IN THE COMPETITION APPEAL TRIBUNAL

CaseNo: 1379/5/7/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

13th May 2024

Before:

The Honourable Mr Justice Butcher
Peter Anderson
Simon Holmes

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Claimant

Kerilee Investments Limited

v

Defendants

International Tin Association

A P P E A R AN C E S

Stephen Nathan KC on behalf of Kerilee Investments Limited (Instructed by Avery Law)

Laura Elizabeth John on behalf of International Tin Association (Instructed by CMS London)

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Monday, 13 May 2024

13 May 2024

(10.32 am)

Opening remarks

THE CHAIR: Yes, as quite a few of you are joining livestream, I must start with the 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, of the proceedings. Breach of that provision is punishable as contempt of court.

Yes, who is going to go first?

Mr Nathan, you, I think, must be on mute if you are trying to communicate.

You still are.

MR NATHAN: I hope now, sir, you can hear me.

THE CHAIR: Yes, I can.

MR NATHAN: I do apologise. It is one of those irritating things. I put it on mute.

I represent the claimant, the plaintiff -- the claimant here, and my learned friend Ms John appears on behalf of the defendant. We have agreed that I should go first because effectively it's my application for either relief from sanctions or to persuade you, sir, that there was no breach of the order, as you will see from my skeleton argument.

Submissions by MR NATHAN KC

MR NATHAN: The starting point is that on 29 October 2021, the tribunal ordered preliminary issues to be decided, and in relation to disclosure, there were a number of agreed extensions of time, each of which were approved by consent orders by the tribunal, and in March 2023, disclosure was completed.

I refer to that simply because my learned friend makes point in her skeleton argument

at paragraph 25, in relation to what went before and I will be saying to you, sir, that what went before is actually irrelevant. But just so that one gets into focus, the last order in that sequence prior to the order was in the form of an unless order requiring the parties to give disclosure.

That was the order of 13 March 2023. That order, however, was one which was made by consent. There was no preceding breach. It was one which was made by consent and it was complied with. So nothing, we would respectfully say, arises from that sequence of orders.

Then, following disclosure, there were two further consent orders granting extensions of time in relation to service of evidence and service of expert reports, the first being on 28 July 2023, which is the order at page 474. I don't propose to ask you to look it up, but it is a consent order. There was then, on 13 November, a further consent order. For some reason, which I don't understand but I don't think really anything turns on it, there is no copy of the order in the file; there is just a letter from the tribunal saying that the chairman will put the order on file in due course.

There then follows the order which was made on 31 January, which is the subject matter really of today's hearing which we find at tab 23, page 447, which provides for an unless order. It is paragraph 2.

Paragraph 1 sets out the timetable. Then paragraph 2 says that "unless the claimant serves its evidence by 4 pm on 24 February 2024, in accordance with paragraph 9 of the directions order as amended by paragraph 1 above, the claim will be struck out with judgment entered for the defendant with costs to be assessed if they are not agreed."

Now it is important to appreciate that prior to the making of that order there had been negotiations for a further extension of time between the parties which commenced on 23 January and continued through to 29 January.

THE CHAIR: Mr Nathan, can I just stop you not because I have a substantive point, I am just worried about the pagination.

MR NATHAN: Yes.

THE CHAIR: At least in the bundle that I have been looking at, that is page -- this order is at page 477. Now it may be that I am just looking at the wrong bundle.

MR NATHAN: I do apologise. I gave -- because it is typed terribly small at the top, it is 477. I read out the wrong number.

THE CHAIR: That relieves me because it shows we are looking at the same bundle. 477, yes.

MR NATHAN: 477. I do apologise.

As I say, the making of that order was preceded by some negotiations, and it is important to look at what happened there, before we look at what happened on 29 February, a month later. It starts at page 705. We have to work backwards because that's the way these things are. It is right at the back of the bundle, the last item in tab 63. It starts at page 75. Forgive me for one moment. It starts at 710, if we work backwards. It starts at the bottom of the page with an email from my instructing solicitor to Mr Henderson at CMS:

"Dear Kenny, I tried to reach you on your mobile a short while ago and should be most grateful if you could return my call this afternoon/evening, please."

Then that's at 4.21. At 4.23 Mr Henderson responds:

"I am on calls until 5.30 today. I will call you this evening."

Then we go forwards to the 5.19, when Mr Sellars refers to a conversation which was then had:

"We spoke at around this time yesterday evening. I should be most obliged to hear from you please? I am generally around this evening if you would like to give me a call. Plainly, it is important that we reach an agreement and avoid troubling the

tribunal."

This relates to the fact that on 26 January, the time under the November order would expire, and there was a negotiation going on in relation to an extension of time for that.

At 5.21, Mr Henderson responds:

"Thanks for your email. We are awaiting client instructions. I anticipate responding this evening and am cognisant that your client requires a prompt answer."

Then we have a response at 1.35 the following day from Mr Sellars:

"Many thanks for the letter yesterday evening. Do you have a moment this afternoon for a quick call?"

We don't in fact have that letter in the bundle. However, that letter, as I understand it, proposed there should be an extension of time, not for the period that my client was asking for, but for a period of 14 days until mid-February, and my client was asking for 28.

Then, if we go forward again, to page 707, we see Mr Henderson writing to my instructing solicitor:

"Should be able to call you at 4 pm ..."

And so on. Then that is then followed by "Many thanks".

We go then to the email from Mr Henderson at 9.49 pm, on the 24th:

"I refer to our telephone conversation ,,, at approximately 4.10. On that call you enquired whether our client would further extend the extension offered in our letter dated 23 January 2023 [it should of course be 2024]. We have now taken instructions from our client on that request. Our client's position remains as set out in our letter of 23 January ..."

Which was an adjournment of 14 days.

That was then followed by an email dated 29 January, which we find at page 705 from my instructing solicitor, which is an important email:

"I am writing further to our exchanges last week and to the claimant's invitation for your client to agree a time extension for exchange of witness statements and expert reports to 29 February. It is recalled that the request was based upon the fact that Mr Beckett [who is the CEO of the claimant company which is an SME] had been unwell across a significant period recently. That impacted not only upon the ability of the claimant to meet the most recent deadline but also created delays in business operations. The further impact was on the ability of the claimant's expert to properly take instructions and in this regard, we are informed by the claimant's experts that given the unfortunate delays and other prior commitments, the earliest that they can produce a draft report is 24 February 2024, with a view to producing their final report ready for exchange on 29 February 2024. The claimant is confident that it will be in a position to exchange on 29 February 2024 and is prepared to agree that on an unless basis. We should be grateful if your client would kindly reconsider its offer to extend the deadline to 9 February 2024 and agree an extension to 29 February 2024. Plainly, there can be no prejudice in a further short 20 days and with the sanction of an unless order. We would be grateful if you would take instructions and revert ..."

At that point, one sees that the parties basically negotiated -- it is agreed that there is going to be an extension; the question is how long. On my side, there has been an offer of an unless order to back that up.

On the 29th, CMS declined the request made by my side. Instead they wrote to the court asking for an order, asking for what they had wanted, which was the shorter extension; referred to the offer from our side of an unless order against the claimant, and the tribunal in its discretion made an order granting an extension of time until 29 February, as my side had requested, and tagged on to it the unless order which my instructing solicitor offered to give on behalf of the claimant.

It is important to understand the context that although there had been no formal

application by my side on 26 January asking for an extension of time, the background of the order of 29 January was that both parties agreed that there was to be an extension; the question was how long and on what terms, in the sense that the claimant had offered an unless order and the court was then invited by the defendant to make an order on the basis of an unless order.

Both parties in fact benefitted from the extension of time to 29 February. We can see that, although -- I say "we can see it", I can't take you to the pages now because they are not before you, but in fact the expert reports which were exchanged on 29 February, and I will come to using the word "exchange" loosely in the sense that there was a debate whether or not there was service on our side on 29 February or not -- but nevertheless the expert reports served by the defendant on 29 February were all dated that day, not 26 January. So obviously some work had been done on those reports in that interim period.

On 29 February, both parties were ready to exchange. Importantly -- again it is in the evidence from Mr Sellars at his paragraph 6 of his witness statement, which I am assuming that the tribunal has had the opportunity of reading, that there had been established a common practice between the parties that exchanges of documents would take place by email. Documents which required to be served or delivered to the other party would be sent by email rather than formally delivered by hand. We can point to two obvious examples: one is referred to by Mr Sellars in his witness statement, being the amended defence which was served by Sherrards, the defendant's former solicitors.

One can also point to the fact that the exchange of lists in March 2023, following the change in solicitors, was also done by email. There was no physical delivery by each party. So that whilst my learned friend in her skeleton makes a -- and indeed the defendant in CMS's letter of 4 March -- makes great point about the provision of Rule

111, insofar as these parties are concerned it was honoured more in the breach than anything else because neither party adhered to that requirement.

What we say is that that is a classic example of if there really is a dispute about it, then there is an estoppel in that a practice had developed between the parties and that there was a legitimate expectation on the part of both parties, but certainly on the part of Mr Sellars on behalf of the claimant, that there would be service by email and not physical delivery of the documents which were going to be served.

As I say, that is paragraph 6 of Mr Sellars' third witness statement. One finds it at page 213 of the bundle, but I don't propose to take you to it unless you want me to.

What then happened, one sees if we go into the bundle at page 570. It is tab 29. Once again, we need to work backwards. It starts at the top of page 570, Ms McTighe on behalf of CMS at 2.51. 4 o'clock being the time when exchange was to take place. She writes to Avery Law, my instructing solicitors:

"It is our intention, in accordance with the CAT Rules 2015, to personally serve these at your offices prior to 4 pm. We await your reply."

And the response then, if one turns forward to 569, from Mr Sellars at 2.54:

"We are ready to exchange and propose doing so by 3.15. Our intention is to exchange by email with a link to the various materials. It would be helpful if you would kindly also serve electronically, please. We will then file our client's materials electronically with the tribunal."

Of course all documents get filed for the tribunal electronically rather than physically, unless there is also the additional requirement for hearings, for example, when a number of bundles also need to be provided physically.

Then, after that email, there was a conversation which Mr Sellars refers to in his witness statement, when he spoke to Mr Henderson, and in which Mr Henderson said that the defendant reserved its position.

That is then reflected in an email which comes through at 3.13 from Ms McTighe, the text of which we see at the top of 569:

"Dear Avery Law, thank you for confirming that you are ready to exchange. Noting that the tribunal has not provided approval for service by means of electronic communication as per the CAT Rules 2015, Rule 111(1)(d) we intend to serve personally in accordance with … 111(1)(a). We reserve the defendant's position if service by the claimant is not properly effected."

As you will appreciate, this was now 45 minutes before the 4 o'clock time for service.

That produced a response from Mr Sellars at 3.24, which starts at page 567 at the bottom of the page, in which he says:

"Dear CMS, pursuant to paragraph 9 of the order of Mr Justice Butcher … (as amended) for the purposes of exchange, please see, below a link to our client's expert report ...(Reading to the words)... in the area of mineral supply chains and a signed witness statement on the issues to be considered at the preliminary issues hearing."

And a link is provided and password:

"Kindly confirm receipt.

"This is being filed electronically with CAT. Please urgently provide us with a link to your client's exchange materials. We note your reservation of rights regarding personal service – as opposed to exchange. ...(Reading to the words)... Please confirm whether or not you require a hard copy of the same? That can be made available to you at the earliest on Monday next week."

The 29th is a Thursday:

"To the extent that your client objects – please confirm – we will make an application for permission for retrospective electronic service. The hope and expectation is that that will not be required."

Then in response at 3.56, Ms McTighe writes:

"Dear Avery Law ..."

This is page 567 at the top:

"Further to your email below providing a link to your client's expert report and witness statements. With regard to service, we maintain our client's position as per our email timed [at] 3.13, and understand that our client's documents were in fact served at your offices a short while ago. ...(Reading to the words)...However, as requested, we enclose a link to the FTP site which contains electronic copies of the defendant's expert reports and witness statements."

Then if we skip a paragraph:

"In line with the CAT's request that we file electronically, we confirm that copies have been filed with the CAT."

Then it ends with:

"As previously noted, our client reserves its position to the extent that your client does not effect proper service."

Then what happened next was that the documents were all printed out and they were served at CMS the following morning by the claimant at 10.30.

If one pauses there, at that moment in time, the defendant's solicitors had received documents. It was obviously convenient to both parties that they should have electronic copies. They had an electronic copy of the documents which were to be served. The following morning, a few hours later, they then were given the hard copies because of their wish that that should be done.

Now I am not seeking to excuse what Mr Sellars did, but -- in this context -- he was lulled into thinking at the time, as he says in his witness statement, that electronic service was the way forward as between both parties. Insofar as that was wrong, it was cured the following morning. There is no question that there can be the slightest prejudice. That is conceded by my learned friend's skeleton, that there was no

prejudice whatsoever to her side over what in fact took place that afternoon followed by the following morning's hard copy delivery.

If it is a correct approach that one can point to an estoppel which prevents the defendant complaining about a defect in service because of the practice which had occurred, then to all intents and purposes, there has been effective service. If, however, sir, you take the view that as regards the court, there can't be an estoppel -- certainly as between the parties there can be -- then one looks at what I might call the realities of the situation, which is what is the harm which has been done? It is absolutely none whatsoever. The harm that has actually been done is that the parties have managed to clock up £90,000-odd between them, I suppose, in having to deal the with aftermath of what should have been, if anybody had half a wit's common sense, to say, "Yes, you ought to have done, but nevertheless there is no harm done," and a great apology from Mr Sellars and the parties would have got on with things, instead of this, the court -- the tribunal received a seven-page letter from CMS seeking to -- under cover of asking for confirmation as to whether or not the claim had been struck out. It is seven pages worth of objections as to say why the court should not grant relief from sanctions to the claimant.

If one therefore has to look at principles, one looks to Denton as the principal source. That is common ground between the parties. If I may then turn to Denton which you will find, sir, in my learned friend's bundle of authorities at tab 2. I apologise, it is tab 4, the passages I want to start with -- subject to anything my learned friend wishes me to read -- starts at page 16, where the Court of Appeal in Denton considered the earlier decision in Mitchell, paragraph 24:

"We consider that the guidance given at paras 40 and 41 of Mitchell remains substantially sound. However, in view of the way in which it has been interpreted, we propose to restate the approach that should be applied in a little more detail. A judge

should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the 'failure to comply with any rule, practice direction or court order' which engages rule 3.9(1)."

Pausing for a moment, we have approached this on the footing that this tribunal will apply the same principles as the High Court would do under the CPR. Essentially, the practice of the tribunal is not to slavishly follow but in principle, where there is similarity, the tribunal will naturally look to guidance from what has taken place in the High Court; and in the context of relief from sanctions, it would be the natural thing, we would respectfully say, for the tribunal to apply the same sort of principles as would be in the case of ordinary litigation in the High Court.

My learned friend has pointed to two authorities which indicate that the tribunal has not actually firmly indicated that it is bound to do so, but nevertheless we think that the proper approach should be that the tribunal should apply Denton principles. There are no others, as it were, ready on display from anybody else suggesting that Denton is wrong or should not be applied by a tribunal in this country.

So we have the three-stage approach. The first is stage, going back to paragraph 24 is:

"... Is to identify and assess the seriousness and significance of the 'failure to comply with any rule, practice direction or court order' which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate 'all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]' ..."

So then one goes to paragraph 25 of Denton where the court says:

"The first stage is to identify and assess the seriousness or significance of the 'failure to comply with any rule, practice direction or court order' ... That is what led the court

in Mitchell to suggest that, in evaluating the nature of the non-compliance with the relevant rule, practice direction or court order, judges should start by asking whether the breach can properly be regarded as trivial."

It is the word "trivial" which caused all the fuss:

"Triviality is not part of the test described in the rule. It is a useful concept in the context of the first stage because it requires the judge to focus on the question of whether a breach is serious or significant."

Pausing, going down a few lines, one starts in the middle of the line:

"In these circumstances, we think it would be preferable if in future the focus of the enquiry at the first stage should not be on whether the breach has been trivial. Rather, it should be on whether the breach has been serious or significant. It was submitted on behalf of the Law Society and Bar Council that the test of triviality should be replaced by the test of immateriality and that an immaterial breach should be defined as one which 'neither imperils future hearing dates nor otherwise disrupts the conduct of the litigation'. Provided that this is understood as including the effect on litigation generally (and not only on the litigation in which the application is made), there are many circumstances in which materiality in this sense will be the most useful measure of whether a breach has been serious or significant. But it leaves out of account those breaches which are incapable of affecting the efficient progress of the litigation, although they are serious."

And so on.

Then, at paragraph 27:

"The assessment of the seriousness or significance of the breach should not, initially at least, involve a consideration of other unrelated failures that may have occurred in the past. At the first stage, the court should concentrate on an assessment of the seriousness and significance of the very breach in respect of which relief from

sanctions is sought. We accept that the court may wish to take into account, as one of the relevant circumstances of the case, the defaulter's previous conduct in the litigation (for example, if the breach is the latest in a series of failures to comply with orders concerning, say, the service of witness statements)."

Well, apart from the -- in the whole of 2023, there were no breaches whatever. In relation to the order which required compliance by 26 January, yes, one can say that there was a breach, and that the parties were negotiating an extension of time, though their negotiation broke down and they resorted to an application to the court to determine whether the extension should be, as the claimant sought, to 29 February or, as defendant sought, to 9 February.

What we respectfully say is that this is a case where the breach falls into the category of neither serious nor significant nor material. It is completely immaterial; it has not affected anybody. Indeed, one would look to see, what is the prejudice; no one has suffered the slightest prejudice by the fact that the defendant had the electronic form of the documents, which is no doubt the one they continue to use all the time, as opposed to the formal served version which they had at 10.30 the following morning. It is difficult to think of anything which is more trivial, to use the Mitchell word, than that.

At paragraph 28 in Denton:

"If a judge concludes that a breach is not serious or significant, then relief from sanctions will usually be granted and it will usually be unnecessary to spend much time on the second or third stages. If, however, the court decides that the breach is serious or significant, then the second and third stages assume greater importance."

The second stage is to determine what is the reason why the breach took place, and the reason why the breach took place is because Mr Sellars had been lulled into thinking that, as before, there would be an exchange of documents between the

parties electronically rather than physically. By the time that he was alerted to the fact that the defendant's solicitor was now seeking to reserve its position without expressly saying, "No, we will not accept service," the fact is that he was lulled and that's unfortunate but it's exactly what happened. It's a perfectly innocent and sensible explanation and it's a very good reason as to why he didn't actually serve physically.

If the parties had discussed, no doubt, the day before, this would never have occurred in the first place, because the one important point to clarify --

THE PRESIDENT: That may be the criticism which is to be made: it should have been discussed the day before.

MR NATHAN: It should have been discussed by both parties. So both parties are equally at fault in the sense that they did not talk about it. But that in a sense is -- it's not a fault on the part of Mr Sellars that he thought that what had taken place before would be what would happen on the day when they were going to exchange these particular documents.

So, you know, I am not saying there is a fault. In the happiest of all worlds everybody would have the benefit of the hindsight that we all now have as to what was going to take place. Because we are all -- we have the benefit of looking now with 20/20 accuracy with the benefit of hindsight.

But it is difficult to see how this omission of service can be categorised into anything other than that it is not serious, it is not material and it is not significant. I am not sure I can really take it any further. It is a matter for I think --

THE CHAIR: I think we understand the arguments in relation to that.

MR NATHAN: What I would like to take you to is then what is said in Prince Abdul Aziz's case, which you will find in my authorities at tab 2. It is His Royal Highness, Prince Abdul Aziz v Apex Global Management. It starts at page 25. I want to take you to paragraph 30 because what is, we suggest, being proposed by the defendant's side

is a journey into territory which is in fact completely forbidden.

Paragraph 30 of the decision of the majority in the Supreme Court says this, at page 35:

"A trial involves directions and case management decisions, and it is hard to see why the strength of either party's case should, at least normally, affect the nature and enforcement of those directions and decisions. ...(Reading to the words)... While it may be a different way of making the same point, it is also hard to identify quite how a court, when giving directions or imposing a sanction, could satisfactorily take into account the ultimate prospect of success in a principled way. Further, it would be thoroughly undesirable if, every time the court was considering the imposition or enforcement of a sanction, it could be faced with the exercise of assessing the strength of the parties' respective cases: it would lead to such applications costing much more and taking up much more court time than they already do. It would thus be inherently undesirable and contrary to the aim of the Woolf and Jackson reforms."

I think what I need to do is to take you, sir, to the different points which are being made against me by the defendant.

There is also one other matter which one ought to take into account. Putting it the other way around for the moment, the question which the tribunal needs to ask itself is: would a refusal of relief from sanctions be a proportionate action on the part of the tribunal, bearing in mind that it involves the striking out of the whole of the claim for what we would say is the most minor of infractions, where the other party actually has possession of the documents in question and the only thing which has not been complied with is the form of physical service.

We respectfully say that to impose the sanction and not grant relief would be completely disproportionate. One can pick that up from the White Book. We have included in our bundle the paragraphs of the White Book which is at tab 6.

THE CHAIR: Page?

MR NATHAN: It starts at page 83. At the bottom of the page is the rule. I want to take you to 3.9.1, second paragraph, which is short. The first paragraph is quite long, but the second paragraph is short:

"In Monson v Aziz, by the Court of Appeal, it was held that the refusal to grant relief against a debarring sanction would not contravene Article 6 ...(Reading to the words)... of the European Convention on Human Rights ground provided that such refusal was proportionate and was for a legitimate purpose."

It would be very difficult to see how the imposition here of a refusal of relief of sanctions -- relief from sanctions -- would be proportionate, and one would wonder what would be the legitimate purpose in the particular circumstances where someone actually provided the documents but in the wrong form.

THE CHAIR: Yes. You were going to go on to the points which are taken against you.

MR NATHAN: Yes. I am going to do that if I may.

The first is if I go to paragraph 23(a), 24 and 25 of my learned friend's skeleton, she relies upon Rule 55 by saying that Mr Beckett's witness statement would fall to be excluded by the tribunal. Now that is simply not something which the tribunal should even begin to engage on at this point in time, because they are beginning then to look at the merits and having to compare and hear the submissions on the relevance of the witness statement and parts of the witness statement which goes for this which statement goes for that, you are looking at the strength at a time when the evidence itself is not all complete.

Let me go back. Rule 55 of the tribunal rules is the general rule which the tribunal has for the purposes of controlling the evidence which is before it, of omitting what should or shouldn't be included. We have Rule 55 in fact in my learned friend's bundle. If we

just turn it up for a moment, it is worthwhile looking at. It is at tab 9, page 64. It goes thus:

"The tribunal may give directions ..."

It is a general provision as to how it controls the evidence:

"... as to the provision of the parties of statements of agreed facts, the issues on which it requires evidence, and the admission or exclusion from the proceedings of evidence, the nature of evidence which requires to decide those issues, whether the party committed to provide expert evidence, and so forth."

Then it goes on to deal with whether or not there should be evidence on oath or by affidavit and so forth. This is a very general provision.

It would be extremely rare at the interim stage before a hearing that a tribunal would then start addressing one particular witness statement in order to consider whether or not it should in part or in whole not be admitted, and --

THE CHAIR: Save that it would be rather curious if the tribunal were to grant relief from sanctions in order to permit the service of something which it could see was completely pointless. I am not saying that is this case, but it just wouldn't do it, would it? I mean, why should it?

MR NATHAN: Completely pointless. But the way it is put by my learned friend is it should be excluded in whole or in part. The time for looking at the evidence is surely either at the opening of the hearing, in order to be able to look at the whole of the evidence, or -- but not before. But I don't think, with respect, that one should actually be looking at part of the evidence as it will be eventually before the tribunal for the purposes of the hearing.

If it is to be said that I need to show that this has a relevance, I just find it very difficult to see that as a matter of principle where one party says, "This is the evidence I wish to put in from the managing director of the claimant, and therefore it contains the

material which I wish to rely on at this stage of the proceedings," it is not the totality of all the material necessarily which the claimant will be putting forward. Because clearly there will be reply evidence, there will be --

THE CHAIR: That's going into another area. I would be very -- I think it might well be abusive for you to say that that isn't the evidence on which the -- the factual evidence on which you intend to rely; not by reference to reply to particular points made in the defendant's evidence -- that's a different matter -- but the intention of the order was that you should serve all the factual evidence on which you intend to rely by that date.

MR NATHAN: Yes. I accept that, but I wouldn't go so far as to say that it is abusive, but that is the evidence which my client wishes to rely on.

If, when it comes to the hearing, the tribunal concludes that the evidence does not materially assist it in its decision, well that's -- but to say that it is, as my learned friend seeks to say, irrelevant and at this point in time for the purpose of considering relief from sanctions which has nothing whatever to do with merits, that the evidence should be excluded, I would respectfully say that is wrong in principle.

THE CHAIR: I understand that. You can't in a sense be in a worse position than you would have been had you said, on 29 February: "We do not intend to serve any factual evidence."

MR NATHAN: But if -- can I put it that --

THE CHAIR: What I mean by that is we would not then look to say, "Oh, but without factual evidence your case is not going to succeed."

MR NATHAN: Yes. But the way I think I would prefer to put it is this: if Mr Sellars had complied with the rule and had served in the correct way, we would never be here in the first place because such an application would not be being made, certainly at this point in time, to exclude under Rule 55 the evidence of my client.

The way it would be dealt with is that if the defendant really thought that the evidence

of Mr Beckett contributed nothing to the claimant's case, then it would simply not respond at all; it would ignore it. That is the way one would deal with it.

But what would be wrong in principle would be to exclude from the evidence that which the claimant wishes to put forward, because the rule is not really designed for the purpose, we respectfully say, of dealing with the case where you, as it were, take a blue pencil to --

THE CHAIR: I think we understand that point. Right. So that is Mr Beckett.

MR NATHAN: I can, if necessary -- let me say at once: I can if necessary take you to passages in Mr Beckett's evidence which are relevant, but it strikes me that this is a matter which actually is more of principle rather than the factual material; but if that is to be a material consideration, then of course I will take you to the passages in Mr Beckett's witness statement which I say do assist the tribunal, or will assist the tribunal along with all the rest of the evidence which there will be by the time we get to the hearing.

I do think it is important, I think, to have a principled approach. One of the areas which the court -- the Supreme Court -- has made very clear, and indeed the same applies both in Mitchell and in Denton, the Court of Appeal makes very clear that the parties should not descend to effectively spending an awful lot of time on satellite matters rather than focusing on the one thing that matters which is the actual breach of the order, because this is a procedural order which has been broken.

THE CHAIR: Save that we do have to look at -- we may have to look at all the circumstances of the case. That is the third Denton principle.

MR CHAIR: Yes, but if this was a case where there was going to be a strike-out mounted, then we would be having three or four days no doubt of -- and the tribunal would have deployed before it all the relevant materials which go and contribute towards what the claimant says is material to its case.

THE CHAIR: Yes.

MR NATHAN: What is being attempted is a sort of -- a bit of a strike-out, which we respectfully say is totally contrary to principle.

THE CHAIR: Yes.

MR NATHAN: It just shouldn't take place.

THE CHAIR: Yes. I think we understand what you say about Mr Beckett's statement.

MR NATHAN: Yes, but I mean, if the position is that you consider that it is a matter which the tribunal ought to consider, then I will of course -- but I will do that in reply then --

THE CHAIR: Yes, yes.

MR NATHAN: -- to make good what I said.

His witness statement is not irrelevant. The fact is it just isn't very relevant, but I am hoping I could actually avoid having to spend some time actually taking you lugubriously through it.

THE CHAIR: You have made your position clear in relation to it not being satisfactory for us to look at it for that purpose, yes.

MR NATHAN: The second complaint about Mr Beckett's statement is that it didn't have the required solicitor's Certificate of Compliance, which was an omission which shouldn't have taken place. That defect has been cured by Mr Beckett's second witness statement which, as you will have seen, doesn't add any factual material but simply effectively confirms that what was in his first statement was what he intends to say, and that second witness statement is accompanied by a certificate from the solicitor.

Now, this arises -- the requirement for the compliance arises by reason of a practice direction from the tribunal in November 2022, which it is worthwhile looking at because the remedies are fairly simple. We have it at page 69 of my learned friend's bundle,

paragraph 4.3 says:

"A witness statement must be endorsed with a certificate of compliance in the following terms ..."

And then at 5:

"Sanctions".

All quite a different scheme of things. Nothing to do with a sanction which is being imposed here.

At 5.2:

"If a party fails to comply with any part of this practice direction, the tribunal may, upon application of any other party ..."

So it requires an application from the defendant to do one of the following:

"Refuse to give or withdraw permission to rely on the witness statement wholly or in part; order that a trial or appeal witness statement be re-drafted in accordance with this practice direction or as may be directed by the tribunal."

So the obvious remedy would be that if there was a complaint by the defendant, then the court would have ordinarily said well you must put a certificate of compliance on the witness statement. It is quite interesting, if you look at what paragraph 4.3 says, it doesn't actually say when the endorsement necessarily needs to be put on. It could actually be put on at any time before the witness is called. So there is no actual timing of it. One direction that the tribunal could make is that the first witness statement should now be endorsed by Mr Sellars in the proper way.

But the way forward which Mr Sellars adopted was, we think, a more elegant way, which was to put in a second witness statement with a Certificate of Compliance confirming what was said in the first witness statement, as being the material which Mr Beckett wished to rely on, and exhibiting that first witness statement to the second one.

Again, in the greater context of things, this is trivial. It really is a minor infraction, but it is important. I am not suggesting it is not important, but it is minor, something that is eminently curable and has indeed been cured.

That deals with Mr Beckett. Then there are objections to the original report from the experts. The first one is that the court didn't give permission for financial experts, or a financial expert, to give evidence as an expert. And the witnesses -- the two experts who have given this joint report and have provided a report speaking of themselves as economic and financial experts.

I have to say that this is the least impressive of the objections taken by my learned friend, because the phrase "financial expert" is a very broad, broad brush of what is the nature of the relevant expertise. Clearly it is the sort of area which one might begin one's cross-examination to say, "What are you saying is a financial expert? What experience do you have of this, or that, or the other?", that would be the way one would deal with that. But to complain and say it is actually a legitimate complaint that the witness has described himself in that particular way as a financial expert, simply does not carry the matter -- it is not a valid complaint to the report at all.

Then the next complaint is that the report is a joint report which is undifferentiated in that both experts have signed the report. There is no objection as such to the report -- paragraph 36 of my learned friend's skeleton says so -- but it is a practical question which is nothing whatsoever to do with the report itself; it is the way forward of how the court or the tribunal when hearing the case will deal with the question of the experts, because obviously each expert would ordinarily be separately cross-examined. If that is to be the way forward when we come to directions time for the hearing, then the experts will identify which part of the joint report each one will answer to, and be responsible for. So that is easily dealt with.

The only question mark I have in my own mind is whether this is a case where in fact

the tribunal may wish to avail itself, when it comes to giving directions, of what is colloquially called hot-tubbing which is permissible in the practice direction under 35, paragraph 11, which provides for the court actually to adopt a collective approach towards the experts where it has all the experts in front of it, and there is actually effectively a discussion between court and the experts, and where there are then questions posed in cross-examination as the next stage.

I don't know how the tribunal will approach the matter, but it is not something which is a legitimate objection to the form of the report to say, "No, you can't do that," and that's all that matters.

Again, that was not -- it's not a valid objection as such. Now, there is one element of the report which we do accept the experts in their original report went too far in what they say, because they ended up by saying certain things about other parts of the case as pleaded out by the parties but which are not relevant to the issue -- the preliminary issues -- that had been ordered. They completely misunderstood what their function was and I don't think that they properly addressed the questions.

In their revised report, for which we apply now to have permission, they have set about correcting what they got wrong. Now, as I say, you appreciate --

THE CHAIR: Could you help me: have they done that merely by excision or by change?

MR NATHAN: No, they have done it by change, because there are a number of areas which it seemed to me that they had not properly addressed what the issues were which they needed to deal with. For example, they didn't address the second part of the preliminary issue at all. It seemed to me that they ought to be doing so.

What they have done is to provide -- and my learned friend takes no objection to it -- in effect a combined report, rather than one which is just simply at this stage confined to supply chains, because they go on and deal with the nature of the market which there

is in relation to the supply chains, because unlike the defendant, they do not see that there is any distinction between each element of the supply chain at all; they see it as simply a global trading which starts at the mine and goes all the way through to when the manufacturer is actually buying the bar or the rod of tin, or buying the powder made from the particular element, one of these three.

What they have done is they accept that -- and they have not in fact changed their views at all that there is a single global trade which takes place. There is a single global market which exists in relation to each of these three elements or metals where they are traded. You cannot salami slice as the defendant seeks to do.

That is one, I think, principle area which the tribunal need to be looking at in due course when it comes to the hearing.

It struck me that it is important -- it is very difficult as, sirs, you will often have noticed in your own experience -- it is very difficult sometimes to control experts to get them to focus upon what they ought to be saying.

I have been brought into this case late, in the sense that I have only just become counsel on behalf of the claimant. I took a firm view that actually what they needed to do was to focus on what I thought were the appropriate issues in the context of what they had previously written. There are some changes. We can identify if necessary what they are, but it is for that reason that we seek permission to put in a revised report which actually deals with the issues properly, because otherwise they will go off in a terribly messy way right from the start.

My learned friend, in relation to the original report has produced, as her appendix A, passages which she says should be crossed out. If you were to take the view that that's the only material that should go in, then so be it, but I don't think that that's a very constructive way forward because we are at the stage now where experts are being engaged at great cost by the parties, and it seems to me it is the right thing to do that

the expert should set off on the right track to start with, rather than going haring off into something in a way which is not going to assist the tribunal in its decision.

The way that we have sought to cure the problem is by seeking to put in a revised report. It has taken longer than we had hoped. I had hoped we would have been able to do it by Easter, very shortly after I had been instructed, but the experts took longer to revise their reports than anticipated. Again, it is not something that is within the control of those who instruct me.

We therefore put our hands up to say that the original report needs to be recast, and it needs to address certain parts, matters, which the first version of it didn't do. For that reason we actually respectfully ask there may be permission to adduce that revised expert report. The other side's expert has not produced a reply report or anything of that kind. We are told that the other side have stopped for the moment whilst this hearing determines what should happen next.

So again, there is no harm that's been done, other than the short time it has taken for this hearing to come on. I don't think I can really, then, assist you further. As I say, I certainly accept that the first report contains material which should not have appeared in the first place.

In paragraph 41 of my learned friend's skeleton, she refers to the fact that the original report refers to the understanding of the experts that they can be assisted while they are giving their evidence by somebody else from their firm. Their understanding is plainly wrong, but I don't think that that is in the slightest a substantive objection to the report itself, or a substantive objection or reason why this tribunal should refuse relief from sanctions.

At paragraph 42 of my learned friend's skeleton she makes -- just a moment -- a point about the declaration and that it is not in accordance with CPR part 35. Strictly speaking the declaration shouldn't be in respect of part 35, but part 35 is reflected in

the guide of this tribunal, and the experts have corrected the omission which there was of one single sentence in the declaration which they have added. They have also provided a statement of truth which was not in the original version.

THE CHAIR: Yes. Well, is there anything else, Mr Nathan? That really covers the ground, doesn't it?

MR NATHAN: I think, sir, we have. The only other area is this kind of general complaint that the evidence doesn't support the pleaded case which seems to me to be -- it is an attempt to get in by the back door what is in effect a strike-out.

If we are going to have to have a strike-out, let it be so, but it needs to be done in a proper way, in a proper principled way, and not by doing that which the Supreme Court says shouldn't happen, which is then you are supposed to descend -- my learned friend invites you to descend into a consideration of all the merits one way and another, and that is completely inappropriate and quite contrary to principle.

I think that that, then, deals with all the matters which I wanted to say to you.

Oh yes, there is one other matter. At the very last sentence -- last paragraph, paragraph 51 of my learned friend's skeleton -- she then applies on behalf of the claimant for the tribunal to exercise its powers under the Rule 55(1) to exclude the evidence, so it is admitted and then to be excluded.

Again, I think first of all that's not the way to make an application in the skeleton argument on 7 January, for a hearing this week. If there is going to be some application in relation to the witness statements, then the proper way of doing it is for the tribunal to admit the witness statement and let the defendant make its application for exclusion, what it wants to do, and do it in a proper and principled way, but not in this kind of half-beat or half-baked way and simply saying, "Well, it is irrelevant, therefore we must exclude it."

THE CHAIR: You are making applications, aren't you?

MR NATHAN: I am, yes.

THE CHAIR: You have done that in a sort of off-the-cuff way as well, haven't you?

MR NATHAN: Well, I have done it in the off-the-cuff way in saying that the witness statement is relevant. If it is to be said that it is irrelevant, prima facie the material that is being put before the court is to be taken as being relevant. It is put before the court by responsible counsel, I hope --

THE CHAIR: What I have more in mind is the experts' report. I mean, if you are going to make applications to put in a different expert report --

MR NATHAN: Yes.

THE CHAIR: -- other than the one you served, in accordance with the logic of what you are just saying now, that's an application, as it were, to be made properly and in the ordinary way. We should then, on that logic, ask ourselves in relation to the question of relief from sanctions: should there be relief from sanctions in relation to the expert report which was served on 29 February?

MR NATHAN: No, I think logically the way it goes forward is this: the first expert report goes in because relief from sanctions is granted; but we, however, made a formal application last week to the tribunal asking for permission to put in a revised expert report.

THE CHAIR: That is not strictly before us today.

MR NATHAN: All I can say, sir, is that is what we applied for. We, therefore, say that if necessary we need to adjourn this hearing in order to deal with that, but certainly my understanding was that we would be dealing with that. But if --

THE CHAIR: Where did you get that understanding from?

MR NATHAN: It is a misunderstanding in the sense that we had put in that application and explained that that was going to be put in --

THE CHAIR: I understand. Yes. Right.

Well, Mr Nathan, is there anything else you need to say? Because we must first of all have an opportunity for a break for the transcribers, and we must also give sufficient opportunity for Ms John to say something.

MR NATHAN: Yes, certainly. I have completed my submissions, sir.

THE CHAIR: Right, thank you very much.

We will take a ten-minute break now.

(11.45 am)

(A short break)

(11.57 am)

THE CHAIR: Yes, Ms John.

Submissions by MS JOHN

MS JOHN: Thank you, sir. We have three items on the agenda today.

The first is whether the claim is struck out by operation of the tribunal's order of 31 January; secondly, if it is, should the claimant be granted relief from sanctions? The third, if the claim survives, if it is not struck out or if relief is granted, what next steps should be directed?

The third point on the agenda I am going to park for now, if I may, and only come back to at a later point if the tribunal indicates that that is necessary.

So on the first point, the question of whether the claim is struck out by operation of the order, it is common ground between the parties that the service which the claimant made on 29 February didn't comply with Rule 111 of the tribunal rules. The only point that has been made as a reason for considering that the claim is not struck out by operation of the order is Mr Nathan's estoppel argument.

Now I think he may have accepted this morning that estoppel is a question that goes

to the relief from sanctions application rather than the question of whether it is struck out, but in writing he had characterised it as a question of whether the claim is struck out. So let me address it on that basis.

THE CHAIR: I understood that he was pursuing that, orally, but perhaps --

MR NATHAN: I think I would confirm that I am formally pursuing it. But I can see that as between the parties there is an estoppel. Anyway, I can develop that later in reply.

MS JOHN: Yes, let me address it on that basis. In my submission it is a point that is only relevant to the question of relief from sanctions and not to the question of whether the claim is struck out in the first place.

We have an unless order here which provides a sanction for non-compliance. It was not complied with, formally, and so the sanction that is provided for takes place automatically, and we have included an extract from the White Book in our authorities bundle to that effect. It is at tab 12, page 69. I don't propose to look at it unless the tribunal wants to, but the authorities are referred to there.

The point is that there is no further order from the tribunal required for that sanction to take effect. It is simply automatic. So it is not affected by what the parties may have done in the past, may or may not have done on this occasion. Where the conduct of the parties does come in is on the question of how we respond to the claimant's application for relief.

The second point to make in response to the estoppel argument is that at least in writing the tribunal was given a somewhat incomplete account of what actually took place on 29 February. So in writing, the tribunal was being referred to a conversation between the solicitors on both sides, and the submission was made that on our side we had been quite “Delphic” in the course of that conversation.

Mr Nathan has shown the tribunal this morning that actually there was a little bit more to the story than that. There was in fact an email exchange between Ms McTighe and

Mr Sellars, in which the defendant indicated in writing that it intended to serve personally, in accordance with the rules. The claimant picked up on that email, acknowledged it, and responded. Then the defendant responded again spelling out that the tribunal has not approved electronic service and so in accordance with Rule 111, the defendant was intending to serve personally.

So it is not quite correct to say, as it was at least said in writing, that the claimant had no forewarning of what the defendant's position was going to be on this. There was more to it than simply the conversation with Mr Henderson. It is not correct to characterise this as some sort of ambush. We did notify them when we were ready to exchange and serve that we would be doing it personally. We explained why we would be doing that and Mr Sellars received and understood that message.

So even if there may have been some sort of practice between the parties before of doing things by email, it was on this occasion indicated in advance quite clearly that we were going to be doing it properly this time.

I do take Mr Butcher's point that, with the benefit of hindsight, it looks as though it would have been much better for that email exchange to have taken place a day sooner. I do appreciate that point, sir. But nonetheless, we do have a notification in advance that was quite clear about what we were going to do. So any convention that might have grown up before had certainly been broken on this occasion.

The third point: in any event, are we estopped from opposing the application for relief from sanctions? This is not an occasion where we are in front of the tribunal saying there has been some egregious breach of the order, and application should be refused on that basis. We are not here today because of the method by which the claimant served its evidence; we are here today because of the content of that evidence and what the practical applications of that are going to be.

So we are not doing anything that could be considered unconscionable. It plainly must

be open to us to make the points that we have made about the contents of the claimant's evidence. With that I come on to the relief from sanctions application.

On the question of approach, Mr Nathan has invited you to apply the Denton principles. I have provided copies of the judgments of Mr Justice Roth in this tribunal showing how the question has been approached here before. If I may, I am just going to ask the tribunal to turn those up very briefly. It is in our authorities bundle. The first one is at tab 6. It is the judgment in Eurotunnel. It starts at page 40. This is a case where, after the conclusion of proceedings, the tribunal had set down a time-frame for the parties to make their cost applications, and that time-frame was not complied with, so the CMA sought relief.

The relevant paragraph is right at the end of the judgment on page 51. It is paragraph 33. Here we can see the judge foreshadowing a rule change that was coming, and indicating in the final sentence that:

"... if the draft rule is adopted (it has now been adopted) the parties should expect the tribunal would adopt a similar approach to that which applies in the High Court following Denton."

If we then turn back to tab 5, we have the tribunal's subsequent judgment in Mastercard. It was June last year, I believe. Yes, June 2023. It starts at page 30 and this is a case where the claimant had applied to introduce new expert evidence late in the proceedings. So it was after the timetable for the exchange of evidence and only six weeks before the start of the trial.

The application was resisted. If we can pick it up from paragraph 14 on page 34, we can see here Mr Cook KC for Mastercard inviting the tribunal to apply the Denton criteria. Paragraph 15, the judge indicates that Mr Cook may be correct in submitting that Denton should apply, but it is unnecessary to decide the question because it does not "make any practical difference to the outcome."

So formally speaking --

THE CHAIR: What does that mean? "Doesn't make any practical difference to the outcome"? That must be because that's what is going to be done anyway.

MS JOHN: Exactly so, sir, yes.

THE CHAIR: So in a sense that is applying Denton.

MS JOHN: In a sense, yes. We are not doing anything -- I think the word Mr Nathan used this morning was we don't follow it rigidly or slavishly. That's what we can see. So he comes on in paragraph 16 to look at whether the application was a serious and significant breach, which obviously looks a lot like Denton criterion 1. Paragraph 17, it is the obvious approach to consider whether there is a good explanation for the application and the manner in which it came to be made. Then, if we turn the page and move down to paragraph 20, in that case there wasn't a satisfactory explanation, but in the second sentence:

"It is necessary to consider all the circumstances of the case so as to enable the tribunal to deal justly with the application."

So that is simply to show the tribunal what's been done before formally. There has been no ruling saying Denton applies in practice. What we are doing is very similar if not identical; we have not yet come across a situation where it makes a difference in practice.

So applying that approach, the first question then: what has happened here? What is the nature of the breach? Now Mr Nathan says that this is a case where the breach is trivial, to use the Mitchell wording, or not serious, not significant, to use the Denton wording. The evidence was served in time but by the wrong method. We had service by the right method the next day and there was no prejudice to the defendant.

Now so far as that goes, we accept that in and of itself the deficient method of service was a technical breach and, as indicated in our written submissions, if that was the

only problem with the claimant's evidence, we would not be here today. There would be no question of the application being opposed.

But that is not the end of the story, and trying to cast it as being that simple is, with respect, quite some mischaracterisation. We are here today because what was served on us on 1 March -- I was going to say 30 February -- what was served on us was half-baked.

I will come on to the detail of the problems with it in a moment, but let me start by addressing why they are relevant. To give the tribunal our position in a nutshell, it is that one has to look in the round at what is happening here. We have to be practical as well as principled, because what has happened, what is happening, is precisely what we anticipated would happen when we wrote our letter on 4 March. The claimant produced something which was only half-baked, it was very obviously half-baked. As soon as it realised what the problems were with its evidence it was inevitable that it was going to try to remedy them.

Of course, that's not always a cause for complaint, but here it is. The reason it's a problem here is because it is taking place against the background of an unless order. The claimant has already had a whole year in which to get this right, just this one stage of the proceedings -- a full year. That is an absolutely extraordinary length of time in any case, but certainly for a preliminary issues hearing. In spite of that it still doesn't have its evidence right. It was obvious that the claimant was going to do exactly what it has in fact done, which is not just ask to cure defective service and allow service the morning after the tribunal's deadline, but also ask for additional time to put its house in order.

So in the event, what we effectively have is a request for an additional nine weeks after the date of the tribunal's unless order to allow service of amended documents.

We could already see that coming down the tracks back in March. That is what we

objected to, and that is what we are resisting today. So it is not right just to look in isolation at deficient service, as Mr Nathan invites, and grant relief on that basis.

It is true, we could take things in that way. We could salami slice the applications so we could deal with what was served in March, and we could then deal with our application under Rule 55 to exclude it as non-compliant, and then all come back in a few weeks time and deal with the claimant's application to put in new evidence nine weeks late.

In my submission that is artificial and plainly not efficient. We already know how the story unfolds, and we should simply grasp the nettle and deal with it today.

Now I am agnostic about how one fits that within the analysis. We can take a holistic look at what constitutes the breach of the unless order, step one of the Denton analysis, or we can take it into account when looking at all of the circumstances in dealing with the case justly and proportionately. The point is this does need to be taken into account somewhere. It is a fundamental part of the picture of what is going on here.

Mr Nathan's response to that is the Abdul Aziz --

THE CHAIR: So you say if we are looking at it just from the pure relief from sanctions for the late service, what we would be looking at, if we are taking that in isolation, we would be looking at the unamended documents?

MS JOHN: Yes. And if one does that, one can see --

THE CHAIR: And Mr Nathan would then have to bring another application to say, in the light of the fact that that was all that was allowed, he should then be entitled to put in new expert reports and compliant witness statements and so on.

MS JOHN: Yes. So this is the point that we need to be practical as well as principled. We could do it that way, but I think your question this morning -- or your point this morning, sir, was why would you grant relief for something that is pointless? Why

would you grant relief for something that we can already see is going to be excluded? And the claimant accepts all of the deficiencies -- I will come on to work through what those deficiencies are, but the claimant accepts most of them; it is already trying to put things right.

THE CHAIR: Yes. So the thrust of your point is what they really want -- what they are really trying to -- the benefit they are really trying to get here is a nine-week extension of time --

MS JOHN: Yes.

THE CHAIR: -- to put in what they should have had by 29 February, and that put like that, that would be a flagrant breach of the unless order.

MS JOHN: Yes, quite so. Quite so. You have my point exactly, sir.

Now Mr Nathan's response to that is to refer to the Abdul Aziz judgment from the Supreme Court. What their Lordships said there was that one should not “generally” look at the underlying substance of a claim when deciding case management issues. That's in paragraph 29 of the judgment. We don't need to go back to it.

As a general proposition of course their Lordships are absolutely right. It is very difficult for the tribunal to engage in disputed questions of substance at the case management stage, and it would obviously also be deeply inefficient to do so. Those are the points that Lord Neuberger made at paragraph 30 of the judgment, which were shown to you.

But I am not inviting the tribunal to try to engage with substantive disputes today. We will go through the detail in a moment, but in summary, just to give the headline points, what I am asking the tribunal to look at falls into two categories. The first is whether the evidence complies with formal requirements -- that's obviously a suitable question for case management stages -- or I am asking you to look at questions of substance that are incontrovertible. There can be no dispute about them, and indeed the claimant

has not disputed them.

So this is not at all the sort of exercise that their Lordships were cautioning against in Abdul Aziz.

Now let me turn to the detail and make some of that good. The first document is Mr Beckett's witness statement. The claimant has accepted that it is deficient as a matter of form, and hence it has asked permission to put in a second witness statement to cure that defect. The claimant maintains that this document is relevant to the preliminary issues. Somewhat confusingly, though, we still have no explanation for why. On our side we still don't see the relevance. We don't see how it is within the scope of the preliminary issues and the permission the tribunal has granted.

Mr Nathan says the tribunal can't get into that. With respect, that's simply wrong: of course the tribunal can deal with whether evidence is within the scope of the permission it has given and whether it goes to the preliminary issues that have been directed. Indeed, Mr Nathan has accepted that it can do so by removing parts of the expert report.

So if it is relevant, then no doubt Mr Nathan will enlighten us in reply. But if he can't do that, the inevitable conclusion has to be that it's not relevant. I don't know whether the tribunal has had the opportunity to read the witness statement, but just to resummarise: it sets out what the claimant does, the claimant's business activities; Mr Beckett is the CEO of the company.

So what the claimant does is all very interesting but really we simply can't understand why that is needed for the purposes of the preliminary issues.

The expert report from Fair Links is of greater concern to us. Here again the claimant has accepted a number of the deficiencies that we have identified. I will look in a moment at the deficiencies that it disputes, but I am going to start, if I may, with the deficiencies that it has accepted.

First of all, all the points that we made about the February report addressing matters outside the scope of the preliminary issues. That was paragraph 40 of our written submissions. Those are accepted. The revised report that has been served has excluded those paragraphs.

They also accept our points about the substance of the evidence. So this was paragraphs 44 to 49 of my written submissions. If I can ask the tribunal just to remind itself of those, it is page 17 of the hearing bundle, paragraph 45. I had the wrong reference.

So paragraphs 45 to 48, there are four points made here and they fall into two categories. Paragraphs 45 and 46 identify points where the claimant's expert evidence in fact supports our pleaded case and not the claimant's. Now the claimant accepts those points, it agrees it can't sustain its pleaded case and hence we have an application for permission to amend the pleading.

Then paragraphs 47 and 48 are slightly different points. These are points where the claimant's expert evidence simply didn't engage with aspects of the preliminary issues. Now again, the claimant accepts those points, and its application to produce a replacement report doesn't just involve remedying the formal non-compliance, it wants permission to fill these gaps that we have identified.

Now if the tribunal will allow me, I am just going to very briefly show you the revised documents because the claimant has insisted that they should go into the bundle, even though formally they didn't have permission to file them.

I will start with the point about applicable law, which is in paragraph 48 of the submission. A fundamental omission. Let's look at what was filed in February. I will take it from the version just immediately behind my submissions and start at page 20. This is the table of contents for the March report. We can see after the executive summary we have section 1 "Markets for minerals and metals". Section 2, "Market for

due diligence traceability programmes", and then "Conclusions" et cetera.

If we turn forward to page 28, paragraph 43, there is a heading halfway down the page "Scope of the work", and the experts set out what they have been instructed to do. We can see there is no reference there to the preliminary issues. We can see explicit instructions to consider two matters which are out of scope, and there is no mention of the question of applicable law, so the effect of the conduct alleged in the claim.

Now if we compare that with what the claimant wants to replace it with, we can turn forward to page 83 of the bundle.

This is the table of contents for this week's report. We have section 1, "Markets for minerals and metals"; section 2, "Market for due diligence traceability programmes"; section 3, a whole new section has appeared on analysing the market impact of the alleged conduct.

If we move a paragraph forward to page 91, paragraph 46 -- we can already see that some new paragraphs have been added above because we are now on paragraph 46, not paragraph 43 -- we have a new set of instructions. We have the preliminary issues set out. At paragraph 47 they are now asked to address the preliminary issues.

At page 122, just to complete the tour, we have the start of section 3 and we have three and a half pages of entirely new analysis.

THE CHAIR: Which page?

MS JOHN: 122, heading at the top of the page: "Analysis of the market impact of the putative conduct alleged in the amended claim".

The same is also true for the other point that we made in our written submissions. This is the question of whether there is a separate market at each level of the supply chain, as the defendant alleges, or whether the entire supply chain from mine to tin can sitting on the shelf in Sainsbury's is all in the same market.

Here the amendments to the report are a little more diffuse, but they are still there. If

I just very briefly show you the easiest examples. If we turn back to page 46 of the bundle, we are now back in the March version of the report.

THE CHAIR: Sorry, I was thinking. Which page did you say?

MS JOHN: I apologise. I will slow down a little.

THE CHAIR: No, it is my fault. Which page?

MS JOHN: 46. We are back in the March version of the report. If we look at paragraph 142, this is the expert's conclusion with respect to the market for tin. So the increase in the price of tin wouldn't turn consumers to other products. Then you have the equivalent conclusion at paragraph 145, the same conclusion with respect to tantalum; and paragraph 148, the same conclusion with respect to tungsten.

Now we can compare with the report served this week. The equivalent paragraphs are at page 110 of the bundle. So paragraph 142, we have additional wording at the end of this paragraph, a small but significant increase in price would turn consumers to actors further up the supply chain; and in paragraph 143 the opinion is that the relevant market is for tin and metal covering the entire supply chain.

Then we get the equivalent conclusion for tantalum in paragraphs 147 and 148; and the equivalent for tungsten in 152 and 153.

So, stepping back, the reason that we have gone through that detail is for two reasons. First of all, the points that we made about the underlying substance of the claim are not in Abdul Aziz territory. They are not points of dispute; on the contrary, the claimant has accepted all of them.

Secondly, we can see from the response, looking at that revised report, what is happening here, which is after the date of the unless order -- nine weeks after -- the claimant wants to rewrite pretty fundamentally its expert report; not just adjust formalities, actually rewrite it. With respect, this approach makes a complete mockery of the unless order. It was clear in March how this was going to unfold, given the

deficiencies in the evidence. That was why we highlighted them, and it is right to take those deficiencies into account now in deciding how to respond to the application for relief from sanctions.

THE CHAIR: So you say if we're looking at just relief from sanctions, if we take that on its own --

MS JOHN: Yes.

THE CHAIR: -- the only thing we would be relieving from sanctions is the unamended documents. And if --

MS JOHN: Yes.

THE CHAIR: And if those are not what the claimant wants, then we shouldn't relieve from sanctions.

MS JOHN: It's pointless. We can see what is going to happen, yes --

THE CHAIR: That's at least one possible way of looking at it.

Yes. Sorry, go on.

MS JOHN: I will move on now to the other deficiencies we have identified that are disputed, the ones that claimant pushes back on.

In particular the point that is resisted is the one we made about the report taking the form of a joint report by experts in different disciplines and doing so on an entirely undifferentiated basis.

The claimant pushes back on that, and Mr Nathan says, "That's something we can address further down the line when we have made a decision about whether we are going to hot tub the experts or not." He says we only need to separate their evidence out if we are going the route of conventional cross-examination.

With respect, that's no answer at all and it is also based on a misunderstanding of how hot-tubs work. I am going to ask the tribunal to turn up our authorities bundle as I run through this. Practice direction 35 is in here at page 81. I start with paragraph 2.4.

There is a requirement that:

"Experts should make it clear --

"(a) when a question or issue falls outside their expertise ..."

Pausing there, in an undifferentiated joint report, we cannot tell where any given matter falls outside the expertise of one or other of the experts.

We then move forward to paragraph 3.2. That's on page 83. 3.2(4):

"An expert's report must ...

"(4) make clear which of the facts stated in the report are within the expert's own knowledge."

Then we move down to paragraph 3.3 which sets out the statement of truth. It is familiar language of course, but I emphasise that what that statement says is:

"... I have made clear which facts referred to ... are within my own knowledge and which are not. Those which are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions ..."

Pausing there, the claimant hasn't addressed our point that with a single undifferentiated report, neither expert is in a position to properly sign this statement, because half of the report is outside each of their respective expertise, and there is no demarcation of which bits they are signing up to.

So Mr Nathan is wrong to say that we have no objection to the report itself; we do object. I think he slightly misunderstood the point in my written submissions. What I was indicating there was: we have no objection to the fact that the claimant has chosen to serve evidence from its economist at the same time as evidence from its industrial expert, even though the direction only related to the industry experts.

If they want to give us their economic evidence early, we obviously have no problem with that. There is a problem with it coming in a big mishmash with the evidence of the industry expert.

On that point, the fact that evidence may be given in a hot-tub in due course is really neither here nor there.

Turning back to PD35, if we turn forward to page 86, we have the provisions on hot-tubbing. This is where we can see that the suggestion being made is really based on a misunderstanding of what a hot-tub is. If we look at paragraph 11.1:

"At any stage in the proceedings the court may direct some or all of the evidence of experts from like disciplines shall be given concurrently."

Not collectively as Mr Nathan said this morning, concurrently.

Similarly in paragraph 11.2, second sentence:

"[There may be] ... a direction for the experts from like disciplines to give their evidence and be cross-examined on an issue-by-issue basis ..."

So the claimant's suggestion that if there were to be a hot-tub there wouldn't be a need for separate reports, we could proceed with what we have, is based on a misunderstanding of how hot-tubs work. We don't just take all the experts in the case, sit them down in a melee and have a chat. These are very carefully controlled sessions where you get the experts from a single discipline being asked a question, and then they respond one after the other. There is no sort of free-for-all discussion.

I can give the tribunal a reasonably recent example from my own experience in the Servier preliminary issues hearing in the High Court. We had one individual expert who covered two different disciplines on one side, and then on the other side there were separate experts. To deal with that, the court held two different hot-tubs, and the individual who had expertise in two disciplines sat in each one. So we didn't have a cross-disciplinary hot-tub with three people sitting in it; they were separated with one individual sitting twice.

So Mr Nathan's suggestion is based on a misunderstanding. You do have to have a separate report from each discipline, irrespective of how we are going to deal with

their evidence orally at trial.

Finally, another practical point: it is not just a question of how we deal with their oral evidence when we get to trial; there is also the question of how we prepare reply evidence. Our experts have to know what they are to reply to and they need to do that within the next couple of weeks if this claim were to go forward.

So it is a problem that the claimant has produced a single and undifferentiated joint report. It's not appropriate to leave it until some unspecified future date to try to cure it. So we do maintain that the report needs to be excluded on that basis, and this point applies equally to the report that has been served this week: there is no attempt been made to address this, this problem remains.

I am about to move on to the question of the second criterion. I probably have ten or 15 minutes left, but I have just noticed the time. I don't know whether you would like to give the transcribers another break or whether you would like me to press on and finish.

THE CHAIR: I think you must go on. As I understand it, you are up against a time limit.

MS JOHN: Yes. Thank you. I am grateful.

So the second criterion: why has this breach taken place?

Again Mr Nathan says, "Let's focus on deficient service and we think that we have been lulled into non-compliance by the defendant's actions."

Now I have already shown the tribunal that that's not strictly correct. Whatever the previous approach might have been, the defendant did make clear on the day of service what our expectations were, that we would be doing things properly, and the claimant received that email and understood its significance.

We also, in my submission, need to step back and look at the wider picture: what is the explanation for the deficiencies in the contents of the claimant's evidence? Now

in writing there was a slightly half-hearted attempt to lay the blame at the feet of their experts. That's a rather unworthy attempt, if I may say so. It is also, as I have shown the tribunal, an unfair suggestion. The experts have done what they were instructed to do, and we can see that those instructions were changed.

This is a case where the claimant is professionally represented, it's not a litigant in person, and indeed it has a specialist team of barristers from Blackstone Chambers that it can draw upon if it wishes to do so. So in my submission there is certainly no good explanation for what has happened as regard the contents of its evidence.

We then come to the question, finally, of what is just and proportionate in all the circumstances? The third limb of the Denton test.

Now I have been through most of the circumstances that we say need to be taken into account. The one remaining point to address is the claimant's habitual non-compliance with orders. We have set out in writing the history of the claimant's delays and prevarications. Indeed, even this week the claimant has ignored the tribunal's indication that it doesn't have permission to file anything other than written submissions, and, without any apparent sense of irony, it has asked for additional time to put in its written submissions.

Now, in my submission, this is simply not the way to conduct litigation. Deadlines are not just aspirations; the tribunal's rules and directions are not just guidance; these are all meant to be binding obligations. At some point it really is important for the tribunal to draw a line and say enough is enough. That indeed is the significance of rule 4(2)(f) of the tribunal rules, which we do lay particular weight on today.

We also rely on rule --

THE CHAIR: Would you like just to refer us back to that one?

MS JOHN: Would you like to see it? Yes, of course. It is at page 63 of my authorities bundle. If we remind ourselves of the structure of the rules: 4(1), the tribunal's

governing principle is to deal with each case justly and at proportionate it cost. Then section (2) explains what dealing with the case justly and at proportionate cost includes; and at (f), we have "enforcing compliance with these Rules, any practice direction ... and any order or direction of the Tribunal."

Sir, I also place weight today on 4(2)(d): ensuring that the case is dealt with "expeditiously and fairly"; and of course fairness includes fairness to the defendant, not just to the claimant.

THE CHAIR: 4(2)(iii)?

MS JOHN: 4(2)(d), ensuring it is dealt with expeditiously and fairly.

THE CHAIR: Yes.

MS JOHN: We say it is just and proportionate to refuse the application for relief today. The claimant has had more than a year to put its house in order. That is more than enough of the tribunal's indulgence. An unless order has been made, and indeed it is the second unless order that has been made in this case and it is now time to draw the line.

The claimant says, well, if you do that, you are going to stifle a legitimate claim. Well, two point on that: first of all, that's no doubt true of many cases that are struck out by unless orders, but we do still make them and we do still enforce them, because we recognise that the interests of justice are wider than just what one does in one case; we also need to recognise the importance of imposing discipline on proceedings and enforcing orders, and that is what rule 4(2)(f) recognises.

The second point, as we have already been through, is that this claim is in fact very weak. Unless the claimant gets permission to rewrite its evidence nine weeks out of time, it is actually looking pretty hopeless.

So in my submission the tribunal should not shy away from the appropriate --

THE CHAIR: Is it relevant for us to consider whether the claimant could start again?

MS JOHN: (Pause) I think if it tried to do that, I think I would be advising on whether it would be an abuse of process for it to do so. There would also be the question of what its claim might look like, because this claim was filed on the eve of Brexit, and we are of course now in a post-Brexit world. I am afraid I am not in a position to say any more than that, but it may well be that the claim would look quite different if it were to be filed today from how it was filed then.

THE CHAIR: Is there any issue about limitation?

MS JOHN: Yes. The claimant is complaining about events going back to 2013. It has accepted that the claim can only seek damages from the date the tribunal got jurisdiction to consider these matters, which is October 2015. When the claim was filed, that was just within the six-year period. Obviously we are now some way down the line, three years ahead. So, yes, the claimant would lose a chunk of its damages.

THE CHAIR: I have bounced you into that, but it was a point which we thought we should at least ask the parties.

MS JOHN: Yes. I think you are right, sir. The damages claim would be cut down by the operation of limitation periods, yes.

Sir, I am prepared to address you on other matters if we get there, but I think it is probably convenient for me to stop at that point and hand back to Mr Nathan to reply, and then deal with other matters if we get there.

THE CHAIR: I think that's right, not least because just in case Mr Nathan said something which, as it were, took you by surprise, I would like to be able to hear what you have to say about that before you have to go.

MS JOHN: Yes.

THE CHAIR: Yes, Mr Nathan.

Reply submissions by MR NATHAN KC

MR NATHAN: May I start almost, as it were, at the end, because my learned friend

starts by saying that there has been habitual non-compliance, but there has not been habitual non-compliance. She is painting a completely false and fictional picture. There have been a series of agreed extensions of time which have taken place up to and including all but the last order.

Every single one is a consent order, including the earlier unless order which my learned friend has referred to which was in March 2023, but that itself was a consent order. It was the price that my client had to pay in respect of an extension of time which was agreed to, and then my client complied with that order.

So there is no habitual -- no picture at all of habitual non-compliance. On the contrary, there is a picture of habitual compliance.

The only matter that could be pointed to, in terms of a non-compliance, was a technical one in the sense that in January 2024 the parties were negotiating about -- as I have already indicated -- an extension of time and as to what length it was going to be, either 14 days or 28.

THE CHAIR: I understand what you are saying that -- habitual non-compliance with orders, but the position is that we are in a very different position from the sort of timescale which was envisaged by the initial orders. One question is: who has sought all those extensions of time?

MR NATHAN: With respect, sir, that is absolutely not an appropriate factor to be taken into account when determining whether or not there should be relief from sanctions. I would respectfully say that is wrong. I deprecate any attempt to look back and now start to examine, when there have been a series of consent orders, with the court taking part in this. The court itself has permitted this to take place. It cannot possibly be right that if the matters have taken longer than the court initially envisaged, that's what has happened. It's not something you can then castigate as a fault and as a relevant factor at all to be taken into account for the purpose of determining the

question of whether there should or should not be relief from sanctions.

My learned friend concedes in her address that the actual breach in question was technical, in other words it was trivial, it has caused no harm whatsoever; and that's the real starting point, because as one sees from Denton, the Court of Appeal has said -- and everyone has been following it ever since -- and in the same way too as the Supreme Court has been applying Denton, that if you are able to establish that it is not a serious breach, then you don't really need to go on to stages 2 and 3.

THE CHAIR: What you want is you want relief in order to rely on your new documents, and you are doing that nine weeks or more after the date.

MR NATHAN: If I could --

THE CHAIR: That might be said not to be trivial.

MR NATHAN: If I might say so, no, it's not quite like that. What we are trying to do is -- what we served is what we served. We want relief from sanctions in respect of what we served.

However, with the benefit of seeing what the complaints are that were being made on 4 March, the -- and because new counsel has actually come into the case -- we have taken the view, or I have taken the view, that actually the expert report should be in a different format, should actually address matters in a different way, clearly focused upon the preliminary issue.

THE CHAIR: That they should have done anyway, shouldn't they? That was why you had so long to do it.

MR NATHAN: I realise that. What I am saying is that they did focus on it, but they didn't focus on it as well, I think, as they might. What one sees, for example, the passages that my learned friend has taken you to lugubriously, in relation to the conclusions reached by these experts, in fact those are part of the economic part side of that report, nothing to do with actual market -- the market parts which the report was

supposedly going to deal with.

My learned friend says she doesn't mind if the report is a combined one, but what these experts have done is in fact slightly refined -- as indeed they are entitled to do and indeed bound to do as experts; if they want to qualify or change their mind, they are bound to signal "We have changed our mind". Those pages which she has taken you to where there are additional words in the conclusions about what the nature of the -- let's just pick up one example, which is if we go to **(Pause)** --

We need to go to 100 and something. If we go to page the section which my learned friend took us to -- picking one up, if we go to page 110 --

THE CHAIR: Yes.

MR NATHAN: -- and look at what is said in relation to tin. There is a similar sort of conclusion in relation to the others. 142:

"However, it is our opinion that a small but significant and durable increase in the prices of metal by a hypothetical monopolist would turn industrial tin consumers to source tin and the (inaudible) minerals of actors further up the supply chain."

That is a qualification of what they originally said, but it is actually to do with the economic side of the report which is not part and parcel of what was actually ordered. What these experts have done is actually went further than the part of what they were supposed to do, which is to talk about supply chains, and go further and then conclude, as they said at 143:

"It is therefore our opinion that on a product basis the relevant market for tin minerals and metal cover the entire supply chain of tin."

Well that's what they said in the first place. So what they have done is to qualify the economic side of their report, not the supply chain side of their report. It's a perfectly legitimate and sensible thing for them to do, given the nature of what they have done by way of the report, but it doesn't mean that the report itself can be tossed out.

If the position were to be that simply you get -- we had to rely upon the expert report as it was put forward in the first place, well, then, we would be doing so. This is not going to be the single expert report in this case on our side, as one knows. I mean, the disciplines are being split up but -- in terms of the order, but in fact what has happened is that there has been a combined report. My learned friend says, well, there is an undifferentiated report here, but what she has not taken on board is that these two experts on our side are in fact experts in both fields.

If one goes to the second report -- it is exactly the same wording in the first report. If we go to page 86 -- we can pick it up in the earlier report as well -- **(Pause)**

I can't find it. If you look at paragraph 4, the introduction, at page 86:

"Anton de Feuardent is an economist and financial expert and has a good understanding of mining and metal sector, and Dr Tim Wilson is a mining industry expert and has a good understanding of economic and financial issues."

In other words they are both putting forward their expertise in all the relevant fields. There is no limitation. The order of the court doesn't limit the number of experts that can be given in relation to each of these subjects. It simply says there can be expert evidence in these two particular disciplines: supply, chains of supply and economics. What these two experts have done, jointly because they have a joint expertise, is to produce a joint report. I readily accept that in practical terms it makes a great deal of sense that they should divide up when it comes to the actual giving of their evidence physically, that one should answer to certain aspects and the other should answer to other aspects of it. It doesn't make this report a defective report which must be now tossed out.

But clearly, how it is to be dealt with is a matter for further directions. As I say, when it comes to the hearing we accept logically it makes sense for one expert to deal with one part and the other expert to deal with the other, one feels more strong in one side

than the other, so it will be.

That's something which if necessary can easily be done and relatively quickly too, if it really causes my learned friend difficulty in terms of her -- how her experts deal with it, but that can't possibly fault the report itself, and if necessary we rely on the first report because that's what was served. It seemed to me, however, that in the light of what the criticisms were that were put forward on 4 March by the defendant's side, that it made a great deal of sense, actually, to sort out, as I saw it, in the report in order to make sure that it actually was referable directly and specifically to the preliminary issue, which is why the experts have included the preliminary issue expressly. They were in fact doing so anyway, but it seemed to me that in terms of format I suggested to them it might be an appropriate way forward for them actually to include reference to the preliminary issue in order to focus what it is that they are saying when it comes to frankly the cross-examination and what the tribunal is trying to look at.

The object of the exercise at the end of the day, I am afraid -- and maybe we have made a great error in putting forward a revised report -- but it was actually to try to assist the tribunal as far as possible.

It is quite important to appreciate that experts are entitled to revised their reports and revise their opinions if that's what they want to do. It is something which one must not allow them not to do, if you see what I mean.

Let me go further forward. What we are asking for is that simply the sanction of striking out the -- set to one side that which was formally served in accordance with Rule 111 on 1 March should stand, and then if the tribunal takes the view that that's what we should do, we will then pursue separately our application for permission to adduce a revised report. I can't say further than that.

As regards Mr Beckett's witness statement, again what was served was a witness statement which didn't have a compliant certificate on it. That is a matter which the

court can direct should be cured, as part of its order, if that is what is required. We believe what we have done as a sensible way forward is to put forward a second witness statement which actually does the curing in a way which is clear, but if, sir, you take the view that the first witness statement should itself be recast with a Certificate of Compliance upon it, then that's a matter which can be a condition attached to the permission for relief from sanctions.

As regards the content of it, we say the content is the content. Let me take you to some parts of it, because clearly it is causing concern. The first witness statement of Mr Beckett is at -- if we go to page 479 --

THE CHAIR: 479?

MS JOHN: 479, which is his first witness statement. What he sets out in the first part, quite properly, is he sets out a certain amount of a number of his experiences, but in doing so what he does is he identifies, so far as he's concerned, that part of the market in this country, which he has actually been involved in in relation to each of these three metals. So, for example, at paragraph 7:

"In 1988 I co-founded ABS Industrial Resources Group in Rotherham as CEO and then also chairman. The nature of ABS' business and its achievements are as follows: in 1982, opened a facility at Mexborough, processing, refining and melting ores and secondary metals, specialising in supply of metal units such as alloys based on cobalt, iron, hafnium, molybdenum, nickel, niobium, which is part and parcel of coltan, tantalum [which is clearly one of the subject matters], titanium, tungsten."

He was not dealing with tin but he was dealing with the other two metals.

Then he goes on, paragraph 7.7:

"1996: formed subsidiary company Tungsten Alloys Manufacturing through the acquisition of Goodwill Plant and Equipment and Mallory Metallurgical Company, a producer of tungsten heavy alloys and components, sold to management in 2006."

So we are identifying businesses active in this country in which my client's CEO has previously engaged.

Then, 7.8:

"1998: formed subsidiary company Special Metal Supplies. That business included forging and rolling high performance metals with particular focus on hafnium, molybdenum, niobium, tantalum, tungsten and zirconium."

Then also 7.9:

"Formed subsidiary company ...(Reading to the words)... Metal SAS in France to be the sales and trading arm of ABS's core UK alloys metals and minerals business model."

7.10:

"2003: formed subsidiary company APT Rwanda for the purpose of mining and processing mineral ores."

So you have a subsidiary company which is operated from the UK mining in Rwanda. Again, what it was doing was mining and processing, amongst other things, coltan which is tantalum, lithium, tin and tungsten. So all three.

Then we have at 8:

"As CEO I drove the growth of ABS Group and the development of its client base. That peak turnover in ABS Group was in the order of $300 million."

This is a UK company business trading and doing business in England.

"Our global client base ..."

And it identifies the clients that it was dealing with, which also include English companies.

Then the last three lines:

"Its success being in no small part due to innovative and progressive metal refining ...(Reading to the words)... and recycling techniques which were coveted by industry

competitors and alloy manufacturers."

In 2013, ABS Group was acquired outright by a German company and he left the business, but it doesn't mean that the business is not there still. He's identified part and parcel of what was going on, the real market going on in this country, in relation to companies with which he has been closely concerned.

Then we go to paragraph 12:

"Kerilee's business model and operation ..."

This is the company which he had founded and which he then started to run when he sold out in ABS in 2013.

12.1:

"The financing and development of mining processing ventures and Kerilee as a UK company."

Paragraph 11:

"Kerilee is managed by me from an office in my UK home. We retain a number of consultants with experience (inaudible) working for over 50 years on five continents whom I have known throughout my career."

So we have a UK company engaged in the very businesses -- and trading and dealing in and processing and mining the very minerals that we are talking about.

Going on to page 483, top of the page:

"Our focus is on critical or strategic minerals as identified below and our geographical interest is Africa. ...(Reading to the words)... Mined and processed minerals are traded via long term sales and/or conversion agreements with key metal and alloy manufacturers throughout the world ... [that must include the UK] thereby allowing mines to access international markets.

"The financing and trading of metallurgical products:

"Certain metal units are converted into high performance metals. Metal oxides and

metal carbides in solid state and powder forms are then marketed via specific distribution agreements."

Again, this is all part and parcel of the trade that we are looking at in the context of this particular claim. Then --

THE CHAIR: I think you have made the point. You are just keeping on making the same point, but I understand it.

MR NATHAN: Yes. The only other thing I would simply say to you very quickly: page 486, paragraphs 17 and 18 onwards, he explains what kind of things they have been doing with these specific minerals. So it is relevant in terms of what he is saying, so it cannot be excluded as being irrelevant.

There is, frustratingly, a sort of repeated complaint: this is all the sort of thing we were always going to expect when we came to the end of February, we knew that there was going to be something that would happen.

Well, with great respect, that is the most unfair kind of criticism to be made, and it is one of the problems which really besets this kind of case and the approach which has been adopted by CMS and the defendant. Because what they have chosen to do is actually to take what is a very minor breach, and which in the ordinary course of events would have caused not the slightest difficulty or problem and tried to write it up into something as if it was a deeply significant breach which should therefore now give rise to a refusal to allow this claim to proceed. And that's a completely wrong way of approaching it. Fundamentally wrong in principle. What they have tried to do is to cover it as if it were a principled approach but it is an unprincipled one and it is an inappropriate and incorrect one.

Certainly what we would like to reach, in the position that we are in now, is a situation where in fact a report in the form of the revised report is one which we would like this tribunal to consider. If you take the view that, no, it's a matter for further application to

be heard, we have made the application, it is there before the tribunal in the sense that it knows that it exists, and we will press forward with it. But that could only be on the basis that the claim is entitled to go forward and not be struck out.

Because that's what we are looking at. It is simply the one element of whether or not this sanction should be imposed, nothing more, and it is being driven up into something which is much greater than in the reality it should be.

Indeed, as both the Court of Appeal in Mitchell, the Court of Appeal in Denton and the Supreme Court, it clearly indicates that the whole idea of the reforms of Woolf and Jackson were that they should ensure that this kind of exercise should not be something that one should have to go through.

THE CHAIR: I am not at all sure about that. At least one view of that was that it is very important that orders should be obeyed. That was part of Woolf and --

MR NATHAN: Of course. Orders should be obeyed, but nevertheless that there would be circumstances which permit the orders, if they are not obeyed, for relief to be given. And the starting point is if it is a trivial or non-serious event, then small things that the law does not care about.

Therefore, the starting point of Denton starts off with: is this a serious or substantial breach? And it isn't. And that should be the end of the -- I can see something is going down with my computer.

I am sorry, the computer in front of me is supposedly -- I am sorry, I think I am going to end up being cut off in 30 seconds.

THE CHAIR: Well, you have more or less finished, have you not, now, Mr Nathan, anyway?

MR NATHAN: -- as much as I can say. But I will come back as soon as I can manage to. If I do get cut off --

THE CHAIR: I am conscious that Ms John has to go. If she has anything which she

considers that she's entitled to say, perhaps she should say it now.

Mr Nathan, you are on. We can see you and hear you.

Ms John?

MS JOHN: Shall I wait for Mr Nathan to return? It is only two very brief points. I don't know how long he's going to be.

THE CHAIR: I'm not quite sure what the position is, because we can see him.

MS JOHN: I think I heard him say that his screen has frozen which may mean that he can't see or hear us.

THE CHAIR: He certainly doesn't seem to hear us.

MR NATHAN: Can you hear me again?

THE CHAIR: Yes, we can hear you now.

MR NATHAN: I am so sorry about that. I do apologise, it is most unfortunate.

THE CHAIR: You now have an echo.

Ms John is just saying she has two points she is going to address us on before she has to leave.

Reply submissions by MS JOHN

MS JOHN: Thank you.

The first point is what Mr Nathan said with regard to his expert report. He said actually both of my experts have expertise in the field of the markets and also in economics and so this report is one in which both experts are covering both areas, and that's fine because there is nothing in the order that prevents them from doing that.

That's something of a surprise from my perspective. Certainly it is the usual practice that one does not have permission for multiple experts from a single discipline unless there is express provision for that, and if it had been made clear that the claimant wished to do that, we would have resisted it.

He's right that the order doesn't expressly contain a limitation. For the tribunal's reference, it is at page 453 of the bundle at paragraph 8. I don't propose to turn it up, but what I will just very briefly go back to is my skeleton for the first CMC back in October 2021, page 662 of the bundle.

This is simply the part of the skeleton where we explained what the proposed directions were, why they were structured in the way that they were. In paragraph 14, just over the page on to 663, is a sentence:

"It therefore seeks permission to produce limited expert evidence. Footnote 1 ..."

And it is footnote 1 that I would just like to remind the tribunal of. That is in fact what we have had to do. So they are not in the bundle, but on our side we have an expert in tin, a different expert in tantalum, and our tin expert also covers tungsten, so we have three separate reports. There is no duplication at all but we do have different individuals.

So that's why the order doesn't say you have permission to produce one expert on the industry and one expert economist, because actually we have three different markets here. We envisaged that there were going to be different individuals with expertise in each of those minerals and metals. It was certainly not because anyone envisaged that the parties were going to have permission to produce multiple experts on the same issue from the same discipline.

The second point is Mr Nathan has tried to explain the relevance of Mr Beckett's witness statement. He points to paragraph 7 and says, look, these are Mr Beckett's activities in the UK.

I would just invite the tribunal to note the dates in that paragraph. They are for activities taking place in the 1980s through to 2013; here the claim is concerned with the period 2015 onwards.

Then paragraph 12 onwards concerns the activity of the claimant. Those activities do

fall within the relevant period but the tribunal will see that they are either activities taking place in Africa or they are trading activities. The claimant has not pleaded a trading market here; the claim and/or the evidence would look very, very different if it had.

Thank you. I am very grateful for your indulgence on those points.

THE CHAIR: Right, thank you very much.

We are going to consider the position over lunch. We intend to resume at 2 o'clock and tell you what we are going to do.

Now if we decided that the claim survived -- and I am not saying we will, but if we were -- we would then quite conceivably want to give some directions. On Ms John's side, I appreciate she can't be here, but would somebody be able to deal with simply that question? Not make any further substantive submissions, but to deal with that?

MS JOHN: Let me take it away and see what I can do, sir. The limitation on my side is I have a young baby, I am technically on maternity leave at the moment. Let me just see how he's doing. It may be that he's all right and my childcare can be extended for a short period after lunch.

THE CHAIR: It will only be a short period. We will not keep you. Even if you are able to come back, we will not keep you.

MS JOHN: If there is any difficulty, I am sure Mr Henderson will be willing to take the hot seat. But leave it with us and let's see what we can do.

MR NATHAN: Can I try to assist, sir? If the tribunal were, at the end of the day, first of all to allow the claim to survive and then indicate it wants to have directions, if you were to indicate the areas of the directions you thought appropriate, I am sure Ms John and myself will be able to work out and submit to you some agreed proposed --

THE CHAIR: We might have our own views in relation to some of them.

MR NATHAN: Yes, but then if you were to express those views, we would then

incorporate them --

THE CHAIR: Indeed, but we might be assisted in expressing those views by someone saying, "That is nonsense", or something. Anyway, all I am saying is it would not be a significant period of time anyway. It would not be more than half an hour.

Thank you very much. We will see you at 2.

MS JOHN: Thank you.

MR NATHAN: Thank you, sir.

(1.21 pm)

(The short adjournment)

(2.00 pm)

THE CHAIR: I am going to tell you what we are going to do. We are going to give relief from sanctions. We will give our reasons in writing in due course. It won't take long, but we want to make sure that we cover the arguments which have been raised properly.

That is only relief from sanctions in respect of the documents which were served on 29 February, or if you like 1 March 2024. We have not dealt with the intimating applications for a re-amendment of the statement of claim for revised witness statement or for revised experts' report.

However, the position is that obviously Ms John and her team know what those applications are. It may be that they do, or perhaps do not, want a further opportunity of dealing with them separately. If they do, then it seems to me that we will have to deal with that in very short order in writing this week.

That is clearly a matter for her. The nature of the arguments, it seems to me, must be pretty clear from today, but I don't want to preclude the possibility of their asking to deal with them separately, because it does seem to me that it is important to deal with these applications separately and appropriately in sequence.

MR NATHAN: May I just simply respond to that, sir? I think we will be content that they should be dealt with in writing, but it seems to me that we have set out our net and indicated what it is that we -- or we have shot our ball into the air. If Ms John wants to object, it seems to me it would be sensible if she started with objections to which we can respond in relation to each of those applications, rather than -- I am quite happy to set out again what the basis is and the reasons why, but I am not sure whether that is a profitable exercise.

THE CHAIR: No, indeed. I don't think it is. It seems to me that if there were going to be objections, the next step would be for Ms John to say what those objections were.

MR NATHAN: Yes. Once that application has been dealt with, then we can have some further directions from the tribunal --

THE CHAIR: Yes, I want to see whether we can make some progress in giving those directions anyway. Now it may be that we can't, but I want to see whether we might be able to at least make some orders nisi, or, as it were, contingently.

You may tell me that is not a good idea, but what we all strongly think is that this case needs some clear direction leading to a hearing date.

MR NATHAN: Yes. I don't think I could disagree with that in the slightest. It seems to me very helpful if that was done.

I think if you are making orders nisi, as it were, then one we could go through the list of what then would follow. If we are given permission to re-amend our statement of claim, the defendant --

THE CHAIR: Mr Nathan, just before you go on: Ms John, do you want to think about what we have just said, perhaps offline for a bit? Or should we press on along the lines that Mr Nathan is now suggesting?

MS JOHN: No, I am quite content with that, sir. I am happy to produce objections to the applications that have been made. I think it would be helpful for us to see the

tribunal's reasons for its ruling before making a decision on those and putting in our response. So I would be grateful if any timetable could take that into account, and I am certainly very happy that we get a date in the diary for a hearing and some steps leading up to it.

THE CHAIR: The difficulty is this is building in further sort of delay, but perhaps it is unavoidable.

MS JOHN: Yes. It is what it is, but I hope it would not delay matters very significantly. Certainly the -- sorry, I am pausing there. I was going to say the experts can get on with preparing their evidence, but perhaps they can't if there are revisions in the pipeline.

What directions was the tribunal hoping to make today?

THE CHAIR: Well, we were hoping to make directions in relation to the service of any -- well, the date for the service of any further factual reply evidence -- we emphasise that it would be reply evidence -- and the date for the service of any economic expert evidence, also probably for a CMC, and conceivably for a determination of a trial date.

MR NATHAN: Sir, I wonder whether in terms of reply evidence that is obviously a sensible thing and that in a way is relatively straightforward. So far as the expert evidence is concerned, it would seem to me that we ought to have provision for having some reply reports, because, the way I understand it, looking at what was being discussed originally, it was contemplated that there would be evidence about supply chains which was intended, at least on the defendant's side, to inform the economics expert. So we need, as it were, to complete first of all the supply chain evidence.

I can certainly see -- my experts did not put in anything in the revised report intended to constitute the views which we take of the evidence put in by the defendant on supply chains. It seems to me that we ought to have --

THE CHAIR: That's very curious. If you say that the economic expertise ought to have taken into account the supply chain expertise, it is very odd that you did it at the same time.

MR NATHAN: Well, I know.

MS JOHN: Quite so, sir. That was why the order was structured in the way that it was, and why we have not yet served our economic evidence. The idea was that the economists would gather all the evidence that they needed -- factual and industry expert -- and then there would be a completed base on which they could put their opinions.

So we still need provision for my economist to put his report in, and then there will need to be replies after that, but the difficulty still remains that we at the moment have an undifferentiated report from the other side. It is very difficult for the experts on my side to know what they are to respond to and how to --

THE CHAIR: I don't really understand that point, Ms John. I understand there may become difficulties in due course as to who is to meet with who, but it would seem to me that your experts should reply to those parts of the report which fall within the scope of their expertise.

MS JOHN: If that is the tribunal's conclusion, then I am happy to proceed on the basis that we do that. What I do not want is points being taken further down the line that somebody has missed something, or somebody has, you know, stepped across what would have been the line drawn on the other side.

One can see that this is going to lead to disputes, potentially. However, I am happy to proceed on the basis that we are where we are, and we see where we get to. I am just indicating that --

THE CHAIR: I don't understand why it is difficult for your experts to respond to the report by reasons of they don't know what voice is saying it on the other side. The

question is not what voice is saying it, but what is being said.

MR NATHAN: Exactly.

MS JOHN: Yes. Very well, as I say, I am happy to proceed on that basis.

THE CHAIR: The issue is what report you are responding to. That is a point which, as I say, depends on the outcome of Mr Nathan's application --

MS JOHN: Yes.

THE CHAIR: -- to which, as I understand it, you would like to object.

MS JOHN: Yes.

THE CHAIR: Right.

MS JOHN: Subject to seeing the tribunal's reasons for its decision today. Obviously there may be something there which we need to take on board, but in principle, yes.

THE CHAIR: Right. Then I am not sure, unfortunately, how far we can now go.

MR NATHAN: I do not think we can really move forward until at least we have seen the reasoning for the decisions, because I can understand that Ms John may wish to abandon or pursue whatever objections in light of what has been decided by the tribunal.

Just taking something as banal as the solicitor's certificate: if you were to conclude, for example, that actually this is something which is a minor matter and would not be something which would have detained you very long in the context of the relief from sanctions, Ms John may sensibly take the view that it is not a line worth pursuing when it comes to the application for Mr Beckett's evidence. I am just taking a simple example which I hope is relatively uncontentious.

Otherwise, I think we are in a position where we probably do need to wait and see what you -- you could perhaps lay down a timetable that Ms John needs to review her position as soon as that decision is taken and produce her submissions in response to the applications within X days of your decision being published. We could move

that way forward.

THE CHAIR: We could probably do that, I suppose.

MR NATHAN: And then we will respond, say, within seven days after that.

THE CHAIR: Yes. Then I hope that I would then resolve any issue that there is on paper myself. I hope that would be satisfactory?

MR NATHAN: Yes.

MS JOHN: Yes, perfectly.

MR NATHAN: I think that's a sensible way forward, yes.

THE CHAIR: Very well. I am afraid that may be all we can do.

Can I just ask my colleagues whether they want to discuss this off line? Could we have five minutes? Five minutes off line.

(2.16 pm)

(A short break)

THE CHAIR: Having considered this, I think we don't see that we can go much further today than to say that the defendants need within seven days of the handing down, publication, whatever one calls it, of the reasons for giving relief from sanctions, to state what are any objections they take to the applications which are made which I have mentioned, and the reasons for that, and that the claimant should then, within perhaps three days --

MR NATHAN: I think slightly longer. If we may have seven as well?

THE CHAIR: Well, I am anxious to get on with this. Why?

MR NATHAN: Five days, if we just have -- I think three days may be just slightly too short.

THE CHAIR: Okay. Five days, you have five days, a working week, to respond. Then I will make a decision in relation to that on paper.

I would want, at the same time, to be able to make any further directions which are

appropriate, or depending on the outcome of those objections. So I want the parties to have given joint consideration to what directions it may be possible to make so that it is at least possible that the same order may be able to both deal with the outcome of any of those objections, and directions for the further conduct of the case.

MR NATHAN: Very well. May I raise one matter sir, which is the question of costs? It seems to me that the issue of costs may well be better informed by the time we know the reasons. If the costs issue could be dealt with on paper, once we know what the decision of the tribunal and what the reasoning of the tribunal is, I can see that it would cut down room for argument and cut down room for debate, once we know what those are. It may be very straightforward and it may be complex.

THE CHAIR: Ms John, what do you say about that?

MS JOHN: Well, my starting position is going to be that we are here because of a breach by the claimant and in the ordinary course one would expect that if anyone was going to bear the costs it was going to be them whatever the outcome. Having said that, if Mr Nathan wants to make an application in writing based on the tribunal's reasons once he's seen them, I am happy that we would deal with that along the same time-frame as his other applications.

So if he put in his application within, say, seven days of seeing the reasons and then we will respond within five days and the tribunal can deal with it at the same time as everything else.

THE CHAIR: Yes.

MR NATHAN: May I simply say this: I am quite happy to say I want the costs because we should not have had the opposition, and I think we need to really see -- sir, you will see immediately that both sides are diametrically opposed and the reasons may actually be quite significant in the context of what form of order you actually do make.

THE CHAIR: Right. That will all have to be dealt with in writing, unfortunately.

MR NATHAN: Most sensibly, if it is dealt with by the tribunal in writing.

THE CHAIR: It will have to be. Any submissions on costs, is there a reason why they shouldn't both be put in within seven days of the reasons?

MR NATHAN: Yes, I think -- then if we each are given an opportunity to respond to the other's submissions.

THE CHAIR: Really?

MR NATHAN: I don't know. The problem is I don't know what my opponent is going to quite say, and she doesn't quite know perhaps what I am going to say. I think she knows one aspect of what I am going to say, because I have already told her, but I don't propose to tell the tribunal.

THE CHAIR: You could effectively make your submissions in relation to costs now. I don't want to make you do that, because Ms John has to go. But is it really necessary to have two further bites in relation to costs?

MR NATHAN: I am content to make the application now, and to hear what Ms John says. It is slightly difficult because I would actually like to know what the reasons are, but let me just outline exactly what my thinking is, sir, which is: one, we have won, costs follow the event therefore we ask for our costs; two, this application for relief from sanctions is something which was forced upon us in the sense that there was the letter of 4 March which strongly objected to any relief from sanctions being given, over seven pages. That was outrageously -- that was conduct which was just simply well out of the norm. The --

THE CHAIR: Mr Nathan, I was not really saying you should make your submissions.

MR NATHAN: I am sorry.

THE CHAIR: What I was saying is I am sure that both of you are more or less in a position now to say what your position is in relation to costs.

MR NATHAN: Yes.

THE CHAIR: If I don't make you make those submissions now, you are saying that we have to have two further lots of written submissions in relation to it. It was that I was just jibbing at.

MR NATHAN: May be, sir, we can do it in this way. Since we have won, as soon as we receive -- we will open the batting with what order we seek. My learned friend can then respond and we will respond to her submissions. That will cut it down very quickly, and our response to her submissions can be dealt with in, say, two days from when we see them, and our submissions can be produced within three or four days of the decision of the tribunal.

THE CHAIR: No, I think the position is, I am afraid, you will both have to put in your submissions on costs within seven days. They are to be confined to five pages and then you can each reply to the others within five days thereafter and that will be confined to three pages.

MR NATHAN: Thank you. I am quite satisfied with that.

THE CHAIR: Right. So I think that's -- is that everything that we can do today?

MR NATHAN: Yes. I am sorry we can't go further, but there we are.

MS JOHN: Nothing further from me, sir, thank you very much.

THE CHAIR: Right. Gentlemen? Peter?

Thank you very much. The next thing you will hear, there will be an order from today insofar as -- I think there will be an order from today, but then the next thing will be reasons.

MR NATHAN: Thank you very much. We are very grateful on our side to you, sir, for the time that you have given us.

THE CHAIR: Right, thank you.

MS JOHN: Thank you.

(2.28 pm)

(The hearing concluded)