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IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1771/7/7/26

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Thursday 16th July 2026

Before:
Mr Ben Tidswell

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Mr Jeremy Newman

Proposed Class Representative

V

Rightmove PLC & Others

Proposed Defendants

A P P E A R A N C E S

Oscar Schonfeld & Greg Adey (Instructed by Scott & Scott UK LLP) on behalf of Mr Jeremy Newman

Rob Williams KC & Ciar McAndrew (Instructed by Herbert Smith Freehills Kramer LLP and Linklaters LLP) on behalf of Rightmove PLC & Others

Digital Transcription by Epiq Europe Ltd
Lower Ground, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400
Email: ukclient@epiglobal.co.uk

(10.30 am)

Housekeeping

THE CHAIR: Good morning, everybody. I'm going to just do the live stream warning, Mr Williams.

Some of you are joining us from the livestream on our website, so I'll start with the customary warning. An official recording is being made and an authorised transcript will be produced. It is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings, and breach of that provision is punishable as contempt of court.

Yes, Mr Williams.

MR WILLIAMS: Good morning, sir. I appear with Ms McAndrew for Rightmove.

THE CHAIR: Yes.

MR WILLIAMS: Mr Schonfeld appears with Mr Adey for the proposed class representative, Mr Newman.

THE CHAIR: Yes.

MR WILLIAMS: This is the first CMC in these proceedings, and it's been listed to deal with one application, and I was going to go straight into that, unless there's anything you wanted to deal with.

THE CHAIR: Yes. There were some things about funding and insurance and the other proceedings, a possibility of a carriage dispute; so those are gone? Nothing to discuss about those today.

MR WILLIAMS: There were no updates on carriage.

THE CHAIR: Yes.

MR WILLIAMS: In relation to funding and documentation relating to funding, the

1 | correspondence is ongoing.

2 | THE CHAIR: Yes.

3 | MR WILLIAMS: There are no issues for today. Obviously, our response is due pretty

4 | soon, and to the extent that those issues aren't satisfactorily resolved in

5 | correspondence, we may need to come back to the Tribunal in fairly short order. But

6 | there's nothing effective today for you, sir.

7 | THE CHAIR: Just remind me. When is your response due?

8 | MR WILLIAMS: It's due a week on Wednesday, I think.

9 | THE CHAIR: Yes. Are you anticipating that there might be a need for disclosure of

10 | some sort; is that the point?

11 | MR WILLIAMS: I think I'm right in saying there is one document which we are told is

12 | coming, but it hasn't come yet, so there's a question as to whether we're going to need

13 | to ask for an order for that to be produced (overspeaking).

14 | THE CHAIR: Yes, I see.

15 | MR WILLIAMS: Then there is ongoing correspondence about other material too.

16 | THE CHAIR: Yes.

17 | MR WILLIAMS: But I think we recognise that to the extent we need an order from the

18 | Tribunal, it's going to have to happen pretty quickly, but we haven't reached that point

19 | yet.

20 | THE CHAIR: Sorry, just so I am clear about where we are going with this, are you

21 | anticipating that you might need an order before you file your response? That is --

22 | MR WILLIAMS: Yes, on at least some issues, sir. Yes. But, I mean, we're told some

23 | material is coming. We haven't had it yet.

24 | THE CHAIR: Yes. Okay. Well, I suppose we'll just have to deal with that if it comes.

25 | I mean, in a sense, it's a little bit unsatisfactory because it will have to presumably be

26 | dealt with on the papers.

1 MR WILLIAMS: Yes, we accept that. I think our position is that we obviously want to
2 give the proposed class representative every opportunity to deal with it voluntarily, and
3 some of these issues have come into focus later than we would have liked, because
4 of the way the correspondence has gone. But if we do need to come back to the
5 Tribunal, it will be no later than the end of this week, sir.

6 THE CHAIR: Yes. Thank you. Mr Schonfeld?

7 MR SCHONFELD: Sorry. Just on that point, sir.

8 THE CHAIR: Yes.

9 MR SCHONFELD: To put a little bit of flesh on the abstract bones the one document
10 that we are due to provide but haven't yet is the fully executed version of the deed of
11 priorities.

12 THE CHAIR: Yes.

13 MR SCHONFELD: And the only reason that hasn't been provided is it hasn't been
14 fully executed yet.

15 THE CHAIR: I see.

16 MR SCHONFELD: As soon as it is, they will have it, but it's not a question of us holding
17 on to something that we could give now.

18 There are further requests for material and information in the latest letter earlier this
19 week, which we'll respond to as quickly as we can, but they're not matters that we can
20 turn around in the course of a day or two. I would also note that I think in the
21 correspondence, Rightmove have taken the position -- perhaps fairly
22 realistically -- that if it needed to make an application for some of this further material,
23 it wouldn't get that material or have that application decided, necessarily, before its
24 response is filed. I think it reserved its position in those circumstances.

25 THE CHAIR: Yes. Do you anticipate with the further material -- maybe you can't
26 say -- but the material they have requested has been requested this week. Do you

1 anticipate there being much room for contention about it, or are you not able to say?

2 MR SCHONFELD: I confess, sir, when that letter came in a couple of days ago, I was
3 focused more on the disclosure application that's already been made, so I can't
4 comment on that.

5 THE CHAIR: Yes. Of course. Okay. Well, we'll just have to deal with it as it comes,
6 I guess.

7 Okay. Thank you. Yes, Mr Williams.

8
9 Issues

10 Submissions by MR WILLIAMS

11 MR WILLIAMS: Sir, in relation to the application for today, the key documents are
12 obviously the skeleton arguments. There's our application, which is at tab 8; the
13 amended draft order, which I'll show you in a few moments, at tab 10 of the core
14 bundle; and Mr Newman's response at tab 11. I assume you have had the chance to
15 look at those.

16 THE CHAIR: Yes.

17 MR WILLIAMS: You will have seen, sir, that the application concerns communications
18 or records of communications between Mr Newman and his team and proposed class
19 members; and those communications are relied on in the application for certification
20 to support a central part of the application, which is whether certification should be on
21 an opt-out basis rather than an opt-in basis. But they haven't been disclosed, because
22 they are said to be privileged.

23 The nub of the issue, we say, is that because the communications have been
24 materially relied on in support of the application for certification on that central issue,
25 privilege has been waived and assertions to the contrary are ineffective. We say the
26 material has to be disclosed now in advance of the application for certification to allow

1 | a fair determination of the case Mr Newman wants to advance in November. That's
2 | the point in a nutshell.

3 | THE CHAIR: Yes.

4 | MR WILLIAMS: There have been exchanges between the parties in an effort to narrow
5 | the issues, and I just want to bring you up to date on that, sir.

6 | You'll have seen that the order that we seek today is focused on communications with
7 | proposed class members, concerning whether they fear retaliation by Rightmove if
8 | they were to co-operate with Mr Newman, for example by providing a witness
9 | statement. I'll say immediately that Rightmove completely rejects the suggestion that
10 | it would retaliate against class members for cooperating with Mr Newman or for opting
11 | into the class, and that suggestion will be strongly contested at the certification
12 | hearing. Class members are obviously critical to Rightmove's business. Rightmove
13 | sees them as partners, and it would be shooting itself in the foot if it were to damage
14 | its relationship with its partners in the way that has been suggested. But the allegation
15 | has been made, and we need to meet it; and it's in that context that we are seeking
16 | disclosure of the evidence that the class representative has relied on, so that we can
17 | see and understand the basis for the allegation and respond to it.

18 | THE CHAIR: Yes. There's a reference in some of the material to jeopardising the
19 | commercial relationship or adverse commercial consequences. I don't know whether
20 | it's intended by the PCR to suggest that that's something less than retaliation or
21 | whether retaliation -- I think we're probably all going to use "retaliation" as a blanket
22 | term, aren't we?

23 | MR WILLIAMS: You make a good point, sir, and it has occurred to me in preparing
24 | for the hearing that our order -- this is obviously most important in the context of the
25 | order, and our order uses the language of retaliation.

26 | THE CHAIR: Yes.

1 | MR WILLIAMS: It did occur to me in preparing for this that actually, if there is going
2 | to be any ambiguity about what we're looking for, then it may be that the language of
3 | the order ought to capture that idea of implications for the commercial relationship. I'm
4 | using it by way of shorthand, but obviously what we're interested in is anything that
5 | goes to that part of the case that's been put forward.

6 | THE CHAIR: Yes. Well, I suppose in a way the order obviously needs to mirror where
7 | we get to, which is itself a reflection of what is being relied on and what are the
8 | consequences of the reliance. If you were successful, then one assumes that that
9 | would sort of find its way down the chain to reflect itself in the order, so hopefully that
10 | wouldn't be contentious.

11 | MR WILLIAMS: Obviously, the way this works is we're looking for the evidence that
12 | Mr Newman relies on, which is said to support his position. So in that sense, the
13 | incentive is on him to provide more rather than less. It's not like the ordinary order for
14 | disclosure, where you want to capture absolutely everything. If Mr Newman wants to
15 | rely on this material, he needs to put it forward, is our position. In that sense, the
16 | principle is clear, and the drafting ought to reflect the principle.

17 | In terms of the run-up to the hearing, there have been various proposals and
18 | counter-proposals. You've seen, I think, that the application originally concerned two
19 | broad categories of information. One was communications with proposed class
20 | members concerning the retaliation issue, which I just mentioned; and the other was
21 | communications which provided pricing information. We wrote last week and indicated
22 | that we would focus on the material where the need for disclosure was most pressing,
23 | which is the retaliation issue.

24 | THE CHAIR: Yes.

25 | MR WILLIAMS: In that letter, we also responded to a number of points that
26 | Mr Newman had made in his response to the application about the scope of the

1 disclosure that we were seeking, and we provided an amended order, which is the one
2 at tab 10. I think it might be worth just looking at that.

3 THE CHAIR: Yes.

4 MR WILLIAMS: I am going to just sort of highlight the changes, really, so we have got
5 them in mind.

6 First of all, the pricing provision is gone obviously.

7 THE CHAIR: Yes.

8 MR WILLIAMS: That's not there. Secondly, just to highlight one point which is
9 important for these purposes, 1(a) seeks any document, any form of communications.

10 The second line says, "which was in existence at the point at which the CPO
11 application was filed". That's one point that we were asked to clarify, and we have
12 clarified that in that language.

13 THE CHAIR: Yes.

14 MR WILLIAMS: The next --

15 THE CHAIR: That's the point about not seeking material at the moment beyond the
16 date of --

17 MR WILLIAMS: Beyond the basis of the application.

18 THE CHAIR: Yes.

19 MR WILLIAMS: Then reading on, it says, "That is relevant to whether the PCM feared
20 retaliation". That is material both supporting a fear of retaliation, that says there was
21 no fear of retaliation, and everything in between...material that's relevant to the issue
22 that we're interested in.

23 THE CHAIR: Yes, but just so, but if, for example, there was a file note recording
24 a conversation in which no mention had been made of retaliation at all, would that fall
25 within this?

26 Because of course --

1 | MR WILLIAMS: If the question wasn't asked and nothing was said about it --

2 | THE CHAIR: Yes.

3 | MR WILLIAMS: -- then no, I think we've accepted that a total nil return on the topic

4 | doesn't go to the issue.

5 | THE CHAIR: Yes.

6 | MR WILLIAMS: But there is an issue which I'll come to in a minute about how best to

7 | capture material.

8 | THE CHAIR: Yes.

9 | MR WILLIAMS: And then if you read on, (b) is material that is relevant to the number

10 | or proportion of class members that may fear retaliation. The position in relation to

11 | that limb of the application has moved on a bit, and I'm going to update you in a minute

12 | about that.

13 | THE CHAIR: Yes. I wasn't completely sure I understood. Well, I understand what it

14 | says, but I wasn't sure I understood the relationship between that and 1(a). It wasn't

15 | entirely clear to me why things in 1(b) wouldn't already be captured in 1(a).

16 | MR WILLIAMS: Well, I think the way I'm going to address the issue --

17 | THE CHAIR: -- solves that problem, yes.

18 | MR WILLIAMS: Paragraph 2 is another point of clarification that was sought by the

19 | class representative about whether we were seeking internal discussion of the issue --

20 | THE CHAIR: Yes.

21 | MR WILLIAMS: -- or whether we were just seeking the records of the communications,

22 | and we make that clear in the order. Since we provided that, the parties have

23 | continued to correspond. I don't know if you've had a chance to see what happened.

24 | THE CHAIR: I haven't seen anything since the bundles and the skeletons.

25 | MR WILLIAMS: Yes, well, let me update you, sir. Mr Newman made two proposals

26 | for disclosure, one of which was touched upon in the skeleton arguments and one of

1 | which came afterwards. The position, as we understand it, is that both of those offers
2 | were made on a sort of "use it or lose it" basis. So by that I mean that Mr Newman
3 | offered some of the disclosure that he had resisted, so the issues appeared on Friday
4 | to be narrowing. But because we didn't accept the offer and instead offered a counter
5 | proposal, that offer came off the table on Friday and we go back to square one.

6 | Then that happened again on Tuesday in the sense that we got an offer again on
7 | Tuesday night, which took matters a bit further, but because we didn't accept that offer
8 | and made a counterproposal, that offer is off the table as well. So as I stand here
9 | today, I need to argue the whole application, including the aspects that Mr Newman
10 | has previously offered now twice. That's where we are.

11 | I don't know whether Mr Schonfeld's instructions are that we are back to square one.
12 | What I was going to do is explain the extent of the differences. If one starts from the
13 | high point of the class representative's offer. But I don't know whether you want to
14 | hear from Mr Schonfeld at this point.

15 | THE CHAIR: I don't know whether Mr Schonfeld wants to say anything. It looks like
16 | probably not, from the look of things.

17 | MR SCHONFELD: I'm happy to confirm the position, which was: the class
18 | representative made an offer on the pragmatic basis that it would dispose of the
19 | application and avoid the need to incur the costs and time of this hearing. He made
20 | that clear in the letter in which he made the first offer. Then there was a further
21 | exchange where it appeared there had been a passing of ships about what the order
22 | was intended to mean. We made a second offer on the Tuesday on the same basis
23 | that it was only being made as a compromise for the application, and strictly without
24 | prejudice to our position that Rightmove is not entitled to any of the documents sought
25 | in the application. So, yes, we are back to square one, as my learned friend puts it,
26 | and we made that very, very plain. Now that we are here and have all incurred the

1 | costs and time, they do need to make their application.

2 | THE CHAIR: Yes.

3 | MR WILLIAMS: Well, that's very clear. I still think it's helpful for you to understand
4 | where the parties got to and where the differences were, because I think it is
5 | illuminating, if I may say so.

6 | So the first difference was in paragraph 1(a), and as I said, our order is for documents
7 | that are relevant to whether class members feared retaliation. (Pause)

8 | Mr Newman came back in on Tuesday and said, "Well, what we're prepared to offer",
9 | at that point was material that is evidence of a fear of retaliation, and material that is
10 | evidence that there was no fear of retaliation to the two poles. But he wasn't prepared
11 | to accede at that point to this order, which is an order for disclosure of material that is
12 | relevant to whether proposed class representatives feared retaliation.

13 | THE CHAIR: I'm sorry, you've lost me there. So just explain the difference.

14 | MR WILLIAMS: He wanted two specific orders.

15 | THE CHAIR: Yes.

16 | MR WILLIAMS: He was prepared to agree at that point.

17 | THE CHAIR: Yes.

18 | MR WILLIAMS: Two specific orders: one was an order under which he'd be required
19 | to produce evidence that a proposed class representative did fear retaliation.

20 | THE CHAIR: Yes.

21 | MR WILLIAMS: Positive evidence, and secondly --

22 | THE CHAIR: Proposed class members?

23 | MR WILLIAMS: Proposed class members.

24 | THE CHAIR: Yes.

25 | MR WILLIAMS: Yes. And secondly, evidence that proposed class members didn't
26 | fear retaliation.

1 THE CHAIR: Yes.

2 MR WILLIAMS: So it was the positive and the negative.

3 THE CHAIR: Yes.

4 MR WILLIAMS: But he wasn't prepared to agree to an order in the terms that we
5 proposed, which was disclosure of evidence relevant to the issue.

6 THE CHAIR: Yes. So just explain to me what, for example: where there might have
7 been a discussion with a proposed class member who talked about it? What would
8 fall in that category?

9 MR WILLIAMS: We don't know, but I think our position is broadly that the issue is
10 capable of having shades of grey. We don't know what views class members might
11 have expressed between the two clear poles of, "Yes, I do fear retaliation" and, "No,
12 I don't fear retaliation". We want to understand the shape and quality of the evidence
13 as a whole.

14 I have to say, we don't understand really why this should be a bone of contention. We
15 do have a concern that if the order were in the shape that the proposed class
16 representative proposed on Tuesday, that there would be something that would fall
17 between the cracks that would be of interest to us, and we really can't see a principled
18 basis on which we shouldn't have an order in the terms that we propose.

19 Once one accepts that one's going to have disclosure of positive evidence and
20 negative evidence, then clearly it seems to us you ought to have the spectrum of the
21 evidence, and I can't see the principled basis on which you ought to only get the
22 evidence if it fits clearly into one of those two boxes. That was a very discrete
23 difference on the form of order, it seemed to us as at Tuesday. Anyway, that offer is
24 off the table now. That was the position on Tuesday.

25 The second issue was a more significant issue of principle, which was that
26 Mr Newman said that the disclosure would have to be anonymised – I think that it

1 | would have to be anonymised and then put into a confidentiality ring as well. So,
2 | I mean, I have to say we don't quite understand why, if it's anonymised, why it should
3 | go into confidentiality in any way. Anyway, the contention that the disclosure would
4 | need to be anonymised -- that is a clear point of difference which I'll need to address.
5 | Our short answer to that, you've probably seen from our skeleton, is that the disclosure
6 | is going to go into a confidentiality ring comprised of lawyers only. So concerns about
7 | the consequences of the disclosure of the class members' identities -- there's really
8 | nothing to that concern because the information is only going to be seen by lawyers
9 | who've given undertakings to the Tribunal. We say, clearly, we need information about
10 | the identity of the class members to test the evidence and to put it in context. I'm going
11 | to come back to that point in due course.

12 | Then as far as paragraph 1(b) is concerned, the parties were really quite close
13 | together on Tuesday. Mr Newman had proposed to address our concern about the
14 | number and proportion of class members that feared retaliation by providing
15 | information rather than documents. I think this might help with the question you asked
16 | me, sir.

17 | The information he was prepared to provide was the number of proposed class
18 | members that he'd had interactions with. We thought the provision of information
19 | rather than documents was a constructive way to deal with this part of the case. We
20 | asked for information about the number of class members that he'd had interactions
21 | with to be supplemented by information about the number of persons he'd actually
22 | specifically asked about the fear of retaliation. It's not just the number of people he
23 | spoke to generally, but the number of people who spoke to about this issue. That
24 | seemed to us to be a fairly small expansion of what had been offered, but that was
25 | resisted for reasons that we don't actually understand.

26 | What we said in our response to that offer was that if this was going to be dealt with

1 | through information rather than documents, it would need to be under a statement of
2 | truth.

3 | If we had been starting from Mr Newman's proposal of Tuesday night, the differences
4 | between us would have been quite narrow. For our part, we stand by the
5 | counterproposal we made. We would be content, in particular for paragraph 1(b) to
6 | be dealt with in the way that I've just described, which is the provision of information,
7 | rather than by the provision of documents. We think that's a constructive way forward,
8 | but I've told you where the parties got to on that.

9 | THE CHAIR: Yes. Did you make a counter offer after Tuesday as well?

10 | MR WILLIAMS: Well, actually, the proposal I've just made about accepting
11 | information -- we made that proposal in response to the first offer. We got that offer
12 | on Friday -- the offer of the number of class members that Mr Newman had had
13 | interactions with. When we wrote back on Monday, we said, "Well, we'd be happy to
14 | accept that plus information about the number of people you asked about the fear of
15 | retaliation". Then we reiterated that offer again when we replied to the offer of
16 | Tuesday. So since Monday, we've been prepared to accept information under 1(b)
17 | instead of documents.

18 | THE CHAIR: In relation to 1(a), I mean, there really isn't a counter offer there; they've
19 | actually moved their position and you want them to move a bit further, is broadly the
20 | right description, isn't it?

21 | MR WILLIAMS: You might have seen this, but on Friday, they offered 1(a). They
22 | actually offered to accede to 1(a) on the condition of anonymity.

23 | THE CHAIR: Yes.

24 | MR WILLIAMS: And we said, "Okay, well, there's an issue about anonymity, but great.
25 | You'll agree to 1(a) and that's going to include information going in both directions".
26 | And they wrote back, "No, it isn't actually, it's only going to be evidence they fear of

1 retaliation, not evidence that goes in the other direction".

2 Now, we actually don't understand how they could have thought that was the correct
3 way to read paragraph 1(a), but anyway, that position was then overtaken, because
4 on Tuesday they wrote back and said they would agree to the two separate orders, as
5 in evidence that shows a fear, evidence that says that there was no fear, but not the
6 form of order --

7 THE CHAIR: Yes, thank you.

8 MR WILLIAMS: So just before I make my submissions, there were just three other
9 points to make by way of overall framing. The first is that, as the Tribunal has seen,
10 Mr Newman says that the Tribunal should consider the issues of waiver and discretion
11 separately and discreetly. In fact, his submission is that the Tribunal can and should
12 deal with this question first. We obviously accept that there are, formally, two
13 questions, but in our submission, the two issues run together, because once
14 Mr Newman has relied on the content of the communications in support of his case, in
15 such a way as to create a waiver of privilege, the communications then do need to be
16 disclosed as a matter of fairness, to see the basis of the case advanced. That's the
17 way that the principles of waiver work in this context, and I'll show you that.

18 THE CHAIR: Just so I understand what you're saying; I think we're all using the
19 judgment from PCP v Barclays as sort of the template for that. I don't think there's any
20 real dispute that that's the way to look at it. I mean, I think it's probably quite a helpful
21 position if that's the case, because otherwise it's very, very complicated, isn't it? But
22 if we all work on the basis that's probably the lens we are looking at it through, then
23 you are saying that the question of fairness is actually just inherent in the question of
24 whether or not there has been a waiver, because you have to look at reliance and the
25 extent of the reliance and the consequences for the case.

26 MR WILLIAMS: Exactly.

1 THE CHAIR: Yes.

2 MR WILLIAMS: The submission I'll be making is: PCP says you need to look at
3 reliance, purpose and context. If you've answered those questions in such a way that
4 there's a waiver, then it necessarily follows that the material needs to be disclosed as
5 a matter of fairness.

6 THE CHAIR: Yes. I think you're saying -- and I think this is probably echoed in some
7 earlier case law -- that there's no general question of fairness here?

8 MR WILLIAMS: No.

9 THE CHAIR: Once one has reached the view that there is a waiver, then it is binary,
10 isn't it? It is what it is, isn't it?

11 MR WILLIAMS: Yes. At that point, we're entitled to the disclosure. Exactly. That's
12 right.

13 THE CHAIR: Yes.

14 MR WILLIAMS: Well, I suppose formally, there's a question of discretion in relation to
15 disclosure, as there is in any application for disclosure. But of course, all of the
16 conclusions that you've drawn en route to finding waiver then tip straight into the
17 exercise of discretion. In our submission, the case for disclosure is overwhelming at
18 that point.

19 THE CHAIR: Yes. I understand. That's helpful. Thank you.

20 MR WILLIAMS: That's the first framing point.

21 The second point, I think, to some extent I've touched on; which is that Mr Newman
22 hasn't only relied on specific communications with particular proposed class members
23 in support of an overall position. He has given evidence about the prevalence of the
24 concerns that were expressed by the proposed class members he spoke to, and then
25 he builds on that to advance a case about the likely position across the class. That's
26 what underpins the paragraph 1(b) issue. We need disclosure or information to

1 | understand the position on that issue of prevalence, and I'll make my submissions
2 | about that.

3 | But in my submission, what you see in the skeleton argument is my learned friend
4 | really walking away from Mr Newman's evidence about this, but we put our application
5 | on the way it's put in the evidence.

6 | THE CHAIR: I'm still a little bit unsure as to why, once -- if you've got A, which is all
7 | the material in existence, that that is relevant to the fear of retaliation, why you haven't
8 | already got B. I mean, I take the point that it's very helpful if the proposed class
9 | representative wants to turn up and give you a list of how many people they've spoken
10 | to and how many raised it, but I just don't quite understand what B brings to the party.

11 | MR WILLIAMS: Well, when I show you the way Mr Newman puts it in his evidence,
12 | you'll see he says the vast majority of proposed class members that he spoke to
13 | express this concern. If what we were to get, let's say -- I'll make up some numbers;
14 | I'm not suggesting this is the position -- but if what we got were: five people who had
15 | expressed a concern said they did fear retaliation; three people who said they didn't
16 | fear retaliation; there were another five people that weren't even asked about the
17 | issue; then we would say, "Well, you're saying the vast majority of --"

18 | THE CHAIR: I see. Yes.

19 | MR WILLIAMS: Can you say the vast majority, and can you then make a submission
20 | about the number of people within the class as a whole? It's just about getting the full
21 | picture, really, in terms of --

22 | THE CHAIR: Yes.

23 | MR WILLIAMS: That's why I put it in terms of the prevalence.

24 | THE CHAIR: Yes, I see. So --

25 | MR WILLIAMS: I think it would be clearer when you see the evidence.

26 | THE CHAIR: No. I'll just make sure I've got that. I think, when we talked about A, it

1 | was plain that you weren't looking for communications in which the subject wasn't
2 | raised.

3 | MR WILLIAMS: That's right.

4 | THE CHAIR: Therefore, it's necessary when you get to B to understand how many
5 | other people there were, because you don't get that through A. I see. That's the point.

6 | MR WILLIAMS: None of this is to suggest that the position has been misrepresented.
7 | I mean, we just don't know. We just don't know how the picture fits together. When
8 | I show you the evidence, you'll see that actually there are differences of emphasis
9 | between the two witness statements.

10 | THE CHAIR: Yes.

11 | MR WILLIAMS: So it's quite hard for us to really get a handle on what the position is,
12 | from what I've said.

13 | THE CHAIR: So in a way, B is actually more like a request for information than it is
14 | for disclosure.

15 | MR WILLIAMS: I think it's turned into that, and we accept that on reflection, it is going
16 | to be a more direct way to get the information, because originally we said we need to
17 | see a broader set of communications in order to put this in context, to see what the
18 | prevalence of the concern is. Then the PCR made a fair point, which said, "Well, it's
19 | not proportionate for you to see communications which don't deal with this issue at
20 | all".

21 | THE CHAIR: Yes.

22 | MR WILLIAMS: Obviously, if we saw everything, if we saw the universe of material,
23 | we could make our own assessment of prevalence and make submissions about that.
24 | But if we're not going to get everything, because it's not on point, then you need to find
25 | another way of allowing us to test that prevalence issue.

26 | THE CHAIR: Yes. I see.

1 MR WILLIAMS: That's the second sort of framing point.

2 The third point is: we've been clear, and I hope you've seen from our skeleton
3 argument, that Mr Newman has an alternative to disclosure. He has the option to
4 withdraw the case that he's advanced based on the communications with class
5 members. It appeared to us last week that Mr Newman wasn't taking that path, but
6 he was instead offering disclosure so that he can maintain this part of his case. But if
7 the Tribunal orders Mr Newman to go further than he's prepared to do, for example,
8 on anonymity, then it is still an option for him to withdraw this part of his case, to
9 withdraw the retaliation allegation. We're not going to insist on disclosure and say,
10 "Well, it's too late; you've waived it now", if he doesn't pursue that part of the case.
11 But the objection is to him having his cake and eating it, basically.

12 THE CHAIR: I think we'll come back to this, because when we look at what's been
13 said and what the reliance is, obviously one has to then look at the precise wording
14 and the particular specific references to conversations or whatever happens to be
15 communications. But if, for example, the statement of case, the claim form and the
16 witness statements had just simply said that Mr Newman had said, "Look, from my
17 general experience of business, I think there might be a chilling effect and a fear of
18 retaliation which would kill the opt-in case", are you saying he could plead something
19 like that, or what does it mean when you say he has got to withdraw his case? How
20 far does he have to withdraw it?

21 MR WILLIAMS: Well, I think what we say at the moment is that the allegation is
22 advanced based on evidence, and if one takes the evidence away, there's no basis
23 for the contention. It's difficult to see, we say, how the way it's been put by Mr Newman
24 can stand without the supporting evidence.

25 THE CHAIR: Yes.

26 MR WILLIAMS: That's the way we put it. Obviously, at a minimum, the evidence

1 | needs to fall away and so on. But we say, actually, he's built his case up on the basis
2 | of that evidence and there's nothing to it without the evidence.

3 | THE CHAIR: Yes. I suppose the PCR skeleton identifies some other cases where
4 | the point hasn't really been tested at all. It's just been said, and it's been given
5 | whatever weight the Tribunal thought was appropriate. I suppose there is a sort of
6 | general inference that people don't think that suing their commercial counterparts is
7 | very good for business. Beyond that, I think it will be very difficult to draw any sort of
8 | inference without, as you say, evidence. But you could draw that inference, couldn't
9 | you, without --

10 | MR WILLIAMS: In at least one of the cases, there was other material in the public
11 | domain to support the position. In one of the cases, it's really quite hard to see what
12 | the nature of the evidence was. In another case, it's not clear whether there was any
13 | basis for it. Certainly, our position is that the way the allegation has been put in this
14 | case is built up on the basis of evidence, and one can't just -- it would be a bare
15 | assertion, actually. The way one took away the evidence, it would be a bare assertion.

16 | THE CHAIR: Yes.

17 | MR WILLIAMS: Yes. With that introduction, I'd like to make my submissions on the
18 | law relating to waiver, which I hope I can take reasonably quickly if you've seen the
19 | way we put it in the skeleton.

20 | THE CHAIR: Yes.

21 | MR WILLIAMS: I was going to start with Malek & Matthews, which is tab 24 of the
22 | authorities bundle, which is quoted in our application, but I will just get it out because
23 | it is illuminating, in my submission. It's page 522.

24 | THE CHAIR: Yes.

25 | MR WILLIAMS: In fact, 16-23 starts off talking about evidence needing to be put
26 | before the court, statements of truth, and so on. The general rule -- you can probably

1 | read for yourself, sir, down to footnote 162. (Pause)

2 | Two points on this. First of all, you can see straight away why it is we say that the

3 | arguments on waiver and disclosure go together, because once the material has been

4 | put in play:

5 | "... the opposite party and the court must have the opportunity of satisfying themselves

6 | that what the party has chosen to release from privilege represents the whole of the

7 | material relevant to the issue in question ..."

8 | And so on. The case for disclosure follows from the waiver.

9 | The second point is that the test, or the guiding idea, is deploying, relying on the

10 | content of the evidence. As one sees towards the end, it says, the test is whether the

11 | contents of the document are being relied on. Here, we would say it's the content of

12 | the communications.

13 | Then towards the end of that passage, before footnote 162, it says, "In such a case,

14 | provided the maker does not quote the contents or summarise them". But a summary

15 | of the content is enough.

16 | THE CHAIR: Just on the first of those points, waiver and disclosure going together.

17 | I mean, this is obviously text on disclosure, and it's talking about disclosure of

18 | privileged documents, waiver and privileged documents. Your case, it actually doesn't

19 | start there, does it?

20 | MR WILLIAMS: No.

21 | THE CHAIR: It starts with the idea that the communications --

22 | MR WILLIAMS: It's waiver of privilege in the communications, and then documents

23 | relevant to the communications become disclosable. So there is one additional sort

24 | of step in the logic.

25 | THE CHAIR: I don't know whether that's unusual, but it's certainly not what you see

26 | in most of these cases that I've looked at, where you start with the CPR 31.14, so here

1 | rule 61, and that is sort of the first condition of entry into the whole discussion. I think
2 | you're saying that's not a necessary condition.

3 | MR WILLIAMS: It's not a necessary condition. I think we could have put it another
4 | way, which is -- I don't know if you saw the second SciPharm case --

5 | THE CHAIR: Yes.

6 | MR WILLIAMS: -- which is where the judge said, "Well, it's an obvious inference that
7 | there are documents that exist which record the communications. They're bound to
8 | be. People don't carry this stuff around in their heads, and therefore you have waived
9 | privilege in those documents". So, I mean, we could have put it in that way.

10 | THE CHAIR: Yes.

11 | MR WILLIAMS: I don't think we would have got to a different point.

12 | THE CHAIR: Yes, I mean, really the only question -- and obviously I'll wait for what
13 | Mr Schonfeld says about it -- is whether you are missing any necessary link in the
14 | analysis. Bearing in mind that it's a serious thing to do to waive find a waiver of
15 | privilege, is that requirement in those cases, where reliance is based on 31.14, is that
16 | part of the protection for the so-called waiving party, and therefore, are you ducking
17 | that? I think you're not ducking it, because you say one way or another, you've got to
18 | deal with it.

19 | MR WILLIAMS: I'm not ducking it. Clearly the privilege is in the communications.

20 | THE CHAIR: Yes.

21 | MR WILLIAMS: I mean, that's clearly where it is. We could have drafted the
22 | application around it, but we don't need to. The privilege is in the communications.
23 | And if you waive the privilege, then documents that are relevant to communications
24 | become disclosable, in other words --

25 | THE CHAIR: Because it's a bit like, you've got cases like Marubeni, haven't you,
26 | where they refer to the legal advice.

1 | MR WILLIAMS: Yes.

2 | THE CHAIR: Actually, maybe it's not a good example, but there are so many cases.

3 | MR WILLIAMS: One can waive privilege in advice without referring to a document.

4 | THE CHAIR: Yes, exactly. Where you've got references to parties taking legal advice,
5 | and quite a lot of the discussion about what a lawyer has said and what hasn't -- all
6 | that discussion about content and so on -- a lot of it really is at a higher level than
7 | saying, "There is a written document".

8 | MR WILLIAMS: Exactly.

9 | THE CHAIR: So in a sense, I don't think -- but we are a little bit further away from that
10 | here. You get into the whole question of inference. I don't know whether you accept
11 | it as a necessary condition that, you have to infer that there is a document that exists;
12 | do you accept that?

13 | MR WILLIAMS: Well, in order to get disclosure then the document should exist. In
14 | the PCP case that we'll see in a few minutes, some of the material was referred to in
15 | openings, some of it was referred to in witness statements.

16 | THE CHAIR: Yes.

17 | MR WILLIAMS: So some of it could have come through the CPR 31.14, documents
18 | referred to in the witness statements. Some of it was simply material that was referred
19 | to in opening, so a different route. Some of it just said, "We were advised by lawyers
20 | throughout". You're going to see this, "We were advised by lawyers throughout".

21 | THE CHAIR: Yes.

22 | MR WILLIAMS: The point was that they waived privilege in the advice.

23 | THE CHAIR: Yes.

24 | MR WILLIAMS: And then documents that went to the advice became disclosable.
25 | That's really the way we put it.

26 | THE CHAIR: Yes. Okay, fine. Let's see what we get when we get to PCP.

1 | MR WILLIAMS: Okay. If you then see, after footnote 162 in Malek, it then says:
2 | "However, the application of the content/ effect distinction as a means of determining
3 | whether there's a waiver or not, cannot be applied mechanistically." [as read]
4 | I'm now going to -- this is now PCP, paragraph 11. That's pointing to the modern
5 | approach to the issue in PCP.
6 | THE CHAIR: Yes.
7 | MR WILLIAMS: Can I say, sir, I mean, we were down for half a day with half a day in
8 | reserve. I'm not going quickly.
9 | THE CHAIR: That's probably my fault, I expect.
10 | MR WILLIAMS: No, no, I'm not complaining about that. I want to answer your
11 | questions, but are you happy for me to move at this pace?
12 | THE CHAIR: Yes.
13 | MR WILLIAMS: And if we're still here after lunch, we're still here.
14 | THE CHAIR: Yes, absolutely. As long as everybody else can manage that, I'm
15 | certainly available.
16 | MR WILLIAMS: Yes, I'm grateful.
17 | Okay, so tab 11, this is PCP.
18 | THE CHAIR: Yes.
19 | MR WILLIAMS: I don't know if you've had a chance to look at it?
20 | THE CHAIR: Yes, I have.
21 | MR WILLIAMS: So paragraphs 2 to 6 provide the context. This is a claim against
22 | Barclays bank on the basis that it had entered into sham arrangements with a group
23 | of persons who are referred to as "the Qataris", which include the state of Qatar, and
24 | misled PCP that they were getting the same deal as the Qataris.
25 | Barclays' witnesses were said to have referred to legal advice in their statements;
26 | there were references to legal advice in their opening and so on and so forth. This

1 | was all said to give rise to a waiver.

2 | You see paragraph 21, for example:

3 | "I shall deal first with Barclays' written opening." [as read]

4 | And then there are extracts from the opening paragraphs. Then just another example,

5 | at paragraph 33. This is an extract from the witness statement of Mr Jenkins:

6 | "I understand that Barclays has not waived privilege over the legal advice sought,

7 | received [and so on]. Without any waiver of privilege by me, I can say that I took

8 | comfort from and adhered to the lawyers' advice in these matters."

9 | So referring generically to the advice rather than specific documents. In fact, I mean,

10 | I just observe in passing -- this is weaker than the facts of our case, because here the

11 | witness is alluding to there being supporting legal advice, rather than saying what the

12 | content of the advice was.

13 | Now, moving through, you've seen the principles quoted in various places. I won't

14 | read it all out to you, but the two fundamental questions that we identify in our skeleton

15 | argument are at 47.4.

16 | "Has there been a waiver of privilege? If so, is it appropriate to order a production of

17 | privileged documents other than those to which reference has been made, which was

18 | the foundation for waiver?" [as read]

19 | And 5 explains that the concept of fairness underpins the rationale because of

20 | concerns about creating a partial picture.

21 | That's 5. And 6 is the point you've already made, sir, that the test doesn't sort of

22 | collapse into sort of umbrella test of unfairness; there is a set of principles.

23 | Paragraph 48 says:

24 | "It is not easy to find a succinct and clear definition when waiver arises", other than,

25 | as we saw in Malek & Matthews, "that the material was deployed as part of the case."

26 | [as read]

1 And we do emphasise the words in the final three lines:

2 "The party waiving must be relying on that reference in some way to support or
3 advance his case on an issue the court has to decide." [as read]

4 That's very much part of the way that we put the application.

5 50 refers to the vexed question of the distinction between the content and the effect of
6 advice. There follows a discussion of the authorities going to that question. Where
7 we get to is that PCP tries to come up with a clearer way of framing that issue, which
8 we see in paragraph 60. Specifically, it rejects a mechanistic application of the
9 distinction between content and effect. You see that in paragraph 55 and 56. That's
10 where the judge says one can't approach the distinction between content and effect
11 mechanistically.

12 The principles, which the judge articulates in lieu of that distinction, or as a guide on
13 how to apply that distinction, are in paragraph 60. Four lines down, he says:

14 "In my judgment, the correct approach to applying the content effect distinction is this:
15 the application of the content effect distinction as a means of determining whether
16 there's been a waiver or not cannot be applied mechanistically; it has to be viewed
17 through the prism of: (a) whether there is any reliance on the privileged material
18 adverted to; (b) what the purpose of that reliance is; (c) the particular context of the
19 case in question." [as read]

20 So I'm going to come back to those three factors in this case.

21 Then just taking it quickly from there, 62 deals with the case of Brennan, which my
22 learned friends cited. The only point I want to make about that is I don't think Brennan
23 suggests a different approach in principle, certainly not to where the law has got to
24 now. Certainly, it isn't authority for the proposition that this all just collapses into
25 a question of fairness.

26 Finally here, 79 quotes Mr Justice Males in *Mid-East Sales*. One again sees towards

1 | the end of the quotation from that case, bottom of page 165:
2 | "The overriding principle is one of fairness, that if the content of legal advice is
3 | deployed or relied on, in order to advance a party's case, fairness may require the
4 | specific advice to be made available so that the court can properly assess that." [as
5 | read]
6 | And that's very much the way we make the application.
7 | Just for your note, 85 and 86 then deal with the second fundamental question, which
8 | is whether there ought to be an order for production of further documents. You've got
9 | the submission about that, that it's cherry picking, ensuring that the court doesn't have
10 | a partial picture. So that's what I wanted to say about PCP.
11 | THE CHAIR: Yes. I mean, it's not been considered at any high level, has it, since
12 | then? I think there are a few cases which have picked it up, but it is at the moment
13 | still just a view at High Court level, isn't it?
14 | MR WILLIAMS: It is, yes. That's true.
15 | THE CHAIR: Yes. I mean, I'm not suggesting that it's not a very good view, and --
16 | MR WILLIAMS: No.
17 | THE CHAIR: -- I think the parties are accepting it's the modern way, if you like, of
18 | looking at it.
19 | MR WILLIAMS: I think that's the way we both put it, I agree.
20 | THE CHAIR: Yes.
21 | MR WILLIAMS: In fact, it's then picked up in the other case I was going to go to, which
22 | is Kyla Shipping.
23 | THE CHAIR: Yes.
24 | MR WILLIAMS: Which is a decision of Charles Hollander sitting as a deputy judge.
25 | He's obviously a recognised expert in the field. This is tab 13.
26 | THE CHAIR: Yes.

1 | MR WILLIAMS: So if you see paragraph 1.

2 | THE CHAIR: I have read this case as well.

3 | MR WILLIAMS: That's helpful, so I'm just going to pick up paragraph 1. There's

4 | a challenge to privilege, and they also contend there's been a waiver of privilege

5 | (inaudible) and disclosure of "additional materials referred to in the witness statement".

6 | So the application is put on the basis that the materials are referred to in the witness

7 | statements.

8 | THE CHAIR: Yes.

9 | MR WILLIAMS: A slightly different way than we put our application. I won't take you

10 | through the facts.

11 | THE CHAIR: I've seen it, yes.

12 | MR WILLIAMS: But the context is that the claimant's solicitor gave a witness

13 | statement in the context of the issue of the proceedings; full and frank disclosure; gave

14 | evidence about how the claim came to light; and referred to the fact that they'd taken

15 | advice from an expert. I won't ask you to read them because obviously you've seen

16 | them, on page 186, paragraphs 165 and 166.

17 | Now, those are the key paragraphs of the witness statement. That's what the judge

18 | refers back to when he disposes of this part of the case. He says these paragraphs

19 | don't contain any reference to documents.

20 | There's discussion of whether there was litigation privilege. You'll have seen -- the

21 | judge wasn't satisfied that the claims of privilege had been made out, and he asked

22 | the solicitor to go back and do that again. Waiver is discussed from paragraph 40.

23 | We see much of the same case law cited, including PCP itself, which is cited at 43.

24 | I wanted to pick up paragraph 46, which we do strongly rely on. It says:

25 | "The case law speaks of 'fairness'. Fairness is often a concept which includes

26 | a discretion for the court. But I do not think there is a discretion here. Fairness in this

1 | context is a fact-specific judgment for the court. On the one hand, where one party
2 | relies on privileged material, it is only fair to the other party that [it] has the opportunity
3 | to satisfy itself that what has been disclosed is not a partial account."

4 | That's essentially the way that we put it, we rely strongly on that passage in Kyla.

5 | If one then looks through, paragraph 48 refers to the judgment of
6 | Judge Havelock-Allan in MAC Hotels, and effectively there the judge makes the point
7 | about how sometimes litigants face a difficult choice because they want to make out
8 | a proposition, but in order to make out a proposition, they would need to potentially
9 | waive privilege and (inaudible). He essentially says, well, sometimes the parties need
10 | to make these decisions, is the way he puts it. He doesn't use the phrase, "You can't
11 | have your cake and eat it", but that's essentially going to that point.

12 | Then the submissions on waiver are at 50 and 51. If you look in particular at
13 | paragraph 50, which is the way the application was put, it says at the end of the third
14 | line, "The references at 165 and 166, cited above, involve waiver of privilege by relying
15 | on the expert report and underlying documents there referred to". That's how the
16 | application was put there.

17 | Then the judge disposes of the application fairly briefly in paragraph 52. He explains
18 | in 52(a) that the purpose of referring to the investigations that were carried out -- the
19 | context was different from (inaudible) case. It was the same sort of case as that. He
20 | says, importantly, in (b):

21 | "Read in this light, the purpose of the explanation at [165] and [166] is to explain the
22 | circumstances surrounding the instruction of the experts and the steps leading up to
23 | the discovery in general terms".

24 | And then he explains the expert report and the general description of the steps that
25 | were followed.

26 | Then following on from that, as you can see:

1 | "There is not any sense a reliance on any particular document by Mr Buss. Indeed,
2 | he does not even refer expressly to documents, merely does so in general terms."
3 | Then he essentially says, he goes through the various steps that were taken
4 | (inaudible) pricing fraud.
5 | The basis for the ruling is that the claimant in that case wasn't relying on the documents
6 | or their content. He was just referring to them as part of a process, a series of steps
7 | that were taken. What the judge clearly isn't saying here is that reference to specific
8 | documents or reliance on particular documents is a necessary part of the test for
9 | waiver. He is just dealing with the way the application was put, as I showed you in
10 | paragraph 50.
11 | THE CHAIR: Yes. I think it is probably still the case that the way you were doing it is
12 | a bit unusual. I'm not saying it doesn't work. It's just a bit unusual, isn't it? I mean,
13 | normally you would see people making the connection between -- maybe you say this
14 | is what you are doing -- but whatever has been referred to in the statement, and
15 | making that connection with the document. Then that's the reliance on that document
16 | that is actually the focus of the enquiry that is set out in PCP and the outcome.
17 | MR WILLIAMS: I don't know if that was the case in PCP itself, though, was it?
18 | Because they were referring to the advice in (inaudible), and I showed you passages.
19 | I could go back to it (overspeaking).
20 | THE CHAIR: No, no, I don't think (overspeaking).
21 | MR WILLIAMS: The waiver in that case referred to relying on the content of the
22 | advice.
23 | THE CHAIR: Yes. Well, it was put in different ways, wasn't it? Sometimes it was put
24 | in very general terms, sometimes more specific, and certainly there are aspects where
25 | in general terms ... But I suppose the reason for making the point is that when you're
26 | talking about legal advice, it's pretty obvious that there's going to be something in

1 | writing. There will be a document. Now, here you might say it is also reasonably
2 | obvious that if the PCR has spoken to potential class members, then someone's going
3 | to make a note of that, because that's all part of the process of building the litigation
4 | case.

5 | MR WILLIAMS: We put it exactly that. That's why we put in SciPharm. SciPharm is
6 | a case -- I'm not going to go to it --

7 | THE CHAIR: No.

8 | MR WILLIAMS: -- but it's a case of 31.14. It's a case of documents that are referred
9 | to in a witness statement, and it's been disapproved on the test for reference to
10 | documents in a witness statement. But we don't rely on it for that purpose. We rely
11 | on it for the simple proposition that where -- the facts of that case, as you have
12 | probably seen, there were discussions with a witness, and then there was an
13 | inconsistency in the account that was given in relation to what the witness had said;
14 | and what his honour Judge Pelling decided is clearly one can conclude -- sorry -- the
15 | documents recording the discussions with the witness, people don't carry this stuff
16 | around in their heads, but of course there are documents.

17 | He then said, and this is the controversial bit of his reasoning, that those documents
18 | have been mentioned in the witness statements. We don't say that documents have
19 | been mentioned here, but we do say that the Tribunal can and should conclude, if you
20 | needed to, there are going to be documents containing or recording the
21 | communications with proposed class members, and therefore the effect of the way
22 | Mr Newman has presented his case is to waive privilege in the content of documents.
23 | It's exactly the same, in my submission.

24 | THE CHAIR: Yes. You say, if we needed to do that, but we have to, don't we? I mean,
25 | don't we have to make the connection between the communications and the document
26 | in order for the whole thing to work? I don't see how it works if you don't do that.

1 | MR WILLIAMS: We don't know whether the communications were purely by email. If
2 | the communications are purely by email, there may or may not be attendance notes
3 | or whatever it is. If the communications were oral, we would infer that there are
4 | attendance notes, but either way there will be documents.

5 | THE CHAIR: Yes. No, I understand the point. I suppose it makes you wonder about
6 | why it is that you have these cases arguing about whether there's a mention or not. In
7 | other words, if you can simply say it's obvious that there has been
8 | a communication -- or there has been a communication, because that's what's relied
9 | on -- so the communication is the thing that's relied on, and it's not necessary to get
10 | into whether there's a document or not, why do we have all these cases about
11 | mentioning, and people failing to get documents because they're not mentioned? And
12 | of course, what has happened, I think, certainly how I see it, it's mentioned as giving
13 | quite a broad ambit. So it doesn't just, as we see with PCP, broad references to legal
14 | advice then bring with it the inference that there's something in writing.

15 | It seemed to me that all those cases that go down that that line, do they do so for
16 | a purpose? Because it's necessary, effectively, to establish the document before you
17 | get to the waiver question, or can you just start with the communication and say there's
18 | been a waiver, and then think about the documents? That's the point. It's the
19 | sequencing point, I suppose.

20 | MR WILLIAMS: I mean, I'll be corrected if I'm wrong. I don't think PCP was an
21 | application for documents referred to in a witness statement in that sense. If you go
22 | back to tab 11 --

23 | THE CHAIR: Well, some of it's not, is it? Because as you say, some of it was and
24 | some of it wasn't. I mean, some of it was the witness statements from the chief
25 | executive. Some of it was --

26 | MR WILLIAMS: I don't know whether it was an application for documents referred to

1 | in the witness statement. It probably is helpful to just look at that in paragraph -- it's
2 | page 157.

3 | THE CHAIR: Yes.

4 | MR WILLIAMS: It's quite like our application in the sense that it says -- the application
5 | was made on the 4 May. It's 1.1:

6 | "Any contemporaneous documents, any interview transcript, insofar as it was
7 | previously withheld from disclosure, inspection, whether by redaction or otherwise, on
8 | the ground of privilege and concerns the ASAs or either of them..." [as read]

9 | And so on. Then it gives a reference to content. It's not put on the basis that the
10 | documents have been mentioned or referred to. It's just put on the basis that
11 | documents have this content, and privilege has been waived in the legal advice. But
12 | there are cases in which the application is made under a procedural rule, which
13 | provides for disclosure of documents mentioned or referred to the witness statements,
14 | and there are cases where the application is made on a different basis.

15 | THE CHAIR: Well, yes, but then you do get to 18, common ground within witness
16 | statements, and in the opening, there are various references to the legal advice.

17 | MR WILLIAMS: I haven't myself read the judgment as dealing with this issue on the
18 | basis that the documents were referred to. I had read it on the basis that privilege has
19 | been waived in the advice.

20 | THE CHAIR: Yes. Okay.

21 | MR WILLIAMS: In my submission, it is really in line with the way we put it. But if the
22 | Tribunal had any reservations about that point, we could simply have put the
23 | application in (inaudible) we said, "Well, look, clearly the Tribunal can and should draw
24 | an inference, and there are going to be documents recording these communications.
25 | They have waived privilege in those documents, and therefore we seek documents on
26 | that basis".

1 THE CHAIR: Yes.

2 MR WILLIAMS: The documents then wouldn't need to have been specifically referred
3 to (inaudible) because they've referred to the content.

4 THE CHAIR: Yes. Quite, yes.

5 MR WILLIAMS: I fully understand you wanting to make sure it all lines up, sir. But in
6 my submission, you get to the same point, however you navigate that.

7 THE CHAIR: Yes.

8 MR WILLIAMS: I've touched on SciPharm and why we made reference to that. There
9 was one other point on the law which I'll just mention, which is the Digicel case, and
10 it's the case which says that the test for waiver is objective, not subjective. Sorry. That
11 is authorities tab 9, page 114, paragraph 31. We've referred to it in our -- (Pause)
12 If you want to see it, I'm happy to --

13 THE CHAIR: Oh, I see. No, fine. I'll just make a note. Yes.

14 MR WILLIAMS: That's where Mr Justice Morgan says the test is objective, not
15 subjective. The fact that Mr Newman and Mr Hain-Cole are saying privilege was not
16 waived isn't an answer.

17 THE CHAIR: No.

18 MR WILLIAMS: So those are the key legal principles. If I can show you the way that
19 the retaliation issue arises in the claim form and then in the evidence.

20 THE CHAIR: Yes.

21 MR WILLIAMS: You'll be aware, sir, that Mr Newman seeks certification on an opt-out
22 basis, and you'll also be, only too aware that the Tribunal's rules identified
23 two particular factors, amongst others, as being relevant to whether certification ought
24 to be on an opt-in or opt-out basis. One is strength of the claims, and the other is
25 practicability. We're obviously focused on practicability.

26 Just to explain where I'm going: I'm going to show you the points made in the claim

1 form about why certification should be opt-out. The point we make is that this issue
2 about retaliation is one of just a couple of points which go directly to that issue, as
3 opposed to there being a case for certification of collective proceedings generally. So
4 the point, as we see it at the moment, will be significant when it comes to this issue in
5 November.

6 It's core bundle, the claim form is at tab 4. I'm just going to pick it up at page 27 of
7 the bundle.

8 THE CHAIR: Yes.

9 MR WILLIAMS: This is dealt with in two sections: 45 through to 46 and 47; and then
10 again at paragraphs 57 and 58.

11 Starting at 45, there's reference to Evans. Here it says:

12 "Evans (inaudible) should have been made on an opt-in rather than an opt-out basis."

13 [as read]

14 In contrast in this case, it is the positive factors that are relied on.

15 Now, I'm not going to critique the case now; I'm just going to go through these factors
16 and take them at face value, and we'll make our submissions about it in November.

17 45.1 is strength of claim, so we're not interested in that. We've then got a number of
18 paragraphs which go to the size of the businesses in the class, and the size of their
19 claims. To some extent, that is obviously a case for collective proceedings on the
20 grounds that it's not for claimants to bring their cases in their own right. You see that,
21 for example, in paragraph 45.4; they could never bring their own claims.

22 "The individual recoverable levels of loss do not justify the expense involved in bringing
23 proceedings." [as read]

24 So on and so forth. That's, "Could they bring an individual proceeding?"

25 45.5 is the plea about retaliation, which you can read.

26 THE CHAIR: Yes.

1 MR WILLIAMS: There's a footnote, but the footnote is making a point about what was
2 said in another case; it's not a footnote to any content or any evidence.

3 45.6 is saying that there have been previous complaints and concerns about
4 Rightmove's pricing, but that's not a point about opt-in or opt-out.

5 45.7 says that large proposed class members can opt out, but that's not a point about
6 whether it's practicable to bring opt-in proceedings; it's just saying larger class
7 members can opt out if they want to.

8 And then 46 is back to the point that this is an appropriate case for collective
9 proceedings. So broadly speaking, in this set of points -- I'm not saying that 45.5 is
10 the only point of any conceivable relevance to opt-in/opt-out, but if you look at the
11 weight of the point, that is the point that goes most directly to that in this series of
12 points. (Pause)

13 If you move through to page 34, and paragraph 57, this is the heading "Opt-in versus
14 opt-out". 57 is strength of claim, so I was going to skip over that and go to 58. This is
15 practicability of opt-in proceedings, and I make basically the same submission: there
16 are a number of factors discussed here, and a lot of it -- it's not very clear that the point
17 goes to opt-in versus opt-out. I'm not going to dissect the whole paragraph, but just to
18 give you an example, at 8.1:

19 "What is the amount that most PCMs could recover?" [as read]

20 That's a factor which goes to the need for collective proceedings. The point is then
21 built out in the brackets to say:

22 "Including compared to the cost of administering an opt-in claim." [as read]

23 Now, clearly there are costs of administering an opt-in claim, but you've seen the value
24 of this claim. Really, there's no serious attempt to develop the position that the costs
25 of administering an opt-in claim outweighs the alternative, as it creates difficulties
26 about cost-benefit analysis and all the rest of it. We know the Supreme Court now

1 | says that if it's practicable for proceedings to be an opt-in basis, they should be. So
2 | that is an example of a point which, in my submission, doesn't -- it's really not very
3 | clear where it's going.

4 | In contrast, if you then down to 58.4:

5 | "Many of the PCMs who would want to recover their losses, sufficiently resourced to
6 | take the proactive steps required ..." [as read]

7 | That is a positive point about opt-in. We obviously disagree with the (inaudible).

8 | Then 58.5 is the retaliation point again:

9 | "Many PCMs might be deterred by it. Rightmove's position as a key trading partner
10 | providing a must-have service." [as read]

11 | So various factors are discussed, but in my submission, of the points that go most
12 | directly to the issue, this point about retaliation is very clearly one; it's clearly going to
13 | be in focus when it comes to the question of opt-in or opt-out certification in November.

14 | I was going to go to the evidence next. Shall I do that and then shall we take a break
15 | for the transcriber?

16 | THE CHAIR: Yes, that's a good idea. Yes.

17 | MR WILLIAMS: I was going to start with Mr Newman's evidence, which is tab 7. And
18 | it's subparagraph 22(b)(ii) on page 159. I'm sure you'll have read --

19 | THE CHAIR: I have read it, yes.

20 | MR WILLIAMS: I'm just going to take you through it, and the way that we analyse it.

21 | THE CHAIR: Yes.

22 | MR WILLIAMS: So the paragraph says, six lines down:

23 | "No waiver of privilege." [as read]

24 | And then it says, "In the course of these interactions ..." Are you there, sir?

25 | THE CHAIR: Yes.

26 | MR WILLIAMS: "In the course of these interactions, it has become apparent that the

1 | vast majority of such PCMs have only been willing to provide information to me on the
2 | understanding that their identity will not be revealed and the information will be treated
3 | as confidential. These PCMs, the vast majority, have expressed a concern they might
4 | face retaliatory conduct from Rightmove, or that their commercial relationship with
5 | Rightmove will be jeopardised should their name be made public." [as read]

6 | So positive reliance on the content has been said to (inaudible) by these class
7 | members. Reading on:

8 | "In those circumstances, I believe it is likely that having publicly to opt into a claim
9 | would deter a significant proportion of PCMs from seeking to take legal action against
10 | Rightmove." [as read]

11 | And so on. So three points: clearly, a summary of the content of the communications
12 | with the PCMs, what they told Mr Newman, and which clearly locks directly into what
13 | we saw in the claim form about why proceedings should be certified on an opt-out
14 | basis.

15 | Secondly, presents a picture of the prevalence of the concerns amongst the proposed
16 | class members Mr Newman has spoken to.

17 | Thirdly, in reliance on the concerns that the "vast majority" of proposed class members
18 | have expressed, Mr Newman draws an inference about the position across the class.
19 | He says "in those circumstances", likely to deter a significant proportion. That
20 | significant proportion corresponds to the "many" that we saw in paragraph 58 of the
21 | pleading.

22 | I'll come back to this point, but my learned friend, in his skeleton argument, disavows
23 | the idea that Mr Newman is making any point about the prevalence of the concerns
24 | that have been expressed across the class, but we are just reading the words. We
25 | are just reading the words in the evidence.

26 | Back to tab 6, then, Mr Hain-Cole, Mr Newman's solicitor.

1 THE CHAIR: Yes.

2 MR WILLIAMS: Paragraph 4. The context of this, as you've probably seen, is there's
3 an annex to Mr Hain-Cole's statement which contains price information. He is actually
4 providing evidence here that is the context for that pricing information, which we aren't
5 seeking now. But one still sees evidence going to the issues that we are considering.

6 So paragraph 4:
7 "As part of preparation for the claim, the PCR has received the input of certain PCMs
8 who have been willing to provide information relevant to the claim." [as read]

9 Then, moving through to paragraph 7, first line:
10 "The proposed class members who provided pricing information and other PCMs." [as
11 read]

12 So it's not just the people who provided pricing information that's referred to in the
13 witness statement -- certainly not on our reading of this statement.

14 "Other PCMs who provided information relevant to the claim were also asked if they'd
15 be prepared to provide a witness statement for the purposes of the proceedings. Four
16 agreed to do so. The remaining PCMs declined, with a significant number citing
17 a concern about the potential impact such a step might have on their ongoing business
18 relationship with Rightmove, including the risk of adverse commercial consequences."
19 [as read]

20 Now, you're quite right to say this is a different formulation; we've used the language
21 of retaliation, clearly we want all of this material. If there's going to be any question of
22 our form of order not capturing that, then obviously we will need to look at that. But
23 we've treated this as all effectively the same issue.

24 This is essentially the same point as is addressed by Mr Newman, but it is, as you've
25 seen, expressed differently. What was "the vast majority" has now become
26 "a significant number". "Vast majority" is not clear; "significant number" is very vague

1 | and different from "vast majority" in our submission. This inconsistency, or difference
2 | of emphasis, between the two statements is a good illustration of how, we say, we've
3 | got a partial picture; we've got no way of testing which formulation, if either of them,
4 | correctly reflects the underlying position.

5 | That is a convenient moment to break, sir.

6 | THE CHAIR: Yes, let's take ten minutes. Thank you.

7 | (11.38 am)

8 | (A short break)

9 | (11.49 am)

10 | MR WILLIAMS: Before I move on with the submissions, can I just go back to the
11 | exchange we were having before?

12 | THE CHAIR: Yes, of course. I don't think your microphone's on.

13 | MR WILLIAMS: Yes, I see green, sorry.

14 | Can I just go back to the exchange we were having before the break, about whether
15 | the Tribunal needs to be satisfied that documents exist. I mean there is a practical
16 | answer to this point, which is that, first of all, amongst the many responses we received
17 | to the application, it was never said there are no documents responsive to the
18 | application, which, obviously, one way to deal with an application like this is to say
19 | that. On the contrary, what we received last Friday on an open basis -- and it probably
20 | is now worth you just looking at this so you can see it -- in the supplemental bundle.

21 | THE CHAIR: Yes.

22 | MR WILLIAMS: Tab 3, page 37. This is the PCR's first proposal.

23 | THE CHAIR: Yes.

24 | MR WILLIAMS: And on page 37, paragraph 3.1(a):

25 | "The PCR will disclose and provide inspection of the documents falling within
26 | paragraph 1(a), as clarified by paragraph 2." [as read]

1 So this is when they agreed to 1(a), or actually, resiling from their agreements to 1(a)
2 because they had, in my submission, not read it correctly. Then they say in (b):

3 "The disclosure and inspection will be subject to protection of the confidentiality ring."
4 [as read]

5 So there isn't actually an issue about whether there are documents responsive to our
6 requests, I don't think. Of all the points that have been taken, that's not one of them.

7 So in my submission, you get to the end point that you reach based on the submissions
8 I made before the break, which is that insofar as there are documents, privilege has
9 been waived in the documents and we're entitled to apply for disclosure of them. We
10 could cut out that step if we needed to.

11 THE CHAIR: Yes.

12
13 Application

14 Submissions by MR WILLIAMS

15 MR WILLIAMS: I'm going to make my submissions mainly under the three headings
16 in PCP: reliance; purpose; and context, but I think they're all points you've seen in our
17 submissions and in our application.

18 I've dealt with reliance when we looked at the evidence. There is no question that
19 Mr Newman has relied on the content of what the proposed class members told him,
20 and it's been summarised in the two witness statements, and it's been deployed in the
21 two witness statements. One of the points that has been made in response to this part
22 of the case is that the summary of the communications is high-level, and we agree
23 with that, but that isn't the answer; that's the problem. The summary is not high-level
24 in the sense that it is just descriptive of the fact that there have been communications
25 and interactions; the evidence clearly crosses the line into reliance on the content of
26 what was said. It's high-level in the sense that it's incomplete and partial. But that's

1 | the case for disclosure; it's not a defence to the application, sort of, basis for resisting
2 | the application.

3 | In this context, I do want to flag what was said in the response, which is at core tab 11,
4 | page 204. (Pause)

5 | Paragraph 4.2.

6 | THE CHAIR: 4.2, did you say?

7 | MR WILLIAMS: 4.2, towards the bottom of 204.

8 | THE CHAIR: I have it, yes.

9 | MR WILLIAMS: This is the paragraph that talks about high-level comments. But
10 | before one gets to that, it says:

11 | "The passages ... do not refer to or place any reliance on any particular document(s)
12 | or communication(s) with any particular PCMs."

13 | You have my submission about that. That's just not the test. They do not state that
14 | any particular PCMs express those concerns, but a particular number or proportion of
15 | PCMs did. So I'm going to come back to those points, but this is the point:

16 | "... given the sliding scale of the extent and formality of the communications with PCMs
17 | such attempts at false precision would be likely to mislead."

18 | But that tells us that there is variability in the depth and the quality and the extent of
19 | the evidence.

20 | Now, of course we don't expect that everyone gave their evidence as if from a template
21 | and spoke with one tongue. People are going to have made whatever comments they
22 | have on the issue. But we can see there is variability, and we're entitled to consider
23 | the implications of that variability for the case that's in advanced: how clearly or
24 | strongly the concern is expressed; was it caveated; how was it elicited; and so on.
25 | Those are all matters that we're entitled to see.

26 | In our submission, this additional colour in fact adds grist to the mill of the application.

1 | It's not a ground for resisting the application.

2 | That, in our submission, is reliance. It's very clear. What is the purpose of the reliance,
3 | per PCP? The Tribunal has seen that it is to advance the case for opt-out certification,
4 | and I won't need to labour the point. That is an issue with major implications for
5 | Rightmove. I'll come back to it. The question of certification is going to be dealt with
6 | in November, and that is why we need the disclosure at this point, so that we can see
7 | the basis for the case that's going to be advanced at the certification hearing.

8 | You will have seen that there is a submission that the Tribunal should be slow to order
9 | disclosure in advance of certification, and we make two short points about that. First
10 | of all, one can't generalise. It depends on what the issue is. I mean, if you take
11 | funding, for example, funding is an issue that is considered at certification, and it's
12 | accepted that in order to deal with that issue, there has to be disclosure of funding
13 | documents and related documentation, in order to allow that issue to be resolved at
14 | the certification hearing. It's really all a question of context.

15 | Secondly, it depends on how the class representative has advanced his case. Our
16 | application is a function of the way Mr Newman has chosen to advance his case on
17 | a key issue for certification, and if he chooses to advance his case on the basis of
18 | undisclosed material, it is reasonable, in my submission, and hardly surprising that he
19 | faces an application for disclosure at the CMC in advance of the certification hearing.
20 | That's what we say about whether it would be atypical for the Tribunal to order
21 | disclosure at this point. We say it's a non-question. You've just got to look at the
22 | issue.

23 | Context, which per PCP is the type of case. This is a collective action, which as I've
24 | said Mr Newman proposes to bring on an opt-out basis, and it is firmly recognised
25 | after Evans that opt-out certification creates litigation pressure on defendants, and it
26 | can create undue litigation pressure on defendants.

1 | We've set out the passages in our skeleton. I wasn't going to take up time going to
2 | them unless you want me to, sir. But the Tribunal has seen the alleged value of the
3 | claim, which is £1.5 billion. This is clearly a case where the risk of undue litigation
4 | pressure is real, and the retaliation argument, as I've said, is -- putting it at its
5 | lowest -- a key argument for opt-out certification. So we have to be able to see the
6 | quality and extent of the evidence and assess whether the account that's been given
7 | is partial. That's a matter of basic fairness, per the authorities, per paragraph 46 of
8 | Kyla Shipping. It's also, as I've said, why we say that the issues of waiver and
9 | disclosure run together.

10 | You will have seen that Mr Newman has sought to reverse the issues and has made
11 | his submissions on discretion first. We say, with respect, that that way of doing things
12 | leads Mr Newman to skirt over what is really the central point, which is that he has
13 | relied on the content of these communications with proposed class members to
14 | advance his case on this central issue. That's both why he has waived privilege and
15 | why the material needs to be disclosed.

16 | If you could just take out the PCR's skeleton argument, which is tab 1 of the
17 | supplemental bundle, and look at paragraph 27, which is on page 10. (Pause)

18 | If you just read that to yourself. (Pause)

19 | Paragraph 27, "The disclosure application focuses ..." (Pause)

20 | THE CHAIR: Thank you. Yes.

21 | MR WILLIAMS: It is quite true that the basis for this application is so that we can see,
22 | test and understand the evidential basis for Mr Newman's case on this central issue
23 | for certification. We really don't understand the suggestion made in this paragraph
24 | that this is a sort of weak or overly generalised basis on which to seek disclosure. This
25 | is the way the process works to ensure that issues are litigated in a way that's fair to
26 | both sides.

1 | In my submission, paragraph 27 really does sort of miss the point of the case law that
2 | I've shown you on waiver and why the principles of waiver operate in the way that they
3 | do.

4 | I'm just now going to deal very briefly with the, submissions that really are dealt with
5 | in the following paragraphs of Mr Schonfeld's skeleton argument. What follows in
6 | these paragraphs is an objection to disclosure on, effectively, various different bases,
7 | all of which come to the same thing. There's arguments based on chilling effects;
8 | there's arguments based on proportionality; there's arguments based on the Tribunal's
9 | governing principles. But in my submission, all of those ways of framing the argument
10 | come back to the same thing, which is that if Mr Newman wants to advance a case on
11 | evidence, he needs to disclose the evidence. That is how the process works, and an
12 | appeal to chilling effects or proportionality doesn't mean that Mr Newman can rely on
13 | evidence that has been put beyond scrutiny.

14 | In my submission, the case for disclosure is clear-cut, and I dare say that may be why
15 | in the offers that were made last week and this week, Mr Newman came very close to
16 | offering us the disclosure that we sought, subject to the point I'm about to come to,
17 | which is anonymity; because in my submission, the case for giving disclosure of the
18 | content is overwhelming.

19 | Coming then to anonymity. We obviously recognise, and recognised when we made
20 | the application, that if one takes the concerns expressed by the proposed class
21 | members as stated in the evidence at face value, those individuals or those
22 | businesses don't want their identity disclosed because they are concerned about the
23 | consequences of their identity being disclosed. That has led to a suggestion at times
24 | that this application has been made in order to try and put undue pressure on these
25 | individuals, or to try and gain some sort of tactical advantage on Rightmove's side.

26 | That is utterly wide of the mark, sir. We are here because the proposed class

1 | representative has taken an approach to the application which prevents us litigating
2 | a central issue on a fair basis. The question is: how can that be achieved? It seems
3 | to us, anyway, that in dealing with this issue, the objective has to be to allow us
4 | a proper opportunity to test and scrutinise the evidence whilst guarding against the
5 | concerns that the proposed class members are said to have expressed, as far as
6 | possible. In our submission, the proposal for disclosure into a confidentiality ring is
7 | a solution. It's the solution to this concern.

8 | If one abstracts from this case for a moment, testing the strength or the credibility of
9 | evidence in any case involves knowing who the witness is and considering their
10 | evidence in context; and that is no less true on this issue than it is of any other.

11 | If I can illustrate the point in this way: the class representative's application, you may
12 | have seen refers to various campaigns and petitions that exist in relation to
13 | Rightmove's pricing. I don't know if you've seen that. Shall I show you?

14 | THE CHAIR: I don't think I have, no.

15 | MR WILLIAMS: It's again Mr Newman's statement, core bundle, tab 7, and it's
16 | page 161.

17 | THE CHAIR: Yes.

18 | MR WILLIAMS: This is the same paragraph 22(b) that we were in before, but we're
19 | now in subparagraph (v). Just read subparagraph (v).

20 | THE CHAIR: Yes.

21 | MR WILLIAMS: If you look down at footnote 12, you can see there's a hyperlink.

22 | THE CHAIR: Sorry. Do you mean subparagraph (vi), isn't it? (Pause)

23 | MR WILLIAMS: I'm sorry. It's subparagraph (vi). (Pause)

24 | Footnote 12. (Pause)

25 | THE CHAIR: You gave me the right footnote, wrong paragraph.

26 | MR WILLIAMS: I'm so sorry.

1 THE CHAIR: It's all right. I got there. (Pause)

2 MR WILLIAMS: You see in footnote 12, there's a reference to a change.org call for
3 CMA probe and so on. That is a reference to something that is something close to
4 a petition.

5 A petition we know that some estate agents have publicly associated themselves with
6 the issue of Rightmove's pricing. We don't know how Mr Newman found the estate
7 agents that he has obtained information from. It's possible that he found them through
8 one of these campaigns. We don't know, and we're driven to speculate because we
9 don't know. But it's one possibility. If one or more of the class members who are said
10 to have expressed a fear about commercial reprisals is on the public record as having
11 objected to Rightmove's fees, that would be a relevant factor in assessing how credible
12 it is to say that they actually fear the implications of opting in and publicly associating
13 themselves with the claim.

14 That's one illustration, and there are other factors. Rightmove obviously has
15 customers of different shapes and sizes. We've got no idea whether the class
16 members who are said to have expressed these concerns are large or small
17 businesses, but the credibility of the fear of retaliation may depend on who the
18 customer is, and the size of the customer. Other customers may have had fallings out
19 with Rightmove at various points. They may have complained directly. These would
20 all be relevant factors. At the moment, we've got no way of looking into any of this.

21 But in my submission, we have to be able to test and explore points like this in order
22 to understand the case that's advanced and potentially respond to it; and without the
23 identities of the class members, we can't do that. But we recognised, when we made
24 the application, this would be a source of sensitivity, and that is why we proposed at
25 the outset that the disclosure of this material would be put into a confidentiality ring,
26 which is comprised solely of lawyers, including Rightmove in-house lawyers, all of

1 | whom have given the relevant undertakings to the Tribunal. These are professional
2 | people who can be relied on not to disclose the information beyond the ring, including
3 | to the Rightmove business, and the Tribunal has to be able to rely on professional
4 | people to operate in that way. That is the way in which proceedings in this Tribunal
5 | routinely function.

6 | Obviously, we've then given consideration to how that would work. In broad terms,
7 | there are more junior lawyers, in-house lawyers in the ring who would be able to use
8 | the identity information, look at Rightmove's own records in relation to particular
9 | customers and carry out enquiries, without needing to have contact with anyone
10 | outside the ring within the business. I say this very firmly: my learned friend's skeleton
11 | is really quite wrong to say that Rightmove would need to breach the terms of the ring
12 | or require any wider disclosure, which would be in violation of the terms of the
13 | Tribunal's order, in order to use the information. I hope that submission is not going
14 | to be repeated. It's really baseless, sir. Clearly, professional people, lawyers, can be
15 | trusted with this sort of information.

16 | THE CHAIR: So you're saying that within Rightmove, the in-house lawyers in the ring
17 | can do what they need to do without asking other people to help them by reference to
18 | particular agents?

19 | MR WILLIAMS: Yes.

20 | THE CHAIR: That's the point, isn't it?

21 | MR WILLIAMS: That's the point, yes. I mean, obviously, if the disclosure were wider,
22 | the enquiries might go wider. But we're not proposing wider disclosure; we're
23 | proposing disclosure to certain individuals, and then the extent of the work that can be
24 | done will be defined by what can be done by those people. The point I'm making is
25 | that the information will be of value and it will be utilised in the way that I've described,
26 | in order to try and put the evidence in its context.

1 THE CHAIR: So tell me again, just on the size of the business. Just tell me again why
2 the size of the business matters. I understood the other points in your list, but why
3 does it help you to know the size of the business?

4 MR WILLIAMS: Well, I mean, I'm making a completely generalised point, really, which
5 is just that a customer that's a very large and important customer, that generates an
6 enormous amount of business with a supplier, is probably in general less likely to fear
7 reprisals, given the scale of the business they do. It's not really a point about
8 Rightmove in particular, it's a more general point than that.

9 It's part of my overall submission that seeing the concerns in context is going to be
10 relevant to appraising them, and there are points we might want to make about it. But
11 at the moment, all I can do is identify in-principle points we might be able to make
12 about this, not knowing what the shape of the evidence is.

13 THE CHAIR: Yes, so you anticipate that, if you were to get this information at the
14 certification hearing, we would have evidence in front of us about the credibility of
15 statements that might have been made to the PCR about retaliation?

16 MR WILLIAMS: Well, potentially. I mean, we have to be in a position to look into that
17 and advance that case if we have a basis for doing so.

18 THE CHAIR: Because you say, if we're going to be persuaded by retaliation as an
19 issue for it being opt out, you say that's sufficiently important to your client's position,
20 and something which you're entitled to test as to whether the evidence actually
21 substantiates that conclusion. Yes.

22 MR WILLIAMS: But without having any sense of the number of people we're talking
23 about -- you know, under any of the headings I've talked about -- it's very difficult to
24 say what the argument might look like, obviously.

25 THE CHAIR: Yes.

26 MR WILLIAMS: But I hope I've given a clear picture of what it is we want to look into

1 | and why the information is necessary in principle.

2 | THE CHAIR: Yes.

3 | MR WILLIAMS: A further point that's made is that we have reserved the right to seek
4 | the release of information from the confidentiality ring. It is true that when we said we
5 | would accept disclosure into the ring, that our position was reserved as to whether we
6 | might need to make an application for information to be taken out of the ring. We didn't
7 | say that about identity information in particular; we were talking about the information
8 | in its generality.

9 | Even if we did make an application -- if we do make an application -- for identity
10 | information to be released, that would be for the Tribunal to decide. We would have
11 | no entitlement to do that, and I would need to persuade you that expanding the ring is
12 | necessary and proportionate, broadly speaking. So frankly, that is scaremongering,
13 | sir.

14 | For those reasons, we say there are compelling reasons why we should be allowed to
15 | see the identity of the proposed class members in question: to properly test the weight
16 | of their evidence. Disclosure into a confidentiality ring is a complete answer to the
17 | concerns that have been expressed.

18 | If that's the order the Tribunal makes, and the proposed class representative feels he
19 | can't make that disclosure, then it's open to him to withdraw the allegation -- to
20 | withdraw his reliance on the evidence. But that would ultimately be the invidious
21 | choice; it's a have your cake and eat it point.

22 | So that deals with the evidence that Mr Newman has relied on. Now, coming back to
23 | the question of further disclosure going wider than that, and the question of cherry
24 | picking and a partial picture. I've explained that this is a particular concern in this case,
25 | because Mr Newman has presented the views of those on whom he relies as being
26 | essentially representative of a wider concern. In our submission, this requires

1 disclosure of evidence or information going beyond the evidence Mr Newman relies
2 on in two respects.

3 First -- we've touched on this already when I opened the application -- evidence
4 pointing in the other direction, the obvious example being class members who said
5 that they did not have any concern about retaliation. In my submission, it's actually
6 quite hard to think of a clearer example of cherry picking than a situation where
7 Mr Newman got to disclose the evidence that he relied on -- that is comments made
8 by people who said they did fear retaliation, but didn't have to disclose comments
9 made by people who said that they didn't fear retaliation.

10 I think I've already explained that Mr Newman's position on this has moved around.
11 Where we got to on Tuesday -- although he doesn't stand behind this offer, but I mean,
12 I addressed you on it when I started. I'll show you what he said now. It's in the second
13 supplemental bundle, I think.

14 THE CHAIR: Yes.

15 MR WILLIAMS: Tab 2. It's 3.1(a) towards the bottom of page 4. I think I made my
16 position clear on this earlier on. We just do not understand why there should be any
17 redrafting. Paragraph 1(a), we want disclosure of the material that goes to the issue.
18 If there are shades of grey about this, then we're entitled to see the evidence that
19 shows shades of grey rather than just the black and the white. And if there is material
20 that falls between the cracks of the two categories in paragraph 3.1(a), but is still
21 relevant to the issue that's identified by paragraph 1(a), then it should be disclosable.

22 I will say this: I mean, when we see how Mr Newman has swung around in terms of,
23 "We can have it, we can't have it", "Okay, you can have it, but only in these two
24 categories", I have to say, the way this has evolved really does, in my submission,
25 heighten the need for a broad order which is going to capture everything that falls
26 under that umbrella, rather than slicing it up into categories.

1 That is one aspect of the prevalence issue, which is contrary evidence and evidence
2 which is on that spectrum between supportive and unsupportive. The second aspect
3 is how to understand the number, or proportion, of agents that Mr Newman spoke to
4 and that expressed concern. Again, I dealt with this earlier on. Mr Newman made
5 a valid point in response to the application, which is to say, "Well, what sort of material
6 is going to demonstrate the number or proportion?" And I explained why, if we had
7 the whole universe of material -- which we did contemplate at one stage -- then we
8 would be able to analyse that.

9 But Mr Newman's team made a positive suggestion, which was the provision of
10 information. As I said earlier on, we've indicated that our application under limb B
11 would be met by providing information in lieu of disclosure about the number of
12 persons that Mr Newman had contact with, had interactions with, and the number of
13 persons that were specifically asked whether they had a fear of retaliation. That
14 seemed to us to be a very modest expansion of what had been offered by the class
15 representative in his letter of last Friday.

16 We just don't understand why the answer to that is no. In our submission, what we've
17 asked for is basic information which goes to the weight of the evidence that the class
18 representative has gathered. Again, the resistance that we see to providing this basic
19 information does tend to heighten our concern and reinforce the need for disclosure.
20 As I've said, that information would need to be supported by a statement of truth.

21 THE CHAIR: So just the number contacted, and the second was the number that
22 indicated concern, did you say?

23 MR WILLIAMS: The number that were asked.

24 THE CHAIR: The number that were asked, yes.

25 MR WILLIAMS: We're going to get the communications --

26 THE CHAIR: Yes.

1 | MR WILLIAMS: -- under 1(a). Sorry, I beg your pardon. We have applied for the
2 | communications under 1(a), and so we will have the positive response.

3 | THE CHAIR: Yes, you'll know the positive response.

4 | MR WILLIAMS: Whatever shade of black, white or grey they are.

5 | THE CHAIR: Yes.

6 | MR WILLIAMS: But then we'll be able to see that the number of people who were
7 | specifically asked.

8 | THE CHAIR: So the number contacted is the total amount of --

9 | MR WILLIAMS: Yes, the number of people in contact with --

10 | THE CHAIR: And then the second question is how many of them were actually asked
11 | the specific question?

12 | MR WILLIAMS: Yes, exactly.

13 | THE CHAIR: Yes, I see. Yes.

14 | MR WILLIAMS: I just wanted to then finish off by responding to a few of the
15 | submissions made in my learned friend's skeleton argument about this issue. So if
16 | you could take out the supplemental bundle, tab 1. (Pause)

17 | Sir, if we pick it up at paragraph 10, page 5. Immediately above that there's the
18 | passage from Mr Hain-Cole's evidence, which you saw earlier on. It says:

19 | "In neither paragraph does Mr Hain-Cole identify, refer to, or place reliance on any
20 | specific document communication with any particular PCM." [as read]

21 | I've made my submissions about that; it's a summarised account of the position across
22 | the PCMs. If you then skip over the next sentence, it says:

23 | "Equally, he does not purport to quantify prevalence of concerns regarding retaliation
24 | or adverse effects [and so on]." [as read]

25 | Well, he doesn't put a number on it, but what he does is he says something vague
26 | about "a significant number", which is actually, as I submitted earlier on, different from

1 | what Mr Newman says. I don't know what weight is being put on the word "quantify"
2 | here, but I mean, the submission is basically not correct. Mr Hain-Cole does put
3 | a measure on the prevalence of the concerns expressed.

4 | The same points apply to paragraph 13, where Mr Newman's counsel deal with
5 | Mr Newman's evidence. You can see, towards the end of the paragraph, "The PCR
6 | was not asserting", can you see that?

7 | THE CHAIR: Yes.

8 | MR WILLIAMS: "The PCR was not asserting that all or a particular number or
9 | proportion of those PCM's had expressly articulated concerns." [as read]

10 | I mean, it's just not correct, sir. I mean, again, he doesn't reduce it to a number, but
11 | he says "the vast majority". And if you look at the last sentence there:

12 | "He was merely recording that such concerns had been expressed by some members
13 | of the class." [as read]

14 | That just doesn't capture the effect of the evidence at all. But even if that were the
15 | position, there would still be a waiver of privilege. The point goes nowhere, sir.

16 | If we turn through then to the back of the skeleton, page 14. If you could just read
17 | paragraph 43.

18 | THE CHAIR: Yes. (Pause)

19 | Yes.

20 | MR WILLIAMS: The problem with that submission is that it is directly contrary to the
21 | way Mr Newman has, in fact, set out the case for opt-out certification in his evidence.

22 | He does make the case in precisely this way, that's the submission I made to you.

23 | Then finally, in paragraph 44. If you look halfway down the paragraph, there's
24 | a sentence that starts, "Neither", on the right-hand side.

25 | THE CHAIR: Yes.

26 | MR WILLIAMS: "Neither Newman 1 nor Hain-Cole 1 suggest that all or even most of

1 | the PCMs expressed concerns." [as read]

2 | But again, it's just simply not correct. I mean, Mr Newman said "the vast majority of
3 | PCMs I spoke to", I mean, that is literally saying most of the PCMs expressed the
4 | concern. If we then carry on reading, it says:

5 | "Nor is it suggested that those concerns were the sole or even the predominant reason
6 | why the PCMs declined to provide a witness statement or requested anonymity." [as
7 | read]

8 | Now, this is the first time, I think, this point has been made. It's not something that
9 | comes across from anything that's been said previously. If, in fact, there were other
10 | reasons in play as to why these class members wanted anonymity, and didn't want to
11 | provide a witness statement, then that is all the more reason for us to have the material
12 | that we've been seeking, so that we've got a clear picture and we can understand the
13 | strength of the concerns that were said to have been expressed about retaliation, in
14 | the context of what are now said to be other reasons for not wanting to co-operate.

15 | Sir, unless I can assist you further, that's my application.

16 | THE CHAIR: Thank you very much.

17 | Submissions by MR SCHONFELD

18 | MR SCHONFELD: Thank you, sir. I wanted to begin by setting out a roadmap of
19 | where I intend to go in these submissions. Not least as I'm conscious we have about
20 | half an hour until lunch; I want to give you a sense of when this might come to an end.

21 | THE CHAIR: Yes. Well, I'm certainly happy for you to take the time you need, so
22 | don't feel under pressure for that.

23 | MR SCHONFELD: Thank you. I was not even going to attempt to squeeze it in the
24 | next half hour.

25 | THE CHAIR: No, I'm sure.

26 | MR SCHONFELD: I will seek not to repeat points that have been made in our

1 response or skeleton argument.

2 Where I will start is the legal tests. A lot of that has already been covered on the
3 waiver of privilege side, so I will take it as quickly as I can. But I do need to go there,
4 particularly on the exercise of the Tribunal's discretion to order disclosure. Then
5 second, I want to place the application in context. Now, my learned friend has done
6 a lot of that himself, but obviously the context looks slightly different depending on who
7 you ask, so we'll need to go back to some of those documents.

8 I think it is common ground that context is critical to the fact and context-specific
9 assessment that's required, both for waiver -- my learned friend's focus -- but also to
10 the exercise of discretion to order disclosure. So we'll need to go back to the claim
11 form, and we'll also need to go back to the witness statements and look at the evidence
12 relied on and the extent of that reliance, particularly because, as my learned friend
13 quite neatly highlighted in the last few submissions he made, a lot of the difference
14 between the parties comes down to how Rightmove have read Mr Newman's and
15 Mr Hain-Cole's witness statements, versus what has been stated repeatedly by the
16 PCR about what his statement means. We'll come back to that.

17 My learned friend says, "Well, read the statement. It's plain on its face". We'll come
18 back to a detailed reading of the statement and whether it is plain on its face that it
19 means what he says it does. It's a bit artificial to say that what the PCR has
20 subsequently clarified it was intended to mean, if there was any scope for ambiguity,
21 is irrelevant, when you, sir, will be here in November -- we will each be here in
22 November and no doubt we will be held to that interpretation of the statement. As
23 I say, I will come back to the statements.

24 Then I want to also briefly go to how this issue of evidence of fear of retaliation has
25 been addressed in other collective proceedings before this Tribunal. I won't dwell on
26 that point, but there are a couple of useful points that come out of it.

1 | Then thirdly, I'll look briefly at the live parts of Rightmove's application. And finally,
2 | I will turn to address the new points that have been made by Rightmove in its skeleton,
3 | in recent correspondence, and in my learned friend's submissions.

4 | Before starting down that road, I want to just address the point that Rightmove have
5 | made about our focus on our side on the test for disclosure in the Tribunal, and looking
6 | at that as a distinct question. That's quite a theme of Rightmove's submissions. We've
7 | addressed whether the Tribunal should order disclosure separately and in some detail.
8 | Now, Rightmove asks the Tribunal -- it applies under a rule which requires the Tribunal
9 | to assess whether it should exercise its discretion to order disclosure. That's an
10 | essential and central part of Rightmove's application. We submit, and have actually
11 | submitted both in our response and in our skeleton argument, giving them plenty of
12 | opportunity to fill in the lacuna, that it's surprising that Rightmove has said so little
13 | about it.

14 | Its position appears to come down to that if privilege over the document sought has
15 | been waived, disclosure automatically follows. That's simply not correct and I'll show
16 | you the test for disclosure that makes clear that it is not the same as the test for waiver
17 | of privilege.

18 | Now the waiver and disclosure tests may collapse into one if you apply under
19 | CPR 31.14, or the equivalent Tribunal rule, for disclosure of a document mentioned.
20 | Then you're entitled to disclosure automatically. But Rightmove has disavowed
21 | reliance on that rule, and actually that disavowal came after we, in the correspondence
22 | preceding the -- actually, let's go there. I think it would be helpful.

23 | So it's in the correspondence bundle, tab 8. This is our letter of 23 June. The parties
24 | have been corresponding on these issues, but it predates the application.

25 | THE CHAIR: 23 June letter, yes.

26 | MR SCHONFELD: Yes, page 30 of the bundle numbering. Paragraph 3.2.

1 THE CHAIR: 3.2.

2 MR SCHONFELD: So here we explain:

3 "Neither Hain-Cole nor Newman 1 make a direct allusion to or specifically mention
4 [and then footnote 10] as required to engage CPR 31.14 and by analogy, rule 61 of
5 the CAT rules..." [as read]

6 THE CHAIR: Yes.

7 MR SCHONFELD: "...Any of the documents of which Rightmove now seeks
8 disclosure so as to engage 61 (b) of the CAT rules." Then we go on to explain why
9 that is not the case, and why you cannot infer that they have been referred to. Then
10 we refer to Rightmove's reliance on SciPharm on that point in the preceding
11 correspondence, and point out that the decision in SciPharm as to whether that sort
12 of implicit reference counted as a mention had been subsequently doubted.

13 That was our understanding at that point; Rightmove hadn't, in the preceding
14 correspondence, said on what basis it sought disclosure, what rule it said was
15 engaged. We presumed that it was relying on the mentioned rule from what it had
16 said in the preceding letters and set out our arguments on that. Then we see in the
17 disclosure application, if we can go to core bundle tab 8, page 190, looking for
18 paragraph 28. (Pause)

19 THE CHAIR: Yes.

20 MR SCHONFELD: We see about halfway down -- again, we're talking about
21 SciPharm to some extent -- there's a sentence bang in the middle of the paragraph
22 that begins, "To be clear"; do you have that?

23 THE CHAIR: Yes, I have that, yes.

24 MR SCHONFELD: "To be clear, Rightmove does not contend that these documents
25 have been mentioned in a witness statement, which was the argument made in
26 SciPharm and on which issue SciPharm has been doubted. Rightmove instead seeks

1 | disclose specific disclosure under rule 53(2)(l)." [as read]

2 | Now, what we have there, sir, is an express disavowal of any reliance on the idea that
3 | the documents have been mentioned in the witness statement. It's probably
4 | unnecessary for me to go this far, but one might infer that they saw the strength of the
5 | points we'd made in correspondence. But we certainly don't accept, as my learned
6 | friend seeks to suggest, that they could have put their application on that basis. We
7 | certainly flagged the possibility to them, and they expressly decided not to take it.

8 | So having put their application as it is, Rightmove has to convince you both that you
9 | should exercise your discretion to order disclosure sought, and insofar as you consider
10 | that you should exercise your discretion in that way, that the documents to be
11 | disclosed are no longer protected by litigation privilege.

12 | We address both of those points, because both are necessary, and because the
13 | answers may be different.

14 | THE CHAIR: Yes. Just to make sure I understand what you're saying, you say that
15 | because it's a disclosure application under rule 53(2)(l), that brings into play the
16 | question of discretion generally?

17 | MR SCHONFELD: Yes, and we'll see precisely the guidance and rules apply to that.

18 | THE CHAIR: Yes, and you say that that the question of waiver is part of that
19 | consideration; is that effectively what you're saying?

20 | MR SCHONFELD: No -- sir, what I'm saying is strictly it's a separate question.

21 | THE CHAIR: Yes.

22 | MR SCHONFELD: The Tribunal can consider -- and you could probably take them in
23 | either order, but the way we've thought about it is -- whether disclosure ought to be
24 | given of these documents, not worrying about whether they're protected by privilege.
25 | And then consider whether, in fact, they are still protected by privilege such that
26 | disclosure cannot be given, or disclosure can be given, but inspection can be withheld.

1 THE CHAIR: Is the difficulty in that that if you look at the waiver question first, then in
2 the course of that you deal with the cherry picking point, and that question of fairness
3 to the applicant -- well, it may not completely dispose of it, but certainly it's quite a big
4 factor in the discretion. So you sort of have to do it first, don't you?

5 MR SCHONFELD: Well, sir, as I say, I think you could do it either way around. In
6 fact, what my learned friend has done, as I understand it in his skeleton and
7 submissions, and what I'm intending to do in these submissions, is look at them
8 conjoined.

9 THE CHAIR: Yes. Well, fine. Okay. I think I'm just struggling a little bit as to how you
10 exercise the discretion under 53(2)(I) without having reached a conclusion about the
11 fairness point.

12 MR SCHONFELD: Yes, I --

13 THE CHAIR: But it doesn't matter. It sounds like it doesn't matter.

14 MR SCHONFELD: The point I'm trying to make, sir, is that the answers to the two
15 questions may be different because the tests are different.

16 THE CHAIR: Yes.

17 MR SCHONFELD: It is perfectly possible for you, sir, to conclude that there has been
18 a waiver of privilege over documents, which you will nevertheless not exercise your
19 discretion to order disclosure of. And we'll come to it -- the key difference between the
20 tests is proportionality, and the concerns that go to that. Proportionality is no part of
21 the test of waiver; proportionality is central to the test of disclosure.

22 THE CHAIR: Well, yes, okay. I mean, again, I'm not sure it really matters. We
23 probably don't want to go down too many rabbit holes along the way. But I mean,
24 I suppose I just struggle a little bit with that, because if, in order to take the significant
25 step of finding that there's a waiver -- and it is a significant step -- you've reached the
26 conclusion that's necessary in order to provide a fair playing field, then it would be

1 | a very odd thing to do, notwithstanding the discretion, to end up with what's manifestly
2 | not a fair playing field.

3 | It may be that when you get into the question of how the disclosure is organised and
4 | what happens with it -- how it's contained, all that sort of thing -- I can see that -- yes.

5 | MR SCHONFELD: I do take that point, sir, and it probably does. You can see that
6 | there may be a core category of documents for which the requirement for disclosure
7 | that drives the waiver of privilege is so strong that any countervailing concerns don't
8 | tip the balance the other way when you come to consider your discretion.

9 | But as you say, sir, there may be a spectrum of documents here -- indeed, there are
10 | a spectrum of documents sought -- where at a certain point, even if you find waiver,
11 | on the application of the waiver test, you decide in these proceedings in the
12 | fact-specific context, actually, "If we order disclosure of that document, we're going
13 | down a rabbit hole that leads nowhere".

14 | THE CHAIR: Yes, I can --

15 | MR SCHONFELD: (Overspeaking) concern, particularly in light of the confidentiality.

16 | THE CHAIR: No, I can see it in principle. I certainly see the point you're making
17 | that -- well, I'm not sure -- if you go down the 31.14 or 61 route, you're still going to be
18 | confronted with those issues.

19 | MR SCHONFELD: No, no --

20 | THE CHAIR: Well, you are in relation to the consequential waiver, aren't you?
21 | Because absolutely you're going to make an order in relation to the ones that are
22 | mentioned. You're clearly going to do this. Let's say you take a very conventional
23 | case, and the document has been expressly mentioned and relied on and all those
24 | boxes are checked. You're then going to ask yourself the question about the
25 | consequential waiver -- the second of the two questions. There, the principles are not
26 | going to be, necessarily -- I suppose there might be a significant difference -- but they

1 | will presumably be some overlap. There'll be some question of proportionality that
2 | comes into that, won't there?

3 | MR SCHONFELD: I suppose, sir, it depends what the context is of the disclosure
4 | sought and on what basis?

5 | THE CHAIR: Yes.

6 | MR SCHONFELD: For example -- and I was going to go there later, I probably -- well,
7 | maybe I should go there.

8 | THE CHAIR: Now, do it in the course you want. I think this is possibly a little more
9 | academic than it needs to be.

10 | MR SCHONFELD: I think it is (overspeaking).

11 | THE CHAIR: No, that's me rather than you. I just want to get the framework in my
12 | head, but I think --

13 | MR SCHONFELD: The distinction between the test for discretion and the test waiver
14 | is not academic, but how it applies or whether it matters rather depends on your view
15 | on the substance.

16 | THE CHAIR: Yes.

17 | MR SCHONFELD: So maybe it becomes clearer as I advance my submissions, rather
18 | than in the abstract.

19 | THE CHAIR: And can I just check with you, just in relation to waiver, you are taking
20 | the point about it? You are saying there's been no waiver, aren't you; is that right?

21 | MR SCHONFELD: Yes.

22 | THE CHAIR: So in your analysis, both those issues are live issues?

23 | MR SCHONFELD: Yes. Finally, sir, just on this, you pondered earlier why these cases
24 | seem almost universally to be 31.14 cases. We say the answer to that is because
25 | otherwise, you do not get the automatic right to disclosure. That's why parties seek to
26 | get within Rule 31.14, because it gives them that automatic right to disclosure as soon

1 | as they've established a mention. Otherwise, they would have to deal with whether
2 | this is the right stage for disclosure, whether it really goes to a material issue, all those
3 | sorts of case management questions that the Tribunal would otherwise need to
4 | consider if you make a disclosure application.

5 | The fact that a document isn't privileged -- most documents aren't -- doesn't give you
6 | an entitlement to disclosure. I mean, obviously the route to finding no privilege is
7 | through waiver, and that suggests a degree of relevance. But the reason the rule
8 | exists and the reason parties try to use it is because it provides that automatic right.
9 | Here, there's no such automatic right.

10 | THE CHAIR: Yes. Well, I'm not familiar enough with the cases, I think, to be able to
11 | say whether I agree with that or not.

12 | MR SCHONFELD: No.

13 | THE CHAIR: And again, I suspect a detailed review of them is probably not the right
14 | thing at this stage of the proceedings.

15 | MR SCHONFELD: Perhaps it was a point of academic interest that came across over
16 | the past few days.

17 | THE CHAIR: Yes.

18 | MR SCHONFELD: As I say, I want to start with the legal principles on the exercise of
19 | the Tribunal's discretion, because those haven't been touched on at all yet. We do set
20 | them out to some degree in our response in section 2. But where I want to start, sir,
21 | is the decision of Mr Justice Roth and Hodge Malek QC in *Ryder v MAN*. That's in the
22 | authorities bundle at tab 10, a 2020 decision in this Tribunal.

23 | THE CHAIR: Yes.

24 | MR SCHONFELD: There are only a couple of paragraphs we need to go to. The first
25 | one is paragraph 35(7), which is page 147 of the bundle numbering.

26 | THE CHAIR: Yes.

1 MR SCHONFELD: There we see:

2 "Disclosure will only be ordered and the order will be framed to ensure that it is limited
3 to what is reasonably necessary and proportionate bearing in mind a number of
4 aspects, the most important of which are ..."

5 Then there are five items listed, I just want to highlight item (b), which is:

6 "... the manner in which the party bearing the burden of proof is likely to advance its
7 case on those issues."

8 And then over the page --

9 THE CHAIR: Sorry, you highlight it because ... I think that Mr Williams is saying it's
10 precisely because you've chosen to advance a positive case on opt-in that involves
11 the question of retaliation that we're here. So in a way, I would have thought that that's
12 something that weighs against you in the discretion rather than for you, isn't it?

13 MR SCHONFELD: Well, sir, as a first point, I don't imagine this is controversial as
14 a matter of principle.

15 THE CHAIR: No.

16 MR SCHONFELD: I wasn't bringing us to it for that. But we say when you look
17 properly at the evidence the PCR advances on fear of retaliation and analyse it
18 properly, and consider what the PCR has said it is intended to mean, which gives you
19 a clear indication of the manner in which he will advance his case on that issue at the
20 CPO hearing, if there was any ambiguity on the face of the document, it's been
21 resolved, and that is important to take into account. There's no need for the Tribunal
22 to blinker itself to that when, when we come to November, that will be how the PCR is
23 held to -- will advance its case. To take a different view of what he said would be
24 mechanistic, to use the terminology from the waiver authorities.

25 THE CHAIR: Okay, right. But I mean, in a way you don't really need to get into all
26 this. If the answer is: he doesn't say what you think he's saying, and it's not offensive

1 | in terms of cherry picking or fairness, then we don't need to get into this, do we?

2 | MR SCHONFELD: Well --

3 | THE CHAIR: I'm not trying to put you off, I'm just sort of trying to work out why this

4 | really matters one way or another.

5 | MR SCHONFELD: The other word I was emphasising in that paragraph, though it

6 | slightly preceded by our conversation earlier, was "and proportionate".

7 | THE CHAIR: Yes.

8 | MR SCHONFELD: Necessity alone is not enough.

9 | THE CHAIR: Yes, sure.

10 | MR SCHONFELD: Then we see, further on, a couple of pages over, I wanted to just

11 | go to paragraph 40, subparagraph (5).

12 | THE CHAIR: Yes.

13 | MR SCHONFELD: It says there:

14 | "It is not therefore simply a question of relevance, as some of the skeleton arguments

15 | we received seemed to suggest. Disclosure will only be ordered in relation to

16 | a specific category of documents if the Tribunal is satisfied that the documents sought

17 | are relevant and that disclosure would be necessary and proportionate. The Tribunal

18 | will not make an order merely because it determines that the documents are relevant

19 | to the issues."

20 | So here, sir -- and I'll come on to it -- if there's an issue around fear of retaliation, mere

21 | relevance to that issue of a document does not mean that the Tribunal should exercise

22 | its discretion. Of course, there's an overlap here with the waiver tests; mere relevance

23 | may not mean that, as a matter of fairness, disclosure is necessary. But the other

24 | point here, again, is the proportionality point. So if this is going to create a very large

25 | storm in a very small teacup that is irrelevant come November, that is something you

26 | can take into account at this point. I'll come on to that point later in my submissions.

1 | I also briefly want to go to Riefa v Apple, which is tab 17 in the authorities bundle.

2 | THE CHAIR: Yes.

3 | MR SCHONFELD: And I want to go to page 280 of the bundle numbering,
4 | paragraph 127.

5 | THE CHAIR: Yes.

6 | MR SCHONFELD: It's a short section. I wonder if you might read to yourself
7 | paragraphs 127 to 129, please.

8 | THE CHAIR: Yes. (Pause)

9 | Yes.

10 | MR SCHONFELD: Thank you. So we see that the proposed defendant -- there, the
11 | case is Riefa v Apple; Amazon was of course a proposed defendant -- sought
12 | disclosure pre-certification of advice given to the PCR in relation to funding
13 | arrangements. That's an issue that goes to certification, not to the substance of the
14 | case. Amazon asserted that privilege over that advice had been waived, and applied
15 | for disclosure.

16 | The Tribunal records here that the chair, the CAT president, had dismissed the
17 | application because it did not meet the requirements of paragraph 6.28 of the CAT
18 | guide, namely that the disclosure sought be:

19 | "... necessary in order to determine whether the claims are suitable to be brought in
20 | collective proceedings."

21 | And that the disclosure sought is "specific and limited". As we can see from the
22 | guidance quoted there, if those requirements are met, the Tribunal may direct that
23 | such disclosure be supplied, prior to the approval hearing. That is a "may" because,
24 | as we've seen, the Tribunal also has to consider proportionality.

25 | It's notable here that, notwithstanding that Amazon asserted a waiver of privilege, the
26 | decision was based on whether disclosure ought to be given in accordance with the

1 guidance in the guide. There's no reference to whether the Tribunal felt it also needed
2 to decide whether there had been a waiver of privilege.

3 As to the question of proportionality, I'd like to go to the Tribunal's disclosure practice
4 direction, which is in the authorities bundle, tab 5. Page 54, specifically.
5 Paragraph 2.4, top of the page. (Pause)

6 THE CHAIR: Yes.

7 MR SCHONFELD: "In determining whether any application for disclosure or
8 inspection of evidence is proportionate, the Tribunal will consider the legitimate
9 interests of all parties and third parties concerned and will, in particular, consider the
10 factors set out in article 5(3) of the Damages Directive."

11 Fortunately, we don't have to go to the Damages Directive because the footnote tells
12 us what those factors are in footnote 3. They include, at (c):

13 "... whether the evidence the disclosure of which is sought contains confidential
14 information, especially concerning any third parties, and what arrangements are in
15 place for protecting such confidential information."

16 Now, of course, the PCMs in this instance are third parties. While we're here, back
17 over the page at 2.2 and 2.3, the practice direction also states, in line with what we've
18 seen in Ryder and Riefa, and the CAT guide:

19 "The application must include a description of the evidence that is sought that is as
20 precise and narrow as possible on the basis of a reasoned justification."

21 "2.3. The Tribunal will limit disclosure or inspection of evidence to that which is
22 proportionate."

23 And we've just seen what it says about the factors to take into account there. Drawing
24 those points together, sir, pre-CPO disclosure should only be ordered if: the disclosure
25 sought is specific and limited; and as precise and narrow as possible; and the
26 disclosure is necessary in order to determine the suitability of the claims for

1 | certification; and it is proportionate - that, of course, isn't part of the waiver test.

2 | That the disclosure sought is relevant is not sufficient. As to both necessity and

3 | proportionality, one of the most important aspects to bear in mind is the manner in

4 | which the PCR is likely to advance its case on certification.

5 | Further, in assessing proportionality, the Tribunal will especially take into account the

6 | legitimate interests of third parties, such as the PCMs, in respect of their confidential

7 | information. That is what I wanted to say about the disclosure test.

8 | On waiver of privilege, it is common ground that the two-stage PCP test applies, and

9 | that that is a highly fact- and context-specific question, rather than some sort of

10 | mechanistic test.

11 | My learned friend has already taken you to a paragraph in Kyla Shipping,

12 | paragraph 46. I was not proposing to ask you to turn it up there, but you may recall

13 | that it begins:

14 | "The caselaw speaks of 'fairness'. Fairness is often a concept which indicates

15 | a discretion for the court. But I do not think there is a discretion here."

16 | I merely note, that's clearly not the case when we come to the question of whether

17 | disclosure should be ordered, where there is a discretion and a proportionality concern

18 | that must be taken into account.

19 | Then in Kyla Shipping -- and it's one sentence, so I don't think you need to turn it

20 | up -- but the next paragraph says, "... the difficulty in reconciling the caselaw is partly

21 | a reflection of the fact-specific nature of the judgment for the court to exercise".

22 | I would just --

23 | THE CHAIR: Which paragraph is that, just for my note?

24 | MR SCHONFELD: Oh, sorry. It's pointed out to me that actually, the previous

25 | sentence is necessary and it wasn't read to you earlier. Are you content for me to read

26 | it, sir, or do you want to go to --

1 THE CHAIR: Well, let's have a look at it. Let's get it (overspeaking).

2 MR SCHONFELD: It's tab 13 of the authorities bundle, page 198. (Pause)

3 Paragraph 46 and 47.

4 THE CHAIR: Yes.

5 MR SCHONFELD: I just read the first three sentences of paragraph 46, about fairness

6 not entailing discretion in the waiver context.

7 THE CHAIR: Yes. We did go to this. I think that's where Mr Williams took us

8 (overspeaking).

9 MR SCHONFELD: Yes, we did. What my learned junior has pointed out to me is that

10 the last couple of sentences were not read out, and that's probably the context for 47.

11 If we begin, "On the other hand ..." My learned friend read out "On the one hand ...",

12 but:

13 "On the other hand, privilege is a fundamental right, and it is only fair to the disclosing

14 party that what must be disclosed is the minimum consistent with fairness to the other.

15 The potential for waiver to extend to collateral documents emphasises the importance

16 of limiting the waiver to what is necessary."

17 "47. Thus, the difficulty in reconciling the caselaw is partly a reflection of the

18 fact-specific nature of the judgment for the court to exercise."

19 I would add to that that caution is needed when applying the case law, also because

20 most of these cases concern potential waiver of legal advice privilege, which isn't the

21 situation here. While the same basic principles apply and the same basic two-stage

22 PCP test, when reading the legal advice privilege cases, it's necessary to consider

23 carefully whether the findings are really analogous, where what is alleged to be relied

24 on here is communications with the potential witness, not legal advice. For example,

25 in the legal advice privilege cases, the court never has to grapple with whether

26 privilege over the identity of the lawyer has been waived; whereas, as we've heard,

1 | that's a central issue between the parties here, whether the identities of these potential
2 | witnesses, privilege over that, has been waived. That's all I wanted to add on the
3 | waiver of privilege authorities.

4 | THE CHAIR: Yes.

5 | MR SCHONFELD: Context is critical, as we've just seen. I think it is worth going back
6 | to the claim form, but I'll try to take it relatively quickly.

7 | THE CHAIR: Yes.

8 | MR SCHONFELD: That's core 4. Page 27 is where the relevant paragraphs begin.

9 | THE CHAIR: Yes. Paragraph 45.

10 | MR SCHONFELD: 45, exactly.

11 | We see here in the header of that paragraph that the claim form summarises the
12 | factors that the Supreme Court identified in Evans as the reasons why those
13 | proceedings should have been opt-in rather than opt-out, and those are the weakness
14 | of the claims, and that they were brought on behalf of well-resourced financial
15 | institutions, and that those institutions had claims in the millions. Then the
16 | subparagraphs address how those factors map onto this case.

17 | My learned friend suggested that most of what's said here isn't actually relevant to
18 | opt-out or opt-in, so I didn't anticipate I'd need to go there, but I think I do have to go
19 | to Evans, to make good that this part of the claim form hasn't been drafted in a vacuum.

20 | You're very familiar with the paragraphs of Evans, no doubt.

21 | THE CHAIR: Yes. I'm just wondering -- I think Mr Williams was suggesting that there
22 | were bits of this that weren't terribly helpful on the question of opt-in and opt-out.

23 | That's correct, but I'm not going to get into that now. What I think he was doing was
24 | emphasising that -- as I understood it, apart from possibly putting down a marker
25 | about what he was going to do later -- what I think he was doing was emphasising that
26 | this is potentially a very important point when we get to November.

1 | I think you are -- I'm anticipating the way you're going to put Mr Newman's evidence
2 | and Mr Hain-Cole's evidence in context is you say it's not such an important point. Is
3 | that where you're going?

4 | MR SCHONFELD: Yes, and --

5 | THE CHAIR: In a way, I'm not sure that -- if that's the position, then it doesn't
6 | really -- I mean, whatever's left after, it's not so important, doesn't really matter, does
7 | it? If you want to go to Evans, fine. I'm just wondering about whether --

8 | MR SCHONFELD: (Overspeaking)

9 | THE CHAIR: I suppose, just to be clear, what I don't want to be doing is getting into
10 | a sort of detailed analysis of how all these things map onto evidence and whether
11 | they're good points or not. I mean, that just seems to me to be --

12 | MR SCHONFELD: Sir, I certainly wouldn't propose to suggest whether they are good
13 | points or not. The point is that each of these subparagraphs -- and maybe I don't need
14 | to do any more than this -- each of these subparagraphs addresses a point that the
15 | Supreme Court in Evans considered relevant to opt-in versus opt-out. The
16 | suggestion -- I think it was put in the skeleton -- that all but two of the points made
17 | aren't actually to do with opt-in or opt-out, that suggestion is wrong, at least as long as
18 | Evans stands.

19 | MR WILLIAMS: I don't want to interrupt, but just if it helps: what I tried to say in my
20 | submissions was that there are points which go to suitability for collective proceedings,
21 | but some of the points go more directly to opt-in or opt-out. I put it a bit differently
22 | orally, anticipating what my learned friend was going to say about it. I see you don't
23 | want to get into it, but also I don't want him -- I did nuance the submission made in
24 | writing, and it's fair to say that, but I just want to be clear that that's the way I put it
25 | orally, which is to do with which ones go most directly to it, and the way you put it to
26 | my learned friend is correct, sir. It's the importance of the point.

1 THE CHAIR: Yes. Thank you.

2 MR SCHONFELD: That is helpful. Thank you.

3 Sir, I don't propose to go through to the subparagraphs.

4 THE CHAIR: Let's work on the basis that you've made your point that you say they

5 map onto Evans, and if it's important, I can go back and look at that. But just one

6 question, and perhaps we do have to go to Evans if you need to.

7 The question of retaliation in 45.5. I can't remember if that's raised in Evans at all. Is

8 that responsive to anything in Evans?

9 MR SCHONFELD: No, that is a freestanding question.

10 THE CHAIR: Yes. Exactly. That's what I thought. Okay. That's --

11 MR SCHONFELD: It obviously comes up in other cases.

12 THE CHAIR: Yes, of course. Exactly. Okay.

13 MR SCHONFELD: I won't go through the other subparagraphs, but let's go to 45.5 in

14 that instance. You've read this already, sir.

15 THE CHAIR: Yes.

16 MR SCHONFELD: It makes the intuitive and obvious point that bringing a claim -- and

17 I think you said this yourself, sir -- against the key commercial counterparty creates

18 a risk of retaliation, or at least a perceived risk.

19 Actually, maybe that's a good moment to pick up one of the points with which my

20 learned friend opened his submissions.

21 THE CHAIR: Yes. Just to be clear, Mr Schonfeld, just to avoid any doubt, I wasn't

22 saying that I thought that was correct. I was just saying there was an argument that

23 could be made.

24 MR SCHONFELD: Of course.

25 No, the point I was just going to pick up en passant is my learned friend opened his

26 submissions with the statement that the PCR has made a suggestion that Rightmove

1 | would retaliate, and that Rightmove vehemently rejects that suggestion. To be
2 | absolutely clear, that Rightmove would in fact retaliate against PCMs is no part of the
3 | pleaded case or the evidence or our submissions. The question is whether PCMs
4 | have a concern about that which would affect their behaviour were the claim to be an
5 | opt-in. So it's no part of our case that Rightmove would in fact retaliate.

6 | So 45.5 makes that, we say, an intuitive and obvious point; and of course, sir, you
7 | weren't purporting to decide that today. But we aren't saying --

8 | THE CHAIR: Let me put it this way. I think -- I don't know what Mr Williams would say
9 | about this -- but it seems to me that if things just stopped there, we wouldn't be having
10 | this application. I don't think there would be any basis to bring the application if that
11 | was the extent of the way it was put. What you might find at the hearing in November
12 | was that, it would be said, "Well, you've got no basis to make that; there's no evidential
13 | basis to it", and that is exactly where I think we end up in the invidious position that
14 | comes out of the MAC Hotels case, doesn't it. That's the difficulty that you've got if
15 | you want to make this point in the context of the opt-in and opt-out argument.

16 | MR SCHONFELD: As I will come to, sir, that is something you can take into account
17 | when you have a discretion whether to order disclosure. Where there's an application
18 | on the mention basis, that point would be irrelevant, but you are not forced to put the
19 | Tribunal and the PCR in the invidious position of not being able to put any evidence
20 | forward to support this intuitive point, because you have a discretion.

21 | I'll come back to that, but you anticipated exactly where I'm going with this. No possible
22 | waiver or application could arise from 45.5, and I may not need to go there; but for the
23 | sake of completeness, if we go to the other paragraph about retaliation, which is 58.5.

24 | THE CHAIR: Yes.

25 | MR SCHONFELD: The same is true there, and again, it's in the context of various
26 | other points made in support of an opt-out structure. But again, we don't understand

1 | the application to be based on either of these paragraphs, and as you say, sir, it
2 | couldn't be. So when my learned friend suggests that our alternative to providing
3 | disclosure he wants is to withdraw this part of our case, that plainly isn't correct. Our
4 | case can certainly stand on this.

5 | I think the point he would make is if you were minded to order the disclosure based on
6 | a waiver arising from the witness statements, we may have to withdraw part of our
7 | evidence to avoid that disclosure, not the pleaded case and not the point in its entirety.
8 | Of course, if he says there's then no evidential basis for it such that it should be struck
9 | out, that's a different application.

10 | THE CHAIR: Yes.

11 | MR SCHONFELD: The next place I want to go is the witness statements.

12 | Yes. Thank you. Maybe that is a good place to stop.

13 | THE CHAIR: I'm not in any sense trying to hurry you, but just want to get a sense of
14 | what the rest of the afternoon looks like. What's your expectation?

15 | MR SCHONFELD: We've made good progress. Your interventions have sped things
16 | up on a couple of points.

17 | THE CHAIR: That's a change.

18 | MR SCHONFELD: No comment, sir.

19 | I hesitate to predict, because it's hard to know.

20 | THE CHAIR: I certainly don't want to hurry you, because Mr Williams had a very good
21 | time, and I don't want you to feel you haven't.

22 | MR SCHONFELD: I hope I can be reasonably quick on the witness statements,
23 | though how you read them seems to be critical to the application; but it may be, sir,
24 | that if the point is we've clarified them and that's what we'll be held to at the hearing,
25 | parsing the words is less important, but I can't prejudge that. Then I do have some
26 | points I need to --

1 THE CHAIR: Fine. I think --

2 MR SCHONFELD: At least another hour.

3 THE CHAIR: Yes, exactly. No, fine. Well, I was certainly expecting that. No, that's

4 fine. But I mean, I think in that case we're probably going to occupy a great deal of

5 the afternoon. There's no pressure at all as far as you're concerned, just so you know.

6 But that's helpful just to get an indication. Good, so we'll resume at 2.00 pm. Thank

7 you.

8 (12.59 pm)

9 (The short adjournment)

10 (1.58 pm)

11 THE CHAIR: Yes, Mr Schonfeld.

12 MR SCHONFELD: Thank you. Just before lunch, I was going to turn on to the witness

13 statements, and I'd like to start with Mr Newman's statement, which is at core, tab 7.

14 The relevant paragraphs begin at page 157.

15 THE CHAIR: Yes.

16 MR SCHONFELD: We've been through these already, and again, I won't labour them,

17 but we see at paragraph 22, Mr Newman says he's:

18 "... applying to bring the Proposed Collective Proceedings as an 'opt-out' collective

19 action on the basis [that's] the most suitable means."

20 And then he says:

21 "I set out below the principal reasons for this belief."

22 And in footnote 4, he cross refers to the paragraphs of the claim form that we've been

23 to, which he says address Evans and the reasons why the claim should be opt out.

24 Then in the subparagraphs, he goes on to set out the reasons for that. We see at (a),

25 that's about the strength of the claim; and (b) is all the practicability points. That largely

26 mirrors the claim form. There are seven points made there.

1 | The one that is the focus of the application is of course (ii) on page 159. I'm going to
2 | read the paragraph in full. I know we've been through it, but --

3 | THE CHAIR: No, no, by all means.

4 | MR SCHONFELD: -- there seems to be a bit of a disagreement on what it means:

5 | "As explained in the first witness statement of Mr James Hain-Cole dated
6 | 30 March 2026, in preparing these Proposed Collective Proceedings, both I and my
7 | team have had interactions with PCMs in relation to the claim, some of which have
8 | resulted in the witness statements from PCMs provided with this application. For the
9 | avoidance of doubt and as explained in Hain-Cole 1, nothing in this statement
10 | constitutes a waiver of privilege ... (and, indeed, the need to maintain privilege ... is
11 | critical for the reasons explained below). In the course of these interactions, it has
12 | become apparent that the vast majority of such PCMs ..."

13 | So that obviously refers back to the PCMs with which the PCR has had interactions in
14 | relation to the claim.

15 | "... have only been willing to provide information to me and my team on the
16 | understanding that their identity will not be revealed and the information will be treated
17 | as confidential. These PCMs [that refers back to the group of PCMs who have been
18 | willing to provide information, but only on the understanding that their identity will not
19 | be revealed] have expressed a concern that they might face retaliatory conduct from
20 | Rightmove or that their commercial relationship with Rightmove would be jeopardised
21 | should their name be made public or associated with the Claim."

22 | I'll pause there. What he doesn't say there is that every single PCM who provided
23 | information on a confidential basis expressed that concern.

24 | THE CHAIR: Just the vast majority - yes?

25 | MR SCHONFELD: No, no, that's a critical misreading of this paragraph. The "vast
26 | majority of PCMs" refers to the ones he's had interactions with. He says the vast

1 majority of the PCMs he has interactions with were only willing to provide information
2 on a confidential basis.

3 THE CHAIR: Yes.

4 MR SCHONFELD: That group expressed concerns about retaliation. Not every single
5 one of that vast majority.

6 THE CHAIR: Oh, okay. But I mean --

7 MR SCHONFELD: Sir, I accept that there is another way of reading it.

8 THE CHAIR: But it's not even so much that there's another way of reading it. I mean,
9 I think Mr Williams doesn't have any idea because of the way it's put, but I'm just
10 stepping away from the precise wording. The suggestion, as I take it, is that there's
11 been a number -- we don't know how many -- that have been spoken to generally.
12 And a substantial proportion, the vast majority, a lot of those people -- however many
13 there are, I don't know, but a lot of them -- have indicated that they don't want their
14 identities to be known. One would assume a decent number of those -- otherwise it
15 wouldn't be worth mentioning -- have said that's because of retaliation.

16 The point of it all is to establish that there is at least, on a sort of a small sample
17 basis -- whatever the size of the sample is, we don't know -- there are quite a few
18 people who are concerned about this; is that not what he's saying?

19 MR SCHONFELD: I'm with you up to the point where you make the inference that it
20 must be a sizable number of those.

21 THE CHAIR: I didn't say -- I didn't have to. I don't think it has to be a sizable number.
22 Why would he identify the concern if it was negligible? If it were one out of 1,000, it
23 really is hardly worth putting in the witness statement. Indeed, if it were one out of
24 1,000 then the witness statement would be downright misleading.

25 So I mean, in a sense, this is sort of going round in circles, because if you're not going
26 to tell us what the answer is, which you're obviously saying you're entitled not to do,

1 | it's all very opaque, isn't it? It's very hard to work out what's going on here, but the
2 | one thing that's clear, in my reading of it, is Mr Newman saying there's a problem here
3 | because there are people who are concerned about retaliation.

4 | The numbers don't really matter that much if what he's saying is that one of the reasons
5 | why this should be opt out, not opt in, is because of that problem; I mean, he is saying
6 | that isn't he?

7 | MR SCHONFELD: Yes, sir -- well, he is saying that PCMs fear retaliation. Specifically
8 | what he's saying is that PCMs fear retaliation should their assistance to this PCR, by
9 | giving information at this stage of the proceedings, become known to Rightmove.

10 | Now, that, of course, is a distinct question from whether PCMs, if this were an opt-in
11 | claim, when it comes time to opt in, would fear retaliation for opting in, and how that
12 | might affect whether they opt in.

13 | THE CHAIR: Well, hang on, where does it say in here that the concern is in relation
14 | at this stage; it doesn't say that, does it?

15 | MR SCHONFELD: Well, it says:
16 | "... PCMs [were] only willing to provide information to me and my team on the
17 | understanding ... their identity would not be revealed. [They] expressed the concern
18 | that they might face retaliatory conduct or [it] would be jeopardised should their name
19 | be made public or associated with the Claim."

20 | THE CHAIR: But you're not suggesting that there would be any difference when we
21 | got to opt-in stage, are you? If that's where we end up, you're not saying that that
22 | concern has just gone away, and they wouldn't be concerned about opting in?

23 | MR SCHONFELD: Sir, I'm not saying either way. I'm saying it's not a direct inference,
24 | or indeed --

25 | THE CHAIR: Well, Mr Newman is saying either way; he's saying, "I believe it's likely
26 | that having to opt in would deter them". I mean, he's saying precisely that.

1 | MR SCHONFELD: Well, he is saying that that is his belief, but the extent to which
2 | those that might be deterred from opting in cannot be inferred from the extent to which
3 | those, who willingly stepped forward at this stage of the proceedings to help, would be
4 | afraid of that being known to Rightmove. Because opting in, and willingly stepping
5 | forward as a smaller number of estate agents and new home developers who assisted
6 | the PCR, are quite different things.

7 | THE CHAIR: Well, I don't think that that's how I read his paragraph. I mean, you may
8 | be right, but I mean, I can't understand why he's telling us all this, in a section that
9 | goes to the Evans questions, and concludes with the words that he does in those
10 | circumstances, if that's not exactly what he's saying. He's saying that there is
11 | a coincidence between what he's learned at this stage and what he would expect to
12 | happen at the opt-in stage.

13 | MR SCHONFELD: Sir, it's not irrelevant; he is certainly linking the two, but the farthest
14 | it goes is that the fact that PCMs have expressed a concern about retaliation if their
15 | voluntary assistance to the PCR at this stage of the proceedings became known to
16 | Rightmove. That suggests that it is at least plausible that PCMs would be worried
17 | about opting in. That's as far as this goes. He's not saying the proportion of PCMs
18 | that fear retaliation by Rightmove, if their voluntary assistance is known, tells you
19 | anything about the proportion that wouldn't opt in as a result. There's nowhere near
20 | that level of specific inference he's suggesting anybody can make. That makes perfect
21 | sense.

22 | THE CHAIR: Well, I think he is making the inference, isn't he? I think he's inviting us
23 | to make the inference, as he says:

24 | "Having publicly to opt-in ... would deter a significant proportion of PCMs."

25 | So he's actually doing precisely what you say he's not doing. He's taking the evidence
26 | he's got in front of him, which is based, as you say, on a different exercise -- because

1 | presumably he's not asking them, "Would you be deterred from opting in?" He's
2 | saying, "Would you help me now?" so I understand it's a different exercise.

3 | But he is then saying, given that experience and the concerns that have been
4 | exercised, he believes that having to opt in would deter a significant proportion. So
5 | I'm afraid I just don't follow that submission of yours. I mean, it's on the face of the
6 | document -- his evidence -- that he's making the connection that you say he's not.

7 | MR SCHONFELD: Well, he's making a connection -- sir, this is a point that's not just
8 | being clarified now; it's being clarified in the response and in our skeleton argument.

9 | THE CHAIR: Well, I don't think that really makes any difference, does it? If it's not
10 | a good point, it's not a good point. I mean, Mr Schonfeld, I don't understand how you
11 | deal with the last sentence, given your argument. Is it not plain from the last sentence
12 | that he is drawing a conclusion from what he's learnt and told us about in general
13 | terms to make, effectively, an evidential submission that, based on the knowledge he's
14 | got, a significant proportion would be deterred? I mean, that's what it says, isn't it?
15 | Why should I not read it like that?

16 | MR SCHONFELD: Two reasons. So the first is that the inference that you're reading
17 | into that, that the proportion -- which he doesn't state -- of PCMs who have assisted
18 | him at this stage who express a fear of retaliation if that assistance is known, tells you
19 | anything about the proportion that wouldn't opt in, can't be made.

20 | THE CHAIR: It can't be made?

21 | MR SCHONFELD: Well, I say, as a matter of logic, it doesn't make sense to make it,
22 | and that's why he doesn't do that.

23 | THE CHAIR: Why not?

24 | MR SCHONFELD: Well, because the --

25 | THE CHAIR: If I were bothered about helping and being exposed in the opt-in claim,
26 | it would be perfectly logical for me to be bothered about being exposed to opting-in to

1 the claim, wouldn't it? What's illogical about that?

2 MR SCHONFELD: Well, there's a few things that are very different. I have to be
3 careful of my words: if you're one of a -- I hope I won't be picked up on this -- a smaller
4 number of PCMs that have assisted the PCR, than might be asked whether they want
5 to opt-in, if it were an opt-in claim. If you're one of a smaller group whose name
6 becomes publicly associated with the claim, and who voluntarily came forward to offer
7 assistance rather than decided whether or not to opt in, you may well have more fear
8 of retaliation and be more likely to have that fear than estate agents or class members
9 in general if this were an opt-in claim and all they were doing was deciding whether to
10 opt in.

11 THE CHAIR: I can see that. In that case, why does Mr Newman tell us that on the
12 basis of what he believes -- of what he's understood from this exercise, these
13 circumstances, which is what he's described -- he believes that there would be
14 a significant proportion deterred from opting in?

15 MR SCHONFELD: Well, sir, his belief is not based solely on the previous sentence.
16 I mean, he says "in those circumstances". But Mr Newman is also an experienced
17 businessman, and can draw on his experience as a businessman to support that
18 belief. So while the fact that some PCMs do fear a commercial retaliation in the
19 circumstances of stepping forward to help the PCR, that makes it at least plausible
20 that some would fear retaliation from opting in, his view is not just informed by that.
21 His view as to a significant proportion can draw on his full wealth of experience about
22 how business parties think about suing their important commercial counterparties.

23 THE CHAIR: Let's step back a little bit on this. It is clear that at the moment, one of
24 the factors that you're going to argue in relation to opt-in/opt-out is going to be
25 retaliation. That's clear from the claim form; and whether it's the only thing that leads
26 them to believe it or just one thing among others, he's explained to us the experience

1 | he's had of people who have been concerned about it and willing to help him, and that
2 | on any view, regardless of what you say, it still forms part of the basis of the final
3 | sentence in that paragraph. It must do, because otherwise, why does he put it at the
4 | end of that paragraph? He says, "in these circumstances".

5 | MR SCHONFELD: Yes.

6 | THE CHAIR: So the question of what has happened now -- how many people are
7 | concerned about it, what they said to him -- is undoubtedly part of the evidential
8 | foundation of the argument that's going to be made at the CPO hearing, isn't it?

9 | MR SCHONFELD: Well, my point is, it's several steps removed from (overspeaking).

10 | THE CHAIR: But it's still part of the foundation, though, isn't it?

11 | MR SCHONFELD: Sir, it's at least tangentially relevant, but on both the test for waiver
12 | and the test for exercise of discretion for disclosure, that's simply not enough. He --

13 | THE CHAIR: Well, no, hang on. You say "tangentially", but actually it's the only
14 | evidence we've got. What other evidence have we got about opt-in/opt-out?

15 | MR SCHONFELD: Well --

16 | THE CHAIR: I mean, we've obviously got Mr Hain-Cole's, but what other evidence do
17 | we have, apart from this paragraph that goes to the question of deterring a significant
18 | proportion of PCMs?

19 | MR SCHONFELD: Sir, this is the only factual evidence, but obviously, in other cases,
20 | the Tribunal's been quite ready to use its general understanding of --

21 | THE CHAIR: Well, put that aside for a minute. How can you say it's tangentially
22 | relevant if it's the only factual evidence we've got on the point?

23 | MR SCHONFELD: Sir, I may have misunderstood. The point I thought you put to me
24 | was that the number or proportion of and the degree to which they fear retaliation in
25 | the circumstances now is relevant. I'm saying that an investigation into the number,
26 | proportion, and degree of that is a quite different scenario -- I'm not saying it's

1 | completely irrelevant to the ultimate question of who would be deterred from opting in,
2 | but it's very uninformative, for the reason I gave before. Also, I mean, there are points
3 | going in the other direction. Those that step forward to help the PCR voluntarily are
4 | inherently likely to be more sceptical about Rightmove and its behaviour and motives.

5 | THE CHAIR: Just hang on. I just simply don't understand the submission you just
6 | made, because I don't see any distinction between what's happened now, in evidential
7 | terms, and what Mr Newman is telling us in this paragraph. I mean, it's the only piece
8 | of evidence we've got that justifies the conclusion at the end. You say you may have
9 | other reasons, but he hasn't told us what they are. The only evidence we've got that
10 | justifies the retaliation theory is what is expressed here, which is what's happened to
11 | date. Is that not the case?

12 | MR SCHONFELD: That is the case, sir, though the point I was making is that the
13 | retaliation theory doesn't require this evidence to stand, and his estimate or his
14 | statement that a significant proportion is not drawn from the proportion of PCMs who
15 | express the fear here. That's not --

16 | THE CHAIR: Well, we don't know. You say that we don't know that. I mean, how he's
17 | reached this is entirely unclear, isn't it? I mean, even less clear, I think, from what
18 | you've said than it was before you got up, because at least before, we were working
19 | on the basis that it was only unclear because we didn't know what was happening
20 | given the discussions now. But now you're telling us there are other things that have
21 | informed his assessment of the significant proportion, and we don't know what they
22 | are. How are we supposed to deal with that?

23 | MR SCHONFELD: I mean, the other point I would make is that last sentence,
24 | Mr Newman expressed his belief, and he is the PCR and has decided to bring these
25 | proceedings as opt-out proceedings. So he necessarily tells you that he believes that's
26 | the most appropriate way to do it, and this is something he believes. That last

1 | sentence, to be honest, sir, has no bearing on the Tribunal's assessment of whether
2 | PCMs will be deterred from opting out.

3 | THE CHAIR: Okay. Well, let's start again, going back to the pleading point.
4 | Obviously, you're entitled to make the points you do in your pleading, and I don't think
5 | anyone's suggesting at the moment -- I hope Mr Williams will let me know if I've got
6 | this wrong -- but I think he was suggesting that if you don't know more than the
7 | pleading, that would be here. So it's these paragraphs that are the problem.

8 | Now, you're telling me these paragraphs are actually largely inconsequential in the
9 | finding that -- this one and the one on Mr Hain-Cole, I think you're submitting they're
10 | largely inconsequential and don't actually provide evidential support for the pleading.
11 | Is that what you're saying?

12 | MR SCHONFELD: I'm saying that it's --

13 | THE CHAIR: You can't have it both ways, Mr Schonfeld. Either you stick with the stuff
14 | and you say it's actually material and it's something the Tribunal needs to know about,
15 | and here it is, in which case you're faced with the waiver problem; or you say it's not
16 | material, in which case, why don't you just withdraw it?

17 | MR SCHONFELD: Sir, we say that the evidence is material only to a very limited
18 | extent; and the limited extent is that the fact of some PCMs expressing a fear of
19 | retaliation in the circumstances as they are now lends plausibility to the pleaded case
20 | that on opt-in, PCMs would fear retaliation. We don't say that it allows the Tribunal to
21 | infer the proportion, that it would be large, or the distribution of those that would be
22 | deterred from opting in. We don't say any of that, and that's not what Mr Newman
23 | says here. The Tribunal will have to form its own view, to the extent it considers
24 | necessary, on how prevalent a deterrent from opting in will be if there's an opt-in.

25 | THE CHAIR: By reference in part to this evidence.

26 | MR SCHONFELD: Well, I think we fairly clearly disowned, and the PCR has said, you

1 | cannot infer the proportion from what is said here. You can infer that at least some
2 | will be, but you can't infer proportion.

3 | THE CHAIR: Yes. I think --

4 | MR SCHONFELD: I mean, it may be that we are going round in circles, sir.

5 | THE CHAIR: I don't think we're going round in circles, Mr Schonfeld. In a way I think
6 | you're just denying the basic reality here, which is that you've put in evidence -- you
7 | say it's not hugely significant, but it is not immaterial, I think you're saying -- but,
8 | I mean, we've got no idea whether that's right. Mr Williams has got no idea whether
9 | that's right, and that is precisely the cherry-picking problem you get with these things
10 | isn't it? If you've put your toe over the line, and we don't know what lies behind the
11 | line, you are, I think, trying to advance some evidential material without there being
12 | proper scrutiny of it, by diminishing it to a point where it at least has some evidential
13 | weight, but not as much that you say justifies a waiver. I just don't think you can do
14 | that. I think once you're over the line, you're over the line. If this has any materiality
15 | to what is clearly going to be a significant point argued at the CPO hearing, you've got
16 | to go one way or the other. Either you advance it and say, "Yes, we're relying on this
17 | evidence", in which case you have to take the consequences, or you withdraw it.

18 | MR SCHONFELD: Sir, the reason I was at this paragraph was because my learned
19 | friend has suggested that the PCR said that the vast majority of PCMs expressed this
20 | concern.

21 | THE CHAIR: Well, look, fine, and I understand there's an argument about that. But
22 | anyway, I think I'm saying to you, that may be relevant at some point in the analysis.
23 | But the point of the analysis, which I think we could come to logically, which is: has
24 | there been a waiver? You ask yourself the two questions that are set out in PCP that
25 | Mr Justice Waksman has identified, seems to be pretty plain that you're giving
26 | evidence on something which the court is going to have to decide, and that gets you

1 | into waiver territory. Then you get into the question of, well, what's the consequence
2 | of that? And it may be you say, "Well, because it's relatively limited, it shouldn't be
3 | a widespread disclosure", but the one thing you're going to have to do if you're in
4 | waiver territory is deal with the fact that you're going to have to provide some
5 | disclosure, I think. I don't think there's any way around it. Once you have crossed the
6 | line and got into "tick the box", if you like, on the first question, I don't see how you're
7 | going to avoid handing over at least some information about what's happened here.

8 | I'm not understanding your submission to be that this material doesn't justify testing.
9 | I mean, we've been given a picture that there are some people who are concerned
10 | about this. Forget about the prevalence question. Just think about the fact of their
11 | being concerned, and that is the fact that we're going to have to form a view on; and
12 | you've put that directly into evidence. I mean, you're not really arguing to the contrary
13 | on that, are you?

14 | MR SCHONFELD: I'm not really arguing the contrary on that, though I would say, sir,
15 | that the fact that there have been some PCMs who expressed this concern does not
16 | appear to be contested, and I can take you to my learned friends' skeleton argument,
17 | where they said that their application does not depend on disbelieving either
18 | Mr Newman or Mr Hain-Cole on the fact that they were told by some PCMs that they
19 | feared retaliation. That's not an issue. Indeed, it's such an unsurprising fact that it
20 | would be surprising if Rightmove realistically thought that Mr Newman or Mr Hain-Cole
21 | had told an untruth. The question is whether, going beyond that basic fact, we've
22 | relied on something like the prevalence, and therefore have to allow them to explore
23 | the prevalence.

24 | THE CHAIR: Well, I think it's more than that, isn't it? Because I think Mr Williams is
25 | saying, for example, there might be people who say they're worried about it, but
26 | actually then they've signed up to the public petition. He's saying -- I think he wants

1 | to test credibility, not in the sense of whether or not Mr Newman is telling the truth, but
2 | whether or not what's been said is consistent with broader evidence. That's, I think,
3 | what he's saying.

4 | MR SCHONFELD: Sorry, sir. Just to make sure I understand: the suggestion is that
5 | Rightmove would go and investigate the other activities of the individuals who
6 | expressed a fear of retaliation, and then come to the CPO hearing, at which those
7 | individuals are not present, and say that they made up a fear of retaliation?

8 | THE CHAIR: Well, I think one of the things that Mr Williams said could be done was
9 | to compare the names of people who say they had a fear with the public, material
10 | where people have complained, and to see whether it has deterred them from making
11 | those complaints; that was one of the things I think he suggested.

12 | MR SCHONFELD: Yes, yes, it was, sir.

13 | THE CHAIR: Are you suggesting that he couldn't do that? They'll probably do that.

14 | MR SCHONFELD: Well, what I'm suggesting at the moment, sir, is that I struggle to
15 | see how that is an exercise which will be of utility come November.

16 | THE CHAIR: Well, because I think you say there are people who've got concerns,
17 | and he would say, well, if, for example, they fell under that category, then their
18 | concerns were evidently not that real.

19 | MR SCHONFELD: Well, first, I'm not sure that's a point that could properly be made
20 | without putting it to the individuals in any case. Second, putting your name to a petition
21 | which has a couple of thousand signatories is quite a different thing from stepping
22 | forward to provide evidence to the PCR on a £1.6 billion claim. So where it quite
23 | leaves the Tribunal, or whether it would advance matters at all in November, is entirely
24 | unclear to me.

25 | THE CHAIR: Okay, well, look, so the point you're making, I think, and you say we
26 | came here because you're concerned about the point about prevalence, about

1 | whether Mr Newman said anything about prevalence.

2 | Where he has given a view about a significant proportion PCMs being deterred. In the
3 | circumstances that he describes of this sampling exercise -- if we can call it that -- that
4 | he's carried out -- an inadvertent sampling exercise -- are you saying that it's not at all
5 | relevant for Mr Williams's client to know what the sampling exercise delivered in terms
6 | of numbers? Why is that not relevant?

7 | MR SCHONFELD: Well, sir, it probably doesn't matter, but I'm not sure I would
8 | describe this as a sampling exercise.

9 | THE CHAIR: It's my shorthand. But it does provide us with a sample, doesn't it?
10 | I mean, on any view, if it has any relevance, Mr Schonfeld, it's because it indicates
11 | that there is some proportion, whatever it is, of people who have been engaged who
12 | have expressed a concern, albeit in a different environment from an opt-in. So
13 | I understand all the points you make about that, but you can't get away from the fact
14 | that either this is useful or it's not. If you're relying on it, it is to be inferred that it is
15 | useful, and therefore, shouldn't we be able to work out exactly what it means? That's
16 | where the argument's being put against you.

17 | At the moment, I don't know what it means. And the way you're seeking to diminish
18 | the importance of it, in a way, that makes it even harder to understand what it means.

19 | MR SCHONFELD: Sir, the scope of any waiver of privilege, and certainly the scope
20 | of any order for disclosure of privileged documents, needs to in some way reflect the
21 | reliance that's placed on those documents. The point I'm making here is Mr Newman
22 | has not placed any reliance on the proportion or prevalence of these concerns.

23 | THE CHAIR: Well, how do you know that? (Overspeaking).

24 | MR SCHONFELD: Well, let me put it this way: at the CPO hearing, as we've made
25 | clear repeatedly, Mr Newman will not place any reliance, and this evidence will not be
26 | read as placing that reliance, on the proportion -- which he doesn't state -- of the

1 | PCMs --

2 | THE CHAIR: Just explain to me how that's going to work; are you anticipating he's
3 | going to give oral evidence?

4 | MR SCHONFELD: No, no, sir. Sir, I'm saying we will not be submitting at the CPO
5 | hearing that you should infer that a large proportion of PCMs express the relevant
6 | concern, because that's not what this says, so we couldn't possibly submit that. We've
7 | made clear that's not what this says, so we can possibly go back on that and submit
8 | the contrary.

9 | THE CHAIR: A large proportion of PCMs overall, you mean?

10 | MR SCHONFELD: Or even a large proportion of the PCMs who were willing to give
11 | this evidence. Because that's not, as Mr Newman has clarified, what this is intended
12 | to say.

13 | THE CHAIR: The trouble with that is that it's a witness statement, Mr Schonfeld.
14 | I mean, it doesn't matter how many letters you write saying you mean something
15 | different; it's a witness statement. He could have provided an amended --

16 | MR SCHONFELD: I mean, maybe all that's needed is to put the words "some of" at
17 | the start of "these PCMs".

18 | THE CHAIR: But I don't think that solves your problem. If we come back to the two-
19 | stage test, are you disputing the application at the first stage? Well, let's get it out and
20 | have a look at it, shall we?

21 | It's in PCP, isn't it? First, has there been a waiver of privilege?

22 | "This involves consideration of whether the PCR has referred to privileged
23 | communications and positively relied on that in some way to support or advance this
24 | case on an issue the court has to decide."

25 | That's the first test. It seems to me you're not disputing that there are privileged
26 | communications being referred to here, I think? (Pause)

1 | MR SCHONFELD: No, no. But clearly there is a reference to communications which
2 | are privileged.

3 | THE CHAIR: And there is the 31.14 point that we've discussed already, and you've
4 | heard what Mr Williams says about that. He says that in the PCP Capital case, it
5 | wasn't a 31.14 case either. He says this is on par with that, and therefore it's not
6 | necessary to have that.

7 | MR SCHONFELD: Sir, if you have it open, I was going to come to it later, but it's
8 | probably useful now. It's tab 11 of the authorities bundle.

9 | THE CHAIR: Yes.

10 | MR SCHONFELD: Paragraph 14 at page 157.

11 | THE CHAIR: Yes.

12 | MR SCHONFELD: It's not as clear as one might hope on the judgment, but obviously
13 | it was clear at the time. I think the quoted basis for the application at paragraph 14,
14 | the quoted paragraph 1.1, makes it clear. It says:

15 | "Any contemporaneous document and any interview transcript, insofar as it (1) was
16 | previously withheld from disclosure or inspection, whether by redaction or otherwise,
17 | on the ground of privilege; and (2) concerns the ASAs or either of them."

18 | So the disclosure being sought is disclosure that fell within previous disclosure orders
19 | but was withheld on grounds of privilege.

20 | THE CHAIR: Well, I suppose it would be, wouldn't it? Because presumably, in
21 | a commercial court case, it would be quite helpful.

22 | MR SCHONFELD: Quite. But, sir, there was no question of entitlement to the
23 | documents if there had been waiver; there was no separate question of disclosure.
24 | That's why it's not a 31.14 case. Because they were entitled to disclosure of the
25 | documents because they fell within an existing disclosure order. What they wanted
26 | was inspection of the ones that had been withheld on grounds of privilege, on the basis

1 | that that privilege had been waived.

2 | THE CHAIR: Yes, but that's consistent with Mr Williams's point, which is that you don't

3 | have to go at this through a 31.14 route.

4 | MR SCHONFELD: But the reason you didn't have to here is that there was

5 | a pre-existing disclosure order --

6 | THE CHAIR: Yes, sure.

7 | MR SCHONFELD: -- at which point the court would have decided whether this

8 | category of documents was necessary and proportionate --

9 | THE CHAIR: Yes, of course, but --

10 | MR SCHONFELD: -- taking consideration of others' interests, et cetera.

11 | THE CHAIR: But I mean, in a way, that's consistent with his position, isn't it?

12 | MR SCHONFELD: I mean, I'm not sure it particularly matters, but I don't think it is,

13 | because the reason PCP doesn't consider proportionality is because that has already

14 | been considered when the order was made. It only needs to consider waiver.

15 | THE CHAIR: Yes, okay, I see, I understand. Just to come back to my question, I'm

16 | inviting you -- if you think that there's a point here that really matters in relation to

17 | 31.14. I've discussed it with Mr Williams and he said, "No, I think it doesn't really

18 | matter which way you go, and I'm entitled to do it this way". And he gives us an

19 | illustration of doing it another way.

20 | You would say, but at least he's got the same point without having to go through 31.14.

21 | I'm just checking that that's not a point that you're taking.

22 | MR SCHONFELD: Well, I don't think --

23 | THE CHAIR: Are you saying there's a jurisdictional problem with the way he's

24 | approached this? That he can't do this unless he applies to 31.14?

25 | MR SCHONFELD: No, no, no.

26 | THE CHAIR: So he can?

1 | MR SCHONFELD: He does have to satisfy the criteria for exercise of discretion to
2 | order disclosure.

3 | THE CHAIR: Well, he has to satisfy -- I understand your point about 53(2),
4 | I understand that, but that's for me that's downstream at the moment. At the moment
5 | we're just looking at waiver.

6 | MR SCHONFELD: Sorry, to avoid us talking across purposes, I am not just talking
7 | about waiver right now. But in your question --

8 | THE CHAIR: Well, I am asking you to try to really pin you down on it, which is why
9 | we're talking about just waiver. I want to know whether you're contesting the first of
10 | the two tests.

11 | I think you accept that you've referred to privileged communications. Then we're into
12 | the thing we've just been debating -- not because I think you wanted to, but because
13 | I want to -- which is: has your client positively relied on reference to the
14 | communications in some way to support or advance his case on an issue the court
15 | has to decide?

16 | I think it's unquestionably the case that he has, isn't he? I mean, are you seriously
17 | suggesting he hasn't relied on the reference to the privileged communications in some
18 | way to support or advance his case on an issue we have to decide?

19 | MR SCHONFELD: There is a concept of sufficient reliance in the authorities, and our
20 | position as set out in the response was that this was not -- this very high-level point,
21 | which I take they turn in another way -- but the very high-level description of the
22 | existence of concerns is not specific enough to lead to a waiver over any specific
23 | communications. Sir, I'm not going --

24 | THE CHAIR: Even though it's the only evidence you've got on the subject?

25 | MR SCHONFELD: Sir, I don't think that whether there is other evidence determines
26 | whether there's a waiver of privilege. I mean, one has to look at it in context. So I can

1 | see how it might be relevant, but if we had one other bit of evidence, I don't know that
2 | that would change the point. The submission we made, or the position we expressed
3 | in the response, was that reliance on the mere fact of the existence of these concerns
4 | did not waive privilege over any particular communications.

5 | Now, I take it, sir, you're probably not with us on that point. So I don't suggest we
6 | spend more time this afternoon on it. But what it certainly doesn't do in this paragraph
7 | is rely on a prevalence point, such as to give an automatic waiver over a wider set of
8 | documents or information to allow you to establish the prevalence. Nor here does he
9 | suggest that the PCMs that expressed this concern had any particular characteristics:
10 | we're not saying they represent the whole class; we're not saying they're of all sizes;
11 | we're not saying any of that. We can't say that at the CPO hearing; we don't have the
12 | evidence.

13 | So we haven't waived privilege over any of that information either, certainly. Now,
14 | I take your point, sir, you're not with us on there being no waiver.

15 | THE CHAIR: Well, I'm just inviting you to -- that's not right. I mean, at the moment I'm
16 | still open to persuasion, Mr Schonfeld, but you're not really giving me any at the
17 | moment, I think, at this point.

18 | MR SCHONFELD: I suppose when we get to it, I don't think it particularly matters
19 | whether there was a waiver over the very narrow point of the existence of these
20 | concerns.

21 | THE CHAIR: Yes.

22 | MR SCHONFELD: Our very first offer included providing the evidence of that.

23 | THE CHAIR: Yes. So this is the 1(b)/1(a) point, is it?

24 | MR SCHONFELD: Well, this --

25 | THE CHAIR: So in a way you're --

26 | MR SCHONFELD: And the anonymity point, sir.

1 THE CHAIR: Yes, exactly. I understand.
2 Just maybe to try and shortcut this a bit: if I were against you in relation to there being
3 a waiver and thought that it was necessary for there to be some disclosure, the points
4 you're making at the moment aren't really pushing back on the disclosure of the 1(a)
5 category, are they? I mean, what did you say about 1(a) that is not within, if you like,
6 the ambit of a reasonable waiver, given -- you said about sufficiency of reliance, but,
7 I mean, where does this go?
8 I understand there's a 1(b) point, and the answer to the 1(b) point that you advanced
9 pragmatically in correspondence will give you the numbers. I think Mr Williams was
10 more or less inclined to accept that, but clearly that's not the way his order is framed.
11 MR SCHONFELD: No.
12 THE CHAIR: But if you're still willing to give him the numbers, then in a way it sort of
13 slightly diffuses the point, doesn't it?
14 MR SCHONFELD: Yes. I mean, we do not think those numbers are required.
15 Certainly it's not part of the application, but nor do we think any disclosure, if one could
16 conceive of disclosure that would provide the same information, is justified in terms of
17 the scope of any potential waiver. If you (overspeaking).
18 THE CHAIR: If you think about where this might end up -- and I'm not saying it is going
19 to end up there -- but if I were to reach the conclusion you did need to have to disclose
20 something, and also that it was important that it got into the question of prevalence,
21 then my difficulty is going to be, well, I've got a very broad application for 1(b)
22 disclosure, but if you're not going to come to the party with what might be a shortcut
23 to that, then I might not have much choice.
24 MR SCHONFELD: Sir, if you are minded to order the disclosure, whatever it might
25 be, in 1(b) --
26 MR WILLIAMS: I hoped I made clear that we were pursuing the counter-proposal.

1 | I mean, we say that there's disclosure and there's information. I don't mean to be rude
2 | and interrupt. I'm just trying to help with the discussion. I'm not applying for 1(b),
3 | because we saw the force of the points that were made, and really, we thought that
4 | was constructive, and we're trying to be constructive.

5 | THE CHAIR: Well, quite, and I think --

6 | MR WILLIAMS: So --

7 | MR SCHONFELD: I may be able to shortcut this. What I was going to say was: if you
8 | were minded to think that 1(b) in some form was necessary, information is by far the
9 | more straightforward route, and we are content to do that instead. What we were not
10 | doing is willing to allow Rightmove to bank that as a starting point and then push for
11 | more.

12 | THE CHAIR: This is all still to play for, Mr Schonfeld, but you might find yourself in
13 | a position where you have to make a choice between giving the information or
14 | 1(b)-type disclosure, because it may be that there's no other practical alternative, and
15 | that's where the proportionality point does come in, doesn't it? In other words, if you've
16 | got a route out which is more sensible but you don't want to take it, then --

17 | MR SCHONFELD: No. Sir, to be clear, if we come to the point where you're satisfied
18 | that prevalence needs to be addressed in some way, we will give the information.

19 | THE CHAIR: Yes.

20 | MR SCHONFELD: The disclosure seems an unnecessarily complicated way of
21 | getting there for everyone.

22 | THE CHAIR: Yes.

23 | MR SCHONFELD: But the point you started on to was about 1(a).

24 | THE CHAIR: Yes.

25 | MR SCHONFELD: The problem with 1(a), and I was going to come on to it as drafted,
26 | is that it was very unclear exactly what was covered. Now, there's been some

1 | correspondence that's clarified it, but if it's going to be embodied in an order, it needs
2 | to be clear on its face. Maybe it is worth going there.

3 | THE CHAIR: Yes. (Pause)
4 | Page 197.

5 | MR SCHONFELD: Thank you, sir.
6 | It's probably possible -- yes. It is worth having the correspondence on this open.

7 | THE CHAIR: Yes, yes.

8 | MR SCHONFELD: Supplemental bundle, tab 4.

9 | THE CHAIR: This is the first supplemental?

10 | MR SCHONFELD: First supplemental. Thank you. Page 40.

11 | THE CHAIR: Yes.

12 | MR SCHONFELD: This is Rightmove's letter of 13 July, and this is responding to the
13 | PCR's original proposal. At paragraph 5, it says, "Rightmove confirms it is willing to
14 | agree to the PCR's proposal, and that proposal ..."

15 | Sorry. Maybe I should have taken you there first. That was the one that referred to
16 | agreeing to 1(a) of the order.

17 | THE CHAIR: Yes. At that stage, you were saying just the binary. Just people who
18 | had said --

19 | MR SCHONFELD: Sorry. Maybe I really should have gone there. It's the previous
20 | tab in the bundle, is our proposal.

21 | THE CHAIR: Yes.

22 | MR SCHONFELD: We say there, at 2.2 --

23 | THE CHAIR: Yes.

24 | MR SCHONFELD: That we don't understand what paragraph 1(b) is meant to mean.

25 | THE CHAIR: Yes.

26 | MR SCHONFELD: Then halfway down, we say:

1 | "Accordingly, we understand that paragraph 1(b) must be aimed at identifying how
2 | many PCMs did not express fears of retaliation, because those that did [previous
3 | sentence] are already captured in 1(a)." [as read]

4 | THE CHAIR: Yes.

5 | MR SCHONFELD: That's how we understood the order.
6 | We then made a proposal, 3.1(a), "We will disclose and provide inspection of the
7 | documents falling within paragraph 1(a), as clarified by 2, with redactions".
8 | We clearly by that meant our understanding of 1(a), which was the documents showing
9 | PCMs fearing reprisal, because we understood at that point that won't be --

10 | THE CHAIR: Yes, I see. So the proposal at this stage is, "We'll give you documents
11 | of communications with PCMs who say they have feared reprisal".

12 | MR SCHONFELD: To make good the evidence that some PCMs did express that
13 | fear.

14 | THE CHAIR: Okay.

15 | MR SCHONFELD: In effect, that's the direct waiver category.

16 | THE CHAIR: Yes. Arguably, that's the documents which, when you get to the second
17 | question, are presumed to have been disclosed. Yes.

18 | MR SCHONFELD: Then the next letter -- back to where we were, paragraph 5 --

19 | THE CHAIR: Yes.

20 | MR SCHONFELD: Rightmove responds and says it's:
21 | "... willing to agree to the PCR's proposal, subject to the PCR additionally providing
22 | information as to how many were asked would they fear retaliation, and confirming
23 | Rightmove's understanding that the documents to be disclosed under
24 | paragraph 3.1(a) of our proposal and paragraph 1(a) of the amended order include
25 | documents regarding PCMs who indicated that retaliation was not a concern."

26 | THE CHAIR: Yes.

1 MR SCHONFELD: That's plainly the opposite of what we had said. We had said we
2 understood 1(a) didn't include those; those were 1(b). So there's a misunderstanding
3 there, or rather a difference of understanding.

4 THE CHAIR: Yes.

5 MR SCHONFELD: If we go to supplemental bundle 2, we can see then our revised
6 proposal. That's at tab 2, page 4, paragraph 3.1(a)

7 THE CHAIR: Yes.

8 MR SCHONFELD: We say We'll: "disclose and provide inspection any document
9 containing or concerning communications [et cetera.] that evidences that the PCM
10 either feared retaliation [...] or indicated that such retaliation [...] was not a concern."
11 [as read]

12 We've lifted that straight from their clarification, the confirmation they requested in the
13 previous letter. The suggestion that my learned friend made, that we've introduced
14 some sort of bifurcation, isn't really fair. We merely followed the bifurcation that they
15 had introduced in the previous letter. Now the suggestion is made that there may be
16 some documents that neither indicate a lack of fear of retaliation nor indicate a fear of
17 retaliation, but may still somehow be caught by paragraph 1(a). With respect,
18 I struggle to understand what those documents might be. If a document doesn't show
19 that a PCM feared reprisal or didn't fear reprisal, how that can be relevant to whether
20 they feared reprisal, which is the wording of paragraph 1(a).

21 Sir, I do hesitate to say that we're accepting paragraph 1(a), certainly not as drafted.

22 THE CHAIR: Right.

23 MR SCHONFELD: But you've seen what our proposal says, and, that, we say, is our
24 updated proposal, so that's a fair bit clearer, if there is going to be an order along these
25 lines.

26 THE CHAIR: Yes. Okay. I see what you're saying. Basically, the fault line here

1 | is -- Mr Williams put it along the lines of there being a grey area between the two. So
2 | there might be, I don't know, people who said, "I might be concerned", or "I might not
3 | be concerned", or, I don't know. It's hard to think of what it might be, but surely if
4 | we're -- well, let's take this in stages, shall we? Let's just take it in stages.

5 | If one sticks with your categorisation, the direct waiver point, you would then be saying,
6 | "Okay, well, that's fine. Those are the people who've indicated the concern", and that's
7 | precisely what's being referred to. That's the sort of presumed waiver, once you've
8 | got past the first limb of the test. Then the question is: what further extension is
9 | necessary to make sure that it's fairly presented? I think you've accepted in that
10 | proposal that that would include people who have said that they're not bothered by it;
11 | is that not right?

12 | MR SCHONFELD: We haven't accepted it, but we've offered it.

13 | THE CHAIR: Well, I'll put it to you, then. Do you not accept that once we're into that
14 | stage, if we're trying to form a picture of what's going on here, do we not need to
15 | know --

16 | MR SCHONFELD: I'm not going to take the point.

17 | THE CHAIR: No. The only thing then is: is there anything else in that picture that is
18 | relevant that we ought to understand? That's really where you get to, isn't it? So, in
19 | other words, is there --

20 | MR SCHONFELD: It's not, sir, whether there's anything else that's relevant; whether
21 | there's anything that's necessary and proportionate.

22 | THE CHAIR: No, no. Fine. But if we're not looking at people who've said nothing
23 | about it, and so whenever there's been a conversation with a PCM about whether they
24 | fear retaliation, they either say, "Yes, I do", or they've said they do, or they might have
25 | said something else; and shouldn't we see all three of those, rather than just two of
26 | them?

1 | MR SCHONFELD: I'm not attempting to draft on the hoof, but perhaps what we need
2 | is wording like, "a PCM commented on whether they fear retaliation".

3 | THE CHAIR: Yes.

4 | MR SCHONFELD: It would capture the grey documents.

5 | THE CHAIR: Because I can't see any point in doing -- once you get past 1, and you
6 | include the notes, it actually --

7 | MR SCHONFELD: It wasn't our intention to leave a grey gap.

8 | THE CHAIR: No, I understand.

9 | MR SCHONFELD: We just couldn't understand that there was a gap.

10 | THE CHAIR: No, I understand. That's helpful. I think we're sort of edging towards
11 | what the right -- and I agree, let's not try and draft on the go.

12 | If I can put it this way: if you're not really pushing back on -- you are disagreeing, I'm
13 | sure -- but if you are taking the steer that you're not in a great position on stage 1, as
14 | far as I can see, and I think you're accepting that the direct waiver then falls into that,
15 | then (inaudible) the question of what's reasonable under limb 2 -- bearing in mind
16 | we've got to come to rule 53(2) in a minute as well -- but how would you manage this
17 | under limb 2? It seems to me the obvious place to draw the line is to say something
18 | along the lines of just what you said people are talking about. What have the
19 | discussions been about? About fear of retaliation. That doesn't seem to me to be an
20 | unreasonable way of striking the balance of fairness, and putting aside the anonymity
21 | point as well.

22 | MR SCHONFELD: That's what I was trying to get to, yes.

23 | THE CHAIR: So those things --

24 | MR SCHONFELD: To get to that point, that way of framing it --

25 | THE CHAIR: Yes.

26 | MR SCHONFELD: -- would seem to capture both the direct and collateral elements

1 | for the waiver.

2 | THE CHAIR: Yes.

3 | MR SCHONFELD: I accept that.

4 | THE CHAIR: Yes.

5 | MR SCHONFELD: As you said, we will need to get to the question of whether that

6 | actually gives rise to disclosure separately. But on the waiver point, yes.

7 | THE CHAIR: Yes, okay, that's very helpful, thank you. Sorry, it's taking you well out

8 | of your way, I'm sure.

9 | MR SCHONFELD: Well, what I will do is -- I'm not going to go to Hain-Cole 1.

10 | Newman 1 really seems the core of this.

11 | THE CHAIR: No.

12 | MR SCHONFELD: What I maybe still do want to do, because I think it is context when

13 | we come to disclosure, is look at some of the other collective proceedings.

14 | THE CHAIR: Yes.

15 | MR SCHONFELD: We make the points in our skeleton at paragraphs 34 to 36. I'm

16 | not going to go into all of those decisions -- they're all recent Tribunal decisions.

17 | I didn't actually check, you may have been sitting on some of them. But the short point

18 | is that the Tribunal has taken into account, as a factor going to whether to order opt-out

19 | proceedings, that concerns about retaliation or damage to commercial relationships

20 | may make proposed class members reluctant to participate in opt-in proceedings.

21 | It has taken those into account in cases where there is no apparent evidence

22 | whatsoever to substantiate those concerns. It is merely taking it as a matter of obvious

23 | commercial reality that that will be a factor playing on PCMs minds.

24 | THE CHAIR: How does that fit into the argument, though? Where does this go; is this

25 | part of a waiver point?

26 | MR SCHONFELD: If I may, sir, I'm drawing a contrast between that and some other

1 | cases. Perhaps can I come back to your question when I --

2 | THE CHAIR: I suppose so, but I'm just not quite sure what the point of looking at those

3 | is. If the analysis we've just done on waiver --

4 | MR SCHONFELD: It's not a waiver point.

5 | THE CHAIR: It's not. Okay.

6 | MR SCHONFELD: It's a discretionary disclosure point.

7 | THE CHAIR: But if there was no disclosure ordered in those cases ...

8 | MR SCHONFELD: Well, the point is, sir, this was, at least by the Tribunal -- and I can

9 | give you the references -- but it's the Rodger and Stephan cases that I'm referring to.

10 | THE CHAIR: Yes.

11 | MR SCHONFELD: The Tribunal in those cases was willing to effectively take judicial

12 | notice of this point.

13 | THE CHAIR: Yes.

14 | MR SCHONFELD: So the idea that here it's proportionate to order the extensive

15 | disclosure sought, so that there can be a large satellite fight using the confidentiality

16 | ring, and that we're going to turn up for a one-day CPO hearing in November and have

17 | extensive submissions about this point -- and whether it is, in fact, the case that PCMs

18 | will fear retaliation if they opt in -- I'm just saying, as a matter of proportionality, given

19 | the way this point has been addressed in other cases, that's disproportionate.

20 | Now, it may be, sir, that you say it's disproportionate to give the full extent of the

21 | disclosure requested, but some core of it is still necessary and proportionate. But it's

22 | certainly a factor to weigh. What we say is the fact that the Tribunal in other cases

23 | takes the point as read is indicative of the likelihood that in November, actually we're

24 | going to say the time we all spent -- if we order this disclosure -- and the money we all

25 | spent thinking about this point and arguing about it, when you come to write your

26 | judgment and say, "Well, it's a point I weigh into the balance", won't have been well

1 | spent.

2 | THE CHAIR: Well, isn't the difficulty with that argument -- unless I misunderstood

3 | it -- it wasn't a contested point in those cases? I mean, or was it?

4 | MR SCHONFELD: Well, let me --

5 | THE CHAIR: Why don't you show me?

6 | MR SCHONFELD: I'm not sure about those two cases, but I was going to take you to

7 | one where it was a contested point.

8 | THE CHAIR: Yes, okay. If it wasn't contested, then it really doesn't seem to me to

9 | add anything at all, because there are lots of things that happen in cases that aren't

10 | contested that don't mean that they shouldn't be contested later.

11 | MR SCHONFELD: I was wrong. Perhaps naively, I was assuming that the defendants

12 | in those cases would have contested every point like this. But, you know, I can see if

13 | we can make it good, but really, I can take you to an example.

14 | THE CHAIR: Yes, why don't you show me what you want to show me?

15 | MR SCHONFELD: So perhaps *Ennis v Apple* is a good example. So that's in the

16 | authorities bundle at 22. I mean, I'm not sure we actually need to -- well, maybe we

17 | do need to go there. Authorities bundle 22, page 449.

18 | THE CHAIR: Yes.

19 | MR SCHONFELD: Paragraph 42. So this is recording Apple's submissions in respect

20 | of the class representative's witness evidence. We see about five lines down,

21 | a sentence:

22 | "Further, the Tribunal should reject the contention that developers are so afraid of

23 | retaliation that opt-in would be impracticable."

24 | So that's the point clearly contested.

25 | "Mr Newman ..."

26 | A different Mr Newman.

1 THE CHAIR: Yes.

2 MR SCHONFELD: "Mr Newman's evidence is hearsay."

3 It's not entirely clear exactly what it is, but one can imagine it might be quite similar to
4 the evidence here, or it might go further.

5 "The alleged subjective views of class members are irrelevant to the objective
6 assessment of practicability. Apple has produced evidence from Mr Watson that
7 developers here, in fact, sued or complained about Apple to regulators."

8 So what we see there is that there was evidence -- it was hearsay evidence. We don't
9 know quite what it said, but it was hearsay evidence -- the defendants made
10 submissions as to weight. There's no suggestion that they sought or obtained
11 disclosure in relation to that hearsay evidence. Equally, there's no suggestion that,
12 sort of, the corollary point was taken and that the class representative sought or
13 obtained disclosure about the suits and complaints made against Apple, which was
14 the point raised on the other side of the ledger.

15 If we go over to paragraph 83, which is several pages on. Page 465.

16 THE CHAIR: Yes.

17 MR SCHONFELD: We see the Tribunal resolving this point. It refers there a few lines
18 down, the sentence beginning:

19 "There is before the Tribunal substantial evidence of concerns being expressed in the
20 public domain ..."

21 So there was also public domain evidence.

22 "... about retaliation, or the risk of retaliation, by the Defendants against developers
23 who challenge them. We make no finding as to whether those concerns are or are not
24 well-founded. We also recognise that some developers have raised proceedings
25 against Apple and that some of the class members are sufficiently substantial
26 organisations that concerns ... might not be a deterrent ... But the very fact that such

1 | concerns have been expressed in the public domain, and the apparent prevalence of
2 | such concerns [again, in the public domain], is a feature of the environment (in our
3 | view, an objective feature of the environment)."

4 | Sir, it appears that the defendant's submissions in that case, as to the weight to be
5 | given to the hearsay evidence, were effective. The Tribunal did not rely on the hearsay
6 | evidence; it relied on the public evidence, and it said that that, sir, weighed in favour
7 | of considering that concerns about retaliation were relevant.

8 | We say the proportionate way to deal with this point is exactly as it was in Apple, that
9 | the defendants are in a position to make submissions about how far -- and indeed,
10 | whether it goes anywhere at all -- to the evidence, the hearsay evidence that we've put
11 | in goes to support our point, just like the defendants in Apple did. Those submissions
12 | as to weight will be heard and will be assessed.

13 | What didn't happen there, and what we submit shouldn't happen in this case, as
14 | a matter of proportionality if nothing else, is that the parties exchange disclosure on
15 | the two opposite sides of the coin that they raised in that case: on the one hand, the
16 | PCR saying some PCMs have expressed concerns to me; and Apple saying, "Ah, but
17 | PCMs have made complaints to and suits against us". There wasn't a large disclosure
18 | exercise by which both sides dug into those and said, "Well, what was the precise
19 | nature of each complaint and dispute and concern, the characteristics of everyone
20 | who raised them?" Not part of the picture.

21 | Obviously, it's up to you to go a different way, sir, but I'm merely saying that it's not,
22 | doesn't appear to be a prerequisite for the Tribunal, or indeed for the parties, to
23 | consider the point can be fairly dealt with.

24 | I just want to go to one more -- in fact, I probably don't need to; I could go there, but
25 | I think you'll hopefully trust that I can read the one line I want to rely on accurately.

26 | This is the Ad Tech v Alphabet case in 2026. There, the Tribunal attached little weight

1 | to the evidence of the class representative's solicitor that class member
2 | disclosure -- as I said, this wasn't about opt-in, but about class member
3 | disclosure -- would place undue pressure on individual class members. This is from
4 | the judgment:

5 | "... his evidence was not based on any inquiries or consultation which the [class
6 | representative] had carried out."

7 | What Mr Newman has sought to do is provide the Tribunal with the benefit of his
8 | enquiries, only to the limited extent of confirming that PCMs in this case have
9 | expressed concerns about retaliation, if their assistance becomes known.

10 | THE CHAIR: What is the paragraph number in Ad Tech?

11 | MR SCHONFELD: Apologies, that is 98.

12 | THE CHAIR: Yes.

13 | MR SCHONFELD: What we say is that it would be -- and these points go to
14 | discretion -- unfair, and would mean that such evidence is very unlikely to be
15 | forthcoming in future, if the result of merely confirming that PCMs have a fear of
16 | retaliation -- that is, answering the Tribunal's call in Ad Tech -- is compulsory
17 | disclosure of privileged communications. Particularly if that disclosure goes much
18 | wider than the evidence actually presented and relied on in relation to the concerns.

19 | That's a point that my learned friend doesn't pick up because he said it doesn't go to
20 | privilege. I accept that, but it certainly goes to the Tribunal's exercise of its discretion,
21 | and whether it's proportionate to order the disclosure. (Pause)

22 | There, I've gone silent. I think it might save us time if I skipped --

23 | THE CHAIR: Yes, that's fine, that's fine. (Pause)

24 | MR SCHONFELD: Sir, I think I can go to the anonymity point next.

25 | THE CHAIR: Yes. (Pause)

26 | MR SCHONFELD: This was the point that was the roadblock to a compromise

1 solution.

2 THE CHAIR: Yes.

3 MR SCHONFELD: As you'll have seen from the updated offer and the point about the
4 grey area in between was not really the one we were taking. We weren't aware that
5 there was the suggestion. Really, the roadblock was the anonymity point. The PCR
6 has been very clear that that's a line in the sand point.

7 Rightmove makes two points by way of justification of its insistence on receiving the
8 identities of the PCMs who fear retaliation if those identities become known. Those
9 are first set out in Rightmove's 13 July letter, that's in the first supplemental bundle,
10 tab 4, page 39.

11 THE CHAIR: Yes.

12 MR SCHONFELD: It's paragraph 3 there:

13 "Rightmove is content to agree to the PCR proposal, save that it is unwilling to agree
14 to the redaction of parts of documents which pertain to the PCMs identities. Rightmove
15 requires this information in order to test the evidence of the PCMs' alleged fear of
16 retaliation by putting it in the context, inter alia: the nature and scale of the relevant
17 PCMs business and their past relationships with Rightmove." [as read]

18 That explanation of why they want to know the identities is not in the application; it's
19 not in the preceding correspondence. So this is the first time that point has been
20 made.

21 The second point, following on, is the point that, effectively, PCMs do not need to be
22 concerned because the identities of these fearful PCMs will only be made known to
23 Rightmove's internal lawyers, and of course its external lawyers, not to other members
24 of the Rightmove business, because they'll be disclosed into the confidentiality ring.

25 That's all we're given to justify the very significant step of revealing, to at least some
26 members of Rightmove, the identities of PCMs whose express wish was for those

1 identities not to be revealed to Rightmove because they fear retaliation.

2 There are three problems with Rightmove's argument. The first is that the PCR doesn't
3 rely on any of the characteristics of the relevant PCMs. The position would be different
4 if the relevant passages of Newman 1 said something to the effect of, "The PCMs that
5 express such fears included both large and small businesses" or "included both estate
6 agents and new home developers". Then we would see the point about why it needed
7 to be ascertained whether that was in fact the case, though even then, the actual
8 identities, quite possibly, wouldn't be necessary.

9 In other words, the power to order disclosure of privileged material only arises to
10 prevent injustice, and any order for disclosure must match the injustice. There's
11 nothing unfair, partial, or misleading if the identities of the PCMs continue to be
12 protected by litigation privilege, in circumstances where the PCR has not relied on
13 those identities, nor any particular characteristics of the relevant PCMs who expressed
14 fears. He's merely relied on the fact that some PCMs expressed fears.

15 The second point is: even if there were a sustainable argument that privilege over the
16 identities has been waived, it's neither necessary nor proportionate to order disclosure
17 so that Rightmove can investigate the nature and scale of their business, or their past
18 relationships with Rightmove. It's really very hard to see -- and I think it's the point you
19 put to my learned friend -- how those points are really going to inform the Tribunal
20 come November.

21 Are we actually going to get into, at the hearing -- well, we'll probably have to be in
22 closed session -- "PCM 1 made the following complaint to Rightmove in 2014, and we
23 say that undermines the fear of retaliation in this particular PCM, and therefore you,
24 the Tribunal, should not find that there could conceivably be a fear of retaliation for
25 other PCMs at opt-in". Is that actually how we conceive of the hearing going, and is it
26 proportionate to open up that line of investigation for Rightmove and put the PCR to

1 | the cost and expense of responding to those points, which ultimately are very unlikely
2 | to lead anywhere?

3 | The third point is that the notion that PCMs' concerns are fully addressed by disclosure
4 | into the confidentiality ring is, with respect, fanciful. First, here, Rightmove has made
5 | clear that that is a temporary state of affairs. My learned friend referred to this; the
6 | disclosure application reserves Rightmove's rights to challenge the confidentiality
7 | designations, and specifically says:

8 | "It reserves its right to request material be removed if necessary for taking
9 | instructions."

10 | Given Rightmove has expressly said that its intention if it finds out the identities of
11 | these PCMs is to investigate the past relationship between Rightmove and these
12 | PCMs, it's a racing certainty that it would, in short order, need to seek the removal of
13 | the material from the CRO so that it's "junior internal lawyers" can actually discuss with
14 | the employees who manage the relevant relationships, and speak to these PCMs,
15 | what the nature of those relationships is, insofar as Rightmove considers that's
16 | a relevant point at all. It's very hard to see otherwise -- I think it's three junior
17 | Rightmove lawyers who are in the confidentiality ring -- how they could plausibly
18 | investigate the matters that Rightmove has suggested, and Rightmove hasn't
19 | explained how they would do it, without having to be in contact with other employees
20 | of Rightmove.

21 | I'm not suggesting they would deliberately breach their obligations, but inadvertent
22 | disclosures from confidentiality rings do happen, particularly where there are large
23 | teams of lawyers involved. Even more so where what needs to be protected is the
24 | identity of a PCM, not a document. Accidentally disclosing a document is maybe
25 | harder to do than accidentally giving a colleague enough information to connect the
26 | dots and realise you're asking about one of these troublemakers.

1 The other point I would make is that Rightmove has not said, and no doubt cannot
2 say, that the in-house junior lawyers who would have access to the identities of these
3 PCMs could never be involved with the commercial relationship with these PCMs
4 directly. If, take for example, a PCM that is in a legal dispute with Rightmove, or
5 a commercial dispute with Rightmove that gets referred to Rightmove's in-house
6 lawyers. It may be referred to the very people who know that PCM is the one who is
7 helping the PCR in this case.

8 How Rightmove could avoid -- it's beholden on Rightmove if it wants to get this
9 information, and says that the confidentiality ring is sufficient protection, to have
10 already explained how it will avoid the PCMs' commercial relationships being affected
11 in that way.

12 In any event, that's talking about actual potential for impact on commercial
13 relationships. There's also the question of whether PCMs fear that impact. While the
14 Tribunal and the lawyers in this room may have a large degree of faith in the ability of
15 confidentiality rings to keep this kind of material within a limited audience, it's
16 unrealistic to expect that the 7,000 plus PCMs, learning that Rightmove has prised the
17 identities of those that helped the PCR, from the PCR in this hearing, will take much
18 comfort from the legal technicality of a confidentiality ring. That's just not realistic.

19 The chilling effect on PCM engagement in this case, and we say in other cases, if
20 you're a PCM in another claim and you know that the possibility is there that your
21 identity will be revealed to the proposed defendant if you come forward and offer
22 assistance, even on a confidential basis. That chilling effect will still be severe.

23 THE CHAIR: So if we get to the point where I think it's the right thing to do for you to
24 provide some information, and then there's obviously the numbers, which effectively
25 the 1(b) points -- it's a combination of 1(a) and 1(b), but just to get some sense of the
26 prevalence, if you like, it's not apparent in the witness evidence. But I mean, really,

1 | without the information being put into the confidentiality ring, it's almost impossible for
2 | Rightmove to do anything else with that information, isn't it?

3 | MR SCHONFELD: Sorry, what information?

4 | THE CHAIR: Well, the 1(a) disclosure for example, it's out of order --

5 | MR SCHONFELD: The anonymised --

6 | THE CHAIR: Well, yes, exactly. So what can they do with that? They can't do
7 | anything with that, can they, really? So there are no further forward in terms of their
8 | ability to challenge the quality of the evidence other than the numbers, are they?

9 | MR SCHONFELD: Sir, I'm not sure if this was another point where we pass like ships
10 | in the night. If it's in anonymised form -- maybe this isn't what we said before -- but if
11 | it's in anonymised form, we're content for it not to be in the confidentiality ring.

12 | THE CHAIR: No, no, I understand that. But I mean, once it's anonymised, the ability
13 | for Rightmove to form any view on, if you like, the substance of the fear and way in
14 | which it's been put, the credibility of it, it's removed isn't it? Because they don't know
15 | who the PCM is, then actually --

16 | MR SCHONFELD: Well, what they wouldn't be able to do, I suppose, sir, is go into
17 | a PCM-by-PCM interrogation of whether the expressed fear is credible.

18 | THE CHAIR: Or form any view on that. Not interrogation. I mean, that's really the
19 | point I'm making. They're not going to be able to form any view of the credibility of the
20 | fear without having some idea of the identity. I'm not saying that that's wrong, I'm just
21 | saying isn't that the natural counter to your argument?

22 | MR SCHONFELD: To a degree, you can form an idea of the credibility of the fear by
23 | the way in which it's expressed. A PCM may say --

24 | THE CHAIR: Well, maybe not, we don't know.

25 | MR SCHONFELD: Yes, but I'm saying it's a possibility. So it's not that there will be
26 | absolutely nothing. But no, you wouldn't be able to interrogate it in the way that you

1 | would if it were a witness that you were going to cross-examine. I mean --

2 | THE CHAIR: I'm not putting it as high as that, Mr Schonfeld, I'm just saying there's

3 | nothing material they could do, really, without more knowledge about the individual

4 | PCM. In a way, it sort of slightly defeats the purpose of any sort of disclosure, doesn't

5 | it?

6 | MR SCHONFELD: No, the prevalence point is separate, right? So the prevalence

7 | point doesn't require the identities --

8 | THE CHAIR: No, no, no, putting that aside. But I mean, if you come back to this point

9 | about the direct waiver. So if it ends up that you've put yourself in the position where,

10 | in relation to the people who have said, "I'm concerned about it", in a direct way, you've

11 | put them in a direct waiver situation; that's what Mr Newman's done -- not Rightmove;

12 | Mr Newman's put them in that position, because he's basically put it in evidence in

13 | issue.

14 | I mean, just the assumption; I think the natural assumption in order for it to be dealt

15 | with properly is that that information should be available, but then you're taking it away

16 | again. So it ceases to be of any particular use, doesn't it?

17 | I mean, I'm not saying it's the wrong answer, I'm just saying, isn't that the import of

18 | what you're saying by insisting on anonymity?

19 | MR SCHONFELD: Well, sir, the first point is that the PCR does not say whether or

20 | not those expressed fears are credible. He's not in a position --

21 | THE CHAIR: No, I don't think we need to go back into all that. I understand, but

22 | I mean, the point is.

23 | MR SCHONFELD: Sir, so we're talking about collateral waiver over the identities in

24 | that instance, because there can be no direct waiver over the identities if they're not

25 | what the PCR relies on, which he doesn't rely on any particular PCM, or anybody with

26 | any characteristic.

1 THE CHAIR: Well, that's interesting. I'm not sure I had appreciated that you were
2 saying that in that way.

3 MR SCHONFELD: The identity is severable from the expression of a fear. The
4 identity is a separately privileged bit of information.

5 THE CHAIR: Well, I -- is it?

6 MR SCHONFELD: Of a potential witness, so -- it is, yes.

7 THE CHAIR: In relation to waiver, really it's if --

8 MR SCHONFELD: You know, it may be so. I thought you were making a point about
9 collateral waiver over the identities.

10 THE CHAIR: No, I'm not. I'm making a point about direct waiver. It seems to me that
11 if you've got into the position where Mr Newman said, "I've spoken to these people
12 and I've drawn these conclusions", and therefore, the logic we've run through before
13 gets you through the first limb of the test. On the face of it, those communications are
14 therefore no longer subject to privilege.

15 MR SCHONFELD: I mean --

16 THE CHAIR: The documents that record those communications are no longer --

17 MR SCHONFELD: What this comes back to, sir, is the difficulty that the case law, that
18 both of us have referred to, doesn't have to grapple with the question of identity.

19 THE CHAIR: No.

20 MR SCHONFELD: Now, I mean, my learned friend hasn't taken the point that the
21 identities are not privileged, so the question is just waiver.

22 MR WILLIAMS: I absolutely do take the point. What we say is they've waived privilege
23 in the communications --

24 MR SCHONFELD: The distinction-making --

25 MR WILLIAMS: -- and the communications are communications with individual.
26 I mean, we've been very clear about that.

1 | MR SCHONFELD: The distinction I was making was that they were not originally
2 | privileged identities. Obviously, you are making the argument that the privilege has
3 | been waived. But, with respect, sir, the basis for that argument is quite unclear. I read
4 | to you the one sentence that is said to justify disclosure of the identities. It's not --

5 | THE CHAIR: At this stage, actually I think the shoe's on the other foot, isn't it? I think
6 | once we've got to the point where there's been a waiver, aren't you then really
7 | arguing -- I think you are then actually arguing under 53(2) -- that there should be
8 | some limitation on that, because of the Tribunal's ability to manage that justly and
9 | proportionately.

10 | MR SCHONFELD: We do say that's the more clear-cut point. That may be the way
11 | through this.

12 | THE CHAIR: But the difficulty with that is -- I think the point I'm trying to make is that
13 | you have then effectively taken away a large point of the direct waiver application.
14 | I mean, the reason they want to see this stuff is because they want to see who said
15 | what, and to get a better picture of that. Obviously they want to get that
16 | (overspeaking).

17 | MR SCHONFELD: I'm not sure. I suppose the reasons they want to see it are in some
18 | ways immaterial, but you've seen how the justification arose. This was hardly a central
19 | plank of the application at the time it was made. I'm not sure I agree with the inference
20 | that the reason they want to see the material is so they can go off and do the
21 | investigation on identities.

22 | THE CHAIR: As I understand it, they've consistently said they want to test the
23 | credibility of the fear. I think originally there was an argument about whether that
24 | meant testing Mr Newman's credibility, and they said, "No, that's not what we mean.
25 | We want to test whether ..."

26 | I can see that it's quite a difficult thing to do that, if you've got no idea who the PCM is

1 | and why they might be saying. But I'm not saying that that gets them home. I'm trying
2 | to point out, I think, that the consequence of your position on anonymity does cut back
3 | into this thing quite a long way. It does actually mean that apart from the prevalence
4 | stuff, they're really not going to get very much that's very useful from this.

5 | MR SCHONFELD: Prevalence and strength of concern, the way it's --

6 | THE CHAIR: (Overspeaking).

7 | MR SCHONFELD: Sir, I accept that not having the identities will mean that they
8 | cannot go and investigate the individual circumstances and histories of the PCMs who
9 | expressed concerns. That of course is the case, and that limits what they can say
10 | about it. The point I'm making, sir, is being able to make those sorts of points is, as
11 | a matter of waiver, not necessary for fairness, because the PCR is not relying on any
12 | of those sorts of points, not relying on who they were or the strength of the concerns
13 | expressed or the credibility of the concerns expressed. So it's not required by fairness,
14 | such as to give rise to a waiver. It's also not --

15 | THE CHAIR: Is that really right? We're back, then, to construing that paragraph, aren't
16 | we, to construing subparagraph two and what Mr Newman means? But if he's drawing
17 | conclusions from what I call the sample -- you don't like me calling it the sample, but
18 | I call it the sample for these purposes -- he's drawing conclusions from that, then the
19 | composition of the sample surely is of some relevance, isn't it?

20 | MR SCHONFELD: Well, I accept it's of some relevance, sir, but that doesn't get you
21 | to waiver.

22 | THE CHAIR: But I think it does, because if it's the direct waiver that we're talking
23 | about, there's no fairness calculation on that. In that case, the fairness calculation is
24 | dealt with because you've relied on it and it's a material point. In this, we're into
25 | collateral waiver.

26 | MR SCHONFELD: Well, sir --

1 THE CHAIR: You say we are, because it's the identity. But I'm not sure that
2 I understand that point. But I understand why you say that -- the identity in the real
3 world is not privileged because they trade under some name somewhere. But in
4 a litigation privilege context, the identity is tied up with the whole conversation, isn't it?
5 It's just part and parcel of the discussion with them, just like there are lots of other
6 things that no doubt they've talked about in the conversations which are privileged as
7 well. It's just that here, the identity is actually relevant to the question that arises from
8 Mr Newman's statement. It seems arguably to be.

9 MR SCHONFELD: Sir, I accept it's arguably relevant, but that doesn't mean that it
10 falls within the direct waiver. I mean, everything that falls within collateral waiver has
11 to be at least arguably relevant, otherwise it couldn't possibly be a collateral waiver.
12 Mere arguable relevance doesn't get us there.

13 THE CHAIR: But I think I'm saying that if you're in limb 1 of the test, then you're not
14 really interested in fairness, because -- I mean, you're obviously always interested in
15 fairness --

16 MR SCHONFELD: I'm saying we're not in limb 1, because --

17 THE CHAIR: Yes.

18 MR SCHONFELD: -- the reliance is on the fact that some PCMs expressed a concern
19 about fear of retaliation. The evidence that is therefore relied on is expressions of
20 concern about retaliation. To that narrow point, which is the direct point relied on, the
21 identity and characteristics of the PCMs are irrelevant. To the wider point, about
22 whether the characteristics of that group and whether that supports Mr Newman's
23 ultimate submission, that's a question of collateral waiver, because it's not the
24 evidence he puts forward.

25 THE CHAIR: I don't see the distinction, I'm afraid. I'm really struggling with that
26 distinction. I don't understand why you say -- what is it that you say that the direct

1 | waiver is about, then? It's not just simply the fact of what they've actually said about
2 | the fear. Is that all you're saying? Surely it's relevant who they are, some sense of
3 | what their characteristics are, to the question of what Mr Newman said in his
4 | statement. I mean, that's just part and parcel of it, isn't it? I don't see how you draw
5 | that distinction.

6 | MR SCHONFELD: Sir, PCP is admirably clear on what it says the broad questions
7 | are. The authorities are unfortunately very unclear on quite how you draw the precise
8 | line.

9 | THE CHAIR: Yes.

10 | MR SCHONFELD: Sir, I think you had my submission that the relevance of
11 | information to testing the overall position of the party does not mean that you get within
12 | the direct waiver test. You're talking about collateral waiver, and that's where the
13 | fairness principles apply. But I don't think, sir -- I come back to the point that there are
14 | two tests here. The waiver test -- even if it's satisfied -- on the anonymity point, we
15 | say, is overwhelming -- on the discretionary disclosure and proportionality and
16 | concerns of third parties for their confidential information, -- the balance is
17 | overwhelmingly against disclosure of the PCM identities. Regardless of whether as
18 | a matter of technicality, there is a waiver over those identities because they are
19 | somehow relevant -- or conceivably arguably relevant -- to a case that Rightmove
20 | might want to make in relation to the general subject matter of fear of retaliation. That
21 | does not outweigh the very strong reasons to allow PCMs to assist class
22 | representatives and empower class representatives to use that information without the
23 | PCMs having to have their identities handed over.

24 | THE CHAIR: Yes. I'm sorry if I'm -- probably me being a bit slow on this, but I don't
25 | understand, if you accept that the communications with PCMs who said, "I'm
26 | concerned about retaliation", you accept that they are within the direct waiver

1 | category -- in other words, they are the communications which are referred to and
2 | which are therefore within limb 1 of PCP -- I don't understand how you segregate from
3 | that the identity of the claimants, and on what basis you do that. That's the bit I'm
4 | struggling with.

5 | The reason it matters is that if you're then going to come back later and say there are
6 | all sorts of proportionality reasons why we shouldn't be doing that, I think it makes
7 | a big difference whether the thing in question is a limb 1 or a limb 2 waiver. If it's
8 | a limb 1 waiver, I think that the mountain for you to climb is much, much higher;
9 | because actually, if you're in limb 2, I'm not sure proportionality in the broader
10 | sense -- in the 53(2) sense -- adds much to the proportionality, the fairness
11 | assessment under the second limb of the PCP test. I mean, there may be some
12 | differences, some different things to take into account; but broadly, all the things you're
13 | saying -- I would have thought -- could fit quite neatly into a discussion about collateral
14 | waiver, whereas I don't think you can fit them in the same way as neatly into
15 | a discussion about what the implications of direct waiver are.

16 | That's the reason why I'm being a bit difficult about it, if you forgive me. I'm finding it
17 | difficult to square those things away, and I don't really understand your sort of
18 | segregation of the identity from the rest of the communication on the direct waiver
19 | channel.

20 | MR SCHONFELD: Let me take another run at it, perhaps.

21 | THE CHAIR: Yes.

22 | MR SCHONFELD: Let us hypothesise an attendance note which covers a variety of
23 | topics --

24 | THE CHAIR: Yes.

25 | MR SCHONFELD: -- and at some point says, "X said they don't want their real identity
26 | to be revealed because they fear retaliation by Y".

1 | To make good the evidence of Mr Newman that those class members expressed
2 | a fear of retaliation, the only part of that attendance note that need be disclosed is,
3 | with X redacted, "expressed a fear of retaliation if their identity was to be revealed".
4 | That's the only part of the attendance note that directly goes in support -- or my learned
5 | friend would say, if somebody says they do not -- but that's the only bit of the
6 | attendance note that directly goes to the evidence. The identity can go to other points
7 | that my learned friend and Rightmove might want to make to undermine the
8 | importance of that evidence. But it doesn't go directly to the evidence, or the reliance
9 | that Mr Newman has placed.

10 | THE CHAIR: Is that a consequence of your reading of that paragraph in Newman 1?
11 | Is it --

12 | MR SCHONFELD: I'm not sure on anonymity that it is a consequence because --

13 | THE CHAIR: Where does it --

14 | MR SCHONFELD: -- because the difference in our readings, I thought, was about
15 | prevalence. My learned friend reads it as saying the vast majority of the class
16 | expressed these concerns. I say that reading is wrong. We have a disagreement on
17 | prevalence, but I don't think anybody reads it as saying that PCMs with particular
18 | characteristics or that are representative across the whole class express these
19 | concerns.

20 | THE CHAIR: Except I think that it's just naturally a broader question, isn't it?
21 | Mr Newman is saying, "There are people we've spoken to who have expressed
22 | concerns". In order to understand that, it can be argued that you need to understand
23 | who they are, don't you? I mean, it's the whole point of waiver, which is that you're
24 | using this communication to advance that position, and it's inherent in that that the
25 | identity is actually helpful to understand the point. It's the cherry-picking point.

26 | MR SCHONFELD: The cherry-picking point.

1 THE CHAIR: You're pulling a bit out of a note, which says --

2 MR SCHONFELD: The cherry-picking point is the basis for the collateral waiver.

3 THE CHAIR: Well, I think the whole thing is about cherry-picking, isn't it?

4 Cherry-picking is --

5 MR SCHONFELD: I mean, there's a question of whether what you say can be

6 supported by the evidence; and there's a question of whether what you say has been

7 cherry-picked to avoid other points.

8 THE CHAIR: Well, we're in a slightly odd situation, aren't we, which is we're back to

9 the 31.14 point, which is that the waiver is said to apply to a communication which

10 might be verbal, might be email, might be a recorded file note. So actually, perhaps

11 it's not obvious how you work out which of the documents is actually subject to the

12 direct waiver. Maybe that's the point.

13 MR SCHONFELD: I certainly agree that we're in a novel territory, and it's quite difficult

14 to work out. I agree with that.

15 THE CHAIR: Let me think about it this way. If there was a single file note in which,

16 somebody had recorded that 16 PCMs had said they were concerned about waiver,

17 and then set out some of the characteristics of them, for example, (inaudible) did that,

18 and Mr Newman had said there are 16 PCMs (inaudible) and had not given us the

19 characteristics, that would fall directly into a limb 1 waiver, wouldn't it? And there

20 would be no question that you'd be able to see the characteristics.

21 MR SCHONFELD: Sorry, would you mind running that by me again? Sorry, I'm not

22 sure I --

23 THE CHAIR: Let's say there's a single file note that just said, "16 PCMs have

24 expressed concerns about retaliation", and then went on to explain who they

25 were -- explain the identity and characteristics. Then Mr Newman were to say, "there

26 are 16 who have expressed concern", that would give rise, wouldn't it, to a direct

1 | waiver point?

2 | And if he was relying on that, he would absolutely be relying on the part of
3 | a communication of which they were entitled to see all, so far as it was relevant to the
4 | case. Because you can't say the identities are not relevant, can you?

5 | MR SCHONFELD: I'm not saying the identities have no conceivable relevance, but
6 | that isn't the test for the direct waiver -- it's the -- I mean, let me put it how my learned
7 | friend put it at the start of his submission: "we're looking for the evidence which
8 | Mr Newman relies on, which is said to support his position."

9 | Now, that evidence of the identities doesn't have any bearing on the evidence that's
10 | said to support his position. I'm not holding my learned friend to that being the limit of
11 | their application. But, with respect to -- if direct waiver were to include anything that
12 | is relevant to the broader question raised by the evidence, it's very hard to see what's
13 | left for a collateral waiver, because a collateral waiver requires you to identify the issue
14 | in question. That's obviously the broader point --

15 | THE CHAIR: Yes, but surely, I thought we'd agreed on the distinction, which was that
16 | the direct waiver applies to the communications which set out the people who said,
17 | "I am concerned about it". And the collateral material is people who have said they're
18 | not concerned about it, or might have said something else about it; I mean, isn't that
19 | the distinction here?

20 | MR SCHONFELD: I think that's a distinction; there's another dimension of the
21 | distinction, which is the communications with people who said they were
22 | concerned -- not the entirety of that communication -- is directly relied on in
23 | Mr Newman's evidence, just the expression of concern; not other topics, not the
24 | characteristics, not the identity.

25 | THE CHAIR: Okay. Well, look, I mean, I think I've probably tortured you enough with
26 | the point. I can understand the point you're making, I'm just not sure I really see the

1 | rationale for it, but anyway, it's -- I mean, I'm not inviting you to have another go.

2 | MR SCHONFELD: I mean, I think the transcriber, if anyone might welcome me not
3 | having another go right now -- so I wonder if --

4 | THE CHAIR: Yes, it's time to take a break, exactly. I'm afraid I am making things
5 | difficult for you. How much longer do you think you'll be?

6 | MR SCHONFELD: The other points I wanted to cover, I mean -- I'm trying to read the
7 | tea leaves, sir, and I suspect the other points I wanted to cover maybe are not so
8 | necessary or can be taken very quickly.

9 | THE CHAIR: I just I'm just anxious to make sure that Mr Williams gets a --

10 | MR SCHONFELD: Yes, sir. Let me take a look over the transcriber's break, but I won't
11 | be much longer.

12 | THE CHAIR: No, fine. Good. Well, you could have a conversation with him and see
13 | how long he thinks he needs at the moment, that might inform. I'm happy to sit until
14 | 4.30 pm if you need it, but maybe you might find out what he anticipates he might need
15 | so you can tailor things accordingly.

16 | Okay, thank you. Let's take 10 minutes.

17 | (3.29 pm)

18 | (A short break)

19 | (3.42 pm)

20 | THE CHAIR: Mr Schonfeld.

21 | MR SCHONFELD: Thank you, sir. Before the break, I think we -- well, perhaps we
22 | weren't going around in circles, but I'm not sure I was succeeding in clarifying for you
23 | the dividing line between limb one of PCP and limb two of PCP.

24 | THE CHAIR: I don't think that's the problem; I think the problem is: why one would
25 | draw a distinction in limb 1 between identity and other material? That's the debate.
26 | I mean, I think the dividing line is a bit complicated because of the way this arises, but

1 | I don't think that was really where the problem was.

2 | MR SCHONFELD: The reason I was focused on the dividing line, sir, was what
3 | I understood to be your suggestion that it would be very hard to suggest that material
4 | falling in limb one shouldn't be disclosed as a matter of proportionality, and taking mind
5 | of other concerns. Now --

6 | THE CHAIR: It would be harder; not necessarily hard, but harder.

7 | MR SCHONFELD: That was the reason I was focused on the dividing line.

8 | THE CHAIR: Yes.

9 | MR SCHONFELD: To be clear, sir, I'm not sure that's correct; either privilege is waived
10 | or it's not. The question of whether to order disclosure of a document -- actually
11 | privileged has bearing on whether we can withhold it from inspection.

12 | In a way, obviously it'd be pointless to order disclosure of a privileged document, and
13 | therefore the court wouldn't do it. But the questions are distinct. I'm not sure there's
14 | any authority for the notion that the discretion or proportionality concerns fall away
15 | where a document falls within limb one. But the point is sort of -- and I think, sir, this
16 | was the point you were making -- that as a matter of how weighty the concerns about
17 | fairness are, the weightier those are, the harder it will be to persuade you that, as
18 | a matter of proportionality and in the context of the case, disclosure shouldn't be
19 | ordered. That obviously is correct, but I don't think the distinction between limb one
20 | and limb two really assists in that regard.

21 | It may be that limb one waiver usually has a higher degree of unfairness if it's not
22 | given, but that's a correlation, not a part of the test.

23 | THE CHAIR: Right. I don't think we're that far apart. I think perhaps, just put it
24 | a slightly different way, it seems to me if you're in limb one, you've effectively -- I mean,
25 | it is a fairness point, and it is a cherry picking point, but it's almost per se. If you are
26 | in limb one and you've referred to a document -- let's take it away from this case and

1 | put it back into PCP, where you've got documents being referred to all over the place,
2 | legal advice, whatever it is. If you refer to it and you've relied on it in a way that is
3 | really material to the case, at that stage you're going to be really pushing it to run
4 | a proportionality argument. Whereas if once you get into limb two and you start getting
5 | into these fairness questions, they seem to me to be much more similar to the
6 | proportionality arguments you might run under 53(2). That's really the point I was
7 | making.

8 | MR SCHONFELD: Sir, I think part of the difficulty here is that we're not -- as my
9 | learned friend put it -- talking about waiver of privilege over particular documents.

10 | THE CHAIR: Yes.

11 | MR SCHONFELD: The suggestion is that there was a waiver over communications.
12 | Now, sir, you pointed out that there could be a record of an oral communication which
13 | was recorded. For example, a telephone call was recorded.

14 | THE CHAIR: Yes.

15 | MR SCHONFELD: The recording will not contain the identity -- or may not contain the
16 | identity -- of the person being spoken to. That recording or part of it might need to be
17 | produced in order to satisfy, as part of a waiver of privilege, if the contents of it are
18 | relied on.

19 | But there would be no automatic waiver over the identity of the person being spoken
20 | to such that that also needs to be produced as part of limb one; it may be that come
21 | limb two, we say that actually you need to hand over the identity, too.

22 | THE CHAIR: Yes, but I mean, here, we're talking about documents that will record
23 | the identity. That's because the recording doesn't; if the recording did, then it probably
24 | would be --

25 | MR SCHONFELD: The point I'm making, sir, is that it's quite possible to rely on the
26 | content of communication without relying on who it is with. That is the situation here.

1 | Now, what --

2 | THE CHAIR: It's the second bit that I struggle with. I don't understand why you say
3 | that. It seems to me that the idea that you can separate, really quite artificially, I would
4 | have thought, the identity of the person from the statement they make, which
5 | Mr Newman records generally, is quite difficult. That's the bit I struggle with. That's
6 | where we do depart, because I just don't understand why you say there's some
7 | arbitrary line that says the identity somehow is not part of what we're interested in
8 | here.

9 | MR SCHONFELD: But it's not an arbitrary line, sir. There are good reasons. The
10 | considerations that apply to whether it is, as a matter of fairness, required to disclose
11 | the identity are different to whether it, as a matter of fairness, is a requirement to
12 | disclose the content that has been relied on.

13 | In this instance, the PCR has said that some PCM's have expressed a concern about
14 | retaliation. Now, to make that good does not require the identity. I don't think there's
15 | a disagreement on that. To make the simple statement that some PCM's expressed
16 | a fear of retaliation, all you need is a document that says, "I have a fear of retaliation".
17 | That was a record of a conversation with the PCM. At least to that extent, the
18 | information about the identity and the content are severable.

19 | THE CHAIR: And I think that's entirely artificial and that's just not what's going on
20 | here. I mean, what's going on here is that Mr Newman said, "I've spoken to all these
21 | people, whoever they are, I've taken my sample and this is what I draw from it". He's
22 | not creating a narrow point that says, "I've spoken to a few people and I'm saying
23 | nothing more than that"; you know, he's made a very general set of statements that
24 | he then uses as a basis to make a very broad statement about the deterrence.

25 | I know you want to read it as narrowly as possible for present purposes, but it's just
26 | not how I read it. It seems to me that if you're into this territory of saying, "A whole

1 bunch of people have come to me and said x and y", it's very difficult not to want to
2 know who the bunch of people are in order to understand the significance of the x and
3 the y. That's the point of difference between us, I think.

4 MR SCHONFELD: Well, let me look at the other side of the ledger when we think
5 about the fairness point. The identity of the people that the PCR has spoken to, as
6 providers of information and potential witnesses, will reveal aspects of his litigation
7 strategy that are not revealed by the content.

8 There are different concerns and considerations when one thinks about revealing
9 those identities. I've also averted to the fact that expression of concerns do not engage
10 the same fundamental concerns of PCMs about the very retaliation they are worried
11 about, but the revelation of their identities does. So the balancing exercise is quite
12 different.

13 THE CHAIR: I understand it. I don't think I'm challenging you on -- I completely
14 understand there are a whole lot of reasons why it's not a great idea, from their point
15 of view, to do this. I understand, indeed, the PCR's point of view. It's not really the
16 debate we're having. I thought we were having a debate about whether you could, in
17 my view, artificially separate the identity from the gist of what's going on in Newman 1.
18 That's the only point we're arguing about. I get the rest of your points.

19 MR SCHONFELD: The difficulty, sir, is that we're in novel territory.

20 THE CHAIR: Yes.

21 MR SCHONFELD: I am not aware of a case that considers this. As you noted, sir,
22 most of the cases concern the mention of a document, which this doesn't, and most
23 concern litigation advice privilege where the identity of the lawyer is really neither here
24 nor there. But this is a novel point, that's why I can't say, "Well, let's go to the
25 authorities bundle tab 7, where it tells us the answer".

26 THE CHAIR: I completely understand the points you make; I absolutely see the weight

1 | of the points you make about the problems about protecting the identity. I understand
2 | all that. I'm not, you know, really taking issue with any of that. We'll see what
3 | Mr Williams says about it, but I think the bit I am taking issue with is that somehow you
4 | can detach the identity in a way that means that it's not important. It doesn't fall into
5 | this whole question of cherry-picking and the fairness to the defendant, because it's
6 | not a material point of what Mr Newman says. I just don't read Mr Newman's witness
7 | statement like that. I just don't think you can compartmentalise what he says in a way
8 | that slices all that stuff off, because it seems to be part and parcel of the story.

9 | MR SCHONFELD: Well, sir, if --

10 | THE CHAIR: That's the problem I've got. That is actually, I think, very much what
11 | Mr Justice Waksman says, the case-specific characteristics, and it's very much
12 | a reading of Mr Newman, and I don't think we're going to gain by going back over
13 | Mr Newman again.

14 | MR SCHONFELD: Oddly enough, that is exactly what I was just going to suggest, but
15 | only because -- as Mr Newman's made clear -- it's a red line, providing the identities.
16 | If it is possible for you, sir, to point me to the part of his witness statement that causes
17 | you to say the identities necessarily must be required as a part of fairness
18 | (overspeaking).

19 | THE CHAIR: I think it's just inherent in the approach he's taken. He said, "We've
20 | spoken to a group of people, and they've told us they're worried about it, and as
21 | a result, I draw the conclusion it's a serious concern". I just don't think you can divorce
22 | who he's had the conversations with as part of, if you like, the communication that's
23 | been relied on -- I mean, that just seems to me to be entirely artificial.

24 | MR SCHONFELD: I'm not sure I'm going to advance that particularly. I mean, I think
25 | we know it is a novel point, and much as I would like the opportunity to explore that
26 | novel point here and maybe somewhere else, for pragmatic reasons we, over the

1 break, took some instructions as to what might be possible or other solutions; one of
2 which is that -- as you may have seen, sir -- the appendix to Hain-Cole 1...

3 THE CHAIR: Which page is that?

4 MR SCHONFELD: It's tab 6 of the core bundle, begins on page 146.

5 THE CHAIR: Yes.

6 MR SCHONFELD: I expect, sir, you haven't had cause to look at this (overspeaking).

7 THE CHAIR: (Overspeaking) because it became apparent that it wasn't so important.

8 MR SCHONFELD: Quite.

9 THE CHAIR: Actually, I'm not sure.

10 MR SCHONFELD: But that relates to part of the application that's been dropped.

11 THE CHAIR: Exactly.

12 MR SCHONFELD: But there, there's anonymised pricing information given, but
13 certain details about the individuals are provided: the location, size, in those two
14 columns.

15 THE CHAIR: Yes.

16 MR SCHONFELD: Now, Rightmove saw fit to drop its application in respect of that.
17 It obviously doesn't consider further information or the individual's identities necessary
18 to investigate whether they are representative, or whether the information they
19 provided is accurate for the individual. That part of the application has been dropped.

20 The PCR would be willing to provide equivalent summary information of those
21 characteristics of the PCMs if that assists to resolve this point, because what the PCR
22 is not willing to do is hand over the names of people he told -- whose involvement he
23 said he would keep confidential. That's not something he's prepared to do.

24 THE CHAIR: So what we would get, if I were to order 1(a) disclosure, they would get
25 the bit of the communication that records what was said, without the name of the
26 person, and that might become PCM 1 or whatever it was, and then they would get

1 | a table which gave them some characteristics. That's the suggestion.

2 | MR SCHONFELD: Yes.

3 | THE CHAIR: Yes. Well, we'll see what Mr Williams says about that.

4 | MR SCHONFELD: Yes. I'm grateful.

5 | THE CHAIR: Yes.

6 | MR SCHONFELD: Sir, I suspect we are at the nub of the issue, and the other points

7 | I was going to pick up are probably not necessary. Maybe it is necessary.

8 | Sir, given that this is the bone of contention between the parties, perhaps rather than

9 | me ploughing on with other submissions, if it's possible, we might find out if that's

10 | acceptable and then we might go home. But otherwise, I can plough on with the

11 | broader points.

12 | THE CHAIR: Just so I'm clear, I'm still working on the basis that this is all disputed

13 | and you're expecting me to give a ruling; are you suggesting that that might not be

14 | necessary?

15 | MR SCHONFELD: Well, sir, I'm not going to try to recap where we've got to, but

16 | if -- based on your strong indications -- we were to maintain the offer we made a couple

17 | of days ago, but also provide the summary information, and make sure that the

18 | wording of the order was something like, "Anybody who commented on ..."

19 | THE CHAIR: Yes. 1(a) becomes adjusted to capture anybody who's talked about

20 | retaliation.

21 | MR SCHONFELD: We would be content to --

22 | THE CHAIR: You give a table with characteristics in relation to 1(a), and then you

23 | give some information in relation to 1(b).

24 | MR SCHONFELD: Yes.

25 | THE CHAIR: That is still more or less on the table.

26 | MR SCHONFELD: Yes.

1 THE CHAIR: Yes. Okay.

2 MR WILLIAMS: I mean, obviously we're reacting to this in real time.

3 THE CHAIR: Yes, of course.

4 MR WILLIAMS: Can I just understand: I don't think my learned friend proposed any
5 of the information that he would provide would help with the first point I made, about
6 whether any of these were people who were on the record as having previously
7 expressed or complained about or expressed concerns about Rightmove's pricing,
8 because all we would know is some general characteristics of their business. That
9 was the first point I made.

10 THE CHAIR: I have to say that I'm not sort of wildly enthusiastic about the CPO
11 hearing dealing with specifics of PCMs. I'm not excluding it, but it does seem to me
12 that at least as a first step, it would be helpful for us to have a much better sense of
13 what was actually said; how many people said it; out of how many; basically, what the
14 sample was and what the sample responses were, and for you to have some idea of
15 the characteristics which would help you with some of the points you have made. I'm
16 not sure how helpful we're going to find it at the hearing if you were to turn up -- say
17 there were five of them who were concerned about retaliation, you were able to go
18 through three of them and say they are terrible troublemakers, or they've been --
19 they've done this or they've done that; I'm not sure at the end of the day how helpful
20 that would be, frankly.

21 MR WILLIAMS: Well, there's a question as to how that issue would be dealt with
22 proportionately in the context of a hearing where there are other issues to deal with,
23 and obviously, I fully accept that. But that's a separate -- and obviously, we'll be very
24 mindful of the range of issues the Tribunal will have to decide, and we won't want to
25 spend a disproportionate amount of the two days down a rabbit hole. But if we had
26 this information -- let's say it's a small number of people, and we've got a fairly clear

1 point to make about each of them -- there would be nothing to stop us putting in a short
2 document, not taking up time at the hearing, saying that this is what we discovered.

3 And it's contextual information. I mean, clearly this isn't going to end up being a trial
4 about the state of mind of these people.

5 THE CHAIR: Well, the thing is --

6 MR WILLIAMS: But in my submission, sir -- I mean, I don't want to sort of go out of
7 sequence with -- I don't even know if I'm into my reply yet, to be quite honest. I don't
8 know whether Mr Schonfeld is still going. But I think that one has to start with the
9 principled application of the principles and the waiver, which I was going to come back
10 to in my reply, and I've got quite a bit to say in response to the very novel point that
11 Mr Schonfeld was developing.

12 But in my respectful submission, if there's a principled basis for that disclosure and it
13 can be dealt with proportionately -- and in my submission, it clearly can be -- then it's
14 really quite a separate question as to whether and to what extent these issues -- how
15 they'll be managed efficiently at the CPO hearing.

16 THE CHAIR: Yes, I suppose so, although -- this may be just a bit too broad brush, but
17 if there were five of them, for example, who had expressed concerns, it's quite difficult
18 to see that that carries much evidential weight at all, isn't it, really? I mean, it may be
19 that if it was five out of ten who had had discussions, perhaps there might be some
20 argument about that. But I am becoming increasingly concerned that this is becoming
21 disproportionate to the issue and how it fits into the whole hearing in November.
22 I absolutely accept that you need to get some more information, because what's
23 currently in -- as you'll appreciate from my engagement with Mr Schonfeld, I do think
24 that Mr Newman is too vague, and if we're going to have it in, then we need to know
25 some more about it. But I don't think that that needs to or ought to descend into a sort
26 of mini-trial of positions of individuals.

1 | MR WILLIAMS: That's the point I'm making, which is I'm not asking for directions to
2 | a mini-trial. I don't know whether Mr Schonfeld has got a bit more to say. I don't know
3 | whether that was the end of the --

4 | THE CHAIR: I think it probably depends on whether you're going to accept his offer
5 | or not, which you are apparently not.

6 | MR WILLIAMS: I'm afraid I don't have instructions to accept the offer, and maybe
7 | I just need to make my (overspeaking).

8 | THE CHAIR: I think Mr Schonfeld may have some things to say, in which case you
9 | ought to get on and do it.

10 | MR WILLIAMS: I told Mr Schonfeld I didn't have lots to get through, but we are now
11 | starting to get a bit close to the wire.

12 | THE CHAIR: How much more, Mr Schonfeld? What have you got?

13 | MR SCHONFELD: Not much. I mean, I think the crux of the matter is, my
14 | learned friend referred to what they might do with the identities. One point that was
15 | made in his submissions was that there is a public petition to which a number of people
16 | have signed, a number of PCMs have signed up, and they would check whether
17 | a PCM has signed up to that. That doesn't require the identities to be disclosed. Our
18 | solicitors can obviously check that and tell Rightmove for each PCM who expressed
19 | a concern whether they signed up.

20 | But to the extent that Rightmove wants to check the names of the PCM against their
21 | previous history with Rightmove, and their relationship and the nature of that, and
22 | whether they previously made complaints to Rightmove, or sued Rightmove, all that
23 | sort of Rightmove information; two concerns. One: it is very hard to see how that can
24 | be done within the confines of the confidentiality ring without a strong risk of
25 | inadvertent disclosure.

26 | THE CHAIR: Well, I think you've made that submission already. I would say you are

1 | repeating yourself.

2 | MR SCHONFELD: The new point is that if they come back with a table saying, "PCM
3 | John has a history of making complaints to Rightmove", we all know that the next step
4 | will be: we will need disclosure from Rightmove so that we can test that, because that's
5 | about their information, and we don't know if that statement is a fair reflection, and
6 | we're right back in. None of that would be privileged, of course. We don't have to deal
7 | with the question of waiver, maybe it's a much simpler question, but we would be right
8 | back here.

9 | So your concerns are about a mini-trial. It's not just that we might get to a mini-trial of
10 | this point and the weight to be placed on each individual PCM's concerns come the
11 | CPO hearing. We're going to spend much of the next few months ping-ponging back
12 | and forth demands for further information about the contextualisation that each of us
13 | might try to make if we go down this rabbit hole. We're looking for a solution that
14 | doesn't lead us there, and the best we've been able to offer thus far is the
15 | contextualising information along the lines of the appendix to Hain-Cole 1, and that's
16 | something within your gift, sir, to order, given that we've offered it.

17 | But what wouldn't make sense is to instead order the disclosure of the identities, the
18 | consequence of which would either be we end up down the rabbit hole, spending a lot
19 | of time and energy to get to a mini-trial which couldn't possibly be done at the CPO
20 | hearing in any sort of sensible way; or the evidence of Mr Hain-Cole and Mr Newman
21 | is withdrawn, and the Tribunal has to pretend it never saw it come the CPO hearing,
22 | and is left with the abstract point that the Tribunal has taken notice of in other cases,
23 | that PCMs may fear retaliation if they have to opt in.

24 | Those are effectively the three options on the table: one that we say is the right one;
25 | two others that we say are suboptimal. I was going to go to all the points. I mean,
26 | maybe I do need to quickly say, because we focused very heavily on the privilege

1 | points, we make quite a lot of points about the exercise of discretion in our skeleton
2 | argument. The reason I wasn't going to go over all of those again is that my learned
3 | friend's submissions, and his skeleton argument responding to our response, where
4 | he made the same points, don't actually meaningfully engage with any of those. The
5 | answer on every occasion is, "Well, the imperatives of fairness trump all", but as we've
6 | seen when we went through the authorities, that's not the only concern. There is
7 | a countervailing proportionality point, and, sir, the points you were just making are
8 | exactly that sort of countervailing proportionality point.

9 | So I would urge you, when considering the exercise of your discretion, to look back at
10 | those arguments at paragraph 45 -- sorry, in the section dealing with exercise of
11 | discretion in our response to the application and in our skeleton argument. Because
12 | those points simply haven't been answered other than by the idea that fairness trumps
13 | all, which we've seen it doesn't on the authorities that are applicable in this Tribunal.

14 | (Pause)

15 | I mean, I don't want to beat around the bush, sir, what isn't going to happen is that we
16 | will provide the identities to Rightmove.

17 | THE CHAIR: Sorry, say it again, what --

18 | MR SCHONFELD: We will not be providing the identities to Rightmove if that is what
19 | was ordered the --

20 | THE CHAIR: (Overspeaking). Yes, you've made that plain. I understand that.

21 | MR SCHONFELD: I didn't want to leave you in any doubt.

22 | THE CHAIR: No, I understand that.

23 | MR SCHONFELD: All right.

24 | THE CHAIR: Yes. Mr Williams.

25 | Submissions by MR WILLIAMS

26 | MR WILLIAMS: I probably ought to just start with this last issue, if I may, sir. Really,

1 | what the sort of last half hour or so of Mr Schonfeld's submissions boiled down to is
2 | that there is some separate privilege in the identity of the individuals that's distinct from
3 | the privilege in the content of what the agents or individuals said to Mr Newman. It's
4 | simply not a coherent submission, in my respectful submission.

5 | The privilege is in the communications, and if Mr Newman waives privilege in the
6 | communications, then he waives privilege in the fact of who the communications are
7 | with. The content of the communication is not separate from the person who engaged
8 | in the communication. Really, one can test it by thinking about it in terms of what is
9 | the principled basis for the test for waiver.

10 | I mean, I addressed you on this in some detail earlier on, but the point of the case law
11 | on waiver is to ensure that the party relying on the material doesn't provide a partial
12 | account, and that the counterparty is in a position to test and assess the evidence.

13 | And I mean, perhaps what --

14 | THE CHAIR: I don't think you need to go into this in any detail.

15 | MR WILLIAMS: No, I was just going to go back and read it out again, but we went in
16 | PCP to the decision of Mr Justice Males which was paragraph 79.

17 | THE CHAIR: Yes.

18 | MR WILLIAMS: And I said at the time, the overriding principle is one of fairness, that
19 | if the content of legal advice is deployed or relied on, in order to advance a party's
20 | case, then fairness may require the disclosure of that advice be made available so
21 | that the court can properly assess the assertion.

22 | The submission I was developing to you is that properly assessing the assertion here
23 | involves testing and analysing, and understanding, the extent to which the evidence
24 | supports the case that's been advanced. To some extent, that is the content, and to
25 | a significant degree it will be who the person is, for the reasons that I developed in my
26 | submissions.

1 First of all, it's just not cogent, in my submission, to try and say that there's a separate
2 privilege in the identity of the person that made the communication. Secondly, if one
3 applies it in terms of those principles, there's absolutely no reason to draw any sort of
4 line somewhere between the content and what was said.

5 It actually isn't true that the point has been advanced by Mr Newman in a sort of way
6 which is estate agent-blind. We saw paragraph 45.5 of the claim form, and that said
7 that the fear of retaliation applies to large and small customers of Rightmove alike. So
8 that's one respect in which the identity, or the nature of the organisations, is relevant.
9 But it goes further than that, because I mean the clearest example I gave of a test to
10 the credibility of the threat is one that would depend very directly on the identity of the
11 customer. That is to say, a person who has -- not because of the nature of the
12 characteristics of their business -- but because they have specifically spoken out
13 against Rightmove in the past.

14 That is something which cannot be tested without the provision of that information.
15 I do repeat the point I made that we are very, very mindful that the Tribunal wants to
16 deal with the certification applications in an efficient and speedy way. We're absolutely
17 not -- there's no risk that we're going to, especially with what you've said today, sir, of
18 us steering this into a mini trial. But we are entitled to test the basis of the evidence.

19 Frankly, as you put it to Mr Schonfeld in the course of argument, our ability to do that,
20 and the utility of the information, is going to be very, very seriously degraded if all we
21 get are anonymised summaries that people who work for estate agents with particular
22 characteristics said x. I mean, that is really not going to enable us to do what we're
23 entitled to do, given the way the case has been advanced.

24 That, I think, is the central point. I entirely endorse, really, the points that you're putting
25 to Mr Schonfeld in the submissions, that really once one accepts that the waiver
26 extends to the identity of the person that created the communication, the estate agent,

1 | there's absolutely no basis on which to sort of draw a line in the middle of it; we're then
2 | entitled to test it. That's the way that the principles work. In my submission, that really
3 | means that the submissions Mr Schonfeld made about this issue break down.

4 | We do accept that beyond waiver, one then gets into questions of the terms of
5 | disclosure when it comes to discretion. That's precisely, in my submission, where the
6 | option of disclosure into confidentiality comes in. I'll come to that in just a minute.

7 | Mr Schonfeld made three specific points about identity beyond his submissions about
8 | privilege and the identity of the agent. First was, he says, they don't rely on the identity
9 | or characteristics of the agent. But I mean, that really does miss the point; this is not
10 | about whether Mr Newman relies on it, but about our ability to test the assertion.

11 | The second point was the concern about a disproportionate satellite issue. And I have
12 | to say, it is a bit much for the PCR, for Mr Newman, to advance his case in this way,
13 | for him to open this issue up and then to say that it would be disproportionate and
14 | unreasonable for us to then want to test the issue and advance contrary submissions.
15 | I mean, it really is an absolute cake and eat it submission. He had the option not to
16 | enter into this, but he's decided to go down this road. Having done so, I'm afraid that
17 | has consequences; that's the invidious choice point again. Really, having set the ball
18 | rolling, it's not for Mr Newman and his team to tell us that it would be disproportionate
19 | for us to litigate the case that he's advanced.

20 | The third point was that the confidentiality ring isn't an answer. I already addressed
21 | this quite fully, and I don't want to repeat the submissions I made, but I do want to say
22 | this: we have asked for this arrangement because we think it will work, and we think it
23 | will work in such a way as to allow us to test the evidence without breaching the ring,
24 | and without having to come back to the Tribunal and ask for further disclosure.

25 | We are very concerned, given the timescales we're working to, sir, that if the can is
26 | kicked down the road to any degree today, we're going to be in real difficulty. We've

1 | got a submission due in a little under two weeks. The hearing is fast approaching.
2 | This hearing has taken a day. It's been a hotly contested hearing. If you were to take
3 | the view today that we should get a bit for now and come back later for more if we
4 | need it, it's really hard to see that we're not going to be back in a contested hearing in
5 | September. We'd then be getting that material quite late coming on to the hearing in
6 | November.

7 | So we would encourage you to grasp the nettle today, sir, because we've had a very
8 | full argument about it; I've given cogent reasons why we haven't accepted disclosure
9 | on an anonymous basis; and I've given, in my respectful submission, principled
10 | reasons why the concerns that have been raised are not real concerns, because
11 | adverse consequences will be dealt with by disclosure into the ring.

12 | Just by way of clarification, when I talked about "a junior lawyer", what I was saying is
13 | that there are a range of lawyers within the ring. Someone junior will be able to do the
14 | detailed work of interrogating the system, and then report back up to the more senior
15 | lawyers, including the general counsel, who's also in the ring. So there's a structure
16 | within that that will allow us to consider and use the information in a useful and
17 | organised way.

18 | I mean, there was a suggestion that the lawyers wouldn't be able to do their day jobs
19 | without, in some way, leaking this information to sales personnel. I mean, it's utterly
20 | far-fetched. The question here is whether the release of the identities of certain people
21 | is going to lead to commercial reprisals against customers. I mean, the idea that
22 | disclosure to a Rightmove lawyer who's given undertakings to the Tribunal is
23 | somehow going to bleed out into commercial reprisals -- I mean, it's just utterly far-
24 | fetched, sir.

25 | And I dealt with the suggestion that it's a racing certainty that we're going to come
26 | back and ask for wider disclosure.

1 | Those are my submissions on that central issue. I can deal with everything else a bit
2 | more briefly, I think.

3 | You have my point on discretion and the test of disclosure, that I'm not saying
4 | disclosure follows automatically from waiver. That's not the way I put it. What I said
5 | is that once you follow the logical steps through the test for waiver, you start from
6 | a position where, in my submission, there is an overwhelming case for the disclosure
7 | to be ordered as a matter of discretion, because of the conclusions that have been
8 | reached as part of the waiver analysis. That's the way I put it.

9 | THE CHAIR: Just on that, in the second, the way that Mr Justice Waksman puts the
10 | second test is: if there's been a waiver, is it appropriate to order production of
11 | privileged documents other than those to which reference has been made, which is
12 | the foundation of the waiver? So there's almost a presumption, isn't there, that if
13 | they're direct waiver documents, they will be disclosed.

14 | MR WILLIAMS: Exactly. I mean, the need for the material to be disclosed is infused
15 | into the test for waiver.

16 | THE CHAIR: Yes, that's the whole --

17 | MR WILLIAMS: That's the whole point of it. That's really the submission I'm making.
18 | I'm not suggesting that it's automatic, I'm just saying that the Tribunal will, to all intents
19 | and purposes, have answered the question in order to decide -- that's the waiver point.
20 | That's what I was trying to get across. It wasn't --

21 | THE CHAIR: Well, of course, that's why, presumably, there's the prism of the three
22 | different lenses to look at it through, because that gives you the flexibility to take into
23 | account the context of the case.

24 | MR WILLIAMS: Yes, that's quite true too, sir. For what it's worth, it isn't actually
25 | correct to say that disclosure under 31.14 is automatic, because there is a residual
26 | discretion not to provide that disclosure. That's the White Book 31.14.1 for your notes,

1 | but I don't think the point goes anywhere.

2 | The meat of this is really that Mr Schonfeld said, "Well, the test for disclosure involves
3 | relevance, necessity, proportionality, and the interests of third parties". We have dealt
4 | with all of those issues as part of our analysis of waiver. That's why we say, when you
5 | get to discretion, you don't form a different view. It's quite true that in any disclosure
6 | application, proportionality is an issue. And proportionality, in that sense, goes to the
7 | practicability and the burden of disclosure.

8 | But you know that Mr Newman's team have offered this disclosure already. They've
9 | already offered effectively everything we asked for, subject to anonymity. So there
10 | can't really be a serious question of this disclosure being disproportionate in that
11 | sense. What we object to, and what we say is unprincipled, is, having carried out the
12 | analysis of waiver first, as you said earlier on, sir, and then, having concluded that
13 | disclosure is required as a matter of fairness, seeking to play that back through
14 | a proportionality test as though you're then going to reach a different conclusion on
15 | whether fairness requires disclosure. I mean, obviously you're not. We accept the
16 | need to consider proportionality in the proper sense, it's just not a basis on which to
17 | unwind the whole of the waiver analysis, which seems to be the effect of
18 | Mr Schonfeld's submission.

19 | I think those are the principal points on discretion. Mr Schonfeld made his
20 | submissions about the evidence. I don't think I need to take up time, because I think
21 | you made the points to Mr Schonfeld that I would have made in my reply if you hadn't
22 | made them to him. His position did move quite a long way in the course of that
23 | exchange, it seemed to us.

24 | I mean, ultimately the points are: is the material, the evidence relating to retaliation,
25 | relied on in support of the case that's pleaded? Although Mr Schonfeld tried to sort of
26 | talk it down a bit, the answer was ultimately yes. It hasn't been withdrawn. He started

1 | to suggest potential tweaks to the evidence on his feet, but it became pretty clear
2 | immediately that the sort of tweaks that they thought about weren't going to help; they
3 | weren't going to change the complexion of the issue. So that's not going to affect
4 | matters.

5 | As he made his submissions, the problem became, in fact, as clear as it's ever been.
6 | We obviously don't read the evidence in the way that he now wants to read it, but
7 | really, the submissions that were made were a clear demonstration of the problem,
8 | which is that it's totally opaque as to who said what and how far it goes. We've got
9 | a completely partial account, which we can't possibly test or assess. Sir, the upshot
10 | is that there clearly needs to be disclosure.

11 | Submissions were made about the approach that's been taken in other cases. I mean,
12 | the focus was, I think, on Ennis, where it was said that the proper approach is for us
13 | to litigate this as an issue of generality, the same way that the issue was argued in
14 | Ennis. Ennis was a different case because there was evidence in the public domain
15 | in that case, and that was relied on. The Tribunal was able to place weight on that
16 | evidence, so one can see why in that context -- the hearsay issue -- the question of
17 | reliance on hearsay evidence may have faded away.

18 | But as you put to Mr Schonfeld in his submissions, all we've got in this case is the
19 | evidence that's in the PCR's statement and that's the way the case has been
20 | advanced. It is a bit much, as I say, for them to advance the case in that way, but tell
21 | us they're entitled to rely on evidence, but we've got to litigate the issue at a level of
22 | generality, because that's the proportionate thing to do.

23 | And then as far as Ad Tech is concerned, it may be the case that in that case the class
24 | representative was criticised for advancing the case without producing evidence to
25 | support the case in relation to retaliation. But we're now just back to MAC Hotels; it's
26 | just the invidious choice point again.

1 Finally, I think where we got to on the details of the order is that the class
2 representative no longer opposes something quite close to our paragraph 1(a), subject
3 to some drafting tweaks, and that would deal with, I think, the points I made about the
4 grey area.

5 To give an example, if it helps, what if someone was asked whether they fear
6 retaliation and they said, "Well, I'm not sure" or, "It depends". I mean, who knows
7 whether that would fit into the yes or no boxes? I mean, we just don't know what
8 people how people responded, but it sounds like there's a solution to that in the
9 drafting.

10 As far as limb 1(b) is concerned, I think where we got to was that Mr Schonfeld
11 wouldn't, seriously, in the end, oppose an order for the offer of information. He was
12 a bit unclear about whether the offer of information would include the extra information
13 that we said it would need to include, about the number of people that were asked, so
14 that we can put that in the context. But in our submission, that's a --

15 MR SCHONFELD: If I may, it would include that.

16 MR WILLIAMS: It would include that. I'm grateful. Then there's the statement of truth
17 point, which, in my submission is necessary, given the history.

18 MR SCHONFELD: That's also fine.

19 THE CHAIR: Sorry, the last point was ...

20 MR WILLIAMS: The statement of truth, and that's also not opposed in relation to that
21 limb. That does, in my submission, just really leave anonymity as the key issue.

22 THE CHAIR: Yes.

23 MR WILLIAMS: And as I say, we do respectfully urge the Tribunal to grasp the nettle
24 on that, because we are now in the second half of July. There really isn't road to kick
25 the can down any more, in our submission. So we've come before the Tribunal for
26 a resolution, and it does need to be resolved. Those are my submissions.

1 THE CHAIR: Thank you. Well, thank you, that turned out to be a longer day than any
2 of us expected. I think no doubt my fault for interrupting you so much. I think it's
3 something on which I'll reserve my decision. I will try and get that to you fairly smartly,
4 though, because I know time is ticking on, and of course, it's getting near the end of
5 term. So hopefully within the next week or so, you should expect something.

6 MR WILLIAMS: Thank you for hearing us all day when we hoped to be done more
7 quickly, but we're grateful to you for sitting all day.

8 THE CHAIR: Thank you.

9 (4.23 pm)

10 (The court adjourned)

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?