IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1294/5/7/18(T)

Victoria House,
Bloomsbury Place,
London WC1A 2EB

30 January 2019

Before:

THE HON MR JUSTICE ROTH
(President)
THE HON MR JUSTICE HILDYARD
HODGE MALEK QC

(Sitting as a Tribunal in England and Wales)

BETWEEN:

WOLSELEY UK LIMITED & OTHERS Claimants

- and -

FIAT CHRYSLER AUTOMOBILES NV & OTHERS Defendants

- and -

DAIMLER AG

Additional Defendant

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APPLICATION

A P P E A R AN C E S

Ms Marie Demetriou QC and Mr Tristan Jones (instructed by Hausfeld & Co. LLP) appeared on behalf of the Wolseley Claimants.

Mr Paul Harris QC, Mr Ben Rayment and Ms Alexandra Littlewood (instructed by Quinn Emanuel Urquhart & Sullivan UK LLP) appeared on behalf of the Daimler Additional Defendant.

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THE PRESIDENT: Yes, Ms Demetriou, good morning.

MS DEMETRIOU: Sir, good morning; I appear for the Wolseley claimants, and I have Mr Jones on my left, and Mr Harris, Mr Rayment and Ms Littlewood are here for Daimler.

As the Tribunal is aware, this application was held over from the last CMC, and I anticipate that the Tribunal has the bundles that were prepared for that CMC and you should have skeleton arguments from each of us, and an additional authorities bundle.

THE PRESIDENT: We do, and thank you all of you for your helpful skeletons.

MS DEMETRIOU: The Tribunal will also know that the Wolseley claimants' application arises in the following context: the Wolseley claim is one of three sets of proceedings in which the same solicitor and counsel team are instructed, the other two being the Suez and Veolia claims. The Tribunal said at the CMC that these three claims should be case managed together. The Tribunal also ordered that the Part 20 defendants in each of the three claims should be permitted to participate in the trial of the main claims. Does the Tribunal have the case management order from the last CMC or shall I hand up a copy?

THE PRESIDENT: Unless it is in a bundle.

MS DEMETRIOU: Can I hand it up, because I think it may be useful to have it. (Same handed)

Just looking at the order for a moment, you will see from paragraph 1 that the Tribunal ordered that the main claims and the additional claims should be case managed together.

Then at 3, the additional defendants - so that would include Daimler:

> "… shall be allowed to participate in the trial of the Main Claims. Insofar as the Additional Claims raise issues regarding the overall loss and damage suffered by the Claimants, or the liability of the Main Defendants to compensate the Claimants for such loss and damage, such issues shall be tried with the Main Claims."

Then apportionment is to be hived off.

Then you see:

> "The question of whether the liability of the Additional Defendants should be tried with the Main Claims is reserved until the next CMC."

That is because of the Scania issue which is yet to be determined.

THE PRESIDENT: Yes.

MS DEMETRIOU: But the key points are that the main claims and additional claims shall be case managed together, and that the additional defendants, including Daimler, shall be allowed to participate in the trial of the main claims. I just ask the Tribunal to bear that in mind for the purposes of this application.

Daimler is not involved in the Suez and Veolia proceedings, and the Wolseley claimants chose not to sue Daimler, even though its trucks form part of the volume of commerce which forms the subject of the claim for damages made by the Wolseley claimants. As is their right, they chose not to sue Daimler, which is not therefore a defendant to the main Wolseley claim.

THE PRESIDENT: They were, I thought, involved as Part 20 defendants in the Suez and Veolia claims at one time and then were removed.

MS DEMETRIOU: That is correct, so they are no longer involved in those proceedings. The Tribunal will also know that DAF and Iveco, who are the defendants to the Wolseley claimants' claim, have brought additional claims for contribution against the other cartelists, including Daimler. So Daimler is a Part 20 defendant in the Wolseley proceedings. So it follows that, pursuant to the Tribunal's order which we have just looked at, Daimler may therefore participate in the trial of the main claim.

I will take the Tribunal in a moment to Daimler's defence to the contribution claim, but what you will see when I take you to it is that the defence to the contribution claim engages fully with Wolseley's particulars of claim. Daimler's liability to Wolseley will therefore be an issue in the contribution proceedings. Despite that, Daimler has purported to bring a claim for negative declaratory relief against the Wolseley claimants, and we contend that no useful purpose whatsoever would be served by making the negative declarations sought by Daimler. Daimler, of course, disagrees, and seeks in its skeleton argument to identify a useful purpose, and that really, boiled down, is the key substantive issue for the Tribunal to decide today.

The Wolseley claimants' application is in two parts, which I will address in turn. We contend first that Daimler's additional claim was not properly issued because it did not issue a claim form; and we contend, second, that if the claim was properly issued it should be struck out or summary judgment should be given in Wolseley's favour, and that is because there is no real prospect that the Tribunal will make the declarations sought as they serve no useful purpose.

Daimler describes the first objection we make about the no claim form as an 'arid and technical' point. Now, of course, in one sense, compliance with the rules of the court is a technical matter, but it is necessary, we say, formally for the Tribunal to determine that issue because it will want to know the framework within which it is considering the substantive issue.

THE PRESIDENT: I do not quite follow that. If you are right on the second issue then it is struck out----

MS DEMETRIOU: Yes.

THE PRESIDENT: -- whether it is properly issued or not, and that is the end of it.

MS DEMETRIOU: Yes, if we are right----

THE PRESIDENT: Is that not correct: you do not need to succeed on the first issue if you succeed on the second?

MS DEMETRIOU: That is true as a matter of substance, but if we are right on the first issue - so if we are right that it has not properly been issued, then technically there is nothing to strike out.

THE PRESIDENT: If we do not need to decide that, that may formally be correct, but one can avoid deciding it. If you are right on the second one, because either it fails because it is not properly issued, or, if it is properly issued, it is then struck out, so you get to the same result.

MS DEMETRIOU: Yes, I think you do get to the same result.

THE PRESIDENT: If you are wrong on what you have described as the key substantive issue, which is the second issue as now formulated, then, even if you are right that it is not properly issued, could Daimler not then go and issue a claim in the High Court for a declaration in the same terms which, *ex hypothesi*, is a properly arguable claim for a declaration, have it transferred to the Tribunal, and the Tribunal would no doubt order that it be tried together with the claim and the Part 20 claims? So we get to the same position at the end of the day.

MS DEMETRIOU: Sir, yes, it would need to seek permission to issue the new claim, but I anticipate that if the Tribunal has ruled that it is arguable that would not, in practice, be an obstacle so I think it ----

THE PRESIDENT: Would it need permission in the High Court to issue the claim?

MS DEMETRIOU: Yes, you would, because of the terms of Part 20, paragraph 7. Can I just show you that? It may be convenient just to look at that now. Sir, if you have the White Book there, it is at page 683. You will see Part 20.7. Of course, Sir, there is a dispute between us as to whether this is a counterclaim or an additional claim. We say it is an additional claim which falls within 20.7, and if we are right you see at (3)----

THE PRESIDENT: I see, yes, because you need the court's permission.

MS DEMETRIOU: Sir, yes.

THE PRESIDENT: In theory, if it is a properly arguable claim for a declaration, permission should be granted.

MS DEMETRIOU: Sir, yes, I entirely accept that, which is why I say that formally the Tribunal needs to decide this, I think, because Daimler will need to know what to do. If we are right on the second point, then the Tribunal will need to know what the position is on the first point, because either the Tribunal will be striking this out because it has been properly made and the Tribunal will then draw the consequences, if we are right, and strike out the claim; or the Tribunal will be ruling that this is not a properly arguable claim. If we are right on the first point and this has not properly been issued, and we are wrong on the second point and it is an arguable claim, then they will need to go to the High Court and seek permission, but the Tribunal will, *ex hypothesi*, have ruled on the second point, and so it should be a reasonably simple matter.

Sir, I am not here telling the Tribunal, or attempting to tell the Tribunal, that the first point is a self-standing ground on which we can get rid of all of this. We accept that the substantive point is the second one, but we do think the Tribunal needs to address it because it will determine how this is to be dealt with going forward as a matter of form.

MR JUSTICE HILDYARD: We could simply say in so far as you need permission you can have it?

MS DEMETRIOU: Well, I am not sure that the Tribunal can do that because, technically, they have to go to the High Court and seek permission. I am not aware that there is - it may be that the Tribunal thinks it has a power to put itself in the High Court's shoes and simply grant permission, but I am not aware----

THE PRESIDENT: I think Mr. Justice Hildyard was saying that if we were a single court judge, what one would do.

MS DEMETRIOU: I see.

THE PRESIDENT: I do not quite follow you as to why we need to necessarily know the answer to the first point if you are right on the second point.

MS DEMETRIOU: Shall I start with the second point?

THE PRESIDENT: I think it might help us if you started with the second point.

MS DEMETRIOU: I will start with the second point, because I am not here trying to persuade the Tribunal that the first point is going to knock this out, I am not saying that.

THE PRESIDENT: No, it is still a technical matter, you may be right or not.

MS DEMETRIOU: So the second point is that, as the Tribunal is aware, we contend that the purported additional claim is not reasonably arguable, because there is no reasonable prospect that the Tribunal will make the declarations sought, the declarations for negative relief. Can I take you, first, please, to the pleadings. You should have a bundle A3, and if

the Tribunal could open that bundle, please, at tab 2, you will see there the Wolseley claimants' particulars of claim, stamped at the top 21 December 2017, and you will see there the two defendant groups, the Iveco defendants and the DAF defendants. The DAF defence is in the immediately following tab, tab 3, and then you have behind tab 4 the Iveco amended defence, and then behind tab 5 is the Wolseley reply. That is dated 28 September 2018. Then behind tab 7 you will see the Iveco additional claim against the other cartelist groups, which include Daimler - you will see that, the tenth third party in the heading.

In the following tabs the Tribunal will find the defences of the various Part 20 defendants to that additional claim.

I think it is relevant to look very briefly at the Volvo example, which is behind tab 11. If you open that up and look at paragraph 2, you will see that what Volvo is saying there is that it is going to address the allegations in Wolseley's particulars of claim, because it is saying:

> "… in the Additional Claim, Iveco deny the Claimants' damages claims, but state that if they are so liable, intend to claim an indemnity or contribution from Volvo. Given that Iveco's alternative is that Volvo are liable with Iveco, this Defence addresses the allegations in the Particulars of Claim as well as those in the Notice."

So that is the position that Volvo have taken.

You will see that, accordingly, they have pleaded a response to the particulars of claim, and you will see a heading underneath paragraph 4, "Response to Particulars of Claim", and there is a full response to the particulars of claim, including, for example, at paragraph 25 that it is denied that the claimant suffered any loss or damage. So that is what Volvo has done.

Then you have behind tab 13 the Daimler defence to the contribution claim made by Iveco, and you will see that it has proceeded on a similar basis to Volvo, responding in detail to the particulars of claim. Sir, you see on page 4, there is a heading at C, and then at paragraph 13:

> "In these sections C-L Daimler sets out its response/Defence to the Claimants' Particulars of Claim and, by so doing, sets out why it does not admit liability for the same loss and damage as is claimed against the Iveco Defendants, or for any loss and damage."

So it has taken a similar approach to the Volvo defendants, and has pleaded fully in the context of its defence to the contribution claim to the particulars of claim for the reason given.

Then at the end of the document you see in very brief form the additional claim, which is at paragraphs 83 and 84, and they are seeking negative declaratory relief. The only basis given is a cross-reference, so it is pleaded by cross-reference, to sections C to L, which are "hereby repeated" - that is what is said at the beginning of paragraph 3, it says that, for those reasons, it is entitled to declarations against the claimants, and then the declarations are set out, including that the defendants, or any of them, are not liable to the claimants for the alleged loss and damage claimed, and/or that Daimler is not liable to the claimants for the alleged loss and damage claimed. The Tribunal will have read the content of those declarations.

One difficulty that this gives rise to, and I will come back to this, is that there is a dissonance or a mismatch between what is said by way of defence to the contribution proceedings and the positive claim that is advanced. What I mean by that is that, although at paragraph 83 Daimler seeks to cross-refer to the matters set out in sections C to L as the basis for its positive claim to negative declaratory relief, when you look at what is in C to L it consists entirely of non-admissions - entirely. In fact, it says so in terms at paragraph 13 it describes what is being done in sections C to L. This all makes sense in the context of a defence to a counterclaim. It says that it sets out why it does not admit liability for the same loss, or for any loss and damage.

If you go through what is said, and I am not going to take you through it in detail, the Tribunal will see that what is included in all of these sections is a series of non-admissions. So, for example, when you come to the issue of damage under section K on page 22, you see at paragraph 73 it is not admitted that Daimler and/or the defendants caused the claimants, or any of them, any loss or damage.

If Daimler were, in reality, going to be advancing an independent self-standing positive claim against the Wolseley claimants, to which we have to plead a defence, it would need not simply to rely on a series of non-admissions, but to set out its positive case in support of that negative declaratory relief, and it simply has not done that.

So, to foreshadow a submission that I am going to make in due course, one consequence of this is that if the additional claim is permitted there would be no prospect of it being heard separately and in advance of the main claim or the contribution proceedings - no prospect at all.

For completeness, and I am not asking the Tribunal to turn them up because they are in very similar form, the equivalent documents in the DAF additional claim are behind tab 15, that

is the contribution claim, and then Daimler's defence and purported additional claim is behind tab 21.

I have shown the Tribunal, I have reminded the Tribunal, of its order following the last CMC, and we say that the purpose of paragraphs 1 and 3 of that order is plainly to permit the additional defendants, which include obviously Daimler, to participate in the main claim. The purpose of that is precisely to admit Daimler and the other additional defendants to advance arguments on liability for the loss claimed by the Wolseley claimants, including in respect of Daimler trucks, or all the trucks in respect of which the defendants are jointly and severally liable.

The additional claim it is fair to say was made before the Tribunal's order, and I will come back in a moment to the background to the claim, but obviously we say its utility must now be judged following the order and in light of the order, and we say, in the light of the Tribunal's order, it simply serves no useful purpose for the reasons I am about to explain.

Before turning to what Daimler says the useful purpose is, the Tribunal will have seen the parties' skeleton arguments and I think it is fair to say that there is quite a large degree of common ground in terms of the test to be applied. There is, in particular, agreement that the issue is whether these declarations would, if made, serve any useful purpose. We both agree that that is the test. Can I just show you where that test is to be found, and if you would turn, please, to the first authorities bundle, tab 11, you will find the *Sabena* case. It is a case that we have both cited in our skeleton arguments, and I just want to show you some key passages. The key passages are to be found at paragraph 41 and following, page 2050 in the top left hand corner. What is said at 41 is----

THE PRESIDENT: Just one moment, page 2050?

MS DEMETRIOU: Page 2050, and paragraph 41 is at the bottom of that page. It says:

> "Lord Wilberforce and Lord Denning MR differed in the circumstances of that case …"

They are referring back to the case referred to in the immediate preceding paragraph -

> "… as to whether the declaration would serve a *useful* purpose. However, if it would, that it would then be appropriate to grant a declaration was agreed. The approach is pragmatic. It is not a matter of jurisdiction. It is a matter of discretion. The deployment of negative declarations should be scrutinised and their use rejected where it would serve no useful purpose. However, where a negative declaration would help to ensure that the aims of justice are achieved the

courts should not be reluctant to grant such declarations. They can and do assist in achieving justice."

Then an example is given of where a patient is not in a position to consent to medical treatment. It says that in that context declarations have an important role to play because without their use then certain recent developments in the law, recent at that time:

"… including the beneficial intervention of the courts in cases concerning mentally incapacitated people would not have been possible."

Then at the bottom of that page:

"He considered that the different situation he was there considering was 'pre-eminently an area in which the common law should respond to social needs.' So in my judgment the development of the use of declaratory relief in relation to commercial disputes should not be constrained by artificial limits wrongly related to jurisdiction. It should instead be kept within proper bounds by the exercise of the court's discretion.

While negative declarations can perform a positive role, they are an unusual remedy in so far as they reverse the more usual roles of the parties. The natural defendant becomes the claimant and vice versa. This can result in procedural complications …"

which we say would occur in this case -

"… and possible injustice to an unwilling 'defendant', This in itself justifies caution in extending the circumstances where negative declarations are granted, but, subject to the exercise of appropriate circumspection, there should be no reluctance to their being granted when it is useful to do so."

Then at 44, you see at the bottom of that paragraph, or half way down:

"In doing so, I also reject the contention of Mr Shepherd that as a matter of principle negative declarations should not be granted (or perhaps only in wholly exceptional cases granted) in respect of possible tortious liability. I would not quarrel, however, with the judge's statement that: 'It may well be that few such cases will lend themselves to relief of that kind, especially where the injured party has a choice of which defendants to sue'."

We say we are in that position because our clients had a choice of who to sue. They have no interest, our clients. They have chosen not to sue Daimler. They have no interest in the issue of whether Daimler is liable for the loss that they have claimed. Yet, if this procedural

mechanism were to be permitted, my clients would be drawn into litigation which they did not want. They had a choice of who to sue.

The other case I think it may be helpful to look at is in the same bundle behind tab 21. It is the *Rolls-Royce* judgment in the Court of Appeal. I am just going to take you to page 350 where Lord Justice Aikens summarised the principles. This does not relate especially to negative declaratory relief but to making declarations more generally. You see at paragraph 120 the principles that are there summarised, I hope conveniently for the Tribunal, by Lord Justice Aikens. There are seven principles. The first is that it is a discretionary power. Second, there must, in general, be a real and present dispute between the parties as to the existence or extent of a legal right between them. Third, each party must, in general, be affected by the court's determination of the issues concerning the legal right in question.

I just want you to look in particular at number (7):

> "In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised? In answering that question it must consider the other options of resolving this issue."

We say that that is a very important consideration here because when we turn to look at what Daimler says is the useful purpose behind these declarations, there are obviously other ways of resolving the point at issue, which is: is Daimler liable to pay any money to DAF and Iveco, who have sued it in the contribution claim? The obvious way, the obviously more appropriate way of resolving that issue is, of course, in the contribution claim. That is, we say, a formidable obstacle to this purported additional claim.

I said I was going to show the Tribunal a little bit of background, and I think it is illuminating to see----

THE PRESIDENT: I think the second of those, the second of Lord Justice Aikens' considerations is not relevant. This case was slightly qualified by Lord Justice Moore-Bick in a subsequent case, that it does not have to be a present dispute, it can be a potential dispute.

MS DEMETRIOU: Yes.

THE PRESIDENT: But I do not think that is an issue for this case.

MS DEMETRIOU: No, I do not think it is an issue for this case. I am really placing emphasis on the seventh of those considerations.

Could the Tribunal please pick up bundle C1, which is the first of the correspondence bundles, and turn, please, behind tab 2, to page 190. This is a letter dated 3 August 2018. This is a letter from Daimler's solicitors to the Wolseley claimants' solicitors setting out the rationale for the additional claim that was being advanced. You see on page 190 under the

heading, "*The additional claim*", there is some discussion about the first point, which I am not addressing you on at the moment, was it properly issued? Then you see on page 191 there is a heading, "*Purpose of the additional claim*", and it is, in my submission, helpful to see how all of this arose, because of course all of this took place before the case management conference and before the order made by the Tribunal. Then you see at the beginning:

> "From the outset … Daimler has indicated its substantial concern and interest in the proceedings. Daimler considers that it needs to be able to have an active role in the defence of the claims being asserted given the potential implications for Daimler."

Then it goes on to say:

> "A number of your clients allege that purchasing entities … [bought Daimler trucks] …"

That is common ground, so we do not quarrel with that.

Then the next paragraph:

> "Your clients, as is their right, chose to issue proceedings against DAF and Iveco. Daimler, as is its right, initially raised the possibility of making an application under CPR Part 19 to be added as a defendant to the proceedings. Despite setting out in correspondence the proper basis for this proposed application, your clients refused to consent to such an application."

Of course, our clients had a right to choose who they sue on a joint and several basis, and so they were not prepared to consent, simply to add, having chosen not to sue Daimler, Daimler as a defendant. Then it says:

> "In the time that we were corresponding with you about the proposed Part 19 application, the DAF and Iveco defendants issued additional claims for contribution against Daimler. In the circumstances, and provided that Daimler would be able to be actively involved in the proceedings as an additional defendant, which the courts generally allow, Daimler decided it was unnecessary for it to proceed with making a Part 19 application.
>
> However, prior to Daimler filing its defence to the additional claims issued by the DAF and Iveco defendants, you made it very clear in your correspondence with Travers Smith, that your clients do not agree to the additional claims being case managed and heard alongside the main claim and that your clients will seek to resist the additional defendants taking an active role in the proceedings. This is a

matter of concern for Daimler for the reasons set out above and in prior correspondence.

In light of your client's position on case management of the additional claims, and their prior refusal to consent to Daimler being added as a defendant under CPR Part 19, Daimler considered it needed to exercise its right to issue an additional claim against your clients seeking the declarations set out in the additional claim. Contrary to the assertions in your letter, the declarations have a very real practical purpose. If Daimler succeeds in its additional claim against your clients, proving that it has no liability, which is clear from the defence … that will have a material impact on the contribution claims that have been brought by the DAF and Iveco defendants."

They then refer to a further practical benefit which relates to settlement which I will come to in due course because that is reiterated in the skeleton argument. What we say is that it is----

THE PRESIDENT: That does seem to us the real point of all this.

MS DEMETRIOU: I am going to come to that, but I do want to show you this because what we see as being the purpose that is put front and foremost is the question of whether Daimler would be able to participate in the main proceedings. That has now been established by the Tribunal's order, and so that purpose now falls away.

We say that what Daimler are now doing, that purpose having fallen away, is trying its best in its skeleton argument to identify some other purpose that might conceivably be achieved.

THE PRESIDENT: They have identified it, to be fair, in the letter in the next paragraph.

MS DEMETRIOU: Yes, can I do it by reference to the skeleton rather than to the letter because they have obviously since then----

THE PRESIDENT: Your suggestion is that this is a late move to try and come up with some other reason.

MS DEMETRIOU: Sir, I am not taking any fairness point, but I have shown the Tribunal that they have made this point. I think, on a fair reading of the letter, that is put as a subsidiary issue, a further practical benefit, and the main motivation for this additional claim is to put themselves in a position where they can participate in the main proceedings, and we say that that is no longer an issue, that has fallen away.

THE PRESIDENT: I think we get that point.

MS DEMETRIOU: I will now address the points made in Daimler's skeleton argument. We see that they claim that - does the Tribunal have the skeleton argument there, because I think it

may be best to do it by reference to their skeleton argument? The relevant passage starts on page 13 of Daimler's skeleton, and you will see a heading "The useful purposes", and three are identified, and I would like to address them in turn, if I may. The first purpose that is put forward, and that is at paragraphs 41 and following, is that the useful purpose would be to show that Daimler is not liable for the damage to the Wolseley claimants. You can see the point that Daimler is seeking to make at paragraphs 44 and 45 over the page. They say that in the contribution claims a key issue would be whether Daimler is liable for the same damage. The first set of declarations would serve the useful purpose of establishing that. The short, and we say compelling answer to that is that that very issue will be determined in the contribution proceedings, and so no purpose whatsoever would be served by having a separate declaration against the Wolseley claimants. We know that Daimler is permitted to participate in the main action as well, and so it can make its points in that context too.

Going back to the seventh of Lord Justice Aikens' points, there are obviously other options in terms of determining this issue, whether Daimler is liable for the damage, and the other options are the contribution proceedings in which the claim has been made against Daimler fully and squarely. You see from its defence to the contribution proceedings that it has engaged fully with the question of liability in the particulars of claim. So that point will be determined in the contribution proceedings. That is obviously the most appropriate forum or process by which to determine the point.

Daimler seeks to address that at paragraph 47 of its skeleton argument by saying that the obvious persons against - they say, were Daimler only to participate in the contribution proceedings, there would be no route for Daimler to establish directly against the Wolseley claimants that Daimler has no liability to them. The obvious persons against whom to seek to establish these findings are the Wolseley claimants themselves, not the main defendants. We say to that, it is not correct to say that the obvious persons against whom to establish Daimler's liability are the Wolseley claimants. They are not the obvious persons at all, because the Wolseley claimants have not sued Daimler. They have got no interest. The Wolseley claimants have absolutely no interest in whether Daimler is liable for the loss. It has sued other defendants on a joint and several basis. The only context in which this point needs to be determined is in the contribution proceedings. It will be determined in those proceedings, and so this declaration adds nothing at all.

At paragraph 48 of their skeleton argument they seem to be saying - Daimler seems to be saying - that a declaration would bring the contribution proceedings to an end. They say it would be conclusive in the contribution claims. The only way in which one can make sense

of this paragraph - what seems to be underlying it is some kind of suggestion that the additional claim against the Wolseley claimants might be determined in advance of the contribution proceedings. If it is going to be determined at the same time as the contribution proceedings it is obviously pointless, and so they must be positing that temporarily it is going to be decided in advance of the contribution proceedings.

We say that that cannot happen for three reasons, and the three reasons are these: first, because the Tribunal has already ordered that the contribution proceedings are to be case managed alongside the main claim; secondly, because, as I showed the Tribunal at the outset, Daimler's additional claim is incapable of simply being extracted and determined in advance of the main claim and the contribution claim. It is parasitic on those claims. Daimler has advanced no positive allegations in support of the relief it sought. The declarations for negative relief that they seek simply depend on the Wolseley claimants not being able to prove their main claim. So the idea that it can be decided in advance of the main claim is nonsensical. If this claim, if this additional claim, were to be decided first, then it would need to be properly pleaded by advancing a positive factual basis for the claim. The Wolseley claimants would need to plead a defence and Daimler would have to lead with its own evidence. So the whole process would have to be reversed.

THE PRESIDENT: I did not get the impression that they are suggesting that it should be determined in advance of the main claim.

MS DEMETRIOU: Sir, if that is correct, then my task is even easier, because if they are not suggesting that, and what they are suggesting is that it is to be decided at the same time as the contribution proceedings, then it is absolutely crystal clear.

THE PRESIDENT: To be decided, no, at the same time as the main claim.

MS DEMETRIOU: As the main claim?

THE PRESIDENT: Not in advance of the main claim, but together with the main claim.

MS DEMETRIOU: To that we say that it is highly unlikely. If the position is that for some reason the contribution proceedings - at the moment it appears likely that the contribution proceedings and the main claim will be decided at the same time, although the Tribunal has not yet formally ruled on that. You have said that they are to be case managed, but because of the Scania issue there is a point to be determined in relation to that.

We say that it would be very, very odd for this additional claim to be decided in advance of the contribution proceedings, whether alongside the main claim or not - let us assume alongside the main claim - in circumstances where DAF and Iveco have brought a claim

against Daimler. It would be very odd to have a trial which determines that contribution claim in which DAF and Iveco are not participating. That would be very odd.

THE PRESIDENT: If it is decided together with the main claim then they would be----

MS DEMETRIOU: If it is decided together with the main claim, on that hypothesis then it would be. So they would be participating.

MR MALEK: No one is suggesting that it should be tried in advance, are they?

MS DEMETRIOU: If that is not what they are suggesting, then we say that our task is easier. If it is to be tried alongside the main claim it serves no purpose because the Tribunal has already ruled that they can make whatever points they want in the main claim. So they can advance arguments on overcharge and compound interest or causation in the main claim. To say that they need an additional claim for negative relief at the same time, we say it simply serves no useful purpose. The issue has been raised in the contribution proceedings. If there is any difficulty with that, if the concern is that this main claim may go ahead in advance of the contribution proceedings, a Tribunal has already ruled that Daimler can participate in the main claim. So we say this additional claim serves no purpose at all, no useful purpose at all.

THE PRESIDENT: Just a pause a moment. If we look at factually what the relief being sought is in the declarations which are in the defence you took us to earlier, tab 13, page 24, the declaration of course is seeking a number of things. If one looks at paragraph 83:

> "… Daimler is entitled to declarations against the Claimants (and each of them) that (i) the Defendants or any of them are not liable to the Claimants for the alleged loss and damage claimed …"

That will be decided in the main claim, that is what it is.

MS DEMETRIOU: Yes.

THE PRESIDENT: And (iii) the Admitted Conduct has not caused the claimants the alleged loss and damage also will be decided in the main claim. I am not sure that (ii), Daimler is not liable, would be decided in the main claim, because the main claim is not against Daimler.

MS DEMETRIOU: Sir, it would be decided, would it not, in practice, because if the admitted conduct, or any other alleged unlawful behaviour, has not caused loss there would be no loss for which Daimler is liable, because they are all liable to the same loss on a joint and several basis.

What the Tribunal has done, and bear in mind that none of the other Part 20 defendants have sought to run an additional claim, it has listened to the arguments of the Part 20 defendants who want to play a part in the main proceedings because, of course, they say, "It affects us

because there are these contribution claims against us", and they are being permitted to play a part. We had a debate at the last CMC as to whether or not they have to share an expert, or whatever.

THE PRESIDENT: Yes.

MS DEMETRIOU: Of course, in practice, what they will be doing is arguing no doubt that there is no overcharge, and so on and so forth, and what that will mean if they are right is that there is no liability at all for anyone.

THE PRESIDENT: What you say is that, although formally point (ii) is not being decided in the main claim because it is not about the liability of Daimler, because of the nature of the main claim, namely a follow on claim from joint and several liability, in effect it will be.

MS DEMETRIOU: Yes, exactly, and that Daimler----

THE PRESIDENT: It would not always be for a Part 20 defendant, but in this case----

MS DEMETRIOU: In this case it will be, and Daimler, moreover, has been permitted by the Tribunal to participate in the main claim.

THE PRESIDENT: Yes, we have got that point.

MR JUSTICE HILDYARD: But you said that it is unarguable that the court would ultimately determine that they should be entitled to a punch line to their participation?

MS DEMETRIOU: Yes, we say that it is unarguable because negative declaratory relief is an unusual remedy - the court has seen that - and it has to be scrutinised carefully, the question really is, will this serve any useful purpose? We say that this is not a useful purpose. It will not serve a useful purpose. The court has to be very cautious because my clients, the claimants, have chosen not to sue these particular defendants. That has to be given weight. Really, unless there is a particular reason, a particular purpose, for permitting this claim to proceed, it would be wrong to draw my clients into this additional further procedural complication.

MR JUSTICE HILDYARD: But they already are because of the participation already directed, and the only question is whether there should be a punch line, and the further question is, given that it is a pragmatic and discretionary approach, is it absolutely inconceivable that we might not at some future time grant the punch line? That is what it comes to, is it not? On this line of your argument, you have to say that it is inconceivable----

MS DEMETRIOU: Sir, I am not sure that I would accept that it is high as inconceivable. They have to show that there is a real prospect that the court would grant the declaration.

MR JUSTICE HILDYARD: No, because this is a summary----

MS DEMETRIOU: And so the test is real prospect. I do not have to show that it is absolutely inconceivable.

MR JUSTICE HILDYARD: Ultimately there is a prospect.

MS DEMETRIOU: Sir, I do submit that we do not have to go so far as to show that it is absolutely inconceivable. We just have to show that there is no real prospect that the court would grant this declaration. I accept that. We do say there is no real prospect because they have not identified a useful purpose.

Sir, Mr Jones makes the point that, of course, in the main claim the points of liability would be decided in a way obviously, given the Tribunal's ruling that the additional defendants can participate, which was binding for the contribution proceedings. So it is inconceivable that the Tribunal would conduct a trial of the main action in which all the Part 20 defendants participated and then made a ruling which left the point open in the contribution claim. That is why we say this declaration, this declaratory relief, simply does not serve a useful purpose.

Sir, I want to reiterate, this is not an arid point that we are taking, because these are already, as the Tribunal knows, very complicated proceedings. There are lots of parties, there are a number of these Part 20 claims, and, as I have explained, we are being faced now with a positive claim against us which reverses the normal rules of litigation and in which we, my clients, would be the defendants. Our position is that if this is allowed to go ahead, we are not in a position simply to plead to the claim as put, because it is defective, no positive allegations have been made. They would have to re-plead it. They cannot have it both ways. They cannot simply seek to piggy-back in a pleading sense on the main claim and say, "Aha, we get our negative declaratory relief". It has to be a proper claim which could stand by itself, and it cannot. So what one would have to have is a process by which they amend their additional claim and put forward positive allegations for why they say they are not liable, because at the moment they are simply relying on non-admissions.

The rules, as the courts have recognised, as the courts say in all of these cases about negative declaratory relief, the normal rules of litigation are reversed, and so the onus would be on them to prove all of this. So there would be the not inconsiderable procedural complication of reversing the burden of proof, and so they would have to lead with evidence and us respond. To say that this is necessary in the context of an already complicated proceedings, a court would not conceivably say that this is a purpose which actually has any meaning.

MR JUSTICE HILDYARD: Do you say that their present pleading is deficient for the purpose of the participation which the Tribunal has already sanctioned?

MS DEMETRIOU: You mean the present pleading, absent the additional claim, yes, I do.

MR JUSTICE HILDYARD: As the pleadings are presently constructed, and given the CMC direction of participation, do you say that the present pleading is not a sufficient hook on which to hang their argument?

MS DEMETRIOU: I say that it is insufficient to hang the arguments of an additional claim. When one is looking at whether the additional claim is a proper claim to make, it has to be a proper self-standing claim. You cannot make a claim which is parasitic on non-admissions. What do we plead to? What they are doing is seeking essentially to preserve the status quo of the Tribunal's order, which is participation in the main claim, but then they are asking for declaratory relief on top of it, and we simply say this declaratory relief serves no purpose.

MR JUSTICE HILDYARD: Supposing their declaratory relief is properly due simply as the means of expressing the consequences, in the view of the Tribunal, of their participation. It is the means of delivering the punch line. What is the result? Why is that useless?

MS DEMETRIOU: Sir, we say that that is not a proper claim. The courts have all recognised that if you are seeking negative declaratory relief you are the claimant, you have got to establish something.

I turn, Sir, your question the other way round, and say that what this demonstrates, the fact that this is a simple bolt-on to the remainder of their pleading simply demonstrates that in reality there is no proper additional claim here. They are simply trying to piggy-back on the proceedings and seek a declaration at the end. We say that is not a proper way to seek a declaration. If you are bringing proceedings to seek a declaration against a defendant you need to prove your case. You cannot simply say these are the proceedings, and we are going to seek a declaration at the end of it, you have to properly plead your case and give us something to respond to. What they are trying to do is bolt it all on, and we say that is not a proper way to proceed, and moreover it does not serve any purpose.

So, Sir, the key point is that the issue at the moment is the Wolseley claimants have not sued Daimler, so there is no issue as to Daimler's formal liability to the Wolseley claimants. At the moment, that only needs to be determined in the contribution proceedings. That is the proper place to determine it. If the main claim is heard in advance of the contribution proceedings, which is not something the Tribunal is currently anticipating, but if it is heard in advance of the contribution proceedings then Daimler will have a chance to participate, will be able to participate pursuant to the order.

THE PRESIDENT: You said that, in fact, that follows as night follows day from liability or non-liability of the other cartelists you have sued because of joint and several liability. If they are liable, Daimler is liable, and if they are not liable then Daimler is not liable.

MS DEMETRIOU: That is correct.

THE PRESIDENT: So going back to Mr Justice Hildyard's point, if you fail against the defendants you have sued, there may be no purpose in the declarations sought at (i) and (iii) because that would be the decision, but the declaration at (ii) is just giving effect to the outcome of the trial as regards Daimler?

MS DEMETRIOU: Sir, one can test it this way: I do not anticipate that the Tribunal is going to be making any declarations at all in the main action. There will be a hearing.

THE PRESIDENT: If it dismisses the claim and finds that your claim fails, then that is effectively saying that the defendants are not liable to you.

MS DEMETRIOU: Sir, yes, exactly. So my point is that given that the Tribunal, when dismissing the claim, finds that effectively there is no liability of any of the defendants or Part 20 defendants to us, then there would be no need to make a declaration.

THE PRESIDENT: I understand the 'no useful purpose' point.

MS DEMETRIOU: Yes, well, that is the point I am making.

THE PRESIDENT: I thought you were running a separate point, namely that this is improper because it is based on non-admissions.

MS DEMETRIOU: No, that is a separate point.

THE PRESIDENT: I do not quite follow that one, because, as Mr Justice Hildyard is saying, it is just actually relating to the outcome of the trial. It is not doing any more.

MS DEMETRIOU: Sir, I can only reiterate what I said, which is that if one is bringing a claim for negative declaratory relief then one must assess that claim in its own right. At the moment, there is no properly pleaded claim against us. Sir, the key point is the one that you say that I just reiterated which you say you understand which is that there is no purpose. If the Tribunal finds against us at the trial, it would not ordinarily be in the business of making any declarations at all, so the idea that it would have to make a declaration of non-liability, we say that such a declaration would not serve any useful purpose. The Tribunal will know that in many proceedings there is a debate following a hearing, particularly in public law proceedings, as to whether a declaration is necessary at all, given the terms of the court's judgment.

THE PRESIDENT: Yes.

MR JUSTICE HILDYARD: There could be a purpose, could there not, because it would crystallise the event for the purposes of appeals of otherwise. Otherwise the participation is *ad hoc*, and there is nothing to hang it on, and the result would be clear, but would it be crystallised?

MS DEMETRIOU: Sir, it would then be crystallised in the contribution proceedings, because that is the place in which the point is being advanced. So it would crystallise in the contribution proceedings. Of course, what we say is that the likelihood is the contribution proceedings will be heard at the same time as the main claim, but if they are not then the Tribunal would obviously, given the participation of the Part 20 defendants, decide the case in a way which applied to the contribution proceedings. So formally there would be a finding in the contribution proceedings one way or the other as to Daimler's liability. Sir, that is why we say there is no need to have any crystallisation in a separate additional claim of this liability, that the issue is raised squarely in the contribution claims and it would be determined in that claim.

THE PRESIDENT: If the main claim failed, the contribution proceedings will fall away.

MS DEMETRIOU: That is right, but then there will be no question of liability, no need to make a declaration at all, so you come back to my earlier point.

Sir, that is what I wanted to say about the first purpose.

The second purpose is the settlement purpose, and that is set out at paragraph 51 and following. It is important to look carefully here at what Daimler are saying. The starting point is section 1(4) of the Contribution Act which is set out materially in their skeleton argument at paragraph 52, and this applies where a defendant settles with a claimant - so here the hypothesis would be DAF, for example, settled with us - and is pursuing a contribution claim here against Daimler, and in effect it imposes a statutory presumption that the defendant, i.e. DAF, was liable to the claimant, i.e. us, so that DAF would not have to prove it in the contribution proceedings. You see at paragraph 53 of their skeleton argument Daimler observes and refers to the *Newson* case that the effect of section 1(4) is to restrict the extent to which a D2, such as Daimler, to a contribution claim, following a *bona fide* settlement entered into by a D1 such as DAF and Iveco can argue in the contribution proceedings after that settlement has been reached that it, D2, was not liable to the claimant for that same damage because D1 was not so liable. That is a correct summary of what section 1(4) says.

It appears from paragraphs 55 and 56 that Daimler sees the purpose of its negative declarations as being to remove this restriction. You see at 55, unless D2 brings its own

claim, etc, etc. In other words, Daimler seems to be saying that the purpose of its declaration would be to enable Daimler, in the event that DAF –for example –or Iveco settles with my clients, to argue in the contribution claim that DAF was not liable to the Wolseley claimants. That seems to be what they are saying. So they have identified the restriction in section 1(4), and they have said absent our additional claim for declaratory relief, that would restrict us in the contribution proceedings from trying to show that DAF was not liable to the claimants.

We say that that argument is wrong because it would be precluded by section 1(4) - the very purpose of section 1(4) is to prevent the liability of DAF, of D1, being reopened regardless. It would be precluded regardless of whether Daimler brings its additional claim. So if the additional claim can go forward and if DAF settles, it would not be open to Daimler in the contribution proceedings to say, "Oh, well, because of our additional claim, we can show that you, DAF, were not liable to the claimants in the first place". If that were permitted that would simply emasculate section 1(4), so every contribution defendant would be able to bring an additional claim and say, "The statutory presumption in section 1(4) is now nullified because of this procedural tactic."

MR JUSTICE HILDYARD: You say it is a presumption that cannot be countered?

MS DEMETRIOU: It is a presumption that cannot be countered. It is very clear what its purpose is, and it is very clear in its terms. It is saying in contribution proceedings there is a statutory presumption, it is presumed as a matter of statute, there is no exception to this so it is presumed. There is a proviso, but that does not apply in this case. It is presumed, as a matter of necessity that D1 is liable. What you cannot do is say, "That is a bit inconvenient, because we might in our contribution proceedings wish to reopen that whole issue, and we are going to do it by serving this additional claim". We say that simply would be improper because that would be depriving section 1(4) of its effect. It simply would not be possible, because let us say the additional claim happened in advance of the contribution proceedings, they would still be stuck with section 1(4) in the contribution proceedings. That is why we say that does not work.

THE PRESIDENT: They say in the letter, in the paragraph dealing with this - they put it more narrowly - it is the only way of showing that the settlement was not *bona fide*.

MS DEMETRIOU: They dropped that. Did they not drop that in later correspondence?

THE PRESIDENT: I do not think that is in their skeleton.

MS DEMETRIOU: No, and they dropped it in later correspondence.

THE PRESIDENT: I see.

MS DEMETRIOU: If that is resuscitated I will address it in reply, but they have dropped that. It may be that that is not what Daimler are arguing, and so I just want to countenance this possibility: it may be that what Daimler is saying is that the effect of section 1(4) is to preclude it, Daimler, from arguing in the contribution proceedings that it, Daimler, is not liable for the loss. We say that that is not the effect----

MR MALEK: I do not think they are suggesting that.

MS DEMETRIOU: Sir, they are not suggesting that. I am not going to deal with that. It was just a little bit unclear from their skeleton argument because one of their descriptions of the *IMI* case seemed a little bit broad. *IMI*, of course, is concerned specifically - the *Newson* case is concerned explicitly with the limitation defence, which is a different position. Where you have a limitation defence, section 1(3) of the Contribution Act bites, and what that says is that D2 cannot generally argue limitation.

THE PRESIDENT: We have got the Act somewhere in the bundles, perhaps we should look at it.

MS DEMETRIOU: It is volume 4, tab 52. Section 1(3) concerns limitation, and it is directed to the litigant in the position of D2, so in this case in the Daimler position. What it says is:

> "A person shall be liable to make contribution … notwithstanding that he has ceased to be liable in respect of the damage in question since the time when the damage occurred …"

Then there is a proviso. Sir, what it effectively means, and this was the issue in *Newson*, is that D2 cannot run a limitation defence itself because of section 1(3). Then, because of section 1(4), it also cannot say that the main claim against D1 was time barred. That was the issue in *Newson*. The point I wish to make is that outside - that is the effect of the statute, so there is no getting around that. You cannot get around that by issuing an additional claim.

In so far as a person in D2's position, which is to run other defences, so, for example, there is no overcharge or any of that business, then they can do that in the contribution proceedings. There is no bar in the Contribution Act or in *Newson* to that taking place.

So what that means essentially is that this purported purpose that is served by the negative declaration as being some way of mitigating the effects of section 1(4), we say that is just not a good argument, because section 1(4) is a compulsory provision, and you cannot just circumvent it by issuing an additional claim.

There is some suggestion in paragraph 58, and again later on at paragraph 63, that there may be some procedural advantage in the additional claim, and I think what is said is that this will keep the claimants in the litigation if there has been a settlement. To that we say, that

is not good enough because the question that the cases require the Tribunal to address is whether the declaration would serve a useful purpose, not whether there might be some process leading to the declaration which is advantageous to one of the parties. There is no basis here in which it can be said that the declaration is advantageous.

The third purpose advanced by Daimler, which is at the bottom of page 18, so that is effective case management and interests of justice. Essentially I have just given you the answer to that. You cannot say the process leading to the declaration confers some procedural advantages, because that is not the question that the cases require the Tribunal to answer. There is nothing here which identifies a purpose served by making the declaration itself. In any event, we would say that if it were the case that the main claim had settled and the contribution proceedings were afoot and Daimler wanted to advance all of its arguments on overcharge, and so on, there are procedural case management powers that the court has which can facilitate that process. There is no need for an additional claim to be made in order to draw the claimants into the process. Do not forget that on that scenario the onus would be on DAF, so Daimler would be in a relatively comfortable position because the onus would be on DAF to show that Daimler were liable.

THE PRESIDENT: When you say the overcharge, does that come within the factual basis within section 1(4) or not?

MS DEMETRIOU: No, because we are talking about D2's liability.

THE PRESIDENT: D2's liability is joint and several in this case.

MS DEMETRIOU: Yes, but 1(4) only precludes Daimler from reopening D1's liability. It is a formal provision which is designed to prevent D1 having to be in a position of showing that the claimant was correct, and it is to facilitate settlement. There is nothing in section 1(4) which would preclude Daimler from arguing that it is not liable, including because there is no overcharge. It could argue that in a contribution claim.

THE PRESIDENT: But D1's liability is based on the overcharge, is it not?

MS DEMETRIOU: That is correct, but that does not matter because the purpose of section 1(4) is to preclude having to argue that it was liable, but there is no obstacle in section 1(4) to D2 raising all these defences, all sorts of defences, other than limitation which is problematic because of section 1(3).

THE PRESIDENT: I am slightly lost. It can raise a defence that it is not liable?

MS DEMETRIOU: Yes.

THE PRESIDENT: That there is not joint and several liability, for example?

MS DEMETRIOU: Even if there is, we say. We say that----

THE PRESIDENT: If there is joint and several liability, then the liability of the first defendant for an overcharge just leads to the liability of the Part 20 defendant, does it not?

MS DEMETRIOU: Sir, on this hypothesis there has been a settlement and so the point has never been determined by a court, so there is no judgment as to whether or not there is joint and several liability. That is the hypothesis on which section 1(4) operates.

THE PRESIDENT: Yes, and then you assume the factual basis of the claim against D1 could be established, do you not?

MS DEMETRIOU: As against D1, yes.

THE PRESIDENT: Yes, and that includes the overcharges, does it not, the actual basis of the claim against D1.

MS DEMETRIOU: We would say that formally what it does is it prevents D1 having to establish that it was liable. That is the formal position.

THE PRESIDENT: Yes, and it could only be liable if there was an overcharge, otherwise nothing to be liable for.

MS DEMETRIOU: Sir, yes, formally that is correct, but we say that there is nothing in the case law which says that that prevents D2 from then arguing those points as a matter of its own liability.

MR JUSTICE HILDYARD: Its liability follows from the concluded issue.

MS DEMETRIOU: Well, Sir, that would be a broader reading of section 1(4) than has so far been the case. Certainly there is nothing in *Newson* that establishes that, because that only relates to----

THE PRESIDENT: That is a legal defence, but the factual basis of the claim against D1 is there was a cartel, it had an effect on prices, and it led to an overcharge of £X, hence the damages. That is all the factual basis. The legal basis is that they were responsible - it is part of the legal basis - for the cartel, and the cartel creates civil liability. That is unlikely to be much of an issue. It is going to be very much questions presumably of causation and pass-on, and all the rest of it. Those are all factual questions, are they not?

MS DEMETRIOU: Sir, can we just turn up section 1(4), you probably have it in front of you?

THE PRESIDENT: Yes, we are looking at it.

MS DEMETRIOU: In my submission, the way it works is this: the presumption is that the person, D1, who has made a *bona fide* settlement can recover contribution without regard, these are the important words:

> "… without regard to whether or not he himself is or ever was liable in respect of the damage …"

So the court is not making, nobody is making any factual assumptions one way or the other. So those words, "without regard", I emphasise. Nobody is in the business at this stage of determining what the truth of the matter is. There is a proviso, and the proviso bites where formally the particulars of claim were not apt to give rise to the liability. You are saying that the court has to assume that the facts are made out, but the purpose of the proviso is that it kicks in if, in fact, the claim on its face is defective. So, in fact, if those facts were proven at trial, then no liability would arise. So it is a proviso which----

MR JUSTICE HILDYARD: So what you are saying is that if you enter into a settlement and the defendant agrees to pay you damages, but the defendant itself would have to still prove that Daimler was party to the cartel in order to recover contribution?

MS DEMETRIOU: Yes.

THE PRESIDENT: I thought you were saying also that the defendant would have to prove that the cartel resulted in an overcharge in the contribution proceedings, but I thought that is what the assumption is in the proviso. Reading the justification in the Law Commission Report - we have all read the *Newson* judgment - is that it avoids the defendant having to, as it were, call evidence in the contribution claim which really would come from the claimant, who is not there.

MS DEMETRIOU: Sir, yes, but can I make two points: the first point is the one I was just seeking to make which is that on the face of the language of section 1(4) there is never any conclusion. As I say, the proviso is limited, so it is not requiring the court to assume facts in a particular favour, it is just dealing with the issue of a defective pleading on its face. So that is the first point I make.

THE PRESIDENT: Just a second, it is just dealing with the issue of a defective pleading.

MS DEMETRIOU: Yes, let me just elaborate a little bit more. What section 1(4) does is permit D1, who has entered into a *bona fide* settlement, to recover contribution without regard - and I emphasise those words, "without regard" - to whether or not he, himself is liable, provided that, on its face, the pleading, if made out - if it had been made out at trial - establishes liability. So if there is some kind of defect on the pleading, such that even if all the facts in it are assumed to be true, it does not give rise to the liability, then the proviso kicks in. What it does not do is say that those facts are established for the purposes of the contribution claim.

Then the second point that I seek to make, which is an overriding point, in my submission - let us say what the Tribunal is putting to me and what Mr Harris says is correct - let us say that section 1(4) would preclude these arguments to be run in a contribution claim, that is

the effect of section 1(4), and it would be emasculated if defendants to contribution claims could suddenly say, "Well, we do not like section 1(4), we are going to issue an additional claim against the claimant to circumvent these provisions". Ultimately, my submission is that section 1(4) says what it says. There may be a dispute about it, but even if it is to be read very broadly, as Mr Harris no doubt will seek to argue and as the Tribunal is putting to me, it would be entirely wrong for the Tribunal to permit this additional claim in order to circumvent its provisions, because those are compulsory provisions. So to then turn round and say, "We have issued this additional claim, section 1(4) does not apply", we say simply does not work. It is simply wrong.

MR JUSTICE HILDYARD: I follow that argument, but if, by settlement, the measure of D1's liability is established, and there is no defect in the pleadings, that is conclusive, is it not, by virtue of the provision?

MS DEMETRIOU: No, Sir, it is not conclusive, but we say in this - we do not agree that it is conclusive, because there are separate contribution proceedings. For the purposes of this claim the Tribunal has ordered, as a matter of case management, that D2s are to participate in the main trial. What I say about that is that no doubt what the Tribunal will do is rule on liability in the main action in a way which is conclusive for the contribution proceedings, but it does not follow, in my submission, from section 1(4) that that is so.

THE PRESIDENT: Just a moment. (The Tribunal conferred) Yes?

MS DEMETRIOU: Sir, subject to anything else the Tribunal wants to put to me, that is all I wanted to say about useful purpose. We say that that really disposes of the useful purposes advanced, or the purposes advanced by Daimler. These declarations would serve no useful purpose on any scenario, and there is no reasonable prospect that the court would make them, and all they would do is complicate what are already very complicated proceedings.

I do not know if the Tribunal wants me to deal briefly with the issue point?

THE PRESIDENT: By the issue point, you mean the issue of the claim?

MS DEMETRIOU: The CPR.

THE PRESIDENT: The CPR point, yes. No, I do not think so. Thank you very much.

Yes, Mr Harris?

MR. HARRIS: Good morning, members of the Tribunal. I also will not deal with any of the technical CPR points unless at any stage invited to do so, so I will skip straight to the substance, whether or not there are any useful purposes. Very, very briefly, I would just remind the Tribunal that, of course, there is a very high hurdle here on a summary judgment

or strike out - I do not propose to go into the skeletons or turn up the cases, you are familiar with that - but we respectfully adopt essentially the stance of Mr Justice Hildyard, which is that my learned friend faces the difficulty of having to establish here today that it is - you used the term "inconceivable", and that is essentially right. It is bound to fail - that is what the cases say - and what is more, bound to fail as determined now by this Tribunal, no matter what happens in this litigation going forward, including as regarding settlement, including as regarding the ability of main defendants to fight, or their wherewithal or actually how they fight and what they choose to focus on, you would be having to decide now - and another thing you would have to include is where the disclosure comes from and who has got witnesses going to what issue - that it is inconceivable, it is bound to fail, I have no prospect at any stage, even years down the line, of any part of these declarations being of any use. What is more, a point I will come back to later on, any use to who? They do not have to be of use to my learned friend obviously. Her entire stance has been, "Essentially they do not do me and my clients any good". That is very interesting, but I am not really, frankly, that interested. I am interested in whether or not they serve a useful purpose to my clients, and they manifestly do, as I shall go on to develop.

In the same way they manifest useful purposes to my client, at least in certain respects they manifest useful purposes to this Tribunal that has to hear them. One of the underlying purposes is to make sure that all relevant disputes between relevant parties get decided directly between those relevant parties at the same time. Therefore, while that is of use to me, it is also of use to the Tribunal. I will develop that. It is of literally no relevance that Ms Demetriou does not want them, or thinks that for her clients they are not of any useful purpose. So that is an opening remark.

Again, I am not going to go back to *Sabena*, but by way of opening remark I will just remind you about a passage that, to be fair to my learned friend, she did read out, there should be "no reluctance to grant them", that is to say negative declarations, "when it is useful to do so". So there is no *in terrorem,* or this is unorthodox, or untraditional, or anything like that. That may have been the case decades ago, but negative declarations, I see them all the time. I have no doubt members of this Tribunal do, and the question is, are they useful?

Now, Daimler, of course, has good substantive reasons for having done what we have done. I would just like to remind you briefly of the context. This is a very large claim brought by the Wolseley claimants, but only against two OEMs, manufacturers, and they are seeking to establish by their claim joint and several liability for all of the truck sales to that group of

claimants, no matter who the claimants purchased from. They have only chosen to sue two OEMs, and that gives rise to obvious problems when you have got a joint and several liability case of a cartel for, say, five or six people, and you only go for two of them. The problems arise from the fact that we have quite obviously a lot, if I can put it colloquially, of 'skin in the game'. You will have seen the figures. Although we are not sued, we are only, by a small margin, the second largest truck manufacturer whose trucks are in issue. It is something a little over 2,000 of our trucks, and that is only marginally behind DAF, which is of course a UK manufacturer and these are UK claimants. We are significantly ahead of the rest, including Iveco who are being sued, it seems for anchor defendant purposes. They have got far fewer trucks, etc, etc. So we have got a significant interest, and it has----

THE PRESIDENT: Some of the other Part 20 defendants also have significant, not quite as many as you, but not insignificant----

MR. HARRIS: Accepted.

MR MALEK: Are you saying that what you could do, as a claimant, is look at five members of the cartel, you decide which is likely, bluntly, to have the smallest pocket, sue them alone, in order to drag everyone else in without having to----

MR. HARRIS: Yes, Mr Malek, exactly, for purely tactical purposes.

MR MALEK: I am not saying that has happened here obviously.

MR. HARRIS: No, I am not saying that has happened here, but you have to decide this on the question of principle, and one of the points that I am going to come on to is my learned friend seeks to suggest that, "Oh, well, essentially, you, Daimler, the Part 20 defendant, you can essentially rely upon the main defendants to get you off the hook, because they will be defending in their own right in the main proceedings". One of the many reasons why, as a matter of principle, this application should be rejected is that there could easily be exactly the situation, Mr Malek, that you have just posited. You only sue one, they do not have the budget, they do not have the wherewithal, they do not have the right resources, and/or they might not, after six months, 12 months or 24 months, but there are a whole host of associated reasons.

Let me give you some very real world examples. It might be that the main defendants do not have the interest in defending in the same way that we do. Let us say they only sell ten trucks, and they have been picked because they are an anchor defendant, or just because you only have to pick one on the joint and several basis. Realistically, they are going to know that come the apportionment stage they are not going to be paying very much. Leaving

aside exactly how you would apportion, the traditional and orthodox basis is share of sale. So let us say you only have ten trucks out of 10,000 trucks, you know that, ultimately, you are not going to be paying very much. That would impact upon your incentives, and indeed your willingness and ability to defend the main claim, you are only a small fry.

Let me give you another example, and this does arise on the facts of this case. It could be that you, as the main defendant, are not properly in a position to defend all aspects of the claim. Take this case. The claimants are pursuing sales of trucks made in Ireland, to some of the claimants, but they are only Daimler trucks, not a single other defendant, DAF or Iveco, or, for that matter, even a contribution defendant. So in those circumstances it may be that either there is no particular willingness to defend those and no particular wherewithal in this sense, that they do not have the knowledge or the information, they may not know anything about that particular market, they may not have documents, and/or they may think, "Hang on a minute, there is only a handful of trucks in relative terms in Ireland, and none of them ours, we are not going to spend a lot of effort on that, because when it comes to the apportionment I am not going to be paying for them probably anyway".

THE PRESIDENT: I can see all that as a powerful reason why you should be allowed to participate in the trial, in the main trial, and call evidence. If one of the two defendants, which, as you recognise here, are well resourced companies, say, "We are not going to bother defending about Ireland, and calling evidence about Ireland", you, Daimler, will be there and you will be able to run the argument on Ireland, so you are not exposed to that risk.

MR. HARRIS: What I am going to do as I develop these submissions is take you to the Act and show you what we say is our entitlement to establish that we do not have any liability for the same damage. I have not quite reached that point yet, but I say that is an entitlement. It comes back to one of the points that, with respect, Sir, you put to my learned friend on the question of procedure, which is, "I have that entitlement and if I wanted to I could go to the High Court and issue a claim", subject to the usefulness point, wholly irrespective of these proceedings, of these ones that have existed and been transferred and just say, "Right, I am now issuing a claim because I want to establish that I have no liability".

When we come to the Act again this will become clearer, because it is quite a difficult set of provisions, but the basic point now is under 1(1), I do not pay any money to anybody, whether by contribution or otherwise, if I am not liable, if Daimler is not liable for the same damage. I will come back to that, but that is essentially the answer.

Before I just turn to the Act I want to again put to bed some of the, if you look, spoken or unspoken myths here. It is because we have so much skin in the game that we were always going to have to participate in a real and meaningful and substantial sense in this case. It is because we have got so much skin in the game that we have obviously got a very real interest. From our perspective, there is obviously a useful purpose in making it clear, including what my Lord, Mr Justice Hildyard said, by the punch line, that that has been established, that we have no liability. That is the purpose of the declarations, and I entirely accept what you have said, if I may respectfully put it like this, Sir, when you say, "It is just the outcome of what happens after you have participated in the hearing". We entirely agree. The declarations, which I shall come to later, they take, if you like, the - they crystallise, to use another phrase that you used that I respectfully adopt, including for appeal purposes, or including for any purposes, the fact that the same liability has not been established against my clients.

Another myth here is a lot of the negative declaration cases where scepticism has been expressed, and quite rightly so in those cases, is where there is what is called an 'unwilling' defendant, and you are dragging somebody into the litigation who is somehow a stranger to the litigation where there is no real dispute and/or no real potential dispute. Of course, we could not be further from that situation ourselves. This is an actual dispute brought, and what I am trying to do is get a negative declaration against somebody who is by no means a stranger to the litigation. Not only are they not a stranger to the litigation, but they are a non-stranger to the litigation who is actively suing in respect of trucks for which my client will have some or all of the final underlying liability.

So we could not be further from one of those unwilling defendant or stranger cases. Quite the opposite, this is an obvious situation in which we have pressing interests because of the amount of trucks in issue and the joint and several liability.

Then again, this is not a case in which, for example, there is a torpedo or an attempt to mess around, if I can put it like that, with case management, to stymie things, to slow things down, to introduce unnecessary procedural impediments or hurdles. This is not that case. Some of those negative declaration cases are like that, but this not that case. To the contrary, as I am going to go on to explain, we want this counterclaim in position precisely so that we can have directly in issue between the parties who are most germane to the dispute the question of whether or not Daimler has any liability to them. In the contribution proceedings that does not arise in a direct sense, and indeed cannot arise in a direct sense. In the contribution proceedings there is no direct avenue by which we, Daimler, as a Part 20

defendant, can turn directly to the C who is essentially suing in respect of our trucks and saying that we are liable, albeit I accept via the main defendant. There is no avenue. The only avenue by which we can turn to the main C is directly.

THE PRESIDENT: In a sense, whose trucks they are, is it not a bit irrelevant in a case of joint and several liability? If the two defendants are not liable then you have got nothing to worry about. Is that not right? You are not being sued and there will be no contribution.

MR. HARRIS: That is right in this sense: if in the main claim against DAF and Iveco that were to fail completely, in every single respect, then the contribution claim falls away even if, including some of the practical reasons that I have given - wherewithal, incentive, etc - they may not do so as effectively as us, in the sense that we have got the direct interest and the evidence and the documentation and data to prove the non-liability as regards at least a substantial part of the claim involving our trucks. There is another reason----

THE PRESIDENT: But you will be doing that - I thought you were making a different point, that there will not be any conclusive determination of your liability to the claimant.

MR. HARRIS: That is right.

THE PRESIDENT: But there will be a conclusive determination, which you can fully assist and participate in, of the defendants' liabilities to the claimant?

MR. HARRIS: I accept that as regards the D1s.

THE PRESIDENT: As regards the D1s, and if the D1s are not liable then you have achieved everything you need to achieve. There is no further purpose you need to achieve, is there?

MR. HARRIS: That is right, but only if and in so far as the D1s succeed in defeating the entirety of the claim. It may be that they will not. This is not a binary question.

THE PRESIDENT: They may not - with your participation which you have they may not. This is not a case where, if they are to some extent liable, then you are not liable to the claimant because there is no joint and several liability. There could be some cases where, although D1 is liable to the claimant, D2 is not, because it is not pure joint and several liability.

MR MALEK: Unless of course the court finds that actually you were not party to a cartel and the others were.

THE PRESIDENT: Yes, and that you would be entitled to argue in the contribution proceedings, that you are not party to the cartel. Given that this is a follow on case, that possibility here is not realistic - it could be in another case - I do not quite see what, given your full participation, if the claim succeeds wholly, in part or fails altogether, that adds for the contribution proceedings.

MR. HARRIS: Let me give you a for instance: if it transpires that in our claim, our counterclaim, we get declarations that we have established that there is no liability save for the Daimler manufactured trucks, or for the Irish trucks, or for the ones in Sweden, or there is a particular differentiation in the overcharge, which is something that you are going to be hearing more about as we go along, this is not necessarily a one size fits all overcharge, and/or there are meaningful differences between OEMs regarding the damages, if any, that have emerged from the emissions technology allegations, then it would certainly be in our interests, serve a useful purpose for us, to have established in the form of declarations as against the claimants that that liability either has not been established, or it is established at a lower level, because that would be highly germane to the----

THE PRESIDENT: That will be established as against the claimants on the defences in the main claim.

MR JUSTICE HILDYARD: My understanding ultimately of your position - and maybe this goes to the adequacy of your pleading, but park that aside for the moment - is that, given that liability may be visited on you by reference to an action in which you are participating but you are not a party, so that you are relegated to, in effect, a back seat driver position where you are not in control of the ultimate journey, and you may have it changed by settlement or otherwise, you wish to be able to participate in legal terms, if you like, not by reference to the CMC order, but also by reference to the actual legal position, and you say that your skin in the game is likely, in fact, to be the greatest, because ultimately on the apportionment proceedings you are probably going to have to carry the can if liability is established.

MR. HARRIS: I am very grateful to you, with respect, Mr Justice Hildyard, Sir, because, yes, that sums up much more eloquently than I was doing the case in a nutshell. I will develop the settlement point in a minute, because it is a very real possibility. We know that because it happened in *Newson*, so it is very real. I will develop that.

Can I just pick up, if I may with respect, Sir, and develop briefly that first point by reference to the Act, so that we are all quite clear. This is a difficult set of provisions. In mine it is at the very end of tab 3, but I believe it might be at the beginning of bundle 4 of your authorities, and I just want to show you how it works so that we can see what the entitlement is on the part of my clients. We begin with section 1(1). What that says is:

> "Subject to the following provisions of this section …"

I am just going to pause there for a minute because this was explained, if I may respectfully put it, rather helpfully by the Court of Appeal in *IMI v Delta*, the *Newson* case. This is the

main provision, 1(1). There are then certain following sub-sections, in particular (2), (3) and (4), that deal with specific things that might happen in any given case, but it is all still subject to you falling within the terms of the specific provision, which you may or may not do on any given case, but you still have to comply with sub-section (1), that is the main provision.

I will not go through them all, but sub-sections (2) and (3) are all about limitation. We do not have to concern ourselves unduly in this case today with those provisions. They were highly material in *IMI v Delta*, they are not that material today, and all they say, and this is per the Court of Appeal, is that you look in (2) at the person who is seeking to be entitled to recover, so that is the D1, and then it says what it says.

Then in (3), the person who shall be liable to make the contribution, that is D2, and then it says what it says, and you are bound by it because it is statute, but we do not have to concern ourselves too much with that.

Then in (4), that involves a situation in which there may have been a *bona fide* settlement. I am going to come to that, because that is a very real possibility.

Let us just see what section 1(1) says after the comma. So subject to those following provisions that I have just identified, what do you have to do? This is the main heart of the Contribution Act:

> "… any person liable in respect of any damage suffered by another person …"

so that is D1 and the "by another person" is C, so D1:

> "…the any person liable in respect of any damage may recover contribution from any other person"

that's D2, me, Daimler,

> "from any other person liable in respect of the same damage (whether jointly with him or otherwise)."

So D1 cannot succeed against D2 if it turns out that D2 is not liable for the damage. So there are two ways of getting out of it as a D2: either, great, D1 succeeds in showing it - that is what you, Sir, Mr President, were positing to my learned friend, and that right, you may succeed as a D2 if it turns out that D1 does a wonderful job and you get off scot-free, the contribution claims die, and I accept that. But I have given all kinds of practical reasons why that might not happen, or might not happen in toto, but the critical point for now is "in any event", in any event, no matter what D1 manages to succeed in, using its documents, its witnesses, its budget, its lawyers, etc, I can come along and say anyway as a D2, "I am not liable in respect of that damage", but if you only have contribution proceedings D2, and this

is your point, Mr Justice Hildyard, cannot turn directly to C. At the moment it is only facing D1. It can say to D1, "Oh, well, I am not liable to you, D1, because I, D2, am not liable to C", but it is not facing C when it says that, because C is not in those proceedings. What I am saying is, however, D2 is entitled to establish that it is not liable in respect of that same damage. Two things: the sensible person, and especially in this context of joint and several liability, is that I should be entitled to turn to C and say to C directly, "I am not liable to you in respect of that damage, because actually one part of the dispute is my liability to C, not, if you like, via D1". The most frequent example of where this happens, and where it starts into the case management issues, is in the case of settlement, because, and this is a point my learned friend simply did not address, in the case of settlement, by definition C has gone. C has left the court room and said, "Thanks very much, I am taking my files, I am taking my files, I am taking my witness statements, I am taking my documents, I am going home with whatever I have settled with." We say, "Whoa, hang on a minute", and this is the nub of the point, in those circumstances which, with respect, this Tribunal cannot avoid, C can settle with who it likes, whenever it likes, and disappear. It could happen today or, to pick up on my future prognosis, it might in six months or 12 months, or whatever, we do not know, and the Tribunal will be left in the lurch, as will we. Although, in theory, we can say D2 to D1, "Oh, well, we are not liable to C", that is D2 saying to D1, "We, D2, are not liable to C", but C is not there.

THE PRESIDENT: I can understand all that in many cases. Take a very simple case, there is a car crash between two vehicles and a pedestrian, who is unfortunately on the scene, gets injured. The pedestrian sues the driver of vehicle A saying, "This crash was caused by your negligence and I was injured, and I am clearly a pure victim". The driver of the other vehicle, B, is concerned that if the victim succeeds against the first driver, against A, A will then bring contribution proceedings against B saying, "Actually, you were negligent too and you would have been liable to the victim." There is independent liability and that the victim chose to sue only one of them, who may, to follow your hypothesis, not have the resources to mount an effective defence, and the driver of the other vehicle is very concerned that then they will be stuck with a big contribution claim when they would like to show that actually, the driver of the first vehicle was not liable at all, and there was no negligence at all. Here it is not two separate instances of independent tortious liability, it is a joint and several liability whereby if the defendant is liable, if D1 is liable, then D2 is liable for the same loss.

MR. HARRIS: There are a number of points there.

THE PRESIDENT: I see that the theoretical logic in certain cases saying, "We must have C there, and we are put in a very difficult position if C is not there, so that we can run the argument of liability as against C". Here your liability is just parasitic on the liability of D1 because it is a joint and several tort.

MR. HARRIS: There are quite a few points in that, if I may. The one I will take last but I will just identify first is this: the only point in my learned friend's submissions with which I agreed about the meaning of the Act was the limited ambit of the 1(4), if you like, "without regard to". On that bit, with respect, she was right, and that answers to some extent your concern.

Just to start with another point, we would say that in circumstances unlike your driver of C, A and B - in circumstances unlike that where there is joint and several liability alleged, it is all the more apposite that one of the people, D2, who is said to have the joint and several liability to C, should be able to turn directly to C and say, "No, no, no." It is all the more apposite, not the opposite, it does not take away, it actually lends force to my submission that I should be able to turn directly to C, precisely because underlying C's claim is a joint and several liability and they have chosen to sue whoever, in this case D1, not all the people who were not jointly and severally liable. So the difficulty, if you like, has been generated precisely by their tactical choice, whatever may have driven it, and one can imagine - I can give some other examples - all manner of tactical reasons why you might have only chosen to sue one or the other. That is one answer.

I think the other answer, if I understood the hypothesised example correctly, was, at one point you said to me, Sir, "Well, D might have an interest in showing that A was not liable", but my case is I also want to show - that is true, I do have that interest if I am a D2 or a B2, but I have an additional interest per section 1(1) in showing that I do not have any liability for the same damage myself, D2. I do not have to go via D1. The real problem is----

THE PRESIDENT: It is joint and several?

MR. HARRIS: That is the legal point. Can I develop that, because actually this is the point where my learned friend and I agree? Can I just take you then, what I said I would do - it is quite difficult so it important to just focus on the words of section 1(4). This is a circumstance where there is a special set of conditions, so not (2), not (3), but it happens to be *bona fide*. Just for your own interests, members of the Tribunal, you can in theory say it was not *bona fide*. That has got nothing to do with today, we are not saying that. Yes, if it turned out that DAF and Iveco have stitched something up and we somehow got some

evidence of that, then we probably would not have to contribute to their settlement, but that is not this case.

What this says is - let us assume----

MR MALEK: I think one of the difficulties is that if there is a settlement it is unlikely to be for 100 per cent. There may be an issue as to which trucks are actually settling. I have seen that before where there is a real dispute as to what parts of the claim are being settled as part of the global figure.

MR. HARRIS: There is that practical point, but then the other point which is more germane to me is, if I have got a declaration as against the claimants saying that, "You, Daimler, have proven that they have not any established any liability" - just to give you an example, in respect of Daimler trucks or in respect of the Irish trucks, or whatever, some sub-set, or that the liability in respect of your Daimler manufactured trucks the overcharge is less, or more of it is being passed on, or the tax consequences are completely different, all of which is of course raised in the pleading, then it is going to be highly germane in those contribution proceedings, even as between D2 and D1, that the Tribunal in a composite action where everybody is there, participating and taking part with the relevant documents, has made that declaration. That is, of course, a useful purpose for me. It may be that C is not participating in the apportionment part of the trial. That is neither here nor there. The question is: does it serve a useful purpose to me? Yes. And does it serve a useful purpose to the Tribunal? Yes, as well, because it would otherwise mean, if I am not entitled to do that, if you like, in the main trial, then you would have to do it separately in a separate trial. That does not make any sense because then you could get inconsistent findings of fact or evidence. So you should be doing it all together.

MR JUSTICE HILDYARD: Your submissions constitute an antidote but they also may be an abrogation of the general rule that claimants are entitled to choose who they sue.

MR. HARRIS: That is right, and that is not an - the question here is justice on the facts of the case, including sensible and proportionate case management. This is a case of joint and several liability where our trucks are highly in issue. It is not even essential that there be Daimler manufactured trucks, but as it happens we are a big part of the claim. They, for their own tactical reasons, have chosen to sue only two, and what we are saying is, "Look at section 1(1), we have this entitlement to show against C that we have no liability for the same damage". You have got that point. The point that I am just developing here involves looking at the further words of section 1(4).

Let us assume that we are in the settlement context. My learned friend's case, with great respect, the claimants plainly have not understood the point. There is absolutely no sense in which we are trying to get behind or abuse section 1(4). Quite the opposite. What does 1(4) actually say? It says that where there has been a *bona fide* settlement, and let us assume that there has been and there is no issue about *bona fide*, then the person who makes the *bona fide* settlement, third line:

"… shall be entitled to recover contribution in accordance with this section …"

so far so good, so that is the settling party -

"… shall be entitled to recover contributions …"

in other words, part of the settlement monies -

"… in accordance with this section without regard to whether or not …"

and the critical words here are -

"… he himself is or ever was liable in respect of the damage …"

So all that this does - for the reasons that the Tribunal has already indicated it has read in the Law Commission Report - is prevent in a contribution proceeding between D1 and D2, when C has already disappeared, precisely because there has been a settlement, D1 does not then have to show that D1 was liable to C. That is all it does. That is why it says "he himself". But 1(4) is still subject to the principle rule----

THE PRESIDENT: And the proviso.

MR. HARRIS: And the proviso, yes, I accept that, and I will say a little bit about the proviso in a minute although it is not that relevant to today's argument. I will say a little bit about it in a minute.

D1 does not have to show that he, himself, is liable, and the reason for that is those two policy reasons. D1 would suddenly have to pretend that even though he has been defending the case against C for all of these years saying, "C, no, no, no, you are wrong, you are wrong, I am not liable", all of a sudden, unless this point were here, D1 would have to, on the face of section 1(1), then turn to D2 and say, "You know for years I have been saying I was not liable to C, well now actually I am going to prove that I was liable to C, because otherwise I cannot get any money from you." The legislature thought, "No, that is absurd, we are not having it". That is why D1 is let off proving that it, D1, was liable to C, subject to the proviso.

Then that has two branches to it, if you like, making D1 suddenly pretend that it is C, when for years probably it has been saying the exact opposite, is very, very difficult practically and it has one massive policy downside. Taking them in reverse order, the downside is it

might deter them from settling in the first place, and the legislature said, "We do not want to deter settlement".

The practical ones are if D1 suddenly has to pretend that it is C, but C has disappeared, D1 is going to have a remarkably difficult job, because to prove that it was liable to C it is then going to start having to summon all C's witnesses, get all the documents that C, who is no longer present, can provide, and then it will not even be - it is obvious, and it is so obvious that Parliament said, "Right, no, no, no, we are not having that".

Before I come back to a few words on the proviso what it does not do, what it expressly does not do, is prevent D2 still saying under the main heart of section 1(1), "Ah, but me, D2, I am not liable for the same damage". It does not do that, quite the opposite. That is expressly preserved because of the limited nature of the carve out in 1(4). I am going to come back to that point in a minute.

My few words on the proviso: the proviso is - again, this is one of the few points where we agree with Ms Demetriou - simply a question of defective pleading. The whole argument in *IMI v Delta* was where do you have to look for what is being established, what facts are in the claim, can you look at replies, can you look at outside sources and what is collateral? That is all a fascinating debate and there was some underlying case law, the *BRB v Hashim* case, and what the Court of Appeal said was, that is beside the point, it is completely beside the point, properly understood. All you do is you take the relevant set of documents, which in many cases is just the pleadings, and it does not have to be limited to just the pleadings.

THE PRESIDENT: You do not need pleadings at all, do you? It can arise in a settlement before a claim is brought?

MR. HARRIS: Yes, you are quite right, it does not have to be pleadings, and that is why they were quite careful to say it is not limited to pleadings. Take a regular, run of the mill case, it is easier to just get a handle on it for illustrative purposes. If the pleading has a *prima facie* case that would, if proven, if those facts are proven would establish liability, then that is it.

MR JUSTICE HILDYARD: It is like a default of defence point where you are----

MR. HARRIS: A little bit, yes.

MR JUSTICE HILDYARD: -- and that is it, the court simply has to look to see, assuming the facts pleaded are established, is that a competent claim?

MR. HARRIS: That is right, yes.

MR JUSTICE HILDYARD: That is the end of it.

MR. HARRIS: That is right, so all of the very complicated argument in *Hashim v BRB* at first instance before, as she then was, Mrs Justice Rose was swung on its side and they said, no, it is a much more simple approach, just as, *prima facie*, on the relevant bundle of documents, which is quite often the pleadings, would they have a legal liability if they proved those facts? That is it, and the reason that that is it is because it is only trying to avoid the two policy evils that would otherwise befall D1. That is all it is doing. It is not saying anything at all about D2 is somehow unable to nevertheless argue that D2 is not liable in respect of the same damage.

Then the point that my learned friend just simply does not deal with is, what is this position? If we find ourselves in the fact circumstances of 1(4), where is C? C has gone. That is the whole point of being in this fact position. C has gone with its documents, gone with its witnesses, it has gone home, taken its ball and gone home. All we are saying is, in those circumstances the sensible thing and the just thing, and you certainly cannot rule this out now as being utterly bound to fail, not least of all because you do not know what will happen about settlement, and it could happen at any moment. We saw what happened in *Newson*. This is what happened.

THE PRESIDENT: We have got that point.

MR. HARRIS: If C has disappeared and yet nevertheless, even though I cannot do certain things as against D1 because of section 1(4), I, Daimler, before this Tribunal, and I am saying to this Tribunal, you cannot establish, you cannot grant judgment giving liability against me, Daimler, in favour of DAF and Iveco, because I, Daimler, am not liable to C in the first place. Where is C? C is not there. That is obviously more difficult for us and critically more difficult, if not impossible, for you. Let me give you the most apposite example. My defence, which we will look at in a moment, includes pass on. One of the reasons that I say I have no liability to the - it is downstream pass on - Wolseley claimants is because even if they establish causation, even if they establish overcharge and all the rest of it, nevertheless they have passed on every penny. That is my defence, I am entitled to run that.

How am I going to do that? How is the Tribunal going to grapple with that when I am saying to this Tribunal that I am entitled to show that I do not have any liability for that same damage under 1(1), so you cannot find for DAF and Iveco absent the C, given that every single part of that argument depends upon C's documents and C's witnesses because it is all about downstream pass on from C.

THE PRESIDENT: This only arises, of course, if the claimants have got judgment against DAF and Iveco for Daimler trucks, rejecting an argument on pass on.

MR. HARRIS: No, with respect, Sir, that is not right.

THE PRESIDENT: DAF and Iveco are only claiming from you for contribution to damage they have agreed to pay to the claimant.

MR. HARRIS: But, Sir, we are positing a situation here where there has been a settlement. There has been no judgment.

THE PRESIDENT: No, but they have agreed to pay the sum to the claimant.

MR. HARRIS: You would know that there is an amount in issue, because otherwise----

THE PRESIDENT: You will not know how it is made up.

MR. HARRIS: You will not how it is made up and there are all manner of commercial considerations that go into settlement and who pays what in respect of what. Indeed, that is the further reason that I want to raise as to the useful purposes.

MR MALEK: It can be complicated if the defendant actually allocates as between them and the claimant. Let us say they allocate a small amount to their own trucks, and let us say you are the only one who sells lots of trucks and they allocate it and say "We are paying this amount for all the trucks of Daimler that were sold in Ireland"?

MR. HARRIS: My principal answer to that is one just does not know, and that is another reason why you cannot rule it out now. My second answer is there are lots of different ways of drawing up settlements.

MR MALEK: I know, I think that can be quite complicated for you depending on how they draw it up.

MR. HARRIS: Well, it would not be complicated, because when DAF and Iveco come to me with this *ex hypothesi* complicated settlement and I say, "You know what, you are not having a penny, and the reason you are not having a penny is because I was never liable to C in the first place under section 1(1)", and I want to be able to do that as against C, and I do not want to be hampered in my ability to do that because C has cleared off having settled. How do I stop that? I stop that by suing C. C cannot clear off having settled, because I still have the valuable and useful purposes of turning directly to C and saying, "Right, I am not liable to you". That is where my declarations come in.

MR MALEK: So what you are saying is you want to lock the claimants in litigation with you so that if they settle, they are still there?

MR. HARRIS: On this point, yes.

MR MALEK: On this point.

MR. HARRIS: And that is entirely legitimate bearing in mind what the nature of this claim is. It is a claim for joint and several liability where my client is exposed to potentially millions

and millions and millions of pounds on the way they put their case, but they have not chosen to sue me. It is a very real possibility. You have got that point.

My learned friend simply did not address that at all. She kept submitting that somehow I am seeking to go behind or abuse, I do not quite know, go behind that. Not at all, that is how 1(4) works, it says that D1 does not have to show that he, himself, is liable. I am not saying at all that as against DAF and Iveco I am going to say, "Here is some defence that showed actually, despite 1(4), you were not liable". Nothing at all, that is completely misconceived. My point is that even if DAF and Iveco are within 1(4), whilst I accept that they do not have to show that they, themselves, were liable, subject to the proviso, nevertheless I want to be able to show, and indeed I insist on at least attempting to show, that I am not liable, because as soon as I am not liable they do not have a claim against me.

THE PRESIDENT: Where I get stuck, Mr Harris, and perhaps I am being obtuse, let us suppose they settle for £1 million. We do not know how that is arrived at, what concessions were made, it might be a commercial negotiation which does not look at the underlying dispute at all. Under section 1(4), first part, it is assumed conclusively that the defendants were liable for £1 million to the claimant, that D1 was liable for £1 million. They do not have to show it. In fact, they will have that liability for the reasons you explained. That is right, is it not? In proceedings against you, they settle for an amount and it is then assumed that they were liable to the claimant, but do not have to show that actually the claimant had a good claim against them for £1 million for all the reasons you claimed?

MR. HARRIS: Yes.

THE PRESIDENT: So that is where it starts. Then they turn round and they claim against you. If you are jointly and severally liable, and that is the basis on which they say you are liable to the claimant, does it not mean by the very nature of joint and several liability that you are liable jointly and severally for the £1 million, even if not a single Daimler truck was included in the calculation at all? Maybe it was only DAF trucks. The nature of the cartel liability is that you are jointly and severally liable for the full amount.

MR. HARRIS: That is a difficult question, one that has not, I think, been yet determined or argued in any of the cases, and to that extent I agree with Ms Demetriou when she made the same submission. Our case - I can see the point that you raise----

THE PRESIDENT: That is why joint and several liability seems to me critical here and so different from the case where there is an independent liability to the claimant, and you want to say, "Well, I want to show I was not independently liable, and I would like the claimant there because the claimant is the person I am arguing with in reality".

MR. HARRIS: My submission on this point - this is the only point where we rely on it - is that this is a limited carve-out for the reasons that were given in the Law Commission paper that we are all now very familiar with. What it does not preclude is any attempt - and this is what Ms Demetriou said as well - on my part as a D2 to come along and show in the contribution proceedings that I am not "any other person liable in respect of the same damage". All of that is preserved. That would be my answer to - your point, if you like, cannot trump what I am entitled to do under section 1(1) and the plain terms of the statute.

MR JUSTICE HILDYARD: Entitled unless the law has foreclosed it already. Mr. Justice Roth is saying joint and several liability exposes you to liability by virtue of it being by its nature joint and several.

MR. HARRIS: Well, I take that point. What you will, of course, appreciate is that there are, as you know, issues in the case about whether or not a proper case of joint and several liability has even been made out, and there are revised pleadings. Do you remember, at the CMC further directions were given for additional pleadings on joint and several liability, and that has now happened.

THE PRESIDENT: Yes, but I did not think that applied to participants in the cartel. You are, unlike some of the defendants, whether in this or other actions, the only Daimler entity sued as the actual cartelist. It is not any UK subsidiary, or whatever, where you can say, are they liable or not?

MR. HARRIS: Yes, that is correct, Sir. You have had the submission from the two of us, which is that it has not been decided, not been addressed, and we both say in unison, at least on this point, that that is a limited set of protections to D1 for the reasons that have been given. I note that it just says that provided he would have been liable, assuming that the factual basis of the claim against him could be established, it does not proceed on the basis that it has been established. That is the nature of the exercise that is going on here. You are looking at the pleading. It is a bit like the default judgment thing we were talking about a moment ago, and you are just asking yourself on the pleading or on the relevant bundle of, if you like, documents that set out the nature of the claimant's case, if that were made out would it be good enough to get a legal claim established? What you are not doing is saying that it has been established.

Another way of testing that is that I am entitled - this is a point that I did not think necessarily would arise today - to come as a D2 in a contribution claim and say that even though I do not challenge the *bona fides* of the settlement, I do challenge the amount of the settlement. That is perfectly legitimate. So take the £1 million, I can come along and say,

"Silly you, you settled for £1 million, but actually you should never have settled for £1 million, if you were going to settle at all it should have only been for £1 because of X, Y and Z point". That is well established that you can do that.

MR JUSTICE HILDYARD: Subject to that point, do you not have to show that you have some arguable basis for demonstrating that you are not another person liable in respect of the same damage?

MR. HARRIS: Yes, and those are the points that are to be found in my pleading. As Ms Demetriou helpfully pointed out, there is a whole series of substantive points going to the question of whether or not I, as against C directly, have any right, and I have to address that at the relevant juncture because she also takes the point about form, it being said to be nothing but non-admission, which is just not right, and, in any event, in my submission, not relevant. I can do that now. It might be a useful----

MR JUSTICE HILDYARD: Your gateway to all this is 1(1), and you say 1(4) preserves your 1(1) right, putting it shortly?

MR. HARRIS: Absolutely, yes.

MR JUSTICE HILDYARD: To get to 1(1), you have to show some basis on which you are not, by reference to the liability of the others, liable?

MR. HARRIS: Yes. It may be an apposite moment then if we could go back, and this is in the bundle which I think is being called A3, the pleadings, bundle, and we had it open at tab 13, which is one of the examples of the----

THE PRESIDENT: This is your Part 20 defence?

MR. HARRIS: Yes, the one that has the counterclaim at the end. Ms Demetriou is quite right when she says there is at the front - we do not need to re-traverse it - the first 11 paragraphs are, if you like, a fairly traditional and orthodox response to the contribution claim against Daimler by, in this case, the Iveco defendants. Then, in a slightly different form but the same in substance to the Volvo one, section C, and if you could flick through to just before the declarations, to L, that essentially takes the form of a defence to the Wolseley claimants' claim. It is important to just see why it is being done. If you pick it up at paragraph 13 on internal page 4:

> "In these sections C-L Daimler sets out its response/Defence to the Claimants' Particulars of Claim and, by so doing, sets out why it does not admit liability …"

and these words are very deliberate -

> "… for the same loss and damage as is claimed against the IVECO Defendants, or for any loss and damage."

That is expressly what we are setting out to achieve, and it is drawn from section 1(1), "do not admit liability for the same loss and damage as is claimed against the Iveco defendant". As you helpfully put it, Sir, Mr Justice Hildyard, earlier, to cut to the chase - I am going to show you some of the examples in a minute - what do the declarations do? If they succeed, they are just a punch line, they are the icing on the cake, they are, "Well, you have now succeeded in doing what you say at 13 you are setting out to do and here are the declarations that show it". So that is where we start and that is where we would end if it turns out that I am right in 13. But today is not whether I am right or not, today is should I be precluded for ever more from even trying.

Then my learned friend makes quite a meal, not in a pejorative sense, but if can put it like that, of saying there is nothing in here but non-admissions. First of all, that is not right, and I will show you some examples in a second, but even more fundamentally my response to that is, so what? What are my declarations, what is the substance of my declarations? I am seeking declarations that either the defendants are not liable or that I am not liable and/or that causation has not been established. Great, I can do that on the basis of non-admissions. If it has turned out that they have not proved it in the main claim, either that they have established liability against the main defendants, or that they have established liability to me, or that they have established causation, great. I will have a declaration to that, please, because what it means is that I am off the hook and I will not be paying anything to anybody, because the claimants will not have established the liability. So I do not accept that it has to be more than non-admissions, but the two additional answers, were that not to be accepted, are that there are some examples in here already of where it is more than non-admission; and, more fundamentally still, is even my learned friend admitted there is a possibility that there might have to be amendments. What I say is this is just preserving the position, because it is possible that this will never be needed, the additional claim. If everything is resolved in all respects with all parties at the main trial then the counterclaim will essentially fall away. We will not be prosecuting it, there will just be no need.

If it turns out that before final resolution of all issues between all people - for example, the Cs have settled and left - then at that point suddenly my counterclaim is going to be of very real benefit to me and to the Tribunal in the manner that I have expressed, and at that point there could be any relevant amendments - at that point. We do not need them now. At that point there could be. That is the point at which you would take stock, and the Tribunal would say to itself, *inter alia*, "Where have we reached on, say, pass on? Where have we reached on, say, overcharge? Where have we reached on, say, Irish trucks, or whatever? In

what respects does Daimler actually now need to amend to produce a positive case?" What on earth would be the point in doing that now? No point. This preserves the position.

THE PRESIDENT: It is really the settlement situation that is driving this, is it not?

MR. HARRIS: And no surprise that is mentioned in the correspondence for that very reason. But the logical precursor, of course, Sir, is that I have an ability, even irrespective of settlement, under 1(1) to say I have no liability for the same damage. What I say there is that it is just practical and sensible case management that because I have that entitlement and ability. And I stand by the words in the skeleton that Ms Demetriou read out, I say the obvious person, if I want to establish my non-liability to C, is for me to do it directly against C, not indirectly via D1. So I stand by that in any event, but I do accept that the settlement really brings this to a head. You have got the points there.

THE PRESIDENT: I can understand your concern about it. Many of these actions settle.

MR. HARRIS: They do. Sir, can I just give you - I am not sure this point is needed, but just so that you have it----

THE PRESIDENT: It does seem to me that if there is no settlement - if it did all go to trial, whether or not you are formally entitled to the declaration, it is not actually going to achieve anything for you. It may give the punch line, but the punch line will be there in the----

MR. HARRIS: Sir, I do not accept that, because I think, with respect, my submission is that the punch line is important, not least of all because we will be arguing in a separate hearing, because that is what the case management direction says, about apportionment. If I have established, say, that I am not liable, or that I am not liable, Daimler, in respect of X, Y and Z, or that I am not liable for the same amount because, say, the overcharge for Daimler trucks is different, or I am not liable for the same amount because, for example, it happens that on the facts, which we are all going to be learning a great deal more about as these cases progress, pass on for Daimler trucks is much greater, or there has not been an upstream pass on into the sale of Daimler trucks to anywhere near the same extent, if at all, as there has been for, say, DAF trucks.

THE PRESIDENT: So it would be 83(ii), that would be the only one? 83(i) and (iii) would be determined in the judgment in the main trial.

MR. HARRIS: Yes. Well, (i) yes, but (iii) gets at a slightly different point, which is that it is going to the question of whether or not the claimants have established causation, and that one is not peculiar to just DAF and Iveco. I accept that (i) must refer to DAF and Iveco. In this particular pleading it is Iveco, but there is a parallel one for DAF. But (iii) is not peculiar or limited to DAF and Iveco. That one also relates to me, because what I am

saying is that they have not established causation, not that they have not established causation just to DAF or just Iveco.

THE PRESIDENT: That will be dealt with in the judgment. Whether the claimants have established causation would be a key part of the judgment, either they have or they have not, or they have to a certain extent or whatever, but that is what the judgment will determine, because the claim had not caused the claimants the alleged loss and damage claimed. That will be evidently determined by the judgment, will it not?

MR. HARRIS: I see the force of the point, Sir, as regards (i). My submission is that it does not apply at all to (ii), and it is of far less force in respect of (iii), because that is focusing on the question of causation. There could be an instance whereby, for example, Daimler is able - it is the examples I have given you, Daimler is able to establish, it would most likely be for Daimler trucks obviously, that there has not been a causation, or a causation of the same amount, or in the same places, or in the same time period as regards Daimler trucks.

MR JUSTICE HILDYARD: The problem is peering into the future with any accuracy. It is a feature of a discretional exercise that it must be exercised at the time.

MR. HARRIS: Yes.

MR JUSTICE HILDYARD: That is what caused me to put it to Ms Demetriou that she has to show that in those circumstances it is conceivably the exercise, because we all know that events may change things.

MR. HARRIS: Again, I would like to submit that you have taken the words out of my mouth, but you have done rather better than the words I have been able to get out, but, yes, we can 100 per cent agree, there cannot be the requisite degree of confidence today that no matter how this pans out, settlement is one example, but there are other examples too. Let us say, for instance, there is only settlement with one of the main defendants, but it just so happened that if we were not making the claim that defendant would then disappear and it has all the documents for one critical part of the case, or, for example, one country, or, for example, one time period, or in respect of one avenue of sale of trucks, because, as the Tribunal knows, there are many leases and different types of leases, and then there is financing, etc, etc, and then they disappear with those critical documents and critical witnesses. We do not know that now. What I am saying to you is that there may well be a genuine benefit, not just for me, but for the Tribunal, at that later juncture where we do not have a crystal ball and cannot foresee, that direct participation as against C then will be of genuine use. You just cannot have that requisite degree of confidence now that it is bound to fail, no matter what happens in this litigation as it progresses. You cannot have that.

I am grateful to those instructing me and to Mr Rayment in particular, because they point out that I have been focusing, as I suppose I would, on the position of OEM defendants, but it might be that only certain - there are, I think, 52 claimants here. It might be that the first ten settle, or the middle 20, and it may be that they have certain critical documents that they settle, and/or witnesses, and/or expertise, and they have disappeared.

Another example might be that there is only one - this could easily happen in historic cartel cases, you have one key witness on the claimants' side, or for that matter on the defendants' side, who is able to speak to a particular issue or set of issues 20 years ago at the beginning of this alleged cartel or this cartel period. Then that is the person who settles out and leaves leaving a big gap.

All I am saying, as I know you appreciate, is that there are all kinds of ways in which this deck of cards could fall or the cookie could crumble, and we cannot foresee them now. Against the background of the high hurdle, you cannot just----

MR MALEK: Can I just go on the hurdle, because if I accept the hurdle for a strike out is bound to fail - but is that the same test for a summary judgment, because summary judgment needs no real prospect, does it not?

MR. HARRIS: Yes, but I put the same submissions in respect of that. Because you do not have the crystal ball you cannot see how the cards are going to fall. Looking forward, prospective is obviously a future looking exercise.

MR MALEK: Yes, exactly.

MR. HARRIS: Can I just - I am conscious of the time, and I had not quite finished. I am really in the Tribunal's hands. What we could do is stop now and that will probably shorten what I do at two o'clock.

THE PRESIDENT: In that case, it is about two minutes to one, let us say two o'clock.

(Adjourned for a short time)

THE PRESIDENT: Mr Harris, you said to us not long before lunch, if I understood you correctly, that it is well established with regard to section 1(4) of the Act that if there is a settlement and then contribution proceedings, it is open to the defendant to the contribution proceedings, that is D2 in the language we have been using, to argue that the quantum of the settlement was too big.

MR HARRIS: Yes.

THE PRESIDENT: Can you help us, and direct us, what is the authority for that, because none of us are familiar with it?

MR HARRIS: I can find the name of it and send it to you.

THE PRESIDENT: I do not want to put you on the spot of having to remember a case.

MR HARRIS: It is the case about the fire at the supermarket.

THE PRESIDENT: Is it discussed in the *Newson* judgment?

MR HARRIS: I am not sure if it is in the Court of Appeal one, because I have got that open. I thought it was paragraph 44, but on a quick flick it does not appear to be. The case is one with an architect and an engineer, and it was *Tesco* or *Sainsbury*. I think it was a *Sainsbury* case, and that is the authority that I have in mind, and I am happy to send it to you.

THE PRESIDENT: Yes, that would be helpful.

MR HARRIS: I am confident, because it did arise, at least in argument at first instance before Mrs Justice Rose in *IMI v Delta*.

THE PRESIDENT: Where is *Newson* in of your bundle of authorities. I think it is bundle 3. This is from the law report, so it should list all the cases cited.

MR HARRIS: Yes. I am very grateful to my learned friends on the other side. There is a passing reference to the point at the end of 59 in Sir Colin Rimer's judgment. It does not cite the authority but it reads at the very end----

THE PRESIDENT: Just a minute, I am just turning it up.

MR HARRIS: Paragraph 59.

THE PRESIDENT: Yes.

MR HARRIS: The final sentence, and the authority that underlies that is this - I am pretty sure it is *Sainsbury*. Yes, this is the one, *J Sainsbury v Broadway Malyan*. Do you want the reference now, or shall we send you a copy?

THE PRESIDENT: If you have got the reference, yes.

MR HARRIS: On Mr Rayment's computer - yes, this is the one, it was all about a fire that went over the top of a wall into the storage area. It is [1998] 7 WLUK 675, but after the hearing we are happy to send you hard copies and identify the passage.

THE PRESIDENT: Has it got a neutral citation number? It might be too early for that.

MR RAYMENT: That is a Westlaw reference. The other reference is 61 Construction Law Reports page 31.

MR MALEK: I think it is easier if you just send it to us.

THE PRESIDENT: That would be helpful, thank you very much.

The other question we had, you drew our attention in your pleading at tab 13 of the main bundle to paragraph 13, where you say, in these sections Daimler sets out its response, and by doing so sets out why it does not admit liability for the same loss and damage as is claimed against the Iveco defendants, and you drew attention to that language. Can you just

help me: where in these sections do you actually set out why you do not admit liability for the same loss as is claimed. I was looking at the pleading on joint and several liability, paragraph 71.

MR HARRIS: At this early stage, which is a point I shall develop in a minute, these are quite early stage pleadings, it includes that, for example, we flat out deny causation in total; and, for example, we say there has been full pass on.

THE PRESIDENT: I understand that, why you say there is no loss and damage suffered by the claimants, but I thought in paragraph 13 you are saying why Daimler does not admit liability for the same loss as against the Iveco defendants - in other words, there is a distinction between Daimler and the Iveco defendants, even if they might be liable, you are not.

MR HARRIS: No, this is intended, and I hope reads as, we, Daimler, have no liability to the claimants. So in that sense, since we have no liability to the claimants, as set out at C through L, we cannot be liable for the same damage as the Iveco defendants. Even if they are liable for something, it cannot be the same as us because we are not liable for anything.

THE PRESIDENT: If you are jointly and severally liable for any loss for which they are liable then you would be. I am looking at your plea at 71 on page 21 where you admit joint and several liability for any loss that the admitted conduct caused the claimants.

MR HARRIS: That is right, but take for instance the case in which we prove that there is no causation established by the claimants at all of any loss, then there is going to be nothing to be jointly and severally liable for.

THE PRESIDENT: Yes, but then the admitted conduct has not caused the claimants any recoverable loss, there is no causation. 71 is saying that if the admitted conduct did cause them any proven recoverable loss - if it caused them no loss then Iveco is not liable for anything.

MR HARRIS: That is right. I think we are slightly at cross-purposes here. All that I am setting out in a general overview in 13, and in a minute I propose to show you some more specifics is to say that effectively trace the language of section 1(1), which talks about liability for the same loss and damage, and then essentially treat myself as if I were a defendant to the main claim, and say, "Well, I am just not liable to you".

THE PRESIDENT: Yes.

MR HARRIS: All I am saying in 13, and then we develop in the rest of C through L is that if I am not liable to the claimant then I am going to get home in the contribution proceedings

because if I am not liable for anything I cannot be liable for the same something as somebody else, even if they are liable.

THE PRESIDENT: Yes, but is 71 not saying that if Iveco is liable for loss from the admitted conduct - in other words, if the claimant succeeds against Iveco - then you admit that you are jointly and severally liable?

MR HARRIS: Yes, that is right, that is what that does say. Essentially, as you put to me before, I would not like to make a formal statement here, but one can understand why we pleaded that, if we were an addressee of an infringement decision.

THE PRESIDENT: I understand fully, and for what it is worth I think it is right, but it is not for me to decide now. It means that if the claimants do establish damages against Iveco, it is accepted that you, arising from the admitted conduct, accept that you are jointly liable for that damage, for that loss, subject then to apportionment.

MR HARRIS: There is both apportionment and there is the fact that if, for example, to take two examples, I establish that there is no causation that is it. My experts and I, we come along to the trial and we just establish that there is no causation and/or the claimants' methodologies all fail, etc, etc, in those circumstances, by establishing that I have no liability to them under 1(1), then I am also going to succeed in the contribution claim notwithstanding what it says there in paragraph 71, because there will not be any underlying establishment of liability that I can share jointly and severally with DAF and Iveco.

THE PRESIDENT: I am not sure I quite understood you. If you established through your experts, doing perhaps a better job than Iveco's experts, that the claimants cannot recover anything from Iveco, then there is no admission that there could be any other liability against you, but if, despite the effort of your experts and argument, it is established that there is liability as against Iveco for a certain loss then you have accepted you are jointly and severally liable for that loss.

MR HARRIS: That is right, but the hypothesis of me standing here today that I intend to come before the Tribunal on my counterclaim and prove that there is no underlying liability----

THE PRESIDENT: To whom?

MR HARRIS: In the counterclaim to Cs directly, to the claimants directly, in my claim that faces them.

THE PRESIDENT: Yes.

MR HARRIS: So you are perfectly right that 71 says what it says and for the reasons that it says it, but I am entitled to come to the court now, as indeed my pleading says, and say that as

against the claimants in an action directly by me against the claimants, I will establish that there is no liability.

MR JUSTICE HILDYARD: You want to establish that none of the defendants is liable to the claimants, and you wish to be in the driving seat in doing so?

MR HARRIS: That is partly right, but also they just have failed to establish anything, and I say overcharge is just one example. Another example would be pass on. Let us say they prove there has been an overcharge, but actually they passed on every penny so the liability to them is nil. Well, there is no liability. That is the purpose of my counterclaim that I intend to cover. My clients have pleaded that this claim has got no liability in it, full stop.

THE PRESIDENT: Yes.

MR HARRIS: But you are quite right, Sir, to point to 71 - I think it was 71 - and say that if it turns out that I do not succeed on that, but that is not a decision we can make today, of course - if it turns out, and then it says what it says, the admitted conduct proved recoverable loss then there is a joint and several liability issue. Those are all big 'ifs'.

THE PRESIDENT: Yes, the question is whether, on that point, having the additional claim there takes it any further. If paragraphs 83 to 84 of the pleading were not there, you would be in any way impeded from making the arguments that you make at paragraphs 1 to 82, other than the point that the Judge has just made, that you would not be in the driving seat, you would be there by reason of the Tribunal's order.

MR HARRIS: It is all the argument that we had before lunch about how, for example, I would not be in the driving seat, for example we cannot see how things are going to pan out, and for example there may be a settlement and C may leave.

THE PRESIDENT: I fully take the settlement point.

MR HARRIS: I know they are all, in my respectful submission, legitimate points, and all the more so when you consider that we have got so much skin in the game and we are going to have a lot of direct evidence of our own that only we can provide. We are going to be learning more about this obviously as these actions and the collective actions progress.

THE PRESIDENT: Yes, but you do not need the counterclaim to adduce your evidence?

MR HARRIS: No, but then we are into the territory we had before lunch. In my respectful submission, I have an entitlement to demonstrate no liability under 1(1) and what is the punch line, to use that phrase, or the icing on the cake. If I have got that entitlement, which I say I have and it says it in the Act, then I should be entitled to the relief that follows from having established that, including because in the currently separate trial as to apportionment - that is currently set out to be a separate trial, that was carved out - then I would wish to be

able to say, if nothing else - I have got a point in the skeleton about how that is conclusive in my favour under 1(5), I do not propose to develop that, that is in writing, even if that is not correct then it is obviously going to be highly relevant in the apportionment claim if I have got declarations from this Tribunal, having heard all of the parties and all of the evidence in the earlier part of the case, showing that, I, Daimler, am not liable, or I am not liable for the same damage or I am not liable for this part of the same damage. Whatever one says about just and equitable when coming to apportionment as between the Part 20----

THE PRESIDENT: Your liability to the claimants for the same damage is because of joint and several liability. That is the liability to the claimants. You are only not liable to the claimants on that basis if Iveco is not liable to the claimants.

MR HARRIS: Sir, you are making a different point there. I say they serve a useful purpose, these actual declarations because in the apportionment trial surely, I respectfully submit, and certainly it could not be decided against as bound to fail now, there will be a high degree of relevance of me having obtained a declaration that shows that I, Daimler, am not liable for - even if it were for only part of the damage, because I have established on facts and evidence that the claimants could not prove against me certain things. What you are saying, Sir, is that there is a conceptual construct, which I understand, the joint and several liability, but then I am saying, "Right, that is fine, but we are going to go to a second round finally, which is apportionment". The exercise there is conceptually different, it is just and equitable. I am not going to go into that but it is fairly at large, and one can mount all manner of arguments about it. All I am saying is, yes, even though it is conceptually in the box of joint and several liability, you have still got to apportion it and I am saying, on the hypothesis here, I have got a declaration that shows that the Cs have not been able to establish against me X, Y and Z, and that is plainly going to be useful, in my submission, when it comes to the just and equitable apportionment.

THE PRESIDENT: You have lost me. This is about liability, it is not about just and equitable. Apportionment is, once there is liability, what is the fair share that ought to be - and it may be according to whether Daimler trucks were relevant or not, and all that will be gone into as between you and the Part 20 claimants, but liability to the claims, which is what you are seeking a declaration in respect of, it is accepted that because it is joint and several, that if Iveco is liable for loss X, you are liable for X. Whether, on apportionment, you should bear half X, 20 per cent X, or very little is a separate question, but that is not addressed by the declaration.

MR JUSTICE HILDYARD: Is your point that you are entitled to show as to each of the elements, breach, causation and loss, that there is no liability? You wish to cut the liability tree down as against everybody in any of its branches?

MR HARRIS: In part, yes, I accept that. Also I think, Sir, Mr President, these declarations, they do not have to be all or nothing. So it could be that Daimler is not liable to the claimants, bearing in mind that this claim is Daimler v the claimants, and then it would not have to be for the entirety of the alleged loss and damage claimed, it could be not liable for this bit, this bit or this bit, or not liable in this amount or the other amount. Likewise, in (iii), has not caused the claimants - it would not have to be the entirety of the alleged loss and damage, although obviously we are going to set out to try to prove that - obviously - but it might be that you say, as regards causation, let us say in this particular time period or in a particular country or as regards a particular type of, say, truck, then that has not been established.

THE PRESIDENT: That is contrary to the whole concept of joint and several liability, is it not? The whole point about joint and several liability is, even if in any maybe moral or equitable way you should not be fastened with the entirety, because Iveco is found liable for that much it is also a liability that rests on you. You can then have an argument with Iveco saying, "Well, it is not fair that I should carry all of it because a lot of it relates to countries where Daimler was not involved, or it could not be shown that Daimler had much to do with it", but the liability is just parasitic on what has been established as against Iveco because that is the whole meaning of joint and several.

MR HARRIS: Take (iii), for example, that one does not mention liability, that one talks about causation. So there is a declaration there about a failure on the part of the defendants to establish causation. So that one does not fall into this category of conceptual difficulty about liability. What we would be able to establish there, obviously if it succeeded, is either no causation has been established at all, or a big chunk of it has not been established, and that would be a declaration inuring our favour and in an action directly by us against the Cs. Then we can turn in the separate apportionment proceedings - this is just one of the purposes, to turn in the separate contribution proceedings and say, "Hang on a minute, the very same Tribunal in the action that took place whenever, weeks or months ago, earlier, has established and given us a declaration that we have shown that the Cs have not established causation in respect of us" - that is the point of the declaration - "in toto or in part".

THE PRESIDENT: (iii) is not in respect of you, it is just "has not caused the claimants the loss being claimed". If it has not, unless the claimants can show that it has, they will not recover any damage for it.

MR HARRIS: Well, Sir, you can see the point. If that one needed to be updated, which I do not accept on my feet, to make it clearer that it is directed towards Daimler then that could be done.

THE PRESIDENT: How would it then----

MR HARRIS: Well, I would not like to do it on----

THE PRESIDENT: I am just trying to understand the point. Directed against Daimler is (ii). I understand the driving seat point. You say at the moment you play a subsidiary role to the defendants, the D1s, Iveco and DAF, they will be arguing this, you would like to be not second fiddle, but main fiddle. I see that point. Aside from that point, it seems to me those are exactly the things that they are arguing in the trial. It may be that (iii) is partly addressed by the *Sainsbury* case, if they settle for £X million, you want to say that it has not caused £X million of loss, they are presumed to be liable because of section 1(4), but only for a much lower sum of loss, and that is what (iii) is getting at.

MR HARRIS: It certainly would include getting at that, definitely, and the point being that it is directly as against C. We can never lose sight of that fact. I would not seek to side-line, the driving seat is really important for the practical reasons that were principally - I was directing submissions by reference to Mr Malek's comments that it may be extremely important in a particular case that the person who has really got the most skin in the game is allowed to be in the driving seat for all of the practical considerations that we gave.

Another one that is in the skeleton but we did not have reason orally to develop is, there can be commercial reasons why a particular party, who has happened to be sued as a main D1, settles with a particular claimant. For instance, it may be that the particular claimant is a really important customer for that D1 generally, even though the particular number, to use the facts of this case, number of trucks sold on that particular claim is relatively small, so much wider commercial considerations.

Let me put it this way: say, for example, this is largely a UK claim but it turns out that the same claimants are really important to that main D1, Iveco, in say Italy, really important, whereas they are basically not important here because they do not buy many trucks here and this is an English claim, so Iveco says to itself, or somebody who is in a D1 position, "I am now going to settle with you for entirely commercial reasons". One can understand that for them. That is entirely legitimate. It does not undermine the *bona fides*, it is a perfectly

legitimate consideration when settling, but it means that we are prejudiced in the sense that it is settled from under us, and unless C is there for me to direct my, effectively, defences to directly, I have to do it via D1, which has all of these flaws that I was developing before the short adjournment.

So the driving seat point is a genuinely significant point.

MR MALEK: When you look at your paragraph 71 you can see why you want to be in the driving seat.

MR HARRIS: Yes, absolutely, that is right.

MR JUSTICE HILDYARD: That is what it comes down to, is it not? It is very unusual for the court to give declarations in respect of intermediate findings. Constituent elements of a claim are very rarely the subject of declarations. The three classic grounds for a declaration are, one, to determine a threatened or imminent claim; two, because you worry that unless you get a declaration it will not be binding save as against parties or their privies, and you want a declaration which speaks to the world; and three, permissible or otherwise is vindication. Are any of those three actually relevant?

MR HARRIS: Yes, because for reasons I developed before the short adjournment, we say that either the declaration that we would obtain directly as against C in my counterclaim would be conclusive as against DAF and Iveco under section 1(5), that is the point in the skeleton.

The point I developed orally and I fully stand by is that, even if somehow that is wrong, in the real practical world they are bound to be highly germane to what is going on in the contribution proceedings. They will have been developed by the same people under the same documents in the same trial with the same witnesses, and in no circumstances can we realistically have, and we certainly do not want, any inconsistent findings by instead of doing that all together in the main trial it is happening at some subsequent stage in the contribution proceedings. So they are bound to be taken account of and they jolly well should be.

There is an additional practical consideration, which is this, and I had been going to develop this separately as one of my closing points: it is in our skeleton argument if you want a place holder, at paragraph 62.

THE PRESIDENT: It is about apportionment?

MR HARRIS: Yes. This is the other practical point. If it turns out that we are right and we get these declarations and it is established that there is no causation and/or no liability either directly by us to C or by the D1s to C, then the apportionment trial, which is currently on the case management order as a separate event, does not take place. That is another good

just and efficient reason and case management reasoning for allowing us to go ahead. There will be no contribution by Daimler. So there, therefore, will be no need to worry about what the apportionment of that liability is. This point crystallises in both the settlement context and the judgment context. We get a judgment on these declarations, and then, if we are right, there will be no apportionment trial. So the second trial will disappear, certainly as regards Daimler.

THE PRESIDENT: If you get a judgment - you are assuming there is no settlement for this purpose?

MR HARRIS: This one works either way, settlement or----

THE PRESIDENT: If there is no settlement then points (i) and (iii) of 83, it seems to me at the moment, on joint and several liability, are determined by the result of the main trial. If the claimants win in the main trial that means the defendants are liable to them, and if they lose it means the defendants are not and the contribution proceedings fall away, and adding this declaration does nothing.

MR HARRIS: Subject to the driving seat point.

THE PRESIDENT: Well, that is the practicalities of how the main trial goes. I understand the driving seat point, but other than that, which is a point of practice, if you like, in terms of the outcome it adds nothing.

THE PRESIDENT: But the driving seat point is the critical point, because the question here is 'useful purpose', and it is useful.

MR JUSTICE HILDYARD: I think I started with the driving seat point and it may be a point of confusion. How far wrong would I be if I summarised the main purposes you consider useful from the exercise of seeking a declaration as being, first, to establish no liability at all as regards any of the defendants in direct confrontation with the claimants?

MR HARRIS: That is a purpose, yes.

MR JUSTICE HILDYARD: That is one purpose. To have a right, *ex officio*, at law to the adjudication of that confrontation even if other defendants settle?

MR HARRIS: Yes, that is another point.

MR JUSTICE HILDYARD: That is second. Third, to crystallise that adjudication by a declaration which makes it unnecessary to query hereafter what the point of decision was?

MR HARRIS: Yes, and I would add that it also avoids inconsistent findings or judgments, including----

MR JUSTICE HILDYARD: They would probably be binding on parties and privies anyway, but I suppose it is not impossible that there should be some argument about that.

Four, in all those circumstances, if you succeed in whole, to make unnecessary any apportionment trial?

MR HARRIS: Yes, certainly as regards Daimler, or anybody else who has a counterclaim of this nature.

MR JUSTICE HILDYARD: What other grounds are there?

MR HARRIS: No, that is a good summary, and I would simply, at the risk, I am afraid, of repetition, say that in all of those there is a genuine practical concern that we - it is partly your *ex officio* point - have a proper entitlement to be in the driving seat. Because of all the practical concerns - they may not have the wherewithal, the budget, there may be commercial considerations that lead them to not fight properly, or they cannot fight for Ireland, or they will not fight for Sweden where they do not sell any trucks, or they are going to settle with these people because they are major----

MR JUSTICE HILDYARD: I think that is within the *ex officio* point.

MR HARRIS: It may well be, but we cannot lose sight of those because the question here - Ms Demetriou put it as, the gist of the question here is this shall serve a useful purpose. Answer, yes, in context. You cannot answer that question just *in vacuo*. In context, given all of these practical concerns and considerations, is it useful? Answer, absolutely.

It may be, I do not know, that the most real of those practical concerns is the settlement. You do not know now whether any or all of the others will happen in six months, 12 months, 18 months, or whatever, and they all could happen.

What you can - I could almost put it like this - take judicial notice of the fact that most of these cases settle. *IMI* is a case with almost identikit facts for present purposes, and it did settle. Then there was this problem of C not being there. That is what this is designed to address. At the risk again of repetition, it addresses it four-square consistently with section 1(4), it does not undermine it, it is entirely consistent with it.

I hope that addresses those issues. What I propose to do in just five or ten minutes is wrap up a few points. In fact, the first one I want to wrap up is what became - although it is not mentioned in my learned friend's skeleton at all, it became, it seems to me at any rate one of her major points and was repeated many times, which is that somehow she cannot plead against my pleading. It was somehow said to be, "Look at tab 13, nothing but non-admissions, and therefore what am I supposed to do?" With great respect, that is just not right, and this point I mentioned before the short adjournment and said I would come back to. Can I just give you some examples in tab 13 of bundle A3 of where, even now, at this very early stage, there are positive cases asserted by Daimler by way of defence to the

allegation of liability? I am going to show you a few of those now and then I am going to make the point that this is all at a very early stage and all these pleadings are in a great state of flux, including today.

Can I just invite you, please, to turn up - I am not going to do every one, although there are quite a few - paragraph 75 on internal page 23 of tab 13. There is a positive case here that if there is any loss and damage established, then Daimler does contend that such loss or damage, including increased costs was wholly or partly passed on. So there is a very straightforward positive case even today.

Paragraph 77 is another example. That one is a positive case, "The claimant must give credit for any lower purchase price". That goes to quantum.

Then 78 is another positive case about over-compensatory tax benefits. There are a few.

I am going to give you a few more so that you get the flavour of this. If you were to go earlier in the pleading to my paragraph 65, and you might just want to put a finger into tab 2 where the particulars of claim are, my paragraph 63 denies my learned friend's paragraph 45, denies it outright.

Paragraph 45 of my learned friend's pleading in tab 2 is the one which says:

> "… as an intended and/or foreseeable consequence of the breaches of statutory duty, the defendants have caused the claimants to suffer loss and damage."

That is a flat denial of causation, that is not a non-admission.

There are plenty of others. I am not going to do all of them, but on the same page in my pleading, at 62(a) there is a denial of one allegation of implementation. Again, that is not a non-admission.

In 62(c) again there is a denial in the third sentence, and if you were to go back to paragraph 44, third sentence, that is the one that alleges breach of statutory duty.

There are others in here. It is already the case that it is unfair to characterise this pleading as only consisting of bare non-admissions throughout. That is the first point, just to correct that on the facts, and those are some examples, there were others.

The second point to note in this regard is that to quite considerable extent, the pleading within C to L - and if you were to look at the pleadings of DAF and Iveco, the main defendants, this is the same, they have to consist of non-admissions at this very early stage, including because of the defective nature of the way in which the case is pleaded against them at this early stage. To give you an illustration, you will recall - and it is set out in this order, the case management order that we looked at before, for example, at paragraph 11 and then further for example at paragraphs 15 and 16 - that at the first case management

conference in this matter, I think in November, the claimants were told that they had to provide all kinds of further information about the positive case that they were pleading so that we can actually deal with it instead of not admitting it. At number 11 they were ordered to file and serve a brief statement summarising the goods or services which they supplied using the trucks. That goes to pass on. The important point is that they were told that they had to do it precisely because it is not done in their original pleading.

Then another one is at 15, that they have to file and serve one or more witness statements from their procurement manager or managers about their processes of procurement, again because it is not set out in their original pleading. Then 16 is another one about the filling of data gaps, and what have you.

This is all going on as we speak. My instructions over the short adjournment were that I think it may have been this morning or yesterday that the Wolseley claimants asked for extensions of time to 14 February on some or all of those paragraphs that I have just referred you to. That is, at least as far as we are concerned, acceptable.

My point here is a more generic one, which is in so far as there is a complaint that the other parts of the pleadings - which is true, other parts of the pleadings are non-admission - then to some extent at this very early stage that is driven by the nature of the very unparticularised pleading that was brought against us in the first place. So we cannot be blamed for that.

Then that translates on into the next point, which again this Tribunal is well aware of, that in some of the other individual claims that process of updating by reference to further witness statements and pleadings and data, and what have you, has already happened. For example, Royal Mail, they have already filed an updated amended particulars of claim. My instructions are that tomorrow DAF, in the Royal Mail claim, will be filing the updated responsive pleading, and one would expect that, given the additional level of detail in the updated amended post-Commission file and post-economic disclosure of the Royal Mail pleading, DAF's pleading would be more specific.

The reason I mention that is because, of course, we are not yet at that stage in this case, but we will be in due course. Then one can expect the pleading to take a rather different shape.

That leads me on to the last point about these pleadings, which is that we would be perfectly content if Ms Demetriou and her team take our current C to L, when she says she cannot plead, and she just says, "Well, actually in so far as you do not admit, say, causation, my response to you is that I have already pleaded my case on causation and I cross-refer you to the paragraphs in my particulars of claim". She does not even have to write them all out.

That is fine. Then there is a traversing of the issues and effectively you close the loop on the counterclaim.

THE PRESIDENT: Yes, a defence can just, given what you are asking for, certainly on (i) and (iii), refer to the claim. As regards (ii), if I have - and I am not sure I have - understood it correctly, can simply assert, "You are liable because it is a cartel and you are jointly and severally liable". So they are not embarrassed in pleading a defence.

MR HARRIS: Not embarrassed. They can deny our entitlement to any relief at all, which no doubt they will, and if they want to put some particulars of that denial in then they can do that. Indeed, Ms Demetriou has identified some of those particulars, what she says are the particulars of that denial.

What became a really central point in Ms Demetriou's pleading, not in her skeleton but in her oral submissions, all of these so called practical points, I have now explained why there is no real force to them.

That takes me almost to the end, I am pleased to say. I made the point in our paragraph 62 about how the apportionment trial may not need to happen at all if we are right on our declarations, and on any view that is sensible and just case management consistent with either the overriding objective or the Tribunal's rules, depending on quite what one sees as being the right sets of rules.

Then there are just essentially two wrap-up points, subject to any further questions from the Tribunal. The first of those is as follows: although we have not dealt with the technical CPR points, there was a point in my learned friend's skeleton that she was taking about how there is supposedly no jurisdiction on the part of the Tribunal to issue a declaration, and that was another reason why I should not have my----

THE PRESIDENT: I think the answer to that is that this is not a section 47A claim, is it?

MR HARRIS: That is one answer, yes.

THE PRESIDENT: It is a High Court claim, is it?

MR HARRIS: Yes, that is right. In that case I say no more. That is my understanding, and you have the point.

That leaves me with a final wrap-up point. I am obviously not addressing the technical points for the reasons that you have ventilated with Ms Demetriou in opening, but just so you know, of course, our position was that they are wrong, but critically as well it has always been pointless for those points to have been raised, because they are merely technical and they could easily be remedied. Can I just give you one letter reference so that you know where we say this in terms, some, by the looks of it, four or five months ago on

11 September 2018. It is in bundle C1, tab 2, page 197. It is a two page letter. I will just read you the relevant sentence:

> "We also note that even if you are correct that the claim for declarations has not been properly been issued …"

I will just let you follow that. It is tab 2 of bundle C1, pages 196 to 197, and in particular the second page of the letter, the top of 197, we essentially say, "If you want to strike out, go out and we will defend". That is the first three sentences.

The one I began reading out is the fourth sentence, "We also note that" - do you have that, Sir?

THE PRESIDENT: Yes.

MR HARRIS:

> "We also note that even if you are correct that the claim for declarations has not been properly issued because the required form is not completed …"

which we do not accept -

> "… we consider that the Tribunal will likely take a pragmatic view of the issue. Your clients now have notice of the claim and we consider the Tribunal will allow any administrative deficiencies to be rectified by re-filing the appropriate form immediately following the CMC."

That is another reason why.

Sir, our final point is exactly the one that the Tribunal adverted to on coming in, all of the argument about the CPR points and the technical things are all a total waste of time and a total waste of money. They could have been and should have been conceded at any point and not pursued. Although I am not going to obviously develop this point, to the contrary, it is being pursued tooth and nail with additional authorities, lengthy skeleton arguments, and we have had to appear here to address it even though everybody on our side and seemingly the Tribunal has clearly taken the view that it was a waste of time from beginning to end.

Unless I can assist further----

THE PRESIDENT: We have not expressed that view, Mr Harris, we just wanted to hear, what seemed to us, the main part of the issue first. Can you just help me on one thing: section 1(5), you refer to in your skeleton, you have not addressed it orally, does that have any relevance?

MR HARRIS: It does, for the reasons in the skeleton, and in a nutshell they are that (5) is of fairly wide ambit. You can see - you may not have to turn this up, but in *Newson* at the end, and I can quote here from paragraph 64 of Sir Colin Rimer's judgment, he says:

> "Section 1(4) must be interpreted purposively. It owes its origins to a policy directed at …"

and then it sets out the policy.

MR MALEK: What paragraph is that?

MR HARRIS: It is paragraph 64, half way through, the important point being that he interprets, and the members of the Court of Appeal, the Act purposively, and by reference to the policies as set out in the Law Commission report. As you will have seen in our skeleton, we identify what the purposes of 1(5) are, as opposed to 1(4), and we say they are essentially to avoid somebody having to fight the same point twice on the merits.

THE PRESIDENT: It is not as broad as that because it is rather specific in what it says.

MR HARRIS: What one has to construe is yet another sub-section of section 1 of the rather difficult Contribution Act by reference to its underlying purpose, just as one does for 1(4), and for that matter 1(1), 1(2) and 1(3). What we say in that context is that 1(5) is capable of being conclusive of Daimler's non-liability in the contribution claims. The way it would work is this - but I accept, Sir, that this is a purposive reading and that is why I started with the point. It is wide, but the reason it is wide is the one that I have given. So the way it would work is if you have got a judgment in any given action - the given action is the one with the claim number that I cite in the skeleton that encompasses both the main claim, the contribution claims and the counterclaim. That is an action brought in any part of the UK by or on behalf of the person who suffered damage because it is brought by Wolseley. It encompasses all the bits that I have just mentioned.

THE PRESIDENT: So not against you?

MR HARRIS: No, but it does not have to be against me. It has to be against any person from whom contribution is sought. DAF and Iveco are both people from whom contribution is sought. They seek it as against themselves and we seek it from them.

THE PRESIDENT: Sorry, they seek it as against each other, you mean?

MR HARRIS: Yes, as against each other. I beg your pardon, I said against themselves.

THE PRESIDENT: "A judgment in favour of a person from whom contribution is sought", is that not a reference to the same person as in the second line?

MR HARRIS: We say that the purpose here is of where you have got an action that is, if you like, multi-partied, like ours, which is both the main claim against DAF and Iveco, DAF and

Iveco's claim against us for contribution, and our claim against the main claimants under our counterclaim, and it is all going ahead together so as to allow us to establish what we say is our non-liability, then read purposively what you have to think is, "Unless this is conclusive would Daimler, notwithstanding that it has established directly as against Cs in its counterclaim non-liability for the damage on the merits, does Daimler have to go and do that again in the contribution claim?" It has already been dealt with once on the merits. We say, no, what the statute does is it takes a realistic, wide and purposive view of everybody having been there all together in the first place, and us having established on the merits in our counterclaim that we do not have any liability, then that is conclusive in all the other parts of the claim. The section is wide enough for that for the reasons that I have given.

I will just run through it one more time: a judgment in any action brought includes all three elements - the main claim, the contribution claim and our counterclaim. That is an action originally brought by or on behalf of the person who suffered damages, that is the Wolseley claimants. What is that judgment? It includes judgment on our counterclaim. Judgment in the counterclaim is----

THE PRESIDENT: Just looking at it, it is an action brought by the Wolseley claimants against any person from whom contribution is sought under the section. The action has to be brought against any person from whom contribution is sought?

MR HARRIS: Yes, and it is brought against DAF and Iveco. The Wolseley claimants' action is brought against DAF and Iveco, and DAF and Iveco are both persons against - they are both any persons from whom contribution is sought because they seek contribution as against each other and Volvo seeks contribution from them in the Part 20, we seek contribution from them and whichever the other defendant was that was not sued originally - whoever the other defendant is, I have forgotten.

THE PRESIDENT: "It shall be conclusive in proceedings as to any issue determined by that judgment in favour of the person from whom the contribution is sought." You have just said that is DAF and Iveco.

MR HARRIS: But it also includes us because we are a person in that action.

THE PRESIDENT: But you are not the person referred to line 2?

MR HARRIS: No, but the point of the section is where you have got "in any action", a person such as my client who has got a direct claim against the Cs under its counterclaim, and on the merits I am establishing that I am not liable, then for the policy reasons that should be conclusive in the proceedings for contribution as against me by DAF and Iveco.

MR MALEK: If you have got the simple situation, claimant and two defendants in the same action, if you have got a judgment and D2 and D1 are claiming contributions against you, you can rely on what is in that judgment.

MR HARRIS: Yes.

MR MALEK: On a different basis, let us say you have got claimant, defendant and Part 20 defendant, and the claimant has got a separate action, for example, against the Part 20 defendant, then you can rely on what is in that judgment. You are moving this a bit further, are you not?

MR HARRIS: I accept I am giving a wide interpretation to that, but the reason, in my respectful submission, would be a good one.

THE PRESIDENT: I can see there may be good reason for what you are suggesting. The question is whether sub-section----

MR HARRIS: I completely accept that, and that is why in the skeleton it logically begins with this is completely conclusive under the wide and proper purposes of interpretation for good policy reasons, but then, if I am wrong on that, we have got the practical points. You are right, Sir, to say that that is still part of the argument, and there it is, and of course the judgment would be in favour of the person from whom the contribution is sought, namely us, but I do accept that that would mean that we are a different person from whom the contribution is sought than the one earlier in the third line, but for the policy reasons there is no reason to constrain it. It is a little bit like, although we are not going into it, why I am properly to be regarded as a counterclaim.

THE PRESIDENT: On the CPR?

MR HARRIS: Yes, on the CPR, but I obviously do not wish to develop that.

Unless I can assist further those are the submissions in opposition to the terms of strike out and you have the written submissions on the CPR.

THE PRESIDENT: Thank you. Yes, Ms Demetriou?

MS DEMETRIOU: Sir, members of the Tribunal, on the interpretation of section 1(5), we disagree with the interpretation Mr Harris placed on it. We say that on the plain wording it cannot bear, those words cannot bear that interpretation. I saw that the Tribunal was putting the various points to Mr Harris that I was going to make in reply, so unless there is anything on that in particular I will not trouble you any further with that point.

MR MALEK: I do not need any help on that.

THE PRESIDENT: No, you need not.

MS DEMETRIOU: I am grateful for that indication. In that case there are three broad points that I wish to make in reply. The first point deals with the non-settlement scenario, the second point deals with the settlement scenario and the third points deals with the practical consequences in general if this additional claim were given permission to proceed. With the Tribunal's permission I will deal with the points in that order.

Starting with the non-settlement scenario - in other words, if the main trial happens - our short point is that Mr Harris has pointed to no real utility, no practical, useful purpose, no useful purpose in making the declaration because the Tribunal has ordered that Daimler can participate in the main trial. When this was put on numerous occasions by the Tribunal to Mr Harris he had various responses, but what they came down to, particularly after the lunchtime adjournment, was that Daimler may seek to argue that certain categories of trucks, for example, or Daimler trucks, were not within the cartel, or were excluded from the cartel. So that was one of the points that he made. The short answer to that is that Daimler is not seeking any declaration to that effect. So none of the declarations sought by Daimler seek to exclude certain categories of trucks or Daimler trucks from the scope of the cartel. The declarations all seek to establish that Daimler is not liable for any of the loss - i.e. any of the loss - on a joint and several basis.

That is why Mr Harris is also wrong on the apportionment point. He said, and he says at paragraph 62 of his skeleton argument, there will be no need for an apportionment trial if these declarations are made. With respect, that does not follow at all, because if there is no need for an apportionment trial that will be because the claimants have failed to establish any loss, and that will be determined by the trial. So there will not be any need for a declaration to establish that. Mr Harris has not in the declarations that he has sought, sought any declarations which go to the matter of apportionment. He has not said, "I want a declaration that Daimler trucks are outside the scope of the cartel", or anything like that. There is nothing in the declarations, which are all aimed at demonstrating that either there is no liability at all, or Daimler has no liability, but they are all aimed at establishing that on a joint and several basis. So they are simply irrelevant to the question of apportionment, save that, of course, the trial might establish that there has been no loss, in which case it is the trial that has established that and it has not flowed from the declaration at all.

So, on analysis, it was a refrain of Mr Harris's submission that we do not know, the Tribunal does not know what might happen, but really it is for him to point to a scenario which might arise in which granting a declaration, making a declaration would serve a practical purpose. We say that he was unable to do that in the context of the non-settlement

scenario, and that is because the Tribunal has made clear that Daimler will have a right fully to participate in the trial.

We do not, with respect, think that there is any force in the driving seat point because, as the President pointed out, that is just a matter of practical management of the trial. Nothing that the Tribunal has said so far indicates that there will be any restriction on Daimler's ability to participate in the trial. To the contrary, the order makes plain that it will be able to participate in the trial, and so that is not a point that has any practical force.

The question was put to my learned friend by Mr Justice Hildyard about the punch line - the punch line point, if I can put it that way - which is, is there not utility, is the practical purpose not served by having a declaration establishing your non-liability to the claimants? The answer to that is, of course a practical purpose is served by establishing Daimler's non-liability, but that punch line will be delivered in the context of the contribution claim, so it is not as though there is not a process, or a dispute, which will give rise to that conclusion. There is.

I would ask the Tribunal to turn back, please, to the Tribunal's own order, and in particular to paragraph 3 of that order. What the Tribunal did in paragraph 3 was to expressly divide up the issues that will arise in the contribution claim. You see the first sentence, which is that the additional defendants shall be allowed to participate in the trial of the main claim, but then it goes on to divide up the issues that are going to arise in the additional claim. It says that in so far as the additional claims raise issues regarding the overall loss and damage suffered by the claimants, that will be tried with the main claims. So all of these points that Daimler wishes to run about the overall loss, depending on expert evidence and all the rest of it, it can run. If it wants to say, for example, that Daimler trucks were not part of the cartel, it can do that in the main action. That is what envisaged by this order.

Then it goes on to say that in so far as the additional claims raise issues as to the liability of the main defendants to compensate the claimants for such loss and damage, that issue will be tried with the main claims too.

Then, conversely, in so far as the additional claims raise issues regarding the amount or apportionment of contribution, such issues will be tried separately from, and subsequently to the main claim. So that is obviously sensible because the claimants have no interest in that question.

Then, finally, the question of whether the liability of the additional defendants should be tried with the main claim was reserved until the next CMC. So the Tribunal has expressly reserved that point to be decided after the next CMC. The point addressed by this last

sentence is precisely the same issue that Daimler is raising or attempting to raise by way of its additional claim. The Tribunal has not yet decided how that issue will be determined. The issue in this last sentence, the liability of the additional defendants, is essentially the same issue as Daimler is raising in its additional claim.

It is likely I would surmise, but of course the Tribunal has not decided yet, that that will be decided along with the main claims. If it is not, and it is decided afterwards, then what we say about that is that there is no realistic prospect of the Tribunal permitting Daimler to run that point in advance with the main trial in circumstances where that very issue is then going to be decided later in the contribution claims. Why would the issue be decided in advance, I ask rhetorically, as regards Daimler when it is there on the face of the pleadings in the other contribution claims. The Tribunal will decide how that point is to be addressed, and the obvious solution is wherever it is to be addressed, whether with the main claim or subsequently, Daimler's point should be determined at the same time because it is one and the same point. It would be very odd to have different categories of contribution defendants whereby some of them are dealt with later, but Daimler is somehow elevated because of this additional claim into a speedier determination of the point.

That is what we say about the non-settlement scenario. We say there is just simply no practical purpose----

THE PRESIDENT: The others being MAN, Volvo, and so on?

MS DEMETRIOU: I am so sorry?

THE PRESIDENT: The other additional defendants being MAN, Volvo, and so on?

MS DEMETRIOU: Yes, exactly. Broadly, Sir, the point is that the Tribunal has yet to decide how those additional claims are going to be dealt with, but whatever it decides it would follow, we say as night follows day, that if Daimler's claim were permitted to proceed it would have to be dealt with at the same time as those contribution claims.

Sir, Mr Jones is quite right, the crucial point is this is not just the other contribution claims, it is the contribution claim brought by Iveco and DAF against Daimler. That is the point, it is those contribution claims against Daimler that have been brought by Iveco and DAF that raise the question of Daimler's liability. Daimler is attempting to raise it in this additional claim, and we say that whatever the Tribunal decides to do with Iveco and DAF's contribution claim, the point is one and the same point and it will have to be determined at the same time, whether with the main trial or subsequently.

THE PRESIDENT: I thought what you were saying is that Iveco and DAF have raised additional claims against a whole series of people, one of whom is Daimler, and they should all be decided together.

MS DEMETRIOU: Yes, and there is a----

THE PRESIDENT: If the Tribunal, when it comes to address the reserved question referred to in the last line of paragraph 3, decides that the additional claim to determine the liability of Volvo and MAN should be heard separately, Daimler's ought to be heard with them and not carved out for special treatment?

MS DEMETRIOU: Sir, the point goes even further than that, because what the Tribunal has decided in the last sentence is that contribution claim brought by DAF and Iveco against Daimler, the liability of the additional defendants, that is all of the additional defendants, so Daimler is an additional defendant. What the Tribunal has decided in that last sentence is that the question of Daimler's liability to Iveco and DAF, when that is to be determined will be ruled on at the next CMC. What we say is that these contribution claims - so the contribution claims brought by Iveco and DAF against Daimler - they raise the question of Daimler's liability to the claimants. That is there on the pleadings. There is an issue in dispute. That is the one of the very issues in dispute in that contribution claim. Daimler's purported additional claim against the claimants raises exactly the same point. We say that that point that Daimler has raised in its additional claim against the claimants will be decided in the contribution claim brought against it by DAF and Iveco. The timing of that is to be determined, but we say, with respect, that it seems inconceivable to us that, given that it is the same issue, the Tribunal will say, "You can have your additional claim up-front, but DAF and Iveco have got to wait to bring their contribution claim against you".

I hope I have put that a little bit more clearly.

THE PRESIDENT: Yes, thank you.

MS DEMETRIOU: Sir, the next point I want to make relates to the settlement scenario. There are two possible ways of construing section 1(4) and the Tribunal put both to me and to Mr Harris that section 1(4) might be construed quite broadly so as to preclude a defendant to a contribution claim challenging matters such as the overcharge, and so on, because those are presumed under section 1(4) against D1. I think both Mr Harris and I took the contrary view, which is that the section is to be read more narrowly than that, so as to preserve the ability of D2 to run those argument in separate contribution proceedings.

We say whichever interpretation is correct no useful purpose would be served by making these declarations. I just want to briefly explain why. If one takes the broad interpretation,

no useful purpose would be served by these negative declarations because they cannot be used, in effect, to deprive section 1(4) of force. Sir, we say it cannot be right that if section 1(4) precludes a contribution defendant in the position of Daimler from running all sorts of defences at the contribution stage that they can simply circumvent that by issuing an additional claim.

If the narrow interpretation is correct, again we say that there is no useful purpose on that hypothesis because Daimler can make its arguments on this hypothesis in the contribution claim. What Mr Harris's argument came down to, and again he repeatedly said, "Who knows what kind of settlement there will be, and the Tribunal is not a position to rule now", and so on. Essentially, what it came down to always is a submission that it would be convenient to have the claimants there, because if the main claim is settled and the claimants are simply let off the hook and disappear then it might be difficult for his clients to argue in the contribution proceedings all the points he wishes to argue about overcharge, causation, and so on. That is essentially what his point came down to, and he did not point to any other useful purpose, other than the process point of having the claimants there. We say that this is entirely the wrong way of analysing the matter, because the question for the court is whether making the declaration granting the relief would serve a useful purpose. It is not whether the process leading to granting the relief might be useful to one of the parties, or indeed to both parties, or indeed to the Tribunal, that is the wrong question.

You have to ask whether making the declaration is useful, and you can test it this way: let us say you get to the end of the contribution claim and the Tribunal asks Mr Harris, "We have ruled now", whichever way it goes, "what purpose, Mr Harris, would be served by us making a declaration which coincides with our ruling in the contribution proceedings?" He would say presumably, "No purpose", because it has already served its purpose because we have had the claimant here.

That is the wrong way to look at it. In a sense, what they are doing is they are using the threat of a declaration, or the process which leads to the making of a declaration, as a procedural device to tempt the claimants to take part in the contribution proceedings. Whether or not the claimants take part, there will be a determination in the contribution proceedings of Daimler's liability. That will happen in the contribution proceedings whether or not the claimants take part. There will be a decision. So the point will have crystallised. There will be a punch line. No useful purpose will be served by making the declaration in addition to the judgment. That is really the question that Mr Harris completely failed to address, no doubt because there is no answer to it.

As I say, it became rather a refrain of Mr Harris's submissions that nobody can speculate as to precisely what is going to happen, there might be different forms of settlement, but ultimately the only useful purpose was this procedural benefit that he identified.

The key point really, just to summarise, is that it is not open to a party to start issuing proceedings for a remedy which will serve no useful purpose simply because you might pick up some procedural benefits along the way. That is the wrong way entirely of looking at it. Ask this: if the claimants, for example, were to settle with DAF, so the difficulty addressed by Mr Harris is, what if the claimants settle with DAF and they get an amount that they are happy with, and suddenly the claimants are let off the hook, the claimants are no longer in the litigation, what do we do practically in the contribution proceedings to try and demonstrate that we are not liable because the claimant will not be there, and we might need their witnesses and we might need disclosure? Two answers to that. One is that the Tribunal, of course, has procedural powers which may assist, and so there are third party disclosure orders, ability to summons witnesses, and so on, so there are powers which can assist address the practical problem.

The second issue is, if the claimants were to settle with DAF and were to settle at an amount with which they are satisfied, they are, and they should be, entitled to walk away from the litigation because they have chosen to sue DAF and Iveco, and if they settle with both DAF and Iveco they should be entitled to walk away. It cannot be right that a defendant to a contribution claim can, by this procedural device, issue a claim for negative declaratory relief and thereby force the claimant back into the proceedings. What if they do? What does the claimant have to do? There is no ability to force the claimant to fight those proceedings. The claimant could just say, "We will walk away, we have got our money, we certainly do not want to take part in a contribution trial and bring all of our witnesses and instruct experts and incur all of that expense, we are very happy to walk away". Where does their additional claim get them then? That is why this is all the wrong way of looking at it. The key question is: does the declaration itself give rise to any useful purpose?

MR JUSTICE HILDYARD: Is that right? It may not be a very useful analogy, but take the case where you have to issue a claim for a final injunction in order to have an interim injunction, and the interim injunction is designed to stop an event happening tomorrow. The final injunction is actually going to be useless, but you need it because you need a financial relief to justify the process. The court does not turn a hair about that. It accepts that you need a hook for an interlocutory process. What is wrong with a punch line on which you can hang a process?

MS DEMETRIOU: Sir, I think the answer to that is that if the interim injunction is granted, and that in effect provides the relief that is required, the court then does not force everyone to come along and fight the final decision. It may be that in that case the need for financial relief falls away, even though it served as the hook to allow the interim relief to be granted. The key point here is - the analytical point is that all of these procedural benefits pointed to by Mr Harris, they are not relevant. That is analytically the reality of the matter, because they do not go to the question which the court is required to address, which is, does making the declaration, does that confer a practical benefit, not does the process leading up to it give rise to practical benefits?

That is the analytical point, but the practical point, which supports that is that in any event it is very odd. You, Sir, put to Mr Harris that the starting point is that a claimant can choose who they wish to sue and that this whole process of negative declaratory relief reverses that and removes that choice. That is why it is quite an exceptional remedy. In this case, on one of the hypotheses that Mr Harris outlined, you have the direct defendants and the claimants settling. My clients have chosen to sue two defendants, as they are entitled to do because there is joint and several liability. There may be cartels where there are dozens of defendants and it may be completely impractical and too expensive to sue all of them. Let us say that the two defendants settle and the claimant is happy with the settlement and says, "Right, we are walking away from the litigation". Can it be right that the procedural device that is contemplated by Daimler is used in order not to produce a remedy which is of practical effect, because it is not, because the point that Daimler is interested in will be decided in the contribution claim, but to assist that process by making it more convenient to fight that point?

MR JUSTICE HILDYARD: Do you say it can never be right?

MS DEMETRIOU: We say that it cannot be right because what you have to ask is whether the remedy itself - there may be circumstances, of course there are, in which granting negative declaratory relief does serve a useful purpose, but we say it does not here because that point will be decided in the contribution proceedings. Once it is decided, so putting yourselves in the position of the Tribunal deciding the contribution claim, there will be some kind of trial, however that takes place and the Tribunal will at the end of it decide whether or not Daimler is liable for this loss. Whichever way it goes, that will be recorded in a judgment and then you will have to ask yourselves, is there any point in expressing this in terms of a declaration? We say the answer will always be no.

Mr Harris did not do anything to gainsay that. His argument was all about, "Well, it will be more convenient, or easier, or better for us, better for the Tribunal, if we have the claimants' witnesses there". We say that is completely the wrong way of looking at it.

MR JUSTICE HILDYARD: Ordinarily, the court is very reluctant and will go a long way to avoid determining an issue of substance between parties who are not before it. Is there any antidote, other than a negative declaration, to the selection of one or two defendants with the necessary consequence of three and four defendants being held liable without having a pitch at the main claimant - is there any antidote to that?

MS DEMETRIOU: Sir, first of all, can I take that question in stages? I think what lies behind, what partly lies behind, or is implicit in your question, Sir, to me is something that Mr Harris repeatedly said, which is that we made a tactical choice to sue two defendants, and it is unfair for one of those defendants who has not been sued to suddenly be left having to fight this issue with their hands tied behind their back. That is essentially the point. That is a red herring, we say with respect, this tactical issue is a red herring. Let us assume that the Wolseley claimants had sued every single one of the cartelists, so let us say they had sued all the defendants. So no tactical decision or costs decision or anything like that was adopted. Then they decide to settle for the whole claim with one of them. There may be lots of reasons why they would decide to do that. The claimants may decide to settle with DAF and they may think, "We have not got quite as much as we had hoped to have got, but this litigation is very expensive". At that point the claimants would be out of the litigation, and DAF will be suing all of the other co-defendants for contribution. They would be entitled to sue all of them for contribution. That is the same position that Mr Harris is postulating, nothing to do with the claimants' tactical choice. That just follows from settlement in a joint and several liability case.

The question is - and really I can wrap this up with the third issue I was going to address, which is consequences - can it be right that a claimant be kept on the hook in those circumstances? We say that that would be wrong because if this Tribunal were to let this claim go ahead, this additional claim go ahead, we would be in a situation where it would be extremely difficult for any claimant to a cartel case to settle claims, because what would happen in a situation where it wanted to settle the whole claim with DAF, is that the other defendants would think, "These contribution claims against us, it is going to be terribly difficult to fight them without the claimant there, so we will just issue". They would, if the Tribunal allows us to go ahead, they would, if properly advised, issue additional claims against the claimant.

What would happen then? The claimant would not settle, so this would be a huge disincentive to settlement. That is why we say it would be very problematic in terms of future consequences and why the Tribunal should be very astute to ask itself the question, not whether there is any procedural advantage but whether the declaration itself - the declaration itself - would have a practical purpose. We say none - none - because this point will be decided in the contribution claim and it is nothing to the point that it might be easier if the claimants were there. The remedy cannot be used as a procedural device to keep the claimants in litigation where they have chosen to settle.

THE PRESIDENT: The claimants might be happy to settle anyway. I am not sure it is a disincentive for the claimants to settle because, as you say, they could still walk away. You could say, "Well, we could settle with DAF and Iveco, the additional claim is still there for a declaration but we have got no interest in it and we will not turn up, we are not going to fight it, because it is (inaudible) as far as we are concerned", and then it is up to Daimler to try and persuade the court to make a declaration by default, which it is quite reluctant to do. It is the defendants who might be reluctant to settle, I would have thought, if they knew that DAF and Iveco might have the disincentive to settle because they would know that there is this declaratory claim hanging over them.

MR MALEK: They might settle, but making sure they settle at the same time as the Part 20 claim.

THE PRESIDENT: That is a possibility.

MS DEMETRIOU: Sir, in the situation that you have posited, which is that the declaration is made, as it were, by default if the court were persuaded to make a declaration.

THE PRESIDENT: No, what I was positing, to be clear, you would have your settlement because you are only claiming against DAF and Iveco. You get a settlement you think is a reasonable sum, so you settle. You know there is this additional claim but you are saying, "We do not care, we are not claiming relief against Daimler, the only relief Daimler is claiming from us is declaratory". It has no financial consequences for your client, and you say, "So we will not fight it".

MS DEMETRIOU: Sir, there are two possibilities. One is precisely that, that the claimants do not fight it.

THE PRESIDENT: So the claimants are not actually in this----

MS DEMETRIOU: No, that is right, so they would not be disincentivised, but in that situation Mr Harris's purported practical benefits would fall away because we would not be there.

THE PRESIDENT: That is exactly what I meant. You would not have a particular incentive to contest it if you have got your settlement, would you?

MS DEMETRIOU: No, exactly, so then there is no benefit. That is why I use that as a way of testing Mr Harris's proposition, that somehow the process leading to the declaration can be the thing that gives rise to the practical benefit and we say that is not right at all.

THE PRESIDENT: You say that is not right as a matter of principle----

MS DEMETRIOU: It is not right as a matter of principle.

THE PRESIDENT: -- but as a matter of practice in the event of settlement it is not clear that you would actually----

MS DEMETRIOU: Participate.

THE PRESIDENT: -- would participate.

MS DEMETRIOU: Exactly, and if we were somehow required to participate it is very hard to see how the Tribunal could require us to participate, but if there were some power to require that then that would be wholly damaging to the settlement process, and really runs against the whole contribution scheme. The whole point is that a claimant should be able to choose who it sues, or settle a claim and walk away, it has no interest any more, and it would disincentivise it, a claimant, if it were forced somehow to fight a trial simply to assist the resolution of the issues. There would be no incentive to settle. We say that is not the likely upshot. The likely upshot, Sir, is, as you have just put it to me, it would simply bow out and not take part, in which case none of these practical benefits arise at all.

So the real question for the Tribunal is - and that is why we do not have to get into all of these hypotheses and the *in terrorem* arguments about "anything might happen and the Tribunal cannot judge it now", but the key question is: on no hypothesis is there any practical benefit for these declarations because, if it goes to trial, the argument can all be made in the main trial. If there is a settlement, the contribution proceedings, call it against Daimler, by DAF and Iveco will determine precisely this point. There would be no purpose at the end of those proceedings in the Tribunal granting any declaration. Instead what we have, if it were permitted to go ahead, is additional complication and subversion of the whole scheme.

I think in the course of that discussion I have wrapped up the points I wanted to make under my third head, which is consequences, and so unless there is anything I can do to help the Tribunal any further those are my submissions in reply.

THE PRESIDENT: I think we will take just ten minutes. Mr Harris, sorry?

MR HARRIS: Sir, there were three brand new points in there. They were quite short, but they were brand new points.

MS DEMETRIOU: I did not raise any brand new points, I am going to resist this.

MR HARRIS: They were brand new points, they are the following----

THE PRESIDENT: Let Mr Harris tell us what they are.

MR HARRIS: There was one, which was the final sentence of paragraph 3 of the order, which was not mentioned in opening. That is a very short point. It is said, by reference to the final sentence, Daimler may somehow illegitimately go first, and if, in fact, the Tribunal says that the additional defendants are to be tried later then it would be legitimate for Daimler to go first. That was a brand new point.

THE PRESIDENT: I think it is said that if the Daimler declaration was done then they would plead separately the question of Daimler's liability on the Part 20 claims. That has been reserved and it would be odd to separate it.

MR HARRIS: That is right, and my learned friend's argument then was, it is inconceivable, she said, that if, under the final sentence of paragraph 3, this Tribunal decides to deal with the liability of the additional defendants at a later stage, somehow nevertheless Daimler should go first because it has got a counterclaim, and the answer to that, leaving aside that it is a brand new point, is that it has got nothing to do with useful purpose of the declaration. It is simply a timing point. You can decide in the exercise of your case management whether everything should happen at one stage or everything should happen at a second stage. It does not undermine the utility of the declarations in any way shape or form.

The second point, another new point, it was suggested by way of testing, you could say of my argument, imagine if we, the Wolseley claimants, sued all the cartelists, MAN, DAF, Iveco and Volvo----

MS DEMETRIOU: Sir, I am sorry, I was responding----

THE PRESIDENT: These are responsive points.

MS DEMETRIOU: They are in response to Mr Harris's argument, this is simply unfair.

THE PRESIDENT: I think it is fair to draw attention to the document, but these are argument, I do not think any other new documents were referred to.

MR HARRIS: Sir, this one needs correcting. This one is just badly run. If my learned friend sues MAN, DAF, Iveco and Volvo, then she settles with DAF, her whole hypothesis was "I then leave". No, you do not, because you have already sued all the others. You cannot just ignore them.

MS DEMETRIOU: Sir, I am so sorry, I think it is implicit in what I said.

THE PRESIDENT: If you can recover all your loss from one, then you do not pursue the others. You would have to bear their costs.

MR HARRIS: That is the point, Sir, that is the new point. You cannot just leave without - you have to discontinue, and then in those circumstances the liability that you sought to establish against the others is not established.

Then there was another new point about not being required to participate. She says, well, if I get my counterclaim and you allow that, and that goes ahead, well, at the trial of the counterclaim they do not have to show up. Sir, there are two points there. Their whole hypothesis of this argument has been that everything is happening at the same time, number one.

THE PRESIDENT: This was the settlement, on the settlement. The main claim has gone. There is just the contribution proceedings and your counterclaim.

MR HARRIS: That is right, and my answer to that, that was not a point that was put in opening, and the answer----

THE PRESIDENT: It is a response to your points.

MR HARRIS: Sir, the answer though is that we would be entitled, because it is a claim by us against them - if they decide not to show up then we are entitled to proceed in default of them showing up.

THE PRESIDENT: I did say that, yes.

MR HARRIS: I am grateful.

THE PRESIDENT: We will take ten minutes.

(Short break)

THE PRESIDENT: Ms Demetriou, we would like to hear you, please, on the other point, the CPR point, but if you could just restrict your submissions to 15 minutes, and an equally short response from Mr Harris.

MS DEMETRIOU: Could I ask the Tribunal to turn up the relevant rule in the White Book, CPR Part 20?

THE PRESIDENT: Yes, which is at page?

MS DEMETRIOU: Sir, it starts at page 680. The issue, as you will have seen in the skeleton arguments, between the parties is whether or not this additional claim is a counterclaim within the meaning of 20.4, or whether it is an additional claim within the meaning of 20.7, any other additional claim within 20.7, and if it is, of course, an additional claim under 20.7, then it can only be made with the court's permission if the claim is not issued at the same time as the defence is filed. What we say is that no claim form was issued, and so a claim

form would have to be issued and so permission would be required, that is the practical consequence.

THE PRESIDENT: Yes.

MS DEMETRIOU: The glossary to the White Book, which is in this volume at page 2741, that contains a guide to the meaning of certain legal expressions, as used in these rules, but it does not otherwise, it says, give the expressions any meaning in the rules which they do not have otherwise have in law, but it is a guide to the meaning. You see:

> "Counterclaim: a claim brought by a defendant in response to the claimant's claim, which is included in the same proceedings as the claimant's claim."

So what you see there is that the counterclaim is responsive to a claim brought by the claimant against this defendant making the counterclaim. So, of course, in this case the Wolseley claimants did not bring any case against Daimler, and so the additional claim is not brought in response to any claim brought against it by the claimant. That is the starting point.

Then if you turn back to Part 20 and look at paragraph 20.2, which is headed "Scope and interpretation", you see there under (1):

> "This Part applies to –
>
> (a) a counterclaim by a defendant against the claimant or against the claimant and some other person …"

So we say "the claimant" must be the claimant who has brought a claim against this defendant. Then at (b) you have:

> "an additional claim by a defendant against any person (whether or not already a party) for contribution or indemnity …"

So, transposing that to this case, that would be, for example, the additional claims made by DAF and Iveco against the other cartelists, they would fall within (1)(b).

Then (1)(c):

> "where an additional claim has been made against a person who is not already a party, any additional claim made by that person against any other person (whether or not already a party)."

We say that is precisely the situation here, so an additional claim was made by DAF and Iveco against Daimler, so they are not already a party. Then, any additional claim made by that party, i.e. Daimler, against any other person, whether or not already a party, that is us. So we say we fall within the situation described in 20.2(1)(c).

Daimler seeks to rely on 20.2(2)(b), which says:

"unless the context requires otherwise, references to a claimant or defendant include a party bringing or defending an additional claim ."

We say that does not help them because the references generally in the CPR to claimants and defendants only make sense in the context of a particular claim. So, for example, Iveco is a defendant in the claim brought by Wolseley against it, but it is a claimant in the claim brought by it against Daimler. So it is not a defendant in the context of that claim. So the rules need to be read and applied with that in mind.

We say what 20.2(2)(b) does not do is, it does not have the effect of requiring one to read the definition of counterclaim as though the relevant claimant may be a claimant in one claim and the relevant defendant as a defendant in a different claim. It does not have that effect and that is not the natural reading and interpretation of the words.

THE PRESIDENT: If the additional claim here were against Iveco and Wolseley, would that come within (1)(a)?

MS DEMETRIOU: Yes, it would.

THE PRESIDENT: Because by reason of 20.2(2)(b), Iveco is a claimant for the purposes of the additional claim?

MS DEMETRIOU: Yes, it would then come within 20.2(1)(a).

Then transposing this to 20.4:

"(1) A defendant may make a counterclaim against a claimant …"

Do you see the heading is "Defendant's counterclaim against the claimant"? That tells you that you can do that without permission if you file it with your defence and there is no need there to issue a claim form.

Then 20.7 is dealing with additional claims other than a counterclaim or a claim for contribution made in accordance with rule 20.6, and so we say that that is the relevant provision that applies.

Sir, you have given me 15 minutes but essentially that is the long and short of it.

THE PRESIDENT: Yes, it is a short point.

MR JUSTICE HILDYARD: But is the purpose of 20.7 not to ensure that there is some bit of paper which impleads the relevant person because the only way in which a court can bring home its jurisdiction is by a process of impleading. You have 20.7 to capture the situation where they are not parties and they must be brought in as parties, because otherwise the court cannot establish and bring home its jurisdiction. If they are already parties by whatever name you call them, there is no necessity to implead because they are already impleaded. Is that not the justification for 20.7?

MS DEMETRIOU: Sir, I am not sure. It may be, it may be that is what it is getting at, but we say that if one looks at the wording of it you just simply cannot interpret "counterclaim against the claimant" to mean a claimant in a different claim. We have referred to some old authorities in our skeleton argument which we can take from our skeleton.

MR JUSTICE HILDYARD: Yes, but one can get too hooked up about the words without looking at why courts insist on claim forms. They do say "in order to establish jurisdiction".

MS DEMETRIOU: Sir, yes, and in a sense I have got it in another case which went against me, not on this point. I was making an argument equivalent to the argument Mr Harris was making on service out rules, and I said obviously this cannot be right because the purpose is X, and everybody agreed with that, but the court said that is not what it says and the Rules Committee may wish to look at this. I am not seeking to advance a purposive justification, I am simply relying on the natural wording of the rules.

MR JUSTICE HILDYARD: So am I, but I am just wondering why 20.7 has that specific requirement.

MS DEMETRIOU: I think it must be right that Part 20.7 - Sir, I would not from you, I think 20.7 is there to require a claim to be issued in circumstances where it is coming out of the blue, as it were, to put it colloquially. The authorities I wanted to just refer you to----

MR MALEK: Before you do that, you are not suggesting, or are you, that Daimler requires to get an order under 20.5?

MS DEMETRIOU: 20.5, let me just double-check. (After a pause) No, we are not suggesting that, we are saying that the provision that applies is 20.7.

THE PRESIDENT: If it is 20.7, you say it is an additional claim.

MS DEMETRIOU: Yes.

THE PRESIDENT: They are a defendant to the contribution proceedings, they are making a claim against Wolseley, have they not done it in the defence?

MS DEMETRIOU: Yes, but the point is that a claim form needs to be issued. They have particularised it, such as it is, in the defence, but that is the point we are making, we say that that is the wrong process.

THE PRESIDENT: They do not need the court's permission if they have issued it as a claim.

MS DEMETRIOU: What they have to do, looking at 20.7(2), the court has to issue the appropriate claim form. So that is in any event. If you do that at the same time as your defence you do not need the court's permission, but if you issue the claim form after your defence, it says at (3)(b) that at any other time the court's permission would be required.

THE PRESIDENT: It seems excessively technical here to issue a claim form where they are filing the defence, they are doing it in their defence where the additional person - the other person - is already in the proceedings. That goes back to Mr Justice Hildyard's point, it is just the issue of the form that you are talking about?

MS DEMETRIOU: Yes, the issue of the form.

THE PRESIDENT: It is not a question of the court's permission provided they had issued the form - is that right, they would not need the court's permission?

MS DEMETRIOU: Had they issued the form at the right time they would not need the court's permission, no.

MR JUSTICE HILDYARD: Another way of looking at it, I suppose, is to ask this: do you say that means that there must be, as it were, a direct confrontation called for, or does it simply mean that you ask the question: is this being prompted by something outside the existing proceedings, or simply because of the existing proceedings?

MS DEMETRIOU: Sir, that is how Mr Harris puts it, but we say that that does not fit with the wording of the rules. If you go back to the glossary we say what that clearly is anticipating or is envisaging is a response to the claim made by this claimant. So this claimant in Daimler's case is DAF or Iveco, not the Wolseley claimants. Moreover, when you look at 20.2 it does expressly deal with the situation of contribution. The drafters of the rules could have drafted a wider, broader, definition of "counterclaim" so as to include something prompted by----

MR JUSTICE HILDYARD: I agree they are sometimes a bit Delphic, but if you take a claim to be a set of circumstances giving rise to a legal form of action, i.e. *Letang v Cooper*, then it is in response to the set of circumstances as so presented, is it not?

MS DEMETRIOU: Except the rule does not say in response to a set of circumstances, it says a counterclaim by a defendant against the claimant.

MR JUSTICE HILDYARD: Yes, but a claim, is it not, that is a legal claim? A legal claim is simply presentation in a legal document of a set of circumstances said to give rise to a legal claim? A legal claim is simply a presentation in a legal document of a set of circumstances said to give rise to a legal claim.

MS DEMETRIOU: Sir, no, I do not think, with respect, that is the correct definition, because if you go back to 20.2(1)(a), and I think I understand your point, Sir, that says:

> "… applies to a counterclaim by a defendant against the claimant or against the claimant and some other person."

Sir, if that interpretation were correct you would not need the words "and some other person", because any person on the hypothesis you have put to me would be a claimant, because they would be a claimant to the counterclaim. Sir, what we say is plainly envisaged by the words "the claimant" is the claimant in the action against the defendant, and it is a counter to that claim. Even though there may well be good policy reasons for expanding it, we say it cannot be read in that expanded way.

I think that really is the point and I am not sure I can assist much by saying anything else.

THE PRESIDENT: Yes. Mr Harris?

MR HARRIS: Sir, I will keep this very short, members of the Tribunal. The problem, amongst others, with my learned friend's submission is that she gives no real effect to 20.2(2)(b), page 680. What she says is you have to read 20.2(1)(a) as just meaning the claimant in the main claim, etc, and it is therefore narrow. But actually 20.2(2)(b) says that is not right, it says:

> "Unless the context requires otherwise …"

which she has not addressed, there is no requirement here -

> "… references to a claimant or defendant include a party bringing or defending an additional claim."

So we have, therefore, have in terms of 20.2(1)(a) a claimant - that is to say the Wolseley claimant, obviously a claimant, nobody disputes that - and then it is a counterclaim by a defendant. So you have to ask yourselves the question "who is a defendant for the purposes of this rule?" The answer is 20.2(2)(b), it includes a party defending an additional claim. That is me.

There is nothing about the context which requires otherwise. To the contrary, as Mr Justice Hildyard put it, if I am not right, you find yourself in the absurd position of having to issue a claim form for somebody who is already in the proceedings, which is a nonsense. I add to that the fact that Ms Demetriou does not address orally or in writing rule 20.1, which deliberately tells the court that there is a purpose to the entire set of rules in CPR 20, and the purpose is to enable counterclaims and other additional claims to be managed in the most convenient and effective manner, and it does not take much of a submission from me to, I hope, persuade you, members of the Tribunal, that it is not just or convenient or efficient, convenient and effective, for me to have to issue another claim form.

That is the only defect that is said to have happened here, there is not a piece of paper with the words "Claim form" on it. Everything else is fine. Indeed, we went to the court and we paid a fee, and we did what they told us to do.

So those are some fatal problems for my learned friend's submissions. They do not end there because, Mr Malek, you raised 20.5. My learned friend's submission is that you can only have a counterclaim against the claimant. That is her case. That is what she says, "Look at the glossary, that is what it means". That cannot possibly be right because of the terms of 20.5.

MR MALEK: That is why I put it to her, but I am just wondering where it takes us.

MR HARRIS: What it means is that her argument is fatally flawed. Here it is saying "counterclaim". So it is a proper counterclaim on any view of the word, whatever happens in this sub-rule is a counterclaim. Who is it? It is against a person other than the claimant. So it cannot possibly be that a counterclaim, properly understood, is only against the claimant, because here it is, a counterclaim against somebody other than the claimant. That is another fatal nail in the coffin.

Mr Justice Hildyard, you raised the point regarding what is it in response to, and you have our point, so I will not repeat it. What we have done is obviously responsive and for good reason.

There is another profound difficulty with my learned friend's submission about the meaning of "counterclaim" and the scope of 20.2(1)(a), which is that she is trying to have her cake and eat it. You know what she says under 20.2(1)(a), but if you now look at 20.7(3):

> "A defendant may make an additional claim .."

My learned friend says that I am in this rule and I should have done this, but that would make me a defendant. That is her case. On her view, I am not a defendant because I am not defending the claim made by the main claimant. What she is saying is, "You are not a defendant under 20.2(1)(a) when it suits me to say that you are not a defendant, but when it suits me to say that you are a defendant, you are a defendant". That is another reason why what she says is wrong.

I invite you to conclude, with respect, that the reason that you have got 20.2(2)(b) is precisely because you are not intended - consistent with the purpose that is set out in 20.1 - to be hide-bound to some technicalities of, "You're only a claimant in this, you are not a claimant in that, you are only a defendant in this, you are only a defendant in that". One asks rhetorically, why would there be 20.2(2)(b) in there at all if the proper approach to

construction here was to be very narrow under 20.2(1)(a), which is my learned friend's case. It does not make any sense.

Then, finally, unless I can assist you on anything further, you will perhaps have seen in a letter that was sent last night, just for the sake of good order we say this is not necessary.

THE PRESIDENT: I do not think we have seen that letter.

MR HARRIS: Well, can I just draw your attention in the White Book to rule 3.10, which is on page 122. I am glad I raised it if the letter has gone astray. It simply said that, although we do not accept that there has been any error----

THE PRESIDENT: 3.10?

MR HARRIS: CPR 3.10, yes, page 122. My learned friend's case proceeds on the premise that even if she were right and I should have issued a piece of paper with the words "claim form" on it, even though the Registry said do not do that, then somehow my claim is defective and invalid so I need to do it all again. That is not what 3.10 says. What 3.10 says is:

> "Where there has been an error of procedure such as a failure to comply with a rule or practice direction –
>
> (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and
>
> (b) the court may make an order to remedy the error."

With great respect, we say if this was even an error, which we do not accept, this is picky and inconsequential, and certainly does not have an end effect of invalidating the order. Even if it did, you could remedy it.

MR JUSTICE HILDYARD: It says, if you read the notes, that:

> "… rule 3.10 provides that errors of procedure do not nullify the procedure or any steps taken in them. Any step taken which is permitted by the CPR is valid even if taken defectively."

On Ms Demetriou's version it was not permitted without a claim form.

MR HARRIS: Yes, but on her case it is that we have done everything - she says we are in 20.7. She says we have done everything under 20.7, save that we did not get a piece of paper with the words "Claim form" on it. It would be permitted by the CPR except that on her case it has been "taken defectively". Obviously we do not accept that, but we say that if it were right this is a classic example of an error that does not invalidate any step taken in the proceedings unless the court so orders because it is so trivial.

It gets worse now for Ms Demetriou, although I am grateful for her candour, because of course she accepts that under 20.7 the purpose is the one you put to us, Mr Justice Hildyard, which is, "Come on, why on earth would you need to do this in circumstances where the claimant is already an existing party to the proceedings?" There is no answer to that, and she quite candidly and properly said, "I am just relying on the words of the rules, I cannot pretend to have a proper purpose for any of this". What that would mean is, we agree, but it means that obviously, even if there is an error, we are in the territory of 3.10."

Although I do not want to detain you any longer but, just in case, there is a similar provision in rules 114 and 115 of the Tribunal Rules under irregularities which is essentially the same point. We are say we are in the territory obviously of 3.10 because the whole argument is about the CPR, the application of the CPR.

MR JUSTICE HILDYARD: I am a bit nervous about this. This point could be extremely important in other contexts, in particular limitation contexts, where if you were bound to issue a claim form after, you might be statute barred. I can see there could be contexts in which it is very important. If 3.10 saved you in any event that would seem strange.

I suppose that leads on to the question, supposing we were not minded to decide this issue, but were prepared in principle to grant permission for a claim form, which can be done on paper I assume, would you be amenable to that?

MR HARRIS: I would have to take instructions. I am not sure the point really arises though, Sir, with respect, because if, just for the sake of argument, you think there is an error, and then you think it is fairly trivial and there is no purpose to any of this, you would be able to, under 3.10, in your discretion order the remedy of the error, and that would just be about our case.

MR JUSTICE HILDYARD: Right, thank you.

MR HARRIS: I do not see how the wider - what it could be and no doubt would be, you will have seen the evidence of Mr Bronfentrinker which was that the Court Registry was contacted twice, and we specifically, via an associate within those instructing me, asked, "Do we need another piece of paper form?" and they said, no, they did not want, but we nevertheless went ahead and paid the money and got if off the ground. It is the most meaningless of errors. Again, Ms Demetriou does not imply prejudice or anything. It is the classic technical defect, if it is a defect at all.

So, unless I can assist further, those are the short submissions on that point.

THE PRESIDENT: Yes. Ms Demetriou, I think you are entitled to reply. There were two new rules referred to.

MS DEMETRIOU: I will be brief. Just three brief points: the first relates to 20.5 of the CPR, which is the point Mr Malek put to me. In my submission, the thinking behind 20.5, or the application of 20.5, it relates back to 20.2(1)(a). Sir, you see in 20.2(1)(a) that this part applies to a counterclaim by a defendant against the claimant or against the claimant and some other person. So that is the only circumstance in which you can have a counterclaim against some other person, where it is done against the claimant too. Then 20.5 deals with the procedure where you are under 20.2(1)(a), so where you are making a counterclaim against the claimant and some other person then this is the process you follow, but we are in that position. It certainly does not mean that you can interpret "counterclaim" very expansively.

The second point is, of course, the Tribunal has to interpret 20.7 in a general manner and not just in relation to the facts of this case. True it is that on the facts of this case Daimler was responding to a claim made by the claimants in an indirect sense, because the claim is a claim for damages made by the claimant, and in its additional claim it responds to that claim. That will not be the case every time a defendant to contribution proceedings tries to make an additional claim. It is because of the circumstances of this type of case where you have joint and several liability that it looks very responsive to the original claim, but there may well be other circumstances where a claimant sues a defendant who brings a contribution claim, and that contribution defendant seeks to bring an additional claim against the claimant directly to the claim, does not flow from the claim, and so this rule has to be interpreted with that in mind as well. We say that provides the justification for why it is drawn the way it is.

Thirdly, in relation to the 3.10 point, we respectfully endorse the points that Mr Justice Hildyard was putting to my learned friend. It is not a means by which a deficiency can simply be waved away, because here we say there was no valid claim in the first place, and that simply cannot be corrected in that manner.

Those are really the only points I wanted to make in reply.

THE PRESIDENT: Thank you all very much. We will consider the submissions we have received and heard and you will be notified when the judgment is ready to be handed down.