, including at the September hearing. It simply is not possible for us to do that without seriously compromising the preparation that we will be doing for the trial in the forthcoming period .

MR JUSTICE ZACAROLI: Can I just ask, just dealing with the specific documents again, or examples of documents, page 89 of the supplementary bundle. Mr Spitz took us to this. This is an example of an agreement.

MR PATTON: Yes.

MR JUSTICE ZACAROLI: This is where the entirety of the schedule headed "Services" has been redacted.

MR PATTON: Yes.

MR JUSTICE ZACAROLI: What is the basis for that?

MR PATTON: This is a contract which will have been drawn up after either a tender or negotiation, and agreement is reached as to the precise package of services that the Defendants are going to provide to this university, as distinct from any other university, and that is the outcome of the process that has taken place between us and the university. It is not information that a competitor should know as to what services we have agreed to provide. They, when they next tender for a contract, will form their own judgment as to what services they are prepared to provide, what cost they think that will have for them, whether that will be profitable, over what period and so on.

Why should they be entitled to see the assessment that we have made as to what we are prepared to agree in relation to the services that we consider can

profitably be provided under our contract with this university?

MR JUSTICE ZACAROLI: How central is the material that we see in that schedule to the issues to be determined in this case?

MR PATTON: I have no reason to think that anything is going to turn on the particular services provided to university A or university B or C. You will not have read, I don't imagine, the expert reports, but the case that's being advanced by the Claimants, if you recall the pleading, is consistent with the expert reports. It is all on a generic basis. They say: "These agreements, these arrangements are anti-competitive. They should be regarded as unenforceable", and so on. There is no attempt to distinguish from one university to another. If you look at their expert's report, she doesn't say "Well, I think university A is going to be acceptable but university B is not and university C is somewhere in the middle", or anything like that. It is all done on a generic basis. You have seen Dr Nils does it in that way.

So although this is part of the evidence, it seems highly unlikely, on the basis of the way the Claimants have put their case so far, that anything is going to turn on the specifics of one university rather than another.

MR LOMAS: Mr Patton, your case is that the market is essentially university by university. So the competition environment that you are imposing is a university-specific one. To what extent does it remove the competition concern, the leakage of confidential information concern that you have if you anonymise the university. This one we are looking at here, Anglia Ruskin becomes university A and so forth. That would dramatically reduce the extent to which your competitor would be able to use this information in competing with any one university, because they wouldn't know which one of 169 it was.

MR PATTON: Yes, I have a number of responses to that. The first is obviously that

they have the unredacted versions of these contracts already, insofar as they have not been marked up for confidentiality.

MR LOMAS: The lawyers?

MR PATTON: I am sorry?

MR LOMAS: The lawyers have, the external team?

MR PATTON: Yes, well, the clients will have everything apart from the bits that have been redacted.

MR LOMAS: Oh, I see. Of course. So they could reverse engineer.

MR PATTON: Secondly, I don't know how informative they would find it if it is divorced from a particular university. Thirdly, I don't know who in our team would be able to do that task between now and 24th January when we open the case.

MR LOMAS: Let's not spend more time on it. It was just a thought.

MR PATTON: No. Thank you.

MR JUSTICE ZACAROLI: Yes. That was going to be my question as well. So carry on, Mr Patton.

MR PATTON: I think I have made all the points I was intending to make.

JUDGE MATTHEWS: Right. Can I just ask then, you obviously refer to the amount of work involved. What volume of documentation are we talking about? I know the percentage we were told is a very high percentage on the Defendant's side and very low percentage on the Claimant's side, but what is the number?

MR PATTON: I don't know. I can't give you numbers for the trial bundle. The reason the percentage appears so high in relation to the Defendant's documents I think is because the Claimants want to have all the agreements in the bundles and the tender documents. So that's really what's driving it at

our end I think, in terms of the percentages.

I know that in relation to our disclosure we have disclosed 388 documents that are designated confidential in their entirety. Then there are 3,823 documents which have some redactions for confidentiality, so not the whole document but something on it is marked as confidential. If those documents have to be looked at again, it really is a very large number of documents.

MR JUSTICE ZACAROLI: Yes. Thank you. If there is nothing further.

MR PATTON: Unless you wanted me to raise. I am sorry .

MR JUSTICE ZACAROLI: No. I think I have your points. Mr Randolph?

MR RANDOLPH: No, Mr Spitz.

MR SPITZ: Thank you, sir. Very briefly, to make two or three points. The first is in relation to the In Federation case. That's the judgment of Mr Justice Roth. Mr Patton read some extracts of that decision out to you but not paragraph 42 of the judgment, which is in bundle 3. I am sorry -- in supplementary authorities bundle, tab 3 of the authorities bundle. It is simply the last sentence that I will read to you, where Mr Justice Roth says:

"In my view, the important points to emerge on the authorities are that, (1), such arrangements are exceptional, (2) they must be limited to the narrowest extent possible and (3) they require careful scrutiny by the courts to ensure that there is no resulting unfairness. Any dispute over admission of an individual to the ring must be determined on the particular circumstances of the case."

Then Mr Justice Roth goes on, at paragraph 57, to make the observation that I have been putting before the Tribunal, where he says in the second sentence:

"I find that there's an increasing tendency for excessive confidentiality claims to be asserted over documents and information in competition law proceedings,

only for those claims to be curtailed or renounced in response to protests from the other side or intervention by the court. It is my understanding that the same is the case in intellectual property proceedings. This is wasteful of time and costs. It is not the way modern litigation should be conducted."

As far as the approach is concerned, Mr Patton points to the fact that this regime was in place and the regime was agreed, but, of course, there are, as I have said, independent considerations that come into play when the trial is at stake, not just from the position of the parties, but obligations and interests that the court will be astute to protect.

So it is not simply a matter of what the parties have agreed and what is appropriate for earlier stages of the proceedings, as the cases made clear, is not necessarily appropriate for trial.

The last paragraph that I would refer the Tribunal to is tab 19 of the authorities bundle. This is the TQ Delta case at paragraph 21, where Mr Justice Henry Carr says:

"In my judgment, the authorities discussed above establish that it is exceptional to limit access to documents in the case to external eyes only so that no representative from a party which is subject to the restriction can see and understand those documents. An external eyes tier does not require justification for restriction by reference to the individual document. It enables one party to decide to exclude all representatives of the opposite party from access to any document that it chooses and places the onus on the party seeking access to apply to the court to obtain it. That approach in my judgment is wrong in principle. Whereas the Court of Appeal said there is room for an external eyes only ring in the early stages, we are no longer at that point. We are at the point where the trial bundle is being put together.

This is when we get to see what exactly is in that bundle and where confidentiality has been asserted."

Two other final points. The first is in relation to the competing interests between the parties. We are what is known as a B to C competitor, whereas the Defendants are B to B, in the sense that we market and sell to students directly, whereas the Defendants do to universities. So there is not a complete alignment between the competitive interests at stake as far as the Claimants are concerned and those that are relevant as far as the Defendants are concerned.

The last point is in relation to the 300-odd completely redacted documents. If the court is not minded to direct a full-blown reconsideration of the confidentiality redactions, which we submit should be done, we would certainly go for the 300-odd completely redacted documents and request a review and a proper justification for confidentiality over those documents.

Sir, you raised a question earlier about numbers rather than percentages. I am instructed that there are 1000 external documents that are in issue. That's the number that I have been provided with.

MR JUSTICE ZACAROLI: In issue? Mr Patton said there were in excess of 3000 documents where there had been some redaction.

MR RANDOLPH: 300 wholly. 3000 partially. In terms of the core bundle, it is down to 1000.

MR SPITZ: I am told, sir, in terms of the core bundle, that number is down to 1000. Trial bundle.

MR JUSTICE ZACAROLI: Just one final point. Mr Patton is right, isn't he, that the order itself contained the solution within it all this time, since the end of May this year, because it was always open to you to say: "We think these

documents, you have not claimed confidentiality properly and these are documents we want to show to our clients".

MR SPITZ: Which is why, sir, I have made a couple of points. One is that sort of regime is intelligible and functional for the early stages of proceedings. But what some of the cases that I have taken you to suggest is that it is not appropriate to do it this way when it comes to the designation of confidential documents at the trial itself. That sort of document by document approach places too great a burden on the parties seeking to challenge confidentiality, and it enables an excessive designation of confidential documents, so that where we are assessing the appropriate regime for the purposes of trial, a different approach is required.

MR JUSTICE ZACAROLI: Sorry to go back on it. I might need a bit of help there. Which particular references were drawing this distinction between at an earlier stage and the trial stage? For example, in paragraph 21 you dealt with --

MR SPITZ: If you refer to our skeleton argument, you will see it at paragraph 20, the reference to the Kelkoo decision:

"The question of what was the right arrangement was very much affected by the stage the proceedings have reached."

It is picked up in --

MR RANDOLPH: Paragraph 17 as well.

MR JUSTICE ZACAROLI: Before you move on, that's talking about whether an external eyes regime is appropriate by the time you get to trial, isn't it, not what the mechanism for challenge would be?

MR SPITZ: That's correct.

MR RANDOLPH: It is paragraph 17.

MR SPITZ: Paragraph 17 in the TQ Delta decision. This is criticising -- the

reference to TQ Delta in paras 19 and 15. It is probably worth, if the Tribunal bears with me, just to turn that up. Tab 9.

MR JUSTICE ZACAROLI: Yes, I have it.

MR SPITZ: Okay. It is also dealing with the external eyes only designation if one has a look at -- picking it up at paragraph 13, and I have already referred to the extract at paragraph 14, but paragraph 15 is important. Then I have already mentioned paragraph 21. It is also worth pointing to, lastly, the same decision, paragraph 24.

MR JUSTICE ZACAROLI: Right. Thank you both very much. We will take a break now to consider the matter and we will come back when we have done so.

(Short break)

RULING ON CONFIDENTIALITY

MR JUSTICE ZACAROLI: I am going to announce what we have decided. I am not going to give detailed reasons now. We need to get on with other matters today. If the parties request more detailed reasons, those can be provided hereafter.

In brief, we are not going to require the Defendants to revisit the whole exercise of analysing the documents in which they have claimed confidentiality for the purposes of deciding whether they are confidential. We are, however, going to require them to do that for a subset of documents, namely those documents where they have redacted the whole of the document for purposes limited to the fact that there is a confidentiality agreement in that document, and where those documents are intended to be in the trial bundles. If they are not going to be in the trial bundles, we do not think it is proportionate to require the exercise to be done at this stage. We provide this further steer:

that we do not think the mere existence of a confidentiality agreement with a third party is sufficient reason to claim confidentiality, in the sense of excluding the other side to this litigation from seeing that document.

As to the remainder, we consider that, and we can give reasons if you need it, but in brief we think we are within circumstances that justify an external eyes only order. This is a competition case which inherently involves risk of competition between the litigants. It therefore gives rise to the need to prevent confidential information being passed to the opposing litigant, where that party is a competitor. We are within territory therefore, which can be said to be exceptional circumstances justifying confidentiality orders of the type made in this case.

Secondly, there is in this case an existing regime which has been in place for six months. That regime has within it the solution to the problem which the Claimants say now exists. They could have applied at any stage for the Defendants to justify the confidentiality claim for any particular document and for any dispute in relation to that to be referred to the Tribunal.

Whilst we accept that it is very important in every case to keep in mind the need to restrict claims to confidentiality to that which is strictly necessary, and that might change over the course of proceedings, nevertheless the order that was made was one which was intended to last throughout the proceedings, not merely at an interlocutory stage. Therefore we think that the fact that the Claimants have not made an application until this very late stage is an important factor to take into account in considering how we should now approach this matter.

No application has been made today to unredact any particular document. As we say, if the Claimants feel that they need any particular document to be

referred to their client outside the confidentiality ring between now and trial or during trial, they will need to make an application to the Defendants in the first instance, to be resolved by us, the Tribunal, if it cannot be resolved by agreement.

MR JUSTICE ZACAROLI: Mr Spitz, you were speaking but you were on mute. You are still on mute.

MR SPITZ: It was just to acknowledge and say thank you to the Tribunal. That was all. Nothing more exciting than that.

MR RANDOLPH: I apologise, sir. I was the mechanical operator. I was trying to do two things at the same time, unmute and move the screen. That obviously defeated me. I will stick to the day job. I can move the screen, for which apologies in advance. This is probably going to go wrong. Yes. Not good. Right. Okay. There we are. Good.

Sir, I think in terms of the items to be looked at we now have experts.

MR JUSTICE ZACAROLI: I think we have dealt with experts.

MR RANDOLPH: Remote. I think we are in agreement. Both parties sought permission from the Tribunal in relation to calling witnesses remotely, for obvious reasons. They are a very long way away. If we are able, with the Tribunal's consent to interpose them when necessary, because they are essentially east and south, so being called early in the morning or early-ish in the morning would be certainly convenient to them, and we would be grateful if the Tribunal could bear that in mind, in terms of order. Obviously, it is disruptive in the normal course of events for there to be witnesses interposed, but given the fact that there are two witnesses, one going to be in Australasia, one in New Zealand, and one in Australia, and the other witness is going to be in Hong Kong, obviously it is going to be difficult to have them cross-examined

throughout our day, which would be their night.

MR JUSTICE ZACAROLI: Yes.

MR RANDOLPH: If the Tribunal could bear with us on that, we would be grateful.

MR JUSTICE ZACAROLI: We are prepared to sit early. I think we might sit at 9 o'clock one or more days to deal with that. The only thing I wanted to raise with you is to be sure -- you both mention in your skeletons you are satisfied there is no issue here. I want to make sure we have covered all the bases. You are sure there is no problem in witnesses of any of the foreign jurisdictions attending to give evidence remotely in proceedings in this jurisdiction. This has been a problem in other cases. Are you satisfied you have been through the necessary hoops to ensure there is no problem, particularly in Hong Kong?

MR RANDOLPH: So far as I am concerned, it is New South Wales, and that is fine. Those are my instructions. I personally have not checked but those are my instructions.

MR PATTON: My instructing solicitors have checked in relation to Hong Kong and New Zealand, which are our jurisdictions and they are satisfied there is no issue.

MR JUSTICE ZACAROLI: I will take it from the parties' solicitors that that is okay. What's left? On my list was an item I didn't mention this morning but it came a late entrant in correspondence was bundling. That's all that's left.

MR RANDOLPH: That's all that's left. 6.44 yesterday was when these letters hit. I had been assuming, as my learned friend Mr Patton had put it, that we weren't going to seek to trouble the Tribunal with this matter. The bundle has to be sorted and served and filed by Friday and we are cracking on it in the usual manner. There are issues that have to be ironed out, but we were

hoping that we wouldn't have to trouble the Tribunal with it. These letters were sent in yesterday and maybe the Tribunal has read them, maybe not. We are in a position where we can crack on. There is no order being sought in the Defendant's solicitors letter. All we would say as ever with a trial bundle, it takes two to tango. There is obviously a degree of disagreements -- I say obviously. There happens to be a degree of disagreement between the parties as to who should do what when. If I can take but one very small example.

MR JUSTICE ZACAROLI: If we are not going to be troubled by it, I do not think we need to listen to anything, but I wonder if either of you is seeking any order at all from us today.

MR RANDOLPH: Maybe my learned friend Mr Patton could be asked that question. We were not going to and he wasn't going to when we read his skeleton because he says that in terms. Then these letters were sent in at 6.44. I assume for a reason rather than for the further education of the Tribunal --

MR JUSTICE ZACAROLI: You are not asking us to make any order at the moment. I will see if Mr Patton is.

MR PATTON: I am sorry it was raised late. The reason it was raised late is we only heard from the Claimants about this on Friday evening. So it came after the skeletons. That's why it has been raised late.

We were concerned by what we read. I will just identify four points of concern which I think may be of concern to the Tribunal if it is not sorted out. These are four things we think the bundle which the Claimant is responsible for preparing needs to comply with, and I hope the Tribunal will agree.

The first is that where e-mails are in the bundle they should have next to them any attachment to that e-mail, and vice versa. The e-mail and the attachment

should not be scattered through the bundle at random locations. That's the first issue.

The second issue. We propose it would be helpful to the Tribunal if the OSAs and tender documents are arranged by university. You get an agreement for a particular university, you get an extension of that, you get the tender documents for that university, all gathered together, rather than being scattered through the bundle. If you are looking for university A, you have all the documents you need right there. That was the second thing.

The third thing is that leaving aside those particular types of documents which might sensibly be arranged in that way, that the documents should be in chronological order, so that you can find a document when you need to find it. Whereas, as we understand it at the moment, the Claimants are proposing that the documents should not be in any order apart from I think whatever the alphanumeric code order is for the documents.

The fourth requirement we think is that the index should identify what the document is. It should have a heading, a title, a name for each document, so that when we and you are looking for documents, you can use the index in a way that's informative rather than again simply having an alphanumeric code.

Those are four we would suggest absolutely conventional and essential requirements for the trial bundle in order for it to be useful to all of us. The reason we thought we ought to make sure the Tribunal was aware of this when we heard on Friday night is that we were not clear that the Claimants are going to do any of those things, because they say that would involve looking at the documents rather than simply relying on an automated process for all of that to happen.

MR JUSTICE ZACAROLI: How are they going to be presented, the documents?

Obviously electronically, but do we have a platform for them yet?

MR PATTON: We understand they will be in Magnum, that they are intending to use the Magnum system with Opus.

MR JUSTICE ZACAROLI: All right.

MR PATTON: But our understanding --

MR JUSTICE ZACAROLI: That makes a difference. If, for example, you are having e-mails with attachments, it is less of a problem if you are using Magnum, because you get a different tab for each e-mail. The fact it is twenty pages long does not matter in terms of finding things. It's more difficult if you have paper bundles, because an e-mail followed by 100 pages of attachments means you have to file through 100 pages to find the next e-mail, but I think that's fine if --

MR PATTON: That assumes you have some way of identifying that that is the attachment to that e-mail.

MR JUSTICE ZACAROLI: Yes.

MR PATTON: Usually you will have that, because Magnum will have uploaded them as family documents, so that they will be linked to each other. The problem is that, as I understand it, it is proposed they not be linked in that way. They will simply be uploaded as separate documents. Unless you happen to work out that that is the attachment to that e-mail, because you draw inferences, you won't know, or perhaps you could search and hope that you will find some indication, but, as we understand it, the suggestion is that the documents will be uploaded in effectively a random order without the family connections being coded in, and that is going to create a bundle which will be very difficult for all of us to work with.

MR JUSTICE ZACAROLI: Yes. Right. Mr Randolph.

MR RANDOLPH: Thank you, sir. Insofar as e-mails and attachments are concerned, I personally had not picked that point up from the correspondence. I think rather than making an order, especially in the light of what you said, sir, in terms of Magnum, and, in fact, as I am instructed, these e-mails and attachments are actually -- as I understand it, the concerns are in relation to the Defendants' documents rather than the Claimants', then while it is hoped that this can be sorted, I am not 100% sure whether it has identified as an issue within -- but it may have been -- in this correspondence, but certainly it is the sort of issue that we don't need an order about that can be sorted.

Insofar as the OSAs and ITTs university by university is concerned there is a problem here. Both parties are stretched. We hear that -- and I am very sorry to hear this -- the Defendant's legal team has been not decimated but there is some impact of COVID on them. I feel very sorry and wish them the very best. We have a small team. These are their documents. They are the Defendants' disclosed documents. They go to the OSAs and the ITTs. They can do this.

Actually, as it turns out, this is all in relation to section F in the trial bundle. I am instructed that the latest iteration of their list of documents for section F includes a blanked out document description column. There's been a lot of air -- a lot of hot air and a lot of angry words said and made about document descriptions and how terrible it is that we are not pulling our weight and how we are not doing that which we should. Actually this is in relation to their documents and they have blanked out their document description column, which means, unless you are blanking out for no reason apart from colouring in, it means they are blanking something out. The something out is the document description, which would help I would suggest in terms of dealing

with the bundling.

So we are willing, and these are my firm instructions, to put and have put our shoulder, our small shoulder, to the wheel, but it takes two to tango, and I am afraid if it is their documents we are talking about and they have already got, for example, document descriptors, but they are blanking them out for some bizarre reason, because this is not going to be a confidentiality issue, because all the lawyers are in the confidential eyes only ring, then I think the correct approach is to say they can put their shoulders to the wheel. That's why this is not the sort of thing that need not come before you, sir, but it is now before you.

RULING ON BUNDLES

MR JUSTICE ZACAROLI: I don't think the question of who should do what is before us. Let us take it in stages. I think it is clearly much more preferable -- everyone agrees this I think -- that e-mails are located in the Opus 2 system with their family next to them.

Secondly, it is clearly helpful that the OSA tender documents are arranged university by university so you can see very quickly what are the terms for the particular university.

Thirdly, it makes sense that, otherwise, documents in what is commonly called a chronological bundle appear in chronological order.

Finally, certainly if one is using Opus, it is much, much easier if the document description column is filled in so we know what we are looking for.

Now I am sure that the parties can cooperate to do this. If it requires someone from the Defendants' solicitors to attend the offices of the Claimants' solicitors, socially distanced no doubt, to look at the computer screen whilst they are

uploading matters, then so be it. That indeed may be the quickest way of doing it if the people doing so are the ones with the relevant knowledge. The parties between them are very strongly encouraged to produce a bundle which looks just the way I have described it.

MR RANDOLPH: I couldn't agree more, sir, if I may say so. I am sure everybody on this call will have listened very carefully to what you have said and will act accordingly.

MR JUSTICE ZACAROLI: Mr Patton, anything to add?

MR PATTON: No. I am grateful. Those are very helpful indications. Thank you very much.

MR JUSTICE ZACAROLI: Right. Is there anything else?

MR RANDOLPH: No. Thank you very much. No.

MR JUSTICE ZACAROLI: Could I ask the parties in the usual way to assist the Referendaires by producing a first draft of an order to memorialise what has been done today?

MR RANDOLPH: Yes, indeed. Sir, just in relation to the amendments it would be very helpful if Mr Patton or indeed Mr Armitage, now that he is free, if he could redraft those -- what have been produced as draft amended defence so as to reflect your order, sir.

MR JUSTICE ZACAROLI: I am sure he will.

MR PATTON: We will.

MR RANDOLPH: As soon as possible, given the fact that time is running for us to reply.

MR JUSTICE ZACAROLI: Yes.

MR RANDOLPH: I am very grateful.

MR JUSTICE ZACAROLI: Very good. Thank you very much, all of you.

MR PATTON: Thank you.

MR RANDOLPH: Thank you so much.

(3.40 pm)

(Hearing concluded)