IN THE COMPETITION APPEAL TRIBUNAL

Case No:1527/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 14th December 2022

Before:
The Honourable Lord Richardson
Ben Tidswell
Derek Ridyard
(Sitting as a Tribunal in England and Wales)

BETWEEN:

ALEX NEILL CLASS REPRESENTATIVE LIMITED
Proposed Class Representatives

v

SONY INTERACTIVE ENTERTAINMENT EUROPE LIMITED AND OTHERS
Proposed Defendants

A P P E A R AN C E S

Alan Bates (Instructed by Milberg London LLP) appearing on behalf of the Proposed Class Representatives (Alex Neill Class Representative Limited).

Daniel Beard KC and Gayatri Sarathy (Instructed by Linklaters LLP) appearing on behalf of the Proposed Defendants (Sony Interactive Entertainment Europe Limited and Others).

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Wednesday 14 December 2022

(10.00 am)

Housekeeping

CHAIR: Good morning everybody. Mr Bates.

MR BATES: Yes. Good morning, members of the tribunal. At this first CMC I appear for the proposed class representative. The proposed defendants appear by Mr Beard King's Counsel and Ms Sarathy.

If I may start with just some housekeeping points. In terms of bundles what I think the tribunal should have is a CMC bundle which has an agreed agenda for today at the front of it. There is then a supplementary bundle with some recent correspondence which I think was provided late last night. Hopefully that's made its way through to the members of the tribunal.

CHAIR: Yes, we have that.

MR BATES: Then there's an authorities bundle, a supplementary authorities bundle. Then of course the skeletons, and attached to the PCR skeleton is a proposed timetable showing the positions of the parties on that.

Can I begin by updating the tribunal on where I think the parties are in terms of what's agreed and what needs to take up time this morning?

CHAIR: Yes.

MR BATES: The agenda includes many matters on which perhaps relatively little time needs to be spent albeit they need to be briefly considered.

With regard to the confidentiality ring, there was at last agreement yesterday on all the terms of the confidentiality ring order. So that perhaps need not take up time this morning.

So that I think --

CHAIR: Sorry Mr Bates, we've been given that, we've seen that. We haven't had

a chance to look at it, other than a passing look and, it looked in pretty standard form. I see Mr Beard nodding as well. So assuming that's the case we can obviously deal with that. Maybe the best thing to do is to just have a quick look at that and we can let you know if there are any issues, to see where they are and if there are and we can just include that in an order.

MR BEARD: In order to get rid of this one it's in very standard form. There is surprisingly nothing very surprising about it. The debate that occurred was to do with timings for challenges and justifications of confidentiality, markings and inclusions of matters within the ring. It was a question of the dates, how long people had to deal with that and a compromise has been reached. So that's a very small reason why it was held up but that's the only issue that's been resolved over the last week. Otherwise it's very standard.

CHAIR: That's very helpful. Thanks, Mr Beard.

MR BATES: So I think sir, there are two substantive matters to take up time today. One is confidentiality and the treatment of funding documents and that perhaps should be a supplementary agenda item on its own, perhaps coming after item 4, I guess that's logically where it comes in the agenda.

After that the other matter for debate is the timetable leading up to the CPO hearing and how far off that hearing needs to be, bearing in mind the time that has already gone past. I suggest that perhaps items 5 to 7 can all be grouped together because they are essentially all about timetable. And that timetable of course being substantially guided by the tribunal's availability in terms of when the tribunal can accommodate the CPO hearing.

CHAIR: Yes. It seemed to me, particularly because of some of the points that Mr Beard has raised, we probably need to do the confidentiality treatment and final documents before we talk about timetable.

MR BATES: Indeed sir, yes.

CHAIR: Just a couple of other things. Forum, I think it is agreed England and Wales. I think that's on the basis that defendants are here and said to be the domicile for most of the members of the proposed class. So we should make that order?

MR BATES: Yes, please sir.

MR BEARD: We're also content with that, thank you.

CHAIR: Good, we'll do that then.

There was an issue about withdrawal of the claim against the third defendant. I got the impression that it got a little bit stuck. Do we need to do deal with that today or is that something you are going to take offline?

MR BEARD: I think it is something we are going to take offline. We had thought we had given the relevant clarity as to the role of the defendant, apparently that is not the case. So I think rather than detaining matters today I think we can deal with that offline. We are hopeful that a resolution can be reached. Some of the suggestions that were made on the other side about undertakings being given just weren't acceptable. So we'll I think talk further and if necessary come back to the tribunal in due course on that.

CHAIR: Good, thank you.

MR BATES: It's obviously primarily a matter for my client. We accept that it's a matter for my client whether or not to withdraw the claim as against particular defendants. So if it's possible for us to do that then obviously we'll notify the tribunal as soon as we can.

CHAIR: Yes. Thank you. Then the only other point I had was publicity notices and maybe we'll pick that up in the timetabling discussion. It wasn't clear to me whether there was agreement on that. Just to check, I can't remember, is the proposal that

the publicity notices have or will be shared with the defendants?

MR BATES: There's a draft publicity notice at page 396 of the main bundle --

CHAIR: Yes.

MR BATES: -- which the class representative proposes to publish next week on 20 December, subject to it being approved by the tribunal. As far as I'm aware there's no objection from the defendants to anything in the contents of that draft publicity notice, so subject to any correction from Mr Beard I think the only debate is as to the precise timing for publication.

CHAIR: Yes. I think -- I mean I don't -- it's not helpful I think for these to be contentious discussions. What we are trying to do is to make sure that the publicity notice is clear and factual and as informative as possible. So hopefully it's not something which is contentious.

MR BEARD: I'll confirm the position in relation to drafting but I doubt that there is anything and I think the only issue that arose was on timing and even there the issue is within the scheme of things relatively miniscule.

CHAIR: Do we need to sort that out or do you want to come back to that, Mr Beard?

MR BEARD: Can I come back on instruction and then we can tidy this one up by the end of this hearing.

CHAIR: Thank you.

Good, okay, so on that basis shall we go into the question of disclosure and confidentiality, Mr Bates?

Disclosure & Confidentiality

MR BATES: Yes. Just to tidy off some points that were raised in the skeleton. The PCR has made a request for disclosure of various versions of the defendant's global developer and publisher agreements, covering the duration of the period to which the claims relate. The position on that is that the defendants have agreed that they will

provide those documents to us once the confidentiality ring is in place and those documents will be provided within the ring. So I don't think any time needs to be taken up on that matter.

As I understand it, there's also a request from the defendants that the PCR disclose publicity materials which have been issued to bring the proposed collective action to the attention of potential class members. Our position on that is that of course the information about the proceedings that has been issued to class members is set out on the website, the bespoke website relating to this class action. So that the material is easily available insofar as it's there.

There may be some social media that was issued at sort of earlier points in time to generate interest and awareness of the proposed action and essentially to draw attention to the website. There also I think may be one or two press releases. We're happy to provide those. But it seems to us that everything else that counts as publicity materials is what is available on our website. We can provide the link to it if required but I'm sure the defendants, you know, are aware of it and have studied it closely. I don't know if Mr Beard wants to raise anything else on that matter.

MR BEARD: Well, frankly the issue we had was we asked for what had been sent out to people or made available to people and we got a response saying "go and look on the internet". We said but we don't know what has gone out in the past, what's gone out in social media and whether or not we can track down all the press releases. So Mr Bates this morning saying he will provide those is extremely helpful. Obviously we can look at the website, there's no issue with that. If there were earlier versions of the material on the website that have been taken down then obviously we would like to see those because we don't want to be having to trawl through the back in the time machine in order to get those. All we were saying was if you've put this stuff out, can we please see it rather than asking us to go on a hunt for it? I think in

correspondence we referred to it as an unnecessary game of "Where's Wally?" We don't need to engage in that in this sort of litigation. So I am very grateful for Mr Bates's indication and if that covers all of the material then that's fine.

MR BATES: It will be a very short game of "Where's Wally"? because as I say the material is almost all available on the website. As far as I'm aware there haven't been substantive changes to that material but we can confirm that that's the case. As I say if there have been social media or press releases that aren't on the website we will provide them.

CHAIR: I think that will be helpful, Mr Bates. We can resolve that. So you will let Mr Beard's solicitors know about the social media and anything else that is not now visible on the website?

MR BATES: Yes.

CHAIR: Thank you.

MR BATES: Yes, sir.

CHAIR: Keep going.

MR BATES: I was going to say that I think brings us to the funding document.

CHAIR: Good. That's really I think -- I expect it is Mr Beard's application. Just by way of preamble to that Mr Beard, just so you understand where we are, it became apparent to us as we started to look in the documents in preparation for the hearing that these are the full sort of unredacted versions of the funding documents. So that includes the funding agreement, CFAs for solicitors and counsel and the litigation budget. I don't think -- I couldn't find the priorities deed or something called the deed of adherence, if that's different from the CFAs. So that is what was provided to the tribunal when the case was filed, the documents were filed.

Now, your fundamental point I think, Mr Beard, that it's not ideal for the tribunal to be working off documents that the parties haven't seen is one that occurred to us as

well. So when it became apparent that that was the case, as I think you will have picked up, we asked for redacted versions of the funding agreement so at least we could work off that. And we have removed the unredacted versions of that document and indeed the other documents from our bundles. So as far as we're concerned we're working off the redacted version of the funding agreement and we don't have anything else in our bundles today. Obviously the registry has the documents I've referred to. If it's necessary we can get into this in more detail, but certainly some of us, when we initially looked at the documents, will have reviewed parts of the funding agreement, not in any detail, we certainly haven't read them in detail, but those are not the documents in front of us at the moment.

Submissions by MR BEARD

MR BEARD: First of all I'm extremely grateful for the tribunal taking the initiative and asking for the redacted documents and indicating that we're working off those today. Because it has become apparent since we'd received the CMC material that something rather unfortunate had happened in the provision of documents to the tribunal in unredacted form, when not only were they not provided to us for reasons that Mr Bates will I'm sure seek to articulate, but we were not actually copied on the letter of 19 August which is in the hearing bundle at page 512, that's tab 49. So tab 49, this is the letter that indicates just over the page at paragraph 3:

"We have provided the tribunal with the unredacted versions of the following documents."

Then it says at 4:

"We respectfully request that the confidential documents are not disclosed to the proposed defendants or anyone else on the basis the confidential documents contained privileged, confidential or commercially sensitive information. We will provide the proposed defendants with a redacted version of the Litigation Funding

Agreement [and there to be nothing else] and a schedule of redactions which set out the basis for redacting or withholding of confidential documents."

Now it must be said that this is profoundly unsatisfactory in a number of ways. Communicating with the tribunal and not copying us in relation to this material, we do not think is a proper way to deal with these things. I'm sure Mr Bates's solicitors will say it was an oversight but the problem with that oversight here is of course that we did not know what was going on in relation to this material with the tribunal's versions. So the witness statement that had been provided suggested a request would be made to the tribunal but obviously we hadn't seen it. Now, that's water under the bridge and we're not in the territory of saying to this tribunal "Oh well you've seen material you shouldn't have, somehow you are tainted", because it's such an early stage in these proceedings and we...

(Frozen screen)

Basis of all of us --

CHAIR: Sorry Mr Beard, we lost you for a second. You were just saying you -- you just said you weren't in the territory of suggesting we were tainted but we lost you.

MR BEARD: I'm so sorry. I was saying that given we are so early in this process and that as, sir, you've already indicated, if you've skim read open material, unless you have, all of you, remarkably retentive memories it is unlikely that that is going to be a problem when we come to the CPO certification hearing itself. So we're not in the territory of an undue concern about it and we are as I say very grateful that the tribunal has moved to looking at redacted versions.

We do on the other hand think that there is a fundamental problem here, because it is clear from the correspondence we have received that Mr Bates's client wants to rely upon material that it claims is privileged, and/or confidential, and/or commercially sensitive, without that material going into a confidentiality ring at least. Now, we say

that is wrong. You cannot proceed on that basis. It is a fundamental principle of civil procedure that in hearing parties, which is what of course this tribunal has to do in relation to a CPO application under Rule 77, in hearing parties, the parties should be put in the same position, and indeed the tribunal should be in the same position as the parties, as to the evidential basis.

Now, we've mentioned in correspondence, and it's in the supplementary authorities bundle, I think you have, some of the case law that pertains to this. Now, I'm happy to take the tribunal to it, but the tribunal is probably very well aware that there are two fundamental principles in litigation. First of all -- well, there are many but in this regard -- that when you're communicating with the court, unless there are very exceptional circumstances, that material should be copied to all parties in the litigation. That was something that the Supreme Court specifically highlighted in cases concerning security-related material.

Furthermore, that you do need to have equality of evidence between parties in civil proceedings. This was specifically tested about a decade ago when the security and intelligence services and the Home Office wanted to rely on what it referred to as closed material in tort actions, but not provide it to the claimants. That matter went all the way up to the Supreme Court in a case called Al Rawi, which is in your bundles, and it was made clear that that was not an appropriate course and in fact you would need to have some sort of special procedure to deal with it. The legislation didn't accommodate that and therefore the claim couldn't proceed as the Home Office and the Security Services wished. It led in due course to the Justice and Security Act being enacted.

Now we recognise that there are nuances in that doctrine in relation to for example ex parte warrant applications, which were dealt with in the Haralambous case, and there may also be other statutory schemes, in correspondence for example Mr Bates

has referred to FOIA applications where there can be other issues arise, but we say the fundamental principle here is equality of evidence.

The big issue we have here is that if it is the case that the claimants do want to rely on material in order to make out the basis for their CPO application, which they say we should not see on any basis, we think there is a legal issue here that needs to be resolved and we think in practice it needs to be resolved in advance of the actual process for the CPO certification, because we need to know on what basis, what evidential basis, we are all operating for the purposes of making those applications.

The reason I go to this first before getting into the substance of the confidentiality discussion and the specific redactions is because we are conscious that we can have a discussion today about those confidentiality redactions, and I'll go on and deal with those in due course, but if in fact what Mr Bates's client wants to do is keep those matters confidential from us, and that's what he's arguing for, that the tribunal should see the underlying material, then all of this discussion could in the end be overtaken...

(Frozen screen)

Not do that.

CHAIR: Sorry Mr Beard, we lost you again. You said everything would be overtaken.

MR BEARD: Well there's a risk that everything could be overtaken if in fact Mr Bates really does need to rely on some of the redacted material in order to make out his CPO certification case, and it is not permissible for him to provide that only to the tribunal because he would have to reconsider his position in relation to confidentiality and so on in due course.

CHAIR: That does make sense and I completely understand why you want to put down a marker on it, and the principles of Al Rawi are familiar and I'm not surprised

you make the points you do, Mr Beard. I suppose there is a practical point, which is before you get into any of that you need to have a situation where a case has been made for material which you can't see, whether it's for privilege or confidentiality or some other basis, and that needs to be made good by Mr Bates. Also, even if that were the case, there would have to be a willingness on the part of the tribunal to proceed in circumstances where that material was available to everyone but not to you, as opposed to just not being available at all. Now, the situation may be complicated by the fact the tribunal already has it and that may play both ways in fact, because you may say there's some significance in the fact it's been made available to us which may have relevance for the privilege argument at least, if not confidentiality. But then you may also say that there's a question of once we've got it what are the implications for us then effectively closing our eyes to it.

But I suppose the practical point seems to me to be that we will have a better idea as to whether any of those points have any shelf life once we do have a sense of how much there is in this document that -- or documents -- that can't be provided or shouldn't be provided to you on any basis, confidentiality ring or otherwise. I suppose that's just a long way of encouraging you -- we would like to get into the question of what the basis is.

MR BEARD: No, no, absolutely. I'm not going to avoid doing that. But I think we need to be a little bit careful because if the conclusion of today were to be that actually some material would still be provided to the tribunal, or it would be Mr Bates's intention that some material would still be provided to the tribunal, which was not being provided at least in the confidentiality ring to us, then I think you still have in principle a problem dealing with this.

Now, obviously your concern, sir, is how relevant is that sort of material in practice? And we will have to visit that.

CHAIR: I think it's -- sorry to interrupt you -- it's not just a question of relevance. This is as I think mostly apparent from following Google. This is a balancing exercise and it's a balancing exercise both in terms of the legislative provision, so 101 and the provisions in relation to confidentiality of the balancing there of the likelihood of harm as well as the effect of confidentiality, the question of confidentiality. It's also a balancing exercise as to whether even in those circumstances that should lead to the sort of conclusion you're talking about. Of course there is a world of difference, isn't there, between matters of national security and questions of what might be in a funding agreement in terms of where those balances sit.

So just to reassure you, I absolutely understand the points you're making, it's entirely fair, but I would like to think we can make quite a lot of progress by having a discussion about those balancing exercises. Then when we get to the point where we hopefully can resolve that, and we can pick this point up again to see where that leaves us.

MR BEARD: Sir, I'm happy to proceed on that basis with one caveat. One needs to be a little careful about the use of the term "balancing exercise". Clearly when you are talking about a discussion, let's assume the parties and the tribunal are going to have the same material only, it is quite right that in relation to that situation it is a balancing exercise to be carried out by the tribunal as to whether or not material should be kept confidential and provided only to a confidentiality ring, or whether it should be made open such that for instance our clients can see it. That undoubtedly is right.

I also take the second point that there may well be a difference in the way in which the law works in relation to national security material as compared with funding material, and it may also be that Mr Bates would argue in due course that there is

a difference between the sorts of civil proceedings that were at issue in Al Rawi and the situation that we're dealing with here. Those will be arguments that are open to him. But I do think the tribunal needs to be cautious about using the language of "balancing exercise" in relation to what it can see as compared with what the parties can see.

CHAIR: Absolutely.

MR BEARD: It may well not be a balancing exercise at all, because without dragging us back to Al Rawi that is the sort of argument that was specifically rejected by the Supreme Court, that it wasn't that sort of, well how difficult is it to deal with these issues type point, how sensitive is stuff, how can we deal with it in confidentiality rings or PII processes or so on; it was saying no, you can't do these things. And that is not a balancing exercises point.

CHAIR: Absolutely understood. That's not the point I was making just to be clear.

MR BEARD: I'm so sorry.

CHAIR: No, no, no, you're quite right to bring clarity to it. I am talking about the situation where the question is whether it is provided to anybody, including the tribunal, for the purposes of the CPO hearing, or nobody. So that's why the reference to -- the marker was put down again, entirely fairly, and I understand the point you are making. Lord Richardson.

LORD RICHARDSON: It was to really come in on that point Mr Chairman, just to say that the issue here, Mr Beard, that the chair is suggesting is that we approach the matter initially on the basis that the tribunal or the parties will all have the same material.

I think the tribunal would require some persuasion, I suspect, that there is any other route open to it. Certainly if one looks at Al Rawi, there doesn't seem to be a great scope for any alternative approach so it seems sensible that we proceed on that

basis as a starting point.

MR BEARD: Yes. No absolutely taken, and sorry, the only reason I essentially make the points back to front is because I think it is important to contextualise them in relation to what I'm about to say. But that is the basis on which we're proceeding, in other words what is it that is needed to be seen by us, and by the tribunal, in order to make out the CPO application or properly consider it and have it heard? Because that's the test here. As the chairman has already adverted to, the references to privilege are frankly just confusing because the idea that you can provide privileged material to the tribunal and retain privilege is just something that I think philosophers might call a category error. But we'll leave that for another day.

With that, if I may, let we go back to the law on the basis that Lord Richardson has just put, which is we're working on the basis that everyone gets the same thing and therefore we're asking ourselves, if we're all going to have the same thing, can we justify or can Mr Bates justify the confidentiality privilege or commercial sensitivity grounds for the redactions? Or non-provision of whole documents that has occurred in this case?

Now, sir --

CHAIR: Mr Beard, just one other thing, actually. I think it may be just to frame the discussion but also the approach that Mr Bates may want to think about this. There is a scenario where everybody gets it, and that may be in a confidentiality ring or it may not be. There's a scenario which, as Lord Richardson indicates, I think is pushing uphill somewhat, where the tribunal gets things that you don't. So we talked about that. There is a scenario where Mr Bates may wish to consider a scenario where no one gets it; in other words, he decides that he's going to put in a redacted document that doesn't contain things that we don't see and you don't see.

Now, a question for you to consider and for Mr Bates to consider is whether, now

that Mr Bates has given us the entire document, even if we don't have it in front of us, whether you are entitled to ask for it, whether that changes the position as to Mr Bates's ability not to provide it, or indeed it should change the tribunal's approach as to whether or not it wishes to see it for the CPO application. So I just put that out there for you to think about and Mr Bates may want to think about that as well.

MR BEARD: That is why I mention the possibility that Mr Bates may actually need to revisit these matters because he's maintaining very extensive confidentiality claims and saying we can't see any of this even in a confidentiality ring, which would mean the tribunal doesn't see any of it, including for instance the litigation budget. Now, we do not understand on what basis this tribunal can sensibly proceed to assess a CPO without sight of a litigation budget. But you know, that is a matter for Mr Bates. If he turns up before the tribunal and says, "I want to make out my CPO certification but I'm not going to provide you with a litigation budget, I'm not going to provide you with a priorities document, I'm not going to provide you with a deed of adherence and you're only going to have a highly redacted LFA", that is up to him. We completely see that. The one passing point I do need to make is, sir, you invited me to make submissions and I'm happy to do so because it's helpful to set out our position, but I don't think we'd accept it's for us to knock over Mr Bates's assertion of privilege, confidentiality or commercial sensitivity. It is for him to maintain those positions or simply not have that material available in these circumstances. But I will just carry on because I think it's sensible if I set out the law where we are on things and Mr Bates can then respond and I think that perhaps takes matters in concrete terms further forward.

So with that, I know the tribunal will be familiar with it, but if you don't mind just indulging me to start with. If we could just go to the rules which are the first tab in the authorities bundle. Not the supplementary authorities bundle, the authorities

bundle.

I was just going to pick it up at page 45 if I may. Tab 1, page 45. I don't know whether you're working electronically or on paper so I'll provide both references. (Pause)

So we have 77:

"Determination of the application for the collective proceedings order. Tribunal may make collective proceedings order after hearing the parties."

CHAIR: If we now and then lose you for a few seconds, that's fine because it doesn't happen very often and not for very long but we lost you after you referred to 77 and read the first line.

MR BEARD: I'm so very sorry, if it persists I might try logging on through another route. 77, I was simply saying, tribunal may make a collective proceedings order after hearing the parties and in circumstances where it finds after that hearing that the criteria in Rule 78 and Rule 79 are met, whether referred to broadly as authorisation and eligibility conditions in the case law.

Then in 78 obviously we have the adumbration of various principles for the authorisation condition where the tribunal may authorise an applicant to act as a class representative. We see as we move through various criteria for instance in 78(ii)(a), can that person act fairly and adequately in the interests of the class members? Various other considerations. B, doesn't have a material interest that's in conflict. D, will be able to pay the defendant's recoverable costs if ordered to do so. These are all familiar but I think it's important to have them in mind as we go to the case law.

If we could then go down to 3, you'll see in determining whether the proposed class representative would act fairly and adequately in the interest of class members, the tribunal shall take into account all the circumstances including suitability of the class

representative. If the proposed class representative is or is not a member of the class. Whether that class is a pre-existing body and the nature and functions of that body.

Then C, whether the proposed class representative has prepared a plan for the collective proceedings that satisfactorily includes a method for bringing the proceedings on behalf of represented persons and notifying them of the progress. A procedure for governance and consultation which takes into account the size and nature of the class. Any estimate of and details of arrangements as to costs, fees or disbursements which the tribunal orders that the proposed class representatives shall provide.

So particularly in relation to 78(iii)(c) and operation of the scheme --

CHAIR: We lost you again at (iii)(c).

MR BEARD: (iii)(c). What we have is a situation where it is not only a concern about whether or not the proposed defendant's costs can be paid, but it is also whether or not there is an adequacy in relation to the costs and funding scheme for bringing the case. Those are considerations that have obviously been picked up in the case law as we'll go on and see. I don't think I need to deal with the eligibility criterion in 79.

So if we may just move to the guide, the tribunal guide which is at tab 2 in that bundle and I was just going to pick it up at page 150.

So the authorisation criterion, this is effectively the Rule 78 consideration in the guide.

Again, the tribunal will be very familiar with this, and I'll deal with it briefly.

If I go to page 151, picking it up just below the indent "Any plan for the collective proceedings". So this is 78(iii)(c) which I took you to just now:

"Tribunal expect the class representative to prepare the plan for the collective

proceedings which addresses the matter set out in the relevant sub-rule. Such a plan should be sufficiently detailed and comprehensive to correspond to the nature of the particular case. It should explain how the proposed class representative and its lawyers intend to ensure collective proceedings will be effectively and efficiently pursued in the interests of the class."

Then it sets out a long list of the sorts of matters that may appropriately be set out in a plan, helpfully.

Then just going back down to the final paragraph of 630:

"There should be appended to the Litigation Plan a costs budget to the end of trial. The purpose of the plan is to assist the tribunal in deciding whether to make a CPO. It does not constrain the jurisdiction of the tribunal to determine the appropriate procedures and if a CPO is made the plan may be subject to revision as the litigation proceeds."

Now, you can already anticipate where I'm going with this. It becomes very clear that you should be having a costs budget made available to you, something that we can critique, but you need it if you're going to consider sensibly the CPO certification application. The guide is saying that. As I say, that document is simply not provided to us.

If I could just go over the page, to 633, and this just picking up on rule 78(ii)(d):

"The fourth factor [sorry, I'm not going through all the factors] the tribunal is required to consider relates to the proposed class representative's financial resources. Would the proposed class representative be able to pay the defendant's recoverable costs in order to do so? By extension the proposed class representative's ability to fund its own costs of bringing the collective proceedings is also relevant.

"In considering this aspect, the tribunal will have regard to the proposed class representative's financial resources including any relevant fee arrangements with its

lawyers, third party funders or insurers. The costs budget appended to the collective proceedings plan referred to above is likely to assist the tribunal's assessment in this regard."

So with that brief reference to the rules and guide, if I could just skip forward to a couple of the cases, one of which, Mr Chairman, you will be more than familiar with. I'll start with that one. It's authorities bundle, tab 4, page 278, and this is the Kent v Apple case and it's the ruling on disclosure of funding arrangements. So I won't read through it all, but if the tribunal could just read paragraphs 2 to 8. As I say, I know the chairman's very familiar with this but just so we're all on the same place, that sets out broadly the facts here, that there had been extensive agreement as to what was to be disclosed. The only arguments concerned premia under the ATE policy and an excess provision. Now I should stress, we're not seeking disclosure of that material. That is not something that concerns us, but I just set that out here.

CHAIR: Yes.

MR BEARD: So just picking up a couple of points. As is absolutely obvious from paragraph 3, the PCR had there served a litigation budget and had actually made clear it would unredact the funder's return in relation to these arrangements that had been put in place. So plainly you had much more extensive provision of material in this case, and the argument was about much narrower issues than we are dealing with today.

If I may, I will skip forward then to page 283 at the bottom, under the heading "Privilege and confidentiality". I just mention these points, paragraphs 15 to 17. 15 obviously sets out a basic description of the nature of legal professional privilege, litigation and advice privilege, which the tribunal will be familiar with. But it does emphasise that it's a bar to disclosure and the idea that somehow if you're claiming

privilege in relation to materials you can still provide them to the tribunal but not to the other side, is just not consistent with that language.

And then 16 deals with non-LPP, sorry legal professional privilege, documents, referring to Rule 101 in relation to confidentiality. And we quite recognise that Rule 101, I can take you back to it, but that governs the way in which the tribunal deals with confidentiality issues.

And there it explains how 101 works:

"In the event of dispute tribunal must decide the matter having the regard to the need to exclude the information of the kind referred to in paragraph 1.2 of schedule 4 to the Enterprise Act. Such information includes commercially confidential information. Schedule 4 doesn't impose an absolute duty to exclude, rather a duty to have regard to the need so far as practicable."

I think this is precisely the sort of balancing exercise, sir, you were referring to earlier:

"Thus, outside privilege we consider that whether information should be redacted or disclosed into a confidentiality ring as a minimum is a question for the discretion of the tribunal balancing the relevance of the information with the interests in confidentiality."

But the question there is where does it go? Not whether or not it can be dealt with asymmetrically. But of course we're recognising here that there is some kind of balancing exercise to be undertaken.

There is then at paragraph 19 a general exposition of the principles that are derived from the case law that is cited by the tribunal. Again, I just invite the tribunal to read paragraph 19. (Pause)

If I could just ask you to go on to paragraph 20.

So it's recognised that the tribunal has a duty to scrutinise these matters but there

will need to be extensive disclosure made in order for the tribunal to be in a position to do so and obviously if that disclosure is made we say it must be made symmetrically. We say that these considerations must inform the way in which the tribunal carries out any sort of balancing exercise in relation to the redactions that have been made here.

Indeed, it is worth noting in 21 that although in this case it was decided the ATE premium and the solicitor excess should not be disclosed, they didn't need to be disclosed so they were kept redacted. In other cases, particularly in O'Higgins, in fact they had been disclosed because there was a carriage dispute there. In other words there were two people coming along saying they wanted to be certified and there was a dispute about which was more suitable and therefore those sorts of details did matter in those circumstances.

But as I say, I'm referring to this case both because it indicates a completely different approach that appears to have been taken by other PCRs, but also because there may be acute pieces of information which are very sensitive which are not germane or critical to the analysis that the tribunal is to carry out and therefore the balancing exercise that is then struck, excluding for instance the ATE premia, makes complete sense. We have no issue with that. As I say we're not pursuing that sort of information, having regard to the case law.

So having looked at Kent, if I may just move on to the Coll v Alphabet case, which begins at 293, and I won't take you through all the facts again, but I think it is just worth bearing in mind, if we could pick it up at paragraph 3, page 295.

CHAIR: Yes.

MR BEARD: So there you see:

"Litigation Funding Agreement being provided, ATE policy being provided, litigation Plan, litigation budget to trial all being provided.

"The PCR requested confidential treatment for certain parts of the LFA [litigation funding agreement] and the ATE policy on one or more of three grounds, commercial confidentiality, strategic sensitivity and privilege."

And if we just go on over the page to 6.1, it's just worth -- 6.1 and 6.2 -- just so you have this for reference. For instance, in relation to 6.1, there had been agreement to limit the solicitor's excess provision clause to only redact the figures for providing the wording. One of the points we make is that actually what we're really interested in is wording, conditions, exceptions and structure. There are times when we are interested in figures but we recognise that certain figures, like ATE premia, may be the sort of thing that it is not necessary for us to see in order properly to be able to critique this. And the same may be true for instance of solicitor's excess provision figures as recognised here.

The other thing just to note in relation to 6.2 is the priorities deed, and obviously we have no idea whether the priorities deed in this case is similar to the priorities deed in the present case because we don't have any sight of the priorities deed in the present case, but it was disclosed in that case.

So 7 sets out the actual disputes here which are very, very different in kind from the ones that we're dealing with. So you'll see this is the tribunal's ruling on two matters at the CMC which remain disputed:

"The PCR's proposed redaction of information relating to the deposit premium payable under the ATE policy."

Now, I should say up until I think it was yesterday, references to an ATE policy in this case was sort of pregnant with possibility but not manifest. We have been told now that there is an ATE policy in place and also, I should be fair to the PCR, they are going to disclose I think that document with the premia redacted to us. So we'll be able to look at these things. If there are other redactions we will have to think about

whether or not we care about them. But that's coming. So that is helpful in this regard.

But I don't know whether there's any issue in relation to the deposit premia that might arise here.

That's the first issue.

The second is whether or not the PCR should be obliged to disclose the percentage level of success fees under the PCR's CFAs entered into with her solicitors and counsel.

In this case we have nothing in relation to the CFAs. They have simply not been provided to us. It's not a matter of some percentages or some numbers having been taken out. We have nothing at all in relation to the CFAs. So what was being argued about here was a narrow question about two sets of figures. One was the deposit premia and the other was the success fees within the CFAs. Then we see the legal background being set out and I won't go back through that since that's stuff that I've already dealt with.

Paragraph 16 on page 299, you'll see citation of the paragraphs I've already taken you to in Kent. And then agreement with that in paragraph 17 which I just invite you to read if you would. (Pause)

Now there are just two points to make. First, obviously we have at 17.1 the issue to do with privilege that I've already touched on and I won't traverse again. Then we have the would or might cause harm consideration in relation to confidentiality. But I do emphasise 3, that harm that would be caused that we're talking about here, would or might be significant harm. And one of the things that we don't see in relation to any of the material that has been articulated, (audio freeze) articulated the defence to these extensive redactions or non-provision of documents, is my significant harm would occur in relation to the generality of these redactions or

non-provision of materials.

Then in 18 there's the reference to the BGL Meerkats case, where it's -- that was slightly different because that was an appeal against the CMA decision and the problem there was that lots and lots of material had been treated as confidential and it just created a practical problem for the running of the process of the trial and also for drafting a judgment and so there was a sort of admonition from the tribunal, please minimise the amount of confidential information because it makes it hard for us to actually deal with these things and it is not justifiable and it is contrary to the principles of open justice.

Then if we pick it up at -- 19 is again agreeing with Kent -- and 20, we then say, we refer to the same case law as the tribunal in Kent. Then we get the reference at paragraph 21 to paragraph 19 of Kent which I've taken you to, and paragraphs 20 and 21, I won't repeat those.

Then we go to 22 and there's a reference in 22.1 to the special nature of the collective proceedings, regime, which I think we all accept is an obvious truth of it.

But then I do want to emphasise 22.2:

"In our view, the starting point in collective proceedings must be that the whole of a PCR's funding arrangements are relevant to the tribunal's assessment of the CPO application. This is made clear by 78(ii)(d), 78(iii) and 6.3.3 of the guide. Subject to issues of privilege or confidentiality, we consider that the presumption should be that if the Litigation Funding Agreement or ATE policy is relevant then prima facie all of its terms are relevant and any redaction to the documents must be properly justified. This presumption of transparency is consistent with it being incumbent on a party to make a request for confidential treatment of a specified document or part of a document pursuant to Rule 101."

Now we say the approach that appears to be adopted in this case actually just

ignored that. We do not understand on what basis simply withholding whole documents, the priorities deed, the deed of adherence, the CFAs, the litigation budget, just wholesale withholding can possibly be consistent with that approach to law.

Part of the difficulty we then face is we get these generalised comments saying, well, you know, there's commercially sensitive material here or some of it -- or there is confidentiality. We do not have any way of getting traction on what it is that is actually germane here that really needs to be justified. We are dealing in generalities. Now, I'll come back to the particular provisions in relation the LFA that have been referred to in a moment because those are more specific, but the extensive nature of the redactions and non-provisions we say is just flying against this presumption of transparency that is required.

Then what's also noted in 3 and just in passing, is that you shouldn't use it as a kind of relevance test on these documents, as you might do in a sort of standard disclosure exercise. That's not the way to deal with these things.

And you'll also see at the bottom, if we go forward, I would invite you to read the remainder of 22, but I think we've probably covered most of the issues here.

What I think is worth noting is in 5, there's this concern about getting a tactical advantage. Because you get insight into the expectations of success in relation possibly to particular stages but overall in relation to the litigation, by getting certain figures, or certain specifications.

What is said is, yes, that can be a justification for material being redacted. Now, we're not disputing that that line of authority or the comments of Mr Hollander in his book on these issues, we recognise that.

But we do say that when you have the solution of a confidentiality ring, where it means that the clients in question can't see material, and therefore these fears that

somehow lawyers will receive instructions to somehow pursue matters in a different way because of what the lawyers have seen in relation to these matters, we say one needs to be extraordinarily cautious about. Because it is common in all sorts of proceedings, whether it's intellectual property proceedings, or all sorts of other competition proceedings, that lawyers receive what may be in a confidentiality ring highly sensitive material that may indeed be tactically beneficial in these circumstances.

But that doesn't mean that they shouldn't see the material in the confidentiality ring and that it should be completely redacted. We say instead these are materials that should be made available so that they can be looked at by the tribunal and critiqued at least by the legal teams. Obviously if you get material in a confidentiality ring and there is an issue that a lawyer says "Well, I think I need to take instructions", you have to come back to the tribunal and say "Well, can I release this sort of information or some gist of this information in order that I can take instructions in relation to it?" But this notion that the lawyers are running all this litigation, on the defendant's side, is not sound. I mean, it is different, plainly, where you have a collective action where you don't have individual claimants instructing and that's why it's very important that the class representative takes these matters responsibly; but on a defendant's side you have the ordinary client relationship. And you can't just go off on frolics...

(Frozen screen)

Confidentiality rings on a confidential basis because you can't convey that information to your clients.

CHAIR: We lost you after the -- you were just referring to frolics but I think we got the gist of it.

MR BEARD: I think I can move on.

So, as I say, we're not taking issue with the principle. We're saying you've got to be

extremely circumspect about really what this tactical advantage is if the material is in a confidentiality ring and does it justify, on the balancing approach, excluding it entirely from the consideration by the tribunal at the CPO hearing?

Just in passing, I'll pick it up, 26.3 on page 309, if you could just read that, you'll see the last couple of sentences again refer to the litigation budget. (Pause)

So just to conclude on this, it's made clear at paragraph 48, that the tribunal refused both the request for those specific figures that I highlighted, in other words the premia and the level of success fees, and it's said you can't have those, the balancing exercise means that they are to be excluded from the consideration.

So that was how that case culminated. But it's the principles that are important from this.

So what we're saying is that if you are going to rely on issues of confidentiality, then in and of themselves they are not a good reason why the material shouldn't be provided into a confidentiality ring. References to tactical or strategic advantage need to be considered extremely carefully when you are talking about material only going into a confidentiality ring. And on the other side we need to consider the extent of the unfairness that results in the parties and in particular the proposed defendants not being able properly to critique the funding arrangements that are being put forward which may be critical to whether or not a CPO should be granted.

Of course, there is a third issue here, which I'm sure the tribunal has well in mind, that given the tribunal's obligations to properly assess whether or not a CPO should be granted, it may consider that there is a real concern about it not having that material.

Now, we've had various schedules of redactions or justifications for redactions provided to us. There was a schedule provided on Monday which would be somewhere in the supplemental bundle. Oh, I'm sorry ...

(Frozen screen)

Moving very swiftly on, because I don't think it takes us much further forward. It does indicate that there were some other redactions that were justified solely on a privilege basis, which we don't really understand. Some were justified on a basis of privilege and/or confidentiality and/or commercial sensitivity, obviously there's a problem as to what the basis is because it may matter but that's something that I can pick up in relation to the more recent correspondence and I don't think I need to worry about the absence of that particular schedule.

If I take it in stages, it's probably sensible to pick it up in relation to the litigation budget first. I think the fullest treatment by the PCR in this regard is in a letter of 12 December, which is at tab 15 in your supplementary correspondence bundle. You've probably seen this one. It starts off with some preliminary remarks but at page 35 --

LORD RICHARDSON: Mr Beard, sorry to interrupt you, I wonder, and I suppose it's a matter perhaps for the tribunal, but I wonder rather than hearing you making submissions based on the imperfect information you have, given the legal analysis that you've set out, whether it might make sense to hear from Mr Bates in response to that, because it seems to me in some ways your -- whilst you have detailed submissions to make this no doubt, you are making a more fundamental point, aren't you, you are saying, well, the approach that is being adopted by the PCR here is not consistent with the legal principles you just explained to us; am I right about that?

MR BEARD: You are right. I'm very happy to now be silent and I can come back and deal with specific issues. I'm entirely in the tribunal's hands, I only started going forward --

LORD RICHARDSON: No, you did say --

MR BEARD: -- at any point.

LORD RICHARDSON: -- entirely at the invitation of the chairman and Mr Chairman, I put that forward tentatively, I don't know if that's a way of proceeding.

CHAIR: I think that makes sense. I'm assuming Mr Beard, you're not really going to be doing much more than referring to this letter and explaining that you don't know what it is that is the underlying point. I mean if you do want to say that it goes beyond that perhaps you ought to say it.

MR BEARD: There are specific points in relation to certain of the specific redactions but I think we do say that they frame their approach wrongly here. Therefore, there is an extent to which if they frame their approach correctly there are swathes of this material that should be provided to the confidentiality ring and I don't need to get into some of the specific issues. I mean obviously I can ramp up the levels of indignation if that helps in any way but I'll perhaps leave that for another moment.

CHAIR: I think we have the point, you are saying there are limited categories of things that are going to fall into the strategic sensitivity (inaudible) not a reason and you can't see how privilege applies. So presumably you are going to repeat those submissions in relation to each of these points.

MR BEARD: There are a couple of other points. For instance, there are some suggestions that if we ask for information about the particular costs available for particular stages, we'd be able to reverse engineer success fee calculations in the CFAs and we say for instance that's not true, because we won't have any handle on the number of hours that are actually anticipated under the funding arrangement, so we wouldn't be able to do the reverse engineering. So there are some particular points like that that, you know, just throwing that out there, is rather uncontextualised and I think I can deal with that when Mr Bates has worked his way through the particular redactions. I think it's important to make clear that here we're talking about not just the redactions within the LFA but all of the documents suite that we're

arguing about.

CHAIR: Yes. Okay good. Mr Bates.

Submissions by MR BATES

MR BATES: Sir, yes. I'm sympathetic to Mr Beard's position because of course he can't see at this point in time what additional material will be available to him by the time of the CPO hearing due to its being disclosed into the confidentiality ring. And also if one can't see some of the blacked out text that will in fact be available to him within the confidentiality ring, one may imagine that it perhaps contains exclusions et cetera which in fact the text may not actually do. And the marker he's laid down regarding the defendant's concerns, obviously entirely legitimate for him to express and they are all noted. Of course there's no disagreement about the points of principle laid down by the tribunal in the Kent and the Coll judgments to which you've been referred. That's all common ground. We're not disputing any of that.

But what I do say very clearly about this at the outset is that his concerns particularly about the PCR seeking to rely at the CPO hearing on material that isn't accessible to the defendant's representatives, even within the confidentiality ring, those concerns are entirely premature and, you know, likely to be entirely academic. Advanced on the basis of correspondence in which Linklaters seem to have approached matters on the basis that the documents they have now, the versions they have now, will be the same as what they have at the CPO hearing, when in fact we've made clear in correspondence, including yesterday for the avoidance of doubt, that that will not be the case and that the redactions we are seeking to maintain will be considerably narrower.

MR BEARD: I'm sorry, that is not clear at all from the correspondence. At the moment we have been told that in relation to the LFA there are provisions in relation to clauses 14.3, and 22.7 that will be provided into the confidentiality ring. Until

Mr Bates started speaking there was no indication that any of the other material we're referring to will be provided into the confidentiality ring. If Mr Bates is saying in fact litigation budget, large amounts of other material is going to be provided into the confidentiality ring, he may well be right that all of this goes away but that is not the position that has been put to us.

CHAIR: Mr Bates, what would be quite helpful would be to take it in bits because it seems that there may be a discussion about the confidentiality ring and what's going to go in and not go in. But just as a starting point, is there material that you are asserting privilege over? If so what is it and on what basis?

MR BATES: Yes. There's no material that we're asserting privilege over.

CHAIR: No claim to privilege. So this is all about either -- so we have the three heads that have been identified and there's privilege, there's a confidentiality because of commercial sensitivity and then there's the strategic sensitivity balancing point. So item 1, privilege; you're not asserting privilege as a reason not to supply any of this material to Mr Beard's clients or Mr Beard depending on how --

MR BATES: We're not asserting privilege as a reason not to supply that material to Mr Beard's clients and indeed we couldn't assert privilege in circumstances where we've provided that material to the tribunal. I think that would be a source of difficulty for us.

CHAIR: That makes sense. Just in relation to the third category, strategic sensitivity, or tactical sensitivity, or however one wants to put it, what is the nature of that -- the extent of that justification? Is there -- to put it simply, are we just talking about a small number of numbers as Mr Beard's indicated comes out of the Kent and the Coll cases or are you taking a broader position on that? What are the items that fall into that bracket?

MR BATES: Yes, well it is almost entirely numbers. There are essentially three

categories of material which we will be seeking to protect from disclosure even within the ring. The first is material that betrays the assessment of risk made by the lawyers' funder or ATE insurer. So that's the first category. That's material that has by and large been withheld in the other cases that the tribunal has considered these issues in.

CHAIR: Just to be clear, sorry, just before -- can you give us -- I'm not going to pin you down, I'm not saying you have to give us absolutely everything that falls under the category but what are you talking about? The ATE premia? The success fee amounts? What are the items you are actually asserting fall into that?

MR BATES: Yes, the ATE premia, the success fee amounts, the sharing of risk, if I can put it that way, the percentage fees that are deferred by the lawyers. Those sorts of figures.

CHAIR: Yes. Sorry, your second category?

MR BATES: The second category is the funders' funding caps that apply at each stage of the proceedings. And the position is that beyond those caps the lawyers are effectively working on a 100 per cent CFA for the remainder of that stage as they would be obliged to do under the Litigation Funding Agreement. So the lawyers would be obliged to fully prosecute the proceedings at each stage regardless or whether or not the funders' cap at that stage has been exceeded.

And the reason for seeking to protect that information is that it could be used strategically by the defendants to put pressure on the PCR and its lawyers, effectively by seeking to ensure that the cost caps at the relevant stages were exceeded. So that the degree of risk on the lawyers was increased. So that's our concern about that.

CHAIR: So Mr Beard I think was suggesting there was a concern about reverse engineering the rates to get back to the CFAs and he's saying that's not going to be

the case if you don't know what the hours are. Is that a concern or are you simply talking about the tactics of ramping up costs so that the costs limits are hit?

MR BATES: It's simply protecting the amount of the funding cap that has been agreed for each specific stage. And also the -- well I think the actual hourly rates are, we are not concerned about releasing those, but as I have already said with regard to the first category, the extent to which there is risk sharing by the lawyers, that percentage we would seek to protect under the first category.

CHAIR: Yes. So just this point about, if you like, busting the caps, I mean that applies generally to the budget, doesn't it? Just as a starting point if you know that the budget is coming, what it is, the fact that it is, I think it is a disclosed number, I had better make sure I don't give a number, I mean I don't know any numbers to give, so that is helpful. I think it is 19 million that is said to be available.

MR BATES: It is over 19 million, yes, that's right.

CHAIR: I mean you start knowing -- the defendants start knowing if that is the budget there must be consequences of not hitting it, on the assumption you are going to disclose the litigation budget, which I haven't looked at in any detail, but if it follows the format of other ones I have seen then it's going to have phases in the litigation and budget amounts attached to it, if you are going to disclose that in the confidentiality ring the same applies to those, if that point is made good. Now that isn't a point I think that has been taken, at least as far as I'm aware, and certainly not accepted, because those litigation budgets aren't generally available. So I'm just wondering why is this different from --?

MR BATES: Well, we will be disclosing within the ring the litigation budget with the amount shown as budgeted amounts. Our concern is specifically with regard to the caps that have been put in place, that have been agreed with the funder, which effectively reflect a distribution of risk as between the funder and the lawyers.

Because how it will work is that up until the relevant caps being reached the funding will be provided by the funder to the lawyers subject to the risk-sharing percentage. But once the cap is exceeded then for the remainder of that specific stage of the litigation the lawyers would effectively be working on a 100 per cent CFA and we say that there is a possibility of that information being used strategically and it's not information that the defendants have a legitimate reason to know or have access to, because the lawyers are anyway under a duty to fully prosecute the proceedings whether those caps are exceeded or not.

CHAIR: Just so I'm clear, are the stages you're talking about -- then -- this is quite difficult because we don't have the document to refer to, typically in a litigation budget I would expect there to be a column for the costs of this hearing, a column for the costs of the CPO hearing, a column for the costs of all the way through to trial, the different bits of work, and then there may well be some columns, I don't know how this one is done, there might be columns for appeal; is that what you're talking about? You're talking about the aggregate amount of each of those stages?

MR BATES: Well, the litigation budget will certainly have the information in that you are describing, sir. And the litigation budget will be disclosed within the confidentiality ring. What I'm talking about --

LORD RICHARDSON: Sorry Mr Bates, sorry to interrupt you, I'm finding this very hard to follow I have to say, because you are suggesting that you are disclosing the litigation budget. Do I understand that correctly?

MR BATES: Yes. There's two different documents we're talking about here. There's the litigation budget which is essentially our projection of what costs will be for the different stages of the litigation, that's the litigation budget, we're required to provide that document. It will be provided --

LORD RICHARDSON: Sorry, sorry --

MR BATES: -- will be provided in the confidentiality ring, but --

LORD RICHARDSON: Sorry to interrupt you, Mr Bates. I'm struggling to understand this because until you said that to me now, I'd understood the position of the PCR to be that they were not disclosing a litigation budget. That was the basis upon which Mr Beard appeared to be proceeding as well, and it seems that we're at a -- we're not on the same page, as it were, because --

MR BATES: Certainly not, no.

LORD RICHARDSON: No. I wonder if again, Mr Chairman, I'm very happy to follow your lead, but I wonder if it would help me certainly if at some point in Mr Bates's submission he could go through the list of documents and matters which are identified in the proposed defendant's skeleton and say what the position of the PCR is, because it doesn't appear to be that which the proposed defendant thinks it is and it's confusing to me therefore on that basis. So I apologise --

CHAIR: I think that would be helpful. What I would like to do before you do that Mr Bates, I would like you just to explain what it is this other thing is that you're talking about that is different from the litigation budget so that we don't lose that point. I'd like you just to finish -- you had a third category of what you called commercial sensitivity. I'd like you to tell us what that is too. If you could do that as quickly as we can. And then go through the skeleton and tell us what's in and what's out. Do you want to just finish the second -- the document -- the other stages and what is that and why it is different to the litigation budget.

MR BATES: Well, yes, I'll deal with that -- the three stages.

So the second stage was the funding caps that have been agreed between the litigation funder and the lawyers for each of the stages. Now, those are separate from the litigation budget. They are figures that are in the Litigation Funding Agreement, and what they set out is that the funder will fund all of the costs save for

the deferred --

CHAIR: Yes, I think we understand how it works. It's the relationship between the two of them -- sorry to interrupt you -- it is just we understand how they work, it's the relationship between the two of them that is confusing.

MR BATES: Yes. I haven't suggested that there is any relationship. Perhaps the stages are the same but the figures that are set out in the litigation budget are projected costs for the work needing to be done at those stages. That is separate from the caps that have been agreed, which reflect --

CHAIR: I just wonder -- yes, I see, I think that's helpful. I think just on that point and we can no doubt come back to it when we get back into the list of what is in and what is out, but it does seem to me that one of the reasons that we want to see the litigation budget, and that the guide makes it very plain that it's going to be put in, is to make sure that it is clear that there is funding for each of the stages and those stages have been estimated in a sensible way.

Now, if you are saying there's a dynamic in the funding arrangements that means at a certain point the funding actually stops and the lawyers have to take responsibility for that, it's quite difficult to see how we are going to make an assessment about the PCR's funding without understanding that. I just put that marker down for you to think about, because I'm not sure I see any difference in principle between, if you like, those two things. But anyway, why don't you give us your third category. You said a third category of things which fall into strategic sensitivity and tactical sensitivity.

MR BATES: Yes, and then the third category will be narrative text which reveals the litigation strategy. So for example the position that would be taken by the PCR in response to an application for security for costs. So where there's something that would actually disclose to the defendants what would happen if they made

a particular application, for example, that would clearly be sensitive material in terms of material that could give an advantage to the defendants if they had access to it.

CHAIR: It's quite difficult to deal with that, isn't it? Because, I mean I don't want to press you to tell us what is actually in it because that defeats the purpose of the discussion, doesn't it, but it does seem that there might well be quite a simple procedural process which is recorded in the documents saying this is what happens if an application for security for costs is made and it might also be something which actually has a substantive consequence as between a PCR and a funder in that case. Now in the first of those situations it's hard to see why there would be any advantage. The second of those situations, it's difficult to see why we wouldn't be interested in that. So it's quite a tricky point again and I'm not quite sure how you get to the bottom of that if we can't -- if we're not looking at the wording. You can't describe it so we don't know what the point is -- the more you tell us about the point the easier it is for us to work out what it is, but that of course defeats the purpose of you claiming it. So you might want to think about what the consequences of that are when we get to the CPO hearing and our ability to satisfy ourselves that the PCR is able to conduct the litigation through to the end, at least in general terms, on the basis of the funding arrangements that apply. Do you see the point I'm making? You may be forced to a bit of a choice that says as to whether -- you're leaving us in doubt about whether the PCR is able to do that because we just don't know, we know there are provisions that appear to be substantive and important but you're not showing us those. If they do give rise to some litigation advantage then it may well be because they do have some consequence for the PCR's position.

MR BATES: Sir, that observation is noted and it's certainly something we'll take away and think about. I mean it may be of assistance if I sort of go back on course as to what I was going to cover because I think it may genuinely assist.

The point which I was going to make was that there seems to be particular confusion on the part of the defendants as to whether or not the PCR is saying that we want to rely, that we intend to rely at the CPO hearing on material that the defendants haven't seen, even within the ring.

Now, that is not an application that we have made. It's not an application that we envisage having to make. There was a suggestion in correspondence over the last few days by the defendant's solicitors that there is this almost immutable principle, not subject to any balancing exercises, that means the party could never rely before the tribunal on information that hasn't been said seen by all parties and we have said we don't agree with that. But as matters stand there's no application from us to rely on material at the CPO hearing that the defendants haven't seen. So taking the point that you've just put to me, sir, we, the PCR, will have to make a choice as to what material we think we need to rely on in order to satisfy the tribunal that the relevant threshold tests for certification are satisfied.

If it seems to us that there is material that we need to place before the tribunal for that purpose, we will need to provide that to the defendant's representatives at least within the ring.

CHAIR: Well, you're back to the extract from Coll, aren't you, at 22.2, where the tribunal said that the starting point is that the whole of the funding arrangements are relevant and the presumption should be that the documents will be provided and the redactions have to be properly justified. That is going to be quite difficult, both as a matter of -- I'm not sure how you're going to justify redactions which you can't explain to us other than being generally narrative text within the litigation strategy, that seems to be a bit of a problem. I am also struggling to see how you are going to reconcile that with our understanding of the funding arrangements, because you could say in relation to any document it has some litigation strategy significance.

I mean knowing how much the budget is falls into that category. The point, and I think the point that does come out from Kent and Coll was that they were unusual cases in the sense that there were particular bits of data which (inaudible) which had no other material significance other than they might allow people to reverse-engineer risk analysis.

So you know, I think they should be seen in the backdrop of that more general statement in Coll as being exceptions rather than the rule.

So I'm just -- I think it would be helpful, I think it would be helpful to pick up Lord Richardson's suggestion, let's see what you have that's in play and what isn't. Mr Beard, I see your hand up. I would like Mr Bates to keep going and get finished unless of course there is something you need to tell us about and then you will get your turn in a minute.

MR BEARD: Of course Mr Bates should finish. I was just conscious that the suggestion that is being made that Mr Bates indicate what would be intended to go into the confidentiality ring could radically change what we're dealing with here. It must be said that this is a complete change of position from what we've seen in correspondence, because in correspondence in the material we've had we have had two communications that specifically said we will provide this redacted material to the confidentiality ring. None of the rest has, I just give you the reference, it's supplemental bundle, tab 15, pages 39 and 40, and it's the bottom box on page 39 and the top box on page 40, that specifically say we'll put it in the confidentiality ring. I will also provide, because it's not in this supplemental bundle, the schedule of redactions that was provided to us on 12 December, which include specific rationale for redactions being litigation privilege amongst other matters. Now I'm very content for Mr Bates to change his position but it is incredibly difficult for us to deal with this at the moment.

CHAIR: That point is understood, Mr Beard. Why don't we just get the position clear, Mr Bates. What's the best document for you to run through and tell us what is still in dispute effectively and what isn't?

MR BATES: Well, we can look at the Litigation Funding Agreement itself. Before I do that, I do want to say this though, if I may, which is that it's important to bear in mind the present situation we're in with the confidentiality ring arrangements and how that has impacted in practice on the PCR's ability to disclose the litigation funding documents. I mean, this isn't a case in which some form of confidentiality ring agreement had been put in place to facilitate some disclosure or whether it's been possible to put in place any confidentiality ring order before the CMC, because as we know the terms of it were only agreed yesterday. Now --

CHAIR: I think Mr Beard's complaint is different, though, isn't it? I don't think he's complaining about the timing, I think he's saying -- I think he's saying that the position appears to have been that you weren't going to put it in the confidentiality ring, if he had known you were going to then he might have created some more urgency in the confidentiality ring but he wouldn't be making an application for disclosure in relation to it. I think he's saying that actually all of the messaging he has had to date suggests that you weren't going to do that except in a small number of cases. Now, I don't think we want to spend our time -- we have limited time here, I would like to spend it on the things that you want to make a case for not being disclosed. Why don't we turn to the things that you -- some clarity around what you are saying you are going to provide to Mr Beard and what you're not and we can work out how to deal with those.

MR BATES: Yes, I'm happy to do that. But to be clear I wasn't seeking to respond to Mr Beard's complaint but merely to say that there are redactions that have been made within the material that's currently available to the defendants which were

made for reasons of commercial confidentiality, regarding commercial confidentiality owed to the funder. But we accept that commercial confidentiality wouldn't be a proper reason for not disclosing the same material within the confidentiality ring. So that's point that I wanted to make.

Obviously of course there are documents that weren't available previously, such as the ATE policy.

In terms of what's likely to be material that we wish to retain redactions of, that falls into three categories I set out earlier. I suggest I pick them up from the Litigation Funding Agreement itself and perhaps the tribunal can have to hand my learned friend's skeleton at paragraph 20 where he sets out the objections to redactions, if you like, bearing in mind these are redactions made to material not within the ring as I've said.

LORD RICHARDSON: Mr Bates, sorry to interrupt you, just before we move to the Litigation Funding Agreement and just so I'm clear about it, am I right to understand that the document currently which was initially provided in the bundle, entitled "The litigation budget", that is a document that you will disclose into the ring? Is that correct? No redactions?

MR BATES: Well, I'll have to take instructions on that. Certainly the document will be disclosed. I'll take instructions on whether there are likely to be any redactions at all from that document.

CHAIR: We need to take a short break for the transcript provider as well. So I think if you could take advantage of that, if we take 10 minutes now and we come back at 11.45. What we'd like from you is a very clear articulation of what you are asserting you are not going to provide into the confidentiality ring or otherwise and the reasons for that. And equally I think Mr Beard is entitled to a clear understanding of what he is getting into the confidentiality ring of those things he's requested. So however you

want to do that, and I'm conscious of the time, it's going to be -- we will sit until after 1.00 but I really would like to spend some time on the timetable as well. I think if you could bring some clarity to that at 11.45 that would be really helpful.

MR BATES: I think it's 11.40 now, if I'm looking at the time correctly.

CHAIR: We'll come back at 11.50 then, you are quite right, thank you.

(11.40 am)

(A short break)

(11.50 am)

CHAIR: We are ready to go again.

MR BATES: Yes. So to deal with the litigation budget first, I have taken instructions on that. It can be provided into the confidentiality ring with no redactions.

CHAIR: What about the CFAs?

MR BATES: Yes, the CFAs, they can be provided subject to redaction of the risk-sharing percentage in terms of the deferred element of counsel fees and solicitor fees, those figures.

CHAIR: And that won't go into the confidentiality ring presumably because it's just -- there is no need --

MR BATES: I think those won't go into the confidentiality ring but the CFAs would otherwise go in, just with those figures redacted.

CHAIR: Sorry, we started at cross-purposes. So the CFA, you are going to redact the risk-sharing provisions, so the numbers effectively?

MR BATES: The numbers yes. And then disclose them into the ring.

CHAIR: What is the reason for putting it into the ring?

MR BATES: Because there are provisions in these various documents over which the funder is claiming commercial confidentiality, that's my understanding, and obviously the PCR does owe confidentiality obligations to the funder in relation to the

arrangements. I mean, once those materials have been put into the ring it may be that there will be scope for having a discussion about what material can be provided out of the ring. I mean that's the usual, you know, way that matters are managed because it will be easier to have a discussion with the defendant's representatives about all of this material when they've seen the vast majority of it. Of course the problem at the moment with having the discussion is that they haven't seen these documents in the form which they will within the next couple of days.

CHAIR: Look, a couple of things. One is if the fastest way to deal with this is for them to go into the ring then that is probably the right thing to do, but just as a marker it is your responsibility to assert a confidentiality that the tribunal accepts, not for you to assume you've got it and then negotiate it with Mr Beard. Secondly, the fact that the funder might consider it commercially confidential is neither here nor there when it comes to the application of Rule 101 and Schedule 4, which requires you, as I think is clear from the case law, to identify not only that it's capable of being confidential, it's confidentially sensitive, but also that it would cause significant harm if it was disclosed. You might want to think about the basis on which you do this Mr Bates, because if Mr Beard then doesn't like what you've done and makes an application I think you are going to be on a cost risk in relation to an argument which you may not be in a very good position. I leave that with you --

MR BATES: I'm not suggesting -- yes, that's very helpful, sir, for that indication. Of course I wasn't suggesting that the funders should have the last word on any of this but equally it is important to us to understand what it is they are claiming confidentiality for so that we can then assess it, which we will do.

CHAIR: But when you say to understand, you should understand that because you had the documents, you filed the documents in August and presumably you've been negotiating them for months and it's not a question you should be asking now, it's

a question you should've asked when you appeared them and decided what you you're going to do with them. So unless I'm misunderstanding I don't think that's a question you should be asking now. It's a question you should know the answer to and if you wanted to take the position that it shouldn't be provided even into the ring, then you need to have a justification that you need to be able to provide in order to get to that point. Again that's very clear in the rules. If you look in the rules, Rule 101 requires you putting material into the ring to identify in relation to each argument the basis for the claim for confidentiality to justify what the ring is.

MR BATES: That's absolutely understood, sir. Obviously for reasons of litigation privilege I can't discuss what communications there had already been with the funder at that stage. But clearly there would have been some discussions with them at that stage. I'm suggesting there may be scope to have a further discussion with them and that's what will happen.

CHAIR: Let's move on let's talk about the Litigation Funding Agreement then.

MR BATES: Yes. Litigation Funding Agreement, the parts that we would wish to continue to redact within the ring are the figures in clauses 1.45 to 1.51. So that's at page 230 of the bundle.

CHAIR: These are the points you were talking about before, are they?

MR BATES: These are the cost limits that apply at each stage. That's the funders' cost limits beyond which the lawyers will be on effectively 100 per cent CFA.

CHAIR: What is the basis on which you make -- I know you've told us that you think it's a matter of strategic sensitivity but what precisely is it that you say is the problem and the significant harm that will arise?

MR BATES: Well, the significant harm that could arise is that the defendants will know information that wouldn't normally be available to them about the specific points in time at which risk will shift entirely on to the lawyers and that may provide

incentives for the defendants to seek to exceed the relevant cost limits or cause them to be exceeded at the relevant stages. There's simply no need, we suggest, for the defendants to have access to that material. In my submission relevance is relevant to the carrying out of the balancing test.

CHAIR: Well, mightn't it be relevant to us to assess at what point the funding effectively runs out and the lawyers are therefore faced with the choice, one assumes, of whether they continue in the funding arrangements or indeed are bearing the funding of the action themselves. I mean that seems to me to be a point which we might be interested in as part of the picture of the whole funding. So that would seem to me to be relevant.

MR BATES: Well, whether or not that is relevant to the tribunal's assessment of whether the threshold test for certification is satisfied is, I suggest, primarily a matter for the CPO hearing, and I have made my point that there will of course be a choice for the PCR in these circumstances, that if that is material that we accept may be relevant for the tribunal to consider at that stage, where the tribunal might otherwise be unsatisfied because it hasn't been provided with that information, then the information will have to be provided at least within the ring so that the defendants can see it.

LORD RICHARDSON: Mr Bates, sorry to interrupt you, I wonder -- I understand the point you're making, of course, but I wonder how is that consistent with two things? One is the tribunal's ability at the CMC to order disclosure. That's the first point. So in other words, when you say it's a matter for the PCR, it's not a matter for the PCR if the tribunal orders disclosure of these documents, is it? Then the second point is -- and this is I think that are you not essentially seeking to elide -- I'm sure not deliberately and not intentionally -- but eliding the obligation that there is on the PCR or any party seeking to engage Rule 101 to make out a case in relation to Rule 101?

In other words, it's not simply as you put it a matter for the PCR to decide whether or not they're intending to rely on the document or not, these are the matters that have to be engaged.

That leads me to the third point which is in Coll they talk about and they characterise the issue as being a tactical unfairness, in the sense that the environment in which you are in, the order which you are seeking, is an unusual one in any environment other than where we find ourselves in the Competition Appeal Tribunal. In that unusual environment therefore, in general terms, there are obligations incumbent upon you to disclose information which go way beyond anything that would exist in another commercial litigation environment.

I wonder if one focuses on the question of tactical unfairness, as opposed to just general strategic benefit, what is the unfairness here that you are pointing at?

MR BATES: Well, the unfairness that we're pointing out is that there is at the least the possibility that it will inform the defendant's litigation strategy in terms of knowing when the risk will be triggered on the lawyers at particular precise points in time because they will know the specific stages to which the relevant caps apply, the stages themselves we have to provide into the ring, but they'll know the figures that go along with that. In my submission, their ability to condition their litigation strategy by reference to how that risk-sharing will be triggered as between the funder and the lawyers does constitute an unfair tactical advantage to them. And I note that at paragraph 38 of the Coll judgment the tribunal was looking there not at a certainty of tactical advantage but at a risk of tactical advantage. That risk was then balanced against consideration of the extent to which the information that the PCR wants to withhold, which was in that case the deposit premium. Was it actually likely to be relevant to matters that had to be decided at the CPO hearing? So I don't disagree with any of the principles that your Lordship set out to me but I do submit that

relevance to the matters at the CPO hearing is also something that has to be taken into account as part of the balance, and that the risk of unfair litigation advantage is itself a reason, at least a consideration, to be put into the pot when deciding whether it's required to be disclosed -- whether the information is required to be disclosed to the defendants in the ring.

CHAIR: Why is it any different from knowing -- from the defendants knowing what the total budget amount is or the budget for each stage is? It is just the same point, isn't it? The same point applies that the defendant could take action that forced the PCR to spend costs and hit the budget, why is it different?

MR BATES: The concern has much more force, when what the defendants would have access to is a precise breakdown showing how the caps apply at different individuated points within the proceedings.

CHAIR: I'm not sure it does. It's the other way round, isn't it? Because with the budget you know that actually the money would have run out. Here it's just a question of who is funding it.

MR BATES: With the budget you know when money would run out only at a point where the totality of that budget has been exceeded but that's very different I suggest from a situation where you have a road map showing for each of the stages in the proceedings how much the costs have to reach before risks are transferred as between the funder and the lawyer at those particular points in time. It's much more precise information that can be used -- could be baked into a litigation strategy by the defendants.

CHAIR: So just to pick up Lord Richardson's point, if we were to reach the view -- is it open for us in your view to reach the view that we're going to want a disclosure of this material now, on the basis that you have filed it with the tribunal and if we were not satisfied, if for argument's sake we were not satisfied that you had met the

requirements of Rule 101 and had established a reason for profit and (inaudible) protection, do you accept it's open to us to make an order for disclosure of the documents?

MR BATES: Of course.

CHAIR: Part of the documents.

MR BATES: Of course.

CHAIR: Okay.

MR BATES: But I would draw the tribunal's attention to clause 1.17.7.2, on page 227, which bears out the point I made earlier about the duty that is on all of the lawyers to prosecute the action, at all of these stages, to the fullest extent, irrespective of whether the relevant funding caps have been exceeded at those stages. Of course, this is a case where there are experienced and well resourced solicitors and also an experienced team of counsel who have given those commitments. That is, I suggest, a consideration for the tribunal both now and at the CPO hearing as to whether the caps and the amounts of the caps that apply at each stages to the funders' support for the lawyers' fees gives rise to any concern about whether the action could be properly prosecuted at every stage.

CHAIR: Just while we're on that page, am I right in thinking that clause 1.19 is no longer a matter you are seeking to redact or does that go into the confidentiality ring?

MR BATES: It's going into the confidentiality ring but it will be unredacted within the ring.

CHAIR: Yes. Okay. Do you want to move on with the --

MR BATES: Yes, the other clause in the LFA is 9.3.

CHAIR: But just skipping over -- you skipped over 5.23, and 5.7, are those things going into the ring as well?

MR BATES: Yes, all of those figures will be released into the ring. And the dates

also.

CHAIR: So clause 9.

MR BATES: Yes, clause 9, specifically 9.3, this is going to what I described as the third category of material requiring redaction. So that's material that would reveal the strategy -- directly reveal the strategy that the PCR intends to adopt in response to an application that the defendants might choose to make. Now, I'm aware -- it's always difficult to set out precisely what's in the text without revealing what's in the text, but if I can emphasise that what's in 9.2 and 9.4, setting out how in general terms the PCR would respond to an application for security for costs, that material will be unredacted within the ring. But in 9.3, specifically in the text that comes after 9.3.1 and 9.3.2, it sets out what the funder would seek to do in response to a request order relating to security for costs. In my submission that particular small portion of text does reveal what the PCR's strategy would be in response to a possible future application. It would clearly be an unfair advantage to the defendants if they knew in advance the approach or stance that the PCR would take in response to a possible future application.

CHAIR: You see, it's quite difficult, I have to say Mr Bates, it's difficult to make any sense of that whatsoever. I just don't know how you think we can deal with that. I mean we have no idea what that might be, and the only conclusion I can draw from it is it's something I'd quite like to see because it may be quite relevant to the way the litigation is going to be conducted and therefore the certification. So I'm struggling really with -- can I be clear, you are saying everything in clause 9 is going to go into the confidentiality ring except for what? Is it just that paragraph below 9.3.2, the blanked out paragraph?

MR BATES: It's -- well I can narrow it down to the last four lines of the text that's below 9.3.2. So there's a block of text immediately below 9.3.2 and it's the last four

lines. You know, I'm happy for the tribunal to look at that text, which of course the tribunal has.

CHAIR: Well, we can't do that, Mr Bates. We're not going to look at documents that Mr Beard can't look at. That's just not going to happen. But look, I think the way to deal with this -- I don't think there's any prospect of us agreeing today that you've reached, you have discharged your burden in satisfying us that this should be protected. And no criticism of you, I think perhaps in a way you have a slightly impossible task. It may well be, I don't know what's in here, and it may well be you do have a justification for it but I'm afraid the basis on which you put it leaves us with no ability to make a reasoned decision about that.

And so I think the only thing we can sensibly do is that you can disclose everything you can into the ring in relation to this. If you decide as you do that you intend to maintain the claim for those last four lines, that's a matter for you, but you will need to make a proper application to us setting out the reasons in terms of Rule 101 and Schedule 4 what the justification for that is, if it goes beyond what you said to us today because I'm afraid what you said to us today will not get you over the line. So we're prepared to give you another chance on that. It may well be that if we can all see the list of clause 9, it makes it easier for you to make that argument. I want to give you the opportunity to make that argument if you want to. I'm afraid on the basis of what you told us we simply can't reach any conclusion, and we are starting with the presumption as set out in Coll that all these documents are available. So I think that's probably -- that's my suggestion about way we deal with it. Mr Beard may have things to say about that but provisionally subject to what he says that is what I think we might need to do here. Of course if you do do that then you will be subject to cost risks in relation to that point if you pursue and are not successful.

MR BATES: All of that is understood, sir, but if I may just lay down a marker about

one point, which is that I wouldn't accept, and I don't think you're putting it to me in quite this way, sir, that there is an absolute bar on the tribunal, possibly a different judge, looking at material in order to decide whether or not confidentiality is being properly claimed for it. The position is perhaps analogous to the hearing which I think I did in front of you, sir, some weeks ago about waiver of legally privileged material where a different judge considered that material and took a view as to whether it should be withheld or not. I mean the reality is --

CHAIR: I don't think it is analogous, Mr Bates, because in those circumstances everybody has seen that document and everybody knew about it except the judge, except the president, and of course it didn't matter because he was trying the case. So I don't think it's analogous at all. I think you can take it as a starting position we are not going to be easily persuaded to look at anything that Mr Beard at least cannot see. So by all means have another go at that if you wish but that is I think our provisional view subject to you producing any clear authority that might justify that. So my suggestion is the way we deal with this is we give you a last chance if you want to have a go at it. Our starting position is that this clause will be disclosed in its entirety unless you want to make that application. And it might be sensible for us to set a date by which you will do that, otherwise pending -- failing that otherwise that clause should be made available to Mr Beard. It's up to you. If you want to continue to press the point I'm just making the observation to you that I think it's difficult. There may well be ways you can do it. There may be a parallel hypothesis you could put to us about what sort of problem it was without actually telling us what the problem was. I leave it to you to worry about that but I don't think we're going to make any more progress today.

MR BATES: That's understood, sir.

CHAIR: That is subject to any observations from Mr Beard later on about that. But

that's my suggestion about how we deal with that. So that's clause 9.

MR BATES: Right. Those are the only redactions we propose to make in the ring to the LFA.

CHAIR: Just to be clear, so whistling through Mr Beard's skeleton, clause 10 goes into the ring?

MR BATES: Yes 10 goes -- everything goes into the ring apart from the things I mentioned, which are the figures in 1.45 to 1.51, and those four lines within 9.3.

CHAIR: Yes. That's very helpful. Then what about other documents? Priorities agreement and deed of adherence.

MR BATES: Yes, the deed of priorities we will disclose unredacted into the ring. The deed of adherence, we will disclose unredacted into the ring save for the stage cap figures. Those are the figures that -- well subject of course to any ruling the tribunal makes today on the points relating to clauses 1.45 to 1.51 of the LFA that we've just discussed.

CHAIR: That will follow the outcome of that point, yes.

MR BATES: Indeed.

Then there's the ATE policy that has recently been incepted and as we state in correspondence we will -- the funders agreed to provide a copy of it to the PCR for the purpose of making disclosure in these proceedings, and we propose to disclose it into the ring subject to the redaction of the premia which I understand is not disputed. I don't think the defendants are seeking the premia.

MR BEARD: No, at the moment we're not, for the reasons I've articulated we're not going after the ATE premia, if in due course it becomes relevant obviously we'll raise it but no for the reasons I articulated previously.

CHAIR: That's been really helpful, thank you, I think we've made some progress. Is there anything else on the disclosure point you want to raise before we go back to

Mr Beard?

MR BATES: No, I think that completes the suite of the funding documents.

Reply submissions by MR BEARD

CHAIR: Okay, Mr Beard. We have made some progress.

MR BEARD: We're in a different world sir, from the way we understood it in correspondence so yes definitely progress made and that's very helpful.

I think we have a couple of issues on process as well as a couple of issues on substance. We are going to pick up the substance ones first on the LFA essentially. I can probably deal with the 9.3 stuff most swiftly because I think we recognise that today there's not much we can do about this. And we hear what the tribunal says that it wants to give the PCR a second chance in relation to it now they've changed their position in relation to these matters. We obviously see the concern that the tribunal has in giving them the proper opportunity. So I'm not sure there's an awful lot more I can say about this. I mean I can go back through the material saying, look, this wasn't what you were saying up until today. I can make a big fuss about that sort of thing. I don't think I'm taking us very much further forward. Therefore the proposal you have, that they need to come forward with an application justifying 9.3, last four lines, so that it can be adjudicated upon if they are maintaining it, I think it's the sensible course. Before I go back to the other substance point it's probably sensible to pick up the broader process point here, which is if and to the extent there are redactions made in any of these documents, beyond that, on what has euphemistically been called mature reflection, then obviously similar applications will need to be made in relation to those.

But there is a further level of application that needs to be made here which is why these documents are in the confidentiality ring in the first place. It seems to us -- I hear Mr Bates talking about the funders' concerns and I'm not going to say that the

funders' concerns are irrelevant, they may be part of the consideration, but they are not, as the tribunal has already indicated, the end of this story. Therefore it seems to us that there need to be two applications made consistent with 101. Which is any redactions that you're taking stuff completely out of the ring, and at the moment that's 9.3 and we'll come back to the stage cost limit stuff in a moment, and then anything else that it turns out is going to be redacted.

Then there needs to be an application in relation to all of these materials, why it is they can't just be made public, because that was the big complaint in BGL. You stick all this stuff in a confidentiality ring and it just creates a logistical nightmare. That's quite apart from the fact that it's contrary to principles of open justice. For our part we can see there might be material that should be in the ring and not public but again we tend to think it's going to be figures and thresholds, not structures and general wording. We don't understand why this stuff needs to be in the ring at all and we want as little as possible in there. So we think that there needs to be two applications made in relation to these things. Now, how -- the timing on that I think we'll need to come back to because of course these things factor into how we're going to deal with the process through to the CPO. Whilst I'm at it on process, I think but I'm not sure, I think the position that Mr Bates is putting forward is that he will not, or the PCR will not be seeking at the CPO certification hearing to rely on any material that it will ask the tribunal to look at but not us to have. Now, if that is the position, fine, if on the other hand there is still a residual category of information they do want the tribunal to look at but not us, again that is an application that needs to be made. There may be nothing to be said, grand, but we need to absolutely bottom that out.

So that actually deals with the process stuff. I think it deals with the one of the substance issues on 9.3.

With that, if I go back to the other substance point, which I think probably one can conveniently take by looking at page 230 in the bundle, which sets out the stages. The concern we have in relation to them is if one looks at 144, 146, you have stage 1 means, we don't even know what stage 1 is. We don't know what stage 2 is. We do know what stage 3 is. Stage 3 is the appeal proceedings before the Court of Appeal. Now, the natural inference we have is that stages 1 and 2 are probably -- and I'm not asking Mr Bates this, this is just our inference -- stage 1 is probably something to do with certification and stage 2 is to do with trial before the CAT. At that point when one thinks about it as those categories the concern we have, and we imagine the concern the tribunal will have, is working out what the actual costs available for each of those stages is. Because that goes to the considerations we were referring to in relation to Rule 78.

Now, in relation to those matters, it seems to us that it is of critical importance that we and the tribunal understand whether or not there are sensible cost limits being set in relation to those stages which we presume are the stages coming before you. Because the problem we have is that these numbers of 19.7 million that are bandied around as total available sums, those include the uplift that goes to the lawyers if they succeed. So the actual money that's available as a budget if they don't succeed is much lower. How much lower, we're not asking for the percentages, we're asking for the total amounts.

The objection that was taken in the correspondence on this -- and it is perhaps just worth going to that, if I may -- because Mr Bates didn't press the point but we do think that it's important. It's in the supplementary correspondence bundle. It was the letter that I took you to at tab 50.

CHAIR: Do you have a page number for that, Mr Beard?

MR BEARD: Yes. So this is the section that we have here.

CHAIR: Do you have a page number for that?

MR BEARD: Yes, page 37.

CHAIR: So this is the --

MR BEARD: I'm sorry, 36 is probably the start.

CHAIR: So this is the 12 December letter?

MR BEARD: Yes, this is the 12 December letter, it was the one where I pointed out that in other boxes they were going to give stuff in the confidentiality ring. We saw this as being objections to it being disclosed at all but we now understand that's not the position being adopted.

But you'll see there at the top of that in clause 1.19 there's a costs limit. Now Mr Bates is not saying that they want to redact anything in relation to clause 1.19 any more, as I understand it. The cost limit and the amount of available funding available to PCR are not one and the same because what has been said is that Ms Neil has asserted that the proposed class representative has access to 19.7 million. But what we see in the explanation is they're not one and the same. The amount of available funding to PCR includes the amount funded by counsel and solicitors.

CHAIR: Yes.

MR BEARD: Now, it's slightly funny language but what we understand that to mean is that the 19.7 includes all the CFA uplifts if they succeed. So the actual amount of money, which may well be disclosed in the litigation budget, we're not saying otherwise, we just haven't seen it, is lower. Then it says:

"By providing the cost limit and the litigation budget and the proposed defendants would be able to reverse engineer the discounted rate solicitors and counsel are acting under pursuant to the CFAs."

So this was the rationale that if you got these numbers you'd be able to reverse out the CFA percentages, but of course that's not true. I already touched on this.

Because you don't know the hours that are being spent or anticipated to be spent, either by lawyers as a whole or between solicitors and counsel, you don't have any way of working out how these CFA percentages would come out. What you do instead have a handle on, if you get these numbers, is what the total amount of costs actually available to the PCR are for each of the relevant stages. We say you need that because otherwise these are the numbers -- they don't tell you anything about whether or not, before you, before we get to the Court of Appeal, we know what the relevant funding arrangements are so that they can be properly scrutinised. We don't, as I say, know the definition of the stages, we don't know the numbers that underlie these things, we say we need both of those, we need the cost limit overall and we want at least the stage 1 and stage 2.

Stage 3 and stage 4 are less relevant because they're appeal, and actually what we're concerned about is the availability of the funds through to the end of these proceedings at the moment.

So that's why we say it is wrong to redact from the confidentiality ring either the nature of stage 1 and stage 2 or the cost limits that apply there, because they are highly relevant. We do not think the concern of being able to reverse-engineer actually exists.

It's also worth bearing in mind, Mr Bates slipped into that easy elision of saying, well, if you gave it to the confidentiality ring the defendants have it. The defendants don't have it, it is external counsel and solicitors that have it.

CHAIR: Mr Beard, just a couple of things. Firstly, I think Mr Bates is not pursuing the argument that says you can reverse engineer in relation to the stage costs.

MR BEARD: Okay.

CHAIR: What I think he was actually saying was that if you know that then you might be incentivised to create a situation where the stage costs are met and the poor old

lawyers are bearing the fees.

MR BEARD: If that's the only argument, sir, you've already put the point back to Mr Bates which is that exists as long as you are trying to assess what the actual costs available to the PCR are. As I say, this isn't a refined process, I mean we're not looking at some kind of tiny incremental stages, that there's some kind of sophisticated -- we're looking at two stages, so far as we can see.

CHAIR: You are also, I think -- this clause, clause 1.19, cost limit, if that's going into the ring you're going to know the difference.

MR BEARD: We're going to know that.

CHAIR: So actually the aggregate amount of the deferred fee is going to be available to you anyway. What I think is peculiar about this is -- I say "peculiar", it's just very opaque, isn't it? -- is there a difference between the aggregate -- if you took the litigation budget which presumably has got some phases in it which correspond in some way with the stages --

MR BEARD: I'm assuming so.

CHAIR: -- one would assume that there would be some relationship between some of the numbers in the stages and some of the numbers in the budget, and if there aren't one would want to know whether that created a distortion to the numbers in the budget. I think that's the point I think that I --

MR BEARD: I mean, there are issues about comparison and coherence of the documentary bundle, as it were. But I mean I do go back to the fact that you have two stages which appear to be CAT stages here. We're going to get the total cost limit. What is being said by Mr Bates is, "No no no no, for the purposes of assessing whether or not you have sufficient funding available as the PCR, we're not going total you what the cost limits are for the stages relating to the CAT proceedings." We say, well, for a confidentiality ring that is obviously material that should be provided

because that is the way it's going to be tested.

CHAIR: I think he's saying -- as I understand it I think he's saying we'll get that in the litigation budget and this is perhaps a more subtle point which is that there's a change in the actual funding arrangement for those cost limits when you have these stage points. But I don't think that changes the point.

MR BEARD: That's not what's in the LFA, I mean these sorts of points about the -- I mean, if what he's saying is that once you've hit the cost limit you're dependent on the lawyers continuing to commit to present full bore in relation to these things. I mean, there is an irony about that submission made by Mr Bates, because if he is saying, well, the lawyers will carry on whether or the cost limits are hit, then plainly we don't get any tactical advantage at all by this. I mean, we can run through the cost limit and the lawyers will keep going, they're like RoboCop, we can't drive them away in these circumstances by running through the costs limits, it doesn't make any difference. But leave that to one side because I don't actually think that's really that plausible a suggestion, and it's why the tribunal is asked to actually look at these things. Because it is a recognition that if you don't have sufficient funding available the exhortations that exist that lawyers will continue may not be borne out and then you get a problem with these proceedings having incurred potentially lots of costs and time and so on, actually petering out, not being dealt with properly. That's what you want to avoid at the outset.

So that's why we say it's plainly relevant that the stages before the CAT at the very least -- I mean, we say all of them but I mean we're most concerned about the CAT at this stage -- to know what we're actually talking about. The tribunal is going to want to know that too. That's why we say, you know, in relation to these issues, to provide them into a confidentiality ring is plainly justifiable in the circumstances. Mr Bates, with respect to him, is nowhere close to meeting the 101 threshold of

saying that there is significant harm of providing these materials into a confidentiality ring given the countervailing concerns that exist about the costs available in relation to these stages.

Now, I'm slightly conscious that if I end up persuading the tribunal that that's the case and we very much emphatically consider it is right, then we are -- I have already accepted that there may have to be another round of application in relation to other elements here. So I'm very happy for the tribunal to determine these things now because we say it's plain and obvious this material should be disclosed in the confidentiality ring. But if the tribunal has concerns I guess the alternative is to allow Mr Bates to go away and consider more carefully whether or not he actually wants to maintain all of these redactions given that he is giving the cost limit at 1.19 and that what we're really focusing on is how this works in relation to the CAT proceedings.

So I think that those are the key issues here. I mean, it's plain vanilla cost limits that should be provided.

CHAIR: Okay, thank you. Is there anything else from you, Mr Beard?

MR BEARD: Can I just take one moment of instruction?

CHAIR: Yes, of course.

MR BEARD: Yes Ms Sarathy just pointed out to me that one issue here is that as we understand it from the material we've been given the litigation budget will continue to include all the uplifts in the total sums being budgeted. Now, we are not clear whether or not there are other numbers in there because obviously we haven't seen it, but obviously the issue here is what the actual money would be without a presumption of success on the part of the claimants, which is essentially what they're working on the basis of potentially in their budget.

CHAIR: Yes. So I think certainly in some of the other budgets I've seen, and I sure you have seen too, Mr Beard, CAT do tend to get a funded number by the funder

with a deferred element then added on as being an additional layer.

MR BEARD: If that's there in the budget then it becomes more and more difficult to understand why there is an objection here and what this notion of significant harm of keeping this material completely redacted in the confidentiality ring is. Because if the budget breaks it down then we are in the territory, sir, of the point that you were raising about questions of consistency and coherence between the two. Obviously, in order to test that, you need to be able to look at the figures that are actually in the LFA.

So it's very, very difficult to see how you can make out significant harm if you're giving to the confidentiality ring the numbers in the litigation budget that are separated out as you say.

So again I think that reinforces our position.

CHAIR: Okay, well thank you very much. We will retire for a few minutes, I don't think we'll be very long, but five, possibly ten. The we will come back and let you know where we've got to.

MR BEARD: Yes. In relation to timings, perhaps we can revisit all of that depending on where we get to.

CHAIR: Absolutely. I noted those points you made, Mr Beard. What we will do is we will pick up -- when we come back we will pick up timetable in the wider sense. So we'll pick up those document points and the hearing itself.

MR BEARD: I'm most grateful, thank you.

CHAIR: Thank you.

(12.35 am)

(A short break)

(12.50 pm)

Ruling

CHAIR: So we have before us effectively an application for disclosure in relation to documents which have been provided to the tribunal in an unredacted form which subsequently the tribunal indicated it would not review and had been replaced with redacted documents in the tribunal's bundles. Those documents are a Litigation Funding Agreement, a litigation budget and some fee arrangements with counsel and solicitors.

In the course of the discussion that is an issue which are set out in Mr Beard's skeleton at paragraph 20 and following and have narrowed down to what's called the stage costs limit issue which is 1.44 and following, and it's some numbers in clause 9 of the Litigation Funding Agreement. The other provisions of the Litigation Funding Agreement which were in dispute are going to be provided into the confidentiality ring that has been agreed. The litigation budget is going to be provided into the confidentiality agreement that has been agreed and so are the conditional fee agreements, subject to redaction of the figures related to success in these documents. So the only items which are still in contention or were still in contention at the conclusion of the discussion were the stage cost limits and parts of clause 9 which follow clause 9.3, namely the last four lines in that clause.

Now, we do not consider that the PCR has made a case for confidential treatment in accordance with Rule 101 of Tribunal's Rules, with particular reference to the provisions in paragraph 1.2 and schedule 4 of the 2002 Act. We are, however, not going to make an order for disclosure of those provisions today. As discussed with Mr Bates, we intend to allow PCR a further opportunity to make a properly justified case for the redaction of those provisions in accordance with Rule 101, and paragraph 1.2 of schedule 4, setting out both -- or setting out the nature of the harm contended for, and in particular the significance of that harm as referred to in Coll.

When we have that justification and any observations that the proposed defendants

wish to make we will make a ruling on those provisions and whether or not they are to be fully disclosed.

Any justification which the PCR wishes to make should be made in writing to the tribunal and copied to the proposed defendants by 30 December. If the proposed defendants wish to respond, if so advised, they should do so by 9 February.

At the same time we consider that the material that has been placed into the confidentiality ring needs to be properly dealt with under Rule 101 of the Tribunal Rules, and that requires again an application in writing indicating the reasons for the claim for confidentiality. That needs to be done in relation to all items in the funding documents which Mr Bates has indicated will be placed into the confidentiality ring, and it should be done again by 30 December, and any observations that the proposed defendants wish to make to be made by 9 January.

We will then respond with a ruling as to whether both requests are upheld.

That deals with, I think, the question of the disclosure of documents, unless there's anything that I've missed, Mr Beard and Mr Bates?

MR BEARD: Just one or two issues. One is just in relation to practicalities of timing. 9 January is a Monday, it's just a week after new year. I think there may just be availability issues. If we could have until 13 January, which is the Friday, to respond, we'd be very grateful.

I think the other thing is we need to make sure there is a timetable for the disclosure of the material, the other material, into the confidentiality ring. Mr Bates said it will be in couple of days, that's grand if that is actually going to be the case, but obviously any consideration of these issues, and indeed Mr Bates's own submissions will presumably refer to and need to take into account the surrounding documents. Because, as we were canvassing, for instance, issues as to the significance of harm, or potential significance of harm, may depend on what other material is available.

So whether or not Mr Bates can give and the undertaking or an indication when he can provide those materials. I mean, I don't want to be unreasonable because I'm conscious we are running up to Christmas, but we just need to be able to look at that stuff and take that into account so that when we receive the submissions on 30 December we're not just looking at a whole panoply of materials for the first time.

CHAIR: Yes. So I think, unless Mr Bates has an objection, I don't think it makes any difference whether it's the 9th or the 13th, in fact, so the 13th would be fine.

In relation to the provision of material to the ring, that should be done immediately. What I suggest -- and again Mr Bates say if you don't think this works -- but we need to confirm that the order has been made for the confidentiality ring and I would suggest from two working days of notification of that to the parties the material should be placed in the ring. Mr Bates, is that feasible, do you think?

MR BATES: Well, it can be two working days from the time when the ring is in place. Obviously there will have to be signatures on the undertakings and everyone will have to agree it's in place. But as soon as that's been done the material will be provided effectively straight away.

CHAIR: That's really helpful, thank you.

On the timing, you presumably have no objection to 13th January?

MR BATES: No sir, no.

CHAIR: Okay. Anything else, Mr Bates, that relates to the confidentiality point?

MR BATES: Nothing from me, sir.

CHAIR: Good, okay. Shall we move on to timetabling?

Discussion re timetable

CHAIR: Just as a starting point for this, we are keen to make sure this case gets moving. I think I have to say when we saw the timetable that was proposed by both parties we were a little surprised that they weren't shorter. Having said that, having

worked quite hard to try and identify an earlier date, we have struggled a little bit with our diaries. In fact, actually, the only date of those suggested to us that does actually work is 7, 8 and 9 June. Now, we are open to exploring other dates but it seemed us to -- I don't know, Mr Beard, whether you've given any indication of availability in relation to those dates? I think they were put forward by Mr Bates. I don't know what your position is in relation to those.

MR BEARD: I think I checked, I will double-check, but I think I'm available ... Yes, yes, in fact we've gone so far as actually to pencil in as a possibility. So, so far as I'm concerned, that works. I'm actually here only today with Ms Sarathy, Ms Thomas isn't here, I know that both of them -- that only one of them can make that hearing date, Ms Sarathy will be with me for that. But that is not a problem overall.

CHAIR: Well, if anyone who can't make it would forgive us. I think probably having an alignment between all the members of the tribunal and the two of you probably helps us quite a lot and I suspect that you may struggle to find anything.

MR BEARD: Yes.

CHAIR: So if that's a helpful indication just in terms of where this likely to end up, then it seemed to us that you're then -- and I don't know if it's helpful to look at the table that Mr Bates attached to his skeleton -- the question is how does it work, working backwards from there. The things leading up to the hearing, the blue dates, seem to us to be perfectly sensible for the purposes of skeletons, bundles and authorities. The question is really whether those dates for the response and the reply make sense. It did seem to us actually, Mr Bates, to be quite tight. We would be open to later dates for both of those, and we think that would work with a June hearing. We provisionally suggest 28 February for the defendant's response, and 14 April for PCR's reply, but we're open to a push back on either of those if that is what you'd like to do.

MR BATES: Certainly from the PCR's perspective those dates are workable for us.

MR BEARD: I would just take instructions, but I think those are workable for us. The only caveat I have to place is that if the issues raised in relation to the confidentiality matters, the applications that are being mooted, 30 December, responding, 13 January, require a hearing, then I can see that that might have a knock-on effect. I'm only saying might, I am not saying necessarily will, but I think, subject to my taking instructions, so long as I can put down that marker that it might be necessary to shift dates slightly depending on where we ended up with any hearing on that, then that is fine.

I suppose the only other thing I have to say is I think we haven't had the final confirmation but I assume that if Mr Bates and the PCR are intending to ask the tribunal to consider anything of the CPO hearing that is not to be provided by us he will indicate that by 30 December as well, because that would require potentially a substantial hearing to deal with these matters.

CHAIR: Yes. I didn't invite Mr Bates to give a view on that because our position on that is that we don't think that would be appropriate. But obviously if Mr Bates wants to make that application then I can't stop him. I don't think you should be in any doubt, Mr Bates, that we are -- and I think your position, as I understand it, is that you're not intending to do so.

MR BEARD: If you could just give me two seconds to take some instructions, I'd be grateful.

CHAIR: Of course. (Pause)

MR BEARD: I think there would be a preference to move to the first week of March, but I think, if we encounter difficulties in preparing our response, we will obviously communicate and seek a short extension. But we think that we can work with 28 February and then six weeks, 14 April, we have no objection to.

CHAIR: That's very helpful. Good, thank you.

Discussion re publicity notices

CHAIR: So the only other thing I think we have to deal with is these publicity notices. I was rather hoping we didn't have to deal with them, but is there really a dispute about the dates of those?

MR BEARD: It's not really a dispute about the dates. I have taken instructions over the short breaks we've had in relation to them. There are one or two factual matters where we do need to go back in relation to it. They are limited but we do need to go back. Given that there are one or two things we've got to check, including the specification in the publicity about how the action is being paid for, in relation to which we would obviously like to see the material into the confidentiality ring before we provided our feedback on that just to make sure that we're confident that we're getting that right. But we can do that relatively swiftly.

The other matter is in relation to the description of the role of SIEUK, which may well be we can reach an agreement to remove it from the proceedings anyway.

But those are the key issues.

So I think we would prefer to give ourselves time to be able to digest the material we're going to get and respond in relation to this material, that the date was 30 December for publicity. We don't see a massive difference between the two, but it would make life easier in terms of being able to respond and make sure that the factual issues were correct.

In terms of the overall tone and so on, I should make clear we're not going to be taking issue with, you know, wording and tone, we recognise that there's a certain neutrality about it that we understand.

CHAIR: Mr Bates, do you have views on this? Does it matter if it's the 30th?

MR BATES: I think the difference of ten days matters very little. What I would say is

that if the defendants have any concerns about the wording of the notice after having received the material we're going to give them, within the ring, within a matter of days, if they could come back to us within perhaps two or three days after that, especially bearing in mind that they do have in-house lawyers within the confidentiality ring. Then that would obviously be helpful in ensuring that the 30 December date can actually be met.

MR BEARD: Look, without taking instructions, I will say we will do our best because the timings we're talking about I suggest will be harmonious with the fact that everyone wants to run away for Christmas. Therefore, I anticipate that people will want to review stuff quickly, respond quickly, and get rid of this so they're not having to think about it over Christmas, tempting as it may be.

CHAIR: Okay, well on that basis then I think we have 30 December, and presumably 20 February follows from that, Mr Bates, is that right for the second date? I don't know whether it matters terribly again but let's just be clear about that.

MR BATES: Well, if we added ten days to our proposal of 30 January that would take us to 10 February.

CHAIR: I see. Mr Beard is not going to argue about that.

MR BEARD: I won't argue about that at all.

CHAIR: That's that.

Is there anything else that we haven't covered we need to deal with?

MR BEARD: I will just check on my side, if I may, for one moment. I don't think so, but I'll just confirm.

From our point of view, no, and most grateful for the efficiency of getting it done by 1.00. Thank you very much.

CHAIR: Mr Bates?

MR BATES: No.

CHAIR: Thank you very much, that's been really helpful, we have made a lot of progress. Of course we look forward to hearing further submissions from you, Mr Bates, according to the timetable, and we have the date in the diary as well. So we will see you all again.

MR BEARD: Thank you very much.

CHAIR: Thank you very much.

(1.05 pm)

(Hearing Concluded)