IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1262/5/7/16

Victoria House,
Bloomsbury Place,
London WC1A 2EB

15 December 2016

Before:

MARCUS SMITH QC
(Chairman)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

AGENTS' MUTUAL LIMITED Claimant

- and -

GASCOIGNE HALMAN LIMITED T/A GASCOIGNE HALMAN Defendant

AND BETWEEN:

AGENTS' MUTUAL LIMITED Claimant

- and -

MOGINIE JAMES LIMITED Defendant

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CASE MANAGEMENT CONFERENCE
(Pre-Trial Review)

A P P E A R A N C E S

Mr. Alan Maclean QC and Mr. Josh Holmes (instructed by Eversheds LLP) appeared on behalf of the Claimant.

Mr. Paul Harris QC and Mr. Philip Woolfe (instructed by Quinn Emanuel Urquhart & Sullivan, UK LLP) appeared on behalf of the Defendant, Gascoigne Halman.

Mr. James Hall (instructed by Gordon Dadds LLP) appeared on behalf of the Defendant, Moginie James.

THE CHAIRMAN: Good morning.

MR. MACLEAN: Good morning, sir. I appear in this matter for the claimant, Agents' Mutual Limited, with my learned friend, Mr. Josh Holmes. Mr. Paul Harris QC and Mr. Philip Woolfe appear for Gascoigne Halman Limited, which is the defendant in one of the cases. My learned friend, Mr. James Hall, appears for Moginie James, who are the defendants in the other action.

THE CHAIRMAN: Thank you, Mr. Maclean.

MR. MACLEAN: Sir, you have had skeleton arguments from all three parties which I hope the court has had an opportunity to read.

THE CHAIRMAN: Yes, it might help you if I indicate what I have read. I have obviously read all three skeletons. I have also read application notices, pleadings and the evidence for the PTR. I have dipped into, but I think you should assume that I have not really read the witness statements and experts reports for the trial, so to that extent you will have to take me to the material.

In terms of how to proceed this morning, it seemed to me that the points on the agenda and the matters to do with the operation of the trial itself, including the question of when the trial should take place we should do last, and perhaps we should be dealing with your three or probably more like two applications, deal with them on an application by application basis, with putting them and then the defendants responding and then proceed on to Gascoigne Halman's applications and deal with them in the same way.

MR. MACLEAN: For my part I am entirely content with that proposal. I think Mr. Hall may wish to address you briefly.

THE CHAIRMAN: Mr. Hall, do please go ahead.

MR. HALL: Thank you, sir. I just wanted, out of courtesy really, to let you know my personal position today. You may have picked this up from a footnote in one of my learned friend's submissions. I have only been briefed for this morning, I am afraid, because I had a pre-existing commitment in the Chancery Division this afternoon. In any event, my instructing solicitor, Mr. Yapp, who sits behind me can carry on for this afternoon. I hope that does not cause any difficulties and I apologise for that. I am unable to get out of this afternoon's matter.

THE CHAIRMAN: I quite understand, and obviously you are excused, but we will try and ensure that any matters that involve your client are dealt with this morning.

MR. HALL: In fact, as you may have seen, sir, from our submissions, our position is essentially neutral on almost everything. The only thing, in fact, that we do have one very minor

objection to is the moving of the trial date, but that is simply because of my own availability again, and my availability is, of course, very much at the bottom of the list of priorities, I think, and so really fall in the hands of the other parties on the other matters.

The only other matter I think I should mention at this point is in the trial timetable section of our submissions we suggested a similar timetabling to the other parties, but for the fact that we said the claimant's witnesses should go first. I see that the other two parties have said that it should be the defendants' witnesses who go first and can I just make it clear now in case I do not get a chance later, that we are perfectly happy for the defendants' witnesses to go first.

THE CHAIRMAN: That is very helpful, and although it really belongs to the end of the day it did seem to me, given the competition issues that we are dealing with in February, that it made more sense for the defence to start and for the claimants to respond in terms of witness order, but we can, perhaps, discuss that in greater detail before.

I have one point for you, Mr. Hall, I think it has been resolved but at the moment, as I understand it you and your team are not party to the confidentiality ring, but you are going to become parties.

MR. HALL: Yes, we will. I am sorry that has taken some time to organise but it will certainly happen in the next few weeks, and still before the trial.

THE CHAIRMAN: That is excellent, because otherwise we would have the unfortunate situation of you and your team having to leave at certain points which I think is highly undesirable on any level. Good, thank you very much. In that case the first item, Mr. Maclean is what I think is agreed, which is the creation of a ring for super-confidential documents.

MR. MACLEAN: Yes, as you say, there was an issue canvassed in correspondence about confidentiality, but it has all been agreed and I think it is common ground that the Tribunal is invited to make an order in the terms in the application. So, the live applications I have relate to the data of a Mr. Glasgow, that you may have seen in the skeleton, and also an application in relation to some activity carried out by Mr. Livesey, one of the other witnesses. I will deal with those straight away, if I may.

Can I just hand up some pieces of paper? It is convenient, perhaps, to hand them all up now rather than to do it *seriatim*. One is relevant to the first matter, Mr. Glasgow's data, but the others are relevant to Mr. Harris' applications and, obviously, I am not going to develop those now, but it would be convenient and, as, sir, you will see in a moment, it will save time----

THE CHAIRMAN: No, hand them all up.

MR. MACLEAN: --if I flag to you now what these documents are and what they say. There are four separate documents here. (Same handed)

THE CHAIRMAN: Thank you.

MR. MACLEAN: The first document is a summary of Agents' Mutual disclosure, and that sets out the documents which have been disclosed by my client and the dates on which they have been disclosed, starting with the initial disclosure on 29th September. So there are 2109 documents disclosed by my clients then, and then there has been supplemental disclosure----

MR. HARRIS: I am sorry to interrupt, we need to have more copies of that please, because I do not think we accept this table which we have just seen, and my solicitors need to have regard to it.

MR. MACLEAN: We will get you a copy.

MR. HARRIS: Can I have that now, please, whilst you are explaining the table.

MR. MACLEAN: All right, we will get you a copy.

MR. HARRIS: Thank you. Can we please have it now, because otherwise we cannot follow the explanation.

MR. MACLEAN: My clients disclosed 2,109 documents on 29th September, and there have been three further tranches of supplemental disclosure. The details do not matter for present purposes. The second document is a similar table summarising the disclosure by Mr. Harris's clients, Gascoigne Halman. They, too, gave initial disclosure of 508 documents on 29th September. They then gave supplemental disclosure on 4th October. There was then some redaction of the disclosure that had already been given, so row 3 in the table is a sub-set, it is a redacted version of some of row 1. They then gave supplemental disclosure on 19th October, and then unredacted versions of something that had been disclosed earlier on 28th October.

Then over the page, sir, supplemental disclosure on 1st November, and then on 15th November, and then on 23rd November. That is pertinent to the application relating to Mr. Glasgow, which I will come to in just a moment. Then further supplemental disclosure was given in December.

Sir, the third document, which is pertinent to the application in relation to Mr. Glasgow's data which I am just about to develop, that says Gascoigne Halman leads, and Gascoigne Halman listings.

THE CHAIRMAN: This is number 3.

MR. MACLEAN: This is a spreadsheet which is taken from Gascoigne Halman's own disclosure. It is simply a print-out of a document which they disclosed recently on 23rd November. What it shows is the number of leads - sir, you may have picked up from your reading in this case that 'leads' is a term which is used a lot. It is used a lot by Mr. Parker, the expert for Gascoigne Halman, and really the fulcrum of his report is based on an analysis of what he calls 'the cost per lead'. That is part of the super-structure of Mr. Parker's report, which we say - it is not a matter for today - is completely misconceived for 154,000 reasons. That is the fulcrum of his approach. So 'leads' is obviously an important aspect. So, this document, taken from Gascoigne Halman's disclosure shows that Gascoigne Halman - if, sir, you have a look at the left hand side of this - 'lead creation', so the first column is mapped for 2014, then 2015 and 2016. Then 'leads for rent', 'leads for sale', 'appraisal leads'. An appraisal lead is a particular type of lead which Mr. Glasgow explains, which I will show you in a moment from his evidence, but it is a particularly valuable type of lead, because it is a contact whereby somebody contacts the estate agent and says, "I might want you to sell my house". That's the Holy Grail for estate agents, because what they really want is people to come to them and say, "I want you to sell my house", because that is obviously how they make their money. So an appraisal lead is a particular type that Mr. Glasgow focuses on, though Mr. Parker does not. Then 'total email leads' and then' total phone call leads'.

For our purposes, sir, the relevant figure to look at is the last row, 2016, 02, that is February, for rent 1,472, so if you could circle that for a moment.

Then the other side of the table are listings. So, these are actual listings. These are properties which are actually listed either for rent or for sale for Gascoigne Halman, again for the various dates, and again, sir, the relevant figure is 2016, 02, for rent, 198, and sale, 1,446. Those correlate, or have some relation to, the figures of 147 and 160 on the left hand side of the table. Sir, I will come to that in a moment with Mr. Glasgow.

Can I show you briefly, without developing it at this stage, the fourth document?

Sir, as you know, Gascoigne Halman have a number of disclosure applications which they make at this pre-trial review. As explained in the skeleton argument my clients have undertaken further searches. Not because we have capitulated and accept that the disclosure exercise that was carried out was deficient in other ways Mr. Harris seeks to advance, but simply in order to try to keep this litigation within manageable bounds, and to deal in a sensible way with applications that are made.

What we have done, in particular, in relation to the two primary applications which Mr. Harris makes in relation to disclosure, which are to do with something called the 'bricks and mortar rule' that is the first one, and then with something called the 'purpose of the OOP rule', which is the second application. Those are the two primary applications that Mr. Harris advances.

The bricks and mortar rule, sir, you will have gathered from the pleadings, in effect, the point is that Agents' Mutual was an organisation which offered membership to estate agents which were not merely online presences, but had physical offices, the so called bricks and mortar rule, which I think is a term coined by my learned friends in the pleading, and it is a perfectly sensible drafting term.

The other one is the OOP rule, and that really is at the very heart of the competition aspects of the case, and you know, I am sure by now, what the OOP rule is. If you are a member of Agents' Mutual with your properties, or your clients' properties on the market, then you may not also list your clients' properties on more than one other competing portal, and in reality what that means is that those joining Agents' Mutual were not able to continue, if they had been with over two listings, both with Rightmove and with Zoopla. So the OOP rule is clearly at the heart of the case.

We have done some searches, and just looking at the first page of this document, can I ask you to look at the second rule, first? Full Service Agents Rule – this is a search of the key words proposed by Ms. Farrell, who is my instructing solicitor, a Partner at Eversheds, in her sixth statement which the court will have read for the purposes of this application, that is at bundle C tab 5. She has carried out the searches that she indicated in that witness statement, my clients were prepared to carry out, and the upshot is that 114 documents were identified on the database, including family. I do not know, sir, whether you are familiar----

THE CHAIRMAN: Documents in the same family where you have, say, an appendix to a document which----

MR. MACLEAN: Precisely.

THE CHAIRMAN: --might be stapled together or accompanies----

MR. MACLEAN: Or an email with a Word attachment, or an Excel spreadsheet attachment, for example. In other words it is a total corpus.

So, 114 documents are on the database, then you take away those that have already been disclosed, and you are left with 109. Then you take away those that have already been reviewed, i.e. reviewed in some other part of the disclosure process already, they have been reviewed and not disclosed because they are not relevant. 35 of those overlap, and the

upshot was that you were left with 15 documents, plus two documents to which legal professional privilege applies, 15 documents. That was the search that Ms. Farrell said she was willing to conduct.

In his skeleton argument, Mr. Harris takes Ms. Farrell to task for that and says that is not enough, and that a different search ought to take place. We have done that as well. That is the first rule. So, these are the key words proposed by Gascoigne Halman, with the same recipients, and that produces a smaller number of documents. The search that Gascoigne Halman wanted would have produced two documents, and those documents have been provided or are about to be provided.

The long and the short of the bricks and mortar point is that the searches we said we would do we have done and there are 15 documents. The searches we were being pressed to do we have done and there are two documents.

THE CHAIRMAN: And how long has Mr. Harris known about the results of these new searches.

MR. MACLEAN: We have only just done them.

THE CHAIRMAN: Right. I appreciate that time has been----

MR. MACLEAN: We have only just done them, but we have done them so that we can find out what the size of the task was. I have not seen the two documents or the 15 documents myself, yet. That is the answer, and those documents will obviously be produced. There is no reason why they cannot be.

So far as the OOP Rule is concerned, over the page, there are two different things here. The first rule, if one looks at Ms. Vernon's second witness statement, which is in bundle C at tab 2, para. 28.1, p. 23 of the bundle, internal p.14.

> "As regards disclosure in respect of the necessity of the OOP Rule, Gascoigne Halman seeks the direction of the Tribunal requiring AM to: conduct a search for all documents including emails between Mr. Springett . . ."

You will have gathered by now that Mr. Springett, at a previous hearing before Mr. Justice Roth, he is effectively the human embodiment of Agents' Mutual, he is the Chief Executive, and Ms. Whiteley's job title is 'Commercial Director'. ". . . between Mr. Springett and Ms. Whiteley, which respond to various key words." The details of those key words do not matter for present purposes. You, sir, get the drift – "need", "necessity", "require", "essential", "crucial", "vital" and somebody has had a good rummage through. the thesaurus We have done that search, and that is the first row on this page. The upshot is that 486 documents identified on the database, 464, once you have struck out those already disclosed, 373 once you exclude those that have already been reviewed. I do not know

what the last column will say because that exercise is still under way, but that exercise is being done and the fruits of it will be produced in fairly short order because 373 documents is obviously not a burdensome obligation in the great scheme of things. My anticipation, but it may be I can firm up that anticipation, is that those documents, whatever that last column says, and it obviously will not be more than 373, and it is mildly improbable that it will be anything like that, can be produced for inspection by next Monday.

If we skip over 28.2, because that is about the sales agents, and I do resist the Tribunal getting into 28.2 for reasons I will develop in opposition to Mr. Harris' application at the appropriate time, I do not want to do that now.

28.3 is for a search for all documents including emails between Mr. Springett and members of the Board, responding to various key words. We have done that search too. It is obviously a different search than the one between Mr. Springett and Ms. Whiteley, but it is possible, not to say likely, indeed, I should have thought, myself, very likely, that there will be a good deal of overlap between these two because, for example, if Mr. Springett sent a document to Mr. Abrahmsohn and copied it, and also sent it to Ms. Whiteley then it would appear in both searches.

You see there the numbers, so it is mildly improbable that the total number of documents which have to be reviewed is 373 plus 264, but much more likely to be something less than that, but whatever it is, it is not very burdensome, and it will be done and the results available by Monday. That is the position on that.

Can I then turn to my applications?

THE CHAIRMAN: Just pausing there, it is very helpful that you have taken me through the results of your searches in response to Mr. Harris' client's application but I infer that they are coming as something of a surprise to Mr. Harris, that is no criticism of you, it might be sensible after your applications have been dealt with for me to rise, perhaps, for half an hour, for Mr. Harris to see to what extent this helpful information assists you in narrowing such applications you wish to make on your disclosure application.

MR. HARRIS: If I may say, that is a very sensible suggestion. This is brand new to us and prima facie, subject to studying this table, it seems as though those parts of the application have just been conceded now, but I will gratefully take the short break.

THE CHAIRMAN: Obviously, if we can make it shorter today that would be helpful.

MR. HARRIS: Thank you.

MR. MACLEAN: I am not suggesting there is any criticism due, but we flagged in the skeleton----

THE CHAIRMAN: You said you would undertake----

MR. MACLEAN: It seemed to me sensible, these are hot off the press, I hope it will save time and simplify things and perhaps lead to more light than heat being generated than has otherwise been the case, to indicate what the position is now, but let us see the force of the suggestion that you have just made.

Can I then turn to the two matters which are still live from my client's point of view in terms of applications, and the first relates to Mr. Glasgow's data. We have set this out fairly extensively in the skeleton argument, I just want to develop it a little bit.

The starting point is if, sir, you take D1, the confidential version, and turn to tab 2, p.164, I think we are looking at the first statement of Mr. Anthony Glasgow. I do not know whether you have had an opportunity to travel into any of this in your pre-reading?

THE CHAIRMAN: I flicked through it, I am afraid no more than that, so let us say the answer is "no" to that.

MR. MACLEAN: Yes. This statement was given on 27th June in support of an application of Gascoigne Halman for the fortification of the cross-undertaking which my client had given as part of what began life as an interim injunction application. In fact, in the end, the interim application was not heard because undertakings were given on the basis of the usual cross-undertakings for damages.

Mr. Harris, in his skeleton argument, makes the point there is no claim for damages in his counterclaim but, of course, let us assume heaven forfend, that at the end of the competition aspects the court were to find my client's case was entirely hopeless on all fronts, it would follow that the injunction to support the OOP rule should never have been granted.

THE CHAIRMAN: And it would certainly be a claim on the undertaking.

MR. MACLEAN: Yes, and that is, in effect, a claim in damages, and the idea that in those circumstances Gascoigne Halman would not enforce the cross-undertaking is, frankly, fanciful.

THE CHAIRMAN: Would not any disclosure then be given, in the course of the inquiry into damages, consequent upon the undertaking?

MR. MACLEAN: Yes, it would, unless Mr. Harris appears to be suggesting that because of the application he had deployed in support of the fortification of the cross-undertaking that somehow it has been determined that the data Mr. Glasgow relied on is correct. I will show you the passage in his skeleton, but that would not be right. You are entirely right, sir, all that Mr. Glasgow was doing was providing data in support of an application for the fortification of the cross-undertaking. That application also was not heard because, again,

that was the subject of a consent order in the end. There was no determination. My clients in the end offered, I think it was, two lots of £250,000 of fortification, which is in the order. Anyway, £500,000 was provided.

This is part of an application for fortification of the cross-undertaking, and Mr. Glasgow in his evidence describes an analysis that he had undertaken of a loss of profit that it was alleged Gascoigne Halman had been suffering on a monthly basis as a result of not being able to list its properties on Zoopla as well as on Rightmove and OnTheMarket, because they chose, when they signed up to my clients, to drop Zoopla and stick with Rightmove.

He refers to appraisal leads. If you would turn to 7.3, which I mentioned earlier:

> "In general, property portals generate four main types of leads and the third one is an appraisal lead which represents enquiries made by vendors for a property that they are interested in selling their property."

Then he tells us, if you go the next paragraph:

> "Of these [various leads] the most important driver of revenue and profit for an estate agency and hence the most important for present purposes …"

not just present purposes, but for the purposes of this case actually on his evidence -

> "… is appraisal leads from vendors who are looking to sell their property."

He goes on to explain why that is the case.

Then he refers at paras.13 and 14 to data collected by Connells. You will have gathered, sir, that Connells acquired Gascoigne Halman in October 2015. If they had not done so I suspect we would not be here, but they did:

> "As I described, by using data from systems under my control I have estimated the incremental benefits to Gascoigne Halman from listing on Zoopla/PrimeLocation …"

We can take that for present purposes as Zoopla rather than Rightmove -

> "… and thus calculated the additional profits that Gascoigne Halman would likely make if it were able to list on Zoopla/PrimeLocation over and above the profits it currently makes."

Then he refers to data at 14.1, relating to the properties listed and leads received by the 550 Connells branches that list their properties with Zoopla:

> "… which have provided a significant dataset from which I have been able to estimate the profile of leads that I would expect Gascoigne Halman to receive by listing with Zoopla …."

He also refers at para.16.3, and this is important for the table that I showed you a minute ago, to:

> "… some limited data available relating to the appraisal leads generated by Zoopla for Gascoigne Halman for the short period of time that Gascoigne Halman listed on Zoopla during part of February 2016. This data suggests that the contribution of Zoopla to appraisal leads was similar across both Connells and Gascoigne Halman.
>
> 16.3.1 In particular Gascoigne Halman had 307 properties for sale or rent …"

and he divides that up as 147 and 160 -

> "… listed on the Zoopla website and received 337 email leads, an average of one per property."

Just pausing there for a second, could you take up the documents from the disclosure we recently obtained from Gascoigne Halman on 23rd November, you will see, sir, at a glance that 16.3.1 does not appear, as it turns out, having been provided with this little bit of disclosure of leads, to be right, because Gascoigne Halman did not have 307 properties for sale or rent listed on the website, they had a total of 198, and 1,446 properties listed based on 307 leads. What he then goes on to say in the next sub-paragraph is:

> "Gascoigne Halman received 30 appraisal leads or around 20 per cent per sale property."

That is because, he is telling us, 30 over 147 is approximately 20 per cent. In fact, he has also transposed the figures for rent and sale because, according to the disclosure, there were 147 for rent and 160 for sale, but that is a minor detail.

What he has, in fact, done, it would appear, is to overstate by a factor of 10 the calculation that he does, because he says 20 per cent per sale property, because there are 30 appraisal leads and roughly 150 properties listed, but there were not. If he is right about 30 appraisal leads, there were 1,446 properties listed. So there is a difficulty with this information. That is not the reason why we make the application, because this fact only came to my attention yesterday. It has only come to our attention very recently. I will develop the reason why we made the application in a moment and why it is relevant to the issues before the Competition Appeal Tribunal. When one looks at it, it becomes the more troubling to see that, in fact, it appears to proceed on a fundamental false premise, and Mr. Glasgow tells us in para.16.3.1 that he understands that technical problems with data upload meant that not all of Gascoigne Halman's properties were listed in this period.

"It is widely expected that if the undertakings were listed these technical problems would be resolved and Gascoigne Halman would list its whole set of properties on offer."

He appears to be wrestling with the fact that the 20 per cent per sale property is a surprisingly high number. In fact, we can now see that the percentage was 2 per cent. That is much more consistent with the factual evidence that is given by Gascoigne Halman's witnesses which were to the effect, and I summarise, "we had tried listing on Zoopla two or three times and they had always been useless".

So there is a problem with Mr. Glasgow's data and a problem with the analysis, which feeds directly into the basis on which the undertaking is fortified. In a sense, that is water under the bridge. It is very close to trial. If the trial was nine months or 12 months away, things might be different, but there is a lot to be done in terms of getting ready for trial. We are not applying today to interfere with the fortification of the cross-undertaking, although it begins to look as if there would be good grounds for doing so.

What we are suggesting is that this data which underlies Mr. Glasgow's analysis is information which my clients ought to be able to have inspection of in order to assess and to test and to analyse the approach which is set out in the factual and evidence by Mr. Parker in particular, and it does arise, contrary to my learned friend's submissions, on the pleadings. We have set out in our skeleton argument what is pleaded at para.53 of amended defence (para.44 of the skeleton argument). In our submission, the data underlying Mr. Glasgow's analysis, which was never provided - he simply provided his witness statement saying he had carried out this exercise.

THE CHAIRMAN: Just pausing there, Mr. Maclean, I thought I read that some of the data has been provided as part of Gascoigne Halman's disclosure in this matter. That is all, is it.

MR. MACLEAN: This has.

THE CHAIRMAN: Yes, I see, and that is the totality of the Glasgow data, is it?

MR. MACLEAN: This is Gascoigne Halman's lead data.

MR. HARRIS: There are also seven spreadsheets full of data on leads from Rightmove, which is also used in this context.

MR. MACLEAN: From Rightmove, that is correct, but we have not got the data from Connells. Mr. Harris is quite right, there is some data showing leads from Rightmove, but what Mr. Glasgow is doing, as you have seen, is saying, "Look what Gascoigne Halman got, what they would have got had they been Zoopla for this period", and then he compares it in

para.16.3.2 to the ratio that Connells got during February 2016. He says Connells got 8.9 per cent and Gascoigne Halman got 20 per cent.

THE CHAIRMAN: To be clear, what you want is the equivalent of this table, or whatever might be the equivalent, for Connells - is that right?

MR. MACLEAN: Yes, that is part of what we want.

THE CHAIRMAN: That is part of what you want. What more do you want?

MR. MACLEAN: What we want is the data collected by Connells referred to by Mr. Glasgow in section B of his statement, and in particular, as I have already indicated, if you go to paras.13 and 14.1 in particular, that is what we are after. He says in para.13:

> "… by using data from systems under my control …
>
> 14 In summary:
>
> 14.1 Data related to the properties listed and leads received by the 550 Connells branches that list their properties with Zoopla/PrimeLocation …"

which provides a significant dataset. So we have not got that. What we have got recently is the limited data available which he refers to at 16.3, which he then describes in 16.3, but he has made a complete Horlicks of describing it for the reasons I have outlined.

He then reassures himself as to how robust his analysis is because the 20 per cent is more than double the Connells' rate. In fact, if he has got that wrong it is actually, we suspect, only 25 per cent, not more than 200 per cent of the Connells rate.

So this data is important for a whole host of reasons, because Mr. Parker in his report, and you may have had a chance to dip into some of that, makes a lot of the importance of the cost per lead. He mentions different types of lead but he does not actually put much store by the different types of lead in the way that Mr. Glasgow does for the appraisal lead. There is a footnote which I will find for you in just a moment where he makes that point. Just while I put my finger on that, or Mr. Holmes does, this issue is relevant. It is pleaded in para.53 of the defence. It is relevant to the expert evidence - so if we take Mr. Parker's report. Mr. Parker's is in E1, 4, tab 26, the thin one, and if you go to para.1.8.5, you will see that he has just been referring to the theoretical framework, which he sets out, and I need not weary you with that for today's purposes. You will see at 1.8.4 that he sets out a theoretical framework. He then says, "I have tested these predictions against the empirical evidence", then he goes on to refer to Rightmove's costs per lead, OnTheMarket's costs per lead and Zoopla's costs per lead as well. This is obviously the executive summary at the beginning, but if you go to p.1821 of the bundle, do you see above para.6.3.4 "Number of leads"?

THE CHAIRMAN: Yes, I see that.

MR. MACLEAN: Then there is a figure at 24, where Mr. Parker refers to and relies on the number of leads generated for agents by the various portals, and that is the denominator for the critical calculation he makes of the cost per lead. You get that from figure 24 at p.1822. Rightmove is the green line at the top, Zoopla is the line in the middle, and OnTheMarket, which of course only starts in 2015, is the red line at the bottom. I suspect we will be looking at figures 24, 25 and 26 more than once in the course of the hearing in February.

So Mr. Parker appears only to consider the total number of leads without distinguishing between appraisal leads which are identified as the most valuable by Mr. Glasgow.

What would be of obvious relevance to all of this and to Mr. Parker's analysis would be to know what Connells' breakdown of its various leads were, and what were the appraisal leads which Connells had. We do not know what that material is, because although Mr. Glasgow has referred to it we have not got it. My learned friend is saying, "Our evidence for trial does not rely on the relevant paragraphs of Mr. Glasgow's statement, Mr. Glasgow is not a witness, he was only dealing with the fortification of the cross-undertaking, that is not in issue any more, so go away, it is not relevant". It is, it is critical. It is critical to testing the understanding of the analysis of Mr. Parker.

So the data relied on by Mr. Glasgow concerning the appraisal leads generated by Zoopla for Connells is clearly of relevance because it might show whether the leads which Mr. Glasgow identified as the most important and valuable for estate agents, have or have not grown at the same rate as the more general data relied on by Mr. Parker, in calculating what is his proxy in this case for price of Zoopla's services to agents, which is the cost per lead. It may shed light on other matters that we have referred to in the skeleton, including in particular whether agents situated in areas where Zoopla was weak prior to the claim's launch, might have faced higher costs per lead from Zoopla, which the claimant's entry – my client's entry – might have had the effect of reducing.

That is important because, as I indicated earlier, the factual evidence from Gascoigne Halman refers to them playing footsie two or three times with Zoopla and have gone to the water and gone away again because Zoopla was not producing very much for them.

THE CHAIRMAN: Just so that I am clear, figure 24 shows a number of leads generated essentially by reference to the portal, if I can call it that, differentiating between the three in question, and what you are looking at in your AM 3, though I appreciate it is Gascoigne Halman figures, is, as it were, the data viewed from the other side, viewed in terms of how

the lead produced by these three portals translates into leads for the purposes of the estate agents in question.

MR. MACLEAN: They only feed into the estate agents who are the customers of the portal, that is right.

THE CHAIRMAN: So, what you are saying you have, and have you used, or is it too recently produced, your table 3? Is that something which your expert will be wanting to look at – when I refer to your "table 3" I am referring to your Gascoigne Halman leads table, the third document you handed up.

MR. MACLEAN: Yes, I do not know whether this has yet been provided to Mr. Bishop, but I dare say it will be. This data that we have been given in disclosure by Gascoigne Halman, as Mr. Glasgow says, is limited data for a short period of time, in particular in relation to 2015 we have only got, on this data, it would appear, January. For 2016 we only have February. This is a single helpful document, but it is the only document that we have relating to Gascoigne Halman, which is one of the agencies which is now part of the very much broader Connells Group, who have more than 500 offices in different parts of the country. It is accepted by Mr. Parker that the market that applies to estate agents – the estate agency market - is not some single national market, which is, of course, common sense, if, like me, you happen to live in Cricklewood you know that Camerons Stiff have got the market sewn up, and if you walk to Camden there is no mention of Camerons Stiff. There is a series of local markets. So, it is important, when analysing the position of Gascoigne Halman or Connells, more broadly, to have that information to help to understand and explore and challenge Mr. Parker's analysis which is at a very high level, and is based on leads generally, without distinguishing between them.

So, in exactly the same way as when the expert reports were produced by Mr. Parker and Mr. Bishop, obviously Mr. Bishop and his team have gone away and looked at this report, and you will have seen from the letter which we appended with the skeleton argument, that RBB, who are the economic experts instructed by my clients, have confirmed that this is data, Mr. Glasgow's data, is data which they do consider to be of some importance. Whether it turns out in the end to be of critical importance or not is a matter that cannot yet be determined, but it is clearly information which is important to understanding, and potentially, very likely to undermine the robustness of the reliability of the report which Mr. Parker has produced at which, as I have said, this concept of the cost per lead, and the way in which he has analysed "lead" is absolutely critical to the whole analysis, because the analysis is, in effect, "OnTheMarket, entered the market, and Zoopla has suffered." Now

Agents' Mutual have not done well enough to, as it were, fill that space. Rightmove has carried on becoming ever more dominant, and Rightmove's cost per lead has gone up, and Zoopla's cost per lead has gone up rather curiously, and my client's cost per lead has gone up, according to Mr. Parker, ergo, he says, the effect of all of this has been anticompetitive, ergo, the OOP rule is unlawful.

That, in two sentences, is my learned friend's case. There are lots of problems with it, but in order to demonstrate, as we ought to be entitled to be able to demonstrate, why that case is flawed we ought to be able to see this data which Mr. Glasgow clearly had in front of him, which had clearly been collated. They are able to rely on it when it suits them for certain purposes, when they want to put the economic screws on my clients by coughing up money to fortify the cross-undertaking, but now that it does not suit them, because we apprehend it will tend to undermine the credibility and robustness of Mr. Parker's approach, we are told: "That is not relevant because, although Mr. Glasgow referred to that data at an earlier part in the very same proceedings, we do not rely on that now, so you cannot have it."

In our respectful submission, that is not a proper approach. Gascoigne Halman have already indicated in correspondence and, as Mr. Harris has said, that they were prepared to disclose, and they have disclosed data about the leads obtained by Gascoigne Halman from Rightmove; no one suggested that data was irrelevant. If that data is not irrelevant then why, one asks rhetorically, can it be said that the data which they have gathered relating to Connells' analysis of Zoopla and Zoopla's performance in terms of leads, why is that not of some other importance. Indeed, given the approach that Mr. Parker takes to cost per lead as being at the very heart of his case, it is very difficult to see how the contrary could be said.

Could I just show you in bundle D1 at tab 2, p.192, this, I think, is the point Mr. Harris was mentioning a moment ago? I think Lord Justice Sedley once had 10 rules of bundles, and one of the rules was that all pages would not bear more than one number, and I am afraid this bundle violates at least one of Lord Justice Sedley's rules. If you look at the 192 number, you should be looking at a letter from Quinn Emanuel of 17th November this year. If you go over the page to 194, this is the point Mr. Harris just made, para. 10:

> "GHL has provided inspection of seven comprehensive spreadsheets showing GHL's lead data from Rightmove for the period 2015-16. In the course of investigating your query, and following further inquiries with our e-disclosure provider, GHL has identified further spreadsheets which fall within this category

but that were inadvertently not included within GHL's disclosure. These will now be uploaded by Consilio . . ."

I think that is an organisation not a human being, but it does not matter. ". . . and disclosed to AM for inspection." I apprehend, putting the pieces together, that since we know what is called "document 3" was, in fact, disclosed on 23rd November, I infer – but I will be corrected if I am wrong, I do not doubt – that para. 10 refers to the further spreadsheets that fall within that category, and that your document 3, sir, falls within that category. Of course, that document is not concerned with Rightmove, it is concerned with Gascoigne Halman and Zoopla. But, the point is, that Mr. Glasgow has told us in paras. 13 and 14.1 that there is another, much bigger, set of data, which is the Connells' data, which would be extremely useful to have.

So, whether one looks at the pleadings or the factual witness statements which I have not taken you to, but I can, if necessary, show you. Let me show you a little bit of Mr. Forrest. In bundle E1 vol. 3, and if you turn, please, to tab 14. Mr. Forrest is the only factual witness at trial on behalf of Gascoigne Halman, who is actually a Gascoigne Halman person himself. He is the finance director, as you see from p.1428, at para. 1. If you look at para. 21, just to put it in context, para. 20, you see he is talking more about Rightmove, but at 21 he deals with Zoopla. Will you just read, please, to yourself, paras. 21 and 22?

THE CHAIRMAN: (After a pause) Yes.

MR. MACLEAN: And 23, in particular, 23 over the page, the last two sentences which begin:

"However, despite . . ."

THE CHAIRMAN: (After a pause) Yes.

MR. MACLEAN: That evidence is, to put it mildly, at least in apparent tension with the conclusions of Mr. Parker, that Zoopla generates a higher volume of leads for agents than my client, and that my client is, therefore more expensive in terms of cost per lead than Zoopla.

In our respectful submission, Mr. Glasgow's data, the data which Mr. Glasgow had available to him about appraisal leads generated by Zoopla for Gascoigne Halman and for the Connells' offices around the country, will allow these obvious tensions in their own evidence, there is tension between Mr. Glasgow and Mr. Forrest, there is tension between what Mr. Forrest says and Mr. Parker's expert report. These will be explored with the witnesses in light of the material which Mr. Glasgow and Gascoigne Halman, and those instructing my learned friend clearly have already gathered. I have made the point that Mr.

Mair of RBB has indicated that, in his view, the data is potentially relevant to the preparation of the experts' report in reply.

So, for all those reasons, looking at the pleadings, looking at the factual evidence, looking at the expert evidence, and looking at Mr. Glasgow's own statement, just in its own terms, in our respectful submission this is material which ought to have been disclosed, as part of the disclosure exercise. It is very difficult to see how this material is not within standard disclosure, and to see why it does not fall within para. 10 of the Quinn Emanuel letter, and the supplementary stuff that they have coughed up including that document 3, it is very difficult to see why, in the process of coughing that up they did not cough up the Connells' data that Mr. Glasgow had.

But, whatever the rights and wrongs of that are, the Tribunal can and should order, if necessary, specific disclosure of this material, and for all the reasons I have been developing that is what the court should do. So, that is the Glasgow data point.

The other application, which I can deal with much more shortly----

THE CHAIRMAN: Should we have Mr. Harris respond to that, and then you can deal with Mr. Livesey secondly?

MR. MACLEAN: If you wish that course. I can deal with Mr. Livesey very shortly, because there is a misunderstanding in Mr. Harris' skeleton as to what it is we are asking for or not asking for, and what it is we are trying to interfere with.

THE CHAIRMAN: I understand. We will do them application by application, so I will invite Mr. Harris to respond to the Glasgow matter. Mr. Harris, just to be clear, the relevance or otherwise of this material to cross-undertakings in damages is not a matter that I need----

MR. HARRIS: I am very grateful, I was going to say that is a red herring. That was going to be my first point, but you have taken it out of my mouth, and I will move on.

Can I just correct one factual matter? What has been handed in as item 3 or table 3, this was, in fact, provided on 17th November, rather than 23rd. It is a minor matter, but the reference to that is the sworn evidence of Ms. Vernon at para.15 of her third witness statement.

What is interesting, sir, about this is that just two days ago, we were written a letter by my learned friend's solicitors saying, "But what is this? What do the columns mean, what does it relate to, what is it all about?" So there is a great song and dance, if I may respectfully put it like that, today by way of application, but they have had this since 17th November, but it appears that they have never looked at it and they were writing a letter just two nights ago saying, "Can you please explain the headings and what have you?" It has plainly never

been of any importance to them, notwithstanding what has been said three times today, and I quote, "Absolutely critical", "Absolutely central to the entire analysis". That was my learned friend's submission. So, just to put this into context, it is greatly overblown what is now said.

One of the central reasons why this application is misconceived, sir, is that it is simply not relevant to the case on effects that we run, anti-competitive effects, to have regard to specific damage figures for Gascoigne Halman or how they were created. It is just not relevant.

The important point now is that nobody says it is relevant. We do not say it is relevant. My learned friend's expert does not say it is relevant. Can I just show you two passages in the experts' reports. You will find them in E1, bundle 4 of 4, it is a slightly similar E1 bundle.

THE CHAIRMAN: Remind me, what date were these reports filed?

MR. HARRIS: 2nd December. There are two, there is the rather more substantial report which is at tab 26. That is Mr. Parker who appears on behalf of my client, Gascoigne Halman. Then there is a much thinner report at tab 27, which is Mr. Bishop's report. Can I invite your attention in tab 27 to Mr. Bishop's report, para.77, and this is internal p.1940 of the bundle, and Mr. Bishop, so that is for my learned friend's team, says:

> "Even if we assume, contrary to standard economic analysis, that vertical agreements between firms without market power might in principle give rise to adverse competitive outcomes …"

and this is the critical part -

> "… it would still be necessary to consider the impact of the OOP Rule on the market as a whole and not just on those estate agents that are subject to that rule."

So that is one instance of Mr. Bishop agreeing with Mr. Parker that this is a macro or pan-market analysis, and it does not end there, because just over the page at 84, Mr. Bishop says:

> "In summary, to the extent that estate agents bound by the OOP Rule are placed at a competitive disadvantage to those not so bound this does not represent competitive harm **unless** it can be shown that the overall degree of competition between all estate agents is significantly reduced, resulting in higher fees and/or lower levels of service for property vendors."

Not surprisingly, sir, that is why you see the table that you were taken to in Mr. Parker's report. Can we just go back to that, it is internal page 1822. That is the number of leads generated by Rightmove, Zoopla and OTM. They are pan or macro market analyses. They

do not descend to the detail of individual estate agents, and it is utterly useless to do so, because both experts are four square agreed that this is a pan market or macro analysis. It is across the market as a whole.

Can you also, sir, please just have regard to the other words in the title that were not identified by my learned friend when he took you to figure 24, very germane for the purposes of this application, "Number of leads … (confidential to AM - based on documents from AM's disclosure)". This table is entirely created from documents we have obtained from them, not the other way round.

This is relevant for two reasons. Mr. Bishop could, if he had thought this was relevant, have dealt with it all himself in his own report based upon data from his own client, but he has not. That is a matter for him, but he could have done it. It is now said that this analysis of leads and relative types of leads, and all the rest of it, to be absolutely central and absolutely critical to the case, but their expert plainly does not think so because he has not dealt with it at all.

I will come back to the so-called RBB letter attached to my learned friend's skeleton.

THE CHAIRMAN: Pausing there, I quite take your point that when one is doing a macro analysis one is looking at the market as a whole. That does not necessarily mean to say that it follows that a micro analysis is not helpful in, as it were, stress testing the macro. I appreciate one has to be very careful here, because inevitably we will only be looking at a sample of the individual estate agents' data, and it will be a sample that is confined to that which is producible on disclosure by the parties here. It does seem to me that there could be, subject to that health warning, an argument that this material is something that ought to be before the court.

MR. HARRIS: Sir, no, because the health warning that you have identified is the critical point. Gascoigne Halman is just one player amongst literally tens of thousands of estate agents that make up the macro market. It is inconceivable that there is going to be any germane of the macro analysis by reference to or borne out of, I think it is the best part of 20,000 estate agents' branches in the country. That is one point.

Another point is that it is said, "Connells is a bit bigger". Yes, Connells is a bit bigger, but it makes up 5 or 6 per cent of the market. So the prospect of - perhaps I could put it like this - the Tribunal obtaining any benefit from any sort of cross-examination of, for example, Mr. Parker when he is doing a macro analysis with which Mr. Bishop agrees, saying, "For the market as a whole, that is relevant", from making some discrete points about individual items of data from one out of - I think it is 20 offices for Gascoigne Halman out of 20,000 -

or even by reference to Connells, which has some 500 or so offices, is negligible. What you call, sir, the 'health warning' is, in fact, the most relevant objection to that course.

The other important point to note, sir, as regards this analysis in Mr. Parker's report, is, first of all, it is almost entirely based upon material that Agents' Mutual, the claimant, has had all along, but if and in so far as any material was generated additionally, not in AM's disclosure, it has been disclosed. So they can have regard to every which way in which Mr. Parker has put forward his analysis, and test it. They have already got that material. It is not our fault that they do not appear to have looked at some of this relevant material. They can do that for trial if that is what they want to do.

THE CHAIRMAN: Mr. Harris, if it is all so irrelevant, why have you actually disclosed the Gascoigne Halman listings that form the data set out on Mr. Maclean's third document?

MR. HARRIS: Because, sir, as the letter we looked at before identified, that was just a pragmatic way of dealing with requests for further information.

THE CHAIRMAN: Yes.

MR. HARRIS: Sir, there is a distinction, because this is Gascoigne Halman data, whereas the data is Connells' data. Connells are not a party to this litigation.

THE CHAIRMAN: Yes, but Mr. Glasgow has access to the data.

MR. HARRIS: Yes, but Mr. Glasgow is a Connells witness. He does not work for Gascoigne Halman. Therein lies another issue that we have to identify here, which is that there is a complete distinction between the reason and the basis upon which this evidence was put forward back in, I think, June of this year, as opposed to its irrelevance now. It was highly relevant back then because we were making the application for fortification. That is now, to use again one of my learned friend's phrases, 'water under the bridge'. That is a finished and finalised application. Had it been the case that my learned friend wished to challenge the basis the numbers upon which we were seeking fortification, and which ended up being two tranches of £250,000, then he could have done so at the time. That is now done and dusted.

THE CHAIRMAN: I entirely accept that, Mr. Harris.

MR. HARRIS: This does not alter the status of Mr. Glasgow. He was Connells back then and he is Connells now. They did not ask for that data, so they were not provided with it. They did not seek it to test it or take any issue with it, notwithstanding all the points that were made this morning. That application is now finished.

That takes me on to the supposed relevance in the pleading. Can we turn that up because that is a little bit of a sleight of hand. The pleadings are in bundle A. The amended defence

is at tab 3. Your attention was drawn in my learned friend's skeleton to para.53. This is very important. This amended defence adopts in the usual way the headings of the particulars of claim. At the end of the particulars of claim at the previous tab, tab 2, there is a heading of "Particulars of loss and damage" under the general heading on internal p.12 of "Causation, loss and damage". That is because they are claimants and they were seeking various forms of relief, including damages for the alleged breach of contract. That is their case, they seek damages.

We, at tab 3, only defend. We do not defend and counterclaim. We adopt the heading, as it says at the beginning in the rubric, and at the end of our document we adopt the heading "Causation, loss and damage", simply because that is the heading that is used in the particulars of claim. That is not because we make a claim for loss and damage. We are responding to their claim for loss and damage. Therefore, there is no counterclaim and there is no allegation that at trial we are going to be mounting a case for loss and damage caused to us by this rule. This line, which has the figure in - it is not a confidential figure - of losses of £44,180 per month as calculated by Mr. Glasgow, was only relevant to the application for fortification. Indeed, that is why it is updated. Do you see the amendments, sir? There was an original estimate of £20,000, and then Mr. Glasgow put in his witness statement and it was amended so as to be the correct figure. That is now completely superfluous. One could even strike it through. It no longer has any meaning or bearing or relevance. We would be quite happy to delete that whole sentence if that made anybody feel any more secure about this. There is no case by us for loss and damage, so that is a bad point.

Another point that my learned friend raises is that he put in an expert letter, it is said. Can we just turn that up? That is attached to the very end of my learned friend's skeleton argument. There are a number of things to be noted about this letter. My learned friend wrongly says, "We have instructed RBB". In fact, they have instructed Mr. Bishop. He is the expert who has opined and given his personal opinions, and he is the one who has signed the report, and he is the one who will be cross-examined. Mr. Bishop has not even written this letter, let alone put in a witness statement, and that is important, sir, because Mr. Bishop's evidence in para. 87 and 83 that we looked at before, and there is another reference, I think, in 74 as well, is that what is relevant is an assessment of the market overall or, to use his phrase: "as a whole". This letter does not begin to address the inconsistency that now appears to arise from the fact that they are saying: "I need some

individual data", but actually Mr. Bishop's own approach is macro, or across the market as a whole. It is a completely unreliable letter, just annexed to the skeleton argument.

In any event, sir, it does not actually say anything remotely resembling the submissions that you have heard this morning. So, at the risk of repetition, my learned friend submitted absolutely central, absolutely critical, and then, to paraphrase, it is the very essence of my case that he wants to undermine. You will struggle to find anything even coming close in this letter. All it says is "potentially relevant", "might give assistance". That is not the basis upon which we should be giving additional specific disclosure in my submission.

THE CHAIRMAN: Well, no, that is fair, Mr. Harris, but nor is the test one of absolute centrality or criticality.

MR. HARRIS: I accept that.

THE CHAIRMAN: And, let us say, I will take those submissions with a pinch of salt. What I am really looking at is whether material which has been described by Mr. Maclean, would be of assistance, and I do not really want to put it much higher than that, to the economists, when considering their macro-analysis of the market. The standard that I suggest you address me on is really the altogether lower one of relevance to the issues rather than whether the case will turn on this. It may, it may not; frankly, I do not want to get into that.

MR. HARRIS: Yes, sir.

THE CHAIRMAN: But what I do want to ensure is that if there is material that is potentially relevant to testing the robustness of a macro-analysis, albeit with the health warnings that I have already referred to then I would be, speaking for myself, keen for that to be in front of the economists.

MR. HARRIS: Sir, I understand that. So, just a couple more points then, including a couple of specific ways in which it is said that it does prove relevant to the testing of the economic evidence, and I will come to that in just a moment, but another point my learned friend raised is that Mr. Forrest refers to the Glasgow evidence, but of course what is significant about that, sir, is that Mr. Forrest refers only to a few paragraphs of Mr. Glasgow's evidence, as not including any that rely upon any data. He simply adopts a description of types of lead and it is therefore not fair to advance and support in the application any suggestion that we are reducing Glasgow's data evidence for the purpose of the trial, we are emphatically not doing that. We say it is of no relevance whatsoever, Mr. Parker has not relied upon it, he does not use it, you have heard those points.

I think I have made this point, Mr. Parker just simply has not used the Glasgow data, full stop.

In my learned friend's skeleton, para. 48, two additional points were raised, which had not been ventilated in any correspondence, they only found the light of day for the first time in this skeleton. It says at para. 48 that they want the Connells data. The second sentence: "It may show, for example, whether the leads which he identifies", that means Mr. Glasgow, "which [Mr. Glasgow] identified as most important and valuable for estate agents have grown at the same rate as the general lead data" but, of course, whether or not the lead data for any particular estate agent, or even two estate agents, GHL and Connells, has grown at any particular rate has no bearing upon a cash flow analysis; it simply does not inform. It does not take one anywhere.

The next way it is put is, in the last sentence of that paragraph:

> "It may also shed light on whether the general data apply uniformly to agents; or whether the agents situated in areas where ZPG was weak prior to the claimant's launch may have faced higher costs . . ."

That was my learned friend's, if you like, geographic local market point. But, this is misconceived, sir, because the Glasgow data is aggregated data. It is perfectly clear from the way in which he describes it in Glasgow – I am happy to take you through that, but not only is it clear from what he says, but we have checked the data, it is just aggregated data, so you cannot begin to "shed light on whether the general data apply uniformly to agents" or agents situated in other areas; it is just not going to assist. So, for those reasons, it does not take us anywhere and we, therefore, resist the application.

Unless I can be of further assistance.

THE CHAIRMAN: Yes, one point, Mr. Harris. You addressed me, quite rightly, because that, I think, is the gravamen of this application, on the Connells data, but Mr. Maclean did show that the table that he handed up, which you disclosed on 17th November, is quite full as regards 2014 and rather less full as regards 2015/16.

MR. HARRIS: Yes.

THE CHAIRMAN: Is that additional data something that you simply do not have, or can you produce?

MR. HARRIS: Yes, and the reason is, as was adverted to, I believe, in Mr. Forrest's statement, that Mr. Maclean took you to, my client, Gascoigne Halman, only had periodic listings with Zoopla, it came on and then it came off. However, it does raise, actually, a postscript point that I should, perhaps, have ventilated earlier, you can see that, insofar as Mr. Maclean wants, for reasons that I say are irrelevant and of no help, but insofar as he wants, nevertheless, to make points about the progress of leads over time, and compare those of a

particular estate agent with what Mr. Parker has done in his report, he can do it. He can use this table to do it. The question is: does one go further, and we say: "No, that is not necessary, not proportionate" because it is so peripheral at the very best. Again, sorry for the risk of repetition, but Mr. Bishop agrees it is not relevant. He has not said otherwise in any letter.

THE CHAIRMAN: Thank you very much, Mr. Harris. Mr. Maclean?

MR. MACLEAN: Very briefly in reply, just a couple of bad points that my learned friend makes, neither of which matter, just so that the position is clear. The disclosure was, I am told, and we can see from the correspondence, given on 23rd, not 17th, but it does not matter. Secondly, Mr. Bishop did not sign the letter, that is true. Mr. Bishop is out of the country, he was not able to sign the letter, but Mr. Mair, his assistant, who had spoken to Mr. Bishop, knows all about the letter. Again, that point is not going to help you, sir, one way or the other to resolve the issue.

Mr. Harris, at one point, I inferred from his submission, was warming himself up to a submission that they no longer had this data, but he told us right at the end of his submissions that they checked what is in it. There has been no suggestion that the data referred to by Mr. Glasgow is somehow not in the custody, control and possession of Gascoigne Halman as it clearly follows they deployed it for their own purposes several months ago.

What it really comes to is that we have been given your Lordship's table 3, which is a very small aspect of the total they stated in March, but that is the most micro material that we have. Mr. Harris has shown you what the experts say about the question of the leads and so on being assessed on a whole micro basis.

Sir, the point you put to Mr. Harris is, with respect, dead right, that just because you are looking at something on a macro level does not mean that the availability of more micro-data is somehow to be left out of account, and left out of court, left out of the possession of one of the parties to the case, and the bigger the micro material that is available, prima facie, the more useful it is likely to be – it may turn out not to be useful in a particular case – but the more likely it is to be useful, in providing a tool to test or assess both for the other side, and indeed for the court, to assess the basis on which the critical evidence, namely the evidence of Mr. Parker, has been advanced.

The other point to make is that Mr. Harris now conveniently says that we can put a line through para. 53 of his amended defence if we like because it really does not help, it is not really in issue, and the £44,180 is only relevant to the fortification. But, sir, that is not the

only passage in the pleading that we have referred to in the skeleton argument, and he does not say anything about para. 36m of the amended defence, which was actually the first paragraph in the pleading that we cited in our skeleton argument at para. 43.

THE CHAIRMAN: 36n?

MR. MACLEAN: 36m – it is a very long paragraph, like most of the paragraphs in the pleading. Paragraph 36 starts at p.35, internal p.30, and you see it is under the heading: "Infringement by Effect", which one suspects is where the meat and potatoes of the case is going to be in February, although there is also pleaded an object case which I do not think is going to trouble anybody for very long, but in para. 36 they say: "The exclusivity requirement has had, and is continuing to have, the following appreciable anti-competitive and unlawful effects, any or all of them, upon competition." Then, p.48: "It has harmed customers of property portals" i.e. agents "and ultimate consumers including vendors and purchasers by . . . reducing the number of leads generated by property portals at a given cost for some agents."

Just to go back, briefly, to Mr. Parker's report, two points from that. The first is Mr. Harris suggests, I think, twice – well, he did twice, but I think what he suggested was that the figure at 24 was based entirely on Agents' Mutual data; that is obvious nonsense, with respect. As is clear from the source under the table at p.1822, the source was Rightmove, and Zoopla/PrimeLocation annual reports, i.e. the green line for Rightmove, and the turquoise line for Zoopla, and the red line for OnTheMarket. So, the red bit came from my client's management accounts, and the other stuff came from Zoopla, and PrimeLocation's annual reports.

Then the fifth note that I was struggling to find earlier, sir, if you turn to p.1797, this is important in relation to the----

THE CHAIRMAN: Just in terms of confidentiality marking, actually only the red bit of the line should be marked "confidential" is that right?

MR. MACLEAN: That is correct, sir. That is absolutely right.

THE CHAIRMAN: Sorry, you were saying?

MR. MACLEAN: If you go back to p.1797, under the heading "Cost per lead", and I have already made the point, and I do not understand Mr. Harris to disagree with this, that the concept of the cost per lead as dealt with by Mr. Parker, is at the core of his report. He says in para. 5.4.10 – you can read it there:

> "The trade-off between price and number of leads, with the price of listing is captured by the calculation of costs per lead. Essentially, the amount that an estate

agent branch will pay to a particular portal for a lead. Rightmove and Zoopla's annual reports both state the number of leads generated as well as the average price paid by an agent branch, and the number of agent branches they serve."

Footnote 109: "I note that the cost per lead metric does not provide information on the quality of the leads generated by a different portal . . ." "portals" that should be. ". . . but for the reasons above, I do not think that this is a material omission." That is, to say the least, hard to reconcile with the emphasis that Mr. Glasgow placed in his witness statement on the concept of appraisal leads, which is something that is clearly of importance to Connells, for whom Mr. Glasgow worked, and he explains that that is the key lead, that is the most important one, and it is inconceivable that Connells' data, that Mr. Glasgow referred to, that we have not seen, does not show the appraisal leads that were provided by Zoopla to Connells. Mr. Parker, in his footnote and, indeed, in his report, shrugs off the fact that the data he has relied on, the macro data from the Connell reports, just talks about leads and does not get down into the reeds of what kinds of leads they are.

THE CHAIRMAN: The problem, Mr. Maclean, is that you will be getting down into some reeds and not others, because you will have data for some agents.

MR. MACLEAN: 500 agents is very important, Mr. Harris says it is only five or six per cent of the market, but that is the best material that is likely to be available. It is the best material available to the parties. There is no better data that my clients can readily obtain. The other side have it and they have not deployed it as documents that they rely on, they have not disclosed it as part of their case for the CAT hearing in February, which is a bit odd. My expert and my clients want to see it and, in my submission, are entitled to have it. I am not suggesting that this data is critical. Mr. Harris elided, with respect, what I was submitting. What I was submitting is central is Mr. Parker's analysis of the cost per lead; that is at the heart of his case. This data is likely to be of some material importance in understanding and testing that data. As I said earlier, whether it turns out actually to impact on Mr. Parker's evidence one way or the other, I do not know, but we are entitled, in my submission, to have this data that is clearly available to Mr. Harris's team because it is the best cohort of relatively large micro data that is available in order to test some of the weaknesses in the approach that Mr. Parker sets out which is based on this single, vanilla, generic, countrywide, single metric lead, which he then bases his analysis of costs per lead on. That is his proxy for price, and that is the basis on which he says, "Look at what has happened to my proxy for price, it has gone up for Rightmove, it has gone up for Zoopla, it's gone up for OnTheMarket, ergo the Gascoigne Halman case is right".

So, sir, for all of those reasons this is data which Mr. Bishop ought to have available to him in the preparation of his reply report.

THE CHAIRMAN: Mr. Maclean, one thing, you heard Mr. Harris's explanation about the reasons for the incompleteness of the data in your document 3, namely the episodic involvement of Gascoigne Halman?

MR. MACLEAN: Yes.

THE CHAIRMAN: I take it that you are not pressing for a fuller table because one would not appear to be----

MR. MACLEAN: That may well be right as to Gascoigne Halman, but of course Gascoigne Halman listed and delisted, and so on, but Connells----

THE CHAIRMAN: No, my question was whether your application is effectively confined now to the data referred to in para.14.1?

MR. MACLEAN: Yes, is the answer.

MR. HARRIS: Sir, may I briefly respond to the new point that Mr. Maclean raised in reply? It is not in any correspondence or in his skeleton?

THE CHAIRMAN: Yes, Mr. Harris.

MR. HARRIS: He took you to another footnote, and I have three short points to make in response to that. What he says is, "Oh, well, look, there is an inconsistency, one witness talks about different types of leads, but your expert economist takes an 'across the market' approach for leads". That is fine, if he wants to put that point. He does not need any data to put that point. It is exactly the same when he says, "There appears to be a tension between Mr. Forrest on the one hand and Mr. Glasgow on the other". Fine, you do not need any data. It is inconceivable that one will cross-examine Mr. Forrest by reference to an individual line of data. Sir, that is the first point.

The second point is again new. He says, "This is not great data". In actual fact, it is hopeless data, 500 offices of 20,000, but he says, "That's the best we have got, so better than nothing". Of course, what he does not tell you, sir, is that he has - I had better not say it in open court, because in one document it has got a yellow confidentiality marking, but it is public knowledge that they have thousands of offices of their own. They are a mutual of estate agents. So if they had thought that this was relevant, or if they now think that this is relevant, and if they think they need a great number of datasets in order to test what is going on, which even their own expert does not seem to think, but if, they have got a ready source of all this information themselves. What is important, sir, is that they have not done

anything about it. It cannot be so central or critical, or even relevant, to use the more relevant test. Even if it were, then they can go off and do it.

The final point is that another way to test that proposition is, have a look at Mr. Bishop's report. Does he do anything by reference to costs per lead on either a macro or a micro level? No, he simply does not do it. Why does he not do it? Because he does not think it is relevant.

Those are my further points, sir.

THE CHAIRMAN: Thank you, Mr. Harris.

This is an application for the production of data relating to the properties listed and leads received by 550 Connells branches as described in summary in a witness statement of Mr. Glasgow dated 27th June 2016. That statement, I should make clear, was made in interlocutory proceedings in support of an application that an undertaking in damages be fortified. It is, *prima facie*, not relevant to the matters that I am dealing with today, which have nothing to do with undertakings of damages. They have to do with the material that should be produced on disclosure for the purpose of the trial of this action next year, and I approach the application on that basis.

The substance of the issues that will have to be dealt with at the trial next year relate to competition issues regarding a market, and it is the case that so far both economists that are addressing the matter are approaching the leads generated by the various portals in play here on what Mr. Harris helpfully referred to as a 'macro' basis. As a result, Mr. Harris contends that the 'micro' data relating to material regarding 550 Connells' branches is of no relevance to the macro analysis conducted by the expert economists.

On the other hand, Mr. Maclean for the claimants suggests, and he puts the suggestion at various levels, that this data is either very important or, at the very least, material that ought to be disclosed for the expert economists to review.

I see some force in the point that is made by Mr. Harris, that when one is dealing with macro economic data, micro economic data does not necessarily fit very well, there is a danger of there being apples and oranges in comparison, and I certainly do not wish in any way to overstate the importance of the material that Agents' Mutual seek to have disclosed. Nevertheless, it does seem to me that it would be unwise to exclude this material altogether from the consideration of the economists in this case, since they

are the experts – and not either the lawyers or this Tribunal, sitting without an economist member next to me.

Although I consider it, therefore, to be a marginal call, it is my determination that this material be disclosed by the defendants for analysis by the economists, but I want to underline the health warnings that I made earlier regarding the value of this data.

Before you resume, Mr. Maclean, Mr. Harris, I do not know whether you have a date that would be feasible for this disclosure to be produced?

MR. HARRIS: Sir, we can certainly do it by the middle of next week. I think it is highly confidential, so it is in the 'super confidentiality ring'.

THE CHAIRMAN: I can understand why, Mr. Harris.

MR. HARRIS: This is competitive data. We accept, obviously, the Tribunal's ruling, and if that is a satisfactory way forward we will disclose it into the super confidentiality ring on Wednesday of next week.

THE CHAIRMAN: I am grateful, Mr. Harris, thank you very much. Mr. Maclean?

MR. MACLEAN: Sir, I am very grateful. Can I turn, and I hope I can deal with this more shortly, to the application in relation to Mr. Livesey. You will have seen from the skeleton that Mr. Livesey is Connells' chief executive, not Gascoigne Halman's chief executive. He has served evidence in reply on behalf of Gascoigne Halman. You have that in the third volume of the E file, which we did have open earlier for Mr. Forrest. It is p.1470. He is the group chief executive for the group and chief executive of Connells Limited. Connells has been acquiring a number of estate agents in recent months and years, including Gascoigne Halman and including another estate agencycalled Rook Matthews Sayer. At para.15 of this statement, and this is under the heading "The collective boycott allegations". I do not know whether you have had a grasp of this, sir?

THE CHAIRMAN: I have, yes.

MR. MACLEAN: I am very grateful. He says at para.15:

> "Mr. Springett indicates at paragraph 15.10 of his fifth witness statement …"

and then he quotes from that, and then he refers to a bit more from Mr. Springett, and then he says:

> "This reference is particularly interesting as it appears that one of the main individuals within this North East group is Mr. Clive Rook of Rook Matthews Sayer, an independent agency that was acquired by Connells in March 2016."

So it is not independent any more, I suppose.

"In light of the evidence and emails referred to by Mr. Springett in his fifth witness statement, I looked to see whether there were any of Mr. Rook's emails that could shed more light on what was being discussed at this time and who was involved in those discussions. I set out what I found below."

Then in para.19, the last sentence, he says:

"I have searched for but not found any email or other communication from Ms. Emmerson in which she responds …"

and so on, but the meat of it is para.15.

Then in para.16 he refers to various emails, an email chain. That email chain is at tab 17, the next tab, and it starts at p.1510, and it runs through to p.1518. Sir, you have the start, as usual with emails, at the end. You have to go to p.1517 to get the first of the email chain. If you look at that first one at p.1517 do you see that it cc's Mr. Springett?

THE CHAIRMAN: Yes.

MR. MACLEAN: It is sent to all sorts of people, and the world and his proverbial wife, but it is cc'd to Mr. Springett, and so are all these emails if you then turn the pages forward towards the front of the bundle. They are all copied to Mr. Springett. If you go to p.1511, so is that one. We have now gone to 27th July. So 27th July at 11.34, from Mr. to all sorts of people, cc'd to Mr. Springett.

Then we get to p.1510, an email from Mr. Rook, of Rook Matthews Sayer, not, of course, then owned by Connells, but now owned by Connells, to Mr. Henning, who has been sending all these other emails, which is not sent to anybody else. It is only sent to Mr. Henning, and indeed the one at the top of the page, the next one from Henning to Rook, it is copied to Mr. Pattinson, but it is not sent to Mr. Springett either.

The point is that Mr. Livesey deploys these emails which are not Connells' emails, they are Rook Matthews Sayer emails. In terms of supporting the collective boycott allegation, they certainly do not support Gascoigne Halman's case - to the contrary, we would say, but that is not a matter for today. What is important is that at para.15 of his statement he says that he had looked to see whether there were of any Mr. Rook's emails that could shed more light on what was concerned.

Our concern, as we set out in the skeleton argument, is to understand what this was all about, what happened on this occasion. Mr. Harris, in his skeleton argument and indeed in the correspondence, says, "You are not entitled to this, it's privileged". That is one of the points that he makes.

If you turn to my learned friend Mr. Harris's skeleton argument, para.33.2, he deals with this application that I am now on, 33.2, p.40. He says an explanation of the position is set out in subparagraphs 18 to 22.

> "The circumstances in which Mr. Livesey became aware of the particular email chain are confidential and legally privileged, and such privilege is not waived."

Just pausing there, that sentence is, with respect, bad law. It is not right that the circumstances are legally privileged, and this is basic principle, if we just turn to Mr. Hollander's text book "Documentary Evidence", and I will hand up the relevant paragraph, perhaps I can just read it out for the moment, para. 1302, there are two categories of privilege, we know there is legal advice and litigation privilege. Litigation privilege, and I quote:

> ". . . only applies where adversarial proceedings are in reasonable contemplation but is wider in ambit. It protects communication which come into existence for the dominant purpose of gathering evidence for use in proceedings and will include communications with third parties if they come into existence for that dominant purpose."

So, it is not the circumstances that are privileged, but communications. We do not seek inspection of disclosure, certainly not inspection, of any communication between Mr. Livesey and any third party. So Mr. Harris' plea of legal professional privilege does not meet the application. We are not after communications with a third party.

Then, Mr. Harris' next point, he says: "Pass these particular emails to GHL", well, yes. Then he says: "The simple and decisive fact is that GHL does not have any right to control or possession of the documents of Connells or Rook Matthews Sayer." So that is a different point, that is not a point about being privileged. That is a point about we cannot give you inspection of this material because it is not within our custody or control. Of course, I accept that Rook Matthews Sayers' documents are within the custody, possession and control of Rook Matthews Sayers and not Gascoigne Halman; I get that point as well. But that also does not meet the application. The application is for a disclosure statement from Mr. Livesey explaining what happened on this occasion he describes in para. 15, and the concern is an obvious one, we set it out in the skeleton argument.

THE CHAIRMAN: Do you think he is cherry-picking?

MR. MACLEAN: He is cherry-picking.

THE CHAIRMAN: That is your stance?

MR. MACLEAN: That is our strong suspicion. In correspondence Quinn Emanuel have said that Ms. Farrell's suggestion in correspondence that there was cherry-picking was "ill-founded" I think were the words that were used. There was a denial in correspondence that there was cherry-picking. But it is, to say the least, a bit odd that Mr. Livesey says that he looked to see – it is obvious what our suspicion is, that he looked to see things and saw some things that helped, and perhaps saw other things that did not help and took away the former and left alone the latter. That is relevant, obviously, at the trial, to the weight that the court might otherwise wish to give to the emails that he does, in fact, rely on. As I have already canvassed, at the trial I strongly suspect I will be making the submission that the emails he has referred to from Rook Matthews Sayer do not get Gascoigne Halman anywhere, rather the contrary. But, we would like to have a statement, with a statement of truth, describing what happened, what exactly did he look at, what did he see when he did his looking and, in relation to the things that he saw when he had done his looking, how many things did he take away? Did he only look at the things that he has referred to in his exhibit, or did he look at other things? What became of those other things?

To deal with the cherry-picking point, we would like some----

THE CHAIRMAN: There is a difference between what he looked for, and what then became of what he looked for.

MR. MACLEAN: We know that what he did was to provide to Gascoigne Halman the ones that he provided, presumably he did not provide any more that have not been disclosed, but we would like to have an explanation of what Mr. Livesey did in this exercise when he looked to see – where did he look and what did he see? That is the essence of it, and that does not trespass on legal professional privilege, nor is it an attempt to obtain disclosure of documents which are within the custody or control of a third party. That is really it; it is as simple as that.

The points made by Mr. Harris, as I say he makes two points in para. 33.2 of his skeleton, and neither of them deal with that point. He says, of course, if you want to get third party disclosure from Rook Matthews Sayer you could go off and do that. Yes, we could, but if we wanted to do that, we could, no doubt, do other things. But, our concern is that Mr. Livesey is going to come along and give this evidence at trial, and then rely on these documents. The cherry-picking concern is an obvious one, and we simply want an explanation from Mr. Livesey as to what he did, and then once he has explained himself he may or may not be subject to cross-examination at trial on that, or it may be he gives a perfectly straightforward explanation. But, as matters stand, the position is unsatisfactory,

and the reasons for not grappling with this may be privileged and the fact that we are after Rook Matthews Sayer's documents and it is as simple as that.

THE CHAIRMAN: You could, of course, cross-examine him at trial anyway.

MR. MACLEAN: That is true, but we are giving Mr. Livesey an opportunity through the application, inviting the Tribunal to direct there to be a disclosure statement or, if you like, a further witness statement, explaining what the circumstances were in which he looked to see, where did he look? What did he see.

THE CHAIRMAN: Mr. Harris, how do you react to Mr. Maclean's kind offer?

MR. HARRIS: We resist this application, sir. You have hit the nail on the head. This is a waste of time and money. If Mr. Maclean wants to cross-examine Mr. Livesey about what he did and did not look at, what was in it, and what was not in it, he is perfectly at liberty to do so, subject, of course, to the fact that I am going to develop in a moment, that there are some highly confidential and privileged circumstances in which the documents to which he did have regard came into his possession; I will develop that bit in a minute. So that even if he did cross-examine there is always going to be a stumbling block, but that is essentially the end of the application. It is disproportionate, not necessary. It is a waste of money and time for a different reason, sir. Even if Mr. Maclean is not satisfied and thinks it was a cherry-picking exercise, and therefore there are other documents, there is only one avenue open to him, which he has already acknowledged. It is acknowledged in his witness statement from his learned instructing solicitor (fifth Farrell, para 35) it is to make a third party disclosure application. So, this is a pointless exercise because it seems, from the skeleton argument, that they are now resiling from the suggestion they made in their evidence about the possibility of even going off to seek third party disclosure.

So, where does this take us? It does not take us anywhere at all. It is not going to ask for the third party disclosure because even though they might still think there is some alleged cherry-picking, which is, of course, denied, then it is a complete non-point. It may be that the reason they will not make that application is because today – this is an application that is contested later on – today they say: "We do not want even a short postponement of the trial" and a third party disclosure application will obviously have an impact on that, but that is a matter for them.

The first point is that for those two reasons this is a side-show and a waste of time and money.

But, in any event, can I show you that this point has already been squarely addressed in the evidence. It is my learned instructing solicitor's witness statement, her third Vernon,

bundle C1, tab 6. She addresses this squarely at paras 17 through to 21, if you could just turn that up, please?

THE CHAIRMAN: Yes.

MR. HARRIS: Under the heading: "Searches carried out by or on behalf of Mr. Livesey in respect of Rook Matthews Sayers", may I invite you to read to yourself, it will be quicker, paras. 17 through 21, just to note that there is an important typo in the fourth line down at para. 18.

THE CHAIRMAN: Yes, she wrote to the Tribunal about that.

MR. HARRIS: So that second "GHL" reference should say "RMS", but, sir, if you could perhaps just refresh your memory as to 17 through 21.

THE CHAIRMAN: (After a pause) Yes, I have read that.

MR. HARRIS: Sir, would you just note in para. 18 that Ms. Vernon refers to the fact that these reasons were already set out in a letter prior to even having to put in this witness statement. For your note, sir----

THE CHAIRMAN: Turn it up, Mr. Harris, let us have a look.

MR. HARRIS: It is D1, tab 2, p.209. The letter begins at p.208, but the relevant part is on p.209 and just to the top of p.210.

THE CHAIRMAN: That is the numbering below the other numbering?

MR. HARRIS: Yes, I think it is the official numbering.

THE CHAIRMAN: The usual problem.

MR. HARRIS: The relevant part is on p.209, and just over to p.210, so under the heading on p.209: "Mr. Livesey and the Rook Matthews Sayer documents".

THE CHAIRMAN: Yes, I see.

MR. HARRIS: You will see that the key points from Ms. Vernon's statement are the point that GHL cannot access, or call for access, i.e. has not searched RMS' documents. Then there is the reference to how Mr. Livesey became aware of the materials being privileged, which I will expand upon in just a moment. Then there is a reference to them being in Mr. Livesey's hands by virtue of his capacity as director of different companies, not the defending companies, and Mr. Livesey further confirming that he has no possession or right, or control, and that GHL has no such rights. All of those points are also in the letter, in other words, the witness statement just, in substance, repeats the letter which was already given.

The most important aspects of this in response, is that GHL does not have, and has never had, any right of access to search RMS documents. It has not done so, and that ought to be

the end of the matter because it would only be if, somehow, GHL, as GHL had the right to search or look at them, that it could be said that there should be some further documents produced. I am going to carry on, sir, I appreciate that is not the sole focus.

THE CHAIRMAN: Indeed, I am sure you will be coming to it, but it seems to me the thrust of Mr. Maclean's submissions this morning were the words used by Mr. Livesey in para. 15, "I looked to see whether" which rather implies he is leafing through files.

MR. HARRIS: I can understand, and this is a fair point, I can understand how, if one is presented with those words on their side of this litigation, you might think that is somehow some free-standing search or some litigation search or disclosure search, but it is not. That is why the first step is: "Does GHL have any such power?" Answer: emphatically "No".

The next step – I am getting there in steps – the next step is that Mr. Livesey, who also has not searched RMS documents for anything of relevance to this litigation, that has simply not happened.

The next step is that RMS has not searched any documents of its own for relevance to this litigation. That has not happened.

The next step is that Connells also has not searched. Nobody has done a search of RMS documents for documents relevant to this litigation. There are some documents that are in the possession of what is now the parent company, Connells, of which, of course, Mr. Livesey is the Group Chief Executive, and he became aware of them for completely separate and unrelated reasons that are not connected with this litigation. They are a separate file that is integrally bound up with legal advice, not litigation privilege, so that was an irrelevance. It is legal advice privilege in which Quinn Emanuel are also instructed, and for this completely separate reason in a separate matter a series of documents have come from RMS's files into the parent company's files. Because, of course, Mr. Livesey is a director of Connells and, as it happens, is also a director or RMS, he knew about these documents, and there are X number of documents. I am not at liberty to tell this court, let alone the claimant, what that separate matter is, what that legal advice was, and why, if you like, a group of other documents came into the parent company's possession.

One thing to note here is that is not GHL's privilege even to waive. It belongs to Connells. Having known about documents that were in his possession for the separate reasons that are shrouded in the legal advice privilege and that are very, very confidential, as well as privileged, Mr. Livesey, as a witness in the GHL action, was presented with the fifth Springett. Mr. Springett's fifth witness statement makes some remarks about the subject matter of various emails. Mr. Livesey knew, because he had read these other grouping of

documents created for the separate and privileged purposes, that there were some materials in this other grouping that bore relevantly upon what Mr. Springett was saying - in other words, it is not the full story, what Mr. Springett was saying. Mr. Livesey, therefore, as we said in the letter and in the witness statement, in his capacity as a director of a separate company, having obtained this grouping of documents pursuant to and further to legal advice privilege of a completely separate nature said, "Oh, I am prepared to give to GHL the relevant email to respond to Mr. Springett". So for these purposes he is a third party who has provided to a litigant a document that is relevant in response to something that somebody on the other side of the litigation has done. That is the end of that.

Sir, you will perhaps not be aware that the identical thing has happened on their side of the equation. Can I just show you where that has happened?

THE CHAIRMAN: Can I just stop you there? It is obvious, Mr. Harris, you are, with considerable skill, skating around something which is obviously enormously sensitive, but not relevant to these proceedings.

MR. HARRIS: That is right, sir.

THE CHAIRMAN: That may, no doubt, be the explanation for the way in which para.15 of the second witness statement of Mr. Livesey is crafted. That is, I am sure, done for very sensible reasons. What I am keen to avoid, however, is something of a car crash occurring at a trial. If I do not make any order and simply tell Mr. Maclean to go ahead and cross-examine, we are going to have the potential for something of a problem in the course of the cross-examination of Mr. Livesey, which I would be quite keen to discharge sooner rather than later.

As a supplementary point to that, or perhaps an equally important point, is that although I appreciate that in your skeleton you reference privilege, and Ms. Vernon in her statement references privilege, I do not regard the articulation of the privilege in the terms that you have put it as sufficiently specific for me to determine whether the privilege exists or not. So, just to put a flag down, I think that your clients would be very well advised to articulate much more clearly the basis upon which privilege is asserted, so that the matter can be ruled upon. If we do not get any further clarity from Mr. Livesey before trial, we are going to need the wherewithal to determine just how Mr. Maclean can go at trial.

MR. HARRIS: Sir, I understand that. The matter is extremely complex. There are certain issues that I might be at liberty to inform the Tribunal. There are two aspects here, and I have to be extremely careful what I say in open court. The matter is highly, highly confidential as well as privileged.

THE CHAIRMAN: You see my difficulty. I do not want to press you on this because doing it on the hoof is going to lead to a car crash, that is quite clear. What I am suggesting is that, whatever the merits actually of Mr. Maclean's application, it seems, as a matter of sensible trial management, that you articulate with as much granularity as you can but in your own time exactly the nature of the difficulty, so that either Mr. Maclean will be shut up before he asks the question, or the Tribunal has the ability to ensure that we do not blunder into an area that is highly sensitive but irrelevant. Do you see where I am coming from?

MR. HARRIS: Sir, I understand very much the conundrum. There is my position, there is the other litigant, there is the Tribunal's position, I understand that, but there are, I will put it like this, certain occasions upon which the Tribunal or the court can be informed of more about a matter than either the other litigant or any of the public, and that is a perfectly legitimate course on some occasions. It is possible that this is one of those occasions. I simply cannot advance any further in open court the understanding of the other matter.

THE CHAIRMAN: Let me absolutely clear, Mr. Harris, I do not want you to address me at all on this today. What I am debating with you is a means of dealing with a point that I can see that, at trial, is likely to be a matter of fair cross-examination.

MR. MACLEAN: Sir, if I may, I do not criticise my learned friend at all for this, but this is the first articulation as far as I am aware of the idea that the privilege that is referred by Ms. Vernon and by Mr. Harris in his skeleton is some form of legal advice privilege. That is news to us. We had assumed, I think fairly sensibly, that the privilege that was being invoked was some form of litigation privilege. So this is all news to us.

I should say, without having taken any instructions, I entirely see, sir, the point that you make, and the last thing I want to do, for my own personal interest, is to have my cross-examination interrupted by some long debate that might last for hours about whether I am entitled to ask the next five questions.

THE CHAIRMAN: Quite.

MR. MACLEAN: Sir, I entirely see that, and if a mechanism can be established by which this matter can be ventilated and explored before trial, then I, for one, would be the first to sign up to it.

THE CHAIRMAN: Thank you, Mr. Maclean. Mr. Harris, you are taking instructions. Please do.

MR. HARRIS: (After a pause) Sir, we have listened carefully to what you have said. Can we take it away? I think you said, 'take it away in your own time', that does not mean kicking it into the long grass , far from it. We will consider it very carefully. It is a very complicated matter, for reasons that I cannot explain in open court. It may be that in the

first instance we are able to provide some, or make a suggestion for providing, further information to the Tribunal that simply cannot be disseminated more widely. It is a very delicate situation, but there are circumstances - indeed there have recently been in this court room - in which I, personally, have been involved, in which that has been the course that has been adopted, because there are certain other considerations which mean it cannot be disclosed in full to even the other side, let alone the public.

THE CHAIRMAN: I quite understand, but we are moving into very deep waters here, because if I am to tell Mr. Maclean, whenever we come to the point, that I am not permitting him to go to certain areas, he is not unnaturally going to ask me why. It does seem to me that there is a fundamental difficulty with the approach of a Gascoigne Halman/Tribunal exchange which does not involve the other parties. I am not saying no, I am saying that I see that as very much a last resort.

MR. HARRIS: Yes, sir.

THE CHAIRMAN: Can I suggest this, and again I am not going to make any order - clearly, just as you have been skating round this with enormous sensitivity this morning, so too has Mr. Livesey - that you seek to revisit para.15 of his second witness statement with a view to Mr. Livesey providing an expansion in your and his own time - again, sooner rather than later is always better, but I appreciate that this will be a difficult question - which deals with the cherry-picking aspect of the background? As I understand it, the only reason Mr. Maclean is going to para.15 is because he is saying that in some way there has been a selection. If it can be said that for reasons that can be, I would anticipate, as opaque as you like, there has not been a selection because of this other matter which is highly sensitive and involves a privileged set of advice in an altogether unrelated matter, it does seem to me that, provided the 'looked to see' point is dealt with and expanded, but without in any way providing details on any other matter that is sensitive----

MR. HARRIS: Yes, sir, that may be the answer, if I may respectfully say, because in so far as the alleged evil is cherry-picking, I am confident that that can be dispelled because that is not what has happened.

THE CHAIRMAN: Exactly so, and you can then simply say that there are certain aspects of the factual matrix regarding the cherry-picking allegation, which I will simply refer to in those general terms. I would imagine that if there is a statement along those lines it will give the Tribunal the ability to tell Mr. Maclean that his questions are really no longer appropriate.

MR. HARRIS: Yes, sir, and I have not dealt with this today because we have got a letter, we have got a witness statement, I can confirm, and it has been confirmed in the letter and in the witness statement, that there has not been a search.

THE CHAIRMAN: Indeed, I think the difficulty is that this will be the evidence of Mr. Livesey. He will say in the witness box that it is true, and Mr. Maclean - one can just craft the questions now - will be saying, "When you say 'looked to see', you had a file in front of you, did you not, and you looked through it and you picked documents and you did not pick other documents?" He will say "No". One can just see the questioning going on and at some point, very rapidly, I imagine, we will blunder into the area of sensitivity, which I am very keen to avoid.

MR. HARRIS: I understand entirely. We will take this away. We will provide something along the lines that you suggest that is carefully crafted, but deals essentially with the allegation of cherry-picking, which is a bad allegation.

THE CHAIRMAN: I am grateful. Mr. Maclean, does that meet----

MR. MACLEAN: (No microphone) (Inaudible) will be provided *inter partes*?

THE CHAIRMAN: At least as a first effort it will be *inter partes*. As I said, I am not closing out a Gascoigne Halman/Tribunal exchange, but in the first instance I would want you to be sending what you send to the Tribunal to the other parties?

MR. HARRIS: Yes, sir, I entirely understand.

THE CHAIRMAN: If it cannot be done, then we will address it again, but I would very much hope it can be done.

MR. HARRIS: Thank you. I am in the Tribunal's hands now. I see the time. There was some development in this table that my learned friend handed in this morning. Equally, that could conceivably be dealt with at the lunch adjournment because there are other aspects of my application. I am in the Tribunal's hands.

THE CHAIRMAN: Would it be sensible, Mr. Harris, for you to have a chance to review with your team what Mr. Maclean and his team produced and that we resume in a hour's time at 1.45? Do you need longer than that?

MR. HARRIS: Perhaps we could do this, sir: perhaps we could take half an hour in the first instance and, if it is not inconvenient to the Tribunal as a whole, take that off the lunch adjournment. I am conscious that there is still quite a lot to get through.

THE CHAIRMAN: I see the time, it is quarter to one. What I am suggesting is that we roll up your time for consideration and your lunch break, so we resume in an hour.

MR. HARRIS: Yes, in that case why do we not adjourn to 1.45.

THE CHAIRMAN: That is what I was suggesting. We will do that.

(Adjourned for a short time)

THE CHAIRMAN: Yes, Mr. Harris.

MR. HARRIS: Good afternoon, sir. Thank you for the early start for the short adjournment. I have in my hand now the table that was handed up by Mr. Maclean. That is the one that looks like this; it is a three page table. "Further searches that the claimant has undertaken or proposes to undertake".

THE CHAIRMAN: It is a three page one?

MR. HARRIS: That is correct, sir. I am pleased to say that there has been some progress by reference to this document. The progress consists entirely of concessions on the part of my learned friend and can I just explain what they are and then explain why it does not resolve the entire matters in dispute. So, looking at the first page, what had happened originally in the case as regards the full Service Agent Rule, that is the one that we call the Bricks and Mortar/Full Service, it is the same thing.

Originally there were no searches conducted for this at all by the claimant, notwithstanding that it is clearly in issue both as object and effect in the pleadings from the very beginning. I am surprised and pleased, as quite a long time ago, in fact, on 10th October, a week or so after the disclosure deadline, we said: 'Hang on a minute, that is a clearly pleaded allegation, why have you not looked for it?' and that was met with resistance. Then there was all kinds of correspondence that I do not propose to take you to, sir, unless you would like to see any of it.

THE CHAIRMAN: No, thank you.

MR. HARRIS: I do not suppose you will. Eventually, on 9th December, so more than two months after the disclosure deadline, and almost exactly two months after we first queried the omission of these relevant searches, it was said in a document that I would like to show you, that some searches would, in fact, be carried out for materials relating to full service agents. That document is to be found in C1, and it is annexed to the sixth witness statement of Ms. Farrell. This is a useful bundle, sir, for the purposes of this part of my submissions.

Tab 1 is our application notice for these various specific disclosure applications for today, and if you turn over the page at para. 3.1, that is the direction that we seek in relation to the bricks and mortar full service agent restriction.

If you look at it, a direction that the claimant be required to search for disclosure, make available for inspection documents which evidence the reasons for the inclusion of this rule.

It is, not surprisingly, a fairly standard style reference to relevant documents on the pleaded rule. But it is not limited, you will note, just in passing, to particular people, whether Mr. Springett or Ms. Whiteley, or even the Board. It is documents relevant to the pleaded allegation. As I say, that had been altogether opposed, therefore we made the application. We are going to be looking back at tab 1, but in the same file at tab 5 there is an annex to the responsive witness statement from Ms. Farrell, and that is to be found in tab 5 at the very end, it is the last page, and it is on internal p.61. This document was provided to us on 9th December, even though it is dated 8th December on p.61, you will see the witness statement is 9th December, so only a few days ago, in the face of more than two months of resistance, and two and a half months after the deadline, where it is conceded, and if you look at the first row of annex 1 to Ms. Farrell's statement, it cross refers in the left hand column to para. 3.1 of the annex to our notice, so that is why I started there.

Then there is a mis-labelling in the next column, under "Issue" you can delete "OOP Rule"----

THE CHAIRMAN: And insert "Bricks and Mortar".

MR. HARRIS: And it should say "Bricks and Mortar". Then I am taking you now to the fourth column, "Keywords", there was a recognition that there did, in fact, have to be a search for these relevant documents by reference to a set of keywords, they are identified.

THE CHAIRMAN: So keywords were not identified between the parties prior to them----

MR. HARRIS: No, because this was an entire category of relevant disclosure, the other side were not searching for at all.

THE CHAIRMAN: In many cases parties will exchange the list of----

MR. HARRIS: That did not happen at all in this case.

MR. MACLEAN: On either side.

MR. HARRIS: That was partly because of the expedited nature of the case, but what I have identified for you, sir, is that leaving this aside, there is obvious relevance on the face of the pleadings, we then queried it on 10th October, so well over two months ago now. So, for the first time, the other side accepted the relevance of some keywords on this topic. Further confusion arose because if you compare the third column with the fifth column, the scope of the newly conceded search was said to be all documents dataset, that would be satisfactory subject to the key words being incomplete, but it is confused because in the fifth column it then seems to limit the entire dataset to simply documents from Spring, i.e. the central part of Mr. Springett's name, to Whiteley, or in reverse.

You may now recall in the skeleton that we wrote, we said: 'finally, thank you, at least you have now recognised that we need to give these'.

But, two points: First, the set of keywords is insufficient that you have now finally acknowledged; and secondly, we do not like this limitation within the dataset. So, going back to my learned friend's table, where there has been the complete concession, and we could look this up if you are very interested, but we said in my skeleton argument at 10.2, 'Do not limit the keywords to the ones in Ms. Farrell's annex 1, add in some more.'

If you look at this table Mr. Maclean handed in, that has now been conceded, so the first substantive row of the table adds in additional keywords.

THE CHAIRMAN: Right.

MR. HARRIS: Just to trace it back: originally, no search, no key words, denial of relevance, you are not having anything, and then it was, okay, impliedly, it is relevant and you can have the first set of data, keywords at annex 1 and we said that is not enough, and they have now conceded the additional keywords.

I just pause there for a minute, because Mr. Maclean, when introducing this document, made a very peculiar submission that somehow we were only asking for the top and not the bottom and, therefore, if he did what I wanted it was only two documents, whereas if they did what he had already agreed to do it was 15. That is, of course, completely misconceived. What we say in the skeleton is we want the key words expanded not substituted. In other words, we want the 15 and the 2, and that is quite clear, it uses the word "expand" in the skeleton.

Be that as it may, where we have now reached a measure of agreement going forward for today's purposes, sir, is in keywords as regards bricks and mortar, it is to do the entire set, and that is now conceded and agreed.

THE CHAIRMAN: Looking at your notice of application, 3.1 is resolved?

MR. HARRIS: It is resolved as regards the keywords, correct. But where there remains a dispute is that what is said in the third column of the table that was handed in is that there was not to be a search, as we understand this table, of the entire dataset, but instead it is to be limited to various authors recipients. You can see what the limitation is, it is two from the following "Spring" or "Whiteley", so effectively the Chief Executive and the Commercial Director or, and then these other items----

THE CHAIRMAN: There are cumulative authors, recipients added in because----

MR. HARRIS: That is right, they are compendiously 'the Board' people, some of them are main directors, and others are companies of the Board members and that is fine. We do want the

documents to and from Mr. Springett and Ms. Whiteley to be searched, and we do want them searched from the Board. It is fine so far as it goes, but there is no reason not to search for the same key words in the entire dataset.

There are two points there, sir. The first is that this is a plainly and centrally relevant allegation of object and effect on a named rule, and one should therefore search for relevant documents in the entire dataset, you do not arbitrarily limit it to certain recipients or authors. What we therefore say in our skeleton argument is that we want the entire dataset searched, and that is what, at least on one view of annex 1 of Ms. Farrell's sixth witness statement, it says it is going to do, scope "all documents in dataset", but now there seems to have been some kind of resiling from that.

So, the point of dispute there is not limiting it to these people, but searching the dataset. This is an illustration of quite how easy the first stage of that search is, sir. They have produced this document out of the hat overnight, seemingly post-skeletons and in preparation for today's hearing. You can see, sir, if you did not already know this from your own personal experience, that it is easy, once you have your entire dataset on an electronic platform, to key in further word searches, keyword searches, and it spews out numbers, such as the numbers in this table. What we say is that should now be done on the whole dataset.

THE CHAIRMAN: Have you spoken to Mr. Maclean about it, or is this a matter that----

MR. HARRIS: This remains a dispute between us as on the skeleton, as we have always asked for the full dataset.

What is interesting, sir, about this, let us say it is now said that that is disproportionate, you cannot assess that submission because what you do not have in here is a corresponding number of how many documents would be caught if they had searched the entire dataset, and that stands in contrast to the third page of this table, which I am yet to come to.

What we can see from this table is that by reference to the expanded keyword searches and the author/recipients, it looks to have been an entirely reasonable and proportionate exercise from the beginning. It seems to produce 43 documents on the top ones, and 140 below, and then you whittle them down as you move across the columns, and that leads to 35 documents in the first round, 57 that had to be reviewed, that is not a disproportionate exercise, quite the opposite. Bear in mind, sir, this should have been done, and there is no reason to apprehend that it could not have been done as long ago as 28th September, so over two months ago when the disclosure deadline first fell.

I invite you to just pause, before we move on to the next page, sir, in this regard, because it is all well and good for Mr. Maclean now to submit: "Look, there are only two documents in the first row, and it is only 15 and some privileged documents in the second row", but what this boils down to is an acknowledgement on the part of the claimant that these are relevant documents that should always have been disclosed, and that is over two months ago.

Secondly, this is no indication of the gravity or significance of these documents. These could be absolutely critical documents, and what we are now prejudiced by, sir, is the fact that we have not even got them today, we have not even received them overnight, notwithstanding that they have now been identified, reviewed, determined to be relevant. If they are significant then, of course, we may need to deal with them either by potentially making further disclosure requests, one does not know what document leads on to another document, but we also have to put them to our witnesses, they may be the witnesses who come from third parties and, in any event, we are running right into Christmas. That is just on p.1. Very, very unsatisfactory, but at least there has now been a concession on some of it, and the outstanding issue is the limitation.

THE CHAIRMAN: Shall we deal with them paragraph by paragraph from the application notice.

MR. HARRIS: Sir, yes. That is what I have to say about para.3.1.

THE CHAIRMAN: As I understand it, the dispute is simply as regards your column 3, Mr. Maclean, the applicant's reference to certain authors and recipients.

MR. MACLEAN: Yes, sir. You say "simply", and, of course, that is a description of the area of dispute. Can I just explain why Mr. Harris is not right to suggest that there is some confusion between column 3 and column 5 of Ms. Farrell's annex. Column 3 deals with the scope - in other words, all the documents in the dataset. So the whole of the dataset will be interrogated, or is up for grabs, as it were, in the search that is going to be conducted. That is by contrast - for example, if you go over the page in Ms. Farrell's annex, which we will perhaps come to shortly on the OOP rule - where the scope of the search is restricted to the emails in the dataset, sir - do you see that, the difference between emails in the dataset, and all the documents in the dataset.

Sir, as you will know with any piece of modern litigation, you then have a search, an interrogation of the dataset, by reference to certain parameters, and those parameters are sometimes particular custodians - that is not happening here; sometimes by reference to key words - that is happening here; and sometimes by reference to whether documents are sent from X to Y, or vice versa. So there is nothing strange about searching all the

documents in a dataset by reference to, first of all, key words, and, secondly, authors and recipients. That is not the intention with column 3. It is just an explanation of the extent to which, or the parameters by which, you are interrogating the dataset. There is nothing strange about that.

Then, what happened was, Mr. Harris says this should all have been done two months ago, and suggests that his wider search that he is now contending for should have been done two months ago. That certainly is, with respect, an entirely fallacious submission.

The obligation of parties on standard disclosure is to conduct a reasonable and proportionate search for documents. Having done so, the obligation is then to disclose and provide for inspection, subject to privilege and the like, documents which fall within CPR 31.6. As you will have gathered from your introduction to this case, the disclosure that has been given was given under the CPR. So disclosure was given of the whole shooting match of the whole case, and it was not just given by the CAT under the rules set by this Tribunal. It was CPR standard disclosure.

So when we come to my table, the first page of p.4, what has happened is, taking Ms. Farrell's second row, first of all, this reflects the bit in the annex to Ms. Farrell's sixth statement. So you take the entire dataset, the whole of the available documentation of my clients, and you search it not by any date restriction, not by any custodian restriction, but by two different sets of restrictions: first of all, the key words which had been set out in her annex, and secondly, emails to or from a whole range of people - Spring, that is Mr. Springett, or Ms. Whiteley, or Abrahmsohn, and so on - and the reason why those people are selected is because they are, respectively, the chief executive, the commercial director, Ms. Whiteley, and all the members of the board.

The reason why that has been selected is that if you look at my learned friend's application notice at bundle C, tab 1, and indeed his skeleton argument, which I will come to in a minute at para.10, their application is premised, if you have para.3.1, on a direction that we be required to search for, disclose and make available for inspection, by no later than a particular date, documents which evidence the reasons for the inclusion by the claimant of this rule.

Then if you take up my learned friend's skeleton at p.4, para.6, where he deals with this application, para.6, in effect, repeats para.3.1. So you see the first sentence beginning, "In its application", and you see the words in the second line, "which evidence the reasons for the inclusion" - do you see that?

THE CHAIRMAN: Yes.

MR. MACLEAN: Then in the next paragraph, "Such documents are plainly relevant to the allegations in X, Y and Z paragraphs:

> "… that the bricks and mortar/full service agent restriction has the object of preventing, restricting or distorting competition."

Then he develops the submission in para.10, and what he says in para.10.1 under the heading "Disclosure", is, "It is not clear what documents C proposes to search". Then he deals with the scope column.

Just pausing here, if you go to Ms. Farrell's again at tab 5 of bundle C, what Ms. Farrell was proposing at that stage, you see from "Author/recipient", was an interrogation of the entire dataset by reference to certain key words and also by reference to documents from Spring to Whiteley or Whiteley to Spring. Mr. Harris is complaining about that limitation in para.10.1. What he goes on to say in 10.1 is that is no good, and, picking it up at line 5 of para.10.1:

> "However, the author/recipient column of the very same row appears to limit the search to 'documents <u>from</u> Spring to Whiteley …' These limitations of searches within the dataset are both unacceptable and unexplained. Much of the claimant's justification for refusing to agree to widen the searches on other issues, including to a greater number of the claimant's employees is that C's key decisions are allegedly taken at Board level."

That is an uncontroversial proposition one might think.

> "If so, then this important bricks and mortar term of the membership agreement must have been discussed at the Board level."

Then he refers to legal advice.

> "It is reasonable to suppose that legal risk areas in the creation of the claimant were, at least, the subject of discussion at Board level. Accordingly, the scope of the custodians' documents searched needs to be similar to the other requests and thus, **at the least**, cover relevant documents in the possession, custody or control of the claimant that came from or went to all Board members, together with all communications between Mr. Springett and Ms. Whiteley. In fact, there is no warrant for the apparent limit to the case of 'Spring' and 'Whiteley', just to documents 'from' and 'to' each other …"

and so it goes on.

So in the search that has been conducted, the difference, the key difference, between Ms. Farrell's table in annex 1, and the second row of document 4 is that we have done precisely

what Mr. Harris is castigating us for not suggesting in his para.10.1, namely, expanded the search not just to Spring or Whiteley or Whiteley or Spring, but to every single member of the board. That is because that will capture - it is impossible to imagine that will not capture - documents which evidence the reasons for the inclusion of the rule in the Membership Rules.

If one is searching all the documents by reference to all of these key words for all of the members of the board and the chief expert evidence and the commercial director, that is, on any view, a proportionate search.

THE CHAIRMAN: Out of interest, have you done simply a run of how many documents are identified removing the restriction in para.3? Does that result in a massively different outcome?

MR. MACLEAN: It would turn the number in the fourth column of this table, which, depending on which key words you use, is either 143 or 114, as you see, sir, to a number between 2,500 and 3,000 - 2,700 odd. In fact, it would convert not the 114 or 143 to 2,700, it would convert the penultimate column to 2,700. Sir, it would be an order of magnitude different.

Mr. Harris's side complained about this, he complained about the search terms, and wanted more key words, different key words. So we did the search by the same authors and recipients on the same database but by reference to Gascoigne Halman's suggested key words. That is the first row. That produced in the end two documents. Those two documents were also produced by the other search. Mr. Harris said they wanted all the key words carried out. I think they made suggestion there was some flaw in this analysis or something I had said on that basis. The short point is that the addition of the key words proposed by Gascoigne Halman produced precisely zero additional documents - not one - because all 35 in the penultimate column in the first row were included in the searches in the second row. The two documents in the last column are part of the cohort of 15 in the last column in the other row.

So the suggestion that a proportionate search in order to get at documents to demonstrate the reasons for, or the object for, a rule in the Membership Rules should go beyond the chief executive, the commercial director and the members of the board is, in my respectful submission, a submission which the late Lord Bingham would have described as 'rather surprising'. That, nonetheless, is Mr. Harris's submission.

It is flawed. It is not right to say that the search he now suggests should be carried out or should have been carried out in September. The obligation is only ever to conduct a proportionate and reasonable search. This first page of this table sets out the proportionate

and reasonable search. In fact, on my learned friend's key words it would have produced precisely two documents, and on our key words it produces 13 more than that. Those documents will be made available. I do not anticipate for a moment that they will cause any difficulty, evidential or to the trial, but if I am wrong about that then no doubt Mr. Harris will make the appropriate application, but I, for my part, should be very surprised.

So, sir, the long and the short of it is that which is, on any view, a reasonable and proportionate search has been carried out, and we know what the fruits of it are. They are either two documents or 15 documents, and Gascoigne Halman will have those documents. That being the case, the suggestion that the bricks and mortar allegation somehow gets drowned for adjourning the trial is entirely fanciful.

MR. HARRIS: May I reply shortly, sir? Some of those submissions are truly startling. Can I invite your attention to the pleadings bundle, sir, bundle A. The first relevant paragraph is para.22(n) in the amended defence, tab 3. This is the unamended part of the defence. It is on internal page 35. It is just identifying within that part of the pleading which describes the agreement which is under attack by the competition pleas - (n) the Membership Rule in question, the bricks and mortar restriction, that is where it first begins life in the pleading.

Then if you were to turn over several pages to para.28 of the document, you will see:

> "Further or in the alternative, as also further particularised below [there are other terms of the agreement that are] likewise void and unenforceable because each term … infringes section 2 …"

Then which ones are identified of the others, we can see, sir, (b) bricks and mortar. So we recite the privilege in them and we say it is illegal under section 2, and then we give in the document various particulars of all our allegations, and the relevant one for bricks and mortar is to be found several pages further on at para.43, internal page 54:

> "The Bricks and Mortar/Full Service Agent Restriction is a naked restriction on competition in the market for the provision of estate agency services in that:
>
> (a) it has the anti-competitive and unlawful object and/or effect of preventing restricting and distorting competition …"

Then various particulars are given.

So right from the date upon which we put in the original defence, which was I cannot remember when, but it was a long time, well before the disclosure deadline. This has been squarely an issue both as a matter of object and effect. Mr. Maclean conveniently forgets the 'effect' part of the pleading.

Even on his own test, one gives proportionate and reasonable disclosure by reference to the pleaded issues – this is all denied, of course, in the reply – then they fall flat on their face, because of the plainly disputed allegation, object and effect, and they gave precisely nil disclosure on it, and did not search for it.

THE CHAIRMAN: They did not search according to the key words that they have now conceded to search? There clearly was a search, and this is the problem in a way with the electronic searches, you have your keywords, you go through the universal documents, and the debate is about which keywords are most effective and produce the response to the pleaded issues. I do not think Mr. Maclean is saying that these are not issues that would have to be determined at trial.

MR. HARRIS: I am happy to accept that, and I will rephrase accordingly. What it portrayed was a wholesale failure to recognise, on the part of the claimant, that this was a squarely pleaded issue in dispute, and that reasonable and proportionate efforts needed to be taken in order to identify within the dataset what documents related to it, that is where there was nil effort and, of course, that is plainly wrong. So, I am entitled, and I maintain what I submitted before, that proper searches should have been done by reference to this dispute at the beginning, which is well over two months ago, and yet they were not. Instead, for the first time, as I said only a matter of days ago, there is finally a recognition that something needed to be done.

What needed to be done? You need to look for object and effect, not just object; that is a bad point, with respect. It does not follow that evidence relevant materials about object and effect are only to be found in documents between the Chief Exec, or the Commercial Director and/or the Board Members, it simply does not follow, because there could be, in any number of other categories of documents material, relevant evidence going to the object, i.e. the reasons for and/or the effect of this rule. Take, for instance, an inquiry from an estate agent, either an actual or a would-be member of the claimant, to some other person in the commercial department, or to, for example, one of the many sales agents that are employed by the claimant about which we are to hear a great deal more later on this afternoon.

They are not caught, and yet they are obviously highly germane, indeed, it seems as though there must be considerably more such documents if the search had been done properly without these limitations, because what we just heard for the first time, when Mr. Maclean was on his feet, is that actually the number in one of the columns goes from 35 up to 2,700. So there plainly is a lot more discussion about these matters in these other documents.

THE CHAIRMAN: Mr. Harris, that really does not follow, does it?

MR. HARRIS: Sir, it does, because if you do not limit it to----

THE CHAIRMAN: We all know that if you pick a particularly popular word you are going to get a hugely disproportionate response in terms of the documents that are hit, that is the problem with keywords. If you have what seems to be a very relevant word to a particular issue, that happens to be a popular word on other matters you are going to get this happening.

MR. HARRIS: Sir, I accept that point, and I was not overstating the case, because what I am not saying is that it suddenly goes up to 2,700 relevant documents. What I am saying is it is going to be more or less inevitable that some additional relevant matters will be within that further amount of documents; I am not saying all of them, but what we have been denied is the opportunity to have regard to any of them. So, unless you give the order which I respectfully invite you to make we are never going to know which, above the 35, up to this new number of 2,700, do, in fact, contain relevant materials on either the object or effect of the bricks and mortar restriction. We say, with respect, that is just not fair, it is a centrally pleaded allegation from the beginning, and should have been done back then.

The next point, sir, in reply is this, there is a further limitation within what is now proposed to meet our concerns – you can see this in the third column of the table that was handed up – to just emails. That has no basis in logic or reason, let alone fairness at all, because----

MR. MACLEAN: That is not right. I can see it says "emails", but it should not say "emails", it should say "documents", it is consistent with Ms. Farrell's statement.

MR. HARRIS: It is all rather unsatisfactory but, even so, if it is not, in fact, "emails", which is what it says, but it is "documents", the previous point still remains, that we know that there are going to be some more and this is far from disproportionate even on those numbers. My instructions are, and I have seen this in lots of other cases and, Sir, you will have seen this too, is that that is the sort of number four reviewers could do in one day – one day – and this could and should have been done back on 28th September, and yet we still do not even have them today.

In my respectful submission, Sir, this is a good example of something where you can apply what are now conceded to be the entire set of search terms to an electronic database and it will result in a not disproportionate number of documents that should be searched so that we can fairly receive, albeit it is now unfair in the sense that it is too late but, nevertheless, it would be grossly unfair if we were never to get them, something that can be searched for by a team of reviewers in one day and then provided to us. Those are my submissions.

THE CHAIRMAN: Thank you, Mr. Harris.

This is an application for further disclosure. It needs to be made clear that the disclosure process has, as is common in litigation these days, been done through document and disclosure platforms which enable the searching of the set of disclosure documents through various parameters, including in particular "key words", "time" and "author/recipient" amongst others.

I am very conscious that this is a case that has been ongoing for some time, and this PTR is my first introduction to this case. I am, therefore, quite reluctant to make any form of judgment unless it is necessary about the process of disclosure to date. It has, no doubt, been for good reason that key words were not agreed between the parties before the disclosure process began which, in my experience, is the normal practice and which might well have avoided this application.

Equally, it is helpful to have a response when further keywords are thought of as soon as possible in time, and I do note that Agents' Mutual have made some helpful points regarding such undertaking this morning. All of this I do not propose to address further. I propose to confine myself to the single point in issue under para. 3.1 of Gascoigne Halman's notice of application.

The only point in dispute relates to the extent to which there should be an unconfined search by reference to "author/recipient". The search that has been carried out by Agents' Mutual has been confined to documents – not emails, but documents – going to or from members of the Board of Directors without limitation subject to that.

The point in dispute is that Mr. Harris, on behalf of Gascoigne Halman, seeks to have that restriction removed altogether. The upshot is that the volume of documents responsive to the search jumps from 35 or 57 (depending on which terms one uses) documents to several thousand – 2,500 to 3,000 – I am told.

I have no doubt in this stage of an ongoing disclosure process it would be disproportionate to remove the "author/recipient" restriction. I say that for the following reason. The basis for the application for a refinement of the search terms on this point, is to ascertain whether there is evidence, and to have that evidence produced regarding the reasons for the inclusion by the claimant of Rule 2.1.3 in its membership rules, which causes the membership of the claimants to be limited to bona fide office based estate or letting agents offering a full range of agency services, otherwise known as the 'bricks and mortars' or 'full service agent' restriction.

It does seem to me entirely clear and understandable that the reasons for the inclusion of such a rule would be discussed predominantly at Board level rather than at a lower level and, for that reason, I consider that the restriction on author/recipient is one that is proportionate and, accordingly, to the extent that it is controversial, the application of Mr. Harris is refused.

MR. HARRIS: Sir, I am grateful. Can I move on, just with one half submitted concern that you made reference to proportionality at this stage, of course, that is a slightly difficult subject for us because, had it been the case that they had done the job that they should have done at an earlier stage then that would not be weighing in the balance. But, be that as it may, it is a relevant background consideration.

The paragraph next in my application, if you were to go back to bundle C1 that relates to this table that has been handed in, is C1, tab 1, my application, and this is now the second page of the table handed in. You will see that this relates to para. 3.2 of my application, so the two relevant pages are 3.2 of the application and the second page of the table that was handed in.

This moves the debate on, away from the bricks and mortar rule, on to the OOP Rule properly so-called. You can see, sir, that there are three parts to 3.2 and they are sub-divided, 3.2.1, .2 and .3. What has happened in p.2 of the table that has been handed in is that there has now, in effect, been a wholesale concession on the face of this application of 3.2.1 and 3.2.3. So, looking at the table that was handed in, the top line concedes para. 3.2.1 of the application. It recites all of those words that are set out as keywords and it refers to the people who are to be searched. So far so good, that is now conceded.

The same thing can be said about 3.2.3 of the application, that is the second row of p.2 of the table.

This welcome concession comes against the background of originally the only documents on this topic being searched being those from Mr. Springett to the Board, not even back again and that was, as we say, plainly inadequate.

Similar points that I will not dwell upon at length, sir, but it is now said, in the first line, there are some 373 that need to be manually searched, yet we do not even know today how many there are, let alone when we are going to get them. Then there are another 264 in the second row not even being searched, we do not know whether we are going to get them and, of course, sir, these go to the single most central part of the entire case about the OOP Rule. So, with great respect, this is grossly unsatisfactory. My learned friend, Mr. Maclean, when he handed in this document said that of course, you do not just add the numbers in one row

to the numbers in the next, there may be some duplication, but just pause to note, sir, on this one, that the top row relates to documents from Mr. Springett to Ms. Whiteley, or back. But, Ms. Whiteley only joined, I think, in August 2013 whereas the purpose of the OOP Rule must have been one of the key most central things right from the first moment of gestation of the entire idea, so they go a long way back in time and I think we started the standard disclosure search from 2010. In other words, even if there is some duplication, chronologically, it cannot be enormous. One does not know for sure how much duplication but, looking at the numbers, there is likely to be several hundred new documents that go to the key central allegation in the case and we do not have them.

What concerns us, sir, about this is even though this concession is welcomed, it has been like drawing teeth. Here we are on 15th December, there has been a suggestion I think in one of the letters that we might be getting these materials by 19th December, but there has been no commitment to that. 19th, of course, is already in the week leading up to Christmas when different people are going away at different times.

Of course, perhaps you do not know, sir, and there is no reason why you should, but in the order that relates to disclosure in this case there are then another 10 days in which the party disclosing can decide which bits are to be confidential and which bits are not. That has the effect of substantially disabling our team with our witnesses and our expert, from having regard to what, on any view, are highly relevant documents on the key term in dispute, effectively before Christmas in the context of this trial.

Later on, of course, I will be making submissions about the impact upon the trial date, but just for now I think, formally, all that needs to be done is a recognition that this is now what has been conceded and therefore agreed, but it does have these knock-on effects.

THE CHAIRMAN: Obviously, I will be hearing you on adjournment in due course.

MR. HARRIS: Yes.

THE CHAIRMAN: I am sorry, it is no doubt me, but is there anything that remains controversial under 2.2?

MR. HARRIS: Yes, 3.2.2 stands in sharp contrast; that is wholly contested. It is a topic about the relevance of disclosure from the sales' agent, and it will take me considerably longer to explain why that is both relevant and proportionate.

In terms of the formal part of today, I think it is just a recognition that the order needs to reflect what has now been agreed 3.2.1 and 3.2.3 and, in due course, we will come to the argument about 3.2.2

THE CHAIRMAN: Right, shall we move on to 3.2.2.

MR. HARRIS: I am happy to do that, yes.

THE CHAIRMAN: Where did you want to go to?

MR. HARRIS: I am entirely in your hands. There is a third page to the table but, in fact----

THE CHAIRMAN: Let us take it in the order of your application, 3.2.2.

MR. HARRIS: Very good, thank you. Yes, this one needs more development, sir, and you will have to have regard to some of the underlying documents. If I can just find the relevant page, perhaps you will give me one moment. (After a pause) Yes, this is the dispute regarding disclosure from or to sales agents. At the moment, there has been no such disclosure save for one or two emails that have been fortuitously disclosed in the context of searches directed to other matters. So, for instance, if you were to take up bundle D1 and turn, please, to tab 1, p.47.

MR. MACLEAN: Can I help my learned friend? They have used the wrong numbers in skeleton, no doubt inadvertently, what he is looking for is pp.50 and 51, which are emails from Ms. Whiteley to the sales' team.

MR. HARRIS: Yes, I have used the other numbers. Thank you very much Mr. Maclean.

If you look at the very bottom right hand numbers, it should be 50 and 51, not the ones above it.

THE CHAIRMAN: Yes, I see.

MR. HARRIS: These are disclosures that we have obtained, not because there has been any search of materials going to or from sales agents but, nevertheless, they have been disclosed by the other side. So, it is Ms. Whiteley in October 2014 to, seemingly, the entire sales team, and we learn from the other evidence that that probably varies over the course of time, but approximately 20 people going around the country trying to sign up agents to the claimant's new portal.

On the previous page, doing as one does with emails, there is another later email of 12th November, again to the sales team from Ms. Whiteley and including, I presume, a particular sales agent, Vicky Thomas.

What is interesting about these emails is that they have been voluntarily disclosed by the other side and you can see on their face that they seem to be full square in favour of the other side's case. Taking the one on the right-hand side they say: "You must not encourage agents to act as a group and boycott a specific other portal". "You must be very careful". "You must not be seen to be leading the market". "Exclusivity approved by Eversheds, our lawyers". Then, on the previous page:

"You will no doubt be getting lots of questions, do not give any information about choices. Do not get involved in any decision."

So, what has happened is that the claimant has seen fit to disclose emails within the sales team when it comes to prima facie exculpatory material on, *inter alia*, the collective boycott allegation that you would find, sir, in paras. 38 to 40 of the amended defence. So, it is seen that, somehow, it is perfectly legitimate for sales agent materials to be provided to us when they seem to exculpate, but that is it; there is no more of this material save only for something that was generated for a different purpose, and which gives us a snippet as to what really was going on in this case.

My first submission is we want to see, and we say that we are entitled to see, the documents that are not just the exculpatory materials which, on their face, say: 'Don't get involved with the boycott', and yet we do not have them.

In this regard, can I now draw your attention to some much more ominous emails, some of which are first referred to in Mr. Livesey's second witness statement. If you pick up, now, please, bundle 3 of E1, and if you were to turn in that witness statement at tab 16 to paras. 15 to 21, you have seen a tiny amount of this earlier today on the RMS point. You have seen para. 15 already, sir, and you have given an indication of how we deal with that going forward.

Then at para. 16, Mr. Livesey says:

"But Mr. Springett refers, in his fifth witness statement, to a meeting organised by Steve Henning . . ." etc.

". . . and to his decision to warn Mr. Henning of the competition law reasons why there should not be any collective agreement. The suggestion is that Mr. Springett's Agents' Mutual was taking steps to ensure that agents understood that they could not make collective decisions about which portal to come off. Then he said at 59 of Springett 5 that he has always been very clear to others that they could not behave in this way."

But then Mr. Livesey says: "I am responding to this. This is effectively not the full story". Following the email that Mr. Springett exhibits there is a subsequent email chain which Mr. Livesey exhibits, and I am going to take you to it in just a moment,

". . . in which Mr. Henning proceeded to organise the meeting that was held on 30th July. The emails in this chain indicate that the agents in the North East that were looking to join Agents' Mutual were discussing collectively which portal to drop."

He cites a bit, but I would like to take you to the email, please. You will find that this one is in the same bundle behind the next tab, using the numbers on the bottom right hand side of the page 1510. This is the very email to which Mr. Livesey refers, 30th July. "Clive Rook is an estate agent in the North East of England", then he is referring to another estate agent, Mr. Henning:

"Morning Steve.

Sorry, Steve, you've probably thought about this but a sheet for table captains . . ."

Pausing there, they are organising a big get together where there will be various people sitting on various tables. So:

". . . a sheet for table captains with a list of points raised as well as record of names on a sheet showing Zoopla and/or Rightmove subscriber . . .

And then the critical bit, sir:

". . . and thoughts and notes against each name as to whether they would want to ditch one or both. I think it is important that we come away from the meeting with a feeling about intention."

So, here they are, these competing estate agents----

THE CHAIRMAN: Just one moment, Mr. Rook is an estate agent, Mr. Henning----

MR. HARRIS: He is a Jan Forster estate agent.

THE CHAIRMAN: They are both estate agents, are either of them sales agents?

MR. HARRIS: No, not yet, not yet.

THE CHAIRMAN: Not yet, okay.

MR. HARRIS: No. I have to take it in stages, sir.

THE CHAIRMAN: Of course, by all means.

MR. HARRIS: In a moment we are going to see that the sales agent is involved, but to start off the building blocks, if you like. These are, on any view, collective discussions about "whether they would want to ditch one or both" between competing estate agents on a collective basis in a particular geographic area, namely, the North East of England. It looks like it is going to happen at this big jamboree meeting that they are arranging, and you have seen the long list of other recipients on the previous pages, do you remember those?

THE CHAIRMAN: Yes.

MR. HARRIS: The meeting was intended to have lots of estate agents. This email was not sent to lots of estate agents.

THE CHAIRMAN: No, but the email on p.1511 is a different email, is it not?

MR. HARRIS: That is right, but they are talking about what is going to happen at the big meeting at which lots of other agents will be present but, of course, I entirely accept that this particular email is just between two of them; of course, I accept that.

As Mr. Livesey says in para. 16, that email at p.1510 gives an indication of what is going on at a local level in the North East, at least as between those two agents. Mr. Rook was, if you like, one of the senior driving forces in that North-East Agency area.

Going back to Mr. Livesey's witness statement, please, so that is back in E1, vol.3, this time at para.17. What he says then is: "In June 2014. . .", so this is the following year:

> ". . . an Agents' Mutual sales agent, Julie Emmerson, was due to attend a regional meeting of the same agents' group in the North East of England, where it was thought that the agents might make a collective decision . . ."

- that cross refers back to the previous email.

> ". . . to come off the specific portal." Mr. Livesey says: "Mr. Springett refers to this email of 2nd June 2014 at his fifth witness statement."

So, what we need to do now, sir, is look at that. Unfortunately, that is in a different E-bundle, it is now in bundle E2 of 4, and you will find that at p.853 looking at the bottom right hand numbers. So, just to locate ourselves, if you like, analytically, sir, the important thing is we are now talking again – a year later, I accept – about the same North East agency group of agents. Picking it up – one has to work backwards – one begins on p.854, and there is an email there from Ms. Whiteley to Mr. Springett.

> "I just wanted to check the legal issues surrounding the North-East meeting",

so there is going to be another meeting amongst these agents. "The meeting is officially a marketing forum. . . " etc.

> "As part of that agenda they were negotiating . . .for a collective rate. That obviously could link to a collective decision for them to choose to list on one particular portal and hence a collective decision to not list on the other portal, in other words there could be a collective boycott as well."

This is Ms. Whiteley saying that to Mr. Springett. Mr. Springett responds, again at the moment just between Mr. Springett and Ms. Whiteley: "Yes, Julie" that is Julie Emmerson, the sales agent who works in this locality, we will see that in a minute.

> "Yes, Julie needs to ask whoever is leading the meeting to put matters like further agent recruitment, communications, etc. in which she should be involved, at the top of the agenda and then move on to agent only matters, joint negation . . ."

I think that should be "negotiation":

". . . with other portals and choice of other portals are completely off limits for us." Okay, so far just Ms. Whiteley and Mr. Springett. Just at the top of the page Ms. Whiteley says:

"But is it okay for them to make a group decision to come off a specific portal for a meeting like this?"

Just pausing there, that is, of course, by itself quite alarming that the Commercial Director, a year after she is brought on board is even asking whether it is lawful to have a collective boycott; that is just in passing. Mr. Springett responds to her over the page, Ian Springett to Ms. Whiteley, North East meeting, 2nd June:

"She must leave before either media negotiation or other portal is discussed. She should not be a party in any sense to this, and she should avoid receiving/sending any messages, documents about it. If questioned about the stance she should refer people to Clive Rook."

But then what happens above on the page is of considerable interest, because what happens is, Ms. Whiteley, Helen, passes on to Julie "if you read the notes below". So, she simply flicks on the email and you will see that:

". . .the meeting agenda needs to be structured in a certain way and, indeed, you can't be present when it gets to the discussion on media negotiation or other portal choice!"

– exclamation mark. What she is saying there to her sales agent, Julie Emmerson, "Don't be present, put them at the end of the meeting. Structure the meeting agenda in a certain way so that you are not actually present when the discussion that you know about takes place. It does not say: "Whatever they do they cannot get involved in that, and we can't have anything to do with it, tell them 'under no circumstances'."

Then what happens is, the next line up, sir, on 2nd June 2014 at 11.40, Julie Emmerson, who is the sales agent, who the claimant refuses to make any searches about at all, Julie passes on that email chain to Clive Rook who is one of the estate agents. So, far from Agents' Mutual saying, directly or even indirectly, to Clive Rook, the actual estate agent: "Crikey, whatever you do, don't get involved in a collective boycott, that's completely illegal." All that happens is that the Commercial Director says to the relevant sales agent: "Make sure you are not present at that bit!" (exclamation mark) "Structure the meeting agenda in a certain way so you are not there at that point", and she, the sales agent, then just passes it on to the estate agent.

The last part of the puzzle for this particular email chain is at the top of that page, and what we see is that Clive Rook does receive the email that is passed on "FYI", and he responds. Who does he respond to? He responds to none other than Julie Emmerson, albeit copied to Ms. Whiteley and Mr. Springett on this particular occasion, and what does he say? He says:

"Hi All, The need to keep the", and then quotation marks: ". . . 'media negotiation' item to the end of the meeting is clearly understood." In other words, there has been, at the very least arguably, a deliberate structuring of the meeting so as to keep illegitimate items to the end of the meeting when the particular sales agent has been told "Don't attend", that is what they say: structure the meeting agenda in a certain way, and then one can only assume that that part of the meeting did then take place, and we know what that was about, it was about collective portal choice.

But what is critical for today's purposes, of course, is that Ms. Emmerson is involved in these chains of communications, so she does know about what they are doing and she is communicated with by them about what they are doing and, what is more, it looks, as a minimum, highly arguably ominous and incriminating.

I imagine Mr Maclean will say that there are all kinds of explanations about this, it is innocent and does not really mean anything. On the face of the documents it plainly is a matter that we are entitled to explore in respect of at least the collective boycott allegation. You will be acutely aware, sir, from your experience in this field that those are very secret sorts of behaviours and, of course, we do not have any access to this material other than through disclosure.

It does not end there, sir, because if you go, all in a few days – so we are few days later now on 10th June.

THE CHAIRMAN: We are still in bundle 1?

MR. HARRIS: We are now in bundle 3 of 4. I am sorry we have to move around like this. We are now in bundle E1 3 of 4, so the one you were in earlier. You have looked at 15.10, but what I would like you to do now is to move on eight days or thereabouts to 10th June, and that is to be found on p.1522. I am going to go to 1522 and then 23 and 26.

Just taking 1522 first, that is 10th June, and this is an email that goes to a Mr. Small, but it is copied to, amongst other people, Julie Emmerson, the sales agent from Agents' Mutual, so that is the critical point in terms of addressees of this email.

It is talking about the Agents' Mutual North East meeting, and it is an update. "Hi Mark, good holiday? A mixed view in the room as to who people will go with." So, plainly, the collective discussions amongst a group of agents about who they will choose, potentially

highly illegal, certainly for this stage, sir, obviously to be explored including, in the interests of fairness, with disclosure. Then it goes on: "Probably more favouring Rightmove, some Zoopla and some undecided." They are plainly discussing in advance, collectively, who they will choose and who knows about this and is involved in the communications? None other than the sales agent where the other side says: "No, we're not going to look at their emails, or any of their documents". Yet, for these other reasons we happen to have this snippet in this document.

Then, over the page, in the same tab, tab 17, we have another very revealing document at 1523, so this is a couple of months later in 2014. Ms. Whiteley emails Mr. Springett and says:

> "Hi Ian, just to let you know that I had an interesting conversation with Clive . . ."

that is Clive Rook:

> ". . . on Friday. He was saying that lots of the agents locally are thinking of pulling off . . ."

and then the suggestion there is both Rightmove and Zoopla. So, there is the two most senior executive members of the Agents' Mutual organisation receiving direct information about potentially illegitimate collective discussions:

> " – he understandably doesn't think that's a good idea. He did say that his view was that they should stick with Zoopla."

So, these are in advance of choices being made, collective discussions, and both Mr. Springett and Ms. Whiteley know about them. Then, what does Mr. Springett say in response to Ms. Whiteley, at the top of the page:

> "I think they're all trying to eat the cake before it's cooked. Pattinson . . ."

that is one estate agent:

> ". . . want off Rightmove, so maybe this is influencing Clive. Much better for us if they leave Zoopla, much less likely to go back. Should I have a go?"

So, they know about collective discussions and here is the Chief Executive saying: "I have learned this advance information about these illegitimate collective discussions about boycotting one or the other or, at any rate, collectively deciding, and he is saying: "Actually, it would be better if they all came off Zoopla, should I have a go?"

That then takes us over the page because, indeed, Mr. Springett does exactly that. We say "Should I have a go?" He does exactly that, he has a go.

You can see this – I will not take you through every page of this, but looking at 1526 there is an email at the bottom of the page from Mr. Springett to Caroline Pattinson, at Pattinsons

obviously, inquiring about "the purpose of the meeting tomorrow, and others to discuss Agents' Mutual".

She responds in the middle of p.1526: "Oh, hi Ian, I've been clear on our position. I'm not prepared to commit" and then she gives what she is and not prepared to do. What does Mr. Springett do against the background of knowing, sir, critically against the background of knowing that there are these collective discussions going on between agents about who to choose and who to ditch. He says:

> "Hi Caroline,
>
> Thanks for this. I appreciate your position, of course. I am simply thinking that if all of the main agents in the North East were aligned it would be easier for them to make courageous decisions about individual and, indeed, potentially, all other portals."

So, there he is actively encouraging them to make collective decisions, quote: "about individual and, indeed, potentially all other portals" against the background of knowing they've been having these collective discussions about who to choose.

This is Julie Emmerson's patch, and we have seen, because we just happen to know, we have this sliver of light that has come through because disclosure has been done by reference to other searches. We just happen to know, almost fortuitously, that Julie Emmerson does, in fact, know about some of these because she is copied in on some of them and, indeed, at or about the same time. In any event, it is her patch.

We have seen an email where Clive Rook, the main man in this patch copies her in. We have seen an email where she passes on information from Agents' Mutual in that direction, and this is all going on at more or less the same time.

We say that there is every prospect, from what we have already seen, that Ms. Emmerson, who is just an example of a sales agent for a particular area, knows more and has, most importantly, potentially in her disclosure documents, more information about these illegitimate collective boycotts and the knowledge of them by Agents' Mutual, including through her, she is an employee, and the knowledge of the senior employees – Mr. Springett and Ms. Whiteley – and, indeed, on the face of a couple of these documents, how they were encouraging and, indeed, facilitating some of this collective behaviour.

So, sir, that is a very solid foundation upon which we say that we should now have further disclosure by reference to the sales agents, and I do not limit this just to Julie Emmerson for the North East.

THE CHAIRMAN: No, that is clear from your----

MR. HARRIS: If this is happening there it could have happened with all the other 19 around the UK and, of course, sir, you will be acutely conscious, if I may respectfully put it like this, it is all well and good to send a head office email such as the very first emails I showed you saying: "Whatever you do, do not get involved in a collective boycott, be very careful". That is one thing to send a head office missive, and it is one thing for Mr. Springett to say, quote: "I was very clear" about telling people not to do this but, on the ground, that may well not be what happened, and these emails show that that was not what is happening, and yet we do not have this material and there has been a point-blank refusal to give it to us. There is no way we can find out about this collective boycott allegation in more detail unless we get the disclosure, it is highly germane.

It is said in my learned friend's skeleton at one point that this is somehow misconceived because it does not look at the right time period, or something like that; it is difficult to understand. But, what you will have to understand, sir, are two things as regards relevant timing about all of this. The collective boycott was an ongoing collective boycott so far as we understand and have been able to allege in our pleading. You can see from these emails that there appear to have been collective meetings in 2013 and in 2014, so there is a time period that expands.

Secondly, and in any event, the OOP Rule we attack *inter alia* on the basis that it is said to endure, allegedly justifiably, for five years. You need to know at trial, sir, with respect, whether it is justified now, as well as whether it was justified at some previous point because it still endures.

Thirdly, and closely related, more people are being signed up to Agents' Mutual, albeit not very many, because it is stagnated, and they are being signed up, in some cases, to the OOP Rule including for five more years – I do not say everybody, but some people. So, the time period is highly relevant. What we say, sir, is that even if this involves looking at some more email servers, this is such a central allegation, and I have already made out a basis by reference to these emails about how we say we have a window into seeing what has been going on. An email server can be readily accessed, and then they can be readily searched.

THE CHAIRMAN: Well, it can be, but then the documents that are produced as a result of the search have to be reviewed.

MR. HARRIS: Sir, I accept that, yes. But, again----

THE CHAIRMAN: So that is where the time comes in.

MR. HARRIS: Yes, but, sir, with all the vigour I can muster at this sort of time of the afternoon in the long term, what would be, in our respectful submission, unfair is for there to be any

suggestion that because they have not done something, which is germane and relevant to a pleaded allegation, at an earlier stage "oh, therefore, it should not be done now", that is the wrong----

THE CHAIRMAN: No, I see the force of that.

MR. HARRIS: That is the wrong way.

THE CHAIRMAN: Let me tell you the problem I have with your 3.2.2, and perhaps you can help me on that----

MR. HARRIS: Yes, sir.

THE CHAIRMAN: --before I hear from Mr. Maclean.

MR. HARRIS: Yes.

THE CHAIRMAN: With great respect to those behind you, I think your search terms, or keywords, are really verging on the hopeless, are they not? You are looking at "reason", "aim", "essential", "crucial", "vital", "purpose", you are going to get massive hits.

MR. HARRIS: I think it has to be both 1 and 2, so it has to be a document that has both within the same document, "OOP" or one other portal, or certainly "exclusivity" on the one hand, and one of these others; it is not just any old document----

THE CHAIRMAN: No, I see.

MR. HARRIS: --where they are talking about "It is vital for me to go to the shops tonight to buy a pint of milk."

THE CHAIRMAN: Nevertheless, the fact is that one would expect, in perfectly innocent communications, OOP and one other portal rather important to emerge, and your class 2 words are, with great respect, extremely common words in use in the English language. I will hear from Mr. Maclean, but suppose one were to go to the other extreme, if you said "We have been provided with an insight into the sort of messages that are going to and between sales agents, one could have, without other limit, a series of rather narrow searches, for instance, quote: "specific portal" unquote, quote: "portal choice", unquote, quote: "media negotiation" unquote and so group decision for group vote, that is culled from the sort of language that is being used in the documents that we have seen, and might, dare I suggest it, result in a more responsive keyword search.

MR. HARRIS: Sir, I am very grateful. Of course, we are all ears as to 'sensible' and 'proportionate' suggestions and, if needs be, we can debate that through the court or we can seek to agree, but, of course, at the moment we are met with a----

THE CHAIRMAN: You are met with blanket opposition.

MR. HARRIS: Yes.

THE CHAIRMAN: I have to say I am a little troubled, and this is the sort of search that one might debate right at the outset of the process and, as you have quite rightly said 'We are not there', we are *in medias res*, and that has both advantages and disadvantages. The disadvantage is we are that much closer to trial. The advantage is that you have got some documents, which you are building a platform of for further searches, and it does seem to me that if we are minded to go down the route you are inviting me to go, that one ought to take advantage of that information and do something rather more specific.

MR. HARRIS: I am certainly not averse to that at all. What I would just remind you, sir, because, of course, you have not had any previous background in this case, is that, of course, when the original disclosure was ordered in relation to this topic, of course, we did not have any window at all, so we were not able to----

THE CHAIRMAN: No, no, of course, that is why we are here now. You have the disadvantage that you are damaged down the road, you have the advantage of having some documents on which you have quite properly based your day.

MR. HARRIS: Perhaps I could leave it like this until any necessary reply, sir, which is we are certainly in the market for an appropriate narrowing of search terms so that they are most appropriately focused, but they have to be directed towards the sales agents' team, and that has to be across the regions because our allegation is a collective boycott across various regions, not limited – it was just lucky that we happen to have got these.

Sir, I think you have the points. May I just take one moment because I have been handed a note? (After a pause) Thank you, sir.

THE CHAIRMAN: Thank you, Mr. Harris. Mr. Maclean?

MR. MACLEAN: Can I start by taking you somewhere that we have not been before, you may not have been at all, sir – there is no reason why you should have been – to the order of Mr. Justice Roth, the directions order, at bundle B, tab 5.

This was the first time this matter came before this Tribunal, and you know, sir, from the background that Sir Kenneth Parker, sitting as a Judge of the Division, had by agreement transferred the competition issues to this Tribunal.

So, we turned up before Mr. Justice Roth in July. We have the transcript, and you should have the transcript, you should have two bundle Bs.

THE CHAIRMAN: I do.

MR. MACLEAN: The reason you have two bundles Bs, and two bundle Ds is that these are bundles from a previous hearing that we have carried over.

THE CHAIRMAN: No, that has been explained to me, thank you. Which bundle B are we talking about?

MR. MACLEAN: The big one, and if you turn to tab 11 you should be looking at a transcript of the CMC.

THE CHAIRMAN: Yes.

MR. MACLEAN: If you go to p.115----

MR. HARRIS: We are at a slight disadvantage, none of us seem to have these bundles.

MR. MACLEAN: I am terribly sorry. (After a pause) Internal p.20 for Mr. Harris' benefit, p.115 of your bundle, sir.

THE CHAIRMAN: Yes.

MR. MACLEAN: Mr. Justice Roth says this:

> "As far as disclosure is concerned, I have to say I am a little concerned about standard disclosure in this sort of case because it can easily get out of control and therefore end up in very considerable costs. We do not need disclosure on market definition after the discussion we have had. In particular, I am concerned about what may be involved if one approaches it that way in the Gascoigne Halman, if I call it, supplementary allegation. That is not in any way to reduce its significance, but there is what is termed the 'collective boycott' allegation in the amended defence at paras.38 to 40. That suggests in a somewhat perhaps, say, speculative way that there were various discussions and meetings at which things may have been said. There clearly were discussions and meetings, but what was said is another question. There are a lot of people involved. I do not want this case to then proceed on the basis that, over what may be quite a long period, all the correspondence between these people, all the emails, have to be trawled over and then be produced if they discuss the forming or operation of the claimant, so then there can be a fishing expedition to see if they say anything that might suggest a collective boycott. That would be disastrous . . ."

Said Mr. Justice Roth, with some foresight one might think:

> ". . . in terms of costs. I have to say, I do not think that is warranted.
> I have not been presented . . ."

and, again, we are echoing the future:

> "I have not been presented with any proposals for more targeted disclosure, and it is really not for the Tribunal to produce them, because it is for the parties to think

about how more targeted disclosure could be conducted. Because of the time of year we are at . . ."

and so on.

We then, at the hearing, proposed limited disclosure for the allegation of collective boycott, at pp. 38 to 40.

Then at internal p.55 (p.150 of the bundle) if you look at the passage at line 19, Mr. Harris said:

"Yes, Sir, and what happened was that you invited us to reflect upon that over the short adjournment, and this is my first opportunity to address you on that, and we have reflected upon it . . ." etc.

Then:

"What we would say is it is highly proportionate for Mr. Springett, seeing as how it is going to be limited on the Tribunal's current direction to one man, for his relevant inboxes and outboxes to be searched for that entire period, 2010 onwards."

The learned judge said this:

"I am not going to do that. I have to say that I presently take the view that if nothing comes out of those two years that lends support to this allegation, which I find a rather curious allegation, I have to say, given the realities of what happened, and what everybody knew had happened, I would be reluctant to direct any more, but you can come back. You may find things and things may look very different, so let us leave it there."

What happened was, if you then look at the order, sir, from the smaller bundle B, tab 5, p.15 (p.2 of the order) do you see para. 7 under the heading: "Disclosure and Inspection of Documents"?

THE CHAIRMAN: Yes.

MR. MACLEAN: Paragraph 7:

"Save to the extent the disclosure and inspection have previously been provided and subject to paragraphs 8 and 9 below, the parties are to provide standard disclosure (including any data provided to their experts) by list by 4pm on 23 September 2016 in respect of all issues in the actions, and each party shall simultaneously give inspection . . ."

and so on. Then 8 is concerned with confidentiality, we need not trouble you with that for the moment, sir.

Then para. 9:

> "The Claimant's searches in relation to the allegations at paragraphs 38 to 40 of Gascoigne Halman's Amended Defence shall be confined to: (i) communications between Mr. Springett and the individuals identified at paragraph 40(a)(iii) of the Amended Defence . . ."

Which are the Board members:

> ". . . during the period 1 January 2013 until 31 January 2015 inclusive; and (ii) documents relating to the allegations at paragraphs 40(k)-(l) of Gascoigne Halman's Amended Defence."

And it is worth just looking at those paragraphs of the amended defence, just briefly. Let me take bundle A, tab 3, and turn to p.49 and just glance at para. 40(a)(iii).

THE CHAIRMAN: Yes.

MR. MACLEAN: Those are the individuals, and those are the Board members, and you have seen them in the search terms, Abrahmsohn, Plumtree, Bartlett, Chesterton, Mr. Fiddes of Strutt & Parker, Mr. Flint of Knight Frank, Mr. Jarman of Savills and Mr. Hodge.

Then, if you go to p.53, here is the four-party meeting allegation of 21st January 2016, at the Langham Hotel, and you see what is said at (k) and (l). This is the core of the collective boycott allegation.

Have you read (k) and (l), sir?

THE CHAIRMAN: Yes, I have.

MR. MACLEAN: If you then take Mr. Harris' skeleton for today at para. 43.3. This is what one now describes as the 'peroration' of the skeleton. At 43.3 he refers to 'gaps in the claimant's disclosure' which he was seeking to have remedied. 43.3.1:

> "In respect of the four-party meeting the claimant agreed on 30th November to run additional searches and on 9th December informed Gascoigne Halman that additional documents would be uploaded on 12th December, a month and a half after the disclosure deadline . . ."

and so on. What he does not say there is that the documents that were uploaded on 12th December were 34 in number, they have been disclosed, they are on the relevant exchange server. Most of them are actually about re-arrangements for making the meeting itself; in other words, entirely anodyne documents.

What is happening here, sir, is that the disclosure for the collective boycott allegation has had, from Mr. Harris' perspective a nil return. There is nothing to support it in the disclosure. Indeed, none of the emails he showed me this afternoon support it either.

What he is now trying to do, notwithstanding Mr. Justice Roth's para.9, is to smuggle in a wholesale opening up of the collective boycott disclosure, despite the fact that Mr. Justice Roth was very specifically tying it down, and I showed you the passage from the transcript. He is doing it under cover of an application, if we turn to bundle C1, tab 2, Ms. Vernon's witness statement in support of my learned friend's, p.23 (p.14 internally), para. 28: "As regards disclosure, in respect of the necessity of the OOP Rule, Gascoigne Halman seeks the direction of the Tribunal requiring AM to 28.1. . ." that is the first part of 3.2 of the application notice, 28.2 is the sales' agents point, and 28.3 is the Board's point.

So, the application is presented, certainly presented to us, as an application for disclosure in respect of the necessity of the OOP Rule. But there is no necessity to extend the search to sales agents, any particular sales agents, or any named sales agents, in respect of the OOP Rule, the necessity of the OOP Rule, for precisely the same reason that I submitted in relation to bricks and mortar, that there is endless material about the OOP Rule passing between Mr. Springett on the one hand and the Board on the other, and vice-versa, and in light of the further searches that have been undertaken between Ms. Whiteley as well.

What is happening here is there is an attempt, under cover of an application said to be in respect of the necessity of the OOP Rule, to go fishing for further documentation on a 'something may turn up' basis in respect of the collective boycott allegation, without any proper application having been made.

What Mr. Harris could and should have done, if he had any material for it – though, in fact, he does not because there is nothing from the four party meeting to help – was to come back with a targeted application in relation to collective boycott, and say: ‘Look, Mr. Justice Roth tied us down’ for, we would say, very good reason, ‘to these parameters, this is what has come out of that, and off the back of that it would, or might be, appropriate to take the further following steps', with a proper application explaining fairly and squarely why it was the application that was being made by reference to the emails that Mr. Harris has shown you. But that is not what he has done.

What he has done is to bring an application to extend to all the sales agents, all the concerns in respect of the necessity of the OOP Rule.

I can deal with that application very shortly indeed, because there were no sales agents until 2014; they did not have any. If I could show you, sir, one document from bundle E1 vol.2, at internal p.475 (p.632 of the bundle). This is an Agents' Mutual business plan for 11th March 2013. It is very hard to read this document at times, but if you look at p.645, under the heading "Market Entry Strategy", you will see at the bottom of the page, it is possible to

read this part of that document: "Given the powers of established competition" – do you see that?

THE CHAIRMAN: Yes.

MR. MACLEAN:

> "It is a new portal that ideally requires members to list their properties exclusively so they are not listed on any other portal. This was part of the market entry strategy adopted by Rightmove and also subsequently by PrimeLocation. However, as indicated above, it will take time for the new portal to be fully effective and agents are now heavily reliant on the leads they receive from the portals. Accordingly, the requirement would be that members list on the new portal website and on one other portal website. This may be implemented after the new portal launches . . ."

and so on. The point is that we can see from the face of this document that the one other portal rule and the necessity for it had been identified and settled upon by March 2013, which was before any sales agents had even been heard.

Then, by September 2014 there were 20 sales agents, and I do not know the details but, I dare say, that the identity of the sales agents who were employed by Agents' Mutual in 2014 may have changed over time, so there is not just 20 individuals, I do not know.

What Mr. Harris wants to do is to extend all of these searches for all of those terms about the OOP Rule to all of those agents without any limit of time and it turns out that the reason for that is nothing to do with the necessity for the OOP Rule at all. As is, first, clear from the skeleton, it was not clear from the witness statement, I have shown you para. 28 of the witness statement, but it is clear from his skeleton, and permissively clear from his submissions this afternoon, that what he is really complaining about on this aspect of para. 3.2 of his application is entirely different from 3.2.1 and 3.2.3, he is complaining about the collective boycott allegation.

I have not had the opportunity or the time to develop the response to those emails and today is not the time for the court to try the collective boycott allegation. But this is, in my respectful submission, a wholly inappropriate application for Mr. Harris to be making. He knew about Mr. Justice Roth's order, that his clients knew about it. What Mr. Justice Roth had in mind when he tied down the collective boycott disclosure in the way that he did was that if anything came out of the limited disclosure he had ordered which, by the way, it has not, then and, as it were, only then a more targeted application could be brought specifically in relation to the collective boycott application. But, it is wholly inappropriate to try to smuggle in this application now for all the sales agents in the way that Mr. Harris does. The

answer to it, for present purposes, in my respectful submission, is for the court simply to say that on any basis the application of these search terms to all the sales agents, without limit of time, would be disproportionate and to reject the application. If Mr. Harris and his clients want to make an application for some further targeted disclosure that is said to go to the collective boycott allegation, I cannot stop them and, I dare say, your Lordship cannot stop them. But that is not the application that he has made and, as I say, it is a rather surprising way, given the way the debate took place at the CMC, given the terms of the order of Mr. Justice Roth, it is, to say the least, a little surprising to see this application being developed in the way that it is, given para. 28 of Ms. Vernon's witness statement. We can see from the skeleton that this is all about the Court of Appeal.

Just a couple of submissions finally on Mr. Harris' skeleton as opposed to what he said this afternoon. If you take para. 17 of his skeleton, this is where he is trying to square the circle. He is trying to square what he is really after, which is a collective boycott. He is going fishing on the collective boycott. He is trying to square that with the way that the application is actually put. So, when he says in para. 17:

> "More widely, the alleged necessity of the OOP Rule is (a) possibly the central issue of this case."

That is right; so far so good.

> "The claimant alleges the OOP Rule was necessary to enable it to establish its brand and market presence so as to enter the property portal market."

That is also right. "We contend the rule was objectively necessary . . ." and so on, that is also correct. Then he says they deny these allegations, that is also correct. Then this:

> "It seems the sales team were those who were actually dealing with agents and are, therefore, a low key very relevant source of evidence as to how the OOP Rule was being explained and justified, and then implemented by estate agents, and of knowledge as to how the OOP Rule was actually perceived when implemented by estate agents."

But the suggestion that evidence as to how the OOP Rule was being explained or justified, and implemented by agents, has nothing to do with the claimant's purpose or the reason or the necessity of introducing the OOP Rule. Neither (i) or (ii) go to the necessity of the OOP Rule, and Mr. Harris did not suggest otherwise in his own submissions.

At para. 18 he then goes on to say that the protestations in as far as this request is some kind of ruse or has some ulterior motive, and are both startling and one-sided. I do not say it is a ruse, but it does have a motive other than the one suggested by Ms. Vernon at para. 28 of

her witness statement. The reason for that is that it has to get round the restriction that Mr. Justice Roth placed on the disclosure.

So, the application as made is, on any view, too broad and, in any event it is improper, and for that reason your Lordship should reject it.

THE CHAIRMAN: Just a couple of points, Mr. Maclean. First, it is always helpful to see that my initial reaction was preceded by Mr. Justice Roth's, but I am quite reluctant at this stage to encourage, by not hearing a possibly differently formulated application today, something which might disrupt matters in the New Year. I have already indicated my provisional reaction to the search terms in 3.2.2 and, I signal now, unless Mr. Harris is particularly eloquent in reply, he is not going to get a search on these terms. But, I do see some force ina much narrower, more focused search of the sort that I put to Mr. Harris, based upon the documents that he showed me which, of course, have not been produced on disclosure. What is your reaction to that? You obviously say it is not the way the application was put in the notice or the evidence, can we park that for the moment, but cut to the chase. You may want to say that you are simply unable to deal with a search on those narrow terms, in which case so be it. On the other hand, it may be that a search on very targeted terms is something that can be done and we can lay the matter to rest here and now.

MR. MACLEAN: The chief focus of Mr. Harris' submission appeared to be on the fact of Ms. Emmerson being the sales agent in the North East, and these emails, the ones involving Mr. Rook and Mr. Henning, seem to place some store in the events that were happening in the North East. None of those emails, in our submission, amount to a row of collective boycott beans, but that was the focus of Mr. Harris' submission.

Now, making a heroic assumption, putting oneself into Mr. Harris' shoes for the moment, in formulating one's application, one might have thought that the starting point and, perhaps, the finishing point, would have been Ms. Emmerson in some particular date range. But, it is not really for me, sir – I understand why the court puts these questions to me, of course, I do – with respect, it is not for me to do Mr. Harris' homework for him.

I will take instructions as to what can be done along the lines that you identified in relation to other search terms, but, as I say, it is not for me, these are very well resourced opponents on the other side of the court, who are well able to come along and make a sensible application. What they did was come along and make an application without putting the Tribunal into the knowledge of the appropriate context of Mr. Justice Roth's observations and, indeed, order, which Mr. Harris never mentioned at all. Because the application has not been properly set up, I am not in a position, either by serving evidence or on my feet, to

say anything sensible about any other sales agents or what involvement they have. I certainly have not seen anything to support the collective boycott allegation, but I appreciate you, sir, are not resolving today whether the boycott allegation is right, wrong or might be right or might be wrong.

I understand the court's difficulty with the trial looming, but, with respect, the boot is on the other foot in relation to this application compared to very much of what Mr. Harris, I suspect, had come along here to say. I will try and take instructions, sir.

THE CHAIRMAN: Thank you, Mr. Maclean.

MR. HARRIS: Sir, again, a brief reply. Not surprisingly, I do not accept for a moment that there is anything improper in this application. You have the transcript and you have noted already from the transcript that there are several instances in which none other than Mr. Maclean said (p.53 line 3):

> ". . . if that exercise throws up documents which put Mr. Harris on to the scent that he thinks he has got something else to sniff out, then of course he can make applications."

Of course, that is exactly what we are doing. There is liberty to apply in Mr. Justice Roth's order, and the President said:

> "I would be reluctant to direct any more, but you can come back. You may find things and things may look very different, so let us leave it there."

So, the express basis upon which that initial order was made was 'come back when you have your disclosure and see what it says' and that is what I have done, so there is absolutely nothing improper at all.

The point was made by my learned friend that somehow it is illegitimate because the sales agents were only signed up at various points during 2014. Incidentally, I could not follow, and this is an aside which might be relevant to something which occurs later in this PTR, Mr. Maclean then read out in open court significant chunks of a document of his own that is confidential. We are going to be talking about confidentiality later on. What he said was they were only signing-up from 2014 but, as I explained in my opening submissions, sir – I thought clearly, but perhaps the message did not get through – that these are the people who were signing up new agents from time to time, and so these are the people, take Ms. Emmerson, or take, I think one was called Vicky Thomas, they would have to go to would-be new agents and they would have to explain and justify the restrictions in the Agents' Mutual membership agreement. So, these people are at the very coalface of explaining and

justifying and telling people how this works and why it is there. That is highly germane, sir, to the allegations about the anti-competitive object and effect of the rule.

MR. MACLEAN: I am terribly sorry, but the allegation in the pleading about the four-party meeting is about people at the top, Mr. Springett, Mr. Crabb, Mr. Platt, Mr. Livesey, people at the top of the tree getting together to have some sort of collective boycott. This allegation, that has now been developed, is to look at the matter through the other end of the telescope entirely. Of course, agents have been signing up new members all the time, that has always been the case, but Mr. Harris is now trying to rewrite the whole basis of his collective boycott allegation because the remedy he has pleaded has not produced anything at all; it is outrageous.

MR. HARRIS: Thank you for that intervention, Mr. Maclean; not very welcome, but nevertheless.

Sir, you will have, perhaps, seen, and you are welcome to have a look at this in your own time, the collective boycott allegation is set out over four pages of my pleading, at bundle A, tab 3. It is a hopeless suggestion for Mr. Maclean, even leaving aside that he did not make it at any other point, that it is limited to the four-party meeting. Can you just identify, sir, that it begins at bundle A, tab 3, p.38?

THE CHAIRMAN: Yes, I have.

MR. HARRIS: Thank you. It is without prejudice to the case about the OOP Rule being in breach of s.2 but, of course, these allegations are intimately connected, as you well appreciate, sir, that connection seems to have escaped my learned opponents. Then we say: "A concerted practice initially between the six founder members of the claimant . . ." and then we identify them, or some of them, and Mr. Springett and the claimant. At the time that we did this pleading, which was months ago, and prior to disclosure, of course, sir, and we try and identify a relevant date at para. 39. Then it goes on with some several pages of particulars. I beg your pardon, Mr. Woolfe correctly identifies, I should have specifically drawn your attention to this, at the top of internal p.49 of the pleading, it is not just between Mr. Springett and the founder members or some of them, but also (ii) – do you have that in line 3, sir – "and members"?

THE CHAIRMAN: Yes.

MR. HARRIS: So this is the allegation. Of course, just cast your mind back, sir, if I can respectfully put it like this, to what we were doing at this stage. We were pleading with a statement of truth, including from the Chief Executive, what we strongly suspect to have been a deeply illegal and highly secret collective boycott allegation, and we pleaded it. We

pleaded it that it includes the members but, of course, it has all been secret from us; we do the best we can about this, and notwithstanding that there had been no disclosure at that point, though we have now the Julie Emmerson style, and Mr. Springett emails, they nevertheless go into print.

Then at 40 we say that it is to be inferred, because at that stage that is all we can do, from the following facts and matters – an agreement showing they jointly communicated understanding and practice between the founder members, and then we give some particulars of that. Then: "It is also to be inferred . . ." this is at (b), and this is completely overlooked by Mr. Maclean: ". . . from the existence of the OOP Rule, which had the objects and/or effects particularised above." This does require, should you be unpersuaded, sir, a careful reading in the context of the whole pleading.

Then: "It is to be inferred further from the notices that were served by each member of the claimant on the claimant pursuant to those agreements", that is, in other words, informing of what portal they had chosen. Then: "It is to be further inferred" – I am happy to go through all of this, sir, but what it demonstrates is that there is a great deal more to this than just the four-party meeting. "It is to be inferred from the facts identified at (b) . . ." – I can go on but the simple point is it was said that it is all about 40 (k) and (l), but it is not.

THE CHAIRMAN: It is more than that.

MR. HARRIS: "By the representations by which the claimant informed potential members of the expectation that OTM was to disrupt the market such that . . ." and I am quoting here from one of their documents, ". . . that members would probably migrate away from the Zoopla Group and list only with Rightmove", and this was all stuff that I was able to plead even before any disclosure.

Then there are some further emails that we specifically plead that we had been able to obtain, sir, even before disclosure because we had found them in the public domain, they are to be found at (g).

There were emails from Mr. Springett of the claimant to members of the claimant – this has nothing to do with just the four-party meeting; these were emails that we were already aware of at the time of pleading, we even identify them specifically by date, by which the claimant asked the members to assist in organising group meetings of existing members and potential future members.

We have seen one set of examples of that, and that is the North East Regional group meetings in both 2013 and 2014, in part of which Julie Emmerson became involved. "Asked members to persuade their local competitors to join . . .", in other words increase the

collective nature of those meetings, and communicated information to the claimant's members, who were choosing to leave, in particular on 12th February 2015 that "over 90% of our member offices have dropped ZPG."

Just pausing there, this is in the context of Mr. Springett, we now know but we did not know then, knowing about the collective meetings, writing to people like Ms. Pattinson, quote: "having a go" unquote, and saying to her, and I paraphrase here because it is not open back in front of me, but we looked at it before, it was something along the lines, was it not, of 'It would be better if you all did this in one group'? Do you recall the email from Mr. Springett to Ms. Pattinson?

THE CHAIRMAN: Yes.

MR. HARRIS: A bad paraphrase, but you know what I am talking about. Then, this is what is being stated to the claimant's members – this is at the top of p.52 of the pleadings – ". . . stated that the claimant's objective of replacing Zoopla/PrimeLocation as the number 2 portal."

So, we now know that he was having a go to facilitate and encourage collective meetings against the background of telling all his members: '90 per cent of you have dropped ZPG', telling Ms. Pattinson that it is better if you all do it in one go, and then telling everybody in public documents that their objective is to replace Zoopla and PrimeLocation. So, all of this is part of a piece. What we say in (h), I know you have had an opportunity to read this, sir----

THE CHAIRMAN: Yes.

MR. HARRIS: --so I will take it quickly.

> "A reasonable reader of even those emails would understand that it was a common object of the claimant and its members so far as possible to delist from Zoopla and to persuade other agents to join the claimant, and likewise to delist from Zoopla. Given the information provided in respect of the claimant's members having delisted and the common infringers that migrate away, the prudent commercial strategy would be to choose Rightmove and Zoopla."

First, the rule itself, and how it led to the structure of operations, is very closely connected with the collective boycott as we plead, and then we already had the material that we pleaded in (g) about collective boycott, and now we have a lot more because of this window that we fortuitously have obtained, and Mr. Justice Roth said: 'You can come back when you have received some more disclosure', so now we do.

THE CHAIRMAN: When did you get that disclosure?

MR. HARRIS: The Julie Emmerson emails?

THE CHAIRMAN: Yes.

MR. HARRIS: I would have to check; can I take some instructions on that?

MR. MACLEAN: September is the answer.

MR. HARRIS: Then, my learned friend – I do not know whether you, sir, are minded to place any weight on this – he says that it is all "smuggled in", it is a strange phrase. What we say is that this is highly relevant, these materials from the sales agents, not just to the collective boycott, that was the point I developed because you, sir, had not seen the emails, so I obviously had to develop that with the emails because you had not seen them. We stand by every word in the skeleton, including what is said at para. 17, which I did advert to in opening, that the sales team were those who were actually dealing with agents, and are therefore very likely a relevant source of evidence as to how the OOP Rule was being explained and justified. You will recall in my opening of the application, orally, I specifically said that that was an ongoing justification that was required and it applies to new agents that are being signed up. We know who were signing those agents up, it was people like Julie Emmerson.

That takes me to the last point of the reply, as a bi-focus. As I said before, we are entirely open to the notion of trimming down any particular keywords, specifically, sir, we have listened hard to what you say about how one or two of them may just give rise to too many, and I am happy to do that, and I can do that in prompt order, and that seems to us to be a very sensible and proportionate course.

Then, my learned friend said that it is all disproportionate – that is a common refrain. Nevertheless, we have an entitlement to see relevant materials on this key allegation and what he fails to identify to you, sir, is that on his own case there is a limited date range, because he said that these people did not even get into place until, I think he said, mid-2014. There we are, it is limited from when they were put into place, which was mid-2014. So, on both fronts, that is a sensible proportionality restriction, so, trimming down the key words, and it has a self-imposed date range.

For those reasons, sir, I invite you to accede to what is a perfectly proper application. I am grateful.

THE CHAIRMAN: Thank you, Mr. Harris. Sorry, Mr. Maclean, you wanted to rise?

MR. MACLEAN: I am not entirely sure what Mr. Harris is proposing there in terms of key words. I think he is inviting you, sir, to make it up for him and that is not appropriate,

because what he is now making the Tribunal do is to give an answer, and particularly an order----

THE CHAIRMAN: I understand, Mr. Maclean.

MR. MACLEAN: And that would not be fair.

THE CHAIRMAN: **I am very grateful to Mr. Maclean for taking me to the back history of the matter in terms of the debate between the parties before the President of this Tribunal regarding disclosure and, in particular, the order made by Mr. Justice Roth on 27th July 2016, regarding the scope of searches that should be made by the claimant in relation to specific allegations as set out in para.9 of that order.**

Of course, Mr. Harris is entirely right, there is, as is usual in these cases a liberty to apply (para. 29 of that order), and it is absolutely proper that that liberty be exercised in the right case, so there can be no question of impropriety or such suggestion in this case.

That said, para. 3.2.2 of the notice of application is crafted in a manner which is altogether too broad given the debate that was had at the early stages of these proceedings before the President, and as I indicated to Mr. Harris in argument I regard the search terms as entirely inappropriate at this stage of the proceedings.

What is more, not only should the application have been more narrowly framed, it could and should have been brought earlier. The fact is, as Mr. Harris rightly points out, collusive conduct of the sort being alleged by his client is, by its very nature, secret, and that is why disclosure is so important and powerful.

I have sought to deal with this matter by reference to the emails that Mr. Harris helpfully took me to by suggesting a narrowing of the search terms in a manner that might produce, if they exist, further documents of the sort that Mr. Harris took me to, and I am referring to the Julie Emmerson emails. However, I am deeply reluctant to formulate search terms on the hoof, unless they can be agreed between the parties and I quite understand why Mr. Maclean cannot rise to the occasion and respond at once to the terms that I floated.

Therefore, I am refusing the application as crafted. I am not closing out a further and more specific application but I think I need to attach a couple of health warnings were such an application to be made in the future.

This is a pre-trial review, the trial date for commencement is to be debated, as Mr. Harris will be doing shortly, but nevertheless, the trial is imminent, and it is very late in the day to have widely framed disclosure applications. If an application is to be

made, it will have to be tight and narrowly drawn; if it is not then it will receive, unless the material circumstances change, rather shorter shrift than it has got today. Having said all that, I would hope that if sensible and narrow search terms arising out of the Julie Emmerson emails are formulated by Mr. Harris' team that they will receive at least some consideration from the claimant's legal team so that the court does not have to be troubled again.

MR. HARRIS: Sir, we are very grateful. May I ask, in those circumstances, whether this is something that might be pursued in short order in the first instance in writing between the parties, but then if there is not an agreement and there are what we consider to be properly narrow targeted search terms, that could be dealt with in writing by the Tribunal. It is just that we are concerned about the amount of time that this will take, and if it needs to be dealt with in another hearing in, say, January, then there is a danger of not getting what we want by default as opposed to on the merits.

THE CHAIRMAN: I understand, that seems, prima facie, sensible. I will not make a direction to that effect, I will give an indication that I would prefer to deal with it in writing if that can be done, but I do not want to tie either your hands, Mr. Harris, or, indeed, Mr. Maclean's, if either of you feel that it is more appropriate that the matter be dealt with orally, but you are clearly right, Mr. Harris, it would be more efficient to deal with this in writing.

MR. HARRIS: I am very grateful, sir. There are still a number of matters, of course.

THE CHAIRMAN: Yes.

MR. HARRIS: I am partly, of course, in your hands. There is an application where we are still not agreed about marketing materials, that was the final page of the table that was handed in. There is an application about financial materials, where there are still some, we say, significant redactions that should not be made, and then there is an application about confidentiality. I am, at the moment, just giving a road map. Then, of course, there is a live issue, hotly contested about whether there should be a short postponement to the start date of the trial, and then there are some other matters that need to be ventilated, although some are not opposed. One was about Mr. Notley's third witness statement, one was about a request for further information, one is about the structure and timetable for trial, and one was about the transcript, bundles, hot-tubbing and there is a remark about cross-management. So, I am just partly conscious of the clock, and I am in your hands, sir.

THE CHAIRMAN: We need to deal with all the live applications, so I suggest we deal with the marketing and financial information next. I will give you an indication of my thinking on

the confidentiality matters when we get there. The further information – is that now agreed?

MR. HARRIS: No, that will not take very long. The position there is my learned friend's skeleton says he thinks that some of it is irrelevant or peripheral, or may be, but he has not told us which ones. We say that they should be directed to either answer them promptly----

MR. MACLEAN: Can I interrupt there? We have not said we will not answer any of the questions, as Mr. Harris knows. We will deal with it by the date they asked us to deal with it, which is 19th December, and we can park that and move on.

MR. HARRIS: Sorry, I simply do not understand that. His skeleton says in terms that he thinks that some of it, quote: "appears irrelevant or peripheral". We say, today----

MR. MACLEAN: Well, I----

MR. HARRIS: With great respect, Mr. Maclean, can I please make my point? Thank you. What we say, sir, is if he is going to, in due course, as is the wont with some litigants, reply to the RFI and say: "Well, actually, we are not answering this because it is irrelevant and peripheral" it is much better to know that now so that you, sir, can decide whether it is, in fact, irrelevant or peripheral.

MR. MACLEAN: There are some people who could pick a fight in an empty house. I was trying to be helpful. Paragraph 103 of the skeleton says that a number of the questions raised by Gascoigne Halman appear to be irrelevant and, at best, peripheral so it is a matter of submission before the Tribunal. That is what Mr. Harris hears when he reads it. "Nonetheless, the claimant will endeavour to answer the request within the timeframe proposed", and we will do so, we will endeavour to do so, and we will do by 19th December.

THE CHAIRMAN: So you are not going to be serving up a string of "Not entitled", you are going to respond.

MR. MACLEAN: We are not going to say "not entitled, get stuffed" or anything along those lines.

THE CHAIRMAN: Mr. Harris, I have to say on some of them I had some sympathy with Mr. Maclean's points, but you win the debate.

MR. HARRIS: Right, that is that one. The next one is the marketing materials. This one appears to be, by reference to my learned friend's table that was handed in, opposed *in limine*, so they are not prepared to give any further, as I understand it, documents relating to marketing, and what I get from that, on p.3 of the hand in, although he did not introduce this when he was handing it in, there seem to be, it is said, a lot of potentially relevant documents if you add the search terms that we have asked for in our application. I do not

hear any dispute from that, so they are not offering any further disclosure, but I can take this in stages, sir.

If you look at the table what we had suggested as 'added proposed key words for marketing' are all of them taken from Mr. Springett's own evidence, these are terms that he uses to refer to marketing, "online marketing", "co-branding" or "marketing channels" or "marketing strategy". So, the first three, sir, that you see in the left-hand column are the words that my learned friend has used, but it is thought not relevant to refer to "online marketing" or "co-branding" or "marketing channels" or "marketing strategy", even though they appear to be every bit as relevant. We say those should be searched for as well.

I am taking, sir, I hope, as read, that you know that this is obviously a live issue in the pleadings. I could give you the references. They deny it but it is a very clearly pleaded issue.

We say, with respect, we need to expand the key words and have a wider search. This 86,000 number, or 84,000 number, what we do not know is how many of that number are thrown up in any event by the marketing words that my learned friend has now conceded that he will use to search. It is a meaningless number by itself. For all I know there are only another 200 documents added by adding on our further search items, we just do not know, and nor do you, sir. We say that for the reasons set out in the pleadings, these are key issues in dispute and they are opposed, and for disclosure purposes these are not sought to be struck out, these are live pleaded issues. So, when my learned friend says in his skeleton that this is somehow not a legitimate issue – perhaps we just ought to turn that up – that is very curious. At my learned friend's skeleton at para. 83, he opposes this application on the basis that it is, and I quote him, "extraordinary".

> "The effectiveness of a particular competitor's marketing strategies now and in the future, that is not something the Tribunal is required to look into."

That seems to be a submission of law that we are not entitled to run the point, and that is the first basis upon which he resists the application. But, sir, if that were right then he would have applied to strike them out.

So, the position you are left with today, sir, is that if he wants to run that point, if that is the advice he gives and it is accepted, he can run that point at trial, but for today you, sir, have to go on the basis of the fact that in the pleadings this issue is----

THE CHAIRMAN: It is paras. 85 and 86 of Mr. Maclean's written submissions that I think you need to address me on.

MR. HARRIS: Yes. And so, for example, it is conceded that it is relevant to refer to "marketing review", and these are, of course, in quotation marks. The relevance of that seems to be conceded notwithstanding these other two points, but how can it be relevant to search for "marketing review", but not to search for "marketing strategy", in particular given that that is a phrase that Mr. Springett himself uses. These are drawn out of Mr. Springett's evidence. It is the same point, if it is relevant to talk about the matters that are conceded it must also be relevant to look for, within quotation marks: "marketing channels". "Co-branding" is a good one, sir. "Co-branding" is a term that is, in fact, used in the membership agreement itself. There is a co-branding requirement on the part of all people who sign up to Agents' Mutual.

We say that those are sensible and proportionate additional keywords. All we can tell now from this response, which plainly could have been provided to us a long time ago, is that there seem to be a lot of materials that relate to marketing. There is a good chance, sir, that there are going to be further materials in there that are relevant. It is no excuse to say: "We just haven't looked at them, or searched for them", that is their obligation on the pleadings, just like it was our obligation on our pleadings to provide materials the other way around.

What we can say, sir, is in light of these indicative numbers we would be happy, in the second column, to accept a search by reference to, I think, Mr. Maclean used the phrase "parameters" earlier, which are to or from Mr. Springett and Ms. Whiteley, and/or to and from the Board. In other words, the same acceptance that has been generated on the previous pages in the second column. That would seem to be a sensible and proportionate way forward, and that is what I invite you to direct, sir.

THE CHAIRMAN: Thank you very much.

MR. MACLEAN: Sir, can I start by taking you to the rules which we have not looked at all. I do not know if you have vol.1 of the White Book?

THE CHAIRMAN: Yes.

MR. MACLEAN: If you turn, please, to 31.7. I am afraid there is a misunderstanding in my learned friend's submissions about what the rules require. It is not a question of searching for everything that might be relevant, it is not even a question of disclosing everything that might be relevant. The starting point is 31.7:

> "(1) When giving standard disclosure, a party is required to make a reasonable search for documents falling within rule 31.6(b) or (c)."

Just reminding ourselves what those are, if you turn back a page, 3.1.6:

"Standard disclosure requires a party to disclose only–

(a) the documents on which he relies; and

(b) the documents which –

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case; and

(c) the documents which he is required to disclose by a relevant practice direction."

If you look at the bottom of p.884, the categories of documents are then explained. (1) own documents, (2) adverse documents, (3) relevant documents, and this is basic principles of the CPR.

". . . these are documents which are relevant to the issues in the proceedings but which do not fall into categories (1) or (2) because they do not obviously support or undermine either side's case. They are part of the 'story' or background. The category includes documents which, though relevant, may not be necessary for the fair disposal of the case."

Then there is "train of inquiry" in *Peruvian Guano*, and that all got swept away by the CPR. So, you do not have to disclose all relevant documents, that is the whole point of this part of the CPR, but still less do you have to search for all relevant documents. What you have to do under 31.7 is to carry out a reasonable search.

In 31.7(2):

" The factors relevant in deciding the reasonableness of a search include the following –

(a) the number of documents involved;

(b) the nature and complexity of the proceedings;

(c) the ease and expense of retrieval of any particular document; and

(d) the significance of any document which is likely to be located during the search."

As to that, I know you have had a chance to look at Mr. Parker's report, sir, and I am not going to take terribly long on this, but if you would turn briefly, please, to E1, the fourth one, to p.1812, you will see that Mr. Parker develops, under the heading: "Marketing", a critique of what my client has done. So, for example, in para. 6.2.15, indeed, in fig. 14 he has the marketing spend of Rightmove and Zoopla and my client, and then in 6.2.15 and 6.2.16, and fig. 15 over the page, and 6.2.17 and, indeed. 6.2.18 he gives a critique of my

client's marketing spend and what we have been up to. So, fig. 15 overall marketing spend, and in 6.2.17 he refers to my clients spending on PPC, that is "Pay Per Click" which you may be familiar with, sir.

The position is that as part of the search that has been carried out, a number of very important documents in relation to marketing have been disclosed. I just want to show you one, sir, because one might think, having seen this, and having regard to 31.7, it is difficult to see what more could be required. This is something called a Portal Performance Report, and they are prepared periodically by my client and discussed at board level, and copies of these reports have been disclosed, together with copies of the relevant board minutes.

Every month that management team receive a report from an external company on 'Pay Per Click activity', which is referring to these Portal Performance Reports. If you would turn over to p.2, there is a summary - this is from September 2016 - of what comes on the following pages. Then if you look to p.3, "Sessions", that is number of individual visits that are made to the relevant site. Then you see new versus returning customers. Then over the page, p.4, the number of unique users with numbers, then p.5, the number of page views with numbers, broken down by month, the number of pages per session per month, the average session duration per month, then the monthly leads at p.6, and then this at p.7, "Media budget and performance", and you see, sir, that is broken down month by month. You can see September, for instance, the first column, and you see there is a total number, and then that is broken down into digital, press, Pay Per Click, then TV, including VOD, which I am told is video on demand.

That is then broken down into the cost per visit, the cost per unique user, the cost per lead. Over the page is a breakdown of where the money was spent, because one of the suggestions apparently that is going to be made at trial is that my clients are pretty clueless at getting into this market, because either they have not been spending enough on marketing - they have been buying too expensive paper clips for the office instead, they should have been spending more on marketing - and/or they should have been using that marketing money more wisely, because they spent it on X media outlet rather than Y media outlet.

We can see from p.8 the breakdown in what one might think was fairly granular detail of what was spent once per month and the way it was spent, and there is a key for what these various things mean. If you look in the box to the right the definitions tell us what 'direct' means, what 'referral' means, and what 'social media' is, 'display', 'Google display text advertising', or whatever. Then the sessions broken down month by month.

On any view, that is granular detail of the marketing spend, how much was spent, where it was spent, and the information about how much was spent and where it was spent is also to be found in the management accounts, and they have been disclosed, and also in other documents that have also been disclosed, including business plans and strategy documents. That has allowed Mr. Parker to create his report, set out in his report his critique of why it is that he says that my client's marketing effort has been insufficient, which he uses as one of his building blocks in the case which he sets out in support of Gascoigne Halman's case on the anti-competitive object or effect of my client's business.

So against that background one says, here is an application by Mr. Harris to extend the search that was carried out to include other key words across the entire database - I appreciate he narrowed it in the very last breath of his submission, and I will come to that in a moment - and, looking at the third page of your document 4, Mr. Harris said that he was not quite sure how many new documents there were, there might only be 200, that, with respect, is a misreading of the table. We know exactly how many new documents there are as a result of the search. That is what the last column is all about. There are 67,446 documents thrown up by Mr. Harris's proposed search once one takes away all those that have already been reviewed. Applying 31.7 is that a proportionate search to have carried out in September? No. In December? No. Any other time? No. End of application.

Mr. Harris then says, "All right, if that is a bit broad, even I can see that is a bit broad, then I will have a go at something a bit narrower". There is no need for anything narrower. We have provided with full granularity the information setting out what the marketing budget is, what has been spent, where it has been spent. Mr. Parker can and has made such points as he thinks fit off the back of that. We will deal with them, if it matters, at the trial, but Mr. Harris is not entitled to any more disclosure or any more inspections or searches on marketing. He has had more than sufficient.

THE CHAIRMAN: Thank you, Mr. Maclean. Mr. Harris?

MR. HARRIS: Sir, yes, perhaps I do need to take you to the pleadings in bundle A.

THE CHAIRMAN: I do not think you do. I am quite prepared to accept that these are in issue. Do, if you feel it is appropriate.

MR. HARRIS: Perhaps I could just read a couple of extracts. It is pleaded fair and square that:

> "… the claimant has never devoted adequate resources to sustain an effective marketing in order to achieve successful or efficient market entry, and in particular not during its first year or two of operations."

Secondly, and this under the heading of "Infringement by theft by reference to the relevant counterfactuals":

> "… nor is there is any reasonable prospect of OTM [OnTheMarket] being able to do so in the short to medium term or even during the excessive period of duration of the OOP Rule, including, because OTM has a weak brand of marketing presence and an insignificant share on any reasonable metric, and has not expended any sufficient amount on marketing such that OTM is not well or adequately known or recognised and/or accordingly is not used materially or at all by estate agent customers or property seekers."

So the allegation goes to the heart of the central issue in the case about the anti-competitive effects or the justification or supposed objective necessity of the OOP Rule. That is where we locate this. That is a centrally relevant point.

What is effectively said in response to my application is, "Oh, well, do not worry, you have got some materials about this, so therefore you should not have any more". That is not the way that disclosure works, by reference to the pleadings, or even on accepted principles of proportionality. What my learned friend cannot answer, for example, is why, if it is relevant to have searched for the words "marketing review", but it is not relevant to have searched for the words "marketing strategy". It must be and yet they have not done that. Yes, we have obtained some materials and we have been able to make some expert submissions about what they show, but we are currently fighting with one hand tied behind our back, because there are other relevant materials that can easily be identified by the application of additional search terms to an electronic dataset, and there is a very good chance that they are going to identify further materials, proportionately targeted materials, that go to the central allegations in my pleading which are denied. It is not right to simply dismiss it when I say, "Look, why do you not, instead of searching the entire dataset, do an even more proportionate search, why do you not tie it down to Mr. Springett and Ms. Whiteley?" After all, Ms. Whiteley is the commercial director and Mr. Springett is the chief executive, so one would have thought that there is a very good chance that they are going to be the ones who were having the most germane comments about marketing strategy and marketing channels.

As I said before, sir, 'co-branding' is a deliberately picked search term because that is a term of the Membership Agreement itself. So one could consider that it is very reasonable for us to have a search by reference to those terms.

So it is wrong to characterise this as some kind of overblown search. These are central allegations and they can be readily searched for with additional terms, and then disclosed, if relevant, including by reference to the board, as has been done with these other terms.

Sir, as regards Mr. Parker, or indeed at trial, just because including "by reference to publicly available data and data that has come from Rightmove or public sources about Rightmove/Zoopla", those are the bits to which my learned friend refers in Mr. Parker's report, that misses the point entirely. What I am talking about here is reference to materials that come from Agents' Mutual, not from Rightmove or from Zoopla or from public sources. So I am not going to be able to advance fairly, or, I respectfully submit, justly the submissions that I want to make about those key allegations in the pleading, unless there is a proportionate additional search, which can be relatively easily done.

So that is the basis upon which we continue to advance the application, sir.

THE CHAIRMAN: **There is no dispute that this is a matter that is alive on the pleadings. If it were not alive on the pleadings, there would be no disclosure at all. However, searches do need to be sensible and proportionate, and I am conscious that the disclosure process in this case is *in medias res* not commencing. What key words one would search under at the beginning of the process is remarkably different to what one will search under in the middle of the process. It may well be that, were one starting afresh, one might choose to add words to 'marketing' to expand the search, but at this stage in the process the disclosure process does not reinvent every time an application is made. The fact is that either the discovery process or disclosure process is made wide enough at the beginning, or you make a specific disclosure application that is specific.**

In this case a search has been done, as outlined in Mr. Maclean's skeleton regarding a number of terms, 'marketing review', 'marketing spend' and 'marketing report'. These have been disclosed. It is simply too late and entirely disproportionate to require a review of the 67,446 documents by a team of solicitors at this stage in the proceedings. I appreciate that the matter might be cut down by reference to other parameters, but that has not been suggested, and I see no proportionate reason for doing so now.

The application is accordingly refused.

MR. HARRIS: Sir, thank you. The next one is, therefore, financial materials. You will see the reference to the relevance of this material at Ms. Vernon's second witness statement at para.39. That is to be found at bundle C1, tab 2. I am just identifying these one by one.

THE CHAIRMAN: Pausing there, Mr. Harris, entirely apropos the environment here, it is getting rather hot in here, I wonder if we could turn the air conditioning down. I do not know if someone could deal with that.

MR. HARRIS: Sir, financial materials. There has been an evolution in this topic and a progressive concession after concession on the part of my learned friend's side, but there remains an important set of outstanding issues. That relates to balance sheet material in the management accounts, and a document referred to as the 'Baker Tilly report', and then lastly, sir, some redactions about financial information that are in board minutes and other materials. So that is the end. That is what is still in dispute, but I have to spend one or two moments identifying why it is relevant to those as well as material that has been conceded. Sir, originally there was - and I will stand corrected - no disclosure of management accounts. I stand corrected, there was disclosure of some management accounts, but they were redacted. Then progressively the redactions have been removed, so we can see more about finances. Further progressively, further management accounts have been made available for additional periods. So that is the background.

Since the time of original disclosure, we have been fighting on all of these fronts, and progressively getting over these hurdles, and the final hurdles are the three that I have just identified. The reasons that these are so relevant and we continue to press, sir, and I am very grateful for your indulgence over all my many applications, are set out at Ms. Vernon's para.39. We give the citations to the pleading, Agents' Mutual has got a pleaded aim of improving service at reduced costs to agents. There is a relevant counterfactual analysis about whether Agents' Mutual is even in a position to succeed both with and without the OOP Rule taking into account the need for ongoing investment in development and marketing, alongside the repayment of the loan notes they principally claimed from the founder members.

Then 39.3, whether the OOP Rule was and still is necessary to overcome any potential economic barriers to entry by creating and building a brand with a major marketing presence.

The parenthesis "still is", sir, that is for the two reasons I adverted to in an earlier application, namely it is a five year duration and we are still in that; and secondly, more people are being signed up over time.

Then, importantly, at 39.4:

> "The alleged necessity of the OOP Rule, including for the five year period, and whether any alternative entry strategies could have been pursued …"

I just read some of the pleadings on that issue -

"… including financial incentives on agents to join Agents' Mutual."

So that is a reference to something like discounted entry periods, entry rates or free entry rates, something like that.

Then Mr. Springett, himself, says in the identified paragraph of his fifth witness statement. Sir, could I invite you to read to yourself the italicised section in 39.4?

THE CHAIRMAN: Yes, of course. (After a pause) Yes, I have read that.

MR. HARRIS: I am grateful. Then it goes on, and there is a highly relevant financial analysis by reference to whether it should be one year, two years, three years, etc.

Then there is a factual dispute about the cost base being too high, 39.5, and we refer to the witness statements.

Then there is a further and important reference to an allegation that we anticipate is going to be advanced as forcefully as is able to be done by my learned friend's team at trial. Sir, I just pause to note that in this version of the document you have got some yellow highlighting starting half way through the first line, but, in fact, the only thing that is confidential is the figure in the final line,

"The fact that AM has had to reduce its proposed marketing budget for 2016 by more than [X] in order to fund these proceedings."

That is not confidential, it is the figure. I shall be calling that the 'diversion' point, the 'alleged diversion' of substantial amounts from the marketing budget to the litigation budget. Taking that one first, we simply do not accept this new allegation in Mr. Springett's witness statement. It is an assertion that there was this substantial diversion, or in any way that there had to be a diversion from the marketing budget to the litigation budget because there may be all manner of other sources of monies. In a previous hearing in open court, sir, there has been reference to the loans made by the original founding members. Indeed, in open court, there was reference to the fact that those loans had been deferred. So there is potentially another source.

Then there is the matter that is referred to over the page in Ms. Vernon's witness statement at 43 and 44. I believe that this one does still remain confidential, so do you see in 43, sir, the document that is identified, and then in yellow there is the heading of the document?

THE CHAIRMAN: Yes, I see that.

MR. HARRIS: So that activity has been going on. Indeed, in confidential terms the activity is given flesh in 44, if you would cast your eye, please, sir, at that.

THE CHAIRMAN: Yes, I have read that.

MR. HARRIS: I am grateful. So there is another potential source. We are entitled to test, we respectfully say, these suggestions that there has been this necessary diversion from marketing to litigation, given that there are these other sources.

What we have got so far, sir, is a whole raft of clearly pleaded issues, to the heart of which goes the question of financial materials. It is no help, sir, for that reason that progressively, over time, like drawing blood from a stone, we have got more management accounts and less and less and less redactions. So a greater spread of accounts for a greater period, and fewer and fewer redactions.

There is a line being drawn in the sand for today's purposes, and that is that the balance sheet materials are said to be irrelevant, even in the very same accounts that have otherwise been disclosed. So somehow a distinction has to be drawn by my learned friend that makes sense between all materials that he has now finally on his side agreed to disclose, because they go to all of these issues, as opposed to one part of those financial accounts, namely the balance sheets. We say there is no sensible distinction of substance between the management accounts and an integral part of them, namely the balance sheet materials.

Just in general terms, sir, a balance sheet is a key part of any accounts. That is why they are included. They show financial standing and sustainability, in particular, sir, when they can be compared over time, which is what we want to do, and what we are otherwise able to do just by reference to things like cash flows and profit and loss, but we cannot compare the balance sheet, and that is very key to the allegations to which Ms. Vernon draws the Tribunal's attention in her para.39. My learned friend in his skeleton at para.92 says that somehow the balance sheet materials are not, and this is his language, "a metric of business performance". To the contrary, sir, they are a highly relevant metric of business performance, particularly when they can be compared by one month through to the next month through to the next month. Arguably, they are the most germane metric of business performance when comparing them over the course of time.

Why are they included? They are included, sir, so as to give a true and accurate and full picture of the finances of a company. They cannot remotely be said to be superfluous or irrelevant. At one point, and I am not sure to what extent this is maintained, it was said, "There is another reason why you cannot have the balance sheet materials, and that is because they are very confidential, and Zoopla is somehow involved in your side of the case, and that is a reason for not disclosing them". Of course, sir, with respect, that is a complete non-point, if it is maintained. If these materials are confidential, they will go into the confidentiality ring just like other materials have, and just like Gascoigne Halman

confidential materials have gone into the confidentiality ring. In any event, sir, if that were a good objection, which it is not, that would also be a reason for not disclosing the management accounts, but they are being disclosed.

So those were the two allegations or objections that were advanced finally in this line in the sand on balance sheets, at least in correspondence, but then in the skeleton two new ones emerged - two brand new ones. Could you turn up my learned friend's skeleton, please, for these purposes, and in particular 91(a). What he says at 91(a) is that it is illegitimate for us even to run a point about lack of an effective competitor. Sir, that is a bad point at this stage. It is the same reason why it was illegitimate to make the same sort of point about marketing. These are squarely pleaded allegations, and they have not been struck out.

If he wants to run at trial the point, "Oh, well, it is not for the Tribunal to even assess the question of whether or not there are not competing and efficient competitors". That is a matter for him and it does not arise today. It is altogether irrelevant.

As it happens, of course, we strongly contest the notion that he is even right on that proposition. It is no job of competition law to protect entry. I mention that it has a flawed and unsustainable business model and cannot succeed unless it uses a deeply anti-competitive tool that sets out to damage other market participants. So it is highly contested and, in any event, does not bear upon the question of disclosure today.

Then in 91(b), he takes a conceptually different point. He says, again, it is not relevant, because one conducts an *ex ante* assessment. That is his point at 91(b).

Just pausing there, if this were correct, which it is not, then there would not have been any disclosure of any financial materials going forward beyond the start date of the Agents' Mutual operation. Of course, all of those have been disclosed. What has happened really is, "You can have all of those, but you cannot have this bit", which we say is wrong. Not only is it wrong because it is inconsistent with the previous practice, but it is wrong for this reason: the OOP Rule continues to apply. It applies today, it applies tomorrow, it applies the next day and, if needs be, it can be justified on a day to day basis, and that is against the background, sir, of Mr. Springett himself saying, as was cited in Ms. Vernon's para.39(4), that he accepts that the original business model projections, which led to a five year duration, have not been borne out in that way in practice - quite the opposite, he has a lot more people at a lot earlier stage than he thought he was going to get when he put the five year rule in place. So it is highly germane to see how the finances of the company have developed in order to assess the squarely pleaded allegation that we say there was an excessive duration of this period.

Then it does not end there, but just for good measure, of course, as I have said a number of times now, this company is continuing to sign up members, and therefore has to continue to justify the application of the OOP Rule, including in some cases for the five year period. So, with respect, the *ex ante* point is also misconceived.

That then is effectively the balance sheets, and then there are the two additional points as part of this application. There is the Baker Tilly document. What we apprehend, and we have certainly not disabused of this apprehension, is that Baker Tilly agree that they are the auditors, as we say in the skeleton, of the claimant company. What we say is that it is going to be of great benefit to the resolution of the issues at the trial for the Tribunal to see a slightly more independent assessment of the finances of the company, which will be put together by independent professionals who have to adhere to their independent professional standards, because of the nature of the allegation in the pleadings, sir, which is that the business model is unsustainable, and that plainly has an impact upon the competitive assessment.

So it is one thing to say management accounts, indeed, plus balance sheet; but it is another thing to say there has been somebody else who knows about the finances of the company with professional standards who has made this assessment of them. It is a single document so far as we can make out. It has been reviewed by the other side, and for reasons that are utterly opaque we are told it is not relevant. Well, we find it impossible, with great respect, to understand how an auditor's report about the company's finances cannot be relevant to the finances of the company. It is not explained, and, sir, we persist with that part of the application.

That takes me on to the final part, sir, and you have been very patient and I am very grateful to you, which is that there have been a large number of redactions of financial materials, some of which appear to have come from the very management accounts which we are now receiving, part of the balance sheet, in other documents. Can I give you a copy of something that we prepared for ease of reference today. It is called "Redactions for irrelevance file", and I think we have got some more copies here. I just wanted to give you an illustration of how unsatisfactory their position has become. (Same handed)

Sir, these are documents extracted from the Agents' Mutual disclosure. I am not going to go through all of them, sir, I will just give you a flavour. If you pick up item 1, this is an Agents' Mutual board minute disclosure document on the first page under the heading number 5 "monthly management accounts", and then "Irrelevant". This is the board discussing the very accounts that we have been given access to. If they are said to be

confidential or super-confidential, so be it, but we find it impossible to conceive of how commentary upon the accounts that we do have is said to be irrelevant. It is highly germane, sir, that there is the perception by the claimant company of its own finances, because that goes to whether or not they think they can, for instance, sustain themselves in the market, whether the marketing budget has been correctly created and then allocated, whether it has been misallocated, whether it is ineffective, and it plainly goes to the question of the so-called diversion allegation. We need to know why it is now said by Mr. Springett, and we are entitled to know, I respectfully submit, that, notwithstanding all these other sources of investment of monies, they are not capable of being deployed in order to, if needs be, boost or alter the nature of the marketing or the other financial performance indicators.

Perhaps we could just have a look, very briefly, at one or two more of these. Over the page there is "Cash flow and funding", sir. This is the same document at tab 1. What we do know of this particular document is the heading, because that has not been redacted, and we say that it is bound to be highly germane, what the company perceives at board level to be its cash flow and funding position given all the allegations about cash flow and funding and sustainability and marketing budget, and use of budgets. Yet it has been redacted.

It is not limited, sir, to board meetings, although you can see just at tab 2 the similar sorts of problems arise, irrelevance at item 4, said to be irrelevant under item 6, cash flow projection. We do not even know what the other headings are, but we can see from the previous board minutes that, if it follows the same numbering, they would be relevant headings.

Obviously, as I say, I am not going to go through all of these, but some of them are board minutes. If you were to now turn, for instance, to tab 6----

THE CHAIRMAN: So the document at tab 1 would fall within para.3.3.3 of your application - is that right?

MR. HARRIS: Sir, 3.3.3, yes, exactly, so "New and unredacted versions of board minutes and communications relating to financial matters which AM has previously disclosed in a form which is redacted". Just to give you a further flavour and just to show that they are not limited simply to financial board minutes, there is one at tab 6. This came under the disclosure of a file name, which we have written in manuscript at the top, "Board 10 February 2014 summary monthly accounts". Inexplicable, in our respectful submission, that should have been disclosed when we got the monthly accounts, and we do not know what else is in there.

Then there is another document at tab 7. One cannot quite tell, but that may be an extract from a board minute.

There is another document at tab 8, which is plainly not a board minute, where large amounts have been redacted as irrelevant. That cannot be balance sheet information. That is not what this period trial balance is about. So even were that a good distinction, which we, of course, do not accept, it would not explain the irrelevance redaction there.

Then there is one at tab 9. I perhaps will not read out the title of the file name just in case that is sensitive, but you can see it for yourself, sir. The entirety of that has been redacted, but it goes to all those items that are identified by Ms. Vernon.

What we have done, sir, is we have just put together a small sample - this is by no means the entirety of the documents that have had these confusing and unexplained redactions on alleged grounds of irrelevance. That is why our application reads as it does at para.3.3, and we cannot see how there are, on any of these applications as regards financial information, any conceivable objections on grounds of proportionality. This is lifting redactions, (a); (b) one document; and (c), lifting some redactions in named documents. So, for those reasons, I strongly urge, if I can, as respectfully as I can, that we need to have further disclosure on the financial information given the centrality of those allegations.

THE CHAIRMAN: Mr. Harris, I will tell you what troubles me. It is not so much what is said by Ms. Vernon up to para.45, it is the introduction to para.46, which is rather conclusory. It says, "Given the highly relevant nature of the full financial position, please lift all the redactions". My concern is that it is rather putting the cart before the horse. The reason the solicitors will have gone through these matters and clearly applied their mind to that which is relevant and irrelevant, and marked certain bits as irrelevant, is as is said in Mr. Maclean's skeleton at para.93, that they have been reviewed and have reached a view that the matter is not relevant. It is not, but do correct me if you make a contrary submission, it is not for Mr. Maclean's clients to justify each and every redaction, it is for you to indicate why specific redactions are not properly made because they are eliminating relevant material for the purposes of these proceedings.

MR. HARRIS: Sir, I accept that, but----

THE CHAIRMAN: I am a little troubled by the blanket nature of your para.3.3, which is that financial material is very, very important, the financial period material has been redacted, please remove the redactions.

MR. HARRIS: Sir, of course there is always that slight conundrum, is there not, because I do not know what is behind the redactions, I cannot tell particularly well whether I need to see

that. What I have done is, I have attempted to show you - this is just on the 3.3.3 point - that there are headings in the board minutes that, on the face of it, seem to show directly why they are relevant. Take, for example, that cash flow and funding heading. Those goes to the heart of allegations that are made about the inadequate cash flow and inadequate funding on various fronts about this claim and undertaking, and yet they are redacted. So it is extremely difficult to understand how there can be any basis upon which it can be said that those are not relevant.

Likewise on Baker Tilly, just a single document, I plainly cannot turn to p.3 of it and say that looks relevant, because we do not have it at all. One would have thought - it is a natural submission, and we say well founded as a matter of commercial common sense - that if the auditors are going to be making a report upon the accounts of this company and how it is developing or not, or sustaining itself or not, they would be reporting that in their report, and that is central to the allegations in the case.

Inevitably, I cannot go any further in terms of detail, but what I do point out is that it is not clear to us, because some of these redactions are historic from some time ago, given the evolution and the progressive concession over more information, whether they are any longer germane redactions, because we have now got far fewer redactions in the management accounts and more of the management accounts.

THE CHAIRMAN: I am quite sure that Mr. Maclean's team are well aware that discovery is a continuing obligation, and if there is a change there will be effective changes in their redactions.

MR. HARRIS: We certainly hope so, but I believe I am right in saying that there has not been an evolution of these financial redactions at any stage.

THE CHAIRMAN: There may be a reason for that, Mr. Harris.

MR. HARRIS: There may be, sir, but equally, as we will develop at a later stage, there have been all manner of problems in the disclosure that has emanated from the claimant company to us over the course of time. You have the point, sir.

THE CHAIRMAN: I have the point, Mr. Harris, thank you very much.

MR. MACLEAN: Can I take the points in reverse order, sir, dealing, first of all, with the board minutes. Those were disclosed in September, and as we say in para.93 of our skeleton argument, they have been considered. They have not just been considered, if I can be so unkind as to put it like this, 'down the disclosure food chain', these redactions have been considered by Ms. Farrell, who instructs me. As far as the Baker Tilly report is concerned, that has been considered very recently by me and by Mr. Holmes.

As far as the former are concerned, our position is that these are redactions which are entirely proper. We understand the difference between redactions for privilege, redactions for relevance. In this case the redactions sometimes say 'Irrelevant', sometimes they say 'Privileged', normally they would just be blanked out. Some of these documents are entirely irrelevant and if one says, "Why are they there at all?" it is because they are part of a family of documents, and some of the other documents are there. That is why we have got pages and pages that are all irrelevant.

The position is, if I may respectfully say so, is as you put to Mr. Harris: these redactions have been made, they have been considered by people who are experienced lawyers, who know what they are doing, they know what the rules are, and the Tribunal and Mr. Harris ought not to go beyond that, behind it, unless there is some particular reason or particular circumstances to give cause for thinking that some error or omission has been made. With respect, it does not follow from Mr. Harris's point that the position has narrowed and things have been moving in terms of these financial documents, and yet we are still left with these ones. He draws the wrong conclusion from the fact that we are still left with these ones. The reason we are still left with these ones is that these are the ones that have been looked at and have been reaffirmed.

So far as the Baker Tilly report is concerned, I looked at that personally yesterday. I am afraid that Mr. Harris's suspicions about the content and nature of that document are simply misplaced. It just is not the kind of the document that he thinks it is, or should be, or might be. I reviewed it, and Mr. Holmes reviewed it independently of me, and we came to exactly the same conclusion, which is that that document is not disclosable under CPR 31.6, standard disclosure. Of course the Tribunal has power to order specific disclosure of documents that do not fall within 31.6, but for what it is worth that is the opinion that he and I, independently of each other, and together, and Ms. Farrell all came to, and Mr. Harris is simply firing an arrow at a target that does not exist.

So far as the balance sheet data is concerned, the management accounts have been disclosed. It is a more marginal call perhaps as to whether those documents are relevant. I certainly hear Mr. Harris saying loud and clear that he thinks that the balance sheet material helps his case. For my part, I am deeply sceptical about that, but if Mr. Harris wants the comfort of seeing the balance sheet data, I am not going to be, at 22 minutes to five, arguing the point. If he wants to have the balance sheet material, if it makes him and his clients happy, he can have it, but he cannot have, at least not within standard disclosure and

without a specific disclosure application, he cannot have the other stuff because our position on that, in my respectful submission, is properly made.

THE CHAIRMAN: Thank you, Mr. Maclean. Mr. Harris?

MR. HARRIS: Finally, thank you, it does make me happy, for what it is worth. Mr. Maclean can rest assured that he has brought a smile to my face! It would have been nice, sir, some time ago when we raised the Baker Tilly report, if I had been given the comfort that Mr. Maclean, Mr. Holmes and Ms. Farrell had independently all looked at the document and they, in the light of all the developments, had said no, then we would not have been here on that today. To get it today is better than not getting it at all, but it is a shame. Anyway, there we go, we accept that.

You, sir, will have to take a view on the other materials. I have done the best I can, I have identified the headings. If you are not persuaded, so be it, but I can only go by reference to the headings. We find it difficult to understand how a board minute that talks about cash flow and funding in the very accounts, the entirety of which we are now going to get, cannot be relevant, particularly when it is also the claimant company's perception of how it is going that it is relevant, not just the underlying materials.

THE CHAIRMAN: I am very glad that Mr. Maclean has managed to bring a smile to your face. It is good to see.

In my judgment, the concession regarding balance sheet is just that, it is a concession that is being made without conceding that the application was right.

As I indicated in argument earlier, it is important to place due weight on the fact that documents have been reviewed for relevance by the solicitors. I am grateful that Mr. Holmes and Mr. Maclean have, themselves, reviewed the document. To be clear, it is one of a solicitor's functions to responsibly consider whether the disclosure process has been properly undertaken, and one of the hardest things a solicitor has to do is to disclose documents that they do not want to disclose, but one must expect that that is done, and done properly.

I fully appreciate, Mr. Harris, that it means that any application that you make at any point in this case is made with one hand tied behind your back. That is the way it works. In order to go behind the statement of a solicitor that a document is irrelevant, I am afraid something more specific is required. For those reasons the application under para.3.3.2 and 3.3.3 is refused.

MR. HARRIS: I am very grateful, sir, thank you very much.

Sir, we are now again in your hands, and I am conscious of the time. There is confidentiality, and I was going to move to that. That is probably a lot quicker.

THE CHAIRMAN: Can I give you an indication and you can respond to that. Confidentiality rings also only work if there is careful co-operation between the parties and a responsible approach to blanking out. I am sure I am not being critical when I say that it is the hallmark of all door cases before the Tribunal that there is too much labelling of 'confidential', and inevitably when the Tribunal begins poking at this sort of thing the areas that are yellowed or blued, or whatever colour they are marked out recede. I am very disinclined, at least at this stage in the proceedings, to impose an obligation on Agents' Mutual to do a review of their claims for confidentiality because there appears to be an inconsistency. The reason I say that is because, if I make that sort of order, we are going to have to then review in fairly granular detail the question of whether there has been compliance.

What I am minded to do is to leave this to the responsible conduct of the parties. I hope that, as the process goes on, the extent to which confidentiality is insisted upon recedes. That is, generally speaking, my experience. I would be not particularly inclined to make any order beyond what is usually done in these cases, but do, Mr. Harris, persuade me to the contrary.

MR. HARRIS: Sir, I am not anxious to prolong the hearing. What I am slightly confused about is that you have quite rightly said, sir, and I entirely accept, that there is a significant measure of responsibility that falls upon solicitors on both sides - my side as well as the other side - and they can and should be trusted to do things like relevance properly, etc. The same, in our respectful submission, goes for confidentiality, which is Ms. Farrell and my learned friend's instructing solicitor and her team. They need to do a responsible and thorough job on the question of confidentiality. My focus is not so much on whether there has been an over-claim for confidentiality. My experience, for what it is worth, coincides entirely with yours, sir, that they tend to recede. Indeed, something has already been read out today, whether that it is a concession or inadvertent, but whatever.

My concern is not so much over claim, but the fact of inconsistencies. What I am worried about - and it is not just on a personal level, it is on behalf of the Tribunal and indeed my learned friends - is that if there are inconsistencies then there are going to be inadvertent true confidential matters read out just because they are different on different documents. I can give you two examples of how that has already happened in this very case because of the inconsistencies. At a hearing in September, as we referred to in our skeleton at para.37, a financial matter was said to be confidential, and we said, "Hang on, in an earlier version

of one of Ms. Farrell's statements", which was then produced, "it was not confidential", the very same thing, and Mr. Justice Roth, the President, said, "I do not understand what is going on".

It could have been the other way round, and then material that was truly confidential was blurted out because of the inconsistency.

Another one, if I could just give you a quick flavour of it, is in Mr. Springett's fifth witness statement, which I believe is in bundle E1, 1 of 4. Could you turn in that fifth witness statement to paras. 17.6 and 17.7. This is on the diversion point, sir, which, of course, is going to be, we apprehend, very much run by the claimant at trial. If you look at the bottom of 17.6, you see:

> "However, during 2016 the claimants had to divert …"

and then confidential -

> "… which would otherwise have been spent on marketing into paying for fees associated with these proceedings …"

etc. So the only thing there that is said to be confidential is the number, and that is why earlier on I did not mention the number. Over the page, if we look at the final sentence of the very next paragraph:

> "In any event, as a result of bringing these claims, …"

then the entirety----

THE CHAIRMAN: There is a figure there as well, is there not?

MR. HARRIS: There is a figure, but look at the rest of it. It is the allegation of even diversion which is inconsistently said to be confidential.

The problem, sir, doing the best I can, we have acknowledged the responsibilities on those instructing me, but I am completely sure that those instructing me will say that we have been attempting to obtain a degree of consistency. It is the consistency that counts for a considerable amount of time. There are several letters over the course of more than a month, or at least a month, trying to get this issue resolved, and there has been a, "No, we are not doing it".

That is the conundrum that faces us, sir. It is welcome that you should identify the responsibilities for both sides. We have been trying and it has not happened, and we respectfully say that it cannot be allowed to continue because it would cause such headaches at trial. Therefore, we felt obliged to come and say, "Please can we have a direction?" That is the position, I regret to say, today. I understand your reluctance, sir. It would be different if we felt that we were going to get some movement on this and there

had been proper adherence to disclosure obligations in other regards, but it has been a very painful process, and I regret to say that is why we are here for the direction.

THE CHAIRMAN: Thank you, Mr. Harris.

MR. MACLEAN: Sir, we respectfully agree with the suggestion which the Tribunal made. No doubt the direction which Mr. Harris seeks would take up time and resources which ought to be spent getting ready for trial. I do not suggest that is necessarily the object of the application, but it would be one of its inevitable effects. On the other hand, as the parties do prepare for trial, which is now on any view reasonably imminent, inevitably the solicitors and indeed counsel turning their mind to preparing opening submissions and looking in more detail at the evidence and the documents, and so on, we will inevitably - at least I will, I am sure Mr. Holmes has already at this stage - have a better grip of what these confidentiality points are, and by the time we get to opening statements and the first witness in the witness box, I would hope, certainly on our side and I am sure on Mr. Harris's side, that matters will have narrowed. It would be unnecessary and, from our point of view a significant aggravation, to send my solicitors and client off now to do some exercise that is inevitably going to happen anyway as we get to trial, and if the parties apply their minds this is a problem which will go away of its own accord in all likelihood, and so the making of the direction which Mr. Harris seeks is neither necessary nor appropriate.

THE CHAIRMAN: Thank you, Mr. Maclean. Mr. Harris?

MR. HARRIS: Sir, just briefly, attractively presented, as always, by Mr. Maclean, but it does not get rid of the problem. We are prejudiced by virtue of the fact that materials that are said to be confidential now on an inconsistent basis cannot obviously be referred to by people who are not in the confidentiality ring. Therefore, we cannot take instructions on some of the materials. It is, frankly, no good to say, "Oh, well, it will be sorted by the first day of trial". That is too late. To be sorted out even ten days before trial is too late because we have got to prepare.

My learned friend prays in aid - and, as I say, attractively done - the fact that it would be a diversion of resources. With great respect, sir, these are resources that should have been deployed properly in the first place.

What about something that he overlooks altogether, namely the resources that are having to be spent by me and my team in order to bring this matter to your attention and seek to have it resolved in good order before the trial? They are resources that should never have had to be expended because these are not our mistakes. It is a matter of regret, sir, and I do say that, but we need to have the responsible solicitor on my learned friend's team go back and

do this exercise properly so as to iron out the inconsistencies, and it needs to be done considerably sooner than the start of trial, and that is how I leave it.

THE CHAIRMAN: Thank you, Mr. Harris. I am not going to make a direction. If there is a particular issue on a particular document regarding confidentiality where, Mr. Harris, your clients are being inhibited from putting a document that they want to put to either a witness or an expert then that can no doubt be raised. I would expect that to be put on a document by document basis.

In terms of the more general point on which your application is based in para.4, which is inconsistency between confidentiality claims and perhaps excessive use of confidentiality, I agree with Mr. Maclean that in the ordinary course this is something which needs to be kept in review by the parties as matters go on. It is only if matters get, for whatever reason, entirely out of hand that the Tribunal would have to intervene. In any event, I can confidently inform the parties that the Tribunal will be poking you to withdraw confidentiality over time, because my experience is exactly that, that one, for safety's sake, labels things 'confidential' when, on examination, they are not. That is a process we will follow in this case.

MR. HARRIS: Thank you, sir. We are obviously ticking items off. Just so that you know, we have got the question of a short postponement to the start date of trial, we have got a formal application - perhaps we could just tick this off - formally I need permission to adduce Mr. Notley's third witness statement, it is not opposed.

THE CHAIRMAN: If it is not opposed, then fine.

MR. HARRIS: At some point we need to talk about trial timetable, transcription bundles and hot-tubbing, and then there is a postscript remark about costs management. I am in your hands, sir. I could make my application for a short postponement to the start of the trial, or we could deal with some of the other things.

THE CHAIRMAN: What I suggest we do is deal with your application to adjourn now, and then, without necessarily making any orders, have a brief discussion about the mechanics of trial, such as timetable, hot-tubbing, electronic documents, and the like.

MR. HARRIS: Yes, sir, I am grateful. Our characterisation is - I know you have just used the terminology 'adjournment', this is not quite how we see this. This is a trial time that is currently due to start on 3rd February, a Friday. What we say is, in light of the fact that, for whatever reasons, there has now been quite a lot of difficulty with disclosure, and there are still outstanding materials, and no doubt outstanding further information, and all of those issues, the fair course is to give a short postponement to the start date of trial, but to have it

still occur in February. What we are not doing, as it has been characterised at various points, is seeking to break a trial fixture and have it sent off into the long grass, or anything like that. What we are saying is it is a short and proportionate delay to the start so as to allow for a fair catering of the additional matters that have been coming out.

In this context, sir, I would just like to draw your attention to the fact that you have been given a bit of a snapshot today as to items about disputed disclosure, you have ruled on some, there have been concessions on others, some we have succeeded on, some we have not succeeded, and likewise in the other direction. It comes against the background of there having been very considerable supplemental disclosures ever since the original disclosure dates. What we were given at an earlier stage was a table that looks like this with four rows that is said to be a summary of Agents' Mutual disclosure, but it is by no means comprehensive. What I have handed up to you now is a list of Agents' Mutual supplemental disclosure. We are *ad idem*, sir, as to line 1 of the landscape table, which is original disclosure of 2,109 documents back in September.

Then there have been all of these additional amounts of supplemental disclosure at the dates, including very, very recently. On 2nd November there were various emails - you can see for yourself, sir. There are some more on 15th November, they are very relevant documents about presentations going to the genesis, aims and purposes of Agents' Mutual, including its rule structure. They are, sir, well over a month and a half late.

Then there were 57 hard copy documents, including some that are highly germane, on 30th November. It is said, "Oops, we forgot to give these to you first time round". Well, that may be the case, everyone can make mistakes, sir, but look when they came. That is only 15 days ago in the context of an expedited trial where we were supposed to have had disclosure two months earlier. With respect, what is alarming about this hard copy disclosure is that it includes print-outs of emails sent, I think, Mr. Springett, additional ones that were never included in the original disclosure, which gives rise to a very justifiable concern on our part, which is how can new, relevant materials from Mr. Springett, who has always been a key custodian for the purposes of the standard disclosure search, emerge out of the ether more than two months after the disclosure deadline. Be that as it may, it has all created an ongoing tide of additional difficulties which, with respect, sir, we should never have had to face, but we are facing on a daily basis. This is what I am saying, it leads to the notion that there is an injustice or an unfairness in just blindly not taking account of the way things have actually panned out when pressing ahead with a trial date on the very same date.

It does not end there because, as you can see from the rest of this table----

THE CHAIRMAN: Yes, I saw that.

MR. HARRIS: You can see the rest of the entries. There are marketing plans, sales briefings - again very relevant - management accounts, which we have been receiving but in various redacted states, and then there are four party meeting documents on 9th December. Then, as a result of today, for the first time it has been agreed to carry out further searches by reference to key words on bricks and mortar, and we will be getting, I think it is now said, at least 15 documents, but we are not sure how important they are. I say "at least 15", that is because when my learned friend first introduced the table there were 15 plus 2, but then when he addressed it was only 15. I am willing to hear what he has to say now, but we do not know, we have not got them, they have not been produced yet. Then we will be getting the results of searches carried out on emails between Ms. Whiteley and Mr. Springett on the purpose of the OOP Rule, but we do not yet have them. There are the management accounts, the further information on the balance sheet and then there are answers to the requests for further information, which of course are relevant to gearing up for trial, which is why we have asked those questions.

What we say, sir, is that a sensible and proportionate response to these is to take account of them. We do not have to cast blame on anybody, but we have to take account of the fact that in an expedited trial things were supposed to be done on an expedited timetable, and it is precisely because the timetable is tight and constrained that when things slip it has a knock-on effect on other things. What one should not do, with respect, we say, is just blindly carry on by reference to the end date, namely the start day of trial, without taking account of the fact that there has been this additional disclosure. I think in court - and perhaps I do not need to wave them around - the supplemental disclosure bundles already contain substantial numbers of documents.

The point is that, as we stand here today, we have already been caused prejudice by reference to the timetable as originally envisaged by the fact that there has been late and ongoing supplemental disclosure, and unless some reasonable account is taken of it by adjusting the start of the trial date, and as a result of the further disclosure that has either been conceded or ordered, or a mixture of both, today, then there is going to be yet further prejudice.

The other difficulty that I said I would come back to at an earlier stage, and which I can deal with briefly, is that there have been considerable problems in just dealing with the way in which the claimant and/or its advisers have provided their disclosure. So there has been an uploading of documents to what is called the 'FTP platform', some electronic platform,

but on several occasions they have been uploaded without reference to us, so we do not know when it has happened, and/or they have been uploaded without reference to the requests that we have made, so we do not know what they are, and/or they have been uploaded in such a manner that they cannot be cross-referred, so that takes yet more time. That stands in sharp contrast to the way that we do it in reverse.

What I am saying, sir, is that these lead to further and further difficulties, they take more and more time, and they lead to progressive problems with the timetable. All I am saying is that in those circumstances we say that there should be a moderate extension to the trial date. We have suggested the sensible course that could be made use of by all sides, including issues relating to things like confidentiality, is two weeks. We are not wedded in stone to two weeks, but what we say is that there needs to be a proportionate and reasonable adjustment to the start date to take account of these difficulties. That is because they do cause prejudice to us.

On the other side of this sort of application, there is always the question, "Okay, you say this, and these are your reasons, but is the other side prejudiced?" In this case that is an easy question to answer, because there has been no hint of a suggestion that there is prejudice on the other side from a reasonable and short postponement of the start date of the trial. Nobody has suggested that, there is no evidence to that effect, there are no submissions to that effect. It would be a difficult submission to make, lest it suddenly appears now in response to my application, because, of course, this is a case in which there is a cross-undertaking. If there is a week or two postponement to the start date my learned friend's client is protected in any event by the cross-undertaking. We are not seeking to reopen the fortification application, or anything like that.

It is interesting, sir, that in this regard back in, I think, July, when we first had the argument about when to list, the candidates were early February - not necessarily the 3rd, that was a date that was chosen by the President as a fixed date - or later in February or later in March. In fact, it was my learned friend's team that was saying at that point, "No, it cannot be the earlier point, we think we need more time", and in fact at that stage they were saying later in March. So not only is there no prejudice from the delay advanced now, but it comes against the background that only a couple of months ago they were saying it should be later in any event. We are not saying move it from 3rd February to 30th March, or anything like that, what we are saying is, please can reasonable and proportionate account be taken of the difficulties that have been created not of our making on a very consistent basis. That is how I advance the application.

There is only one other point to make, that my learned friend, for reasons best known to himself, in the skeleton argument made some entirely superfluous comment about my availability. On a personal level, I am faintly touched that there should be concern over my workload, and I am obviously very impressed that they should be keeping tabs on my workload in January. Be that as it may, it is a very odd remark, and we do not advance and we do not rely upon my other work commitments in any way, shape or form. I might just as well say, equally irrelevant, maybe they do not want to move back because they have got commitments in March. It is a hopeless submission. If the Tribunal is at all interested, in fact, moving the trial does cause other professional difficulties. It is a fact of life at the Bar, as you well know, sir, if there are difficulties and prejudice is caused, which is why I make the application, if it succeeds I will have to deal with my other clients as best I can. That is something that I have to live with. So it is an irrelevance.

Those are the reasons why we respectfully contend that there should be a short postponement of the start date to take account of these many difficulties.

THE CHAIRMAN: Thank you.

MR. MACLEAN: Sir, if Mr. Harris was a litigant in person in the small claims court facing a trial there, this piece of paper would be a fragile basis for applying for an adjournment of the trial. He is not a litigant in person in the small claims court, he is leading counsel for a major company of estate agents, instructed by Quinn Emanuel, with a budget approved by Mr. Justice Roth, the President, cut down from the astronomical figure that was advanced - and you do not perhaps need to turn it up, it is number B, tab 20, which is the President's judgment on the costs management, which approved the reduced estimate of future costs for trial preparation, trial and the PTR combined of well over £1 million. The idea that these documents, given supplemental disclosure, and there has been supplemental disclosure on the other side, is a basis for adjourning the trial is, with respect, pathetic.

Today's events have led not only to the disclosure of these further documents by my clients, but also the important, or perhaps potentially important, disclosure that is to be given in relation to the Glasgow data which we have been told we will get next Wednesday. We will have to cope with that.

If any of the disclosure which is given late on any side gives rise to points of factual evidence that genuinely require further factual evidence to be given, then no doubt one party or the other, or both, will make applications, and if they can show that the evidence could not have been given at an earlier stage and it is all the other side's fault for disclosing something late, then no doubt that application will fall on fertile ground. If they cannot, no

doubt it will fall on stony ground. As I say, the idea that this document and the events of today, when Mr. Harris's applications have mostly failed, provides ground for adjourning the trial is, with respect, risible.

MR. HARRIS: Unless I can assist further.

THE CHAIRMAN: Thank you both very much.

It is in the nature of expedited hearings that they involve an enormous amount of work, and it is also in the nature of expedited hearings that one factors into the trial timetable and the estimate of timetable to trial matters such as additional documents coming out, and further work of an unexpected nature that has to be done in the course of preparing. This is heavy litigation. Both sides have got significant legal teams. I can see no reason to change the trial date from that which is set, and it does seem to me that even if one is seeking - and I will use the word 'adjourn' rather than 'postpone' - an adjournment of 14 days or less, it is nevertheless important, not least for the organisational purposes of the Tribunal, that those dates be met unless there is a very compelling reason otherwise, and there is not in these circumstances.

I quite appreciate what you say about the burdens of preparing, which I do understand, but, Mr. Harris, I am afraid the application is refused.

MR. HARRIS: Thank you, sir. We have now got the question - perhaps I can take two easy ones - of transcription. I think it is agreed between these parties - between Gascoigne Halman and the claimant company - that there be LiveNote transcription. I am not entirely sure of the position of Moginie James on the question of LiveNote transcription and the costs thereof.

THE CHAIRMAN: I do not know if you can assist?

MR. YAPP: It is not a point on which I have instructions, and I apologise. I suspect that we may well seek some form of same day transcription as opposed to LiveNote, but may I come back on that?

THE CHAIRMAN: Of course, we will leave it there.

MR. HARRIS: Then only aspects of bundles, it is rather mundane, I believe there is agreement that there should be principally hard copy bundles, but that there will be available an electronic bundle as well, both to the Tribunal and to anyone who wants to use it. I expect I will be using hard copy mostly, but it may be that I am a bit of Luddite.

THE CHAIRMAN: No, I find for cross-examination that hard copy is probably preferable to electronic. Speaking for myself, an electronic version in addition to a paper version would be of assistance.

MR. HARRIS: Yes, sir, I think that is agreed.

MR. MACLEAN: Yes, I believe so. I agree about the hard copy. From my point of view I am still in the 19th century!

THE CHAIRMAN: In terms of trial timetable and hot-tubbing, perhaps I could just give you an indication: my inclination is that hot-tubbing could be of assistance in this case. I am slightly hampered by the fact that I do not know exactly who the wing members will be for the trial. One of the factors that does seem to me to be relevant is whether or not there is an economist on the panel, which might make hot-tubbing rather more straightforward than otherwise. I have skimmed through the expert reports and it does seem to me that even if there were not an economist it would be something that would be beneficial. I wonder if these are all matters that the parties could perhaps put in writing, a set of agreed proposals, and we could then correspond with a view to making, if necessary, an order in the New Year as to how things are going, rather than making an order now.

That could equally include, for instance, the organisation of the bundles for trial. I am very conscious of the time, and it does seem to me that these are matters that perhaps could be set out in correspondence in the next few days, and we could reach a view fairly quickly. I do not know how that strikes the parties?

MR. HARRIS: Sir, is the suggestion that we try to reach an agreed trial timetable within the 12 days?

THE CHAIRMAN: Yes.

MR. HARRIS: And that we try to reach a consensus on what it should look like?

THE CHAIRMAN: Certainly, if there is to be hot-tubbing, there needs to be some form of mutual agenda as to the questioning topics that are approached. Perhaps I could get an indication of the parties' views at the moment? Is anyone against hot-tubbing as a matter of principle?

MR. HARRIS: I do not believe there is much between my learned friend and me as regards how to use the 12 days.

MR. MACLEAN: I think there might be. Hot-tubbing, in principle, we rather suspect it is a good idea, so we respectfully agree with what you have said, sir. We think it would be beneficial, fairly obviously, if one of the wing members was an economist. It might not be the end of the world if it was not, but it would be beneficial. So far as the hot-tubbing, and so on, is concerned, we are content to deal with that.

If Mr. Harris is about to say that there is not much between us on the timetable, it does not look as if there is, but there are one or two important points between us. I can deal with the

matter now, if that is convenient. The President, in bundle B, tab 5, made quite precise provisions for the trial. That is the small bundle. At para.21 he said that there should be a trial commencing on Friday, 3rd February, to be completed by Monday, 20th February - that is 12 days - including an interval of two days for the preparation and one day for the reading of written closing submissions. We always thought that was an excellent idea, and we still do. We have set out in our skeleton argument a proposal for how that time should be divided up. There is not a huge amount between Mr. Harris about how the time should be divided up, but can I show you what it is? I know the Tribunal is not going to rule about this now, but I do not want the Tribunal to leave here thinking this is basically all agreed because it is not. In para.32 of our skeleton we suggest the first day, Friday, is for openings. It is agreed by Mr. Harris and myself, and I think also Moginie James, that they are, in effect, the claimants in terms of witnesses, and so on, for the hearing. So their witnesses will go first.

THE CHAIRMAN: That seems sensible. Mr. Harris, is that agreed?

MR. MACLEAN: Mr. Harris agrees with that.

MR. HARRIS: Yes, it is agreed.

MR. MACLEAN: So we propose the factual witnesses for the claimants first over two days, and then our witnesses will be two days.

One of the differences between Mr. Harris and me, if you look at para.38 of his skeleton argument, is that he is proposing six days for factual evidence, and he has done away completely with two of - I do not want to use the phrase ‘free days’, because they certainly will not be free days - the three days that the President set aside, two for writing and one for reading, for closing submissions. On Mr. Harris’s proposal, it is not at all clear that the preparation of closing for his day 10 will be written at all. For our part, sir, and having had regard to the factual evidence which we have on this side, we will not need three days to cross-examine the defendants’ witnesses, we just will not, two will be sufficient, perhaps even ample. We find it hard to believe that the other side will need three days for cross-examining Mr. Springett, Mr. Wyatt, and Mr. Simons - it says Mr. Staggs, but that is a mistake. We, for our part, cannot see that three days is going to be necessary for the factual evidence.

We propose four days, as you see from para.32, for the factual evidence, then moving on to the experts, with a one day hot-tub on Friday of the first full week, and then a second day of three part cross-examination of the experts the following Monday. Then the President’s three days, which we do respectfully suggest were a very good idea at the time, and still are.

That then brings us to closing submissions, and this is the other point of departure. I am sure that this is simply a slip by Mr. Harris in his skeleton, but having conceded rightly that his clients are, in effect, claimants for these purposes, that his witnesses go first, he suggests that the claimants would be going first in oral closings with the defendants to follow. Of course, that is not right, that is not the practice in this Tribunal, it is the other way around. It would be Mr. Harris and Moginie James to make their closing submissions, then me to follow, with points in reply from Mr. Harris. That would be the usual approach.

MR. HARRIS: Yes, I accept that, that is a typo.

MR. MACLEAN: I am grateful for that. He has made me smile! What is then between us is----

THE CHAIRMAN: Reading and preparation days?

MR. MACLEAN: -- do we need six days of factual evidence, to which my emphatic answer is no. What has happened to the President's three days, which are an excellent idea? The answer is that Mr. Harris has effectively used them for factual evidence, and it is going to be necessary. With respect, the President's timetable is much to be preferred. Were I to be in your shoes, I would have thought it might be in the interests of the Tribunal if the parties were to spend two days preparing their closing submissions and the Tribunal has time to read them. The closing submissions would then be prepared and presented to the Tribunal on an informed basis and the Tribunal is able to test the advocates with the points that are troubling the Tribunal.

THE CHAIRMAN: That does make life much easier, but on the other hand if you are telling me, Mr. Harris, that it is simply not possible to deal with the cross-examination of factual witnesses in the times envisaged in para.32, then obviously I need to hear you on that.

MR. HARRIS: I am grateful to my learned friend for his exposition. We do not have a crystal ball. It strikes me, experienced in these matters, that four days for four witnesses from GHL's side and three witnesses from the claimant company side, when there are multiple witness statements and voluminous exhibits for a lot of them, is just too tight. There is a difference between us. We have said six days, and they say four. One does not know precisely, sir, but four days, with respect, we say is just too tight. You said earlier that you understandably have not had the opportunity, but there is a lot in, for example, Mr. Springett's fifth and sixth witness statements, there is a lot of Mr. Notley's original witness statement, and then he has done a reply. There is a lot in Mr. Livesey's. There is a lot of material there.

I am content, if Mr. Maclean wants to say, "I definitely will not be taking more than two days", that is what he submitted a moment ago----

THE CHAIRMAN: Yes, he did.

MR. HARRIS: If he wants to write that into the timetable, that is fine, but I would respectfully contend that it is only sensible for there to be potentially a longer amount of time set aside for factual witness evidence, including my cross-examination of their witnesses.

THE CHAIRMAN: I think the key question is how long are you going to be with the claimant's witnesses - that is really the question, is it not?

MR. HARRIS: It is, although what sometimes advocates do, and I have been guilty of doing this myself, is say, "I am only going to need three hours for so and so", and then they forget that there could be another, say, hour of re-examination. I am not saying there will be, but it often gets overlooked, and I have this terrible feeling that if we constrain the timetable to a maximum of four days for that many witnesses it will just prove not to be enough. I do not know about you, sir, but my universal experience of witnesses is that they always take longer than you think they will take - always. I cannot conceive of any trial that I have been involved in where there have been seven witnesses, including multiple statements on lots of topics----

MR. MACLEAN: Nine witnesses.

MR. HARRIS: Leaving aside the experts----

THE CHAIRMAN: We are just talking factual witnesses here.

MR. HARRIS: Yes, but there is a relevant point about Moginie James that I am about to make. I just cannot conceive of it being done. It would be great if it could, but I have got to be as realistic as I can based on my experience, and I do not think that is realistic.

THE CHAIRMAN: In my experience, the witnesses either go dramatically shorter or dramatically longer, and you can never predict which way it is going to go but it all comes out in the wash. I appreciate, of course, that is something which you would not appreciate making as a submission if they all go long.

MR. HARRIS: There is also Moginie James to be factored in. I venture to suspect, and I certainly do not want to tread on Mr. Maclean's toes if this is not correct for him, that perhaps there has not been factoring in of the fact that Moginie James are involved in this trial, and they need to be able to cross-examine and re-examine. Bearing that in mind, we think that four days is just too tight, not a sensible course.

THE CHAIRMAN: I am very conscious that Mr. Hall is not here. As I indicated at the outset, I am not going to make any order regarding timetable. What I suggest is that all the parties consider rather more carefully the points they have to put. Obviously you will be doing that in the run-up to trial. Can I suggest that you confer on a more granular timetable - in other

words, you try the impossible and actually give times for each witness. That will concentrate the mind a little bit.

We will also, on the Tribunal's part, be reading in ourselves, so it may be that we can approach the matter that way. Perhaps I could invite you, Mr. Harris, and Gordon Dadds, if I can address you, sir, to give some greater thought as to exactly how long you will need. Mr. Maclean, perhaps you can think whether your two days is correct or whether you want to move away from that, and seek to get a little bit more of a precise timetable, and we can deal with the matter in correspondence. I am not going to make any orders regarding trial timetable today.

MR. MACLEAN: Yes, sir. I think what I am hearing from the Tribunal is that, in principle, the Tribunal thinks that the preferred structure of the preparation of written closings and some time to read them before delivery of closing submissions is a good one, if that can be accommodated?

THE CHAIRMAN: Yes. Can I say this: why do we not proceed on the basis that nothing is set in stone but that, *prima facie*, what the President suggested is the template, and you tinker with that with reasons, rather than reinvent the wheel. So if we proceed on the basis of your para.32, but I am very conscious that I do not want anyone unnecessarily cut short. I know you will all be as efficient as you can, but if the view is that the defendants' cross-examination cannot be done in two days, then that is obviously a matter that I will take into account.

MR. HARRIS: Sir, yes, I am quite happy with that. I would simply suggest that, in the usual way, ordering of the trial is quintessentially a matter for you and your wing colleagues. It is appropriate to have the President identify at a much earlier stage that it might be desirable to have this and it might be desirable, but it is a matter for you, sir.

THE CHAIRMAN: I quite appreciate that.

MR. HARRIS: It may be that if it is still thought desirable to have two complete non-sitting days and then a third non-sitting day to read that which has been produced by the advocates in the two non-sitting days, then it may mean that the trial is 13 days, not 12. I am just saying that there needs to be a degree of realism here.

THE CHAIRMAN: I agree, Mr. Harris, I think that is a point well made.

MR. HARRIS: The last point then, sir, is the issue of hot-tubbing. We agree with you this far, sir, which is that I do not think we can sensibly make any direction now. We can think about it further. I would just like to flag up two issues that concerns us to some degree. The first is, we are acutely conscious that hot-tubbing can have benefits but it is an

enormous workload upon the Tribunal. That is, of course, a matter for the Tribunal to assess, whether or not it wants to take on that workload, but it cannot sensibly replace the sort of forensic adversarial litigation which is designed ultimately to get at the root points unless there has been a prodigious input. It can be very back-breaking. We simply identify that.

The other point, sir, is that, as we identify in our skeleton argument, there is a curious mismatch between the expert evidence as adduced so far. Mr. Bishop, who appears as the expert on behalf of the claimant, does not address key parts of my learned friend's case, namely, objective justification and exemption. That is fine, they do not have to run a case on either of those two points supported by expert evidence. They have obviously chosen not to do so. This comes against the background, sir, of a costs management hearing in, I believe, September that Mr. Woolfe attended where the President specifically said that he anticipated that the claimant's expert would be addressing these matters. Yet, notwithstanding that, and notwithstanding the issues on the pleading, and notwithstanding their case in both the particulars and the reply, they have chosen not to do so. Fine. What would be most unfortunate, and we say that we would strongly resist, is any suggestion that there can now be the adducing of evidence that they have deliberately chosen not to do on those two central parts of their case with their expert. The reason that that is relevant, sir, to hot-tubbing is that it would be most unfair, in our respectful submission, for there to be the opportunity for Mr. Bishop, because this is Tribunal led, there might be a Tribunal process of questioning, to be able to advance topics that he has not addressed, and has chosen not to address. Our expert has addressed what he has chosen to address. Plainly he does not advance a case on exemption or objective justification. The point is what we cannot allow, because it is Tribunal led rather than party led, there to be additional scope for expert evidence to come in that they have chosen not to put in.

We cannot resolve that now, but we just want to make it perfectly clear that that is a choice that they have made, and it cannot be slipped around now by some other method of dealing with experts.

THE CHAIRMAN: Yes, I understand. I think one of the points - I am sorry, Mr. Maclean, do you want to say something?

MR. MACLEAN: Not unless the Tribunal wishes me to. Mr. Harris's indefatigability has my utter admiration. He is now objecting to a report that is going to be produced on 9th January next year. I do not want to say anything unless the Tribunal wishes to hear from me.

THE CHAIRMAN: No, I do not think I need anything further. What I was going to make a point on was the joint statements which are due on 20th January. I wonder if Mr. George could hand round an order that was made on 17th November in the *Generics (UK) v CMA* litigation, which I was minded to make in this case, regarding how the joint statements should be compiled. (Same handed)

I am really looking at paras.7 and 8 of the order. It seemed to me that this was a very sensible way of setting out what would assist the Tribunal in terms of how the joint statement should be structured and what it should address.

MR. MACLEAN: Sir, for our part, we respectfully entirely agree with that. It is something that one sees also in the Commercial Court, and it is a useful----

THE CHAIRMAN: It is becoming fairly standard, but I would be minded, unless anyone objects, in the terms of paras.7 and 8 of this order.

MR. HARRIS: We are entirely content with that, sir.

THE CHAIRMAN: I am very grateful to the parties, thank you. In that case, we will leave it there for today, and if the parties can liaise on timetable that will be helpful. What I will do for my part is review in rather greater detail than I have done the material that has been filed so far, and the Tribunal will write to the parties with a view to hot-tubbing and what view we have reached. It will not naturally be a final view. I would invite submissions back. We will give a fairly strong indication as to what we would hope to do.

MR. HARRIS: I am grateful, sir, and that leaves only what I have described earlier as a 'postscript', which is the final matter in my skeleton argument. It is not a live matter for today, but I have been instructed to bring it to the Tribunal's attention, which is that there were cost management provisions effectively imposed upon us. We do not take issue with the fact that they have been. That is a battle that has been had. There were various bases upon which it was said that budgets that we had proposed for various items were too high, and that is why they needed to be managed down. They were, number one, PTR today; and number two, expert evidence.

The PTR has turned out to be every bit of what we predicted, and nothing like what was suggested it would be on the other side, and yet our budget was substantially brought down. I simply flag that because, of course, my solicitors are understandably concerned that we had predicted, and then with some degree of crystal ball gazing at an earlier stage the Tribunal said, "I do not think that will happen". It has now happened. That might require a revisiting. The reason I raise it now is because probably it will need to be revisited before the trial starts. I am not sure, but I am willing to look into this and will stand corrected,

whether these things can all be revisited after the event when the trial is completed. I simply flag that up.

The other one is the expert's report, and it is germane to what I submitted a moment ago, which is that it was said back at the costs management hearing, "Well, your budget for your expert, you, GHL, is way too high, look at the budget for Mr. Bishop, it is a lot lower, they are going to be doing a similar amount of work, therefore you, GHL, must have your budget substantially reduced". We can see from this file, sir, E1.4.4, you just need to open it----

THE CHAIRMAN: Yes, I see that.

MR. HARRIS: A very much greater degree of analysis and work was conducted by Mr. Parker. Critically at the costs management where it was said by the learned President, "It is going to be more or less the same, including because I anticipate that Mr. Bishop for the claimant company is going to be addressing objective justification", that was not corrected, and he has not done it. It was a false prognostication that there was going to be a similar amount of work and yet we have been capped as a result.

I have been asked to draw those matters to the Tribunal's attention because it seems likely that there will be a need to revisit some aspects of costs management in due course.

THE CHAIRMAN: Thank you for drawing it to my attention. I do not propose to say anything at all. Mr. Maclean, if you wish to say anything, by all means do.

MR. MACLEAN: I do not want to say anything about that, but there is one matter which Mr. Harris has not mentioned, which is the costs of the PTR. Mr. Harris's skeleton argument proceeds on the basis that he was going to be applying for a costs order against my client, but he, wisely, if I may say so, has not mentioned the point. In my respectful submission, if one looks at what has happened today in terms of win, lose or score draw, Mr. Harris has not chalked up very many wins at all, if any. Perhaps the bricks and mortar was the high water mark of his applications, whereas my clients were successful in relation to the applications vis-à-vis Mr. Glasgow. The position on Mr. Livesey turned out to be a bit of a score draw. So was the position on the OOP Rule, because Mr. Harris pressed his application in relation to the sales agents. He did not succeed in relation to the finance material. He did not succeed in particular in adjourning the trial, and the position on confidentiality was a bit of a nil-nil draw.

In all of those circumstances, although our submission is that this PTR was always going to happen in any event so some money was going to have to be spent, Mr. Harris has just made the very submission that I was about to make, which is that had it not been for all these applications, most of which Mr. Harris lost, on his own applications, and he failed to

resist my applications, it would have been a much shorter and a simpler experience of a couple of hours rather than the marathon that we have today.

In those circumstances, although one is extremely tempted to suggest that my clients should have an immediate costs order in their favour as a result of some of this, the submission that I do make is that the appropriate order, taking a step back and looking at it as a whole, is that the costs of and occasioned by the PTR and the applications made at it should be the claimant's costs in the cause.

THE CHAIRMAN: Mr. Harris?

MR. HARRIS: Sir, it is an unrealistic application. This is a PTR where we are here in any event for a whole series of reasons that are standard. As my learned friend, himself, has said, there have been score draws or no draw, or however he wants to put it, nil-nil. The Tribunal has dealt with things in a responsible and sensible manner by not making orders in certain circumstances, and a lot of things, if you like, have come out in the wash. Of course, the key point that my learned friend fails to draw back to the court's attention is that there has been concession after concession after concession in the face of our application. So the fact that there has not been a need to actually fight them out today has only been because we made the application and prior to today they have been conceded. Then there were further concessions today.

So, in the scheme of things, sir, the sensible order is just that costs be in the case of the whole PTR.

MR. MACLEAN: The reason that one makes concessions, or addresses or considers one's position, before a hearing is so that when one gets to the hearing one has one's tackle in the best order. One then has to decide whether to press ones applications or not. We needed to press two applications which were respectively a win and a score draw. Mr. Harris came to court pressing all sorts of applications that he really ought to have thought better of before he got here, and he only succeeded on one of them and lost on all the others. If anything, he might think that it is rather generous for an immediate costs order, and I maintain the submission that the appropriate order is the claimant's costs in the case.

THE CHAIRMAN: As you said, Mr. Maclean, the parties did have to be here in any event. This has been a very helpful introduction to the case for me. Costs in the case.

MR. MACLEAN: Finally, and I am sure I speak for Mr. Harris, the Tribunal's indefatigability is also to be wondered at and appreciated, and we are very grateful to you sitting so extraordinarily late.

THE CHAIRMAN: Thank you very much.

MR. HARRIS: Sir, indulging me with your great patience has been most appreciated.

THE CHAIRMAN: Thank you all very much.

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