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6 **IN THE COMPETITION**
7 **APPEAL TRIBUNAL**

Case No.: 1342/5/7/20, 1409-1410/5/7/21 (T)

8
9 Salisbury Square House
10 8 Salisbury Square
11 London EC4Y 8AP
12 (Remote Hearing)

13 Thursday 28th July 2022

14
15 Before:

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17 **SIR MARCUS SMITH**
18 (President)

19
20 (Sitting as a Tribunal in England and Wales)

21
22
23 BETWEEN:

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25 **SPORTRADAR AG & ANOTHER**

Claimants

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27 v

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29 **FOOTBALL DATACO LIMITED**
30 **BETGENIUS LIMITED & ANOTHER**

Defendants

31
32 and

33
34 **SOFT CONSTRUCT (MALTA) LIMITED & OTHERS**

Interveners

35
36
37 **A P P E A R A N C E S**

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39 Ronit Kreisberger QC, Alan Bates and Ciar McAndrew (instructed by Sheridans appeared
40 on behalf of the Claimants)

41 Kassie Smith QC and Henry Edwards (instructed by DLA Piper UK LLP appeared on
42 behalf of the First Defendant)

43 Tristan Jones, Ian Mill QC and Tom de la Mare QC (instructed by Macfarlanes LLP
44 appeared on behalf of the Second and Third Defendants)

45 Aidan Robertson QC (instructed by RPC appeared on behalf of the Interveners)

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(9.30 am)

Housekeeping

MR JUSTICE MARCUS SMITH: Well, good morning, everybody. Thank you for attending this hearing remotely. That is due to the difficulties I, and perhaps others, have had in getting into London because of the train issues. But thank you for making yourselves available remotely. This is a remote hearing, it is also being live streamed. The usual rules regarding live stream apply, which is that no one listening in, and you are all very welcome to listen in as third parties, no one listening in should either transmit, record or photograph this hearing. To do so would be a breach of the rules. The hearing is, of course, being recorded and transcribed for purposes that I have authorised, but no one else is to do that.

So that is the pro forma warning.

If I can then move on to the documents I have read and the materials I have before me, I have printed out and I have read with great care the three written sets of submissions, Sportradar's, Genius' and Football Dataco's. I have open the electronic bundles A through to O. I don't seem to have a bundle F, I hope that is deliberate but I have those and the authorities bundles available to me. I am bound to say that although I have looked through them pretty quickly, I have devoted the bulk of my attention to the skeleton arguments and you will have to take some care, I think, to take me through the other materials, to the extent you need to. So that is by way of warning.

Agenda. I have slightly reworked the agenda, and let me give you an indication of how I would like us to approach the various topics. First of all, not something on the agenda, but one which has increasingly struck me as potentially

1 problematic that we need to discuss, is the fact that this is a hybrid hearing.
2 I have done a number of these before, and by hybrid, I mean there are issues
3 that are both High Court issues and CAT issues. Now, in the past, it has
4 always been very clear which Tribunal is sitting in relation to which issues. In
5 this case, we are going to be sitting as a three -- we are not today but that is
6 because of availability questions. Come October, it will be three of us sitting
7 and hearing both the Tribunal matters that the three of us should hear and the
8 High Court matters that only I am determining.

9 Now, I would like, as the first item of the agenda, to discuss that a little further.

10 Because I think the more I think about it, the more it seems to me I want to
11 hear from the parties as to, in particular, what the end product deliverable is
12 going to be. Is it going to be one judgment, is it going to be two? If it is going
13 to be one judgment, is there going to be a common section? That is item 1.

14 Item 2 is confidentiality, redesignation of confidential material and exactly how this is
15 going to work. And just as a flag, I have looked at the order that I got late last
16 night. I don't think what the parties have in mind is going to work. I will
17 explain why, and I will invite submissions on what I hope is an easier course
18 for everyone concerned, in terms of dealing with sensitive material. But I will
19 expand on that. That is item 2.

20 Item 3 is sampling. And I know that there is a substantial amount of agreement that
21 sampling, in terms of the ownership of grounds, should be --

22 **MS KREISBERGER:** Yes, I am so sorry to interrupt.

23 **MR JUSTICE MARCUS SMITH:** Not at all.

24 **MS KREISBERGER:** But, unfortunately, the screen froze at my end, and
25 unfortunately, I missed what you had to say on item 2.

26 **MR JUSTICE MARCUS SMITH:** Oh, not at all. Thank you, Ms Kreisberger, for

1 raising it and everyone should feel free to indicate when the stream interrupts.

2 What I said about item 2 was confidentiality. And what I said was I had looked at the
3 order that had been sent through to the Tribunal last night. I don't think what
4 is being proposed works. I have my own suggestion as to what I think will
5 work. I will run that past the parties, and obviously, we will need to discuss it.
6 But that is item 2 on the agenda.

7 Item 3 was sampling. And I think you caught up with your feed then. I am
8 essentially sympathetic to the idea that we can't possibly hear evidence in
9 relation to each sports ground in issue. That is obviously right. What I am
10 slightly jumpy about is the Tribunal buying what are colloquially termed "a pig
11 in a poke." Normally, when one has sampling, the Court has a great deal of
12 control over the sample that is selected, and that is done well in advance of
13 the trial. What I don't want to be put into a position of doing is being, as it
14 were, obliged, on the basis of the samples that I haven't policed, to be
15 required to reach findings across the generality of the sports grounds. I am
16 perfectly prepared to say that I see sampling as a sensible approach and I am
17 more than willing to draw inferences from specific instances that the parties
18 serve up, but I do think I need to put a marker down that I haven't looked at
19 the sampling exercise in any way, shape or form, and I wouldn't want the
20 parties to think that I am going to be obliged, because I haven't, as it were, put
21 down an imprimatur on sampling, to say that material is going to be enough to
22 enable a proper finding of fact across the board. I am certainly not saying
23 I won't try, and that the Tribunal won't try, but I think there needs to be
24 a health warning which I am articulating now which we can discuss as part of
25 item 3, going forward.

26 Fourthly, there is the question of trial preparation generally, the trial timetable, the

1 bundling. We will be discussing bundling, I think, in relation to confidentiality
2 anyway. But I note that there is a disagreement about the length of time that
3 is needed for various parts of the hearing. Again, just to flag where I am
4 coming from, I am keen to have more time with the factual witnesses and the
5 experts, because that is always where the pinch comes in relation to trials.
6 I know the parties need time to prepare their closing submissions. That is
7 where, clearly, the advocates want to put their best foot forward. I wonder
8 whether it might be sensible to say there is a limited gap between the close of
9 the evidence and oral closing submissions, with written materials to be
10 exchanged after the trial, so that the parties can actually take, let us say,
11 a fortnight after the end of the closing submissions orally, to put together a set
12 of written submissions in closing that will be ideally more focused than if they
13 are produced in haste and exchanged, let us say, a week or two weeks after
14 the end of the trial. So that is my thinking there, in terms of maximising time
15 with the witnesses and ensuring that I have the closing material that I need.
16 But again, that is something for discussion. I raise that so that you have in
17 mind where I am coming from.

18 Then finally, and lumping together the various disclosure and requests for witness
19 summons and things like that, we will deal with those, I hope, fairly quickly.
20 Let me give you an indication that it struck me that most of these applications
21 are ones where the initial take of the judge is going to be to say no rather than
22 yes. They seem to me all to be, as it were, kicking the tyres of disclosure that
23 has been done already, and as it were, second guessing or checking the work
24 that has been done. I may be wrong about that as a general broad brush
25 proposition, but that is my impression now. I take the view that I have before
26 me a series of properly represented and very capable teams, and my general

1 presumption is going to be that if a job has been done, it has been done
2 properly, and that is my starting point in respect of, essentially, all of these
3 applications, just so that you know where I am coming from. So if you get
4 a series of nos in respect of all of these applications, no matter who is making
5 them, that is the reason why, but of course, I will hear the parties. I would
6 like, however, to hear from each application in this regard fairly briefly,
7 because otherwise, we will be going on not just all day, but well into the
8 evening, and I am afraid I can't afford that. We are going to have to finish at
9 4.30 today.

10 So those are rather compendiously, the five items on the agenda. We will have any
11 other business as item 6. But item 5 is the one I feel I want to give the fastest
12 movement on, and deal with as quickly as possible. The others, I would like
13 to spend some time on.

14 So before I go to item 1, is there anything anybody would like to say to me about
15 things that I have missed, or points which are so fundamental that they ought
16 to draw them to my attention now?

17 **MS KREISBERGER:** Sir, yes, I should just say I hear what you say on the items
18 concerning disclosure, but I would like to spend a little time taking you through
19 the material on the witness summonses. That, from Sportradar's perspective,
20 is a critically important application before you today. So I just ask for some
21 indulgence on that.

22 **MR JUSTICE MARCUS SMITH:** That is the Mark Locke/Tom Russell point; is that
23 right?

24 **MS KREISBERGER:** That's the one, yes, Sir, I am grateful.

25 **MR JUSTICE MARCUS SMITH:** Okay. Well, Ms Kreisberger, clearly you will have
26 the time. But let me flag up now that I had labelled this one as one for more

1 than just a light no, but quite a heavy no, so I will obviously hear you and you
2 can persuade me that my heavy no needs to be turned into some kind of yes.
3 So thank you for raising that: you at least know where I am coming from and
4 I know where you are coming from. Is there anything else before we jump
5 into item 1?

6 **MS KREISBERGER:** I should just say I am not sure you need me to introduce the
7 cast and go through appearances, but I, for one, don't know who
8 Mr Robertson is appearing on behalf of.

9 **MR JUSTICE MARCUS SMITH:** That is entirely fair. Mr Robertson is carrying over
10 his role from yesterday, I think, isn't he?

11 **MR ROBERTSON:** Yes, I am appearing for the SCM parties. The previous two
12 days I described myself as third reserve. Today, I think I have been promoted
13 to first reserve for Mr Patton QC.

14 **MR JUSTICE MARCUS SMITH:** Mr Robertson, he hasn't submitted any written
15 submissions, unless I have missed them and he is here, really, on a watching
16 brief because of the nexus between this hearing and the hearing that we were
17 discussing yesterday for trial in early 2024: so I suspect Mr Robertson will be
18 jumping in when he thinks it is appropriate but, Mr Robertson, I hope you
19 won't treat it as a discourtesy if I rely on you to jump in when appropriate,
20 rather than go through the usual "over you to" questions that I would do if you
21 were, as it were, a full fledged party.

22 **MR ROBERTSON:** Not at all, Sir, that is exactly the role I would expect to play.
23 I think I may have something to say on confidentiality. As regards written
24 submissions, we haven't submitted anything for this hearing. Our statement
25 of intervention is due tomorrow and will be served tomorrow.

26 **MR JUSTICE MARCUS SMITH:** I am very grateful, thank you very much.

1 Mr Jones, I see you have your hand up.

2 **MR JONES:** Yes, so just while we are doing not quite introductions, could I just
3 make clear that all of the counsel on behalf of Genius who signed the skeleton
4 argument, are here, including Mr Mill and Mr De La Mare, who are here with
5 me and if it would assist the Tribunal to hear from them, of course you will be
6 able to do so, otherwise I will be on camera for the day.

7
8 Item 1

9 **MR JUSTICE MARCUS SMITH:** I am very grateful. Mr Jones, stay on camera, you
10 are very welcome but if you need to invite me to shift the focus of the camera,
11 provided someone else does the shifting, I am more than happy to hear from
12 Mr Mill and/or Mr De La Mare. Ideally, not together, but in sequence, but
13 otherwise, I am more than happy for you to be front and centre on screen.
14 I will say welcome to Ms Smith, because you are the only one I haven't, of the
15 parties, addressed. But I don't think I need the roll call of persons, you are all
16 very familiar to me and you are all very welcome.

17 So the problems of a hybrid hearing. This is something which, probably, I should
18 have appreciated a long time ago, but it is only when I started thinking about
19 the mechanics of how the Tribunal would meet and the end product that we
20 would produce, that it seemed to me important that we put this up as item 1.
21 So clearly, the Tribunal will be hearing everything. We can't have the two
22 ordinary members dancing in and out, according to which issue there is. So
23 they are going to be sitting there, hearing material which they are not going to
24 be making the decisions on. I don't think there is a problem with that. And
25 that, inevitably, is going to mean that when we retire, we are obviously going
26 to focus in our discussions, on the competition issues that are before the

1 Tribunal but I hope the parties aren't going to expect us to erect some kind of
2 Chinese Wall, where I am only discussing and ruthlessly focusing on only
3 discussing the competition issues with the ordinary members. And clearly,
4 I am going to focus on that, but it seems to me it would be unhelpful to the
5 Tribunal's deliberations if the parties were to expect that kind of Chinese Wall
6 erection. You can take it from me that I will decide the matters that are
7 High Court matters on my own and you can take it from me that I will be
8 deciding the Competition Appeal Tribunal matters with my colleagues. And if
9 and to the extent that I am concerned that I don't know into which camp
10 a particular issue falls, then obviously, I will raise that with the parties, but
11 I don't anticipate that being a problem. That is how the body of the hearing,
12 I think would run, but I would like anyone who thinks that that is an incorrect
13 approach, to speak up now or forever hold their peace, effectively. Good, no
14 speaking up there. That seems to be the straightforward question. The
15 harder question is the deliverable. Now, my initial thinking was that we would
16 produce a single judgment which would, within it, demarcate those bits which
17 were, as it were, my bits and those bits which were Tribunal bits. The reason
18 that was my starting point was because there is bound to be -- and clearly,
19 I haven't given very much thought to how the judgment will look, but there is
20 bound to be common factual bits which ought to be at the beginning of the
21 judgment, setting out the foothills, without particular direction towards
22 High Court issues or Competition Appeal Tribunal issues, they are just
23 background that the reader needs to know. And that, as it seems to me, is
24 likely to be common to both judgments. After that, one would have specific
25 bits dealing with specific jurisdictions, and there, the demarcation would be
26 clear. The more I thought about that, the more it seemed to me to be quite

1 a messy judgment. It would require very rigorous structuring to make sure
2 that any appellate court, for instance, knew who was deciding what. And it
3 seems to me that it might be better to have two judgments, one dealing with
4 the common issues and the competition issues, in other words a judgment by
5 the Tribunal, and then a separate judgment, a High Court judgment, that
6 would adopt those parts that needed to be adopted of the competition
7 judgment, and then went on and dealt with the High Court issues entirely
8 separately, so that one would have a very clear bifurcation between
9 jurisdictions.

10 That, it seems to me, is probably the better course, but I am very keen to hear from
11 the parties, because at the end of the day, the thing they want from the Courts
12 in this case is a judgment that is useful in resolving their dispute and which
13 they can, as necessary, take on to appeal in the easiest possible way.

14 So that is the question. I don't know, Ms Kreisberger, do you want to start in terms of
15 any comments you have about that?

16 **MS KREISBERGER:** Thank you, Sir. Well, I obviously haven't had time to take
17 instruction or reflect, but to put it this way: no objections spring to mind. That
18 seems like a very sensible way forward. The only thought that occurred to us
19 is one would need to be clear as to the statutory basis of any appeal for each
20 judgment, although in fact, that would make no difference in terms of the time
21 limits. So it would just be getting the procedural mechanism right. But other
22 than that, we certainly see the sense in what you are proposing.

23 **MR JUSTICE MARCUS SMITH:** Well, Ms Kreisberger, let me be clear. I will, up to
24 I think, the first day of the trial, be open to any further thoughts that any party
25 has. I mean to be clear, this is something which cropped up when I began
26 thinking: how exactly is this going to work? And it didn't arise in Agents

1 Mutual, which is the other very big hybrid matter that I have done, because
2 there, what happened is the trial slid in and out of High Court to CAT, to
3 High Court to CAT, without there being any particular overlap. This is the first
4 time I have addressed this particular problem which is why I have taken a bit
5 of time over it. Thank you very much. Noted that you don't, at the moment,
6 see any problem with the course I have suggested. Mr Jones for Genius.

7 **MR JONES:** Sir, of course, clarity is key from our point of view, and we very much
8 understand, Sir, why you have reached the view that you have, that it is likely
9 to be best achieved by having two judgments. We also haven't considered it
10 in detail, of course, but at the moment, we can entirely see the sense in that.
11 It would, of course, be necessary to make sure that in the High Court
12 judgment, you refer to adopting sections from the CAT judgment. It may even
13 be that copying and pasting those sections would be a better approach, just to
14 produce two completely standalone documents, but Sir, I am tinkering with
15 that suggestion. In broad terms, we agree with you.

16 **MR JUSTICE MARCUS SMITH:** I am grateful. I mean it did cross my mind what
17 would happen if I was in the dissenting minority in the CAT decision, and
18 deciding the High Court matter on my own. I strongly suspect that is not
19 going to happen, because the intellectual gymnastics that that would involve,
20 seem to me almost impossible, so let's hope it doesn't come to that. I am
21 sure it won't, but it just underlines the fact that this is something we do need to
22 keep half an eye on. Thank you. At the moment, no issues but only at the
23 moment, no issues with what I have been saying. Ms Smith.

24 **MS SMITH:** Yes, my Lord, I think the formal position is that the competition law
25 defences to the High Court action have in fact been transferred to the CAT, so
26 those aspects of the High Court action are before the CAT in any event, so

1 they will be decided by the three man Tribunal, three person Tribunal. So we
2 think that the suggestion that there be two judgments, and that the CAT
3 judgment effectively comes first, and determines those issues that are before
4 the CAT, including the competition law defences, makes a lot of sense and
5 then a High Court judgment which either adopts or in fact proceeds on the
6 basis of the decisions that have been made in the CAT, seems to work for us,
7 both from the point of view of making it clear who is making what decisions
8 but also, that seems to work from the point of view of which Tribunal, which
9 Court is hearing which aspects of the case, pursuant to the orders that have
10 already been made.

11 **MR JUSTICE MARCUS SMITH:** Well, thank you, Ms Smith. Mr Robertson, I think it
12 is appropriate on this point to see if you have anything to add, because it is --
13 I am not sure it is without precedent, but it is quite a novel point, and any
14 pearls of wisdom that you have would be gratefully received, but if there are
15 none, then there are none.

16 **MR ROBERTSON:** No pearls from me this morning, my Lord.

17 **MR JUSTICE MARCUS SMITH:** Very grateful. I am going to proceed prima facie
18 on the basis of separate judgments with adoption, rather than cutting and
19 pasting, but I am very neutral as to how exactly the two judgments are
20 structured. I can see advantages and disadvantages to both. If and to the
21 extent I identify further problems, I will of course, raise them with the parties,
22 and if the parties identify for themselves something which they think I, or
23 indeed the Tribunal, ought to consider, then of course, please do raise them.
24 But I think it would be helpful if they were raised, to the extent they arise, on
25 Day 1 of the trial, so I can bear in mind those points through the course of the
26 hearing, rather than have it at the end, when perhaps one's intellectual

1 furniture has been arranged in a particular way. So thank you all very much.
2 I am going to leave it at that. I am not making any order in that regard but
3 I have the parties' helpful views for the moment.

4 Can I turn, then, to the question of confidentiality. Let me try and unpack why it
5 matters and how it matters, so the parties can work out what is needed from
6 them. At the moment, we have what I am presumptively going to understand
7 as an over-inclusive confidentiality regime. I think that is common ground
8 between the parties. Let me say at once, I am not particularly fazed by that.
9 Most confidentiality regimes are over-inclusive, and that doesn't matter during
10 the course of the interlocutory phases of the trial. It is something which,
11 frankly, is probably more convenient, rather than less, for the parties. The
12 problem comes when one hits the trial itself, and what matters there is not so
13 much the de-designation or redesignation of confidentiality material, as the
14 identification of passages in both the submissions and in the
15 cross-examination of witnesses, where the advocates take the view it is not
16 going to be possible fairly to cross-examine or make submissions in respect of
17 a given topic, without engaging confidential material which needs to be dealt
18 with under some kind of special regime. So I don't think -- and this is why
19 I think the order that I saw last night doesn't work -- I don't think that a regime
20 of working out what is and what isn't confidential in the trial bundles is what is
21 called for. I am perfectly happy to maintain the trial bundles in a protected
22 confidential state. What I think the parties need to think about is the extent to
23 which they can refer to these materials in open court and the extent to which
24 they need to, without the protection of a going into private regime.

25 So what I think the advocates all need to think about is, first of all: when I am making
26 submissions, can I do so elliptically? Can I do so by saying to the Tribunal

1 "Read this, but for heaven's sake, don't speak it aloud"? Now, normally, that
2 works quite well because the advocates and the Tribunal are sufficiently fleet
3 of foot to be able to do matters that way, and I will protect any document that
4 is generally referred to in court as being confidential, by the powers that
5 I have got to preserve them from third parties. So it seems to me we can do
6 an awful lot of the submissions in open court, whilst protecting confidential
7 material. I may be wrong about that, but that is something for the advocates
8 to think about.

9 The harder question is when one comes to the witnesses, because I don't like the
10 idea of witnesses being obliged, in addition to all of the other stresses of
11 cross-examination, to worry about blurting out material that is sensitive, that
12 they have been told is sensitive, and thereby create an additional pressure on
13 the witnesses which shouldn't exist. So that is where I think I am inclined to
14 be receptive to an application to go into private session. But that application
15 needs to be extremely tightly confined, because as you will know from my
16 ruling in BGL, I am distinctly unkeen to go into private session. What I want in
17 the course of preparation is for the parties to isolate those areas of
18 cross-examination where they just can't avoid referencing material that is
19 sensitive to one or more of the parties without going into private session.

20 Now, I don't know whether that is the solution. I think it is. I certainly don't think that
21 what has been canvassed so far with parties identifying what is sensitive and
22 what isn't in the trial bundles and the Tribunal adjudicating upon it in the
23 course of September, I just don't think that works. But I am going to hand the
24 baton back now to the parties and I will use the same order as before.
25 Ms Kreisberger, do you have any initial response to that general framework
26 for resolving the question?

1 **MS KREISBERGER:** Sir, I do, but might I take, perhaps, just 30 seconds, so I can
2 ensure that I am speaking with instruction?

3 **MR JUSTICE MARCUS SMITH:** Of course. What we will do, and I am sure that is
4 true of all of the advocates, I will just still my microphone and camera for
5 five minutes. So we are ten past now. We will resume at quarter past.
6 Hopefully, that will make things easier rather than harder. Let's do that until
7 10.15 am.

8 **MS KREISBERGER:** I am very grateful.

9 **MR JUSTICE MARCUS SMITH:** Thank you.

10 **(10.10 am)**

11 **(A short break)**

12 **(10.15 am)**

13 **MR JUSTICE MARCUS SMITH:** Mr Bates, I see you but no one else. We will wait
14 for the others to join. Mr Robertson is here. Excellent. We just need
15 Mr Jones. Yes, there we are.

16 Yes, Ms Kreisberger.

17 **MS KREISBERGER:** Sir, that was a very productive few moments, because I was
18 able to take a very clear set of instructions, and we are grateful for the
19 indication and quite share your lack of enthusiasm, Sir, for going into camera.
20 But we are not attracted to moving away from the agreed mechanism. And
21 I have a number of points on that, but there is one critical point that I wanted
22 to bring to your attention, Sir.

23 **MR JUSTICE MARCUS SMITH:** Yes, of course.

24 **MS KREISBERGER:** Which is this: as you said, you described the ring as
25 over-inclusive. That is something of an understatement because it was, in
26 fact, just a quick fix. So it is replete with material which is not confidential, and

1 that was done purely for reasons of pragmatism alone, entirely divorced from
2 the question of whether any particular document is confidential in nature. It
3 just all went into the ring. And the critical point from Sportradar's perspective,
4 and I am putting forward Sportradar, the client's, view, is that this is essentially
5 a nightmare for them because my client has no visibility on all the documents
6 in the ring, and is therefore unable to give instruction.

7 **MR JUSTICE MARCUS SMITH:** Oh, right, okay. I understand. That is the other big
8 problem that arises. If I were to say that I wanted your clients and, indeed, all
9 of the other lay clients involved to identify three persons who would have
10 access to the confidential material, I would want them to have explained the
11 undertaking that binds everybody regarding the use of material in the case,
12 whether it is confidential or not, only for the purposes of this litigation. And
13 I would expect each party to identify three persons who could give instructions
14 and who would not be able to use for other purposes, the material; in other
15 words, I would like it to be persons who can, as far as possible, be assured of
16 not being put in temptation's way, or not being obliged to partition their brains
17 in order to eliminate that which is useful for their business purposes and that
18 which is useful for the case. But would that go some way to meeting your
19 objections?

20 **MS KREISBERGER:** Sir, I will just take instruction on that immediately.

21 **MR JUSTICE MARCUS SMITH:** Right, let's do that again for all parties, because
22 the thing is, what is not going to work is for us to have the kind of disputes
23 which crop up in relation to disclosure and evidence that I have a fine supply
24 of today, in the course of September. I am not going to be remotely inclined
25 to make myself available to resolve this sort of thing, because I have other
26 things which are, I am afraid, a better use of my public time in that time.

1 I have a singularly large judgment to write and I intend to write it. So the
2 parties should be aware that I am distinctly disinclined to become the umpire
3 in a "he said/she said" confidentiality dispute about what can and what cannot
4 be dedesignated. So the parties need to be pretty aware that the solution
5 they have got isn't going to work and I am not going to be ordering it unless
6 you are exceptionally persuasive. Ms Smith, I see you have your hand raised.

7 **MS SMITH:** Yes, just one point of clarification before we break to take instructions,
8 my Lord, and that is your suggestion that three or whatever number of lay
9 clients have access to all of the material for the purposes of assessing
10 confidentiality, for the purposes of these proceedings only. Can I just clarify,
11 I am assuming that those three individuals, or however many individuals,
12 would all be required to sign confidentiality undertakings?

13 **MR JUSTICE MARCUS SMITH:** Well, I have no issue with that. Frankly, it is
14 something I have given a great deal of thought to in relation to general
15 practice and the one thing that has struck me is that in, now, 30 years of
16 practice as a barrister and a judge, I have never really articulated in my own
17 mind how the undertaking formally implied, now express, was as it were,
18 imprinted on lay clients' minds. And it is only, I think, with the increasing rise
19 of sensitive commercial information in competition and IP cases that this
20 question is becoming articulated almost on a daily basis. And there is now
21 a great deal of law which suggests that whilst one can exclude the lay client
22 from the confidentiality ring, it is really not something which is desirable at all,
23 and needs to be specifically justified. So that is informing my view that
24 Ms Kreisberger has made an excellent point that needs to be addressed. But
25 to be clear, I have no issue with there being an undertaking that is signed. Let
26 me be even clearer. I have no issue in making an order for this regime to

1 operate under a penal notice and for the lay clients to have explained to them
2 by their legal teams, precisely what that means if there is a breach. So that is
3 another thought that I would be having about this sort of thing. Confidential
4 information needs to be protected but it is only one of the values that applies
5 in this sort of context. The two other values which matter as much, if not
6 more, are the ability for the lay client to participate in the process and for the
7 public to participate in the process by seeing what is going on in open court.
8 Now, those are all competing values, because what the lay client needs to
9 see is going to be different to what the public ought to see and what is
10 protected by confidentiality is going to be inconsistent with both of those,
11 themselves, inconsistent regimes. But I hope that answers, Ms Smith, your
12 query. Are there any other points of clarification that any of the parties want
13 to raise before, I think, we rise for another five or so minutes, in order to see
14 whether this is an appropriate way forward?

15 No other points. Well, Ms Kreisberger, do you want some time? I quite understand
16 if you do.

17 **MS KREISBERGER:** Yes, five minutes, we would be grateful.

18 **MR JUSTICE MARCUS SMITH:** Of course. It is 25 past now. We will resume at
19 10.30 am. Thank you.

20 **(10.25 am)**

21 **(A short break)**

22 **(10.30 am)**

23 **MR JUSTICE MARCUS SMITH:** Yes, I think we have everybody. Ms Kreisberger,
24 back to you.

25 **MS KREISBERGER:** Sir, we have two points in response, really. The first is we can
26 certainly give you our suggestion in relation to an extended ring. It would

1 need more than just three individuals, and perhaps I could address you on
2 that in a moment. But Sportradar's very clear position is that the value which
3 you articulated, Sir, of the public being able to participate in the process, does
4 need to be given proper emphasis and there is a concern that this trial, which
5 will involve quite a lot of prejudicial material, some of which I would like to take
6 you to today, ought to be aired in public, it ought not to happen behind closed
7 doors. So we are still looking to see if there is some compromise which will
8 not unduly burden you, Sir, and the Tribunal, but where we don't proceed on
9 this basis, where non-confidential documents have been put into the ring for
10 reasons of pragmatism, then occasion an application before you, Sir, to
11 cross-examine in camera. And it is a related concern that while I quite see,
12 Sir, that you don't want to be peppered with confidentiality applications and
13 there needs to be an effort to see how that could be avoided, equally, the
14 applications that you refer to, tightly confined applications to cross-examine in
15 camera, in themselves could have a derailing effect on the trial. We are
16 concerned that that would divert resource and we do wonder if there is some
17 mechanism which would allow for dedesignation and then those documents
18 which haven't been dedesignated would need to be justified as confidential,
19 where a party says: well, I want to cross-examine on these documents, not
20 behind closed doors.

21 **MR JUSTICE MARCUS SMITH:** Ms Kreisberger, let me, and forgive me for
22 interrupting, I do think we can get to that position, but without the
23 dedesignation phase. The fact is, as far as the public are concerned, there is
24 actually no difference between a set of trial bundles that are simply trial
25 bundles not referred to in court, and a set of trial bundles that contain
26 confidential material. They don't see either until they are referenced in open

1 court. So I don't see the point of a dedesignation exercise in that way. What
2 I am expecting is that the parties will identify those areas where they are
3 going to be going which will be sensitive for them and sensitive for other
4 parties. I am not saying, I want to be very clear about this, I am not saying
5 that the mere fact that one party says "Please, Judge, this is confidential",
6 means that we are going to go into private session. That is not going to
7 happen. If the parties together say, "We have a consensus that this material
8 is sensitive, has got to be referred to orally, and therefore, we need to go into
9 private session", then I will attach very considerable weight to that common
10 position.

11 If, on the other hand, it is one party saying, "I want to cover this", and the other party
12 saying, "No, this is appropriate to be dealt with in open court", then I will deal
13 with that either on the first day of the trial or when the matter arises in the
14 course of the trial. What I am not going to have is a cottage industry of
15 theoretical arguments about what is and what isn't confidential. I am going to
16 want the parties, the advocates in particular, to focus on where they are
17 going. I am expecting each advocate to be sensitive not just to their own
18 party's concerns but to others', in other words, if you are going somewhere --
19 and I am not expecting a document by document list of where you are going,
20 what I am expecting is the parties to say, "Look, I am going to be
21 cross-examining about -- " Well, let's take your point of material -- of bad
22 conduct that needs to be aired in public, well, I would expect, Ms Kreisberger,
23 you to be addressing that with your counter-parties without my involvement
24 and if that can't be resolved, then I will deal with it. And I will then want to
25 hear why it is that the very considerable sacrifice to open justice is required in
26 that particular instance. But I don't want to do it by reference document to

1 document, I want to do it by reference topic by topic, because that I think, is
2 what colours what is sensitive and what is not. So I hope that answers your
3 question satisfactorily. I am very conscious that I haven't heard from any
4 other party, and it may be that we have to shift away from that. But does that
5 answer your concern?

6 **MS KREISBERGER:** It is a very helpful indication, and I think this needs to be
7 addressed in the spirit of cooperation and with the goal of opening up as
8 much of this material as possible.

9 **MR JUSTICE MARCUS SMITH:** Yes, I mean I am on the record in BGL as saying
10 exactly that, so the parties can take it that I am not going to be rowing away
11 from BGL. The problem in BGL is that the problem only arose the moment
12 Ms Glasgow, the witness in question, went into the witness box. In opening,
13 counsel had very capably, elliptically referenced the materials and the
14 sensitivity was avoided. When the point was put to the witness, it was, it
15 seems to me, unfair that she be obliged to sculpt her answers by reference to
16 the code list of home insurance providers, and so through extremely gritted
17 teeth, we went into private session for most of her evidence. Now, that is
18 what I want to avoid. If we are going to go into private session, it needs to be,
19 "I need to cross-examine for an hour on this topic, we can't avoid it", or if there
20 is a dispute, I will resolve whether it is avoidable or not and then, depending
21 on my determination, we do or do not go into private session.

22 **MS KREISBERGER:** That is understood, and a very helpful indication, Sir.

23 **MR JUSTICE MARCUS SMITH:** Okay, we will follow the same order. Mr Jones, do
24 you have anything to add or subtract from that?

25 **MR JONES:** Yes, Sir, firstly, if I may start with the general approach, before going
26 on to the question of the persons in the ring. So in broad terms, we think that

1 what you have suggested is an elegant solution in terms of giving both open
2 justice, which we also agree has to be the paramount consideration here, but
3 also, Sir, as you say, not unduly taking your time and the Tribunal's time in the
4 run up to the hearing. There is the practical point, Sir, which you were just
5 discussing with Ms Kreisberger which we had also had some concerns about,
6 which is just to put a bit of colour on this, that of course, during the course of
7 cross-examination, my team will obviously be cross-examining on the basis of
8 Sportradar's confidential material. So it won't be possible for us simply to
9 reach a judgment ourselves about what is confidential, there is going to need
10 to be a process. The key thing is not to involve the Court. But there is going
11 to have to be a cooperative, as Ms Kreisberger said, process over the next
12 month, of the parties really narrowing down what they are saying is
13 confidential and really knowing where the disputes are, in case they need to
14 be raised. And, Sir, I think from the discussion you have just had with
15 Ms Kreisberger, we are now all on the same page on that. But that is
16 something which struck us as very important and I am grateful for the
17 clarification which I think I heard on that.

18 **MR JUSTICE MARCUS SMITH:** There absolutely has to be dialogue, and let me
19 throw -- and sorry for interrupting again, but let me throw into the mix
20 something which did work in the past, which is adoption of the Patent Court
21 practice of the production of cross-examination bundles, say 48 hours before
22 the witness comes into the witness box. Now, that serves two purposes. It
23 does involve, obviously, tipping your hand as to the documents you are going
24 to be going to, but it does save a considerable amount of time because the
25 witness, if they have had enough time to read the file -- and I am not talking
26 about 20 files, I am talking about one or two at the most, files, with the

1 documents that are going to be used for cross-examination -- and I am not
2 saying it is only the documents, but it is most of them -- what you can do is the
3 witness can read them, it saves time in the witness box because the witness
4 is familiar with what is going on there, and as an incidental benefit, it flags up,
5 when the bundles are sent to the witness and to the other parties, the concern
6 that you may have thought a document is unproblematic but let us say,
7 hypothetically, Ms Kreisberger sees it and says, "Well, hang on a minute, you
8 can't possibly refer to this in open court, you have to go into private session
9 for this", and thereby one draws out the problem. It doesn't, I think, obviate
10 the need for anterior discussion, but it does, I think, provide a safety net
11 because there is going to be, in the case of certain documents, a lack of
12 understanding of other parties' sensitivity. Sorry, I cut you off there but that
13 does seem to me something which we might want to bear in mind when we
14 come to discussing trial preparation and trial structure, but I will hand back to
15 you to carry on with your submissions.

16 **MR JONES:** Sir, that's a very helpful submission and we will take it away. Could
17 I just make this quick observation on this, which is that I think for our part, we
18 would be much more optimistic that the anterior discussions, as you described
19 them, Sir, would have resolved or at least identified any disputes on
20 confidentiality. The reason I say that, Sir, is because as you know, an awful
21 lot, pretty much all of the documents, have been treated as confidential, and
22 the context here is, of course, a context of fierce competitors sharing current
23 pricing information, current customer information. So if I can just put it this
24 way, there is a lot of potential areas for battle and we need to be discussing
25 over the next few weeks to try and minimise any of that and resolve any of
26 those sorts of battles between us rather than leaving it until a couple of days

1 before cross-examination. So as a backstop, we will think about that, but that,
2 Sir, is my immediate optimism on that particular --

3 **MR JUSTICE MARCUS SMITH:** I completely agree that the cross-examination
4 bundle route is a, as it were, pimple on the elephant's backside rather than the
5 solution so absolutely, I don't think one can rely solely on that, but it may be
6 something we deploy as a device. But I don't think, and I entirely agree with
7 what you said, that there is any substitute for careful discussion behind the
8 scenes between the parties, and I am sure there will be points about
9 confidentiality and private session which I will have to resolve. The point you
10 have just made about dates is something which I can see different people will
11 take different views. I mean that regularly happens in these courts, where
12 one party is saying, "Oh, for heaven's sake, it is five years old, what is the
13 problem?" and the other party says, "Well, it is five years old, but it indicates
14 exactly where we are at the moment; it is sensitive. Now, as a general
15 precept, the older, the less sensitive. But I don't want to be taken as giving
16 any kind of guidance beyond what you know about my usual practice in terms
17 of wanting things to be openly aired and for the private session to be the
18 outcome of last resort. So the only thing I would say in addition to what you
19 have just said, Mr Jones, is this: if there is a dispute about going to private
20 session, it is for the party wanting to go into private session to do the running
21 and they are going to have to explain to me why the sacrifice to open justice
22 is, in that limited case, the right thing to do. And that was my problem with
23 BGL because I was absolutely confident that we were going into private
24 session in relation to material which I was pretty certain was not susceptible of
25 proper protection, and the only reason we did that was because it was raised
26 too late and that is why it is on the agenda today, because there is ample time

1 to flesh out the problems.

2 **MR JONES:** Sir, I am very grateful for that. If I turn then to the question of the
3 clients in the ring.

4 **MR JUSTICE MARCUS SMITH:** Yes.

5 **MR JONES:** The two points are related. They are related in this sense: that if the
6 parties are able to cooperate through August to narrow the scope of any
7 disagreements regarding confidentiality, then the natural consequence of that
8 will be that even without letting clients into the ring, they will have access to
9 a much bigger universe of documents and information. So that is really the
10 starting point for us because the question that then arises is: will anyone need
11 to see more? That is why they should be let into the ring, if fairness requires
12 them to see more and, as Ms Kreisberger says, fairness requires them to be
13 able to give instructions. Of course, the kind of information that we are talking
14 about letting each other's clients see, is not -- there is perhaps a couple of
15 exceptions to what I am about to say, but for the vast majority of it, it is not
16 technical sort of information that you need someone in-house to look at to
17 help you, the legal team, understand. It is not the sort of information that one
18 often sees in IP cases and the like. It is going to be information about our
19 prices and our commercial strategies. So there is in our mind, a real question
20 over why anyone would need to see information in the ring. And then layered
21 on top of that, there is this problem, Sir, which I know you heard some
22 submissions on yesterday, but the issue which we see is a real practical
23 problem, which is that going into the ring for a client and giving
24 an undertaking, and an undertaking backed by a penal notice, effectively
25 means that they then are going to be unable to take part in commercial
26 decisions for which that information might be relevant. So they have seen

1 pricing information, they have seen the other side's commercial strategies,
2 and they are now under an undertaking to put it out of their minds. And Sir,
3 for that reason -- I mean we, for our part, I can say straightforwardly now,
4 would not take the opportunity, we wouldn't take up the opportunity of putting
5 any of our clients in the ring. There is no one who feels that they could do
6 that. They feel that because of their commercial obligations, they wouldn't be
7 able to balance that role with the obligation to the Court and the penal notice.
8 Against, I should say, a backdrop, where of course, Sir, you will be very well
9 aware that the sort of information we are talking about, if it was shared
10 ordinarily, would be a hard core cartel. And different, of course, if it is shared
11 under the auspices of a trial, and ordered, but one would still face some quite
12 difficult questions around the judgment calls, which client needs to see
13 information to give instructions. So we, for our part, would not take advantage
14 of the opportunity, Sir, no one would be willing, and able, to give the
15 undertakings. Other parties, of course, will need to reach their own views.
16 Subject, though, if I might just make two quick practical points. The first is we
17 would want to see the list of names that any other party wants to put into the
18 ring, so that we can have a look at what their role is, and how it is that they
19 are really going to put this information out of their minds. And relatedly --
20 sorry, I said two practical points, I have three in fact, Sir, so my second and
21 related point is that I heard Ms Kreisberger's suggestion that they would need
22 more than three. For our part, we can't see why. I have explained why we
23 can't see any are required, but we certainly can't see why more than one is
24 required and it is impossible to imagine why more than three are required,
25 when as I have said anyway, the scope of the confidential information would
26 have narrowed down, and it's not information they're going to be able to give

1 instructions on. So that was my second point. And my third practical point is
2 because of the significance of all of this, we do very much endorse, Sir, your
3 suggestion that it be backed by a penal notice, so that if anyone from the
4 client does come into this ring which is only going to be dealing with the most
5 sensitive information, they would be doing so subject to the backing of a penal
6 notice.

7 **MR JUSTICE MARCUS SMITH:** Thank you for that, and before I move on to
8 Ms Smith and Mr Robertson, and then no doubt back to Ms Kreisberger, let
9 me just articulate my thinking about this. I consider that the solution to this is
10 to put an additional burden on the legal team of each party to determine the
11 extent to which their client can appropriately see material that is confidential.
12 The reason I am doing that is because, as I have already said, going through
13 on a document by document basis, lifting things up, is simply not going to
14 work in this or, indeed, pretty much any case. So the fact that I am saying
15 that documents within the confidentiality ring are, in theory, open to the lay
16 client, does not mean that in practice they should be. That is, of course, going
17 to be a matter for the very careful judgment of the client and the lawyers. And
18 that is why there is going to be a penal notice, there is going to be
19 an undertaking by pre-named people. I want there to be discussions between
20 the parties about who is going to be dealing with the documents on that basis
21 and I would like there to be an opportunity for objection to take place, to say,
22 "Look, are you sure about this?" But when push comes to shove, absent the
23 most obviously wrong case, I am going to leave this to the good judgment of
24 the parties in question. But each party is going to have to explain to each
25 individual -- and again, I am not going to say anything about number, but
26 three seems to me about the right amount, but who knows, I am not privy to

1 the parties' thinking, it may have to be more. But each person coming in is
2 going to have to sign a suitably worded declaration that tracks the express
3 undertaking contained in the CPR. By strange coincidence, it is not in the
4 Tribunal Rules. That is something that will change in the future, but it is the
5 CPR that has the undertaking. And I am going to want the undertaking also to
6 be given by the corporate entity involved. Because I want this regime to have
7 real teeth, in that if there is a collateral use of material, then someone is going
8 to be fined, or someone is going to prison. And this is giving proper teeth to
9 the case. Now, you may say there is no way of policing this. Well, I disagree.
10 I think there is. But also, I think that we are dealing with capable professional
11 teams and lay clients, who presumptively, I am going to assume, will take
12 their obligations very seriously. And, frankly, if I had my QC explaining to me
13 that there is a penal notice and what it meant, then I would start thinking
14 extremely carefully about what I was going to do to documents that were
15 disclosed to me and I would be saying internally, in my own mind, "Do I really
16 need to see this?" And that is how I think things should be. I hope that deals
17 with your three concerns. If they don't, if you have any points that you want to
18 add, then by all means add it. Otherwise, I will move on to Ms Smith.

19 **MR JONES:** Sir, that is all very clear and I think it does deal with the concerns that
20 I raised. Thank you.

21 **MR JUSTICE MARCUS SMITH:** I am very grateful, Mr Jones. Ms Smith, over to
22 you, if you have anything to add or subtract to what has gone before.

23 **MS SMITH:** No, my Lord, I think we are absolutely of a view and sympathetic to the
24 concerns that the hearing should be in public as far as possible and so we do
25 think an idea of using cross-examination bundles, for example, is a good idea,
26 so that it can be seen at least 48 hours in advance, what may be put to the

1 witnesses and whether there is an issue as to confidentiality of any of those
2 materials. However, that does leave the confidentiality points to a very late
3 stage, and the last thing we want is for there to be confidentiality disputes
4 48 hours before a witness goes into a box. So we do need to have a process,
5 as Mr Jones said, over the course of the next six weeks, to ensure that
6 material, what is really confidential, insofar as there is any material that is
7 really confidential, that that has been identified, (1), identified and (2), any
8 disputes have been resolved as to whether or not it is, because there may be
9 disputes as to whether or not material is confidential and we don't want to
10 leave those disputes until 48 hours before the witness goes into the box.

11 So, my Lord, as to the initial process that has to go on, in our submission, we
12 absolutely agree with Mr Jones on that over the summer. We also strongly
13 support what he said about the first stage of that process should be one which
14 is just at a lawyer level, because we also agree that a lot of material, we hope,
15 should be able to be brought back out of the confidentiality designation that it
16 was given as an excess of caution at an earlier stage. We think a lot of that
17 material will come out. That assessment can certainly be done, we think,
18 along the lines of what the parties have already pretty much agreed, which is
19 between the solicitors. The point is that when we get to the point where we
20 have the material which has been identified, which will be pricing information,
21 customer information, to what extent should there be lay client involvement in
22 assessing that material? And we also strongly endorse what Mr Jones said
23 about even with a system of undertakings with penal notices and corporate
24 undertakings, as your Lordship has indicated, which we think would be
25 absolutely necessary for any lay client involvement in looking at that kind of
26 material, which is sensitive commercial information, is currently incredibly

1 commercially sensitive, and will continue to be because, just again to put
2 some colour, from FDC's point of view, FDC's two main customers in its only
3 business, the business of selling this football betting data, are Genius and
4 Sportradar. And they are our two customers for, essentially, what is our only
5 business. And there have been rights cycles, there will be future rights
6 cycles, in which both of those customers will be involved and there is one
7 rights cycle coming up very shortly, I think, in about a year's time. So these
8 are all immediately important issues of commercial confidentiality and we
9 are extremely concerned that our two main customers, who are the other
10 parties in this proceedings, if individuals from those customers have seen
11 material that is extremely sensitive and relevant to the rights cycles that they
12 will be taking part in next year, if they have seen it for the purposes of these
13 proceedings, obviously they can't put it out of their minds. So we welcome
14 very much what Mr Jones has said, that he is unlikely to feel to be in any
15 position for any of his lay clients to be able to give confidentiality
16 undertakings. And we say that that must be right. We also have a problem,
17 in that FDC is a very small company; we have four employees. And Mr Ford,
18 who is the witness in these proceedings, is essentially the main employee.
19 The other three are people with more minor administrative jobs. So Mr Ford
20 is really the only person who can helpfully look at any confidential information,
21 if your Lordship considers that lay involvement is required. And he would find
22 it, I think -- I haven't had instructions, but I anticipate he would find it extremely
23 difficult to sign an undertaking because he is the person who will be running
24 the rights cycles that are coming up. So it may very well be that we are also
25 in a situation that none of our lay clients, well our only lay individual, will be in
26 a position to sign the undertaking. If that is the position that we reach, and

1 that is just on the facts of this particular case, Mr Jones' clients also feel
2 unable to produce any lay clients, we have an unsatisfactorily unbalanced
3 position, where Ms Kreisberger wants to give a number of her lay clients
4 access to this information even under a penal notice and we are concerned
5 that unless they undertake as part of that, not, for example, to take part in
6 subsequent rights auctions, there is going to be a potential problem, and
7 an imbalance in the situation that we find ourselves. We absolutely agree
8 with you that a penal notice and an undertaking taken at a corporate level as
9 well, are essential in our view, however, it would be extremely difficult for any
10 individuals who have given those undertakings to subsequently play any part
11 in subsequent auctions. Subsequent rights cycles.

12 **MR JUSTICE MARCUS SMITH:** Thank you. Again, let me push back on that to
13 enable both you to respond and for Ms Kreisberger, who I think is the person
14 pushing in slightly a different direction to the other parties, to understand what
15 I envisage working. And, Mr Robertson, I will come to you next. I think it is
16 important that you say your piece. First of all, the mere fact that you produce
17 a lay client who signs the undertaking, does not mean that they have to see
18 any documents. All it does is enable documents to be seen rather than not to
19 be seen. So I don't see any issue with either Mr Jones or, indeed, yourself,
20 putting forward lay clients who will sign an undertaking, so that you have the
21 ability to put documents under their nose if you need to take instructions.
22 Whether you exercise that ability or not, it seems to me is a matter that will
23 turn on the individual judgment of each team.

24 It does seem to me, however, that one cannot, simply to ensure the protection of the
25 lay clients, have a regime where they can simply say, "I would like to see
26 everything." I think they need to have protection because I am anticipating no

1 breach of the undertaking, because the consequences of its breach are,
2 frankly, going to be so serious. So it seems to me that given that we have the
3 likelihood of pretty much continuous QC involvement between now and the
4 beginning of trial, I am going to contemplate a gatekeeper function that
5 documents that are presently subject to the confidentiality regime can be
6 produced to a lay client who has signed the appropriate undertaking, but they
7 are produced on the say so of leading counsel, with a list being kept of those
8 documents that have been produced. Now, that puts an obligation on both
9 the lay client and on the QC in question to ensure that the lay client is
10 appropriately protected, and if, for no good reason, the lay client says, "Oh,
11 I would like to see all of the sales metrics of my rival", and the QC says, "Well,
12 why?" and they say, "Well, because I am interested", well then a conversation
13 will be had. I appreciate that is placing a considerable burden on the silks in
14 each case, but frankly, I think that is why one has the outstanding individuals
15 bearing the suffix QC in the first place. I can place, I think, a great deal of
16 reliance on the good judgment and it goes without saying, professional
17 integrity of the counsel involved. We can maybe make it senior juniors, or
18 partners, but I like the idea of the advocates in the case being involved in this
19 because they will know what is needed by way of introductions in order to
20 make their case properly runnable, including in getting instructions from their
21 lay clients.

22 Mr Jones, I see you have your hand up. I will deal with you first, and then, Ms Smith,
23 you can come back on that point.

24 **MR JONES:** Sir, I am grateful for you letting me jump in here. It is only that I have
25 been asked to raise two other points which have occurred to my team over
26 the last few minutes and they affect Mr Robertson and Ms Kreisberger, so

1 I will deal with them briefly. From my point of view, I very much like the idea
2 of the silks having to discuss these points, but we entirely see the sense in
3 that. The two points I wanted to raise is, firstly, Mr Robertson hasn't spoken
4 yet, but we had rather been assuming his clients would not have access
5 under the regime that has been described, because we do not see any good
6 reason for them to be able to look at confidential material, given the role that
7 they are playing. That was the first point. And the second point, Sir, picks up
8 on what you were just talking about in terms of ensuring that people see the
9 minimal number of documents that they really need to. Can we propose, Sir,
10 that parties who do show documents to lay clients under this regime, keep
11 a list.

12 **MR JUSTICE MARCUS SMITH:** Indeed. Within my own mind I thought I had said
13 so, but that is certainly what I have in mind. I don't think the list should be,
14 without more, published to other parties, because that would show too much
15 by way of tactics. But I think that the parties ought to budget for that list being
16 disclosed to the Court and to the other parties at the conclusion of the trial.

17 **MR JONES:** Yes, Sir. That sounds very sensible to us. I am very grateful.

18 **MR JUSTICE MARCUS SMITH:** Mr Jones, was there anything else before I move
19 back to Ms Smith?

20 **MR JONES:** Nothing else.

21 **MR JUSTICE MARCUS SMITH:** No, I am very grateful. Ms Smith, back to you.

22 **MS SMITH:** Perhaps Mr Robertson could jump in, because I am hoping he is about
23 to jump in to say he doesn't need to take part in the process.

24 **MR JUSTICE MARCUS SMITH:** I rather think he is going to say the opposite, but
25 let's make sure I have dealt with your concerns. Does what I have proposed
26 assist the concerns that you have articulated?

1 **MS SMITH:** My Lord, I think so. If I can just perhaps set out step by step what
2 I understand the proposal to be. And as I understand it, the proposal is that
3 there is initially a process which is carried out by the legal teams and the legal
4 teams reach as much agreement as they can as to what comes out of what is
5 currently being all designated as confidential. And I think everyone is
6 confident that a great deal of the material will have come out just by having
7 gone through the legal process between legal teams. So that is the first
8 process. We then have a chunk of, a smallish chunk of documents, material,
9 where it cannot be agreed that they should be taken out of the confidentiality
10 ring. The question is then, what do we do with those documents? And there
11 will still have to be a decision as to how they be put in front of individuals, if
12 we want to put them in front of individuals, in court. But just leaving it to one
13 side for the moment, the point is how we deal with taking instructions on those
14 documents, before we get to the hearing, and how we take instructions on
15 those documents before we get to a hearing is what we have been discussing
16 just now. And as I understand, the proposal at the moment is that if the
17 parties feel there are lay individuals who need to look at those documents,
18 they identify them, those who are willing to give undertakings, they identify
19 those individuals and tell the other parties who those individuals are. Those
20 individuals then give the undertaking backed by a penal notice, together with
21 the corporate undertaking. Then there is a process, which is subject to QCs
22 looking at it, there is a process of identifying by the legal team which
23 documents they want those individuals who have given the undertaking to
24 look at. The QC has to effectively sign off on what documents should be put
25 to that individual or need to be put to that individual. Ms Kreisberger is
26 shaking her head, but it doesn't seem to me there would be any other way of

1 ensuring it is policed correctly, so that the legal teams are satisfied that those
2 are the documents that are necessary to be put to the individuals. So the list
3 of documents that the solicitors feel the individual needs to see are then
4 approved by the QC and they are kept, there is effectively an audit trail kept,
5 of the list of documents that are going to be put to this individual. Not to be
6 shared with the other side during the course of the process, but to be there in
7 case there are any issues that arise subsequently. And as your Lordship
8 said, I think, with a view to the possibility that that list is disclosable and may
9 be disclosed. If that is the process, I think we would be satisfied with it and
10 we would be able to accept that process. There is then a question as to
11 whether we would feel able for any of our individual lay clients to give the
12 undertaking, but that is by the by. If I understand, that is the process that is
13 being proposed. I just thought it was necessary to set it out clearly, step by
14 step. It does then still leave the problem that there is likely still to be this
15 chunk of documentation which is disputed, as to whether or not it is
16 confidential, and then we need to decide when we have an argument about
17 whether or not that can be put to a witness in court, for example, and how it is
18 put to that witness in court.

19 **MR JUSTICE MARCUS SMITH:** Well, thank you, Ms Smith. That is a very clear
20 exposition of what you think I have said. And I think I will give you a beta
21 minus for translating what I have thought about. So you are close, but not
22 quite there. I think the issue where you have perhaps not read what I am
23 thinking right, and let me articulate what I think it is, is this: I see there being
24 two separate problems with confidentiality. One is the taking of instructions
25 problem and the other is the what gets put in open court problem. And they
26 are, I think, two distinct issues which will have their own drivers in terms of

1 what gets disclosed to whom. In other words, there may very well be the
2 need to disclose to a witness a document that is sensitive for
3 cross-examination purposes, so that the point can be put, which the lay client
4 really doesn't need to see. Equally, there may be a point that the lay client
5 needs to give instructions on which, actually, doesn't get deployed in the
6 course of the trial at all. So I do think that you need -- everyone needs to bear
7 in mind that there are two separate strands. From that, it follows that I don't
8 think it is helpful to have a single process whereby one moves from those
9 documents designated confidential, to those documents designated non-
10 confidential. I don't think it is helpful, because one is asking the wrong
11 question in relation to the documents and I don't think it is helpful, practically
12 speaking, because we are going to get to a situation where someone is going
13 to want to run to the Court for an answer and I am going to be writing my
14 judgment in *Apple v Optis* and I am not going to be wanting the difficulty of
15 dealing with what is inevitably going to then be a series of problems. So the
16 way we are going to solve it, and I think it meets your concerns, but I am
17 raising it now so that we can ensure that it does, is this: as far as the taking
18 instructions point is concerned, there will be produced by each party a list of
19 those people from whom it is proposed that undertakings be given. There will
20 be a time, not a very long period of time, but a time for concerns about that to
21 be raised, both in terms of the number of people and in terms of who they are.
22 However, to be clear, I am going to be giving the lead in terms of decision
23 making to the legal teams of the persons who want to join, as it were, the ring,
24 who want to give the undertakings, rather than the other way round. And the
25 reason I am doing that is because I am placing significant weight, and I think
26 appropriate weight, on the professional capabilities of the Queen's Counsel

1 involved. So we will then get a series of undertakings given by the individuals
2 and by the corporate party to whom those individuals are affiliated. That set
3 of undertakings will be subject to a penal notice and I want no one to be under
4 any illusions that if there is a breach of the undertaking contained and given,
5 then that will be resulting in fines, prison, the usual panoply of rather
6 exorbitant powers that the Court has when there is a question of committal.
7 And let's put our cards on the table. The penal notice is in because I want to
8 be able to trigger the contempt of Court regime. That is why it is there.

9 So the next step is whether, even though the undertaking has been given, the
10 person giving the undertaking actually needs to see any documents. And
11 there it will be a question of the QC in each case acting as the gatekeeper, so
12 that they can determine whether the client ought, in its own interests, or in his
13 or her own interest, to see the material in question. I am going to leave that to
14 the judgment of the professionals involved, the QCs, because I think they will
15 know best what is in their clients' interests and what is not. There will be
16 an audit trail. It will be kept by each QC in the case. It will not be disclosed to
17 other parties, absent order of the Court, until the end of the proceedings,
18 when I will expect each party to exchange the list of documents that have
19 been sent or given to the lay person giving the undertaking. That way one will
20 have, albeit after the event, an understanding that X, whoever the X might be,
21 couldn't possibly have properly given the undertaking and received this
22 particular document, and at that point, I will leave it to whichever party is
23 interested in triggering the contempt jurisdiction and we will go from there.
24 But I really don't expect us to get there. But that is the safeguard as far as the
25 getting instructions point is concerned.

26 Turning then to the other side, what is actually referred to in court, what I am

1 expecting is a series of conversations over the summer, whereby the process
2 of working out what goes into the trial bundles begins. In that case, obviously
3 people are going to be starting to think about what needs to be before the
4 Court. I am not interested in a process of classification or declassification.
5 I am interested in the identification over the course of the preparation of the
6 trial bundles and beyond, in working out areas of sensitivity on the part of
7 other parties. So, inevitably, in the course of compiling the bundles, someone
8 is going to say, "Look, do you know this is very sensitive. Why do you want it
9 in? Does it have to be in?" That will be the sort of conversation that I would
10 expect to have happen. And at that point, the response will be, "Well, we
11 know it is sensitive, it will have to go in because we are proposing to explore
12 such and such an area with such and such a witness." And in that case, the
13 documents will go in. And again, I want to be absolutely clear, the fact the
14 documents go in says nothing, absolutely nothing, about how I am going to
15 treat those documents at trial. I would expect those conversations to become
16 ever more specific about sensitive areas, and I am going to expect the parties
17 to work out what they agree is sensitive, and so sensitive that we need to go
18 into private session, and what areas they disagree on. Then on Day 1 of the
19 trial, I will deal with any disagreements.

20 Now, it will be for the party wanting things to be dealt with in private session to make
21 the running. But I have indicated that if the parties before me all say, "Look,
22 the only way we can explore this is by going into private session", you are not
23 going to get much push back from me, because I trust the parties to do this
24 right. If there is disagreement, then there will be push back and the running
25 will have to be made by the person who wants to go into private session.
26 That is the usual rule. We can then have bells and whistles on top of that.

1 Cross-examination bundles, it seems to me, is a good idea. I am not going to
2 direct that at the moment. We will discuss that when we come to item 4, trial
3 preparation. But that is how I see the other side working. So it is slightly less
4 formal than, Ms Smith, you are articulating. I am not expecting a kind of
5 regime where one has a negotiation about what goes into the bundle and
6 what doesn't. I am expecting, if a party says, "I want the document in the
7 bundle", for it to go in, but I am expecting the parties to be responsible about
8 that and for the dispute to be dealt with when the trial begins. And to be clear,
9 if anyone is messing about, because I know confidentiality can be used, and
10 I am sure it is not here, but it can be used as a weapon, the person who is
11 wasting my time will have the matter taken out of their allocation of time for
12 trial. So we have a time limited process. If I am of the view that disputes are
13 being brought before me which really shouldn't be, then someone is going to
14 pay the price. It won't be in terms of costs, it will be in terms of a guillotine on
15 how long you have to cross-examine whoever it is. I am not going to apply
16 that, other than in a very broad way. I appreciate that there will be areas of
17 legitimate disagreement and I don't want to suppress that. But if anyone
18 starts playing games with this process, then they are going to have games
19 from the Court.

20 Now, Ms Smith, it is not quite what you said but is it something that you can live
21 with?

22 **MS SMITH:** It is not dissimilar, my Lord, and it must have been my fault for not
23 being clear, but it is in fact, almost exactly along the lines of what I anticipated
24 for, and what I laid out specifically for taking instructions and I am grateful for
25 the clarification that that process is the one that is necessary for taking
26 instructions. And I absolutely take on board what you say about the separate,

1 in fact parallel, process of producing trial bundles and then deciding whether
2 those documents that are in the trial bundle can be dealt with in open court or
3 not. I think on that basis, I think we are happy with that, yes.

4 **MR JUSTICE MARCUS SMITH:** I am very grateful, thank you very much, Ms Smith.

5 Is there anyone else before I move to Mr Robertson? No, I see no hands up.

6 Mr Robertson, first of all, do you want to come into the process; secondly, do
7 you have any bells and whistles to attach?

8 **MR ROBERTSON:** Three short points. First, as regards taking instructions, we
9 shouldn't be excluded from the process as a matter of principle, as Mr Jones
10 invites you to do, so we should be capable of taking part. As to whether we
11 do or not, I simply have to reserve my position on that. I don't have
12 instructions.

13 Secondly, when it comes to referring to documents in court, we won't be part of that
14 process. That is not our role as interveners.

15 The third point is just to lay down a marker. In the High Court proceedings in which
16 we have had a two-day CCMC, we are reconvening in September, although
17 I suspect that will just be Mr Patton, not myself. Obviously, we will review
18 what has been said in this PTR, and we will make our submissions
19 accordingly on the appropriate approach to disclosure in that September
20 hearing. But I just do want to make the observation that we have, as
21 I understand it, 33,000 documents disclosed into a confidentiality ring, for
22 reasons purely of convenience and not of confidentiality. That can't be
23 allowed to happen again.

24 **MR JUSTICE MARCUS SMITH:** Well, thank you very much, Mr Robertson. Again,

25 I will push back so that the other parties interested can understand where

26 I am coming from. I would like to think that I have designed a regime that is

1 so spectacularly unattractive that only necessity would entail a person to
2 come into the regime and sign the undertaking. On that basis, and it seems
3 to me you have that point well on board, I think you should be entitled to
4 participate in the way that has been done. Do I hear any push back from
5 anyone on that? Mr Jones, I mean the matters have moved on quite
6 significantly since you addressed me. I would like to think there is enough
7 protection to ensure that Mr Robertson's clients ought to have the availability
8 of this course, whether they take it or not.

9 **MR JONES:** Sir, I don't have any point of principle. We think it is extremely unlikely
10 they will need to, and he said everything which you have said today on that
11 front, so I don't need to take any more time on that, thank you.

12 **MR JUSTICE MARCUS SMITH:** I am very grateful, thank you.

13 The second point is not for today, but it is the question of the extent to which
14 documents in this case are imported into the 2024 trial that we were
15 discussing yesterday. I want to be quite clear that that is not something for
16 decision today. It obviously can't be. But for my part, I am keen to utilise the
17 pipeline, if I can call it that, that exists between these proceedings and the
18 2024 proceedings, but of course, I am quite conscious that the sort of
19 protections that we have been discussing today need to be reflected in the
20 pipeline. If one created an automatic conduit of the materials in this case to
21 the 2024 case, then obviously that would be unhelpful and not what I have in
22 mind. But I would hope, Mr Robertson, that you will be able to communicate
23 with the other parties who have an interest in the documents but not
24 an interest in the proceedings, a satisfactory way of dealing with this, because
25 this has been a very helpful discussion, not just for the October trial, but
26 I think for the way in which disclosure can be handled in the 2024

1 proceedings. And I hope that the thoughts that we have been articulating
2 today and the order that we will make, can be translated with appropriate
3 changes to the 2024 trial that we were discussing yesterday.

4 **MR ROBERTSON:** That is a very helpful indication, Sir. And we will resume the
5 dialogue on this at the end of September.

6 **MR JUSTICE MARCUS SMITH:** We will, thank you very much.

7 So Ms Kreisberger, have we, by a nice circular route, got to an outcome that your
8 clients are going to be happy with?

9 **MS KREISBERGER:** We have, and much of what you have had to say has been
10 music to Sportradar's ears, so I am grateful for that indeed. I have, really, two
11 practical points, not necessarily for the order but I think I should just raise
12 now. The first is in terms of the documents going into the trial bundle, it
13 occurs to us -- and I raise this as a matter which can be dealt with, one would
14 hope, collaboratively between the parties -- when putting the bundle together,
15 it would make sense for a party to simply mark a document as confidential, so
16 we know where that party stands on that document. If another party wants to
17 cross-examine on that document, it can then be challenged and if it can't be
18 resolved between the parties, it can be put to you, Sir, at trial, at the point of
19 cross-examination but it seems a sensible, practical approach for everyone's
20 clarity, as to what is in the bundle that a party is still seeking to preserve
21 confidentiality over. I am not suggesting that that be part of the order, I am
22 suggesting that the parties speak to each other about this.

23 **MR JUSTICE MARCUS SMITH:** Well, if I may say so, I think that is a sensible
24 approach, provided it is not formalised. And to be clear, what I would want
25 the parties to do, but I am not going to make an order about this, is not to
26 focus so much on confidentiality, as to whether a document is so sensitive

1 that if push comes to shove, they are going to be saying, "You can only refer
2 to this in private session." In other words, it is not confidentiality that is really
3 interesting me, it is the sensitivity that is so great that someone is saying,
4 "Look, if you have to make the point, you are going to have to make it in
5 private session", because that is where the fault line is going to arise. It is not
6 going to be in relation to whether something is confidential or not. Frankly,
7 I am taking the Peter Mandelson approach of being supremely relaxed about
8 confidentiality. I really want to get into a position where I just don't care.
9 What I do care about is the appropriate protection of sensitive material, in
10 conjunction with obtaining proper instructions from clients and in conjunction
11 with open justice. So those are the three points of the triangle I have in mind
12 and to that extent, your point is a well made one, provided the parties know
13 why they are putting a red label or a red hand on certain documents.

14 **MS KREISBERGER:** That is understood, Sir. The threshold that should be applied
15 to the practicalities of this, I am grateful for that.

16 The other point I had was the discussion we have had around who should go into the
17 ring. The immediate thought and submission on Sportradar's side, and
18 I appreciate this can be taken off line, is that Sportradar's general counsel and
19 senior counsel, so in-house lawyers, should go into the ring. And I make two
20 points on that. The first is, it has been very difficult -- as you know, Sir, I am
21 hoping to have time today to make an application to you to summons two
22 witnesses, and that has been prepared without instruction, or significant
23 instruction, because of the underlying material. It's been very difficult and so
24 I was very happy to hear your suggestion, Sir, because it is really a timing
25 issue. Sportradar wants to be able to take instruction, give instruction. So it
26 has been in a somewhat invidious position, without having the in-house

1 lawyers in the ring. And the second point to make on that, Sir, is they have no
2 wish to see confidential pricing data. None at all. So your proposals will be
3 applied in that spirit. They don't want access to that, they want to be able to
4 give instructions on other material.

5 **MR JUSTICE MARCUS SMITH:** Well, I am very grateful for that indication. I mean
6 I am now, myself, satisfied that -- and I am sure this is not the descriptor that
7 is appropriate to your in-house counsel, but even if one had an ill-advised lay
8 client, we now have a process whereby the other parties can be, I think,
9 assured to a very high standard that their sensitive material will be protected,
10 because frankly, I am putting a significant burden on the lawyers, and I know
11 the safeguards will be properly applied, for that reason, if no other. So thank
12 you for the indication. I am going to leave it to the parties to work out both the
13 detail of the order, which is not going to be straightforward, and the
14 discussions about who goes into the ring, who gives the undertaking and how
15 the identification of sensitive material goes forward. But I am pleased that we
16 have a regime which (a), appears to work and (b), doesn't involve a huge
17 amount of satellite litigation which, frankly, I would not be able to resolve in
18 a timely way to enable the process to work properly. So unless there is
19 anything more from anyone, I suggest we move on to the next item of the
20 agenda.

21 **MR ROBERTSON:** Sir, should there be a transcriber's break?

22 **MR JUSTICE MARCUS SMITH:** Mr Robertson, I am very grateful to you. It is 11.31
23 am. We will rise for ten minutes, until 11.40 am. Thank you very much for the
24 reminder. Ten minutes.

25 **(11.31 am)**

26 **(A short break)**

1 (11.41 am)

2

3 Item 3

4 **MR JUSTICE MARCUS SMITH:** I notice that my line dropped, can you all continue
5 to hear and see me? Yes, all good. I am very grateful.

6 So item 3 is sampling. I have given an indication that I am not unsympathetic,
7 indeed I am very sympathetic, to the reason that has been raised. But I have
8 equally indicated I don't want to be left, as it were, buying a pig in a poke,
9 because I don't have a sufficient feel for how effective sampling will be. Who
10 is best to address me on this? I know there is a substantial degree of
11 common ground and it is really my push back on something which I think the
12 parties are happy with. So whoever wants to take me through the point.
13 Mr Edwards, I see you have unmuted.

14 **MR EDWARDS:** Yes, Sir.

15 **MR JUSTICE MARCUS SMITH:** That seems to have done it.

16 **MR EDWARDS:** Yes, I can.

17 **MS KREISBERGER:** Sorry, Sir, I was kicked out.

18 **MR JUSTICE MARCUS SMITH:** And I see Ms Smith has vanished, I see a black
19 hole where she should be. Let's wait.

20 **MR EDWARDS:** Yes, Ms Smith will be back shortly, I think we are trying to resolve
21 the feedback issue.

22 **MR JUSTICE MARCUS SMITH:** Oh, I see. Well, Mr Edwards, if you are happy to
23 go on without Ms Smith being present, then please do.

24 **MR EDWARDS:** Thank you, Sir. Can I just first check, are you happy with the
25 amendments? I think they are essentially agreed, but both my client and also
26 I think Genius, have made amendments to their statements of case on this

1 issue.

2 **MR JUSTICE MARCUS SMITH:** Yes, I think if there is consensus between the
3 parties, then I didn't see an issue that I had. So I am prepared to order those.

4 **MR EDWARDS:** I am grateful.

5 **MR JUSTICE MARCUS SMITH:** If there is no push back.

6 **MR EDWARDS:** I am grateful, Sir. We have taken on board your point about
7 whether or not the sample we have adopted is representative enough, and
8 obviously, what we have proposed, well, the parties are substantially agreed
9 on, is that there will be five clubs which have registered freehold or leasehold
10 interests, and also an additional club that is in the position of just having
11 a contractual licence. And perhaps in an effort to give you slightly more
12 comfort on whether or not the sample is representative enough, what we
13 propose on our side is that we try to get as many of the six clubs we have
14 identified that just have contractual licences, into to the sample, so we expand
15 the sample slightly from what we have originally proposed. It might be worth
16 me just briefly taking you through the rationale for why we proposed the
17 sampling. I think you understand that it is just worth having that laid out.

18 **MR JUSTICE MARCUS SMITH:** Yes, of course.

19 **MR EDWARDS:** The reason we propose sampling on this issue is to show each of
20 these clubs has a freehold or leasehold interest in the land. You would have
21 to have Land Registry documents which are often quite lengthy and also
22 Companies House documents, because sometimes these clubs are corporate
23 groups with more than one company in them and one company will own the
24 land and another company will own the -- well, will operate the actual football
25 club. So you need, you know, a number of public documents and if you were
26 to do this for 130 clubs, that would introduce a lot of evidence into the

1 proceedings. So that is why we proposed sampling in the first place.

2 In the course of looking into this issue, we discovered that six of the clubs in the EFL
3 just have contractual licences, they don't have a registered leasehold or
4 freehold interest. They still have a claim in trespass, we say, or at least
5 an arguable claim and the law on this point is very briefly summarised in our
6 skeleton on page 12.

7 **MR JUSTICE MARCUS SMITH:** You don't need to take me to that, I understand the
8 point. I am quite conscious of the way in which football clubs generally
9 structure themselves, because when I did the section 994 into Blackpool
10 Football Club, all of the oddities in which the ground was held emerged and
11 I am quite conscious that there is a variety of models that can be used. And
12 to be clear, where I am coming from, I am really only raising a concern that to
13 date, the Court hasn't been involved in the sampling process. I am deriving
14 considerable comfort from the fact that no one is standing up saying it can't be
15 done on the basis of the sample being proposed, and so it seems to me that
16 this is likely to work. I simply wanted to put my own marker down that it hadn't
17 received, as it were, the Court's audit in the way that a sampling process
18 normally would, because it is normally raised much earlier. That is not
19 a criticism of anyone, it is just an articulation of something that struck me
20 when I was reading the papers last night.

21 **MR EDWARDS:** I am grateful for that indication, Sir. So just to explain how we aim
22 to make the sample slightly more representative than it might otherwise be,
23 obviously, if a club has a freehold or leasehold interest, it almost has
24 automatic standing to bring a claim in trespass because it has an imputed
25 possessory interest, and that is something that is dealt with in the skeleton.

26 **MR JUSTICE MARCUS SMITH:** Yes.

1 **MR EDWARDS:** For the clubs that just have contractual interests, the facts may
2 matter more, so what we propose is that by the beginning of September, we
3 try to get as much information on this position as possible, and essentially
4 seek out the contractual licences that each of the six EFL clubs we have
5 identified have, and put those into the sample. So we may have a maximum
6 of 11 or, you know, slightly under that, if we don't find contractual licences for
7 each of the clubs in the six we have identified that just have a contractual
8 interest. Hopefully, that is a way in which to make the sample representative.
9 But yes, that is our proposal. I hope the other parties are content to agree
10 with it, and also it seems sensible to you, my Lord.

11 **MR JUSTICE MARCUS SMITH:** Well, I am very grateful, Mr Edwards. Obviously,
12 I don't want anyone to engage on the substance of the point, but if anyone
13 has anything to say about its ultimate workability and any concerns, then
14 I would want to hear those now, just so that we could deal with them, but if
15 there is nothing, then we can move on.

16 Excellent. Nothing. I am very grateful to you, Mr Edwards, for so clearly articulating
17 the point, and thank you to the other parties for their cooperation.

18
19 **Item 4**

20 **MR JUSTICE MARCUS SMITH:** Item 4, then. Trial preparation. In a sense, I am
21 prepared to take a consensus approach here. If the parties, together,
22 consider that there is a common way forward, then I am going to proceed on
23 the basis that the parties know the case rather better than I do, and I am
24 minded to row in behind that. The differences between the parties seemed to
25 me to be relatively small and really focused on the amount of time, and there
26 was a day's difference, I think, in terms of witnesses and experts. My sense

1 there is that if one can go with the longer time, that is likely to be better than
2 the shorter, and I say that simply because I don't think I have yet had a trial
3 where some advocate or other has not been saying, "If only I had another
4 hour, I could make this point better, more slowly." And I want to give all of the
5 advocates and all of the clients the sense that they are, within reason, going
6 to have as much time to unpack their case as necessary.

7 Now, that is of course, subject to the question of the gap between the evidence and
8 the written closing submissions, and the oral closing submissions. And really,
9 I think the point, subject to any other points that the parties want to raise, the
10 point really is this: does the idea of after the event closing submissions appeal
11 to the parties or do you want to have a high pressure gap in which you put in
12 written closing submissions which the Court will read at a more or less
13 extremely brisk pace and digest later on, after the trial has finished properly,
14 or do you want to take the opportunity of having a much more free flowing set
15 of oral submissions, where you focus not on everything but on what are the
16 key points, and have, let us say, a fortnight later, the exchange of closing
17 submissions? I am putting quite a clear spin on where I think the parties
18 ought to go, but I will stop spinning, and I will invite, in the usual order --
19 Ms Kreisberger, what do you say about the timetable generally and the
20 pressure points of witness cross-examination time and closing submissions in
21 particular?

22 **MS KREISBERGER:** Yes, Sir, we agree with everything you say on that.
23 Sportradar is the party proposing, I think, a day longer for factual witnesses.
24 I think it is only a day between us, 8 or 9. Sir, did you receive our proposed
25 timetable for trial which is in colour?

26 **MR JUSTICE MARCUS SMITH:** Was it in your skeleton?

1 **MS KREISBERGER:** No, it was sent in overnight.

2 **MR JUSTICE MARCUS SMITH:** Oh yes, I have got that somewhere. Let me try
3 and find it.

4 **MS KREISBERGER:** It is a colourful table.

5 **MR JUSTICE MARCUS SMITH:** I can't find it. "Sportradar, proposed timetable."
6 Let me open that up. Hopefully it will be what we have in mind. For some
7 reason it is not downloading.

8 **MS KREISBERGER:** I don't think it is of as much use if I hold it up to the screen.

9 **MR JUSTICE MARCUS SMITH:** No, for some reason I have the document but my
10 machine is steadfastly refusing to download it. Let me close the relevant
11 application and see if I can start again. It is just an ordinary PDF, isn't it?

12 **MS KREISBERGER:** It is, yes. And it is just a single page.

13 **MR JUSTICE MARCUS SMITH:** Oh. Okay. I think there is some kind of
14 connection issue. One moment. Let me try again.

15 **(Pause).**

16 Right, I have got it. Thank you very much.

17 **MS KREISBERGER:** Excellent.

18 **MR JUSTICE MARCUS SMITH:** Yes.

19 **MS KREISBERGER:** So this is, hopefully, consistent with your indication that
20 openings should be more compressed. So we have simply allowed a day for
21 each side. So we would have a day. I think Mr Robertson would like 30
22 minutes of our Day 1, and then the defendants have Day 2 for opening and
23 then we go into witnesses. We don't find it terribly helpful to allocate a certain
24 number of days without seeing how that might actually fall out by each
25 witness, which is why we produced this table. Mr Jones' clients fairly point out
26 that the order of their witnesses is a matter for them, so this is sort of just

1 a proposed order that is not set in stone. But what you do see is how long,
2 roughly, will be spent with each witness. That allows for nine days. We have
3 some non-sitting days, of which one would hope we have no more than 4 day
4 weeks, sitting in a trial of this length.

5 **MR JUSTICE MARCUS SMITH:** Yes.

6 **MS KREISBERGER:** But we have that cushion, if needed to be utilised. Then it is
7 two days for each of the economists' cross-examination. This table sets out
8 the traditional approach of having written closings before oral closings but, Sir,
9 your spinning is very persuasive, so we are really in your hands on that, and
10 that time could, instead, be used for preparation of oral closings, with written
11 closings to follow.

12 **MR JUSTICE MARCUS SMITH:** Well, let's see. Certainly my spin appears to have
13 had effect on your clients, but let's see what the position of the other parties
14 is. Mr Jones -- oh, so sorry, is there more to say? Sorry, so sorry, I didn't
15 want to interrupt you.

16 **MS KREISBERGER:** Just a last point. I am terribly sorry to interrupt. But just to
17 cover the timetable on oral closings.

18 **MR JUSTICE MARCUS SMITH:** Yes.

19 **MR KREISBERGER:** On this basis, it would be two days for each side. To the
20 extent Mr Robertson wanted some time in oral closing, that would come out of
21 the claimants' two days and, equally, the defendants would share their two
22 days, so they might have a day each, but that ensures parity on each side of
23 the case. So that would be the fair allocation.

24 **MR JUSTICE MARCUS SMITH:** I am very grateful. Thank you very much,
25 Ms Kreisberger. Before Mr Jones, I turn to you, let me be clear that I regard
26 timetables as extremely important in terms of managing expectations as to

1 where things go and where things don't go. But it is my practice to be quite
2 flexible in terms of how the hours pan out, in the sense that I am, generally
3 speaking, other commitments notwithstanding, to extend the court day if
4 I think there is good reason to do so. So the parties can take it that provided
5 I see, and my colleagues see, benefit in stretching the day, we will do that,
6 because trials are there for the parties to unpack, and I want everyone to
7 leave the courtroom feeling that they have had the opportunity to make the
8 best of their case. And provided I think that that opportunity is being sensibly
9 availed, then you can expect cooperation, not the shutters coming down at
10 4.15 or 4.30, if we can go longer, profitably. So I would like the parties to see
11 the timetable in that light, and equally, I would hope that although, of course, it
12 is for each party to call witnesses in their order, for there to be a degree of
13 cooperation in terms of enabling the cross-examining party to unpack their
14 case most efficiently in terms of order. I am not making any ruling there, but
15 I am expecting a degree of sensible cooperation in terms of behaviour within
16 the rules.

17 Mr Jones, over to you in terms of how you see the timetable unpacking.

18 **MR JONES:** Sir, I am very grateful. Could I show you another document which
19 I hope will be helpful. It is page 18 of my skeleton argument.

20 **MR JUSTICE MARCUS SMITH:** Yes, indeed. Let me -- yes, I have that.

21 **MR JONES:** You will see there is a table there where we tried to set out all of the
22 parties' positions, so it gives a helpful overview.

23 **MR JUSTICE MARCUS SMITH:** Yes.

24 **MR JONES:** The table which Ms Kreisberger has just shown you slightly altered
25 their position, so shall I just run through the column on the right to say where
26 we are now, updating the Sportradar entries. There are three that would need

1 to be updated there.

2 **MR JUSTICE MARCUS SMITH:** Yes.

3 **MR JONES:** Openings, Sportradar now also say two days. And then down at
4 closings, Sportradar say four days.

5 **MR JUSTICE MARCUS SMITH:** Yes.

6 **MR JONES:** And down at the total, Sportradar I think adds up to 24 days.

7 **MR JUSTICE MARCUS SMITH:** Yes.

8 **MR JONES:** So, actually, there is a lot of agreement here. And Sir, I think the broad
9 thrust of the discussion that you just had was that the Sportradar division
10 overall, is one which might be attractive to you, Sir. You will see there really
11 wasn't much difference between us, but in broad terms, they were wanting
12 nine days on witnesses of fact and we were wanting eight days there, but five
13 on closings.

14 **MR JUSTICE MARCUS SMITH:** Yes.

15 **MR JONES:** So that is a minor point. And we have heard what you, Sir, have said
16 about wanting more time on witnesses, so on those overall divisions, we take
17 your point and we are very happy with the overall numbers in the Sportradar
18 column now.

19 However, there are four points I need to address you on, where there are differences
20 between us.

21 **MR JUSTICE MARCUS SMITH:** Yes.

22 **MR JONES:** And the first one is this: it is the division of time for opening and closing
23 submissions, because as Ms Kreisberger has just explained, her proposal is
24 essentially to split it in half, by which she means she would have half and my
25 clients and FDC would have half to share between us. And I should say
26 myself and Ms Smith have suggested a three way split. Sir, I entirely take the

1 point which I think lies behind Ms Kreisberger's suggestion, that she needs to
2 deal with everything in the case against both my clients and FDC. In all of the
3 cases, I should say.

4 **MR JUSTICE MARCUS SMITH:** Yes.

5 **MR JONES:** I entirely see that particular argument. But on the other hand, firstly,
6 we do each have distinct issues, my clients and Ms Smith's clients. But
7 secondly, we are entitled, whilst trying our very best not to duplicate each
8 other, which we will do, we will absolutely do, we are entitled to put the case
9 our own way. We are entitled to draw out from our own expert reports and
10 our own witnesses. And Sir, as I say, we are very much intending not to
11 duplicate each other, there has already been coordination on that. But
12 whether the split is a third each or perhaps something slightly more tilted in
13 Ms Kreisberger's favour, it should not be a straight 50/50 split. That goes
14 much too far in favour of Sportradar and simply doesn't acknowledge the fact
15 that as I said, we are entitled to put our own case, in our own way, whilst
16 doing everything we possibly can to avoid duplication.

17 **MR JUSTICE MARCUS SMITH:** Mr Jones, I agree with you. It does seem to me
18 that there is a difference between the openings and the closings. I am much
19 more sympathetic to Ms Kreisberger in her 50/50 split on the openings,
20 because there is inevitably a burden on the person who starts, just to
21 introduce the Court, although of course, the Court have done some
22 pre-reading, but just to introduce the Court into the way in which things are
23 going. And then to have, I mean often one doesn't have, but to have the other
24 50 per cent split 50/50 between the defendants, with Mr Robertson pitching in
25 if he feels advised, out of the claimant's time. I do think that your point has far
26 more force when it comes to the closing submissions. And speaking entirely

1 for myself, you are likely to get rather more interested questioning from the
2 Court in closings than in openings. And it seems to me, there the parties
3 should proceed on the basis that it is not possible to say whose case is going
4 to attract the most interest from the Tribunal, or whether that is a good or
5 a bad thing if that interest is attracted. It seems to me, therefore, that we
6 ought to maximise the amount of time in closings and split it initially, at least,
7 three ways. Again, taking appropriate account of Mr Robertson's watching
8 brief, with minor interventions in play.

9 Now, does that mean that we can lockdown the two days in opening on that basis,
10 but debate just how many days we have for oral closings and of course, the
11 question of how the oral closings relate to the written closings which I suspect
12 you will be coming to in terms of what your clients' preference is?

13 **MR JONES:** Yes, I will come on to that. In terms of the openings, yes, Sir, we have
14 heard what you say on that. And certainly for my part, we can lock that down
15 on openings. Ms Smith may have a different view, of course.

16 On closings, again, we very much endorse, Sir, what you have said there and it is
17 particularly the oral closings that we are concerned to make sure we have
18 sufficient time on.

19 Can I come back to the order of closings? It was going to be my --

20 **MR JUSTICE MARCUS SMITH:** Of course.

21 **MR JONES:** It may make more sense for me to deal with that separately.

22 **MR JUSTICE MARCUS SMITH:** Yes.

23 **MR JONES:** That was my first point, on the split of time for submissions.

24 My second point is a similar one, which is the division of time for cross-examination,
25 because whilst it is right to say that there is only a day between us overall,
26 eight days versus nine days for cross-examination, and whilst, Sir, I have said

1 that the nine days is something that we would be happy with, when one
2 actually drills down into the detail of it, Ms Kreisberger's suggestion on the
3 timetable which she has sent round is that she should have seven days out of
4 those nine to cross-examine Genius' and FDC's witnesses, and that we
5 should have, between us, two days to cross-examine her witnesses. And Sir,
6 that just, to put it shortly, that just, obviously, does not make sense. Clearly
7 there are more FDC and more Genius witnesses than there are Sportradar
8 witnesses. But in broad terms, they are covering the same issues. They are
9 covering the same issues. And if one picks up -- and obviously, there are
10 some points that are particular to my clients, there are some which are
11 particular to other clients, but if one looks for a very rough and ready guide, if
12 you pick up the witness statement bundle and you look at how many of those
13 pages are dedicated to Sportradar witnesses, it is about a third. And all
14 Ms Smith and I are saying is we want three days, which is all we have asked
15 for, three days, which here, would be out of nine days, to cross-examine
16 Sportradar's witnesses. And so Ms Kreisberger has said that she agrees, Sir,
17 with your suggestion of nine days, but as I say, lying behind that is a land grab
18 for that time for her own clients.

19 **MR JUSTICE MARCUS SMITH:** Hang on, when you say three days, three days
20 each?

21 **MR JONES:** No, three days in total. Three days in total between me and Ms Smith
22 for all of the three Sportradar witnesses. I should say there is one main
23 witness for Sportradar, and two very minor ones, but it would be three days in
24 total, dedicated to their witnesses, which on this approach, would then leave
25 six days for Ms Kreisberger to divide as she sees fit between our witnesses,
26 between Genius witnesses and FDC witnesses.

1 **MR JUSTICE MARCUS SMITH:** Let me intervene here. I am not in a position, and
2 I strongly suspect the parties are not in a position, to actually be crystal clear
3 about how long they are going to be cross-examining each witness. It seems
4 to me we are, what, two months before trial. And unless you are exceptionally
5 well prepared, your cross-examination notes are sort of back of the envelope
6 topics rather than proper cross-examination. So you are not going to know at
7 this stage how long you are going to be. What we need to ensure is that we
8 have enough time to deal with all of the factual evidence and all of the expert
9 evidence in the round. I am not interested today in talking about guillotines.
10 So what I am going to say is this: I am going to leave it to the parties to work
11 out what they need, and by that, I mean need, properly, to present their case,
12 on the basis that this Court isn't interested in irrelevant or lengthy
13 cross-examination. If you can't work out a timeframe, then I will look at it on
14 Day 1 of the trial, when I will have read the statements and if I think someone
15 is going for a land grab unreasonably, then I will impose a guillotine. If, on the
16 other hand, agreement has broken out, then I won't, because I, consistent
17 with what I have said already, will be guided by the case where the parties are
18 agreed. So unless someone is saying that nine days just isn't going to be
19 enough in the round, which I don't think anyone is saying, then I am happy, if
20 the parties are, to leave the matter for resolution later on down the line. I may
21 then have a view as to whether the nine days are split six/three or whether
22 some other split is appropriate, but at the moment, not actually having looked
23 at the witness statements, I am really not in a position to second guess or
24 resolve a disagreement between the parties. But I will be in that position
25 come trial.

26 **MR JONES:** Sir, I am very grateful, and on that basis, I have nothing more to say on

1 that second issue. I think that clears that up.

2 My third point is looking back at page 18 of my skeleton, you will see my 24 days
3 corresponds to Sportradar's 24 days, and then, Sir, you will have seen that
4 FDC's adds up to 27. And this is really to emphasise the point of agreement
5 between Ms Kreisberger and myself, which is we think, my client thinks, this
6 trial can finish in the week of 7 November, and on that basis, we think if at all
7 possible, it should finish in that week.

8 **MR JUSTICE MARCUS SMITH:** Yes.

9 **MR JONES:** That then leads on to the fourth topic that I wanted to address you on,
10 which is the order of oral and written submissions, where we do have some
11 concerns, Sir. The normal approach, of course, is that one produces, if one is
12 doing oral and written, one produces a written document which one then
13 speaks to in oral closings, and the oral closings are a somewhat punchier and
14 more focused set of submissions for having that larger document in the
15 background. You are able to be punchier and more focused on your own
16 case, but also in responding, if necessary, to what others have said in their
17 own written submissions. And if the Tribunal has questions arising out of
18 written submissions to put to the party who made those submissions or to put
19 to other parties, it can do so. Sir, the reason I say that is that reversing the
20 order does, as we see it, have a couple of consequences which we would be
21 concerned about. One is this point, and it is just a timing point. Sir, we don't,
22 for our part, think that reversing the order and having oral closings followed by
23 written closings would particularly save time on the trial timetable. The reason
24 I say that is because the oral closings would still need to be written up by the
25 counsel teams and you would still want to have a very good idea of what is
26 going into your more detailed written submissions in due course. So the work

1 that would have to be done is essentially, anyway, going to have to be done
2 within the same timetable. Of course, one could leave things for later, but
3 there will still be that big chunk of work which ordinarily, in these big trials, of
4 course, people do as the trial unfolds, you don't really do it in the three days
5 that's allocated in the timetable.

6 **MR JUSTICE MARCUS SMITH:** Yes.

7 **MR JONES:** That is the first point. We don't really see that it has much of a benefit
8 in terms of the timing. We think this timetable can be accommodated by
9 having written closings followed by oral closings.

10 The second point is this: we are concerned that it would be a recipe for just ongoing
11 submissions and questions later down the track, because what will happen is
12 oral submissions will be made, then people will put in their written
13 submissions which will inevitably make more points, some of which will
14 inevitably be contentious, some of which might even lead to areas which the
15 Tribunal would have wanted to explore with counsel in oral closings. And we
16 can see a real potential here for this to carry on in the form of repeated written
17 submissions which, Sir, judges often tell us they would prefer to avoid if
18 possible and certainly we would prefer to avoid if possible. Sir, those are the
19 real concerns we have on that suggestion.

20 **MR JUSTICE MARCUS SMITH:** That is helpful. I mean just looking at
21 Ms Kreisberger's timetable, we have four days plus the weekend to do the
22 written closings. Is it proposed that those closings would simply be produced
23 close of play Monday, with no opportunity for the Tribunal to read or are they
24 going to be produced, as it were, first thing on Monday, with the Tribunal
25 reading on Monday, 7 November?

26 **MR JONES:** Sir, that may, Sir, be a question more for what the Tribunal would like

1 to have and also, I suppose, what Ms Kreisberger would like to have, because
2 on her timetable, she wouldn't get the defendants' written closings until she
3 was about to speak, so perhaps I hand over to Ms Kreisberger.

4 **MS KREISBERGER:** I can cut through that.

5 **MR JUSTICE MARCUS SMITH:** Yes, of course.

6 **MS KREISBERGER:** I am sorry, Sir, it is certainly intended that everyone would
7 have Monday to read written closings.

8 **MR JUSTICE MARCUS SMITH:** Right.

9 **MS KREISBERGER:** So it would be first thing on Monday morning.

10 **MR JUSTICE MARCUS SMITH:** Okay. Well, Ms Kreisberger, I see the problems.

11 Indeed, they have emerged when I have had, after the event, closings of
12 every party wanting to get the last word, and one gets the sort of forensic
13 battle of forms which really doesn't help anyone. If we said that it is going to
14 be the timetable as per your coloured diagram but with closings submitted 9
15 am on 7 November, giving the Tribunal a day to shoot through them, does
16 that work for you?

17 **MS KREISBERGER:** It does and that was our original proposal.

18 **MR JUSTICE MARCUS SMITH:** That was your original, very good.

19 **MS KREISBERGER:** And I would have the additional problem of losing a key
20 member of my counsel team if matters went into the following week in any
21 event, so there are some advantages.

22 **MR JUSTICE MARCUS SMITH:** Yes, it does mean that we have a completion of
23 the court record at the end of that week, which does have a distinct attraction.
24 All right, Mr Jones, we will do that, subject to what Ms Smith has to say about
25 the points that you have raised. So, Ms Smith, I think it is really time for
26 openings, time for closings, do we have enough time for witnesses and

1 experts, and what do you think about before or after written closing
2 submissions?

3 **MS SMITH:** My Lord, thank you. Can I just ask you in that regard -- and I will deal
4 with those points that your Lordship has outlined very helpfully and now
5 I know where everyone else is -- it might be useful in that regard to have our
6 skeleton open, pages 6 to 7. Particularly because we set out what were our
7 concerns about the initial proposal for written closings.

8 **MR JUSTICE MARCUS SMITH:** Yes.

9 **MS SMITH:** You will see there under the heading, "D, Written closings", and those
10 concerns that we set out there also explain the difference between the 27
11 days and the 24 days which Mr Jones took you to on -- our timetables were
12 adding up overall. But our main concern, you will see at the top of page 7,
13 was the time for written closings is also being used for oral closings and we
14 do think that the quality of both will suffer as a result. And also, particularly,
15 that on what was then Sportradar's and Genius' proposal that the parties have
16 three days to prepare and lodge written closings and then immediately to
17 deliver oral closings, I now see Ms Kreisberger's timetable has changed
18 a little. We were concerned that it would not be of any use to the parties or
19 the Tribunal that we exchange written closings and then immediately stand up
20 to give our oral closings, without having been given the opportunity to see
21 each other's written submissions before we make our oral closings. So those
22 were our main concerns and we put forward the alternative along the lines
23 which your Lordship has initially suggested, of if we were only going to be
24 able to have three days to prepare oral closings, we use those just to prepare
25 the oral closings and file the written closings after the end of the trial.
26 However, having heard now what the parties say about written closings being

1 lodged at 9 o'clock on the morning of 7 November, that does change things
2 a little. We don't have a great deal of time to consider the other side's written
3 closings before we deliver our oral closings but we have a day. So things are
4 a little better from that point of view. Not just from the parties' point of view
5 but from the Tribunal's point of view. Everyone needs to know what
6 everyone's final position is before we stand up. Oral closings are not going to
7 be very helpful unless we do. I think from that point of view, we would be
8 willing to accept the proposal that on the basis that written closings are
9 exchanged at 9 o'clock on Monday, 7 November, it really has to be
10 an absolute deadline, then we would be able to go into oral closings on
11 Tuesday and for the rest of the week and have everything done by the end of
12 the week of 7 November. So I think we could accept that proposal. But then
13 the question goes to working backwards through this timetable, really. Then
14 the question is the allocation of time for oral closings and we absolutely adopt
15 and for the very same reasons, the submissions that Mr Jones made and
16 I think your Lordship took up, that there should be a one third/one third split on
17 closings and we are happy to live with the half/half split on openings; the
18 half/half being half to Ms Kreisberger and half to the defendants together.

19 **MR JUSTICE MARCUS SMITH:** Yes.

20 **MS SMITH:** The only slight wrinkle in that is where we fit in SCM for the closings,
21 because I think Mr Robertson's clients have said they would like half a day for
22 closings.

23 **MR ROBERTSON:** If I can just update you on that, we would like half a day in total,
24 that will be 30 minutes in opening and then two hours in closing.

25 **MR JUSTICE MARCUS SMITH:** You are breaking up, I don't know if it is my fault.

26 **MR ROBERTSON:** Can everybody else hear me okay?

1 **MR JUSTICE MARCUS SMITH:** Would you mind repeating that, I think my
2 connection has become a little bit fragile.

3 **MR ROBERTSON:** Right, 30 minutes opening, so following on from Ms Kreisberger,
4 and then two hours closing, again following on from Ms Kreisberger.

5 **MR JUSTICE MARCUS SMITH:** I think if the parties would bear with me just one
6 moment, I am just going to check my connection, because I am getting a very
7 poor signal quality. So it may be that I disappear from the courtroom while
8 I adjust this, but I will do that now.

9 **(Pause)**

10 I do apologise to the parties, I don't know what went wrong there, but my connection
11 just decided to give up the ghost. I have moved location and I hope we have
12 a more stable connection. What I don't now have is the electronic documents.
13 I have the skeleton submissions, but I don't have the electronic documents.
14 I don't think that is problem for the moment. Mr Robertson, you were cut off
15 saying, I think, you needed two hours.

16 **MR ROBERTSON:** It is going to be Mr Patton and he needs 30 minutes in opening,
17 following on from Ms Kreisberger, and then two hours in closing, again
18 following on from Ms Kreisberger.

19 **MR JUSTICE MARCUS SMITH:** I understand. Well, it seems to me that given the
20 timetable we have got, with effectively four days of closing submissions, the
21 Monday being a reading day, we ought to be able to accommodate a one third
22 split, carving out one and a half or two hours for yourself from that. If
23 necessary, we will sit longer to make sure that the parties have got enough
24 time in which to say what they want to say. But I am not inclined, unless the
25 parties want to press me to, to go any further in terms of articulating exactly to
26 the minute when Ms Kreisberger sits down, and when Mr Jones, or Mr Patton,

1 or Ms Smith, stands up. Is that alright?

2 **MS KREISBERGER:** Sir, we would certainly prefer to leave it open. If it were
3 a concluded view, then I would be asking to address you, with your
4 permission, further, on this idea of a third, a third, a third, which will, frankly,
5 tilt the scales against Sportradar for closings. Particularly as Mr Jones says,
6 there are some differences, particularly in their economic case, and fairness
7 requires that I have the time in closing to address the two different cases put
8 against me. But Sir, if you are content not to make an order now, I don't think
9 I need trouble you further on that.

10 **MR JUSTICE MARCUS SMITH:** Well, look -- Ms Smith.

11 **MS SMITH:** I was going to say, I was halfway through my submissions when
12 Mr Robertson jumped in, so rather than going to Ms Kreisberger for reply, it
13 might be more sensible for me to finish my submissions.

14 **MR JUSTICE MARCUS SMITH:** No, of course. I am afraid we are all victims of the
15 connection disaster that I had.

16 **MR ROBERTSON:** I apologise to Ms Smith for jumping in on her.

17 **MS SMITH:** Oh, it was useful to get the clarification. I think I said it would be useful
18 to get -- the time for oral closings didn't make any obvious accommodation or
19 obvious time for your client, and that was, in effect, when you jumped in,
20 which was absolutely necessary but I hadn't dealt with -- and just to finish off
21 that, my submissions on oral closings, we are also satisfied that it be four
22 days overall, no further formal order to be made by the Court about split of
23 those four days at this stage, but we do strongly endorse the initial indications
24 of a third, a third, a third, with Mr Robertson's clients being accommodated
25 within that as well. The initial informal indication that the Court made in that
26 regard, for the reasons that have already been well rehearsed. But we are

1 happy that the only formal order at the moment is that there be four days for
2 oral closings in total.

3 As regards the final point that I need to address your Lordship on, if I may, is I think
4 there is an outbreak of agreement on the cross-examination, the time needed
5 for experts, and how that cross-examination of experts should be split, so we
6 don't need to say anything more about that. We are happy with the six days
7 for experts, two days for each party's experts.

8 On the factual witnesses, which is green on Ms Kreisberger's table -- although
9 I understand your Lordship probably doesn't have that open, have access to
10 that.

11 **MR JUSTICE MARCUS SMITH:** No, but I have it in mind.

12 **MS SMITH:** The factual witnesses, we are very happy that there be nine days
13 overall for the factual witnesses and we are very happy with the position that
14 that is the only formal order, that there be nine days overall, but informally, we
15 would want to make the point, very strongly put a marker down, that two days
16 for Sportradar's witnesses is not enough. Even if it were not two defendants
17 on one side, if it were only one defendant versus one claimant, two days
18 would not be enough. And if I just, in that regard, refer you to page 6 of my
19 skeleton, my Lord.

20 **MR JUSTICE MARCUS SMITH:** Yes.

21 **MS SMITH:** You will see there the point that we made as to needing three days for
22 Sportradar's witnesses rather than two. And the point I make at the end of
23 that sub-paragraph (c):

24 "The witness statements exchanged by Sportradar in early April 2022 were nearly
25 double the length of the FDC witness statements, whilst their witness
26 statement in reply was longer than all four of our witness reply statements

1 combined."

2 And if you look at that, and then -- and unfortunately, you don't have it open,
3 my Lord, but Ms Kreisberger's timetable, what she is suggesting is two days
4 for cross-examination of all of her witnesses and almost two days of
5 cross-examination that she gets for our one -- no, two days of
6 cross-examination for all of our witnesses that she gets, when all of our
7 witnesses' statements are half the length of her witness statements. So it is
8 obvious, even if there were not two defendants in this case, and we have, as
9 Mr Jones said, liaised and we have already started to discuss cutting up
10 cross-examination topics between the two defendants, so as to ensure that
11 there is no duplication, and that is exactly how we will be proceeding. We will
12 ensure that there isn't duplication of cross-examination by trying to agree
13 a split of topics. Even if there weren't two witnesses, we can't do Sportradar's
14 witnesses in two days. That is just impossible, when you look at the amount
15 of material. Ms Kreisberger thinks she needs two days for half the amount of
16 material.

17 **MR JUSTICE MARCUS SMITH:** Thank you. Okay. Well I think we have
18 a consensus. We have two days opening, split 50/50, with extra time for
19 Mr Patton at 30 minutes. We have witness and expert evidence locked down,
20 in terms of duration but not in terms of allocation between parties. And I am
21 going to stand by what I said earlier, which is I will keep a close eye on this
22 and I will expect, as part of Ms Kreisberger's one day's opening, to unpack
23 any problems that we have with the agreement of timeframe for witnesses
24 and experts. I hope I don't have to impose a guillotine but I will be in a better
25 position to do so when I have done the reading for the trial. So we will leave it
26 there because I am satisfied that we have enough time, and hopefully, a little

1 bit more than enough time, for the witnesses and the experts.

2 That leaves us with the preparation of written closings, which will be before the oral
3 closings, as I think generally agreed, over the period indicated in
4 Ms Kreisberger's timeframe, with delivery of those by exchange, and filing
5 with the Tribunal, 9 am sharp on the Monday morning. That leaves four days
6 for the oral closings. What I am going to indicate, and it is no more than
7 an indication, is that each party, that is to say, leaving Mr Robertson, or
8 Mr Patton on one side for the moment, each party gets one day. We leave
9 the Friday in reserve for allocation according to need, and by the way, need is
10 going to be defined by what the Tribunal finds interesting rather than what the
11 parties want the Tribunal to find interesting, and we will allocate one and
12 a half or two hours to Mr Patton by way of extensions to those three days, so
13 that we have everyone with a third, a third, a third split but time for
14 Ms Kreisberger's reply on the Friday, if so advised, and a degree of overrun
15 according to need. Again, I stress it will be what the Tribunal needs to hear
16 rather than what the parties want the Tribunal to hear that will inform the work
17 on the Friday, and we will have a far better idea, I think, of where we want the
18 parties to go, in terms of their oral submissions, when we have had written
19 openings and written closings. So is there any massive protest to that?
20 Ms Kreisberger, you are raising your hand.

21 **MS KREISBERGER:** I am raising my hand but it is certainly not a matter of protest
22 at all, it is a small point.

23 **MR JUSTICE MARCUS SMITH:** Yes.

24 **MS KREISBERGER:** I am not sure it needs to be ordered now, so I wondered if it is
25 something we could revisit nearer the time, because the timetable will be
26 tweaked, given what you say, Sir. And we heard what Ms Smith said about

1 written closings and wonder whether it may be sensible to have a Friday night
2 deadline rather than a Monday morning deadline, given that the Tribunal will
3 have three sets of written closings, with any additional material from SCM,
4 any submissions from SCM, and as Ms Smith pointed out, it is rather tight to
5 have one day with the other side's written closings before getting on one's
6 feet, namely me. So as I say, we hear what she says on that and it may be
7 sensible to have a Friday night deadline for written closings.

8 **MR JUSTICE MARCUS SMITH:** Is there any immediate reaction, Mr Jones, from
9 you; Ms Smith, from you?

10 **MR JONES:** Sir, yes. We would much prefer the Monday at 9 am, although I heard
11 Ms Kreisberger suggesting that this could maybe be left for later.

12 **MR JUSTICE MARCUS SMITH:** Yes, she was. I am not going to make a direction,
13 then, about the precise time for the written closings. We will have two working
14 options. One is midnight on Friday and the other is 9 am on Monday. We will
15 leave it to further consideration, which of those we adopt, and if necessary,
16 I will order one or the other by the beginning of the writing of written closing
17 submissions.

18 There are a few points which arise in addition. First of all, I am going to direct that
19 the written opening submissions but not the written closing submissions be
20 split according to jurisdiction. It seems to me that we will be helped if we are
21 going down the separate judgment route, if the openings are separate
22 documents between competition and High Court matters. I am not going to
23 direct the same for the closing submissions. I think that the division will be
24 clear enough from the written openings not to require the parties to work on
25 two separate documents for closings. If the parties want to do separate
26 documents, then that is absolutely fine, but it seems to me there will be

1 enough pressure on the parties not to impose that and I don't see any real
2 benefit because it will be the written openings that will indicate where the
3 parties all consider the issues to lie, in terms of jurisdiction. So unless there is
4 any objection, that is what I would like to have happen. I am not seeing any
5 serious objection there. I am very grateful. Again, we can revisit that if our
6 thinking continues closer to the time, but since I am, at the moment, of the
7 view that it will be separate judgments rather than a single judgment, it seems
8 to me important that the written openings track that, just so that we are aware
9 early rather than late, of any dispute about where any particular issue might
10 end up. I don't anticipate there being a dispute, but if there is a problem, then
11 we do need to know about it earlier rather than later. That is the thinking
12 behind that.

13 I am a fan of cross-examination bundles. I am not necessarily going to order that,
14 because I think it is a little bit early in the day. But when one is talking about
15 the need not to pull rabbits out of hats and surprise witnesses and to have
16 an efficient run in terms of unpacking the evidence, I do think that around
17 48 hours before the time for each witness to come in, it would be helpful to
18 have that done. I am not ordering it. I would like the parties to bear it in mind.
19 And so I am not going to say any more, nor invite responses to that. It is
20 a suggestion at this stage. It may become more than that, depending on how
21 I feel in opening, when I have a better sense of the shape of the case. Is
22 there anything more that I need to address in terms of timetable or trial
23 operation?

24 **MS SMITH:** My Lord, there are two outstanding matters, others may have more.
25 I think from our point of view, there is the length of the skeleton arguments.
26 We are absolutely happy with the suggestion that there be separate written

1 openings for the High Court and CAT. However, you will see that there are
2 applications agreed between the parties that we need an order, given the
3 nature of this case, for an extension to the time limit that we would normally
4 find in a Competition Appeal Tribunal case. And I think the parties have
5 asked for 60 pages in total. Even in light of what you say about splitting that,
6 I think my preference would be that we, from our point of view, maintain
7 60 pages in total and then it is up to the parties to decide how to split that.

8 **MR JUSTICE MARCUS SMITH:** Is that generally agreed? Very good. So ordered.

9 **MS SMITH:** Thank you, my Lord.

10 The second point that I think we still need to raise is the proposal by Genius for the
11 production of a factual narrative. You will have seen that in the skeleton
12 argument.

13 **MR JUSTICE MARCUS SMITH:** Yes, I have seen that. I have forgotten that.

14 **MS SMITH:** You will already have before you, my Lord, a chronology, a dramatis
15 personae, and a list of issues, all of which, at the moment, are in preparation
16 by the parties and drafts are being exchanged. The question is whether you
17 also need the factual narrative. You will have seen the reasons why we say in
18 our skeleton argument, paragraphs 17 to 19, that really, particularly prior to
19 the start of trial, such a document will be of limited use and also -- well, there
20 are a number of issues. First, we say it will be of limited use before we have
21 heard the evidence. Secondly, we say that it is disproportionate and not
22 an efficient use of resources when we have a lot to prepare before the trial,
23 because third, we say, if one party is going to be putting a factual narrative,
24 then either there needs to be an agreed factual narrative between all three
25 parties in the interests of fairness, which again, would cause a great deal of
26 diversion of resources from getting that trial ready, or there needs to be three

1 factual narratives so that each party is able to ensure that their emphasis of
2 the facts can be before the Tribunal. And I do not anticipate that three
3 competing factual narratives would be of any use to the Tribunal. And also
4 given the fact that we are going to have lengthy skeleton arguments,
5 60 pages from each party, and oral closings, and written closings, where the
6 parties can, particularly the written closings and the oral closings, the parties
7 can make submissions on the facts, the evidence having been tested, we say
8 that really there isn't any good reason for the additional production of a factual
9 narrative.

10 **MR JUSTICE MARCUS SMITH:** Is that your position also, Mr Jones?

11 **MR JONES:** No, my position is the opposite on this one, Sir. It is me who is
12 pushing for the factual narratives. I will try to be brief.

13 **MR JUSTICE MARCUS SMITH:** Let me work out Ms Kreisberger's position.
14 Ms Kreisberger, in whose camp do you fall, Ms Smith's or Mr Jones'?

15 **MS KREISBERGER:** We are a little agnostic, sitting on the fence. If Mr Jones has
16 his order, then of course we would like to put in a factual narrative as well.
17 But we are not pressing it upon you. I am going to leave that to Mr Jones.

18 **MR JUSTICE MARCUS SMITH:** The question is how far this is needed because of
19 the direction that witness statements should be witness statements rather
20 than factual narratives. What I am inclined to think is this: you, Mr Jones, can
21 you get your factual narrative in by Friday, 16 September?

22 **MR JONES:** Yes, Sir.

23 **MR JUSTICE MARCUS SMITH:** All right. Then Ms Smith, Ms Kreisberger, you will
24 have a fortnight to throw in whatever else you fancy and we will read that at
25 the beginning of October. What I will suggest is that each of you produce
26 a red lined version of additions to Mr Jones' single version which we have on

1 the 16th and that you produce separate versions which add in the bits that
2 Mr Jones has left out, for the Tribunal to read on 30 September. At the
3 moment, I am not sure how useful these documents will be, but I can see why
4 Mr Jones is asking for it, because the parties, quite rightly, are taking on
5 board the quite clear direction that has come from the Courts that witness
6 statements shouldn't be containing superfluous material. And so although
7 I am not in any way suggesting that it's a document that will be hugely useful,
8 I think it might be, and for that reason, that is what I am going to direct.
9 Ms Smith, Ms Kreisberger, are you happy with that?

10 **MS SMITH:** My Lord, for our part, given that Mr Jones' clients have said that they
11 are going to take on most of the work on that, and that we will have
12 an adequate opportunity in those two weeks to make any additions or suggest
13 any changes to that document, we are relaxed about that. We are happy with
14 that order.

15 **MR JUSTICE MARCUS SMITH:** Excellent. Ms Kreisberger, same for you?

16 **MS KREISBERGER:** Not quite, Sir. We have some concerns. The first question
17 that I have is the extent to which this is genuinely intended to be a neutral
18 document, because otherwise, this process involves one defendant putting
19 their version of the factual narrative before the Tribunal and the Court and
20 then the other parties, just before trial, having to grapple with what could be
21 a highly tendentious document, and diverting resource away to deal with it.
22 So we are a little concerned as to how this might play out.

23 **MR JUSTICE MARCUS SMITH:** Well, look, I wasn't born yesterday, I am going to
24 read this with a clear understanding of who has produced it and when.
25 Mr Jones, you know me well enough that I would rather have a document that
26 is useful which means that it unpacks the stuff that you wouldn't necessarily

1 want me to read, rather than the stuff that you also want me to read, because
2 frankly, sooner or later, we are going to get to the complete story. So I am
3 sure you will be producing what you think is going to be a neutral document
4 for the assistance of the Court, and we have a fortnight in which any of the
5 more egregious errors, which I am sure you won't commit, can be corrected
6 by both parties, Ms Smith and Ms Kreisberger, and for what it is worth, the
7 Tribunal will read those documents. But I am not going to say it has to be
8 a neutral document, I am not going to say it has to be agreed, I am going to
9 say that I don't want deletions from your narrative. I am very happy for there
10 to be corrections, I am more than happy for there to be additions, but I want it
11 to be quite clear that it is a basic document produced by your clients,
12 Mr Jones, and then there is a fortnight for two versions to be produced, one
13 by Ms Smith's clients, one by Ms Kreisberger's clients, containing additions or
14 supplements to the entries that you have made. And we will see if it is useful.
15 It seems to me, since you think it is useful, I ought to give you the latitude to
16 put it in.

17 **MR JONES:** I am grateful, Sir.

18 **MR JUSTICE MARCUS SMITH:** Is there anything else on trial that we need to
19 discuss, before we get on to the question of disclosure and witness
20 summonses?

21 **MS KREISBERGER:** There has been some exchanges between the parties about
22 the perhaps not riveting topic but important topic of trial bundle deadlines.

23 **MR JUSTICE MARCUS SMITH:** Yes.

24 **MS KREISBERGER:** I think I need to put that before you, Sir.

25 **MR JUSTICE MARCUS SMITH:** No, of course.

26 **MR KREISBERGER:** I think the differences in the parties' positions are quite small,

1 so I think we are close to agreement but I think I need to begin with
2 an apology. We had said in our skeleton that Sportradar could provide the
3 first draft of the bundle index by 29 July, which is tomorrow. Sportradar
4 would, in fact, appreciate just a couple more days, so we are suggesting
5 2 August, which is Tuesday next week. Partly because resources have been
6 taken up with this hearing today. So that is a very tiny tweak. Sir, is it helpful
7 if I just read through the dates? I have them written down in front of me.

8 **MR JUSTICE MARCUS SMITH:** Yes, just before you do, though, can you help me
9 as to how you are actually compiling these? Are we doing this electronically,
10 or are we doing this by way of, as it were, a list of indexed documents? How
11 are the parties working?

12 **MS KREISBERGER:** Let me just take instructions, if I may, just so I don't misspeak
13 on that.

14 Sir, it is a manual index, so it is a manual index of documents based on the team's
15 review of relevant documents.

16 **MR JUSTICE MARCUS SMITH:** Right. Do the parties have, and I should know this,
17 a common electronic database, or is it intended that the trial be done on
18 papers?

19 **MS KREISBERGER:** We do. We will have Opus in place.

20 **MR JUSTICE MARCUS SMITH:** Right. Well, what I am going to invite the parties to
21 think about, and we can probably knock this on the head before we rise, is
22 whether one oughtn't to be deploying the Opus functionality to put in and
23 remove documents from the trial bundle, so that instead of exchanging a list
24 which then has to be compiled by each of the other parties to work out what
25 actually is going in there, one has a pre-populated list of what your clients
26 want in, which can then be added to or subtracted from by the other parties,

1 so one gets, as it were, a working set of electronic documents and then if
2 necessary, one can produce, because I know Magnum Opus do this very well,
3 one can produce physical bundles after that process has been completed.
4 Now, that might affect the timeframe in which you operate, but it does seem to
5 me to be a more useful way of getting materials together, rather than simply
6 listing documents which will then have to be looked up, in order to work out
7 precisely what is in them and what isn't. Ms Kreisberger, you first.

8 **MS KREISBERGER:** Yes, thank you, Sir. I think there are two points to make on
9 that. First of all, the work has been done on Sportradar's side, which is why
10 we really need just a couple more days. So the index exists and we are quite
11 keen to move matters along, so that this litigation can progress at pace.

12 **MR JUSTICE MARCUS SMITH:** Sure.

13 **MS KREISBERGER:** Because we don't have much of a window to trial. And I think
14 the issue, Sir, is timing. I think everyone is keen to utilise Opus once that is
15 up and running and in place, but we have a set of timings, a timetable, with
16 the draft bundle index, that takes us to, by agreement on the part of all three
17 parties, to 26 August. So that would be the date that the trial bundle can be
18 filed with the Tribunal. But that depends on Sportradar sending its draft index
19 to the other parties next week. If that is done, we can meet the 26 August
20 deadline. Any later than that becomes problematic for the advocates and
21 possibly --

22 **MR JUSTICE MARCUS SMITH:** No, I entirely understand. What I am really
23 exploring is whether there isn't a saving of time and energy that can be
24 achieved by essentially circulating an electronic set which is chopped and
25 changed according to concerns articulated by other parties, with the end date
26 being, as you say, 26 August. I mean it may be that that is what the parties

1 were envisaging anyway.

2 **MS KREISBERGER:** I think we are going to be in Opus' hands. The hope is one
3 could get Opus up and running quite speedily. It is unlikely that could be done
4 by Tuesday, which is the date we were suggesting. But we do have all
5 of August, and the timings were set very much with the confidentiality
6 mechanism in mind, which has now fallen away. So I am not sure I can give
7 the Tribunal an assurance today as to what can be done with Opus and how
8 quickly that could be up and running. We can give the assurance that the trial
9 bundle index could be sent across just as a Word document next week.

10 **MR JUSTICE MARCUS SMITH:** Alright. I see Mr Jones has his hand up, but let me
11 just give you an indication of what I think ought to happen. Your index goes
12 out as soon as it can, let's say close of play Tuesday. I am not going to order
13 this, but I want the parties to use the electronic regime that they are
14 contemplating using anyway, and I think you ought to get the list of
15 documents coming next Tuesday on to Opus as quickly as possible, with
16 a view to being able to look through that and either hide or delete documents
17 from the list or add them as the confidentiality discussions progress. And then
18 by no later than 26 August, have a finalised Opus file of documents which can
19 then, as necessary, be produced as paper bundles for those who want them.

20 Now, Mr Jones, we will go to you first and then, Ms Smith, if you have any additional
21 suggestions above that.

22 **MR JONES:** After hearing what you have just said, I have nothing to add, Sir, thank
23 you.

24 **MR JUSTICE MARCUS SMITH:** I am grateful. Ms Smith?

25 **MS SMITH:** My Lord, in fact, my solicitor here is nodding vigorously, as she is the
26 one who is going to have to be putting together this material. We absolutely

1 agree with your Lordship's suggestion. It would be the most efficient way of
2 proceeding, that we get the index at the very latest, by the Word form
3 document from Ms Kreisberger's clients, at the very latest by 2 August. We
4 get the documents on to the Opus functionality as soon as possible, so what
5 your Lordship exactly indicated; not only can we look at the documents for
6 confidentiality purposes when they are up on that platform, we can also make
7 sure there is access for all of the counsel teams and legal teams over the
8 summer, so we can start working through the documents even before they
9 finally go into a trial bundle that can be produced physically as well, or in hard
10 copy, on 26 August. So we think your Lordship's suggestion is, with respect,
11 an extremely good suggestion and we absolutely wholeheartedly endorse it.

12 **MR JUSTICE MARCUS SMITH:** Well, there we are, Ms Kreisberger, that is what we
13 will do then.

14 **MS KREISBERGER:** I am grateful. Just by way of update, Sir, I am told Sportradar
15 has signed the T and Cs with Opus and I think we are just waiting for the
16 other parties to do so. So I welcome their endorsing that proposal and if they
17 can get on and do that, we can make those timings work.

18 **MR JUSTICE MARCUS SMITH:** Excellent, thank you. We are going to rise until
19 2.10 pm. Before we do so, I just want to invite the parties to use the next hour
20 to think about how far they are going to be pressing what is item 5 on the
21 agenda, which is the witness summonses and the disclosure. Let me indicate
22 to you why I am raising this again. The fact is, as will be clear, and I hope the
23 parties expect, I am not at the same speed in terms of preparation as the
24 parties are about the factual issues, the disclosure process, and the need to
25 have certain witnesses before the Court. But it is the usual practice of a Court
26 to examine quite closely the documentary and witness record as it is

1 produced. If it is the case that a party could have produced but did not
2 produce a witness, in other words, if the witnesses that are produced fall short
3 in covering something, then that is something which a party can make
4 submissions about, and which the Tribunal will take into account. Now, I am
5 not saying that that is this case, I don't know, but you are all sensible people.
6 You know what I am going to think if there is a gap. And the question of
7 whether there is a gap or not is something that I can't tell now. I am going to
8 hear from Ms Kreisberger, saying, "Yes, it is vital we have these two people
9 in", and someone else is going to say, "No, there are already people coming
10 in that will deal with these areas." Well, I don't know. Similarly, all of the
11 points on disclosure, these are matters which I would be receptive to hearing
12 submissions about. If someone has cut corners in a culpable way on
13 disclosure, that is going to come out, because we are going to be having the
14 witnesses in, we will see the gaps in the record. I gave an indication earlier
15 that my present disposition with regard to these details was that the answer
16 probably ought to be no, in relation to all of them because they seem to me to
17 be second guessing the work that had been done so far and because we
18 have parties who are capable and responsible. It seems to me that that is
19 where we probably should lie with the matters. But I am not going to say no,
20 I clearly can't. If the parties want to press their points, then so be it. I will
21 obviously hear you. But my sense is that this is not a particularly productive
22 use of party and court time. But I am very alive to the fact that complaints
23 have been made about the material that has been adduced as part of the
24 record. I am a cards on table judge but precisely which cards ought to be on
25 the table, I can't judge now. So I am going to leave the parties with that
26 thought. I am not going to invite any response until 2.10 pm. I will leave you

1 to have an hour to cogitate and hopefully I will be back in my office with the
2 papers, in order to deal with such matters as remain live. Thank you all very
3 much. Until ten past.

4 **(1.10 pm)**

5 **(The luncheon adjournment)**

6 **(2.10 pm)**

7 **MR JUSTICE MARCUS SMITH:** Ms Kreisberger, what I propose we do is take the
8 list of matters as set out in paragraph 4 of Sportradar's skeleton argument.
9 We have done 4A, which is the redesignation of documents, this morning.
10 I think that brings us to 4B, which is the application to issue witness
11 summonses to Mr Locke and Mr Russell.

12 **MS KREISBERGER:** I am grateful for that, Sir. What I propose to do, and it had
13 been agreed with the other side, was to deal with that application together
14 with the application for disclosure of pro forma documents, because they go
15 hand in hand.

16 **MR JUSTICE MARCUS SMITH:** That is which item, just so I can keep ticking it off;
17 is that item C, the pro forma documents?

18 **MS KREISBERGER:** That was item 5.

19 **MR JUSTICE MARCUS SMITH:** Yes, in that case it is 4C. Very good.

20 **MS KREISBERGER:** I am grateful. I should say since this afternoon's session
21 started, I have been kicked out twice, so I have my fingers crossed this will
22 work, but if I disappear ...

23 **MR JUSTICE MARCUS SMITH:** No, of course, the communications seem to be
24 remarkably fragile today, so I would be grateful if all could keep an eye on
25 everyone else, so if there is an interruption, we can spot it and move on and
26 deal with it.

1 **MS KREISBERGER:** I am grateful, Sir.

2 I will open on the three points, the two summons and the disclosure application, and
3 then Mr Jones can respond to those together, and that is by agreement.

4 **MR JUSTICE MARCUS SMITH:** Yes.

5 **MS KREISBERGER:** I heard what you said before the lunchtime adjournment. We
6 are certainly on the same page in terms of only pursuing matters of real
7 importance to the litigation. In that spirit, Sportradar dropped two of its
8 disclosure applications before today's hearing, but this one is maintained
9 because of its importance.

10 **MR JUSTICE MARCUS SMITH:** Of course.

11 **MS KREISBERGER:** Sir, it is rather unsatisfactory, but I do need to take the
12 Tribunal to material which is currently, for now, still in the confidentiality ring,
13 so I think we do need to go into camera, and most conveniently, for the whole
14 of my submissions on this application.

15 **MR JUSTICE MARCUS SMITH:** Okay, you can't elliptically refer to and invite me to
16 read materials?

17 **MS KREISBERGER:** I can't. I think it will result in such a contrived set of
18 submissions that I think it will be more efficient if we go into camera.

19 **MR JUSTICE MARCUS SMITH:** Well, is that a general sense? Mr Jones, you are
20 the most involved person there. Are you agreeable to that?

21 **MR JONES:** Sir, certainly for my part, I had thought I could do it by elliptical
22 references, because Ms Kreisberger wants to go to some WhatsApp
23 documents. Some of them are open anyway, and some of them, I had
24 thought one could just point you to the passages, but of course, I don't -- that
25 is all I can say on the topic at the moment.

26 **MR JUSTICE MARCUS SMITH:** No, of course.

1 **MS KREISBERGER:** Unless Mr Jones could confirm that there is nothing
2 confidential, he has seen this material, we have cited it in correspondence.

3 **MR JUSTICE MARCUS SMITH:** I don't think I am asking Mr Jones to confirm there
4 is anything confidential. What I am asking, really, is whether you can make --
5 by reference to the documents, inviting me to read them and I will make the
6 necessary order protecting those materials pro tem, under my powers to
7 prevent third parties from looking at them. I mean I appreciate it is somewhat
8 academic, given that there may be no third parties watching, but we are on
9 live stream as well, and I am quite keen to maintain the live stream, unless it
10 really can't be done. Do you want to make a start?

11 **MS KREISBERGER:** I will make a start, Sir. The practical difficulty --

12 **MR JUSTICE MARCUS SMITH:** The documents obviously won't go up on the
13 screen, it is just your submissions that will go up on screen, along with you.

14 **MS KREISBERGER:** I am grateful for that. Let's see how we go. I am going to
15 have to say some words to tell you where on the page to read from.

16 **MR JUSTICE MARCUS SMITH:** Of course you are, yes.

17 **MS KREISBERGER:** But I think if Mr Jones is willing to be pragmatic, I can't believe
18 that will result in the spillage of any crown jewels.

19 **MR JUSTICE MARCUS SMITH:** Let's see how we go.

20 **MS KREISBERGER:** I am grateful.

21 **MR JUSTICE MARCUS SMITH:** Mr Jones, if there is a problem, you will pipe up
22 and we can take it from there.

23

24 **Application by MS KREISBERGER**

25 **MS KREISBERGER:** I am applying under rule 56 for the witness summonses. They
26 relate to Mr Mark Locke, who is the founder and CEO of Genius, and Mr Tom

1 Russell, who is the General Counsel. Now, the issue in overview and the
2 reason why Sportradar seeks to summons Mr Locke -- I will deal with
3 Mr Locke first, if I may and then come on to Mr Russell and the disclosure
4 application -- Mr Locke was intimately involved in, oversaw, and directed the
5 negotiations with Perform, and it is Mr Locke who made the critical decisions,
6 particularly on the licence fee quote, to Perform, a fee that Perform was asked
7 to pay Genius for a secondary supply licence, and I will take you to the
8 relevant communications.

9 Mr Russell, who I will come on to, was also central to the discussions and when I say
10 this application meets the threshold of material extremely important to the
11 litigation, and his evidence being extremely important, crucially, Mr Russell
12 has given a statement in these proceedings, signed by a statement of truth,
13 on the reasons why the Perform negotiations failed. So we have his
14 evidence. But he has not been put forward for the trial.

15 **MR JUSTICE MARCUS SMITH:** Is there a CEA notice in respect of that evidence?

16 **MS KREISBERGER:** Sir, it may make sense if I take you to that evidence. You will
17 see it is not a witness statement, it is -- well, he calls it a schedule. It is not
18 a schedule, and I will show you why that is.

19 **MR JUSTICE MARCUS SMITH:** It is not a witness statement either, because it is
20 not in evidence.

21 **MS KREISBERGER:** It is signed by a statement of truth. So it is evidence of
22 Mr Russell.

23 **MR JUSTICE MARCUS SMITH:** That may well be, but Mr Jones, you are not
24 relying on this, are you?

25 **MR JONES:** No.

26 **MR JUSTICE MARCUS SMITH:** No. Okay.

1 **MS KREISBERGER:** I will take you to the statement.

2 The issue is the veracity of what he says is not borne out by the contemporary
3 documentation that we have seen. Sir, I propose to structure my submissions
4 in relation to the summons for Mr Locke in four parts, as follows: I will say
5 a few very brief words on the legal test. With an eye on the time, I won't dwell
6 on that. I will then take you to the pleadings to show that this issue, the failed
7 Perform negotiations, is, contrary to what my learned friend says in his
8 skeleton argument, actually a central issue in this case. I will then take you to
9 the relevant communications that we want Mr Locke to explain. And I will
10 lastly address Genius' objections to the application.

11 **MR JUSTICE MARCUS SMITH:** Yes, thank you, Ms Kreisberger, I don't need to
12 worry about the law.

13 **MS KREISBERGER:** I am grateful. In which case, let me just say this: the
14 touchstone of the legal test is whether the application is in the interests of
15 justice.

16 **MR JUSTICE MARCUS SMITH:** Yes.

17 **MS KREISBERGER:** And there is case law on that. Mr Jones says in his skeleton
18 that the starting point is that summonses involve the Court's coercive power.
19 Well, you don't see that in the authorities. The question for the Tribunal is
20 whether justice is furthered by issuing the summons. Quite simply, under the
21 governing principles, apart from anything else.

22 Moving on, then, Sir, to the pleaded issues, my second point.

23 **MR JUSTICE MARCUS SMITH:** Yes.

24 **MS KREISBERGER:** I will take you to the pleadings to show how this issue, that is
25 the negotiation of a secondary supply licence with Perform, fits into the case
26 and that it is an issue of real significance which arises for determination by the

1 Tribunal. And, indeed, the Tribunal has already ordered that it is a disclosure
2 issue. I will come back to that. But if we go to the pleadings, the claim form is
3 in bundle A. Sir, are you using the electronic versions?

4 **MR JUSTICE MARCUS SMITH:** I am, yes.

5 **MS KREISBERGER:** In which case, I don't think you need the tab number.

6 **MR JUSTICE MARCUS SMITH:** No, I think that would help, actually, tab number
7 first and then page.

8 **MS KREISBERGER:** I am grateful. In which case it is tab 1, page 30.

9 **MR JUSTICE MARCUS SMITH:** When you are saying page 30, are you referring to
10 A/30?

11 **MS KREISBERGER:** Yes I am.

12 **MR JUSTICE MARCUS SMITH:** Yes, good.

13 **MS KREISBERGER:** And I think there may be some small discrepancy.

14 **MR JUSTICE MARCUS SMITH:** I will use the A and B numbers. I have A/30 before
15 me.

16 **MS KREISBERGER:** Thank you, Sir. If I could ask you to look at paragraph 71, that
17 introduces the infringement in relation to the restriction by object.

18 **MR JUSTICE MARCUS SMITH:** Yes.

19 **MS KREISBERGER:** "The agreement has the object of preventing, restricting or
20 distorting competition because [and this is important] having regard to its
21 content, aims, and economic and legal contexts, and also taking into account
22 the subjective intentions of the parties [and I stress that] to the agreement, it is
23 inherently harmful to competition."

24 Sir, if you then move forward to A/32.

25 **MR JUSTICE MARCUS SMITH:** And who are the parties to the Agreement for this
26 purpose?

1 **MS KREISBERGER:** This is the FDC agreement, so that is FDC and Genius.

2 **MR JUSTICE MARCUS SMITH:** Okay.

3 **MS KREISBERGER:** This is the agreement which is at the heart of this challenge.

4 The agreement which gives Genius exclusivity over the data, the FDC data.

5 **MR JUSTICE MARCUS SMITH:** Yes.

6 **MS KREISBERGER:** So if I could then ask you to move forward to page A/32.

7 **MR JUSTICE MARCUS SMITH:** Yes.

8 **MS KREISBERGER:** And that fleshes out, that develops the opening passage in

9 relation to the anti-competitive objectives of the agreement. This is a central

10 part of Sportradar's case; why is this agreement anti-competitive by object:

11 "Given FDC's monopoly position in the data, the objective aims and/or inherent

12 consequences of the FDC agreement include but are not limited to ... "

13 And you see the first point is the conferral of the five year monopoly on Genius.

14 **MR JUSTICE MARCUS SMITH:** Yes, I see that.

15 **MS KREISBERGER:** That is the protocol, the essential aspect of the agreement.

16 And then, Sir, if you could move forward to A/33.

17 **MR JUSTICE MARCUS SMITH:** Yes.

18 **MS KREISBERGER:** You see the objective of the agreement, its aim, is to render

19 rival suppliers of the SDSB services, those are the data services to

20 bookmakers, entirely commercially dependent on Genius for a sublicense of

21 the official data.

22 **MR JUSTICE MARCUS SMITH:** Yes.

23 **MS KREISBERGER:** And you see the wording below sub-paragraph 7:

24 "Sportradar infers that FDC and Genius subjectively intended any or each of the

25 anti-competitive aims and consequences pleaded above and reserves its right

26 to rely on them."

1 That is precisely what we are doing now, and Sir, you will know it is part of the legal
2 test to do so, one is entitled to rely on subjective intentions. Just so you have
3 it, if you move forward to page A/35, you see there the part of the pleadings
4 that deals with the particulars of effects, as distinct from objects.

5 **MR JUSTICE MARCUS SMITH:** Yes.

6 **MS KREISBERGER:** And over the page, A/36, if I could just ask you to read
7 sub-paragraph F to yourself on A/36. That is the parallel allegation in relation
8 to the effects of the agreement.

9 **MR JUSTICE MARCUS SMITH:** Yes, I will read that.

10 **(Pause).**

11 Yes.

12 **MS KREISBERGER:** I am grateful, Sir. So in other words, an anti-competitive aim
13 or consequence of the agreement is the fact that Genius was put in the
14 position and intended to be put in the position of gatekeeper, with the power
15 to control whether its own rivals could get access to that important, essential
16 data. In other words, rivals were made beholden to Genius.

17 Now, you will notice, and I emphasise this point because of the arguments in
18 Mr Jones' skeleton, the allegation that I have shown you refers to rival
19 suppliers, SDSB suppliers, data suppliers, in the plural, and we know that the
20 two principal rivals to Betgenius are Sportradar and Perform.

21 **MR JUSTICE MARCUS SMITH:** Yes.

22 **MS KREISBERGER:** And the same point applies to the effect allegation.

23 **MR JUSTICE MARCUS SMITH:** Yes.

24 **MS KREISBERGER:** It refers to the effect on competitors to Betgenius, in the plural;
25 rival SDSB suppliers. And just so you have it, Sir, 75G on effects, goes on to
26 plead constructive refusal in relation to Sportradar by Genius. So you have

1 the generic pleading that the aim and the consequence and the effect of the
2 agreement was to put rivals in this difficult position of being beholden to
3 Genius, and then you have a separate pleading which sets out the effect on
4 Sportradar. Of course, at the time of pleading, those are the only facts of
5 which Sportradar was aware; the impact on itself.

6 Now, Sir, turning to Genius' defence.

7 **MR JUSTICE MARCUS SMITH:** Yes.

8 **MS KREISBERGER:** Genius relies heavily and repeatedly on the fact that the FDC
9 Genius agreement required Genius to grant secondary supply licences on
10 non-exclusive and non-discriminatory terms, to rebut the allegation against it
11 of anti-competitive aims and effects, and I will show you the overarching
12 averment is at A/3/132.

13 **MR JUSTICE MARCUS SMITH:** Yes, I have that, thank you.

14 **MS KREISBERGER:** Thank you. That is paragraph 6.1. Towards the end of the
15 paragraph, Genius pleads as follows.

16 **MR JUSTICE MARCUS SMITH:** Yes, I see it.

17 **MS KREISBERGER:** Yes. It expressly preserved the possibility of downstream
18 competition by requiring Genius to grant these licences on non-exclusive and
19 non-discriminatory competitive terms. Accordingly, it didn't have the object or
20 effect of restricting competition. And then if I could ask you to turn up
21 page 175. And I am certainly not taking you to all of the references, because
22 there are quite a number. At tab 3-page 175.

23 **MR JUSTICE MARCUS SMITH:** Yes, I have that.

24 **MS KREISBERGER:** Now, this responds to the specific allegation that I showed you
25 in relation to anti-competitive object.

26 **MR JUSTICE MARCUS SMITH:** Yes.

1 **MS KREISBERGER: (Pause)**
2 Sir, I was temporarily kicked out. Can you hear me?
3 **MR JUSTICE MARCUS SMITH:** Yes, I didn't notice that. We can certainly hear you
4 now.
5 **MS KREISBERGER:** I have an alternative laptop if things become unmanageable,
6 but I will soldier on if that is okay.
7 **MR JUSTICE MARCUS SMITH:** Let's persist, yes, thank you.
8 **MS KREISBERGER:** Paragraph 65.6 pleads that rival suppliers are able to obtain
9 secondary supplier licences on non-exclusive and non-discriminatory terms.
10 **MR JUSTICE MARCUS SMITH:** Yes.
11 **MS KREISBERGER:** And then if you move forward, Sir, and this is a different
12 formulation, which is why I want to show it to you, which is directly relevant to
13 A/179.
14 **MR JUSTICE MARCUS SMITH:** Yes.
15 **MS KREISBERGER:** 68.5. It is the introductory wording of the second sentence:
16 "Genius has been ready and willing to grant a secondary supplier licence on
17 appropriate terms."
18 "Ready and willing". I am going to take you to the documents that contradict that.
19 And Sir, perhaps just for your note, paragraph 37.2.1, which is at page 154 of
20 the Genius defence, refers to Genius being, and I quote, "entirely willing" to
21 grant these licences on non-discriminatory terms. So you see it is a central
22 part of Genius' defence.
23 **MR JUSTICE MARCUS SMITH:** Yes.
24 **MS KREISBERGER:** There can't be any doubt on the pleadings that there is
25 a central, foundational issue between the parties as to whether --
26 **MR JUSTICE MARCUS SMITH:** Look, I am prepared to accept these are points

1 I need to resolve on the pleadings. I am not going to be drawn on central.

2 **MS KREISBERGER:** Understood. But I have to put this before you, Sir, and I have
3 had to labour the point for this reason: surprisingly, Genius don't accept that it
4 is a central issue. They say this at paragraph 18 of their skeleton:

5 "The Tribunal will note that the pleaded points do not directly raise any issue about
6 negotiation --"

7 **MR JUSTICE MARCUS SMITH:** One moment, this is Genius' skeleton,
8 paragraph 18?

9 **MS KREISBERGER:** I am sorry, Genius' skeleton, paragraph 18.

10 **MR JUSTICE MARCUS SMITH:** Right, yes, okay, got that.

11 **MS KREISBERGER:** This is why I have had to go through this quite carefully, Sir.

12 **MR JUSTICE MARCUS SMITH:** Yes.

13 **MS KREISBERGER:** Because it is not common ground that it is a pleaded issue,
14 and you are quite right to pick me up. I am not asking you to determine its
15 centrality. So they say:

16 "The pleadings don't raise any issue about negotiations between Genius and
17 Perform which are at most, a small part of the factual matrix."

18 **MR JUSTICE MARCUS SMITH:** Yes.

19 **MS KREISBERGER:** I am sorry, I have to raise this. That is not right. At best, that
20 is sophistry. The position is those allegations in the pleadings don't refer to
21 Perform by name because it doesn't need to, because it refers in generic
22 terms to SDSB's suppliers, and there are three main SDSB suppliers: Genius,
23 Perform and Sportradar. You heard Ms Smith say today that two of her main
24 customers are in this litigation: Sportradar and Genius. Now, it is just a bad
25 point, Sir. It is a bit like saying Genius isn't named because the allegation
26 refers to "the defendant". Perform's name might not be cited in those

1 provisions, it is elsewhere, but it is directly in issue because it refers to the
2 effect on Genius' rivals and Genius has two key rivals, Perform and
3 Sportradar.

4 **MR JUSTICE MARCUS SMITH:** Yes, okay.

5 **MS KREISBERGER:** I should just flag, Genius also claims that there are other
6 parties known as turnkey providers that are rivals. We don't accept they are.
7 It is a factual issue. I don't wish to trouble you with it, Sir, but I don't think
8 anyone is going to dispute that the triptych is Genius, Sportradar and Perform.

9 That concludes my submissions on the pleadings, showing you that the negotiations
10 of secondary supply licences is a central issue in the case or is an issue in the
11 case, particularly on Genius' own defence. They pray in aid that these
12 negotiations were on non-discriminatory terms and that Genius was ready and
13 willing to enter into them. I am now going to take you to the communications
14 concerning Mr Locke --

15 **MR JUSTICE MARCUS SMITH:** Yes.

16 **MS KREISBERGER:** -- which show that not to have been the case.

17 **MR JUSTICE MARCUS SMITH:** Yes.

18 **MS KREISBERGER:** This is where I will exercise caution insofar as I can.

19 **MR JUSTICE MARCUS SMITH:** Just give me the things to read and I will read
20 them.

21 **MS KREISBERGER:** I am grateful. If I could ask you to turn up bundle G. I have
22 five examples I am going to take you to, Sir.

23 **MR JUSTICE MARCUS SMITH:** Yes.

24 **MS KREISBERGER:** Bundle G, tab 3-page 16. This is a WhatsApp chat group. It
25 was created on 31 July 2019. So this is after the agreement between FDC
26 and Genius was entered into, so Genius is now the exclusive provider of this

1 data. The group was created by Mr Burton, Steve Burton, who was COO of
2 Genius, and is COO of Genius.

3 **MR JUSTICE MARCUS SMITH:** And he is giving evidence?

4 **MS KREISBERGER:** And he is giving evidence, along with Mr Davison, who is
5 CCO, chief commercial operating officer, who is giving evidence. And
6 Mr Locke, the CEO and Mr Russell, the general counsel, who are the subject
7 of this application.

8 **MR JUSTICE MARCUS SMITH:** Yes.

9 **MS KREISBERGER:** Mr Burton called the group "FDC Perform", helpfully. And on
10 page G/16 they are debating, and I won't read the content out.

11 **MR JUSTICE MARCUS SMITH:** Okay, you are going to want to ask the
12 protagonists to this conversation about it.

13 **MS KREISBERGER:** Yes, but I do, Sir, need you to look at the content of this,
14 because it is very interesting, in my submission. They are debating the price
15 that they are going to quote to Perform for a secondary sublicense.

16 **MR JUSTICE MARCUS SMITH:** Right.

17 **MS KREISBERGER:** Can I ask you to read, Sir, can you see 15:16:09? So this is
18 31 July and this is the time, and you have Jack Davison. I can't imagine there
19 is any issue with that.

20 **MR JUSTICE MARCUS SMITH:** I have read what is said there.

21 **MS KREISBERGER:** I am grateful. Could you read down to 15.43.

22 **MR JUSTICE MARCUS SMITH:** Very good. You want me to read the whole
23 conversations between those two times?

24 **MS KREISBERGER:** Yes.

25 **MR JUSTICE MARCUS SMITH:** I will do that, okay.

26 **MS KREISBERGER:** I am grateful.

1 (Pause).

2 **MR JUSTICE MARCUS SMITH:** Yes, I have read that.

3 **MS KREISBERGER:** And, Sir, if you go to page G/17, so over the page.

4 **MR JUSTICE MARCUS SMITH:** Yes.

5 **MS KREISBERGER:** I am going to read this out without saying the number:

6 "I think we can make that number look like [you see there the figure] regardless ..."

7 **MR JUSTICE MARCUS SMITH:** Right.

8 (Pause).

9 I fear Ms Kreisberger you may have frozen. Yes.

10 **MS KREISBERGER:** I have been kicked out. I am back.

11 **MR JUSTICE MARCUS SMITH:** We spotted it this time. You were just -- could you

12 give me the reference to where that figure appears, because I don't think --

13 **MS KREISBERGER:** Yes, I am grateful.

14 **MR JUSTICE MARCUS SMITH:** G/17.

15 **MS KREISBERGER:** G/17, second line, that first figure that you see there:

16 "I think we can make that number look like --"

17 **MR JUSTICE MARCUS SMITH:** I have got it.

18 **MS KREISBERGER:** So what they are saying there is: we can get this number up

19 to that figure, that is what we can charge.

20 **MR JUSTICE MARCUS SMITH:** Okay.

21 **MS KREISBERGER:** Mr Davison refers to a spreadsheet, and then Mr Davison, if

22 you could go to the bottom third of the page, 18.17.19. We are still on

23 31 July.

24 **MR JUSTICE MARCUS SMITH:** Yes, I have got that.

25 **MS KREISBERGER:** "The issue with making the supply feed too high is that it

26 devalues the licence which is the thing we have control over. The problem

1 with too low [and I would like you to note this] is that it makes it seem more
2 affordable."

3 And they talk about some numbers there. Then if you could move forward, please,
4 to G/20.

5 **MR JUSTICE MARCUS SMITH:** Yes.

6 **MS KREISBERGER:** There you have Mr Russell -- sorry, this is halfway down the
7 page. You will see there is some blacked out, redacted text.

8 **MR JUSTICE MARCUS SMITH:** Yes, I have got that.

9 **MS KREISBERGER:** A few lines above that, at 7.09.23 in the morning, on 1 August.

10 **MR JUSTICE MARCUS SMITH:** Yes, I have that.

11 **MS KREISBERGER:** You have Mr Russell saying:

12 "I am telling lawyers they need to prep a response. It sets out our commercial
13 proposal at ..."

14 And you see the figure there.

15 **MR JUSTICE MARCUS SMITH:** Yes.

16 **MS KREISBERGER:** Now, if I could just pause there. That is the figure they were
17 going to quote to Perform for supplying data which is the subject matter of this
18 litigation. So that is the quote to Perform.

19 **MR JUSTICE MARCUS SMITH:** Yes.

20 **MS KREISBERGER:** And then the critical section, Sir, comes on the next page,
21 G/21.

22 **MR JUSTICE MARCUS SMITH:** Yes.

23 **MS KREISBERGER:** Do you see the first redacted box?

24 **MR JUSTICE MARCUS SMITH:** I do.

25 **MS KREISBERGER:** 8.10.34, "Mark". That is Mr Locke, the CEO:

26 "Guys, I really think we are getting this wrong."

1 So that refers back to the figure you saw. He goes on:
2 "The pricing [then there is a split] is arbitrary. Sorry, I have been thinking a lot about
3 this."
4 And then the critical phrase:
5 "At the prices we are talking about, if I were Perform, I would accept the proposal."
6 **MR JUSTICE MARCUS SMITH:** Right.
7 **MS KREISBERGER:** In other words: you have set the number too low, Perform
8 might say yes to this secondary supplier licence.
9 **MR JUSTICE MARCUS SMITH:** Yes.
10 **MS KREISBERGER:** So let's see what happens.
11 **MR JONES:** Sir, I apologise for jumping in.
12 **MR JUSTICE MARCUS SMITH:** Mr Jones, yes.
13 **MR JONES:** Sir, it is only because I had understood that you were going to be
14 invited just to read these, and of course, they all have times next to them, so
15 you could do that.
16 **MR JUSTICE MARCUS SMITH:** I agree, I can read these perfectly myself, to
17 myself.
18 **MS KREISBERGER:** I just want to make sure, because there's quite a lot of text
19 that -- this is my concern.
20 **MR JUSTICE MARCUS SMITH:** Ms Kreisberger, let me say that I am prepared, and
21 I know that Mr Jones will be saying different things at trial, but let me assume
22 for the sake of argument, that this is a smoking gun conversation. That it is,
23 you know, the cat's whiskers as far as your client's case is concerned.
24 Mr Jones, don't worry, I am simply assuming this for the sake of argument.
25 We have two of the protagonists to the conversation giving evidence. You are
26 going to ask them about this. Now, you can equally easily ask them what they

1 heard or read from the persons in the conversation who are not being called.
2 You can, if they say, "Well, I don't know what Mr Locke or Mr Russell meant",
3 put to them what you would submit they did mean. And I will reach a view.
4 Now, I can't understand, if you have no witness at all, assuming this was
5 a smoking gun conversation, if you had no witness at all, well, maybe I would
6 be sniffing at why there wasn't evidence on this that you could put, but I have
7 to say, even then, you would be able to put to me what the conversation said,
8 what you inferred out of it and you then say, "Oh, and Mr Jones, rather
9 surprisingly, hasn't called anyone." And I would say, "Oh yes, that is rather
10 surprising, I wonder why that has not been done."

11 **MS KREISBERGER:** Sir, sorry --

12 **MR JUSTICE MARCUS SMITH:** And infer --

13 **MS KREISBERGER:** Sorry, Sir, to interrupt you, I was kicked out again, I wonder if
14 we should pause. I am terribly sorry.

15 **MR JUSTICE MARCUS SMITH:** I am hypothesising. That is entirely fine. Would it
16 be sensible to try your other laptop?

17 **MS KREISBERGER:** I think perhaps, because it is rather regular now.

18 **MR JUSTICE MARCUS SMITH:** It does appear to be a problem at your end rather
19 than my end, unusually.

20 **MS KREISBERGER:** I need to break to set it up, I am in your hands, Sir, if that is
21 okay.

22 **MR JUSTICE MARCUS SMITH:** Of course, we will rise for five minutes. If you need
23 longer, that is fine, but I will still my camera and microphone until ten to, and if
24 you are not back at ten to, don't worry, we will wait for you, because
25 I anticipate that the points I am putting, it is more important that you hear them
26 than Mr Jones, although of course, I am sure Mr Jones will --

1 **MS KREISBERGER:** Thank you, Sir.

2 **MR JUSTICE MARCUS SMITH:** No, not at all, I will suspend my microphone
3 camera.

4 **(2.46 pm)**

5 **(A short break)**

6 **(2.50 pm)**

7 **MR JUSTICE MARCUS SMITH:** Well, I am back, Ms Kreisberger. Your problems
8 seem to have affected me. I am back where I was with a more stable
9 connection, but it means I am afraid I only have one screen. I have all of the
10 documents but you will have to bear with me when I look for them and if I look
11 distracted, it is probably because I am looking at a document and not at you.
12 But before your defenestration, after mine, I was putting the following point,
13 and excuse if I repeat myself. Let's assume that the material in the chat that
14 you are showing me is central and, as it were, a deal breaking document to
15 your client's advantage and to Mr Jones' client's disadvantage. Why,
16 assuming that to be the case, is it important and in the interests of justice that
17 you get Mr Locke and Mr Russell in the witness box, when you are already
18 going to have Mr Davison and Mr Burton in the box, susceptible to
19 cross-examination, and to add a further question to that, even assuming if
20 Mr Jones weren't calling those two gentlemen, why couldn't you perfectly fairly
21 put the case that this conversation, which you have got, is a smoking gun and
22 the fact that Mr Jones hasn't called any evidence at all, which I know is not the
23 case, but you could make the point there that inferences ought to be drawn.
24 So why, apart from being desirable and something your clients want, is it in
25 the interests of justice that these two gentlemen, in addition to the two who
26 are being called, be called?

1 **MS KREISBERGER:** Sir, because Mr Locke made the statement.

2 **MR JUSTICE MARCUS SMITH:** Well, yes, I know.

3 **MS KREISBERGER:** It is as simple as that.

4 **MR JUSTICE MARCUS SMITH:** Okay.

5 **MS KREISBERGER:** The Tribunal may want to hear, one might expect -- in order to
6 be able to have the best evidence in front of you, Sir, you may want to ask the
7 maker of the statement: what did you mean by that?

8 **MR JUSTICE MARCUS SMITH:** Well, yes, but I may, and probably will, and I am
9 sure you will ask it before I do, ask what the receiver of the statement made of
10 it.

11 **MS KREISBERGER:** Sir, my submission -- sorry, more technical issues.

12 **MR JUSTICE MARCUS SMITH:** No, not at all.

13 **MS KREISBERGER:** Sorry, Sir, that took me out of my stride.

14 **MR JUSTICE MARCUS SMITH:** No, not at all.

15 **MS KREISBERGER:** My submission is this, if I could just take it, and I did want to
16 take you to some other material, but I will perhaps come back to that in
17 a moment, I am in your hands, Sir.

18 **MR JUSTICE MARCUS SMITH:** Yes.

19 **MS KREISBERGER:** But it is only when you see the material that you can really
20 form a view. But what Mr Locke meant is in issue because he was the
21 decision maker and he set the price to Perform. And it is Genius who plead,
22 "We were willing and able, we were ready to negotiate secondary supply
23 licences". And Mr Locke, on our case, made a decision to set a price that
24 would not be acceptable to Perform.

25 Now, Sir, you may want to hear from Mr Locke as to why he did that. Mr Davison
26 may well tell you, "Well, I can't tell what you was in Mr Locke's mind." It is

1 a pleaded issue. The subjective intentions of Genius is a pleaded issue.
2 Mr Locke is the decision maker. He set the price and he made a decision in
3 a single day, and I won't give the number, to inflate the price by over
4 100 per cent. Now, for the benefit of the litigation, and in the interests of
5 justice, Sportradar wants to give Mr Locke an opportunity to explain why he
6 made that decision. And that is Mr Locke's evidence. He took the decision, it
7 is not for someone else. We then inevitably end up in the situation where
8 Mr Davison says, "Well I can't tell you why Mr Locke made that decision.
9 I can't tell you that."

10 Now, of course, Sir, you are right we will be asking you to draw adverse inferences
11 because Genius has made a decision not to call Mr Locke. It is a surprising
12 decision in my submission and it is a decision that if it is appropriate for me to
13 raise with you now, may hamper the Tribunal's ability to determine the issue.

14 **MR JUSTICE MARCUS SMITH:** Well, I can tell you it certainly won't do that. One
15 of the down sides of this job is that you can't duck the issue. You have to
16 decide it. And you decide it on the basis of the evidence that there is. Put it
17 this way: if, in the rather nasty hypothesis that Mr Locke and Mr Russell were
18 both run over by the number 13 bus, I would be able, I think, to make
19 a decision on the basis of the materials before the Court. And the documents.

20 Now, you of course, have the added advantage that you can say, as you have done
21 and as you will be entitled to say again, "Look, actually, the most important
22 person has not been called." And certain inferences can be drawn from that.
23 But whether -- and I want to be clear, I am not saying I will be drawing
24 inferences at all because I will need to be on top of the material going forward
25 and I will need to consider the evidence in the round.

26 Whilst it might be, and I am not really going to be drawn on this, whilst it might be

1 desirable to have Mr Locke and/or Mr Russell in the witness box, and as I say,
2 I am not even going to be drawn on that, I do struggle to see whether it is in
3 the interests of justice. It seems to me that the interests of justice test is really
4 saying that the evidence of this particular person is important, precisely
5 because there is a lack of material which means that even the drawing of
6 inferences is rather difficult to achieve. Now, in that sort of situation, if, for
7 instance, you knew there was a conversation but it wasn't recorded anywhere,
8 and there was only one person in Mr Jones' power to serve up by way of
9 giving evidence, and for no good reason, Mr Jones is saying, "Nope, he is not
10 coming", well, then I might just say think, "Yeah, I ought to hear from them."
11 But that is really not the case here.

12 **MS KREISBERGER:** Sir, maybe I can help you on that.

13 **MR JUSTICE MARCUS SMITH:** Okay.

14 **MS KREISBERGER:** I did want to end on this one, but if you want me to move
15 along, I will.

16 **MR JUSTICE MARCUS SMITH:** Yes, of course.

17 **MS KREISBERGER:** I am not going to read it out, but whilst we have G/22 open.

18 **MR JUSTICE MARCUS SMITH:** G/22, yes, I have that.

19 **MS KREISBERGER:** It is still the same WhatsApp chat. 17.37.

20 **MR JUSTICE MARCUS SMITH:** Let me find that. So G/22, 17.37. Oh, I have got
21 it, yes.

22 **MS KREISBERGER:** That is the figure given per month. If you multiply that figure
23 by 12 --

24 **MR JUSTICE MARCUS SMITH:** Okay, I can do that.

25 **MS KREISBERGER:** -- that is the figure that was quoted to Perform.

26 **MR JUSTICE MARCUS SMITH:** Right.

1 **MS KREISBERGER:** And you can compare that to the figure I began with. So in
2 terms of the inflation of one day, as a result of Mr Locke's intervention. I just
3 want to ensure that you have got that point.

4 **MR JUSTICE MARCUS SMITH:** No, I am grateful.

5 **MS KREISBERGER:** But to your very helpful indication, Sir, as to the sort of
6 material that might assist, I am going to go directly to my fifth example, and
7 then I am in your hands as to whether you want me to show you any other
8 material or not.

9 **MR JUSTICE MARCUS SMITH:** Yes, thank you.

10 **MS KREISBERGER:** G/223.

11 **MR JUSTICE MARCUS SMITH:** G/223.

12 **MS KREISBERGER:** That is at tab 15. That is the covering letter.

13 **MR JUSTICE MARCUS SMITH:** Right, I've got that. 223 you want me to go to.

14 **MS KREISBERGER:** That is just a covering letter. If you go then to 225.

15 **MR JUSTICE MARCUS SMITH:** 225.

16 **MS KREISBERGER:** And I will make sure I have the right -- sorry, this is not my
17 marked up version, so I am just going to make sure I give you the right
18 reference. If you start reading at -- it is the sort of top quarter of the page,
19 15.29.08.

20 **MR JUSTICE MARCUS SMITH:** Yes, I have that. "Please", it begins with?

21 **MS KREISBERGER:** Yes, that is Mr Locke.

22 **MR JUSTICE MARCUS SMITH:** Okay, and I read down to where?

23 **MS KREISBERGER:** If you could read down to "unless you say so", which is at
24 11.21.37.

25 **MR JUSTICE MARCUS SMITH:** Okay, let me read that.

26 **(Pause).**

1 Just so that I know, are these transcripts of recordings, or are these typed
2 exchanges?

3 **MS KREISBERGER:** These are all WhatsApp text messages.

4 **MR JUSTICE MARCUS SMITH:** So they are texted in, yes, thank you. I probably
5 should know that. I am grateful for the clarification.

6 Yes, I have read that, thank you.

7 **MS KREISBERGER:** So, Sir, you can see that there was an open Slack post which
8 upset Mr Locke very much.

9 **MR JUSTICE MARCUS SMITH:** Yes.

10 **MS KREISBERGER:** We don't have that post, we have asked for it, but what you
11 see is Mr Locke saying, "Don't post that stuff on an open channel".

12 **MR JUSTICE MARCUS SMITH:** Yes.

13 **MS KREISBERGER:** So it goes rather directly to your point that things weren't
14 written down, at least on the open channel, and Mr Locke was asking people
15 to keep quiet. We can only ask Mr Locke about this exchange. It is
16 an exchange between him and Mr Dougan. Mr Dougan is not a witness in
17 these proceedings.

18 **MR JUSTICE MARCUS SMITH:** Yes.

19 **MS KREISBERGER:** But you can see the direction, "You need to be super careful",
20 from Mr Locke. So we have real reason to think that there is evidence that is
21 not before the Tribunal, and as I say, that Slack post is not before the
22 Tribunal. Once that post is forthcoming, Sportradar will want to put the
23 question to Mr Locke, no doubt: why was it such a -- and I won't repeat the
24 Anglo Saxon -- such a mess up?

25 **MR JUSTICE MARCUS SMITH:** Have Genius refused to produce the post, or are
26 they saying they can't find it?

1 **MS KREISBERGER:** I think we are just waiting for an answer.

2 **MR JUSTICE MARCUS SMITH:** Yes.

3 **MS KREISBERGER:** So Sir, as I say, there are other references, there is other
4 material from Mr Locke, but I am in your hands as to whether I go to them.
5 What I would ask for an opportunity is to address the objections that Genius
6 has laid out in its skeleton to the summons in relation to Mr Locke.

7 **MR JUSTICE MARCUS SMITH:** Well, okay.

8 **MS KREISBERGER:** Genius makes four points. I can deal with it very briefly.

9 **MR JUSTICE MARCUS SMITH:** Yes.

10 **MS KREISBERGER:** They say: well, the WhatsApp exchange is merely debating
11 different perspectives. They say it is just a one line comment and it is
12 questionable that Mr Locke will be able to explain it, they say, given the
13 passage of time. And they say what he meant is irrelevant, the only issue is
14 how Genius behaved. And my learned friend says Mr Davison and Mr Burton
15 can give evidence on the point.

16 **MR JUSTICE MARCUS SMITH:** Yes.

17 **MS KREISBERGER:** So my five points, just so you have them, Sir, is first, what
18 Mr Locke meant is very much in issue. Mr Jones denies that. We need to
19 know why his instruction was to set the price at a level that Perform would not
20 accept, and I have shown you that the pleading brings in subjective intentions.
21 So the matters in issue are not confined to what Genius did, its open conduct
22 on the market, it is what it said internally. It is an extraordinary submission.
23 The Tribunal is entitled to know the reasons why it behaved in the ways that it
24 did, particularly when one is looking at a price hike.

25 **MR JUSTICE MARCUS SMITH:** Yes.

26 **MS KREISBERGER:** As to the fact that it is a one line comment, Sir, this will take

1 me in a moment to my next application in relation to disclosure. Genius has
2 so far resisted disclosure of internal communications concerning Perform. We
3 don't have it. So the fact that it is a one line comment, well, we have this
4 WhatsApp by good fortune. There is no category of documents that have
5 been ordered, setting out internal Genius communications.

6 Thirdly --

7 **MR JUSTICE MARCUS SMITH:** Okay, I am more interested in the disclosure,
8 I must say.

9 **MS KREISBERGER:** Sir, and I am grateful for that, because I think if you are
10 against me on this, I think the disclosure application really becomes very
11 important.

12 **MR JUSTICE MARCUS SMITH:** I will bear in mind what I want to hear Mr Jones on
13 and what I don't want to hear Mr Jones on, but what is the battle line in
14 relation to discussions between Genius and Perform?

15 **MS KREISBERGER:** Right, I will move on to that, Sir.

16 **MR JUSTICE MARCUS SMITH:** Okay.

17 **MS KREISBERGER:** I need to give you a little bit of history on that, to explain how
18 we got to the point where there is this lacuna in relation to internal exchanges.
19 So Sir, disclosure issue number 22 is the relevant one, so if we could turn to
20 that. That is at B/138.

21 **MR JUSTICE MARCUS SMITH:** Ms Kreisberger, I have got half an eye on the time,
22 and I know we have about another eight of these to go.

23 **MS KREISBERGER:** Yes.

24 **MR JUSTICE MARCUS SMITH:** Mr Jones, I am going to give Ms Kreisberger
25 something to tilt at. I am not, and I will make a short ruling on this, but I am
26 not going to issue any witness summons in relation to Messrs Locke and

1 Russell. You should understand why I am not going to do that. It is because
2 I don't consider it comes close to the in the interests of justice case. The
3 materials I have seen, it seems to me, enable me quite easily to decide the
4 matters in issue. I have documentary evidence. I am going to have two
5 witnesses. If and to the extent there are gaps, and I am not saying there are,
6 but if and to the extent there are gaps, then you know what the rule is. If
7 I think they are gaps which are susceptible of a need of explanation through
8 a witness who has deliberately not been called, well then, that is the inference
9 I will draw. I am not saying I will, but you will exercise your judgment about
10 that. And there we are. So I am not going to ask you to address me on the
11 witness summons application. I can see that it might possibly get on the
12 would be nice to have list. I am not even going that far, but that is as far as it
13 does go, at its highest, and that doesn't meet the interests of justice test.

14 Turning, however, to the question of disclosure, it does seem to me that certain
15 different questions arise and before we go to the history, which may or may
16 not be relevant, I would like to know the bottom line of why these materials,
17 the Genius/Perform negotiations, probably in a specific window of time, can't
18 be produced, if they exist. And it might help, Ms Kreisberger, if you just were
19 to say what the position of your clients is.

20 **MR JONES:** Let me give a brief summary of the position, and I will elaborate, either
21 now or after Ms Kreisberger, whatever suits you, Sir.

22 **MR JUSTICE MARCUS SMITH:** Thank you.

23 **MR JONES:** The summary is this. Firstly, a large amount of material has already
24 been disclosed, going to the question of internal discussions and if you want
25 to put it this way, my client's motivation. Obviously, I will develop that in due
26 course. That is the first point. There is already a lot of stuff going to this

1 issue. Secondly, we were not ordered to provide information relating to
2 negotiations with Perform. That is why it wasn't done. We weren't ordered to
3 do it when we did everything else. Thirdly, and this is the question you just
4 put to me, it would be a burdensome exercise now to go back and do that,
5 when it wasn't ordered at the time, because in a nutshell, the documents
6 which were gathered for disclosure were held on a platform which we don't
7 have access to any more, so we would have to restore that. The reason we
8 don't have access is because the documents that ultimately weren't relevant
9 and not disclosed, don't just get kept on a platform, because that is very
10 expensive, so you shut the platform down. You would have to restore the
11 platform. That would take, we understand it, ten days for our e-disclosure
12 people, but after that, we would have to run the searches which we didn't do
13 first time round because it wasn't required. And I think it is being said it is
14 a four month period, whichever custodians would have been involved in the
15 negotiations, but of course, you go through all of the usual hoops. Here,
16 maybe you would see it as the dark ages, but the reality is, we have been
17 using keywords, I think all parties have, so we'd use keywords, then we would
18 have a manual search. It would have to be done over the summer when we
19 are doing everything else. That is my really nutshell guide and I only give you
20 that in case -- I don't know, Sir, whether you would prefer me to elaborate on
21 those reasons now, or hand back to Ms Kreisberger for her to actually make
22 the disclosure application, and then I can respond. I am in your hands, Sir.

23 **MR JUSTICE MARCUS SMITH:** Is that true of communications emanating to and
24 from specific individuals? That is to say, Mr Locke or Mr Russell?

25 **MR JONES:** Yes.

26 **MR JUSTICE MARCUS SMITH:** In other words, is that answer something which

1 applies in response to all communications from the person involved in this
2 conversation?

3 **MR JONES:** Yes. I mean, obviously, if we were only ordered to do it in respect of
4 some named individuals, it would obviously be a narrower exercise, but yes,
5 in broad terms, what I said applies across the board. We don't have access
6 any more to documents which weren't caught in the sort of formal process for
7 disclosure and, obviously, we would have to do keyword searches and so on.
8 So yes, the answer applies to all of them, Sir.

9 **MR JUSTICE MARCUS SMITH:** Yes, I see, thank you.

10 **MR JONES:** There is maybe one gloss I should put on that, which is when you see
11 the application that was being made, there were two components to it. One of
12 them was really targeted and it was targeted on some spreadsheets which
13 their economist had highlighted and was actually referred to in his report. And
14 we did see that, actually, that is reasonably easy for us to track down because
15 we can go back to individual's own inboxes, we don't need to involve,
16 necessarily, external providers and so on. Just to be clear, we actually have
17 really thought about what is the proportionality, and we said we would give
18 that. So it is only this much bigger category, where they just want a search
19 which wasn't ordered first time round. That is what I am objecting to, Sir.

20 **MR JUSTICE MARCUS SMITH:** I think that is a helpful steer. Ms Kreisberger, that,
21 I think, gives you a target to tilt at. I mean what are you asking for? Are you
22 asking that the data be reconstructed so the search can be run?

23 **MS KREISBERGER:** We are asking for the documents, the internal
24 communications, concerning the negotiations with Perform. It is a highly
25 confined application. It concerns one counterparty and a four month
26 period, May to August 2019. But, Sir, it is very important that you have this

1 fact in front of you, which Mr Jones didn't cover. And the reason we are here
2 is because, whether deliberately or not, I am certainly not making any
3 submissions of that sort, but the factual position is that the Tribunal was
4 misled by Genius in relation to the nature of the exercise involved in the
5 original disclosure application. Sir, if you just give me a moment, I do need to
6 show this to you. It goes straight to the heart of the issue and how we got
7 here.

8 So if I could ask you to turn up B/138.

9 **MR JUSTICE MARCUS SMITH:** B/138, yes, of course. Give me a moment.

10 **MS KREISBERGER:** Sir, if you see disclosure issue number 22.

11 **MR JUSTICE MARCUS SMITH:** Yes, I have that.

12 **MS KREISBERGER:** "What agreements, if any, does Genius have with other
13 providers of SDSB services in respect of the data?"

14 **MR JUSTICE MARCUS SMITH:** Yes.

15 **MS KREISBERGER:** "What was the extent of the negotiations between Genius and
16 those providers? What fees or other amounts were payable? So any
17 discussion that failed to lead to an agreement, why did they fail?"

18 Now, Sir, Genius resisted disclosure on this issue and they said this, and I am just
19 going to give you the reference, we don't need to turn it up. The reference is
20 M/100 in the bundle. They said:

21 "Disclosure on this issue would be substantial and disproportionate and would
22 require trawling three years' worth of emails and numerous counterparties."

23 Now, the Tribunal took Genius at its word. The Tribunal, you may recall this, Sir,
24 was concerned that the application was open ended --

25 **MR JUSTICE MARCUS SMITH:** Yes.

26 **MS KREISBERGER:** -- and accepted that this would be a very heavy task. So what

1 Genius was ordered to do is at B/138:

2 "Search for and provide copies of agreements."

3 And then:

4 "Produce a schedule supported by a statement of truth, setting out all of those
5 counterparties within the scope of this request with whom Genius commenced
6 negotiations, where those negotiations failed to result in a concluded
7 agreement. The schedule should contain a brief statement as to why the
8 negotiations ended without agreement, and then approximate timeline."

9 So, Sir, you ordered a schedule because Genius said, "There are so many
10 counterparties, so much work, we have to trawl three years' worth of data."
11 You took them at their word.

12 What happened is Genius produced a document. A document which --

13 **MR JUSTICE MARCUS SMITH:** Where is that?

14 **MS KREISBERGER:** That is at M/6/174. Sir, they boldly call this document
15 a schedule, because they were asked to disclose a schedule. It is not. It is
16 a single page.

17 **MR JUSTICE MARCUS SMITH:** Let me get it up, first of all. 174.

18 **MS KREISBERGER:** 174-tab 6, if that is helpful.

19 **MR JUSTICE MARCUS SMITH:** Yes, just a second. Sorry, we are in bundle M or
20 N?

21 **MS KREISBERGER:** M, M for mother.

22 **MR JUSTICE MARCUS SMITH:** M for mother. One moment.

23 **MS KREISBERGER:** Sir, do you to have that?

24 **MR JUSTICE MARCUS SMITH:** I do have that, yes.

25 **MS KREISBERGER:** You will see counterparties.

26 **MR JUSTICE MARCUS SMITH:** Hang on, M/174?

1 **MS KREISBERGER:** 174, I am sorry, Sir.

2 **MR JUSTICE MARCUS SMITH:** 174. What I have got is "Disclosure issue 22 --
3 Schedule of negotiations...".

4 **MS KREISBERGER:** Yes, you will remember the context was lots of counterparties,
5 three years' worth of trawling. What you see is a single counterparty, four
6 month period, and then --

7 **MR JUSTICE MARCUS SMITH:** Let me read it, Ms Kreisberger.

8 **(Pause).**

9 Yes, I see.

10 **MS KREISBERGER:** And that is how we got to where we are today. That is all we
11 got from Mr Russell, not the promised numerous counterparties. Very difficult
12 search, would be disproportionate.

13 So let me set out for you, Sir, so you have the full picture. Genius has never given
14 us what we asked for. I can take you to the chronology very briefly, but
15 having received the Russell statement, I can tell you that Sportradar wrote
16 back promptly, asking again for internal communications concerning Perform,
17 because now we knew there was one counterparty, it is a four month period
18 and the Tribunal, I am afraid, had been misled about the nature of the task.
19 Genius have resisted and resisted all of the way through, and that is why we
20 are where we are today. They haven't given that to us. I think, Sir, so you
21 have the full picture, they have given three categories of disclosure, as well as
22 the single page Russell statement on Perform. Mr Jones referred to a large
23 amount of material. Actually, what they have given, we say, isn't even within
24 the scope of the disclosure order. They have disclosed 1,200 documents with
25 turnkey operators. Now, there is a factual dispute between the parties as to
26 whether turnkey operators are in the same position as Sportradar, Genius and

1 Perform, the three key competitors. We say they are not. Incidentally, FDC
2 agree with Sportradar. FDC's economist says turnkey operators don't operate
3 in the same market. If it is right, if FDC and Sportradar are right that turnkey
4 operators are not SDSB suppliers, Genius was wrong to give disclosure of
5 those agreements. Now, I don't ask you, Sir, to resolve that factual dispute
6 between the parties, that is a factual dispute. But the point I am drawing out
7 is we say that disclosure is, frankly, irrelevant, and certainly doesn't illuminate
8 the issues about negotiating secondary supply licences with Sportradar and
9 its one other main competitor. So that is the first bucket of disclosure which
10 we say isn't helpful.

11 The second bucket is Genius has disclosed external communications between them
12 and Perform. Now, Sir, I have shown you some material.

13 **MR JUSTICE MARCUS SMITH:** Sorry, when you say "external communications",
14 what do you mean?

15 **MS KREISBERGER:** Correspondence between Genius and Perform.

16 **MR JUSTICE MARCUS SMITH:** Right.

17 **MS KREISBERGER:** Not Genius' internal thinking.

18 **MR JUSTICE MARCUS SMITH:** Right, I see.

19 **MS KREISBERGER:** So correspondence between the two. Now, I have taken you
20 to some of the material. What you see from some of this prejudicial material
21 is Genius say one thing to Perform, in other words, they adopt the stance
22 consistent with their pleading that they are ready and willing to engage in
23 negotiations with their competitors for secondary supply licences, but when
24 you look at their internal communications, they have something else
25 completely: "Let's set a price which Perform won't accept." So my point, Sir,
26 is the correspondence, again, is not very illuminating. What we want to know

1 is what was Genius' internal thinking on the issue.

2 The third element of disclosure, the schedules which Jack Davison referred to in the
3 WhatsApp chat, also not terribly illuminating because they related to the early,
4 low figure before the price hike that afternoon.

5 So what we have is this lacuna. Genius has consistently refused to conduct
6 searches of internal documents in relation to the failed negotiations with
7 Perform, the only genuine competitor of Genius, who was in the same boat as
8 Sportradar, and it is only by good fortune that we have the material that we do
9 have. That material suggests that what we don't have is likely to be highly
10 probative.

11 Sir, can I give you two references to documents? I am not going to read them out,
12 I am going to leave you to read them.

13 **MR JUSTICE MARCUS SMITH:** Yes, of course.

14 **MS KREISBERGER:** Two references. I am grateful. The first is at M/4/132. The
15 reason I am showing you this is because it demonstrates my point --

16 **MR JUSTICE MARCUS SMITH:** 132? M/132.

17 **MS KREISBERGER:** Tab 4/132. Just before you turn to it, I will just flag the
18 references.

19 **MR JUSTICE MARCUS SMITH:** Yes.

20 **MS KREISBERGER:** This is to illustrate my point that whilst they were making
21 a show of being willing to engage with Perform and Sportradar, internally, they
22 were saying something really very different. If I could ask you to go to page
23 M/132.

24 **MR JUSTICE MARCUS SMITH:** Yes, I have that.

25 **MS KREISBERGER:** And you will see the first bullet point. Then a few copies in
26 colour. You have some red text. If I could ask you to read the green

1 paragraphs below the red paragraphs.

2 **MR JUSTICE MARCUS SMITH:** Yes, of course.

3 **MS KREISBERGER:** I am grateful. This is from Mr Burton, Steve Burton.

4 **(Pause).**

5 **MR JUSTICE MARCUS SMITH:** Yes I have read that.

6 **MS KREISBERGER:** So the last line in the second passage, "All the while", that is
7 actually what was going on behind the scenes.

8 **MR JUSTICE MARCUS SMITH:** Yes.

9 **MS KREISBERGER:** That is what we want to know more about. And then if you
10 could just go forward to page 135, this is another example where Mr Burton
11 makes clear that negotiations with Perform and Sportradar were really a piece
12 of theatre and Genius had no intention at all of engaging with Sportradar and
13 Perform in good faith.

14 **MR JUSTICE MARCUS SMITH:** Yes.

15 **MS KREISBERGER:** If I could ask you to read from about a third of the way down,
16 18.04.2019, 23.53.23, it begins, "We are in a really good place".

17 **MR JUSTICE MARCUS SMITH:** Yes, I have got that.

18 **MS KREISBERGER:** I am told this is out of the ring.

19 **MR JUSTICE MARCUS SMITH:** Nevertheless, it is more efficient for me to read it.

20 **MS KREISBERGER:** I understand.

21 **MR JUSTICE MARCUS SMITH:** Yes, I have read that.

22 **MS KREISBERGER:** "The longer we can make them feel like they are in
23 a process."

24 **MR JUSTICE MARCUS SMITH:** Yes.

25 **MS KREISBERGER:** So it is a sham.

26 **MR JUSTICE MARCUS SMITH:** Yes.

1 **MS KREISBERGER:** And you also have, further down the page, if you go to 45
2 seconds past midnight --

3 **MR JUSTICE MARCUS SMITH:** Yes.

4 **MS KREISBERGER:** -- Steve Burton, "All we say", so they are coming up with
5 a ruse here.

6 **MR JUSTICE MARCUS SMITH:** Yes.

7 **MS KREISBERGER:** Mr Davison finds it very funny, "Ha, ha, ha, ha, ha, love it".
8 And Mr Burton replies, "I think we need to buy time". And if could you read
9 on, Sir.

10 **MR JUSTICE MARCUS SMITH:** Yes. I see, I have read that. Okay, go on.

11 **MS KREISBERGER:** This is why we have every reason to think there is lots of
12 prejudicial material, and this is not a belts and braces application, this is
13 a hole in the disclosure, and the reason we got here is because Genius
14 resisted the original disclosure request because they said it was too
15 burdensome, too many parties, too long. It is one party, four months, it was
16 never the case.

17 **MR JUSTICE MARCUS SMITH:** Ms Kreisberger, there is a big difference between
18 looking for external communications between one party and Perform and
19 trawling internal communications, where you really have no end point or focal
20 point, apart from probably keywords, to undertake the search.

21 **MS KREISBERGER:** But, Sir, all one is suggesting is a four month period, it is
22 a very limited period, May to August, and the search term is "Perform",
23 frankly. We don't have that material. Sir, just to remind you it is Genius that
24 relies on their readiness and willingness, I have shown you the pleading, and
25 this is why. They say, "We were ready and willing to enthusiastically engage
26 with Sportradar and Perform." That is their pleading. That is their defence.

1 And we say those internal documents we have incidentally seen, show that
2 they weren't. But we don't have the full picture because they have resisted
3 and resisted running these searches. One counterparty, four month period.
4 Sir, in my submission, that is simply not good enough and everything I have
5 shown you suggests that the Tribunal won't have the full picture before it.

6 **MR JUSTICE MARCUS SMITH:** Yes.

7 **MS KREISBERGER:** Sir, I am reminded as well that the other limitation to make this
8 a confined disclosure exercise is to limit the custodians to the key Genius
9 individuals, and you have had the names through this. So this is really
10 a small, confined exercise in relation to a very important point. And we know
11 from the documents we do have that Genius were trying to keep it quiet, not
12 allow its external comms to reveal its real strategy. As I said, it was a piece of
13 theatre. So we really need to see these internal documents, otherwise we
14 won't know what went on.

15 **MR JUSTICE MARCUS SMITH:** Yes, thank you very much.

16 **MS KREISBERGER:** Sir, unless I can assist any further on that.

17 **MR JUSTICE MARCUS SMITH:** No, I am very grateful, Ms Kreisberger. Mr Jones,
18 I don't need to hear from you. I am going to refuse the application and I will
19 give my reasons now.

20 **Ruling**

21 (For Ruling, see [2022] CAT 37)

22 **MR JUSTICE MARCUS SMITH:** What's next?

23 **MR JONES:** Sir, I am grateful for that. So I don't want to take your time on this
24 point, but I should just say for the record that those allegations of us having
25 misled the Tribunal, we obviously take that really seriously. They are,
26 obviously, completely and utterly rejected for our part. I am not going to

1 spend time on it because I know you don't want to and we don't need to, but
2 I just want to make that clear on the transcript.

3 **MR JUSTICE MARCUS SMITH:** No, that's fair enough and let me make clear that
4 I am neither accepting nor rejecting those points. They may or they may not
5 emerge in the course of submissions. To be clear, Ms Kreisberger is perfectly
6 entitled to make them and you are perfectly entitled to reject them but not for
7 today. But I do understand why you put it on the record. I quite see why.

8 **MR JONES:** Yes. I had an application for disclosure of certain additional materials.
9 We have given careful thought to that over lunch, Sir, in light of the indication
10 which you gave this morning and, essentially, the reasons that you have just
11 given, we see the sense in what has been said and I am not going to pursue
12 that application. Do you want me to map it to the issue numbers, to be clear?

13 **MR JUSTICE MARCUS SMITH:** If you could map it to the issue numbers in
14 Sportradar's skeleton, which for better or worse, I am using as the agenda for
15 these points, that would be very helpful.

16 **MR JONES:** It is 4F.

17 **MR JUSTICE MARCUS SMITH:** 4F. Very good. I think it is 4D next, which is
18 FDC's application for legal advice.

19 **MR EDWARDS:** Yes, Sir, I am going to address on you that, if that is all right.

20 **MR JUSTICE MARCUS SMITH:** Yes, thank you, Mr Edwards.

21

22 **Application by MR EDWARDS**

23 **MR EDWARDS:** This is an application that arises from Sportradar's evidence on its
24 knowledge or beliefs as to whether the activities of its scouts were lawful.

25 **MR JUSTICE MARCUS SMITH:** Yes.

26 **MR EDWARDS:** This relates to a defence, and essentially the evidence is that

1 Sportradar believed its acts were lawful on the basis of legal advice, but that
2 advice has not been disclosed, and really, the rationale for this application is
3 for certainty for cross-examination. Either we have to have the advice so we
4 can test that evidence, or the evidence has to be taken out, and not tested in
5 cross-examination. Now, the point on knowledge is pleaded as a defence to
6 each of Dataco and Genius' IP claims, so in relation to equitable breach of
7 confidence, as you know, there is a requirement for the defendant to have
8 notice that the information misused is confidential.

9 **MR JUSTICE MARCUS SMITH:** Yes.

10 **MR EDWARDS:** That is pleaded at paragraph 33D of Sportradar's --

11 **MR JUSTICE MARCUS SMITH:** Mr Edwards, can I just give you an indication as to
12 how I propose to deal with these points. I think in the relevant evidence and
13 the other materials, there is simply reference to having taken legal advice or
14 received legal advice and then there is the standard statement that privilege is
15 not waived. Have I got that right, broadly speaking?

16 **MR EDWARDS:** At a high level, yes. It may be worth taking you to the evidence
17 just to sort of talk through it, but yes.

18 **MR JUSTICE MARCUS SMITH:** Well, let me be clear. I am not going to require
19 a document, or the material referring to legal advice to be deleted from the
20 statements but I am certainly not going to accept that simply because there is
21 reference to having received legal advice, that I am going to infer that that
22 legal advice said, "Yes, big tick, you are acting lawfully", I am simply going to
23 take it as the fact that the parties, or the party in question, obtained legal
24 advice and that is it. I am not going to take any inference one way or the
25 other as to what that advice said. Now, that is tantamount to deleting it.
26 I don't want to delete it because it does seem to me significant that the parties

1 thought the point was sufficiently important to take legal advice on the point.
2 And I have, and I am thinking of my decision in Cardiff Bus, drawn inferences
3 from the fact that a point was sufficiently serious to obtain legal advice,
4 without actually having seen the legal advice. So I do think it is a material
5 fact, but if Ms Kreisberger is thinking that by referring to legal advice in the
6 abstract, she is home on the basis that the lawyers said, "Don't worry,
7 everything is fine, you are behaving properly", well, that's not going to happen.

8 **MR EDWARDS:** Can I just unpack what you mean by taking the point seriously?

9 **MR JUSTICE MARCUS SMITH:** Of course.

10 **MR EDWARDS:** Does that just mean you are not saying that you would draw the
11 inference that they had a firm belief that what they were doing was lawful,
12 because from --

13 **MR JUSTICE MARCUS SMITH:** No, because that would be to colour what the
14 advice was. I will know nothing about the advice. I would accept that it is
15 unlikely that a person saying "I got legal advice" would have been told, "It is
16 totally unlawful, what you are doing", but I am not going to take the assertion
17 that X obtained legal advice as any kind of justification that the conduct in
18 question received the imprimatur of the lawyer whose advice was sought,
19 because on that, you would, I think, need to say, "Here's the advice, and
20 I followed it."

21 **MR EDWARDS:** Can I briefly take instructions?

22 **MR JUSTICE MARCUS SMITH:** Yes, of course.

23 **(Pause).**

24 **MR EDWARDS:** Sir, there is one other point which is there are certain documents
25 that have been put into evidence that appear to reflect legal advice that
26 Sportradar has received. Could we confirm that you would take the same

1 stance on that?

2 **MR JUSTICE MARCUS SMITH:** Yes. I mean what I am prepared to do is, I think,
3 and it may not have very much weight, but the fact that legal advice was
4 obtained is something which can be asserted without importing a waiver of
5 privilege. But it goes no further than that. What the legal advice says, or said,
6 remains under wraps. And I can't draw an inference one way or the other
7 from a party's assertion of the privilege. Now, that cuts both ways.
8 Ms Kreisberger can't go and say, "Gee, we behaved lawfully because we got
9 legal advice." You can't say, "Gee, they behaved unlawfully because they got
10 legal advice", because I don't have the legal advice. It becomes
11 a background fact of -- well, I wouldn't say total irrelevance, but it is
12 extraordinarily marginal.

13 **MR EDWARDS:** On that basis, I think we will adopt the same position of Genius, we
14 are not going to take the application further, my Lord.

15 **MR JUSTICE MARCUS SMITH:** I am very grateful, Mr Edwards, but I think it is
16 important that that be raised, because I can understand why you have
17 a concern, and I hope, or I clearly have, assuaged that concern to an extent.
18 I am very grateful to you. That brings us, I think, to E, the Sportradar
19 compliance with the practice direction in relation to the list of documents
20 accompanying Mr Lampitt's witness statement.

21 **MS KREISBERGER:** That issue has been resolved.

22 **MR JUSTICE MARCUS SMITH:** Has it? I will put a line through that.

23 **MS KREISBERGER:** It has.

24 **MR JUSTICE MARCUS SMITH:** F we have dealt with, I think. G is next.

25 **MS KREISBERGER:** Sir, that is the application that I mentioned in opening that we
26 haven't pursued prior to this hearing.

1 **MR JUSTICE MARCUS SMITH:** Very good. I will put a line through it. I am just
2 making sure that I cover everything. H is next. This is FDC's applications.
3 Oh, sampling, that is dealt with, as well, isn't it? Ms Smith, have I got that
4 right? Yes.

5 **MR EDWARDS:** Yes.

6 **MR JUSTICE MARCUS SMITH:** Very good. I, Sportradar's request to conduct
7 further searches of Mr Ford's email inbox.

8 **MS KREISBERGER:** Another one we didn't pursue.

9 **MR JUSTICE MARCUS SMITH:** Very good, I am very grateful. Do forgive me,
10 I haven't kept a complete matrix because things have been moving a little too
11 quickly for my spreadsheet to keep up, so I am using this as a way of not
12 missing things. J we have dealt with. That seems to have brought me to the
13 end of that list. Is there anything else that I have missed?

14 **MR JONES:** Sir, there is a really very, very minor point which didn't make it on to
15 that list because it was so minor, which is in your order last year on experts,
16 there was a requirement that if any expert wants to rely on any documents
17 which were not listed in, as it was then, the disclosure schedule, I think it was,
18 has to make an application. My expert relies on one document which is some
19 draft CMA guidance. I think Ms Smith actually has the same point that she's
20 raised in a letter. I can take you to the letter and explain this in more detail if
21 that would assist but I don't think it is controversial.

22 **MR JUSTICE MARCUS SMITH:** No. Is there any objection to that document being
23 deployed by the experts from any party? I hear silence. No. The reason for
24 that direction was because one of the problems that exists in relation to expert
25 evidence is that in the universe, which is a vast universe, of public material,
26 experts have a knack, a quite understandable knack, of drawing on materials

1 that they find useful. What they don't do, because they are not under
2 an obligation to do so, is flag up early that that is what they are doing. And
3 the purpose of this mechanism is not to act as a bar to using this material, it is
4 intended to act as a signal to the other experts that this is what the expert
5 listed in this material is looking at and is taking seriously. So two months
6 before trial, I don't have a problem in the list being supplemented. If it is the
7 day before the expert goes into the witness box, I anticipate I will have a big
8 problem. So at the moment, particularly when no party is objecting,
9 permission is given.

10 **MR JONES:** I am very grateful, Sir. There was one other -- oh, I apologise, Sir.

11 **MR JUSTICE MARCUS SMITH:** No, not at all. Do go on, Mr Jones.

12 **MR JONES:** Just a very short point that we thought it may be helpful just to raise,
13 which is that we recently have had the joint expert statement. There is, in
14 broad terms, not an awful lot of agreement. That is putting it very mildly. Sir,
15 I know that you have experience of a lot of cases where experts are really
16 locked in dispute. But we rather suspect, Sir, that this might be out of the
17 ordinary, even from that perspective. And the only reason I raise this is, in
18 broad terms, to put it on your agenda, because it might have a couple of
19 practical consequences. One is we weren't sure whether the Tribunal had yet
20 selected a panel, and it may be too late for me to make this point, but it really
21 does seem to us you might find it very helpful in this case to have
22 an economist on the panel, if that is possible. So I just wanted to raise that in
23 case it is helpful. And the second related point is just in terms of time for
24 preparation, to make sure it is on your radar that any time you can make, you
25 are obviously extremely busy, but there will in this case, be a lot of opportunity
26 to spend that time well. That is all from me.

1 **MR JUSTICE MARCUS SMITH:** That is very helpful, Mr Jones. There will be
2 an economist on the panel. Don't hold me to it, but I believe it will be
3 Mr Derek Ridyard, who is more than capable of holding his own with any
4 expert economists, including ones as eminent as the ones that are coming to
5 this trial. This does raise an incidental point, and I don't raise it to make any
6 order, but just to gauge the view of the parties, which is the question of
7 concurrent evidence and hot-tubbing, which we haven't discussed. I don't
8 really want to reach any view until I have had a chance to get to grips with the
9 expert evidence, but if the parties have a view at the moment as to what order
10 they might like the Tribunal, in due course, to make, then I am all ears. I am
11 inferring from the fact that there is considerable divergence that this might be
12 a case not for hot-tubbing but for cross-examination. I am seeing nodding all
13 round. Is there anyone who is dissenting from that? Deafening silence.

14 **MR JONES:** No, Sir, exactly. No dissent, certainly not from us, and I think we have
15 all agreed, for precisely the reasons that you have just given.

16 **MR JUSTICE MARCUS SMITH:** Well, thank you. That is very helpful. In that case,
17 although I will conduct, in particular with Mr Ridyard, a sense check about
18 whether we think concurrent evidence might help, you can all proceed on the
19 basis that it is going to be cross-examination as usual, unless we say anything
20 to the contrary and, frankly, I don't expect us to, because where one has got
21 a root and branch divergence, my preference is to let the advocates do their
22 job and cross-examine, and then for the Tribunal to follow in behind and
23 sweep up with any questions after that, rather than to take the lead. So as
24 I say, I am not making any ruling, but I think the parties are entitled to
25 an indication as to at least my thinking.

26 **MR JONES:** Yes, I am very grateful, Sir. Could I ask, if the Tribunal's thinking does

1 begin to shift, that we be given an opportunity then, before any decision
2 comes, to make further submissions to you, just in writing, on this?

3 **MR JUSTICE MARCUS SMITH:** Oh, Mr Jones, that goes without saying. I don't
4 think it is fair to impose on the parties either form, without them at least having
5 the opportunity to say how they think things should be done. So absolutely.
6 We would give quite a lot of notice, because if we were to go down, and
7 I really don't expect us to, but if we were to go down the hot-tubbing route, we
8 would need quite a lot of assistance from the parties in terms of framing the
9 issues that need to be traversed and ensuring that the hot tub process works
10 as efficiently as it does when it is implemented. But for my part, what you
11 have said, and as there is no dissent from the other parties, there is a real
12 divergence in, as it were, the view that the experts take, which is absolutely
13 fine, that is a good indicator to me that cross-examination rather than
14 hot-tubbing is the appropriate approach. So yes, we will let you know if that
15 changes in good time before the trial.

16 **MR JONES:** Thank you, Sir.

17 **MR JUSTICE MARCUS SMITH:** I will just check that there is nothing more.
18 Otherwise, can I thank the parties for the very considerable assistance they
19 have provided during the course of this hearing. Let me make clear, because
20 this is practically the last day of term and I anticipate that the order that we
21 have agreed is going to take some time to pull together, my position is that
22 I have made these orders, and I am expecting them to be complied with.
23 I think I have been as clear as I can be on the transcript, what I am saying and
24 I am expecting the parties to get on with what I have directed, and we can
25 leave the order to catch up. The fact is -- I have just been told Mr Ridyard is
26 not on the Tribunal by Mr Dhanowa, who is clearly looking in there but there is

1 an economist on the panel, I have clearly misremembered who it is. I am on
2 so many cases that I get, I think, a little bit confused but it is the practice of the
3 Tribunal -- Mr Dhanowa is being very assiduous, it is Mr Peter Anderson and
4 Mr Michael Cutting who are the wing members in this case. That is my error,
5 but it has now been helpfully corrected by the Registrar. That is the Tribunal
6 you will have. I don't think it makes any difference to the answers I gave
7 earlier on, but just to complete my thoughts regarding the order that I have
8 made, I am prepared to let the drafting of the order take its time, it is not going
9 to be an easy matter to undertake, but the order stands as I have made it
10 today. I am very grateful. Thank you all very much. And until the far side of
11 the summer. Thank you.

12 **MS KREISBERGER:** Thank you, Sir.

13 **MR JONES:** Thank you, Sir.

14 **(4.08 pm)**

15 **(The hearing concluded)**

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