IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1342/5/7/20

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Hybrid Hearing)

Friday 6th November 2020

Before:
The Honourable Mr Justice Roth
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Sportradar AG and Another

-v-

Football DataCo Limited and Others

A P P E A R AN C E S

Ronit Kreisberger QC, Alistair Lindsay and Ciar McAndrew (On behalf of Sportradar AG and Sportradar UK Limited)
Kassie Smith QC and Thomas Sebastian (On behalf of Football Data Co Limited)
Tom De La Mare QC and Timothy Lau (On behalf of Betgenius Limited and Genius Sports Group Limited)

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Friday, 6 November 2020

(10.30 am)

MR JUSTICE ROTH: Good morning everyone. This, as you know, is a remote hearing but it is, as you will appreciate, just as much a court hearing as if you were all here present in the Tribunal where I'm sitting.

I must start by explaining that a recording is being made of the proceedings in the usual way and a transcript will be produced and I must warn everyone participating in the hearing that it is a criminal offence to make any other audio or visual recording of the proceedings, that's a contempt of court punishable by up to two years imprisonment. So I have to give you that warning.

If at any time you lose connection, just send a message to the registry at the CAT or to the Referendaire you've been dealing with and we'll pause the proceedings until you've been able to rejoin us.

We will take a break mid-morning. As you know, that's our usual practice for the benefit of the transcribers, but I think it's particularly important for all of us in a remote hearing because everyone's experience is that these remote hearings are rather more tiring than being physically in the courtroom.

I've also seen that there are a number of confidential documents or confidential passages in documents. As documents as a whole I think they're mostly in annexures to the pleadings and it may be that no one will be referring to any of those.

As regards the pleadings, they are, I think, largely figures and, again, it may be that no reference is made to them but if anyone is referring to them, no doubt you'll be careful just to draw my attention to the paragraph where the figure is and not read it out.

Can I just in that regard mention, in the claim form, which I think is bundle 3A, this is a question just to clarify with Ms Kreisberger, if you go to pages 47, 48 and I think 49 in the claim form, that's the internal page numbering, you will see there are various figures, financial amounts that are all highlighted as confidential and similarly 48 and the top of 49.

On the next page, 50, there is a table, table 3, summary of Sportradar's damages claim, where some of the same figures appear. They're not highlighted in my copy, but I would assume they are intended to be marked confidential. Is that right?

MS KREISBERGER: Sir, I will double check that, but I would be grateful if we could work on that basis and I'm grateful to you, sir, for picking that up.

MR JUSTICE ROTH: I mean, they are some of the same figures that have appeared.

MS KREISBERGER: It must follow and I think that must be an omission on our part.

MR JUSTICE ROTH: So let's treat those figures equally as confidential.

MS KREISBERGER: I'm grateful.

MR JUSTICE ROTH: With that by way of introduction, I just thank you for your skeleton arguments, rather less skeletal in the case of the second and third defendants, I have to say, but I have read them all and I think it's for the first defendant, Ms Smith, it's your application.

Application by MS SMITH

MS SMITH: Thank you, sir. Good morning. I appear with Thomas Sebastian for FDC, Football Dataco Limited. Tom de la Mare QC and Tim Lau appear for Genius. Ronit Kreisberger QC, James Abrahams QC, Alistair Lindsay and Ciar McAndrew appear for Sportradar.

As you say, sir, this is FDC's application under Rule 71 of the Tribunal rules for the

transfer of these proceedings to the High Court so as to allow a Competition Law claim made under the section 47A of the Competition Act to be heard together with the counterclaims advanced by the defendants for breach of confidence and for unlawful means conspiracy.

It's common ground that the Tribunal doesn't have jurisdiction to hear those counterclaims, so if the claim and the counterclaims are to be heard together, it will have to be by the High Court.

Sportradar's position is that the Tribunal should hear the competition law claim first and separately from the counterclaims. The counterclaims should be issued in the High Court and stayed and then subsequently if necessary heard by the High Court.

Our submission in a nutshell is that it's normal practice for the court to hear claims and counterclaims together for very good reasons. Essentially it ensures consistency and efficient conduct of the proceedings and such reasons apply with force we say to the present case. There is no reason to depart from the normal approach where we say the issues arising on the claims and counterclaims are so very interlinked as they are in this case.

Unfortunately the inevitable result of that is that the proceedings will need to be transferred to the High Court.

In my submissions this morning, I propose to address three issues, sir, and they are the following. First, very briefly, the approach that should be taken to determine the appropriate forum in cases involving competition law. Secondly, and I'll concentrate my submissions on this, as it's the crux of the application I say, I will consider the question of whether or not resolution of the competition claim can determine the dispute between the parties and also the related point about the relationship, the inter-relationship, as a matter of

fact and law between the claim and the counterclaims. Then third and finally I will briefly finish by making one or two points in response to Sportradar's complaint it's being denied its choice of forum.

MR JUSTICE ROTH: Just before you start on that, given your introduction, can I clarify. If there were no counterclaim, then do you accept there would be no basis on which it would be reasonable to transfer?

MS SMITH: I'm not sure, my Lord, whether that would be -- we haven't considered that issue and we haven't made submissions on that basis.

MR JUSTICE ROTH: Well, you know, you haven't made submissions on it, that's why I'm asking you the question. It would be an orthodox competition claim under which you raise various defences involving a number of areas of law, which we get in response to competition claims, but we don't generally, the Tribunal, transfer a competition claim within section 47A just because it involves considering other areas of law.

MS SMITH: No, my Lord, and I take that point. The difficult issue is that the defences that we raise are competition law-based defences but the claim from the very beginning, and this is paragraphs, I think, 94 of the claim form, from the very beginning raised issues involving breach of private law rights. So I think it would have been almost impossible for this case to have proceeded without the counterclaims and in fact at the very beginning in response to the pre-action correspondence, our response was if you bring these claims we will be bringing counterclaims because the issues are so inextricably linked.

My Lord, I will just very quickly refer you to the paragraphs I'm thinking of in the claim form. I recall it's about paragraph 92/93 of the claim form.

Yes, paragraph 92 is about 102 and it's first in 101, their 101 claim, paragraph 82, which is at bundle 3A, tab 1, internal page numbering 39.

MR JUSTICE ROTH: Yes.

MS SMITH: Paragraph 82. And it goes on to make submissions on the terms and conditions of entry and make submissions that, insofar as they give effect to the exclusivity agreement, they are themselves unlawful. Then the same points are made under the 102 claim on internal page numbering page 44, paragraph 92 of the claim form and then 93 and 94 over the page.

So from the very beginning, even before we put in our defence, this case had issues of private law rights.

MR JUSTICE ROTH: What they're saying is it's not, they're saying they recognise the private law rights and they're saying but competition law overrides, or, forgive the expression, trumps the private law right. So it's not in dispute that there are private law rights. So it's a competition law point and you can say, well, it was always envisaged there will be a counterclaim. It doesn't follow from the claim form itself there will be a counterclaim. But simply on the claim form itself what I was asking is do you accept that in itself absent the counterclaim, would not be a basis for transfer and your case is, as I understood your opening remarks, it's based on the counterclaim, the fact that there is a counterclaim, and the nature of the counterclaim.

MS SMITH: My case is based on the counterclaim, because there is a counterclaim and I don't therefore need to say, well, if there weren't a counterclaim, this is what we would have done. But I do not think that I would accept that if there had not been a counterclaim but nevertheless there was -- had not been a counterclaim we would not have applied or transferred to the High Court. We may very well have reached the conclusion that, because of the issues of private law that arise, even on the case without the counterclaim, the High Court has a competition law jurisdiction. It also has judges who have

expertise of both competition law and intellectual property rights, pure property rights issues and we may in that case have said that this is one of those exceptional cases where you should not follow the guidance of the Court of Appeal, even in a case that is solely brought on the basis of section 47A and it doesn't involve counterclaims. So I don't think in that case we would necessarily have said that we would not still be making this application, my Lord, because --

MR JUSTICE ROTH: Yes.

MS SMITH: -- the High Court still has jurisdiction in competition law claims and it still does have jurisdiction in pure competition law claims. But in any event, my Lord, there are counterclaims, there have always been counterclaims and in the pre-action correspondence it was said that if you bring this claim, we will be bringing counterclaims. And this is a point and we may come back to, may not have time to come back to on the choice of fora, having --

MR JUSTICE ROTH: Well, I saw that from the skeletons, and more particularly the witness statements, that the claimant was told before the start of proceedings and so -- no, I have that point. I understand.

MS SMITH: I'm not sure I need to spend much time in that case on the approach that should be taken to determine the appropriate forum. Your Lordship is very well aware of the Court of Appeal's dicta in Sainsbury's v Mastercard and we would rely on paragraph 358 of the Court of Appeal's judgment, which says in cases that raise issues other than the competition law issues, which this case does because of its counterclaims, whether the competition issues should be heard by the CAT and the other issues heard by the High Court depends on consideration of the specific proceedings, such as how important and how easily separable from the other issues the competition issues are.

We say that the competition law and private law issues are so interrelated in this case that they need to be considered by the same court and that we are in the position more akin to that which was the position in the Unwired Planet case, where it was not practical to divide the case between two courts and, as Mr Justice Birss said in this case, it would be a recipe for confusion because the issues are so interrelated.

MR JUSTICE ROTH: Yes.

MS SMITH: And the other cases cited by Sportradar, the Fiat Trucks claims, the follow on claims, those claims involve only competition law claims.

So moving onto the second issue that I will address, the important issue. The capacity of the competition law claim to determine the dispute between the parties and the inter-relationship. Sportradar's position is set out, and if I might ask your Lordship to have a look at this, I think we're both working from the hard copy bundles. Bundle 1, tab 3, Sportradar's skeleton argument and at paragraph 27 of their skeleton argument, which is on bundle page number 65, Sportradar's case is that the terms and conditions and the ground regs are unlawful to the extent that they are relied on to implement the exclusivity in the FDC-Genius agreement. Their argument only is that it goes no further than saying if the FDC-Genius agreement is unlawful, then the terms in the ground regs and ticketing conditions which give effect to that agreement are also unlawful and unenforceable and those ground regs and ticket conditions to which Sportradar objects are identified in broad terms in its pleadings. For your note, for example, Sportradar's reply, paragraphs 12B and 13, which is found at -- I'm not going to take you to the file, but for the reference it's file 3B, tab 4, page 8.

Sportradar describes the restrictions in the ground regs and ticketing conditions to

which they object as being, and I quote, "restrictions on the unauthorised collection and dissemination of unofficial data by third parties". The specific terms on which we rely for our counterclaims are set out in our counterclaims. Your Lordship may have seen them. I don't know if you need me to take you to those.

MR JUSTICE ROTH: Well, I've read the counterclaim and I see the nature of the conditions you rely on.

MS SMITH: So the conditions -- yes.

MR JUSTICE ROTH: I mean, as I understand it, Sportradar's position is, if it fails to impugn the FDC-Genius agreement, so if its competition law claim on the agreement fails, then it accepts that the ticketing conditions and ground regulations are enforceable and you'll get your remedies under those provisions, which I think are the basis of the claim in trespass and contract. So I'll clarify it with Ms Kreisberger, but, as I understand it, they effectively accept that you'll then be entitled to judgment for breach of contract and trespass.

MS SMITH: Yes, well, I'll come back --

MR JUSTICE ROTH: And subject to, of course, assessment of damages, but that, as I understand it is the position. Let me just check -- just one moment, Ms Smith. Ms Kreisberger, is that correct?

MS KREISBERGER: Thank you, sir, that's -- sorry, there's feedback. That's precisely the position and I will develop that briefly in submissions. But that's exactly right.

MR JUSTICE ROTH: So, to be clear, there is some feedback. Ms Smith, can you mute for a moment. That might be the reason. Would it be right, therefore, that you would -- you may not deal with the scouts, the individual scouts, but

as far as your client is concerned, then consent to judgment for the breaches in contract and trespass for damages to be assessed.

MS KREISBERGER: That's correct.

MR JUSTICE ROTH: Yes.

MS KREISBERGER: Sir there is a different argument on confidence but we accept that the terms would bind, we accept that there are contractual rights and we accept that there are property rights and we accept that we will have been in breach of those rights if we're wrong that the terms violate competition law.

MR JUSTICE ROTH: Yes, that's what I thought.

MS KREISBERGER: Precisely as you said, sir, there will be questions on quantum.

MR JUSTICE ROTH: Thanks very much. And if you could now mute and we'll go back to Ms Smith.

MS SMITH: Yes, I would like to come to that, because I don't think the position is quite as simple as Ms Kreisberger suggests but --

MR JUSTICE ROTH: Well, her client has accepted, you can say maybe they shouldn't have, but they have accepted that you would be entitled to succeed. There's open acceptance on that point.

MS SMITH: Can I perhaps deal with my points in the order that I propose to deal with them, because I will come back to that. Statements have been made in correspondence and skeleton arguments but I'll come back to see how that fits with what the pleaded case and the pleaded defences that have actually been made by Sportradar in response to the counterclaims. But if I could first, before coming to the situation if Sportradar lose on their competition claim, address the position if they win, because we say, even if they win, this claim, the competition claim, should not be addressed in the absence of or in isolation from the private law counterclaims and I make that argument on the

following basis.

Sportradar's own counterfactual, which you will have seen from the pleadings, is that, even if they succeed in establishing that the exclusivity requirements of the FDC-Genius agreement are unlawful and unenforceable, the terms in the ground regulations and the ticketing conditions could still properly and lawfully have existed. Sportradar's counterfactual is set out in their claim form.

If I could take you to that, sir, at bundle 3A, tab 1, paragraph 73. That's internal page numbering, page 35.

MR JUSTICE ROTH: Yes.

MS SMITH: Now, in Sportradar's counterfactual world they say that the data would have been licensed on a non-exclusive basis and that FDC, we, would have been likely to adopt the licensing structure proposed in the original RFP, that is giving a non-exclusive three year grant of official provider and the appointment of (inaudible) providers. So a limited number of non-exclusive providers.

So in Sportradar's counter factual world, competition law has rendered the exclusivity provisions of the FDC-Genius agreement unenforceable but the terms and agreements in the ground regs and the ticket conditions still exist and need to still exist to exclude unauthorised scouts from the stadia.

MR JUSTICE ROTH: Yes.

MS SMITH: Now Sportradar appears to accept that would have been the case, that's the second part of paragraph 29 of their skeleton where, "the unlawful upstream restriction is removed the clubs are entitled to bar data operators without accreditation."

But they say -- well, they would not have barred us because we would have got a non-exclusive licence and that is indeed pleaded at paragraph 98 of their

claim form, which is on page 47, external page numbering 47 of the bundle.

They say, and totally unparticularised, paragraph 98, Sportradar would have been granted a licence to collate LLMD, which would have enabled it to create its own comprehensive database of the data.

We have denied, in paragraph 133 of our defence, which for your note is in bundle 3A, tab 2, paragraph 94, that they would have been granted such a licence. So in order to succeed in their competition claim to the extent that it knocks out our counterclaim as well, Sportradar have to succeed not only on their primary competition argument that the FDC-Genius agreement is unlawful and invalid but that the exclusivity arrangements are also unlawful because they would have acted so as to implement or would have been implementing the unlawful exclusivity.

The point is this, and it's a complex point. If Sportradar succeed in arguing that they would have got a licence in the counterfactual world, that does not retrospectively invalidate or extinguish the ground regulations and the ticketing conditions. An argument that the enforcement of a patent is anti-competitive does not extinguish the patent. What it does is give arguably the person who wants to use the patent and says they have been unlawfully excluded in an abusive way from using the patent, a right to a licence to that patent. It doesn't give them the right to breach the patent.

We say similarly, if Sportradar should have been given a licence in the counterfactual world, in the factual world they didn't have the right to go into the stadia and breach the terms and conditions because they didn't have a licence at the time.

The ground regulations are not invalidated by competition law. They existed in the factual.

Sportradar's competition claim only invalidates the provisions in the FDC-Genius agreement which are found to be in breach of article 101 or 102. Sportradar then have a claim for damages if they win for breach of competition law, calculated on the basis that in the counterfactual they would have got a licence, they say.

But we still have a claim for what happened in the factual.

Saying they would have had a licence for the purposes of calculating their competition law damages is not saying they had a licence in the factual.

They did in fact breach the ground regulations and ticketing continues and we have a claim against them for that and importantly we have a claim against them for what happened in the factual not just for damages but also a gain-based claim for an account of profits.

That, we say, is a different claim made on a different legal basis.

Now, it may very well be that Sportradar's claim, if they win, for competition law damages, should be set off against our claim for damages or an account of profits or the breach of the private law rights. But that set off cannot be done in the Tribunal, it can unfortunately only be done in the High Court.

Now, there may be arguments about what as a matter of intellectual law what the right approach is, but our approach will be that which I have outlined, that competition law does not in effect extinguish the patent, it gives you a claim for a licence and that argument can, I say, only be properly made in front of the High Court unfortunately because of the limited jurisdiction of the CAT.

Now, my Lord, certainly I would say it cannot be determined on this stage on a one day, three quarter day case management conference.

MR JUSTICE ROTH: Well, can I put two points to you arising from that. One in your favour. It seems to me that even if Sportradar wins on invalidating the

exclusive agreement, it doesn't necessarily follow that they succeed on their plea in paragraph 98. In other words they might show that the agreement was anti-competitive. They may have a claim, it depends how it would be analysed and it's not for today, it may be loss of a chance, it may be that they can say they probably would have got it, but they may not succeed on saying that they would have got a licence. It seems to me it's not inconceivable by any means that they win on condemning the agreement, but they don't persuade anyone that they would have been successful on a proper tender. So it may be they don't even establish they would have got a licence, you would say all the more so your counterclaim -- you're muted.

MS SMITH: I'm muted. That's absolutely the case, that this is a case of step by step. First, they have to establish that the FDC-Genius exclusivity provisions are unlawful. Second, they have to establish that they would have got a licence and, even -- so we may get to the position where we've had a full competition law case, a full competition law argument with all the expert evidence, but they have not got to establish they would have got a licence. But even if they established that they would have got a licence, we then come against the argument, the next stage argument which I have outlined, which is that that does not necessarily mean that our claim for what happened in the factual is extinguished.

MR JUSTICE ROTH: I understand that second point. So what they say, as I understand it, their case is that if the exclusivity was unlawful, then insofar as you are relying on private law rights to exclude their people from collecting this data in the grounds, in the football grounds, that is in itself -- you're not permitted to do that by reason of competition. So they say, I don't think they're saying the ground regulations as such are invalid. Some of the

allegations are a bit ambiguous, but that's not the way I read it. They're saying that if there is an unlawful exclusivity then to rely on private law rights to enforce that unlawful exclusivity is itself anti-competitive. So there is a competition law issue, a fundamental competition law issue. Now, you may say that's wrong. I mean, you do say it's wrong. And maybe you'll succeed in saying it's wrong. But it's a question under competition law as to whether you're correct in saying it remains fully enforceable and the patent analogy applies or whether under competition law you can't rely on it, and that's something that's got to be decided. That's the issue between the parties and it seems to me it's an issue of competition law.

MS SMITH: Well, my Lord, it might be, but we say the point is that, even before we get there, they are not saying, I don't think, that the ground regs and ticketing conditions could not be used to enforce the private law rights against unlicensed data operators.

So if they had been an unlicensed data operator, if they couldn't have got a licence, we could have used our private law rights against then, even on Sportradar's case. But we say, and we go to the next stage which I've outlined, even if they had been a licensed operator we still have a claim against them for what happened in the factual and such claims may be offset against each other but -- they may be offset against each other by the CAT.

The situation is made more complex because the FDC-Genius agreement actually contains two distinct forms of exclusivity. First of all it gives Genius the exclusive right to the collect and collate data. Secondly it gives Genius an exclusive right, subject to the secondary supplier agreement, an exclusive right to supply the data, and those are two different restrictions, each of which operate in a different way and each of which may have a different effect on

competition in potentially different markets.

Now, we've pleaded a case, our defence, separately as regards each of those forms of exclusivity. That's in our defence, bundle 3A, tab 2, external page numbering 64 to 83. Paragraph 97 of our defence, page 83 and you'll have seen we have different arguments to make as regards the exclusive right to collect and collate, it was subject to competitive tendering exercise, giving rise to efficiencies, is justified, does not restrict competition and different arguments made in paragraph 97B as regards the exclusive right to supply, and that right is subject to a secondary supplier agreement.

So different restrictions operating in different markets and one can imagine for example that Sportradar succeeds in its challenge to the grant of the exclusive right to supply the data but it doesn't succeed in its challenge to the grant of the exclusive right to collect the data.

Now, in such a situation this case would not be resolved in my submission. Sportradar would not be satisfied, or I ask the question would Sportradar be satisfied with being denied access to the stadia so it can't put together its own database, simply on the basis that it would get a sub licence for the data collected by Genius?

Now Sportradar hasn't addressed that point, even though it was raised in my skeleton and in Ms Hoy's first witness statement.

Given the emphasis in its pleading on wanting and needing the ability to put together its own database, for which its scouts must get access to the data, it seems unlikely in the extreme that Sportradar would be satisfied with such a result.

So again we can have a full trial of the competition law issues and still no resolution of the dispute between the parties.

So that's what happens if there's sort of semi-resolution of the issues. What

happens if Sportradar loses its competition claim entirely? And, sir, this is what you just raised with Ms Kreisberger. They say, because of the assurance that's been given on the face of the skeleton and in correspondence, that we don't need to worry. They stop putting their scouts into the stadia and we could simply go and get damages in the High Court for past breaches.

Now, we make three points, my Lord, and these are important. Three important points as regards that assertion.

First, we say that such an informal assurance is not good enough in the context of these legal proceedings.

MR JUSTICE ROTH: When you say -- sorry to interrupt you -- when you say such an informal assurance, I mean, if it's conveyed into an undertaking and it's been said by counsel now in response to my question in open court, that if you say that's not good enough, if it becomes an undertaking on the part of the claimant, that would resolve that point, wouldn't it?

MS SMITH: I'm not sure it's quite that simple, because an undertaking as to what exactly. As Ms Hoy says --

MR JUSTICE ROTH: An undertaking in terms of what Ms Kreisberger has said, that if it fails, and it may be one has to be clear whether it fails on everything, but I think if it fails to impugn the agreement, then it will not contest your claim in trespass and contract.

MS SMITH: Well, my Lord, I just make the simple point that, if Sportradar is willing to give the undertaking to the court which is set out in the terms in Ms Hoy's first witness statement, paragraph 26 --

MR JUSTICE ROTH: Just a minute. Where's that?

MS SMITH: Paragraph 26. It's found in bundle 2, tab 3, page 11 --

MR JUSTICE ROTH: Bundle 2, tab 3. Sorry, page 11.

MS SMITH: Yes, paragraph 26. In order for the competition law to be determinative of the dispute between the parties, the claimants would need to undertake to submit to judgment on the counterclaim, to be a subject to court ordered injunction and to submit to an enquiry on account --

MR JUSTICE ROTH: They don't have to agree to what the remedy will be, but they will submit to judgment on liability and then you can argue in the High Court whether there should be an account or not or damages or not. But it's resolved the liability issue.

MS SMITH: If they give that undertaking, which they have not to date and in fact have said such relief is unnecessary in the correspondence, then that might deal with my first point. But it doesn't deal with my second and third points, which are these.

My second point is that Sportradar's assurance is inconsistent with its pleaded case in defence of the counterclaim.

Now, Ms Kreisberger was careful to say that they have a different argument on confidence. In fact Sportradar, in response to questions from your Lordship, she said we have a different argument on confidence, in fact Sportradar have pleaded pure private law defences to both the breach of confidence claim and counterclaim and the unlawful means conspiracy counterclaim, which are quite separate from and survive and are independent of their competition law defences and I do need to take your to their pleading in regards to that, sir.

If I can take you to bundle 3B. First, bundle 3B, tab 4.

MR JUSTICE ROTH: That's the reply.

MS SMITH: That's the reply and in paragraph 7, which starts on internal page numbering 4 and goes over the page, internal page numbering 5, at the top of

that page, it is denied that the data is either confidential or a trade secret on the following grounds. Subparagraph (a), it's denied there any confidentiality on the data, basically on the grounds that it's public.

MR JUSTICE ROTH: Yes.

MS SMITH: So the initial argument is this data isn't confidential anyway. Then further or alternatively they then set out in subparagraph (b) their competition law defence. But there is a prior defence that the data is not confidential.

MR JUSTICE ROTH: And that goes to the breach of confidence claim, not to the trespass or the contract?

MS SMITH: Well, no, my Lord, actually what the claim -- the counterclaims are is a counterclaim for unlawful means conspiracy.

MR JUSTICE ROTH: Yes.

MS SMITH: Because the ticketing agreements are between the clubs and the scouts and the land is owned by the clubs. So they are not pure counterclaims for breach of contract on trespass. They are unlawful means conspiracy --

MR JUSTICE ROTH: Yes, but what are the unlawful means?

MS SMITH: The unlawful means are entering into a conspiracy to breach the -- this is where we go on to the private law, where I get a little more shaky -- to engage in unlawful acts with a view to damaging the interests of FDC.

MR JUSTICE ROTH: Yes, but the unlawful acts --

MS SMITH: And the unlawful acts themselves are -- so in order for FDC to make a claim there has to be a conspiracy -- well, there first of all has to be unlawful acts. Then there has to be a conspiracy and in order for FDC to bring its counterclaims there have to be unlawful acts and then there has to be the conspiracy. Sportradar's defence --

MR JUSTICE ROTH: Before you go to there, I'm trying to see what there has to be, as you say, unlawful acts. I mean, the unlawful acts I thought are breach of contract, trespass and breach of confidence.

MS SMITH: That's right.

MR JUSTICE ROTH: And you rely on all three.

MS SMITH: Yes, sir, that's right.

MR JUSTICE ROTH: So you will succeed on -- even if you don't get breach of confidence, you will succeed on your unlawful means conspiracy because you've got -- you don't need three separate unlawful means, you only need one.

MS SMITH: Well, sir, we may succeed in establishing trespass and/or breach of contract, we may, FDC --

MR JUSTICE ROTH: Yes.

MS SMITH: -- but we also need to establish a conspiracy and Sportradar's case is that there is no such conspiracy. If you look at their indicative defence to our counterclaim, which is at tab 5 of the bundle you've got open --

MR JUSTICE ROTH: Hm-mm.

MS SMITH: -- and you look at paragraph 17, which is on page 27 of the external page numbering, you'll see in paragraph 17 a number of arguments as to why they say the allegation of conspiracy is denied. Subparagraph (a) it is denied the activity of Sportradar and its scouts amount to a combination.

MR JUSTICE ROTH: Yes.

MS SMITH: (c), it's denied the scouts or Sportradar acted with the intention of causing damage.

MR JUSTICE ROTH: Yes.

MS SMITH: (d), over the page, it is denied, for the reasons given above, neither

Sportradar nor any of its scouts had knowledge that their acts were unlawful. So even if we establish the acts are unlawful, knowledge is denied. So there are three defences at least to the conspiracy claim which are still live even if Sportradar loses its claim on the FDC Genius agreement being unlawful. So we say there is still, on Sportradar's pleaded case, despite what they might say by way of assurance now separately, that is inconsistent with their pleaded case where there is still a forward looking dispute between the parties which needs to be determined by the High Court before the defendants, we, can succeed on our counterclaim.

MR JUSTICE ROTH: Yes.

MS SMITH: So even leaving that to one side, simply saying, well, as Sportradar blithely says in paragraph 30 of its skeleton any claims of damage in respect of Sportradar's past conduct can be dealt with subsequently, obviously those counterclaims will need to be considered by the High Court, cannot be dealt with by the CAT, and my Lord, it's not simply going to be a question of the High Court doing some sums, the court will need to consider what unlawful behaviour was as a matter of fact engaged in by Sportradar and its scouts in order to establish the claim for damages, what unlawful behaviour was actually committed, when, on what occasions, with what effects, how many times, when it --

MR JUSTICE ROTH: Well, that's part of the working out of the quantum, I suppose. I agree, we have to do that.

MS SMITH: But it will be not far off a full trial of the private law counterclaims because you will have to establish, as a matter of fact, exactly what happened when, how, and with what effect. So just saying that that can be dealt with subsequently, it's not going to be a simple matter of doing some sums.

So we say, what I've said, is there's no such thing in this case as a clear win or a clear clean win or a clean lose for Sportradar in its competition claim. The Tribunal cannot be satisfied that either outcome will lead to a clear or final resolution of the dispute between the parties.

It's not sensible nor efficient for the Tribunal to seek the separate the competition claim -- to seek to separate the competition law from the counterclaims and to try that claim first. We say that we can't engage in a piece of scalpel-like dissection to pull the competition law claim out of the counterclaims, it's impossible we say, or at the very least highly impracticable for the court to try to separate the competition law claim from the private law counterclaims. It's not an easy matter and I would like, because they are inextricably linked as a matter of fact and law and these are further points which I have to make.

Now, Sportradar assert that there are private law rights, this is paragraph 32 of its skeleton. Yes, they say there are private law rights in this case, but the nature and extent of those rights have no impact whatsoever on the competition law analysis and we say that's quite simply wrong. It fails to take account of how competition law works. It's also inconsistent with their pleaded case and I make three points in that regard.

MR JUSTICE ROTH: Suppose you're right on that and it may have an impact on the competition analysis. I mean, if you're right, and, as I say, assuming you're right for the moment, then that will be a matter that would be determined in dealing with the competition law issue. You would say, well, what Sportradar says is not right because of these private law rights and they affect the competition analysis and Sportradar says, no, it doesn't and as a matter of competition law the court, to use a neutral term, will have to decide that and it will have to be decided whether it's the High Court or the CAT.

MS SMITH: My Lord, yes, but we say, given that dealing with the competition law claim does not provide a clean, clear and final answer to the counterclaims, it must be correct, given the extensive overlap and the competition law and the counter law claims, it must be right that the claim -- it must be right and it must be efficient and it must be sensible that the claims and the counterclaims are addressed together because there will be raised substantially similar issues which are relevant not only to the claim but also to the counterclaims and it is just not sensible for them to be raised in front of the Tribunal and then to be raised again all over again with regard to the same evidence, similar evidence, same issues, in front of the High Court and the points are these, the three points I want to make are these.

I've shown you Sportradar's private law defences and counterclaims for breach of confidence on unlawful means conspiracy. What these appear to say is as follows. Sportradar argues its standalone private law defences to the counterclaims. Those standalone private law defences can only be determined or should most properly be determined in the High Court. There are questions of confidentiality, there are questions of whether there was conspiracy, there are questions of whether there was an awareness of unlawfulness. Those are private law issues which land outside the CAT's jurisdiction.

MR JUSTICE ROTH: Yes, I think that's -- I'm with you on that.

MS SMITH: Sportradar argues it has those defences and those defences exist regardless of what the position under competition law is as to the lawfulness or otherwise of the ticketing conditions.

MR JUSTICE ROTH: Yes.

MS SMITH: The consequence of that appears to be that Sportradar's case is that it

can send scouts into the stadia to collect the data and neither FDC nor Genius has any basis in private law to stop them. Now, if that's so, the grant of exclusivity under the FDC Genius agreement is frankly irrelevant. It certainly doesn't restrict competition because Sportradar argues that it lawfully sends its scouts into the stadia and, regardless of the exclusive rights afforded under the agreement to Genius, we have no basis, and Genius has no basis, to stop it from doing so.

Now, if that is correct. The competition law claim effectively falls away.

MR JUSTICE ROTH: Yes.

MS SMITH: The second point, and related, which is perhaps not so extreme, but is also very important, is the existence or otherwise of these private law rights is of central importance to Sportradar's competition law claim, particularly to its market definition.

Obviously in its case on market definition under article 102, in order to carry out its determination of the relevant market under 102 the court will obviously have to determine what substitutes are available for the FDC data which Genius is granted access under the agreement as defined. Now, you'll have seen from the pleadings that one issue is whether off tube data is a substitute for FDC data.

MR JUSTICE ROTH: Yes.

MS SMITH: And that's the data that comes along a few seconds after the goal is scored as a result of the match being screened on television.

Now, one question as to whether or not off tube data is a proper substitute for the FDC data is the question of latency. That is how long it takes for the goal to be broadcast on TV, because it takes seven seconds.

MR JUSTICE ROTH: Yes.

MS SMITH: If someone's in the stadia they can immediately send a message on their phone or iPad or whatever, saying a goal has been scored. It may take seven seconds for that be to on the television. Those issues are of central relevance to market definition. It's also of central relevance to the breach of confidence counterclaim. You've seen from Mr de la Mare's skeleton that the leading case on the breach of confidence is the Racing Partnership case and I think shortly after or shortly before our skeletons were drafted, the Court of Appeal handed down its judgment in the Racing Partnership case and the Court of Appeal held that the latency of the data in that case was one highly relevant issue to whether or not the data was confidential.

So that issue, that will need to be addressed in evidence, is an issue that's common to both the claim and the counterclaim and we say it should be considered by one court in one set of proceedings.

MR JUSTICE ROTH: Let me make sure I've understood that. You explain the definition issue and whether off tube data is substitutable, and I can see how that goes to latency, how latency's relevant to that, the question of market definition and that will be an evidential question. But to the confidence, you say the market definition is relevant to the confidence. I didn't quite follow you.

MS SMITH: The fact that as well as the data which in that case was granted under an agreement between Racing Partnership Limited and whoever they were -- it was similar to the situation that currently obtains as regards racing, there was an exclusive distributor who was allowed to be on the race course obtaining the data immediately. However, the races were also on the television.

MR JUSTICE ROTH: Yes.

MS SMITH: They said that the fact that the data, which is said in this case to be confidential, the fact that that data is almost simultaneously available on television is a factor which is of extreme importance to whether or not that data is actually confidential.

MR JUSTICE ROTH: Yes. Well, we can go to the case. Perhaps we should. I thought that the majority judgment said, given that it goes on television, the individual pieces of data are not confidential. The confidence, and I think it was Lord Justice Lewison, is in the compilation of the data and that they accepted irrespective of latency was confidential.

MS SMITH: I think so, but as I understood the extent of how much time effectively elapses between the data available on site and being available on television would be a factor going to whether it's confidential or not if it were a longer time lag. It may be -- I think in this case -- again I'll have to be guided by Genius, whose counsel were involved in that case, but in that case I think that there was quite a substantial seven second time lag or latency of seven seconds.

MR JUSTICE ROTH: Yes.

MS SMITH: Which, again, if it had been shorter, may not have made -- may have been an issue as to whether or not it was confidential. But in any event that issue is, we say, common.

I think there's also a related point which is based again on Sportradar's defences to the counterclaims which is if it's correct that we cannot legally prevent its scouts from going into the stadia, no private law claim (inaudible), arguably the data obtained by Sportradar and its scouts from inside the stadia is also a substitute for FDC data and should also be part of the market definition.

So, again, whether or not they are correct as a matter of private law again goes, we

say, to the market definition. Can we or can we not bar them from the grounds, the stadia? They say we cannot. If we cannot, it must be the case that the data they obtained from going into the stadia is part of the relevant market.

So, again, the issues of private law are very inexorably linked with say with the issues of competition law.

The third point is that, even if you move away from market definition, we say that the nature of the private law rights and the extent of the private law rights is relevant to the question of whether there exists an unlawful restriction or an abuse. Sportradar in this regard say the fact that their property rights were involved didn't prevent the court from finding an abuse in the Arriva the Shires case, nor did the fact that the clubs had private law rights preclude the application of competition law in the football broadcasting decisions. Well we're certainly not saying, and we never have said, that the existence of private law rights precludes the application of competition law. But we do say that the existence or otherwise of those rights will inform the way in which competition law applies, and the demands which competition law makes of a (inaudible) which has such rights and our pleaded case in that regard, I would like to take you to -- I know I'm running over the time --

MR JUSTICE ROTH: I accept what you say, that it may inform competition law, but the fact that you have those private law rights is not in dispute. So we don't need a trial of your counterclaim.

MS SMITH: Yes, my Lord, and that is what I have shown you. It is in dispute.

MR JUSTICE ROTH: No, what you've shown me is that there's dispute on the question of the legal requirements for conspiracy but not that there's any dispute that you have and that the stadia have private law proprietary rights,

that there are contractual rights, I mean, that's all common ground so -- if you'll just listen for a moment -- only the competition law argument will take place, having regard to your point as to whether, what effect do those private law rights have on the competition law analysis, as they do as private law rights often do in competition cases, as you know, when one has to consider, well, in the light of that, can this be anti-competitive? A refusal to supply is one of the clearest examples, where people can say, I have a right to control my own property and competition law shouldn't make me part with it if it I don't want to or admit someone to my port if I don't want to, and the whole essential facilities doctrine is in the light of to what degree should competition law interfere with private law rights. So, I mean, it's -- you're absolutely right in my view in saying the existence of the private law rights will inform the competition law analysis, but I don't quite see that at the moment as a reason that's relevant to the issue that I've got to decide today.

MS SMITH: Sir, if I may just make one point in that regard. There may be no defence to the underlying property law rights as regards trespass and contract and the contractual law rights.

MR JUSTICE ROTH: Yes.

MS SMITH: There is, however, a dispute as to whether or not the information is confidential in nature.

MR JUSTICE ROTH: Yes.

MS SMITH: And that is fundamentally to a private law issue. We say, and this is paragraph 122 of our defence and I'll just double check, we say, and I'll take you to the pleading and after I've made the general point, that the confidential nature of the data and the fact that it is incorporated in a database, to which attach database rights under the European Database Regulations, renders

this data akin to intellectual property, akin to copyright data or patents and that is our case at paragraph 123 of our defence, bundle 3A, tab 2, page number 91.

MR JUSTICE ROTH: Yes. Paragraph -- sorry, can you give me the paragraph number again?

MS SMITH: 123.

MR JUSTICE ROTH: Thank you.

Let me just look at it.

Yes, so 122 is saying database, trade secret and 123 is saying refusal to licence cannot save for exceptional circumstance constitute abuse, yes, and no exceptional circumstances here. Yes, I see.

MS SMITH: So we are saying and Sportradar will dispute that, but that is an issue that will be in the case, that we say confidential data protected by a database rights in a database should be treated as effectively an IP right. That gives rise to different issues and complicated issues both as regards the two different restrictions that are said to exist in this case. Fundamentally it is a question of who can be given the right to collect data and exclusive right to one person to collect the data and then it also goes to the issue of the supply of that data by the exclusive licensee, and we say that whether or not this is confidential data, which is in dispute by Sportradar, and then whether that confidential data should be dealt with as a quasi-IP right, IP issues giving rise to the test that is to be applied as a matter of competition law, are issues that are inextricably linked and also a question of efficiency. Are we really saying that these issues have to be analysed twice? First by the Tribunal in its competition law claim and secondly again by the High Court in any private law case.

MR JUSTICE ROTH: But the paragraph in 123, that doesn't arise outside the competition claim, does it?

MS SMITH: But it only arises if the material is confidential at all and Sportradar say the data is not confidential and --

MR JUSTICE ROTH: Well, I thought a database is slightly different from confidential information, isn't it? So it could be a database right without being confidential, I think.

Yes, so you say the issues of whether it's confidential would arise twice.

MS SMITH: It would arise twice and in fact it really -- whether or not it's confidential is not a question that the CAT can determine. It is a question that is outside the jurisdiction of the CAT.

MR JUSTICE ROTH: Well, I mean, we can determine it. We can't give relief for breach of confidence. But if we have to determine it as part of a competition law issue, and we often determine legal issues.

MS SMITH: Sorry, you're right, it's a question of whether it should be determined twice and we say it's much more efficient to be dealt with together as it is an issue that goes to private law rights and competition law rights.

I'm aware of the time and I'm aware that Mr de la Mare needs to make submissions, so I'm not going to make any more submissions on my third point about the choice of forum. I think have you my three points on that --

MR JUSTICE ROTH: Yes, well, you say that actually it shouldn't be a race to the door. It was clear all along that you were going to do a counterclaim, you could have got in first and therefore, while in some other cases, there might be some relevance in choice of forum, this isn't one of them, because it's almost just happenstance you got there first and so it's not a factor that should weigh in this case.

MS SMITH: And I don't think -- that's absolutely so, sir. Also I don't think I need to make submissions on the various points that are made in the witness evidence about us seeking to delay proceedings. These proceedings have not been brought promptly in any event and you'll have seen Ms Hoy's evidence on that. We don't seek to delay. In fact we are seriously of the view that this splitting the case and trying to deal with it in two different courts will have the opposite effect. It is likely to delay these proceedings further than dealing with all the issues in front of one court.

Finally, we obviously accept that the CAT has specialist expertise. Unfortunately, it also has limited jurisdiction and that's why we make the application we do that these claims and counterclaims need to be considered together in front of the High Court.

MR JUSTICE ROTH: Yes.

MS SMITH: Those are my submissions for the first defendant.

MR JUSTICE ROTH: Yes, and I've also got your written submissions, which were very clear. Yes, thank you.

Before we turn to the second defendant, would that be a sensible moment to take a ten-minute break.

MS KREISBERGER: Sir, just on that, I thought it might be helpful to share that we had agreed timings between ourselves --

MR JUSTICE ROTH: Yes, I've seen that.

MS KREISBERGER: You have seen that. I just wanted to check that. We'd be very happy with a break if that's convenient.

MR JUSTICE ROTH: What it says in the document I've got, openings by defendants, 10.30 to 12.10, allowing for a ten-minute shorthand break. So at some point in that time frame there's ten-minute break. That's how

I understood it.

MS KREISBERGER: Yes, I just needed to make sure you had ten past 12 in mind as the end.

MR JUSTICE ROTH: Well, I think -- I might give -- I mean, Mr de la Mare another ten minutes. I appreciate, because he's otherwise being cut a bit short. But I think the right moment to have the break is now rather than in the middle of Mr de la Mare's submissions.

MR DE LA MARE: Thank you sir. What I had agreed with Ms Smith is that we were going to share our time 50:50. That's now not going to happen. Quite a lot of my time has been taken up. I will try to do as much as I can --

MR JUSTICE ROTH: I think if I say -- give you till 12.20 rather than 12.10, because I think you've lost some time, and we'll -- it's now quarter to, or not quite. So if we come back at five to -- I'll give you half an hour, I think, we come back at five to and you have still 12.25.

MR DE LA MARE: I'm grateful.

MR JUSTICE ROTH: And we will I'm sure manage accordingly. Could I remind everyone to mute your microphone so that otherwise the recording will pick up any rude remarks you make about the judge, which I'm sure you would wish to avoid.

(11.43 am)

(A short break)

(11.55 am)

MR JUSTICE ROTH: Yes, Mr de la Mare.

Submissions by MR DE LA MARE

MR DE LA MARE: If I can start with some framing points. This is the first contested

transfer out of the CAT and as such it raises an issue of principle about how this principle should be approached.

As a matter of logic given the possibility of transfer into the CAT and transfer out of the CAT, the question of principle should receive the same answer irrespective of the forum it arises in. It should receive the same answer here as it would if the totality of the pleadings were before the High Court and the question posed to the High Court is how to proceed and whether to transfer the competition element of the claim to the CAT.

It means that in logical terms you need to look at the totality of the litigation and ask if it makes sense, if it is fair and just, if it's workable to transfer the competition proceeding to the CAT. In short, as we say in our skeleton argument, the issue that arises --

MR JUSTICE ROTH: Just one moment. I'm told my camera is off but it's not -- although I've turned it on. Just a moment. Let me try again.

Can you see me now?

MR DE LA MARE: I can't, my Lord.

MR JUSTICE ROTH: Give me a moment, because it's definitely been turned on. Let's try to resolve that. Let's try once more. Yes, just pause a moment.

I will try to just leave you for a moment and return and let's hope that resolves it.

Resolved that?

MR DE LA MARE: No change, sir.

MR JUSTICE ROTH: No, no change. Yes, well just a moment. Yes, we can't get the camera on.

Can you see me now?

MR DE LA MARE: No, sir.

MR JUSTICE ROTH: No?

MR DE LA MARE: No.

MR JUSTICE ROTH: You still can't see me. Ah, because I've now got the little icon.

MR DE LA MARE: I suspect it's a bandwidth problem.

MR JUSTICE ROTH: Well, we've --

MR DE LA MARE: It may help if the others who are on video turn their video off. That does help in my experience.

MR JUSTICE ROTH: It shouldn't be a bandwidth problem -- we've had hearings with 100 people participating, so --

MR DE LA MARE: That's the limits of my very small knowledge.

MR JUSTICE ROTH: You will get any time lost made up, Mr de la Mare, but let's try to sort this out. We've called for some assistance. So we'll just pause. The funny thing is it was showing me in the corner.

MR DE LA MARE: Yes, you're back, sir.

MR JUSTICE ROTH: Right. It's very puzzling, but there we are.

Yes, you were saying logically look at the totality of the proceedings when deciding what to do.

MR DE LA MARE: Yes, and once you appreciate that that's the appropriate lens and it must be looked at just as much as if you were a High Court judge looking at the problem, you see immediately that it is the Steel v Steel issue of whether or not to order a preliminary issue, but with a twist. And it's a very important one, and readily reconciled. The twist is that Parliament has created this tribunal and this tribunal is particularly equipped and designed to resolve competition law issues.

That therefore means there are effectively, if you like, two potentially conflicting principles in play.

There's the familiar thinking about resisting the siren song, I think that's how Lord

Neuberger puts it in Rossetti, of the attractions of the preliminary issues, which are often more illusory than real, versus the imperative to have competition law issues where possible, and fairly done, resolved and tried by this tribunal. And it's those two principles that need to be reconciled.

The reconciliation of those principles hasn't been a problem to date with the exception perhaps of the Unwired Planet case and the reason for that isn't hard to fathom. All of the cases to date have been plain vanilla competition claims in which the competition claim has been the totality of the claim in question.

MR JUSTICE ROTH: I'm not sure that's true of Gascoigne Halman.

MR DE LA MARE: I was going to come to Gascoigne, I'm going to deal with that --

MR JUSTICE ROTH: Is that one a pure competition claim?

MR DE LA MARE: No, Gascoigne is an easy case under the Steel v Steel test.

MR JUSTICE ROTH: No, but I thought you were saying they were all pure competition except for Unwired Planet.

MR DE LA MARE: Yes, Unwired Planet and Gascoigne. The rest are all plain vanilla cases, cartel damages claims, whether or not they are pure follow-ons, hybrid claims, standalone allegations of cartel infringement et cetera. There's no competing private law claims in play, no competing claims for damages and that's the important point to emphasise, claims for damages, because claims for damages bring them areas of enquiry, disclosure, investigation et cetera.

The two cases that have gone to grapple with it, the first, Halman, was a simple case in which the competition claim was a total answer to the only argument advanced, the only claim advanced, it was a claim in contract. And the answer to the claim in contract was that the contract on which they were being

sued was unenforceable because it was anti-competitive.

It's also important to note about that case that there was no counterclaim for damages and that much you can see from the fact that the mechanism of transfer in that case was not Part 30 PD8.4, which is the provision that allows section 47A damages claims to be transferred, it was PD8.11, which is the mechanism that allows infringement issues to be transferred to the CAT. And so all that was transferred to the CAT for resolution was the infringement issue, did the agreement in question infringe.

I mention that, because the very fact that there wasn't a claim for damages flowed from the fact that the relevant defendant in question hadn't been infringing rights and using the competition arguments to defend their infringement of rights. They were trying to release themselves from obligations --

MR JUSTICE ROTH: Are you saying there's no claim in damages or no counterclaim in damages?

MR DE LA MARE: No counterclaim for competition law damages. It was a pure defensive action, a bit like the SCM proceedings, where competition law was simply set up to defeat a claim in private rights but no corollary claim for damages for breach of competition flowing from the unlawful agreement. It's not hard to see why a case like that readily satisfies the Steel v Steel test. Competition law issue is determinative, at least one way. It will be a complete answer to the contract claim and there are no questions of duplication or lack of efficiency because there is no parallel claim for damages by way of counterclaim.

MR JUSTICE ROTH: The Steel v Steel, the preliminary issue test doesn't feature in the guidance of the Court of Appeal in Sainsbury's, does it?

MR DE LA MARE: It doesn't but the issues confronting the Court of Appeal in

Sainsbury's were very different. They were all plain vanilla competition law claims.

MR JUSTICE ROTH: I mean they gave guidance more generally, of course, and they don't say - including hybrid claims - they don't say you approach it on the basis of a preliminary issue, they say you approach it on the basis, as I understand that paragraph, which most of you have quoted, and it's very fact specific looking at the particular considerations in the proceedings.

MR DE LA MARE: With respect, if you look at that paragraph, my Lord, you will see the reasoning in that paragraph itself, if you like, anticipates or condenses the very considerations that arise in the Steel v Steel case. They look at whether or not the issues would be complete and determinative. They look at questions of cost and delay and matters of that kind.

MR JUSTICE ROTH: Yes, they're all relevant, but it's not decisive. They are relevant considerations.

MS SMITH: But those are exactly the considerations that you look at when deciding on a preliminary issue, my Lord. The relevant passage is set out in our paragraph at 79 and that's what's investigated.

Of course the issue in that case was whether or not pure plain vanilla claims that for various historical reasons had ended up in the CAT and the High Court --

MR JUSTICE ROTH: I'm talking about they're giving guidance looking forward generally, not whether that particular case --

MR DE LA MARE: Yes, but if it --

MR JUSTICE ROTH: I've got your point, yes.

MR DE LA MARE: You have the point. Then the last case in the analysis is the Unwired Planet case and that of course is exactly the kind of complicated case we say this case is. It's a FRAND case in which there were arguments

about non-infringement of the relevant patents. There were arguments about which were the essential patents, whether the patents were caught by FRAND competition law obligations, caught by the contractual FRAND obligations and then lastly were questions of relief and all of those features have chimes in this case and it was because of the impossibility of unbundling the IP infringement issues, which are the exact analogue and we entirely agree with what Ms Smith said, the exact analogue to the bundle of private rights in this case, because the difficulty of unbundling those issues and the risk of inconsistency between the parallel High Court proceedings and any putative CAT proceedings that proved absolutely central in Mr Justice Birrs' decision to refuse to transfer.

Once again, Steel v Steel didn't feature, but you see exactly the same features of preliminary issue analysis being used and reached for in order to decide the case.

So we say, once you are faced with a mixed claim, it is helpful and useful to ask the questions posed by Mr Justice Neuberger as he then was. Questions actually which the claimants instinctively reach for, in part shaped no doubt by Sainsbury's in the Court of Appeal, is there a determinative issue one way or the other, is it efficient to proceed in this way, can you safely carve off the issue, will it produce satisfactory results? Particularly in terms of bindingness and the avoidance of the risk of conflicting judgments. Those are really, really important issues and whether or not the ruling of the CAT will bind all of the eventual parties to the High Court litigation is a particular feature in this case given the complexities of the positions of the scouts and the clubs.

The second framing point I'll take very quickly so you have the point. It's an objective analysis. The parties' wishes are at best a liminal consideration.

They're not even referred to in CAT rule 71. They are expressed --

MR JUSTICE ROTH: Well, I accept that, yes.

MR DE LA MARE: So there we have it. So next point, we're entirely ad idem with Ms Smith that the central question, or at least one of the central questions in this case is whether or not the litigation is going to produce determinative effects either way and Sportradar's case, an ambitious one I would suggest, is that this litigation will be determinative either way, either if it wins or if it loses. Its case therefore rests on the oft-repeated contention that the competition law claim is, and I quote Mr Nixon, legally and factually separable from the private rights claims, a claim repeated in the skeleton at paragraph 6C. In short it rests on a simple contention that if we win there are no other issues, if we lose there are no other issues, and with respect, nothing could be further from the truth. Let's take the slightly simpler scenario of if they lose the case. Well, the answer here is given there's no forward-looking dispute. We will agree to an undertaking or something of that kind. I note briefly that we have sought an undertaking historically and it's been refused, but let's assume an undertaking will be supplied. That is no answer at all. The simple reason it's no answer is because there is a full defence to the private law claims on every single material element and there is one paragraph that illustrates that very, very clearly indeed. It's the indicative reply to our claims in bundle 3B, tab 6, page 29 to 30. Could I ask my Lord to pull that up -- sir, sorry.

MR JUSTICE ROTH: 3B, tab 6, page 29 to 30. Yes.

MR DE LA MARE: Very helpfully, the drafter of this document, which I suspect is principally Mr Abrahams, first on the pleading, has summarised everything that is to come by way of private law and competition law defence to the private law claims.

Start off with 3A, with the contractual arrangements. 3B, because the counterclaim is founded on the FDC-Genius agreement, the whole of Genius' claim fails. That's obviously right if they succeed and we've never suggested otherwise. But look at C and following, because this is the case predicated on us winning:

"Insofar as Genius relies on the law of confidence, and its counterclaim fails because the information in question is not confidential nor subject to any obligation of confidentiality, especially since the contractual terms in question are not enforceable."

It's not a proposition dependent upon that. So confidentiality is contested throughout, both for the freestanding tort and as the constituent element of the tort of unlawful means conspiracy.

Insofar as Genius relies on breach of contract, that's an unlawful means for the purpose of the unlawful means conspiracy. The contractual terms are unenforceable, there is the competition law argument, and, 2, Genius is not a party to any of the contracts relied upon. So the argument is going to be made that, for the purposes of the tort of unlawful means conspiracy, there is a requirement of privity. You can't sue upon the breach of someone else's contract.

So that's a complete answer. Well, that is the pleaded case. That's the answer we're given in relation to that.

Then at E, trespass. (i), well, that's the competition law argument again. Why? Because the contractual terms are unenforceable and they are variously described in all of the documents as unenforceable or voided. They're obviously said to be unenforceable for breach of article 101 and/or 102. Then again a freestanding answer, irrespective of competition law at (ii), Genius

does not have any relevant rights in the land in question. So what they're saying is we can't rely upon the trespass on the clubs' land because we don't own the clubs' land and that's the defence to the claim of unlawful means conspiracy.

Then F says, insofar as Genius relies on conspiracy, its counterclaim fails because none of the elements of the unlawful conspiracy are present. And one can look at how that is unpacked in particular at 23 and following at page 34 of the bundle pagination, page 6 of the pagination of this defence and what you see at 23 through to 27 is a series of challenges to just about every aspect of the conspiracy claim, a denial of any confirmation for the purposes of the law of conspiracy between Sportradar and its scouts and then in particular, and this will be familiar to my Lord from the Newson litigation, which went to the Court of Appeal and the parallel Emerald litigation all about unlawful means conspiracy, there's a denial of the constituent element of any intention to cause harm to Genius. That's a key element of the unlawful means conspiracy argument. And, as my learned friend has also pointed out, there's a denial of any knowledge which has been conclusively ruled by the Court of Appeal in the TRP case not to be a constituent element of the tort. So that part of the case is hopeless.

MR JUSTICE ROTH: Can I just interrupt you, just for my information. In TRP I think I saw that the Court of Appeal refused permission to appeal.

MR DE LA MARE: Yes.

MR JUSTICE ROTH: Your client of course is in that litigation. Is either side seeking to take it further?

MR DE LA MARE: It's not my client, it is Mr Mill, Mr Cleaver that act for TRP and as I understand it time for petitioning the Supreme Court expires on Tuesday and

we don't know whether or not the defendants Tote and SIS are going to be going to the Supreme Court.

MR JUSTICE ROTH: But you know whether you are seeking to go?

MR DE LA MARE: Well, I'm not instructed, so, no, I don't.

MR JUSTICE ROTH: But you're --

MR DE LA MARE: They're not my client. Betgenius isn't involved in TRP --

MR JUSTICE ROTH: It's SIS. Sorry.

MR DE LA MARE: It's the various race-courses and various course bookies are involved. It's nothing to do with the parties in this litigation. The only point of intersection is that Mr Cleaver and Mr Mill are acting for the claimants in that case.

MR JUSTICE ROTH: Yes, I see. The parties are wholly different.

MR DE LA MARE: Wholly different on both sides.

MR JUSTICE ROTH: Yes. So we don't know. Yes.

MR DE LA MARE: While we're talking about that case, can I ask you to turn it up because it does illuminate the point my learned friend made about the intersection between confidentiality and the core competition market issue in this case, which is going to be the issue of off tube and the substitutability of off tube data.

Those two issues, if not the opposite sides of the same coin, are very, very closely related issues.

Now, at-the-races in the Court of Appeal is 7F, tab 29 and the relevant passage I would like you to look at is --

MR JUSTICE ROTH: It's not at-the-races, it's the Racing Partnership.

MR DE LA MARE: At-the-races was one of your cases, I think.

MR JUSTICE ROTH: That was a different case I think.

MR DE LA MARE: There's been a lot of litigation in the race-course sector, both in the databases and in competition law.

MR JUSTICE ROTH: Yes.

MR DE LA MARE: 185 and following reveals the key difference between Lord Justice Lewison and Lord Justice Arnold, who are the only judges who give the reasoned decisions on the question of confidentiality. Lord Justice Arnold had no doubt that all of the data in question was confidential. The approach of Lord Justice Lewison is set out at 184 and following, and his approach is this: there was no evidence before the judge to explain the particular value of the data and the particular features of latency et cetera to make explicit findings as to the period of time that the data had special value before being broadcast or as to that value and you can see that the emphasis on the absence of findings at 185 and 186, and having pointed it out, he then went on to look at the fact that it was common ground that it was all being broadcast and all of races are broadcast, if nothing else, in bookies themselves, often on the television as well, and on the basis of that he found that the race day information, but not the aggregated information, was not confidential.

What the ratio of the Court of Appeal is is not particularly clear because all that Lord Justice Phillips says at 170 is that the basis for his agreement with Lewison LJ as to the result of whether or not there was a breach of confidence was predicated on his agreement that there was no unconscionability in this case. Why? Because SIS had received the data from Tote in good faith that it was free from any relevant restriction. You see that at 170.

MR JUSTICE ROTH: Yes, I think he agrees with all the reasons of Lewison but he

adds then a comment. So I think he adopts the reasoning of Lord Justice Lewison.

MR DE LA MARE: I think that's probably fair, my Lord, but what you can plainly see is that Lewison LJ's reasoning is plainly influenced by the state of evidence as to the value of the data, latency et cetera.

Now, of course in this case my learned friend Ms Kreisberger's case turns centrally on two contentions. One, that many of the matches in question are not broadcast live. The three leagues embrace 132 clubs. It's only the Scottish Premier League and the Premier League matches all of which are broadcast live somewhere in the world and the data gathering, the off tube exercises are worldwide exercises. Some of the Championship but not all of the Championship games are broadcast. None of the League 1 and League 2 games are broadcast. And, yes, it's a right of access they seek to all of them. It is also her pleaded case that televised matches are inadequate for the purposes of obtaining the types of data that they wish to obtain by ground access. So there's an express plea of the inadequacy of the televised data in question.

Both of those features are massive differences to the Racing Partnership case. They immediately take one out of the reasoning of Lewison LJ and they leave, I put it no higher than this, entirely at large the massive issue as to whether or not this information is capable of protection through the law of confidence.

MR JUSTICE ROTH: Can I ask you on confidence?

MR DE LA MARE: Yes.

MR JUSTICE ROTH: I mean the confidence -- it's difficult to see that the information, the individual facts, in themselves have the quality of confidence, who scores a goal, whether there's a penalty, what's the time of kick off, the

identity of the referee, are things that are known to thousands of people admitted normally, not at the moment of course, to matches. Doesn't the confidence arise from the contractual grant of exclusivity --

MR DE LA MARE: No.

MR JUSTICE ROTH: -- going back to -- and it's the fact that there has been a contractual arrangement that is the foundation of there being a confidence. If one goes back to, as I think you point out in your defence, the House of Lords in Douglas v Hello that it's the contractual framework of the money that gives them the quality of confidence when otherwise they wouldn't have it? Is that not right?

MR DE LA MARE: No, that's not right, with respect, my Lord. We make exactly the opposite point in paragraph 42 of our skeleton. The point in Douglas v Hello was there was no contract to the photographer who snuck into the wedding. He wasn't bound by any contract at all.

MR JUSTICE ROTH: No, not a contract with him, that there had been an arrangement to monetise in that case with OK and therefore I think Lord Hoffmann says follow the money, these are key.

MR DE LA MARE: But the key issue is not contractual arrangements as such, it's whether or not you've exercised control over the venue so as to ensure that you are able to exploit. That's the issue. It's nothing to do with a contractual arrangement. It's to do with whether or not you are exercising control over areas of your private ownership or under your control to ensure that other people don't have an opportunity to exploit and that's the very point we make at paragraph 14.2 of our skeleton argument and there is no doubt that that is precisely what the clubs do, have always done and do so irrespective of the Genius-FDC agreement, they exercise that control, if nothing else, to ensure

that no one takes any film in the stadium to stop rival broadcasts of snippets from mobile phones or matters of that kind.

So all kinds of commercial activities they wish to control and the grounds are highly controlled places. The purpose of the ticket conditions and the ground conditions, which are of very long standing, certainly not linked to this 2019 agreement, is to provide that control, that control would exist through the voluntary grant or not of licences in any event. There's no need for a contract to exercise control. When I decide whether or not someone crosses the threshold of my house, I don't make them a contract. I grant them a licence and it may be subject to a limitation. It's not a contractual licence, it's simply a licence to enter the land.

That's exactly why the reasoning in the Tote case in the Racing Partnership was, notwithstanding the fact that Tote had not signed the Arena terms (the Arena terms in that case were the equivalent of the ticketing or ground conditions), notwithstanding that they were trespasses because they were effectively outside the boundaries of the consent that they were operating under. That's very clear from the passages we've cited in paragraph 14.2 of our skeleton.

So where you're led to inevitably is this. If we win, there's going to be a huge battle on all of these issues as set out in the reply. They go to all elements of all of the torts and they raise issues, confidentiality, control, et cetera, which overlap completely with the substantive issues about what is the value of the rights, what is the relative value of off tube, what is the interaction between off tube and stadium data and that's even before you come to the question of damages.

Now, damages in our case is no small matter. My client has paid a large sum for a five year exclusivity, I don't need to say what it is but it's a significant sum of

money and for at least one full season those rights have been interfered with substantially, if we are right, but the infringing activity of Ms Kreisberger's clients, and they've effectively stripped that many million pounds payment, annual payment, of much, if not all of its value and we will want to recover that. In the process of working out how much damage we have suffered or what account of profits we're entitled to, you will need to pick through all of the financial figures in relation to the relative value of off tube or not and then you will need to work out, because this is the way the market works, how the rights that have been taken on an infringing basis have been fed into the bundles of rights that are sold by Ms Kreisberger's clients and what additional revenue they've been able to make on the basis of including these rights in their bundle of rights and therefore what sales on an individual event by event basis we may have lost out on in consequence.

All of that damages enquiry takes you to exactly the same kind of things that you're going to look at for the purposes of the competition case and therefore where you're going to get to is an exercise that is completely duplicative, is duplicative in materials of disclosure, because I'm going to have to go back over the disclosure to check you've missed nothing, duplicative in any event in terms of witness statement --

MR JUSTICE ROTH: When you say duplicative in terms of disclosure, I mean, the disclosure is made between these parties, you've got disclosure. You don't have to disclose it again.

MR DE LA MARE: I mean the exercise of searching for relevant documents is going to be duplicative and you're going through the same cache of documents and look at them with a separate focus because of the damages claim. Likewise with witness statements. You are going to go back and prove with the same

people but do so not from the perspective of working out how the market works but explaining how much profits the relevant parties have made from the act of infringement --

MR JUSTICE ROTH: In a sense, when you split off liability and quantum, as one often does, and indeed if I were to decide this application against the first defendant and the case stayed in the CAT, it may well be in any event that any question of damages would be split off and that one could deal with liability first. So you always, when you get to damages, you will then have to go back and see what are the relevant documents and witnesses might have to come again.

MR DE LA MARE: There's never been any suggestion of that hitherto, sir --

MR JUSTICE ROTH: We haven't had a case management conference. So of course there hasn't been a suggestion. But it's pretty normal, as you know, in competition cases where liability's strongly in issue to hive off damages.

MR DE LA MARE: But the problem with that course is the information in question doesn't really go to the question of damage, it also goes to market definition, because it's --

MR JUSTICE ROTH: I suppose it does, but that's --

MR DE LA MARE: The very data about what you have and haven't received for unofficial stadia data, off tube data et cetera is a key constituent in this case in working out how the market works and what its parameters are, and therefore excluding all of that disclosure and its analysis from the liability trial, if you like, is to deny the very material that you need to investigate.

MR JUSTICE ROTH: Well, no, you wouldn't exclude it. Of course not, if it's relevant. You'd look at it. But there are lots of other reasons why you split off damages. It's not because you don't -- the same material may not be -- quite

often the same witnesses have to come back.

MR DE LA MARE: But the point I'm making is simply this, my Lord. Once you start looking at these issues, you see that everything is interconnected, everything takes you into the same terrain of enquiry and that the private damages claims that are supposedly parked and are supposedly entirely separate and hermetically sealed from the competition issues are intimately related with them at every level. The issue of confidentiality and off tube data, the issue of revenue, the issue of relative value of the different forms of rights, the issue as my learned friend Ms Smith pointed out as to whether or not the activity is infringing and therefore a relevant consideration for the purposes of market definition, the AGCM issue. That's also live in this case, because if my learned friend Ms Kreisberger is right in paragraph 3 of her reply, there is no infringing activity in question at all, and that means that in any stadia anywhere in the world someone can gather data like this without there being any legal liability and that therefore means it's a legitimate form of activity for the purposes of market definition.

So the case that the matter is a simple one and falls away if they lose is hopeless. It's even worse when you look at the position from a perspective of is it determinative if they win and the reason is this: this case, however you look at it, however you look at it, ultimately comes to an attack on the lawfulness of the ticketing conditions or the ground regulations. There is no case or no defence to the claims and counterclaims unless those conditions are attacked.

Now, it's very unclear what my learned friend's case is on that front, but it's one of the logical possibilities, either the regulations are said to be unlawful outright unless and until there is a --

MR JUSTICE ROTH: Mr de la Mare, you say it's unclear. It seemed pretty clear to

me and I clarified it with Ms Kreisberger that that is not their case. You can say the pleadings need tidying up but it's been made very clear that is not the case, and it's not said that if the attack on the exclusivity agreement with your client fails, then independently the ticketing conditions and ground regulations are unlawful and you may --

MR DE LA MARE: I understand --

MR JUSTICE ROTH: I know there is a passage in the pleadings which is ambiguous and that's why I clarified it, but it has been clarified.

MR DE LA MARE: It is consequential, absolutely. They first need to establish that the FDC agreement is unlawful but what do they say is the consequence of that unlawfulness and what they call the no commercial logging agreement, they say the consequence of that is that the ticketing conditions are themselves unenforceable and unlawful unless and until such point in time as effectively there has been a lawful retender. And that's -- I'm looking for the reference -- that's in their skeleton argument as much as anything else.

Now, if that's the position, if the ticketing arrangements are unlawful until there is a new tender, the simple answer to their case is that there is no licence at all to enter the ground, you've negated the only basis on which you've gained consent to enter the ground and you're necessarily engaged in trespass and breach of --

MR JUSTICE ROTH: I think it's only that part of the conditions, what's called the addressee terms that I used to -- it's enforcing them so as to support the exclusivity. That's how it's pleaded.

MR DE LA MARE: That's how it's pleaded. That's a case of severance and it's predicated --

MR JUSTICE ROTH: I don't think it is severance in the sort of blue pencil way. It's

not that sort of severance. It's to rely on these things in certain circumstances is, it's said, rightly or wrongly, to offend against competition law.

MR DE LA MARE: The provisions are repeatedly said to be void and unenforceable. That's the language used and that's the language of 101 and that is the effect of article 101. It's not restrained to train journeys, it's 101. So the argument bites on the contract or it doesn't, if it bites on the contract, either the contract as a whole or the provision objected to is voided.

Now, the problem with that argument is you can't sever the commercial agreements, no commercial activity provisions from the relevant conditions or ground regulations because it entirely changes the meaning of the documents in question and in order to be able to sever something, it needs to meet the blue pencil test and the test of substantial severance.

So what they're trying to do is use severance to create a consent where it was never granted and that's an object lesson in how not to approach the severance.

One has the interesting question, let's suppose even that is possible, and it would be very new law, what then is the position of in terms of whether there is still an obligation of confidentiality in these circumstances where on the facts it's absolutely plain there's no consent to the activity in question, and we would say in those circumstances there is still obligations of confidence owed, we can control the ground and there was no intention to let them in and that must be particularly so, when as Ms Smith explained, on their own counterfactual case, they need the ticketing and ground regulations as part of their collective selling arrangements upon which they rely for their counterfactual in which they say they would be the ABDS supplier.

All of that tells you that none of this is anything like a defence to these claims even if they prevail in their competition law argument.

At most, they might have a claim to damages that might give rise to a claim that can be set off against their liability for their infringing conduct. That's the highest I can see that it could be and it would be a damages claim by reference to a loss of a chance as you put it in the exchange with Ms Smith.

No answer at all if really the competition law claim is a set-off claim to their acts of or infringement and bear in mind at no stage have they paid for these rights at all. They have effectively free ridden --

MR JUSTICE ROTH: No, I see that. It's not been paid for.

MR DE LA MARE: And so on any analysis there has to be something in the account for the activity that they've undertaken on an infringing basis. They can't be entitled to say unless and until there is in place a new arrangement, we're entitled to do everything we would ordinarily pay for for free and that is effectively the substance of their argument.

So where you get to is it's not determinative either way and there are plainly going to be all kinds of issues looked at in the context of the competition law proceedings that will be of direct relevance to the private claims which then leads me to the last couple of topics which I'll address very quickly indeed.

The first topic is the relevant parties to the litigation.

Given the attack on the ticketing conditions, and given the attack on the ground regulations, which are agreements on the part of the clubs or conditions on the part of the clubs, albeit in template forms suggested by the relevant leagues of which they're parties, the leagues are not the FDC, the leagues are the FAPL, the SPL, et cetera, all designed to exercise control over the grounds for all forms of commercial exploitation, not just live data but most obviously broadcast, the key income stream, to be attacking those arrangements and the enforceability of those arrangements, whether it's the

ticketing conditions as a whole or whether it's the particular terms, the no commercial activities provisions, to be attacking that without the main beneficiary of and the counterparty to those agreements being before the court, so as to be given an opportunity to be heard and, critically, so as to be bound by the result is an exercise fraught with danger. I can't think of a single competition case in which a party has effectively made an argument that the key to its success is showing the unlawfulness in competition law terms of an agreement between a third party and the claimant. It's just -- it's unparalleled. Ordinarily, were that to occur in the High Court, you would be saying the party to the agreement that you're impugning in that way has to be joined to the litigation as a necessary and proper party --

MR JUSTICE ROTH: Can't you say -- can I interrupt you. Let's assume that argument's a good one. Why can't we do that in the CAT under Rule 13?

MR DE LA MARE: You can. Absolutely. But then the question is how do you do that in a satisfactory basis and what we suggested in our skeleton argument, it's of course burdensome and disproportionate to have every club or every league joined to litigation, but what there need to be are representative defendants whose representative status in the litigation will be binding throughout the relevant industry. That's what's required, a sample club, a sample league et cetera, which will then provide an optic for the case and the problem is the High Court can do that, because you can have in the High Court representative defendants. There is no power equivalent to CPR Part 17 for representative defendants in the CAT and that is a problem. It's a problem from a case management perspective and it's one of the reasons why we say the case management of this case at the very least should be run in the High Court and until --

MR JUSTICE ROTH: But I thought it's the three leagues that are the basis of posing these and recommending the conditions?

MR DE LA MARE: That's correct. The three leagues set out template terms for the ground conditions, the ticketing conditions are at the discretion of each and every club. It's very clearly set out in Ms Smith's client's pleading, where all the terms are pleaded out.

It's also set out and there's no material dispute, these restrictions have been around for donkey's years.

MR JUSTICE ROTH: No, these a --

MR DE LA MARE: So none of those parties are before the CAT and unless they are brought before the CAT in some effective way and it's hard to see how that can be done without the equivalent of CPR 17, the judgment in question won't be binding on the clubs and that immediately brings all kind of terrible interchange problems. You can't have a duty like this being dealt with in a half-cocked fashion that leaves the target of at least some of the arguments able to say we weren't party to that litigation, we're not in the CAT, there are terms and conditions, no one ever asked us if they're enforceable or not.

That's the first problem.

The second problem is the scouts. We want to sue the scouts. We don't want to do so in a disproportionate way. We don't want to sue every single scout but we get to get relief that stops the scouts coming into the grounds and infringing our rights. Why? Because they're recidivists. Point 1. Point 2, we can't be certain that if they are stopped from working for Sportradar, they won't go and work for someone else. There's all kinds of practices. We want the scouts to stop scouting for anyone, not just Sportradar. We've made proposals that representative defendant scouts be joined as party to the proceedings so that

they're bound. They are bound by the competition law findings and the private law findings. There is no way to achieve that in the CAT. Why? Because there is no possibility of any claim against them in the CAT. There is the jurisdictional barrier because the claim we bring against them doesn't fall within section 47A of the Act --

MR JUSTICE ROTH: Well, can I ask you this? Insofar as the defence to your counterclaims relies on, as it does, of course, on the same competition issues, indeed you say it's one of the things you rely on the fact they're bound up, if you wish to the counterclaim to seek in the High Court representative orders for the scouts or indeed the clubs, and that can be done, and then those same competition issues could be transferred, or not transferred, but under section 16.1 to the CAT so they can be decided and that will bind all the parties in the High Court proceedings?

MR DE LA MARE: Well, my Lord, that is an ingenious suggestion, but it rather illustrates the wisdom of the last point we make apart from the SCM proceedings which is making decisions like this at this stage of the litigation is simply making decisions too early --

MR JUSTICE ROTH: Well, you're applying -- it's the defendants who brought the application asking me to make a decision now.

MR DE LA MARE: It's the claimants who have sought to gain the case management of the case by issuing it in the CAT --

MR JUSTICE ROTH: If you say we should wait with deciding transfer until a little later on, but I'm being asked to decide it now at the behest of the defendants.

MR DE LA MARE: What I say is this case should be case managed in the High Court. You should transfer it now. The High Court should case manage everything, getting all the parties in, getting in representative defendants,

getting pleadings from all of the parties, dealing with any applications for summary judgment et cetera and then when the case is ready for being considered for a transfer to the CAT, across the totality of the case, at that stage the High Court can consider whether to transfer the case back to the CAT. That's my submission. What's happening here, this whole exercise of the CAT grabbing the case is being considered far too early, far too early, and the reason is not hard to see. My learned friend doesn't want to litigate the case in the High Court, they want to keep it as simple as they say is possible, which means excluding our claims and our matters of importance and that's wrong in principle. There is nothing to stop the High Court transferring back in due course, either under 8.4 or 8.11 if, as events transpire, that proves appropriate. But you're nowhere close to being able to make a final decision.

The suppressed predicate of my learned friend's case really is this, that everything that happens in the High Court should be stayed, that there shouldn't be any High Court litigation. Why should that be the case? Should Ms Smith's client be prevented from seeking summary judgment on their claims --

MR JUSTICE ROTH: Well, I accept that and I'm not obviously ordering a stay. I can't. There aren't even any High Court proceedings to stay at the moment, they haven't been done. But if they are started and if there is an application for summary judgment, independent of any competition issues, I can see good arguments why that should be heard if it's got nothing to do with the competition claim. But I'm not sure that's something I need to address.

MR DE LA MARE: Well, it rather illustrates the prematurity point I was seeking to make.

The last point is this, the SCM proceedings, it's no part of my case to say they're the same as this case. They aren't like this case. They do have some points of

similarity however. The first is litigation between, if you like, another of our competitors. SCM is a direct competitor of both Ms Kreisberger's clients and my clients, one of the four or five main players on the market. That's the first similarity. The second similarity is that that case raises questions of a private law infringement and of competition law and the private law infringement arguments are effectively a contention that scraping, in the circumstances of this market, because of the lack of confidentiality of the data, you'll see, lack of confidential data, same sort of issue, is not an infringing activity. That's the basis on which the database claims made are defended. Now, that raises exactly the same market definition poser my learned friend raised, which is if that's right that must be true across the board and relevant to market definition for all of the claims, both claims.

The second point is, whilst the actual competition law arguments themselves are much more ambitious than FDC's -- than Sportradar's case and target every single exclusive agreement, not just the FDC agreement, the market definition issues produced by that argument are identical. You have to define the relevant market in question in the context of exactly the same types of activities. You only need to cursorily skate through the defence, paragraphs 8 and thereabouts to see that the market definition issues are exactly the same, and having two cases being tried on the same issue of market definition in the same market as between the same competitors is potentially a dangerous matter that may require case management and I need put it no higher than that. All of the disclosure in that case, which, will, once it comes to our hands be disclosable in these proceedings. So if we get material showing how their bundling works, how they see particular rights, that's all going to be relevant to --

MR JUSTICE ROTH: I've got a bit lost and it's my fault, I'm sure. You say all of the disclosure in that case that comes into your hands would be disclosable in these proceedings.

MR DE LA MARE: Yes.

MR JUSTICE ROTH: I thought you said -- yes, I see. Because you are the party in this case. You're the claimant.

MR DE LA MARE: We're the claimant. So, when they give us all the material that they have to give us to show their activities for the purposes of that claim, we'll then have to disclose not necessarily all of it, but good portions of it in this litigation because it will be relevant to the issues of market definition in this case. That's why we said in our skeleton argument -- whose length I apologise for, but there are these points of complexity that don't jump out at one from this litigation, which we tried to set out in full -- that's why we said that inexorably where you're going to get to at the very least is there's going to be tedious and difficult questions about confidentiality rings and about cross disclosure as between the different cases and managing that across divisions is far from optimal and it's an area where we would say there is at least a respectable school of thought that, at least until the point that you're ready for trial, having the matters in the same division so that they can be case managed by the same judge to deal with, let's say, the same or look alike confidential rings as between the actions is a highly sensible thing to do.

We don't go so far as saying, and we never have said, that the cases need to be tried together or anything like that. It's far too early to take any judgment of that kind. All we do is point to those proceedings to say they're very similar in a number of respects to this case at least in respect of some issues. They are going to raise disclosure and practical case management issues that require a

common approach and that that is a factor further supporting the grounds we've already developed for a transfer. So "--

MR JUSTICE ROTH: Yes. I think you need to wrap up --

MR DE LA MARE: That's it. Unless there's anything I can assist you with further, that was all I was going to say.

MR JUSTICE ROTH: All right. Just one question.

MR DE LA MARE: Yes, sir.

MR JUSTICE ROTH: The unlawful means for the conspiracy that you rely on are, as I understand it, trespass, breach of contract, breach of confidence, is that right?

MR DE LA MARE: Correct.

MR JUSTICE ROTH: And if you succeed on establishing conspiracy, and I think I was pointed to some of the defences raised, there's no combination, no intention to injure et cetera, but, assuming you overcome those, and they are not good grounds of opposition, and then the one on knowledge which you point out has been decided by the Court of Appeal in the TRP, if -- will you not then succeed, and my question is on conspiracy, if you overcome those defences, with regard to the unlawfulness on the basis of trespass and breach of contract, or do you need breach of confidence as well?

MR DE LA MARE: That's a good question, sir. I think there is a strong case for summary judgment in relation to trespass as the relevant unlawful means. The breach of contract as unlawful means does trigger the competition law argument. For the reasons I've given there's an incoherence even in that case because effectively they either impugn the entirety of the agreement, in which case they shoot themselves in the foot on trespass or they seek to sever, in which case there's still no answer.

The breach of confidence issue, I think we've seen enough of what they say on that to show that, one way or the other, that issue is likely to require massive factual investigation.

Now, what that means is there is a route for Ms Smith's client for summary judgment on the claim and it logically follows there's also a route for my clients to summary judgment on the defence on the basis that, once it's trespassory activity, they can't contend that they're suffering any loss because they have no rights to be in the grounds in the first place. So absolutely and it's one of the things both Ms Smith and I have emphasised --

MR JUSTICE ROTH: No, I see that. That wasn't quite my question. My question was, to succeed for conspiracy for unlawful means, if you succeed in showing trespass and you succeed in showing breach of contract and overcome the generic defences to conspiracy --

MR DE LA MARE: Yes --

MR JUSTICE ROTH: -- doesn't that get you home on unlawful means conspiracy irrespective of whether there's a breach of confidence or not?

MR DE LA MARE: It gets you a very large way home not least because -- and it's important I point this out -- the unlawful means conspiracy case in At The Races succeeded. So, once it was held that the information in question was confidential, albeit on the grounds identified by Lord Justice Lewison, the ancillary claim for unlawful means conspiracy in that case succeeded. So, yes, it's a pointer to the fact that there is no defence to some of this, but --

MR JUSTICE ROTH: Well, I'm not saying that. I'm just saying that whether you succeed or not in showing that this information was confidential is not critical to your conspiracy claim, your unlawful means conspiracy.

MR DE LA MARE: That's correct, my Lord. Yes.

MR JUSTICE ROTH: That was what --

MR DE LA MARE: Yes. We can get home with unlawful means of trespass simply on that basis.

MR JUSTICE ROTH: Or breach of contract.

MR DE LA MARE: Or breach of contract. Yes.

MR JUSTICE ROTH: Yes.

MR DE LA MARE: Thank you, sir, for your indulgence, I'm --

MR JUSTICE ROTH: Yes. Well, I think it's now about eight minutes to one. I think the sensible thing is to take a break now, rather than just have eight minutes of response and to start again. If we start again at 1.45, that will make up a bit of time.

MR DE LA MARE: I'm grateful.

MR JUSTICE ROTH: And with Ms Kreisberger's response and you will get your 20 minutes between you for replies as anticipated.

MR DE LA MARE: 10 minutes.

MR JUSTICE ROTH: 20 means between you, i.e. ten minutes each. So we'll say quarter to two. 1.45.

(12.53 pm)

(The luncheon adjournment)

(1.45 pm)

MR JUSTICE ROTH: Good afternoon. Ms Kreisberger, I think it's your turn.

Submissions by MS KREISBERGER

MS KREISBERGER: Thank you, sir. Sir, I was proposing to address four broad arguments which the defendants have advanced in support of the application to transfer and then explain why we say each one is wrong.

So to set those four out. The first is the question of the applicable legal test under rule 71, which Betgenius alone says is highly unfavourable to Sportradar because the test is that for deciding whether a preliminary issue should be hived off.

The second point is that both defendants contend that Sportradar's competition claim can't be determined without at the same time determining the responsive claims for breach of confidence and unlawful means conspiracy. So they say the Tribunal has to give up jurisdiction on that basis.

Thirdly, they say Sportradar is wrong to say that there's clear efficiency in the competition claim being heard in the Tribunal. They reject our contention that if Sportradar wins the responsive claims necessarily fail, and if it loses, a central dispute, the central dispute about whether scouts can go into the grounds, is resolved.

Then finally Betgenius latterly introduced the argument which doesn't overlap with FDC's applications that these proceedings should be subject to some form of joint case management in a completely separate set of proceedings against SCM in the High Court involving data scraping.

So, sir, I was proposing it take these points in turn but it may be useful to set out at the outset that my submission is that the dispute centres heavily on what I lay down as the second point. So if Sportradar is right that the competition claim is distinct and severable from the responsive claims, then there's no good reason why this tribunal can't proceed to hear that claim and the application fails. So my submissions will focus on point 2.

But to begin with the applicable legal principles, FDC accepts that the Tribunal has a wide discretion under rule 71. Betgenius, as you heard from Mr de la Mare, does not. It argues in its skeleton argument at paragraph 39 that mixed

claims should ordinarily be commenced and heard in the High Court, relying on Court of Appeal in Sainsbury's, and that the test for deciding whether to define a preliminary issue applies to the question of transfer under rule 71, as you heard, and Mr De la Mare even relies on Lord Neuberger's statement that it may often be appropriate to resist an initial attraction to ordering a preliminary issue.

My first point is that the Court of Appeal did not say that mixed claims should be commenced and heard in the High Court. That's a mischaracterisation of what's been said. You've been taken to the passage. It starts at paragraph 12 of our skeleton from the Sainsbury's Court of Appeal judgment. I suspect it's familiar territory for the Tribunal.

MR JUSTICE ROTH: Yes. You needn't say more about that.

MS KREISBERGER: So shall I -- I'll move on from Sainsbury's. All I was going to say on this point of the legal test is the argument from Mr de la Mare that rule 71 is -- the discretion is fettered by reference to the preliminary issues test is wrong in principle because the two issues raise entirely different questions.

Whether to --

MR JUSTICE ROTH: I'm not sure, to be fair, he quite put it as saying the discretion is fettered. I think he said that the discretion should be exercised on the same basis as the preliminary issue test. That's how I understood it.

MS KREISBERGER: Yes, I'll direct my submissions to that characterisation of it. I think he said the same considerations apply.

MR JUSTICE ROTH: Yes.

MS KREISBERGER: I say that's not correct because when a court is looking whether it should hive off a preliminary issue to be heard ahead of a full trial, that's a case management question for the court seized, based in particular

on efficiencies. Often it is the case that preliminary issues are heard based on agreed facts which can militate in favour of early determination ahead of a trial. But here, and I realise I'm at risk of stating the obvious, the question is one of forum for the entire competition claim, in other words whether all matters relating to a competition dispute, including the facts and the evidence which are often a heavy burden in a competition case, as you well know, should that dispute be determined by the specialist tribunal, the factual dispute.

Now, of course it's right that that's a question which must be answered by reference to the specific circumstances of the case at hand. But the calculus is entirely different from a preliminary issue because the cards aren't stacked against the claimant in the way that Betgenius suggests. On the contrary, far from applying the highly unfavourable test which they advocate, my submission is there needs to be a very good reason for the tribunal to close its doors to a competition claim given that it's the purpose-built forum to hear them and has a whole host of advantages, as the Court of Appeal adumbrated.

So there needs to be a genuine bar, such as the impossibility of hearing the competition claim independently of non-competition claims along the lines of Unwired Planet, where any attempt to dissect competition FRAND from contractual FRAND was a recipe for chaos.

Now, I'm aware that Mr de la Mare says Unwired Planet is analogous. It's not remotely comparable to this case. This case is a challenge to an exclusive grant to collect and distribute live sport data which forecloses competition downstream. It raises an array of technical, legal and economic considerations relating, this is a non-exhaustive sample, to relevant economic markets, market power and dominance, anticompetitive objects and effects,

the applicable counterfactual and alleged economic efficiencies and it engages decisional practice of the Commission such as the football decisions and seminal competition jurisprudence. It's precisely the sort of claim which is fundamentally apt for determination and, sir, coming back to your first question to Ms Smith, if there were no counterclaims there would be no debate at all.

That brings me to my second point, so that's all I was proposing to say on the overarching legal test, the approach.

MR JUSTICE ROTH: Yes.

MS KREISBERGER: So my second approach, which as I said is in my submission dispositive of this application, this is the answer sufficiently, which is FDC's claim that it is impossible, that's FDC's language, impossible for the tribunal to determine the competition claim because it has to be dealt with at the same time as the claims for breach of confidence and unlawful means conspiracy. And FDC set this out, it's at paragraph 30 of Ms Smith's skeleton and I'm quoting from that, they say the precise content of and requirements imposed on the defendants by competition law are informed by the existence or otherwise of the defendant's private law rights. The content of the requirements. So that's a submission of law from FDC. It's not explained in the skeleton why that should be the case and they haven't cited any authority in support. The skeleton refers to paragraphs, and I'll give these to you, sir, for your note, 94 and 122 to 124 of FDC's defence and Ms Smith took you to those passages this morning.

I think it is helpful, though, to turn them up and that's at 3A, tab 2, page 82.

MR JUSTICE ROTH: Just a moment.

3A2. Do you want to go to paragraph 94 first --

MS KREISBERGER: Yes, please, sir.

MR JUSTICE ROTH: Is that page 82?

MS KREISBERGER: Page 82.

MR JUSTICE ROTH: Yes.

MS KREISBERGER: So again, these four paragraphs are FDC's pleaded case on why its private law rights that it claims are integral to the competition claim. So what you get from paragraph 94 is that three categories of rights are referred to there: database rights, commercial confidentiality and trade secrets. So you see those in that paragraph and, staying with 94, it's then pleaded in the last sentence, so it's about five lines up from the end, in the premises:

"As is the case with licence agreements in respect of any intellectual property right, the mere fact that the right holder has granted to a sole licensee the exclusive right to collect the material is not sufficient to justify a finding of anti-competitive object."

So that's the pleaded case there.

So you see they say these three rights are IPRs and there's your legal test under restriction by object.

We then move forward to page 91 and there you have paragraph 122, 123 and 124. 122 simply repeats the categories of rights referred to in 94 and cross refers to it, and then paragraph 123 posits what FDC claims to be the relevant legal test in relation to abuse of dominance here and you see this in the first sentences. What they are setting down here is that the abuse alleged is a refusal to licence an IP right: as is the case with the exercise of any intellectual property right, the refusal by an undertaking holding a dominant position to licence a third party or grant them an exclusive licence cannot in

the absence of exceptional circumstances constitute an abuse. That's a well-known test drawn from cases like IMF and Microsoft on abusive refusals to licence IP. So that's what they say is the legal test.

Then moving on to 124, that's put in the alternative and what 124 does is it refers to private property rights. So it says that the data and the Betgenius database arises from amongst other things the exercise of the clubs' private property rights, which there's been some discussion of this morning, and it says based on the fact that there are private property rights, it posits a different formulation of a refusal to grant access test under Article 102.

Then paragraph 124 finishes with a rather insightful observation. It says Sportradar has failed to plead a particularised case let alone establish that any such access must be provided to it in the present case. There's very good reason why Sportradar hasn't pleaded that and that's because that isn't Sportradar's case. So its absence is a pretty heavy clue and I'm going to develop that for you, sir.

But these pleaded assertions about the relevant legal tests are entirely wrong-headed because they don't actually relate to Sportradar's claim.

So I'll come back to that. But putting these pieces together, FDC's logic on the transfer application appears to be that Sportradar's claim under competition law is that FDC has refused to licence IPR to it in the form of database rights, trade secrets, confidential information and for that reason the defendants' intended claims against Sportradar for breach of confidence and unlawful means conspiracy must be heard together with the competition infringement claim. So that's the logic.

I'd like to make three points in response which show that that logic completely breaks down. So I'll set them out and then develop each one.

The first is that it is no part of Sportradar's claim that FDC has engaged in a refusal to licence an IP right to it. That's why FDC is quite right it's not pleaded. FDC's characterisation of Sportradar's competition claim is completely wide of the mark and I'll take you to Sportradar's pleaded case to demonstrate this. So that's my first point.

My second submission is that this is not a case about licensing IPRs at all. Not only is that not the legal head of infringement being advanced, it's not about IPRs.

My third point is, to the extent that there are private law rights that are relevant to the competition assessment, and I will come on to how they are relevant, it is fully within the Tribunal's competence to take account of them. Sir, I'm simply repeating a point you have made yourself this morning and there's no need to determine the intended claims under confidence and unlawful means conspiracy at the same time. They don't tread the same ground.

So taking each in turn and, as I said, this is really the focus of my submissions today, Sportradar's pleaded case on infringement, if I may ask you to turn up 3A again, Sportradar's claim form is at tab 1 and in the interests of brevity and ease of reference, I will take the points by reference to the summary at the front end of the claim form but, sir, for your note, I will give you the relevant paragraphs in the body of the pleading.

So the first head of infringement is captured and summarised at paragraph 8 of page 6 and what is alleged is a breach of Article 1 Chapter 1 and the subject matter of that breach is the upstream agreement between FDC and Betgenius, according to which Betgenius is given total exclusivity for a five year period, which is capable of extension, to collect live data in stadia for the three leagues for onward-supply to bookmakers. So you see that in paragraph 8. It's the upstream exclusive rights to use LLMD, that is the live

data, that's the events as they happen, and it has the effect of shutting out competition in the downstream market including from Sportradar. So that is the object and effect of the grant of exclusivity, the shutting out of all competition to Betgenius in the downstream market, the market in which it competes with Sportradar. So, sir, you'll appreciate that it shares features with cases like the Commission's football broadcasting decisions, which also concerned the exclusive grant of broadcasting deals upstream and foreclosure downstream between broadcasters. So it's in that mould.

The second head of infringement is at the next paragraph, paragraph 9. Sorry, sir, I said I would give you the reference in the circumstances. It's paragraph 69 -- sorry, let me just check that reference.

MR JUSTICE ROTH: I'll be able to find it. I don't want to take up time.

MS KREISBERGER: It begins at 69. I'm grateful.

MR JUSTICE ROTH: Yes, paragraph 9 is the abuse.

MS KREISBERGER: Abuse. Same points, long-term grant of exclusivity by FDC to Betgenius upstream. So it's the same subject matter but it also constitutes an abuse because FDC is the gate keeper to the data. At paragraph 9 is set out the applicable legal test for abuse. The applicable legal test is that the exclusive grant isn't competition on the merits or normal competition and it's capable of hindering competition in the downstream market. So that's the test that we say is the relevant one and so, to give another relevant authority, this would fit within Arriva v Luton Airport where Mrs Justice Rose said it was an abuse for the dominant undertaking, the operator of the airport, to grant exclusivity for a long period to a single downstream provider, thereby distorting competition in the downstream market. So that's --

MR JUSTICE ROTH: Yes.

MS KREISBERGER: So, just to finish this off, and this is important, I think, for this application, paragraph 10 sets out the ancillary restrictions that we say will also violate competition law and this is the question of the attendee terms, the terms and conditions on the tickets and the ground regulations which preclude the gathering of live data.

Sir, I'm going to take you to those a little later on.

MR JUSTICE ROTH: But I think -- I mean, I think paragraph 10 is the important one for present purposes because, although there was some suggestion that, well, if a competition case involves consideration of private rights, it should go to the High Court. But that wasn't really pursued with much emphasis because -- and you made the point the CAT often has to consider private law rights as a part of its determination of competition law. What's clearly at the heart of that is the overlap with the counterclaims and that's why it seems to be paragraph 10 which is the one that's critical and I'm just trying to understand what -- and perhaps you can explain, you say ancillary restrictions. What actually is being said in paragraph 10 about the attendee terms?

MS KREISBERGER: Yes. Thank you, sir. Let me be very clear. The allegation that -- the thrust of this case, the heart of this case is the challenge to the upstream exclusivity.

MR JUSTICE ROTH: Yes.

MS KREISBERGER: So that is the mainstay of the claim. But any contractual provision which gives effect to unlawful exclusivity -- so we're now in a world where we have made out our case on the upstream exclusivity and it's unlawful. Any contractual provision which gives effect to the exclusivity is also in breach of Article 101. It's a very simple point and for as long as that term

gives effect to the upstream exclusivity, it is unlawful and unenforceable under Article 101.

Now, I'd like to make two points. I was going to come on to this a little later, but it probably makes sense to deal with it now. Two points. The first is there seemed to be some confusion this morning. If we strike down the upstream exclusivity and FDC retender and award licences which give access to the grounds on a non-exclusive basis, in that case the attendee terms are valid and lawful and enforceable because they don't implement or give effect to unlawful restrictions. So that's very clear. So if we move to a world which is competitive, the attendee terms can stand.

What about the world in which the attendee terms do allow the prohibition of the collection of data in circumstances where that prohibition is unlawful? Let's turn to the terms themselves, because Mr de la Mare's submissions on this mischaracterise the issue. The ground regulations themselves are at 5C, tab 38.

So we have a selection of ground regulations but the ones at tab 28 are the Premier League ground regulations and other league regulations follow in the bundle which you may wish to read at your leisure. But I'm going to focus on the Premier League ground regs and if you can turn to paragraph 19, which is on page 140, this is a problematic provision which shores up what we say is the unlawful arrangement upstream.

MR JUSTICE ROTH: Yes.

MS KREISBERGER: So I will read out the relevant part:

"Mobile telephones ..."

MR JUSTICE ROTH: Sorry, which --

MS KREISBERGER: Paragraph 16 at the bottom of the page.

MR JUSTICE ROTH: Yes.

MS KREISBERGER: I'm going to take you to the (ii). So mobile phones or other devices are permitted within the grounds provided that (ii) no material that is captured, logged, recorded, transmitted, played, issued et cetera may be published or otherwise made available to any third parties et cetera.

So that's your prohibition.

If we go back to the page 139, you see near the top of that page the definition of material. Material is any video, audio, and any or information or data.

Mr de la Mare addressed you on the blue pencil test suggesting that this doesn't work and the whole thing is chaos. If we are being asked to suggest some blue pencilling, all that needs to be done for as long as the unlawful upstream provisions are in place is to delete "and/or any information or data". So clause 16 itself.

MR JUSTICE ROTH: Sorry, sorry, from the definition of material?

MS KREISBERGER: From the definition of material.

MR JUSTICE ROTH: There's also 19, isn't there, that's relevant.

MS KREISBERGER: That's the prohibition on the person, and that's in the same terms, also relying on the defined term "material". So again deleting that part of the definition would have the same impact there.

MR JUSTICE ROTH: Hm-mm.

MS KREISBERGER: And just for completeness, tab 41, staying with the Premier League, these are the ticketing terms and conditions.

At page 145, so the first page there, the relevant passages are clauses 2.4 and 2.5, which are in the same terms as we just read in the ground regs, 2.4 captures 19, which you took me to.

MR JUSTICE ROTH: Yes.

MS KREISBERGER: And, again, material is defined this time at the end of the document at page 150 in precisely the same way. So again, any deletion would simply be to information or data. So the suggestion that the whole thing would collapse and that there would be a chaos is not just right.

MR JUSTICE ROTH: I see that. What I still want to understand is what you're saying in paragraph 10. Suppose the court, and by that I mean High Court or the Tribunal, it doesn't matter, were to say, yes, you're right, this agreement, this exclusive agreement, is anti-competitive but simply because it's too long, five years, I know the defendants try to say it's really three years, but assuming I accept your argument, this is effectively a five-year agreement, with I think a first option to renegotiate, it should have been a three-year agreement, three year exclusive, and that would be all right, but it's a five-year agreement so it's anti-competitive. Are you then saying, well, it follows from that conclusion that it would follow that these limited terms, but the ones you took me to, are therefore themselves anti-competitive and breach Article 101 or are you saying, as other parts of your pleading seem to say, that there is some ambiguity, it would seem to me that enforcement of those conditions, and it does say enforcement in paragraph 10, in support of a five year agreement is anti-competitive but enforcement of those conditions in support of an agreement that wasn't anti-competitive would be fine and that therefore you're not trying to strike down the term but restrain enforcement of it in those circumstances, do you see the distinction I'm making?

MS KREISBERGER: I think I do, sir. Perhaps you can tell me if I have fully addressed it with this point in response. The question is a binary one. Does a contractual provision infringe 101? If the upstream exclusive agreement is unlawful, for whatever reason that may be, whether it's duration or that the

principle of licensing all data for any period of time to a single operator, if you have an infringement of Article 101 upstream, any other contractual provisions which give effect to that infringement are unlawful for the period during which they give effect to the infringement.

Now, what that means in terms of redrafting things we don't have to decide now. But one way of dealing with it is one simply says, well, we don't rely on these prohibitions on entry at the grounds or we delete the relevant words. But what one cannot have is an agreement upstream which has been struck down and terms and conditions which in effect preserve that unlawful exclusivity because then the challenge to the upstream agreement has become otiose, it is pointless.

You have to be able to follow the line of contractual provisions and sweep up contracts that enforce the restrictions of competition. So you can't achieve exclusivity by virtue of the attendee terms being struck down, the FDC Betgenius contractual terms.

MR JUSTICE ROTH: Yes.

MS KREISBERGER: We will certainly have another look at the pleading if that needs to be tightened, but the language of enforcement is simply to capture reliance on those terms to give effect to the unlawful agreement.

MR JUSTICE ROTH: Yes. Thank you.

MS KREISBERGER: Sir, in that case, moving on.

So the reason I was taking you to those provisions, the passages in our pleaded case, is to demonstrate that Sportradar hasn't alleged a refusal by FDC to grant Sportradar a licence to collect live data. That is simply not the case which is put.

MR JUSTICE ROTH: No, I see that.

MS KREISBERGER: So the challenge is to the exclusivity. There's no separate allegation that the infringement is refusal to licence, refusal to access and Ms Smith's point that we've pleaded a counterfactual in which Sportradar does get a licence, of course we've pleaded a counterfactual for the purposes of damages, because we haven't suffered loss unless we would have got a licence to enter in a competitive world. So of course that goes to the reason why we say we've suffered loss but let's be clear. The damages claim is subsidiary. The thrust of Sportradar's case is that there is an ongoing infringement that needs to be brought to an end and that is the case of infringement. There is no infringement counterfactual in which we need to demonstrate that Sportradar would have been authorised. It's an objective case, not a subjective case.

So to that extent FDC's logic that this tribunal would be called upon to make findings about intellectual property rights which they say are the subject of the responsive claims because this is a case about refusing to license IPRs, that's a straw man.

I'll just -- I'm conscious, sir, that you have the point, so I just want to finish by making this point. Ms Smith added some authorities to the bundles at a late stage. I understood that to be a response to our contention that this proposition of law wasn't supported by authority. She hasn't taken you to them this morning but I'm just going to make one point from the case of Purple Parking, which is at 7B9 of the bundle.

MR JUSTICE ROTH: Do you want me to turn it up?

MS KREISBERGER: Yes, only briefly. Sir, it may be you're well familiar with that case.

MR JUSTICE ROTH: Well, in general terms but not of every detail and it's a long

judgment.

MS KREISBERGER: Yes and you'll be pleased to know I'm not getting into detail. So paragraph 76, which is on page 28, let me just frame the point for you. They say -- this goes to the point that FDC has pleaded that this is a case about refusing to licence an IPR. I just demonstrated it's not. To the extent that it is said, ah, but it is in substance, something Ms Smith might like to say in reply, but in substance it is a case about refusing to licence IP, if that is her contention that's wrong as a matter of law and that proposition can be drawn from Purple Parking.

So paragraph 76, Mr Brealey, for Heathrow, said that this was an essential facility case. So what he says is, in the third sentence, what makes cases like this different, according to him, is that they fall into the category that he describes as essential facilities cases. How has an asset which it owns and controls, and he goes on to say a refusal to give access to an essential facility, a high test is required before that can be said to be wrongful.

So he said that's the nature of the infringement being alleged.

In the following paragraph, it's recorded that Mr Maclean for Purple Parking said that's a false characterisation of the wrong alleged. If characterisation is required in this particular case, it's to be found in a discrimination category, not some notion of essential facilities, and this point was determined by Mr Justice Mann at paragraph 105 on page 36 at the bottom of the page. The judge said:

"I therefore find that the case against Heathrow does not have to fit into the category of essential facilities or fail. Even if the subject of the facilities market can be described as essential facilities, Purple and Meteor are entitled to put their case on abuse in another way."

So this simply goes to the point that we can't be told what our case is. We've pleaded our case and it's not for FDC to put it in different terms.

MR JUSTICE ROTH: Yes.

MS KREISBERGER: So, to the extent that she relies on a proposition which was set out in paragraph 94 of her pleading, that exclusive IP licences can't without more be restrictions by object, that's not relevant to this case.

So to the extent that what is FDC is saying is this is a case about refusing to licence IPRs and that needs to be heard together with the responsive claim, that fails.

Moving along then to my second point which I set out, that this is not a case about IP rights, it's just a point I need to deal with briefly. So not only is it not a case about refusal to licence IP rights, it's not really a case about IP rights at all. I set out the three categories of rights referred to in the FDC pleading, database rights.

MR JUSTICE ROTH: Yes.

MS KREISBERGER: Trade secrets, confidential information and I explained that the whole thrust of Sportradar's case is Betgenius' exclusive access to the stadia. So the subject matter, and we've talked a bit about the private rights, the subject matter of the exclusive right to Betgenius is access to property. It's a property right that Betgenius gets from FDC and that's what FDC refers to at paragraph 124 of the defence and you don't need to turn it up, but, just for your note, clause 4.1(a)(i) of the FDC Genius agreement which is at 5C, tab 37, page 46, also makes clear, the relevant clause makes clear, that what Betgenius is given at that stage is an access to property right to capture the live events and data.

So it's the access to property which is the subject matter of Sportradar's challenge. It's not an IPR licence.

Now, I would hope, coming back to the IPRs that are claimed, I would hope that it's common ground that there can be no database right over live data before it's recorded and collected in a database. Nor can there be trade secrets. Sir you made this observation this morning, we're talking about events taking place in public, has Marcus Rashford scored a goal, which happens before hundreds or thousands of spectators. That's not a trade secret. That's not confidential. It's a live event and that's not like TRP. TRP, as you pointed out, related to the Tote database. That's what was confidential, not the live event. So that's why I say this isn't really a case about IPRs and the cases that Ms Smith added to the bundle, QC Leisure and McGill, those are cases about licensing copyright, copyright in TV listings --

MR JUSTICE ROTH: Well, I wasn't taken to them, so I don't think you need take up time with them.

MS KREISBERGER: No, I'm grateful.

To the extent that the database right exists in Betgenius' own database, which is populated with the evidence collected at the ground, there is no dispute and I think have you this point too, sir, Sportradar doesn't dispute that Betgenius can claim database protection over its own database nor are database rights the subject matter of the responsive claims. So on any view database rights are not a point of contention nor are they a point of overlap. So FDC reliance on them is a red herring.

That brings me to my third point.

FDC advances a broader proposition that the Tribunal would be hamstrung if it heard the competition claim, because the competition assessment can't be isolated from what they call private law issues.

MR JUSTICE ROTH: Well, I don't think -- you needn't trouble yourself with that. I'm

quite satisfied that we can take account of private law rights and we do in deciding the competition issue. I mean, that goes to the question of whether the CAT could properly and fairly adjudicate on your claim and simply a defence relying on private law rights. The real issue is the counterclaims here, it seems to me. That's at the heart of the transfer question and -- which I think is the next main point that you're coming to.

MS KREISBERGER: Yes.

MR JUSTICE ROTH: Because that's the issue that I think is at the heart of the application. I know Ms Smith wasn't prepared, although she was a bit cautious about it, to accept that, if it was just your claim absent a counterclaim there would be no basis for transfer, which was the question I put to her and she wouldn't concede that. But she was quick to say, well, in a sense that's a hypothetical question, the whole situation here arises because there are counterclaims.

MS KREISBERGER: Sir, I think I missed the end of that.

MR JUSTICE ROTH: Can you hear me now?

MS KREISBERGER: Yes, I can.

MR JUSTICE ROTH: I was just saying that although Ms Smith wouldn't concede there wouldn't be a basis for transfer absent a counterclaim, when I asked her that question she was somewhat cautious in resisting that point and she was quick to say, well, that's really hypothetical because the whole issue arises here because there are counterclaims. So, I mean, that's what we've got to grapple with and I can tell you for myself the fact that -- I mean, even if there were database rights involved, if it was simply whether that prevents there being a breach of competition law, that's something the Tribunal could determine. The issue here is that we've got these counterclaims involving

things which can't be heard in the Tribunal in full, that's clear, and what we do about that and how that changes things. That seems to be at the guts of all this.

MS KREISBERGER: So I think my next submissions engage that point. Sir, I'll take you through it and perhaps bear with me, because it still relates to the private law rights but what I'm now turning to is the question of the confidence claim, because that seems to be the only -- it is the only area of overlap given that there's no issue in relation to the contract rights, property rights.

So --

MR JUSTICE ROTH: Subject to -- just interrupting you, subject to the point about the additional parties, which you'll come to, the point that Mr de la Mare made about the scouts.

MS KREISBERGER: I'll come on to that at the end if I may.

So the reason why there's no barrier in terms of overlap between the claim and the counterclaim does come back to this point on private law rights. It is this. As you know, we accept the existence of rights under contract law, property law, and we rely on them, because it's having those rights which facilitates the infringement.

MR JUSTICE ROTH: Hm-mm.

MS KREISBERGER: But the question for the purposes of the competition law assessment does not involve any consideration by the Tribunal of the source of any private law rights. So from the Tribunal's perspective it doesn't matter whether they derive from contract law, property law or an equitable obligation of confidence. That doesn't matter for these purposes. So it is important to come back to the point that we've agreed that the private law rights exist and I've taken you to the attendee terms. Given those rights under contract law

and property law, Sportradar accepts that the stadia have a control mechanism to control entry and it's precisely because of that unfettered ability to control entry to their grounds by virtue of the contractual terms and to prohibit data collection by unauthorised operators that facilitates the infringements.

So I would like to put it this way, and this is all going to the question of overlap in relation to the confidence claim. The competition issue in relation to all of these private law rights, including the overlapping issue of confidence, is a binary one. All that the Tribunal needs to take account of in its competition assessment is the question can non-authorised data operators be excluded under private law or not? And we accept, it's common ground, we accept they can and that is par for the course with other cases that I've mentioned where undertakings have private law rights which facilitate the exclusion.

But what I want to come back to is in none of these cases is there any investigation of the precise nature or source of the rights under private law. So in Luton Airport for instance -- sorry, in Arriva, in Luton Airport, it's simply stated at paragraph 1 of the judgment that the operator of the airport has the right under a concession agreement to grant the exclusive agreement. Similarly in the football broadcasting decisions the leagues clearly had the right to the media rights. There's a specific finding that I'd like to take you to in Purple Parking. So, again, that's 7B, bundle 7B, tab 9, page 74.

MR JUSTICE ROTH: Yes.

MS KREISBERGER: It's just one passage in the judgment and I'll read it out, sir.

MR JUSTICE ROTH: What paragraph?

MS KREISBERGER: Paragraph 240 on page 74.

MR JUSTICE ROTH: One moment. Yes.

MS KREISBERGER: "I would also add that my decision is not affected by the fact that the controls in question are contained in byelaws. In taking the steps that it took, Heathrow was relying on the situation that it had produced in byelaws with the force of criminal law."

Then we get to the really significant sentence:

"Because of the position which HAL occupies at Heathrow, it is in a position to control access through byelaws and not through the enforcement of proprietary rights. In my view that makes no difference. That is merely the control mechanism and its position as the maker of byelaws merely gives it another method of control and not a special method of control which is exempt from the effects of competition law."

So applying that proposition here, that the source of the control mechanism does not matter and that is why, this is the central point, we say FDC's claims that live in play data has the quality of confidence adds nothing to the analysis of competition law, even if you accept that there could be confidence in the question of who scored the next goal, which is a bold submission.

MR JUSTICE ROTH: So to make sure I've got it right, what you say is there might be a dispute, there is a dispute, as to whether this is confidential, but it doesn't matter for the competition claim, it will just be an additional control mechanism to the proprietary and contractual one and indeed, if it exists, it will be a control mechanism which might bind your client even if it's not bound by a proprietary right because it's not your client but the scout who actually goes on the ground. But you're saying in a sense, one can accept for the purpose of this claim that it's possible there is a confidential quality in the data, it's just another control mechanism and the question in the competition case, as the bylaws were, an additional control mechanism on top of the airport's

proprietary, Heathrow's undoubted proprietary right, is whether -- enforcement of those rights in the way you explained is however many there are in support of the exclusivity is anti-competitive.

MS KREISBERGER: That's --

MR JUSTICE ROTH: Have I got the point?

MS KREISBERGER: You have, sir. I'm grateful for that.

MR JUSTICE ROTH: So it's not even necessary to have a potentially complex, or Mr de la Mare saying no, it's all been decided now in TRP, IP debate on whether this is confidential or not.

MS KREISBERGER: None at all. None at all, because another way of putting the point is that the control mechanism has full protection under private law, it's fully operative, it can sound in damages, it's actionable, it can be pursued by virtue of an injunction. It has full protection under private law under as a control mechanism. Whether there is could be an additional layer of equitable obligation is of no odds for these purposes of the competition assessment. And, sir, I would just observe as an aside -- I should make clear that of course you have the point that we don't accept that there's confidence on the pleaded case in relation to the intended claims, but that needn't concern us here.

But, yes, I would also just observe that confidence may be relevant to a different question which doesn't arise here, and that's the question of who is entitled to sue to enforce the private law restrictions which may well yield a different answer from who is entitled to sue for breach of the attendee terms under contract law. That might explain why the responsive claims are brought in the way that they are brought. There isn't a claim for breach of contract. But that's just an interesting observation. It's of no consequence at all to the competition analysis.

MR JUSTICE ROTH: Yes.

MS KREISBERGER: So FDC claims there are contract rights, we agree. FDC agrees the clubs have private property rights. We agree. FDC also claims the live match data is confidential and benefits from the protection under equity. We disagree but for these purposes one must ask so what?

MR JUSTICE ROTH: Yes.

MS KREISBERGER: So if it's helpful just to draw those points together before I move on from this part of my submission. This isn't a case about IPRs. Sportradar's case doesn't involve a refusal to licence IP to it. The Tribunal isn't being asked to determine IP claims or private law claims. You have the point that, to the extent they are relevant, the Tribunal can take full account of private law rights and critically the last point is there's no overlap with the intended responsive claims for breach of confidence because the source of the control mechanism is irrelevant for these purposes and the extent of other private law rights aren't in dispute.

MR JUSTICE ROTH: I mean, there is, I think, formally a dispute on the pleadings as to whether this is confidential or not because, as you pointed out, the defendants say it is and I haven't been through your reply carefully, but I imagine you dispute that. But you say that dispute, although it's there, need not be resolved. Is that because it doesn't add to the private rights that are not in dispute?

MS KREISBERGER: That's right. It is not relevant to the analysis of the competition assessment.

MR JUSTICE ROTH: Yes.

MS KREISBERGER: So that is the dispute. There is a dispute. We of course don't accept that but that is a dispute for another day's proceedings if we get that

far, by another court.

So that explains why we say there's no reason why as a matter of legal analysis the Tribunal can't proceed to hear the claim and that, as I said, is sufficient grounds in my submission for the Tribunal to dismiss the application because there isn't a legal bar.

Our other points, and this was presented by Ms Smith as the crux of the matter, we don't say this is the crux of the matter at all. We simply observe that there is further good news if the claim remains in the Tribunal which is the very significant efficiencies, particularly if the High Court decides to stay the responsive claims if and when they're issued, that of course is not a matter for this tribunal and I certainly don't suggest otherwise. But the efficiencies that arise if Sportradar wins, then it is the case that the competition claim is dispositive and the responsive claims, if brought, necessarily fail.

Now, I have to address a mischaracterisation of the submissions in our skeleton. Mr de la Mare said that Sportradar's position was, if we win, there are no other issues, if we lose there are no other issues. That is not my submission. If we win the responsive claims fail as a matter of law. But if Sportradar loses, then the substantial --

MR JUSTICE ROTH: Can we leave --

MS KREISBERGER: Yes.

MR JUSTICE ROTH: I appreciate you don't say it the other way. But to take the point if you win, you may win in various ways, I think you'd accept that you could win on what you say is the core of your case, namely that the exclusive agreement offends against competition law and that is struck down. But first of all you may not win in saying, as alleged in paragraph 98, that you would have been granted a licence on the balance of probability. It's not clear you'll

succeed on that just because you've succeeded in striking down the licence. They're different points.

MS KREISBERGER: I'm grateful to you for raising that.

MR JUSTICE ROTH: I think you accept that. You accept that, do you?

MS KREISBERGER: Of course I accept that. But that latter point goes only to damages, not to infringement.

MR JUSTICE ROTH: Yes.

MS KREISBERGER: So that would be a -- that would certainly be a scenario that Sportradar considers a win because --

MR JUSTICE ROTH: Fair enough. And you may say -- your fall back would be a loss of chance. But there is another aspect in which you might succeed, not striking down the agreement but not totally it seems to me, which is suppose that the court or tribunal found no, as you contend, five-year exclusivity or perhaps exclusivity for all three leagues and not split up like media rights are sometimes split up into subsets, offends against competition law, but that doesn't have the effect that during the currency of the agreement anyone could go into the grounds and start sending back the ingredients of the data, just as, for example, if one thinks of media rights, if, for argument's sake, the Premier League were to grant a 20-year exclusive broadcasting right in one broadcaster, something for that length would very probably be anti-competitive, it doesn't mean that during the currency of the agreement anyone else would be free to go into the sports ground and start broadcasting. And, I mean, it may have that consequence but it doesn't seem to me it's inevitable. So you might succeed in striking down the agreement but still the defendants could say nonetheless that doesn't have the effect, as you contend, that they are not entitled to rely on their private rights to exclude the

scouts in this case. Your claim is one for damages but they could still exclude the scouts during the currency of the agreement. Do you follow what I'm saying? That the two didn't necessarily follow? They might do and that is your case, but you might not succeed on that. And so there might be, even though you've won, a claim saying, yes, you get your damages, for loss of a chance or because you should have got the licence, but there is still an infringement of private rights that can be enforced. That seems to me one possible outcome and not a fanciful one and the fact that there's an unlawful exclusive agreement doesn't mean that there's, as it were, a free for all in the period of the agreement. You follow the point, I think.

MS KREISBERGER: I do. So taking that in turn. My points in response are first of all it seems at least in my submission an unlikely scenario because what the consequence of that is that you have struck down an exclusive grant of rights but by maintaining the entry terms, the same effect is implemented in the market. So you've struck down an exclusive agreement but on the ground no one other than the authorised data operator is allowed in. So you haven't really struck down the exclusive agreement.

MR JUSTICE ROTH: Well, I see the argument, but I think you can see the contrary argument, that it doesn't effect in damages.

MS KREISBERGER: Yes. So then I go to my second point, which is, well, as I said at the outset, the question of whether it's dispositive is a potential efficiency from the claim remaining in the tribunal but it's not the reason why. So there is at least a scenario where Sportradar wins on all fronts and the responsive claims fail. So I am able to outline a potential efficiency which flows from that scenario. I don't think I need to persuade you, sir, that all scenarios give rise to efficiencies because the prior question is: is there any legal bar? Is it, as

FDC claims, impossible to hear the competition claim?

MR JUSTICE ROTH: Well, I'm not sure legal bar. It might be their submission. I don't think that's, I have to say, I'm not persuaded it's a question of a legal bar, I think it's a question and that's how I read Sainsbury's, of considering all the factors and, putting it slightly crudely, what makes the best sense, what's the sensible way forward looked at objectively. It's possible to continue, I don't think there's a legal bar, or I don't think that's the test, if it's a legal bar, but even if it is, I don't think there's a legal bar here. But is it sensible and, as you put it, efficient and just cause to proceed here or would it be more appropriate, taking account of all the special considerations, particular considerations here, for this to be heard with the counterclaims? I look at it more broadly.

MS KREISBERGER: I accept that of course, but I would calibrate it a little differently to say it's not simply a de novo look at all of the circumstances. There is a presumption set out in Sainsbury's that where possible competition claims should proceed in the tribunal. So the cards are stacked in the favour of the competition claim resting where it is unless there are real disadvantages. So I accept that I have been rightly picked up on the terminology of bar, but, as I said in opening there's got to be a very good reason. So I would calibrate a little differently.

But what I say on efficiency is I have shown that there is a scenario in which Sportradar has a clean win, the responsive claims fail and they wither on the vine. I accept that there of course are other permutations that might yield fewer efficiencies and of course it's far too early to know which scenario one might end up in.

MR JUSTICE ROTH: Yes.

MS KREISBERGER: Does that address the point, sir? If I may just take instructions.

MR JUSTICE ROTH: Yes.

MS KREISBERGER: Sir, I'm reminded that there is an additional point, which is the fact that you may have two damages claims, and we accept that's one scenario, shouldn't pre-determine the issue because the fact that you didn't transfer now whilst you proceed to hear the infringement claim doesn't mean that the Tribunal couldn't order a transfer further down the line if there were in fact two damages claims, that it made good sense to deal with together in the High Court. But that would be following a competition trial on infringement.

MR JUSTICE ROTH: Yes.

Yes, thank you.

MS KREISBERGER: Sir, I was going to say a word on TRP but I don't think I need to address you on - the only issue that I was going to raise in relation to TRP, is that an effective control mechanism is a necessary condition of claims under the head of confidentiality. So that's why we say it makes good sense to hear the competition claim first, given that one scenario is the control mechanism fails and so it's not feasible to have a claim in confidentiality. So that efficiency is a potential one which could be realised.

The fact that the attendee terms might survive the collapse of the upstream exclusive restrictions, that's beside the point. As I said, if there's a competitive mechanism upstream, there is no issue in relation to the attendee terms going forward and FDC might look to bring breach of confidence claims against unauthorised data operators who enter in contravention of those terms in that hypothetical future world of a competitive allocation of access rights.

MR JUSTICE ROTH: Yes.

MS KREISBERGER: Sir, I want to come back then to the scenario if Sportradar loses on the competition point and you have asked me about that and I hope the position is clear. Mr de la Mare said that our position was that if we lose there are no other issues. That just is simply not our submission.

If we lose, as, sir, you questioned me, we accept that there are breaches under contract law and property law. I'm afraid that to the extent that Betgenius and FDC bring claims which go beyond those breaches, then they have to do the work, they have to make out their claims and they can be addressed separately from and likely after the determination of the competition claim. So the fact that there is a dispute between the parties on the elements of conspiracy is simply a feature of the case that the defendants have chosen or will choose to bring when they issue those claims. But it's not to the point on the transfer application, the fact that there will be a further trial in relation to those issues.

MR JUSTICE ROTH: Yes, but, just to be absolutely clear so that it's also on the transcript, if you lose in impugning the validity, in impugning under competition law, the FDC Genius agreement, you accept that the attendee terms are then fully valid and enforceable, is that right?

MS KREISBERGER: We accept that. Sportradar has been totally unequivocal on this point. It's been transparent and consistent. If it loses it won't send data scouts into the stadia. It’s addressed at paragraph 30 of our skeleton.

MR JUSTICE ROTH: No, I've seen that, but that's a different point.

MS KREISBERGER: And we accept a breach in relation to trespass and contractual terms. So we cannot give an undertaking that Sportradar will submit to judgment --

MR JUSTICE ROTH: No, I see that, but the claim against is --

MS KREISBERGER: It's a different claim.

MR JUSTICE ROTH: No, I see that. But you accept -- now you accept for yourself breach and does it follow that you accept that the attendee terms which are the ticketing restrictions and the ground regulations I think or whatever they're called, are then fully valid and enforceable?

MS KREISBERGER: We accept that.

MR JUSTICE ROTH: Yes. That was my understanding of what you're saying.

MS KREISBERGER: Yes, and -- yes.

MR JUSTICE ROTH: Yes, and it's then in the light of that that the defendants can pursue their remedies against whomever.

MS KREISBERGER: Absolutely.

MR JUSTICE ROTH: But one issue that arises is that of the scouts, who I think are represented by the same solicitors as act for your client. Now, of course the counterclaims are against them also.

MS KREISBERGER: Yes.

MR JUSTICE ROTH: This may be a bit hypothetical but that acceptance that you've given on behalf of Sportradar won't bind them so technically it would be open to them to start running an argument, but that's not some competition point regarding those terms.

MS KREISBERGER: I don't have instructions on that point and, sir, if it's helpful, we can come back to you. But our position on this is firm, that the scouts should have no role in this whatsoever. The scouts entered the grounds based on Sportradar's open and transparent position that the attendee terms give effect to an anti-competitive agreement. So that was the assurance which the scouts had that this was Sportradar's position. The idea that these parties are pursuing what are largely students who had that assurance from Sportradar is

a matter of severe regret on our side.

MR JUSTICE ROTH: No, I've seen all of that. But I imagine if they were to put in a defence that, as it were, was inconsistent with the clear statement -- and if they were to put in a defence that was inconsistent with the position of Sportradar on the competition issue, which is pretty unlikely, and raise a different additional competition issue in some way, that could be -- that issue can be transferred here if they wanted to take a different line.

MS KREISBERGER: Sir, can I just take instructions on that?

MR DE LA MARE: I think sir, in relation to that, that can be only be true if it is in relation to an infringement issue. If they take offence in relation to the private law matter, that can't be transferred.

MR JUSTICE ROTH: But it would be an infringement issue to say that relying on -- if they wanted to say that relying on the attendee terms was anti-competitive, even though the agreement survives and was not entered into in --

MR DE LA MARE: That would be -- yes.

MR JUSTICE ROTH: Yes, that was what I had in mind. If they took a (inaudible) defence, there would be no reason to do it. Yes. Thank you.

Yes, so you were saying -- and I was asking you about the scouts.

MS KREISBERGER: Yes. So I can't today make submissions on behalf of the scouts.

MR JUSTICE ROTH: Yes.

MS KREISBERGER: And I would assert they don't have any money, so some of this may be a little fanciful.

MR JUSTICE ROTH: Yes.

MS KREISBERGER: All I can say today is that Sportradar won't be sending the scouts in under this hypothesis and that's the assurance we give.

MR JUSTICE ROTH: Yes.

MS KREISBERGER: So, just to conclude on that point, all we said is -- coming back to the question of what would be outstanding, what would have been addressed if we lose is the need for any injunctive action, that would be otiose and there would be no conduct to enjoin because Sportradar will stop sending the scouts in. So that will be resolved, everything else is in play to be dealt with and that's the liability and damages and, sir, as you observed, very likely separate trials.

MR JUSTICE ROTH: Yes.

MS KREISBERGER: I was then going to move onto the SCM proceedings, which Mr de la Mare referred to this morning. As you know, about three months after the transfer application was made, Betgenius proffered this new reason for transfer. I don't intend to dwell on this point, but the fact that Betgenius has sued a party called SCM for scraping data from Betgenius' protected databases and that that party has pleaded a defence under competition law is no reason to transfer. As Mr de la Mare was quite clear this morning, he said he's not suggesting they need to be heard together but transfer should nonetheless take place to preserve the potential for the two proceedings to be jointly case managed in appropriate areas and he referred to disclosure.

Now, that proposal will be opposed by SCM. Sir, you may have seen their letter from SCM's solicitors, RPC.

MR JUSTICE ROTH: No, I have not actually -- I've seen reference to it. I haven't seen the actual letter. What's the reference for the letter?

MS KREISBERGER: The reference is 4B at 73 to 78.

Yes, that's a page reference. There are no tabs in that bundle.

MR JUSTICE ROTH: Yes.

MS KREISBERGER: And, sir, I will leave you to read that letter but, to paraphrase, they oppose any form of joinder or joint case management very clearly.

MR JUSTICE ROTH: Do they talk about joint case management as well as joinder?

MS KREISBERGER: We will just check precisely the terms they --

MR JUSTICE ROTH: It's a long letter.

MS KREISBERGER: It's a few pages, so I don't want to misrepresent --

MR JUSTICE ROTH: Because it seems to talk about joinder and as you say they don't accept there's any significant overlap and so on.

MS KREISBERGER: Yes, if I just take you to paragraph 3.71 on page 77, they do say clearly that they don't think it will be appropriate for the proceedings to consolidated, joined or otherwise case managed. So they reject any form of joint case management.

MR JUSTICE ROTH: Yes.

MS KREISBERGER: So it is clearly put.

MR JUSTICE ROTH: Yes, thank you.

MS KREISBERGER: In my submission, this is not a persuasive point in favour of transfer, so I address it only briefly. The two proceedings have little in common. Betgenius is the only party common to both claims. SCM alleges that over 150 data rights agreements in a panoply of sports are unlawful under competition law and it potentially raises a whole host of relevant markets.

There's also no allegation under chapter 2 in their case and apart from anything else, the competition defence advanced by SCM may well be short lived because Betgenius candidly admits that it intends to apply to strike it out. That's at paragraphs 3.9 and 73 of Mr de la Mare's skeleton. But conveniently it survives while this application is heard.

Now, I confess, Betgenius advanced a rather exotic argument. It's at paragraph 64 of the skeleton, that the scraping allegations could somehow be relevant to market definition. I struggle to follow the logic and if I may say, the only scraping here is Betgenius scraping the barrel for a decent point to support the transfer application.

MR JUSTICE ROTH: Yes.

MS KREISBERGER: Sir, I think there's one final point which was raised by Mr de la Mare which is why hadn't Sportradar sued the clubs.

Now, if I could just respond to Mr de la Mare's submission there. As I set out, the whole thrust of Sportradar's case is to the upstream exclusivity. The additional ancillary challenge to the attendee terms which we discussed is ancillary to the main case. So there's no reason to weigh these proceedings down by joining a host of clubs and not only that, there is another point why it's not necessary. So the parties to what we say are the main infringement, FDC and Betgenius, and it invariably on our case has an impact on the attendee terms, but on the facts of the case there's no reason why that requires the clubs to be parties to these proceedings.

Now, sir, I have to be very careful here. So if I could just direct you to the relevant bundle but not read out the section.

MR JUSTICE ROTH: Yes.

MS KREISBERGER: So it's in Sportradar's reply which is at 3B, tab 4 and it's paragraph 12 and 13.

And those paragraphs refer to clauses of the FDC-Genius agreement which I can't read out.

MR JUSTICE ROTH: Shall I read them to myself?

MS KREISBERGER: Yes, please.

MR JUSTICE ROTH: And then you can -- and then you'll have to end.

Yes.

MS KREISBERGER: I won't say anything about that for obvious reasons.

MR JUSTICE ROTH: Yes, I see.

MS KREISBERGER: Sir, that concludes my submissions, unless you had any further questions.

MR JUSTICE ROTH: Yes. It's only this, and if you suggest in various places that if the transfer application is rejected, the proceedings that will be started in the High Court shall be stayed, obviously that's not a matter I can decide --

MS KREISBERGER: Yes.

MR JUSTICE ROTH: -- even though I can indicate a view, and there are no proceedings at the moment in the High Court to stay anyway, but if they are commenced it doesn't follow that they're immediately stayed, if one of the claimants wanted to seek summary judgment, there's no reason that can't proceed and if there no competition issues involved, which will depend on the grounds for summary judgment, the grounds of opposition and so on, that can be heard. It doesn't need to be stayed if it doesn't engage the matters that are in this claim.

MS KREISBERGER: I fully accept that.

MR JUSTICE ROTH: Yes.

MS KREISBERGER: As you say, it's a consequence of the absence of any overlap.

MR JUSTICE ROTH: Yes, and it's only to the extent that there may be an overlap and that one would see when matters develop there. Yes. Well, there is some overlap in the defences clearly.

Yes. Thank you.

I think it might be -- I know we're running a bit out of time, but I think again it's

sensible to have a short break and if we take - if we say we'll resume at 3.30 and then I'll hear from the short replies from Ms Smith and Mr de la Mare.

(3.21 pm)

(A short break)

(3.30 pm)

MR JUSTICE ROTH: Yes. Ms Smith, would you like to respond.

Submissions in reply by MS SMITH

MS SMITH: Thank you, sir. The test to be applied by the CAT in this case is not one whether there is a legal bar to the tribunal hearing the claim, competition law claim, separately from the counterclaims which cannot be heard by the CAT. The question is whether it's sensible and efficient for the CAT so to order and that arises not simply from what the court said by the Court of Appeal at paragraph 358 in its judgment in Sainsbury's v Mastercard, but also importantly from the fact that the Tribunal is bound to act in a case such as the present on an application such as the present in line with the governing principles which are set out in Rule 4 of the Tribunal rules. And, sir, you'll be absolutely familiar with those. They reflect almost verbatim the overriding objective set out in CPR 1.1 and those guiding principles are that the Tribunal has to ensure the case is dealt with justly and at proportionate cost. It has to ensure, so far as practicable, that a case is dealt with in a way that saves expense, ensuring that the case is dealt with expeditiously and fairly. So this is a question we say, a central question, of efficiency.

Ms Kreisberger said, well, yes, there may be efficiencies but that's not the point. We say it is absolutely the central point. You have to be satisfied, sir, in my submission that hearing the competition law claims separately from the

counterclaims which you cannot hear would be efficient, is most likely to save expense and most likely to ensure the case is dealt with expeditiously and we say you cannot be satisfied that that would be the case.

Your discussion with Ms Kreisberger as to the various possible outcomes of the competition law claim and the various ways in which Sportradar may win but not actually win completely, for example as regards the duration of the exclusive agreement, I also gave you the examples this morning as it might win on one of the restrictions, say the restriction on supply but not on the restriction of collection. These all have different applications and various outcomes for the ground regulations and ticketing condition arguments that Sportradar make. The point is, even if Sportradar wins on its Article 101/102 case that the agreement, the FDC-Genius agreement imposes unlawful exclusivity provisions, it may still not win on the point that the terms excluding Sportradar from the stadia are unlawful. It is certainly not the case, as Mr Kreisberger said, that it's beside the point if the terms and conditions in the ground regs and ticketing conditions survive the collapse of the exclusive provisions, because if Sportradar win on its competition law claim but that does not have the effect of making the terms that exclude Sportradar from the stadia unlawful, there is a real possibility that there be substantial issues that will still need to be considered by the High Court in costly and duplicative subsequent proceedings on the counterclaim. Even if Sportradar wins, in quotation marks, its competition claim.

However, you have to be satisfied in our submission that hearing the competition law claims separately from the counterclaims, which you cannot hear, would be efficient regardless of the outcome of the claim. I've already said that if Sportradar win their competition law claim there may still be substantial issues

to be argued on the counterclaims which cannot be heard by the CAT, that is substantial duplication and wasted costs. If Sportradar loses its competition claim, Sportradar will still pursue, despite its assurance, the assurance that it has given in the skeleton, Sportradar will still pursue the private law defences that are set out in its indicative defences to the counterclaims. They will still assert there's no confidentiality in the data, they will still assert that even if they accept their coming into the stadia breached the terms of the ground regs and the ticketing conditions, even if they accepted there was trespass and breach of contract, but there was no unlawful means conspiracy, they will still assert there's no conspiracy.

As Ms Kreisberger fairly admitted, we, FDC, will still have to make out our claim on conspiracy in order to make good our counterclaim. We will still have to make out our case on breach of confidence and that case on breach of confidence will raise issues of latency of the data which are the other side of the coin of the issues that will already have been heard in front of the Competition Appeal Tribunal. So there is real danger of duplication, real danger of wasted costs, excessive costs. This is not the most efficient way of dealing with the claim.

Now, it's clear that even if Sportradar loses on its competition claim, we can't simply get on the basis of what Sportradar are offering today, a liability judgment on our counterclaims. We still have to make out our claim on conspiracy and our claim on confidence.

So it's not just a question of picking off damages to the High Court, the High Court will still have to hear substantial issues on liability. But even on relief, it's not simply a question of damages, it's also a question, a very important question, as to what injunctive relief FDC might be able to get against Sportradar and I would like, to if I may, take you, sir, to our counterclaim. It's in bundle 3A,

tab 2, page 113, where we set out at the bottom of page 113 the claims that we make for an injunction.

The first injunction, these have been very carefully drafted to make sure they do the job from the point of view of private law claims. The first injunction is based on the breach of confidence claim. The second injunction I'm informed is based on the conspiracy claim and that's an injunction to restrain the scouts or the Part 20 defendants from acting by themselves through their employees or agents to engage in any of the following acts, to enter and remain in the grounds for commercial practices, to use a mobile telephone et cetera.

The third injunction that we seek is an injunction to restrain both the first and second Part 20 defendants and each of them only if their directors, officers and employers or agents or any of them are engaging or paying or otherwise inducing, persuading and procuring any persons to carry out the acts set out in paragraph 2, so any of the acts that the scouts are being procured or persuaded to carry out and in supplying equipment. All of these issues raise substantial questions of fact. What was the relationship between the defendants and the scouts? Did they, and if so what equipment did they supply to them, did they supply tickets to them, how did they engage with them or induce or persuade them to carry out the acts of entering onto the stadia? So again I've said damages is not just a question of doing sums, but it's not just damages that we claim or an account of profits, which again will give rise to substantial issues that will need to be heard by the High Court, but also the question of the injunctions that we are seeking.

MR JUSTICE ROTH: Yes.

MS SMITH: Issues that will need to be considered by the High Court if the -- if Sportradar lose will inevitably, we say, lead to extra costs and most efficiently

the case it should be dealt with together by one court and it should be case managed together by one court as to decide how to deal with all of these issues once we have got to the stage, for example, that pleadings have closed and evidence is exchanged, are there efficiencies in taking points out at that stage for example that are simple competition law points once the facts have been established that could, for example, be dealt with cleanly by the CAT. You cannot at this stage decide that there is a clean, efficient way in which the CAT can hold on to this case and address only the competition law claims.

There is too much overlap on the facts, too much overlap on the law between the claims and the counterclaims to enable you to decide that the most efficient way of managing these cases at the moment is that the claim remains in the CAT and then we have in effect parallel proceedings going on in the High Court.

Say that competition law claims stays in the CAT. We then have to issue the defendants' other counter claims in the High Court, or we have the right to issue our counter claims in the High Court. It's not necessarily the case that we will receive instructions to stay those proceedings. It's not -- we may receive instructions to apply for summary judgment. There is a substantial damage that thereby two sets of parallel proceeding in the CAT and the High Court raising similar overlapping issues, giving rise to duplication of costs and duplication of litigation on the same issues and there really are no efficiency reasons for proceeding in that way. The most efficient way of dealing with these proceedings is that they are dealt with, the claims and counterclaims are dealt with together by one court who is able to case manage those claims together, decide at the appropriate stage in the proceedings whether they are

issues where the expertise of the Tribunal would make it efficient and desirable for it to hear carefully defined competition law issues, but that cannot be done at this stage, certainly we say it cannot be done at this stage, and the implications in the case between the claims and counterclaims at the moment will be that thereby the substantial -- it just makes no sense and it is not the appropriate way to proceed in this case.

The assurances that are given by Sportradar are not good enough to avoid. They are not good enough to avoid the problems that I have outlined. Ms Kreisberger was quite honest that the assurances she was able to give do not deal with the counterclaims even if she loses on her claim. Those are my submission in reply.

MR JUSTICE ROTH: Thank you very much. That was very clear.

MR DE LA MARE: Sir.

MR JUSTICE ROTH: Yes, Mr de la Mare.

Submissions in reply by MR DE LA MARE

MR DE LA MARE: Preliminary issues first of all. You have my point which is that the case law on the preliminary issues helps inform the exercise of the discretion. I'm not fettering discretion, I'm not suggesting anything of the kind, I'm saying it's a source of relevant principles to tackle the problem before you. I was quite candid that it has to be adapted to provide for the twist in this case, which is the special statutory role of this tribunal which is an important consideration not addressed by the authorities. But nevertheless the warnings about the dangers of supposedly clean issues being hived off are alive in this case and the centre point of my learned friend's case is now the efficiencies that would stem from trying a freestanding point, which is exactly

the argument a party always makes in a preliminary issue context, and the very arguments the case law requires suspicion of. It rather completes my analogy.

My learned friend said that the test should be that there should be a very good reason to take this case out of this Tribunal. Presumably that's also the test that would be applied in the High Court. There would have to be a very good reason not to transfer any issues into the CAT. There's no trace of such test either in Sainsbury's or in the judgment of Mr Justice Birss. There is no such test and that is not the law. It's a question for the court to approach on the basis of all the principles, with no rigid presumption of that kind.

As for the point about forum, of course, this court is a specialist forum but that doesn't begin to answer the questions that arise from the types of preliminary issues that arise here in circumstances where there are potential jurisdictional problems, jurisdictional limitations on this tribunal. Questions of form in those circumstances can't trump the questions of substance.

The second topic, efficiency, and I agree that this is, along with the sort of dispositive nature of the proceedings or not, the central area of inquiry. Where we got to is really this. My learned friend has accepted, as I understand it, that we should be allowed to run all of the private law claims in parallel in the High Court proceedings and she accepted that that's the logic of her argument and the reason it's the logic of the argument is they are on her case separable from the competition law claims. So under questioning from you she accepted that we could apply for summary judgment and to take those claims in whichever direction we wanted to so long as they were independent of competition law.

It's difficult to think of a course of conduct more obviously calculated to cause

fragmentation and multiply cost by running the cases in parallel. It's the very thing that the Court of Appeal warn against in the Sainsbury's case and the reason why they were concerned that the cases should be joined was precisely in order to avoid the dangers posed by having different bits of the case in different places and of course that was the centre piece of Mr Justice Birss' reasoning in Unwired Planet.

So my learned friend referred to there being various scenarios in which various things happened. She accepted there were some scenarios in which she might get a complete win, other scenarios in other circumstances with fewer inefficiencies. All of her scenarios therefore had different degrees of savings and those types of cases are in my experience precisely the case where the court refuses to determine a preliminary issue precisely because of the uncertainty of the supposed savings that a win would deliver.

Third point: what is this case about. My learned friend said this wasn't a case of IP infringement. She's quite right in that respect. Her case is nothing to do with the IPR owned by FDC of which we are the exclusive licensee and the party entitled to give secondary licences. She, on behalf of her client, wants something very different. They want a right of access to the stadium to make their own IPR. Not a licence from FDC's database rights, they want to make their own database rights. As a music law hack, it's a bit like someone saying I want to be let into the studio, the recording studio, with my own recording equipment to make my own recording of the band, my own rival version of IP, which I'm then going to exploit without paying for it. That is not a McGill argument. A McGill argument is being taking a compulsory license of the IP. They don't want a compulsory licence to the IP.

It's not even an argument like the broadcasting decision cases, which were all about

the exclusivity of the options to make such recordings and how they were divvied up ultimately between BT and Sky. It's a completely different and quite novel argument and it's all about access and what it illustrates is why private rights are at the heart of this case, because what my learned friend ultimately is trying to do is to compel access to the stadia. That's the objective. If she can't compel access to the stadia, there is no opportunity to make the rival IP that they wish to make which they say will generate the competitive benefits of having different sources of information and different ways of presenting data, a form of competitive IP to the FDC data which is the consumer benefit they rely upon in this case. The very fact that therefore this is about access to private land in that sense and a right of access to do your own things in the land illustrates why private rights are at the heart.

Next point: the if we win scenario.

Now, if we win, there's no doubt that their defences to the claims will fall away, absolutely not, but for the fact that they are going to fight the confidential information point and my learned friend was very careful and candid about that. No concessions on confidentiality or that the information in question is confidential, notwithstanding that a lot of it isn't live broadcast data or anything of that kind. That issue therefore necessarily will be a re-run -- however one looks at it from the perspective of efficiency, it will be a re-run -- of the whole off tube market definition value debate, the whole area of inquiry where in her case she says this material is so very valuable in relation to these football clubs that effectively we're in a 102 case, a market of its own, such is the value of that data, it's a must-have set of data for this market. There's a slight contradiction there, you may think.

But, anyway, all of that will be re-run in the confidentiality case and it's obviously

important to my client to have protection over the confidential data itself and there was no attempt to answer the overlap on the damages claim. The minute we start investigating damages, you're rerunning issues that arise in market definition, you're reinvestigating where the profits and the money goes and how the market works and how they've managed to exploit and all of that. So they'll be a massive --

MR JUSTICE ROTH: Can I just understand -- sorry to interrupt you.

MR DE LA MARE: Yes.

MR JUSTICE ROTH: When you say a re-run of the off tube, re-run as between whom?

MR DE LA MARE: Re-run as between, in a win scenario, my clients and Ms Smith's clients, who will be suing for damages, they will say we need to see first of all how much money you have made for the account of profits claim that we'll have and which we'll be entitled to elect in favour of in place of a damages claim and equally there'll be a reinvestigation of how its damaged our exploitation of our rights. All of that entails an investigation a how the rights in question or how the infringing rights have been sold on into the downstream markets.

MR JUSTICE ROTH: Yes.

MR DE LA MARE: So the whole area for inquiry is about how the downstream markets have been affected by their conduct, which is the very issue that will be the subject of market definition and the investigation of whether or not there's a relevant restriction of competition.

MR JUSTICE ROTH: To the extent that the CAT, if it is heard by the CAT, has made findings, that will be binding.

MR DE LA MARE: It will be binding on the --

MR JUSTICE ROTH: On your clients.

MR DE LA MARE: Yes.

MR JUSTICE ROTH: On your clients, the claimant and FDC.

MR DE LA MARE: Yes. Absolutely. But the uncomfortable scenario I suggest, sir, is that you will be going back into much the same subject matter but with a different optic. You'll be looking at the same or much the same material but in a different way for a different purpose and there'll be all kinds of arguments about whether or not that finding made in the purpose of market definition necessarily means that, in the context of damage X, Y and Z follows, you'll be picking over the same ground and we'll be arguing about the kind of issue estoppel effects of findings in the earlier judgments for the purpose of the damages inquiry and that's a very unhappy scenario for one to find oneself in when there's a far simpler course of just trying the issues that belong together together as opposed to breaking them up because they're competition law issues and because you want to have the competition law issues before a competition law court.

So that's the if we win scenario. The if we lose scenario, I heard what my learned friend said and it was very clear. It was very clear that they said that the relevant provisions of the ground regulations, with the clever blue pencil argument my learned friend came up with by reference to the word "material", that they were unenforceable. That was her case. The particular words that said or data logging or whatever it was in the definition of other materials, those were to be severed.

The problem with her argument is that it addresses only the first test of severance. Severance has two limbs to it and you have applied both those limbs in your judgment in Jones v Ricoh. The relevant case starting on this is Chemidus

Wavin. The relevant principles are in Bellamy & Child at 16.147. You have to show that the blue pencil test can be met and you have to show substantial severance is possible, in other words that you don't change the parties' intent by severing and what clearer case of changing the parties' intent could there be than changing it from a situation where I say you cannot come to my land because you're going to make a competing form of IP or engage in a commercial activity to which I don't consent, I'm cutting that out so that effectively you have consent to enter the land to do the very thing the person doesn't want to you do.

That is on any view going to fail the test of substantial severance and, once it does, my learned friend's argument that the competition law claim answers everything and that the agreements answer everything falls away. She's left in a situation where there is no licence, no entitlement to get on the land and she or her clients are in a position of infringement.

So the idea that the competition law arguments are a complete answer in the circumstances where we lose, it doesn't get to first base. It doesn't get to first base because the attack has to be on the relevant agreement and the attack either doesn't work or proves too much and that's even before one gets to the inefficiency, as my learned friend Ms Smith has identified.

Then what about the source of control argument?

The source of control argument was an ingenious attempt to avoid some of the logical problems of my learned friend's arguments. She effectively said, well, we concede there is a relevant source of control in the law of trespass and in the agreements which will be in place if our competition law arguments fail. Well, that's the first marker: if the competition law arguments fail. But the first area of inquiry, is there an operative regime of control.

Let's say there is. Let's say it's simply trespass and the law of trespass as I suggest it is and have just suggested in my submissions. The fact that there is a relevant source of control in that sense is only a partial answer to the problems posed by this case when the real question is the activity in question infringing in any relevant sense in the sense of likely to be prevented. In circumstances where my learned friend is saying on the one hand trespass and contract response and on the other hand my learned friend is saying you can't sue by the tort of unlawful means for either trespass or breach of contract for privity reasons or because it's not your land and I don't need to bring the relevant clubs who are the parties on the other side of the privity equation into the court, she is trying to have her cake and eat it. They are trying to create a situation where there is some control but not in the hands of the very people with the commercial rights in question and that is an act of prestidigitation with respect. There is either control or there is not.

Then we come to the supposed solution by way of submission to judgment and various matters of that kind. Now, with great respect to my learned friend, her case has always been clear, that they will effectively stop the activity if they lose and they say on that basis they shouldn't have to give an injunction. Well, generally parties that lose litigation will stop without an injunction but you still get an injunction anyway. It's no answer to an IP infringement case to say, well, if it's found that I'm infringing, I'll stop infringing so you don't need to give an injunction. That's not how the law works.

But in any event there was a total lack of clarity as to exactly what was being accepted by reference to the rest of the case and we'll go back to the questioning my Lord put to my learned friend. You asked in terms are you going to be submitting to judgment on the damages so that there's only inquiry

and the initial answer was yes. That was the initial answer my learned friend gave from which she backtracked.

There are some very simple questions that have to be answered. Are you submitting to judgment if we bring a claim? Is that your client's intention or not? If so, are you submitting to judgment in relation to the claims for breach of confidence? I think the answer --

MR JUSTICE ROTH: Well, I think the answer is --

MR DE LA MARE: No.

MR JUSTICE ROTH: -- became clear that they're not submitting to judgment and that was very clear in the submissions. But what they are accepting is that the attendee terms are valid and enforceable and there is no grounds for impugning them. Whether you have a claim in unlawful means conspiracy therefore against Sportradar is something you'd have to establish. That's Sportradar's position.

MR DE LA MARE: Well, that being so, my Lord, there really isn't, with respect, any material concession on the side of the damages claim at all. All of that therefore remains to litigated out. There are therefore none of the savings that my learned friend identifies in relation to the if we lose scenario and, as I explained, that damages investigation is a substantial exercise worth many millions of pounds potentially which will be gone through in any event.

Now my learned friend will say damages are a secondary issue to her client and, you know, an add-on to their real desire to stop the continuing infringement. That's certainly not a fair characterisation of how my client, who has paid many millions of pounds for these rights, sees the situation, damages is a very real concern for them.

Last two points: SCM and the clubs.

A slightly unfair point was made that we'd raised the SCM proceedings three months after the transfer application. We raised them promptly after we received the defence of SCM in those proceedings and we immediately --

MR JUSTICE ROTH: Yes. I don't think you can be criticised for that.

MR DE LA MARE: No, and on any view it's relevant and material information for the court in the case management decision it has to make, so we were quite right --

MR JUSTICE ROTH: Yes. Well, there's no problem about that, Mr de la Mare.

MR DE LA MARE: Absolutely.

The second point to make is that it was suggested SCM was a bit part player or something of that kind and one doesn't have to be worried about it. It's just a simple scraper. SCM is BetConstruct. Every time you go through my client's defence and look at the main players in the market in which we operate, and the main players are Sportradar, they are my client, they are BetConstruct, they are IMG and they are Perform. It's one of the five principal players with a broad spectrum offering of sports data. It's not some minor player.

MR JUSTICE ROTH: Yes.

MR DE LA MARE: -- with respect. It's a direct competitor of both Sportradar and Betgenius. So that's the first point.

The second point to note is that, whilst my learned friend went on at substantial length about how the actual allegations under 101 and 102 are different, a point we've flagged from the outset, she had no answer to the points about the necessity for cross-action disclosure or the problems of confidentiality rings that would arise. Now, there will be real problems when we are having to disclose Sportradar's material to SCM and vice versa and that is a logistical problem in the case.

Then she said we were scrapping the barrel by suggesting that the IP infringement case was relevant to market definition. I don't accept that for a moment. The case that is being made is that scraping is lawful in this market.

Now, if that proposition of SCM's is correct and it is, I think, an ambitious submission -- Ms Kreisberger and I probably agree in relation to that -- but if that submission is correct, that is a very important input from the perspective of market definition because it means that anybody whose prices are placed on the internet will be capable of having those prices scraped and resold, exactly what SCM is doing and that is not a minor issue. It may not be an issue my learned friend wishes to raise in these proceedings but it is nevertheless a material consideration.

The fact that there are 150 data rights agreements in play, well, that's obviously a big difference. One of them of course is the FDC-Genius agreement that is attacked like everything else and true enough it is that the proceedings may be short lived. We have indicated we intend to strike them out as they seem ambitious. Let me say no more than that from a competition law perspective. But the point I made and made in the skeleton argument is that it's not ultimately whether or not the competition law argument is one that is the determinant of potential needs -- I emphasise the word "potential" needs -- for potential areas of joint case management or joined up thinking in relation to the cases, it's the logistical issues in relation to the disclosure and its handling in relation to the cases that arises in any event.

Lastly, the clubs. It was suggested that there was no reason for the clubs to be parties to this litigation. Well, you have my essential case on that and my learned friend's case is one of cake and eat it. The clubs are the missing component, she says, when it's convenient to defeat the relevant causes of

action on privacy grounds and yet they are no necessary party to the case for the purposes of the competition law claims and that remains the case even though, on her case, she's impugning the legal validity and enforceability of central terms in the club's ticketing and ground regulations. It can't be both and the very fact that the CAT doesn't have powers to direct a representative defendant is a relevant consideration for those reasons which, along with the position of the scouts, and my Lord has my point there, has my concerns there, that the scouts need to be folded in to be bound by these proceedings, they need to be folded to be bound by any competition proceedings or rulings, which at present can't be, and they need to be folded in to be case managed so that their disclosure evidence et cetera is folded into the case as it develops and at present there is no way for that to occur.

Unless there's anything else I can assist you with, sir, those are my reply submissions.

MR JUSTICE ROTH: Well, thank you all.

These issues of transfer, they may not have arisen in a contested application in this tribunal, they have arisen elsewhere, as you know, and issues of overlapping jurisdiction are never straightforward. So I shall consider all that you've said both in writing and orally and you'll be informed in the usual way when a judgment is ready to be issued.

Thank you all very much.

(4.04 pm)

(Hearing concluded)

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Key to punctuation used in transcript

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