IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1624-1627/7/7/23

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Thursday 23rd May 2024

Before:
The Honourable Lord Richardson
John Alty
William Bishop

(Sitting as a Tribunal in England and Wales)

BETWEEN:

JUSTIN GUTMANN
Proposed Class Representative

v

VODAFONE LIMITED & Others
Proposed Class Defendants

A P P E A R AN C E S

Rhodri Thompson KC, Nicholas Gibson and James White (Instructed by Charles Lyndon Limited) on behalf of Justin Gutmann

Rob Williams KC, Jenn Lawrence (Instructed by Slaughter and May) on behalf of Vodafone Limited and Vodafone Group PLC

Marie Demetriou KC, Hugo Leith (Instructed by Freshfields Bruckhaus Deringer LLP) on behalf of EE Limited and BT Group PLC

Brian Kennelly KC & Hollie Higgins (Instructed by Linklaters LLP) on behalf of Hutchinson 3G UK Limited

Mark Hoskins KC & Matthew Kennedy (Instructed by Ashurst LLP) on behalf of Telefonica UK Limited

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Thursday, 23 May 2024

(10.32 am)

LORD RICHARDSON: Yes, good morning.

Before we begin, I need to give the customary warning that some of you are joining us live stream on our website, so I need to warn you that an official recording is being made, and an authorised transcript will be produced. But it is strictly prohibited for anyone else to make an unauthorised recording -- whether audio or visual -- of the proceedings, and a breach of that provision is punishable as a contempt of court.

The other matter that I would like to raise for counsel is, I would be extremely grateful if you could introduce yourselves the first time you speak as that will help the transcribers. Thank you very much.

Now, before we address the agenda, it appeared to the Tribunal that there were a number of relatively uncontroversial matters we would like to deal with first of all. I have in mind the question of forum and the question of confidentiality. And then, from there, we will deal with the issues raised under future conduct.

Now, in that regard, I see -- or I infer -- that helpfully the Proposed Defendants have, as it were, parcelled up issues amongst you, and I'm going to make the assumption -- and I'm sure I will be corrected if I'm wrong -- that that Defendant which has, as it were, articulated the argument on behalf of the Proposed Defendants, their counsel will speak to those, and I will invite them to do so. And, of course, if other counsel wish to add anything to that, we can deal with it at that stage.

But on that basis, then, Mr Thompson, can I ask you, first of all: am I correct that on the question of forum, that the parties are agreed that the forum for these cases should

be England and Wales?

MR THOMPSON: Yes. Could I just ask whether you prefer to be called "my Lord" or "Sir" in this jurisdiction? I discussed it with Mr Hoskins and --

LORD RICHARDSON: Well, I'm grateful for the question. I think strictly "Sir" is probably the correct term as I'm out with my territorial jurisdiction, so let's just proceed on that basis. Thank you very much for the question.

MR THOMPSON: I am grateful. Subject to that, I think Mr Kennelly and I are the only two who address the issues of forum in any detail. And I think -- as we discussed just before the Tribunal came in -- we are agreed that the forum should be England and Wales, subject to the qualification which I think both Mr Kennelly and I have made, should any issue arise which is specific to another jurisdiction.

LORD RICHARDSON: Yes. Mr Kennelly, that is the position of the Defendants, Proposed Defendants?

MR KENNELLY: Yes.

LORD RICHARDSON: Thank you.

Now, on the question of confidentiality, the Tribunal notes that some progress has been made in this regard, and I think I'm right that a draft, as it were, has been prepared by the Proposed Class Representative, and that has been commented on, I think on behalf of the Defendants, by those representing Three.

Is that correct?

MR THOMPSON: I believe that is correct. I think Mr Gibson was primarily going to deal with this issue. As I understand it, there is nothing really between the parties except we put, in square brackets, the question of whether or not the Tribunal wishes to address the Confidentiality Protocol at this stage, or whether they are happy to leave that until later.

I don't think there is any substantive issue about confidentiality, because we have

relied on public documents, we have made disclosure of various elements of our funding arrangements, and we are content that what we have disclosed to be treated as public in that sense. So, there is no need at the moment for the confidentiality ruling, that the position is governed by the Tribunal Rules, and in particular Rule 102, at the moment.

LORD RICHARDSON: Yes. I think the only thing the Tribunal felt was, although we understood -- and, of course, we will be corrected if we are wrong about this -- we understood that there wasn't any pressing issue in relation to confidentiality at this stage, nonetheless it would make sense for the parties to engage and, as it were, complete the process of agreeing a protocol simply lest it prove to be necessary -- at some stage it may well be needed, and it is better to deal with it sooner rather than later.

That was the only thought that the Tribunal had on that side.

MR THOMPSON: Yes. I think we have taken it as far as we can. I think the ball is probably in the Defendants' court. But if Mr Gibson wants to add anything?

LORD RICHARDSON: Mr Gibson?

MR GIBSON: Just very briefly, Sir. I think they did write back on behalf of the Proposed Defendants, on behalf of Three, in a very helpful way. It was left there because of the lack of necessity immediately. There was one point between us as to whether the Rules required us to do anything at this stage or not. We say there was a misinterpretation, or misreading of Rule 74.4(d), which is narrowly confined to Rule 54 interpretation, so we say it was proper to continue and to try and move things forward, and we welcome the indication that that should be taken now.

LORD RICHARDSON: Yes. Mr Kennelly?

MR KENNELLY: We agree it is important to make progress as quickly as possible on the draft protocol. We have a mark-up, it may not be necessary for the Tribunal to

make an order or set a deadline for us to reach an agreement, but we hear what the Tribunal has said and we will engage with expedition, with the PCR.

LORD RICHARDSON: That is very helpful, Mr Kennelly.

Mr Gibson, so Three having come back to you, would I be right in understanding that then it is for the PCR, as it were, to respond to those comments and mark-ups of the protocol?

MR GIBSON: I will have to refresh my mind exactly where the correspondence had got to. I think one way or another we can pick up where we are. I think there might be some bits where they have commented, other bits where they haven't. We can go back to correspondence, and I'm sure that both solicitors will move things forward in an expeditious fashion.

LORD RICHARDSON: Thank you very much, that is very helpful. Unless there is any other matter on those points, that then brings us to the question of future conduct. Now, again, I note there has been a measure of agreement insofar as the parties are all agreed that these four cases should be dealt with, or jointly managed, at least up until the point of the CPO application.

The matter that then is between the parties is, as we understood it, essentially the form of the response -- or one of the issues is the form of the response by the Proposed Defendants, and that issue, there are two aspects to that. One is the question of the response, and whether the Proposed Defendants should prepare one proposed response with annexes, or whether they should be entitled to lodge separate responses. And, also, whether there should be any restriction on the Proposed Defendants in respect of any expert evidence they intend to lead.

Now, Mr Thompson, do you want to address that issue?

MR THOMPSON: Yes, certainly. The only other issue that I think has also been agreed, and is reflected in paragraph 4 of our draft order, is what I have called the

pooling of evidence.

LORD RICHARDSON: Yes.

MR THOMPSON: And I think that is also uncontroversial.

LORD RICHARDSON: Yes.

MR THOMPSON: Where disagreement breaks out, in at least a modest form, is over the form of any joint response or responses. And, perhaps, slightly more vigorous is the dispute about how many expert reports it will assist the Tribunal to see.

LORD RICHARDSON: Yes.

MR THOMPSON: And Dr Bishop will recall the *Trucks* saga where the Tribunal was treated to, I think, possibly 15 to 20 expert reports at the CPO stage. I think the formal position is that the Defendants require permission to serve expert evidence, indeed we probably require permission to serve Dr Davis' expert evidence, but I don't think that is controversial.

So, the question is whether or not there should be permission granted. But I will take it in turn.

In terms of the joint response, we say that both these issues are essentially matters of the Tribunal's discretion, pursuant to the governing principals which are set out in Rule 4 of the CAT Rules -- and I don't think I need to turn them up. They are at the second volume of Authorities, tab 27, page 996, and they give the Tribunal very broad discretion and a steer as to how it should exercise that discretion.

Then, the second element, which I think I should take shortly, because it is very well known, that there is now extensive guidance -- not only from the CAT itself but also from the Court of Appeal and the Supreme Court -- about the way in which the CPO process should be conducted. And, in our skeleton, we refer to a paragraph from the Court of Appeal in the *Trucks* case which draws together that case law and essentially gives a steer to the Tribunal that the CPO process should not be engaged in as

a massive battle between the parties. That the Tribunal should seek, so far as possible, to keep it within bounds, and to produce shorter judgments in the exercise of its case management discretion, without prejudicing the rights of both sides to a fair hearing of the application in accordance with the applicable rules.

That is at tab 18 of the second volume of Authorities at page 833. It is paragraph 9 of the Court of Appeal judgment.

Then, of course, there is a forest of cases now, and the Defendants have referred to a number of cases where different approaches were taken. In some cases, the defendant, as a matter of discretion, puts in a single response. In some, some of them put in a single response. And then most recently -- in fact it was myself, I was here a couple of months ago -- in the *Water* case, where the President gave a clear indication not only that only a single response should be given by the defendants in those cases, but also that it wouldn't be helped by numerous expert reports on the same issues. That is at the second volume of Authorities, tab 33, in particular pages 115 to 116.

LORD RICHARDSON: In that case the Tribunal made no order of the sort that you seek in this case.

MR THOMPSON: Well, they made an order in relation to a single response.

LORD RICHARDSON: But not in relation to experts.

MR THOMPSON: Not in relation to experts. They gave an indication, not an order, that they wouldn't be assisted by multiple expert reports.

LORD RICHARDSON: Just, again -- to give you a sense of the Tribunal's initial view, having carefully considered the skeletons that have been prepared -- clearly, the wise words of the President in that case would apply equally here. The Tribunal is not going to be assisted by having four expert reports, one from each of the Proposed Defendants, clearly. But just so, I suppose, the Tribunal here would be interested to

know why it would be necessary to, and whether it would be proportionate, to impose an order of the sort that you seek in relation to the experts in this case.

MR THOMPSON: I will come to the expert -- I don't know whether the Tribunal will be assisted in relation to the first issue, the nature of the response, but I think you will have seen, in our skeleton argument, that we essentially make two points. First of all, that the underlying facts are essentially common across the four claims -- at least for the CPO purposes as to whether or not there are common issues and the suitability of Mr Gutmann to act as a class representative, and the methodology of Dr Davis as a matter of economics. Because, indeed, it is the same report in each case.

So, we say that this is a case where, if anything, the position is somewhat stronger than in *Water*, in that there were overlapping issues, on joint dominance in particular, and there is only a single expert report that has been adduced. So, we say this is a stronger case than *Water* for a single response, albeit with individual annexes.

LORD RICHARDSON: Clearly the practical good sense of having a single document which consolidates the positions -- insofar as they can be consolidated -- of the Defendants, prior to a hearing of the CPO application, that is something which the Tribunal would greatly value and can see the good sense in.

I wonder if, really, the difference between you and the Defendants is about how we get there. In the sense that: you propose a single response with annexes, whereas the Defendants seem to be, at the moment, insistent upon the fact that they should be allowed to lodge their own separate responses.

I wonder out loud whether, if they were to lodge their separate responses, and then be required to consolidate them into a single document such that the net end result was that the Tribunal, and indeed the PCR, was provided with a single document which set out the common areas of agreement between the Defendants, and, where necessary, they disagreed in relation to the application, that is the end point we get to.

So far as the PCR is concerned, does it matter how we get there?

MR THOMPSON: I don't want to venture into, as it were, scholastic debate, because you can see it in terms of these skeleton arguments. But, in the world of a word processor, it wouldn't have been difficult for the four Defendants to have produced a single skeleton argument, with enthusiastic agreement with one another's submissions, which is pretty much what we have in different formats here. So, I don't want to worry about, you know, the form, as it were.

So, I think the first issue in a way is quite a narrow one.

LORD RICHARDSON: Yes.

MR THOMPSON: I would only make three points. Whatever is agreed we, I think, agree -- or whatever is ordered, we agree that this is for the CPO stage only.

LORD RICHARDSON: Yes.

MR THOMPSON: Assuming, perhaps rashly, that the CPO is granted, we would anticipate then there would be a CMC at which the Tribunal would consider how to take these cases forward to trial; and whether together or separately; and whether some issues together and some issues separately -- issues of that kind. And at that point the whole issue would be revisited.

The second point is -- and I think it is implicit in what you have already put to me, Sir -- that there may well be issues that individual Defendants want to raise. And, to some degree, I think O2 has already suggested there may be one or two issues that it wants to raise, and obviously it is entitled to do that. Likewise, the other Defendants, if so advised.

LORD RICHARDSON: Yes.

MR THOMPSON: And the third point -- which is actually a very important one and is reflected in the Order that was made in *Water* -- is that the Defendants naturally emphasise their rights of defence, which we don't dispute. There is also an issue of

equality of arms, and to some extent that is illustrated by today, in that we have complied with some squeezing into the page limit of 20 pages to address all the issues, whereas the Defendants have, between them, had a rather more leisurely approach and I think their combined skeletons are probably twice as long as ours.

So whatever approach is made -- and in the *Water* case I think it was a ratio of 50:60 that was imposed -- but whether or not this is a single document, or four separate documents, it doesn't seem to us fair that they should have carte blanche to effectively have four bites of the cherry whereas we only have one.

So, any order for length of documents should, possibly with some friction, essentially put us in the same position as the Defendants, particularly if we have to deal with each of their individual points within a single document.

So, that is, as it were, an important practical proviso we would make.

LORD RICHARDSON: Yes, yes.

Now, does this conclude what you want to say in relation to the response side of these matters?

MR THOMPSON: Yes.

LORD RICHARDSON: So, is there anything, then, that you want to add in relation to the experts side of matters?

MR THOMPSON: Yes, there is. For us, it seems to us that, formally, in light of the postscript to the *Trucks* judgment -- which it might be worth looking at just briefly.

LORD RICHARDSON: Yes.

MR THOMPSON: That is the first volume of Authorities, tab 13. It starts at page 543 but the postscript starts at page 651, and it is in fact just the first two sentences:

"The annex to this judgment lists the plethora of expert reports served by all the parties to these two applications, under Rule 55.1(d) concerning claims under section 47A, the judge --"

LORD RICHARDSON: Sorry, Mr Thompson, just a moment, I think --

MR THOMPSON: It is paragraph 265.

LORD RICHARDSON: It is the D bundle, and which volume of the D bundle?

MR THOMPSON: It is volume D1.

LORD RICHARDSON: And the tab was?

MR THOMPSON: Tab 13.

LORD RICHARDSON: Then page 651, or paragraph 265. Thank you, Mr Thompson. I'm using the --

MR THOMPSON: Sorry, I am --

LORD RICHARDSON: I'm using the electronic bundle and I'm not there, but --

MR THOMPSON: I'm too enthusiastic.

LORD RICHARDSON: Thank you.

MR THOMPSON: So, I don't think I need to read the first sentence again, that is essentially understanding the complaint about the volume of expert evidence in that case.

LORD RICHARDSON: Yes.

MR THOMPSON: Then the more important:

"Under Rule 55.1(d) concerning claims under section 47A, the Tribunal gives directions as to whether the parties are permitted to provide expert evidence at the hearing of the claim. When a party wishes to adduce such evidence, permission is accordingly sought in a case management conference."

So, as I understand it, for understandable practical reasons, the position is that, formally speaking at least, each of the parties require permission to file expert evidence. And, from that perspective, we would say that the position of the Defendants in relation to expert evidence is notably weak.

That the only Defendant who has addressed the issue at all in its skeleton argument

has had its submissions adopted by the other Defendants. And I don't know if we need to turn it up, but the only point that BT and EE make, is that the Defendants aren't in a position to determine the extent to which expert evidence may be required, either individually or at all. And that is notwithstanding the extremely eminent legal and presumably economic teams that have been advising them for six months.

So, in our submission, it is quite surprising that they don't even know whether they will need expert evidence and, if so, what form it will take.

So, against that background, it seems to us that our position is an eminently reasonable one. Namely, that they should be given permission to adduce at least some economic evidence in response to Dr Davis' single report, if they are ultimately so advised. But, there is certainly no basis, at the moment, for them to be given permission to adduce more than one such expert report. The only party that has addressed it at all says it is at a preliminary stage, and the others have made no submissions on it at all.

The position is compounded by the fact that -- as I have already mentioned -- there is an overlap here between one important issue on joint dominance, and, indeed, on the common policy that has been adopted by all the Proposed Defendants, and challenged and criticised by both Ofcom and the CMA, and that there is only a single expert report for them to respond to, on behalf of the PCR prepared by Dr Davis.

So, we would say that the position in relation to multiple expert reports in this case, at least at the CPO stage, is even weaker than it was in *Water*, where the President made it clear that the Tribunal, even in that case, wouldn't be assisted by multiple experts addressing the same issues, even though there were five -- indeed, in relation to Thames, a sixth report by a separate expert in that case.

So, at the moment, we say that the case hasn't been made out for more than one expert on behalf of the Defendants. That is our position on that. So, we are content

for one expert to be instructed to assist the Tribunal, but at the moment we don't see any cases being made for more than one.

LORD RICHARDSON: Now, what I'm proposing to do, now, is to hear from, I think it will be Ms Demetriou, to respond on this point. Unless there is anything else that you want to say at this stage?

MR THOMPSON: No thank you, Sir. The general point about what the exercise is at the CPO stage, whether or not Dr Davis' report gives us sufficient blueprint to trial by the well-known test.

LORD RICHARDSON: Yes.

MR THOMPSON: So, we say that is a factor that should be taken into account as to whether you really need, or will be assisted by four separate reports on that question.

LORD RICHARDSON: As I have said -- and I don't imagine this comes as a surprise to anyone -- the Tribunal would, as I have already said, not be assisted by multiple expert reports.

I think the question really is perhaps a narrower one, and that is: how we, and the extent to which the Tribunal imposes restrictions at this stage. But I have your submissions on that. I think --

MR THOMPSON: If it is dealt with by indication rather than by order, then maybe we will all go away happier, but perhaps I will let Ms Demetriou say something.

LORD RICHARDSON: Indeed, thank you very much. Ms Demetriou.

MS DEMETRIOU: May it please the Tribunal. My learned friend seeks to set up a false choice between asking the Tribunal to make an order now that we all serve a single response and rely on a single expert economist, and some alternative world in which we all serve separate responses and multiple expert reports. That is not what we are advocating.

Sir, we, on our side, are acutely aware that it is not going to be of assistance to the

Tribunal to have duplicate documents. And our point is that the Tribunal should not, it is unnecessary for the Tribunal to make an order now. It may, indeed, be counter-productive.

The reason for that is that we are at an early stage of determining -- on each of the Defendants' parts -- investigating the claim and determining what are the points that they wish to take at the certification hearing.

This is a complex claim and there are differences, as my learned friend recognises, between the individual positions of the Defendants -- who are, of course, fierce rivals. So, differences in terms of their pricing, and differences in terms of their contracts, commercial strategy, and the information that they provided to their customers.

So, given that we are at an early stage, we are not in a position to compare notes and determine the degree to which there is overlap.

Now, if there is complete overlap in the points that we end up taking, then we can assure the Tribunal that we won't overburden the Tribunal, and we will do as we have done today, which is: we have divided the points between us, there is no duplication, everyone is dealing with one issue. And the question on whether there are separate documents, or it is all in one document is, in a sense, a side point. If there is no duplication, then the likelihood is that there will be a single document. So, if there is no difference between the parties, the likelihood is that the most efficient way forward will be a single document.

As, indeed, has happened in other cases in which there have been no orders. So, in the *FX* litigation, there was no order of the type that my learned friend seeks, but all the defendants put in a single response, because that was the most efficient thing to do.

Similarly, in the *McLaren* case, three of the defendants put in a single response because that was the most efficient thing to do.

So really our submission, in terms of the response, is that the Tribunal can leave it to us. That is the appropriate thing to do, given that, at the moment, there is no clarity as to the extent to which there is overlap between the Defendants on the points they wish to take.

LORD RICHARDSON: I understand that point. However, that, in a sense, does not take away from the value that the Tribunal would gain from there being a single document. Because it doesn't seem to me unreasonable to anticipate that, whilst there may be areas of disagreement, there will also be areas of agreement. To that extent, I think the Tribunal is minded, as I put it to Mr Thompson, by whatever route we get there -- and that is a matter for discussion -- to require the Defendants to prepare a single document.

Now, the question that then arises, if we are dealing with the question of response, is: would the Defendants prefer to lodge separate documents and then consolidate them, or would they prefer to simply lodge a single document. One can see there are different timetabling aspects to that. But what the Tribunal is quite clear about is the end point.

The Tribunal is very grateful for the extent the Defendants have essentially achieved that result. But there is still the fact -- it is not a small point Mr Thompson makes -- that essentially the Defendants, in responding simply to the PCR, have done so in four separate documents, over a broader canvass, as it were.

So, I would be grateful if you could assist me on that point, Ms Demetriou.

MS DEMETRIOU: Yes. Sir, we absolutely understand the point, and everybody has heard what you have said.

LORD RICHARDSON: Yes.

MS DEMETRIOU: We will endeavour to produce a single document. I think the difficulty with laying down an order now, that that be the case, is that there is

a possibility that that is inefficient, in the sense that: if it were, for example, the case that everyone was taking completely different points, then the Tribunal would in effect have different responses stitched together -- so under the auspices of the same heading. So, there would be, in those circumstances, no real difference between a single document and multiple documents. But we have heard what you say, and insofar as that is efficient, then that is what we will endeavour to do.

The danger with laying down a rigid route to that, at this stage now, so as to say -- well the options that I think you canvass, Sir, that we should be entitled to put in our own documents and then consolidate them, or go straight to a single document, is that choosing one or the other may create an inefficiency. Because really what we need to do is to see where we get to in terms of the overlap and decide which of those two routes is less costly.

LORD RICHARDSON: Unfortunately, decisions have to be taken, orders have to be given, and timetables have to be set down. There is inevitably, on occasion, inefficiencies that arise as matters evolve.

In terms of the approach that I am suggesting, if I understand correctly, the Defendants -- and insofar as you speak for them all -- would have no difficulty with the notion that at the CPO hearing the Tribunal would be presented, on behalf of the Defendants, with a single response, with annexes which set out any particularities or specialities. Am I right to understand that?

MS DEMETRIOU: Well, Sir, yes. That is the clear preference that the Tribunal has expressed, so we obviously want to assist the Tribunal as best we can.

LORD RICHARDSON: Yes. That is helpful.

On the question of the experts, am I right in understanding that the Defendants at this stage do not seek permission to adduce any expert evidence?

MS DEMETRIOU: No, I think that is not correct.

Clearly, at the certification stage, the Tribunal will -- in exercising its gatekeeper role -- have to satisfy itself that the methodology put forward by the PCR satisfies the *Pro-Sys* test.

LORD RICHARDSON: Yes.

MS DEMETRIOU: In order to satisfy itself of that, the Tribunal will want to consider any arguments put forward, or any evidence put forward by the Defendants.

LORD RICHARDSON: Yes.

MS DEMETRIOU: Because that is the way that the adversarial system works. So, in order for the points to be before the Tribunal we will have to raise them. So, we do seek permission to rely on expert evidence.

At present we don't know what the extent of that expert evidence is. And at present, Sir -- this is because this is a very complex claim, and if I can just give a flavour of that?

LORD RICHARDSON: Yes.

MS DEMETRIOU: What it is requiring, certainly my client to do, is investigate the factual position over an extensive period of time -- you have seen the length of the claim period -- in circumstances where the claim is brought against EE and BT, but BT didn't own this mobile phone business until 2016. So, one is having to investigate old systems, changing commercial and pricing strategy, in order to work out whether or not the claim as brought -- I'm focusing on certification now and the methodology put forward -- is adequate to try this case.

That is not an easy matter, and that is underway. But the position that we are in, is that each of the Defendants have instructed their own economic expert from whom they are seeking advice on the complicated matters raised by the claim. And reserve the right to rely on expert evidence -- and seeks permission, indeed, to rely on expert evidence at the CPO hearing.

LORD RICHARDSON: That is an interesting correction, if I may say so, Ms Demetriou. Because it seems to me -- I completely understand the position you're advancing, which is to say: it is very complicated, we have not had a lot of time to consider it, we are in the process of doing so.

MS DEMETRIOU: Yes.

LORD RICHARDSON: Your initial submission was: you reserve the right. I quite understand that. I struggle slightly with your correction, which is "seeking permission" because: are you really seeking permission for an expert on behalf of each of the Defendants, at this stage? Would it not be fairer to say, essentially what you're saying at the moment is: you don't know how many experts you intend to lead, if indeed any. It would seem likely you may, but at this stage, you are not seeking permission from the Tribunal for any particular expert.

So, therefore, I wonder if actually this is a matter which, properly, the logic of your submission would suggest that what the Tribunal should do is, having given the very clear indication that we have done -- and I don't think we could be any clearer, but I will say it for a third time: we are not going to be assisted by four experts.

MS DEMETRIOU: No.

LORD RICHARDSON: But then it can become a question that you can consider and reflect on that -- all the Defendants can reflect on it -- and, in light of the advice, when you have had time to consider matters and can then make an application for permission, which can be considered. And, if you're seeking more than one expert, the extent to which you're seeking more than one expert -- which would be, instead of a rather abstract concept, would be a particular question, because you will be seeking a particular expert in respect of a particular set of issues, and if Mr Thompson has a difficulty with that, then no doubt he can raise that at that stage, and the Tribunal can make a decision if it needs to.

MS DEMETRIOU: Sir, I certainly see the sense of that. Can I take instructions on that, as I'm speaking on behalf of everyone?

LORD RICHARDSON: Yes. Ms Demetriou, I have a suggestion, actually, which is: what I'm minded to do is, once we have dealt with the limitation issue as well, is then to break. That would give you an opportunity to consider the matter more fully. Because I don't expect you to go down the aisle, as it were, and --

MS DEMETRIOU: I'm most grateful, Sir. Can I say this in relation to your suggestion?

LORD RICHARDSON: Yes.

MS DEMETRIOU: So, the concern, Sir, that we had in relation to an order now, is that it may potentially shut us out from making points. That proposal, if I may respectfully say so, certainly meets that concern.

Of course, the other point that I would wish to make is that: we understand, very loudly, very clearly, that the Tribunal doesn't want to be faced with multiple expert reports. And we have said, I think, we have committed in our response that insofar as we are taking the same point, one expert will deal with that point. So, I hope that we have flagged a willingness to co-operate to achieve that end.

LORD RICHARDSON: Absolutely. The Tribunal will recognise that, thank you.

MS DEMETRIOU: Sir, thank you.

LORD RICHARDSON: Mr Thompson, is there anything that you want to say, briefly, in response?

MR THOMPSON: Very briefly. Obviously, I'm mindful I'm representing a large number of consumers --

LORD RICHARDSON: Yes.

MR THOMPSON: -- but against some fairly doughty opponents, with doughty legal representatives, who have been aware of this issue since 2018, which I believe is after BT took over EE.

So, in my submission, it is surprising that six months after they received this, none of the Defendants seem to be in a position to decide what expert, if any, expert evidence they wish to adduce.

LORD RICHARDSON: Yes.

MR THOMPSON: Yet their draft Order seeks a very categorical permission, both in relation to multiple responses and multiple expert reports.

LORD RICHARDSON: Yes.

MR THOMPSON: And, if I understood the exchange between yourself and Ms Demetriou, it is arguable that our rather more modest proposal, that they should have permission for one expert, is actually perhaps overgenerous. And, at the moment, they haven't really made out a case for any expert evidence, and perhaps more appropriate is that they should be entitled to seek permission at some point to be proposed, whether one or more.

LORD RICHARDSON: Indeed, but that is certainly what I put to Ms Demetriou. If I understand her position, and the position of the Defendants, is: they don't want to be foreclosed at this stage but equally they wish to reserve their position.

Now, if I understand your position, that would be consistent with it. Because you're essentially saying, at this stage, you think the Tribunal needs to have an eye to ensuring that they are not inundated by expert reports, which you would also be inundated by, and I completely see that. But it would equally not be prejudiced by what is being proposed.

MR THOMPSON: Indeed. I think the only other point that I would make is that the Guide, which was produced in 2015, takes a very beady-eyed approach to expert evidence, both generally and in relation to applications. I don't think it is actually mandatory to even adduce an expert report in support of a CPO application. Whereas, of course, the whole expert industry has taken on a pivotal role in these cases. And

perhaps *Trucks* was the high, or low, point of that development.

So, I don't want to say any more at that stage. I think the Tribunal has these points well in mind.

LORD RICHARDSON: Yes, thank you. That is very helpful.

So, the next issue that the Tribunal would like to be addressed on is the limitation issue. As I understand, essentially what is in dispute is whether that matter should be dealt with discretely, or whether it should form part of the CPO hearing. I'm very grateful to you, Mr Hoskins, as I think it is you who is leading on this point.

Before we go any further, I think it is probably helpful for the Tribunal to advise the parties that, given commitments of the Tribunal, it is unlikely for -- the first date at which a hearing can be held on limitation would be August.

Thereafter, the Tribunal has no real availability in September. And that would then bring us into the period of time which, as I understand it, the Defendants are not keen to have a hearing.

I wonder, against that background, whether what is, we understand, to have been proposed by the Defendants, namely, having a hearing in relatively short order, is essentially going to be undermined by practicalities. But that is one point.

The other point then, I think it is fair to say, and in light of that, is that the Tribunal, I think, requires some persuasion that it is an efficient use of time to deal with this matter separately. I say that also in context of, and wondering whether what really is at issue here, is when we have a hearing for the CPO and the limitation hearing, if those are to be put together.

Because I understand, and I appreciate, Mr Hoskins, this is a point that has been taken, as it were, on your behalf by Mr Williams, in relation to the timing of matters.

But I thought it would be helpful before you embarked on your submissions, which might have been predicated on the notion that we could have a hearing sometime in

June or July, that that is unlikely to be possible.

MR HOSKINS: Can I be cheeky and ask --

LORD RICHARDSON: Please, I don't think it is being cheeky.

MR HOSKINS: You don't know the question yet!

LORD RICHARDSON: That's true!

MR HOSKINS: Is the Tribunal able to give an indication as to when the certification hearing might be? Because obviously that is part of this puzzle.

LORD RICHARDSON: Of course. I think it is fair to say that that is a matter that is more, I think, dictated by availability on your side of the bar. Clearly Mr Bishop is involved in the litigation in the first part of next year as well. And that would mean that the initial months of 2025 would not be possible.

So, really, the question so far as the Tribunal would be concerned, is whether there was time for a hearing to be scheduled in the autumn, or late part of 2024, which, failing, we would be into the latter part of March, I think, of 2025. So, if that gives you some indication.

MR HOSKINS: It does.

The difficulty we have on our side is: three of the leading counsel for the Defendants are in the *Apple* trial. It is not simply a question of a lack of availability in January or February, because we are going to be doing the *Apple* trial. There is also the preparation for that, and we may have different brief timings between us but -- for example, I'm under brief for that from the beginning of October.

So, if it were the position that a certification hearing was going to take place at a time we could all do it, that may be very attractive to our respective clients. If that is a realistic possibility, it may well be that is something we should be taking instructions on.

LORD RICHARDSON: Yes.

MR HOSKINS: Because it may well be, if the Tribunal, having given the indication, if we were told that: well, if you want to have all your counsel here, the price of that is a limitation plus certification hearing when you can all do it, that is obviously something that we would want to take instructions on and see how attractive that is. Rather than me just butting my head against the wall and the clients say "What have you done --"

LORD RICHARDSON: No, no, it was rather anticipating that that might be your position, I thought it was sensible to inform you of the position first of all.

If I would understand correctly -- and again, it may make sense for you to take instructions rather like I offered to Ms Demetriou -- but it is certainly not something that, at first instance, you seek to resist.

If the suggestion to the Tribunal was: we fix a single hearing, and it would be a hearing at which all counsel could be accommodated, you would wish to consider whether to insist or not on splitting up the limitation issue as a separate hearing. Is that it?

MR HOSKINS: I need to take instructions on it. I can see why that might well be attractive to the clients. I think it is fair to say, if the suggestion was: it was a rolled-up limitation and certification, it is going to take place in the autumn, when three of the senior counsel aren't available, I think they may have a different approach.

LORD RICHARDSON: Yes, I understand that.

MR HOSKINS: I don't know if Mr Thompson has any immediate reaction, if the suggestion is rolled up limitation and certification but at a time that everyone can do, because if that is acceptable to his client, then the puzzle is starting to coalesce around that possibility.

LORD RICHARDSON: Mr Thompson, can you help us on that?

MR THOMPSON: Well, we -- not unnaturally, since that was our favourite option -- have given some thought to that, and given the indications from the Defendants' counsel team, and our own availability, it appeared to us that the month

before Christmas might be possible for everyone. I have the *Water* CPO at the end of September, as indeed does Mr Hoskins and Mr Williams, so earlier than the start of October is not really feasible.

I am actually away the first half of October. And, then, clearly Mr Hoskins has issues. But, as I understood it, the period immediately before Christmas is open and would be possible for our team, and I think in the *Water* case -- and to some extent it reflects the debate we have had already -- it may or may not be necessary for the Defendants to have all their favourite counsel available, for what is essentially a single point of law on limitation, plus the well-known eligibility and authorisation issues in relation to the CPO.

But that is more for them to make submissions than for me.

LORD RICHARDSON: Yes.

MR THOMPSON: But the only point --

MR HOSKINS: December is not on the table. Professional commitments for me, mean -- Mr Thompson may be tilting at windmills, but that is not the suggestion.

MR THOMPSON: I'm not sure what the suggestion was made by the Tribunal.

LORD RICHARDSON: I have a further suggestion -- subject to the views of the Tribunal -- that what I'm going to propose is that we have a break now, at a slightly earlier stage, and these discussions can take place amongst you. And it may be that when we come back, if you have different views as to when we have the CPO hearing, so be it, but it would be helpful to understand if there is a common position or not, and if there is not a common position, where you disagree, rather than trying to do this --

MR THOMPSON: Can I ask one further question?

LORD RICHARDSON: Please.

MR THOMPSON: I think there is a difference of opinion between the Claimants' side and the Defendants' side as to the likely length of a CPO hearing. That partly reflects

indications from the Tribunal in *Water* about what the President called the "vanilla" issues.

LORD RICHARDSON: Yes.

MR THOMPSON: And he thought they could be dealt with in two days, and a longer period was only put down because of other regulatory issues. If that approach was taken here, by broad analogy, that would suggest three days might be a suitable time period with a day for the limitation point.

LORD RICHARDSON: Yes.

MR THOMPSON: Whereas, I think the Defendant side of things are going for a slightly longer period, possibly four or five days. I don't know whether the Tribunal --

LORD RICHARDSON: Perhaps we can clarify before we break. Mr Thompson, or is it Mr Williams, good morning.

MR WILLIAMS: Yes it is,Vodafone.

LORD RICHARDSON: Thank you.

MR WILLIAMS: At the moment the scope of the hearing is very unclear. Our position was that, given the number of parties and the potential range of the issues, that it was sensible to list the certification for up to four days. If the estimate comes down we could do that, but we can't if the listing is shorter in the first place.

LORD RICHARDSON: Yes, if one then adds Mr Hoskin's limitation point to that, then it would be five days.

I think the Tribunal's sense of it was that three days, plus a reserve day, would seem adequate on the basis of what we know. Clearly, if many issues come out of the woodwork in the meantime, then that might need to be revisited. But it may be that the difference between three days plus a reserve day and five days is not huge. But I think if that helps the discussion, which I'm going to invite the parties to have now, then that is certainly, I think, our indication.

MR WILLIAMS: If there is a degree of flexibility around the estimate then this is less key. The reason for suggesting is that there are sometimes other commitments around that, but if we can retain that flexibility-

LORD RICHARDSON: Yes. Thank you.

MR THOMPSON: Just, as a further guideline for any discussions, I guess it would be helpful to have some indication about what priority the Tribunal would give for the availability of everybody's favourite leading counsel. Because that may constrain things quite considerably. I hear Mr Hoskin's indication, although I don't think that appears in the skeleton argument. But, if in fact there is no time when all of the Defendants' leading counsel are available, then we will have to come back to you.

LORD RICHARDSON: I think that is a decision which is probably best for the Tribunal to make when we have all the information before us rather than give an indication somewhat in the abstract.

MR THOMPSON: Thank you.

LORD RICHARDSON: Thank you. So, on that basis, we will adjourn, shall we say, for 15 minutes, and we will see where we are when we come back.

(11.24 pm)

(A short break)

(11.46 pm)

LORD RICHARDSON: Good morning, again.

MR THOMPSON: Good morning.

LORD RICHARDSON: Mr Thompson and Mr Hoskins.

I think we gave the indication that the Tribunal does have some availability in August. The reason I thought that might be helpful was, in answer really to your last point, Mr Thompson. The Tribunal was approaching the matter this way: clearly counsel of the eminence that we have before us today are very busy. And one can approach this

matter by saying that the Tribunal will take that into account, or the Tribunal can approach it by saying: we are not going to take it into account at all.

If we take the latter approach, then the only thing that determines when we fix a hearing is practicality and when the Tribunal has availability, and the parties have to make do.

It seems -- at least subject to anything that counsel may wish to make, submissions they may wish to make -- we can either approach it in that way, which would suggest we fix a much earlier hearing, or we can approach it by taking into account counsels' availability, which would indicate, I suspect, a hearing in March. I suspect that is where we would end up to accommodate everybody.

It seemed, to the Tribunal at any rate, to adopt an approach whereby some parties got to have their counsel and other parties didn't, didn't seem particularly even-handed.

Mr Thompson, does that help you in terms of giving an indication of where the Tribunal is?

MR THOMPSON: Sir, I understood from the Tribunal that they might have availability in August --

LORD RICHARDSON: Yes.

MR THOMPSON: -- which I suspected would be met with equal measures of consternation by various counsel, although I think physically that wouldn't cause me a problem.

LORD RICHARDSON: Yes.

MR THOMPSON: I have no other cases in August, so that is a possibility from my perspective.

In terms of availability on the view that there is a possible compromise between the two positions that the Tribunal put to us, namely: taking some account, but not much account of counsel's availability -- and I think the President in *Water* suggested he

might give slightly more weight to the availability of the PCR's counsel, given that there is only one of us, but leaving that on one side -- it did appear to us that the period before Christmas -- possibly the 9th to the 16th -- would be a period when our side of the house would be content, and I understand Mr Williams would be available. But the other three leading counsel for the Defendants have difficulties because they are under brief in preparation for a hearing to take place in the New Year.

So, it sounds as if, as the Tribunal indicated, the counsel preference -- if everyone's preferences were taken into account -- would indeed push us back to mid-March or early April.

LORD RICHARDSON: Yes.

MR THOMPSON: The compromise position would be December. And the, what I might call the "hard line position", would probably be August, and we would have to give up our chalets in Marbella, or wherever, and be here instead -- which of course would be a pleasure.

I don't know which the Tribunal favours, or what the Defendants may wish to say. But ...

LORD RICHARDSON: Thank you, Mr Thompson.

Mr Hoskins?

MR HOSKINS: It is too hot in Marbella in August, I suggest Fife might be a better place!

LORD RICHARDSON: And requires no legislation.

MR HOSKINS: So, three options on the table.

August, I will be frank, would be deeply unfair because, like it or not, trying to find counsel -- assuming there are a large number of counsel here who couldn't do it, and I'm one of those, and I will be quite frank, it is because, yes we are busy, and we need time off, and there are pre-arranged holidays with family, and that is an important

aspect. If that is the case, then trying to find suitable counsel who are available in August, it is just not fair to the clients, to put them in that position.

The December date, the 9th to the 16th, you're wiping out three counsel if you do that. And, again, because --

LORD RICHARDSON: Sorry, which counsel would not be available for that date?

MR HOSKINS: I'm not available; Ms Demetriou is not available; Mr Kennelly is not available; and the juniors, I'm told. It is the same for my junior as well.

So, it is not even a continuity of: you lose your silk but you keep your junior. It is wiping out the whole team.

LORD RICHARDSON: For three of the Defendants.

MR HOSKINS: For three of the Defendants.

Again, the truth is: because of the buoyancy of the competition litigation market, trying to find replacements, even not in August, is not easy. You just have to look at the Tribunal's own diary to see how much litigation is going on in this field.

Again, it is just not fair, in my submission, to leave the clients scrambling around trying to find whoever can do this for one week in December.

This is an important case. The allegations are very serious. The sums claimed are high. It just wouldn't be fair to the clients to put them in that position.

So that leaves us with mid-March to early April, which I understand Mr Thompson can do and everyone on this side of the bench can do.

I do put it as a fairness and practicality submission. It is in the interests of fairness; it is only fair to the clients that that should be the date that should be adopted.

Just to make it so you have the dates: The *Apple* trial ends on 28 February 2025. You will be wanting some skeleton arguments from us in this case if we are to have the hearing, so I would ask for some time to be left obviously for us to come out of trial and to pick up this case and produce the skeletons that you are going to need.

I would have thought that on that basis, the window, if the Tribunal can accommodate it, that would work on that basis, would be sometime between 17 March up until 4 April.

I don't know how you're placed, but if you are placed there, everyone can be in the same place at the same time, on those dates, if you can do it.

LORD RICHARDSON: I think so far as the Defendants -- I appreciate this may be Mr Williams' side of matters but -- were we to proceed down that route, the date for fixing for provision of responses, replies, et cetera, those would clearly still potentially overlap with other commitments, but that --

MR HOSKINS: Something has to give.

LORD RICHARDSON: So, you're not seeking to --

MR HOSKINS: We are seeking special treatment but not for everything.

Mr Williams has a proposal for that in relation to the March date. If you wanted to hear him on that now, you would have more bits to the puzzle, if that is helpful.

LORD RICHARDSON: Yes. Why don't we deal with that next and deal with the disclosure matter lastly.

Mr Williams, thank you.

MR WILLIAMS: Your Honour, I can start with just telling you what our dates are, and to the extent that you want me to develop submissions in relation to those dates, I can do that.

Working backwards from a hearing in the middle of March, we had thought we would need the PCR's reply by say no later than the end of January in order to give us time to consider that in advance of skeleton arguments. And working both backwards and forwards, in terms of our responses to the application, we had in mind that that ought to be made available by some time in the second half of October. So that would give us the period between then and now to do the co-ordination that the Tribunal wants

us to do, to deal with questions around admissions for expert evidence as discussed by Ms Demetriou earlier on. And it would also give the PCR a reasonable period, a decently long period with our responses in advance of their replies. So that is the sort of brainwork that we had in mind.

LORD RICHARDSON: May I take it from that, Ms Demetriou, you, having had the opportunity to take instructions on the matter we discussed, that that is the position of the Defendants as a whole?

MS DEMETRIOU: That is correct.

LORD RICHARDSON: That is very helpful. Thank you.

Now, in terms of the timetable -- and if we complete it all, Mr Williams -- there will be the question of the skeletons in advance of the hearing at one end, and also the question of notification to anyone who wishes to take objection, as it were, which is dealt with in the PCR's draft Order. I'm not sure if you have dealt with that, I appreciate it may have been because you took a position on the limitation issue.

MR WILLIAMS: That is right. What we proposed was a process for the PCR to take account of any strike-out ruling applicable and revise the notice. So, we were focused on that.

LORD RICHARDSON: Yes. In light of the fact that we are contemplating --

MR WILLIAMS: We have moved away from that, so there won't be a revision of the notice. Obviously, what is necessary in relation to that step is that there is publicity, sufficiently in advance, for third party interests to come forward, and for all that material to be available well in advance of the hearing.

If we are looking at a hearing in March, there is quite a long window within that in which that could happen. And I would have thought the Tribunal would want those third-party indications to come forward in the period before Christmas -- if we are looking at that timeline -- and that would involve publicity, I would have thought, no later than

some time in the autumn. But on the basis of the time that we are now talking about, there is plenty of time for that to happen, and the sequence of that to (inaudible).

LORD RICHARDSON: Yes. Do you have any particular issues with the proposed steps outlined by PCR in their draft Order?

MR WILLIAMS: No, we don't. I mean, it is right to say, I think, under the Rules the way this works is that third parties have the right to object, and they have the right to ask the Tribunal to make submissions.

So, the purpose of the Tribunal putting this process in place is to allow those steps to happen. It is not, this stage of publicity I don't think has a formal status under the Rules. We don't -- we agree with the steps. I think the question is what the dates ought to be.

LORD RICHARDSON: That is very helpful. Thank you, Mr Williams.

Mr Thompson, what submissions do you have in relation to the timetabling?

MR THOMPSON: I think, certainly insofar as I represent Mr Gutmann -- which I do -- his strong preference, and indeed the guidance of the Court of Appeal to which I mentioned, would tend to confirm that.

LORD RICHARDSON: Yes.

MR THOMPSON: Would suggest that the outcome of the Defendants' approach is quite a leisurely one for what, on one view, is effectively a sort of permission stage to allow this case to go ahead, and is liable to be a recipe for quite a considerable delay if, as seems likely, some of the issues are relatively complex, and it may take a little time for the Tribunal to produce a judgment.

So, from our point of view in terms of efficiency, we would be strongly in favour of December. We consider that Mr Williams is a very eminent competition silk in his own right and is well able to represent the legitimate interests of the Defendants.

I also think it is true to say that both Mr Kennelly and Ms Demetriou are instructed by

the same clients, which does not necessarily mean that either will be released, but it does appear that it is possible that there might be some flexibility there, but obviously that is a matter for them.

If the March date is to be followed, then I would simply note that Mr Gibson, in this busy litigation world, has the McLaren trial, which is running for ten weeks ending on 21 March. So, we would have some pressure on our side in preparation, although we would all be available from that date. But it is not an ideal date for Mr Gibson.

And we can task the team to some degree at least while he was in trial. So that is another factor --

LORD RICHARDSON: Yes.

MR THOMPSON: -- that I think that the Tribunal should be aware of.

Otherwise, I don't think I can add to it. I think it is a matter for the three options that the Tribunal has already pointed us to: whether to take the hard, the soft, or the, what you might call the Goldilocks approach, somewhere in the middle.

LORD RICHARDSON: In terms of, if we are talking about a March date, then Mr Williams has proposed the responses by the second half of October and your reply by the end of January.

Do you have any observations in relation to that, and what would be the knock-on effects if we were looking at December?

MR THOMPSON: I think the December would have to work out a different set of deadlines. Off the top of my head, I think probably similar sort of spacing, but shifted three to four months forward would seem reasonable. Although I suspect the first issue would be how soon the Defendants could put forward their responses in whatever form the Tribunal directs.

LORD RICHARDSON: Yes.

MR THOMPSON: My constraints is that I have the *Water* hearing which I think some

of my learned friends also have at the end of September. And there is a possible further *Water* hearing at the end of January, which may cause problems for my learned friends.

But, otherwise, the December date is satisfactory from our point of view.

LORD RICHARDSON: And so, but if I understand you correctly, the broad structure in terms of sequencing and timing that Mr Williams has proposed, you don't have any issue with?

MR THOMPSON: No, not in itself.

LORD RICHARDSON: Very well. Thank you very much. Is there anything else that you want to add?

MR THOMPSON: I think Mr Gibson may have.

MR GIBSON: Yes. I think it was only a question of how we would deal with third party interventions, if there are any. But obviously it is hard to predict at this stage whether there will be any other interveners, or possible objectors, but that would need to be built into the timetable.

LORD RICHARDSON: Thank you. That is very helpful. Very well. Mr Williams?

MR WILLIAMS: Sir, I will deal with the workability of December for reasons other than counsel availability. I don't want to take up time if I don't need to.

LORD RICHARDSON: Just to briefly --

MR WILLIAMS: Yes. One starts from where your discussion with Ms Demetriou ended, which is that the Tribunal is looking for maximal cooperation from the Defendants in the preparation of their responses.

LORD RICHARDSON: Yes.

MR WILLIAMS: It is a fact of life that cooperation takes time. There would be an initial phase of flushing out what the points are, the extent to which they are in common, and so on and so forth.

Then, after that, one would get to the stage of trying to coordinate, potentially, expert evidence on the approach that you have discussed with Ms Demetriou. We would have the permission stage. And one doesn't need to take that very far to see that it will take us beyond July, into the autumn, before we can really start to settle those documents.

As soon as one is into September/October, for the CPO response, you can see that there is going to be excessive pressure on the December deadline. If we put our CPO responses in today, in October, there has to be a chance of reply, there has to be skeleton argument.

So, we say, with respect, that that date doesn't work for reasons aside from counsel's availability.

LORD RICHARDSON: Yes, thank you. That is helpful.

Very well. Now, the final matter I think that we need to deal with is the question of the Defendants' application for disclosure.

Mr Kennelly, I think you're leading on that, is this correct?

MR KENNELLY: Yes.

Just to briefly outline the application before getting into the materials. As you have seen from our submissions, part of the Tribunal's gatekeeper function is ensuring that the PCR has secure and sufficient funding to be able to pay his own costs in the event that he loses at trial.

The Tribunal should be able to know the PCR's non-contingent legal fees and ATE premia. The costs and expenses that fall to be paid if the PCR loses. You should be able to compare those to the level of secured funding.

In this case, there is already a significant shortfall between the PCR's estimated cost budget -- which is £20.3 million -- and the secured funding of £18.8 million.

LORD RICHARDSON: Sorry to interrupt you. That shortfall, as you characterise it,

is one that one sees in all of the cases, isn't it?

MR KENNELLY: Indeed. It exists because of the uplift of what the lawyers receive in the event that the PCR is successful. And so, the cost budgets will provide for a high figure, which is the budget in the event that they are successful, and the lawyers get the uplift, but then, also, a reduced level if they lose and they pay their lawyers the lower level.

What the Tribunal doesn't know, crucially in this case, is the lower level, and it is that which you need to compare to the level of secured funding to know if PCR can fund this through to trial, even if he loses.

In working that out, it is important to take into account the ATE premia that fall to be paid in any event. Because, like the legal fees, there is an ATE premium that must be paid in any event, even if they lose, and an uplift which will be paid if the PCR succeeds. I have been working out whether the funding is enough to cover the non-contingent costs. You have to take out of that funding, the ATE premia, and ATE premia tax that fall to be paid in any event.

LORD RICHARDSON: Yes.

MR KENNELLY: As, Sir, you said to me a moment ago, the brokers must be on the lower level, the lower level of legal fees, and ensuring that they can be covered by the secured funding; how are you to know that?

Now, our primary case, as you saw in our submission, is no longer disclosure of the specific non-contingent ATE premia, or the specific non-contingent legal fees. The PCR is concerned that if we have the specific number for the non-contingent legal fees, it would give us some insight into the PCR's lawyers' own perception of the merits of their case, because that is the element that is at risk.

So, our primary request is, now, only for the total amount of non-contingent costs and expenses. That is the combined figure, single combined figure, covering the ATE

premia, and ATE premia tax -- 12 per cent -- and the non-contingent legal fees. And any other expenses which are payable regardless of the outcome, such as the experts' fees.

We seek a single total combined figure so the Tribunal can know, by comparing that to the level of secured funding, that the PCR is able to fund this through the trial, even if he loses.

If we have a total single combined number, we will have no insight into the PCR's own lawyers' perception of the merits of their own case.

The Guide -- with that brief instruction, I would ask you to turn to the Guide itself, which explains, it deals with this point. Bundle D/28/1059. Paragraph 6.33.

This is obviously very familiar to the Tribunal, I will deal with it quickly.

"The fourth factor the Tribunal is required to consider relates -- this is in certification to the Proposed Class Representatives' financial resources, would the Proposed Class Representative be able to pay the Defendants' recoverable costs if ordered to do so."

We are not concerned with that here. I'm focused on the next sentence:

"By extension, the Proposed Class Representative's ability to fund its own costs of bringing the collective proceedings is also relevant. And in considering this aspect, the Tribunal will have regard to the Proposed Class Representatives' financial resources, including any relevant fee arrangements with its lawyers, third party funders or insurers. The costs budget appended to the collective proceedings plan referred to above is likely to assist the Tribunal's assessment in this regard."

We will come to the cost budget in a moment.

I take you now, please, to the level of funding which the PCR has secured. For that you need to go to bundle A/17/1472. And the witness statement of Mr Gutmann himself, it is paragraph 47. I take you to it only to show you the level of funding which Mr Gutmann has secured, and you see the figure there, £18.8 million approximately,

covering the costs of pursuing the four related proceedings.

After it -- and the PCR places some reliance on this -- Mr Gutmann says:

"Should it be required, there is also provision for me to seek further funding from the funder."

That, we say, provides no real further reassurance. He can always ask for more, there is no assurance that it will be provided. So, £18.8 million odd.

Before we come to compare that to the costs budget, I need to take you to the question of the ATE premia and the ATE premia tax that the PCR will need to pay even if he loses at trial.

The Tribunal does not have that number. You don't have the ATE premium or the combined number when you apply the tax to it. So we have tried to estimate it by reference to recent proceedings in this Tribunal.

For that I would ask you to turn to the judgment in the *FX* CPO application from 2021. That is in bundle D/11/329. It is the first page.

You see the case, and I would ask you then to turn to page 442 -- D/11/442 -- and in that table, near the bottom of the page, below paragraph 313, you see the premia that were in issue -- in that case, of course, that case concerned a carriage dispute where the jury were comparing the funding to be secured by one PCR against the funding secured by another, which is why the comparison is being made here. But it is useful because we see the kind of level of ATE premium that arises for cover of the type, or of the level at issue in our case.

So, in that table, the premia is split between paid deposit premia and future deposit premia. The future deposit premia is payable if the certification application succeeds.

So, the Tribunal combine those numbers, as I would ask you to do, and we have the combination, over the page -- so these are the premia that must be paid in any event. This is premia that do not depend on the PCR succeeding.

The last column in that table refers to deferred and contingent premia, and that tells you the uplift that the ATE insurer receives by way of premia in the event that the PCR succeeds. So, we are not concerned with the much bigger numbers for deferred or contingent premia, we are looking at the combination of the paid deposit premia and the future deposit premium.

Over the page, I draw your attention to the lower of the two figures. It is the one that is closest to the facts of our case. The *Evans* PCR premia was £3.4 million, and that was the premia that was required for cover of £23 million.

For that I would ask you to turn to page 448. That is A/28/448.

LORD RICHARDSON: D is it?

MR KENNELLY: Sorry, forgive me, D -- D/11/448. It is the very bottom by "H: Extent of Insurance", and you see the level of cover that the two applicant PCRs had obtained.

Putting the O'Higgins one to one side, and focus on the Evans PCR, Evans had obtained cover of £23 million for which a premium of £3.4 million was being charged. The ATE cover in our case -- which Mr Gutmann secured -- is £20 million, £20 million of cover.

I will give you the reference for that, it is not in dispute: A/28/1740.

So, because Mr Gutmann has £20 million worth of cover, we refer to this as a guide to the level of ATE premium you would have to pay in any event, even if he loses. This is a figure from 2021. I'm not saying it is a perfect guide, but it gives the Tribunal an idea of the kind of money that Mr Gutmann will have to pay to the ATE insurer even if he loses. That would have to come out of his £18.8 million of secured funding.

So, if you think about the £3 million, if it is about £3 million, and 12 per cent ATE tax on that, that leaves him with about £15 to £16 million of secured funding.

With that in mind, I would ask the Tribunal to go to the cost budget itself. That is in

A/24/1669. I would ask you to look, first, at the total figure which is in the --

LORD RICHARDSON: Just a moment.

MR KENNELLY: So sorry.

LORD RICHARDSON: Can I get the reference again?

MR KENNELLY: Tab 24, Sir.

(Pause)

LORD RICHARDSON: Thank you. I think we have it now, thank you.

MR KENNELLY: So, looking back, we know there is £18.8 million of secured funding, we don't know what the ATE premium is, or the total figure when we include tax. It could leave the PCR with about £15 million to £16 million of funding. And if we look at the budget, in the bottom right-hand corner of the table we see the total figure which is £20.3 million, and the problem with the budget is that it is referring only to the contingent legal fees. It is the higher figure. It does not tell us what the non-contingent legal figures are, it does not isolate them.

That wouldn't be a problem if the figure in the budget was significantly ahead of the likely non-contingent cost and expenses, but there are problems with this budget anyway.

First it is, we say, manifestly understated. If you look at the notes, the second note -- they are in very small type -- but in the second note below the table, it says:

"The budget has been prepared on the assumption that there will be no interlocutory applications or any preliminary issues."

There is a reference to "cost mediation settlement" but I think they are included in the table.

Then, if you look at disclosure, looking again at the notes, footnote 5:

"Disclosure covers negotiating and agreeing disclosure parameters, viewing the Defendant's disclosure and third-party disclosure, in all applications in respect of

disclosure."

So, the disclosure costs cover a very broad range of matters, and the Tribunal has well in mind that this is a stand-alone claim without, if the case is certified, the Class Representative will seek extensive disclosure from the four different operators, and that disclosure will have to be provided and reviewed. And the cost involved in that exercise, the Tribunal now knows from other cases, are very significant indeed.

We look at the costs which are budgeted for this exercise. We see them in the middle of the table, the column headed "Disclosure". And those figures which, on their face, look large in absolute terms, are manifestly insufficient for the kind of disclosure exercise a case like this is likely to involve.

We are not asking the Tribunal to assess the likely level of costs now. The point is that the cost budget is already, already unrealistic. And then, when you come to compare it to the available funding, you will have to ask if that £18.8 million figure is going to cover the ATE premia and the tax, and the economist fees which have to be paid in any event, and what will that leave for the lawyers? That leaves, on our estimate, potentially about £9 million -- the legal fees that will arise to be paid in any event, even if the PCR loses.

Now, the budget provides for £12 million for legal fees. But we don't have any sense of what the legal fees will have -- what the likely legal fees are in the event that the PCR loses at trial.

If those fees, if the PCR's legal fees are more than £9 million in the event that he loses at trial, then it may well be the case that the funding is insufficient. The PCR has not secured sufficient funding to take this to trial.

We are not looking for precision, as I said. All the Tribunal needs is the total figure of non-contingent fees and ATE premia, together with other expenses that fall to be paid in any event, to provide you with the reassurance that you ought to have.

MR BISHOP: I know, Mr Kennelly, the Tribunal has certain responsibilities here about making sure that the funding is there. But let me ask the question: suppose we made a mistake about this, there was inadequate funding, we went through and at some late stage the PCR was unable to proceed further. Who would be prejudiced by that? The lawyers clearly, for PCR, would. But would anyone else be prejudiced by that?

MR KENNELLY: We made this point (inaudible) our submission, the obvious question, "Why do you - the Defendants – care. This is an opportunistic point-score exercise" but the Tribunal's gatekeeper role extends beyond points --

MR BISHOP: That is why I said, at the beginning, that we have a certain responsibility, yes. But --

MR KENNELLY: May I make the point, because I haven't answered your question? Why does it matter? The concern is -- and I'm not making any suggestions about the lawyers in this case, but the concern is -- if the lawyers know that the case is not funded adequately, through to trial in the event that they lose, it may influence how the case is run and managed to the detriment of the class members.

The class members themselves may be prejudiced if the legal representatives in the case know that the case is not properly funded, through to trial, in the event that they lose.

MR BISHOP: You mean, in practice that means that they might, when they come to talk to whoever it is on your side about settlements, they might settle for less than they really should be?

MR KENNELLY: That is the concern.

MR BISHOP: Yes.

MR KENNELLY: That is why the Guide directs the Tribunal to consider this matter.

MR BISHOP: I understand. I just wanted to bring out the point that it is really -- these things actually would be down to the benefit of your client, wouldn't they, if these points

were important ones and were ever to arise? Isn't that right?

MR KENNELLY: First, only in a superficial way. I'm not concerned --

MR BISHOP: Sounds like several millions of superficiality.

MR KENNELLY: But the problem is, we all have a lot of experience in these cases. It is in everyone's interests that they are properly run and run efficiently. It actually helps the Defendants if the PCR's representatives act in the best interests of their clients.

MR BISHOP: I take the point.

MR KENNELLY: That is why I anticipated one's first impression. But, in truth, it is in our interests and it is in especially the Tribunal's interests, that the case is properly funded and properly managed through to trial, and that everyone has predicable and well-understood incentives.

LORD RICHARDSON: Just picking up on Dr Bishop's point: the lawyers concerned have advised Mr Gutmann that the funding is sufficient, haven't they? We know that.

MR KENNELLY: That is the assurance that he has received, yes. He says so in his statement.

LORD RICHARDSON: So, to that extent, is that not a relevant factor that the Tribunal is entitled to take into account in considering this? In other words, we are not dealing with these -- the way you have presented it, that is fine, there is no criticism of the way that you have done it -- if we look at the budget and the funding, we also have to take into account that Mr Gutmann has been advised, and we are aware of the nature of that advice. And that is a factor that we are entitled to take into account as well, isn't it?

MR KENNELLY: Yes. But the weight which is given to that assurance that Mr Gutmann has received is, we say with respect, limited. It is not that Mr Gutmann needs to be satisfied, it is that the Tribunal needs to be satisfied.

And if Mr Gutmann had interrogated -- if Mr Gutmann said: "I have reviewed and compared the different questions of contingent and non-contingent fees and interrogated what I have been told", that would be a different thing.

There is no suggestion that he has interrogated the assurance which he has been given by his legal team.

LORD RICHARDSON: I think that is a slightly surprising submission, in the sense that Mr Gutmann has very skilled and experienced lawyers. He goes to those -- are you suggesting that he is required to take out a calculator and sit and do the sums himself?

MR KENNELLY: Well, potentially the kind of high-level analysis which I put to you, which has taken a matter of minutes, might well be the kind of thing that a responsible class representative ought to do, and then record in a way that does not disclose any information in his own statement.

But the Guide is very clear: this is a factor that the Tribunal needs to take into account. The PCR prepares his evidence knowing that. And, in other cases -- I will take you to those -- the Tribunal has been given more information to allow it to be satisfied that the PCR is properly funded through to trial.

It is odd that PCR resists even giving the total figure, which couldn't prejudice them in any way. It doesn't reveal anything sensitive about their own lawyers' perception, the total figure which will give the Tribunal satisfaction, that it has received in other cases.

That is the first point that the PCR makes against us, that he has had the assurance. He says that such an assurance was sufficient in *Gutmann v Govia Thameslink* -- another case on which he places reliance.

May I take the Tribunal to that next, just to show you where that kind of assurance appears and was shown to be sufficient. That is in D/16/774. It is paragraph 7.

By way of background --

LORD RICHARDSON: Could we have the tab again?

MR KENNELLY: Sorry; D/16/774.

LORD RICHARDSON: Thank you.

MR KENNELLY: In this case Mr Gutmann had brought two sets of proceedings against train operating companies holding, on the one hand South Western rail franchise, and the other hand a South Eastern rail franchise, so two different sets of proceedings.

Paragraph 7, the PCR had a litigation budget showing estimated costs a little over £8 million, but funding had been secured -- and if you skip down about six lines -- the funding was up to just over £5 million, and the Tribunal questioned counsel for the PCR about their apparent shortfall. He explained both solicitors and counsel were working under CFAs for -- a significant portion of their fees were deferred so that the cost to be paid through to the end of trial should not exceed the available funding.

Now that is said to have been sufficient in that case, and the PCR says that should be good enough for you.

But, I place reliance on what came next which, in my submission, is likely to have influenced the Tribunal, because they say:

"Moreover, the budget was prepared on the basis that these proceedings would be heard separately. And since the Tribunal directed at the hearing that the proceedings and case management be heard together, there should be some resulting efficiencies that would reduce the overall cost."

So, the Tribunal had satisfied itself that, looking at the matter as a whole, the assurance that it had received was likely to be a good one.

But, in any event, even if that was sufficient for the Tribunal in *Gutmann v Govia*, these matters are highly fact-specific, and the Tribunal is entitled to be reassured, and reassured in a way that does not prejudice the PCR.

Finally, the PCR says, in the cases of *Kent* and *Coll* -- the collective proceedings action against Apple and Google respectively -- the detail that we seek was not provided.

I go first to *Kent*, if I may, and Apple -- that is D, tab 9, page 290, that shows you the case. And then page 294, the litigation budget. Over the page there is a reference to 15 phases of the litigation and total cost figures, total through to trial costs are stated to be over £15.3 million. That did exclude ATE premium. Total funded amount is lower, £11.3 million, which does include the ATE premia, so there is a shortfall.

But reference then is made to the spreadsheet, which distinguish between full hourly rates and CFA hourly rates. And the difference between the two hourly rates is the element of the lawyers' fees deferred under the terms of the CFA, the deferred element, and subject to a successful outcome.

The higher figure includes a deferred element. Total funded amount excludes the deferred element.

So, they could see, in *Kent*, that the funded amount was sufficient to cover the non-contingent --

LORD RICHARDSON: I'm not sure I'm following you, Mr Kennelly.

So, what is it that you say the Tribunal had in *Kent* that we don't have? Because, reading that, I have to say, I read it to say that all that the spreadsheet disclosed -- we have Dr Bishop, I don't know whether he remembers this level of detail -- all the spreadsheet disclosed was that there was a difference between these two rates. It didn't disclose the actual amount of those rates.

MR KENNELLY: Well, not only Dr Bishop, but I was also in this case. Part of it was confidential, so we have to be careful what we say. But I think all I can say is that the Tribunal appeared to have been satisfied here that the non-contingent element -- the bit that did not depend on success -- was covered by the total funding amount. That the funding was sufficient to cover it.

LORD RICHARDSON: I suppose it is quite important, isn't it, how they were satisfied, and why they were satisfied of that. Because I, in reading your skeleton, you seek to distinguish this case and *Coll*, and I must say I struggled to understand the basis for the distinction. Because it did seem to me that the information that was provided in *Kent* and *Coll* appeared on all fours with the information with which the PCR has provided the Defendants to the Tribunal in this case.

So, if you're seeking to make a distinction, it would be very helpful to me if you could really spell that out.

MR KENNELLY: Indeed. We will come to *Coll* but here the total funded amount has been calculated -- the final sentence:

"... sum of 13.3 million for total funded amount excludes [this is the same sentence I read before] that deferred element."

So, the £11.3 million excludes, expressly excludes the element that depends on the PCR succeeding.

LORD RICHARDSON: Yes. That is the same as our case, isn't it?

MR KENNELLY: No. Because we don't know, on our budget --

LORD RICHARDSON: We know that it excludes the deferred amount?

MR KENNELLY: No, we don't know. Because we don't know -- the £18.8 million is simply the secured funding.

LORD RICHARDSON: Yes.

MR KENNELLY: The budget is £20.3. We have not been told that the £18.8 -- sorry, we have not been given any figure that excludes a deferred payment.

LORD RICHARDSON: Perhaps it is just me that finds it confusing.

MR KENNELLY: No, if you go back to the cost budget --

LORD RICHARDSON: Yes. That was in the A bundle.

MR KENNELLY: Yes. It is tab 24.

LORD RICHARDSON: Do you have the page reference?

MR KENNELLY: I'm so sorry, it is page 1669.

LORD RICHARDSON: Yes.

(Pause)

MR KENNELLY: There is no mention here of any figure that excludes the element that depends on the success of PCR's case.

LORD RICHARDSON: These figures, it is the first note, isn't it: "All the rates shown are full rates ..."

MR KENNELLY: Yes, exactly.

LORD RICHARDSON: "However, solicitors and counsel will be working on conditional ... "

Is your point this: here we are told what the full rates are. We had, in relation to the total funded amount, we have what Mr Gutmann says in his statement, and he says "£18.8 million", and that would be sufficient.

But your point is: the difference, the distinction that you're drawing with *Kent* is that he doesn't say, expressly, that that figure of £18.8 is calculated on the basis of the non-deferred fees?

MR KENNELLY: That is the point. I'm sorry it has taken me --

LORD RICHARDSON: No.

MR KENNELLY: That is the point, and it is the same in *Coll*.

And again, what we struggle to understand is why the PCR won't provide that information since it was provided.

In *Coll*, tab 10 in the same Authorities bundle, D10, the case begins at 305, and page 319 is the beginning of the section on the litigation budget. 319.

Again, if you go to (iii), a figure for total funded amount, £11.2 million. Then it says:

"Although this appears in the litigation budget under items 1 and 2 above, which

suggest it is derived from the figures appearing above, it is not."

"It appears" is the important bit.

"... It appears from the footnote and has been explained to us: this figure is calculated by applying the discounted CFA rates agreed for each member of the legal team to be hours reflected in the litigation budget."

So that figure, like in *Kent* -- £11.2 million -- has been calculated by reference to the lower level of lawyers' fee. Just so that the Tribunal can be satisfied there that the funded amount was sufficient to take them through to trial even if they lost.

LORD RICHARDSON: They didn't know -- I suppose the point that I'm right in saying, am I not: in neither *Kent* nor *Coll* did the Tribunal know the information that you are seeking here?

They had an additional piece of information, which was: they were told the total funded amount secured has been calculated, and that is sufficient because it is based on the non-deferred piece -- that is the point that you make -- but they were not told either what the ATE premia were, or what the non-deferred legal fees actually amounted to. They were simply told: we have calculated the budget on that basis and it is sufficient. Is that right?

MR KENNELLY: That is correct, yes. And I think, unless I'm told otherwise **--**

(Pause)

If you go to page 320, you see the litigation budget records the deposit premia. So, this is -- the non-contingent element of course is the legal fees plus the ATE premia. And there is no dispute, this figure is funded by the LFA, you see that? Do you see the disbursements include the deposit premium and, of course, the deposit premium is the premium that isn't deferred. That is the premium that has to be paid in any event.

So, the litigation budget records the total of those two items -- the legal fees at a

discounted level and the deposit premium -- to be 11.29 million. I'm sorry I didn't point that out sooner.

I'm looking at paragraph 1, sub 2(ii).

LORD RICHARDSON: Yes. So, the litigation budget in that case did include, so unlike in this case, it did include the deposit premia.

MR KENNELLY: Indeed. That is what -- and you saw earlier what a deposit premia means: it means the premium that falls to be paid in any event, as distinct from the deferred or contingent --

LORD RICHARDSON: So, *Coll* is different from -- the facts of *Coll*, therefore, are different from *Kent* in that sense?

MR KENNELLY: Yes. Sorry, they are the same. In *Kent* the same information is involved. I misunderstood. I had understood that the total wasn't given, but I'm apparently -- that is not correct, even in *Kent* the total figure is there.

LORD RICHARDSON: Can you show us that?

MR KENNELLY: Yes. Paragraph 13 on page 295. Total funded amount is defined three lines down, and that includes the deposit premia.

LORD RICHARDSON: Yes. But you're not comparing like with like there, are you, because this is the total funded amount whereas what we were looking at in *Coll* was the budget.

MR KENNELLY: It is the combination of the, if you look at the --

LORD RICHARDSON: I'm sorry, Mr Kennelly, it is probably me being confused in myself. But I understood that in this case we had the budget to trial, which doesn't include the ATE --

MR KENNELLY: Yes.

LORD RICHARDSON: -- premia. And we had the total funded amount which did. And then, in *Kent* we have the same situation: the budget doesn't include the ATE

premia but the total funded amount does.

You have shown us, in *Coll*, that it would appear that in that case the budget did include the ATE premia. But that is different from what you're showing us here, which is the total funded amount includes the ATE premia.

MR KENNELLY: Can I --

At the bottom of that paragraph: the sum of £11.3 million excludes the deferred element. But the very last line of that tells you that £11.3 million excludes the deferred element and legal fees, but includes the ATE deposit premium.

LORD RICHARDSON: Yes. But that is the same as we have here, isn't it?

MR KENNELLY: No, because -- you mean in the Gutmann case before us?

LORD RICHARDSON: Yes.

MR KENNELLY: No, because we have not been told that the £18.8 million covers the deposit premium for the ATE insurance, and fall to be paid in any event, plus non-contingent legal fees.

LORD RICHARDSON: So, I suppose it is the same point you're making. It is just that we haven't been told how that total funded amount has been calculated.

Is that the point?

MR KENNELLY: Yes. The point is: what we need to be told -- what you need to be told -- is that it has been calculated so as to include the £18.8 million. The legal fees that fall to be paid even if PCR loses, and the ATE premia which fall to be paid even if the PCR loses.

MR ALTY: Sorry, can I -- at the risk of extending this, there is a letter -- and I apologise, it is the letter from the PCR solicitors towards the end of the table -- which does say that the £18 million, £18.8, includes, or is based on the deferred legal fees and includes the ATE deposit premium. So, it does seem to be just the same as the others.

MR KENNELLY: The common ground of the cost budget does not include the PCR's ATE premia.

MR ALTY: But it says the total funded amount does. It is from Charles Lyndon -- sorry, I didn't copy the whole thing to save paper.

MR GIBSON: B13.

MR ALTY: I don't know if I have misunderstood this, but it might be helpful to have confirmation that that is what it says.

MR GIBSON: (inaudible) I will check.

LORD RICHARDSON: I am not sure that is the letter actually.

MR KENNELLY: I apologise.

LORD RICHARDSON: I think the one we have sets out the comparison between *Kent* and *Coll* and our situation.

MR GIBSON: I will find it. I understood the Tribunal were referring to the very last page of the letter, page 158 behind B, tab 13. It has the comparator table of the PCR.

LORD RICHARDSON: I'm in the wrong bundle, that is why I can't find it. Thank you, Mr Gibson. That is the letter we are referring to.

MR GIBSON: There are additional references that I can take the Tribunal to in due course.

LORD RICHARDSON: So that, Mr Kennelly, is helpful, in the sense that that is a piece of information that we have, which would appear to indicate that the total funded amount is calculated on the basis of deferred legal fees and the ATE deposit premia. Which is, if I understood your submissions, the same point that the Tribunal -- of which the Tribunal was aware in *Kent* and *Coll*.

Is that right?

MR KENNELLY: On the face of that, it appears to be the same.

LORD RICHARDSON: Yes.

MR KENNELLY: My point went beyond legal fees and the ATE deposit premia. Because, as I said earlier, there are also the fees that need to be paid -- expert fees and the fees of the class representative, which are not contingent.

It is the total figure of those which needs to be covered by the net amount from the secured funding.

LORD RICHARDSON: Thank you. I understand your point in relation to *Kent* and *Coll*.

MR KENNELLY: The last point made in the application was in relation to CFAs. Whether, in the CFAs, there are any terms which provide for contingent fees to be paid by the PCR, but don't depend on the Defendants covering costs.

This is a further risk that the secured funding could be eaten into by costs which the PCR has to pay, which will not be covered by the Defendants.

So, for example, if the PCR has agreed to pay his lawyers on a staged basis -- the proceedings reach a certain stage -- that is contingent, but it is a fee which may not be covered by the Defendants. And certain CFAs provide for payments like that.

We simply ask, if any terms in the CFA, if they exist, which cover those kinds of contingent fees, because they are not the kinds of non-contingent fees we have been discussing to this point.

LORD RICHARDSON: Thank you very much, Mr Kennelly.

Now, do I understand it is Mr Gibson who is addressing these points? Thank you.

MR GIBSON: Yes (inaudible).

LORD RICHARDSON: Very happy to hear from you, Mr Gibson. What I'm minded to do -- subject to ensuring that this doesn't inconvenience parties, or other members of the Tribunal -- I'm minded to sit on to hear your submissions.

Do you have a sense of how long you think you will be in reply?

MR GIBSON: I think I can give you a short answer in a couple of minutes. But I think,

because it gets quite fiddly, I would like to give you the reassurance that the suppositions that you have had are well-founded. And I want to take you through some documents in relation to that.

I will try to do it within half an hour to 45 minutes, maybe less.

LORD RICHARDSON: Are we content to sit on? Let's proceed on that basis, thank you.

MR GIBSON: In relation to this application, I make reference to four parts.

First, I'm going to recap very briefly on what is actually asked for in this application.

Second point is just to touch on what I think is most important, to go to the facts and look at the actual figures themselves. And I can give the Tribunal some comfort as to what is and isn't covered by those figures.

Third topic is to look briefly at the law. And my learned friend, Mr Kennelly, has already helped me take the Tribunal to many of those points. So hopefully I don't have to take up too much time on that.

Fourthly, I will wrap up with some points by way of submissions as to why we say the application should be dismissed.

Briefly, then, in relation to -- by way of summary and the application, I'm going to talk about the scope of the application, the basis for it, and just briefly remind us what the justification, or reasons given by Three are.

As to the scope, my learned friend quite rightly noted that the application that was originally made three weeks ago, the primary position there was for disclosure of the deferred element, the actual proportion; that is no longer their primary or, indeed, any position. They have been absolutely candid that what they now want is the total amount and they disavow any requirement to scrutinise the subset of the detail of that.

As to the basis of the application -- it is just a point for completeness -- we note that the basis that it is said to be made on is Rule 89.1(b) and that is in Linklater's letter,

tab B11, paragraphs 3.1 and 3.9. We assume, just for completeness, that that was an error because that Rule, 89.1(b):

"... provide the Tribunal with power to order disclosure to be given by the class representative to any or all represented persons."

And that clearly does not apply here, not least because -- so we have assumed that we are talking about either 53.2(l) or 89.1(a), just to ensure that that is properly reflected in any order.

As to the reasons -- my learned friend quite rightly focused, made it clear that he was relying on paragraph 6.33 of the Guide; ie, the provision of the relevance of the class representative's own costs. And the significance of that is that it is on the same basis on which the *Kent* and *Coll* applications were advanced. And, essentially, they argue that PCR can't satisfy the Tribunal as to that point in relation to own cost funding, because we haven't disclosed the non-contingent legal fees which is liable under the CFAs, or the deposit premia, and the ATE premia tax, ie, collectively as one overall figure, as it is now advanced, by way of the application in the skeleton argument.

The short answer to that, is that we have provided that overall number. That is the £18.8 million number, and I will explain to you the reasons why that is the position.

LORD RICHARDSON: Yes.

MR GIBSON: To do that, I'm going to turn up -- as my learned friend did -- both Mr Gutmann's statement and the cost budget. They are both in the A bundle, volume 3.

If we start with the cost budget which is at tab 24, at page 1669 -- I'm sure you're now familiar with. This is the costs budget, and it stands, as my learned friend pointed out, in the corner, bottom right-hand corner, £20.3 million odd, including VAT where applicable.

I want to flag a couple of points. First, as I think the Tribunal noted, the first asterisk

note makes clear that it is always shown here at full rates. So, the calculation of legal fees incorporates the contingent element.

At the risk of teaching grandmother to suck eggs, there obviously, when you're looking at a discounted CFA, there are actually three components, possibly more.

You start with the base rate, call that 100 notionally. You have a non-contingent or non-deferred or discounted rate, let's say, for example, it is 50. Then, that is what is payable come what may. That 50 of the 100.

In the event of success, you have two things that happen.

One: you have the uplift to the full rates, back up to 100. And that is significant because that is what this note indicates this table is reflecting.

You also have the uplift for success, on top of that, of whatever percentage rate was agreed. That element is payable -- is not payable as a recoverable cost, it is payable by way of deferment from any damages sum.

I wanted to flag that when we are talking about uplift, that is sometimes a loose word. We are talking about the movement up from 50 to 100, not the movement up above 100 in relation to that. That is what this table shows and that note makes clear.

You will also see from this table that it includes disbursements in relation to experts. You see that about, under the halfway line: you have "Experts and Misc", you have "Economist", "Case Pilot", "PR Consultant" and "Other Disbursements" in the column on the left-hand side. Quite small to read. Does the Tribunal see that?

LORD RICHARDSON: Yes.

MR GIBSON: What this table shows is the total budget for the entire litigation for solicitors, counsel and disbursements, including experts, at full hourly rates, and therefore including that contingent element up to 100. But it excludes -- and you see this from Mr Gutmann's statement, which I'm going to go to in a minute -- the ATE deposit premia or, indeed, the contingent premia that would be payable in the event

of success.

This wraps up everything in relation to, if you like, the legal and experts and that side of things, and gives an amount payable at the full rate.

Now, my learned friend suggested that this budget was insufficient. That obviously is a point that we will have, no doubt, plenty of time to discuss at the CPO hearing, and we will very much enjoy getting into the nitty-gritty of it. To the extent that the Tribunal is interested in that point at the present stage, I will flag that whilst my learned friend pointed out the first half of the triple asterisk note: "this budget has been prepared on the assumption that no interlocutory applications have been issued... " That sentence does finish: "... we have, however, included contingency amounts".

And for the amount of the contingency, you can see the penultimate column in the table, headed "Contingency" and if you follow to the bottom you will see that that is over 3 million contingency.

So, what my solicitor has done is not try to attribute to a particular application but give a very generous allowance for the fact that there will be -- some contingencies will need to be met.

So, I want to give the Tribunal some reassurance on that. So that is what the budget shows.

If I can turn up, then, at tab 17 of the same bundle, Mr Gutmann's statement. And my learned friend took you to paragraph 45 at page 1471. This is under the heading "Estimates and Details of Arrangements Relating to Costs, Fees and disbursements". And then Rule 78.2(a) and 78.3(c)(iii). The reason I flag that is that this is the point that is relevant to the point that is made by my learned friend. This is the element that we are addressing, the points that the Guide indicates -- the Guide rather confusingly raises a point at paragraph 6.33 in the context of 78.2(d), which is the ability to pay adverse costs, but we say it sits more naturally here. And this is the reassurance that

the Tribunal is given.

Firstly, there is a reference to the cost budget and an explanation of the way it has been compiled, which confirms the points I have just made.

Then he refers to the fact that he has funding -- paragraph 46. And then over the page, at 1472, paragraph 47, he explains that the funded figure is £18.8 million-odd.

He also makes the point, in the last sentence there:

"Should it be required, there is also provision for me to seek further funding."

My learned friend suggests that that should be given little weight. I would say one shouldn't underestimate the importance of that statement, for the obvious reason, I would submit, that LCM, having invested significantly in these proceedings, is unlikely to walk away from its investment, rather than adding a little bit more to the pot, in order to be able to secure the outcome it has invested for, to that point.

It is very much in its interests to consider carefully, and likely also to make the contribution of further funding. So, we say that last sentence should not be treated lightly.

He then goes on to explain, at paragraphs 48 and 49, not only has he secured the investment of the funder; i.e., an actual cash investment, he has also secured an investment from other stakeholders; namely, the counsel and solicitor teams, who have agreed to put at risk a proportion of their fees. That is another form of investment.

So, the figure, the 18.8 million figure comprises the cash element that he has, plus the reduced amount that he has to pay to solicitors and counsel, taking into account the fact that they have invested in this deferral, or contingency way that I have described.

LORD RICHARDSON: I understand your submission in that regard, and it is consistent with the letter that we have looked at. But it is fair to observe that it doesn't actually say that in black and white, does it?

MR GIBSON: You're absolutely right, Sir, it is very compressed, and that is precisely

why, in the course of correspondence -- and I'm going to take the Tribunal to that -- we sought to clarify matters. So, I would accept that that was just, if you like, a slightly elliptical way of phrasing it. We say an obvious inference, but I accept it is not expressed, it is an inferential point that you would have to draw from that.

He also refers -- and, again, to the point of inference but I think a fair one -- he says it refers to the fact -- paragraph 49 -- that the lawyers who obviously prepared the budget and negotiated the litigation funding agreement, have confirmed that the funding in place is sufficient to progress the matter to trial and final judgment should that be necessary.

Again, this is a statement that Three suggests should be disregarded, because Mr Gutmann was wrong simply to accept the advice of his legal advisers on this point. With respect, we say that is a surprising and, we would say, untenable submission. The lawyers in question are not only highly experienced in this area, they have successfully obtained CPOs in numerous cases, and in fact have recently litigated one case to a successful settlement, the second settlement, and significantly the highest value settlement to date. They have also said -- they are also the lawyers who drew up the budget and negotiated the funders on the PCR's behalf, but they also have skin in the game, since they have every reason -- both professionally and personally -- to want to ensure that the case is properly funded all the way to trial.

My learned friend says that they also may want to settle because it is underfunded. That seems to me a somewhat illogical position for the solicitors to put themselves in. They have sought to obtain funding to litigate to trial. They have given an assurance, with all of their professional responsibilities, that that is the position. And I think that is, therefore, something that Mr Gutmann was entirely at liberty to place significant reliance on. And we say it is a somewhat surprising suggestion that there is anything wrong with him having done so.

We say -- and as I say, I will explain how we elaborate on this in correspondence -- that it is clear that the £18.8 million figure constitutes the total figure for the anticipated non-contingent costs the PCR will incur through to trial. Namely, the non-contingent legal fees payable to solicitors and counsel, the total disbursements which fall to be paid in any event, including expert fees, and therefore non-contingent, and the deposit premia tax and commissions for the ATE insurance.

This is what the PCR has explained. And I will take the Tribunal to three places. The final destination is the one that the Tribunal pointed out earlier, but before we get to that, if you take up the correspondence bundle C, tab 32, the letter of 1 March, from my instructing solicitors Charles Lyndon to Linklaters acting for Three, but generally dealing with this point on behalf of the Proposed Defendants, as I understand it.

Paragraph 34 of this letter, page 92 of the bundle, you see there is a heading "Insufficient Funding Obtained to Meet the Cost of the Full Related Proceedings".

In respect of that, paragraph 34, they make the point that:

"In addition to the £18.819 million provided by LCM, the counsel and solicitors teams have agreed to work on a partial conditional fee basis. Accordingly, there is no shortfall between the funding of LCM and the cost budget."

That is the point -- we will come on to look at the specifics of how *Kent* and *Coll* map on to this, but that is, we say, precisely the point that you were debating with my learned friend there -- that the figure, the £18.8 million figure does comprise all of the non-contingent elements.

That is why it was said the £18.8 million represents the sufficient amount to fund it all the way to trial.

We say that is a natural and obvious inference of that statement. Because if you didn't have -- if you haven't included all of those elements, you couldn't give that assurance.

And, accordingly, there is no shortfall, as I say.

Then the second reference is at tab 51 of the same bundle. This is my instructing solicitor's letter of 9 May, paragraph 24, on page 162.

This is under the heading "Disclosure of the CFAs and ATE Policy Premia".

LORD RICHARDSON: We can read the letter I think. I understand.

MR GIBSON: I'm sorry. Yes, you see the letter, that reiterates the same point, we would say.

LORD RICHARDSON: Yes. You go from there to the letter we were looking at in the B bundles.

MR GIBSON: I do, but just -- there are two additional points in that letter, apart from the table, just to finish that. Sorry to labour the point. I can apprehend you're following much faster than I'm going.

I will give the references. But at paragraph 23 on page 154 of the B bundle, that is where the figure £18.8 -- it is fair to say that this figure includes the ATE deposit premia, and it takes into account the PCR's solicitors'/legal team's reduced hourly rates, as set out in the CFAs.

At paragraph 25.1, a similar point, halfway down:

"The difference between the cost budget and the fund amount is addressed by the terms of the CFAs."

So, again, further confirmation.

Those, we say, are all the points in the evidence, in addition to the table which you have already referred to, that make good on the fact that the £18.8 million figure is the figure that my learned friend now seeks, by this application, as now being defined in this skeleton.

I was going to take you briefly to *Coll* and *Kent*.

LORD RICHARDSON: I don't want to dissuade you or take you out of the order of your submissions, but I think we are reasonably comfortable with the detail of *Coll* and

Kent.

The point I would be grateful for you to address, which is the point that is taken against you, which is -- I understand you say there is no distinction on the facts, and that is the point that you make in this letter that we are just looking at, but there is a difference in this sense, isn't there, that -- potentially -- that part of the argument there deals with relevancy, and part of the argument deals with this question of tactical advantage. And the point that was taken against you is: well, you need to think about the tactical advantage in the context of what is being sought here, as opposed to what was being sought in *Coll* and *Kent*. Because the point was taken against you: the Proposed Defendants are not looking just for the ATE premia on their own, but they are looking for this, as it were, global figure of the non-contingent legal fees, disbursements, and the deposit premia.

So, certainly speaking for myself, I would be grateful if you were to address that point, which I think comes out of *Coll* and *Kent*.

MR GIBSON: Yes. The short answer is: the figure that they are asking for is the one that we have already given. So, it is not clear precisely what more they need.

If that is all they want, I think there is an element of, perhaps in the correspondence, ships passing in the night, or something like that. As always, when you get to the business-end of things, points are clarified significantly. I think, if that is all they want, then perhaps the quicker answer would have been to have stated, once again, that that is what we have already given.

To that extent, there is no tactical advantage in that figure because we have already given it. If they are asking for something more, which I apprehend they have moved away from, then the point falls away.

There is still the point that they are asking for about other terms of the CFAs. I think I can deal with that this way: the £18.8 million figure includes all the money that is due

on a non-contingent basis. The reference to this staged-payment point, if you go to the underlying bar counsel document, I don't read necessarily as being a contingent element -- it is a staged element. You can have a non-contingent CFA that simply broke up the amounts and paid them at different points in time.

The point: we have made allowance for everything that will be payable in the event that we don't win. That is what the £18.8 million figure is. Again, that may be another ships-passing-in-the-night point.

You have been listening to this for 70 minutes now. It may boil down to a simple point that: as often in correspondence -- a good conversation in front of a Tribunal sometimes is a quicker way of dealing with things, albeit slightly more expensive.

Sir, I can take you to *Kent* and *Coll* to show that the two figures in those cases map on precisely to the two figures we are looking at here. The cost budget figure, which is, in each case includes all the contingent element of legal fees but none of the ATE premia -- either deposit or contingent. That is the first figure. In all three cases that is the higher figure. And in all three cases the lower figure is the total amount required to get you to trial.

So, therefore, it has all the non-contingent elements in: the non-contingent legal fees and the non-contingent -- i.e., deposit -- ATE premia.

My learned friend made a point about experts. And to the extent -- this wasn't a point taken before, I think, but I can reassure you that the figure, the total funded amount, the £18.8 million, we would have been happy to clarify that point had it been raised earlier. And I can clarify it now. It does include the expert element. That is why the assurance is given, that: to get to trial we need £18.8 million, and there we go.

I won't go into the detail of *Kent* and *Coll* if that is --

LORD RICHARDSON: I'm content with what you have said.

MR ALTY: I am too, yes, thank you.

LORD RICHARDSON: I'm not sure he has finished quite yet. Don't worry, Mr Kennelly, I will give you an opportunity to respond.

MR GIBSON: When my learned friend took you to the particular references in the judgment -- it is paragraph 13 of *Kent*, and paragraph 26(1)(ii) and (iii) of *Coll* -- just to be absolutely clear -- it may be worth turning it up because there was an element of confusion -- but, in the *Coll* case, if you look at those paragraphs which are behind tab 10 of the first bundle, D, the first volume of D, tab 10, page 319.

LORD RICHARDSON: Yes.

MR GIBSON: The total figure in (i) is not relevant except to see how the (ii) figure is made up. (ii) figure is stated to exclude any ATE premia of any kind -- that is the second line of (ii). And it is derived from the (i) figure, but it discounts it by disbursement of 1 million because that relates to the distribution phase.

If you look back up to (i), you see the last element of that, it is calculated by reference to estimates of time spent on their base rate, i.e. normal rate, so that is the 100 per cent figure. That is how we know that the total through-to-trial figure here is the same as the cost budget figure in our case. It includes all of the fees, including the contingent element of legal fees, but excludes all of the ATE premia. That is true of both cases.

If you look at (iii) -- my learned friend has already taken you to this -- you see that the total funded amount figure is the converse. It includes the deposit premium -- because it is discounted CFA rates -- but excludes a contingent element.

I think that is actually very clear and is precisely what we have just seen in our case.

LORD RICHARDSON: Yes.

MR GIBSON: I won't detain you further with that.

What I will take you through, very quickly, are four short points by way of concluding submissions.

The first is that there is no shortfall -- I will take you through all four and then elaborate on them.

The second is that the information sought is not relevant or necessary to the CAT's assessment of the CPO application to the extent that -- we would say that is subsumed in the point that it is already there. You don't need anything more because you already have it.

LORD RICHARDSON: Yes.

MR GIBSON: The third is that, if there is anything more required -- and specifically we were required to start delving into the CFAs themselves, the terms, the bit that still remains -- we say that would, or at least might provide the PDs with a tactical advantage.

And, fourthly, we say that precedent confirms these applications should be dismissed -- essentially the *Kent* and *Coll* point, and indeed the *Gutmann* point that was already made.

I will take those relatively quickly if I may.

First, the shortfall point. That is incorrect because, as I have explained, the two figures are made up on different bases. The apparent shortfall -- if I can put it that way -- is actually no more than the fact that they are not trying to match like with like. They are composed of different elements. When you take into account the fact that the funded element discounts for the contingent element, the legal fees, you readily see that that is how you get down to a figure that can still be covered by £18.8.

My learned friends did a calculation based on guesswork as to what that would mean in terms of discount for us. I think my learned friend said it was all down to £9 million, but in the skeleton, it is suggesting a 40 per cent reduction. Either way, those aren't outlandish reductions one sees from the publicly available information in other cases about the CFAs on which legal teams work. And it is well within the parameters of

those cases -- I make no comments about the ones in our case, of course -- but we say it is not an outlandish position to be in. And, therefore, the £18.8 is perfectly credibly an amount that would make sense.

I can take the second point even more quickly. It is not relevant or required because they already have that which they asked for. And they don't need the detail of the CFAs, for reasons I have already given you.

The information sought would confer an unfair tactical advantage to the extent they want anything more. That is consistent with the way we approached *Kent* and *Coll*.

We say -- it is the point that you asked me for earlier, Sir -- if all they are asking for is what we have already given them, there is no unfair tactical advantage and we say no more about that. If they press for anything more in relation to detail of the CFAs, we say they cross that line, for the reasons that *Kent* and *Coll* adumbrate.

And we say precedent is on our side.

I won't go through, hammering it out, but *Coll*, *Kent* and the *Gutmann* case -- in which my solicitors are also instructed and gave the reassurance, through learned counsel in that case, and it was accepted, we say rightly so, for the same reasons that the shortfall can be readily explained in the way that I have done.

Unless there is anything further, those are our submissions.

LORD RICHARDSON: That was very helpful, thank you Mr Gibson. And I think that was significantly shorter than the time you allowed, so thank you very much.

Mr Kennelly, do you want to make any --

MR KENNELLY: Just two short points.

LORD RICHARDSON: Yes.

MR KENNELLY: The core of my learned friend's submission is that his clients had provided to us, already, that which the PCR provided to the Tribunal in *Kent* and *Coll*.

LORD RICHARDSON: Yes.

MR KENNELLY: But the funded amount covered the ATE deposit premia and the non-contingent fees, and he relied on two letters for that purpose. I will ask you to go back to those.

LORD RICHARDSON: Yes.

MR KENNELLY: The first was in the C bundle, tab 32, page 92, paragraph 34.

In addition to the £18.8 million -- this is to answer the point about insufficient funding, and the shortfall between the £20.3 million and £18.8, he says:

"In addition to the funding of £18.8, counsel and solicitor teams have agreed to work on a partial conditional fee basis and, accordingly, and for that reason alone, there is no shortfall between the funding from LCM and the costs budget."

There is no reference there to the ATE premia which fall to be paid in any event.

So that does not tell us that when you take out the ATE premia -- that falls to be paid in any event -- and the non-contingent fees, there is no shortfall.

The second letter was the one that was taken up by the Tribunal and put to me, at the end of my submissions -- bundle B, tab 13, page 157 and 158.

When I looked at 158, at the close of my submissions, for a moment I thought this was actually the information which was provided in *Kent* and *Coll*. On its face it looks as though they are saying that the total funded amount includes deferred -- sorry, includes the non-contingent legal fees and ATE deposit premia, although it refers to deferred legal fees and not to non-deferred legal fees.

But when one goes back to the previous page one sees exactly what they are saying in that table. On the previous page they simply set out the passages from *Kent* and *Coll*, which record that in those cases the Tribunal was told, in terms, that the funded amount covered the ATE deposit premia and the non-contingent fees.

And at paragraph 31 they say:

"The PCR considers the passages above -- *Kent* and *Coll* -- support the approach

taken by his team in preparing the cost budget which he has filed as part of the PCR application in the (inaudible) proceedings. They reveal the exact same information by illustration."

He goes on, then, to show total funded amount and provide the information which is set out there.

That is simply saying: the cost budget tells you this. But it is not true. If you look at the cost budget, it does not tell you this.

LORD RICHARDSON: If you look in the paragraph, in the same letter, in the bundle at page 154, it says:

"The PCR also obtained funding from the LCM of £18 million, including VAT where applicable, to conduct these proceedings. This figure includes the ATE deposit premia and it takes account of PCR's legal team's reduced hourly rates as set out in the CFAs."

That is making a point, isn't it?

MR KENNELLY: The problem, Sir, is that when read as a whole, it looks as if they are simply asserting it by reference to *Kent* and *Coll*. It is not clear enough. And none of this should be a surprise to the PCR. We adjusted our position, instructively, before the hearing. We put in a draft Order saying the total figure would do, and we said that in our skeleton. So, they have been well advised that an adjusted position was taken, and there is no prejudice to them providing it. It is not information that we have had properly provided so far.

LORD RICHARDSON: Thank you very much, Mr Kennelly, and thank you to all counsel for their submissions.

Unless there are any points that my colleagues want to raise, we will rise now and sit again, as near as we can to 2.00, and we will give you our decision then.

(1.22 pm)

(The short adjournment)

(2.18 pm)

LORD RICHARDSON: The Tribunal is very grateful to counsel and those sitting behind counsel for the helpful submissions that we have received, both orally and in writing.

We intend to order that the four proceedings are, clearly, to be treated as proceedings in England and Wales. We will make no order in respect of the confidentiality protocol at this point but do encourage all parties to engage in, and to complete the process, of agreeing the confidentiality protocol.

We will order the four proceedings to be jointly case managed up to the CPO application, and we will order that evidence in one stand as evidence in all.

In respect of fixing a hearing, we intend to fix a hearing for 31 March 2025, for three days, with one day be held in reserve. The reason we have reached that decision is essentially seeking to strike a balance between, on the one hand, fairness to the parties and their chosen representation, but also taking into account the fact that that will represent some degree of delay in advancing proceedings. However, in all the circumstances, we are satisfied that insofar as that does represent a slightly later date than that which was advocated for by the PCR, it is not a significant delay in comparison to the significant disruption which would have arisen had we fixed an earlier date.

We will order the Proposed Defendants to file and serve a joint response, with liberty for each of the defendants to annex to that joint response particular issues which arise in respect of their cases, and we will order that to be lodged by 21 October of this year. Given that timescale, we do not consider it unreasonable to require Defendants to proceed in that way. We consider it should, in those circumstances, be possible for the Defendants to organise themselves so as to avoid any unnecessary or inefficient

procedure.

We will order the Proposed Defendants to apply for permission to seek to adduce evidence of experts, if any, by 9 September of 2024.

We will order that the strike-out be dealt with at the same hearing as the CPO application. We will order the PCR to reply by 30 January 2025. We will order bundles to be prepared and lodged by 21 March and skeleton arguments by 24 March.

Now, in relation to publicity, and also objections, Mr Thompson, what dates do you propose in respect of paragraphs 12 to 16 of your draft order?

MR THOMPSON: Could I just consult with those behind me, what they think is realistic?

LORD RICHARDSON: Please.

(Pause)

MR THOMPSON: I think the suggestion from the counsel team would be: the end of November might be a suitable time, but I don't know if the Tribunal wants it sooner than that?

LORD RICHARDSON: I think we had in mind that, particularly given the potential size of the class, that a longer period would be desirable. I am aware, for example, that in the *Sony* litigation, a period of six weeks was allowed, but other longer periods have been allowed given the scale of the class, which is clearly very significant in this case. So, from that point of view, it would seem to me, subject to the views of the Tribunal, that aiming for a date, as it were, at the end of the summer would make sense. Which I suppose is slightly sooner than the date you are talking about.

MR THOMPSON: In that case, it is possibly just as good to go for the end of July as the end of September.

LORD RICHARDSON: Indeed. That was somewhat in my mind.

MR THOMPSON: I think those behind me would be content with that. But perhaps

we can come back to you if there is any difficulty about it.

LORD RICHARDSON: Let me hear, I think -- would it fall to you, Mr Williams, to respond on this point? Do you have any views on this?

MR WILLIAMS: No, thank you.

LORD RICHARDSON: What I would do, then, is indicate that the Tribunal was minded to make the orders in terms of paragraphs 12 to 16, and leave it to -- in a normal way -- for parties to liaise as to final terms of the order, and to come back with dates.

MR THOMPSON: I'm grateful. Standing here, I don't see any particular reason why we couldn't manage the end of July, because a lot of work has been done.

LORD RICHARDSON: Yes. Clearly, if there is further -- once you have had a proper opportunity to consider the matter you can revert if necessary.

MR THOMPSON: I am very grateful.

LORD RICHARDSON: Thank you.

MR WILLIAMS: Just, Sir: 12, 13 and 14, I think, will probably be the same date, having looked at the forward notice that the PCR has prepared so far. Because I think at the moment the form of draft notice they have gives publicity to the application and, in doing so, invites representations --

LORD RICHARDSON: Yes.

MR WILLIAMS: -- from the third parties. And then obviously the dates in 15 and 16 are consequential on that.

So, I think -- I don't know if the Tribunal has a view about how long that window ought to be?

The only point that struck us was that, once third parties, if any, have responded under 15 and 16, it would be good to have visibility of that material in advance of the hearing in case it has case management implications.

LORD RICHARDSON: Indeed. Mr Thompson?

MR THOMPSON: I mean, one possibility would be to give them until the end of September, and that would allow both sides to comment, were there anything material. Because that would be before the respondents have put in their responses.

LORD RICHARDSON: That would be, that would give them essentially -- I suppose, thinking about it practically, if you're aiming for the end of July, taking into account the summer, you are really only giving four weeks to parties to organise themselves from that point.

I wonder if pushing that out possibly until the end of October -- I appreciate that that would mean that that didn't fit into the period of time which I have allowed for the Defendants to serve their response.

Do you have any observations?

MR WILLIAMS: I don't think it needs to, Sir, it is a parallel stream --

LORD RICHARDSON: Yes, it is not something that would necessarily fit into that.

MR WILLIAMS: No. And obviously it would then give the PCR visibility of those responses a long way in advance of its Reply, to the extent that that is relevant.

LORD RICHARDSON: Yes. Are you content with that?

MR THOMPSON: Yes, I'm perfectly content with that.

LORD RICHARDSON: Very well, let's operate on that basis.

So, therefore, the dates for 15 and 16 would be by the end of October.

MR WILLIAMS: While I have interrupted you, Sir, just a small point which I think relates to points you have already dealt with. I don't know if you have our draft Order handy? It is the B/27, starting at page 227.

LORD RICHARDSON: I have it as a separate document.

MR WILLIAMS: You will see in paragraphs 9, 10 and 15, we have the words -- in the second line of paragraph 9:

" ... and any other applications which the PDs may make".

That is intended to cater for the fact that, as part of the CPO response, the Defendants may make applications for summary judgment or strike-out, and that word is not in the PCR's order, but we would ask you to include that drafting --

LORD RICHARDSON: Yes.

MR WILLIAMS: -- in each of the corresponding paragraphs.

LORD RICHARDSON: Yes. I'm content that we proceed on that basis. The one difference I suppose between that and what I have set out is that we are splitting out the question of expert evidence and dealing with that separately and in advance.

MR WILLIAMS: Yes, sorry, I didn't mean that application.

LORD RICHARDSON: No.

MR WILLIAMS: I am grateful.

LORD RICHARDSON: Thank you.

These are no doubt points that can be dealt with in terms of finalising the terms of the draft Order.

So, the last matter that we need to deal with is the Proposed Defendants' application for disclosure, which we will refuse.

In respect of the first aspect of that, we consider it is unnecessary, in light of the information that has been provided against the background of the submissions that were made. In respect of the second aspect, we consider that a basis has not been made out which persuades us that disclosure should be ordered in that respect.

It seems it is unclear what relevance that information would have. And even if it were relevant, it seems to us there is a risk of tactical advantage there. And, overall, we are not persuaded to order disclosure in that respect.

Now that, I think, deals with all the applications that were before us. Unless counsel have any other issues they wish to raise?

Mr Thompson?

MR THOMPSON: I don't think there are any other practical issues. I think, we obviously considered the question of whether there are any implications for costs but I think, in the circumstances, it is probably appropriate to hold that over until the CPO applications. Unless the Tribunal has a different view?

LORD RICHARDSON: I will obviously hear what the defence have to say. Mr Kennelly?

MR KENNELLY: That is probably sensible.

LORD RICHARDSON: Very well, we will hold over that question until the CPO applications are heard.

Is there anything on the Defendants' side that you wish to raise at this stage?

MR KENNELLY: No.

LORD RICHARDSON: I'm grateful. Again, thank you very much, that concludes the hearing.

(2.30 pm)

(The hearing concluded)