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6 **IN THE COMPETITION**
7 **APPEAL**
8 **TRIBUNAL**
9

Case No: 1754/12/13/25

10
11 Salisbury Square House
12 8 Salisbury Square
13 London EC4Y 8AP
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Tuesday 17th March 2026

15
16 Before:

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18 James Wolffe KC
19

20 (Sitting as a Tribunal in England and Wales)
21

22
23 BETWEEN:
24

25 **Zenobē Energy Limited**

Applicant

26
27 And
28

29
30 **Gas and Electricity Markets Authority**
31

Respondent

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33
34 **A P P E A R A N C E S**
35

36 Nicholas Gibson on behalf of Zenobē Energy Limited (Instructed by Norton Rose Fulbright)
37

38 Joseph Barrett KC, Rupert Paines and Barney McCay on behalf of Gas and Electricity
39 Markets Authority (Ofgem)
40

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1
2 **Tuesday, 17th March 2026**

3 **(10.30 am)**

4 **JUDGE WOLFFE:** Good morning, Mr Gibson. Before I do anything else, I should
5 read the usual warning to anyone joining us by live stream on the website.

6 An official recording is being made and an authorised transcript will be produced, but
7 it is strictly prohibited for anyone else to make an unauthorised recording, whether
8 audio or visual, of the proceedings. Breach of that provision is punishable as a
9 contempt of court.

10 Mr Gibson, good morning.

11 **MR GIBSON:** Good morning. I appear, as you know, for the applicant Zenobē and
12 my learned friends Mr Barrett, KC, Mr Paines and Mr McCay appear for the
13 respondent, GEMA.

14 Can I confirm that you have either in hard or soft copy the various bundles? I can run
15 through them if you want to check.

16 **JUDGE WOLFFE:** I have them here on the screen.

17 **MR GIBSON:** Just to recap, Bundle A comprises key documents and skeletons.
18 That's a fresh bundle, albeit one that is closely similar to what was there before in CMC
19 1. Bundle B, pleadings and witness statements has been updated from CMC 1 to add
20 in GEMA's evidence at the back. Bundle C has got volume 1, which is the same as
21 for the CMC 1 and volume 2, which is the correspondence since then. D, authorities
22 freshly prepared for this CMC. Some authorities are the same but re-ordered and then
23 Bundle E is only in soft copy and that's just the exhibits. I don't imagine we are going
24 to have to look at very much of that, just one or two pages. It's a bit disproportionate
25 to print thousands of pages just for that purpose.

26 **JUDGE WOLFFE:** Absolutely. I don't think -- I certainly never saw a hard copy.

1 **MR GIBSON:** We are very modern. It is great. I have got my hard copies.

2 **JUDGE WOLFFE:** I have also seen an exchange over the last 24 hours or so and
3 I have got a competing agenda. So I suspect the first --

4 **MR GIBSON:** That's what I was going to come to.

5 **JUDGE WOLFFE:** The first item of business is the order of business.

6 **MR GIBSON:** There was one point I was going to make just while clearing the decks
7 about what the agenda won't include. That is, we are not going to make any
8 submissions in relation to the prejudicial account of our motivation in bringing this
9 claim. I don't really know why it is always a feature of the submissions for every CMC
10 that they try to put the boot in but we do strongly object to the way that our motivation
11 is characterised.

12 The Amended Reply makes perfectly clear that we have no objection to an LDES
13 scheme. Our only objection is to the scheme as specifically designed by GEMA and
14 our concerns around that scheme arise from the effect that that promises to have not
15 just on our business but also on consumers and the achievement of the Clean Power
16 2030 target. I just wanted to set that down as a clear marker. Hopefully we don't have
17 to keep doing that but it was unfortunately a feature of the skeleton again that started
18 in that vein.

19 So the points of disagreement are both as to the order of agenda items and then as to
20 some points of detail.

21 Our position is based on the order that was made at the end of the last CMC, by which
22 this CMC was listed primarily to deal with, one, GEMA's application to re-amend, as
23 anticipated, and two, disclosure matters arising from GEMA's belated candour
24 evidence again as anticipated. Our agenda is structured on that basis.

25 So, firstly, we propose we deal with GEMA's application to re-amend and then matters
26 flowing from that application and I make clear, therefore, that what to do with GEMA's

1 amendments in relation to section 10P flows naturally from that re-amendment
2 application and so too do the procedural questions arising from our decision to
3 challenge the 2026 decision, which is again a corollary of the decision that's been
4 made by GEMA and the amendments that are made to address that decision. So
5 those two points follow from that, we say.

6 **JUDGE WOLFFE:** Do I understand from that that if I were to refuse the application to
7 re-amend from Ofgem that you would not be seeking to challenge the February 2026
8 decision?

9 **MR GIBSON:** Not entirely, sir, no. We would want to challenge it from an abundance
10 of caution because of the way things have developed -- we will come on to develop
11 that in due course, but the short point is no.

12 The second point in our agenda is to deal with GEMA's evidence and matters flowing
13 from that evidence. There is a number of items that we have outlined in our skeleton
14 and in correspondence. I just propose to take you through those and then finish with
15 confidentiality as a discrete item at the end, and GEMA will obviously speak to its own
16 thing.

17 We just flag that GEMA proposes to take our challenge to the 2026 decision first. We
18 don't understand that and it doesn't seem to be -- it is not consistent with the basis on
19 which we've advanced that application, or at least that proposal, and, secondly, they
20 propose to deal with confidentiality first. Now I don't feel that strongly if they want to
21 deal with that first. If we want to split the atom --

22 **JUDGE WOLFFE:** Can I maybe cut through it, Mr Gibson? I think the sensible way
23 to deal with the agenda is I'll hear Mr Barrett on the application to amend his pleadings
24 which, as you say, has been foreshadowed essentially since the start of this case. We
25 will deal with that and anything that flows from that. We will then deal with your
26 application to either amend your existing pleadings or file a new notice of appeal and

1 we'll deal with that. Then we'll deal with issues to do with evidence and we'll leave the
2 confidentiality point to the end. That strikes me as the perfectly logical way to proceed.
3 Unless there is anything else you want to say at this point, I think on that basis it is
4 Mr Barrett's application to re-amend and you can take it I have read the competing
5 positions. Obviously if there's anything you want to particularly say or, you know, focus
6 for me at this point, that would be helpful.

7 **MR BARRETT:** Of course, my Lord. Thank you. As my Lord knows, we have set out
8 our position in quite a bit of detail in writing, intending to be helpful and I hope it is of
9 assistance.

10 My Lord, you have seen the relevant history set out in the published documents and it
11 is explained in considerable detail in the witness statement of Mr Hutcheson. It has
12 been the position from the point in time at which the relevant Bill was introduced to
13 Parliament on 11th March that the choreography of the work that would be undertaken
14 to develop the scheme and then implement it once the Act was in force has been there
15 since the outset, and indeed the documents make very clear the position was
16 communicated to the claimant from the outset and the claimant has understood from
17 11th March exactly the choreography of the various decisions that followed.

18 As my Lord has noted in opening, it has been clear indeed since before the
19 commencement of these proceedings that the acts and the adoption decision would
20 be part of the proceedings, indeed, a very important part of the proceedings. It was
21 made clear repeatedly to the claimant in pre-action correspondence.

22 My Lord presided over the previous CMC where we had an amendment, which
23 essentially was a foreshadowing and updating amendment, which further highlighted
24 and put down the marker that the adoption decision would follow in due course once
25 the Act had come into force. The claimant's position was to state to the Tribunal that
26 it didn't take any substantive points about the substance of those amendments. No

1 | doubt a practical decision to avoid costs risks, but we certainly say a stance and
2 | approach which is starkly inconsistent with the opposition to the application that is
3 | advanced today.

4 | On the substance, my Lord, we have set out obviously in the schedule to our skeleton
5 | argument the relevant amendments. I don't propose to turn those up unless it would
6 | be of assistance. We say our case is set out perfectly clearly and indeed we have
7 | gone to some effort to do that, given the tenor of the complaints which were made at
8 | the last CMC to the effect that the claimant suggested it had some difficulty in
9 | understanding our case.

10 | I don't want to dwell on it, my Lord, I would simple simply submit that paragraphs 59B
11 | and C of the re-amended defence are particularly clear as to what we say about the
12 | legal effect of these decisions and their consequences.

13 | On the law, my Lord, the only basis that's been put forward by the claimant to justify
14 | its opposition to the amendments is its reliance on the first instance decision of
15 | Mr Justice Sheldon in a case called Hidenda Tax. And the relevant paragraphs are
16 | 21 to 23. The case is no authority at all for any of the propositions the claimant seeks
17 | to advance. It is merely a rather unsurprising example of one particular case where
18 | one particular claim became academic because the authority conceded the claim.

19 | That is, of course, one possible sort of circumstance in which a claim could become
20 | academic. It is no authority in support of the claimant's position obviously for
21 | a plethora of reasons. A claim for judicial review cannot or will not become academic
22 | for all sorts of other reasons.

23 | The legal premises which underpin the submissions you have had from the claimants
24 | are essentially two-fold, my Lord, and we say conceptually they are just fundamentally
25 | muddled and misconceived. There is a proposition put to you that a claim can only be
26 | rendered academic by a further decision if the further decision is one which is

1 favourable to the claimant. That's nonsense. We have just given you one example
2 illustrating that it is nonsense. That's at paragraph 22(1) of our skeleton, the *AFA*
3 case. The second proposition is that a claim can only be rendered academic by further
4 decision if the first decision is withdrawn.

5 Again, my Lord, that is a nonsense. See the analysis of Mr Justice Fordham helpfully
6 set out at paragraph 34 of the Charity Commission case, where he specifically takes
7 on that submission and explains why it misses the point. Again it is one example of
8 a case in which a claim may be rendered academic. Obviously it is not the only
9 circumstance.

10 We say the Charity Commission case is particularly helpful. Obviously there are points
11 of factual distinction, but the principle we see explained at 34 we respectfully submit
12 is closely analogous to the present case and demonstrates putting matters at their
13 lowest that the case we advance is reasonably arguable.

14 For those reasons, my Lord, we say there is no substance in the objections which are
15 put to you by the claimant. We say this application should have been consented to.

16 We do say it is somewhat unfortunate that your time has been taken up at this hearing
17 today with a contested application. It should have been dealt with in a more sensible
18 way.

19 My Lord, for those reasons I would invite you to allow the amendments, unless I can
20 be of further assistance.

21 **JUDGE WOLFFE:** Just two points, if I may. At the outset you said that Ofgem's
22 position has been clear from before the proceedings started.

23 **MR BARRETT:** Yes.

24 **JUDGE WOLFFE:** That the Act and the adoption position would be part of the
25 proceedings.

26 **MR BARRETT:** Yes.

1 **JUDGE WOLFFE:** I may well not have picked everything up, but I certainly recall at
2 the last hearing it being perhaps a development of the position you accepted at that
3 point that to run the argument there would need to be an adoption decision. Is it the
4 position that it was always anticipated that there would be an adoption decision?

5 **MR BARRETT:** Yes, absolutely my Lord. I am sorry. I will take you through the
6 documents so it is clear. To make that good, one needs to look at the decision-making
7 documents running back from 11th March 2025. I say it's always been absolutely
8 clear when one follows the chronology of published documents that the whole
9 structure of the implementation of this project was that as the bill was passing through
10 Parliament, Ofgem was conducting the development work. The intended timing was
11 that the Act would come into force at the back end of 2025. It would impose a statutory
12 obligation. Ofgem would then be taking a decision pursuant to that statutory obligation
13 adopting the work done up to that point. So I say absolutely that is a feature of this
14 legislative process and implementation process which has been -- it is hard wired into
15 all of the documents and publications. I will seek to make that good at the trial
16 obviously by showing you the detail.

17 **JUDGE WOLFFE:** Yes. The other question I had was just to make sure, taking the
18 argument you are running at a very high level, and please do correct me if either of
19 these propositions are wrong, on the one hand you are making an argument of
20 substance, in other words, as it were, on the liability.

21 **MR BARRETT:** Yes.

22 **JUDGE WOLFFE:** That the Act provides a shield as a matter of law.

23 **MR BARRETT:** Yes.

24 **JUDGE WOLFFE:** For the scheme as it now stands by virtue of the adoption position.
25 If I understand your position, it goes to liability. That's not quite the right word under
26 the Act, but it goes to lawfulness.

1 **MR BARRETT:** Yes.

2 **JUDGE WOLFFE:** You also make a point that goes effectively to relief to the effect
3 that whatever -- I mean, one hypothesises that Mr Gibson is correct about what
4 happened last September.

5 **MR BARRETT:** Yes.

6 **JUDGE WOLFFE:** You would say that relief -- it's been -- whatever the correct legal
7 analysis is of that position.

8 **MR BARRETT:** Yes.

9 **JUDGE WOLFFE:** That is now rendered academic by what has happened through
10 the statutory process.

11 **MR BARRETT:** Yes.

12 **JUDGE WOLFFE:** That would be our basis for you would say --

13 **MR BARRETT:** Refusing relief.

14 **JUDGE WOLFFE:** Mr Gibson obviously would take a different position. You would
15 say that was the basis for refusing relief.

16 **MR BARRETT:** Yes.

17 **JUDGE WOLFFE:** And there may be some nuances around whether it's an answer
18 to all forms of relief and so on but you would say those are matters for the substantive
19 hearing to address.

20 **MR BARRETT:** Indeed, my Lord. Perhaps I wouldn't dissent from the way my Lord
21 has just articulated two possible analyses, but perhaps if I can just explain my position
22 in my own words, my Lord, as I want to be as clear as I possibly can.

23 **JUDGE WOLFFE:** Absolutely. The reason I put it to you in that way is I just want to
24 make sure that I understand what the lines of argument are at the sort of top level.

25 **MR BARRETT:** Absolutely. If I could ask you to just quickly look at my skeleton and
26 could I ask you to turn to page 13 of the skeleton argument?

1 **JUDGE WOLFFE:** You will just need to give me a moment to navigate. There we go.
2 Which paragraph?

3 **MR BARRETT:** If you look at 21(2) you will see we reproduce sections from the
4 pleading.

5 **JUDGE WOLFFE:** The first point you are making is when is the appeal academic
6 and/or otiose, and/or relief, and/or no quashing or equivalent relief should be granted.

7 **MR BARRETT:** Indeed. I think as my Lord was putting to me it is very much put in
8 the alternative.

9 **JUDGE WOLFFE:** Yes.

10 **MR BARRETT:** But the central point of substance is in the emphasised text where
11 we say any such decision has been superseded and/or is of no continuing legal effect
12 or relevance.

13 **JUDGE WOLFFE:** Yes.

14 **MR BARRETT:** Now when one reads the authorities about further decisions and the
15 application of the academic claim principle, what we are going to find at the trial is that
16 some of the authorities analyse the point as going to what I think of in my mind as
17 substance, essentially saying there is no continuing legal effect of the decision. There
18 is simply no claim, if I can put it in those terms.

19 Some of the authorities, however, don't use that language. Some of the authorities
20 actually use language which indicates they are not really grappling with what I regard
21 as that prior very important point. They just speak in the language of relief and the
22 refusal of relief.

23 **JUDGE WOLFFE:** Yes.

24 **MR BARRETT:** For that reason, we rely on both potential analyses, because you are
25 going to be looking at cases that use both approaches. We say irrespective of which
26 of the two lines is preferred by the Tribunal, the end result is the same which is that

1 the claim falls to be dismissed. I hope that's clear, my Lord. That's how we seek to
2 put it.

3 **JUDGE WOLFFE:** That's very helpful. Thanks, Mr Barrett. That's all I need from you,
4 just now.

5 Mr Gibson.

6 **MR GIBSON:** Yes, my Lord. I don't want to tax you, but this is an extremely important
7 point, we say. With respect, I think it needs to be dealt with, with a degree more rigour.
8 So I am going to do that, if I may.

9 **JUDGE WOLFFE:** Well, the question I have, Mr Gibson -- I don't in the least dispute
10 that it is a taxing point and that there is a lot in it, but is that not an argument for the
11 substantive hearing? We have three days in April. Is this really something that
12 I should be seeking to foreclose today?

13 **MR GIBSON:** We say yes, sir.

14 **JUDGE WOLFFE:** I know you do. You may have detected from the question I have
15 asked --

16 **MR GIBSON:** I do, sir.

17 **JUDGE WOLFFE:** That you will need to persuade me that that's the position.

18 **MR GIBSON:** Indeed, sir. In a situation where we say it is clear the position is
19 hopeless that is precisely the situation where, with respect, you should take the robust
20 decision to excise this from the matters that we will have to deal with in April precisely
21 to avoid the time and cost that will continue to be wasted in dealing with a hopeless
22 argument.

23 So that goes to the arguability point, but there is a second plank, which I am going to
24 take you to. The authorities are perfectly clear that where a pleading is not sufficiently
25 rigorously pleaded, that too is a basis on which to refuse amendments or allow it to
26 proceed, again for perfectly sensible case management reasons. So I recognise I will

1 have to persuade you.

2 My learned friend quite rightly points out the threshold is the same as for strike out.

3 I have to show that their argument is fanciful. Well, they have to show their argument

4 is not fanciful but I am not going to take a burden of proof point on this. I say it is quite

5 clear it is fanciful for all the reasons I have set out. With respect, they have not

6 engaged with it. We have given them multiple opportunities to explain their case.

7 Instead what they suggest is what we are looking for is a tutorial on the law. With

8 respect, we are asking them to set out facts which substantiate the argument they

9 want to make, which is a perfectly normal, logical and sensible approach to pleading.

10 They have repeatedly spurned opportunities that we have given them to do that.

11 We have not just launched in here and said, "throw this out." Last time around, we

12 said we will allow the amendments to go in without prejudice. We were very clear we

13 were reserving our position on arguability on the understanding that, having set out

14 our concerns about arguability both in correspondence and at that hearing and having

15 taken the trouble to plead very carefully in the amended reply the problems they had

16 with their pleading, we have given them ample opportunity - we thought they would

17 take the opportunity to address, but instead no, with a certain amount of chutzpah they

18 have said, "No, we are not going to."

19 I am going to take you to the law. We say the law supports our application now that

20 this should be struck out. Not struck out, because we cannot do that. The amendment

21 should not be allowed. I will come on to the point about strike out, to make the entirely

22 sensible and correct point that you don't have power to strike out, but I will come on to

23 that in a moment. This is about amendments and we say these amendments should

24 not be allowed for reasons I am going to come on and adumbrate. I apologise now,

25 but in order to persuade you I feel I have to take you to the detail, if I may?

26 **JUDGE WOLFFE:** I suppose there are a couple of preliminary observations. The first

1 is although this is an application to amend, the basic line of argument has been
2 foreshadowed from the outset of this case. It has been plain from the word go that
3 what was originally the bill and its ultimate passage would be a feature and that Ofgem
4 were going to run the argument that essentially they are running -- wish to run now
5 and Mr Barrett has outlined. So that's point one. It is not in reality a new point.

6 The second point by way of preliminary observation, and this is -- you shouldn't take
7 from this that I am not interested to hear the argument that you are going to advance,
8 but on the face of it, it is not a particularly complicated or surprising argument, given
9 the sequence of events which are articulated in the pleadings, and I suppose the
10 question I have in a sense is what more is needed by way of pleading to provide
11 a foundation for the line of argument Mr Barrett wishes to advance? I suppose the
12 question in my mind is what facts are necessary beyond that? We see a sequence of
13 development of the scheme as a decision or not which you challenge. That's
14 something which will be for the substantive hearing.

15 That has been done, as it were, in parallel with legislation being passed, the bill
16 ultimately passed and becomes an Act. There's a debate about what the Act means
17 and that will be for the substantive hearing and the argument against you, which has
18 always I think been foreshadowed, is that the Act by one legal analysis or another
19 results in an answer to the challenge to what was done in September.

20 Mr Barrett has pointed me to the slightly different ways it is put. Those are really legal
21 arguments that simply flow from the sequence of events.

22 What I struggle with, but you will show me why my struggling is, you know,
23 unnecessary struggling or not correct, is what additional factual pleading is necessary
24 to provide the foundation for the legal debate which would arise between the parties.

25 Again I suppose just so you know my preliminary thinking is I don't find the -- I don't
26 myself instinctively find the argument to be one that I wouldn't wish to leave to the

1 substantive hearing. I think you will have to persuade me that it is so unarguable. On
2 the face of it, it seems a perfectly -- it will be an interesting argument, but it is not one
3 that I -- it is one that feels to me like one for the substantive hearing rather than
4 preliminary skirmishing. The question in my mind is whether time is well spent in those
5 preliminary skirmishes rather than putting in place the foundation for the substantive
6 hearing.

7 So those are my preliminary thoughts, Mr Gibson. I usually find it is helpful for counsel
8 to know where a judge is going.

9 **MR GIBSON:** Yes, it is.

10 **JUDGE WOLFFE:** So you know what you are --

11 **MR GIBSON:** Exactly what I am happy to do. Your reticence is understandable, sir,
12 for the obvious reason that if you are trying to remove something, you have to meet
13 the threshold of it not being arguable. I can see that. It is because of the unarguability
14 of GEMA's position that I maintain that it is nicer to put this defence out of its misery
15 now than have it continuing to go on.

16 I would make two observations. The first is this defence is the tail that has been
17 wagging the whole proceedings since the start. We have basically slowed the pace
18 of these proceedings. We had suggested when we originally lodged these
19 proceedings that they should be heard in the week commencing 9th February,
20 ironically the week in which the judicial review was heard in the other case, so there
21 might have been some timetabling clash, but we would have got in there first.
22 Everything could have been done and dusted. In circumstances where everybody in
23 this room, or at least on our side of the room we have been pushing to try to get this
24 moving as quickly as possible. The only real reason it appears we haven't done that
25 is because we have been waiting around for a decision to be made long after the actual
26 decision that's being challenged. So we do have a concern that this has been going

1 on long enough and needs to be stopped now.

2 The second point is that the submissions -- and it is a feature of the evidence from
3 Mr Jones as well -- make a point that we have known about their intention for ages.
4 We dispute it was clearly stated that they were going to adopt -- take a decision to
5 adopt the previous work immediately after the Act entered into force. That wasn't clear
6 to us. It was only clear when they wrote a letter to us on 19th December, but it is clear
7 that they thought section 10P was going to be trump card for them. That was perfectly
8 clear.

9 **JUDGE WOLFFE:** Yes. That was always part of the case.

10 **MR GIBSON:** With respect, the fact you have been told something is going to happen
11 doesn't mean that that thing then becomes an arguable defence for the thing you are
12 challenging. I mean, advance notice of a bad point is still advance notice of a bad
13 point. I don't really think that 'advance notice' submission is either here or there. The
14 question you have to assess --

15 **JUDGE WOLFFE:** I take that, yes.

16 **MR GIBSON:** The question we have to assess, looking at the pleading, what we have
17 actually said, and I am going to take you to it, is have they done two things? One,
18 have they particularised their pleading sufficiently, and I take on board the point you
19 want me, sir, to address you on what more they should do, and two, even if they had
20 set it out clearly, is that position once it has been properly pleaded and particularised,
21 is it even arguable? We say it is not properly particularised and it is not arguable, and
22 for both those reasons we say we should be stopping this circus now.

23 So I am going to take you through a brief recap on the relevant legal principles to reply
24 when considering an application to re-amend. I will do that as quickly as I can because
25 I know your patience will be tested if I do it in too much detail.

26 **JUDGE WOLFFE:** Can I also make an observation, Mr Gibson? At the outset you

1 made a point perfectly properly of taking issue with the way your motivation is
2 characterised. I don't think it is helpful to characterise the way the --

3 **MR GIBSON:** I withdraw the comment --

4 **JUDGE WOLFFE:** The way the respondents have set out their case.

5 **MR GIBSON:** Yes. The second thing I will do is I will analyse the proposed
6 re-amendments themselves in order to show why they are insufficiently particularised
7 and in the event unarguable.

8 Thirdly -- I don't know whether it is a matter you want addressed immediately, but I will
9 touch on what we should do at some point if you are with me on the re-amendments
10 and what happens to the balance. I won't touch upon that if I have not persuaded you
11 of the first two points.

12 Two points just by way of introduction. There's a reference in GEMA's skeleton to us
13 having described all of the previous amendments as entirely unobjectionable. Can
14 I just turn up what I actually said in the CMC 1 transcript. That's in Bundle A, tab 9,
15 page 480. It is lines 11 to 17 on that page. I said:

16 "Indeed some of the amendments my learned friend took you through are entirely
17 unobjectionable. We raise nothing about that, but I should make one point clear,
18 though. Our position is a pragmatic one and we don't accept the arguability
19 necessarily, all these points, but we are not taking a point on that because our real
20 concern is to have clarity to reply meaningfully to the amendments once they have
21 been made."

22 So at that point I was hoping that, by giving them the opportunity, they would clarify
23 matters and then we would be able to see whether it was arguable. So it is entirely
24 proper we say not to have rushed in headlong but to have given them the opportunity
25 to improve their position, that's why I say given these multiple opportunities, I will take
26 you through that as well, and now we say we have come to the end of the road, as it

1 were.

2 So we did not object to purely factual amendments which updated the chronology, and
3 you have examples, for example, at Amended Defence paragraph 4 where they
4 change references from the bill to the Act. Obviously, we had no objection to that.
5 That is indeed entirely unobjectionable.

6 I should say that doesn't mean we accept their points about the relevance of these
7 changes, but we didn't propose to make a song and dance about something that didn't
8 need to be objected to.

9 Secondly and relatedly, you will have seen I just went on to say that we don't accept
10 arguability. I think that should have been perfectly clear.

11 The second point I would like to make is it is suggested that we have been able to
12 plead a fully pleaded response and somehow that's an answer to what we are saying
13 now. Of course, we did our best to plead a reply as fully as possible, mindful of the
14 duty of procedural rigour. I am going to come on to that in a moment. We also
15 expressly flagged that key elements of the pleading were indeed deficient. I will just
16 take you to two examples, if I may, in bundle B, tab 8, where the amended reply is. If
17 you turn to page 361, you will see paragraph 20A.

18 **JUDGE WOLFFE:** 361 in bundle B?

19 **MR GIBSON:** Bundle B, yes, sir. It is the bottom of page 361, paragraph 20A.

20 **JUDGE WOLFFE:** Sorry. I have gone past it.

21 **MR GIBSON:** Not at all.

22 **JUDGE WOLFFE:** Bear with me.

23 **MR GIBSON:** This is a pleading to defence paragraph 43A which is the
24 paragraph that introduces the relevant intention to make a decision. We say two
25 things. One just to highlight we say -- over the page on to page 362 we say:

26 "As the second sentence ... if the phrase ... is intended to refer ...", and then we

1 describe what we infer they mean, "the legal and factual correctness of [that]
2 characterisation is denied."

3 That's one point where they should be making clear what it is they are actually saying,
4 not leaving us to infer points, but more importantly we say at the bottom of that
5 paragraph, three lines up, middle of the paragraph:

6 "Further, the relevance of GEMA's intention to take a future decision to 'adopt the
7 development work undertaken to date' (and/or of any future decision by GEMA
8 purporting to give effect to that intention) to the present proceedings against the extant
9 decision is not properly explained properly or at all ..."

10 This, if you like -- I will come on to look at the pleadings. Just to take your point about
11 what they should do, it is not enough to point generally to the passage of the Act and
12 then to make the general submission that that makes your case academic, otiose or
13 otherwise undeserving of relief.

14 We say that begs the question what is it about what has happened, specifically what
15 facts are they that give rise to that legal conclusion? It simply we say does not allow
16 us to engage properly with what they have said if they don't explain the specific facts
17 that make good on that proposition. In all the cases we have looked at my learned
18 friend quite rightly said they turn on the facts. The judge looks very -- I will go to each
19 of the cases they have mentioned and show this to you, sir. They look at the specific
20 facts and ask themselves "On those facts does that lead to the conclusion that this is
21 academic".

22 Now I have gone to the *Hidenda* case. They make some straw man propositions on
23 what I say about that, which is not actually the case and I will come on to touch on that
24 anyway. In each of those cases, the *Hidenda* case, which I took you to last time, the
25 *Good Law Project* case, which they mention in correspondence but apparently are no
26 longer interested in pursuing, and the two cases they mentioned in their skeleton, all

1 of those cases turn on the particular facts, and we say that is what the pleadings should
2 be making clear now.

3 Apart from anything else etc, this is not just a point about being fair in preparation for
4 a case. It is actually supposed to facilitate the resolution of disputes rather by
5 settlement or otherwise. Holding everything back to try to ambush us at the hearing,
6 as to how the general facts in my specificity make good this proposition, it is not just
7 the way one litigates these days. Maybe in a pre-Woolfian days -- no relation to you,
8 sir -- that may have been the way people carried on, but we say it is not the way things
9 are done nowadays.

10 To be perfectly clear, you plead the argument and then you plead the facts in support
11 of that argument. That's how you get clarity as to pleading and rigour in pleading.

12 **JUDGE WOLFFE:** The question I have is in looking to the very particular facts in this
13 case -- I don't think you will need to show me authority -- the case of whether a case
14 is academic or not will turn on the particular circumstances. Thinking about the
15 circumstances of this case, is there anything more that is required to set up the
16 foundation for the argument -- and this is a question and I welcome your assistance
17 on it -- anything more than that Parliament has passed an Act that has come into force
18 that is now the law of the land? Ofgem say that has certain consequences. You
19 dispute the interpretation of the relevant provision. So that's -- you know, that sets up
20 certain consequences or not.

21 Then the second fact is the decision and the decision says what it says. So if there's
22 an issue about specification of what was meant at the time that you put these
23 averments into your pleadings about what Ofgem intended by way of adopting
24 development work to date, that's answered or not answered by the terms of the
25 decision, but the terms of the decision are the terms of the decision and either provide
26 a foundation for the argument which Mr Barrett wants to run or they don't and, you

1 know, that's ultimately a dispute for the substantive hearing, isn't it? I suppose it is
2 really focusing very squarely on your contention that there are facts that Ofgem need
3 to plead in order to provide a platform for running the line of argument that, you know,
4 rightly or wrongly, they wish to run and to -- I really welcome your assistance on what
5 facts you say are needed beyond those two events.

6 **MR GIBSON:** Well, I think part of the problem is I don't want to have any sort of
7 scope -- room for manoeuvre on the day. If those are the two facts that they say --
8 one, legislation was passed; two, a decision was taken to adopt a 2025 decision,
9 pursuant, allegedly, to, 10P coming into force -- if that's the sum total of the facts that
10 they are going to rely upon to cash out on their arguments about academic, otiose and
11 no relief, if they will plead those two facts, that's a very good start. Then we know that
12 that's all we are dealing with.

13 The second point I would make is even if they do do that, the argument is still hopeless.
14 So I can take you through -- let me take you to the legal principles first. I have been
15 promising to do that. I can take, if you like -- we can take it as read --

16 **MR BARRETT:** Sorry to rise. Speaking for myself, I would be extremely
17 grateful -- I would be assisted and the court would be assisted if my learned friend
18 could answer your question what are the facts that are said to be absent that are
19 a necessary ingredient of a valid pleading, because I don't understand it from my
20 learned friend's skeleton. I don't think he has identified those missing facts in his
21 skeleton. It does seem to me it is an absolutely essential requirement of him opposing
22 this application. He's avoiding answering the court's entirely reasonable question.
23 I am in some difficulties because I don't know what his answer to that is and it is said
24 to justify an opposed application. I would be grateful if he would answer it.

25 **JUDGE WOLFFE:** Mr Gibson, you have heard that. You can take it if you don't give
26 me facts, that won't be lost on me, but I understand --

1 **MR GIBSON:** I think I have answered that question.

2 **JUDGE WOLFFE:** You then have a consequential argument which is that even if
3 those are the facts that are being relied on, you say the argument is hopeless.

4 **MR GIBSON:** Yes. Let me quickly do the law and then we will actually go to what the
5 pleading says. I will highlight -- it may be in one part of the pleading they talk about
6 these facts, but when you get to the actual pleading about what they are arguing in
7 terms of the academic -- they don't explicitly refer back and say "Those are the only
8 facts we rely upon". If they want to do that, that is a different criticism altogether on
9 just arguability, but at the moment that's not the way it is pleaded. So I have answered
10 that question and I will make good on it by actually going to the pleading and explaining
11 it in more detail.

12 As to the law, you will have seen that we set out in paragraph 12 of our skeleton the
13 well-established legal principles regarding amendments, which are derived from Court
14 of Appeal authorities including the *Habibsons Bank* case cited in a more recent case
15 quoted at the White Book, paragraph 17.3.5. I won't turn it up, but that is the authorities
16 bundle D, tab 6, page 230.

17 That makes the point that amendments must contain, one, sufficient detail to enable
18 the other party and the court to understand the case that is being advanced and two,
19 reasonable grounds upon which to defend the claim.

20 The second point I would like to emphasise by reference to the law is, you will
21 remember where I took you to two cases which both refer to Lord Justice Singh's
22 judgment in the *Talpada* case regarding the importance of rigour in pleading judicial
23 review cases, and in light of how matters developed, I hope you will indulge me if I take
24 you back very briefly to one or two points made in those cases.

25 The case of *Leighton* is at tab 8 of the authorities bundle and I would like to go to
26 paragraphs 72 and 73 page 266 to 267 where Mr Justice Cavanagh quotes --

1 **JUDGE WOLFFE:** Give me a minute, please.

2 **MR GIBSON:** Forgive me. That was tab 8 of bundle D and it is page 266. So Mr
3 Justice Cavanagh is there quoting from Lord Justice Singh's judgment. I think you
4 read it last time, sir. So I just wanted to highlight paragraph 67 makes the point that:

5 "Public law litigation must be conducted with an appropriate degree of procedural
6 rigour. Both fairness and the orderly management of litigation require that there must
7 be an appropriate degree of formality and predictability in the conduct of public law
8 litigation as in other forms of said litigation."

9 Paragraph 69 makes the point:

10 "The court should be prepared to take robust decisions and not permit grounds to be
11 advanced if they have not been properly pleaded."

12 Then at paragraph 73 Mr Justice Cavanagh makes the point:

13 "This applies equally to defendants."

14 The other case, just to take you to it briefly, is at tab 11 of that bundle. It is the (*TTT*)
15 *v Michaela Community Schools Trust* case. Mr Justice Linden. If you turn to
16 page 404, you remember we were looking at the debate between him and senior
17 counsel, Ms Hannett, regarding whether Ms Hannett's case had been appropriately
18 pleaded. This is particularly relevant. He emphasised that the requirement for
19 procedural rigour in pleadings applies not just to the ground being pleaded, but also
20 to the facts relied upon in support of the relevant ground. One sees that in the italicised
21 wording quoted from the practice direction at the bottom of page 404.

22 I would note in passing that the emphasis in that case and in the particulars echoes
23 the point I have already cited from the Court of Appeal authorities in the White Book
24 about the need for amendments to be sufficiently detailed to be understood.

25 At paragraph 251 Mr Justice Linden went on to explain what Lord Justice Singh meant
26 when he said the court should be prepared not to permit grounds to be advanced if

1 they had not been properly pleaded, he says:

2 "As Lord Justice Singh indicated, the aim of these requirements is to avoid unfairness
3 and to ensure the orderly and efficient management of proceedings in accordance with
4 the overriding objective."

5 It obviously is the same as governing principles in the Tribunal for relevant purposes:

6 "And in particular to enable the other party to know the case it has to meet and to
7 prepare its evidence and arguments and make decisions about the litigation
8 accordingly."

9 So that's just making the point I made a moment ago. You have to have clarity in the
10 pleading, i.e., if you are going to make an allegation, as here, in relation to the
11 argument being academic, you have to tie that back to the specific factual points you
12 are relying upon in support of that argument. It's not enough to leave those adrift
13 elsewhere in the pleading. You need to tie things tightly to the pleading and know
14 precisely what the factual basis for your allegation is.

15 The third and final point I want to take you to on the law is just to highlight what the
16 CAT rules say about rigour and pleading, and the Guide in particular at paragraph 477.

17 I don't think we need to turn it up, because we did it last time. Just confirms that the
18 defence is entitled to respond in a reasoned manner to the grounds contained in the
19 notice of appeal. I emphasised reasoned manner because that supports the point
20 made in *TTT* that it is not just about setting out the grounds of defence. You have to
21 also set out the factual reasons for supporting each such ground.

22 So, with respect, as I said, the idea that we are actually requesting a tutorial on the
23 law from my learned friends – no doubt it would be illuminating – but all we are doing
24 is asking for GEMA to comply with a duty to plead with an appropriate degree of
25 procedural rigour as required by the Court of Appeal and the Tribunal.

26 So with that by way of prefatory remarks on the law, I will go and look at what the

1 pleadings actually say. You will remember -- I think we touched on this already at
2 CMC 1 -- the purpose of these amendments was expressly said that it would set out
3 the reference to the anticipated decision, which was ultimately taken on 18th February,
4 to adopt GEMA's previous work, including the 2025 decision. I won't turn it up, but in
5 the transcript at page 17, lines 5-24 you had a debate with my learned friend Mr Barrett
6 and you asked:

7 "JUDGE: So a decision under the Act will be a necessary part of the case?"

8 GEMA: Yes.

9 JUDGE: Until there is such a decision the argument you have outlined doesn't really
10 get off the ground.

11 GEMA: Precisely. We will apply to amend to introduce that decision, yes."

12 GEMA has helpfully extracted the relevant paragraph from the draft re-amended
13 defence into the annex to its skeleton, tab 16 of Bundle A, pages 576 to 578. I did
14 notice there was one small typo at the top of 577. I think that should be a reference
15 to amended defence, paragraph 43A but otherwise I couldn't see anything different
16 from the pleading in the body of the main draft pleading.

17 Just to reiterate, there are, of course, a few of those amendments which are simply
18 statements of the fact as things have moved along and we obviously to that limited
19 extent don't take any objection to those. For example, that's paragraphs 2, 28 and 42
20 of the draft re-amended defence I believe.

21 **JUDGE WOLFFE:** Which paragraphs were those?

22 **MR GIBSON:** 2, 28 and 42. I will just turn them up so we are all looking at the same
23 things. In each of those my recollection is that the amendments do no more than
24 update the chronological record, as it were. So we don't object to those amendments
25 in and of themselves. However, for the avoidance of doubt we do strongly dispute the
26 relevance of the facts, that there is any relevance to those changes for the purposes

1 of our case.

2 We say the remainder of the amendments are objectionable because they seek to
3 attribute a legally unarguable consequence to the fact that section 10P has entered
4 into force. They seek to establish a defence to our challenge to the 2025 decision on
5 the purported basis that section 10P had purportedly -- and the 2026 decision
6 purportedly taken pursuant to section 10P -- operates to defeat our challenge to the
7 2025 decision, i.e. one taken before section 10P was passed into law, let alone
8 entered into force.

9 We see an example of the pleading to that effect in the provision my learned friend
10 took you to at paragraph 59B.

11 The second, related reason is because they seek to present the 2026 decision as
12 having been undertaken by GEMA for the purposes of its duty under section 10P. We
13 say this and similar attempts to present the 2026 decision as somehow required by or
14 the necessary consequence of section 10P are denied, as we have already made
15 clear in our amended reply at paragraph 20A of 30A(ii) and so on.

16 I am going to address you about arguability in a moment, for now I am just focused on
17 showing you why they are insufficiently clearly pleaded and I am conscious of the
18 points you have already made today about that, sir.

19 I think it is probably easiest to go to the point where the purported section 10P defence
20 is set out to its fullest and we say still inadequate extent. That is the provisions at
21 paragraph 59B to 59C. I don't know whether you have the annex to their skeleton
22 open or the actual --

23 **JUDGE WOLFFE:** I have the annex open, but by all means take me to the actual
24 pleadings if it is necessary.

25 **MR GIBSON:** No. The annex is fine I believe, sir. So these do we say set out no
26 more than bald assertions without any proper particulars or explanation for the basis

1 for those assertions.

2 So in 59B, taking them in turn, 59B purports to set out GEMA's positive case in respect
3 to section 10P, i.e., the effect and consequences of the 2026 decision and its adoption
4 of the 2025 decision "is to render C's appeal academic and/or otiose, and/or that no
5 relief and/or no quashing of equivalent relief should be granted in respect of C's
6 appeal". There are no particulars or other explanation for the basis for those
7 assertions in that paragraph.

8 Now, I don't think it should be controversial to make the point that that's where the
9 facts in support of the contention should sit. It is perfectly legitimate, as we have done
10 throughout our pleading, to use cross-reference and say paragraph X is repeated. We
11 don't have to have the whole thing set out again but we do need to be clear about
12 precisely which facts they say support that contention. As presently drafted, that's just
13 missing altogether.

14 **JUDGE WOLFFE:** They say it is the effect and consequence of the decision to which
15 they have already referred, including the adoption of the September publications for
16 the purpose of what they contend to be a statutory duty and you dispute. Then they
17 close the paragraph by saying:

18 "The scheme is and will be conducted under a duty impressed by primary legislation
19 and is not or is no longer capable of challenge."

20 Now they may be right or wrong about whether it is a duty but does that not --

21 **MR GIBSON:** That's a statement of their case without any additional facts creeping
22 in. If that bald, general fact is the only one they rely on, then so be it, if that's the sum
23 total of their case. The basis for their case must be clear: I just want to know we are
24 not pleading to a different point when we get to the hearing.

25 **JUDGE WOLFFE:** It is the basis, a partial basis, of your opposition to their application
26 to amend that they have not adequately pleaded facts. So this is not an occasion for,

1 you know, seeking to -- you know, for you to make good the opposition you have to
2 persuade me that there are insufficient facts there. I don't think it is really an answer
3 to say "If that's the only facts they plead, so be it", but I suppose what you could take
4 from that is that for the purposes of the arguments you want to advance about
5 arguability --

6 **MR GIBSON:** I am going to come on to that, yes, sir.

7 **JUDGE WOLFFE:** I appreciate you might reasonably take it that, you know, the
8 essential things that are relied on, the essential points that are relied on for the various
9 arguments being foreshadowed there are, first of all, what's said to be the imposition
10 of a duty by a primary legislation and, secondly, the decision, which they have already
11 pled out.

12 **MR GIBSON:** I will address it on that basis. If that's the sum total, so be it.

13 At 59C we also say contains a bare denial without any reason to support it. It purports
14 to deal with the amended reply at paragraph 29.2. I will not take you to it, but we say
15 it doesn't actually deal with the full breadth of what we say there.

16 In any event the third sentence states in respect of our argument, 59C(1) says:

17 "This is incorrect and specifically denied."

18 With respect, that is deficient because it doesn't explain the basis on which it refutes
19 the factual matters that we have set out in the amended reply, or at least positively set
20 out the facts that they say support it.

21 I think we have seen from their skeleton argument that the only fact they are saying is
22 the word "must" appears in subsection (1) and (2) of section 10P.

23 **JUDGE WOLFFE:** The section to which you have drawn my attention ends with
24 a colon and the proposition is then explained in the following two subparagraphs.

25 **MR GIBSON:** I am sorry, sir. I was jumping ahead. I am looking at sub-paragraph
26 (1):

1 "Section 10P 1989 imposes a duty within the meaning of schedule 3 of the Subsidy
2 Control Act 2022."

3 We say section 10P incorporates a measure of discretion. They say "this is incorrect
4 and specifically denied."

5 We say there are a number of factual features about section 10P that need to be
6 addressed and explain why it is in those circumstances they say they are not. I can
7 take you to them, sir. I feel I am not making much progress on this, so maybe I should
8 move to arguability in the interests --

9 **JUDGE WOLFFE:** I am interested in hearing anything you want to say, Mr Gibson.
10 I mean, what -- just again speaking as a matter of impression I can see that
11 paragraph 1 -- 59C(1) sets out what no doubt will be an interesting legal debate about
12 the nature of section 10P. Not immediately obvious why that requires -- how far that
13 legal debate about the nature of the section, whether it imposes a duty or creates
14 a discretion is going to be informed by factual pleading.

15 **MR GIBSON:** We do say we have set out in our pleading, if you turn up the amended
16 reply, bundle B, tab 8, paragraph 29(2) on page 365 -- we make a number of factual
17 points. Forgive me, sir. I have just lost my place. Sorry. 29(2). We make the point
18 the quotation from section 10P is selective and therefore it does not reflect full scope
19 and meaning. We point out the key elements of section 10P that have been omitted.
20 We make the submission in accordance with established principles of statutory
21 interpretation one has to read the provision as a whole and in context. We say in
22 particular there is significant room for discretion on the part of GEMA in relation to key
23 elements of the design of the LDES scheme and then we specifically identify which of
24 those key elements we will be relying on.

25 So we have set out what we say is our factual premise for saying it's a legal power.
26 On the other hand they say "It is a legal duty. We deny your case on power is correct"

1 with no particulars on which to say that. We say that's unsatisfactory. I propose to
2 move to arguability on the basis that that is something which I think is even clearer.
3 We say, as I mentioned earlier, GEMA sought to present section 10P as some sort of
4 trump card which defeats our challenge to the 2025 decision. It is very important to
5 keep in mind that this is a challenge to the 2025 decision. It is through that prism –
6 that's the target they have to hit in their defence.

7 **JUDGE WOLFFE:** I understand, you know, interesting questions arise about
8 retrospectivity and, you know, the impact of the ultimate enactment of the legislation
9 and passing -- making of the decision. I don't for a moment diminish the interest of
10 the question.

11 **MR GIBSON:** I am not questioning anything personally, sir. I know you will be very
12 rapt when you get to this if I don't succeed today.

13 **JUDGE WOLFFE:** So I understand the nature of the argument. What I am interested
14 in is the basis on which you say it is an argument that I should not even be entertaining,
15 which is essentially what you are inviting me to do.

16 **MR GIBSON:** We set out seven points in our skeleton. I will take you through those,
17 but the headline point we say, at the risk of mixing too many of one's card analogies,
18 when you look at it properly this defence is a combination of both a house of cards,
19 which is inherently unstable without any proper foundation, and a three card trick, i.e.,
20 an exercise of sleight of hand or misdirection to distract from the fact there is no proper
21 defence to the primary arguments around whether or not this is actually a subsidy
22 scheme. They are trying to pull schedule 3 out of their back pocket in order to defeat
23 that in a way that we say is simply not open to them.

24 So the first and fundamental point I would like to make, keeping in mind that this is a
25 claim for review of the 2025 decision, is that the defence would only serve a useful
26 purpose if it could provide an alternative answer to the claim in a scenario where we

1 have succeeded on the arguments about subsidy and scheme. I think that's the way,
2 sir, you looked at it at the first CMC. You dealt with the questions about subsidy and
3 scheme and then said "What about this schedule 3 argument". Otherwise we say the
4 defence would add absolutely nothing to those other arguments and it would be
5 pointless and only serve to lead to additional cost and expense, which would be we
6 say contrary to the governing principles, and that alone would be a basis on which to
7 refuse to exercise your discretion to allow the amendments. That is presumably why
8 GEMA has indeed pleaded the section 10P defence as an alternative.

9 I just flag this because sometimes in the submissions it seems to shy away from that
10 or at least in my mind it is not clear that's what they are saying, but if we look at
11 paragraph 57 of the defence, that has remained the same throughout. It says:
12 "If (quod non) LDES C&F is a 'subsidy scheme' within the meaning of the Subsidy
13 Control Act it will be established and operated under a duty imposed by primary
14 legislation ..."

15 So that's the basis on which it is advanced. That then means the section 10P defence
16 logically starts from the premise that we are right that the relevant target is the 2025
17 decision. So we are looking at an event that happened on 23rd September 2025.

18 The second point I want to make follows on from that observation and that's that, since
19 the section 10P defence is based on a statutory provision that had not passed into law
20 let alone come into force at the time of the relevant decision – which ex hypothesi is
21 what we are dealing with, since this is pleaded in the alternative, i.e., where we have
22 proven that this is the relevant decision – that defence faces some obvious and we
23 say equally fundamental chronological problems.

24 To be fair my learned friend in submissions at the first CMC did accept that the facts
25 that 10P was not in force at the time of the 2025 decision and that section 10P is not
26 retroactive in its effect. That's at transcript page 16, lines 16 to 19. That's Bundle A,

1 | tab 9, page 429.

2 | So we say it is against that backdrop that one needs to assess whether the 10P
3 | defence has any further life. We say those first two points dispose of the opportunity
4 | to run the point about whether or not section 10P operates to show that there is no
5 | breach of duty or whatever they suggested -- the lawfulness shield. The lawfulness
6 | shield does not arise because there was no shield to pick up on 23rd September. The
7 | only way it can arise is if the anticipation of the possibility of picking up a shield at
8 | some point in the future means that our case, which is about the 2025 decision,
9 | somehow renders our challenge to that 2025 decision hopeless.

10 | So we say that you can only do that if you come within the confines of the case law
11 | that they seek to rely upon.

12 | They have thrown out various allegations including it is academic, it is otiose, unworthy
13 | of relief, has been superseded and has no continuing effect or relevance, but we say
14 | none of those allegations has been properly explained and they all are unarguable. It
15 | is precisely this situation we say where the court should be prepared to take robust
16 | decisions, as Lord Justice Singh has encouraged the court to do so, and not permit
17 | grounds to be advanced which are not properly pleaded and hopeless. So we say you
18 | can be confident in taking that decision for the reasons I am going to address you on
19 | now.

20 | The third point is to address their points on whether the decision -- whether
21 | section 10P or the fact of the 2026 decision, which we have established are the only
22 | facts they are relying on, whether those two facts render the 2025 decision academic.
23 | We say it clearly does not. They have not pointed to single case which makes good
24 | on that proposition, because there is none. We point --

25 | **JUDGE WOLFFE:** I think, as you said a moment ago, it is not about previous
26 | authorities. It is about how the principles of law properly applied to these facts operate.

1 **MR GIBSON:** Those are the two facts. We say there is no analogue in any of the
2 cases that they have shown us that shows that those facts should be sufficient to make
3 good on that proposition.

4 If you look at what the proposition actually involves, the statement in paragraph 18 of
5 *Hidenda*, which while it is indeed a first instance decision, if you look at paragraph 18,
6 if we just turn it up briefly, tab 12 of the authorities bundle.

7 I have just seen the time, sir. I don't know if you want to stop for the transcriber, at
8 what point you would like me to do that. I can complete this point if you like.

9 **JUDGE WOLFFE:** Yes. If you would complete this point and then we will take a short
10 break for the benefit of the transcriber.

11 **MR GIBSON:** I am on page 435, tab 12. In the middle of the page under the heading
12 "Is the claim academic?", paragraph 18. This is a first instance decision of Mr Justice
13 Sheldon, who is very well regarded and quite well known to other people in the room:
14 "It is well established that a claim is academic if 'there is no longer a *lis* to be decided
15 which will directly affect the rights and obligations of the parties' ..."

16 Support for that is cited from Lord Slynn's judgment in the House of Lords. So we say
17 this is not just a first instance decision, this is a first instance decision setting out for
18 the convenience, I have gone here setting out a well-established proposition.

19 So one has to ask oneself whether on the facts of our case there is any longer a *lis* to
20 be decided which would directly affect the rights and obligations of the parties in
21 respect of the 2025 decision. Do those two facts, i.e., the facts of the entry into 10P
22 and the taking of the decision on the 18th February 2026 mean there is no longer a *lis*
23 to be decided. We say it is unarguable that can be the case. That's why we are inviting
24 you to refuse this amendment, sir, because we just don't think we can continue with
25 this notion any longer.

26 You will remember the facts of this case, which I took you to, which established that in

1 that case the claim became academic because HMRC had effectively conceded the
2 claim by putting in place a mechanism to mitigate the effect of its early decision and
3 because it gave an open undertaking to consider the tax claims properly formed the
4 basis for the grievances.

5 In that case, if you like, that was a withdrawal category of the *lis* no longer being
6 relevant.

7 In correspondence GEMA relies on the *Good Law Project*, it wasn't mentioned today.

8 We say that case doesn't answer the point at all. That was a case in which a decision
9 was withdrawn whereas here we are dealing with the situation where GEMA has been
10 perfectly clear it is not going to withdraw the 2025 decision. We see that from the
11 transcript of the previous hearing, page 65, lines 12 to 16. Tab 9, Bundle A, page 478.

12 **JUDGE WOLFFE:** Yes. Indeed, in effect, they have adopted it.

13 **MR GIBSON:** That's precisely the point I am going to come on to here. That's
14 a fundamental point of distinction from any of the cases we have looked at here. In
15 a nutshell our argument is in circumstances where their evidence, their decision, the
16 decision on which we now understand they are putting all their eggs into that basket,
17 that is a decision to adopt the 2025 decision and there is simply no basis in those
18 circumstances for saying that the effect of that is legally to render the 2025 decision
19 otiose, academic, unworthy of relief. Quite the reverse we say. If you have adopted
20 the decision, you are taking the same decision in the same process and we say there
21 is no basis in any of the authorities that have been relied upon to say that's a basis on
22 which to say that our claim has become unarguable.

23 So against the backdrop -- again to remind you they are trying to argue that the
24 decision taken on 23rd September is defeated by something that happened later in
25 time. That in itself is challenging -- there are no time turners in this world.

26 **JUDGE WOLFFE:** I don't think they need to say that your claim is unarguable. They

1 simply have to argue it --

2 **MR GIBSON:** No, no. They have to show ultimately that there should be no relief
3 ordered because the nature of what happened in February 2026 is such as to erase
4 history in relation to September 2025.

5 **JUDGE WOLFFE:** Uh-huh.

6 **MR GIBSON:** They can't use it as a shield. That's just chronologically incoherent. So
7 it has to be through this prism of the relief aspect, arguing that on the basis of the case
8 law about when a court will find something has become academic as a result of
9 subsequent event. They have to show where on earth in the case law that is
10 supported, and we say it clearly isn't. So clearly this is a fanciful prospect.

11 So, as I say, the *Good Law Project* was a case where the decision was withdrawn.
12 Even then the effect of the withdrawal was not to have the effect of rendering the
13 challenge to that decision academic, because it had ongoing effects. So on the basis
14 of what EHRC's advice had said, employers had taken actions which meant that it had
15 an ongoing effect. I am going to leave that there. I promised to finish that point. I have
16 gone already to the *Good Law Project*.

17 It I pause there and we will pick up after a short break if that would be helpful, sir.

18 **JUDGE WOLFFE:** We will take a short break. 15 minutes. How long have you got,
19 Mr Gibson?

20 **MR GIBSON:** I have cut out a large piece, which you will be relieved to know, but I
21 do want to take each of those seven points. I will start with the fourth in a moment.
22 I think I should be done within 45 minutes hopefully, sir. You are giving me your
23 Paddington bear stare, sir. I will take that under advisement. I will try to do it more
24 quickly.

25 **JUDGE WOLFFE:** I want to make sure I have the argument you want to advance
26 and, you know, we will see how things go after the break. Then I infer from that that

1 we are going to be here through lunch likely.

2 **MR GIBSON:** I think we probably will go into the afternoon, sir. I had assumed this
3 was a full day.

4 **JUDGE WOLFFE:** There is a full day set aside. So it is really just to get a sense of
5 where we are in terms of progress.

6 **MR GIBSON:** Yes, sir. I think -- obviously my learned friend will say, but I think the
7 other points on the agenda are relatively modest. This is the important one. The
8 reason I am taking you through this is I anticipated you might have some reticence, as
9 any sensible judge would. As you can see, I feel very strongly about this and would
10 like to take you through it if I may.

11 **JUDGE WOLFFE:** Indeed, Mr Gibson. I welcome that last remark, because certainly
12 my own impression was this would be, you know, the important issue in terms of time
13 and that the other issues, also important, of course, but hopefully will be resolved
14 relatively quickly. Is that a fair expectation?

15 **MR BARRETT:** Can I just put down a marker. My learned friend has just indicated
16 that we are going to be half a day on these arguability submissions. There is going to
17 be half a day of submissions on arguability. I just wanted to put down that marker.

18 **JUDGE WOLFFE:** Not lost on me, Mr Barrett. Thank you.

19 **MR GIBSON:** Thank you, sir.

20 **JUDGE WOLFFE:** Back in 15 minutes. Where are we? We will sit again at 12.00.

21 **(Short break)**

22 **JUDGE WOLFFE:** Right, Mr Gibson. Bear in mind that I have read the skeleton, so
23 you can take that for granted, and if you perhaps from that then, you know, articulate
24 the points that you wish me to --

25 **MR GIBSON:** I apprehend that reading the skeleton wasn't enough, though, sir, so
26 I will try --

1 **JUDGE WOLFFE:** Well, indeed. That's precisely why I want to hear you.

2 **MR GIBSON:** The otiose point.

3 **JUDGE WOLFFE:** Put forward on the contention that what is in the
4 amended -- re-amended pleading would not set up an arguable point for us to discuss
5 at the substantive hearing.

6 **MR GIBSON:** Yes, sir. So the otiose point I will take very briefly. Although it is framed
7 as an "and/or" and therefore alternative argument, we have not seen any particulars
8 as to how that actually differs in any way whatsoever. On the contrary, in the letter
9 sent on 27th February, paragraph 4(d), they just used the word one "ibid" to record
10 their response in relation to "otiose". So it just makes the same point as their point on
11 "academic". In the skeleton argument there is no elaboration either.

12 This is a case where it is clearly not otiose, as we said before the break. This is a case
13 where they are adopting the previous work. We say that is precisely the opposite of
14 something that's become academic or otiose. It is maintaining the same approach in
15 the 2026 decision as it did in the 2025 decision and therefore the same criticisms which
16 Zenobē has made of the 2025 decision remain relevant, useful and unanswered. So
17 we say that is the dictionary opposite of an otiose decision, an otiose challenge.

18 The fifth and further related point is also unarguable, that is to say the contention that
19 the decision has been superseded or of no continuing legal effect or relevance. No
20 explanation for this has been offered whatsoever. It seems from the skeleton and the
21 way they deal with "academic" and "supersede" in the same section that it is just
22 another way of saying the same point. I reiterate the point that I made earlier that it is
23 GEMA's own case that the 2025 decision has not been superseded but rather been
24 adopted.

25 I just pause there to reflect on what those words mean. "Supersede" means to replace
26 something, to make it obsolete. "Adopting" means to accept and use something again,

1 the very opposite of making something obsolete.

2 You will recall the point made by GEMA in submissions at the first CMC in the
3 transcript. It might be worth briefly turning this up. Transcript, tab 9, page 478. In
4 response to the questions we had at that point about whether or not they were
5 withdrawing their case my learned friend was clear. Page 65, lines 11 to 13. Sorry.
6 I have the line numbers wrong. It is 14 to 16 in this version:

7 "The plea in 43A is that the September publications are being adopted. If one is
8 adopting something, one is not withdrawing it. You might say that they're opposites
9 or close to opposites."

10 We say precisely the same is true of something that is being superseded versus being
11 adopted.

12 So on their own evidence the argument this is academic or otiose or superseded or
13 whatever just simply doesn't fly, and whilst we are not dealing with a strike-out, I
14 do reflect on the fact that in the classic case *Easyair v Opal Telecom* Lewison J makes
15 clear that if you are dealing with a case that essentially turns on a point of law and you
16 are dealing with it on the basis of facts as the respondent has pleaded them and
17 argued them, if on those facts and the law there is no argument, then you should grasp
18 the nettle and do away with it.

19 I do say that is precisely what we are dealing with here. GEMA has been crystal clear
20 it is not withdrawing or abandoning the prior decision: it's adopted it. Therefore, it can't
21 now argue that it is doing precisely the opposite of what it's publicly stated it's doing in
22 trying to argue that it is somehow superseded.

23 Indeed the argument by taking the 2026 decision to adopt the 2025 decision, that
24 somehow the 2025 decision ceases to have any continuing legal effect or otherwise
25 is essentially an argument that it does have retrospective effect, that section 10P has
26 retrospective effect when it clearly doesn't.

1 My learned friend would quite rightly be the first to accept it doesn't and it is clear on
2 its face it doesn't. We are quite clear about the way in which Parliament frames
3 provisions if they are meant to have retrospective effect and this is not it. So it is
4 clearly not open to GEMA to run an argument that is tantamount to arguing that
5 section 10P has retroactive or retrospective effect.

6 I am just going to touch on the two authorities that my learned friend refers to in his
7 skeleton as being supposedly supportive of the arguability of this defence. Those are
8 obviously distinguishable because there the relevant decision was superseded. So
9 my headline line point in relation to both is the facts do not assist one iota. They are
10 the complete opposite of this case.

11 The *AFA* case, at tab 27 of bundle D, page 751, paragraph 2 -- I can take this point
12 very briefly -- makes clear that it is dealing with the immigration rules, which involve
13 a two-stage decision-making procession. First an eligibility provision – this is
14 paragraph 2 on page 751 – and secondly, a review decision. Unsurprisingly one might
15 say the latter review decision renders the eligibility decision academic, because the
16 review decision does what it says on the tin. It is a decision to review the prior decision
17 and that truly does render the prior decision superseded and of no relevant legal effect.
18 That is not the relationship with the 2026 decision to 2025 decision. GEMA's evidence
19 does not support that being the relationship. As I have said, GEMA's evidence is it
20 has adopted the 2025 decision. So that case is directly opposite.

21 If we turn over the tab to tab 28, the *Charity Commission* case, a very recent case of
22 6th March, Mr Justice Fordham deals with a situation which again is not remotely
23 relevant to the present case. My learned friend did have the good grace to
24 acknowledge that there were factual differences between the two cases. We say
25 those factual differences are fundamental.

26 At the bottom of page 772, paragraph 28, we see the introduction of the 2025 decision

1 letter. That was a decision made by the Ombudsman to lay special reports pursuant
2 to section 10(3) of the 1967 Act. It was common ground that that is a decision that is
3 susceptible to judicial review.

4 What then happened – and this is outlined in paragraphs 29 to 30 – is that Parliament
5 called in the decision and took a different decision to follow a different route through
6 matters, a different process, which was not susceptible to judicial review.

7 Well, again, whilst the original decision was not withdrawn in that case -- this is not
8 a withdrawal case – it is still a case which meets that threshold test of *Hidenda*, the
9 *lis* is extinguished, because they have no longer pursued a course of action,
10 a process, they have no longer taken a decision that's susceptible to judicial review.
11 We say there is no analogue here, because clearly on the facts that case was indeed
12 superseded because they followed a different decision and a different process. Here
13 we have precisely the same decision being adopted to follow continuing precisely the
14 same project assessment process. There is absolutely no similarity, indeed it is
15 precisely the opposite of what GEMA has done in this case.

16 So we say it is perfectly clear – well beyond the standards required to show that their
17 arguments are fanciful – that even on their own evidence none of the various ways in
18 which GEMA has sought to formulate its section 10P defence is remotely arguable.

19 On the contrary, the evidence is that it is adopting a decision that completely
20 undermines their reliance on section 10P to defeat our challenge to the 2025 decision.

21 There's a sixth problem, a fundamental one, which despite GEMA describing it
22 as -- how is it put? – “a hopeless contention” in my learned friend’s skeleton at
23 paragraph 30, they don't actually engage at all with the point being made. They refer
24 to the general position, the Tribunal has discretion as to how it grants relief, like any
25 court exercising powers in relation to judicial review.

26 We say that is beside the point when you are dealing with a provision for which

1 Parliament has chosen to set a mandatory consequence of a finding of breach. We
2 are not blurring breach and remedy here. We are dealing with a situation where on
3 the hypothesis -- we discussed this at the outset -- that we are right on the first two
4 grounds, so this is a subsidy scheme, and therefore all of the other points for this
5 remedy fall into place. I am going to take you through it -- I hope you can tolerate it --
6 to show that GEMA have not contested any of the other points we pleaded; GEMA did
7 not push back on them. GEMA chose -- GEMA made a strategic decision, which we
8 pointed out in the reply, on 14th January, to take a very narrow approach to their case.
9 No doubt they wanted to limit the scope of candour disclosure, or whatever strategic
10 benefit they saw from that. They've taken a very narrow approach and they can't now
11 seek to jump out of the bed they have made; they must lie in it.

12 **JUDGE WOLFFE:** Well, they contend that the decision was not a subsidy scheme for
13 reasons which will be a matter for debate no doubt and your point on this argument is
14 that it is only if they lose on those decisions that this point becomes relevant the logic
15 of their position has to be that it saves the day for Ofgem even though the court or the
16 Tribunal by that point will have concluded that what happened in September was
17 a subsidy scheme. That's really the point you are making, if I understand it.

18 **MR GIBSON:** Indeed. So the question then arises -- in circumstances where we have
19 otherwise shown our case to be a good one and they can't use the section 10P as
20 a shield, because that is chronologically incoherent, so they have to use it on the relief
21 basis. In those circumstances, how do they show there is no relief in circumstances
22 where none of the case law on relief supports them? I have just shown you. They are
23 adopting, not superseding or whatever. I don't want to go through all that again.
24 More fundamentally one of the planks of our case relies on section 31(1) and that
25 mandates that you have to prohibit the decision, the scheme if there's not been
26 a mandatory referral.

1 Let me just take you, if I may, through what we plead in relation to that. In our notice
2 of appeal, tab 1, bundle B, page 31, the bottom of page 31 -- let me know when you
3 are ready for me to carry on.

4 **JUDGE WOLFFE:** Sorry. It's taking me ...

5 **MR GIBSON:** Sorry.

6 **JUDGE WOLFFE:** There we go. Yes.

7 **MR GIBSON:** We plead out quite clearly in paragraphs 141 and 142 the
8 consequences of GEMA's breach of section 52(1)(a), which is the obligation to make
9 a mandatory referral. In the preceding sections -- I am conscious of the time so I will
10 not take you through it -- we set out each of the elements for making that mandatory
11 referral satisfied. In response they say it is not a subsidy. It is not a scheme. Schedule
12 3.

13 They are not contesting the other aspects of it, so if we won on the ones they contest
14 and this section 10P argument doesn't assist, then -- the section 10P argument
15 reduces down to a relief argument and that's not available given they have conceded
16 all the ground that gets us to a breach of section 52(1).

17 The corollary of that -- I will take you to the statute --

18 **JUDGE WOLFFE:** I think that depends on the interpretation of the subsidy control
19 there which itself, if I understand correctly, is a matter of dispute, that the word
20 "prohibited" doesn't qualify or limit the range of relief that might be granted in
21 a particular case. I understand the argument you are making, but again the question
22 is whether that's something that can be resolved at this stage of the case rather than
23 after we have heard as a full tribunal the arguments.

24 **MR GIBSON:** Two points. One, it is not pleaded that they take exception to the word
25 "prohibited" and say it blocks them from getting relief. It is not part of their pleading.

26 Two, we say that the word -- there is no arguable basis for saying when Parliament

1 uses the word "prohibited" it means anything other than prohibited. I don't even
2 understand how that is even an argument that you can say Parliament meant
3 something different from what it clearly said.

4 **MR BARRETT:** It is quite an important point, my Lord. No remedial discretion.

5 **JUDGE WOLFFE:** That's not lost on me, Mr Barrett, and it is not lost on me that what
6 we are really arguing about or discussing perhaps is the extent to which it would
7 be -- Mr Gibson, you are seeking to persuade me it is so plain that I should grasp the
8 nettle, but, you know, as I think you are detecting, I am very loathe to make decisions
9 on points of substance at this stage which, you know, are really to be dealt with at the
10 substantive hearing by the full tribunal unless you really, really persuade me that the
11 point is not one that is capable of being advanced.

12 **MR GIBSON:** Let me just take you then briefly to chapter 2 and particularly to
13 section 31 of the Act and just look at what the Act actually says.

14 **JUDGE WOLFFE:** Yes, of course.

15 **MR GIBSON:** Section 31 appears -- the chapter starts at page 10 of tab 1 in
16 bundle D. It is entitled "Prohibitions and other requirements". If you then turn to
17 page 20, you see section 31(1). We say this states in terms that really admit of no
18 alternative interpretation:

19 "A subsidy or subsidy scheme" as we are dealing with in this case, "in respect to which
20 a public authority must request a report from the CMA under section 52(1) is prohibited
21 if a mandatory referral request has not been submitted in relation to it."

22 We say GEMA has expressly admitted that it did not submit a mandatory referral to it.

23 The only basis on which it says it did not do that is because it was not a subsidy and
24 not a scheme, because ex hypothesi looking at this position those points have been
25 determined in our favour, section 10P does not assist one iota.

26 **JUDGE WOLFFE:** Let's just pursue that on the hypothesis that's correct. If you are

1 correct so far and nothing had happened post September, then one would say that
2 what you say was a subsidy scheme and Mr Barrett says was not a subsidy scheme,
3 but if you are right that it was a subsidy scheme in September is prohibited.

4 Mr Barrett says, and he will be right or wrong on this, and we will decide when we get
5 there in due course what the position is, he says Parliament has also said since then
6 that GEMA must put in place a scheme and they have taken a decision pursuant to
7 their duty which, as they characterise it, and you say it is not a duty and I don't have
8 a view on that question at the moment, but if he's and that it's a duty and they've made
9 a decision pursuant to duty, then to what extent, if at all, is it of any continuing legal
10 relevance, whatever the analysis, to say that the September 2025 decision created
11 a scheme that was prohibited?

12 Now it may well -- you may well say there is a legal purpose and there's a point to that
13 and Mr Barrett says "No, there isn't" but, you know, that's a debate yet to be had rather
14 than something I can foreclose today, isn't it?

15 **MR GIBSON:** You can, because in order to get back to that result you have to revisit
16 the ground we have already laid that it doesn't have retroactive effect. We are dealing
17 with a 2025 decision. So unless there's a coherent legal argument, which, as I was
18 explaining, there isn't one, unless there is a coherent legal argument as to why a piece
19 of legislation from February touches on the challenge to the decision in 2025, they
20 don't get home.

21 So if I have made clear, as I have, that chronologically you can't -- there is no
22 chronological argument for using s.10P as a shield. You have to show that the
23 legislation had retroactive effect if you want to say that something happened in
24 February 2026, touched on September 2025. The residual argument, therefore, is;
25 okay, we can't defeat it, you know, with a shield. We therefore have to say look at
26 what happened afterwards and that goes to relief. It is a relief question. We say it is

1 only a relief question if the question of relief properly arises and Section 31 --

2 **JUDGE WOLFFE:** Just so I understand it, you would say -- and you will have separate
3 arguments to run in relation to the February 2026 decision -- but you would say that it
4 doesn't bear retrospectively on relief on whatever we might decide in relation to the
5 September -- what happened in September.

6 **MR GIBSON:** You have to take -- you are quite right doing so. You have to take it in
7 stages. We are looking at 2025 decision. This is my point about the three card trick.
8 I don't mean to sound pejorative. It is just a colourful way of describing it.

9 **JUDGE WOLFFE:** We are really dealing with a problem of what Lord Rodger of
10 Earlsferry described as intertemporal law.

11 **MR GIBSON:** Lord Rodger was a great man, but I can't pretend to remember exactly
12 what he said on this subject.

13 **JUDGE WOLFFE:** He was making the point that intertemporal law can raise some of
14 the same kinds of conundrums that transjurisdictional law can cause.

15 **MR GIBSON:** I am very glad he said it. I take a simplistic view of things.

16 **JUDGE WOLFFE:** I don't diminish the interest and potential complexities of the
17 argument that arises. I think what I am testing, as you can detect, is whether there is
18 nothing in the point that Mr Barrett wishes to advance.

19 **MR GIBSON:** With respect, Mr Barrett has not unpacked to explain his point. He is
20 saying because there was a decision taken in 2026 and that 2026 decision in and of
21 itself, having no retrospective effect, has certain effects from February 2026 onwards,
22 that somehow by means that haven't been explained or articulated, somehow causes
23 that to be an effective defence to our challenge to the 2025 decision. We can debate
24 the 2026 decision in due course. The 2025 decision is what we are concerned with
25 here. As I said, chronologically you can't use something from February 2026.

26 In terms of relief, which is the only limb open to us it is not superseded. So all the

1 case law in relation to academic or otiose or all those different permutations are
2 defeated by the fact that they have adopted the decision. That's their evidence. It is
3 also defeated by the fact that section 31, to which they've chosen not to plead – to
4 accept in relation to the point that *ex hypothesi* we have pleaded – so for relevant
5 purposes we have actually succeeded upon. In those circumstances, section 31 says
6 that the scheme is prohibited. That's not a phrase that admits of any alternative
7 interpretation. The fact that Parliament said something else in February 2026 would
8 only be relevant if Parliament said "By the way, when you are looking at something in
9 September 2025, this has effect on that" and that's called retroactivity. There are very,
10 very clear ways in which the law deals with that. And my learned friend in his previous
11 CMC says they were not arguing that it was retroactive.

12 So we say that -- we are just taking my learned friend's argument at face value, taking
13 the evidence at face value and saying in those circumstances we should grasp the
14 nettle today and remove this aspect of the case so we can focus in on the remaining
15 aspects, i.e., whether it's a subsidy, whether it's a scheme.

16 I don't think I need to take you to the pleading to show that they have not contested all
17 this. I think it should be common ground, but I can if it would assist. It is perfectly
18 clear that they have not contested this point in relation to the mandatory referral. So
19 that's what I wanted to say in relation to that sixth point in section 31.

20 The seventh point doesn't strictly arise, because we say for all the reasons I have
21 given you this is unarguable, so it falls away. The seventh point relates to the
22 interpretation of section 10P, whether it is a duty or a power. That's going to be
23 a debate for what meaning of section 10P is when it actually entered into force on 18th
24 February. That's a debate we may well have in relation to the second challenge, the
25 2026 decision, but it is not one for today. So if we focus on the 2025 decision, it doesn't
26 arise.

1 We say – if you thought it was relevant to consider it – that that too is unarguable,
2 because the Hansard debate makes perfectly clear the meaning of the words "duty"
3 and "power" have very specific meanings under schedule 3, paragraph 4. I don't know
4 whether you want me to take you to that now, sir. You will have seen in my skeleton
5 the points I make. It is very clear. No attempt has been made to engage with that.
6 We say in those circumstances they have chosen -- as I said we invited them to plead
7 to it. I took you to the points in our amended reply. They say "No, we pleaded it in
8 our particulars".

9 On the particulars they pleaded there is no attempt to explain why there is not sufficient
10 room for discretion, and there being sufficient room for discretion under section 10P,
11 I will just take you briefly through section 10P to show you precisely what we mean in
12 that regard. It is in tab 2 of the authorities bundle, pages 76 to 78.

13 **JUDGE WOLFFE:** Sorry. Where are we?

14 **MR GIBSON:** Tab 2 of the authorities bundle, pages 76 to 78. It is where section 26
15 of the Planning and Infrastructure Act sets out what section 10P looked like. This
16 should have been updated. This says "Prospective". We accept this is now in force.
17 Section 10P my learned friend points out uses the word "must" in subsections 1 and
18 2. We say yes, but we are looking here very specifically at what the meaning of legal
19 duty and legal power is for the purposes of schedule 3, paragraph 4.

20 The Hansard debate makes very clear that:

21 "A subsidy is granted by primary legislation only if the Act itself makes that provision
22 directly or" and this is the case I think that my learned friend -- we are dealing with -- "or
23 the grant of a new subsidy or public authority is required with no room for discretion
24 on the part of that authority."

25 We say in circumstances where section 10P, which you have to read as
26 a whole -- there is no use stopping after sub-section 2 -- you have to look at the whole

1 of it, and it is perfectly clear -- I mean, sub-section (2) intimates that the scheme must
2 be designed and the rest of the paragraph talks about the degree of discretion open
3 to GEMA in relation to design. So sub-section (3)(b) says:
4 "It must be open to persons to meet any specified criteria." So, to jump ahead, I should
5 make clear every time I use the word "specified" it must be understood in light of
6 sub-section (8) which defines specified as meaning:
7 "Specified by the authority for the purpose of the scheme in a document published or
8 the condition of a licence."
9 So we say every time we see the word "specified" that is a flag there is discretion for
10 GEMA. So any other specified criteria in sub-paragraph (3)(b), paragraphs 4(a) and
11 (b), the provisions in relation to payments to and from under the cap and floor scheme
12 are in relation to a specified amount and in specified circumstances. So both of those
13 sub provisions provide room for discretion for GEMA.
14 Sub-section (5) in relation to the revenue and costs part of the analysis – another
15 crucial part of the design of the scheme – provides (a):
16 "Revenue of a specified kind."
17 (b):
18 "Costs of a specified kind."
19 These are all crucial features of the design of the scheme and all ones in which GEMA
20 has discretion.
21 Sub-section (6) states clearly that:
22 "The authority may determine how costs are to be calculated for the purposes of the
23 scheme."
24 That completes, as I say, the list of different provisions we say clearly provide ample
25 room for discretion. Indeed, it is those very features that constitute the basis for the
26 challenge in this case. As I said at the beginning, we don't challenge the making of

1 an LDES scheme. On the contrary, we have been perfectly clear that we can see the
2 good sense of that. If it had been properly designed it is going to help support the
3 objectives that we support, Clean Power 2030 targets. Our concern is that the
4 supported LDES should not by collateral damage cause untold damage to SDES,
5 short term, short duration energy storage, and thereby undermine the very objectives
6 that they are seeking to achieve. It is the design features, the discretionary aspects
7 of section 10P that both show this is a legal power on the specific meaning of that term
8 under paragraph 4B of Schedule 3, and illustrate precisely why we say the case is
9 problematic.

10 So there is no effort to answer any of these points whether in the pleading or skeleton
11 or correspondence, and we say that too means that GEMA's case on section 10P, this
12 aspect of section 10P is also unarguable, albeit we say it doesn't strictly arise in this
13 case against the 2025 decision.

14 So for all of those reasons we do invite you, sir, to grasp the nettle, as Mr Justice
15 Lewison encouraged judges to do.

16 **JUDGE WOLFFE:** However painful that may sometimes be.

17 **MR GIBSON:** I know, sir. Sometimes one has to endure the pain in order to get -- no
18 pain, no gain and all that, sir. Grasp the nettle. We would ask you to decide this on
19 the facts as pleaded and set out in the evidence of GEMA and on the basis of the law,
20 which, as we say -- we have given them multiple attempts to set out what they
21 say -- why they say the law shows they do have an arguable case, and I have
22 systematically gone through each one of their attempts and explained why it fails on
23 the facts as they've set them out. On that basis we say we do urge you to grasp the
24 nettle and stop this part of the case now.

25 **JUDGE WOLFFE:** Thank you very much, Mr Gibson. That's very helpful.

26 Mr Barrett, is there -- what would you like -- is there anything you would like to say in

1 | reply?

2 | **MR BARRETT:** There are a few things I would like to record, my Lord. The first one
3 | is you have just heard an extended submission that you should decide that the
4 | construction of section 10P is as the appellant contends and it is unarguably so. The
5 | basis of that submission is solely a reference to Hansard in circumstances where my
6 | learned friend has not shown you any authority that establishes that Hansard is even
7 | admissible and in circumstances where the substance of the submission is that you
8 | should rewrite the natural and ordinary meaning of the words in the statute.

9 | This is not an appropriate use of your time or the parties' time. Still less is it an
10 | appropriate submission in the context of what amounts to strike-out application
11 | resisting an amendment. These are not serious or proper submissions.

12 | Second, my learned friend has been given all morning and he has not identified any
13 | facts which he says is a necessary ingredient of the current pleading which is omitted.
14 | You have given him every opportunity to do so and he has not done so.

15 | Thirdly --

16 | **JUDGE WOLFFE:** Can I just confirm I have picked it up correctly, Mr Barrett? The
17 | facts you rely on are the passage into force of section 10P; the legal convention that
18 | section 10P imposes a duty; and then the further fact that Ofgem has made a decision,
19 | which we can read, and the effect of which, assuming if I were to grant the amendment,
20 | would be a matter for discussion in due course?

21 | **MR BARRETT:** Those are, as my Lord put it in my respectful submission accurately,
22 | the essential facts. There is also the factual context, which is the entirety of the
23 | decision-making process and the passage of the Bill through Parliament, and I will not
24 | be precluded from making the submissions about those before the Tribunal, but those
25 | are the essential facts of the pleading. Absolutely, my Lord.

26 | **JUDGE WOLFFE:** Yes, because, I mean, what struck me, reading the amended

1 pleadings, is that, you know, read against that general background, those
2 circumstances set up a set of questions.

3 **MR BARRETT:** A set of legal questions, my Lord.

4 **JUDGE WOLFFE:** A set of legal questions.

5 **MR BARRETT:** Indeed.

6 **JUDGE WOLFFE:** Those are the two essential facts that give rise to those legal
7 questions.

8 **MR BARRETT:** Yes.

9 **JUDGE WOLFFE:** Then we get on to Mr Gibson's argument as to the merits or
10 otherwise of those legal contentions.

11 **MR BARRETT:** Which we look forward to discussing at the final hearing.

12 **JUDGE WOLFFE:** There is nothing else you want to say about those just now, is
13 there?

14 **MR BARRETT:** I don't think so unless there is a point you would be assisted by
15 hearing from me on.

16 The only point I wish to add is my learned friend at no point in his submissions engaged
17 with the inescapable consequence of the answer he gave to your question at the very
18 start of this hearing, which is yes, he does want to and need to challenge the adoption
19 decision irrespective of what happened with the amendment application.

20 I do respectfully submit, my Lord, that was a very perceptive question and the answer
21 was entirely revealing, and given the answer that was provided, we should not have
22 spent this morning in the Tribunal in my respectful submission.

23 **JUDGE WOLFFE:** Okay. Thank you.

24 **MR GIBSON:** Just for the avoidance of doubt we do not accept for one moment that
25 the challenge to the 2026 decision has any relevance whatsoever to the question of
26 the 2025 decision. I can take you to that, but I won't do so now, sir.

1 **JUDGE WOLFFE:** No. I think I can probably anticipate why that would be.
2 Okay. I think what I'll do is I'll go off the bench for fifteen minutes and then -- with
3 a view to, if I am able to, you know, just absorb the material over that time, give you
4 a decision before lunch so that you can then reflect on where that takes us in terms of
5 the afternoon.
6 If I don't feel that I'm able to reflect sufficiently on the material by then, then I will
7 obviously give you a decision after lunch, but shall we -- I'll rise now for fifteen minutes
8 and come back at 12.50, unless you are advised otherwise. Thank you.

9 **(Short break)**

10

11 **RULING**

12 **JUDGE WOLFFE:** Thank you.

13 I have before me an application from Mr Barrett to re-amend GEMA's defence. In
14 terms of Rule 12 he requires the permission of the Tribunal to make this amendment.

15 Rule 12(3) provides:

16 "In deciding whether to grant permission under paragraph 1 the Tribunal shall take into
17 account all the circumstances, including whether the proposed amendment (a)
18 involves a substantial change or addition to the appellant's case; (b) is based on
19 matters of law or fact which have come to light since the appeal was made, or (c) for
20 any other reason could not practicably have been included in the notice of appeal."

21 So the proposed re-amendment is to update the pleadings in light of two events: firstly,
22 the coming into force of section 10P of the Electricity Act 1989 inserted by the Planning
23 and Infrastructure Act of 2025 and, secondly, a decision taken by GEMA under that
24 section *inter alia* adopting work which had previously been undertaken.

25 On that basis GEMA contends, and I quote from paragraph 59B of the re-amended
26 pleadings, that:

1 "The effect and consequences of the decision referred to at paragraph 43A above,
2 including but not limited to the adoption of the September publications for the purpose
3 of its statutory duty under section 10P of the Electricity Act 1989, is to render C's
4 appeal academic and/or otiose and/or that no relief and/or no quashing or equivalent
5 relief should be granted in respect of C's appeal. The scheme is and will be conducted
6 under a duty imposed by primary legislation, namely section 10P, and is not or is no
7 longer capable of challenge in these proceedings."

8 Mr Gibson argues that the proposed re-amendment is deficient in that it does not
9 adequately plead the facts on which the contentions which GEMA wishes to advance
10 arise. He also argues that GEMA's legal contentions are unarguable.

11 Having considered the submissions both in writing and orally advanced by the parties,
12 I grant GEMA's application to re-amend. I do so for the following reasons.

13 First, from the outset GEMA has relied on the anticipated effect of what was then the
14 Planning and Infrastructure Bill. By the date of the CMC in January that Bill had been
15 passed. GEMA amended its pleadings at that stage to plead the enactment of the
16 legislation and the present amendment was foreshadowed at that time. This is not
17 a new point. It has been anticipated from the outset.

18 Secondly, the amendment responds to that change in the law and the decision which
19 GEMA has made pursuant to it. Those developments in effect crystallise the point
20 which GEMA has previously foreshadowed but which, as Mr Barrett accepted in
21 January, depended on a further decision being made once the Act was in force. The
22 amendments could not have been included in the pleadings at the outset.

23 Thirdly, I reject Mr Gibson's contentions that the pleadings are deficient or that GEMA
24 seeks to plead an unarguable case. The essential facts on which GEMA relies for the
25 contentions which it wishes to advance are the passage into force of section 10P and
26 the decision which it has taken pursuant to that section, albeit that those

1 | circumstances fall to be read against the factual background of the development of the
2 | scheme.

3 | GEMA relies on these events as providing an answer to the claim. Mr Barrett
4 | contends that there are different ways of analysing the legal effect of those events as
5 | foreshadowed in his pleadings.

6 | I am satisfied that the contentions which he wishes to advance are seriously arguable
7 | and merit debate at the substantive hearing.

8 | I fully understand the arguments that Mr Gibson advances, but the more that I have
9 | listened to them, the more convinced I have become that these are arguments which
10 | ought to be addressed before the full tribunal at the substantive hearing rather than
11 | foreclosed by a decision at this stage by me.

12 | In those circumstances it would not be appropriate for me to comment further on the
13 | respective merits of the various points which are at issue between the parties.

14 | So that's my decision on the amendment application.

15 | Is there anything, Mr Barrett, that you --

16 | **MR BARRETT:** The costs, my Lord, of dealing with this matter. We seek them on
17 | an indemnity basis. We say, firstly, we are the successful party in respect of the
18 | application. Costs follow that in the ordinary way.

19 | We say the submissions that have been put to you today and the time that has been
20 | taken up with them we say is highly unreasonable. The approach that's been taken
21 | we do say is some distance outside of the norm and that's evident in some of the
22 | fundamental points which emerged in the course of my learned friend's submissions:
23 | the failure, despite it being one of two grounds advanced for opposing the application,
24 | to identify any fact that was said to be omitted as a necessary ingredient of the
25 | pleading; inability to point to any authority in support of the proposition that the
26 | amendment was unarguable. We do say, my Lord, the conduct that's been displayed

1 in relation to this application is not reasonable and it is not appropriate and we do invite
2 the Tribunal to award costs on an indemnity basis.

3 **JUDGE WOLFFE:** Yes.

4 **MR GIBSON:** You will not be surprised to know, sir, we object full-throatedly to that
5 suggestion. We say it is entirely reasonable for us to test the arguability of the points
6 made against us in circumstances where we had repeatedly asked for these points to
7 be explained in correspondence and they were not and all we have done is set
8 out -- we presaged this very clearly in correspondence before the first CMC and
9 throughout that CMC. We expressly reserved our position and gave them ample
10 opportunity to explain their position and we were just following through quite
11 reasonably on that.

12 The suggestion that we have not set out any authorities to support our position, I don't
13 quite know whether we were in the same room for the past hour or so, but I have quite
14 clearly gone through meticulously both the pleadings and the authorities and we don't
15 accept for one moment that what we have done is anything other than the normal
16 approach of testing arguments which we say are of fundamental importance to the
17 case, trying to assist the Tribunal to encourage it to grasp the nettle and remove this
18 part of the defence . We accept, of course, you have not been persuaded but we say
19 the appropriate order is no order as to costs or costs in the case.

20 **JUDGE WOLFFE:** Can either party remind me of the costs order I made following the
21 previous hearing?

22 **MR GIBSON:** You will find it in Bundle A, tab 10 I believe it is, and I think it is towards
23 the end of that tab. It is paragraph 14.

24 **JUDGE WOLFFE:** Mr Barrett, before I make a ruling on costs there is one matter
25 bearing on costs on which I would welcome your assistance, namely whether it's
26 appropriate that the costs of a senior and two juniors present at this hearing should be

1 reflected in any order that I might make now or indeed that the Tribunal might make at
2 a later date.

3 **MR BARRETT:** Yes. I am not inviting you to summarily assess. That would be a
4 point to be picked up in due course. I can follow the argument that might be made
5 about the reasonableness of those costs. There are points in due course I would wish
6 to make about that, but on the quantum, on the figure that may well be an argument
7 that the claimant wishes to make. It is not a point in my respectful submission that
8 goes to the prior question of the principle and the correct order.

9 **JUDGE WOLFFE:** Yes. The Tribunal is these days, from time to time, as you may
10 know for the benefit of any future assessment of costs a view that the representation
11 present in court was not a level of representation that ought to be visited on the other
12 party in costs and I would welcome any submission that you wish to make to me as to
13 why I shouldn't make an observation in the context of this hearing that on the face of
14 it to have a senior and two juniors present at a case management conference of this
15 sort is not a cost entirely obvious for Ofgem whether they wish to bear that cost, but
16 whether it is a cost that should be visited on the other party in the event of an adverse
17 award is another question.

18 So I will perhaps leave you with that thought. Rather than ruling on your motion now,
19 given the time, I will perhaps rise now and give you an opportunity to say anything you
20 would like to say on that after lunch so you have a chance to collect your thoughts on
21 that particular question and then I will give a ruling on your application for costs and
22 then we can get on with the rest of the agenda.

23 **MR BARRETT:** Of course. Thank you.

24 **PRESIDENT:** Thank you very much.

25 **MR GIBSON:** Thank you, sir.

26 **(1.02 pm)**

1 **(Lunch break)**

2 **(2.00 pm)**

3 **JUDGE WOLFFE:** Mr Gibson, I think I have Mr Barrett's application.

4 **MR GIBSON:** I was just being polite. I am quite happy to sit down again.

5 **JUDGE WOLFFE:** Mr Barrett, I think you were going to --

6 **MR BARRETT:** Sure. Just very briefly, my Lord --

7 **JUDGE WOLFFE:** If you give me a moment. There we go. That's the document
8 I was working on. Sorry.

9 **MR BARRETT:** My Lord, just very shortly, of course, I follow my Lord's points. Very
10 often it would be the case that I would accept three counsel would be somewhat over
11 egging it. The factual position here, my Lord, as you can see looking at the court and
12 the people you have before you, you have a three person counsel team attendance.
13 You have one solicitor. So that is the way the team, as it were, has been divvied up
14 on the Authority's side for the purposes of today's hearing.

15 A slightly different division of labour on the part of the claimant, Mr Gibson, counsel by
16 himself with a larger team of solicitors in attendance. We say the outturn of that is the
17 parties have allocated the work as between the solicitor and counsel team in a slightly
18 different way. We apprehend both in terms of the numbers of either side attending
19 and incurring costs there is either parity or very close to parity, there may be more, I
20 don't know.

21 We also say just very briefly in terms of the costs, my Lord will be very familiar, that
22 those on this side are acting on public rates. There is no doubt the costs will be
23 a fraction of those being incurred by the claimant.

24 So in those circumstances, my Lord, we would invite you not to enter the caveat you
25 have suggested for those reasons, but obviously it is a matter for my Lord's discretion.

26 **JUDGE WOLFFE:** Yes. You are not making any submission about the division of

1 labour or, you know, the particular requirements to have two counsel. I should say
2 this is not a -- any adverse comment on the contribution which both your juniors I am
3 sure have made, having been in the position of being both junior and senior, I am very
4 conscious that there are significant contributions that can be made in various different
5 ways. So the caveat is not about work that I am sure they will have done. It is really
6 about the need for them both to be here for the purposes of this hearing.

7 **MR BARRETT:** Yes. There is not very much I can say, my Lord. You have obviously
8 seen the extent and intensity of the correspondence that has taken place,
9 including -- this reflects poorly on me -- I learnt of further correspondence this morning
10 I had not seen about the issue of confidentiality and confidentiality restrictions and so
11 on. The nature and intensity of that work certainly in my submission has placed
12 particular demands.

13 As I indicated, the way we have staffed and allocated our team is we have a rather
14 larger counsel group and rather smaller solicitors. These days, my Lord, in my
15 respectful submission the divide between the counsel and solicitor parts of the team
16 is perhaps more fluid than it used to be. So we are certainly having to deal with that
17 aspect of the way the litigation is being conducted, but I don't think I can say too much
18 more than that.

19 **JUDGE WOLFFE:** Thank you, Mr Barrett. Mr Gibson, is there anything you need to
20 say on this?

21 **MR GIBSON:** We think an observation would be appropriate, sir. Just in keeping with
22 the comments made by the President generally about costs and in particular I am not
23 making any aspersions at all on the contributions of the juniors, but we do say it is
24 disproportionate to expect my client to pay for three counsel to be here. There is just
25 simply not -- I have obviously got solicitor support and excellent solicitor support but
26 the counsel role is being fulfilled solely by me. There's no fluidity there. I am

1 shouldering it and managing to deal with it as I am. I think the same should be
2 expected on the other side in terms of what we pay for.

3 As to the people in the room, I can say that three of them are clients, one is a trainee
4 and the two solicitors I have supporting with me. I am not sure they would for one
5 moment suggest they would charge for both of those for a CMC. It would be different
6 for a substantive hearing but we would say the indication in relation to counsel would
7 be entirely appropriate in the circumstances.

8 **JUDGE WOLFFE:** Thank you very much.

9

10 **RULING ON COSTS**

11 **JUDGE WOLFFE:** Okay. Mr Barrett, in relation to your application for costs, first of
12 all, Ofgem should bear the costs of the preparation of the amendment, but I award you
13 your costs incurred by reason of the opposition to the amendment. I hope that gives
14 a sufficient clarity in terms of the division of cost. I am not going to award costs on
15 an indemnity basis and I am going to award the costs on the basis of one senior and
16 one junior and solicitor support, of course. I do that, as I said a moment ago, without
17 casting any comment on the contribution that I'm sure your juniors will have made. It
18 is simply by reference to the -- what does seem to me the somewhat excessive
19 counsel presence for a case management hearing of this sort.

20 **MR BARRETT:** Thank you, my Lord.

21 **MR JUSTICE WOLFFE:** Okay. Where do we go from there?

22 **MR GIBSON:** I think the next agenda item is the 2026 decision challenge.

23 **JUDGE WOLFFE:** I suppose one thing that follows, if there is foreshadowing of
24 a strike-out application, I don't think I have a strike-out application before me, nor
25 could I deal with it if I did.

26 **MR GIBSON:** Indeed whilst I was counselling a strike-out application, that involved

1 tidying of loose ends if you were with us on GEMA's re-amendment. So given that
2 that re-amendment has been allowed, then --

3 **JUDGE WOLFFE:** That falls away.

4 **MR GIBSON:** -- we are not seeking to strike out the bits that lay underneath it.

5 **JUDGE WOLFFE:** Good.

6 **MR GIBSON:** The next thing that flows from this is the challenge to the 2026 decision.

7 We have engaged in correspondence very constructively and the parties, as
8 I understand it, are agreed that we would be more procedurally efficient, if it
9 commends itself to you, sir, to deal with this by way of an amendment to the existing
10 proceedings.

11 The way in which we have drafted the document, the challenge to the 2026 decision
12 so far is by way of a free standing notice of appeal. I don't know whether you would
13 find it helpful to turn that up.

14 **JUDGE WOLFFE:** Yes. Thank you.

15 **MR GIBSON:** It is at tab 7 of Bundle A, page 363. Sorry, sir. Are you with me?

16 **JUDGE WOLFFE:** Yes, I am.

17 **MR GIBSON:** What I did, you will see on the front page, 363, we explain that the text
18 that's by way of a mark-up, it is done in amendment style in order to enable the reader
19 to see readily what's different between the two notices of appeal and what little there
20 is that's different, but it was done by way of a free standing document. The only reason
21 it was done in amendment was to illustrate that point of no difference in the fact that
22 the same grounds are pleaded -- at least the first four grounds are pleaded in respect
23 of both.

24 This has been pleaded as a free standing document. It is ready to go if that's the way
25 in which you want to go, mindful that the deadline is today, so we would need to press
26 the button before 4 o'clock if that's what we are doing so we don't come into any

1 procedural complications.

2 However, if you were minded to go with what the parties are suggesting to do by way
3 of amendment, two things flow from that. One is that I will need to rejig this so it reads
4 as an amendment coherently to the existing pleading, which I think will require a little
5 bit of thought. I am not sure the actual end product will be particularly cumbersome to
6 read, but it will require some careful thought to make sure it tracks through, so I will
7 need a little bit of time to do that.

8 What it also means is we won't need to file an independent notice of appeal and
9 therefore we won't need to go through all of the procedural steps associated with that.

10 So that's why we say it would be neater all round, particularly given the fact we are all,
11 you know, hammer and tongs going for our April hearing, that we don't want to put any
12 impediments to that.

13 So unless I can assist you further, that's sort of the outline of where we see things
14 going. Do you want me to talk to you any further on the pros and cons of why it is we
15 say an amendment or do you think that sufficiently covers the ground, sir?

16 **JUDGE WOLFFE:** I think that sufficiently covers the ground as far as that is
17 concerned, and I have no -- I can see the advantages in simply amending into the
18 existing process. The question I had is, as I understand it, what you are doing by
19 either route is you are challenging what you accept is a decision made in February of
20 this year.

21 **MR GIBSON:** Uh-huh.

22 **JUDGE WOLFFE:** And the question I had was under reference to subsection (3) of
23 Section 70 of the Act.

24 **MR GIBSON:** Uh-huh.

25 **JUDGE WOLFFE:** I suppose maybe I should start with subsection (1), Section 70:
26 "An interested party ..."

1 **MR GIBSON:** Just forgive me. I am just going to turn that up.

2 **JUDGE WOLFFE:** I am sorry. It is page 49 of bundle D.

3 **MR GIBSON:** I am with you, sir.

4 **JUDGE WOLFFE:** "Interested parties aggrieved by the making of a subsidy decision
5 may apply for the Competition Appeal Tribunal for a review of the decision.

6 (3) the means of making application is by sending the Tribunal a notice of appeal in
7 accordance with Tribunal procedure rules."

8 Then I think if we look at the rules it's very similar language, you know, I suppose the
9 question I had was whether simply as a matter of technical compliance with the
10 statutory requirements you are required to make your application by way of a notice
11 of appeal rather than by simply amending into an existing appeal.

12 **MR GIBSON:** Yes, sir. That is why we prepared it on that basis. I confess that I have
13 not given thought to the scope of your discretion to deal with these things. I suppose
14 what we want to try to avoid is an unnecessary degree of administrative hassle both
15 for you, for the Tribunal and for us if we trigger the process. If we have to do that step
16 on the understanding that once that's done none of the administrative steps that flow
17 from that in terms of having to publish a separate thing, give a separate case number,
18 if you administratively truncate all that so we have complied with the statutory
19 requirement, what we then do is put that to one side and you direct that you want me
20 to, if you like, merge the two into one document, then I don't -- I will turn my back and
21 just double check. It's really just about administrative simplicity that we are trying to
22 strive for. We want to tick the boxes and we have prepared for that which I think is
23 a good point to have raised, if I may say so, but if you think you can cut through the
24 administrative red tape, then that would be much appreciated.

25 Can I just turn my back to check?

26 **JUDGE WOLFFE:** Yes, absolutely and I will check with the referendaire that there is

1 nothing that she would like brought to my attention in terms of managing the process.

2 Sorry Mr Gibson.

3 **MR GIBSON:** I am grateful for the referendaire's input, as always. We agree, to be
4 prudent, that we should tick the Section 70 box. I am grateful to you, sir, for flagging
5 that. At that point provided you are comfortable that the Tribunal can then exercise its
6 full discretion in relation to case management and its proactive approach to these
7 things, hopefully we can then park that, if you like, without, as I said, creating the extra
8 web pages or whatever, fold it in and then we can produce as directed an amended
9 version which, as I say, will be a sort of mash up between this and the other one.

10 I confess I have to think through structurally how we are going to do that.

11 My objective would be to minimise the number of changes we need to make to the
12 existing proceedings in order to give effect to what we are seeking to achieve, namely
13 challenging the 2026 decision without prejudice to the question, as I flagged, which
14 appears in the amended reply.

15 It is slightly through the looking glass because we have been pleading things in the
16 amended reply in these proceedings and my learned friend has very helpfully been
17 pleading defences in the defence to the reply. It is all a little bit odd and unusual.

18 I think we have to accept that's an intertemporal feature of the case.

19 **JUDGE WOLFFE:** Indeed. At the end of the day the pleadings are there to serve the
20 effective administration of justice.

21 **MR GIBSON:** Quite.

22 **JUDGE WOLFFE:** At the same time when the statute says something should be done
23 in a particular way --

24 **MR GIBSON:** I entirely agree.

25 **JUDGE WOLFFE:** -- even if parties agree I might be -- you know, it might be better
26 that we do what Parliament has directed.

1 **MR GIBSON:** You will not hear any objection from us. If we can cut through the
2 administrative side after that, then I think that's an elegant solution, if I may say so, sir,
3 obviously subject to anything Mr Barrett wishes to say.

4 **JUDGE WOLFFE:** Thank you.

5 **MR GIBSON:** Shall I go and give Mr Barrett a chance?

6 **JUDGE WOLFFE:** Mr Barrett, do you have any observations, firstly on the technical
7 point that I have raised and how in a way that minimises cost and inconvenience to
8 manage the process.

9 **MR BARRETT:** Just briefly, my Lord, I must confess I have not thought about the
10 technical point you have made on the wording of Section 70. As a matter of first
11 impression, which is all I can offer, I think that may well be a good technical point is
12 my reaction, but I have not thought about it properly and frankly to give you a useful
13 view I would need to give it at least a little bit of thought.

14 In the circumstances, my Lord, it would seem the prudent course is to proceed on that
15 footing. I think, as my learned friend indicated, and following that with as a practical
16 matter producing a single pleading that captures the issues, it seems to me it is going
17 to be of more assistance for the Tribunal and the parties if there is a single document
18 everyone is looking at rather than having to put two (inaudible) at the hearing but that
19 can be dealt with as a matter of (inaudible) I think.

20 **JUDGE WOLFFE:** I suppose the first decision is -- obviously ultimately it is a matter
21 for you, Mr Gibson, but it would seem prudent for you to file your notice of appeal.

22 **MR GIBSON:** We will press the button.

23 **JUDGE WOLFFE:** As you will appreciate, CAT time limits are strict.

24 **MR GIBSON:** Yes. I have read a very good judgment recently --

25 **JUDGE WOLFFE:** Beyond that it then becomes a question of -- again I am afraid
26 I haven't followed this through just to check whether there's anything in the rules that

1 compels -- once the notice is in compels matters to proceed in a particular way.

2 **MR GIBSON:** I can see the referendaire's very helpfully is shaking her head. My
3 understanding is once you get into the rules you have a wide discretion as to how you
4 manage matters.

5 **JUDGE WOLFFE:** Yes, but it may be that I will need to dispense formally with the
6 requirement to file a defence and, you know, any other --

7 **MR GIBSON:** If it would assist you, sir, I am sure between myself, Mr Barrett and his
8 juniors we can come up with a form of order -- we can work through those points and
9 make sure they are all covered.

10 **JUDGE WOLFFE:** In terms of the substantive point once you file your notice of appeal
11 the intention would be that you consolidate the case into -- in a single document,
12 whether that be by way of -- I suspect, given that the pleading has all been in the
13 existing, you know, notice and response and so on, it will be simplest to plug your
14 averments about the February decision into that document.

15 **MR GIBSON:** Yes.

16 **JUDGE WOLFFE:** And there will be no doubt some tidying up to be done around that,
17 and that I should dispense with any procedural requirements in the rules which would
18 normally follow from you having filed a notice of appeal on the footing that, you know,
19 the two are going to be consolidated. Does that at least as a sort of high level principle
20 seem like a sensible way forward? Obviously if either of you identify, you know,
21 a technical problem with doing that, and I will look at it again myself just to make sure
22 that I am happy that I can achieve that, but is that enough by way of our decision to --

23 **MR GIBSON:** Very much so, sir. Subject to Mr Barrett agreeing that seems sensible,
24 putting our collective heads together, I am sure we will identify if there is anything.
25 I think pragmatically I will endeavour to do that by way of an amendment to the existing
26 notice of appeal because that is the ground that we seem to be agreed on, and if I find

1 a problem in doing that I will in the first instance raise it with Mr Barrett and his juniors,
2 and, if necessary, raise it with you.

3 The next question then is one of timing. My learned friend had suggested very
4 helpfully that they could put in a response to the document we put in by Friday. That
5 was obviously subject to the fact I now need to rework it to be an amendment. I would
6 like to say I can do that by Thursday, but I may live to regret that. If I aspire to do that
7 and if for any reasons there is any difficulty, I will alert my learned friend to it. Because
8 we are not quite sure how it is going to work, I do not want to commit irrevocably but
9 I am conscious we need to move things forward quickly.

10 I have not had a chance to discuss it with my learned friend but if we are trying to stick
11 to the deadline for us to do the reply by next Wednesday one way of doing that would
12 be that we file our amended pleading by Thursday. They then have two working days
13 and a weekend to do it by Monday and then that gives me two working days, Tuesday,
14 Wednesday, to plead the reply and obviously I can start thinking about the reply based
15 on what they have already said but I will not be able to write much down because you
16 need to wait to see exactly how it comes out. That will be quite an intense week I think
17 for both of us but I would rather try to achieve that to keep everything completely on
18 track.

19 I will try to avoid this, but if we do need to come back to you and ask for a day's
20 indulgence here or there, we will alert you as soon as we can. We will not be able to
21 alert within the three days under the practice direction but we will do it as soon as we
22 can. Obviously subject to what Mr Barrett says, that is what we propose.

23 **JUDGE WOLFFE:** Mr Barrett, how does that sound like to you?

24 **MR BARRETT:** Provided we are clear the document is going to reflect what we see
25 here at tab 7, I think that's doable -- tight but doable.

26 **JUDGE WOLFFE:** Yes. Why don't I simply make a direction to that effect, Mr Gibson,

1 that you will file your amendment --

2 **MR GIBSON:** Sorry, sir. I just have to make a note.

3 **JUDGE WOLFFE:** Yes. Not at all -- file your amendment by -- I think when you say
4 by Thursday, I take it you mean close of business on Thursday?

5 **MR GIBSON:** The later it is the better. It is obviously a question of me doing it and
6 having to check with the client, who is very efficient and helpful but nonetheless still
7 has to have an opportunity to read the documents.

8 **JUDGE WOLFFE:** Of course. You have offered Thursday, so I am saying Thursday.
9 Mr Barrett to respond by close on Monday, and then we keep -- I don't need to do
10 anything about Wednesday, because we already have that date.

11 **MR GIBSON:** I would ask for some indulgence if for any reason we have had to miss
12 the 4 o'clock deadline on Wednesday and it was a bit later. I'm not
13 expecting -- whatever time it comes on Monday, even if it comes at midnight or even,
14 you know, the early hours of the following morning. We are more concerned about
15 trying to keep things moving along. If we know it is going to be ready for Tuesday
16 morning, then that's when I will put aside time to actually look at it.

17 **JUDGE WOLFFE:** Yes. That's appreciated, and equally, you know, if events conspire
18 and the optimism of counsel proves to be, you know -- then by all means, as you have
19 indicated, ask me to shift the dates by a day or two.

20 **MR GIBSON:** The thing that might prove to be quite a compressed ambitious time is
21 obviously the deadline for producing our responsive evidence also falls on the
22 Wednesday. That's the only thing that I think -- I say that's the only thing. That is one
23 thing that I think may create quite a lot of pressure on us. As always, we have hit
24 every deadline so far. We are going to endeavour to carry on in that vein.

25 **JUDGE WOLFFE:** Okay. Would it be sensible for me to relax that deadline say to
26 the end of next week? Would that cause any difficulties?

1 **MR GIBSON:** Friday, 27th?

2 **JUDGE WOLFFE:** Yes.

3 **MR GIBSON:** From our side -- I'll double check -- I think that would be very helpful.

4 I don't think imagine it will cause any disruption, but obviously my learned friend --

5 **JUDGE WOLFFE:** It doesn't have any knock-on consequences for the timetable

6 heading for the substantive hearing otherwise?

7 **MR GIBSON:** We can turn up the order, but I don't believe it does, sir, no. I don't

8 want to speak out of turn. If I just turn up the order at tab 10, the deadline for reply

9 evidence is at paragraph 9. The next provision is to file an agreed hearing bundle by

10 Tuesday, 14th April. So I don't foresee that causing any difficulty, obviously subject to

11 Mr Barrett having an opportunity to consider . I will just turn my back to check.

12 **JUDGE WOLFFE:** Of course, yes.

13 **MR GIBSON:** That would be much -- I am sorry.

14 **JUDGE WOLFFE:** I take it --

15 **MR GIBSON:** That would be much appreciated.

16 **JUDGE WOLFFE:** Mr Barrett, any problem with that? That seems sensible given all

17 the other things that have to be done.

18 **MR BARRETT:** (Inaudible) No objection.

19 **MR WOOLFE:** Well, I will relax that deadline for responsive evidence to 27th.

20 **MR GIBSON:** The reply will be 25th and the response evidence will be 27th.

21 **JUDGE WOLFFE:** Yes. Now I should just say the point that the referendaire has just

22 raised with me is that if we have a new notice of appeal, that I imagine may require to

23 go on the CAT website and there is then an opportunity for applications to intervene.

24 You may want to have a -- you may want to have a look at that and whether you

25 consider that you want to invite me to, if I have the power to do so, dispense with those

26 matters. Equally it may simply be that that's a consequence of you challenging

1 another decision and therefore there having to be a new notice of appeal.

2 **MR GIBSON:** Yes. Well, I mean --

3 **JUDGE WOLFFE:** If that's the position, that's the position. I will deal with applications
4 to intervene as and when they come.

5 **MR BARRETT:** If we publish, my Lord, your ruling, it may deter applications.

6 **MR GIBSON:** Mr Barrett raises a very good point. One would hope that once bitten,
7 twice shy. If we can dispense with it, we would encourage you to dispense with it, but
8 if that is not possible, then obviously we just hope that your timeous ruling will put the
9 fear of God into anybody from trying to intervene in this one.

10 Certainly from our perspective we want to resolve it in April, and we are conscious that
11 if we have interventions piling in, that's going to put strain on both sides and be -- we
12 don't want to raise the prospect of an unworkable timetable.

13 **JUDGE WOLFFE:** It is not lost on me and I am very conscious that the reason for
14 filing a new notice of appeal is an effectively technical requirement in order to allow
15 the issues that, as I said earlier, have been foreshadowed from the outset in this case
16 to be properly ventilated when we get to the substantive hearing. So while I won't
17 prejudge any matters that might arise, you may take it that that's the sort of context in
18 which I'll be thinking about issues which may come up, but let's have a look and see if
19 we can deal with that in other ways.

20 **MR GIBSON:** We would invite the Tribunal to consider whether it has the power to
21 disapply these things and obviously you will take a view and one way or another I think
22 pragmatically we all have a common intention to deliver on it in April.

23 **JUDGE WOLFFE:** Yes.

24 **MR GIBSON:** So we won't let anybody get in the way of us.

25 **JUDGE WOLFFE:** Thank you, Mr Gibson. Okay. Next --

26 **MR GIBSON:** Someone is very helpfully making a point .

1 **JUDGE WOLFFE:** Yes. (Pause.)

2 **MR GIBSON:** I am very grateful to Ms Kluske for pointing out that Rule 17 is
3 something we may have occasion to look at, which is about consolidation, and I think
4 it is useful to have flagged that, but one that we can reflect on and may use as part of
5 the recitals for the body of the order. It may have the power to resolve this. It is
6 a question of whether one can do that immediately before anything else is triggered,
7 but we will take that away and look at it collectively and come back to you. We have
8 a fine list of actions to take arising out of the CMC.

9 Unless my learned friend has anything else further to say in relation to the 2026
10 decision and our challenge to that, I think that agenda item is dealt with. I am looking
11 to Mr Barrett to see if he wants to add anything.

12 **MR BARRETT:** No, thank you.

13 **MR GIBSON:** Then that leaves matters arising from GEMA's evidence. We propose
14 that -- the correspondence issues are what they are. We don't propose to take up time
15 with that before you, sir.

16 That just leaves confidentiality. I am happy to report -- and again Mr Barrett will correct
17 me if I am misstating anything -- that over the lunch adjournment we took the time to
18 explain the basis on which we were claiming confidentiality in relation to the categories
19 set out in Mr Palmer's witness statement and his exhibit.

20 I believe Mr Barrett is satisfied, having had that explanation, that the information is
21 properly confidential. The question then arises what to do about that. There are three
22 options I think on the table.

23 There is the pragmatic option that we settled on last time of not referring to it subject
24 to the possibility of -- subject to preparing the confidentiality ring order so it was
25 available if it was required.

26 I don't want to take up a lot of time going into the whys and wherefores of why it is we

1 have changed our mind about that, but suffice it to say that the reference in Hutcheson
2 to that information without applying any confidentiality protections has created some
3 concern on our part that we do need to take steps to make sure that it is properly
4 protected.

5 So we don't think the do nothing option is a safe one, even if it transpires that no-one
6 has any occasion to look at this information at any point from now until the conclusion
7 of the hearing. We would rather have in place the apparatus, architecture, whatever
8 you say, to have that protection there so that it is prophylactic, if nothing else, and
9 better not to have a distraction around that issue in what is going to be quite
10 a compressed timeframe for the hearing.

11 We would therefore say that we need to adopt one of two approaches. We set out on
12 23rd January a standard form orthodox confidentiality ring order that was based on
13 the confidentiality ring orders that have been made in subsidy control proceedings in
14 the Tribunal to date, the Weis case and I can't remember the other one. I think it was
15 the Competition Commission -- sorry -- the Bristol Airport case. Those are the two
16 models that we used. I understand that the wording is very, very similar to those two.
17 The merit of that approach is that it is tried and tested. The wording is not one that is
18 sort of bespoke, cooked up, and therefore is unlikely to lead to any unforeseen
19 problems with it.

20 We are conscious -- my learned friend makes the point that he thinks it may be
21 somewhat disproportionate to use a full confidentiality order for a relatively narrow
22 amount of information.

23 On that I would say, first of all, the confidentiality ring order -- we can look at it, if you
24 like -- is actually only three pages of substantive text. There is obviously a page for
25 names of individuals subject to the undertaking and then a page of the undertaking
26 has to be signed. That to our mind is not an extremely large amount of information to

1 digest. It is standard form. It is orthodox. We all know what we are doing. It is tried
2 and tested.

3 Had we known the way the twists and turns might work out, I think the quickest thing
4 would have been just to have just agreed that back in January. As it is, we spilt a lot
5 of ink going back and forth over this. I am conscious that if we go for a bespoke
6 approach, we may be spilling more ink unnecessarily just to produce a shorter
7 document, which would be an odd way to save time and money.

8 So that's our preferred approach. However, trying to be as cooperative and helpful as
9 we can, we did send a letter this morning, which my learned friend hasn't had a chance
10 to digest, but we handed him a hard copy, of a more truncated form of order, which
11 we tried to prepare on the basis of what my learned friend has suggested.

12 I have to say I am not enamoured with that approach, because I just don't know that it
13 is going to be as safe, having been cooked up in quite short order and on a bespoke
14 basis, and for the saving of two pages I would strongly prefer to go with the CRO
15 approach that we have been suggesting from the outset.

16 There is a lot more detail I could go into, but I am keen, having taken up so much time
17 this morning, to make good and try to curry favour with you as being as brief as
18 possible on this, sir.

19 I am being flippant, sir. I know you are very tolerant and I don't need to be short, but
20 I think that does cover the ground as far as I am concerned. Mr Barrett obviously takes
21 a slightly different view, so I'll allow him to ...

22 **JUDGE WOLFFE:** Yes. I will hear Mr Barrett and then consider whether there is
23 anything more I need to raise with you, Mr Gibson. Thank you.

24 **MR BARRETT:** So you have the context, my Lord, this is a single paragraph of the
25 claimant's witness statements. It refers to matters which in my respectful submission
26 on any view are wholly irrelevant to the issues before the Tribunal at the final hearing.

1 I obviously will not read out, my Lord, the paragraph. I think it is sufficient to say they
2 concern a third party.

3 In my respectful submission there is no plausible route by which one can see that the
4 factual material is relevant to the four issues of law that you will be determining at the
5 hearing. That's use of public resources; scheme or no scheme; and what I will refer
6 to as the section 10P point; and the vires issue, the freestanding vires issue, those
7 four points. Not relevant in my respectful submission to any of those.

8 For that reason we respectfully submit the short and obvious route through is that the
9 parties both effectively simply not rely on and excise the relevant paragraphs. That's
10 the end of the matter. No more cost. No more work. No need for orders.

11 The claimant has said it doesn't agree with that. It is not happy to agree that as a way
12 forward. It hasn't really been able to explain why in a way that I can understand. It
13 hasn't been able to explain why it is suggested that this material is relevant to the
14 issues at the trial. That's surprising, because the claimant's position until quite recently
15 was to agree that the material wasn't relevant to the issues at the trial. There has
16 been something of a change of position.

17 So that's my first point, my Lord. The answer is both parties simply don't refer to this.
18 It's a non-issue.

19 The second point is, if that's not the approach we adopt, then the principle is open
20 justice, and the correct and required approach is that which interferes with or departs
21 least from open justice.

22 The guidance you will see we set out in our skeleton at paragraph 5.3 from the Court
23 of Appeal in the *Ambrosiadou* case. Paragraphs 50 to 54 indicates that the appropriate
24 course is a short, simple order, which provides that the relevant material will not be
25 referred to, and read out in open court.

26 As I understand my learned friend's submissions to you today, he says that he is not

1 comfortable with that for some reason. He suggests it poses some risk. We
2 respectfully don't agree with that or follow that. It is a course which is identified by the
3 Court of Appeal as the appropriate course to deal with these matters. We can't see
4 the slightest basis for a suggestion that's not an appropriate or adequate way to
5 address the point. That's the course which will both involve the minimum departure
6 from open justice and also reduce as far as possible the costs and the work required
7 of both parties. We would therefore commend that to the Tribunal.

8 **JUDGE WOLFFE:** Thank you, Mr Barrett.

9 Mr Gibson, anything you wish to say in reply?

10 **MR GIBSON:** Just a couple of points of detail. Just to be absolutely clear, whilst the
11 debate has arisen because of Mr Hutcheson referring to a single paragraph of
12 Mr Palmer, there are actually three points in the evidence over which protection is
13 being sought. I don't know if it would be helpful to turn them up so you can see them.

14 **JUDGE WOLFFE:** I think I had better understand precisely the scope of the areas.
15 Obviously you will presumably simply be directing me to the relevant page and
16 passage without referring to it.

17 **MR GIBSON:** Indeed, sir. I don't know whether it is appropriate to go into private
18 session out of an abundance of caution. When we refer to a document, technically
19 you might have to make a ruling that that document -- the reference to it. I don't think
20 people tend to do that in this court, although actually one should, because a reference
21 to a document in the course of open proceedings technically actually does constitute
22 disclosure of that.

23 **MR BARRETT:** No, not if the judge has directed that it is not to be treated as read
24 aloud.

25 **JUDGE WOLFFE:** For the avoidance of doubt I will direct that neither counsel will
26 read out or refer to the passages in ways which could identify its contents, and for the

1 avoidance of doubt until any further order of the court, and I anticipate I will make some
2 sort of order very shortly, the passages to which -- three passages to which you are
3 about to direct me are to be treated as not put into the public domain simply by your
4 pointing me to them.

5 **MR GIBSON:** Thank you, sir. I think we are actually saying the same thing.

6 **JUDGE WOLFFE:** Yes.

7 **MR GIBSON:** If I take you to Palmer first. Palmer 1 is at tab 6, bundle B. If you then
8 turn to page 270, which is at paragraph 236. The version I have in my bundle is
9 redacted. That's quite helpful. Then I can't say anything silly. Do you have the text
10 in unredacted form in front of you, sir?

11 **JUDGE WOLFFE:** I have a passage in square brackets and marked in green, but the
12 text itself is legible.

13 **MR GIBSON:** So you have the confidential version. I have the non-confidential
14 version redacted out. So that's helpful for me. It will be very difficult for me to explain
15 why that is confidential, but since it's accepted -- without disclosing it.

16 **JUDGE WOLFFE:** Yes.

17 **MR GIBSON:** That is one bit of information.

18 **JUDGE WOLFFE:** As I understand it, all we are doing at the moment is identifying
19 the three passages so that any order -- if I find that I prefer Mr Barrett's approach, I can
20 formulate any order in a way that, you know, relates to the relevant material.

21 **MR GIBSON:** Yes, sir. I mean, the reason I am taking you to this is just so we know
22 exactly what currently is on the table on confidentiality. I am going to make some
23 submissions about why the order would be useful for potential future material, but this
24 is what currently from the outset has been flagged as being confidential. So there's
25 that.

26 Then a different point arises in relation to paragraph 303 at page 290 I believe it is.

1 Yes, 290.

2 **JUDGE WOLFFE:** Okay.

3 **MR GIBSON:** It is in paragraph 303 on 290. In your version I expect you have -- sorry.
4 I will give you a moment.

5 **JUDGE WOLFFE:** Yes.

6 **MR GIBSON:** There is two bits of information that are marked in green in your
7 document.

8 **JUDGE WOLFFE:** Yes.

9 **MR GIBSON:** As is apparent from the context, that's confidential information to
10 Zenobē.

11 The next thing to do -- it will have to be in soft copy. It is in the exhibits bundle. If you
12 go to bundle E, tab 1, page 1596, and if I have guided you to the correct page, sir, you
13 should have a page that forms part of a submission Zenobē made to GEMA. You can
14 see quite clearly the box around those four paragraphs marked as being confidential.
15 That information relates back -- is consistent with the first passage I showed you from
16 Palmer 1. It is a bit more detailed in some respects, but there is a little bit more
17 information in paragraph 236. So paragraph 236 and that you are looking at now is
18 one category we seek protection of and then paragraph 303 is the second category of
19 information. That's the universe of confidential information that we have before us at
20 the moment.

21 In case it wasn't clear, we do say obviously we can't rule out the possibility that in
22 a week or so's time in reply evidence there may be more confidential information that
23 we wish to protect. As I stand here now, I honestly don't know either way exactly how
24 that will fall, but, as I said a moment ago, we say on a prophylactic basis rather than
25 having to go back and forth and, you know, workshop or tweak the scope of an order
26 at that time it would be best to have protection upfront now that deals with that

1 possibility.

2 My learned friend said it is not relevant and that's what we had agreed, but obviously
3 the change in position was Mr Hutcheson referring at paragraph 145 of his first witness
4 statement to the first passage from Mr Palmer, paragraph 263, in a way that did not
5 seek to protect the confidential information and stated that he did not think it was
6 confidential.

7 We think that was an unfortunate thing to have done. As I said, we are not proposing
8 to get into the whys and wherefores, but it was unfortunate. On that basis that is one
9 of the things that gives us pause and we just think it would be much safer all round
10 just to have the orthodox CRO in position so everybody is clear and these sort of
11 mistakes don't happen again, and if there is any more confidential information, it falls
12 within the ambit of that.

13 I don't understand my learned friend to say that the CAT CRO is an inappropriate
14 incursion on the principle of open justice. We don't say that it actually encroaches
15 much further. What it does, in protecting the same information to the same extent, it
16 just actually protects it in a more hermetically sealed way. We don't think it actually
17 constitutes a further incursion on the principle of open justice. Both options will require
18 this information not to be available to the public. That is the incursion on open justice.
19 All we are debating here is how we protect those two bits of information. So the open
20 justice point we say doesn't really go either way on that.

21 We say that the costs of agreeing a standard form order would have been minimal
22 compared to the costs that have been taken up in debating this point we say
23 unnecessarily.

24 We set our stall up in October when we filed the papers and we sent a draft CRO and
25 confidentiality protocol in line with the practice direction on 23rd January in advance
26 of the first CMC. It wasn't consequently agreed. We have had plenty of time to do

1 this and do so now, and we would just say the easiest thing would be just to order the
2 orthodox standard form order, sir. Thank you.

3 **JUDGE WOLFFE:** Anything arising from that, Mr Barrett?

4 **MR BARRETT:** Just to note that my learned friend had every opportunity. He has not
5 identified any basis upon which this material is said to be relevant to any of the issues
6 that you are going to determine at the hearing.

7 **MR GIBSON:** I did say that Mr Hutcheson referred to this material even though he
8 said it wasn't relevant. That is precisely the kind of situation we are trying to avoid.

9 **JUDGE WOLFFE:** If I were to go with Mr Barrett's approach, I take it that any order
10 would also have to cover the paragraph 145 in Hutcheson?

11 **MR GIBSON:** Yes, sir, because that is derived from the same --

12 **JUDGE WOLFFE:** So -- on you go.

13 **MR GIBSON:** We would invite you to -- what the order is saying, whether it is the
14 short form order or the classic CRO, we would frame it as being the confidential
15 information, and the form of wording that we have adopted in our -- I don't know
16 whether we have -- my learned friend has a copy of this. It was only sent this morning.

17 **JUDGE WOLFFE:** (Handed.) Thank you.

18 **MR GIBSON:** This is the short form order, as I say, which we are less enamoured of,
19 but the information -- forgive me. I am just trying to remind myself. Yes. So
20 paragraph 2:

21 "Confidential information is defined as information over which confidential privilege has
22 been claimed and justifying confidential treatment by the Tribunal according to Rule
23 101."

24 So we would say that this order should -- whether it is the CRO or this order, we would
25 invite you to frame it in general terms, because then we don't need to -- we need to
26 make an application to you in respect of new confidential information, but if you are

1 minded to agree that, then it naturally falls underneath this order or the CRO without
2 having to make new orders in the spirit of trying to minimise the costs of this process,
3 sir.

4 **JUDGE WOLFFE:** I suppose my concern about the form of order is paragraph 2. So
5 it is an order that applies to confidential information which is, first of all, information
6 over which confidential treatment has been claimed and, two, justifying confidential
7 treatment by the Tribunal under Rule 101. It doesn't particularly assist in clarifying
8 precisely which passages in which documents are said to be protected.

9 **MR BARRETT:** My Lord, can I show you our draft order?

10 **JUDGE WOLFFE:** It might be helpful if you can take me to that. I have looked at
11 these various documents.

12 **MR BARRETT:** It is tab 14, sir. In the recital -- we have sought to define in the recital
13 what information was covered. We have drafted it so that it covers both witness
14 statements. That's covered off. I think the only change in my submission that would
15 be necessary is we need to add the other paragraphs that Mr Gibson has mentioned
16 today. So if we add those paragraphs, in my submission that sought to be resolved
17 really.

18 **MR GIBSON:** Yes. The definition of confidential information in our bespoke short
19 form order is taken from the standard form wording in the CRO the Tribunal uses
20 habitually, which is at tab 14 of bundle A, page 549. This I think probably is
21 an illustration of why it is best to deal with the order as a whole, because I think there's
22 a provision in that order for the process by which to actually establish confidential
23 information in a more thorough way. My learned friend is just using the standard CRO.

24 **JUDGE WOLFFE:** I have in front of me Mr Barrett's order. I am comparing it with
25 yours. There are really, as I understand it, two issues that need to be addressed. One
26 is the reading out of the parts of the document that are confidential and the second is

1 the making available of the document to non-parties other than in a redacted form --

2 **MR GIBSON:** That's dealt with at paragraphs 3 and 4 of our draft.

3 **JUDGE WOLFFE:** -- which in your draft is 3 and 4.

4 **MR GIBSON:** Yes.

5 **JUDGE WOLFFE:** paragraph 4 binds the party who produced the document or for
6 whom it was produced. I am looking at Mr Barrett's, which binds the respondent. It
7 strikes me that whatever form of order I make it should deal with reading out the
8 relevant material in Tribunal proceedings and the provision by either party to any
9 non-party. Is there any particular reason why --

10 **MR GIBSON:** It is to do with -- as I said, this is the problem with doing things -- I was
11 looking back at the Tribunal's Guide and rules around, because obviously the Tribunal
12 takes a slightly different approach from the High Court.

13 I think where you are going, sir -- I imagine the Scots law position is more similar to
14 the High Court than the Tribunal. So, yes, either party would be the way that I would
15 normally approach it if I were dealing with a CPR 5.4 or CPR 5.4D issue. I'd need to
16 look at the Guide to check, because I don't have it at my fingertips. I think it's because
17 the way in which a non-party can get access to information is if they approach the
18 party who produced the document or for whom the document was produced and seek
19 that they provide it to them.

20 **JUDGE WOLFFE:** Because the other party is already under a constraint.

21 **MR GIBSON:** Yes. I am slightly nervous, because the CRO tried and tested. This
22 we are sort of feeling our way. Anyway ...

23 **JUDGE WOLFFE:** Yes. Okay.

24 **MR BARRETT:** Just to clarify, my Lord, the reason our draft only binds us is because
25 the information is all the claimant's information. So from our perspective what the
26 claimant chooses to do with its information is a matter for it. As far as the restraints

1 imposed, as we're the ones receiving their material, that's how we've drafted it.

2 **JUDGE WOLFFE:** I can see that. It is because rather than simply restricting access
3 to paragraphs 236 and 303, you are defining protected information as the information
4 in that paragraph.

5 **MR GIBSON:** We are pooling thoughts. I think the reason why I drafted it this way in
6 more general terms is because the obligation on us under the Guide arises -- my
7 learned friend says it is up to us to decide what to do with the information. It is not
8 actually. If information wasn't protected in this way and was read into court, the
9 parties -- one party would come to us and we would be -- I don't know whether the
10 word "obliged" would be right because it is in the Guide -- but the expectation would
11 be that we would provide them a copy of that document.

12 So the objective of this order, which I might not have got quite right, is to make sure
13 that both we as the people whose information we want to protect and the other side
14 are all subject to the same obligations. It is a function of the way that the point may
15 arise in the Guide.

16 **JUDGE WOLFFE:** It strikes me -- that's very helpful, Mr Gibson. Thank you both.
17 What I propose to do, but I am going to articulate this as a proposal, so either of you
18 can tell me if there's a flaw that I haven't spotted, is I am attracted by Mr Barrett's basic
19 approach, which is to define clearly the passages which are confidential, and I propose
20 to make an order that those passages will not be read out in the proceedings and that
21 those passages will not be provided by either party to any non-party, but what I would
22 propose to do, is rather than defining information as being the information highlighted
23 in those passages, simply to identify the passages as being passages that are on that
24 basis confidential.

25 I think the consequence of that will be that neither party is either -- is permitted and
26 certainly not obliged to provide these documents -- what I might call the redacted parts

1 of these documents to any third party, but it meets Mr Barrett's point that Zenobē, if it
2 chose to, can put that information in those passages into the public domain, because
3 it is Zenobē's information.

4 **MR GIBSON:** I see that.

5 **JUDGE WOLFFE:** So I think the benefit of that, as I see it, is it gives absolute clarity
6 about what is protected. It gives absolute clarity about, you know, who is subject to
7 restrictions and what those restrictions are, and it goes no further than is necessary to
8 protect the information that has so far been identified and I am entirely content to
9 accept that all of the passages, Mr Gibson, that you have identified, including the
10 paragraph in Mr Hutchinson's statement should be protected in this way.

11 That leaves over what happens if any part of your responsive evidence contains
12 confidential material. What I suggest you do with that is that you identify any passages
13 that are confidential and the Tribunal can make a further order in the same terms to
14 protect those passages.

15 **MR GIBSON:** Yes. Can I ask for a slight tweak to that, which is that we take off the
16 recital that refers to "protected information" and instead refer to a schedule. You can
17 then update the schedule more easily than having -- the same order can be done by
18 way of amendment. I have seen it done that way in other cases, but either way.

19 **JUDGE WOLFFE:** Yes. I am working with Mr Barrett's draft.

20 **MR GIBSON:** Okay.

21 **JUDGE WOLFFE:** You are absolutely right. We could define the passages which are
22 protected in a schedule to that order and then the order could, in fact, provide for the
23 Tribunal to by direction add additional passages. That's a helpful drafting suggestion.

24 **MR BARRETT:** (Inaudible).

25 **JUDGE WOLFFE:** Would it trespass on parties to invite counsel to, with that
26 guidance, produce a draft which I can consider?

1 **MR GIBSON:** Yes, sir. One question is whether you accept the undertaking should
2 operate, as we have got in our order. We think it is a useful reminder to those people
3 dealing with confidential information of the importance of dealing with it appropriately.
4 It is the classic way that confidential information is protected in the CAT. I have signed
5 many of these over the years. It is not -- as I said, it is a clear reminder of exactly what
6 you are supposed to be doing or not doing with the information.

7 **JUDGE WOLFFE:** Mr Barrett, any views?

8 **MR BARRETT:** My Lord, I think it is just adding paper and work to the order you are
9 going to make is going to literally get the parties (inaudible). With the best will in the
10 world I don't (inaudible).

11 **MR GIBSON:** That would be true of all confidentiality ring orders, sir, if that were the
12 case.

13 **JUDGE WOLFFE:** Well, indeed, but I think at this stage, Mr Gibson, I think the
14 proposal -- the order that I proposed a moment ago ought to suffice.

15 **MR GIBSON:** Very good, sir.

16 **JUDGE WOLFFE:** Clearly if there is any issue which arises, I have no doubt you will
17 bring it to my attention.

18 **MR GIBSON:** It has arisen and we want to avoid it arising again, but I won't press the
19 point any further, sir.

20 **JUDGE WOLFFE:** And, of course ... I think that's it. Good.

21 **MR GIBSON:** I think that's sufficient guidance, sir. We can take it away. Certainly
22 from my perspective, subject to anything Mr Barrett wanted to say, that was all we
23 wanted to raise with you for today, sir.

24 **JUDGE WOLFFE:** I am just waiting for Mr Barrett. Do you want to say anything more,
25 Mr Barrett?

26 **MR BARRETT:** No. Thank you, my Lord.

1 **MR GIBSON:** I just wanted to say thank you very much for your patience in listening
2 to my submissions this morning.

3 **JUDGE WOLFFE:** You don't need to thank me, Mr Gibson. It's what I am here to do.
4 Thank you both and I suppose one thing I should check before we go is we have the
5 dates for the substantive hearing in the diary. Is there anything else that either party
6 has identified that the Tribunal needs to do in order to facilitate the effective
7 consideration of this matter at that hearing.

8 **MR GIBSON:** I don't believe. So I am just going to turn my back.

9 **MR BARRETT:** For our part, no, my Lord.

10 **JUDGE WOLFFE:** So all the necessary procedural directions are already in place so
11 far as the parties are concerned.

12 **MR GIBSON:** Yes. If anything occurs to us as we move towards the hearing, no
13 doubt we will be astute to bring that to your attention on a timely basis.

14 **JUDGE WOLFFE:** Thank you. Mr Gibson, I hope you have a nice day on Monday.
15 Congratulations on the prospective elevation, if that's the right word.

16 **MR GIBSON:** To Mr Barrett's heights, sir.

17 **JUDGE WOLFFE:** Thank you very much.

18 **MR GIBSON:** Thank you very much.

19 **(3.02 pm)**

20 **(Hearing concluded)**

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Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
...	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?