IN THE COMPETITION APPEAL TRIBUNAL

Case No 1597/5/7/23 & 1581/5/7/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 31st October 2023

Before:

The Honorable Lord Richardson
Paul Lomas
Professor Alasdair Smith

(Sitting as a Tribunal in England and Wales)

BETWEEN:

GLOBAL-365 PLC & Utilita Energy Limited and others

Claimants

v

PayPoint Plc and others

Defendants

A P P E A R AN C E S

Colin West KC & Ligia Osepciu for GLOBAL-365 PLC
(Instructed by Addleshaw Goddard LLP)

Derek Spitz & Harry Stratton for Utilita Energy Limited and others
(Instructed by TupperS Law)

Josh Holmes KC & Daisy Mackersie for PayPoint
(Instructed by Norton Rose Fulbright LLP)

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Tuesday, 31 October 2023

(10.30 am)

Housekeeping

THE CHAIR: Good morning. I need to begin by reminding everyone that some of you are joining us via live stream on our website, so I must start therefore with a customary warning. An official recording is being made and an authorised transcript will be produced. But it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, and breach of that provision is punishable by contempt of court.

Very well, with that beginning, Mr Holmes, you're sitting to my left.

MR HOLMES: Yes, sir.

THE CHAIR: Am I right to think that you are opening matters?

MR HOLMES: I am happy to do so. We hadn't actually discussed the order of play. I am very happy -- I have an application as you'll have seen, I'm very happy to develop that, but equally I'm happy to take the points in the order of the agenda that the Tribunal would prefer. I'm in your hands, sir.

THE CHAIR: Well, I think the first thing that we would be interested in understanding is to what extent matters had developed from the skeletons and the information that we had that was last submitted. Because I would understand, even if matters haven't progressed from there, that much has been agreed essentially between the parties.

MR HOLMES: That's correct, sir. There's a large element of common ground. As you'll have seen there are really two outstanding matters between the parties. The first concerns what disclosure should be made today. You'll have seen from the order that PayPoint has agreed to requests for disclosure at this, the first CMC, from the claimants. But there is a question as to whether any disclosure should be made by

the claimants to be ordered at this CMC. That's the first point.

The second point, which very much follows from the first, is the timetable according to which we will then work to trial. There are two points in relation to that, sir. The first is as to the end date, by what date could we realistically get the case on for trial. The parties are agreed that it's a relatively contained matter and that the trial estimate is between three and four weeks. Our estimate was originally three weeks. The claimants' was four weeks and we're content to list provisionally on that basis. And whether intervening steps, the milestones leading to the trial, should or should not be listed today. We say that it's appropriate that they should. That reflects the approach that is set out in the Tribunal's rules of procedure and it makes obvious sense to have the directions so that the parties understand what they're working towards, they know the dates and it also stress-tests the date of the trial. So those are the matters that are in issue. It's relatively contained, sir, and I'm happy to develop my submissions further, so that my learned friends can respond if that is the easiest way.

THE CHAIR: Yes. That's very helpful, Mr Holmes. Am I right then in understanding, although you didn't expressly address it, that there hasn't been any further progress in agreeing matters since the skeletons were lodged?

MR HOLMES: No, sir. We provided the annex setting out our proposals for categories of documents to be given by the claimants. The claimants haven't engaged with that since.

THE CHAIR: Very well. I think the other matter which I think requires to be dealt with before anything else, is agreement that these two sets of proceedings be dealt with together. I understand from the information that's been provided that that is not contentious. But I think I will confirm that with all counsel before we go any further and subject to that, I will then return to you to open your application as it were.

MR HOLMES: I'm grateful, sir. For our part I can confirm that we think it makes obvious sense to manage and to hear these proceedings together given the close overlap and the risk of inconsistent outcomes absent that way of proceeding.

THE CHAIR: Thank you very much Mr Holmes.

Mr Spitz?

MR SPITZ: Yes, thank you, sir. We confirm likewise we are content with joint case management. I think that it's also not in dispute that the evidence in one set of proceedings will be evidence in the other set of proceedings as well. I think that's common ground. One point I would make, it's not for today, it may arise in due course, is whether the proceedings, whether it makes sense and this could be considered at a later point, to have a split trial. To have the liability trial and then a separate quantum trial for liability purposes. I think it makes complete sense for joint case management. That may not necessarily carry through all the way but that's not something that I propose to raise now. I simply note that that may be something that we look to consider further down the line.

THE CHAIR: Thank you. And, Mr West?

MR WEST: I also confirm that that is correct. We would also wish to reserve our position in relation to any possible split trial. Whilst there are common issues, there are other issues which are perhaps less common, particularly causation, and some which are not common at all, i.e., quantification. It may be that that can be dealt with by some form of split trial or perhaps simply by timetabling that certain days of the trial are to deal with non-common issues. The legal representatives of the party which is not involved in those issues, their attendance can be dispensed with if their clients would prefer them not to attend on those days.

The only other related issue I will just mention, which is related to the issue of joint

case management, is what if anything the Tribunal should say or do today about the possibility that further claims may emerge down the line arising out of the Ofgem decision, for example, by other energy companies. I don't suggest we need to address that now but it is a related issue on the agenda.

THE CHAIR: Yes. Thank you.

MR LOMAS: Can I raise one point? The parties seem to be agreed on an estimate of four weeks. That is a four-week total period for liability and quantum, irrespective of whether they're split, or is that four weeks whenever we decide, with the possibility of a separate liability trial afterwards because I had understood four weeks to be agreed as the total.

MR BAILEY: At the moment four weeks is agreed for both cases, liability and quantum in both.

MR LOMAS: Thank you.

THE CHAIR: Is that your position as well, Mr Spitz?

MR SPITZ: Yes.

THE CHAIR: Well, on that basis then, Mr Holmes, do you want to proceed with your application?

MR HOLMES: Yes, sir. If the Tribunal will permit me just to make a brief observation on the points which have just been made. In relation to a split trial, that's obviously not business that is before you today but I should put down a marker that we don't see that as a sensible way of proceeding in circumstances where the estimate for the whole trial is contained. It's not a huge leviathan. A four-week trial is by the standards of this Tribunal pretty crisp. There are serious concerns on our side about causation and quantum, such that if the issue of liability were resolved against us and of course, liability is an issue, we will be contesting liability. But if it were resolved against us that

wouldn't resolve the case at all. It would leave matters unresolved and the sensible course is therefore to hear all matters together so that matters of causation and quantum can be determined alongside liability.

THE CHAIR: A matter, and I don't want to take you out of your order, which would probably fall within the second part of your application, about the timetable, is the question of duration. Now I appreciate that it is something that the parties seem to be agreed on to some extent but from our perspective I think we would greatly welcome some detail because it did seem, given as you say, and as is apparent from the skeleton and the pleadings, that liability is an issue and one then looks at potentially complex issues of causation arising as well, and quantum, that 16 court days does seem tight from our perspective. So we would welcome an understanding of the detail, particularly as I think from your perspective you thought possibly only 12 days was required. So on that basis it will be helpful to understand, if you're able to, the granular nature of how many days you think are going to be required for what evidence. When one looks at it from that perspective certainly it seems to the Tribunal to be quite tight.

MR HOLMES: Yes, understood. That's a helpful indication from the Tribunal. We should all perhaps reflect upon it. But I can certainly assist you with our provisional thinking in relation to the timetable so you understand how we arrived at the estimate. We were working on the basis of crisp openings, as is the usual course in this Tribunal. Which we think could usefully be confined to two or three days. The Tribunal will obviously have had the parties' cases set out substantially in writing, in written submissions before the hearing. There will then be factual evidence in the normal way. But, as regards liability, it may be that the factual evidence is relatively limited in scope. This is not a secret cartel case. This isn't a case in which the factual underpinnings of the case are substantially in issue. There are contracts which the

Tribunal can consider, and it will need to consider whether those contracts are or are not infringing of competition law. But that will be a matter partly for submission, some factual evidence, but we think it will turn substantially on expert evidence as well. We were working on the basis of expert evidence in the discipline of competition economics and competition damages quantification.

THE CHAIR: Yes.

MR HOLMES: So, in very broad terms, we were proceeding on the basis of most of the first week being taken up with submissions, the second week being taking up with factual evidence, possibly slipping into the third week, and expert evidence followed by short closings at the conclusion. And, in relation to the expert evidence, it's obviously much too early for the Tribunal to form a view about this now, but in other cases some efficiencies have been achieved through the hearing of expert evidence concurrently. It obviously places a burden on the Tribunal so it's not something that we would presume to suggest as necessarily appropriate at this stage. You need to take a view in due course. It does undoubtedly allow the expert evidence to proceed more quickly because the experts are heard in parallel. You hear their views on each issue in turn and that normally allows some time saving.

THE CHAIR: Yes.

MR LOMAS: Mr Holmes, I see the point in relation to whether there is dominance and whether there is abuse in terms of factual evidence. But I can imagine factual debate around the theory of harm and causation and damages could get quite involved when you are talking about the development of apps and their penetration rate in markets and things like that. Indeed, the alternatives that were available to Utilita. Isn't that going to expand the factual evidence element a degree?

MR HOLMES: I hear what you say. I think we all need to reflect in the light of those

observations. In truth, we don't have estimates of numbers of factual witnesses, from the parties yet. So, it's hard to be sure at this stage. It may be in the light of what you say that the parties might agree to a five-week provisional listing if the Tribunal were minded to go down that path. I should say also, I think we were all proceeding on the basis of court sitting days. I apprehend from your early remarks that that is also how the Tribunal understood the estimate. Time might also need to be allowed for pre-reading. If it assisted, we could always discuss at a convenient point later in the morning and see whether we could hammer out an estimate as agreed between us for your consideration.

THE CHAIR: Yes. Thank you.

Submissions by MR HOLMES

MR HOLMES: I am grateful. If we could turn then to the question of disclosure. If the Tribunal would permit me, could I just begin with two preliminary observations about the disclosure that is under consideration at this CMC. The first is one could be forgiven for thinking based on some of the submissions that were made in writing by my learned friends that this was a debate as to whether disclosure should be made at the first CMC. And reliance is placed on Rule 60, paragraph 2 of the Tribunal's rules, which proceeds on the basis that in the ordinary course disclosure will be considered at a second CMC. If I could scotch that immediately, sir. None of the parties are proceeding on the basis that disclosure should be left for the second CMC. On the contrary, as you'll have seen from the agreed order, the claimants have requested disclosure of categories of documents by PayPoint, and PayPoint has agreed to provide those categories of documents. So, the question is not whether disclosure could be given at the first CMC but rather what disclosure should be given. Should it be confined to disclosure by my clients, or can focused categories of documents that

are clearly relevant to the claim be identified now so that progress can be made ahead of the second CMC and the business of disclosure at the second CMC can be more focused based on an initial disclosure. So that's the lay of the land as we see it. Just to make that good, sir, it might assist if we were to open up the composite draft order prepared by the parties, which is at tab 17 of the joint case management conference bundle, volume A part 1.

Picking it up on page 209 you see in the black text, matters that are agreed between the parties. At paragraph 6 you see the disclosure which my clients, PayPoint, have agreed to provide and there are three individual documents. Then two categories of documents which are to be disclosed by 24 November. So in a short period following this CMC. You see at D, they include the communications between Ofgem and PayPoint in the context of Ofgem's investigation and the documents that were provided. Turning over a page you see at E, disclosure of PayPoint's contracts insofar as they have not already been provided, a category of PayPoint contracts. So, two categories of documents and for the avoidance of doubt, sir, neither of these are pre-existing repositories. Both entails work on the part of PayPoint to assemble them. The contracts category is a bespoke disclosure search for the purposes of these proceedings and the Ofgem communications, the documents passing back and forth between Ofgem and PayPoint, are similarly not in a pre-assembled set. They are communications from up to six years ago over a two-year period across a number of separate sources.

MR LOMAS: Between identifiable custodians is not the worst search in the world.

MR HOLMES: That is true. This litigation isn't Trucks. We can take it as read that this is relatively circumscribed. The point I'm making is simply that this is not without some work. There were some submissions we saw in writing, from the claimants that

suggested that this was entirely pre-assembled and that's not the case.

What's in debate is whether, looking down page 210, disclosure should also be given by GLOBAL and Utilita, the claimants. You'll see that there's only one item of disclosure currently agreed for disclosure by the GLOBAL claimants. That is at paragraph 9. It's a non-redacted version of their after-the-event insurance policy, which is relevant to the question of whether there is adequate security for costs.

But what is disputed -- that I should say although it's shown in green here, which is a PayPoint proposal, is an area where there has been progress. I should have noted that earlier. I hope the Tribunal will forgive me.

Then at paragraph 11 you see the real meat of this. Our contention that further documents should be disclosed ahead of the second CMC by the claimants in each set of proceedings and by PayPoint, the categories of which are set out in the annexes. I will come to the annexes if I may in a moment but if I could first just address you on the law applicable to this. I mentioned Rule 60(2), which is the provision my learned friends rely on. The rules aren't in the authorities bundle but I'm assuming that you have them, sir.

THE CHAIR: Yes.

MR HOLMES: If we could start with Rule 60 then, which is on page 46 of the version that I have here. I don't know if that matches with yours?

THE CHAIR: It's the same, yes.

MR HOLMES: And you'll see, sir, at 60(2), that subject to paragraph 3, and unless the Tribunal otherwise thinks fit, at the first case management conference the Tribunal decides whether when disclosure reports and EDQs should be filed, and at a subsequent case management conference the Tribunal decides what orders to make in relation to disclosure. Now, three points about that. The first point, it is

obviously applicable only unless the Tribunal otherwise thinks fit. As one would expect there's no one-size-fits-all approach to disclosure in Tribunal proceedings. The Tribunal has a discretion to adapt the approach to disclosure to suit the circumstances of the case before it. Second point, this is subject to paragraph 3 and looking down the page at paragraph 3, you see that the Tribunal may at any point give directions as to how disclosure is to be given, including as to the searches to be undertaken, whether disclosure is to take place in stages. So a flexible and permissive regime. Third point that is underlined by the earlier provision in relation to directions for case management. In Rule 53 of the Tribunal's rules at page 31, and continued on page 32, you see at paragraph 2:

"The Tribunal may give directions" as to a number of things and that includes "for the disclosure and the production by a party or third party of documents or classes of documents."

And at paragraph, going back up to recite paragraph 1, you see that the Tribunal may deal with it at any time whether on the request of a party, or on its own initiative at a case management conference. That again confirms the flexibility of these provisions.

At the risk of repetition sir, the parties agree that this CMC is an occasion to depart from Rule 60(2), by giving disclosure. And PayPoint has volunteered a number of items of disclosure in that regard.

So what approach should the Tribunal take to deciding whether to accede to PayPoint's request for further disclosure? First, the question is to be approached having regard to the Tribunal's governing principles set out in Rule 4, which are to be found on page seven. You see at paragraph 1 that the Tribunal should ensure that each case is dealt with justly and at proportionate cost. At two, various relevant

matters are outlined which includes saving expense, dealing with the case in ways proportionate to its value, importance and complexity, and ensuring that it is dealt with expeditiously and fairly. And in subsequent paragraphs, a focus on an active approach by the Tribunal with a view to achieving early clarity as to the matters at issue. So you see at paragraph 3 parties' cases are to be set out fully in writing as early as possible. At 4, reference is made to active case management. At 5(b), this includes identification of and concentration on the main issues as early as possible. And at 5(c), fixing a target date for the main hearing as early as possible, together with a timetable for the proceedings up to the main hearing, taking into account the nature of the case. So, those are the principles governing this application.

Second, it's relevant to look at the Tribunal's previous guidance in its case law on the disclosure to be given. A helpful summary of the general approach is provided by the Tribunal in the course of the Trucks litigation, which is -- its ruling on disclosure is at tab 2 of the authorities bundle beginning at page 50. Of the rolling number. You see there paragraph 35, the broad principles are set out as to the approach to be applied by the Tribunal. And the two points I would emphasise are of relevance today paragraph 1 -- subparagraph 1, orders for standard disclosure will not in general be made and at subparagraph 6 over the page, ordinarily disclosure will be by reference to specific pleaded issues and specific categories of documents. So a category-based approach to be taken to disclosure, applying a flexible approach informed by the Tribunal's general focus on proportionality and expedition.

Turning then to the categories of disclosure that we say should be given. If you could look again at the draft order, and apologies for jumping around, the draft order at tab 17, and turning to the annexes. You see at annex A on page 214, the categories sought from Utilita. There are four identified. Paragraph 1 consists of some narrowly

drawn requests relevant to limitation which are needed to understand Utilita's state of knowledge of matters relevant to the claim. You'll see that they include communications between Utilita and Ofgem concerning PayPoint's contractual arrangements. These are the analogue of the documents which Utilita is seeking from PayPoint at this CMC and which PayPoint has agreed to disclose, relating to the investigation.

Paragraph 2 then identifies documents relating to Utilita's procurement of pre-payment services. These obviously go to the heart of Utilita's claim. The documents sought include Utilita's contracts with pre-payment service providers. You see that at point (d). Again, the analogue of the disclosure being given by PayPoint at this CMC. This material goes to dominance. It sheds light on Utilita's outside options and it also goes to abuse. Was Utilita in fact constrained by the provisions. Finally, it goes to quantum. You'll have seen from the pleading that Utilita calculates its loss based on an estimate of prevailing competitor fees in the market. And the disclosure will shed light on whether that figure is accurate having regard to the other offers that were available to Utilita. This is centrally important in getting to grips with quantum in this case.

Paragraph 3 then identifies targeted document requests concerning the specific issues arising from Utilita's launch of its own non-OTC pre-payment service. Paragraph 4 identifies documents and data relevant to the issue of pass-on. They are there to establish whether as one might expect Utilita recovered some or all of the fees charged by payment service providers from its downstream energy customers thereby extinguishing its loss. Now, these categories will obviously need to be disclosed in order to resolve the claim. A number of them should already have been collected in order to plead the claim. At all events, the sooner they are collected and disclosed the better.

We haven't apprehended from Utilita any suggestion that these are not relevant categories of documents to be given.

Annex B contains similarly focused requests in relation to GLOBAL. Central to GLOBAL's claim is the contention that it had a market-ready and superior product, the SMARTpre-pay system, available from 2019 but was unable successfully to launch the product because of PayPoint's contractual arrangements. In order to understand and test that claim, paragraph 1 seeks targeted disclosure concerning the product and its performance in the market. To make good on its claim GLOBAL will need to lift the lid on its entry plans and product details, to provide documents on its efforts to sell its products and to show how the business has developed and what difficulties it has faced. These are the subject of paragraph 1.

Again, just noting, this includes a request for GLOBAL's contracts with energy suppliers. You see that at point (f) on page 218, analogous to the disclosure being given now by PayPoint. Paragraph 2 then concerns GLOBAL's complaint to Ofgem, once again the analogue of the disclosure that PayPoint is giving. I'm just -- in case the point occurs to the Tribunal we're not confident that all of those communications will have been provided to us by way of access to file during the Ofgem investigation. Only partial access to file was provided and it's therefore necessary to understand what passed between GLOBAL and Ofgem.

PayPoint is disclosing now its communications with Ofgem and we say GLOBAL should do the same so the Tribunal has a complete picture.

Paragraph 3, is a request --

MR LOMAS: Just before we leave that, what's the relevance of that complaint to the issues?

MR HOLMES: It sheds light on how GLOBAL understood the market and what details

of the product, for example, that were provided. How it understood the scope to access the market. Who it saw as the competitors of PayPoint. All of those are matters that could be illuminated by the information provided by disclosure. I should have clarified GLOBAL was the complainant.

MR LOMAS: Thank you.

MR HOLMES: So for that reason we say that this material is likely to be relevant and important.

Finally, paragraph 3 is a request for data to understand in numbers how the business has developed and was planning to develop. They're ordinary course of business accounts which should be readily available. Then finally, at (c), you see that PayPoint is also proposing further disclosure for itself to supplement the materials collected during the investigation. So, standing back, we say that the sooner the parties crack on with this disclosure, the better. This case is not the Trucks litigation. It's not that complicated, and it is not that large by the Tribunal's standards. It is in everyone's interest to get on and put evidential flesh on the bare bones of the proceedings. The disclosure is not disputed to be relevant and we request it now. We say it will help to focus matters at the second CMC. We also say that this is the fair approach to take in the circumstances of this case. In some competition cases, there is an asymmetry of information in favour of the defendant where the conduct complained of was in the nature of a secret cartel. But the present case is not of that kind. It concerns PayPoint's contractual arrangements. The claimants know full well about those arrangements. Utilita was a counter-party. GLOBAL was the complainant to Ofgem. They are described in the commitments decision. PayPoint has already given the claimants disclosure of many of its contracts from the relevant period and the information asymmetry in this case lies on the other side of the fence. It relates to the

claimants' case on causation and quantum. At the moment, PayPoint knows very little about GLOBAL's supposedly superior product on the basis of which GLOBAL claims an astronomical amount in damages. Similarly, PayPoint does not know what informed Utilita's procurement decisions or what alternative terms it was being offered although its claim rests on an estimate of alleged alternative terms available in the market. This will all need to be addressed and given the clear need for such disclosure, it's preferable to make a start on it now rather than wasting several months on the production of disclosure reports and EDQs. Where relevant categories of documents are already clearly discernible, we say that there is no reason to wait behind those documents. To be clear, we have no objection to producing them if the Tribunal thinks that they will be useful, but we say that they should not hold up the disclosure of categories already identifiable as relevant. If the Tribunal is not persuaded that the categories sought by PayPoint should all be ordered now, it is at least appropriate, in my submission, to give disclosure from the claimants that is analogous to that which PayPoint has agreed to provide in short order. Namely their contracts on the relevant market and their communications with Ofgem in the context of the investigation. That will move matters along. Not as far as we would like but it will nonetheless helpfully advance matters ahead of the second CMC and we say it's also in accordance with considerations of equity given the disclosure which PayPoint is providing. So, sir, those are my submissions in support of disclosure subject to any questions that the Tribunal might have.

THE CHAIR: Yes. Thank you.

MR LOMAS: One question. It may be micro, in relation to GLOBAL-365, annex B, paragraph 1(c)(4), which my eye alighted upon. That did seem to be:

"All requests for funding, financing, development ...(Reading to the words)... or

potential funding, financing expected timings of such funding."

That seemed quite wide and quite marginal. Can you support that request?

MR HOLMES: We're told that there is an oven-ready product that would have rolled out at very significant scale across the market. That would obviously have required funding commitments in place, and we simply don't know whether and to what extent that was the case. We see it as relevant to testing that proposition. Let me just take instructions to make sure.

MR LOMAS: It's quite widely framed. If your point is we don't know whether they could have done it and had the money to do it that is an understandable point. If it's all the intricacies of how they decided to fund a particular piece of tech development, that's seems to me quite wide.

MR HOLMES: Sir, that's a very fair point if I may say so. One of the misfortunes of this CMC is that we have not had any process of refinement through engagement with the claimants. Their response has been in reliance on Rule 60(2) simply to pull up the drawbridge. To say now is not the time for us to give any disclosure. We would be very happy, as we signalled in our skeleton argument, to engage in short order over the precise terms of these requests. And I am sure that if the Tribunal were minded to order disclosure substantial progress could be made in ensuring that they are manageable and kept within confines. We are a co-operative party and we would engage co-operatively the -- I see you smiling.

MR LOMAS: Parties are always co-operative.

MR HOLMES: On this occasion though the proof of our good faith is the disclosure we are giving.

MR LOMAS: You've got liberty to apply in any event if there are matters that are not settled.

MR HOLMES: Yes indeed. Are there any further questions?

THE CHAIR: No, that's very helpful. Thank you.

MR HOLMES: I'm grateful.

Submissions by MR WEST

MR WEST: Gentlemen, I shall endeavour to address what my learned friend said responsibly. He began by saying that the issue before you today is not whether there should be disclosure but what disclosure there should be, because his clients have agreed to provide some initial disclosure in the form of the Ofgem file and any other contracts not in that file.

In my submission there is an important distinction to be drawn in these cases and it frequently is drawn, and I will show you that in a second, between initial disclosure which parties are in a position to provide without carrying out searches, and what I have called general disclosure, which requires parties to go off and do searches and which therefore engage the debate about proportionality, the scope of searches and so on.

The question in my submission here is whether the Tribunal should now order that general disclosure before we have the benefit of disclosure reports and electronic documents questionnaires which the Tribunal's rules are clear should ordinarily be provided or the Tribunal should at least consider whether they should be provided. We have included in the bundle some authorities to show that this is commonly done. These are just examples but, in the authorities bundle, at tab 4 one has one such example. This was from a case called PSA and it was somewhat similar to this case in that it was what I call a quasi follow-on case. In other words, there was a relevant Competition Authority decision, but it did not, it wasn't binding in the proceedings. Now in the present case that's because the decision was a commitments decision and

therefore only provisional. In the PSA case it's because the allegations in the case went beyond the scope of the decision. In that case it was a Commission decision. Turning in the order to paragraph 3 you see disclosure in respect of confidential decisions. I should say this was the order made at the first CMC under paragraph 60 of the rules. It makes provision for the other parties to the decision to be notified of this process and to be allowed to propose redactions to the decision but subject to that for the less redacted version of the confidential Commission decision to be disclosed.

Paragraph 4 then deals with disclosure and inspection of the Commission file documents and has a similar provision for notification. It goes on to provide for the Commission file documents to be handed over and then under paragraph 4.4, any other documents which the defendants held relating to the investigation which for whatever reason were not on the Commission file could also be handed over following the first CMC.

There are then some further provisional directions and then one sees at paragraph 8 an order for the service of disclosure reports and electronic documents questionnaires. And then at 9, a further case management conference to consider further case management matters, including further disclosure. Precisely what one would expect for a CMC order from a first CMC in this Tribunal. One finds something very similar in tab 7. This was another quasi follow-on case. In that case it was quasi follow-on because the particular project, this was a wind farm project at issue, the contract for that project fell after the date when the Commission held that the cartel had come to an end. Nevertheless, one sees very similar, first stage of disclosure, starting at paragraph 3. Similar notification provisions, again not required in this case, but to allow the parties to make redactions to which they're entitled and then an order for disclosure of a less redacted version of the decision. Then one sees disclosure reports

and electronic documents questionaries at paragraph 9 and then further CMC at paragraph 10. So the only disclosure that was made was in relation to the Commission decision.

And in my submission that is precisely what one would expect in a case in this Tribunal. We have put these in the bundle and as far as I'm aware, my friend has not produced any examples where the Tribunal has done what he is asking for today.

This naturally, as I say, reflects what the Tribunal has said, is its ordinary approach in Rule 60. My friend relies on various provisions of the rules which make clear that the CAT has of course a wide procedural discretion, which we don't dispute, but Rule 60 nevertheless sets out how the CAT will in general, exercise discretion in relation to the specific question of disclosure at the first case management conference. The reason for that is because at this stage the Tribunal has not given a direction one way or the other on disclosure reports and electronic documents questionnaires. I will come on to that in a second as to precisely what those documents are. My friend then said you can't draw a distinction the way I seek to do it between initial and general disclosure because he said in fact, his clients would have to carry out searches in order to give the initial disclosure to which they have agreed, but there's no evidence about any of that. Which isn't surprising because his clients agreed it. His clients agreed to give those categories so it's not surprising that we don't have evidence about how difficult it may be to do so.

He then referred to the Trucks decision but in my submission that is nothing to the point. Yes, disclosure in this Tribunal is by categories, rather than by means of an order for standard disclosure. That's not disputed. But that judgment doesn't address the question of when the Tribunal should make an order for disclosure by categories. The approach of disclosure by categories is similar to what one sees in

international arbitrations, where there's never been a procedure of standard disclosure and in international arbitrations it's common to refer to the schedules requesting the categories of disclosure one is seeking from the other side as Redfern schedules, Redfern being one of the co-authors of one of the main books on arbitration. One finds the terminology of Redfern schedules in certain rulings of this Tribunal and one of which is in the bundle, but that is the process by which the parties reach agreement or crystallise their disagreements as to which of the categories each side is asking for the other side is prepared to give or not prepared to give and why. That process has not been gone through. We say there are very good reasons why it has not been gone through. Only one of which is that we do not yet have the disclosure reports, electronic documents questionnaires.

The members of the Tribunal may be more or less familiar with these documents. They are court forms. I have copies of them if the Tribunal would like to see an uncompleted disclosure report or electronic documents questionnaire. But if not, it requires the parties to set out, in the case of the EDQ relating only to electronic documents, what relevant documents it has, in what format it holds them. The approximate costs that would be incurred if it had to give disclosure of the various categories of documents, where they are held, and so on and so forth.

The type of material which is highly relevant are a Redfern schedule type of dispute, particularly if one party is going to say, for example, it would be disproportionate for us to have to give that category because of the cost involved or it's unnecessary for us to give that category because it's duplicative of another sources of documents that we've already agreed to provide. And these are reliable sources of information about the documents the parties hold and the form in which they hold them because they're required to be attested by a statement of truth. They are documents that the parties

have to take seriously in preparing and on which they can rely in this, in the Redfern schedule dispute process.

We haven't had that yet. My friend's suggestion appears to be that it should happen in tandem with the disclosure that he seeks but that in my submission is clearly inefficient.

There are a number of other respects in which the Redfern schedule process will be better informed at the second CMC. One is that we will by that stage have had PayPoint's initial disclosure, i.e., the contents of the Ofgem file and any other contracts not contained within that file. We don't at the moment know what that contains, how many documents it contains or how extensive it is. That may enable the claimants to refine the scope of any further disclosure requests which they may make of PayPoint. We also do not as yet have full responses by PayPoint to the requests for further information which have been submitted by both GLOBAL-365 and Utilita.

THE CHAIR: I'm sure you'll be coming to this in a moment. Those two matters plainly I can see would enable you to refine requests for further disclosure by PayPoint, but it is not clear to me and perhaps you're not making this submission, they don't impact upon PayPoint's request from disclosure from your clients, do they?

MR [WEST: The electronic forms and the initial disclosure do not. That's correct. That refers only to the further disclosure to be given by PayPoint.

THE CHAIR: The other way. Just to finish off the point to enable you to address it in full. What I am to understand of your submissions thus far, what I am keen to understand is what is preventing progress being made on the requests that the defendants make for disclosure from your clients. Because I can see entirely how it might be possible if we went down a different procedural route to refine requests and so on and so forth using Redfern schedules or whatever. What I am keen to

understand is that would take time, what's preventing progress being made today, essentially?

MR WEST: It's really that the nature and timing of the requests that have been made. My friend is very keen to say that these are really all just the analogue of what his clients have agreed to produce. That may be the case in relation to some of the subcategories, but it certainly isn't the case in relation to the generality of the requests. If one looks at the requests --

THE CHAIR: I should have said I didn't mean to take you out of your order and you are now carefully addressing the point I made but if it would suit you to finish off and come back to this please do so.

MR WEST: Perhaps I will park that for a second. It's partly the nature of the requests that we say are not limited to documents you'll have on a USB stick already which you can just hand over. They do require searches and they certainly would require a process of refinement to be gone through and the issue with the timing of that is firstly, I have already made the point, we don't have the electronic documents questionnaires and disclosure reports which the rules suggest that we should have when doing this exercise. But the other is that, and I think it was 21 August of this year, the Tribunal gave a direction that any applications to be returned by this hearing should be issued and served by 12 October. The first we heard of these categories of disclosure, the details of them, the specific categories which were being sought from my clients, was on 9 October. We were previously informed on the 6th that some categories would be sought and then we were sent the categories on the 9th.

And that simply does not allow sufficient time for the Redfern schedule process to which I have been referring to be gone through so that my client could then make an application in relation to the disputed categories on 12 October. It simply wasn't

practicable, even leaving aside the point that we say this isn't the right time to do it, look at the Tribunal rules.

As I say, looking at the categories that's why you don't have -- ordinarily if one was looking at categories of disclosure, like this at a disputed disclosure hearing, one would have all of these categories in the first column and in the second column one would have my client's response, yes or no, or partially yes and partially no. And the reasons. Then in the next column one would have the response to those reasons. That then crystallises what we are happy to give and the reasons why we're not happy to give what we're not happy to give, to the extent that PayPoint continues to press for the wider disclosure than we're happy to give. The Tribunal simply doesn't have that. The reason it doesn't have it is because of the history and timing of when this was raised. So in my submission it isn't appropriate for us to start doing it now on the hoof and for me by way of submissions to explain why these categories are too wide. What the Tribunal should order is this be dealt with at the second CMC in order that you'll have that document before you, which is an extremely helpful document shortcutting these kinds of dispute.

THE CHAIR: The unattractive aspect of that course, and clearly that's a course that is open to us, the unattractive aspect is essentially, that nothing will happen until the second CMC in respect of collation of information. I understand that part of your application is to seek a CMC in the early part of next year. For various reasons I think it's going to be unlikely for the Tribunal to convene a CMC until probably March of next year. That's due to issues of availability of the Tribunal. Now, that's obviously a fact that you were unaware of but that being the likely position, that would make it all the more unattractive if nothing were to happen in respect of disclosure until that point. When I say nothing will happen with disclosure, of course there's the agreed

disclosure. I see that.

MR WEST: Well, if we had been faced with a request which was genuinely a request for initial disclosure from my clients, which was genuinely the analogue of what PayPoint have agreed to give, we may not be in this position today. My friend may seek to persuade you to go through this and fillet it out and find the ones that are sort of analogous, I would suggest that the Tribunal shouldn't do that. It may be some alternative process can be thought of, such as in the case of the realm of Redfern schedules being exchanged therefore it appears that some categories are not disputed and the parties were happy to hand them over, and provision can be made for that to be, for those documents actually to be handed over at an earlier stage, parking the question of what's to happen with where there is a dispute that the Tribunal needs to resolve. That is as I say, dealing with this ad hoc because that's the position in which I'm left.

My friend is simply not to right say these are simply the analogues. This is the process which I say the Tribunal shouldn't do. If one goes through it, for example, page 27, category 1A, check documents relating to GLOBAL-365's plans for the development, launch, growth and ongoing operation of its pre-pay system. That appears to cover all documents relating to plans for the operation of the system. That would be most documents which GLOBAL-365 has. Under (2), documents relating to the services it intends to provide including the features and functionality intended to offer. That's every marketing email that GLOBAL-365 ever sent. Under (b) for example, any problems or service outages. Any problems ever? On any day or any year? The Tribunal already picked up C(iv) funding and financing documents, which is just we say far too wide. (d) communications between GLOBAL-365 and energy suppliers in relation to the supply of pre-payment services. That's all communications

GLOBAL-365 has ever sent to energy suppliers. One could go on. But the fact is these are not analogous. They aren't off-the-shelf, they require searches, and more than that they require proper refinement. The process of to-and-fro to which I have referred and which the points I'm doing my best to make on my feet are made in a more formal and thought-through fashion.

My friend hasn't, in response to receipt of my skeleton, said okay, here's a list of two or three categories that you probably do have on a USB stick. He is trying to do it on his feet today but that isn't his application. If it had been we might have had the chance to take instructions about it. So those are my submissions.

THE CHAIR: Thank you. Mr Spitz?

Submissions by MR SPITZ

MR SPITZ: Sir, to address the question that the Tribunal rightly raised a moment ago and then perhaps to go through the submissions that I want to make. I think that it's not the case that there would be no progress between now and March on the basis that a CMC before March looks unlikely, because the parties can and indeed probably ought to engage in the process of producing the disclosure reports and the EDQs, the questionnaires, and that is an extensive exercise and a time consuming one, but it's certainly a more systematic way of doing things than picking and choosing from a list of categories of documents that the claimants ought to be disclosing now.

So, with respect, it's not the case that the parties would sit on their hands. A lot of work could be done and then at the CMC in March that process of the exchange of the questionnaires and schedules and the Redfern schedules themselves can be debated and the Tribunal will be in a position to make orders at that CMC.

We, on behalf of Utilita, support and gratefully adopt the submissions that Mr West has made. The general approach, and we don't say that it is an invariable approach,

it's the starting point, it's the default position as it were, is that the question of whether and when each party should file a disclosure report is not dealt with until the second CMC.

The parties will usually be better able to formulate disclosure requests and the Tribunal will be better able to make disclosure orders once the parties have exchanged the information about what documents they have available to disclose.

Now PayPoint says that Utilita should be able to do this solely by reference to the pleadings. We don't need to turn it up, but that's in their skeleton at paragraph 12. But Utilita of course would justifiably prefer to make disclosure requests that are formulated in light of the answers to the questionnaire and the disclosure report so that it has a sense of the number and the categories of documents available.

Although PayPoint says that it has in fact identified categories of documents relative to the pleaded issues, what is striking is how sparse are the categories PayPoint has suggested that it should disclose against. My learned friend took the Tribunal to annex C. If we could just turn that up, that's tab 17 at page 220. This is the categories of documents that PayPoint suggests that it ought to be disclosing. Now, we have had a look and made a list of what one would have expected to find there but does not find, and just to give you a flavour, sir, of what is not produced, there's generally nothing about the internal consideration or internal communications that will be disclosed, only the communications with the outside world. As far as the relevant markets are concerned, there is nothing on PayPoint's own market analysis or analysis of consumer preferences. There's nothing on energy suppliers and consumers changing between pre and post payment, nothing on the different sectors in which terminals were allegedly used. That goes to the issue of relevant markets. On the question of dominance, there's nothing on the extent of PayPoint's market share, whether in terms

of locations, transactions or values, and nothing relating to the Post Office / Payzone decision.

MR LOMAS: Have they been requested for so far --

MR SPITZ: Indeed --

MR LOMAS: I am just clarifying there is a list of things they haven't offered, there's also things you haven't asked for.

MR SPITZ: Indeed, quite so. The list goes on because as far as abuse is concerned, there's nothing about the exclusivity arrangements with agent retailers, their negotiation, internal consideration, or enforcement. Now, my learned friend says that this isn't an information asymmetry kind of case because it's not secret cartel. He says if anything, the information asymmetry goes the other way. But that is not correct, with respect. We do not know the extent of PayPoint's network. We don't know the extent of these exclusivity provisions with other energy suppliers and when it comes to the agent retailers, we're even less sighted about those. And sir, you'll recall that there are two aspects to the questions of dominance and abuse of dominance. What we say is that the defendants sewed up the market at two different levels. The first is the level between PayPoint and the energy suppliers. The second is the arrangements that were put in place between PayPoint and the agent retailers. We do not know, we are not sighted about the nature and extent of the arrangements with the retailers save for what has been said in the Ofgem decision.

There are a number of other omissions in relation to abuse, and similarly, when it comes to quantum, there's nothing in relation to decision-making around pricing, or compliance with the commitments decision or its impact on pricing. Now, what we are told is, in response to this sort of point that is because some of this material is covered in the Ofgem report. Which is precisely the reason why it makes sense for us to see

what has been disclosed in the Ofgem report in the formulation of disclosure requests and why it makes sense to sequence things in the manner that we have suggested. Let's see what's in the report. Those are for the most part off-the-shelf documents and that is the usual approach that is taken. That will assist us in formulating our requests and in checking off this list of omissions that I've identified, what remains missing and what has been provided.

THE CHAIR: To make the same point I made to Mr West. I can see how that would inform and refine the requests that Utilita would seek to make of PayPoint. What I'm interested to understand is -- and I appreciate your response, no doubt why you've adopted the submissions Mr West has made, we are where we are now and I appreciate from your perspective you would say that has impacted upon your ability to respond to the request for documents which are contained in the annexes to the application made by PayPoint. What I am keen to understand, I think the Tribunal is keen to understand is what progress can be made proportionately, in respect of recovery of documents from Utilita. So not recovery by Utilita or disclosure to Utilita but disclosure by Utilita.

MR SPITZ: Indeed. Sir, I understand the question. I think that as I said earlier that the best progress that can be made is the progress that one would ordinarily make, which is through the disclosure reports and the questionnaire. It shouldn't be accepted at face value that the disclosure that is asked of us is simply the analogue of what PayPoint has agreed to give. They are only handing over contracts, not negotiations, not internal considerations. They are handing over communications with Ofgem in relation to this particular investigation but they're asking us for communications with regulators generally and our internal consideration of those documents. So, the analogue should be looked at with some caution because it's not a perfect analogue.

What we say is it's premature to order further disclosure before PayPoint clarifies what its case is. There's one example that with your permission I would like to show you. It's paragraph 47 of PayPoint's defence. That's volume A, tab 8, page 143.

This is PayPoint's pleading in relation to objective justification. I won't read it out but if the Tribunal would have a look at the way that that plea is framed.

THE CHAIR: Page 143?

MR SPITZ: Page 143. This is PayPoint's plea of objective justification.

(Pause)

Now, we say about that that it's really a boilerplate pleading. It's not clear what the new products are, what the high service levels mean, even whether PayPoint is positively alleging that it did invest in these things because the Tribunal will notice that the way that the pleading is drafted PayPoint only says the relevant efficiencies would have included these things. Not that they actually did include these things. So, what then transpired is we raised this issue in reply at paragraph 29 of our reply, which is tab 9, page 161. You'll see we say:

"The alleged efficiencies are so vaguely pleaded and poorly particularised as to be susceptible to strike out."

Then we make the point:

"Not least because the alleged and necessary causal connection between the anti-competitive terms complained of and the alleged efficiencies is neither properly particularised nor understood."

We followed this up with an RFI in September 2023. It's not necessary to turn that up now. But PayPoint accepts in principle that it needs to answer these questions. We sought a response by 19 October. PayPoint has yet to respond to the questions that we raised in our RFI and it proposes to do so by 14 November 2023. We don't

begrudge them the time they need to properly particularise their case but it's very difficult to see how Utilita is meant to formulate disclosure requests on issues like this when PayPoint has still not properly particularised its case or answered Utilita's reasonable request for information.

Utilita needs to know what products PayPoint alleges it would have developed for consumers to help it interrogate that allegation in disclosure.

The second reason why we oppose the application on disclosure is that it's premature before Utilita has received the Ofgem documents. It may be that in light of those documents and the claimants' review of those documents that the claimants are able to rely on the Ofgem investigation and do not require a broader disclosure as if they were starting from scratch. It may be that the Ofgem investigation documents clearly point to the particular documents the claimants could seek by way of targeted disclosure.

Allowing the claimants to receive the Ofgem investigation documents and review them before making their disclosure requests may mean a cheaper and faster disclosure exercise for all.

THE CHAIR: I don't want to interrupt you but I'm conscious of the fact we've been going for an hour and 15 minutes, and we are required to let the shorthand writers have a break. Would now be a suitable point to do that?

MR SPITZ: Indeed.

THE CHAIR: Thank you very much. That's what we will do now.

(11.50 am)

(A short break)

(12.00 pm)

THE CHAIR: Mr Spitz.

MR SPITZ: The last point on this topic pertains to the question of the exchange of disclosure reports and electronic documents and questionnaires. Our position is that the parties should exchange these reports and EDQs, and that we will all be better able to formulate disclosure requests and the Tribunal will be in a better position to make disclosure orders once the parties have exchanged information about what documents they have available to disclose. This will help the parties seek disclosure orders which are proportionate and to plan the timetable to trial in light of the volume of documents that they have to review.

THE CHAIR: One point I wanted to put to you was were we to grant disclosure in terms of the annexes sought by PayPoint, it would be open to either claimant, or indeed any party, to apply and thereby to address some of these issues that you say would arise in relation to disclosure and indeed which might in a perfect world have been dealt with prior to today. Is that not correct?

MR SPITZ: Indeed. It would be possible. Our submission on that, the risk is that when one deals with things piece-meal on the one hand we have a very clear set of pre-existing documents that were before Ofgem and a set of easily identifiable agreements that can be disclosed and then on the other hand we have imperfectly non-analogous documents that are sought from us. Our point would be that it is to precisely avoid one initial set of disclosure followed by further requests and applications that the EDQs and the disclosure questionnaires are intended to address. That would be our response to that.

The last point to make is that since PayPoint accepts none of the provisional findings in the Commitment's decision, and in fact its position is that the claimants cannot rely on that decision in respect of substantive matters at all, this will have a significant bearing on the nature and extent of the disclosure exercise.

The claimants should not be deprived of the ordinary approach to formulation of disclosure by way of disclosure reports and EDQs. As I mentioned before the short adjournment, there is a lot that the parties can be getting on with in framing those reports in the meantime in the run up to the next CMC.

THE CHAIR: Yes.

MR SPITZ: Those are my submissions.

THE CHAIR: Thank you very much, Mr Spitz. Mr Holmes.

MR HOLMES: I will focus on brass tacks. If it pleases the Tribunal, I won't address every point. If there are any points you want me to deal with --

THE CHAIR: Only particular points that arise from what has been said.

MR HOLMES: Absolutely. The first point is I think there's been a very useful set of submissions if I may say so. The first point is that we're in the unusual position of being a defendant that is wanting to push on. Normally it is the claimants that are in that position, but we do want to make progress because these claims hang over us and we want to do what we can and make as much progress as we can with the time available. Five months of delay we say, if the next CMC cannot be until March, would be excessive and would let to an unfortunate hiatus during which progress was not being made.

The second point is it is a notable feature of my learned friends' submissions that they do not suggest either of them that the categories of document identified are in general terms irrelevant or will not be required to be disclosed in these proceedings. So this isn't a case where they suggest these aren't appropriate categories. They quibble with the detail and suggest potential refinements, but they don't suggest that this disclosure won't be necessary.

The third point is they rely principally on disclosure reports and EDQs and say that we

should wait behind those. We say that where there are already categories of documents that are clearly relevant, there is no need for that delay, particularly in circumstances where a further CMC cannot be until March. Still less would it be appropriate to delay behind Redfern schedules which are appropriate, in particular, in very large-scale litigation such as the Trucks litigation. They are certainly not par for the course in proceedings before this Tribunal.

THE CHAIR: Just on that point Mr Holmes, as I understand PayPoint's position, these aren't 'either / or' are they? In the sense that if we were to grant disclosure as you seek it, then we could also require that the disclosure schedules and, if necessary, Redfern schedules could be prepared such that any further matters could be addressed at the second CMC. Is that not correct?

MR HOLMES: Quite right, sir, that is our position. We respectfully submit the two could work in parallel so that we could consider in a more informed way the proposals and the disclosure report and in the EDQs in light of the initial disclosure given. It may be, for example, that particular custodians identified by the claimants prove not to be particularly relevant in view of the materials we've already had. That will allow for a more proportionate exercise at the second CMC.

The final point concerns the way through. Without wishing to assign blame at this stage for the impasse that we find ourselves in, for whatever reason progress hasn't been made since we provided the schedules, the annexes on the 9 October 3 weeks ago, and therefore we find ourselves without the refinements having been discussed which are identified now for the first time during the course of oral submission. There are as we see it two solutions to that, the first potential solution would be for the Tribunal to make the order and if practical difficulties arise, for applications to be made as you, sir, suggested. We respectfully suggest that is a sensible approach in the

circumstances. The second possibility would be for the parties to go away after this CMC and liaise in short order on the basis of an indication from the Tribunal and seek to make what progress can be taken to agree annexes which could then be submitted to the Tribunal and in so far as any disagreements could not be resolved that could be left for resolution on the papers. I appreciate that may be less attractive to the Tribunal because it leaves this hanging over you when in fact, there may be no need for that if minds are focused by the need for an application. So I think of those two courses we respectfully commend the first but either of those we say is a possible way through. Subject to any questions, those, sir, are my responsive submissions.

THE CHAIR: Thank you very much. So does that take us then to the second issue, which is the question of the end date as it were to which we're working?

MR HOLMES: Yes, sir. On this I think I can be brief. On the question of whether directions should be made for intermediate steps for trial, we submit that is the ordinary course and is appropriate so that parties can plan on the basis of a clear road map to trial. Of course, the dates are provisional, they may be subject to subsequent adjustment but it is sensible to lay out a road map. The claimants have cavilled on particular dates. We don't of course know what the end date is. That will be subject to the Tribunal's availability and the process that you chose to adopt in relation to disclosure. But sir, on that matter, I have no doubt that if you put the parties in a room for an hour, they could arrive at sensible directions to trial because the steps aren't in dispute. So, then as regards the timing for the Tribunal -- we're really in your hands, sir. I don't know if the Tribunal has any ability to give us a preliminary indication as to when it might be available so that we can work around that window?

THE CHAIR: I think that is a question about which we would be grateful to have submissions, it was my understanding, and this may be wrong, was that all parties as

it were had availability on the dates proposed by the claimants but the date proposed by PayPoint in November of next year caused difficulty for one set of, I think, it's may be Mr West, and am I right in broad terms?

MR HOLMES: I believe so, sir. I don't want to speak for Mr West. He can confirm the position as to --

THE CHAIR: Is that right, Mr West?

MR WEST: Yes.

THE CHAIR: That's being so, I think as the Tribunal understands it these two broad options are before us, i.e., the proposed date in November or a date in thr Trinity Term, the way it's been framed by the claimants. Insofar as you're seeking to urge the earlier date, I think we would be grateful to understand your submissions in that regard.

MR HOLMES: Yes.

THE CHAIR: Otherwise, it would seem as if, so far as the parties were concerned, that the other date as I understand it wouldn't cause you any difficulties beyond you seeking to urge expedition?

MR HOLMES: Sir, we have availability in the Trinity term. Not for the whole of it, but dates we apprehend could be found for a listing of perhaps six weeks in the light of the points that Mr Lomas made, which with respect we see the force of. So, that we don't press the November dates. At the time when we proposed them, we weren't aware of the availability issue I believe, and we would be happy to work on that basis.

MR LOMAS: Three weeks to six weeks. We need to exercise a bit of restraint here.

MR HOLMES: You're quite right.

MR LOMAS: It will be 12 by this afternoon.

MR HOLMES: I hope not. We're just alive to the points that you've made. We do see the sense of perhaps, listing longer than is needed and then refining down so there

are dates in people's diaries. It is always easier to shorten than it is to lengthen. That six weeks I should say does also make in our minds anyway provision for pre-reading, which I think should be done in accordance with CAT's guide to proceedings.

THE CHAIR: That's very helpful. Thank you, Mr Holmes. Mr West, is there anything you want to add to what you've heard?

MR WEST: That's common ground. That does leave the question as to whether the Tribunal should make, should set down the interim steps now. It's fair to say that is not the best --

THE CHAIR: I think the Tribunal's provisional view about that would be that once we fix the end point that you learned counsel applying your minds to it, would be able to identify dates working backwards from that along broadly the lines that have been outlined by PayPoint in is draft order. That would be a matter that would be more efficiently dealt with in that way rather than us sitting and haggling over particular days along that timeline. Subject to any observations you would wish to make that in that regard.

MR WEST: I am sure but of course it may end up having to be varied at the second CMC. There's also a possibility.

THE CHAIR: That is very helpful. Mr Spitz.

MR SPITZ: Our position is the same as Mr West. We can work on that basis and certainly, trial in the Trinity term does provide some leeway for applications that may well come up, further disclosure applications, potential applications to amend and so on. The November date made things a little bit tight for that sort of possibility.

THE CHAIR: Thank you. Thank you, that's extremely helpful. What the Tribunal is going to do now is adjourn to consider submissions. Obviously, we've had some time during the earlier adjournment but just to finalise our views and we would hope to be

in a position to come back to you just before lunch time.

(12.47 pm)

(A short break)

(12.51 pm)

THE CHAIR: I'm very grateful to counsel for their helpful submissions. In terms of what we've decided, if I can work from the draft order, which is tab 17 in the first part of volume A of the bundle, the first matter is the date of the second case management conference and for reasons which I have touched upon already during the course of submissions, the date for that hearing is going to be 18 March of next year. Now, that to some extent, influenced the Tribunal in the decisions that it has taken in respect of further disclosure because the Tribunal's view was that it was important to make as much progress as could be made in the intervening time.

So to deal with the matters, first of all, in paragraph 8, the Tribunal determines that the defendants shall have until 22 December to disclose non-confidential documents. That, to some extent, is driven by the fact that insofar as the second case management conference has been pushed back somewhat, it makes sense for that date to take that into account. I didn't understand it to be strongly pushed by Mr West.

In terms of further disclosure thereafter, I understand paragraph 9 is not in dispute. That takes us, first of all, to the question of disclosure reports and the electronic documents questionnaires and the Tribunal is of the view that those would be of assistance. Therefore, we will order that the parties shall exchange disclosure reports and electronic documents questionnaires by 5 pm on 12 December 2023.

In terms of the categories of documents in annexes A, B and C of the draft order, the Tribunal having reflected on matters is of the view that matters should move at the speed of what has been agreed as opposed to the speed of what might be disagreed.

So, on that basis, we are going to order disclosure in terms of those annexes. We would expect parties to act reasonably and co-operatively in addressing any issues that would arise from that and make application, if required, and the Tribunal will address any such application if necessary and appropriate on a documents-only basis to ensure that that process is facilitated so far as possible.

In light of the date for the case management conference, that disclosure should be made by 2 February of next year. We also expect the parties to put us in the position to be able to make any decisions that remain outstanding on further disclosure, if any, at that second case management conference. Accordingly, insofar as matters are in dispute the Tribunal would expect a Redfern schedule to be provided to it. In respect of the date of trial, the Tribunal will list a six-week trial from 28 April 2025. We would expect, as was foreshadowed in what I said to counsel, that the parties would be able to agree the steps leading up to, or the timetable for the steps leading up to that listing date we would expect the parties' representatives to revert to the Tribunal with that agreed timetable.

That leaves two matters which we raised in advance of the second case management conference. The first one is that the Tribunal at that case management conference would wish to be addressed by parties as to the scope and number of experts which each party intends to lead at trial. The Tribunal is somewhat surprised at first blush that each party only seeks permission to lead one expert and we would expect to be addressed on the need, if the parties consider it, for the Tribunal to hear evidence from experts beyond the field of competition economics in relation to matters, for example, of accountancy or other evidence as to the nature of the markets concerned.

So the Tribunal expects the parties to be in a position to address it on those matters at the second case management conference and the other matter there obviously

which I have touched upon already is the Tribunal would expect to be addressed on any outstanding issues for disclosure at that hearing informed both by the disclosure reports, electronic documents questionnaires and a Redfern schedule if there are any outstanding matters.

Now, I think that addresses all the matters that we require to determine today.

MR WEST: Can I briefly ask a question on clarification on the order you have made.

THE CHAIR: Please.

MR WEST: Firstly, I understand there to be liberty to apply in relation to the disclosure order.

THE CHAIR: Yes.

MR WEST: My query concerns the test which the Tribunal will apply on any such application. Is it a re-hearing as it were or will my clients be required to demonstrate some sort of change of circumstances, justifying revisiting an order which the Tribunal has made because it may be suggested on the application by my friends, "Well, you haven't shown a change of circumstances so the Tribunal cannot revisit its order."

THE CHAIR: The Tribunal's view is in so far as we've not heard detailed submissions for the reasons you outlined, in relation to the scope and intensity of disclosure that the Tribunal would be prepared to entertain any such application on a re-hearing basis.

MR WEST: I'm very grateful.

Finally, in relation to the listing date of 28 April, is that the date when the trial is to commence or the date of the listing window? Because we previously discussed the Trinity term which begins at the beginning of June to the extent there may be availability issues in April or May?

THE CHAIR: That may just simply be a lack of familiarity with me with the use of the term "Trinity term."

MR HOLMES: I hesitate to interrupt, I should say we also have some difficulty with the date suggested. I apologise if we haven't made that clear.

THE CHAIR: The fault is entirely that of me. It is based on the fact that I am completely unfamiliar with the term "Trinity term" this is not being a term used north of the border. I have been provided with information that the Trinity Term runs from 4 June, as Mr West was suggesting, until 31 July. What I am going to do in this regard is the Tribunal will list the trial from Trinity Term as opposed to not in Trinity Term as I previously said, and will advise the parties of the precise date of the listing window at that point. So I'm very grateful, thank you, Mr West for raising that point.

MR HOLMES: It is common ground that this should be done on the ground of mutual availability, if possible. Perhaps counsel's clerks might liaise with the Tribunal as well to inform the Tribunal of the dates that might be workable from our perspective.

THE CHAIR: I am quite content we proceed on that basis.

MR HOLMES: I am grateful.

THE CHAIR: Mr Spitz, is there anything you want to add?

MR SPITZ: Nothing sir.

THE CHAIR: Very well. Unless any counsel have any other issue to raise, that concludes the hearing. Thank you very much.

(1.15 pm)

(The hearing concluded)