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IN THE COMPETITION

Case No. 1077/5/7/07

APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A.2EB

Tuesday, 13 March 2007

Before:
MARION SIMMONS QC
(Chairman)

ADAM SCOTT TD
VINDELYN SMITH-HILLMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

EMERSON ELECTRIC COMPANY
& Ors

Claimants

and

MORGAN CRUCIBLE COMPANY PLC

Defendant

Ms Jane Wessel (instructed by Crowell & Moring) appeared for the Claimants.

Mr. Robert Osgood and Mr. Nathy Dunleavy (instructed by Sullivan & Cromwell) appeared for the Defendant.

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CASE MANAGEMENT CONFERENCE

1 MS WESSEL: We are here this afternoon at the Tribunal's invitation to address case management
2 issues arising because of the rather unusual posture of this case. As you are aware we brought
3 our claim, which was lodged with the Competition Appeal Tribunal on 9th February, seeking
4 damages for illegal cartel activity against a number of defendants. Of these defendants only
5 one is presently before the Tribunal, being the Morgan Crucible Company. The other – shall I
6 call them 'potential' – defendants are presently involved in proceedings in the CFI challenging
7 the Commission Decision upon which our action is based.

8 We, the claimants, find ourselves in a position of needing to proceed with our claim as the
9 limitation period set down in the Tribunal's rules was due to expire as to Morgan Crucible, the
10 non-appealing defendant.

11 THE CHAIRMAN: Perhaps you could take that at an appropriate time?

12 MS WESSEL: Yes, I would be happy to – should we do that now?

13 THE CHAIRMAN: If it is a convenient time, otherwise you can do it whenever you wish.

14 MS WESSEL: That is perfectly fine, we can do that now. Our claim arises under s.47A of the
15 Competition Act. It is based on a decision of the European Commission dated December 3rd,
16 2003, I believe it is. In that decision the European Commission found that all of the addressees
17 were liable for cartel activity, which it described in really rather powerful terms which we can
18 come to, I am sure, on another day.

19 The crux of the finding of the Commission was that the addressees had engaged in an illegal
20 cartel. They had for many years (the cartel decision itself covers 1988 to 1999) fixed prices
21 and conducted a range of other activities all of which were undertaken for the purpose of
22 restricting and interfering with competition in the Community.

23 THE CHAIRMAN: What I was interested in was the question of the limitation period.

24 MS WESSEL: The limitation period question, yes, of course. Under s.11, Schedule 4 of the
25 Enterprise Act 2002 the Competition Appeal Tribunal has rule making powers, if you will,
26 with respect to limitation periods; those rule making powers are exercised in rule 31 of the
27 CAT's rules. Those rules provide essentially that an action must be brought within a period of
28 two years from the relevant date.

29 THE CHAIRMAN: Yes.

30 MS WESSEL: For the definition of the "relevant date" we turn to the Competition Act, s.47A(8).

31 That provides that:

32 "The periods during which proceedings in respect of a claim made in reliance on a
33 decision or finding of the European Commission may not be brought without
34 permission are –

- 1 (a) the period during which proceedings against the decision or finding may
2 be instituted in the European Court; and
3 (b) if any such proceedings are instituted, the period before those proceedings
4 are determined.

5 In respect of Morgan, the non-appealing party in the European proceedings, the limitation
6 period would, according to the calculations (we have set these calculations out at para.18 of our
7 application to the Tribunal) these proceedings ought to have been brought against Morgan
8 arguably by 13th February 2005.

9 THE CHAIRMAN: I thought the decision was 3rd December 2003?

10 MS WESSEL: 2003, it was.

11 THE CHAIRMAN: Yes, so if it is 3rd December 2003 why is it February?

12 MS WESSEL: Well because there is a period – is it 90 days?

13 THE CHAIRMAN: Yes.

14 MS WESSEL: - within which to take proceedings in the CFI, so that takes the period out a bit. That
15 date also runs from the date of service. We have assumed for these purposes that no period of
16 time elapsed between the decision being issued and it being served. So it is the expiry of the
17 time within which Morgan might have taken an appeal that marks the beginning of our two
18 year period for bringing these proceedings.

19 MR. SCOTT: Sorry, can you help me? Where do I find in the section a suggestion that there is a
20 differential period once proceedings have been instituted in Luxembourg?

21 MS WESSEL: As to those who have appealed and those who have not appealed – is that your
22 question, sir?

23 MR. SCOTT: Correct.

24 MS WESSEL: Well we do not, and that – if I may say – goes to the crux of the claimant's dilemma.

25 If the provisions were clear that if any of the addressees appeal the Commission decision then
26 the limitation period will not commence to run as to any of them the position would be clear.
27 Sadly we do not have such clear language and according to our reading – and our reading of
28 this may be incorrect – if we did not bring proceedings against Morgan within the two year
29 period commencing from the lapse of their time to appeal then we risked never being able to
30 bring proceedings against Morgan before this Tribunal. If our reading of the limitation period
31 is incorrect, and that two year period has not begun to run against any party as yet, then we are
32 content because in those circumstances it will be a simple task for the proceedings to be
33 brought together against all parties in a timely manner.

34 There has been no ruling that we are able to find on this point and I would certainly submit that
35 the rules as they are written did not contemplate this type of situation arising.

1 THE CHAIRMAN: Going back to the first point we were on, you say it was 13th February 2004, let
2 us assume that is the right date, when you take into account the time for appeal that would take
3 you to February 2006?

4 MS WESSEL: Yes, it would.

5 THE CHAIRMAN: But these proceedings were not issued until 2007.

6 MS WESSEL: Quite right.

7 THE CHAIRMAN: Relying on a postponement?

8 MS WESSEL: Yes.

9 THE CHAIRMAN: Now we have not seen the document that has that in it?

10 MS WESSEL: I have a single copy of it with me. I can certainly provide you with that. I do not
11 think the fact that that period was agreed is a bone of contention.

12 MR. OSGOOD: Madam Chairman, members of the Tribunal, if I may, My name is Robert Osgood.
13 I think I have an application before you to appear ----

14 THE CHAIRMAN: Yes.

15 MR. OSGOOD: -- on behalf of my client, Morgan Crucible.

16 THE CHAIRMAN: Should I say for the purposes of today – I assume there is no objection from
17 you?

18 MS WESSEL: No, there is no objection.

19 THE CHAIRMAN: For the purposes of today we will permit you to represent your client. We will
20 consider, and that may come out during this hearing, whether that is appropriate for the future,
21 but for the purposes of today you have permission.

22 MR. OSGOOD: Thank you, madam Chairman. You asked whether we had copies of the Tolling
23 Agreement that my friend was addressing – if I may hand up copies of that document.
24 (Document handed to the Tribunal) Also, at an appropriate time I would like to comment on
25 the point that has been discussed.

26 THE CHAIRMAN: You will have an opportunity. Is **this** the document you were going to refer us
27 to?

28 MS WESSEL: I assume it is – I have my own copy. (Document handed to Ms Wessel) Thank you,
29 Mr. Osgood. Yes, madam Chairman, this is the document that I was referring to. This
30 document constituted, as I understand it, part of a settlement of US proceedings against Morgan
31 that were based on a separate decision of cartel by the US authorities. This is dated February
32 11, 2006. We have the benefit of having one of the signatories to this agreement present since
33 Mr. Osgood negotiated that agreement with a colleague from my firm a year ago, and the
34 agreement included ----

1 MR. SCOTT: Sorry, before you proceed, can you turn, without mentioning in open court what it
2 says, to para.14?

3 MS WESSEL: Yes.

4 MR. SCOTT: And just before we make any further reference to this document, do either of you wish
5 to make any observations as to what this document says, being that we are in open court?

6 MS WESSEL: (After a pause) This is a matter for consent among the parties, it seems to me. May
7 Mr. Osgood and I just take a moment?

8 MR. SCOTT: Certainly, it's just that we do not want to embarrass you, it would just be sensible to
9 sort this out before we make further reference to the document.

10 MS WESSEL: (After a pause) Thank you very much. I am very grateful to you for pointing that
11 out. This agreement is an agreement between the companies who I represent and the company
12 who Mr. Osgood represents. We do not feel that there is any harm in discussing the provisions
13 of this in open court, particularly in light of the fact that the confidentiality provision itself
14 allows us to disclose the contents of the agreement where required by judicial process.

15 MR. SCOTT: We are content if you are content. We just did not want you to proceed without
16 realising that this is a public hearing.

17 MS WESSEL: I am most grateful to you.

18 THE CHAIRMAN: If I can say, the course you are taking is the right course because it ought to be
19 dealt with in a public hearing; it would be very difficult to have a private session in relation to
20 matters of this sort.

21 MS WESSEL: It would be unmanageable; I think it would be very difficult. The context of the
22 Tolling agreement was an agreement that was reached among the companies whom I represent
23 and Morgan Crucible in relation to US litigation proceedings. As part of the agreement it was
24 agreed that any applicable limitation ----

25 THE CHAIRMAN: This is clause 4 – is it?

26 MS WESSEL: Yes, it is clause 4 of this agreement on the third page. It was agreed that any
27 limitation period that was applicable to foreign claims – in this context “foreign” of course
28 means non-US, would be “tolled”, which is an American expression meaning “postponed”, as I
29 am sure you are aware, for a period not to exceed 12 months beginning as of the effective date.
30 The “effective date” is – forgive me.

31 MR. OSGOOD: It is the first line of the document.

32 MS WESSEL: It is indeed, thank you, Mr. Osgood. The effective date is February 11, 2006.

33 THE CHAIRMAN: And where is your 12 month period?

1 MS WESSEL: The 12 month period is the first sentence of para.4 at the top of the third page:

2 “Tolling of Statute of Limitations Period. The Morgan Defendants agree that the relevant
3 statutes ...”

4 THE CHAIRMAN: “... not to exceed 12 months ... provided that ..”

5 MS WESSEL: Yes, would you like me to take you through the entire provision? I am certainly
6 happy to?

7 THE CHAIRMAN: Well let us see in a moment what Mr. Osgood says about it.

8 MS WESSEL: So it was for this reason that these proceedings were brought in the Competition
9 Appeal Tribunal on 9th February 2007, which was the last business day before the 11th February
10 2007. We have been unable to find any decision of this Tribunal interpreting Rule 31 that
11 might give us guidance on whether Morgan’s two year period has in fact commenced to run in
12 light of the CFI appeals.

13 THE CHAIRMAN: There may be another interesting question, and that is whether the rule
14 31 limitation period can be extended.

15 MS WESSEL: Yes, the limitation period is under the Limitation Act.

16 THE CHAIRMAN: That does not give the court the statutory power. The Limitation Act says that
17 an action between parties shall be brought within ... so long. The question is whether this is a
18 statutory power?

19 MS WESSEL: Again, that is a question which I do not think has been addressed under this
20 Tribunal’s rules.

21 THE CHAIRMAN: No, I am raising it.

22 MS WESSEL: Yes, but under the Limitation Act, were that to be the period we were working with -

23 ---

24 THE CHAIRMAN: Then it can be extended.

25 MS WESSEL: I believe the position would be that by entering into an agreement, extending the
26 period provided under the Act, the parties would have waived any right to object.

27 THE CHAIRMAN: Absolutely.

28 MS WESSEL: Now, you raise a very interesting point, madam Chairman, whether the same position
29 applies under the CAT’s rules is again a question which I do not think has ever been addressed.
30 I would submit though that there is no reason why the rule which would apply under the
31 Limitation Act should not also apply here, and that there should be a waiver of any right to
32 object to proceedings being brought later than might otherwise be thought necessary, subject to
33 an agreement. After all, this was part of the consideration which was bargained for in the
34 settlement in the US. So certainly *inter partes* there would appear to be an inequity worked
35 were that agreement not to be given effect by the Competition Appeal Tribunal.

1 My second point would be that it would indeed appear to be somewhat ironic in this particular
2 situation where we have the split between appealing and non-appealing parties, if we as the
3 claimants were to lose the benefit of the Tolling Agreement, and were to find ourselves in a
4 position where we ought to have brought proceedings a year ago, when here we are a year
5 hence and still the CFI proceedings have not publicly progressed. We do say that in order to
6 reach a conclusion to these proceedings on our claim it will be necessary to have all the parties
7 before the Tribunal. To begin the proceedings it is not necessary, but to have a satisfactory
8 conclusion to these proceedings it would only be right and proper that all of the defendants
9 should be here, since they were all so intricately involved in the cartel activities.

10 MR. SCOTT: Can we just note at that point that, as we understand it, you have only named some of
11 the co-infringers in this suit.

12 MS WESSEL: Yes.

13 MR. SCOTT: Now that is a matter for you, but we do note that as a feature of the proceedings as at
14 the moment you have brought them.

15 MS WESSEL: Yes, and I would be content to give some background to that if that would be of
16 assistance, or we can do that at another time.

17 MR. SCOTT: Well let us stick with the point we are on at the moment, but since you raised the
18 matter it is one of the things that we have noted.

19 MS WESSEL: Yes. Thank you. Is there anything further that I can assist you with at this time on
20 the limitation point?

21 THE CHAIRMAN: No, we understand your basis for doing it now. I think what we have to address
22 today is effectively where we are going from here and how we are going to deal with the
23 preliminary matters, so have you and Mr. Osgood got a list of the matters that you have thought
24 ought to be considered today?

25 MS WESSEL: Madam Chairman, we did have a brief meeting yesterday where we discussed a
26 number of issues, and I would be happy to address those now. We have not had an opportunity
27 this afternoon to round up again, so there may be additional issues that Mr. Osgood wishes to
28 raise.

29 THE CHAIRMAN: Well would a way forward then be for us to have your list, for Mr. Osgood to
30 add whatever should go on the list, so we can see where we are going?

31 MS WESSEL: Yes.

32 THE CHAIRMAN: And then to take it from there as to how we are going to proceed today with all
33 the matters on the list and, of course, we have in our mind certain things, so we will see if they
34 are on your list or not.

1 MR. OSGOOD: Madam Chairman, I wonder before we go on to that stage if I could just comment
2 on the earlier dialogue about the process in bringing this claim so far?

3 THE CHAIRMAN: Yes.

4 MR. OSGOOD: Thank you. It is our respectful submission that this claim is off on the wrong foot.

5 If one looks at the Competition Act 1998, s.47A(8) it provides that:

6 “The periods during which proceedings in respect of a claim made in reliance on a
7 decision or finding of the European Commission may not be brought without
8 permission are –

- 9 a) the period during which proceedings against the decision or finding may be
10 instituted in the European Court; and
11 b) if any such proceedings are instituted, the period before those proceedings
12 are determined.”

13 That is the statutory basis for bringing this claim. The front cover of the claim itself says that
14 this is a claim in respect of s.48A of the Competition Act 1998. There is no question that the
15 claimants are relying for liability on the European Commission’s decision of December 3rd,
16 2003. If we refer to the Guide of the Competition Appeal Tribunal, p.6, 2.1 of the Guide to
17 Proceedings of October 2005, the sixth paragraph says:

18 “Monetary claims by persons based on infringement decisions made by the OFT ...
19 (skipping words) ... or the EC Commission ... (skipping words) ... once any appeals
20 against such decisions have been finally determined ...”

21 that is to say one can commence a proceeding after a decision against the European decision
22 has been finally determined – any appeals.

23 If one then goes to Rule 31(3) of the CAT Rules, if I can invite your attention to Rule 31:

24 “Commencement of Proceedings.” As you know, under (1) there is the two year statutory
25 limitation, and then (2) it tells you when the relevant date is. “(3) The Tribunal may give its
26 permission for a claim to be made before the end of the period referred to in (2)(a) ...” so that
27 Rule 31(3) allows this Tribunal to give permission for a claim to be made: “... after taking into
28 account any observations of a proposed defendant.”

29 What I believe the Rules and the Guide say is that if there is a multi-party case and any one of
30 the parties is taking an appeal against the decision that is to be used to establish liability, the
31 only way a claim can be brought before a final decision on the European Commission’s
32 decision –if there is an appeal – is if one comes to this Tribunal and asks permission. I would
33 submit that is as clear as day on the face of the statute and the rules.

34 THE CHAIRMAN: How does that fit in with your tolling agreement?

1 MR. OSGOOD: The tolling agreement says that this tolling agreement shall not affect whether or
2 not there is a running of the statute of limitation to one way or the other. It says that it will not
3 prejudice either party as to whether or not there is a running of the statute.

4 THE CHAIRMAN: It says:

5 “The Morgan Defendants agree that the relevant statutes of limitation which apply to
6 the Plaintiffs’ Foreign Claims will be tolled for a period not to exceed twelve (12)
7 months ...”

8 from the effective date. Now, that means that that ends in February 2007. If the situation is
9 that you couldn’t have commenced proceedings before this Tribunal before February 2007 ----

10 MR. OSGOOD: Madam Chairman, this does not mean that they could not have come in six months
11 ago and asked permission to institute a proceeding. There is nothing in this tolling agreement
12 that prohibited them after the first six months – there is a provision that says “During the first
13 six months of the 12 month period you may not institute a proceeding, but after the six month
14 runs you may.” My submission is that these claimants should have come in six months ago and
15 asked for permission to proceed. At that point the Tribunal could have considered all of the
16 parties to the case, the status of the appeals against the Commission’s decision and made a
17 reasoned judgment, but that is not what has happened. We know that there are three pending
18 appeals that asked for annulment of the European Commission’s decision. So we submit the
19 proper course would have been for the claimants to have made an application ----

20 MR. SCOTT: Mr. Osgood, just as a matter of correction, as I understand it there is one appeal that
21 asks for annulment of the whole decision, and two appeals that ask for annulment in respect of
22 the appealing party.

23 MR. OSGOOD: That is not what the claimants say. Let me refer to the claim at para.48, pages 20
24 and 21. I refer to para.48 of the claim itself, pp.20 and 21. 48.1 says that SGL sought
25 annulment of the decision. 48.2 says that Schunk sought annulment of the decision. 48.3 says
26 that Carbone sought annulment of the decision. I have no independent knowledge of the status
27 of those appeals, but I believe there was an exhibit B attached to the claim as well, which I do
28 not happen to have ----

29 THE CHAIRMAN: Mr. Osgood, I suggest that you continue with what you were doing before we
30 went off on this, because this raises other points and we will get completely out of order. So if
31 you could go back to the jurisdiction point and then we will come on to this in a moment.

32 MR. SCOTT: You will see what the problem is later, but carry on.

33 MR. OSGOOD: Thank you. It is our respectful submission that the proper way forward here is for
34 the claimants to withdraw the current claim, and to submit a new application to seek permission
35 not only to bring in Schunk and SGL, and we will put Carbone to one side for the moment but

1 that is a very interesting situation, but also permission to bring in Morgan on the basis that the
2 Tribunal does not have jurisdiction without granting permission while an appeal is pending
3 against the European Commission's decision. So that is our submission as to the proper way
4 forward.

5 I would like to add, if we get into a question of the way forward, why it is our view that the rule
6 should be "It is everyone or no one", it should be all or nothing. The claimants say that the
7 substance of their claim is substantially similar with respect to all defendants – that is para.51
8 of the claim, p.21. The claimants' application to seek permission to initiate a claim – if I may
9 refer you to that? I have some specific language that I would like to examine – again I am
10 referring to the application now – para.24 at p.9. The claimants in their application say that it
11 would be contrary to the interests of justice and to the principles of the overriding objectives if
12 the claimants were to proceed with their monetary claim against Morgan alone.

13 At para.25 they refer to efficiency, the need to bring all their claims in a single proceeding,
14 avoid running the risk of irreconcilable findings of fact and judgment ----

15 THE CHAIRMAN: I think we have read this.

16 MR. OSGOOD: -- and so on. So it is our submission that because there are so many common
17 issues, including the impact of the settlement of the US litigation, the meaning of releases that
18 each of the parties executed, and the meaning of those releases for this claim ----

19 THE CHAIRMAN: Looking at it from your point of view – I can see that maybe from the
20 claimants' point of view that may be true – but from your client's point of view, there may be
21 common issues but it does not matter if they are decided with your submissions, or with your
22 submissions plus three other submissions, because your submissions from your client's point of
23 view are the best submissions and therefore why does it matter if the other people are there or
24 not?

25 MR. OSGOOD: It matters to my client, madam Chairman, for this reason, and it is an issue of
26 proportionality: my client accounts for less than 2 per cent of the sales in controversy. 98 per
27 cent of the liability, 98 per cent of the sales are outside this Tribunal's room at the moment.
28 Paragraph 90 of the claim lists certain sales that are estimated by the claimants. The total
29 number of sales approximates 300 million – I think it is 291.7 million. The claimants say that
30 my client accounted for 4.5 million of those sales. In fact, if we wanted to get into that issue
31 we think the sales were actually €17,000, not 4.5 million. My point is my client should not be
32 forced to proceed when we are not even the tail on the dog – we are perhaps the hair on the tail
33 of the dog. The major parties are outside this room.

34 THE CHAIRMAN: But they could have decided not to proceed against the other three parties, and
35 only to bring proceedings against you. If they had done that ----

1 MR. OSGOOD: If they had done that, madam Chairman, we would still be in the situation where
2 because the European decision is the bedrock for liability, we are faced with an unstable
3 situation.

4 THE CHAIRMAN: That's a different point. The point about whether the period of limitation has
5 started against you is a different point to the question of whether it's right to proceed against
6 you without the other parties? The points which you referred us to, which are in 25 and 26,
7 relate to matters which do not actually affect you, they affect the claimants. I was asking you
8 whether there are any matters which affect you in the claim if the other three are not there?

9 MR. OSGOOD: It is difficult, it is like proving a negative. It is very difficult for me to know,
10 without the presence of the other parties what issues would be implicated if they were here, but
11 may affect my client. All I can tell you is that the claimants say there are common issues and it
12 seems to me the right way to proceed is to have an omnibus application for permission and
13 decide whether or not, given the appeal, that this should go forward.

14 THE CHAIRMAN: Thank you.

15 MS WESSEL: Madam Chairman, may I address some of the points that Mr. Osgood has raised in
16 this discussion on this point?

17 THE CHAIRMAN: Yes.

18 MS WESSEL: Firstly, I see nothing in the tolling agreement requiring the claimants, who are before
19 you now, to act once the initial six month period referred to in para.4(d) of the tolling
20 agreement has run. Now, if Mr. Osgood is correct and that an appeal by any one (or any
21 number) of a Commission decision has the effect of putting the brakes on the running of the
22 rule 31 period as to all of the addressees, then these proceedings are indeed premature as to all
23 of the parties.

24 THE CHAIRMAN: The point that Mr. Osgood was addressing was in relation to a question that I
25 asked, which is that if the situation is that limitation has not yet started effectively, so that you
26 are premature, how does the tolling agreement fit in with that when the tolling agreement has
27 extended it for a period of 12 months from the date of the agreement, which means that one has
28 a tension – possibly -----

29 MS WESSEL: One does indeed have a tension.

30 THE CHAIRMAN: -- between the tolling agreement, which apparently suggests that you only have
31 12 months to bring a claim, and on the other side possibly – and I am making no comment as to
32 how we would decide it – that possibly with rule 31 limitation has not yet started?

33 MS WESSEL: Yes, those two would not sit comfortably together at all. Now, what was in the
34 contemplation of the parties when they entered into this agreement would obviously be a matter

1 which would need to be fleshed out in evidence were that thought to be the appropriate way of
2 dealing with the issue.

3 THE CHAIRMAN: If Mr. Osgood is right in that you need permission to start this claim, then the
4 question would be whether by issuing the claim in the way you did, that is sufficient for the
5 purposes of asking permission?

6 MS WESSEL: We would submit it would be sufficient for those purposes and that making the
7 application as we did within that one year period, would be sufficient had it been necessary to
8 bring an application for permission to be so requested.

9 THE CHAIRMAN: All that 31(3) says is the Tribunal may give its permission for a claim to be
10 made.

11 MS WESSEL: Yes.

12 THE CHAIRMAN: So there is nothing in there that suggests that you have to make an application,
13 effectively?

14 MS WESSEL: There is not.

15 THE CHAIRMAN: So by bringing the claim form to the attention of the Tribunal and saying you
16 want to make the claim ----

17 MS WESSEL: The effect of that is that if permission is required permission is sought.

18 THE CHAIRMAN: Yes.

19 MS WESSEL: That would be a sensible way of proceeding with that. We doubt though whether
20 Mr. Osgood is correct on the limitation period for this reason: it cannot surely be right that
21 when Morgan has chosen not to lodge an appeal against the Commission decision for, I am
22 sure, very pragmatic reasons, that it can ride on the coat tails of its co-conspirators ----

23 THE CHAIRMAN: Can I put it to you a different way and see what your answer is?

24 MS WESSEL: Yes.

25 THE CHAIRMAN: It is obvious why your client did not make an appeal because they got 100 per
26 cent leniency.

27 MS WESSEL: Precisely.

28 THE CHAIRMAN: And they were the whistle blowers?

29 MS WESSEL: Yes.

30 THE CHAIRMAN: So they cannot go along and say that the Commission were wrong in saying that
31 there was an infringement of the competition matters, so they could not make that appeal.

32 MS WESSEL: Yes.

33 THE CHAIRMAN: However, if it turned out that when the others appeal the decision is totally
34 quashed and it was found that there was no conspiracy at all between anybody and no

1 infringement of competition, then would it be right that a national court could award damages
2 against someone who had been totally vindicated?

3 MS WESSEL: If the someone you refer to were indeed totally vindicated that could be problematic,
4 but that cannot ever be the effect of the appeals that are presently pending in the CFI.

5 THE CHAIRMAN: Why?

6 MS WESSEL: Because there were other parties who were addressees of the decision.

7 THE CHAIRMAN: Ah, but just assume for the moment that everybody becomes vindicated?

8 MS WESSEL: And only the whistle blower has chosen not to take an appeal?

9 THE CHAIRMAN: Because it would be appropriate for the whistle blower to appeal, for some
10 reason he decided to admit everything and had misread the law, for example? There was no
11 dishonesty in it, they had misread the law, they say that those circumstances don't actually add
12 up to a cartel offence and so everybody becomes exonerated.

13 MS WESSEL: In those circumstances where there was a clear finding of a lack of any cartel
14 activity, any activity in violation of Article 81, I do not think our claim could stand.

15 THE CHAIRMAN: But you would not know that at the present point.

16 MS WESSEL: No, indeed.

17 THE CHAIRMAN: So if that is right then it does indicate that the decision that is referred to in rule
18 31 is the decision and any appeal from the decision, whether it is the claimant here or a third
19 party, and until the decision as an independent matter has been determined ----

20 MS WESSEL: Yes.

21 THE CHAIRMAN: Because otherwise you could get into the situation where everybody is
22 vindicated.

23 MS WESSEL: Yes, I certainly take your point on that.

24 THE CHAIRMAN: I have not thought this through so we do not know if it is right or wrong, but it
25 does just seem to me that there is something ----

26 MS WESSEL: On the other hand you have a potential circumstance where you have a whole group
27 of addressees of a Commission decision, all of whom are found liable for infringement of
28 Article 81. Only one of them takes an appeal to the CFI, perhaps on a small technical point
29 which applies only to itself ----

30 THE CHAIRMAN: Well that may be different.

31 MS WESSEL: Well what are we to do though during the pendency of the CFI proceedings, that is
32 the question we are faced with.

33 THE CHAIRMAN: But that may be where you get permission, and that is why the provision in
34 relation to permission is there because, for example, if everybody has only appealed on fine
35 that may not have any bearing on a damages' case.

1 MS WESSEL: Indeed, and that would be the easy case, but let's suppose a circumstance where the
2 parties who have appealed or, in my hypothesis, the single party who has appealed, is seeking
3 annulment, since we are not parties to the CFI appeal we are not privy to the reasons they are
4 seeking annulment, those reasons may go only to its own conduct and not to the existence of a
5 cartel.

6 THE CHAIRMAN: Again, that is where permission could come in, so that one makes sure – as far
7 as one can.

8 MS WESSEL: How is one to do that though, without having information about the details of the
9 CFI appeal, which are not publicly available to us? That is the difficulty. It is a difficult
10 conundrum and one which I do not think was anticipated by the rules. Our action has
11 obviously been motivated in meeting our professional obligations not to miss the limitation
12 period. Perhaps Mr. Osgood's view of the rules will prevail and it will turn out that we have
13 been hasty – I do not think we can be criticised though for doing so.

14 MR. SCOTT: Just on a hypothetical basis, if we were to establish that none of those appealing to
15 Luxembourg were challenging the finding of infringement, and were only challenging the
16 penalty then there would still be a proceeding before an appellate body for the purposes of
17 subsection (b) ----

18 MS WESSEL: Yes.

19 MR. SCOTT: -- but there might well be arguments for beginning the foothills of the monetary
20 claim, because nobody was actually challenging the finding of infringement.

21 MS WESSEL: Yes.

22 MR. SCOTT: My recollection is that what it actually says is "... decision or finding of the European
23 Commission", so that a claim made in reliance on a finding is provided for even though the
24 decision – I do not know, this is an untested point as far as we are aware ----

25 MS WESSEL: Yes.

26 MR. SCOTT: -- but it is possible to envisage a situation in which it would be sensible to start and to
27 give you permission, even though an appeal against penalty was proceeding in relation to a
28 number of defendants, or potential defendants.

29 MS WESSEL: Yes, sir, I think that is the case. We have to bear in mind here that the cartel period,
30 for the cartel we are dealing with, ran from 1988 to 1999. Time has already ticked on. The
31 claimant's losses began to be incurred as long ago as 1988 and there are circumstances where
32 these things need to be pursued, and there is a problem with potentially disappearing evidence,
33 disappearing witnesses, retiring, deceased witnesses. I know there have been prior issues in
34 relation to this cartel with documents no longer being available; so all of these factors mitigate
35 in favour of getting on with it.

1 THE CHAIRMAN: Well is not the way to resolve this the pragmatic approach – subject to what Mr.
2 Osgood says, that when we come to deal with permission in relation to the second, third and
3 fourth defendants, we also deal with it in relation to the first?

4 MR. OSGOOD: Yes, madam Chairman, it is our submission that the claimants should seek this
5 Tribunal's permission, including the claim against Morgan Crucible, and we would be
6 expecting to be part of that dialogue – I think it is scheduled presently for 30th May.

7 THE CHAIRMAN: At the moment. You were suggesting that it would be necessary to withdraw
8 the claim that was made and start again. In my pragmatic approach, and the way that I was
9 reading rule 31(3) just now would not mean that they needed to do that because by making the
10 claim it is for us to give permission if the time period has not expired, and therefore they have
11 made the claim against you, so the only question is whether we give permission. That requires
12 us to entertain your observations and that can be done with the other parties at the relevant date.

13 MR. OSGOOD: Madam Chairman, and members of the Tribunal, I do not mean to be overly
14 procedural, however, let me just say that I think s.47A of the Competition Act is jurisdictional.

15 THE CHAIRMAN: Yes.

16 MR. OSGOOD: It allows the Tribunal to have a defined jurisdiction. This is not a court of unlimited
17 jurisdiction, and I think that it is clear that rule 31(3) provided the process by which the
18 claimants should have proceeded, i.e. they should have come in and asked for permission.

19 THE CHAIRMAN: That is not what it says in subsection 31(3). What it says is: “The Tribunal
20 may give its permission for a claim to be made ... after taking into account ...” so by providing
21 to the Tribunal a claim it is then for the Tribunal to give its permission, and the Tribunal in so
22 doing should take account of observations. So it does not need, under these rules, a separate
23 application?

24 MR. OSGOOD: We will obviously abide by the ruling of the Tribunal, however I would just say
25 that the controlling statute is s.47A(8) which is a declaratory ----

26 THE CHAIRMAN: I am sorry?

27 MR. OSGOOD: I am going back to s.47A(8) of the Competition Act 1998.

28 THE CHAIRMAN: Yes.

29 MR. OSGOOD: It clearly lays out when a proceeding may not be commenced, and this is
30 jurisdictional. In effect it says that this Tribunal, with great respect, does not have jurisdiction
31 unless it grants permission in the case where there is a pending appeal against the European
32 Commission decision that is relied on for liability. That is why I say that the proceeding so far
33 against Morgan is null and void.

34 THE CHAIRMAN: I think what you are suggesting is that the claim has to be brought, i.e. the
35 permission has to be given before the year is up under your tolling agreement. So what your

1 tolling agreement is trying to do is to limit our statutory power, and to say that this Tribunal
2 should have done something in a shorter period than it has done it under your tolling
3 agreement?

4 MR. OSGOOD: With respect, madam Chairman, I would never argue that the tolling agreement can
5 affect the jurisdiction of this Tribunal.

6 THE CHAIRMAN: I think that is the effect of what you were submitting actually.

7 MR. OSGOOD: I do not see it in quite the same way.

8 THE CHAIRMAN: Well they presented to this Tribunal a claim within the 12 months.

9 MR. OSGOOD: And the statute says the only way they can proceed with a claim is to first apply for
10 permission. It also says – and the rules say this quite clearly – that the Tribunal has to take into
11 account any observations of the proposed defendants.

12 THE CHAIRMAN: No, with respect, it does not say quite what you are saying, because what
13 subsection 8 says is:

14 “The periods during which proceedings in respect of a claim made in reliance on a
15 decision or finding of the European Commission may not be brought without
16 permission.”

17 So the question is: when does the Tribunal need to give its permission? A claim was provided
18 to the Tribunal and before your tolling agreement, and it is only your tolling agreement which
19 is bringing down the guillotine. We did not give permission within the period between the time
20 when the claim was provided, and the termination of the period on your tolling agreement.

21 Had your tolling agreement not been there, there could be no question that we could be sitting
22 here today or on 30th June, and give the permission. So it is only your tolling agreement which
23 allows you to make this submission. So I think I was right in suggesting that what you were
24 submitting is that your tolling agreement limits the powers of this court.

25 MR. OSGOOD: I am not sure that I follow that, madam Chairman.

26 MR. SCOTT: Can I just try and clarify something, because I think you may have to turn the page to
27 rule 32. The manner of commencing proceedings involves making a claim. You may think
28 that there is a logical inconsistency between 31 and 32 insofar as you may think you have to
29 make an application before you make a claim, but in fact to start, under 32, you have to make a
30 claim. We may then have to rule on its admissibility but it seems that under the rules you have
31 to make the claim in order to get started, even though that claim may be declared out of time
32 either for being too early or too late.

33 THE CHAIRMAN: Or may require permission?

34 MR. OSGOOD: That is certainly one reading of rule 32, although there is an alternative reading, I
35 would suggest, and that is that rule 32 applies to those cases where there is notice of appeal. It

1 is clear that the European Commission's decision upon which the claimants rely is solid and
2 final. That is when you can launch a claim. If it is not in that category, that is if there is an
3 appeal pending then one has to look at 31(3) and seek permission .

4 THE CHAIRMAN: It does not say that. If you could just look at 31(3) it does not say "Where the
5 time has not yet commenced a claimant, or potential claimant, must seek the permission of the
6 court to make a claim". What it says is the Tribunal may give its permission for a claim to be
7 made, and at the moment I read that to mean that the claimant sends a claim form to the
8 registrar under 32(1). The registrar has a look at it; the registrar is concerned because there is a
9 decision and an appeal. It looks into that question and if the Registrar considers that the
10 limitation period has not yet started and, if we call it the "limitation period" – it is not quite a
11 limitation period. 31(1) has not yet been triggered. It says to the other party, will you give us
12 your observations, and the Tribunal will then consider whether it gives permission for that
13 claim to be made.

14 MR. OSGOOD: On the other hand we might ask what did the claimants do here with respect to
15 Schunk and SGL, because when they noticed that there wasn't an appeal pending that they had
16 lodged against the Commission's decision, they filed **this** piece of paper – they did not call it a
17 claim, or fill out a claim form, they filed an application for permission to initiate a claim for
18 monetary loss pursuant to s.47A.

19 THE CHAIRMAN: Well that may be how they read it may not be correct.

20 MR. OSGOOD: Well it just seems to me that this is precedent in this very case, and if they did it as
21 to SGL Carbon.

22 THE CHAIRMAN: Why should they not do it for you?

23 MR. OSGOOD: Exactly.

24 THE CHAIRMAN: But the claim form is a claim form against all four. The claim form was sent to
25 this Tribunal on the basis of a claim against all four, but openly and transparently they said that
26 as far as they were concerned it appeared to them that the claim against the 2nd to 4th defendants
27 required our permission. They did not say that the claim against the first defendant required
28 our permission, because they did not feel that it did, but if it did it doesn't seem to me at the
29 moment that 31.3 prevents us from giving that permission.

30 MR. OSGOOD: Before giving that permission we would like ----

31 THE CHAIRMAN: Oh absolutely, absolutely, no question.

32 MR. OSGOOD: -- the opportunity to think our way through and try to persuade you of the rightness
33 of our submission.

34 THE CHAIRMAN: That could be done, that is the pragmatic approach that that could be done at the
35 hearing where permission is being considered.

1 MR. SCOTT: Just so we do not lose it, this goes back to 47A(5)(b) which is the statutory provision
2 which leads on to rule 31, so that: "... no claim may be made in such proceedings – otherwise
3 than with the permission of the Tribunal, during any period specified ..." and then it takes you
4 down to subsections (7) and (8). So the statutory provision which lies behind rule 31 is in 47A.
5 Clearly there has to be a process by which you reach (5)(b) and the reality is if it is not in the
6 guide that is partly because we have not faced a situation like this before to provide a precedent
7 to write up in the guide, and this will be the case which no doubt gets referred to in future in
8 terms of explaining how we do proceed in these circumstances.

9 THE CHAIRMAN: There is another interesting question about all this because when the claim form
10 was sent to you, you did not come back and say: "Ah, wait a minute, there cannot be any claim
11 against us at the moment" and/or "They are now too late under the tolling agreement." What
12 you did was to acknowledge the claim, and ticked the box: "I intend to defend all of this
13 claim".

14 MR. OSGOOD: Yes, and I made two submissions. One, I asked to appear before this Tribunal and I
15 did not want to be too presumptuous – and I am eagerly anticipating your ruling on that
16 application. Secondly, I thought it was an important threshold issue to point out in a letter that
17 I sent to the Tribunal last week, that we should not be here at all because these claims have
18 been released.

19 THE CHAIRMAN: But if this submission that you were making was correct you would at that stage
20 have said that "We should not be here because they are completely out of time, because they
21 didn't make an application against us for permission – they needed permission – and now they
22 can't start proceedings against us because of the tolling agreement."

23 MR. OSGOOD: Actually I thought that was the purpose of the case management conference.

24 MS WESSEL: I am rather lost as to whether I have brought these proceedings too late or too early!
25 (Laughter)

26 THE CHAIRMAN: I am afraid we have been going around in that circle as well.

27 MS WESSEL: Indeed. Clearly these are issues that are going to need directions.

28 THE CHAIRMAN: Yes, why it is so important is it goes to jurisdiction, and therefore it is very
29 important that it is dealt with.

30 MS WESSEL: Yes, of course.

31 THE CHAIRMAN: Let us get on to the list. I suspect the answer is that we use the pragmatic
32 approach and subject to everybody thinking about it between now and then it comes on the
33 agenda for the 30th or whenever we have that hearing.

34 MS WESSEL: Yes, indeed, I mean these issues clearly need to be addressed sooner rather than later.
35 The list is actually quite a short one from my perspective. It does not – or at least it did not

1 until this afternoon – seem to us that there is any good reason to postpone Morgan’s defence to
2 our claim and we would like to see Morgan put in its defence. We say this because, as Mr.
3 Osgood has just pointed out, he felt it necessary to put one of his defences to you in
4 anticipation of this case management conference. There are clearly other defences that he
5 intends to raise against our claim, and it would seem to us to make sense for those issues to be
6 addressed in a pleading sooner rather than later, so that we all understand what the parameters
7 of this case are going to be.

8 THE CHAIRMAN: Yes, are we right that it expires about 28th March at the moment?

9 MS WESSEL: Yes, I believe that is correct.

10 THE CHAIRMAN: Is that the date you had, 28th March, or you had not considered it?

11 MR. OSGOOD: It is our position that we need to sort out first permission to proceed.

12 THE CHAIRMAN: Oh I appreciate that, but at the moment – assuming that this jurisdictional point
13 had not arisen – your defence is due on 28th March, you accept that?

14 MR. OSGOOD: Yes, yes.

15 THE CHAIRMAN: That is all I wanted to know, thank you.

16 MS WESSEL: No doubt on behalf of Morgan Mr. Osgood will say that this is unduly burdensome
17 for them to proceed with the defence at this stage.

18 THE CHAIRMAN: We do not want submissions on each of the items, we just want the items ----

19 MS WESSEL: All right.

20 THE CHAIRMAN: -- and the first item is Morgan’s defence.

21 MS WESSEL: That is the first point, that we see no reason for that to be postponed. The second
22 point is on disclosure. There are clearly documents in Morgan’s possession that are going to be
23 critical to an accurate assessment of the claimant.

24 THE CHAIRMAN: Does that come before defence?

25 MS WESSEL: No, I think it comes after defence, but I think it is worthwhile to get at least
26 consideration for directions for disclosure on the list.

27 THE CHAIRMAN: That is a matter that one would be timetabling in after defence.

28 MS WESSEL: Yes. And that is my whole list – nice and simple.

29 MR. OSGOOD: If I may address this issue ----

30 THE CHAIRMAN: Just the list for the time being.

31 MR. OSGOOD: The list is the defendants (my client) will agree to preserve all documents, in fact
32 we have already issued instructions to our client to that effect. Secondly, if we are going to
33 proceed at all before permission is sought we would request that the claimants amend
34 paragraph 90 of their claim and do what rule 32(3)(c) requires, which states that the claim must
35 include:

1 “a statement of the amount claimed in damages, supported with evidence of losses
2 incurred and of any calculations which have been undertaken to arrive at the claimed
3 amount.”

4 I understand that we have at best only estimates of sales, we have no claimed amount and that
5 is clearly a requirement of rule 32.

6 We also have serious doubts about the sales figures in para.90. I have asked my client
7 repeatedly to find out as assiduously as it could what my client’s sales were outside the United
8 States to these claimants; the answer keeps coming back €217,000 of sales during this, which
9 means that we are seven one hundredths of one per cent of the claim. Where they estimated
10 €4.5 million of sales to two of the five claimants we just do not know. My point is that in the
11 claim there is not even a beginning of a statement of damages. All it does is estimate, in the
12 millions, sales, and that is not what rule 32 requires.

13 THE CHAIRMAN: And do you have anything else on your list?

14 MR. OSGOOD: My list would also include joining the others whenever the application goes
15 forward.

16 THE CHAIRMAN: Yes.

17 MR. OSGOOD: Certainly I would not voluntarily agree to be putting in a defence prematurely.

18 MS WESSEL: May I please just briefly address the damages’ point?

19 THE CHAIRMAN: Yes.

20 MS WESSEL: In the section of our claim that deals with quantum we have stated quite plainly that
21 we cannot tell you what our damages are. What we have done is that each of the claimants has
22 made its best estimate of purchases which, bear in mind, go back almost 20 years to the
23 beginning of the cartel period being 1988. Even if we could state those numbers for purchases
24 with 100 per cent accuracy, which we concede we cannot now, although that number will
25 continue to be refined as disclosure progresses, what we cannot ever do is tell you what
26 proportion of those purchases represents the cartel price hike. The information as to how much
27 extra the claimants paid as a result of the cartel is information which we will only find out in
28 disclosure. It is, by its very definition, information that was held secretly from the purchasers.
29 We would be happy, at an appropriate time, to amend the claim to give a proper damages’
30 figure but in order to do that we need to know how much extra the cartel charged us over and
31 above the competitive price. To get that information we need disclosure. So for that reason I
32 would say that any amendment would be premature and would merely be another stepping
33 stone towards a statement of damages.

34 MR. SCOTT: In para.96 you refer to having made a formal application to the Commission for
35 access to documentation. Can you update us on the progress of that application?

1 MS WESSEL: I can indeed. Just the day before yesterday I received a refusal of that request, which
2 was not wholly unsurprising. The Commission gave a number of reasons for that refusal – I
3 would be happy to circulate a copy of that, but amongst them, of course, was the pending CFI
4 proceedings.

5 THE CHAIRMAN: Does the application that you made specifically refer to particular documents in
6 relation to particular parties, or was it just a general application asking for disclosure ----

7 MS WESSEL: It was broader than your first alternative suggests.

8 THE CHAIRMAN: So you did not ask for the particular documents that you would need in order to
9 establish the loss that you have been referring us to?

10 MS WESSEL: We did not ask for particular identified documents because we do not know what
11 they are.

12 THE CHAIRMAN: But you did not ask for documents which they acquired from Morgan Crucible,
13 which related to this particular aspect of your damages' claim here?

14 MS WESSEL: I believe we did. Yes, the purpose of our original letter was obviously to try and
15 obtain documents to assist us with quantification.

16 THE CHAIRMAN: Yes, but it depends how a letter is worded.

17 MS WESSEL: Yes. I do have the annex to our letter. We asked for communications between the
18 co-conspirators relating to details of the illegal price fixing ----

19 THE CHAIRMAN: Ah well that does not cover this point.

20 MS WESSEL: It is broader. We asked for documents reflecting the prices actually charged.

21 THE CHAIRMAN: But generally, not just Morgan Crucible?

22 MS WESSEL: No. Our request related to the parties who we anticipated to be encompassed in these
23 proceedings, and our letter was, as I recall, framed in that context.

24 THE CHAIRMAN: Documents in relation to all of those four defendants?

25 MS WESSEL: Yes, but our request was sadly denied. We are considering whether to pursue that
26 further, although that may not get us anywhere, and it seems to me that the Commission's
27 answer is likely to be that I should seek disclosure here.

28 THE CHAIRMAN: They would only have these particular documents because they have obtained
29 them from Morgan Crucible, so either Morgan Crucible still have copies of them and therefore
30 would have to provide them in disclosure, or they are in control of them because they can give
31 permission to the Commission.

32 MS WESSEL: Yes, precisely.

33 THE CHAIRMAN: Therefore those would be disclosable documents in any event. They do not
34 have anything that you would obtain on disclosure.

1 MS WESSEL: No, I do not think so. I believe the parties have the documents. I think there is
2 reference somewhere in the Commission decision to two CDs containing all the documents
3 upon which the Commission relied having been given to the parties.

4 THE CHAIRMAN: That may be information which is not totally relevant here and may relate to
5 parties that are not here.

6 MS WESSEL: That is possible.

7 THE CHAIRMAN: And if one looks at each individual defendant, or prospective defendant here
8 there may be confidential matters between them. There may not because it is very historical.

9 MS WESSEL: Yes, and any issues that arise on confidentiality will obviously have to be addressed
10 in an appropriate fashion.

11 THE CHAIRMAN: Yes, but as I understand it at the moment, and of course one does not know yet,
12 but from what you are saying there is nothing that you would get from the Commission that
13 you will not get on discovery, or disclosure.

14 MS WESSEL: I believe that to be the case, yes.

15 MR. SCOTT: In Mr. Osgood's last remark he referred to joining other defendants, and earlier on – I
16 think it was in Mr. Osgood's remarks – he referred to Carbone who you have not joined as a
17 defendant?

18 MS WESSEL: Yes.

19 MR. SCOTT: Is there anything between the two of you that we should know?

20 MS WESSEL: No, I should perhaps explain. I believe we have referred to this in the claim.

21 MR. SCOTT: There are proceedings already in the United States.

22 MS WESSEL: Exactly. In the proceedings in the US there are, I understand, currently very active
23 discussions about whether non-US claims are or are not before the court. Carbone Lorraine is
24 taking the position that non-US claims are without the jurisdiction of the US courts. Those
25 acting for our claimants here are in the US taking the position that they can bring their
26 European claims amongst others in the US courts. We have no wish to bring proceedings for
27 the same recovery in two separate places. Should Carbone Lorraine be successful in the US in
28 having the European claims dismissed from those proceedings we would certainly have to think
29 again about whether Carbone Lorraine should be here or in other proceedings that might or
30 might not be consolidated with these proceedings.

31 THE CHAIRMAN: Well that brings us effectively to Mr. Osgood's letter to us, because what he is
32 submitting is that there is a complete release in the US proceedings, or in the US settlement.
33 Now, he has annexed a settlement agreement.

34 MS WESSEL: Yes.

35 THE CHAIRMAN: Is this **the** settlement agreement?

1 MS WESSEL: It is a settlement agreement, madam Chairman.

2 THE CHAIRMAN: Is there more than one settlement agreement?

3 MS WESSEL: Yes. **This** settlement agreement is dated February 3, 2005 which actually precedes
4 the filing of my present client's claims by some seven months. This is a settlement of the class
5 action which is I believe still underway in the US.

6 THE CHAIRMAN: This settlement agreement has been approved in the US courts, has it not?

7 MR. OSGOOD: Yes, madam Chairman. The class action has been settled, it is over. My friend's
8 client opted out of that settlement, and then they opted back in.

9 THE CHAIRMAN: Yes.

10 MR. OSGOOD: Part of the negotiations surrounding the opting back in was that they would agree to
11 be bound by all the provisions of their settlement in the Morgan settlement agreement which I
12 have attached to my letter.

13 In the US proceedings they made European claims against all the defendants, including
14 Carbone, SGL, Schunk and Morgan, as reflected in my letter where I have exerted some of
15 those claims.

16 There was an omnibus settlement by all of the parties, except Carbone. So they are proceeding
17 with their claims, their "European claims" – if I may call them that, and include (with
18 apologies) the UK as part of Europe – they are proceeding with their European claims against
19 Carbone, because Carbone did not settle with them. We settled and we have the release which
20 said that we give up all claims that were asserted or any matter that could ----

21 THE CHAIRMAN: No, we understand the point you are making, we need to understand the
22 claimant's point on this.

23 MR. OSGOOD: I will make a prediction that the US court, on the basis of a Supreme Court
24 decision called *Empagran*, will throw out the claimant's US European claims, because the US
25 courts are without subject matter jurisdiction, and then the claimant will bring Carbone before
26 you and say "Now you need to bring another party in here". There is presently *sub judice*
27 before the US Judge a motion to dismiss. It has been fully briefed and it is going to be argued
28 on April 3. It is very likely that after the oral argument on the legal point – jurisdiction –
29 Carbone will be brought before you because the US Judge will not let the European claims go
30 forward in the US, which is another reason why we should not be hurrying here, and rushing.

31 THE CHAIRMAN: Except that you say that there is no subject matter because you have settled the
32 subject matter.

33 MR. OSGOOD: There is no subject matter ----

34 THE CHAIRMAN: You have opened the debate now. If the courts in the US say that they have no
35 jurisdiction over the European cases then how can you say that you have settled all those cases?

1 MR. OSGOOD: Because the release clearly says that we have settled any claim that was brought in
2 the US court for ever and all time, and that is the plain meaning and language of the release.

3 THE CHAIRMAN: Thank you.

4 MS WESSEL: It will not surprise you that we disagree with this position.

5 THE CHAIRMAN: Do we have all the documents? Can we decide this today or does this have to
6 go over as part of the agenda?

7 MS WESSEL: It has to go over as part of the agenda, quite definitely. First, you have more of the
8 documents now that you have the tolling agreement.

9 THE CHAIRMAN: We did not have the approval of the court either, because there has to be ----

10 MS WESSEL: Yes, I must take instructions on that, I was not aware that the final class action
11 settlement approval had been given, so apologies for my ignorance on that.

12 THE CHAIRMAN: I think it was given September or October last year.

13 MS WESSEL: I am behind the times, clearly. But we are comparing apples and oranges with the
14 papers Mr. Osgood has given you, because he has given you the complaint that was filed by the
15 claimants here and others against the cartel members, but then he has given you the class action
16 settlement. These are not the same. If you are to look at what falls within the scope of the
17 class action settlement you must look to the class action complaint.

18 THE CHAIRMAN: What we need to see is your opt in to the class action settlement.

19 MS WESSEL: Yes, exactly, we did, as Mr. Osgood referred to a little while ago, opt out and then
20 opt back in and the tolling agreement that you have helps to complete the picture. We could
21 spend all afternoon on this issue alone and I think it suffices to say ----

22 THE CHAIRMAN: So one of the directions that we need, which is why I was trying to get a list.

23 MS WESSEL: It suffices to say that this should be on that list.

24 THE CHAIRMAN: One of the directions that we need to deal with is whether there has been a
25 settlement of the subject matter of – I will call it the CAT claim.

26 MR. OSGOOD: Madam Chairman, if I can just point out you have a second document attached to
27 the tolling agreement, it is the stipulation of dismissal. It is part of the same document, the last
28 two pages. You will notice, if you have that stipulation of dismissal in hand, para.2 reads – and
29 by the way this is a stipulation that was signed by Crowell & Moring on behalf of their clients –
30 the same clients that are before you.

31 “Plaintiffs and the Morgan Defendants shall adhere to and be bound by all terms of
32 the Settlement Agreement entered into on February 3, 2005, by and between the
33 Morgan Defendants and class plaintiffs in connection with In re Electrical Carbon
34 Products Antitrust Litigation ... and the terms of the MDI Settlement shall apply with

1 full force and effect as to Plaintiffs and the Morgan Defendants, including without
2 limitation the release terms of paragraphs 21 and 22 thereof ...”

3 If you look at tab 2 of my letter of March 9 you will find the Morgan settlement, and paras. 21
4 and 22 of the release terms which I excerpted in my letter to the Tribunal at p.3 and 4.

5 MS WESSEL: What paragraph number?

6 MR. SCOTT: Paragraphs 21 and 22 he is coming to, which are headed “Release Terms” and are on
7 pp.9 and 10.

8 MS WESSEL: Thank you.

9 THE CHAIRMAN: If you look eight lines up:

10 “... and which relate to or arise out of any alleged unlawful conspiracy to fix, raise,
11 maintain or stabilise the prices of electrical carbon products in the United States.”

12 MR. OSGOOD: “... or of any state or other jurisdiction.”

13 THE CHAIRMAN: No, it does not have that in this one that I am reading. Eight lines up.

14 MR. OSGOOD: Are you on para.21?

15 THE CHAIRMAN: Page 9, yes. That comes about 12 or 14 lines up.

16 MR. SCOTT: Needless to say, Mr. Osgood, we have given attention to this since you sent it to us,
17 and we have realised that when we look at the document the term states “s” is in lower case,
18 and is not defined. It is clear when we turn to para.22 which has in contemplation California,
19 and we recognise that Michigan has also been in contemplation in other documentation, that in
20 the words immediately following the quotation of s.1542 of the California Civil Code, it says:
21 “By any law of any state or territory of the United States”, and then it goes on in a way which
22 suggests that the word “state” there refers to a state of the United States. Now, if we then turn
23 back to para.21, eight lines down: “... arising under the antitrust laws of the United States or of
24 any state or other jurisdiction” we are left with the question does that logically – since the word
25 “state” appears to be being used of a state in the United States – refer to states of the United
26 States or does it refer to some wider concept of “state”?
27 Our reading of para.22 leads us to suspect that it means “State of the United States”, not any
28 other state.

29 THE CHAIRMAN: But that leads on to another question, because if you look a bit further down you
30 will see the words that I have been referring to and it is only in relation to prices of electrical
31 carbon products in the United States.

32 MR. OSGOOD: “Or that are in any way connected with any fact, circumstance, statement or event
33 or matter of any kind that was raised or referred to, or could have been raised or referred to in
34 this litigation”, and there is no doubt that the European Commission’s decision was alleged in

1 the US case, and they claimed injury as a result of cartelised products sold in Europe, and that
2 is what was settled.

3 THE CHAIRMAN: But is that related to matters which happened in the US which had an effect in
4 Europe, or did it relate to a separate cartel in Europe? We have not looked into the proceedings
5 so one cannot tell, and I am not asking you to answer it at the moment, but there are two
6 different points there – you understand the point?

7 MR. OSGOOD: I do, yes.

8 MS WESSEL: I know we do not want to – nor can we – develop submissions fully, but if I could
9 just point out two other things that might assist you here. In the definitions in the class action
10 settlement at tab 2 of Mr. Osgood’s letter of 9th March, p.3 contains a definition of “class” or
11 “plaintiffs”, and the “class” includes “... all persons ...” omitting the parenthesis, “... who
12 purchased electrical carbon products in the United States or from a facility located in the
13 United States during the relevant period.” So the class of persons that is being dealt with in
14 this class settlement does not include the claims before this Tribunal, which are not concerned
15 with the purchase of products in the United States.

16 THE CHAIRMAN: But you opted into this settlement.

17 MS WESSEL: We did because this settlement only settled US claims, that is why we opted into it,
18 and foreign claims – “foreign” for this purpose being non-US – are explicitly carved out in the
19 tolling agreement that was entered into with Morgan, and you will find that at para.1(b) ----

20 THE CHAIRMAN: Well clearly this is going to be a very interesting point.

21 MS WESSEL: It will be an interesting point.

22 THE CHAIRMAN: And we need some directions in relation to dealing with this point.

23 MS WESSEL: We do, thank you.

24 THE CHAIRMAN: Are there any other points that need to be dealt with as preliminary issues?

25 MR. OSGOOD: Not that presently occurs.

26 MS WESSEL: I have nothing further – I think we have plenty to be getting on with.

27 THE CHAIRMAN: All right. So my list at the moment – it is probably slightly back to front:

- 28 (i) Morgan’s defence,
- 29 (ii) disclosure,
- 30 (iii) whether or not there has been a settlement of what I call ‘the subject matter’ of
31 the CAT claim; and
- 32 (iv) permission re the second, third and fourth defendants – query the first defendant
33 as well.

34 MR. SCOTT: And, query Carbone if there is a development?

1 THE CHAIRMAN: Well there is no application at the moment so I think we can leave Carbone –
2 that is my feeling – do you agree?

3 MRS. SMITH-HILLMAN: I agree.

4 THE CHAIRMAN: We can leave Carbone aside for the time being.

5 (The Tribunal confer)

6 THE CHAIRMAN: There is the amendment of para.90, and there is also representation by Mr.
7 Osgood – we must not forget that.

8 MR. OSGOOD: Madam Chairman, I assume within the application regarding the other defendants
9 and possibly Morgan, you are including the issue of subject matter jurisdiction and my point
10 earlier on s.47?

11 THE CHAIRMAN: Yes, because we could not give permission if we did not decide that point in
12 relation to Morgan, so all that has to come into the equation, and whether or not that point is
13 good; and whether or not we need permission can all be dealt with at the same time as dealing
14 with permission – it is sensible to deal with the whole thing together.

15 MR. OSGOOD: Yes.

16 THE CHAIRMAN: So the first thing is the question of permission. At the moment the date that was
17 sent out was 30th May which I think happens to be Whitsun week. This is going to take more
18 than one day – or at least we had better allow more than one day because there may be quite a
19 lot of parties here, and we now have this additional point in relation to Morgan Crucible. We
20 did look at our diaries before and what we could do is 26th and 27th June.

21 MS WESSEL: I am just checking the copy of counsel’s diary that I have and I see that he may or
22 may not be available those dates.

23 THE CHAIRMAN: Well we do not normally take into account ----

24 MS WESSEL: I understand that. I think that should be acceptable and workable.

25 MR. OSGOOD: It is certainly fine with us.

26 THE CHAIRMAN: We will fix it for two days, only so that we keep our diary open. If we can
27 manage to do it in one day we will. The claimants have put in their application for permission
28 in relation to the second, third and fourth, but having regard to what we have been discussing
29 today, you probably want to put something in in relation to the first as to the s.47 and the
30 tolling agreement points – are you with me?

31 MS WESSEL: Yes, I am.

32 THE CHAIRMAN: And secondly, assuming that Morgan is unsuccessful on that point, then
33 permission if that is necessary, and whether or not permission is necessary at all.

34 MS WESSEL: Yes.

35 THE CHAIRMAN: So you have three points really I think. Now, when should that skeleton

1 MS WESSEL: How quickly would you like our submissions on those points?
2 THE CHAIRMAN: Well it is a question of either working back or working forwards?
3 MS WESSEL: Shall we work back.
4 THE CHAIRMAN: Well if one works back and it is 27th June – what is going through my mind is
5 this: the observations of the second to fourth defendants, if they decide to put in any
6 observations, should take into consideration possibly what you also say in relation to
7 permission and these other points in relation to Morgan.
8 MS WESSEL: Yes.
9 THE CHAIRMAN: So in order that one has time – you put in your skeleton in relation to Morgan,
10 or your written submissions in relation to Morgan; that Morgan and/or the other defendants or
11 potential defendants, can put in their submissions and you have time to reply ----
12 MS WESSEL: That would be appreciated.
13 THE CHAIRMAN: -- one needs time between each of those for the time to do it, and we have
14 plenty of time between now and 26th June – and having regard to the fact that the second to
15 fourth defendants are not involved today and have to take instructions, etc., and will have to
16 look at your document and so on, if we said that you had, say, four weeks from now and then
17 we gave four/six weeks that would probably just work, would it not?
18 MS WESSEL: Yes, I think it would.
19 THE CHAIRMAN: So we are now 13th March – you do not want it on 10th April that is the day after
20 Easter, so why do we not say 17th April?
21 MS WESSEL: Yes, that is greatly appreciated, thank you.
22 THE CHAIRMAN: 17th April, and then Morgan’s skeleton – how long would you want for that?
23 MR. OSGOOD: Could we have four weeks?
24 THE CHAIRMAN: Yes, so that is 15th May, then I am going to say if the second to fourth
25 defendants are intending to make any written observations they should do so by 15th May as
26 well – if possible.
27 MR. OSGOOD: I wonder if we could move it to Friday, the 18th?
28 THE CHAIRMAN: Yes. Second to fourth prospective defendants, any observations if possible also
29 by 18th May.
30 MR. OSGOOD: Thank you.
31 THE CHAIRMAN: That gives you until 15th June for any response.
32 MS WESSEL: Those dates work perfectly.
33 THE CHAIRMAN: That works perfectly for 26th, 27th June.
34 MS WESSEL: Indeed, it all ties in nicely. I should also inform the Tribunal that I have, at the
35 Registrar’s suggestion, been in touch with those lawyers, whom I have heard from – dealing

1 with the second to fourth defendants – though they were not necessarily instructed to deal with
2 the merits of this claim, I have had a reply this week from the second and third defendants
3 acknowledging I had kept them informed and saying they did not intend to come. I have not
4 had any reply from those who were instructed on some points on behalf of the fourth defendant.

5 THE CHAIRMAN: We have had a reply.

6 MS WESSEL: Excellent.

7 THE CHAIRMAN: From Freshfields. I am sure they will see it from the transcript.

8 MS WESSEL: May I just ask about service – would the Tribunal's wish be that our submissions are
9 sent simultaneously to both Morgan and the potential defendants?

10 THE CHAIRMAN: I would have thought that was appropriate, yes. To be sent to all four – we will
11 call them 'defendants' – plus Tribunal. That gets us to the hearing date, which will now be 26th
12 June. We should also deal with the question of whether there has been a settlement of the
13 subject matter, and on that one I would have thought that Morgan should go first. You
14 probably want to elucidate your letter – or you do not? You do?

15 MR. OSGOOD: I do.

16 THE CHAIRMAN: So we could use the same dates but the other way around. So on the settlement
17 issue the first defendant's skeleton or submission on 17th April.

18 MR. OSGOOD: Madam Chairman, without trying to speak for the other defendants that are not here
19 I think they may also have a similar issue and might be invited to address the settlement issue,
20 they have releases as well. How does the Tribunal wish to proceed on that subject?
21 Alternatively it could wait until after the permission hearing?

22 THE CHAIRMAN: That is what was going through my head, but we could deal with yours.

23 MR. OSGOOD: Well they have an interest because they were also parties to the class settlement and
24 the language in the settlement papers, and I believe the release language in each of the
25 settlements is identical, so I would have thought they have a keen interest in participating in
26 that dialogue.

27 THE CHAIRMAN: If that is the case, I think the way possibly to deal with it – I shall talk aloud,
28 shall I? The way possibly to deal with it is to make directions in relation to the settlement
29 issue. If it turns out that the second to fourth defendants have a similar point we can then look
30 to see whether it would be appropriate to move it to another hearing after permission has been
31 given, but we may as well elucidate it to start with

32 MR. OSGOOD: That makes good sense.

33 THE CHAIRMAN: The Morgan skeleton is 17th April. We will not ask the prospective defendants
34 for any observations on that or their skeleton because that would be inappropriate as they are

1 not, on any basis, parties at the moment. The claimant's response is 18th May and the
2 defendant's response to that will be 15th June.

3 MR. OSGOOD: Just to clarify if the other non-appearing defendants wish to be heard on the subject
4 of settlement, how will that be handled?

5 THE CHAIRMAN: Well if they say they have the same point then we will have to look at what they
6 say and we may have to then make direction in relation to them if we give permission in
7 relation to them and adjourn your application to when we hear theirs, but at the moment they
8 are not before us, I cannot make any order in relation to them.

9 MR. OSGOOD: I understand.

10 THE CHAIRMAN: The only order I can make is in relation to observations on the rule 31 point
11 because I can invite comments by a particular date.

12 MR. OSGOOD: Yes, this may be repetitive but an alternative is to put over the issue of settlement
13 until after permission so that one knows the parties in the room before that issue is treated.

14 THE CHAIRMAN: Well for the reasons that we had already elucidated it will probably be more
15 efficient if we at least got to elucidate what the point is because otherwise if it becomes a non-
16 point when it is looked into, or an easy point to resolve then the second to fourth defendants
17 may say that "The first defendants can go alone on this; if that is their best point they can take
18 it." On the other hand, if they think oh, yes, we are going to join in on this but there may be all
19 sorts of different scenarios that may happen. So I think as you are taking the point at the
20 moment let us timetable you and see what happens.

21 MR. OSGOOD: Thank you.

22 MS WESSEL: May I go back to the permission directions?

23 THE CHAIRMAN: Yes.

24 MS WESSEL: I understood that the dates we discussed were for submissions on the Morgan
25 permission point, if I may put it that way.

26 THE CHAIRMAN: No, you were going to put in your skeleton on the Morgan one.

27 MS WESSEL: Yes.

28 THE CHAIRMAN: We have not received any submissions, observations on your original against
29 the second to fourth. There will now be the first defendant as well, possibly, so all of those are
30 going to be invited to put in their observations by 18th May and so you can respond to all of
31 them.

32 MS WESSEL: My reply will deal with whatever observations and submissions ----

33 THE CHAIRMAN: Is that all right?

34 MS WESSEL: Yes, it is, perfectly.

1 THE CHAIRMAN: We will also have the ones on the settlement issue, which is effectively at the
2 moment only between you and we will see whether the point is also taken by the others and, if
3 it is, then we may re-timetable when that is dealt with, otherwise it will be dealt with at the end
4 of 26th or 27th June as a second issue to be decided then.

5 In relation to permission it seems to us, and I think we were verging on discussing this before,
6 that there is a question as to what actually is before the CFI? Is it only fine? Is it involvement
7 and liability, and does it affect this claim, the English proceedings? One way to identify that is
8 for the Registrar of this Tribunal to write to the Registrar of the CFI and that seems to us an
9 appropriate way of obtaining neutral information. Do you have any submissions on that?

10 MS WESSEL: I think that would be most welcome, and if the Registrar could seek to find out not
11 only the basis for the appeals that have been lodged with the CFI but also if there is an
12 anticipated timetable, that might also be of assistance to our own planning for these
13 proceedings.

14 THE CHAIRMAN: Yes.

15 MR. OSGOOD: No objection.

16 THE CHAIRMAN: So the Registrar will write a letter, a copy of which will be provided to you. Do
17 you want an opportunity to look at that letter?

18 MR. OSGOOD: Not on our part, no.

19 MS WESSEL: I do not believe that is necessary, thank you.

20 THE CHAIRMAN: So that will be done. That leaves us with the amendment of para.90. You were
21 submitting, I think, MS WESSEL, that it is the best you can do?

22 MS WESSEL: Yes, that in a nutshell is it.

23 THE CHAIRMAN: Until you get disclosure?

24 MS WESSEL: Yes, precisely. I do not see that an attempt to get a footstep closer to accuracy at this
25 stage of proceedings would necessarily be terribly helpful to anybody.

26 THE CHAIRMAN: One of the reasons why it is useful to state the amount of the claim, if possible,
27 and how one arrives at it is to see whether there is any possibility of negotiating and of settling
28 the claim, and that is why it is encouraged.

29 MS WESSEL: Indeed.

30 THE CHAIRMAN: But if that is impossible ----

31 MS WESSEL: Without information which is not in our possession and which we cannot obtain
32 without the assistance of the Tribunal we cannot do it.

33 MR. OSGOOD: Madam Chairman, I had understood, where I come from, that a claimant has the
34 burden of proof on one's claim, and has the burden of submitting evidence and making a
35 statement so that the defendant is at least on notice what the claim is and the amount of the

1 claim. Paragraph 90 does not tell my client in even the simplest notice terms what purchases
2 were made in a given year, what the products were, from whom the products were purchased,
3 were they manufactured in the United States? In which event I have a statute of limitation
4 issue. there is nothing in para.90 to put me on notice as to what the quantum is or what the
5 purchases are that form the basis for the claim. Now, surely if estimates have been made we
6 can be told the basis for the estimates.

7 THE CHAIRMAN: I think what you are saying is that if you look at p.36 and the table that is at the
8 top of the page, there are figures there, 1.9 million under your heading, and you are saying
9 “How are those figures arrived at?”

10 MR. OSGOOD: We show no sales to Emerson at all, zero sales outside the United States. As to
11 Valeo they got €3,600,000 worth of sales, that is where we have our 217,000. Bosch is
12 irrelevant to Morgan because we settled with Bosch, and they concede that in their claim. They
13 are only asserting those sales as against the other parties – no sales from Visteon, no Rockwell.
14 So as far as Morgan is concerned, D1 sold only €217,000 worth of product to one of the
15 claimants during this period. I take the Tribunal’s point that if we can get some clarity on these
16 numbers we might make some progress.

17 MS WESSEL: First of all, Mr. Osgood does have further information which I gave him yesterday
18 afternoon which I hope will be able to help him to track down the other sales in Morgan’s own
19 records. Secondly, we are talking about purchases of products dating all the way back to 1988.

20 THE CHAIRMAN: Yes, but MS WESSEL you have actually pleaded here – let us take the C2 one
21 - €3.6 million.

22 MS WESSEL: Yes.

23 THE CHAIRMAN: You must have figures or details from which you got that figure.

24 MS WESSEL: We have.

25 THE CHAIRMAN: It is being suggested that that figure should be €217,000, which is a very big
26 difference.

27 MS WESSEL: It is indeed a very big difference.

28 THE CHAIRMAN: If you have the basis upon which you have calculated the 3.6 million then it is
29 not that the matters are back in 1988 and you do not have the materials, because you had the
30 materials to get to the 3.6 million. Is it not possible for you to provide the underlying
31 calculation to get to the 3.6 million, and to get to the 1.9 million, because it is being said that
32 that is just US sales?

33 MS WESSEL: Yes, these are estimates, they are not accurate numbers.

34 THE CHAIRMAN: There must be a way of calculating.

35 MS WESSEL: There is a basis for it, and the basis for it in broad terms was provided to

1 Mr. Osgood yesterday, so I do not know whether he has managed to get any further in finding
2 the other sales over and above the €17,000. I do not know what that €17,000 figure relates
3 to. Clearly these issues need fleshing out and I would not claim otherwise. At some point we
4 do need to pin down some numbers both for the sales and for what the cartel price hike – if I
5 can refer to it that way – that leads us to our damages’ number is. We could provide further
6 incomplete information now, or we could wait until we have more information.

7 THE CHAIRMAN: Well you must have some information to have got to this, but it may be that you
8 have given that information to Mr. Osgood yesterday?

9 MS WESSEL: We have.

10 MR. OSGOOD: Yesterday I got the names of two affiliates that may have purchased.

11 MS WESSEL: That **did** purchase.

12 MR. OSGOOD: Well we are tracking two new names down of affiliates and I have not had a chance
13 yet. My point is simply if they know that there were purchases from some company called ITT
14 Automotive, I think was one name ----

15 MS WESSEL: These are the two that they told you about?

16 MR. OSGOOD: And another one, Leroy something – why do they not just tell us who bought the
17 product when, in what amounts and in what years.

18 MS WESSEL: If I may just address that? The names of those companies are, or ought to be very
19 well known to Mr. Osgood since they were ----

20 THE CHAIRMAN: Well to his client anyway.

21 MS WESSEL: No, to Mr. Osgood actually, because they were disclosed to him on a list of affiliated
22 companies in connection with our client’s opt out of the US class action as long ago as August
23 2005, so this is not new.

24 THE CHAIRMAN: But if you have those names, and you have this figure you must have estimated
25 somehow ----

26 MS WESSEL: Yes.

27 THE CHAIRMAN: -- from some documents ----

28 MS WESSEL: We have.

29 THE CHAIRMAN: -- how you got to those figures, so there is a bit more information than the
30 names.

31 MS WESSEL: There is.

32 THE CHAIRMAN: And it must be of assistance if you are going to make a claim to say how much
33 it is from each of those and how you have arrived at those figures?

34 MS WESSEL: Yes.

1 MR. SCOTT: One question: you have mentioned affiliates and one of the questions in my mind is
2 that there are some references, for example to predecessors and interest, and I think one of the
3 things that is going to have to be detailed is what are the legal names or the “trading as” names
4 of all the entities that are really involved here. For example, it is revealed that one was trading
5 as “The Ford Motor Company”, so that helps the defendants in looking out for “The Ford
6 Motor Company”, but what is being suggested is that there is a wider group of names to look
7 for than the names obvious on the face of the record.

8 MS WESSEL: Yes, and I have provided the details of the names that we believe that Mr. Osgood
9 will need to track down, to him and, as I said, they are not unknown to him from previous
10 proceedings.

11 THE CHAIRMAN: But it is not just the names because you have figures here and you must have
12 had some basis of estimating those figures.

13 MS WESSEL: Indeed.

14 THE CHAIRMAN: And therefore it must be helpful to produce the calculation which got you to
15 these figures, and how it is broken down, and it now appears broken down by different
16 affiliates.

17 MS WESSEL: By different affiliates in different countries.

18 THE CHAIRMAN: So one needs the affiliates and the amount on each affiliate and how you arrive
19 at that amount for that affiliate.

20 MS WESSEL: Yes.

21 THE CHAIRMAN: Does this include interest?

22 MS WESSEL: No, no, it does not. This is simply our estimate of purchases – nothing more – it does
23 not include anything else.

24 THE CHAIRMAN: So that is something which must be helpful in order to work out or to see what
25 these figures are and to take us on to the next stage.

26 MS WESSEL: The question then is one of timing and whether it is helpful to do that now or whether
27 it would be more helpful to do it later when more information is available and the figures that
28 are then ----

29 THE CHAIRMAN: Well when you say “more information”, whose information?

30 MS WESSEL: The defendants, be it one or more.

31 THE CHAIRMAN: But in order for them to deal with the documents they need to disclose you
32 have to have given them the basis for seeing what are the areas that are relevant, and without
33 knowing that there were these other entities they would not have known to go to those other
34 entities. Similarly, it would be helpful, if you have the information, which years were those

1 other entities, because otherwise it is very difficult to know which years to go to, which
2 documents.

3 MS WESSEL: Yes.

4 THE CHAIRMAN: And then if you know which years – you may not be able to give a definite
5 figure, but you can say “Well the supplies were in the region of X amount in those years”. So I
6 would have thought there is information which would be useful which is pre-disclosure,
7 because in order to ask for the disclosure one would need to give that information.

8 MS WESSEL: Yes.

9 THE CHAIRMAN: The question is whether we make an order for that, or whether you want to go
10 away and consider it – it is your pleading – and decide what information you are going to give?

11 MS WESSEL: I think I need to take instructions more on timing because if we are to amend now, or
12 now-ish, then I want to make that amendment as complete a step forward as it can be at this
13 early stage.

14 THE CHAIRMAN: It may be that the appropriate way forward on this is not by way of amendment
15 as such, but by way of supplementary particulars.

16 MS WESSEL: Yes, perhaps we could deal with it that way.

17 THE CHAIRMAN: Because it is a neat point.

18 MS WESSEL: Yes.

19 THE CHAIRMAN: And one could do it by way of supplementary particulars. But you are going to
20 be asked by the others, I suspect, if the action proceeds for the same information.

21 MS WESSEL: I am certain of it.

22 (The Tribunal confer)

23 THE CHAIRMAN: You need time to consider with your clients how you are going to deal with this.
24 We do not know how long this is going to take you and what information you will want to give
25 but it does seem to us that if you are going to make an application for specific disclosure at
26 some future point in relation to this then it is helpful to identify what disclosure it is, and in
27 order to identify what disclosure it is one needs this information.

28 MS WESSEL: Yes.

29 THE CHAIRMAN: So I think you need to go away and think about what voluntary particulars you
30 want to give in relation to para.90, and possibly you might want to consider – I have not looked
31 at the claim sufficiently – whether there is anything else that might be helpful in that area. The
32 sooner you give it the sooner the defendants can consider their position. But it probably is not
33 appropriate to be making an order in relation to the defence until we have sorted out the
34 preliminary issues that we are going to deal with on the 26th June.

35 MS WESSEL: Yes, that makes sense.

1 THE CHAIRMAN: So we are not going to make any order in relation to para.90 or the Morgan
2 defence. What we will need to do – the time for the Morgan defence is extended until further
3 order and we can then deal with that on 27th June.

4 MR. OSGOOD: Thank you.

5 THE CHAIRMAN: Mr. Osgood, you say it is €17,000 and that there are no sales in relation to
6 Emerson outside the US?

7 MR. OSGOOD: That is our current information.

8 THE CHAIRMAN: Right, would it be helpful in order to resolve this, because there is a big
9 difference between 217,000 and 3.6 million, if you gave some particulars of the 217,000
10 voluntarily?

11 MR. OSGOOD: We would be happy to, yes. We would do that voluntarily.

12 THE CHAIRMAN: Yes, and then perhaps that can be resolved between you and one can identify
13 where the difference is.

14 MR. OSGOOD: Yes.

15 THE CHAIRMAN: Is there any other information that might be helpful that you might want to
16 disclose voluntarily?

17 MR. OSGOOD: I do not know whether the claimants can go beyond providing us just with gross
18 sales' information, and actually give us some indication of how they approach the subject of
19 quantum of damages?

20 THE CHAIRMAN: What I was asking you is whether there is any other information you might
21 want to give them, to do with the 1.9 million? You say that is all US sales.

22 MR. OSGOOD: Well we do not see any European sales to Emerson.

23 THE CHAIRMAN: Right, so there is no information you can give because you cannot find it?

24 MR. OSGOOD: That is correct.

25 MR. SCOTT: As I understand it, what the claimants will say is that because of the nature of the
26 relationship between the infringers it is not until they have a better understanding of what
27 happened between the infringers that they will be able to get some grip on which of the
28 possible bases of quantifying their monetary claim they should make, and put before us the
29 arguments which are sketched at the moment in the claim form, and I think that is
30 understandable. They were not parties to the infringement and they were not party to how the
31 infringers approached infringing and they have not been given access to the Commission files.
32 So at the moment they are at some disadvantage. This is not a normal sort of negligence
33 action, this is an action where at the moment there is a finding of infringement by the
34 Commission – I know that is subject to proceedings – but that is the position in which they find

1 themselves, and so it is quite natural that it will take them some time to digest the information
2 that they get from you and you get information from them.

3 MR. OSGOOD: I am very sympathetic with that point because the European Commission itself said
4 it was impossible to know whether there was any impact, and that is in the Commission
5 decision itself.

6 THE CHAIRMAN: Well then the only other point about disclosure is that you indicated earlier that
7 you had explained to your clients not to destroy any documents and to preserve them.

8 MR. OSGOOD: Yes, and we are happy to share with my friend the memorandum that has been
9 circulated within the company on our advice, and we can do that immediately after this hearing
10 – if that would be helpful?

11 MS WESSEL: Madam, I would certainly appreciate seeing that memorandum and I am sure that Mr.
12 Osgood is doing everything he can to ensure that documents are not being destroyed. My
13 hesitation arises because there is a history here of document destruction and our concerns are, I
14 think, understandable.

15 THE CHAIRMAN: What would you like us to do about it?

16 MS WESSEL: I honestly do not know if there is a mechanism, given that the decision is made that
17 disclosure cannot happen yet I do not know what mechanism can be put in place.

18 THE CHAIRMAN: It is not for the Tribunal to ----

19 MS WESSEL: No, no.

20 THE CHAIRMAN: If you want to make an application either here or somewhere else in relation to
21 it then that is a matter for you, and I think you need to investigate what you want to do because
22 you either accept the undertaking or you see whether there are other means for dealing with it
23 having regard to the history in this matter.

24 MS WESSEL: And in that regard, seeing the instructions that have been given within Morgan would
25 be most helpful.

26 THE CHAIRMAN: Well that is going to be produced to you, so I do not need to make an order in
27 relation to that, and it is up to you to take such advice as is required to see what you can do
28 about it.

29 MS WESSEL: Yes.

30 MR. OSGOOD: Thank you, madam Chairman. I would just make very briefly this comment: first,
31 the allegations of document destruction were made with respect to a time period before
32 Sullivan & Cromwell entered the case; and secondly, had to do with the United States. We
33 have preserved all materials given to the European Commission which formed the basis of their
34 decision, and I can make that representation without hesitation.

35 MS WESSEL: And I accept it without hesitation as well, and without reservation.

1 THE CHAIRMAN: That does lead on to you being the attorney or the representative in the court
2 with the right of audience. That has raised in our minds a number of issues, and although they
3 are issues that are peripheral in one sense, because clearly you are an advocate, and clearly you
4 have a lot of experience as an advocate both in the European Court and in the American Courts,
5 and that is taken as read.

6 As you know, if this was the High Court you would not have a right of audience. A litigant in
7 person does have a right of audience and here it is sometimes directors of companies and
8 advisers of companies, etc. But of course that is the company itself and its own internal people
9 who are appearing and they have decided not to pay for an adviser. Where there is a
10 professional independent adviser the situation is slightly different, I think, and there are a
11 number of concerns in relation to that, and it may well be that they are concerns that you will
12 be able to resolve.

13 My first concern is one that comes out of what we have been discussing, because if you had a
14 right of audience before the High Court you would be able to give an undertaking to the court
15 which can be enforced. If you are a lawyer who does not owe that duty to the court, then you
16 cannot give that undertaking. That is something that can possibly be got round, but it is a
17 consideration that we need to have in our minds in deciding the way forward. Again, in
18 relation to the preservation of documents the same considerations apply. In relation to the
19 duties of disclosure the same considerations apply. This is a matter for you and not for us, but I
20 do not know what the insurance position is, because clearly if you have a right of audience
21 because you have higher rights of advocacy then your insurance policy clearly covers it, but
22 does the insurance policy cover this sort of application and granting permission? You may
23 have already considered all these matters.

24 The other issue is in relation to the English rules of procedure, both the Civil Procedure Rules
25 and the rules in this Tribunal which are, of course, different from the European rules and
26 different from the American rules. One of the reasons that those who appear as professionals
27 are English barristers and solicitors is because they are accredited to know those rules. The
28 same thing also in relation to the English law of substance in these proceedings because the tort
29 law and the damages' law here and the tort law and the damages' law in America are different,
30 so when we get to that stage we need to be satisfied – and your clients need to be satisfied –
31 that we are being properly addressed. You may have considered a lot of those things and you
32 may like to comment upon them now.

33 There may be ways of being able to resolve those matters and for you to still be the advocate,
34 but I think those matter are matters which need to be considered in the context of giving or
35 considering permission for you to appear. It may be that there are certain occasions such as

1 today when it was quite appropriate, and certain times when it may be that an English lawyer
2 would be more appropriate. But I think that is something which is mostly for you but a bit for
3 us in deciding whether we give permission.

4 (The Tribunal confer)

5 THE CHAIRMAN: I think I did mention but just to make sure – the duty to the court in relation to
6 English rules of disclosure. I assume that Sullivan & Cromwell have solicitors, and I do not
7 know if they have them with higher rights of audience? I assume they are undertaking English
8 litigation – some American firms are, and some American firms are not.

9 MR. OSGOOD: We have a number of English qualified lawyers ----

10 THE CHAIRMAN: But are they doing litigation.

11 MR. OSGOOD: They are not doing litigation in the High Court, for example. I appreciate the
12 considerations that you mention. You have given me food for thought.

13 THE CHAIRMAN: I do not want to discourage you in one sense.

14 MR. OSGOOD: I propose to take those very wise comments into consideration, to think carefully
15 about them, and to respond not off the cuff but at some appropriate future time, which should
16 not be too long from now.

17 THE CHAIRMAN: Well it may well be that that needs to be resolved before the next hearing in the
18 sense that we either have to give you permission to deal with the next hearing, or it needs to be
19 resolved before that.

20 MR. OSGOOD: Yes.

21 THE CHAIRMAN: Especially if it has insurance implications, but that is a matter for you.

22 MR. OSGOOD: In my own mind I distinguish different stages, the ultimate stage of an actual trial,
23 if you will, with witnesses – although I understand the formal rules of evidence do not apply
24 according to your rules.

25 THE CHAIRMAN: But of course they are in our mind and the American rules are in your mind.

26 MR. OSGOOD: Yes, but I tend to think of a formal trial – testing experts and witnesses – as down
27 the line at some point, perhaps, if we cannot resolve this in some amicable way.

28 THE CHAIRMAN: This Tribunal does try to get on with it, and it is unfortunate but for various
29 reasons we have had to have until the 27th June for the next hearing. Our history is that that
30 would have happened much earlier, and certainly we will be trying, if we are going to get on
31 with this case, and it is not stayed (and that may depend on what the CFI tells us) then it will be
32 full steam ahead. So I think if one is thinking about the case going on in the way that cases go
33 on for many years that is not the way that this Tribunal works.

34 MR. OSGOOD: I am very pleased to hear that!

1 THE CHAIRMAN: We do not have the docket system here and the civil cases and the most difficult
2 cases going to the end of the docket every day so that they never get heard; it will be timetabled
3 as quickly as possible.

4 (The Tribunal confer)

5 MR. OSGOOD: I appreciate those comments, and I would like an opportunity to think about them
6 outside of the room.

7 THE CHAIRMAN: And with your colleagues. We are interested to hear that in fact Sullivan &
8 Cromwell does not do litigation, that they do not have English litigation solicitors. Of course
9 one way of doing it is to instruct a young barrister who can be your Junior – I am not saying
10 that we would accept it or not accept it, but that is a possible way of dealing with it.

11 MR. OSGOOD: I appreciate that suggestion, yes. I will try to respond in fairly short order to the
12 comments and observations that have been made, and bearing in mind, of course, this is of
13 course the mother country of American law, and we depend upon the common law and trace it
14 from England of course. So let me consider that further.

15 THE CHAIRMAN: If you went down the route of thinking about a barrister who became your
16 Junior they would have to consider – and I am sure it can be sorted out – but they would have
17 to consider how they get instructed in a case going on in an English Tribunal not by a firm of
18 solicitors who have litigation rights. I am just pointing that out so that you can discuss it if that
19 is the way you think you might go, and then we will have to consider what arrangements there
20 are in order to decide whether it satisfies all the difficulties.

21 MR. OSGOOD: Thank you, yes.

22 THE CHAIRMAN: Thank you very much. Is there anything else?

23 (The Tribunal confer)

24 THE CHAIRMAN: The Registrar will copy the transcript of today's hearing and the order that is
25 made, i.e. when we draw it up, to the second to fourth prospective defendants, so that they are
26 aware of everything that took place today. About representation, because that does need to be
27 sorted out before the next hearing – do you think you can sort that out in the next two or three
28 weeks?

29 MR. OSGOOD: Yes, I do, madam Chairman.

30 THE CHAIRMAN: Because if it requires another hearing or some input from me it really needs to
31 be done in the next couple of weeks, so if you could come back urgently that would be helpful.

32 MR. OSGOOD: I have it in my calendar for the next two or three weeks.

33 THE CHAIRMAN: I would like to sort it out so that if you have to come back to me, or to us –
34 depending on how we do it – and we need a hearing or something, then I would like to have
35 made a decision before the Easter break.

1 MR. OSGOOD: Which means before the end of this month, really?
2 THE CHAIRMAN: That is right – well it is 5th April or something, yes, if that is possible.
3 MR. OSGOOD: The school break begins at the end of this month, actually.
4 THE CHAIRMAN: All right, well the end of this month. Is there anything else?
5 MS WESSEL: Nothing further from me, thank you, madam Chairman.
6 MR. OSGOOD: Thank you very much to all the members of the Tribunal for bearing with us and
7 having patience with us, and I very much appreciate the guidance that you have all given today.
8 Thank you.

9 (The hearing concluded at 4.45 p.m.)